To Err is Human, To Apologize is Hard: The Role of Apologies in Lawyer Discipline

Leslie Levin  
*University of Connecticut School of Law*

Jennifer K. Robbennolt

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ARTICLES

To Err is Human, To Apologize is Hard: The Role of Apologies in Lawyer Discipline

LESLEE C. LEVIN* AND JENNIFER K. ROBBENNOLT**

ABSTRACT

The lawyer discipline system is often the only recourse for complainants when lawyers misbehave. Yet it is also deeply unsatisfying. Most grievances are dismissed and even when a sanction is imposed, the complainant receives no monetary compensation. Lawyers rarely even apologize for the harm they caused. Yet apologies can repair relationships and trust, decrease distress, restore the victim’s standing, and affirm important values. In this article, we explore whether and how apologies might be more systematically incorporated into the lawyer discipline system to address lawyer mistakes and misconduct. We detail how apologies are currently sporadically used and evaluated by disciplinary authorities. We explore the psychological, educational, and signaling benefits of apologies and the beneficial features of apologies for complainants, lawyers, and disciplinary authorities. We then consider the various junctures at which apologies could productively be incorporated into the discipline process and the psychological and legal impediments to doing so. We conclude by considering how lawyers could be better educated about the benefits of making meaningful apologies in the context of lawyer discipline and how they might be trained to do so.

Table of Contents

INTRODUCTION .................................................. 515

I. THE CURRENT USE OF APOLOGIES IN LAWYER DISCIPLINE... 520

* Hugh Macgill Professor of Law, University of Connecticut School of Law. Thanks go to Margaret Tarkington for pointing out relevant literature and to the incomparable research librarians at the University of Connecticut Law School. © 2021, Leslie C. Levin and Jennifer K. Robbennolt.

** Alice Curtis Campbell Professor of Law and Professor of Psychology, University of Illinois College of Law.
A. APOLOGIES AS MITIGATION .............................. 521
B. APOLOGIES AS PART OF DISPUTE RESOLUTION .... 524
C. APOLOGIES AS PART OF DIVERSION OR SANCTION ..... 526
D. APOLOGIES AS EVIDENCE OF REHABILITATION WHEN SEEKING READMISSION .......................... 527

II. WHY IS IT DIFFICULT FOR ATTORNEYS TO APOLOGIZE? .... 528

III. SUCCESSFUL APOLOGIES ................................. 534
A. GOOD APOLOGIES ACKNOWLEDGE MISCONDUCT, ACKNOWLEDGE HARM, AND TAKE RESPONSIBILITY. .... 536
B. GOOD APOLOGIES INCLUDE A PROMISE NOT TO REPEAT. 538
C. GOOD APOLOGIES REPAIR HARM .......................... 539
D. SINCERITY AND REMORSE ................................. 540

IV. INCORPORATING APOLOGIES INTO THE LAWYER DISCIPLINE PROCESS ........................................ 547
A. EARLY DISPUTE RESOLUTION .............................. 547
B. DIVERSION CONDITIONS ................................. 550
C. NEGOTIATED DISCIPLINE SANCTIONS .................... 553
D. DISCIPLINARY HEARINGS ................................. 555
E. FORCED APOLOGY SANCTIONS .......................... 557
F. REINSTATEMENT ........................................... 560

CONCLUSION .................................................. 562
INTRODUCTION

Lawyer discipline is often a last resort for aggrieved clients and can be a difficult and deeply unsatisfying process. Complainants can struggle to determine where to file a complaint and states may provide little explanation of what the public can expect in the discipline process. The vast majority of complaints are dismissed without a hearing. Even if the complaint proceeds, the complainant can only participate as a witness. Complainants’ views do not receive much weight in the imposition of sanctions. They typically cannot appeal a hearing panel’s determination or the sufficiency of a sanction. Even when disciplinary authorities find lawyer misconduct, clients rarely receive return of the legal fees they paid. Nor does the discipline system provide compensation for the harm that the lawyer caused. Complainants rarely even receive an apology.

Most lawyer discipline complaints are brought against solo and very small firm lawyers and allege neglect of client matters or failure to communicate. These are the lawyers who represent individuals and small businesses, often in personal plights (e.g., bankruptcy, criminal, family, personal injury). Their clients often have little leverage to force their lawyers to remedy their conduct. Clients

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1. For example, in order to file a complaint in New York, the client must first determine in which of four judicial departments the lawyer was admitted to practice. In all states, they must determine whether to file the complaint with the state bar or some other entity. In some states, the information about filing a complaint and the complaint form are only available in English. See, e.g., Attorney Discipline, KY. B. ASS’N, https://www.kybar.org/page/attdis [https://perma.cc/H74G-4GC3] (last visited June 15, 2021); General Counsel, OKLA. B. ASS’N, https://www.okbar.org/ge/complaint/ [https://perma.cc/XE95-QWEK] (last visited June 15, 2021). See also Office of the Committee on Professional Conduct, ARK. JUDICIARY, https://www.arcourts.gov/administration/professional-conduct [https://perma.cc/6VZ2-4B7S] (last visited June 15, 2021).

2. Some official websites do not explain the steps involved, what the complainant can hope to achieve, or how long the process is likely to take. See, e.g., Frequently Asked Questions, S.C. JUD. BRANCH, https://www.sccourts.org/discCounsel/faq.cfm [https://perma.cc/E4GV-9KN8] (last visited June 15, 2021); see also Attorney Discipline, supra note 1.


4. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.4(e) (1992) (noting that complainant’s recommendation as to sanction is not to be considered as either a mitigating or aggravating factor in the determination).


of solo and small firm lawyers often pay relatively small sums to hire their lawyers—although these amounts are not small for them—or retain lawyers on a contingent fee basis. These clients may only retain a lawyer once in their lifetime, for matters such as a divorce or a bankruptcy, and so the lawyer may not be concerned about attracting their repeat business. If the clients are not repeat players in the legal system, they may not have the leverage or understanding of how to get their lawyers to remedy their behavior when their lawyers’ conduct is inadequate or improper.9

Nor can these clients easily sue their lawyers for malpractice. A lawyer’s neglect or failure to communicate—for months or even years—may not have caused compensable injury. Legal malpractice is notoriously difficult to prove and even demonstrable neglect (e.g., a blown statute of limitations) will not result in a plaintiff’s verdict unless the client can also demonstrate that the client would have prevailed at trial.10 The complexity of legal malpractice cases precludes clients from effectively representing themselves, but many have trouble finding counsel to represent them in malpractice cases. Clients of solo and small firm lawyers can typically only afford to sue for malpractice on a contingent fee basis, and legal malpractice lawyers will usually only take on high value cases.11 Some clients cannot find a malpractice lawyer willing to represent them in a legal malpractice case because their previous lawyers are uninsured and there are no other assets available to recover on a judgment.12 This is not an uncommon problem; in some jurisdictions, close to 40% of solo lawyers in private practice are uninsured.13

If clients want any satisfaction, they are left with the lawyer discipline system. But this system is designed to protect the public rather than to provide remedies for individual complainants.14 When there is minor misconduct, a lawyer may enter into a confidential “diversion” agreement with discipline authorities, which includes conditions—such as attending a mandatory ethics course—but is not considered a disciplinary sanction.15 The discipline sanctions that disciplinary authorities can impose on lawyers (e.g., private admonitions, reprimands, suspension, and disbarment), may provide no more than cold comfort to injured clients.

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9. In contrast, large corporate clients can demand the partial return of fees or that their large law firms immediately remedy the problem. They can credibly threaten to sue or take their business elsewhere. See David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799, 815–17, 824–26, 828–29 (1992).


While a few jurisdictions order fee restitution for neglect of client matters, restitution is not the norm.\textsuperscript{16} Clients derive so little from the process that it is surprising that they bother filing complaints at all.\textsuperscript{17}

Incorporating lawyer apologies into lawyer discipline is a way of responding to the needs of complainants while also furthering the goals of the discipline system. Unprofessional or unethical attorney behavior creates a breach in the attorney-client relationship, a relationship that should be founded on trust.\textsuperscript{18} The lack of an apology can further damage the relationship and the injured client, adding insult to injury and constituting a secondary injury. Apologies, on the other hand, as inherently relational responses to harmdoing, may make an important contribution to repairing the breach and can be beneficial to clients, attorneys, and the profession.\textsuperscript{19} Importantly, apologies have been found to decrease distress and anger in their recipients.\textsuperscript{20} They can address recipients’ nonmaterial needs for respect and the restoration of standing.\textsuperscript{21} Both the apologizer and the recipient can experience positive physiological effects.\textsuperscript{22} Apologies can increase understanding,
repair trust, improve relationships, decrease aggression, and reduce the need to exact punishment.\textsuperscript{23}

Apologies also provide an opportunity to articulate, acknowledge, reflect on, and reaffirm shared values.\textsuperscript{24} This recognition and reaffirmation of values can be meaningful to recipients. It can also contribute to a process of learning, rehabilitation, and reintegration of the offending attorney.\textsuperscript{25} ‘These processes of improvement can be an important part of attorney discipline. This is especially true because public discipline sanctions are infrequent\textsuperscript{26} and most lawyers who receive grievances will continue in practice.

Apologies are already being used more systematically in the medical field. Scholars and health care providers have begun to recognize the benefits of apologies as a response to patient harm that results from medical error. Litigants in medical malpractice cases report that their desire for an apology is one factor that motivated them to bring suit.\textsuperscript{27} And patients predict that they would want an

\begin{thebibliography}{99}

\bibitem{24} Francesca Bartlett, \textit{The Role of Apologies in Professional Discipline}, 14 \textit{Legal Ethics} 49, 56 (2011).

\bibitem{25} See generally Brown & Wolf, supra note 18, at 285.


apology from their medical care provider if the provider made a mistake. Over the past couple of decades, hundreds of health care organizations have adopted communication-and-resolution programs that incorporate apologies—along with open communication, investigation of errors, and compensation for harm caused by conduct that falls below the standard of care—at the core of how they respond to adverse outcomes. Organizations that have effectively implemented this approach have seen positive effects on their malpractice liability, improvements in patient safety, and improved experiences for both patients and providers.

In this article, we consider the value and challenges of incorporating apologies into lawyer discipline. The idea itself is not new: apologies are already used to address lawyer misconduct in Canada, England and Wales, Australia, and


New Zealand. \[31\] We explore why apologies would be a useful response to complaints about lawyers, the types of apologies that would be most meaningful, and the conditions under which they might be employed in the United States. In Part I we provide a brief overview of the lawyer discipline process and discuss the current episodic use of apologies in lawyer discipline. Although far from systematic, courts sometimes consider apologies as evidence of remorse. Apologies are also sometimes used to resolve disputes with complainants, as sanctions, or as requirements of reinstatement to practice. Part II explores the barriers to apologies by lawyers in disciplinary contexts. It is difficult to admit errors, even to ourselves, leading lawyers to justify or explain away misconduct or point fingers at others. To apologize is to be vulnerable and uncomfortable. In Part III, we argue that despite these barriers, apologies have important benefits for claimants, and some advantages for disciplinary authorities and lawyers. We describe the key parts of successful apologies. Part IV identifies the six junctures at which apologies might be meaningfully and more systematically employed in the lawyer discipline context. We also consider the impediments and disadvantages to apologies at certain points and the complications posed at each juncture. We conclude by discussing the benefits of teaching law students and lawyers about the role of apologies in practice and how to apologize well.

I. THE CURRENT USE OF APOLOGIES IN LAWYER DISCIPLINE

To better understand how apologies are currently used and viewed in lawyer discipline, a brief overview of the disciplinary process is needed. \[32\] The process starts when a potential complainant (often a client or opposing party) reviews the disciplinary authority’s website or contacts the regulator concerning a problem involving a lawyer. In some states, disciplinary authorities will try to resolve certain matters before a complaint is filed. \[33\] Once a complaint is made, disciplinary authorities will review it and may try to informally resolve it, refer it elsewhere for dispute resolution, or dismiss it if the matter is not within their jurisdiction or does not constitute a violation of the professional conduct rules. \[34\] If an investigation

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31. See, e.g., Legal Ombudsman Scheme Rules, r. 5.38 (Can.); Francesca Bartlett, Summary Compensation and Apology Orders in England and Wales, Australia and New Zealand: Different Structures, Different Responses, 24 INT’L J. LEGAL PROF. 177, 178 (2017).

32. The process can vary considerably from state-to-state and so the description that follows will not reflect the procedures in all jurisdictions.

33. See infra notes 62–64 and accompanying text.

34. See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(A)(1) (2002). Some complaints do not fall within the jurisdiction of disciplinary counsel because the alleged misconduct occurred outside the statute of limitations or for other reasons. In some jurisdictions, disciplinary authorities will not consider certain claims such as ineffective assistance of counsel, even though these claims may implicate duties of diligence and competence which are governed by the rules of professional conduct. See, e.g., Important Information and Instructions, St. B. GA., https://www.gabar.org/forthepublic/upload/Grievance-Form_English.pdf [https://perma.cc/2929-EJ9E] (last visited June 15, 2021).
appears warranted, disciplinary counsel will conduct one.\textsuperscript{35} If the matter is not dismissed but the misconduct was minor in nature, disciplinary counsel may ask the lawyer to consent to diversion conditions in lieu of discipline.\textsuperscript{36} Disciplinary counsel will also have the discretion to recommend probation or an admonition upon consent.\textsuperscript{37} In other cases, disciplinary counsel may file formal charges and the matter will proceed to a hearing. If a referee or hearing panel finds lawyer misconduct, a sanction will be recommended to a disciplinary board or state court for approval.\textsuperscript{38}

Apologies are not a regular part of the lawyer discipline process. But they sometimes enter the process in a variety of ways.

\section*{A. APOLOGIES AS MITIGATION}

When disciplinary authorities find that lawyer wrongdoing occurred, they will often consider the lawyer’s “remorse” when deciding the type of sanction that should be imposed. A showing of remorse is treated as a mitigating factor when imposing discipline\textsuperscript{39} and the absence of remorse may be considered an aggravating factor.\textsuperscript{40} Whether a lawyer is truly remorseful can be difficult to determine and judges sometimes disagree about whether the lawyer has demonstrated true remorse.\textsuperscript{41} Even when the lawyer demonstrates genuine remorse, it may not be sufficient to outweigh very serious misconduct.\textsuperscript{42}

Courts sometimes view apologies as evidence of remorse,\textsuperscript{43} but have not systematically considered the importance or characteristics of those apologies when evaluating this evidence. This may explain why courts will sometimes describe a lawyer as expressing remorse, without specifying whether the lawyer made an apology. Even when a lawyer’s apology is noted, the court may not explain to

\textsuperscript{36} See, e.g., MO. SUP. CT. R. 5.105(d) (2020). Diversion agreements are used in 33 states. See 2018 Survey on Lawyer Discipline Systems, supra note 26, at Chart II.
\textsuperscript{37} ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(C) (2002).
\textsuperscript{38} See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(E), 11(F) (2002); CONN. PRACTICE BOOK §§ 2–40(h), 2–47A (2020).
\textsuperscript{39} ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32(l) (1992).
\textsuperscript{40} See, e.g., \textit{In re Moore}, 792 S.E.2d 324, 326 (Ga. 2016); \textit{In re Halpin}, 53 N.E.3d 405, 406 (Ind. 2015); \textit{In re Rooney}, 709 N.W.2d 263, 268 n.4 (Minn. 2006).
\textsuperscript{43} Likewise, a failure to apologize may be viewed as an absence of remorse. See, e.g., \textit{In re Moore}, 41 P.3d 831, 835 (Kan. 2002); Office of Disciplinary Counsel v. Flaugh, No. 112 DB 2015 (Pa. Jun. 15, 2016); see also \textit{In re Evans}, 801 F.2d 703, 707 n.1 (4th Cir. 1986) (noting that lawyer’s failure to apologize for his action is a factor that can be considered in choosing the severity of the sanction).}
whom the apology was directed. In one typical case, the court observed that the lawyer “testified that she is extremely sorry for what happened to her clients. She also apologized to the Court for neglecting her obligations in these disciplinary proceedings.”\textsuperscript{44} It is not possible to determine from this description—and it may not have been clear to the court—whether the lawyer’s statements about being “extremely sorry” were intended as an apology to her clients. Nor is it clear whether the clients were even present.\textsuperscript{45}

Courts sometimes give “significant weight to a lawyer’s apology,” while at other times they decline to do so.\textsuperscript{46} They do not appear to give more weight to apologies made in private settings than those made at public hearings.\textsuperscript{47} They also do not seem to place greater importance on apologies made to aggrieved clients or other members of the public\textsuperscript{48} than on apologies made to disciplinary authorities, opposing counsel, or the bar.\textsuperscript{49} Courts or hearing officers sometimes find a failure to apologize to clients to be evidence of absence of remorse,\textsuperscript{50} but they do not appear to systematically consider this issue. At least one court has noted that the mere fact that a lawyer did not apologize for misconduct does not

\textsuperscript{44} People v. Hooker, 318 P.3d 77, 87 (Colo. O.P.D.J. 2013).

\textsuperscript{45} For other examples, see Attorney Grievance Comm’n v. Moore, 135 A.3d 395, 400 (Md. 2016) (noting lawyer apologized at oral argument without indicating to whom apology was made); \textit{In re} Rooney, 709 N.W.2d at 267 (noting apology made at hearing without stating to whom apology was made).

\textsuperscript{46} ANNOTATED STANDARDS, supra note 42, at 492–93. In cases in which courts decline to find real remorse notwithstanding an apology, it is often because the lawyer failed to take responsibility for misconduct or did not also display other conduct reflecting remorse. See, e.g., \textit{In re} Augenstein, 871 P.2d 254, 258 (Ariz. 1994); People v. Beecher, 224 P.3d 442, 453 (Colo. O.P.D.J. 2009).


\textsuperscript{48} For example, the court may note without further differentiation that apologies were made to clients and other affected parties. See, e.g., \textit{In re} Lang, 741 S.E.2d 152, 154 (Ga. 2013) (noting in a defalcation case that the lawyer apologized to the client, the state bar, and the court); \textit{In re} Wyatt’s Case, 982 A.2d 396, 414 (N.H. 2009) (apology made to court, client, professional conduct committee, and bar). For some other cases in which the court noted apologies to clients or other victims who were members of the public, see People v. Braham, 409 P.3d 655, 665 (Colo. 2017) (apology to clients); \textit{In re} Carucci, 132 A.3d 1161 (Del. 2016) (apology to clients); \textit{In re} Levin, 709 S.E.2d 808, 809 (Ga. 2011) (apology to victim’s family); \textit{In re} LeBlanc, 884 So. 2d 552, 554, 556 (La. 2004) (apology to client); Lawyer Disciplinary Bd. v. Morgan, 717 S.E.2d 898, 908 (W. Va. 2011) (apology to victims); Lawyer Disciplinary Bd. v. Sirk, 810 S.E.2d 276, 277 (W. Va. 2018) (apology to client).

\textsuperscript{49} \textit{See}, e.g., \textit{In re} Dillon, 176 A.3d 716 (Del. 2017) (finding remorse where lawyer’s apologies were to Disciplinary Board and Superior Court in case involving neglect of client matters); \textit{In re} Boudreaux, 2017 Bankr. LEXIS 4541, at *49–50 (Bankr. S.D. Ga. Aug. 22, 2017) (finding remorse where there was apology to court, law partner, and bankruptcy trustee, but not to clients).

\textsuperscript{50} \textit{See In re} Silva, 29 A.3d 924, 943 (D.C. App. 2011); \textit{In re} Hunt, 820 S.E.2d 716, 722 (Ga. 2018) (noting failure to apologize to client and her sons during mitigation hearing); \textit{In re} McCarthy, 938 N.E.2d 698, 699 (Ind. 2010); Cleveland Metro. Bar Ass’n v. Sleibi, 42 N.E.3d 699, 704–05 (Ohio 2014). A stated refusal to apologize to a client may also be viewed as a lack of remorse. \textit{See In re} Gonzalez, 919 N.W.2d 559, 565 (Wis. 2018) (noting that hearing officer found that the lawyer’s statement that he would not apologize to client reflected a “troubling lack of remorse”).
alone establish that the lawyer refused to acknowledge the wrongful nature of the misconduct.  

The timing of apologies can affect whether remorse will be considered a mitigating factor when determining sanctions. Some courts have found that apologies that are made late in the process do not constitute mitigation. Yet other courts have accepted apologies to clients as evidence of sincere remorse and have weighed them significantly in favor of mitigation even when they came as late as a disciplinary hearing. Indeed, one court even treated as mitigating evidence a “profuse public apology” that was not offered until two judges on the panel noted the absence of remorse. Yet some lawyers who handle discipline defense believe it is against their clients’ interests to apologize early—or even in the culpability phase of a disciplinary hearing—because it will be taken as an admission against them.

Courts will sometimes parse the language of apologies to determine whether they actually express remorse for engaging in misconduct. Where an apology is also viewed as an attempt to justify the lawyer’s conduct, it tends not to be treated as mitigating evidence. Likewise, when the lawyer who apologizes demonstrates in other testimony a lack of understanding of his wrongdoing, the apology may be given little weight. Even when apologies are made to affected clients,

51. See Attorney Grievance Comm’n v. Shuler, 117 A.3d 38, 47 n.12 (Md. 2015).
52. In re Hodge, 407 P.3d 613, 660 (Kan. 2017); In re Coe, 903 S.W.2d 916, 918 (Mo.1995); ANNOTATED STANDARDS, supra note 42, at 492-93; see also In re Rosales, No. SA 16 MC 1326 DAE, 2017 U.S. Dist. LEXIS 229250, at *86 (W.D. Dist. Tex. July 11, 2017) (noting “belated” apology made by lawyer at hearing does not excuse intentional misconduct over a period of time).
53. See In re Ortner, 699 N.W.2d 865, 877 (S.D. 2005) (discounting apology that came sixteen months after lawyer became aware of his ethical violation); In re Preszler, 232 P.3d 1118, 1135 (Wash. 2010) (failure to apologize until a year after complaint came too late to deserve consideration as mitigation). See generally In re Augenstein, 871 P.2d 254, 258 (Ariz. 1994) (noting that lawyer’s “late apology, standing alone, is insufficient to support a finding of remorse”); Attorney Grievance Comm’n v. Fox, 11 A.3d 762, 775 (Md. 2010) (noting that respondent did not apologize until his trial testimony).
54. People v. Waters, 438 P.3d 753, 765 (Colo. 2019). For other examples of cases in which apologies at the hearing were credited as evidence of remorse, see In re Kurth, 433 P.3d 679, 682, 684, 690 (Kan. 2019); Geauga City Bar Ass’n v. Patterson, 855 N.E.2d 871, 873 (Ohio 2006); Lawyer Disciplinary Bd. v. Sirk, 810 S.E.2d 276, 277, 282 (W. Va. 2018).
55. In re Coe, 903 S.W.2d 916, 918 (Mo. 1995).
56. See, e.g., Douglas Levy, Sorry/Not Sorry, M ICH.L .W EEKLY, Feb. 17, 2016; see also In re McGrath, 280 P.3d 1091, 1100 (Wash. 2012) (illustrating the use of an apology against a lawyer).
58. See, e.g., In re New River Dry Dock, 2011 Bankr. LEXIS 3602, at *28 (Bankr. S.D. Fla. Sept. 20, 2011) (noting that the apology could be summed up as “I was wrong in my approach but. . . .”); Attorney Grievance Comm’n v. Jacobs, 185 A.3d 132, 142 (Md. 2018) (noting that while statement to client sounded like apology, it “does not demonstrate that Respondent takes any responsibility for the outcome. . . .”); In re Sea, 932 N.W.2d 28, 38 (Minn. 2019) (noting that lawyer apologized to court for tardiness and not for lying).
59. See, e.g., In re Murray, 47 A.3d 972 (Del. 2012) (declining to find remorse where lawyer apologized but did not seem to understand why his actions were subject to discipline proceedings); Attorney Grievance Comm’n v. Fox, 11 A.3d 762, 775 (Md. 2010) (rejecting apology at trial as evidence of remorse where lawyer also testified that he still did not believe he violated any rules). In this article the male pronoun is used to refer
they are not necessarily treated as mitigation if surrounding conduct does not reflect remorse.60

B. APOLOGIES AS PART OF DISPUTE RESOLUTION

Apologies also occasionally occur in connection with efforts to avert or resolve a discipline complaint. About a dozen jurisdictions have Attorney Consumer Assistance Programs (ACAP) that will attempt to resolve low-level matters involving issues such as failure to communicate.61 Some jurisdictions with ACAP programs, including Florida, Massachusetts, and Texas, attempt to resolve minor problems before a complaint is even filed.62 In some states, disciplinary authorities invite potential complainants to contact them before filing a written complaint63 while others require potential complainants to contact the disciplinary Intake Department or an ACAP program before filing a complaint.64 Disciplinary authorities in other states automatically screen the complaints they

60. See, e.g., Lawyer Disciplinary Bd. v. Kohout, 798 S.E.2d 192, 211 (W. Va. 2016) (finding apology insufficient to show remorse where lawyer retained client funds from settlement).


receive to determine whether they are appropriate for informal resolution. Some disciplinary authorities attempt to resolve low-level complaints themselves or refer such complaints to fee arbitration and other dispute resolution processes.

Lawyer apologies are not, however, a routine part of efforts to resolve matters informally in most jurisdictions. ACAP programs that responded to our email inquiries do not systematically request or encourage lawyers to apologize. As one ACAP director stated, “Since ACAP does not determine whether either party was at ‘fault,’ there is no effort to encourage either party to apologize.”

Similarly, an ACAP attorney explained that not taking sides “just seems more likely to lead the parties to focus on repairing the problem instead of assigning blame.” A third observed that she did not see clients prioritizing getting an apology over resolving the underlying issues, such as a failure to communicate.

Yet another ACAP program director explained that the responsibility of the disciplinary authorities “is to protect the public, not to obtain [a] satisfactory resolution of a dispute between an individual client and lawyer.”

Nevertheless, after learning from disciplinary authorities that a grievance has been filed, some lawyers decide to apologize to the complainant, either because they are genuinely contrite or “as a means to restore the relationship and resolve the grievance short of discipline or diversion.” One regulator who used to screen complaints noted that “in about [half of] cases, an apology is often all the complainant wants. In that sense, they can be very effective.”


66. See, e.g., Attorney Matters, SUP. CT. N.Y., APP. DIV., SECOND JUD. DEP’T, http://www.courts.state.ny.us/courts/ad2/attorneymatters_ComplaintAboutaLawyer.shtml [https://perma.cc/X8HD-PSL9] (last visited June 15, 2021) (noting that after staff attorney reviews complaint, it “may be transferred to the grievance, mediation, or the fee dispute committee of the local bar association”).

67. The only one that appears to come close is Georgia’s Client Assistance Program, which “routinely encourages and facilitates rectifying communication.” There are instances where the communication includes an apology and other times where it does not. E-mail from Mercedes Ball, Dir., Client Assistance Program of the Office of Att’y Gen., St. B. Ga., to Leslie C. Levin (Mar. 5, 2020, 14:50 EST).

68. E-mail from Lee A. Ramos, ACAP Dir., N.C. St. B., to Leslie C. Levin (Mar. 6, 2020, 13:11 EDT).

69. E-mail from Linn D. Davis, Assistant Gen. Counsel & Client Assistance Office Att’y, Or. St. B., to Leslie C. Levin (Mar. 6, 2020, 16:46 EDT).

70. Telephone Interview with Molly Powers, Program Dir., Client-Att’y Assistance Program, St. B. Tex. (Mar. 6, 2020).


72. See E-mail from Keith Sellen, Dir., Wis. Office of Lawyer Reg., to Leslie C. Levin (Mar. 19, 2020, 09:54 EDT).

73. E-mail from Michael Kennedy, Vt. B. Counsel, to Leslie C. Levin (Mar. 19, 2020, 19:02 EDT).
C. APOLOGIES AS PART OF DIVERSION OR SANCTION

As previously noted, when lawyers engage in minor misconduct, many jurisdictions permit these lawyers to enter into diversion agreements in lieu of discipline.\(^74\) Diversion is usually only available where the lawyer does not have a recent record of disciplinary sanctions.\(^75\) Diversion conditions may include mediation, counseling, monitoring, CLE, restitution, and other corrective action that disciplinary counsel and the respondent lawyer agree is appropriate.\(^76\) In a small number of jurisdictions, apologies are expressly identified in the rules governing diversion as terms that can be agreed upon as part of diversion.\(^77\) Bar counsel in one of those states explained that assistance panels “often suggest a letter of apology, but don’t require it. Our panels are concerned that an apology letter (1) could be viewed as too easy an out; and (2) might be used against the lawyer in a malpractice case.”\(^78\) Other disciplinary authorities report that apologies are rarely or never used as conditions in diversion.\(^79\) To whom the apologies are addressed and how frequently they occur is not generally known.\(^80\)

Apologies may also be a part of negotiated discipline sanctions.\(^81\) Such negotiations may occur after a probable cause determination or formal charges and

74. See supra notes 15, 36 and accompanying text.

75. The ABA recommends that diversion not be available where the respondent has been publicly disciplined in the last three years or the misconduct is of the same nature as the misconduct for which the lawyer was disciplined in the past five years. ABA Model Rules for Lawyer Disciplinary Enforcement R. 9(B) (2016); see also Colo. R. Civ. P. 251.13(b)(6)–(7) (2020); Kan. Rules Relating to Discipline of Att’y’s R. 203(d) (2019); Okla. Rules Governing Disciplinary Proceedings R. 5.1(d)(3)–(4) (2018). A few jurisdictions generally will not offer diversion when discipline was previously imposed. See Rules Governing the D.C. Bar R. XI, § 8.1(b) (2020) (noting diversion is not available where discipline was previously imposed absent “exceptional circumstances”).


78. E-mail from Michael Kennedy, supra note 73.

79. See, e.g., E-mail from Keith Sellen, supra note 72 (reporting use in “a few cases”); E-mail from Luke Mette, Chief Disciplinary Counsel, Del. Office of Disciplinary Counsel, to Leslie C. Levin (Mar. 19, 2020, 8:42 EDT) (reporting they are not used); E-mail from Alan Pratzel, Chief Disciplinary Counsel, Mo. Office of Chief Disciplinary Counsel, to Leslie C. Levin (Mar. 20, 2020, 11:26 EDT); E-mail from Tara van Brederode, Assistant Dir., Office of Professional Regulation of the Sup. Ct. of Iowa, to Leslie C. Levin (Mar. 24, 2020, 11:27 EDT); E-mail from Seana Willing, St. B. Tex., to Leslie C. Levin (Mar. 19, 2020: 17:45 p.m. EDT).

80. Although Maryland’s Rule 19-716 (c)(iii) provides for apologies as permissive condition of diversion, Maryland does not maintain statistics reflecting how often apologies are used in diversion agreements. E-mail from Lydia Lawless, B. Counsel, Att’y Grievance Comm’n of Md., to Leslie C. Levin (Mar. 21, 2020, 12:32 EDT); see also E-mail from Douglas J. Ende, Chief Disciplinary Counsel, Wash. St. B. Ass’n, to Leslie C. Levin (Apr. 8, 2020, 18:37 EDT) (reporting anecdotally that apologies were used as diversion conditions about two times in ten years). But see 2014 State of the Attorney Disciplinary System Report 33 (2015), [https://www.njcourts.gov/attorneys/assets/eoa/2014oaeanualrpt.pdf?c=ZQ [https://perma.cc/PH4N-NZK8] (last visited June 15, 2021) (noting that letters of apology were a condition of diversion on three occasions that year).

81. See, e.g., In re Hartin, 764 S.E.2d 542, 543 (Ga. 2014) (describing State Bar’s request to lawyer to apologize to client and refund a portion of fee in connection with negotiated voluntary discipline agreement);
result in an agreed-upon disposition much like a plea bargain. Less commonly, apologies are ordered as part of a discipline sanction after a hearing and finding that lawyer wrongdoing occurred.82 A search in LEXIS/NEXIS for cases in which the court or disciplinary authority ordered an apology as part of discipline sanction—other than on consent—yielded relatively few cases, with some of them involving an apology to the court and other affected individuals, rather than to clients or other complainants.83 Apologies are more often made a condition of a lawyer’s reinstatement to practice after a lawyer has been suspended or disbarred.84

D. APOLOGIES AS EVIDENCE OF REHABILITATION WHEN SEEKING READMISSION

A lawyer seeking readmission to practice must show rehabilitation; 85 as a result, courts frequently look for evidence of the lawyer’s remorse. 86 For this reason, apologies can help lawyers achieve reinstatement. 87 Hearing panels may give “substantial weight to the fact that [a] petitioner has not expressed remorse


82. Apologies are listed as one discipline option in Tennessee. See A Primer on the Discipline of Attorneys in Tennessee, TENN. B. ASS’N (Jan. 27, 2012), http://www.tba.org/info/a-primer-on-the-discipline-of-attorneys-in-tennessee [https://perma.cc/SCG8-M27U]. It is unclear, however, how frequently they are required without the lawyer’s consent.


84. See, e.g., In re McCann, 669 A.2d 49, 59 (Del. 1995) (requiring letters of apology to complainants and any other injured parties as a condition of reinstatement); In re Odo, 375 P.3d 320, 330 (Kan. 2016) (noting hearing panel recommended that lawyer must provide clients with “sincere apology” prior to reinstatement); Stewart v. Miss. Bar, 969 So. 2d 6, 14 (Miss. 2007) (ordering lawyer, prior to reinstatement, to write letter of apology to former clients); In re Benavidez, 808 P.2d 612, 614 (N.M. 1991) (requiring letter of apology to clients before reinstatement); Office of Disciplinary Counsel v. Nicholson, 685 N.E.2d 1234, 1235 (Ohio 1997) (requiring public apology to judge and prosecutor prior to reinstatement); see also In re Schuchardt, No. 3:18-MC-39, 2019 WL 6716992, at *11 (E.D. Tenn. Dec. 10, 2019) (requiring that an apology letter to the judge be included in any application for early reinstatement).


86. See, e.g., In re Wiederholt, 295 P.2d 396, 399 (Alaska 2009); In re Martinez-Fraticelli, 850 N.E.2d 155, 171 (Ill. 2006); Milligan v. Bd. of Prof’l Responsibility, 301 S.W.3d 619, 627–28 (Tenn. 2009); In re Rosellini, 739 P.2d 658, 662 (Wash. 1987).

87. See, e.g., In re Stanback, 913 A.2d 1270, 1279, 1286 (D.C. Ct. App. 2006); State ex rel. Okla. Bar Ass’n v. Townsend, 277 P.3d 1269, 1277–78, 1281 (Okla. 2012); In re Moss, 899 N.W.2d 357, 358, 360 (Wis. 2017); see also In re Gutman, 599 N.E.2d 604, 609–10 (Ind. 1992) (noting that an apology and an effort to make restitution “can provide strong indication of a remorseful state of mind.”).
or apology” for conduct that led to disbarment. A failure to apologize to a lawyer’s victims may be viewed as a “significant indicator” of a lack of remorse in this context.

Nevertheless, apologies considered at the time of reinstatement are not invariably accepted as evidence of remorse. Courts may consider whether a lawyer waited until shortly before applying for reinstatement to make an apology. In addition, they may look to whether the lawyer also attempted to make full restitution to determine whether the lawyer understands and appreciates the wrong that was done.

II. WHY IS IT DIFFICULT FOR ATTORNEYS TO APOLOGIZE?

Richard Abel, in his case studies of disciplined New York lawyers, describes the case of attorney Philip Byler, a Harvard-educated lawyer who got into a fight over legal fees with his client that probably could have been resolved with the return of some money and an apology. The dispute arose after Byler took a client’s tax refund check as his legal fees in a tax matter, and the client disputed the amount of the fee. After the client filed a complaint, disciplinary authorities offered Byler a private admonition to resolve the matter. Instead, he fought his way through disciplinary proceedings, where he could not bring himself to state that he was sorry that he had not put the disputed funds in escrow. Byler ended up with a one year suspension from practice and could not gain reinstatement for an additional year.

To err is human. It is also human to find it difficult to apologize. While lawyers may be increasingly willing to consider advising their clients about

90. See, e.g., In re Pacenza, 204 P.3d 58, 63–64 (Okla. 2009) (questioning candor of the respondent’s apologies to former clients).
91. See In re Daniel, 135 A.3d 796, 798 (D.C. Ct. App. 2016); In re Asher, 987 So. 2d 954, 957, 961 (Miss. 2008); In re Thompson, 864 P.2d 823, 826 (Okla. 1993).
92. See, e.g., In re Stanback, 913 A.2d at 1280, 1283; In re Pacenza, 204 P.3d at 64.
93. For a full discussion of Philip Byler’s case, see ABEL, supra note 17, at 289–366. Before disciplinary proceedings commenced, the client’s brother, who is a legal ethics expert, warned Byler that “you are playing Russian Roulette with your career.” Id. at 301, 308.
94. Id. at 314–15. The offer required him to return or escrow the disputed fee.
95. Id. at 328–29. Byler subsequently fought his case up to the New York Court of Appeals. Id. at 337.
96. Id. at 334, 337.
97. The New York Court of Appeals upheld his original suspension in October 2000. Id. at 337. Byler was also unable to display remorse when he initially applied for reinstatement. Id. at 340–41, 343. He was not reinstated until October 1, 2002. Id. at 348.
98. See, e.g., Douglas N. Frenkel & Carol B. Liebman, Words That Heal, 140 ANN. INTERN. MED. 482, 482 (2004) (“Apologies have a potential for healing that is matched only by the difficulty most people have in offering them . . .”).
apologies,\textsuperscript{100} they are less likely to consider offering an apology when they have erred themselves.\textsuperscript{101}

One salient factor that makes apology difficult in situations that could involve litigation or discipline is concern that the apology might be taken as evidence of error or wrongdoing.\textsuperscript{102} As we will see, robust apologies include the admission of responsibility—acknowledging the wrongful conduct and the harm that it has caused. Accordingly, the prospect of a malpractice lawsuit or disciplinary proceedings can mean that the instinct is to avoid apologizing for fear that the apology will lead to negative legal consequences (legal liability, discipline, loss of a job).\textsuperscript{103} Lawyers, in particular, may be especially attuned to these legal risks.\textsuperscript{104}

But even beyond these concerns about apologies as admissions, there are a range of reasons why it can be psychologically difficult to apologize. As an initial matter, it can simply be difficult to recognize or admit (even to oneself) that a mistake has even been made. In one study of lawyers involved in discipline cases, for example, most of the lawyers “were convinced that they had done nothing wrong.”\textsuperscript{105} How can this be?

People who have erred or made unethical decisions can be motivated to deny (to themselves and others) that they have acted wrongfully and to make efforts to reconcile any bad acts with their own positive self-image.\textsuperscript{106} The disconnect

\textsuperscript{100.} See generally Jonathan R. Cohen, \textit{Advising Clients to Apologize}, 72 S. CAL. L. REV. 1009 (1999).

\textsuperscript{101.} O’Grady, supra note 19, at 8 (“Although lawyers increasingly advise their clients to apologize to opposing parties in a dispute, often to facilitate settlement, they generally do not consider the role of apology as it applies to them and to their lawyering work.”).

\textsuperscript{102.} See Cohen, supra note 100, at 1028–30; Jennifer K. Robbennolt, \textit{Apologies and Legal Settlement: An Empirical Examination}, 102 MICH. L. REV. 460, 465–67 (2003); Hiroshi Wagatsuma & Arthur Rosett, \textit{The Implications of Apology: Law and Culture in Japan and the United States}, 20 LAW & SOC’Y REV. 461, 483 (1986) (“A crucial inhibition to a person making an apology in an American legal proceeding is the possibility that a sincere apology will be taken as an admission: evidence of the occurrence of the event and of the defendant’s liability for it.”); see also infra note 247 and accompanying text.

\textsuperscript{103.} Cohen, supra note 100, at 1010 (“If a lawyer contemplates an apology, it may well be with a skeptical eye: Don’t risk apology, it will just create liability.”); Gallagher et al., supra note 28, at 1003 (describing physicians’ concern that apologizing will lead to liability); Jennifer K. Robbennolt, \textit{Attorneys, Apologies, and Settlement Negotiation}, 13 HARV. NEGOT. L. REV. 349, 353 (2008) (“[M]any defendants avoid apologizing and are so counseled by their attorneys and insurers.”). Loss aversion may mean that these potential losses loom large. See O’Grady, supra note 19, at 29.

\textsuperscript{104.} See Robbennolt, supra note 102, at 375 (finding that lawyers as representatives were more likely than laypeople to be influenced by the admissibility of an apology received by a client).

\textsuperscript{105.} ABEL, supra note 17, at 491; see also Leslie C. Levin, \textit{Misbehaving Lawyers: Cross-Country Comparisons}, 15 LEGAL ETHICS 357, 370 (2012) (noting that for lawyers in other case studies “it was very difficult [for them] to even recognize that they had misbehaved”).

between their poor performance or unethical behavior and their otherwise positive view of themselves results in uncomfortable feelings of cognitive dissonance.\textsuperscript{107} This may be particularly true for attorneys who have violated professional rules or norms because their behavior has compromised a core aspect of their identity as competent and ethical legal practitioners. “Dissonance is bothersome under any circumstance, but it is most painful to people when an important element of their self-concept is threatened—typically when they do something that is inconsistent with their view of themselves.”\textsuperscript{108}

Trying to square that incompatibility can lead people to deny, recharacterize, or attempt to explain away their behavior, even to themselves.\textsuperscript{109} Indeed, people find it relatively easy to marshal reasons to support decisions they have made.\textsuperscript{110} In the context of discipline, lawyers may blame aspects of their situation;\textsuperscript{111} point the finger at their clients or opponents;\textsuperscript{112} or fault the judge or the disciplinary authorities.\textsuperscript{113} As attorneys look back on their decisions and behavior, confirmation bias can lead them to selectively attend to aspects of their actions that bolster these rationalizations and to downplay aspects that might cause them to question their competence or ethics.\textsuperscript{114} They may distance themselves from the unethical


\textsuperscript{108}. Tavriss & Aronson, supra note 106.


\textsuperscript{111}. See Abel, supra note 17, at 33, 65, 100 (finding that disciplined attorneys blame situational factors such as workload, judicial backlog); Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659, 713–14 (1990) (describing attorneys who blamed their firms’ billing requirements for their unethical billing practices); see also Edward E. Jones & Richard E. Nisbett, The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in Attribution: Perceiving the Causes of Behavior 80 (Edward E. Jones et al. eds., 1972).


nature of their decisions by thinking about them as business decisions rather than ethical ones or by using euphemisms.\textsuperscript{115} They may minimize the wrongfulness or consequences of their behavior by pointing to even more egregious violations or mistakes committed by others.\textsuperscript{116} Similarly, they may enlist alternate moral principles or different ways of judging fairness to explain their behavior, invoking the concept of zealous advocacy, for example, or arguing that they were protecting client confidences, or responding in kind to the way the other side acted (evoking a reciprocity norm).\textsuperscript{117} The analytic skills that are taught in law school and that are a central part of legal practice may mean that lawyers, in particular, are well-prepared to engage in these sorts of rationalizations.\textsuperscript{118}

The legal ethics rules may also contribute to this self-justification. In some cases, the formal rules are quite clear. In others, they are vague and leave considerable discretion to lawyers’ judgments.\textsuperscript{119} Rules that require “reasonable”


\textsuperscript{116} O’Grady, supra note 19, at 196–97.


\textsuperscript{118} O’Grady, supra note 19, at 31 n. 92 (“Lawyers, in particular, are trained to see a problem from different perspectives; thus, it is certainly not unreasonable to think that individuals trained in the law may perceive a lawyering error as ‘harmless’ when considered against an outcome”); Robbennolt & Sternlight, supra note 106, at 1146 (“[L]awyers are particularly skilled at and, indeed, are trained to be experts at argumentation, to pay close attention to exceptions, and to engage in dispassionate analysis.”). The sense that lawyerly ways of thinking cause people to rationalize and justify is reflected in the fact that people engaged in this sort of thinking are sometimes described as “intuitive lawyers.” See Jonathan Haidt, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, 108 PSYCHOL. REV. 814, 822 (2001); Roderick M. Kramer & David M. Messick, Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 59 (David M. Messick & Ann E. Tenbrunsel eds., 1996); see also Kath Hall & Vivien Holmes, The Power of Rationalisation to Influence Lawyers’ Decisions to Act Unethically, 11 LEGAL ETHICS 137 (2009).

diligence\textsuperscript{120} and rules that prohibit false statements of “material” fact,\textsuperscript{121} for example, leave room for interpretation of what is “reasonable” or “material.” This ambiguity can create the “wiggle room” that may allow rationalization and justification to occur.\textsuperscript{122}

In similar ways, memory for mistakes and unethical acts can conspire to help people avoid recognizing them. “If mistakes were made, memory helps us remember that they were made by someone else. If we were there, we were just innocent bystanders.”\textsuperscript{123} Of perhaps even more concern, people’s understanding of and memory for the relevant ethical standards tend to change in the wake of bad behavior – another manifestation of cognitive dissonance.\textsuperscript{124}

Other psychological phenomena can also play a role. People tend to be overconfident in their abilities\textsuperscript{125} and to believe that they are objective and ethical.\textsuperscript{126} This can make it difficult to engage in appropriate and accurate self-assessment and to recognize mistakes. For example, lawyers who are overly confident in their competence to handle particular types of cases or a high volume of work may not recognize when they are in over their heads. Lawyers who have too much faith in their own objectivity may fail to see when their decisionmaking crosses an ethical line. And lawyers who are too assured that they can fix mistakes are more likely to compound those mistakes with additional missteps. Those who are most likely

\textsuperscript{120} Model Rules of Prof’l Conduct R. 1.3 (2018) [hereinafter Model Rules].

\textsuperscript{121} Model Rules R. 3.3, 4.1.


\textsuperscript{123} Tavris & Aronson, supra note 106, at 70. See also Patricia H. Werhane, Moral Imagination and the Search for Ethical Decision-Making in Management, 8 Bus. Ethics Q., 1, 75 (1999) (describing “moral amnesia”).


to make the kind of mistakes that stem from lack of skill or competence may also be the least likely to recognize the mistake. Lawyers who tend towards perfectionism or who place a great deal of importance on being right can also find it difficult to see or admit error.

Even when attorneys can come to grips with their mistakes and overcome their fear of litigation or discipline, apologies may not come easily. People who cause harm tend not to perceive as great a need for an apology as do those who have suffered harm. It is possible that such gaps are particularly prevalent when attorneys cause harm because attorneys tend to be highly analytical and may be less likely to recognize the emotional importance of an apology to the complainant.

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127. O'Grady, supra note 19, at 19, 41. See also David Dunning, The Dunning-Kruger Effect: On Being Ignorant of One’s Own Ignorance, in 44 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 247 (2011).
129. O'Grady, supra note 19, at 17 (“The very job of being a good lawyer . . . is intertwined with being right and properly exercising good judgment.”).
130. Recent research has found that harm-doers who have fixed mindsets are less likely to accept responsibility than those who have growth mindsets. Karina Schumann & Carol S. Dweck, Who Accepts Responsibility for Their Transgressions?, 40 PERSONALITY & SOC. PSYCHOL. BULL. 1598, 1601 (2014).
134. See Robbenolt, supra note 103, at 380.
defend may also disincline attorneys to apologize for their conduct.\textsuperscript{135}

Lawyers may find that the prospect of apologizing threatens their sense of identity and self-esteem.\textsuperscript{136} Apologizing, moreover, creates vulnerability. It may be embarrassing, awkward, or uncomfortable. And it may be associated with negative emotions such as shame and anger.\textsuperscript{137} Because apologies can empower the recipient of the apology with control over how to respond to the apology and rebalance the moral relationship of the parties, apologizers may experience a comparable lack of control.\textsuperscript{138} Correspondingly, those who do \textit{not} apologize may feel more in control, have a greater sense of value integrity, and experience more positive self-esteem.\textsuperscript{139} Yet people who are contemplating apologies tend to overestimate these aversive characteristics of apologizing, anticipating that apologizing will be worse than it often turns out to be.\textsuperscript{140} In addition, attorneys may worry that an apology will not help, or simply not know how to go about apologizing effectively.\textsuperscript{141} Research suggests that just as they overestimate the aversiveness of apologizing, harm doers tend to underestimate the beneficial effects of apologies.\textsuperscript{142}

\section*{III. SUCCESSFUL APOLOGIES}

If the barriers to apologizing can be overcome, apologies can play a constructive role in attorney discipline. From a claimant's perspective, an apology might be successful if it makes the claimant feel respected, restores the claimant's sense of dignity, alleviates the hurt and anger that have resulted from the misconduct, increases positive emotion, or restores trust. A respondent-lawyer might consider an apology successful if it is either a more personally satisfying response to error,\textsuperscript{143} or an instrumental way of minimizing the

\textsuperscript{135} Jonathan R. Cohen, \textit{The Culture of Legal Denial}, 84 NEB. L. REV. 247, 264–66 (2005); O'Grady, \textit{supra} note 19, at 27.

\textsuperscript{136} See Karina Schumann, \textit{An Affirmed Self and a Better Apology: The Effect of Self-Affirmation on Transgressors' Responses to Victims}, 54 J. EXPERIMENTAL SOC. PSYCHOL. 89, 90 (2014).

\textsuperscript{137} See, e.g., TAVRIS & ARONSON, \textit{supra} note 106.

\textsuperscript{138} Tyler G. Okimoto, Michael Wenzel & Kyli Hedrick, \textit{Refusing to Apologize Can Have Psychological Benefits (and We Issue No Mea Culpa for this Research Finding)}, 43 EUR. J. SOC. PSYCHOL. 22, 26, 28 (2013).


\textsuperscript{141} For discussion of these barriers to physician apologies, see Thomas H. Gallagher, Jane M. Garbutt, Amy D. Waterman, David R. Flum, Eric B. Larson, Brian Waterman, William Dunagan, Victoria J. Fraser & Wendy Levinson, \textit{Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Error to Patients}, 166 ARCHIVES INTERNAL MED. 1585, 1585 (2006); Kaldjian et al., \textit{supra} note 131.

\textsuperscript{142} Leunissen et al., \textit{supra} note 140, at 333.

\textsuperscript{143} Natalie May & Margaret Plews-Ogan, \textit{The Role of Talking (and Keeping Silent) in Physician Coping with Medical Error: A Qualitative Study}, 88 PATIENT EDUC. & COUNS. 449, 452 (2012) (finding that for doctors who had made mistakes, apology conversations with patients or their families were “critically important to
potential negative consequences for the lawyer (e.g., forestalling litigation or minimizing punishment). In addition, successful apologies might improve the lawyer’s self-image or improve the lawyer’s standing in the eyes of the community by decoupling the lawyer’s character from the wrongful behavior; increase feelings of sympathy for and understanding of the lawyer; and restore trust in the lawyer. A disciplinary authority is likely to consider an apology to be successful if it contributes to the rehabilitation of the lawyer or fosters a commitment to do better going forward, resolves a case efficiently, helps to restore trust in the profession, reaffirms the norms of the profession, or bolsters the legitimacy of the regulatory body itself or the legal profession more broadly.

We consider the components of successful apologies with an eye to all these potential effects. These effects, of course, can be intertwined in complicated ways and sometimes these goals can be in tension. A lawyer’s instrumental apology aimed at appeasement, for example, might undercut the role of clients and others in bringing issues to the attention of disciplinary authorities or inappropriately restore trust. A client who receives an apology in a disciplinary proceeding might forego a malpractice claim, undermining the potential deterrence effects or compensation that might result from such litigation. At the same time, however, we have seen that legal malpractice claims are rare and difficult to win and a meaningful apology in the disciplinary context may better serve the complainant than lengthy, hard-fought, and risky litigation. A particular apology, then, may be more or less successful depending on the perspective from which it was viewed.

144. See generally Cohen, supra note 100; Robbennolt, supra note 102; Lee Taft, Apology Subverted: The Commodification of Apology, 109 YALE L.J. 1135 (2000).


146. Goffman argues that an apology causes 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.” ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971).

147. See A.W. Wu, S. Folkman, S. J. McPhee & B. Lo, Do House Officers Learn From Their Mistakes?, 265 J. AM. MED. ASSN. 2089 (1991) (finding that doctors who accepted responsibility for a mistake were more likely to make constructive changes in their practices); see also Plews-Ogan et al., supra note 143, at 239 (“Understanding and accounting for human error may . . . by mitigating maladaptive behaviors in the wake of mistakes, and instead promoting learning and prevention, serve as an effective way to reduce errors both individually and organizationally”); Margaret Plews-Ogan, Justine E. Owens & Natalie B. May, Wisdom Through Adversity: Learning and Growing in the Wake of an Error, 91 PATIENT EDUC. & COUNS. 236 (2013).

is viewed. But, at their best, apologies have the potential to simultaneously satisfy the concerns of complainants, lawyer-respondents, and disciplinary authorities. As we will see, not all apologies are created equally or likely to be equally effective in accomplishing this range of objectives. The best apologies acknowledge and take responsibility for the misconduct and its consequences, commit to improved behavior going forward, offer to repair the harm, and convey sincere remorse.149

A. GOOD APOLOGIES ACKNOWLEDGE MISCONDUCT, ACKNOWLEDGE HARM, AND TAKE RESPONSIBILITY

The defining feature of true apologies is that they acknowledge the error and its consequences and take responsibility for both. It is this acknowledgment and responsibility-taking that distinguishes an apology from other forms of accounting, such as denial, excuse, or justification.150 When we apologize, “we not only apologize to someone but also for something.”151 Those who have been harmed by another person frequently desire such acknowledgment.152 And apologies that take responsibility tend to be the most satisfying to recipients.153 When courts

149. Apologies that address these essentials more comprehensively tend to be more effective. Dhami, supra note 23, at 54; Roy J. Lewicki, Beth Polin, & Robert B. Lount, Jr., An Exploration of the Structure of Effective Apologies, 9 NEGOT. & CONFLICT MGMT. RES. 177, 184 (2016); Steven J. Scher & John M. Darley, How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act, 26 J. PSYCHOLINGUISTIC RES. 127 (1997); Folmer et al., supra note 132. Comprehensive apologies tend to be particularly important to victims when the harm is more severe and when the offender is seen as more responsible for the harm. Id.

150. See GOFFMAN, supra note 146; LAZARE, supra note 131, at 75 (identifying the importance of acknowledging the responsible party, the offending behavior “in adequate detail,” the impact of the behavior, and that the behavior violated social norms); NICK SMITH, I WAS WRONG: THE MEANINGS OF APOLOGIES 28–54 (2008) (describing the importance of the acceptance of blame); TAVUCHIS, supra note 21, at 17; Barry R. Schlenker & Michael F. Weigold, Interpersonal Processes Involving Impression Regulation and Management, 43 ANN. REV. PSYCHOL. 133 (1992); Marvin B. Scott & Stanford M. Lyman, Accounts, 33 AM. SOC. REV. 46 (1968).

151. TAVUCHIS, supra note 21, at 13; see also SMITH, supra note 150, at 28–33 (describing the importance of a corroborated factual record).


153. See, e.g., Lewicki et al., supra note 149, at 185; Thomas C. O’Brien, Tracey L. Meares & Tom R. Tyler, Reconciling Police and Communities With Apologies, Acknowledgments, or Both: A Controlled Experiment, 68 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 209–10 (2020); Kristin M. Pace, Tomasz A. Fediuk & Isabel C. Botero, The Acceptance of Responsibility and Expressions of Regret in Organizational Apologies After a Transgression, 15 CORP. COMM. 410, 420 (2010); Robbenolt, supra note 102, at 486–89, 495–97; Jennifer K. Robbenolt, Apologies and Settlement Levers, 3 J. EMPIRICAL LEGAL STUD. 333, 359–64 (2006); Scher & Darley, supra note 149; Manfred Schmitt, Mario Gollwitzer, Nikolai Förster & Leo Montada, Effects of Objective and Subjective Account Components on Forgiving, 144 J. SOC. PSYCHOL. 465, 478–79
refuse to credit lawyer apologies that justify their misconduct or because the lawyers otherwise demonstrate a lack of understanding of the wrongdoing, they are often reacting to the failure of the apologies to include this basic element. Simply offering sympathy to a victim can be helpful, though such sympathy apologies tend not to be as effective or meaningful as responsibility-accepting apologies. And, in some circumstances, the lack of acknowledgement and responsibility-taking makes the apology less satisfying and can potentially do more harm than good. Consider conditional or vague apologies: “I apologize if I did anything...” or “I apologize for what happened...” or “I’m sorry if anyone was offended...” These apologies fail to adequately acknowledge the behavior or the harm and shift the blame rather than take responsibility.

Acknowledgment and responsibility-taking are related to another interest held by many people who are harmed by others—the desire for information about what happened. People who are provided by the wrongdoer with timely information about what happened tend to be more satisfied and less likely to pursue

(2004); see also Joshua M. Bentley, What Counts as an Apology? Exploring Stakeholder Perceptions in a Hypothetical Organizational Crisis, 32 MGMT. COMM. Q. 202, 216–17 (2018); Mitchell Simon, Nick Smith, & Nicole Negowetti, Apologies and Fitness to Practice Law: A Practical Framework for Evaluating Remorse in the Bar Admission Process, 2012 PROF. L. 37, 72 (arguing that a good apology will include accepting the “legal sanctions for her wrongs, though she may protest these penalties to the extent that she finds them unjustifiable as disproportionate to her offense”).

154. See supra notes 58–59 and accompanying text; In re Kamb, 177 Wash.2d 851, 305 P.3d 1091 (Wash. 2013) (the court found that the lawyer’s “‘reasoning away the misconduct does not constitute acknowledgement of misconduct’); In re Krombach, 286 Wis.2d 589, 707 N.W.2d 146 (Wis. 2005) (“The referee found that the lawyer ‘still has not demonstrated an understanding that what he did was steal from his clients’ and at the end of the day, the lawyer thought he owed his clients nothing. According to the referee, ‘[t]his does not demonstrate an acceptance of responsibility.’”); see also Bruce Green & Jane Campbell Moriarty, Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process, 40 FORDHAM URB. L.J. 139, 154 (2012) (noting that “[t]here may be room for disagreement about whether the lawyer’s acknowledgment is sufficient full, or whether the lawyer has understated the extent of his or her misconduct, its seriousness, or its consequences”).

155. See Robbennolt, supra note 102, at 486–87; Robbennolt, supra note 153, at 359–64.


Providing information about what happened can “convey respect for the victim and affirm his or her status. The very fact that the perpetrator thinks that the victim is due an explanation signals respect for the victim and tends to diminish the victim’s anger.” Acknowledgment and explanation can affirm “Yes, this is what happened. I agree with the wronged party (and others) as to the facts of the case and how they are being interpreted” and can make clear that what happened was not victim’s fault.

Finally, it is worth noting that effective acknowledgement may take time to develop. To fully acknowledge the wrongful behavior and its consequences, the harm-doer may need to make an effort to understand the victim’s perspective to appreciate the nature and scope of the harm done so that he can communicate that understanding. Apologies tend to be more successful when the victim feels heard and the offender has been able to express an understanding of the wrongful behavior and how that behavior has affected the victim.

B. GOOD APOLOGIES INCLUDE A PROMISE NOT TO REPEAT

Most definitions of good apologies include a commitment to improve behavior in the future. And research has found that people find apologies to be more satisfactory when they include promises to refrain from committing future


160. Tavuchis, supra note 21, at 57. See also Smith, supra note 150, at 28–33 (describing the importance of a corroborated factual record); All Things Considered, Former Mayor Calls On Philadelphia To Apologize For MOVE Bombing, NPR (May 17, 2020), https://www.npr.org/2020/05/17/857636427/former-mayor-calls-on-philadelphia-to-apologize-for-move-bombing?utm_medium=RSS&utm_campaign=national [https://perma.cc/KM8G-RE27] (describing role of apology in providing clarity about what happened), See generally William L. Benoit, Crisis and Image Repair at United Airlines: Fly the Unfriendly Skies, 1 Int’l CRISIS & RISK COMM. Res. 11, 22 (2018) (“[I]t is not enough to apologize for something—one must apologize for the perceived offense.”).

161. Lazare, supra note 131, at 78 (“[B]y acknowledging the offense, the offender says, in effect, ‘it was not your fault.’”).

162. Cynthia McPherson Frantz & Courtney Bennigson, Better Late Than Early: The Influence of Timing on Apology Effectiveness, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201, 204–05 (2005); see also Amy S. Ebesu Hubbard, Blake Hendrickson, Keri Szejda Fehrenbach & Jennifer Sur, Effects of Timing and Sincerity of an Apology on Satisfaction and Changes in Negative Feelings During Conflict, 77 W. J. COMM. 305, 315 (2013); Aili Peyton & Ryan Goei, The Effectiveness of Explicit Demand and Emotional Expression Apology Cues in Predicting Victim Readiness to Accept an Apology, 64 COMM. STUD. 411, 425 (2013); Michael Wenzel, Ellie Lawrence-Wood, Tyler G. Okimoto & Matthew J. Hornsey, A Long Time Coming: Delays in Collective Apologies and Their Effects on Sincerity and Forgiveness, 39 Pol. Psychol. 649, 661–62 (2018); see generally Bartlett, supra note 24, at 56 (noting that apologies are “about acknowledging the wrong committed and the importance of such a breach for a community”).

163. See e.g., Goffman, supra note 146, at 113; Smith, supra note 150, at 80–91.
offenses.\textsuperscript{164} Such apologies recognize and reaffirm both the shared norms of behavior and imply a commitment to uphold them.\textsuperscript{165} Whether or not the behavior truly will not recur,\textsuperscript{166} people tend to infer from apologies that the behavior was an aberration or that the perpetrator has learned a lesson and will not repeat the behavior.\textsuperscript{167} Because victims of harm are often motivated by the hope that the same thing will not happen to them again or to someone else, these commitments to non-repetition are important to them.\textsuperscript{168}

C. GOOD APOLOGIES REPAIR HARM

Good apologies include attempts to repair the harm caused by the misconduct.\textsuperscript{169} Apologies are more effective when they include offers of repair,\textsuperscript{170} and

164. Moore & Mello, supra note 152; Scher & Darley, supra note 149. Recipients may also infer such a promise from an apology, whether it is explicitly made or not.


168. See, e.g., Gallagher et al., supra note 29, at 1004; Hickson et al., supra note 27, at 1361; Mazor et al., supra note 28, at 415; Kathleen M. Mazor, Sarah M. Greene, Douglas Roblin, Celeste A. Lemay, Cassandra L. Firneno, Josephine Calvi, Carolyn D. Prouty, Kathryn Homer & Thomas Gallagher, More Than Words: Patients’ Views on Apology and Disclosure When Things Go Wrong in Cancer Care, 90 Patient Educ. & Couns. 341, 345 (2013); Relis, supra note 152, at 72; Vincent et al., supra note 27, at 161.

169. See, e.g., GOFFMAN, supra note 146, at 113; SMITH, supra note 150, at 80–91; Bentley, supra note 153, at 217–18; see also Simon et al., supra note 153, at 72 (arguing that apologies ought to offer a “proportional amount of redress,” though they “need not meet excessive demands from victims with unreasonable or inappropriate expectations”).

170. See e.g., William P. Bottom, Kevin Gibson, Steven E. Daniels & J. Keith Murmighan, When Talk Is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation, 13 Org. Sci. 497, 507 (2002); Tessa Haesevoets, Chris Reinders Folmer, David De Cremer & Alain Van Hiel, Money Isn’t All That Matters: The Use of Financial Compensation and Apologies to Preserve Relationships in the Aftermath of Distributive Harm, 35 J. Econ. Psychol. 95 (2013); Whitney K. Jeter & Laura A. Brannon, “I’ll Make It Up to You.” Examining the Effect of Apologies on Forgiveness, 13 J. Positive Psychol. 597, 601 (2017); Lewicki et al., supra note 149, at 185; Moore & Mello, supra note 152; Scher & Darley, supra note 149 at 128; Schmitt et
victims who are compensated for their harm are more likely to feel that the offender has sufficiently apologized, expressed remorse, and taken responsibility. 171 In explaining why repair is central to apologies, Archbishop Desmond Tutu gives the following example: “If you take my pen and say you are sorry, but don’t give me the pen back, nothing has happened.”172

Material repair is important, 173 but other forms of repair are also possible. Apologies themselves may repair some of the non-material harm caused by the misconduct. Or an attorney might perform free legal work or offer some other sort of support to the client. Sometimes compensating for the harm is not feasible because the offending lawyer lacks malpractice insurance or other financial means to compensate a victim. While compensation or other ways of rectifying harm is important and ought to be encouraged, apologies are still desired and useful even when compensation is not forthcoming. In fact, there is some evidence that when full compensation is not available, there is perhaps even more room for apologies to be restorative.174

D. SINCERITY AND REMORSE

At their best, apologies communicate the genuine remorse that an offender feels for having engaged in wrongful behavior and caused harm. 175 When asked to craft the apologies that they would like to receive, people frequently include words like “truly,” “sincerely,” or “deeply” to describe the contrition that they hope for.176 Sincere remorse is seen as a signal to recipients of apologies that the harm-doer acknowledges and understands the wrong and its consequences and commits to non-repetition. Apologies that are perceived to be sincere, therefore, tend to more effective than those that are not.177 As one leading scholar of


171. See, e.g., Folmer et al., supra note 21, at 335; Schmitt et al., supra note 153, at 477.


174. Folmer et al., supra note 21, at 335–36.

175. LAZARE, supra note 131, at 107–08 (describing the “deep, painful regret that is part of the guilt people experience when they have done something wrong” and noting that remorse can serve as a “sign of [the apology’s] authenticity”); Murphy, supra note 166, at 433 (distinguishing remorse and apology and noting that “we are interested in apologies only to the degree that we believe that they are sincere external signs of repentance and remorse and reliable external signs of future atonement”); SMITH, supra note 150, at 68 (describing “categorical regret” as “she regrets what she has done because it is wrong, she wishes she had done otherwise, and in accordance with this realization she omits to not making the same mistake again”).

176. Bentley, supra note 153, at 218. Judges, too, may distinguish “between apology and remorse, generally refusing to recognize the former as a legitimate reason to mitigate, at least not without some other indication that it signals the latter.” Robinson et al., supra note 23, at 746.

177. Alfred Allan, Dianne McKillop, Julian Dooley, Maria M. Allan & David Preece, Apologies Following an Adverse Medical Event: The Importance of Focusing on the Consumer’s Needs, 98 PATIENT EDUC. & COUNS. 1058, 1060–61 (2015); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, But Was He Sorry?
apologies has noted, “[a]pology should be rooted in responsibility and remorse rather than in economics and strategy. It is the ethical response to injuring another, irrespective of the economic consequences.” In contrast, “[w]hen victims perceive apologies to be insincere and designed simply to “cool them out,” they often react with more rather than less indignation.” Sentencing judges, too, report that sincerity and “genuine remorse” are important to them. And we have seen that courts are disinclined to treat apologies as mitigation when judges do not perceive that they reflect sincere remorse.

Assessing sincerity, however, is complicated for a variety of reasons, including the incentives that offenders might have to feign sincere apologies. Criminal offenders might find incentives for insincere apologies in sentencing guidelines that value remorse, the desire to obtain parole or probation, or restrictions on entry into restorative justice programs. Tort offenders might apologize to forestall lawsuits or minimize payouts. In disciplinary cases, attorneys may hope to placate complainants or appease regulators.

Signals of sincerity might be found in the content of the apology. The more robust the apology—acknowledging wrongdoing and harm, committing to do better going forward, and expressing a desire to make amends—the more the indicia of sincerity. Similarly, costly apologies, those that go beyond “cheap talk” and have consequences for the offender, tend to be seen as more sincere.
Conversely, apologies that are conditional or technical or vague seem less sincere. Apologies given repeatedly with no changes in the underlying behavior seem less sincere, while ongoing behavior consistent with the apology can bolster the perceived sincerity of the apology. In this vein, a lawyer in a discipline case might bolster the credibility of an apology by adopting office practices and procedures that would prevent recurrence of the offense or by agreeing to substance abuse or mental health counseling.

Victims and others might also look for cues to sincerity in facial expressions, body language, or demeanor. But people have a great deal of difficulty in accurately assessing whether another person is being sincere. Despite conventional wisdom to the contrary, people have difficulty reading emotions and it is quite hard to determine whether someone is lying. Cultural differences, too, can complicate evaluations of apologetic communication even further.

Research has also shown that judges attempting to assess remorse in criminal cases vary widely in their views of what cues indicate remorse—with the same
cues that signal remorse to some judges, signaling a lack of remorse to other judges.\(^{192}\) Courtrooms and formal proceedings present additional difficulties for judging remorse. As one judge admitted:

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\text{[Assessment of remorse] is very difficult, especially for judges who are just seeing bits and slices when the person appears in these very formalized, stylized settings. For judges to think, sitting up on the bench, that they can really figure out whether this guy is remorseful, is remorseful enough, and is it real, it is the height of arrogance.}^{193}
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Existing procedures may provide limited opportunities to display remorse. And even offenders who may be able to express remorse in a less formal or charged setting may find it difficult to do (or do well) on cue or under the scrutiny of decision makers in formal proceedings.\(^{194}\) One study found that judges seemed to pay little attention to the ways that the contextual features of the criminal justice setting might also influence how remorse is or is not displayed.\(^{195}\)

Sincerity is also clearly at issue when offenders are required, or even encouraged, to apologize. In other contexts, apologies may be requested by tort victims or encouraged by mediators\(^{196}\) or courts may order an apology by a criminal defendant as a condition of probation.\(^{197}\) The apologies generated by offenders under compulsion tend to be less robust than those generated more spontaneously, conveying less remorse and taking less responsibility.\(^{198}\) But even when

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192. Zhong et al., supra note 190, at 43–44; see also Green & Moriarty, supra note 154, at 154 (noting that observers may disagree “about whether expressions of contrition are sufficiently sincere”); Kate Rossmanith, Steven Tudor & Michael Proeve, *Courtroom Contrition: How Do Judges Know?*, 27 Griffith L. Rev. 366 (2019).

193. Zhong et al., supra note 190, at 43; see also Bibas & Bierschbach, supra note 190, at 98 (noting that “[s]entencing allocutions . . . are tightly scheduled, hurried, vague, and often in front of a judge who did not preside over the guilty plea.”).


195. Zhong et al., supra note 190, at 46.


they contain the same content, compelled apologies may be perceived as inherently lacking in sincerity.199

At the same time, however, spontaneous or voluntary and coerced apologies may have more in common than it first appears. Even voluntary apologies may be insincere or offered for self-serving reasons, or simply perceived as insincere.200 And even ordered or coerced apologies may have positive effects. It is not hard to find instances in which victims request, demand, and negotiate for apologies, suggesting that they expect to find some value in them despite their lack of spontaneity.201 A number of studies, moreover, have found little difference in how recipients react to apologies offered spontaneously as compared to those that are offered at the urging of another or that are negotiated by the parties.202 Recipients, for example, tend to accept both spontaneous and coerced apologies.203 This may be, in part, due to apology “scripts,” which prescribe that the giving of an apology ought to be followed by the acceptance of that apology and that may constrain recipient reactions to coerced apologies, impelling them to accept them despite their deficits.204 Victims may be “forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or [the victim] forgives because it is embarrassing not to once the wrongdoer has given a colorable apology.”205 But recipients also seem to make similar internal judgments of spontaneous and coerced apologies, judging the offerors of either spontaneous or coerced apologies to be more remorseful and likable and being more willing to

199. Even children see coerced apologies as communicating less remorse and as less likely to help repair the harm. Craig E. Smith, Deborah Anderson & Anna Strausberger, Say You’re Sorry: Children Distinguish Between Willingly Given and Coerced Expressions of Remorse, 64 MERRILL-PALMER Q. 275, 278 (2018).

200. See generally Dacher Keltner, Randall C. Young & Brenda N. Buswell, Appeasement in Human Emotion, Social Practice, and Personality, 23 AGGRESSIVE BEHAV. 359 (1997). Ed Dauer sums up the contradictions of insincere apologies when he notes that “[o]n the one hand, if practiced apologizing is effective, it will be so only because it satisfies some need the recipients of the apologies actually have. On the other hand, there is the nagging thought that insincerity camouflaged as contrition is, well, insincere.” Edward A. Dauer, Apology in the Aftermath of Injury: Colorado’s “I’m Sorry” Law, 34 COLO. LAW. 47, 51 (2005).

201. See, e.g., Bibas & Bierschbach, supra note 190, at 143; Robbennolt, supra note 102, at 464; Robbennolt, supra note 196, at 129.

202. See Jeffrey J. Rachlinski, Chris Guthrie, & Andrew J. Wistrich, Contrition in the Courtroom: Do Apologies Affect Adjudication?, 98 CORNELL L. REV. 1189, 1226 (2013); Jane L. Risen & Thomas Gilovich, Target and Observer Differences in the Acceptance of Questionable Apologies, 92 J. PERSONALITY & SOC. PSYCHOL. 418, 421, 423–24 (2007); Robbennolt, supra note 196, at 131. One study found that spontaneous apology was seen as no more sincere and was predicted to be less effective than a requested apology, perhaps because the request gave the victim the opportunity to express his or her perspective prior to the apology. Peyton & Goei, supra note 162, at 423.

203. Risen & Gilovich, supra note 202, at 421, 423–34; see also Battistella, supra note 156, at 193 (“[W]hile it would be high-minded to prescribe sincerity over instrumentality, that prescription would not reflect either reality or utility.”).

204. See Mark Bennett & Christopher Dewberry, “I’ve said I’m sorry, haven’t I?”: A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients, 13 CURRENT PSYCHOL. 10 (1994); Risen & Gilovich, supra note 202, at 419. Observers, in contrast, are more likely than victim-recipients to distinguish between and react more favorably to voluntary apologies (more liking, less desire to punish, more willing to work with) than to coerced apologies. Id., at 421, 423–24.

205. WILLIAM IAN MILLER, FAKING IT 92 (2003).
work with them in the future than offenders who do not apologize.206 Because the
wrongdoer’s giving of an apology reflects the recipient’s worth and deserveningness
of amends, recipients are motivated to believe them. Likewise, recipients’ desire
to see themselves as kind-hearted people who are willing to forgive, can cause
them to credit even coerced apologies.207 The fundamental attribution error,
moreover, inclines people to attribute other people’s behavior to dispositional,
rather than situational factors.208 For this reason, recipients may tend to credit the
sincerity of the apology, rather than attributing it to the circumstances that elicited
it.209

Other studies have found that recipients have more favorable reactions to sponta
neous or voluntary apologies than to compelled or ordered apologies, but that
recipients may still find value in coerced apologies as compared to no apology at
all.210 Apologies that are offered with little or with feigned sincerity, offered
grudgingly, negotiated by the parties, or even ordered by a court might still serve
important purposes. Such statements of apology, for example, might provide vic
tims with an acknowledgement of the wrongdoing and its consequences. Victims
might find some consolation in hearing the offender articulate that acknowledg
ment.211 One victim of discrimination who refused to settle his discrimination
claim without an apology explained: “I know for a fact it won’t be sincere at this
point. I just want them to acknowledge what they did was wrong. They may not
believe it, but at least I could say I have it in writing that [they] admitted that
what [they] did was wrong.”212 Requiring such acknowledgement can signal that
the injured person is valued by the community and should be treated as such.213

207. Id. at 419, 427.
208. See generally Richard E. Nisbett & Lee Ross, Human Inference: Strategies and
Shortcomings of Social Judgment (1980); Lee Ross & Richard E. Nisbett, The Person and The
Situation 4 (1991); Lee Ross, The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution
209. See Risen & Gilovich, supra note 202, at 432; Robbennolt, supra note 102, at 508.
210. See, e.g., Alfred Allan, Dianne McKillop & Robyn Carroll, Parties’ Perceptions of Apologies in
Resolving Equal Opportunity Complaints, 17 Psychol. Med. 538, 544 (2010); Alayna Jehle,
Monica K. Miller, Markus Kemmelmeier & Jonathan Maskaly, How Voluntariness of Apologies Affects Actual
and Hypothetical Victims’ Perceptions of the Offender, 152 J. Soc. Psychol. 727, 735–37 (2012); Weiner et
al., supra note 20, at 299, 305; see also Carroll, supra note 197 (summarizing purposes of apology orders in
Australia); van Dijck, supra note 197 at 507 (arguing that “[t]he mere fact that court-ordered apologies are
sought suggests that they serve a purpose”).
211. See Allan et al., supra note 210, at 544 (describing a range of complainant reactions to non-voluntary
apologies).
212. White, supra note 197, at 1272; see also Michael Proeve & Steven Tudor, Remorse:
Psychological and Jurisprudential Perspectives 203 (2010) (noting that “[t]here is a certain value in simply
seeing that the offender recognizes that other people think his actions were wrong and expect expressions
of remorse and apology from him”).
213. The sincerity of the apology might matter less for these purposes. See, e.g., Lazare, supra note 131, at
39 (noting that when a public apology is about declaring the offense for the record, “the question of sincerity
may never arise”).
The apology ritual might serve as a measure of punishment.\footnote{See Nick Smith, Against Court-Ordered Apologies, 16 NEW CRIM. L. REV. 1, 49 (2013) (noting that “Kant justifies court-ordered apologies because offenders . . . deserve to suffer the negative emotions associated with such rituals”); see also Minneapolis v. Richardson, 239 N.W.2d 197, 206 (Minn. 1976) (describing a court-ordered apology as “calculated to humiliate and debase its writer and will succeed in producing only his resentment—an emotion not particularly conducive to the advancement of human rights”).} Affirmation of the violated norms can also reinforce and signal the importance of those norms to victims, offenders, other lawyers, and the broader community.

The effects of compelled apologies on the offender are understudied and will likely vary across cases. In some cases, being pushed to account for their behavior might provide offenders with occasion to re-examine it.\footnote{See, e.g., C. Daniel Batson, Elizabeth R. Thompson, Greg Seuferling, Heather Whitney & Jon A. Strongman, Moral Hypocrisy: Appearing Moral to Oneself Without Being So, 77 J. PERSONALITY & SOC. PSYCHOL. 525, 529 (1999) (noting that such accountability may “heighten awareness of discrepancies between behavior and salient personal standards, creating pressure to act in accord with standards”). See generally PROEVE & TUDOR, supra note 212, at 205 (arguing that the expression of remorse might be a learning experience that helps to prompt the experience of remorse); Green & Moriarty, supra note 154, at 170 (arguing that “[r]equiring lawyers to explain their past behavior and account for the ethical lapses might be beneficial in preventing future unethical and deceptive behavior”).}

Such reexamination might facilitate learning and, ultimately, better practice. Recognition of error may lead to feelings of guilt, which may also prompt better behavior going forward.\footnote{See generally FESTINGER, supra note 107; COGNITIVE DISSONANCE: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY (Eddie Harmon Jones ed., 2019).} It is possible that over time, the apology will influence the offender’s attitudes and generate feelings of remorse.\footnote{See Festinger & Carlsmith, supra note 124; Saulnier & Sivasubramaniam, supra note 198, at 380 (noting that the opportunity to attribute the apology to an external force—such as an incentive or order—may “nullify the offender’s ability to experience desirable, belief-changing outcomes tied to the act of apologizing”).}

On the other hand, some offenders may chalk their apology up to the external forces that compelled them to give it, missing out on an opportunity for learning.\footnote{See Minneapolis v. Richardson, 239 N.W.2d 197, 206 (Minn. 1976) (noting the potential for ordered apologies to “humiliate and debase” and produce “resentment”); Christopher Bennett, Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual, 23 J. APP. PHIL. 127, 130 (noting that for an offender to “swallow his dissent and make an apology that is not true to what he believes” can be “humiliating”); Smith, supra note 214, at 49 (arguing that compelled apologies might be more likely to alienate than reintegrate); see also Hodgins & Liebeskind, supra note 23 at 297–316 (exploring the role of “reproach” in eliciting defensive motivations in offenders).} To the extent that being forced to apologize is experienced by the lawyer as humiliating, the lawyer might become even more alienated from the discipline process and the organized legal profession.\footnote{Hosser et al., supra note 166, at 146; Tangney et al., supra note 166, at 801–02; see also Brandon J. Griffin, Jaclyn M. Moloney, Jeffrey D. Green, Everett L. Worthington, Jr., Brianne Cork, June P. Tangney, supra note 166, at 146; Tangney et al., supra note 166, at 801–02; see generally Roy F. Baumeister, Arlene M. Stillwell & Todd F. Heatherton, Guilt: An Interpersonal Approach, 115 PSYCHOL. BULL. 243 (1994).} And it is possible that forced apologies could trigger feelings of shame, which tends to be associated with denial and defensiveness. Shame, in contrast to guilt, is associated with a tendency to continue engaging in maladaptive behavior.\footnote{See generally PROEVE & TUDOR, supra note 212, at 205 (arguing that the expression of remorse might be a learning experience that helps to prompt the experience of remorse); Green & Moriarty, supra note 154, at 170 (arguing that “[r]equiring lawyers to explain their past behavior and account for the ethical lapses might be beneficial in preventing future unethical and deceptive behavior”).}
IV. INTEGRATING APOLOGIES INTO THE LAWYER DISCIPLINE PROCESS

Lawyer apologies can help repair the lawyer-client relationship, improve the lawyer discipline experience for the complainant, and provide lawyers with emotional relief and an opportunity for growth. In some cases, apologies can also communicate important messages to the profession and to the public. But apologies are only appropriate in certain cases. Some lawyer discipline complaints lack merit. They are filed by clients who are unhappy with case results, by opposing counsel for strategic reasons, or by opposing parties who are unhappy with the tactics or goals the lawyers pursued. In such cases, lawyer apologies are rarely warranted. There are other instances, however, when lawyer apologies should be encouraged—or even required—at various junctions in the discipline process.

A. EARLY DISPUTE RESOLUTION

Lawyer apologies can be usefully employed when a potential complainant contacts an ACAP or a disciplinary authority that attempts to informally resolve minor matters before a complaint is filed. In many cases, the source of unhappiness is simply a failure to communicate with clients. As noted, a lawyer will
sometimes spontaneously apologize to facilitate resolution of a problem.226 If ACAPs were to more systematically educate lawyers about the benefits of lawyer apologies and encourage lawyers to apologize, they might help to resolve more disputes between potential complainants and lawyers and reduce the number of disciplinary complaints that are ultimately filed. Apologies at this stage might also help to repair more lawyer-client relationships. True apologies—which would include fixing the problem that gave rise to the complainant’s decision to contact the ACAP—could also help, more generally, to restore the client’s confidence in the legal profession.

There is some tension, however, between promoting lawyer apologies and the purposes of ACAPs, which are to resolve minor conflicts, reduce the number of disciplinary complaints filed against lawyers, and weed out frivolous complaints.227 Indeed, the success of ACAPs is often assessed by looking at decreases in filed disciplinary complaints or the number of matters that are informally resolved.228 For these reasons, the focus of ACAPs and other intake screening has been on resolving matters rather than assigning blame.229 And there are instances where the potential grievances arise out of misunderstandings that are not the lawyer’s fault. In other cases, however, where the lawyer has failed to perform adequately—for example, in communicating with clients or attending to work diligently—systematically encouraging apologies can help resolve conflict. Likewise, matters that some lawyer discipline authorities decline to handle—such as lawyer rudeness230—could be constructively addressed with apologies. In a regulatory system that provides no monetary compensation, a sincere apology would provide some psychological satisfaction to many complainants and reinforce the lawyer’s commitment to improved practice. Even a lawyer apology offered to avert a discipline complaint—which may not be entirely sincere—could provide the potential complainant with the feeling of being respected, help repair the relationship, and help restore confidence in the lawyer and the legal profession.

226. See supra note 72 and accompanying text.


228. See, e.g., Freeman, supra note 227, at 11; Willing, supra note 227, at 844.

229. See supra notes 68–69 and accompanying text.

230. In some jurisdictions, lawyer discipline authorities decline to address complaints about rudeness. See, e.g., Complain About a Lawyer’s Conduct, WYO. ST. B., https://www.wyomingbar.org/for-the-public/attorney-complaints/complain-about-a-lawyers-conduct/ [https://perma.cc/MA2P-7P8X]; How to File a Complaint Against a Lawyer, VA. ST. B., https://www.vsb.org/site/regulation/inquiry [https://perma.cc/3M6J-7J2W]. Some ACAPs also decline to address these issues. See Client Assistance Program of the Office of the General Counsel (CAP), supra note 62, at 6 (stating that if CAP is called about lawyer rudeness, it “advises the consumer that such behavior is not condoned and is unprofessional, but does not violate the Georgia Rules of Professional Conduct”).
There are additional reasons, however, why ACAPs may not want to systematically encourage lawyers to apologize in all matters in which the lawyer engaged in wrongdoing. In order to work effectively, ACAPs need lawyers to be cooperative. For this reason, some ACAPs also bill themselves as working to help lawyers resolve problems with their clients. A practice of routinely encouraging lawyer apologies could cause some lawyers to view the programs even more defensively than some already do, which may increase lawyer reluctance to cooperate. In addition, systematic efforts to elicit lawyer apologies could delay the resolution of minor issues, such as the return of client papers, which the client may need done as quickly as possible. In such cases, where the attorney-client relationship has ended, an apology may be less important, while a speedy resolution of the problem may be a greater concern. ACAPs that can effectively educate and coach attorneys about the importance and benefits of apologizing will likely be the most successful in achieving their goals.

A slightly different scenario arises once a disciplinary complaint is filed. The filing of a complaint may signal a complete breakdown in the relationship from the client’s perspective and it raises the stakes for the lawyer. There may be more work for apologies to do to repair the relationship in such cases, and in some instances such repair may not be easy or even desired. But even at this stage apologies can provide acknowledgment of harm and wrongdoing, show respect, reaffirm norms, signal desire for improvement, and aid dispute resolution.

How hard should disciplinary authorities advocate for a lawyer to apologize at this point? Some Australian regulators suggest to lawyers, with different degrees of force, that they apologize at this juncture. In Victoria, some disputes are resolved through informal dispute resolution which includes suggesting to respondent lawyers that they apologize to the complainant. In Queensland, the
regulator put lawyers on notice that he might dismiss certain complaints rather than pursue them if the lawyer apologizes.235 This approach is likely to generate some insincere apologies, but would still allow the complainant to hear the respondent-lawyer acknowledge the wrongdoing and the harm it caused, signal that the regulator values the complainant, and highlight shared underlying values. Even an insincere apology at this juncture might facilitate repair of the relationship and push the attorney to critically examine his behavior.

There are, of course, situations in which ACAPs or disciplinary authorities should not encourage an apology to induce a client to forgo filing or pursuing a discipline complaint.236 Under the rules of the ACAPs, they will not do so where serious misconduct is alleged.237 In addition, apologies should not be encouraged in lieu of discipline where a lawyer repeatedly engages in minor violations of rules of professional conduct. For example, some lawyers who fail to return phone calls to one client may repeat this behavior with other clients. Unfortunately, some ACAP programs do not retain records for any significant length of time,238 making it difficult for repeat offenders to be identified and more appropriately sanctioned by disciplinary authorities.

B. DIVERSION CONDITIONS

Diversion is another juncture at which disciplinary authorities should routinely consider whether a lawyer apology is appropriate. Lawyers who are offered diversion in lieu of discipline are generally not required to admit to misconduct.239 They do, however, enter into diversion agreements in which they commit to satisfy certain conditions.240 These conditions are mostly rehabilitative, such as attending law office management programs, ethics courses, or participating in

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236. Some offenders simply are not candidates for restorative justice approaches and should be more harshly sanctioned for their offenses. See Jeffrey W. Stempel, Paradox Lost: The Potential of Restorative Justice Discipline – With a Cautionary Call for Making Distinctions, 12 NEV. L. REV. 350, 361 (2012).


238. Client Assistance Program of the Office of the General Counsel (CAP), supra note 62 (stating that CAP retains original correspondence for 30 days); Timothy, supra note 227, at 14 (noting that if matters are successfully resolved, contents of file “are completely destroyed”).

239. See, e.g., UTAH SUP. CT. R. PROF’L PRACTICE 14-533(g) (2016). Note that this differs from various types of “restorative justice” programs, in which acceptance of responsibility for wrongdoing is often required for participation.

240. See, e.g., KAN. RULES RELATING TO DISCIPLINE OF ATT’YS R. 203(d) (iv) (2019); LA. RULES FOR LAWYER DISCIPLINARY ENFORCEMENT § 11(H) (2019).
lawyer assistance programs. The conditions may also include fee arbitration or fee restitution, and very rarely, an apology.

The identity of lawyers who agree to diversion is treated as confidential. The complainants may be told that the lawyer was referred to a diversion program and completed the program requirements, but do not usually learn the terms of the agreement. Where the complainant was a client, the lawyer-client relationship has likely ended. In such cases, apologies are not needed to repair the relationship, but may at least give the complainant the satisfaction of feeling like the harm that the lawyer caused has been acknowledged. An apology may also cause respondent lawyers to confront that their misconduct caused real harm.

Most states that utilize diversion in lieu of discipline do not expressly provide for apologies as a condition of diversion. Nevertheless, their rules may permit apologies to be one of the conditions of diversion where they provide for the use of any other “corrective course of action” to address the lawyer’s misconduct.

Some lawyers may be wary of making apologies, however, because evidentiary rules traditionally permit the introduction of apology statements against a party as a party admission. This exposes lawyers to the risk that an apology could be used against them in a subsequent legal malpractice case. But this may not be a substantial problem, at least in the diversion context. As a practical matter, the types of minor misconduct that give rise to diversion are unlikely to serve as the basis for a legal malpractice lawsuit. Jurisdictions that seek to use apologies as part of lawyer discipline should nevertheless be aware of potential lawyer concern and consider options for how to address it. One approach might be to leave attorneys to assess the risks for themselves. Another might be to adopt a


244. See, e.g., N.M. Rules Governing Discipline 17-206 (H)(7) (2018); Utah Sup. Ct. Rules Prof’l Practice 14-533 (e), (f)(1) (2019). An exception might occur when the complainant is involved in the completion of one of the diversion conditions, such as fee arbitration.

245. Even when the complainant contacts an ACAP program, some lawyers have “immediately withdrawn” from representation or become angry with clients. See Timothy, supra note 227, at 14. Diversion is an even more stressful experience for lawyers because a complaint has been filed and disciplinary authorities believe that lawyer misconduct occurred.


247. See Robbennolt, supra note 102, at 466–67.

248. This same evidentiary issue arises, however, when lawyer apologies are offered for more significant lawyer misconduct.
rule which provides that apologies cannot be used against the respondent in subsequent discipline or legal malpractice proceedings. 249

At this stage, lawyers may agree to apologize as a confidential condition of diversion because they believe it is appropriate or because it will resolve the need to proceed to a disciplinary hearing. In some cases, the lawyer will be genuinely contrite, creating the most potential for the apology to benefit both the recipient and the lawyer. 250 In other cases, the lawyer’s apology may not be sincere, but will be offered because it is expedient. Even here, however, the apology may serve to acknowledge the wrongdoing and its harm and to reaffirm the norms underlying the rules of professional conduct.

Requiring an apology as a condition of diversion raises the need to document that the lawyer-respondent has made the apology as required. That could mean encouraging written apologies that could be provided to the complainant and the regulator, or apologies offered in face-to-face meetings with a representative of the regulator in attendance. In-person apologies offered at any stage allow the complainant to have a voice, provide more space for give and take between the lawyer-respondent and the complainant, allow the lawyer-respondent to adapt and respond to the ways in which the complainant reacts to the apology, and may provide victims with greater “emotional and ceremonial meaning.” 251 Face-to-face apologies may also help respondents more fully grasp the consequences of his behavior for the complainant. 252 The prevalence of apologies offered in mediation or other restorative justice processes suggests that apologies can be effective even in the presence of third party observers. 253

249. Many jurisdictions have adopted apology laws that preclude the use of some statements of apology as evidence of liability in civil proceedings, but most only protect statements of sympathy and condolence and some are limited to cases involving medical errors. Only five jurisdictions have rules that preclude the admissibility of statements expressing responsibility for wrongdoing, and these are limited to situations involving health care providers. See Benjamin J. McMichael, R. Lawrence Van Horn & W. Kip Viscusi, “‘Sorry’ Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk, 71 Stan. L. Rev. 341, 346 (2019); see also Jonathan R. Cohen, Legislating Apology: Pros and Cons, 70 U. Cin. L. Rev. 819 (2012); see generally Jennifer Robbennolt, 45 Court Rev. 90, 91 (2008) (describing purpose of apology laws).

250. It is possible that this will be particularly true if the complainant is not aware that the apology is one of the conditions of diversion as the apology may be perceived as more sincere. As noted above, however, not all studies have found differences in recipients’ reactions to spontaneous or encouraged or negotiated apologies. Those that do find that coerced apologies may still be more effective than no apology at all. See supra notes 196–203 and accompanying text. Future research should continue to explore recipients’ views of these types of coerced or incentivized apologies.

251. See, e.g., Lazare, supra note 131, at 39; Smith, supra note 150, at 77.

252. See, e.g., Bibas & Bierschbach, supra note 190, at 115 (arguing that “[b]y humanizing the transgression and its consequences, face-to-face interaction can break down pride, fear, pain, anxiety, and other barriers to accepting responsibility and thus pave the way for genuine repentance.”).

At the same time, face-to-face apologies can be daunting for offenders and run the risk that the lawyer will execute the apology badly. Lawyer who undercut their attempts to apologize with excuses or justifications, offer conditional apologies or statements that blame the complainant (“I’m sorry if you misunderstood”), or vent their anger at the complainant run the risk of further disaffecting the complainant and inflicting additional injury. Written apologies afford an opportunity for offenders to carefully attend to the content of the apology in a way that is more difficult to do in a more fluid conversation that proceeds in “emotional fits and starts with garbled content.” Some lawyer-respondents might prepare a written apology that they deliver in person. In such cases, the work done to think through and craft a written apology may help to prepare an offender to have a more productive interaction with the victim.

C. NEGOTIATED DISCIPLINE SANCTIONS

Negotiated sanctions are the product of negotiations between disciplinary counsel and a lawyer-respondent where the lawyer engaged in sufficiently serious conduct that a discipline sanction is warranted. Like plea bargains in criminal cases, negotiated sanctions sometimes result in a more favorable outcome than a lawyer would receive after a full disciplinary hearing. Negotiated sanctions typically include a sworn statement by the lawyer admitting to the misconduct that occurred. A disciplinary board or a court usually reviews and must approve the negotiated sanction.

When negotiating sanctions, disciplinary counsel should consider seeking an apology from the respondent, especially where the complainant is a client or another member of the public. This would require a shift in the orientation of disciplinary counsel’s office, because the focus of lawyer discipline has traditionally been on public protection and not on the interests of individual complainants. Some states would also need to amend their discipline rules to provide for apologies as part of a discipline sanction. Lawyer apologies would produce the same salutary effects as they would in the pre-complaint and diversion contexts,
providing complainants with the feeling that their harm has been acknowledged, even if they cannot obtain compensation for the harm. At the same time, lawyer apologies would not, in most cases, undermine efforts to protect the public and may further incentivize some individuals to bring lawyer wrongdoing to the attention of disciplinary authorities.260

As in the diversion context, attorneys may be guarded or unwilling to apologize for fear that an apology will be used in subsequent legal proceedings.261 These fears, however, may be exaggerated. Most lawyers who are sanctioned do not also face malpractice litigation.262 Individuals with viable malpractice claims tend to refrain from filing grievances because they want to ensure that their former lawyers remain in practice so those lawyers can pay a malpractice judgment.263 Legal malpractice lawyers advise their clients not to file grievances until after the malpractice action has concluded to avoid stiffening the defendant’s resistance to the malpractice claim.264 The sanctions themselves, moreover, may be admissible in later legal proceedings, even if the apology is not.265 The risks of admission of an apology, therefore, seem less stark in this context.

How hard should disciplinary counsel “push” for an apology as part of a negotiated settlement where a lawyer-respondent does not initially wish to provide one?266 A demand by disciplinary counsel for a lawyer to apologize to a complainant may be experienced as a threat to identity by some respondents who wish to continue to view themselves as good lawyers who simply made a minor mistake.267 Indeed, some lawyers will be incapable of admitting—even to themselves—that they made a mistake at all.268 Insisting that a reluctant lawyer apologize could impede disciplinary counsel’s ability to reach a negotiated sanction or require the diversion of resources to a hearing when a negotiated sanction was otherwise possible. In either case, it may take more time to resolve the matter.


261. See supra note 247 and accompanying text.

262. Some jurisdictions effectively discourage the public from filing disciplinary complaints where malpractice occurred. See, e.g., Attorney Discipline, IOWA JUD. BRANCH, https://www.iowacourts.gov/opr/attorneys/attorney-discipline [https://perma.cc/L9CD-FH7D] (last visited July 8, 2021) (stating that if client is damaged by a lawyer’s negligence “another lawyer should be consulted” and that the “Attorney Disciplinary Board has no jurisdiction of a negligence claim”). As one regulator noted, “[i]n the majority of situations involving potential malpractice actions, the lawyer disciplinary system will play little or no role.” Martin A. Cole, When Malpractice is an Ethics Issue, BENCH & BAR (Dec. 2002).

263. See, e.g., In re Himmel, 533 N.E.2d 790, 791–92 (Ill. 1988).

264. See KRITZER & VIDMAR, supra note 10, at 59.


266. Compelled apologies raise First Amendment issues. See infra notes 296–299 and accompanying text. Pressing for an apology would not violate the lawyer-respondent’s First Amendment rights, however, because the lawyer could decline to apologize and proceed to a hearing.

267. See supra notes 105–07 and accompanying text.

268. ABEL, supra note 17, at 205; see supra note 106 and accompanying text.
The limited resources of many state disciplinary systems, therefore, may militate against disciplinary counsel pushing for a lawyer apology when it would seemingly derail a negotiated sanction. In making this calculus, disciplinary counsel would need to weigh the importance and value to the complainant of an apology. An apology may be very important to some complainants, while less important to others. Similarly, disciplinary counsel should consider how resistant the lawyer is to apologizing, particularly if pushing an apology seems likely to further entrench or disaffect a reluctant lawyer. Counsel could also explore with reluctant lawyer-respondents whether there might be some form of acknowledgement that they might be willing to make, even if they are not willing to offer a robust apology. In this way, the content of the apology itself could become negotiable. And this process of negotiating complainant needs and lawyer-respondent willingness to apologize may prove educational to the lawyer.

D. DISCIPLINARY HEARINGS

When disciplinary matters proceed to a hearing, lawyer-respondents typically will not apologize during the fault stage due to concerns that an apology will be viewed as an admission of wrongdoing. The challenge for lawyer-respondents, however, is that there may not be a separate sanctions phase of the hearing after misconduct has been found. As one former regulator noted, the lawyer is “faced with the practical difficulty of arguing alternatively that the Commission did not meet its burden of proving misconduct,” but if the lawyer is found to have acted wrongfully, “the [lawyer] is remorseful.”

It can also be very difficult for lawyer-respondents to apologize at this stage for other reasons. Solo and small firm lawyers often view disciplinary authorities and the discipline process with suspicion, and question their legitimacy and objectivity. And indeed, there may be some bias in the process. Moreover,
these lawyers often self-represent during discipline hearings and become deeply entrenched in their positions. It can be very hard for them to pivot from strongly advocating their innocence during the fault stage to exhibiting contrition when sanctions are about to be imposed. This is especially true if the fault and penalty evidence are heard on the same hearing date. Even when the guilt and penalty phase are separated and lawyers are given the opportunity to express remorse, it can be very difficult for some lawyers to do so.

In addition, it might be argued that an apology at this late stage comes too late to be meaningful. For some complainants and disciplinary authorities that may be true. But, on the other hand, moral reflection often takes time and the offender’s reflection on and understanding of the wrongdoing is often important to victims. Thus, particularly if the delay in apologizing reflects an effort to grapple with the wrong and the resulting harm, apologies at this stage may not be too late to benefit the individuals who receive them or the respondent lawyers.

Lawyer apologies during disciplinary hearings might become more prevalent if the ABA Standards for Imposing Lawyer Sanctions were amended to explicitly provide that the mitigating factor of “remorse” can be demonstrated by a sincere
apology made directly to those who the lawyer harmed.\textsuperscript{285} Evaluation of the strength of remorse as a mitigating factor should include consideration of whether the apology was accompanied by lawyer efforts to remedy the wrong. A written apology after a finding of misconduct and before the sanctions phase, where possible, would enable discipline decisionmakers to evaluate the extent to which the lawyer took responsibility for the wrongdoing.

Yet there is some risk that the apology will be drafted by the respondent’s attorney—if the lawyer-respondent is represented—or will otherwise not genuinely reflect the respondent’s remorse.\textsuperscript{286} While such an apology may benefit the complainant,\textsuperscript{287} its ability to contribute to the rehabilitation of the respondent lawyer is less certain,\textsuperscript{288} as is its usefulness to the court when attempting to evaluate the lawyer’s remorse. Oral lawyer apologies could also be evaluated by disciplinary authorities during the penalty phase, but evaluations of their sincerity would be as challenging as they are for courts.\textsuperscript{289} Moreover, those apologies are only likely to be meaningful to complainants if they are present at the hearings when the apologies occur or are able to review a transcript of the hearing.

\section*{E. FORCED APOLOGY SANCTIONS}

Courts occasionally force parties to apologize in criminal\textsuperscript{290} or civil cases\textsuperscript{291} or as part of a disciplinary sanction.\textsuperscript{292} Other courts have declined to do so on the

\begin{itemize}
\item \textsuperscript{285} The same could be achieved if courts would expressly recognize the importance of apologies when considering remorse, but an amendment to the ABA Standards for Imposing Lawyer Sanctions is likely to generate swifter adoption of this approach.
\item \textsuperscript{286} The participation of the respondent’s lawyer does not necessarily have to undermine the utility of the apology, whether it is delivered in writing or in person. In fact, in the criminal context, judges have suggested that defendants are often unprepared for allocution and that attorneys could better prepare them to convey remorse and accept responsibility. Bennett & Robbins, supra note 180, at 750, 755, 767.
\item \textsuperscript{287} Robbennolt, supra note 196, at 131 (finding that recipients discounted apologies offered through a lawyer but finding that such apologies were better than no apology).
\item \textsuperscript{288} Much may depend on how the process of counseling the respondent concerning the apology occurs. Indeed, respondents might benefit from being counseled through a process of introspection and reckoning so that they can give a sincere apology. See generally Cohen, supra note 100; Jonathan Cohen, The Immorality of Denial, 79 Tul. L. Rev. 903 (2005). Good counselors may be able to help lawyers manage the threats to their identity that stem from the complaint by reflecting on their core values. Such reflection can result in less defensiveness and more comprehensive apologies. See Schumann, supra note 132.
\item \textsuperscript{289} See supra notes 192–93 and accompanying text.
\item \textsuperscript{291} See, e.g., Desjardins v. Van Buren Community Hosp., 969 F.2d 1280, 1283 (1st Cir. 1992); Imperial Diner v. State Human Rights Appeals Bd., 417 N.E.2d 525, 528 (N.Y. 1980).
\end{itemize}
basis that it is not the court’s role to order apologies or because the court lacked the statutory or equitable power to do so. Even when courts conclude they have the power to order apologies, however, forced apologies raise significant constitutional concerns not present in the earlier scenarios when lawyers consent to apologies.

Only a few courts have noted the likely First Amendment implications of court-ordered apologies. Yet court-ordered apologies would seem to constitute

292. See, e.g., People v. Piccone, 459 P.3d 136, 163 (Colo. 2020); In re Kraushaar, 907 P.2d 836, 838 (Kan. 1995); In re Castellano, 566 P.2d 1152 (N.M. 1977). Courts sometimes require apologies as part of contempt proceedings. See In re Kemper, No. 93CA15, 1994 Ohio App. LEXIS 619 at *10 (Ohio Ct. App. Jan. 31, 1994). Federal courts have also imposed apologies as sanctions or discipline for violations of their rules. See Kim v. BancOfTexas Group., 99 F.3d 775, 776 (5th Cir. 1996); In re Swan, 833 F. Supp. 794, 800 (C.D. Cal. 1993), rev’d on other grounds sub nom. U.S. v. Wunsch, 250 B.R. 887, 900 (Bankr. S.D. Ohio 2000). Likewise, in Australia and New Zealand, apology orders are used in cases of unsatisfactory service. Bartlett, supra note 31, at 180–81, 186, 192. In England and Wales, the Office of Legal Complaints, which deals with complaints against lawyers that do not rise to the level of a disciplinary charge, can direct the lawyer to make an apology to the complainant if an informal resolution is not reached. Id. at 187–88.


294. See, e.g., Birnbaum v. U.S., 588 F.2d 319, 321, 335 (2d Cir. 1978) (an apology requested for the government opening mail was not available under 28 U.S.C. § 1346 (b)); Top of Form Gray v. UAW Local 12 Jeep Comm., No. 3:02CV7618, 2004 U.S. Dist. LEXIS 5877, at *7 (N.D. Ohio Mar. 16, 2004) (apology requested from a union for discrimination was not available under ADA); City of Minneapolis v. Richardson, 239 N.W.2d 197, 205–06 (Minn. 1976) (apology requested because of discriminatory practices by police was not available under Minnesota statute); Pa. Human Relations Comm’n v. Alto-Reste Park Cemetery Ass’n, 306 A.2d 881, 889 (Pa. 1973) (apology requested because of race-based discrimination was not available under Pennsylvania Human Relations Act); Illinois v. Johnson, 528 N.E.2d 1360, 1361–62 (Ill. App. Ct. 1988) (declining to uphold portion of sentence requiring a published apology in a newspaper where effect appeared to go beyond intent of the statute).


296. See Woodruff v. Ohman, 29 Fed. Appx. at 346 (noting absence of authority “that would permit a court to order a defendant to speak in a manner that may well contravene the beliefs the defendant holds”); Defend Affirmative Action Party v. Regents of Univ. of Cal., No. 16-cv-01575-VC, 2016 U.S. Dist. LEXIS 60085, at *2 (N.D. Cal. May 4, 2016) (noting that court-ordered apology would “almost certainly be a First Amendment violation”); Dahn v. Adoption All., 164 F. Supp. 3d 1294, 1318 (D. Colo. 2016) (stating that “Court is cognizant of the constitutional implications attendant to enjoining a party to make statements that may run contrary to his or her beliefs”); Griffith v. Clark, No. LT-460-2, 1993 Va. Cir. LEXIS 41, at *37 (Va. Cir. Ct. Mar. 4, 1993) (stating that “First Amendment concerns preclude the court from ordering the apology originally suggested by [defendant]”). The handful of courts that have actually analyzed the issue have been divided on the constitutionality of forced apologies. Compare United States v. Clark, 918 F.2d 843, 847–48 (9th Cir. 1990), overruled on other grounds, United States v. Keys, 95 F.3d 874 (9th Cir. 1998) (upholding apology requirement in criminal case); State v. K.H.-H., 353 P.3d 661, 665 (Wash. 2015) (upholding apology requirement in juvenile
compelled speech because they involve a state actor requiring an individual to speak words and communicate ideas with which the speaker may fundamentally disagree.\textsuperscript{297} Under a strict scrutiny standard, the state must show that the apology order serves “a compelling interest and is narrowly tailored to achieve that interest.”\textsuperscript{298} The “narrowly tailored” analysis asks whether the “least restrictive means” have been used to achieve the state’s interest.

Court-ordered apologies may have difficulty meeting that standard. The purpose of lawyer discipline is to protect the public, the administration of justice, and public confidence in the bar.\textsuperscript{299} To date, states have not displayed much interest—much less a “compelling interest”—in providing remedies for complainants via the discipline system. Even if there were a compelling state interest in providing complainants with a meaningful remedy, forced apologies are unlikely to be the least restrictive means to achieve it. There are other remedies that could compensate the complainant for the harm the lawyer caused—including fee restitution and monetary damages—that would not raise First Amendment concerns.

If courts are able to order lawyer apologies as a sanction, they would most likely order written apologies, with all the benefits and limitations of written apologies previously described.\textsuperscript{300} As noted, even when apologies are compelled, they can benefit complainants because they provide acknowledgement that the individual was wronged and help restore the complainant’s trust in the legal system. Reports of apology sanctions may also reinforce for the legal profession the

\textsuperscript{297} As the Supreme Court has noted, the First Amendment protects “the decision of both what to say and what not to say.” See Riley v. Nat’l Fed’n of the Blind of N.C., 487 U.S. 781, 796–97 (1988) (emphasis in original). See also State v. K.H.-H, 374 P.3d 1141,1142–43 (Wash. 2016) (noting that “[b]ecause a forced apology involves making an offender say something he does not wish to say, it implicates the compelled speech doctrine”).

\textsuperscript{298} See Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 340 (2010) (quoting Fed. Election Comm’n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007)). But see K.H.-H, 353 P.3d at 667–69 (Bjorgen, J., dissenting) (noting that majority applied the wrong test in its analysis of the constitutionality of a court-ordered apology). Alternatively, the Court might conclude that an apology order would need to withstand the somewhat less rigorous “exacting scrutiny” standard, which the Court has suggested might be appropriate in cases where forced payments of agency fees were at issue. See Janus v. AFSCME, 138 S. Ct. 2448, 2464 (2018). Exacting scrutiny requires that the compelled speech must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” See id. at 2464–2465 (quoting Knox v. SEIU, 567 U.S. 298 (2012)). The Court has not clearly indicated when it will apply the exacting scrutiny standard, but court-ordered apologies are also unlikely to withstand that demanding test.

\textsuperscript{299} See, e.g., In re Marshall, 762 A.2d 530, 540 (D.C. Ct. App. 2000); In re Kurth, 433 P.3d 679, 692 (Kan. 2019); In re Grigsby, 815 N.W.2d 836, 844 (Minn. 2012); In re Chastain, 532 S.E.2d 264, 268 (S.C. 2000); In re Juarez, 24 P.3d 1040, 1063 (Wash. 2001); ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.1 (1992).

\textsuperscript{300} See supra notes 254–55 and accompanying text. Written apologies provide documentation that the apology occurred and that it was sufficient to satisfy the court’s requirements. They mostly arise in connection with private admonitions, public reprimands or probation. Apologies are not typically required when lawyers are suspended or disbarred but are instead required as conditions of reinstatement. See infra note 302 and accompanying text.
idea that clients and the public should be treated with dignity and respect, and that they are entitled to apologies when lawyers cause them harm.

A required apology may also force the lawyer to articulate and possibly reflect upon the reasons why his behavior was problematic and the harm that it caused. Yet courts must be mindful that some lawyers will not reflect and that some may even experience forced apologies as a degradation ritual that has the effect of alienating the lawyer and making him view the discipline process and its goals with distrust or contempt.\(^{301}\) In some cases, a significant risk of alienation might counsel for communication of disapproval of the lawyer’s conduct—to the attorney, the complainant, and the public—through means other than an apology. In such cases, the sanction itself or a statement by the disciplinary authority or court reflecting empathy for the victim might have to substitute for an apology. In other cases, where the complainant is particularly in need of acknowledgment and can obtain no other relief, a court may want to consider ordering an apology even if the lawyer is apt to respond negatively.

F. REINSTATEMENT

When a lawyer is disbarred or suspended from practice, courts occasionally order the lawyer to apologize as a condition of reinstatement.\(^{302}\) This approach seems to present fewer First Amendment concerns about compelled speech because the lawyer can choose whether to reapply to practice. The courts that have required an apology as a condition of reinstatement mostly have not considered the constitutional question, which may be because disciplined lawyers have felt ill-positioned to raise it.\(^{303}\)

It seems likely that courts will conclude that they can require lawyers to apologize as a condition of reinstatement without violating lawyers’ constitutional rights,\(^{304}\) but they have not yet carefully considered the issue. The closest the U.S.

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301. See supra notes 219 and accompanying text. It is possible that being forced to write an apology might be less humiliating or alienating than being forced to apologize face-to-face. Future research should more thoroughly explore the effects of written and face-to-face apologies on both the recipient and the apologizer.

302. See supra note 84 and accompanying text; see also In re Moncier, 550 F. Supp. 768, 813 (E.D. Tenn. 2008); In re Mekler, 669 A.2d 655, 671 (Del. 1995); In re Black, 941 P.2d 1380, 1387 (Kan. 1997); Jonathan Ringel, Six Georgia Lawyers Lose Bar Licenses, DAILY REPORT (Fulton County, Ga.), Apr. 28, 2005, at 9.


304. Some judges have echoed the view, first voiced by Benjamin Cardozo, that “membership in the bar is a privilege burdened with conditions.” In re Rouss, 116 N.E. 782, 783 (N.Y. 1917). Under this view, which has been dubbed the constitutional conditions theory, attorneys voluntarily relinquish their First Amendment rights when they become members of a state’s bar. See Margaret Tarkington, Throwing Out the Baby, The ABA’s Subversion of Lawyer First Amendment Rights, 24 TEX. REV. L. & POL. 41, 47 (2019). This theory has been criticized by most scholars. Id. at 48–49. Nevertheless, the constitutional conditions theory has shown remarkable endurance. See, e.g., Ippolito v. Fla., 824 F. Supp. 1562, 1573 (M.D. Fla. 1993); Cambiano v. Neal, 35 S. W. 3d 792, 799 (Ark. 2000); Stuart v. Walker, 143 A.3d 761, 767 (D.C. Ct. App. 2016); Brooks v. Bd. of Prof’l Responsibility, 578 S.W.3d 421, 427 (Tenn. 2019); Lawyer Disciplinary Bd. v. Sidiropolis, 828 S.E.2d 839, 856 (W.Va. 2019) (Workman, J., concurring); Office of Lawyer Regulation v. Mandelman, 912 N.W.2d 395, 402 (Wis. 2018).
Supreme Court has come to addressing the First Amendment implications of a condition requiring a lawyer to apologize was in *In re Snyder*, when it considered a lower court’s offer to dissolve a suspension order against a lawyer if he apologized for writing a letter the court considered disrespectful. But the Court did not ultimately decide the constitutional issue. Since then, some courts have required lawyers to apologize to avoid contempt sanctions, but they have not considered the constitutionality of those requirements. In one recent case, a federal district court rejected a lawyer’s argument that an apology required as a condition of early reinstatement violated his First Amendment rights, but the court’s reasoning was undeveloped.

Short of requiring an apology, courts and discipline authorities might incentivize lawyers seeking reinstatement to consider making an apology to victims by stressing the usefulness of apologies in demonstrating remorse and rehabilitation when lawyers apply for reinstatement. One way to encourage these apologies would be to expressly incorporate into the ABA Model Rules for Lawyer Disciplinary Enforcement commentary a statement that apologies are among the criteria that should be considered when evaluating whether the lawyer “recognizes the wrongfulness and seriousness of the misconduct for which the lawyer was suspended or disbarred.” While this could generate some insincere apologies, those apologies are also likely to provide victims and disciplinary authorities with many of the advantages previously described. By encouraging apologies through the Standards rather than imposing coercive conditions, this might also make the process of apologizing more meaningful to the sanctioned lawyers.

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305. *In re Snyder*, 472 U.S. 634 (1985). In that case, the lower court offered to dissolve a six-month order of suspension against Snyder if he apologized for what the court perceived to be a disrespectful letter. Snyder declined to apologize. *Id.* at 638–41.

306. The Court did not find the letter supported a finding of contumacious behavior and never reached the constitutional issue. *Id.* at 647.

307. See, e.g., *In re Smith*, 926 So. 2d 878, 889 (Miss. 2006) (suggesting that lawyer may avoid further jail time for criminal contempt if lawyer apologized); *In re Daniels*, 530 A.2d 1260, 1267 (N.J. 1987) (noting that judge offered to vacate jail sentence for contempt and reduce fine if lawyer apologized); Comm. on Legal Ethics of W. Va. State Bar v. Farber, 408 S.E.2d 274, 282-83 (W.Va. 1991) (noting that judge offered to drop criminal contempt matter if lawyer apologized); see also *In re Smothers*, 322 F.3d 438, 443 (6th Cir. 2002) (stating that lawyers can be required to apologize on the record in order to avoid a criminal contempt proceeding).

308. See *In re Schuchardt*, No. 3:18-MC-39, 2019 U.S. Dist. LEXIS 212603 (E.D. Tenn. Dec. 10, 2019). In that case, the magistrate judge had recommended that an apology by Schuchardt, who was suspended from practice, be included in any application for early reinstatement. *Id.* at *33–34. The district court found that because Schuchardt was “not being compelled to apologize in any way and is free to serve his suspension without apology” the First Amendment claim was “meritless.” *Id.* at *34. The court ultimately adopted the magistrate’s recommendation, stating that Schuchardt may apply for early reinstatement, but the application “must” include a copy of a letter of apology to another judge. *Id.* at *54. Using this same reasoning, a court could conclude that an apology could be made a condition of reinstatement because the lawyer was free not to reapply for readmission.


310. See supra notes 18–22, 140–44 and accompanying text.
Lawyers seek reinstatement to practice following suspensions and disbarments, which are usually only imposed when serious misconduct or substantial harm has occurred. Victims tend to experience a stronger desire for apologies after more severe or intentional harm, though more severe harm or more intentional conduct make it harder for apologies to do their repair work. In addition, the fact that these apologies may not come for years after the lawyer misconduct may temper their effects and some complainants may not value them. But for some complainants, an apology may be better late than never. When that is the case, apologies at this stage, as at other stages of the discipline process, can provide the victim with the feeling that the respondent lawyer acknowledges the harm the lawyer caused. By responding to victims’ need for apologies, authorities can also help affirm that the legal system and the profession more broadly respect the victims.

One advantage of apologies in the context of reinstatement is that the lawyer has time and distance from the discipline proceeding, which may enable the lawyer to reflect on what occurred and become more psychologically prepared to make a genuine apology. An apology at this point might also be experienced as part of a reintegration process. The notion of “earned redemption” contemplates that wrongdoers should be held accountable and that they should be able to “earn their way back into the trust of the community.” An apology allows the lawyer to profess understanding of and commitment to the relevant professional norms, signaling the promise of improved behavior going forward. This expressed understanding also makes it more likely that colleagues and peers will reintegrate the lawyer as part of the community of lawyers.

CONCLUSION

Lawyers are paid to be knowledge experts and it can be hard for them to admit mistakes—even to themselves. Not all lawyers will be willing to apologize. And not all lawyer apologies will be successful or satisfying to complainants or disciplinary authorities. Badly executed apologies may be counterproductive or compound the original harm. But those lawyers who are willing to engage in the introspection necessary for a meaningful apology may find that they are able to

311. See, e.g., ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS II (1992).
312. See, e.g., Leunissen et al., supra note 132, at 316–21; Folmer et al., supra note 132.
314. See Moore & Mello, supra note 152.
315. See supra note 280 and accompanying text.
repair relationships, regain trust, learn from their mistakes, improve their standing, and obtain better outcomes. Their experience of the discipline process may also be less adversarial and prolonged. Even those attorneys who offer grudging apologies may be able to reap at least some of these benefits. Disciplinary authorities who effectively encourage apologies may find that they are better able to educate and reintegrate lawyers, more effectively affirm important professional norms, and improve public trust in the profession. Importantly, all of this can make the discipline system more meaningful and satisfying for complainants.

Law schools have tried in recent years to teach law students how to identify their mistakes and reflect upon how they can do better in the future. But law schools have not traditionally taught students how to admit those mistakes to others, even though lawyers are increasingly being required to do so. An ABA formal ethics opinion now states that lawyers are required to disclose to their clients when they make a material error that is reasonably likely to harm or prejudice the client. In such instances, an apology may help avert a lawsuit or resolve the matter on more favorable terms for the lawyer. Admitting mistakes and apologizing for them may also prevent further mistakes or help keep the lawyer-client relationship from deteriorating to the point that a disciplinary complaint is necessary. Lawyers, therefore, need to learn how to admit mistakes, understand the benefits of apologies, and become skilled at providing good apologies.

There is a human tendency to share successes, but not mistakes or failures. As we have seen, mistakes and failures can threaten self-esteem. But we also tend to underestimate the valuable information that stories about failure can impart. One way to help law students and lawyers develop a healthier approach to mistakes is for professors and mentors to share their own mistakes with their students and mentees.


319. ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 481 (2018). Lawyers must also disclose their errors if they are of such a nature that “it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.”


321. Id. at 63–65.

Such sharing permits vicarious learning from others’ mistakes.\textsuperscript{323} Openness about mistakes, moreover, can help to normalize the fact that lawyers, even good ones, make mistakes, and make it easier for others to admit error.\textsuperscript{324} Such openness can also help to foster a growth-mindset approach to mistakes, treating mistakes as opportunities for learning and improvement, rather than as evidence that the attorney is not cut out for the practice of law.\textsuperscript{325}

Discussion of the role of apologies across practice settings could be introduced in law school courses on professional responsibility or client counseling, or incorporated into clinical work.\textsuperscript{326} These discussions could include teaching students about the barriers to admitting responsibility,\textsuperscript{327} the nature of successful apologies, and the range of positive benefits that apologies can have. Simulations and role-play exercises can help students practice the communications skills necessary to apologize well.\textsuperscript{328} Programs designed to teach medical professionals to apologize often successfully incorporate exercises in which participants can practice apologizing to standardized patients, improving participants’ competence and confidence in offering apologies.\textsuperscript{329} These skills are not only important for lawyers in the disciplinary context, but will have great benefits for successfully navigating lawyer-client relations throughout the lawyer’s career.

\textsuperscript{323} Albert Bandura, \textit{Vicarious Processes: A Case of No-Trial Learning}, 2 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1 (1965).
\textsuperscript{324} See Easton & Oseid, supra note 322; Taft, supra note 128, at 360.
\textsuperscript{325} See Carol Dweck, \textit{MINDSET: THE NEW PSYCHOLOGY OF SUCCESS} (2008); see also Easton & Oseid, supra note 322, at 509 (“Mistakes then, are not something to be avoided at all costs, but something to embrace when they happen despite our best human efforts to avoid them. They are career-boosters, not career-killers.”).
\textsuperscript{326} On the importance of institutional culture in shaping how lawyers deal with mistakes, see O’Grady, supra note 19, at 36–43; Robbenolt & Sterlinight, supra note 106, at 1175–74.
\textsuperscript{327} See, e.g., CATHERINE G. O’GRADY & TIGRAN ELDRED, BEYOND THE RULES: A BEHAVIORAL LEGAL ETHICS APPROACH TO UNDERSTANDING WHY LAWYERS MAKE UNETHICAL DECISIONS AND WHAT CAN BE DONE ABOUT IT (forthcoming 2021).
\textsuperscript{329} See, e.g., Gillies et al., supra note 326, at 403–04; Gunderson et al., supra note 326, at 231; Halbach & Sullivan, supra note 326, at 602–03.