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

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ARTICLES

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

LESLIE C. LEVIN* AND JENNIFER K. ROBBENOLT**

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.

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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 complaint¹ and states may provide little explanation of what the public can expect in the discipline process.² The vast majority of complaints are dismissed without a hearing.³ 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.⁴ They typically cannot appeal a hearing panel's determination or the sufficiency of a sanction.⁵ 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 that the lawyer caused. Complainants rarely even receive an apology.⁶

Most lawyer discipline complaints are brought against solo and very small firm lawyers⁷ and allege neglect of client matters or failure to communicate.⁸ These are the lawyers who represent individuals and small businesses, often in personal plight matters (e.g., bankruptcy, criminal, family, personal injury). Their clients often have little leverage to force their lawyers to remedy their conduct. Clients

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/gc/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/discounsel/faq.cfm> [<https://perma.cc/E4GV-9KN8>] (last visited June 15, 2021); *see also Attorney Discipline*, *supra* note 1.

3. *See, e.g., Annual Report of 2019*, ATT'Y REGISTRATION & DISCIPLINARY COMMISSION 22 (2020), <https://www.iardc.org/AnnualReport2019.pdf> [<https://perma.cc/V3T2-5AP3>] [hereinafter ARDC Annual Report]; *44th Annual Report*, ATT'Y GRIEVANCE COMMISSION MD. 22 (2019), <https://www.courts.state.md.us/sites/default/files/import/attygrievance/docs/annualreport19.pdf> [<https://perma.cc/Z5T9-M7TC>].

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).

5. *See, e.g., Discipline Process Frequently Asked Questions*, CONN. JUD. BRANCH STATEWIDE GRIEVANCE COMMISSION, https://www.jud.ct.gov/SGC/faq_discipline.htm [<https://perma.cc/Y5QM-JUCE>] (last visited June 15, 2021); *Annual Report, June 1, 2019–May 31, 2020*, ST. B. TEX. COMMISSION FOR LAW. DISCIPLINE 19 (2020), https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=41986 [<https://perma.cc/2DMJ-WF5U>].

6. E-mail from Mark Dubois, former Chief Disciplinary Counsel of Connecticut, to Leslie C. Levin (Oct. 23, 2020, 11:31 EDT).

7. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312–13 (2004).

8. *See, e.g., ARDC Annual Report*, *supra* note 3, at 21, 48; *Regulation of the Legal Profession in Wisconsin, Annual Report Fiscal Year 2019–2020*, at 39, <https://www.wicourts.gov/courts/offices/docs/olr1920fiscal.pdf> [<https://perma.cc/593V-UN7Q>].

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 lifetimes, 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.

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).

10. HERBERT KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* 54–56 (2018); RONALD E. MALLIN, 4 *LEGAL MALPRACTICE* § 33:29 (West ed. 2021).

11. KRITZER & VIDMAR, *supra* note 10, at 147–48.

12. Leslie C. Levin, *When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109, 114 (2019).

13. See, e.g., ARDC Annual Report, *supra* note 3, at 20.

14. Levin, *supra* note 12, at 128; see also Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 11 (2002).

15. See, e.g., Bryan D. Burgoon, *Diversion to Disbarment, The Florida Lawyer Discipline System*, FLA. B. NEWS (Dec. 1, 2013), <https://www.floridabar.org/the-florida-bar-news/diversion-to-disbarment-the-florida-lawyer-discipline-system/> [https://perma.cc/2LQA-HRHR].

While a few jurisdictions order fee restitution for neglect of client matters, restitution is not the norm.¹⁶ Clients derive so little from the process that it is surprising that they bother filing complaints at all.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.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.¹⁹ Importantly, apologies have been found to decrease distress and anger in their recipients.²⁰ They can address recipients' nonmaterial needs for respect and the restoration of standing.²¹ Both the apologizer and the recipient can experience positive physiological effects.²² Apologies can increase understanding,

16. Levin, *supra* note 12, at 129. Clients who have had money stolen by their lawyers can seek to recover from client security funds, but these are separate from state discipline proceedings. There are also typically limits on the amounts that victims can recover. See ABA, *2017 – 2019 Survey of Lawyers' Funds for Client Protection*, at 25–26 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017-2019-cp-survey.pdf [<https://perma.cc/RN3B-CB4C>].

17. The discipline process is also difficult and unsatisfying for lawyers. In many cases, grievances are unjustified. Clients may file grievances because they do not understand what they can reasonably expect from lawyers or because they are unhappy with their results. Responding to a grievance is stressful and time-consuming for lawyers. Some solo and small firm lawyers believe that as a group, they are unfairly targeted by discipline authorities. See Levin, *supra* note 7, at 372–73. Lawyers can become so consumed with justifying their conduct that they make matters worse for themselves in the process. See RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 182 (2008); see also *infra* notes 93–98 and accompanying text.

18. Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 253 (2012) (describing the “profound breach of trust” involved in disciplinary matters).

19. See generally Catherine Gage O’Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 NEW ENG. L. REV. 7–8 (2016).

20. See, e.g., Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457, 461 (1994); Ken-ichi Ohbuchi, Masuyo Kameda & Nariyuki Agarie, *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 219 (1989); Bernard Weiner, Sandra Graham, Orli Peter & Mary Zmuidinas, *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 296 (1991).

21. See, e.g., NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 13 (1991); Christopher P. Reinders Folmer, Willem H. Van Boom & Pieter T. M. Desmet, *Beyond Compensation? Examining the Role of Apologies in the Restoration of Victims' Needs in Simulated Tort Cases*, 43 L. & HUM. BEHAV. 329, 335–36 (2019).

22. See Charlotte V. O. Witvliet, Lindsey Root Luna, Everett L. Worthington Jr. & Jo-Ann Tsang, *Apology and Restitution: The Psychophysiology of Forgiveness After Accountable Relational Repair Responses*, 11 FRONTIERS PSYCHOL. 1, 7–8 (2020); Charlotte vanOyen Witvliet, Thomas E. Ludwig & David J. Bauer, *Please Forgive Me: Transgressors' Emotions and Physiology During Imagery of Seeking Forgiveness and Victim Responses*, 21 J. PSYCHOL. & CHRISTIANITY 219, 227–28 (2002); Charlotte Witvliet, Everett Worthington & Nathaniel Wade, *Victims' Heart Rate and Facial EMG Responses to Receiving an Apology and Restitution*, PSYCHOPHYSIOLOGY 588 (2002). See generally Kathleen A. Lawler, Jarred W. Younger, Rachel L. Piferi,

repair trust, improve relationships, decrease aggression, and reduce the need to exact punishment.²³

Apologies also provide an opportunity to articulate, acknowledge, reflect on, and reaffirm shared values.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.²⁵ These processes of improvement can be an important part of attorney discipline. This is especially true because public discipline sanctions are infrequent²⁶ 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.²⁷ And patients predict that they would want an

Rebecca L. Jobe, Kimberley A. Edmondson & Warren H. Jones, *The Unique Effects of Forgiveness on Health: An Exploration of Pathways*, 28 J. BEHAV. MED. 157 (2005).

23. See, e.g., Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 746, 749 (1982); Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353, 357–59 (1989); Martin V. Day & Michael Ross, *The Value of Remorse: How Drivers' Responses to Police Predict Fines for Speeding*, 35 L. & HUM. BEHAV. 221, 230–31 (2011); Mandeep K. Dhimi, *Offer and Acceptance of Apology in Victim-Offender Mediation*, 20 CRITICAL CRIMINOLOGY 45, 54 (2012); Ryan Fehr, Michele J. Gelfand & Monisha Nag, *The Road to Forgiveness: A Meta-Analytic Synthesis of Its Situational and Dispositional Correlates*, 136 PSYCHOL. BULL. 894, 904 (2010); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 294 (2000); Marti Hope Gonzales, Julie A. Haugen & Debra J. Manning, *Victims as "Narrative Critics": Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691, 696 (1994); Holley S. Hodgins & Elizabeth Liebeskind, *Apology Versus Defense: Antecedents and Consequences*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 297, 312 (2003); Peter H. Kim, Donald L. Ferrin, Cecily D. Cooper & Kurt T. Dirks, *Removing the Shadow of Suspicion: The Effects of Apology Versus Denial for Repairing Competence- Versus Integrity-Based Trust Violations*, 89 J. APPLIED PSYCHOL. 104, 109 (2004); Peter H. Kim, Kurt T. Dirks, Cecily D. Cooper & Donald L. Ferrin, *When More Blame is Better than Less: The Implications of Internal vs. External Attributions for the Repair of Trust After a Competence- vs. Integrity-Based Trust Violation*, 99 ORG. BEHAV. & HUM. DECISION PROCESSES 49, 58–59 (2006); Ohbuchi et al., *supra* note 20, at 219; Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 782–83 (2012); Weiner et al., *supra* note 20, at 296.

24. Francesca Bartlett, *The Role of Apologies in Professional Discipline*, 14 LEGAL ETHICS 49, 56 (2011).

25. See generally Brown & Wolf, *supra* note 18, at 285.

26. See ABA, *2018 Survey on Lawyer Discipline Systems*, Chart I-Part A, III-Part B (2020), https://www.americanbar.org/groups/professional_responsibility/resources/surveyonlawyerdisciplinesystems2014/ [<https://perma.cc/4A75-N978>] (reflecting that out of more than 83,000 complaints received in 2018, fewer than 2,900 resulted in public sanctions).

27. Charles Vincent, Magi Young & Angela Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1612 (1994); see also Gerald B. Hickson, Ellen Wright Clayton, Penny B. Githens & Frank A. Sloan, *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985).

apology from their medical care provider if the provider made a mistake.²⁸ 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 approach²⁹ have seen positive effects on their malpractice liability, improvements in patient safety, and improved experiences for both patients and providers.³⁰

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

28. See, e.g., Thomas H. Gallagher, Amy D. Waterman, Alison G. Ebers, Victoria J. Fraser & Wendy Levinson, *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1004 (2003); Kathleen M. Mazor, Steven R. Simon, Robert A. Yood, Brian C. Martinson, Margaret J. Gunter, George W. Reed & Jerry H. Gurwitz, *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 415–16 (2004); Kathleen M. Mazor, George W. Reed, Robert A. Yood, Melissa A. Fischer, Joann Baril & Jerry H. Gurwitz, *Disclosure of Medical Errors: What Factors Influence How Patients Respond?*, 21 J. GEN. INTERNAL MED. 704, 708–09 (2006); Amy B. Witman, Deric M. Park & Steven B. Hardin, *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565, 2566 (1996).

29. Some programs have struggled with effective implementation. See, e.g., Thomas H. Gallagher, Richard C. Boothman, Leilani Schweitzer & Evan M. Benjamin, *Making Communication and Resolution Programmes Mission Critical in Healthcare Organisations*, BMJ QUALITY & SAFETY (May 5, 2020), <https://qualitysafety.bmj.com/content/qhc/early/2020/05/05/bmjqs-2020-010855.full.pdf> [<https://perma.cc/9ZF7-DL83>]; Timothy B. McDonald, Melinda Van Niel, Heather Gocke & Deanna Tarnow, *Implementing Communication and Resolution Programs: Lessons Learned From the First 200 Hospitals*, 23 J. PATIENT SAFETY & RISK MGMT. 73 (2018); Michelle M. Mello, Allen Kachalia, Stephanie Roche, Melinda Van Niel, Lisa Buchsbaum, Suzanne Dodson, Patricia Folcarelli, Evan M. Benjamin & Kenneth E. Sands, *Outcomes in Two Massachusetts Hospital Systems Give Reason for Optimism About Communication-and-Resolution Programs*, 36 HEALTH AFF. 1795 (2017); Michelle M. Mello, Stephanie Roche, Yelena Greenberg, Patricia Henry Folcarelli, Melinda Biocchi Van Niel & Allen Kachalia, *Ensuring Successful Implementation of Communication-and-Resolution Programs*, BMJ QUALITY & SAFETY (Jan. 20, 2020), <https://qualitysafety.bmj.com/content/qhc/early/2020/01/20/bmjqs-2019-010296.full.pdf> [<https://perma.cc/8HJX-XXAB>].

30. See, e.g., Allen Kachalia, Kenneth Sands, Melinda Van Niel, Suzanne Dodson, Stephanie Roche, Victor Novack, Maayan Yitshak-Sade, Patricia Folcarelli, Evan M. Benjamin, Alan C. Woodward & Michelle M. Mello, *Effects of a Communication-and-Resolution Program on Hospitals' Malpractice Claims and Costs*, 37 HEALTH AFF. 1836, 1840–41 (2018); Bruce L. Lambert, Nichola M. Centomani, Kelly M. Smith, Lorens A. Helmchen, Dulal K. Bhaumik, Yash J. Jalundhwa & Timothy B. McDonald, *The "Seven Pillars" Response to Patient Safety Incidents: Effects on Medical Liability Processes and Outcomes*, 51 (Supp. 3) HEALTH SERV. RES. 2491, 2499–507 (2016); Florence R. LeCraw, Daniel Montanera, Joy P. Jackson, Janice C. Keys, Dale C. Hetzler & Thomas A. Mroz, *Changes in Liability Claims, Costs, and Resolution Times Following the Introduction of a Communication-and-Resolution Program in Tennessee*, 23 J. PATIENT SAFETY & RISK MGMT. 13, 16 (2018); Michelle M. Mello, Yelena Greenberg, Susan K. Senecal & Janet S. Cohn, *Case Outcomes in a Communication-and-Resolution Program in New York Hospitals*, 51 (Supp. 3) HEALTH SERV. RES. 2583, 2589–92 (2016); Julia C. Prentice, Sigall K. Bell, Eric J. Thomas, Eric C. Schneider, Saul N. Weingart, Joel S. Weissman & Mark J. Schlesinger, *Association of Open Communication and the Emotional and Behavioural Impact of Medical Error on Patients and Families: State-Wide Cross-Sectional Survey*, BMJ QUALITY & SAFETY (Jan. 20, 2020), <https://qualitysafety.bmj.com/content/early/2020/01/31/bmjqs-2019-010367> [<https://perma.cc/56QS-9G63>].

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

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.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.³⁶ Disciplinary counsel will also have the discretion to recommend probation or an admonition upon consent.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.³⁸

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

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 discipline³⁹ and the absence of remorse may be considered an aggravating factor.⁴⁰ Whether a lawyer is truly remorseful can be difficult to determine and judges sometimes disagree about whether the lawyer has demonstrated true remorse.⁴¹ Even when the lawyer demonstrates genuine remorse, it may not be sufficient to outweigh very serious misconduct.⁴²

Courts sometimes view apologies as evidence of remorse,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

35. See, e.g., *How to Submit a Request for Investigation*, ATT'Y REGISTRATION & DISCIPLINARY COMMISSION, <https://www.iardc.org/howtorequest.html> [<https://perma.cc/RT8B-U5EZ>] (last visited June 15, 2021).

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.

37. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(C) (2002).

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).

39. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32(l) (1992).

40. See, e.g., *In re Moore*, 792 S.E.2d 324, 326 (Ga. 2016); *In re Halpin*, 53 N.E.3d 405, 406 (Ind. 2015); *In re Rooney*, 709 N.W.2d 263, 268 n.4 (Minn. 2006).

41. See, e.g., *Attorney Grievance Comm'n v. Shuler*, 117 A.3d 38, 51 (Md. 2015) (Battaglia, J., dissenting). See generally Susan Bandes, *Remorse and Judging*, in *REMORSE IN CRIMINAL JUSTICE: MULTIDISCIPLINARY PERSPECTIVES* (forthcoming 2021).

42. ABA ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS 494 (2015) [hereinafter ANNOTATED STANDARDS]; *Lawyer Disciplinary Bd. v. Wheaton*, 610 S.E.2d 8, 18 (W. Va. 2004) (noting that remorse did not outweigh "profound impact" of lawyer's actions).

43. Likewise, a failure to apologize may be viewed as an absence of remorse. See, e.g., *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 *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.”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.⁴⁵

Courts sometimes give “significant weight to a lawyer’s apology,” while at other times they decline to do so.⁴⁶ They do not appear to give more weight to apologies made in private settings than those made at public hearings.⁴⁷ They also do not seem to place greater importance on apologies made to aggrieved clients or other members of the public⁴⁸ than on apologies made to disciplinary authorities, opposing counsel, or the bar.⁴⁹ Courts or hearing officers sometimes find a failure to apologize to clients to be evidence of absence of remorse,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

44. *People v. Hooker*, 318 P.3d 77, 87 (Colo. O.P.D.J. 2013).

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); *In re Rooney*, 709 N.W.2d at 267 (noting apology made at hearing without stating to whom apology was made).

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., In re Augenstein*, 871 P.2d 254, 258 (Ariz. 1994); *People v. Beecher*, 224 P.3d 442, 453 (Colo. O.P.D.J. 2009).

47. *See, e.g., In re Wyatt’s Case*, 982 A.2d 396, 414 (N.H. 2009) (apology made at oral argument considered favorably); *Lawyer Disciplinary Bd. v. Wheaton*, 610 S.E.2d at 18 (apology at hearing demonstrated remorse); *In re Sorenson*, No. SB-01-0165-D, 2001 Ariz. LEXIS 179, at *32 (Ariz. Nov. 7, 2001) (apologies to client constitute mitigating factors). *But see In re Hanlon*, 110 P.3d 937, 946 n.29 (Alaska 2005) (noting that a “public apology” can be an indication of remorse).

48. For example, the court may note without further differentiation that apologies were made to clients and other affected parties. *See, e.g., 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); *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); *In re Carucci*, 132 A.3d 1161 (Del. 2016) (apology to clients); *In re Levin*, 709 S.E.2d 808, 809 (Ga. 2011) (apology to victim’s family); *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).

49. *See, e.g., 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); *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).

50. *See In re Silva*, 29 A.3d 924, 943 (D.C. App. 2011); *In re Hunt*, 820 S.E.2d 716, 722 (Ga. 2018) (noting failure to apologize to client and her sons during mitigation hearing); *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. *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.⁵¹

The timing of apologies can affect whether remorse will be considered a mitigating factor when determining sanctions.⁵² Some courts have found that apologies that are made late in the process do not constitute mitigation.⁵³ 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.⁵⁴ 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.⁵⁵ 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.⁵⁶

Courts will sometimes parse the language of apologies to determine whether they actually express remorse for engaging in misconduct.⁵⁷ Where an apology is also viewed as an attempt to justify the lawyer’s conduct, it tends not to be treated as mitigating evidence.⁵⁸ Likewise, when the lawyer who apologizes demonstrates in other testimony a lack of understanding of his wrongdoing, the apology may be given little weight.⁵⁹ 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*, MICH. L. WEEKLY, Feb. 17, 2016; see also *In re McGrath*, 280 P.3d 1091, 1100 (Wash. 2012) (illustrating the use of an apology against a lawyer).

57. See, e.g., N.C. State Bar v. Badgett, 2011 N.C. App. LEXIS 1302, at *30–32 (N.C. Ct. App. June 7, 2011).

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

to lawyers who are subject to grievances and discipline because those lawyers are typically male. *See, e.g.*, Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 786–87 (2004); LESLIE C. LEVIN & SUSAN SAAB FORTNEY, REPORT TO THE WISCONSIN OFFICE OF LAWYER REGULATION: ANALYSIS OF GRIEVANCES FILED IN CRIMINAL AND FAMILY MATTERS FROM 2013-2016, at 27 (2020).

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).

61. The Mississippi Bar launched the first consumer assistance program in 1994. Stephanie Francis Ward, *Voices of Reason*, A.B.A. J. (Mar. 21, 2006, 10:27 AM), https://www.abajournal.com/magazine/article/voices_of_reason [https://perma.cc/SP22-PVAF]. One of the reasons for starting ACAP programs was because the majority of complaints did not raise issues that the disciplinary authorities would address, leading to public disillusionment with the lawyer discipline process. *See* Roy M. Sobelson, *Legal Ethics*, 48 MERCER L. REV. 387, 387 (1996).

62. *Attorney Discipline*, FLA. B., <https://www.floridabar.org/public/acap/> [https://perma.cc/RF52-AA2Z] (last visited June 15, 2021). Florida also has Local Professionalism Panels that provide a process for filing professionalism complaints for resolution “whether or not it rises to the level of an ethical breach.” *Local Professionalism Panels by Circuit*, FLA. B., <https://www.floridabar.org/prof/local/> [https://perma.cc/RHN4-AALH] (last visited June 15, 2021). For the programs in Georgia, Massachusetts, and Texas, see *Client Assistance Program of the Office of the General Counsel (CAP)*, ST. B. GA., <https://www.gabar.org/committees/programs/sections/consumerassistanceprogram/index.cfm> [https://perma.cc/LU54-L7QS] (last visited June 15, 2021); *Filing a Complaint Against an Attorney*, MASS. BD. B. OVERSEERS, <https://www.massbbo.org/Complaints> [https://perma.cc/NH73-Z8C7] (last visited June 15, 2021); *Client-Attorney Assistance Program (CAAP)*, ST. B. TEX., <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/CAAP/default.htm> [https://perma.cc/9MC9-CCSK] (last visited June 15, 2021). Arizona, Louisiana, North Carolina, Oregon, South Carolina, Tennessee, and Utah also have ACAP programs.

63. *See Request for Assistance Form*, WASH. ST. B. ASS’N, [https://www.wsba.org/docs/default-source/licensing/discipline/2018-08-31-request-for-assistance-fillable-form\(00445837\).pdf?sfvrsn=dae3cf1_20](https://www.wsba.org/docs/default-source/licensing/discipline/2018-08-31-request-for-assistance-fillable-form(00445837).pdf?sfvrsn=dae3cf1_20) [https://perma.cc/29F8-P2V2] (last visited June 15, 2021); *Complaint Form*, W. VA. OFF. DISCIPLINARY COUNS., <http://wvdc.org/comppacket.pdf> [https://perma.cc/2Z5W-KUMD] (last visited June 15, 2021).

64. *Charge Against a Lawyer*, ST. B. ARIZ., <https://www.myazbar.org/ACAP/ChargeAgainstALawyer.cfm> [https://perma.cc/2NEK-RZSM] (last visited June 15, 2021); *Frequently Asked Questions*, MISS. B., <https://www.msbar.org/ethics-discipline/disciplinary-process/frequently-asked-questions/> [https://perma.cc/M7JX-4AN5] (last visited June 15, 2021).

receive to determine whether they are appropriate for informal resolution.⁶⁵ Some disciplinary authorities attempt to resolve low-level complaints themselves or refer such complaints to fee arbitration and other dispute resolution processes.⁶⁶

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.⁶⁷ 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.”⁶⁸ 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.”⁶⁹ A third observed that she did not see clients prioritizing getting an apology over resolving the underlying issues, such as a failure to communicate.⁷⁰ 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.”⁷¹

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.”⁷² 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.”⁷³

65. See, e.g., *Professional Responsibility Program FY 19 Annual Report* 7, VT. PROF'L RESPONSIBILITY BD., <https://www.vermontjudiciary.org/sites/default/files/documents/2019%20PRB%20Annual%20Report.pdf> [<https://perma.cc/HAA4-38YU>] (last visited June 15, 2021); *Regulation of the Legal Profession in Wisconsin, Annual Report Fiscal Year 2019–2020*, *supra* note 8, at 4.

66. See, e.g., *Attorney Matters*, SUP. CT. N.Y., APP. DIV., SECOND JUD. DEP'T, http://www.courts.state.ny.us/courts/ad2/attorney_matters_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).

71. E-mail from Christine Deshler, Dir., Att'y & Consumer Assistance Program, Office of B. Counsel, Mass. Bd. of B. Exam'rs, to Leslie C. Levin (Mar. 12, 2020, 13:07 EDT).

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’YS 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”).

76. See, e.g., WASH. ST. CT. R. FOR ENFORCEMENT OF LAWYER CONDUCT 6.1 (2019).

77. See MD. SUP. CT. R. ATT’YS 19-716(c)(3)(A)(iii) (2019); Dolores Dorsainvil, *Diversion Agreements Provide Alternative to Attorney Discipline*, WASH. LAW., Apr. 2010, at 10; Vermont Manual for Assistance Panel Members 6, VT. JUDICIARY, [https://www.vermontjudiciary.org/sites/default/files/documents/Manual for Assistance Panels.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/Manual%20for%20Assistance%20Panels.pdf) [<https://perma.cc/8ARV-GVDK>] (last visited June 15, 2021).

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/oea/2014oeaannualrpt.pdf?c=zXq> [<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

Anderson v. Ky. Bar Ass'n, 262 S.W.3d 636, 639–40 (Ky. 2008) (describing negotiated discipline that included thirty-day suspension and public apology).

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.

83. *See, e.g.*, *People v. Piccone*, 459 P.3d 136, 163 (Colo. 2020) (requiring apology to City Attorney); *Fla. Bar v. Michaels*, 2018 Fla. LEXIS 2652, No. SC16-2018, at *1 (Fla. Sept. 27, 2018) (affirming uncontested referee report requiring lawyer who was suspended to write a letter of apology to four assistant state attorneys); *Fla. Bar v. Ratiner*, 46 So. 3d 35, 41 (Fla. 2010) (requiring lawyer during probation to mail letters of apology to deponent, court reporters, and videographer at deposition); *Anderson v. Ky. Bar Ass'n*, 262 S.W.3d 636, 640 (Ky. 2008) (requiring lawyer to publish letter of apology in local newspaper); *Hubbard v. Ky. Bar Ass'n*, 571 S.W.3d 90, 92 (Ky. 2019) (requiring apology to opposing side and the court); *La. State B. Ass'n v. Estiverne*, 512 So. 2d 417, 420 (La. 1987) (requiring apologies to complainants); *In re Washington*, No. SC97715, Terms and Conditions of Probation (Mo. 2019), available at <https://www.courts.mo.gov/file.jsp?id=140925> (requiring letter of apology to judge as a term of probation); *In re Wolfbrandt*, No. 72316, 2017 Nev. Unpub. LEXIS 623, at *6 (Nev. July 25, 2017) (requiring letters of apology to two clients).

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).

85. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 2.2(2)(c) (1992).

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.⁸⁸ A failure to apologize to a lawyer’s victims may be viewed as a “significant indicator” of a lack of remorse in this context.⁸⁹

Nevertheless, apologies considered at the time of reinstatement are not invariably accepted as evidence of remorse.⁹⁰ Courts may consider whether a lawyer waited until shortly before applying for reinstatement to make an apology.⁹¹ 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.⁹²

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.⁹³ 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.⁹⁴ After the client filed a complaint, disciplinary authorities offered Byler a private admonition to resolve the matter.⁹⁵ 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.⁹⁶ Byler ended up with a one year suspension from practice⁹⁷ and could not gain reinstatement for an additional year.⁹⁸

To err is human. It is also human to find it difficult to apologize.⁹⁹ While lawyers may be increasingly willing to consider advising their clients about

88. *Lawyer Disciplinary Bd. v. Moore*, 591 S.E.2d 338, 353 (W. Va. 2003); *see also In re Ganim*, No. CV030404638S, 2012 WL 5200337, at *13 n.4 (Conn. Super. Ct. Sept. 27, 2012), *aff’d sub nom.* *State Grievance Comm. v. Ganim*, 87 A.3d 1078 (Conn. 2014).

89. *In re Wiederholt*, 24 P.3d 1219, 1230 (Alaska 2001).

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. The client initially faced a claimed IRS tax deficiency of \$180,000 and due to Byler’s work, received a \$52,917 tax refund. *Id.* at 289, 296.

95. *Id.* at 314–15. The offer required him to return or escrow the disputed fee.

96. *Id.* at 328–29. Byler subsequently fought his case up to the New York Court of Appeals. *Id.* at 337.

97. *Id.* at 334, 337.

98. 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.

99. *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,¹⁰⁰ they are less likely to consider offering an apology when they have erred themselves.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.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).¹⁰³ Lawyers, in particular, may be especially attuned to these legal risks.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.”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.¹⁰⁶ The disconnect

100. See generally Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999).

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.”).

102. See Cohen, *supra* note 100, at 1028–30; Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 465–67 (2003); Hiroshi Wagatsuma & Arthur Rosett, *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.

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, *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.

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).

105. ABEL, *supra* note 17, at 491; see also Leslie C. Levin, *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”).

106. Rachel Barkan, Shahar Ayal, Francesca Gino & Dan Ariely, *The Pot Calling the Kettle Black: Distancing Response to Ethical Dissonance*, 141 J. EXPERIMENTAL PSYCHOL.: GEN. 757, 757–58 (2012); see Shaul Shalvi, Francesca Gino, Rachel Barkan & Shahar Ayal, *Self-Serving Justifications: Doing Wrong and Feeling Moral*, 24 CURR. DIR. PSYCHOL. SCI. 125, 127–28 (2015). See generally Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013); O’Grady, *supra* note 19, at 27; CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* (2007).

between their poor performance or unethical behavior and their otherwise positive view of themselves results in uncomfortable feelings of cognitive dissonance.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.”¹⁰⁸

Trying to square that incompatibility can lead people to deny, recharacterize, or attempt to explain away their behavior, even to themselves.¹⁰⁹ Indeed, people find it relatively easy to marshal reasons to support decisions they have made.¹¹⁰ In the context of discipline, lawyers may blame aspects of their situation;¹¹¹ point the finger at their clients or opponents;¹¹² or fault the judge or the disciplinary authorities.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.¹¹⁴ They may distance themselves from the unethical

107. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 8 (1957); see also Shahar Ayal & Francesca Gino, *Honest Rationales for Dishonest Behavior*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* 149, 150 (Mario Mikulincer & Phillip R. Shaver eds., 2012) (describing ethical dissonance).

108. TAVRIS & ARONSON, *supra* note 106.

109. See, e.g., Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 *PERSONALITY & SOC. PSYCHOL. REV.* 193, 194 (1999); Lisa L. Shu, Francesca Gino & Max H. Bazerman, *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 *PERSONALITY & SOC. PSYCHOL. BULL.* 330, 331 (2011).

110. See, e.g., Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 122, 123 (1996); see Michael I. Norton, Joseph A. Vandello & John M. Darley, *Casualty and Social Category Bias*, 87 *J. PERSONALITY & SOC. PSYCHOL. BULL.* 817, 817 (2004); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 *LAW & HUM. BEHAV.* 261, 264 (2007); see also Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231, 231–32 (1977); ABEL, *supra* note 17, at 100 (lawyers in disciplinary proceedings).

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).

112. See, e.g., ABEL, *supra* note 17, at 65, 101 (describing lawyers who blamed their clients). See also *id.* at 350–51; Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 *GEO. J. LEGAL ETHICS* 205, 258–62 (1999); cf. Lisa G. Lerman, *Scenes From A Law Firm*, 50 *RUTGERS L. REV.* 2153, 2187–88 (1998).

113. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 *WIS. L. REV.* 495; see also ABEL, *supra* note 17, at 32 (describing lawyers who blame “selective prosecution”); MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 328 (2004) (describing lawyer skepticism of particular ethical rules).

114. See O’Grady, *supra* note 19, at 20–21; Robbenolt & Sternlight, *supra* note 106, at 129–30. See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCHOL.* 175 (1998).

nature of their decisions by thinking about them as business decisions rather than ethical ones or by using euphemisms.¹¹⁵ They may minimize the wrongfulness or consequences of their behavior by pointing to even more egregious violations or mistakes committed by others.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).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.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.¹¹⁹ Rules that require "reasonable"

115. Bandura, *supra* note 109, at 195–96; *see also* Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 1, 6, 22–23 (2003); James R. Detert, Linda Klebe Treviño & Vicki L. Sweitzer, *Moral Disengagement in Ethical Decision Making: A Study of Antecedents and Outcomes*, 93 J. APPLIED PSYCHOL. 374, 375 (2008); Celia Moore, James R. Detert, Linda Klebe Treviño, Vicki L. Baker & David M. Mayer, *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 PERSONNEL PSYCHOL. 1, 5 (2012); Shu, Gino & Bazerman, *supra* note 109, at 331; Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 231–32 (2004). Within the legal profession, lapses of ethical judgment are often described as "mistakes" or "gray areas" rather than being labeled as "misconduct." *See* Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 711–12 (1998); Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 754 (1998).

116. Bandura, *supra* note 109, at 196–97.

117. David M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 28, 35 (2015); Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137, 147 (1975); *see also* Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 126 (2011); Tage Shakti Rai & Alan Page Fiske, *Moral Psychology is Relationship Regulation: Moral Motives for Unity, Hierarchy, Equality, and Proportionality*, 118 PSYCHOL. REV. 57, 61–65 (2011); Eric Luis Uhlmann, David A. Pizarro, David Tannenbaum & Peter H. Ditto, *The Motivated Use of Moral Principles*, 4 JUDGMENT & DEC. MAKING 479, 489 (2009); *see also* ABEL, *supra* note 17, at 297–98 (describing how lawyer justified keeping part of unexpected client's tax refund on grounds it was a "fair return" for lawyer's work).

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"); Robbenolt & 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).

119. *See* Lynn Mather & Leslie C. Levin, *Why Context Matters*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 12 (Leslie C. Levin & Lynn Mather eds., 2012).

diligence¹²⁰ and rules that prohibit false statements of “material” fact,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.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.”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.¹²⁴

Other psychological phenomena can also play a role. People tend to be overconfident in their abilities¹²⁵ and to believe that they are objective and ethical.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

120. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2018) [hereinafter MODEL RULES].

121. MODEL RULES R. 3.3, 4.1.

122. Maurice E. Schweitzer & Christopher K. Hsee, *Stretching the Truth: Elastic Justification and Motivated Communication of Uncertain Information*, 25 J. RISK & UNCERTAINTY 185, 190–98 (2002); Shalvi, Gino, Barkan & Ayal, *supra* note 106, at 126–27; *see also* Jason Dana, Roberto A. Weber & Jason Xi Kuang, *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67 (2007).

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”).

124. Shu et al., *supra* note 109, at 332, 339, 343; Lisa L. Shu & Francesca Gino, *Sweeping Dishonesty Under the Rug: How Unethical Actions Lead to Forgetting of Moral Rules*, 102 J. PERSONALITY & SOC. PSYCHOL. 1164, 1168 (2012); *see also* Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 203–04 (1959); Shirit Kronzon & John Darley, *Is This Tactic Ethical? Biased Judgments of Ethics in Negotiation*, 21 BASIC & APPLIED SOC. PSYCHOL. 49, 58 (1999); Judson Mills, *Changes in Moral Attitudes Following Temptation*, 26 J. PERSONALITY 517, 518 (1958).

125. Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133, 140–41 (2010); Don A. Moore & Paul J. Healy, *The Trouble with Overconfidence*, 115 PSYCHOL. REV. 502 (2008).

126. Nadav Klein & Nicholas Epley, *Maybe Holier, But Definitely Less Evil, Than You: Bounded Self-Righteousness in Social Judgment*, 110 J. PERSONALITY & SOC. PSYCHOL. 660, 662 (2016); David M. Messick, Suzanne Bloom, Janet P. Boldizar & Charles D. Samuelson, *Why We Are Fairer Than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480, 482, 485, 488 (1985); *see generally* Nicolas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171 (2004); Nicholas Epley & David Dunning, *Feeling “Holier Than Thou”: Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861 (2000); Geoffrey P. Goodwin & John M. Darley, *The Psychology of Meta-Ethics: Exploring Objectivism*, 106 COGNITION 1339 (2008); Jonathon R.B. Halbesleben, M. Ronald Buckley, & Nicole D. Sauer, *The Role of Pluralistic Ignorance in Perceptions of Unethical Behavior: An Investigation of Attorneys’ and Students’ Perceptions of Ethical Behavior*, 14 ETHICS & BEHAV. 17 (2004).

to make the kind of mistakes that stem from lack of skill or competence may also be the least likely to recognize the mistake.¹²⁷ Lawyers who tend towards perfectionism¹²⁸ or who place a great deal of importance on being right¹²⁹ can also find it difficult to see or admit error.¹³⁰

Even when attorneys can come to grips with their mistakes and overcome their fear of litigation or discipline, apologies may not come easily.¹³¹ People who cause harm tend not to perceive as great a need for an apology as do those who have suffered harm.¹³² It is possible that such gaps are particularly prevalent when attorneys cause harm because attorneys tend to be highly analytical¹³³ and may be less likely to recognize the emotional importance of an apology to the complainant.¹³⁴ The adversarial culture of law and an inclination to deny and

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).

128. See Lee Taft, *A Toll on Lawyers*, 80 TEX. B. J. 360, 360 (2017) (describing the toll on perfectionists who make mistakes); Debra Cassens Weiss, *Perfectionism, 'Psychic Battering' Among Reasons for Lawyer Depression*, A.B.A. J. (February 18, 2009), http://www.abajournal.com/news/article/perfectionism_psychic_battering_among_reasons_for_lawyer_depression/ [<https://perma.cc/7CJD-R5DF>]. See generally Joachim Strober, Natalie Schneider, Rimi Hussain & Kelly Matthews, *Perfectionism and Negative Affect After Repeated Failure: Anxiety, Depression, and Anger*, 35 J. INDIVIDUAL DIFFERENCES 87 (2014).

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).

131. See generally AARON LAZARE, ON APOLOGY 159–69 (2004). For an exploration of the barriers to apologies among physicians, see Lauris C. Kaldjian, Elizabeth W. Jones, Gary E. Rosenthal, Toni Tripp-Reimer & Stephen L. Hillis, *An Empirically Derived Taxonomy of Factors Affecting Physicians' Willingness to Disclose Medical Errors*, 21 J. GEN. INTERNAL MED. 942, 946 (2006).

132. See, e.g., Christopher P. Reinders Folmer, Peter Mascini & Joost M. Leunissen, *Rethinking Apology in Tort Litigation: Deficiencies in Comprehensiveness Undermine Remedial Effectiveness*, 15 REV. L. & ECON. 27 (2019); see also ROY F. BAUMEISTER, *EVIL: INSIDE HUMAN VIOLENCE AND CRUELTY* (1997) (describing the "magnitude gap" in the perceptions of victims and offenders); Gabrielle S. Adams & M. Ena Inesi, *Impediments to Forgiveness: Victim and Transgressor Attributions of Intent and Guilt*, 111 J. PERSONALITY & SOC. PSYCHOL. 866, 867 (2016) (describing differences in how harm doers and victims perceive intent); Jill N. Kearns & Frank D. Fincham, *Victim and Perpetrator Accounts of Interpersonal Transgressions: Self-Serving of Relationship-Serving Biases?*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 321, 322 (2005); Joost Leunissen, David De Cremer, Christopher P. Reinders Folmer & Marius van Dijke, *The Apology Mismatch: Asymmetries Between Victim's Need For Apologies and Perpetrator's Willingness to Apologize*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 315, 315 (2013). This is likely to be particularly true for harm doers who have a relatively low degree of concern for the victim or their relationship with the victim. Karina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27 CURRENT DIRECTIONS PSYCHOL. SCI. 74, 75 (2018).

133. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1381 (1997); Chris Guthrie, *The Lawyers' Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 156-57 (2001); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 45 (1982).

134. See Robbenolt, *supra* note 103, at 380.

defend may also disincline attorneys to apologize for their conduct.¹³⁵

Lawyers may find that the prospect of apologizing threatens their sense of identity and self-esteem.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.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.¹³⁸ Correspondingly, those who do *not* apologize may feel more in control, have a greater sense of value integrity, and experience more positive self-esteem.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.¹⁴⁰ In addition, attorneys may worry that an apology will not help, or simply not know how to go about apologizing effectively.¹⁴¹ Research suggests that just as they overestimate the aversiveness of apologizing, harm doers tend to underestimate the beneficial effects of apologies.¹⁴²

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 that contributes to emotional relief¹⁴³ or an instrumental way of minimizing the

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

136. See Karina Schumann, *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).

137. See, e.g., TAVRIS & ARONSON, *supra* note 106.

138. Tyler G. Okimoto, Michael Wenzel & Kyli Hedrick, *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).

139. *Id.*; Brent T. White, *Saving Face: The Benefits of Not Saying I'm Sorry*, 72 L. & CONTEMP. PROBS. 261, 266 (2009). Individuals vary in their proclivity to offer apologies. Andrew J. Howell, Raelyne L. Dopko, Jessica B. Turowski & Karen Buro, *The Disposition to Apologize*, 51 PERSONALITY & INDIVIDUAL DIFFERENCES 509 (2011).

140. Joost M. Leunissen, David De Cremer, Marius van Dijke & Christopher P. Reinders Folmer, *Forecasting Errors in the Averseness of an Apology*, 27 SOC. JUST. RES. 322, 329–30, 333 (2014).

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, *Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Error to Patients*, 166 ARCHIVES INTERNAL MED. 1585, 1585 (2006); Kaldjian et al., *supra* note 131.

142. Leunissen et al., *supra* note 140, at 333.

143. Natalie May & Margaret Plews-Ogan, *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).¹⁴⁴ In addition, successful apologies might improve the lawyer's self-image¹⁴⁵ or improve the lawyer's standing in the eyes of the community by decoupling the lawyer's character from the wrongful behavior,¹⁴⁶ 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,¹⁴⁷ 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.¹⁴⁸ 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

healing and positive coping"); Margaret Plews-Ogan, Natalie May, Justine Owens, Monika Ardelt, Jo Shapiro & Sigall K. Bell, *Wisdom in Medicine: What Helps Physicians After a Medical Error?*, 91 ACAD. MED. 233, 239 (2016) (finding that facing errors may "help stem personal grief and burnout"); see also Thomas H. Gallagher, Amy D. Waterman, Jane M. Garbutt, Julie M. Kapp, David K. Chan, W. Claiborne Dunagan, Victoria J. Fraser & Wendy Levinson, *U.S. and Canadian Physicians' Attitudes and Experiences Regarding Disclosing Errors to Patients*, 166 ARCHIVES INTERNAL MED. 1605, 1608 (2006) (reporting that 74% of physicians who disclosed error to patients felt relief).

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

145. See Julie H. Hall & Frank D. Fincham, *Self-Forgiveness: The Stepchild of Forgiveness Research*, 24 J. SOC. & CLINICAL PSYCHOL. 621 (2015).

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).

148. See generally, Jennifer K. Robbenolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Legal Decision-Makers as Goal Managers*, 68 BROOK. L. REV. 1121 (2003) (discussing the need for legal decision makers to manage multiple, sometimes consistent, sometimes inconsistent, goals).

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).

152. See, e.g., Nathalie Des Rosiers, Bruce Feldthusen & Oleana A. R. Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL’Y & L. 433, 442 (1998); Gallagher et al., *supra* note 28, at 1004; Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC’Y REV. 645, 661 (2008); Hickson et al., *supra* note 27, at 1361; Jennifer Moore & Michelle R. Mello, *Improving Reconciliation Following Medical Injury: A Qualitative Study of Patient Responses to Patient Safety Incidents in New Zealand*, 26 BMJ QUAL. & SAFETY 788 (2017); Tamara Relis, *“It’s Not About the Money: A Theory of Misconception of Plaintiffs’ Litigation Aims*, 68 U. PITT L. REV. 701 (2006); Vincent et al., *supra* note 27, at 1612.

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*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 209–10 (2020); Kristin M. Pace, Tomasz A. Fedruk & 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,¹⁵⁴ 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.¹⁵⁵ 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 *it* offended you.” Or apologies that shift blame or cast doubt on or minimize the consequences of the misconduct: “I’m sorry if anyone misinterpreted . . .” or “I’m sorry if anyone was offended . . .”¹⁵⁶ 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.¹⁵⁷ 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 acknowledgment 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 sufficiently full, or whether the lawyer has understated the extent of his or her misconduct, its seriousness, or its consequences”).

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

156. *See* EDWIN L. BATTISTELLA, SORRY ABOUT THAT: THE LANGUAGE OF PUBLIC APOLOGY 37–38, 95 (2014); Joshua M. Bentley, *Shifting Identification: A Theory of Apologies and Pseudo-Apologies*, 41 PUB. REL. REV. 22, 24 (2015); Zohar Kampf, *Public (Non-) Apologies: The Discourse of Minimizing Responsibility*, 41 J. PRAGMATICS 2257, 2258 (2009); LAZARE, *supra* note 131, at 92–93; Yiwei Wang & Matthew S. McGlone, *Did I Offend You or Did It? Agency Assignment in Interpersonal Apology*, 57 DISCOURSE PROCESSES 66, 67–68 (2020). For examples of these sorts of apologies in the #MeToo context, *see* Charlotte S. Alexander, *Sorry (Not Sorry): Decoding #MeToo Defenses*, 99 TEX. L. REV. 341 (2020); Lesley Wexler, Jennifer K. Robbenolt & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 2019 ILL. L. REV. 45, 74, 82.

157. Hadfield, *supra* note 152 (describing 9/11 victims’ desire for information); Hickson et al., *supra* note 27, at 1361 (describing a desire for information in the tort context); Vincent et al., *supra* note 27, at 1611 (same); *see also* Rachel Abrams & Danielle Ivory, *G.M. Secrecy on Crashes Adds to Families’ Pain*, N.Y. TIMES (Apr. 3, 2014), <http://www.nytimes.com/2014/04/03/business/barriers-wall-off-the-facts-of-gm-car-crashes.html> [<https://perma.cc/8AH9-K4B6>]; Juliet Macur, *As Gymnasts Who Were Abused Seek Answers, They Are Offered Only Money*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/sports/olympics/biles-gymnastics-settlement-nassar.html> [<https://perma.cc/85KJ-3B65>].

litigation.¹⁵⁸ 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.”¹⁵⁹ 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”¹⁶⁰ and can make clear that what happened was not victim’s fault.¹⁶¹

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.¹⁶²

B. GOOD APOLOGIES INCLUDE A PROMISE NOT TO REPEAT

Most definitions of good apologies include a commitment to improve behavior in the future.¹⁶³ And research has found that people find apologies to be more satisfactory when they include promises to refrain from committing future

158. See, e.g., Dwight Golann, *Dropped Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 HEALTH AFFS. 1343, 1345–46 (2011); E. Allan Lind, Jerald Greenberg, Kimberly S. Scott & Thomas D. Welchans, *The Winding Road From Employee to Complainant: Situational and Psychological Determinants of Wrongful-Termination Claims*, 45 ADMIN. SCI. Q. 557, 576 (2000); Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision To File a Medical Malpractice Claim*, 29 L. & Soc’y Rev. 413, 427 (1995).

159. Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 537 (2001).

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 J. 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 Bennisson, *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.¹⁶⁴ Such apologies recognize and reaffirm both the shared norms of behavior and imply a commitment to uphold them.¹⁶⁵ Whether or not the behavior truly will not recur,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.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.¹⁶⁸

C. GOOD APOLOGIES REPAIR HARM

Good apologies include attempts to repair the harm caused by the misconduct.¹⁶⁹ Apologies are more effective when they include offers of repair,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.

165. TAVUCHIS, *supra* note 21, at 13; Michael Wenzel, Tyler G. Okimoto, Norman T. Feather & Michael J. Platos, *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375 (2008).

166. Predicting future behavior is quite difficult. See generally Brandon Garrett & John Monahan, *Assessing Risk: The Use of Risk Assessment in Sentencing*, 103 JUDICATURE 42 (2019); John Monahan & Jennifer Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489 (2016); Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583 (2018). Moreover, the likelihood of future offending may depend, in part, on the nuances of the offender's emotional reactions. Guilt is associated with decreased recidivism, while shame, when it motivates the offender to externalize blame, is associated with increased recidivism. Daniela Hosser, Michael Windzio & Werner Greve *Guilt and Shame as Predictors of Recidivism: A Longitudinal Study with Young Prisoners*, 35 CRIM. JUST. & BEHAV. 138, 146 (2008); June P. Tangney, Jeffrey Stuewig & Andres G. Martinez, *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, 25 PSYCHOL. SCI. 799, 801–02 (2014). On the complex associations between remorse and recidivism, see Bandes, *supra* note 41; Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 439 (2007) (“The wrongdoer can be self-deceptive or just honestly mistaken about the sincerity of his own repentance, and even the sincerely repentant wrongdoer can suffer from weak will.”).

167. Gold & Weiner, *supra* note 23, at 292; Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense*, 85 PSYCHOL. REP. 246, 248 (1999); Dawn T. Robinson, Lynn Smith-Lovin & Olga Tsoudis, *Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions*, 73 SOC. FORCES 175, 185 (1994).

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. Firmino, Josephine Calvi, Carolyn D. Prouty, Kathryn Horner & 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 1611.

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 Murnighan, *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

al., *supra* note 153, at 478–79; Jeanne S. Zechmeister, Sofia Garcia, Catherine Romero & Shona N. Vas, *Don’t Apologize Unless You Mean It: A Laboratory Investigation of Forgiveness and Retaliation*, 23 J. SOC. & CLINICAL PSYCHOL. 532, 548 (2004).

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

172. NANCY BERLINGER, *AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS* 61–62 (2005).

173. Folmer et al., *supra* note 21, at 332. See generally Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417 (2003)

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.”¹⁷⁸ 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.”¹⁷⁹ Sentencing judges, too, report that sincerity and “genuine remorse” are important to them.¹⁸⁰ And we have seen that courts are disinclined to treat apologies as mitigation when judges do not perceive that they reflect sincere remorse.¹⁸¹

Assessing sincerity, however, is complicated for a variety of reasons, including the incentives that offenders might have to feign sincere apologies.¹⁸² 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.¹⁸³ In disciplinary cases, attorneys may hope to placate complainants or appease regulators.¹⁸⁴

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.¹⁸⁵ Similarly, costly apologies, those that go beyond “cheap talk” and have consequences for the offender, tend to be seen as more sincere.¹⁸⁶

The Role of Remorse in Capital Sentencing, 83 CORNELL L. REV. 1599, 1633 (1998); Robinson et al., *supra* note 23, at 816–17; Edward C. Tomlinson, Brian R. Dineen & Roy J. Lewicki, *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. MGMT. 165 179–80 (2004). Sincerity is also important to evaluations of excuses. Jerald Greenberg, *Looking Fair vs. Being Fair: Managing Impressions of Organizational Justice*, 12 RES. ORG. BEHAV. 111, 133 (1990). *See generally* Bandes, *supra* note 40 (reviewing studies).

178. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1459 (2000).

179. Miller, *supra* note 159, at 538; *see also* Robert A. Baron, *Attributions and Organizational Conflict: The Mediating Role of Apparent Sincerity*, 69 ORG. BEHAV. & HUM. DECISION PROCESSES 272 (1988); Erving Goffman, *On Cooling the Mark Out*, 15 PSYCHIATRY 451 (1952).

180. Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocation in Sentencing*, 65 ALA. L. REV. 735, 752 (2014).

181. *See supra* notes 57–60 and accompanying text; *see also* Attorney Grievance Com'n of Maryland v. Pennington, 876 A.2d 642, 661 (Md. 2005) (display of remorse seen as an attempt at damage control); Statewide Grievance Committee v. Lafferty, No. CV 000070144S, 2000 WL 1474880 (Conn. Super. 2000) (attorney only apologized for a “technical” and “inadvertent” violation).

182. *See, e.g.*, Bartlett, *supra* note 24, at 55.

183. *See generally* Taft, *supra* note 144.

184. *See In re* Coe, 903 S.W.2d 916, 918 (Mo. 1995) (en banc) (apology seemingly made to reduce disciplinary penalty).

185. *See* Robbennolt, *supra* note 153, at 358–59; Robbennolt, *supra* note 102 (unpublished data finding association between the taking of responsibility and perceived sincerity).

186. The relevant “costs” could be compensation to the victim but could also involve other negative consequences for the offender, such as cancelling important plans, forgoing profits or other opportunities, or legal exposure. *See*, Yohsuke Ohtsubo & Esuka Watanabe, *Do Sincere Apologies Need to Be Costly? Test of a Costly Signaling Model of Apology*, 30 EVOLUTION & HUM. BEHAV. 114, 118–20 (2018); Yohsuke Ohtsubo, Esuka Watanabe, Jiyoung Kim, John T. Kulas, Hamdi Muluk, Gabriela Nazar, Feixue Wang & Jingyu Zhang, *Are*

Conversely, apologies that are conditional or technical or vague seem less sincere.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰ Cultural differences, too, can complicate evaluations of apologetic communication even further.¹⁹¹

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

Costly Apologies Universally Perceived as Being Sincere? A Test of the Costly Apology-Perceived Sincerity Relationship in Seven Countries, 10 J. EVOLUTIONARY PSYCHOL. 187 (2012); *see also* Yoksuke Ohtsubo, Masahiro Matsunaga, Hiroki Tanaka, Kohta Suzuki, Fumio Kobayashi, Eiji Shibata, Reiko Hori, Tomohiro Umemura & Hideki Ohira, *Costly Apologies Communicate Conciliatory Intention: An fMRI Study on Forgiveness in Response to Costly Apologies*, 39 EVOLUTION & HUM. BEHAV. 249 (2018).

187. *See supra* note 156 and accompanying text.

188. *See, e.g.*, Basil Halperin, Benjamin Ho, John A. List & Ian Muir, *Toward an Understanding of the Economics of Apologies: Evidence from a Large-Scale Natural Field Experiment* (2019), <http://www.nber.org/papers/w25676.pdf> [<https://perma.cc/BCF5-L49X>]; C. Harry Hui, Felicia L. Y. Lau, Karina L.C. Tsang & S. Tess Pak, *The Impact of Post-Apology Behavioral Consistency on Victim's Forgiveness Intention: A Study of Trust Violation Among Co-Workers*, 41 J. APPLIED SOC. PSYCHOL. 1214, 1222–25 (2011); *see also* Simon et al., *supra* note 153, at 73 (noting ongoing behavior as signal of sincerity).

189. *See, e.g.*, Bennett & Robbins, *supra* note 180, at 756; Corwin et al., *Defendant Remorse, Need for Affect, and Juror Sentencing Decisions*, 40 J. AM. ACAD. PSYCHIATRY & L. 41, 46 (2012).

190. *See generally* Lisa Feldman Barrett, Ralph Adolphs, Stacy Marsella, Aleix M. Martinez & Seth D. Pollak, *Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements*, 20 PSYCHOL. SCI. PUB. INTEREST 1 (2019); Bella M. DePaulo, James J. Lindsay, Brian E. Malone, Laura Muhlenbruck, Kelly Charlton & Harris Cooper, *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003); Aldert Vrij, Pär Anders Granhag & Stephen Porter, *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 PSYCHOL. SCI. PUB. INT. 89 (2010). These difficulties in assessing demeanor can also open the door to biases. *See, e.g.*, Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You're Sorry Enough?*, 16 JUST. Q. 99, 117 (1999); M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018); Rocksheng Zhong, Madelon Baranoski, Neal Feigenson, Larry Davidson, Alec Buchanan & Howard V. Zonana, *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY & L. 39 (2014); *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 105 (2004) (noting concerns over “reward[ing] well-executed fakery and the “acquired skill” of expressing “appropriate” attitudes in the courtroom” and bias in interpreting remorse).

191. *See, e.g.*, William W. Maddux, Peter H. Kim, Tetsushi Okumura & Jeanne M. Brett, *Cultural Differences in the Function and Meaning of Apology*, 16 INT'L NEGOT. 405, 412 (2011); David Matsumoto, *Cultural Similarities and Differences in Display Rules*, 14 MOTIVATION & EMOTION 195, 205–08 (1990); *see also* Ryan Fehr & Michele J. Gelfand, *When Apologies Work: How Matching Apology Components to Victims' Self-Construals Facilitates Forgiveness*, 113 ORG. BEHAV. & HUM. DECISION PROCESSES 37, 40 (2010); Hong Ren & Barbara Gray, *Repairing Relationship Conflict: How Violation Types and Culture Influence the Effectiveness of Restoration Rituals*, 34 ACAD. MGMT. REV. 105, 106, 113 (2009).

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:

[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

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 mediators¹⁹⁶ 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

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 Rossmann, 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.”).

194. *See* Rossmann et al., *supra* note 192; *see also* Jung Jin Choi & Margaret Severson, “What! What Kind of Apology is This?”: *The Nature of Apology in Victim Offender Mediation*, 31 CHILD. & YOUTH SERV. REV. 813, 819 (2009) (describing offenders’ difficulty in communicating sincere remorse to victims).

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

196. *See* Jennifer K. Robbenolt, *The Effects of Negotiated and Delegated Apologies in Settlement Negotiation*, 37 L. & HUM. BEHAV. 128, 129 (2013).

197. *See* Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1268–69 (2006). For discussion of ordered apologies across different countries, *see* Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYDNEY L. REV. 317 (2013); Robyn Carroll, *You Can’t Order Sorrow, So is There Any Value in an Ordered Apology - An Analysis of Ordered Apologies in Anti-Discrimination Cases*, 33 U.N.S.W.L.J. 360 (2010); Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT’L & COMP. L. 205 (2000); Wannes Vandebussche, *Rethinking Nonpecuniary Remedies for Defamation: The Case for Court-Ordered Apologies* (June 19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236766 [<https://perma.cc/B965-FXK2>]; Gijss van Dijk, *The Ordered Apology*, 37 OXFORD J. LEGAL STUD. 562 (2017); Andrea Zwart-Hink, Arno Akkermans & Kiliaan Van Wees, *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 U.W. AUSTL. L. REV. 100 (2014).

198. Alana Saulnier & Diane Sivasubramaniam, *Effects of Victim Presence and Coercion in Restorative Justice: An Experimental Paradigm*, 39 L. & HUM. BEHAV. 378, 383–84 (2015).

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 Straussberger, *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 deservingness 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 spontaneous 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 victims with an acknowledgement of the wrongdoing and its consequences. Victims might find some consolation in hearing the offender articulate that acknowledgment.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

206. Risen & Gilovich, *supra* note 202, at 421, 423–34.

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 Process*, 10 ADV. EXPERIMENTAL SOC. PSYCHOL. 173 (1977).

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 PSYCHIATRY, PSYCHOL., & L. 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 "there 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.²¹⁴ 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.²¹⁵ 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.²¹⁶ It is possible that over time, the apology will influence the offender's attitudes and generate feelings of remorse.²¹⁷

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.²¹⁸ 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.²¹⁹ 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.²²⁰

214. 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”).

215. See, e.g., C. Daniel Batson, Elizabeth R. Thompson, Greg Seufferling, 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”).

216. See Hosser et al., *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).

217. See generally FESTINGER, *supra* note 107; COGNITIVE DISSONANCE: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY (Eddie Harmon Jones ed., 2019).

218. 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”).

219. 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).

220. Hosser et al., *supra* note 166, at 146; Tangney et al., *supra* note 166, at 801–802; see also Brandon J. Griffin, Jaclyn M. Moloney, Jeffrey D. Green, Everett L. Worthington, Jr., Brianne Cork, June P. Tangney,

IV. INCORPORATING 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.²²¹ In some cases, apologies can also communicate important messages to the profession and to the public.²²² 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.²²³ In such cases, lawyer apologies are rarely warranted.²²⁴ 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.²²⁵ As noted, a lawyer will

Daryl R. Van Tongeren, Don E. Davis & Joshua N. Hook, *Perpetrators' Reactions to Perceived Interpersonal Wrongdoing: The Associations of Guilt and Shame with Forgiving, Punishing, and Excusing Oneself*, 15 SELF & IDENTITY 1, 2 (2016).

221. The focus in this section is on apologies to clients, although clients are not the only complainants. In many cases the complainant is a member of the client's family who may be paying the bill or who for other reasons is acting on behalf of the client. See LEVIN & FORTNEY, *supra* note 59, at 7–8. In other cases, it is the opposing party who brings the complaint. *Id.* The benefits of apologies to these complainants are likely to be similar. Less often, the complainant is a lawyer or a judge. *Id.* The effects of apologies to these latter complainants may be more modest but may also help to repair these relationships.

222. Apologies can signal acceptable norms of behavior to the profession and signal to the public that the profession views the public as deserving of respect. Apologies may also provide greater incentives for the public to file grievances when misconduct occurs because the apology provides some actual benefit to the complainant.

223. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 23 (2007).

224. Likewise, some adverse outcomes experienced by medical patients are due to negligence and others are not. When negligence is lacking, medical providers ought not be expected to take responsibility for wrongdoing. Instead, they might more appropriately offer an explanation about what happened, express regret for the outcome, and convey sympathy to the patient. Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 376, 380 (2009). Medical communication and resolution programs are based on this notion. See, e.g., Thomas H. Gallagher, Michelle M. Mello, William M. Sage, Sigall K. Bell, Timothy B. McDonald & Eric J. Thomas, *Can Communication-and-Resolution Programs Achieve Their Potential? Five Key Questions*, 37 HEALTH AFF. 1845 (2018); Kachalia et al., *supra* note 30, at 1836.

225. See, e.g., *Practice Assistance and Improvement Program*, LA. ST. B. ASS'N, <https://www.lsba.org/PracticeAssistance/> [<https://perma.cc/B38S-DW7B>] (noting that complaints focus on minor problems such as lawyer-client communications); *Consumer Assistance Program (CAP)*, BD. OF PROF'L RESPONSIBILITY OF THE SUP. CT. OF TENN., <https://www.tbpr.org/for-the-public/consumer-assistance-program> [<https://perma.cc/GMU8-V8CE>] (noting that “many complaints are a result of communication problems”); Stephen E. Schemenauer, *What We've Got Here... Is a Failure... to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLIN L. REV. 629, 679 (2007) (noting that failure to communicate was the top complaint in Texas Client Attorney Assistance Program).

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 discipline 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.

227. See, e.g., John Freeman, *Good News on the Ethics Front*, S. CAR. LAW., Jan-Feb. 2002, at 11, 11; Jeanine P. Timothy, *The First Decade: The Consumer Assistance Program Has Proven Itself to be a Valuable Program*, UTAH B.J., Nov.-Dec. 2007, at 13, 13; Seana Willing, *The Texas Attorney Discipline System: A Look at the Initial Impact of Sunset Review Recommendations*, 82 TEX. B.J. 844, 844 (2019).

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 disciplinary 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-7I2W>]. 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.²³¹ A practice of routinely encouraging lawyer apologies could cause some lawyers to view the programs even more defensively than some already do,²³² 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.²³³

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.²³⁴ In Queensland, the

231. See, e.g., Mark D. Killian, *ACAP Helps Lawyers and Clients Sort Through Their Differences*, FLA. B. NEWS (Mar. 1, 2016), <https://www.floridabar.org/the-florida-bar-news/acap-helps-lawyers-and-clients-sort-through-their-differences-2/> [<https://perma.cc/WH88-53XC>] (noting that job of ACAP “is to weed out many baseless complaints against lawyers” and that they “often are able to cool off angry clients and save some Florida attorneys from getting involved in the Bar’s disciplinary system”); *Client Assistance Program of the Office of General Counsel (CAP)*, *supra* note 62 (explaining how the ACAP assists attorneys as well as consumers). This is also reflected in the names of some of the programs, which are sometimes called “Client-Attorney Assistance Programs.” See, e.g., *Client-Attorney Assistance Program (CAAP)*, *supra* note 62. Louisiana’s Attorney-Client Assistance program attempts “to facilitate a resolution of the complaint to the satisfaction of all parties.” *Practice Assistance and Improvement Program*, *supra* note 225.

232. See *infra* note 276 and accompanying text.

233. See generally TAVUCHIS, *supra* note 21, at 64 (discussing the pedagogy of apology and the role of a third party as apology “coach”); Choi & Severson, *supra* note 194, at 819 (discussing role of preparation and education in fostering and communicating sincere apologies); May & Plews-Ogan, *supra* note 143, at 452 (describing the benefits to physicians of talking over an error with an expert or mentor); Michelle M. Mello, Richard C. Boothman, Timothy McDonald, Jeffrey Driver, Alan Lembitz, Darren Bouwmeester, Benjamin Dunlap & Thomas Gallagher, *Communication-and-Resolution Programs: The Challenges and Lessons Learned From Six Early Adopters*, 33 HEALTH AFFAIRS 20, 25 (2014) (discussing the importance and challenges of winning over skeptical doctors to a communication-and-resolution approach); Mello et al., *supra* note 29 (same).

234. See Linda Haller, *Restorative Lawyer Discipline in Australia*, 12 NEV. L. J. 316, 329 (2012).

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

235. *Id.* at 328; *see also* Robert Brittan, *Regulating the Legal Profession in Queensland, Australia* 11 (2017), https://www.lsc.qld.gov.au/__data/assets/pdf_file/0008/542654/regulating-the-legal-profession-in-queensland-australia.pdf [<https://perma.cc/8CXW-2KZ8>] (reporting number of apologies secured without resort to disciplinary action).

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).

237. *See, e.g.*, *Attorney/Consumer Assistance Program, The Discipline Process*, ST. B. ARIZ., [azbar.org](https://perma.cc/QP8H-YG4D) [<https://perma.cc/QP8H-YG4D>] (last visited June 15, 2021); *Consumer Assistance Program (CAP)*, *supra* note 225.

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.²⁴¹ The conditions may also include fee arbitration or fee restitution, and very rarely, an apology.²⁴²

The identity of lawyers who agree to diversion is treated as confidential.²⁴³ 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.²⁴⁴ Where the complainant was a client, the lawyer-client relationship has likely ended.²⁴⁵ 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.²⁴⁶

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.²⁴⁷ 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.²⁴⁸ 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

241. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 (G)(1); COLO. R. CIV. P. 251.13(a) (2020); D.C. CT. OF APPEALS RULES GOVERNING THE BAR R. XI, § 8.1 (d) (2020); ARIZ. ATT’Y DIVERSION GUIDELINES VI (A)(3)(e) (2011), <https://www.azbar.org/media/m4zh1syl/diversion-guidelines.pdf> [https://perma.cc/BVT6-R3MF]; *supra* note 15 and accompanying text.

242. *See, e.g.*, COLO. R. CIV. P. 251.13 (c) (2020); N.D. RULES FOR LAWYER DISCIPLINE 6.6 (E)(9); N.M. RULES GOVERNING DISCIPLINE 17-206 (H)(1)(b), (H)(3)(f); UTAH SUP. CT. RULES PROF’L PRACTICE 14-533 (a)(7) (2020).

243. *See, e.g.*, COLO. R. CIV. P. 251.13 (i) (2020); ARIZ. ATTORNEY DIVERSION GUIDELINES VI (11).

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.

246. *See, e.g.*, N.D. RULES FOR LAWYER DISCIPLINE 6.6 (E) (11); UTAH SUP. CT. RULES PROF’L PRACTICE 14-533 (a)(9); WASH. RULES FOR ENFORCEMENT OF LAWYER CONDUCT 6.1 (2014).

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.").

253. MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (1994); Chris Stern Hyman & Clyde B. Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project*, 25 HEALTH AFF. 1394 (2006); Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265 (2000).

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.”²⁵⁴ 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.²⁵⁵

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.²⁵⁶ A disciplinary board or a court usually reviews and must approve the negotiated sanction.²⁵⁷

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.²⁵⁸ Some states would also need to amend their discipline rules to provide for apologies as part of a discipline sanction.²⁵⁹ Lawyer apologies would produce the same salutary effects as they would in the pre-complaint and diversion contexts,

254. SMITH, *supra* note 150, at 78.

255. *Id.*

256. *See, e.g.*, D.C. CT. OF APPEALS RULES GOVERNING THE BAR R. XI, § 12.1 (b) (1) (ii) (2021); Hernandez v. Fiedler, No. 19-0088 (Ct. Statewide Griev. Comm. Sept. 27, 2019), <https://www.jud.ct.gov/sgc/decisions/19-0089.pdf> [<https://perma.cc/MD9W-EXAM>].

257. *See, e.g.*, D.C. CT. OF APPEALS RULES GOVERNING THE BAR R. XI, §§ 6 (a) (3), 12.1 (c) (2020); MASS. SUP. JUD. CT. R. 4:01(8)(1)(c) (2020).

258. *See, e.g.*, ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.1 (1992); Fred Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677 n.1 (2003).

259. Most states’ disciplinary rules expressly provide for the sanctions that can be imposed. *See, e.g.*, MASS. SUP. JUD. CT. R. 4:01(4) (2020) (stating that discipline may be by disbarment, suspension, public reprimand or admonition). In some jurisdictions, the rule language is flexible enough to encompass an apology as part of probation or in connection with other sanctions. *See, e.g.*, D.C. CT. OF APPEALS RULES GOVERNING THE BAR R. XI, § 3(a)(7), (b) (2020). In others, they are not.

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.

260. On the importance of perceived legitimacy for cooperation with institutions, see generally Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78 (2014); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

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.

265. See, e.g., *Roy v. Diamond*, 16 S.W.3d 783, 790–91 (Tenn. App. 1999).

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.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ And this process of negotiating complainant needs and lawyer-respondent willingness to apologize may prove educational to the lawyer.²⁷²

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.²⁷³ The challenge for lawyer-respondents, however, is that there may not be a separate sanctions phase of the hearing after misconduct has been found.²⁷⁴ 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.”²⁷⁵

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.²⁷⁶ And indeed, there may be some bias in the process.²⁷⁷ Moreover,

269. Cf. Allan et al., *supra* note 210.

270. See *supra* notes 219-20 and accompanying text.

271. See LAZARE, *supra* note 131, at 205; Verity Winship & Jennifer K. Robbennolt, *Admissions of Guilt in Civil Enforcement*, 102 MINN. L. REV. 1077, 1133-34 (2018); see also Robbennolt, *supra* note 196.

272. See SMITH, *supra* note 150, at 78 (noting that “[o]ffenders might learn a great deal about the nature and consequences of their wrongdoing” by negotiating the content of apology).

273. See Levy, *supra* note 56.

274. Donald Lundberg, *I’m Sorry, So Sorry: The Element of Remorse in Professional Regulation*, RES GESTAE, Jan.-Feb. 2013, at 20. See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 (D)(4) (2002); MONT. RULES FOR LAWYER DISCIPLINARY ENFORCEMENT 12 (D)(3)-(4) (2015) (including no requirement for separating the culpability and sanctions phases of the disciplinary hearing).

275. See Lundberg, *supra* note 274, at 23.

276. ABEL, *supra* note 17, at 506; Levin, *supra* note 7, at 372-73; Mark Hansen, *Picking on the Little Guy*, A.B.A. J., 30, 31 (Mar. 2003); OREGON STATE BAR DISCIPLINARY SYSTEM TASK FORCE REPORT (July 15, 2002), https://www.osbar.org/surveys_research/disciplinary.html [<https://perma.cc/R3VZ-XV83>].

277. Debra Cassens Weiss, *New California Bar Study Finds Racial Disparities in Lawyer Discipline*, A.B.A. J. (2019), <https://www.abajournal.com/news/article/california-bar-study-finds-racial-disparities-in-lawyer-discipline> [<https://perma.cc/SRER-ZUBA>]. But see REPORT BY THE STATE BAR OF CALIFORNIA, INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW

these lawyers often self-represent during discipline hearings and become deeply entrenched in their positions.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰

In addition, it might be argued that an apology at this late stage comes too late to be meaningful.²⁸¹ 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.²⁸² Thus, particularly if the delay in apologizing reflects an effort to grapple with the wrong and the resulting harm,²⁸³ apologies at this stage may not be too late to benefit the individuals who receive them or the respondent lawyers.²⁸⁴

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

Firms and Large Size Law Firms (2001), http://www.calbar.ca.gov/Portals/0/documents/reports/2001_SB143-Report.pdf?ver=2017-05-19-134106-347 [<https://perma.cc/FA3F-PBJA>]; Hansen, *supra* note 276, at 32–33 (describing results of New Mexico report finding no evidence of discrimination).

278. See, e.g., ABEL, *supra* note 17, at 508. In Wisconsin, for example, fewer than one-quarter of all lawyers who received sanctions during 2013–2016 were represented by counsel. See LEVIN & FORTNEY, *supra* note 59, at 25.

279. See ABEL, *supra* note 17, at 507 (noting that the structure of the disciplinary process is "profoundly uncondusive to repentance").

280. See, e.g., *id.* at 359. In the Byler case study described earlier, Abel notes that Byler was asked in the penalty stage "Are you sorry you didn't put this money in escrow" but all the lawyer would comment was, "With the benefit of hindsight, one might have taken a different course of action" and "I'm sorry that the thing happened." *Id.*

281. See, e.g., Moore & Mello, *supra* note 152 (finding that injured patients devalued apologies that came significantly after the event). Reflecting the instinct that apologies should be offered soon after the offense, former Senator Fred Thompson reportedly said, "If you've got to eat any crow, or maybe even half a crow, it's better to do it warm than when it gets cold." LAZARE, *supra* note 131, at 171. Similarly, Tavuchis notes that "there is a critical, if variable, period following a transgression after which the potential efficacy of an apology diminishes or is nullified." TAVUCHIS, *supra* note 21, at 87.

282. Frantz & Bennigson, *supra* note 162, at 204–205; see also SMITH, *supra* note 150, at 173 (discussing the time and effort needed for categorical apology).

283. See, e.g., Wenzel et al., *supra* note 162.

284. For an example of one widely reported medical malpractice case that was contentious until the hospital CEO apologized on the eve of trial, see John Hill, *Kent Hospital Settles Suit with Woods Family*, PROVIDENCE J. (Dec. 2, 2009), http://www.projo.com/health/content/woods_trial_new_2_12-02-09_KVGLE5A_v12.3cf5131.html [<https://perma.cc/MF4H-RL9J>] ("It was all I ever needed to see in my life, one human being saying to another human being 'I'm sorry for your loss.'"); Russell J. Moore & John Howell, "I'm Sorry" Paves Way to Woods' Suit Settlement, WARWICK BEACON (Dec. 3, 2009); see also LAZARE, *supra* note 131 (describing an instance in which the lateness of an apology, in conjunction with other deficits, contributed to an unsuccessful apology, as well as apologies that were successful despite significant delay).

apology made directly to those who the lawyer harmed.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.²⁸⁶ While such an apology may benefit the complainant,²⁸⁷ its ability to contribute to the rehabilitation of the respondent lawyer is less certain,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.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.

E. FORCED APOLOGY SANCTIONS

Courts occasionally force parties to apologize in criminal²⁹⁰ or civil cases²⁹¹ or as part of a disciplinary sanction.²⁹² Other courts have declined to do so on the

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.

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.

287. Robbenolt, *supra* note 196, at 131 (finding that recipients discounted apologies offered through a lawyer but finding that such apologies were better than no apology).

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.

289. *See supra* notes 192–93 and accompanying text.

290. *See, e.g.*, *Melvin v. Zappala*, No. 15-1225, 2016 U.S. Dist. LEXIS 47826, at *2 (W.D. Pa. Apr. 7, 2016) (describing order that former judge write letters of apology as part of sentence); *Slayton v. State*, No. 49A04-1410-CR-463, 2015 Ind. App. Unpub. LEXIS *458 (Ind. App. Apr. 22, 2015) (noting that lower court ordered criminal defendant to write apology letter); *State v. Whitfield*, 827 So. 2d 1196, 1197 (La. Ct. App. 2002) (upholding sentence that included letter of apology to victim); *State v. Lobato*, 611 N.W.2d 101, 102 (Neb. 2000) (affirming sentence that included letter of apology to victims); *State v. Ogden*, No. 94-1485-CR, 1995 Wisc. App. LEXIS 85, at *2 (Wis. Ct. App. Jan. 26, 1995) (describing apology order); Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 890 (2012); White, *supra* note 194, at 1268–69; Amanda Garrett, *Apologize or Go To Jail, Judge Orders Criminals to Say, "I'm Sorry," to Victims*, PLAIN DEALER, Oct. 9, 1999, at 1B.

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).

basis that it is not the court's role to order apologies²⁹³ or because the court lacked the statutory²⁹⁴ or equitable power to do so.²⁹⁵ 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.²⁹⁶ 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 *Krim v. BancTexas 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*, 84 F.3d 1110 (9th Cir. 1996); *In re Gooch*, 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.

293. See *Woodruff v. Ohman*, 29 Fed. Appx. 337, 346 (6th Cir. 2002); *McKee v. Turner*, 491 F. 2d 1106, 1107 (9th Cir. 1974); *Thompson v. Sholar*, No. 5:19-CV-P197-TBR, 2020 U.S. Dist. LEXIS 51684 (W.D. Ky. Mar. 25, 2020) (noting that court “was not commissioned to run around getting apologies”).

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).

295. *Compare Villescas v. Abraham*, 285 F. Supp. 2d 1248, 1256 (D. Colo. 2003) (apology is a permissible equitable remedy) with *Kitchen v. Essex Cty. Corr. Facility*, No. 12-2199, 2012 U.S. Dist. LEXIS 77356, at *10 (D. N.J. May 31, 2012) (apology is not cognizable remedy “either within the meaning of a § 1983 action or as a general legal remedy”); *Burkes v. Tranquilli*, No. 08-474, 2008 U.S. Dist. LEXIS 51403, at *14 (W.D. Pa. July 2, 2008) (finding no authority to require apology as a remedy); *Woodruff v. Ohman*, 29 Fed. Appx. at 346 (“[T]he district court exceeded its equitable power when it ordered [defendant] to apologize.”). See also *Rumbles v. Hill*, 182 F.3d 1064, 1066–67 (9th Cir. 1999), *overruled on other grounds*, *Booth v. Churner*, 532 U.S. 731 (2001) (district court correctly “held that it had no power to . . . compel a party to apologize”).

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.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.”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.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.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

matter) *with* Kelly Sutherlin McLeod Architecture v. Schneickert, 125 Cal. Rptr. 3d 83, 94–95 (Cal. App. 2011) (finding forced apology in civil arbitration proceeding violates party’s First Amendment rights).

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”).

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.

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).

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.

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.

303. See Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 44 (2005).

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.³⁰⁵ But the Court did not ultimately decide the constitutional issue.³⁰⁶ Since then, some courts have required lawyers to apologize to avoid contempt sanctions,³⁰⁷ 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.³⁰⁸

Short of requiring an apology, courts and discipline authorities might incentivize lawyers seeking reinstatement to practice 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."³⁰⁹ 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.³¹⁰ 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.

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.

309. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 25(E)(4) (2002).

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.³¹¹ Victims tend to experience a stronger desire for apologies after more severe or intentional harm,³¹² though more severe harm or more intentional conduct make it harder for apologies to do their repair work.³¹³ 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.³¹⁴ But for some complainants, an apology may be better late than never.³¹⁵ 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."³¹⁶ 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.³¹⁷

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.

313. See, e.g., Bennett & Earwaker, *supra* note 20, at 460; Ohbuchi et al., *supra* note 20; C. Ward Struthers, Judy Eaton, Alexander G. Santelli, Melissa Uchiyama & Nicole Shirvani, *The Effects of Attributions of Intent and Apology on Forgiveness: When Saying Sorry May Not Help the Story*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 983, 986 (2008).

314. See Moore & Mello, *supra* note 152.

315. See *supra* note 280 and accompanying text.

316. Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AM. BEHAV. SCI. 768, 770 (1998).

317. See, e.g., Dena M. Gromet & Tyler G. Okimoto, *Back Into the Fold: The Influence of Offender Amends and Victim Forgiveness on Peer Reintegration*, 24 BUS. ETHICS Q. 411, 419, 422 (2014).

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.³¹⁸ 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.³¹⁹ 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.³²⁰ 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.³²¹ 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.³²²

318. See, e.g., Jodi S. Balsam, Susan L. Brooks & Margaret Reuter, *Assessing Law Students as Reflective Practitioners*, 62 N.Y. L. SCH. L. REV. 49, 52 (2018); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 878, 889–90 (1996); Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 968–73 (1989); see also Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 891 (1985) (calling for law schools to teach “critical self-reflectiveness”).

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.”

320. See, e.g., Lauren Eskreis-Winkler & Ayelet Fishbach, *Hidden Failures*, 157 ORG. BEHAV. & HUM. DECISION PROCESSES 57, 60–62 (2020).

321. *Id.* at 63–65.

322. See generally Stephanie D. Easton & Julie Oseid, “*And Bad Mistakes? I’ve Made a Few*”: *Sharing Mistakes to Mentor New Lawyers*, 77 ALB. L. REV. 499 (2013). Note, too, the trend of holding events to reflect on professional screw-ups. See FUCKUP NIGHTS, <https://fuckupnights.com/> [<https://perma.cc/7LGZ-W4FG>] (last visited June 15, 2021).

Such sharing permits vicarious learning from others' mistakes.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.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.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.³²⁶ These discussions could include teaching students about the barriers to admitting responsibility,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.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.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.

323. Albert Bandura, *Vicarious Processes: A Case of No-Trial Learning*, 2 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1 (1965).

324. See Easton & Oseid, *supra* note 322; Taft, *supra* note 128, at 360.

325. See CAROL DWECK, *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."). On the importance of institutional culture in shaping how lawyers deal with mistakes, see O'Grady, *supra* note 19, at 36–43; Robbennolt & Sternlight, *supra* note 106, at 1173–74.

326. Some medical schools have begun to incorporate training about error disclosure and apologies into their curricula. See, e.g., Ralph A. Gillies, Stacie H. Speers, Sara E. Young & Christopher A. Fly, *Teaching Medical Error Apologies: Development of a Multi-Component Intervention*, 43 *FAM. MED.* 400 (2011); Anne J. Gunderson, Kelly M. Smith, David B. Mayer, Timothy McDonald & Nikki Centomani, *Teaching Medical Students the Art of Medical Error Full Disclosure: Evaluation of a New Curriculum*, 21 *TEACHING & LEARNING IN MED.* 229 (2009); Joseph L. Halbach & Laurie L. Sullivan, *Teaching Medical Students About Medical Errors and Patient Safety: Evaluation of a Required Curriculum*, 80 *ACAD. MED.* 600 (2005); Chan Woong Kim, Sun Jung Myung, Eun Kyung Eo & Yerim Chang, *Improving Disclosure of Medical Error Through Educational Program as a First Step Toward Patient Safety*, 17 *BMC MED. EDUC.* 52 (2017); Katherine Mangan, *Acting Sick*, 53 *CHRON. HIGHER EDUC.* A10 (2006).

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).

328. See generally ROY STUCKEY, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 179–88 (2007); Jay M. Feinman, *Simulations: An Introduction*, 45 *J. LEGAL EDUC.* 469, 469–71 (1995); Gerald R. Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 *J. LEGAL EDUC.* 307, 307 (1984).

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.