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Legal Consequences of Apologizing

*Peter H. Rehm and Denise R. Beatty**

I. INTRODUCTION

People say "I'm sorry" for many different reasons.¹ One of these is to apologize. According to a recent article, four basic motives for giving an apology are 1) to salvage or restore a damaged relationship; 2) to express regret and remorse in order to diminish pain and suffering; 3) to escape punishment; and 4) to relieve a guilty conscience.²

Another reason some people say "I'm sorry," however, is to express sympathy or concern, even when they have done nothing wrong.³ Keeping these possible motivations from becoming confused is important for both the speaker and listener. It is especially important not to let others misunderstand the meaning of your apology by assuming that an expression of sympathy is an admission of guilt. The circumstances do not always make the difference clear, and differences between people provide ample opportunity for misunderstanding.⁴

Thus, when something bad happens, people often do not know what to say or do. If they need to apologize for something, they often perceive a vulnerability to some potentially bad consequences stemming from the apology itself.⁵ This tends to make people reluctant to apologize, often to their own detriment.⁶ On the other hand, someone who says "I'm sorry" to express sympathy may not perceive any vulnerability until after a misunderstanding has occurred.⁷

This article discusses the legal consequences of saying you are sorry, whether as an apology or an expression of sympathy. It discusses questions such as whether an apology is understood to be an admission of guilt, whether an apology fulfills any elements of a tort, how an apology can be useful for avoiding

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1. WEBSTER'S COLLEGE DICTIONARY (2d ed. 1991).
2. Aaron Lazare, *Go Ahead, Say You're Sorry*, PSYCHOLOGY TODAY, Jan./Feb. 1995, at 45.
3. DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 231-33 (1990).
4. *Id.*
5. Lazare, *supra* note 3, at 78.
6. *Id.*
7. See TANNEN, *supra* note 4.

litigation, how an expression of sympathy should be worded to minimize the possibility that it could be misunderstood to be an admission of guilt, and why someone who is guilty of some error should apologize without concern that this would make their situation worse. It analyzes various apologies in the context of medical malpractice, attorney discipline, and correcting mistakes at trial.

II. THE NEED FOR APOLOGY

A. *The Injured Person's Need for Sympathy or an Apology*

Expressions of sympathy and apology are helpful to an injured person or loved ones in a variety of ways.⁸ These persons need to receive an apology or other expression of sympathy as part of the healing process.⁹ Apologies or expressions of sympathy make a tragic event bearable by removing any doubt about bad intentions or apathy and allowing aggrieved persons to blame the event on the spinning of fortune's wheel.¹⁰

B. *The Injuring Person's Need to Express Sympathy or Offer an Apology*

The injuring person needs to apologize, but this need appears antithetical to the values of success and perfection.¹¹ It is difficult for the injuring person to maintain self-respect in the presence of those who were injured.¹² Apology can reestablish this self-respect.¹³ The failure to apologize, or inability to apologize successfully can lead to strained relationships, grudges and vengeance.¹⁴

Something magical happens, however, when we apologize to those we have hurt. A sincere apology, tendered and accepted, can heal humiliation and generate forgiveness.¹⁵ The sincere apology includes: 1) acceptance of responsibility for wrong-doing; 2) an explanation for the offense; 3) communication that the offensive behavior was not intended as a personal affront; and 4) the expression of genuine, soul-searching regret, communicating guilt, anxiety, and shame.¹⁶

8. Lazare, *supra* note 3, at 40.

9. *Id.*

10. *Id.* at 42-43.

11. *Id.* at 40.

12. *Id.*

13. *Id.* at 42.

14. *Id.* at 40.

15. *Id.*

16. *Id.* at 43; *but see*, Hiroshi Wagatsuma & Arther Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 491 (1986) (relating an anecdote about an American who tried to return home from Japan without a valid visa. An explanation of how the visa problem came to be waived nothing, but a change of approach from explanation to written apology solved the problem).

"The apology is a reparation of emotional, physical or financial debt. The admission of guilt and regret are meant . . . to repair damage . . . [done] to . . . [another's] self-concept . . . [While] reparations are largely symbolic . . . [the process] is emotionally satisfying to both . . . parties."¹⁷

C. *An Apology Can Help Avoid Litigation*

An apology, properly given and accepted, diffuses anger and helps avoid litigation.¹⁸ Sometimes obtaining an apology is an object of litigation.

III. IT IS DIFFICULT TO APOLOGIZE

The previously mentioned benefits of apology can be obtained more often with an understanding of the barriers to apology and how these barriers may be overcome. This section introduces and discusses reasons why people might be reluctant to apologize or otherwise express regret.

A. *Genuine Communication Difficulties*

The English language is full of ambiguities. Meaning is found not only in context, but in shared beliefs, behaviors, values, customs and experience.¹⁹ Often, context allows more than one meaning to make sense.²⁰ The word "love," for example, is well known to mean many different things.²¹ Yet, in spite of ambiguity, the listener often assumes a meaning. This usually is the problem when someone says "I love you" in a well established relationship, which allows familiar context to dictate the correct meaning.

Another word that means different things to different people is "sorry."²² This one word can be used to express regret for another's misfortune (sympathy), or regret for one's own act (remorse).²³ Compared to "I love you," "I'm sorry" is said in a wider variety of contexts. Nevertheless, even when there is not an

17. *Id.*

18. Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39, 68 (1994). It has been found in the medical malpractice arena that when physicians are honest about what has happened and accept responsibility, patients are less likely to sue.

19. Diane Paul-Brown & Charles C. Diggs, *Recognizing and Treating Speech and Language Disabilities*, AM. REHABILITATION, Dec. 22, 1993, at 30.

20. Rohaniah Saini, *Love: Fantasy or Reality? The Best Marriage - A Meeting of Both Hearts and Minds*, THE STRAITS TIMES, Feb. 14, 1993, at L1.

21. *Id.*

22. Lazare, *supra* note 3, at 43, 76, 78. In contrasting words used in the apologies of F.W. de Klerk to South Africans, President Richard Nixon's resignation speech and Senator Bob Packwood's apology to Congress, the word sorry meant something different in the way each man used the word.

23. *Id.* at 78.

established relationship or mutual understanding of personalities, meaning is still assumed by the listener.

B. Personality and Gender Differences

Culture, gender and personality style affect how we view apologies and expressions of sympathy.²⁴ While there are no absolute rules, women tend to apologize more easily than men.²⁵ Women are also more likely to say "I'm sorry" to express sympathy or concern.²⁶ When the speaker is clearly blameless, it is easy not to mistake such an expression of concern for something else. When the proper target of blame is uncertain, however, such an expression could be misunderstood as an apology or confession of responsibility or guilt.²⁷

C. Problems of Intent

The danger is increased when an aggrieved person is looking for someone to blame. Worse yet, some persons throw blame at others without caring if doing so is just. Although rare, some people believe they can take advantage of an apology for profit.

D. Fear of Legal Consequences

Usually, apologies are admissible into evidence.²⁸ Admissibility into evidence does not necessarily mean useful as evidence of guilt.²⁹ Since an apology usually can be admitted into evidence, and because some plaintiffs choose to understand an apology as an admission of guilt, it seems safest not to apologize.³⁰ Case law suggests, however, that courts do not see it this way.³¹ Judges and juries seem to like apologies and treat them favorably.³² Often, an

24. Paul-Brown & Diggs, *supra* note 20.

25. TANNEN, *supra* note 4, at 232.

26. *Id.*

27. *Id.*

28. See, e.g. Usher v. Jones, 943 F.2d 889 (8th Cir. 1991); United States v. Lutz, 621 F.2d 940 (9th Cir. 1980); Pieczynski v. Florida, 516 So. 2d 1048 (Fla. 1987); McKim v. Indiana, 476 N.E.2d 503 (Ind. 1985).

29. In cases where an apology was allowed as an actual admission of guilt, there was an actual acknowledgement of wrongdoing. See William v. Alabama, 354 So. 2d 48 (Ala. 1977). When there was no actual acknowledgment of wrongdoing, but there was ambiguity as to admission, interpretation of such was left up to the jury. See Pieczynski v. Florida, 516 So. 2d 1048 (Fla. 1987). When an apology was given clearly without admission of criminal conduct, it was not considered decisive of guilt. See McKim v. Indiana, 476 N.E.2d 503 (Ind. 1985).

30. See Cynthia Crossen, *Simple Apology for Poor Service is in Sorry State*, WALL ST. J., Nov. 29, 1990, at B1, B7.

31. See *infra* pars IV.A-C.

32. See *infra* parts IV.A-C.

apology does nothing to satisfy the plaintiff's burden of proof.³³ In some proceedings, an apology can be a mitigating factor, and the lack of an apology can be an aggravating factor.³⁴

The practice of never apologizing is not in the public interest because it leads to litigation rather than reconciliation.³⁵ Judges do not mention "public policy" as a reason for respecting apologies. They simply state that an apology is insufficient to fulfill the elements of the case.

IV. SURVEY OF CASES AND LAWS INVOLVING AN APOLOGY

How do the courts treat an apology?³⁶ This section covers more than what the law is by focusing on how judges and juries think and react. Thus, any cases or other sources that shed light upon such thoughts have been reviewed, regardless of their value as precedent or authority in any particular jurisdiction.

A. *Medical Malpractice Cases*

1. Apology for Serious Mistake During Surgery Did Not Establish any Element of a Malpractice Claim.

In a medical malpractice action, does an apology or an admission of mistake by the defendant satisfy any of the elements of the malpractice claim? Usually, a plaintiff in a medical malpractice action must set forth the following elements: (1) a duty of care on the part of the defendant to the plaintiff; (2) a violation of that duty through a failure to conform to the requisite standard; and (3) causation of the injury resulting from that failure.³⁷

In its 1982 decision in *Senesac v. Associates in Obstetrics and Gynecology*,³⁸ the Supreme Court of Vermont held that a doctor's admission of a mistake did not automatically prove the doctor departed from the appropriate standards of medical care.³⁹ In June of 1973, defendant Mary Jane Gray, M.D., performed a therapeutic abortion upon plaintiff Mary Senesac.⁴⁰ During the procedure, Gray perforated Senesac's uterus and had to perform an emergency

33. See *infra* part IV.A.

34. See *infra* part IV.B.

35. See Shuman, *supra* note 19.

36. This type of question does not lend itself to easy research. There is no West topic or key number that is particularly helpful.

37. Demetrios G. Metropoulos, *Son of COBRA: The Evolution of a Federal Malpractice Law*, 45 STAN. L. REV. 263, 264 (1992); Payne v. Marion Gen. Hosp. 549 N.E.2d 103, 104 (Ind. 1990).

38. *Senesac v. Associates in Obstetrics and Gynecology*, 449 A.2d 900 (Vt. 1982).

39. *Id.* at 903.

40. *Id.* at 901.

hysterectomy.⁴¹ Gray allegedly apologized to Senesac shortly after the operation, saying that she had "made a mistake, that she was sorry, and that [this] had never happened before."⁴²

At trial, Senesac introduced no expert medical testimony to show that Gray departed from the standard of care ordinarily exercised by the average reasonably skillful gynecologist.⁴³ She attempted to satisfy this element of the tort with the admission of mistake and the apology.⁴⁴ The trial court ordered a directed verdict in favor of the defendant.⁴⁵ Senesac appealed the granting of the motion for a directed verdict.⁴⁶

On appeal, Senesac argued that the directed verdict was improper because the jury could reasonably have concluded from Gray's statement that she had admitted negligence.⁴⁷ The Supreme Court of Vermont, in reviewing the directed verdict, assumed, without deciding, that the apology had actually occurred.⁴⁸ The court acknowledged that it is possible for a plaintiff to win without expert medical testimony when the defendant's own testimony establishes the standard of care and subsequent departure.⁴⁹ However, they affirmed the directed verdict because Gray's statement did not establish a departure from the standards of care and skill ordinarily exercised by physicians in similar cases.⁵⁰ The court saw this statement as simply being the physician's belief and expression of the belief that her performance was not in accordance with her own personal standards of care and skill.⁵¹ This statement, without additional expert medical evidence, was not enough to establish the second element of the tort.⁵²

This case appears to say that plaintiffs, supposedly armed with an apology, must prove their cases just as if the apology did not exist. A mere apology does not prove any of the elements of the case because evidence about particular medical facts or events is still missing from the plaintiff's case. Since a mere apology pertains to a doctor's self-image and feelings, it is not evidence of any particular medical fact or event. This leaves the plaintiff legally in the same position as one who did not receive an apology.

41. *Id.*

42. *Id.* at 903.

43. *Id.*

44. *Id.*

45. Plaintiff's additional claim was lack of informed consent. The court dismissed this claim, with prejudice, as to defendant Gray. The jury decided the issue as to the codefendant association of doctors, finding in favor of the association. *Id.* at 902.

46. *Id.* at 902.

47. *Id.* at 901.

48. *Id.* at 902.

49. At trial, Senesac relied on cross examination of the defendant to set forth the proper standard of medical care. On appeal, the Supreme Court of Vermont assumed, without deciding, that she succeeded. *Id.*

50. *Id.*

51. *Id.* at 903.

52. *Id.*

Senesac also suggests that a doctor should be very careful about how an apology is worded.⁵³ The doctor should not inadvertently admit negligence where none existed. In practical terms, dangerous statements include explanations about what he knew that he should or should not have done.

2. Apology for the Inadequate Outcome of a Medical Procedure was Not an Admission of Liability

In *Phinney v. Vinson*,⁵⁴ defendant Robert Vinson, M.D., performed a transurethral resection of the prostate upon plaintiff Robert Phinney.⁵⁵ After the operation, recurring pain caused the plaintiff to go to another doctor.⁵⁶ The second doctor allegedly told Dr. Vinson that he had performed an "inadequate resection," and the first doctor allegedly apologized to the plaintiff "for his failure to [perform an adequate resection]."⁵⁷ Plaintiff sued and the trial court granted defendant's motion for summary judgment.⁵⁸

On appeal, Phinney argued that the apology, without more, was sufficient evidence of liability to allow the case to go to trial.⁵⁹ Plaintiff relied on a few cases in which statements by the defendant were used to establish liability.⁶⁰ The Supreme Court of Vermont affirmed, however, and distinguished an apology from a clear admission of liability.⁶¹ The cases plaintiff relied upon were clear admissions of liability, such as the defendant admitting an injury was caused by "negligence"⁶² and defendant stating that injuries would have been avoided "if he had checked on [plaintiff] as he should."⁶³

The lesson *Phinney* teaches is how difficult it is for a plaintiff to win based on an apology alone. It appears safe for a practitioner to apologize for an inadequate outcome or result, as long as there is no admission that the inadequate outcome was caused by the practitioner's negligence. It appears that there is an understanding that the result of an operation is not guaranteed, not every operation will be successful, and an apology for the inadequacy of an operation does not mean the doctor is liable for negligence. This is a practical precedent in that it allows a doctor to express sympathy or empathy, without fear of reprisal, when

53. *See id.* at 903.

54. 605 A.2d 849 (Vt. 1992).

55. *Id.* at 849.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 849-50.

61. *Id.*

62. *Id.* (quoting *Woronka v. Sewall*, 69 N.E.2d 581, 582 (Mass. 1946)).

63. *Id.* (quoting *Wooten v. Curry*, 363 S.W.2d 820, 822 (Tenn. App. 1961)).

the result of a procedure is not as good as was hoped for. Such expressions usually help heal the feelings and relationships of all persons involved.⁶⁴

It seems that an admission of negligence by doctors to their patients can get doctors into trouble. Where there is no actual negligence (something patients can hardly determine), doctors should be careful in choosing their words. When apologizing, expressing sympathy or delivering bad news, words should be chosen to convey sympathy and empathy in a way that cannot be misconstrued as an admission of negligence or fault.

B. Attorney Discipline Cases

This section covers attorney discipline. Such cases are distinct from tort cases in that the issue is not damages, but whether or not the attorney is fit to practice law.

The cases reviewed included a discussion of apology as a mitigating factor and the lack of apology as an aggravating factor.⁶⁵ The apologies the courts looked for were self-initiated expressions of sorrow, regret or remorse to the injured clients, as well as remorse generally before the court.⁶⁶ Self-initiated restitution to injured clients was also very important.⁶⁷

The effect of apology, remorse and regret in attorney disciplinary proceedings can be evaluated in several ways.⁶⁸ The first is possible when the decision explicitly explains how the apology factors into the equation.⁶⁹ Usually, however, the court's decision simply lists the aggravating and mitigating factors.⁷⁰ The opinion may mention lack of apology and remorse as an

64. "The apology is a show of strength . . . an act of generosity . . . [and] a commitment." Lazare, *supra* note 3 at 78.

65. See *In re Coe*, 903 S.W.2d 916 (Mo. 1995); *In re Westfall*, 808 S.W.2d 829 (Mo. 1991); *Office of Disciplinary Counsel v. Christie*, 639 A.2d 782 (Pa. 1994); *Mississippi State Bar v. Young*, 509 So. 2d 210 (Miss. 1987).

66. In the case *In re Coe*, the court noted that although the apology was a mitigating factor, the failure to apologize until a lack of remorse was noted by two members of the court was an aggravating factor. *Coe*, 903 S.W.2d at 918.

67. *Cincinnati Bar Ass'n v. Lange*, 564 N.E.2d 1069 (1991).

68. See generally, *Coe*, 903 S.W.2d at 916.

69. *Id.*

70. In *Mississippi State Bar v. Young*, mitigating factors were listed as apology, remorse, admission of guilt and the defendant's unblemished record. *Mississippi State Bar*, 564 N.E.2d at 210. In *In re Coe*, mitigating factors were listed as apology and lack of a dishonest motive, while aggravating factors were listed as a prompting to apologize and multiple offenses. *Coe*, 903 S.W.2d at 918. In *Office of Disciplinary Counsel v. Christie*, mitigating factors were listed as apology, lack of criminal record, cooperation with the investigating body and participation in therapy. *Christie*, 639 A.2d at 785. In all these cases, factors were simply listed, but no explanations were given as to the importance or weight of each factor.

aggravating factor,⁷¹ or the presence of apology and remorse as a mitigating factor.⁷²

The second way to evaluate the importance of apology is to compare outcomes of cases that do or do not involve an apology.⁷³ Since each case is unique, there are usually several different factors mentioned in each one.⁷⁴ It is difficult to extract the apology's contribution to the outcome.⁷⁵ The outcome can also be influenced by other factors unmentioned in the opinion. Nevertheless, by reading many such cases, one obtains a feel for the importance of apology.⁷⁶

A third way to evaluate the importance of apologies is to compare the outcome of a case involving apologies with the American Bar Association's Standards for Imposing Lawyer Sanctions.⁷⁷ Many courts already make such a comparison.⁷⁸

A fourth way to see the importance of apology occurs rarely; when within one case, the attorney defendant becomes apologetic and his treatment changes. Refusal to apologize seems to have great power to stir the ire of those investigating attorney malpractice claims,⁷⁹ but willingness to apologize has the opposite effect on those investigating such claims.⁸⁰

71. See *supra* note 65 and accompanying text.

72. *Id.*

73. *Id.*

74. See *supra* note 70 and accompanying text.

75. *Id.*

76. *Id.*

77. The standards related to apology include:

Std. 9.22 *Factors which may be considered in aggravation.* Aggravating factors include: . . . (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; . . . (j) indifference to making restitution; [and] Std. 9.32 *Factors which may be considered in mitigation.* Mitigating factors include: . . . (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; . . . (l) remorse.

78. *In re Getty*, 401 N.W.2d 668, 671 (Minn. 1987). The attorney defendant showed extreme rudeness to the court. The court discussed the fact that the appropriate punishment was a sixty day suspension, but in light of numerous apologies, chose instead to impose only public censure. *Id.*

79. *In re Snyder*, 734 F.2d 334, 336-37 (8th Cir. 1984). The attorney defendant was not complying with the Criminal Justice Act ("CJA") guidelines. When asked to revise a statement to the court, he complied but then returned, asking to be taken off the list of those who would take indigent clients, and additionally, making derogatory comments about the court. The court issued an order asking the defendant to show cause as to why he should not be suspended from practice in federal court. The defendant stated that he would, in the future comply with CJA guidelines, but refused to apologize for his negative statements to the court. He was suspended from practice in federal courts. *Id.* Additionally, when an attorney defendant maligned the justices in *Ramirez v. State Bar of California*, 619 P.2d 399, 405 (Cal. 1980), he was put on notice of the seriousness of his misconduct. Understanding that an apology was in order, he chose again to malign the justices and was subsequently suspended for one year. *Id.*

80. See *In re Smoot*, 757 P.2d 327, 328 (Kan. 1988). Attorney defendant was convicted of felony possession of cocaine. Profuse apologies to the court kept him from disbarment.

1. Cooperation During Attorney Disciplinary Proceedings

The difference made by an apology was apparent in the recent Ohio case, *Cincinnati Bar Association v. Lange*,⁸¹ in which attorney William C. Lange was retained by a client to investigate a potential medical malpractice claim.⁸² He promised his client he would obtain a written opinion from a medical expert.⁸³ Later, he wrote his client a letter saying their medical records had been reviewed by an expert and they did not have a malpractice claim.⁸⁴ In fact, he did not refer anything to an expert as he promised.⁸⁵

Lange's client found out about Lange's failure to investigate the claim and complained to the Cincinnati Bar Association.⁸⁶ A grievance committee investigated the complaint.⁸⁷ According to findings made in a later hearing, Lange did not cooperate with the committee in its investigation.⁸⁸ He deliberately misrepresented to two members of the committee that he had consulted a medical expert in Tennessee and that he had sent his client's medical records to the expert.⁸⁹ The Cincinnati Bar Association, which had been lied to and apparently saw no remorse from Lange, recommended a one year suspension.⁹⁰

This matter was heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.⁹¹ Apparently, at this point it was obvious to Lange that he could not hide his misdeeds, since he suddenly returned his fee of \$500 to his client.⁹² The panel concluded that Lange was "truly sorry for his actions inasmuch as he readily admitted his conduct and stated to the panel that his conduct was inexcusable."⁹³ The panel, which saw remorse, recommended merely a public reprimand for everything, including the misrepresentations to the client and to the Cincinnati Bar Association.⁹⁴ The Supreme Court of Ohio followed the panel's recommendation and ordered a public reprimand.⁹⁵

81. 564 N.E.2d 1069 (Ohio 1991).

82. *Id.* at 1070.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

2. Restitution

Attorney disciplinary bodies want to see that an attorney who has committed malpractice has made restitution to the injured client.⁹⁶ For restitution to be a mitigating factor it should be made willingly without the disciplinary body having to order it.⁹⁷ Exhibiting indifference to making restitution and making restitution only after the disciplinary body orders it can be an aggravating factor.⁹⁸

3. Remorse Indicates Hope

One important reason an apology is given such great weight is that it is an essential step towards progress.⁹⁹ When someone sincerely apologizes in the sense of expressing sincere remorse, it means the person has recognized and acknowledged their mistake.¹⁰⁰ The person does not deny the conduct, since it is not possible to express remorse for one's conduct while simultaneously denying such conduct occurred.¹⁰¹ It is, however, possible to both express sympathy for an injured person and to deny all responsibility for the injury.

In 1990, the Supreme Court of Utah disbarred an attorney, J. Richard Calder, for carelessly and negligently representing two separate clients, for trying to avoid responsibility for his conduct by making false statements in an affidavit, and for hiding assets in a personal bankruptcy action to prevent one of his clients from collecting a malpractice judgment.¹⁰² In concluding the list of reasons justifying the disbarment, the court quoted the disciplinary hearing panel, which observed that Calder has "failed to recognize that he has engaged in any misconduct and displays a total lack of remorse and has contradicted on many occasions his own testimony in order to avoid any responsibility."¹⁰³

Attorneys who are standing before a disciplinary committee are being judged by those who are peculiarly competent to determine whether an attorney was negligent. Where a disciplinary committee finds negligence, an admission will usually produce a better outcome than denial.¹⁰⁴ One reason for this is that "the

96. See *Louisiana State Bar Assoc. v. Burton Guidry*, 571 So. 2d 161 (La. 1990).

97. *Id.* at 162-65. The defendant attorney commingled firm and client funds, converted client funds, and neglected his client's legal matter. The Office of Disciplinary Conduct recommended a two-year suspension, but the court considered several factors in determining the degree of sanction. Among the factors considered were whether the attorney acted in bad faith, committed fraud or forgery, made restitution and whether restitution was made before or after the disciplinary hearing. In this case, because the attorney defendant did not act in bad faith and made full reimbursement (part prior to investigation), he was suspended for only six months.

98. See, e.g., *Matter of Chard*, 881 P.2d 333, 336 (Ariz. 1994).

99. See *In re Mines*, 523 N.W.2d 424, 427 (S.D. 1994).

100. *Id.*

101. Lazare, *supra* note 2, at 78.

102. *In re Calder*, 795 P.2d 656, 657 (Utah 1990).

103. *Id.* at 658 (quoting the recommendation of the Panel of the Board of Bar Commissioners).

104. See *supra* note 97.

purpose of bar discipline is not to punish the lawyers but to deter others and protect the public."¹⁰⁵

4. When Remorse is Not Enough

Remorse is one of the first steps to change and it indicates that there is hope.¹⁰⁶ On the other hand, if someone expresses remorse for conduct, but claims they were not accountable for it, such as in the case of a mental illness, this may limit or extinguish any hope for change.¹⁰⁷

In a 1994 disciplinary case before the Kansas Supreme Court, *Matter of Herman*, an attorney was disciplined for misconduct during representation of several of his clients.¹⁰⁸ The attorney, John C. Herman, was suffering from a mental disorder resulting from the combined effects of alcohol consumption, depression, and possibly bipolar mood disorder that affected his ability to practice law.¹⁰⁹ A panel that investigated the complaints found that, among other acts and omissions, Herman had missed several deadlines, misrepresented the status of litigation, and billed for work that had not been done.¹¹⁰ However, the panel was convinced that Herman was not motivated by personal financial gain and that he was sincere and contrite.¹¹¹

In imposing discipline, the court considered many factors, including the fact that Herman "felt shame and remorse for his actions," "apologized to the panel," and that he "appears to have made peace with his clients as they request no discipline and report complete satisfaction with the manner in which he has acknowledged his mishandling and made [\$90,000] restitution."¹¹² However, it appears that where a mental disorder or illness is the cause of the conduct, remorse is not enough. The court ordered that Herman be subjected to a twenty-four month suspension, continued treatment and close supervision by another attorney.¹¹³

When very serious crimes are involved, remorse appears to have a limited influence on the discipline ordered. Again in Kansas, an attorney, John E. Fierro, was convicted of and disciplined for six counts of attempted indecent liberties with a child.¹¹⁴ There was no sexual intercourse or sodomy involved.¹¹⁵ He was

105. *Matter of Augenstein*, 871 P.2d 254, 257 (Ariz. 1994) (quoting *In re Kersting*, 726 P.2d 587, 595 (Ariz. 1986)). In a dissenting opinion in *Augenstein*, one judge wrote that courts declaring to protect the public by disciplining lawyers are merely paying lip service to that ideal, and that the trend in attorney discipline cases is becoming increasingly punitive. *Augenstein*, 871 P.2d at 261.

106. *In re Herman*, 869 P.2d 721 (Kan. 1994).

107. *Id.*

108. *Id.*

109. *Id.* at 261.

110. *Id.* at 722-23.

111. *Id.* at 724-25.

112. *Id.* at 725.

113. *Id.* at 728.

114. *Matter of Fierro*, 869 P.2d 728 (Kan. 1994).

sentenced to six terms of three to ten years.¹¹⁶ In the attorney disciplinary proceedings that followed, a hearing panel recommended that Fierro be indefinitely suspended and a disciplinary administrator recommended that he be disbarred.¹¹⁷ The panel found as aggravating factors a pattern of misconduct, multiple offenses (six young girls were involved) and the vulnerability of the victims.¹¹⁸ The panel found only three mitigating factors: that Fierro was cooperative throughout the proceedings, that he had made substantial steps toward rehabilitation, and that he had demonstrated a great deal of remorse.¹¹⁹ The Supreme Court of Kansas ordered suspension for an indefinite period, rather than disbarment.¹²⁰

A year earlier in the *Matter of Keithley*, the Supreme Court of Kansas had ordered the disbarment of an attorney, Richard E. Keithley, who was convicted by a jury of aggravated incest with his stepdaughter.¹²¹ The hearing panel in the *Matter of Keithley* wrote:

While certain evidence was offered by the Respondent which would indicate that he has undergone rehabilitation; that he now recognizes the impropriety of his acts; and has otherwise expressed remorse, the inescapable conclusion is that his conduct during the period in question was simply unacceptable, by whatever standard of measurement one would choose to use. Even in the absence of a Code of Professional Responsibility, it would be inconceivable that anyone would suggest that the Respondent should retain the right to practice law.¹²²

C. Apology Can Correct Mistakes in Trial

In trial, when an attorney makes a mistake that could result in a mistrial, an apology in the presence of the jury for the mistake has been useful in avoiding such a result.¹²³ In the opening statement of *Thimatraiga v. Chambers*,¹²⁴ the plaintiff's counsel accused defendant's counsel of violating Maryland law in conducting the pretrial.¹²⁵ After a motion for a mistrial was denied, plaintiff's counsel explained away the remark and apologized to the jury and opposing counsel.¹²⁶ However, the defendant persisted by seeking a mistrial upon

115. *Id.* at 729.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Matter of Keithley*, 850 P.2d 227 (Kan. 1993).

122. *Id.* at 229.

123. *Thimatraiga v. Chambers*, 416 A.2d 1326 (Md. 1980).

124. *Id.*

125. *Id.* at 1330.

126. *Id.*

appeal.¹²⁷ The Maryland Court of Appeals affirmed the trial court's denial of the motion, relying on the apology and advisory instructions by the trial judge to the jury.¹²⁸ The advisory instructions said the lawyer's opening and closing statements were not evidence.¹²⁹ This certainly was of lesser value in remedying the character attack upon defendant's counsel. Only the apology and explanation had the power to undo the damage of the accusations.

D. Statutory Law

In 1986, Massachusetts enacted a law making evidence of expressions of sympathy or benevolence relating to pain, suffering or death of a person involved in an accident inadmissible.¹³⁰ "Accident" is defined broadly to be any injurious occurrence which is not the willful act of a party.¹³¹ The full text of the law reads as follows:

§ 23D Admissibility of benevolent statements, writings or gestures relating to accident victims.

As used in this section the following words shall, unless the context clearly requires otherwise, have the following meanings:

"accident", an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

"Benevolent gestures", actions which convey a sense of compassion or commiseration emanating from humane impulses.

"Family", the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children or parent, or spouse's parents of an injured party.

*Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.*¹³²

This law is the only one of its kind currently enacted. Case law shows that mere expressions of sympathy do not prove liability. These cases, however, arrived at their result by summary judgment, directed verdict or jury verdict.¹³³ When a plaintiff is trying to mischaracterize an expression of sympathy as an admission of liability, this Massachusetts law provides a way to reject the

127. *Id.*

128. *Id.* at 1330-31.

129. *Id.* at 1330.

130. MASS. GEN. LAWS. ANN. 233 § 23D (Supp. 1995).

131. *Id.*

132. *Id.* (emphasis added).

133. *See supra* part IV.A.

mischaracterization at an early stage of litigation without disposing of the entire case. Thus, the plaintiff has notice that the expression of sympathy cannot be relied upon and that the case should be strengthened, if possible, or the issue dropped.

Perhaps the most important benefit of the law is that it provides a safe harbor for expressing sympathy for accidental injuries. According to a medical malpractice defense attorney, when something bad happens in a health care context, the health care providers tend to react in certain ways.¹³⁴ Many withdraw and become cold to the patient (if still living) and to the patient's family.¹³⁵ David B. Erickson, senior counsel at Intermountain Health Care in Salt Lake City, Utah, found health care providers are taught that anything they say can be used against them and the withdrawal reaction is the effect of such teaching.¹³⁶ Yet, this is the time when the patient and family need emotional support the most.¹³⁷ Erickson urges health care providers to empathize, sympathize and offer assistance without assuming things they do not know.¹³⁸

V. CONCLUSION

This article illustrates that judges and juries understand that expression of sympathy, regret, remorse and apology are not necessarily admissions of responsibility or liability. This serves the public interest because such expressions have the potential to reduce the number of lawsuits, rather than attract litigation. When someone goes to court armed only with an apology, they may find that it does nothing to satisfy the elements of the case they need to prove. Additional evidence is required, almost as if the apology did not exist.

"Apology is . . . a social contract of sorts. It secures common moral ground, whether between two people or [on a larger scale]."¹³⁹

Apology is a show of strength. It is an act of honesty because we admit we did wrong; an act of generosity, because it restores the self-concept of those we offended. It offers hope for a renewed relationship and .

134. Interview with David B. Erickson, Senior Counsel, Intermountain Health Care, Provo, Utah (April 17, 1996) and by telephone (April 17, 1996).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* Mr. Erickson also said that in an attempt to comfort the family, health care providers sometimes admit to "facts" they are not qualified to admit. For example, they may assume they know the cause of an adverse medical event or assume it could have been prevented. Others are quick to point the finger at one another. Such erroneous admissions and finger pointing are not helpful. He also said that most medical malpractice cases do not go to trial (estimating perhaps fewer than 5%). He has found that many plaintiffs just want someone to say they are sorry.

139. Lazare, *supra* note 3, at 43.

. . possibly even a strengthened one. The apology is a commitment . .
. an act of courage.¹⁴⁰

An apology has an unusual power to move the healing process forward. There is hope that with an increased understanding about the legal consequences of apology, more people will feel safe in tendering an apology.

140. Lazare, *supra* note 3, at 78.