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"Attorneys, Apologies, and Settlement Negotiation"

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Attorneys, Apologies, and Settlement Negotiation

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Introduction

Over the past decade more than 35 states have passed legislation to amend the rules of evidence to make inadmissible some forms of apology.[1] While states differ as to the particular types of statements these statutes protect, and the effects of such protection are unclear, these reforms reflect a growing interest in the role of apology in the settlement of disputes. Concurrent with this legislative reform, many legal commentators have debated whether defendants ought to apologize to those they have allegedly harmed and, similarly, whether attorneys ought to advice their clients to do so. Many have begun to argue that advising legal clients to apologize may reap important benefits – including increasing the possibility of reaching an out-of-court settlement.[2]

Until recently, there was little empirical exploration of how apologies might operate in the litigation context. However, contemporary empirical research has begun to explore the influence of apologies on litigant decision-making. This research has generally found that apologies influence claimants' perceptions, judgments, and decisions in ways that are likely to make settlement more likely -- for example, altering perceptions of the dispute and the disputants, decreasing negative emotion, improving expectations about the future conduct and relationship of the parties, changing negotiation aspirations and fairness judgments, and increasing willingness to accept an offer of settlement.[3] These studies have provided valuable insight into the role of apologies in the settlement decision making processes of individual litigants.

Legal negotiation, however, is often characterized by the involvement of attorneys in the negotiation process. Thus, while the research into how apologies influence the decision making of individual claimants has shed considerable light on how apologies alter claimants' perceptions and judgments, it is also necessary to examine how apologies might influence the recommendations of their legal advisors. Attorneys are likely to have substantial influence over claimants' settlement decisions. Moreover, there are reasons to anticipate that attorneys may respond differently to apologies than do their clients. Attorneys as agents occupy qualitatively different roles in the process than do their

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[1] *See infra* notes 21-27.

[2] *See, e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999) [hereinafter Cohen, *Advising Clients to Apologize*]; Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002) [hereinafter Cohen, *Legislating Apology*]; Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055 (2004); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Daniel Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1157 (2000).

[3] *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006) [hereinafter Robbennolt, *Apologies and Settlement Levers*].

clients and may have an orientation toward analytical thinking and legal rules that influences their understanding of the implications of apologies.[4] To-date, no empirical research has explored the ways in which attorneys are influenced by apologies as they counsel claimants and make recommendations about settlement.

This paper empirically explores how attorneys respond to apologies offered in litigation as they advise claimants about settlement, and compares the reactions of attorneys to those of lay litigants. While there is evidence that apologies influence claimants in ways that are likely to make settlement more likely, the research presented here demonstrates that attorneys react differently to apologies than do claimants. Part I of the paper provides some legal background about the role of apologies in the litigation setting. Part II reviews the recent empirical work that has explored how apologies affect the decision making of claimants. This work has found that apologies result in more favorable attributions, more positive and less negative emotion, and judgments that are likely to improve the prospects for reaching a settlement. Part III turns its attention to the role of attorneys in the negotiation process, describing the important role attorneys play in negotiating settlements and the relevant ways in which attorneys and clients may differ in their roles and approaches. It then presents an empirical investigation of how attorneys' judgments are influenced by apologies to their clients. While attorneys understand the information conveyed by apologies in ways that are strikingly similar to claimants, attorneys' judgments about settlement when apologies are offered diverge from those of claimants. Part IV explores the implications of these effects for attorneys counseling clients in cases in which apologies are offered or desired and for the role of mediation in resolving disputes.

I. Apologies in Litigation

When one person allegedly injures another, he or she often attempts to account for the conduct that led to the injury. Specifically, he or she might attempt to disavow, explain, excuse, or justify the behavior that purportedly led to the injury.[5] Alternately, he or she might offer an apology to the injured person. An apology is a statement offered by a wrongdoer that expresses "acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done."[6] Apologies can be distinguished from other forms of accounting in that they acknowledge responsibility for the conduct that caused the harm. Accepting blame and expressing regret for one's behavior signals a recognition of the norm or rule that was violated and of the harm caused to the other.[7]

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[4] *See infra* notes 66-84.

[5] *See, e.g.*, 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)

[6] NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 3 (1991).

[7] *See* ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971) ("In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction;

As a general matter, empirical studies examining the impact of apologies in a variety of contexts have demonstrated a range of positive effects that flow from apologizing. These effects include more favorable attributions, more positive and less negative affect, improved physiological responses, decreased need to punish, and more likely forgiveness.[8] When the offense is such that it raises the possible involvement of the legal system, however, defendants, defense counsel, and insurance companies have traditionally worried that apologizing will only make things worse for the defendant; specifically, that any apology will be viewed as an admission leading to more certain legal liability. Consequently, many defendants avoid apologizing and are so counseled by their attorneys and insurers.[9]

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verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution."). Thus, while apologies may also include additional components – such as promises to refrain from similar behavior in the future and offers of repair or compensation – it is this acceptance of responsibility that is thought to be the central characteristic of an apology. Statements that express sympathy and do not accept responsibility are thought to be incomplete by most definitions. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 115 (1998) ("Full acceptance of responsibility by the wrongdoer is the hallmark of an apology."); 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, 129-30 (1997) (arguing that "[t]he admission of responsibility for the transgression is a necessary feature of an apology because it conveys to the listener that the speaker is aware of the social norms that have been violated . . . , and therefore conveys that the speaker will be able to avoid the offense in future interactions").

[8] *See, e.g.*, Mark Bennett & Deborah Earwaker, *Victim's Response to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457 (1994); 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, 358 (1989); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies about Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291 (2000); Marti Hope Gonzales et al., *Victims as "Narrative Critics:" Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691 (1994); Holley S. Hodgins & Elizabeth Liebeskind, *Apology versus Defense: Antecedents and Consequences*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 297 (2003); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediation Appraisal and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219 (1989); Ken-ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts*, 134 J. SOC. PSYCHOL. 5 (1994); Jennifer R. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressions*, 6 ACAD. PSYCHOL. BULL. 49 (1984); Scher & Darley, *supra* note 7; Bernard Weiner et al., *Public Confession and Forgiveness*, 50 J. PERSONALITY 281, 291 (1991).

[9] Cohen, *Advising Clients to Apologize*, *supra* note 2, 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."); Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003) (describing physicians' concern that apologizing will lead to liability). *See also* Before the Accident or Injury – What You Should Know, http://www.settlementcentral.com/page0087.htm?x&q=apologize (last visited May 18, 2008) (advising that "[t]he very first thing to remember is *never apologize at the scene of an accident*" (emphasis in original)); Car Accidents: Handling the Accident Scene & Your Damaged Vehicle, http://www.settlementcentral.com/page0007.htm?x&q=apologize (last visited May 18, 2008) ("No apologies-EVER. *DO NOT APOLOGIZE TO ANYONE AT ANYTIME*." (emphasis in original)).

Concern over the possible adverse effects of apologies stems largely from the potential use of an apology as an admission of responsibility.[10] As a general matter, an apology by a party to litigation is admissible under the exception to the hearsay rule that allows admission of a party's own statements.[11] Other rules of evidence may prevent the admission of certain apologetic statements in some circumstances – for example, statements made in settlement discussions are protected under Rule 408[12] and statements made in mediation are protected in most jurisdictions.[13] However, apologies that are made outside of these contexts are potentially admissible.

Despite the potential risks, there has been growing interest in the possibility that clients might benefit, legally and otherwise, from apologizing. Those who consider themselves to be potential defendants, including physicians[14] and corporate actors,[15] are

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[10] 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."). It is worth noting that, empirically, it is not clear whether, under what circumstances, or to what degree an apology might alter the risk of an adverse liability determination. Whether apologies influence liability decision making in civil cases has not been examined in empirical studies. On one hand, in the criminal context, confession evidence has been shown to exert a powerful effect on decision-making. *E.g.*, Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997); Saul Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33 (2004). On the other hand, studies examining attributions of responsibility in nonlegal contexts, however, have found that offenders who apologize are seen as having acted *less* intentionally and are blamed *less*. *E.g.*, Scher & Darley, *supra* note 7.

[11] Under the Federal Rules of Evidence, statements made out of court that are "offered in evidence to prove the truth of the matter asserted" are inadmissible as hearsay. FED. R. EVID. 801(c), 802. There is an exception, however, for statements made by a party to the litigation. FED. R. EVID. 801(d)(2).

[12] Fed. R. Evid. 408 ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible."). *See also* FED. R. EVID. 409 ("Payment of Medical and Similar Expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."). Some statements made within the context of such negotiations are potentially admissible. For example, Rule 408 does not preclude admission of statements made in settlement negotiations for purposes other than to prove liability. FED. R. EVID. 408. *See* Cohen, *Advising Clients to Apologize*, *supra* note 2, at 1035, for a general discussion of the limits of Rule 408 and its application to apologies ("F.R.E. 408 does not preclude such evidence from pre-trial discovery, nor does it prevent such evidence from being revealed to third parties.").

[13] UNIF. MEDIATION ACT § 4, 7A U.L.A. 85 (2001) (listing state statues). *See generally* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 17-19. *But cf.* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001).

[14] *See, e.g.*, MICHAEL S. WOODS, HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE (2004); Douglas N. Frenkel & Carol B. Liebman, *Words that Heal*, 140 ANNALS INTERNAL MED. 483 (2004); Aaron Lazare,

engaged in on-going discussions that debate the relative merits of apologizing for having caused injury.[16] In addition to the potential physical, psychological, and relational benefits of apologies,[17] commentators have argued that apologies have the potential to facilitate the settlement of legal disputes -- breaking impasse to allow productive negotiation, allowing resolution to occur more quickly, or resulting in settlement terms that are more favorable to the one who has apologized.[18]

Some proponents of encouraging apologies in litigation have considered how defendants who desire to apologize might do so "safely" given the patchwork of evidentiary protection traditionally available. One recommendation has been that defendants consider offering statements that express sympathy for the other party, but that stop short of admitting responsibility for having caused injury (i.e., "I'm sorry you

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Apology in Medical Practice: An Emerging Clinical Skill, 296 JAMA 1401 (2006); Lucian L. Leape, *Understanding the Power of Apology: How Saying "I'm Sorry" Helps Heal Patients and Caregivers*, 8 FOCUS ON PATIENT SAFETY 1 (2005); Peter Geier, *Emerging Med-Mal Strategy: "I'm Sorry,"* NAT'L L.J., July 17, 2006, at 1; Laura Landro, *The Informed Patient: Doctors Learn to Say 'I'm Sorry'; Patients' Stories of Hospital Errors Serve to Teach Staff*, WALL ST. J., Jan. 24, 2007, at D5; Katherine Mangan, *Acting Sick: At Medical Schools, Actors Help Teach Doctors How to 'Fess Up to Mistakes – and How to Avoid Them*, CHRON. HIGHER EDUC., Sept. 15, 2006, at 8; Jennifer K. Robbennolt, *Apologies and Adverse Medical Events*, ORTHOPAEDIC LEGAL ADVISOR, Summer 2006, at 1; Kevin Sack, *Doctors Say 'I'm Sorry' Before 'See You in Court,'* N.Y. TIMES, May 18, 2008, at A1; Gail Garfinkel Weiss, *Medical Errors: Should You Apologize?*, MED. ECON., Apr. 21, 2006, at 50; Rachel Zimmerman, *Medical Contrition: Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry,'* WALL STREET J., May 18, 2004, at A1. *See generally* Jennifer K. Robbennolt, *What We Know and Don't Know about the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009 (2005).

[15] *See, e.g.*, IAN AYRES, SUPER CRUNCHERS 58-59 (2007) (describing Continental Airlines' experiments with apologies); Patricia G. Barnes, *Who's Sorry Now? Media Defendants' High-Profile Apologies are Cheaper than Litigation,* A.B.A. J., Jan. 1996, at 20; Mike France, *The Mea Culpa Defense*, BUSINESSWEEK, Aug. 26, 2002, at 76; Barbara Kellerman, *When Should a Leader Apologize and When Not?*, HARV. BUS. REV., Apr. 2006, at 73; Alison Stein Wellner, *Making Amends*, INC. MAG., June 2006, at 41; *Analysis: Whether Companies Should Publicly Apologize for Wrongdoing* (National Public Radio broadcast, Apr. 3-4, 2002).

[16] *See generally* Cohen, *Advising Clients to Apologize*, *supra* note 2; O'Hara, *supra* note 2; O'Hara & Yarn, *supra* note 2; Orenstein, *supra* note 2; Shuman, *supra* note 2; Taft, *supra* note 2.

[17] *See, e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 2; Michael E. McCullogh et al., *Interpersonal Forgiving in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCHOL. 321 (1997); Orenstein, *supra* note 2, at 243-44; Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 1 (1973); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 53; Charlotte vanOyen Witvliet et al., *Please Forgive Me: Transgressors' Emotions and Physiology During Imagery of Seeking Forgiveness and Victim Responses*, 21 J. PSYCHOL. & CHRISTIANITY 219 (2002).

[18] *See* Cohen, *Advising Clients to Apologize, supra* note 2; Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 660 (1976) ("Since dispute-negotiation usually turns in large part on whether the respondent has violated some norm, a settlement often cannot be achieved unless the respondent accounts for his past actions by explicitly or implicitly admitting that a norm-violation has occurred."); Orenstein, *supra* note 2; Shuman, *supra* note 2.

were hurt" rather than "I am sorry I hurt you.").[19] These sympathetic expressions are not complete apologies by most definitions – lacking, in particular, an acknowledgement of responsibility for the behavior that led to the harm.[20] However, it is argued that by offering at least an expression of sympathy, defendants can reap some of the benefits of apologizing while simultaneously minimizing any increase in liability risk.

Concurrently, many states have recently enacted statutes that are intended to encourage and protect certain apologetic expressions by making them inadmissible in court.[21] Massachusetts enacted the first statute preventing the admission of some apologies in 1986.[22] Since 1999, over two-thirds of the states have followed suit and have enacted statutes that explicitly provide some apologies with evidentiary protection. Many of these statutes apply to civil litigation generally;[23] others apply specifically to cases of medical error.[24] In addition, these statutes vary as to the type of apologetic statements that are protected. For example, some statutes only prevent the admission of those statements that express sympathy (i.e., "I'm sorry that you were hurt."), while preserving the admissibility of any statement that acknowledges fault (i.e., "It was my fault.").[25] Other statutes have gone further, also providing protection to statements that

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[19] Cohen, *Advising Clients to Apologize, supra* note 2, at 1048. *See also* Gallagher et al., *supra* note 9, at 1004 (describing physician tendency to "'choos[e] their words carefully' when talking with patients about errors").

[20] *See supra* note 7.

[21] Similar reforms have been undertaken in Canada and Australia. *See* John C. Kleefeld, *Thinking Like a Human: British Columbia's Apology Act*, 40 U. BRIT. COLUM. L. REV. 769 (2007); Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483 (2005).

[22] MASS. GEN. LAWS ANN. CH. 233, § 23D (West 1986) ("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.").

[23] *See, e.g.*, CAL. EVID. CODE § 1160(a) (2000); FLA. STAT. § 90.4026(2) (2001); HAW. REV. STAT. § 626-1 (2006); IND. CODE ANN. §34-43.5-1 (2006)); MASS. GEN. LAWS CH. 233 §23D (1986); MO. REV. STAT. § 538.229 (2007); TENN. R. EVID. § 409.1 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (1999); WASH. REV. CODE § 5.66.010(1) (2002).

[24] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2605 (2005); COLO. REV. STAT. § 13-25-135 (2003); CONN. GEN. STAT. § 52-184(d) (2005); DEL. CODE ANN. tit. 10, §4318 (2006); D.C. CODE ANN. § 16-2841 (2007); GA. CODE ANN. §24-3-37.1; 735 (2006); IDAHO CODE § 9-207 (2008); ILL. COMP. STAT. 5/8-1901 (2005); IOWA CODE § 622.31 (1999); LA. REV. STAT. ANN. § 13:3715.5 (2005); ME. REV. STAT. ANN. tit. 24, § 2907 (2005); MD. CTS. & JUD. PROC. CODE ANN. § 10-920 (2004); MONT. CODE. ANN. § 26-1-814 (2005); NEB. REV. STAT. § 27-1201 (2007); N.H. REV. STAT. ANN. § 507-E:4 (2005); N.C. GEN. STAT. § 8C-4, Rule 413 (2004); N.D. CENT. CODE § 31-04-12 (2007); OHIO REV. CODE ANN. §2317.43 (2004); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (2004); OR. REV. STAT. §677.082 (2003); S.C. CODE ANN. §19-1-190 (2006); S.D. CODIFIED LAWS § 19-12-14 (2005); UTAH CODE ANN. § 78-14-18 (2006); VT. STAT. ANN. tit. 12, §1912 (2006); VA. CODE ANN. § 8.01-581.20:1 (2005); W. VA. CODE § 55-7-11(a) (2005); WYO. STAT. ANN. § 1-1-130 (2004).

[25] *See, e.g.*, CAL. EVID. CODE § 1160(a) (2000) ("The portion of 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 that person or the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section."). *See also* DEL. CODE

express "fault," "error," or "mistake."[26] Still other statutes protect "apologies" without clearly defining the term.[27]

Proponents of these "safe" apologies suggest that if the law protects apologetic expressions from admissibility, defendants will be more likely to offer them. However, whether these apology statutes will result in more apologies and what form those apologies might take are open empirical questions. While many argue that the fear of litigation generally, and the fear that an apology will increase the risk of liability more specifically, impedes defendants' abilities to offer apologies, other cultural and psychological barriers to apologizing may operate as well. Nancy Berlinger recognizes the role that these other obstacles to apologies may play when she notes that "merely protecting apologies is not the same as encouraging them. Genuine apologies are never fun to make."[28] Critics recognize that allowing apologies to be introduced against the apologizer in a subsequent legal proceeding may have a "chilling effect" on such expressions of remorse, but argue that removing the legal consequences of apologizing would diminish the moral content of the apology.[29] Others, however, argue that even legally protected apologies are socially useful, can promote settlement, and should be encouraged (or at least not discouraged).[30]

ANN. tit. 10, §4318 (2006); FLA. STAT. § 90.4026(2) (2001); HAW. REV. STAT. § 626-1 (2006); IND. CODE ANN. §34-43.5-1; LA. REV. STAT. ANN. § 13:3715.5 (2005); ME. REV. STAT. ANN. tit. 24, § 2907 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (2004); MASS. GEN. LAWS ANN. ch. 233, § 23D (1986); MO. REV. STAT. § 538.299 (2007); NEB. REV. STAT. § 27-1201 (2007); N.H. REV. STAT. ANN. § 507-E:4 (2005); TENN. R. EVID. § 409.1 (2003); TEX. CIV. PRAC. & REM. CODE § 18.061 (1999); VA. CODE ANN. § 8.01-581.20:1 (2005); WASH. REV. CODE § 5.66.010(1) (2002).

[26] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2605 (2005) ("[A]ny statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider . . . to the patient, a relative of the patient, the patient's survivors or a health care decision maker for the patient and that relates to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care is inadmissible as evidence of an admission of liability or as evidence of an admission against interest."); COLO. REV. STAT. § 13-25-135 (2003) (covering statements "expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence"); CONN. GEN. STAT. § 52-184(d) (2005) (same); GA. CODE ANN. §24-3-37.1 (2006) (covering statements "expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence"); S.C. CODE ANN. §19-1-190 (2006) (same).

[27] *See, e.g.*, D.C. CODE ANN. § 16-2841; IDAHO CODE § 9-207 (2007); 735 ILL. COMP. STAT. 5/8-1901 (2005); IOWA CODE § 622.31 (1999); MASS. GEN. LAWS ANN. CH. 233, § 23D (1986); MONT. CODE. ANN. § 26-1-814 (2005); N.C. GEN. STAT. § 8C-4, Rule 413 (2004); N.D. CENT. CODE § 31-04-12 (2007); OHIO REV. CODE ANN. §2317.43 (2004); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (2004); OR. REV. STAT. §677.082 (2003); S.D. CODIFIED LAWS § 19-12-14 (2005); UTAH CODE ANN. § 78-14-18 (2006); VT. STAT. ANN. tit. 12, §1912 (2006); W. VA. CODE § 55-7-11(a)(2005); WYO. STAT. ANN. § 1-1-130 (2004).

[28] NANCY BERLINGER, AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS 62 (2005).

[29] *See* Taft, *supra* note 2, at 1157.

[30] *See, e.g.*, Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Orenstein, *supra* note 2. For a review of the arguments see Cohen, *Legislating Apology, supra* note 2.

II. Claimant Responses to Apologies

Recent empirical work has begun to explore the role of apologies in the civil justice system and to examine the nuances of the ways in which apologies may influence the resolution of legal disputes. This work uses a variety of different methodologies including studies that ask potential litigants about how they predict they would react to an injurious situation, studies that ask actual litigants about their motivations and reactions, and experimental studies that explore the ways in which people react to systematically varied situations. This body of work suggests that apologies have a role to play in fostering settlement, but that the complexities of the apologies and contexts may moderate the ways in which apologies influence settlement.[31]

As an initial matter, people anticipate that they would desire an apology if they were injured by another. A number of studies have found that medical patients report that they would want to receive an apology from their physician if the physician made a mistake.[32] In addition, studies that have asked litigants about their motives for bringing suit find that many of these plaintiffs believe that an apology from the other side is one factor that might have changed the course of the litigation.[33]

Data from a small study of 19 medical malpractice cases that were mediated are consistent with these expressed desires.[34] In some of the cases, the defense offered an

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[31] For a review see Jennifer K. Robbennolt, *Apologies and Civil Justice*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 195 (Brian H. Bornstein et al. eds., 2008).

[32] *See, e.g.*, Gallagher et al., *supra* note 9 (finding that patients in focus groups expressed a desire to receive apologies, assurance that the health care provider regretted the error, information about what happened, and assurance that such errors would be prevented in the future); Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 415 (2004) (finding that eighty-eight percent of surveyed health plan members endorsed the notion that following a medical error they "would want the doctor to tell me that he or she was sincerely sorry"); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565 (1996) (finding that ninety-eight percent of the patients in her study "desired or expected the physician's active acknowledgement of an error. This ranged from a simple acknowledgement of the error to various forms of apology").

[33] Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that nearly forty percent of claimants who thought that something could have been done to prevent the litigation indicated that litigation would not have been necessary if the medical provider had offered an explanation and apologized). *See also* Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359 (1992) (finding that claimants in suits involving perinatal injuries were motivated to file suit when the physician was not forthright about what happened (twenty-four percent), in order to find out what had happened to cause the injury (twenty percent), or to deter and punish the provider, including preventing future injuries (nineteen percent)); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985) (reporting interviews with libel plaintiffs indicating that many of them attempted to first resolve their conflict with the media source and most of them ask for "retraction, correction, or apology").

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

apology, while in other cases no apology was offered. Interestingly, 91% (10 of 11 cases) of the cases in which the defense offered an apology settled as compared to only 38% (3 of 8 cases) when no apology was offered.[35] While these cases differed in more ways than the presence or absence of an apology, and no other information about the nature of the settlements was given, these results are at least suggestive of the notion that apologies may help to settle cases.[36]

Similarly, particular institutions have successfully adopted polices of disclosing errors, apologizing for them, and compensating for the resulting injuries. For example, at the Veterans Affairs Medical Center in Lexington, Kentucky, patients are informed that there has been an adverse event whether or not they are already aware that there has been an incident.[37] If the hospital determines that there has been an error, an apology is proffered and an offer of settlement made.[38] Since implementing this policy, the hospital reports that patients are less angry following adverse events and are more likely to maintain a good relationship with the hospital. The hospital also reports that cases settle more quickly, self-reporting of errors by the medical professionals has increased, the hospital has received positive publicity, and litigation costs have declined.[39] Other institutions (e.g., University of Michigan Health System, John's Hopkins, Children's Healthcare of Atlanta, Sturdy Memorial Hospital in Boston) have adopted similar policies and report similarly positive results.[40]

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[35] *Id*. at 1395.

[36] One possibility is that an apology was offered in cases that were already perceived to be progressing toward settlement. Such selection bias would make these results difficult to interpret. In addition, it appears that these cases all involved the same negotiator on the defense side. *Id*. at 1397. Thus, it is possible that the negotiator was particularly skilled at making apologies.

[37] *See* Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000); Steve S. Kraman, *A Risk Management Program Based on Full Disclosure and Trust: Does Everyone Win?*, 27 COMPREHENSIVE THERAPY 253, 254 (2001); Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963 (1999); Albert W. Wu, *Handling Hospital Errors: Is Disclosure the Best Defense?*, 131 ANNALS INTERNAL MED. 970 (1999).

[38] If, however, the hospital determines that the care provided was adequate, no settlement offer is made. Kraman, *supra* note 37, at 256.

[39] Kraman, *supra* note 37; Kraman & Hamm, *supra* note 37. The hospital reports that as compared to thirty-five comparable VA hospitals over the seven-year period following implementation of the policy, the Lexington hospital was in the top twenty percent of facilities in terms of the number of claims against it (possibly reflecting the fact that more patients learn of errors) but was among the lowest twenty-five percent of facilities in terms of the amount of total payments. *Id*.

[40] *See* Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 HEALTH AFF. 73, 78 (2003); Virginia L. Morrison, *Heyoka: The Shifting Shape of Dispute Resolution in Health Care*, 21 GA. ST. U. L. REV. 931 (2005); Tanner, *supra* note 14; Zimmerman, *supra* note 14; *see also* Sorry Works!, www.sorryworks.net (last visited May 18, 2008).

In addition to this data from the field, experimental research has provided insight into the processes by which apologies can influence the ways in which injured parties construe an injury-producing incident and, thus, their willingness to settle with the injurer. Specifically, these experiments find that apologies influence a variety of litigation related judgments and decisions, including the inclination to seek legal advice, the positions taken in settlement negotiations, and the likelihood of accepting a particular settlement offer.

In one study, Kathleen Mazor and her colleagues explored patients' decisions about whether to obtain legal advice following a medical injury.[41] Members of an insurance plan were asked to take the perspective of a patient who had been injured by a medical error. Participants were either told that following the error the physician provided little information and did not take responsibility for the error (the "nondisclosure" condition) or were told that the physician provided information about what had happened, apologized and took responsibility for the error, and detailed steps that would be taken to prevent recurrence (the "full disclosure" condition). Patients who were told that the physician had provided full disclosure following the error expressed greater satisfaction and fewer negative emotions, reported more trust in the physician, were less likely to indicate that they would change doctors, and were less likely to indicate that they would seek legal advice in response to the incident than were patients whose physician had not disclosed.[42]

Professors Russell Korobkin and Chris Guthrie conducted an experimental investigation of the effects of an apology on litigants' settlement decisions in a landlord-tenant dispute.[43] Participants were asked to assume the role of the tenant in a dispute between and landlord and a tenant over a broken heater – the landlord had not fixed the heater and had stopped returning the tenant's calls – and to evaluate a particular offer of settlement from the landlord. Participants who were told that the landlord had apologized to them were marginally more likely to accept the landlord's offer than were participants who had not received an apology.[44]

Similarly, I conducted a series of studies to examine how laypeople in the role of an injured party respond to apologies in making settlement decisions.[45] Participants were asked to respond to a scenario in which they were injured in a bicycle-pedestrian collision. The other party offered either a partial apology, which consisted of an

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[41] Mazor et al., *supra* note 32; Kathleen M. Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?* 21 J. GEN. INTERNAL MED. 704 (2006).

[42] Mazor et al., *supra* note 32, at 413.

[43] Korobkin & Guthrie, *supra* note 3.

[44] *Id.* at 148. The landlord "apologized" by saying, "I know this is not an acceptable excuse . . . but I have been under a great deal of pressure lately." *Id*.

[45] Robbennolt, *Apologies and Legal Settlement*, *supra* note 3; Robbennolt, *Apologies and Settlement Levers*, *supra* note 3.

expression of sympathy but no acceptance of responsibility, a full, responsibility-accepting apology, or no apology. Apologies, particularly those that accepted responsibility for having caused injury, favorably influenced a variety of attributions made about the situation and the other party, including perceptions of the character of and the degree of regret experienced by the other party, expectations about the way in which the other party would behave in the future, and expectations about the relationship between the parties going forward.[46] Similarly, apologies influenced the emotions that participants reported they would feel – decreasing anger toward the other party and increasing sympathy for the other's position.[47] Full, responsibility-accepting apologies showed these effects consistently.[48] Apologies that merely expressed sympathy were more context dependent, favorably influencing these attributions under some circumstances, but not in others.[49]

These studies also found that apologies influence judgments that are directly related to legal settlement decision making. For example, the value that a negotiator sets as his or her reservation price (or "bottom-line"),[50] the negotiator's aspirations,[51] and the negotiator's judgment about what a fair settlement would entail have all been shown to influence final negotiated outcomes.[52] In these studies, there were circumstances under

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[46] Robbennolt, *Apologies and Legal Settlement, supra* note 3; Robbennolt, *Apologies and Settlement Levers*, *supra* note 3.

[47] *Id*.

[48] *Id*.

[49] Robbennolt, *Apologies and Legal Settlement, supra* note 3; Robbennolt, *Apologies and Settlement Levers*, *supra* note 3. There is also some evidence that these sympathy expressions can have detrimental effects under some circumstances. Robbennolt, *Apologies and Legal Settlement, supra* note 3 (study 2).

[50] A negotiator's reservation price is "the lowest valued outcome (in utility terms) at which the negotiator is willing to accept agreement" – that is, the negotiator's "bottom-line." Sally Blount White & Margaret A. Neale, *The Role of Negotiator Aspirations and Settlement Expectancies in Bargaining Outcomes*, 57 ORG. BEHAV. & HUM. DECISION PROCESSES 303, 305 (1994). *See also* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 51 (1986); HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 110 (2002); G. RICHARD SHELL, BARGAINING FOR ADVANTAGE 27 (1999). In the context of the settlement of civil cases, a plaintiff's reservation price is the lowest amount she would accept to forego trial and settle the case.

[51] A negotiator's aspiration level focuses on "the highest valued outcome (in utility terms) at which the negotiator places some non-negligible likelihood that the value would be accepted by the other part(ies)." White & Neale, *supra* note 50, at 304-05. In the context of the settlement of civil cases, a plaintiff's aspiration value is the best settlement agreement she could hope to achieve.

[52] *See, e.g.,* Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation, in* BARRIERS TO CONFLICT RESOLUTION 86 (Kenneth J. Arrow et al. eds., 1995); Max H. Bazerman et al., *Perceptions of Fairness in Interpersonal and Individual Choice Situations*, 4 CURRENT DIRECTIONS PSYCHOL. SCI. 39 (1995); W. Clay Hamner & Donald L. Harnett, *The Effects of Information and Aspiration Level on Bargaining Behavior*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 329 (1975); George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426 (1989); Robin L. Pinkley et al., *The Impact of Alternatives to Settlement in Dyadic Negotiation*, 57 ORGANIZATIONAL BEHAV. & HUM.

which apologies influenced the values that participants set for two of these settlement levers -- their aspirations and judgments of fair settlement values -- such that those who received an apology set lower values for these settlement levers.[53]

Similarly, apologies influenced how individuals evaluated a settlement offer in terms of its ability to make up for the harm suffered, how they appraised their need to punish the other party, and how they assessed their willingness to forgive the other party. Participants receiving apologies judged an offer as being more adequate, felt less need to punish the other party, and were more willing to forgive.[54] Finally, full, responsibility-accepting apologies increased the tendency of recipients to accept a particular settlement offer.[55] Interestingly, none of these judgments or decisions were systematically influenced by variations in the applicable evidentiary rule relating to apologies.[56]

III. Attorneys and Apologies

A. Attorneys in Settlement Negotiation

Clearly, there is growing evidence to support the notion that apologies can be beneficially offered to claimants in settlement negotiation. The litigants themselves, however, are not the only legal actors involved in legal settlement decision-making. In fact, "[t]he feature of litigation bargaining that most differentiates it from other types of negotiation is the presence of lawyers."[57] While the client, not the attorney, is supposed

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DECISION PROCESSES 97, 107 (1994); White & Neale, *supra* note 50; Sally Blount White et al., *Alternative Models of Price Behavior in Dyadic Negotiations: Market Prices, Reservation Prices, and Negotiator Aspirations*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 430 (1994).

[53] Robbennolt, *Apologies and Settlement Levers*, *supra* note 3 (finding effects on settlement levers when fault was relatively more clear). Reservation prices followed the same direction pattern, but the differences were not statistically significant. *Id*.

[54] Robbennolt, *Apologies and Legal Settlement*, *supra* note 3; Robbennolt, *Apologies and Settlement Levers*, *supra* note 3.

[55] Robbennolt, *Apologies and Legal Settlement*, *supra* note 3, at 487.

[56] Robbennolt, *Apologies and Legal Settlement*, *supra* note 3; Robbennolt, *Apologies and Settlement Levers, supra* note 3.

[57] Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 81 (1997). *See also* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510 (1994) (noting the "legal system's central institutional characteristic—litigation is carried out by agents [attorneys]"); Herbert M. Kritzer, *Contingent-Fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795 (1998) (describing how "lawyers exercise considerable control over their clients in the settlement process"); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-Adversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 318 (1999).

to make the ultimate decision about whether to accept or reject a settlement offer,[58] it is not unlikely that a client's attorney will have considerable influence on the client's settlement decisions.[59] Clients look to their attorneys for advice and rely on them for knowledge of the substantive rules governing the case, their understanding of the processes involved, and their expertise as negotiators.[60] In addition, Professor Bert Kritzer recognizes that there is considerable uncertainty involved in settling civil cases – uncertainty which attorneys are accustomed to confronting, but which most clients are not.[61] Thus, attorneys are able to influence clients' settlement decision making through the ways in which they go about "creating initial expectations, preparing clients for the settlement negotiations, and selling the settlement proposal to the client."[62]

Professors Korobkin and Guthre experimentally demonstrated the influence of attorney recommendations on clients' settlement decision-making, using the landlord-tenant dispute described above and again asking participants to assume the role of the tenant.[63] In a control condition, the dispute over the broken heater was described and participants were asked whether or not they would accept a particular settlement offer from the landlord. In several additional "attorney influence" conditions, participants were given further information from their lawyers that either attempted to provide the clients with information about some of the psychological processes that might cause them to reject an offer, described a technique for considering the other party's perspective, or explicitly recommended that the clients accept the offer. Participants in these attorney influence conditions were more likely to accept the offer than were participants who did not receive such information or advice from their attorneys.[64] These results suggest that,

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[58] MODEL RULES OF PROF'L CONDUCT R. 1.2(a): "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement in a matter."

[59] *See* Korobkin & Guthrie, *Role of the Lawyer, supra* note 57 (reporting experimental results); Kritzer, *Lawyers and Their Clients, supra* note 57 (citing studies); Gilson & Mnookin, *Disputing Through Agents*, *supra* note 57, at 510 ("[L]awyers have long been considered to have a special influence on how litigation is conducted."). *See also* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones' Case*, 50 MD. L. REV. 213 (1991) ("[L]awyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt.").

[60] Eisenberg, *supra* note 18, at 664 ("Because a lawyer is both a personal advisor and a technical expert, each actor-disputant is likely to accept a settlement his lawyer recommends."); Jeffrey Z. Rubin & Frank E.A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 NEGOT. J. 395, 396 (1988) ("One of the primary reasons that principals choose to negotiate through agents is that the latter possess expertise that makes agreement – particularly favorable agreement – more likely."); Sternlight, *supra* note 57, at 318 ("Very simply, clients are largely dependent upon their agents or attorneys for information as to the strengths and weaknesses of each side's case and for an evaluation of the advantages and disadvantages of a proposed settlement.").

[61] Kritzer, *supra* note 57, at 812.

[62] Kritzer, *supra* note 57, at 800. *See also* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 119-124 (2004).

[63] Korobkin & Guthrie, *Role of the Lawyer*, *supra* note 57. *See supra* notes 43-44 and accompanying text.

[64] *Id*.

at least in some circumstances,[65] attorney recommendations can influence clients' settlement decision making.

Given the presence of lawyers in much legal negotiation and their influence on client decision making, it is important to understand the effects that apologies might have on the settlement recommendations that attorneys make to their clients if we want to understand how apologies operate to influence decision making in litigation. Importantly, there are a number of reasons that attorneys might be expected to have different responses to apologies than do laypeople. In particular, attorneys occupy a different role and may have different skills than do their clients – which may lead them to focus their attention in different ways than would their clients.

First, attorneys may respond differently to apologies for reasons attributable to their role as attorney. Importantly, attorneys in legal negotiation act in the role of agent, rather than as a party to the underlying dispute. In such a role, attorneys as agents are likely to be more detached from the interpersonal aspects of the dispute as they have neither been injured nor alleged to have done the injuring, and the relationships at issue are not their own.[66] This detachment may enable the attorney to manage the conflict in a way that avoids the barriers to settlement that may result from an emotionally charged atmosphere,[67] and may also lead the attorney to respond differently than the client would have to the psychological and emotional aspects of the dispute and to place different emphasis on the importance of an apology.[68]

A separate set of role effects may be related to the ways in which attorneys are compensated. Plaintiffs' attorneys, who are often compensated by a contingency fee, may not be inclined to negotiate lower monetary settlements in light of apologies, while

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[65] Korobkin and Guthrie did not find effects of attorney influence for a second scenario (involving an auto accident and the influence of framing). *Id*. *See also* Kritzer, *supra* note 57 (reviewing studies finding client control under some circumstances).

[66] *See* Cohen, *Advising Clients to Apologize*, *supra* note 2; Rubin & Sander, *supra* note 60, at 397; Eisenberg, *supra* note 18, at 662 (arguing that an agent or "affiliate normally brings to the dispute a degree of objectivity which the actor-disputant cannot attain"). This detachment may also make it easier for an attorney to offer an apology on behalf of a client than for the client to apologize personally. *See generally* Eisenberg, *supra* note 18, at 661 (arguing that an actor's agent "can make admissions or proposals, more or less on his behalf, that he himself might be embarrassed to make. In all these cases, the institutional structure permits the claimant to deal with a person who, while institutionally affiliated with the actor-respondent, can nevertheless account dispassionately for his affiliates actions, since he is not alleged to be personally at fault"). Note that this study was designed such that the identity of the participants and their role as agent or litigant were completely confounded. Thus, an interesting question not examined here is whether attorneys respond differently to apologies in their role as attorneys than they would as parties in their own disputes.

[67] *See, e.g.,* Rubin & Sander, *supra* note 60, at 397 (noting that "[a]nother important reason for using an agent to do the actual negotiation is that the principals may be too emotionally entangled in the subject of the dispute").

[68] *See* Rubin & Sander, *supra* note 60, at 397 ("[T]he very 'detachment' we are touting as a virtue of negotiation through agents can also be a liability.").

defense attorneys, who are more likely to be compensated by an hourly fee, may not be eager to speed settlement of a case with an apology.[69] Speaking specifically of contingency fee arrangements, Cohen and others have noted, "to the extent that the apology reduces the level of the financial settlement, plaintiffs' lawyers have an incentive to avoid it."[70] At the same time, however, it is argued that these same contingency fee lawyers have incentives to settle cases quickly, and apologies may be consistent with that end.[71]

Second, there is evidence that attorneys are inclined to be more analytical and less emotional in their general approach to settlement than are their clients.[72] These differences likely stem from a combination of selection into and training within the profession. As Professors Korobkin and Guthrie note, to be accepted into law school, "an applicant must demonstrate higher than average ability to think analytically."[73] Once they are admitted into law school, their legal education tends to focus on teaching them "to analyze legal conflicts carefully and unemotionally."[74] Similarly, Professor Len Riskin writes that: "Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties."[75]

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[69] *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987). *See also* KRITZER, *supra* note 62 (discussing the influence of lawyers' financial incentives on recommendations about settlement). *See also* A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensatory Lawyers*, 22 INT'L REV. L. & ECON. 217 (2002) (arguing that contingency fee lawyers may not have an incentive to settle quickly and may make settlement demands that are too high).

[70] Cohen, *supra* note 2. *See also* KRITZER, *supra* note 62, at 140 ("We do know from earlier research that the contingency fee structure serves to constrain and focus negotiation on money for the simple reason that contingency fee lawyers have to collect money for their clients in order to be paid."); Sternlight, *supra* note 57, at 322 ("[T]hese nonmonetary goals likely have little appeal for the attorney who, after all, cannot take a one-third contingency of an apology.").

[71] *See* Sternlight, *supra* note 57, at 327 ("When an attorney represents a client under a contingent fee agreement, the attorney frequently has an incentive to settle the case more quickly, and therefore for a lower amount, than does the client."); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 95-105 (1974). *See also* Sternlight, *supra* note 57, at 327-31 (discussing other divergences between lawyer and client that might cause cases to settle too quickly).

[72] *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (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 (2001); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

[73] Korobkin & Guthrie, *supra* note 57, at 87.

[74] Korobkin & Guthrie, *supra* note 57, at 87. *See also* Eisenberg, *supra* note 18, at 663 ("If, as is frequently the case, the affiliate is a professional, objectivity may itself be a norm in which he is schooled.").

[75] Riskin, *supra* note 72, at 45. Riskin cites the following anecdote:

> A law school classroom incident shows how quickly this deafness afflicts students-usually without anyone noticing. Professor Kenney Hegland writes:

Of particular relevance to how attorneys and clients will respond to apologies in litigation, there is evidence that lawyers may be less influenced by concerns for equity or vindication in responding to settlement offers than are litigants. Using the landlord-tenant dispute described earlier, Professors Korobkin and Guthrie compared the tendency for litigants and lawyers to seek equity as they engaged in settlement negotiations over the broken heater.[76] Lay participants were asked to assume the role of the tenant; attorneys were asked to assume the role of the tenant's attorney. Some respondents of each type were told that the landlord had failed to have the heater repaired and had stopped returning the tenant's calls; others were told that the landlord had failed to have the heater repaired because he had been unexpectedly called out of the country for a family emergency. Tenants who were told of the family emergency were more inclined to accept the settlement offer than were those who were not provided with this information.[77] In contrast, the lawyers' advice about whether to accept the settlement offer did not differ across the two conditions.[78] Korobkin and Guthrie concluded that "lawyers are more likely than litigants to apply an expected financial value analysis to the settlement-versus-trial decision, whereas certain cognitive and social-psychological phenomena that can distract from expected value analysis are more likely to influence litigants."[79]

> In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:
>
> In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked "If you were Seller, what would you say?" What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.
>
> After asking the question, I looked around the room for a volunteer. As is so often the case with the first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.
>
> "OK," I said, "What would you say if you were the seller?"
>
> "I'd say 'I'm sorry'."

Id. at 45-46 (quoting Kenny Hegland, *Why Teach Trial Advocacy? An Essay on Never Ask Why*, *in* HUMANISTIC EDUCATION IN LAW 68, 69 (J. Himmelstein & H. Lesnick eds., 1982)).

[76] Korobkin & Guthrie, *Psychological Barriers*, *supra* note 3.

[77] *Id*.

[78] Korobkin & Guthre, *Role of the Lawyer*, *supra* note 57.

[79] *Id*. at 82. As Professor Sternlight notes, such differences between clients and lawyers may operate in two

Third, attorneys may have a more heightened focus on protecting legal rights than do their clients. Indeed, one study found that the lawyers studied believed that one of the most fundamental roles they served as legal professionals was their service as "watchdogs" who are concerned with protecting their clients' legal entitlements.[80] In particular, attorneys may have a better sense of the evidentiary value of an apology and may be more attuned to the ramifications of evidentiary rules prohibiting or allowing apologies into evidence than are their clients. As Bartels has noted:

> [U]nderstanding how the law applies to such things as traffic violations and tort liability is something that the lay person is at least loosely familiar with. Evidentiary standards, however, are different. Lawyers, not lay persons, learn the nuances of the Evidence Code so as to navigate a client through a legal dispute. Knowledge of the Evidence Code, as well as the Code of Civil Procedure, is often the main reason people seek aid from lawyers when faced with potential litigation."[81] Moreover, some have argued that because attorneys "typically . . . become involved only when formal litigation is contemplated, [they] are likely to negotiate on the basis of legal principles, rules, and precedents.[82]

Thus, the evidential value of an apology and the rules of evidence that determine an apology's admissibility may have a relatively greater impact on how apologies are viewed by attorneys.

Given these differences in role and orientation, attorneys may be more likely to engage in expected value calculations and to define the clients' problem narrowly with a focus on the legal and economic issues, often to the relative neglect of the more intangible and emotional non-legal issues.[83] Accordingly, apologies might be expected to affect attorneys' assessments of settlement offers differently than they affect litigants' assessments.[84]

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different ways such that sometimes lawyers may push for settlement in cases that should not settle and at other times lawyers may impede the settlement of cases that should settle. Sternlight, *supra* note 57.

[80] Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149, 171 (1994).

[81] William K. Bartels, *The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141, 151 (2000-01).

[82] Eisenberg, *supra* note 18, at 664-65.

[83] *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (describing dispute problem definition as ranging from narrow to broad); Sternlight, *supra* note 57.

[84] Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1186 (1997) ("[E]ven when individual parties are suited to the apology ritual, the possibility for apology may never arise if their lawyers are present."). *See generally* Cohen, *Advising Clients to Apologize*, *supra* note 2, at 1042-46 (discussing reasons why attorneys neglect apology).

B. The Influence of Apologies on Attorney Perceptions and Settlement Levers

How, then, are attorneys' perceptions and judgments affected by apologies offered in litigation? As noted above, previous research has found that apologies can have an influence on litigants' perceptions of the other party and of the incident that led to the dispute and on their settlement posture. In particular, apologies tend to lower claimants' aspirations and estimates of a case's fair settlement value.[85] The present study was designed to replicate this earlier examination of the effects of apologies on attributions and settlement levers, with one crucial difference. While the earlier study examined the effects of apologies on laypeople as potential litigants, the present study used the same scenario to examine the effects of apologies on attorneys in their representational capacity.

The basic scenario involved a relatively simple personal injury dispute involving a bicyclist who ran into a pedestrian.[86] The study asked attorneys to assume that they represented the client described in the scenario. Attorneys were then asked about their perceptions of the situation and to give their reservation prices, aspirations, and assessments of the fair settlement value of the case. In order to examine the effects of apologies on attorneys' perceptions of the case and their settlement levers, three variables were manipulated.[87] First, the nature of the apology offered was varied such that attorneys evaluated a version of the scenario in which the cyclist did not offer an apology, offered a partial apology that merely expressed sympathy for the injuries, or offered a full apology that took responsibility for having caused the injuries.[88] Second, the evidentiary rule that was described to the attorneys was varied such that either nothing was mentioned about the rules of evidence, participants were explicitly told that apologies were protected and would not be admitted as evidence,[89] or participants were explicitly

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[85] Robbennolt, *Apologies and Settlement Levers*, *supra* note 3 (finding that apologies decreased settlement levers when there was evidence of the offenders' responsibility).

[86] The scenario was the same as that used in Robbennolt, *Apologies and Settlement Levers, supra* note 3.

[87] In a typical experiment, a large number of participants evaluate the same case. All aspects of the case are held constant, except the variable of interest in the study. Therefore, any observed differences in the responses of participants who evaluated cases involving different levels of the manipulated variable can be attributed to that variable, unconfounded by other influences. *See* HANS ZEISEL & DAVID KAYE, PROVE IT WITH FIGURES: EMPIRICAL METHODS IN LAW AND LITIGATION 5 (1997 For examples of experimental research on legal settlement negotiation see Chris Guthrie, *Panacea or Pandora's Box? The Cost of Options in Negotiation*, 88 IOWA L. REV. 601 (2003); Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996); Korobkin & Guthrie, *Psychological Barriers*, *supra* note 3; Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13 (1988).

[88] The condition in which the offender offered a partial apology stated in relevant part: "After the accident, Pat contacted your client and said: 'I am sorry if you were hurt. I really hope that you feel better soon.'" The condition in which the offender offered a full apology stated in relevant part: "After the accident, Pat contacted your client and said: 'I want to let you know how sorry I am. The accident was my fault. I was going too fast and not watching where I was going until it was too late. I am so sorry.'"

[89] In the conditions in which apologies were protected, the rule was described as follows: "Please assume that the law of your state prevents apologies from being used against defendants in court. Thus, Pat's

told that apologies were admissible as evidence.[90] Finally, the evidence relevant to assigning responsibility was varied such that attorneys either evaluated a version of the scenario in which it was relatively clear that the cyclist was at fault in causing the injuries or a version of the scenario in which the cyclist's fault was more ambiguous.[91] Each attorney was asked to respond to one of the resulting eighteen version of the scenario, with the scenarios assigned randomly to the attorneys.[92]

One-hundred ninety attorneys participated in the study.[93] Attorneys were recruited for participation in the study through e-mail recruitment messages sent to the alumni of two law schools and posted in bar e-newsletters and listservs in two states. Attorneys were asked to click on a web-link to access the study materials, including the scenario and the questionnaire.

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statements to your client will not be admissible in court as evidence that Pat was at fault for the accident. Assume that this was common knowledge and that Pat knew that if she apologized it could not be used against her if there was a lawsuit."

[90] In the conditions in which apologies were not protected, the rule as described as follows: "Please assume that Pat's statements to your client could be introduced in court as evidence that Pat was at fault. Assume that this was common knowledge and that Pat knew that if she apologized it could be used against her if there was a lawsuit."

[91] In the conditions in which the offender's fault was somewhat ambiguous, participants were told: "A number of your clients' neighbors saw the accident or the events leading up to it. One of them reported that she thought the bicyclist might have hit some sort of obstruction in the path. One of them said later that she had found a large pothole near the place where the accident occurred. Your client had been mulling over a problem the client had been having at work and your client isn't sure that the client was really paying attention to the surroundings or where the client was going."

In the conditions in which the offender's fault was more clear, participants were told: "A number of the clients' neighbors saw the accident or the events leading up to it. Several of them reported that the bicyclist was riding too fast given the curves in the path and the number of people out walking. One of them observed that the rider appeared to be reaching for a water bottle while riding at excessive speed. A bystander further down the path reported that she saw the cyclist almost hit another pedestrian shortly before the collision."

This manipulation was successful: attorneys rated the offender as more responsible in the condition in which the offender's responsibility was more clear (mean = 5.84) than they did in the condition where responsibility was more ambiguous (mean = 4.96). $F(1,169) = 25.010$, $p < .001$, $\eta 2 = .129$. In addition, attorneys rated their client's responsibility as greater in the ambiguous condition (mean = 2.34) than in the clear evidence condition (mean = 1.91). $F(1,170) = 12.371$, $p = .001$, $\eta^2 = .068$.

[92] The three manipulated variables were fully crossed in a 3 (apology) x 3 (evidentiary rule) x 2 (offender fault) factorial design, resulting in eighteen different versions of the scenario. In addition to being asked to respond to the scenarios described here, attorneys were also asked to indicate whether they had advised clients about apologies, and to comment on the circumstances under which they might advise a client to apologize, the barriers they saw to apologies in litigation, and their views of the effects of evidentiary protection for apologies. These data will be addressed in a separate article.

[93] The attorneys had a mean age of 47 and they represented a wide range of experience, obtaining their licenses to practice law between 1948 and 2004 (*mean* = 1985); 30% were female.

C. Results

Analyses were conducted both on the sample of all attorneys who participated in the study (N = 190) and on the subgroup (N = 119) who reported that in their civil practice they represented either mostly plaintiffs or represented plaintiffs and defendants approximately equally.[94]

1. Perceptions

The attorneys were asked a series of questions designed to elicit their perceptions and attributions about the situation and the opposing party. To facilitate analysis of these perception questions, two scales were constructed from these measures.[95]

The first scale represented the attorneys' overall assessment of the apology and the information it conveyed. This scale included attorneys' ratings of the sufficiency of the apology, the degree to which the offender thought he or she was responsible, the offender's regret, the degree to which the offender would be careful in the future, the degree to which the offender's conduct offended the attorney, the degree to which the offender respected the attorney's client, and the offender's morality.[96] The second scale[97] represented attorneys' evaluations of their likely response to the incident. It included attorneys' ratings of the offender's responsibility for the incident,[98] the anger they would expect their client to feel,[99] their sympathy for the offender, the degree to which they thought their client would forgive the offender, and the degree to which they thought the offender should be punished.[100]

a. Assessment of apology

The nature of the apology offered to their clients clearly influenced attorneys' assessment of the apology and the information it conveyed about regret, respect, felt responsibility, and so on.[101] Attorneys whose clients received a full apology made more positive assessments of the apology and the information conveyed by the apology than did attorneys who were told that their clients had received only a partial apology, who, in

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[94] Thus, attorneys who indicated that they do not handle civil cases or that their civil practice consisted primarily of defense work or transactional work were excluded from this subgroup.

[95] The groups of variables to be included in each scale were determined in previous research with laypeople by a principal components factor analysis. Robbennolt, *Apology and Settlement Levers*, *supra* note 3, at 358. The factors derived in previous work with laypeople resulted in reliable scales in this study as well, *see infra* notes 96 and 97, and were used to facilitate comparisons with that previous work.

[96] Alpha = .84.

[97] Alpha = .69.

[98] Reverse coded so that higher values indicate less responsibility.

[99] Reverse coded so that higher values indicate less anger.

[100] Reverse coded so that higher values indicate a preference for less punishment.

[101] $F(2,169) = 101.599$, $p < .001$, $\eta^2 = .546$.

turn, made more positive assessments than did attorneys whose client received no apology at all.[102]

The degree to which the offender appeared to be at fault also influenced attorneys' assessment of the apology.[103] Attorneys made more favorable assessments of the apology and the information conveyed by the apology when the offender's fault was more ambiguous than when it was relatively clear.[104] In the full sample, the type of evidentiary rule also influenced attorneys' assessment of the offender's apology.[105] Overall, attorneys made more favorable assessments of the apology when it was not protected by an evidentiary rule than when it was protected.[106]

b. Evaluation of Response

The degree to which the offender appeared to be at fault also influenced the attorneys' evaluations of their response to the incident.[107] Attorneys' evaluations – evaluations of the offender's responsibility, their client's anger, their sympathy for the offender, their assessment of their client's inclination to forgive the offender, and their judgment that the offender should be punished – were more positive when the offender's fault was more ambiguous than when it was relatively clear.[108] Neither the type of apology[109] nor the evidentiary rule[110] influenced these evaluations.[111]

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[102] Ps < .001. No Apology mean = 3.23; Partial Apology mean = 4.35; Full Apology mean = 5.25. All follow-up analyses conducted to explore differences among more than 2 groups used the Tukey test. *See* GEOFFREY KEPPEL & SHELDON ZEDECK, DATA ANALYSIS FOR RESEARCH DESIGNS 174-76 (1989). Attorneys also rated full apologies as being more sincere than they rated partial apologies. $F(1,109) = 50.721$, $p < .001$, $\eta^2 = .318$. The results for attorneys who represent plaintiffs were similar for the effects of the nature of the apology on assessments, $F(2,100) = 47.822$, $p < .001$, $\eta^2 = .489$ (No Apology mean = 3.37; Partial Apology mean = 4.22; Full Apology mean = 5.18) and on sincerity, $F(1,66) = 25.221$, $p < .001$, $\eta^2 = .275$.

[103] $F(1,169) = 5.537$, $p = .037$, $\eta^2 = .032$.

[104] Ambiguous Fault mean = 4.40; Clear Fault mean = 4.10. The effect of fault on assessments of apologies was similar for those attorneys who represented plaintiffs in civil cases, $F(1,100) = 4.137$, $p = .045$, $\eta^2 = .040$ (Ambiguous Fault mean = 4.51; Clear Fault mean = 4.08).

[105] $F(2,169) = 3.365$, $p = .037$, $\eta^2 = .038$.

[106] Not Protected mean = 4.47; Protected mean = 4.11. The mean for the condition in which no evidentiary rule was specified (M = 4.18) did not differ from either of the other conditions. The means were similar for those attorneys who represented plaintiffs in civil cases, but with this smaller sample the difference was not statistically significant. $F(2,100) = 1.740$, $p = .181$, $\eta^2 = .034$ (No Rule mean = 4.43; Protected mean = 4.10; Not Protected mean = 4.35).

[107] $F(1,170) = 19.495$, $p < .001$, $\eta^2 = .103$.

[108] Ambiguous Fault mean = 4.25; Clear Fault mean = 3.69. The effect of fault on evaluations was similar for those attorneys who represented plaintiffs in civil cases, $F(1,101) = 10.043$, $p = .002$, $\eta^2 = .090$ (Ambiguous Fault mean = 4.19; Clear Fault mean = 3.68).

[109] $F(2,170) = 1.212$, $p = .300$, $\eta^2 = .014$.

[110] $F(2,170) = .395$, $p = .674$, $\eta^2 = .005$.

[111] There was a three-way interaction: $F(4,170) = 2.580$, $p = .039$, $\eta^2 = .057$.

c. Expectations

The evidence related to the offender's fault, not surprisingly, also influenced attorneys' expectations about the likelihood that they would win the case if it were to go to trial.[112] Attorneys estimated their chances of winning as higher when the offender's fault was more clear than when it was relatively ambiguous.[113]

In addition, the nature of the apology had a marginally significant influence on attorneys' expectations about the likelihood that they would win at trial.[114] Attorneys whose client received an apology that accepted responsibility for having caused the injuries estimated their chances of winning as higher than did attorneys who received only an expression of sympathy.[115]

There was no statistically significant influence of evidentiary rule on expectations about the likelihood that participants would win at trial.[116]

Table 1. Effects of Apologies on Perceptions*

	Assessment of Apology	Evaluation of Response	Expectations for Trial
No Apology	3.23[a]	4.14[a]	5.63[ab]
Partial Apology	4.35[b]	3.88[a]	5.31[a]
Full Apology	5.25[c]	4.09[a]	5.73[b]

*Values reported are means on scales running from 1 to 7; higher values indicate more positive assessments, more favorable evaluations, and higher expectations of winning. For each rating, means with different superscripts differ significantly.

2. Settlement Levers

The next set of analyses examined the influences of apology, offender fault, and evidentiary rules on attorneys' values for several factors that have been identified as

[112] $F(1,170) = 10.527$, $p < .001$, $\eta^2 = .058$.

[113] Ambiguous Fault mean = 5.30; Clear Fault mean = 5.80. The effect of fault on estimates of the likelihood of winning was similar for those attorneys who represented plaintiffs in civil cases, $F(1,101) = 5.587$, $p = .020$, $\eta^2 = .052$ (Ambiguous Fault mean = 5.37; Clear Fault mean = 5.78).

[114] $F(2,170) = 2.696$, $p = .070$, $\eta^2 = .031$.

[115] Full Apology mean = 5.73; Partial Apology mean = 5.31. No Apology (M = 5.63) did not differ significantly from either a full or partial apology, $ps > .05$. The effect of the nature of the apology on estimate of the likelihood of winning was similar for those attorneys who represented plaintiffs in civil cases, $F(1,101) = 3.018$, $p = .053$, $\eta^2 = .056$ (Full Apology mean = 5.76; Partial Apology mean = 5.28; No Apology mean = 5.68).

[116] $F(2,170) = 1.388$, $p = .252$, $\eta^2 = .016$. Similarly, for attorneys who represented plaintiffs in civil cases, $F(2,101) = 1.293$, $p = .279$, $\eta^2 = .025$.

having important influences on settlement decision making. These settlement levers include attorneys' aspirations, estimates of fair settlements, and reservation prices.[117]

a. Effects of Apology

The nature of the apology influenced the settlement levers that the attorneys set for the negotiation. Across all three settlement levers, the general pattern for the overall sample suggests that attorneys tended to set higher values for the settlement levers when full responsibility-accepting apologies were offered than they did when no apology was offered. The values attorneys set when partial sympathy-only apologies were offered fell in between these two (see Table 2 and Figure 1). The effect of apology on aspirations was statistically significant;[118] the effect of apology on judgments about a fair settlement value was marginally significant;[119] the effect of apology on attorneys' reservation prices followed this general pattern, but the differences were not statistically significant.[120]

Table 2. Effects of Apologies on Settlement Levers

	Transformed Means (SD)	Median $ Amounts
Aspirations		
No Apology	234 (141)	$50,000
Partial Apology	256 (158)	$50,000
Full Apology	295 (166)	$62,000
Fair Offer		
No Apology	173 (78)	$25,000
Partial Apology	182 (82)	$25,000
Full Apology	206 (94)	$36,000
Reservation Price		
No Apology	143 (69)	$15,000
Partial Apology	151 (73)	$16,000
Full Apology	160 (68)	$25,000

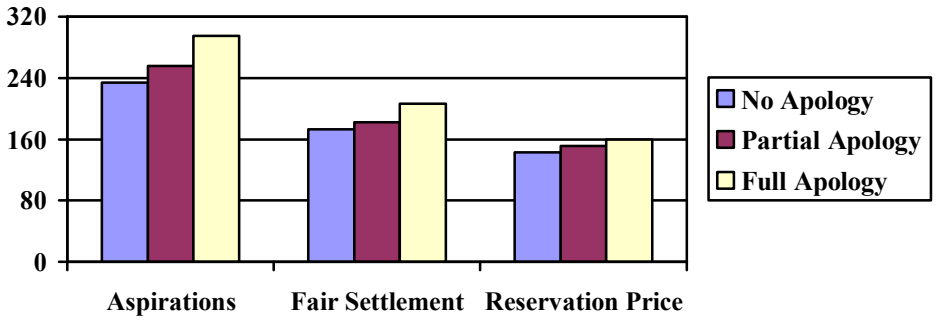
[117] For a more detailed discussion of the relationships among settlement levers, negotiation processes and outcomes, and apologies, see Robbennolt, *Apologies and Settlement Levers, supra* note 3. Separate analyses of variance (ANOVA) were conducted for each settlement lever. Because the distribution of values for each settlement lever was highly skewed, outliers were re-coded to the next highest value within each condition and the analyses were conducted on square-root transformed data.

[118] $F(2,168) = 3.132$, $p = .046$, $\eta^2 = .046$.

[119] $F(2,168) = 2.748$, $p = .067$, $\eta^2 = .032$.

[120] $F(2,170) = 1.070$, $p = .345$, $\eta^2 = .012$. There were no statistically significant effects of evidentiary rule or responsibility on settlement levers.

Figure 1. Effects of Apologies on Settlement Levers



For those attorneys who represented plaintiffs in civil cases, the pattern was similar, but slightly different. For each settlement lever there was a significant interaction between the nature of the apology and the applicable evidentiary rule.[121] For these attorneys the pattern that full apologies tended to result in larger settlement levers than did no apology (with settlement lever values for partial apologies in between), was true only when the attorneys were told that the apology would be admissible under the rules of evidence.[122] When no rule was indicated[123] or the apology was inadmissible,[124] there were no differences in the settlement levers set by the attorneys in the different apology conditions. These plaintiffs' attorneys, therefore, only set different settlement levers in response to an apology being offered when the apology would be admissible as evidence.

b. Effects of Perceptions

In contrast to laypeople, attorneys' assessments of the apology and the information that it conveyed had no significant influence on reservation prices,[125] aspirations,[126] or

[121] Aspirations: $F(2,97) = 3.055$, $p = .020$, $\eta^2 = .112$ (modifying a main effect of apology, $F(2,97) = 3.390$, $p = .038$, $\eta^2 = .065$); Reservation Prices: $F(2,97) = 2.574$, $p = .042$, $\eta^2 = .094$; Fair Settlements: $F(2,97) = 4.334$, $p = .003$, $\eta^2 = .152$ (modifying main effects of apology, $F(2,97) = 3.162$, $p = .047$, $\eta^2 = .061$, and evidentiary rule, $F(2,97) = 3.493$, $p = .034$, $\eta^2 = .067$). For all three settlement levers, there were 3-way interactions between the nature of the apology, the evidentiary rule, and the evidence of fault – but the sample size was too small to confidently examine the simple effects. The pattern of means suggests that the above pattern of apology effects holds when evidence is admissible and fault is ambiguous (i.e., there was not already other evidence of fault) but not when the apology is inadmissible or the offender's responsibility is already clear.

[122] Aspirations: $F(2,36) = 9.263$, $p = .001$, $\eta^2 = .340$; Reservation Prices: $F(2,37) = 3.784$, $p = .032$, $\eta^2 = .170$; Fair Settlements: $F(2,36) = 7.001$, $p = .003$, $\eta^2 = .280$.

[123] Aspirations: $F(2,33) = .821$, $p = .449$, $\eta^2 = .047$; Reservation Prices: $F(2,32) = .629$, $p = .540$, $\eta^2 = .038$; Fair Settlements: $F(2,32) = 1.033$, $p = .368$, $\eta^2 = .061$.

[124] Aspirations: $F(2,37) = .783$, $p = .464$, $\eta^2 = .041$; Reservation Prices: $F(2,39) = .285$, $p = .754$, $\eta^2 = .014$; Fair Settlements: $F(2,38) = .048$, $p = .954$, $\eta^2 = .002$.

[125] $F(1,183) = .535$, $p = .466$, $R^2 = .003$. Similarly, for attorneys who represent plaintiffs in civil litigation, $F(1,114) = .073$, $p = .788$, $R^2 = .001$.

fair settlement judgments.[127] Attorneys' evaluations of their response to the incident, however, had a significant influence on reservation prices[128] and fair settlement judgments.[129] For each of these settlement levers, the more attorneys' evaluations tended to favor the offender (i.e., judgments that the offender was less responsible, less deserving of punishment, less likely to have angered their client, more sympathetic, and more likely to be forgiven by their client), the lower they set the values of each settlement lever. Similarly, attorneys' estimates of their chances of winning the case if it went to court had a significant influence on reservation prices,[130] fair settlement judgments,[131] and, for the total sample, aspirations.[132] In each case, the greater the attorneys' estimates of their chances of winning the case in court, the higher they set the values of each settlement lever.

IV. Implications

A. Effects of Apologies on Attorneys and a Comparison to Litigants

Attorneys' responses to apologies in the context of this case parallel the responses of laypeople in previous studies in a number of ways. First, attorneys assessed apologies and the information communicated by the apologies in ways that were similar to the assessments made by claimants. Both groups assessed full responsibility-accepting apologies more positively than they did partial sympathy-only apologies. Similarly, both attorneys and claimants assessed both of these types of apology more positively than they did no apology.[133] This suggests that attorneys and laypeople made similar judgments about the relative sufficiency of the different types of apologies and that the apologies conveyed similar information to both groups about the degree to which the offender

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[126] $F(1,181) = 2.243$, $p = .136$, $R^2 = .012$. Similarly, for attorneys who represent plaintiffs in civil litigation, $F(1,112) = 1.446$, $p = .232$, $R^2 = .013$.

[127] $F(1,181) = .556$, $p = .457$, $R^2 = .003$. Similarly, for attorneys who represent plaintiffs in civil litigation, $F(1,112) = .441$, $p = .508$, $R^2 = .004$.

[128] $F(1,184) = 8.107$, $p = .005$, $R^2 = .042$. Similarly, for attorneys who represent plaintiffs in civil litigation, $F(1,115) = 4.296$, $p = .040$, $R^2 = .036$.

[129] $F(1,182) = 6.366$, $p = .012$, $R^2 = .034$. For attorneys who represent plaintiffs in civil litigation, this effect was marginally significant, $F(1,113) = 3.379$, $p = .069$, $R^2 = .029$. In contrast, aspirations were not influenced by these evaluations. $F(1,182) = .912$, $p = .341$, $R^2 = .005$ and $F(1,113) = 1.003$, $p = .319$, $R^2 = .009$, for the total sample and the attorneys who represent plaintiffs in civil litigation, respectively.

[130] $F(1,184) = 11.555$, $p = .001$, $R^2 = .059$. For attorneys who represent plaintiffs in civil litigation, this effect was marginally significant, $F(1,115) = 3.623$, $p = .059$, $R^2 = .031$.

[131] $F(1,182) = 11.067$, $p = .001$, $R^2 = .057$. For attorneys who represent plaintiffs in civil litigation, this effect was marginally significant, $F(1,113) = 3.600$, $p = .060$, $R^2 = .031$.

[132] $F(1,182) = 4.576$, $p = .034$, $R^2 = .025$. This effect was not significant for those attorneys who represented plaintiffs in civil litigation, $F(1,113) = 1.314$, $p = .254$, $R^2 = .011$.

[133] *See supra* note 102; compare to Robbennolt, *Apologies and Settlement Levers*, *supra* note 3, at 359. Mean ratings are also similar: Attorneys: No Apology mean = 3.23; Partial Apology mean = 4.35; Full Apology mean = 5.25; Laypeople: No Apology mean = 2.9; Partial Apology mean = 4.2; Full Apology mean = 5.2.

thought he or she was responsible, the offender's regret, the degree to which the offender would be careful in the future, the degree to which the offender's conduct was offensive, the degree to which the offender respected the client, and the offender's moral character.

Similarly, the same factors influenced expectations about success at trial for both attorneys and claimants. Both attorney and claimant expectations of success were influenced by the evidence relating to the other party's fault such that greater evidence of fault was associated with higher expectations of winning.[134] In addition, both attorney and claimant expectations were influenced by apologies in the same ways – both groups had higher expectations of winning when the injured party received a full responsibility-accepting apology as compared to partial, sympathy only, apology.[135]

In contrast, attorneys and claimants differed in how apologies influenced their evaluations of their likely responses to the incident -- their evaluations of the offender's responsibility, the client's anger, their own sympathy for the offender, the client's inclination to forgive the offender, and their own judgment that the offender should be punished. Claimants' evaluations tended to be more favorable to the offender following an apology.[136] In contrast, attorneys' evaluations were not influenced by apologies.[137]

In addition, apologies influenced attorneys' settlement levers in ways that are different from the ways in which they have been shown to influence claimants' settlement levers. While there was not a statistically significant effect of apologies on reservation prices for either group, apologies pushed attorneys' aspirations and estimates of fair settlement values in a different direction than they did claimants'. Specifically, attorneys whose client received a full apology set somewhat higher aspirations and made somewhat higher estimates of a fair settlement value than did attorneys whose client received no apology.[138] In contrast, apologies have been shown to decrease laypeople's aspirations and estimates of fair settlement value under some circumstances.[139]

Interestingly, this effect was further qualified for plaintiffs' attorneys. The pattern of setting higher values for settlement levers when an apology was offered was significant for this subgroup of attorneys only when it was made clear that the applicable evidentiary

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[134] *See supra* note 112-113; compare to Robbennolt, *Apologies and Settlement Levers*, *supra* note 3, at 362.

[135] *See supra* note 114-115; compare to Robbennolt, *Apologies and Settlement Levers*, *supra* note 3, at 359.

[136] Robbennolt, *Apologies and Settlement Levers, supra* note 3, at 361 (finding that respondents who received apologies made more positive evaluations). *See also* Robbennolt, *Apologies and Legal Settlement, supra* note 3, at 489 (finding that respondents who received a full apology made more positive evaluations).

[137] *See supra* note 109. Instead, attorneys evaluations were influenced by the evidence of the offender's responsibility. Robbennolt, *Apologies and Legal Settlement, supra* note 3, at 489.

[138] *See supra* notes 118-119.

[139] *See* Robbennolt, *Apologies and Settlement Levers*, *supra* note 3, at 362-65. While each group's reservation prices followed the same general pattern as the other settlement levers, neither group's reservation prices differed significantly among the different apology conditions. *See supra* note 120 (attorneys) and Robbennolt, *Apologies and Settlement Levers*, *supra* note 3.

rule made such apologies admissible.[140] That is, settlement levers were higher only when full apologies were offered *and* those apologies were not made inadmissible by the rules of evidence. This may suggest that attorneys are more attendant to the legal effects of the evidentiary rules than are litigants.

B. Attorney-Client Relations

These results suggest that clients and attorneys value apologies differently and that attorneys have instincts about the functions of apologies that are inconsistent with the ways in which their clients react to apologies. Such a divergence is consistent with concerns about a disconnect between the perceptions and interests of attorneys and clients. Many commentators are concerned about the risk that attorneys' focus on the relevant legal rules will dominate the negotiation process and the ultimate settlement of the dispute, to the exclusion of the non-legal interests of the parties.[141] In particular, many have argued that attorneys are inclined to dismiss apologies, despite evidence that they are valued by clients.[142] Accordingly, when defendants apologize, attorneys may not recognize the value that their clients attach to those apologies. This may lead the attorneys to resist settlement or to push for trial where their clients might otherwise prefer to settle.[143] Conversely, attorneys may not recognize the importance of clients' demands for apologies that are not forthcoming. They may not, therefore, entirely understand their clients' or opposing clients' resistance to settlement in the absence of apologies. For plaintiffs' attorneys, this may result in a reduced ability to "bring [the] client along" to accept a settlement. Similarly, this lack of focus on the value of apologies may lead defense attorneys to dismiss plaintiff requests for apology.[144] In addition, defense

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[140] *See supra* notes 121-124.

[141] *See, e.g.,* Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (describing nonmonetary interests); Sternlight, *supra* note 57.

[142] *See, e.g.,* Levi, *supra* note 84, at 1186-87 ("Because apologies are beyond the ambit of traditional adversarial behavior, lawyers may dismiss apology as irrelevant or treat any mention of it with suspicion."); Sternlight, *supra* note 57, at 324-25 ("Lawyers will also tend to dismiss, as fluff, offers or requests for apology.").

[143] Sternlight, *supra* note 57, at 324-325 ("Their [lawyers'] quest for justice or to protect their clients against an unfair result may lead them to insist on going to trial.").

[144] *See* Williams, *supra* note 17, at 24-25 & n. 75 (finding that in 53% of cases that went to trial, settlement failed due to lawyer inability to "bring [the] client along"); Sternlight, *supra* note 57, at 321-22 ("Because the attorney does not share her client's nonmonetary interests, she may regard these interests as having little or no value. . . . Yet, if these nonmonetary interests are important to the client, their absence may well prevent a settlement from being reached."). *See also* Kritzer, *supra* note 57 (discussing strategies attorneys use to bring clients along). For examples of instances in which apologies were viewed by litigants as important interests, see, e.g., Piper Fogg, *Minnesota System Agrees to Pay $500,000 to Settle Pay-Bias Dispute*, CHRON. HIGHER EDUC., Feb. 14, 2003, at A12 (describing class-action plaintiff's disappointed reaction to the settlement: "'I want an apology,' she said, 'and I am never going to get it'"); Editorial, *The Paula Jones Settlement*, WASH. POST, Nov. 15, 1998, at C6; Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 442 (1998); Carl D. Schneider, *What It Means To Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265, 274 (2000) (describing negotiations stalling "over the

attorneys may advise their clients against apologizing because their perspective suggests that apologies will lead to less favorable settlement terms in addition to any increased liability risk.[145] Any of these disconnects may interfere with attorneys' ability to settle cases to the best satisfaction of their clients.[146]

At the same time, however, it is possible that that the differences in the ways in which apologies affect claimant and attorney settlement levers could serve to bring attorney and client expectations closer in line with each other. Many have argued that plaintiffs bring with them unrealistic expectations about the value of a case[147] and that plaintiffs' attorneys work to manage such expectations and to "sell" proposed settlements to clients.[148] If this is true, then a decrease in plaintiffs' aspirations and a corresponding increase in their attorneys' aspirations could serve to bring attorney and client aspirations closer together, at least in some cases.[149]

The different responses that attorneys and clients have to apologies offered in the context of litigation – whether these responses ultimately push them closer together or

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plaintiff's demand for an apology, even after the sides had agreed on the damages to be paid" (emphasis omitted)).

[145] *See* Levi, *supra* note 84, at 1186-87 ("If a party asks for an apology, the opposing lawyer is likely to regard that party as intransigent and to protect her client from the risk that evidence of apology could become a basis for assigning liability in a subsequent legal proceeding.").

[146] *See* Melissa L. Nelkin, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 423 (1996) ("Clients inevitably suffer when their lawyers insist on divorcing the professional encounter from the emotional underpinnings of the dispute involved. Client dissatisfaction with legal representation often results from the lawyer's inability to see the client's emotional self as anything but an impediment to sensible, rational management of the legal problem . . ."); Sternlight, *supra* note 57, at 271 ("These disparities between the perceptions and incentives of lawyer and client may at times impede settlements that would serve the best interests of the client or principal. Psychological or economic divergences between lawyers and their clients will also sometimes cause a settlement to be reached that is inappropriate in that it does not serve the client's best interests.").

[147] *See, e.g.,* Kritzer, *supra* note 57. A number of studies have explored the influence of media on public perceptions of civil case outcomes. *See* Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5 (2003) (reviewing studies).

[148] *See, e.g.,* Kritzer, *supra* note 57; Williams, *supra* note 17 (discussing failures to "bring clients along").

[149] Thus, obtaining an apology could be one way in which attorneys attempt to "cool their clients out" – i.e., prepare them to take smaller monetary settlements. *See* Erving Goffman, *On Cooling the Mark Out*, 15 PSYCHIATRY 451 (1952). *See also* ROSENTHAL, *supra* note 71, at 110 (describing the process of "preparing the client to accept less than he anticipates and persuading him that it is in his best interest to do so" as "cooling the client out"). Note that attorneys and claimants responding to the materials used here did not appear to have converging expectations when apologies were offered. However, the materials asked participants to assume that there would be no subrogation. Attorneys may have come to higher overall valuations of the case than did claimants due to their understanding of the collateral source rule. Interesting future research could explore the conditions under which the divergence in attorney and client reactions to apologies serve to exacerbate the differences in their expectations and vice versa , as well as the consequences of such effects.

pull them apart – are likely to affect the discussion between attorney and client about settlement. It is not clear how, or even if, this disparity in response to apologies gets negotiated between attorneys and clients – and the present data do not provide evidence about how that negotiation is enacted.[150] Nonetheless, given the different inclinations of attorneys and claimants with regard to apologies, the involvement of attorneys in legal disputes has the potential to change the dynamics of negotiations involving apologies. Thus, attorneys must give special consideration to how to appropriately advise clients about settlement when an apology is at issue. In particular, the present data offer some insight into how attorneys can assist plaintiffs by balancing respect for the interests that clients may have that are addressed by apologies while also providing a perspective that helps clients to evaluate the credibility and legal consequences of an apology offered in the context of litigation.

Importantly, clients bring to the attorney-client relationship a comparative advantage in their ability to identify and weigh their own non-legal, psychological, social, and emotional interests – including their need, or lack thereof, for apologies.[151] A disconnect between how attorneys and litigants respond to apologies might suggest that attorneys have to take extra care to understand the need that clients may have for an apology or other non-monetary interests that an apology might serve. Attorneys, therefore, may need to make efforts to step outside of familiar legal and expected value calculations to recognize that their clients' preferred ends may diverge from such rational analysis.[152] While rational, economic calculations involving the likelihood of winning and the likely recovery if successful may be standard fare to legal analysts, clients may expect the claiming process to serve other goals as well.[153] In addition to obtaining compensation,

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[150] This may be an area in which attorneys and clients will negotiate power. *See* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1991-1992). *See also* KRITZER, *supra* note 62, at 806-12 (discussing preparing clients for settlement, selling the settlement, and dealing with balky clients).

[151] Clients do encounter some difficulties in evaluating their interests. Research into affective forecasting has demonstrated that people are generally able to identify the type of response they will have to an event (i.e., the particular emotion and whether it is positive or negative), but are less able to predict the intensity of that response or its duration. *See, e.g.,* Jeremy Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 IND. L. J. 155 (2005); Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345 (2003) (reviewing research on affective forecasting). Attorneys, therefore, may also be able to assist clients by helping them to better assess what it is that they want. *See* Chris Guthrie & David F. Sally, *Miswanting, in* THE NEGOTIATOR'S FIELDBOOK 277 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006); Jean R. Sternlight & Jennifer K. Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. DISP. RESOL. 437 (2008).

[152] *See* Sternlight, *supra* note 57, at 330 (arguing that "where an attorney pushes a client to accept a settlement that, from a purely financial perspective, is rational, the attorney may not increase that client's utility or satisfaction").

[153] Sternlight, *supra* note 57, at 355 ("Although attorneys often think about cases primarily in terms of likelihood of success on the merits and consequential dollar value, either in court or in a settlement, they should recognize that clients' interests are not necessarily so narrow."). *See also* Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1093 (2003) (arguing that decision makers make decisions to balance competing goals).

claimants may be concerned with being treated fairly and with respect, with exacting vengeance, with gaining assurance that the wrongful behavior will not recur, and so on.[154]

One of the primary benefits of resolving disputes through the settlement negotiation process rather than through an adjudication is thought to be that, in negotiation, the parties are able to take into account a variety of relevant norms and to incorporate a range of remedies that might not be considered in an adjudication – that is, "the universe and operation of norms in dispute-negotiation is typically open ended."[155] Attorneys who are most adept at integrating these varying client goals and decision norms with the legal realities of cases as they counsel clients and craft settlement agreements are likely to best satisfy the interests of their clients. Being attuned to client desires for apologies may, thus, serve the interests of both client and attorney.[156] It is important in this regard to recall that, in addition to showing a divergence in how attorneys and clients respond to apologies, the data also show a striking similarity in how attorneys and laypeople understand and assess apologies. Thus, attorneys may not find it difficult to understand clients' perception of particular apologies and the information that an apology can convey. Beyond this, attorney awareness that their instincts about the implications of that understanding differ from those of their clients can help them address this divergence as they counsel clients.[157]

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[154] Menkel-Meadow, *supra* note 141, at 2677 ("[P]eople and entities in disputes may have a wide variety of interests (of which legal principles may be one class) and may decide that, in any given case, social, psychological, economic, political, moral, or religious principles should govern the resolution of their dispute."); Sternlight, *supra* note 57, 302-06 (detailing a number of nonmonetary goals that parties may have; rejecting a monetary settlement "may reflect a rationality that is broader than the mere maximization of wealth"); Vincent et al., *supra* note 33 (identifying four primary reasons plaintiffs pursued litigation: "accountability – wish to see staff disciplined and called to account; explanation – a combination of wanting an explanation and feeling ignored or neglected after the incident; standards of care – wishing to ensure that a similar incident did not happen again; and compensation – wanting compensation and an admission of negligence").

[155] Eisenberg, *supra* note 18, at 644-45. Eisenberg argues, further, that a process that incorporates non-legal or competing norms is not less principled than a process based on legal rules: "whether a process turns heavily on principle depends on the extent to which principles determine the outcome, not on the nature of the principles nor the precise manner in which they determine the outcome." *Id*. at 645. *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

[156] Client satisfaction is likely to result in improved attorney reputation and increased referrals. *See* KRITZER, *supra* note 62 (arguing that contingency fee lawyers rely on past clients for referrals and that lawyers obtain reputations for whether they serve client interests well). *See also* Levi, *supra* note 84, at 1178-68 (arguing that "[b]ecause apology may improve the dispute resolution experience for both parties, lawyers concerned about client satisfaction should consider attending more carefully to demands for apology").

[157] Law schools also have a role to play in helping to develop a skill set that includes both analytical acumen and the ability to engage the emotional aspects of disputes. *See* James R. Coben, *Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map*, 50 U. FLA. L. REV. 735 (1998); Guthrie, *supra* note 72, at 185 (arguing that law school ought to teach students "not only to *think* like lawyers but also to *feel* like lawyers").

There is much concern, however, about the possibility that plaintiffs will be taken advantage of by insincere apologies or that plaintiffs are not attentive enough to law (e.g., evidentiary rules) and will improvidently forfeit legal entitlements.[158] In particular, there is concern that plaintiffs will be "duped by communication strategies into relinquishing valuable legal rights, which can actually exacerbate the economic dimension of suffering."[159] Attorneys, who are likely to have superior knowledge of the legal rules, heightened analytical skills, and an objective detachment from the emotion of the dispute,[160] may be able to moderate the potential for such effects by ensuring that the clients make informed settlement decisions.

Ideally, offenders would not offer insincere apologies. As Jonathan Cohen has argued, "[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."[161] Nonetheless, it would not be surprising if alleged offenders sometimes offered insincere or carefully crafted apologies for purely strategic reasons, divorced from feelings of responsibility and remorse.[162] Such insincere apologies may

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[158] *See, e.g.,* Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 DEPAUL L. REV. 601, 608 (2005-2006) (arguing that as attorneys "[w]e need to be self-conscious about what we, and our clients, demand in exchange for forgiveness"). For debate over the appropriateness of private settlement and issues of self-determination, see Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV 1339 (1994); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985); Menkel-Meadow, *supra* note 141; Ellen Waldman, *Substituting Needs for Rights in Mediation: Therapeutic or Disabling?*, 5 PSYCHOL. PUB. POL'Y & L. 1103 (1999); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

[159] Taft, *supra* note 158, at 609. Taft concludes that "[s]eeing our enemy on bended knee may alleviate suffering tied to the human inclination for revenge, but when it leads someone who has suffered a serious injury to relinquish a meritorious claim, it can indeed become a Trojan horse." *Id*. at 613-14. *See also* O'Hara, *supra* note 2, at 1079 (positing that apologies offered by doctors in medical malpractice cases may cause "meritorious claims . . . to drop out of the pool"); O'Hara & Yarn, *supra* note 2, at 1178 (positing that "in the event that a victim chooses to forgive the transgressor, he is willing to accept less than full compensation for his injury").

[160] *See supra* notes 66-83.

[161] Cohen, *supra* note 37, at 1459. *See also* Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903 (2005); Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247 (2005).

[162] *See, e.g.,* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999); O'Hara & Yarn, *supra* note 2, at 1186 ("[A]pology can be used as a tool for organizations to strategically take advantage of individual victims' instincts to forgive in the face of apology."); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 440 (arguing that with respect to criminal law, "a practical problem with giving credit for remorse and repentance is that they are so easy to fake; and our grounds for suspecting fakery only increase when a reward . . . is known to be more likely granted to those who can persuade the relevant legal authority that they manifest these attributes of character. . . . One might even suspect, indeed, that the truly remorseful and repentant wrongdoer . . . would not seek a reduction in punishment but would rather see that punishment as one step on a long and perhaps endless road of atonement").

serve some goals that plaintiffs have (e.g., serving to acknowledge the wrong).[163] However, such apologies may fail to serve other plaintiff goals (e.g., achieving a change in behavior) and intuitively seem less desirable than those offered out of sincere remorse.[164] About apologies offered for strategic purposes, Professor Ed Dauer comments, "[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."[165]

If litigants are able to detect and reject insincere apologies, there might be less cause for concern. This is because the perceived sincerity of an apology matters to its recipients. People do not have the same favorable responses to explicitly insincere apologies that they have to sincere apologies,[166] and insincere apologies may actually cause people to react negatively.[167] Thus, as Professor Dale Miller has argued, when injured parties "perceive apologies to be insincere and designed simply to 'cool them out,' they often react with more rather than less indignation."[168]

It is not clear, however, how well injured parties are able to detect and respond to insincerity, particularly when efforts are made to appear sincere.[169] On the one hand,

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[163] *See* Robbennolt et al., *supra* note 153.

[164] *See* TAVUCHIS, *supra* note 6, at 13 ("[W]e not only apologize *to* someone but also *for* something.") and at 19 ("An apology . . . requires *not* detachment but acknowledgment and painful embracement of our deeds, coupled with a declaration of regret.").

[165] Edward A. Dauer, *Apology in the Aftermath of Injury: Colorado's "I'm Sorry" Law*, COLO. LAW. Apr. 2005, at 47, 51.

[166] *See* Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. MGMT. 165 179-80 (2004) (finding that apologies described as sincere resulted in greater willingness to reconcile than did apologies that were not sincere). Similarly, the sincerity of an excuse influences its effectiveness. See review of studies on excuses in Jerald Greenberg, *Looking Fair vs. Being Far: Managing Impressions of Organizational Justice*, 12 RES. ORG. BEHAV. 111, 130 (1990); *see also* Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanations to Manage Conflict*, 46 HUM. REL. 349 (1993).

[167] *See, e.g.,* Daniel P. Skarlicki et al. *When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome*, 34 J. APPLIED SOC. PSYCHOL. 322, 336 (2004) (finding that unfair offers in an ultimatum game that were accompanied by apologies were more likely to be rejected than the same unfair offers given without such a seemingly manipulative apology). *See also* Robbennolt, *Apologies and Legal Settlement*, *supra* note 3 (finding that under some circumstances mere expressions of sympathy were seen as less sincere and had detrimental effects).

[168] Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 538 (2001). *See also* Murphy, *supra* note 162 ("[W]e 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.").

[169] *Compare* WILLIAM IAN MILLER, FAKING IT 78 (2003) (arguing that apologies are easy to "fake") and Murphy, *supra* note 162 (arguing that remorse and repentance are easy to fake) *with* Orenstein, *supra* note 2, at 241 (arguing that "the emotion of contrition is hard to fake in person"). *See also* Taft, *supra* note 2.

claimants are sensitive to the differences in content conveyed by apologies that accept responsibility for having caused harm and statements that only express sympathy for injuries.[170] Similarly, the effectiveness of apologies is influenced by a number of factors that might be seen as signals to the sincerity of the apology. Thus, apologies that include promises to forbear from similar wrongful conduct in the future,[171] apologies that are accompanied by offers of compensation,[172] and apologies that are properly timed[173] all produce more favorable reactions than apologies without these features. These factors may operate, at least in part, by altering the perceived sincerity of the apology.

On the other hand, there is also evidence that people are inclined to respond favorably even to apologies that seem to be insincere[174] and that those who reject apologies, even unconvincing apologies, are judged less favorably than those who accept them.[175] Thus, an apology "script" that contemplates that an apology will be followed by acceptance of that apology may hold sway over apology recipients' behavior. In addition, norms of reciprocity may prescribe the acceptance of apologies. The reciprocity norm demands "that we should try to repay, in kind, what another person has provided us."[176]

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[170] *See* Robbennolt, *Apologies and Legal Settlement*, *supra* note 3. In addition, contextual factors that might be thought to be indicia of sincerity may influence lay reactions to apologies. *See also* Robbennolt, *Apologies and Settlement Levers*, *supra* note 3, at 368. Attorneys are also sensitive to differences in content conveyed by apologies. *See supra* notes 101-102.

[171] *See* Scher & Darley, *supra* note 8.

[172] *See* Scher & Darley, *supra* note 8, at 133; Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 477-480 (2004).

[173] *See* Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005) (finding that apologies were more effective after sufficient time for the injured party to express his or her concerns and for the wrongdoer to express understanding of those concerns); Skarlicki et al., *supra* note 167 (experimental study using the ultimatum game finding that ex ante apologies were not effective); Tomlinson et al., *supra* note 166, at 179-80 (finding greater willingness to reconcile when an offender's "restorative action" came quickly after the breach than when it was delayed).

[174] *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) (finding a tendency for participants to accept even an apology from a repeat offender); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007). *See also* MILLER, *supra* note 169, at 92 (arguing that "the victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology").

[175] *See* Bennett & Dewberry, *supra* note 174, at 14-16 (finding that participants rated victims most favorably when they accepted a wrongdoer's apology and least favorably when they rejected the apology; victims who rejected "unconvincing" apologies were given ratings similar to victims who rejected more convincing apologies); Risen & Gilovich, *supra* note 174, at 426 (finding that the recipient of an apology was judged more favorably when she accepted either a spontaneous or a coerced apology than when she rejected either apology).

[176] *See* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 19 (1993).

Concessions offered by one party to a negotiation trigger, under this norm, the obligation to make a reciprocal concession.[177] If an apology offered by a defendant is viewed as a "concession," victims and observers may respond favorably because they feel an obligation to respond with a reciprocal "concession" of their own.

Finally, there is no evidence that laypeople distinguish among apologies that are offered in the face of differing rules of evidence.[178] Previous research has found that claimants make similar evaluations of apologies offered subject to different evidentiary rules.[179] Litigants may focus on personal factors (e.g., this person must be sorry) to the neglect of situational factors (e.g., this apology didn't cost them anything) when making causal attributions about the apologetic behavior.[180] Accordingly, they may not be sensitive to variations in the evidentiary value of apologies that result from these different evidentiary rules.

While additional research examining the determinants of perceived sincerity in the context of legal apologies is necessary, the existing research suggests some cause for concern. To the extent that injured parties feel social pressure to concede in the face of an apology or do not appreciate the legal ramifications of the apology, they are potentially vulnerable to insincere or strategic apologies. Attorney advisors may be able to play an important role in this regard. First, recent research has shown that observers are more likely to distinguish between sincere and insincere apologies than are the direct

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[177] *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829, 833-835 (2004).

[178] *See* Robbennolt, *Apologies and Legal Settlement*, *supra* note 3; Robbennolt, *Apologies and Settlement Levers*, *supra* note 3. Note, however, that an apology can be sincerely offered even though it is subject to a rule protecting it.

[179] *See* Robbennolt, *Apologies and Legal Settlement*, *supra* note 3; Robbennolt, *Apologies and Settlement Levers*, *supra* note 3.

[180] *See* Robbennolt, *Apologies and Legal Settlement*, *supra* note 3. As a general matter, observers have a tendency to attribute people's attitudes and behavior to dispositional factors rather than situational factors. This is known as the fundamental attribution error. 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 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 173 (1977) ("People's inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior, has been termed the 'fundamental attribution error.'"). For empirical demonstrations, see John M. Darley & C. Daniel Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973); Harold H. Kelley et al., *A Comparative Experimental Study of Negotiation Behavior*, 16 J. PERSONALITY & SOC. PSYCHOL. 411 (1970); Michael W. Morris et al., *Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits*, 77 J. PERSONALITY & SOC. PSYCHOL. 52, 52 (1999); Paula R. Pietromonaco & Richard E. Nisbett, *Swimming Upstream Against the Fundamental Attribution Error: Subjects' Weak Generalizations from the Darley and Batson Study*, 10 SOC. BEHAV. & PERSONALITY 1 (1982); Dean G. Pruitt & Julie L. Drews, *The Effect of Time Pressure, Time Elapsed, and the Opponent's Concession Rate on Behavior in Negotiation*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 43 (1969).

recipients of apologies.[181] In contrast to direct recipients, observers do not feel obligated to accept insincere apologies, and when observers do reject such apologies they do not expect to be and are not judged more harshly nor do they judge themselves differently.[182] Thus, the social constraints that may limit recipients' responses to apologies do not operate they same way when it comes to third party observers.

Second, the present study provides evidence that attorneys, while understanding the content of apologies in ways that are similar to laypeople, have a different understanding of the legal implications of apologies. Thus, attorneys are comparatively better positioned to use their analytic skills and knowledge of the law to help their clients evaluate the merits of the case, the context and nature of the apology, the legal consequences of the proffered apology, the effects of any applicable evidentiary rules, and the legal and economic merits of any particular settlement decisions. The results obtained here suggest that attorneys have an important role to play in using these skills to ensure that clients have considered the relevant legal factors.[183]

When attorneys engage in "prudential discussions . . . about the relative merits of particular courses of action" and help clients to understand their legal rights, they are serving an important function.[184] The legal counseling process, therefore, should include discussion of the relevant evidentiary rules and the implications of those rules for the case. As Professor Jackie Nolan-Haley argues in the context of mediation: "clients must have a general knowledge about the relevant law governing their case, so that during

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[181] Risen & Gilovich, *supra* note 174 (finding that targets and observers responded differently to sincere and insincere apologies). Similarly, observers of false flattery are less likely to believe it than are the targets of such flattery. *See, e.g.*, Randall A. Gordon, *Impact of Ingratiation on Judgments and Evaluations: A Meta-Analytic Investigation*, 71 J. PERSONALITY & SOC. PSYCHOL. 54 (1996); Roos Vonk, *Self-Serving Interpretations of Flattery: Why Ingratiation Works*, 82 J. PERSONALITY & SOC. PSYCHOL. 515 (2002).

[182] Risen & Gilovich, *supra* note 174, at 426-430.

[183] *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (characterizing the role of lawyers as helping to ensure just outcomes by, in part, making sure that clients understand choices); Sternlight, *supra* note 57, at 365 (arguing that in the context of mediation "attorneys must sometimes play a more dominant protective role to ensure that their clients are not duped, harmed, coerced, or otherwise taken advantage of in the course of mediation"); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 854 (1997-1998) ("[L]awyer participation [in mediation] should be encouraged to improve the fairness of the mediation. Research on the balance between the need to preserve fairness and the fear that lawyers will disrupt the effectiveness of mediation sessions indicates that the balance weighs in favor of lawyer inclusion."). *See also*, Cohen, *Advising Clients to Apologize*, *supra* note 2, at 1067 ("If, as the recipient of an apology, you know that the apologizer has apologized in such a way as to ensure insulation from legal liability, you may attach less worth to that apology than otherwise, and a plaintiff's lawyer should be sure to point this out to her client.").

[184] Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1381-82 (1998). *See also* DAVID BINDER ET AL., LAWYERS AS COUNSELORS 273-274 (1991) (discussing importance of helping clients explore consequences of proposed settlements).

deliberation they may meaningfully evaluate alternative courses of actions. Clients' knowledge of their legal rights honors the principle of informed consent."[185] Similarly, "when [clients] understand what their agreements mean and what legal entitlements they may have waived in making such agreements, then they may be said to have truly exercised self-determination."[186] Clients may still appropriately choose to forfeit such legal entitlements,[187] but will have done so with an understanding of the legal consequences. The same is true of client decision making about settlement when an apology is at issue – a client who accepts a settlement offer understanding the implications of an apology has made an informed decision.

The challenge for the legal counselor is to help the client to integrate varying client goals and an array of decision norms with the legal realities of the case in order that the client may understand the consequences of choosing to accept or reject an offer of settlement. In incorporating these varying norms into the client counseling and settlement negotiation process, attorneys walk a delicate balance. On the one hand, client satisfaction depends on attorney attention to client goals. At the same time, to serve as effective counselors, attorneys must ensure that their clients understand the legal considerations and the implications of the law for the clients' goals. In striking this balance, Professors Korobkin and Guthrie have argued that:

> When a lawyer recognizes that a client's expressed litigation preference is inconsistent not only with expected financial value analysis but also with the maximization of the client's desired ends, the lawyer should intervene in the decision making process. At the same time, though, the lawyer should recognize that a client's stated preference might be utility maximizing even if it diverges from expected value analysis. If the lawyer suspects this to be the case, she should avoid intervening in client decision making to ensure that she does not talk the client out of an appropriate decision.[188]

In concrete terms, then, when an apology has been offered, the attorney can assist the client in identifying and understanding the legal and non-legal implications of the apology. First, attorneys can help their client assess the significance and value of the apology offered for the client. In evaluating a potential settlement, it is useful for both

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[185] Nolan-Haley, *supra* note 184, at 1385. *See also* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 836 (1999) (clients "should have an understanding of the range of possible outcomes and laws that may affect those outcomes").

[186] Nolan-Haley, *supra* note 185, at 813.

[187] *See id.* at 836-37 (arguing in the context of mediation that "This is not to suggest that, once informed of their legal entitlements, parties will automatically seek legal remedies in the mediation process. Other nonlegal values may matter more. But if the principle of informed consent means anything in court mediation, it means that parties should be able to decide for themselves what values do matter. They should know what legal entitlements they are waiving in the name of autonomy and self-determination").

[188] Korobkin & Guthrie, *supra* note 57, at 135-36.

attorney and client to understand the importance of the apology to the client. As noted earlier, the client is better positioned to play a lead role in undertaking this assessment, guided and assisted by the attorney.[189] Second, attorneys can explain the evidentiary relevance of the apology to the case so that the client understands the legal context, and can help the client in assessing the merits of the settlement offer. The client, then, in consultation with her attorney, can assess the degree to which she is satisfied with the settlement offer (and the apology) given the circumstances of the case, the nature of the apology, and the legal consequences. By helping the client identify and understand the potential legal and non-legal consequences of an apology, the attorney can help the client made an informed decision about how to respond to the settlement offer.[190] In this way, plaintiffs' attorneys may be able to protect clients' legal entitlements, while leaving room for clients to value apologies.

In other circumstances, plaintiffs' attorneys may have clients who resist settling in the absence of an apology. Understanding the significance and value of an apology to a client is useful under these circumstances as well. First, recognizing a client's desire for an apology may lead to the consideration of options for settlement that include non-monetary components from which the client may gain more utility. Alternately, an attorney who is aware of a client's desire for an apology can raise with the client the possibility that the other party's failure to apologize or to apologize sufficiently stems from the situational constraints of the legal system. There is some evidence from previous studies that drawing attention to the legal rules of evidence may moderate the negative effects of an opponent's failure to apologize.[191] Such insight may enable a client to accept a settlement offer even when no apology is forthcoming.[192]

C. Mediation and Apologies

The results of this research also suggest that mediation may be a process within which apologies in the context of dispute settlement can be usefully addressed.[193] In mediation,

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[189] *See* BINDER ET AL., *supra* note 184.

[190] *See* Nolan-Haley, *supra* note 184, at 1386-87 (describing how the attorney and client can combine this information "in order to achieve a contextualized understanding for decision-making").

[191] *See* Robbennolt, *Apologies and Settlement Levers*, *supra* note 3, at 372 (finding that when participants "were explicitly told that apologies were not protected, [they] made more positive assessments of offenders who did not apologize, and made more positive assessments of offenders who offered partial apologies").

[192] For discussion of how attorneys/agents can "enhance cooperation" more generally, *see, e.g.*, Gilson & Mnookin, *supra* note 57, at 512 (arguing that "lawyers may allow clients to cooperate in circumstances when their clients could not do so on their own"); Rachel Crosen & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331 (1997).

[193] *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 116-137 (2d. ed. 1992); Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOT. J. 221, 221 (1987); Levi, *supra* note 84; Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265 (2000). *See also* Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 L. & CONTEMP. PROBS. 185 (1997) (giving examples of apologies in mediation).

a neutral third-party assists disputants with the negotiation process, but has no authority to impose a resolution.[194] Because many states provide that statements made in mediation are not admissible in subsequent legal proceedings,[195] defendants and defense attorneys may be more comfortable offering apologies in mediation. But perhaps more importantly for the present discussion, the mediation process was designed, in part, to allow parties to play a central role in the negotiation process and to determine for themselves the norms that would govern the resolution of their dispute.[196] These characteristics of the mediation process have important implications for addressing the differing ways in which disputants and attorneys respond to apologies.

First, allowing parties to determine the norms by which to resolve their dispute allows disputants to introduce non-monetary factors -- such as apology -- into the discussion. Indeed, Professor Carl Schneider has argued that apology

> "is embedded in the very nature of the [mediation] process. Mediation, after all, is frequently about disputes in which at least one party feels injured by the other. Along with negotiation over the facts of the case, demand for compensation, and denunciation of the other side, there is often a felt need for some acknowledgment of harm done, a need for some acceptance of personal responsibility for the injury inflicted -- in short, an apology."[197]

Mediation, then, provides parties with an occasion to communicate desire for apology to the other side and can be a process that is designed to facilitate such conversations.[198]

Second, when the parties are at the table for the negotiation discussions, they are able to communicate directly with each other, rather than relying solely on their attorneys to conduct the negotiation.[199] In this regard, Professor Jean Sternlight has noted that "[m]ediation is an extremely valuable dispute resolution technique precisely because it can potentially help to overcome problems created by the conflicts of interest and

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[194] *See generally* Riskin, *supra* note 72.

[195] *See supra* note 13. Apologetic statements made in mediation may also be protected under rules protecting statements made in settlement negotiations more generally. *See supra* note 12.

[196] *See generally* Welsh, *supra* note 158. *See also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) (emphasizing self-determination). *But cf.* Welsh, *supra* note 158 (arguing that the value of party self-determination has been diluted in court-connected mediation programs).

[197] Schneider, *supra* note 193, at 269. See also Levi, *supra* note 84.

[198] Sternlight, *supra* note 57, at 342 (arguing that mediation "offers parties an opportunity to voice their requests for nonmonetary relief that their attorneys may not have emphasized").

[199] *Id.* at 339 (arguing that "one of the greatest and yet unsung benefits of mediation" is that parties "can learn about various aspects of the dispute on their own rather than through their lawyer's filter" and "can express themselves directly instead of relying on their lawyers to be their voice").

divergent psychologies between lawyers and their own clients."[200] This function of mediation may be particularly important given the divergence in reactions to apologies by disputants and attorneys demonstrated in this research. In mediation, the injured party can voice his need for an apology in a context in which the offender can hear and respond to that need directly, without translation by the attorneys, who may have a differing perspective on the role of apologies.

Importantly, mediation offers a forum in which the parties themselves can participate directly in the settlement negotiation discussions, while still being assisted by the mediator and advised by their attorneys. A skilled mediator may be able to help create the opportunity for a discussion among the disputants that involves acknowledgement and apology, and to facilitate that discussion.[201] Moreover, a skilled mediator may be able to facilitate the negotiation that may need to occur between attorney and client, helping each to see the perspective of the other. In addition to the mediator, the attorneys are still available to counsel clients and can still advise clients as to the legal consequences of apologies or particular settlements.[202] Just as in other counseling contexts, however, attorneys should be sensitive to the fact that their clients may value apologies in ways that diverge from their own.[203]

The findings that attorneys have somewhat different responses to apologies also have implications for attorneys who serve in the role of mediator. Just as attorneys may not value apologies in the same ways as do their clients when they are in the role of counselor, attorneys as mediators may not be as attuned to disputants' needs to give or receive apologies as would non-lawyer mediators. Professor Chris Guthrie has argued more generally that "mediation is highly unlikely to be a purely facilitative process as long as lawyers serve as mediators."[204] Instead, lawyers may be best suited to serve as mediators under circumstances in which a more evaluative form of mediation is appropriate.[205] Similarly, there may be challenges to implementing mediation as a

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[200] *Id.* at 273.

[201] *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 94 (1994); Levi, *supra* note 84, at 1193; Sternlight, *supra* note 57, at 343. *See also* Schneider, *supra* note 193, at 277 (noting that additional consideration ought to be given to "whether preparing people to recognize, accept, and respond to opportunities for apology is necessary or properly the role of the mediator; [and] the place of apology in various kinds of mediation").

[202] *See also* Sternlight, *supra* note 57, at 345 ("[L]awyers often have an important role to play in protecting their clients during the course of a mediation and ensuring that any agreement that is reached is fair to the client of otherwise appropriate.").

[203] *But cf.* Schneider, *supra* note 193, at 275 ("[W]hen attorneys step into mediation they seldom leave behind their adversarial instincts. If attorneys are present, it is generally far more difficult to hold open the space for apology.").

[204] Guthrie, *supra* note 72, at 149.

[205] In contrast, the skills of nonlawyer-mediators may be less well suited to mediation contexts that require (or in which the parties' desire) an evaluation of the legal merits of the claim. For discussion of different approaches to mediation—i.e., facilitative and evaluative—see Leonard L. Riskin, *Mediator Orientations,*

process that offers disputants a full opportunity to realize and conduct the ritual of apology when lawyers act as mediators.[206] Thus, when acting as facilitative mediators or in contexts in which apologies or other nonmonetary aspects of the dispute are likely to be relevant, attorney mediators may need to pay particular attention to the ways in which disputants tend to value apologies.

Conclusion

Attorneys and laypeople understand the messages conveyed by different types of apologies in similar ways. Both groups make assessments of the sufficiency and meaning of apologies that are strikingly similar. Apologies convey information to both groups about the apologizer's felt responsibility, regret, likely future behavior, respect for the claimant, and so on. Likewise, both attorneys and laypeople distinguish among different forms of apologies, with both groups finding that apologies that accept responsibility for having caused harm communicate these messages more clearly than do mere statements of sympathy.

Attorneys and laypeople diverge, however, in how they view the implications of apologies for their settlement-related judgments and decisions. In contrast to laypeople, who show a tendency to be more amenable to settlement following an apology, attorneys set their aspirations higher and expect more as a fair settlement when an apology is offered. The present study does not examine the antecedents of this divergence, and it is plausible that the different reactions of attorneys to apologies stem from attorneys' self-selection into the profession, attorney training in and after law school, the attorney's role as an advisor and not a party to the dispute, or some combination of these (or other) factors.[207] Future research might fruitfully explore this range of possibilities.

Regardless of its source, however, the divergence found here between attorneys and laypeople in how they respond to apologies has implications for the attorney-client relationship. Attorneys may need to make an effort to keep in mind disputants' potential interests in the giving and receiving of apologies and that disputants' responses to such overtures may differ from their own.[208] At the same time, however, the differences in how attorneys and laypeople respond to apologies suggests an important role for

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Strategies and Techniques, 12 ALTERNATIVES TO HIGH COST LITIG. 111-114 (1994); Riskin, *supra* note 83; Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003). For criticism of the evaluative/facilitate distinction, see, e.g., Kimberlee Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31-32 (1996); Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid"lock*, 24 FLA. ST. U. L. REV. 985 at 1001-03 (1997).

[206] *See* Guthrie, *supra* note 72, at 175 (arguing that "the non-lawyer-mediator is more likely than the lawyer-mediator to be cognizant of non-monetary considerations that might be important to the plaintiff, like an apology…").

[207] *See supra* Part III A.

[208] For a discussion of the importance of perspective taking in the attorney-client relationship, see Sternlight & Robbennolt, *supra* note 151, at 495-454.

attorneys in counseling clients about the legal implications of apologies. Attorneys who recognize both the importance of apologies to clients and their own distinct reactions to apologies, can effectively use the interviewing and counseling process to help civil clients explore their interests in giving or receiving apologies, educate clients about the legal consequences of apologies, and provide their third-party observations of apologies that are offered. In addition, mediation may provide a forum in which apologies can be negotiated among disputants and their attorneys. Future research ought to continue to explore how differences in attorney and client responses to the notion of apologies in litigation play out in these counseling and mediation processes.