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Saying “I’m Sorry” is Not So Simple: Embracing the Complexity of the Apology With a New Evidentiary Rule

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I. INTRODUCTION

The book All I Really Need To Know I Learned In Kindergarten describes sixteen life
lessons that we already knew by the time we were five.1 Right between “Don’t take things that
aren’t yours” and “Wash your hands before you eat” is the flagship rule of apology: “Say you’re
sorry when you hurt someone.”2 As Fulgham’s book illustrates, apologies have been a part of
our lives since we were children.3 They teach a child how to repair a wrong they have done, and

1 See ROBERT FULGHAM, ALL I REALLY NEED TO KNOW IN LIFE I LEARNED IN KINDERGARTEN (Villard

2 Id. at 6-7.

3 “Parents teach their children the importance of apology. Religions teach their members the importance
of asking for forgiveness, as well as the importance of forgiving. Finally, schools, civic groups, and mass
media all focus in varying degrees on the development of moral sentiments.” See Ann O’Hara & Douglas
are thus an indispensable part of a child’s early socialization.\(^4\) Apologies are so omnipresent in our lives, we may not even realize the deep impact they can have on those involved.\(^5\)

Apologies are everywhere.\(^6\) In day-to-day life, when a person apologizes, they must deal with a myriad of consequences for that apology. These may include vulnerability to the victim, embarrassment, a bruised ego, or even rejection of the apology by the victim.\(^7\) However, when the wrong one apologizes for turns into a lawsuit, the one apologizing has an additional penalty. Piled on to the emotional consequences that accompany any apology, a potential defendant must also worry about his apology’s use against him in court to prove that he is liable.\(^8\) Recently, a debate has developed over whether or not the law should intervene to remove the fear of apologizing through enactment of an evidentiary rule to protect the apology from admissibility into evidence at trial.\(^9\) On the one hand, protection of the apology might increase the amount of


\(^5\) Lee Taft, Apology Subverted: The Commodification of Apology, 109 YALE L.J. 1135 (2000). Professor Taft explains that “we are living in a time in which extraordinary, public acts of contrition have become commonplace.” Id. at 1135.

\(^6\) Taft describes the current role of the apology in our culture as “apology mania.” Id.

\(^7\) See Peter H. Rehm & Denise R. Beatty, Legal Consequences of Apologizing, 1996 J. Disp. Resol. 115, 115 (1996) (“[W]hen something bad happens, people often do not know what to say or do. If they need to apologize for something, they often perceive a vulnerability to some potentially bad consequences stemming from the apology itself. This tends to make people reluctant to apologize, often to their own detriment.”).

\(^8\) See Jennifer K. Robbennolt, Apologies and Legal Settlement: An Empirical Examination, 102 Mich. L. Rev. 460 (2003) [hereinafter Robbennolt, Settlement]. Professor Robbennolt argues that “defendants, defense counsel, and insurers worry that statements of apology will be admissible at trial and will be interpreted by jurors and judges as admissions of responsibility.” Id. at 460.

\(^9\) Lee Taft, Apology Within a Moral Dialectic: A Reply to Professor Robbennolt, 103 Mich. L. Rev. 1010, 1010 (2005). Professor Taft writes that “over the last several years, much has been written about the role of apology in facilitating the resolution of legal disputes. Id. (citing Jonathan R. Cohen, Advising Clients to Apologize, 72 S. Cal. L. Rev. 1009 (1999); Daniel Schuman, The Role of Apology in Tort Law, 83 Judicature 180 (2000); Taft, Commodification, supra note 5; Deborah L. Levi, Note, The Role of
apologies made, and in doing so, facilitate earlier settlement and overall healing of the victim, but that protection might also increase the number of strategic apologies given simply to avoid a lawsuit without suffering legal consequences for the wrong. Both of these arguments ignore the importance of what makes an apology successful. When only apologies that are most likely to succeed are protected by a new evidentiary rule, the law is able to encourage only the right kind of apologies, the kind that will be accepted and thereby can effectively promote settlement and healing.

This Comment will argue that both the federal and state evidentiary laws relating to an apology are not adequate to achieve the goals of an apology, the goals of increased settlement and healing of the victim. Currently, the federal evidentiary rules and half of the states’ evidentiary rules do not offer any special protection from admissibility for an apology. Those

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10 Taft argues that “there is a movement to legislatively ‘protect’ apologies from the effects of the traditional rule in order to facilitate apology without evidentiary encumbrance.” Taft, Reply at 1010.

11 See infra notes 178-179 and accompanying text (describing Taft’s arguments against protection of apology).

12 See infra notes 34-37 and accompanying text (discussing the relationship of the elements of an apology to its success).

13 Jennifer K. Robbennolt, Apologies and Settlement, __ COURT REV. __ (forthcoming 2009)[hereinafter Robbennolt, Litigation]. Professor Robbennolt acknowledges that the complexity of the apology may have a role in the formulation of a new Rule. Id. While Professor Robbennolt advocates protection of the apology, she concedes that “[r]ecent empirical work has begun to explore the role of apologies in the civil justice system and to examine the nances of the ways in which apologies may influence the resolution of legal disputes.” Id. She goes on to admit that “apologies have a role to play in fostering settlement” but “the complexities of the apologies, the context in which they are offered, and whether the apology is being evaluated by a claimant, attorney, or judge may moderate the ways in which apologies influence settlement.” Id.

14 See infra, notes 184-365 and accompanying text.

15 See infra, Part III (discussing the evidentiary rules).
states that do have an evidentiary rule related to apology protect the wrong type of apology, the type not likely to succeed in the first place.\textsuperscript{16} The current approaches of the federal and state evidentiary rules are not closely tailored enough to the goals of settlement and healing, and the complexity of an apology calls for a more specific protection that will facilitate these goals in the most efficient way.\textsuperscript{17}

Therefore, this Comment proposes a new evidentiary rule that protects only apologies that are the most likely to succeed given four essential elements of an apology: (1) acceptance of fault,\textsuperscript{18} (2) relationship between the giver and receiver of the apology,\textsuperscript{19} (3) form of the apology,\textsuperscript{20} and (4) timing of the apology.\textsuperscript{21} Apologies that accept fault, are given within a close relationship, are given verbally and face-to-face, and are given at an intermediate time, are the ones most likely to be successful,\textsuperscript{22} and by protecting only these apologies from admissibility, the law can shift to protect the right type of apology.\textsuperscript{23} By protecting the kind of apology most likely to succeed, the goals that lie behind the apology, namely settlement, and healing of the victim, are effectively promoted.\textsuperscript{24}

\textsuperscript{16} See infra, Part III.B.2 (discussing the state evidentiary rules).

\textsuperscript{17} See infra, Part IV (discussing the role of the elements in the legal setting and the proposed new Rule).

\textsuperscript{18} See infra, Part II.A, notes 40-51 and accompanying text.

\textsuperscript{19} See infra, Part II.B, notes 52-58 and accompanying text.

\textsuperscript{20} See infra, Part II.C, notes 59-67 and accompanying text.

\textsuperscript{21} See infra, Part II.D, notes 68-77 and accompanying text.

\textsuperscript{22} See infra Part II, notes 40-77 and accompanying text.

\textsuperscript{23} See infra Part IV.B, notes 267-275 and accompanying text (proposing the text of the new rule).

\textsuperscript{24} Id.
Part II will dissect the four essential elements of an apology and analyze what makes each element most successful.\textsuperscript{25} Part III will introduce the evidentiary law that affects the admissibility of an apology and review the current federal and state legislation surrounding this admissibility.\textsuperscript{26} It will also analyze the arguments surrounding the existing debate over the admissibility of an apology.\textsuperscript{27} Part IV will analyze how the elements of an apology are translated into the legal setting.\textsuperscript{28} It will then show that neither the arguments for or against protection of the apology in Part III are adequate, and that a new evidentiary rule that embraces the complexity of an apology, rather than ignoring it, is the best solution.\textsuperscript{29} The new evidentiary rule will then be presented in Part IV, accompanied by a mathematical model that shows how the new rule incorporates the different elements of the apology.\textsuperscript{30} Part IV will present real cases where the proposed rule can be applied,\textsuperscript{31} and will also analyze the interaction of the new rule with the current evidentiary rules.\textsuperscript{32} Part V will conclude this Comment.\textsuperscript{33}

\textsuperscript{25} See infra Part II, notes 40-77 and accompanying text.

\textsuperscript{26} See infra Part III, notes 78-171 and accompanying text.

\textsuperscript{27} See infra Part III.B.3 and III.B.4, notes 172-183 and accompanying text.

\textsuperscript{28} See infra Part IV.A notes 193-266 and accompanying text.

\textsuperscript{29} See infra Part IV.B notes 267-275 and accompanying text.

\textsuperscript{30} See infra Part IV.C, notes 267-275 and accompanying text.

\textsuperscript{31} See infra Part IV.D, notes 276-365 and accompanying text.

\textsuperscript{32} See infra Part IV.E notes 366-411 and accompanying text.

\textsuperscript{33} See infra Part V, notes 412-416 and accompanying text.
II. ELEMENTS OF A SUCCESSFUL APOLOGY

An apology is a complex exchange between a victim and an offender that contains many different parts and pieces. The presence or absence of some of these pieces, or elements, can be a predictor of how successful an apology will be. Four elements that are the most essential to the success of an apology are (1) acceptance of fault, (2) relationship between the giver and receiver of the apology, (3) form of the apology, and (4) timing of the apology. Through dissection of each of these elements, it will become clear how each element can make an apology successful.

34 Several studies have found that more elaborate apologies result in a better reaction toward the transgressor. See, e.g., Bruce W. Darby & Barry R. Schlenker, Children’s Reactions to Apologies, 43 J. PERSONALITY & SOC. PSYCH. 742 (1982). In their study, Darby and Schlenker evaluated the responses of children to a variety of apologies given after a wrongdoing. Id. They found that the children judged transgressors who gave more intricate apologies more favorably, as better people, people they liked more, blamed less, were more willing to forgive, and thought should receive less punishment. Id. at 744.

35 Factors which may contribute to the success of an apology in the settlement context include timing, context, and reasonableness of the offer. See Robbennolt, Settlement, supra note 8, at 504. Robbennolt found in her study that the apology was a big factor in the success of the settlement offer. See Jennifer K. Robbennolt, Apologies and Settlement, __ COURT REV. __ (forthcoming 2009) [hereinafter Robbennolt, Apologies and Litigation]. She found that “[a]pologies, 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.” Id. Professor Robbennolt also recognizes the complexity of the apology as a significant factor in the success of the apology in settlement. Id. at 4.

36 See infra Part II.A (discussing acceptance of fault).

37 See infra Part II.B (discussing relationship).

38 See infra Part II.C (discussing form).

39 See infra Part II.D (discussing timing).
A. Acceptance of Fault

Acceptance of fault is the first crucial element to the success of an apology. With respect to this element, there are two types of apologies, a full apology and a partial apology. A full apology accepts fault for the wrong done and the harm caused from that wrong. A typical example of a full apology is: “I’m sorry I caused you to be hurt.” It acknowledges both the harm and the wrong by admitting oneself as the cause of that harm. A partial apology, on the other hand, expresses only sympathy or regret for the results of the wrong, but does not take responsibility as the cause of that harm. A typical example of a partial apology is: “I’m sorry you feel hurt.” The partial apology acknowledges the harm, but does not acknowledge that the wrong was the cause of that harm. Because it lacks an acceptance of fault, a partial apology

40 Almost every list of the pieces of an apology suggests that acceptance of fault is crucial to the success of the apology. See, e.g., Carl Schneider, What It Means to be Sorry: The Power of Apology in Mediation, 17 MEDIATION QUARTERLY 3 (Spring 2000) (naming the fault element “acknowledgement”); TAVUCHIS, MEA CULPA, supra note 4 (naming the fault elements “naming the offense” and “admitting fault”); Michael B. Rainey, Kit Chan & Judith Begin, For Practical and Legal Reasons, An Apology when Things Go Awry is a Good Idea, But Beware of the Dangers, 26 ALTERNATIVES TO HIGH COST LITIGATION 115 (2008) (naming the fault element “sincerity”).

41 See Robbennolt, Settlement, supra note 8, at 468 (discussing full and partial apologies).

42 See Cohen, Advising Clients to Apologize, supra note 9, at 1014.

43 Id.

44 Id.

45 Id.

46 Id. Cohen describes two examples of a partial apology, the first, “I’m sorry this happened,” as apology that expresses regret, and the second, “I’m sorry you feel hurt,” as an expression of sympathy. Id. Both are merely partial apologies because they do not accept fault for causing the harm. Id.

47 Id.
signals to the victim that the apology is not sincere, and the victim is therefore less likely to accept it.\textsuperscript{48}

A victim is most likely to accept an apology that contains a clear articulation to the victim that there is an acceptance of fault, such as the full apology “I’m sorry I hurt you.”\textsuperscript{49} However, even if the words chosen do not explicitly accept fault, it is possible that an acceptance of fault could be implied if the context of the apology is one in which the words used are not ambiguous.\textsuperscript{50} For example, an apology that contains other indications of sincerity to the victim, such as a showing of emotion or vulnerability, may implicitly signal an acceptance of fault to the victim.\textsuperscript{51} Accordingly, while an apology that implicitly accepts fault may be more successful

\textsuperscript{48} A study by Gregg Gold and Bernard Weiner asked participants to put themselves inside a hypothetical situation where they had been wronged. See Gregg J. Gold & Bernard Weiner, Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression, 22 BASIC & APPLIED SOC. PSYCHOL. 291 (2000). The transgressor then gave the participant either an expression of remorse, or nothing at all. \textit{Id.} The study found that the wrongdoers who expressed remorse were judged to be of higher moral character and thus less likely to act the same way in the future. \textit{Id.}

Two famous apologies made by public figures illustrate the difference in effectiveness between a full and partial apology. The first was made by John Kerry after he insinuated that the United States soldiers in Iraq were not educated. He stated: “I sincerely regret that my words were misinterpreted to wrongly imply anything negative about those in uniform, and I personally apologize to any service member, family member, or American who was offended…” See Associated Press, Kerry Apologizes to Troops after ‘botched joke’, msnbc.com, Wed, Nov. 1, 2006. The second apology was made by Hugh Grant after he was publicly caught with a prostitute. See William L. Benoit, Hugh Grant’s Image Restoration Discourse: An Actor Apologizes, 45 COMMUNICATION QUARTERLY, n.3, 251-67 (Summer 1997). He stated that he “could accept some of the things that people have explained, ‘stress,’ ‘pressure,’ ‘loneliness’—that that was the reason. But that would be false. In the end you have to come clean and say I did something dishonorable, shabby and goatish.” \textit{Id.} While Kerry’s partial apology generally fell flat, Grant’s full apology revived his image and career. \textit{Id.}

\textsuperscript{49} Because of the inherent ambiguity in the words, “I’m sorry,” it is important when apologizing not only to want to accept fault, but to communicate to the victim that you have chosen to accept fault, thereby eliminating the ambiguity in the words. See Legal Consequences of Apologizing, supra note 7, at 117-18.

\textsuperscript{50} For instance, Cohen describes that the words “I’m sorry” might be “used to express regret for another’s misfortune,” and thus sympathy, “or regret for one’s own act” and thus remorse. \textit{Id.} at 117-18.

\textsuperscript{51} This often occurs in an “established relationship” where there is a “mutual understanding of personalities,” enabling the victim to assume an acceptance of fault through the sincerity of the delivery. \textit{Id.} at 117-18.
than one that clearly only offers sympathy, the apology most likely to be successful is one that offers a clear articulation of an acceptance of fault.

**B. Relationship**

Another factor that contributes to the success of the apology is the relationship between the giver and receiver of that apology.\(^5^2\) This element can make an apology successful because of the apology’s evolution as a tool for reconciliation in a cooperative relationship.\(^5^3\) In the early stages of human evolution, individuals learned that by using an apology instead of physical retaliation to mend a dispute, each side could conserve the resources the physical retaliation would have consumed.\(^5^4\) This new method, the apology, allowed the victim the chance to move on in the relationship, past the wrong done, and continue to reap the benefits of the cooperative


\(^5^3\) Evolution is based on the theory that the traits that are the most adaptive will survive from generation to generation, while the least adaptive traits will die out. *See* O’Hara & Yarn, *supra* note 3, at 1148. O’Hara and Yarn state that the assumption one must begin with in evolution is “that the primary objective of the gene is reproductive success relative to others.” *Id.* The role of natural selection then, is to “filter the less reproductively successful from the more reproductively successful.” *Id.* Biologists then begin with that assumption, wants to have reproductive success and its competing with others for it. *Id.* Thus, “natural selection acts to filter the less reproductively successful from the more reproductively successful.” *Id.* at 1148. So, “biologists begin with the assumption that the primary objective of the gene is reproductive success relative to others,” and that “natural selection acts to filter the less reproductively successful from the more reproductively successful.” *Id.* at 1148. In that way, the evolution of cooperation and altruism “among related individuals should [ ] be an intuitively sensible strategy from a biological perspective because it increases the survivability of genes.” *See id.* at 1150-52. Even the cooperation behind those that are not related can be explained by reciprocal altruism, which states that “a cost to reproductive success today is a net gain to reproductive success tomorrow, providing [the other party] actually reciprocates.” *Id.*

\(^5^4\) Those who feel a need to apologize and forgive “can conserve their resources for activities that enhance their survivability and reproductive fitness.” O’Hara & Yarn, *supra* note 3, at 1157.
An apology thus evolved as a less costly tool for a victim to move on in a cooperative relationship from a wrong done to him. Because the evolution of an apology came from the desire to continue in a cooperative relationship, it makes sense that the more cooperative a relationship is, the more likely the individuals in that relationship want to continue in it, and consequently the more likely an apology given within that relationship is to be successful. Therefore, an apology between family members is more likely to be successful than an apology between neighbors or co-workers, and an apology between neighbors or co-workers is more likely to be successful than an apology between strangers. The closer, or more cooperative, the relationship between the victim and the offender is, the more likely the apology is to be successful.

Because one who apologizes is able to conserve their resources, “they thus are placed at a competitive advantage relative to those individuals who must incur the full costs of moralistic aggression.”

Frans de Waal, a well-known ethologist, described watching this evolutionary feature at work with a colony of chimpanzees at a zoo in the Netherlands. He describes the interaction: “In the course of a charging display, the dominant male attacked a female, which caused screaming chaos as other chimpanzees came to her defense. When the group finally calmed down, an unusual silence followed, with nobody moving, as if the apes were waiting for something. Suddenly the entire colony burst out hooting, while one male worked the large metal drums in the corner of the hall. In the midst of the pandemonium I saw two chimpanzees kiss and embrace.” He realized afterwards that the embracing individuals were “the same male and female of the initial fight” and that their embrace was in fact a reconciliation, an unspoken apology.

See O’Hara & Yarn, supra note 3, at 1157, discussing the idea of reciprocal altruism, which explains the cooperative behavior between any two people, related or not, that desire to continue on a cooperative relationship. Reciprocal altruism embraces the idea that if one cooperates now and helps someone else, that person is likely to pay them back and help them in the future.

The old proverb “blood is thicker than water” showcases the idea that a familial relationship is stronger than any other. See Robert Hendrickson, ENCYCLOPEDIA OF WORD AND PHRASE ORIGINS (1997). See also FIGURE 2, providing a graphical representation of the correlation between the closeness of the relationship of the giver and receiver of the apology and the success of the apology.
C. Form

The form an apology is given in is another element crucial to the success of the apology. The more personal and private an apology is, the more a victim can feel the sincerity of the apology, and thus the more likely it is to be successful. A verbal apology is more personal than a written one because the recipient of a verbal apology is able to pick up more sincerity from the offender. A face-to-face apology is more personal than one where information is relayed to the victim through another source because that other source can interfere with the exchange of sincerity between the victim and offender. Public apologies in particular showcase a lack of repentance and sincerity that victims, who in many cases are the public itself, crave. Another element that effects the form the apology is most likely to be successful in is the context with which the apology is given. That context, including the gender

59 The form of the apology must be dictated by the severity of the harm to the victim. See Jeffrie G. Murphy, Remorse, Apology and Mercy, 4 OHOIO ST. J. CRIM. L. 423, 433-34 (2007) (“For grave wrongs, we-both victims and spectators-normally expect more than a verbal formula.”).

60 Orenstein describes how it important it is to apologize personally. See Aviva Orenstein, Gender And Race in the Evidence Policy: Apology Excepted: Incorporating Feminist Analysis Into Evidence Policy Where You Would Least Expect It, 28 SW. U. L. REV. 221, 241 (1999). O’ Hara & Yarn agree that while written apologies might work at times, “often face-to-face communications are necessary. O’Hara & Yarn, supra note 3 at 1139.

61 While apologies may be written, “they are most effective and affecting when delivered orally.” Orenstein, Feminist Analysis, supra note 60, at 241.

62 “Part of facing up to the wrong is actually facing the human being wronged. The emotion of true contrition is hard to fake in person and has a powerful effect on the injured party.” Id.

63 Murphy describes a recent phenomenon known as the “decline of remorse.” See Murphy, Remorse, supra note 59, at 433-34. He argues that public apologies have become everyday occurrences, and very rarely do they show the repentance and remorse that spectators crave. Id. at 433. They are usually closer to a verbal “fill in the gap” formula, where the transgressor simply says the words with the names and place filled in, but shows no real remorse. Id. Murphy goes on to explain that this type of apology is only truly effective for small transgressions. Id. at 434. Murphy explains that “for small wrongs, the mere verbal formulae ‘I apologize’ or ‘I am sorry’ or ‘Forgive me’ or ‘Excuse me’ are generally adequate since their only function is to keep oiled the wheels of civility and good manners.” Id.
of those involved, the culture of those involved, and the perspective taken by those involved may affect the success of the form of the apology as well by becoming another interference with the exchange of sincerity from the offender to the victim. Even in the face of

64 There may be differences in how different genders give and receive apologies. See Legal Consequences of Apologizing, supra note 7, at 118. In citing Deborah Tannen, Cohen states that tentatively “women tend to apologize more easily than men.” Legal Consequences of Apologizing, (citing DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 231-33 (1990)). Orenstein agrees that apology may be more common in women than men, and also that it may be something learned from early childhood socialization. See Orenstein, Feminist Analysis, supra note 60 at 250-51. Orenstein says that because an apology is seen as weak, it “explains why more men than women might resist apologizing, since most boys learn early on that their peers will take advantage of them if they appear weak.” Id. “Girls, in contrast, tend to reward other girls who talk in ways that show they don't think they're better than their peers.” Id.

65 Cross-cultural psychologists have stressed that in collective cultures (such as Japan) behavior is governed by adherence to social norms, while in individualistic cultures (such as the United States) behavior is dictated by individual attributes such as personal beliefs or attitudes. See Seiji Takaku, Bernard Weiner, & Ken-Ichi Ohbuchi, A Cross Cultural Examination of the Effects of Apology and Perspective Taking on Forgiveness, JOURNAL OF LANGUAGE AND SOCIAL PSYCHOLOGY, Vol. 20 Nos. 1 & 2, 144-166, 147 (March/June 2001). Therefore, when an apology is given in a collective culture, the apology will be more successful if it helps maintain a good relationship with others in the future or if it maintains a social norm, while an apology given in an individualist culture will be more successful if it protects the victim’s self-identity. Id. Therefore, apologies given in individualist societies such as the United States need to be even more carefully crafted because the desire for cooperation overall is not as high as it might be in a collective country such as Japan. Id.

66 A recent study has found that when offended parties cultivate empathic feelings towards their offenders they are more likely to accept an apology and forgive. See Seiji Takaku, The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance-Attribution Model of Interpersonal Forgiveness, 141 JOURNAL OF SOCIAL PSYCHOLOGY 494, 494-508 (2001). In Professor Takaku’s perspective study, participants were asked to read an incident in which a classmate offended them. Id. They were each given one of four perspective related instructions. Id. Those given the recall-self-as-transgressor (RSAT) condition were told to visualize an event where they had done something similar to what their classmate had done. Id. Those given the imagine-self (IS) condition were told to imagine how they would feel if they stood in their classmates’ shoes during the transgression. Id. Those given the imagine-other (IO) condition were told to visualize how they would feel if something like this really happened to them. Id. Each participant then read the classmate’s apology. Id. Those in the RSAT category were 48.9% more likely to forgive than those in the control category, those in the IO category were 35.4% more likely to forgive and those in the IS category were 17.6% more likely to forgive. Id. Thus, when a victim is able to put the incident in perspective, and more specifically, when the victim is able to put themselves in the transgressor’s shoes, they are more likely to accept the apology, and the apology is then more likely to be successful.
these potential contextual difficulties, the more personal the form of an apology is, the more likely it is to succeed.\textsuperscript{67}

\textit{D. Timing}

Timing is another vital element to the success of an apology.\textsuperscript{68} An apology given at the wrong time may be doomed to fail,\textsuperscript{69} while apology given at just the right time tees it up to succeed.\textsuperscript{70} If an apology is made too early, it may be viewed as insincere, and accordingly will be less likely to be accepted.\textsuperscript{71} However, if an apology is given too late, the meaning of the apology may be diluted, and therefore it may also be unsuccessful.\textsuperscript{72} A recent study shows that there may be an ideal intermediate time period, in which to give an apology.\textsuperscript{73} The study found

\textsuperscript{67} See supra notes 61-62 (discussing how apologies that are more personal are more likely to be successful).


\textsuperscript{69} See Aaron Lazare, \textit{Go Ahead Say You're Sorry}, PSYCHOL. TODAY, Jan.-Feb. 1995, at 78 ("Timing can also doom an apology."); see also \textit{How to Say You're Sorry When You Don't Really Mean It and He Started It Anyway}, REDBOOK, Nov. 1991, at 72 ("An apology should be timely and enthusiastic or it's worthless."); see also Rainey, Chan & Begin, supra note 68 at 116 ("if the apology is said at the wrong time in a conflict, it may have no effect or it could possibly escalate the conflict.").


\textsuperscript{71} Delaying an apology until after the victim has a chance to feel heard might be the most effective way to right a wrong. See Cynthia McPherson Frantz & Courtney Bennigson, \textit{Better Late Than Early: The Influence of Timing on Apology Effectiveness}, 41 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 20 (2005).

\textsuperscript{72} Senator Fred Thompson famously apologized to President Clinton on October 8, 1997 for implying the President had been involved in a fund swapping conspiracy, stating “If you’ve got to eat any crow, or maybe even half a crow, it’s better to do it warm than when it gets cold,” implying that earlier is indeed better when it comes to an apology. See Associated Press, \textit{Thompson Apologizes for Linking Clinton, Teamsters}, USA TODAY, Oct. 9, 2007. The Dalai Lama also seems to subscribe to the philosophy that an early apology is better, advising that “when you realize you’ve made a mistake, take immediate steps to correct it.” See THE DALAI LAMA, INSTRUCTIONS FOR LIFE (collected 2000).
that in order to maximize the chances of success of the apology, the transgressor should wait until the victim is “ripe” to receive the apology. While one needs to wait until the victim is ripe before apologizing, he also should not wait too long, lest the victim moves past the point of ripeness and becomes overly ripe. By waiting too long the offender signals to the victim that

73 See Better Late Than Early, supra note 71. Participants in the timing study were each told to imagine that the following situation had happened to them. Id. Their roommate, with whom they had made plans, did not show up and did not call to say they were not coming. Id. The next day, they called their roommate to talk to them about it. Id. After reading this scenario, the participants were told one of three different descriptions of the phone conversation: either the roommate gave an apology at the beginning of the conversation, the roommate gave an apology after having talked with them about the incident, or the roommate gave no apology at all. Id. Participants were asked a variety of questions about their positive feelings both right after the incident and after the phone call. Id. The results showed that when the roommate gave no apology at all, conditions actually worsened from the night before, evidenced by an 8.7% decrease in positive feelings. Id. When the apology was given at the beginning of the phone call, conditions improved, shown by a 9.4% increase in positive feelings. Id. Finally, when an apology was given after a discussion of the event, conditions drastically improved, with positive feelings increasing a whopping 37.9%. Id.

The study gave participants seven emotion words (angry, understanding, frustrated, forgiving, satisfied, resentful and irritated) and asked them to indicate how much they felt each emotion. Id. These ratings, which were made on seven-point scales (1=not at all to 7=very) were averaged together to create a single score that measured initial reactions to the transgression as well as a single score that measured the final reactions to the transgression. Id. To calculate the percentages below, the score for the initial reactions from the score was subtracted from the score for the final reactions and that number was divided by the score for the initial reactions to find the percentage increase in positive emotions based on timing.

The conclusion of the study was that the later apology was over four times more effective (9.4% increase in positive feelings with the early apology, and 37.9% increase with the later apology) in increasing positive feelings about the event than the early apology. Id.

74 The study found that the reason later apologies were more effective than earlier ones was because the victim felt “heard and understood”; they were “ripe” to receive and accept the apology. Id. McPherson Frantz & Bennigson argue that an apology offered too early during a conflict may pressure someone who is not ready, or ripe, to accept the apology. Id. This study has one important limitation, however. The overall time frame was short, twenty-four hours from the incident to the apology. Id. While the study shows that waiting might be an effective strategy for apologizing, it seems intuitive that waiting too long may eventually render the apology ineffective. The authors argue that the victim must be “ripe” in order to properly receive the apology, but ripeness doesn’t last forever. Id.

75 By way of a metaphor, think of the readiness of the victim to receive the apology as a banana. You need to wait for a banana to ripen first before you can eat it, because it will not taste right when it is green. But if you wait too long, the banana becomes brown and goes bad. It is possible that in the same way, there may be a point in time where an apology “goes bad,” though it is impossible at this time to know what the parameters of that time in a variety of situations, might be.

The timelines for the ripeness of an apology may also depend on the severity of the harm caused. See O’Hara & Yarn, supra note 3, at 1139 (“For small offenses, effective apologies need to occur right
he does not really care about what happened enough to have apologized in a timely fashion.\textsuperscript{76} This suggests that there is an intermediate time period, that is not too early, but not too late, during which an apology will be most likely to be succeed.\textsuperscript{77} Combining the results for these four elements gives the end result that an apology most likely to succeed is one that accepts fault, is given within a close relationship, is given in a personal form, and is given during some intermediate time.

III. APOLOGY AND ADMISSIBILITY

Currently, a defendant who apologizes has no motivation under the law to give a good apology with respect to these elements, or in other words, an apology that is likely to be successful. Under the current federal evidentiary rules and most state evidentiary rules, an apology made by a party to a suit is admissible in court, and may then be used against the party to prove liability.\textsuperscript{78} Because of this, potential defendants in civil suits are inclined not to apologize to potential plaintiffs for fear that that the apology will amount to a figurative death away, but for some larger offenses, delay can be more effective. In these latter situations, immediate apologies may not imply sufficient remorse and suffering.

See, e.g., In re Chase, 37 B.R. 142, 155 (Bankr. S.D.N.Y. 2007). The court in this case held that the defendant’s apology was “too little, too late” because he waited until the time of the sanctions proceeding to make his apology. \textit{Id}. The court did not accept this apology as an adequate mitigating circumstance against imposing sanctions. \textit{Id}.

McPherson Frantz & Bennigson acknowledge this point, and suggest that rather than suggesting that a later apology is always more successful, it is more likely that the success of an apology could be mapped by a mound shaped curve with early and late apologies tending to be ineffective. \textit{See Better Late Than Early, supra} note 71 (“Recent research suggest that some apologies are too late to be effective. Thus, there may be a U-shaped function relating apology timing and outcome satisfaction—extremely early and extremely late apologies are likely to be ineffective.”).

The Federal Rules of Evidence do not provide any specific protection for an apology. \textit{See infra}, note 94 (discussing other federal rules that may apply to an apology). \textit{See also supra}, note 158 (discussing the state jurisdictions that provide an evidentiary protection to an apology).
sentence in the case. The importance of the apology has been magnified with the recent increase in popularity of alternative dispute resolution. Proponents of dispute resolution argue that apologies should be encouraged because they increase the chances of settling a case without a lawsuit. Similarly, proponents of apology stress the importance of the healing that an apology can provide to one who has been wronged. A debate has thus arisen over whether or not an apology should be protected from admissibility in court through an evidentiary rule.

Those who argue for adoption of a rule to protect the apology stress that removing the fear of the liability “death sentence” that comes from apologizing will encourage more potential defendants to apologize to their potential plaintiffs, and that apology will facilitate settlement and moral healing. However, many have argued back that by protecting an apology from introduction into evidence at trial, a new evidentiary protection would remove the consequences for the wrong.

79 The exceptions to hearsay, particularly the admissions exception, becomes “another impediment to be overcome in apologetic discourse, particularly evidentiary rules that allow an apology be construed as ad admission for consideration by a court or jury in a suit by the offended against the offender.” Taft, *Commodification*, *supra* note 5, at 1150.

80 “[T]here are numerous legal articles addressing [the apology’s] role in litigation, particularly in the context of alternative dispute resolution.” Taft, *Commodification*, *supra* note 5, at 1135-36.

81 Professor Robbennolt produces an empirical study that shows that an apology will indeed enhance the likelihood of settlements. See Robbennolt, *Settlement, supra* note 8; *see also infra* notes 201-208, and accompanying text (discussing Robbennolt’s study).

82 Professor Taft agrees that “[h]ealing for clients” … “can be facilitated relationally by apology.” Taft, *Commodification, supra* note 5. He goes on to state that apology can increase healing “because through apologetic discourse there is a restoration of moral balance.” *Id.* Taft concludes by stating that an apology “is potentially healing for both the offended and the offender.” *Id.*

83 *See supra*, note 9 and accompanying text (discussing the current legal debate over apology).

84 *See infra*, note 174, (listing scholars who argue for protection of apology).

85 *See Taft, Reply, supra* note 9; Taft, *Commodification, supra* note 5.
A. Jumping the Evidence Hurdles

Before the decision is made whether to apologize or not, someone must have committed a wrong to apologize for. When that wrong turns into a potential lawsuit, a victim may desire to use a potential defendant’s apology to try to prove that defendant’s liability for the wrong. In a civil case, the victim turned plaintiff has the burden of proving that the offense occurred, and in order to do that, the plaintiff must have evidence. The evidence in a trial might take a tangible form, such as a gun or a videotape, but it could also be in a verbal form, such as statements made by anyone involved in the incident, including either party. Before those statements are admitted into evidence for consideration by a trier of fact, there are several hurdles they must get over. Two of biggest hurdles these statements must jump before they are admitted are relevance and hearsay.

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86 When an offense is one that legal liability could be attached to, it is possible that a plaintiff will use that apology to lead to “more certain legal liability” for the defendant. See Robbennolt, Apologies and Litigation, supra note 13.

87 See JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 337, 412 (5th ed. 1999) (“The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.”).

88 See generally id.

89 A piece of evidence may be inadmissible because it is irrelevant. See FED. R. EVID. 402. It may be inadmissible because it is prejudicial. See FED. R. EVID. 403. It may not be properly authenticated. See FED. R. EVID. 901. It may not the best evidence. See FED. R. EVID. 1002. It might be privileged and therefore inadmissible. See FED. R. EVID. 501.

90 “Evidence which is not relevant is not admissible.” FED. R. EVID. 402. “Hearsay is not admissible except as provided by [the Federal Rules] or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” FED. R. EVID. 802.
1. Jumping the Hurdle of Relevance

In order for a statement to move past the relevance hurdle, it must tend to prove or disprove some fact on the road to showing the defendant’s liability. Relevance is the first hurdle any piece of evidence must get over before it can be admitted. This is because a statement offered into evidence that is not relevant is not admissible. But even if a statement is relevant, the Federal Rules of Evidence contain many rules that might render that statement inadmissible. Therefore, deeming a piece of evidence relevant does not automatically admit it into evidence, it just allows that evidence to move past relevance to the other hurdles it must jump. An apology from a defendant that is deemed relevant may fall under one of these many other hurdles found in the Federal Rules to take the apology out of admissibility.

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91 "Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

92 See FED. R. EVID. 402.

93 “[E]vidence which is not relevant is not admissible.” FED. R. EVID. 402.

94 Subsequent remedial measures taken after an event or injury which would have made the harm less likely to occur are not admissible to prove negligence, culpable conduct, or product liability. See FED. R. EVID. 407. Evidence of civil settlements, offers to settle, statements accompanying an offer to settle, and conduct or statements made during settlement negotiations are not admissible to prove liability for or invalidity of a claim or its amount. See FED. R. EVID. 408. Evidence of a plea of guilty later withdrawn, a plea of no contest, and a statement made in the context of a plea negotiation which does not result in a plea of guilty or a plea of guilty later withdrawn are not admissible against a criminal defendant. See FED. R. EVID. 410. Evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. See FED. R. EVID. 409. Evidence that a person was or was not insured is not admissible to prove liability. See FED. R. EVID. 411. Evidence of which probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, consideration of undue delay, waste of time or needless presentation of cumulative evidence is not admissible. See FED. R. EVID. 403. While the Federal Rules do not provide an exception for statements made during mediation, several states provide an exception of their own. See e.g., UNIF. MEDIATION ACT § 4 (“A mediation communication is privileged … and is not subject to discovery or admissible in evidence in a proceeding…”).

95 See infra Part III.A.2 and accompanying text (discussing these exceptions).
prove that the defendant did something wrong.\textsuperscript{96} This is because in most cases, a person would not apologize unless they have actually done something wrong.\textsuperscript{97} Therefore, the low threshold of relevancy is almost always met when an apology is offered into evidence.

2. Jumping the Hurdle of Hearsay

Once a statement is found to be relevant, it must also get over the hurdle of hearsay.\textsuperscript{98} Hearsay is defined as an out of court statement offered to prove the truth of the matter asserted.\textsuperscript{99} “Out of court” means that the offered statement is not “one made by the declarant while testifying at the trial or hearing,” and so a statement made at any time other than the current trial meets this component of hearsay.\textsuperscript{100} A “statement” is defined to be any “oral or written assertion,” or “non-verbal conduct of a person,” if that conduct is intended as an assertion.\textsuperscript{101} “Offered to prove the truth of the matter asserted” generally means that the statement is being

\textsuperscript{96} Apologizing “signals a recognition of the norm or rule that was violated.” Robbennolt, Apologies and Litigation, supra note 13.

\textsuperscript{97} Interestingly, there may be cases where a person might apologize when they have in fact done nothing wrong. For instance, there is evidence which shows that women are more likely to say “I’m sorry” to express sympathy or concern. See TANNEN, supra note 64, at 232; see also Feminist Perspective, supra note 60, at 251 (“Often the "apology" does not literally mean that the woman believes that she has engaged in wrongful conduct; rather it is issued as a means of expressing sympathy and a means of acknowledgment of the other person's pain or difficulty” (citing Carol Lynn Mithers, Don't Be Sorry, LADIES HOME J., Sept. 1994, at 58 (stating that "women's excess apologizing is simply a matter of speaking style" and that "many women will say I'm sorry' not as a literal apology but as a way of acknowledging that something may have been difficult for the other person.")�).

\textsuperscript{98} See Fed. R. Evid. 802.

\textsuperscript{99} “Hearsay is a statement, other than the one being made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c).

\textsuperscript{100} CLIFFORD S. FISHMAN, A STUDENT’S GUIDE TO HEARSAY 5 (3d ed. 2007); Fed. R. Evid. 801.

\textsuperscript{101} Id.
offered to prove what was said, not just the fact that it was said.\textsuperscript{102} Hearsay is historically regarded as unreliable for three main reasons: the absence of oath of the speaker, the lack of an opportunity to cross-examine the speaker, and the absence of an opportunity to view the demeanor of the speaker.\textsuperscript{103} The lack of these three elements in a hearsay statement makes it more likely the statement will be unreliable.\textsuperscript{104} Particularly, the lack of the opportunity to cross-examine the person who made the statement deprives the other party of a fundamental right, one designed to aid the search for truth above all else.\textsuperscript{105} A statement that is determined to be hearsay is inadmissible unless it fits under one of the hearsay exceptions or exemptions in the Federal Rules of Evidence.\textsuperscript{106} Similar to a statement that is not considered relevant, a statement

\begin{itemize}
  \item \textsuperscript{102} See id. at 6. The relevant question for this element of hearsay is what purpose the lawyer offering the statement wants the judge or jury to hear it. \textit{Id.}
  \item \textsuperscript{103} There are four commonly known risks when a witness gives testimony in court: (1) Misperception—the witness did not observe correctly, (2) Faulty Memory—the witness does not recall correctly during his testimony what happened, (3) Misstatement—the witness thinks she is describing correctly put has picked an ambiguous word, and (4) Distortion—the witness fabricates the truth. \textit{See} Michael H. Graham, \textit{Stickperson Hearsay: A Simplified Approach to Understanding Hearsay}, 1982 U. ILL. L. REV. 887, 891 (1982). Graham argues that “to protect against these four risks, the law provides that a witness may testify at trial only as to matters within his personal knowledge (1) under oath or affirmation, (2) in person, so that the trier of fact may observe the witness' demeanor, and (3) subject to contemporaneous cross-examination..” \textit{Id.} at 888.
  \item \textsuperscript{104} \textit{Id.}
  \item \textsuperscript{105} “Cross examination is the heart and soul of a criminal trial.” Jack B. Swerling, \textit{Trial Advocacy: "I Can't Believe I Asked that Question": A Look at Cross-examination Techniques}, 50 S.C.L. REV. 753, 753 (1999). “[Cross-examination] has been described as the true vehicle in the search for truth in the courtroom.” \textit{Id.} (citing FRANCIS L. WELLMAN, \textit{THE ART OF CROSS-EXAMINATION} 7 (4th ed. 1948)). The witness is subjected to cross-examination to test his credibility, perception, recollection, and the consistency of his assertions. Only after being subjected to the test of cross-examination will a jury possess enough information to believe in whole or in part, or reject in whole or in part, the witness's testimony. \textit{Id.}
  \item \textsuperscript{106} See \textit{FED. R. EVID.} 802 (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”). If the evidence falls within the definition of \textit{FED. R. EVID.} 801(c), the judge must exclude it unless the offering party persuades the judge by a preponderance of the evidence that
\end{itemize}
considered hearsay is inadmissible, and will not be admitted unless it can fit under one of the exceptions found in the rules.

A defendant’s apology is often considered hearsay. The apology is generally made at some time before trial, and thereby satisfies the requirement that the statement be “out of court.” Apologies that are made during the actual trial will not satisfy the definition of hearsay. An apology is also usually used to prove the truth of the apology itself, or in other words, to prove that the defendant actually was sorry and consequentially that it was more likely that he is liable. There are instances where an apology may not be introduced into evidence to prove what was said, but rather to prove the effect that apology had on a listener, or to prove circumstantially the state of mind of the speaker. However, in most instances, an apology is introduced to prove the liability of the speaker, because the apology signals that a wrong was

the statement satisfies the requirements of an exception to the hearsay definition or of an exception to the hearsay rule. 
*Stickperson Hearsay, supra* note 103, at 888.

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107 See, e.g., Samaniego, *infra* note 325, and accompanying text. See also *infra* notes 125-127 and accompanying text (discussing cases where an apology was determined to be hearsay and then subsequently admitted under an exception to hearsay).

108 *See supra* note 100.

109 *Id.*

110 See, e.g., Samaniego, *infra* notes 325-330 and accompanying text (discussing that the apology was offered to try to prove that the offender actually committed the wrong). See also Pieczynski, *infra* note 127 and accompanying text (giving an example of an apology offered to prove the truth of the matter asserted).

111 See *Fed. R. Evid.* 801 advisory committee’s notes. “The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted.” *Id.* (citing MCCORMICK, *EVIDENCE* § 225). “If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.” *Id.* (citing Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev’d on other grounds 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed 534); see also United States v. Wilkerson, 469 F.2d 963, 968 n.12 (5th Cir. 1972) (“Since Branum's apology arguably was offered not to prove the “truth” of what Branum said (i. e., the apology), but rather to prove the state of mind that it reflected (i. e., Branum's notion that Wilkerson was in charge), the statement may not be hearsay at all.”).
done. As a result, in order to be admissible, most apologies must fall under an exception to hearsay.  

The exceptions to hearsay are grounded in the notion that the types of statements they protect carry less risk of unreliability and untrustworthiness than a normal hearsay statement.  

There are many different hearsay categories court have found an apology to fit under. The next sections focus on the hearsay exceptions an apology is most likely to fall under: the admissions exception, the statements against interest exception, and the state of mind exception.

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112 See infra notes 109-132, and accompanying text (discussing some of these exceptions and how they apply to an apology).

113 The exceptions to the hearsay rule contained in FED. R. EVID. 803 and 804 “have a common underlying theme: each describes a situation in which a statement fits the definition of hearsay set out in FED. R. EVID. 801(c), but is nonetheless considered sufficiently trustworthy to overcome the hearsay hurdle. A STUDENT’S GUIDE TO HEARSAY, supra note 99, at 35. Similarly, the Catchall exception in FED. R. EVID. 807 requires that a statement be “shown to be trustworthy enough to overcome the law’s bias against hearsay.” ld.

114 See e.g., FED. R. EVID. 801(d)(2)(A); FED. R. EVID. 804(b)(3); FED. R. EVID. 803(3). See also infra notes 118-148, and accompanying text (discussing the application of these exceptions in cases).


116 FED. R. EVID. 804(b)(3).

117 FED R. EVID. 803(3). The likelihood that an apology will fit under one of these exceptions and thus become admissible is such a common assumption that one court assumed that an ordered apology in a criminal trial was an abuse of discretion because of the likelihood that it would be used later in a civil trial See United States v. Acevedo, 1997 U.S. App. LEXIS 17578 at *5 (10th Cir. 1997) (“Further, such apology could perhaps be admissible evidence in a civil proceeding by Jane Doe against Acevedo. In any event, we conclude that the condition imposed by the district court in the instant case requiring Acevedo to “apologize” to Jane Doe for raping her was, under the circumstances, an abuse of discretion.”).
a. The Admissions Exception

The admissions exception in Federal Rule of Evidence 801(d)(2) provides that a statement “offered against a party” that is “the party’s own statement” is admissible even if that statement is categorized as hearsay.\textsuperscript{118} The admissions exception requires that the offered statement be the defendant’s own, and that it be introduced into evidence against the defendant.\textsuperscript{119} Therefore a defendant cannot use his own statement under this exception to help his own case.\textsuperscript{120} The admissions exception exists not only to sidestep the risks of unreliability in hearsay, but additionally because of the idea that a party should not be able to escape his own statements.\textsuperscript{121} Further, because a defendant is usually present at trial, he may always choose testify himself to explain his own statements if he so chooses, and therefore admitting his statement should not harm him as much as if he were denied any chance to explain it.\textsuperscript{122}

\textsuperscript{118} \textsc{Fed. R. Evid.} 801(d)(2)(A).
\textsuperscript{119} A statement offered against a party and that is the party’s own statement is defined as “non-hearsay” under the Federal Rules. \textit{See} \textsc{Fed. R. Evid.} 801(d)(2)(A). This also means that a defendant cannot use this exception to except his own statement from inadmissibility. The statement must be offered against the party to fit under this exception. Other states have their own evidence rules on the Admissions exception which often closely tailor the Federal Rules. \textit{See, e.g.}, \textsc{Tenn. R. of Evid.} 803 (1990) (“Admission by Party-Opponent. —A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity ..., an admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.”)
\textsuperscript{120} This is in contrast to the Federal Sentencing Guidelines, which do allow a defendant to use an apology to help their own case by suggesting a lower sentence for acceptance of responsibility. \textit{See infra} note 258 (discussing the sentencing guidelines on the issues of timing of the apology).
\textsuperscript{121} Fishman describes these two rationale: “First, there is the common-sense conviction that a party should not be permitted to exclude his own statement on hearsay grounds; to allow such an objection would amount to allowing a party to claim, ‘My own statement should not be admissible against me because what I said was untrustworthy.’” \textsc{A Student’s Guide to Hearsay}, \textit{supra} note 99, at 57.
\textsuperscript{122} \textit{Id.} at 57 (“Second, if a party is unhappy that his own statement is being offered against him, the antidote is simple: he can take the stand and attempt to explain what he said, what he meant, or why the jury should not hold what he said against him.”). “Most of the lost protections in the use of out-of-court statements as substantive evidence are largely regained where the declarant is a witness and can be confronted and cross-
An apology is often considered admissible under the admissions exception because it is generally offered by the plaintiff to be used against the defendant, and because it is the defendant’s own statement.\(^{123}\) In *State v. Butcher*, the court found that although the defendant’s apology was hearsay, the defendant was testifying, and so the normal risks of a hearsay statement of absence of oath, lack of cross-examination and lack of demeanor evidence were not present with this apology.\(^{124}\) The court then admitted the apology under the admission exception.\(^{125}\) Similarly, the court in *United States v. Lutz* found that an apologetic letter written by the defendant was admissible under the admissions exception.\(^{126}\) The court in *Pieczynski v. State* also considered an apology by the defendant an admission because it was the defendant’s own statement, and was offered to prove the truth of what was said, that “he was sorry and could not help himself.”\(^{127}\) Because of the apology’s role as proof of the wrong done, the admissions examined. The danger of faulty reproduction is negligible where there is competent evidence to show that the statement is his or, as in the instant case, the witness admits that the prior statement is his. The declarant as a witness is also under oath and must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury.” *State v. Igoe*, 206 N.W.2d 291, 297 (N.D. 1973).

\(^{123}\) See Fed. R. Evid. 801 (defining hearsay).

\(^{124}\) 2004 Ohio App. LEXIS 5016 (October 21, 2004). The court offered the following rationale for admitting an apology card sent by the defendant to the plaintiff: “problems of trustworthiness are not critical in this class of admission since the opposing party controls the decision to introduce the statement and the party declarant will be in court to refute any unfavorable impact of the statement.” *Id.* at *P60. The court found that the card was a statement “offered against the declarant who is a party to the action. Therefore, the apology card falls within the exception to the rule excluding hearsay.” *Id.* at *P61.

\(^{125}\) *Id.*

\(^{126}\) 621 F.2d 940 (9th Cir. 1980). The court found that an apologetic letter written by Lutz to a defrauded client in which Lutz stated that the defendant had been fired because of promises he made to clients was admissible under the admissions exception. *Id.* at 947.

\(^{127}\) 516 So. 2d 1048 (Fla. 1987). A friend of the defendant testified that “[Pieczynski] started apologizing and mumbling and he got up and said he couldn’t help himself…” *Id.* at 1051. The court found the part of the defendant’s statement that said he was sorry and could not help himself was admissible under the admissions exception. *Id.*
exception is one of the most likely hearsay exceptions for an apology to fall under. If an apology falls under the admissions exception, it is deemed admissible despite its hearsay status.

\[b. \text{The Statements Against Interest Exception}\]

Unlike the admissions exception, the statement against interest exception applies to any witnesses, and carries the additional requirement that the speaker be unavailable. Similar to the admissions exception, the purported statement must tend to “subject the declarant to civil or criminal liability” to fit under this exception. For an apology to fall under this exception, the declarant of the apology must be unavailable at trial through either privilege, refusal to testify, lack of memory, death or serious illness, or unavoidable absence. Further, the apology must y

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128 While a full apology is more likely to be admitted under the admissions exception and potential defendants are thus discouraged from making them, there is evidence that jurors may respond more favorably to a full apology. See Robbennolt, Settlement, supra note 8, at 476. Defendants in civil trials who show remorse were perceived more positively by mock jurors than those who did not. Id. The results showed “male participants awarded marginally less in damages against the physician who expressed remorse at the time of trial or who did nothing to indicate remorse or a lack thereof than they did against physicians who were remorseless or who expressed.” Id.

129 The statements against interest exception states that if a declarant is unavailable, a statement by the declarant which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true is inadmissible. FED. R. EVID. 804(b)(3).

130 FED. R. EVID. 804(a)(3).

131 See FED. R. EVID. 804(a).

‘Unavailability as a witness’ includes situations in which the declarant--(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a
tend to subject the declarant to liability. Like the reasons for the apology to be offered against the defendant under the statements against interest exception, an apology will tend to show that the declarant is liable because it tends to show that because he apologized, the declarant did something wrong.\textsuperscript{132}

Courts have admitted an apology under the statements against interest exception despite the apology’s categorization as inadmissible hearsay.\textsuperscript{133} In \textit{United States v. Samaniego}, the court found that an apology made by one of the defendants fell under the statements against interest exception and that it was properly admitted by the district court.\textsuperscript{134} The court found that because the apology “admitted having stolen” the victim’s property, it would “subject the declarant to civil or criminal liability’ within the meaning of \textit{Rule 804(b)(3)}.”\textsuperscript{135} The court also found that the declarant was unavailable because there had been reasonable efforts made to locate the

\begin{quote}
hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

\textit{Id.}
\end{quote}

\textsuperscript{132} See \textit{supra} notes 124-127, and accompanying text for a discussion of the tendency of the apology to show liability under the admissions exception.

\textsuperscript{133} In \textit{U-Drive-It Car Co. Inc. v. Friedman}, 153 So. 500 (La. Ct. App. 1934) a Pre-Rules case, there was a car accident in which Driver 1 brought a suit against Driver 2’s insurance company. \textit{Id.} at 500. The court held that Driver 2’s affidavit admitting fault following the car accident was admissible against the insurance company from which liability could flow, even though Driver 2’s insurance contract prohibited him from ‘voluntarily assum[ing] liability.’ \textit{Id.} at 501. The court rationalized this admission by staying that “there is something contrary to our ideas as to what should be an established public policy for an insurer to require from the assured that he, the assured, shall not make a statement about the facts of accident in which he may be involved.” \textit{Id.} at 503. See also \textit{United States v. Samaniego}, 345 F.3d 1280, 1284 (11th Cir. 2003) (considering an apology a statement against interest).

\textsuperscript{134} Samaniego, \textit{supra} note 133, at 1283.

\textsuperscript{135} \textit{Id.}
defendant, who had fled to Panama. An apology may therefore be admitted under the statements against interest exception.

c. The State of Mind Exception

An apology may also be admitted into evidence under the state of mind exception. The state of mind exception contained in Federal Rule of Evidence 803(3) allows a statement of the declarant’s “then existing state of mind, emotion, sensation, or physical condition” to be admitted, despite its classification as inadmissible hearsay. A statement will not be admissible under this exception, however, if it is a “statement of memory or belief” used to try to prove the fact that was remembered or believed. This limitation exists to avoid the problem of allowing a state of mind produced by an event to prove that event actually occurred.

An apology may fall under the state of mind exception if it is offered to show how the declarant felt at the time he made the apology. For example, in United States v. Samaniego,


136 Id. at 1284.

137 See also Smith v. Belterra Resort Indiana, 2007 WL 4238959, *1 (S.D.Ind. Nov. 27, 2007) (“Plaintiff is permitted to provide evidence from Defendant or Defendant's employees and representatives that expresses sympathy, an apology, or a sense of benevolence only to the extent that it amounts to an admission against interest in accordance with Rule 804 of the Federal Rules of Evidence. Otherwise such evidence must be excluded.”).

138 FED. R. EVID. 803(3).

139 Id.

140 Id.

141 This limitation is necessary “to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis or an inference of the happening of the event which produced the state of mind.” FED. R. EVID. 803(3) advisory committee’s notes.
the court found that an apology made by the defendant to the victim was evidence of a then existing state of mind of the declarant, his “remorse.”\footnote{See, e.g., Samaniego, supra note 133, at 1282 (“An apology is evidence of a then-existing state of mind or emotion.”).} Although the court conceded that the apology was hearsay, it found that the apology was nevertheless admissible to prove the truth of the matter asserted, which in this case was the fact that the defendant “felt remorse at the time he made the apologetic statement.”\footnote{Id.} However, the court also held that the limitation on the state of mind exception applied in this case, reasoning that the apology could not be used to prove that the defendant committed the wrong, because that would be attempting to prove that the defendant was remorseful because he committed the wrong, not just that he was remorseful.\footnote{Id. at 1283 (“What Iglesias said was offered to show not only that he was remorseful, but also that he had stolen the belts. Rule 803(3) expressly prohibits the use of a statement of then-existing state of mind in this way.”).} This would effectively use the statement of belief, the defendant’s remorse, to prove that he did something wrong to be remorseful for, and therefore it takes the statement out of consideration under 803(3).\footnote{See supra notes 140-141.} An apology may be admissible under the state of mind exception as long as it is not used to try to prove the existence of the fact underlying that state of mind.\footnote{Id.} Therefore, in order to jump the hearsay hurdle and be admitted into evidence, an apology might not meet the definition of hearsay at all, or if it does meet the hearsay definition, it may fit under the admissions exception, statement against interest exception, or state of mind exception, and hence be deemed admissible.\footnote{See supra note 140-141.}
B. Current Evidentiary Rules That Protect an Apology From Admissibility

1. Settlement and Mediation

The hearsay exceptions are not the only evidence rules that may affect an apology’s admissibility. Federal Rule of Evidence 408 protects any statement made during settlement negotiations from admissibility at trial to prove liability.\(^\text{149}\) The thrust behind this rule is that statements made during negotiation may simply have been made to try to reach a peaceful ending, and should not be then used against a person who was seeking a reconciliation at trial.\(^\text{150}\) The policy considerations of furthering alternative dispute resolution without a trial are another consideration behind this rule.\(^\text{151}\) In fact, the rule was expanded beyond just protection of offers of settlement to cover all conduct and statements made during the negotiations in order to further these important goals of increased settlement and resolution for parties.\(^\text{152}\) While the Federal Rules do not provide a parallel protection to statements made during mediation, many state jurisdictions apply a similar protection to that of Rule 409 for statements made during mediation.\(^\text{153}\) But under the Federal Rules, any apology made during a settlement negotiation is

\(^{149}\) Fed. R. Evid. 408; see also, e.g., Cal. Evid. Code 1152 (“Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”).

\(^{150}\) Fed. R. Evid. 408 advisory committee’s notes (“Exclusion may be based on [the grounds that] the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position.”).

\(^{151}\) Id. (“A more consistently impressive ground [for this rule] is promotion of the public policy favoring the compromise and settlement of disputes.”).

\(^{152}\) Id. (“These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.”).
completely protected from admissibility at trial because it falls under the “conduct or statements made in compromise negotiations” language of Rule 409. This evidentiary rule is the only complete affirmative protection an apology has under the Federal Rules. A defendant is free to make any apology he desires during settlement without worrying whether or not that apology will be admissible at trial. If a defendant apologizes outside of settlement, the defendant now subjects that apology to a determination by the court of whether or not the apology is hearsay and whether or not it fits under an exception.

2. State Evidentiary Rules

While the Federal Rules provide no specific protection to an apology, many state jurisdictions do provide a specific protection in some form. While the same hearsay analysis

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153 CAL. R. EVID. 703.5 (“no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding.”); see also Olam v. Congress Mortg. Co., 68 F. Supp 2d 1110 (N.D. Cal. 1999) (holding that while a mediation privilege did exist for the mediator, that privilege was effectively waived when the parties entered into a mediation contract).

154 FED. R. EVID. 409.

155 Of course, an apology may be deemed inadmissible if it does not meet the hearsay definition or if it meets a hearsay definition, but these rules do not specifically target an apology for affirmative protection. See Part III.A.2, supra, notes 98-148 and accompanying text (discussing the hearsay definition and exceptions).

156 The policy considerations of the rule seek to allow the parties in settlement wide latitude in choosing what to say in order to increase the chances of an actual settlement. See supra notes 150-152 (discussing the advisory committee’s notes on the goals of implementation of Rule 408).

157 As a result, the apology is taken out of the defendant’s hands. Many defendants will choose not to apologize and not to take the chance that a court will deem their apology admissible. See supra note 8, discussing the fear of making an apology for fear of the legal consequences.

158 ARIZ. REV. STAT. ANN. § 12-2605; CAL. EVID. CODE § 1160(a); COLO. REV. STAT. § 13-25-135; CONN. GEN. STAT. § 52-184(d); DEL. CODE ANN. tit. 10, §4318; D.C. CODE ANN. § 16-2841; FLA. STAT. § 90.426(2); GA. CODE ANN. §24-3-37.1; 735; HAW. REV. STAT. § 626-1; IDAHO CODE § 9-207; ILL. COMP. STAT. 5/8-1901; IND. CODE ANN. §34-43.5-1; IOWA CODE § 622.31; LA. REV. STAT. ANN. §
done in Part III. A will also be done in for an apology in a state jurisdiction, most of whom
pattern their own evidentiary rules after the federal ones, many states now provide an additional
protection for an apology that might take the apology out of this hearsay consideration
altogether. In 1986, Massachusetts became the first state to pass a statute to specifically
protect apologies from admissibility. The Massachusetts statute protects only partial, or
sympathy only, apologies. Since then a total of thirty-six of the fifty-one state jurisdictions
have also given at least some sort of protection from admissibility to an apology. Of those
thirty-six states, most have stuck with the original Massachusetts precedent, and similarly only
protect partial apologies. Only six states protect full, fault-accepting apologies. Further,

13:3715.5; ME. REV. STAT. ANN. tit. 24, § 2907; MD. CTS. & JUD. PROC. CODE ANN. § 10-920; MASS.
GEN. LAWS CH. 233 §23D; MO. REV. STAT. § 538.229; MONT. CODE. ANN. § 26-1-814; NEB. REV.
STAT. § 27-1201; N.H. REV. STAT. ANN. § 507-E:4; N.C. GEN. STAT. § 8C-4, Rule 413; N.D. CENT.
CODE § 31-04-12; OHIO REV. CODE ANN. §2317.43; OKLA. STAT. ANN. tit. 63, § 1-1708.1H; OR. REV.
STAT. §677.082; S.C. CODE ANN. §19-1-190; S.D. CODIFIED LAWS § 19-12-14; TENN. R. EVID. § 409.1
TEX. CIV. PRACT. & REM. CODE ANN. § 18.061; UTAH CODE ANN. § 78-14-18; VT. STAT. ANN. tit. 12,
§1912; VA. CODE ANN. § 8.01-581.20:1; WASH. REV. CODE § 5.66.010(1); W. VA. CODE § 55-7-11(a);
WYO. STAT. ANN. § 1-1-130.

159 See supra note 143 (listing the state statutes that provide some sort of specific protection to an
apology).

160 See MASS. GEN. LAWS ANN. CH. 233, § 23D (West 1986).

States, 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.

Id.

161 Id.

162 See supra note 158 (listing all the state statutes that protect apologies).

163 CAL. EVID. CODE § 1160(a); DEL. CODE ANN. tit. 10, §4318; D.C. CODE ANN. § 16-2841; FLA.
STAT. § 90.4026(2); HAW. REV. STAT. § 626-1; IDAHO CODE § 9-207; ILL. COMP. STAT. 5/8-1901; IND.
CODE ANN. §34-43.5-1; IOWA CODE § 622.31; LA. REV. STAT. ANN. § 13:3715.5; ME. REV. STAT. ANN.
tit. 24, § 2907; MD. CTS. & JUD. PROC. CODE ANN. § 10-920; MASS. GEN. LAWS CH. 233 §23D; MO.
REV. STAT. § 538.229; MONT. CODE. ANN. § 26-1-814; NEB. REV. STAT. § 27-1201; N.H. REV. STAT.
ANN. § 507-E:4; N.C. GEN. STAT. § 8C-4, Rule 413; N.D. CENT. CODE § 31-04-12; OHIO REV. CODE
five of those six states that protect full apologies only protect them in health care situations, in which a doctor apologizes after a medical mistake. Many of these statutes operate to protect the apology by excluding it from classification under the admissions exception, however,

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ANN. §2317.43; OKLA. STAT. ANN. tit. 63, § 1-708.1H; OR. REV. STAT. §677.082; S.D. CODIFIED LAWS § 19-12-14; TENN. R. EVID. § 409.1; TEX. CIV. PRAC. & REM. CODE ANN. § 18.061; UTAH CODE ANN. § 78-14-18; VT. STAT. ANN. tit. 12, §1912; VA. CODE ANN. § 8.01-581.20:1; W. VA. CODE § 55-7-11(a); WYO. STAT. ANN. § 1-1-130. The California Evidence Rule provides a good example of a statute that protects only partial apologies, and only in a medical error situation. See CAL. EVID. CODE § 1160(a). The Statute states:

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.

Id.

164 ARIZ. REV. STAT. ANN. § 12-2605; COLO. REV. STAT. § 13-25-135; CONN. GEN. STAT. § 52-184(d); GA. CODE ANN. §24-3-37.1; 735; S.C. CODE ANN. §19-1-190; WASH. REV. CODE § 5.66.010(1); see also supra Part II.A, notes 40-51 (discussing of full, fault-accepting apologies). The Colorado Statute provides a good example of a statute that protects full apologies in medical error situations. See COLO. REV. STAT. § 13-25-135. It states:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding relating to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. (emphasis added).

Id.

165 ARIZ. REV. STAT. ANN. § 12-2605; COLO. REV. STAT. § 13-25-135; CONN. GEN. STAT. § 52-184(d); GA. CODE ANN. §24-3-37.1; 735; WASH. REV. CODE § 5.66.010(1). See supra, note 164 for the text of Colorado’s statute that protects only partial apologies and only in medical situations.

166 California’s statute provides a typical example of a statute that protects an apology as an admission. See CAL. EVID. CODE § 1160(a). It states:

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.
several also protect an apology from consideration as a statement against interest when the declarant is unavailable at trial. A few states protect the apology from admissibility under either of these exceptions by designating the apology “inadmissible for any purpose” or “inadmissible to establish civil liability.” These last two considerations that render an apology “inadmissible,” disregard the apology’s potential hearsay status, similar to Federal Rule 408 that renders an apology during settlement inadmissible despite any hearsay status it might have. However, at this point, the most common evidentiary rule, in force in thirty states, is one that

\[\text{Id.}\]

167 ARIZ. REV. STAT. ANN. § 12-2605; COLO. REV. STAT. § 13-25-135; CONN. GEN. STAT. § 52-184(d); D.C. CODE ANN. § 16-2841; GA. CODE ANN. §24-3-37.1; IDAHO CODE § 9-207; LA. REV. STAT. ANN. § 13:2715.5; ME. REV. STAT. ANN. tit. 24, § 2907; MD. CODES & JUD. PROC. CODE ANN. § 10-920; OHIO REV. CODE ANN. §2317.43; OKLA. STAT. ANN. tit. 63, § 1-1708.1H; UTAH CODE ANN. § 78-14-18; VA. CODE ANN. § 8.01-581.20:1; W. VA. CODE § 55-7-11(a); WYO. STAT. ANN. § 1-1-130. It should also be noted that every statute which protects the apology as a statement against interest also protects it as an admission. See id. Arizona’s statute provides a good example of a statute which protects both admissions. See ARIZ. REV. STAT. ANN. § 12-2605. It states:

> In any civil action that is brought against a health care provider as defined in section 12-561 or in any arbitration proceeding that relates to the civil action, any 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 or an employee of 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.

\[\text{Id.}\]

168 DEL. CODE ANN. tit. 10, §4318 (“inadmissible for any purpose”); HAW. REV. STAT. § 626-1 (“inadmissible to establish civil liability”); IND. CODE ANN. §34-43.5-1 (“inadmissible for any purpose”); MO. REV. STAT. § 538.229 (“inadmissible for any purpose”); N.C. GEN. STAT. § 8C-4, Rule 413 (“inadmissible to prove negligence or culpable conduct”); OR. REV. STAT. §677.082; S.C. CODE ANN. §19-1-190 (for healthcare outcomes, “inadmissible as evidence”); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (inadmissible if offered to prove liability); VT. STAT. ANN. tit. 12, §1912 (inadmissible for any purpose); WASH. REV. CODE § 5.66.010(1) (“inadmissible as evidence” for any purpose).

169 See supra notes 150-152 and accompanying text (discussing Rule 408).
protects only partial apologies from admissibility. The next most common practice, used by twenty-five states, and the federal rules as well, is to not protect apologies with any rule at all.

3. Arguments for Protection of Apology

The two most commons approaches then, are to not protect an apology at all, or to protect only partial apologies. Because of the division among the jurisdictions about what the correct level of protection of apologies is, a debate between those advocating to protect apologies, and those advocating not to protect them, has emerged. Both sides agree that the goals of protection of an apology with an evidentiary rule are to encourage settlement and healing of the plaintiff. Proponents of protection of the apology argue that an evidentiary rule to protect apologies will serve these goals. They argue that by encouraging apologies through removing the fear of the legal consequences, an apology can decrease the amount of lawsuits filed, and

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170 See supra note 148 for a list of the these statutes.

171 See supra note 163 for a list of the statutes that do protect an apology. All other states have no rule for an apology, and the federal rules similarly have no rule for an apology.

172 See supra notes 169-170, and accompanying text (listing these statutes).

173 See infra, notes 172-183, and accompanying text (discussing the arguments for and against protecting an apology).

174 There is evidence that an apology can helps mend a dispute and a relationship because of the psychological effects it has on the victim. See Robben Holt, Apologies and Litigation, supra note 13. Robben Holt found that various studies that analyzed “the impact of apologies in a variety of contexts” showed there is “a range of positive effects that flow from apologizing.” Id. She found that “these effects include more favorable attributions, more positive and less negative emotion for both apologizer and recipient, improved physiological responses for both parties, improve future relations, decreased need to punish, and more likely forgiveness.” Id. Protecting the apology can also promote reconciliation of a dispute. Orenstein, Feminist Perspective, supra note 60, at 223. Protection of the apology can help to facilitate settlement as well. See Cohen, Advising Clients to Apologize, supra note 9, at 1013 (1999). Apology also has the potential to increase the success of reconciliation of a dispute through mediation. Marshall H. Tanick & Teresa J. Ayling, Alternative Dispute Resolution By Apology: Settlement by Saying “I’m Sorry,” HENNEPIN LAW, July-Aug. 1996 at 22; Stephen B. Goldberg et al., Dispute Resolution, supra note 70, at 159-62 (3d ed. 1999).
increase settlement for ones that are filed.\textsuperscript{175} Proponents of protection of the apology reason that as the rules stand, an apology is usually admissible under an exception to hearsay, and because of this, potential defendants are scared away from apologizing.\textsuperscript{176} They argue that protection of the apology from admissibility with an evidentiary rule encourages apologies, and encouraging

\textsuperscript{175} There is empirical evidence in the area of medical malpractice litigation that shows an apology may reduce litigation and promote early settlement. See Virgil Van Dusen & Alan Spies, Professional Apology: Dilemma or Opportunity, 67 AMERICAN JOURNAL OF PHARMACEUTICAL EDUCATION 3 (2003). Van Dusen and Spies’ study found that from a group of patients who had filed medical malpractice suits, 37 percent said they would not have filed a lawsuit if they had been given a complete explanation and apology. \textit{Id.} It should be noted that the patients also stated that a complete explanation and apology was more important to them than monetary compensation for the injury. \textit{Id.} The University of Michigan instituted an active encouragement of doctor’s to apologize for mistakes, and since that policy began in 2002 malpractice lawsuits and notices of intent to sue have decreased from 262 in 2001 to 130. See Associated Press, \textit{Doctors urged to apologize for mistakes; Softer approach aims to reduce malpractice lawsuits} (November 11, 2004). In Apologies and Settlement, Robbennolt cites some anecdotal examples of an apology’s effect on litigation. See Robbennolt, \textit{Settlement, supra} note 8, at 464. Attorney Bruce W. Neckers describes:

\begin{quote}
In a case in which I represented the plaintiff, the wrongdoer himself tearfully acknowledged is role in the tragic accidental death of my client’s son. It had a huge impact on the settlement of the case. There never would have been a lawsuit of the same person had made the same comments to the mother during the 30-day period in which her son lay dying in the hospital, or during the three days his young body was at the funeral home. The sad part in that case is that the defendant and his company wanted to express the same thought near the time of the accident, but claimed to have been prohibited by doing so by their insurance carrier.
\end{quote}

Bruce W. Neckers, \textit{The Art of the Apology}, MICH. B.J. June 2002, at 10, 11. See also Carl, D. Schneider, \textit{What It Means To Be Sorry: The Power of Apology in Mediation}, 17 MEDIATION Q. 265, 274 (describing negotiations stalling “over the plaintiff’s demand for an apology, even after the sides had agreed on the damages to be paid.”); Piper Fogg, \textit{Minnesota System Agrees to Pay $500,000 to Settle Pay-Bias Dispute}, CHRON. HIGHER EDUC., Feb. 14, 2003, at A12 (in reaction to the settlement, plaintiff said “I want an apology…and I am never going to get it.”).

\textsuperscript{176} See Robbennolt, \textit{Settlement, supra} note 8, at 465 (“In the context of civil disputes, the conventional wisdom among legal actors has been that an apology will be viewed as an admission of responsibility and will lead to increased legal liability—and accordingly, that apologies ought to be avoided.”); see also id. at 467 (“Attorney and others fear that any apology will be admitted into evidence as an admission of fault. Consequently, some clients are hesitant to apologize. Likewise, lawyers and insurance companies may be unlikely to advise their clients to apologize or to make any statement that could be construed as an apology. In fact, they may actively discourage such statements.”).
apologies will encourage settlement and healing, and thus the goals of protection of an apology would be furthered.177

4. Arguments Against Protection of Apology

In response, opponents of protection of the apology with an evidentiary rule argue that the goals of increasing settlement and healing are not truly furthered by protection of apology by a rule. They argue that when the apology is protected from admissibility, the legal consequences of the wrongdoing are effectively taken away.178 Thus, rather than promoting the healing of the victim, the apology becomes an item of exchange given to the plaintiff to elicit a response.179 This exchange causes the apology to lose its the moral element, and opponents of protection argue that plaintiffs will be taken advantage of by insincere apologies calculated to elicit the

177 Robbennolt, Settlement, supra note 8, at 504 (“Providing evidentiary protection for apologies may serve to encourage the offering of apologies, or at least to signal that apologies are a desired response to an injury-producing event, without diminishing the value and effectiveness of apologies.”); see also Orenstein, Feminist Perspective, supra note 60, at 247 (“Because apologies are so crucial to social interaction and personal peace, it is desirable that law facilitate or, at least, not hinder the possibility of this healing ritual.”).

178 Professor Taft argues that a true apology is a moral act in which there is something on the line for the person apologizing. See Taft, Commodation, supra note 5, at 1149. He argues that the admission of the apology is an important part of the moral dialectic of apology. Id. at 1157. He argues “the law recognizes that an apology, when authentically and freely made, is an admission: it is an unequivocal statement of wrongdoing.” Id. The law allows this acknowledgement into the legal setting “as a way to allow the performer of apology to experience the full consequences of the wrongful act.” Id. An apology made “with full knowledge of the legal ramifications, is much more freighted than an apology made in a purely social context” because “[n]ow the offender must confront not only shame, fear, and humiliation, but financial risk as well.” Id. To apologize with the full awareness of the ramifications “calls on the offender to exercise great courage, one of the markers of a truly moral act.” Id. On the other hand, when an apology is protected from admissibility, “no legal consequence can attach to the party through the apology” and thus “apologetic discourse moves from potential to actual corruption.” Id. at 1156.

179 Taft argues that when an apology is exchanged for settlement, the exchange is missing the moral climate necessary for an authentic apology. See Taft, Commodation, supra note 5, at 1149. He argues that this type of bargained for apology cannot be authentic because an authentic apology “cannot come about and do its work under conditions where the primary function of speech is defensive or purely instrumental and where legalities take precedence over moral imperatives.” Id. (quoting TAVUCHIS, MEA CULPA, supra note 4, at 62).
response a defendant desires. This would effectively erode the morality of the apology, and would not truly promote the moral healing a victim needs. Potential plaintiffs may be less likely to accept a strategic apology tailored for evidentiary protection, and as a result, settlement would be less likely. Therefore, opponents of protection of the apology essentially argue that the goals set out by the proponents of the apology would not actually be furthered by an evidentiary protection because the protection would be unable to distinguish good apologies from bad ones, and consequently too many bad, or strategic, apologies would be encouraged.

The problem then becomes how to encourage apologies without encouraging the wrong type.

180 There is concern that plaintiffs will be taken advantage of by strategic apologies tailored to fit the types of apologies protected by the evidentiary rules, often a partial apology which does not accept fault. See, e.g., Taft, Commodification, supra note 5, at 1154 (arguing that in order for an apology to be authentic, it must express sorrow and wrongdoing, and that the evidentiary rules of Massachusetts and Texas, that only protect partial, sympathy only apologies, require a defendant to twist his apology into a statement which no longer meets the requirements of an authentic apology). Some other examples of strategic reasons a defendant may apologize are to “escape punishment” as in a “criminal sentencing where expression of remorse can lower a sentencing.” or “to save a guilty conscience” or possibly to “preempt further accusation or discussion of one’s wrongdoing.” See Orenstein, Feminist Analysis, supra note 60, at 241. The judicial system agrees that the apology has an undeniable moral element. See Strittmatter v. Briscoe, 504 F. Supp.2d 169, 176 (E.D. Tex. 2007) (“While, as a legal matter, Strittmatter is not entitled to monetary compensation, some expression of regret appears due to him as a moral matter. Apologies, however, are not remedies that courts can order, and if they were, they would be of little consequence.”)(emphasis added).

181 Id.

182 However, it is interesting to note that protecting, and thereby encouraging, or rewarding an apology by making it inadmissible does not exonerate the defendant from his or her wrongdoing. It merely makes apologizing costless for the defendant. Making an apology inadmissible simply deprives the plaintiff of one piece of evidence he otherwise might have used to prove wrongdoing by the defendant. Of course, a good apology may in essence contain a confession, which is a very third powerful type of evidence. Occasionally that confession may be essential to proving the plaintiff’s case, and sometimes it may be very helpful. While making apologies inadmissible may cause some plaintiffs to lose, and may reduce the odds that other plaintiffs will prevail, it does not guarantee the defendant success by any means. It does, however, allow the defendant to obtain some of the benefits of the apology (a reduced chance that the plaintiff will sue, for example) without accepting the corresponding burden (an admissible confession, for example).

183 See supra note 180, discussing the increase of strategic apologies that would result from protection of the apology.
IV. A NEW EVIDENTIARY RULE

The solution to this problem is in a new evidentiary rule that protects and thereby encourages only those apologies most likely to be successful. While both sides on the debate of protection of the apology acknowledge the complexity of the apology,184 they fail to realize that its complexity can and should be taken into consideration in the formation of a new rule to protect it.185 By ignoring the complexity of the apology, the current arguments on both sides of the debate are insufficient. Similarly, the current federal and state evidentiary rules that do protect an apology at all, overwhelmingly protect the wrong kinds of apologies, and consequently they also miss the mark.186 Therefore, this Comment proposes a new rule that only protects apologies that are most likely to succeed.187 Accordingly, only an apology that accepts fault,188 is given within a close relationship,189 is given in a personal manner,190 and is given during an intermediate time191 should be protected from admissibility. By closely tailoring the

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184 See infra note 276 (showing acknowledgement of the complexity of the apology).

185 Robbennolt argues that only full apologies should be protected by an evidentiary rule, and thus takes one of the elements into consideration, but does not integrate any others into her argument for protection of apologies. See Robbennolt, Settlement, supra note 8.

186 See supra Part III.B (discussing the current evidentiary rules)

187 See infra Part IV.B (introducing the new Rule).

188 See supra Part II.A (discussing acceptance of fault).

189 See supra Part II.B (discussing relationship).

190 See supra Part II.C (discussing form).

191 See supra Part II.D (discussing timing).
goals of protection of the apology, settlement and healing, to the rule, the new rule will protect and encourage only apologies that are most likely to achieve these goals. 192

A. The Elements of An Apology In the Legal Setting

The elements of the apology discussed in Part II may be transitioned into the legal setting, thus reaffirming that a new evidentiary rule that embraces these elements can and will work. 193 This section will show how acceptance of fault, 194 relationship between giver and receiver, 195 form of the apology, 196 and timing of the apology, 197 function in the legal setting. Rather than ignoring the complexity of the apology and the opportunity to carve out an exception to protect the most successful apologies, as the current evidentiary rules and arguments on both sides of the recent debate do, this Comment will argue that there is a way to isolate and protect only apologies most likely to succeed with a new evidentiary rule by using these elements. 198

192 See infra Part IV.B (for the text of the new Rule).

193 See infra Part IV.A (discussing how the elements of the apology function in the legal setting).

194 See infra Part IV.A.1 (discussing acceptance of fault in the legal setting).

195 See infra Part IV.A.2 (discussing relationship in the legal setting).

196 See infra Part IV.A.3 (discussing form in the legal setting).

197 See infra Part IV.A.4 (discussing timing in the legal setting).

198 See infra Part IV.B (presenting the new Rule).
1. Acceptance of Fault By The Defendant

In Part II, the conclusion was reached that an apology that accepts fault is more likely to be successful than one that does not.\(^{199}\) This conclusion can be translated into the legal setting as well to enforce that a new evidentiary rule should take acceptance of fault into consideration because of its relationship to an apology’s success.\(^{200}\) There is empirical research that in the settlement context, a full apology is more successful than a partial one.\(^{201}\) In Robbennolt’s settlement study,\(^{202}\) participants read a hypothetical scenario about a pedestrian-bicycle accident, and were asked to put themselves in the injured pedestrian’s shoes.\(^{203}\) After the accident, each participant received either a partial apology expressing sympathy for their injuries, a full apology

\(^{199}\) See supra Part II.A (discussing how an apology that accepts fault is more likely to succeed).

\(^{200}\) In Spencer v. State, --- So.2d ----, 2009 WL 487736 (Ala. Crim. App. 2009), the court found that a clearly insincere apology was not an adequate mitigating circumstances for sentencing. The defense called [Spencer] to the stand to testify in the penalty phase before the jury. [Spencer] also testified before the Court in the sentencing phase before the Court. [Spencer] testified about his education, having completed the tenth grade. He also testified that he obtained a GED in the job corps as well as an electrician trade, but felt it was more profitable to sell drugs. He then went on to relate his version of the events that led to the shooting of these officers. During the sentencing hearing before the Court, [Spencer] testified that he was sorry for what he had done and apologized to the families of the victims. This was the sum total of the non-statutory mitigating evidence offered by [Spencer]. This Court did not consider this as mitigating evidence. Although [Spencer] offered an apology for his actions, it is in direct contradiction with the undisputed facts of the case nor his statement to police after his arrest, or his testimony before the jury in the penalty phase. His attitude in both was one of entitlement or justification. He was untruthful because the undisputed physical evidence contradicts his testimony. Id. From the court’s rationale, it can be inferred that the court did not accept the apology because it was not sincere.

\(^{201}\) In Robbennolt’s study, “a full apology was viewed as more sufficient than either a partial apology or no apology.” See Robbennolt, Settlement, supra note 8, at 484.

\(^{202}\) See Robbennolt, Settlement, supra note 8, at n.109-115 for more information on the procedures of the study.

\(^{203}\) Id.
where the other party also took responsibility for causing the injuries, or no apology at all.\textsuperscript{204} All
the participants then read a settlement agreement that covered only the out-of-pocket expenses of
the injured victim, and then were asked how likely they were to accept the settlement offer.\textsuperscript{205} The results showed that the level of acceptance for the participants that received a full apology
was much higher than those that received a partial apology.\textsuperscript{206} In fact, the study found that not
only did a partial apology not help the chances of settlement, it actually made settlement less
likely than if there was no apology at all.\textsuperscript{207} While those that received a full apology were more
likely to accept the settlement than those who received a partial apology, those that received a
partial apology were less likely to accept the settlement than those who got no apology.\textsuperscript{208}

While an apology that accepts fault is likely to increase the chances of success, as
Robbennolt’s study shows, it may also increase the chances of the apology’s consideration as an
admission to hearsay under the law.\textsuperscript{209} For example, in the case of \textit{Becton v. Starbucks Corp.}, an
employee for defendant corporation Starbucks apologized to a customer after a lid that was
allegedly attached improperly fell off, burning the victim with the hot liquid inside.\textsuperscript{210} The
employee then followed her apology for the lid not being properly attached by “indicating that

\begin{footnote}
\textsuperscript{204} \textit{Id.} at 484.
\textsuperscript{205} \textit{Id.} at 483.
\textsuperscript{206} \textit{Id.} at 485-86. \textit{See also infra} FIGURE 1; TABLE 1, showing the results of Robbennolt’s study.
\textsuperscript{207} Fifty-two percent of participants indicated they would definitely or probably accept an offer when no
apology was given. \textit{See} Robbennolt, \textit{Settlement, supra} note 8, at 485-86. In contrast, when a partial
apology was given, only thirty-five percent said they would definitely or probably accept the offer. \textit{Id.} at
486; \textit{see also infra} FIGURE 1; TABLE 1.
\textsuperscript{208} \textit{See infra} FIGURE 1; TABLE 1, showing the results of Robbennolt’s study.
\textsuperscript{209} \textit{See} Fed. R. Evid. 801; \textit{see also supra} Part III.A.2. (discussing the admissions exception).
\end{footnote}
those particular cups and lids must have been defective.” The court found that because the employer accepted responsibility for the injury by indicating that her employer Starbucks had caused it through their defective lids and cups, her statement was admissible under the admissions exception to hearsay.

While studies such as Robbennolt’s show that an apology that accepts fault increases the chances of success, cases such as Starbucks confirm that these apologies most likely to be successful are also most likely to be admissible through the admissions exception to hearsay. As a result, the types of apologies most likely to be successful are discouraged because they can be used against a party at trial. Further, because thirty of the thirty-six states that protect apologies from admissibility at all only protect partial apologies, that are not likely to be successful and may even be detrimental, apologies not likely to be successful are encouraged. These reaches a paradoxical result. The apology must succeed to truly reach its goals of settlement and healing, but the type of apology currently encouraged is a partial one not likely to succeed at all. Because of this, a new evidentiary rule should include acceptance of fault as a consideration in protection of the apology in order to protect apologies most likely to

211 Id. at 741.

212 Id. The court found that “[h]er conduct clearly supports a finding that she worked for Starbucks and was acting in the scope of her employment when she made the statement. Therefore, the manager’s statement is properly characterized as an admission by a party opponent, non-hearsay under Federal Rule of Evidence 801(d)(2)(D).” Id.

213 Robbennolt notes that “[r]esearch using actual litigants in actual cases has the benefit of realism, but the researcher is unable to control the myriad factors that make cases differ from one another, making the isolation of the variable of interest impracticable.” See Robbennolt, Settlement, supra note 8, at n.108.

214 See supra Part III.A.2.a (discussing the admissions exception).

215 See supra note 189, showing how a partial apology actually decreased acceptance levels lower than if no apology was given at all; see also infra FIGURE 1; TABLE 1.

216 See supra Part III.B (discussing the state evidentiary rules related to apology).
be successful, and thereby most likely to achieve the goals of settlement and healing of the victim.  

2. Relationship Between Defendant and Plaintiff

The importance of the relationship within which the apology is given is apparent in the legal setting as well. The conclusion reached in Part II.B was that the closer the relationship is between the giver and receiver of the apology, the more likely the apology is to succeed. Similarly, the relationship between a plaintiff and defendant can be analyzed, and the closer that relationship is, the more likely the apology from a defendant will be to succeed. While many lawsuits might be brought by strangers, many plaintiffs and defendants have some sort of prior relationship. For instance, when a patient sues his doctor for malpractice, there is a prior relationship and duty of care built into the dispute. When the dispute arises between a

217 Other scholars have proposed the idea of only protecting full apologies as well. See Robbennolt, Settlement, supra note 8. See also Feminist Analysis, supra note 60, at 247 (“My proposal would except apologies and admissions of fault in civil cases.”).

218 See supra Part II.B, notes ___ to ___ and accompanying text; see also O’Hara & Yarn, supra note 3, at 1174. O’Hara and Yarn found that because “the transgressor may hope to continue in the relationship,” and because “forgiveness presumably enhances the future benefits that are obtainable,” that “an apology has the potential to repair the relationship better and faster than a failure to apologize.” Id. This is because “the apology communicates to the victim that the transgressor does care about his relationship with the victim.” Id.

219 See Goldberg et al., Saying You’re Sorry, supra note 70, at 221 (“To the extent that the dispute has occurred in the context of an ongoing relationship, the apology is valuable in repairing whatever harm to the relationship has resulted from the dispute.”).

220 See id.

221 See Feminist Analysis, supra note 60, at 255-56. Promoting apology is particularly important in the context of a professional relationship. The relationship between a professional and the one served (e.g., lawyer-client, clergyperson-penitent, doctor-patient) depends on personal connections as well as expert service. Such professional relationships often encompass a high degree of trust and rely
neighbor or family member, there is an even stronger prior relationship there.\textsuperscript{222} As a result, when the parties are family, the apology will be more likely to succeed than if the parties have a professional relationship, like a doctor and patient. However, an apology within a professional relationship will be more likely to succeed than one between strangers.\textsuperscript{223}

The importance of the relationship within which the apology is given can be found indirectly in some state rules of evidence. These states acknowledge the importance that the relationship between the parties may have on the success of the apology, and as a consequence, the effect the relationship has on reaching the goals of settlement and healing.\textsuperscript{224} Many states that protect an apology only do so in medical malpractice situations.\textsuperscript{225} Specifically targeting the relationship between doctors and their patients acknowledges the uniqueness of that relationship and the importance in protecting it.\textsuperscript{226} Cementing this acknowledgment of the importance of a doctor-patient relationship, some of these statutes go against the general trend of protection of on outside professionals' expertise, because laypeople are often unable to evaluate the quality of the service.

\textit{Id.}

\textsuperscript{222} Robbennolt comments that part of the reason an apology may have been accepted in her study was because it was in the context of an “interpersonal dispute between neighbors” and notes that an apology might be less likely if it were made “outside the interpersonal context (e.g. by a corporation).” Robbennolt, \textit{Settlement, supra} note 8, at 504. Similarly, O’Hara and Yarn argue that a prior relationship has an affect on the plaintiff’s ability to accept the apology. O’Hara & Yarn, \textit{supra} note 3, at 1139. They argue that “[t]he victim's perceptions of the character of the act and the offender's intentions and prior reputation are additional contextual factors that determine whether an apology will be accepted.” \textit{Id.}

\textsuperscript{223} \textit{See supra} notes 52-58, discussing how the closer and more cooperative a relationship is, the more likely it is to be successful.

\textsuperscript{224} \textit{See supra} note 165 (listing the state statutes that protect an apology in a health care situations).

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} \textit{See} Edward A. Dauer, \textit{Apology in the Aftermath of Injury: Colorado’s “I'm Sorry” Law, \textit{THE COLORADO LAWYER,} April 2005 at 47, 47 (2005) (arguing that the Colorado Statute is unique because it “applies only to civil actions alleging liability for unanticipated outcomes in health care.”).
only partial apologies, and protect full apologies as well.\textsuperscript{227} This shows that the state legislatures that adopted the rules were willing to go farther in protecting apologies within a doctor-patient relationship than the general trends of other states within all relationships.\textsuperscript{228} The doctor-patient relationship is one that statutes like the Colorado one have deemed to be important, and it is also one where an apology will be more likely to succeed and in doing so achieve the goals of settlement and healing.

Currently, the federal evidentiary rules of apology do not account for the relationship between the defendant and plaintiff.\textsuperscript{229} Of those states that protect an apology, few account at all for the relationship between the parties. Those that do only account for one type of important relationship, that of a doctor and patient.\textsuperscript{230} Similarly, neither proponents or opponents of evidentiary protection for an apology have argued for the consideration of relationship in an evidentiary rule.\textsuperscript{231} Because of the importance of relationship in the success of an apology, and the importance of success of an apology in reaching the goals of settlement and healing, a new evidentiary rule should take the relationship of the plaintiff and defendant into account, and

\textsuperscript{227} See COLO. REV. STAT. § 13-25-135. The statute protects “any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider.” \textit{Id.}

\textsuperscript{228} See supra Part II.A (discussing the protection of full apologies versus partial apologies); see also Part IV.A.1 (discussing of the protection of full apologies versus partial apologies in the legal setting).

\textsuperscript{229} One could argue that the evidentiary rules that protect apologies in medical malpractice situations do take into account the relationship by focusing on one type of relationship, that between a doctor and patient, in which an apology is most likely to succeed. \textit{See Feminist Analysis, supra} note 60, at 262 (arguing that “the parties involved and society at large gain significantly when doctors inform patients and apologize for errors.”); see also \textit{supra} note 165 (listing the five states that protect full apologies in medical malpractice situations).

\textsuperscript{230} \textit{See supra} note 165 (listing the state statutes that protect full apologies in medical malpractice situations).

\textsuperscript{231} \textit{See infra} notes 252-254, discussing the acknowledgement of the complexity of the apology.
protect only those apologies that are given within a close relationship, and are therefore most likely to succeed.  

3. Form of Apology Given By Defendant

The form of an apology given from a defendant to a plaintiff should also be considered in a new rule because of its effect on the success of the apology. An apology that has interference between the defendant and plaintiff will be less likely to succeed. In the legal setting, that interference can take many shapes, from an issuance of an apology through someone else, or the defendant writing the apology down and having someone else read it out loud. For example, in the case of State v. Lortz, the defendant issued a written apology for his wrong, and submitted that apology to an interviewing detective. The court held that the written apology was admissible as an admission of a party opponent under Ohio’s analogue to Federal Rule of Evidence 801(d)(2), even though it was given through an intermediary, the detective. Because

232 See supra Part II.B (apologies given within a close relationship are more likely to succeed).

233 See supra Part II.C (discussing the importance of the form of the apology to the apology’s success).

234 O’Hara & Yarn stress the importance of a personal, face to face apology. O’Hara & Yarn, supra note 3, at 1140. They state that whether they know it or not, “consciously or unconsciously, victims pay attention to just about everything: eye contact, breath, body posture, facial expressions, tone of voice, pace of speech, and even order of words. All available information about the transgressor's apology can go into an interpretation of its sincerity.” Id.

235 Orenstein argues that an apology in a legal setting cannot be successful unless it comes directly from the defendant’s mouth. See Feminist Analysis, supra note 60, at 245. Orenstein argues that “unlike monetary compensation, which can come from many different sources” such as “the tortfeasor's employer, insurer, or estate,” an apology “can only come from the wrongdoer or some successor-in-moral-interest” in order to be a “successful transaction.” Id.


237 Id. at 12.
this apology contained two forms of interference, the fact that it was written and that it was given through a third party, instead of face-to-face, its form was not one likely to succeed.\textsuperscript{238} It is not an apology that a new rule should try to protect because it is unlikely to succeed and unlikely to promote settlement or heal the victim.

An example of a slightly more personal apology is in the case of \textit{United States v. Murray}, from the United States Court of Military Appeals.\textsuperscript{239} In this case a doctor issued an apology to his patient whom he had mistreated during an examination.\textsuperscript{240} He gave this apology verbally, but through a third party.\textsuperscript{241} The doctor asked a nurse to come up to the patient’s room, and that nurse told the patient that the doctor “apologized” and “was sorry for what he had done.”\textsuperscript{242} The patient did not accept this apology.\textsuperscript{243} The form of this apology, given through a third person and as a result, not face-to-face, may have had a bearing on the patient’s non-acceptance of this apology. It is also possible that fear of liability led the doctor to apologize through someone else, rather than face-to-face, on his own.\textsuperscript{244} The court found that because this apology tended to show that the doctor did something wrong, it was “inadmissible hearsay.”\textsuperscript{245} Therefore, the court

\textsuperscript{238} \textit{See supra} Part II.C (discussing that the more personal the form of the apology is, the more likely it is to be successful).

\textsuperscript{239} United States v. Murray, 15 C.M.A. 183 (1964).

\textsuperscript{240} \textit{Id.} at 185.

\textsuperscript{241} \textit{Id.}

\textsuperscript{242} \textit{Id.} The patient testified at trial that “[a] nurse working on the ward came to me and said she had a message from Airman Murray and she said he said he apologized and he was sorry for what he had done.” \textit{Id.}

\textsuperscript{243} The patient told the nurse that came in to deliver the apology that she “wouldn’t accept his apology because he didn’t have no right of doing it.” \textit{Id.}

\textsuperscript{244} \textit{See supra} note 8, discussing the fear of apologizing.
reached a decision contrary to the goals of an apology, goals that can only be achieved through acceptance of the apology. Because the form of this apology was not personal, this apology was less likely to be accepted by the victim, and subsequently it was not accepted by the victim. Because it was not accepted, there was less chance of a reconciliation, and less chance of healing the victim. Therefore, a new rule should take into account the form of an apology to promote these goals through protection of an apology that will actually succeed.

The federal and state evidentiary rules currently do not account for the fact that a more personal form makes an apology more likely to succeed. Similarly, while both proponents and opponents of protection of the apology acknowledge that form may have an effect on the apology’s success, they make no argument that the form should be considered in protection of the apology. Thus, a new evidentiary rule that embraces the role of the success of an apology in increasing settlement and healing should take the form of the apology into consideration. Hence, a new rule should protect an apology that is made in the most personal form possible, ideally one that is given verbally from a defendant, directly to a plaintiff, face-to-face.

245 Id. at 185. The court held that there was “no doubt that the testimony by either victim concerning the purported apologies transmitted to them by individuals not called as witnesses and subject to cross-examination was inadmissible hearsay.” Id.

246 See supra note 225.

247 See Legal Consequences of Apologizing, supra note 7, at 116. Apologies are “helpful to an injured person or loved ones in a variety of ways.” Id. A victim “need[s] to receive an apology or other expression of sympathy as part of the healing process.” Id. In fact, an apology may even be described as “magical.” Id. A good apology “can heal humiliation and generate forgiveness.” Id. An apology can also increase the chances of a settlement. See infra FIGURE 1, TABLE 1, and accompanying text (describing Robbennolt’s study that found that a full apology increased settlement levels).

248 See supra Part III.B (discussing the federal and state evidentiary rules applying to an apology).

249 See infra note 276-277 (discussing the acknowledgement of the complexity of the apology).

250 See supra Part II.C (reaching the conclusion that the more personal the form of the apology is, the more likely it is to succeed).
4. Timing of Apology From Defendant

The success of an apology may also depend on its timing.\textsuperscript{251} In Part II, the conclusion was reached that an apology given within an intermediate time, not too early, but not too late, is most likely to succeed.\textsuperscript{252} This timing element can be translated into the legal setting as well.\textsuperscript{253} Thus, an apology given from a defendant to a plaintiff must come soon after the incident potentially leading to a lawsuit, but not immediately.\textsuperscript{254} In \textit{Haas v. Kasnot}, a Pennsylvania Supreme Court case, the court reasoned that the timing of an apology given “two or three” minutes after a car accident, was a factor in determining the apology should not be admitted.\textsuperscript{255} The court argued that these two or three minutes gave the defendant enough time to reflect on what he had done.\textsuperscript{256} The natural inference, then, is that an immediate apology would not give the defendant the same opportunity to reflect on the wrong.\textsuperscript{257} It seems then that an immediate apology in the context of a lawsuit is too soon to be likely to be successful, and therefore the immediacy of an apology should weigh against its protection by an evidentiary rule.

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\begin{itemize}
\item \textsuperscript{251} See supra Part II.C.
\item \textsuperscript{252} See supra Part II.D.
\item \textsuperscript{253} Goldberg and his colleagues state that “timing is a critical element.” Goldberg, \textit{Saying You're Sorry}, supra note 70, at 223. The apology “must come soon after the injury, or at least soon after the injured person voices his or her grievance.” \textit{Id.}
\item \textsuperscript{254} \textit{Id.}
\item \textsuperscript{255} \textit{Id.}
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} An immediate apology does not convey sufficient remorse to the victim. See O’Hara & Yarn, supra note 3, at 1139.
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However, certain aspects of the law seem to suggest that that when it comes to a statement of remorse, immediate can be better.\textsuperscript{258} For example, the excited utterance exception to hearsay may value an early statement of apology over a later one by admitting a statement that is made while still under the stress of the event.\textsuperscript{259} To dispel this theory, it is important to realize that an apology, unlike other statements, requires a level of reflection for true success.\textsuperscript{260} For example, in \textit{Haas v. Kasnot}, the court reasoned that the apology was not a spontaneous utterance because it was not “an emotional, impulsive outburst made under the spell of excitement or shock caused by the occurrence” and because it was “uttered before the processes of the intellect have had opportunity to come into play.”\textsuperscript{261} An apology that satisfies these conditions the court describes is not the type of apology that is likely to be successful because a plaintiff knows that the defendant has not yet had the time to think about what was done wrong and truly take responsibility for it.\textsuperscript{262}

\textsuperscript{258} See U.S. SENTENCING GUIDELINES MANUAL, § 3E1.1(h). Under the Federal Sentencing Guidelines, another factor which may determine whether the defendant qualifies for a two point decrease in the point determination for a final sentence is the timeliness of the defendant’s conduct in manifesting the acceptance of the apology. \textit{Id.} Similarly, the excited utterance exception provides evidentiary protection to a statement made right away. \textit{See} FED. R. EVID. 803(2) (“A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”).

\textsuperscript{259} See FED. R. EVID. 803(2). The excited utterance exception to hearsay allows “a statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition” to be admitted over a hearsay objection. \textit{Id.}

\textsuperscript{260} See supra, note 73 (discussing McPherson Frantz & Benningson’s study that found that a later apology was more successful than an immediate one).

\textsuperscript{261} Haas v. Kasnot, \textit{supra} note 255, at 173.

\textsuperscript{262} See supra note 74 (explaining that a later apology allowed the victim to feel heard and thus more likely to accept the apology).
Therefore, a new evidentiary rule must focus on the plaintiff’s acceptance of the apology, and because very early apologies are not as likely to be accepted, they should not be protected.\textsuperscript{263} An apology given too late, at the last minute, should also not be protected because it is not likely to be seen as sincere.\textsuperscript{264} In contemplating an ideal time frame in which to protect an apology, the timeline of a lawsuit is important to consider.\textsuperscript{265} This timeline starts with the incident, moves to the filing of the lawsuit, a possible mediation or settlement, and finally a trial. With this timeline in mind, a new evidentiary rule should protect only those apologies made by the defendant during this intermediate time, at least a few minutes after the incident, but before trial.\textsuperscript{266} In turn, each of the other elements essential to the success of an apology can be translated into the legal setting. A new evidentiary rule should take these elements, and with them, the success of an apology, into consideration in the formulation of a new evidentiary rule to protect the apology. By taking the success of the apology into consideration, a new rule can encourage apologies likely to succeed, and can therefore actually lead to the goals of settlement and healing of the victim.

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\textsuperscript{263} \textit{Id.}
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\textsuperscript{264} \textit{See supra} note 74, discussing the timing study that found that a defendant needed to be ripe to accept the apology in order for it to succeed. \textit{See also} United States v. Fonner, 920 F.2d 1330, 1335 (7th Cir. 1990) (finding the district judge did not abuse his discretion in concluding that Fonner's last-minute apology was a “deceitful little show”).
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\textsuperscript{265} \textit{See supra} Part II.D.
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\textsuperscript{266} By the time the lawsuit gets to a trial, it is likely that the plaintiff is no longer “ripe” to receive the apology. \textit{See supra}, notes 75-76 (discussing the idea that an apology given too late is not likely to be successful). At the point of trial, the defendant has now had several opportunities to apologize: after the incident, at a possible settlement conference or mediation, and any other time before trial has begun. The potential plaintiff has been “ripe” for quite some time. \textit{See supra} notes 74-75 (discussing “ripeness”). Waiting until the trial to apologize signals to the plaintiff that the defendant is not really sincere about the apology because he has not taken up the several past opportunities he may have already had to apologize. \textit{See id.}
\end{flushright}
B. The New Rule

Given the importance of acceptance of fault, relationship, form and timing in the success of an apology, this Comment proposes a new rule that protects only those apologies that are most likely to succeed in considering these four elements. By embracing the complexity of the apology, this rule, unlike the current rules, will promote only those apologies that will succeed in the goals of increasing settlement and healing of victims. This new Rule is similar in construction to Federal Rules of Evidence 407, 408, and 409. Those rules protect subsequent remedial measures, offers of compromise, and offers to pay medical expenses from admissibility. 267 The consideration behind each of these rules is to encourage a certain type of behavior, whether that be implementing a remedial measure that works better than an old one through Rule 407, reaching a settlement agreement through Rule 408, or assistance to an injured person through an offer to pay medical expenses in Rule 409.268 In Rule 409, the advisory committee notes acknowledge that if the rules did not somehow protect an offer to pay medical expenses, it “would tend to discourage assistance to the injured person,” and the committee

267 Fed. R. Evid 407 (“When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence [or] culpable conduct.”); Fed. R. Evid. 408 protects offers of compromise and other statements and conduct during settlement negotiations from admissibility. See supra, notes 150-152 (discussing this rule). Rule 409 protects “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.” Fed. R. Evid. 409. 268 The advisory committee notes to Rule 409 state that “the considerations underlying this rule parallel those underlying Rules 407 and 408.” Fed. R. Evid. 409 advisory committee’s notes. The notes go on to state that:

generally evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.

Id.
subsequently uses this conclusion as a their rationale for adoption of the rule to encourage this same behavior by protecting it from admissibility.\textsuperscript{269}

Using the same rationale as the rules committee, a new rule is proposed to encourage a certain type of behavior, in this case, a successful apology. An apology can increase the chances of settlement, something the advisory committee clearly values by choosing to protect all conduct and statements made during settlement negotiations.\textsuperscript{270} An apology can also increase the healing of the victim, something the advisory committee also values, shown through its rationale for Rule 409 to encourage “assistance to the injured person.”\textsuperscript{271} For these reasons, a new evidentiary rule is proposed to render inadmissible an apology that is likely to be successful.

**Proposed Rule: Inadmissibility of an Apology\textsuperscript{272}**

Evidence of an apology is not admissible to prove liability if, given the following four factors, the apology is deemed one likely to be successful.

(a) The apology contains an acceptance of fault.

(b) The closeness of the relationship within which the apology was given.

(c) The personal nature of the form in which the apology was given.

(d) The time frame in which the apology was not immediate, but was before trial.

\textsuperscript{269} FED. R. EVID. 409 advisory committee’s notes.

\textsuperscript{270} See supra notes 174-175 (discussing how an apology can increase the chances of settlement). See also FED. R. EVID. 408 (protecting all statements made during settlement negotiations from admissibility).

\textsuperscript{271} See supra note 229 (discussion the moral healing an apology can provide to a victim). See also supra note 268 (giving the text of the advisory committee’s notes on Rule 409).

\textsuperscript{272} Hereinafter, this proposed rule will be referred to as the “new Rule” in the text and footnotes.
Using the new Rule to consider whether an apology is to be admitted, a judge will weigh these four factors, or elements, under a totality of circumstances, to rule whether or not the apology will be admitted.\textsuperscript{273} This new Rule will closely tailor the law to the goals of encouraging settlement and healing of the victim by only protecting an apology that is likely to actually reach these goals by succeeding. The totality of the circumstances also ensures that the lack of one successful element of the apology will not render the apology unable to be protected and as a result, admissible. The new Rule looks at all four elements of the apology and then determines if in putting the weight of each individual element together, the apology is one likely to be successful overall.\textsuperscript{274} Thus, the fear of apologizing that is instilled in defendants will now be turned to a fear of giving a bad apology that is strategic.\textsuperscript{275} The new Rule will encourage good apologies, and therefore will encourage settlement and healing.

\textbf{C. Mathematical Illustration of the Rule – The Cube Model}

As can be seen from the discussion of the elements of the apology and the new Rule presented above, the apology is an incredibly complex interaction between the plaintiff and the defendant.\textsuperscript{276} The interaction of the elements presented in the new Rule will help determine the

\textsuperscript{273} Robbennolt mentions that the law should take into account the complexity of the apology when determining the shape of the law. See Robbennolt, Settlement, supra note 8, at 491 (“Policymakers, litigants, and lawyers must take into account these complex effects when making decisions about the appropriate role of apologies in settling civil disputes.”).

\textsuperscript{274} The totality of the circumstances test “concentrates on looking at all the circumstances”… “rather than only one or two aspects.” WEBSTER’S NEW WORLD LAW DICTIONARY (Wiley Publishing 2006).

\textsuperscript{275} This should certainly appease the fears of critics of protection of the apology such as Taft, who worry that protection of an apology will encourage strategic apologies unlikely to be successful. See supra note 180.
apology’s success, and in return, will determine whether or not it will be protected under the new Rule. It is possible now to model the new Rule to enable a clearer view of the possible interactions between the four elements of the Rule.

In order to illustrate how the new Rule will function, this Comment offers a mathematical model of the interaction between these elements: acceptance of fault, relationship between giver and receiver, form of the apology, and timing of the apology. This model will illustrate that the analysis of each element’s likelihood of success in an apology can be combined together to show what an apology most likely to succeed, and as a result be protected by the new Rule, looks like. Under the new Rule, each apology must be analyzed given these four elements. In determining how successful the apology is with respect to each element, this Model assigns a point value for each element based on what type of apology is most successful for that element. The point value for an element in isolation represents that element’s likelihood of success, and thus illustrates how that element would weigh towards overall success in the totality of the circumstances of the new Rule. The Model will assign a total point value for the entire apology by adding the values for each of the four elements together. This total point value represents the total weight of the apology given the totality of the circumstances of all elements

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276 See Robbennolt, Settlement, supra note 8, at 491 (“The effect of apology on settlement decisions was complex, however, and depended on the type of apology offered.”); Id. at 515 (“The findings reported here support the conclusion that apologies can be beneficial in facilitating settlement of disputes. The results also suggest, however, that apologies influence settlement in relatively complex ways.”).

277 See id. at 491 (“Several factors, such as the nature of the apology, the severity of the injury, and the other evidence of responsibility, affect the capacity of an apology to facilitate settlement.”).

278 Infra, Figure 2.

279 See infra Figure 5 [hereinafter “Cube Model”].

280 See infra Part IV.C.5 (giving the exact assignment of points for each element); see also infra Figure 5; Figure 6.
considered together. The higher the total point value, the more likely that, given all the elements together, the apology is to be successful.

1. Design of the Cube

The Cube Model is a way to visualize how the elements interact within the new Rule’s totality of circumstances test. Because we live in a world of only three dimensions, unfortunately only three variables can be modeled at a time. Because of this unfortunate limitation, the first element, acceptance of fault, has been left out in the model. The rationale choosing this element to leave out is that of the four elements, it is the only one without a real gradient to its success. This means that an apology usually either accepts fault or it does not. In contrast, the other elements have more of a gradient to their success. For example, the closer the relationship between plaintiff and defendant, the more likely the apology is to be successful. There is not an “all or nothing” aspect for the relationship between the plaintiff and defendant like there generally is for acceptance of fault. Thus, the Cube Model analyzes

281 A higher point value illustrates a higher likelihood of the apology to succeed. See infra Figure 6.

282 There is a cutting edge model of a four dimensional system known as the hypercube. However, the only way for it to be projected to a two dimensional space is to show it rotating about a plane, a feat not possible here. See generally, Thomas F. Banchoff, Beyond the Third Dimension: Geometry, Computer Graphics, and Higher Dimensions, Scientific American Library, 1996.

283 See supra, Part IV.A.1 (concluding that an apology that accepts fault is more likely to be successful than one that does not).

284 See supra, notes 40-51 (discussing apologies that accept fault and those that do not).

285 See e.g., supra, Part IV.A.2 (arriving at the conclusion that the closer the relationship between the giver and receiver, the more likely the apology is to be successful). See also infra Figure 2; Figure 3; Figure 4 (showing the actual graphical representations of the elements of relationship, form and timing’s correlation to success).

286 See id.
the three other elements of apology together: relationship, form and timing. Each axis represents one of these elements, and each axis has been split into three different sections, each representing a potential example of an apology for that element. The Cube Model is an illustration of how the elements of the apology can interact with one another under the totality of the circumstances test contained in the new Rule.

2. The X-Axis: Part (b) -- Relationship

The horizontal x-axis illustrates part (b) of the new Rule, the relationship between the defendant and the plaintiff. Each of the three sections on this axis contains a different example of a relationship between the defendant and the plaintiff. The conclusion drawn in Part IV-B was that the closer the relationship is between the defendant and plaintiff, the more likely the apology is to succeed. Therefore, a closer relationship will weigh more heavily in favor of protection under the new Rule. The first box on the x-axis contains the relationship least likely to succeed, that of strangers. The next, and more likely relationship to succeed, is

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287 In Robbennolt’s study, she discusses inclusion of an acceptance of fault as either occurring or not occurring in the scenario, but also concedes that the type of relationship could have a great effect on the success of the apology. See Robbennolt, Settlement, supra note 205.

288 See supra Parts II.B, II.C, II.D, IV.B, IV.C, IV.D (discussing the role of the four elements).

289 See infra FIGURE 5.

290 See supra Part II.A (analyzing what types of relationships make an apology most likely to succeed).

291 See infra FIGURE 5.

292 Supra Part IV.B.; see also FIGURE 2, graphing the positive correlation between the relationship between the plaintiff and defendant and the success of the apology. As the relationship gets closer, the apology is more likely to succeed. Id.

293 See supra Part IV.B (giving the text of the new Rule).
a professional relationship, such as the one between a doctor and patient. The final, and most likely relationship to succeed, is one between family members. As one moves along the x-axis, the apology becomes one more likely to be protected under the new Rule under part (b).

3. The Y-Axis: Part (c) -- Form

The y-axis illustrates part (c) of the new Rule, the personal nature of the form the apology is given in. The more personal the form of an apology from the defendant to plaintiff is, the more likely it is to be successful. As one moves up, in the positive direction, along the y-axis, the forms become more personal, and more likely to be protected by the new Rule. The first, and least personal, is a written apology, the next is a verbal apology that is not face-to-face, and the last, and most personal, is a face-to-face verbal apology. So the more personal the

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294 See supra Part II.B (discussing the conclusion that the more cooperative a relationship is, the more likely an apology will be to succeed).

295 See supra notes 221-226, and accompanying text (discussing the personal nature of the relationship in health care situations).

296 See supra notes 51, 58 (discussing the most personal relationships and the correlation of that element to success of the apology).

297 See infra, FIGURE 5.

298 See supra Part IV.C; see also infra FIGURE 3 (showing the correlation between how personal the form of the apology is and how successful the apology is likely to be).

299 See infra FIGURE 5; see also supra Part IV.A.3, (discussing how personal different forms of apology are).

300 See infra FIGURE 5 (This apology is denoted on the Cube Model by “W”).

301 See infra FIGURE 5 (This apology is denoted on the Cube Model by “nFFV”).

302 See infra FIGURE 5 (This apology is denoted on the Cube Model by “FFV”). Court have agreed that a verbal face-to-face apology allows the best opportunity for an apology to be judged for success. See, e.g., Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) (“[r]emorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility”).
form of the apology is, the more points the apology has on the Model for that element, and the more heavily the form will weigh towards protection of the apology under the new Rule.

4. The Z-Axis: Timing

The z-axis\textsuperscript{303} illustrates Part (d) of the new Rule, the timing of the apology. In the Cube Model, as one moves along the z-axis, the apology becomes later in time.\textsuperscript{304} An apology made immediately after the incident, without time for reflection, is too early to be likely to be successful.\textsuperscript{305} Similarly, an apology given too late, after trial starts, is too late to be likely to be successful.\textsuperscript{306} With that said, apologies that are given without any time for reflection are assigned only one point in the Model, as are apologies that are given after trial starts.\textsuperscript{307} Apologies that are given during the time frame between immediacy and trial are given two points to denote they are more likely to be successful than ones made outside that time frame.\textsuperscript{308} An apology given within this ideal time frame is more likely to be successful than one given outside the ideal time frame, and therefore a higher point value inside the time frame denotes a greater weight to the timing factor under part (d) of the new Rule.

\textsuperscript{303} The z-axis is the three dimensional axis which moves out of the page.

\textsuperscript{304} See infra Figure 5.

\textsuperscript{305} See supra Part IV.A.4 (discussing the ideal time frame for apology in a lawsuit).

\textsuperscript{306} Id.

\textsuperscript{307} See infra Figure 4 (showing the correlation between the timing of the apology and its success). This is a mound shaped curve. Early and late apologies are not as likely to be successful. See supra Part II.D. Apologies given in an intermediate time are more likely to be successful. Id.

\textsuperscript{308} See infra Figure 5 (assigning points along the z-axis, for timing).
5. Shading: Where is the apology most likely to succeed?

Each small cube in the Model represents an illustration of an apology that contains the three elements that make up that small cube. In determining the overall success of that apology under the totality of the circumstances in the new Rule, the Model adds together the point values of each element that makes up the Cube. In order to more easily visualize these point values, the cube is shaded according to its point value, and in turn, its success.\textsuperscript{309} The shading was done by assigning each cube a number value based on the point values of each of its elements: relationship, form and timing.\textsuperscript{310} The point value for each element was assigned based on what makes that element most successful.

For the x-axis, that contains the relationship element, a closer relationship between the plaintiff and defendant means the apology is more likely to be successful, and thus a higher point value was assigned the closer the relationship was.\textsuperscript{311} The new Rule contemplates the relationship in which the apology was given in part (b).\textsuperscript{312} The closest relationship, family, is assigned the highest point value, three, and is in turn given the greatest weight under the new Rule.\textsuperscript{313} For the form element, on the y-axis, the conclusion was that the more personal an apology is, the more likely it is to be successful.\textsuperscript{314} The new Rule takes the personal nature of

\textsuperscript{309} See infra FIGURE 5; FIGURE 6 (illustrating the shading).

\textsuperscript{310} See infra FIGURE 6 (showing how the shading was assigned with the total point values for each small cube).

\textsuperscript{311} Family members were assigned the highest point value, at 3, a doctor and patient were assigned 2 point, and strangers were assigned 1 point; see also infra Figure 2, graphing the correlation between relationship and success.

\textsuperscript{312} See supra Part IV.B (giving the text of the new Rule).

\textsuperscript{313} See infra FIGURE 5.

\textsuperscript{314} See supra Part IV.A.2 (discussing this conclusion).
the form the apology was given in into consideration in part (c).\textsuperscript{315} The most personal apology, one that is verbal and face-to-face, is given the highest point value on that axis, a three., and is thus given the greatest weight under the new Rule.\textsuperscript{316} For timing, apologies too early and too late are not as likely to be successful.\textsuperscript{317} Therefore, the assignment of points was a bit different, with both early and late apologies given the lowest point value, a one, and apologies in an intermediate time period given the highest point value, a two.\textsuperscript{318} Apologies given in this intermediate time period are, as a result, given a greater weight under the new Rule.

Each small cube's value is the addition of the three values that make up that small cube.\textsuperscript{319} Darker shading corresponds to a higher total point value, and thus a higher likelihood of success.\textsuperscript{320} The apology with the lowest probability of success is one where the plaintiff and defendants are strangers, the apology is written, and the apology comes either too early or too late, and consequently, that apology has the lightest shading.\textsuperscript{321} The darkest box, the apology most likely to succeed, is the one where the plaintiff and defendant are family, the defendant gives the apology verbally and face-to-face to the plaintiff, and the defendant gives the apology during an intermediate time.\textsuperscript{322} Under the new Rule, only apologies most likely to be successful

\textsuperscript{315} See supra, Part IV.B (giving the text of the new Rule).

\textsuperscript{316} See infra FIGURE 5.

\textsuperscript{317} Supra Part IV.D; see also infra FIGURE 4 (graphing the relationship between timing and success).

\textsuperscript{318} An early apology was assigned 1 point, a late apology was also assigned 1 point, and an intermediate apology was assigned 2 point.

\textsuperscript{319} See FIGURE 6. For instance, the cube in the top right hand corner has a value of 3 for relationship (on the x-axis), 3 for form (on the y-axis), and 1 for timing (on the z-axis).

\textsuperscript{320} A higher total point value for that box.

\textsuperscript{321} This apology can be seen in the lower left hand corner of FIGURE 5, with a total value of 3. This apology got 1 point for relationship (strangers), 1 point for form (written) and 1 point for timing (early).
given the four elements in the Rule, the apologies in the darkest shaded small cubes, will be protected. In promoting the most successful apologies, the new Rule will effectively promote settlement and healing of the victim.

D. The Rule In Action

Using both the new Rule and the Cube Model as an illustration of that rule, this part will analyze what the results in real cases would be under the new Rule, and how those results differ from how court originally ruled. In each of these examples, the apology will be described, and then a analysis of each of the four elements for that apology will be provided.\(^{323}\) The new Rule will then be applied to analyze the four elements of the apology together under the totality of the circumstances. In order to visualize how the rule applies to the apology, the Cube Model will be used to calculate a point total.\(^{324}\) Under the new Rule, only an apology that is likely to be successful given the four elements, an apology with a high point total on the Cube Model that falls into the darkest shaded boxes, will be protected from admissibility.

1. The Samaniego Case: A Successful Apology Protected By the New Rule

In U.S. v. Samaniego, the court held an apology admissible under the statements against interest exception in the Federal Rules of Evidence.\(^{325}\) The case revolved around a champion boxer, Roberto Duran, who claimed his brother-in-law, Bolivar Iglesias, was involved in stealing

\(^{322}\)See Figure 6. This apology is the box labeled “8.” It has a total value of 8 points. This apology got 3 points for relationship (family), 3 points for form (verbal and face to face) and two points for timing (intermediate time). This is the apology with the highest probability of success.

\(^{323}\)See supra Part IV.B (giving the text and discussion of the new Rule).

\(^{324}\)See Figure 6 (giving an idea of how the point totals correspond to the position on the Cube Model).

\(^{325}\)See United States v. Samaniego, 345 F.3d 1280, 1284 (11th Cir. 2003).
his championship belts.\textsuperscript{326} The belts were stolen in 1993, and ten years later, the FBI finally got involved to investigate the disappearance of the belts.\textsuperscript{327} At trial, the court admitted evidence in the form of testimony from Duran that Iglesias “apologized in [Duran’s] presence for stealing the belts.”\textsuperscript{328} The testimony also included the fact that Iglesias “asked forgiveness for having stolen the belts.”\textsuperscript{329} While the 11th Circuit found that the district court improperly admitted the apology under the state of mind exception contained Federal Rule of Evidence 803(3), it affirmed the trial court’s decision because the apology was admissible under the statements against interest exception in Federal Rule of Evidence 804(b)(3).\textsuperscript{330}

To analyze this apology under the new Rule, each factor of the Rule must be evaluated. Here, under part (a) of the new Rule, there was an acceptance of fault by Iglesias, evidenced by the testimony that Iglesias “asked for forgiveness for having stolen the belts.”\textsuperscript{331} In analyzing the relationship between Duran and Iglesias under part (b), they were brothers-in-law, and accordingly family.\textsuperscript{332} Under part (c), the form the apology was given in was personal and face-to-face, because Duran testified the apology was given to him “in his presence.”\textsuperscript{333} Finally, the timing of the apology is not completely clear from the court’s discussion of the apology, but

\textsuperscript{326} Id. at 1281.
\textsuperscript{327} Id.
\textsuperscript{328} Id.
\textsuperscript{329} Id. at 1283.
\textsuperscript{330} Id. (“The part of Iglesias’s apology in which he admitted having stolen Duran’s belts is a statement against interest, because it would ‘subject the declarant to civil or criminal liability’ within the meaning of [the Rule].”)
\textsuperscript{331} Id.
\textsuperscript{332} Id.
\textsuperscript{333} Id.
it seems fair to infer from the description that it was given some time after the incident, but before trial. Thus, all four factors in this case make the apology more likely to be successful, and weigh towards protection under the new Rule. Accordingly, the new Rule would protect this apology from admissibility under the totality of the circumstances, despite the fact that it would otherwise be admissible under the statements against interest exception to hearsay. In illustrating this apology on the Cube Model, this apology would get three points for relationship, three for form, and two for timing, giving it a total of eight points, an apology most likely to be successful, in the most darkly shaded box.

The result under the new Rule is more just than the one the 11th Circuit reached because it considers the future impact of the protection of a successful apology. The result of decisions like the one the 11th Circuit made here, to admit the apology, causes lawyers to advise their clients not to apologize. But the type of apology Iglesias gave in this case is one that lawyers should encourage their client to make to facilitate settlement and healing of the victim. Although in this case there was no settlement, and it is unclear the amount of healing the apology

334 See Figure 6. The apology was given between family members, and is therefore in the highest scoring category on the x-axis.

335 See Figure 6. The apology was given personally and face-to-face, and is therefore in the highest scoring category on the y-axis.

336 The apology was not given immediately, and was not given after trial began, so therefore it fits into the intermediate time frame, and receives two points.

337 See Figure 6.

338 See supra note 8 (discussing clients fears of apologizing for fear of the legal consequences).

339 See generally Cohen, Advising Clients to Apologize, supra note 9 (arguing that lawyers should encourage their clients to apologize to facilitate settlement and healing).
here gave, these are the types of apologies that will be able to effectively facilitate these goals.340 Because there is no current protection for this apology under the evidentiary rules, this apology, that is very likely to be successful, is lumped in with every other apology that is against the speaker’s interest, and is admitted.341 Therefore, with the rules as they stand, all apologies are discouraged because they could lead to liability, just as Iglesias’s apology leads to his liability here. With the new Rule, good apologies, such as the one Iglesias made, will be encouraged.

2. The Coe case: An Unsuccessful Apology Not Protected By the New Rule

The Coe case represents an apology that was not likely to be successful.342 Professor Taft describes this apology as one that, if protected by an evidentiary rule, would encourage the wrong type of apology.343 In this case, a lawyer, Carole Coe, acted unethically during a trial in 1990 by behaving disrespectfully toward the presiding judge.344 Coe was then charged with violations of the state ethical rules, for which a subsequent hearing was held.345 The court found Coe violated the rules and suspended her from practice for six months.346 After her sentence was delivered, two members of the court then “suggested” that if Coe would give a public apology,

340 See Robbennolt, Settlement, supra note 8 (arguing that a successful apology is more likely to induce a settlement or healing).

341 See supra Part III.A.2.b (discussing the admissibility of an apology under the statements against interest exception).

342 In re Coe, 903 S.W.2d 916 (Mo. 1994).

343 See Taft, Commodification, supra note 3, at 1146-47.

344 “During the course of the trial, Coe was held in contempt four times, and on the fourth finding was ordered into custody.” Id. at 1146.

345 In re Coe, supra note 342.

346 See id. at 920 (Covington, J., dissenting).
they would consider changing the sentence to “only a public reprimand.” On November 30, 1994, Coe sent a letter of apology to Judge Stevens, the judge in the case where her behavior was at issue. In the letter, Coe stated “[u]pon reflection, I sincerely feel that I was wrong to engage in my confrontations with you during this lengthy jury trial, and to place our profession in a negative light to the general public.” She then wrote that she was “requesting, under a separate letter, that the Kansas City Star and the Daily Record publish this letter.”

Each element of the apology must be analyzed under the new Rule. Under part (a) of the Rule, this apology accepted fault because Coe stated she was “sincerely wrong” to “engage in confrontations” with the judge, and therefore that factor weighs towards protection. Under part (b) of the Rule, the two parties in this case were the judge and the lawyer. This is a relatively close relationship, similar to the “professional” relationships described in Part IV.A.2. It is likely one that both parties would continue in beyond this incident, as lawyers and judges frequently cross paths, and therefore the parties would be more motivated to reconcile. Therefore, this factor weighs slightly towards protection under the new Rule.

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347 Id. at 919 (Robertson, J., dissenting).
348 Id. at 920 (Covington, J., dissenting).
349 Id. at 921 n.1 (Covington, J., dissenting).
350 Id.
351 See supra, Part IV.B (discussing the new Rule).
352 In re Coe, supra note 345, at 921.
353 See Taft, Commodification, supra note 3, at 1146.
354 See supra Part IV.A.2, notes 204, 209-210 and accompanying text, discussing professional relationships.
355 Id.
the Cube Model, this relationship probably would put us in the second section on the x-axis, most similar to the doctor patient relationship.\textsuperscript{357} Under part (c) of the new Rule, the form of Coe’s apology was a written letter to the Judge, and thus was not verbal or face-to-face.\textsuperscript{358} On the Cube Model, this puts it in the lowest section on the y-axis, the least likely to be successful.\textsuperscript{359} Finally, under part (d) of the new Rule, the timing of the apology was around four years after the transgression took place, and was after the original hearing for the lawyer’s sanctions.\textsuperscript{360} Thus, the apology was after trial and this factor weighs against its protection by the new Rule. To illustrate, this puts the apology the “late” section in the Cube Model.\textsuperscript{361} Thus, while the apology accepts fault under part (a), and was given within a professional relationship under part (b), its form and timing under parts (c) and (d) were not likely to be successful. While acceptance of fault weighs towards protection the apology under part (a), part (c) and (d) weigh

\textsuperscript{356} It does not weigh heavily because it is not a relationship of the most cooperative type, such as family. It does not weigh against protection because it is not that of strangers either. The relationship is somewhere in between these two.

\textsuperscript{357} The relationship between a lawyer and judge requires a similar duty of respect and care that a doctor patient relationship requires. \textit{See supra} notes 224-228, and accompanying text (discussing the doctor patient relationship and its effect on the success of an apology). Because the relationship between a lawyer and a judge is somewhere between strangers and family, it was put in the middle section on the Cube Model. \textit{See infra} Figure 5; \textit{see also supra} note 219 (“To the extent that the dispute has occurred in the context of an ongoing relationship, the apology is valuable in repairing whatever harm to the relationship has resulted from the dispute.”).

\textsuperscript{358} \textit{See supra} notes 348-350, and accompanying text (discussing the form of the letter from Coe).

\textsuperscript{359} \textit{See supra} Part IV.A.3 (discussing how form dictates success). \textit{See also supra} Part IV.C (discussing the design of the Cube Model); \textit{see Figure} 5.

\textsuperscript{360} The trial that Coe acted wrongfully in was held in 1990, the apology letter was not sent until 1994. \textit{See In re Coe, supra} note 318, at 920 (Covington, J., dissenting).

\textsuperscript{361} Four years may be enough time that the apology has now “gone bad.” \textit{See supra} notes 74-75, discussing the idea that the “ripeness” of a victim to receive an apology does not last forever. It may also be that in this case four years is well within the time that the victim, in this case the judge, is “ripe” to receive the apology. If perhaps the judge in this case was used to waiting a few years before an incident in his courtroom was resolved, he may have a longer, and later, time period in which he would be “ripe” to receive the apology. \textit{See id.}
toward admitting it, and part (b) is basically neutral.\footnote{See supra, notes 355-354 (discussing this element in the apology).} Therefore, under the totality of circumstances of the new Rule, this apology would not be protected, and would be admitted.

The point values given to Coe’s apology within the Cube Model would be two for relationship, one for form, and one for timing, equaling a total of four.\footnote{See supra, notes 321-322 (explaining that the highest point total an apology can have on the cube is 8, while the lowest is 3).}

Taft argued that this type of apology is exactly the type that should not be protected because it is simply used as a bargaining chip, and encourages the wrong type of apologies.\footnote{Taft states that “Coe helps us see how the moral dimension of apology is easily lost when it is injected into the legal arena, even when it occurs under the scrutiny of an en banc court.” Taft, Commodification, supra note 3, at 1147.}

Because the proposed new Rule only works to protect an apology that might already be deemed admissible under another evidentiary rule, and not to make admissible an apology that is otherwise not admissible, the results of this case would come out the same using both sets of rules. The new Rule is not designed to change the status of already inadmissible evidence.\footnote{See infra Part IV.E (discussing this idea in more detail).}

The difference in result with the new Rule is that it is able to leave alone those bad apologies that are admissible, and thus discourage potential defendants from making those apologies. Thus furthers the purpose of encouraging good, successful apologies. While the result in this case would not be immediate, the hope is that the new Rule would encourage good, successful apologies by making them inadmissible, and that with that encouragement, bad apologies that are not affirmatively protected by the Rule will be further discouraged.
E. Interaction of the New Rule With the Current Rules

1. The Federal Rules

   a. The Admissions exception

   The new Rule might render an apology otherwise admissible under the admissions exception to hearsay now inadmissible. Therefore, an apology that might have been admissible before under the admissions exception because it accepted fault, such as in the Starbucks case discussed in Part IV.A.1, would be inadmissible under the new Rule if under the totality of the circumstances, it was determined an apology likely to succeed. The acceptance of fault, rather than being a factor to cut towards admissibility under the hearsay exception, would now be a factor to cut against admissibility, and towards inadmissibility, because of its ability to make an apology successful, and therefore to encourage successful apologies. Encouraging apologies that accept fault will allow an evidentiary protection to better fit the goals of protection of apology.

   The new Rule would not render an apology that does not fit under the admissions exception now admissible. The admissions exception acts to take a statement that is considered

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366 See supra Part IV.B (giving the text of the new Rule).

367 See supra notes 2010-212 (discussing the Starbucks case).

368 The new Rule is a totality of the circumstances test. See supra Part IV.B (for the text and discussion of the Rule). Therefore, one element’s strength or weakness will not defeat the consideration of the apology as protected under the Rule. See, e.g., Part IV.C.5 (discussing the shading of the cube as a representation of the totality of the circumstances).

369 See supra Part II.A, Part IV.A.1 (discussing how a full apology is more likely to be successful than a partial one).

370 An apology that accepts fault is more likely to be successful. See supra, note 337. An apology that is successful and accepted by the victim is more likely to actually heal a victim and to actually promote settlement.
inadmissible hearsay and make it admissible.\textsuperscript{371} If a statement is considered hearsay and does not fall into this or another exception, the statement is not admissible.\textsuperscript{372} The new Rule would not change this result.\textsuperscript{373} Statements considered hearsay that do not meet the admissions exception will still be held inadmissible.\textsuperscript{374} These apologies may include many partial apologies that do not give a clear acceptance of fault.\textsuperscript{375} While these partial apologies are ones that the new Rule is attempting to discourage, the new Rule would not attempt to change the hearsay status of these apologies, because doing so would attempt to change the basis for the hearsay rule.\textsuperscript{376}

\textit{b. The Statements Against Interest Exception}

Similar to the admissions exception, the new Rule would render inadmissible a apology that has been held to be admissible under the statements against interest exception if the apology

\textsuperscript{371} See FED. R. EVID. 801(d)(2)(A). See also supra Part III.A.2. (discussing the admissions exception and its application to an apology).

\textsuperscript{372} See supra Part II.A.2 (discussing the hearsay definition and the exceptions to hearsay).

\textsuperscript{373} See supra Part IV.B (presenting the new Rule and showing how it is applied).

\textsuperscript{374} See supra Part IV.B (giving the text of the new Rule). The new rule makes certain apologies “inadmissible” but does not render any apologies already inadmissible, admissible.

\textsuperscript{375} See, e.g., Farrell v. Dept. of Interior, 314 F.3d 584 (Fed. Cir. 2002). The court found that while the defendant argued his apology was remorseful because it was given orally and immediately, it was followed by “a lengthy justification of his actions during which he attempted to explain away [his wrongs].” \textit{Id.} at 594, n.3. Thus the court held that “[t]he administrative judge’s finding of lack of remorse” was supported by “substantial evidence.” \textit{Id.} See also supra, Part II.A (giving examples of partial apologies that do not accept fault).

\textsuperscript{376} See supra, note 103 and accompanying text (discussing the risks that hearsay statements would pose if they were to be admitted). The new Rule does not undercut these risks because it makes a statement inadmissible, not admissible. If the new Rule did attempt to render an apology otherwise inadmissible under the hearsay rules now admissible, these hearsay risks would once again rear their ugly head, and there would be an inherent unfairness, the same unfairness that underlies the exclusion of statements under the hearsay rule.
is one likely to be successful given the four factors in the Rule.\textsuperscript{377} The new Rule would not affect an apology that is considered hearsay but does not fit under the statements against interest exception.\textsuperscript{378} The statements against interest exception, unlike the admissions exception, requires that the declarant be unavailable.\textsuperscript{379} This requirement would not affect the status of the apology at the time it was given.\textsuperscript{380} Similar to the admissions exception, the new Rule would be more likely to take an apology that was admissible under this exception because it accepted fault\textsuperscript{381} and render it more likely to be admissible because it accepts fault under the new Rule. This again, would encourage the right kinds of apologies.

c. \textit{The State of Mind Exception}

The state of mind exception renders an apology that would otherwise be considered hearsay admissible if it is introduced not to prove what was said in the apology, but to prove the state of mind of the speaker.\textsuperscript{382} As the \textit{Samaniego} case showed, an apology may be introduced in order to show that the declarant felt “remorse” at the time the apology was made.\textsuperscript{383} Therefore

\textsuperscript{377} \textit{See supra} Part IV.B (presenting and discussing the new Rule).

\textsuperscript{378} \textit{See supra} notes 107-112 (discussing the determination of an apology as hearsay).

\textsuperscript{379} \textit{See supra} note 128 (giving the text of the rule).

\textsuperscript{380} The new Rule evaluates the elements of the apology at the time the apology was given. If a defendant or declarant apologizing later became unavailable, this would not effect the analysis of the elements under the new Rule.

\textsuperscript{381} \textit{See supra} Part III.A.1.b. (discussing the Statements Against Interest exception). \textit{See also} Samaniego, \textit{supra} note 325, and accompanying text (presenting an apology considered admissible under this exception because it accepted fault).

\textsuperscript{382} \textit{See Fed. R. Evid.} 803(3).

\textsuperscript{383} \textit{See supra} note 145 (“What Iglesias said was offered to show not only that he was remorseful, but also that he had stolen the belts.”)
a full apology that accepts fault is more likely to be interpreted by a court as a statement of remorse.\textsuperscript{384} Therefore the new Rule may render an apology that was admissible under the state of mind exception now inadmissible.\textsuperscript{385} An apology that accepts fault is one most likely to fall under this exception because it more shows remorse more clearly.\textsuperscript{386} But an acceptance of fault also makes the apology more likely to succeed, and thus the new Rule reaches a better result in protecting an apology that contains an acceptance of fault.

An apology given in a more personal form is also more likely to fall under the state of mind exception because it signals sincerity and remorse to the victim.\textsuperscript{387} The new Rule would reach a better result because rather than admitting and thus discouraging apologies that are given in a form that blatantly shows remorse, it would protect and thus encourage apologies given in a form that signals remorse, apologies that are more likely to be accepted by the victim.\textsuperscript{388} The new Rule would not affect an apology that falls under the exception to the state of mind rule that requires that the statement of belief not be used to try to prove the fact believed.\textsuperscript{389} Therefore only apologies that are offered to show that the defendant felt remorse, and not to show that the defendant actually did something wrong, would be affected by the new Rule.

\textit{d. Settlement Negotiations – Rule 408}

\textsuperscript{384} See supra Part II.A (discussing full apologies).

\textsuperscript{385} See supra Part III.B.2.c (the statements against interest exception).

\textsuperscript{386} See, e.g., Samaniego, supra note 142, and accompanying text.

\textsuperscript{387} See supra note 62 (“Part of facing up to the wrong is actually facing the human being wronged. The emotion of true contrition is hard to fake in person and has a powerful effect on the injured party.”)

\textsuperscript{388} See supra Part IV.B (for the text of the Rule).

\textsuperscript{389} See supra notes 140-141 (discussing this exception to the state of mind exception of hearsay).
Like inadmissible hearsay statements that do not fit under a hearsay exception, statements made during settlement negotiations will not be affected by the new Rule.\textsuperscript{390} The new Rule affirmatively protects apologies but does not strip any protection away from an apology that an evidentiary rule already provides.\textsuperscript{391} Therefore, apologies that would have been protected under Rule 409 will remain untouched by the new Rule. This will continue to promote the important goal of settlement by allowing any apology made during settlement to remain inadmissible.\textsuperscript{392} An apology made during settlement may not be as strong on the factors under the new Rule, but may still be likely to be successful because of the willingness of the parties to try to reconcile, evidenced by their participation in settlement in the first place.\textsuperscript{393} In conclusion, the new Rule would only affect apologies which may have been deemed admissible already. The new Rule would render inadmissible an apology likely to be successful given the factors of the new Rule, even if the apology would have otherwise been admissible through the admissions exception, statements against interest exception, or state of mind exception to hearsay.\textsuperscript{394} However, the new Rule would retain the inadmissible status of apologies that are considered hearsay but do not fit under an exception, and apologies made during settlement negotiations.\textsuperscript{395}

\textsuperscript{390} See Fed. R. Evid. 408 (protecting statements made during settlement negotiations).

\textsuperscript{391} See, e.g., note 376 (discussing how apologies that are considered hearsay but do not fit under a hearsay exception are not affected by the new Rule).

\textsuperscript{392} The new Rule makes certain apologies otherwise admissible now inadmissible. Any apology made during settlement is already inadmissible under Rule 408, therefore these apologies are not affected by the new Rule.

\textsuperscript{393} See supra notes 150-152, discussing the important policy considerations of encouraging settlement.

\textsuperscript{394} See supra note 376.

\textsuperscript{395} Id.
2. The State Rules

The proposed new Rule is a federal one.\textsuperscript{396} This allows the Rule to have an immediate effect on the federal system and with it the federal rules. The hope would be that as has been done with other federal evidentiary rules, the states would then adopt this rule into their own jurisdictions.\textsuperscript{397} Looking forward and assuming that states did incorporate this rule into their jurisdictions, the new Rule would then interact with the existing state rules regarding apology.

\hspace{1cm} a. \textit{That Protect Only Partial Apologies}

State evidentiary rules that protect only partial apologies would effectively be replaced by adoption of the new Rule. This result is needed because the current state rules of evidence that protect only partial apologies from admissibility are too over inclusive.\textsuperscript{398} They attempt to encourage apology and with it settlement and healing, but they encourage any partial apology, without regard to that apology’s likelihood to succeed. Therefore, even if the apology is given between strangers, is written and not face-to-face, and is given way too early or way too late, it would be protected as long as it was a partial apology.\textsuperscript{399} The apology just described is one least

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\textsuperscript{396} See supra Part IV.B (presenting and discussing the new Rule).
\textsuperscript{397} Most state jurisdictions pattern their state evidentiary rules after the Federal Rules of Evidence. See, e.g., supra note 119 (stating the Tennessee analogue to the Federal Rules of Evidence for the admissions exception).
\textsuperscript{398} See SCOTT BREWER, THE PHILOSOPHY OF LEGAL REASONING (1998) (describing the interpretation of a legal rule). Brewer states that “a legal rule instantiates some background goal, purpose, or justification.” Id. at 267. He notes that “cases might arise in which some form of conduct literally within the language of the rule-formulation seems not to serve the rule’s background purpose or justification.” Id. He then argues that the purpose should always be most important, by staying that the “language of the rule should yield to the purpose.” Id. at 268. Brewer emphasizes that it is especially important to look at the true purpose of the rule when “the language is overinclusive.” Id.
\textsuperscript{399} See infra FIGURE 6 (this would be the apology labeled “3,” the apology least likely to succeed).
\end{scriptsize}
\end{flushright}
likely to succeed.\(^{400}\) In attempting to encourage apologies, the state rules that protect partial apologies may encourage some apologies likely to be successful, but they cast too wide a net, and will also protect and encourage many apologies not likely to be successful.\(^{401}\) The arguments against protecting apology with a rule like these states have done, however, cast no net at all, and are therefore under inclusive, not protecting and not encouraging any apologies at all.\(^{402}\)

The new Rule solves this discrepancy by casting a net that catches only apologies that are most likely to succeed.\(^{403}\) The new Rule is closely tailored to the success of the apology, and consequently to the goals of settlement and healing.\(^{404}\) If adopted by the states that currently protect only a partial apology, the new Rule would effectively replace these old evidentiary rules. Under the new Rule, an apology that offers only sympathy and as a result is not likely to be successful, is no longer likely to be protected, unless all of the other factors weigh towards its success.\(^{405}\) Instead of the apology’s categorization as a partial one acting as a dispositive factor in protection, the new Rule takes the status of an apology as full or partial as just one of the four elements in determining overall success. Because the new Rule is closely tailored to the success

\(^{400}\) See infra Figure 6, this is the apology labeled “3.” See also supra note 321 (describing an apology least likely to succeed).

\(^{401}\) See supra Part III.B.4 (giving Taft’s arguments against protection of the apology because of the increase in strategic (bad) apologies that would result).

\(^{402}\) See supra Part II.B.4 (discussing the arguments against protection of the apology).

\(^{403}\) See supra Part IV.B (presenting and discussing how the new Rule works). The new Rule only protects apologies that are most likely to succeed given the four essential elements to the success of an apology.

\(^{404}\) An apology that is accepted is more likely to actually induce the plaintiff to accept a settlement offer. See supra notes 201-208, and accompanying text (discussing of Robbennolt’s settlement study).

\(^{405}\) See supra Part IV.B (introducing the new Rule). See also Part II.A and Part IV.A.1 (discussing how an acceptance of fault makes an apology more likely to be successful).
of the apology, only apologies most likely to succeed overall will be protected. The new Rule, unlike the state evidentiary rules that protect only partial apologies, will embrace the complexity of the apology in order to ensure that only successful apologies are protected and therefore encouraged.  

*b. That Protect Apologies In Health Care Situations*

State evidentiary rules that only protect apologies in health care situations would effectively be replaced by the new Rule as well, but the new Rule would protect many of the same situations that these health care rules protected. The state evidentiary rules that protect apologies in health care situations are still not closely tailored enough to the goals of success. While they take relationship into account, they leave out other close relationships where an apology is likely to succeed, such as family members, and focus only on the doctor patient relationship. Because the new Rule protects apologies likely to succeed and takes relationship into consideration as a factor in that success, the status of a doctor patient relationship is a ready-made positive factor that exists to lean the apology towards protection under the new Rule. But the new Rule enhances the protection these health care rules provide by requiring that there be additional factors that lead to the success of the apology from a doctor to a patient other than

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406 See supra note 148 for a list of the statutes that protect only partial apologies. These statutes take only one element of an apology into consideration, and they use that element in the wrong way by protecting and promoting an apology not likely to succeed. See supra Part II.A.

407 See supra note 165 (listing the states that protect full apologies in health care incidents).

408 The new rule takes the closeness of the relationship between the plaintiff and defendant into account in determining whether or not to protect the apology. See supra Part IV.B. Because the relationship between a doctor and patient is already closer than that of strangers, in a health care situation this factor is already slightly leaning towards protection of the apology, just as the old state evidentiary rules that protected that apology in health care situations.
just the existence of the relationship itself.\textsuperscript{409} Therefore, a doctor is encouraged not just to apologize, but to apologize well, and thereby to increase the chance that the victim of the malpractice is healed by the situation.\textsuperscript{410} A victim that is healed may be less likely to bring a lawsuit, and if he does, may be more likely to settle if given a good apology from a doctor, rather than just any apology at all.\textsuperscript{411} The new Rule will reach a better result than the current state evidentiary rules, whether they are rules that protect only a partial apology, or protect apologies only in health care situations. Because the new Rule will be closely tailored to the success of the apology, and because the new Rule will take four elements into consideration in that success rather than just one under the totality of the circumstances, the new Rule is the best solution to reach the goals of settlement and healing of the victim.

V. CONCLUSION

This Comment has explored the complexity of an apology. It argued that protection of an apology with an evidentiary rule can further the goals of settlement and healing of the victim. But in order to truly further these goals, an evidentiary rule must be more closely tailored to the

\textsuperscript{409} Thus, the fact that the doctor is apologizing to the patient is not enough. He will be required to make a good apology, one that is likely to succeed, in order to be protected by the rule. This would encourage doctors not just to apologize, but to apologize in person and at the right time, and it will also allow doctors to accept fault for their mistake without the fear of a lawsuit. \textit{See supra} notes 207-211 and accompanying text.

\textsuperscript{410} An apology that is actually successful and accepted by the victim is more likely to actually heal the victim. \textit{See supra} notes 10, 82. \textit{See also} Lortz, supra notes 236-240. An apology such as the one given in this case might be automatically protected under the current state health care exceptions, even though it was deemed an apology not likely to succeed. This new rule would force the doctor that apologized in that case to apologize well, and would increase the likelihood that the patient would accept it. If the doctor had been encouraged to give an apology that was more likely to succeed, if he had given it in person for example, the patient may have accepted it and not brought any lawsuit at all.

\textsuperscript{411} \textit{See supra} note 10; \textit{see infra} FIGURE 1 and TABLE 1 (showing the ability of an apology to increase settlement).
success of an apology than the current evidentiary rules provide.\textsuperscript{412} An apology that is successful and accepted by a plaintiff is most likely to actually encourage settlement and healing. The new Rule, then, takes into consideration four essential elements to the success of an apology: acceptance of fault, relationship, form, and timing.\textsuperscript{413} An apology that accepts fault, is given within a close relationship, is given in a personal form, and is given during an intermediate time period, is most likely to be successful, and an apology considered to be successful given each of these elements will be protected by the new Rule.\textsuperscript{414} This new Rule will encourage successful apologies by protecting them and removing the fear of making them. It will not run the risk of encouraging bad apologies because it will be closely tailored to only protect successful apologies. In adopting the new Rule as a federal evidentiary rule, the hope is that many states will follow by adopting the Rule into their own state evidentiary rules. Of course, a few questions would remain to be determined with respect to the new Rule, most importantly, which factor, if any, might weigh more heavily than the others in determining the likelihood of success of the apology under the totality of the circumstances.\textsuperscript{415} While the new Rule does not have a bright line cutoff for what is a successful apology and what is not, it provides a workable framework to determine this question with the four factors it presents.\textsuperscript{416} This new Rule is an important and necessary step in the right direction in the protection of the apology, a step that

\textsuperscript{412} See BREWER, supra note 398 (discussing the importance of the construction of the rule in facilitating the purpose of that rule).

\textsuperscript{413} See supra Part IV.B (the text of the new Rule).

\textsuperscript{414} See supra Part IV.B (the new Rule). See supra Part IV.A (discussing what makes each element most successful).

\textsuperscript{415} The new Rule is a novel approach. Perhaps a new study will find that acceptance of fault makes an apology twice as likely to be accepted than the relationship the apology is given in. Perhaps the form of the apology is more important than all of these things. These are all questions that are open to be explored and answered by future research.

\textsuperscript{416} See supra Part IV.D (providing examples of how the new Rule is applied in cases).
will encourage citizens not just to apologize for their wrongs, but more importantly, to apologize well. By encouraging society to give good apologies, we as citizens, but more importantly as humans, can all make a better effort to mend the bridges we have burned and to heal the wounds we have inflicted on one another.

**Figure 1: Effect of the Type of Apology on Acceptance of the Settlement Offer**

![Figure 1: Effect of the Type of Apology on Acceptance of the Settlement Offer](image)

**Table 1: Full vs. Partial Apology Acceptance Levels**

<table>
<thead>
<tr>
<th>Type of Apology</th>
<th>Definitely/Probably Accept</th>
<th>Definitely/Probably Reject</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>FULL Apology</td>
<td>73%</td>
<td>13%</td>
<td>13%</td>
</tr>
<tr>
<td>PARTIAL Apology</td>
<td>35%</td>
<td>25%</td>
<td>40%</td>
</tr>
<tr>
<td>NO Apology</td>
<td>52%</td>
<td>43%</td>
<td>5%</td>
</tr>
</tbody>
</table>
**Figure 2: Relationship Between Plaintiff and Defendant and Success of Apology**

![Graph showing the relationship between relationship and success.](image)

**Figure 3: Form of Apology from Defendant to Plaintiff and Success**

![Graph showing the form and success relationship.](image)
Figure 4: Timing of Apology from Defendant to Plaintiff and Success

![Figure 4 Diagram](image)

Figure 5: Cube Model: Rate of Success Given the Interaction between Relationship, Form and Timing

![Figure 5 Diagram](image)
Figure 6: Cube Model with Total Point Values

By: Amy Poyer