

# Unlocking Apology's Potential in Resolving Disputes

BY WESLEY PARKS AND C.J. LARKIN



*Apology is a powerful mediation tool. This article discusses legal protections for apologies in settlement negotiations and mediations, the benefits of effective apologies, and the pitfalls of inadequate apologies.*

During the 2022 Academy of Motion Picture Arts and Sciences (Academy) Awards, some of us witnessed the “slap heard around the world.”<sup>1</sup> The rest of us immediately heard about it. The fallout included potential criminal charges, an Academy investigation, and a series of apologies meant, at the very least, to mitigate the damage. Lawyers and alternative conflict resolution professionals may have instinctively thought about liability and what expressions of regret could effectively reestablish equilibrium between Will Smith and Chris Rock. This article considers the substantive moral and legal dimensions of an apology, including legal protections available in Colorado and its use in dispute resolution. It also uses Will Smith’s response to the Academy Awards incident to illustrate the essential components of an effective apology.

### **Apology and Morality**

Apology is defined as (1) “an admission of error or discourtesy accompanied by an expression of regret” and (2) “an expression of regret for not being able to do something.”<sup>2</sup> Yet, beyond simple regret, an apology is deeply rooted in morality. As one writer put it: Apology leads to healing because through apologetic discourse there is a restoration of moral balance—more specifically, a restoration of an equality of regard. Understood this way, apology is valuable because it offers the offender a vehicle for expressing repentance and the offended an opportunity to forgive. Apology, then, is potentially healing for both the offended and the offender.<sup>3</sup>

Apology recognizes right versus wrong behavior and identifies that the right behavioral norm has not been followed.<sup>4</sup> Children as young as 3 years old understand the moral importance of apology, and it is one of the first forms of dispute resolution they are taught.<sup>5</sup> But notwithstanding its apparently prominent role in morality, “when apology is cast into the legal arena, its fundamental moral character is dramatically, if not irrevocably, altered.”<sup>6</sup>

Legal and moral obligations are often at odds with one another when an offending party contemplates an apology. The tension between the law and one’s own morals and interpersonal style only intensifies during a dispute in which a fact finder must determine a causal connection between a person’s prior actions and a resulting injury. Concerns immediately arise over whether an apology will tilt the scales of justice against the apologizer. Although research has shown that an effective apology positively correlates with decreased legal tort liability,<sup>7</sup> the fear of receiving punishment for showing some responsibility for an injury sometimes results in foregoing this basic human communication. Thus, even though an expression of regret for a judgment error or discourtesy is not equal to an admission of fault, legal professionals often advise clients not to apologize for fear that apologetic words will cause clients to incur legal liability.

American society—thought of as egalitarian—generally discourages apology as a mode of dispute settlement. “[T]he greatest impediment to apology is a pervasive cultural attitude that views apology as a weakness, an emotional expression antithetical

to traditional American values of autonomy and independence.”<sup>8</sup> In American culture, apology is often used to excuse wrongful behavior, as an introduction before tendering blame on an unrelated third party or circumstance for the wrongful behavior, or sometimes to shift the blame onto the person who has been injured.<sup>9</sup> While Americans view apology as a preferred mode of dispute resolution for some situations, such as between children and parents where “dependent behaviors are fostered in frequent interactions with adults,”<sup>10</sup> fear of litigation often inhibits adults from engaging in the moral and humane act of apologizing after another person has been injured by our actions.<sup>11</sup>

Anthropologists have found that the use of apology as a dispute resolution mechanism is more prevalent in hierarchical societies. “[M]oral superiority of [the] individual is acknowledged and reaffirmed by the offender’s confessing and expressing regret for the offending actions thereby acknowledging the wrongness of his/her position and the correctness of the offender’s position.”<sup>12</sup> In hierarchical societies, apology maintains relationships when social mobility is limited, promotes complementary hierarchical behavior in seeking forgiveness from someone higher in the social structure, and resolves challenges to reputation.<sup>13</sup>

Yet in any society, an effective apology can empower the person who is wronged to forgive the apologizer and resolve the dispute. “To apologize is to engage in a social ‘ritual whereby the wrongdoer can symbolically bring himself low (or raise us up).’”<sup>14</sup> Foregoing an apology out of fear that empowering an injured party will result in a worse outcome for the apologizer is unfounded. Studies regarding incidents of legal liability after apology have shown that legal liability decreases when an effective apology is tendered to an injured party.<sup>15</sup>

### The Scope of Legal Protections

Most states, including Colorado, have passed legislation or enacted rules that specifically protect apologies in certain civil matters.<sup>16</sup> These protections include safe harbors in medical malpractice matters, protections for statements made in general civil matters when negotiating settlements, and protections for statements

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made during mediation. The laws and rules facilitate the use of apology in negotiations and mediations.

### Safe-Harbors in Medical Malpractice Matters

State laws protecting apology in medical malpractice claims<sup>17</sup> can be categorized according to whether both admissions of fault and expressions of regret or remorse are protected. While

38 states have passed laws that protect the use of apology in medical malpractice matters, Colorado is among only five that “offer broad protections for statements of sympathy, fault, error, mistake, and even negligence.”<sup>18</sup> CRS § 13-25-135(1) provides:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related 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, a relative of 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.*<sup>19</sup>

Of the states that provide protection for apologies in medical malpractice actions, Colorado ranks among only five that also protect admissions of fault, which would normally be admissible evidence under CRE § 801(d)(2) as a non-hearsay statement of a party-opponent.<sup>20</sup> CRS § 13-25-135 also protects a physician who admits fault during an apology from CRE 803(2), the hearsay exception rule for excited utterances.<sup>21</sup>

### Other Civil Matters

Some, but not all, state statutes that protect apologies in medical malpractice matters also generally apply to other civil matters.<sup>22</sup> The Colorado authorities discussed below offer participants involved in non-medical civil disputes additional apology protections but vary in the scope of protection from legal exposure for an explicit and full admission of fault.

### CRE 408

CRE 408 is modeled after corresponding Fed. R. Evid. 408, which was enacted to promote non-judicial settlement of disputes and is intended to protect “admissions of liability or

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opinions given during compromise negotiations [as] inadmissible [evidence].”<sup>23</sup> CRE 408 protects confidential settlement communications and applies to apologies given during negotiations and/or mediations.<sup>24</sup> CRE 408(a)(2) provides that “conduct or statements made in compromise negotiations regarding the claim” are not admissible when offered to prove liability.

CRE 408(a)(1), like its federal counterpart, also bars admission of evidence of liability made during compromise negotiations. But the protections are not as broad as may appear at first glance. Although evidence from such statements cannot be used to prove liability, the statements may still be used to prove a defendant’s knowledge, or for another purpose, such as to prove bias or prejudice.<sup>25</sup> Thus, Rule 408, when used to protect an apology in general civil matters, doesn’t provide as much protection as CRS § 13-25-135. Those relying on this rule for protection should proceed with caution when apologizing and consider a form of apology that does not include a full admission of fault.

#### **CRE 409**

CRE 409 protects evidence of “furnishing or offering or promising to pay medical, hospital, or similar expenses.”<sup>26</sup> An apology is often accompanied by an offer to “make things right” or to somehow compensate the injured party. Offers of payment for medical, hospital, or similar expenses are often derived from humane impulses rather than a desire to admit fault.

Like their federal counterparts, CRE 408 and 409 protect subsequent remedial measures and offers of compromise from being

used against the offeror. Rule 408 provides broader protections than Rule 409 due to the function of settlement-related communications: “Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed [regarding Rule 408].”<sup>27</sup> On the other hand, the legislative history of Fed. R. Evid. 409 states that it “does not extend to conduct or statements [that are] not a part of the act of furnishing or offering or promising to pay.”<sup>28</sup> Rule 409 is thus narrower in scope because it only protects communications related to the payment of “medical, hospital, or similar expenses” made near or at the time of the act that elicited the apology. Thus, Rule 409 provides protections for offers to pay that may accompany apologies.

#### **The Colorado Dispute Resolution Act**

The Colorado Dispute Resolution Act (CDRA)<sup>29</sup> protects confidential communications made during mediation. These protections cover apologies and are stronger than those afforded in CRE 408 and 409.<sup>30</sup> The CDRA defines a “mediation communication” as “any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization, or party . . . .”<sup>31</sup> Notably, the definition of a mediation communication does not include agreements to mediate or final written, fully executed agreements.<sup>32</sup> A mediation communication disclosed in violation of this

confidentiality protection may not be admitted into evidence in judicial or administrative proceedings.<sup>33</sup>

CRS § 13-22-307(2)(b)-(d) provides exceptions to the confidentiality protections provided during mediation. These are narrow and limited to communications that (1) “[reveal] the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years”; (2) are necessary and relevant to an action alleging willful or wanton mediator/mediator organization misconduct; and (3) are required to be made public by statute.<sup>34</sup> The only other way to disclose a confidential mediation communication is by written consent of all parties and the mediator.<sup>35</sup>

An apology expressed during mediation is subject to the heightened protection of confidential mediation communications. Attorneys should counsel their clients on the CDRA’s added protections and consider the use of apology, when appropriate, to move parties toward settlement. As discussed below, empirical studies have shown that apology increases the likelihood of settlement and may result in more favorable settlement amounts for the apologizer.

#### **Case Law Extensions**

The CDRA’s confidentiality protection has been extended to communications that occur outside of mediation. In *Yaekle v. Andrews*, the Colorado Supreme Court consolidated two cases, the first involving two corporate shareholders in a dispute over corporate ownership rights, and the second involving two neighbors in a contract dispute over easement rights.<sup>36</sup> The primary

issue before the Court in both was whether CRS § 13-22-308 abrogated common law contract principles that allow the formation of contracts during mediation. CRS § 13-22-308(1) provides:

If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

In the first case, the mediator filled out a form that outlined the terms of the agreement, and the attorneys signed the form and agreed to draft a “more formal” settlement agreement afterward. The attorneys attempted to codify the agreement, but Yaeke never signed it. A dispute later arose over the terms in the formal settlement agreement and whether the first agreement was enforceable. In the second case, a mediator drafted two pages of notes detailing the settlement terms, but neither party signed the purported agreement. One of the parties sought to enforce the settlement terms reached during mediation as evidenced by the mediator’s notes.

The Court ruled that CRS § 13-22-308 did not abrogate contract formation principles, but the confidentiality protections in CRS § 13-22-307 “[bar] the use of communications made in the presence or at the behest of the mediator as evidence of a binding contract.”<sup>37</sup> In the first case, a party sought to admit as evidence of contract formation communications that occurred after the mediation had concluded. The Court held that subsequent communications may only be protected under mediation confidentiality if those communications were “made in the presence or at the behest of the mediator.”<sup>38</sup> In the second case, the Court held that the mediator’s notes could not be used as evidence of a contract as they were confidential and not admissible as evidence to prove the existence of a contract.<sup>39</sup>

Applying *Yaeke*, an apology communicated in the presence of or at the behest of the mediator is a protected mediation commu-

nication under the CDRA. More recently, in *Tuscany Custom Homes, LLC v. Westover*, the Colorado Court of Appeals expanded *Yaeke*’s definition of mediation communications to include “evidence that discloses information concerning a mediation communication” even if such evidence arose after the mediation had concluded, such as a subsequently drafted proposed settlement agreement not executed by the parties.<sup>40</sup> In *Yaeke*’s and *Tuscany*’s wakes, mediation communications could have wider application to ongoing settlement negotiations that regularly occur after mediation. Accordingly, to obtain the CDRA’s protections, attorneys should consider how mediator involvement may affect confidentiality protections when a disputant wishes to apologize after, rather than during, a mediation.

### The Benefits and Pitfalls of Apologies

Those involved in legal disputes often experience the classic stages of grief and loss: denial, anger, bargaining, depression, and acceptance.<sup>41</sup> An apology may help move a disputant past the emotions related to grief and loss. As one commentator stated, “an apology might operate to influence settlement decision making by altering the injured party’s perceptions of the situation, the other party, or the offer itself.”<sup>42</sup> Thus, an effective apology may prompt a party’s increased willingness to settle or change the negotiation dynamics “to smooth the way toward an eventual settlement.”<sup>43</sup> When counseling a client or mediation participant on how to make an effective apology, practitioners should assess the prospective apology recipient’s interest in receiving an apology so the apology may succeed in encouraging settlement. Reviewing ineffective apologies also helps with counseling clients on how to give an effective apology.

Apology is a central concept to “therapeutic jurisprudence (TJ),” which “is an approach to law, lawyering, and the resolution of legal matters that seeks to assess the effects of laws and legal rules, processes, and personnel on individuals’ wellbeing, relationships, and psychological functioning.”<sup>44</sup> Apology can change a disputant’s perception of the other party, which may influence settlement decision-making, and decrease anger and increase sympathy toward

the other party.<sup>45</sup> For example, a 2003 study by Jennifer Robbennolt found that a full apology, as opposed to a partial apology, tendered during negotiations increased the likelihood of settlement.<sup>46</sup> A full apology:

- expresses embarrassment and chagrin;
- clarifies that the apologizer knows what conduct was expected and sympathizes with any negative sanction imposed;
- rejects, repudiates, and disavows the wrong behavior;
- espouses the right behavior and avows to pursue that course going forward; and
- offers penance and volunteers restitution.<sup>47</sup>

Robbennolt summarized the benefits of a full apology as follows:

Full apologies were seen as more sufficient apologies, as evidencing more regret and a greater likelihood of care in the future, and as offered by people of higher moral character. Full apologies favorably altered assessments of the conduct leading to the injuries and changed the emotions of the injured party so as to reduce anger and increase sympathy for the offender. Full apologies were seen as mitigating potential damage to the relationship, were more likely to lead to forgiveness, and inclined injured parties to look more favorably on the settlement offer.<sup>48</sup>

An apology does not have to be a full apology, but empirical research has shown that a full apology tends to be more effective.<sup>49</sup> An effective apology results in more “favorable attributions, more positive and less negative affect, improved physiological responses, decreased need to punish, and more likely forgiveness.”<sup>50</sup> On the other hand, disingenuous apologies and partial apologies may have detrimental effects and often result in worse outcomes than giving no apology at all. Robbennolt found that a partial apology that avoided taking responsibility had worse effects on settlement when the injury suffered was greater and when fault was more easily discerned; in such cases, a partial apology was found to be less effective than no apology at all.<sup>51</sup>

Robbennolt’s study also showed that apologies influence settlement offer amounts.

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Attorneys representing clients in negotiations tend to increase the dollar amount of damages sought when their clients receive a full apology that is admissible as evidence of fault. On

### APOLOGY SCORE CARD\*

Rate the sample apology in each category and give examples supporting your score and suggestions for improvement. (Can be used for coaching apology.)

SCORING: 1 (poor) 2 (attempt) 3 (decent) 4 (good) 5 (excellent)

1. Score \_\_\_\_ Gave a detailed account of the situation
2. Score \_\_\_\_ Acknowledged their role in the event/situation
3. Score \_\_\_\_ Took responsibility for their role (an explanation, not an excuse)
4. Score \_\_\_\_ Acknowledged the outcome (hurt/damage/consequences)
5. Score \_\_\_\_ Described alternate courses/options (what they should or could have done differently to avoid the outcome)
6. Score \_\_\_\_ Expressed sincere regret for their role and outcome
7. Score \_\_\_\_ Offered restitution, repair, or retribution (punishment)
8. Score \_\_\_\_ Promised change/improvement with concrete a plan
9. Score \_\_\_\_ Listened to the aggrieved party (or was willing to)
10. Score \_\_\_\_ Answered questions (or was willing to)

Extra Credit:

Score \_\_\_\_ Asked for forgiveness or made another gesture of humility

TOTAL SCORE \_\_\_\_ of 50

(Add scores for questions 1-10 + Extra Credit)

*\*Adapted by C.J. Larkin from [www.perfectapology.com](http://www.perfectapology.com)*

the flip side, when apology protections make admissions of liability inadmissible, attorneys tend to not increase the amount of damages sought in settlement negotiations.<sup>52</sup> Based on these tendencies, apologies that are protected may reduce extreme positions in negotiations, enhance discussions, and result in monetary savings for defendants.

#### Crafting an Appropriate Apology

Given the power of apology, clients and other mediation participants should be coached on using it effectively. Author Larkin developed a coaching tool for rating the effectiveness of apologies, the Apology Score Card, included here. This tool can help clients craft an apology and, on the other hand, understand what others want to receive in an apology. To illustrate how to use the Score Card, excerpts from actor Will Smith's three apology statements regarding his behavior at the 2022 Academy Awards are evaluated. He made the first statement on

the award stage about 20 minutes after the incident, the second the next day on Instagram, and the third five days later in his statement of resignation from the Academy. A suggested alternative apology follows the evaluations.

#### *Excerpts from Smith's Apology at the Academy Awards*

Oh, man. Richard Williams was a fierce defender of his family. In this time in my life, in this moment, I am overwhelmed by what God is calling on me to do and be in this world. Making this film, I got to protect Aunjanue Ellis, who is one of the strongest, most delicate people I've ever met. I got to protect Saniyya [Sidney] and Demi [Singleton], the two actors that played Venus and Serena. I'm being called on in my life to love people and to protect people and to be a river to my people. I know to do what we do, you got to be able to take abuse. You got to be able to have people talk crazy about

you. In this business you got to be able to have people disrespecting you. And you got to smile, you got to pretend like that's okay. Richard Williams, and what I loved—thank you, Dee—Denzel said a few minutes ago, “At your highest moment, be careful, that’s when the devil comes for you.” It’s like, I want to be a vessel for love. . . . I want to apologize to the Academy. I want to apologize to all my fellow nominees. This is a beautiful moment, and I’m not—I’m not crying for winning an award. It’s not about winning an award. Art imitates life. I look like the crazy father, just like they said, just like they said about Richard Williams. But love will make you do crazy things. . . . I hope the Academy invites me back.<sup>53</sup>

### Smith’s Instagram Apology

Violence in all its forms is poisonous and destructive. My behavior at last night’s Academy Awards was unacceptable and inexcusable. Jokes at my expense are a part of the job, but a joke about Jada’s medical condition was too much for me to bear and I reacted emotionally.

I would like to publicly apologize to you, Chris. I was out of line and I was wrong. I am embarrassed and my actions were not indicative of the man I want to be. There is no place for violence in a world of love and kindness.

I would also like to apologize to the Academy, the producers of the show, all the attendees and everyone watching around the world. I would like to apologize to the Williams Family and my King Richard Family. I deeply regret that my behavior has stained what has been an otherwise gorgeous journey for all of us. I am a work in progress.<sup>54</sup>

### Smith’s Academy Resignation Statement

I have directly responded to the Academy’s disciplinary hearing notice, and I will fully accept all consequences for my conduct. My actions at the 94th Academy Awards presentation were shocking, painful, and inexcusable. The list of those I have hurt is long and includes Chris, his family, many

of my dear friends and loved ones, all those in attendance, and global audiences at home. I betrayed the trust of the Academy. I deprived other nominees and winners of their opportunity to celebrate and be celebrated for their extraordinary work. I am heartbroken. I want to put the focus back on those who deserve attention for their achievements and allow the Academy to get back to the incredible work it does to support creativity and artistry in film. So, I am resigning from membership in the Academy of Motion Picture Arts and Sciences and will accept any further consequences the Board deems appropriate. Change takes time and I am committed to doing the work to ensure that I never again allow violence to overtake reason.<sup>55</sup>

### Evaluating Smith’s Apologies

Smith’s first statement was made in a highly tense situation and colored by little time to reflect or to seek advice. His comments were focused on his self-image and the difficulty of being a public figure, and his delivery was emotional and self-justifying, and it did not mention Rock. Notwithstanding the reasons for his behavior, justifications are seldom helpful and often undermine acceptance of the apology.

The second statement was better. It mentioned violence, expressed responsibility and regret, aimed the apology at Rock and the audience, and mentioned he was a work in progress. But the apology lacked an acknowledgment of the harm experienced by those he was apologizing to, and he failed to demonstrate how he could have otherwise acted. Further, he did not offer restitution or repair.

Smith made the third statement after becoming aware that the Academy was going to review his actions. This statement seems more balanced and thorough; Smith took more responsibility, demonstrated sincere remorse (“I am heartbroken”), humbly submitted his resignation from the Academy, and said he was willing to accept consequences from the Academy. He expanded his apology to Rock’s family and to his own family and friends.

Using the Apology Score Card, Smith’s final apology statement was effective in:

- #2) acknowledging his role
- #3) taking responsibility
- #4) acknowledging some harms/outcomes
- #6) offering sincere, heartfelt regret
- #7) offering retribution by resigning from the Academy and indicating willingness to accept consequences
- #8) committing to change by stating a willingness to improve and not behave in the same manner again.

But Smith’s statement was ineffective in:

- #1) offering a detailed account, because he never described what he did
- #4) fully describing the harm/outcomes experienced, especially by Rock
- #5) proposing alternatives to his behavior; he did not demonstrate an understanding of what he could have done instead
- #7) making concrete offers to repair Rock and others to whom he apologized
- #8) promising change; he promised change but failed to discuss a concrete plan for change
- #9) listening; he did not offer to listen to those to whom he was apologizing
- #10) offering to answer questions

As for extra credit, Smith did not ask for forgiveness, though some may see his resignation as a gesture of humility.

On the numerical index, the authors rate Smith’s first statement at about 20, his second at about 60, and his third, which is much improved, in the 80 to 85 range (a solid B). But with all things, there’s room for improvement.

### A “More Perfect” Apology

The suggested apology below was designed to incorporate much of Smith’s original statements. Apply the Apology Score Card and decide how you would rate it.

I would like to humbly apologize for my actions and words at the Academy Awards last night. During presenter Chris Rock’s opening comments, he made a joke that seemed to address my wife’s shaved head, referring to the movie *G.I. Jane*. I am not sure whether Mr. Rock was aware that my wife suffers from alopecia, which has caused severe hair loss. I assumed that he did, and I was immediately furious at him. While he was still speaking on stage, I walked onto

the stage and slapped him in the face. I returned to my seat and yelled at him to not talk about my wife anymore, including curse words that caused the Academy's sensors to cut sound to the television audience.

I want to take full responsibility for my actions and my words. Although this incident was triggered by a joke made by Mr. Rock, my actions and words were inexcusable and unwarranted. It was my choice to accelerate the situation to physical violence and to continue the damage I was causing to everyone by yelling expletives from my seat in the audience. I realize now that I could have waited to speak to Mr. Rock until afterward while shaking my head at him from my seat to let him know that I did not appreciate his joke. With my wife's permission, I could have mentioned why it was a painful joke to us in interviews after the ceremony. These actions could have had the desired impact but would have required more patience and control from me.

It has taken me an evening and day of sleepless reflection to realize all the harm that my actions caused. I would like to apologize to several people and groups of people for the negative effects on them from my actions. First and foremost, I would like to apologize to Mr. Rock for what must have been a physically and emotionally painful experience. I can only imagine his shock, confusion, and embarrassment in those moments. I would like to acknowledge that Mr. Rock managed the situation with grace and restraint. I am grateful to him for his handling of the moments after the incident. In apologizing to Mr. Rock, I would like to include his family and friends, who must have felt as much or more of his shock, confusion, hurt, and embarrassment as they watched the incident unfold.

I would like to apologize to the other nominees and awardees last night, especially Questlove, whose award came soon after the incident. Appreciation of your demanding work, passion, creativity, and excellence was diminished by the shadow of my actions. During the rest of the award

ceremony, I felt the change in the tone and enjoyment of the evening that I had caused.

I believe that all of us in the film industry are peers and colleagues, and I will never forget what I took away from you all last night.

I would like to apologize to the Academy leadership. As far as I know, this incident was unprecedented. I can only imagine the confusion and dismay that leadership and my colleagues must have experienced last night. My actions created an emergency of sorts, and I deeply regret that I caused such a situation. I regret, as well, that the Academy now must undertake a formal process to address my actions. I completely understand that need and I will cooperate fully in that process.

I would like to apologize to the Williams family and all the *King Richard* crew and producers. This incident did serious harm to the glowing recognition that *King Richard* received and deserved. I apologize to Mr. Williams for my comments, which seemed to excuse my behavior by referring to your protection of your family.

I would like to publicly apologize to my wife, family, friends, partners, and staff. My misguided attempt to protect and stand up for my wife was done without her permission or agreement. I am especially sorry for the embarrassment and disrespect she may have felt then and may still feel now. To everyone who cares about me, I know that you were shocked and deeply concerned by what happened last night. I apologize for the effect of my actions on you all. For all of you, I want you to know how sorry I am that I have diminished our work together and, possibly, jeopardized our current and future endeavors. I hope that we can meet to discuss best steps forward now that I have created this situation for us.

I would like to apologize to both the in-person and remote Academy Awards audience. The film-loving public who watch the Awards with excitement and interest were subjected to a spectacle that tarnished everything they love about the Awards and film. I am deeply sorry for the impact that

my actions and words had on what should have been a brilliant and shining evening for the audience.


Moving forward, I will work to examine myself and my responses and will get the help I need to make sure that I am never guilty of this sort of response again. With the help of my family, I have reached out to mental health professionals for advice about next steps. I plan to begin working with a therapist immediately and will provide updates on my progress.

Mr. Rock, I would like to offer to talk privately with you at any time so that I can answer any questions you have and hear anything that you would like to say to me. I have already spoken privately with my family and the Williams family, expressing my deep regret, hearing their concerns, and answering their questions. I am sure that part of the Academy's process will be to speak with me, both to ask questions of me but also to express their concerns and decisions in response to this incident and my behavior. I stand ready to participate in any process of healing that would be helpful to anyone involved.

Finally, I have offered my resignation from the Academy as an acknowledgement of the harm I have caused and to indicate the high respect I have for the Academy. My hope is that my resignation can help to return the focus back on those who deserve attention for their achievements and allow the Academy to get back to the incredible work it does to support creativity and artistry in film.

Thank you for reading my comments,  
Will Smith

## Conclusion

An effective apology can help disputants overcome grief and loss, promote reason in negotiations, and elicit empathy and sympathy for the other side. Empirical evidence has shown that apology increases settlement rates and decreases animosity between parties. Legal protections for settlement communications encourage apologies by precluding their use as evidence of fault. Mediators, attorneys, and other dispute resolution professionals should all take advantage of this powerful tool. 



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## NOTES

1. On March 27, 2022, during a televised broadcast of the Academy Awards, actor Will Smith was recorded rising from his seat in the audience, walking onto the stage, and slapping award presenter Chris Rock, who had made a remark that Smith perceived as unfairly denigrating his wife. What followed was public outrage, several apologies by Will Smith, and an Academy investigation, with potential penalties up to and including retraction of Smith's award for best actor, which he received that same night. No criminal charges were filed after Rock's refusal to press charges.
2. <https://www.merriam-webster.com/dictionary/apology>.
3. Taft, "Apology Subverted: The Commodification of Apology," 109 *Yale L.J.* 1135, 1137-38 (2000).
4. *Id.* at 1142.
5. See Wellman et al., "The Early Development of Moral Criteria," 50:3 *Child Dev.* 869 (Sept. 1979).
6. Taft, *supra* note 3 at 1136.
7. See Ebert, "Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry," 5 *Ind. Health L. Rev.* 337, 352 (2008). The author notes a 1992 study that demonstrated that families and patients who filed a medical malpractice suit against their doctors would not have done so if the doctor had apologized and offered a full explanation.

8. Taft, *supra* note 3 at 1142.
9. Hickson, "The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study," 25 *Ethnology* 283, 292 (Oct. 1986).
10. *Id.* at 291. This is consistent with the use of apology as a dispute resolution mechanism when there are differences in power, position, or status.
11. Cohen, "Legislating Apology: The Pros and Cons," 70 *U. Cin. L. Rev.* 819, 841 (2002). The author suggests that juries who award damages will look more favorably upon a defendant who has apologized, especially when punitive damages are at issue.
12. Hickson, *supra* note 9 at 286. The author studied the use of apology in Fiji, where "one's rank is determined by one's genealogical position in the patrilineage-subclan-clan hierarchy." *Id.* at 284.
13. See *id.* at 292.
14. Robbennolt, "Apologies and Legal Settlement: An Empirical Examination," 102 *Mich. L. Rev.* 460, 477-78 (2003) (citing Murphy, "Forgiveness and Resentment," in Hampton and Murphy, eds., *Forgiveness and Mercy* at 14, 28 (Cambridge Univ. Press 1988)).
15. An ineffective apology can have worse results than no apology at all by "create[ing] further harm that can strain relationships or fuel bitter vengeance." Taft, *supra* note 3 at 1141. See also Robbennolt, *supra* note 14 at 495.
16. See Afrassiab, "Why Mediation & 'Sorry' Make Sense: Apology Statutes as a Catalyst for Change in Medical Malpractice," 2019 *J. Disp. Resol.* 197, 206 (2019). Thirty-eight states have passed apology laws that protect the use of apology in medical malpractice matters. Afrassiab divides these states into "partial apology states" and "full apology states" according to the amount of protection provided. Colorado is considered one of five full apology states in that the law provides "broad protections for statements of sympathy, fault, error, mistake, and even negligence." See also CRS § 13-25-135.
17. Afrassiab, *supra* note 16 at 206-7. This article includes a chart listing the state statutes and the year they were enacted.
18. *Id.* at 206.
19. CRS § 13-25-135(1) (emphasis added).
20. Fed. R. Evid. 801(d)(2) corresponds to CRE 801(d)(2) and allows admissions of fault into evidence as a statement of a party-opponent.
21. Fed. R. Evid. 803(3) corresponds to CRE 801(d)(2) and likewise allows admissions of fault into evidence as an exited utterance.
22. See, e.g., Mass. Gen. Laws Ann. Ch. 233, § 23D; Cal. Evid. Code § 1160; Tex. Civ. Prac. & Rem. Code Ann. § 18.061; Fla. Stat. Ann. § 90.4026; and Wash. Rev. Code Ann. § 5.66.010. These rules and statutes provide protection for an apology, but these protections are not inclusive of statements of culpable conduct.
23. Fed. R. Evid. 408, Notes of Committee on the Judiciary, House Report No. 93-650.
24. 1974 U.S.C.C.A.N. 7075, 7081.
25. *Am. Guarantee and Liab. Ins. Co. v. King*, 97 P.3d 161, 169 (Colo.App. 2003).
26. CRE 409 mirrors the federal rule of the same number, and the legislative history of the federal rule is also applicable to the Colorado version.
27. *Id.*
28. Fed. R. Evid. 409 Advisory Committee Notes (West 1972).
29. CRS §§ 13-21-301 et seq. See CRS §§ 13-21-302(2.5), -307.
30. In Colorado, "mediation communications enjoy greater protection than settlement communications under CRE 408." *King*, 97 P.3d at 169.
31. CRS § 13-22-302(2.5).
32. *Id.*
33. CRS § 13-22-307(3).
34. CRS § 13-22-307.
35. CRS § 13-22-307(2)(a).
36. *Yaekle v. Andrews*, 195 P.3d 1101, 1104 (Colo. 2008).
37. *Id.*
38. *Id.* at 1109.
39. *Id.* at 1112.
40. *Tuscany Custom Homes, LLC v. Westover*, 490 P.3d 1039, 1042 (Colo.App. 2020).
41. Daicoff, "Apology, Forgiveness, Reconciliation, and Therapeutic Jurisprudence," 13 *Pepp. Disp. Resol. L.J.* 131, 148 (2013) (citing psychologist Elisabeth Kübler-Ross, who first documented these stages of grief and loss).
42. Robbennolt, *supra* note 14 at 481.
43. *Id.* at 482.
44. Daicoff, *supra* note 41 at 153.
45. *Id.* at 153-54.
46. Robbennolt, *supra* note 14 at 486. Seventy-three percent of respondents in the study were inclined to accept offers when a full apology was offered as compared to 35% when a partial apology was offered and 52% when no apology was offered.
47. *Id.* at 468 (citing Goffman, *Relations in Public: Microstudies of the Public Order* (Routledge 1971)).
48. *Id.* at 506.
49. Robbennolt, "Attorneys, Apologies, and Settlement Negotiation," 13 *Harv. Negot. L. Rev.* 349 (2008).
50. *Id.*
51. Robbennolt, *supra* note 14 at 495-96.
52. Robbennolt, *supra* note 49 at 376-77.
53. Specter, "Will Smith Has Been Banned From Oscars Ceremonies for the Next 10 Years," *Vogue* (Apr. 8, 2022), <https://www.vogue.com/article/will-smith-apologizes-in-a-shocking-historic-oscars-acceptance-speech>.
54. <https://www.nbclosangeles.com/news/local/read-will-smiths-apology-for-slapping-chris-rock-at-the-oscars-full-text/2858315>.
55. <https://variety.com/2022/film/news/will-smith-resigns-academy-oscars-slap-chris-rock-1235221041>.