



# Apology, sympathy, and empathy: The legal ramifications of admitting fault in U.S. public relations practice



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## ABSTRACT

This study examines the litigation ramifications of apologies given during a crisis. Examining federal and state laws on the evidentiary issues affecting apology, this study shows that in 38 jurisdictions apologies are not admitted into evidence at trial if the apology contains certain characteristics. From this analysis practical suggestions are given to PR practitioners on how to craft legally protected apologies during a crisis.

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## 1. Introduction

Apology is pervasive within American society. At its core apology is part of having good manners because it is viewed as taking responsibility for oneself. Frequently children are admonished for not “saying they’re sorry” or for not giving an apology and “mean it.” This culture of apology goes beyond childhood and influences adult behaviors as well. In fact, apology has become a type of “ritual” within our society in which aggrieved people are made right by the issuance of an apology (Bolivar, Aerten, & Vanfraechem, 2013, p. 124). Because of this, apology has become a popular form of communication, particularly in public relations. This role of apology is evident in numerous crisis communication case studies and theories that argue organizations sometimes must use apology to maintain relationships with publics (Swann, 2008; Richardson & Hinton, 2015; (Hendrix, Hayes & Kumar, 2012).

All of this comes at a price. Apology is not a cure-all for PR crises because there are legal implications that resonate well after the crisis has passed. Public relations literature suggests that organizations need to own their transgressions and seek transparency to build relationships with key publics. However, in many crises PR practitioners are faced with legal limitations on what, if anything, they can say about the organization’s level of fault. This frequently creates tension between public relations and legal departments who struggle between acknowledging organizational fault and legally denying all responsibility (Coombs, 1995; Coombs 2013; Lee & Chung, 2012).

The admission of guilt by a person or organization has a longstanding history in U.S. criminal and civil laws. Currently the Federal Rules of Evidence specifically recognize admissions of guilt as an exception to hearsay rules. Federal Rule of Evidence 801(d)(2) allows for statements made by a party-opponent (i.e., person being sued) to be admitted at trial regardless if the person who made the statement testifies. Similarly Rule 804(b)(3) allows a person’s prior statements against interest (i.e., statements that demonstrate guilt) into evidence regardless if the speaker testifies (Federal Rule of Evidence 804). These admissions and statements can take many forms including verbal and written statements such as press conferences, press

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releases, official statements, and social media comments. Because most states craft their evidence rules to mirror the Federal Rules of Evidence, all organizations facing litigation in state or federal courts can have their prior statements admitted into court as evidence of their legal fault.

Studies show that apology, empathy, and sympathy are essential to catharsis and decreasing public anger over intentional and unintentional organizational transgressions (Helmreich, 2012; Taft, 2000; Cohen, 2002). Most importantly, one study of apology even showed that sympathetic statements reduce the amount of lawsuits because plaintiffs frequently file suits to secure an apology rather than a monetary reward (Robbennolt, 2006). Recognizing the role apology plays in post-crisis empathy, state legislatures began passing “I’m sorry” laws that specifically exempted certain types of apologetic statements from being used as evidence of guilt at trial. Currently 38 state jurisdictions in the United States have some form of “I’m sorry” law. The approach to these laws varies state-by-state with some jurisdictions exempting apology only in certain situations while other states exempt apology from evidence altogether. Some states even have specific language requirements that exclude statements of empathy from being admissible while allowing statements of fault to be admissible as evidence without exception (“I’m sorry laws, 2007; Saitta and Hodge, 2012).

These laws present a unique issue for the public relations practitioner facing a crisis situation. Knowing the contours of the Federal Rules of Evidence as well as the parameters of the current 38 “I’m sorry” laws gives practitioners the ability to craft effective public relations messages that protect organizations from legal fault. This study examines the current federal rules concerning admissions as well as the 38 “I’m sorry” laws. From this analysis this study gives practical suggestions for PR practitioners for crafting effective messages during crisis communication.

## 2. Apology use in public relations practice: a pervasive strategy

Apology has been a long studied type of communication practice dating back as early as Plato’s Apology (Vassallo, 2005). In public relations research apology is frequently analyzed within the context of crisis communication. The main debate surrounding apology is whether apology is an effective communication tactic. Early studies argued that apology was an effective tool in communication management. Recently new studies suggest apology, while frequently used, is often over-used as a strategy.

Apology as a communication tactic has been a well-researched area in communication scholarship since the 1970s. Ware and Linkugel (1973) analysis of apologia used social psychology and rhetorical traditions to fashion an understanding of the motivations and implications of apology in Western civilization. By the 1980s and 1990s other scholars emerged that refined research on crisis response strategies and apology (Tedeschi & Riordan, 1981; Sturges, 1994; Hearit, 1994; Benoit, 1995; Benoit & Drew, 1997). Benoit (1995) had a particularly important impact on the study of apology because he focused on image repair and how apology had multiple functions, specifically self-protection. Scholars in the 1990s began examining apology and crisis communication within a public relations contact. Their work took a different approach to crisis arguing that apology had usefulness in limited scenarios.

The public relations implications of crisis strategy are huge for organizations because proper crisis response influences the attitudes toward an organization’s image. Coombs and Holladay (2008) review of crisis communication scholarship since the 1990s found that apology has been accepted by many academics as a universally accepted practice for organizations despite the fact that apologies can have expensive collateral consequences.

Theories that directly affect the efficacy of apology and crisis strategy emerged in the 1990s and 2000s. One major work that challenges the wholesale use of apology was Coombs (1995) Situational Crisis Communication Theory (SCCT) matrix that detailed how crisis response warrants a complex set of responses. Coombs (1995) work on SCCT was a major development in public relations research and has been applied to a multitude of crisis scenarios. Coombs (1995) and Coombs and Holladay (1996) crisis matrix was based on the four types of crises: faux pas, terrorism, transgression, and accident. These types of crisis are informed by the intentionality and the source of the crisis. Each type of crisis warrants different response strategies depending upon the organization’s history, the level of injury, and the organization’s level of fault. Coombs (1995) crisis communication matrix does not mention apology specifically as a category of response, but his matrix’s mortification strategy, such as remediation, repentance, and rectification, do contain a level of admission of fault or apology.

Despite these studies on apology and Coombs’ (1995) inclusion of mortification in his crisis response categories, scholars continue argue that apology should be used only in specific circumstances. Coombs and Holladay (2008) advocate that apology is not always a best practice for PR practitioners because rectifying organizational crisis can be achieved by “sympathy” or “compassion” (p. 255). They argue that apology does not necessarily have to be full-blown. Using a partial apology sometimes achieves the same effect as a complete apology. This does not mean studies do not show apology is valuable. McDonald et al. (2010) argues that in certain crisis scenarios where public anger is high, admission of fault and “confession” should be used in certain crises even though there may be legal ramifications (p. 269). Coombs (2013) found apologies can reduce anger at organizations and mitigate ill will toward an organization. The use of an apology within society is part of reason why organizations may feel they need to apologize. Coombs (2013) states that apology in some circumstances becomes an expectation and when organizations fail to meet this expectation publics become angry. In fact, Coombs (2013) argues that this expectation of apology is so powerful that an organization may have to apologize because without it the crisis will worsen.

Outside communications, legal research on apology shows that apologies reduce litigation, particularly where there has been injury or death (Saitta & Hodge, 2012; Helmreich, 2012; Pearlmutter, 2011). Studies show that lawsuits are frequently

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