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

Cayce Myers

Virginia Tech, Communication Department, 181 Turner Street SW, 121 Shanks Hall, Mail Code 0311, Blacksburg, VA 24061, United States

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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.

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 Rule 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 releases, official statements, and social media comments. Because most states craft their evidence rules to mirror the Federal

E-mail address: mcmyers@vt.edu

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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 filed because litigants feel as if they have been wronged and deserve an apology from the transgressor (Miller, 1986; Vincent,

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Phillips, & Young, 1994; Robbenholt, 2003). Boothman, Blackwell, Campbell, Commiskey, & Anderson (2009) showed that in Michigan the amount of lawsuits declined when mandatory apology laws were implemented that required doctors to apologize to patients who were the victim of malpractice. They found that patients expected apologies from doctors, and when they received them were more likely to feel goodwill and have less anger toward the physician and healthcare provider.

However, as Coombs and Holladay (2008) note, apology is not without risks. Apologies can become evidence at trial as an admission of wrongdoing. Legal departments correctly advise PR practitioners and spokespersons that apology can trigger fodder for litigation and ultimately cost an organization thousands in legal fees and judgments. Because of this reality apology as a PR tactic is in a quandary. While research shows apology should be sparingly used, it does have utility as a PR technique during a crisis. There is also a cultural expectation of apology for organizational transgressions. However, against this backdrop apology is risky because it can be used against an organization. For practitioners to be able to use apology effectively they must know the legal rules that affect its usage and state laws that remove apology from evidence in court.

3. Research questions and method

Because apology is an important component to PR research and practice it is important to explore the legal ramifications of apologies. Given the importance of apology, this study seeks to answer three research questions:

- How do the federal rules of evidence define and regulate apologies?
- How so state "I'm Sorry" laws define and regulate apologies?
- How do federal and state evidence laws concerning apology affect PR strategy during crisis and impending litigation?

To answer these research questions this study legally analyzes federal and state evidence laws. For this study all U.S. federal evidence laws and 38 state "I'm sorry" laws were analyzed.[1] This analysis looked for the specific rules regulating apology and its admittance into evidence. Particular attention was paid to these laws' definition of apologies and how apology differed from other forms of communication. This study concludes with practical suggestions about the legal status of apology in federal and state jurisdictions.

4. Apology as "admission by party opponent": the federal rules of evidence

To understand the implications of apology within litigation it is important to understand how evidence works in American trials. The Federal Rules of Evidence were created in 1975 to create a universal method of admitting evidence in federal courts. Based on common law rules of evidence, the Federal Rules of Evidence provides 11 Articles, or classifications of rules, and 67 specific rules that range from governing hearsay to when an interpreter can be used at trial. Many states conform their state rules of evidence to mirror the federal rules. As of 2015, 38 states follow some part of the Uniform Rules of Evidence, which is largely based on the Federal Rules of Evidence. The 12 states that do not follow the Uniform Rules of Evidence base their evidence rules on old common law. However, because common law informed the initial creation of the Federal Rules of Evidence it is typical to find overlap between the federal and state jurisdictions that follow common law evidence rules.

At the core of the Federal Rules of Evidence are the rules concerning admissibility of evidence. Rule 401 governs what is considered "relevant evidence." It states:

"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 probably or less probable than it would be without the evidence (Federal Rule of Evidence 401).

Rule 402 further clarifies the important of "relevant evidence" stating that when an issue is in question at trial information that directly proves or disproves that fact at trial is generally admissible (Federal Rule of Evidence 402). However, there are some limitations on the admission of this evidence. Rule 403 entitled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time" states some "relevant evidence" may be inadmissible in certain situations. The rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence (Federal Rule of Evidence 403).

This means that even if evidence is relevant, sometimes it will still be excluded if evidence is prejudicial to the party. For example, if a company were sued for manufacturing a defective product, memos showing executives knew about the defects before they were sold would be relevant evidence under Rule 401. However, if those same memos also showed the company failed to pay taxes, those memos arguably could be excluded under Rule 403 because jurors could be prejudiced against the company based on the unrelated issue of tax evasion. Rule 401 and Rule 403 are balanced against each other

[1] Jurisdictions that have "I'm Sorry" laws: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia. All of these jurisdictions' "I'm sorry" statutes were included in this study's analysis.

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to determine admissibility. At issue is how important the evidence is to the underlying claim made at trial and the level of prejudice the party may receive from the evidence. This determination is made by the trial judge and is solely made within his or her judicial discretion. Appealing these issues of balancing Rules 401 and 403 are frequently difficult because appellate courts give great deference to trial judges in admission of evidence.

Hearsay is a further limitation on relevant evidence. Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to provide the truth of the matter asserted." Rule 802 states hearsay is not generally admitted unless it falls into one of the exceptions provided in the Federal Rule of Evidence (Federal Rule of Evidence 802). For example, in a trial where a company manufactured defective products an employee who saw the defects first-hand during the manufacturing process could testify at court about what he saw. However, if that employee then told his wife about what he saw, the wife could not testify as to what her husband/employee told her because those statements would be hearsay under Rule 801.

Not all out of court statements are hearsay. Out of court statements made by a party opponent, a person who is directly involved in the lawsuit as a plaintiff or defendant, are general admissible even if that person does not testify. Rule 801 also specifically excludes certain out of court statements from being categorized as hearsay. Rule 801(d)(2) states that statements made by an opposing party outside of court are admissible. Rule 801 enumerates the following standards when out of court statements made by party opponents are admissible and not hearsay:

An Opposing Party's Statement. The statement is offered against an opposing party and:

(a) was made by the party in an individual or representative capacity;
(b) is one the party manifested that it adopted or believed to be true;(c)was made by a person whom the party authorized to make a statement on the subject;
(c) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(d) was made by the party's coconspirator during and in furtherance of the conspiracy (Federal Rule of Evidence 801(d)(2)).

This rule is important because it means that statements made by an individual party or their representative are admissible in court. Rule 801(d)(2) does not require the party who actually made these statements to testify. These out of court statements can be admitted through the testimony of a witness who heard the party make, or merely agree with, the out of court statements. This should not be confused with privileges under the Fifth Amendment of the United States Constitution that allows witnesses not to incriminate themselves during testimony. Rather, the power of Rule 801(d)(2) is that legal parties, in both civil and criminal cases, can have their out of court statements admitted into evidence through the testimony of witnesses who heard what they said.

This has particularly harsh consequences for apologies, which are frequently characterized as admissions of guilt. For instance, if a company issued an apology for wrongdoing that apology could be admitted in court because under Rule 801(d)(2) it constitutes an admission. Perhaps even more importantly, the Federal Rules of Evidence does not distinguish between the manner and forum in which the admissions are made. If an apology were given in a press release or privately in a conversation both communications would be admissible at trial. This is part of the reason why public relations crisis communications are carefully screened by legal departments. Because these statements made by the company are not hearsay and can be re-told in court by anyone who heard the statement, organizations can potentially cause greater problems for themselves by their own attempts to manage a crisis. For instance, the Court of Appeals for Ohio found that in a criminal prosecution of vehicular assault the defendant's apology card given to the injured driver of another vehicle was admissible as an admission (Ohio v. Butcher, 2004).[2] Similarly the Court of Appeal of California, Third Circuit held that a doctor's statement in which he said "Boy, I sure made a mess out of things today, didn't I" constituted an admission of fault in a medical malpractice case (Wickoff et al. v. James et al., 1958). These cases illustrate that acts of remorse and apology, whether spontaneous or deliberate, can be admitted as admissions at trial. Because of this, organizations' attorneys warn against an overly sympathetic response to crisis, which may lead to what Coombs (2013) described as an increased anger by crisis victims when an apology is withheld. It is against this backdrop that states began creating apology exemptions from evidentiary rules. These laws were crafted to protect potential defendants from being sued, while allowing victims to receive the apology they may expect from a wrongdoer.

5. I'm sorry" laws in U.S. state evidence laws

Even though states generally follow the same admission by party opponent rules as federal jurisdictions, some states have carved out exceptions for apologies. State apology exemptions, commonly referred to as "I'm Sorry" laws, take multiple forms depending on the jurisdiction. Currently 37 states and the District of Columbia have "I'm Sorry" laws. As Table 1 shows 13 states have no "I'm Sorry" laws and follow the federal hearsay exceptions for all admissions. These states without an "I'm Sorry" statute are a cross-section of jurisdictions in the United States: Alabama, Arkansas, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. Jurisdictions that do

[2] Ohio is a state that follows the Uniform Rules of Evidence, which is modeled after the Federal Rules of Evidence.

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Table 1
U.S. Jurisdictions' Approach to "I'm Sorry" Laws.

Stance	Number of Jurisdictions
States with "I'm Sorry" Laws that only apply to healthcare providers	28
States with general "I'm Sorry" Laws that applies to all situations	10
States with No "I'm Sorry" Laws	13

have "I'm Sorry" laws are not monolithic in their approach. The first major difference between states' "I'm Sorry" laws is whether the laws apply to all potential defendants or only to defendants in medical malpractice claims.

Twenty-eight jurisdictions have "I'm Sorry" laws that only apply to medical healthcare providers. This includes providers, such as doctors, nurses, hospital administration, and insurance companies, who express sympathy or regret over a loss or injury resulting from potential malpractice. One potential reason this exception exists is "I'm Sorry" laws are frequently the result of tort reform measures taken by the medical community. These laws allow for limited expressions of sympathy by healthcare providers in medical malpractice cases. Only ten states have "I'm Sorry" laws that exempt apologies or sympathetic actions for all potential lawsuits. In all of these jurisdictions, "I'm Sorry" exceptions could protect both a legal wrongdoer and their representatives, including public relations counsel. However, in all jurisdictions there is a limitation on what type of message constitutes an apology.

In all jurisdictions with "I'm Sorry" laws, both statements and actions that convey remorse are excluded from evidence. California's law is typical in this regard. California Evidence Code §1160 states "statements, writing, or benevolent gestures expressing sympathy or a general sense of benevolence. . .shall be inadmissible as evidence." Other states, such as Illinois and North Carolina, even exclude offerings of monetary compensation as evidence of legal admission (Illinois Compiled Statute §5/8-1901; North Carolina General Statute §8C-1, Rule 413). Vermont even allows for statements and actions expressing apology or sympathy made in the first 30 days after injury to be inadmissible (Vermont Statute Annotated Title 12 § 1912). Benevolent actions are mentioned in nearly all of these statutes regardless of whether they apply only to medical malpractice or the general wrongdoing. California Evidence Code §1160, Missouri Revised Statute §538. 229 and Florida Statute §90.4026 define "benevolent gestures" as "actions which convey a sense of compassion or commiseration emanating from humane impulses." Louisiana's "I'm Sorry" law states that "any communication, including but not limited to an oral or written statement, gesture, or conduct. . .expressing or conveying apology, regret, grief, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" is excluded from evidence (Louisiana Revised Statute Annotated §13:3715.5). This broad language describing apologetic, sympathetic, and benevolent communications highlights the purpose of these laws, which is to foster environments in which wrongdoers can engage in socially appropriate responses to crisis.

Despite the expansive nature of many of these laws, the older evidentiary conventions of admission by party opponents still exist. As Table 2 shows of the 38 jurisdictions that have "I'm Sorry" laws 18 jurisdictions have laws that include statutory language within the "I'm Sorry" law that explicitly states admissions of fault within an apology are admissible. These statutes tend to differentiate between an apology for someone's circumstance and an apology that reflects an admission of wrongdoing. These laws do not provide a litmus test for what constitutes a fault-free apology, but interpreting the statutes it seems that apology is viewed as a statement that reflects sympathy for the wronged party's circumstances. Maryland is typical of this type of law. In the Maryland "I'm Sorry" law only "apologies or expressions of regret" that do not contain admissions of fault are excluded from evidence (Mary Code Annotated Courts and Justice Procedure § 10-920). There is not an operationalization of "apologies or expressions of regret." The language suggests this law protects sympathetic statements from being labeled as admissions.

Florida's "I'm Sorry" law is representative of the approach that reserves the right to use fault-based apologies as admissions. It reads:

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 to that person or to the family of that person shall be inadmissible as evidence in a civil action. A statement of fault, however, which if part of, or in addition to, any of the above shall be admissible pursuant to this section (Florida Statute § 90.4026).

The construction of this statute suggests that apologies or sympathetic gestures must be parsed to remove any essence of admission of guilt. Hawaii's statute also permits the inclusion of fault-based apologies into evidence stating, "This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule" (Hawaii Revised Statute §626-1, Rule 409.5). This means that in the 18 jurisdictions with "I'm sorry" laws, apologies that include fault admissions can still be used as evidence at trial. Crafting these statements requires a careful evaluation of content and an objective assessment of the multiple ways a statement may be interpreted. Even then, the apologizer still runs the risk of having the statement interpreted as an admission of fault.

Table 2
Fault exemptionin Jurisdictions with "I'm Sorry" Laws.

Stance	Number of Jurisdictions
Jurisdictions that exempt fault based apologies from evidence	20
Jurisdictions that include fault based apologies in evidence	18

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One last nuance of the "I'm Sorry" laws is they protect statements that are given to a specific audience. All of the 38 jurisdictions with "I'm Sorry" laws state that these laws protect statements that are given to the victim or families of victims. This means that public statements of apology, unless directed at victims and their families, would be excluded from exemption. This creates a problem for public relations practitioners who may hope to use the statements to maintain an organization's image during a crisis. However, this does not mean a public statement can never be protected under these laws. Public statements directed toward victims and their families conceivably can be protected even if these statements serve the additional function of image management. To ensure protection under these "I'm Sorry" laws practitioners need to be cognizant of how they are crafting these messages. In cases where there are multiple victims or even a community of victims there is even a stronger case that "I'm Sorry" laws would apply to communications made in a public forum such as a press conference, town hall, or press release.

6. Implications of U.S. federal and state evidence laws in public relations practice

The prevailing view that apology causes many negative collateral consequences is correct. Research demonstrates apology has a power within communications practice. Additionally, apology during a crisis event may be expected (Coombs, 2013). Because of this it is important for practitioners to know how to craft a legally defensible, yet believable, apology. Examining the current evidentiary laws at the state and federal level there are five things public relations practitioners need to ensure that they do before they use any mortification strategy in a crisis situation.

First, practitioners need to ask whether their potential legal liability in the United States will be in a federal or state jurisdiction. This may seem like an issue that would be best left for lawyers to determine. However, determining legal jurisdiction on a crisis has a direct impact on strategy of apology or benevolence. Federal jurisdiction arises when the issue at hand involves federal laws, such as statutes, Constitutional issues, or federal agency regulations (28 U.S.C. § 1331). Because public relations is a field subject to commercial speech regulations, federal jurisdiction may frequently be triggered. Equally possible are scenarios where public relations firms are representing clients whose crisis involves some type of federal regulatory agency, such as the Environmental Protection Agency or Federal Trade Commission. Another way federal jurisdiction is triggered is if the plaintiff and defendant in a lawsuit have legal residency in two different states and have a lawsuit where the damages exceed $75,000 (28 U.S.C. §1332). Federal jurisdiction is important for PR strategy because the Federal Rules of Evidence do not recognize exceptions for apologies. Practitioners who have clients facing federal litigation may be forced to not use apologies because those statements and acts can be used as evidence showing admission.

In state jurisdictions practitioners need to know the relevant state evidence laws pertaining to apology. State jurisdiction varies state-to-state, but generally if a case involves a state law or a plaintiff and defendants from the same state, state jurisdiction will apply. Currently 38 jurisdictions have "I'm Sorry" laws that protect apology and sympathetic acts from entering evidence. However, state laws are nuanced and have caveats that carve out exceptions such as apply "I'm sorry" laws only when the speaker is a healthcare provider. However, despite this healthcare provider limitations on "I'm Sorry" laws do not mean PR practitioners are not covered in those states. With the growing field of health communication, practitioners frequently find themselves representing medical organizations, including hospitals, pharmaceutical companies, or insurance providers. These groups perhaps have the greatest risk of crisis given that they regularly deal with issues involving life and death. Practitioners representing those clients can take advantage of these "I'm Sorry" laws to craft mortification messages that protect and maintain the client's image while providing the expected apology to victims.

Second, practitioners in state jurisdictions with "I'm Sorry" laws need to evaluate who their audience is. All jurisdictions that have "I'm Sorry" laws specifically state the apologetic statement or act is protected from becoming evidence of fault if the communication is directed to the family of victims or victims themselves. A cursory reading of these statutes means that interpersonal communications between wrongdoers and victims are exempt from evidence. However, a closer reading of the statutes indicates that public statements may also be protected under existing "I'm Sorry" laws if those statements or acts are directed at the families of victims. This means that practitioners who use direct and mass communication techniques can be protected from potential admissions so long as the messages are crafted to directly address victims and their families. For instance, a press conference given by a practitioner may contain direct communications to victims or families even though it is held in a public forum. In fact, large crises frequently have multiple victims and widespread community impact, e.g. man-made environmental disasters. In those situations conventional public relations communications could be protected under "I'm Sorry" laws so long as the jurisdictions were not federal or in a state without these evidentiary exceptions.

Third, practitioners in "I'm Sorry" jurisdictions need to parse language to emphasize sympathy and empathy while minimizing fault. As Table 2 shows currently 18 jurisdictions have "I'm Sorry" laws that allow admissions of fault within an apology into evidence at trial. That means that practitioners must be careful when crafting these statements or doing benevolent acts. All 38 jurisdictions that have "I'm Sorry" laws do not provide specific operationalization of apology, sympathy, benevolence, or empathy. Because of that, it is likely that actions and statements that potentially can be interpreted as admission will be evaluated by a judge to determine if they are excluded or admitted into evidence. This is a highly subjective process in which trial judges have almost unencumbered discretion. Appellate courts typically do not reverse trial courts on evidentiary decisions absent an abuse of discretion by the trial court judge. This means that it is important for practitioners to craft messages early and potentially with attorneys to ensure protection. Even those "I'm sorry" jurisdictions who do not have fault exemptions still have evidence laws that are subject to interpretation. It is conceivable that a well-crafted apology can be challenged by a plaintiff's lawyer on the grounds that the statement is not an apology, but an admission.

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Fourth, practitioners need to evaluate whether the organization is making non-verbal apologies through its actions. The old adage that "actions speak louder than words" is central to evidentiary laws concerning admissions. Knowing all of the tactics, verbal and non-verbal, an organization uses in a crisis may help the practitioner to make an informed decision on strategy. Both federal and state evidence laws allow evidence of a party's actions. These actions are not statements and therefore not subject to hearsay rules. For instance, if an organization were accused of making illegal payoffs, those checks and bank accounts where the payoffs were processed are admissible evidence. No hearsay rule could prevent this from entering into evidence because it is not an out of court statement. Rather it is an out of court actions that relevant to the case under Federal Rules of Evidence Rule 401.

Admissions are not always direct statements. Under Rule 801(d)(2) a party can give an admission not only be directly expressing guilt, but also statements made by a third party that "manifested it [the party] adopted or believed it could be true." This means that if a party agrees with statements that insinuate fault those statements are admissible. It is also important to note that among the "I'm Sorry" jurisdictions actions that are meant to convey apology can sometimes be interpreted as admission. This includes paying for medical bills, providing shelter, or pre-paying damages to victims. While some state jurisdictions specifically exclude paying bills and benevolent acts from evidence, many do not. This means that benevolent actions may or may not be excluded from evidence as admissions. Well-crafted apologies that do not admit fault may be undermined by an organization's actions that suggest culpability. Because of this it is important for practitioner to know all crisis strategies used by an organization. PR communication does not occur in a vacuum and context matters. An organization's crisis strategy should include verbal and non-verbal communications and it is important for the practitioner to manage, and at the least be aware, of these responses.

Fifth, practitioners need to recognize apologies are not always off-limits because of potential litigation. Reading federal and state evidence statutes, practitioners may get the false impression that apologetic statements are too risky because of potential litigation. While it is true that apology, sympathy, and empathy is a complex form of PR communication that can have unintended legal consequences, it is important to note that admission of fault is not dispositive of guilt. That means that even if an apology were admitted into evidence as an admission of fault, that piece of evidence alone does not necessarily mean a party will be found legally responsible by a jury or judge. Admissions are pieces of evidence. Trials have large amounts of evidence proffered by both plaintiffs and defendants. Admissions are only one part of that total body of evidence. While admissions are certainly damaging to a defendant, they may not suggest liability if other evidence to the contrary is produced. However, this does not mean that admissions of fault are to be taken lightly. Juries can consider all of the evidence or none of it in their deliberations. That means the weight of admission depends upon the fact-finders.

7. Conclusion

The debate over the efficacy of apology in crisis communications is important for public relations practice. As scholars have shown apology does work, but it comes with a price. However, practitioners should know the legal contours that govern PR communications. While federal and state evidence laws affect the approach a practitioner takes in a crisis scenario, knowing these laws provides new opportunities for practitioners.

PR and legal departments frequently disagree over communication strategy. Perhaps this can be best explained by viewing PR as a profession focused on communication while law is a profession focused on risk-aversion. However, PR and law share common goals of maintaining the integrity of an organization's image, mitigating collateral damage, and doing what is best to make an organization successful. Working within the boundaries of evidentiary rules allows practitioners craft even more salient messages. Implementing this into PR practice provides practitioners the opportunity to build internal relations with legal departments and contribute in a new way to managerial decisions. While evidence rules may limit what can be said in a crisis, they provide practitioners the opportunity to craft even more sophisticated messages that help build relationships with publics and clients alike.

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