

Apologies and Communications of Sympathy in Litigation

Many people, out of a sense of goodwill or kindness, feel the need to apologize following an accident—whether it is a car accident, an injury that occurs in a store or business, or an accident on a job site. For individuals, it is possible an apology following an accident may later be used in litigation to show an admission of fault. For businesses, there is additional concern because an apology by an employee on behalf of the business may later be used to show an admission of fault on the part of the business.

A number of states, including Indiana, have recognized the effect a simple apology may have in helping prevent litigation. To that end, Indiana enacted Indiana Code § 34-43.5. Under this statute, communications of sympathy are not admissible to prove fault for causing or contributing to a loss, damage to property, injury, or even death. The statute defines a communication of sympathy as a statement, gesture, act, conduct, or writing that expresses: (1) sympathy, (2) an apology, or (3) a general sense of benevolence. I.C. § 34-43.5-1-3. As a result, a general apology or communication of sympathy cannot be used to show a party admitted fault.

Despite this limitation, the statute permits statements of fault to be used to show an admission of fault. The question then becomes—How can you tell the difference between a communication of sympathy and a statement of fault? To constitute a communication of sympathy, especially where an apology is involved, the communication must be vague. A partial apology, such as “I am sorry this occurred,” would likely be inadmissible. On the other hand, the statement, “I am sorry, this is my fault” may be admissible as a statement of fault.

To best avoid having these statements used against you, or your business, the best policy is to avoid making even a general apology and instruct your employees to do the same. While Indiana has attempted to encourage apologies by limiting their use against a party in litigation, the distinction between an apology and an admission of fault is a fine line that is not worth the risk to you or your business. Though apologies are effective at resolving conflicts in the real world, in the legal world they may only intensify the conflict by adding fuel to the plaintiff’s fire. Given the potential pitfalls, it may be best to avoid the apology altogether. In circumstances where an apology may be effective or necessary, it is important to craft the apology in a way that avoids admitting liability. If not carefully worded, that apology may come back to haunt you later.

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