

APOLOGIES AND THE LAW

**PRESENTED BY THE JANUARY TEAM
HARRY PHILLIPS AMERICAN INN OF COURT**

JANUARY 16, 2007

January Team Members:

Ben Cantrell, Co-Captain

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Bill Koch, *liaison*

AGENDA

Overview on Apologies and the Law

Professor Erin O'Hara

The Use of Apologies in Civil Disputes

**Professor Erin O'Hara
Kate Payne, R.N., J.D.
Dr. Jerry Hickson
Bill Leader, Esq.**

The Use of Apologies in Criminal Disputes

Hon. Monte Watkins

APOLOGY IN LITIGATION AND MEDIATION

Erin Ann O'Hara
Professor of Law, Vanderbilt Law School
January 16, 2007

I. Apologies

- A. The Power of Apology
- B. The Elements of Apology
 - 1. Identification of Wrongful Act
 - 2. Expression of Remorse
 - 3. Promise to Forbear
 - 4. Sanction/Offer of Repair
- C. What Apologies Are Not
 - 1. Excuses
 - 2. Expressions of Sympathy
- D. Strategic Apologies

II. Civil Wrongs

- A. Encouraging Settlement/Resolution
- B. Apologies as Evidence
- C. Apologies and Damages
- D. Promoting Apology: Medical Malpractice Example
- E. Problems with Promoting Apology?
 - 1. Regulatory Function Dampened
 - 2. Institutional Apologies

III. Criminal Wrongs

- A. The Rise of Victim-Offender Mediation
- B. Apology in Victim-Offender Mediation
- C. Promoting Apology for Criminal Wrongs
- D. Problems with Promoting Apology?
 - 1. Repairing Hurtful Relationships—Domestic Violence
 - 2. Predation for Sociopaths

Tenn. Evid. Rule 409.1

TENNESSEE COURT RULES ANNOTATED
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*** Changes received through June 2, 2006 ***

TENNESSEE RULES OF EVIDENCE
[EFFECTIVE JANUARY 1, 1990]
ARTICLE IV. RELEVANCE

Tenn. Evid. Rule **409.1** (2006)

◆ [Review Court Orders which may amend this Rule](#)

Rule 409.1. Expressions of sympathy or benevolence.

(a) That 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 such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.

(b) For purposes of this Rule:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means an injured party's spouse, parent, grandparent, stepparent, child, grandchild, sibling, half sibling, adopted sibling, or parent-in-law.

HISTORY: [Added by order entered January 31, 2003, and effective July 1, 2003.]

NOTES:

Advisory Commission Comments [2003].

Rule 409.1 renders inadmissible certain statements and actions reflecting sympathy for persons injured in accidents. This rule, like Evidence Rules 408, 409, and 410, is designed to encourage the settlement of lawsuits. It complements Evidence Rule 409, which makes inadmissible payment of medical and related expenses on the issue of liability. The underlying theory of Rule 409.1 is that a settlement of a lawsuit is more likely if the defendant is free to express sympathy for the plaintiff's injuries without making a statement that would be admissible as an admission of a party opponent. Without this rule, a defendant's statement such as "I am sorry that you have suffered so much from the accident" might well be admissible as an admission of a party opponent. Accordingly, defense counsel may advise against making such statements in order to avoid the creation of harmful evidence. Yet a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter. This process is consistent with the modern focus on mediation and other methods of dispute resolution that seek to avoid a trial by facilitating a resolution acceptable to all parties.

The rule is similar to that enacted in Massachusetts ([Mass. Ann. Laws ch. 233, § 23D](#)) and California (West's Ann. [Cal. Evid. Code § 1160](#)). A Texas provision is also consistent with Rule 409.1. See Vernon's Tex. Stat. & Code Ann., Civ. Prac. & Remedies Code § 18.061.

Rule 409.1 embraces only civil cases involving an "accident." It is inapplicable in criminal cases. It also extends only to "benevolent gestures"; it does not exclude statements of fault.

Compiler's Notes.

The addition of this rule, as promulgated and adopted by the supreme court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the addition of this rule provided that it take effect on July 1, 2003.

HIERARCHY NOTES:

[Tenn. Evid. Note](#)



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