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States Starting to Offer Legal Protection for Apology

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States Starting to Offer Legal Protection for Apology

There is a small trend a-foot in the state legislatures, and a welcome one at that: Providing some legal protection for people who want to apologize for their role in a harm, but who are fearful because of the possibility that their apologies will later be used against them in legal proceedings.

California recently became the third state to enact such apology, or "benevolent gestures," legislation, enacting section 1160 of the California Evidence Code in July 2000. The state of Texas passed similar legislation in 1999, section 18.061 of the Civil Practice and Remedies Code. Massachusetts has had a benevolent gestures law on the books since 1986.

The problem that the legislation seeks to address is fairly straightforward. People involved in accidents often feel a need to apologize for the incident, even when they may not have been fully to blame. While this may be good for the human spirit, it's historically been bad legal advice because such statements may plausibly be inferred as an admission or a statement against interest in a later legal proceeding. When it comes to the law, you are better off keeping your mouth shut, despite the toll on the heart.

The anomaly has been the subject of increasing study by legal scholars in recent years, with at least two major law review articles published on the topic by prestigious law schools, Yale and the University of Southern California Law Center. The author of the first of those pieces, Professor Jonathan R. Cohen of the University of Florida Levin College of Law, briefly summarized the issues for *Dispute Resolution Magazine*. (See page 16, this issue.)

The California legislation addresses the problem by amending its existing evidence rules to make "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" inadmissible to prove the speaker's liability in a civil action when they are made to the victim or the victim's family. However, the provision also makes clear that routine admissions of liability are not protected from admissibility.

A simple car accident helps illustrate the point. One driver says to the other one of three things:

- I am sorry.
- It was my fault.
- I am sorry. It was my fault.

Under the new California law, the first statement clearly cannot be used against the speaker in a subsequent proceeding. The second statement clearly can. What about the third statement? The apology part is inadmissible, but the admission part comes in. (Arguably this could be problematic for the speaker, who may wish a jury to hear the apology along with the admission.)

In drawing this line, the California law is narrower than the Massachusetts and Texas measures, neither of which distinguishes statements of apology from admissions. In my view, the legislative clarity is helpful because one may reasonably question how closely courts will adhere to the more broadly worded Massachusetts and Texas statutes when the rubber hits the road in a high-stakes case, particularly if the statement is mixed or ambiguous. The California approach at least provides some guidance, both to those wishing to apologize and to courts applying the rule in particular cases.

But this is a relatively minor quibble compared to the larger importance of the legislation in bringing the law into alignment with the human condition. May the other 47 states quickly follow suit!

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The Alternative Newsletter has resurfaced a year after the passing of its founding editor, James B. Boskey. The new managing editor is Robert Kirkman Collins, a New Jersey lawyer and adjunct professor at Boskey's former Seton Hall University School of Law.
The first edition is surely a keeper, with tributes to Boskey by his wife, Adele, and several former colleagues, as well as the familiar eclectic mix of ADR news, cases and legislation of importance, practice standards, jobs, web sites, calendar information and so on. All of this material is still available for only $15 per year.

For subscription information and other questions about *The Alternative Newsletter*, contact Robert Collins at collinro@shu.edu.

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John Lande has succeeded Bobbi MacAdoo as the director of the University of Missouri-Columbia School of Law LL.M. program in Dispute Resolution. ... Rocco Scanza, a former American Arbitration Association senior official, is now executive director of the Alliance for Education in Dispute Resolution. ... David Schwartz, a law professor at the University of Wisconsin Law School, has filed an amicus brief on behalf of several legal scholars (including myself, I must disclose) urging the U.S. Supreme Court to rule that the Federal Arbitration Act does not apply to contracts of employment.

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