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POTENTIAL BUSINESS INTERRUPTION COVERAGE FOR COVID-19: SHUTDOWN BY CIVIL AUTHORITY

by David A. Shaneyfelt

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The VCBA board leadership remains vigilant and is monitoring the situation in real-time and responding rapidly as conditions evolve.

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PRESIDENT'S MESSAGE: SPEAK UP IF YOU DON'T WANT THE LAW LIBRARY RELOCATED AND DOWNSIZED

by Kathryn E. Clunen

I was an avid reader as a child and loved it when my mom took me to our local library – and I'm sure she loved the peace and quiet of it. I found the library to be relaxing but also exciting, as I would never know what books I'd discover there. As a law student, I loved studying at the Southwestern University School of Law library. Located on the first floor of the old Bullocks Wilshire Building, it has so much history and Art Deco charm. Now, as a family law attorney, I frequent the Ventura County Law Library. I'm in court about once a week and the Law Library is so convenient. I frequently pop in to use the computers or to do quick research.

Who Knew?

Recently, however, I was surprised to learn there are plans to move the Law Library off the courthouse property and renovate the current location for another use. I was even more surprised to learn that almost none of my colleagues seemed to know anything about the plans to move. To find out more, I attended the Law Library's February Board of Trustees meeting, which meets once a month at noon in the Law Library. **Amber Rodriguez** is the current president and there are five other trustees on the board.

DissoMaster

During the board meeting's public comment period, I was joined by five other attorneys and a paralegal who all spoke in favor of keeping the Law Library at its current location. I shared an example of how I use the library, which has the only copy of DissoMaster that's not inside the courthouse. DissoMaster is a program used to determine child support and temporary spousal support. Inside the courthouse, the small conference rooms adjacent to some of the third-floor courtrooms have them, but those conference rooms close, leaving the Law Library the only available space with DissoMaster. Unfortunately, if the Law Library moves off-site, DissoMaster may not be able to move with it, as it is my understanding that the court owns the program.

Settlement Negotiation After Court

I've also had good luck continuing negotiations with opposing counsel in the Law Library after the courtrooms have closed. Another family law attorney at the board meeting, **Lauren Nicholson**, talked about her experience with this as well. It keeps up the momentum. If the parties had to get in their cars and drive to another location, they would lose momentum and probably postpone or discontinue their negotiations. Nicholson, who is also a professor at the Ventura College of Law, shared that her students also frequently use the Law Library.

Last Minute Research

Yet another benefit of having the Law Library at the courthouse is it can easily be used for last minute research on the days when you're in court. **Coleen Gillespie**, who also attended the meeting, has been an attorney for 34 years and has used the Law Library since she moved to the county 25 years ago. She recently helped a fellow patron find a form she needed for an upcoming hearing. Gillespie opined, "It is the best public law library I have ever seen in any county." She remembers bringing her daughter to the Law Library when she was little. Her daughter is now a second-year law student at Hastings.

Historical Books

Gillespie uses the Law Library for researching in historical books and books that are not online. Part of the proposed plan for moving the Law Library involves removing historical books from the premises and storing them in an off-site facility. To get a historical book, patrons would have to submit a request and then wait several days for the book to be retrieved. This would be detrimental to those who can't wait that long for the information they need, like someone arguing in a hearing that same day. Gillespie explained, "The Law Library is not just book storage; it preserves history and truth, which is more important now than ever. Its prominence at the front of the



Attorney Sara Peters, Katie Clunen and law librarian Katie Drow outside the Law Library

government building makes it accessible and visible to everyone. Downsizing and moving the library is against longstanding public policy to make access to knowledge available to everyone equally."

Equal Access

Other commenters at the meeting agreed that having the Law Library at the courthouse gives equal access to the public. It was also pointed out that those who rely solely on public transportation might have trouble finding or getting to the Law Library if it's moved off-site. Local attorney **Zoya Shenker**, who first brought this issue to my attention, said, "The Law Library's location in the wing of the courthouse is a statement to the people of this County that they do not need to go far in search of legal information essential to the meaningful access to justice." Another way the Law Library benefits the public is by hosting the Ventura County Legal Aid Clinic on the first and third Tuesday of each month. Volunteer attorneys provide free assistance to County residents who qualify based on income.

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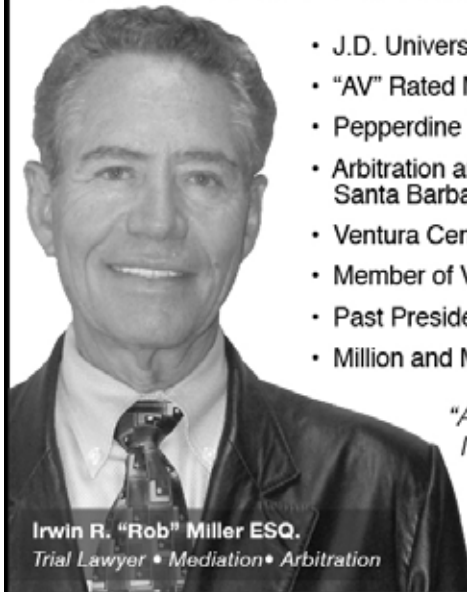
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2020 CHANGES AND UPDATES IN THE PROBATE WORLD

by Amber Rodriguez

Extensive changes to the Probate Code often have a common thread, such as when the Indian Welfare Act was incorporated into the Code, as well as when the Domestic Partnership Act was put in place. The “theme” this year is new, periodic adjustments to the Small Estate maximum. This includes uncollected payroll, personal and real property numbers. The most commonly used number (for Small Estate Affidavits) is now \$166,250, effective Jan. 1, up from \$150,000. Adjustments will be made every few years using the Consumer Price Index. (Prob. Code, § 890.) Amendments to sections 13000, *et seq.* also primarily address these periodic adjustments.

Additional new code sections of interest:

- For conservatorships, sections 2640, subdivision (c), 2641, subdivision (d) and 2541.5. Section 2541.5 changes the evidence standard for a conservator to be granted authority to remove a conservatee from their personal residence from a preponderance of the evidence to a requirement of clear and convincing standard of evidence. Sections 2640, subdivision (c) and 2641, subdivision (d) address the use of government benefits to pay attorney and conservator fees.
- For drafting and litigation, section 21380, subdivision (a)(4) expands the categories of persons to which the presumption of a donative transfer applies. Section 21611, subdivision (d)(1) changes the definition of an omitted spouse to eliminate the previous “loophole” applicable to a marriage occurring shortly before death that would have otherwise been subject to a donative transfer presumption.

There are just a handful of new and updated Judicial Council forms. Most notably, the new DE-115 is to be used when giving notice in a probate or trust matter regarding a section 850 petition. A separate form is required to confirm proper personal service has been completed. The code sections and form numbers are indicated on DE-

115. Other forms that have been updated include DE-120 and all the Small Estate forms.

On a side note, official legislation is on the horizon for electronic wills in California. Given the legislative cycle, it is possible those changes may be in effect as soon as Jan. 1, 2021. These new guidelines will have a significant impact on how we handle and identify valid wills and other testamentary documents. Local rules will likely need to be updated and adjusted to accommodate the new electronic will provisions, once effective.

Our local rules have also undergone some changes. The local rules about electronic filing have been updated. Quite a few items listed on the “exceptions” portion are either specific to probate or frequently used in probate matters. That list should be reviewed prior to e-filing any document to assure the filing will not be rejected.

While there were not any updates made specifically to the probate, conservatorship and guardianship section of our local rules, there may be a few in the next cycle (effective July 1). Updates to local rules can be viewed online through the Ventura County Superior Court website.



Amber Rodriguez is the Chair of the Executive Committee for the Estate Planning and Probate section of the VCBA. Her practice focuses on Probate and Trust Litigation and Administration,

Estate Planning and Conservatorships. She can be reached at arodriguez@estateattorneycalifornia.com, or you can visit her website at estateattorneycalifornia.com.

PRESIDENT’S MESSAGE:

Continued from page 3

Substantial Downsizing Planned

Scott Powers, Deputy Executive Officer in the County CEO’s office, explained that there has been talk about relocating the Law Library for the past five or six years. The County provides the library space, utilities and maintenance. (Law Library operations are financed primarily through a portion of the filing fees paid to the Ventura County Superior Court.) Powers urged that the move should be viewed from a business perspective. He also mentioned that plans have been drawn for the proposed new location and that this is the first time that talks about relocating have gotten this far. Shenker, who saw the plans at the board’s January meeting, said that the library would be downsized substantially.

The fate of the Law Library will ultimately be decided by the Ventura County Board of Supervisors at a future meeting, date tbd. Powers told the Board of Trustees and others in attendance that notice of the meeting will be given at least two months in advance. The Board of Trustees and Powers are to discuss arrangements for a community meeting regarding the proposed relocation and downsizing.

Let Your Voice Be Heard

If you care about the location and size of the Law Library, it’s time to speak up. Contact the Ventura County Board of Supervisors, including **Matt LaVere**, a past Barristers board member, and let them know your opinion before it’s too late. And show up at the next Law Library board meeting on Wednesday, April 8 at noon in the Law Library to express your opinion.

By the way, my mom now takes my kids to the library on Fridays. Again, I think she does it for the peace and quiet.

Kathryn E. Clunen is of counsel at the Dion Law Group, APLC and practices family law. She can be reached at KatieC@dionlawgroup.com or (805) 497-7474.



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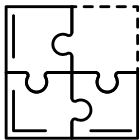
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POTENTIAL BUSINESS INTERRUPTION COVERAGE FOR COVID-19: SHUTDOWN BY CIVIL AUTHORITY

by David A. Shaneyfelt

Perhaps – just perhaps – somewhere buried in your client’s commercial property insurance policy is a provision promising coverage for loss of business “due to order of civil authority.” Now is the time to look, because the global calamity caused by COVID-19 has resulted in the shutdown of many businesses by civil authority.

Consider this a brief primer on the subject while you send that email to your client right now, asking them to send you a copy of their property insurance policy so you can look for potential coverage.

When you get the policy, first look to see whether your client has coverage for “business interruption” loss. This coverage is sometimes added as a supplement to existing property coverage and it aims to cover loss of business while attending to a property loss. It lets a business owner recover profits that otherwise would have been generated during the period of shut down and repair.

If your client does *not* have business interruption insurance, then your client may have a tall order in proving damage to property for COVID-19. Business interruption coverage is typically triggered by some physical damage to property, which is readily seen in examples like fire or water. But how does a virus cause physical damage to property? Scant case law exists in this area.

On the one hand, a virus damages people, not property. On the other hand, a virus may be caught through contact with tangible property. The few cases that have addressed such issues seem to offer support for this latter position. (See *Motorists Mutual Ins. Co. v. Hardinger* (3d Cir. 2005) 131 Fed. Appx. 823, 826 [presence of e-coli bacteria constituted direct physical damage to property rendering a house uninhabitable]; *Brand Management, Inc. v. Md. Casualty Co.* (D. Colo. 2007) 2007 WL 1772063 at p. *2 [sushi manufacturer was entitled to business interruption loss after discovery of listeria forced shut down]; *Coopers v. Travelers Indemnity Co.* (N.D. Cal. 2002)

2002 WL 32775680 at p. *5 [presence of e-coli in well constituted direct physical damage to property].)

In any case, if your client *does* have business interruption coverage, keep looking. Sometimes coverage is provided for when a business is shut down by order of civil authority. Language varies widely, but some provisions *may* provide a basis for coverage of losses due to the coronavirus. Consider this language:

Civil Authority. We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

This language allows coverage on these conditions: When an order of civil authority (1) Prohibits access to the insured premises; (2) Is caused by or results from physical damage to property, other than insured property; and (3) The damage to property must be due to a peril covered under the policy. The purpose behind such language is to protect a business from loss when the business is shut down by order of civil authority because of some *other* property owner’s damage.

For example, a fire rages through an area and destroys some buildings, but not others, and not yours. The Fire Marshall then closes your business, because it is dangerously close to the adjacent property. You therefore have coverage for the loss of business, even though you have little or no property damage. Under this language, a business owner would have to prove COVID-19 caused physical damage to *other* property, requiring the owner to shut down its business. Time will tell whether this is a tall order of proof, but at least it falls within the realm of possibility.

But other policy language is broader and may be more helpful:

Interruption by Civil or Military Authority: This policy is extended to cover the loss sustained during the period of time when, as a result of a peril not excluded, access to real or personal property is prohibited by order of civil or military authority.

These requirements do *not* limit coverage to physical damage to property. Instead, coverage is allowed when a civil authority issues an order which (1) Prohibits access to the insured premises; and which (2) Is caused by or results from a peril covered under the policy.

The first condition is generally clear. “Civil authority, when contained in an insurance policy, refers to the situation when a civil authority prohibits access to the insured’s premises resulting in a total loss of business income.” (*New York Career Institute v. Hanover Ins. Co.* (N.Y.S. 2005) 6 Misc.3d 734; see also *US Airways, Inc. v. Commonwealth Ins. Co.* (2004) 2004 WL 1094684 [Metro Authority’s closure of airport following 9/11 attack was a closure by civil authority that resulted in denial of access for purposes of business interruption coverage].) In the case of COVID-19, multiple civil authorities have issued closure notices at all levels of government. And some are more particular than others.

Notably, mere *fear* of the virus will not be enough. Coverage will only be triggered when a civil authority actually issues an order. (See *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.* (2011) 636 F.3d 683, 686-87 [mere fear of hurricane damage was insufficient to claim loss of business interruption due to civil authority].)

The second condition seems problematic. Can a virus be deemed “a peril covered under the policy?” It might. Again, it depends on what and how the policy considers a “peril.” Typically, that would include fire, explosions, burst pipes, storms, theft, and vandalism. But natural disasters can appear in the list; same with riots and “civil commotion.” COVID-19 might fit within one of those categories.

But even if it can't, several court decisions have made clear that, in the case of closure by civil authority, a business need not show that direct physical damage to property occurred. One of the earliest cases to address loss of business income due to civil authority – *Sloan v. Phoenix of Hartford Ins. Co.* (1973) 46 Mich.App. 46 – makes clear that coverage for loss due to civil authority may be independent of any requirement to show physical damage.

There, the policy included coverage for actual loss “when as a direct result of the peril(s) insured against, access to the premises described is prohibited by order of civil authority.” An owner of several movie theaters claimed loss of income when its theaters were shut down by order of the Michigan governor due to riots in Detroit.

The insurance company argued that the insured was required to demonstrate physical damage as a prerequisite to coverage. The court disagreed, ruling that the civil authority coverage provision was *separate and independent* from the damage provision and that its terms controlled. Under this rationale, any civil order

requiring a business to close because of COVID-19 may well offer coverage to affected businesses, without any need to show that the virus itself caused damage to the business.

When courts have denied coverage for loss due to civil authority, they have done so for reasons that are unique to the policy language at issue, such as that the damage leading to the closure order must have

occurred on “adjacent property.” (See *Syufy Enterprises v. The Home Ins. Co. of Indiana* (N.D. Cal. 1995) 1995 WL 129229 [finding no business income coverage for loss by civil authority, because the Rodney King curfew orders were not based on adjacent property damage or a direct result of the riots]; *United Airlines, Inc. v. Ins. Co. of the State of Pa.* (S.D.N.Y. 2005) 385 F.Supp.2d 343, 351-54, *affd.* 439 F.3d 128

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Continued from page 11

POTENTIAL BUSINESS INTERRUPTION
COVERAGE FOR COVID-19: SHUT-
DOWN BY CIVIL AUTHORITY

[claim for business interruption loss due to civil authority was denied, because the damage did not occur to an “adjacent” property – the Pentagon is not “adjacent” to Ronald Reagan Airport.]

In contrast, cases addressing loss of business interruption due to order of civil authority make clear that the terms of coverage will control when the terms are capable of a plain reading. (See *By Development, Inc. v. United Fire and Casualty Co.* (8th Cir. 2006) 206 Fed.Appx. 609 [losses caused by action of civil authority that prohibited access to insured’s premises due to “Grizzly Gulch” fire began seventy hours after governor’s order, because policy said so]; *Zurich Am. Ins. Co. v. ABM Industries, Inc.* (2nd Cir. 2005) 397 F.3d 158, 171 [janitorial service contractor was entitled to prove claims for loss of business interruption due to civil authority by showing which sites it was denied access due to post-9/11 access orders, because policy terms controlled].)

American businesses need every available option to help them survive this global calamity. If insurance coverage for loss due to closure by order of civil authority will help them survive, you can do your client a world of good by checking into this option for them.



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HAVE YOU HEARD?

The Ventura County Superior Court has announced temporary closures and limited services. Up-to-date information can be found at <http://www.ventura.courts.ca.gov/>. Other courts have issued similar orders.

The Commission on Judicial Performance has served Notice of Formal Proceedings on Judge Jeffrey G. Bennett. Read more at https://cjp.ca.gov/wp-content/uploads/sites/40/2020/03/Bennett_NFP_3-2-20.pdf.



The Law Offices of Claudia Silverman, APC, has a new address and phone. Her new mailing address is 1000 Town Center Drive, Suite 300, Oxnard, CA 93036. She can

be reached by phone at (805) 568-9580 or email at claudia@legalsilverman.com

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Zoom TELECONFERENCING

by J.P. McWaters

In today's economy, attorneys need to look to alternative ways to interact with clients and attorneys. One easy-to-use video conferencing solution is Zoom. It's free if you're hosting or moderating meetings under 40 minutes. For meetings over 40 minutes you will need a Zoom account. (Check the plans available for the free and paid options)

There are other software packages like GotoMeeting, Google Hangout, Skype, and Cisco Webex that you can also use and research.

WHAT YOU'LL NEED

• A solid performing laptop or desktop computer that can stream video. You can do this by checking to see if you can stream YouTube Videos. (Also see links that will help you test..)

• Your computer should also have a built-in microphone and video camera. If you don't want to be seen, call in by phone or disable your computer camera.

- Internet with hard line or fast Wifi.
- Optional: Microphone-enabled speaker

LINKS THAT WILL HELP YOU TEST YOUR BANDWIDTH

Internet speed: <https://fast.com>
 Test your connection and camera: <https://zoom.us/test>

LOOKING PROFESSIONAL

Keep in mind your computer camera picks up everything. Tidy up your desk and surrounding office space. Dress the part if this is an important meeting. Zoom also has a virtual background feature that puts

you any conference room, office or tropical location. Search Zoom virtual backgrounds for more information.

And always be sure to test! Don't wait until the day of the meeting to test.

You will find this technology valuable and will help you save time and keep you safe.



J.P. McWaters specializes in website development, marketing and SEO. He can be reached remotely at jp@nueworks.com or (805)701-8688.


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