Summer 2020

The LITIGATOR

VOLUME XVI OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 2

Inside

'Summer in Quarantine' offers opportunities

Joe Weinberger
CCTLA President

Welcome to Summer in Quarantine!! I must say this is not the summer message I envisioned writing. Times have changed, and we are now looking for a new normal. The best message I can pass along is one of hope. This virus will ultimately pass, and we will survive and grow stronger as a result of the challenges we have faced.

Take this time to make yourself a better advocate for your clients. Many groups and individuals are offering reduced rates and free webinars. I have personally been attending multiple webinars by *Case Analysis and Dan Ambrose*. These are amazing opportunities to watch actual courtroom footage of some of the masters of our craft. They appear live to interrupt the footage and explain their thought process, and they explain what they did, why they did it and what they would change. I have had the benefit of watching *Rex Parish, Sean Claggett, Brian Panish and Keith Mitnik*.

Trial By Human, with Nick and Courtney Rowley, is also putting on free seminars. Nick and Courtney are helping us to confront the insurance carriers and dispel the false narratives that we have come to accept. These seminars point out the propaganda that we have learned and refute it with strong messages. It is time to start advocating not only for our clients, but also for the defendants that we sue. They are but pawns in the insurance carriers' game. We need to get them involved and fighting for full justice. They should not be subjected to the insurance carriers disregard. It is their lives and assets that are at risk. We need to get them to aggressively push for the protection that their premium dollars have paid for. In this way, the rising tide will lift all of our boats and insurance carriers will pay full justice for our clients. The hammer of bad faith is alive and well, and we need to channel that force for the benefit of our clients.

Keith Mitnik is unable to travel to New York to record his podcasts, so he has chosen to produce regular email versions. He calls his emails "At home, but not alone, Brushstrokes," and he will be giving his personal thoughts and strategies on how to turn the tables on the defense. He teaches us to turn the "bruises" of our cases into positives by taking the game away from the defense and making these issues our turf.

For example, in his first message, Keith teaches the difference between visibility and conspicuity, the difference between being able to see and object and the competition for

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Mike's CITES

By: Michael Jansen
CCTLA Member

Please remember that some cases are summarized before the official reports are published and may be reconsidered or de-certified for publication. Be sure to check to find official citations before using them as authority.

Equitable Tolling Could Extend Your Statute of Limitations

Re: Jay Brome v. California Highway Patrol
Jan. 28, 2020 / 2020 DJDAR 708

FACTS:

Jay Brome, California Highway Patrol officer, is openly gay. During his 20-year career with the CHP, he was the subject of derogatory homophobic comments, was refused backup assistance during enforcement stops, and he had many other complaints about pranks and negative comments from fellow officers about his sexual orientation. Brome filed administrative complaints, which were all dismissed. He was issued a right-to-sue letter but did not file a lawsuit because he hoped his complaints would be taken seriously and the situation would improve. Finally, after 19 years, Brome went out on medical leave in January 2015 and filed a Workers' Compensation claim based on work-related stress. The Workers' Compensation claim was resolved in Brome's favor on Oct. 27, 2015. and he took industrial disability retirement (IDR) on Feb. 29, 2016.

On Sept. 15, 2016, Brome filed an administrative complaint with the Department of Fair Employment and Housing. On Sept. 16, 2016, He filed a lawsuit against the CHP in Superior Court, asserting four claims under the Fair Employment and Housing Act based on discrimination, harassment and retaliation. The CHP moved for summary judgment, contending Brome's claims were untimely because he did not file his administrative complaint within one year of the challenged actions, as required by former Government Code section 12960 (d) [one year statute of limitations].

ISSUE:

Did Plaintiff blow the statute of limitations (one year)?

RULING:

The Workers' Compensation case tolled the statute of limitations. Plaintiff did not blow the statute of limitations. The motion for summary judgment was denied.

REASON:

Defendant's motion for summary judgment was denied because a statute of limitations is suspended or extended if all the elements of ***equitable tolling*** are met. McDonald v. Antelope Valley Community College District (2008) 45 Cal.App.4th 88, 99-100. The three elements of equitable tolling are: (1) timely notice, (2) lack of prejudice to the defendant and (3) reasonable and good faith conduct on the part of the plaintiff.

In this case, the defendant knew of Plaintiff's claim within the statutory period because of the Workers' Comp case. A Workers' Compensation case can support equitable tolling for a personal injury statute of limitations even if the claims are not coextensive. Elkins v. Derby (1974) 12 Cal.3d 410, 417-418. With regard to good faith on the part of the plaintiff, the court herein stated that the 11-month wait after the Workers' Compensation case was concluded before filing the third-party complaint was caused by years of harassment and hostility due to anti-gay bias and because Plaintiff was so distressed that he became suicidal. Therefore, it cannot be said that Plaintiff was not in good faith.

Plaintiff also argued in opposition to the motion for summary judgment that defendant continued to violate his rights and therefore the continuing violation doctrine made the defendant's statute of limitations defense inapplicable as a matter of law. The Appellate Court agreed.

Finally, Plaintiff argued that he was constructively discharged, even though his theory that conditions were so intolerable that a reasonable employee would feel forced to resign for purposes of establishing constructive discharge. Yet, Plaintiff argued the same employee could reasonably believe the situation was salvageable for purposes of establishing a continuing violation. Although the court realized these arguments contradicted each other, the court stated its task is simply to determine whether facts in the record could support either proposition. Since there were sufficient facts, the motion for summary judgment was reversed in favor of Plaintiff.

Could COVID-19 person-to-person transfer be a basis for a civil lawsuit?

By: John T. Stralen, CCTLA Board Member

Given the Coronavirus pandemic, it is inevitable that injury attorneys will be getting questions about whether a civil lawsuit can be brought against someone for transmitting the Coronavirus. The short answer is: It depends.

Based on well-established tort law, including past California Supreme Court precedent, under certain circumstances such a cause of action for negligence appears plausible. Starting with the basics: California Civil Code Section 1714(a) provides that: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person…."

In other words, as stated by the California Supreme Court,discussing general principles of negligence, "All persons are required to use ordinary care to prevent others being injured as the result of their conduct." Rowland v. Christian (1968) 69 Cal. 2d 108, 112. Determining when a duty exists requires balancing "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." Rowland v. Christian (1968) 69 Cal. 2d 108, 113.

Concerning the negligent transmission of an infectious disease in particular, in Doe v. Roe (1990) 218 Cal.App. 3d 1538, 1541, the appellate court determined the defendant was liable for the negligent transmission of herpes. In that case, there was no dispute that the defendant knew he was infected with herpes, including having had several previous outbreaks. The defendant claimed "that he could not transmit [the disease to the plaintiff] as long as he was symptom-free." Affirming judgment in favor of plaintiff, the court noted that the "defendant admitted he had actual knowledge that herpes was sexually transmissible…. Having discovered that he had a venereal disease, defendant did nothing." *Id*. at 1546; see also Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 997 (finding liability for transmission of herpes where "consent to sexual intercourse [was] vitiated by one partner's fraudulent concealment of the risk of infection with venereal disease").

The Doe case was cited in a later California Supreme Court decision involving the liability of a husband who was sued by his wife for infecting her with

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‘Summer in Quarantine’ offers opportunities

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a persons’ attention. Landowners have an affirmative obligation to see dangerous conditions. Our clients are looking towards where they are heading and getting their tasks completed. It is not enough that a dangerous condition is visible. Our client’s vision is actively looking for their desired object, not searching for hazards. In contrast, landowners are required by law to search these out and provide warnings for our clients. It is the burden of the defense to establish that our clients were in fact negligent. It is not enough to just show that a hazard could have been seen.

These seminars are but a few examples of the free opportunities we have to learn to become not only better lawyers, but better people.

We can also take this “pause” to improve our cases. Review your caseload and complete that discovery you have been pushing to the side of your desk. Speak to your clients and their families. Get to know them and how their lives have been suddenly, unavoidably and unnaturally changed through no fault of their own. Learn how they have been affected so that one day you can stand in their shoes and connect with an adjuster, a defense lawyer, a judge or a jury and give full meaning to the losses your client has suffered. Only by standing in your client’s shoes and truly feeling the pain that they have suffered can you obtain full justice for them.

Spend time with your staff. Learn what problems they have and work towards solutions that will make them happier in their jobs and better employees. In this new world, many people are scared and unsure of how to proceed. We live in an amazing time and the ability to work remotely is made so much easier by the available technology. Learn about this technology, embrace it, and work with your staff to implement these changes. Allow your staff to be comfortable in their surroundings and help them to better work with you and your clients. In this way, they will become more productive.

On a different note, I am proud to say that efforts are being made on the state and local levels to return to business as usual. Micha Star Liberty and CAOC are working with the Supreme Court, the Legislature, and the State Bar to establish safe and protective guidelines for the operations of the court. The various California trial lawyer associations are meeting and looking for ways to help with the transition and how to maintain justice. Locally, we are working with the Sacramento Superior Court to provide a FAQ that will provide guidance on how the courts will return to more normal operations and how the transition will occur.

I look forward to the ability to see all of you in person. Until then, be safe, be healthy, keep a positive attitude—and keep working to be the best advocate for your clients that you can be.

Could COVID-19 be a basis for a civil lawsuit?

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HIV. John B. v. Superior Court (2006) 38 Cal. 4th 1177. The John B. court noted that other states allow such negligence claims. The court quoted from a North Carolina ruling that “for over a century, liability has been imposed on individuals who have transmitted communicable diseases that have harmed others.” Berner v. Caldwell (Ala.1989) 543 So.2d 686, 688. The court also relied on an out of state decision that held “it is a well-settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease.” Crowell v. Crowell (1920) 105 S.E. 206, 208. The John B. ruling further provides: “The general principle is established that a person who negligently exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in damages.” 39 Am.Jur.2d (1999) Health, § 99, p. 549. The court ultimately concluded that there was liability for negligent transmission of HIV where the defendant, under the totality of circumstances, had reason to know of the infection.

Of course, to establish liability for another person’s negligence, there must also exist sufficient proof that the potential defendant actually transmitted the infection.

In cases of hospitalization or death, damages are not an issue. Thus, given the appearance of a duty, along with massive media exposure and safety information that is widely available about the health risks of the Coronavirus, a viable claim for negligence appears to exist against a person who had actual or constructive knowledge that he or she had Coronavirus and failed to take reasonable precautions.

Pro Bono Services

By: Justin M. Gingery, Gingery Law Group, PC, and CCTLA Board Member

When we paid State Bar membership dues this year, most licensed members were asked to complete a survey questionnaire from the State Bar requesting our individual pro bono hours in an effort to determine just how much access licensed professionals are providing "indigent individuals."

The California State Bar Board of Trustees seems to be providing improved access to justice at the top of the list of objectives. Consider "Goal 4" of the State Bar's 2017-2022 strategic plan, the resulting proposed rule changes offered last year to "support access to justice for all California residents and improvement to the state's justice system" and the recommendations of the Task Force on Access Through Innovation of Legal Services. The State Bar Board of Trustees is attempting to gather the evidence necessary to make a compelling case in support of the task force's recommendation.

On Dec. 9, 1989, the State Bar adopted a "Pro Bono Resolution" that was amended on June 22, 2002. At that time, the Board of Governors of the State Bar of California concluded the following: There is an increasingly dire need for pro bono legal services for the needy and disadvantaged; the federal, state and local governments are not providing sufficient funds for the delivery of legal services to the poor and disadvantaged; lawyers should ensure that all members of the public have equal redress to the courts for resolution of their disputes and access to lawyers when legal services are necessary; and the chief justice of the California Supreme Court, the Judicial Council of California and judicial officers throughout California have consistently emphasized the pro bono responsibility of lawyers and its importance to the fair and efficient administration of justice.

The Board of Governors reminded all lawyers that California Business and Professions Code §6068(h) establishes that it is the duty of a lawyer "never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed" and resolved the following:

(1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;

(2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours

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Pro Bono Services

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per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;

(3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring that any law firm wishing to recruit on campus provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities; and

(4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono service.

Since the adoption of the Pro Bono Resolution over 30 years ago, the State Bar Board of Trustees has become increasingly concerned that lawyers have failed to provide those poor, disadvantaged and not-for-profit organizations equal and adequate access to the American justice system. It is why the task force is now recommending that the tech industry be allowed to practice law and provide legal services so that the spirit of the Pro Bono Resolution can be met.

Legal work for clients referred from a qualified legal services program will always qualify as pro bono. A qualified legal services provider is one who receives funding from the State Bar's Legal Services Trust Fund (IOLTA) Program. Assisting friends or relatives who are not indigent is not pro bono. Similarly, if a client is suddenly unable to pay for legal services, that does not count as pro bono because the attorney expected compensation at the outset of the representation. Also, volunteer work and charitable donations is not pro bono unless the work and donations involve legal services.

Most of us are committed beyond our calendars, and I am regularly impressed by the amount of time most CCTLA members spend to benefit our community. According to the State Bar, it has not been enough. We must either begin replacing our other commitments with pro bono efforts or make more time to do so.

I don't intend to be a fear monger or inspire action through threats, but if the State Bar Board of Trustees has its way, non-attorneys and the technology industry will be competing with us to provide legal services. Imagine the changes to our industry if Amazon was able to provide legal services in every practical area with its monthly Prime subscription. Even the largest and most powerful firms would experience a setback, and it could be devastating to solo practices.

In an effort to inspire pro bono efforts in a more productive manner, I wanted to share one of the best pro bono experiences of my career. My sister-in-law is an attorney in Butte County, and she filed a complaint on a wrongful death/murder case out of Colusa County to try and toll the statute (it arguably had already run since the death occurred more than two years before the filing) for a friend of a friend who was the widowed mother of three children, and her deceased husband was the major income source for the family.

The case was Ayala v. Moore Brothers, and the facts involved in the case were the subject of an *NBC Dateline* episode titled "The Family Business" because of the much more intriguing underlying murder investigation rather than the civil action.

Briefly, Moore Brothers in Colusa County is one of the largest rice farms in California and has been passed down to the male descendants for three generations. At the time of the incident, two brothers (Roger and Gus) were the owners, and they each had an adult son of their own (Paul and Peter, respectively) as the heirs apparent.

Peter and Paul were not the most ideal candidates to take over ownership of the farm mainly because they were not as competent and hard-working as Foreman Roberto Ayala. Roger and Gus routinely praised Roberto and threatened their sons that Roberto would inherit the farm if they didn't get their lives and work ethics straight.

The incident occurred when Roberto was asked to repair a malfunctioning irrigation valve. That day, Roberto had his seven-year-old son, Fabian, with him at the farm. When Roberto opened the fuse box controlling the irrigation pump, it exploded, igniting Roberto and witnessed by Fabian. The boy ran through two miles of rice fields to a neighbors' house to get help, to no avail.

A thorough investigation included the Colusa Sheriff's department, ATF and the FBI, and murder, not accident, was

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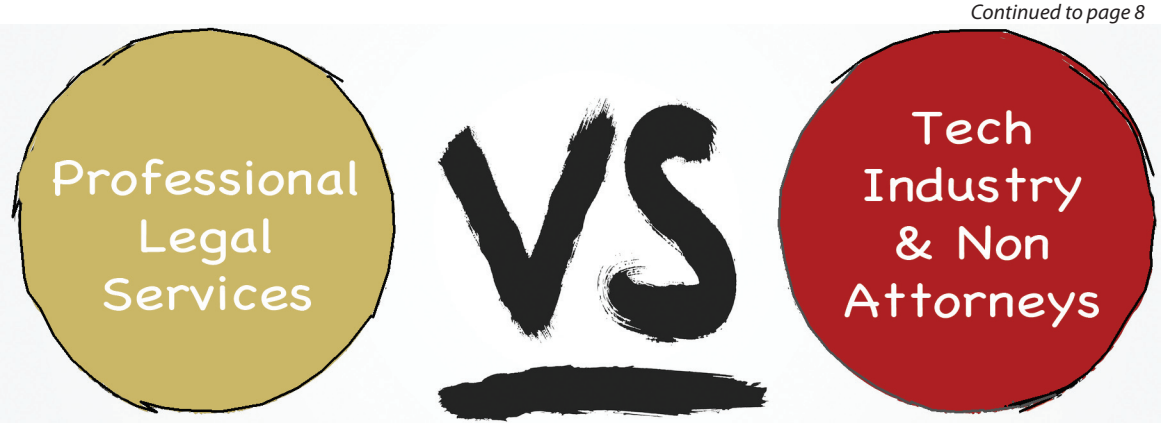

Pro Bono Services

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determined. Paul tried to frame Peter as the murderer, but in a page right out of a murder mystery, the investigation found the imprints of the exact bomb design on a blank notepad in Paul's home. Paul was convicted for his crimes.

My "charity case" (as my employer called it) started as an effort to get beyond the exclusive remedy rule in Worker's Compensation and the statute of limitations issue. However, I knew the entire time that even if I did find a way to get some recovery, it was all going to the clients, and I was working without any expected compensation. By the time I was asked to get involved, Worker's Compensation had paid the death benefit to the mother but nothing to the dependent children.

The Honorable Jeffrey Thompson was the judge in the underlying criminal trial, so he was intimately familiar with the facts and evidence. As a result, he was incredibly patient and, I think, curious, about my pro bono efforts. He allowed me three opportunities to amend the complaint in the face of multiple demurrers. Once I was able to finally satisfy the judge with the facts sufficient to survive the exclusive remedy (namely that Paul Moore was the heir to Moore Brothers farms consistent with three generations of precedent, Paul Moore was managing the farm, residing in the farm office and in control of the daily operations and therefore, the employer of Roberto Ayala) and the statute of limitations issue, I just had to go through the discovery process to prove those alleged facts.

Unfortunately, by the time I was able to take depositions, Gus had lost capacity to testify, and brother Roger had no problem testifying that he did not have a testamentary document distributing his multi-million dollar estate, that Paul was not an employer and that although Roger intended to break three generations of tradition and not give the farm to his son, he wasn't sure who would inherit the farm. None of the other employees of the farm were willing to participate and testify honestly to Paul's role on the farm out of fear of their citizenship status or the anticipated repercussions. Even Roberto's brother, who took over as foreman, did not want to jeopardize his position in order to help his family.

An unconventional offer (the title to a work truck and $50,000) was made to my clients before filing a motion for summary judgment that they accepted. I was also able to obtain the Worker's Compensation death benefit for the dependent children. We also obtained a $20 million judgment against Paul should he ever be released or inherit the farm.

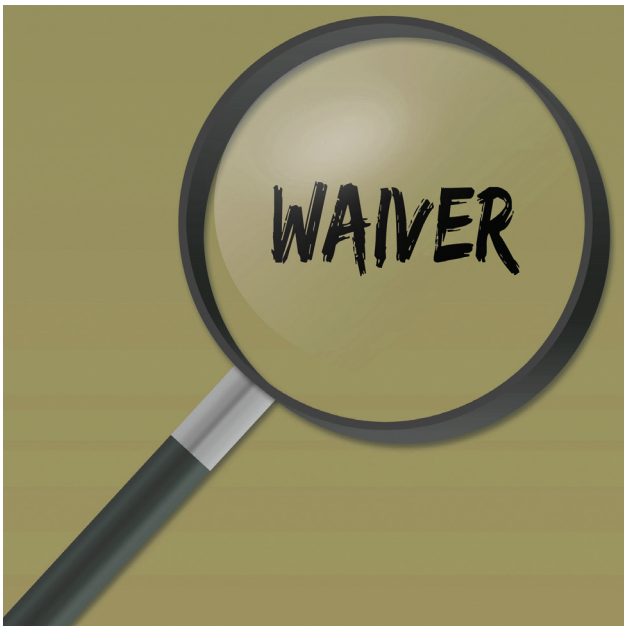
Nearly two years and well over 100 hours were spent, and it remains one of the greatest learning experiences and most interesting pro bono cases of my career. It is not my intention to convey old war stories, but I hope to inspire a desire to take on more pro bono cases and will also show the Board of Trustees that the practice of law should remain in the attorneys' hands.

DON'T GET PANCAKED! THERE MAY BE A WAY AROUND THAT WAIVER

By: Glenn Guenard
CCTLA Board Treasurer

We recently resolved a case involving an injured minor, government entity, a rogue lunch table—and a valid liability waiver. Our client, age 11, was at an after-school program at his elementary school. He was asked by an adult volunteer of the program, along with some other students, to take down and move a large cafeteria table that was on wheels. Client's friend was pushing, and our client was on the other side of the table—pulling. His foot got caught under the wheel, and the table then fell over and "pancaked" him, causing a severe hip injury.

We argued it was negligent to allow children to move a heavy table with lousy center of gravity. The school denied liability, citing a liability waiver signed by the client's parents. In response, we filed suit and litigated the case for three years.



The major liability issue became: Did the contracting parties intend, at the time of signing the waiver, that the after-school program would be released from liability after an 11-year-old child was asked to move a large cafeteria table and was injured after it tipped over and fell on him?

It is well known that parties are free to contract to release the liability of a party. "[N]o public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." (Tunkl v. Regents of University of California (1963) 60 Cal.2d 92, 101.) "Whether a release bars recovery against a negligent party "turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control." (Rossmoor Sanitation, Inc., v. Pylon, Inc. (1975) 13 Cal.3d 622, 633.)

In Leon v. Family Fitness Center (No. 107), Inc. (1998) 61 Cal.App.4th 1227, Leon was injured after a bench collapsed beneath him while he was sitting in a sauna. Leon had signed a waiver with "assumption of the risk" and "hold harmless" provisions for injuries sustained at the facility. "In its most basic sense, assumption of risk means that one person, in advance, has given his express consent to relieve another of obligations toward himself, and to assume the chance of injury from a known risk…" (*Id*. at p. 1234.) "Here, an individual who understandingly entered into the membership agreement at issue can be deemed to have waived any hazard known to relate to the use of the health club facilities. These hazards typically include the risk of a sprained ankle due to improper exercise or overexertion, a broken toe from a dropped weight, injuries due to malfunctioning exercise or sports equipment, or from slipping in the locker-room shower. On the other hand, no Family Fitness patron can be charged with realistically appreciating the risk of injury from simply reclining on a sauna bench. Because the collapse of a sauna bench when properly utilized is not a 'known risk,' we conclude Leon cannot be deemed to have assumed the risk of this incident as a matter of law." (*Ibid*.)

By analogy, injuries resulting from activities of the after-school program, that could have been reasonably contemplated by the parties in the subject waiver, include: soft tissue injuries and even broken bones from athletic endeavors, paper cuts, or unintentional puncture wounds from over-sharpened color pencils during arts & crafts—not being crushed by a cafeteria table after being asked to move it by an after-school program employee. Since being crushed by a cafeteria table cannot be construed as a "known risk" of participating in the after-school program—it could

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Waiver

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not have been reasonably contemplated by the parties at the time of signing the waiver.

Furthermore, parties cannot contract out of future gross negligence. The question becomes: "Is it grossly negligent for an after-school employee to direct 11-year-olds to move large cafeteria tables?"

In City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, the California Supreme Court looked at whether a release of liability for a city recreational program can effectively include a clause for future gross negligence. The tort arose when the program negligently supervised minors swimming—resulting in a child drowning.

The court concluded that such a clause would violate public policy and is unenforceable. "'Gross negligence' long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" (*Id*. at p. 754.)

According to the United States Consumer Product Safety Commission (CPSC), children should not move, touch or play around folded tables. The CPSC "warns school officials and those organizations that use school facilities that children cannot safely move mobile folding tables commonly found in school cafeterias and meeting rooms. The tall heavy tables can tip-over and seriously injure or kill a child." (*Ibid*.) "Most of the accidents happened during after-school or non-school sponsored activities. The tables overturned when the wheel or bottom edge of the table apparently hit a child's foot or when the child attempted to ride on the table while it was being moved. Typically, two children were moving the table, one child pulling and the other pushing. The child pulling was the one injured or killed." (*Id*.)

Here, the injury happened at an after-school program. The table's wheels hit the client's foot, and the table overturned. Two children were moving the table, one pushing and one pulling. Client was the one pulling—and he was the one who was injured. Our client suffered the same injury that the CPSC Safety Alert intended to prevent. Directing a child to move a table that is known to cause significant injury would constitute an extreme departure from the ordinary standard of conduct.

In summation, the client's injury arose out of circumstances not contemplated by the parties at the time the Waiver was signed—*and* the injury arguably arose out of gross negligence on behalf of the after-school program employee. A liability waiver is not in-of-itself dispositive.

Basic understanding of contract principles—and independent legal research, guided by the facts of the case, had the defense re-thinking their waiver armor.

At the end of the day, there was a chink in that armor, and the valid waiver could not shield the defense from liability. A few weeks before trial, the defense, after stonewalling for three years, proposed a private mediation. We were able to get our client fairly compensated.

CCTLA members: Share your experiences, verdicts, lessons learned

CCTLA is seeking legal-themed articles for publication in its quarterly publication, *The Litigator,* which presents articles on substantive law issues across all practice areas. No area of law is excluded. Practice tips, law-practice management, trial practice including opening and closing arguments, ethics, as well as continuing legal education topics, are among the areas welcomed. Verdict and settlement information also welcome.

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office.

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; website art is too small).

Please include information about the author (legal affiliation and other basic pertinent information) at the bottom of the article.

For more information and deadlines, contact CCTLA Executive Director Debbie Keller at debbie@cctla.com.


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Cooper v. California Highway Patrol

Bob Buccola and Robert Nielson of Dreyer Babich Buccola Wood Campora, LLP represented the front-seat passenger in a t-bone collision with a CHP vehicle. Surveillance footage showed the CHP driver ran a red light and did not initiate the emergency lights until after the collision, and Defendant admitted liability.

Plaintiff sustained a non-displaced fracture at the C2 vertebra as well as a right-leg fracture. She was seven months pregnant at the time, although, fortunately, her unborn baby was unharmed in the collision and was ultimately delivered without complications. While Plaintiff was able to avoid any surgeries, she did have to undergo several pain management procedures.

Plaintiff's closed-head injury claim was hotly disputed. While neither side disputed the fact that she lost consciousness at the scene of the collision, she presented to the emergency room with an uncompromised Glasgow Coma Score of 15 and had no positive diagnostic findings of brain trauma either in the emergency room or by way of subsequent MRIs.

Subsequently, Plaintiff's treating neuropsychologist diagnosed Plaintiff with a mild traumatic brain injury following a litany of cognitive testing, whereas Defendant's neurologist and neuropsychologist disputed that she suffered anything beyond a transient concussion. Defense experts emphasized the fact that she was legally blind—a congenital condition that left Plaintiff permanently disabled her entire adult life—and alleged that she at least subconsciously exaggerated her cognitive symptoms, which were entirely absent from her medical records for approximately 10 months post-accident. Defendant ultimately argued that any cognitive symptoms were at best psychosocial in nature.

Plaintiff's past medical specials totaled $101,302. Her doctors indicated she would require ongoing pain management treatment and may eventually require surgical intervention on her spine if the pain became intolerable.

Further, while Plaintiff had spent nearly two decades unemployed due to her disability, she had found some minimum-wage work several months before the collision and was attending community college in the hopes of ultimately pursuing a career assisting with childcare.

The case ultimately was resolved a week before trial, after nearly three years of litigation.

Precedent for These Unprecedented Times

By Robert Nelsen
CCTLA Board Member

With no end in sight, one would be forgiven for finding it difficult to focus on anything beyond this tragedy

"These are unprecedented times." That phrase has been used a lot recently – and rightfully so. As of April 27, 2020, over one million people in the United States had been infected with COVID-19, more than 50,000 of whom have lost their lives to it. Families are separated, our heroic healthcare workers and essential employees are being worked to the bone, and our daily lives are a shell of what they once were. With no end in sight, one would be forgiven for finding it difficult to focus on anything beyond this tragedy.

However, we still have a fiduciary duty to our clients and an ethical obligation to prosecute their interests to the fullest extent possible. With most courts being closed, many of the tools we have at our disposal to zealously advocate for our clients and push cases forward have been put at bay. Insurance companies may seek to take advantage of this, resulting in our clients having to wait much longer than usual to obtain justice. While there is no simple fix to this, below are some ideas and supporting authority that I hope will be helpful in getting the most out of the tools we have left.

Settlement Options – 998s and Policy Limits Demands

One obvious way to prosecute your client's case is to get it into a settlement posture that is favorable to your client. Nothing puts pressure on carriers like policy limits demands and 998 Offers. While the latter may prompt an objection, I am aware of no pandemic exception to a carrier's responsibility to evaluate a reasonable statutory offer within the 30-day time provision set forth under CCP 998.

As always, make sure your demand and offer contain sufficient information to allow the defense to evaluate the claim and the offer must be made in good faith with a realistic belief that it will be accepted. (See, for example, Najah v. Scottsdale Ins. Co. (2014) 230 Cal.App.4th 125.) Further, consider granting any reasonable requested extensions or requests for additional information to bolster your later claims that the lid is off the policy or that the Defendant had plenty of time to reasonably evaluate the claim.

In addition, from a calendaring perspective, any 998 Offer sent or received by electronic service will *not* have the five (5) day extension afforded by service by mail, under CCP 1013(a). Instead, CCP 1010.6 applies, adding two days for service. Electronic service has been favored by almost all superior courts, and has even been made mandatory in the numerous counties where e-filing is also mandatory. See CRC Rule 2.251(c)(3).

With our country's economic future being very uncertain, and with unemployment on the rise, carriers may be reluctant to want to settle cases in the hopes that claimants will become more desperate. This does not mean that we should settle our clients cases for whatever we can get. Now does seem as good a time as ever to try and set these cases up for positive outcomes, whether that be now or by way of trial once the courts open back up.

Discovery Options

"The interest in truth and justice is promoted by allowing liberal discovery of information in the possession of the opposing party." (Westinghouse Electrical Corp. v. Newman & Holtzinger (1995) 39 Cal.App.4th 1194)

Every party is entitled to discovery "as a matter of right unless statutory or public policy considerations clearly prohibit it." (Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355) Discovery policies are liberal and, "the party seeking discovery is entitled to substantial leeway." (Volkswagen of America, Inc. v. Superior Court (2006) 139 Cal.App.4th 1481)

I am of the belief that discovery should be easier to conduct in these times. The reason being that attorneys have far less scheduling conflicts – no trials, no hearings, etc. – and many deponents have very open schedules. As such, absent a situa-

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tion where someone is directly affected by this terrible virus, I believe that it is prudent to inquire before granting extensions on written discovery and should be aggressive in getting depositions set.

Depositions are the discovery tool that Defendants are most likely to be uncomfortable moving forward with in this current environment. Fortunately, there are a lot of alternative options available that allow depositions to move forward while still respecting the need for social distancing. The most common example of this is video conference deposition. During video conference depositions, each participant is in a different location, including the deponent and the court reporter.

Under CCP 2025.310(a) and CRC Rule 3.1010(a), any party is entitled to conduct a deposition by video conference (or any other electronic means). However, under CCP 2016.030, a stipulation is typically required to allow the witness to be sworn in outside the presence of the court reporter.

Video conference depositions are not new. I spoke with Morgan Albanese—a deposition coordinator at Veritext (and a very good resource, by the way)—and was surprised to find that their virtual format has been around for 12 years. There are some silver linings to conducting depositions this way, as well. For example, costs are reduced by not having to pay travel costs for anyone involved. Further, the court reporter shortage is not an issue because you can find any court reporter in the state instead of being limited to just the geographic area of the deposition itself. When things return to normal, those who waited to take depositions will not be alone, and a shortage is going to be inevitable.

While we are unable to simply force Defendants to comply with our deposition notices, this timeframe does allow you the opportunity to meet and confer extensively. This will be critical should law and motion come into play later and also continues to put pressure on the Defense. I had a situation where counsel for the Defense initially expressed concerns about the efficacy of video conference depositions and had indicated that he was not comfortable with the process. In that setting I cc'd Morgan at Veritext on an e-mail to the attorney, which gave her the opportunity to write out how easy the process is. She even offered to give him and his client a tutorial beforehand. This seems to have been enough to allow the deposition to go forward, but, if not, the record will be very unfavorable for the Defense in a law and motion setting (*Morgan has authorized me to give out her e-mail address in case anyone else needs similar assistance: malbanese@veritext.com*).

Any motions brought before the court will ultimately assess whether the moving party met their burden of showing that "good cause" exists to prevent the deposition from going forward, or otherwise set some parameters. CCP 2025.240(b). While a Motion to Quash, a deposition notice pursuant to CCP 2025.410(c) automatically stays the taking of that deposition, this motion, along with a protective order, open these attorneys up to sanctions if the court finds that it was a tactic made in bad faith (CCP 128.5) or if it was done to cause unnecessary delay (CCP 128.7). This is in addition to standard discovery sanctions, which are set forth in CCP 2025.420(h), and a separate motion will be required. With the added time between the filing of these motions and the dates of their hearing due to the court closure, this also gives attorneys more ample opportunity to comply with the 21 day safe harbor provisions.

It is also worth noting that most of the published opinions defining "good cause" in the context of a protective order involve significant constitutional issues such as privacy rights, trade secrets, and freedom of the press. And while most courts will surely give some credence to the seriousness of this pandemic, the setting of a video conference deposition is very safe, making it very difficult for anyone to justify a refusal to move forward with these important depositions.

With all of the safeguards available to us through these vendors, we should be able to move our cases along in a manner that is safe for those involved. While these are unprecedented times, there is precedent that the pursuit of justice for our clients should still take precedence. Be safe and good luck.

CAOC responds to $54-billion state budget deficit's impact on courts

SACRAMENTO (May 7, 2020)—The following is a statement by Consumer Attorneys of California President Micha Star Liberty regarding the governor's announcement of a $54-billion budget deficit.

"Our state and our individual communities cannot afford a tidal wave of budget cuts to vital programs and resources upon which all Californians depend – but particularly our state's most vulnerable citizens during the ongoing COVID-19 pandemic. Our courts in particular have been struggling to recover from past budget cuts that seriously destabilized a cornerstone of our democracy. From everyday citizens to our biggest businesses, society depends on the effective operation of our courts. New funding cuts would slow civil justice to a crawl, impacting the livelihood of citizens across the spectrum. We urge the federal government to put aside politics and step up with financial assistance to states across the nation suffering under the yoke of the coronavirus pandemic. A swift and effective recovery depends on maintaining the operational vitality of states. Without it, the fiscal malaise will almost certainly outlast the viral threat."

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Coronavirus crisis legal resources page launched

SACRAMENTO—The worldwide public health crisis unleashed by COVID-19 has turned everyone's lives upside down. The impact on the courts and the ability of lawyers to represent clients seeking justice has been undercut like never in our lifetimes. CAOC, to assist its members and the general public, has created a special webpage featuring resources to help navigate these daunting times. To access the webpage and its links to a variety of useful documents and tools:

https://www.caoc.org/index.cfm?pg=Coronavirus

Among the offerings available:

- Latest COVID-19 Court News
- Court Status: All 58 CA Counties
- COVID-19 Webinars
- SBA Disaster Loains
- Crisis Business Services
- Judicial Council COVID-19 Updates
- CA Bar Association COVID-19 News
- Federal Courts Updates
- Additional Resources

At CAOC's urging, Judicial Council expands e-service during COVID-19 for general civil, family and probate proceedings

SACRAMENTO (April 17, 2020)—California's top court authorities issued an emergency rule pushed by Consumer Attorneys of California that promotes electronic service of documents to guard public health and protect legal rights during the coronavirus pandemic.

The California Judicial Council action will expand electronic delivery of legal papers that in normal times would be sent to a law office via mail, fax or overnight delivery.

That victory follows on CAOC's efforts earlier this month that prompted the Judicial Council to extend the statute of limitations until the crisis is over, approve a procedure for remote depositions and grant a six-month extension of the five-year limit for bringing civil cases to trial.

The latest emergency action expands on a 2003 rule that allowed electronic service of documents in civil cases only when both sides agreed to it. In the weeks since statewide stay-at-home orders shuttered law offices and courthouses, complaints arose about opposing counsel refusing electronic service.

Such inflexibility puts legal staff and attorneys in a difficult and potentially risky position. Documents delivered by mail to a law office require a staffer to pick up the material and deliver it to the appropriate attorney, raising risks to all involved. Similarly, using mail to serve documents involves a trip to the office to make copies and then to the post office, compounding the public health risk. Under the new rule, only one side needs to request e-service.

"During this very difficult and scary time, our clients need us to continue pursuing justice on their behalf by moving claims forward, and e-service will help," said CAOC President Micha Star Liberty. "It's shameful that intentional bad-faith tactics have been putting lawyers and legal staff at risk of being exposed to COVID-19 in order to carry out their duties."

The new rule will apply until 90 days after the crisis is over and is intended to provide statewide uniformity. It will not, however, eclipse existing rules already adopted for electronic service in some counties.

Bills backed by CAOC ok'd by Assembly Judiciary Committee

AB 3262 levels playing field between online sellers and traditional stores

SACRAMENTO (May 11, 2020)—The California Assembly Judiciary Committee, meeting on May 11 for the first time since its return from a coronavirus pandemic shutdown, passed three bills supported by Consumer Attorneys of California.

Assembly Bill 3262 by Asm. Mark Stone (D-Monterey Bay) holds online marketplaces like Amazon to the same legal standard as traditional brick-and-mortar businesses when Internet retailers place dangerous products in the stream of commerce. This bill will ensure that California law does not continue to subsidize online commerce, which has a spotty product safety record, at the expense of injured Californians. **AB 3262** is sponsored by Consumer Attorneys of California, California Teamsters Public Affairs Council and United Food and Commercial Workers Union Western States Council.

"**AB 3262** is particularly relevant and necessary in light of the COVID-19 crisis, as most consumers are now purchasing most products online and safety is critical," said CAOC President Micha Star Liberty.

CAOC also sponsors, along with the California Defense Council, **Assembly Bill 2723** by Asm. David Chiu (D-San Francisco). **AB 2723** will streamline settlement procedures by allowing a settlement agreement reached at mediation to be enforceable by the court, even if one or more of the parties is not present, by allowing an attorney who represents a party, or, if a party is an insurer, an agent who is authorized in writing by the insurer to sign on the insurer's behalf.

AB 2723 won approval on the committee's consent calendar, along with **Assembly Bill 3062** by Asm. Jay Obernolte (R-Hesperia). This bill removes the sunset provision on **Senate Bill 383** (Wieckowski), a measure signed by Gov. Jerry Brown in 2015 that was co-sponsored by CAOC, the California Defense Counsel and the California Judges Association. The goal of **SB 383** was to improve trial and court-related efficiencies by providing procedures and deadlines to streamline the lengthy demurrer process so that cases can move efficiently through the judicial system. **SB 383** has enabled parties to resolve some of the demurrer objections out of court.

Also approved by the Judiciary Committee was CAOC-backed **AB 3092** by Asm. Buffy Wicks (D-Oakland) that would give sexual harassment victims of UCLA gynecologist James Heaps a one-year window to seek justice in a civil court. Last year, CAOC championed a bill to allow the molestation victims of a USC campus gynecologist to seek justice.

For more information on these CAOC articles:
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When a Valid Waiver Just Might Not Be Valid

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CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at dsglawyer@gmail.com, Rob Piering at rob@pieringlawfirm.com, Glenn Guenard at gguenard@gblegal.com, Chris Whelan at Chris@WhelanLawOffices.com, Alla Vorobets at allavorobets00@gmail.com or Linda Dankman at dankmanlaw@yahoo.com

Upcoming programs and events have been postponed due to current events and will be rescheduled as soon as possible.

We'll post more information via www.CCTLA.com as it becomes available.

CCTLA Calendar of Events