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PROFESSIONAL LIABILITY UPDATE

Relationship-Driven Results *July 2017*

We are pleased to bring you our firm's Quarterly Professional Liability Update. We appreciate the opportunity to represent your interests and to provide you the best possible service.

We pride ourselves in building partner relationships with our clients. We hope you benefit from the articles in this update. We also would like to share with you some personal and professional information of members of our Professional Liability team for you to get to know us a little better. Thank you again and we wish you continued success in 2017.

Recent California Cases

Comparative Fault Jury Instruction Appropriate Where Client Was "Knowledgeable" on the Issues that Allegedly Caused Her Damage

The Second District Court of Appeal's recent defense decision in *Yale v. Bowne* (2017) 9 Cal.App.5th 649 will be helpful for California attorneys to show comparative fault of the plaintiff client in legal malpractice claims. The Court held a comparative fault instruction was properly given to the jury because there was sufficient evidence that the client was aware of a community property issue and was negligent in failing to discuss it with her attorney. This decision may be helpful for early resolution negotiations with plaintiff's counsel who may not realize that the client's conduct, awareness, and sophistication are also at issue even though a professional is involved.

In *Yale*, the client hired an attorney to assist her in preparing a trust. The client sued the attorney because she alleged that the trust transmuted her separate property to community property. The Court found the client had read the trust, including the provisions granting the separate property to community property, and was "entirely conversant" with the issues. The Court found the client had the "basic knowledge" to question her attorney, but chose to remain quiet and proceed with the trust.

At trial, a jury allocated a percentage of fault to the client. On appeal, the client had several arguments that we often see from legal malpractice plaintiffs. First, she argued that the comparative fault instruction should not have been given because all she did was rely on her attorney's advice. She also argued that she did not have the knowledge or expertise to understand the trust that her attorney prepared. Finally, she argued that the instruction was inappropriate when her conduct did not interrupt the causal chain from the attorney's negligence.

The Court did not agree and held the comparative fault instruction was proper. The Court focused on the client's knowledge and awareness of the potential community property issue. Knowing about the provisions in her trust, the Court found

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the client had an obligation to bring her concern to her attorney's attention and failed to do so. Thus, the Court found the client contributed to her own damages.

Streamlining Duplicative Negligence and Breach of Fiduciary Duty Claims

Legal malpractice defense attorneys often use a demurrer or motion to strike to deal with duplicative claims that arise from garden-variety professional negligence allegations. We often see complaints with a legal malpractice claim followed by a separate breach of fiduciary duty claim that merely states "see above paragraphs." These types of overbroad and conclusory allegations may no longer be enough to survive the pleading stage with the Second District Court of Appeal's recent decision in *Broadway Victoria, LLC v. Norminton, Wiita & Fuster* (2017) 10 Cal.App.5th 1185. The Court held that where the basis for a claim of breach of fiduciary duty arises from the same facts and seeks the same relief as a legal malpractice claim, the claim for breach of fiduciary duty is duplicative and should be dismissed. While other jurisdictions have held as much in the past, this is the first California appellate case confirming that a client cannot maintain duplicative legal malpractice and breach of fiduciary duty claims. To prove a breach of fiduciary duty requires an additional showing that the attorney breached a duty of confidence or loyalty.

In *Broadway*, Plaintiff Broadway Victoria, LLC ("Broadway"), a commercial real estate company, sued its former attorneys Norminton, Wiita, & Fuster, Thomas Norminton, and Thomas Norminton, PC ("Norminton") for legal malpractice and breach of fiduciary duty arising from Norminton's representation of Broadway in a breach of contract action. Broadway, under an assignment, had sued a third party for breaching a lease agreement by not giving it the right of first refusal. The trial court granted summary judgment against Broadway's contract claim because the assignment of the lease agreement did not include an assignment of the particular claim.

Broadway then sued Normington for legal malpractice and breach of fiduciary duty, because it argued that its attorneys should have advised it to clarify with the bankruptcy court that the assignment included the particular claim before suing the third party. The trial court granted Normington's nonsuit motion on the breach of fiduciary duty claim, because there was no evidence of a breach of loyalty or confidence.

The Second District Court of Appeal agreed and held "when the basis for a claim of breach of fiduciary duty arises from the same facts and seeks the same relief as the attorney negligence claim for malpractice, the claim for breach of fiduciary duty is duplicative and should be dismissed." While there may be evidence that the attorneys negligently failed to present an important litigation strategy to their client to support a finding of professional negligence, it could not alone support a finding of breach of fiduciary duty. Broadway argued that its attorneys took advantage of it by billing for legal services that the law firm knew were unjustified because the legal theories were weak. Without evidence of disloyalty, the Second District Court of Appeal disagreed: "To conclude otherwise would mean that any time an attorney is compensated for pursuing a losing litigation strategy that the attorney did not fully vet with the client, we must assume the attorney did so to fleece the client." The *Broadway* decision will be effective for distinguishing a professional negligence and breach of fiduciary duty claim, two causes that are often thrown hand-in-hand in legal malpractice complaints.

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Updates With California Rules of Professional Responsibility

The changes in advertising from the phone book to the internet brought with it new opportunities to advertise and new challenges in policing attorney solicitations. The State Bar of California Standing Committee on Professional Responsibility and Conduct recognized the challenges to attorneys with a presence on the internet and social media in a number of Formal Opinions. Attorneys must be cognizant of what they say, how they say it, and to whom it is said, especially on social media where privacy settings allow for instant public dissemination.

For example, Formal Opinion No. 2012-186 analyzed under what circumstances an attorney's postings on social media websites may be subject to professional rules and standards governing attorney advertising. In the Opinion, the Committee recognized that postings on Facebook and Twitter could be considered advertising and solicitations. The Committee provided a number of examples. An attorney's boasts about a trial win may not rise to the level of a communication under the current rules. But, an attorney who boasts about a win and asks the question "who wants to be next" in the same post likely does violate the rules. Sixteen letters typed "in the moment" could bring you before the bar.

In a related Formal Opinion No. 2016-196, the Committee stated that blogging by an attorney could also be considered a communication under the Rules of Professional Conduct. The Committee warned that while most "traditional blogs expressing the blogger's knowledge and opinions on various topics and issues, legal and non-legal will be regarded as core or political speech," a blog that also advertises for an attorney's employment must comply with the Rules of Professional conduct.

The current Rule 1-400 governing advertising and solicitation is long and convoluted. It will come as no surprise that the new proposed Rules of Professional Conduct completely revise Rule 1-400 by cutting it into a number of separate distinct rules. Although these new rules, primarily found in Section 7, are similar in many aspects to Rule 1-400, an obvious change is the addition of the term "real time electronic contact" as a form of solicitation. Notably, the proposed new rules do *not* define the term "communication", ultimately leaving interpretation of what constitutes a communication up to the courts or Committee.

These changes, viewed in conjunction with the Committee's analysis that blogs or Facebook comments may be considered a form of solicitation, should alert attorneys to be extremely mindful of statements made on social media. This is particularly true when an attorney does not have control over how their profile is published.

LinkedIn advertises itself as a "professional" social network and is often touted by many as a great way to advertise yourself to colleagues and employers. But, the state bar associations of Florida and New York determined that LinkedIn's "Specialties" Section could be considered a violation of the Rules of Professional Conduct. Under both Florida and New York Rules of Professional Conduct, attorney were barred from using terms like "Specialties" in advertising unless they were properly certified by the requisite organization. Although LinkedIn changed the name of the section to "Skills and Expertise" in 2012, attorneys must remain wary of any designations that could imply they are a certified expert in a certain field.

In this day and age of the internet, nothing is ever really deleted, even snapchat videos, and innocuous posts could result in an unwanted appearance before a bar committee. As social media and its use is ever-changing, attorneys will need to be flexible and cautious in their use of both the internet and new telephone "apps" for advertising, solicitation and, simply communicating with the public.

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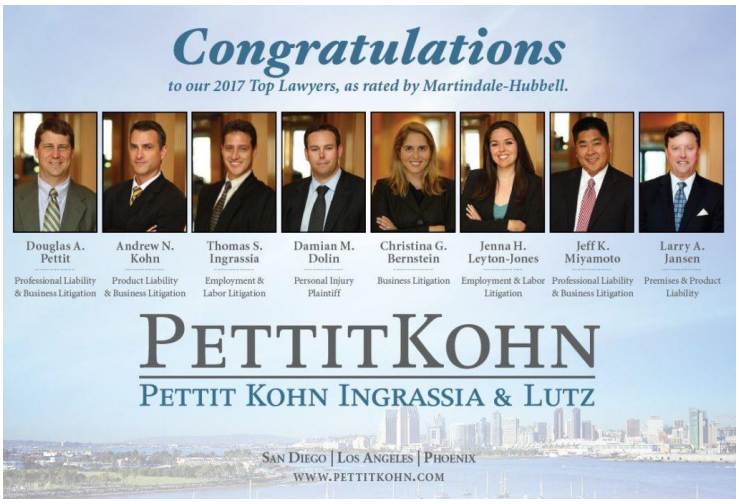
Top Lawyers 2017

Eight Pettit Kohn Ingrassia & Lutz San Diego attorneys have been included in San Diego Magazine's annual list of "Top Lawyers." For this issue, San Diego Magazine invited Martindale Hubbell to share its list of local lawyers who have obtained an AV-rated status, thus reaching the highest level of ethical standards and professional excellence. Martindale Hubbell has set the standard for peer review ratings.

Included in this list were our own **Shareholders Doug Pettit, Jeff Miyamoto, and Christina Bernstein for Professional Liability**, Larry Jansen for Bodily Injury Defense, Shareholder Andrew Kohn for Business Litigation, Shareholder Jenna Leyton-Jones for Labor & Employment, Shareholder Thomas Ingrassia for Labor & Employment Litigation, and Shareholder Damian Dolin for Personal Injury.



To view the full listing in more detail visit: 2017 Top Lawyers in San Diego

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Team Spotlight

A Minute in the Life Of:
Valerie Garcia Hong

Hometown: Westmont, Illinois (Southwest suburb of Chicago)

College: University of Illinois (Urbana-Champaign), Major in Journalism

Law School: Chicago-Kent College of Law

Biggest trend in Professional Liability: Lawyers are attractive targets of cyberattacks. A solo practitioner or small law firm may think hackers are targeting only the big law firms. However, a solo practitioner or law firm must still be aware of cybersecurity vulnerabilities. Hackers are far more sophisticated now – it's not the obvious email you receive from your "client," who has never traveled outside his hometown, who is now stranded in Cairo and needs a million bucks. Lawyers need to be proactive with their cybersecurity programs.

Most recent book read: Disrupt, The First Book on Leadership by the Filipina Women's Network, a collection of short stories of how Filipina women across the world thrive in the challenges of living in a multi-cultural global economy.

TV series currently watching: Mickey Mouse Roadster Racers on Disney Junior (when you have two girls under the age of 4).

Sport I most enjoy: I golf with a wonderful group of women called "Ladies on Course of San Diego" who host charity tournaments that benefit local nonprofits that address women's issues.

This is Pettit Kohn Ingrassia & Lutz PC's quarterly professional liability update publication. If you would like more information regarding our firm, please contact Doug Pettit, Christina Bernstein, Jeff Miyamoto, Valerie Garcia Hong, Matt Smith, Jennifer Hendricks, Rada Feldman, Derek Noack, or Emily Arnett at ***(858) 755-8500****.*