

Pettit Kohn's Professional Liability team has extensive experience representing attorneys, accountants, real estate brokers and agents, insurance brokers and agents, and other professionals against claims of professional malpractice and intentional torts. The firm has represented some of California's preeminent attorneys and law firms. Our attorneys have experience at all levels of representation and handle matters in Southern California and Arizona.

The firm has successfully handled numerous trials, obtaining jury verdicts in favor of professionals throughout Southern California, and successfully handled matters before California Courts of Appeal. Our background, experience, and willingness to listen to our clients' objectives ensures our clients get the representation they deserve

PROFESSIONAL LIABILITY UPDATE

Relationship-Driven Results

February 2017

We are pleased to bring you our firm's inaugural Quarterly Professional Liability update. We appreciate and are grateful for the opportunity to represent your interests and for earning your trust and confidence to provide you the best possible service. 2016 was a strong performance year for our Professional Liability team as our firm celebrated its 10 year anniversary and we recognize that our successes would not have been possible without your support and assistance.

We hope you enjoy the upcoming articles and professional liability subject matter knowledge that we would like to share for your benefit. We pride ourselves in building partner relationships with our clients and so we also would like to share with you some personal and professional biographical 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 Updates

Broad Application of the One-Year Statute of Limitations to An Attorney's Professional Services

California's one-year statute of limitations set forth at Code of Civil Procedure section 340.6, subdivision (a) is well-known to apply to garden-variety legal malpractice claims. However, a recent California Supreme Court decision followed by subsequent appellate decisions suggest the broad application of section 340.6(a) to claims like malicious prosecution, unfair business practices, and accounting.

Recently, in *Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, the court held that section 340.6(a) operates as a time-bar to claims that are not typically looked at as professional negligence claims; namely, unfair business practices, conversion, accounting, money had and received, and breach of contract. The plaintiff in *Foxen* contended that the four-year statute of limitations set forth at Code of Civil Procedure section 337 should apply because her claims were based on a written instrument. The plaintiff argued that her contract claims were not based on the "quality" of her attorneys' legal services, but her attorney's breach of "nonprofessional obligations" that are generally owed in any contractual relationship. (*Foxen, supra*, 6 Cal.App.5th at pp. 291-292). The court disagreed and held that plaintiff's contract claims necessarily depended on proof that her attorneys violated a professional obligation arising by virtue of them being her attorneys, including whether plaintiff's attorneys properly accounted for settlement funds in a personal injury action.

Our California Supreme Court in *Lee v. Hanley* (2015) 61 Cal.4th 1225 evaluated the legislative history in the Legislature's purpose in enacting section 340.6(a). After section 340.6(a)'s enactment, the focus shifted to the alleged wrongful conduct, rather than often poorly worded legal theories in a complaint to determine the governing statute of limitations. The Court found section 340.6(a) would apply broadly

to any claims that depend on proof that the attorney violated a “professional obligation” in the course of providing professional services. (*Lee, supra*, 61 Cal.4th at p. 1236.) The California Supreme Court cited to several cases including *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 195-196, a case successfully handled by [Pettit Kohn Ingrassia & Lutz PC](#) at the trial and appellate level, which applied 340.6(a) to a malicious prosecution claim against an attorney.

The *Foxen* Court confirmed that where more than one statute may apply to a particular claim, “a specific limitations provision prevails over a more general provision.” (*Foxen, supra*, 6 Cal.App.5th at p. 296 citing *Yee, supra*, 220 Cal.App.4th at p. 195 [more specific statute of limitations at section 340.6(a) applied to malicious prosecution claim against an attorney rather than general statute applicable to malicious prosecution claims, generally].) Thus, in *Foxen*, the Court found plaintiff’s Business and Professions Code section 17200 claim for unfair business practices that arose out of her attorney’s violation of professional obligations was also governed by the one-year statute of limitations at section 340.6(a) rather than the general four-year statute at Business and Professions Code 17208.

Attorney Malpractice Exception to California’s Mediation Confidentiality Provisions

The California Law Review Commission (“CLRC”), the independent state agency assisting the Legislature and Governor examining California law, is considering reforms to the mediation confidentiality provisions of California Evidence Code Section 1115 *et seq.* As legal malpractice defense practitioners, we have routinely raised the mediation confidentiality provisions following the California Supreme Court’s decision in *Cassel v. Superior Court* (2011) 51 Cal.4th 113 where the Court held that the policies underlying the mediation confidentiality provisions preclude a client from suing his attorney for alleged negligence occurring at a mediation. The *Cassel* decision has been broadly applied to include conversations “for the purpose of, in the course of, or pursuant to” the mediation, both before and after, even if the mediator is not present or involved.

Following *Cassel* and on recommendation from the Legislature, the CLRC has been reviewing whether to include an exception to the mediation confidentiality provisions as it applies to attorney malpractice since 2012. Other jurisdictions, including those states who have adopted the Uniform Mediation Act, already exclude alleged misconduct of an attorney during mediation from the mediation confidentiality provisions.

The CLRC has evaluated several [considerations](#) for the proposed exception known as Evidence Code section 1120.5, including an *in camera* screening process for alleged attorney misconduct, usage while the underlying mediated dispute is still pending, inclusion of mediator testimony, and application to attorneys acting as mediators. In 2015, the CLRC decided that any proposed exception would exclude attorney mediators and would only apply to attorneys representing clients at mediation. The CLRC is still evaluating the other considerations.

Based on the last five years, we can expect that the CLRC is likely to recommend to the Legislation an exception to the mediation confidentiality provisions. What it will actually look like is still under scrutiny. Last December, the CLRC considered revisions to proposed Evidence Code section 1120.5 and discussed the possibility of requiring the California State Bar to collect data if the proposed exception is enacted. The proposed new law will still be made public for comment for several months with anticipated changes before the Legislature has an opportunity to vote on it.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

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Best Law Firms

Pettit Kohn Ingrassia & Lutz is proud to announce their selection as a Tier One "Best Law Firm" for Legal Malpractice – Defendants ranked by U.S. News & World Report.

The U.S. News – Best Lawyers® "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. To be eligible for a ranking, a law firm must have at least one lawyer listed in The Best Lawyers in America© list for that particular location and specialty.

Two Shareholders, [Douglas Pettit](#) and [Thomas Ingrassia](#), were selected for inclusion in The Best Lawyers in America® for 2017. Mr. Pettit has been recognized for seven consecutive years and Mr. Ingrassia has been recognized for five consecutive years.

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The complete 2017 "Best Law Firms" rankings can be found at <http://bestlawfirms.usnews.com/> and The Best Lawyers recognition can be found at <https://www.bestlawyers.com/>

Firm Attorney Accomplishments



Team Spotlight

We will highlight a team member in each issue. We start with Doug Pettit. Doug is a founding member of the firm and chair of the Professional Liability department. Super Lawyers identified him as one of the top ten lawyers in San Diego last year and Best Lawyers in America recognized him as the top legal malpractice attorney in San Diego two years ago.

A Minute in the Life Of: **Douglas Pettit**

Hometown: New Cumberland, West Virginia (population: 1,200)

College: Bethany College, West Virginia majoring in Economics

Law School: Washington & Lee University

Biggest trend in Professional Liability: The use of technology in the professional marketplace. The speed and access of information arising from advancements in technology has provided both opportunity and risks. There are enhanced expectations of attorneys for electronic discovery, access to information, and speed of communications. These communications are not always as well thought out. Also, handling electronic document discovery in a cost effective manner is becoming an inherent part of all cases.

Most recent book read: “A Man Called Ove” by Fredrik Backman

TV series currently watching: Longmire

Sport I most enjoy: To watch – soccer. To play – basketball (although the NBA still hasn’t returned any of my calls). I am still waiting for the 5’9” and under professional league.

When I’m not practicing law I spend my time: Volunteering as a coach for my eighth grade son’s basketball team, and going on family hikes.



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