

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.

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PROFESSIONAL LIABILITY UPDATE

Relationship-Driven Results

October 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.

CASE UPDATES

Successive Representation of Insiders and Small Corporate Clients: Different Disqualification Rules Apply After *Beachcomber Management Crystal Cove, LLC v. Super. Ct.* (2017) 13 Cal.App.5th 1105

It is your lucky day: Kim Kardashian, a very successful entrepreneur, walks into your law office and hires you to assist with her several related businesses.

You also help Kim set up a limited liability company with her four sisters (the "Company"). Emoji Management, LLC ("Management") serves as its managing member. Kim is the managing member of Management. The Company has four other members (Kim's sisters) who invested in it but have no participation in the day-to-day operations.

Since then, your law firm occasionally assisted the Company with some employee disputes, and a subpoena request in a lawsuit against one of Kim's other businesses.

A few months ago, one of the members, Kylie Jenner, has accused Kim of mismanaging the Company's funds and breaching duties to the other shareholders. Your law firm represented the Company along with Kim in responding to Kylie's letters threatening litigation and objecting to Kim's management of the Company.

Now, Kylie and the other members have filed a lawsuit on the Company's behalf as a shareholder derivative action against Management and Kim.

Kim and Management hire you to represent them, and the Company hires independent counsel. After you file an answer on behalf of Kim and Management, the Company demands that you withdraw or it will file a disqualification motion against you.

Should you withdraw?

The above scenario happened in *Beachcomber Management Crystal Cove, LLC v. Superior Court* (2017) 13 Cal.App.5th 1105.

Under the normal disqualification rules, you would be prohibited from representing Kim and Management.

The Rules of Professional Conduct prohibit an attorney from accepting "employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." (Cal. Rule of Professional Conduct 3-310(e).)

In successive representation cases, an attorney cannot continue the representation when the two representations are substantially related. If a former client demonstrates a "substantial relationship" between the subjects of the former and current representations, it is presumed that the attorney accessed confidential information. In this situation, disqualification is mandatory.

But the court in *Beachcomber Management Crystal Cove, LLC* held that for closely held corporations, there is a different rule. An attorney who previously represented a closely held company may represent a corporate insider in a derivative lawsuit against the insider. There is no threat to the attorney's duty of confidentiality to the company because the insiders are the source of the company's confidential information. (*Beachcomber Management Crystal Cove, LLC, supra*, 13 Cal.App.5th at p. 1122.) The rule for closely held companies turns on whether the insiders "had access to the same information as the attorney who represented both the insiders and the company." (*Ibid.*)

In the hypothetical situation here, all of your information came from Kim and Management (the insiders) as Kim had the exclusive right to manage the Company.

In light of this new published holding, in the scenario here, a disqualification motion will likely not succeed. However, this same rule may not extend to larger corporations. If there is any doubt as to whether your corporate client is a "small company," be careful about continuing such a representation. Similarly, take heed if there is any uncertainty on whether there are sources of confidential information that your insider clients do not have access to.

Pre-Trial Victories Are Proof of Probable Cause to Overcome Malicious Prosecution Claim Even If Claims Deemed to Be Brought In Bad Faith

The California Supreme Court confirmed its liberal approach in determining whether an attorney had probable cause to bring and maintain a lawsuit to defeat a malicious prosecution claim in its recent decision, *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767. The elements of malicious prosecution are familiar. A plaintiff must prove: (1) he obtained a legal termination of the underlying matter in his favor; (2) the underlying matter was brought and maintained against the plaintiff without probable cause; and (3) the underlying matter was initiated with malice. In California, professional liability defense attorneys often utilize a special motion to strike under the "anti-SLAPP" statute (Code of Civil Procedure § 425.16) to strike a plaintiff's malicious prosecution claim by proving that the attorney had probable cause when he brought and continued to litigate the underlying matter.

Areas of Practice

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Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

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Retail

Transactional & Business Services

Transportation

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The *Parrish* Court addressed the standard for determining whether the underlying matter was brought and maintained against the plaintiff without probable cause. The standard is already forgiving and lenient to attorneys sued for malicious prosecution, namely there is probable cause for the underlying matter if reasonable attorneys would agree the claims were tenable, not frivolous, and did not totally lack merit. To meet this standard, professional liability defense attorneys often rely on the “interim adverse judgment rule” which provides a defense to the attorney in a malicious prosecution claim if the attorney prevailed on an important ruling in the underlying action, which includes defeating a motion for summary judgment, obtaining a preliminary injunction, or defeating a nonsuit or directed verdict motion at trial. These victories under the “interim adverse judgment rule” establish that the attorney had probable cause to sue, even if he later lost at trial.

In *Parrish*, the law firm of Latham & Watkins sought an injunction on behalf of its client, FLIR Systems, to prevent alleged trade secret misappropriation by former employees. Through discovery, Latham & Watkins changed their theory to threatened misappropriation against the former employees when they learned that the former employees had submitted a business plan to another company before they were employed by FLIR Systems. Latham & Watkins defeated the former employees’ motion for summary judgment by submitting expert declarations that claimed the former employees needed information exclusively from FLIR Systems for their proposed business plan.

At trial, FLIR Systems’ experts admitted that the information was available from other sources for the former employees’ business plan. The former employees obtained a verdict against FLIR Systems and the trial court determined that FLIR Systems obtained the preliminary injunction and maintained the action in bad faith to limit competition.

As expected, the former employees sued Latham & Watkins and FLIR Systems for malicious prosecution. The trial court granted the defendants’ special motion to strike under the anti-SLAPP statute because it held the interim adverse judgment rule arising from the denial of the summary judgment showed the defendants had probable cause to defeat the malicious prosecution claim.

The California Supreme Court in *Parrish* affirmed and held that the trial court’s post-trial finding that the underlying matter was brought in bad faith did not vitiate its earlier finding granting the preliminary injunction and its denial of the summary judgment motion finding that the underlying matter had some arguable merit. The *Parrish* Court confirmed its liberal and lenient approach that litigants and their attorneys need not attempt to predict how a trier of fact would weigh competing evidence or abandon their claims if the evidence may come down against them. Where a litigant and his attorney knows of facts that would support a set of inferences to justify a favorable ruling on the merits, the litigant and his attorney may rely on those facts to continue to maintain his case.

Parrish is a useful roadmap for professional liability defense attorneys utilizing a special motion to strike under the “anti-SLAPP” statute to get their clients out of a malicious prosecution claim. For the motion, we need to present evidence that supports the attorney’s factual theories for each claim. If the attorney decided to change theories or claims during the litigation, we need to provide the facts that the attorney knew at the time that triggered the change in theory. So long as the action was not maintained through fraud, we can expect the interim adverse judgment rule to continue to help defeat a malicious prosecution claim.

BEST LAWYERS

Best Lawyers® has released their listing for the 2018 *Best Lawyers in America*® and Pettit Kohn Ingrassia Lutz & Dolin is proud to announce that three Shareholders have earned inclusion into this prestigious group.

For the eighth year in a row, Shareholder and Vice President **Douglas Pettit** has been recognized for his work in Legal Malpractice Law – Defendants. In addition to this recognition, Mr. Pettit has also been distinguished as the **2018 San Diego “Lawyer of the Year” for Legal Malpractice Law – Defendants** reflecting his identification as the top lawyer in San Diego in this practice area. Doug was also identified as the top lawyer in San Diego in this practice area in 2015.

The firm is also proud to announce that Shareholder **Jeffrey K. Miyamoto** was selected for inclusion in 2018 *Best Lawyers in America* for his work in the practice area of Legal Malpractice Law – Defendants.

Doug and Jeff are members of Pettit Kohn’s Professional Liability team.

First published in 1983, *Best Lawyers* is the oldest and most respected peer review publication in the legal profession. Spanning 75 countries world-wide and covering 145 practice areas, *Best Lawyers* is widely regarded as the most reliable, unbiased source of legal referrals anywhere. Pettit Kohn Ingrassia Lutz & Dolin congratulates Doug, Tom, and Jeff for their outstanding legal work and the high regard in which they are held by their peers. For additional information about Best Lawyers, please visit www.bestlawyers.com.



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Team Spotlight

This month we highlight Shareholder Jeff Miyamoto, who we are proud to announce has been included for the first year in the 2018 *Best Lawyers in America* listing for Legal Malpractice Law – Defendants.

A Minute in the Life Of: **Jeff Miyamoto**

Hometown: San Diego, CA

College: University of California, Irvine (majored in Economics)

Law School: University of San Diego

Biggest trend in Professional Liability:

The use of firm/company website content and social media in litigation. In defending professionals, I often see opposing counsel refer to our clients' online bios at deposition. It is important to frequently update and review your online profile for accuracy and compliance. On the flip side, when investigating our clients' adversaries, we have also found some very interesting and useful information on social media platforms such as Facebook, Twitter and LinkedIn.



Most recent book read: *Fantasy Life* by Matthew Berry

TV series currently watching: *Ozark* and *The Americans*

Sport I most enjoy: Playing in my weekly co-ed softball league. I have also been a long-suffering San Diego Padres season ticket holder since 1999 (the year AFTER we last made it to the World Series).

This is Pettit Kohn Ingrassia Lutz & Dolin 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.