

*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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# PETTIT KOHN

PETTIT KOHN INGRASSIA LUTZ & DOLIN

## PROFESSIONAL LIABILITY UPDATE

Relationship-Driven Results

April 2018

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.

### Recent Updates

#### **Litigation Privilege Not Applicable to "Bluffing" Demand Letters Says *Dickinson v. Cosby (2017) 17 Cal.App.5th 655***

Your longtime client and America's once-beloved entertainer Carvey Billstein walks into your law office and asks you to assist him with a demand letter threatening litigation. Ever since #MeToo went viral, several women have come forward with decades-old accusations of Carvey drugging and sexually assaulting them. In just a matter of hashtags, your client has changed from a beloved TV dad to an accused rapist in the public conscience.

A year ago, you represented Carvey in negotiating a deal with Netflix for a comedy special. The comedy special is due to air on Independence Day. Despite the controversy, Netflix announced it was planning to release the comedy special as scheduled.

Two days ago, Rainy Daniels, a well-known supermodel and TV personality, publicly accused your client of sexually assaulting her. Rainy appeared on Entertainment Tomorrow (ET) and said that Carvey drugged and raped her in 1982. Rainy also claimed that the rape story was not in her 2002 autobiography because Carvey and his lawyers pressured the publisher to remove it.

Since the airing of Rainy's interview on ET, several media outlets have contacted your client indicating an intention to run follow-up stories and seeking Carvey's comment. Your client hires you to represent him in responding to the media outlets with a demand that they stop the release of Rainy's fabricated rape story and threat of litigation. Your client claims that Rainy's rape story is a lie and contradicts what she wrote in her own book. The only story Rainy gave 16 years ago in her autobiography was that she refused to sleep with Carvey and he blew her off.

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Netflix just advised you that it will pull the plug on the comedy special if the scandal grows. Your client wants to dissuade the media outlets from running the story before the Independence Day release, although he does not want to sue if any do run the story.

Should you write the demand letter?

In light of the new published holding in *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, lawyers should be careful about sending a demand letter suggesting that accusations against their clients are “lies.”

California’s Civil Code section 47(b) litigation privilege may bar claims based on pre-litigation demands made in anticipation of litigation and logically related to the action. The litigation privilege’s broad protection applies to a pre-litigation communication so long as litigation was actually contemplated. But the court of appeal’s holding in *Dickinson* is an instructive warning on just how high the bar is for showing that “litigation was contemplated in good faith and under serious consideration” when the demand letter was sent.

In *Dickinson*, former supermodel and TV personality Janice Dickinson sued Bill Cosby and his lawyer for defamation based on demand letters from Cosby’s attorney, on behalf of Cosby, sent to several news media outlets suggesting that Dickinson was a liar. In 2014, Dickinson accused Cosby of drugging and raping her in 1982 in an interview on Entertainment Tonight (ET). ET also ran a story that said Dickinson claimed the publisher omitted the rape story from her 2002 autobiography because of pressure from Cosby and his lawyers. Cosby’s attorney sent a demand letter to media outlets who indicated an intent to run follow-up stories to Dickinson’s interview on ET. The letterhead read: “CONFIDENTIAL LEGAL NOTICE” and “PUBLICATION OR DISSEMINATION IS PROHIBITED.” The demand letters stated that Dickinson’s rape allegations were a “fabricated” and “defamatory lie” and explicitly threatened litigation if the media outlet ran Dickinson’s rape story.

The *Dickinson* court rejected the argument made by Cosby and his (now former) lawyer in their anti-SLAPP motions that the demand letter was a pre-litigation communication protected by the absolute litigation privilege. The demand letters were sent only to media outlets which had not yet run the story but indicated an intention to do so. And Cosby never sued any media outlets which ran the story. Thus, the demand letters were simply a “bluff” intended to scare the media outlets into silence, “but with no intention to go through with the threat of litigation if they were uncowed.” (*Dickinson, supra*, 17 Cal.App.5th at p. 684.) Dickinson’s defamation lawsuit against Cosby and his lawyer is presently active in trial court. In March 2018, the California Supreme Court denied Cosby’s petition for review.

In the hypothetical situation here, your client advised you that he does not want to sue media outlets and the letter is only intended to dissuade the outlets from running the story. In light of this new published holding, in the scenario here, the demand letter may not qualify for protection under the litigation privilege. If there is any doubt as to whether a pre-litigation demand on behalf of a client is a serious threat of litigation, as opposed to just a settlement “bluff,” be careful about clicking “send.”

## Proposed Revisions Regarding the Relationship Between Mediation Confidentiality and Attorney Malpractice Claims

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We often recommend mediation to our clients as a widely-used alternative dispute resolution option for a neutral party to facilitate settlement discussions between parties. California's mediation privilege, framed by California Evidence Code §§ 1115-1128, has been in place for over twenty years. Uninhibited, candid, and protected communications during mediation have been crucial to effective dispute resolution. For many of our clients, the mediation privilege provides a degree of assurance that what we say in mediation will not be later used to our detriment. However, plaintiffs' professional negligence attorneys on behalf of their clients have raised problems with the existing mediation laws when proving that the client's attorney committed malpractice or engaged in other misconduct during mediation. (See, e.g. *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118.)

Based on the competing interests between assuring candid disclosures at mediation against the difficulties of properly assessing attorney misconduct, the California Law Revision Commission ("Commission") has been tasked with providing research and recommendations to the Legislature related to Senate Concurrent Resolution ("SCR") No. 91. The Legislature had requested the Commission to evaluate the "relationship under current law between mediation confidentiality and attorney malpractice and other misconduct..." Notably, other jurisdictions including District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, and New Jersey have implemented the Uniform Mediation Act ("UMA") which also includes a carve-out provision that directly addresses the intersection of mediation confidentiality and professional misconduct. (See Uniform Mediation Act § 6(a)(6).)

In December 2017, the Commission completed its research and issued its Final Recommendation, which can be found at <http://www.clrc.ca.gov/pub/Printed-Reports/RECpp-K402.pdf>. The Commission has recommended an exception known as proposed Evidence Code § 1120.5 to California's mediation confidentiality law which would carve out and, consequently weaken, the privilege related to attorney misconduct claims. The Commission states the exception would "focus on holding attorneys accountable for mediation misconduct, while also allowing attorneys to effectively rebut meritless misconduct claims." (See proposed Evidence Code § 1120.5 & Comment.)

The Commission states that proposed Evidence Code § 1120.5 would not be used to undo a settlement and would protect against claims based on buyer's remorse. The exception would only apply in a State Bar disciplinary proceeding, a claim for damages due to legal malpractice, or an attorney-client fee dispute. It is only applicable where there has been a claim that an attorney breached a professional obligation that occurred in a mediator context. It is not applicable to attorneys acting in roles as mediator. At this time, mediators cannot be called to testify or produce certain documents in the malpractice claim. The full breadth of proposed Evidence Code § 1120.5 can be found in the Final Recommendation.

The Senate Judiciary Committee hearing on SCR No. 91 is scheduled for the end of April. The Committee's decision to accept the Commission's recommended changes to existing mediation laws will have a significant impact in how we defend our clients.

## San Diego Super Lawyers 2018

Pettit Kohn Ingrassia Lutz & Dolin is excited to announce that two attorneys from its Professional Liability team, shareholders Douglas Pettit and Valerie Hong, have been selected for inclusion in the 2018 San Diego *Super Lawyers*® list. Each year, only 5 percent of attorneys are selected to this list in each state.

Super Lawyers is a Thomson Reuters business, which rates lawyers from over 70 practice areas who have attained a high degree of peer recognition and professional achievement. The multiphase selection process includes a statewide survey, independent evaluation of candidates, and peer reviews by the top candidates in their practice area. The result is a credible listing of experienced attorneys that can be used as a resource for those seeking the top legal counsel.

Douglas Pettit, shareholder and co-founder of the firm, has been included in this list for the 12<sup>th</sup> consecutive year. Mr. Pettit is an accomplished trial attorney and member of the American Board of Trial Advocates (ABOTA). In addition to his recognition by Super Lawyers, Mr. Pettit was distinguished by *Best Lawyers*® as the San Diego “Lawyer of the Year” for Legal Malpractice Law – Defendants for both 2015 and 2018.

Shareholder Valerie Garcia Hong has been included in the San Diego *Super Lawyers* list for the 4<sup>th</sup> consecutive year. Ms. Garcia Hong is a seasoned attorney and helps clients resolve a diverse range of complex business litigation matters. She has also handled high-stakes personal injury and wrongful death cases through trial. Ms. Garcia Hong is also an active community member who holds several leadership roles, including board member and past President of Filipino American Lawyers of San Diego, and board member of Women of Color in the Law.



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## Team Spotlight

Shareholder Christina Bernstein has over 15 years of civil litigation experience representing individual and corporate clients. Christina works with clients from case inception through trial to develop a specifically tailored case plan to achieve each client's specific goals. She has extensive experience in civil litigation, including matters involving construction, personal injury, product liability, professional liability, and contract and property disputes. Christina has handled numerous successful appeals and speaks to fellow lawyers on preserving issues for appeal at trial.

Ms. Bernstein was recently named to San Diego Magazine's 2018 Top Lawyers list in the practice area of Professional Liability. The list is comprised of attorneys who have achieved an AV rating from Martindale-Hubbell. Martindale-Hubbell's Peer Review Ratings have recognized lawyers for their professional excellence and high ethical standards for more than a century.

### A Minute in the Life Of: **Christina Bernstein**

**Hometown:** Oceanside, CA

**College:** University of California San Diego

**Law School:** George Washington University Law School

**Biggest trend in Professional Liability:** Cyber security breaches

**Most recent book read:** Camino Island by John Grisham

**TV series currently watching:** Just finished Stranger Things 2

**Sport I most enjoy:** Tennis



*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.*