

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.

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PROFESSIONAL LIABILITY UPDATE

Relationship-Driven Results

September 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

First Comprehensive Changes to Rules of Professional Conduct Become Operative Next Month

On May 10, 2018, the California Supreme Court approved the first comprehensive changes to the Rules of Professional Conduct since 1989. The 69 new or amended rules (up from 46), which will become operative in November 2018, bring the California rules into closer alignment with the ABA's Model Rules.

The rules most likely to affect your practice are detailed below.

Communication with Clients (Rule 1.4)

Current Rule 3-500, "Communication," requires that a lawyer shall keep a client reasonably informed about "significant developments" relating to the employment or representation.

New Rule 1.4 is more specific and in line with the Model Rule. In addition to requiring lawyers to keep the client reasonably informed about significant developments, the lawyer must also:

- Promptly inform the client of any decision or circumstance requiring either disclosure or the client's informed consent;
- Consult with the client about the client's objectives and the manner of achieving them; and
- Advise the client of relevant limitations on the lawyer's conduct, such as those methods of assistance prohibited by the rules.

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Unconscionable Fees (Rule 1.5)

Current Rule 4-200 states that an attorney may not charge or collect an unconscionable fee. The current rule lists factors that may be considered in determining whether a fee is unconscionable. New Rules 1.5(b)(1) and 1.5(b)(2) add the following factors to the list: (1) whether the lawyer engaged in “fraud or overreaching” in negotiating or setting the fee; and (2) whether the lawyer has failed to disclose material facts.

These changes are significant. The current factors make it difficult to argue a fee is unconscionable. The “overreaching” and failure to disclose “material” facts allow for a variety of arguments claiming a fee to be unconscionable.

Fee Sharing (Rule 1.5.1)

Pure referral fees are still permitted under new Rule 1.5.1. However, to divide fees for shared work or responsibility, attorneys now need to obtain informed written consent from the client at the time of the agreement or as soon as reasonably practicable.

Conflicts of Interest (Rule 1.7)

Current Rule 3-310 implements a “checklist” approach to current client conflicts, listing the instances in which written disclosure of a potential conflict is required. In keeping with the Model Rules, new Rule 1.7 takes a more global approach, requiring the attorney to consider first whether the representation is “directly adverse to another client in the same or a separate matter.” Comment [2] expands the definition of “matter” to encompass “any judicial or other proceeding, application, request for ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons.” The new conflict rule therefore prohibits representation of a client if that client’s interests are adverse to those of another client the lawyer has counseled or represented in almost *any* capacity.

Additionally, under the new rule, a lawyer may not accept representation without obtaining informed written consent where “there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.” Even without direct adversity, the lawyer is still required to disclose and obtain informed written consent if there is any other interest that could possibly impact the lawyer’s responsibilities to the client.

Safekeeping of Client Property (Rule 1.15)

Current Rule 4-100, which governs the safekeeping of client property, requires that funds received or held for the benefit of the client be segregated in a client trust account. However, the current rule does *not* require that advance deposits on fees be held in a client trust account. The flexible nature of the current rule means that firms can deposit advance fee payments into the firm’s operating accounts.

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As of November 1, 2018, this practice would violate the Rules: new Rule 1.15 explicitly adds “advances for fees” as client property that must be held in trust, thus requiring that essentially *all* funds received from a client be maintained in a client trust account in California. The only exceptions are flat fees (if disclosed in writing that the client has the right to have the flat fee deposited in a trust account) and true retainers, which are classified not as funds belonging to the client but rather funds belonging to the lawyer because the retainer is earned upon receipt.

The new rule also keeps the language regarding funds “received **or held** for the benefit of the client.” This suggests that when the new rules go into effect, client funds already held in a firm’s operating account and not yet earned will likely need to be identified, segregated, and moved to a trust account maintained in California.

Duties to Prospective Clients (Rule 1.18)

Rule 1.18 is a new rule codifying existing evidentiary and professional standards. Rule 1.18 designates any person who consults a lawyer for the purpose of retaining the lawyer or securing legal advice as a prospective client. Under the new rule, lawyers are prohibited from disclosing or using confidential information obtained from the prospective client.

Additionally, lawyers are prohibited from accepting representation of a client with interests materially adverse to those of a *prospective* client, even if the lawyer does not actually accept representation of the prospective client. The exception to this rule is if all affected parties have given informed written consent, or if the lawyer took reasonable measures to avoid obtaining more information than necessary from the prospective client, is timely screened from the matter, and written notice is provided.

Under the new rules, lawyers should be especially careful in consulting with prospective clients to avoid accepting more information than necessary. When in doubt, lawyers should disclose the potential conflicts in writing and attempt to obtain informed written consent to the representation. And remember, under new Rule 1.4, lawyers have a duty to **promptly** inform the client of any circumstances requiring disclosure, such as a potential conflict arising out of information obtained from a prospective client.

Prohibition on Discrimination (Rule 8.4.1)

The new rule prohibiting discrimination, harassment, and retaliation is the most expansive of the new rules, and one which every California lawyer should be aware. This rule is the only rule for which two versions were released for public comment.

Current Rule 2-400 prohibits discrimination in the management or operation of a law practice, and requires a prior adjudication of unlawful conduct by a tribunal of competent jurisdiction before a lawyer can be subject to discipline by the State Bar. The current rule provides a due process ‘buffer’ between attorneys and disgruntled employees or clients alleging discrimination.

New Rule 8.4.1 dramatically expands the scope of the rule and eliminates the requirement that there be a final determination of unlawful discrimination before the State Bar can impose discipline. Rule 8.4.1 **prohibits unlawful**

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discrimination, harassment, and retaliation in connection with the representation of a client, the refusal to accept a client, termination of a client, and in law firm operations. Under the new rule, lawyers can be subject to discipline by the State Bar on a mere *accusation* of discrimination. Moreover, the alleged discrimination need not be just in the operation of a law practice; it could arise from the choice to represent or not represent a client as well. Rule 8.4.1 also recognizes a much wider range of “protected characteristics” than are recognized by Rule 2-400.

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BEST LAWYERS

Pettit Kohn Ingrassia Lutz & Dolin is proud to announce that San Diego shareholders Douglas Pettit, Andrew Kohn, Thomas Ingrassia, and Jeffrey Miyamoto have been recognized as leading practitioners in their practice areas by *Best Lawyers*® in the 2019 listing of *The Best Lawyers in America*. Since it was first published in 1983, *Best Lawyers* has become universally regarded as one of the premier guides to the legal profession. This exclusive listing is compiled based on an exhaustive peer-review evaluation in which tens of thousands of top lawyers provide confidential nominations and feedback.

Two of the recognized shareholders are both leaders of Pettit Kohn's Professional Liability team:

Shareholder and Vice President [Douglas Pettit](#) has been included in the *Best Lawyers* listing for his work in Legal Malpractice Law – Defendants each year since 2012. He was also named the *Best Lawyers* “Lawyer of the Year” in San Diego for this practice area in both 2015 and 2018. This year, Mr. Pettit has also been recognized for his work in Commercial Litigation.

Shareholder [Jeffrey Miyamoto](#) was also included in this publication for the second straight year for his work in Legal Malpractice Law – Defendants.

This recognition is a testament to their superior legal work and outstanding professionalism, and Pettit Kohn Ingrassia Lutz & Dolin congratulates them for receiving this honor.

Best Lawyers is published in 75 countries world-wide and processes over seven million evaluations spanning 145 practice areas. For over three decades, the publication has earned the respect by the legal profession, media, and public as a credible source of referrals. For more information about *Best Lawyers*, visit their website at www.bestlawyers.com.



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Team Spotlight

Senior Counsel Matthew Smith has extensive experience in all aspects of civil litigation, including trials, arbitrations, and mediations. Matt represents individuals and business clients on a wide variety of professional and business litigation matters. He has served as lead counsel or co-counsel in more than a dozen trials and arbitrations. Matt has also handled several successful appeals and has argued before the Fourth District Court of Appeal. His primary focus is professional liability and business litigation matters.

A Minute in the Life Of: **Matthew Smith**

Hometown: Redmond, WA

College: University of Washington

Law School: Washington & Lee University

Biggest trend in Professional Liability: Conflicts of interests continue to be a major focus in most Professional Liability matters. Lawyers, accountants, and other professionals owe strict ethical obligations to current and former clients. These duties, combined with the pressures of a busy practice, can create potential pitfalls for any professional. This is particularly the case when people transition from one firm to another.



Most recent book read: Fire in the Hole – a collection of short stories by Elmore Leonard

TV series currently watching: Better Call Saul

Sport I most enjoy: College football (Go Huskies!)

When I'm not practicing law, I spend my time: Spending time with my family and helping coach my daughter's softball team.