

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 would also 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.

Mediation Confidentiality Standards Even Stricter in Light of New California Evidence Code Section 1129: What Attorneys and Insurers Should Know About the Changes

On January 1, 2019, the California Legislature amended California Evidence Code Section 1129. The amendment, found in SB-954, added a new section to the portion of the Evidence Code dealing with mediation confidentiality. The result is a new standard for mediations: a mandatory, written informed consent disclosure before all mediations.

The Code now mandates that attorneys must, as soon as reasonably practicable and *before the client agrees to participate in mediation*, provide the client with a printed disclosure containing all confidentiality restrictions. The attorney must obtain the client's informed written consent in the form of a signed acknowledgement that she has read and understood those restrictions. If the attorney is not retained until after a client has already agreed to participate in mediation, the attorney must still comply with the printed disclosure requirement, and promptly provide the client with a disclosure form.

This disclosure requirement applies to insurers as well. Insurers who retain external counsel on behalf of their insured are not exempt from this new law and are also required to execute and sign the disclosure form. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 119 [confidentiality applies to all participants of mediation]; *See Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1406.)

The disclosure statement must be:

1. Printed
2. In the preferred language of the client
3. In at least 12-point font
4. On one single page, detached from any other document
5. Include the names of the attorney and client
6. Signed and dated by the attorney and client

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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Generally, the disclosure agreement must state at least the following:

1. All communications, negotiations, or settlement offers in the court of mediation must remain confidential.
2. Statements or writings made in preparation of mediation are not admissible or subject to discovery.
3. A mediator's report, opinion, or recommendation cannot be submitted or considered by a court.
4. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct in connection with mediation.
5. All communications between the client and the attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used, even if the client later decides to sue the attorney for malpractice due to something that occurred during mediation.
 - a. An attorneys' potential liability for malpractice is not limited and the client can still report an attorney for professional misconduct to the California State Bar.

What are the remedies for failure to obtain the signed mediation confidentiality disclosure?

The attorney's failure to undertake this step may be a basis for Bar discipline. However, the failure to obtain informed consent is not a basis to later overturn the parties' settlement. As this new provision becomes more firmly entrenched in practice, failure to comply is likely to become a standard of care issue.

The new disclosure also has implications for legal malpractice cases. Mediation confidentiality and attorney accountability have long been competing policy interests, with mediation confidentiality typically prevailing. The new confidentiality disclosure ensures the client fully understands—and gives consent in writing—that they cannot and will not use mediation communications in a later lawsuit against their attorney.

Because insurers also need to execute this informed consent form, this new amendment could have consequences for insurers. While mediation confidentiality has always been the rule, the new confidentiality disclosure requirement ensures all participants in the mediation are prevented from using mediation communications in nearly every future circumstance. Insurers will be prohibited, in most cases, from offering *any* evidence related to mediation in any later coverage action against the insured. (*Ironshore Specialty Ins. Co. v. 23andMe, Inc.* 2015 U.S. Dist. LEXIS 64145 at 12 [disallowing an insurance company from submitting a mediation statement by its insured].) An insurer must demonstrate an "extreme circumstance justifying an exception to the privilege." (*Cassel*, 51 Cal.4th at 119.) These extreme circumstances apply only to instances where due process is implicated, or where literal interpretation would produce absurd results, clearly violating the legislature's presumed intent. (*Cassel*, at 124.)

Thus, insurers should be mindful that correspondence and documents drafted in preparation for mediation, all statements during mediation, and any orders following, are strictly confidential; and courts will now be even more

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reluctant to allow any information related to mediation in subsequent action in light of the new section 1129 of the California Evidence Code.

Likewise, attorneys should be sure to provide a disclosure form to every client and insurer for signed execution before a client agrees to engage in mediation. Firms should consider preparing a standardized form based on the Code's attached example to more easily and readily provide to all clients before discussing the possibility of mediation.

LEGAL DEVELOPMENT

First District Court of Appeal Follows Second and Fourth, Applying One-Year Statute of Limitations to Malicious Prosecution Claims Against Attorney Defendants
(*Connelly v. Bornstein* (2019) 33 Cal. App. 5th 783)

In *Connelly*, the First District Court of Appeal recently affirmed a trial court's application of the one-year statute of limitations for attorney professional misconduct (Code Civ. Proc., § 340.6(a)), instead of the two-year limitations period for personal injury claims, to a tenant's malicious prosecution claim against a landlord's attorney. The trial court dismissed that claim as untimely.

The Court of Appeal concluded that the application of § 340.6 (a) to a malicious prosecution claim against an attorney who performed professional services in the underlying litigation is appropriate because of the similarity of attorneys' obligations (Rules Prof. Conduct, rule 3.1(a)(1)) to the elements of malicious prosecution, the policy concerns about the cost of malpractice insurance, and the unavailability of the advice-of-counsel defense to lawyers defending malicious prosecution claims.

In so holding, the court followed a line of cases starting in 2011 in which appellate courts in the Second and Fourth district had previously held the one-year statute of limitations in C.C.P. § 340.6(a) applied to malicious prosecution claims against an attorney. (*Vafi v. McCloskey* (2011) 193 Cal.App.4th 874; *Yee v. Cheung* (2013) 220 Cal.App.4th 184). (*Yee* was a case argued successfully by our firm at the trial court and appellate court and established precedent in the 4th Appellate District). Following the decisions in these cases, the Supreme Court in *Lee v. Hanley* (2015) 61 Cal.4th 1225 had issued an opinion discussing the scope of section 340.6(a) as applied to a claim seeking the return of advanced but unearned attorney fees. In doing so, the Supreme Court held that "the statute applies not only to actions for professional negligence but to any action alleging wrongful conduct, other than actual fraud, arising in the performance of professional services."

The Court of Appeal found that section 340.6(a) applies to malicious prosecution claims against attorney defendants, explaining that an action for malicious prosecution closely resembles an action for legal malpractice, and pointing out that "the wrongful conduct when an attorney engages in malicious prosecution is the provision of professional services itself" rather than merely incidental to the provision of professional services. Thus, the court reasoned, following *Lee*'s construction of section 340.6(a), the one-year statute of limitations applies to malicious prosecution claims against attorneys.

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Team Highlights & Successes

Pettit Kohn's Professional Liability team has an excellent reputation and are amongst the most skilled and experienced in the region. Our team handles litigation in both state and federal courts, including appeals.

In recent months, Pettit Kohn Ingrassia Lutz & Dolin's Professional Liability team has achieved a number of victories for its clients, including:

- Prevailed on an anti-SLAPP motion to strike malicious prosecution action, arising from an underlying class action lawsuit brought against a manufacturer. The court also awarded attorney's fees in the amount of \$35,000;
- Successfully defended a substantial motion for sanctions for client's alleged misstatements to the court, on the grounds that the motion was procedurally barred by the safe harbor requirements of Code Civ. Pro. Section 128.7;
- Succeeded in striking improper claims for punitive damages and attorney's fees in complaint against a law firm for legal malpractice and violation of California's Unfair Competition Law;
- Won a sanctions award recovering all requested attorney's fees spent litigating ESI discovery abuses in a trade secrets case;
- Prevailed on a motion for summary judgment in a legal malpractice claim on the basis that the attorney's malpractice did not cause harm where the plaintiff alleged that the attorney improperly pursued equitable, instead of contractual, remedies relating to a real estate purchase contract;
- Prevailed on an anti-SLAPP motion in a malicious prosecution action that arose from an underlying case where our clients sued directors and officers for allegedly breaching fiduciary duties by taking on unnecessary debt, instead of equity, in a scheme to take the assets of a publicly traded company. The court also awarded attorney's fees in the amount of \$112,000. The matter is presently on appeal and was argued this month;
- Prevailed on an anti-SLAPP motion in a case where a homeowner sued his Homeowner's Association and its attorney for actions relating to the plaintiff's home and attempts to repair a roof. The plaintiff brought causes of action for unfair business practices, defamation, and aiding and abetting. The court also awarded attorney's fees in an amount of approximately \$25,000.

Pettit Kohn Ingrassia Lutz & Dolin has successfully handled numerous trials resulting in favorable jury verdicts for professionals throughout Southern California. We are the law firm of choice to defend attorneys, a fact recognized by U.S. News *Best Law Firms*, which ranks us in the top tier of firms in San Diego for Legal Malpractice Law – Defense.

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Firm News

Pettit Kohn Opens New Office in Tucson, Arizona

AV-rated civil and trial litigation law firm Pettit Kohn Ingrassia Lutz & Dolin is pleased to announce that the firm has expanded its footprint to Tucson, Arizona. Shareholder and accomplished ABOTA attorney, Grant Waterkotte, has opened and completed the move into the firm's second Arizona office. The firm's expansion brings additional service offerings driven by the growing needs of its client base.



**Pettit Kohn Proudly Supports the American Bar Association's
Fall Legal Malpractice Conference**

Pettit Kohn Ingrassia Lutz & Dolin is proud to support the American Bar Association and their 2019 Fall Legal Malpractice Conference taking place on September 11-13, 2019 at the Hilton Bayfront Hotel in San Diego.

The event offers programming on legal malpractice issues, developments and trending topics as well as networking opportunities with legal practitioners from across the United States. Attendees will earn up to 6.75 CLE credit hours (including 3.25 ethics hours). For more program information or to register, visit their website here: <http://bit.ly/2WWHjP6>. We hope to see you there!



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Team Spotlight

A Minute in the Life of Caitlin Clarke

Hometown: Princeton, New Jersey

College: University of Michigan

Law School: George Washington University School of Law

Most recent book read: “The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.”

TV series currently watching: Lonesome Dove. It’s an old western. I read the book while traveling through rural Texas, and now I’m watching the show.

Sport I most enjoy: To play—Ice hockey. To watch—College football. Go Blue!

When I’m not practicing law, I spend my time: Hiking with my dog, running, and enjoying San Diego’s great restaurants and breweries.

Biggest trend in Professional Liability: Cybersecurity and professionals’ liability for failing to take adequate measures to protect against hacks and leaks. The risk is constantly evolving, and it is critical for professionals to be proactive and well-informed on the changing landscape of cyber liability. Lawyers (and other professionals) have obligations to safeguard their clients’ confidential information. Increasingly, professionals are expected to understand their company’s cyber security requirements and take adequate measures to secure their electronic data. Businesses must routinely provide their employees with best practices training on recognizing malicious communications, practicing safe wi-fi usage, safely storing and transmitting highly confidential material electronically, and how to respond to ransomware attacks. All professionals responsible for client data should seriously consider their need for both first-party and third-party cyber liability coverage.



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, Matt Smith, Jocelyn Hannah, Joseph Sammartino, Caitlin Clarke, Julia Dalzell, Alexander Cohen, or Sabrina Johnson at (858) 755-8500.