

*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*

*April 2020*

We are pleased to bring you our firm's Quarterly Professional Liability Update. We appreciate the opportunity to represent your interests. We are continuing to provide outstanding legal services to all of our clients in the midst of the global pandemic, while also adapting to new ways of doing business which promote the health and safety of our team.

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.

## **The Price of Incivility: When the Lawyer's Unprofessional Behavior Has Consequences for the Client and Potential Malpractice Consequences for the Lawyer**

*For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required.<sup>1</sup>*

In the practice of law, ethical behavior is universally recognized as being of paramount importance. However, *civil* behavior—cooperation, forthrightness, and respect for others—frequently takes a backseat. Too often, civility is viewed as weakness in a profession that demands nothing less than zealous advocacy. To appease clients and garner results, attorneys often cling to a litigation style founded on aggression, obstruction, and gamesmanship. The line between zealous advocacy and incivility is not always clear. Attorneys often test the limit because judges have historically been reluctant to sanction attorneys for anything but the most egregious behavior.

Recently, however, California state and federal judges have taken a more active role in denouncing incivility and have shown a new willingness to impose sanctions as both a punishment and deterrent. Monetary sanctions for incivility not only reflect poorly on the attorney but could possibly expose the attorney to a malpractice action if the behavior becomes a detriment to the client's case. Therefore, not only is civility required, and, more recently, actively sanctionable, it is also prudent in order to avoid potential repercussions of malpractice claims.

## **Civility: What Are the Rules & Regulations?**

The Code of Civil Procedure imparts a duty upon lawyers to act with civility in their professional dealings. California Code of Civil Procedure section 583.130 states all parties "shall cooperate" in bringing the action to trial or other disposition—indicating combative, uncompromising, gamesmanship behaviors will not be tolerated. Likewise, local court rules have codified their own civility

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guidelines. (See, e.g., Orange County Civility Guidelines [“Courts expect lawyers to show others respect. Lawyers are officers of the court. Each lawyer’s conduct should reflect well on the judicial system, the profession, and the fair administration of justice.”].)

The California State Bar and many other state and local Bar associations require new members to take an oath to practice with professionalism. New attorneys in California must promise to “treat opposing counsel with dignity, courtesy, and integrity.” Young attorneys may seek to adhere to this civility oath; however, as the years progress, many attorneys disregard these standards and engage in more incivility which include personal attacks in meet and confer processes, hearings and depositions, excessive objections in depositions, and gamesmanship in discovery. Noticing these trends, professional organizations, clubs, and associations have stressed the importance of civility as a core element of attorney professionalism. Many continuing education electives focus on civility, while organizations such as the Inns of Court and American Board of Trial Advocates impress the importance of civility on all members. While these rules, regulations, and reminders are present, courts are now also displaying a readiness to sanction conduct they deem uncivil.

### **Recent Federal and State Opinions Send a Clear Message: Civility is Required in the Practice of Law**

#### *Judge Bedworth’s Opinion in Lasalle v. Vogel*

In a recent 4<sup>th</sup> district opinion (*Lasalle v. Vogel*, 4th Dist. Ct. of Appeal No. G055381), an attorney’s lack of professional courtesy ultimately caused a substantial waste of the client’s time and resources. In *Lasalle*, the court reversed a default judgment obtained by the Plaintiff because the Plaintiff’s attorney rejected the Defense’s reasonable request for accommodation in favor of “gotcha” tactics. The court deemed this behavior uncivil and unprofessional and reversed the judgment.

*Lasalle* was a legal malpractice case. Counsel for Plaintiff had not received an Answer to the Complaint by the 35<sup>th</sup> day. On the 36<sup>th</sup> day, counsel mailed a letter to Defendant with a corresponding e-mail demanding that if Defendant did not respond by the following day, he would seek a default. Defendant had conferred with an attorney who corresponded with counsel for Plaintiff seeking an extension to file her Answer. Instead of agreeing to this extension, waiting a mere two business days after sending his letter, Plaintiff filed a default.

Defendant quickly responded through her attorney, seeking to set aside the default. Defendant’s attorney submitted an affidavit with her set aside motion explaining she was a single mother working full-time as a family law attorney and going through her own divorce, in which she had just discovered her husband failed to pay their mortgage and property taxes and the property had gone into default. Plaintiff opposed the relief and asked the court to take judicial notice of the Defendant’s record of State Bar discipline. The court did so and denied the requested relief. A default was entered against Defendant in the amount of \$1 million.

<sup>1</sup> Kim v. Westmoore Partners, Inc. (2011) 201 Cal. App. 4th 267

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Defendant appealed and the Fourth District Court of Appeal reversed. The court directed attorneys to behave better and remarked, in no uncertain terms, that a lack of professional courtesy will not win attorneys cases. The court addressed some instances of especially bad behavior, including the following:

*“We had a lawyer named John Heurlin who wrote to opposing counsel, ‘I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit,’ admonishing counsel to ‘educate yourself about attorney liens and the work product privilege.’ Mr. Heurlin closed his letter with the clichéd but always popular, ‘See you in Court.’ That and other failures resulted in Mr. Heurlin being sanctioned \$6,000 for filing a frivolous appeal and referred to the State Bar. Our court thought publishing the ugly facts of the case, which they did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, would get the bar’s attention. It didn’t.”*

The court concluded that Plaintiff’s actions were unreasonable and unprofessional, warning other attorneys to act with the utmost civility in upholding the integrity of the profession or risk adverse consequences for themselves and their clients.

*Judge Gallo’s 2019 Opinion in  
La Jolla Spa MD, Inc. v. Avidas Pharma. LLC*

In a recent opinion from the Southern District of California, the Honorable William V. Gallo sanctioned an attorney in the amount of \$28,502 for “aggressively harassing opposing counsel far beyond any sensible measure of what could be considered zealous advocacy.” (*La Jolla Spa MD, Inc. v. Avidas Pharmaceuticals, LLC*, (2019) Case No.: 17-CV-1124-MMA(WVG).) Judge Gallo also ordered the sanctioned attorney to self-report to the State Bar and attach the sanction order to any pro hac vice application for admission to practice in the Southern District of California *in perpetuity*. The court proclaimed that in over ten years, it had never seen such “atrocious conduct” that was more “fitting and more deserved” of the imposition of sanctions. (*La Jolla Spa, supra*, at 47:2-3.)

In *La Jolla Spa*, the court was able to gauge the offending attorney’s demeanor over the course of numerous discovery disputes. The court described her conduct as repeatedly raising her voice at opposing counsel and even the court, continuously interrupting counsel and the court, and characterizing Plaintiff’s case as a “garbage case” on multiple occasions. Judge Gallo also noted that the attorney repeatedly failed to meet and confer about discovery disputes, often stating she would respond at a later date but then failing to respond despite multiple efforts to follow up. At times, she simply ignored opposing counsel’s meet and confer communications. Her general demeanor during teleconferences with the court was noted to be consistently flippant, overly aggressive, truculent, and quick to confrontation.

However, the turning point was a deposition in which the attorney engaged in conduct that is not necessarily uncommon—but which the court made clear is unacceptable and sanctionable. According to the court, the attorney:

- Repeatedly objected to questioning;

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- Instructed her witness not to respond on grounds of relevancy;
- Coached her witness;
- Aggressively raised her voice, standing and motioning at counsel in a threatening manner; and
- Urged opposing counsel to hurry up his questioning, to ask questions in a different manner, or remarked his case was “garbage.”

The deposition was recorded by both a videographer and a stenographer, providing approximately 133 examples of misconduct for the court to evaluate, and ultimately sanction.

In a thorough and impassioned forty-seven-page detailed opinion denouncing this conduct, the court found the attorney acted in bad faith, justifying sanctions in the full amount sought by Plaintiff. Judge Gallo’s opinion certainly serves as a wakeup call to attorneys who rely on obstructive, abusive, and harassing behavior as part of their repertoire of “zealous advocacy”.

**What Should Attorneys Watch Out For?**

These recent decisions demonstrate courts are cracking down on uncooperative, obstructive, and dilatory gamesmanship, and re-instilling rules and guidelines setting forth the professional responsibilities of attorneys. In sum, attorneys should be aware that the following, while not exhaustive, represents common behavior that may result not only in detriment to a client’s case, but also sanctions against the attorney—resulting possibly even in a malpractice action down the road:

- Needlessly increasing the expense of litigation to cause detriment to your opponent;
- Speaking derogatorily or in an abusive or harassing manner to opposing counsel, witness, or parties;
- Interposing speaking objections, unsupported objections intended only to obstruct or impede the flow of questioning, or coaching a witness at depositions;
- Withholding or tampering with evidence;
- Failing to afford opposing counsel basic professional courtesies such as reasonable extensions, responses to communications, and deference to their schedule;
- Service of papers late on a Friday or on the day before a holiday in order to give opposing counsel less time to respond, in violation of section 7(d) of the San Diego guidelines on civility; and

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- Referring derisively to the merits of an opposing party’s case, such as calling the case “garbage” or “worthless.”

In refraining from abusive, uncooperative, and sanctionable behavior, attorneys can avoid potential malpractice suits and unhappy clients while upholding the respect and dignity of the legal profession.

## **LEGAL DEVELOPMENTS**

### **Lawyers’ Obligations After an Electronic Breach or Cyberattack**

As the holders of sensitive client information, law firms present an attractive opportunity for hackers. Indeed, it is often said that law firms, and businesses in general, are divided into two categories: those that have been hacked, and those that will be. In Formal Opinion 483, the ABA Standing Committee on Ethics and Professional Responsibility addressed the topic of an attorney’s ethical obligations when a data breach exposes confidential client information.

#### **Duty of Competence**

Model Rule 1.1 requires a lawyer to provide “competent representation to a client,” which “requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” In 2012, recognizing the impact of technology on the practice of law, the ABA clarified this rule to require lawyers to keep abreast of changes in the law and its practice, “including the benefits and risks associated with relevant technology[.]”

The committee notes that lawyers must use reasonable efforts to monitor the technology and office resources connected to the internet, as well as external data sources. Yet, an ethical violation does not necessarily occur if a data breach is not immediately detected. Rather, an ethical violation may occur when a lawyer does not undertake reasonable efforts to avoid data loss or to detect a cyber-intrusion.

When a data breach is either suspected or detected, Model Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate any damage caused by the breach. As a matter of best practices, lawyers should consider developing an “incident response plan” with specific procedures in place for responding to a data breach. A competent lawyer must then evaluate what occurred and how to prevent a reoccurrence, consistent with Model Rule 1.6(c), which requires lawyers to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.”

A lawyer must then determine whether electronic files were accessed, and if so, which ones. This information gathering process is necessary for a lawyer to understand the extent of the intrusion and to enable the lawyer to make a full disclosure to the client, consistent with the lawyer’s duties of communication and honesty under Model Rule 1.4 and 8.4(c).

#### **Duty of Confidentiality**

Model Rule 1.6(a) requires that “A lawyer shall not reveal information relating to the representation of a client” unless certain circumstances arise. The



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Retail

Transactional & Business Services

Transportation

2012 amendments added a duty in paragraph (c) that “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

An attorney’s obligation in preserving client confidentiality is not governed by a strict liability standard; rather, the obligation is one of reasonable efforts. Accordingly, Rule 1.6 is not violated even if data is lost or accessed, provided that the lawyer has made reasonable efforts to prevent the loss or access.

**Obligation to Provide Notice**

Model Rule 1.4(a)(3) provides that a lawyer must “keep the client reasonably informed about the status of the matter.” Rule 1.4(b) provides that “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Thus, when a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information, a lawyer has a duty to notify the client of the breach.

It is less clear whether lawyers must inform former clients regarding a data breach. Model Rule 1.9(c) provides that “A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation[.]” Model Rule 1.16(d) directs lawyers to return “papers and property” to client at the conclusion of a representation, and has commonly been understood to include the client’s file, irrespective of the form in which it is held. As a matter of best practices, lawyers are encouraged to reach agreement with clients prior to the end of a relationship about how to handle the client’s electronic information.

**Conclusion**

Even when lawyers make reasonable efforts to prevent the unauthorized disclosure of confidential client information and keep abreast of changes in technology, a data breach may nonetheless occur. When a data breach occurs, lawyers have a duty to notify clients of the breach under Model Rule 1.4. Such disclosure keeps the client “reasonably informed” and also permits the client to make informed decisions regarding the representation.

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## Team Highlights & Successes

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

- Doug Pettit and Caitlin Jones tried an eight-week legal malpractice and non-payment of fees case to a San Diego jury. The Plaintiff alleged that the firm's client failed to properly represent her in a lengthy will contest case against some of her children involving her deceased husband's will. Plaintiff asked the jury to award in excess of \$5 million, which included approximately \$2 million in alleged economic damages and emotional distress. (The trial court denied multiple motions to dismiss the emotional distress claim.) The jury found for the defendant law firm on plaintiff's claim and awarded unpaid attorneys' fees based on an account stated cause of action.
- Doug Pettit and Jocelyn Hannah successfully defended an order granting an anti-SLAPP motion on appeal to the Fourth District Court of Appeals. The firm brought an anti-SLAPP motion on behalf of the firm's client which was sued for malicious prosecution following a shareholder derivative suit in which it was alleged the plaintiff wrongfully took debt financing instead of equity in an effort to wrongfully take intellectual property owed by the corporate entity. The plaintiff appealed and the decision was affirmed following oral argument. The firm recovered all of the attorneys' fees incurred by the client in defending the lawsuit.
- Doug Pettit and Jocelyn Hannah were successful on appeal following an anti-SLAPP motion in another malicious prosecution case where the firm's client was sued following an unsuccessful trial involving breach of contract and violation of the Computer Fraud and Abuse Act claims. The 4<sup>th</sup> District Court of Appeals affirmed the trial court's decision following oral argument.
- Doug Pettit and Julia Dalzell prevailed on summary judgment where the plaintiff alleged the law firm failed to properly represent him in a breach of a real estate agreement where he sought specific performance. The trial court found that plaintiff could not establish that any alleged malpractice caused harm.

The Team has also continued to handle business litigation matters and has achieved a number of successes on these cases as well, including:

- After prevailing on summary judgment on behalf of an HOA client, Matthew Smith also prevailed at the California Court of Appeal, securing a hard-fought victory. Pettit Kohn also received attorneys' fee awards in favor of their client totaling more than \$50,000.
- Matthew Smith successfully defended a contentious dispute over a real property boundary. The case was dismissed and the opposing party was ordered to pay the legal fees incurred by Pettit Kohn's client.

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- The Team settled a contentious business litigation matter involving a dispute over a large commercial transaction, with alleged damages of over \$2.5 million. After months of aggressive litigation, Pettit Kohn was able to negotiate a very favorable settlement, in which the client was dismissed without paying any money.
- The Team represented a home health care business in a contentious litigation involving claims and cross-claims. The client alleged that the competing business wrongfully took former employees and trade secrets. The competing business brought similar cross-claims and alleged slander as well. Pettit Kohn was able to secure a \$5 million settlement for its client and a dismissal of all cross-claims.

Pettit Kohn Ingrassia Lutz & Dolin has successfully handled numerous trials resulting in favorable jury verdicts for professionals throughout Southern California. U.S. News *Best Law Firms* ranks us in the top tier of firms in San Diego for Legal Malpractice Law – Defense and has identified Doug Pettit as San Diego’s Malpractice Lawyer of the Year twice in the last five years (2015 and 2018).

**Firm News**

**Three Shareholders Included in *The Best Lawyers in America*® 2020**

Pettit Kohn Ingrassia Lutz & Dolin is proud to announce that San Diego shareholders Douglas Pettit, Andrew Kohn, and Thomas Ingrassia have been recognized by *Best Lawyers*® in the 2020 listing of *The Best Lawyers in America*. They have each been selected as leading attorneys in their areas of practice.

Douglas Pettit is a leader in the firm’s Professional Liability team. He has been included in the *Best Lawyers* listing each year since 2011. This year he was recognized for his work in Legal Malpractice Law – Defendants, Commercial Litigation, and Professional Malpractice Law – Defendants. Notably, Mr. Pettit was named the *Best Lawyers* “Lawyer of the Year” in San Diego for Legal Malpractice Law – Defendants both in 2015 and 2018. Mr. Pettit has also achieved a significant rating accomplishment of AV Preeminent from Martindale-Hubbell and is a member of the American Board of Trial Advocates (ABOTA), having tried over 40 cases to verdict in California.

Thomas Ingrassia has been recognized by *Best Lawyers in America* for his work in Employment Law – Management each year since 2013. Additionally, Mr. Ingrassia has been recognized for his work in Labor and Employment Litigation. Tom has also achieved an AV Preeminent rating, Martindale-Hubbell’s highest rating for professional excellence and ethical standards.

Andrew Kohn has been recognized by *Best Lawyers* for his work in Personal Injury Litigation – Defendants. Mr. Kohn is a member of the American Board of Trial Advocates (ABOTA) and was recently elevated in rank to Associate. He has tried more than 30 cases to verdict and has also achieved Martindale-Hubbell’s highest rating of AV Preeminent for his legal ability and ethical standards.



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Selection to the *Best Lawyers* listing is an honor that reflects their dedication to providing superior legal counsel and the high regard in which they are held by their peers. *Best Lawyers* is an exclusive listing compiled based on an exhaustive peer-review evaluation in which the leading lawyers in their respective practice areas provide confidential nominations and feedback about the professional abilities of their colleagues. *Best Lawyers* is published in 75 countries worldwide and processes over seven million evaluations spanning 145 practice areas, and the methodology results in a meaningful and substantive evaluation of legal services. Since its first publication in 1983, *Best Lawyers* 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](http://www.bestlawyers.com).

### **Super Lawyers® Honors Ten Pettit Kohn Attorneys from San Diego Office**

Pettit Kohn Ingrassia Lutz & Dolin is proud to announce that ten of its attorneys have been recognized by *Super Lawyers*® and named to the 2020 San Diego *Super Lawyers*® and Rising Stars lists. Each year, the rigorous selection process names only the top 5 percent of attorneys in the region to the Super Lawyers list, and the top 2.5 percent of attorneys to the Rising Stars list.

This year, the following Pettit Kohn attorneys have earned the Super Lawyers distinction:

- Douglas A. Pettit: Professional Liability – Defense (2007-2020)
- Andrew N. Kohn: Personal Injury – Defense (2015-2020)
- Thomas S. Ingrassia: Employment & Labor (2008-2020)
- Jennifer N. Lutz: Employment Litigation – Defense (2011-2020)
- Damian M. Dolin: Personal Injury – Plaintiff (2015-2020)

Notably, Ms. Lutz was recognized by Super Lawyers as one of the [Top 25 Women Lawyers in San Diego](#).

In addition, Mr. Pettit and Mr. Ingrassia earned recognition in the San Diego [Top 50](#), which lists attorneys who have achieved the highest ranking from their peers. Mr. Pettit was also included in the Top 50 list in 2010, and 2012-2017, as well as the Top 10 list in 2015 and 2016. Mr. Ingrassia was previously included in the Top 50 list in 2016 and 2017.

*Super Lawyers*® Rising Stars are recognized as the top up-and-coming lawyers in their region. The following Pettit Kohn attorneys have been honored as 2020 Rising Stars in San Diego: Christine E. Boisclair, Shannon R. Finley, Ryan H. Nell, Jennifer P. Suberlak, and Janice Y. Walshok.

The recognition of these ten attorneys is a testament to the outstanding service and professionalism that are hallmarks of Pettit Kohn Ingrassia Lutz & Dolin. Congratulations to the Pettit Kohn attorneys who have been selected to this year's Super Lawyers and Rising Stars lists.

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Appellate

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Restaurant & Hospitality

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About Super Lawyers

Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The patented, multiphase selection process includes independent research, peer nominations, and peer evaluations by practice. The goal is to provide the public with a credible listing of experienced attorneys that can be used as a resource for those seeking top legal counsel. The regional San Diego Super Lawyers list is published annually in *Super Lawyers Magazine* and is available online. To learn more about the Super Lawyers or Rising Stars process, visit their website [here](#).

**Team Spotlight**

**A Minute in the Life of Jocelyn Hannah**

**Hometown:** San Diego

**College:** Boston University (B.A. International Relations); University of Edinburg (M.Sc. Nationalism Studies)

**Law School:** University of San Diego

**Most recent book read:** *The Wise Man's Fear* by Patrick Rothfuss

**TV series currently watching:** Ozark

**Sport I most enjoy:** Soccer

**When I'm not practicing law, I spend my time:** Raising my teenage daughter

**Biggest trend in Professional Liability:**

A continuing trend in the professional liability arena is cyberthreats. This is particularly significant for lawyers and firms who represent financial institutions and/or healthcare providers, and therefore receive and regularly deal with highly sensitive confidential information. The need for and ability of such professionals to keep their clients' information safe from cyber-attacks at the firm level is an ever-moving target as technology evolves and cyber criminals develop new methods of attack.



*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, Caitlin Jones, Julia Dalzell, Alexander Cohen, or Sabrina Johnson at (858) 755-8500.*

