



## Important Legal Malpractice Cases in 2017

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This article highlights California court holdings from 2017 that impact Legal Malpractice Law and touch upon the following substantive areas of law: fee agreements; disqualification; Anti-SLAPP and litigation privilege; attorney-client privilege and work product; mediation privilege; and cases affecting prosecution of legal malpractice claims.

### Fee Agreements.

- *Leighton v. Forster* (2017) Cal.App.5th 467 – An email from an attorney enclosing an unsigned fee agreement that was never signed and returned did not satisfy requirements of the Business and Professions Code Section 6148 and the attorney was not entitled to his fees.

### Disqualification.

- *Lynn v. George* (2017) 15 Cal.App.5th 630 – An attorney may be subject to disqualification by a non-client when the attorney owes a duty to preserve confidential information in a non-client relationship. However, a potential attorney-client relationship is not enough to justify disqualification.
- *Beachcomber Management Crystal Cove, LLC v. Superior Court* (2017) 13 Cal.App.5th 1105 – In ruling on a motion to disqualify a managing member's counsel from representing the managing member in an action by a non-managing member, the trial court was required to determine whether the managing member had access to the same confidential information as the law firm that had represented both the managing member and the LLC.
- *Guardant Health, Inc. v. Foundation Medicine, Inc.* 2017 WL 5127733 – A law firm's representation of a client was not complete where an appeal to the Patent Trial and Appeal Board was still possible and the fee agreement required the firm to inform the client that the attorney-client relationship had ended.
- *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083 – Disqualification was appropriate where an attorney reviewed inadvertently disclosed attorney-client privileged information that the attorney had received from his client to prevent future harm to his client.

- *IARS Systems Software, Inc. v. Superior Court* (2017) 12 Cal.App.5th 503 – In a criminal action, the *Brady* disclosure obligation of producing exculpatory evidence in its possession notwithstanding the attorney-client privilege did not apply to the defendant’s employer’s law firm.

### **Anti-SLAPP and Litigation Privilege.**

- *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768 – The litigation privilege did not preclude defamation liability where a statement was made alleging that a law firm knew their client’s claim was on forged documents because the statement did not “further the object of the litigation.”
- *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655 – Litigation privilege did not bar a claim arising from a demand letter because the defendant sent the letter without a good faith contemplation of litigation.
- *Optional Capital, Inc. v. Akin Gump Strauss Hauer & Feld LLP* (2017) 18 Cal.App.5th 95 – The litigation privilege barred conspiracy and aiding and abetting claims against a defendant law firm arising out of their representation of a former investor and the negotiated settlement of that action.

### **Attorney-Client Privilege and Work Product.**

- *Tucker Ellis v. Superior Court* (2017) 12 Cal.App.5th 1233 – The law firm controlled the work-product privilege for documents an attorney who had left the firm drafted while there.
- *Behunin v. Superior Court* (2017) 9 Cal.App.5th 833 – The Los Angeles appeals court endorsed the possibility that a public relation firm hired to influence press coverage of litigants or advise on strategy could be protected like others between a client, the lawyer and a third-party expert or litigation consultant where communications were “reasonably necessary” to accomplish the purpose for which the attorney was retained.

### **Mediation Privilege.**

- The California legislature is considering a new evidence code exception to mediation confidentiality. The revision would allow clients who have been provided negligent legal advice in the context of a mediation, to use as evidence communications and documents otherwise subject to the mediation confidentiality rule.

### **Cases Affecting Prosecution of Legal Malpractice Claims.**

- *Flake v. Neumiller & Beardslee* (2017) 9 Cal.App.5th 223 – One-year statute of limitations on legal malpractice claim started running when defendant law firm filed a

motion to withdraw from representing plaintiff, not when the court later granted that motion.

- *Yale v. Bowne* (2017) 9 Cal.App.5th 649 – Under certain circumstances it may be proper to apply the concept of “comparative fault” in legal malpractice actions. While precedent had previously recognized the concept of “contributory” negligence may apply in legal malpractice cases, this is the first opinion to approve the use of a “comparative” negligence defense in a legal malpractice action.
- *Broadway Victoria, LLC v. Norminton, Wiita & Fuster* (2017) 10 Cal.App.5th 1185 – When the basis for a claim of breach of fiduciary duty arises from the same facts and seeks the same relief as the attorney negligence claim for malpractice, the claim for breach of fiduciary duty is duplicative and should be dismissed.
- *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767 – The denial of summary judgment in the underlying action established probable cause to bring that action, and therefore, plaintiffs could not establish a probability of success on their subsequent malicious prosecution claim.



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