the abtl REPORT

abtl SD 2026 ANNUAL MEMBERSHIP

$110.00: ***100% Club!*** *(All litigators in firm, $25 GROUP DISCOUNT)*
135.00: *Individual Attorney*
75.00: *Retired Judge | Public Interest Lawyer | Young Attorney (1-3 yrs)*
FREE: *Active Judge | Student | FIRST TIME Young Attorney (1-3 yrs)*

abtl.org/sandiego

Register NOW!

GO TO:

ABTL EVENTS INCLUDE:

- QUARTERLY NETWORKING DINNER PROGRAMS
- MCLE SPECIALTY LUNCHTIME PROGRAMS
- JUDICIAL BROWN BAG LUNCHTIME PROGRAMS
- ANNUAL SEMINAR IN RESORT LOCATIONS
- QUARTERLY ABTL REPORT NEWSLETTER
- JUDICIAL MIXER
- MOCK TRIAL

...AND MORE!

INSIDE

BACK to Inside this issue

PRESIDENT'S LETTER:

ABTL San Diego, 2026

By Jon Brick

It is my honor and privilege to serve as the 2026 ABTL San Diego President. As we start the year, we are well on our way to reaching our goal of 500 members and continue to be fiscally sound. Thanks to the work of our Dinner Program Committee – past and present – we are looking forward to stellar presentations this year – and a special thank you to Colin Ward for all of his work in setting up our first program, SCOTUS Review, at the US Grant on March 24th.

I also want to thank all of the Sponsors who make ABTL possible. Without our sponsors we would simply not be able to provide the programs, services, and opportunities offered by ABTL. Please remember our sponsors when you or your firm needs services. This year our sponsors are ADR Services, Inc.; Bill VanDeWeghe, Esq. Mediator and Arbitrator; Express Deposition Services; JAMS; JND Legal Administration; Judicate West Alternative Dispute Resolution; Justice Served Arbitration & Mediation Services; Signature Resolution, and Steno.

It is hard to believe that we are almost through the first quarter of 2026. It seems that time not only flies when we are having fun but also when we are dealing with the tremendous amount of work we all face on a daily basis. Our Judges have unbelievable caseloads, and virtually every lawyer I have the pleasure of working with seems to have more work than hours in which to do it, on top of the personal lives we all (hopefully) have. Despite the demands on our time, so many continue to contribute their time and talents to ABTL.

As we all know, nothing – literally nothing – at ABTL San Diego gets done without the work, often behind the scenes, of our Executive Director, Lori McElroy. I cannot thank her enough for keeping the ship sailing smoothly. I also want to thank our Board of Governors, Judicial Advisory Members, and especially our Executive Committee Chairs and Vice-Chairs, for their work in assuring that our Chapter continues to provide excellent programming and extensive networking between the Bench and Bar. The time and effort required to plan and execute our Dinner Programs, MCLE Specialty Programs, Nuts-and-Bolts Programs, Brown Bag Lunches, Membership, Sponsorship, the ABTL Report, Community Outreach, Mock Trial, Leadership Development and, especially this year, the Annual Seminar, can often seem overwhelming. Without the hard work of our members these programs would not exist.

I highlight the Annual Seminar because San Diego is hosting this year at the Aviara in Carlsbad. The planning for our program –"Litigation in 2026: Effective Advocacy in the Age of AI, Fake News, and the Vanishing Attention Span"– is well under way and ahead of schedule, promising preeminent panelists covering a range of topics relevant to today's practice. While many think of non-Hawai'i seminars as "off years," remember that San Diego is a destination for some 32 million visitors per year, and we plan on showing the other Chapters why they are (or should be) jealous of those of us lucky enough to call San Diego home. Mark your calendars and plan to attend October 8-11 at Park Hyatt Aviara.

2026 is shaping up to be another great year for ABTL. When you have a chance, please talk to your colleagues about ABTL and encourage them to consider joining – maybe even invite them to one of our programs so that they can see what they are missing.

Sincerely,

Jon Brick

Jon Brick is a partner at the Law Offices of Schulz Brick & Rogaski.

ABTL San Diego's SCOTUS Review: A Look Inside the Supreme Court's Direction

By Rachael Kelley

Photo Caption (L to R): Paul Watford, Jon Brick (ABTL President), Colin Ward, Jean Claude (J.C.) André, Jordan Bock, John Bash

On March 24, the ABTL San Diego chapter hosted a panel discussion at the historic US Grant Hotel, bringing together four distinguished legal minds — Judge Paul Watford, John Bash, Jean-Claude ("J.C.") André, and Jordan Bock — for an insider-level conversation about the Supreme Court's most significant recent business-related decisions and the growing influence of the emergency ("shadow docket") matters on the Court.

A central theme of the evening was the Court's positioning toward business interests. Judge Paul Watford opened with a statistical observation: the rate at which petitioners prevail before the Roberts Court suggests the current Court is more favorable to business interests than its predecessors, even as the Court hears fewer business cases overall.

The panel also discussed specific cases, including the pending Monsanto case and the Third Circuit's role in creating a circuit split on a FIFRA preemption dispute where other circuits had declined to do so. The panel suggested that the case was heard because it was presented in a business-friendly posture — though they cautioned it remains a tough preemption question. The panel also discussed the decline in merit cases on the docket, noting that procedural "vehicle problems" may be to blame.

The most active segment of the discussion addressed the shadow docket. The panelists described the process, which operates with minimal transparency — no oral argument, minimal briefing, no conference deliberation, and often no written explanation — yet has increased substantially in scope. The panel noted 39 emergency applications this term alone, with four still pending — a stark contrast to the pre-2005 era when emergency matters were rare and almost exclusively confined to death-penalty cases. While the panelists acknowledged the Court is trying to improve its handling of these matters, they questioned whether some matters presented as emergencies warrant that treatment.

Despite the concerns about process and workload, the panel's consensus was that interpersonal civility on the bench remains strong — though the pressures of the emergency docket may test that collegiality going forward.

Overall, the event was well attended and provided a useful and lively discussion of the current SCOTUS court. ABTL thanks and appreciates the panelists for their time, and we look forward to seeing you at our future dinner events!

Rachael Kelley is a Partner at Burton Kelley LLP. She is also an ABTL Board of Governor's member and a chair of the ABTL Dinner Committee

Continued on page 5

BACK to Inside this issue

Q1 Dinner - SCOTUS

Photography by c.dobbs487@gmail.com

abtl SD

Continued on page 6

BACK to Inside this issue

Q1 Dinner - SCOTUS

Photography by c.dobbs487@gmail.com

BACK to Inside this issue

Judges On AI: Practical Use Cases In Chambers

By Judge Allison Goddard (February 13, 2026)

Do artificial intelligence tools have any practical judicial applications?
In this Expert Analysis series, state and federal judges explore potential use cases for AI in adjudication and beyond.
If you're a judge who would like to contribute to this series, email expertanalysis@law360.com.

In the spring of 2023, I encountered something unexpected from one of my high school students: a fairly bland, but well-constructed and grammatically correct, essay on how they would amend the U.S. Constitution.

It was, let's just say, inconsistent with this student's previous writing efforts. Although my heart wanted to believe this was the product of inspired teaching, my head told me there was probably a more logical explanation. My daughter, also a student, was quick to break my heart when she explained the reason for the student's sudden improvement: "Oh Mom, that's ChatGPT."

Chat what?

My husband, a full-time high school teacher, explained that ChatGPT was becoming ubiquitous at his school. He did a live demo for me, and then picked my jaw up off the floor afterward. It was obvious this technology was revolutionary.

As a person whose stock-in-trade is predominantly research and writing, it was also obvious that the legal profession would be among the first industries to feel that revolution, whether we like it or not. And so my journey into the world of generative AI began.

I learned the most by reaching out to lawyers who were already on the leading edge of technology and the law, like professor Maura Grossman of the University of Waterloo and Alex Tievsky of Edelson PC. They patiently explained to me what a large language model is, how generative AI is different from AI and showed me practical ways the technology could be used to enhance legal work.

Together, we developed a presentation on generative AI for judges in my court,

the Southern District of California, that has become the foundation for an ever-growing number of presentations to judges and lawyers across the country.

In teaching generative AI over the past two years, I've learned quite a few things myself.

To begin with, avoidance is not an option. Although the initial reaction of educators at all levels was to employ AI detection tools and ban its use, there has been a shift toward acceptance. Courts and law firms should follow suit, because there is no going back.

Generative AI is already part of the writing process for future lawyers.

We have to accept that the way we're writing, and learning to write, is changing. Humans are much less likely to be first drafters in a generative AI world. Instead, we need to develop our skills as editors.

Indeed, my own writing process has changed. If I am writing a letter of recommendation, for example, my first pass is to enter a prompt into a generative AI tool with a description of interactions with the subject, and then ask the tool to draft the letter for me. I get a great first draft that I edit to ensure it reflects my personal style. This takes about one-third of the time, but does not sacrifice the quality of the letter — and in fact, often enhances it.

How I Use AI in Chambers

There are lots of ways to use generative AI responsibly to make the judicial system more efficient and more effective. Here are just a few examples of how I use generative AI in chambers.

Settlement Conferences

Generative AI tools allow me to go deeper into the facts of a case that I am trying to settle. I use these tools to summarize key documents — like court orders, trial transcripts and depositions — to help me understand the details underlying the dispute.

I can ask the tool to identify each party's strongest and weakest arguments, and create a list of questions that I should ask the parties to facilitate settlement discussions.

Hearings and Trials

Generative AI tools can be used to edit jury instructions and verdict forms so that they are easier to comprehend. I can use the tools to create timelines for trial, draft the opening summary of the case for voir dire, and prepare summaries of testimony during and after the trial.

For hearings, I can upload the parties' briefs and ask for a list of questions or issues to address.

Continued on page 9

Judges on AI | *continued from page 8*

Drafting Orders

I have not found any tool that serves as an easy button, allowing the user to upload briefs and then a final, polished order pops out. Instead, generative AI tools are most useful for drafting the first version of discrete portions of orders, such as summaries of the parties' arguments. They are also useful for synthesizing and organizing the evidence provided by the parties in support of or in opposition to a motion.

They are essential for running a final check of all authorities cited in any order, including case cites and quotations, before the order is published.

Administrative Tasks

I have used generative AI tools to brainstorm presentation titles and content ideas, draft correspondence, and prepare performance review narratives. And yes, I tried to use it to do a first draft of this article, but scrapped it because it was too generic. Instead, I uploaded my final draft and received helpful feedback from a generative AI tool that I used for final edits.

A Written Policy

In my chambers, we ensure that generative AI is used responsibly by having a written policy that governs any use of generative AI tools. The key elements of that policy are as follows:

- Clerks and law school externs must disclose the use of any generative AI tool in their work to me. This ensures that we have a conversation about what tools they are using and how they are using them.
- Sealed documents and sensitive personal identification information cannot be uploaded into a generative AI tool.[1]
- Human oversight is required at all times to ensure that generative AI tools are used to assist, but not replace, human judgment. All outputs must be reviewed and verified.
- Bench memos and draft orders must be checked using a brief checking tool to confirm that they do not contain any hallucinated authorities.
- Use of any generative AI tool must also comply with all other court rules and policies.

This framework has enabled my chambers to harness the benefits of generative AI tools while maintaining the human judgment and accountability our judicial role demands.

Overall, my advice to judges and lawyers is to run toward this technology, not away from it. Generative AI is transforming our society as we speak. No doubt, there will be good and bad effects. We should embrace the constructive and responsible ways it can be used to further the judiciary's mission to serve the public and uphold the rule of law.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] For information submitted in advance of settlement conferences, I advise the parties in the order setting the conference that I may use generative AI tools to review the information they submit, and give them an anonymous method for opting out.

Allison Goddard is a U.S. magistrate judge in the U.S. District Court for the Southern District of California.

BACK to Inside this issue

State and Territorial Significance in the 2024-2025 U.S. Supreme Court Term: A Review of Opinions and Emergency Orders

By Marisa Janine-Page

As San Diego's preeminent trial attorneys, ABTL members must navigate a legal landscape shaped by the Supreme Court of the United States' interpretations of constitutional rights, procedural rules, and substantive law. The 2024-2025 Term saw SCOTUS redefine standards of evidence, clarify the scope of civil rights protections, and alter the balance between federal and state authority in high-stakes cases concerning digital speech, immigration authority, and birthright citizenship. The following summarizes key civil cases to guide your litigation strategies, courtroom arguments, and client communications with the impact of these cases on our local community. By staying informed about these latest rulings, ABTL's members are equipped to advocate effectively and ethically within the current national backdrop of political intensity and institutional skepticism.

DOCKET COMPOSITION AND COMPARATIVE STATISTICS

The 2024-2025 term was marked by a robust docket that impacted state and U.S. territory governments. SCOTUS issued approximately 67 merits opinions—six fewer than the 2023-2024 term. The Court's merits docket accounted for most of these rulings. In contrast, SCOTUS issued several dozen summary orders and resolved a reported 113 emergency applications ("shadow docket" matters)— up from 44 in the prior term. While most of these emergency applications dealt with death penalty matters, 43 cases involved substantive legal questions beyond routine or procedural matters.

Unanimous decisions comprised 42% of the Court's output—down from last term's rate of 44% and the 2022-2023 term's rate of 50%. In another 9% of the cases, decisions split along ideological lines—6–3 outcomes with all Republican-appointed justices in the majority and all Democratic appointees in dissent.

The Merits Docket

First Amendment

Religious Charter Schools. *OK Statewide Charter School Board, et al., v. Drummond* (Per Curiam-Justice Barrett recused). St. Isidore of Seville Catholic Virtual School, a privately owned and operated school in Oklahoma, sought to be the nation's first publicly funded religious charter school. The case challenges whether educational decisions are considered state action because the school has a contract with the state to provide free education to students and whether the First Amendment's Free Exercise Clause prohibits such action, or whether the Establishment Clause requires a state to exclude religious schools from its charter-school program. With Justice Barrett's recusal from the case, an equally divided Court affirmed the judgment of the Oklahoma Supreme Court, which held a publicly funded religious charter contract violated state and federal laws prohibiting government establishment of religion.

Religious Accommodations in Education. *Mahmoud v. Taylor* (Justice Alito – 6-3). Parents challenged whether a school board's mandatory, non-opt-out curriculum for K-5 students, which included LGBTQ+ inclusive storybooks, violated their rights to direct the religious upbringing of their children. The Court looked back to 50-year-old law and applied a strict scrutiny standard even though the school's actions were generally applied because the policy posed a "real threat of undermining" the religious beliefs parents wished to instill. The Court held that parents have a right to control the religious development, belief, and practice of their child. The Court allowed for a preliminary injunction, establishing that schools must respect parental requests to opt children out of specific, religiously objectionable curricular materials. (Dissents: Justice Sotomayor with Kagan and Jackson.)

Tax-Exempt Religious Organizations. *Catholic Charities Bureau, Inc. v. Wisconsin Labor and Industry Review Commission* (Justice Sotomayor - unanimous). The CCB argued that its care for the poor, disabled, and elderly was a religious mission entitled to tax exemption, even if it served all people regardless of faith. The Wisconsin Supreme Court denied the exemption, reasoning their work was not "operated primarily for religious purposes" because they neither engaged in proselytization nor limited their charitable services to Catholics. The Supreme Court reversed, holding that states cannot discriminate against religious organizations based on their specific religious practices.
Age Verification for Porn Sites. Free Speech Coalition, Inc. v. Paxton (Justice Thomas – 6-3). Plaintiff challenged Texas law requiring age verification for access to online explicit content. The Court upheld the statute, finding that the law was sufficiently tailored under intermediate scrutiny and only incidentally burdened adults' protected speech under the Free Speech Clause. (Dissents: Justice Kagan with Sotomayor and Jackson.)

Continued on page 11

BACK to Inside this issue

State and Territorial Significance... | *continued from page 10*

Fourteenth Amendment

Due Process in Injunctions. *Trump v. CASA, Inc*. (Justice Barrett – 6-3). The Trump administration challenged lower court injunctions that prohibited enforcement of the birthright citizenship executive order nationwide . The Court ruled that injunctions must be tailored to provide relief only to the specific plaintiffs in the case, rather than blocking policies for the entire nation. While the Court did not rule on the constitutionality of the birthright citizenship order itself, the decision effectively allowed for the implementation of the policy while restricting the ability of lower courts to issue broad, nationwide bans. (Dissents: Justice Sotomayor with Kagan and Jackson.)

Civil Rights for All. Ames v. Ohio Department of Youth Services (Justice Jackson - unanimous). Marlean Ames, an Ohio woman, alleged she was demoted and discriminated against by her lesbian supervisor, when she replaced Ames with a gay man who had less experience. The case challenged whether the Civil Rights Act of 1964 prohibited workplace discrimination against "any individual" versus a minority individual. The Justices rejected, as outdated and mistaken, the view that "members of a majority group" must show more evidence of discrimination before they can sue and win and held that the nation's anti-discrimination laws apply equally to all employees, regardless of whether those complaining of bias are white or Black, gay, or straight.

The Commerce Clause / Equal Protection Act

United States v. Skrmetti. (Chief Justice Roberts – 6-3). Transgender youth, families and medical providers challenged a Tennessee law prohibiting puberty blockers and hormone therapies to transgender minors. The Court rejected the heightened scrutiny review, upholding the more deferential rational basis review applied. The Supreme Court determined that the regulation of gender-affirming treatment for minors falls within the state's authority to regulate medical practice and protect children, rather than being an unconstitutional discrimination against transgender individuals. It affirmed that Tennessee's ban on gender-affirming treatment for minors

Continued on page 12

BACK to Inside this issue

State and Territorial Significance... | *continued from page 11*

does not violate the Equal Protection Clause. (Dissents: Justices Sotomayor with Jackson and Kagan.)

The Commerce Clause / Environmental

City and County of San Francisco v. EPA. (Justice Alito – 5-4). San Francisco argued that the EPA's National Pollutant Discharge Elimination System (NPDES) permit, which required the city to ensure its discharge did not violate general water quality standards in the Pacific Ocean, was too broad and violated the CWA by not defining specific, actionable limitations challenged the EPA's authority under the Clean Water Act. The Court invalidated "end-result" conditions and held that the EPA must define specific, technical steps a permittee must take to meet water quality standards, rather than simply penalizing them for the final outcome. (Dissents: Justice Barrett with Sotomayor, Kagan, and Jackson.)

Seven County Infrastructure Coalition v. Eagle County, Colorado. (Justice Kavanaugh – unanimous, Gorsuch not participating). Challenged the railway's Environmental Impact Statement (EIS) as deficient because it failed to account for increased oil production in Utah and refining in the Gulf Coast. The Court determined that National Environmental Policy Act ("NEPA") reviews should focus on the direct effects of the project at issue rather than distant, indirect effects, and held that the Surface Transportation Board was not required under NEPA to analyze the upstream oil drilling or downstream refining effects of a proposed 88-mile Utah railway. The Court ruled that NEPA does not mandate evaluation of environmental impacts from separate projects outside an agency's regulatory authority. This decision significantly narrowed the scope of judicial review under NEPA, emphasizing that courts must afford "substantial agency deference" when reviewing environmental documents. (Concurring opinion arguing for narrower ruling: Justice Sotomayor with Kagan, and Jackson.)

Oklahoma v. EPA. (Justice Thomas – unanimous, Alito recused). Oklahoma challenged the EPA's rejection of their individual State Implementation Plans (SIPs) for ozone pollution. The EPA argued that because it used a uniform "omnibus" method to disapprove 21 states' plans at once, the action was "nationally applicable" and must be challenged in the D.C. Circuit. The Court determined that because the EPA's decisions were based on specific, local, fact-intensive analyses of each state's plan, they were not a "nationwide determination." The decision prevents the EPA from grouping multiple, separate state-level decisions into a single rule to force litigation in the EPA's favored venue.

The Shadow Docket (Emergency Applications)

Among the 43 substantive emergency applications, several cases had profound implications for state and federal power:

Due Process / Immigration

A.A.R.P. v. Trump. (Per curiam – 7-2). The ACLU filed suit on behalf of a class of detainees, arguing that the Trump administration was bypassing standard immigration proceedings under the Alien Enemies Act to remove people without due process. The Court issued a temporary order stopping the removal of the detainees to maintain its jurisdiction and subsequently affirmed that those detained under the Act have the right to challenge their removal through writs of habeas corpus. (Dissents: Justice Alito with Thomas.)

Noem v. Doe. (Per curiam – 5-4). Challenged the Trump administration's 2025 termination of humanitarian parole processes for immigrants from Cuba, Haiti, Nicaragua, and Venezuela. Plaintiffs argued the categorial revocation of humanitarian parole programs was arbitrary and violated the Administrative Procedure Act (APA). The district court initially blocked the termination, finding the government's actions likely illegal, but the Supreme Court stayed the district court's order allowing the administration to terminate the parole processes, which removed the legal status and work permits of approximately 500,000 individuals. (Dissents: Justice Jackson with Sotomayor.)

Federal Funding to Force Elimination of DEI Initiatives:

Department of Education v. California. (Per curiam – 5-4). The DOE terminated federal grants for teacher recruitment and training in several states, including California, due to inclusion of Diversity, Equity, and Inclusion (DEI) initiatives. The Court majority concluded that such claims should be handled by the Court of Federal Claims rather than the Administrative Procedure Act in district court. It stayed the district court's temporary restraining order, required reinstatement of the funds, and allowed the immediate freeze of funds while signaling that the government could withhold grant funding while long-term litigation continues. (Dissents: Justice Jackson with Sotomayor and Kagan.)

Continued on page 13

State and Territorial Significance... | *continued from page 12*

Executive Power

Trump v. Wilcox. (Per curiam – 6-3). Challenged President Trump's authority to remove members of independent agencies (specifically the NLRB and MSPB) without cause despite statutory protections. The Trump administration argued that, because the NLRB exercises executive power, statutory "for-cause" restrictions on removing its members are unconstitutional. A district court ordered that Wilcox be reinstated. The Supreme Court granted an emergency stay of the reinstatement, indicating that the President likely has authority to remove officials at will, signaling a significant shift away from the 1935 Humphrey's Executor precedent that protects independent agency officials. The effect was to leave the NLRB without a quorum and strengthening presidential control over independent agencies. (Dissents: Justices Kagan, Sotomayor, and Jackson.)

TRENDS AND CONCLUSION

The 2024-2025 Term revealed continued growth in SCOTUS's emergency applications, with an increase in the number and substantive breadth of Shadow Docket orders. The Merits Docket reflected ongoing disputes over the limits of state power, religious liberty, and federal administrative authority. This Term's opinions and orders are certain to continue to shape the legal environment here in San Diego, especially in areas of immigration, civil rights, and state vs. federal authority.

Ms. Janine-Page is a Certified Appellate Law Specialist and the Founder of MJP Appeals and Litigation.

IN MEMORIAM

By Justice William Dato

Former Associate Justice Howard B. Wiener of the Fourth District Court of Appeal, Division One, passed away on March 20, 2026. Justice Wiener was born in Providence, Rhode Island on February 1, 1931, attending public schools there. He graduated from Brown University in 1952 with a bachelor of arts degree in philosophy. Three years later, he obtained his law degree from Harvard University Law School.

Following graduation from law school, Justice Wiener and his wife Joan moved to California, where he served as a law clerk to U.S. District Court Judge Benjamin Harrison in Los Angeles from 1955 to 1956. He was admitted to the California Bar in January 1956. During the next 20 years, he practiced law in a small firm in West Covina, handling all types of cases. He was also active in the legal community, serving as President of the Pomona Valley Bar Association in 1968, on the Board of Trustees of the Los Angeles County Bar Association from 1969 to 1971, and on the State Bar Board of Governors from 1972 to 1975 (Vice President, 1974-1975).

On July 25, 1975, Governor Edmund G. Brown, Jr. appointed him to the San Bernardino County Superior Court. Roughly three years later, in May 1978, the Governor selected him to be an Associate Justice on Division One of the Court of Appeal, Fourth Appellate District in San Diego. Over the next 15 years, Justice Wiener became known for clear and thoughtful opinions that adapted and applied legal principles to compassionately serve the interests of people from all walks of life.

Despite practicing law in Los Angeles and the Inland Empire, Justice Wiener quickly became active in the San Diego legal community, serving as President of the William B. Enright American Inn of Court from 1991 to 1993, and later as one of its four distinguished emeritus members. In 2018 he was honored by all five San Diego Inn of Court chapters with the second-ever lifetime achievement award. A vocal advocate for education at every level and a mentor for many younger lawyers, Justice Wiener was an adjunct professor at the University of San Diego (USD) School of Law (1979-1986) and California Western School of Law (1986-1994), teaching professional responsibility and appellate advocacy respectively. He also served as Chair of the Board of Visitors at USD Law School. In 1982, he obtained a Master of Laws Degree in judicial process from the University of Virginia Law School.

Justice Wiener retired from the Court on December 31, 1993. Beginning in 1994, he was actively engaged in private dispute resolution, handling more than 1,700 cases as a mediator, arbitrator and private judge. Over the years, he served on the Board of Governors of the Association of Business Trial Lawyers (ABTL) and contributed several articles to the ABTL Report. He is co-author with Jon B. Eisenberg and Ellis J. Horvitz of the California Civil Practice Guide, Civil Appeals and Writs, published by The Rutter Group. In 2007, he was interviewed for the California Appellate Courts Legacy Project. The interview is available at California Appellate Court Legacy Project | District Courts of Appeal.

Justice William Dato is a Fourth Appellate District Judge

Preserving Privilege in the Age of AI: Key Lessons from *United States v. Heppner*

By Elaine F. Harwell

A federal court in the Southern District of New York has handed down what already may be one of the most consequential legal technology rulings in 2026. In ***United States v. Heppner***, No. 25 CR. 503 (JSR), 2026 WL 436479, (S.D.N.Y. Feb. 17, 2026), the court addressed important questions of first impression: whether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, the AI user's communications are protected by attorney-client privilege or the work product doctrine. In both instances, the court answered no.

Factual Background

Bradley Heppner was indicted in October 2025 on charges of securities fraud, wire fraud, conspiracy, making false statements to auditors, and falsifying corporate records in connection with his alleged misconduct as a business executive. After receiving a grand jury subpoena, Heppner used a publicly available AI platform (Claude) and created approximately thirty-one documents memorializing what his counsel eventually described as communications outlining defense strategy and potential legal arguments. Heppner asserted privilege over these documents, arguing that he had inputted information learned from counsel, had created the documents to facilitate conversations with counsel, and had subsequently shared the documents with counsel. In considering whether the documents were protected by attorney-client privilege or the work product doctrine, the court ultimately rejected all of Heppner's arguments and granted the government's motion to compel production of the AI-created documents.

Attorney-Client Privilege

Generally, the attorney-client privilege attaches to communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice. The court found that Heppner's AI-generated documents failed at least two, if not all three, of these elements.

First, the court found the AI documents were not communications between Heppner and his counsel. Perhaps obvious, but important for the court's analysis, the court found that Claude is not an attorney. This alone disposed of Heppner's claim of privilege. The court was unmoved by the argument that AI inputs are more analogous to the use of cloud-based word processing software, reasoning that all recognized privileges require a trusting human relationship and, in the attorney-client context, a relationship with a licensed professional who owes fiduciary duties and is subject to discipline. No such relationship existed, or could exist, between an AI user and a platform such as Claude.

The court also found the communications with the AI platform were not confidential. Specifically, the court noted that Heppner communicated with a ***public*** third-party AI platform which required users to consent to their privacy policy. The privacy policy disclosed that Anthropic (the private company operating Claude) collected data on both users' inputs and Claude's outputs, used such data to train Claude, and reserved the right to disclose such data to a host of third parties, including governmental regulatory authorities. The court further noted that AI users do not have substantial privacy interests in their conversations with a publicly accessible AI platform, which users voluntarily disclose to the platform and which the platform retains in the normal course of its business.

Heppner also did not communicate with Claude for the purpose of obtaining legal advice. Although Heppner's counsel asserted that he communicated with Claude for the express purpose of later talking to counsel, counsel also conceded that Heppner did not do so at the suggestion or direction of counsel. The court also rejected the argument that sharing the AI documents with counsel retroactively conferred privilege finding that it is black-letter law that non-privileged communications are not somehow changed into privileged ones upon being shared with counsel. Critically important was the court's finding that even if certain information that Heppner input into Claude was itself privileged, he waived that privilege by sharing the information with Claude and Anthropic, just as if he had shared it with any other third party. In light of Anthropic's privacy policy, Heppner had no reasonable expectation that the inputs would not be shared with other third parties.

Work Product Doctrine

The work product doctrine provides qualified protection for materials prepared by or at the direction of counsel in anticipation of litigation or for trial, and its availability in reference to materials in the possession of a client depends upon the existence of a real, rather than speculative, concern that the thought processes of the client's counsel in relation to pending or anticipated litigation would be exposed.

In ***Heppner***, the court found the AI documents did not merit work product protection because, even assuming they were prepared in anticipation of litigation, they were not prepared by or at the direction of counsel. Heppner's counsel confirmed they were prepared by Heppner on his own volition and while the AI documents did affect counsel's strategy going forward, they

BACK to Inside this issue
Continued on page 17

Preserving Privilege in the Age of AI... | *continued from page 16*

did not reflect defense counsel's strategy at the time Heppner created them. As Heppner was not acting as his counsel's agent when he communicated with Claude, the doctrine's core purpose of protecting the mental processes of the attorney was not implicated.

Key Lessons from *Heppner*

In light of ***Heppner***, attorneys should consider the following immediate and practical steps when using or advising clients about AI tools:

- Avoid inputting privileged client information into any public AI platform. If AI assistance from a public platform is used, ensure that factual inputs are anonymized or limited to non-privileged information.
- Consider using AI tools offered through enterprise agreements with robust confidentiality controls, data use and retention restrictions, and contractual prohibitions on third-party disclosure. Unlike public platforms, these arrangements may better support a claim of privilege or confidentiality.
- For work product purposes, the attorney should direct the AI-assisted task, actively review and edit the output, and ensure that the final work product reflects the attorney's own judgment and strategy.
- Counsel clients to use caution when undertaking use of AI tools. Consider advising clients not to independently use AI tools to generate materials related to pending or anticipated litigation without attorney guidance, and explain the potential waiver risks.
- As with all AI outputs, conduct rigorous reviews. The risks of inaccurate legal citations and fabricated authorities are a well-documented phenomenon that has already resulted in sanctions in several high-profile cases. All AI outputs should be independently verified before use.
- Check any specific disclosure obligations required by local court rules. Many local court rules, as well as evolving guidance in this space, require or encourage disclosure of AI-assisted work product.

Generative AI is truly a new frontier, but AI's novelty does not mean that its use is not subject to longstanding legal principles, and it does not alter the fundamental requirements of privilege. Maintaining traditional safeguards, exercising careful supervision over AI-assisted work, and employing the same diligence applied to any other legal work are not optional in the AI era. In addition, attorneys should expect more courts to weigh in on the discoverability of AI inputs and outputs as we continue to see widespread adoption of these tools.

Elaine F. Harwell is a partner at Procopio, Cory, Hargreaves & Savitch LLP.

Why Ethics Matter in Mediation

By Randa M. Trapp

Is the legal profession, in fact, a noble profession? Some may wonder if it ever was. When I started practicing law 40 years ago, I truly believed the legal profession was a noble profession. However, over the course of the last decade or so, our noble profession has been veering off course. Some would say it is a sign of the times, but that should not be the case. Members of the legal community should be societal leaders and live up to the California attorney's oath, which contains the following language: "I will strive to conduct myself at all times with dignity, courtesy, and integrity." Which brings me to my topic: ethics in mediation.

There is a growing sense that lawyers and judges do not always conduct themselves with the level of integrity expected of legal professionals. As a result, there has been a recent increase in articles, seminars, and trainings on ethics in mediation. A few years ago, I joined my JAMS colleague, Charles Dick, on the circuit presenting a program titled "Mediation Ethics for Advocates and Mediators." We were asked to present to bar associations, law firms, and law departments. It was not necessarily because Charles and I are particularly gifted and entertaining presenters. It was because lawyers and judges were and are feeling the negative effects of mediation without ethics. In other words, it is impacting their bottom line: Cases are not settling because of unethical behavior, which means clients are forced to spend more money on unnecessary, protracted mediation. So, Charles and I not only addressed mediator ethics, but we also shared our expertise on the subject from our experiences and extensive research.

Unethical behavior is a growing concern with lawyers skating close to and sometimes crossing the ethical line by doing everything from showing up to mediation unprepared to lying. This concern was confirmed by what our audiences had been experiencing in their practices. It is important to note that the lawyers who were and are engaging in these types of behaviors do so at their own peril.

As a starting point, lawyers should understand that there is a difference between being a courtroom advocate and mediation counsel. They are completely different roles with different skillsets and different rules. While being overbearing in depositions, burying your opponent with discovery requests, producing "millions" of documents in discovery, and other scorched-earth tactics may work in litigation or a robust motion practice, such behavior is most often not helpful in mediation. In fact, it will derail a mediation faster than a snow cone melts in the desert.

Not only is a lawyer's role different in mediation than it is in litigation, but the goal also differs. In litigation, the goal is to win or minimize the damage to your client. When you pause litigation to mediate, however, the goal should be to resolve the matter. Mediation may not result in a "win," but it will surely result in minimizing the damage to your client. So, both lawyer and client should approach mediation with a different mindset—it is not about winning or lose; it is about resolution. To get to resolution, there needs to be a clear understanding that neither party will get everything they want in mediation. Thus, both sides must be prepared to give up something—to compromise. Compromise is difficult and can be fraught with emotions, which can impede resolution. However, compromise gives your client an opportunity to participate in crafting the outcome, which can include closure. Studies show people are more apt to accept an outcome in which they had some level of control. The alternative—going to trial—is risky. Some liken it to a roll of the dice. It is difficult to predict what a judge or jury will do in trial. Even the best, most expensive jury consultants cannot guarantee an outcome. In mediation, you—or more specifically, your client—have some control over what happens. Having that control and input will likely give your client the closure and relief needed to move on, feeling confident they were well served by the lawyer and the legal system.

The mediator also has a significant role in helping the parties reach resolution. To be effective, the mediator needs to have access to as much information as possible. Additionally, a skilled mediator understands the psychology of conflict and conflict resolution. He or she will allow the parties to vent and reveal what is driving the conflict and preventing resolution. That process takes time, patience, and excellent listening skills. Understanding the impediments to resolution, a skilled mediator can help the parties gradually shift from focusing on impediments to engaging in developing creative solutions. In doing so, and at the appropriate time, the mediator will also help the parties understand the implications of walking away from a possible resolution. By providing the parties with a neutral perspective of the facts and risks, the mediator can assist the parties and counsel with determining whether compromising a bit more is a better option than marching off to trial. There is no question that some cases must be tried. However, when one looks at the statistics regarding settlement, it is likely your case is one that should settle. This message is often better received from the mediator than from counsel.

Continued on page 19

Why Ethics Matter in Mediation | *continued from page 18*

The Nuts and Bolts of Mediation

What is mediation? Section 1115(a) of the California Evidence Code defines mediation as "a process in which a neutral person or persons facilitates communication between the disputants to assist them in reaching a mutually acceptable agreement." It is a means by which the parties can avoid costly litigation by taking an offramp from the litigation highway to uncertainty and engaging in an expeditious, somewhat informal, and less expensive process to reach a client-directed resolution.

Let's face it: Litigation is no fun for your clients. It is slow, expensive, and uncertain. After even a brief experience in the litigation process, most clients conclude they do not want to be involved in what can be a drawn-out and expensive process. Rather, they would prefer a faster, less expensive, less formal process where they can get results.

For the individual, litigation is an intimidating process with rules and procedures that are not intuitive and offers no control over the outcome. That feeling of helplessness can be bewildering even if your client believes they are completely in the right. For the business client, litigation can be a distraction from the business of making widgets and thus impact the bottom line, no matter how big or small the case. Nevertheless, time is a finite commodity that is better spent outside of court. Mediation is the perfect solution for those who are willing to participate in earnest. It works. It's cost-effective. And everyone feels like they've been heard, which is of particular importance these days.

Who is this neutral person? The neutral is just that—neutral. The neutral is usually a lawyer or a retired judge, but there is a growing number of subject matter experts who are entering the alternative dispute resolution space. Examples include insurance, financial and business professionals who have substantial experience in a given field. They make excellent neutrals, as they have actual hands-on experience in their field of expertise.

Also, a neutral person is one who does not have a relationship with any of the parties, counsel or subject of the dispute that would cause a reasonable person to believe the neutral would not be free from bias for or against any party, attorney, issue, or entity involved in the dispute. This is important in that the parties and attorneys should feel comfortable sharing sensitive information with the neutral, who can then use that information where appropriate to facilitate resolution.

Neutrals have a bevy of ethical obligations, including the big "C": confidentiality. Pursuant to California Evidence Code section 1119, and with a few exceptions, all written and oral communications shared before or during the mediation process are inadmissible and not subject to discovery in any noncriminal proceeding. And, with very few exceptions, the mediator is deemed not competent to testify in any subsequent civil proceeding. Thus, the attorneys and clients are provided the space and confidence to share information about their case, both strengths and weaknesses, that can be used by the mediator to facilitate a settlement. The neutral is obliged to keep information learned from each side confidential unless the neutral is given explicit permission to use the information. To paraphrase an African proverb: "The cemetery is filled with people who kept secrets from their doctors." The same is true in mediation. If information is not shared with the mediator, or if the mediator is not given permission to use sensitive information in his or her discretion to assist the parties in reaching resolution, then the mediation is for naught.

Chief among them is the obligation to avoid using the mediation process in bad faith. The Ethical Guidelines for Settlement Negotiations (A.B.A. Section of Litigation, 2002) state that a lawyer should not employ the settlement process for an improper purpose or in bad faith. In other words, while the Guidelines do not impose a formal duty of "goodfaith participation," they make clear that attorneys should not misuse mediation and should approach the process with integrity and professionalism.

There are countless examples of conduct that fails to meet this standard. For example, ethically challenged lawyers may use mediation as a fishing expedition, show up for a mediation with a client who is ill-informed as to why they are there and how mediation works, fail to bring the person who has full settlement authority to the mediation, or fail to bring key evidence to a mediation. In fact, some attorneys show up for mediation without bothering to learn what their client wants out of mediation, without knowing the strengths and weaknesses of their case, and, importantly, without knowing anything about the mediator. This situation happens most often when an attorney is hired on the eve of the mediation solely for the purpose of appearing at mediation. But it is important to note that the client's failure to prepare for mediation and retains counsel on the eve of mediation does not absolve the unwary attorney of potential ethical violations.

Continued on page 20

Why Ethics Matter in Mediation | *continued from page 19*

Good-faith participation is key to a successful mediation. Studies have shown that mediations have a higher rate of success when the lawyers and clients are prepared and are realistic in terms of possible outcomes and ethical considerations; in other words, mediations have a better chance of success when counsel and parties approach the mediation with the intent to participate in good faith and to reach an amicable resolution. It is a complete waste of time, resources, and money to enter a mediation for reasons other than to resolve the matter.

Good-faith participation ***in*** mediation necessarily involves preparation ***for*** mediation. Preparation for mediation involves more than preparing your client for arbitration (Evidence Code section 1129 printed disclosure and acknowledgment requirements) and drafting a brief. Developing a strategy for your client's case, and specifically for the mediation, is vital. An attorney who can succinctly convey to the mediator a well-thought-out, reasonable strategy that acknowledges not only the strengths but also the weaknesses of the case is more apt to have the mediator adopt and utilize key components of the strategy to move the case toward resolution. Otherwise, the mediator may be rendered less effective and reduced to a conduit conveying numbers, with no real basis to support the number or why the number should be accepted. The time and money invested in mediation are better spent when the parties are engaged in meaningful conversations as to how to resolve the matter, rather than clumsy efforts to develop a strategy during mediation.

If the goal of mediation is to settle your case with your client feeling well-served throughout the process; with your integrity intact, which can lead to referrals from opposing counsel and possibly the opposing party; and with the mediator thinking that you were thoroughly prepared, thoughtful, reasonable and ethical, then you have done your client, yourself and the legal profession a great service.

Hon. Randa M. Trapp (Ret.) *is an arbitrator and mediator at JAMS. She previously served for 18 years on the San Diego Superior Court, including 11 years in the Civil Division, where she presided over all aspects of civil litigation. She can be reached at rtrapp@jamsadr.com.*

BACK to Inside this issue

Association of Business Trial Lawyers – San Diego

2026 Officers and Board Members

Officers

President —
Jon Brick, Schulz Brick & Rogaski

Vice President —
Dave Lichtenstein, Caldarelli Hejmanowski & Leer

Treasurer —
Dan Gunning, Wilson Turner Kosmo

Secretary—
Anne Wilson, Duckor Metzger & Wynn, APLC

Judicial Board of Governors

2024-2026

San Diego County Superior Court | Hon. Katherine A. Bacal
San Diego County Superior Court | Hon. Carolyn Caietti
United States District Court, SDCA | Hon. Allison H. Goddard

2025-2027

San Diego Superior Court | Hon. Rachel Jensen
United States District Court, SDCA | Hon. Michael Berg
United States District Court, SDCA | Hon. Linda Lopez

2026-2028

San Diego Superior Court | Hon. Blaine Bowman
San Diego Superior Court | Hon. Ronald Frazier
San Diego Superior Court | Judge Victor Pippins

Board of Governors

2024-2026

Allen Matkins | Joe McGeady
Buchalter | Ryan Caplan
Caldarelli Hejmanowski Page Leer LLP | David Lichtenstein
DLA Piper | Mary Dollarhide
Hahn Loeser & Parks LLP | Jenny L. Dixon
Knobbe Martens | Daniel Hughes
Manatt Phelps & Phillips, LLP | Randy Grossman
Morrison & Foerster LLP | Drew Alan Hillier
Shustak Reynolds and Partners | Joseph Mellano
ViaSat | Colin L. Ward
Wilson Elser | Sarena Kustic

2025-2027

Fox Law, APC | Brett Norris
Robberson Schroedter | Maggie Schroedter
Robbins Geller Rudman and Dowd | Sam Sheldon
Schulz, Brick & Rogaski | Jon Brick
SDGE | Raul Olamendi Smith
The Business Litigation Group, P.C. | Christian Andreu-von Euw

2026-2028

Barnes & Thornburg LLP | John Fitzsimmons
Burton Kelley, LLP | Rachael Kelley
Duckor Spradling Metzger Wynne | Anne Wilson
Fitzgerald Knaier LLP | Robert Knaier
Franklin Soto Leeds | Cheryl Dunn Soto
Greeley Thompson LLP | David M. Greeley, Esq.
Jones Day | Christian Platt
Kirby & Kirby | Jason Kirby
Pillsbury Winthrop Shaw Pittman LLP | Michelle Herrera
Procopio Cory Hargreaves and Savitch | Sasha Selfridge
Rosing Pott & Strohbehn | Amy Chambers
Seltzer Caplan McMahon & Vitek | Andrea Myers
Sheppard Mullin | Benjamin Brooks
Wilson Turner Kosmo | Dan Gunning

Association of Business Trial Lawyers – San Diego

2026 judicial Advisory Board, Past Presidents, and Committee Chairs

Judicial Advisory Board

2024-2026

Fourth District Court of Appeal | Justice William Dato
San Diego Superior Court | Hon. Matthew Braner
San Diego Superior Court | Hon. Peter Deddeh
San Diego Superior Court | Hon. Robert Longstreth
San Diego Superior Court | Hon. Kenneth J. Medel
San Diego Superior Court | Hon. Laura Parsky
United States District Court, SDCA | Hon. Cynthia Bashant
United States District Court, SDCA | Hon. Anthony J. Battaglia
United States District Court, SDCA | Hon. Daniel E. Butcher
United States District Court, SDCA | Hon. Gonzalo Curiel
United States District Court, SDCA | Hon. William Hayes
United States District Court, SDCA | Hon. Jinsook Ohta
United States District Court, SDCA | Hon. Todd W. Robinson
United States District Court, SDCA | Hon. Nita Stormes
U.S. Magistrate Judge, SDCA | Hon. Bernard Skomal
JAMS | Hon. Irma E. Gonzalez (Ret.)
JAMS | Hon. Randa Trapp (Ret.)
Judicate West | Hon. Victor E. Bianchini (Ret.)
Judicate West | Hon. Linda Quinn (Ret.)

2025-2027

San Diego Superior Court | Hon. Wendy Behan
San Diego Superior Court | Hon. Kevin Enright
San Diego Superior Court | Hon. Michael T. Smyth
US Bankruptcy Court S. District of CA | Hon. Christopher Latham
US Bankruptcy Court S. District of CA | Hon. J Barrett Marum
United States District Court, SDCA | Hon. Roger Benitez
United States District Court, SDCA | Hon. Karen Crawford
United States District Court, SDCA | Hon. Lupe Rodriguez
Signature Resolution | Hon. Kari Katz (Ret.)
Signature Resolution | Hon. Eddie Sturgeon (Ret.)
Judicate West | Hon. Larry Burns (Ret.)
Judicate West | Hon. Robert Dahlquist (Ret.)
Judicate West | Hon. Steven Denton (Ret.)

2026-2028

San Diego Superior Court | Hon. Marcella McLaughlin
San Diego Superior Court | Judge John Meyer
United States Bankruptcy Court, SDCA | Hon. Margaret Mann
United States District Court, SDCA | Hon. Marilyn Huff
United States District Court, SDCA | Hon. Janis Sammartino
United States District Court, SDCA | Hon. Andrew Schopler
ADR | Hon. Charles Hayes (Ret.)
JAMS | Hon. Lorna Alksne (Ret.)
Judicate West | Hon. Timothy Casserly (Ret.)
Judicate West | Hon. Steve Denton (Ret)
Judicate West | Hon. Joan Lewis (Ret.)
Judicate West | Hon. Ronald Prager (Ret.)
Judicate West | Hon. Timothy Taylor (Ret.)
Signature Resolution | Hon. Kenneth So (Ret.)

Dinner Programs

Ryan Caplan, chair
James Crosby, vice chair 1
Rachael Kelley, vice chair 2

Annual Seminar

Christian Andreu von-Euw, chair

Membership

David Greeley, chair
Nate Smith, vice chair

Sponsor Relations

Ivana Torres, chair
Joe McGeady. vice chair

Judicial Advisory Board

Hon. Michael Smyth, chair

Hon. Victor Pippins, vice chair

Leadership Development Committee

Dzvinka McKie, chair
Joe Radochonski, vice chair

Specialty MCLE Lunches

Drew Alan Hillier, chair
Justin Martin, vice chair

Community Outreach

Hon. Linda Lopez, chair
Sam Sheldon, vice chair

Bi-Annual Trial Skills Seminar

2026 - skip year

Mock Trial

Vivian Adame, chair
Caitlin Macker, vice chair

The ABTL Report

Lori McElroy, design
Cheryl Soto, editor
Brittany Salamin, 2nd editor

Past Presidents

Mark C. Mazzarella, 1992-1994
Michael Duckor, 1994-1996
Peter H. Benzian, 1997
Hon. Ronald L. Styn, 1998
Claudette G. Wilson, 1999
Meryl L. Young, 2000
Alan Schulman, 2001
Howard E. Susman, 2002
Hon. J. Richard Haden, 2003
Frederick W. Kosmo, Jr., 2004
Charles V. Berwanger, 2005
Hon. Maureen F. Hallahan, 2006
Hon. Jan M. Adler, 2007
Robin A. Wofford, 2008
Edward M. Gergosian, 2009
Mark C. Zebrowski, 2010
Anna F. Roppo, 2011
Hon. M. Margaret McKeown, 2012
Rich Gluck, 2013
Marisa Janine-Page, 2014
Jack R. Leer, 2015
Brian A. Foster, 2016
Paul A. Tyrell, 2017
Michelle L. Burton, 2018
Randy Grossman, 2019
Alan Mansfield, 2020
Rebecca Fortune, 2021
Hon. Lorna Alksne (Ret.), 2022
Paul Reynolds, 2023
Andrea Myers, 2024
Jenny Dixon, 2025

www.abtl.org/sandiego

BACK to Inside this issue

Thank You

PLATINUM

JAMS®

JUDICATE WEST
Alternative Dispute Resolution

SIGNATURE RESOLUTION

GOLD

ADR SERVICES, INC.℠

STENO
REVOLUTIONIZING COURT REPORTING

SILVER

BILL VANDEWEGHE, ESQ.
MEDIATOR AND ARBITRATOR
JAMS®

Express Deposition Services
by EXPRESSNETWORK

JUSTICE SERVED
ARBITRATION & MEDIATION SERVICES

JND
LEGAL ADMINISTRATION

Sponsors 2026

BACK to Inside this issue