



# AI and Confidentiality: The Confidentiality Continuum, a Practical Guide for Lawyers

By Christian Andreu-von Euw and Jayson L. Cohen\*

## Introduction

This article focuses on the **confidentiality** of AI in the legal world, not its **reliability**.<sup>1</sup> The guidance on reliability is voluminous, consistent, and uncontroversial: AI hallucinates, and lawyers must verify any information it produces.

By contrast, only a few court decisions have addressed AI's confidentiality. They provide conflicting signals about court confidence in AI's ability to protect confidential information, but they also suggest a lack of technical understanding among judges and lawyers about how AI tools work. Despite this uncertain landscape, attorneys have duties of competence and confidentiality that they must fulfill when using AI or advising clients about its use. This article seeks to help lawyers understand and apply existing ethical and court guidance when they use AI and advise clients on AI risk mitigation and options.

**The article is the first in a two-part series.** The first part of the series consists of sections I through III. Section I presents the ethical rules governing the duties of confidentiality and competence that apply to AI, along with bar opinions interpreting those rules for internet services and AI. Section II examines the few court decisions that have considered AI's confidentiality, including the controversial opinion in *United States v. Heppner*. We review the split in authority on whether work product protection survives AI use and identify the tendency of courts to sort AI technology into "open" systems (deemed unsafe) and "closed" systems (deemed safe). To start moving beyond this open/closed dichotomy, Section III offers a high-level description of the technology underlying AI. Here, we distinguish the different behaviors by AI model providers, such as data storage and use, that affect confidentiality risk.

## I. Ethical Rules and Their Application to AI

Lawyers have duties to protect client confidences that apply to AI use. Model Rule 1.6 of the Rules of Professional Conduct addresses an attorney's obligation to keep client information confidential and applies to all technology use by lawyers, including AI.<sup>2</sup> Rule 1.6(a) prohibits an attorney from disclosing client information without informed consent, among other exceptions. All states have adopted an identical or similar rule. Rule 1.6(c) further requires "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Most states have adopted or are in the process of adopting a form of Model Rule 1.6(c).

## INSIDE

AI and Confidentiality:  
The Confidentiality Continuum,  
a Practical Guide for Lawyers  
By Christian Andreu-von Euw  
and Jayson L. Cohen

cover/7-10 ➤

PRESIDENT'S LETTER  
By Jon Brick

page 3 ➤

Q2 Dinner Program  
CORPORATE INSURANCE TRENDS  
photo Gallery  
By Jenny Dixon

page 4-5 ➤

CALIFORNIA LITIGATION AND  
APPELLATE PRACTICE UPDATE:  
CIVIL PROCEDURE, ADR, AND  
ATTORNEY CONDUCT  
By Marisa Janine-Page

page 12-15 ➤

Understanding CMMC:  
Why Cybersecurity Compliance  
Is Now a Litigation Issue  
By Anne Wilson  
and Katherine Fine

page 17-19 ➤

# Signature Resolution is a proud supporter of ABTL San Diego.

Hon. Keri G.  
Katz (Ret.)



Hon. Kenneth J.  
Medel (Ret.)



Hon. Kenneth K.  
So (Ret.)



Hon. Eddie C.  
Sturgeon (Ret.)



EXCLUSIVELY AT  
**SIGNATURE** RESOLUTION  
[SIGNATURERESOLUTION.COM](http://SIGNATURERESOLUTION.COM)

## PRESIDENT'S LETTER:

# ABTL San Diego, 2026

By Jon Brick

Labor Day has come and gone, the kids are back in school, or so those with kids still in school tell me, and Halloween decorations have appeared in every store. I haven't seen any Christmas items yet, but I am sure it won't be long. The annual Judicial Mixer took place September 8<sup>th</sup> at the Federal Court Complex, complimentary to ABTL members and all judiciary. It was great to see everyone who attended.

Those of us lucky enough to call San Diego home know that being "America's Finest City" isn't just a slogan. And it is official – San Diego has the best weather in the country. The Camelot Climate Index ranks San Diego's weather #1 in the United States!

*It's true! It's true!*

*The crown has made it clear:*

*The climate must be perfect all the year.*

*A law was made a distant moon ago here,*

*June, July and August cannot be too hot;*

*And there's a legal limit to the snow here...*

*In [San Diego].*

*The winter is forbidden till December...*

*And exits March the second on the dot.*

*By order summer lingers through [October]...*

*In [San Diego].*

*I know it sounds a bit bizarre.*

*But in [San Diego]*

*That's how conditions are.*

*The rain may never fall till after sundown,*

*By eight the morning fog must disappear.*

*In short, there's simply not,*

*A more congenial spot*

*for happy everaftering than here*

*In [San Diego].*

**"CAMELOT" ~Alan Jay Lerner (1960)**

Our Q3 Dinner program, "Developments in D&O Insurance and Class Action Securities Claims," featured a distinguished panel of broker and carrier experts who provided discussion and insight into an often-overlooked area that touches virtually every aspect of the law in one form or another.



One final mention that San Diego is hosting the Annual Seminar this year at the Park Hyatt Aviara Resort in Carlsbad, October 8-11. This year's program, "Litigation in 2026: Effective Advocacy in the Age of AI, Fake News, and the Vanishing Attention Span", will feature top trial lawyers and jurists from around the State, as well as non-attorney experts discussing the new, ever-changing litigation challenges faced by the Bar and the Bench.

As always, I want to thank all our sponsors who make ABTL possible, and especially our Executive Director, Lori McElroy, for keeping everything running smoothly. I also want to thank the contributors to this Report and our Report Committee, Cheryl Dunn Soto, Brittany Salamin and Lori, for all their work. Articles are needed for the Q4 Report – submit an article and you too can get published!

Sincerely, *Jon Brick*

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

## ABTL San Diego's Q3 Networking Dinner Program

# Emerging Corporate Insurance Risks

The ABTL community gathered on August 13, 2026, at the Westin San Diego Gaslamp Quarter for networking and an outstanding dinner program, **Corporate Insurance Trends: D&O, Artificial Intelligence, Cyber, and Securities Class Actions**. Hahn Loeser & Parks LLP hosted the reception, and the dinner was made possible through the generous support of our event sponsors; JAMS, Judicate West, Signature Resolution, ADR Services Inc., Justice Served, and Hahn Loeser.

This event brought together litigators, members of the judiciary, and insurance professionals for an engaging discussion about working effectively with insurers and brokers and addressing emerging litigation trends. ABTL members heard insights from an accomplished panel that included Megan Castler, Senior Vice President and Senior Claims Advocate, FINPRO, at Marsh Risk; Anthony Fowler, Vice President of Claims, Financial Lines, at Starr Companies; Rachael Kelley, Chief Technology Partner at Burton Kelley LLP; and Jessenia Vazcones-Yagual, Assistant Vice President and Head of Private Company D&O Claims at Sompco. Bill VanDeWeghe of JAMS served as moderator, offering the perspective of a mediator frequently called upon to facilitate resolution among the parties, their counsel, and their insurers.

An overarching theme of the evening's discussion was the need for a cooperative approach among counsel, brokers, insurers, and even mediators. Megan Castler explained that the broker's role is to maximize available coverage and stressed that a broad tender approach is often appropriate. She advised that, because the insured is the broker's client, counsel should seek to leverage that relationship. As litigator Rachael Kelley noted, counsel can lose control of a matter if a claim is not tendered promptly. Jessenia Vazcones-Yagual encouraged insureds and their counsel to reach out early because there is often available coverage that they may not realize exists. She also noted that carrier representatives are frequently attorneys themselves and can serve as valuable resources. Anthony Fowler recommended that counsel determine whether coverage exists as early as possible because "no one likes surprises." He added that insurers closely monitor litigation trends and comparable cases. Bill VanDeWeghe reminded attendees that tendering a claim or dispute does not automatically affect insurance rates or premiums; generally, there is no impact unless a claim is ultimately paid.

The panelists stressed that insurers want notice of mediations well in advance, rather than merely a few weeks before they occur. As Fowler advised, "Give us time to work with you." They also emphasized the importance of promptly sharing adverse facts, unfavorable documents, and other significant developments. Vazcones-Yagual explained that insurance representatives often must navigate internal approval processes and therefore need complete information to conduct an

accurate analysis. Fowler noted that insurers cannot properly evaluate settlement value without understanding the key risks presented by the case.

For plaintiffs' counsel, the message was simple: "Please do not hide the ball." Insurers want damages calculations well in advance of mediation so that defendants and insurers have sufficient time to conduct due diligence and be prepared for meaningful settlement discussions. This is particularly important when multiple insurers are involved, as several layers of review and approval may be required. Unreasonable settlement demands can also delay resolution. VanDeWeghe emphasized that clear communication with clients regarding their tolerance for risk and their ability to fund legal fees and costs is a critical component of effective litigation strategy.

The panel also shared several noteworthy litigation trends. Over the past decade, the median time from filing to resolution has increased from 2.8 years to 3.7 years, while the average settlement value has grown from \$30 million to \$54 million as of mid-2026. AI-related litigation continues to increase, whether based on allegations that companies have overstated their use of artificial intelligence or understated the risks that AI poses to business operations. Filings in 2026 have already surpassed the total number of AI-related cases filed in 2025. Castler also reported seeing AI increasingly serve as the basis for discrimination claims in employment litigation.

Insurers are also seeing significant growth in "pump-and-dump" litigation, with eleven cases filed through mid-2026 compared with only one or two cases annually during each of the previous four years. Another developing area involves litigation arising from the impact of tariffs on businesses. Three such cases have been filed to date in 2026, matching the total number filed in 2025. Companies with international operations may also face risks associated with foreign tariff regimes. Castler reiterated that insureds should tender claims whenever coverage may be available to determine whether protection exists and echoed VanDeWeghe's point that the act of tendering alone does not affect premiums.

In closing, the panel underscored that insurance brokers and carrier representatives are critical participants in the litigation process. Counsel should take full advantage of their knowledge, experience, and expertise to achieve the best possible outcomes for their clients.



*JENNY DIXON is a partner at Hahn Loeser and ABTL's Immediate Past President.*

## Q3 Dinner - CORPORATE INSURANCE TRENDS

Photography by [c.dobbs487@gmail.com](mailto:c.dobbs487@gmail.com)



Photo Caption (L to R): Jon Brick (ABTL President), Bill VanDeWeghe (JAMS), Jessenia Vazcones-Yagual, Megan Castler, Rachael Kelley, Anthony Fowler



THANK YOU  
Ryan Sausedo  
& Merridith Delinojs



abtl  
SD

[BACK](#) to Inside this issue

# The Gold Standard in Private Dispute Resolution



*Results Beyond Dispute<sup>SM</sup>*

*We are proud to offer the services of these experienced local neutrals.*



Hon. Cynthia G. Aaron, Ret.



Hon. Jan M. Adler, Ret.



John S. Adler, Esq.



Hon. Jeffrey B. Barton, Ret.



Jonathan A. Brenner, Esq.



Hon. Larry A. Burns, Ret.



Hon. Timothy M. Casserly, Ret.



Hon. Robert P. Dahlquist, Ret.



Hon. Steven R. Denton, Ret.



Hon. William V. Gallo, Ret.



Hon. Herbert B. Hoffman, Ret.



Richard A. Huver, Esq.



Hon. Joan M. Lewis, Ret.



Hon. Frederick L. Link, Ret.



Hon. James A. Mangione, Ret.



Hon. William McCurine, Jr., Ret.



Hon. Thomas P. Nugent, Ret.



Hon. Leo S. Papas, Ret.



Gregory A. Post, Esq.



Hon. Linda Quinn, Ret.



Kristin Rizzo, Esq.



Thomas E. Sharkey, Esq.



Hon. Nita L. Stormes, Ret.



Hon. Timothy B. Taylor, Ret.



Hon. Joel R. Wohlfeil, Ret.



## ***Judicate West Proudly Welcomes Hon. Ronald F. Frazier, Ret.***

- 44 years of combined judicial, litigation and mediation experience
- ABOTA member & 2023 "Judge of the Year" recipient
- 750+ settlement conferences and mediations

**402 W Broadway Suite 2400 San Diego CA 92101**

## AI and Confidentiality... | *continued from cover*

These Rule 1.6 confidentiality obligations work hand-in-hand with Model Rule 1.1, which requires basic attorney competence. It includes a directive to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>3</sup>

AI is not the first technology that entrusts client data to third-party providers, and past bar opinions have addressed such technologies under these rules. The use of email elicited bar opinions that generally find it is safe if the attorney makes reasonable efforts to protect client confidences. For example, ABA formal opinion 477R reaffirmed that **unencrypted** email can be an acceptable method of lawyer-client communication but re-emphasized that lawyers must understand the risks and tradeoffs of every form of online communication.<sup>4</sup> It concluded broadly that “lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the following factors [from comment 18 to Model rule 1.6] to determine what effort is reasonable”:<sup>5</sup>

- the sensitivity of the information;
- the likelihood of disclosure if additional safeguards are not employed;
- the cost of employing additional safeguards;
- the difficulty of implementing the safeguards; and
- the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).<sup>6</sup>

State bar associations have issued similar opinions allowing the use of third-party services like cloud software and online data storage as long as attorneys exercise care.<sup>7</sup>

Recent bar guidance that is specific to AI has built on this foundation. In 2023, the California State Bar issued guidance on applying the reasonableness standard to the use of AI.<sup>8</sup> It directed lawyers to review terms of use and consult an IT professional before inputting client information into an AI tool.<sup>9</sup> California is also revising the comments to its conduct rules, reiterating that AI does not alter a lawyer’s duties of competence and confidentiality, which require the exercise of professional judgment and the protection of client information.<sup>10</sup> These duties also encompass the need to obtain informed client consent before using AI. ABA Formal Opinion 512, issued in 2024, advises that lawyers need informed client consent before inputting client information into an AI tool.<sup>11</sup> The New York City Bar Association similarly requires informed client consent.<sup>12</sup>

This ethical guidance steers in one direction: the better attorneys understand AI technology, the better they can satisfy their ethical obligations and serve their clients.

## II. Confidentiality in the Courts

### Most Courts Have Protected AI Use for Litigation as Work Product

Court guidance on confidentiality issues raised by AI has been less clear than bar guidance. Commentators have focused on **United States v. Heppner**, an early decision that allowed discovery of AI use and denied claims of work product and privilege.<sup>13</sup> It led to countless law firm articles warning of AI’s dangers, many of which gave the mistaken impression that all AI use is inherently risky or that general purpose commercial AI tools offer insufficient protections.

Commentators have paid less attention to **Warner v. Gilbarco, Inc.**, another decision that issued on the same day as **Heppner** and reached the opposite conclusion.<sup>14</sup> Since then, most, but not all, court decisions have protected the inputs and outputs of AI use from discovery in litigation. Below, we present an overview of the cases that have considered this issue, providing a starting point for lawyers trying to make decisions about their own AI use, advise a client about the client’s AI use, or advocate for their preferred AI practices in Court.

**Heppner** held that a defendant’s interactions with a “publicly available AI platform” were neither attorney-client privileged nor entitled to work product protection under the Federal Rules of Criminal Procedure.<sup>15</sup> It reached that conclusion after considering the consumer-tier terms of service for that AI tool and the types of disclosure that were possible in that situation. The court was particularly concerned about the AI model provider’s ability to “train” its models on Heppner’s user data, an important issue we discuss below. **Warner** reached the opposite conclusion. It held that the work-product doctrine under the Federal Rules of Civil Procedure did protect a pro se litigant’s use of a similar consumer AI tool, finding that the use of AI did not constitute a disclosure to an adversary, which would be required to waive work product protection.<sup>16</sup>

Three subsequent decisions found **Warner**’s AI-friendly analysis more persuasive than **Heppner**’s analysis. **Morgan v. V2X Inc.** applied **Warner** to hold that work-product protection in a civil case applied to use of AI tools.<sup>17</sup> It analogized use of AI to the expectation of privacy in everyday use of internet-based email and messaging through third-party providers like Google.<sup>18</sup> In **Assini v. Hayward**, a New York court expressly followed **Warner** and **Morgan** and quashed a subpoena seeking a litigant’s ChatGPT logs, holding that AI use neither surrendered confidentiality nor waived work-product protection.<sup>19</sup> And in **Tate Group Automotive, LLC v. Legacy Automotive Capital, LLC**, a Texas court similarly followed **Warner** and **Morgan** and found that a non-lawyer’s “chats” with ChatGPT were protected work product, but also ordered disclosure of all discovery materials shared with ChatGPT.<sup>20</sup>

*Continued on page 8*

## AI and Confidentiality... | *continued from 7*

A recent Massachusetts court, however, followed *Heppner*. It found work product protection did not apply where a civil litigant represented by counsel, as opposed to a pro se litigant, used ChatGPT through a romantic partner without his counsel's knowledge.<sup>21</sup>

In contrast to this post-*Heppner* split of legal authority, two decisions that issued before *Heppner* and *Warner* protected an attorney's use of AI during litigation. *Tremblay v. OpenAI, Inc.* and *Concord Music Group, Inc. v. Anthropic* both blocked production of lawyer prompts and their corresponding AI responses.<sup>22, 23</sup>

### Protective Orders Offer Guidance

Court decisions that consider prospective protective order limitations on AI use provide insight into how courts understand AI technology. They also provide guidance on where courts may draw lines in the future to separate protected use from waivers of work product and privilege. These court decisions appear to divide AI applications into two classes based on concerns about disclosing confidential information: "open," "no-cost," or "consumer" AI tools are deemed to raise a real risk of training on and disclosure of confidential information, while "closed" or "enterprise" AI tools sufficiently eliminate these risks. The *Morgan* case, discussed above, issued a protective order forbidding "mainstream low-to-no-cost AI" tools whose terms allow "(1) storing or using inputs to train or improve its model; [or] (2) disclosing inputs to any third party except where such disclosure is essential to facilitating delivery of the service," while permitting the parties to use more protective "Enterprise-tier AI" instead.<sup>24</sup> *Jeffries v. Harcros Chemicals, Inc.* similarly issued a protective order forbidding the use of "open AI tools" on discovery materials but permitting "closed AI tools."<sup>25</sup>

The chart below provides a summary of the case law discussed above.

Reality is more nuanced than "open" and "closed" AI. The many choices about data storage, data use, and terms of service and use present a continuum of AI confidentiality possibilities. These may influence the advice an attorney provides to a client. We present this continuum of choices below. But, first, so attorneys can better understand these choices, we take a step back to explain how the large language models at the core of AI work and how they are accessed.

### III. Technology: AI Basics and Confidentiality

Several court opinions discussed above, and many commentators, share the belief that AI poses a unique and inherent confidentiality risk because AI models are trained on user data. The primer below on AI technology shows there is

no such inherent risk because AI training and subsequent AI use are separate and unrelated processes.

### AI Models, their Training, and Inference

A large language model is, at its core, an enormous set of mathematical equations that receives text and predicts the text most likely to follow.<sup>26</sup> A simple version is found in modern email tools that auto-predict short phrases (like "Attached please find") from just a few characters (like "Att"). More sophisticated models work on the same principle, even if vastly more complex and capable.

AI models use data in two basic phases: (1) training, when the model learns to recognize patterns; and (2) inference, when the model generates outputs "inferred" from the inputs.<sup>27</sup> In training, the AI model adjusts its settings with the goal of predicting patterns in the training data. Any data used in training can influence the settings. This creates a risk that input training data may, directly or indirectly, be reflected in later outputs.<sup>28</sup>

In inference, end-users, such as lawyers and their clients, interface with the model. Users input a prompt (also known as a query or request), which the model processes to produce an output. Importantly, no training occurs during inference when using the AI models offered by major model providers.<sup>29</sup> The model's settings remain fixed.

While user inputs and outputs during inference do not affect the model, logs of these inputs and outputs, kept by the model provider, can be, and sometimes are, used to train new models or new versions of the same models. This training, if it occurs, creates some risk that user information could potentially be disclosed to a subsequent user of that model. Because of this, unsurprisingly, legal authorities largely agree that confidential information should not be input into an AI offering that may train its model(s) on user session data.

As explained in the second Part of this series, training on user logs can be disabled in almost all AI products, and it is generally disabled by default in AI products offered to businesses.<sup>30</sup>

### AI Tool Design

Users rarely interact with AI models directly. Instead, software tools mediate the exchange, translating a user's requests into one or more inference steps and assembling the results into a coherent response.

The simplest such tool is the AI chatbot, which captures the user's prompt, sends it to a model on the model provider's servers, and displays the response. The user experiences a somewhat normal conversation. But this simple design

*Continued on page 9*

## AI and Confidentiality... | *continued from 8*

hides complexity. The model remembers nothing from one request to the next.<sup>31</sup> To create the appearance of an ongoing conversation and increase the usefulness of its answers, the chatbot logs and resends the accumulated inputs and outputs from the entire session with each new request. This is an example of “context,” a term of art used to describe the working information given to an AI model along with a request.<sup>32</sup> It helps the model tailor its answers to the specific task and situation instead of producing a general response.

Many chatbots add other context, such as details about the user, with the aim of providing more tailored results. This context comes from account settings, user-saved instructions and preferences, user profiles, and “memory” files generated by the AI tool for the chat.<sup>33</sup>

Context management can give the user the impression that the model is learning from its interactions, as if the user were training the model by chatting. But no training is occurring. The model is never modified, and the information being collected is personal to the user’s chat or account. It does not affect how the model behaves with other users.

Specialized software tools, such as legal AI tools, add more context. They combine the user’s requests with information the user may never see, such as pre-configured instructions designed to steer the model toward a particular goal. A legal research tool, for example, might instruct the model

to rely only on authority from its own case law database, to cite holdings rather than dicta, and to flag any proposition it cannot tie to a source. Generally, the more specialized the software, the more it layers additional context onto the basic exchange of query and result. Authors



**CHRISTIAN ANDREU-VON EUW** is a Partner at Bayla Law. His practice focuses on disputes involving artificial intelligence, computer security, trade secrets, patents, technology contracts, and other technology-focused issues



**JAYSON L. COHEN** is a Partner at Bayla Law. His litigation practice focuses on patents, trade secrets, artificial intelligence, and complex commercial disputes concerning high tech, telecom, life sciences, and chemistry. His space practice encompasses space and earth station licensing as well as rulemakings, coordination, and consultations involving satellite spectrum rights and use.

**ATTORNEY ADVERTISING:** Because of the generality of this article, the information provided in it may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

## ENDNOTES

- 1 \* Contact information: Christian ([christian@baylalaw.com](mailto:christian@baylalaw.com)); Jayson ([jcohen@baylalaw.com](mailto:jcohen@baylalaw.com)).

The term “artificial intelligence” applies to many technologies including spam filtering, speech recognition, and aspects of traditional search engines. Here, it refers to software based on large language models such as those offered by vendors like OpenAI and Anthropic, often referred to as Generative AI.

- 2 American Bar Association, *Model Rules of Professional Conduct* (2013).
- 3 *Id.*, Comment 8 to Model Rule 1.1.
- 4 ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 477R: *Securing Communication of Protected Client Information*, at 3-5 (May 11, 2017).
- 5 *Id.* at 5.
- 6 *Id.* at 4.
- 7 See, e.g., Ill. State Bar Ass’n Prof’l Conduct Advisory Op. 16-06 (2016) (“A lawyer’s use of an outside provider for cloud-based services is not, in and of itself, a violation of Rule 1.6, provided that the lawyer employs, supervises and oversees the outside provider.”); Wash. State Bar Ass’n Advisory Op. 2215 (2012) (“[A]

lawyer using online data storage must not only perform initial due diligence when selecting a provider and entering into an agreement, but must also monitor and regularly review the security measures of the provider.”); N.C. State Bar 2011 Formal Op. 6 (“[A] lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information”); Pa. Formal Op. 2011-200 (“An attorney may ethically allow client confidential material to be stored in ‘the cloud’ provided the attorney takes reasonable care to assure [confidentiality and security].”); see also ABA Formal Op. 08-451 (2008) (foundational opinion allowing outsourced storage of client information).

- 8 The State Bar of California, Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*, at 2-3 (Nov. 16, 2023).
- 9 *Id.* at 2; see also *id.* (regarding Rule 1.1, Duty of Competence: “Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.”).

*Continued on page 10*

## AI and Confidentiality... | *continued from 8*

- 10 The State Bar of California, *Proposed Amendments to the Rules of Professional Conduct Related to Artificial Intelligence*, <https://www.calbar.ca.gov/public/public-meetings-comment/public-comment/public-comment-archives/2026-public-comment/proposed-amendments-rules-professional-conduct-related-artificial-intelligence>.
- 11 ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 512: *Generative Artificial Intelligence Tools*, at 6-7 (July 29, 2024).
- 12 New York City Bar Association, Committee on Professional Ethics, Formal Opinion 2024-5: *Gen AI in the Practice of Law*, at 3 (Aug. 2024).
- 13 820 F. Supp. 3d 292 (S.D.N.Y. 2026) (memorializing Feb. 10 oral opinion).
- 14 820 F. Supp. 3d 629 (E.D. Mich. 2026).
- 15 820 F. Supp. 3d at 296-99.
- 16 820 F. Supp. 3d at 636-37.
- 17 No. 25-cv-01991, 2026 WL 864223, at \*3-5 (D. Col. Mar. 30, 2026).
- 18 *Id.* at \*4.
- 19 No. 607683/2024, --- N.Y.S.3d ---, 2026 WL 1677232, at \*3-4 (Sup. Ct. Nassau Cty. June 4, 2026).
- 20 Order, No. 25-BC11B-0020, slip op. at \*1-4 (Tex. Bus. Ct. June 3, 2026) (Dorfman, J.).
- 21 *Shealy v. Seaside Investments, LLC*, Order, No. 2684CV00799-BLS2, slip op. at \*2-6 (Mass. Sup. Ct. Suffolk Cty. June 16, 2026) (Squires-Lee, J.).
- 22 No. 23-cv-03223, 2024 WL 3748003, at \*2-3 (N.D. Cal. Aug. 8, 2024).
- 23 No. 24-cv-03811, 2025 WL 1482734, at \*1-3 (N.D. Cal. May 23, 2025).
- 24 2026 WL 864223, at \*7.
- 25 No. 25-2569, 2026 WL 820218, at \*4 (D. Kan. Mar. 25, 2026).
- 26 See OpenAI, *Better Language Models and Their Implications*, OpenAI (Feb. 14, 2019), <https://openai.com/research/better-language-models>; see also Anthropic, *Tracing the thoughts of a large language model* (Mar. 27, 2025), <https://www.anthropic.com/research/tracing-thoughts-language-model>.
- 27 Nvidia, *What's the Difference Between Deep Learning Training and Inference?* (updated 2025), <https://blogs.nvidia.com/blog/difference-deep-learning-training-inference-ai/>.
- 28 See, e.g., Nicholas Carlini et al., *Quantifying Memorization Across Neural Language Models*, International Conference on Learning Representations (Mar. 6, 2023), <https://arxiv.org/abs/2202.07646>.
- 29 See, e.g., Anthropic, *Choosing a Claude model and effort level in Claude Code*, <https://claude.com/blog/claude-model-and-effort-level-in-claude-code> (last visited July 20, 2026) (“The weights of each model are set during training, and by the time you’re sending requests they’re read-only. Nothing in your prompt, your CLAUDE.md, or your context changes them. (If you’ve run into the word inference, that’s all it means: using the model after training is done, with the weights fixed.)”).
- 30 AI algorithms that update a model from user inputs during inference exist but are rare. They are, however, outside the scope of this paper because the major model providers represent that their commercial models do not train on user inputs. See OpenAI, *Business Data Privacy, Security, and Compliance*, <https://openai.com/business-data/> (last visited July 25, 2026) (“we do not use . . . inputs or outputs [] for training or improving our models”); Anthropic, *Is My Data Used for Model Training?*, Anthropic Privacy Center, <https://privacy.claude.com/en/articles/7996868-is-my-data-used-for-model-training> (last visited July 25, 2026) (“we will not use your inputs or outputs . . . to train our models”); Google, *How Gemini for Google Cloud Uses Your Data*, Google Cloud Documentation, <https://docs.cloud.google.com/gemini/docs/discover/data-governance> (last updated July 17, 2026) (“Gemini doesn’t use your prompts or its responses as data to train its models”).
- 31 See Claude Docs, *Using the Messages API*, <https://platform.claude.com/docs/en/build-with-claude/working-with-messages> (last visited July 25, 2026) (“The Messages API is stateless, which means that you always send the full conversational history to the API.”).
- 32 See, e.g., Anthropic, *Effective Context Engineering for AI Agents* (Sept. 29, 2025), <https://www.anthropic.com/engineering/effective-context-engineering-for-ai-agents>.
- 33 See OpenAI, *Memory FAQ*, <https://help.openai.com/en/articles/8590148-memory-faq> (saved memories, in addition to chat history, are “part of the context ChatGPT uses to generate a response”) (last visited July 26, 2026); OpenAI, *Dreaming: Better Memory for a More Helpful ChatGPT* (June 4, 2026), <https://openai.com/index/chatgpt-memory-dreaming/>.

Virtual  
Latinos

“

The beauty of mediation is that it gets people out of conflict so they can move on with their lives.”

— Kim Taylor, CEO and President, JAMS

475+

Neutrals

10,000+

Mediations annually

## JAMS is the way forward

For more than four decades, we've pioneered custom mediation to fit every matter and every client. Our neutrals bring unmatched experience finding common ground to help parties move forward with confidence.

Find a mediator at [jamsadr.com](http://jamsadr.com).



# California Litigation and Appellate Practice Update: Discovery, Evidence, Trial Practice, Settlement, and Arbitration

By Marisa Janine-Page

California appellate courts continued during the past year to address issues arising throughout the life of a civil case – from discovery and evidentiary preparation through expert disclosure, trial, settlement, and post-judgment proceedings. Several decisions provide particularly useful guidance for trial lawyers concerning discovery sanctions, privileged materials, evidentiary foundations, expert disclosures, preservation of error, settlement practices, and arbitration agreements. The following summarizes several noteworthy developments.

## DISCOVERY

### Discovery Sanctions and the Preference for Trial on the Merits

Several decisions illustrate both the breadth and limits of trial court discretion in imposing discovery sanctions.

Atlas v. Davidyan (Second District, Division Eight). The Court of Appeal affirmed entry of default judgment as a terminating discovery sanction after repeated discovery violations. The court reiterated that trial courts may impose monetary, evidentiary, issue, and ultimately terminating sanctions for misuse of the discovery process, and review of the sanction selected is highly deferential. **Practice Tip:** A persistent pattern of noncompliance can justify terminating sanctions. Counsel confronting repeated discovery violations should create a clear record demonstrating both the violations and the ineffectiveness of lesser measures.

Rodriguez v. WNT, Inc. (Fourth District, Division One). Plaintiff's counsel deliberately ignored discovery requests, motions, and orders for months while having difficulty communicating with his client, without notifying opposing counsel or the court or seeking appropriate relief. The Court of Appeal affirmed dismissal and rejected an attempt to characterize counsel's deliberate conduct as attorney fault requiring mandatory relief under Code of Civil Procedure section 473(b). The court also found the challenge to terminating sanctions forfeited because plaintiff had not opposed the sanctions motion on the merits below and failed to provide an adequate appellate record. **Practice Tip:** When a client becomes unavailable or uncooperative, do not simply allow discovery deadlines and orders to pass. Inform the court, communicate with opposing counsel, and seek appropriate extensions, a continuance, or other relief. And if sanctions are sought, preserve substantive objections in the trial court.

Higginson v. Kia Motors America, Inc. (Fourth District, Division One). The court emphasized the other side of the equation. Although Kia committed discovery misuse, the Court of Appeal rejected the argument that terminating sanctions were required. Discovery sanctions are intended to remedy discovery abuse, not to provide punishment or avoid trial on the merits. Courts ordinarily should proceed incrementally, considering monetary sanctions before more severe nonmonetary remedies, and terminating sanctions generally should follow unsuccessful lesser sanctions unless the record establishes they would be ineffective. The court nevertheless concluded that Kia's discovery misconduct constituted an irregularity sufficient to require a new trial. **Practice Tip:** Match the requested discovery sanction to the harm. A serious discovery violation does not automatically justify terminating sanctions, but misconduct that materially affects the fairness of trial may support other significant relief, including a new trial.

### Discovery Sanctions and Appealability

Morales v. City and County of San Francisco (First District, Division Three). The court refused to aggregate separate sanctions orders to reach the \$5,000 statutory threshold for immediate appeal and declined to treat the attempted appeal from a \$1,500 sanction as a writ petition. More consequentially, the court found the remaining appeal both objectively and subjectively frivolous and imposed appellate sanctions against counsel where the appeal included plainly non-appealable orders, forfeited arguments, positions inconsistent with those taken below, and factual assertions contradicted by the record. **Practice Tip:** Before appealing a discovery sanction, independently confirm appealability and preservation. Separate sanctions orders ordinarily cannot simply be combined to satisfy the statutory appealability threshold.

### Depositions of Government Enforcement Agencies

People v. Superior Court (Credit One Bank, N.A.) (Fourth District, Division Two). The Court of Appeal addressed as a matter of first impression whether the People may be required to designate a person most qualified for deposition in a civil enforcement action. The court held that the People constitute a "person" subject to deposition under the Civil Discovery Act but recognized that a PMQ deposition of a government enforcement agency may effectively become a deposition

*Continued on page 13*

## California Litigation and Appellate Practice Update... | *continued from page 12*

of opposing counsel. Accordingly, when the People seek a protective order, the trial court must apply the heightened "extremely good cause" standard governing depositions of opposing counsel. **Practice Tip:** A PMQ notice directed to a government enforcement agency is not categorically prohibited, but expect heightened scrutiny where responding to the noticed topics would require testimony from prosecuting attorneys or their functional equivalent.

### EVIDENCE AND PRIVILEGE

#### Receiving an Opponent's Privileged Communications

Guardian Storage Centers, LLC v. Simpson (Fourth District, Division Three). Former employees provided their lawyers with company emails containing communications with company counsel. The law firm reviewed the emails, did not notify the company that it possessed them, refused to return them after demand, and indicated that it intended to use them in the litigation. The Court of Appeal held that the trial court used the wrong framework in denying disqualification. The rule governing inadvertently disclosed privileged material also applies when it is reasonably apparent that privileged material was taken from the privilege holder without authorization. The fact that the former employees originally had been intended recipients did not eliminate the privilege or counsel's resulting obligations. **Practice Tip:** When opposing counsel's apparently privileged material comes into your possession, stop reviewing it and address privilege before attempting to use it. The fact that your own client supplied the material does not necessarily eliminate the obligations triggered by receipt of an adversary's privileged communications.

#### Declarations From Non-English-Speaking Witnesses

Detrick v. Shimada (Second District, Division One). A Japanese-speaking litigant who could not read, write, or speak English submitted an English-language declaration in support of summary judgment. No evidence identified the interpreter or translator, established that person's qualifications, or verified that the declaration accurately reflected the declarant's words. The Court of Appeal held the declaration was not competent evidence and reversed summary judgment. The Court of Appeal explained that Evidence Code provisions governing interpreters apply to written as well as oral testimony. A signature alone does not establish reliability where the declarant cannot read the document she signed. **Practice Tip:** When submitting an English-language declaration for a witness who cannot read English, establish the translation foundation. Identify the interpreter or translator, establish

qualifications, and provide evidence that the translated declaration accurately reflects the witness's statements.

### EXPERT WITNESSES

Two decisions underscore that expert disclosure requirements concern not only who will testify but what opinions the expert will offer.

#### Last-Minute Expert Designations

McDonald v. Zargaryan (Second District, Division Eight). The plaintiff disclosed a new medical expert only one week before trial. Rather than filing the statutorily required motion for leave to augment the expert witness list, plaintiff simply sought to proceed with the new expert, and the trial court permitted the testimony after allowing an immediate deposition. The Court of Appeal held this was an abuse of discretion and vacated the judgment. The court emphasized that the motion requirement permits the proponent to demonstrate good cause while giving the opponent an opportunity to establish prejudice. A last-minute deposition does not substitute for compliance with that statutory procedure. **Practice Tip:** If a new expert becomes necessary after the statutory exchange, move promptly for leave to augment. Do not assume that offering an expedited deposition will cure an untimely designation.

#### Undisclosed Expert Opinions

Jogani v. Jogani (Second District, Division One). The 21-year dispute produced another important expert-disclosure warning. After a five-month jury trial resulting in approximately \$6.85 billion in compensatory and punitive damages, the Court of Appeal concluded that the trial court prejudicially erred by permitting a damages expert to offer an undisclosed opinion that investments sold during the financial crisis would have grown to approximately \$1.98 billion using a stock-fund index as a proxy. **Practice Tip:** Expert disclosure obligations concern the substance of the opinions to be offered, not merely the identity of the witness. A disclosed expert cannot use trial testimony to unveil a materially new damages theory that was not properly disclosed.

### TRIAL AND POSTJUDGMENT PROCEDURE

#### Attorney Misconduct Can Undo a Verdict

Allen v. Patel (Fourth District, Division Two). A jury awarded plaintiff more than \$1 million, but the trial court granted a new trial based on counsel's misconduct, and the Court of Appeal affirmed. The misconduct included promising expert causation evidence that was never produced, presenting inflammatory evidence unsupported by causation evidence, inviting the jury to punish the defendant during the compensatory phase

*Continued on page 14*

## California Litigation and Appellate Practice Update... | *continued from page 13*

of a bifurcated trial, urging jurors to "defend our community," violating orders *in limine*, attacking opposing counsel, and continuing lines of questioning after objections had been sustained. Attorney misconduct supports a new trial when it is prejudicial, which the court decides by considering the entire trial, the seriousness and atmosphere of the misconduct, the likelihood of jury prejudice, and whether objections or admonitions could cure it. **Practice Tip:** Zealous advocacy does not protect a verdict obtained through repeated violations of evidentiary rulings or improper appeals to the jury. Counsel should treat rulings *in limine* as continuing boundaries throughout opening statement, examination, and closing argument.

### The Limits of Nunc Pro Tunc Relief

Stop G-19, LLC v. Tooling Express, Inc. (Second District, Division One). The trial court timely granted a motion to set aside and vacate a judgment, but later attempted, after expiration of the statutory 75-day period, to enter a different judgment *nunc pro tunc*. The Court of Appeal held that a court that timely grants the motion may not use a *nunc pro tunc* order after expiration of its statutory power to enter a substantively new judgment. **Practice Tip:** A *nunc pro tunc* order can correct the record to reflect action actually taken; it cannot restore expired jurisdiction or permit a court to take new substantive action after a statutory deadline has passed.

### Contribution After a Joint and Several Judgment

R & J Sheet Metal, Inc. v. W.E. O'Neil Construction Co. of California (Second District, Division One). One judgment debtor satisfied a joint and several judgment while another debtor's appeal remained pending. The court held that the pending appeal prevented the trial court from ruling on the contribution motion but did not prevent the paying defendants from timely filing it. A later motion adding accrued post-judgment interest was properly treated as an update of the original motion rather than a new, untimely motion.

**Practice Tip:** A stay may prevent adjudication without preventing a filing necessary to preserve a statutory deadline. Distinguish carefully between the court's power to act and a party's ability or obligation to file.

### Preserve Objections During Jury Selection

Matthews v. Ryan (Second District, Division One). The trial court announced that rather than seating prospective jurors randomly by number, it intended to ask for volunteers to fill the jury box. Although the procedure conflicted with statutes requiring random jury selection, defense counsel did not object. The Court of Appeal affirmed, holding the challenge forfeited. A request that the trial court address hardships "the

normal way" did not preserve an objection to the method of seating jurors. **Practice Tip:** If the court announces a jury-selection procedure that appears inconsistent with statute, make a specific and timely objection. A generalized comment about preferred procedure will not necessarily preserve the issue for appeal.

## SETTLEMENT PRACTICE

### Section 998 Offers and Insurer Consent

Matthews v. Ryan (continued). This case also addressed a settlement issue. Plaintiffs' Code of Civil Procedure section 998 offer expressly conditioned acceptance on the defendant's liability insurer's consent. The Court of Appeal held that the condition did not invalidate the offer because an insurer's consent is necessarily a practical condition of settlement where the insurer controls payment. The court remanded, however, for determination whether the offer was reasonable and made in good faith. **Practice Tip:** A section 998 offer does not become invalid merely because it expressly recognizes an insurer's necessary consent, but validity does not eliminate the separate requirement that the offer be reasonable and made in good faith.

### Wire Fraud and Settlement Payments

Thomas v. Corby Restaurant Development Corp. (Fourth District, Division One). After the parties settled a personal injury action, an imposter using a spoofed email address caused defense counsel to wire \$475,000 in settlement proceeds to the wrong account. The Court of Appeal adopted a first-impression rule that the risk of loss from fraudulent diversion of a wire transfer falls on the party in the best position to prevent the fraud. Courts consider the totality of the circumstances, including computer security, prior breaches or warnings, suspicious email addresses, changes to payment instructions, and whether counsel independently confirmed wiring instructions. The defense bore the loss because multiple warning signs accompanied the fraudulent instructions, including a changed payee, a request for a wire when counsel had contemplated payment by check, an altered email address and phone number, and duplicate instructions. **Practice Tip:** Never change settlement-payment instructions based solely on email. Independently verify wiring instructions using previously authenticated contact information, particularly when the method of payment, payee, bank, account, email address, or other material information changes.

### Review of Good-Faith Settlement Determinations

Fennessy v. Altoonian (Third District). The Court of Appeal addressed a division of authority concerning review of good-

*Continued on page 15*

## California Litigation and Appellate Practice Update... | *continued from page 14*

faith settlement determinations under Code of Civil Procedure section 877.6. The court held that the statute's expedited writ procedure is not the exclusive avenue for appellate review. A party may challenge a good-faith settlement determination in a post-judgment appeal even if it did not previously seek writ review. **Practice Tip:** Writ review remains the mechanism for obtaining immediate review of a good-faith settlement ruling, but *Fennessy* recognizes that failure to pursue a writ does not necessarily foreclose post-judgment appellate review. Be aware, however, that the Courts of Appeal have divided on this issue.

### ARBITRATION

#### No Special Presumption Favoring Arbitration

*Fuentes v. Empire Nissan, Inc.* The California Supreme Court addressed unconscionability in an employment arbitration agreement and clarified an important point concerning arbitration doctrine. The trial court found a very high degree of procedural unconscionability based on the barely legible agreement and the circumstances under which the employee was asked to sign it. The Court of Appeal nevertheless relied in part on the proposition that federal and California law strongly favor arbitration in construing related confidentiality agreements. The Supreme Court rejected use of a presumption favoring arbitration to decide whether an arbitration agreement is unconscionable. Arbitration agreements are contracts and receive the same treatment as other contracts; a policy favoring arbitration does not permit courts to resolve ordinary contract questions in favor of enforcement. The Court also concluded that related confidentiality agreements could support substantive unconscionability because they permitted the employer to pursue in court claims it was likely to bring while requiring the employee's claims to be arbitrated.

**Practice Tip:** Do not invoke a generalized "policy favoring arbitration" to resolve contract formation, interpretation, or unconscionability issues. Analyze the arbitration agreement under ordinary contract principles and examine related agreements for provisions that may create one-sided access to a judicial forum.

#### The Circumstances of Signing Matter

*Velarde v. Monroe Operations, LLC* (Fourth District, Division Three). A new employee was presented with 31 documents, told to move through them quickly while an HR manager waited, and informed that she had to sign the arbitration agreement to begin work. When she said she did not understand it, the HR manager inaccurately told her the agreement would allow disputes to be resolved without either party having to pay lawyers. The Court of Appeal emphasized that intent to mislead was unnecessary; the relevant question was the effect of the employer's statements

and the circumstances surrounding execution. The court concluded the employee's assent was not voluntary or informed and, considering the oppressive formation process together with the agreement's terms, affirmed the finding of unconscionability. **Practice Tip:** Enforceability depends on more than an arbitration agreement's printed words. Employers should provide meaningful time to review the agreement and should ensure personnel responsible for onboarding accurately describe what the agreement does.

#### Pleading Matters When Determining Who Must Arbitrate

*Holland v. Silverscreen Healthcare, Inc.* The California Supreme Court considered whether heirs who had not themselves agreed to arbitrate could nevertheless be compelled to arbitrate wrongful death claims based on a decedent's arbitration agreement with a skilled nursing facility. The court reaffirmed that heirs may be bound under Code of Civil Procedure section 1295 when their wrongful death claims arise from professional negligence, but not every injury alleged against a health care provider constitutes professional negligence. Claims based on custodial neglect may fall outside that rule. Because the pleadings did not necessarily establish that the wrongful death claim arose from professional negligence, the Supreme Court concluded the plaintiffs should have been permitted to amend before the court determined whether the claim was subject to arbitration. **Practice Tip:** On a motion to compel arbitration, carefully examine the pleaded theory of liability rather than assuming that every claim against a health care provider sounds in professional negligence. Where arbitrability turns on the nature of the claim, pleading choices may determine the result.

### TRENDS AND CONCLUSION

The past year's decisions reflect a recurring emphasis on process and preservation. From discovery and expert disclosures through trial, settlement, and arbitration, procedural shortcuts can jeopardize substantive results. For trial and appellate practitioners alike, the common lesson is straightforward: preserve objections, build the record, follow statutory procedures, and pay careful attention to details that may ultimately determine whether a result survives appellate review.



*MS. JANINE-PAGE is a Certified Appellate Law Specialist and the Founder of MJP Appeals and Litigation.*



## Why hire a Certified Appellate Law Specialist?

An appeal is not a continuation of trial.  
It is the final opportunity to shape the outcome.

**MARISA** Janine-Page

**One lawyer.  
Two perspectives.  
A consequential advantage.**



*MJP*  
Appeals &  
Litigation

Experienced Trial Attorney | Certified in Appellate Law

MJPAppealLaw.com | 619.987.7234



**“LITIGATION IS FUN AND A  
GREAT USE OF TIME AND MONEY”**  
...said no client, ever!

**LET'S GET THAT CASE SETTLED**

**BILL VANDEWEGHE, ESQ.**  
MEDIATOR AND ARBITRATOR

bvandeweghe@jamsadr.com | 619.540.0627

# Understanding CMMC: Why Cybersecurity Compliance Is Now a Litigation Issue

By Anne Wilson and Katherine Fine of Duckor Metzger & Wynne, APLC

For years, cybersecurity lived in the world of IT departments and compliance officers. It rarely surfaced in a deposition, a breach-of-contract complaint, or a purchase agreement. That has changed. With the rollout of the Cybersecurity Maturity Model Certification ("CMMC"), a contractor's cybersecurity posture is now a contractual condition, a warranty, and, increasingly, the factual core of federal False Claims Act ("FCA") litigation.

Business litigators do not need to become cybersecurity engineers, but they do need to understand what CMMC is, why it creates new categories of disputes, and how to identify potential exposure before it lands on their desk as a lawsuit. This article offers a primer on CMMC and a practical view of where litigation risks are most likely to arise.

## What CMMC Actually Is

CMMC is the Department of War's ("DoW") framework for verifying that companies in the federal supply chain adequately protect sensitive government information. Established under Title 32 of the Code of Federal Regulations, Part 170, and enforced through the contract clauses at DFARS 252.204-7021 and others, it converts what used to be a voluntary set of best practices into a hard condition of doing business with the federal government.

The mechanism is straightforward. A contractor's compliance status is recorded in a government database called the Supplier Performance Risk System ("SPRS"). Contracting officers review that status before awarding a contract or exercising an option year. In practical terms, no valid status means no award.

The framework has three tiers, scaled to the sensitivity of the information involved:

**Level 1 (Basic Safeguarding).** Fifteen basic controls (i.e., security measures) designed to protect Federal Contract Information ("FCI"), verified through annual self-assessment.

**Level 2 (Advanced Protection).** Alignment with the 110 security controls in NIST SP 800-171 designed to protect Controlled Unclassified Information ("CUI"). Depending on the contract's sensitivity, this requires either an annual self-assessment or an audit by a Certified Third-Party Assessment Organization ("C3PAO").

**Level 3 (Expert Protection).** The more demanding controls in NIST SP 800-172, evaluated directly by government assessors for the highest-risk defense programs.

The key takeaway for a litigator is that these tiers are not abstract benchmarks. Each one is tied to a specific number (SPRS score) that the contractor certifies to the government. That certification is where the legal exposure begins.

## A Phased Rollout Through 2028

CMMC is being phased in, meaning that both the compliance landscape and the litigation risk will intensify over the next several years. The current timeline is as follows, although it is subject to revisions throughout the implementation process.

| Phase   | Timeline                      | What Applies                                                                                                        |
|---------|-------------------------------|---------------------------------------------------------------------------------------------------------------------|
| Phase 1 | Nov. 10, 2025 – Nov. 9, 2026* | Programs may begin including CMMC clauses; focus on Level 1 and Level 2 self-assessments as conditions of award.    |
| Phase 2 | Nov. 10, 2026* – Nov. 9, 2027 | Requirements expand to Level 2 third-party (C3PAO) certifications; discretion to add Level 3 (DIBCAC) requirements. |
| Phase 3 | Nov. 10, 2027 – Nov. 9, 2028  | Level 2 (C3PAO) and Level 3 (DIBCAC) certification mandates in applicable contracts.                                |
| Phase 4 | Beginning Nov. 10, 2028       | CMMC requirements become mandatory across all applicable defense contracts.                                         |

\*On July 13, 2026, DoW announced the immediate suspension of CMMC Phase 2 set to go into effect on November 10, 2026 and all future milestones. DoW appointed a task force to conduct a 60-day "top-to-bottom" review of the certification program focused on eliminating bureaucracy and enabling innovation. Existing Phase 1 requirements remain in effect until further action by DoW.

The practical consequence is that self-attestation is giving way to independently verified audits. As the standard tightens, the gap between what a contractor claims and what it can actually demonstrate becomes a live litigation risk.

*Continued on page 18*

## Understanding CMMC... | continued from page 17

### Why Business Litigators Should Care

It is a mistake to view CMMC as solely a government-contracts specialty. The framework is generating disputes that look and feel like ordinary commercial litigation, including breach of contract, fraud, successor liability, and indemnification claims, but with a cybersecurity fact pattern underneath. Four risk areas deserve particular attention.

**False Claims Act Exposure.** Under the Department of Justice's ("DOJ") Civil Cyber-Fraud Initiative, misrepresenting a CMMC compliance level or submitting a false SPRS score is treated as actionable fraud under the False Claims Act (FCA), which means treble damages and statutory penalties — creating an exposure profile that dwarfs most contract remedies and turns a compliance shortfall into a bet-the-company problem.

**Prime-Subcontractor Disputes.** Prime contractors are responsible for enforcing CMMC "flow-down" obligations on subcontractors that handle FCI or CUI. The government does not indemnify a prime when a subcontractor falls short. Non-compliant subs can trigger termination, breach-of-contract claims, and bid protests that ripple throughout the supply chain. This is precisely the kind of multi-party commercial dispute litigators handle every day.

**M&A Due Diligence and Reps and Warranties.** Misstatements about CMMC readiness or SPRS scores made during an acquisition can surface after closing as breach-of-warranty claims, escrow holdbacks, and valuation disputes. Cybersecurity representations are no longer boilerplate; they are load bearing.

**Performance Disputes and Lost Option Years.** Because contracting officers must confirm an active SPRS affirmation before award or renewal, a lapse in compliance can cause a default termination or the loss of option years, with no government liability. The contractor absorbs the entire loss, forcing it to breach contracts with its sub-contractors, and the finger-pointing that follows often ends up in court.

### The Enforcement Trend Is Already Here

These are not theoretical risks. The DOJ has been actively using the False Claims Act (FCA) to pursue cybersecurity misrepresentations, and recent settlements show how quickly a technical shortfall becomes a substantial liability:

United States v. LOGZONE, Inc. (2026): A defense logistics contractor paid **\$507,144** after certifying a perfect NIST SP 800-171 score of 110 in SPRS. A subsequent Defense Contract Management Agency audit calculated its true score at negative 170 (against a minimum possible of negative 203). The gap between the claimed and actual scores was found to be fraud.

United States v. Raytheon Company & Nightwing Group (2025): An **\$8.5 million** settlement resolved allegations that the contractor failed to maintain compliant System Security Plans under NIST SP 800-171. Notably, the DOJ named Nightwing as a successor in liability, which is a warning that cybersecurity exposure can follow spun-off entities and acquirers for years.

United States ex rel. v. MORSECORP, Inc. (2025): A **\$4.6 million** settlement, triggered by a whistleblower complaint from the company's own Head of Security, addressed the use of non-FedRAMP-compliant email and cloud storage and a deliberate delay in correcting inaccurate SPRS scores. Internal compliance staff can, and do, become *qui tam* relators.

United States v. Aero Turbine Inc. & Gallant Capital Partners (2025): A **\$1.75 million** settlement affected not only the contractor but also its private-equity parent. A private equity firm executive was involved in operational decision-making; hence the DOJ extended FCA exposure to the institutional investor. This is a caution for any parent that exercises control over a non-compliant subsidiary.

Read together, these cases map neatly onto core litigation practice areas: contract disputes sparked by default or non-renewal, M&A and successor-liability claims arising from thin due diligence, and whistleblower actions rooted on unresolved cybersecurity gaps.

### Why the Government Is Pushing So Hard

It helps to understand the threat driving this enforcement. The Defense Industrial Base ("DIB") comprises more than 100,000 contractors and subcontractors, roughly 80% of them of which are small and medium-sized businesses. That creates an enormous, unevenly defended attack surface, and foreign adversaries treat smaller vendors as stepping-stones into larger programs. Four nation-states (China, Russia, Iran, and North Korea) reportedly account for more than 77% of suspected state-sponsored cyber operations globally, with China the most active threat to defense supply chains.

The intrusions are patient and severe. The Chinese campaign known as Volt Typhoon maintained access to networks supporting U.S. Navy logistics for as long as five years before discovery; a related campaign, Salt Typhoon, went undetected in an Army National Guard network for nine months. In one breach, hackers compromised a small subcontractor's unclassified system and exfiltrated technical specifications for a supersonic anti-ship missile. The SolarWinds compromise, which involved Russian actors inserting malicious code into widely used IT software, reaching the Departments of Commerce, Homeland Security, and Treasury. These tangible

Continued on page 19

## Understanding CMMC... | *continued from page 18*

consequences are why the DoD is moving from self-attestation to verified, independent audits and why it is willing to litigate. The risks to national security vastly outweigh the costs of litigation.

### **What Your Clients Need to Know Now**

If you represent a company that sells to or contracts with the DoD or works with companies that do, a few proactive steps can dramatically reduce exposure:

**Audit SPRS Documentation.** Confirm that every score on file is current, accurate, and supportable. A stale or optimistic self-assessment is the single most common trigger for FCA exposure.

**Review Flow-Down Language in Subcontractor Agreements.** Make sure CMMC obligations are properly passed down, with meaningful audit and remedy rights, so a subcontractor's failure does not become the prime's liability.

**Build CMMC into Deal Diligence.** In any acquisition, treat cybersecurity readiness and SPRS accuracy as a diligence item and a specific representation and never an afterthought buried in general compliance reps.

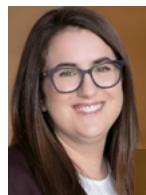
**Screen Pending Disputes for CMMC Issues.** In any live contract dispute or termination, ask early whether compliance status is a factor. It often reframes both the exposure and the leverage.

**Engage Counsel.** Prior to Level 2 and Level 3 audits by C3PAO and DIBCAC, run internal audits to identify weaknesses and shortfalls. When these internal audits are conducted under the supervision of counsel specializing in CMMC issues, the internal audits can be protected by attorney-client privilege and procedures can be corrected and strengthened before a company moves forward with a third-party audit.

Identifying these deficiencies early is far cheaper than defending them later. The difference between a corrected self-assessment and a False Claims Act settlement is measured in millions.

### **The Bottom Line for Litigators**

CMMC has quietly become a commercial-litigation issue wearing a cybersecurity costume. The disputes it generates (fraud, breach, successor liability, indemnification, whistleblower claims) are squarely within the business litigator's wheelhouse. The lawyers who recognize that now, and counsel clients to get their SPRS scores and subcontractor terms in order before a problem matures, will save their clients from the far more expensive fight later.



**ANNE WILSON** is a shareholder at Duckor Metzger & Wynn, ALPC, and she is the current Secretary of ABTL San Diego.



**KATHERINE FINE** is a shareholder at Duckor Metzger & Wynn, ALPC, and a member of ABTL San Diego.

**PROUD  
SILVER SPONSOR**

**JND**

**Award-winning class action  
settlement administration,  
eDiscovery, legal notice programs,  
incident response,  
and litigation support services.**

**www.JNDLA.com**

THE NATIONAL  
LAW JOURNAL  
BEST OF 2025  
HALL OF FAME



Proudly Welcomes

## Hon. Roger T. Benitez

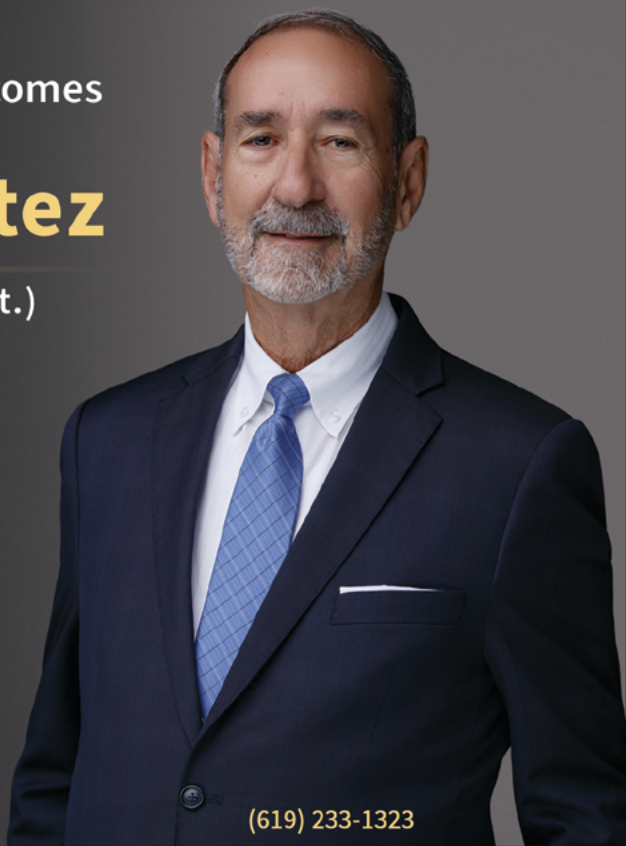
United States District Court Judge (Ret.)

### Areas of Expertise:

- Multidistrict Litigation (MDL)
- Securities and Shareholder Disputes
- Antitrust and Competition Law
- Patent and Intellectual Property
- Complex Commercial Litigation
- Class Actions
- Employment and Wage & Hour
- Consumer Privacy and Data Breach
- Product Liability
- Real Estate and Real Property

For more information and scheduling, please contact Haward Cho at [haward@adrservices.com](mailto:haward@adrservices.com)

(619) 233-1323



**Share your thoughts!  
Contribute an Article!  
Get Published!**

ABTL is always looking for articles geared toward business litigation.

*If you are interested, please contact: [abtlsd@abtl.org](mailto:abtlsd@abtl.org)*

## SEAMLESS. SECURE. SAFE.

# DEPOSITIONS ELEVATED




Susanne De La Flor  
(619) 203-4024  
susanned@expressdeposition.com



### COURT REPORTING

Benefit from the expertise of our reporters with decades of knowledge of court reporting procedures. Our scheduling team can source the most suitable reporter, ensuring a seamless fit for your needs.



### INTERPRETING & TRANSLATIONS

Our proficiency spans across 200 languages and dialects, enabling us to address your professional interpretation and translation needs.



### TRIAL TECHNOLOGY & GRAPHICS

Customized technology to fit your needs, from simple to a complex staging of video and enhance the impact of your trial story with our experienced hot seat technicians.



### EXHIBIT MANAGEMENT

Featuring Express Exhibit Share. Paperless exhibits for your litigation events. Easily introduce, manage and collaborate on digital exhibit files using a computer or mobile device.



### DOCUMENT REPOSITORY

Access your transcripts and exhibits easily with our secure document repository, anytime, anywhere.



### CERTIFIED LEGAL VIDEOGRAPHY

Enhance your case with precise video services that capture reactions and demeanor.



# IS YOUR COURT REPORTING AGENCY PUTTING YOU FIRST?

## We built Steno with you in mind.



That's why we offer each client a dedicated account team, transparent pricing, and around-the-clock concierge care.

Because we believe litigation services should be an asset, not a headache.

Experience the difference today at *Steno.com*.

# 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*

*Cox Castle | Rebecca Reed*

*Duckor Spradling Metzger Wynne | Anne Wilson*

*Fitzgerald Knaier LLP | Robert Knaier*

*Franklin Soto Leeds | Cheryl Dunn Soto*

*Gomez Trial Attorneys | John Gomez*

*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. Michelle Pettit  
 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  
 United States District Court, SDCA | Hon. Brian White  
 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.)  
 Signature Resolution | Hon. Kenneth So (Ret.)  
 Judicate West | Hon. Timothy Taylor (Ret.)

### Dinner Programs

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

### Annual Seminar

Christian Andreu von-Euw, chair  
 Maggie Schroedter, vice 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

Justin Martin, 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](http://www.abtl.org/sandiego)

# Thank You

## PLATINUM



**SIGNATURE**  
RESOLUTION

## GOLD



## SILVER

**BILL VANDEWEGHE, ESQ.**  
MEDIATOR AND ARBITRATOR



## AD/Online



*Sponsors*  
**2026**