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CHAIR'S COLUMN

Written by Jose A. Cordova



Serving as Chair of the California Lawyers Association Litigation Section has been a great privilege. As my term concludes, I am grateful to the Executive Committee, our staff, our members, and advisors.

As I reflect on my year as Chair, I can proudly say that my time has been impactful. From the outset, my goals were to strengthen the value of Litigation Section membership while expanding our connection to different communities that make California's legal profession unique.

With the Executive Committee, we made thoughtful, budget-conscious decisions to help our Section provide you with greater value in today's competitive environment. We also established a standing committee dedicated to delivering high-quality, accessible educational webinars and exploring new ways to make the Sections resources more affordable to members.

We also focused on listening to you, our members. We are in the process of implementing a Section-specific survey of our membership that will provide valuable feedback about how the Litigation Section can better serve you. That valuable information will continue to guide the Section's work after my term ends.

One of the priorities of my tenure as Chair was expanding the Section's visibility and relationships. I represented the Section in nearly every event I was invited to, including minority and affinity bar association events such as the 2025 APABA Silicon Valley Gala, the Charles Houston Bar Association 70th Annual Gala, the 2026 Minority Bar Coalition of the San Francisco Bay Area Unity Awards, the East Bay La Raza Holiday Party, BALIF's 46th Annual Gala, and others. These events created opportunities to build relationships and present Litigation Section Scholarship Awards to deserving recipients.

I am especially pleased with our renewed engagement with the New Lawyers Section. I am excited about this relationship because it creates a pathway for newer lawyers to get involved with the Litigation Section, increase membership, and help shape the future of our profession.

Our signature programs also reflect our Section's exceptional work. I was honored to help facilitate the 2026 Litigation and Appellate Summit, moderate a distinguished panel of jurists, introduce our 2026 Trial Lawyer Hall of Fame Awardee, and serve on the planning committee. I am also pleased to be involved with the planning committee for

our Pathways to the Bench program scheduled for September 18, 2026, in Sacramento. These programs represent our commitment to high-quality education and meaningful professional connection.

Service to the broader community remained important during my term. Our Executive Committee continued our support for Law Suits, a program dedicated to providing clothing to those in need who are applying for jobs. We also participated in a holiday meal-service effort at GLIDE in San Francisco during the holiday season, and assembled hygiene kits for women experiencing homelessness. As you can see, the Section's commitment to justice extends beyond the courtroom.

As expected, I faced several challenges during my time as Chair, and I saw each of them as an opportunity to grow as a person and as a leader. I was able to maintain my enthusiasm, humility, and persistence by remembering my past. I am the first Latinx person to serve as Chair of the Litigation Section. I grew up in California's San Joaquin Valley, the son of farmworkers who did not speak English. My path to Stanford, the UCLA School of Law, and this profession was not conventional or easy, and those experiences continue to influence my approach to this profession and leadership.

Jose A. Cordova

Jose A. Cordova is the chair of the Litigation section of the California Lawyers Association. His practice is based in San Francisco, California.

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EDITOR'S FOREWORD: LIKE THESE HOT TOPICS? GIVE ME A CALL.

Written by Benjamin G. Shatz
Editor-in-Chief



This issue contains the usual and unusual. We have an article about direct review in the California Supreme Court by Robin Johansen and Adam Hofmann. Appellate jurisdiction is a usual topic for us; but direct review in the Supreme Court is pretty unusual. Also, congrats to Adam Hofmann for his nomination to the First District Court of Appeal!

Changes are afoot in the world of peremptory strikes, as explained by Matthew Wegner and Kyle Berry. Next, Tom Freeman takes us back to the classic *Seaman*'s case to explore the tortious assertion of contractual liability. *Seaman's* reminds of me of seeing an appellate argument just after *Freeman & Mills* had overruled the "Seaman's tort." A pro per was asserting that tort and every lawyer in the room, and the justices, knew that law was now dead. But everyone kept composed and the court allowed the pro per to argue as best he could. The lesson is, when dealing with pro pers what matters is that they be given a chance to argue. There is no point in trying to correct their understanding of the law in court; the decision will do that. Speaking of pro pers, see Nicole Pelcic's article on procedural tools to help defend against them.

We are delighted to present an article by Damien Charlotin about the biggest trend in sanctions: AI hallucinations. He is not a California lawyer, but he has become famous as the collector of "AI Hallucination Cases," available at DamienCharlotin.com/hallucinations. Right now he has compiled 2,149 cases and counting! His conclusions about what all these sanctions cases tell us about lawyering may surprise you.

Continuing the "AI" theme, Zach Streiff's article addresses confidentiality and privilege in the AI context. And Professor Slomanson is back, this time to share his thoughts on AI Hallucinations and the Bar. Another hot topic (*not* AI) is the ruling on bouncing judges. Tom Watson fills us in on *J.O. v. Superior Court*, one of this year's key Supreme Court cases.

Marc Alexander enlightens us with a book review of E. Jean Carroll's *Not My Type: One Woman vs. A President*. Please also check out Arnold Peter's piece on DEI programs that work. His path to the American Dream and his take on DEI deserves consideration.

Finally, we end with Connor Sakati's Appellate Advocacy in Art, complete with many graphics. Those who have argued appeals in Orange County will recognize some of the artwork.

That's what's in this issue. If you've read this foreword, maybe you're the sort of lawyer who would like to help create this publication. If so, please contact me so we can chat about serving on our Editorial Board.

DIRECT REVIEW IN THE CALIFORNIA SUPREME COURT

Written by Robin B. Johansen and Adam Hofmann



Robin B. Johansen



Adam Hofmann

Paths to review in the California Supreme Court fall into three categories. The first and most frequently utilized is its general appellate jurisdiction: discretionary grants of review in cases arising through ordinary appellate procedures. Second, the California Constitution and a few statutes grant the Court exclusive jurisdiction in a narrow subset of cases. Third, and even more rarely invoked, is the Court's original jurisdiction. This article will discuss all three, along with tips for seeking direct review and examples of successful efforts.

JURISDICTIONAL BASES FOR SUPREME COURT REVIEW

Ordinarily, the California Supreme Court takes cases by granting a party's petition for review or on its own motion, following trial proceedings and a decision by a Court of Appeal. (Cal. Const., art. VI, § 12, subd. (b); Cal. Rules of Court, rule 8.512(c).) It grants review in those rare cases where it is necessary to resolve either a decisional split in the Courts of Appeal or an important legal issue, or when there has been some jurisdictional defect in the appellate proceedings. (Cal. Rules of Court, rule 8.500(b).) The California Constitution also allows the Court to transfer an appellate case to itself for resolution (Cal. Const., art. VI, § 12, subd. (a)), but in practice, it never does.

Bypassing the Courts of Appeal, the Supreme Court is also vested with exclusive appellate jurisdiction over death penalty convictions (Cal. Const., art. VI, § 11, subd. (a)) and to determine questions of California law upon the certified request of the United States Supreme Court, a United States Court of Appeals, or another state's highest court (Cal. Rules of Court, rule 8.548). The California Legislature has periodically attempted to grant the Court exclusive appellate jurisdiction by statute, but the Courts of Appeal have consistently found those grants unconstitutional. (See *Communities for a Better Environment v. Energy Resources Conservation & Development Com.* (2020) 57 Cal. App.5th 786, 796 [Energy Commission site certifications] *Hollywood Park Land Co., LLC v. Golden State Transp. Financing Corp.* (2009) 178 Cal.App.4th 924, 939 [judgments on tribal-gaming compacts]; *California Commerce Casino, Inc. v Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1417 [same]; *In re Perris City News* (2002) 96 Cal.App.4th 1194, 1197-1198 [petitions for designation as newspaper of general circulation].)

The Court also has discretion to bypass lower courts in cases over which it has concurrent original jurisdiction. For example, parties may file petitions for writs of habeas corpus, mandate, certiorari, and prohibition in the California Supreme Court without first securing trial or appellate decisions. (Cal. Const., art. VI, § 10.) However, the

Court generally exercises its discretion to hear those original proceedings in rare cases involving important, time-sensitive issues. (See, e.g., *Legislature of the State of California v. Weber* (2024) 16 Cal.5th 237, 246-254 [considering whether proposed ballot initiative would fundamentally alter state governance such that it was a constitutional revision, rather than amendment]; *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 252 [deciding whether laws dissolving redevelopment agencies were unconstitutional].) Additionally, certain decisions of the California Public Utilities Commission and Workers' Compensation Appeals Board are subject to the Court's concurrent original jurisdiction. (Pub. Util. Code, § 1756, subd. (a); Lab. Code, §§ 5950, 5955; Cal. Rules of Court, rules 8.720 & 8.724.)

Finally, the Court has exclusive jurisdiction over a narrow band of disputes. Under the Constitution, the Court is the sole arbiter of disputes over the exercise of gubernatorial authority by a Lieutenant Governor (Cal. Const., art. V, § 10) and must evaluate a Governor's decision to pardon or commute the sentence of a person twice convicted of a felony (Cal. Const., art. V, § 8, subd. (a)). Through the Judicial Council's rulemaking, the Court also has the exclusive authority to review State Bar decisions on attorney admissions and discipline and decisions by the Commission on Judicial Performance. (Cal. Rules of Court, rules 9.13 & 9.60.)

DIRECT REVIEW IS EXCEEDINGLY RARE

As described above, it is possible to take a case directly to the Supreme Court. But lawyers should be sure to tell their clients not to hold their breath. It is an understatement to say that the Court rarely exercises its discretion to issue an alternative writ or order to show cause in an original proceeding. Judicial Council statistics for 2025, the most recent year available, show that litigants in that year filed approximately 1,275 such petitions—a number that may include requests from the federal courts for interpretations of state law, which are not broken out for purposes of the Judicial Council report—but the Court issued only 26 orders to show cause, or in only about 2 percent of the cases. That year was actually higher than its predecessors, recently averaging closer to 1 percent of filed petitions. The chart below shows how rarely an OSC was issued in prior years:

			Petitions for review					Original proceedings		
Fiscal year	Written opinions (A)	Granted on own Motion (B)	Granted (C)	Granted and held (D)	Granted and transferred (E)	Denied (F)	Percentage granted (G)	Total (H)	Alternative writs or orders to show cause (I)	Other dispositions (J)
FY25	51	0	38	342	41	2,891	13%	1,275	26	1,249
FY24	52	0	41	214	32	2,710	10%	1,163	9	1,154
FY23	56	0	43	228	45	2,627	11%	1,489	15	1,474
FY22	50	0	40	359	109	2,831	15%	1,490	13	1,477
FY21	59	1	41	542	56	3,262	16%	1,919	16	1,903
FY20	78	1	49	251	81	3,193	11%	2,108	18	2,090
FY19	75	0	45	123	104	3,477	7%	2,106	20	2,086
FY18	83	0	43	191	83	3,449	8%	1,998	11	1,987
FY17	92	2	52	369	46	3,611	11%	2,247	16	2,231
FY16	79	1	76	294	36	3,679	10%	3,018	17	3,001

(Judicial Council of California, *2026 Court Statistics Report: Statewide Caseload Trends* at p. 23, https://courts.ca.gov/system/files/file/csr_2026.pdf.)

Moreover, even when the Court does issue an OSC, that does not mean it will actually decide the case. For example, although the Court issued alternative writs or OSCs in 26 cases in 2025, it produced only four written opinions in original proceedings that year. (*Id.* at p. 21.)

Given these statistics, lawyers should think carefully about whether they really need a decision from the California Supreme Court or whether it is possible to achieve client goals with a decision from a superior court or Court of Appeal. In addition, lawyers should consider that denial of review is statistically probable and the process of seeking review will merely create delay, forcing their clients almost inevitably to start over in lower courts. Lawyers should only pursue direct review when the Supreme Court's imprimatur is necessary and the risk of delay is low.

TIPS FOR SECURING DIRECT REVIEW

So, what does it take to get the Court to hear your case? It is impossible to know what would cause four justices to vote to take a case at any given time, but certain prerequisites are clear. You will need (1) a pure question of law that (2) presents an urgent issue of statewide importance. It helps to have an issue that affects the courts or one that involves an election matter that must be decided quickly. It also helps to have a high-profile client or clients, such as the Governor, the Legislature, or a well-known nonprofit organization. The lack of such a client is by no means fatal, however. You can get the same impact from amicus letters in support of review without having to convince an individual or organization to be a party to the case.

One such case before the Supreme Court was *Family Violence Appellate Project v. Superior Court*, (Aug. 10, 2026, S288176) 2026 Cal. Lexis 4133. The petitioners in that case challenge Government Code section 69957, subdivision (a), which prohibits electronic recording of certain court proceedings even when a court reporter is not available. The petition argued the statute interferes with the courts' inherent authority to ensure equal access to justice and to administer proceedings fairly and efficiently and the lack of a verbatim record denies low-income litigants their rights both at trial and on appellate review.

Because of the immediate impact of the statute on the courts, this was one case that needed no real amicus support to pique the Court's interest. In fact, the Court was so interested that it overlooked a lack of real adversity, given that the superior courts named as respondents agreed with the petitioners that the statute was unconstitutional. The Court eventually invited the Attorney General to file a return and will resolve the case based on that. (*Family Violence Appellate Project v. Superior Court* (Apr. 23, 2025,S288176) 2025 Cal. Lexis 2339.)

A review of other cases the Court has taken over the years shows that many relate to elections. Although the Court has made clear that pre-election challenges are discouraged (see *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1030), it has taken several such cases as original proceedings over the years. These often involve redistricting. (See *Legislature v. Padilla* (2020) 9 Cal.5th 867; *Vandermost v. Bowen* (2012) 53 Cal.4th 421; *Wilson v. Eu* (1992) 1 Cal.4th 707; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638; *Legislature v. Reinecke* (1972) 6 Cal.3d 595; *Silver v. Brown* (1965) 63 Cal.2d 270.) The Court has also taken several cases, some pre-election and some post-election, that implicate the initiative process, which the "courts have consistently declared it their duty to 'jealously guard"' and liberally construe . . . so that it '"be not improperly annulled."'" (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934; see, e.g., *Briggs v. Brown* (2017) 3 Cal.5th 808, 827 [death penalty constitutional amendment]; *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 497 [Legislature's authority to put advisory measure on the ballot]; *Strauss v. Horton* (2009) 46 Cal.4th 364, 453 [same-sex marriage]; *Senate v. Jones* (1999) 21 Cal.4th 1142, 1153 [proposal to require redistricting by state Supreme Court]; *Legislature v. Eu* (1991) 54 Cal.3d 492, 501 [term limits]; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341 [Victims' Bill of Rights]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219-220 [Prop. 13].)

Nonetheless, the Court has declined to exercise original jurisdiction even on major initiative cases. In 2020, voters passed Proposition 22, sponsored by ride-share companies like Uber and Lyft, which made their drivers independent contractors. Proponents and opponents spent over $200 million on the election (Hussain et al., *How Uber and Lyft persuaded California to vote their way*, L.A. Times (Nov. 23, 2020) latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22), and when the measure passed, the opposition asked the Supreme Court to rule on the constitutional validity of some of its provisions. In January 2021, the Court declined, and the challengers took their case to the Alameda County Superior Court, then to the First District Court of Appeal, and finally to the Supreme Court. (*Castellanos v. State of California* (2024) 16 Cal.5th 588, 599.) The whole process took three and a half years.

Another area in which the Court has been willing to exercise its original jurisdiction is the death penalty. Although the Court automatically hears appeals from sentences of death, those cases are almost always fact specific. As a result, the Court has been willing to hear certain broader challenges to the state's death penalty provisions. The Court recently issued an OSC in a case called *Office of the State Public Defender v. Bonta*, OSC issued May 27, 2026, S284496, involving racial disparities in implementation of capital punishment. Notably, however, the Court's order came after two

years of deliberation and directed proceedings to occur in the Sacramento County Superior Court. Again, even when the Court acts, it often does not rule substantively in the first instance.

Thus, it is hard to see any clear pattern in the types of cases that might succeed as original proceedings. The one thing that is clear is that most cases are "postcarded," a term for summary denials presumably dating back to the days before electronic notification. The Court's denial will be without prejudice to bringing the case in a lower court. So, if you have the time and resources to risk getting postcarded but think you have a solid argument for original review, by all means, give it a try.

Robin B. Johansen is senior counsel with Olson Remcho. Ms. Johansen has represented the California Legislature, a number of California constitutional officers, and numerous local governmental entities on a variety of public policy issues. She is a member of the California Academy of Appellate Lawyers and has worked extensively on election matters at both the state and local levels.

Adam Hofmann is the Deputy Judicial Appointments Secretary in the Office of California Governor Gavin Newsom. He is a certified appellate specialist and was previously a partner and co-chair of the appellate practice at Hanson Bridgett LLP, representing government agencies and private businesses in a civil appeals covering a wide range of substantive legal areas, including public finance and revenue measures, state and federal constitutional rights, employee benefits, labor standards, and election law.



GOODBYE PEREMPTORY STRIKES(?), HELLO SECTION 231.7

Written by Matthew K. Wegner and Kyle J. Berry



Matthew K. Wegner



Kyle J. Berry

On January 1, 2026, section 231.7 of the Code of Civil Procedure went into effect for certain civil cases, altering the landscape of peremptory challenges during jury selection in civil trials. (See § 231.7(k), amended by Stats. 2025, ch. 656, § 1.) The new section 231.7 prohibits the use of peremptory strikes "to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups." (§ 231.7(a).) The well-intentioned statute, enacted to further the laudable goal of eliminating implicit bias in jury selection, makes significant changes to the traditional use of peremptory strikes. But—whether it was the Legislature's intent or not—section 231.7 could effectively spell the end of peremptory strikes in many civil trials.

Until January 2026, a party exercising a peremptory strike in civil cases was not required to explain the basis for exercising a peremptory strike. (§ 226.) This age-old tenet of California jurisprudence has been a staple of jury selection procedures for plaintiff and defense counsel, alike. But now, if a party—or a trial court, on its own motion—objects to a peremptory strike on the basis of section 231.7, the party seeking to strike the juror must explain the reason(s) for that strike. This is antithetical to a core rationale for the peremptory strike in California: When the litigant sensed a juror was prejudiced against his or her client, but could not explain precisely why, the law gave the litigant a very limited number of "free passes." "[I]n many instances the party either cannot establish his reason by normal methods of proof or cannot do so without causing embarrassment to the challenged venireman and resentment among the remaining jurors." (*People v. Wheeler* (1978) 22 Cal.3d 258, 275, disapproved of on other grounds by *Johnson v. California* (2005) 545 U.S. 162, 173.) The former peremptory strike regime existed to address the indelible human element inherent to jury selection: it is to be used when "something just doesn't *feel* right." While section 231.7, prudently, requires any challenge be asserted and argued outside the presence of the jury, it nevertheless functionally nullifies a litigant's safe harbor for exercising peremptory strikes.

Section 231.7 also changes *Batson*'s burden-shifting framework. The landmark Supreme Court decision *Batson v. Kentucky* (1986) 476 U.S. 79, forbids exercising a peremptory challenge to exclude a juror solely based on the

juror's race. Under *Batson*, the burden of persuasion " 'rests with, and never shifts from, the opponent of the strike.' " (*Johnson*, at p. 171, quoting *Purkett v. Elem* (1995) 514 U.S. 765, 768.) This feature of jury selection jurisprudence ensured that a party could not derail their opponent's jury selection strategy by simply objecting to every peremptory strike. But under section 231.7, the objecting party need not explain why they think the statute was violated. Instead, the litigant asserting the strike must explain the rationale for it. It seems clear, now, that the objecting party's only burden is to *object*; it is no longer to persuade the trial court. And since the proponent of the strike now has the burden of justifying the strike, they may be forced to reveal their trial strategy to support their request. But, since courts generally disfavor ex parte proceedings to adjudicate *Batson* challenges, there may be no way to avoid disclosing this trial strategy to the opposing party. (See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 262–263 ["[I]t seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them."].)

Moreover, the new statute makes it unlikely a trial court would ever grant a peremptory strike when a section 231.7 objection is lodged.

First, the trial court cannot speculate as to the reasons *justifying* the strike; but it *can* speculate as to reasons for *opposing* the strike. The statute attempts to obscure this duality by declaring that, while the trial court may not speculate on justifications for the strike, (§ 231.7(d)(1)), it may consider, expressly, "[w]hether a reason *might* be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups" (§ 231.7(d)(3)(E), italics added). Further, the Court need only find "there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a *factor* in the use of the peremptory challenge," to sustain the objection. (§ 231.7(d)(1), italics added.)

Second, appellate courts are far more likely to reverse a trial court decision overruling a section 231.7 challenge than sustaining one. This is because the statute alters the standard of review for appellate courts in significant ways. In particular, it changes how an appellate court would normally review factual findings and changes the presumptions the appellate court will make about the trial court's decision. The statute requires the trial court to make significant and express factual findings; but that is not new. The issue is that the statute abrogates the doctrine of implied findings in the case of section 231.7 challenges.

Normally, it is not reversible error to fail to make all statutorily required findings: "[C]ourts have developed the doctrine of implied findings by which the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment." (*Laabs v. City of Victorville* (2008) 163 Cal. App.4th 1242, 1271.) Section 231.7 flips this maxim on its head. Now, "[t]he appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record." (§ 231.7(j).) This statute represents a rare exception to the general deference paid to trial courts. (*Laabs*, at p. 1272.) Notably, the trial court's denial of a section 231.7 strike after it makes findings on the record that would tend to support the strike, but are not mentioned by the striking party, "might call for special scrutiny by the reviewing court in its de novo review of the trial court's denial of an objection made under section 231.7." (*People v. Ortiz* (2023) 96 Cal.App.5th 768, 800.)

The statute also changes the harmless error rules. Erroneous rulings on *Batson* challenges have always been deemed per se reversible. (*People v. Arellano* (2016) 245 Cal.App.4th 1139, 1144.) This new statute maintains the *Batson* rule, stating that the erroneous *denial* of an objection to a peremptory strike is deemed prejudicial. (§ 231.7(j).) But, "the deemed prejudicial standard of section 231.7(j) does not apply when an objection to a peremptory challenge is erroneously *granted*." (*People v. Guzman* (2025) 115 Cal.App.5th 464, 477, italics added.) The practical effect of this distinction is that trial courts can avoid the risk of reversal by sustaining section 231.7 objections.

Third, and more egregiously given the overladen dockets of the Superior Courts, section 231.7 challenges can derail proceedings at any point. In the event the Court sustains an objection to a peremptory challenge, the Court "shall" quash the jury venire and start jury selection anew, at the request of the opposing party. (§ 231.7(h)(1).) Additionally, a party can raise a section

231.7 objection at any point during the trial. While the statute specifies that an objection shall be made before a jury is impaneled, it also allows challenges to be made after a jury is impaneled if "information becomes known that could not have reasonably been known before a jury was impaneled." (§ 231.7(b).) On its surface, this might seem reasonable, but in practice it is not difficult to imagine this carve-out being used as a basis to request a new trial.

This statute was designed to ferret out an attorney's implied bias, meaning that the attorney's conduct at any point during the proceedings now can be used to show an earlier peremptory strike was improper. (See *People v. Alston* (2026) 118 Cal.App.5th 575, 586 [noting § 231.7's requirement to show "that the prosecutor's presumptively invalid reason was 'unrelated to [the prosecutor's] conscious or unconscious bias and [was] instead specific to the juror and bear[s] on that juror's ability to be fair and impartial in the case,'" quoting § 231.7(f)].) (Brackets in original.) The statute's adoption of such an amorphous notion of what constitutes implied bias indicates that subtle comments by lawyers made during trial, questions counsel asks of witnesses, or arguments made in later evidentiary colloquies could be used to connect the dots between an earlier peremptory challenge and potential implied bias. In such case, if the section 231.7 motion is granted after the jury is impaneled, the court must declare a mistrial and start the trial anew. (§ 231.7(h)(2).)

Clever litigators will surely consider raising 231.7 challenges near the end of trial—which will pose a challenge on the striking party to explain all their reasons for deciding to strike a juror days, weeks, or even months earlier. One approach by the party opposing a strike might be to make section 231.7 challenges to every peremptory strike, note the opposing party's justifications, and then, using notes carefully compiled throughout the proceedings, renew the section 231.7 objection at the end of trial, arguing that counsel's trial strategy evidences their pretextual justifications for strikes based on implied bias. In cases with trials lasting several weeks or even longer, memories will fade, making rebutting these claims more difficult.

Faced with these potential pitfalls, a party might refrain from using peremptory strikes altogether. But that raises different concerns. If a party chooses not to use all their peremptory strikes, they face significant hurdles to preserve the claim a juror should have been excused for cause. Specifically, they will need to justify the failure to exhaust their challenges. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 970; *People v. Manibusan* (2013) 58 Cal.4th 40, 61.) It seems almost certain that avoiding a section 231.7 objection will not be a sufficient reason to justify failure to exhaust all a party's peremptory strikes in such a case.

This is not to say that using peremptory strikes is no longer possible in California. But a party seeking to use peremptory strikes should be familiar with reasons that are presumptively invalid, which are detailed in section 231.7(e) and (g). For long-time litigators, this statute will undoubtably change how they think about jury selection, given that common reasons to strike jurors may now be deemed presumptively invalid. (See, e.g., § 231.7(e)(7) [presuming invalid a peremptory challenge that the prospective juror is not "a native English speaker"].) Counsel should be ready to justify, based on the facts of the case, valid reasons for the strike showing that the juror is personally biased against their client. By the same token, counsel seeking to oppose peremptory strikes now have a valuable tool in their belt.

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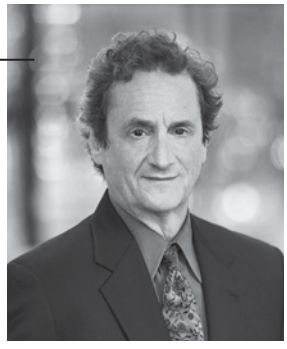
SEAMAN'S DIRECT BUYING REDUX: TORTIOUS ASSERTION OF CONTRACTUAL LIABILITY

Written by Tom Freeman



The tendency to treat contractual disputes as fodder for tort claims has persistently threatened to undermine the distinction between contract and tort—and thereby erode the social policies served by maintaining that distinction. Epic jurisprudential battles have been waged on this ground. Ultimately, the courts have recognized the importance of preserving the contract/tort distinction. But lessons learned in those hard-fought battles must inevitably be relearned in new contexts as the lure of tort damages often proves irresistible to those engaged in contractual disputes.

Perhaps the most infamous of the so-called "contort" battles was triggered by the California Supreme Court's recognition of a claim for tortious denial of contract in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752 [overruled by *Della Penna v. Toyota Motor Sales* (1995) 11 Cal.4th 376]. While that battle ended with the Supreme Court's dramatic renunciation of the "*Seaman's* tort" in *Freeman & Mills, Inc. v. Belcher Oil, Inc.* (1995) 11 Cal.4th 85, the war continues through the (sometimes legitimate, sometimes not) characterization of contractual breaches as fraudulent. The *Seaman's-Freeman & Mills* odyssey teaches that to maintain the proper separation of contract from tort and thereby effectuate policies furthered by that distinction, courts must carefully scrutinize the viability of "fraud" claims arising from a contractual relationship.

The fraud claim that is possibly most antithetical to the policies furthered by maintaining the distinction between contract and tort arises as a cross-claim to an ordinary claim for breach of commercial contract. Consistent with "the best defense is a good offense" maxim, breach-of-contract *defendants* have filed cross-complaints for "fraudulent" nondisclosure based on the plaintiff's nondisclosure of its interpretation of language in commercial contracts. Because commercial contracts typically involve performance over time, contractual language intended to cover future events is usually ambiguous as applied to future conditions—i.e., the language may reasonably be construed in more than one way. Taking advantage of the inherent ambiguity of language in commercial contexts, those defending against breach of contract claims can almost always assert cross-claims for "fraudulent" nondisclosure of the plaintiff's interpretation of ambiguous contractual language. Permitting such cross-claims would eviscerate the contract/tort distinction, transforming garden-variety commercial breach of contract cases into high stakes tort cases raising the specter of a broader range of

compensatory damages, increased litigation costs, and the *in terrorem* effect of punitive damages.

The lesson learned from California's failed *Seaman's* experiment is that courts, in their gatekeeping role, must whenever possible maintain the separation of contract from tort at the pleading stage. Just as the bad faith denial of contractual liability "tort" cannot survive demurrer without frustrating the efficacy of contract law, a cross-claim for "fraud" based on a breach-of-contract plaintiff's nondisclosure of its *interpretation of contractual language* must likewise be rejected at the outset. Otherwise, virtually every claim for breach of a commercial contract could be met by a cross-claim for fraud—thereby sacrificing the policies underlying the contract/tort distinction that led the Supreme Court to overrule *Seaman's* after just 11 years.

THE GREAT DEBATE OVER THE "TORTIFICATION" OF CONTRACT

The "death of contract" through the expansion of tort was arguably the hottest commercial law debate in the last quarter of the twentieth century. Professor Grant Gilmore predicted that modern innovations in tort law (such as strict liability in tort) may eventually lead to the demise of contract law. Gilmore famously asked whether it "is the fate of contract" to "be swallowed up by tort (or for both of them to be swallowed up in a generalized theory of civilized obligations)." (Gilmore, The Death of Contract (1974) 94.) The courts have largely answered "no" to Gilmore's provocative question by applying limiting doctrines like the "independent tort rule" to prevent contract law from "drown[ing] in a sea of tort." (*East River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 866.)

The California Supreme Court was at the center of this great debate in the 1980's. Its 1984 opinion in *Seaman's* represents the highwater mark of what Gilmore called "contorts." In *Seaman's*, the court recognized a new "tort" for bad faith denial of the existence of contract or contractual liability. Following *Seaman's*, ordinary commercial claims for breach of contract were routinely accompanied (or replaced) by tort claims for bad faith denial of contractual obligations. Predictably, the newfound "*Seaman's* tort" resulted in widespread confusion as California courts struggled to distill a viable standard for distinguishing contract from tort. Notably, courts outside California almost universally rejected the *Seaman's* tort as an unprincipled intrusion into the domain of contract.

The *Seaman's* debate ended in 1995 when the Supreme Court's landmark opinion in *Freeman & Mills* repudiated the *Seaman's* tort just 11 years after creating it. To maintain the line separating contract from tort—and thereby protect contract law policies—*Freeman & Mills* held that tort recovery is not available for bad faith denial of contractual liability. (*Freeman & Mills*, at p. 102.) The lessons learned from the *Seaman's* debate are laid out in a series of Supreme Court opinions that culminated in *Freeman & Mills*. Those opinions highlighted the need to protect the efficiency of contract law by maintaining contract law limitations on damages and the streamlined nature of contract litigation.

CONTRACT LAW POLICIES ARE FOSTERED BY THE SEPARATION OF CONTRACT FROM TORT

Critical to the demise of the *Seaman's* tort was the recognition that "differences between contract and tort give rise to distinctions in assessing *damages* and in evaluating underlying *motives* for particular courses of conduct" that serve important public policies. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515, italics added.) These policies are directly implicated when a plaintiff's ordinary breach of commercial contract claim is countered by a cross-claim for fraud based on the plaintiff's failure to disclose its interpretation of contractual language.

"Contract law exists to enforce legally binding agreements between parties." (*Applied Equipment*,at p. 514.) Its "main purpose" is "the realization of reasonable expectations induced by promises." (1 Corbin on *Contracts* (1963) p. 1.) To accomplish that purpose, "'the party injured by breach should receive as nearly as possible the equivalent of the benefit of performance.'" (*Applied Equipment*, at p. 514.) "In economic terms, [the] plaintiff has lost the benefit of a bargain and is entitled to recover compensation in the form of contract damages," i.e., "benefit of the bargain" damages. (*Id.* at p. 517.) This limits the scope of contract damages "to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at the time; consequential damages *beyond* the expectations of the parties are not recoverable." (*Id.* at p. 515, italics added.) Or, as Justice Holmes famously put it, "'[T]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.'"

(*Freeman & Mills*, p. 106, quoting Holmes, *The Path of the Law* (1897) 10 Harv.L.Rev. 457, 462.)

Consequently, a duty to perform under contract law is akin to an "option" because the obligor may either perform *or* pay contract damages (i.e., "benefit of the bargain" damages). (See Posner, *Economic Analysis of Law* (8th ed. 2011) § 4.16, p. 170 [describing Holmes' "option theory of contract"].) That "option" encourages "efficient breach of contract" by allowing one party to a contract to breach and pay damages rather than perform, at least where it is worth more to that party to breach rather than to perform. (*Huynh v. Vu* (2003) 111 Cal.App.4th 1183, 1198-1199.) By encouraging efficient breach, the limited scope of contract damages "result[s] in increased production of goods and services at lower costs to society." (*Freeman & Mills*, at p. 98.)

By contrast, "'"[t]he duties of conduct that give rise to [tort liability] are imposed by law, and are based primarily on social policy, and not necessarily based upon the will of the parties ...."'" (*Applied Equipment*, at p. 515.) Tort damages are designed to serve broader social policies than contract law by compensating victims to protect "'"the interest in freedom from various kinds of harms"'" and deterring wrongdoing. (*Id.* at pp. 515-516.) Thus, "'[f]or the breach of an obligation not arising from contract, the measure of damages ... is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.'" (*Id.* at p. 516, quoting Civ. Code. § 3333.) That is why tort damages, unlike contract damages, may compensate victims for "mental suffering and emotional distress," which tend to be unpredictable at the time of contracting, and include "punitive or exemplary damages, which are designed to punish and deter statutorily defined types of wrongful conduct." (*Applied Equipment*, at p. 516.)

THE *SEAMAN'S* TORT AND ITS DEMISE

Seaman's infamously recognized a new tort claim for "bad faith" denial of a contract's *existence*, which encompassed a claim for bad faith denial of contractual *liability*. Even as it did so, the Supreme Court acknowledged that "injecting tort remedies" into the commercial contracting context creates a risk that "tort remedies will intrude upon the expectations of the parties." (*Seaman's*, at pp. 91-92.) The resulting tension between contract and tort policies eventually proved too much.

The Supreme Court overruled *Seaman's* in *Freeman & Mills*, holding that plaintiffs cannot pursue tort claims for denying contractual liability "at least in the absence of violation of an *independent duty* arising from principles of tort law other than denial of the existence of, or liability under, the breached contract." (*Freeman & Mills*, at p. 95, italics added.) This "independent tort" rule "was developed to ensure that the law of contract would not 'drown in a sea of tort.'" (*Rattagan v. Uber Technologies, Inc.* (2024) 17 Cal.5th 1, 20.)

The independent tort rule serves contract law policy of stability and predictability in commercial contracting by limiting the scope of damages arising from the breach of a contract. That limitation "encourage[s] contractual relations and commercial activity by enabling parties" at the time of contracting "to estimate in advance the financial risks of their enterprise." (*Allied Equipment*, at p. 515.) That's critical because "predictability about the cost of contractual relationships plays an important role in our commercial system." (*Ibid.*) And the limited scope of contract damages alleviates the chilling effect that risk of tort liability would have on commercial contracting. (*Freeman & Mills*, at pp. 102-103.)

Stability and predictability are also furthered by contract law's treatment of contractual breach as a morally neutral act—which contrasts with the "wrongdoing" that tort law deters. (*Applied Equipment*, at p. 516.) Treating contract breach as morally neutral encourages commercial contracting without discouraging efficient breaches. (*Freeman & Mills*, at pp. 97-98, citing *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 77.) As the late Justice Stanley Mosk explained, "[t]his amoral view [of contract law] is supported by the economic insight that an intentional breach of contract may create a net benefit to society. The efficient breach of contract occurs when the gain to the breaching party exceeds the loss to the party suffering the breach, allowing the movement of resources to their more optimal use. (See Posner, *Economic Analysis of Law* (1986) 107–108.) Contract law must be careful 'not to exceed compensatory damages if it doesn't want to deter efficient breaches.' (*Id.* at p. 108.)" (*Freeman & Mills*, at p. 106 (dis. opn. of Mosk, J.); accord *id.*at p. 98 (maj. opn.); *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 711, fn. 25.)

Contract law's treatment of breach as morally neutral also avoids the higher costs of tort litigation. While contract claims are often disposed of on demurrer or summary judgment, tort claims implicating motive

must usually be resolved by a jury. (*Hunter v. Up-Right, Inc*. (1994) 6 Cal.4th 1174, 1185.) The risk of jury bias stemming from heated litigation over motive, and the resulting unpredictability, is a "cost" of tort litigation that, when applied in the contracting context, impairs the efficacy of commercial contracting. (*Ibid*.; accord *Freeman & Mills*, at p. 99; *All-Tech Telecom Inc. v. Amway Corp*. (7th Cir. 1999) 174 F.3d 862, 865-866 (Posner, C.J.) [explaining that "[m]any doctrines of contract law … are designed to limit the scope of jury trial of contract disputes" while "[t]ort law does not have these screens against the vagaries of the jury"].)

OLD (*SEAMAN'S* TORT) WINE IN A NEW (FRAUD-LABELED) BOTTLE

A cross-claim for "fraudulent" assertion of contractual liability based on the plaintiff/cross-defendant's nondisclosure of its *interpretation of contractual language* is a claim for tortious *assertion* of contractual liability akin to the invalidated *Seaman's* claim for tortious *denial* of contractual liability. Both frustrate contract law policy by transforming commercial contract disputes into tort cases implicating a much broader range of damages and unpredictable motive-based litigation.

Barring this species of cross-claims for tortious assertion of contractual liability is necessary because such "fraud" cross-claims are otherwise inevitable in commercial contract disputes. Fraud cross-claims are inevitable because it is virtually impossible to draft commercial contracts that are impervious to conflicting interpretations. (See *Delta Dynamics, Inc. v. Arioto* (1968) 69 Cal.2d 525, 531 (dis. opn. of Mosk, J.) ["it has become virtually impossible under recently evolving rules of evidence to draft a written contract that will produce predictable results in court"].) And even if it were possible to draft ambiguity-free commercial contracts, it would be "infinitely [and therefore inefficiently] costly" because "the costs of foreseeing and providing for every possible contingency that may affect the costs of performance to either party over the life of the contract are prohibitive." (Posner, *The Law and Economics of Contract Interpretation* (2004) 83 Tex.L.Rev. 1581, 1582.)

To protect the contract law policies furthered by the line separating contract from tort, the party asserting contractual claims should not be subject to the risk of liability in tort for failing to disclose its interpretation of contractual language. Otherwise, cross-claims for fraud would transform most (if not all) commercial contract disputes into tort cases, which is the outcome condemned in *Freeman & Mills*.

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THE VIEW FROM THE DOCKET: WHAT HUNDREDS OF AI SANCTIONS CASES TELL US ABOUT LAWYERING

Written by Damien Charlotin



In April 2025, I was teaching a course at Sciences Po Law School, in Paris, on the capabilities and limitations of large language models (LLMs) in the legal profession, and I wanted data. The conversation about AI hallucinations in law had, at that point, exactly one exhibit: *Mata v. Avianca*, the June 2023 New York case where counsel filed a brief full of cases ChatGPT had invented. Everyone cited *Mata* as a cautionary tale, which it was; but no one could tell me whether it was an aberration or the first sighting of something systemic.

Which is why I started counting. The AI Hallucination Cases Database now holds over 1,800 adjudicated matters across 39 jurisdictions, and I add several entries on a daily basis. The threshold to get in the database is a judicial finding or suspicion that someone – most often, a pro se litigant, but also lawyers, and even judges or arbitrators – has put their name on content that can only be explained by AI misuse: fake citations, obviously, but also false quotes from existing cases, or authorities or norms that are fundamentally misrepresented.

What follows is what over a year of counting has taught me – with particular attention to California, which supplies a large share of the American entries and which, for reasons I will get to, is one of the best places in the world to study this problem.

1. AMERICA IS THE ONLY PLACE YOU CAN TRULY LOOK

The database is heavily skewed toward the United States, followed by comparable Anglo-American countries: Canada, the United Kingdom, and Australia. And then, in the USA, while every state has at least one entry in the database, California is over-represented with over 10% of all entries. The reflexive explanation is that American and Californian lawyers are more litigious (certainly), more tech-savvy (depends), and/or more reckless (unproven).

In fact, the real explanation is that the United States is the only large jurisdiction where this research is *possible*. This is often overlooked, but America is blessed with a particularly rich and helpful legal data environment. PACER and CourtListener make it feasible to monitor millions of federal dockets at once. California adds its own layer: appellate opinions are published and searchable, trial court records are accessible in ways that would be unthinkable elsewhere, and the state's volume means that anything happening at all is happening here in numbers large enough to see.

Compare France, my home jurisdiction, where legal publishers hoard legal decisions behind licensing arrangements that prevent exactly the kind of bulk analysis I do; and where further legal material, such as briefs, pleadings, or interlocutory orders, are not published at all. Or Germany, or Italy, where only a fraction of first-instance decisions are ever published. The database includes entries from Brazil, Spain, the Netherlands, and Israel – but I found them the way one finds good mushrooms, not the way one mines ore; this is an endless source of frustration for legal data analysts and, possibly, a future limit on the deployment and usefulness of legal AI within these jurisdictions.

But this also matters for how you read the numbers: absent proper access to legal data, one cannot be certain of the extent of the problem. We see AI misuse in American data, and especially federal data; we struggle to see it in some state data, and abroad. Add to this differences in judicial style and duties, and in AI adoption in general, and you understand that the numbers do not tell the whole story – and the database is necessarily an undercount.

2. LAWYERS AND JUDGES ARE DOING THEIR JOB

But even then, the numbers we have are, all things considered, *not that high*. A few thousand reprimands or sanctions over the handful of years since AI has started being used in legal matters do not indicate an epidemic of hallucinations, or any systemic blow to the system. Certainly, one case may be already one too many for the poor clerk or junior that has to make sense of some nonsensical AI-generated brief; but compared to the hundreds of thousands of cases filed every year, the headline number appears relatively low.

And so, the second thing the data shows, and the one that most surprised me, is how well the existing system is handling this.

In my experience teaching law and AI to students and professionals alike, *everyone* has encountered hallucinations when using AI. This is not surprising when one understands how the underlying technology works; indeed, the capacity to hallucinate is what makes LLMs able to be creative in the first place. But what is also clear is that most people know how to handle the risk: verify the cites against authoritative sources, and strike the problematic cites. While summer interns were unlikely to make up an entirely fake citation, they were prone to over-read or misapply precedents; AI takes it to another level, but the remedy – proper supervision – remains the same.

Meanwhile, American judges – California judges very much included – have proven willing to name the problem, name the lawyer, and impose consequences. They have done so using tools that long predate generative AI: Rule 11, or CCP section 128.7, as well as the inherent power to sanction, and the certification every attorney of record already makes that a filing is warranted by existing law. No new statute was required. Hence a wide menu of sanctions in the database, running from wasted costs and fee-shifting to referrals to disciplinary authorities to, in a handful of cases, dismissal of the offending party's claims.

Opposing counsel deserve equal credit: many entries in the database exist because a lawyer on the other side pulled the citation, found nothing, and told the court. Cite-checking used to be unglamorous work, a chore; but it now has an expected payoff, and the profession has responded; to my dismay, I am starting to see wrong or unfounded allegations that the other side has hallucinated, evidence that this has become an argument like any other in the litigator's arsenal.

All this to say that I am not certain that legislative efforts addressing the issue by doubling down on the need to check and verify are relevant, or even helpful. Every California entry in my dataset is an instance of a judge sanctioning hallucinated material with the tools already available; the central problem is a compliance and supervision gap, and that gap won't easily be fixed with yet another certification requirement.

3. THE BAD ACTORS

Here is the finding I did not expect, and which I now think is the most important one.

More than half the cases in the database involve self-represented litigants, and those cases are mostly unfortunate: a person without a lawyer asks a chatbot for authority supporting their position, and the chatbot – optimized to be helpful rather than truthful – obliges, hallucinations included. The smaller half involves licensed attorneys, mostly from solo or small practices, and the same scenario is frequent; many are, in fact, fooled by the new AI features of tools they had been using for years.

But another scenario is also not uncommon: hallucinations as the sorry, and expected, result of an underlying recklessness or vexatiousness. What courts sanction, overwhelmingly, is not the use of AI, but most often what happened next: the lack of candor, the doubling down – insisting the cases are real, blaming a paralegal, blaming a junior associate, inventing an explanation for why the reporter cannot be found.

As such, cases like these turn out to be excellent detectors of something that was already there. A lawyer who files a brief without reading the cases in it was, in all likelihood, not reading the cases before either. AI did not create the recklessness; it made the recklessness apparent.

So the substantial minority of genuine bad actors in my database – people who did not make an honest mistake, who knew or should have known and did not care – are not really an AI story. They are people who were already there, under different names; vexatious claimants, if pro se, or a "bad lawyer," when they happened to have secured some law degree somewhere. Counter-intuitively, hallucinations may be doing courts and bar associations a favor, freeing them to sanction these actors for faults they cannot defend.

4. HALLUCINATIONS ARE MANAGEABLE, NOT SOLVED

Every few months someone announces that the newest model has solved hallucination. It has not, and it will not, because confabulation is not a bug of this technology, it is a feature. A model that could never produce a sentence unsupported by its training data could not draft, brainstorm, or argue by analogy either. Grounding, retrieval, and verification can reduce the risk substantially, but none should be confused with a guarantee of truth.

What will change is the salience. Hallucinated citations are on their way to becoming an ordinary category of professional annoyance, like a badly scanned exhibit or a transposed docket number: a thing that happens, and that competent practice catches. Verification will be a line item in the workflow rather than a crisis.

Besides, the annoyance comes with a benefit. A profession that is now systematically checking whether cited authorities exist is a profession doing something it had too often stopped doing. String citations copied from a prior brief, copied in turn from a brief before that, are a long-standing feature of legal writing. Before AI entered the scene, many citations performed no argumentative work in the first place. If the hallucination scare incentivizes verification and good epistemic hygiene, the law will be better for it.

5. WHAT THIS MEANS FOR TRAINING LAWYERS

Which brings me to the practical conclusion.

Nearly every case in my database is, at bottom, a supervision failure rather than a technology failure. Someone delegated a task, directly or indirectly, to a system whose failure modes they did not understand, and did not check the output because they did not know what to check for. That is not a problem you solve with a prohibition, and it is not a problem you solve with a disclosure requirement. It is a problem you solve by teaching people how the tools work, and how to handle their mistakes.

The instinct to legislate is understandable and mostly misdirected. The instinct to ban is worse: lawyer told not to use AI will use it anyway, and simply not tell anyone – a supervision problem turning into a concealment problem. The only durable answer is competence: the sort a lawyer needs in order to know when an LLM is likely to fabricate, what grounding actually does and does not guarantee, and why the confident, well-formatted, correctly-Bluebooked citation is, maybe, the output you should trust least.

This is the thinking behind UC Law San Francisco's hands-on AI course, *the AI-enabled Lawyering Lab* – which I direct with my colleagues Tal Niv and Drew Amerson, and which will be required for all law students in the next academic year. The premise is that lawyers (current or future) should build with AI tools, break them, and watch them fail, because that is how you develop the intuitions that no amount of policy guidance will give you. Students who can automate a legal process are ready to see new uses for AI; who have watched a model invent a case in front of them do not need to be told to check citations; and who see AI being confused in ways only a machine can will know never to trust unsupervised AI end-to-end.

The version of this that the profession urgently needs is the one aimed at practicing lawyers – not a CLE hour on

the ethics of AI, but genuine technical fluency, the kind of technological competence that is already a duty in most formulations of the professional rules. But the kind treated as a curriculum, and not an aspiration.

Until then, the database remains open, and the count continues to rise.

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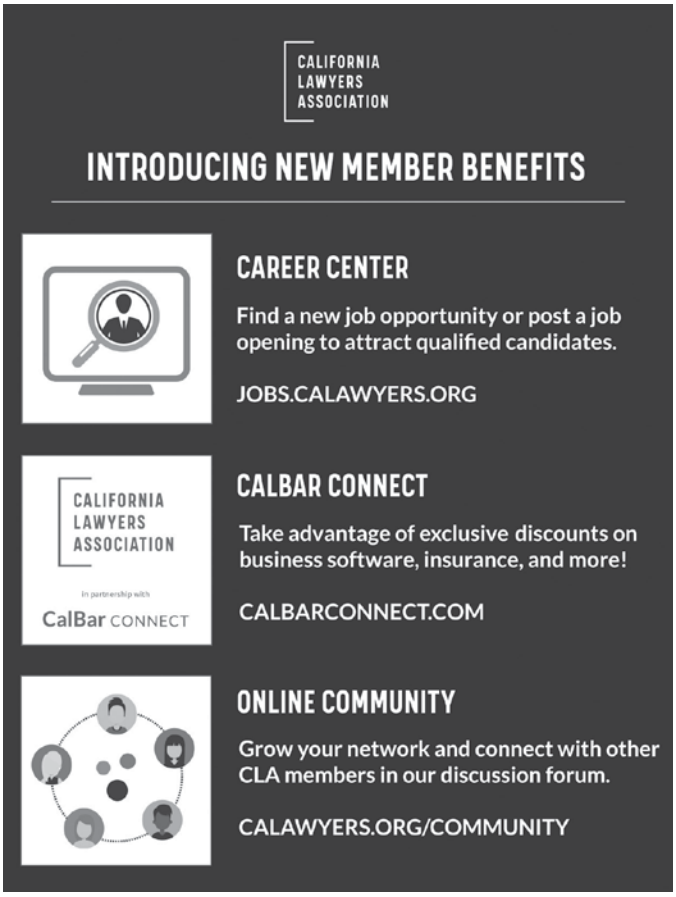
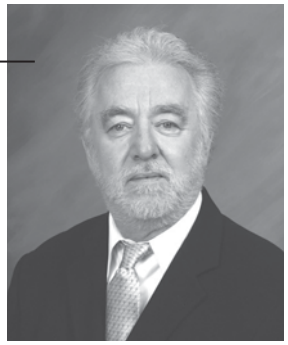


AI HALLUCINATIONS AND THE BAR

Written by Bill Slomanson



I. DEFINING MOMENT

When I first heard of lawyer "hallucinations," I expected exposés about drugs or mental illness. But as my own assisted research–aka WestLaw–revealed: "'Federal [and state] courts increasingly confront filings prepared with … tools [that] can enhance efficiency, [but] they also create a new professional hazard, synthetic authority presented as precedent. No uniform standard yet governs this issue.'" (*Andre v. Warden, FCI Danbury* (D.Conn. 2025) 827 F.Supp.3d 294, 305.) This essay addresses the dark side of modern legal research linking AI, hallucinations, ethical lapses, judicial disappointment, lawyer sanctions, and the occasional lack of common sense.

There are newspaper accounts, social media commentaries, legislative inquiries, and various new laws involving such hallucinations. (See, e.g., Caskey, *Gen AI and Attorney Ethics: A State-by-State Roundup,* JDSupra (Aug. 12, 2024), https://www.jdsupra.com/legalnews/gen-ai-and-attorney-ethics-a-state-by-1926077.) The California Legislature, for example, has just prescribed AI protections for its citizens and state agencies. Civil Code section 3111 thus applies to AI developers who market their free or commercially available products in this state. Thus, "before each time … that a generative [AI] system or service … is made publicly available to Californians for use … the developer of the system or service shall post on the developer's internet website documentation regarding the data used by the developer to train the generative [AI] system or service …." (*Ibid*., eff. Jan. 1, 2026).

AI's legal impact is not limited to the courts. The February 2025 bar examination resulted in "hundreds of prospective California lawyers [who] complained that their bar exams were plagued with … irregularities, [whereafter] the state's legal licensing body … caused fresh outrage by admitting that some multiple-choice questions were developed with the aid of [AI]." (Jarvie, *State Bar of California admits it used AI to develop exam questions, triggering new furor* (Apr. 24, 2025), latimes.com/california/story/2025-04-23/state-bar-of-california-used-ai-for-exam-questions [as of Feb. 9, 2026].)

Hallucinations have also attracted congressional attention. *House*: "Like those before them, AI technologies will produce many good things, but also many bad ones, like … generative AI hallucinations affecting our courts by making up false citations." (Testimony of Professor Neil Richards, *AI at a Crossroads: A Nationwide Strategy or Californication?*, Hearing before the House of Representatives Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet, 119th Congress 33 (Sept. 18, 2025), congress.gov/event/119th-congress/house-event/118623/text.)

Judges are not immune from legislative scrutiny. *Senate*: Senator Chuck Grassley recently challenged two federal judges regarding their alleged hallucinations. As he charged in a letter to one of

them, that judge's order "prompted public concern that generative [AI] may have been used in preparing the order with little or no human verification. [¶] … [¶] … It is particularly concerning that you would characterize as 'clerical' the inclusion of individuals who are not parties to this case as if they were, the reliance on quotations that do not exist, and the citation to declarations from individuals who appear nowhere in the record." (Letter from Charles Grassley to the Honorable Henry T. Wingate, pp. 1-2, fns. omitted (Oct. 6, 2025) grassley.senate.gov/imo/media/doc/grassley_to_the_honorable_henry_twingateaioversight.pdf.)

Senator Grassley's other letter challenged a judge's withdrawal of an order. The "Court … relied on quotations 'mistakenly attributed to decisions that do not contain such quotes'; and … misstated the outcomes of cited cases—indicating that motions to dismiss were denied when they had, in fact, been granted. [¶] Public reporting attributes these types of substantive errors as hallmarks of generative [AI] 'hallucinations'—a term used to describe instances where AI systems produce fabricated quotations or mischaracterize legal authorities, despite warnings that AI systems can generate errors and should be independently verified by careful human review. … [A] 'temporary assistant' in your court 'used an [AI] platform' in contributing to the Court's original decision, and 'that the opinion was inadvertently issued before a review process was able to catch errors introduced by AI.' " (Letter from Charles Grassley to the Honorable Julien Xavier Neals, pp. 1-2 (Oct. 6, 2025) fns. omitted, grassley.senate.gov/imo/media/doc/grassley_to_the_honorable_julien_xavier_neals_-_ai_oversight.pdf.)

With these general allegations in mind, one must embrace the associated specifics. The Oxford English Dictionary defines *AI* as "the capacity of computers or other machines to exhibit or simulate intelligent behaviour" and "to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages." Further definitions are likewise available in Frostestad, *Technologically Competent Reprised: Ethical Practice in an AI Age and Considerations for our Courts in a Burgeoning AI Era*, 12 Belmont L. Rev. 336, 339 (2025).

An AI *system* is one "that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments." (*Artificial Intelligence & Responsible Business Conduct*, OECD (2019) p. 1, https://mneguidelines.oecd.org/RBC-and-artificial-intelligence.pdf [as of Feb. 9, 2026].)

Within that system, "'*generative* [AI]' means [a model] that can generate derived synthetic content, including text, images, video, and audio that emulates the structure and characteristics of the system's training data." (Cal. Senator Tom Umberg, Legislative Council's Digest, Generative artificial intelligence: attorneys and arbitrators, Sen. Bill 574, § 2(B) (Jan. 30, 2026), italics added, leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260SB574 [as of Feb. 9, 2026].)

Hallucinations are *deceptive* generative AI search results. They appear to be authentic. Examples were recently featured in a California case involving a brief "'containing what are commonly referred to as [AI] "hallucinations"—here, made[-]up quotes from reported decisions [and] quotes from "a transcript of a hearing in a different matter altogether"….' " (*Shayan v. Shakib* (2025) 116 Cal.App.5th 619, 621-622.)

Using AI in one's legal practice is not in itself unethical. Instead, "[a] lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. [A] lawyer may supplement any AI-generated research with human-performed research and supplement any AI generated argument with critical, human-performed analysis and review of authorities." (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*, *Executive Summary*, p. 3 (Nov. 2023), calbar.ca.gov/sites/default/files/portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf.)

II. PROPOSED LEGISLATION

SB 574, as amended, is likely to be enacted into law. The California Senate adopted it *unanimously* on January 30, 2026. (Sawicki, *Bill Regulating Attorney AI Use Passes California Senate*, Law360 (Jan. 30, 2026), law360.com/pulse/courts/articles/2436501/bill-regulating-attorney-ai-use-passes-california-senate.) Section 1 of the proposed legislation would add new section 6068.1 to the Business and Professions Code: "(a) It is the duty of an attorney using generative artificial intelligence to practice law to ensure all the following: *** (3) Reasonable steps [to] *** (A) Verify the accuracy of generative artificial intelligence material, including any material prepared on their behalf by others. (B) Correct any erroneous or hallucinated output in any material used by the attorney." (SB 574.)

Section 2 would amend California's basic frivolous pleading statute–Code of Civil Procedure section 128.7–by adding: "2(b)(2)(A) A brief, pleading, motion, or any other paper filed in any court shall not contain any citations that the attorney responsible for submitting the pleading has not personally read and verified, including any citation provided by generative artificial intelligence." (SB 574.)

Section 3 would add new Code of Civil Procedure section 1282.1(a), the first of four related subsections, as follows: "(1) An arbitrator shall not delegate any part of their [his or her] decision-making process to any generative artificial intelligence tool. (2) The use of generative artificial intelligence tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence. (3) An arbitrator shall not relinquish their decision-making powers to generative artificial intelligence and shall avoid delegating any tasks to generative artificial intelligence tools if such use could [inappropriately] influence procedural or substantive decisions. [Under] (b)(1) An arbitrator shall not rely on information generated by generative artificial intelligence outside the record without making appropriate disclosures to the parties beforehand and, as far as practical, allowing the parties to comment on its use. (SB 574.)

SB 574 also requires attorneys employing generative AI in their practices to ensure that confidential information is not entered into a public generative AI system. It would also require them to ensure that they verify the accuracy of their AI research, and correct any erroneous or hallucinated output in any material they use. One would assume that these principles apply to nonattorney arbitrators as well.

III. ILLUSTRATIVE CASELAW

The following articulation, likely to be widely cited and recited, appears in *Versant Funding v. Teras Breakbulk Ocean Navigation Enterprises* (S.D.Fla. May 20, 2025) 2025 WL 1440351 *6-*7: "The Court takes the submission of a hallucinated, fake case citation [as] a serious misrepresentation to the Court and to opposing counsel. Judges in our nation's courts … need to be able to rely upon competent counsel to submit well-reasoned pleadings, motions, responses, replies, and other papers containing accurate and supported arguments, facts, and case law. … [¶] This case should be a warning to lawyers that your pleadings, motions, responses, replies, and other papers filed with any must be first checked and then double-checked. There is no room in our court system for the submission of fake, hallucinated case citations, facts, or law. And it is entirely preventable by competent counsel who do their jobs properly and competently. [¶] In sum, counsel who decide to … litigate must ensure that they carefully evaluate, and advocate—not hallucinate."

Shayan is perhaps the leading California exemplar. Two points thus deserve mention at the outset. First, a Westlaw editor inserted an extraordinary caveat: "This decision contains [a] discussion of citation references that are incorrect or do not actually exist. These invalid citations appeared in the original court opinion and have been preserved as written since they are part of the official record." (*Shayan*, at p. 619.) Translation? Westlaw has to incorporate the bad to illustrate the good. [Westlaw now says: "This document contains discussion of unverified citations, likely generated by AI tools used by a party or counsel. These citations are not attributable to the Court. The unverified citations have been preserved as part of the official record, but links are unavailable."]

Second, "[w]e acknowledge … the majority of the fabricated quotes in the opening brief do not appear to be misrepresentations that work to appellant's advantage [because] the brief does not represent the law to be more favorable to appellant's arguments than it actually is." (*Shayan*, at p. 626.) This career-impacting irony suggests a mild form of strict liability for practitioners who feel, at best, too busy to properly exercise their supervisory obligations; and, at worst, where the root cause is fraudulent intent. This extraordinary acknowledgment debunked the logical impulse that the sanctioned lawyer engaged in malfeasance. But his misfeasance came at a price.

The *Shayan* umpire thus belted out three hallucination strikes: (1) made-up quotes from reportable decisions; (2) quotes from hearings in a different matter than stated; and (3) strategically replacing original ellipses with a quotation borrowed from another case. Regarding Strike 1, it was undisputed that the appellant's lawyer filed an opening brief containing 10 fabricated quotations. They were used in his brief, in a way that did not appear in the cited authority. Strike 2 was fabricated language paraphrasing cited authority. Strike 3 was going beyond the language that actually appeared in the cited authority, via either a purported quote or paraphrase. (*Shayan*, at pp. 621-622.)

In opposition to the respondent's motion to dismiss the appeal, the appellant's lawyer offered various explanations: e.g., that these were clerical citation errors, rather than being solely attributable to using AI tools. That is, his early drafting process had provided his staff with temporary "placeholder" quotations. These were intended to be subsequently corrected with the precise citations. But they "inadvertently remained in the final brief." (*Shayan*, at p. 622.) He also provided explanatory staff chat logs and a quotation clarification and verification table as evidence of his innocent mistakes.

But innocence is sometimes only in the eyes of the beholder. In the following word to the wise, the court declined to accept these explanations as de minimis mistakes. By "filing a brief that misrepresents legal authority, [counsel] unreasonably violated longstanding rules of this court. Regardless of whether inaccuracies in a brief are the result of using artificial intelligence (AI) tools or some other drafting process … the signatory attorney is responsible for the content of the brief … for [the] inaccuracies it contains." (*Shayan*, at p. 621.)

The *Shayan* opinion invoked two instructive California cases in support of its hallucinatory misconduct findings. First, another California attorney admitted the violation of his professional duty by including a hallucinated citation (and misrepresenting the law provided in other opinions). As the panel in that case complained: "When criminal defense attorneys fail to comply with their ethical obligations, their conduct undermines the integrity of the judicial system. It also damages their credibility and potentially impugns the validity of the arguments they make on behalf of their clients, calling into question their competency and ability to ensure defendants are provided a meaningful opportunity to be heard. [They] must make every effort to confirm that the legal citations they supply exist and accurately reflect the law for which they are cited." (*People v. Alvarez* (2025) 114 Cal.App.5th 1115, 1119 [$1,500 sanction].) Civil or criminal, this passage drives home the deep thrust that hallucinations stab into the heart of judicial process.

The other *Shayan* hallucination precedent invoked the specter of dismissal based on filing a frivolous appeal. As that court reasoned: "We conclude by noting that 'hallucination' is a particularly apt word to describe the darker consequences of AI. AI hallucinates facts and law to an attorney, who takes them as real and repeats them to a court. … [T]here are many instances … where hallucinations are circulated, believed, and become 'fact' and 'law' in some minds. We all must guard against those instances." (*Noland v. Land of the Free* (2025) 114 Cal.App.5th 426, 448 [$10,000 sanction].)

IV. SANCTIONS

Shayan brandishes the potential costs associated with court-filed hallucinations. The Second District Court of Appeal: (1) struck the initial brief; (2) ordered the appellant's attorney to file a corrected opening brief–which could differ from the original only via corrected citations; (3) file both a corrected and redlined version of the revised brief; and (4) pay a $7,500 monetary sanction to the court clerk. The panel also directed the clerk to serve a copy of its sanctions order on the State Bar. (*Shayan*, at pp. 624-626.) The panel had denied the respondent's motion to dismiss two months before publishing the court's hallucination opinion. (*Id*. at p. 625, fn. 2.) Its members obviously resented having to hash out this time-consuming sidebar. Adding insult to injury, the *Shayan* court noted the "appellant's opposition [to the sanctions motion] itself contains inaccurate representations of case holdings." (*Shayan*, at p. 624.)

The impact of the *Shayan* sanction order was not merely financial. Whenever a judge imposes sanctions against an attorney that total $1,000 or more, the judge or clerk must notify the State Bar. (Bus. & Prof. Code, § 6086.7(a)(3) [excluding discovery orders].) Additionally, the sanctioned attorney must also report that order to the State Bar. It must be in writing, and submitted within 30 days of the time the attorney learns that judicial sanctions have been ordered. (§ 6068(o)(3).) The State Bar then launches disciplinary investigation. (§ 6092.5 [duties of State Bar].)

The court implicitly invoked (but did not cite) the vintage remedial concept: "[T]o say that the sins or faults or delinquencies of a lawyer must always be visited upon his client so as to impose tremendous financial penalties upon him … is to ignore the practicalities and realities of the lawyer-client relationship." (*Link v. Wabash Railroad Co.* (1962) 370 U.S. 626, 646 [Black, J., dissenting from dismissal of the plaintiff's case].)

In California, "[n]oting that a dismissal often forces the client to pay for the sins of the lawyer, we explained: 'The drastic measure of dismissal should only be used where there is a clear showing that the client is the cause of counsel's failure to comply … where the client will not cooperate with or supply necessary material

to his or her attorney or where no other reasonable sanction will produce compliance with the rules and orders of the court.' " (*Traweek v. Finley* (1991) 235 Cal. App.3d 1128, 1134 [reversing trial court's failure to induce compliance via sanctions short of dismissal].) As the panel reasoned: "Our inherent authority to impose this [dismissal] sanction 'should [nevertheless] be exercised only in *extreme* situations, such as where the conduct was clear *and deliberate* and no lesser sanction would remedy the situation.' " (*Shayan*, at p. 625, italics added.)

V. Rx FOR AI

The lawyer who has read this far is likely: (1) concerned about using AI; (2) not fully comfortable with integrating this new legal tool into his or her practice; (3) respects its limitations–or ignores hallucinations at his or her peril; (4) has embraced a rudimentary understanding of AI's impact on the legal profession; and (5) has hopefully consulted a competent legal administrator—who is well-versed not only in AI options, but also the traditional citation modes. One must thus evaluate the law firm's resource allocation, both human and technological. Assuming the above SB 574 generative AI provisions become law, there's no escaping their influence on the best practices for lawyers and arbitrators.

As a prominent legal administrator counsels: "No matter what AI solutions you select and implement, ultimately, lawyers and legal professionals remain accountable for the final results and how they're used. Legal administrators can help reduce the risk of overreliance or lack of oversight by scheduling AI check-ins to explore use cases and reinforce best practices when collaborating with AI." (Goldman, *How to Overcome Lawyer Concerns about AI 'Hallucinations'* (2025) 44 Legal Mgmt. 14, 16.) To paraphrase a familiar adage: Smart lawyers learn from their mistakes; wise lawyers learn from the mistakes of others.

A novice's starting point could be a law review article that evaluates the performance of various AI tools. (See, e.g., Munir et al., *Evaluating AI in Legal Operations: A Comparative Analysis of Accuracy, Completeness, and Hallucinations in Chatgpt-4, Copilot, Deepseek, Lexis+ AI, And Llama 3* (2015) 53 Int'l J. Legal Info. 103.) The hallucination landscape is of course always evolving. One might thus consult Joshua Rodewald's book, *AI Hallucinations Decoded: A Practical Guide for Everyday Users to Master and Avoid AI Missteps* (2024), available at amazon.com/AI-Hallucinations-Decoded-Practical-Everyday/dp/B0CW34LL57.

In conclusion, one should embrace this succinct admonition by a prominent California lawyer: "Large firms have been quick to adopt AI. While smaller firms and solo practitioners [have] proceeded more cautiously, there is no longer room to pretend that AI can be ignored. Skepticism must give way to competent ethical use." (Cardone, *Measure twice and cut once: Enduring lessons from the past teach attorneys how to responsibly use AI*, Daily J. supplement, Top Professional Responsibility Lawyers 2026, p. 21 (Feb. 4, 2026).)

A court's inherent authority also embraces litigant "bad faith." The judge might be unable to directly sanction a hallucinatory faux pas under state or federal frivolous pleading rules. But "courts have found that citing to hallucinated cases constitutes bad faith, even when unintentional. … Given the broad attention given to the problem with AI generated cases … no attorney can claim ignorance …. Accordingly, this misconduct is tantamount to bad faith and sanctionable under the Court's inherent authority.' [¶] … [¶] . . . [T]his court [therefore] exercises its considerable discretion under its inherent powers and ORDERS counsel … to pay $10,000 in attorney's fees as sanctions for citing nonexistent cases hallucinated by AI." (*Medical Buyers Group v. Pence* (M.D.Ga. 2026) 2026 WL 149949, *3-*4, citations omitted.)

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NEW ERA, FAMILIAR RULES: PROTECTING CONFIDENTIALITY AND PRIVILEGE IN CALIFORNIA LITIGATION AMIDST RAPID TECHNOLOGICAL CHANGE

Writen by Zachary A. Streiff



In February 2026, a federal court sitting in New York ruled that a criminal defendant's written exchanges with an artificial intelligence (AI) platform were not protected from disclosure by the attorney-client privilege. The case is *United States v. Heppner*, and a plethora of legal commentary followed the decision's release, proposing what *Heppner* might augur for the future of the attorney-client privilege at a time when both lawyers and clients are increasingly turning to AI. (See *United States v. Heppner* (S.D.N.Y. 2026) 820 F.Supp.3d 292.)

Meanwhile, around the same time, a Michigan federal court, after hearing a civil discovery dispute, declined to compel production of a litigant's communications with an AI platform. (See *Warner v. Gilbarco, Inc.* (E.D.Mich. 2026) 820 F.Supp.3d 629.)

The contrasting results in *Heppner* and *Warner* show a legal system grappling with the increasing sophistication and ubiquity of AI. The emergence of this technology means future privilege disputes are certain to recur with regularity. On this new battleground, courts and practitioners must discern the parameters of attorney-client privilege.

Running parallel to this question of privilege, California lawyers must consider more broadly how AI affects the concept of confidentiality. How should a prudent lawyer advise a client who wants to consult AI, but also wants the AI usage to take place within the protective realm of the attorney-client privilege? And, equally important, what precautions should lawyers and those within their organizations take to protect confidentiality when employing AI during a representation?

At the time of this writing, no published California case law dictates explicit guidance for how to incorporate the realities of AI into the existing framework of attorney-client privilege. Yet, the analysis of attorney-client privilege and confidentiality in the AI era will not take place against a blank backdrop.

THE STATE BAR OF CALIFORNIA MAY AMEND THE RULES OF PROFESSIONAL CONDUCT TO ADDRESS AI

In November 2023, the State Bar published an informal memorandum, "*Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*." The document was originally intended to be used as general guidance. But in August 2025, the California Supreme Court requested that the State Bar review its existing guidance document and evaluate whether any provisions on the use of AI should be incorporated directly into the Rules of Professional Conduct. (Letter from the California Supreme Court to State Bar of California (Aug. 22, 2025).)

The State Bar has taken up this request and has commenced a proposed addition to the Rules of Professional Conduct, affecting several rules. Most relevant here are the proposed changes to Rules 1.6, 5.1, and 5.3.

The proposed amendments to Rule 1.6, which pertains to a lawyer's handling of confidential information belonging to a client, would add a new comment [2] to the Rule. The new comment [2] would clarify that the term "reveal" includes exposing confidential information to technological systems, including AI, where the circumstances are such as to create a material risk that the information will be used in a manner inconsistent with the lawyer's duty of confidentiality.

Next, the proposed amendments would touch upon Rule 5.1, which regulates the responsibilities of managerial and supervisory lawyers. Comment [1] to Rule 5.1 is subject to a proposed modification clarifying that managerial lawyers must make reasonable efforts to establish internal policies and procedures governing AI. Similarly, a proposed modification to the comments following Rule 5.3 would clarify that a lawyer must give nonlawyer staff appropriate instruction and supervision in all aspects of their duties, including AI.

Broadly speaking, the proposed rule changes sound a cautionary note, warning that California lawyers are expected to understand the confidentiality implications of AI. Yet, these confidentiality implications in large part remain to be seen. Even if the proposed rule changes are adopted in full in their present form, they will not dictate the result of any given confidentiality or privilege scenario. As case law and other guidance becomes available, this area will become less fraught. For the time being, the solution is to apply established legal principles to the question of AI.

THE FEDERAL DECISIONS OFFER LIMITED GUIDANCE IN CALIFORNIA

Despite the vigorous ongoing discussion of *Heppner* and *Warner* in the scholarly and legal community, the decisions themselves offer only limited guidance for practitioners in the California courts. The two rulings were applying substantive bodies of law distinct from California law. The federal law on privilege resembles California law, but differs enough to leave room for doubt.

The California law of attorney-client privilege is a creature of statute, and "the courts of this state have no power to expand them or to recognize implied exceptions." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206, citing *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373; see also *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1129 ["Evidentiary privileges are creatures of statute."].)

Federal law on the attorney-client privilege is distinct from California law on the same topic. (See *Wood v. Superior Court* (2020) 46 Cal.App.5th 562, 585 [finding citations to federal case law on privilege unpersuasive in a case where California law of privilege governed].) Unlike California, the federal law of privilege is greatly influenced by case law. (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389 ["The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."].) Further, the substantive standards applied to determinations of privilege materially differ under federal law, and the distinction can be outcome-determinative. (See, e.g., *Behunin v. Superior Court* (2017) 9 Cal.App.5th 833, 851 [discussing that California law, unlike federal law, requires a showing by the party invoking the privilege that inclusion of a third party on a communication was "reasonably necessary" for the attorney to provide legal advice].)

While the federal court decisions in *Heppner* and *Warner* will not be binding in the California courts, the two federal cases will remain high-profile instances of persuasive authority, for as long as there remains a relative paucity of case law guidance on AI. For that reason alone, a study of these decisions is worthwhile for any California litigator.

Heppner is a criminal prosecution arising from alleged securities fraud and wire fraud. Shortly before the defendant was arrested, he input several queries into Claude, an AI tool run by the well-known AI firm Anthropic. When the government executed a search on the defendant's home, agents seized electronic devices that stored information containing both the defendant's input text and the Claude's AI output. The prosecution contended that it should be able to review and use all this AI-related data, while the defense rejoined that such data was covered by the attorney-client privilege.

The *Heppner* prosecutors filed a motion asking for a ruling that the AI materials were entitled to neither the attorney-client privilege nor attorney work product protection (only the discussion of privilege will be further explored here). District Judge Jed Rakoff ultimately agreed with the government's position, finding the AI materials not entitled to the privilege.

The *Heppner* court outlined three primary reasons for its finding of no privilege: (1) the AI documents were not communications between the defendant and counsel; (2) the AI documents were not confidential; and (3) the AI documents were not created for the purpose of obtaining legal advice from professional legal advisers. (See *Heppner*, at pp. 296-297.)

First, the *Heppner* court accurately remarked that the AI queries and responses before the court were not a communication between a lawyer and a client. The *Heppner* court's reasoning included a statement that "Claude [the name of Anthropic's AI platform] is not an attorney." (*Heppner*, at p. 296.) The key question for purposes of attorney-client privilege remains the same as it was in the pre-AI era: was the communication between a client and a lawyer? Because the answer in *Heppner* was "no," the court concluded the communication did not appear privileged.

Second, the *Heppner* court analyzed the lack of confidentiality of the AI documents. To this point, the court observed that, at a minimum, Claude, and its owner, Anthropic, were both third parties outside the attorney-client relationship. Beyond that, Anthropic reserved broad rights in its privacy policy to retain and use user data for "training" the AI model, and to disclose user data to a variety of third parties, including "governmental regulatory authorities." (*Id.* at p. 296.) Because the very party seeking to unveil the privileged communications in *Heppner* was the government, the privacy policy's warning of potential disclosure to the government was probably a significant persuasive factor. (Cf. *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1068 [attorney-client privilege destroyed by use of litigation opponent's electronic systems, which came with express warning that use was not confidential].)

Third, the *Heppner* court said that the purpose of the communication with Claude was not to obtain legal advice. Although defense counsel asserted that the defendant had communicated with Claude for the "express purpose of talking to counsel," the defense also conceded that no attorney had ever suggested or directed the defendant to use AI. (*Heppner*, at p. 297.) The court concluded that the defendant had consulted Clause of the defendant's own volition, and without the direct involvement of attorneys. Under these circumstances, the *Heppner* court ruled that the exchanges with Claude were not privileged.

Heppner provides potential lessons on how to avoid a disastrous loss of privilege, but the decision's impact in California remains limited. *Heppner* will not be binding on any of the California courts, and it was applying a different substantive law of privilege. Moreover, *Heppner* was a criminal case, and the court appeared to give at least some weight to the fact that the privacy policy for Claude explicitly called out potential sharing with governmental authorities. A parallel scenario would be much less common in civil litigation.

The lesson from *Heppner* is that attorney involvement and approval for the use of AI can offer a better chance of protection as compared to solely client-initiated research. Better yet, a client could allow the attorneys to conduct all the AI research. Secondarily, *Heppner* shows the importance of the oft-neglected duty to read the privacy policies of technology platforms, including AI.

The decision in *Warner* offers a brief point of contrast to *Heppner*. *Warner* involved an employment discrimination complaint pending in the Federal District Court for the Eastern District of Michigan. The *Warner* plaintiff and the defendants encountered discovery disputes and filed cross-motions. Only the defendants' motion to compel is relevant to AI. Specifically, the *Warner* defendants sought to compel production of "all documents and information concerning [plaintiff's] use of third-party AI tools in connection with this lawsuit." (*Warner*, at p. 636.)

The *Warner* court denied the defendants' request for several reasons. First, the court held that the AI materials were not relevant, not proportional, and not

within the proper scope of discovery under Rule 26(b). (See Fed. R. Civ. P. § 26(b).)

Second, the *Warner* court found that the plaintiff's work product objection had merit, because disclosure of the materials would reveal the plaintiff's internal analyses and mental impressions.

Third, the *Warner* court rejected the idea that the plaintiff had waived the work product protection by submission to a third party. The submission of information to an AI service was not likely to lead to sharing the information with an adversary, and therefore was not a waiver. In so finding, the *Warner* court noted that the federal standard for waiver of the attorney-client privilege is less protective than the federal standard for waiver of work product protection.

The *Warner* court also stated: "ChatGPT (and other generative AI programs) are *tools*, *not persons*, even if they may have administrators somewhere in the background." (See *Warner*, at pp. 636-637.) As a result, the *Warner* court refused to compel the production of any AI materials.

Like *Heppner*, *Warner* is not binding on the California courts. The ultimate results in the two decisions display an obvious contrast. *Warner* shows a far greater reluctance to find a waiver based on transmission to an AI service, by reasoning that AI is more like a tool than a person. The *Warner* court also inquired more than the *Heppner* court into the reasons the information was sought, finding the purpose of the request insufficiently tied to the proper scope of discovery.

EXISTING CALIFORNIA LAW ON PRIVILEGE AND CONFIDENTIALITY ALREADY OFFERS SIGNIFICANT GUIDANCE.

The key to understanding how to protect confidentiality in the age of AI lies in using well-established law on confidentiality and privilege as a lens to evaluate the series of steps that occur when prompting an AI platform.

Despite the complexity of AI on a technical level, its functioning can be distilled into recognizable legal concepts. When a user prompts an AI, the user's computer sends a communication to the AI model, usually over the internet (AI tools exist that are able to run entirely on a local server, but at present, internet-based platforms appear to be the lion's share of the market for AI). The AI model processes the request in its own internal language, based on units known as "tokens," and then sends back the response. Again, the AI's response usually travels over the internet. There can be multiple waypoints along this process of communication.

Because the use of AI relies on electronic communications, California's well-established law of privilege will continue to apply. It is not necessarily true that AI-specific rules are needed. In fact, the pending changes to the Rules of Professional Conduct suggest that, rather than new freestanding rules, the current focus is on how to clarify the application of existing rules to AI. California courts can and likely *will* determine that existing principles of privilege are sufficient to resolve disputes that arise around the privileged nature, or lack thereof, of communications involving AI.

Attorney-client privilege is a longstanding "hallmark" of American law. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The purpose of the privilege is to "safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics . . . ." (*Ibid.*)

The attorney-client privilege attaches to confidential communications between a client and a lawyer. (*Roberts*, at p. 371 [superseded on other grounds].) The Evidence Code specifically defines a "confidential communication" in this context as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (§ 952.)

The definition of a confidential communication is easier to understand and apply when broken down into its several elements:

> (1) the parties to the communication must include, at a minimum, a client and the client's lawyer;
>
> (2) the communication must be made "in confidence"; and

(3) if others are privy to the communication, it remains confidential only if the other persons are: (a) present to further the interest of the client in the consultation, *or*

(b) if disclosure to the other persons is reasonably necessary for transmission of the information or accomplishment of the purpose of the consultation between the client and lawyer. (See *Ibid*.)

Compare the statutory definition of a confidential communication to an instance of client-initiated AI research, similar to the client-initiated use of Claude in *Heppner*. On element 1 of the definition, the set of electronic communications that must occur to use an online AI platform do not take place between a client and a lawyer. Rather, the communications are sent over the internet to a waypoint necessary for the AI to do its work.

Some might object that the electronic impulses sent between the client's computer and the AI are not "communications" with a third party, because, in the *Warner* court's words, an AI is a tool, not a person. According to this reasoning, if a client's use of a notepad to write down questions to later ask an attorney can be privileged, why not a client's use of an AI platform to preview legal authority in anticipation of consulting the lawyer?

This type of analogy may convince some courts, but it relies on ignoring the fact that for all internet-based AI platforms (and unlike the notepad), a series of electronic communications must occur to enable use of the platform, and those communications go to electronic systems administered and maintained by people. Remember, that even the skeptical *Warner* court acknowledged that there may be "administrators somewhere in the background." (*Warner*, at p. 637.)

In this vein, Evidence Code section 917, subdivision (b), provides that a communication "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." But that section merely allows a privilege to *avoid* being *destroyed*; it does not create a privilege where the necessary attorney-client character of the communication is lacking. On element 1, solely client-initiated AI research is at risk of failing the required test of being a communication between a lawyer and a client.

The lesson apparent from this thought experiment is that independent client usage of internet-based AI platforms is a potential minefield. If a client (rather than the lawyer) *must* use AI, the best chance of protecting confidentiality is to have a preexisting attorney-client conversation, with the AI usage being incidental to the existing attorney-client dialog. If, as in *Heppner*, the client initiates the AI research without any prior involvement or knowledge of the lawyer, a high risk ensues that a reviewing court would find the necessary attorney-client character lacking, defeating the privilege from the very outset.

Element 2 of the definition of "confidential communication," that the communication must have been made in confidence, is also worthy of elaboration. As detailed previously, Evidence Code section 917, subdivision (b) provides that mere usage of electronic systems maintained by others to send a communication, in and of itself, does not destroy the confidential character of the communication.

Regardless, consider diving into a review your preferred AI platform's privacy policy. A variety of sharing may be allowed under the platform's policies. Lawyers should scrutinize: (i) the persons and parties with whom sharing of information is authorized under the policy; (ii) the purposes for which information may be shared; and (iii) options offered by the platform to limit sharing and use of information. The more sharing and use of information that occurs, the more likely it is that a privilege will be found lacking through use of the service. The *Heppner* case offers a sobering reminder that some courts will be willing to look into the applicable privacy policy of a platform to divine whether its use was "confidential" under all the circumstances.

Element 3 pertains to scenarios in which a third party of some kind is privy to the communication. The communication may nevertheless qualify as privileged if the third person is present to further the interest of the client or is otherwise reasonably necessary to accomplish the purpose for which the lawyer has been consulted. (Evid. Code, § 952.) A variety of categories of third party may qualify as "reasonably necessary" under this test. (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1501 [providing a nonexhaustive list of types of persons who could be reasonably necessary to a representation].) Given the fact-bound nature of the "reasonably necessary" standard, no per

se rule on AI is likely to be forthcoming. Certainly, a reasonable argument exists that usage of AI within the attorney-client relationship is "reasonably necessary" to provide efficient communication and rapid research. Until a court accepts this argument, the "reasonably necessary" test remains yet another lingering question.

PARTING THOUGHTS: A SHORT LIST OF QUESTIONS AND POTENTIAL PRACTICES TO CONSIDER.

- For confidentiality purposes, not all research prompts and outputs are of equal concern. Consider that some generic or generalized inquiries may not be major confidentiality concerns. At the other end of the spectrum, privileged confidences and trade secrets should be shielded from AI platforms until a comprehensive confidentiality audit of the platform can be completed.
- Instruct clients that as a general rule, they should *not* consider AI platform usage to be confidential.
- If a client desires AI research on a confidential matter, the best protection would involve having a lawyer perform the research using an AI platform with a strong privacy policy.
- When a client nevertheless wishes to perform AI research personally, it remains prudent to integrate the use of AI into ongoing lawyer-client dialog, though this step cannot guarantee a finding of privilege.
- Check the privacy policies of AI platforms used for confidential information. With whom is the platform sharing user information? For what purposes does the sharing occur?
- Review, whether in privacy policies or elsewhere (e.g., a security dashboard), AI platforms used by lawyers, staff, and clients have options to enhance privacy and limit sharing or use of user information. A good rule of thumb is to maximize privacy and minimize sharing as much as permitted, without compromising the usability of the service. Consider that an unexplained failure to exercise available options to protect privacy may be construed strongly against a later claim of confidentiality or privilege.

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THE NEW ETHICS COMMITTEE OF THE CALIFORNIA LAWYERS ASSOCIATION

The California Lawyers Association has created a new Ethics Committee to help ensure CLA members stay up-to-date with their ethical obligations. This new advisory group will create educational content, comment on proposed rule changes, write advisory opinions on emerging ethical issues, and issue ethics alerts and reminders to CLA members.



AFTER *J.O. V. SUPERIOR COURT*: WHAT CALIFORNIA LITIGATORS NEED TO KNOW ABOUT THE NEW LIMITS ON SECTION 170.6 CHALLENGES

Written by H. Thomas Watson



INTRODUCTION

On May 28, 2026, the California Supreme Court fundamentally altered the landscape governing peremptory challenges to judges under Code of Civil Procedure section 170.6 (section 170.6). In *J.O. v. Superior Court* (2026) 19 Cal.5th 753, a unanimous opinion authored by Justice Groban partially overruled *Solberg v. Superior Court* (1977) 19 Cal.3d 182 and held, for the first time, that courts may examine the good faith of section 170.6 challenges when they are deployed as part of a systematic, bad-faith campaign to remove a judge from an entire category of cases.

The decision leaves intact the core function of section 170.6—every litigant's right to disqualify a judge based on a genuine, good-faith belief in prejudice, without proof and without a hearing. But the decision introduces a burden-shifting framework, borrowed from the *Batson v. Kentucky* (1986) 476 U.S. 79 jury-selection context, that allows courts to scrutinize challenges when a pattern of abuse is shown. For litigation practitioners across California—whether at private firms, district attorneys' offices, public defenders' offices, or county counsel—the decision requires an immediate reassessment of how section 170.6 challenges are initiated, documented, and defended.

This article explains the significance of the *J.O.* decision, traces the doctrinal shift from *Solberg*, and provides detailed practical guidance on how counsel should adapt their practices going forward.

BACKGROUND: SECTION 170.6 AND THE *SOLBERG* ERA

THE STATUTE

Code of Civil Procedure section 170.6 grants every party or attorney in a civil or criminal action the right to disqualify an assigned judge by filing an affidavit—or making an oral statement under oath—declaring that the judge is "prejudiced against a party or attorney or the interest of a party or attorney" (§ 170.6, subd. (a)(1)) such that the declarant "cannot, or believes that he or she cannot, have a fair and impartial trial or hearing" (§ 170.6, subd. (a)(2)). No supporting facts are required. The

disqualification is automatic, and each side is limited to one such challenge per case.

SOLBERG AND BLANKET CHALLENGES

In *Solberg*, 19 Cal.3d at pages 194, 202, 204, the California Supreme Court upheld the constitutionality of section 170.6, including its use for so-called "blanket challenges"—the practice by which a government agency or institutional litigant systematically files challenges against a single judge across all or most cases assigned to that judge. The *Solberg* court acknowledged that blanket challenges could be used to "intimidate judges" and lead to "judge-shopping," but treated those harms as "a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6." (*Solberg*, at 194–195, 204.) Courts were expressly forbidden from inquiring into the motivations behind any challenge, even if the court suspects that the party has abused its right to utilize section 170.6. (*Solberg*, at 193, 198.)

THE RISE OF BLANKET PAPERING

In the decades after *Solberg*, the practice of blanket challenges proliferated. High-profile examples included the Orange County District Attorney's Office filing challenges in 46 of 49 cases assigned to then-Superior Court Judge Thomas Goethals after he began investigating prosecutorial misconduct in 2015; the Sacramento County District Attorney's Office challenging a judge in every criminal case in 2023; and numerous other district attorneys, public defenders, and county counsel offices across the state using the tactic to force reassignment of judges whose rulings they disfavored. Even though Courts of Appeal repeatedly urged the Supreme Court to revisit *Solberg*, the Court declined to take up the issue until *J.O.*

THE *J.O.* DECISION

FACTS

The petitioner, J.O., is a conservatee in San Joaquin County. After Superior Court Judge Erin E. Guy Castillo admonished a county attorney for improper conduct, the San Joaquin County Counsel's Office—representing the Public Conservator—began systematically disqualifying her in conservatorship and mental health cases. Petitioner's counsel estimated that approximately 325 section 170.6 challenges were filed against Judge Guy Castillo in less than four months. As a result of these challenges, the judge was reassigned from the mental health and conservatorship department to one handling misdemeanors, traffic, and small claims.

County counsel filed a section 170.6 motion to remove Judge Guy Castillo, which she granted. Petitioner subsequently filed an opposition to the motion. Judge Kristine Eagle denied the opposition, observing that she felt bound by *Solberg*. The Court of Appeal summarily denied J.O.'s writ petition challenging the denial. The Supreme Court granted review, framing the issue as whether *Solberg* should be "overruled or limited insofar as it allowed a public agency to bring 'blanket challenges' against particular judges under Code of Civil Procedure section 170.6." (Appellate Courts Case Information: Case Summary, *O. (J.) v. S.C. (San Joaquin County Public Conservator)*, <tinyurl.com/4f9s5u44> [as of July 24, 2026].)

HOLDING

The Supreme Court unanimously held that *Solberg* is overruled to the extent it barred courts from examining blanket challenges for bad faith. (*J.O.*, at 763.) When a party abuses section 170.6 through bad-faith blanket challenges to force a judge off an entire category of cases, the court may look behind the affidavit and examine the challenger's good faith. (*J.O.*, at 763; see *id.* at 781–785.)

THE SEPARATION OF POWERS RATIONALE

The Court grounded its holding in the separation of powers doctrine. The California Constitution vests in the judiciary—through the presiding judge—the authority to assign judges to particular cases and departments. When a litigant uses blanket challenges in bad faith to override those assignments, it effectively seizes a constitutional function reserved for the courts. (*J.O.*, at 770–771, 778–781.)

Critical to the Court's reasoning was its finding that the factual premises underlying *Solberg* no longer hold. In 1977, felony filings statewide numbered approximately 54,000; by the most recent year measured, they approached 180,000. Modern courts operate specialized calendars for conservatorships, family law, drug treatment, and mental health—all requiring judges with particular training. Budgets are tighter and judicial vacancies are real. In this environment, allowing a party to force a specialized judge off an entire category of cases causes concrete damage to the judiciary's ability to fulfill its constitutional obligations. (*J.O.*, at 769–776.)

THE NEW BURDEN-SHIFTING FRAMEWORK

The Court adopted a three-step burden-shifting framework modeled on *Batson*. (*J.O.*, at 781–783.)

STEP ONE: THE OBJECTING PARTY'S PRIMA FACIE SHOWING

The party opposing a section 170.6 motion—or the court itself—must timely object and make a preliminary showing that the challenging party is lodging bad-faith blanket challenges. This is typically done by pointing to a pattern of repeated challenges against the same judge, often concentrated after an identifiable adverse ruling or event. (*J.O.*, at 782–784.)

STEP TWO: THE BURDEN SHIFTS TO THE CHALLENGER

If the prima facie showing is made, the burden shifts to the party that filed the challenge to articulate a genuine, case-specific reason for believing the judge is prejudiced in the particular matter at issue. The boilerplate statutory affidavit alone will no longer suffice once the burden has shifted. (*J.O.*, at 784.)

STEP THREE: THE COURT'S GOOD-FAITH DETERMINATION

The court then evaluates whether the stated reason is credible or whether the challenge is part of a bad-faith blanket policy. If the court finds bad faith, it may deny the challenge. If it finds the challenge was made in good faith for case-specific reasons, the court must grant the challenge. (*J.O.*, at 784–785.)

CONTRAST WITH *SOLBERG*

Under *Solberg*, no objection mechanism existed, no burden could shift, and no inquiry into motivation was permitted: the challenge was simply granted regardless of circumstances. (*Solberg*, at 194.) The *J.O.* framework introduces conditional reviewability while preserving the automaticity of individual, good-faith challenges.

WHAT CONSTITUTES "BAD FAITH"

The Supreme Court identified bad faith primarily through circumstantial, pattern-based indicators rather than direct proof of retaliatory intent. (*J.O.*, at 782–783.) The following types of evidence are probative of the prima facie case:

Temporal concentration following an adverse event. A sudden spike in challenges against a single judge beginning after an identifiable triggering event—such as an admonishment, an adverse ruling, or a finding of misconduct—is the paradigmatic indicator. In *J.O.*, the blanket papering commenced after the judge admonished a county counsel attorney. In *People v. Superior Court* (*Tejeda*) (2016) 1 Cal.App.5th 892, challenges against Judge Goethals surged after he began investigating prosecutorial misconduct. (*J.O.*, at 783.)

Statistical volume and rate. The sheer number and proportion of challenges filed against a single judge is itself probative. Approximately 325 challenges in under four months—as alleged in *J.O.*—cannot plausibly reflect 325 separate, individualized assessments of prejudice. (*J.O.*, at 761, 763–764.)

Institutional origin from a repeat-player entity. When challenges emanate from a single office that appears in all or most of a judge's cases, the pattern suggests an organizational policy rather than independent, case-specific decision-making by individual attorneys. (*J.O.*, at 779–780.)

Functional effect of removing a judge from a docket. Evidence that the challenges have resulted in—or are designed to achieve—the judge's reassignment from an entire category of cases confirms that the purpose of the challenges is docket-level removal, not case-level bias avoidance. (*J.O.*, at 780.)

Reasons that are insufficient. The opinion, read in light of the amicus briefing and legislative record, makes clear that the following reasons do not constitute genuine bases for believing a judge is prejudiced: disagreement with a judge's legal rulings (which are reviewable on appeal); perceived lenient or harsh sentencing; a judge's inexperience; or the administrative burden of filing a for-cause challenge under section 170.1. (*J.O.*, at 778–781.)

PRACTICAL GUIDANCE FOR COUNSEL

This section addresses what litigators should do now to ensure that their future section 170.6 challenges withstand scrutiny under *J.O.*'s framework.

DOCUMENT THE CASE-SPECIFIC BASIS AT THE TIME OF FILING

The most important practice change is contemporaneous documentation. Under *Solberg*, no justification was required and none needed to be preserved. Under *J.O.*, if a bad-faith objection is raised, you will need to articulate a genuine, case-specific reason for believing the judge is prejudiced in the particular case. Practitioners should:

- Maintain a brief internal memorandum—even a few sentences—explaining why the challenge is being filed in each case. The memo should identify facts specific to the case, the parties, or the attorney-judge interaction that give rise to a good-faith belief that the judge is prejudiced against the party or attorney. This memorandum need not be disclosed unless and until a bad-faith objection triggers the burden-shifting inquiry, at which point it becomes your evidence of good faith.
- Avoid boilerplate language. If the internal justification reads identically across dozens of files, it will undermine rather than support a claim of individualized decision-making.
- A genuine, case-specific reason might include any of the following: the judge has previously represented the opposing party; the judge made statements in the particular case suggesting prejudgment bias or prejudice; the judge has a personal connection to a party or witness in the specific matter; or facts about the case itself that give rise to a reasonable concern about impartiality.
- Check the local rules governing section 170.6 challenges. For example, the Los Angeles County Superior Court recently issued General Order 2026-GEN-010-00, which requires any party or attorney who has previously made more than two challenges in the prior year to provide a verified written declaration or oral attestation under penalty of perjury disclosing their recent history of challenges to the assigned judge when making a new challenge.

ELIMINATE OFFICE-WIDE OR BLANKET POLICIES

The single most dangerous practice after *J.O.* is maintaining a formal or informal office policy to challenge a particular judge in every case. If your office has issued such a directive—whether by email, memorandum, verbal instruction, or standing order—it should be rescinded immediately. Any discoverable evidence of a blanket policy will virtually guarantee that the prima facie case of bad faith is established and that no case-specific justification will be credited as genuine.

This does not mean that multiple attorneys in the same office can never challenge the same judge. It means that each challenge must reflect an independent, case-specific assessment by the attorney handling that particular matter.

MAINTAIN INTERNAL RECORDS THAT SUPPORT INDIVIDUALIZED DECISION-MAKING

For high-volume offices, the key is demonstrating that challenges are made on a case-by-case basis by the responsible attorney, not imposed from above. Practices that support this showing could include:

- Delegating the challenge decision to the individual attorney assigned to the case, rather than to supervisory personnel. Ensure that case files reflect the individual attorney's reasoning.
- Tracking challenge data internally. If your office challenges the same judge in a high percentage of cases, you should be prepared to explain why—and if the reason reduces to institutional policy, consider whether the practice can survive scrutiny.
- Documenting instances in which your office appeared before the challenged judge *without* filing a challenge. Evidence that the same office accepted the judge in some cases undermines the inference of a blanket policy.

UNDERSTAND WHAT REASONS ARE INSUFFICIENT

Certain justifications will not pass muster at step two of the *J.O.* framework, even if they are sincerely held:

- A judge's "incorrect application of the law" is not prejudice—it is the basis for an appeal. An attorney who challenges a judge because of disagreement with past rulings will struggle to characterize that as a genuine belief in prejudice against the party or attorney in the present case.
- Perceived inexperience, the need for the judge to receive additional training, or generalized

concerns about a judge's temperament are similarly insufficient to establish a genuine belief in prejudice. These concerns reflect preferences about judicial quality, not beliefs about prejudice.

HOW TO RESPOND TO A BAD-FAITH OBJECTION

If opposing counsel or the court raises a bad-faith objection to your section 170.6 challenge, you should be prepared to:

- Present evidence of your case-specific justification. This is where contemporaneous documentation pays off. Offer the court a declaration or oral statement explaining why, in this particular case, you believe the judge is prejudiced.
- Distinguish your challenge from any broader pattern. If your office has filed challenges against the same judge in other cases, be prepared to explain that each challenge was independently assessed. Evidence of cases in which your office did *not* challenge the judge will be particularly useful.
- Challenge the sufficiency of the prima facie showing. The objecting party bears the initial burden. If the objection rests on a small number of challenges, or if the challenges are spread over a long period without temporal concentration around any adverse event, argue that the pattern evidence is insufficient to trigger the burden-shifting inquiry.

STRATEGIC CONSIDERATIONS FOR HIGH-VOLUME LITIGANTS

District attorneys, public defenders, county counsel, and private firms that handle a dominant share of a particular case type in a given county face heightened risk under *J.O.* because their repeat-player status makes patterns visible and because they appear before the same judges in virtually every case.

These practitioners should:

- Be selective in exercising section 170.6 challenges. The very fact that you appear in most cases on a judge's docket means that even a modest percentage of challenges can look like a blanket policy when viewed in the aggregate. Reserve challenges for cases where you have a genuine, articulable concern.
- Rotate decision-making. Having multiple attorneys independently assess whether to file a challenge—rather than having a single supervisor direct challenges across the office—creates a stronger record of individualized judgment.
- Accept the limits of the statute. Section 170.6 was designed to give litigants a safety valve against perceived bias in individual cases. It was not designed to allow one office to dictate which judges hear which categories of cases. *J.O.* makes explicit what appellate courts had recognized for years: the statute does not grant institutional litigants the power to override judicial assignments.

OPEN QUESTIONS AND FUTURE LITIGATION

J.O. resolves the threshold question—blanket challenges are no longer immune from scrutiny—but leaves several significant issues open for future development:

What numerical or proportional threshold triggers the prima facie case? The Court did not draw a bright line. Is it fifty percent of cases? Eighty percent? One hundred percent? The California Judges Association flagged this definitional problem in its amicus brief, noting that a government attorney could accept a judge one time yet file 99 challenges and argue there is no "blanket" policy. The Court's adoption of a flexible, totality-of-the-circumstances standard rather than a numerical rule suggests that lower courts will need to develop this standard on a case-by-case basis.

How does the framework apply when challenges are spread across multiple individual attorneys? A public defender's office may employ dozens of attorneys, each filing one challenge per case. The aggregate effect is a blanket challenge, but no single attorney has filed more than one. The Court signaled that the constitutional concern arises from the conduct, not the identity of the filer, but the mechanics of proving institutional coordination will present evidentiary challenges.

Does the Court's *Batson* analogy extend further? The Court imported burden-shifting from the jury-challenge context, and the California Judges Association drew explicit parallels to Code of Civil Procedure section

231.7 (which prohibits pretextual peremptory challenges to jurors based on race). Whether courts will eventually require affirmative justifications for peremptory challenges to judges—analogous to the justification required when a *Batson* objection is sustained against a juror strike—remains to be seen.

What procedural vehicle triggers the objection? The opinion describes a "timely" objection by the opposing party, but does not specify the procedural form. Must the objection be in writing? Can the court raise it sua sponte? Must it be made before or after the challenged judge steps aside? These procedural details will likely be addressed through local rules or further appellate guidance.

What is the standard of appellate review? It is not yet clear whether a trial court's good-faith determination will be reviewed for abuse of discretion or de novo. Given the factual nature of the inquiry, the abuse of discretion standard will likely govern, but the constitutional dimension of the issue may invite more searching review.

CONCLUSION

J.O. restores to the judiciary a measure of authority over its own assignments that *Solberg* had effectively surrendered. For most litigants, the practical impact will be minimal—a single, good-faith challenge in a single case remains automatic, unreviewable, and fully protected. The decision targets only the narrow but consequential practice of weaponizing the statute across an entire docket.

For institutional and high-volume litigants, however, the decision demands immediate attention. The affidavit that was once unreviewable can now be examined when a pattern of bad faith is shown. The time to implement documentation practices, dismantle blanket policies, and train individual attorneys on case-specific decision-making is now—before the first bad-faith objection lands in your courtroom.

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ON THE RUNWAY AND BACKSTAGE: A REVIEW OF E. JEAN CARROLL'S *NOT MY TYPE: ONE WOMAN VS. A PRESIDENT*

Review by Marc D. Alexander



E. Jean Carroll cribbed the title for her account of her trial with Donald J. Trump from Trump's notorious statement, "she's not my type." That statement has become heavily freighted. To many, it seemed the flip comment was a rather demeaning and dismissive way to address Carroll's accusation of sexual abuse in a dressing room at Bergdorf Goodman. After Trump, during a deposition, was shown a photo of a younger Trump and Carroll together, and mistook Carroll for his former wife Marla Maples, Trump's statement "she's not my type" seemed implausible.

Occasionally, Trump has favorably compared his looks and popularity to those of a young Elvis. But the title also suggests that Trump, who may have seemed like a fun guy decades ago, turned out not to be Carroll's type at all.

"Not my type" is also significant, because it points to the importance of appearance. By doing so, it highlights Carroll's central problem with proving her defamation case – a problem about which both sides, attorneys, experts, and Carroll were well aware. By the time of the trial, Carroll was 79 years old. She could no longer be mistaken for Trump's vision of Marla Maples. But to win the trial, the jury had to be made to imagine that Carroll three decades earlier, was indeed Trump's "type."

Therefore, the trial was very much about appearance, or at least, about imagined appearance. Carroll's root metaphor for the courtroom is the "runway" – a word used dozens of times throughout the book to describe the path in "Judge Lewis A. Kaplan's courtroom with the oak, the jury box, and the famous runway." For Carroll, the trial is a performance where the players strut and fret, making their exits and entrances. More to the point, Carroll sees the courtroom with its central runway, as a fashion show staged on the runway and focused on presenting appearances to those who will judge. If Judge Kaplan directed the show, the advocates were the couturiers, representing their brands.

In Carroll's retelling, this trial is forever about fashion and show. Carroll's armor is a navy-blue Dior-inspired Zara suit that "may as well be cut from steel," and a "gorgeous, stiffly billowing skirt [that]

fences my area, protects my perimeter." Her attorney Robbie Kaplan wears stone-gray, custom tailored, four-button single-breasted suits with pearls. Carroll's attorney Shawn G. Crowley is "a beautiful woman." Trump's attorney, Alina Habba, is his "most beautiful attorney." Habba "looks so pretty with her dark hair pulled into a low bun–the humble-brag of a beauty!" The witness Robbie Myers is "the beautiful former editor-in-chief of Elle." As for Carroll herself, her college sorority "would nominate me to be in beauty pageants," and Carroll would be crowned Miss Indiana University.

Trump's attorney Joe Tacopina "'opens his jacket to show me the signature of his celebrated tailor, because – *Of course*! *Of course*! *Of course*! – his suit *is* bespoke.' . . . And, Friends, just let me tell you: Until you have seen the lining of a Tacopina jacket, you have never seen the aurora borealis."

In this constructed world of appearances, fashion, and cosmetics, where we see the runway through Carroll's droll, watchful eyes, our gaze is directed to Trump and "his once overhandsome face coated in bright apricot makeup the thickness of Elizabeth I's death mask." This appears to be Carroll's version of the Biblical injunction, "you will know them by their fruit." If appearance is her message, apricot is the medium.

While the runway may be Carroll's root metaphor, luck and backstage preparation were immensely important. For one thing, she might never have brought suit at all, had she not partied with the MSNBC crowd, including Lincoln Project co-founder and anti-Trumper George Conway. It was Conway who explained to Carroll the difference between criminal and civil law, and the possibility of suing Trump for defamation. Conway also introduced Carroll to Robbie Kaplan, who became Carroll's advocate and champion. Kaplan, who had successfully argued before the Supreme Court, and earlier been a partner at Paul, Weiss, provided exceptional representation.

Carroll is not an attorney, but she understands story-telling and appreciates the importance of appearance and performance in a jury trial. She was fashionably dressed and quaffed with her bob haircut by experts, and she was meticulously prepped for her witness role by the Carroll Team. She endured thorough mock cross-examination and constructive criticism by her own team, an experience mitigated by a constant river of snacks and a few good meals.

Carroll and her attorneys persevered. It is not irrelevant that she mentions that two of her attorneys were athletes and that she had been Miss Cheerleader USA. Physical stamina is an obvious asset in a stressful trial.

What does this celebrity trial tell us about our system of justice? First, it is inconceivable that a civil case could be successfully prosecuted against a famous billionaire without a significant investment of resources for expenses; it is still somewhat unclear as to how Carroll's lawsuit was fully funded. In a footnote Carroll writes, "*Carroll v. Trump* is well into its second year when Reid Hoffman, the founder of LinkedIn, steps up and provides some funding for the costs of *Carroll I* and *Carroll II*." Only a litigant with significant resources or with an attractive high-profile plaintiff's case, or both, could ever have persevered and prevailed against Trump.

Second, because this was a celebrity trial, it also involved an appeal to public opinion, with Trump speaking often and loudly to the media, likely hoping to influence the jury pool and the anonymous jurors, who were not sequestered.

Third, while Carroll's root metaphor may be the runway, and the splendor and excitement of a fashion show, the Carroll Team worked hard on the backstage production. We do not yet have a Joe Tacopina memoir, but we learn from Carroll's account about the intense backstage strategizing, trial and witness preparation, and long workdays of the Carroll Team.

Fourth, while part of the trial was outside the courtroom and directed to the press, ultimately it was going to be decided in the somewhat closed and insulated system of the courtroom, where the judge controlled the admissibility of evidence and presented the instructions to the jury. Though the jurors were not sequestered, they were anonymous, and security was heightened, hopefully to protect and enable them to exercise their independent judgment.

One would like to conclude with, "In the end . . ." But as of the writing of this review, the end is not yet in sight. By the time you read this, you may know the ending.

Carroll's lawsuits offer a master class in procedural twists. Two lawsuits: one filed in 2019, tried in 2024, and resulting in an $83.3 million award; and a second filed in 2022, but tried first, and resulting in a $5 million award. The 2019 suit was for defamation only, because a claim for sexual assault (battery) was time-barred. It

stalled, while Trump's attorneys argued the Federal Tort Claims Act required substituting the United States as a party, alleging Trump's defamatory statements in 2019 were made in his capacity as president.

Later, the 2022 lawsuit was filed because New York enacted the Adult Survivor's Act, opening a narrow time window allowing for inclusion of the battery claim. That later-filed lawsuit went to trial first, including both the defamation and battery claims, and resulting in the $5 million verdict.

Following the $5 million verdict, Trump repeated defamatory statements. Now the 2019 lawsuit, including only the defamation claim, was ripe for trial, and a jury awarded $18.3 million in compensatory damages, and $65 million in punitive damages. So the jury that awarded the larger award did so only on the defamation claim, though the earlier case that went to trial established predicate facts, namely, that Trump had defamed Carroll once before, and a predicate to that earlier award was the jury's finding that Trump sexually assaulted Carroll.

The verdicts in both cases were upheld by the Second Circuit Court of Appeals, and the Supreme Court denied cert as to the $5 million case. It's confusing: the lawsuit filed first was tried second. The lawsuit filed second was tried first and involved the defamation and battery claim. The lawsuit filed first was only for defamation. And the lawsuit with only the defamation claim, but not the battery claim, resulted in the much larger verdict.

The $5 million case is over. The Supreme Court denied cert., and $5,625,005.48, interest included, was disbursed to Carroll's attorneys on July 9, 2026. Trump petitioned for a rehearing of the cert. denial, and the petition was denied.

Trump filed a cert. petition regarding the $83.3 million award on July 28, 2026, claiming unwaivable presidential immunity for his acts. Also, Trump's Department of Justice filed a cert. petition, arguing that the United States, not Trump, was the proper defendant. Under the Federal Tort Claims Act, the United States cannot be sued for defamation.

On May 27, 2026, the New York Times reported the Department of Justice had opened a criminal investigation into whether Carroll had committed perjury when she denied knowledge of how her lawsuit had been funded. Judge Kaplan had considered this accusation earlier, ruling that Tacopina could not mention "Reid Hoffman," the alleged source of litigation funds, before the jury. But perhaps there was the flicker of a thought that if Carroll had lied and could have been impeached on this collateral matter, then erroneously forbidding the mention of Reid Hoffman might provide a basis to overturn the verdicts. Or could there be an even simpler explanation for opening a criminal investigation?

Trump did promise at the March 4, 2023 Conservative Political Action Conference that, for those who felt wronged and betrayed, he would be their warrior, their justice, and their retribution. Just perhaps he had himself in mind.

Attorney General Todd Blanche, who met Trump as his criminal defense attorney, testified to the Senate Judiciary Committee on July 15, 2026, "I'm his lawyer - was his lawyer. And now I'm the deputy attorney general." Blanche was also involved in Trump's civil appeals of the Carroll lawsuits. Recusing himself, Blanche assigned the Carroll matter to the U.S. Attorney's Office in Chicago. What does it say about the rule of law and the deployment of the Department of Justice, when the President becomes warrior, justice, and retribution in his own very personal cause?

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MY JOURNEY IN DEI PROGRAMS THAT WORK

RECOGNIZING HARD WORK, OVERCOMING ADVERSITY, AND BROADENING THE PATH TO THE AMERICAN DREAM

Written by Arnold P. Peter



DEI PRINCIPLES WE ALL SUPPORT, AND WHERE THE MODERN APPROACH HAS FAILED

Diversity, Equity, and Inclusion are three principles no one can honestly disagree with. We all want a society where people of every background have a fair shot at the American Dream. Unfortunately, the modern term "DEI" has, sometimes for good reason, become associated with rigid quotas, lowered standards, and the admission or hiring of individuals unprepared for the responsibilities placed upon them. These approaches undermine public trust and harm the very people they claim to help.

There is a critical difference between standards genuinely tied to job performance and standards designed to exclude. Legitimate standards include the physical demands of firefighting, the ability to read and interpret the law, or the capacity to safely pilot an aircraft. Exclusionary standards include literacy tests used to disenfranchise Black voters, arbitrary height or strength requirements used to keep women out of law enforcement, and legacy admissions favoring the privileged over the qualified.

The Supreme Court recognized this distinction in *Griggs v. Duke Power Co.* (1971), invalidating employment requirements that disproportionately excluded African-American applicants yet bore little relationship to job performance. *Griggs* did not abolish standards; it required that standards actually measure the ability to do the work—a principle that remains sound today.

Real DEI does not mean eliminating necessary standards. It means making sure those standards are relevant, fair, and applied equally. It also means removing barriers that have no connection to a person's ability to perform the job, grow in the role, and succeed.

THE LAW HAS LONG DISTINGUISHED OPPORTUNITY FROM OUTCOME

The modern debate assumes that expanding opportunity and preserving merit are incompatible. American law rejects that false choice. From the Reconstruction Amendments through the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, the law has removed artificial barriers to fair competition—but rarely guaranteed

equal results. The Equal Protection Clause promises equal protection of the laws, not equal outcomes; Title VII bars discrimination because of race, color, religion, sex, or national origin, yet guarantees no one a job, promotion, admission, or contract. It guarantees only the opportunity to compete fairly.

Ricci v. DeStefano (2009) illustrates that balance. A city discarded valid firefighter promotional exam results because minority candidates scored lower than expected. The Court held that scrapping valid results solely because of racial outcomes was itself unlawful discrimination absent a strong basis for believing the exam violated Title VII. Employers should eliminate discriminatory barriers, not manipulate outcomes once fair standards have been applied.

EQUAL PROTECTION MEANS EQUAL PROTECTION FOR EVERYONE

Recent decisions confirm these laws protect every individual equally. In *Muldrow v. City of St. Louis* (2024), the Court held that Title VII reaches discriminatory job transfers even absent significant financial harm. And in *Ames v. Ohio Department of Youth Services* (2025), a unanimous Court rejected heightened evidentiary burdens for majority-group plaintiffs, reaffirming that civil rights laws protect everyone equally.

THE ADA SHOWS HOW REAL INCLUSION WORKS

No statute better illustrates principled inclusion than the ADA, which requires reasonable accommodation of qualified individuals unless it imposes an undue hardship—while preserving essential job requirements. A pilot must still safely fly an aircraft, a firefighter must still perform demanding rescues, and a trial lawyer must still competently represent clients. In my own employment and entertainment practice, this works extraordinarily well, because the ADA asks a simple question: can a qualified individual perform the essential functions of the position once unnecessary obstacles are removed? That is a model for opportunity generally.

THE FIRST REAL DEI PROGRAM THAT GRANTED THE OPPORTUNITY TO ACHIEVE

My life demonstrates a very different model of DEI. When DEI focuses on expanding opportunity to those truly deprived of it, rather than reducing individuals to the color of their skin, it can work extraordinarily well. By any traditional academic measure, I would not have been considered qualified for anything requiring higher education. Yet when opportunity is paired with hard work, discipline, and resilience, potential can flourish. I have been the fortunate recipient of two such programs.

My family came to the United States as Christian religious refugees. We received our first winter clothing through the generosity of Goodwill, and we were embraced by an African-American church in South Central Los Angeles. I attended a high school where fewer than 10 percent of students went on to college. My counselor told me the only viable option for someone like me was to enlist in the military.

My father rejected that idea, and I enrolled at California State University, Long Beach, hoping to become a police officer. There, I discovered the Reserve Officers' Training Corps (ROTC), which put me on the path to becoming a commissioned officer in the Military Police Corps, eventually attaining the rank of Captain. ROTC did more than train me; it provided much-needed income to remain in college and opened doors that would otherwise have stayed locked for students from families like mine.

A MODEL OF INTEGRATION: HOW THE MILITARY LED THE WAY

The U.S. military was once deeply segregated, with Black, White, and Asian service members restricted to separate units through World War II. President Truman issued Executive Order 9981 in 1948 to mandate equality of treatment across the armed forces, and serious desegregation began in 1950 at the start of the Korean conflict. Wartime needs accelerated integration, and by 1953 the military was fully integrated—making it one of the first major American institutions to dismantle official segregation, well before the Civil Rights Act of 1964. Since then it has often been held up as a model for inclusion and advancement, proving that diversity and merit can go hand in hand in the most demanding environments.

A powerful modern example is Vice President J.D. Vance. Raised in poverty in Middletown, Ohio, in a chaotic home marked by addiction and instability, he was eventually raised by his grandparents. By traditional measures, he would not have been expected to succeed beyond a working-class job. Yet after serving honorably

in the Marine Corps, where he gained discipline and a path to education through the G.I. Bill, he enrolled at Ohio State University and graduated summa cum laude, then earned admission to Yale Law School, where he initially felt out of place but ultimately excelled. His life illustrates that real DEI is not about quotas or preferences, but about recognizing and investing in potential wherever it is found. He succeeded not because standards were lowered, but because he was given a fair shot to meet them.

WHAT THE MILITARY TAUGHT ME: DISCIPLINE, LEADERSHIP, AND RESPONSIBILITY

On a personal level, the military gave me far more than an education. It taught me discipline, responsibility, and leadership—and most importantly, "sleep management!" At a young age, I was entrusted with significant authority over people, resources, and decisions that mattered. I quickly learned that leadership demands integrity, judgment, and accountability. As is often said, rank has its privileges but also its responsibilities. That lesson has guided me ever since and led me to my next life-changing DEI opportunity.

OPPORTUNITY WITHOUT ILLUSION AT LOYOLA LAW SCHOOL: REAL SUPPORT, WITH THE DEMANDS OF MERIT

Encouraged by college professors who saw my potential rather than my circumstances, I applied to law school and was admitted to Loyola Law School in Los Angeles through its LEDOP—Legal Education Development Opportunity Program. Contrary to assumption, LEDOP was not defined by race, nor was admission limited to ethnic minorities. It was based on an individual assessment identifying applicants who had faced significant adversity or lacked traditional academic indicators but still demonstrated strong potential for success.

In my entering class were a young woman whose family fled communist Belarus for political persecution, the son of poor white farmers from California's Central Valley, and the daughter of a Mexican-American gardener and housekeeper raised in one of Chicago's most impoverished neighborhoods. Despite our vastly different backgrounds and obstacles, the law school determined that we all showed the promise and potential to succeed.

LEDOP provided me with a 50 percent scholarship, but I still had to work to cover the remaining tuition, books, gas for commuting, and other basic living expenses. I fulfilled my military obligation one weekend each month and one month each summer, earning the equivalent of the monthly salary of an Army private. During the school year, I worked two jobs.

My law school day began at 5:00 a.m. calling substitute teachers for a local school district. I then drove 60 to 90 minutes to downtown Los Angeles for classes, and afterward made the same drive back to work as a janitor until early evening. I came home to eat quickly and study for the next day—no lingering in the library or grabbing a beer with a study group. It was not glamorous, but it demanded discipline, rigorous time management, and endurance, and it instilled the lasting conviction that adversity can be overcome without lowering expectations or special treatment.

Loyola's LEDOP commitment to merit was real. Once admitted, LEDOP students had to meet exactly the same academic standards as every other student—no adjusted grading, no separate curve, no diminished requirements. Many classmates did not make it past the first semester, and some did not survive the first year. The program opened the door but did not lower the standards. Those who struggled were first offered additional academic support, but if they still could not meet the standards, they were respectfully and firmly weeded out. That is what genuine merit-based opportunity looks like.

INDIVIDUALS, NOT CATEGORIES

This principle animates *Students for Fair Admissions v. Harvard* (2023). The Court did not hold that diversity lacks value; it held that government-supported institutions generally may not classify applicants by race in ways inconsistent with the Equal Protection Clause. As Chief Justice Roberts observed, individuals must be treated as individuals, not as representatives of racial categories. One may debate the policy, but as constitutional law it reaffirms a longstanding principle: opportunity should turn on a person's own achievements, character, experience, and potential—not immutable traits. Ironically, that describes the very programs that transformed my life. Neither ROTC nor Loyola's LEDOP selected me for a preferred racial category; they selected me because they recognized unrealized potential.

WHAT REAL DEI REQUIRES: OPPORTUNITY WITHOUT PRIVILEGE AND STANDARDS WITHOUT APOLOGY

Although my poor high school education left me unprepared for college, ROTC, or law school, I excelled in all three. I received several honors as an outstanding military student, graduated law school in good standing, earned a prestigious federal clerkship, and joined the longest continuously operating law firm in the United States. At the firm's annual black-tie dinner at the Waldorf Astoria, I found myself seated next to a young woman attorney whose family traced its lineage to the Revolutionary War. In time, I became one of the few South Asians to serve in senior legal and executive roles at Universal Studios, later led the entertainment and media practice of an international law firm, and then founded my own firm.

These accomplishments came not from privilege but from persistence, resilience, and the refusal to accept defeat. The executive skills I rely on today were learned through necessity and repeated setbacks and failure.

True DEI are rooted in recognizing potential, not just credentials. Talent does not always emerge from privilege or polished résumés drafted by paid counselors; it can be found in those who have faced setbacks, lacked access to elite education, or started from hardship, but who possess the determination, intellect, and resilience to excel when given a fair chance.

True DEI widens the path not by lowering the bar, but by removing barriers that were never justified to begin with—barriers based on race, gender, zip code, or economic status. Once in the door, everyone is held to the same expectations, and success is earned. This is not about handouts. It is about fairness—about rewarding grit, promise, and capability wherever they appear.

WHAT 30 YEARS OF PRACTICE CONFIRMS: BROAD RECRUITMENT, RIGOROUS STANDARDS

Having represented both employees and employers, and clients in entertainment transactions, for more than three decades, I have reached one consistent conclusion: the most successful organizations recruit broadly, evaluate fairly, maintain rigorous standards, and invest heavily in developing promising people.

None of that requires lowering expectations. In fact, lowering expectations often harms the very individuals institutions hope to help. High expectations combined with meaningful opportunity remain the most powerful engine of social mobility ever devised.

I would be remiss not to acknowledge that the United States remains one of the few countries where this kind of mobility is realistically possible. My parents arrived as religious refugees with little more than faith and determination, and within a single generation their son rose from refugee child to Army officer, federal judicial law clerk, and founder of his own firm. Across much of Europe and the developing world, socioeconomic status stays tied to family background for generations. America is not perfect, but it offers an unparalleled capacity for reinvention.

A POWERFUL SUMMARY: WHAT MY JOURNEY SHOWS

My journey demonstrates that real DEI is not about lowering standards or engineering results. It is about extending opportunity to those who have been denied it while holding everyone to the same high expectations, and recognizing merit in perseverance and the capacity to learn from failure. When access is broadened without compromise, talent rises on its own—reinforcing the fairness, mobility, and promise at the heart of the American Dream.

After 30 years practicing employment law and handling entertainment transactions, I have reached a simple conclusion. The best diversity program I ever experienced did not ask what race I was; it asked what obstacles I had overcome. It did not lower the standards—it gave me the opportunity to meet them, believing that merit is measured not only by where someone starts, but by how far they have traveled. That is the America that welcomed my family. That is the America that transformed my life. And that is the America worth preserving.

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DEFENDING AGAINST THE PRO PER PLAINTIFF: PROCEDURAL TOOLS FOR THE REPEAT-FILER ERA

Written by Nicole Pelcic



The defense bar has a repeat-filer problem. Self-help legal resources have put sophisticated pleadings in the hands of plaintiffs who would not have filed them a decade ago and have made it economically viable to recycle claims that have already been adjudicated. The result is a docket of cases where the merits matter less than the procedural history, and where a defense lawyer's most valuable skill is recognizing that the case in front of her has been litigated before.

California has built a substantial procedural toolkit for these cases. Most defense lawyers know pieces of it. Few use it as a coordinated system. This article maps the tools that matter most, the order in which to deploy them, and the record you need to build for any of them to work.

I. THE VEXATIOUS LITIGANT STATUTE (CODE CIV. PROC., §§ 391-391.8)

Section 391, subdivision (b), defines a vexatious litigant through four alternative categories, and most practitioners know only the first. Subdivision (b)(1) is the familiar "seven-in-seven" rule (better called the "five-in-seven" rule): a plaintiff who, in the prior seven years, has commenced or maintained in propria persona at least five litigations (other than in small claims court) that were finally determined adversely. Subdivision (b)(2) targets the relitigator, the plaintiff who keeps coming back to the same controversy after a final determination. Subdivision (b)(3) covers repeated frivolous motions or discovery tactics within a single action. And subdivision (b)(4), which is frequently overlooked, provides a shortcut for plaintiffs previously declared vexatious in any substantially similar matter. If your case fits more than one subdivision, plead them all. Trial courts vary on which prong they find most persuasive, and you do not want to lose a motion because you put your eggs in the wrong statutory basket.

A. SECURITY ORDERS VERSUS PREFILING ORDERS

The statute provides two remedies, and the choice between them matters. A security order under section 391.1 is case-specific: the court may require the plaintiff to post security if it finds vexatious status and no reasonable probability of prevailing. If the security is not posted, the action is dismissed under section 391.4. A prefiling order under section 391.7 is systemic: it bars new in propria persona filings statewide without leave of the presiding judge, and the litigant lands on the Judicial

Council's vexatious litigant list. The two are not mutually exclusive, and in most repeat-filer cases defense counsel should ask for both. The security order resolves the case in front of you. The prefiling order makes the next one harder to file. The evidentiary showing largely overlaps, so the marginal cost of asking for both is low.

B. THE EVIDENTIARY SHOWING

The moving party bears the burden on vexatious status and, when requesting a security order, also bears the burden of establishing the absence of the plaintiff's reasonable probability of prevailing. The principal vehicle for both is the request for judicial notice under Evidence Code section 452, subdivision (d). Two practice points matter here. First, courts will take judicial notice of the existence of prior pleadings, judgments, dismissals, and dockets, but not of the truth of factual matters asserted within them. (*Ibid.*; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1560-1561.) Attach the operative orders, not just the pleadings. Second, your supporting declaration should do the work of walking the court through the chronology. Trial judges do not have time to assemble your case for you, and the cleaner your presentation, the better your odds.

Record building begins at intake. PACER and the California courts' case search systems are the starting point, but they are not enough. Most repeat-filers operate across state, federal, bankruptcy, and appellate dockets that do not cross-reference each other. Keep a spreadsheet for every repeat-filer matter that lists each prior action by case name and number, court, representation status, claims asserted, and disposition. That spreadsheet becomes the backbone of every motion in the case.

C. FEDERAL COURT COUNTERPARTS

Section 391 does not apply in federal court, but federal courts have their own authority under the All Writs Act and their inherent power to control their dockets. (28 U.S.C. § 1651(a); *Weissman v. Quail Lodge Inc*. (9th Cir. 1999) 179 F.3d 1194, 1197.) The Ninth Circuit set out a framework which requires notice and an opportunity to be heard, an adequate record, substantive findings of frivolousness or harassment, and an order narrowly tailored to the conduct. (*Molski v. Evergreen Dynasty Corp.* (9th Cir. 2007) 500 F.3d 1047, 1057.) Where your plaintiff is filing in both systems, parallel applications are sometimes warranted.

II. RES JUDICATA AND COLLATERAL ESTOPPEL AT THE PLEADING STAGE

Vexatious litigant designation addresses the litigant. Preclusion addresses the claims. In most repeat-filer cases, the more powerful early-disposition tool is the preclusion-based demurrer, because it disposes of the case rather than merely constraining the plaintiff's future filings.

A. PRIMARY RIGHTS AND THE RECYCLED CLAIM

California claim preclusion is built on the primary rights doctrine. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) A cause of action is defined by the right to be free from a particular injury, and a single primary right yields a single cause of action regardless of how many legal theories the plaintiff pleads. (*Ibid.*; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) Once the primary right has been litigated to a final judgment on the merits, a second action on the same right is barred, even if the plaintiff offers new theories or seeks new remedies. (*Crowley*, at p. 682.)

This is the doctrine that lets you knock out the reformulated complaint. The plaintiff who lost a wrongful foreclosure action cannot revive the same dispute as quiet title, slander of title, or unfair business practices, so long as the underlying harm is the same. The repleading game ends where the primary right was previously adjudicated.

B. PRIVITY AND NONMUTUAL ISSUE PRECLUSION

Privity is where claim preclusion most often fails, particularly in industries with layered ownership and servicing structures. California takes a functional approach: privity exists where the nonparty's interests were adequately represented in the prior action. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 826.)

When privity defeats claim preclusion, do not give up. Nonmutual collateral estoppel frequently survives. A defendant who was not a party to the prior action may still invoke issue preclusion against a plaintiff who was, provided the issue was identical, actually litigated, necessarily decided, and final on the merits. Issue preclusion is the second arrow in your quiver, and many cases that look unwinnable on claim preclusion grounds are clear winners on issue preclusion.

C. DEMURRER MECHANICS

Preclusion is properly raised on demurrer when the basis appears on the face of the complaint or in judicially noticeable matter. Pair the demurrer with a request for judicial notice attaching the operative documents from the prior action: the complaint, the dispositive ruling, and the judgment.

The most common pitfall here is reliance on noticed documents for disputed facts. The court may notice that a prior ruling was entered. The court may not notice the truth of the factual allegations underlying it. Drafting the demurrer to depend only on what the court can properly take from the orders themselves will avoid the most common reason these motions get denied.

D. THE ROOKER-FELDMAN THRESHOLD

When the repeat-filer migrates to federal court, the *Rooker-Feldman* doctrine often provides a jurisdictional bar. (*Rooker v. Fid. Trust Co.* (1923) 263 U.S. 413; *D.C. Court of Appeals v. Feldman* (1983) 460 U.S. 462.) Federal district courts lack jurisdiction over what are, in substance, appeals from state-court judgments. (*Exxon Mobil Corp. v. Saudi Basic Industries Corp.* (2005) 544 U.S. 280.) The Ninth Circuit applies a de facto appeal test: the action is barred where the plaintiff complains of a legal wrong by the state court and seeks relief from the state-court judgment itself. (*Bell v. City of Boise* (9th Cir. 2013) 709 F.3d 890, 896-897.)

Rooker-Feldman is jurisdictional; preclusion is a merits defense. Raise both where applicable, with *Rooker-Feldman* as the threshold and preclusion as the alternative ground.

III. STRATEGIC SEQUENCING

A. PRECLUSION FIRST, THEN VEXATIOUS DESIGNATION

In most repeat-filer cases the preclusion-based demurrer should come first. It is procedurally simpler, the supporting record can be presented through a single request for judicial notice, success disposes of the action rather than merely constraining the litigant, and a sustained demurrer creates a preclusive judgment that strengthens your position in any future action.

Concurrent motions make sense when the plaintiff has shown a pattern of immediate refiling, or when the prior litigation record is voluminous but the legal theory recycling is limited. The choice is case-specific, but the default should be preclusion first.

B. FEE RECOVERY

Fee recovery in these cases is uneven, and you should set expectations with your client accordingly. Section 391, subdivision (c), addresses expenses incurred in connection with violations of prefiling orders, but the recovery is limited to that conduct. Sanctions under sections 128.5 and 128.7 are additional avenues, but each requires a separate showing, and the section 128.7 safe harbor must be observed.

The most reliable fee path is the underlying contract or statute. In cases arising from contracts with fee provisions, lender litigation in particular, the fee clause usually survives the dispute and supports recovery for defending the action, including the procedural motions. Identify your fee basis at intake, and structure your motions to support the eventual fee application.

C. THE APPELLATE RECORD

Expect an appeal. The pro. per. appellant has every incentive to seek review, and the trial court record is your only protection against a reversal that revives the dispute.

Three rules: (1) Every dispositive ruling should be supported by a clear evidentiary record. (2) Every request for judicial notice should be ruled on explicitly. And (3) every order should specify the grounds and identify the preclusive basis or statutory categories invoked, so that the appellate court is not left to reconstruct the trial court's reasoning. The cost of careful record management is modest. The cost of an appellate reversal, and the revival of a case you thought was closed, is not.

IV. CONCLUSION

The repeat-filer problem is not going away. Self-help resources will continue to proliferate, and the economics of serial counseling will continue to support litigation that would not survive an objective merits review. The procedural toolkit is the response: vexatious

litigant designation, claim and issue preclusion, careful record building, and disciplined sequencing.

These skills transfer broadly. The recycled-claim problem appears wherever there are repeat plaintiffs and standardized defenses, in employment, consumer, premises liability, and lender litigation alike. The lawyer who can spot a recycled claim at intake, build the record to dispose of it on demurrer, and pursue vexatious litigant designation where the conduct warrants it is a lawyer who saves clients time, money, and the recurring exposure of having to relitigate disputes that were resolved long ago.

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APPELLATE ADVOCACY IN ART

Written by Connor Sakati





Hermon A. MacNeil, "Justice The Guardian of Liberty" (1935). East Pediment, U.S. Supreme Court, Washington, D.C. Sculpted Vermont marble.

Appellate lawyers are artists. Or at least they should be, Jonathan Shapiro, screenwriter for *Boston Legal* and a former federal prosecutor, recently told the San Diego Appellate Inn of Court. During the Inn's February program, entitled "Appellate Advocacy in Art," Shapiro shared that the process of writing a script for a TV show and writing a brief for an appellate court is startlingly similar. Each case—and each TV episode—has characters, dialogue, and a plot. And just as a Hollywood screenwriter tells a story, it's our job as advocates to tell our clients' stories, too.

But art isn't just a tool appellate advocates use to argue a case. February's program was a tour of the many ways art shares the stories of the people involved in appellate litigation, past and present. Inn members saw pictures of courthouse architecture and murals, watched clips from movies depicting great appellate advocates, and chuckled at irreverent newspaper cartoons. The media were diverse. But each piece shared the common goal of telling the story of the people appellate litigation impacts, from the advocates who press for justice, to the Justices who make tough calls, to, most importantly, the people whose lives and liberties hang in the balance.

Some art reminds us of litigation's past, telling the story of how appellate advocacy has shaped our society and of the people appellate cases have impacted. During the program, Inn members examined the art that adorns several of our nation's courthouses. One of Shapiro's favorite pieces of courthouse architecture is the East Pediment of the United States Supreme Court (Inn members learned that a pediment is the triangular portion sitting atop the building's columns). Etched in the pediment's marble are three historical lawmakers: Confucius, Moses, and Solon. These three men represent that law has an ancient pedigree and has, for thousands of years, been a cornerstone of human civilization.



Andrew K., Kaylee F., Jose C., Abraham V., Stacy Lynn R., Juan G., *Mendez v. Westminster School Dist*. (2009) (Cal. Ct. App., Fourth Dist., Div. Three, Santa Ana, California). Acrylic paint on wood.

The art in the California Court of Appeal's courthouse in Santa Ana trades the grand sweep of legal history for more recent, more concrete events. In that courthouse, paintings by local students adorn the halls, portraying published cases from Southern California. One of the most moving murals depicts *Mendez v. Westminster School District* (S.D.Cal. 1946) 64 F.Supp. 544, *aff'd*, 161 F.2d 774 (9th Cir. 1947). In that case, Mr. Gonzalo Mendez challenged a law requiring his children to attend segregated schools. He prevailed. And while the mural celebrates his victory, it also shows how the law furthered injustice. The mural's fence and chain, its lock emblazoned "Segregation" and its sign commanding "No Mexicans Allowed," are jarring sights in a courthouse. Another mural depicts the defendant in *In re James Warner Eichorn* (1998) 69 Cal.App.4th 382. In that case, a homeless Vietnam War veteran raised a necessity defense to a law banning sleeping in public areas. He too prevailed. These murals are powerful because they don't just celebrate the law. They serve as a reminder that our legal history is littered with injustice, too.



Unknown student artist, *In re James Warner Eichorn* (undated) (Cal. Ct. App., Fourth Dist., Div. Three, Santa Ana, California). Acrylic paint on wood.

And art celebrates the great advocates who fought to right those injustices. Inn members watched clips of the film *Loving*, which tells the story of the case that, in *Loving v. Virginia* (1967) 388 U.S. 1, resulted in the United States Supreme Court concluding that Virginia's laws barring interracial marriage were repugnant to the United States Constitution. The film shows the long odds advocates faced—and the joy legal victory finally brought to a couple who could, at long last, legally live together as man and wife. Similarly, clips from *On the Basis of Sex* showed how a young Ruth Bader Ginsburg fought against discriminatory laws—and faced discrimination from an appellate panel while doing so.

Other art communicates the present, sharing the appellate process with those who can't be there to see it. During the program, Shapiro lamented that the United States Supreme Court still bars cameras from the courtroom. In his view, sharing videos of courtroom proceedings would build public trust in and a public understanding of the Court. To rectify this issue, Shapiro cast his own Supreme Court to hear *Kennedy v. Louisiana* (2008) 554 U.S. 407, and enlisted his *Boston Legal* characters to argue the case. Through this TV episode, art communicated how the Supreme Court operates to those who may never have a chance to travel to Washington, D.C. and watch an argument themselves. And, writing the episode put Shapiro's appellate skills to the test, as he predicted the arguments counsel would make and questions the Justices would ask. For that episode, *Boston Legal* won a Peabody Award.

Beyond TV, courtroom sketch artists transmit appellate courts' most important moments beyond the four walls of the courthouse. And, quick-witted cartoonists humorously hold the bench accountable. The Inn members saw a number of these sketches, which captured milestones in Supreme Court history, like new Justices' investitures and major oral arguments.

Appellate advocacy also appears, if sparingly, in photographic art. The accompanying image depicts oral argument during the appeal of Kevin Barry Artt in the Northern Ireland Court of Appeal at the Royal Courts of Justice in Belfast, Northern Ireland, in 2020. Visible are Artt's barrister, Fiona Doherty, Q.C., and solicitor, Andrew Moriarty, who successfully argued for the reversal of Artt's false conviction for an IRA murder in a Diplock court 37 years earlier. The photograph, taken from the gallery, offers a glimpse into the traditional trappings and attire still prevalent in British courtrooms today.



D. Lawton, Oral argument at the Royal Courts of Justice, *R. v. Artt* (Mar. 5, 2020). Photograph.

Justice José Castillo concluded February's program, remarking that a good appellate advocate sculpts a brief from the rough, unformed clay of a voluminous record, turning a stale transcript into a compelling story. But, art isn't just an advocate's tool. It centers us, reminding us advocates of the importance of the legal enterprise. The Supreme Court's East Pediment reminds us of the long history of lawmaking, a river whose currents lawyers enter each time they research, write, and argue. Murals like those at the Santa Ana courthouse remind of us of the human consequences of arguments lawyers make. And, film reminds us of the great advocates who came before us, inspiring us to further the causes of liberty and justice as they did. Art reminds us why appellate advocacy matters.

Other images drawn from the world of appellate advocacy appear below.



Edwin Howland Blashfield, *The Power of The Law* (1899). Oil on canvas. Hanging in the New York Appellate Division Courthouse in New York City.



Charles Paul Renouard, *The Final Stage of the Dreyfus Case, the Cour de Cassation assembling to hear M Ballot Beaupre's Report*, The Graphic, June 3, 1899. Lithographic illustration.



Robert-Fleury, Joseph-Nicolas. *Galileo Galilei before members of the Holy Office in the Vatican in 1633*. (1847) Musée du Louvre, Paris. Oil on canvas.



Jon Kudelka, Cartoon No. 297, The Saturday Paper, April 18, 2020, at page 3. Watercolor on paper.



Art Lien, Admiralty Law (courtroom sketch, Mar. 25, 2019) SCOTUSblog. Watercolor on paper.



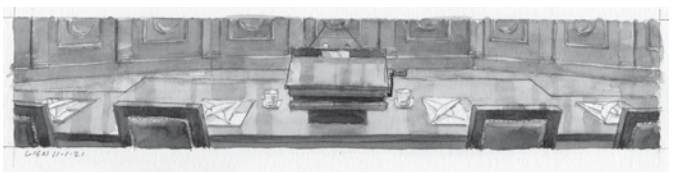
Art Lien, *Pandemic Teleconference* (courtroom sketch, May 4, 2020) SCOTUSblog. Watercolor on paper.



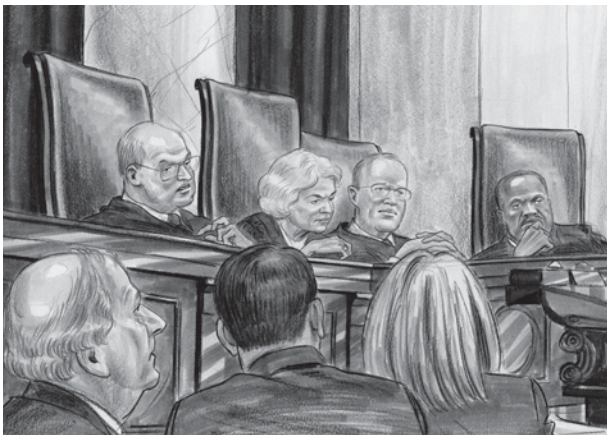
Art Lien, Stokeling v. U.S., Justice Kavanaugh's first argument on the bench (courtroom sketch, Oct. 9, 2018) SCOTUSblog. Watercolor on paper.



Art Lien, Michael J. Mongan, California Solicitor General, California v. Texas (courtroom sketch, Nov. 10, 2020) SCOTUSblog. Watercolor on paper.



Art Lien, Empty Bench (courtroom sketch, Nov. 1, 2021) SCOTUSblog. Watercolor on paper.



Art Lien, *Supreme Court Justices William Rehnquist, Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas on the Bench* (courtroom sketch) (undated) NBC News/SCOTUSblog. Watercolor on paper.

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