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Success for Women In and Out of the Courtroom

Hon. Elizabeth D. Laporte (Ret.)

Five years ago, I attended the United States District Court for the Northern District of California's annual conference along with other judges from the federal court, lawyer representatives to the court and other attorneys. There, professors Joan Williams of the University of California, Hastings College of the Law and Deborah Rhode of Stanford Law School—leading scholars regarding how women fare in the legal profession—spoke of the obstacles that, despite much progress, many still faced, including implicit bias. I was already familiar with studies in which

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In the Northern District of California, district judges and magistrate judges often require parties to submit their discovery disputes in the form of letter briefs with specific limitations on the number of pages. Letter briefs have become popular with the Court because they are seen as a more efficient way to resolve discovery disputes than the default five-week briefing and hearing schedule with 25-page briefs that normally applies to motions. However, letter briefs place a premium on making the right arguments in limited space. In the midst of discovery in a busy case, and given all the demands of modern legal practice, it can sometimes be hard for attorneys to find the time needed to write a well-crafted letter brief. Still, it's obviously essential to do it because what you do or don't get in discovery, or what you are forced to produce, can have a significant impact on the strength of your claims and defenses, as well as on the expense of litigation. The authors of this article

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VINCE PARRETT

On SHANE READ'S WINNING AT CROSS-EXAMINATION

Vince Parrett

All business trial lawyers can benefit from Shane Read's new book, *Winning at Cross-Examination*. By focusing on the importance of creating compelling bottom-line messages, Read shows how cross examination is done right by some of the best trial lawyers alive using examples like David Boies in the Proposition 8 trial challenging California's ban on same-sex marriages.

The golden thread that runs throughout Read's book is that to effectively cross-examine a witness you must first develop a bottom-line message that will show why you should win. Developing a bottom-line message before crafting your cross-examinations will focus you on what is most important and thereby help you ask the right questions. And it will stop you from going down rabbit holes that waste the valuable time of counsel, witnesses, and the court—and even worse, bore the jury.

Likewise, the topics that you choose for your cross-examinations should advance your bottom-line message to win your case. To help you select the right topics for a successful cross, Read shows you how to use the acronym ***CROSS***:

- **C**redibility: challenge by showing a witness's (1) favoritism for one side, (2) past criminal convictions or evidence of untruthfulness, (3) murky perceptions of what happened, or (4) memory of past events that is too good;

- **R**estrict damaging testimony: show the jury a witness's lack of knowledge about important matters;

- **O**utrageous: exploit witness statements that exceed the limits of what jurors will believe as true, *e.g.*, "It depends on what the meaning of 'is' is" or "I smoked, but I never inhaled";

- **S**tatements that are inconsistent: impeach with statements made by the witness prior to trial that are inconsistent with trial testimony; and

- **S**upport your case: Read considers this one of the most neglected tools in an attorney's arsenal on cross. For even if a witness has hurt you on direct, you can still ask many questions that will support and highlight your bottom-line message to the jury.

Interestingly, Read's advice to focus your cross on crystal-clear themes conflicts with some of Irving Younger's famous Ten Commandments of Cross-Examination, which many of us learned in law school or in CLE courses on trial advocacy. Irving Younger, a distinguished professor of trial techniques at Cornell Law School, attorney at a major New York law firm, and Judge on the Supreme Court of New York City, was a strong believer in his commandments. He wrote, "I cannot tell you how powerfully I want to preach these Ten Commandments. You should never violate them; if you do, you will want the ground to open up beneath your feet, so that you will sink in and be devoured forever. Every time you violate these commandments, your case will blow up in your face. . . . They come from on high; they must be obeyed."

But Read begs to differ, arguing that some should never have been included in the list and are "flat-out wrong." Among the Ten Commandments, Read highlights in **bold** those that are wrong:

1. *Be brief.*
2. *Use plain words.*
3. **Use only leading questions.**
4. *Be prepared.*
5. *Listen.*
6. **Do not quarrel.**
7. *Avoid repetition.*
8. **Disallow witness explanation.**
9. **Limit questioning.**
10. **Save for summation.**

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MARIE BAFUS

On SECURITIES LITIGATION

Federal courts may adjudicate more claims under the Securities Act of 1933 ("Securities Act") following a recent Delaware Supreme Court decision. Earlier this year, the Delaware Supreme Court ruled that corporations may require stockholders to litigate claims under the Securities Act in federal court, holding that such forum provisions in corporate charter documents and bylaws are facially valid. The Court's decision in *Salzberg v. Sciabacucchi*, --- A.3d ---, 2020 WL 1280785 (Del. Mar. 18, 2020), reversed an earlier ruling of the Delaware Court of Chancery and opened the door for Delaware corporations to require plaintiffs to bring Securities Act claims in federal court. From the perspective of the defense bar, the decision allows Delaware corporations to mitigate the costs, inefficiencies, and burdens imposed when such claims are filed and litigated in state court.

Marie Bafus

Background

Over the past several years, the plaintiffs' bar has increasingly filed Securities Act claims in state rather than federal court. Plaintiffs' lawyers view state court as a more favorable forum for such cases because many of the key provisions of the Private Securities Litigation Reform Act ("PSLRA") – including more stringent pleading standards, an automatic stay of discovery pending motions to dismiss, and a statutory process for appointing lead plaintiffs – often have been held inapplicable in state court proceedings. To address that trend and minimize the prospect of multiple Securities Act cases proceeding simultaneously in different courts, many corporations included provisions in their charter documents or bylaws requiring Securities Act claims to be brought exclusively in federal court. The enforceability of those clauses assumed greater importance after the U.S. Supreme Court's March 2018 decision in *Cyan, Inc. v. Beaver County Employees' Retirement Fund*, which confirmed that plaintiffs may file Securities Act claims in either state or federal court.

Delaware law expressly permits corporations to use their charter documents and bylaws to require internal corporate claims – *e.g.*, derivative suits and claims involving alleged breaches of fiduciary duty, the rights of stockholders, or application of the Delaware General Corporation Law – to be brought exclusively in the Court of Chancery. But in December 2018, Vice Chancellor J. Travis Laster of the Court of Chancery found that federal forum provisions (FFPs) – those requiring Securities Act claims to be brought in federal court – are unenforceable under Delaware law. In *Sciabacucchi v. Salzberg*, V.C. Laster held that while charter documents and bylaws may properly specify that claims involving the "internal affairs" of Delaware corporations be litigated in Delaware, they may not regulate matters involving federal law or other "external issues."

The Delaware Supreme Court Decision

Reversing V.C. Laster's decision, the Delaware Supreme Court held that FFPs: (1) are, on their face, within the permissible scope of bylaws and charter provisions because (in the words of the relevant statute) they address "the management of the business" and "conduct of the affairs of the corporation"; (2) provide corporations with "efficiencies in managing the procedural aspects of securities litigation" post-Cyan; and (3) do not violate Delaware law or policy. The Delaware Supreme Court rejected the lower court's finding that, as a matter of Delaware law, mandatory forum provisions are applicable only to matters involving a corporation's "internal

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ROGER N. HELLER

On CLASS ACTIONS

Picking up where the last decade left off, the 2020s are off to a fast developing and interesting start for class action practitioners in the Ninth Circuit, with the court already handing down several notable opinions addressing such important issues as personal jurisdiction, privacy law, class damages, punitive damages, and Article III standing.

Roger N. Heller

At the intersection of several of these issues, is perhaps one of the most closely-watched cases of the year, *Ramirez* v. *TransUnion LLC*, --- F.3d ---, 2020 WL 946973 (9th Cir. Feb. 27, 2020), where the Ninth Circuit recently provided clarification regarding the application of Article III standing principles in the class action context.

The *Ramirez* case involved allegations that the defendant credit reporting bureau knowingly violated the Fair Credit Reporting Act ("FCRA") by placing inaccurate "terrorist alerts" on consumers' credit reports, failing to take reasonable steps to ensure the accuracy of the information, and incorrectly indicating to the consumers that the alerts had been removed from their credit reports when that was not the case. The plaintiff, on behalf of himself and a proposed class of others who had these false alerts on their reports, sought statutory and punitive damages under the FCRA. After the district court certified a litigation class pursuant to Federal Rule of Civil Procedure 23(b)(3), the case proceeded to a jury trial. After the trial, the jury found in favor of plaintiff and the class and awarded statutory damages and punitive damages. On appeal, the Ninth Circuit affirmed the jury's award of statutory damages as "clearly proportionate to the offense and consistent with the evidence." The court determined, however, that the jury's punitive damages award—approximately 6.45 times the amount of the statutory damages—were excessive under the facts of the case and the standards articulated by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and ordered that the punitive damages be reduced by approximately 38% (*i.e.*, to a ratio of 4:1). *Ramirez*, 2020 WL 946973, at *18-19.

Prior to addressing the damages issues, the majority tackled two important issues regarding Article III standing in the class context. *First*, the majority held that, at the motion to dismiss stage, class certification stage, and, for purposes of injunctive relief, at the judgment stage, only the representative plaintiffs must have Article III standing. *Ramirez*, 2020 WL 946973, at * 7. *Second*, the majority held that, at the final judgment stage of a class action, only those class members who can satisfy Article III standing requirements may recover monetary damages. *Ramirez*, 2020 WL 946973, at * 8.

It is probably fair to say that neither of these holdings significantly defied general expectations among class practitioners. As the *Ramirez* majority noted, the first holding followed prior Ninth Circuit authority on the issue. *Id.* at * 7 (citing *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018); *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015), *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *Casey v. Lewis*, 4 F.3d 1516, 1519–20 (9th Cir. 1993)). As for the second holding, the issue was essentially presented but not resolved by the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). The requirement that class members must satisfy Article III to recover damages at the final judgment stage does not stray significantly from the practice, employed in certain types of class cases that go to trial, of utilizing a second phase or process (*i.e.*, bifurcation) regarding the calculation and/or allocation of class members' damages.

After addressing these doctrinal issues, the *Ramirez* majority conducted a detailed analysis of whether the recovering class members in the case at hand had Article III standing under the Supreme Court's and Ninth Circuit's respective decisions in *Spokeo*, concluding that each class member did, in fact, allege a concrete injury and had Article III standing. The majority emphasized the severe nature of the inaccurate information at issue and the corresponding risk of harm. *Ramirez*, 2020 WL 946973, at *8-14. The third member of the panel, who concurred in part and dissented in part, would have held that only those class members

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AMY BRIGGS

On INSURANCE LITIGATION

On March 16, 2020, six Bay Area counties issued "shelter in place" orders, which effectively brought many businesses to a grinding halt. Lawsuits against insurers who sold business interruption coverage are now rolling in, thus far led largely by restaurants. In California, for example, Thomas Keller's Michelin-starred restaurant—The French Laundry—recently filed suit in Napa County seeking coverage for the shutdown of his restaurant. Similar suits have been filed in New Orleans and Chicago. As one CEO recently put it, "Shut the doors = shut down the revenue. If that's not a property-based interruption, I'll go light the [expletive] thing on fire myself."

Amy Briggs

Many policyholders, however, are not ready for litigation, and instead are asking what they need to do simply to preserve their rights under their business interruption policies. Of course, it is critical for clients to read their insurance policies and know their terms and conditions. Generally speaking, however, there are three different steps to keep in mind.

First, many policies require a notice of loss within a limited time frame following awareness of either the event causing the loss or the loss itself. A notice of loss is a straightforward document that simply alerts the insurer to the fact of a loss. Even if the insured does not timely submit notice, failure to do so is not necessarily fatal. California generally follows a notice-prejudice rule, requiring the insurer to demonstrate that it was actually and substantially prejudiced by the late notice. *Northwestern Title Security Co. v. Flack*, 6 Cal.App.3d 134, 140 (1970). This can be a difficult burden for insurers to meet except in rare circumstances. Strict adherence may be required, however, in other jurisdictions.

Second, commercial property and business interruption coverage requires that the insured then submit a proof of loss. A proof of loss is a more detailed document that provides the insurer with information substantiating the claim that is being made. Generally speaking, it entails a sworn and notarized itemized statement that includes information such as (1) the date and cause of the loss; (2) documents that support the value of the property and the amount of loss claimed (*i.e.*, estimates, inventories, receipts, etc.); (3) the identity of parties claiming the loss under the policy; (4) parties having an interest in the property, like the bank holding the mortgage; and (5) the policy under which coverage is sought.

Often—but not always—the time to submit a proof of loss runs from the date the insurer requests it. Be advised that it may be due within 60 days of the request, which, given the current situation, could be a challenging deadline for insureds to meet.

Submission of a proper and timely notice and proof of loss may be subject to a "substantial compliance" standard. *McCormick v. Sentinel Life Ins. Co.*, 153 Cal.App.3d 1030, 1046 (1984). Accordingly, a defect in a notice or proof of loss, by itself, is rarely a sufficient ground to deny a claim. Moreover, the insurer is under a duty to specify any defects in the notice or proof of loss so that the insured can address them. If the insurer fails to identify the deficiency, the notice is waived. Cal. Ins. Code §§ 553, 554. However, the total failure to comply with the notice and proof of loss conditions could excuse insurer liability altogether. *1231 Euclid Homeowners Assn. v. State Farm Fire & Cas. Co.*, 135 Cal.App.4th 1008, 1018 (2006); *Hall v. Travelers Ins. Cos.*, 15 Cal.App.3d 304, 308 (1971).

If your client is unable to meet the proof of loss deadline for logistical reasons, make sure it is in touch with its insurer to obtain an extension *in writing*.

Third, if the client receives a denial from its insurers, it may want to initiate litigation or arbitration. Many clients may have California's four-year statute of limitations in mind and feel little pressure to move forward at this time. But that would be a mistake. Most property and business interruption insurance contains a different—and much shorter—contractual limitations period. For instance, the California Standard Form Fire

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Frank Cialone

On TRUSTS & ESTATE LITIGATION

No-contest clauses and the anti-SLAPP law, again . . . . A few years ago, I wrote a column in this publication in which I discussed the tension between then-recent changes to the Probate Code governing the application of no-contest clauses in testamentary instruments and the anti-SLAPP law. Since then, several cases have reached the Court of Appeal and confirmed the need for the Legislature to resolve that tension.

Frank Cialone

A no-contest clause provides, in essence, that a beneficiary of a will or trust instrument will be disinherited if he or she contests that instrument. Such clauses have long been held valid in California. They promote the policies of honoring donative intent and discouraging litigation. On the other hand, they limit access to the courts and create potential forfeitures, deterring what might well be meritorious claims of undue influence or similar problems in the procurement of testamentary instruments. In practice, moreover, they often resulted in drawn-out "safe harbor" proceedings in which parties sought preliminary findings that would avoid a no-contest provision.

The Legislature balanced these interests by enacting Probate Code Section 21311, in 2010. That statute provides that no-contest clauses will be enforced only against "[a] direct contest brought without probable cause" (and against certain other types of claims if the no-contest clause itself expressly so provides). To invoke a no-contest clause, a trustee, named executor, or other interested party will bring a petition to disinherit in order to obtain a court determination that Section 21311 applies. But, because the predicate for such a petition is the filing of litigation (*i.e.*, the contest), it can trigger a motion to strike, and a request for attorney's fees, under the anti-SLAPP statute, C.C.P. Section 425.16. To defeat such a motion, the petitioner must offer admissible evidence to show that the contestant lacked probable cause for his or her claim. An anti-SLAPP motion stays discovery, and an order granting or denying such a motion is subject to an immediate direct appeal.

Reported cases confirm that the anti-SLAPP statute applies to a petition to enforce a no-contest clause. *See, e.g., Kay v. Tyler*, 34 Cal. App. 4th 505, 510 (2019). In one case, the Court of Appeal stated that "the policies underlying the no contest provisions have been carefully balanced by the Legislature" through its enactment of Probate Code section 21311, and that "the anti-SLAPP procedures may impede some of those goals, including increasing litigation costs and potential delay." *Urick v. Urick*, 15 Cal. App. 5th 1182, 1195 (2017). But the *Urick* court also found that the anti-SLAPP statute—which the Legislature expressly directed the courts to construe broadly—applies by its terms to a petition to disinherit. (In both cases, the Court of Appeal reversed an order granting the anti-SLAPP motion, finding that the petitioner had adequately demonstrated a likelihood of success on the merits.)

To put this in practical terms: The trustee of a trust (or the named executor of a will, or a beneficiary of such instruments) that contains a no-contest provision will likely want to invoke that provision in the event of a contest. But a lawyer representing that person will have to advise that doing so risks an anti-SLAPP motion and an award of fees to the contestant—and also risks months or years of delay, not only to the litigation but to the overall administration and distribution of the trust or estate, while such a motion is litigated and appealed. In both *Kay* and *Urick*, the Court of Appeal acknowledged that good reasons exist to limit the application of the anti-SLAPP statute to actions to enforce no contest clauses. But in both cases, the Court also acknowledged that those reasons are for the Legislature to consider.

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Success for Women In and Out of the Courtroom

reviewers of two otherwise identical resumes, except for one having a female-sounding first name and the other a male-sounding one, rated the male resume superior (as well as similar studies involving a name usually associated with African-Americans and a typically Caucasian one). Yet I was particularly struck by what Professor Williams termed "the tightrope" that women must navigate due to stubborn gender stereotypes between being seen as likeable versus being respected. *See* Joan C. Williams and Rachel Demsey, *What Works for Women at Work: Four Patterns Working Women Need to Know* (2014). When women attorneys are perceived as likeable, they are also often mistakenly perceived as less competent; but when they are perceived as competent, they too often get demerits for being unlikeable or worse. By contrast, men enjoy more latitude to be perceived as both, without being penalized for an authoritative stance. This bias runs deep in the unconscious of both men and women. Think, for example, of the two meanings of "stature" as "natural height" (women being shorter on average) and "importance or reputation gained by ability or achievement," illustrating the traditional association of greater physical height, where men on average loom over women, with higher status and skill. *Oxford English Dictionary* (2020) (www.oed.com).

Wanting to do something to help, I gathered a handful of the excellent women attorneys at the conference to meet and brainstorm, thus launching the Women Attorneys Advocacy Project. Many attorneys (too numerous to list all) have generously volunteered their time to the Project, including Randy Sue Pollack who has worked tirelessly from the start and current members Jamie Dupree, Miriam Kim, Michelle Roberts, Charlene (Chuck) Shimada and Juliana Yee. With the full support of the court, including Chief Judge Phyllis Hamilton, we have put on a series of programs open to all at the federal courthouse, as well as at UC Hastings and Stanford Law School. Our programs have included panels of judges or judge moderators, including Judge Yvonne Gonzalez Rogers and Justice Teri Jackson, and outstanding attorneys giving tips on how to overcome obstacles and—at least as important—create and get the most out of opportunities. Other programs have featured outstanding coaches in effective styles of speech and presentation in the courtroom and other litigation settings. They focused on how to project confidence and competence without being perceived (too often unfairly) as tentative and uncertain on the one hand, or cold and overly aggressive on the other (*i.e.*, walking the tightrope). Then, in March of 2020, we co-sponsored an Association of Business Trial Lawyers dinner program, which I moderated, featuring outstanding and diverse panelists: the Honorable Teri Jackson of the First District Court of Appeal; Ruth Bond of the Renne Public Law Group; Kate Dyer of Clarence Dyer & Cohen; Jan Little of Keker, Van Nest & Peters; and Quyen Ta of Boies Schiller Flexner. We had an excellent turnout, including both men and women.

Based on these programs, talking to many judges and lawyers (female and male; of diverse ages, ethnicities and backgrounds; straight and from the LGBTQ community), reading the research, and my own experience (first as an attorney and then over two decades as a judge), certain common themes and lessons emerged. One fundamental takeaway is that diverse teams that embrace inclusivity deliver better results, as numerous recent studies have shown, so attorneys and judges benefit when law firms enable women and ethnically diverse attorneys to contribute fully. Further, some clients are demanding such teams, with women and minority attorneys playing important roles, not just window dressing, and juries and judges are paying attention. *See, e.g.*, David Rock and Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016). Seizing these opportunities requires leadership, by both men and women. As more women and minorities graduate from law school, they need mentorship, feedback and opportunities to learn and shine. Fortunately, many judges are actively encouraging oral argument and examination of witnesses by newer lawyers, which means more opportunities for women attorneys, as well as minorities, as the pipeline improves with a higher percentage graduating from law school.

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Success for Women In and Out of the Courtroom

Women can take steps to help themselves and each other, building their confidence and in some cases overcoming cultural pressures that have traditionally led some of them to voice opinions in a tentative tone or not to take up space. For example, if at a meeting a woman first makes a good point that is ignored, others can echo it; and if a man gets credit for later raising the same point, others can thank him for agreeing with the original comment. Many attorneys can benefit from training in effective vocal skills, posture, body language and eye contact to better project confidence and competence while successfully navigating the tightrope. *See, e.g.*, Cara Hale Alter, *The Credibility Code: How to Project Confidence and Competence When it Matters Most* (2012).

Women also have to be prepared for the obstacles they may encounter. Courtroom behavior is generally more respectful under the eyes and ears of the judge, but on occasion we still observe an attorney (more often male) talking over and interrupting opposing counsel (more often female or younger). Attorneys must be prepared not to get knocked off their stride and to calmly but persistently have their say, enlisting the help of the judge if necessary.

More often, uncivil behavior occurs outside the courtroom (*e.g.*, in the hallway, in meet and confer sessions and in depositions). And sometimes even lead counsel is still mistaken for a secretary or associate when female, young, minority or some combination thereof. (As Quyen Ta noted at the ABTL dinner program, she recently came to take a deposition and wondered why it was slow to begin, only to learn that opposing counsel was waiting for lead counsel—assuming that role could not be hers. And Justice Jackson in her courtroom, albeit without a robe, has been mistaken for a clerk.) Attorneys must be ready to calmly but firmly correct such mistakes and call out bad behavior, make a record, enlist help as needed and not back down. Many judges, including those in the Northern District, take calls during depositions and can rule when opposing counsel misbehaves, *e.g.*, on obstreperous speaking objections, as well as in subsequent motions. In the alternative dispute resolution setting, the mediator can help ensure a level playing field, set a respectful tone and, if necessary, separate the parties and their counsel.

Traditionally, women have shouldered more responsibility for raising children and doing housework ("the second shift," as sociologist Arlie Hochschild termed it in her book of the same name), although younger generations are sharing responsibilities more equally. Accommodating the need for flexibility (*e.g.*, for school and doctor appointments)—and not just permitting but encouraging the use of parental leave by men and women alike, rather than stigmatizing it—helps retain valuable attorneys in whom law firms have invested. Openness to hiring attorneys who have left the workforce for a period of time to raise children and to non-traditional arrangements like job sharing also keeps talented attorneys in the work force.

Importantly, each of us needs to develop our own effective style that is authentically ours. As Oscar Wilde said, "Be yourself. Everyone else is already taken." From my experience on the bench, calm, persistent (but not repetitive) advocacy based on solid preparation on the law and the evidence is far more persuasive than overheated rhetoric or interrupting opposing counsel or—worst of all—the judge. Therefore, do not give up your voice, do not bluster and be prepared to address the substantive issues and answer any questions from the judge.

Finally, working together to overcome bias, implicit or otherwise, is beneficial for all because law firms, clients and judges cannot afford to go without the full contributions that the skills and expertise of women attorneys bring to the table.

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Pointers on Discovery Motions in Federal Court

are magistrate judges on the Court, and we offer some pointers for briefing discovery disputes.

1. Tell us what you want

It seems incredible, but sometimes lawyers don't say what they want from the court. They are so mired in their dispute and complaints about the opposing party and counsel that they forget to ask for specific relief. Some briefs are rants instead of well-reasoned explanations why the other side should produce specified documents or information. A better strategy is to remember that there is a decisionmaker on the receiving end of the letter brief who must decide what to do. Instead of just handing the Court a problem – the other side's misconduct – propose a solution. Ideally, the first line of the letter brief would state the relief requested and the reason for that request. Think about it this way: if you can't figure out what you want, how are we supposed to know? In particular, with discovery disputes, the lawyers normally have much more information about the case than we ever will – what documents have and have not been produced, who the custodians are, who's been deposed, and so on. We're looking to you to identify what you want because we usually don't know what you have. Given the space limitations on letter briefs, if you cannot summarize your request in one or two sentences, your request is probably doomed.

2. Include the essential information

Give us what we need to know to rule on your dispute. You should include, as an attachment or as a quote in the brief, the specific request or requests and the response by the opposing party, and cite the specific number of the request(s) at issue. When we review disputes over discovery, we always read the request(s) and response(s). Sometimes the information or discovery that the moving party seeks is not even contained in any specific request, and in other situations, the opposing party has failed to object in the written objections on the basis asserted in the brief. Sometimes the opposing party explains in the written response that the requested documents or information do not exist, and the requesting party completely ignores that written response. The written requests and responses matter.

Also, make sure that the letter brief provides an adequate discussion of the specific requests you want us to address. When your opponent stiffs you on 100 requests for production all at once, it may be tempting to file an angry letter brief denouncing their obstructionist tactics and demanding immediate compliance, but there is no way that the space limitations will allow you to explain why we should compel production of documents responsive to 100 requests. It's much more effective to break down a major dispute into more digestible pieces.

3. Provide a summary of the case

Federal courts have busy dockets, and each of us touches a large number of cases in any given week. As a result, when you file a discovery letter brief, you should not assume we remember the case or can learn about it quickly. Often we feel as if we are entering a movie halfway through and struggle to catch the plot. If a discovery referral to us takes place a year or two into the case, we may in fact be entering it halfway through. So, tell us what your case is about, or at least the part that's relevant to your discovery dispute. If there is another order or pleading on the docket that explains the case well, refer to it by docket number. For example, an order on a motion to dismiss or a case management statement usually provides a good summary of facts. We know that lawyers have problems squeezing information into a short letter brief, so referring to other sources is helpful for us.

4. Tell us why you need the evidence

Tell us why the information you want is relevant, and then tell us why it matters. Too many letter briefs skip past this part. If you do that, you force us to guess at a theory of relevance, which may not be what you were thinking. Also, be concrete and lay out what you plan to do with the information

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you're seeking. For example, if you're seeking the defendant's revenue information, don't just say it relates to multiple issues in the case, including damages, because that tells us nothing new. Identify the claim that allows you to recover the defendant's profits related to certain conduct, and then detail how you would use this revenue information to get there. A motion to compel is much more compelling if we have a practical sense of why you need this evidence and what you're going to do with it. It's true that lawyers are sometimes reluctant to be that specific for fear of educating their opponent or divulging their trial strategy. Realistically, however, your opponent is far more likely to have already figured this out, and the issue is educating us, the decisionmakers.

5. Don't wait until the last minute

Judges have common sense, and we think you do too. If there is something you really need to prove your case, we assume you will ask for it right away, and if the other side doesn't agree to give it to you, you will promptly meet and confer with them and then raise this issue with the court. Even if you technically have the ability to ask the court to order the opposing party to produce information or documents at the last minute, don't do that. For example, under our district's local rules, parties may file motions regarding discovery (normally in the form of a discovery letter brief) up to seven days after the discovery cutoff, but filing a request that late might hurt your chances of getting a favorable ruling. First, raising a discovery dispute on the very last day to do so sends a message that this is the stuff you didn't care about enough to seek earlier. If you actually wanted to use these documents in depositions, you obviously wouldn't have waited until the last possible day to seek help from the court. Second, a late-breaking motion to compel that raises more than minimal issues can present scheduling concerns. If we grant the request and order production or additional responses, that could affect the schedule for dispositive motions or trial. If we as magistrate judges are handling discovery for a district judge, we must learn whether compelling further discovery will create a problem for the district judge. If you worry that you are filing too soon, let us know that you are filing earlier rather than later to give us notice that there are disputes about discovery that might affect the timing of other motions or trial. We can always send you back to meet and confer further, but we will be aware at least of the issue and can plan accordingly.

6. Tell us when you need the evidence

If you need the documents or information by a certain time frame, explain why and show that you were diligent in raising this dispute. Setting production deadlines often isn't necessary and can sometimes be undesirable, so you need to tell us when you need a deadline. For example, if it's early in the case and you have a dispute about whether a certain subject is relevant, but the parties are still in the process of negotiating who the document custodians will be, setting a production deadline at the same time the Court rules on the relevance objection would likely not make sense. But if you have a schedule for upcoming depositions, then you might need a production deadline. You will know these background facts much better than we will. Conversely, if we rule against you and order you to provide additional responses, documents, or a witness for deposition, you should be prepared at the hearing to say how long you need to comply.

7. Discuss proportionality

If you are asking for something, try your best to explain why it's not that hard for the other side to produce it. We know you're at a disadvantage because you have limited information about how your opponent stores documents and information, but through the Rule 26(f) conference, meet-and-confers, and early depositions, you may learn enough that you can say something credible on this score.

Conversely, if you're opposing the request, explain what is easy and what is hard for you to do and give specific information. How many people-hours will it take to produce the requested

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On TRUSTS & ESTATE LITIGATION

The purposes of the anti-SLAPP statute do not appear to include making it easier to bring a contest without probable cause, or imposing obstacles to enforcing no-contest clauses when against such a contest is brought. In this context, moreover, even a successful anti-SLAPP motion will not end the litigation: the parties will still litigate the merits of the contest, even if the claim that it was brought without probable cause is stricken. It seems appropriate, then, to provide that a petition to enforce a no contest provision pursuant to Probate Code Section 21311 should not be subject to the anti-SLAPP statute. In the meantime, practitioners in this area must be mindful of the interplay between the two statutes.

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Pointers on Discovery Motions in Federal Court

information or documents? Have you talked to your IT experts or conducted a sampling to bolster your claim of burden? Is some of the requested information in a database and you could run a query and find it easily, but the rest requires time-intensive manual review? Often we will ask during a hearing if parties can produce some information even if they cannot produce all of the requested information, and often the parties agree to the limited scope of production.

8. Follow the rules

Read the standing order of the judge assigned to this dispute. For example, in our district, all magistrate judges require discovery disputes to be raised in letter briefs, and none of us allows motions. Some of our standing orders require lawyers to meet and confer in person or by telephone; communicating in writing is not sufficient to satisfy the requirement of meeting and conferring. If you hand us a poorly formed discovery dispute that doesn't satisfy our rules, we may hand it right back to you and tell you to sharpen your pencil.

Each judge has an order outlining the number of pages for the letter brief and how to handle attachments. All of the orders are different, but most give fewer than 10 pages for a joint letter brief.

Some judges also allow informal discovery conferences without letter briefs, and the order will also address that issue.

9. Ask for hearing

If the matter is complicated, don't be afraid to ask for or volunteer for a telephone hearing or actual hearing. We often call them when we want to ask questions. And if you participate in a hearing by telephone, make sure we can hear you loudly and clearly. Even though you are not physically present, you should be mentally present. We have held hearings where lawyers have called in while driving or getting in an elevator or multi-tasking, and it is clear that there are distractions that make the argument ineffective.

10. Don't whine about things that don't matter

Often the letter briefs we receive catalogue a long list of supposedly evil acts opposing counsel committed, and those actions have nothing to do with the dispute at issue. (And sometimes the acts weren't evil.) If you think that you can sway us with your recitation of wrongdoing, you are sadly mistaken.

In conclusion, we hope that these pointers help you to file successful, succinct letter briefs.

Hon. Sallie Kim and Hon. Thomas Hixson are U.S. Magistrate Judges for the Northern District of California, both with chambers in San Francisco.

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On Shane Read's Winning at Cross-Examination

While five of them are good, Read explains how the other five "are so incorrect that they undercut his whole list." For instance, in his Tenth Commandment, Younger proclaimed that "you should save the ultimate point for summation" and argued that during your cross you should ask "the one question" that the jury will not understand why you asked—but you ask it anyway, because you know you can explain it in closing argument. Younger preached that your question will be so intriguing that the jury will think about it for the rest of the trial and wonder why you asked it; then you can give them the prize in your closing argument.

But Read shows that the reality of how jurors make decisions—they make snap judgments about you and your cross—makes Younger's Tenth Commandment bad advice. You need to grab your jurors' attention with your bottom-line message and never let go. Jurors are not going to spend any time thinking about your "clever" question after you asked it. They are not going to be "intrigued" by it and as a result wait breathlessly throughout the trial for a prize you will give them during your close.

Instead, by focusing your questions on your bottom-line message, Read argues that you should never wait until closing argument to tie up the reasons for asking your questions on cross-examination. So Read would replace Younger's Tenth Commandment with, "Never save it for summation. Make your points on cross now." The jury is contemporaneously deciding who won the battle of cross-examination, and it's up to you to show them clearly that you won.

Regarding Younger's Ninth Commandment to "limit questioning," Younger uses the following cross-examination from a criminal trial for assault to make his point that you must avoid asking "the one question too many":

Q. Where were the defendant and the victim when the fight broke out?
A. In the middle of the field.

Q. Where were you?
A. On the edge of the field.

Q. What were you doing?
A. Bird watching.

Q. Where were the trees?
A. On the edge of the field.

Q. Were you looking at the birds?
A. Yes.

Q. So your back was to the people fighting?
A. Yes.

Younger declares that after getting that helpful answer, "You stop and sit down. And what will you argue in summation? That he could not have seen it. His back was to them. You have challenged perception. Instead, you ask the one question too many:

Q. Well, if your back was to them , how can you say that the defendant bit off the victim's nose?
A. Well, I saw him spit it out."

Younger says that "this is the kind of answer you will get every time you ask the one question too many."

But Read says this is a bad commandment and terrible example. Why? Because if you don't ask the last question, the prosecutor surely will ask it on redirect examination. Your momentary "victory" on cross-examination would be immediately snatched away when the prosecution asks the "one question too many" that you cleverly avoided asking. When the prosecutor does this, you not only look foolish, you also look like you were trying to hide the truth.

Younger's example is also a bad one because it assumes that the prosecutor somehow did not discover before trial the key fact that this witness saw the defendant spit the victim's nose out of his mouth. But how realistic is that? If the prosecutor even briefly interviewed the witness before trial, wouldn't the witness tell the prosecutor about that unforgettable sight? That's why Read would change this commandant to: "Be the truth-teller in the courtroom."

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On Shane Read's Winning at Cross-Examination

Likewise, Read shows that the example that Younger used to support his Eighth Commandment—"disallow witness explanation"—actually undermines it completely. Younger used a cross examination by Abraham Lincoln, representing a defendant charged with murder, of the star witness who claimed to have seen the defendant hit the victim on the head:

Q. Did you actually see the fight?
A. Yes.

Q. And you stood near them?
A. No, it was about 150 feet or more.

Q. In the open field?
A. No, in the timber.

Q. What kind of timber?
A. Beech.

Q. Leaves on it rather thick in August?
A. Yes.

Q. What time did all this occur?
A. Eleven o'clock at night.

Q. Did you have a candle?
A. No, what would I want a candle for?

At this point, Younger insists that anyone but a "genius like Lincoln" must "stop and sit down. The witness has been impeached. He could not have perceived the murder."

But Read argues that it would be a mistake to stop and sit down for three reasons: First, by abruptly stopping and sitting down when the witness just asked a legitimate question that the jury may be interested in, you're giving the jury the bad impression that you're hiding the truth, that you're not a truth-teller in the courtroom. The second problem with sitting down is that on redirect examination the prosecutor will be sure to protect the witness by phrasing the question this way:

Q. Let me start where Lincoln so abruptly stopped. Do you remember asking him why you would need a candle before he abruptly sat down?
A. Yes.

Q. Let me ask you the question that he deliberately ignored. Is there a reason that you did not need a candle?
A. Yes. I could see because there was a full moon.

The third problem is that Younger's example does not make his point because the last two questions about the time of night and whether the witness had a candle to see by *do* work if there had been no moonlight that night. So to win this cross you don't need to be a "genius," you only need to ask a few more questions to show that there was no moonlight—just like Lincoln did:

Q. How could you see from a distance of 150 feet or more without a candle at eleven o'clock at night?
A. The moon was shining real bright.

Q. A full moon?
A. Yes, a full moon.

Lincoln then pulled out an almanac and asked the witness:

Q. Does the almanac not say that on August 29 [the night of the murder], the moon had disappeared; the moon was barely past the first quarter instead of being full?
A. [Witness does not answer.]

Q. Does not the almanac also say that the moon had disappeared by eleven o'clock?
A. [Witness does not answer.]

Q. Is it not a fact that it was too dark to see anything from 50 feet, let alone 150 feet?
A. [Again, witness does not answer.]

Regarding Younger's Sixth Commandment, "Do not quarrel," Read explains that this would

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On Shane Read's Winning at Cross-Examination

be correct if Younger meant "do not argue with the witness"—but Younger meant something different. Younger wrote that if during your cross-examination you get an answer that is "contradictory, absurd, patently false, irrational, crazy, or lunatic," you should stop and sit down.

Reads argues that "instead of sitting down, highlight the irrational answer for the jury." This ties back to Read's central theme that "you should use cross-examination to argue your case to the jury"—even where you know that the witness will give negative answers. Read encourages you to drive home the themes of your case through cross-examination, especially in the face of hostile answers, for two reasons: First, you want to remind the jury in your questions of facts that support your case. Second, you want the jury to contrast the truth of your questions with the lies of the defendant's answers. For, once you "have credibility with the jury, each of the witness's denials will be a further nail in his coffin."

Finally, Younger's Third Commandment proclaims, "use only leading questions." But Read shows how that makes for a boring cross-examination and can even undermine it if pushed too far. Read argues that it would be much better if this commandment read, "Only ask leading questions *unless* the answer to a non-leading question cannot hurt you." For it is perfectly fine to ask the witness to explain something if you know that whatever the explanation will be, that answer will not hurt your bottom-line message to the jury.

David Boies in the Proposition 8 trial is one of many powerful real-life examples that Read shows of brilliant trial lawyers on cross getting right to their bottom-line message. The key opposing expert, David Blankenhorn, opined during his direct examination that California's ban on same-sex marriages should be upheld because children raised with one biological parent are worse off than children that grow up with two married biological parents. On cross, Boies wasted no time in challenging that assertion. After an exchange with the witness about different types of studies, Boies goes straight for the kill:

Q. Let me jump right to the bottom line, OK, sir?
A. Good.

Q. Are you aware of any studies showing that children raised from birth by a gay or lesbian couple have worse outcomes than children raised from birth by two biological parents?
A. No, sir. Would it be OK for me to say additional—

Q. It would not be OK for you to volunteer anything. I heard your—the speech that ended, and I'm really trying to move along; OK, sir? You will have a chance to make speeches when your counsel is asking you questions.
A. OK.

Boies did *not* follow Younger's Tenth Commandment to ask subtle questions and tie everything up in closing. Instead, what did Boies do? He tells the witness and shows the trier of fact exactly what he wants to prove on cross, by confidently proclaiming: "Let me jump right to the bottom line, OK?" By making his bottom-line message through cross and never losing control of the examination, Boies won the cross, and won the trial.

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On SECURITIES LITIGATION

affairs"; instead, the scope of the relevant statute is broad enough to extend to certain other matters, including Securities Act claims. The decision stressed that provisions designed to regulate where stockholders may bring claims based on their purchase of shares in a company (such as Securities Act claims) fall within an area of "intra-corporate" matters, and thus are not purely "external" matters (such as tort or commercial contract claims). Finally, the decision concluded that FFPs do not violate federal policy or principles of "horizontal sovereignty" vis-à-vis other states.

What this Means for Federal Courts and the Plaintiffs' Bar

As more Delaware corporations adopt FFPs, federal courts can expect to adjudicate more Securities Act claims than they have in the recent past. And, as more Securities Act claims end up in federal court, plaintiffs will face the additional hurdles imposed on such litigation by the PSLRA.

To the extent plaintiffs determine to bring a Securities Act claim in state court despite an FFP, the Delaware Supreme Court left open the possibility that – although such provisions are facially valid – they may be invalid "as applied" – in other words, plaintiffs can argue that a particular FFP is not enforceable in a particular set of circumstances.

What Companies Can Do

- Delaware corporations without FFPs should consider adopting such a provision promptly. The easiest way to do so is by means of a bylaw amendment, which may be accomplished via board action and does not require a stockholder vote. And, although the Delaware Supreme Court's decision is based on – and limited to – Delaware law, it may provide persuasive authority for companies incorporated in other states that may want to adopt FFPs.

- Delaware corporations that adopted FFPs before the Court of Chancery's decision in Sciabacucchi but determined not to enforce them pending appellate review in that case, should view the Delaware Supreme Court's decision as a "green light" to seek enforcement of FFPs going forward. To the extent such companies included risk factors or other disclosures (including on Form 8-K) regarding the non-enforcement of FFPs, such risk factors and disclosures may need to be updated.

- For companies currently defending Securities Act claims in state court, if they had pre-existing FFPs but deferred enforcing them in the wake of Sciabacucchi, they may want to consider whether to seek enforcement now. The success of that strategy will depend on various factors, including the law of the state where the action is pending, the stage of litigation, and whether there are parallel actions in federal court. The ability of a corporation to enact a provision now that would apply retroactively to a pending suit is not yet clear.

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On INSURANCE LITIGATION

Insurance Policy (codified in California Insurance Code § 2071) provides:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

There are three important aspects to understand about this provision.

The first is that the limitations period is significantly shorter than the four years allowed by statute. Cal. Civ. Code § 337.

The second is that this shorter, contractual limitations period is routinely upheld by California courts. *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1093 (9th Cir. 2003) ("Under this provision, any claim that is 'on the policy' must be brought within 12 months of the 'inception of the loss' or it is time-barred.").

And third, the 12 months begins to run from "inception of the loss," not the insurer's denial of the claim. The California Supreme Court has clarified that "inception of the loss" is that point in time when appreciable damage occurs and is or should be known to the insured. *Prudential-LMI Comm'l Ins. v. Superior Ct.*, 51 Cal.3d 674, 686-87 (1990). And, given the national emergency arising out of COVID-19 and the impact on businesses, many policyholders are well aware of the loss their businesses have sustained. This means that the 12-month contractual limitations period is likely well underway for many policyholders already.

The limitations period is tolled while the insurer investigates the claim. *Prudential-LMI,* 51 Cal.3d at 692-93 (equitable tolling applies from time insured gives notice to time insurer denies claim in writing). But clients are reporting that the denials they have received have been almost immediate. *See, e.g.*, Complaint, *Big Onion Tavern Group, LLC et al. v. Society Insurance, Inc.*, No. 20-02005 (D. Ill. Mar. 27, 2020), ECF No. 1 (alleging insurer prospectively circulated memorandum concluding no coverage due to COVID-19 shutdown). This means that your client's claim may not have been tolled for very long.

Clients also may not be sure whether their policies afford coverage and need time to consult with their brokers or attorneys. In California, however, courts have generally rejected these reasons as a basis to extend the contractual limitations period. *Abari v. State Farm Fire & Casualty Co.*, 205 Cal.App.3d 530, 535 (1988) ("It is the occurrence of some ... cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations.").

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On CLASS ACTIONS

who had the false information disseminated to a third party had Article III standing. *Id.* at *23.

Looking ahead, while the generally fact-specific and claim-specific nature of the Article III standing and punitive damages inquiries may very well limit the direct applicability of *Ramirez* to other cases, class practitioners in the Ninth Circuit should expect to see *Ramirez* cited and quoted in their cases for the foreseeable future, particularly regarding the doctrinal issues. On the plaintiffs' side, the confirmation in *Ramirez* regarding Article III standing standards at the pleading and class certification stages, and the majority's analysis and application of *Spokeo* to claims involving risk of harm, may prove helpful. On the defense side, it is probably reasonable to expect an uptick in the filing of decertification motions at or around the time of trial, which was already becoming an increasingly standard procedural event for those class cases that go to or threaten to go to trial. Class practitioners on both sides should pay careful attention to the development of the law in this area.

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