One Judge's Perspective:

Maximizing Effectiveness in the Presentation of Your Case

The Fundamentals

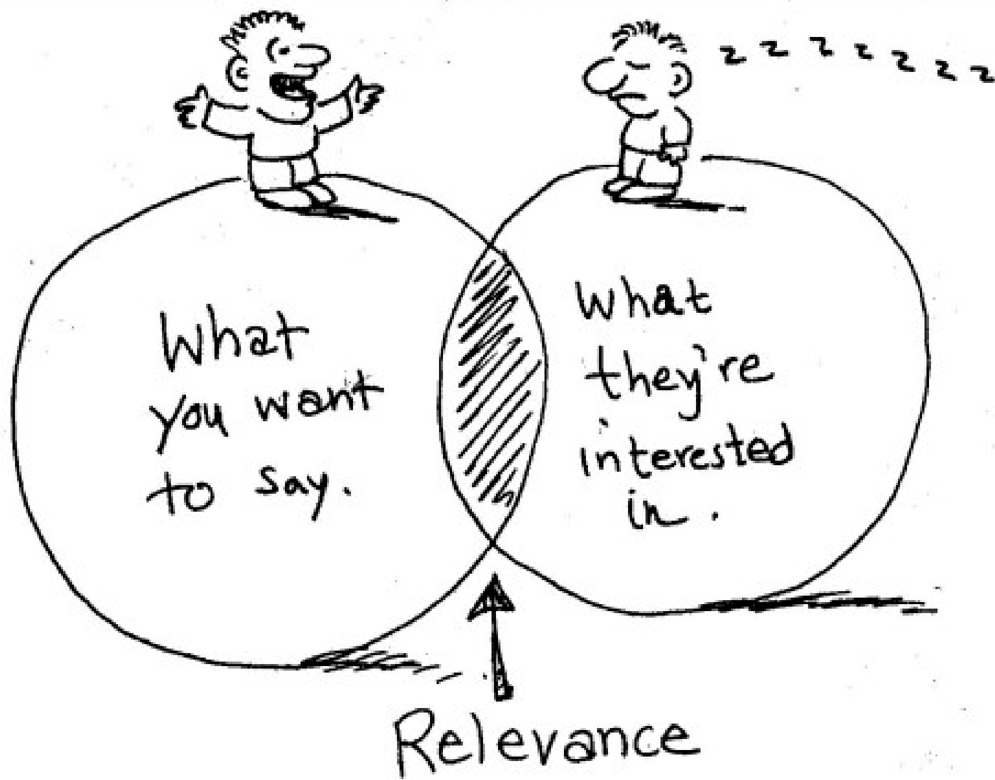
- Know where you’re going
- It doesn’t have to be a train wreck
- You get more flies with honey than you do with vinegar
- What goes around comes around/the shoe will inevitably fall on the other foot
- Tomorrow is another day

Briefing

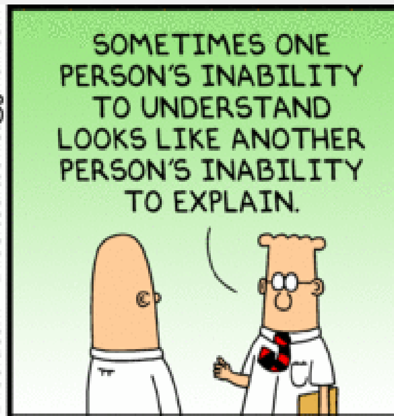
- Organized & Succinct briefing and memos
- Too much, too little, or just right?
- Is a road map a good idea?
- Citations to Idaho law or 9th Circuit law, unless…
- Citations to the record
- Courtesy copies to the judge
- Late briefing

Oral Argument

- Assume the judge has read your motion and the relevant case law (unless he or she hasn't)
- No need to read the briefing to the judge
- Still, a difference between reading & digesting
- Summarize the main points
- Address the relevant distinctions or similarities in the case law
- Acknowledge the weak points & then explain why they don't matter or control your particular situation
- <u>It's your job to help educate the court</u>


zzzzzzz
What you want to say.
What they're interested in.
Relevance

SOMEONE TOLD ME YOUR PRESENTATION WAS CONFUSING AND UNPERSUASIVE.
Dilbert.com DilbertCartoonist@gmail.com


SOMETIMES ONE PERSON'S INABILITY TO UNDERSTAND LOOKS LIKE ANOTHER PERSON'S INABILITY TO EXPLAIN.
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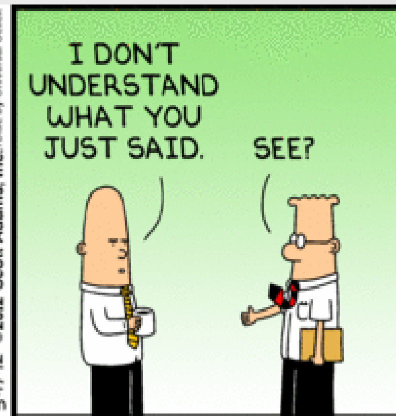
I DON'T UNDERSTAND WHAT YOU JUST SAID.
SEE?

Discovery Disputes

"**If there is a hell** to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are **eternally locked in discovery disputes** with other lawyers of equally repugnant attributes."

Kreuger v. Pelican Prod. Corp., C/A No. 87-2385-A, slip. op. (W.D. Okla. Feb. 24, 1989).

Discovery

- Discovery – why not turn it over sooner rather than later?
- Volume of documents/Form of information
- Most important factor: the relationship of counsel
- Meet & Confer requirement

NO, Counselors!
"Meet and confer"
outside.

Where a provision of the I.R.C.P is substantially similar to a provision of the F.R.C.P. and the Idaho appellate courts have not interpreted the Idaho rule, "cases construing the federal rules are persuasive." *Stewart v. Arrington Const. Co.*, 92 Idaho 526, 529, 446 P.2d 895, 898 (1968). Like Federal Rule 37, I.R.C.P. 37(a)(2) "does not set forth what must be included in the moving party's certification except to indicate that the document must declare that the movant has 'in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.'" *Shufflemaster, Inc. v. Progressive Games, Inc.,* 170 F.R.D. 166 (D.Nev.1996); *Leimbach v. Lane (In re Lane),* 302 B.R. 75 (Bankr.D.Idaho). This court finds the *Shufflemaster* Court's analysis of the requirements of the rule persuasive:

> in order to effectuate the underlying policy of the federal rule, a moving party must include more than a cursory recitation that counsel have been "unable to resolve the matter." Counsel seeking court-facilitated discovery, instead, must adequately set forth in the motion essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties. That is, a certificate must include, *inter alia,* the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any.
>
> In addition to including the actual certification with a motion compelling discovery, the movant must have performed as set forth in the rule. This means a moving party must in good faith confer or attempt to confer with the nonresponsive party regarding the discovery dispute. The first element of performance is "good faith" in conferring. "Good faith" under 37(a)(2)(B) contemplates, among other things, honesty in one's purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action. *See,* Black's Law Dictionary 624 (5th ed. 1979). "Good faith" is tested by the court according to the nature of the dispute, the reasonableness of the positions held by the respective parties, and the means by which both sides conferred. Accordingly, good faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means.
>
> The "conferment" is the second component of performance. It requires a party to have had or attempted to have had an actual meeting or conference. Such an obligation is clear from the plain meaning of the word "confer", which derives from the Latin roots *com* meaning "together" and *ferre* meaning "to bring." Hence, the word literally translates as "to bring together." The Court therefore finds that in order to bring a proper motion to compel under Rule 37(a)(2)(B), a moving party must personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention. *See, Nevada Power Co. v. Monsanto Co.,* 151 F.R.D. 118 (D.Nev.1993).

Scheduling

- Rule 16(a) Conferences
- Civil Motion Days vs. Special Sets
- Scheduling Orders—Planning Ahead; Is There Enough Time; Departure From Scheduling Order
- Meeting Deadlines—Is the Court Even Available
- Orders to Shorten Time

"A court's evaluation of good cause is not coextensive with an inquiry into the propriety of the amendment under…Rule 15." *Forstmann,* 114 F.R.D. at 85. Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Fed.R.Civ.P. 16 advisory committee's notes (1983 amendment); *Harrison Beverage Co. vs. Dribeck Importers, Inc.,* 133 F.R.D. 463, 469 (D.N.J.1990); *Amcast Indus. Corp. vs. Detrex Corp.,* 132 F.R.D. 213, 217 (N.D.Ind.1990); *Forstmann,* 114 F.R.D. at 85; 6A Wright, Miller & Kane, *Federal Practice and Procedure* section 1522.1 at 231 (2d ed. 1990) ("good cause" means scheduling deadlines cannot be met despite party's diligence). Morever, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. *Cf. Engleson vs. Burlington Northern R.R. Co.,* 972 F.2d 1038, 1043 (9th Cir.1992) (carelessness not a ground for relief under Rule 60(b)); *Martella vs. Marine Cooks & Stewards Union,* 448 F.2d 729, 730 (9th Cir.1971), *cert. denied,* 405 U.S. 974, 92 S. Ct. 1191, 31 L.Ed.2d 248 (1972); *Smith vs. Stone,* 308 F.2d 15, 18 (9th Cir. 1962). Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. *See Gestetner Corp. v. Case Equip. Co.,* 108 F.R.D. 138, 141 (D.Me.1985). If that party was not diligent, the inquiry should end.

Johnson vs. Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir. 1992)

Summary Judgment Motions

- Prep your summary judgment motion as you would prep for trial
- Know what you have to establish
- Know what facts must be in the record
- Anticipate the opposing party's evidence; arguments on the Law; ability to demonstrate issue of fact

Summary Judgment Motions

- Rule 56 contemplates a memo & affidavits in support; a memo & affidavits in opposition; a reply memo to address arguments raised in the memo in opposition
- Rule 56 does <u>not</u> provide for reply affidavits
- Rule 56(f): If you want more time, make sure you've met the standard
- Motions for Reconsideration: Did the court miss something? Or did you not submit "All your stuff"?

THAT'S A GOOD IDEA
PLEASE, TELL ME MORE
DIYLOL.COM

When Motions in Limine Aren't Really Motions in Limine

- Summary Judgment Motions by another name
- Discovery Sanctions masquerading as "Motions in Limine"

Cooperation & Civility

Cooperation & Civility

- Principled representation
- There can be disagreements without disagreeableness
- Obligation to educate clients and oneself about the pros and cons of the case, & the reality of the situation, before far too much time, money, and emotion have been invested relative to the outcome

Back to the Basics

- Know where you're going
- It doesn't have to be a train wreck
- You get more flies with honey than you do with vinegar
- What goes around comes around/the shoe will inevitably fall on the other foot
- **Tomorrow is another day**

From: Mahmood Sheikh <msheikh@isb.idaho.gov>
To: 'ttibbitts@nextitle.com'; 'AKERRICK@boisestate.edu'; Clay Gill
Subject: FW: Cambridge LLP 2016 Cross-Border Litigation Presentation Series

I thought the email below might be of interest to the International Law Section, the Dispute Resolution Section and the Litigation Section.

Mahmood U. Sheikh | Deputy Executive Director
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(208) 334-4500 ext. 1888 |Fax: (208) 334-4515 |www.isb.idaho.gov |www.idaholawfoundation.org
msheikh@isb.idaho.gov

From: Annette Strauser
Sent: Monday, December 21, 2015 5:13 PM
To: Mahmood Sheikh
Subject: FW: Cambridge LLP 2016 Cross-Border Litigation Presentation Series

Mahmood – I think this is something for you. ☺

From: Edem Alfeche [mailto:ealfeche@cambridgellp.com]
Sent: Monday, December 21, 2015 9:11 AM
To: Annette Strauser
Subject: Cambridge LLP 2016 Cross-Border Litigation Presentation Series

Dear Ms. Strauser,

I am the Continuing Legal Education Coordinator at Cambridge LLP, a preeminent litigation boutique law firm located in Toronto, Canada. Each year the lawyers at Cambridge LLP visit important law associations across the United States offering Continuing Legal Education Programs and seminars designed to assist U.S. Lawyers in identifying and dealing with key issues involved in cross-border litigation and arbitration involving Canadian parties.

We would welcome the opportunity to attend at your association to provide the following complimentary CLE program. This program can be delivered in either 1-hour or 2-hour formats and is accompanied by a detailed PowerPoint presentation:

Cross-Border Litigation, Arbitration and Dispute Resolution Involving Canadian Entities: Key Considerations for U.S. Lawyers.

There is no Greater trade relationship in the world than exists between the United States and Canada. in 2014 combined two way trade and bilateral investment topped 1.4 trillion dollars. Staggering! Litigation, Arbitration and ADR involving U.S. and Canadian jurisdictions has grown in lockstep with this trade and investment. It is essential that U.S. lawyers be equipped to properly advise clients involved in cross-border disputes with Canadian entities. Cambridge LLP is a prominent boutique Canadian Law firm and a leader in cross-border litigation, arbitration and dispute resolution in Canada. Our 2016 Cross-Border Seminar Series provides U.S. Legal

counsel with vital information (from a uniquely Canadian legal perspective) to assist them when confronted with cross-border disputes.

- Choice of jurisdiction: key considerations (U.S. v Canada)
- Enforcing U.S. monetary and non-monetary judgments in Canada
- Forum non conveniens - moving the case to the U.S.
- How to obtain evidence in Canada for use in U.S. proceedings
- Costs consequences in Canada: the "loser pays" rule
- Limitation periods in Canada, pitfalls to avoid
- Substantive and procedural advantages and disadvantages: Canada vs. U.S.A.
- Extraordinary remedies in Canada: anton Piller Orders (civil search orders); mareva Injunctions (asset freezing orders)
- Obtaining injunctive relief in Canada
- Internet defamation - is Canada a libel tourism destination
- Service of court documents in Canada – key considerations
- Reciprocal Enforcement of Support/Custody Orders (family law)

Please contact the undersigned for further details and to discuss timing and availability and for speaker's biographies.

Thank you.

Sincerely,

Edem Alfeche
CLE Coordinator
Email: ealfeche@cambridgellp.com
Phone: 1 (289) 271-2694

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From: Jason Gray <jgray@ks-lawyers.com>
To: Clay Gill
Subject: FROM THE ISB DIVERSITY SECTION

Dear Section Chair Gill, Litigation Section:

In the Idaho State Bar Diversity Section, we are amazed that it is nearly five years since our highly successful and well-received seminars in 2011, celebrating the 220th anniversary of the ratification of the Bill of Rights. Our seminars in Moscow and Boise resulted in the creation of Love the Law! to encourage high school and college students from under-represented groups to consider a career in the law, besides presenting some of the best discussions of civil rights issues in recent memory.

The ISB Diversity Section is again organizing two seminars, one in Moscow and one in Boise on September 15, 16 and 17, 2016, in conjunction with Constitution Day, 2016, and we need your help and support once again.

In 2011, many sections of the Idaho State Bar stepped up with generous sponsorships to support outstanding speakers and involve high school and college students.

We are again asking your section to donate to our efforts to highlight the central document of civil liberties in American government. If your section joins our efforts with a significant contribution or pledge of $1,000.00 at this time, we will provide two invitations to the special event with the keynote speaker in Boise or Moscow at your choice. We will also extend a special discount to your section members to reduce the CLE price of the event.

I would be glad to discuss this personally with you at your convenience. We need to have you commit early so that we can invite and commit the outstanding speakers we hope to have speak in both seminars. We need your participation by December 15, 2015, so we can invite the speakers and arrange for facilities.

Thank you for your support and confidence. The Bill of Rights remains the bulwark of the rule of law in our democracy. This celebration will give us a chance to celebrate this essential part of our legal system.

Sincerely,

Jason Gray
Chair, ISB Diversity Section

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