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The Burden of Burden

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By

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A while back I came through a rough patch on discovery motions in a series of cases. Well, maybe the parties had the rough patch. Some resisted discovery demands on the basis of burden-- the most common argument made. In some of these cases, I saw that the proof of burden was flawed, and at the same time I had gnawing sense that there really might be severe burdens involved, and that I risked issuing orders impossible to comply with. This was exceedingly unpleasant.

The problem is that some lawyers don't know how to shoulder the burden of burden. The rules—including that which puts the burden on the party complaining of burden—are designed to ensure judges don't get snowed by vacuous presentations. But even parties with good arguments tend to default to bad ones.

Here are a few ideas to help you help judges get it right.

1. **A Many Splendored Thing**. Burden is about *proportionality*. There's always burden. The question is, is there *too much*? The apparently nebulous standard has substance: there really are factors you can argue. There's a factor some call relevancy, but which actually hides two separate factors: the pertinence or materiality of the issue in the case and the utility or relevancy of the specific discovery at stake to that issue. There is a further factor usually hidden in the evaluation of burden: the availability of other means of discovery. Here's a summary: if Alice wants a document from Bob, the burden analysis will involve (a) the stakes in the case (e.g., lots of money v. not very much); (b) where else the data in the document could be found (nowhere else v. from a lot of different places including Alice's own files, implicating an analysis of the burden *on Alice* to get the data from some other place); (c) how much time and effort it will cost Bob to produce it. Other factors are: (d) what issue the document relates to (a core issue v. outlier), and (e) how important the document is to that issue (it will help a little v. help a lot). That's at least five factors. Those factors may change over the life of the case: materiality rises and falls, the availability of alternative sources may become more clear, and needs will become more targeted as trial approaches.

2. **There's No There There**. I thought "admissible evidence" was a tautology. Not. Lawyers try to prove burden with inadmissible evidence all the time. They are chock full o' hearsay, sometimes even overtly ("on information and belief" or "I am informed") because, actually, the declarant lawyer personally has *no clue* what the burden is and fails to get statements from those who *do* know. Sometimes the declarations are sworn under penalty of perjury—but under the laws of the state of Georgia or Florida. Or of the United States. These are nice places but those declarations won't do under CCP § 2015.5 and state judges won't read them. The result is often that there isn't any admissible evidence at all of burden. This is very grim.

3. **Fizz and Philosophers.** What should be in those declarations? First, a few things that are just empty fizz: (i) the billions and billions (as Carl Sagan might have said if he'd been a lawyer, God forbid) of pages turned over *before* the dispute arose—none of which are at issue in this motion; (ii) how nasty and irresponsible the moving party was when it came to producing *its* documents—again, not the items at issue now. (iii) My favorite snow job is what I call the Zeno spiel. Remember this guy from Philosophy 101? His paradoxes relied on the fact that time and space are infinitely divisible, and since we can't move through an infinite number of steps, we can't move at all. The arrow never gets to the target. My mother as she got older used to complain it was too much to go to the local village:- we have to get up, she's say, go down the stairs, open the back door, open the car door, get in, sit down, put the key in, and—you get the idea. Declarations relying on Zeno usually come up in electronic discovery (ESI) disputes and they go like this: we have to go through twenty-two steps with respect to five different databases in three different states, involving a large number of custodians and may have to draft up to (we see "up to" a lot in these sorts of declarations, sort of like a store's "savings up to 80% off") ten different querying reports with between three and thirty different formats and "up to" two hundred fields.

Is that a lot? *I have no idea*.

4. **The Right Stuff**. Burden evidence includes the costs, in time and money, of complying with the demands at issue. No guesses; no speculation; although estimates of course are fine--I mean, estimates with a foundation. With ESI, that usually means a test run, some sort of sample, from which it's reasonable to extrapolate.

5. **Choices, choices**. Because the discovery probably has *some* claim to relevance, it's best for the responding party to come up with alternatives rather than a flat refusal to produce. You likely know so much more than the judge on what's really feasible, so take the initiative here. Do it in the meet and confer. Suggest samples, partial responses based on a time period, or on *really* key custodians; perhaps a rolling productions, or a PMK deposition to demonstrate what's involved to get the documents; or cost shifting (which the judge might adopt particularly if the materials sought are marginal). For ESI, suggest the technical folks on both sides have an off the record discussion on systems, formats, database structures, useful reports, and the like to see if they can come up with a plan—they probably will.

And while it's tempting to come to the judge when the parties can't agree on search terms or what sort of returns to demand from predictive coding, judges won't be helpful unless they are presented with options consisting of specific costs and benefits. That is, it's pointless to ask a judge whether search terms should be arranged one way or the other. But you might be able to convince the court to adopt an approach with specified (1) costs, (2) likely percentage of missed useful documents (recall), and (3) likely percentage accuracy (or precision); all as contrasted with the other side's proposals.

Which leads me to baseball arbitration. Consider: each side makes a proposal with the estimates of the three factors above—or (e.g., outside the ESI context) any other mix of specific costs and benefits. The court picks the most reasonable one. As in baseball arbitration, each side has an incentive to appear the most reasonable and to avoid the extreme positions that are usually taken in discovery battles.

6. **Be Sneaky**. A last tip on how to succeed on burden objections. Get the other side to use classically overbroad boilerplate demands: have them ask for "any and all" documents which "in any way" "relate, pertain, concern, reflect, mention, or refer to" any person or issue which might possibly be involved. That will greatly ease the burden of burden.

Resources

Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc., 246 Cal. App. 4th 566 (2016) (offer alternatives when arguing burden)

E. Laporte, et al., "A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26," 9 FEDERAL COURTS LAW REVIEW 19, 49-50 (2015).

Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:74.1, 8:692.8, 8:1456.40 (Rutter: 2016)

Curtis Karnow, "Complexity in Litigation: A Differential Diagnosis," 18 UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW 1 (2015), available at <http://scholarship.law.upenn.edu/jbl/vol18/iss1/2/>

Paul Cleary, "Some Thoughts On Discovery and Legal Writing," 82 THE OKLAHOMA BAR JOURNAL 2923 (December, 2011) available at http://www.craigball.com/Cleary_Discovery_and_Legal_Writing.pdf