Denver Law Review Forum

Volume 90 Article 14

6-17-2013

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TAXING COSTS OF ELECTRONIC DISCOVERY – A REVIEW

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Electronic discovery is rapidly expanding, exceeding its role as merely a routine part of litigation. It is included in the litigation process from the beginning at the parties' required meet-and-confer during the Fed. R. Civ. P. 26(f) conference and potentially through the end of the case during the taxation of costs in favor of the prevailing party as permitted by Fed. R. Civ. P. 54(d). This rule allows the prevailing party to recover certain costs, subject to limitation by court rule, federal statute, or other court order. Courts are divided as to whether the costs of electronic discovery may be assessed under 28 U.S.C. § 1920(4). Who will bear the costs, and how much of that cost may be shifted to the losing party, are common questions. However, courts are divided on the type and amount of costs that may be recovered by the prevailing party. The courts in favor of taxing electronic costs view electronic discovery as unavoidable due to the highly technical nature of the work as well as the efficiencies of having experts compile the data.[1] Courts taking a contrary view hold that Congressional intent in cost-shifting does not include discovery obligations such as producing electronically stored information ("ESI") or preproduction steps.[2]

During discovery information stored electronically may be produced and may include "email, web pages, word processing files, audio and video files, images, computer databases, and virtually anything that is stored on a computing device – including but not limited to servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players."[3] The Sedona Conference sets forth six areas in which e-discovery is different than paper discovery: (1) volume and duplicability, (2) persistence, (3) dynamic and changeable content, (4) metadata, (5) environment-dependence and obsolescence, and (6) dispersion and searchability.[4] Not only is e-discovery voluminous, potentially in the millions of pages, but it is replicated and stored in different locations, each a potential source of relevant information. Similarly, each copy or change may be logged by the computer or software, which may create

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1. *Race Tires Am. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 168–69 (3d Cir. 2012), *cert. denied*, No. 11-1520 (Oct. 1, 2012).

2. *Id.* at 169–70.

3. THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (Jonathan M. Redgrave et al. eds.,,2d ed. 2007).

4. *Id.* at 2–5.

several different copies of the same document albeit with different information such as edits or changes. Producing this information to the opposing party may be as easy as compiling documents in their native format or may be complicated enough to require a third-party vendor to assist in locating, identifying, and producing the information. In the latter situation, the question arises – is the locating, identifying, and producing information akin to paper copying? Or has technology yet again stepped ahead of the law?

I. TAXATION OF COSTS – THE *RACE TIRE* DECISION

The federal rules permit a prevailing party to receive costs, excluding attorney's fees, "[u]nless a federal statute, these rules, or a court order provides otherwise."[5] Congress, in codifying 28 U.S.C. § 1920 "define[d] the term 'costs' as used in Rule 54(d)."[6] Section 1920 provides that a federal judge or clerk may assess certain costs, including "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."[7]

Most recently, the Third Circuit Court of Appeals considered what "necessarily obtained for use in the case" meant in relation to electronic discovery in the *Race Tires* decision. Race Tires asserted claims against Hoosier Racing Tire Corporation and Dirt Motor Sports for purportedly violating portions of the Sherman Act in the creation of the "single tire" rule in contracts between Hoosier as the supplier and Dirt Motor Sports as the licensing body.[8] The issue on appeal was whether $365,000 in fees by third party vendors "covering such activities as hard drive imaging, data processing, keyword searching, and file format conversion, are taxable, without differentiating between those charges that constitute fees for exemplification and the charges that constitute costs of making copies."[9]

In holding that only "scanning and file format conversion [could] be considered to be making copies" the *Race Tires* Court considered the history behind section 1920 in their resolution of the case.[10] Congress codified section 1920 as a modern descendant of the Fee Act of 1853. One concern that prompted the Act was the different outcomes in cases with assessed costs against litigants and the "exorbitant fees" awarded to the prevailing party.[11] Congress created the Act with specific limitations on the types and amounts of fees that could be changed. The Act marked a departure from the English Rule, which required reimbursement of all

5. Fed. R. Civ. P. 54 (d)(1).
6. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987).
7. 28 U.S.C. § 1920(4) (2008).
8. *Race Tires*, 674 F.3d at 160.
9. *Id.* at 159–60.
10. *Id.* at 160, 164.
11. *Id.* at 164.

fees to the prevailing party, with the American Rule, which allowed recovery of some but not all fees.[12] The Act was "included in the Revised Judicial Code of 1948 as 28 U.S.C. §§ 1920 and 1923(a)."[13] The *Race Tires* Court next considered the parameters of a party to recover for making copies by considering the common use of the term.

Important to the *Race Tires* Court was the use of the broader term "materials" in the statute which "plainly signifie[d] that § 1920(4)'s allowance for copying costs is not limited to paper copying."[14] The court grouped the third-party vendor's services into five categories: "collecting and preserving ESI; processing and indexing ESI; keyword searching of ESI for responsive and privileged documents; converting native files to TIFF; and scanning paper documents to create electronic images."[15] In rejecting a majority of charges as not recoverable under section 1920, the court noted that costs allowable under Rule 54(d)(1) are limited by the statute. The court emphasized that not all costs are recoverable, and parties are often responsible for the cost and burden of responding to discovery.[16] In breaking down the electronic discovery process, the *Race Tires* Court differentiated review and production as non-taxable while converting native files to TIFF files was taxable.[17]

II. TAXATION OF COSTS – THE OTHER CIRCUITS' APPROACH

Courts do not uniformly assess costs under section 1920. The Third Circuit determined that Congress did not intend section 1920(4) to allow recovery of all costs related to producing electronic documents, only those related to creating a copy. Therefore, the approach in *Race Tires* disallows costs for "gathering, preserving, processing, searching, culling, and extracting ESI" because that "simply do[es] not amount to making copies."[18] The Federal Circuit Court of Appeals takes a different view. In that circuit, the absence of a cost-sharing agreement for creating a database to review ESI would have been taxable in favor of the prevailing party under section 1920(4).[19]

The *Ricoh* Court took a broader view of document production than "only printing and Bates-labeling a document."[20] In that case, the parties agreed to split the costs of a third party vendor who would create a secure database to produce the ESI in its native format. At the end of the case, the prevailing party moved the court to tax costs, including its portion of the database cost, against the other party. The court cited the

12. *Id.*
13. *Id.*
14. *Id.* at 166.
15. *Id.* at 167.
16. *Id.* at 170–71.
17. *Id.* at 167–69.
18. *Id.* at 170.
19. *See Ricoh Co. v. AMI Semiconductor*, 661 F.3d 1361, 1365 (Fed. Cir. 2011).
20. *Id.*

2008 amendment to section 1920(4) changed from "copies of papers" to "copies of any *materials* … to reflect the idea that electronically produced information is recoverable in court costs."[21] If the parties would not have agreed to share the costs of a database, the prevailing party would have been able to recover its portion of the cost because the documents were produced in their native format.[22] Similarly, the Fifth Circuit Court of Appeals permitted a prevailing party recovery of its cost for performing optical character recognition on its discovery.[23]

III. CONCLUSION

The American Rule generally requires the prevailing party to shoulder the burden of producing documents or ESI in discovery, subject to a limited ability to tax costs at the end of the case. Section 1920(4) allows a prevailing party to recover "fees for exemplification and the costs of making copies of any materials."[24] Whether electronic discovery falls within either exemplification or making copies is unclear. So far, the United States Supreme Court has declined to wade into the fray. The courts that have addressed taxation of costs in this context are divided. In the Third Circuit, identifying, culling, processing, and reviewing ESI is not a cost that would be reimbursed for paper copies, much less electronic copies. Therefore, only costs associated with scanning or making the ESI available in its native format are recoverable. In the Federal and Fifth Circuits, the courts have taken a broader view. Those circuits allow costs to be recovered in the information gathering and processing steps as costs incurred initially by the prevailing party. To best protect a client, parties should consider an agreement outlining exactly who pays for the costs of ESI, including the identifying, culling, and processing. Such a cost-shifting agreement may allow the parties to allocate the costs between them in a manner they view as fair under the circumstances and avoid the uncertainty within this area of the law.

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21. *Id.* (emphasis in original) (internal quotation and alteration omitted).

22. *Id.* at 1365–66.

23. *Rundus v. City of Dallas*, No. 3-06-CV-1823-BD, 2009 WL 3614519 (N.D. Tex. Nov. 2, 2009), *aff'd* 634 F.3d 309, 316 (5th Cir. 2011) ("[T]he determination of whether such copies are reasonably necessary is best made by the district court, and we give great deference to its decision.")

24. 28 U.S.C. § 1920(4) (2008).