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Recovery of E-Discovery Costs: A Vital Consideration from Beginning to End

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The costs of electronic discovery have traditionally been borne by the producing party. Even a defendant found free of liability could still be stuck with the bill for these costs. But a growing number of court decisions indicate that a prevailing party may recover some e-discovery costs. Understanding the potential for recovering these costs not only may enable a defendant to avoid a Pyrrhic victory at the end of a case, but also will empower a defendant to set reasonable limits on the scope of discovery at the beginning.

The starting point for recovering e-discovery costs is Fed. R. Civ. P. 54(d)(1), which states that "unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." These costs include "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." 28 U.S.C.A. § 1920(4). The critical determination, then, is whether e-discovery costs are "necessary."

Where a party requests the production of documents in an electronic format, some courts have found costs related to the technical aspects of making such a production (as distinct from the legal aspects associated with reviewing documents) to be "necessary" and, therefore, taxable, rather than merely for the convenience of counsel. *See, e.g., In re Ricoh Company, Ltd. Patent Litigation*, 2011 WL 5928689, *3 (Fed. Cir. 2011) (costs related to vendor's "electronic document database" taxable but subject to parties' cost-sharing agreement); *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2011 WL 1748620, *8-9 (W.D. Pa. 2011) (collecting cases); *In re Aspartame Antitrust Litigation*, 2011 WL 4793239, *2-3 (E.D. Pa. 2011).

The *Aspartame* decision from the Eastern District of Pennsylvania is particularly instructive for methodically addressing e-discovery costs in itemized fashion. After noting that "e-discovery saves costs overall by allowing discovery to be conducted in an efficient and cost-effective manner," the court awarded costs for actions performed by third party vendors which significantly "reduced the pool of potentially responsive documents" *i.e.*, creation of a litigation database, data storage, imaging hard drives, keyword searches, deduplication, data extraction, and processing. *Aspartame*, at *3. Costs were also awarded for the creation of load files (which were specifically requested in discovery), OCR (because "searchable documents are essential in a case of this complexity and benefit all parties"), privilege screens, hosting data, and related technical support. *Id*. By contrast, the court declined to award costs associated with a concept-based document review tool, reasoning that this tool was "not necessary for litigation but rather [was] acquired for the convenience of counsel." *Id.* at 4.

Despite its logic, the principle embodied in *In re Ricoh*, *Race Tires*, and *Aspartame* remains subject to conflicting case law. Some courts have found that scanning documents for use in electronic format is only for the convenience of counsel, and thus not "necessary." *See Roehrs v. Conesys, Inc.*, 2008 WL 755187, at *3 (N.D. Tex. Mar. 21, 2008). *But see BDT Products, Inc. v. Lexmark International, Inc.*, 405 F.3d 415 (6th Cir. 2005) (finding electronic scanning and imaging to be necessary and therefore recompensable); *Brown v. McGraw-Hill Cos., Inc.*, 526 F.Supp.2d 950 (N.D. Iowa 2007) (same). And some courts have declined to assess costs related to e-discovery vendors because they are hired to "search for and retrieve discoverable … documents," tasks which would be done by paralegals and attorneys in a non-electronic case. *Klayman v. Freedom's Watch, Inc.*, 2008 WL 5111293, *2 (S.D. Fla. 2008). *See also Kellogg Brown & Root International, Inc. v. Altanmia Commercial Marketing Co., W.L.L.*, 2009 WL 1457632 (S.D. Tex. 2009). *But see CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F.Supp.2d 1376, 1381 (N.D. Ga. 2009) (calling e-vendor services "the 21st Century equivalent of making copies" and "not the type of services that attorneys or paralegals are trained for or are capable of providing"); *Parrish v. Mannatt, Phelps, & Phillips, LLP*, 2011 WL 1362112 (N.D. Cal. 2011); *Cargill Inc. v. Progressive Dairy Solutions, Inc.*, 2008 WL 5135826 (E.D. Cal. 2008).

Documenting e-discovery costs is a critical component of any cost recovery effort and must not be overlooked as courts are unlikely to award undocumented costs. *See Francisco v. Verizon South, Inc.*, 272 F.R.D. 436 (E.D. Va. 2011) (denying certain costs for lack of documented support); *Tibble v. Edison Int'l*, 2011 WL 3759927 (C.D. Calif. 2011) (supporting documents include invoices, competitive bidding papers, and evidence of market rates).

Knowing a jurisdiction's law on recovery of e-discovery costs is vital. At the earliest stages of a case it can shape your exposure assessment and rein in discovery requests. Where the prevailing party may recover e-discovery costs, after all, requests for e-discovery are likely to be more targeted. And, at the end of the case, it may allow you to put money back in your pocket.