E-Discovery Cost-Shifting

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Electronic discovery costs continue to rise. Litigants are forever seeking ways to reduce e-discovery costs across all phases of the process. An attractive option for big companies with voluminous electronically stored information (ESI) is to attempt to shift e-discovery costs to the opponent. The Federal Rules of Civil Procedure provide an avenue for shifting such costs – Fed. R. Civ. P. 26(b)(2)(B) – but it is only available upon a showing that the ESI sought by the requesting party is not reasonably accessible. Similarly, Rules 26(b)(2)(C) and 26(c) are general provisions that allow for relief, including cost-shifting, when courts find that the burden or expense of proposed discovery outweighs its likely benefit, or that they need to protect a party from undue burden or expense.

Courts, though, have been reluctant to use the above provisions to shift e-discovery costs in a non-sanctions context, except in limited circumstances. Relying on the presumption espoused in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), that responding parties must bear the expense of complying with discovery requests, courts find that cost-shifting "is not to be 'considered in every case involving the discovery of electronic data, which – in today's world – includes virtually all cases' … Any principled approach to electronic evidence must respect [the *Oppenheimer*] presumption." *Barrera v. Boughton*, 2010 WL 3926070, at *3 (D. Conn. Sept. 30, 2010) (quoting *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003)).

However, even when a producing party does not obtain cost-shifting under Rule 26(b)(2) during the active phase of a case, there is another potentially useful means to recoup e-discovery costs after the case is over, namely through taxing of "exemplification" or "copying" costs under 28 U.S.C. § 1920(4). While the basic cost-taxing provision has existed for decades under 28 U.S.C. § 1920, allowing prevailing parties to recover costs spent on clerk and marshal fees (28 U.S.C. § 1920(1)), deposition transcripts (28 U.S.C. § 1920(2)), witness fees (28 U.S.C. § 1920(3)), and certain other costs, we have discerned a marked trend in recent years toward parties seeking – and often obtaining – reimbursement for e-discovery costs under 28 U.S.C. § 1920(4).

Below we have highlighted trends in recent case law where litigants have attempted successfully and unsuccessfully to use either Rule 26 or 28 U.S.C. § 1920 to shift e-discovery costs.

I. Cost-Shifting Under Rule 26(b)(2)(B), 26(b)(2)(C) And 26(c)

The typical scenario for obtaining e-discovery cost-shifting under the Federal Rules is under Rule 26(b)(2)(B) where the producing party makes a showing of inaccessibility of the ESI sought, the requesting party demonstrates good cause for the discovery notwithstanding inaccessibility, and the court orders the requesting party to share in costs as a condition of the discovery. *Takeda Pharmaceutical Co., Ltd. v. Teva Pharmaceuticals USA, Inc*., 2010 WL 2640492 (D. Del. June 21, 2010) (court found that the request for documents relating to patents for a 13-year period was not reasonably accessible and shifted 80 percent of vendor costs to the requesting party based on the producing party's showing that it would have to pay a vendor approximately $1.5 million to produce ESI for the extended time period, not including the cost to review the documents for privilege and relevance); *see also Helmert v. Butterball, LLC*, 2010 WL 2179180 (E.D. Ark. May 27, 2010) (cost-shifting was inappropriate because court had not compelled discovery of any ESI that was inaccessible).

Even if a court makes a finding of inaccessibility, it is unlikely that the costs of a privilege or relevancy review will be shifted to the requesting party. *Universal Delaware, Inc. v. Comdata Corporation*, 2010 WL 1381225 (E.D. Pa. March 31, 2010) (refusing to shift non-party's privilege review cost); *but see CNX Gas Co. LLC v. Miller Petroleum, Inc.,* 2011 WL 1849082 (Tenn. Ct. App. May 11, 2011) (affirming order shifting defendant's costs related to a privilege review).

There are other limited scenarios where litigants have been successful in obtaining Rule 26 cost-shifting in the non-sanctions context. For example, courts will shift e-discovery costs where the parties have already spent significant resources throughout the litigation on e-discovery issues, and the court wants to incentivize the parties to be more reasonable. *DeGeer v. Gillis*, 755 F.Supp.2d 909 (N.D. Ill. 2010) (court ordered parties to share responsibility for future electronic productions because the parties had not approached production of ESI with a spirit of cooperation or efficiency and court believed cost-sharing would "encourage Defendants to carefully consider whether the future electronic searches they have proposed to undertake are proportionate to the likely benefit"). Similarly, courts will shift costs to make requesting parties live up to representations made during the discovery process on cost-sharing. *Clean Harbors Envt'l Svcs., Inc. v. ESIS, Inc.,* 2011 WL 1897213 (N.D. Ill. May 17, 2011) (court allowed discovery of backup tapes and ordered the requesting party to split costs evenly, because, among other reasons, producing party had mentioned early in litigation it would seek cost-shifting and opponents appeared to indicate they would share in the costs).

Courts will also shift costs to requesting parties that do not specify a form of production initially and then later seek a re-production in a different format. *Chevron Corp. v. Stratus Consulting*, 2010 WL 3489922 (D. Colo. Aug. 31, 2010) (court ordered requesting party that did not specify form and received searchable PDFs without metadata to pay for re-production in native format with metadata intact).

Non-parties are more likely than parties to obtain cost-shifting. Courts have found that non-parties are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a lawsuit to which they are not a party. *Phillip M. Adams v. Fujitsu Limited*, 2010 WL 1064429, at *4 (D. Utah March 18, 2010); *see also Miami-Dade County v. Johnson Controls, Inc*., 2011 WL 1548969, at *4 (S.D. Fla. April 21, 2011). Thus, courts do not typically require non-parties to show inaccessibility as a prerequisite to obtaining cost-shifting despite the existence of Rule 45(d)(1)(D), which contains the same inaccessibility standard as that set forth in Rule 26(b)(2)(B). *Miami-Dade County,* 2011 WL 1548969, at *4; *Phillip M. Adams*, 2010 WL 1064429, at *4; *but see Universal Delaware, Inc. v. Comdata Corp*., 2010 WL 1381225 (E.D. Pa. March 31, 2010) (court found inaccessibility existed in ordering cost-shifting relating to non-party Ceridian). Courts base their rationale to order cost-shifting when a non-party is involved on Fed. R. Civ. P. 45(c)(1), wherein a party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena or risk sanctions. *Miami-Dade County*, 2011 WL 1548969, at *4.

II. Taxation Of Costs Under 28 U.S.C. § 1920

Under Fed. R. Civ. P. 54(d)(1), a prevailing party is presumptively entitled to an award of costs, and the initial responsibility to tax costs is placed upon the clerk of the court, and not the district judge. The clerk may tax costs upon 14 days' notice to allow the losing party time to object. Fed. R. Civ. P. 54(d)(1). If the losing party serves a motion within seven days objecting to the clerk's taxation decision, the district court will make a *de novo* determination concerning the bill of costs. *Id.* Rule 54(d) does not itemize the types of costs that are taxable. Rather, a statute, 28 U.S.C. § 1920, lists the categories of costs that a court may award under Rule 54(d)(1). The statute provides in relevant part:

> A judge or clerk of any court of the United States may tax as costs the following:
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> * * *
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> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.
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> 28 U.S.C. § 1920(4) (2008).

We have collected and analyzed cases involving attempts by prevailing parties to tax e-discovery costs under 28 U.S.C. § 1920(4). Through that effort, we have discerned a marked increase in cases over several years. In the first eight months of 2011, at least 10 cases have involved efforts to tax e-discovery costs, many of them successful. This, in our opinion, constitutes a discernible trend, and merits attention by lawyers handling cases involving substantial e-discovery costs.

What kind of e-discovery costs are recoverable under the statute? § 1920(4) contains an express requirement that the expenses be "necessarily obtained" for use in the case, but courts are split with regard to the "necessity" of certain types of e-discovery costs. As a general rule, courts appear most likely to approve of costs for scanning or imaging of documents, as those costs are easy to characterize as "exemplification" or "costs of making copies of any materials," which are expressly cited as taxable costs in the statute. *See, e.g., Brown v. The McGraw-Hill Companies, Inc*., 526 F.Supp.2d 950, 959 (2007) (holding that "electronic scanning of documents is the modern-day equivalent of 'exemplification and copies of paper,' and, therefore can be taxed pursuant to § 1920(4)").

Other courts have approved taxation of costs for database creation. The largest single cost award we identified was in a case in which the prevailing party sought – and was awarded – $4.6 million in costs for "creating a litigation database." *Lockheed Martin Idaho Technologies Company v. Lockheed Martin Advanced Envt'l Systems, Inc.,* 2006 WL 2095876, at *2 (D. Idaho July 27, 2006) ("[T]he litigation database was necessary due to the extreme complexity of this case and the millions of documents that had to be organized.") The court found that the cost of the database, while high, was "not unreasonably so, and it saved immense time for counsel who otherwise would have to sift through the documents by hand." *Id. See also Race Tires America, Inc. v. Hoosier Racing Tire Corp*., 2011 WL 1748620 (W.D. Pa. May 6, 2011).

A typical basis for denying e-discovery costs is a finding that the expenditures were made solely for the convenience of counsel, and were thus not "necessary." Such was the case in *Roehrs v. Conesys, Inc.,* 2008 WL 755187, at *3 (N.D. Tex. Mar. 21, 2008), where the court found that digital versions of documents were "merely more convenient for counsel to search and examine, not that they were necessary." Similarly, courts are likely to deny costs for e-discovery expenditures that appear similar to work typically performed by attorneys or paralegals. *See Kellogg Brown & Root Int'l, Inc. v. Altanmia Comm'l Marketing Co.,* 2009 WL 1457632, at *5 (S.D. Tex. May 26, 2009) (vendor costs for data extraction and storage associated with efforts to identify potentially responsive documents held non-taxable because such costs resemble "the work of an attorney or legal assistant in locating and segregating documents that may be responsive in discovery" and there was no showing the documents were actually produced).

Interestingly, in a 2011 case with similar facts – a party seeking reimbursement of vendor invoices for "reproducing, scanning, and imaging of client documents 'for review and *potential* production'" – the prevailing party's e-discovery costs were held to be recoverable. In *Parrish v. Manatt, Phelps & Phillips, LLP,* 2011 WL 1362112 (N.D. Cal. Apr. 11, 2011), the court allowed taxation of costs not only for copying of *produced* documents, but also for costs associated with copying *collected documents that were not produced* because these costs were necessary expenditures "made for the purpose of advancing the investigation and discovery phases of the action." *Parrish,* 2011 WL 1362112, at *2. The court rejected the non-prevailing party's argument that because the majority of the electronically copied documents were not actually produced in discovery, they were necessarily made for the convenience of counsel. *Id.* at *3. Employing language that would cheer the spirits of most e-discovery practitioners, the court noted that

> [d]ocument production takes time …. [T]he fact that defendants had not yet produced all the client documents they had begun to collect and review does not show that those client documents were reproduced only for attorney convenience. On the contrary, it suggests that defendants were warming up their electronic discovery engine so that timely document productions could be made.
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> *Id*.

We believe that counsel involved in big e-discovery cases should take note of the *Parrish* court's full-throated endorsement of e-discovery cost recovery under 28 U.S.C. § 1920(4), because the statute represents a potentially powerful tool to recoup costs after the case is over, especially where Rule 26 cost-shifting is unavailable.

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