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From the Experts

Cost-shifting in E-discovery: Options and Opportunities

John D. Martin, Renee S. Dankner and Jarrett Coco, Corporate Counsel

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It is no secret that e-discovery costs can account for a substantial portion of a company's costs to defend a lawsuit. According to one study, e-discovery costs alone can account for as much as 90 percent of litigation costs. Another study indicates that e-discovery costs for a typical midsize lawsuit run about \$3.5 million.

With costs of this magnitude, it's also not surprising that cost-shifting is an important subject for in-house counsel in charge of e-discovery. There are two routes defendants typically pursue to recoup e-discovery costs: via the federal rules while litigation is pending, and via 28 USC §1920 postjudgment. Regardless of the route, a defendant's ability to recover costs may be limited. A defendant may be able to recover technical costs associated with producing electronically stored information (ESI), especially if that ESI is considered inaccessible; however, it is less likely that a defendant would be able to recover the costs associated with reviewing that ESI for privilege or relevance, which typically account for the bulk of e-discovery costs.

Cost-shifting While Litigation Is Pending

Courts typically perform a cost-shifting analysis based on the proportionality test set out in Rule 26 of the Federal Rules of Civil Procedure. Under Rule 26(b)(2)(c), the court balances the "burden or expense of the proposed discovery" with "its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues." The seminal case on cost-shifting is *Zubulake v. UBS Warburg*, in which the court set out a seven-factor test based on Rule 26 (in decreasing order of importance) to determine whether cost-shifting is appropriate.

According to *Zubulake*, the court considers:

1. The extent to which the requests are specifically tailored to discover relevant information.
2. The availability of such information from other sources.
3. The cost of production compared to the amount in controversy.

4. The total cost of production compared to the resources available to each party.
5. The relative ability of each party to control costs and its incentive to do so.
6. The importance of the issues at stake in the litigation.
7. The relative benefits to the parties of obtaining the information.

Most courts recognize that technical costs may be shifted, but the costs associated with relevance and privilege review are often found to remain with the producing party. The *Zubulake* court, as well as many other courts, required a showing of inaccessibility before considering cost-shifting. However, other courts have held that a showing of inaccessibility is not required. In one recent case, *Adair v. EQT Production*, the court found that it could consider review costs when deciding whether discovery imposes an undue burden or expense on a responding party, and that the court may shift those review costs, in whole or in part, to the requesting party.

The Federal Rules Advisory Committee recently has proposed a new cost-shifting provision to Rule 26(c) that would explicitly recognize the court's authority to enter a protective order to allocate discovery costs. The proposed advisory committee note states that "courts are coming to exercise this authority," explicitly recognizing the court's authority in the rule "will forestall the temptation some parties may feel to contest [it]."

In federal courts, the presumption is that the responding party pays for discovery requests; therefore, courts place the burden of proof on the responding party to demonstrate that costs should be shifted. This is not true in some state courts, however. For example, in New York state courts, the presumption is that the requesting party pays for the discovery it requests.

Indeed, there have been recent efforts to bring a requester-pays approach to federal courts. Advocacy groups such as Lawyers for Civil Justice (LCJ) and the Defense Research Institute (DRI) are seeking to shift the cost of discovery from the producing party to the requesting party, which effectively places the cost-benefit decision in the hands of the requesting party, removes incentives to over-request, and may help address costs and burdens associated with e-discovery.

Cost-shifting After Judgment

A prevailing party can seek to recover at least some of its ESI costs under 28 USC § 1920(4). Section 1920 allows the court to tax costs involving "[f]ees for exemplifications and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."

However, "making copies" remains unclear in the ESI context. Some courts have awarded only conversion costs under §1920. For example, in a recent case, *Race Tires America v. Hoosier Racing Tire*, the U.S. Court of Appeals for the Third Circuit decided that although "there may be strong policy reasons to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so . . . under [§ 1920]."). Similarly, in *Country Vintner of N. Carolina v. E. & J. Gallo Winery*, the Fourth Circuit followed *Race Tires* and affirmed the lower court's decision that only costs for the conversion of native files to TIFF or PDF formats and the transfer of files onto CDs constituted "making copies" as contemplated by Section 1920(4). And in *Phillips v. WellPoint*, the Southern District of Illinois cited *Race Tires* and *County Vintner* favorably and found that defendants may only recover the actual costs of scanning hard copies and converting native files to TIFF.

Other courts have defined “making copies” more broadly. In *In re Online DVD Rental Antitrust Litigation*, the Northern District of California rejected *Race Tires*, finding that “broad construction of § 1920 with respect to electronic discovery production costs—under the facts of this case—is appropriate.” The court awarded “TIFF conversion costs; copying/‘blowback’ costs purportedly not documented; document productions purportedly not delivered; professional fees re: visual aids.” Another case that gave §1920 a broad reading was *Jardin v. DATAlegro*, which allowed project-management costs related to “physical production” of overseeing conversion of files to TIFF format.

Notably, none of these cases provided for costs relating to review for relevance or privilege. But some cases have allowed the prevailing party to recover substantial technical costs. For example, in *Lockheed Martin Idaho Technologies v. Lockheed Martin Advanced Environmental Systems*, the District of Idaho awarded \$4.6 million (100 percent) of requested e-discovery costs associated with creating a document review database. On the other end of the spectrum, the *Eastern District of Pennsylvania* in *Fells v. Virginia Department of Transportation* refused to tax any costs associated with the processing of electronic records because the techniques were not technically “photocopying or scanning.”

In light of the foregoing, a prevailing party’s efforts to recover costs under §1920 may be met with varying degrees of success. Still, it may be well worth the party’s time to pursue recovery under §1920. Before doing so, however, a prevailing party may want to take a close look at the case law in the jurisdiction relating to §1920 and weigh the amount of the outstanding costs that could arguably be considered associated with “making copies.”

Cost-shifting Considerations

Here are a few considerations to keep in mind when contemplating cost-shifting:

- **Consider Cost-shifting Early:** The court has discretion to shift almost any e-discovery cost while the litigation is pending; however, relying on §1920 after the verdict means costs will be confined to those associated with “making copies” only.
- **Carefully Track Costs:** The court and your adversary may soon be going through them with a fine-tooth comb. Demand accurate and detailed invoices from e-discovery vendors to help the court find that recovery of the costs is proper. In *Race Tires*, the court was critical of the e-discovery vendor’s invoices, which were “notable for their lack of specificity and clarity.”
- **Object Timely and Appropriately:** A court might be less inclined to shift costs after the fact if the producing party failed to timely object to the overly broad or unduly burdensome nature of the request.

The Bottom Line

In today’s ESI-laden litigation environment, cost-shifting is one way for a party to mitigate discovery expenses. Under the Federal Rules, a producing party may be awarded some relief if the court finds that the burden of producing the ESI is outweighed by its likely benefit to the requesting party. Depending on the jurisdiction, this method may require a showing that the ESI sought is inaccessible. Under 28 USC §1920, a prevailing party may recover e-discovery costs associated with “making copies.” Both of these routes provide a recovery method for technical costs; however, recovery of review costs—often a substantial cost associated with discovery—is granted only rarely.

John D. Martin is a litigation partner at Nelson Mullins Riley & Scarborough and the practice leader

for the firm's Encompass division, which provides information governance, litigation readiness and discovery services. He is a member of the Defense Research Institute and the Sedona Conference's Working Group on Electronic Document Retention and Production. He can be contacted at john.martin@nelsonmullins.com. Renee S. Dankner is of counsel to the firm and head of client relations for the Encompass division. Her areas of focus include electronic information governance, e-discovery and business intelligence. She can be contacted at renee.dankner@nelsonmullins.com. Jarrett Coco is an associate at the firm and focuses on business litigation, pharmaceutical and medical device litigation, e-discovery and litigation readiness, and records and document management. He can be contacted at jarrett.coco@nelsonmullins.com.

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