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Two-step test emerges for recovering e-discovery costs in the 7th Circuit

After the smoke of litigation has cleared and you've raised the last celebratory toast to the victorious team, you turn to calculating the spoils of the conquest. Although the recovery of costs are (hopefully) a very small part of your victory, the costs of collecting, processing and producing electronically stored information are often substantial. This article discusses the recovery of e-discovery expenses in the context of Federal Rules of Civil Procedure (FRCP) and the law of the 7th U.S. Circuit Court of Appeals.

FRCP 54(d)(1) states that "[u]nless a federal statute, these rules, or court order provides otherwise, costs — other than attorney fees — should be allowed to the prevailing party." Congress has gone further and specified what litigation expenses are recoverable costs in 28 U.S.C. Section 1920. This list includes "Fees for the exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use the case." 28 U.S.C. Section 1920(4).

The recoverability of e-discovery costs is not new to the courts of the 7th Circuit in which a two-step test has emerged. First, the court determines if the e-discovery costs are recoverable. Second, the court must determine the amount of any recoverable costs. The requesting party bears the "burden of demonstrating the amount of its recoverable costs" under this second step. *Telular Corp. v. Mentor Graphics Corp.* No. 01 C 431, 2006 WL 1722375, at *1 (N.D.Ill. June 16, 2006).

In *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 644 (7th Cir. 1991) the 7th Circuit held that costs of data conversion which save time that would be spent reviewing the data are "not recoverable as copying costs." The court cited *EEOC v. Sears, Roebuck & Co.* 114 F.R.D. 615 (N.D.Ill. 1987). Sears, the prevailing party, sought to recover the cost of microfilm and microfilm rental equipment as recoverable costs. The court disallowed the expense because, in part, it appeared that the technology was used for "counsel's convenience." *Id.* at 626.

Technology has come a long way since the days when using microfilm was a "convenience" — so too has the courts' analysis of recoverable costs. In *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the 7th Circuit held that the cost "for converting computer data into a readable format in response to plaintiffs' discovery requests" was recoverable under 28 U.S.C. Section 1920. *Id.*, 591. Similarly, "cost may be awarded under Section 1920(4) for electronically scanning and processing documents because the electronic scanning of documents is the modern-day equivalent of exemplification and copies of paper." *Rawal* at *2 (internal quotations and citations omitted).

Two recent cases apply the test and demonstrate the consequences of not keeping detailed records and e-discovery vendor invoices. First, *Rogers v. Baxter Intern. Inc.* 04 C 6476, 2011 WL 941188, 4 (N.D.Ill. March 16, 2011), contrasts *Northbrook Excess*' unrecoverable costs with *Hecker*'s recoverable costs. Simply put, the cost necessary to put the data into the format required for production to the opposing party is recoverable, but costs for making the data more amenable to review by the movant is not. *Rogers*, at *4.

The *Rogers* court denied the cost paid to the e-discovery vendor because the vendor did not break out the purpose of its work in a way for the court to determine if the costs were recoverable. "The invoices submitted by [defendants] provide no assistance to the court in assessing what work was actually performed and the accompanying affidavit describes the work in only the most general terms." The movant failed the first part of the test.

Second, although the billing records in *Rawal* were more specific, the court denied the motion for costs "because United does not separate those costs from the unrecoverable costs associated with creating a searchable database, it has failed to carry its burden of demonstrating the amount of its recoverable costs." *Rawal*, at *3 (internal citations omitted). The court noted that the cost associated with making the documents searchable were equivalent to having an attorney or paralegal read through the documents to determine whether documents are responsive and, therefore, was unrecoverable.

Often the line between these steps is blurred because both steps rely on the records of costs incurred. As a practical matter, the lack of detailed invoices from an e-discovery vendor can be fatal to the recovery of costs under either part of this test. The court's analysis of United's $14,997.50 in billing records reinforces the very detailed billing records from the outset of the case.

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The court noted that "[t]ypical lines on the billing sheets read: 'Compile, organize and prepare for attorney review electronic documents,' 'Compile and organize electronic documents regarding several custodians and plaintiffs to assist attorney in preparing for the case,' and 'Prepare documents for attorney review.' " *Id.* at *3. The court acknowledged that it was possible that some of the e-discovery costs were "incurred simply for the electronic scanning of documents, which are recoverable" but these were inseparable from the unrecoverable costs. Thus, United failed the second part of the test.

To ensure that e-discovery costs are recovered, attorneys must work with their e-discovery vendor to segregate those costs that are closest to the "[f]ees for exemplification and the costs of making copies" allowed under Section 1920(4). You should provide the court with the cost-per-page of ingesting the electronic documents into a database.

It should also be noted that courts have denied costs incurred for optical character recognition and coding services. Therefore, the vendor must work to keep any additional costs related to making the document searchable separate from the cost of "simply for scanning." This may be difficult in the heat of litigation, but by taking the time to make sure that the scanning costs are well documented, your client will be able to take advantage of the strong presumption for the recovering of costs afforded by FRCP 54(d)(1).

NEXT CHAPTER

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