MILLER CANFIELD

Recovery of E-discovery Costs

March 19, 2012

Costs associated with e-discovery can be enormous. That's not news. What is news is the courts' increased willingness to award a prevailing party e-discovery costs under 28 USC §1920(4).

The statute had been limited to the recovery of "[f]ees for exemplification and the costs of making copies of papers…." In light of the increasing importance of e-discovery, the statute was amended – and "papers" changed to "any materials." This change has facilitated the courts' ability to award costs incurred in the process of producing electronically stored information during discovery.

Recoverable Costs under Section 1920(4)

Recently, the court in *In re Aspartame Antitrust Litigation*, provided insight into what factors to consider when awarding e-discovery costs. Included were:

The court considered the above, along with the fact that the parties agreed to use keyword searches and de-duplication tools to reduce e-discovery costs, and concluded that such tools decreased the volume of data for the benefit of both parties. The court went on to award the prevailing party over $500,000 in e-discovery costs, which included the cost of creating a litigation database, data storage, data processing and hosting, metadata extraction, imaging of hard drives, de-duplication, keyword searches, and OCR processing.

In another case, *Jardin v DATAllegro, Inc.*, defendants were awarded for both converting documents into a useable format and for project management costs. The court was careful to draw a line between the technical expertise needed in the production of electronic data and document review and strategic decision making reserved to lawyers. Costs associated with the former are recoverable. Costs associated with the latter are not. In total, defendants received over $134,000 in taxed costs under Section 1920(4).

Non-recoverable Costs under Section 1920(4)

Courts have also drawn a distinction between e-discovery costs that are "necessary" (as defined in the statute) versus costs that are for the mere convenience of counsel. For example, courts have refused to award exemplification costs for sophisticated document management programs, confidentiality labeling, and bates labeling.

Additionally, an agreement between the parties can supersede Section 1920(4). In *Ricoh Co. Ltd. v Synopsys, Inc.*, the appellate court reversed an award of over $230,000 for the use of a vendor-hosted litigation database because the parties had agreed at the outset of litigation to equally share the cost of the service.

An Itemized Bill of Costs is Very Important

As these cases indicate, there is no consensus among jurisdictions regarding recoverable costs. However, courts have agreed on the importance of submitting a detailed bill of costs in order to recover even basic e-discovery related costs. In *Ricoh*, for example, the court remanded a $300,000+ award for reproduction and exemplification because the bill of costs did not provide sufficient detail to justify the award.

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The courts' familiarity with e-discovery tools combined with the amendment of Section 1920(4) has led to a greater willingness to award e-discovery costs. Please give us a call if you need assistance with e-discovery or records management.