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## BNA INSIGHT

IE Discovery's Stacy Jackson identifies the taxation of e-discovery costs, proposed changes to the Federal Rules of Civil Procedure, and the quiet campaign for standards as the significant e-discovery events of 2011.

### The Year in Review: An E-Discovery Update for 2011



BY STACY JACKSON

**F**or awhile, the e-discovery case law for this year seemed pretty run of the mill. Cases were about preservation, sanctions, cooperation, and the like.

But then, there were a few late blooming trends and cases that really caught my attention—taxable costs and the proposed rule changes to the Federal Rules of Civil Procedure. A push for standards in the e-discovery industry has also been quietly taking place this year.

*Stacy Jackson is corporate counsel with IE Discovery. She has managed IE Discovery's Legal Services team, working directly with client attorneys in charge of cases and coordinating project management to ensure quality deliverables. Ms. Jackson has extensive experience in medical malpractice, product liability, employment law, government contracts, and affirmative cost recovery for environmental matters. Ms. Jackson can be reached at [SJackson@iediscovery.com](mailto:SJackson@iediscovery.com)*

### Taxable Costs

**Background.** It's no secret that with the advent of electronic data, litigators have been grappling with the costs associated with electronically stored information (ESI) during the discovery phase of their case.

Data is cheap to store, voluminous, lives on many different types of media, and lingers around for a long time. Given all of those characteristics, it becomes an expensive proposition to collect, preserve, cull, review, and produce that data to opposing counsel in a cost efficient way.

**The Rules.** When the Federal Rules were amended, parties could recoup some of those costs if they made an appropriate cost-shifting argument. But now, there is a new weapon to recoup some of those costs and it comes in the form of taxable costs. The words "taxable costs" are code for "the loser pays".

Federal Rule of Civil Procedure 54(d)(1) provides that "[u]nless a federal statute, these rules or a court order provides otherwise, costs—other than attorneys' fees—should be allowed to the prevailing party."

**What's Recoverable?** The prevailing bill of costs must be reviewed carefully and does not give the court unrestrained discretion to reimburse a winning litigant. The costs that are recoverable are specifically enumerated in 28 U.S.C. § 1920.

In a paper world this statute applied to “fees for exemplifications of copies of papers”. In 2008, the statute was amended to change the phrase to encompass electronic data—“fees for exemplification and the costs of making copies of any materials.”

And thus, the door was opened for the recovery of fees associated with electronic discovery.

**The Cases.** There have been several cases this year which address taxable costs in an attempt to recover e-discovery expenses under the “new and improved” § 1920. The first case is *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 2011 U.S. Dist. LEXIS 48847 (W.D. Pa. May 6, 2011). In this antitrust case, summary judgment was granted in favor of the defendant.

Under § 1920, the defendant requested to recover \$367,369.36 in vendor costs for searching and producing electronic documents requested by the plaintiffs. Plaintiff cried foul at the taxation of e-discovery costs under 28 U.S.C. § 1920 arguing that the statute did not authorize e-discovery costs.

The court found that plaintiffs aggressively pursued the electronic discovery aspect of this case, including 119 requests for documents and electronically stored information. The case involved 490 gigabytes of data, 270,000 files from one of the defendant’s servers.

Plaintiff also imposed, over the defendant’s objection, 442 search terms which resulted in over 7 million hits. *Race Tires* at \*27-28. Furthermore, another defendant created a litigation database and retained the services of a computer expert. The court stated:

There is no indication that electronic scanning was used merely for the convenience of the parties or the attorneys. STA requested, and Defendants produced, a massive quantity of data. A careful review of the vendor’s invoices reveals that the services provided were not the type of services that attorneys or paralegals are trained for or are capable of providing. The services were highly technical. . . . In this case, the Court finds that the requirements and expertise necessary to retrieve and prepare these e-discovery documents for production were an indispensable part of the discovery process. *Id.* at \*28-30.

The lesson learned here is—*live by the sword, die by the sword*. If you are going to aggressively pursue e-discovery, then your opponent may aggressively pursue taxable costs if they are the victor.

**Tibble.** The next taxable cost case is *Tibble v. Edison Int’l*, 2011 U.S. Dist. LEXIS 94995 (C.D. Cal. August 22, 2011). In this ERISA action, Edison requested costs for unearthing electronically stored information. The issue became whether the costs associated with the technical expertise to do so were recoverable. *Id.* at \*21.

The court found that:

Defendants’ costs were not accrued merely for the convenience of counsel, but were necessarily incurred in responding to Plaintiffs’ discovery requests. Plaintiffs propounded 28 requests for production of documents, including electronically stored information, reaching documents over a decade old. Plaintiffs aggressively sought electronic files, whether active, deleted, fragmented, or stored on electronic media or network drives. Ultimately, Defendants

produced 537,955 pages of electronic documents in response to Plaintiffs’ requests. *Id.* at \*23.

The plaintiffs also attacked the amount of the costs as excessive. The court found that since defendant selected the vendor based on expertise after a competitive bidding process and the technician charged market rates that the costs were allowable. *Id.* at \*24-25.

The lesson here is: *the spoils go to the victor at the market rate.*

<i>In re Aspartame</i> Partial Listing of Requested Costs		
Type of Cost	Allowed	Unallowable
OCR	●	
Attenex Document Mapper		●
Hosting Fees	●	
Concept Based Review		●
Electronic Data Recovery	●	
Tape Restoration	●	
Data Management	●	
Data Extraction & Processing	●	
Compiling Terms & Reports	●	
Scanning	●	
CD/DVD Replication	●	
Hard Drives		●
Technical Support		●
Convert TIFF to PDF		●
De-Duplication	●	
Keyword Searches	●	
Freight		●
Document Production	●	
Written Discovery Requests	●	
Copies	●	
Privilege Review	●	
Back-Up Tape Restoration	●	
User Software Access Charges	●	
Consulting Services for Native File Processing	●	
Endorsed Electronic Bates Labels		●
Confidential Designation		●
Black & White Copies		●

***In re Aspartame.*** The third case this year on taxable costs is *In re Aspartame Antitrust Litigation* (E.D. Pa. Oct. 5, 2011).

Just like *Race Tires*, this was an antitrust case where the defendant prevailed on summary judgment. Defendant was awarded costs in the amount of \$573,035.13.

The largest portion of the costs were associated with creating a litigation database, processing and hosting electronic data, conducting keyword and privilege screens on the documents, making documents OCR searchable, extracting metadata, and related activities.

The volume of e-discovery in this case was “staggering”:

- Defendant Ajinomoto had 87.73 gigabytes worth of data and spent \$135,696 processing the data;

- Defendant Nutrasweet collected 1.05 terabytes of data; and

■ Defendant Holland Sweetener collected 366 gigs of data.

Parties had agreed to use keyword searches and de-duplication software to reduce the costs of discovery. Defendant's use of third-party vendors reduced the pool of data from 87 percent to 39 percent.

The court awarded them the cost of:

- creating the litigation database;
- storing the data;
- imaging hard drives;
- keyword searches;
- de-duplication;
- data extraction and processing;
- keyword screening for privileged data;
- hosting (due to ongoing nature of the discovery); and
- creating the Concordance load files, since plaintiff requested, but never used them.

The court did not award the use of Attenex Document Mapper—a document review tool with visual clustering of a document collection based on concepts extracted from those documents. It held that the tool exceeded the necessary keyword searches and filtering function and was deemed a cost not necessary for litigation but rather acquired as a convenience for counsel.

An additional \$5,449 was denied as a cost for a concept based review platform and document analytics.

Plaintiffs attempted to argue that cost of data recovery and tape restoration was work typically done by an attorney or paralegal and thus not allowed as a taxable cost. The court found these to be technical processes and thus allowable.

By contrast, a request for costs for Bates and Confidentiality labeling was denied and cited as being a convenience.

The lesson learned from the *Aspartame* case is: *the victor receives the spoils, but nothing extravagant will be allowed.*

## More Changes to the Federal Rules of Civil Procedure?

It's been five years since the Federal Rules of Civil Procedure were amended to specifically address issues regarding electronic discovery.

Some feel that the rules need to be modified again: sort of a tune up to fine tune some issues that were not fully addressed by the 2006 amendments.

Others feel that the rules haven't been around long enough to work out the kinks and should not be amended at this time.

Nonetheless, the Civil Rules Advisory Committee is looking at the rules and considering possible amendments to the e-discovery provisions. In particular, they are looking at the problem of preservation and sanctions.

*Although litigants at some companies have asserted that overall expenditures for collection, processing, and review were higher than those for their preservation responsibilities, others claimed that preservation costs (both direct and indirect) overwhelmed production costs. All companies re-*

*ported that preservation-related expenditures have become a significant portion of their total costs of discovery. — RAND Corporation, Costs of Pre-Trial Discovery of Electronically Stored Information (Sept. 7, 2011)*

**Absence of 'Bright Line.'** The problem is, of course, that there is no bright line test for when preservation is to commence.

The "when you know or reasonably should have known" standard leaves a lot of gray area regarding the "should have knowns."

Accordingly, many organizations are getting hit with sanctions. Even if you have a firm grip on what a "should have known" is, the cost of preserving that information is skyrocketing.

**Just ask KPMG.** Recently, KPMG sought a protective order to limit the scope of its preservation obligations in a Fair Labor Standards Act case. At issue was whether KPMG had to preserve computer hard drives for thousands of former employees who were potential putative class members.

In this case, KPMG had preserved over 2,500 hard drives at a cost of over \$1.5 million. And that was just the tip of the iceberg. *See, Pippins v. KPMG*, 2011 U.S. Dist. LEXIS 116427 (S.D.N.Y. Oct. 7, 2011); 11 DDEE 439, 10/27/11 and 11 DDEE 476, 11/24/11.

Some possible solutions to the problem include:

- a detailed rule regarding preservation obligations;
  - a general rule regarding preservation obligations;
- or
- a sanctions-based rule that describes appropriate responses and sanctions for failure to preserve.

**Congress Jumps In.** A Congressional hearing was held on December 13, 2011 entitled "The Costs and Burdens of Civil Discovery." The hearing was an effort to assess the scope of the problem and various witnesses were heard from.

*"While many costs of preservation, such as the cost of responding to litigation holds, accrue on a per-case basis, other preservation costs are not tied to a particular matter. They instead reflect the costs for a company to create internal systems to handle preservation across all cases. These "fixed costs" include expensive investments in technology that companies make in order to control what would otherwise be even higher per-case preservation costs." — Written Statement of William H.J. Hubbard, Congressional Hearing, The Costs and Burdens of Civil Discovery, Dec. 13, 2011*

## A Push for Standards

Finally, a push for standards in the e-discovery industry has gained momentum this year.

Many industries have baseline standards for quality. For instance, if you go to any car manufacturer they will have a checklist of the minimum standards of quality required when producing a vehicle.

There are no such industry wide standards for e-discovery.

Accordingly, e-discovery services are, for the most part, bought and sold based on price, with little or no consideration given to the value of the services.

In fact, the DESI (Discovery of Electronically Stored Information) IV 2011 Workshop took on this very task. This year, they discussed creating a standard authority or certification entity that could certify compliance of an e-discovery standard. They debated the benefits of a standard versus the potential costs of implementing such a standard. See, <http://bit.ly/e6Abwl> for further DESI IV information.

“Quality standards provide not only a baseline expectation, but allow service providers to differentiate themselves and demonstrate value. Cost has long been the driving force in e-discovery purchasing, but it is just one factor in determining overall value when purchasing services. Though purchasers in the industry have some expectation of quality, they regularly have no assurance that their vendor has a history of quality for a given cost.” — Chris Knox, *Purchasing Based on Value in E-Discovery*, 11 DDEE 376, 9/15/11

**Related Industry Activities.** Other industry thought leaders are searching for a standards solution to the e-discovery quality issue as well, including The Sedona Conference®, the Text Retrieval Conference (TREC) Le-

gal Track, and the Electronic Discovery Reference Model (EDRM).

Sedona Conference has issued a Commentary on Achieving Quality in E-Discovery which calls for the development of e-discovery standards and best practices when processing data.

Similarly, TREC is currently evaluating the effectiveness of various methods of information retrieval technology to find a baseline for quality when it comes to search.

Lastly, the EDRM has several ongoing projects to create a framework to manage discovery.

## Growing Pains?

It is clear from this year’s events that e-discovery is no longer in its infancy. Maybe we have moved into the gangly, awkward teen years, but we are still trying to find our footing.

We have progressed beyond discussions of “what is a native file” and “what is metadata” to broader more encompassing issues.

Although the community has always been mindful of costs, we have now seen a movement toward recouping taxable costs. Doing this will make everyone think twice about using e-discovery as a sword when trying to browbeat their opponent into submission.

We are also looking back to see how the Federal Rule Amendments have, and more importantly, have not worked out.

Finally, a push to provide standards for the industry is an attempt to think about the entire e-discovery life cycle and develop holistic best practices.