Published on *The National Law Review* https://natlawreview.com

Colorado Court Breaks from Current Precedent in E-Discovery Cost Award

Article By:

Amy Wills

In a short order issued on February 13, 2015, U.S. District Judge Christine Arguello awarded prevailing defendants in a civil rights suit more than $55,000 in costs incurred to respond to document requests, including costs associated with searching and retrieving email and other ESI. See *Comprehensive Addiction Treatment Center, Inc., et al. v. Daria Leslea*, et al., Civil Action No. 11-cv-03417 (D. Colo., Feb. 13, 2015).

This order is a sharp departure from current case law, which typically limits a prevailing party to recovering only those e-discovery costs associated with "copying" or "duplicating" information (generally less than 10% of all e-discovery costs). Judge Arguello's opinion places Colorado squarely outside the current consensus on this issue.

In one of our blog posts last summer, we discussed CBT Flint Partners, LLC v. Return Path, Inc., 2013-cv-1036 (Fed. Cir. Dec. 13, 2013), in which the U.S Court of Appeals for the Federal Circuit addressed the recoverability of e-discovery costs and issued a detailed opinion providing guidelines for determining what types of e-discovery costs are recoverable. See Federal Circuit Clarifies Standard for Recovery of EDiscovery Costs, posted June 10, 2014.

As summarized in that blog post, the Federal Circuit, in an opinion it classified as "consistent with" other circuits, concluded that 28 U.S.C. § 1920, which enumerates certain expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d), applies only to documents produced pursuant to Rule 26 or other discovery rules. The Federal Circuit determined that § 1920 does not apply to documents a party creates for its own litigation or other use.

In sum, the Federal Circuit provided:

[R]ecoverable costs under section 1920(4) are those costs necessary to duplicate an electronic document in as faithful and complete a manner as required by rule, by court order, by agreement of the parties, or otherwise. . . . But only the costs of creating the produced duplicates are included, not a number of preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication. CBT Flint at 9-10 (emphasis added).

According to the Federal Circuit, such non-recoverable preparatory costs include costs incurred in

preparing to copy, such as keyword searching, reviewing documents for responsiveness and privilege, and training to use review software as well as de-duplication and decryption costs.

In contrast, Judge Arguello's recent opinion awarded the prevailing defendants $55,649.98 in costs incurred by the defendants in retaining a private consulting company to retrieve and convert ESI into a retrievable format to produce information requested by the plaintiffs. In doing so, Judge Arguello rejected the plaintiffs' argument that because the services of the third party ESI vendor in retrieving, restoring, and converting data did not constitute "copying" under § 1920(4), costs associated with that work were not recoverable. See Order at *1.

Instead, noting that other courts have recognized that § 1920(4) includes e-discovery related costs, that plaintiffs were well aware of the "difficulties and complexities encountered in the restoration and conversion effort" to retrieve information responsive to plaintiffs' discovery requests, and that the plaintiffs used information obtained in the ESI production to file an amended complaint, Judge Arguello concluded that the ESI expenses were reasonably necessary for use in the case and are expenses pursuant to § 1920(4). Order at *2.

In reaching this conclusion, Judge Arguello did not conduct the typical analysis of whether certain e-discovery costs can be interpreted to technically fall within § 1920(4) as "exemplification" and "copying" costs, but instead focused on the extent of discovery requested, the difficulty of retrieving ESI to satisfy such requests, and whether the information obtained was "reasonably necessary for use in the case" and "not merely for the convenience of the parties." Order at *3.

Judge Arguello's opinion evidences a view that a party who issues broad discovery requests must consider the ultimate consequences. In discussing the recovery of costs generally, she explained that "[t]he risk of being charged with the costs of complying with one's own discovery requests encourages parties 'to make narrow, focused discovery requests, rather than going on broad, potentially expensive, fishing expeditions.'" Order at *2.

Judge Arguello also noted, in this particular case, that despite the plaintiffs' awareness of the complexity and difficulty of retrieving ESI responsive to their discovery requests, "at no time" did the plaintiffs "initiate discussions aimed at limiting the scope of their requests for information or take other measures to limit the costs of the endeavor." Order at *2. She concluded that the plaintiffs' "own litigation choices and aggressive course of discovery necessarily resulted in 'heightened' defense costs" they were responsible for as the losing party. Order at *3.

What remains to be seen is whether Judge Arguello's order will impact how other jurisdictions analyze these issues or whether Colorado will remain an outlier. In the meantime, this order serves as a warning for parties engaging in expensive and complex e-discovery. Colorado litigants should be aware of the potential for high e-discovery-related cost awards.

National Law Review, Volume V, Number 103