

## **ARE E-DISCOVERY COSTS RECOVERABLE BY A PREVAILING PARTY?**

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The costs of electronic discovery can be crushing.<sup>1</sup> Such costs, moreover, can easily be imposed (with a few strokes of the word-processing key-board, a standard demand for documents and electronically stored information may issue). Some critics fear that e-discovery may be used as a weapon, to extract unwarranted settlements, merely as a means to avoid the burdens of e-discovery.<sup>2</sup> Many courts and commentators suggest cooperation and early planning and judicial intervention as methods of reigning in such costs.<sup>3</sup> But, so long as incentives exist to over-state e-discovery demands, such methods may be inherently limited.<sup>4</sup>

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<sup>1</sup> See Institute for the Advancement of the American Legal System, *Electronic Discovery: A View From The Front Lines* at 5 (2008), available at <http://www.du.edu.legalinstitute/pubs/EDiscovery-FrontLines.pdf> (noting that a “midsize” case could cost \$2.5 to \$3.5 million in the processing, review and production of electronic information); see also Alfred W. Cortese, Jr., *Skyrocketing Electronic Discovery Costs Require New Rules*, ALEC POLICY FORUM (Am. Legis. Exchange Council), Mar. 2009, at 10, available at <http://www.alec.org/am/pdf/apf/electronicdiscovery.pdf> (noting that production of electronically stored information often produces costs in the millions for one case); Lisa Rickard, *Our Broken Legal System And Its Impact On Competitiveness*, Institute for Legal Reform, June 27, 2008, [http://www.instituteforlegalreform.com/component/iler\\_president\\_corner/55/article/33.html](http://www.instituteforlegalreform.com/component/iler_president_corner/55/article/33.html) (“The U.S. has the most expensive litigation system in the world . . .”).

<sup>2</sup> Jamsadr.com, Virtual Roundtable: E-Discovery, <http://www.jamsadr.com/files/Uploads/Documents/Articles/Quinn-Hughes-2009-08-EDiscovery-Roundtable.pdf> (last visited May 14, 2010) (counsel may “use the burdens of e-discovery as a weapon.”) (quoting e-discovery expert Harold A. Barza, Esq., from Quinn Emanuel Urquhart Oliver & Hedges); Chris Mondics, *E-discovery Profoundly Changing Lawyering*, June 9, 2008, <http://www.killinofirm.com/media/pdf/Inquirer-jun-09-08.pdf> (quoting e-discovery expert Tess Blair, from Morgan, Lewis & Bockius: “Does this enhance justice? Not usually . . . [i]t becomes a weapon in many cases.”).

<sup>3</sup> The Sedona Conference Cooperation Proclamation (2008), for example, has received extensive judicial endorsement, as well as support from many commentators in the legal community. See THE SEDONA CONF., THE SEDONA CONFERENCE COOPERATION PROCLAMATION, July 2008, available at <http://www.thesedonaconference.org/dltForm?did=proclamation.pdf>. See generally Stephen C. Bennett, *How Can Courts Encourage Cooperation in Discovery?*, 82 N.Y. ST. B.J. 27 (2010).

<sup>4</sup> See AMERICAN COLLEGE OF TRIAL LAWYERS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM A-4, Aug. 1, 2008, available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650> (survey results suggest that “the current civil justice system promotes excessive discovery[,]” and “e-discovery is being abused by counsel”); AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2, 7, 16 (Mar. 11, 2009,

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This Article suggests an additional tool for restricting inappropriately excessive e-discovery demands: the threat that the costs of such discovery may be awarded to the prevailing party in litigation. In one recent case, *CBT Flint Partners, LLC v. Return Path, Inc.*,<sup>5</sup> for example, the court awarded the prevailing party \$243,453.02 in fees for services of an e-discovery vendor used “to collect, search, identify and help produce electronic documents . . . .”<sup>6</sup> The court noted that “[t]axation of these costs will encourage litigants to exercise restraint in burdening the [other] party with the huge cost of unlimited demands for electronic discovery.”<sup>7</sup>

As in *CBT Flint*, courts increasingly have begun to recognize that such costs may be awarded under applicable rules.<sup>8</sup> Savvy practitioners, moreover, have begun to strategize around the possibility of such cost awards.<sup>9</sup> Thus, this tool may become an important component in the e-discovery process. This Article reviews these trends, and suggests some ways in which these trends could improve the efficiency of the e-discovery process.

### I. WHAT ARE THE APPLICABLE RULES?

Rule 54(d) of the Federal Rules of Civil Procedure provides that, “[u]nless a [F]ederal Statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”<sup>10</sup> The Rule, as stated, is mandatory, and creates a “strong presumption” that all costs

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revised Apr. 15, 2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (“many lawyers believe that they should—or must—take advantage of the full range of discovery options offered by the rules[;]” electronic discovery, in particular, “has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense;” electronic discovery is a “nightmare” and “a ‘morass’”).

<sup>5</sup> *CBT Flint Partners, LLC, v. Return Path, Inc.*, Civil Action No. 1:07-CV-1822-TWT, 2009 WL 5159761 (N.D. Ga., Dec. 30, 2009).

<sup>6</sup> *Id.* at \*4.

<sup>7</sup> *Id.* at \*5.

<sup>8</sup> See R. Robin McDonald, *Judge Heaps E-Discovery Costs On Plaintiff*, *Fulton County Daily Report* (Jan. 14, 2010), available at <http://www.law.com/jsp/article.jsp?id=1202437930333> (noting that experts say the outcome of the *CBT Flint* case may change the way legal costs are apportioned after trial).

<sup>9</sup> See Chris May, *Slashing E-Discovery Costs in a Digital Universe*, *Litigation Support Today*, Feb. 3, 2009, <http://www.litigationstoday.com/readers/article/slashing-e-discovery-costs-in-a-digital-universe/> (offering various methods to minimize costs of e-discovery).

<sup>10</sup> FED. R. CIV. P. 54(d).

authorized for payment will be awarded to the prevailing party.<sup>11</sup> Costs are generally payable despite the pendency of any appeal.<sup>12</sup>

The types of costs that a prevailing party may recover are outlined in 28 U.S.C. § 1920:

- (1) [f]ees of the clerk and marshal;
- (2) [f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) [f]ees and disbursements for printing and witnesses;
- (4) [f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) [d]ocket fees . . . ;
- (6) [c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services . . . .<sup>13</sup>

Significantly, in 2008, Congress amended Section 1920, modifying the phrasing of part (4) (previously, fees for exemplification and “copies of paper”) to now refer generally to “the costs of making copies of any materials. . . .”<sup>14</sup>

Despite the apparent mandate in Rule 54 that the prevailing party must always receive its costs, the Supreme Court has made clear that courts retain “power to decline to tax as costs” items enumerated in Section 1920,<sup>15</sup> and that requests for costs must

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<sup>11</sup> *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007); *see, e.g., Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000) (noting Rule 54 creates a “heavy presumption in favor of awarding costs to prevailing party”); *Sally v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1017 (5th Cir. 1992) (recognizing a strong presumption that the court will award costs to the prevailing party); *see also White & White v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir. 1986) (stating Rule 54 “creates a presumption in favor of awarding costs, but allows denial of costs at the discretion of the trial court”); *Poe v. John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1982) (“Costs, unlike attorney’s fees, are awarded to a prevailing party as a matter of course, unless the district court directs otherwise; unusual circumstances need not be present.”); *Horizon Hobby, Inc. v. Ripmax Ltd.*, No. 07-CV-2133, 2009 WL 3381163 at \*3 (C.D. Ill. Oct. 15, 2009) (“Costs should generally be accepted so long as they fall into one of the categories of costs statutorily authorized for reimbursement.”). A party opposing taxation of costs thus must make a showing sufficient to overcome the presumption of an award. *See Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 636 (11th Cir. 1991).

<sup>12</sup> *See Singleton v. Select Specialty Hosp.-Lexington, Inc.*, Civil Action No. 5:07-230-JMH, 2009 WL 1636177, at \*4 (E.D. Ky. June 10, 2009) (“District Courts have authority to tax costs after a judgment is entered despite an appeal being taken.”) (citing 28 U.S.C. § 1920 language that “[a] judge or clerk of any court of the United States may tax . . . costs”).

<sup>13</sup> 28 U.S.C. § 1920 (2008).

<sup>14</sup> Judicial Administration and Technical Amendments Act of 2008, Pub. L. 110-406, § 6 (section entitled, “assessment of court technology costs”) (enacted October 13, 2008).

<sup>15</sup> *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–43 (1987). The *Crawford* Court, moreover, confirmed that district judges may not award

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be given “careful scrutiny” to ensure compliance with the statute.<sup>16</sup> Thus, a district court “necessarily must assess the reasonableness of any fees and costs requested.”<sup>17</sup> And the party requesting costs “carries the burden of showing that the requested costs were necessarily incurred and reasonable.”<sup>18</sup>

District courts, moreover, retain “broad discretion” to determine “to what extent” a prevailing party may be awarded costs.<sup>19</sup> A court may, for example, determine that each party “bear part or all of its own costs,”<sup>20</sup> but if it declines to award any costs to the prevailing party, it generally must state reasons for the order.<sup>21</sup> “A party need not prevail on all issues to justify an award of costs”<sup>22</sup>, and a party is prevailing where judgment is entered in its favor, “regardless of the amount of damages awarded.”<sup>23</sup> Although a court may consider the “equities” and the

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costs that fall outside the statutory categories set forth in Section 1920. *Id.* at 441, 445.

<sup>16</sup> *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964) (rules do not give district courts “unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur”); *see also* *BDT Prods., Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005) (district courts charged to “interpret the meaning of the items listed” in Section 1920); *Mota v. Univ. of Texas Houston Health Sci. Ctr.*, 261 F.3d 512, 529 (5th Cir. 2001) (court may award only those costs specified in Section 1920, unless there is “explicit” statutory or contractual authority authorizing additional award); *EEOC v. W & O, Inc.*, 213 F.3d 600, 620 (11th Cir. 2000) (federal courts limited to awarding only those costs enumerated in Section 1920).

<sup>17</sup> *Trustees of the Chicago Plastering Inst. Pension Trust v. Cork Plastering Co.*, 570 F.3d 890, 904–05 (7th Cir. 2009).

<sup>18</sup> *Id.* at 906.

<sup>19</sup> *Barber v. Roth*, 7 F.3d 636, 644 (7th Cir. 1993); *see also* *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 762 (8th Cir. 2006) (stating that the district court has “substantial discretion in awarding costs.”); *Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977) (explaining that there is broad discretion to allow or disallow costs).

<sup>20</sup> *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 999 (5th Cir. 1976).

<sup>21</sup> *See* *Chapman v. AI Transp.*, 229 F.3d 1012, 1039 (11th Cir. 2000) (“To defeat the presumption and deny full costs, a district court must have and state a sound basis for doing so.”); *see also* *Schwartz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985) (stating that reasons must be given when a motion for an award of costs is denied).

<sup>22</sup> *See* *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983) (finding that “the case must be viewed as a whole to determine . . . the prevailing party”).

<sup>23</sup> *Weitz Co., LLC, v. Transp. Ins. Co.*, 2009 WL 3336021 at \*1 (S.D. Fla. Oct. 14, 2009) (citing *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Corp.*, 298 F.3d 1238, 1248 (11th Cir. 2002)); *Thomas v. Newton*, 2009 WL 1851093 at \*2 (E.D. Mo. June 26, 2009) (explaining that in a comparative fault action, where no party was found to be at fault, defendant was “prevailing” party).

“public interest” in the case,<sup>24</sup> where a party is prevailing, a court generally must award something in the way of costs under the statute.<sup>25</sup> A court may also consider the financial status of a non-prevailing party in rendering a cost award, but it “should require substantial documentation of a true inability to pay.”<sup>26</sup>

## II. ARE DISCOVERY MATERIALS COVERED?

Rule 54 and Section 1920 do not, on their face, mention the costs of discovery.<sup>27</sup> Most courts that have considered the subject, however, have held that, at very least, the cost of producing one copy of discovery materials to a requesting party may be recoverable as part of the costs in a case.<sup>28</sup> Indeed,

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<sup>24</sup> See *First Am. Corp.*, 184 F.R.D. 234, 243 (S.D.N.Y. 1998) (considering “public importance” of case, and “equities presented,” court reduced award of costs to non-party for compliance with subpoena to 35.5% of what had been requested).

<sup>25</sup> See *Mawulawde v. Bd. of Regents of the Univ. Sys. of Ga.*, No. CV 105-009, 2009 WL 3753986 at \*2 (S.D. Ga. Nov. 9, 2009) (“[E]ven in those rare circumstances where the non-prevailing party’s financial circumstances are considered in determining the amount of costs to be awarded, a court may not decline to award any costs at all.”) (quoting *Chapman*, 229 F.3d at 1039).

<sup>26</sup> *Mawulawde*, 2009 WL 3753986, at \*2 (submission regarding financial inability inadequate where “unaccompanied by tax returns, pay stubs, or other outside documentation.”); see *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 517 (8th Cir. 2006) (“[G]eneral statement of fairness” insufficient to defeat request for costs); *Carlson v. Bukovic*, No. 07 C 06, 2009 WL 2744028, at \*2 (N.D. Ill. Aug. 26, 2009) (explaining that documentation should include “evidence in the form of an affidavit or other documentary evidence of both income and assets, as well as a schedule of expenses[,]” which “will ensure that district courts have clear proof of the non-prevailing party’s dire financial circumstances” and “will limit any incentive for litigants of modest means to portray themselves as indigent”) (citing *Rivera v. City of Chicago*, 469 F.3d 631, 635 (7th Cir. 2006)); *Kaplan v. City of Chicago*, No. 05 C 2001, 2009 WL 1940789, at \*3 (N.D. Ill. July 6, 2009) (rejecting claim of indigence where party “offer[ed] no actual evidence of her financial status, such as an affidavit itemizing her assets and liabilities”); *Smith v. Augustine*, No. 07 C 81, 2009 WL 1748235, at \*2 (N.D. Ill. June 18, 2009) (determining that a court must make “threshold” factual finding that losing party is “incapable of paying the court-imposed costs at this time or in the future[;]” factual showing by losing party insufficient where she “submitted no evidence that she expects to lose her job or income at any time in the near future”) (citing *Rivera*, 469 F.3d at 635).

<sup>27</sup> See generally 28 U.S.C. § 1920 (2008) (word “discovery” does not appear); FED. R. CIV. P. 54 (similarly, the word “discovery” does not appear).

<sup>28</sup> See, e.g., *EEOC v. W & O Inc.*, 213 F.3d 600, 623 (11th Cir. 2000) (“Copies attributable to discovery” . . . recoverable under § 1920(4).”); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999) (“[W]e have never held that a district court may not award a litigant the cost of preparing a single set of the documents in a case.”); *Rundus v. City of Dallas*, No. 3-06-CV-1823-BD, 2009 WL 3614519, at \*2 (N.D. Tex. Nov. 2, 2009) (“The cost of copying

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although the word “discovery” does not appear in Section 1920, discovery appears to fit neatly within the meaning of “copies . . . necessarily obtained for use in the case,” as provided in that statute.<sup>29</sup>

A producing party need not (as a means of reducing costs) offer the requesting party an inspection of materials, versus production of copies, in response to discovery requests.<sup>30</sup> Nor can a party avoid paying the costs of discovery merely by asserting that the documents produced ultimately proved to be irrelevant.<sup>31</sup> Moreover, where a party provides “incomplete” records in response to discovery requests, the requesting party may recover the costs of obtaining the records from another source.<sup>32</sup>

### III. ARE ELECTRONIC MATERIALS COMPENSABLE?

Even before the 2008 congressional modification of Section

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documents produced to the opposing party during discovery are ‘necessarily obtained’ for use in the litigation and are taxable.”) (citing cases); *Horizon Hobby, Inc. v. Ripmax Ltd.*, No. 07-CV-2133, 2009 WL 3381163, at \*5 (C.D. Ill. Oct. 15, 2009) (explaining that “costs attributable to discovery” are compensable); *United States ex rel. Meyer v. Horizon Health Corp.*, No. C 00-1303 SBA, 2007 WL 518607, at \*4 (N.D. Cal. Feb. 13, 2007) (explaining that discovery documents “tendered to or prepared for the opposing party” are among recoverable costs); *but see Little Rock Cardiology Clinic, P.A. v. Baptist Health*, No. 4:06CV01594 JLH, 2009 WL 763556, at \*3–4 (E.D. Ark. Mar. 19, 2009) (determining that the cost of reproducing ESI, including scanning and production of the data on a CD-ROM, incurred for purposes of a discovery response, not recoverable under Section 1920).

<sup>29</sup> *See Schering Corp., v. Amgen, Inc.*, 198 F.R.D. 422, 428 (D. Del. 2001) (“Copying documents in response to a discovery request is, by its nature, necessary for use in preparing [plaintiff’s] case.”) (footnote omitted).

<sup>30</sup> *See Rundus v. City of Dallas*, No. 3-06-CV-1823-BD, 2009 WL 3614519, at \*3 (N.D. Tex. Nov. 2, 2009) (rejecting argument that costs not taxable “because defendants failed to produce their original documents for inspection before making any copies”). Thus, “[a] party who elects to respond to a document request by producing copies or electronic files, in lieu of allowing the requesting party to inspect original documents, does so at the risk that it will never recover the costs of production.” *Id.* Only if it becomes a “prevailing” party can the responding party recover its costs for producing “one set of documents, in whatever form,” to the requesting party. *Id.*

<sup>31</sup> *Kaplan*, 2009 WL 1940789, at \*4 (determining that plaintiff made “no showing” that responding party “produced documents to her that were not responsive to her discovery requests” and “one copy of each document” produced is permitted).

<sup>32</sup> *See Thomas v. Newton*, No. 4:07CV556 AGF, 2009 WL 1851093, at \*5 (E.D. Mo. June 26, 2009) (explaining that defendant is entitled to costs of obtaining plaintiff’s medical records and worker’s compensation files, where plaintiff’s records were “incomplete, too remote in time,” and “not properly authenticated for purposes of admission” into evidence).

1920 (removing the term “exemplification and the costs of copies of papers,” and substituting “exemplification and the costs of making copies of any materials”),<sup>33</sup> courts in many jurisdictions had come to recognize that “exemplification,” in the modern era, includes electronic copying.<sup>34</sup> Some contrary authority, nevertheless, focused on the prior reference to “paper” in the former version of Section 1920, and held that the reference to paper restricted a court’s ability to award costs for electronic copies.<sup>35</sup>

The recent revision to Section 1920 (to remove the phrase “paper copies” and substitute the phrase “any materials”) apparently rejects the limitation of compensable costs to mere photocopies.<sup>36</sup> This revision, indeed, comports with general developments in modern communications and data management technology, where surveys suggest that more than eighty percent of documents are created (and maintained) in electronic form.<sup>37</sup>

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<sup>33</sup> See *supra* note 14 and accompanying text.

<sup>34</sup> See, e.g., *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 427–28 (7th Cir. 2000) (explaining that exemplification “signifies the act of illustration;” so long as “the means of presentation furthers the illustrative purposes of an exhibit . . . it is potentially compensable”); *BDT Prod. Inc., v. Lexmark Int’l Inc.*, 405 F.3d 415, 420 (6th Cir. 2005) (finding that “electronic scanning and imaging” may constitute “exemplification,” within meaning of Section 1920); *Brown v. McGraw-Hill Co’s. Inc.*, 526 F. Supp.2d 950, 959 (N.D. Iowa 2007) (finding that “the electronic scanning of documents is the modern day equivalent” of ‘exemplification and copies of paper’ as set forth in Section 1920); *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, No. CIV. S-03-949 LKK/GGH, 2007 WL 512428, at \*10 (E.D. Cal. 2007) (“[S]canning is akin to copying. The purposes of the two methods are largely the same, to reproduce a document so that it may also be utilized by multiple parties and individuals.”).

<sup>35</sup> See, e.g., *Kohus v. Toys ‘R’ Us Inc.*, 282 F.3d 1355, 1358–59 (Fed. Cir. 2002) (citing Black’s Law Dictionary for definition of “exemplification” as “an official transcript of a public record, authenticated as a true copy for use as evidence[,]” and holding that a video animation is not an “exemplification”); *Arcadian Fertilizer, L.P. v. MPW Indus. Serv., Inc.*, 249 F.3d 1293, 1297 (11th Cir. 2001) (explaining that because videotape exhibits and computer animation were “neither copies of paper nor exemplifications within the meaning of § 1920(4),” taxing of costs was error).

<sup>36</sup> See *Howell v. Boyle*, Civil No. 08-727-KI, 2009 WL 4885233, at \*3 (D. Ore. Dec. 10, 2009) (noting that “[t]here is no requirement in § 1920 that copies must be paper copies;” awarding costs to “scan” medical records); *but see Del. Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, No. 07-20199-CIV-JORDAN, 2009 WL 5127941, at \*7 (S.D. Fla. Nov. 6, 2009) (misciting current Section 1920(4) as requiring “copies of paper,” and holding that CD duplication was not compensable).

<sup>37</sup> Some ten years ago, researchers at the University of California-Berkeley estimated that more than eighty percent of the information in the world was “born digital.” See PETER LYMAN & HAL R. VARIAN, *HOW MUCH INFORMATION?* 3–

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The use of electronic means of reproduction, moreover, may offer substantial efficiencies not available through paper.<sup>38</sup>

**IV. WHAT DOES “NECESSARILY OBTAINED FOR USE IN THE CASE” MEAN?**

Section 1920(4) refers to exemplification and copying of materials “necessarily obtained for use in the case.”<sup>39</sup> This provision does not require that the copies be used at trial or in papers filed with the court.<sup>40</sup> Thus, the standard for compensation is not 20/20 hindsight. Rather, where “the prevailing party could have reasonably believed that it was necessary to copy the papers at issue[,]” a court ordinarily should grant compensation.<sup>41</sup> Moreover, where the materials at issue

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4 (Univ. of Cal. at Berkeley) (2000), *available at* <http://www2.sims.berkeley.edu/research/projects/>. The growth in new media and storage capacity over the past ten years has certainly pushed that percentage much higher. *See* BLUE RIBBON TASK FORCE ON SUSTAINABLE DIGITAL PRES. & ACCESS, SUSTAINING THE DIGITAL INVESTMENT: ISSUES AND CHALLENGES OF ECONOMICALLY SUSTAINABLE DIGITAL PRESERVATION 8 (2008):

Our capacity to capture, store, and access information about the economic, scientific, political, and cultural aspects of society has grown exponentially. More and more of our societal activities transpire in digital environments: business transactions, scientific research, education, recreation. These activities often consume digital information as input and produce digital information as output.

<sup>38</sup> *One River Place Condo. Assoc. v. Axis Surplus Ins. Co.*, No. 07-1305, 2010 WL 235028, at \*2 (D. La. Jan. 14, 2010) (“This court will not punish [the prevailing party] for choosing the more efficient, electronic method of producing copies.”).

<sup>39</sup> Taxation of Costs, 28 U.S.C. § 1920 (2008).

<sup>40</sup> *See Delaware Valley Floral Group*, I2009 WL 5127941, at \*3 (citing *U.S. Equal Employment Opportunity Comm’n. v. W & O, Inc.*, 213 F.3d 600, 623 (2000)).

<sup>41</sup> *W & O, Inc.*, 213 F.3d at 623; *see also Howell*, 2009 WL 4885233, at \*3 (“The fact that items are neither introduced into evidence nor otherwise become part of the official court record does not determine whether that item was necessarily obtained for use in the case.”) (citing *Haagen-Daz Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587, 588 (9th Cir. 1990)); *Mawulawde v. Bd. of Regents of the Univ. Sys. of Ga.*, No. CV 105-009, 2009 WL 3753986, at \*3 (S.D. Ga. Nov. 9, 2009) (noting that courts will consider necessity of the prevailing party to produce the papers when determining costs); *Carlson v. Bukovic*, No. 07 C 06 2009 WL 2744028, at \*1 (N.D. Ill. Aug. 26, 2009) (noting that depositions “need not be used in support of a dispositive motion or introduced at trial to be reasonably necessary[;]” costs approved where “reasonably necessary at the time” they were incurred) (quoting *Jackson v. United Parcel Serv., Inc.*, No. 07-CV-0450-MJR-CJP, 2008 WL 5244846, at \*2 (S.D. Ill. Dec. 16, 2008)); *but see Little Rock Cardiology Clinic P.A. v. Baptist Health*, No. 4:06CV01594 JLH, 2009 WL 763556, at \*4 (E.D. Ark. Mar. 19, 2009) (finding that Section 1920(4) only encompasses costs of copying

are part of the official records of the proceedings (on motions, or at trial), there may be some further presumption that the costs of copying such materials is “necessary.”<sup>42</sup> A court may not, however, tax costs incurred “merely for the convenience of the requesting attorney[.]”<sup>43</sup>

A finding that costs incurred were “necessary” to the proceedings requires more than mere assertions from the party requesting payment.<sup>44</sup> The dividing line between “necessary,” and “for the convenience of counsel,” however, is not particularly well established. Some courts preclude recovery of “investigative” costs (as not “necessary” for trial).<sup>45</sup> Others

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documents received as evidence or prepared for use in presenting evidence).

<sup>42</sup> *Cf.* *Thomas v. Newton*, No. 4:07CV556 AGF, 2009 WL 1851093, at \*3 n.3 (E.D. Mo. June 26, 2009) (where deponent testifies at trial, or is listed on witness list for trial, deposition of witness is “reasonably necessary” for trial preparation).

<sup>43</sup> *Marcus & Millichap Real Estate Inv. Serv. Inc. v. Sekulovski*, No. 07 C 5369, 2010 WL 145785, at \*9 (N.D. Ill. Jan. 12, 2010); *Padurjan v. Aventura Limousine & Transp. Serv., Inc.*, No. 08-20128-CIV, 2009 WL 4633526, at \*23 (S.D. Fla. Dec. 2, 2009) (“Copies made for the general convenience of counsel or copies of documents already possessed by the prevailing party’s counsel are not recoverable.”); *see also* *McDowell v. Safeway Stores, Inc.*, 758 F.2d 1293, 1294 (8th Cir. 1985) (“Before awarding such costs, the court should determine that transcripts were not obtained primarily for the convenience of parties but were necessary for use in the case.”).

<sup>44</sup> *See* *Pioneer Natural Res. USA, Inc. v. Diamond Offshore Drilling, Inc.*, No. 05-0224, 2009 WL 4020563, at \*2 (E.D. La. Nov. 17, 2009) (“[B]efore the Court can tax costs, it must find that the costs were necessarily incurred in the litigation, and this finding must be based on some proof of the necessity.”) (citing *Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994)); *see also* *Pioneer*, 2009 WL 4020563, at \*2 (“When cost-seekers neglect to supply any verification that the costs claimed were ‘necessarily incurred in the case’ and instead state only that the costs were expended ‘in the preparation and litigation of this case,’ the district court does not abuse its discretion by denying all costs except filing fees.”) (quoting *Sanders v. Wash. Mut. Home Loans, Inc.*, Nos. 05-2166, 06-1996, 2009 WL 365683, at \*11 (E.D. La. Feb. 10, 2009)).

<sup>45</sup> *See* *Transamerica Life Ins. Co. v. Lincoln Nat’l Life Ins. Co.*, No. C06-110-MWB, 2009 WL 2584838, at \*5 (N.D. Iowa Aug. 17, 2009) (“When such costs are incurred before the filing of a case, they appear, without more, to be investigatory and not necessarily obtained for use in the case.”) (reducing award for depositions taken in earlier case). *But see* *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006) (“Even if a deposition is not introduced at trial, a district court has discretion to award costs if the deposition was necessarily obtained for use in a case and was not ‘purely investigative.’”) (citation omitted in original); *Slagenweit v. Slagenweit*, 63 F.3d 719, 721 (8th Cir. 1995) (taxing of costs for deposition transcript not introduced at trial appropriate because it was “not shown that the deposition was purely investigative” or that the transcript was obtained “for reasons other than trial preparation”); *Davis v. City of Springfield*, Nos. 04-3168, 07-3096, 2010 WL 375180, at \*2 (C.D. Ill. Jan. 22, 2010) (cost of transcripts of deposition taken in

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preclude recovery for “convenience” services, such as expedited transcripts.<sup>46</sup> And costs for multiple copies, or attorney correspondence, may be rejected as a “convenience,” rather than trial preparation.<sup>47</sup> On this approach, some courts have rejected the costs of electronic scanning of documents as a mere “convenience.”<sup>48</sup>

**V. ARE PREPARATION AND PRESENTATION COSTS COMPENSABLE?**

The question arises as to what Section 1920 means by “exemplification and . . . copies.” Some courts have read the term “narrowly,” as focusing solely on “physical preparation and duplication of documents, not the intellectual effort involved in their production.”<sup>49</sup> These terms, on that view, could be read to exclude extraction or other preparation of data.<sup>50</sup> Further, Rule 54(d) expressly excludes “attorney’s fees” from the definition of

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related case compensable where “reasonably required” to defend main case, and “[counsel] asked questions in those depositions” that related to main case).

<sup>46</sup> See *Paul N. Howard Co. v. P.R. Aqueduct & Sewer Auth.*, 110 F.R.D. 78, 81 (D.P.R. 1986) (noting that convenience services, such as expedited transcripts, are not within scope of Section 1920).

<sup>47</sup> See *Rundus v. City of Dallas*, No. 3-06-CV-1823-BD, 2009 WL 3614519, at \*2 (N.D. Tex. Nov. 2, 2009) (“[C]harges for multiple copies of documents, attorney correspondence, and other such items are not taxable as costs.”); see also *Horizon Hobby, Inc. v. Ripmax Ltd.*, No. 07-CV-2133, 2009 WL 3381163, at \*6 (C.D. Ill. Oct. 15, 2009) (noting that where party produced “hard copies” of documents in discovery, it could not also recover costs related to electronic copies of same documents).

<sup>48</sup> See *Roehrs v. Conesys, Inc.*, No. 3:05-CV-829-M (BH), 2008 WL 755187, at \*3 (N.D. Tex. Mar. 21, 2008) (scanning of documents into electronic format for “convenience for counsel” was not “necessary,” thus not a recoverable cost); *Conoco, Inc. v. Energy & Env’tl Int’l, L.C.*, No. Civ.A. H-01-4242, 2006 WL 734396, at \*2 (S.D. Tex. Mar. 22, 2006) (finding that copying costs must be necessary and not for mere “convenience of counsel.”); but see *Cargill Inc. v. Progressive Dairy Solutions, Inc.*, No. CV-F-07-0349-LJO-SMS, 2008 WL 5135826, at \*6 (E.D. Cal. Dec. 8, 2008) (where “invoice-case management was done electronically because of the volume of documents, [and] scanning of documents was necessary to provide an adequate defense to the several motions and trial presentation,” such costs were recoverable).

<sup>49</sup> *Romero v. City of Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989) (“Section 1920(4) speaks narrowly of ‘[f]ees for exemplification and copies’”).

<sup>50</sup> See, e.g., *Rundus*, 2009 WL 3614519, at \*4 (cost of “Bates labeling,” CDs and “coding” not recoverable, as these are “incidental expenses,” not copying); *Petersen v. Union Pacific R.R. Co.*, No. 06-3084, 2009 WL 2163470, at \*4 (C.D. Ill. July 17, 2009) (DVD and shipping charges, together with charges for copying from VHS to DVD disallowed as “these items do not fit any of the categories of taxable costs”); *Fells v. Va. Dep’t of Transp.*, 605 F. Supp.2d 740, 743 (E.D. Va. 2009) (noting that the “costs of . . . ‘initial processing, Metadata extraction [and] file conversion’” not recoverable).

recoverable costs to be awarded a prevailing party.<sup>51</sup> Thus, to the extent that search and extraction of documents, even if done by machine, corresponds to work that might be handled by lawyers and paralegals, some courts have disallowed costs for such efforts.<sup>52</sup>

A more modern view of “exemplification and copies,” however, takes account of changes in technology.<sup>53</sup> Thus, in *CBT Flint*, the court, noting that e-discovery services were “not the type of services that attorneys or paralegals are trained for or capable of providing,” held that such services are “the 21<sup>st</sup> Century equivalent of making copies.”<sup>54</sup>

When in doubt, courts might simply exercise their discretion to exclude costs that are not clearly connected to the exemplification and copying process.<sup>55</sup> Thus, for example, the costs of on-line

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<sup>51</sup> FED. R. CIV. P. 54(d)(1).

<sup>52</sup> See, e.g., *Kellogg Brown & Root, Int’l Inc. v. Altanmia Comm. Mktg. Co.* W.L.L., No. H-07-2684, 2009 WL 1457632, at \*5 (S.D. Tex. May 26, 2009) (“The steps of extracting data from an electronic medium, and storing it for possible use in discovery is more like the work of an attorney or legal assistant in locating and segregating documents that may be responsive to discovery than it is like copying those documents for use in a case.”); *Klaymin v. Freedom’s Watch, Inc.*, No. 07-22433-CIV, 2008 WL 5111293, at \*2 (S.D. Fla. Dec. 4, 2008) (costs to search, find and retrieve discoverable ESI would be incurred by lawyers and paralegals in paper context; thus, costs not compensable); *Windy City Innovations, LLC v. AOL, Inc.*, No. 04 C 4240, 2006 WL 2224057, at \*3 (N.D. Ill. July 31, 2006) (disallowing costs of electronic coding and keyword searching, because, in absence of electronic system, work would be performed by an attorney or paralegal).

<sup>53</sup> See *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 428 (7th Cir. 2000) (finding “no limits inherent in the term ‘exemplification’ that would . . . preclude [a court] from compensating a party for . . . computer-based, multimedia displays,” and that “[t]his approach allows appropriate room for the more sophisticated types of multi-media presentations made possible by technological advances.”).

<sup>54</sup> *CBT Flint Partners, LLC v. Return Path, Inc.*, No. 1:07-CV-1822-TWT, 2009 WL 5159761, at \*5 (N.D. Ga. Dec. 30, 2009); see also *Davis v. City of Springfield*, No. 03-3007, 2008 WL 818331, at \*8 (C.D. Ill. Mar. 20, 2008) (finding two-thirds of costs of court-appointed vendor, assigned to assist parties in copying data, recoverable); *Neutrino Dev. Corp. v. Sonsite, Inc.*, No. H-01-2482, 2007 WL 998636, at \*4 (S.D. Tex. Mar. 30, 2007) (costs of extracting privileged metadata recoverable under Section 1920(3) as “fees and disbursements for printing,” because alternative was to print paper copies of hundreds of documents).

<sup>55</sup> See *Computer Cache Coherency Corp. v. Intel Corp.*, 2009 WL 5114002, at \*4 (N.D. Cal. Dec. 18, 2009) (Bates-numbering and electronic scanning costs recoverable as part of reproduction costs, but OCR and metadata extraction costs not recoverable as “merely for the convenience of counsel”); see also *Richardet v. Murdale True Value*, 2009 WL 3853823, at \*2 (S.D. Ill. Nov. 18, 2009) (in ruling on costs for “exemplification” of exhibits, “the costs must be

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research and travel expenses may not be recoverable as exemplification and copying costs.<sup>56</sup> Similar standards may apply to the costs associated with “exemplification” of exhibits at trial.<sup>57</sup>

**VI. WHAT ARE “REASONABLE” FEES FOR EXEMPLIFICATION AND COPIES?**

Rule 54(d) and Section 1920 do not require compensation for exemplification and copying at any specified statutory rate. The Advisory Committee Notes to Rule 54, however, largely addressing the separate question of attorney’s fees, do suggest that “local rates” or “customary rates” should generally determine the appropriateness of an award.<sup>58</sup> Some authority suggests that similar “local rates” analysis should apply to costs for exemplification and copying.<sup>59</sup>

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associated with ‘creation,’ as opposed to mere packaging and display or ‘glitz”).

<sup>56</sup> See, e.g., *OneBeacon Ins. Co. v. First Midwest Bank*, 2009 WL 2612518, at \*2 (N.D. Ill. Aug. 24, 2009) (costs of on-line research and retrieval of documents through PACER system not compensable as such costs are “recoverable only as part of an award of attorney’s fees”) (citing *Haroco, Inc. v. Am. Nat’l Bank & Trust Co.*, 38 F.3d 1429, 1440 (7th Cir. 1994) for proposition that “computer research costs are more akin to awards under attorney’s fees provisions than under costs.”); *Baum Research & Dev. Co. v. Univ. of Mass. at Lowell*, 2009 WL 2095982, at \*7 (W.D. Mich. July 14, 2009) (legal research expenses and travel and lodging costs not reimbursable).

<sup>57</sup> Compare *Transamerica Life Ins. Co. v. Lincoln Nat’l Life Ins. Co.*, 2009 WL 2584838, at \*10–11 (N.D. Iowa Aug. 17, 2009) (use of courtroom technology, including expenses of vendor, to present exhibits in “efficient and effective manner” part of exemplification where both parties used such technology, but declining to award cost of vendor’s travel, food and lodging) and *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 557388, at \*3–4 (N.D. Ill. Mar. 22, 2004) (collecting cases in which courts have upheld an award of costs for graphic services, multimedia equipment rental and multimedia presentations) with *Tesler v. Costa Croccherie S.p.A.*, 2009 WL 1851091, at \*3 (S.D. Fla. June 29, 2009) (no statutory authority for award of costs for “equipment rental or fees charged by videographer for playback of video depositions at trial”) (quoting *Morrison v. Reichhold Chem. Inc.*, 97 F.3d 460, 465–66 (11th Cir. 1996)); and *Chevron v. Aker Maritime, Inc.*, 2008 WL 594650, at \*16 (E.D. La. Jan. 2, 2008) (assistance of electronics technicians at trial did not constitute compensable “exemplification”).

<sup>58</sup> See FED. R. CIV. P. 54, Advisory Committee Notes (“[C]ourt may order disclosure of additional information, such as that bearing on prevailing local rates . . .”); *id.* (explaining how local rules might “establish[] a schedule reflecting customary fees or factors affecting fees within the community”). A partial schedule for certain expenses, not covered as “costs” (per diem for witnesses, and mileage) appears at 28 U.S.C. § 1821 (2010).

<sup>59</sup> See *Mawulawde v. Bd. of Regents of the Univ. Sys. of Ga.*, 2009 WL 3753986, at \*4 (S.D. Ga. Nov. 9, 2009) (stating that rate for copies “should

The e-discovery context, however, may present some unique challenges to courts, in determining what are “reasonable” costs for exemplification and copying. A recent survey suggests that more than six hundred providers of electronic discovery services exist nationwide.<sup>60</sup> Many major corporations, moreover, have begun to take their e-discovery services “in house,” to help them reduce costs.<sup>61</sup> A host of variables (size of project, time to completion, location of custodians, and many others) may affect the costs of a project.<sup>62</sup> As a result, accounting for the reasonable costs of e-discovery may be difficult.<sup>63</sup>

Ultimately, the question of cost calculation may turn on the burden placed on the applicant to show that its cost requests are “reasonable in amount and necessity.”<sup>64</sup> At least one court, moreover, has recognized that self-interest generally should

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approximate the rate of local print shops, unless a higher in-house rate is factually supported as reasonable by the party requesting costs.” (citations omitted). *But see Marcus & Millichap*, 2010 WL 145785, at \*11 (“[N]o requirement that counsel survey local retailers every time [they have] a large photocopying job.”).

<sup>60</sup> George Socha & Tom Gelbmann, *Strange Times*, LAW.COM, Aug. 1, 2009, <http://www.law.com/jsp/PubArticle.jsp?id=1202435558482>. For details on the Socha-Gelbmann survey, see [www.sochaconsulting.com](http://www.sochaconsulting.com).

<sup>61</sup> See Christopher Musico, *E-Discovery Requests Set to Rise in 2010*, DESTINATIONCRM.COM, Jan. 8, 2010, <http://www.destinationcrm.com/Articles/CRM-News/Daily-News/E-Discovery-Requests-Set-to-Rise-in-2010-60124.aspx> (explaining that a recent study found “more companies are beginning to dedicate leadership and staff specifically to e-discovery, comparable to the effort some organizations have undertaken in customer service by appointing chief experience officers”); see also *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 237 (1st Cir. 1997) (noting that where services are performed in-house, “[e]ven if only by reasoned approximation,” the prevailing party must either “demonstrate the various components” of its in-house copying costs (“e.g., the prorated cost of purchasing or leasing the photocopier, the copy paper, and salaries attributable to making the copies), or show the prevailing cost of comparable outside copy services”).

<sup>62</sup> See FindLaw.com, Law & Legal Information, <http://technology.findlaw.com/electronic-discovery/electronic-discovery-guide/processing/project-scope/> (last visited May 14, 2010) (“[D]ataset sizes and types, timeframes for processing, and the complexity of the processing requirements drive the scope of the project. This scope will ultimately drive the cost.”).

<sup>63</sup> Daniel Garrie, *Indirect Costs of Electronic Discovery (e-discovery)*, J. LEG. TECH. RISK MGMT., Feb. 8, 2010, <http://www.ltrm.org/2010/02/08/indirect-costs-of-electronic-discovery-e-discovery/> (“[T]he impact of e-discovery on [a] business is difficult to quantify . . . The costs can extend beyond the e-discovery fees for a particular case.”).

<sup>64</sup> *OneBeacon Ins. Co. v. First Midwest Bank*, 2009 WL 2612518, at \*2 (N.D. Ill. Aug. 24, 2009) (awarding of costs must be “reasonable in amount and necessity,” and the prevailing party has the “burden of demonstrating the amount of its recoverable costs.”) (citations omitted).

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motivate responding parties to reduce discovery costs, since it is unlikely that a party would “increase its costs unnecessarily without knowing that it would prevail at trial.”<sup>65</sup> Indeed, the court noted that, in light of this “market” constraint on unnecessary costs, “it is not the Court’s job to pore through the voluminous record” in search of “unnecessary costs.”<sup>66</sup>

**VII. HOW MUCH DETAIL IS REQUIRED TO SUSTAIN AN AWARD OF COSTS?**

A district court retains discretion to determine the “details” required to support a request for costs.<sup>67</sup> At a minimum, a prevailing party must provide “some basis by which the court may exercise its obligation to fully scrutinize” cost requests.<sup>68</sup> A party seeking copying cost recovery is “not required to identify all of the documents copied,” but must at least provide a “breakdown” of the costs incurred.<sup>69</sup>

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<sup>65</sup> *Petersen, v. Union Pac. R.R. Co.*, 2009 WL 2163470, at \*4 (C.D. Ill. July 17, 2009).

<sup>66</sup> *Id.* (“[P]ainstaking judicial inspection of fee claims (and especially cost claims) is unnecessary when there is a market constraint on running up excessive expenses.”) (citing *Anderson v. Griffin*, 397 F.3d 515, 522 (7th Cir. 2005)). *See also Griffin*, 397 F.3d at 522 (“When taking depositions the defendants could have had no confidence that they were going to win the case and thus be able to submit a bill of costs, or that if they won and therefore could submit such a bill the plaintiffs would have the wherewithal to pay it. So they had an incentive not to take unnecessary depositions or otherwise incur excessive costs. That incentive was a better check on extravagance than would be a court’s effort to decide after the fact whether a particular expenditure was sensible given its anticipated contribution to a favorable outcome of the litigation.”).

<sup>67</sup> *Trustees of the Chicago Plastering Institute Pension Trust v. Cork Plastering Co.*, 570 F.3d 890, 904 (7th Cir. 2009) (noting that it was “within the court’s discretion to require the additional details it found missing from . . . [a] plaintiff’s documentation”); *DP Solutions, Inc. v. Rollins*, 353 F.3d 421, 434 (5th Cir. 2003) (discussing how district courts retain discretion to determine “level of specificity necessary” to support award of costs).

<sup>68</sup> *Peltz v. Moretti*, No. 1-05-CV-2643, 2009 WL 3447419, at \*5, 8 (N.D. Ohio Sept. 21, 2009) (stating that where court was “without any record to carefully scrutinize prior to awarding any costs,” award should be denied without prejudice to further submission) (citation omitted); *see also United States v. Viking Resources, Inc.*, 2009 WL 2605286 at \*2 (S.D. Tex. Aug. 20, 2009) (explaining that bill of costs for copies, merely listing expenditures, without explanation, is insufficient).

<sup>69</sup> *Petersen*, 2009 WL 2163470, at \*3 (citation omitted); *see In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 237 n.20 (1st Cir. 1997) (“In the case of photocopying, counsel should inform the Court of the number of copies, the cost of each copy, and provide, if possible, a breakdown of the reasons why photocopying of certain documents was necessary.”) (quoting *In re Motor*

Where a movant fails to provide “any indication as to the nature, purpose and billing rate” for copying charges, a request for costs may be denied.<sup>70</sup> Alternatively, the court may reduce the award, or make its own reasonable estimate of the appropriate amount of the award.<sup>71</sup> On “rare occasions,” a court may determine that discovery on cost issues “would be useful to the parties.”<sup>72</sup> Courts, however, generally discourage “satellite litigation” on the question of fees and costs in a case.<sup>73</sup>

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Freight Express, 80 B.R. 44, 46 (Bankr. E.D. Pa. 1987)); *Fogelman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991) (explaining that although prevailing party need not “identify every Xerox copy made for use in the course of legal proceedings,” party must make “some demonstration that reproduction costs necessarily result from that litigation.”); *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 643 (7th Cir. 1991) (discussing how a party seeking costs is required to provide “the best breakdown obtainable from retained records.”); *Rundus v. City of Dallas*, No. 3-06-CV-1823-BD, 2009 WL 3614519, at \*2 (N.D. Tex. Nov. 2, 2009) (“Although the prevailing party need not ‘identify every xerox copy made for use in the course of a legal proceeding,’ there must be some nexus between the costs incurred and the litigation.”) (citing *Fogelman*, 920 F.2d at 286); *Smith v. Augustine*, 2009 WL 1748235, at \*4–5 (N.D. Ill. June 18, 2009) (awarding costs to party that provided “comprehensive breakdown of what documents were copied, in addition to the price per copy;” and denying award to other party that “fail[ed] to identify anything actually copied”).

<sup>70</sup> See *Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 2009 WL 5127941, at \*3 (S.D. Fla. Nov. 6, 2009) (explaining that the cost award must be denied); *Barrett v. Ambient Pressure Diving, Ltd.*, 2009 WL 3435852, at \*3–4 (D.N.H. Oct. 19, 2009) (explaining that where a defendant offered “no affidavit or other evidence” to establish whether processing of computer records constituted “exemplification,” and invoices for services provided “no useful explanation,” cost award denied).

<sup>71</sup> See, e.g., *Horizon Hobby, Inc. v. Ripmax Ltd.*, No. 07-CV-2133, 2009 WL 3381163 at \*5 (C.D. Ill. Oct. 15, 2009) (explaining that where a party had not “presented an adequate explanation” why copies were “necessary and reasonable,” and large volume of copies were “likely made for the convenience” of counsel, court made “reasonable estimation of the number of copies truly necessary,” and reduced cost award); *Padurjan v. Aventura Limo. & Transp. Serv., Inc.*, 2009 WL 4633526, at \*23 (S.D. Fla. Dec. 2, 2009) (explaining that where counsel failed to attach invoices and failed to provide details of copying costs, award of costs reduced by seventy-five percent, with court recognizing that “some amount of copies were necessarily obtained for use in the case because the docket reflects over 200 entries and the case involved significant discovery”).

<sup>72</sup> FED. R. CIV. P. 54, Advisory Committee Notes.

<sup>73</sup> See *Qad, Inc. v. ALN Assocs., Inc.*, 807 F. Supp. 465, 467 (N.D. Ill. 1992) (“[T]he very process of judicial intervention increases the costs to the parties (the fees-on-fees component) and to the system itself (the so-called satellite litigation problem) . . . [thus] where fee-shifting has been found necessary, and where the factors are such as to make the market a reliable source of information, this Court’s continuing sense of the matter is that the inquiry into the proper measure for such fee-shifting ought to begin and end right there.”);

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## VIII. HOW DOES RULE 68 AFFECT AN AWARD OF COSTS?

Rule 68 of the Federal Rules of Civil Procedure provides that at any time, more than ten days before trial, “a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms[.]”<sup>74</sup> If the opposing party accepts the offer, within ten days, judgment may be entered.<sup>75</sup> “An unaccepted offer is considered withdrawn, but . . . does not preclude a later offer.”<sup>76</sup> “Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.”<sup>77</sup> Even where liability has been established, so long as the “extent of the liability remains to be determined by further proceedings, the party [found] liable may make an offer of judgment.”<sup>78</sup> “If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.”<sup>79</sup>

These provisions of Rule 68 were intended to “encourage settlements and avoid protracted litigation.”<sup>80</sup> In substance, Rule

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*see also* Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (determining that a request for fees “should not result in a second major litigation”); Miller v. Artistic Cleaners, 153 F.3d 781, 784 (7th Cir. 1998) (noting need to avoid “satellite litigation solely on fees”); Alexander v. Mayor and Council of the Town of Cheverly, 953 F.2d 160, 161 (4th Cir. 1992) (deciding that in view of the “specter of satellite litigation,” appellate review of lower court decisions on fees is “limited”).

<sup>74</sup> FED. R. CIV. P. 68(a).

<sup>75</sup> Several proposals for reform of Rule 68 have circulated over the past few years. *See, e.g.*, John E. Shepard, *Likely Consequences of Amendments To Rule 68, Federal Rules of Civil Procedure*. Federal Judicial Center 1, 2 (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule68.pdf/\\$file/rule68.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule68.pdf/$file/rule68.pdf) (suggesting revisions to Rule 68 to permit offers by any party, and to provide “more significant incentives for making or accepting reasonable offers”). *See generally* Elaine A. Carlson, *Fee Shifting in Texas: Understanding the New Offer of Settlement Practice*, J. TEX. CONSUMER L. 36, 36–39, available at <http://www.jtexconsumerlaw.com/V7N1pdf/V7N1feeshifting.pdf> (reviewing advantages and disadvantages of Rule 68, and proposed amendments).

<sup>76</sup> FED. R. CIV. P. 68(b).

<sup>77</sup> *Id.*

<sup>78</sup> FED. R. CIV. P. 68(c).

<sup>79</sup> FED. R. CIV. P. 68(d).

<sup>80</sup> *See* FED. R. CIV. P. 68, Advisory Committee Notes (1948); Thomas D. Rowe, Jr., *Offer of Judgment*, 13 Moore’s Fed. Pract. § 68.02[2] at 68-6 (2000) (explaining that the primary purpose of Rule 68 is to promote “settlements and avoid protracted litigation”); J. Karen Arnold, *Delta Air Lines, Inc. v. August: Taking the Teeth Out of Rule 68*, 43 U. PITT. L. REV. 765, 768 (1982) (discussing how Rule 68 was intended as “regulatory device for controlling unnecessary litigation”). Similar rules, with similar purposes, exist at the state level. *See* Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment And Its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL.

68 changes the definition of “prevailing party” (used in Rule 54) to include a party that manages to contain its liability. For Rule 68 purposes, a party that offers judgment is prevailing if the opposing party does not obtain a judgment in excess of the amount offered.<sup>81</sup>

Because Rule 68 (like Rule 54) uses the term “costs,” the same questions of cost-shifting for e-discovery costs may arise in the context of Rule 68 settlement offers, as they do in the context of prevailing party requests for costs. Judge Scheindlin, in one of the early *Zubulake* decisions, for example, ordered restoration of backup tapes, and suggested that the defendant could shift the costs of such work by making a Rule 68 offer of judgment.<sup>82</sup> Similarly, at least one recent decision suggests that a prevailing plaintiff, who turned down an offer in excess of the amount recovered at trial, could not recover for copying costs incurred after the offer was made.<sup>83</sup> Thus, if “costs” in the Rule 54 context include e-discovery costs, arguably “costs” in the Rule 68 context connote the same thing.

#### IX. COULD COST AWARDS AFFECT E-DISCOVERY PRACTICE?

To date, as the foregoing summary of cases suggests, the predictability of court awards of costs for e-discovery (especially costs related to presentation, extraction and processing of data) has been somewhat limited. One can imagine, however, several steps that parties and courts may take, to harness the power of cost awards to control excessive discovery demands.

Parties responding to discovery requests might object to the requests on grounds of undue burden. In addition, they might indicate that, if they prevail in the litigation, they will seek to recover the costs of discovery (including, with some particularity, the costs of steps deemed unduly burdensome). Similar itemization of undue costs might accompany any Rule 68 offer a party may choose to make. At the end of the case, if the responding party seeks to recover costs, it might point to the

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51, 63-64 (1997) (noting that most states have adopted Rule 68 in some form).

<sup>81</sup> See FED. R. CIV. P. 68, Notes on Decisions: Purpose (4) (protecting “the party who is willing to settle from burden of costs which subsequently accrue”).

<sup>82</sup> See *Zubulake v. UBS Warburg LLC.*, 217 F.R.D. 309, 311, 317, 324 (S.D.N.Y. 2003).

<sup>83</sup> See *Richardet v. Murdale True Value*, Civil No. 07-368-MJR, 2009 WL 3853823, at \*1 n.2 (S.D. Ill. Nov. 18, 2009) (“A plaintiff who turns down the offer and then does worse at trial has to pay the defendant’s costs (and his own).”) (citing *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999)).

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objection as (at least) providing notice to the other party of its views on the scope of compensable costs.

The scope (and amount) of compensable costs might also be an appropriate issue for discussion during Rule 26 “meet and confer” discovery conferences between parties.<sup>84</sup> If the parties agree on the scope (and amount) of compensable costs, such agreement may be enforceable even if the court would not otherwise have authority to impose such costs (due to limitations in the rules).<sup>85</sup> Discussion of the methods and the associated costs for e-discovery, moreover, may encourage both parties to choose more efficient processes and providers. Where the producing party has told the requesting party, in advance, what solutions it has chosen, and what the costs of such solutions may be, the requesting party may have difficulty, in opposing an award of costs, to second-guess the propriety of the methods selected.

The imposition of costs may also serve as a valuable tool for courts. Where a party objects to certain discovery costs on grounds of undue burden, a court might (in some circumstances) permit the discovery, but then explicitly state that such costs will be taxable at the end of the case.<sup>86</sup>

Parties facing discovery costs that are not justified by the amount at stake in a litigation, moreover, may choose to make a Rule 68 offer of judgment, to place some limit on the amount of exposure to such costs, and to encourage settlement. The risk that such costs may be imposed on a recalcitrant plaintiff, otherwise unwilling to cooperate in reaching a reasonable settlement, may change the dynamics of the settlement process.<sup>87</sup>

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<sup>84</sup> See FED. R. CIV. P. 26(f)(2) (noting that when parties conference, they discuss everything from the basis and nature of their claims to possibilities of settlements or resolution of the case).

<sup>85</sup> See *In re Apollo Group, Inc. Sec. Litig.*, CV 04-2147-PHX-JAT (LEAD), CV 04-2204-PHX-JAT, CV 04-2334-PHX-JAT, 2009 WL 2169178, at \*1–2 (D. Ariz. July 17, 2009) (“In determining the scope of taxable costs, courts are limited to the items enumerated in § 1920 and items authorized by contract or statute.”); see also *Woodard v. STP Corp.*, 170 F.3d 1043, 1045 n.3 (11th Cir. 1999) (“[A]ssessment of attorney’s fees and costs may be authorized by contract or statute.”); *Harbor Ins. Co. v. Schnabel Found. Co.*, 992 F. Supp. 431, 435 (D.D.C. 1997) (“[W]hen a contract includes an attorneys’ fees provision[,] the Court has the discretion to decide the means of proof necessary to establish the appropriate amount.”).

<sup>86</sup> See *Overlap, Inc. v. Alliance Bernstein Inv. Inc.*, No. 07-0161-CV-W-ODS, 2008 WL 5780994, at \*2–3 (W.D. Mo. Dec. 29, 2008) (ordering defendant to recover and produce data from backup tapes, and noting that “this expense qualifies as a component of the cost to be awarded to the prevailing party”).

<sup>87</sup> *But cf.* Kevin F. Amratuzio & Joyce L. Jenkins, *Application of The “Offer of*

More generally, courts and rule-makers (as well as Congress) may wish to study the potential benefits associated with defining (and perhaps extending) the scope of compensable e-discovery costs. Just as Section 1920 was updated to recognize that “copies,” in the modern age, means much more than paper copies, it may be desirable to specify what the “exemplification” and “copying” process truly involves, in an era of ubiquitous use of electronically stored information.

#### X. CONCLUSION

As the song goes, “money changes everything.”<sup>88</sup> In the case of e-discovery, where a party perceives that it can obtain leverage in a case by inflicting burden on another through discovery requests, it has an incentive to “push the edges of the envelope” in pursuing such requests. The risk of the imposition of the costs of e-discovery at the end of a case, reflected in the trend of the rulings outlined above, may serve to recalibrate the incentives, and encourage a more reasonable, efficient and targeted approach to discovery.

The precise shape of this trend toward awarding costs for e-discovery expenses is yet to be charted. In particular, state courts, which often—but do not always—follow federal rules and precedent, will no doubt develop their own approaches to this cost issue.<sup>89</sup> Further, the related question arises whether non-parties, responding to subpoenas, may recover their costs for

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*Settlement” Statute: Less Than Legislative Intent?*, COLO. LAW. 2557 (1995) (“[U]nlikely that any significant proportion of litigants will generate exorbitant or unnecessary litigation expenses merely in the hope of ‘punishing’ an opponent who declines an offer of settlement.”).

<sup>88</sup> For the lyrics to “Money Changes Everything” see Cyndi Lauper Lyrics, “Money Changes Everything,” [http://www.oldielyrics.com/lyrics/cyndi\\_lauper/money\\_changes\\_everything.html](http://www.oldielyrics.com/lyrics/cyndi_lauper/money_changes_everything.html) (last visited May 14, 2010).

<sup>89</sup> *Compare* Zurich Am. Ins. Co. v. Wis. Physicians Serv. Ins. Corp., 306 Wis.2d 617, 640-41 (Wis. Ct. App. 2007) (“This is clearly a [case] where the law has not kept pace with technology . . . [u]nless the legislature revises the statute to add electronic reproduction/imaging to the statute as an item of cost, imaging costs do not fall within the costs statutes . . .”) with *El Dorado Meat Co. v. Yosemite Meat & Locker Serv., Inc.*, 58 Cal. App. 4th 612, 616-17, 620 (Cal. Ct. of App. 2007) (under statute permitting recovery of costs for “exhibits and photocopies of exhibits . . . reasonably helpful to aid the trier of fact[,]” \$111,063 in billings for personnel required to summarize raw data for purposes of exhibit that permitted party to “mount its defense” was recoverable; “[t]he idea that the cost is not allowable because the exhibit could have been created using adding machines, ledger paper, and pencils instead of electronic databases is antiquated”).

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producing electronic information.<sup>90</sup> Developments in these areas, like those in the general arena of “costs” under Rule 54 of the Federal Rules of Civil Procedure, will no doubt be greatly affected by changes in information technology, and best practices in litigation.<sup>91</sup>

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<sup>90</sup> Rule 45(d) of the Federal Rules of Civil Procedure (which applies to non-parties), like its counterpart in Rule 26(b)(2) (which applies to parties), provides that a court may “specify conditions” for discovery, which may include a shifting of the costs of responding to a subpoena. *See* *Guy Chem. Co. v. Romaco A.G.*, 243 F.R.D. 310, 311-313 n.1 (N.D. Ind. 2007) (explaining that despite general presumption that responding party must bear the expense of complying with discovery requests, pursuant to Rule 45(d), court granted motion to compel compliance with subpoena, on condition that requesting party pay all costs of production, estimated at \$7,200 in costs to search for and produce electronic information; noting, “[s]imply put, it is not ABRO’s lawsuit and they should not have to pay for the costs associated with someone else’s dispute”). Similarly, Rule 45(c)(2)(B)(ii) provides that, on motion to compel production in response to a subpoena, the order must protect the responding non-party from “significant expense” resulting from compliance. Thus, a non-party may (at the court’s direction) recover not only its costs of copying, but legal fees associated with compliance with a subpoena. *See In re First Am. Corp.*, 184 F.R.D. 234, 240-41 (S.D.N.Y. 1998) (“A nonparty’s legal fees, especially where the work benefits the requesting party, have been considered a cost of compliance reimbursable” under Rule 45) (citing cases). Finally, Rule 45(c)(3)(C)(ii) permits a court, on motion to quash a subpoena, to specify conditions for compliance with the subpoena that “ensure[] that the subpoenaed person will be reasonably compensated.” FED. R. CIV. P. 45(a)(3)(C)(ii).

<sup>91</sup> For an overview of best practices in electronic document management and litigation, *see generally* THE SEDONA CONF., THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (2d ed. Nov. 2007), *available at* [www.thesedonaconference.org](http://www.thesedonaconference.org); *see also* THE SEDONA CONF., THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2d ed. June 2007), *available at* [www.thesedonaconference.org](http://www.thesedonaconference.org).