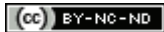


SECTION 1920 AND E-DISCOVERY

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SECTION 1920 AND E-DISCOVERY

Joshua A. Haft*

Electronic discovery (“e-discovery”) presents numerous challenges for attorneys, parties to litigation, and courts, ranging from increased costs to the scope of discovery requests to electronic search protocols. However, relevant changes to the Federal Rules of Civil Procedure and federal statutes related to the changing nature of e-discovery are not keeping pace with these challenges. One commentator has observed that, “compared to the rate of change of technology in the area of e-discovery, rule changes move like molasses.”¹

In the context of costs, one issue that has become increasingly prevalent is the taxation of e-discovery costs to the losing litigant, a procedure that essentially awards to the prevailing party e-discovery costs it incurred.² Given the monetarily significant and growing cost of e-discovery services, it has been argued that awarding costs to the prevailing party could be one way to reign in unnecessary discovery requests.³ One commentator has argued that the ability to impose e-discovery costs can be used as a tool by courts in situations where there is a disagreement over the scope of an e-discovery request.⁴ For example, where one

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¹ Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 18–19 (2004).

² John W. Joyce, *District Court Taxes Losing Litigant \$367,359 in E-Discovery Costs*, LITIGATION NEWS (Sept. 16, 2011), http://apps.americanbar.org/litigation/litigationnews/top_stories/091611-federal-court-e-discovery-taxability.html.

³ Steven C. Bennett, *Are E-Discovery Costs Recoverable By a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537, 554 (2010).

⁴ *Id.* at 555.

party views a cost as an undue burden, the court can grant discovery on the condition that the costs will be taxable to the losing litigant at the conclusion of the litigation.⁵ Perhaps this would encourage litigants to seek only information that is essential to resolve the dispute for fear of having to later pay for an inquiry that amounted to a fishing expedition.⁶

Although Federal Rule of Civil Procedure 54 and 28 U.S.C. § 1920 do not explicitly mention discovery costs, or more specifically, e-discovery costs,⁷ this Note will demonstrate that the advisory committee notes associated with the original 1937 adoption of Rule 54 and the legislative histories of 28 U.S.C. § 1920 and the 2008 amendment to 28 U.S.C. § 1920(4) support the taxation of e-discovery costs to losing litigants. This statutory authority on which numerous courts have relied serves as concrete support for those awards. In arriving at this conclusion, this Note will examine the aforementioned advisory committee notes and legislative histories in detail in Parts C and E. Furthermore, this Note will review a selected set of federal district court and appellate court cases that address the taxation of e-discovery costs in Parts F and G. In that context, this Note will demonstrate that the courts that have held in favor of taxation of e-discovery costs recognize the evolving technological needs in the discovery process in a manner that is consistent with Rule 54, 28 U.S.C. § 1920, and the 2008 amendment to 28 U.S.C. § 1920(4).

A. *The Significance of Legislative History and Its Relevance in Statutory Interpretation*

Controversy has long existed regarding the use of legislative history as a tool of statutory interpretation. However, in 1892, the landmark Supreme Court case *Holy Trinity Church v. United States* overturned the traditional rule preventing judicial decisions from relying on legislative history derived from the congressional record at the time the statute was considered and passed.⁸ *Holy Trinity* was the first time that a majority of the Supreme Court allowed legislative history to carry sufficient weight to trump inconsistent statutory text.⁹ The case has been invoked

⁵ *Id.*

⁶ See Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1109–10 (1993).

⁷ Bennett, *supra* note 3, at 542–43. See 28 U.S.C. § 1920 (2006 & Supp. II 2008); FED. R. CIV. P. 54.

⁸ Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835–36 (1998).

⁹ *Id.* at 1836.

many times to indicate that statutory text would not control in a particular case.¹⁰ *Holy Trinity* addressed the enforcement of the Alien Contract Labor Act of 1885 against a church that imported an English clergyman to serve as its rector.¹¹

According to the statute in question, “it shall be unlawful . . . to . . . assist or encourage the importation or migration, of any alien or aliens . . . into the United States . . . under contract or agreement . . . to perform labor or service of any kind in the United States”¹² In *Holy Trinity*, the Court explained that despite the statutory text, the act was intended to address workforce issues regarding the importation of manual laborers, not professionals, relying on the fact that the common understanding of the terms “labor” or “laborer” did not encompass the duties of preaching or preachers.¹³ The Court then stated: “another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”¹⁴ This statement indicates that Congress’ goal in enacting a particular statute is relevant in determining how that statute should be interpreted.

Subsequently, the Court focused on and discussed Congress’ purpose for the statute in question. The Court referenced a district court case that described as “common knowledge”¹⁵ Congress’ goal of remedying the negative effect on the labor market of a situation in which large capitalists exploited foreign laborers in a system reminiscent of indentured servitude, where employers would pay the immigrants’ travel fare in exchange for some period of work at a very low wage.¹⁶ The explanation also noted that nothing in the congressional committee reports or other parts of the legislative history indicated that the United States had “a surplus of brain toilers.”¹⁷ Congressional intent was further explicated when the Court referenced a house committee report and a senate committee on education and labor report in support of the proposition that the statute was intended only to

¹⁰ *Id.*

¹¹ *Id.* at 1835.

¹² *Holy Trinity Church v. United States*, 143 U.S. 457, 458 (1892).

¹³ *Id.* at 463.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 463–64.

¹⁷ *Id.* at 464.

encompass manual, unskilled laborers.¹⁸ Ultimately, the Court held that although the church's conduct in importing the clergyman was explicitly covered by the statute, Congress did not intend it to apply to professional workers such as clergymen.¹⁹ Although the holding was unequivocal, at least one commentator has argued that the Court misread the legislative history in *Holy Trinity* in that the relevant legislative history actually supported the plain language of the statute and thus, a ruling against the church.²⁰

In contrast to the aforementioned use of legislative history, several highly influential textualist members of the judiciary argue against the use of legislative history as an authoritative indication of congressional intent when construing the meaning of a statute.²¹ The textualist argument is based on two major premises: (1) the 535-member Congress does not have a “‘genuine’ collective intent with respect to matters left ambiguous by the statute itself,”²² and (2) legislative history has not been voted upon by Congress or signed by the President and thus, it should not be given “decisive weight” or “dispositive effect.”²³ It has also been argued that textualism serves as a way to protect separation of powers and prevent “legislative self-delegation”²⁴ by preventing ambiguous statutes from being interpreted by government officials who do not have the constitutional authority to perform this function (i.e. judges are not constitutionally empowered to legislate).²⁵ Despite this vocal opposition, legislative history is widely used by courts, including the Supreme Court, in statutory interpretation.²⁶

¹⁸ *Id.* at 464–65.

¹⁹ Vermeule, *supra* note 8, at 1835.

²⁰ *Id.* at 1837.

²¹ John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 674 (1997).

²² *Id.* at 675.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286–96 (1976) (applying relevant legislative history to hold that 42 U.S.C. § 1981 is applicable to racial discrimination against white persons in private employment).

B. Federal Rule of Civil Procedure 54

According to Rule 54(d)(1) of the Federal Rules of Civil Procedure, “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”²⁷ Based on the text of this rule, when a party prevails in a case, it can recover costs from the losing party in addition to any award of damages that it receives.²⁸ In addition, Rule 54(d)(1) authorizes the clerk of court to allow costs to the prevailing party on fourteen days’ notice, but allows the court to review the clerk’s action if a motion is served within the next seven days following the clerk’s taxing of costs.²⁹

The Supreme Court has explicitly held in *Crawford Fitting Co. v. J.T. Gibbons, Inc.* that within the seemingly broad discretion for courts to award costs offered by Rule 54(d)(1), a district court is limited to taxation of costs authorized by a federal statute.³⁰ The Court refused to infer that Rule 54(d) or another more general statute resulted in the repeal of a more specific statute, such as 28 U.S.C. § 1920.³¹ In other words, a general statute will not supersede a specific statute without “clear intention otherwise.”³² Thus, when a court awards costs pursuant to Rule 54(d), it cannot authorize costs beyond what Congress has specified in another statute. That said, district courts typically have significant discretion in deciding whether to award costs to the prevailing party in litigation within the context of such a statute and there is a strong presumption that the district court will do so with the appellate court conducting a review for abuse of discretion.³³ Despite the outwardly broad discretion available under Rule 54(d)(1), courts consistently acknowledge that they may only award costs within the scope of the

²⁷ FED. R. CIV. P. 54(d)(1).

²⁸ *Id.* See also Andrew Mast, Note, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825, 1833 (2010).

²⁹ FED. R. CIV. P. 54(d)(1).

³⁰ *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444–45 (1987).

³¹ *Id.* at 445.

³² *Id.*

³³ *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 483 (5th Cir. 2006). See also *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994) (Asserting that there is a prima facie presumption that the prevailing party is entitled to costs and the losing party must overcome that presumption. In addition, “[t]he power to award costs under Rule 54 is a matter within the sound discretion of the district court.”).

statute that authorizes the particular costs that are being assessed.³⁴ Thus, although Rule 54(d) cost awards are reviewed under an abuse of discretion standard, the court's discretion under Rule 54(d) has been limited such that a court cannot award more than costs allowed by § 1920.³⁵ However, a court may exercise its discretion to deny costs to a prevailing party.³⁶

C. Historical Purpose of Rule 54

The 1937 advisory committee notes that accompanied the original Federal Rules of Civil Procedure include a note that specifically examines subsection (d) of Rule 54.³⁷ The advisory committee stated, “[f]or the present rule in common law actions, see *Ex parte Peterson*, 253 U.S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va. L. Rev. 397.”³⁸ These citations provide insight into what the advisory committee envisioned when enacting Rule 54(d) and how the committee anticipated that the courts would implement the Rule.³⁹ Although one might interpret the advisory committee notes to refer to a common law rule changed by the Federal Rules of Civil Procedure, the content of the case and the article cited by the advisory committee notes supports the text of Rule 54(d).

This Note is written in the context of the complexity and ambiguity in the current state of the law regarding taxation of e-discovery costs. Thus, it is

³⁴ See, e.g., *Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1374 (Fed. Cir. 2006). See also *Johnson v. Pac. Lighting Land Co.*, 878 F.2d 297, 298 (9th Cir. 1989) (“[District] court discretion does not include the authority to tax costs beyond those authorized by statute.”).

³⁵ See, e.g., *Summit Tech.*, 435 F.3d at 1374.

³⁶ *Energy Mgmt. Corp.*, 467 F.3d at 483.

³⁷ FED. R. CIV. P. 54(d)(1) advisory committee's note (1937).

³⁸ *Id.*

³⁹ The text of Rule 54(d) in the April 1937 advisory committee report in which this note first appeared is not materially different from the current text of Rule 54(d)(1) and seems to embody the same basic purpose as the current rule. In the April 1937 advisory committee report, the text read as follows:

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law.

Report of Advisory Committee on Rules for Civil Procedure, UNITED STATES COURTS, 135 (Apr. 1937), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf>.

fascinating to note that the Payne article cited by the advisory committee expressed hope that the Federal Rules of Civil Procedure, which were in the process of being written at the time that article was published, would address the issue of costs and revise the statutes related to cost awards to prevailing parties.⁴⁰ The Payne article went on to note that prior to the enactment of the Federal Rules of Civil Procedure, costs were taxed to the losing party unless prohibited by statute or an established principle of law such as the principle that costs are denied to the prevailing party when a court lacks jurisdiction.⁴¹ The Payne article concluded that the law regarding costs is “disconnected and fragmentary.”⁴² In addition, Payne stated that cases (often involving insubstantial amounts of money) were decided haphazardly and “[t]here seems to be no underlying principles of law involved other than that the prevailing party should be reimbursed for a portion of the expense of the litigation.”⁴³ Thus, despite the relative confusion in the common law and the fact that e-discovery represents a significant litigation expense, the pre-Rule 54 common law supports the notion that e-discovery costs are taxable to the losing litigant.

While e-discovery represents a technological evolution that has changed the nature of litigation costs (often resulting in far more significant volumes of discoverable material and thus substantially larger costs),⁴⁴ Rule 54 introduced a broader, all-encompassing definition of cost taxation. The broad definition of costs would establish a principle of law that Payne found to be lacking in this area. The advisory committee did not explain what aspects of Payne’s article were intended to guide Rule 54(d); however, in order to make the law less disconnected and fragmentary, it is essential that all costs that are necessary to litigation, and within the scope of statutory authority, be evaluated and taxed appropriately. It is highly unlikely that the advisory committee sought to perpetuate the lack of clarity that existed in the common law by adopting Rule 54(d).

The 1937 advisory committee note also referenced *Ex parte Peterson* (heard before the Supreme Court under the name *In re Peterson*), in which the plaintiff

⁴⁰ Philip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397, 401, 430 (1935).

⁴¹ *Id.* at 408–09.

⁴² *Id.* at 429–30.

⁴³ *Id.* at 430.

⁴⁴ See David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 MINN. J.L. SCI. & TECH. 151, 151–52 (2011).

brought an action to recover \$21,014.43 that was allegedly due to the plaintiff for coal that was delivered to the defendant.⁴⁵ The defendant denied that the plaintiff presented a complete record of the transactions between the parties and counterclaimed for failure to perform on coal contracts totaling \$9,999.10.⁴⁶ The judge appointed an auditor and stenographer upon motion of the defendant, despite opposition by the plaintiff, to investigate the facts and simplify issues for the jury with costs to be paid by one or both parties as determined by the trial judge.⁴⁷ In deciding this dispute, the Supreme Court addressed the question of whether the trial court had discretion to tax the costs of the auditor and stenographer.⁴⁸ The Court stated that:

Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury.⁴⁹

In further explaining the then current law on the issue, the Court noted several circuits held that printing expenses for records and briefs were taxable to the losing litigant.⁵⁰ The Court held that because there was no federal or state statute and no court rule on these specific costs, auditors' and stenographers' fees could be taxable items "like other expenditures ordered by the court with a view to securing an intelligent consideration of a case."⁵¹ Ultimately, the Court explained, the trial court's order was erroneous in stating that one or both parties should bear the costs, given the long-held rule that "in actions at law the prevailing party is entitled to costs as of right, except in those few cases where by express statutory provision or by established principles costs are denied."⁵² Likewise, the prevailing party was

⁴⁵ *In re Peterson*, 253 U.S. 300, 304 (1920).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 315.

⁴⁹ *Id.*

⁵⁰ *Id.* at 315–16.

⁵¹ *Id.* at 317.

⁵² *Id.* at 318–19 (internal citations omitted).

entitled to “the entire costs in the trial court”⁵³ and the court could not apportion costs based on failure of part of the prevailing party’s claims or other fairness considerations.⁵⁴

The Supreme Court’s statements in *In re Peterson*, cited in the advisory committee note in 1937, support an interpretation of Rule 54(d)(1) that grants cost awards to prevailing parties as long as those costs are not barred by a federal statute.⁵⁵ In the context of this Note, those statements support e-discovery cost awards under 28 U.S.C. § 1920. Even prior to the codification of Rule 54, there was strong support in the common law that prevailing parties were entitled to litigation costs including the use of outside experts such as an auditor and stenographer.⁵⁶ While *In re Peterson* does not, of course, address e-discovery in particular, the opinion emphasized that costs could be taxed when deemed by a court as essential to the litigation.⁵⁷ A similar distinction between essential and non-essential costs has been applied in cases addressing e-discovery costs under Rule 54(d)(1) and § 1920(4) such that e-discovery costs were awarded to the prevailing party where they were deemed necessary, but declined where they were for the convenience of counsel.⁵⁸ E-discovery services represent a technological extrapolation of necessary expert services,⁵⁹ such as auditors or stenographers, because modern litigation often cannot be resolved effectively without those services. Today, relevant information is often stored in electronic databases, especially in litigation involving large business or government entities. Therefore, an examination of the advisory committee note to Rule 54(d) reveals that the cited

⁵³ *Id.* at 318.

⁵⁴ *Id.*

⁵⁵ *See supra* note 37.

⁵⁶ *In re Peterson*, 253 U.S. at 315–16.

⁵⁷ *Id.* at 315.

⁵⁸ *See Tibble v. Edison Int’l*, No. CV 07-5359 SVW (AGRx), 2011 WL 3759927, at *7 (C.D. Cal. Aug. 22, 2011); *Fells v. Va. Dept. of Transp.*, 605 F. Supp. 2d 740, 743–44 (E.D. Va. 2009). These cases will be explored in significant detail in Part F of this Note.

⁵⁹ Courts have recognized that in the context of e-discovery, expert services refer to those highly technical services related to production that are beyond the ability or expertise of attorneys and paralegals. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 168 (3d Cir. 2012), *cert. denied*, 11-1520, 2012 WL 2340866 (U.S. Oct. 1, 2012); *Tibble*, 2011 WL 3759927, at *7–8; *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).

material is consistent with the text of the Rule that provides for cost awards to the prevailing party.

D. § 1920

The text of the relevant statute, 28 U.S.C. § 1920, that has been relied on for taxation of e-discovery costs states that “[a] judge or clerk of any court of the United States may tax as costs the following: . . . (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”⁶⁰ The current statute reflects a 2008 congressional amendment, which modified paragraph (4) of § 1920. Congress removed the term “copies of papers” and changed it to “the costs of making copies of any materials where the copies are.”⁶¹ The removal of the word “papers” holds significance in the context of e-discovery. A significant number of federal district courts and federal appellate courts have interpreted this statute to allow for recovery of e-discovery costs by the prevailing party.

With regard to the types of costs to which § 1920 can be applied, the Supreme Court explained in *Crawford Fitting Co. v. J.T. Gibbons, Inc.* that “[s]ection 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).”⁶² Although § 1920 lists costs that “may” be taxed, that statute does not authorize taxation of costs in addition to what is listed because § 1920 would serve no purpose if Rule 54(d) granted authority to district courts to tax costs as they deem appropriate in a given situation.⁶³ In other words, courts have discretion under Rule 54(d) to award costs listed in § 1920, but they lack discretion to award costs not listed in § 1920. Therefore, § 1920 can be thought of as actually defining the term “costs” that appears in Rule 54(d).⁶⁴ Subsequent to the *Crawford* case, the § 1920 list of taxable costs has been considered an exhaustive list.⁶⁵ The *Crawford* Court was also abundantly clear that § 1920 was not in any way repealed by Rule 54(d) or by any other federal statute that does not specify the cost at issue nor can a federal court tax costs beyond those enumerated in § 1920

⁶⁰ 28 U.S.C. § 1920(4) (2006 & Supp. II 2008).

⁶¹ Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, sec. 6, § 1920(4), 122 Stat. 4291, 4292.

⁶² *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42 (1987).

⁶³ *Id.* at 441.

⁶⁴ *Id.*

⁶⁵ Mast, *supra* note 28, at 1833–34.

“without plain evidence of congressional intent to supersede [this] section[].”⁶⁶ Although courts may not tax costs beyond those included in § 1920, courts generally have the ability to interpret the meaning of the items listed in § 1920.⁶⁷

E. Legislative History of § 1920

1. Legislative History of the Original 1948 Text of § 1920

Title 28 of the United States Code was enacted partially in response to the status of federal statutes governing the judiciary which, according to the 1948 senate judiciary committee report, encompassed a set of statutes that was “archaic, ambiguous, conflicting, and to an unascertained extent repealed by implication by later statutes.”⁶⁸ In addition, the committee noted the majority of statutes was made obsolete by the Federal Rules of Civil Procedure and that Title 28 constituted uncontroversial and substantial improvements that modernized the law as applied to the federal judiciary.⁶⁹ The senate judiciary committee’s statements are congruent with the concept of adapting the judiciary to respond to evolving circumstances of litigation such as the expansion of e-discovery.

The house judiciary committee reiterated the senate committee’s goals in stating that “the bill would modernize and bring up to date the laws relating to the judiciary and to judicial procedure” in a manner similar to what the Federal Rules of Civil Procedure accomplished.⁷⁰ The house also noted the tremendous societal changes that had occurred since the previous statutory revision to the Judicial Code in 1911 and that the federal judiciary had admirably withstood those changes.⁷¹ More specifically, the house judiciary committee report noted that § 1920 was written to be consistent with Federal Rule of Civil Procedure 54(d).⁷² The committee noted that instead of stating that the judge or clerk of the court “shall”

⁶⁶ *Crawford Fitting Co.*, 482 U.S. at 445.

⁶⁷ *BDT Products, Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005).

⁶⁸ ALEXANDER WILEY, REVISING, CODIFYING, AND ENACTING INTO LAW TITLE 28 OF THE UNITED STATES CODE, ENTITLED “JUDICIAL CODE AND JUDICIARY,” S. REP. NO. 80-1559, at 1 (1948).

⁶⁹ *Id.* at 1–2.

⁷⁰ REVISION OF TITLE 28, UNITED STATES CODE. REPORT FROM THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, TO ACCOMPANY H.R. 3214, A BILL TO REVISE, CODIFY, AND ENACT INTO LAW TITLE 28 OF THE UNITED STATES CODE, ENTITLED “JUDICIAL CODE AND JUDICIARY,” H.R. REP. NO. 80-308, at 8 (1947).

⁷¹ *Id.* at 2.

⁷² *Id.* at A162.

tax costs, the language was substituted such that the judge or clerk of court “may” tax costs because Rule 54(d) makes taxation of costs discretionary rather than mandatory.⁷³ The house judiciary committee report reflects the need to harmonize, modernize, and streamline federal judiciary procedure in a manner that accords with changes to the judicial landscape. Furthermore, while both the senate and house reports far pre-date the arrival of e-discovery, it is apparent that with regard to judicial procedure, Congress has consistently focused on keeping the law in line with evolution in judicial practice. This focus is reflected in Congress’ 2008 attempt to modernize the federal judiciary through the Judicial Administration and Technical Amendments Act, which amended § 1920(4).

2. Legislative History of the 2008 Amendment to § 1920(4)

The current state of § 1920(4) in which the phrase “copies of papers” was substituted with “the costs of making copies of any materials where the copies are [necessarily obtained for use in the case]” was intended by Congress to specifically account for costs associated with e-discovery.⁷⁴ Perhaps most clearly, the section of the Public Law where this statutory amendment was made is titled “Assessment of Court Technology Costs.”⁷⁵ According to the congressional record of the senate, the Judicial Administration and Technical Amendments Act of 2008 was “intended to improve the administration and efficiency of our federal court system by replacing antiquated processes and bureaucratic hurdles with the necessary tools for the 21st century.”⁷⁶

In the congressional record of the house of representatives, Representative Zoe Lofgren of California urged the passage of “noncontroversial measures proposed by the judicial conference to improve efficiency in the [f]ederal courts.”⁷⁷ Representative Lofgren also specifically referenced the amendment to § 1920(4) in stating that one of the proposed statutory amendments “mak[es] electronically produced information coverable in court costs.”⁷⁸ These statements are strong

⁷³ *Id.*

⁷⁴ 28 U.S.C. § 1920(4) (2006 & Supp. II 2008); Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, sec. 6, § 1920(4), 122 Stat. 4291, 4292.

⁷⁵ Judicial Administration and Technical Amendment Act of 2008 § 6.

⁷⁶ 154 CONG. REC. S9897-01 (2008).

⁷⁷ 154 CONG. REC. H10270-01 (2008).

⁷⁸ *Id.*

evidence of congressional intent to allow the taxation of e-discovery costs, despite the legislative history's lack of clarity regarding the scope of taxation (i.e. it is not clear that all e-discovery costs are taxable under § 1920(4)).

F. Review of Recent Court Decisions on Taxation of E-Discovery Costs

1. Evolution from “Exemplification” to the 2008 Amendment

Prior to the 2008 amendment to § 1920(4), federal courts were beginning to recognize the technological changes in the litigation process, and thus, interpret the original, pre-2008 version of § 1920(4) to allow for taxation of certain types of electronic copying through interpretation of the term “exemplification,”⁷⁹ though some courts remained focused on the term “paper” to preclude such recovery.⁸⁰ In 2005, the United States Court of Appeals for the Sixth Circuit held in *BDT Products, Inc. v. Lexmark International, Inc.*, that the district court did not abuse its discretion in taxing copying costs because “electronic scanning and imaging could be interpreted as ‘exemplification and copies of papers.’”⁸¹ Interestingly, the court also justified the reasonableness of the taxation based on the fact that there was a “voluminous record.”⁸² Although the court did not explicitly invoke the “necessarily obtained”⁸³ language of § 1920(4), it was implied that the size of the

⁷⁹ The term “exemplification” has been interpreted differently by courts. For example, the Federal Circuit predicted that the Sixth Circuit would apply a narrow legal definition of “exemplification” per *Black’s Law Dictionary* such that the term referred to “an official transcript of a public record, authenticated as a true copy for use as evidence.” *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 166 (3d Cir. 2012), *cert. denied*, 11-1520, 2012 WL 2340866 (U.S. Oct. 1, 2012) (quoting *Kohus v. Cosco, Inc.*, 282 F.3d 1355, 1359 (Fed. Cir. 2002)). In contrast, the Seventh Circuit articulated a more expansive definition of “exemplification,” citing *Merriam-Webster’s Collegiate Dictionary* for proposition that “exemplification” is “the act of illustration by example,” a definition “broad enough to include a wide variety of exhibits and demonstrative aids.” *Race Tires Am.*, 674 F.3d at 166 (quoting *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000)). In *Race Tires America*, the Third Circuit declined to decide whether “exemplification” referred to authentication of public records or illustrative evidence. 674 F.3d at 166.

⁸⁰ Bennett, *supra* note 3, at 543–44.

⁸¹ *BDT Products, Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., ___ U.S. ___ (2012), 132 S. Ct. 1997 (2012) (*Taniguchi* abrogated *BDT Products* on grounds unrelated to the proposition for which it is cited here. *Taniguchi* held that, based on the meaning of the term “interpreter,” § 1920(6) allows cost awards for oral interpretation services only, but not those that translate writing. *Taniguchi*, 132 S. Ct. at 2003–04).

⁸² *Id.*

⁸³ 28 U.S.C. § 1920(4) (2006 & Supp. 2008).

record influenced the conclusion that copying costs were a necessary part of the litigation; and therefore, the district court did not abuse its discretion in taxing these costs.⁸⁴ Nonetheless, the court's decision relied significantly on its interpretation of the text of § 1920(4). This decision can be thought of as an attempt to justify e-discovery taxation based on the statute that was in place prior to the 2008 amendment because the court recognized evolving technological needs in the discovery process.

Citing the *BDT Products* decision, the United States District Court for the Northern District of Iowa held in its 2007 decision, *Brown v. McGraw-Hill Companies, Inc.*, that "electronic scanning of documents is the modern-day equivalent of 'exemplification and copies of paper,' and, therefore, can be taxed pursuant to § 1920(4)."⁸⁵ In this case, it is significant to note that McGraw-Hill sought only \$205.12 from the plaintiff for costs related to both black and white and color paper scanning.⁸⁶ Thus, despite the unambiguous statement by the court regarding the electronic scanning of documents, it would be difficult to extrapolate this logic to a case involving e-discovery costs in the hundreds of thousands, even millions of dollars. Likewise, prior to the 2008 amendment to § 1920(4), the idea that scanning was the equivalent of copying was likely far more judicially palatable than asserting that extensive and expensive forensic e-discovery work falls within the ambit of copying.

2. Recognition of Technological Changes: Post-2008 Amendment Decisions

Consistent with the aforementioned pre-amendment decisions regarding scanning of documents, *Cargill v. Progressive Dairy Solutions* addressed the taxation of FedEx/Kinkos charges for electronic document scanning as part of production in discovery.⁸⁷ The United States District Court for the Eastern District of California explained that these costs were recoverable because the volume of documents required that the production be electronic; and thus, "scanning of documents was necessary to provide an adequate defense to the several motions

⁸⁴ *BDT Products*, 405 F.3d at 420.

⁸⁵ *Brown v. McGraw-Hill Cos.*, 526 F. Supp. 2d 950, 959 (N.D. Iowa 2007).

⁸⁶ *Id.* at 958.

⁸⁷ *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).

and trial presentation.”⁸⁸ Interestingly, even though this decision was rendered after the 2008 amendment to § 1920(4), the court based its decision on “authority that electronic data and scanned data are considered ‘exemplification’” rather than invoking the recent statutory amendment that explicitly removed the “paper” limitation from the copying language of § 1920(4).⁸⁹

In *CBT Flint Partners v. Return Path*, the plaintiff argued that \$243,453.02 in fees incurred by the defendant’s e-discovery vendor for services rendered in response to plaintiff’s discovery request was not taxable under § 1920.⁹⁰ The United States District Court for the Northern District of Georgia noted a difference of opinion in courts as to whether e-discovery costs were recoverable under § 1920 because some courts viewed them as the modern equivalent of exemplification and copies, whereas other courts held that assembling such records for production in discovery is normally performed by lawyers or paralegals and is thus not taxable to the losing litigant.⁹¹ Who should perform the service is relevant because § 1920 does not allow for taxation of costs for attorney or paralegal work and such costs would be more appropriately considered in an award of attorney’s fees.⁹² While recognizing that there have been differences of opinion regarding the scope of § 1920, the court acknowledged that the services⁹³ provided here were “highly technical” and that attorneys and paralegals are neither trained to provide such e-discovery services nor capable of performing them.⁹⁴

Likewise, the *CBT Flint* court asserted that e-discovery costs are necessary in the “electronic age” and that perhaps the taxation of these burdensome costs might

⁸⁸ *Id.*

⁸⁹ *Id.* The *Cargill* court also references *BDT Products v. Lexmark Int’l, Inc.* for the proposition that “electronic scanning and imaging could be interpreted as ‘exemplification and copies of papers.’” *Id.* (citing *BDT Products v. Lexmark Int’l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005)). Given that *Cargill* was decided so soon after § 1920(4) was amended, the *BDT Products* decision was perhaps the most relevant precedent because the change in statutory language only reinforced that decision.

⁹⁰ *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1380–81 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).

⁹¹ *Id.* at 1381 (citing *Kellogg Brown & Root Int’l, Inc. v. Altanmia Commercial Mktg. Co.*, Civil Action No. H-07-2684, 2009 WL 1457632, at *4–*5 (S.D. Tex. May 26, 2009)).

⁹² *Kellogg Brown & Root Int’l, Inc.*, 2009 WL 1457632, at *5 (citing *Windy City Innovations, LLC v. America Online, Inc.*, No. 04 C 4240, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006)).

⁹³ The services provided by the e-discovery vendor in this case included the production of electronic documents from both network files and hard drives. *CBT Flint*, 676 F. Supp. 2d at 1380.

⁹⁴ *Id.* at 1381.

discourage litigants from insisting that the opposing party produce huge quantities of costly e-discovery materials.⁹⁵ A final notable point that the court considered was that the cost would have been higher to produce the 1.4 million documents and six versions of source code at issue in paper than the cost to pay for e-discovery services.⁹⁶ Presumably, the court addressed this point because if the defendant had indeed produced these documents in paper form, there would have been no question that the cost of making those copies would have been taxable under § 1920(4). Therefore, it would have been nonsensical to preclude recovery of a less expensive discovery method, especially in light of the fact that § 1920(4) was amended in 2008 with the recognition that recovery for copying papers was no longer sufficient to satisfy the needs of modern litigation.⁹⁷

Not all district courts have allowed for taxation of e-discovery costs to the losing litigant. In *Fells v. Virginia Department of Transportation*, the United States District Court for the Eastern District of Virginia rejected the defendant's recovery of e-discovery costs under § 1920(4).⁹⁸ The court declined to extend the statutory notion of "copying" to what the court described as "a burgeoning array of electronic discovery techniques."⁹⁹ The court stated that § 1920(4) allows for recovery of expenses for copying of materials that are reasonably necessary for litigation, but not for copies made for counsel's convenience.¹⁰⁰ The court referred to testimony that the e-discovery techniques used in the case fashioned documents for efficient use in litigation (i.e. convenience), which essentially resulted in the defendant seeking recovery for the creation of searchable electronic documents.¹⁰¹ In holding that the defendant did not meet its burden to demonstrate that § 1920 should support the recovery of these costs, the court stated:

Regardless of whether scanning documents should be viewed as copying materials, the court does not find that this category of taxable costs includes defendant's techniques of processing records, extracting data, and converting

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See 154 CONG. REC. S9897-01 (2008).

⁹⁸ *Fells v. Va. Dept. of Transp.*, 605 F. Supp. 2d 740, 743 (E.D. Va. 2009).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

files, which served to *create* searchable documents, rather than merely *reproduce* paper documents in electronic form.¹⁰²

This distinction between creating searchable documents and reproducing paper documents in electronic form is dubious at best: the mere conversion of documents into electronic form often results in creating a searchable document as the vast majority of common electronic document formats have some function that enables searching. The court concluded its discussion of § 1920 taxation by stating that because the statute does not support recovery for electronic data processing, the court would not determine whether the costs associated with e-discovery of these documents were necessary at the time they were incurred.¹⁰³ Rather than draw the somewhat tenuous distinction between searchable documents and paper reproductions, the court likely could have made a statutorily consistent argument that the creation of searchable documents was not necessary, but rather merely for the convenience of counsel.

In a frequently cited decision on this issue, *Kellogg Brown & Root International, Inc. v. Altanmia Commercial Marketing Co.*, the United States District Court for the Southern District of Texas held that the data extraction and storage services performed by an e-discovery vendor in question were not recoverable by the prevailing party under § 1920(4) because they were not “electronic equivalents of exemplification and copying.”¹⁰⁴ The court then stated that “extracting data from an electronic medium and storing that data 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.”¹⁰⁵ However, although the perception may be that such preparation of documents is more like the work of an attorney than it is like copying, the court did not explain how a lawyer or legal assistant would have the necessary skills to perform this work. As articulated in *CBT Flint*, technical services are a necessary part of modern litigation and neither lawyers nor their legal staffs have the requisite skills to perform this work without employing

¹⁰² *Id.* (emphasis in original).

¹⁰³ *Id.* at 744 (citing 28 U.S.C. § 1920(4) (2006 & Supp. II 2008); *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass’n*, 830 F.2d 522, 528 (4th Cir. 1987)).

¹⁰⁴ *Kellogg Brown & Root Int’l, Inc. v. Altanmia Commercial Mktg. Co.*, No. H-07-2684, 2009 WL 1457632, at *5 (S.D. Tex. May 26, 2009).

¹⁰⁵ *Id.*

an expert.¹⁰⁶ The court discussed another case that held that e-discovery costs were not recoverable under § 1920(4) because the type of electronic document retrieval performed in that case would have been performed by attorneys and paralegals in a non-electronic document case and thus, would not have been taxable under § 1920(4).¹⁰⁷

This argument is not persuasive because it denies the reality that e-discovery is a complex and specialized part of modern litigation. Simply because legal professionals may have performed a type of work in the paper context does not mean that legal professionals can or should do it in the electronic context. Furthermore, the court cited the *Fells* case for its distinction between scanning/copying paper documents into an electronic format and data processing to create searchable electronic documents.¹⁰⁸ However, as discussed earlier, evolving technology with regard to document formatting undercuts this argument.

In *Tibble v. Edison International*, the United States District Court for the Central District of California highlighted the distinction between e-discovery costs for convenience of counsel and those that are necessary for the litigation.¹⁰⁹ The plaintiffs objected to being taxed for the defendants' costs related to employing computer experts who extracted large amounts of computer data and asserted that those costs fell outside the scope of Rule 54 and § 1920.¹¹⁰ The e-discovery costs in question were approximately \$530,000.00, which made them the most significant of the defendants' costs.¹¹¹ The court relied on a Ninth Circuit decision for the proposition that the court has significant discretion to interpret the § 1920 categories when taxing costs to the losing litigant.¹¹² In addition, the court noted a

¹⁰⁶ See Bennett, *supra* note 3, at 544. See also 28 U.S.C. § 1920(4) (2006 & Supp. II 2008); Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, sec. 6, § 1920(4), 122 Stat. 4291, 4292.

¹⁰⁷ *Kellogg, Brown & Root Int'l*, 2009 WL 1457632, at *5 (citing *Klayman v. Freedom's Watch, Inc.*, No. 07-22433-CIV, 2008 WL 5111293 (S.D. Fla. Dec. 4, 2008)).

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Tibble v. Edison Int'l*, No. CV 07-5359 SVW (AGR), 2011 WL 3759927, at *7 (C.D. Cal. Aug. 22, 2011) (citing *Fells v. Va. Dep't of Transp.*, 605 F. Supp. 2d 740, 743-44 (E.D. Va. 2009) (proposing that "costs relating to providing computerized data are unavailable under § 1920 when such steps are taken merely for the convenience of a party.")).

¹¹⁰ *Tibble*, 2011 WL 3759927, at *6-7.

¹¹¹ *Id.* at *6.

¹¹² *Id.* at *7 (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, 633 F.3d 1218, 1221 (9th Cir. 2011)).

presumption that the prevailing litigant is entitled to § 1920 recovery and that the losing litigant bears the burden of showing that § 1920 recovery is inappropriate.¹¹³

Within that context, the court explained that defendants' costs were necessary rather than for the convenience of counsel based on the plaintiffs' requests for electronically stored information ("ESI") with which the defendants were required to comply, including requests for documents that were over ten years old and requests that ultimately encompassed 537,955 pages.¹¹⁴ The court again invoked both the magnitude and wide scope of ESI requests, a common sense justification for taxing significant costs on the losing litigant. The court also specified that the costs in this case were not excessive because the third-party computer technicians were selected based on a competitive bidding process and were charging market rates.¹¹⁵ Rather than explore the intricacies of § 1920 and Rule 54, the court accepted the concept that electronic discovery costs are taxable under § 1920(4).

The United States Court of Appeals for the Federal Circuit recently discussed the recoverability of e-discovery costs under § 1920(4), specifically referencing the 2008 amendment's legislative history.¹¹⁶ In *In re Ricoh Co., Ltd. Patent Litigation*, the plaintiff argued that the district court should not have awarded \$234,702.43 of costs to the prevailing defendant under § 1920(4) for the use of Stratify, a third-party e-discovery vendor engaged in electronic database creation and other document processing and review functions, because the Stratify costs involved creation of an electronic document review database that was not necessary to the litigation.¹¹⁷ The court explained that under § 1920(4), exemplification and copying costs associated with document discovery are recoverable and then referenced Northern District of California Local Civil Rule 54-3(d)(2) for the proposition that reproduction of discovery documents is a taxable cost.¹¹⁸ The court then concluded that the costs for the database created by Stratify were taxable because the database served as a means through which document production was accomplished in this case.¹¹⁹

¹¹³ *Id.* (quoting *Coffield v. Crumpler*, 179 F.R.D. 510, 514 (E.D. Va. 1998)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *8.

¹¹⁶ *In re Ricoh Co., Ltd. Patent Litig.*, 661 F.3d 1361, 1365 (Fed. Cir. 2011).

¹¹⁷ *Id.* at 1364–65.

¹¹⁸ *Id.* at 1365.

¹¹⁹ *Id.*

The *Ricoh* court then pronounced that document production should not be “so narrowly construed as to cover only printing and Bates-labeling a document.”¹²⁰ Also, given the technological changes regarding e-discovery that have occurred, electronic document production has been recognized by courts as within the “exemplification” and “making copies” provisions of § 1920(4).¹²¹ Most significantly, the court specifically referenced the 2008 amendment to § 1920(4) and the legislative history of that amendment that supports the taxation of e-discovery costs.¹²² While unambiguously recognizing that the production of electronic documents is recoverable under § 1920(4), the court concluded that in this particular situation, the plaintiff and defendant agreed to share the Stratify costs and that agreement supersedes and precludes taxation.¹²³

G. Requests to the Clerk of Court for Taxation of E-Discovery Costs

One recent district court case involved a prevailing litigant that sought taxation of e-discovery costs directly from the clerk of court.¹²⁴ While the language of § 1920 clearly supports the clerk of court’s ability to review the record and tax e-discovery costs, one wonders whether Congress intended that the clerk of court should have the authority to tax the staggering costs associated with e-discovery.¹²⁵

In *Race Tires America v. Hoosier Racing Tire Corp.*, the clerk of court determined that the two defendants’ taxable e-discovery costs were \$125,580.55 and \$241,788.81 respectively based on the court’s consideration of the parties’ Bills of Costs and other relevant aspects of the record.¹²⁶ The United States District

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1365–67.

¹²⁴ See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-cv-1294, 2011 WL 1748620, at *3 (W.D. Pa. May 6, 2011).

¹²⁵ 28 U.S.C. § 1920 (2006 & Supp. II 2008) (“A judge or clerk of any court of the United States may tax as costs the following: . . .”). For example, in *Race Tires America*, the costs that were requested as taxable from the clerk of court pursuant to § 1920(4) included the following categories: “(1) preservation and collection of ESI; (2) processing the collected ESI; (3) keyword searching; (4) culling privileged material; (5) scanning and TIFF conversion; (6) optical character recognition (“OCR”) conversion; and (7) conversion of racing videos from VHS format to DVD format.” *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 161-62 (3d Cir. 2012), *cert. denied*, 11-1520, 2012 WL 2340866 (U.S. Oct. 1, 2012).

¹²⁶ *Race Tires*, 2011 WL 1748620, at *3.

Court for the Western District of Pennsylvania upheld the clerk of court's award of e-discovery costs to the defendants under § 1920(4), reasoning that there was no information to suggest that electronic scanning was for the convenience of the parties or counsel rather than a necessity.¹²⁷ In reviewing the historical context of taxing e-discovery costs, the court took special note of the 2008 amendment to § 1920(4), stating that prior to this amendment that changed "copies of papers" to "copies of any materials," courts struggled with the issue of whether § 1920(4) allowed for recovery.¹²⁸ However, subsequent to this amendment, the court stated that "no court has categorically excluded e-discovery costs from allowable costs."¹²⁹

In addition, the court attached substantial significance to the magnitude of the e-discovery requests by the plaintiff, twice noting that the plaintiff requested a "massive quantity" of ESI.¹³⁰ The court also noted that the parties agreed to produce documents electronically and that the plaintiff "aggressively pursued e-discovery under the Case Management Plan."¹³¹ The court specifically noted that the plaintiff made 273 discovery requests to one defendant and 119 requests to the other, which resulted in the copying of 490 gigabytes of data and 270,000 files.¹³² The specific citation of these numeric data values reflects the importance of quantity in the analysis. The court noted that the e-discovery vendor services provided to the defendants were "highly technical" and thus, attorneys or paralegals would not have had the requisite skills or training to perform those services.¹³³ The decision addressed the distinction that courts have made between costs for scanning, imaging, and conversion of non-electronic materials (the type of costs allowed in *BDT Products*) and costs that are made "to improve the format and design of electronic evidence."¹³⁴ In contrast to the latter costs, which "tend to serve a party's aesthetic preferences rather than exemplification of evidence,"¹³⁵ the

¹²⁷ *Id.* at *9.

¹²⁸ *Id.* at *6 n.6.

¹²⁹ *Id.*

¹³⁰ *Id.* at *9.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

court found that the expert e-discovery services taxed to the losing litigant in this case were indispensable to the discovery process.¹³⁶

The United States Court of Appeals for the Third Circuit partially overturned and partially affirmed the decision in *Race Tires America, Inc.* in an opinion that narrowed the scope of § 1920(4) while recognizing that certain costs associated with e-discovery are statutorily recoverable.¹³⁷ The panel “agree[d] that scanning and conversion of native files to the agreed-upon format for production of ESI constitute ‘making copies of materials.’”¹³⁸ Therefore, the court affirmed the taxation of \$20,083.51 for “scanning of documents to create digital duplicates” and TIFF conversion, which was the agreed-upon format for the conversion native files for production of ESI.¹³⁹ The court also found no abuse of discretion in the district court’s taxation of \$10,286.91 for transferring VHS recordings to DVD format because it qualifies as “making copies” under § 1920(4), although the court noted that such copying did not necessarily require the “technical expertise of electronic discovery vendors.”¹⁴⁰

Despite approving of the aforementioned costs, the court disallowed taxation of costs for the rest of the charges from the e-discovery vendor.¹⁴¹ The following categories of e-discovery costs were disallowed by the court: preservation, collection, and processing of ESI, keyword searching, culling privileged material, and optical character recognition conversion.¹⁴² The court stated that the district court did not explain why it considered the vendor’s services to be encompassed within “making copies,” but instead concluded that necessity of those services to “the ultimate production of electronic ‘copies,’ the services were equivalent to one entire act of ‘making copies.’”¹⁴³

¹³⁶ *Id.*

¹³⁷ *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 171–72 (3d Cir. 2012), *cert. denied*, 11-1520, 2012 WL 2340866 (U.S. Oct. 1, 2012).

¹³⁸ *Id.* at 167.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 167–68.

¹⁴¹ *Id.* at 171.

¹⁴² *Id.* at 161–62.

¹⁴³ *Id.* at 168.

The *Race Tires America* court's reasoning was critical of other courts that allowed taxation of significant e-discovery vendor charges, stating that "[t]he decisions that allow taxation of all, or essentially all, electronic discovery consultant charges, such as the district court's ruling in this case, are untethered from the statutory mooring."¹⁴⁴ The court noted that § 1920(4) does not authorize taxation of costs simply because they require technical expertise nor does it authorize taxation of costs for all of the steps that ultimately lead to production of copies.¹⁴⁵ In the pre-e-discovery era, the court noted that only the act of making copies would have been considered taxable because the statute only permits for taxation of the costs of making copies, but not "taxation of charges necessarily incurred to discharge discovery obligations."¹⁴⁶ Ultimately, the court concluded that it lacks authority pursuant to § 1920(4) to award full e-discovery costs to the prevailing party despite policy reasons or equitable circumstances in favor of such taxation.¹⁴⁷ Further, the panel distinguished the decision *In re Ricoh Patent Litigation* because that case involved the creation of a document review database as agreed upon by the parties, which the Third Circuit acknowledged as taxable "as the functional equivalent of making copies" as opposed to "all the other activity, such as searching, culling, and deduplication, that are not taxable."¹⁴⁸ The *Race Tires America* decision reflects an acknowledgement that certain e-discovery costs are taxable under § 1920(4), while placing an unequivocal limitation on the scope of such taxation.

H. Conclusion

Legislative history has long been an effective tool in statutory interpretation. In reviewing relevant legislative history materials, this Note has found that the 1937 advisory committee notes to Rule 54 and the legislative histories of § 1920 and the 2008 amendment to § 1920(4) support a broad-based application of taxation of e-discovery costs. The courts that have spoken on taxation of e-discovery costs have generally justified fitting the costs into § 1920(4) by focusing on the necessity of such costs and the sheer volume of the e-discovery records

¹⁴⁴ *Id.* at 169.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 171.

¹⁴⁸ *Id.* at 171 n.11.

(perhaps implying that any other form of production would be impossible or at the very least, imprudent).

It is significant to note that, while some of the courts' analysis on this issue is fact specific in that they are examining the actual type of e-discovery services provided in the context of statutory text, there seems to be a certain level of arbitrariness in the way courts evaluate whether or not costs are taxable under § 1920.¹⁴⁹ For example, there is no clear definition of what makes e-discovery services necessary versus convenient in a particular case; nor is there any specific quantity of discoverable materials that makes paper production impracticable. As the relevant technology is further refined, it will become easier to define the necessary scope of e-discovery services and these definitions will undoubtedly become sharper. Likewise, courts will refine their decisions with more concrete standards and statutory arguments as the understanding of § 1920(4) becomes more robust. Perhaps there will even be a future statutory amendment to clarify any ambiguity that may exist with regard to e-discovery costs.

¹⁴⁹ See Bennett, *supra* note 3, at 554.