



## Which Deposition Costs Are Recoverable In Texas?

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Most trial lawyers would readily agree that a prevailing party in litigation can recover its costs. Texas Rule of Civil Procedure 131 says as much. But what costs, exactly? Even experienced trial lawyers may find they don't know which litigation expenses are recoverable if they win. The confusion is not surprising considering that Texas appellate courts seldom delve into questions about taxing costs — and when they do, they can disagree about the answers.

Deposition costs present one such area of dispute. Texas Civil Practice and Remedies Code §31.007(b) states that a prevailing party may recover “fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit,” as well as “such other costs and fees as may be permitted by these rules and state statutes.” But what about copies of deposition transcripts, which are routinely ordered by parties during trial preparation? What about costs for videotaping depositions? Or other costs associated with depositions, like real-time transcription, rough transcripts and expedited transcript delivery? The answers are important to clients footing the bill, who may expect to recover these costs in the end, and to losing parties who want to reduce the costs they must pay. In a recent Texas state-court antitrust conspiracy case, just one of the defendants incurred deposition-related costs exceeding \$55,000, for more than forty depositions. But only about \$7,000 of that total was for original deposition transcripts, i.e., for depositions that the defendant originally noticed. In complex, multiparty litigation where each party pays for its own deposition copies, total deposition-related costs routinely exceed six figures. With so much at stake, it's important for practitioners to understand what costs they may be able to recover at the end of the case, and what expenses they or their clients will have to swallow — even if they win.

Looking first at copies of deposition transcripts, Texas Rule of Civil Procedure 140 states, “No fee for a copy of a paper not required by law or these rules to be copied shall be taxed in the bill of costs.” Of course, no party is required by law to order copies of deposition transcripts. Does this mean that a prevailing party can recover transcript costs for depositions it noticed, but not for depositions that other parties noticed?

Texas courts have disagreed. In Houston, the 1st District has noted that, “[g]enerally, in Texas, expenses incurred in prosecuting or defending a lawsuit are not recoverable as costs, unless permitted by a statute or equitable principle.”<sup>[1]</sup> Therefore, since “the rule providing for the taxing of costs for depositions does not include taxing the cost of copies of depositions,” and copies of depositions are not required by law, “they are not properly taxable as costs.”<sup>[2]</sup> Shaikh relied on the same logic in refusing to award costs for videotaping depositions. Videotapes “are not required by law and are part of the expenses of litigation,” and thus the cost of videotaping depositions cannot be recovered.<sup>[3]</sup>

The Dallas Court of Appeals came to a similar conclusion in *Gumpert v. ABF Freight System*,<sup>[4]</sup> noting that it was an issue of first impression.<sup>[5]</sup> It went on to hold, “[B]ecause no statute or rule authorizes the recovery of the costs to videotape a deposition or obtain a

copy of a deposition transcript,” the trial court erred by awarding those costs. More recently, the Austin court agreed with Gumpert that it was error to award costs for copies of deposition transcripts to a party who did not originally notice or initiate the depositions.[6]

Other Texas jurisdictions have decided differently. In San Antonio, the court held in *Crescendo Invs., Inc. v. Brice*,[7] that “[a]warding costs for certified copies of depositions which may be admitted at trial does not violate Rule 140,” noting that “[t]he expense of taking depositions has long been recognized as a chargeable item of court costs.” *Crescendo* did not address videotaping depositions, but as an “expense” of taking a deposition, it may well be a recoverable cost as well.

Similarly, in *El Paso*, the appellate court declined to find that the trial court abused its discretion in awarding costs for deposition-related expenses, including copies of transcripts and videotapes.[8] The court remarked that the depositions and transcripts “were necessarily obtained for use in the suit and were used to question witnesses and prepare for argument at trial.”[9] However, the appellants failed to direct the court to specific disputed items in the statement of costs, and therefore the court was unable to “determine which itemized costs in defendants’ verified statements of costs constitute the \$27,232.76 that was purportedly improperly taxed.”[10]

Despite these differences in opinion, it seems that courts are trending towards disallowing costs for copies of transcripts and for videotaping depositions. The *Gumpert* case considered the holdings in *Crescendo* and *Fasken* and rejected them, pointing out that no statute or rule specifically allows a party to recover the costs for copies of deposition transcripts, videotaping, or general expenses “necessary to the conduct of trial.”[11] Subsequently, *Star Operations* “agree[d] with the reasoning of [its] sister court in *Gumpert*.”[12]

Although none of these opinions specifically addressed additional deposition costs like real-time transcription, rough transcripts or expedited transcript delivery, the rationale of *Gumpert*, *Shaikh* and *Star Operations* rejects their recoverability. If costs for copies of transcripts and videotaping are not recoverable, then such other deposition-related costs would likewise be unrecoverable, because no statute or rule specifically authorizes their recovery, and such costs are incurred for the convenience of the parties, not required by law. In the same way, courts outside of Texas have recognized that real-time transcripts “are purely for the convenience of counsel and not necessary.”[13]

Ultimately, trial lawyers should carefully consider which deposition-related expenses are truly necessary to the conduct of their case before incurring them, especially when many of those costs may be unrecoverable, even to a prevailing party. And those who lose and face a substantial bill of costs from the other side should know that some of those costs are not allowed.

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[1] *Shaikh v. Aerovias de Mexico*, 127 S.W.3d 76, 82 (Tex. App. – Houston [1st Dist.] 2003, no pet.).

[2] *Id.* at 82.

[3] *Id.*

[4] 312 S.W.3d 237, 242 (Tex. App. – Dallas 2010, no pet.)

[5] *Id.* at 240

[6] *Star Operations, Inc. v. Dig Tech, Inc.*, No. 03-15-00423-CV, 2017 WL 3263352, \*16 (Tex. App. – Austin July 27, 2017, pet. denied).

[7] 61 S.W.3d 465, 481 (Tex. App.—San Antonio 2001, pet. denied)

[8] *Fasken v. Land & Minerals, Ltd. v. Occidental Permian Ltd.*, 225 S.W.3d 577, 596 (Tex. App.—El Paso 2005, pet. denied).

[9] *Id.*

[10] *Id.*

[11] 312 S.W.3d at 241-42.

[12] 2017 WL 3263352 at \*16.

[13] *McCabe v. United States*, 2008 WL 2980010, at \*9 (N.D. Iowa 2008); see also *AIG Glob. Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 2011 WL 102715, at \*2 (S.D.N.Y. 2011).