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A Practical Guide to Recovering Fees Under 28 U.S.C. § 1920

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Congratulations! You just won your case in federal court, maybe on summary judgment or after trial. Enjoy the celebratory dinner, but the hard work isn't over quite yet.

In addition to assessing appellate risk and whether there is a statutory or contractual basis to seek attorney's fees, don't forget one important, albeit likely smaller, source of money: taxing recoverable costs against the losing party. Although the process is straightforward, there are some quirks and nuances to be aware of.

To maximize the return on investment of attorney time and to avoid common pitfalls, this article summarizes the types of recoverable costs and how to file for them.

Who can recover costs?

Federal Rule of Civil Procedure 54(d) (1) provides that "costs — other than attorney's fees — should be allowed to the prevailing party."

"Prevailing party" is not statutorily defined, and the Fifth Circuit has set forth three factors in *Veasey v. Abbott*: "(1) the plaintiff must achieve judicially-sanctioned relief, (2) the relief must materially alter the legal relationship between the parties, and (3) the relief must modify the defendant's behavior in a way that directly benefits the plaintiff at the time the relief is entered."

What costs are recoverable?

28 U.S.C. § 1920 is the controlling statute

for the taxation of costs in federal courts. It provides that a judge or clerk of any United States court may tax as costs the following in favor of a prevailing party:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Each category is straightforward and generally limited to low amounts. One exception, and the category that this article will particularly focus on, is No. 2.

1. Fees of the Clerk and Marshal

These costs are straightforward and generally undisputed. They include filing fees paid to the court to initiate the lawsuit, as well as fees paid to the U.S. Mar-

shal for service of process or other official duties.

2. Fees for Transcripts

This category is typically the largest source of potential recoverable costs. It includes transcripts of depositions, court hearings and the trial itself. Importantly, costs are only available for transcripts that were “necessarily obtained for use in the case.” Whether a transcript was “necessarily obtained” is based on the reasonableness standard and evaluated at the time the cost was incurred. The Fifth Circuit in *Fogleman v. ARAMCO* wrote, “If, at the time it was taken, a deposition could reasonably be expected to be used for trial preparation, rather than merely for discovery, it may be included in the costs of the prevailing party.”

Commonly accepted taxable costs include the written deposition transcripts for witnesses whose testimony was necessary for dispositive briefing and at trial or for witnesses disclosed by the opposing party as potentially having relevant information. For example, in *Honestech, Inc. v. Sonic Solutions.*, a court in the Western District of Texas allowed recovery of deposition transcript costs for witnesses disclosed by the other party, even though they were not called at trial). A closer call can arise in two situations: (1) when a party seeks to recover costs for a deposition videotape; and (2) when aligned parties represented by different counsel each seek fees for the same deposition(s).

First, deposition videotapes may potentially be recovered if they meet the “necessarily obtained” standard, as the Fifth Circuit held in *S & D Trading Academy, LLC v. AAFIS Inc.*, noting the 2008 amendment to the text of 28 U.S.C. § 1920(2). Typically, a deposition cannot be presented as testimony at trial unless the witness is “unavailable,” which includes death, age, illness, infirmity and being located more than 100 miles from the courthouse, according to Federal Rule of Civil Procedure 32(4). If a case is in Houston and the witness is in Midland

and not under the control of either party (for example, a former employee), it is reasonable to expect that the deposition video may be played at trial and therefore can be taxed as a recoverable cost.

By contrast, courts may disallow deposition videotape costs if the party cannot provide “credible evidence to suggest that, at the time of the depositions, they reasonably expected any of the deposed witnesses to be absent from trial,” according to the Eastern District of Texas’ opinion in *Motion Games, LLC v. Nintendo Co.* If the witness is local and likely to appear at trial, courts are unlikely to award video costs. For example, if the witness lives within 100 miles of the courthouse when deposed and there is no reasonable expectation of a move before trial, it is unlikely that a party can credibly argue that it believed it was “reasonably necessary” to pay for the deposition video during discovery.

Courts are split on whether using a deposition video to impeach a witness at trial justifies awarding costs when the transcript is available. In *Motion Games*, a court in the Eastern District held that “Defendants argue that they could have used the video deposition to impeach a witness’s credibility, but have not disputed that they could have used printed transcripts to achieve the same purpose.” Compare that with *Royall v. Enter. Prods. Co.*, a case in the Southern District, which held that “Enterprise’s explanation that it recorded Royall’s deposition in anticipation for attacking Royall’s credibility and for impeachment is reasonable.”

Second, in a case with multiple prevailing parties who were aligned and cooperated, be careful about each party seeking to recover costs for copies of the same deposition transcript against the losing party. Courts have discretion to deny or otherwise limit the costs that are taxed for duplicative requests. In *Aircraft Holding Sols., LLC v. Learjet, Inc.*, a court in the Northern District of Texas reduced deposition costs “pro rata by the number of defendants represented in this case by joint counsel when each deposition was taken.” A court in the Western

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District of Texas), in *E.A.F.F. v. United States*, noted that “Even if the U.S. Attorney’s office for the Western District of Texas and Main Justice are more appropriately viewed as separate firms, courts have often disallowed multiple copies of depositions on the presumption that they were obtained for convenience of counsel, absent a showing that multiple copies were necessary.”

To get ahead of this potential scenario, consider whether the aligned parties had a reasonable expectation when the costs were incurred that the alignment would not last through the end of the case. Another option is to split the costs during discovery to avoid the possibility of multiple petitions for the same costs.

3. Fees and Disbursements for Printing and Witnesses

A prevailing party may be able to recover costs for printing briefs, appendices and other documents required by the court. The standard is “proving the necessity of the photocopies,” according to the Western District of Texas in *Maduhu v. Maduhu*. Witness fees include statutory per diem and travel expenses for witnesses who testify at trial or in depositions, as set by 28 U.S.C. § 1821.

4. Fees for Exemplification and Copies

“Exemplification” refers to the official authentication of documents, such as certified copies of court records. The cost of making copies of materials is recoverable only if the copies were “necessarily obtained for use in the case.” In *NuVasive, Inc. v. Lewis*, a court in the Western District of Texas wrote that this typically includes copies of exhibits, pleadings and discovery materials submitted to the court.

5. Docket Fees

Minimal docket fees are set by 28 U.S.C. § 1923 and depend on the type of case and amount at controversy (e.g., “admiralty appeals involving more than \$5,000”).

6. Compensation of Court-Appointed Experts and Interpreters

If the court appoints an expert witness or interpreter, their compensation, as well as the costs of special interpretation services under 28 U.S.C. § 1828, are recoverable.

Timing of seeking recoverable costs

Once you have identified recoverable costs, it is time to collect the underlying invoices and draft a Bill of Costs by completing Form AO 133. Submit the Bill of Costs by the deadline, which is not defined in the statute. While Section 1920 authorizes the recovery of costs, it is silent on the filing deadline. Parties instead must refer to the applicable Local Rules of the relevant U.S. district court. In Texas, each district court requires that a Bill of Costs be filed within 14 days of entry of judgment on the docket: Northern District (Local Rule 54.1); Southern District (Local Rule 54.2); Western District (Local Rule CV-54(a)(1)); and Eastern District (Local Rule 54(a)).

Although the 14-day deadline is straightforward, determining when it starts to run is sometimes less evident. District courts may enter a final judgment that awards the prevailing party its taxable costs, but a final judgment may also be silent on costs. In that latter scenario, courts have held that the 14-day clock nonetheless started when final judgment was entered because the prevailing party is presumptively entitled to recover taxable costs pursuant to 28 U.S.C. § 1920.

The bottom line: don’t wait, because courts have denied a prevailing party’s Bill of Costs that was filed after the applicable 14-day deadline.

Conclusion

To make sure that you maximize your recoverable costs under 28 U.S.C. § 1920, keep in mind the following tips:

- Calendar the applicable deadline from the Local Rules as soon as

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final judgment is entered, even if it is silent on costs.

- Confirm whether you can justify the cost for a deposition video, including whether the witness was likely to be unavailable for trial.
- Coordinate with counsel for aligned parties to avoid seeking duplicative costs.