# UNITED STATES DISTRICT COURT

# FOR THE

# WESTERN DISTRICT OF NORTH CAROLINA

OFFICE OF THE CLERK

## BILL OF COSTS HANDBOOK

FEBRUARY 10, 2003

**BILL OF COSTS HANDBOOK**

# TABLE OF CONTENTS

# I. Tax OF COSTS BY THE CLERK

## A. INTRODUCTION

Costs shall be taxed by the Clerk pursuant to Rule 54(d)(1), Federal Rules of Civil Procedure and Local Rule 54.1. Not every expense of litigation is not recoverable.

This handbook has been prepared to assist counsel in the preparation of bills of cost. We encourage litigants to review it thoroughly.

When a judgment is entered for a party in this court, it may just state that the party recover a sum certain with costs. These costs are not itemized at this point in the proceedings. If counsel are unable to agree as to the amount of costs, it is the duty of the Clerk, or the Clerk's designee, to tax all allowable costs and to include them in the judgment upon the filing of a proper request for taxation of costs.

## B. PROPER FORMAT

Before any bill of costs is taxed, it must be submitted on the proper form. A party claiming any item of costs of disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

Forms may be obtained from the Office of the Clerk's web site at www.ncwd or the sample found in this handbook may be used. The form contains the necessary affidavit. It is the responsibility of counsel to serve opposing counsel, provide the court with a certificate of service and attach a separate itemization and the documentation to support the claims made. Documentation may include receipts, orders and stipulations of the parties. Please be advised that counsel must ensure that any receipts are self-explanatory (i.e., receipts for service shall

include the names of the individuals, why they were served, where they were served, and the cost for service). Claims for docket fees under 28 U.S.C. §1923 shall be broken down by fee. The Clerk may disallow any expenses that do not have adequate supporting information and documentation.

The original and one copy of the bill of costs shall be filed with the Clerk. After the Clerk has taxed the costs, counsel for either side may, within five (5) days, file a motion to review the action of the Clerk and request review by the court. Once the court has ruled on the motion filed by any party, and the matter of costs has been determined, those costs are included in the judgment and should be paid directly to the prevailing party. These costs are not processed through the Office of the Clerk. To record payment, counsel may file a notice of satisfaction of costs.

The Clerk will tax costs even if the case is appealed, unless a stay pending appeal has been granted by the court. However, if all parties prefer to postpone the taxation proceeding until the conclusion of all appellate proceedings, the Clerk should be advised in writing. Counsel will be responsible to advise the Clerk at the conclusion of all appellate proceedings that costs may be taxed.

## II. AUTHORITY FOR TAXATION OF COSTS

The authority for the Clerk to tax costs can be found at:

- 28 U.S.C. §1920 (Taxation of costs);
- 28 U.S. C. §1821 (Per diem and mileage generally; subsistence);
- 28 U.S.C. §1921 (United States marshal's fees);
- 28 U.S.C. §1922 (Witness fees);
- 28 U.S.C. §1923 (Docket fees and costs of briefs);
- 28 U.S.C. §1924 ( Verification of bill of costs);
- Federal Rule of Civil Procedures 54(d)(1);
- Local Rule of Civil Procedure 54.1;
- Federal Rule of Appellate Procedure 39(e).

## III. TIME FOR FILING

A prevailing party may request the Clerk to tax allowable costs, other than Attorneys' fees and expenses, by filing a bill of costs within 30 days after the expiration of time allowed for appeal of a final judgment or decree or after receipt by the Clerk of an order terminating the action on appeal. ***The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.***

If a party objects to the bill of costs or any item claimed by a prevailing party, that party must state its objection in a motion for disallowance of costs with a supporting brief within ten (10) days after the filing of the bill of costs. Within five (5) days thereafter, the prevailing party may file a response motion and brief.

Either party may request review of the Clerk's ruling by filing a motion within (5) days after the action of the Clerk.

## IV. PREVAILING PARTY

Unless the court directs otherwise, the prevailing party is entitled to recover costs. Even where a judgment is silent about costs, it is generally viewed as a judgment allowing costs where no doubt exists as to who is the prevailing party. The Supreme Court has held that a party in whose favor a judgment is rendered is the prevailing party, regardless of whether that party sustains the entire claim or only a portion thereof. Roberts v. Madigan, 921 F.2d 1047, 1058 (10th Cir. 1990), cert. denied 112 S.Ct. 3025 (1992) (Court awarded full costs to the party that prevailed on the vast majority of claims and issues.)

The issue of whether or not a party is a prevailing party is a little less clear when the case is dismissed prior to judgment. When the case is dismissed with prejudice, most circuits, including the Fourth Circuit, provide for the awarding of costs on the grounds that the defendant is the prevailing party. Kollsman v. Cohen, 996 F.2d 702 (4th Cir. 1993) (Dismissal of action, whether on merits or not, generally means defendant is prevailing party for purposes of ward of fees and costs under Federal Civil Rules.)

Until recently, when a party dismissed an action with or without prejudice, the district court had the discretion to award costs to prevailing party. However, some circuits, including the Fourth Circuit are now making a distinction between a dismissal with prejudice and a dismissal without prejudice for the purposes of awarding costs. The more recent view is illustrated by Szabo Food Service, Inc. v. Canteen Corp, 823 F.2d 1073 (7th Cir. 1987), in which the Seventh Circuit refused to grant attorneys' fees to the defendant after the plaintiff obtained a voluntary dismissal without prejudice. The Seventh Circuit noted that under a dismissal without prejudice the defendant was still at risk from litigation on the claim. Accordingly, the court held that a dismissal under Rule 41(a) is not "the practical equivalent of a victory for the defendant on the merits," and the defendant could not be considered a prevailing party.

The Fourth Circuit recently adopted the same position in an unpublished opinion of Best Industries v. North American Scientific, Inc., 134 F.3d 362, 1998 WL 39383 (4th Cir.(Va.)). In this case the plaintiff also moved and was granted a voluntary dismissal without prejudice and the court agreed with the Seventh Circuit's view that a voluntary dismissal without prejudice does not render a defendant a prevailing party. The court noted the distinction with its own decision in Kollsman was that Kollsman dealt with a dismissal with prejudice, leaving the defendant without risk of further litigation on the claim. Therefore, Kollsman did not provide direct support for the proposition that a dismissal without prejudice makes the defendant a prevailing party.

It should be noted that an even more recent case, Sequa Corporation v. Cooper, 245 F.3d 1036 (8th Cir. 2001), in which that court has found that a voluntary dismissal without prejudice does not deprive a district court of its authority to award costs. This serves to illustrate that circuits continue to be of two distinct views on whether the defendant becomes a "prevailing party" when the plaintiffs obtain a voluntary dismissal without prejudice. For now, the Clerk will be guided by the Fourth Circuit's position in Best.

## V. DISCUSSION OF TAXABLE COSTS

The Clerk will review and tax costs in the following categories. Counsel are responsible for providing the required receipts, orders, stipulations or other documentation to support their bill of costs. The Clerk may deny costs without adequate supporting documentation. Items normally taxed will include, but not be limited to those items specifically listed on the bill of costs form which are explained in more detail herein.

### A. FEES OF THE CLERK

1. Taxable

a. Filing fee of complaint, removal and habeas corpus petitions.
b. Docket fees pursuant to 28 U.S.C. §1923.
c. Appellate fees pursuant to FRAP 39(e).

### B. FEES FOR SERVICE OF SUMMONS AND SUBPOENA

Fees paid to the U.S. Marshal Service for service of process are recoverable. In making the fees of the Marshal taxable as costs in 28 U.S.C. §1920, Congress exhibited an intent to make service of process a taxable item. The federal rules now allow for the service of process in civil matters by methods other than the U.S. Marshal Service. The costs of these other methods are recoverable as costs. See, Alflex Corp. v. Underwriters Labs, Inc., 914 F.2d 175, 177-78 (9th Cir. 1990) (per curiam), cert. denied, 502 U.S. 812, 112 S.Ct. 61, 116 L. Ed. 2d 36 (1991). Therefore, amounts paid to private process servers are recoverable. Generally, the Clerk will tax reasonable service fees for summonses, service fees for trial subpoenas for witnesses who are present and available to testify and service fees for deposition subpoena.

**C. FEES OF THE COURT REPORTER FOR ALL OR ANY PART OF THE TRANSCRIPT NECESSARILY OBTAINED FOR USE IN THE CASE.**

The general rule is that the costs incurred in taking depositions will be taxed in favor of the prevailing party if the taking of the depositions was reasonably necessary at the time it was taken, even though they may not have been used at trial. Absent introduction into evidence of the deposition, the prevailing party must show that the deposition was relied upon for cross-examination or impeachment purposes, or a showing that the deposition was useful in assisting a resolution of the contested issues. The Fourth Circuit has held that even if depositions are not actually used at trial, the cost of the transcripts are recoverable if taking the deposition seemed reasonably necessary in light of the particular situation existing at the time of taking. See, LaVay Corp. v. Dominion Federal Savings and Loan Association, 830 F.2d 522, 528 (4th Cir. 1987), cert. denied, 484 U.S. 1065, 108 S.Ct. 1027, 28, 98 L.Ed. 2d 991 (1988).

Taxable transcript costs are not limited to the number of deposition pages necessary for a motion for summary judgment as at the time of taking the depositions, defendant could not know which aspects of the deposition or whose deposition would be needed for preparation of the motion for summary judgment until after the deposition is taken. See, Jop v. City of Hampton, VA, 163 F.R.D. 486, 488 (E.D. VA. 1995).

Taxable costs in this category normally include:

1. The court reporter's attendance fee and travel costs.
2. The charge for only the original transcript.
3. Transcripts procured at direction of the court.
4. Transcripts ordered for appeal purposes.
5. Transcripts prepared pursuant to stipulation of parties with an agreement to tax as costs.
6. Transcripts introduced into evidence.
7. Transcripts used at trial to impeach a witness.
8. Transcripts used in support of a motion.
9. Costs of copies of papers obtained as exhibits in the deposition.

10. One copy of the trial transcript for each party represented by separate counsel.

Non-taxable costs in this category normally include:

1. Cost of daily or expedited copy produced solely for the convenience of counsel, **unless prior court approval was obtained.**
2. Attorneys' fees and expenses incurred while taking a a deposition.
3. Long distance phone charges for telephone deposition.
4. Transcripts of video depositions as the Clerk will generally not tax the costs of both a video deposition and a transcript.
5. Multiple copies of depositions.

## D. FEES AND DISBURSEMENTS FOR PRINTING.

These fees and disbursements usually do not become involved in trial court proceedings. The court of appeals taxes these fees and disbursement and includes them in their mandate. These taxed costs are in addition to those recoverable in the trial court. General copy costs are recoverable at the district court level under fees for exemplification and copies of papers necessarily obtained for use in the case discussed below.

## E. FEES FOR WITNESSES.

Witness fees are generally a recoverable cost with clear limits as set by 28 U.S.C. §1821. As a rule, these fees are not limited to the day the witness testifies but includes those days in which the witness necessarily attends the trial.

1. Attendance fees as set by 29 U.S.C. §1821 which are presently $40.00 per day.
2. Mileage fees for use of a privately owned automobile with mileage computation based upon a uniformed table of distances at the same rate prescribed for

for federal employees in 5 U.S.C. §5704 (.30 cents per mile).

3. Subsistence allowance for witnesses is taxable in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to 5 U.S.C. §5702(a) for official travel by federal employees for the city in which the trial or deposition was held. No itemization of expenses is required.
4. Actual expenses of travel on the basis of the means of transportation reasonably utilized if a common carrier is used instead of the witness's personal automobile. A witness is required to utilize a carrier at the most economical rate reasonably available and furnish a receipt or other evidence of actual cost.
5. Miscellaneous toll charges, taxicab fares between places of lodging and carrier terminals, and parking fees may be taxed. Receipts or evidence of fee paid is required.
6. Expert witness fees **ONLY** for court-appointed witnesses.

Non-taxable costs in this category normally include but are not limited to:

1. The expenses of witnesses who are themselves parties in the case.
2. Compensation paid to an expert witness in excess of statutory fees, **without prior order of the court.**
3. Rental vehicles. Witness will receive only the mileage rate for the distance traveled.
4. Federal employees are not entitled to attendance fees, but may receive the mileage and subsistence allowance for any overnight stays.

**F. FEES FOR EXEMPLIFICATION AND COPIES OF PAPERS NECESSARILY OBTAINED FOR USE IN THE CASE.**

"Exemplification has been interpreted to embrace all manner of demonstrative evidence, including enlarged photographs, if necessary to the understanding of issues and material aid to the jury. Costs for copies of pleadings, memorandums and motions filed with the court are also a recoverable cost. See. Independence Tube Corp. v. Copperweld Corp., 543 F.Supp. 706, 722 (N.D. Ill. 1982). Other items such as separate binders for the jurors and enlargements of exhibits and like material are taxable under this section.

Costs or copying expenses are also recoverable. The prevailing party seeking copying costs need only provide best breakdown obtainable from retained records; if documentation establishes that copies were made for the case for its attorneys and billed in normal course with documents coming in, it is sufficient. See, Movitz v. First National Bank of Chicago, 982 F.Supp. 571 (N.D. Ill. 1997). Costs for in-house photocopies and for copies at out-side copy centers are recoverable upon verification that the fees included only those photocopies that were necessary for the case. Printouts or records from an in-house copy counter which automatically bills clients based upon client codes may be used as a receipt for in-house copies. The general, rule is that the prevailing party is not required to submit bill of costs containing descriptions so detailed as to make it impossible economically to recover photocopying costs; rather, the prevailing party is required to provide best breakdown obtainable from retained records. See, Northbrook Excess and Surplus Insurance Company v. Procter and Gamble Company, 924 F. 2d 633 (7th Cir. 1991). Costs for copies of pleadings, memorandums and motions filed with the court are included in this section.

### G. OTHER TAXABLE COSTS

1. Bond premiums.
2. Interpreter fees when appointed by the court.
3. Video and audio tapes of depositions upon order of the court.

## VI. NON TAXABLE COSTS

The Supreme Court has held that federal courts are limited to assessing only those costs enumerated under 28 U.S.C. §1920 and may not tax costs above and beyond items listed or in amount in excess of statutory limits. See, Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42, 107 S.Ct. 2494, 2497, 96 L.Ed. 2d 385, 391 (1987). Accordingly, the following items are not considered taxable and will generally be denied by the Clerk.

A. Attorney fees and travel expenses incurred in attending depositions, conferences and trial, as well as expenses incurred by investigations or site visits.
B. Word processing, typing charges, and copy charges which are incidental to an attorney's services.
C. Computerized legal research charges.
D. Paralegal expenses.
E. Mediation fees.
F. ASCII, CD-ROM, computerized indices or optical discs produced for the benefit of counsel.
G. Postage fees (other than for summons/subpoenas), delivery and notary fees; FEDEX type charges.
H. Long-distance telephone calls and fax charges.
I. Damage surveys.
J. Accountant's expenses.
K. Office overhead.
L. Pro Hac Vice fees.