CLERK'S GUIDELINES FOR TAXATION OF COSTS
IN THE WESTERN DISTRICT OF OKLAHOMA

I. Introduction

In many instances, Bill of Costs are routine, administrative functions of the Clerk's office, involving small amounts of money. In complex cases, however, the costs may become a major consideration, involving requests for tens of thousands of dollars. In either instance, counsel's valuable time must be used to research this somewhat obscure area of post-trial work. The basic tenants of costs in the Federal Courts as presented in this paper will hopefully aid counsel in correctly determining proper costs and minimizing the amount of time required for such determination.

II. Statutes, Rules and Procedural Matters

A. Federal Rule 54(d)

The basis for awarding costs in Federal Court comes from Rule 54(d), Federal Rules of Civil Procedure, which directs:

> "Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

Federal Rule 54(d) creates a presumption that the prevailing party shall recover costs. Most judgments expressly state that the party in whose favor judgment was rendered shall recover costs of the action. However, if a judgment fails to state that costs are allowed, the presumption that costs will be awarded to the prevailing party remains because Rule 54(d) directs that costs shall be allowed "unless the court otherwise directs." Thus, the presumption remains unless the court affirmatively states that a party should not be awarded costs or that parties should bear their own costs.

B. 28 U.S.C. §1920

Allowable items of costs are set forth in 28 U.S.C. § 1920 which reads as follows:

A judge or clerk of any court of the United States may tax as costs the following:

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 cost 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.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

C. LCvR54.1

A clerk of court is allowed to tax costs pursuant to Section 1920. In the Western District of Oklahoma by Local Rule 54.1, the judges have delegated the initial Bill of Costs hearing to the Clerk's office. Therefore, counsel must file the Bill of Costs with the Clerk. After the Bill of Cost is filed, the Clerk's office will set a hearing date and give notice to all counsel of record by CM/ECF e-mail service.

Verification of the Bill of Costs is required by 28 U.S.C. § 1924 which states:

"Before any bill of costs is taxed, the party claiming any item of cost or 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 necessary incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

Local Rule 54.1 provides in part:

1. Bill of Costs. Within 14 days after the entry of judgment, the party recovering costs shall file a bill of costs on the form available from the Clerk of Court and support the same with a brief and verification. The brief should (1) clearly and concisely itemize and describe the costs, (2) set forth the statutory basis for seeking those costs under 28 U.S.C. § 1920, and (3) reference and include copies of applicable invoices, receipts and disbursement instruments. Proof of service upon all adverse parties shall be indicated.

2. Objections to Bill of Costs. Where a party objects to any item in a Bill of Costs, such objection shall be set forth with any supporting affidavits and documentation and must be filed with the court and served on all adverse parties within 14 days after the Bill of Costs was filed.

3. Taxation of Costs. Where no objections are filed, the clerk may tax the costs in full and it will not be necessary for the parties to appear. Where objections are filed, a hearing will be scheduled by the clerk to review the Bill of Costs and the objections.

Copies of invoices and receipts or an affidavit are required. These should be attached to the Bill of Costs as exhibits. It is helpful if the exhibit summarizes the items and amounts on a single page followed by the receipts and invoices.

Where written objections are filed, appearances are necessary by counsel. Counsel may request an appearance by telephone if counsel resides outside the Oklahoma City area. The Clerk makes every effort to grant requests for appearance by telephone unless persuaded by an objection from opposing counsel or maters in the Bill of Costs are so complex and paper intensive as to make a telephone appearance unfeasible.

Upon proper motion, the Clerk's rulings will be reviewed *de novo* by the district court. Rule 54(d) provides: "On motions served within 7 days thereafter, the action of the clerk may be reviewed by the court."

In summary, counsel may file with the Clerk of Court a verified Bill of Costs and supporting brief within 14 days of judgment, even if costs were not mentioned in the judgment. A hearing will be set upon filing. The Clerk's office will notify all counsel of record of the hearing date. If no written objection is filed, no appearance at a hearing is necessary. If written objections are filed, a hearing is held with counsel present. Counsel who reside outside of Oklahoma City may appear by telephone upon request. Counsel may obtain review by the District Court of the rulings by the Clerk by filing a motion to review taxation of costs within 7 days after entry of taxation of costs by the Clerk.

III. Prevailing Party and Entitlement to Costs

As stated in Federal Rule 54(d), there is a presumption in favor of awarding costs to the prevailing party. Sometimes there is a dispute as to who prevailed. Thus, entitlement to costs is the first determination in a cost hearing.

A. Prevailing party is one in whose favor the judgment is rendered.

It has been argued in a case with five causes of action that the plaintiff prevailed on only one cause of action and therefore was not the prevailing party. In that case, judgment had been awarded to plaintiff in excess of $200,000 on the one cause of action. Under those circumstances, it was ruled that plaintiff was the prevailing party. The rule of thumb is that the prevailing party is one in whose favor judgment is rendered. See, Roberts v. Madigan, 921 F.2d 1047, 1058 (10th Cir. 1990) cert. denied, 505 U.S. 1218 (1992); compare Howell Petroleum Corp. v. Sampson Resources Co., 903 F.2d 778, 783 (10th Cir. 1990).

B. Costs might be awarded on items connected to the cause of action which prevailed.

There may be a circumstance in which clearly delineated causes of action might allow separating costs between those causes of action which succeeded and those which failed. It was

successfully argued to separate the causes of action in an insurance contract case in which plaintiff prevailed on the contract but failed on a bad faith claim. In that instance, recovery on the contract was approximately $20,000. Plaintiff had spent most of its cost pursuing a bad faith claim which failed. Costs related to the insurance contract were separated from those relating to the bad faith claim when they could be clearly delineated.

To be absolutely clear on this point, there was not an apportionment in which a percentage reduction occurred. Instead, if an item was completely related to the failed claim of bad faith, it was excluded. But if the item related in some form or manner to the insurance contract even though it was also related to the bad faith claim, it was not excluded.

C. Economic Hardship

Notwithstanding the presumption in favor of a prevailing party, indigency of a losing party may avoid costs. The award of costs rests in the sound discretion of the court. Therefore, arguments have been made that the economic disparity between the parties would render award of costs unfair to the losing party. The argument may be bolstered in a civil rights' claim in which vindication of civil rights could be chilled by the taxing of costs against indigent parties. Generally, to avoid costs it must be shown that the losing party is indigent and the suit neither frivolous nor brought in bad faith. See, Zeran v. Diamond Broadcasting, Inc., 203 F.3d 714, 722 (10th Cir. 2000).

These arguments are equitable in nature and therefore better reserved for judicial determination rather than for administrative determination by the Clerk. Thus, the Clerk of Court for the Western District of Oklahoma routinely denies economic hardship arguments, leaving that determination for the District Court if the parties seek review of the taxation of costs. See, Cantrell v. International Brotherhood of Electrical Workers, 69 F.3d 456, 459-460 (10th Cir. 1995).

D. Costs May Be Denied to Prevailing Party in Diversity Action Where Jurisdictional Amount is Not Obtained.

Although Federal Rule 54(d) creates a presumption in favor of the prevailing party, an express provision in a United States statute may rebut that presumption. An example of this may be found in diversity cases in which the prevailing party obtains less than the jurisdictional amount. Title 28 U.S.C. § 1332 states:

> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

IV. Allowable Items

Once entitlement to costs is determined, allowable costs must then be ascertained. 28 U.S.C. 1920 sets forth the permitted categories of costs. Costs outside the enumerated items are viewed askance and with a narrow eye. The Supreme Court stated: "We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny." In the same opinion, the Supreme Court continued: "[T]he discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." Farmers v. Arabian American Oil Co., 379 U.S. 227, 235 (1964).

A. Fees of Clerk

The filing fee of $350.00 is recoverable by the prevailing plaintiff. The removal fee of $350.00 is recoverable by the prevailing defendant.

B. Fees for service of summons and subpoena.

Reasonable service fees for summons, attachments and other process are allowed. Fees of either the Marshal or a private process server are allowed. Fees for trial subpoenas and deposition subpoenas are allowed assuming the witness was called to testify or the transcript of the deposition was necessarily obtained for use in the case.

C. Fees of the Court Reporter for all or any part of the transcript necessarily obtained for use in the case.

1. Transcripts. Transcripts may be found to be necessarily obtained if the court ordered the transcript or if the need arose for purpose of preparation or response to certain motions. For example, a hearing before a magistrate judge which is later appealed to a district judge may require a transcript. Also, certain portions of a trial transcript may be necessary obtained for post-trial motions. Cost of transcripts ordered by counsel in preparation of the next day's trial are generally not allowed.

2. Depositions. Depositions are necessarily obtained if they are read into evidence, used for impeachment purposes, or taken from a key witness. A key witness may be defined as a witness around whom the structure of the case revolves. Obviously, the plaintiff and the defendant are key witnesses. A corporate representative could be considered a key witness. Perhaps, an expert witness in a medical malpractice or a products liability case might be considered a key witness or a "critical" witness. Although all witnesses used may seem "key" or "critical," the essential element is whether the attorney structured a substantial portion of the lawsuit around the testimony of the deponent.

Copies of depositions found to be necessarily obtained in a case will be allowed, including an original and one copy if the winning party conducted the deposition. If the winning party defended the deposition, a copy is allowed if such deposition is found to be necessarily obtained for use in the case.

Costs of video depositions and a transcript are recoverable if necessarily obtained for use in the case. See, Titlon v. Capital Cities/ABC. Inc., 115 F.3d 1471 (10th Cir. 1997); Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990).

D. Fees and Disbursements for Printing

These fees include reasonable costs of printing necessarily obtained for use in the case. These might include copier services outside the law firm. Normally, these costs are included with copies of papers necessarily obtained in the case and will be discussed in Section F below.

E. Fees for Witnesses (28 U.S.C. § 1821)

1. Witness Fee. No distinction is made between a fact witness and an expert witness. The allowable costs are $40.00 for each day that it is necessary for the witness to attend trial (usually the day of trial on which the witness testifies). If a witness is subpoenaed for trial and paid a witness fee, but is not called as a witness, such expense may not be recoverable.

2. Subsistence. Subsistence allowance is allowed for witnesses who live too far to be expected to travel to and from their residence daily while in attendance at trial. Subsistence rates, as well as mileage rates are posted annually by the Administrator for General Services for the Federal Government.

3. Travel Allowance. By car, round trip mileage is allowed at the rate as published by the General Services. 28 U.S.C. § 1821(c)(2). Witnesses traveling by common carrier will be reimbursed for actual expenses on a basis of reasonably utilized transportation and the most economical rate.

4. Miscellaneous Allowance. Toll charges for roads, bridges and tunnels, and costs for ferries and taxi cab fares between lodging and the carrier terminals, and parking fees will be paid in full upon proper proof of expense.

F. Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case.

Copies of papers necessarily obtained in the case are those papers which help bring about the disposition of the case. In other words, those papers related to the actual trial (or summary judgment). For example, trial notebooks, trial exhibits, and jury instructions are papers and pleadings related to the trial.

Expenses for demonstrative evidence such as blow ups, models, charts, photographs and other graphic aids may be recoverable if the demonstrative evidence was actually used in the trial.

Charge for in-house copies of papers should be at the same rate that is normally charged to the client, but generally no greater than 15¢ per page.

Copies printed outside the law practice should be reimbursed on a basis of actual expense, excluding expedited charges.

G. Other Costs

Costs not enumerated in section 1920 are rarely awarded. Costs from an appeal which are taxable in the District Court are often included in the "Other Costs" category and may be found in Fed. R. App. P. 39(e). This rule includes the premiums paid for costs of the supersedeas bond and the fee for filing a notice of appeal.

Under the category "Other Costs" some lawyers include attorney fees. Attorney fees are not recoverable under section 1920 and should be sought under a separate motion for attorney fees filed with the Court. Local Rule 54.1 requires a separate motion and supporting brief for legal (attorney) fees.

Sometimes lawyers include travel costs, such as to a deposition, under other costs. Lawyer's travel costs are not recoverable. Other items not recoverable are: Westlaw research costs, postage, phone bills and secretarial or paralegal help. These and other items traditionally absorbed in the "overhead" of a law practice will not be allowed.

Conclusion

These basic guidelines should enable the parties to prepare a proper Bill of Costs. As always, in the practice of law, there may be issues which do not fall within the parameters of basic guidelines. In those instances, parties must review case law and make their best arguments. This document should not be interpreted as a Local Court Rule, but merely as helpful suggestions by the Clerk of Court.