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This Week's Feature

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Winners Don't Walk Away Empty Handed: Don't Forget Your Costs

by Madeline Dennis

So the court granted summary judgment in your client's favor on all claims. Time to put your pencil down, right? Wrong. In the midst of celebrating the case's demise, it can be easy to forget that you are entitled to more than just a judgment in your favor. It is time to cash in on your triumph and file a bill of costs.

The thought of *one more filing* after winning the case might sound cruel and unusual, but in just a few steps, you can go the extra mile for your client and make the win that much sweeter.

First, determine which statutes and local rules apply. Federal Rule of Civil Procedure 54(d)(1) applies in federal actions, but most federal courts have local rules that supplement Rule 54. States have their own costs statutes and guidelines. The applicable rules, statutes, and related case law will help you answer the key questions in drafting your bill of costs.

Who

Rule 54(d)(1) provides for costs to the "prevailing party." Prevailing party status requires "a judicially sanctioned change in the legal relationship of the parties." *Dattner v. ConAgra Foods, Inc.*, 458 F.3d 98, 103 (2d Cir. 2006). Litigants who win on the merits—i.e., by a trial or a summary judgment motion—or who enter court-enforced settlement agreements, are

prevailing parties for purposes of Rule 54. *Id*. Litigants who obtain dismissal on forum non conveniens grounds, for example, are not. *Id.*

What

28 U.S.C. § 1920 governs the types of costs that are recoverable in federal actions. But review the jurisdictional case law interpreting § 1920, which may provide for costs not explicitly listed in the statute. *See, e.g.*, *Tilton v. Capital Cities/ABC, Inc*., 115 F.3d 1471, 1477 (10th Cir. 1997) (holding that 1920(2) implicitly permits costs for video depositions). Section 1920 specifies that transcripts and copies must be "necessarily obtained for use in the case," which requires a reasonable belief that the item at issue will be used or entered into evidence, even if it ultimately is not. *See Templeman v. Chris Craft Corp*., 770 F.2d 245, 249 (5th Cir. 1985) (explaining the court may tax deposition costs shown "to have been reasonably necessary in light of the particular situation at the time it was taken"). Costs are generally recoverable for clerk fees, printing and copying, depositions, transcripts, witness fees, witness travel and subsistence, interpreter fees, basic technology, and preparation of demonstrative evidence. Costs are not available, without a specific statute, for attorney's fees, attorney travel costs, or specialized software. Certain costs under section 1920 are limited to the amounts specified in other statutes. *See* 28 U.S.C. § 1821 (governing witness fees and costs). State courts are not bound by section 1920 and may provide for costs beyond it. *See, e.g.*, Fla. R. Civ. P. Statewide Uniform Guidelines for Taxation of Costs (providing that mediation expenses may be taxed as costs).

When

Rule 54 is silent regarding timing, but most local jurisdictions have rules providing a deadline for filing for costs, anywhere from 10 to 30 days after entry of a judgment. *See, e.g.*, N.D. Ind. L.R. 54-1; M.D. Ga. L.R. 54.2.2. However, costs may not be submitted before a judgment is entered. *See, e.g.*, *Reg'l Care Servs. Corp. v. Companion Life Ins. Co*., No. CV-10-2597-PHX-LOA, 2012 WL 2260984, at *6 (D. Ariz. June 15, 2012).

How

Once you determine which costs you are entitled to and your deadline for filing, you are ready to draft your bill. 28 U.S.C. § 1924 requires an accompanying affidavit in federal actions that verifies that every requested cost "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." Many jurisdictions have bill of cost and affidavit template forms on their websites, which makes the process easier, but be sure to describe specifically each item claimed and why it was necessary to avoid denial or reduction of your claimed costs. *See, e.g.*, *Elliott, Reihner, Siedzikoski, & Egan, Inc. v. Richter*, No. CIV A 96-3860, 2000 WL 427377, at *1 (E.D. Pa. Apr. 20, 2000) (reducing copying costs by half for failing to describe what was copied).

Under Rule 54, a clerk may tax costs on 14 days' notice, and counsel for both sides have seven days from the date that the clerk taxes costs to seek review of the clerk's action by filing a motion. Failure to timely move for review of a clerk's taxation of costs constitutes waiver in the absence of a showing of excusable neglect. *See, e.g., Gohl v. Livonia Pub. Sch.*, No. 12-CV-15199, 2016 WL 2848421, at *3 (E.D. Mich. May 16, 2016).

Also consider using the filing as a bargaining chip by offering to forgive the costs in exchange for the losing party's agreement not to appeal the judgment in the case.

While the last thing that you want to do after winning a case is file one more thing, you will find that the dollars add up, and submitting your bill of costs is a worthwhile endeavor that demonstrates to your client that you are a champion, not just a winner.

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