UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF KANSAS

OFFICE OF THE CLERK OF COURT

BILL OF COSTS HANDBOOK

(12/4/2013)

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Title

I. TAXATION OF COSTS GUIDELINES

Introduction

The purpose of this handbook is to assist counsel in determining which costs are typically approved by the Clerk and thus should be included in the bill of costs. This handbook has been prepared for informational purposes only. It should not be read as a promise or guarantee that certain items or costs will/will not be awarded in every circumstance. Final cost decisions are made by the Clerk of Court or a designated deputy Clerk, and appeals from these decisions are made to the District Judges, who have substantial discretion under the law when deciding a cost challenge.

Pursuant to Federal Rule Civil Procedure 54 (Judgment; Costs at 1), "costs—other than attorney's fees—should be allowed to the prevailing party," and these costs may be taxed by the Clerk on 14 days' notice. Not all expenses submitted may be recoverable and discretion is awarded to the clerk's office. Counsel should review 28 U.S.C. § 1920 (Taxation of costs at 1) for guidance on the kinds of costs that are recoverable under the law.

When a judgment is entered for a party in this court, it may simply state that the party is entitled to recover a sum certain with costs. These costs are not required to be itemized at this point. If an agreement cannot be reached by counsel, it will be the duty of the Clerk or a designee to tax all allowable costs upon the filing of a proper request for taxation of costs as set forth in the District of Kansas Local Rule 54.1 (Taxation and Payment of Costs).[1] If the judgment does not specify the award of costs, the Clerk will proceed with the taxation of costs pursuant to Fed. R. Civ. P. 54 (d) at 1, in favor of the prevailing party unless otherwise ordered by the court.

Procedure

Pursuant to local rule D. Kan. R. 54.1(a), the prevailing party entitled to recovery of costs must file a bill of costs on the form provided by the clerk's office (AO 133) within 30 days after (a) the expiration of the time allowed for appeal of a final judgment or decree; or (b) receipt by the Clerk of an order terminating the action on appeal. The form can be obtained in person at the clerk's office or under the forms section on the Court's web site at www.ksd.uscourts.gov.

Before any costs are taxed, the filing party shall execute the declaration (affidavit) portion of the AO 133 form that the items are correct and have been necessarily incurred in the case and that the services for which any fees have been charged were actually and necessarily performed. See 28 U.S.C. § 1924 (2006) (Verification of bill of costs at 1). A bill of costs filed without proper verification will not be taxed.

Additionally, the party seeking said costs must file a memorandum in support of its costs with the bill of costs. D. Kan. R. 54.1(a)(2) at 1. The memorandum must (A) clearly and concisely itemize and describe the costs (failure to itemize and verify costs may result in their being disallowed by the Court); (B) set forth the statutory basis for the reimbursement of those costs under 28 U.S.C. § 1920 at 1; (C) reference and include copies of relevant invoices, receipts and disbursement instruments, orders or stipulations in support of the requested costs; and (D) state that a reasonable

[1] If a bill of costs request is made under the Equal Access to Justice Act, then the local rule establishing submission of bill of costs does not apply. See Fruitt v. Astrue, 604 F.3d 1217 at 3 (10th Cir. 2010).

effort has been made, in conference with opposing counsel or pro se party, to resolve disputes regarding any particular costs. D. Kan. R. 54.1(a)(2)(A)-(D) at 1.

Moreover, counsel must ensure that supporting documentation for any particular costs be 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 (2006) (Docket fees and costs of briefs at 1) shall be broken down by fee. Any requested costs that do not have this supporting information will be disallowed. See Dodson Int'l Parts, Inc. v. Altendorf, No. 00–4134–SAC, 2005 WL 1799247 at 2 (D. Kan. 2005); ACE USA v. Union Pacific R. Co., Inc., No. 09–2194–KHV, 2012 WL 1027467 at 3 (D. Kan. 2012).

Any objection to the bill of costs must be set forth concisely and with supporting documentation and must be filed with the Court and served on counsel of record within 14 days from the date the bill was filed. D. Kan. R. 54.1(b)(1). Within 7 days from the date the response memorandum was filed, the moving party may file a reply memorandum. D. Kan. R. 54.1(b)(2). If objections are filed, the Clerk or designated deputy Clerk shall consider the objections and shall tax costs, subject to review by the Court as set forth below. If no objections are filed, the Clerk or designated deputy Clerk shall tax costs and allow such items as are properly taxable under the law. D. Kan. R. 54.1(b)(3).

After the Clerk or designated deputy Clerk has made a determination of costs, the parties have seven (7) days in which to file a motion asking the Court to review the decision and retax the costs. Review by the court is granted at the court's discretion. See Fed. R. Civ. P. 54 (c) at 1.

Generally, payment of costs is paid directly to the prevailing party and not to the clerk's office. See D. Kan. R. 54.1(d) for details.

I. WHAT COSTS ARE TAXABLE?

Only those costs specifically mentioned in 28 U.S.C. § 1920 at 1 are taxable. The Clerk must deny all other costs requested, even if the opposing party has failed to make an objection. The citations included below are for reference only and may not reflect the current state of the law with respect to any particular fee category.

A. **Clerk's Fees**

Taxable

a. Admission fees (Burton v. R.J. Reynolds Tobacco Co., 395 F. Supp. 2d 1065 at 4 (D. Kan. 2005))
b. Appellate fees (Fed. R. App. P. (39)(e) (Costs on Appeal taxable in the District at 1-2))
c. Docket Fees (28 U.S.C. § 1923 at 1)
d. Fees Pro-Hac-Vice (Vornado Air Circulation Sys., Inc. v. Duracraft Corp., No. 92-1543-WEB 1995 WL 794070 at 1 (D. Kan. 1995); Whitaker v. Trans Union Corp., No. 03-2551-CM, 2006 WL 2574185 at 1 (D. Kan. 2006); Stein v. Stein, No. 04–1311–JTM, 2007 WL 625822 at 3 (D. Kan. 2007))
e. Filing Fees (28 U.S.C. § 1914 at 1 (District court; filing and miscellaneous fees; rules of court))

B. Conversion Fees

Taxable

a. Imaging documents to Internal Data Management warehouse (Tilton v. Capital Cities/ABC, Inc., 115 F.3d 1471 at 7 (10th Cir. 1997))

Non-Taxable

a. Deposition transcripts to ASCII disks (Berry v. Gen. Motors Corp., No. 88–2570–JWL, 1995 WL 584496 at 2 (D. Kan. 1995); Burton, 395 F. Supp. 2d 1065 at 17; Whitaker at 2, 2006 WL 2574185 at 2; Seyler v. Burlington N. Santa Fe Corp., No. 99–2342–KHV, 2006 WL 3772312 at 2 (D. Kan. 2006))
b. Deposition transcripts to diskettes (Green Constr. Co. v. Kansas Power & Light Co., 153 F. R.D. 670 at 1 (D. Kan. 1994))
c. E-transcripts (Burton, 395 F. Supp 2d 1065 at 17), Stein, 2007 WL 625822 at 2
d. Min-u-scripts/diskettes (State ex rel. Stephan v. Deffenbaugh Indus., Inc., 154 F.R.D. 269 at 2 (D. Kan. 1994); Burton, 395 F. Supp. 2d 1065 at 17)

C. Copy/Printing Fees

Taxable

a. All copy fees based on $.10 per page rate (F.D.I.C. v. Grant-Thornton, No. 86-1531-MLB at 15 (D. Kan. Sept. 7, 1994); Koehn v. Yamaha Motor Corp., U.S.A., No. 94–1112–JTM, 1997 WL 250456 at 3-4 (D. Kan. 1997); Scheufler v. Gen. Host Corp., No. 91–1053, 1998 WL 754614 at 2 (D. Kan. 1998))
b. All copy fees based on $.20 per page rate (Wolf v. Burum, No. 88–1233–C, 1990 WL 129463 at 2 (D. Kan. 1990); Seyler, 2006 WL 3772312 at 3-4 (D. Kan. 2006))
c. Color copies at $1.50 each and copies of photos at $3.50 (Seyler, 2006 WL 3772312 at 6)
d. Copies allowable when necessarily obtained for use in the case. Printing was allowable at $.12 per page (Whitaker, 2006 WL 2574185 at 3)
e. Documents for the court (Washington v. Bd. of Pub. Utils., No. 88–2312–O, 1990 WL 182347 at 1 (D. Kan, 1990))
f. Exhibit and jury notebooks requested by the court (Grant-Thornton, No. 86-1531-MLB at 19)
g. Exhibit and Rule 45 documents (less delivery charge) (Tilton, 115 F.3d 1471 at 7)
h. Multiple copies of depositions (Wolf, 1990 WL 129463 at 2)
i. Multiple copies of pleadings (Wayman v. Amoco Oil. Co., No. 91-1451-MLB at 16 (D. Kan. 1997))
j. Photographs and X-Rays (Elliott v. Kitowski, No. 89-1495-MLB at 3 (D. Kan. Nov. 8, 1993))
k. Printing of paper used for correspondence (Wayman, No. 91-1451-MLB at 15-16)
l. State and Probate records – deemed necessary (Elliott, No. 89-1495-MLB at 3)
m. When agreed between parties (Wayman, No. 91-1451-MLB at 11-15)
n. When necessary for the case (Callicrate v. Farmland Indus., 139 F. 3d. 1336 at 4-5 (10th Cir. 1998); Stein, 2007 WL 625822 at 2, 3)
o. Copies of papers which are part of the trial court record *Vornado* Air Circulation Sys., 1995 WL 794070 at 3)

Non-Taxable

a. Copy of pleadings for convenience only (Washington, 1990 WL 182347 at 1
b. Cost incurred in responding to discovery (Pehr v. Rubbermaid, Inc., No. 99-2089-JWL, 196 F.R.D. 404 at 1 (D. Kan, 2000); McCauley v. Raytheon Travel Air Co., No. 00–2017–JWL, 2001 WL 1464781 at 1, 2 (D. Kan. 2001); Stadtherr v. Elite Logistics, Inc., No. Civ. A. 00–2471–JAR, 2003 WL 21488269 at 2 (D. Kan. 2003); Whitaker, 2006 WL 2574185 at 3)
c. Exhibit notebooks under normal circumstances (Grant-Thornton, No. 86-1531-MLB at 20)
d. For certain deposition transcripts – no documentation (Battenfeld of Am. Holding Co. v. Baird, No. 97–2336–JWL, 196 F.R.D. 613 at 4 (D. Kan. 2000))
e. Material relating to severed co-defendant (Ortega v. IBP, Inc., 883 F. Supp. 558 at 4 (D. Kan. 1995))
f. Must be 'necessary' (Birch v. Schnuck Mkts, Inc., No. CIV. A. 95–2370–GLR, 1998 WL 13336 at 2 (D. Kan. 1998))
g. Not in excess of $.10 without supporting authority (Jacobs v. Boeing Co., No. 98-1398-MLB at 4 (D. Kan. Dec. 9, 2002); Berroth v. Farm Bureau Mut. Ins. Co., No. Civ. A. 01–2095–CM, 2003 WL 22102135 at 5 (D. Kan. 2003))
h. Number stamping on depositions (Berry, 1995 WL 584496 at 3)
i. Two extra copies of daily transcripts (Grant-Thornton, No. 86-1531- MLB at 14)
j. Uncertified copies from clerk's office when not from the same case (Green Constr. Co., 153 F.R.D. 670 at 12)
k. Without documentation (State of Kan. ex rel. Stephan v. Deffenbaugh Industries, Inc., Civ. No. 92–2049–KHV, 154 F.R.D. 269 at 2 (D. Kan. 1994); Battenfeld, 196 F.R.D. 613 at 4)

D. Costs (Generally)

Taxable

a. Indigent Plaintiff (Smith v. Blue Cross/Blue Shield, Inc., No. 94–4053–DES, 184 F.R.D. 634 at 3 (D. Kan. 1999); Johnson v. Oklahoma ex rel. University of Oklahoma Bd. of Regents, Nos. 99-6322, 99-6427, 2000 WL 1114194 at 2 (10th Cir. 2000))
b. Indigent upon filing but financial conditions improved, court assessed fees and costs (Treff v. Galetka, 74 F.3d 191 (10th Cir. 1996) at 8-9)
c. Must be prevailing party (Centennial Mgmt. Servs, Inc. v. Axa Re Vie, No. 97–2509–JWL, 2001 WL 123871 at 1-3 (D. Kan. 2001); Lintz v. Am. Gen. Fin., Inc., No. 98–2213–JWL, 203 F.R.D. 486 at 2 (D. Kan. 2001))
d. Necessary for the case (Cohen-Esrey Real Estate Serv., Inc. v. Twin City Fire Ins. Co., No. 08-2527-KHV, 2011 WL 3608671 at 2, 3 (D. Kan. 2011).
e. Only on prevailing issues (Burton, 395 F. Supp. 2d 1065 at 13)
f. To prevailing party when voluntarily dismissed case with prejudice before trial (Cantrell v. Int'l Broth. of Elec. Workers, 69 F.3d 456 at 3 (10th Cir. 1995)
g. When party prevailed on vast majority of issues (Hutchings v. Kuebler, No. 96–2487–JWL, 1999 WL 588214 at 2 (D. Kan. 1999))

E. Delivery/Shipping Fees

Taxable

a. Exhibits and shipping: Meredith v. Schreiner Transp., Inc., 814 F. Supp. 1004 at 5 (D. Kan. 1993

Non-Taxable

b. Fed-Ex postage and delivery charge (Wabnum v. Snow, No. 97–4101–SAC, 2001 WL 1718043 at 3 (D. Kan. 2001); Grant-Thornton No. 86-1531-MLB at 10; Ortega, 883 F. Supp. 558 at 5; Albertson v. IBP, Inc., No. Civ.A. 96–2110–KHV, 1997 WL 613301 at 1, 2 (D. Kan. 1997); Wayman, No. 91-1451-MLB at 12; Scheufler, 1998 WL 754614 at 1; Whitaker, 2006 WL 2574185 at 1; Seyler, 2006 WL 3772312 at 2; Cohen, 2011 WL 3608671 at 2)

a. Overnight delivery charge (Stadtherr, 2003 WL 21488269 at 3)

b. Postage (Berroth, 2003 WL 22102135 at 4; Whitaker, 2006 WL 2574185 at 1, 2)

F. Deposition

1. Costs/Fees

Taxable

a. Deposition fees and transcripts (State of Kan. ex rel. Stephan, 154 F.R.D. 269 at 2; Whitaker, 2006 WL 2574185 at 2)

b. For Defendant's expert witnesses – up to $40 (Griffith v. Mt. Carmel Med, Ctr., No. 92-1141-MLB, 157 F.R.D. 499 at 6 (D. Kan. 1994))

c. For travel and lodging of out of town expert witness (Meredith, 814 F. Supp. 1004 at 3)

d. Independent interpreter for each side (Vornado Air Circulation Sys., Inc., 1995 WL 794070 at 4)

e. Mileage for over 100 miles (Tilton, 115 F.3d 1471 at 6)

f. Opposing party's potential experts (Anton v. Harrington, No. 94-1025-MLB at 4-5 (D. Kan. July 12, 1996))

g. Used by court for Summary Judgment (Wolf, 1990 WL 129463 at 2)

h. Videotaping with time-stamping for efficiency (Seyler, 2006 WL 3772312 at 2)

i. When all were used at trial or Summary Judgment (Elliott, No. 89-1495-MLB at 3; Wayman, No. 91-1451-MLB at 10-11)

j. When included stenographer's sitting fees (Washington, 1990 WL 182347 at 1)

k. When not used in Summary Judgment (Wolf, 1990 WL 129463 at 2; Hutchings, 1999 WL 588214 at 2)

l. When reasonably appeared necessary at the time it was taken (Kansas Teachers Credit Union v. Mut. Guar. Corp., 982 F. Supp. 1445 at 3 (D. Kan. 1997))

Non-Taxable

a. ASCII disks and Min-u-scripts (Hutchings, 1999 WL 588214 at 2)
b. Cost of exhibit copies (Cohen, 2011 WL 3608671 at 2)
c. Court disallows cost of copy, original only (Birch, 1998 WL 13336 at 2; Hutchings, 1999 WL 588214 at 2; Wabnum v. Snow WL 1718043 at 2; Stadtherr, 2003 WL 21488269 at 3)
d. For deposing Plaintiffs who settled (Wayman, No. 91-1451-MLB at 7)
e. For a witness who was not at trial, deposition deemed unnecessary (Albertson, 1997 WL 613301 at 1-2)
f. If taken solely for discovery (Birch, 1998 WL 13336 at 2)
g. "Signature Fee" (Kansas Teachers Credit Union, 982 F. Supp. 1445 at 3)
h. Shipping, archiving, jurat preparation and exhibit fees relating to depositions (Cohen, 2011 WL 3608671 at 2)

2. Transcripts

Taxable

a. Additional copy, when state law requires (Cohen, 2011 WL 3608671 at 2)
b. Copy for each counsel (Wolf, 1990 WL 129463 at 2)
c. Copy of Plaintiff's own deposition (Ortega, 883 F. Supp. 558 at 5)
d. Generally (Vornado Air Circulation Sys., Inc., 1995 WL 794070 at 1-2; Anton, No. 94-1025-MLB at 2-3; Whitaker, 2006 WL 2574185 at 2; Stein, 2007 WL 625822 at 1)
e. Necessary at the time it was taken (Cohen, 2011 WL 3608671 at 2)
f. Non-testifying person (Grant-Thornton, No. 86-1531-MLB at 6)
g. Of a video deposition (Meredith, 814 F. Supp. 1004 at 3; Birch, 1998 WL 13336 at 1)
h. Of video tapes (Tilton, 115 F.3d 1471 at 10)
i. Original and one copy (Green Constr. Co., 153 F.R.D. 670 at 9)
j. When not used at trial (Koehn, 1997 WL 250456 at 3)
k. When shared between KS and Chicago counsel (Grant-Thornton, No. 86-1531-MLB at 14)
l. When used at summary judgment (Cohen, 2011 WL 3608671 at 2)

Non-Taxable

a. Convenience copies or deemed unnecessary (Elliott, No. 89-1495-MLB at 4; Green Constr. Co., 153 F.R.D. 670 at 9; Ortega, 883 F. Supp. 558 at 5; Berry, 1995 WL 584496 at 2; Whitaker, 2006 WL 2574185 at 2; Stein, 2007 WL 625822 at 1)
b. Purely Investigatory (Cohen, 2011 WL 3608671 at 2)
c. To convert to disk (Grant-Thornton, No. 86-1531-MLB at 15)

3. Video Tapes

Taxable

a. Depositions video tapes/DVDs – generally (Tilton, 115 F.3d 1471 at 10; Whitaker, 2006 WL 2574185 at 2; Cohen, 2011 WL 3608671 at 2-3))
b. Originals (Meredith, 814 F. Supp. 1004 at 3; Grant-Thornton, No. 86-1531-MLB at 11)

c. Video and printed depositions when both are deemed necessarily obtained for the case, must have independent uses (Higgins v. Potter, No. 08-2646-JWL, 2011 WL 3667097 at 3 (D. Kan. 2011))
d. When necessary for use in case (Cohen, 2011 WL 3608671 at 2)
e. When used at trial (Koehn, 1997 WL 250456 at 3)

Non-Taxable

a. Convenience copies (Grant-Thornton, No. 86-1531-MLB at 13)
b. Only the transcripts would be taxed as Costs, per agreement (Griffith, 157 F.R.D. 499 at 4-5)

G. Exhibits

Taxable

a. Deemed "necessary" and "reasonable" (Elliott, No. 89-1495-MLB at 4; Burton, 395 F. Supp. 2d 1065 at 23)
b. Enlargement of anatomical illustrations when injury issue (Compton v. Subaru of Am., Inc., No. 90-1088-MLB at 8-9 (D. Kan. Aug. 4, 1997))
c. Enlargement, when necessary to the case (Cohen, 2011 WL 3608671 at 4)
d. Preparation of exhibits when actually used at trial (Grant-Thornton, No. 86-1531-MLB at 18)
e. Preparation of photo enlargements and computer images (Compton, No. 90-1088-MLB at 7-8)
f. Preparation of prototype (Vornado Air Circulation Sys., 1995 WL 794070 at 3)
g. Purchase, storage and transport of exemplar auto (Compton, No. 90-1088-MLB at 6-7)
h. With prior court approval (Treaster v. Healthsouth Corp., 505 F. Supp.2d at 7 (D. Kan. 2007); Cohen, 2011 WL 3608671 at 3); (Battenfeld of Am. Holding Co., 196 F.R.D. 613 at 2)
i. Without prior court approval – special circumstances (Compton, No. 90-1088-MLB at 4-5)

Non-Taxable

a. Board exhibits used at trial (Battenfeld of Am. Holding Co., 196 F.R.D. 613 at 3-4)
b. Client meetings/briefings regarding preparation (Grant-Thornton, No. 86-1531-MLB at 17)
c. Demonstrative enlargements for bench trial (Vornado Air Circulation Sys., 1995 WL 794070 at 2)
d. Enlargements of papers used by witness – illustrative (Compton, No. 90-1088-MLB at 8)
e. Enlargements and reproduction of trial exhibits (Albertson, 1997 WL 613301 at 2)
f. Expert fees for creating computer simulation (Compton, No. 90-1088-MLB 7-8)
g. Fees of photographer and copying of photos (Compton, No. 90-1088-MLB at 8)
h. Graphics consultant regarding preparation (Grant-Thornton, No. 86-1531-MLB at 17)
i. Intellectual preparation/work (Scheufler, 1998 WL 754614 at 2)
j. Preparation of exhibits not used at trial (Grant-Thornton, No. 86-1531- MLB 18)
k. When just 'helpful' to win, not necessary (Seyler, 2006 WL 3772312 at 3; Burton, 395 F. Supp.2d 1065 at 8)

a. When strictly illustrative (Compton, No. 90-1088-MLB at 8)

H. Facsimile Transmissions

Taxable

a. Ordered in pretrial order, necessary* (Berroth, 2003 WL 22102135 at 4-5)

Non-Taxable

a. Long-distance, facsimile & delivery charges (Stadtherr, 2003 WL 21488269 at 2)

* However, under 28 U.S.C. § 1920 Facsimile costs, miscellaneous costs at 11, a fee of $.50 per page may be allowable.

I. Interest Fees

Taxable

a. Begin accruing on date when costs are first quantified, but only on final amount rewarded (Wheeler v. John Deere Co., 986 F.2d 413 at 1-3 (10th Cir. 1993))

J. Interpretation Services

See 28 U.S.C. § 1828 (2006 at 1) for a discussion of interpretation services in full.

Taxable

a. Independent interpreter for each side in depositions (Vornado Air Circulation Sys., 1995 WL 794070 at 4)

K. Legal Research

Non-Taxable

a. Computer research (Albertson, 1997 WL 613301 at 1; Ortega, 883 F .Supp. 558 at 6)

L. Liability (of Clerk)

Taxable

a. Clerk Taxed jointly and severally (Wayman, No. 91-1451-MLB at 9)

M. Mediation Fees

Non-Taxable

a. Generally (State of Kan. ex rel. Stephan v. Deffenbaugh Indus., Inc., 154 F.R.D. 269 at 2; Aerotech Res., Inc. v. Dodson Aviation, Inc., No. 00-2099-CM, 237 F.R.D. 659 at 7 (D. Kan. 2005))

N. Microfilm

Non-Taxable

a. Reproduction cost (Pehr, 196 F.R.D. 404 at 4)

O. Min-U-Scripts/Diskettes

Non-Taxable

a. Generally (Stadtherr, 2003 WL 21488269 at 3; Hutchings, 1999 WL 588214 at 2)

P. Pro-Hac-Vice Fee

Non-Taxable

a. Attorney appeared unnecessary (Kansas Teachers Credit Union, 982 F. Supp. 1445 at 3-4)

Q. Rental Fees

Taxable

a. TV/VCR used at trial; i.e., showing of deposition (Meredith, 814 F. Supp. 1004 at 2-3; Compton, No. 90-1088-MLB at 7)

Non-Taxable

a. Copy machine rental and set-up at courthouse (Grant-Thornton, No. 86-1531-MLB at 20)
b. Elmo– used at trial (Scheufler, 1998 WL 754614 at 2)
c. Wind tunnel for experiments (Vornado Air Circulation Sys., Inc., 1995 WL 794070 at 3)

R. Searches (Prior Act)

Non-Taxable

a. Generally (Pehr, 196 F.R.D. 404 at 4)

S. Service Fees

Taxable

a. Cost of postage if service is executed by mail (Fed. R. Civ. P. 4 at 109; Mary M. v. N. Lawrence Cmty. Sch. Corp., 951 F. Supp. 820 at 11-12 (S.D.Ind.1997))
b. Cost of service for two Plaintiffs allowed even though one severed later (Ortega, 883 F. Supp. 558 at 4-5)
c. For multiple subpoenas if justifiable reasons exist (Cohen, 2011 WL 3608671 at 1-2, 7)
d. Generally (Anton, No. 94-1025-MLB at 6; Albertson, 1997 WL 613301 at 2; Stein, 2007 WL 625822 at 2)
e. U.S. Marshal fee for service (Griffith, 157 F.R.D. 499 at 8; Burton, 395 F. Supp.2d 1065 at 15) Kansas Teachers Credit Union, 982 F. Supp. 1445 at 3; 28 U.S.C. § 1921 (2006) at 1-2; Seyler at 2, 2006 WL 3772312)

Non-Taxable

a. Fees for service of Plaintiff when willing to appear without service (Wabnum, 2001 WL 1718043 at 2)
b. Postage disallowed for service (Whitaker, 2006 WL 2574185 at 1)
c. Service of summons and subpoena when person served not deposed (Hutchings, 1999 WL 588214 at 3)

T. State Court

Taxable

a. Case transferred to State Court (Callicrate v. Farmland Indus., Inc., 139 F.3d 1336 at 5-6 (10th Cir. 1998))

U. Telephone Charges

Taxable

a. Telephone service charges (Whitaker, 2006 WL 2574185 at 2)

Non-Taxable

a. Long distance facsimile and delivery charges (Stadtherr, 2003 WL 21488269 at 2)
b. Long distance telephone charges (Ortega, 883 F. Supp. 558 at 6; Scheufler, 1998 WL 754614 at 1)

V. Technical Support

Taxable

a. For operation of video system at trial – when found necessary to case (Battenfeld of Am. Holding Co., 196 F.R.D. 613 at 4)

Non-Taxable

a. For operation of video deposition system used at trial – when only used to increase likelihood of prevailing (Battenfeld of Am. Holding Co., 196 F.R.D. 613 at 4)

W. Transcript Fees

Taxable

a. Court reporter fees (Seyler, 2006 WL 3772312 at 2)
b. Daily transcripts – generally (Vornado Air Circulation Sys., 1995 WL 794070 at 2; Whitaker, 2006 WL 2574185 at 2)
c. Deemed "indispensable" or "necessary" (Elliott, No. 89-1495-MLB at 2; Grant-Thornton, No. 86-1531-MLB at 6; Stein, 2007 WL 625822 at 2)
d. Expedited transcripts – when necessary (Barrett v. U.S., 1994 WL 481777 at 1 (D. Kan. 1994); Burton, 395 F. Supp. 2d 1065 at 18)
e. Of closing arguments when parties agreed to split cost (Vornado Air Circulation Sys., 1995 WL 794070 at 2)
f. Of expert testimony (Griffith, 157 F.R.D. 499 at 7-8)

Non-Taxable

a. Expedited transcripts – when deemed for convenience (Birch, 1998 WL 13336 at 1)
b. Transcript of proceeding before the FAA (McCauley, 2001 WL 1464781 at 1)
c. When only for convenience (Compton, No. 90-1088-MLB at 6; Whitaker, 2006 WL 2574185 at 2; Stein, 2007 WL 625822 at 1)
d. When "unnecessary" (Battenfeld of Am. Holding Co., 196 F.R.D. 613 at 5)

X. Translation of Documents

Taxable

a. Generally (Tilton, 115 F.3d 1471 at 11)

Y. Travel Expenses

Taxable

a. For physician expert witness (Meredith, 814 F. Supp. 1004 at 3; Griffith, 157 F.R.D. 499 at 6-7)

Non-Taxable

a. For counsel Barrett, 1994 WL 481777 at 2; Albertson, 1997 WL 613301 at 1)
b. For travel and meals of videographer (Grant-Thornton, No. 86-1531-MLB at 13)
c. Mileage and meals (Ortega, 883 F. Supp. 558 at 6)

Z. Witness Fees

Per diem, travel and mileage fees are generally taxable for witnesses. See 28 U.S.C. § 1821 (2006) at 1-2 for a full discussion.

Taxable

a. "Acceptable" fees and subsistence for witnesses who are "necessarily attending" the trial (Green Constr. Co., 153 F.R.D. 670 at 9-12; Burton, 395 F. Supp.2d 1065 at 19)
b. Airfare, at economic rate (Cohen, 2011 WL 3608671 at 4)
c. Attendance, travel and subsistence fees for discovery depositions (Albertson, 1997 WL 613301 at 2)
d. Expert witnesses only up to $40 per day (Green Constr. Co., 153 F.R.D. 670 at 10; Ortega, 883 F. Supp. 558 at 6; 28 U.S.C. § 1821 at 1)
e. For corporation employees who aren't named individually (Green Constr. Co.,153 F.R.D. 670 at 10)
f. Subsistence charges, no higher than the maximum per diem allowance (Cohen, 2011 WL 3608671 at 4-5)
g. Witness employees of federal government – specific circumstances (Barrett, 1994 WL 481777 at 1-2)
h. Witness fee and mileage (Stein, 2007 WL 625822 at 2)
i. Witness fee and parking, mileage or taxi fare (Burton, 395 F. Supp. 2d 1065 at 20-21, 24)

Non-Taxable

a. Denial of witness fees as a sanction (Koehn, 1997 WL 250456 at 4)
b. Expert witness (Albertson, 1997 WL 613301 at 2)
c. For depositions (Wabnum, 2001 WL 1718043 at 3)
d. For expert reports (Griffith, 157 F.R.D. 499 at 7)
e. For multiple days for creator of computer simulation testifying about the simulation (Vornado Air Circulation Sys., 1995 WL 794070 at 2-3)
f. For "non-testimonial" services (Green Constr. Co., 153 F.R.D. 670 at 7; Burton, 395 F. Supp. 2d 1065 at 19)
g. For self (Anton, No. 94-1025-MLB at 7)
h. For witness present in capacity as corporate representative (Battenfeld of Am. Holding Co., 196 F.R.D. 613 at 5-6)
i. Meals for counsel (Burton, 395 F. Supp. 2d 1065 at 21)

j. Non-testifying witness (Grant-Thornton, No. 86-1531-MLB at 6; Scheufler, 1998 WL 754614 at 2); (Green Constr. Co., 153 F.R.D. 670 at 10)
k. Witness fee for plaintiff (Wabnum, 2001 WL 1718043 at 2)

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 119. Evidence; Witnesses (Refs & Annos)

28 U.S.C.A. § 1821

§ 1821. Per diem and mileage generally; subsistence

Currentness

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. 1252(b)[1]) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provisions of section 3144 of title 18 apply) may not receive fees or allowances under this section, regardless of whether such a witness is incarcerated at the time he or she makes a claim for fees or allowances under this section.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 950; May 10, 1949, c. 96, 63 Stat. 65; May 24, 1949, c. 139, § 94, 63 Stat. 103; Oct. 31, 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798; Mar. 27, 1968, Pub.L. 90-274, § 102(b), 82 Stat. 62; Oct. 27, 1978, Pub.L. 95-535, § 1, 92 Stat. 2033; Dec. 1, 1990, Pub.L. 101-650, Title III, §§ 314(a), 321, 104 Stat. 5115, 5117; Oct. 14, 1992, Pub.L. 102-417, § 2(a)-(c), 106 Stat. 2138; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, § 308(g)(5)(E), 110 Stat. 3009-623.)

Notes of Decisions (401)

Footnotes

[1] So in original. Reference in parenthesis should probably be "(8 U.S.C. 1229a)".

28 U.S.C.A. § 1821, 28 USCA § 1821
Current through P.L. 113-49 approved 11-13-13

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 119. Evidence; Witnesses (Refs & Annos)

28 U.S.C.A. § 1828

§ 1828. Special interpretation services

Currentness

(a) The Director of the Administrative Office of the United States Courts shall establish a program for the provision of special interpretation services in criminal actions and in civil actions initiated by the United States (including petitions for writs of habeas corpus initiated in the name of the United States by relators) in a United States district court. The program shall provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions.

(b) Upon the request of any person in any action for which special interpretation services established pursuant to subsection (a) are not otherwise provided, the Director, with the approval of the presiding judicial officer, may make such services available to the person requesting the services on a reimbursable basis at rates established in conformity with section 9701 of title 31, but the Director may require the prepayment of the estimated expenses of providing the services by the person requesting them.

(c) Except as otherwise provided in this subsection, the expenses incident to providing services under subsection (a) of this section shall be paid by the Director from sums appropriated to the Federal judiciary. A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in a civil action, and any moneys collected as a result of such order may be used to reimburse the appropriations obligated and disbursed in payment for such services.

(d) Appropriations available to the Director shall be available to provide services in accordance with subsection (b) of this section, and moneys collected by the Director under that subsection may be used to reimburse the appropriations charged for such services. A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in the action.

CREDIT(S)
(Added Pub.L. 95-539, § 2(a), Oct. 28, 1978, 92 Stat. 2042; amended Pub.L. 97-258, § 3(g), Sept. 13, 1982, 96 Stat. 1065.)

Notes of Decisions (1)

28 U.S.C.A. § 1828, 28 USCA § 1828
Current through P.L. 113-49 approved 11-13-13

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1914

§ 1914. District court; filing and miscellaneous fees; rules of court

Currentness

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 954; Nov. 6, 1978, Pub.L. 95-598, Title II, § 244, 92 Stat. 2671; June 19, 1986, Pub.L. 99-336, § 4(a), 100 Stat. 637; Oct. 18, 1986, Pub.L. 99-500, Title I, § 101(b) [Title IV, § 407(a)], 100 Stat. 1783-39, 1783-64, and Oct. 30, 1986, Pub.L. 99-591, Title I, § 101(b) [Title IV, § 407(a)], 100 Stat. 3341-39, 3341-64; Oct. 19, 1996, Pub.L. 104-317, Title IV, § 401(a), 110 Stat. 3853; Pub.L. 108-447, Div. B, Title III, § 307(a), Dec. 8, 2004, 118 Stat. 2895; Feb. 8, 2006, Pub.L. 109-171, Title X, § 10001(a), 120 Stat. 183.)

JUDICIAL CONFERENCE SCHEDULE OF FEES

District Court Miscellaneous Fee Schedule

(Issued in accordance with 28 U.S.C. § 1914.)

(Effective May 1, 2013)

The fees included in the District Court Miscellaneous Fee Schedule are to be charged for services provided by the district courts.

- The United States should not be charged fees under this schedule, with the exception of those specifically prescribed in Items 2, 4 and 5, when the information requested is available through remote electronic access.

- Federal agencies or programs that are funded from judiciary appropriations (agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006 and bankruptcy administrators) should not be charged any fees under this schedule.

1. For filing any document that is not related to a pending case or proceeding, $46.

2. For conducting a search of the district court records, $30 per name or item searched. This fee applies to services rendered on

behalf of the United States if the information requested is available through electronic access.

3. For certification of any document, $11. For exemplification of any document, $21.

4. For reproducing any record or paper, $.50 per page. This fee shall apply to paper copies made from either: (1) original documents; or (2) microfiche or microfilm reproductions of the original records. This fee shall apply to services rendered on behalf of the United States if the record or paper requested is available through electronic access.

5. For reproduction of an audio recording of a court proceeding, $30. This fee applies to services rendered on behalf of the United States, if the recording is available electronically.

6. For each microfiche sheet of film or microfilm jacket copy of any court record, where available, $6.

7. For retrieval of a record from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, $53.

8. For a check paid into the court which is returned for lack of funds, $53.

9. For an appeal to a district judge from a judgment of conviction by a magistrate judge in a misdemeanor case, $37.

10. For original admission of attorneys to practice, $176 each, including a certificate of admission. For a duplicate certificate of admission or certificate of good standing, $18.

11. The court may charge and collect fees commensurate with the cost of providing copies of the local rules of court. The court may also distribute copies of the local rules without charge.

12. The clerk shall assess a charge for the handling of registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.

For management of registry funds invested through the Court Registry Investment System, a fee at a rate of 2.5 basis points shall be assessed from interest earnings.

13. For filing an action brought under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. 104-114, 110 Stat. § 785 (1996), $6,355. (This fee is in addition to the filing fee prescribed in 28 U.S.C. § 1914(a) for instituting any civil action other than a writ of habeas corpus.)

14. Administrative fee for filing a civil action, suit, or proceeding in a district court, $50. This fee does not apply to persons granted in forma pauperis status under 28 U.S.C. § 1915.

Electronic Public Access Fee Schedule (Eff. 4/1/2013)

(Issued in Accordance with 28 U.S.C. §§ 1913, 1914, 1926, 1930, 1932)

The fees included in the Electronic Public Access Fee Schedule are to be charged for providing electronic public access to court records.

Fees for Public Access to Court Electronic Records (PACER)

(1) Except as provided below, for electronic access to any case document, docket sheet, or case-specific report via PACER: $0.10 per page, not to exceed the fee for thirty pages.

(2) For electronic access to transcripts and non-case specific reports via PACER (such as reports obtained from the PACER Case Locator or docket activity reports): $0.10 per page.

(3) For electronic access to an audio file of a court hearing via PACER: $2.40 per audio file.

Fees for Courthouse Electronic Access

(4) For printing copies of any record or document accessed electronically at a public terminal in a courthouse: $0.10 per page.

PACER Service Center Fees

(5) For every search of court records conducted by the PACER Service Center, $30 per name or item searched.

(6) For the PACER Service Center to reproduce on paper any record pertaining to a PACER account, if this information is remotely available through electronic access: $0.50 per page.

(7) For a check paid to the PACER Service Center returned for lack of funds: $53.

Free Access and Exemptions

(8) Automatic Fee Exemptions:

- No fee is owed for electronic access to court data or audio files via PACER until an account holder accrues charges of more than $15.00 in a quarterly billing cycle.

- Parties in a case (including pro se litigants) and attorneys of record receive one free electronic copy, via the notice of electronic filing or notice of docket activity, of all documents filed electronically, if receipt is required by law or directed by the filer.

- No fee is charged for access to judicial opinions.

- No fee is charged for viewing case information or documents at courthouse public access terminals.

(9) Discretionary Fee Exemptions:

- Courts may exempt certain persons or classes of persons from payment of the user access fee. Examples of individuals and groups that a court may consider exempting include: indigents, bankruptcy case trustees, pro bono attorneys, pro bono alternative dispute resolution neutrals, Section 501(c)(3) not-for-profit organizations, and individual researchers associated with educational institutions. Courts should not, however, exempt individuals or groups that have the ability to pay the statutorily established access fee. Examples of individuals and groups that a court should not exempt include: local, state or federal government agencies, members of the media, privately paid attorneys or others who have the ability to pay the fee.

- In considering granting an exemption, courts must find:
  - That those seeking an exemption have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information.

  - That individual researchers requesting an exemption have shown that the defined research project is intended for scholarly research, that it is limited in scope, and that it is not intended for redistribution on the internet or for commercial purposes.

- If the court grants an exemption:
  - The user receiving the exemption must agree not to sell the data obtained as a result, and must not transfer any data obtained as the result of a fee exemption, unless expressly authorized by the court.

  - The exemption should be granted for a definite period of time, should be limited in scope, and may be revoked at the discretion of the court granting the exemption.

• Courts may provide local court information at no cost (e.g., local rules, court forms, news items, court calendars, and other information) to benefit the public.

Applicability to the United States and State and Local Governments

(10) Unless otherwise authorized by the Judicial Conference, these fees must be charged to the United States, except to federal agencies or programs that are funded from judiciary appropriations (including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act [18 U.S.C. § 3006A], and bankruptcy administrators).

(11) The fee for printing copies of any record or document accessed electronically at a public terminal ($0.10 per page) described in (4) above does not apply to services rendered on behalf of the United States if the record requested is not remotely available through electronic access.

(12) The fee for local, state, and federal government entities, shall be $0.08 per page until April 1, 2015, after which time, the fee shall be $0.10 per page.

Judicial Conference Policy Notes

The Electronic Public Access (EPA) fee and its exemptions are directly related to the requirement that the judiciary charge user-based fees for the development and maintenance of electronic public access services. The fee schedule provides examples of users that may not be able to afford reasonable user fees (such as indigents, bankruptcy case trustees, individual researchers associated with educational institutions, 501(c)(3) not-for-profit organizations, and court-appointed pro bono attorneys), but requires those seeking an exemption to demonstrate that an exemption is limited in scope and is necessary in order to avoid an unreasonable burden. In addition, the fee schedule includes examples of other entities that courts should not exempt from the fee (such as local, state or federal government agencies, members of the media, and attorneys). The goal is to provide courts with guidance in evaluating a requestor's ability to pay the fee.

Judicial Conference policy also limits exemptions in other ways. First, it requires exempted users to agree not to sell the data they receive through an exemption (unless expressly authorized by the court). This prohibition is not intended to bar a quote or reference to information received as a result of a fee exemption in a scholarly or other similar work. Second, it permits courts to grant exemptions for a definite period of time, to limit the scope of the exemptions, and to revoke exemptions. Third, it cautions that exemptions should be granted as the exception, not the rule, and prohibits courts from exempting all users from EPA fees.

Registry Fund Fees--Item 13
(54 F.R 20407, May 11, 1989)

Effective June 12, 1989, a fee will be assessed for handling funds deposited in noncriminal proceedings with the court and held in interest bearing accounts or instruments pursuant to 28 U.S.C. § 2041 and Federal Rules of Civil Procedure rule 67. For new accounts, i.e, investments made on or after June 12, 1989, the fee will be equal to the first 45 days income earned on the deposit. Each subsequent deposit of new principal in the same case or proceeding will be subject to the fee. Reinvestment of prior deposits will not be subject to the fee. For existing accounts, i.e., investments held by the court prior to June 12, 1989, a fee will be assessed equal to the first 45 days of income earned beginning 30 days after June 12, 1989. Subsequent deposits of new principal in the same account will be subject to the fee. Subsequent reinvestment of existing deposits will not be subject to the fee.

The fee will apply only once to each sum deposited regardless of the length of time deposits are held and will not exceed income actually earned on the account.

The fee does not apply in the District Courts of Guam, Northern Mariana Islands, the Virgin Islands, the United States Claims Court, or other courts whose fees are not set under 28 U.S.C. § 1914.

Registry Fund Fees--Item 13
(55 F.R. 42867, October 24, 1990)

Effective December 1, 1990, the registry fee assessment provisions were revised and converted from a one-time charge equal to all income earned in the first 45 days of the investment to a charge of 10 percent of the income earned while funds are held in the court registry. Additionally, the fee was extended to any funds placed in the court's registry and invested regardless of the nature of the action underlying the deposit.

The new method will not be applied on investments in cases from which a fee has been exacted based on the prior method (interest earned in the first 45 days the funds were invested or the first 45 days following July 12, 1989). The new method will also not be applied in cases where the investment instrument has a maturity date greater than one year, but where a fee under the prior method applies but has not been deducted.

The fee does not apply in the District Courts of Guam, the Northern Mariana Islands, the Virgin Islands, the United States Claims Court, or any other federal court whose fees are not set under 28 U.S.C. §§ 1913, 1914, and 1930.

Registry Fund Fees--Item 13
(56 F.R. 56356, November 4, 1991)

Effective February 3, 1992, the registry fee assessment provisions are revised and converted from a charge equal to 10 percent of the income earned while funds are held in the court's registry to a variable rate based on the amount deposited with the court and, in certain cases, the length of time funds are held in the court's registry.

The revised fee will be a fee of 10 percent of the total income received during each income period from investments of less than $100,000,000 of registry funds in income-bearing accounts. On investments exceeding $100,000,000 the 10 percent fee shall be reduced by one percent for each increment of $50,000,000 over the initial $100,000,000. For those deposits where funds are placed in the registry by court order for a time certain, for example, by the terms of an adjudicated trust, the fee will be further reduced. This further reduction will amount to 2.5 percent for each five-year interval or part thereof. The total minimum fee to be charged will be no less than two percent of the income on investments.

The following table sets out the fee schedule promulgated by this notice:

REGISTRY--SCHEDULE OF FEES

[% of income earned]

Amount of deposit*	0-5 yrs.	>5-10 yrs.	>10-15 yrs.	>15 yrs.
less than 100M	10	7.5	5.0	2.5
100M-<150M	9	6.5	4.0	2.0
150M-<200M	8	5.5	3.0	2.0
200M-<250M	7	4.5	2.0	2.0
250M-<300M	6	3.5	2.0	2.0

300M-<350M	5	2.5	2.0	2.0
350M-<400M	4	2.0	2.0	2.0
400M-<450M	3	2.0	2.0	2.0
over 450M	2	2.0	2.0	2.0

The new fee applies to all earnings applied to investments on and after the effective date of this change, except for earnings on investments in cases being administered under the provisions of the May 11, 1989 notice [54 FR 20407], i.e., to which the fee equal to the first 45 days income is applicable.

The fee, as modified herein, will continue to apply to any case where the court has authorized the investment of funds placed in its custody or held by it in trust in its registry regardless of the nature of the underlying action.

The fee does not apply in the District Court of Guam, the Northern Mariana Islands, the Virgin Islands, the United States Claims Court, or any other Federal court whose fees are not set under 28 U.S.C. §§ 1913, 1914, and 1930.

Notes of Decisions (21)

Footnotes

* Except where otherwise authorized by the Director, each deposit into any account is treated separately in determining the fee.

28 U.S.C.A. § 1914, 28 USCA § 1914
Current through P.L. 113-49 approved 11-13-13

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1920

§ 1920. Taxation of costs

Effective: October 13, 2008

Currentness

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 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.

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

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 955; Oct. 28, 1978, Pub.L. 95-539, § 7, 92 Stat. 2044; Oct. 13, 2008, Pub.L. 110-406, § 6, 122 Stat. 4292.)

CROSS REFERENCES
Arbitration award, inclusion of costs, see 28 USCA § 654.
Costs, denial of to plaintiff where plaintiff recovers less than $50,000, see 28 USCA § 1332.
Costs allowed to prevailing party; treatment of, see Fed.Rules Civ.Proc. Rule 54, 28 USCA.
Costs of previously dismissed action, see Fed.Rules Civ.Proc. Rule 41, 28 USCA.
Court of the United States defined, see 28 USCA § 451.
Exemption of United States for costs except where statute permits taxation, see 28 USCA § 2412.
Fees and costs in admiralty and maritime cases, see 28 USCA § 1925.
Marshal's fees, see 28 USCA § 1921.
Offer of judgment affecting costs, see Fed.Rules Civ.Proc. Rule 68, 28 USCA.

Reporter's transcript, fees for, see 28 USCA § 753.
Taxation of costs in fine, forfeiture and criminal proceedings, see 28 USCA § 1918.
Travel expenses of witnesses, see 28 USCA § 1821.

RESEARCH REFERENCES
ALR Library
40 ALR, Fed. 2nd Series 115, Construction and Application of Court Interpreters Act, 28 U.S.C.A. §§ 1827, 1828.
28 ALR, Fed. 2nd Series 397, Recovery of Computer-Assisted Research Costs as Part of or in Addition to Attorney's Fees Under Federal Fee-Shifting Statutes.
155 ALR, Fed. 445, Propriety Under 28 U.S.C.A. and Rule 54(D) of Federal Rules of Civil Procedure of Allowing Prevailing Party Costs for Copies of Depositions.
156 ALR, Fed. 311, Taxation of Costs Associated With Videotaped Depositions Under 28 U.S.C.A. § 1920 and Rule 54(D) of Federal Rules of Civil Procedure.
142 ALR, Fed. 627, What Constitutes "Fees" or "Costs" Within Meaning of Federal Statutory Provision (28 U.S.C.A. § 1915 and Similar Predecessor Statutes) Permitting Party to Proceed in Forma Pauperis Without Prepayment of Fees And...
102 ALR, Fed. 828, Taxation of Costs Under 28 U.S.C.A. § 1918.
81 ALR, Fed. 36, What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously So as to Warrant Imposition of Liability on Counsel Under 28 U.S.C.A. § 1927 for Excess Costs, Expenses, and Attorney...
80 ALR, Fed. 168, Recoverability of Cost of Computerized Legal Research Under 28 U.S.C.A. § 1920 or Rule 54(D), Federal Rules of Civil Procedure.
50 ALR, Fed. 472, Propriety Under 28 U.S.C.A. § 1920 and Rule 54(D) of the Federal Rules of Civil Procedure of Allowing Prevailing Party Costs for Copies of Depositions.
29 ALR, Fed. 932, Deposition Expenses as Includible in Judgments for Costs Under 28 U.S.C.A. § 2412 in Civil Actions Brought by or Against United States.
14 ALR, Fed. 901, Construction and Application of 28 U.S.C.A. § 1921 Authorizing Fees of United States Marshals to be Collected and Taxed as Costs.
Encyclopedias
28 Am. Jur. Proof of Facts 2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence.
50 Am. Jur. Proof of Facts 2d 263, Damages for Copyright Infringement.
28 Am. Jur. Proof of Facts 3d 267, Proof of Wrongful Termination of Motor Vehicle Dealership.
28 Am. Jur. Trials 1, Housing Discrimination Litigation.
Forms
Federal Procedural Forms § 12:46, Complaint in Federal Court--By CFTC--Seeking Injunction--Violations of Commodity Exchange Act, Rules or Regulations [7 U.S.C.A. §§ 1a, 2, 6b, 6*o*, 13a-1; 28 U.S.C.A. §§ 1920, 2412; 17 C.F.R...
Federal Procedural Forms § 1:1412, Memorandum--Of Plaintiffs in Support of Bill of Costs [28 U.S.C.A. § 1920; Fed. R. Civ. P. 54(D)(1)].
Federal Procedural Forms § 45:322, Motion--For Prejudgment and Postjudgment Interest--Termination of Employee With Disability [28 U.S.C.A. §§ 1920, 1961; 42 U.S.C.A. §§ 2000e-5(G), 12117(a)].
Treatises and Practice Aids
Americans With Disab. Pract. & Compliance Manual § 10:89, Motion--For Prejudgment and Post-Judgment Interest--Termination of Employee With Disability [28 U.S.C.A. §§ 1961, 1920; 42 U.S.C.A. §§ 2000e-5(G), 12117(a)].
Americans With Disab. Pract. & Compliance Manual § 13:27, Plaintiff's Brief in Support of Motion Vacating Magistrate's Order Denying Preparation of Transcript of Proceedings at Government Expense [20 U.S.C.A. § 1415(H)(3), (i); 28 U.S.C.A. § 753(F)]...
Federal Procedure, Lawyers Edition § 51:99, Costs Authorized Under 28 U.S.C.A. § 1920.
Federal Procedure, Lawyers Edition § 28:157, Expert Witness Fees.
Federal Procedure, Lawyers Edition § 50:255, Attorney's Fees and Costs.
Federal Procedure, Lawyers Edition § 50:296, Costs.
Federal Procedure, Lawyers Edition § 51:100, Costs Authorized Under 28 U.S.C.A. § 1920--Stenographic Transcripts.
Federal Procedure, Lawyers Edition § 51:101, Costs Authorized Under 28 U.S.C.A. § 1920--Exemplification and Copies of Necessary Papers; Demonstrative Evidence.
Federal Procedure, Lawyers Edition § 80:405, Equitable Exceptions to Limits Imposed by 28 U.S.C.A. § 1821.
Federal Procedure, Lawyers Edition § 50:1215, What Costs Are Recoverable.

Relevant Notes of Decisions (65)
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GENERALLY

Construction with other laws--Generally

Investigative costs are included in "full costs" recoverable under Communications Act, since "full costs" permitted under Act differ from, and can exceed, the "taxable costs" available under statute defining "taxable costs." Kingvision Pay-Per-View Ltd. v. Autar, E.D.N.Y.2006, 426 F.Supp.2d 59.Telecommunications 1253

Discretion of court

The taxing of costs is a matter within trial judge's discretion. Marcus v. National Life Ins. Co., C.A.7 (Ill.) 1970, 422 F.2d 626. See, also, Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, C.A.9, 1962, 316 F.2d 275; Hohensee v. Basalyga, D.C.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982; Prashker v. Beech Aircraft Corp., D.C.Del.1959, 24 F.R.D. 305.Federal Civil Procedure 2723

Power to allow items normally taxable as costs is within sound discretion of district court. Stacy v. Williams, N.D.Miss.1970, 50 F.R.D. 52, affirmed 446 F.2d 1366.Federal Civil Procedure 2723

Prevailing parties--Generally

Generally, costs should be taxed in favor of prevailing party. Brecklein v. Bookwalter, W.D.Mo.1970, 313 F.Supp. 550. See, also, Hohensee v. Basalyga, D.C.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2727

Where neither party prevails, it is appropriate to deny costs to both parties. Hohensee v. Basalyga, M.D.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2726.1

---- Miscellaneous parties awarded costs, prevailing parties

Stipulations or agreements

Where the parties stipulated that complainants were not to be charged with the defendant's costs or expenses, and the defendant's attorney did not object, the subsequent filing of a cost bill for defendant's solicitor's fees was a violation of the agreement. Cahn v. Qung Wah Lung, C.C.Cal.1886, 28 F. 396, 12 Sawy. 92.

Employment actions

Apportionment of costs

Where on an appeal there was no occasion to resolve a certain issue raised in briefs because Court of Appeals affirmed orders in question on other grounds, but in support of such issue, an appellee devoted much of its brief and, in addition, filed an appendix consisting of 124 pages, in such situation, appellee would be taxed with one-half of cost on appeal, notwithstanding fact it prevailed on the appeal. Switzer Bros., Inc. v. Chicago Cardboard Co., C.A.7 (Ill.) 1958, 252 F.2d 407, 116 U.S.P.Q. 277.Federal Civil Procedure 2744

Bill of costs--Generally

Although statute allowing federal court to tax as costs against losing party fees for exemplification and copies of papers necessarily obtained for use in the case does not demand page-by-page precision, a bill of costs must represent a calculation

that is reasonably accurate under the circumstances. Summit Technology, Inc. v. Nidek Co., Ltd., C.A.Fed.2006, 435 F.3d 1371, 77 U.S.P.Q.2d 1674.Federal Civil Procedure 2740

STENOGRAPHIC TRANSCRIPTS GENERALLY

---- Hearings on motions, stenographic transcripts within section, stenographic transcripts generally

Expense of court reporter's transcripts of three evidentiary hearings in three-judge action challenging constitutionality of regulations promulgated by state Board of Trustees of Institutions of Higher Learning for off-campus speakers at state colleges and universities was allowable as costs recoverable by successful plaintiffs where transcripts of three hearings held before managing judge of court sitting alone were obtained for and were necessary to keep two remaining judges abreast of case and to have readily available a complete record of proceedings. Stacy v. Williams, N.D.Miss.1970, 50 F.R.D. 52, affirmed 446 F.2d 1366.Federal Civil Procedure 2740

Where transcripts of pretrial hearings, in patent infringement suit, were not reasonably necessary for proper presentation of case, prevailing defendant's costs thereof would be disallowed. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, 50 F.R.D. 5.Patents 325.11(6)

Amount allowed, stenographic transcripts generally

Only the amount a transcript at the end of trial would have cost would be taxed as costs, at the maximum $2 per original page statutorily prescribed rate, where additional expense for obtaining transcripts of two pretrial conferences and daily transcription of trial was excessive and primarily for the convenience of counsel, even though the court used the transcript in the formulation of its opinion and order. Paul N. Howard Co. v. Puerto Rico Aqueduct and Sewer Authority, D.Puerto Rico 1986, 110 F.R.D. 78.Federal Civil Procedure 2740

STENOGRAPHIC TRANSCRIPTS OF DEPOSITIONS

---- Miscellaneous cases cost allowed, videotaped depositions, stenographic transcripts of depositions

Fee for video and stenographic versions of depositions was recoverable by alleged infringers, as prevailing party in copyright infringement action, where videotaped and stenographic versions of the depositions were necessarily obtained for use in the case; written transcripts of the depositions were needed to submit page/line deposition designations required by the court and to refer the court and opposing counsel to passages in the transcripts when impeaching witnesses at trial and playing designations of the video-taped versions at trial. Baisden v. I'm Ready Productions, Inc., S.D.Tex.2011, 793 F.Supp.2d 970.Copyrights and Intellectual Property 90(1)

Successful defendant in age discrimination action was entitled to recover as costs the expense of videotaping deposition of witness who was not available for trial under provision authorizing recovery as costs of variant form of witness fee, but fee recovered would be limited to $30 per diem. Fressell v. AT & T Technologies, Inc., N.D.Ga.1984, 103 F.R.D. 111.Civil Rights 1584

Deposition on written interrogatories, stenographic transcripts of depositions

Where plaintiff took deposition before officer on written interrogatories, a reasonable officer's fee of $10 per diem was taxable against losing defendant as costs. Hancock v. Albee, D.C.Conn.1951, 11 F.R.D. 139.Federal Civil Procedure 2738

Extensive nature of depositions, stenographic transcripts of depositions--Generally

Deposition transcript costs were excessive and therefore not completely recoverable under statute permitting a federal court to tax as costs certain fees of the court reporter for stenographic transcripts necessarily obtained for use in the case, where invoice

for one deposition translated to a charge of $10.00 perpage, while the two invoices that actually included itemized charges only included a $3.50 page charge along with unrecoverable incidental costs including expedited charges, transcription disk and e-mail charges, and shipping costs. Halliburton Energy Services, Inc. v. M-I, LLC, E.D.Tex.2007, 244 F.R.D. 369.Federal Civil Procedure 2738

---- Impeachment of witnesses, trial use, stenographic transcripts of depositions

Prevailing plaintiff would be allowed to recover costs of depositions of defendant's witnesses, with the exception of one deposition whose alleged use during trial for impeachment of other witnesses was at best questionable and as to which it was not demonstrated that the deposition reasonably seemed necessary at the time it was taken. Shared Medical Systems v. Ashford Presbyterian Community Hosp., D.Puerto Rico 2002, 212 F.R.D. 50.Federal Civil Procedure 2738

Incidental charges, stenographic transcripts of depositions

Although entitled to recover cost of depositions, prevailing party was not entitled to recover costs incident to depositions, such as court reporter's per diem charge, lodging, and eating expenses, or room and beverage charges for deposition, or cost of copying depositions. Viacao Aerea Sao Paulo, S.A. v. International Lease Finance Corp., C.D.Cal.1988, 119 F.R.D. 435.Federal Civil Procedure 2738

---- Miscellaneous cases, copies, stenographic transcripts of depositions

Trial judge did not abuse discretion in permitting counsel for husband and wife maintaining Tort Claims Act suit, §§ 1346(b) and 2671 et seq. of Title 28, predicated on substantial injuries to wife as result of surgery to tax as costs copies of depositions of government medical officers, nurses and corpsmen.U.S. v. Kolesar, C.A.5 (Fla.) 1963, 313 F.2d 835.Federal Civil Procedure 2738

STENOGRAPHIC TRIAL TRANSCRIPTS

Complexity of issues, stenographic trial transcripts

Court reporters' fees for transcripts could be recovered as costs by professional football players who prevailed in antitrust class action against National Football League (NFL); transcripts were "necessarily obtained" in preparing for case, within meaning of cost statute, since trial was long and complicated. Brown v. Pro Football, Inc., D.D.C.1993, 839 F.Supp. 905, on reconsideration 846 F.Supp. 108, reversed 50 F.3d 1041, 311 U.S.App.D.C. 89, certiorari granted 116 S.Ct. 593, 516 U.S. 1021, 133 L.Ed.2d 513, motion granted 116 S.Ct. 905, 516 U.S. 1109, 133 L.Ed.2d 838, affirmed 116 S.Ct. 2116, 518 U.S. 231, 135 L.Ed.2d 521.Federal Civil Procedure 2740

Length of trial, stenographic trial transcripts

In stockholder's action, which consisted of consolidation of several such actions, wherein recovery of $4,000,000 was sought from several defendants, and trial consumed seven days distributed over several weeks, single copy of daily trial transcript, which ran over 1,200 typed pages, was reasonably necessary for use on trial within this section. Perlman v. Feldmann, D.C.Conn.1953, 116 F.Supp. 102.Federal Civil Procedure 2740

---- Court use, daily or expedited transcripts, stenographic trial transcripts

Defendants as prevailing parties were entitled to tax costs in the amount of $1.50 for prime or original page of daily transcript and one-half of cost of court copy of such transcript where a daily transcript was obtained for use in the case and was indispensable to the court. Syracuse Broadcasting Corp. v. Newhouse, N.D.N.Y.1963, 32 F.R.D. 29, affirmed 319 F.2d 683.Federal Civil Procedure 2740

---- Length of trial, daily or expedited transcripts, stenographic trial transcripts

Where, due to length of trial, in patent infringement suit, and complexity of case, daily transcript of testimony and final arguments was reasonably necessary for proper trial and decision of case, defendant, which prevailed, would be permitted to tax cost of its copy of transcript and its share of court's copy of transcript of trial and final arguments. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, 50 F.R.D. 5.Patents 325.11(6)

PRINTING AND WITNESSES

---- Expert witnesses, witness fees, printing and witnesses

In federal civil rights case brought by arrestee's parents and estate against county, police officers, county correctional health agency, and nurse, plaintiffs could not recover expert witness fees and expenses incurred with respect to their claims under §§ 1983; rather, plaintiffs were entitled only to statutory per diem witness fee for each testifying expert. Agster v. Maricopa County, D.Ariz.2007, 486 F.Supp.2d 1005.Civil Rights 1476

Manufacturer that prevailed in products liability action was not entitled to costs from plaintiffs in form of expert witness fees for manufacturer's expert to extent fees exceeded statutory limitation of $40 per day, as expert was not court appointed. Ezelle v. Bauer Corp., S.D.Miss.1994, 154 F.R.D. 149.Federal Civil Procedure 2741

---- Miscellaneous witness fees, printing and witnesses

Professional football players who prevailed in antitrust class action against National Football League (NFL) were not entitled to award of defense witness expenses as cost, absent evidence concerning number of days witnesses were in court, their travel expenses, their subsistence expenses, or why plaintiffs would have incurred any cost for defense witnesses.Brown v. Pro Football, Inc., D.D.C.1993, 839 F.Supp. 905, on reconsideration 846 F.Supp. 108, reversed 50 F.3d 1041, 311 U.S.App.D.C. 89, certiorari granted 116 S.Ct. 593, 516 U.S. 1021, 133 L.Ed.2d 513, motion granted 116 S.Ct. 905, 516 U.S. 1109, 133 L.Ed.2d 838, affirmed 116 S.Ct. 2116, 518 U.S. 231, 135 L.Ed.2d 521.Federal Civil Procedure 2741

EXEMPLIFICATION AND COPIES OF PAPERS GENERALLY

Necessarily obtained for use in case, exemplification and copies of papers generally--Generally

Employer's requested costs of $226.86 for in-house photocopies were reasonable, as required for recovery upon prevailing on employees' overtime pay claim under FLSA, where employer attached documentation of photocopier counter records indicating total of 1,194 copies made at $0.19 perpage, and copies were necessarily used in letters, discovery exhibits, attachments, and exhibits for depositions. Rodriguez v. Marble Care Intern., Inc., S.D.Fla.2012, 862 F.Supp.2d 1316.Labor and Employment 2405

---- Miscellaneous copies necessary, necessarily obtained for use in case, exemplification and copies of papers generally

Under First Circuit law, following judgment for alleged infringer in patent infringement suit, alleged infringer's photocopying costs were taxable to patentee under statute setting forth kinds of expenses that could be taxed as costs against losing party, although alleged infringer did not identify each photocopied page as having been "necessarily obtained for use in the case," where alleged infringer reduced its outside vendor invoice for copying by 50 percent, to account for non-necessary copies, and, given that complex patent litigation involved hundreds of thousands of documents and copies, alleged infringer was not expected to track the identity of each photocopied page. Summit Technology, Inc. v. Nidek Co., Ltd., C.A.Fed.2006, 435 F.3d 1371, 77 U.S.P.Q.2d 1674.Patents 325.11(6)

Trial use, exemplification and copies of papers generally

Prevailing school district, in suit under the IDEA to recover cost of unilateral private placement of handicapped student, was entitled to recover copy costs for 8,318 **pages**, and 15 **cents per page** was reasonable copy cost, where school district made two copies of its filings for the court and one for the student, and one copy of all of the student's filings, found it necessary to provide copies of relevant portions of transcript before hearing officer to two of its witnesses, and made one copy of each of the depositions for use at trial. Cypress-Fairbanks Independent School Dist. v. Michael F. by Barry F., S.D.Tex.1995, 931 F.Supp. 474, affirmed as modified 118 F.3d 245, 152 A.L.R. Fed. 771, certiorari denied 118 S.Ct. 690, 522 U.S. 1047, 139 L.Ed.2d 636.Education 898(9)

Exhibits, exemplification and copies of papers generally

Prevailing defendant's cost of reproducing its original trial exhibits, in patent infringement suit, would be allowed, in view of complexity of proof of factual issues involved, but cost of one copy of such exhibits would be disallowed. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, **50** F.R.D. 5.Patents 325.11(6)

Environmental actions, exemplification and copies of papers generally

Costs for printing and photocopying, subpoena service and witness fees, filing fee, and depositions were recoverable, after reducing photocopying by **50** percent, in clean water case. Proffitt v. Municipal Authority of Borough of Morrisville, E.D.Pa.1989, 716 F.Supp. 845, affirmed 897 F.2d 523.Federal Civil Procedure 2738; Federal Civil Procedure 2740; Federal Civil Procedure 2741

Bill of costs, exemplification and copies of papers generally

While a **page**-by-**page** justification for copying costs is not required to render the costs taxable, the prevailing party must offer some evidence of necessity; nonetheless, counsel should inform the court of the number of copies, the cost of each copy, and provide, if possible, a breakdown of the reasons why photocopying of certain documents was necessary. Osorio v. One World Technologies, Inc., D.Mass.2011, 834 F.Supp.2d 20.Federal Civil Procedure 2742.1

EXEMPLIFICATION AND COPIES OF DEMONSTRATIVE EVIDENCE

---- Necessarily obtained for use in case, enlargements of exhibits, exemplification and copies of demonstrative evidence

Issue of whether defendant's costs for trial exhibits, including enlargements, could be assessed against plaintiff could not be determined on appeal absent evidence as to whether enlargements were "necessarily obtained for use in the case" within meaning of **28** U.S.C.A. § 1920(4), which authorizes taxation of costs for exemplification and copies of paper under such circumstances. Crues v. KFC Corp., C.A.8 (Mo.) 1985, 768 F.2d 230.Federal Civil Procedure 2740

Prevailing plaintiff could not recover cost of eleven mounted enlargements used during trial to better represent its case before the jury; such costs are not allowed by cost statute, and although helpful and convenient, the enlargements were not necessary to the litigation of the case. Shared Medical Systems v. Ashford Presbyterian Community Hosp., D.Puerto Rico 2002, 212 F.R.D. **50**.Federal Civil Procedure 2736

---- Necessarily obtained for use in case, charts and diagrams, exemplification and copies of demonstrative evidence

Cost of charts, including blow-ups, flip-charts, and **page**-sized color exhibits, used during trial in professional football players' antitrust class action against National Football League (NFL), were recoverable, where such charts were necessary to players' presentation of their case to jury. Brown v. Pro Football, Inc., D.D.C.1993, 839 F.Supp. 905, on reconsideration 846 F.Supp. 108, reversed **50** F.3d 1041, 311 U.S.App.D.C. 89, certiorari granted 116 S.Ct. 593, 516 U.S. 1021, 133 L.Ed.2d 513, motion

granted 116 S.Ct. 905, 516 U.S. 1109, 133 L.Ed.2d 838, affirmed 116 S.Ct. 2116, 518 U.S. 231, 135 L.Ed.2d 521.Federal Civil Procedure 2736

In patent infringement suit, successful defendants would be awarded as costs only 25 **percent** of their expenses for elaborate and detailed charts, which were prepared by their expert and which went far beyond the needs of the occasion. Emerson v. National Cylinder Gas Co., D.C.Mass.1957, 147 F.Supp. 543, 112 U.S.P.Q. 163, affirmed 251 F.2d 152, 116 U.S.P.Q. 101.Patents 325.11(6)

Photocopying, exemplification and copies of demonstrative evidence

Plaintiff could not recover photocopying costs in Truth-in-Leasing Act action, where his submissions did not provide information regarding purpose of photocopies, document copied, number of copies, or **per page** copying cost. Faraca v. Fleet 1 Logistics, LLC, E.D.Wis.2010, 693 F.Supp.2d 891.Federal Civil Procedure 2740

Photocopying costs would be awarded in employment discrimination suit at the rate of $.10 **per page**. Meacham v. Knolls Atomic Power Laboratory, N.D.N.Y.2002, 185 F.Supp.2d 193, affirmed 381 F.3d 56, vacated 125 S.Ct. 1731, 544 U.S. 957, 161 L.Ed.2d 596, on remand 461 F.3d 134, remanded 305 Fed.Appx. 748, 2009 WL 33609, on remand 627 F.Supp.2d 72.Civil Rights 1584

INTERPRETERS AND EXPERT WITNESS FEES

Interpreter fees, interpreters and expert witness fees--Generally

Federal district court has power to tax interpreter's fee. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, **50** F.R.D. 5.Federal Civil Procedure 2736

---- Necessity of evidence, interpreter fees, interpreters and expert witness fees

Question determinative of whether interpreter's fee should be taxed as costs is whether items translated were reasonably necessary for proper determination of issues. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, **50** F.R.D. 5.Federal Civil Procedure 2736

---- Trial use, interpreter fees, interpreters and expert witness fees

Prevailing defendant, in patent infringement suit, would not be allowed costs of translating certain documents, absent indication that such documents, or parts thereof, were admitted into evidence. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, **50** F.R.D. 5.Patents 325.11(6)

---- Patent actions, interpreter fees, interpreters and expert witness fees

Prevailing defendant, in patent infringement suit, would be allowed costs of interpreter's services which were required in connection with testimony of certain witnesses. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, **50** F.R.D. 5.Patents 325.11(1)

---- Amount of fee, expert witness fees, interpreters and expert witness fees

Cost award of $4,863 granted to defendant for time its experts attended trial improperly exceeded statutory allowable of $40 **per** day for each day of witness' trial attendance, including days spent travelling to and from trial. Holmes v. Cessna Aircraft Co., C.A.5 (Tex.) 1994, 11 F.3d 63.Federal Civil Procedure 2741

---- Civil rights actions, expert witness fees, interpreters and expert witness fees

Non-attorney expert's fees for services rendered to prevailing parents in IDEA action are not "costs" recoverable from state under IDEA's fee-shifting provision, regardless of legislative history arguably stating intent to include such fees within recoverable costs; provision itself contains no hint of state's responsibility for expert fees, "costs" as term of art generally does not comprise expert fees, and recoverable costs and witness fees in federal courts are strictly limited by statute. Arlington Cent. School Dist. Bd. of Educ. v. Murphy, U.S.2006, 126 S.Ct. 2455, 548 U.S. 291, 165 L.Ed.2d 526.Education 898(6)

Although under general cost statute [28 U.S.C.A. § 1920], expert witness fees are not recoverable, in actions under Title VII, and Age Discrimination in Employment Act, expert fees may be reimbursed as part of attorney fees under 42 U.S.C.A. § 1988 if they are reasonably necessary to plaintiff's case. Bruno v. Western Elec. Co., D.C.Colo.1985, 618 F.Supp. 398.

ATTORNEY FEES

Attorney fees generally

Because the statutory list of taxable costs embodies Congress' considered choice as to what expenses should be taxable, courts are not permitted to allow taxation of costs not included in the list, and because attorneys' fees are not on the list, taxable costs do not include attorneys' fees. Kingvision Pay-Per-View Ltd. v. Autar, E.D.N.Y.2006, 426 F.Supp.2d 59.Federal Civil Procedure 2735; Federal Civil Procedure 2736

Attorneys' fees are not ordinarily recoverable in absence of a statute or enforceable contract providing therefor. Hohensee v. Basalyga, M.D.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2737.14

Considerations governing, attorney fees--Generally

Counsel fees should be awarded only in rare and unusual instances. Hohensee v. Basalyga, M.D.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2737.14

Computerized legal research, attorney fees

Although charges for computerized legal research were not specifically authorized by 28 U.S.C.A. § 1920, they were allowable in civil rights action under 42 U.S.C.A. § 1988. Levka v. City of Chicago, N.D.Ill.1985, 107 F.R.D. 230.Civil Rights 1486

Divorce, attorney fees

Chapter 7 debtor's former wife could not recover attorney fees in her adversary proceeding to except from discharge, under discharge exception for non-support divorce debt, debtor's obligation to pay her $400 per month pursuant to marital property settlement, despite former wife's reliance on domestic court's ability to award fees in divorce case, given that no award of fees was made to former wife in divorce decree or property settlement agreement, that Bankruptcy Code did not authorize award of fees in former wife's situation, and that attorney fees were not type of costs that could be assessed in favor of prevailing party. In re Schwaiger, Bkrtcy.D.Kan.2007, 361 B.R. 181.Bankruptcy 2185

Merit Systems Protection Board, attorney fees

Expenses which are recoverable as part of attorney fees do not include those which are awardable as "costs" under 28 U.S.C.A. § 1920, as Civil Service Reform Act does not authorize Merit Systems Protection Board to award such costs. Lizut v. Department of Army, M.S.P.B.1985, 27 M.S.P.R. 611.Merit Systems Protection 493

MISCELLANEOUS COSTS

Filing fees, miscellaneous costs--Generally

Clerk's filing fee may be taxed as costs. Hohensee v. Basalyga, M.D.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2736

---- Miscellaneous cases, filing fees, miscellaneous costs

Award to claimant of costs of court filing fee, fee to accept service per statute, and fees incurred for deposition transcripts necessarily obtained for use in case was warranted under statute governing taxation of costs in claimant's action against ERISA plan administrator alleging nonpayment of benefits allegedly due under plan. Merigan v. Liberty Life Assur. Co. of Boston, D.Mass.2012, 839 F.Supp.2d 445.Labor and Employment 717

Non-statutory costs generally, miscellaneous costs

Nonstatutory costs should be taxed sparingly. Hohensee v. Basalyga, M.D.Pa.1969, 50 F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2721

Costs in equity causes were not limited to the items specified in former § 830 of this title, but additional items were allowable in the discretion of the court unless controlled by statute or rule of court. Gotz v. Universal Products Co., D.C.Del.1943, 3 F.R.D. 153. See, also, Barber-Coleman Co. v. Withnell, D.C.Mass.1928, 28 F.2d 543; Smith v. James Mfg. Co., D.C.N.Y.1938, 21 F.Supp. 636.Federal Civil Procedure 2724

Identification of costs, miscellaneous costs

Award of prevailing parties' bill of costs, which included $2,628 for 43.8 hours that some unidentified person spent serving unidentified documents on unidentified recipients for $60 per hour, would be vacated, given that Court of Appeals, as well as district court, could not tell which outlays were on statutory list of allowable costs and which were not and that prevailing parties declined to fill Court in about what unnamed person or persons accomplished during 43.8 hours in question.Collins v. Gorman, C.A.7 (Ill.) 1996, 96 F.3d 1057.Federal Courts 932.1

---- Supersedeas bond, bond premiums or expenses, miscellaneous costs

Where appellant agreed to pay private party $250 per month for supplying $10,000 as security for issuance of supersedeas appeal bond, and payments totalled $5,750, such payments were not ordinary expenses of obtaining bond but were sums to be paid on speculative money-making private contract and trial court properly refused to tax them as costs. Kemart Corp. v. Printing Arts Research Laboratories, Inc., C.A.9 (Cal.) 1956, 232 F.2d 897, 109 U.S.P.Q. 234.Federal Civil Procedure 2743.1

Document management program, miscellaneous costs

Prevailing party in securities fraud litigation was not authorized to tax costs related to electronic database created and maintained to manage over 1.8 million pages of documents produced during discovery, under statute permitting taxing of fees for exemplification and costs of making copies of any materials, where counsel created and maintained database solely for its own benefit and not to facilitate responses to discovery requests. Finnerty v. Stiefel Laboratories, Inc., S.D.Fla.2012, 900 F.Supp.2d 1317.Securities Regulation 157.1

Subpoenas duces tecum, miscellaneous costs

Employer's use of private process server at time of service of subpoena and motion for summary judgment on employee's unsuccessful employee's Fair Labor Standards Act (FLSA) claims was reasonable and necessary, so as to entitle employer to

recovery of $35.00 for service of subpoena and $60.00 for service of summary judgment motion, even though costs for summary judgment motion exceeded United States Marshal's fee of $45.00 **per** hour; employee was not represented by counsel and was pro se at the time of service, and employee had failed on numerous occasions to respond to the court's orders, thus, making proof of notice particularly important to employer and to the court. Monelus v. Tocodrian, Inc., S.D.Fla.2009, 609 F.Supp.2d 1328.Labor And Employment 2402; Labor And Employment 2405

---- Attorneys, travel expenses, miscellaneous costs

Travel and subsistence expenses, particularly for counsel, need not be taxed as costs. Hohensee v. Basalyga, M.D.Pa.1969, **50** F.R.D. 230, affirmed 429 F.2d 982.Federal Civil Procedure 2737.4

---- Witnesses, travel expenses, miscellaneous costs

Contractor's request for $17,492.33 in costs incurred for witness fees and accompanying travel and lodging expenses warranted reduction to $11,956.87, reimbursable upon prevailing in relators' False Claims Act suit, since relators' objection to expense of one-way plane fare was speculative, lodging expenses were required to conform to maximum **per** diem rates allowable for federal employees, and additional witness expenses for Internet, telephone, and valet parking were disallowed as unnecessary, but all witnesses for whom costs were requested were deemed reasonably necessary for contractor's adequate trial preparation, even though contractor did not call all of those witnesses to testify at trial. U.S. ex rel. Davis v. U.S. Training Center, Inc., E.D.Va.2011, 829 F.Supp.2d 329.United States 122

While former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover a two-day attendance fee of $80 for physician to attend deposition, the cost of the car he took to and from the airport, and cost of physician's subsistence allowance, the cost of lodging was not taxable **per** se. Burton v. R.J. Reynolds Tobacco Co., D.Kan.2005, 395 F.Supp.2d 1065.Federal Civil Procedure 2738

Successful antitrust plaintiffs were entitled to award of costs for hotel and subsistence expenses of experts at rate of $75 **per** expert **per** day. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., N.D.Ohio 1988, 684 F.Supp. 953.Antitrust And Trade Regulation 991

Witness who appears before federal court or before any person authorized to take his deposition pursuant to any rule or order of court of the United States is entitled to fees and allowances, including attendance fee of $40 **per** day for each day's attendance. James v. Wash Depot Holdings, Inc., S.D.Fla.2007, 242 F.R.D. 645.Federal Civil Procedure 1333; Witnesses 27

Investigation or research expenses, miscellaneous costs

Prevailing defendant, in patent infringement suit, would not be allowed costs incurred in having certain tests conducted where such tests were in nature of preliminary investigation. Kaiser Industries Corp. v. McLouth Steel Corp., E.D.Mich.1970, **50** F.R.D. 5.Patents 325.11(1)

Facsimile costs, miscellaneous costs

Prevailing plaintiff in civil rights case was entitled to reimbursement of costs spent for facsimile transmissions, at a rate of fifty **cents per page**; faxes were necessary and **per page** rate was not excessive. Jackson v. Austin, D.Kan.2003, 267 F.Supp.2d 1059.Civil Rights 1476

28 U.S.C.A. § 1920, **28** USCA § 1920
Current through P.L. 113-49 approved 11-13-13

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1921

§ 1921. United States marshal's fees

Currentness

(a)(1) The United States marshals or deputy marshals shall routinely collect, and a court may tax as costs, fees for the following:

(A) Serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, complaints, or any other writ, order or process in any case or proceeding.

(B) Serving a subpoena or summons for a witness or appraiser.

(C) Forwarding any writ, order, or process to another judicial district for service.

(D) The preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale.

(E) The keeping of attached property (including boats, vessels, or other property attached or libeled), actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate, including overtime, for each deputy marshal required for special services, such as guarding, inventorying, and moving.

(F) Copies of writs or other papers furnished at the request of any party.

(G) Necessary travel in serving or endeavoring to serve any process, writ, or order, except in the District of Columbia, with mileage to be computed from the place where service is returnable to the place of service or endeavor.

(H) Overtime expenses incurred by deputy marshals in the course of serving or executing civil process.

(2) The marshals shall collect, in advance, a deposit to cover the initial expenses for special services required under paragraph (1)(E), and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded. This paragraph applies to all private litigants, including seamen proceeding pursuant to section 1916 of this title.

(3) For purposes of paragraph (1)(G), if two or more services or endeavors, or if an endeavor and a service, are made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most

remote from the place where service is returnable, adding thereto any additional mileage traveled in serving or endeavoring to serve in behalf of the party. If two or more writs of any kind, required to be served in behalf of the same party on the same person in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected.

(b) The Attorney General shall from time to time prescribe by regulation the fees to be taxed and collected under subsection (a). Such fees shall, to the extent practicable, reflect the actual and reasonable cost of the service provided.

(c)(1) The United States Marshals Service shall collect a commission of 3 percent of the first $1,000 collected and 1 ½ percent on the excess of any sum over $1,000, for seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise, and receiving and paying over money, except that the amount of commission shall be within the range set by the Attorney General. if[1] the property is not disposed of by marshal's sale, the commission shall be in such amount, within the range set by the Attorney General, as may be allowed by the court. In any case in which the vessel or other property is sold by a public auctioneer, or by some party other than a marshal or deputy marshal, the commission authorized under this subsection shall be reduced by the amount paid to such auctioneer or other party. This subsection applies to any judicially ordered sale or execution sale, without regard to whether the judicial order of sale constitutes a seizure or levy within the meaning of State law. This subsection shall not apply to any seizure, forfeiture, sale, or other disposition of property pursuant to the applicable provisions of law amended by the Comprehensive Forfeiture Act of 1984 (98 Stat. 2040).

(2) The Attorney General shall prescribe from time to time regulations which establish a minimum and maximum amount for the commission collected under paragraph (1).

(d) The United States marshals may require a deposit to cover the fees and expenses prescribed under this section.

(e) Notwithstanding section 3302 of title 31, the United States Marshals Service is authorized, to the extent provided in advance in appropriations Acts--

(1) to credit to such Service's appropriation all fees, commissions, and expenses collected by such Service for--

(A) the service of civil process, including complaints, summonses, subpoenas, and similar process; and

(B) seizures, levies, and sales associated with judicial orders of execution; and

(2) to use such credited amounts for the purpose of carrying out such activities.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 955; Sept. 9, 1950, c. 937, 64 Stat. 824; Aug. 31, 1962, Pub.L. 87-621, § 1, 76 Stat. 417; Nov. 10, 1986, Pub.L. 99-646, § 39(a), 100 Stat. 3600; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7608(c), 102 Stat. 4515; Nov. 29, 1990, Pub.L. 101-647, Title XII, § 1212, 104 Stat. 4833.)

Notes of Decisions (67)

Footnotes

[1]

So in original. Probably should be capitalized.

28 U.S.C.A. § 1921, 28 USCA § 1921
Current through P.L. 113-49 approved 11-13-13

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1923

§ 1923. Docket fees and costs of briefs

Currentness

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys and United States trustees shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 956; June 18, 1954, c. 304, 68 Stat. 253; Nov. 6, 1978, Pub.L. 95-598, Title II, § 245, 92 Stat. 2671.)

Notes of Decisions (45)

28 U.S.C.A. § 1923, 28 USCA § 1923
Current through P.L. 113-49 approved 11-13-13

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1924

§ 1924. Verification of bill of costs

Currentness

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 necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 957.)

Notes of Decisions (13)

28 U.S.C.A. § 1924, 28 USCA § 1924
Current through P.L. 113-49 approved 11-13-13

End of Document

2012 WL 1027467
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

ACE USA and **ACE** European Group Limited, Plaintiffs,
v.
UNION PACIFIC RAILROAD COMPANY, INC., Defendant.

Civil Action No. 09–2194–KHV. | March 26, 2012.

Attorneys and Law Firms

Andrew H. McCue, The Meyers Law Firm, LC, Kansas City, MO, David E. Heiss, Peter E. Kanaris, Jacob C. Murov, Jefferson D. Patten, Megan E. Ritenour, Fisher Kanaris PC, Chicago, IL, for Plaintiffs.

Craig M. Leff, Gregory F. Maher, Yeretsky & Maher, L.L.C., Overland Park, KS, Raymond J. Hasiak, Jr., **Union Pacific** Railroad Co ., Omaha, NE, for Defendant.

Opinion

MEMORANDUM AND ORDER

KATHRYN H. VRATIL, District Judge.

***1** This matter comes before the Court on defendant's *Bill Of Costs* (Doc. # 177) filed January 26, 2012, *Plaintiffs' Objection To Defendant's Bill Of Costs* (Doc. # 178) filed January 7, 2012 and *Defendant **Union Pacific** Railroad Company's Motion For Leave To File Out Of Time Memorandum In Support Of **Union Pacific's** Bill Of Costs* (Doc. # 179) filed February 9, 2012. For the following reasons, the Court overrules defendant's motion, sustains plaintiffs' objections and finds that defendant may not recover costs.

The facts of this case are well documented in the parties' briefs and the Court's two previous orders. *See Memorandum And Order* (Doc. # 176) filed December 7, 2011 (overruling plaintiffs' motion to alter or amend judgment); *Memorandum And Order* (Doc. # 164) filed August 15, 2011 (sustaining defendant's motion for summary judgment and overruling plaintiffs' motion for summary judgment). The Court will not repeat them here. In short, two insurance companies, **ACE USA** and **ACE** European Group Limited (as subrogees of AGC Soda Corporation) sued **Union Pacific** Railroad Company, Inc. under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, for water damage to soda ash that **Union Pacific** transported from Wyoming to Texas in June and July of 2007.

Both plaintiffs and defendant are sophisticated parties and have litigated this case to the hilt. On the parties' cross motions for summary judgment, their briefs alone covered more than 500 pages. On August 15, 2011, the Court sustained *Defendant **Union Pacific** Railroad Company's Motion For Summary Judgment* (Doc. # 127) filed May 31, 2011 and overruled *Plaintiffs' Motion For Partial Summary Judgment On Defendant's Defenses* (Doc. # 106) filed April 5, 2011. On December 12, 2011, the Court overruled *Plaintiffs' Motion To Alter Or Amend Judgment And Leave To Amend Their Theory Of Recovery* (Doc. # 167) filed September 2, 2011.

On January 26, 2012, defendant filed a bill of costs under 28 U.S .C. § 1920. *Bill Of Costs* (Doc. # 177). This set off a flurry of additional briefing because, as defendant admits, the bill of costs does not comply with D. Kan. Rule 54. 1, which governs taxation and payment of costs. *See Defendant **Union Pacific** Railroad Company's Motion For Leave To File Out Of Time Memorandum In Support Of **Union Pacific's** Bill Of Costs* (Doc. # 179) filed February 9, 2012. Section 1920 provides that upon the filing of a bill of costs, a judge or clerk of any federal court may tax as costs certain fees and compensation of certain experts and interpreters. 28 U.S.C. § 1920. Rule 54 of the Federal Rules of Civil Procedure provides that "costs—other than attorney's fees—should be allowed to the prevailing party," and Local Rule 54.1 provides the procedure for the taxation and payment of costs. Local Rule 54.1 provides in part that (1) a "party entitled to recover costs must file a bill of costs on a form provided by the clerk" within 30 days after the expiration of time allowed for appeal of a final judgment or decree or receipt by the clerk of an order terminating the action on appeal; (2) the "party seeking costs must file a memorandum in support of its costs with the bill of costs," which must include a statement that the party has made a reasonable effort, in a conference with opposing counsel, to resolve disputes regarding costs; and (3) that "[t]he failure of a prevailing party to timely file a bill of costs constitutes a waiver of the taxable costs." D. Kan. Rule 54.1(a)(1)-(3); *see also* D. Kan. Rule 7.1 (brief or memorandum must accompany all motions, except in certain circumstances inapplicable here).

***2** Defendant filed the bill of costs within the allotted time and on the proper form, but did not file the memorandum with the bill of costs or make reasonable effort to resolve

the disputes regarding costs with plaintiffs. Defendant clearly did not comply with Local Rule 54.1, which requires it to "file a memorandum in support of its costs *with* the bill of costs." D. Kan. Rule 54.1(a)(2) (emphasis added).

On February 7, 2012, plaintiffs filed objections to defendant's bill of costs. *Plaintiffs' Objection To Defendant's Bill Of Costs* (Doc. # 178). They argue that the Court should reject defendant's bill of costs entirely because it does not comply with Section 1920 or D. Kan. Rule 54.1. In addition to defendant's failure to file a memorandum in support of its claim for costs or to confer with plaintiffs' counsel before filing the bill of costs, plaintiffs note that defendant's bill of costs does not show that the claimed costs are properly taxable under Section 1920.

On February 9, 2012, three days after the deadline to file its bill of costs, defendant filed a motion for leave to file out of time a memorandum in support of its bill of costs based on excusable neglect. Doc. # 179. Defendant argues that its failure to comply with the requirements of Local Rule 54.1 was due to an "oversight ... owing to a mistake by its counsel who, during the preparation of the Bill of Costs, inadvertently relied upon a rule book containing the former version of Rule 54. 1, which required no separate Memorandum, rather than the most recent version of Rule 54. 1, which does." Doc. # 179 ¶ 11. The current version of Rule 54.1 took effect on March 17, 2011.

Local Rule 6.1 governs motions for an extension of time to perform an act required or allowed to be done within a specified time. Under this rule, a party must file a motion for extension of time before the specified time expires, and "[a]bsent a showing of excusable neglect, the court will not grant extensions requested after the specified time expires." D. Kan. Rule 6.1(a). Excusable neglect is a "somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.,* 507 U.S. 380, 392 (1993). Inadvertence, ignorance of the rules or mistakes construing the rules, however, do not usually constitute excusable neglect. *Id.*

The determination of whether neglect is excusable is at bottom an equitable one that requires taking account of all relevant circumstances surrounding the party's omission, including (1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant and (4) whether movant acted in good faith. *Id.* at 395; *Bishop v. Corsentino,* 371 F.3d 1203, 1206–07 (10th Cir.2004). Of these factors, fault in the delay is "a very important factor—perhaps the most important single factor—in determining whether neglect is excusable." *Biodiversity Conservation Alliance v. Bureau of Land Mgmt.,* 438 Fed. Appx. 669, 673 (10th Cir.2011); *United States v. Torres,* 372 F.3d 1159, 1163 (10th Cir.2004); *City of Chanute v. Williams Natural Gas Co.,* 31 F.3d 1041, 1046 (10th Cir.1994). Courts also consider whether the moving party's underlying claim is meritorious, whether the mistake was a single unintentional incident (as opposed to a pattern of deliberate dilatoriness and delay) and whether the attorney attempted to correct his action promptly after discovering the mistake. *Jennings v. Rivers,* 394 F.3d 850, 856–57 (10th Cir .2005) (citing *Hancock v. City of Okla. City,* 857 F.2d 1394, 1396 (10th Cir.1988); *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.,* 715 F.2d 1442, 1444–45 (10th Cir.1983)). Moreover, the court recognizes that a "mistake ... could occur in any [attorney's] office, no matter how well run." *Id.*

***3** Defendant argues that its reliance on an outdated version of the local rules constitutes excusable neglect. The Court disagrees. Allowing defendant to file the memorandum in support of its bill of costs out of time would only slightly prejudice plaintiffs by forcing them to respond to the memorandum after already filing objections to defendant's incomplete bill of costs. And the length of delay would be slight because defendant filed its memorandum only three days after the deadline. These factors, defendant's counsel's attempt to promptly correct the mistake and the absence of any evidence that defendant acted in bad faith weigh in favor of allowing defendant to file its memorandum out of time.

Although the late filing would have no impact on judicial proceedings because the case is closed, the untimely filing undermines important concerns for finality of litigation embodied by the time requirements for the filing of bills of costs. *See Dodson Int'l Parts, Inc. v. Altendorf,* No. 00–4134–SAC, 2005 WL 1799247, at *1 (D. Kan. June 29, 2005) (citing *Woods Constr. Co. v. Atlas Chem. Indus., Inc.,* 337 F.2d 888, 891 (10th Cir.1964)). Moreover, the reason for the delay weighs heavily against defendant. Defendant's only reason for failing to timely file a memorandum in support of its bill of costs as required by Rule 54.1(a)(2) is counsel's mistake in relying on an outdated version of the Court's local rules. Applying the *Pioneer* factors, the Court has found that "some occasions justify a finding of excusable neglect even when [the] delay is caused by ignorance of the rules." *White v. O'Dell Indus., Inc.,* No. 99–2315–JWL, 2000 WL 127267, at *2 (D.Kan. Jan. 14, 2000) (citing *Pioneer Inv. Servs.,* 507 U.S. at 392). The Tenth Circuit, however, has emphasized that even after *Pioneer,* "fault in the delay remains a very

important factor—perhaps the most important single factor—in determining whether neglect is excusable." *Biodiversity Conservation Alliance,* 438 Fed. Appx. at 673; *Torres,* 372 F.3d at 1163; *Williams Natural Gas Co.,* 31 F.3d at 1046.

It is well established that inadvertence, ignorance of the rules, and mistakes construing the rules do not constitute excusable neglect. *See Quigley v. Rosenthal,* 427 F.3d 1232, 1238 (10th Cir.2005). The Court has refused to find excusable neglect when the mistake was caused by a failure to read the rules or a lawyer's error in interpreting the rules. *Patel v. Reddy,* No. 10–2403–JTM, 2010 **WL** 4115398, at *2 (D.Kan. Oct. 19, 2010) (citing *City of Shawnee, Kan. v. Argonaut Ins. Co.,* No. 06–2389–GLR, 2008 **WL** 2699906, at *4 (D.Kan. July 2, 2008) (misinterpretation of rules); *Thomas v. Bd. of Educ., Unified Sch. Dist. # 501,* 177 F.R .D. 488, 490–91 (D.Kan.1997) (failure to read rules)). In *Berecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003,* a similar case in which the Court found that defense counsel's reliance on an outdated version of the local rules did not constitute excusable neglect, the Court noted as follows:

> ***4** It is counsel's responsibility to keep current on the Court's local rules. The most current local rules are provided, free of charge, on the Court's website.... This is the quintessential example of an attorney who is simply ignorant of the rules applicable to him, a circumstance that does not constitute excusable neglect. Counsel's reliance on an outdated ... publication, rather than the Court's published local rules, does not change the excusable neglect analysis.

No. 09–2516, 2011 **WL** 1060955, at *2 (D.Kan. March 21, 2011).

Defendant relies on *Cohen–Esrey Real Estate Services, Inc. v. Twin City Fire Ins. Co.,* No. 08–2527–KHV, 2011 **WL** 3608671 (D.Kan. Aug. 12, 2011). In that case, the Court found that defendant's failure to comply with the new rules governing bills of costs constituted excusable neglect. *Id.* at *6–7 & n. 13. In that case, however, the amendment to Local Rule 54.1 had taken effect only five days before the defendant filed its bill of costs and Lexis Nexis (the online research service which defense counsel used) did not reflect the rule change. *Id.* at *7. At the time defendant filed its bill of costs in this case, the amendment to Rule 54.1 had been in effect for nearly 11 months, which is more than enough time for counsel to take notice of the rule and comply with the new requirements.

Because "counsel's misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief unless the word 'excusable' is to be read out of the rule," the Court finds that defense counsel's failure to comply with the requirements of Local Rule 54.1 does not constitute excusable neglect. *Torres,* 372 F.3d at 1162 (examining "excusable neglect" standard in Fed. R.App. P. 4); *Allen v. Magic Media, Inc.,* No. 09–4139–SAC, 2011 **WL** 903959, at *1 (D.Kan. March 15, 2011); *Berecek & Young Advisors,* 2011 **WL** 1060955, at *3. The Court therefore overrules *Defendant **Union Pacific** Railroad Company's Motion For Leave To File Out Of Time Memorandum In Support Of **Union Pacific's** Bill Of Costs* (Doc. # 179).

Defendant did not comply with Local Rule 54.1 in filing its bill of costs and the Court overrules its motion for an extension of time to do so. For this reason, and substantially the reasons stated in *Plaintiffs' Objection To Defendant's Bill Of Costs* (Doc. # 178), defendant is not entitled to recover costs under 28 U.S.C. § 1920. *See Strope v. Gibbens,* No. Civ.A. 01–3358–KHV, 2004 **WL** 2519238, at *4 (D.Kan. Nov. 8, 2004) (overruling plaintiff's motion for costs for not following local rule); *Betts v. Atwood Equity Coop. Exch., Inc.,* No. 88–4292–R, 1990 **WL** 252144, at *3 (D.Kan. Dec. 24, 1990) (denying plaintiff's motion for costs, damages, fees, expenses and interest, which the court construed as a bill of costs, for not complying with local rule); *Kovach v. State Farm Gen. Ins. Co.,* Civ. A. No. 88–2099–S, 1989 **WL** 94574, at *2 (D.Kan. July 28, 1989) (denying plaintiff's request for costs in motion for attorney's fees because it did not comply with local rule); *see also* Bill Of Costs Handbook, http://www.ksd.circ10.dcn/bill-of-costs-handbook, at 4 (Jan.2011) **(any requested costs that do not have supporting information, which includes the memorandum, will be disallowed)**.

***5 IT IS THEREFORE ORDERED** that *Defendant **Union Pacific** Railroad Company's Motion For Leave To File Out Of Time Memorandum In Support Of **Union Pacific's** Bill Of Costs* (Doc. # 179) filed February 9, 2012, be and hereby is **OVERRULED.**

IT IS FURTHER ORDERED that *Plaintiffs' Objection To Defendant's Bill Of Costs* (Doc. # 178) filed January 7, 2012, be and hereby is **SUSTAINED.** Defendant has not complied with Local Rule 54.1 regarding the taxation and payment of costs and therefore is not entitled to recover costs.

End of Document

237 F.R.D. 659
United States District Court,
D. Kansas.

AEROTECH RESOURCES, INC., Plaintiff,
v.
DODSON AVIATION, INC., et al., Defendants.

Civil Action No. 00-2099-CM. | Dec. 19, 2005.

Synopsis

Background: Plaintiff brought suit against defendants for tortious interference with a business relationship, fraudulent promise of a future event, fraud by silence, and breach of a fiduciary duty owed to plaintiff. Jury returned verdict in favor of plaintiff on fraud by silence claim, but found in favor of defendants on all other claims. Plaintiff filed objection to defendants' bill of costs, and defendants filed objections to plaintiff's bill of costs.

Holdings: The District Court, Murguia, J., held that:

[1] plaintiff who prevailed on one of four claims and was awarded damages based on successful claim was a "prevailing party" within meaning of rule authorizing award of costs to prevailing party;

[2] defendants who prevailed on three of four separate claims were also entitled to award of costs; and

[3] expense of depositions not used at trial were taxable as costs.

Plaintiff objection denied; defendants' objections granted in part and denied in part.

West Headnotes (16)

[1] **Federal Civil Procedure**
Discretion of Court

The decision to grant or deny costs to the prevailing party pursuant to civil procedure rule is within the sole discretion of the district court. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[2] **Federal Civil Procedure**
Taxation

The party claiming allowance of costs bears the burden of proving the amount of compensable costs; the party opposing the award of costs bears the burden of demonstrating that the award would be improper. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[3] **Federal Civil Procedure**
Prevailing Party

Only one party may be classified as the "prevailing party" for purposes of rule authorizing award of costs to the prevailing party. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
Result of Litigation

Although only one party may be classified as the "prevailing party" for purposes of rule authorizing award of costs to prevailing party, district courts may apportion costs when neither party fully prevails on all claims. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

2 Cases that cite this headnote

[5] **Federal Civil Procedure**
Prevailing Party

A denial of costs does not constitute an abuse of discretion when the prevailing party is only partially successful. Fed.Rules Civ.Proc.Rule

54(d)(1), 28 U.S.C.A.

[6] **Federal Civil Procedure**
Prevailing Party

Because a denial of costs is a severe penalty, there must be some apparent reason to penalize the prevailing party if costs are to be denied. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[7] **Federal Civil Procedure**
Prevailing Party

Plaintiff who prevailed on one of four claims and was awarded damages based on successful claim was a "prevailing party" within meaning of rule authorizing award of costs to prevailing party, notwithstanding that defendants prevailed on the majority of claims presented to the jury. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[8] **Federal Civil Procedure**
Discretion of Court
Federal Civil Procedure
Prevailing Party

District court has discretion to apportion costs among the parties, reduce plaintiff's award to reflect partial success, or deny costs to both parties. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[9] **Federal Civil Procedure**
Prevailing Party

Where plaintiff prevailed on only one of four claims, and jury instructions did not require jury to award one amount of damages if jury found in favor of plaintiff on any or all of the presented claims, the claims were not alternative theories of recovery but separate claims on which defendants prevailed, entitling them to an award of costs, notwithstanding that awarding costs to defendants had the effect of reducing award of costs to plaintiff. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[10] **Bankruptcy**
Judicial Proceedings in General

Prevailing defendant was precluded from enforcing bill of costs as to defendants who were debtors in possession in Chapter 11 bankruptcy proceedings, as proposed bill of costs represented attempt to collect a claim subject to the automatic stay. 11 U.S.C.A. § 362(a); 28 U.S.C.A. § 1920.

[11] **Federal Civil Procedure**
Particular Items

Pro hac vice fees are recoverable in the District of Kansas in a bill of costs. 28 U.S.C.A. § 1920.

3 Cases that cite this headnote

[12] **Federal Civil Procedure**
Depositions

A district court has great discretion to tax the cost of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself; if a deposition is not used at trial, the costs are allowable if the court finds that the costs were reasonably necessary. 28 U.S.C.A. § 1920.

6 Cases that cite this headnote

[13] **Federal Civil Procedure**
Depositions

Expense of depositions not used at trial were taxable as costs, where deponents were listed as witnesses in plaintiff's expert witness disclosures, and thus depositions were reasonably necessary to plaintiff. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 26(a), 28 U.S.C.A.

1 Cases that cite this headnote

[14] **Federal Civil Procedure**
Depositions

Expense of witness depositions not used by plaintiff at trial were taxable as costs, as depositions were reasonably necessary to plaintiff because the witnesses were administrative employees who had been involved in the preparation and translation of key communications as revealed by documents produced by defendants, and plaintiff's counsel could not have known what slant the witnesses might put on the documents without deposing them. 28 U.S.C.A. § 1920.

1 Cases that cite this headnote

[15] **Federal Civil Procedure**
Stenographic Costs

Costs of expedited trial transcripts would not be awarded to plaintiff and defendants, where neither party sought or received confirmation from the court that an expedited copy of transcript was necessarily obtained. 28 U.S.C.A. § 1920.

3 Cases that cite this headnote

[16] **Federal Civil Procedure**
Particular Items

Plaintiff's use of interpreters was reasonably necessary at trial, justifying an award of costs for compensation of interpreters, where translation charges were incurred during testimony of witness at trial and translations of exhibits offered into evidence at trial. 28 U.S.C.A. § 1920.

Attorneys and Law Firms

***660** Carl H. Hoffman, Coral Gables, FL, James W. Herron, Lewis, Rice & Fingersh, St. Louis, MO, Richard L. Richards, Jarvis & Richards, Coral Gables, FL, William H. Meyer, Leawood, KS, for Plaintiff.

Donald G. Scott, R. Pete Smith, McDowell, Rice, Smith & Gaar, Kansas City, MO, for Defendants.

Opinion

MEMORANDUM AND ORDER

MURGUIA, District Judge.

On February 6, 2004, the clerk of the court entered a bill of costs for plaintiff **Aerotech** Resources, Inc. in the amount of $20,368.55. On March 30, 2004, the clerk of the court entered a bill of costs for defendants **Dodson Aviation**, Inc., **Dodson** International Parts, Inc. and Robert L. ("J.R.") **Dodson**, Jr. in the amount of $10,190.38. Pending before the court are Objections of **Dodson Aviation**, Inc., **Dodson** International Parts, Inc., and Robert L. **Dodson**, Jr., to Proposed Bill of Costs Submitted by **Aerotech** Resources, Inc. (Doc. ***661** 177) and Plaintiff's Objection to Defendants' Bill of Costs (Doc. 182).

I. Facts

On February 25, 2000, plaintiff brought suit against defendants for tortious interference with a business relationship, fraudulent promise of a future event, fraud by silence, and breach of a fiduciary duty owed to plaintiff. On June 4, 2001, a jury returned a verdict in favor of plaintiff on its fraud by silence claim, but finding in favor of defendants on all other claims. The jury awarded damages to plaintiff based on this verdict in the amount of $211,500. On January 30, 2004, the Tenth Circuit affirmed

the decision of the district court.

I. Standard

[1] Federal Rule of Civil Procedure 54(d)(1) states: "Expect when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." The decision to grant or deny costs to the prevailing party pursuant to Rule 54(d)(1) is within the sole discretion of the district court. *Zeran v. Diamond Broad., Inc.,* 203 F.3d 714, 722 (10th Cir.2000) (citing *Homestake Mining Co. v. Mid-Continent Exploration Co.,* 282 F.2d 787, 804 (10th Cir.1960)).

[2] The taxation of costs is governed by 28 U.S.C. § 1920, which states:

> 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers 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.

28 U.S.C. § 1920. The party claiming allowance of costs bears the burden of proving the amount of compensable costs. *Allison v. Bank One-Denver,* 289 F.3d 1223, 1248-49 (10th Cir.2002). The party opposing the award of costs bears the burden of demonstrating that the award would be improper. *Rodriguez v. Whiting Farms, Inc.,* 360 F.3d 1180, 1190-91 (10th Cir.2004).

III. Analysis

A. Who is the Prevailing Party?

Plaintiff objects to defendants' Bill of Costs generally, arguing that Federal Rule of Civil Procedure 54(d) grants costs to the prevailing party, and because judgment was entered in favor of plaintiff, defendants are not the prevailing party and are not entitled to recover costs under Rule 54(d). Defendants argue that of four claims, plaintiff prevailed on only one. Thus, defendants argue, defendants prevailed on the majority of claims submitted to the jury. Plaintiff contends that, because each of the four counts was an alternative theory of recovery, defendants' "win" on three of four counts has no practical effect; damages would have been the same whether plaintiff prevailed on one or all four counts.

The first issue before the court, therefore, is determining which party is the prevailing party. Typically, "the litigant in whose favor judgment is rendered is the prevailing party for purposes of Rule 54(d)[1]." *Barber v. T.D. Williamson, Inc.,* 254 F.3d 1223, 1234 (10th Cir.2001) (quoting Wright & Miller, *Federal Practice & Procedure,* § 2667). Rule 54 "limits a district court's discretion to award costs in two ways. First, Rule 54 creates a presumption that the district court will award costs to the prevailing party. Second, a district court must provide a valid reason for not awarding costs to a prevailing party." ***AeroTech**, Inc. v. Estes,* 110 F.3d 1523, 1526 (10th Cir.1997) (citations omitted).

[3] Notably, case law and Rule 54(d) suggest that only one party may be classified as the prevailing party. Rule 54(d) states that ***662** "costs other than attorneys' fees shall be allowed as of course to *the* prevailing party unless the court otherwise directs" (emphasis added). Moreover, in a case involving similar facts as the instant case where both parties "prevailed" on at least one claim, the Tenth Circuit held that "both the plaintiff and the defendant" were not "literally 'the prevailing party' for purposes of Rule 54(d)(1)." *T.D. Williamson, Inc.,* 254 F.3d at 1235 n. 7.

[4] [5] [6] Although only one party may be classified as the prevailing party, the Tenth Circuit has identified several alternatives in which district courts may apportion costs when neither party fully prevails on all claims. For example, in *Barber v. T.D. Williamson, Inc.,* the Tenth Circuit held that the plaintiff, who was awarded nominal damages for one of three total claims, was the prevailing party. 254 F.3d at 1234. The court elaborated, however, by noting that the district court has broad discretion to apportion costs among two partially successful parties, or deny costs to either side.

> [I]n cases in which the prevailing party has been only partially successful, some courts have chosen to apportion costs among the parties or to reduce the size of the prevailing party's award to reflect the partial success. Or, in cases in which "neither side entirely prevailed, or when both sides prevailed, or when the litigation was thought to be the result of fault on the part

> of both parties," some courts have denied costs to both sides. "[W]here the court exercises its discretion[,] the identification of the prevailing party may [in the end] become so unimportant as to be almost immaterial."

Id. at 1234-35 (citations omitted). Furthermore, the Tenth Circuit has stated that "a denial of costs does not constitute an abuse of discretion when the prevailing party is only partially successful." ***AeroTech**, Inc.,* 110 F.3d at 1526 (citation omitted). On the other hand, "because a denial of costs is a 'severe penalty,' there must be 'some apparent reason to penalize the party if costs are to be denied.' " *Id.* at 1526-27 (quoting *Klein v. Grynberg,* 44 F.3d 1497, 1507 (10th Cir.1995)).

[7] [8] The court finds that, pursuant to relevant case law, plaintiff is the prevailing party even though defendants prevailed on the majority of claims presented to the jury. *See T.D. Williamson, Inc.,* 254 F.3d at 1234. This determination is not controlling, however, because this court has discretion to apportion costs among the parties, reduce plaintiff's award to reflect partial success, or deny costs to both parties. *See id.*

[9] The court finds it significant that defendants do not request that the court eliminate or reduce plaintiff's costs to reflect partial success. Accordingly, the court is not inclined to *sua sponte* reduce the prevailing party's award of costs. Thus, the remaining question before the court is whether to award costs to defendants.

Plaintiff argues that it prevailed on one of four alternative theories of recovery. Thus, plaintiff argues that its award would have been the same had the jury found in favor of plaintiff on one or all four claims. The court is not persuaded by this argument. The jury was presented with four claims: (1) tortious interference with contract, (2) breach of fiduciary duty, (3) fraudulent promise of a future event, and (4) fraud by silence. Although the court is unwilling to speculate as to the jury's actions or analysis, the court's review of the jury's instructions does not lead it to conclude that each theory was an alternate of the others. The relevant jury instructions read:

> [I]f you find for plaintiff on plaintiff's claim of tortious interference with a business relationship, plaintiff's claim of fraudulent promise of a future event, plaintiff's claim of fraud by silence, or plaintiff's claim of breach of fiduciary duty, you should award plaintiff an amount of money that the greater weight of the evidence shows will fairly and adequately compensate plaintiff for its loss or damage as was caused by the defendants' actions.

Jury Instruction No. 24 (Doc. 123). Thus, the jury was instructed to award plaintiff damages if the jury found in favor of plaintiff on any one of the claims before it. The court does not read these instructions to require the jury to award one amount of damages, ***663** and one amount only, if the jury found in favor of plaintiff on any or all of the presented claims.

The court also finds persuasive the fact that the Tenth Circuit, in affirming the jury's verdicts, found that while the claims before the jury were similar, they were not identical. Therefore, the jury's verdict was not inconsistent. ***Aerotech Res**., Inc. v. **Dodson Aviation**, Inc.,* 91 Fed.Appx. 37, 41 (10th Cir.2004) ("Jury verdicts that resolve separate and distinct causes of action are not facially inconsistent.").

The court finds, therefore, that although plaintiff is *the* prevailing party, both plaintiff and defendants partially prevailed; plaintiff prevailed on one claim, while defendants prevailed on three other, wholly separate, claims. Because defendants partially prevailed, the court finds that awarding costs to defendants is proper. The court recognizes that awarding costs to defendants has the same effect of reducing plaintiff's costs. Nevertheless, this result is appropriate under these circumstances because the court, in its "broad discretion" under Rule 54(d)(1), *Roberts v. Madigan,* 921 F.2d 1047, 1058 (10th Cir.1990), could have reduced or denied plaintiff's costs as an alternative, *see Howell Petroleum Corp. v. Samson **Res**. Co.,* 903 F.2d 778, 783 (10th Cir.1990) (stating that a district court has "discretion to refuse to award costs to a party which was only partially successful"); *Roberts,* 921 F.2d at 1048 ("[W]e conclude that the district court's decision to award costs to the party that prevailed on the vast majority of issues and on the issues truly contested at trial was not an abuse of discretion."). The court finds that awarding costs to both plaintiff and defendants more fairly compensates each party's respective partial success.

B. Defendants' Objections to Plaintiff's Bill of Costs

1. Chapter 11 Bankruptcy Protection

[10] Defendants object to plaintiff's bill of costs on several grounds. First, defendants **Dodson Aviation**, Inc. and **Dodson** International Parts, Inc. object on the ground that these two defendants are debtors in possession in Chapter 11 bankruptcy proceedings. These two defendants allege that plaintiff's proposed bill of costs represents an attempt

to collect a claim subject to the automatic stay under 11 U.S.C. § 362(a). Plaintiff acknowledges that **Dodson Aviation**, Inc. and **Dodson** International Parts, Inc. enjoy an automatic stay under Chapter 11, but argues that defendants' objections as a whole are moot because defendant Robert L. **Dodson**, Jr., who has not sought bankruptcy protection, has not objected to the bill of costs.

The court deems defendant Robert L. **Dodson**, Jr.'s absence from the body of defendants' motion objecting to plaintiff's bill of costs an oversight, because defendant Robert L. **Dodson**, Jr. was listed in the title of the motion, and Mark Doty, attorney for Robert L. **Dodson**, Jr., signed the motion.[1] Therefore, the court finds that plaintiff is precluded from enforcing the bill of costs as to defendants **Dodson Aviation**, Inc. and **Dodson** International Parts, Inc. However, because defendant Robert L. **Dodson**, Jr. is jointly and severally liable for judgment against defendants, the court will address defendants' other arguments.

2. Objections to Specific Taxable Costs

a. Pro Hac Vice Fees

[11] Defendants object to plaintiff's pro hac vice fees, citing two cases outside the Tenth Circuit. Pro hac vice fees are recoverable in the District of Kansas. *See Harris v. Oil Reclaiming Co., Ltd.,* 2001 WL 395392, at *2 (D.Kan.2001); *Davis v. Puritan-Bennett Corp.,* 923 F.Supp. 179, 181 (D.Kan.1996). Thus, defendants' objection on this issue is overruled.

a. Deposition Expenses

[12] Defendants argue that the expense of a deposition not used at trial is not taxable as costs. Again, defendants cite several cases outside the Tenth Circuit. Plaintiff ***664** argues that the costs relating to the depositions of Markus Sleuwen Guerrero,[2] Marvin James Holtgrieve, Lisa Williams, Sarah Dunn and Boyd Mesecher are allowable in light of *Green Construction Co. v. The Kansas Power & Light Co.,* 153 **F.R.D**. 670 (D.Kan.1994), which held that a district court has "great discretion to tax the cost of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself." *Id.* at 678. Necessity is a factual determination. *Id.* If a deposition is not used at trial, the costs are allowable if the court finds that the costs were "reasonably necessary." *Id.*

[13] Plaintiff argues that the depositions of Mr. Guerrero and Mr. Holtgrieve were reasonably necessary because defendants listed these witnesses in their Rule 26(a) disclosures. Plaintiff supplied the court with an affidavit to this effect. Because defendants did not reply to plaintiff's response, and relying on the affidavit supplied by plaintiff, the court finds that these witnesses were, in fact, listed in defendants' Rule 26 disclosures. For this reason, the court finds that these witnesses' depositions were reasonably necessary to plaintiff.

[14] Plaintiff next contends that the depositions of Ms. Williams and Ms. Dunn were reasonably necessary because these witnesses were administrative employees who had been involved in the preparation and translation of key communications as revealed by documents produced by defendants. Plaintiff argues that its counsel could not have known what slant these witnesses might put on these documents without deposing them. Defendants did not reply to this argument. Based on the limited facts available, the court finds the depositions of Ms. Williams and Ms. Dunn were reasonably necessary.

Finally, plaintiff states that it did not take the deposition of Mr. Mesecher, but instead seeks the costs of the transcript of a deposition of Mr. Mesecher taken by defendants. The court finds that transcripts of the other parties' depositions are reasonably necessary.

The court overrules defendants' objection regarding depositions.

c. Charges for Disks, Minuscripts, and Delivery

Defendants next object to plaintiff's charges for ASCII disks, minuscripts and delivery and postage charges. Plaintiff stipulates that these costs are not taxable. Specifically, plaintiff concedes that a total of $140.63 should be deducted from plaintiff's costs.[3] Therefore, the court sustains defendants' objection on this issue.

d. Court Reporter Attendance Fees

Defendants also object to a $170 court reporter attendance fee for the deposition of Markus Sleuwen Guerrero, stating that this fee appears to be duplicative of the four witness attendance fees of $42.40 separately claimed by plaintiff. Plaintiff contends that the court reporter fee was $42.50 an hour, which is separate from the attendance fees of $42.40 paid to three witnesses, Mr. Guerrero, John B. Foster III, and Thomas E. Ashworth, plus $48.30 paid to General Banderas, totaling $175.50. Defendants did not respond to these arguments. The court finds that defendants were mistaken about the perceived duplication of court reporter fees; plaintiff has adequately demonstrated the difference

between these fees and plaintiff's witness attendance fees. Therefore, the ***665** court overrules defendants' objection on this issue.

e. Expenses for Trial Transcript

[15] Defendants next object to a $2,260 fee for the preparation of a trial transcript, including expedited transcript and copying charges, arguing that plaintiff made no attempt to explain how the transcript of the trial itself was necessarily obtained for use in the case. Plaintiff argues that it ordered expedited copies of defendants' opening statement and the testimony of J.R. **Dodson**. In addition, after defendants ordered an expedited copy of the testimony of plaintiff's president, Carlos Ruiz, plaintiff ordered an expedited copy of this transcript as well. Plaintiff contends that it ordered these transcripts because credibility with respect to complex fact patterns were at issue in the two-week trial. Plaintiff notes that defendants also ordered expedited excerpts of the trial transcript.

"To award this premium cost for daily production [of a transcript], a court must find that daily copy was necessarily obtained, as judged at the time of transcription." *Griffith v. Mt. Carmel Med. Ctr.,* 157 **F.R.D**. 499, 506 (D.Kan.1994) (quoting *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1248 (10th Cir.1988)). "However, '[i]f the issues in [the] case were so complex as to justify overlooking the lack of pretrial approval, the court [can use] its discretion to award the cost where the daily copy proved invaluable to *both* the counsel *and* the court.' " *Id.* (quoting Laura B. Bartell, *Taxation of Costs and Awards of Expenses in Federal Court,* 101 **F.R.D**. 553, 568 (1984) (emphasis in original)). "Whether an item is necessarily obtained for use in a case ... calls for a factual evaluation, a task which is committed to the discretion of the trial court." *Id.* (quoting *Mikel v. Kerr,* 499 F.2d 1178, 1183 (10th Cir.1974)); *see also Barber v. Ruth,* 7 F.3d 636, 645 (7th Cir.1993) ("[T]ranscipts need not be absolutely indispensable in order to provide the basis of an award of costs; it is enough if they are 'reasonably necessary.' " (citation omitted)); *Corder v. Lucent Tech., Inc.,* 162 F.3d 924, 928 (7th Cir.1998) (holding that the district court did not abuse its discretion in awarding costs for expedited delivery of deposition transcripts when the expediency was needed in light of the discovery and motion schedule set by the court). *But see Va. Panel Corp. v. Mac Panel Co.,* 887 F.Supp. 880, 886 (W.D.Va.1995) ("The cost of daily copies of trial transcripts is recoverable if the daily transcript is indispensable, rather than merely for the convenience of the attorneys." (citing *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 233-34, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964))).

Here, even though plaintiff did not order a daily copy of the transcript, but rather an expedited copy, *Griffith* is instructive. The court finds that neither party sought or received confirmation from the court that an expedited copy of the transcript was necessarily obtained. In addition, although the trial at issue lasted two weeks and dealt with four different claims, the court finds that plaintiff's use of an expedited copy of the transcript was not invaluable to both plaintiff and the court because the court had no use for the transcript. *Griffith,* 157 **F.R.D**. at 506. Accordingly, the court sustains defendants' objection and denies both plaintiff and defendants the costs of expedited transcripts. Thus, the court overrules plaintiff's request for $2,260 in costs for expedited transcripts and copies of transcripts, and defendants' request for $793 in costs for expedited transcripts.[4]

f. Expenses for Interpreters

[16] Defendants also object to costs totaling $2,661.32 for the compensation of interpreters, arguing that plaintiff makes no attempt to identify what documents were translated and how these documents were necessarily obtained for use in the case. Plaintiff contends that the translation charges at issue were incurred for translation services during the testimony of Mauricio Peraza at trial and translations of exhibits offered into evidence at trial. Plaintiff's ***666** counsel also noted, via affidavit, that the translations were not for the convenience of plaintiff's counsel, who is fluent in Spanish without the aid of an interpreter or translator. Defendants did not respond to plaintiff's arguments.

The court finds that, based upon the evidence provided by plaintiff, plaintiff's use of interpreters was reasonably necessary at trial. As such, the court overrules defendants' objection on this issue.

g. Expenses for Mediation

Defendants also object to plaintiff's costs of $1,031.25 for **mediation expenses**. Plaintiff agrees that costs of mediation are not taxable. As such, the court sustains defendants' objection on this issue, and reduces plaintiff's costs by $1,031.25.

h. Conclusion

1. Plaintiff's Bill of Costs Totals

Plaintiff sought $20,368.55 in costs from defendants. Pursuant to this Order, the court sustained defendants'

objections regarding plaintiff's costs for disks, minuscripts, and delivery totaling $140.63, expedited trial transcripts totaling $2,260, and mediation expenses totaling $1,031.25. Therefore, according to the court's calculation, plaintiff is entitled to costs from defendants in the amount of $16,936.67.

2. Defendants' Bill of Costs Totals

Defendants sought $10,190.38 in costs from plaintiff. Pursuant to this Order, the court, *sua sponte,* reduced defendants' costs by $793 for expedited transcript costs. Therefore, according to the court's calculation, defendants are entitled to costs from plaintiff in the amount of $9,397.38.

IT IS THEREFORE ORDERED that Objections of **Dodson** **Aviation**, Inc., **Dodson** International Parts, Inc., and Robert L. **Dodson**, Jr., to Proposed Bill of Costs Submitted by **Aerotech** Resources, Inc. (Doc. 177) is granted in part and denied in part, and Plaintiff's Objection to Defendants' Bill of Costs (Doc. 182) is denied.

IT IS FURTHER ORDERED that plaintiff is entitled to costs from defendants in the amount of $16,936.67, and defendants are entitled to costs from plaintiff in the amount of $9,397.38.

Footnotes

1 Consistent with this finding, the court's mention of "defendants" throughout this motion refers to all three defendants.

2 This witness was referred to as both Markus Sleuwen Guerrero and Markus Sleuwen. The court will refer to him as Markus Sleuwen Guerrero throughout this motion.

3 The $140.63 total is itemized as follows, as outlined in plaintiff's response: $5 for a ASCII disk, $10 for condensed transcript/index, and $11 delivery is deducted from the cost of Robert **Dodson**, Jr.'s August 28, 2000 deposition; $18 for a ASCII disk, $18 for a Min-U-Script, and $34.38 for delivery/shipping and handling is deducted from the cost of Markus Sleuwen Guerrero's August 30, 2000 deposition; a $16 courier charge is deducted from cost of General Carlos Banderas's March 31, 2001 deposition; and $10 for a CT/Index, $10 for a ASCII disk, and $8.25 for a delivery/courier charge is deducted from the cost of the May 17, 2001 deposition of J.R. **Dodson**.

4 The court notes that although plaintiff argued generally that defendants should not be awarded costs, plaintiff did not specifically object to any of defendants' costs. However, in the spirit of fairness, the court denies the cost of expedited transcripts to both parties.

1997 WL 613301
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Gary E. **ALBERTSON**, Plaintiff,
v.
IBP INC., Defendant.

No. Civ.A. 96–2110–KHV. | Oct. 1, 1997.

Attorneys and Law Firms

Timothy E. Power, Power & Allison Law Group, P.A., Overland Park, KS, for Gary E **Albertson**, plaintiff.

Thomas A. Hamill, Benjamin S. Tschudy, Martin, Pringle, Oliver, Wallace & Swartz, L.L.P., Overland Park, KS, for **I.B.P**., I.N.C., defendant.

Opinion

MEMORANDUM AND ORDER

VRATIL, J.

***1** Defendant prevailed at trial, based on the jury's finding that plaintiff had been injured on the way to assume the duties of his employment. This matter comes before the Court on *Plaintiff's Motion to Retax* (Doc. # 149) filed July 25, 1997, under Fed.R.Civ.P. 54(b). Plaintiff objects to defendant's statement and claims that many of the costs awarded defendant are not recoverable under 28 U.S .C. § 1920. Specifically, plaintiff claims that the clerk improperly taxed the costs of computer assisted research, delivery expenses, travel expenses, certain deposition fees, witness fees, service of process, and enlargement fees.

Taxation of costs is authorized by Fed.R.Civ.P. 54(d) and governed by 28 U.S.C. § 1920. Rule 54(d) provides that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." The clerk taxes the costs. Fed.R.Civ.P. 54(d)(1). Upon motion, the Court reviews the clerk's assessment of costs de novo. *Ortega v. City of Kansas City, Kan.,* 659 F.Supp. 1201, 1218 (D.Kan.1978), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir.1989).

Plaintiff argues that defendant engaged in misconduct and that costs should therefore be denied on equitable grounds. A prevailing party is presumably allowed all costs, however, unless the Court finds reason to penalize the party. *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1425 (D.Kan.1995), *aff'd by* 76 F.3d 1178 (10th Cir.1996). Taxation of costs not specifically authorized by 28 U.S.C. § 1920 is within the Court's discretion. *See Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 232, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964). Plaintiff asserts that defendant's misconduct with respect to the evidentiary hearing on August 29, 1996, its failure to properly identify witnesses, its failure to make a settlement offer, and its filing of a frivolous motion for summary judgment are reasonable grounds for denying defendant its taxable costs. *See Manildra Milling,* 878 F.Supp. at 1425 (refusing request to deny costs where plaintiff included multiple nonmeritorious issues prolonging the trial and where plaintiff received only insignificant relief). The reasons presented, however, are not sufficiently egregious to justify the penalty which plaintiff seeks. Therefore, the Court declines to exercise its discretion to deny costs in their entirety.

I. Computer Assisted Research, Delivery Expenses and Travel Expenses

Plaintiff objects to taxation of costs for defendant's computer assisted research, document delivery expenses and travel expenses for counsel and staff. **Computer assisted research** is not specifically authorized by Section 1920. "[T]he discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer,* 379 U.S. at 235. In *Ortega v. **IBP**, Inc.,* 883 F.Supp. 558, 563 (D.Kan.1995), the court held that computer assisted legal research was not a taxable cost. We apply that same analysis in this case and order that such costs be denied.

***2 Delivery expenses** are not taxable as costs. *See Ortega,* 883 F.Supp. at 563 (holding that postage fees and fax services are not taxable); *City of Kansas City, Kan.,* 659 F.Supp. at 1219 (holding that postage is not a taxable cost).

Defendant has also billed **travel expenses for its counsel** and staff as costs. *Ortega* also prohibits the travel expenses of counsel to be taxed as costs. *See also Meredith v. Schreiner Transport, Inc.,* 814 F.Supp. 1004, 1007 (D.Kan.1993).

II. Depositions

Plaintiff objects to costs for the **deposition of a witness who was not called at trial.** The standard for determining whether deposition expenses are taxable as costs is whether the deposition was necessary to the case. "Though

use at trial by counsel or the court readily demonstrates necessity, if materials or services are reasonable necessary for use in the case even though not used at trial, the court can find necessity." *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1246 (10th Cir.1988). The taxing of deposition costs will not be allowed if the deposition is "purely investigatory in nature." *City of Kansas City, Kan.,* 659 F.Supp. at 1219.

Plaintiff asserts that Viola Heskett, a state vocational expert, was not called as a witness at trial, and that her deposition costs should not be taxed to plaintiff. If the deposition is necessary to the case, however, the costs will be allowed even though the witness did not testify at trial. *Christian v. Tackett,* 86 F.R.D. 220 (D.Miss.1979). Defendant has failed to prove the necessity of Ms. Heskett's deposition, however, and costs for the deposition will be denied.

IV. Witness Fees

Plaintiff objects to $420 assessed as **witness expense for the discovery *depositions*** *of* Milton Payton, Richard Moore, Martin Ringgold, and Cathy Loucks, arguing that the cost exceeds the scope of allowable witness fees and that plaintiff should not have to pay for defendant's own witnesses. Section 1920(3) expressly authorizes witness fees to be taxed as costs. **Witness fees may include attendance fees of $40 per day and travel and subsistence fees**. 28 U .S.C. § 1821(b), (c) and (d) (1994). The fees paid Payton, Moore, Ringgold, and Loucks are in accordance with the statutory limits and thus may be taxed to plaintiff.[1] "The Court has great discretion to tax these costs upon finding that they were necessarily obtained for use in the case." *Kansas ex rel. Stephan v. Deffenbaugh Indus., Inc.,* 154 F.R.D. 269, 271 (D.Kan.1994). The testimony of the witnesses was necessary to the case. Costs will be allowed.

Plaintiff also objects to the taxing of costs associated with the attendance of Diane Jordan and Frank Englebrecht at the evidentiary hearing on August 29, 1996. The evidentiary hearing was scheduled to determine whether plaintiff was on his way to assume the duties of his work. At the last minute, the defendant identified two new witnesses to be examined at the hearing. Because of the late identification of new witnesses, the Court gave defendant the option of trying that issue as part of the trial on the merits in December or holding the hearing without the witnesses. Defendant opted for the former and the Court canceled the hearing. The general rule is that "no witness fee may be taxed for a person who travels to the courthouse but does not testify at trial." *Green Construction Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 679 (D.Kan.1994). Because Jordan and Englebrecht did not testify on August 29, 1996, their fees may not be taxed as costs.

***3** Fees for Karen Sherwood and John Ward are also included in defendant's Bill of Costs. Plaintiff claims that because the fees are for **expert witnesses**, they should be disallowed. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) holds that the federal court cannot exceed the limits of 28 U.S.C. § 1821 absent statutory authority when a prevailing party assesses costs for its expert witnesses. Witness attendance fees are $40 per day. Defendant has assessed the fees at $3429.20. They should be reduced to $40 per each day of attendance. Karen Sherwood and John Ward attended trial only on December 10, 1996.

V. Service of Process

Plaintiff objects to the costs for service of process on Diane Jordan because 28 U.S.C. § 1920 does not expressly authorize **service of process** by private process server. This Court, however, has recognized that costs for service of process are taxable. "Applying the widely accepted reasoning that Congress intended to allow costs for private service of process, courts tax the costs of such service of process." *Ortega,* 883 F.Supp. at 561 (citing *Griffith v. Mt. Carmel Medical Center,* 157 F.R.D. 449 (D.Kan.1994)). The costs for service will be allowed.

VI. Enlargement Costs

Plaintiff disputes defendant's bill for **enlargements and reproductions of trial exhibits,** claiming that they are not authorized costs under Section 1920. Until recently, *Euler v. Waller,* 295 F.2d 765, (10th Cir.1961), was the controlling case in the Tenth Circuit with respect to taxation of costs for trial exhibits. Under *Euler,* only costs for trial exhibits that were pre-approved by the court could be taxed. In *Tilton v. Capital Cities/ABC, Inc.,* 115 F.3d 1471 (10th Cir.1997), however, the Tenth Circuit recently observed that the Supreme Court in *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964) had rejected the bright line rule. *Tilton,* 115 F.3d 1476. The Tenth Circuit therefore held that costs for trial exhibits will be examined on a case by case basis to determine if costs are justified. *Id.* In this particular case the costs are not excessive and thus will be allowed.

IT IS THEREFORE ORDERED that *Plaintiff's Motion to Retax* (Doc. # 149) filed July 25, 1997, be and hereby is sustained in part, in that the Clerk of the Court is directed to **disallow** the following costs: Westlaw research,

$5325.19; **delivery expenses**, $551 .84; travel expenses, $541.89; court reporter and witness fees for Viola Heskett, $405.40; witness fees for Karen Sherwood and John Ward, $3349.20; and witness fees for Diane Jordan and Frank Englebrecht for their appearance on August 29, 1996, $235.00. In all other respects, plaintiff's motion is overruled.

Footnotes

1 The Court finds these witnesses were necessary to the case. Milton Payton was the driver of the truck that collided with plaintiff. Officer Rick Moore testified as to his investigation of the collision. Martin Ringgold is an EMT who testified as to the health care the plaintiff received. Cathy Loucks testified regarding her knowledge of the events following the accident with respect to the care of Mr. **Albertson's** children.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

FILED

JUL 12 1996

RALPH L. DeLOACH, CLERK
By _____ Deputy

RANDAL D. ANTON,

Plaintiff,

v.

J. E. HARRINGTON, D.O.,

Defendants.

CIVIL ACTION

No. 94-1025-MLB

ORDER

Before the court are the following:

1. Plaintiff's objection (Doc. 122) to defendant's revised bill of costs (Doc. 121), contesting several transcripts (Doc. 122 at 4-5), subpoena service (Doc. 122 at 5), printing (Doc. 122 at 5-6), and witness (Doc. 122 at 6) costs; and

2. Defendant's response to plaintiff's objection to the revised bill of costs (Doc. 123).

Plaintiff disputes costs assessed by the clerk following a defendant's verdict in a malpractice case. This court reviews de novo the taxing of a prevailing party's costs by the clerk, Griffith v. Mt. Carmel Medical Ctr., 157 F.R.D. 499, 502 (D. Kan. 1994).

Normally, the prevailing party in a civil action is entitled to recover costs under Fed. R. Civ. P. 54(d), Serna v. Manzano, 616 F.2d 1165, 1167 (10th Cir. 1980). The costs pertinent here are enumerated by U.S.C. 28 § 1920 (1986):

. . .

(2) Fees of the court reporter for all or any part of the

COST OF DEPOSITIONS Pg 2. GRANTED
COST OF TRANSCRIPT CLOSING STATEMENT Pg 6 DENIED
COST OF SUBPOENA Pg 6 DENIED

AO 72A

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stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

. . .

A trial court has no discretion to award costs that are not set out in § 1920. Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 441-42 (1987). The prevailing party has the burden of establishing that the expenses in question are authorized under § 1920. Green Const. Co. v. Kansas Power & Light Co., 153 F.R.D. 670, 675 n.4 (D. Kan. 1994). In some cases, this requires a showing that the materials were "necessarily obtained for use in the case." 28 U.S.C. § 1920(2) and (4). If that burden is met, there is a presumption favoring the award. U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1245 (10th Cir. 1988). The amount of such costs must be carefully scrutinized, however, to ensure that it is reasonable. Id.

Costs for Deposition and Other Transcripts

Fees for stenographic deposition transcripts can be recovered by the prevailing party if those transcripts are "necessarily obtained for use in the case," Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983). Although a deposition used at trial carries a presumption of necessity, Furr v. AT & T Technologies, 824 F.2d 1537, 1550 (10th Cir 1987),[1] those not used at trial may also be

[1]Although plaintiff proposes that the Furr court also implied the converse of its ruling (that depositions not used at trial carry a presumption of superfluity), this conclusion is not

considered necessary if so shown by the prevailing party, Griffith at 502. Although the affidavit of Ms. Lisa A. McPherson stating that those items on the bill of costs were "necessarily incurred" (Doc. 117) is entitled to consideration, it is not conclusive. In exercising its discretion, the court has considered its knowledge of the case as well as the common sense aspects of litigation to determine the allowable costs.

At the outset, the court rejects plaintiff's arguments that a prevailing party cannot recover costs for copies of depositions noticed and taken by the losing party, including depositions of parties who settle before trial, and that costs cannot be recovered for depositions of persons ultimately not listed on a final witness list. No authority is cited in support of these arguments.

Section 1920(2) does not by express terms limit recovery of costs to the original deposition transcript. Stated another way, it does not preclude recovery of costs for copies. While there are older cases which state that costs for copies are not recoverable (e.g., Firtag v. Gendleman, 152 F. Supp. 226 (D.D.C. 1957)), more recent cases allow for the recovery of costs for one copy of a deposition, regardless of who noticed and took it, if it is determined that the deposition was necessarily obtained for use at trial. See DiPecco v. Dillard House, Inc., 149 F.R.D. 239, 241-42 (N.D. Ga. 1993) and Board of Directors, Water's Edge v. Anden Group, 135 F.R.D. 129, 132-136 (E.D. Va. 1991). Moreover, as noted in Water's Edge, the focus should be on whether the deposition was

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supported by that court's reasoning.

necessary for preparation for trial at the time the deposition was taken. Id. at 135.

No competent defense counsel aware of Kansas cases such as Wooderson v. Ortho Pharmaceutical Corporation, 235 Kan. 387, cert. denied, 469 U.S. 965 (1984) and Glenn v. Fleming, 240 Kan. 724 (1987) would believe it "unnecessary" to attend depositions taken by plaintiff of co-defendants. Defendant has satisfied his burden to show that the depositions were necessary for the preparation of his defense.

Accordingly, the court overrules plaintiff's objection to costs pertaining to transcripts of depositions taken by plaintiff's counsel of defendants Harrington, Taduran and employees of defendant Satanta Hospital (Satterfield, Holmes, Lee, Davis, Ellis, Black and Mason-Anton). At the time these depositions were taken, all defendants were still in the case.

Plaintiff alleges that the depositions of plaintiff and his wife were split amongst the then-defendants, and thus defendant cannot claim the full cost of these depositions (item 3). Although plaintiff's counsel's affidavit is an interesting display of deductive skill, it is not sufficient to overcome the evidence of costs submitted by defendant: a bill from the reporting agency, and a cancelled check. Plaintiff's phone-call evidence indicates that the costs of copying this deposition would be similar, if not exactly identical, to the amounts remitted by the co-defendants to the defendant. Plaintiff's objection to these costs is overruled.

The costs of the depositions of plaintiff's potential experts,

Drs. Hartwell, McMaster, Bonham and Messrs. Hardin and Longacre (item 5), are also contested. As this court held in Griffith, at 504-505, the costs incurred by the prevailing party in deposing the losing party's experts are recoverable by the prevailing party. Although most of these witnesses did not testify at trial, they were being considered for such use by the plaintiff when the depositions were taken. Therefore their depositions by the defendant were necessary for the preparation of his case. Plaintiff's objection to these costs is overruled.

Dr. Pirela-Cruz was initially one of plaintiff's experts. For reasons the court cannot now recall, plaintiff's counsel announced that he would not use him. Defendant's counsel then subpoenaed Dr. Pirela-Cruz for a deposition in Las Cruces, New Mexico, apparently believing that the doctor's testimony would be helpful to defendant's case. Plaintiff objected to use of the deposition before trial and by letter dated December 8, 1995, the court ruled that the deposition would mislead the jury and excluded it under Fed. R. Civ. P. 403.

Dr. Pirela-Cruz's deposition presents a different situation. Unlike the deposition of plaintiff's other experts, defendant's counsel knew when he took the deposition that plaintiff did not intend to call the doctor. While defendant's counsel apparently believed the deposition would be helpful to defendant's case, the way it was taken would have misled the jury. Under these circumstances, the court exercises its discretion in favor of plaintiff's objection to the deposition and related subpoena costs.

The final transcript contested by the plaintiff is the copy of the court reporter's record of the opening statements (item 6). Deputy Clerk Marlin Miller has already deducted this amount in the revised bill of costs.

Fees for Service of Subpoena

U.S.C. 28 § 1920 allows for the taxing of "Fees of the . . . marshal," which include subpoena service fees. As this court held in Griffith, at 508, a prevailing party who uses a private server instead of the marshal may recover this expense, but only up to the marshal's cost for the same service.

Plaintiff alleges that Ms. Davis's (defendant's counsel's legal assistant who served the subpoenas) excursion to Garden City and Liberal was a "dirty laundry" hunt rather than a service trip. However, defendant has submitted to the court record of the two subpoenas served by Ms. Davis. It is not evident to the court that the witnesses subpoenaed "were obviously more than willing to come without subpoenas," (Doc. 122 at 6). Therefore, plaintiff's objection to these costs is overruled.

Fees for Photocopying

Plaintiff contends that since the expenses claimed by the defendant as "printing" are really photocopying, they should be excluded from the bill of costs. Although these expenses are not strictly printing, as used in § 1920(3), they fall within the context of § 1920(4) as "copies of papers necessarily obtained for use in the case." Therefore, plaintiff's objections to these costs is overruled.

Fees for Witnesses

As plaintiff notes, the general rule reiterated in Greene Construction Co. v. Kansas Power & Light, 153 F.R.D. 670, 679 (D. Kan. 1994), is that the prevailing party cannot recover witness fees (appearance, transportation, subsistence) for himself. The reasoning behind such a policy, that the interested party should not recover for taking part in his own case for his own ends, is sound. Therefore, plaintiff will not be taxed for Dr. Harrington's expenses. Plaintiff's objections to other witness costs are overruled.

Table of Allowed Costs

Item	Description	Cost ($)
Transcripts	L. M. Anton	$ 311.36
	R. D. Anton	717.77
	J. E. Harrington	198.00
	R. Hartwell	423.58
	J. F. McMaster	517.58
	J. D. Hardin	311.59
	M. Longacre	294.20
	J. M. Bonham	247.50
	V. Taduran	220.00
	P. Satterfield	11.00

	D. Holmes	35.20
	T. G. Lee	48.40
	V. Davis	56.10
	C. Ellis	22.00
	S. Black	64.90
	M. Mason-Anton	28.60
	Transcript Subtotal	$3,507.78
Service Fees (mileage at .30/ mile)	Moody and Kindel	153.30
Copying		27.36
Witness Fees	All but Harrington and Pirela-Cruz	143.00
Total Costs		$3,831.44

Accordingly, plaintiff's objections to revised bill of costs (Doc. 122) is granted, in part, and overruled, in part.

IT IS SO ORDERED.

Dated this 12th day of July 1996, at Wichita, Kansas.

MONTI L. BELOT
United States District Judge

1994 WL 481777
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Ernestine **BARRETT**, Plaintiff,
v.
The UNITED STATES of America, Defendant.

No. 92–2362–JWL. | July 29, 1994.

Attorneys and Law Firms

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Robert A. Olsen, Office of U.S. Atty., Kansas City, KS, for defendant.

Opinion

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

***1** This case is before the court on plaintiff's motion to retax costs (Doc. # 85) and defendant's motion to retax (Doc. # 90). On February 12, 1994, the court ordered judgment in favor of the defendant on all claims, 845 F.Supp. 774. Defendant filed a bill of costs on May 3, 1994, and a revised bill of costs on May 13, 1994, in the amount of $4,302.46. On May 13, 1994, the Clerk of the District Court taxed a partial amount of the costs requested by the defendant against the plaintiff in the amount of $2,147.58 (Doc. # 84). On May 17, 1994, plaintiff moved to retax costs. Defendant responded to plaintiff's motion and also filed a motion to tax costs that the Clerk denied. For the following reasons, plaintiff's motion to retax is granted in part and denied in part. Defendant's motion to retax is denied in part and granted in part.[1]

Taxation of costs is authorized by Fed.R.Civ.P. 54(d) and governed by 28 U.S.C. § 1920 (1988).[2] Standards for assessment of costs are well established in this district. See *Miller v. City of Mission, Kansas,* 516 F.Supp. 1333, 1339 (D.Kan.1981). Expenses incident to preparing a case for trial are not recoverable under the statute. *Id.,* citing 6 Moore's Federal Practice 54.70[1]. Only those expenses for items necessarily obtained for use in the case are recoverable. 28 U.S.C. § 1920 (1988). The court presumes that a prevailing party shall recover costs and, therefore, some reasons must appear for penalizing the prevailing party if costs are to be denied. *True Temper Corp. v. CF & I Steel Corp.,* 601 F.2d 495, 509–510 (10th Cir.1979). The Supreme Court limits assessment of costs to those items provided by § 1920 and § 1821, unless overridden by contract or explicit statutory authority. *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 86, (1991) citing *Crawford Fitting Co. v. Gibbons, Inc.,* 482 U.S. 437, 439 (1988).

PART I. Plaintiff's Motion to retax

The plaintiff contends that the Clerk should not have taxed the stenographic transcript of the deposition of Plaintiff's expert, Dr. Gary Green, taken by defendant. Plaintiff argues that because the deposition was not read to the Court in its entirety at trial and was not offered into evidence, the deposition is a discovery expense that should not be taxed. The standard for determining whether a transcript is a cost to be taxed under 28 U.S.C. § 1920 is whether it was reasonably necessary to the litigation of the case. *Ramos v. Lamm,* 713 F.2d 546 (10th Cir.1983). While use of a deposition at trial strongly indicates necessity, other factors may be considered when determined whether the transcript is reasonably necessary for use in the case. *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). Necessity is measured by the facts known to counsel at the time the deposition was taken, not at the time of trial. *Merrick v. Northern Natural Gas Co.,* 911 F.2d 426, 434 (10th Cir.1990). Because this transcript was used extensively at trial to cross-examine Dr. Green, the court finds that the stenographic transcript was reasonably necessary to the litigation of the case. The Clerk properly taxed the cost of the transcript of plaintiff's expert, Dr. Gary Green.

***2** In addition, plaintiff contends that costs defendant incurred for expedited transcripts of the depositions of witnesses David L. Brooks and Anthony Hall should not have been taxed by the Clerk. These depositions were taken approximately one week before trial. In order to use these depositions at trial, defendant was required to have these **transcripts expedited**. Plaintiff offerred these transcripts into evidence and, therefore, the defendant required these transcripts to use at trial. The court finds the expedited transcripts were reasonably necessary for use at trial, and, thus finds that their cost was properly taxed by the Clerk.

Plaintiff contends that the Clerk improperly taxed the transportation, mileage and parking expenses incurred by defendant's witnesses Darrell L. Richards and Matthew Hamidullah. Both witnesses are **employees of the Federal**

Bureau of Prisons, Washington, D.C. Plaintiff argues that these witnesses, because they are employees of the United States, are parties to the action and that the travel expenses of parties are not authorized by 28 U.S.C. § 1920. However, a court may tax as **costs the travel and subsistence of Federal Government employees** so long as their testimony was reasonably necessary for use at trial. *United States v. Pommerening,* 500 F.2d 92, 102 (10th Cir.1974) *cert. denied* 419 U.S. 1088, *reh'g denied* 420 U.S. 939. The court will allow the expenses of a government witness to be taxed and will not consider them parties to the action.

Both parties disagreed as to the expenses that should have been taxed. The Clerk assessed the transportation, mileage, and parking fees paid by Richards and Hamidullah and refused to tax the subsistence and vehicle rental fees submitted by the defendant. Under 28 U.S.C. 1920, a party may recover fees paid to witnesses. The guidelines for fees paid to witnesses are found in 28 U.S.C. 1821. A witness may be compensated for travel expenses to attend trial. 28 U.S.C. 1821(c)(1) (1988). Defendant submitted airline receipts for the travel of Richards and Hamidullah to travel from Washington, D.C. to Kansas City. The court finds that these transportation expenses are reasonable and should be taxed against the plaintiff.

Defendant also submitted mileage expenses for the travel of Richards and Hamidullah. Under 28 U.S.C. 1821(2), a witness may be paid a travel allowance equal to the rate paid to Federal employees under 5 U.S.C. 5704. At the time of trial, the rate under this section was 25 cents a mile for use of a privately owned automobile. 5 U.S.C.A. 5704(a)(2) (West Supp.1994). The defendant submitted mileage expenses calculated at 25 cents per mile. Therefore, the Clerk properly taxed the mileage expenses of Richards and Hamidullah.

Finally, Plaintiff requests that the court find that Defendant owes Plaintiff $1,500 for a deposition fee paid in advance by Plaintiff to Plaintiff's expert Dr. Green. Defendant acknowledges that defendant owes Plaintiff some amount for the deposition, but argues that $1,500 is excessive. The court agrees and orders that $500 is a reasonable fee for the deposition.

PART II. Defendant's Motion to retax

***3** The Clerk denied the car rental expenses as well as the subsistence expenses of Richards and Hamidullah. In addition, the Clerk denied the attorney travel expenses for defendant's attorney to attend the depositions of plaintiff's expert, Dr. Gary Green, as well as the depositions of Mr. Brooks and Mr. Hall.

The Clerk denied the car rentals of Richards and Hamidullah submitted by the defendant. The statute does not state that vehicle rental fees are recoverable and the court may not tax this expense. See *Crawford* at 442. Thus, the Clerk properly denied these expenses to be taxed.

The Clerk denied the subsistence expenses of Richards and Hamidullah to be taxed to the plaintiff. Witnesses shall be given a subsistence allowance when the place of attendance is so far removed from the residence of the witness that an overnight stay is required. 28 U.S.C. 1821(d)(1) (1988). However, the amount paid to the witness must not exceed the maximum per diem allowance given federal employees pursuant to 5 U.S.C. 5702(a). 28 U.S.C. 1821(d)(2) (1988). At the time of trial, this amount was $101 dollars for travel to Kansas City. Because of the distance between Kansas City and Washington, D.C., an overnight stay was required for these witnesses to attend trial. The subsistence expenses for Mr. Richards on January 19 and January 20 were $101.19. Therefore defendant's request for $320.57 for Mr. Richards is reduced to $320.19 and the court orders the Clerk to tax $320.19 against plaintiff.

The defendant submitted a subsistence request of 231.80 for Mr. Hamidullah. Defendant's request includes lodging expenses of $88.78 for time spent in Orlando, FL. These expenses were not incurred in relation to this trial and shall not be taxed. Defendant's request for $143.02 for a two-night stay in Kansas City, KS is below the amount authorized. The Clerk shall tax the plaintiff for the subsistence expenses of Mr. Hamidullah in the amount of $143.02.

Finally, defendant has requested reimbursement for the **travel expenses incurred by defendant's attorney** to take the deposition of Dr. Gary Green and attend the deposition of Mr. Hall and Mr. Brooks. Travel expenses incurred by a party's attorney to attend a deposition are generally not taxed as costs. *Nugget Distributors Cooperative of America, Inc. v. Mr. Nugget, Inc.,* 145 F.R.D 54 (E.D.Pa.1992). The defendant argues that counsel was required to attend the depositions because attendance was vital and the attendance at the depositions would be required in order to effectively prepare for trial. A court may otherwise award these fees if there is evidence of bad faith, vexatiousness or oppressiveness. *J.T. Gibbons, Inc. v. Crawford Fitting Co.,* 760 F.2d 613, 616 (5th Cir.), *cert. denied,* 474 U.S. 890 (1985). The circumstances stated by the defendant do not warrant an exception to the general rule. The Clerk properly denied the taxing of attorney's expenses related to the attendance of the depositions of Green, Hall, and Brooks.

***4 IT IS THEREFORE ORDERED THAT** plaintiff's motion for retaxation of costs (Doc. # 85) is granted in part and denied in part. Further, defendant's motion to retax costs (Doc. # 90) is granted in part and denied in part. The Clerk of the District Court is directed to decrease the award of costs to the defendant by $36.79 ($463.21 for the subsistence expenses minus $500 for the fee of Dr. Green), for a total revised costs award of $2,110.79.

Footnotes

1 Plaintiff has not responded to defendant's motion.

2 A judge or clerk of any court of the United States may tax as costs the following:
Fees of the clerk and marshal;
Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
Fees and disbursements for printing and witnesses
Fees for exemplification and copies of papers necessarily obtained for use in the case;
Docket fees under section 1923 of this title;
Compensation of court appointed experts, compensation of interpreters and salaries, fees, and costs of special interpretation services under section 1828 of this title.

196 F.R.D. 613
United States District Court,
D. Kansas.

BATTENFELD OF AMERICA **HOLDING** COMPANY, INC. and SMS Capital Corp., Plaintiffs,
v.
BAIRD, KURTZ & DOBSON, Defendant/Third–Party Plaintiff,
v.
Friedrich Theysohn GmbH et al., Third–Party Defendants.

No. 97–2336–JWL. | Oct. 11, 2000.

Clients brought negligence action against accounting firm arising out of accounting and auditing services firm provided to corporation purchased by plaintiffs. Defendant filed a third-party complaint against sole shareholder of corporation and its parent. After plaintiffs and defendant reached a settlement, and jury found in favor of the third-party defendants, defendant filed motion to retax costs. The District Court, Lungstrum, J., **held** that: (1) third-party defendants would not **be** allowed to tax as costs the expense of hiring a consulting firm to present the video depositions of various witnesses at trial; (2) third-party defendants would not **be** allowed to tax as costs the expense of preparing certain board exhibits used at trial; (3) third-party defendants would not **be** allowed to tax as costs the expense of photocopying 120,000 documents; and (4) third-party defendants **were** entitled to tax as costs the expense of copying six deposition transcripts of various expert and fact witnesses.

Motion granted in part and denied in part.

West Headnotes (11)

[1] **Federal Civil Procedure**
Amount, rate and items in general

Court will sparingly exercise its discretion with regard to expenses not specifically allowed by cost statute. 28 U.S.C.A. § 1920.

[2] **Federal Civil Procedure**
Particular items

Third-party defendants would not **be** allowed to tax as costs the expense of hiring a consulting firm to present the video depositions of various witnesses at trial, absent showing that use of a video technician at trial **was** "necessary" to their case. 28 U.S.C.A. § 1920.

2 Cases that cite this headnote

[3] **Federal Civil Procedure**
Particular items

The reasonable cost of preparing maps, charts, graphs and kindred material is taxable, pursuant to cost statute, when necessarily obtained for use in the case. 28 U.S.C.A. § 1920.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
Particular items

Third-party defendants would not **be** allowed to tax as costs the expense of preparing certain board exhibits used at trial, absent showing that the exhibits **were** "necessary" to their case; at most, the demonstrative exhibits merely illustrated various defenses and themes raised by third-party defendants. 28 U.S.C.A. § 1920.

4 Cases that cite this headnote

[5] **Federal Civil Procedure**
Stenographic costs

A copy is "necessarily obtained" within the meaning of cost statute only where the court believes that its procurement **was** reasonably necessary to the prevailing party's preparation of

its case. 28 U.S.C.A. § 1920(4).

1 Cases that cite this headnote

[6] **Federal Civil Procedure**
Stenographic costs
Federal Civil Procedure
Taxation

Third-party defendants would not **be** allowed to tax as costs the expense of photocopying 120,000 documents, where bill of costs contained no explanation or elaboration about the nature or use of the documents, and thus third-party defendants failed to show that the documents **were** "necessarily obtained" for use in the case. 28 U.S.C.A. § 1920(4).

[7] **Federal Civil Procedure**
Depositions

Third-party defendants **were** entitled to tax as costs the expense of copying six deposition transcripts of various expert and fact witnesses, as issues raised in the depositions clearly related to setoff claim of one of the third-party defendants. 28 U.S.C.A. § 1920(4).

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Stenographic costs

To award costs for daily production of trial transcripts, a court must find that daily copy **was** necessarily obtained, as judged at the time of transcription. 28 U.S.C.A. § 1920(2).

4 Cases that cite this headnote

[9] **Federal Civil Procedure**
Stenographic costs

Generally**, taxation of costs for daily copy of trial transcripts is not allowed absent prior court approval**; however, if the issues in the case **were** so complex as to justify overlooking the lack of pretrial approval, a court can use its discretion to award the cost where daily copy proved invaluable to both the counsel and the court. 28 U.S.C.A. § 1920(2).

1 Cases that cite this headnote

[10] **Federal Civil Procedure**
Stenographic costs

Third-party defendants **were** not entitled to costs associated with obtaining daily trial transcripts, where they did not ask the court, prior to trial, to approve the special expense of daily transcripts, and case **was** not lengthy or complex. 28 U.S.C.A. § 1920(2).

5 Cases that cite this headnote

[11] **Federal Civil Procedure**
Witness fees

Third-party defendants **were** not entitled to recover witness fees for days on which witness **was** present at trial in his capacity as corporate representative rather than in his capacity as a witness. 18 U.S.C.A. § 1821.

Attorneys and Law Firms

***615** Vivian Williams Addam, Shook, Hardy & Bacon L.L.P., Randall E. Hendricks, Phillip G. Greenfield, Leigh A. Bishop, Rouse, Hendricks, German, May & Shank, Scott M. Brinkman, Lewis, Rice & Fingersh, L.C., Kansas City, MO, James A. Snyder, Lathrop & Gage L.C., Overland Park, KS, John R. Gerstein, Ross, Dixon & Masback, Washington, DC, Timothy K. McNamara, Daniel L. McClain, L.J. Buckner, Jr., Lathrop & Gage L.C., Kansas City, MO, for **Battenfeld** of America

Holding Co., Inc. and SMS Capital Corporation and Baird Kurtz & Dobson.

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Opinion

MEMORANDUM & ORDER

LUNGSTRUM, District Judge.

Plaintiffs Battenfeld of America Holding Company, Inc. and SMS Capital Corporation filed this negligence action against defendant accounting firm Baird, Kurtz & Dobson ("BKD") arising out of accounting and auditing services BKD provided to American Maplan Corporation ("AMC"), a corporation purchased by plaintiffs from AMC's sole shareholder Friedrich Theysohn GmbH ("FTG"), which in turn was owned by VGT AG ("VGT"). According to plaintiffs, BKD should have discovered that certain individuals had made false entries in AMC's financial records, resulting in a material overstatement of assets, equity and earnings and a material understatement of liabilities. In turn, BKD filed a third-party complaint against, *inter alia,* FTG and VGT, alleging that those entities directed the fraudulent conduct and should be held responsible for any damages resulting from that conduct.

The case was tried to a jury over the course of four weeks. At the close of the evidence, while the jury was deliberating, the plaintiffs and BKD reached a settlement with respect to plaintiffs' claims. The jury found in favor of the third-party defendants on BKD's claims. This matter is presently before the court on BKD's motion to retax costs (doc. # 634). As set forth in more detail below, BKD's motion is granted in part and denied in part.

In their bill of costs, FTG and VGT requested the clerk to tax as costs the amount of $82,824.02. On June 15, 2000, the clerk filed a bill of costs and supplemental bill of costs awarding FTG and VGT a total of $82,107.02. BKD now requests that the court retax the costs. Specifically, BKD objects to the following as costs: $3,645.00 for technical support at trial; $3,805.00 for the creation of board exhibits used at trial; copying charges in the amount of $28,813.88 for certain documents and $1,723.95 for certain deposition transcripts; daily copy expenses in the amount of $12,544.89; and certain witness expenses.[1]

Technical Support

[1] FTG and VGT seek to recover $3,456.00 for "technical support for operation of video deposition system" used at trial. In essence, FTG and VGT used the services of a consulting firm to present the video depositions of various witnesses at trial, including editing those videos during trial. While FTG and VGT concede that these costs are not expressly authorized by 28 U.S.C. § 1920, they nonetheless urge the court to exercise its discretion to award such costs. *See U.S.* ***616** *Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1246 n. 29 (10th Cir.1988) (unusual or nonstatutory costs may be granted "where a sufficient showing of necessity is made"). The court, however, will sparingly exercise its discretion with regard to expenses not specifically allowed by statute. *See id.* at 1246.

[2] The court declines to exercise its discretion here and grants BKD's motion with respect to these particular costs. Simply put, the court cannot conclude that these costs were "necessarily" incurred. According to FTG and VGT, the use of a professional video technician in this case was "necessary for an efficient presentation of the evidence and for the jury's understanding of the issues." The court readily acknowledges that FTG and VGT's presentation of video depositions at trial was both efficient and helpful.[2] The court also recognizes that, in appropriate cases, counsel may find it necessary to utilize such technology in order to increase his or her client's chance of prevailing before a jury. In this particular case, FTG and VGT's use of such technology may have even been a factor in the jury's ultimate decision to the extent FTG and VGT's evidence was presented more clearly and efficiently than BKD's evidence. Nonetheless, it does not necessarily follow that such costs should be shifted to BKD. *See Vornado Air Circulation Systems, Inc. v. Duracraft Corp.,* No. 92–1543–WEB, 1995 WL 794070, at *3 (D.Kan. Nov. 29, 1995) (while computer simulation exhibits were helpful to an understanding of the issues, they "were by no means necessary to the defendant's case").[3] In short, FTG and VGT have not shown the court that the use of a video technician at trial was "necessary" to their case.

Board Exhibits

[3] [4] FTG and VGT also seek to recover $3,805.00 for the creation of certain board exhibits used at trial. The reasonable cost of preparing maps, charts, graphs and

kindred material is taxable, pursuant to 28 U.S.C. § 1920, when necessarily obtained for use in the case. *Mikel v. Kerr,* 499 F.2d 1178, 1182 (10th Cir.1974); 28 U.S.C. § 1920(4) (permitting clerk to tax as costs "fees for exemplification and copies of papers necessarily obtained for use in the case").[4] According to FTG and VGT, these board exhibits **were** "necessary" to an "effective and efficient" presentation of the evidence at trial. For the same reasons as set forth above in connection with FTG and VGT's request for **costs associated with technical support**, the court grants BKD's motion with respect to these costs. The court cannot conclude that the board exhibits **were** "necessarily" obtained for use in the case. Again, while FTG and VGT's use of such materials at trial may have helped the jury to understand the issues and, thus, **may have ultimately helped FTG and VGT prevail before the jury,** there has **been** no showing that these exhibits **were** "necessary" to FTG and VGT's case such that the costs should **be** shifted to BKD. At the ***617** most, FTG and VGT's demonstrative exhibits merely illustrated various defenses and themes raised by FTG and VGT. For these reasons, the request is denied. *See Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1428 (D.Kan.1995) (denying request for costs associated with producing demonstrative exhibits where exhibits **were** "merely illustrative of expert testimony, other evidence, or argumentative matter"), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996).

Copying Charges

[5] In their bill of costs, FTG and VGT request the clerk to tax costs in the amount of $28,813.88 for copies of more than 120,000 documents produced by BKD during discovery and $1,723.95 for copies of certain deposition transcripts. Section 1920(4) allows for the taxation of "fees for exemplification and copies of papers necessarily obtained for use in the case." A copy is "necessarily obtained" within the meaning of section 1920(4) only where the court believes that its procurement **was** reasonably necessary to the prevailing party's preparation of its case. *See Pehr v. Rubbermaid, Inc.,* **196 F.R.D**. 404, 407–08 (D.Kan.2000). FTG and VGT bear the burden of establishing that the costs fall within the provisions of section 1920. *See id.* at 406–07 (citations omitted).

[6] FTG and VGT have not shown that the copies of the 120,000 documents **were** "necessarily obtained" for use in the case. They have simply submitted statements from copying services for thousands of copies, without identifying the use made of the copied materials. Moreover, the bill of costs submitted by FTG and VGT seeks reimbursement for "copies of **documents produced by all parties (from BKD)" with no explanation or elaboration about the nature or use of the documents**. While the court would not expect FTG or VGT to identify every photocopy made, the court does expect these parties to make some effort to identify the nature of the documents and the number of documents copied with respect to a particular subject. Without such information, the court cannot distinguish between copies "necessarily obtained" for use in the case and other copies. Because FTG and VGT have failed to show that the copies **were** necessarily obtained, they cannot recover these costs. *See Fusion, Inc. v. Nebraska Aluminum Castings, Inc.,* No. 95–2366–JWL, 1997 WL 614317, at *1 n. 1 (D.Kan. Sept. 18, 1997) (although it **was** not necessary to decide the issue, the court "would have likely disallowed the entire amount sought for copying expenses because plaintiff has not broken down those expenses by document or type of document; the court is therefore unable to determine whether any of the copies **were** reasonably necessary"); *Green Construction Co. v. Kansas Power & Light Co.,* 153 **F.R.D**. 670, 683 (D.Kan.1994) (disallowing copying expenses where prevailing party merely submitted statements from copying services without identifying use made of the photocopied materials). BKD's motion is granted with respect to these copying charges.

[7] FTG and VGT also seek to recover $1,723.95 for copies of six deposition transcripts of various expert and fact witnesses whose testimony pertained solely to the issue of whether BKD's audits of AMC met the relevant standard of care. According to BKD, the issue of its own negligence had nothing whatsoever to do with BKD's fraud and indemnity claims against FTG and VGT and, thus, FTG and VGT did not need to obtain copies of those depositions. In response, FTG and VGT point out that FTG had asserted a setoff claim against BKD, alleging that BKD negligently prepared for and negligently performed the financial audits of AMC and that BKD's negligence caused damage to FTG, as the former owner of AMC. Because of this setoff claim, then, FTG maintains that the issue of BKD's accounting malpractice **was** integral to FTG's defense. BKD does not address this argument in its reply brief. In the absence of any response from BKD, the court concludes that these costs **are** properly taxed to BKD. The issues raised in the depositions, primarily BKD's negligence, clearly related to FTG's setoff claim. As such, copies of those deposition transcripts **were** reasonably necessary to the preparation of FTG's defense. FTG has met its burden of showing that the costs fall within the purview of section 1920 and BKD's motion is denied with respect to these costs.

****618 Daily Trial Transcripts***

[8] [9] Next, FTG and VGT seek costs in the amount of

$12,544.89 associated with obtaining daily trial transcripts. To award this "premium cost for daily production, a court must find that daily copy was necessarily obtained, as judged at the time of transcription." *See Manildra,* 878 F.Supp. at 1426 (citing *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1248 (10th Cir.1988)). As a general rule, taxation of costs for daily copy is not allowed absent prior court approval. *Id.* (citation omitted). If, however, the issues in the case "were so complex as to justify overlooking the lack of pretrial approval, a court can use its discretion to award the cost where daily copy proved invaluable to both the counsel and the court." *Id.* (citation omitted); *accord U.S. Indus.,* 854 F.2d at 1248.

[10] FTG and VGT concede that they did not ask the court, prior to trial, to approve the special expense of daily transcripts. *See U.S. Indus.,* 854 F.2d at 1247 (characterizing daily copy as a "special expense"). Nonetheless, they contend that obtaining daily copy was "invaluable" to both counsel and the court in light of the "multitude of testimony from the nine parties in the case." FTG and VGT further argue that

> [i]t was a fast-paced trial with numerous evidentiary issues that sprung up on a continual basis. Many of the evidentiary disputes were resolved because the parties referred to prior days' transcripts, thereby saving the Court and jurors time and ultimately expediting the resolution of the trial.

While the court expresses no opinion as to whether daily copy was necessary for counsel at trial, the court is in the best position to assess the value of the daily copy to it. *See id.* at 1248. Suffice it to say, daily **copy was not necessary** for the court's handling of the case. *See id.* The court cannot recall any occasions in which it even looked to daily copy for guidance in analyzing an evidentiary issue. While daily copy may have aided the parties in resolving various disputes amongst themselves, the court is fairly confident that it could have resolved those issues for the parties in the absence of daily copy. In short, this case was neither so complex nor so lengthy as to justify imposing such "special costs" on BKD. *Compare id.* at 1246 (affirming district court's denial of costs associated with daily copy in complex federal securities case where trial involved 11 defendants and jury deliberated for over one week) *with Manildra,* 878 F.Supp. at 1427 (allowing costs for daily copy in a case involving claims of patent infringement, antitrust violations, Lanham Act violations, and unfair competition where trial spanned 94 days over the course of eleven months and the court found that daily copy "proved critical to the court's management of the litigation").

Witness Fees

FTG and VGT seek to recover witness fees in the amount of $1,139.00 for travel, lodging and other expenses related to the deposition of Dr. Ernst Kruger (Dr. Kruger traveled from Germany to the United States for his deposition) and witness fees in the amount of $6302.69 in connection with Dr. Stefan Schatz's travel to and presence at trial. BKD contends that no costs should be allowed with respect to Dr. Kruger's deposition and that the costs associated with Dr. Schatz's presence at trial should be reduced by $1,089.00.

With respect to Dr. Kruger, BKD maintains that FTG and VGT cannot recover any fees because Dr. Kruger, as a party to the action, was not a "witness" entitled to recover expenses pursuant to 18 U.S.C. § 1821 and, in any event, FTG and VGT were ordered by the court during the discovery process to pay one-half of Dr. Kruger's expenses due to scheduling conflicts. In response, FTG and VGT simply rehash arguments that they made at the time the court issued its April 7, 1999 order that FTG and VGT pay half of Dr. Kruger's expenses. The court declines FTG and VGT's invitation to revisit that order. Rather, the court concludes that FTG and VGT's $1,139.00 liability, which arose from a discovery order, is separate and distinct from BKD's obligation to pay costs as determined by the court, which arises under Rule 54 and section 1920. *See* ***619** *Phillips USA, Inc. v. Allflex USA, Inc.,* No. 94–2012–JWL, 1996 WL 568814, at *2 (D.Kan. Sept. 4, 1996). BKD's motion with respect to witness fees for Dr. Kruger is granted.

[11] With respect to Dr. Schatz, BKD argues that FTG and VGT cannot recover witness fees for the nine days on which Dr. Schatz was present at trial in his capacity as **corporate representative** rather than in his capacity as a witness. Accordingly, BKD requests that Dr. Schatz's witness fee be reduced by $1,089.00.[5] According to FTG and VGT, costs for witness fees may be awarded for days a witness is not testifying but is "necessarily" attending trial. *See Green Construction Co. v. Kansas Power & Light Co.,* 153 **F.R.D.** 670, 679 (D.Kan.1994) ("[A]ttendance and subsistence allowances for witnesses are not restricted to the days the witness actually testifies, but may also be awarded for each day the witness necessarily attends trial, time spent during delays and temporary adjournments, and the time necessary for travel to and from the place of attendance."). Relying on this principle, FTG and VGT maintain that Dr. Schatz's attendance at trial for the nine days in question was "necessary." According to FTG and VGT:

> [I]t **was** necessary and imperative that Dr. Schatz **be** in attendance for the time at issue to hear the testimony of other witnesses, particularly Helmut Eschwey and Ulrich Hallemeier, witnesses who plaintiffs put forth to discuss the relationship between plaintiffs and VGT and, specifically, discussions that took place between representatives of plaintiffs and Dr. Schatz. Furthermore, as VGT's sole representative, it **was** important that the jury view Dr. Schatz. Dr. Schatz also had to hear the testimony of various witnesses put forth by plaintiffs and BKD in order to plan the defense of VGT, adequately prepare for his own testimony and rebut the allegations of plaintiffs and BKD.
>
> FTG and VGT also maintain that Dr. Schatz had to **be** "on call" during the last week of trial because it **was** not possible to schedule Dr. Schatz's testimonial appearance with precision and Dr. Schatz **was** traveling from Germany to testify.

The court rejects FTG and VGT's arguments. As an initial matter, Dr. Schatz could not have **been** in the courtroom to hear the testimony of other witnesses in his capacity as a witness because the parties had invoked Federal Rule of Evidence 615. Thus, the only explanation (and FTG and VGT seem to concede as much) is that Dr. Schatz **was** present in the courtroom in his capacity as a corporate representative. As such, Dr. Schatz is not entitled to witness fees. *See Sprague v. Elliott Mfg. Homes, Inc.,* Civ. A. No. 91–2286–GTV, 1992 WL 398441, at *1 (D.Kan. Dec. 22, 1992) (witness not entitled to fees and allowances for days when he attended court in his capacity as **corporate representative)**; *Quigley v. General Motors Corp.,* Civ.A. No. 85–2458–S, at *1 (D.Kan. July 22, 1987) (disallowing fees for person who "**was** defendant's representative at trial, [as] parties to the litigation **are** not permitted to recover the cost of their own presence at trial."). BKD's motion is granted with respect to Dr. Schatz's fees; the fee shall **be** reduced by $1,089.00.

IT IS THEREFORE ORDERED BY THE COURT THAT BKD's motion to retax costs (doc. # 634) is **granted in part and denied in part**. The motion is denied with respect to FTG and VGT's request to recover $1,723.95 for copies of **certain deposition transcripts** and is otherwise granted. The parties shall submit a revised bill of costs, reflecting the reductions made in this order, to the clerk within twenty (20) days of the date of this order.

IT IS SO ORDERED.

Footnotes

1 BKD also objects to FTG and VGT's request for the costs associated with obtaining an additional copy and ASCII diskette of a certain deposition ($210.55) and obtaining an expedited transcript of another deposition ($936.93). In response, FTG and VGT have withdrawn their claims for these costs. Thus, BKD's motion is granted with respect to these costs.

2 The video technician **was** able to edit video depositions on the spot and **was** able to pinpoint quickly relevant excerpts for use at trial.

3 In support of their argument that such costs **are** appropriately shifted to BKD, FTG and VGT direct the court only to a transcript of a hearing before United States District Judge Wayne R. Andersen in the Northern District of Illinois. In that case, *Elkay Manufacturing Co. v. Ebco Manufacturing Co.,* Judge Andersen granted Elkay's request for $24,248.28 for costs incurred in the use of sophisticated computer equipment to display exhibits during trial. The circumstances surrounding the use of the equipment in *Elkay,* however, **are** easily distinguished from the circumstances here. As Judge Andersen noted in his ruling, Elkay, the plaintiff, "could not have displayed the exhibits without the use of the equipment." Here, of course, FTG and VGT could have displayed their video depositions without the aid of a video technician. Moreover, the defendant in *Elkay* used plaintiff's equipment a "fair amount" in presenting its case, too. Thus, Judge Andersen concluded that shifting the cost to the defendant-who had used the equipment itself-**was** not inappropriate. Finally, *Elkay* **was** a bench trial and Judge Andersen specifically noted that the use of the equipment assisted the court in understanding the evidence and in reaching its ultimate decision. Those considerations **are** simply not present here.

4 "Exemplification" has **been** interpreted to embrace all manner of demonstrative exhibits, including models, charts, photographs, illustrations, and other graphic aids. *See Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1428 n. 10 (D.Kan.1995) (citation omitted), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996).

5 This amount represents a $40 per day attendance fee plus a $81 per day subsistence allowance, multiplied by nine days.

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2003 WL 22102135
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

Christine R. **BERROTH**, Plaintiff,
v.
FARM BUREAU MUTUAL INSURANCE CO., INC., Defendant.

No. Civ.A. 01–2095–CM. | Aug. 5, 2003.

Attorneys and Law Firms

Gregory M. Dennis, Kent T. Perry & Co. LC, Overland Park, KS, Richard W. Noble, The Noble Group. P.C., Kansas City, MO, for Plaintiff.

Deena Hyson Bailey, Rebecca A. Hesse, Terry L. Mann, Martin, Pringle, Oliver, Wallace & Bauer, LLP, Wichita, KS, for Defendants.

Opinion

MEMORANDUM AND ORDER

MURGUIA, J.

***1** Pending before the court is plaintiff Christine R. **Berroth's** Application for Attorneys' Fees, Expenses & Costs (Doc. 140). As set forth below, the court awards attorneys' fees and costs of $119,102.46.

This case was tried December 9–17, 2002, on plaintiff's claim that defendant failed to promote her in violation of Title VII of the Civil Rights Act of 1964. The jury returned a verdict in favor of plaintiff on December 17, 2002, and awarded $10,325.82 in compensatory damages and $10,000 in punitive damages. On April 28, 2003, the court entered an order which, in part, denied defendant's motions pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, and reserved a ruling on plaintiff's application for attorneys' fees, on the grounds that plaintiff had not yet filed a memorandum required by District of Kansas Rule 54.2. The court has received and reviewed plaintiff's memorandum, defendant's response, and plaintiff's reply, and is prepared to rule.

Plaintiff requests the court to award $124,875.25 in fees and expenses pursuant to 42 U.S.C. §§ 1981a, 1988, & 2000e–5, and has attached itemized billing records. Plaintiff, as the fee applicant, carries the burden of establishing that she is entitled to an award of attorneys' fees and must document the appropriate hours expended and hourly rates. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). In determining a reasonable fee, "the most useful starting point ... is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 432. From this initial calculation, the court "should exclude ... hours that were not 'reasonably expended." ' *Id.* A party seeking to recover attorneys' fees must provide the court with time records that "reveal ... all hours for which compensation is requested and how those hours were allotted to specific tasks." *Ramos v. Lamm,* 713 F.2d 546, 553 (10th Cir.1983).

The court approaches the issue of reasonableness by first considering whether it is appropriate to exclude certain items from the billing records submitted by plaintiff that defendant argues are not reasonable expenses. Second, the court determines whether the rates charged by plaintiff's counsel are reasonable.

I. Items Defendant Argues Should be Excluded as Unreasonable Attorneys' Fees

A. Unsuccessful Claims

1. Motion to Compel

Defendant argues plaintiff should not recover for expenses incurred in connection with plaintiff's Motion to Compel, which was denied by U.S. Magistrate Judge James P. O'Hara, and with the Motion for Review of that order, which was denied by the undersigned judge.

Plaintiff states in her memorandum in support of her motion for attorneys' fees, that she does not seek payment with regard to the Motion to Compel and Motion for Review. Plaintiff itemizes this amount as 34.50 hours, or a total of $4,830.00 in attorneys' fees, and expenses of $5.35. Plaintiff has not, however, provided any indication to the court that these figures were deducted from the total amount claimed. The court is unable to verify that this amount was excluded from the total fees plaintiff seeks. As noted above, it is plaintiff's burden to document the expenses claimed. The court subtracts $4,830.00 in fees and $5.35 in expenses from the total amount claimed.

2. Motion to Consolidate

***2** Defendant argues plaintiff should not recover for

expenses incurred in connection with plaintiff's Motion to Consolidate, which the court denied. Plaintiff states in her memorandum in support of her motion for attorneys' fees, that she does not seek payment with regard to the Motion to Consolidate. Plaintiff itemizes this amount as 3.50 hours, or a total of $560.00 in attorneys' fees. Plaintiff has not, however, provided any indication to the court that these figures were deducted from the total amount claimed. The court is unable to verify that this amount was excluded from the total fees plaintiff seeks. As noted above, it is plaintiff's burden to document the expenses claimed. The court subtracts $560.00 in fees from the total amount claimed.

3. Sexual Harassment and Retaliation Claims

Defendant contends plaintiff should not recover for legal work related to a sexual harassment claim, which was not preserved in the Pretrial Order; and a retaliation claim, upon which the court granted summary judgment in favor of defendant. Defendant states that, "[b]ecause counsel did not indicate which block entries of time were spent on the unsuccessful claims, defendant suggests that the percentage reduction would be appropriate," but does not suggest a percentage for the court to apply.

As the Tenth Circuit stated in *Jane L. v. Bangerter:*

> If claims are related, failure on some claims should not preclude full recovery if plaintiff achieves success on a significant, interrelated claim. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley,* 461 U.S. at 440; *see also Spulak v. K Mart Corp.,* 894 F.2d 1150, 1160 (10th Cir.1990). A claim is related to another claim if it is based on "a common core of facts." *Hensley,* 461 U.S. at 435. We have refused to permit the reduction of an attorneys fee request if successful and unsuccessful claims are based on a "common core of facts." In *Tidwell v. Fort Howard Corp.,* 989 F.2d 406, 412–13 (10th Cir.1993), for example, we held that the trial court abused its discretion in reducing attorneys fees for a plaintiff who prevailed under some provisions of the Equal Pay Act but failed on her Title VII and state law claims.

61 F.3d 1505, 1512 (10th Cir.1995). Moreover, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley,* 461 U.S. at 435.

Here, the court finds that the alleged sexual harassment and retaliation claims arise from an operative core of facts that are common to those facts upon which plaintiff relied in presenting her failure to promote claim. In prevailing upon her failure to promote claim, plaintiff received substantial relief such that a reduction in the lodestar based upon "results obtained" is not warranted under the Supreme Court and Tenth Circuit's interpretation of existing law. Furthermore, even if the court were to find that plaintiff should not recover upon claims for which she did not prevail at trial, neither party has suggested a means through which the court could properly apportion the fees and costs. The court cannot arrive at such a method, due to the interrelatedness of the claims. Defendant's objection is overruled on this basis.

B. Expenses Unrelated to this Litigation

1. Payment of Mr. Noble's Annual Registration Fee

***3** Defendant claims plaintiff should not recover for expenses in connection with plaintiff's compliance with a November 5, 2001 Show Cause Order entered by the court addressing plaintiff's counsel's failure to pay his annual registration fee. In response, plaintiff states, "[a]s for the total of one-half hour on November 12 & 13, 2001 ... that would be a reduction of $70.00." (citing Ex. 1 to Pl.'s Application (November 30, 2001 invoice)). The court hereby reduces the total award by $70.00.

C. Other Allegedly Unreasonable Expenses

1. Trial Preparation for Mr. Noble

Defendant argues that expenses connected with plaintiff's counsel, Richard Noble's efforts to become prepared for trial are unreasonable because Mr. Noble first-chaired the trial while plaintiff's co-counsel, Gregory Dennis, was more involved with discovery and had greater knowledge of the case. Defendant criticizes such expenses as "duplicative."

"An attorney may not recover fees from an adversary that could not be billed to the client; such fees are presumptively unreasonable." *Sheldon v. Vermonty,* 237 F.Supp.2d 1270 (D.Kan.2002) (citing *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1249 (10th Cir.1998)). The court believes it is quite common for an attorney to first-chair a trial when the attorney was not actively involved in discovery. Moreover, even if the court were to accept defendant's argument, defendant has not identified which hours should be stricken or suggested a percentage reduction for the court to apply. Defendant's objection is denied.

2. Voluminous Nature of Plaintiff's Submissions to the Court

Defendant claims plaintiff's counsel has expended unnecessary time due to plaintiff's lengthy and verbose style employed in papers submitted to the court, as noted by Judge O'Hara in his Memorandum and Order of July 18, 2002 (Doc. 59). The court concurs with Judge O'Hara's evaluation. However, the court refuses to apply a reduction in the amount of attorneys' fees claimed. This court observed in its order partially granting and partially denying summary judgment that the failure of plaintiff's *and* defendant's counsel to follow the local rules had created an undue burden upon the court in its attempt to timely adjudicate the case:

> The court encourages counsel for both parties to consult D. Kan. R. 56.1(a), and, in the future, to number separately each fact provided in a memorandum supporting or responding to a summary judgment motion. Further, the court reminds counsel that in responding to a motion for summary judgment, a party that wishes to rely upon facts not contained in the movant's memorandum should set forth each additional fact in a separate paragraph. D. Kan. R. 56.1(b)(2). In this case, counsel for both parties have included multiple facts in single numbered paragraphs. Moreover, plaintiff's counsel has presented additional facts in the same numbered paragraphs at which plaintiff responds to facts set forth in defendant's motion for summary judgment. Such disregard for the local rules of this court has hindered the court's efficient disposition of the pending motion.

4** ***Berroth *v.* ***Farm*** ***Bureau*** ***Mut.*** ***Ins.*** *Co., Inc.,* 232 F.Supp.2d 1244, 1246 n. 4 (D.Kan.2002). The court will not comment further upon the propriety of defendant's criticism of the efficiency of plaintiff's counsel. Moreover, even if the court were to attempt to apply a reduction, defendant does not suggest a method by which the court should make such a calculation. The court will not speculate regarding the amount of time a counsel whose writing is highly concise would have expended in drafting similar papers. The charges assessed by plaintiff's counsel are not unreasonable. Defendant's objection is overruled.

3. Inquiry into Proper Party Named as Defendant

Next, defendant asserts plaintiff should not recover for charges related to plaintiff's attempt to determine whether the proper party had been named as defendant. The court finds that such expenses were reasonable and could be properly charged to a client. Defendant's objection is overruled.

4. Performance by Counsel of Tasks Usually Assigned to Nonlawyers

Defendant argues that plaintiff's counsel has completed tasks usually assigned to couriers and paralegals, including delivery of papers to the courthouse for filing. In response, plaintiff claims that certain records include travel and filing time in addition to substantive work upon the case which is properly attributed to an attorney. For example, on page 5 of Exhibit 2 attached to plaintiff's application for attorneys' fees and costs, plaintiff has a single billing entry for November 15, 2002, which states a rate of $160.00 per hour for 7 hours, with the following narrative description:

> Finalize "plaintiff's witness list'; travel to courthouse to file "plaintiff's witness list" & "plaintiff's exhibit list/sheet" and hand deliver same to judge's chambers' read two cases cited by judge on anti-retaliation clause not applying to internal company investigations; phone conversation with RWN; wrote e-mails with attachments to RWN; two e-mails with attachments to T. Mann; two faxes to T. Mann of "plaintiff's witness list" and "plaintiff's exhibit list/sheet"; work on trial questions for M. Goe; phone conversation with client; work on "plaintiff's proposed voir dire questions."

The court concurs that delivery tasks could not be reasonably billed to a client and should be excluded from the total amount of recovery.

A party seeking to recover attorneys' fees must provide the court with time records that "reveal ... all hours for which compensation is requested and how those hours were allotted to specific tasks." *Ramos,* 713 F.2d at 553. Given

plaintiff's counsel's use of narratives such as that excerpted above, it is unclear what amount of time counsel devoted to delivery-related tasks. Moreover, neither party has suggested a prevailing area courier rate that ought to be imposed in lieu of the $160.00 rate per hour plaintiff seeks. The court believes that a courier could have carried out the duties in question for $50 or less. Accordingly, the court excludes from the total recovery $110 in attorneys' fees.

5. Travel Time

***5** Defendant claims plaintiff should not recover the total amount billed for travel to and from Manhattan, Kansas. Defendant objects to an entry dated April 4, 2002, in which plaintiff's counsel states that he expended 5 hours at a rate of $160.00 per hour, with the following description: "travel to and from Manhattan, Kansas; take deposition of Charles Petrik; phone conversation with Rick Noble re: Petrik's deposition." ((Pl.'s App. for Attorneys' Fees, Costs, & Expenses, Ex. II, at 1).

As the Tenth Circuit stated in *Smith v. Freeman,* driving time may be given a reduced hourly rate due to its nature as "essentially unproductive." 921 F.2d 1120, 1124 (10th Cir.1990). In *Aquilino v. University of Kansas,* this court applied a 50% reduction for attorney time spent in transit. 109 F.Supp.2d 1319, 1326 (D.Kan.2000). Clearly, however, the entire record was not devoted to driving time. As noted above, counsel's narrative insufficiently explains how counsel allocated his time. Plaintiff states that her counsel seeks only half of the total amount of the recovery in connection with Mr. Petrik's deposition, with the other half apportioned to a case involving the same parties and counsel, *Brown v. **Farm Bureau Mut**. **Ins**. Co.* The court believes four hours is a reasonable amount of travel time between counsel's office in the Kansas City area and Manhattan, Kansas. Accepting plaintiff's explanation of dividing costs between the two cases as true, the court applies a 50% reduction for two hours, and subtracts $160 in fees from the total recovery.

II. Reasonable Rate

A court assessing attorneys' fees should apply a reasonable rate, defined as one "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The court finds that the rates charged by counsel—$185.00, $200.00, and $225.00 for Mr. Noble; $130.00, 140.00, and $160.00 for Mr. Dennis; and $55.00 and $65.00 for paralegals—are in line with the rates prevailing in the Kansas City community by lawyers of comparable skill, experience, and reputation, particularly considering that the top rates charged by counsel were for trial time. *Accord Fid. & Deposit Co. of Md. v. Hartford Cas. **Ins**. Co.,* 215 F.Supp.2d 1171, 1189 (D.Kan.2002) (finding $205 to $250 hourly rate reasonable in commercial litigation).

III. Costs

Defendant argues plaintiff should not recover the full amount of the costs claimed, for the reasons set forth below. As noted by this court in *Ortega v. IBP, Inc.:*

> "[C]osts shall be allowed as of course to the prevailing party" under Federal Rule of Civil Procedure 54(d). Section 1920 governs what specific costs the Court may tax. 28 U.S.C. § 1920. The clerk taxes the costs upon notice by the prevailing party. Fed.R.Civ.P. 54(d)(1). The Court reviews the clerk's assessments of costs de novo. *Ortega v. City of Kansas City, Kan.,* 659 F.Supp. 1201, 1218 (D.Kan.1987), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir.1989). If § 1920 does not specifically authorize an expense, the Court may "sparingly exercise its discretion in allowing such costs." *Id.*
>
> ***6** The prevailing party carries the burden of establishing that § 1920 authorizes the costs sought to be taxed. *Green Constr. Co. v. Kan. Power & Light Co.,* 153 F.R.D. 670, 675 (D.Kan.1994). Courts may exercise discretion in determining the necessity of the materials or services to the case. 28 U.S.C. § 1920. Once the prevailing party meets this burden, a presumption in favor of awarding the costs exists. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988).

883 F.Supp. 558, 560 (D.Kan.1995).

A. Postage

Plaintiff seeks reimbursement for **postage expenses.** However, as noted by defendant, "[f]ederal courts in Kansas deny taxation of postage costs based upon a lack of statutory authority in [28 U.S.C.] § 1920." *Id.* at 562. Defendant's objection is sustained.

B. Facsimile Transmissions

Plaintiff seeks to recover for several **facsimile transmissions**. Defendant argues that the court should deny such expenses, because plaintiff does not identify the basis for the charges. In plaintiff's response, she states that

the faxes were used to transmit documents associated with the trial and for purposes of serving defense counsel by fax as required by the pretrial order. The charges in dispute total $34.00, and plaintiff's rate per page was $0.50.

The court finds plaintiff has sufficiently justified the facsimile charges claimed, and that the rate of $0.50 per page is reasonable. *Accord Ortega,* 883 F.Supp. at 562 (finding that a rate of $1.00 per page faxed was reasonable).

C. Photocopies

Defendant argues plaintiff should not recover the costs of in-house photocopies, because plaintiff has not stated the per page charge for such copies. Based upon the court's experience and knowledge of the case, the court is satisfied that a **per page charge of $0.10** is reasonable. *Accord Cadena v. Pacesetter Corp.,* 1999 **WL** 450891, at *8 (D.Kan. Apr.27, 1999).

D. Deposition Transcripts

Finally, defendant objects that the plaintiff has not properly attributed costs of deposition transcripts between this case and the *Brown* action. In response, plaintiff states that each of the depositions to which defendant objects were reasonably necessary. Specifically, plaintiff pointed out that each of the five witnesses was called at trial, and that both parties cited the depositions in question in their summary judgment briefs. Furthermore, plaintiff points out that she had attempted to be economical by taking only the depositions of four of the individuals in question. The court finds plaintiff has made an adequate showing that the depositions to which defendant objects were reasonably necessary in this case. Defendant's objection is overruled.

IV. Order

The court accordingly awards fees and costs to plaintiff as follows:

$124,875.25 [amount claimed in attorneys' fees and costs]

- 4,830.00

- 5.35

- 560.00

- 70.00

- 110.00

- 160.00

- *37.44* [postage as calculated by court]

$119,102.46

***7** IT IS THEREFORE ORDERED that plaintiff's Application for Attorneys' Fees, Expenses & Costs (Doc. 140) is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff is awarded $119,102.46 in attorneys' fees and costs.

1995 WL 584496
Only the Westlaw citation is currently available.
United States District Court, D. Kansas

James A. **BERRY**, et al., Plaintiffs,
v.
GENERAL **MOTORS** CORPORATION, Defendant.

No. 88–2570–JWL. | Sept. 22, 1995.

Attorneys and Law Firms

Dennis E. Egan, the Popham Law Firm, Kansas City, MO, Michael K. Whitehead, Crews, Waits, Brownlee & Berger, Kansas City, MO, and Christopher Iliff, Stillwell, KS, for plaintiffs.

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Opinion

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

I. *Introduction*

***1** This case is before the court on plaintiffs' Objection to Defendant's Bill of Costs (Doc. # 259). On November 30, 1993, the court ordered judgment in favor of defendant on all counts at issue in the case. Following affirmance by the 10th Circuit Court of Appeals, defendant filed a bill of costs on June 23, 1995 in the amount of $22,820.49. Subsequently, plaintiffs filed their objection to the bill of costs, asking the clerk to reduce the costs taxed to plaintiffs to $15,310.68. Defendant responded to plaintiffs' objection by asking the clerk to tax costs to the plaintiff in the amount of $21,945.49. Costs are to be taxed as set out below.

Taxation of costs is authorized by Fed.R.Civ.P. 54(d) and governed by 28 U.S.C. § 1920 (1988). Federal Rule of Civil Procedure 54(d)(1) authorizes the taxing of costs "to a prevailing party unless the court otherwise directs." Title 28 U.S.C. § 1920 outlines taxable costs by category:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witness;
>
> (4) Fees for exemplification and copies of papers 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 trial court has no discretion to award costs not listed in section 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42 (1987). The prevailing party has the burden of proving that the expenses sought to be taxed fall within the section 1920 categories. *Green Constr. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 675 (D.Kan.1994). If the prevailing party carries this burden, a presumption arises in favor of taxing those costs. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir.1988). The amount of such costs, however, must be carefully scrutinized to ensure that it is reasonable. *Id.* (citation omitted). A trial court reviews *de novo* the clerk's assessment of costs and the final award rests in the sound discretion of the court. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 232–33 (1964).

II. *Discussion*

Defendant's bill of costs includes $17,075.24 for "Fees of the court reporter for any part of the stenographic transcript necessarily obtained for use in the case," pursuant to 28 U.S.C. § 1920 (1988). Whether or not materials were necessarily obtained for use in the case is a factual determination based on the record. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir.1988). "Though use at trial by counsel or the court readily demonstrates necessity, if materials or services are reasonably necessary for use in the case even though not used at trial, the court can find necessity." *Id.* at 1246. " 'Necessarily obtained' does not mean that the materials and services obtained 'added to the convenience of counsel ... and perhaps ... have made the task of trial judges easier.' " *Id.* at 1245.

A. ***Depositions and Trial Transcripts***

***2** Plaintiffs object to numerous bills submitted by court reporting services for depositions of various witnesses. Plaintiffs maintain that defendant's requested costs should be reduced for depositions not used at trial; for extra copies of depositions; and for duplicative and inappropriate charges. Each will be examined in turn.

Plaintiffs initially assert that because the depositions of Robert Worthley and William Leavitt were not used as evidence in trial, their costs may not be taxed. "Necessarily obtained" does not mean used at trial. *Id.* at 1246. "[A] district court rule that permits costs only for depositions received in evidence or used by the court in ruling upon a motion for summary judgment is narrower than section 1920." *Merrick v. Northern Natural Gas Co.,* 911 F.2d 426, 434 (10th Cir.1990) (citing *Hernandez v. George,* 793 F.2d 264, 268–69 (10th Cir.1986).

Robert Worthley and William Leavitt were both plaintiffs in this action. Under the circumstances of this case, depositions of party-opponents are reasonably necessary to trial preparation. Although neither party appeared as a witness at trial and although Mr. Leavitt's claim was dismissed before trial, both were plaintiffs when their depositions were taken. *See Merrick,* 911 F.2d at 434 (citing with approval a statement from *Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1099 (5th Cir.1982): the best practice is to determine which depositions were reasonably necessary in the light of facts known to counsel at the time they were taken, rather than at trial). Further, both parties cited Mr. Leavitt's deposition in their summary judgment papers. The costs of deposing Mr. Worthley and Mr. Leavitt will be taxed to the plaintiffs.

Plaintiffs also assert that defendant attempts to recover the cost of extra copies of various depositions. Defendant stresses that it seeks costs for only the bills submitted by the court reporter and not any subsequent photocopying of the transcript. As the submitted receipts indicate, however, the court reporter provided defendant with the original transcript, a copy and a second, free copy of each deposition. Section 1920(4), rather than section 1920(2), covers copies of depositions. Only copies necessarily obtained for use in the case come within that section and may be taxed. *Ortega v. IBP, Inc.,* 883 F.Supp. 558, 561 (D.Kan.1995). Defendant has failed to prove that these copies were necessarily obtained. Costs shall be reduced $0.75 per page. Costs for the following depositions are affected: **Berry**, Carter, King, Walsh, Hendrix, Gold, Scott, Leavitt, Dold, Hurt, Howell, DiDonna, Simpson, McCauley, White and Olson. Together these depositions total 2646 pages. Therefore, costs shall be reduced by $1984.50.

Plaintiffs next object to a bill for the services of the court reporter in providing a transcript of Dr. Olson's testimony at trial on August 14, 1992. Plaintiff argues the billing is duplicative since defendants received a second copy of Dr. Olson's testimony as shown in the billing dated August 13, 1993. Examination of the submitted receipts indicates that duplication may have occurred. **Thus, defendant has not met its burden of proving that both bills reflect costs of transcripts necessary for use in the case.** Defendant's argument summarizes into a claim of convenience. Plaintiffs will not be taxed for the June 25, 1993 bill in the amount of $99.75, covering Dr. Olson's trial transcript.

B. ***ASCII Disks***

***3** Plaintiffs object to the taxation of $120.00 paid to the court reporter for a copy of the trial transcript on ASCII disks. Defendant argues that because of the size of the trial transcript, the **ASCII disks** helped defendant to more readily reference the trial transcript. As noted above, however, "necessarily obtained" does not mean that the materials and services added to the convenience of counsel. Defendant fails to prove that the ASCII copy of the trial transcript was necessarily obtained for use in the case. Costs of the ASCII disks will not be taxed to plaintiffs.

C. ***Expert Witnesses***

Under section 1920(3), defendant seeks the costs of Dr. Olson, who charged $900.00 for three hours preparing for his deposition and his actual deposition time. Plaintiffs contest the taxing of this bill. The Supreme Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445 (1987), held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." The Court continued, "[T]he inescapable effect of these sections in combination is that a federal court may tax expert witness fees in excess of the $[40]–per–day limit set out in § 1821(b) only when the witness is court-appointed." Dr. Olson was not court appointed. Consequently, because the bill submitted by defendant indicates that Dr. Olson's preparation and deposition occurred on the same day, $40 only will be taxed to plaintiffs.

D. ***Copies of Exhibits and Depositions***

Plaintiffs' final objections concern defendant's bill of costs for exemplification and copies. Plaintiffs argue that

defendant has not shown that these costs were necessarily incurred. A party may be awarded costs for copying a deposition when it can make an adequate showing that the copy was reasonably necessary to defend the plaintiffs' claim, and for purposes other than convenience of counsel in investigating the facts of the case. *Morrissey v. County Tower Corp.*, 568 F.Supp. 980, 983 (E.D.Mo.1983).

Plaintiffs argue that exhibits may not be taxed if they were not admitted into evidence. As shown above, admission into evidence is not a prerequisite to taxation. Defendant maintains that these exhibits facilitated presentation of the evidence. Contrary to plaintiffs' belief, facilitation does not always equal convenience. The court concludes that the exhibit used in the motion hearing before the court was necessary to the orderly, persuasive presentation of the evidence.

The September 1 receipt for the defendant's damages exhibit has scrawled on it "corrected, Jim, 9–22–92". Consequently, even if the damages exhibit was necessary, the defendant has failed to provide evidence of the reasonable cost of the exhibit. Therefore, the alleged cost of this exhibit, $734.84, will not be taxed to plaintiffs.

Defendant seeks to recover the $729.69 it spent copying plaintiffs' trial exhibits. Such duplicative expenses added to the convenience of defendant but cannot be deemed necessary under section 1920. Costs will be reduced accordingly.

***4** With the bills of July 29 and August 5, 1992, defendant requests the cost of preparing four **numberstamped copies of trial exhibits**. Plaintiffs object on the grounds that defendant did not need four copies of trial exhibits. This court agrees and holds that only one copy was necessary. The remaining three copies added to the convenience of the court and the parties. Such convenience, although helpful to and appreciated by the court, does not warrant taxation of costs to the nonprevailing party. *U.S. Indus., Inc.*, 854 F.2d at 1245. Furthermore, **numberstamping the documents contributed soley to the convenience of the court and litigants**. The costs of photocopying on the bills dated July 29, 1992 and August 5, 1992 will therefore be reduced by 75 percent and the cost of numberstamping will be eliminated. The total reduction in taxed costs for these two receipts equals $1496.88.

The bill for $100 dated July 1, 1993 states merely that it covers the cost of typesetting. Because the defendants have not explained how this bill is relevant or necessary to the case, it will not be taxed to the plaintiffs.

Plaintiffs argue, and defendant agrees, that defendant erroneously included the amount of $875.00 as an estimate for which actual services were billed on August 23, 1993. The award of costs will therefore be reduced by $875.00.

III. *Conclusion*

Defendant originally requested $22,820.49 in costs. For the reasons set forth above, that amount will be reduced as follows:

Original request	$22,820.49
less	
Copies of depositions	1,984.50
Copy of Dr. Olson's trial testimony	99.75
ASCII disks	120.00
Dr. Olson's expert witness fees	860.00

Damages exhibit, bill dated September 1, 1992	734.84
Copies of plaintiffs' trial exhibits	729.69
Numberstamped copies of trial exhibits	1,496.88
Typesetting	100.00
Erroneously included estimate	875.00
Total costs taxed to plaintiffs	$15,819.83.

IT IS THEREFORE BY THE COURT ORDERED THAT plaintiffs' Objection to Defendant's Bill of Costs (Doc. # 259) is granted in part and denied in part. The Clerk of the District Court is directed to retax defendant's costs to the plaintiffs in the amount of $15,819.83.

IT IS SO ORDERED.

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1998 WL 13336
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Randy Lee **BIRCH**, Plaintiff,
v.
SCHNUCK MARKETS, INC., et al., Defendants.

No. CIV. A. 95–2370–GLR. | Jan. 5, 1998.

Attorneys and Law Firms

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Robert P. Numrich, Martha E. Madden, Evans & Dixon, Patrick G. Reavey, Shook, Hardy & Bacon L.L.P., Kansas City, MO, David P. Madden, Fisher, Patterson, Sayler & Smith, Overland Park, KS, for **Schnuck** Markets Inc, SM Properties L P, Wilmington Trust Company, a Delaware Corporation, defendants.

Opinion

MEMORANDUM AND ORDER

RUSHFELT, Magistrate J.

***1** The court has under consideration Plaintiff's Objections To Defendant SM Properties, L.P.'s (SMP) Bill of Costs (doc. 105) and Plaintiff's Objections To Defendants **Schnuck** Markets, Inc. (SMI) & Wilmington Trust Company's (WT) Bill of Costs (doc. 106). The court treats each set of objections as a motion to re-tax costs. (*See* Order of Apr. 25, 1997, doc. 107.) Defendant SMP opposes the motion against its Bill of Costs. Defendants SMI and WT partially oppose the motion against their Bill of Costs, as set forth *infra.*

Defendants seek reimbursement of fees relating to depositions of their expert, Randall Noon, and of plaintiff and his experts, Richard E. Gyllenborg and Charles Erik Nye, M.D. (Bills of Costs, docs. 104 and 105.) Defendants claim the following expenses incurred for the **depositions of plaintiff and Mr. Gyllenborg: expedited stenographic services;** copies; split attendance fees; and copies of exhibits, including color copies for the Gyllenborg deposition. SMI and WT also seek $7.50 for an ASCII disk relating to each deposition. With respect to the depositions of Drs. Nye and Noon, defendants seek expenses for copies, concordances, and exhibits. SMP also seeks postage expenses for both depositions. SMI and WT seek $5.00, furthermore, for an ASCII disk of the deposition of Dr. Nye. Defendant SMP also seeks photocopying expenses.

Defendants SMI and WT have withdrawn their request for charges for expedited deposition transcripts and ASCII disks. They have also withdrawn their request for costs regarding the deposition of Dr. Noon. Accordingly, the court will not tax such items as costs.

Plaintiff contends that no listed deposition was necessary for use at trial. He further contends that, if they were necessary, he should not bear the expense for more than one copy of the transcripts of his and Mr. Gyllenborg's depositions. He also contends that he deposed Dr. Noon only for discovery. He asserts that no one used the transcript of that deposition at trial and that defendants did not call Dr. Noon as a witness. He suggests that costs for investigatory, discovery depositions are not recoverable. He also contends that written transcripts of the video-deposition of Dr. Nye merely served the convenience of defense counsel. He asserts that defendants needed no transcript to cross-examine Dr. Nye, because the video-deposition was taken as a trial deposition. He also opposes taxation of costs for postage or concordances. He contends that SMP should not recover photocopying expenses, because it has not shown they were necessary.

Defendants SMI and WT contend that the depositions of plaintiff and his experts were used at trial. They argue that the costs of such depositions and the transcript as to Dr. Nye are therefore taxable. They contend they used the transcript to impeach plaintiff at trial. They also argue that they are entitled to copies of original deposition transcripts. They suggest that they needed them to refer to particular pages of the transcript at trial, while the court possessed the original.

I. Standards

***2** Fed.R.Civ.P. 54(d)(1) authorizes the taxing of costs "to a prevailing party unless the court otherwise directs." Section 1920 of Title 28 of the United States Code "defines the term 'costs' as used in Rule 54(d)." *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 441, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). A trial court has no discretion to award costs not listed in § 1920. *Id.* at 441–42. Defendants, as the prevailing parties, have the burden to show that the costs sought to be taxed fall within the

categories of § 1920. *See Dutton v. Johnson County Bd. Of County Comm'rs,* 884 F.Supp. 431, 436 (D.Kan.1995). For fees of the court reporter for the stenographic transcript and for exemplification and copies of papers, items taxable under subparagraphs (2) and (4) of § 1920, such burden includes showing they were "necessarily obtained" for use in this case. If the prevailing parties carry this burden, a presumption arises in favor of taxing those costs. *See U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). The court, however, must carefully scrutinize the amount of such costs to ensure its reasonableness. *Griffith v. Mt. Carmel Med. Ctr.,* 157 F.R.D. 499, 502 (D.Kan.1994). The final award of costs rests within the sound discretion of the court. *Dutton,* 884 F.Supp. at 436 (citing *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 232–33, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964)).

II. Discussion

The court may tax as costs "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *See* 28 U.S.C. § 1920(2). "The trial court has great discretion to tax the cost of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself." *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 677 (D.Kan.1994). Whether transcripts are necessarily obtained for use in the case is a question of fact for the court. *U.S. Indus.,* 854 F.2d at 1245. "Necessarily obtained" does not mean merely that the material added to the convenience of counsel or made trial easier for the court. *Id.* Actual use by counsel or the court, on the other hand, is not required. *Id.* at 1246. "The court must determine whether the depositions reasonably seemed necessary at the time they were taken." *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1427 (D.Kan.1995), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996).

Costs relating to the deposition transcript of Dr. Noon are not recoverable. SMP did not necessarily obtain such transcript for use in the case. Plaintiff asserts that he took the **deposition only for purposes of investigation and discovery.** SMP does not contest that assertion. Although it has submitted an affidavit of counsel with its Bill of Costs, the affidavit does no more than identify the affiant as counsel for defendant and state "[t]hat the items claimed in the Bill of Costs are correct and have necessarily incurred in the case." (Aff. Of David P. Madden, attached to Bill of Costs, doc. 104.) In response to the objections, moreover, SMP simply states that it asked the court to tax the depositions itemized therein because they were "necessarily obtained for use in the case." It provides nothing of substance to support that conclusion. Transcripts of investigatory, discovery depositions are not necessarily obtained for use in the case. "Depositions taken solely for discovery are not taxable as costs." *Furr v. AT & T Techs., Inc.,* 824 F.2d 1537, 1550 (10th Cir.1987) (internal quotes omitted). SMP provides only conclusory statements in an affidavit of counsel that it necessarily incurred the costs of the transcript. When confronted with objections, a party must present more than conclusory statements that the cost was necessary. *See Green Const. Co.,* 153 F.R.D. at 677 and n. 8.

***3** For similar reasons the court declines to tax the **photocopying expenses** claimed by defendant SMP. It has not substantiated the need for them. Its itemization reveals total expenses of $383.20 for 1,916 copies incurred on December 31, 1995 and 1996; April 1, July 1, and October 1, 1996; and March 1, 1997. In response to the objections to the expenses, it simply states that "[t]he expense of copying materials reasonably necessary for use in the case are recoverable." The court agrees with the principle. SMP has the burden to show facts, however, from which the court can conclude that the copies were reasonably necessary for use in the case. It has not carried that burden. Neither the affidavit of counsel, its response, the itemization, nor any combination of the three suffices to show the copies were reasonably necessary for use in the case.

The court also declines to tax postage expenses. "Federal courts in Kansas deny taxation of postage costs based upon a lack of statutory authority in § 1920." *Ortega v. IBP, Inc.,* 883 F.Supp. 558, 562 (D.Kan.1995). "Postage expenses do not fall within section 1920 and, therefore, cannot be taxed to plaintiff." *Diskin v. Unified Sch. Dist. No. 464,* No. Civ.A. 95–2244–EEO, 1997 **WL** 161943, at *2 (D.Kan. Mar.28, 1997).

The court will tax the **costs for only one written transcript of the video-deposition** of Dr. Nye. The Tenth Circuit Court of Appeals has recently addressed the propriety of taxing costs for both a video deposition and written transcripts of such deposition. *See Tilton v. Capital Cities/ABC, Inc.,* 115 F.3d 1471, 1478 (10th Cir.1997). The Circuit agreed with the reasoning in *Meredith v. Schreiner Transp.,* 814 F.Supp. 1004 (D.Kan.1993) and concluded "that in most cases, a stenographic transcript of a videotaped deposition will be 'necessarily obtained for use in the case.' " *Tilton,* 115 F.3d at 1478. As stated by the *Meredith* court, the "better practice is to allow the costs of both videotaped and stenographic depositions, absent some good reason not to do so." 814 F.Supp. at 1006. Such practice "is consistent with the 'necessarily obtained for use in the case' language of 28 U.S.C. § 1920(2)." *Id.*

The *Meredith* court held it appropriate to tax the cost of a written transcript of a videotaped deposition, if the transcript has "a legitimate use independent from or in addition to the videotape which would justify its inclusion in an award of costs." *Id.* It set forth some legitimate uses of such a written transcript. They include use as a replacement for a videotape which has become lost, erased, or otherwise unusable due to technical difficulty; use for more easily editing objectionable portions of the deposition testimony; and use by appellate courts to more efficiently review claims of error relating to deposition testimony. *Id.*

The court finds a written transcript of the deposition of Dr. Nye had a legitimate, independent use aside the videotape. It provides insurance against a lost or otherwise unusable videotape. Defendants SMI and WT used the transcripts to impeach testimony of plaintiff relating to medical records of Dr. Nye. They cross-examined plaintiff with the medical records. The court concludes that defendants SMI and WT necessarily obtained the written transcript for use in this case.

***4** The court does see good reason, however, to exclude costs for another copy of the written transcript for the use of SMP. The copy obtained and used by SMI and WT provides sufficient insurance against a lost or otherwise unusable videotape. SMP presents no facts from which the court can conclude that it necessarily obtained a separate copy for itself. Such failure constitutes "good reason," within the meaning of *Meredith,* not to tax the costs of another copy of the written transcript to plaintiff.

The court next addresses costs for copies of the transcripts of the depositions of plaintiff and Mr. Gyllenborg. Section 1920(4) of Title 28 of the United States Code governs copies of depositions. *Berry v. GMC,* No. 88–2570–JWL, 1995 **WL** 584496 at *2 (D.Kan. Sept.22, 1995). Section 1920(4) allows the court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." Unless the prevailing parties "prove" that they necessarily obtained a copy, in addition to the original, the court will decline to tax the fees associated with the copy. *Diskin,* 1997 **WL** 161943, at *2. Defendants have failed to prove that the additional copies of the transcripts were necessarily obtained for use in this case. They argue that they needed copies after they filed the originals with the court. Such need is more for convenience than necessity. D.Kan. Rule 30.2 requires the initiating party to retain the original of a deposition and not file it, unless ordered by the court. Even after an original is filed with the court, parties have access to it.

"[T]he cost of a copy of a deposition is not taxable when it is obtained only as a matter of convenience and the original is open for inspection as part of the court's records." 10 Charles A. Wright et al., *Federal Practice and Procedure* § 2676 (1983). "[E]xtra copies of filed papers ... are not necessary but are for the convenience of the attorneys and are therefore not taxable." *Voight v. Subaru–Isuzu Automotive, Inc.,* 141 F.R.D. 99, 103 (N.D.Ind.1992). This court has held, furthermore, that consulting copies "as a basis for objections at trial ... does not establish that the copies were necessary for the presentation of [the] evidence at trial, rather than simply for the convenience of counsel." *See Cushing v. Riley,* No. Civ.A. 93–2354–EEO, 1995 **WL** 261163, at *3 (D.Kan. Apr.3, 1995). The court will not tax plaintiff with fees for both the original and the copy of the deposition transcripts of plaintiff and Mr. Gyllenborg.

The court finds that costs for concordances and expedition of transcripts were incurred for the convenience of counsel, not necessarily for trial. The court will not tax these costs.

Defendant SMP originally requested $1,488.03 in costs. For the reasons set forth above, the court will tax $379.20 of these costs against plaintiff. It finds costs for depositions of plaintiff ($165 .20) and Gyllenborg ($214.00) to be taxable.

***5** Defendants SMI and WT originally requested $1,116.83 in costs. They amended that request to $743.70 in response to the objections. The court will tax $489.30 of these costs against plaintiff. This includes the amounts taxable for SMP, as well as $110.10 in costs for the deposition of Dr. Nye.

For the foregoing reasons, the court sustains in part and overrules in part Plaintiff's Objections To Defendant SM Properties, L.P.'s Bill of Costs (doc. 105) and Plaintiff's Objections To Defendants **Schnuck** Markets, Inc. & Wilmington Trust Company's Bill of Costs (doc. 106). The Clerk of the District Court is directed to tax the costs of defendant SM Properties, L.P. against plaintiff in the amount of $379.20. The Clerk is further directed to tax the costs of defendants **Schnuck** Markets, Inc. and Wilmington Trust Company against plaintiff in the amount of $489.30.

IT IS SO ORDERED.

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395 F.Supp.2d 1065
(Cite as: 395 F.Supp.2d 1065)

United States District Court,
D. Kansas.
David BURTON, Plaintiff,
v.
R.J. REYNOLDS TOBACCO CO., Defendant.

No. 94–2202–JWL.
Oct. 20, 2005.

Background: Former smoker filed personal injury products liability action against cigarette manufacturer claiming that cigarettes caused his peripheral vascular disease (PVD) and addiction. After jury verdict in favor of manufacturer on smoker's design defect and conspiracy claims and in favor of smoker on claims for failure to warn, negligent testing and research, and fraudulent concealment, the United States District Court for the District of Kansas, 205 F.Supp.2d 1253, awarded smoker $15 million in punitive damages, and cigarette manufacturer appealed. The Court of Appeals, 397 F.3d 906, affirmed compensatory damages award and reversed award of punitive damages. On remand, smoker filed bill of costs, seeking $503,249.37 as his costs, and manufacturer filed motion to strike bill of costs.

Holdings: The District Court, Lungstrum, Chief Judge, held that:
(1) court would not entirely deny costs to smoker;
(2) court would disallow any costs that were attributable solely to smoker's dismissed claims against second manufacturer;
(3) court would not award smoker all his costs as sanction against manufacturer for deliberately and needlessly increasing the cost of litigation;
(4) court would allow, as fees of the clerk, amount paid for filing fee and pro hac vice fee for admission of smoker's lead counsel;
(5) smoker was entitled to recover, as a service fee, $30 paid to the Secretary of State to effect service of process upon manufacturer;
(6) court would allow, as a taxable cost, smoker's share of the cost of a daily trial transcript;
(7) smoker was entitled to recover cost of one transcript for each deposition reasonably necessary for his trial preparation;
(8) fees for non-attendance related expenses for expert witnesses were not taxable;
(9) smoker was entitled to recover expenses related to witness' attendance at deposition or trial at rate of $40 per day;
(10) use of animations to illustrate physicians' expert testimony was insufficient to justify award of $40,429.85 paid for animations;
(11) court would tax costs of trial exhibits and copies of documents submitted to court for in camera review; and
(12) smoker was not entitled to recover his "other" expenses.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 2723

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2723 k. Discretion of Court. Most Cited Cases

Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation

170Ak2727 k. Prevailing Party. Most Cited Cases

The allowance or disallowance of costs is within the sound discretion of the district court; this discretion, however, is constrained by the fact that the federal rules of civil procedure create a presumption that the court will award costs to the prevailing party. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 2742.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.1 k. In General. Most Cited Cases

When the court exercises its discretion and denies costs to a prevailing party, it must state a valid reason for doing so. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 k. Prevailing Party. Most Cited Cases

The court may deny costs when the **prevailing party** was only partially successful, when damages were only nominal, when costs were unreasonably high or unnecessary, when recovery was insignificant, or when the **issues** were close or difficult. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 k. Prevailing Party. Most Cited Cases

Denial of costs to a prevailing party is a severe penalty, and therefore there must be some apparent reason to penalize the party if costs are to be denied. Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 k. Prevailing Party. Most Cited Cases

Federal Civil Procedure 170A 2742.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.1 k. In General. Most Cited Cases

Given the longevity, complexity, and contentiousness of former smoker's personal injury products liability action against cigarette manufacturer, district court would not entirely deny costs to smoker, as prevailing party, on grounds that he did not initially verify his bill of costs or for filing a supplement containing hundreds of pages of documentation itemizing his costs. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation

170Ak2727 k. Prevailing Party. Most Cited Cases

District court would not deny entirely costs sought by former smoker in personal injury products liability action against cigarette manufacturer, on ground that they were unreasonably high or unnecessary; although smoker claimed half million dollar in his bill of costs, court would tax only those costs to which smoker was statutorily entitled, and, after being reduced, his costs were no longer unreasonable or unnecessary. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 k. Prevailing Party. Most Cited Cases

District court would award former smoker his statutorily recoverable costs incurred on claims on which he obtained judgment against cigarette manufacturer; even though smoker prevailed on only two of his 11 claims, his counsel did a commendable job of withstanding manufacturer's litigation tactics of resisting discovery via largely meritless claims of privilege, filing endless motions, and raising all plausible arguments on every minute point, and it took smoker more than 11 years to prosecute lawsuit, to obtain a judgment, and to collect on that judgment. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 k. Prevailing Party. Most Cited Cases

Federal Civil Procedure 170A 2742.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.1 k. In General. Most Cited Cases

District court would not deny former smoker's costs entirely because he failed to differentiate the costs he incurred on his losing and dismissed claims against cigarette manufacturers from those upon which he ultimately prevailed, but would endeavor to disallow costs where record revealed that smoker necessarily incurred those costs prosecuting claims upon which he was ultimately unsuccessful. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[9] Federal Civil Procedure 170A 2728

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2728 k. Dismissal and Nonsuit. Most Cited Cases

District court would disallow any costs that were attributable solely to former smoker's now-dismissed claims against cigarette manufacturer. Fed.Rules Civ.Proc.Rule 54, 28 U.S.C.A.

[10] Federal Civil Procedure 170A 2795

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2795 k. Other Particular Conduct. Most Cited Cases

District court would not award former smoker all costs he claimed to have incurred in personal injury products liability action as sanction against cigarette manufacturer for deliberately and needlessly increasing the cost of litigation; although manufacturer litigated case so aggressively that it would have worn down most plaintiff's attorneys, it did so largely within the bounds of zealous advocacy. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[11] Federal Civil Procedure 170A 2753

170A Federal Civil Procedure
170AXX Sanctions
170AXX(A) In General
170Ak2751 Constitutional, Statutory or Regulatory Provisions
170Ak2753 k. Purpose. Most Cited Cases

A Rule 11 sanction is not meant to reimburse opposing parties for their costs of defense; it is not directed toward litigation conduct in general. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[12] Federal Civil Procedure 170A 2735

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2735 k. Amount, Rate and Items in General. Most Cited Cases

A district court has no discretion to award items as costs that are not set forth in the federal cost statute. 28 U.S.C.A. § 1920.

[13] Federal Civil Procedure 170A 2742.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.1 k. In General. Most Cited Cases

The party seeking costs has the burden of establishing the amount of compensable costs and expenses to which he is entitled. 28 U.S.C.A. § 1920.

[14] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

District court would allow, as **fees of the clerk**, amount paid by former smoker for filing fee and pro hac vice fee for admission of his lead counsel, but not other purported filing fees or pro hac vice fees, which smoker failed to establish were necessarily incurred in personal injury products liability action against cigarette manufacturer. 28 U.S.C.A. § 1920(1).

[15] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

Former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover, as a service fee, $30 paid to the Secretary of State to effect service of process upon manufacturer. 28 U.S.C.A. § 1920(1).

[16] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited

Cases

District court would allow the cost of service of three deposition subpoenas up to amount that would have been incurred if the United States Marshal's office had effected service, instead of at rate charged by private process servers. 28 U.S.C.A. § 1920(1).

[17] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

District court would not tax against cigarette manufacturer the cost of serving subpoena on former legal counsel for another manufacturer, which was the prevailing party with respect to former smoker's claims against it. 28 U.S.C.A. § 1920(1).

[18] Federal Civil Procedure 170A 2740

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2740 k. Stenographic Costs. Most Cited Cases

District court would allow, as a taxable cost, former smoker's share of the cost of a daily trial transcript in personal injury products liability action against cigarette manufacturer; case was sufficiently lengthy, complex, and contentious that court was persuaded that the cost of a daily transcript was reasonably necessary to smoker's trial preparation. 28 U.S.C.A. § 1920(2).

[19] Federal Civil Procedure 170A 2740

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2740 k. Stenographic Costs. Most Cited Cases

To award cost for daily production of a trial transcript, a court must find that daily copy was necessarily obtained, as judged at the time of transcription. 28 U.S.C.A. § 1920(2).

[20] Federal Civil Procedure 170A 2740

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2740 k. Stenographic Costs. Most Cited Cases

District court would disallow cost of transcript of punitive damage hearing, as former smoker ultimately was not the prevailing party on that aspect of personal injury products liability action against cigarette manufacturer. 28 U.S.C.A. § 1920(2).

[21] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

The costs of taking and transcribing depositions reasonably necessary for litigation are generally awarded to the prevailing party under the federal cost statute. 28 U.S.C.A. § 1920.

[22] Federal Civil Procedure 170A 2742.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.1 k. In General. Most Cited Cases

Whether costs are for materials necessarily ob-

tained for use in the case is an issue of fact to be determined based on the existing record or the record supplemented by additional proof; the court must carefully scrutinize all items proposed as costs. 28 U.S.C.A. § 1920.

[23] Federal Civil Procedure 170A 2735

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2735 k. Amount, Rate and Items in General. Most Cited Cases

"Necessity," in context of determining whether costs are for materials necessarily obtained for use in the case, means a showing that the materials were used in the case and served a purpose beyond merely making the task of counsel and the trial judge easier; necessity is judged in light of the facts known to the parties at the time the expenses were incurred. 28 U.S.C.A. § 1920.

[24] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover cost of one transcript for each deposition that court was persuaded was reasonably necessary for his trial preparation, but not additional charges incurred for the convenience of counsel, such as minuscripts, keyword indices, ASCII disks, exhibits, postage, and delivery. 28 U.S.C.A. § 1920.

[25] Federal Civil Procedure 170A 2741

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2741 k. Witness Fees. Most Cited Cases

Expert witness fees are taxable under cost statute only to the relatively modest extent allowed by statute limiting attendance fee to $40 per day. 28 U.S.C.A. §§ 1821, 1920(3).

[26] Federal Civil Procedure 170A 2741

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2741 k. Witness Fees. Most Cited Cases

Fees claimed by former smoker for non-attendance related expenses for expert witnesses, such as consultations, affidavit production, medical record review, analysis, and preparation of expert reports and disclosures, were not witness attendance fees or related travel expenses and, as such, were not taxable in personal injury products liability action against cigarette manufacturer. 28 U.S.C.A. §§ 1821, 1920(3).

[27] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover expenses related to physician's attendance at deposition, taxable at $40

per day for two days of deposition, together with physician's actual parking fees. 28 U.S.C.A. § 1821(b), (c)(3).

[28] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover expenses related to physician's attendance at deposition, including $40 attendance fee and amount for his mileage. 28 U.S.C.A. § 1821(b), (c)(2).

[29] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

As prevailing party in personal injury products liability action against cigarette manufacturer, former smoker was entitled to recover expenses related to physician's attendance at second deposition, including $40 attendance fee and cost of taxi fares. 28 U.S.C.A. § 1821(b), (c)(3).

[30] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

While former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover a two-day attendance fee of $80 for physician to attend deposition, the cost of the car he took to and from the airport, and cost of physician's subsistence allowance, the cost of lodging was not taxable per se. 28 U.S.C.A. § 1821(b), (d)(1, 2).

[31] Federal Civil Procedure 170A 2741

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2741 k. Witness Fees. Most Cited Cases

As prevailing party in personal injury products liability action against cigarette manufacturer, former smoker was entitled to recover expenses related to physician's testifying at trial, including a one-day attendance fee of $40 and his taxi fares, but not for the amount physician billed for meals; cost of means was not statutorily recoverable, and was also not recoverable as a subsistence allowance, as record did not reveal that physician was required to stay overnight. 28 U.S.C.A. § 1821(b), (c)(3), (d)(1).

[32] Federal Civil Procedure 170A 2741

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2741 k. Witness Fees. Most Cited Cases

Former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was entitled to recover expenses related to physician's attendance to testify at trial, including a two-day attendance fee of $80 and a subsistence allowance for the day with the hotel stay and for the return day, but not for any expenses related to physician's premature arrival. 28 U.S.C.A. § 1821.

[33] Federal Civil Procedure 170A 2741

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2741 k. Witness Fees. Most Cited Cases

Expenses itemized by former smoker in personal injury products liability action against cigarette manufacturer were partially taxable as witness attendance fees and partially non-taxable, to the extent determined by the statutory rate. 28 U.S.C.A. § 1821.

[34] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

Use of **animations to illustrate physicians' expert testimony was insufficient** to justify award of $40,429.85 that former smoker paid for animations; animations, while impressive, helpful, and informative, **were not necessary** to the presentation of smoker's personal injury products liability action against cigarette manufacturer. 28 U.S.C.A. § 1920(4).

[35] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

The reasonable cost of preparing maps, charts, graphs, and kindred material is taxable when necessarily obtained for use in the case. 28 U.S.C.A. § 1920(4).

[36] Federal Civil Procedure 170A 2740

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2740 k. Stenographic Costs. Most Cited Cases

A copy is "necessarily obtained" within the meaning of the federal cost statute only where the court believes that its procurement was reasonably necessary to the prevailing party's preparation of its case. 28 U.S.C.A. § 1920(4).

[37] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery because the producing party possesses the original documents and, thus, such papers are not "obtained" for purposes of the federal cost statute. 28 U.S.C.A. § 1920(4).

[38] Federal Civil Procedure 170A 2742.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.1 k. In General. Most Cited Cases

Former smoker failed to meet burden of establishing that costs of medical records, deposition related costs, litigation copy costs, copies of exhibits for testifying experts, and copies from clerk, were taxable; check stubs and invoices for copies and binding were insufficient to permit court to determine the cost of copies that were necessarily obtained for use in personal injury products liability action against cigarette manufacturer. 28 U.S.C.A. § 1920(4).

[39] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Under a proper demonstration of necessity, the cost of videotaping a deposition can be properly recoverable. 28 U.S.C.A. § 1920(2).

[40] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

District court would tax costs of trial exhibits that were necessarily obtained for use by former smoker in his personal injury products liability action against cigarette manufacturer. 28 U.S.C.A. § 1920.

[41] Federal Civil Procedure 170A 2740

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2740 k. Stenographic Costs. Most Cited Cases

District court would tax the cost of copies of documents former smoker submitted to the court for in camera review in his personal injury products liability action against cigarette manufacturer; smoker overwhelmingly prevailed in his battle against manufacturer's claims of privilege, his counsel utilized these documents effectively at trial, and smoker was forced to combat claims of privilege to prevail in lawsuit. 28 U.S.C.A. § 1920.

[42] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 k. Prevailing Party. Most Cited Cases

Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

There were no grounds to tax expenses incurred for claims upon which former smoker ultimately did not prevail, in personal injury products liability action against cigarette manufacturer, including cost of cigarette advertisements, editing commercials, reproducing video ads, and copying audio recordings. 28 U.S.C.A. § 1920.

[43] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

Former smoker, as prevailing party in personal injury products liability action against cigarette manufacturer, was not entitled to recover expenses for computer legal research, express and courier delivery charges, his counsel's travel expenses or non-travel related expenses for legal research, long distance, telephone calls, postage, fax services, meals, and parking, or costs for cigarettes, which were presumably purchased for use as trial exhibits. 28 U.S.C.A. § 1920.

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MEMORANDUM AND ORDER

LUNGSTRUM, Chief Judge.

Plaintiff David Burton filed this personal injury products liability action against defendants Brown & Williamson Tobacco Corporation f/k/a American Tobacco Co. and R.J. Reynolds Tobacco Company. The case proceeded to a jury trial, and the jury returned a verdict in plaintiff's favor and awarded plaintiff compensatory and punitive damages. On appeal, the Tenth Circuit affirmed the compensatory damage award against Reynolds and reversed the award of punitive damages. This matter is now before the court on plaintiff's bill of costs (Docs. 736 & 753) and Reynolds' Motion to Strike and Opposition to Plaintiff's Bill of Costs (Doc. 740). For the reasons explained below, the court will grant the motion in part, deny it in part, and take the remainder under advisement. More specifically, the court will propose to tax costs against Reynolds in the amount of $31,783.60 and will allow the parties an opportunity to submit supplemental briefs, including additional evidentiary materials where pertinent, to clarify whether particular itemized expenses should be taxed under the parameters outlined below.

PROCEDURAL HISTORY

Plaintiff David Burton filed this lawsuit in 1994. In the lawsuit, he claimed that defendants' cigarettes caused his peripheral vascular disease and addiction. After nearly eight years of pretrial preparation, ***1072** the case proceeded to a jury trial on February 5, 2002. Ultimately, the jury returned a verdict in plaintiff's favor on three of his claims, awarded him $196,416 in compensatory damages and authorized punitive damages against Reynolds, and awarded him $1,984 in compensatory damages from American Tobacco. Plaintiff and American Tobacco reached a settlement after trial and plaintiff dismissed his claims against American Tobacco with prejudice. The court awarded plaintiff $15 million in punitive damages from Reynolds. On February 9, 2005, the Tenth Circuit affirmed the jury verdict against Reynolds on plaintiff's negligent failure to warn and test claims and the award of compensatory damages, but reversed the verdict on liability as to plaintiff's fraudulent concealment claim and the pendent $15 million punitive damage award. *See generally* *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906 (10th Cir.2005).

On March 11, 2005, plaintiff filed his bill of costs (Doc. 736) seeking $503,570.61 as his costs in this action. This court received the Tenth Circuit appeal mandate on May 16, 2005, and entered a second amended judgment on May 17, 2005. On May 18, 2005, Reynolds filed a Motion to Strike and Opposition to Plaintiff's Bill of Costs (Doc. 740). On June 30, 2005, plaintiff filed an amended bill of costs (Doc. 753) seeking $503,249.37 as his costs. He subsequently filed supplemental supporting documentation (Doc. 752). In light of plaintiff's filing of the amended bill of costs and supplemental documentation, the court permitted the parties to submit supplemental briefs addressing the issue of plaintiff's costs in this case. Thus, each of the parties has had an opportunity to fully address the issue of costs.

The clerk has not yet taxed costs against Reynolds. The court recognizes, however, that requiring the clerk to perform this typically ministerial function would be both unduly burdensome and futile given the hotly contested nature of the voluminous bill of costs

exceeding more than a half million dollars. The court therefore ordered the parties to show cause (Doc. 758) why the court should not definitively resolve the issue of costs based on the record currently before the court without requiring the clerk to tax costs in the first instance. Plaintiff did not respond and Reynolds responded that it does not object to the court ruling on the issue of costs without requiring the clerk to tax costs in the first instance. Without objection from the parties, then, the court will proceed to resolve this issue.

In doing so, the court wishes to draw attention to the nature of the record currently before the court. Plaintiff has filed a bill of costs exceeding a half million dollars. His itemization is 62 pages and his supporting documentation is 729 pages. As discussed in more detail below, the overwhelming majority of plaintiff's claimed costs clearly are not taxable under the applicable federal cost statute, 28 U.S.C. § 1920. Plaintiff, rather than recognizing this and devoting his efforts to providing meaningful information to the court so that the court can determine the extent to which arguably taxable costs should be taxed, instead categorically argues that the court should sanction Reynolds pursuant to Rule 11 of the Federal Rules of Civil Procedure and award plaintiff all of these costs. The court is not, however, going to sanction Reynolds because, as explained below, it is unpersuaded that such sanctions are warranted under Rule 11. Consequently, plaintiff's failure to provide the court with more detailed information concerning many of the itemized expenses is not particularly helpful and often inadequate to allow the court to determine whether particular costs should be taxed against Reynolds. Thus, ***1073** although the record at this procedural juncture is voluminous, the *meaningful* record with respect to many of the particular itemized costs is unfortunately scant.

For this reason, the court will utilize the following procedure. First, the court is issuing below its proposed ruling on plaintiff's bill of costs. The court realizes that once the parties have the benefit of the court's ruling concerning the parameters under which the court intends to tax costs they may be able to provide more meaningful information concerning whether particular costs fall within those parameters. The court, then, will allow the parties to submit supplemental briefs, including any additional evidentiary materials that they believe to be pertinent, asking the court to modify its position with respect to specific costs and specifically addressing the costs which the court is taking under advisement. At that time, the court will not be inclined to revisit the parameters under which it intends to tax costs. Rather, the court simply wishes to give the parties a final opportunity to clarify the nature of particular itemized costs so that the court can accurately determine whether they should be taxed. In doing so, the court is attempting to provide a meaningful substitute for the usual procedure of allowing the parties to seek review of the clerk's taxation of costs. *See* Fed.R.Civ.P. 54(d)(1) ("[T]he action of the clerk may be reviewed by the court.").

DISCUSSION

For the reasons set forth below, the court denies Reynolds' request for the court to entirely disallow plaintiff's costs and the court likewise denies plaintiff's request to sanction Reynolds and allow plaintiff to recover all of his claimed costs. The court will, however, endeavor to disallow costs that appear to be attributable to plaintiff's unsuccessful claims as well as to plaintiff's claims against the now-dismissed defendant, American Tobacco. As such, the court proposes to tax costs against Reynolds as follows: $310 as fees of the clerk and marshal; $14,035.26 as fees of the court reporter; $1,665.46 as fees for witnesses; and $15,772.88 as fees for copies, for a total of $31,783.60.

I. *Threshold Considerations*

Before delving into the particular itemized expenses in plaintiff's bill of costs, the court will address several threshold considerations. First, Reynolds ar-

gues that the court should strike plaintiff's bill of costs or entirely deny it for a variety of reasons. Second, plaintiff argues that the court should sanction Reynolds for its conduct during the litigation in this case and award plaintiff all of his claimed costs. For the following reasons, the court declines to do either.

A. *Reynolds' Arguments to Strike or Entirely Deny Plaintiff's Bill of Costs*

[1][2][3][4] The Federal Rules of Civil Procedure provide that "costs other than attorneys' fees shall be awarded *as of course* to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d)(1) (emphasis added). The allowance or disallowance of costs is within the sound discretion of the district court. *Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 722 (10th Cir.2000). The court's discretion, however, is constrained by the fact that Rule 54 creates a presumption that the court will award costs to the prevailing party. *Id.* When the court exercises its discretion and denies costs to a prevailing party, it must state a valid reason for doing so. *Id.* The court may deny costs when the prevailing party was only partially successful, when damages were only nominal, when costs were unreasonably high or unnecessary, ***1074** when recovery was insignificant, or when the issues were close or difficult. *Id.* Denial of costs is a severe penalty, and therefore there must be some apparent reason to penalize the party if costs are to be denied. *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1526–27 (10th Cir.1997).

[5] Reynolds originally argued that the court should strike plaintiff's bill of costs because it was not verified as required by 28 U.S.C. § 1924 and by Form AO 133, and because plaintiff had not submitted sufficient information to allow the court to identify what items were claimed and whether they were properly recoverable as costs. Since Reynolds filed its motion, however, plaintiff has since filed an amended bill of costs on Form AO 133 containing a declaration signed under penalty of perjury that the costs are correct and were necessarily incurred in this action. Thus, plaintiff's bill of costs has now been verified. Additionally, plaintiff filed a supplement containing hundreds of pages of documentation itemizing his costs. As such, defendant's arguments on these issues are now obsolete. Reynolds then argues that the court should deny plaintiff's amended bill of costs because it was not submitted within the time limit of D. Kan. Rule 54.1(a), it was not submitted on Form AO 133, and it does not provide the detail required of AO 133 for allowable fees for witnesses. This case, however, was unusually lengthy and generated a voluminous record. Plaintiff timely filed his original bill of costs and filed an amended bill of costs and supporting documentation within a reasonable period of time after the appeal mandate was filed in this court. Given the longevity, complexity, and contentiousness of this case, the court will not entirely deny plaintiff's costs for these reasons.

[6] Reynolds argues that plaintiff makes no attempt to limit recovery to the costs allowable under § 1920. In this respect, the court notes that the Tenth Circuit has stated that the fact that "costs were unreasonably high or unnecessary" can serve as a valid reason for denying costs. Plaintiff's claimed half million dollar bill of costs would arguably fall in this category. The court will not, however, deny plaintiff's costs entirely for this reason. Instead, the court will tax only those costs to which he is statutorily entitled. After doing so, plaintiff's costs are reduced to only a fraction of his originally claimed costs. At that point, his costs are no longer unreasonable or unnecessary. Therefore, the court will not entirely deny his costs on that basis.

[7] Reynolds argues that the court should exercise its discretion and deny plaintiff's costs because plaintiff lost far more claims than he won. Specifically, plaintiff ultimately prevailed on only 2 of his 11 claims in this case. To the extent that the court might have discretion to deny plaintiff's costs for this reason, *compare Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir.1990) (trial court did not abuse its discretion

by refusing to award costs to the party that prevailed on a majority of claims that were the central claims at issue); *Howell Petroleum Corp. v. Samson Res. Co.*, 903 F.2d 778, 783 (10th Cir.1990) (trial court did not abuse its discretion by refusing to award costs to a party that was only partially successful), *with* *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1234 (10th Cir.2001) (magistrate judge erred in granting costs to both parties where judgment was entered in favor of plaintiff; noting that usually the litigant in whose favor judgment is entered is the prevailing party for purposes of Rule 54); *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 458 (party need not prevail on every issue to be considered a prevailing party for purposes of Rule 54), the court ***1075** declines to do so. Even without the punitive damage award, plaintiff still obtained a $196,416 judgment against Reynolds. This is by no means a small amount, and it should not be overshadowed by the voluminous record that is largely attributable to the aggressive manner in which Reynolds chose to litigate this case. Plaintiff's counsel did a commendable job of withstanding Reynolds' litigation tactics of resisting discovery via largely meritless claims of privilege, filing endless motions, and raising all plausible arguments on every minute point. It took plaintiff more than eleven years to prosecute this lawsuit, to obtain a judgment against Reynolds, and to collect on that judgment. The court has no doubt that plaintiff's counsel incurred significant amounts of statutorily recoverable costs in litigating this case. **Plaintiff ultimately prevailed, and the court will award him his statutorily recoverable costs incurred in doing so.**

[8] Along those same lines, Reynolds argues that the court should deny plaintiff's costs entirely because he has failed to differentiate the costs he incurred on his losing and dismissed claims from those upon which he ultimately prevailed. The court will not entirely deny plaintiff's costs for that reason. The court will, however, endeavor to disallow costs where the record reveals that plaintiff necessarily incurred those costs prosecuting claims upon which he was ultimately unsuccessful. *See* *Barber*, 254 F.3d at 1234 ("[I]n cases in which the prevailing party has been only partially successful, some courts have chosen to apportion costs among the parties or to reduce the size of the prevailing party's award to reflect the partial success."). Nonetheless, the evidence at trial overlapped significantly on the claims on which plaintiff prevailed versus those on which he lost, and therefore the court is unpersuaded that plaintiff necessarily incurred significant additional costs prosecuting those claims on which he was unsuccessful. Therefore, the court will not categorically reduce or entirely disallow plaintiff's costs on this basis. The court will, however, disallow any costs that appear to be attributable solely to those claims.

[9] The court will also disallow any costs that are attributable solely to plaintiff's claims against American Tobacco. Plaintiff is asking the court to tax costs against Reynolds, not American Tobacco. Plaintiff dismissed his claims against American Tobacco with prejudice and American Tobacco is therefore considered to be the prevailing party with respect to that aspect of the case. *See* *Cantrell*, 69 F.3d at 458 (dismissal with prejudice makes the dismissed defendant the prevailing party for purposes of Rule 54). Therefore, the court will not allow plaintiff to recover his costs inasmuch as they appear to be solely attributable to his now-dismissed claims against American Tobacco. With that being said, however, his claims against American Tobacco have never been a particularly significant part of this case. He predominantly smoked Camel cigarettes (manufactured by Reynolds) and smoked Lucky Strike cigarettes (manufactured by American Tobacco) only when he could not get Camels. In ruling on defendants' motions for summary judgment, the court found that the evidence against American Tobacco was "thin" but sufficient to withstand summary judgment. *See* *Burton v. R.J. Reynolds Tobacco Co.*, 181 F.Supp.2d 1256, 1271 (D.Kan.2002). The jury assessed only one percent fault against American Tobacco. Plaintiff's efforts in prosecuting his claims against the two defendants

overlapped significantly because the evidence largely pertained to the manner in which tobacco companies marketed cigarettes, the fact that plaintiff ***1076** became addicted to cigarettes, and that he suffered from peripheral cardiovascular disease because of his addiction. Thus, the court will endeavor to disallow costs where the record reveals that those costs were necessarily incurred solely in prosecuting plaintiff's claims against American Tobacco. The court will not, however, categorically reduce or entirely disallow plaintiff's costs on this basis because the court is unpersuaded that plaintiff necessarily incurred significant additional costs in prosecuting this case against American Tobacco over and above the costs he necessarily incurred in prosecuting his case against Reynolds.

B. *Plaintiff's Request for Sanctions*

[10] Plaintiff, on the other hand, asks the court to sanction Reynolds for deliberately and needlessly increasing the cost of this litigation by, in essence, litigating this case so aggressively. Plaintiff asks the court to sua sponte sanction Reynolds pursuant to Rule 11 of the Federal Rules of Civil Procedure for Reynolds' past conduct. Plaintiff asks the court to award him "the costs of all expert consultation fees, Westlaw charges, postage, and travel/lodging expenses." Just as the court finds Reynolds' arguments that the court should entirely deny plaintiff's costs to be unpersuasive, the court finds plaintiff's argument to be equally unpersuasive.

[11] As much as the court might share plaintiff's disdain for Reynolds' litigation tactics in this case, sanctions under Rule 11 are not warranted as urged by plaintiff. "A Rule 11 sanction is *not* meant to reimburse opposing parties for their costs of defense." *Anderson v. County of Montgomery,* 111 F.3d 494, 502 (7th Cir.1997) (emphasis in original) (holding the defendants were not entitled to full reimbursement of their costs of defense under Rule 11 just because the case was frivolous), *overruled on other grounds by DeWalt v. Carter,* 224 F.3d 607, 613–18 (7th Cir.2000). Rule 11 applies to a party's representations made to the court by virtue of signing and presenting to the court a particular pleading, written motion, or other paper. Fed.R.Civ.P. 11(a), (b); *cf. Griffen v. City of Oklahoma City,* 3 F.3d 336, 339 (10th Cir.1993) ("By its terms, Rule 11 only authorizes sanctions for the *signing* of a document in violation of the Rule." (emphasis in original)). It is not directed toward litigation conduct in general. Here, Reynolds litigated this case so aggressively that it would have worn down most plaintiff's attorneys. But it did so largely within the bounds of zealous advocacy. In doing so, Reynolds defeated many of plaintiff's claims, most significantly the $15 million punitive damage award. Thus, the court cannot find that the documents Reynolds filed with the court during this lawsuit generally ran afoul of Rule 11 by being presented for an improper purpose or by having no reasonable basis in law or fact. In short, the court will not sanction Reynolds in the manner suggested by plaintiff simply because Reynolds chose to devote such significant resources to this lawsuit. The court will allow plaintiff to recover those costs to which he is statutorily entitled—no less and no more—giving due weight to the fact that plaintiff necessarily incurred significant costs in this case because of Reynolds' litigation tactics.

II. *Statutorily Recoverable Costs*

[12][13] The taxation of costs under Rule 54(d) is governed by 28 U.S.C. § 1920, which provides that the judge or the clerk may tax as costs the following categories of expenses:

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) ***1077** Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers 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.

28 U.S.C. § 1920. The court has no discretion to award items as costs that are not set forth in section 1920. *Bee v. Greaves,* 910 F.2d 686, 690 (10th Cir.1990). Plaintiff, as the party seeking his costs, has the burden of establishing the amount of compensable costs and expenses to which he is entitled. *Allison v. Bank One–Denver,* 289 F.3d 1223, 1248–49 (10th Cir.2002).

A. *Fees of the Clerk and Marshal*

[14] Plaintiff seeks $323.50 as **fees of the clerk**. This includes a $120 filing fee (Supp.[FN1] at 276) which the court will allow. The court will also allow plaintiff's $25 pro hac vice admission fee (Supp. at 277). A 10/6/94 docket entry reflects that this was for admission of Kenneth B. McClain, plaintiff's lead counsel. The court finds that this fee was necessarily incurred in this case. Thus, the court will allow a total of $145 as fees of the clerk.

FN1. The court's reference to "Supp." refers to the Paginated Courtesy Copy of Plaintiff's Supplement to Amended Bill of Costs which Reynolds provided to the court. This courtesy copy is a duplicate of the supporting documentation submitted to the court in plaintiff's Supplemental Documentation to Amended Bill of Costs (Doc. 752), but has the additional benefit of being paginated and therefore is much easier to reference.

Plaintiff's claimed costs also include a $10 pro hac vice fee for Nick Mebruer (Supp. at 280) and another $10 pro hac vice fee (Supp. at 281), which a 11/19/98 docket entry reflects was likely for admission of Nimrod T. Chapel, Jr. The manner in which Messrs. Mebruer and Chapel were a necessary part of this case is not readily apparent to the court. Similarly, with respect to the $50 fee for admission to the Tenth Circuit (Supp. at 283), it is unclear what attorney was admitted to the Tenth Circuit or whether his or her admission was necessary to the case. Plaintiff's claimed fees of the clerk also includes $63.50 on 10/28/94 documented by a check stub (Supp. at 278) stating that it was for a "Filing Fee." A second filing fee, however, would not have been required and, notably, no filing fee was docketed by the clerk on or soon after that date. Another $20 charge on 1/21/99 is documented by a check stub to the "District Court" (Supp. at 282). Again, no fees of the clerk were docketed on or soon after that date. A $25 charge on 10/17/95 is documented by a check stub that it was for a "Pro Hac Vice Fee" (Supp. at 279). The check stub does not, however, provide the name of the attorney for whom pro hac vice admission was sought and the court's docket sheet does not reflect that any pro hac vice fees were docketed on or soon after that date. Based on the present state of the record, then, plaintiff has failed to establish that any of these fees of the clerk were necessarily incurred in this case. Accordingly, the court takes these issues under advisement pending supplemental briefing.

[15][16] Plaintiff also seeks $350 as fees for service of summons and subpoena. Plaintiff's claimed service fees include $30 paid to the Secretary of State on 5/19/94. The docket sheet reflects that plaintiff effected service of process upon Reynolds via the Secretary of State (Return of Service, Doc. 3) and upon American Tobacco via a waiver of service of process (Waiver of Service, Doc. 11). Thus, plaintiff necessarily incurred this $30 service fee in effecting***1078** service of process on Reynolds, not American Tobacco, and the court will therefore allow this amount. Plaintiff also claims $225 to Agency One Investigations for subpoena service fees for depositions of Drs. Murray Senkus, Alan Rodgman, and Robert DiMarco at the rate of $75 each. The court finds that plaintiff necessarily incurred all of these service fees in preparing his case. Although plaintiff did not pay these fees to the **marshal** as expressly required by § 1920(1), service fees to private process servers are generally taxable up to the amount that

would have been incurred if the **U.S. Marshal**'s office had effected service. *See Griffith v. Mt. Carmel Med. Ctr.*, 157 F.R.D. 499, 508 (D.Kan.1994). The cost for service by the marshal is $45. The court will therefore allow the cost of service of the three subpoenas up to $45 each, or $135. *See, e.g., Kansas Teachers Credit Union,* 982 F.Supp. at 1447–48 (reducing the taxable cost of service of a subpoena to the then-$40 amount charged by the U.S. Marshal). The court, then, will allow $165 ($30 + $135) as fees of the marshal.

[17] Plaintiff also claims $95 paid to the deputy sheriff in Eastham, Massachusetts, as a subpoena service fee for Arnold Henson's deposition (Supp. at 178). Mr. Henson was formerly legal counsel for American Tobacco. As discussed previously, American Tobacco was the prevailing party with respect to that aspect of the case. Therefore, the court will not tax against Reynolds the cost of serving Mr. Henson with a subpoena.

All total, then, the court will allow $310 as fees of the clerk and marshal, take the matter under advisement with respect to other claimed fees of the clerk, and otherwise disallow plaintiff's claimed fees of the marshal.

B. *Fees of the Court Reporter*

Plaintiff's bill of costs seeks $37,615.16 as fees of the court reporter. [FN2] The court may tax as costs "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Plaintiff seeks essentially two categories of court reporter fees under this category of taxable costs. First, plaintiff seeks his costs for transcripts of various court hearings and trial. Second, he seeks his costs for deposition transcripts.

> FN2. Exhibit B to plaintiff's response also lists additional costs as "Deposition and Trial Transcripts/Court Reporter Fees," including $638.15 (Supp. at 66), $685.12 (Supp. at 135), $733.05 (Supp. at 136–37), $762.37 (Supp. at 138–39), $771.30 (Supp. at 140–41), $803.18 (Supp. at 145–46), $757.28 (Supp. at 149), and $420 (Supp. at 728). These items, however, were not listed as claimed court reporter fees in plaintiff's itemization in support of his bill of costs. Thus, they are disallowed as court reporter fees solely because plaintiff did not claim them as such in his bill of costs.

1. Transcripts of Court Hearings and Trial

The standard for taxation of costs for a transcript of in-court hearings and trial transcripts has been stated as follows:

> The basic standard ... in determining whether to allow the expense of a transcript as a taxable cost is whether the transcript was "necessarily obtained for use in the case." This does not mean that the transcript must have been "indispensable" to the litigation to satisfy this test; it simply must have been "necessary" to counsel's effective performance or the court's handling of the case. The transcript may have been procured either for use at the trial or after the trial. But the words "use in the case" in Section 1920 mean that the transcript must have a direct relationship to the ***1079** determination and result of the trial. Taxation will not be allowed if the transcript was procured primarily for counsel's convenience.
>
> 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2677, at 438–40 (3d ed.1998).

[18][19] Plaintiff and defendant shared the cost of a daily trial transcript. Plaintiff's share equaled $3,580 (Supp. at 333). "To award this premium for daily production, a court must find that daily copy was necessarily obtained, as judged at the time of transcription." *U.S. Indus., Inc. v. Touche Ross & Co.*, 854

F.2d 1223, 1248 (10th Cir.1988), *overruled on other grounds as recognized by Anixter v. Home–Stake Prod. Co.,* 77 F.3d 1215, 1231 (10th Cir.1996). This case was sufficiently lengthy, complex, and contentious that the court is persuaded that the cost of a daily transcript was reasonably necessary to plaintiff's trial preparation. Accordingly, the court will allow this cost. *See, e.g., Vornado Air Circulation Sys., Inc. v. Duracraft,* No. 92–1543–WEB, 1995 WL 794070, at *2 (D.Kan. Nov.29, 1995) (court allowed cost of daily transcript notwithstanding the lack of prior approval where case was sufficiently complex that a daily transcript was reasonably necessary); *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1426–27 (D.Kan.1995) (same, where issues litigated were complex and trial was lengthy, and daily transcripts helped to focus issues, avoid repetitive testimony, and expedite trial), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996).

The court is unpersuaded, however, based on the record currently before the court that the **various transcripts of in-court hearings were obtained for use in the case as opposed to being procured solely for counsel's convenience**. This includes the following expenses: $92 for transcript by Donna Mellegard for 6/17/96 status conference (Supp. at 315); $96 for transcript by John Bowen & Associates for 5/9/00 status conference (Supp. at 317); $53.25 for transcript by John M. Bowen for final pretrial conference (Supp. at 330); $74.25 for 1/24/02 limine conference by Becky Ryder (Supp. at 336); and $151.50 for hearing on 2/1/02 by Becky Ryder (Supp. at 337). *See, e.g., Phillips USA, Inc. v. Allflex USA, Inc.,* No. 94–2012–JWL, 1996 WL 568814, at *1 (D.Kan.1996) (cost of transcript of hearing was not taxed as costs where **prevailing party did not meet its burden of establishing that the transcript was necessarily obtained for use in the case**). **The court takes these issues under advisement pending supplemental briefing.**

[20] The court will disallow the cost of the $195 transcript of the punitive damage hearing (Supp. at 343) because plaintiff ultimately was not the prevailing party on that aspect of the case.

2. Deposition Transcripts

[21][22][23] "The costs of taking and transcribing depositions reasonably necessary for litigation are generally awarded to the prevailing party under 28 U.S.C. § 1920." *Callicrate v. Farmland Indus., Inc.,* 139 F.3d 1336, 1339 (10th Cir.1998). Whether costs are for materials necessarily obtained for use in the case is an issue of fact to be determined based on the existing record or the record supplemented by additional proof. *U.S. Indus., Inc.,* 854 F.2d at 1245. The court must carefully scrutinize all items proposed as costs. *Id.* Necessity in this context means a showing that the materials were used in the case and served a purpose beyond merely making the task of counsel and the trial judge easier. *Id.* Necessity is judged in light of the facts known to the parties at the time the expenses were incurred. *Callicrate,* 139 F.3d at 1340.

***1080** [24] Plaintiff seeks the cost of entire court reporter invoices that include not only the cost of the deposition transcripts themselves, but also additional charges for such items as **minuscripts**, keyword indices, **ASCII disks**, exhibits, and postage and delivery. The court will disallow these charges because they are for items for the convenience of counsel. *See Hutchings v. Kuebler,* No. 96–2487–JWL, 1999 WL 588214, at *3 (D.Kan. July 8, 1999) **(costs of ASCII disks and minuscripts would not be taxed)**; *Albertson v. IBP, Inc.,* No. 96–2110–KHV, 1997 WL 613301, at *2 (D.Kan. Oct.1, 1997) (delivery charges are not taxable as costs); *Ortega v. IBP, Inc.,* 883 F.Supp. 558, 562 (D.Kan.1995) (postage associated with depositions was not taxable). Thus, the court will limit plaintiff's taxable costs to the cost of one transcript for each deposition that the court is persuaded was reasonably necessary for plaintiff's trial preparation.

First, the court will allow the costs of deposition transcripts that plaintiff actually used as evidence at

trial. *U.S. Indus., Inc.*, 854 F.2d at 1246 (use at trial readily demonstrates necessity). This includes the cost of transcripts for Pamela Harris's depositions. The court will allow at least $199.50 for her deposition taken on 12/22/95 (Supp. at 292) at the court reporter's non-expedited rate (190 pages x $1.05 per page), and the court will take the matter under advisement with respect to the additional charge for expediting the transcript because plaintiff has not yet established the necessity of **expediting the transcript**. The court will also allow $161.70 for Ms. Harris's second deposition on 12/29/95 (Supp. at 294) and $109 for the cost of the transcript of John Ward's deposition on 1/10/96 (Supp. at 298). The court will allow the cost of the transcript of Mr. Ward's deposition on 2/11/01 for $456.20 (Supp. at 340–341). Although the cost of this transcript was for "same day" service, the court is persuaded that this same day service was necessary due to the urgency of taking this deposition during trial. The court will also allow $1,212.75 for the cost of G. Robert DiMarco's deposition (Supp. at 328). In total, then, the court will allow plaintiff at least $2,139.15 as his costs for these deposition transcripts used at trial.

The court will also allow plaintiff his costs of deposition transcripts that were used on summary judgment. *See Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1474 (10th Cir.1997) (holding the district court properly taxed costs of transcripts that were used by the court in ruling upon a motion for summary judgment). This includes the cost of all three volumes of plaintiff's deposition—$336, $318, and $47.50 (Supp. at 284, 285, 318); $53.55 for Gary Kramer and $95 for Vinaya Koduri (Supp. at 291); $74 for Rosa Tolliver and $71 for James Redick (Supp. at 288); $51 for Thelma Burton (Supp. at 289); $70 for Barbara Stroer (Supp. at 290); $638.15 and $106.70 for David M. Bums (Supp. at 295–96); $33.88 [FN3] for Thomas R. McLean (Supp. at 301); $479.38 and $545.87 for Neil E. Grunberg (Supp. at 302–03); $741.90 and $1,313.85 for Alan Rodgman (Supp. at 316, 327); $485.80 for David V. Cossman (Supp. at 319–20); and $1,199.50 for Murray Senkus (Supp. at 325). The court will also allow two-thirds of the invoice located at Supp. at 307, or $1,655.03, as the costs for the depositions of John Robinson and David Townsend. The court finds that plaintiff necessarily incurred the ***1081** costs of all of these deposition transcripts in order to withstand defendant Reynolds' motion for summary judgment. The court will therefore tax as costs $8,316.11 for these deposition transcripts.

> FN3. This invoice amount appears to be a typographical error because the invoice states that the deposition was 308 pages at $1.10 per page, or $338.80, but the court cannot find any support in the record to suggest that plaintiff actually paid the higher amount for Dr. McLean's deposition transcript.

The court is unable to conclude that plaintiff necessarily obtained any other deposition transcripts for use in the case based on the record currently before the court. The court recognizes that plaintiff may be able to demonstrate necessity with respect to some of the other deposition transcripts, *see Callicrate*, 139 F.3d at 1339–40 (court is empowered to find necessity and award costs as long as materials are reasonably necessary for use in the case, but depositions taken merely for discovery are not taxable as costs), and therefore the court takes the following itemized costs under advisement pending supplemental briefing: deposition transcripts for Mark Huber (Supp. at 286), deponent not specified (Supp. at 287), attorneys conferences, Roger Christensen, Harold Vande Haar, William Lewis, Helen Burton, and Floyd Bartlett (Supp. at 288), John Baeke (Supp. at 293, 304), deponent not specified (Supp. at 297), William P. Newman III (Supp. at 299), Kathie Allison (Supp. at 300), Zalman Amit (Supp. at 305), Warren Phillips (Supp. at 306), William Samuel Simmons (Supp. at 307), Jacqueline Oler (Supp. at 308), Richard W. Pollay (Supp. at 309), P. Caren Phelan (Supp. at 310), James Martin (Supp. at 311), C. Robert Cloninger (Supp. at 312), John G. Pollock (Supp. at 313), Ronald J. Lukas (Supp. at 321), Deborah K. Hoshizaki (Supp.

at 324), Harmon McAllister (Supp. at 326), and James Bums (Supp. at 331). The court recollects that other deposition transcripts (e.g., Arnold Henson, Alonzo Hollinshed, and Ora Burton) were pertinent to plaintiff's now-dismissed claims against American Tobacco, not Reynolds, and the court does not intend to tax those costs against Reynolds.

In sum, the court will allow the following fees of the court reporter: $3,580 for the trial transcript, $2,139.15 for deposition transcripts used at trial, and $8,316.11 for deposition transcripts used to withstand defendant Reynolds' motion for summary judgment. The total taxable fees of the court reporter, then, are $14,035.26.

C. *Witness Fees*

[25] Plaintiff claims $229,202.77 as costs for fees for "witness/experts." Section 1920(3) allows the court to tax as costs "[f]ees and disbursements for ... witnesses." **Expert witness fees** are taxable under § 1920(3) only to the relatively modest extent allowed by 28 U.S.C. § 1821. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987); *Hull ex rel. Hull v. United States*, 978 F.2d 570, 572–73 (10th Cir.1992) (district court erred in awarding expert witness fees in excess of those allowed by § 1821). Section 1821 generally allows a $40 per day attendance fee plus travel and subsistence expenses related to attendance.

[26] Therein lies the problem with the overwhelming bulk of plaintiff's claimed witness fees. Most are for non-attendance related expenses for expert witnesses such as consultations, affidavit production, medical record review, analysis, and preparation of expert reports and disclosures. These types of items clearly are **not witness attendance fees** or related travel expenses. As such, they are not taxable. The following expenses will be disallowed on that basis: $250 for consultation with Thomas McLean (Supp. at 180); $5,625 for affidavit production by Richard Pollay (Supp. at 182); $1,600 for economic analysis by John Ward (Supp. at 183); $2,945 for life care plan report and related expenses by Kathie Allison (Supp. at 184); ***1082** $1,917.50 for chronology of events and $150 for record review by Jenny Beerman (Supp. at 185–86); $655 for affidavit and disclosure statement by Thomas McLean (Supp. at 187); $350 for consultation with John Hughes (Supp. at 188); $850, $2,500, and $3,650 for various expert expenses such as reviewing medical records, conferences, etc. by John Baeke (Supp. at 181–91); $2,625.77 for evaluation of Mr. Burton by John Hughes (Supp. at 192); $2,625 for preparation of expert report by Neil Grunberg (Supp. at 193); $2,450 for preparation of expert report by David Bums (Supp. at 194); $2,400 for clinic review and analysis by Peter Tuteur (Supp. at 195); $1,187.50 for record review by Pamela Harris (Supp. at 196); $700 for deposition preparation by Davis Burns (Supp. at 197); $1,800 for deposition preparation by Peter Tuteur (Supp. at 198); $1,125 for reviewing information by Neil Grunberg (Supp. at 202); $6,927.71 for additional expenses of John Baeke (Supp. at 203); $450 for consultation with Allan Brandt (Supp. at 204); $800 for the deposition of Dr. Phillips, as it appears that he was a witness of American Tobacco (Supp. at 205); $1,875 for reviewing deposition transcript by Neil Grunberg (Supp. at 212); $1,062.50 for review of deposition transcript by John Baeke (Supp. at 214); $875 for reviewing records by Pamela Harris (Supp. at 215); $1,800 for record review and research by David Cossman (Supp. at 216); $1,012.50 for record review, research, report, etc. by Kathie Allison (Supp. at 219); $480 for economic report update by John Ward (Supp. at 220); $2,850 and $300 for record review and report by David Cossman (Supp. at 221–22); $140 for non-allowable deposition related time with Alan Rodgman (Supp. at 223); $12,075 for telephone conversations, document review, and drafting of declaration by Charles Tiefer (Supp. at 224–26); $3,750 for reviewing files and preparing report by John Ward (Supp. at 227); $5,050 for document review, research, and preparation of affidavit by John Ward (Supp. at 228); $9,625 for "digging for documents," arranging copying, re-

viewing records, and assisting with cross-examination by Mr. McLain by Charles Tiefer (Supp. at 229–30); $45 for Arnold Henson witness fee (Supp. at 246) because Mr. Henson was a witness of American Tobacco; $1,350 for deposition preparation by David Cossman (Supp. at 247); $630 for time spent by Alan Rodgman at deposition (Supp. at 248); $7,200 and $1,800 for supplementation of expert report by Neil Grunberg (Supp. at 249–50); $2,400 for record review and working on storyboard by David Cossman (Supp. at 253); $1,057.50 for record review, interviews, and cost analysis by Kathie Allison (Supp. at 254); $1,350 for trial preparation by Neil Grunberg (Supp. at 255); $500 and $2,000 for consulting with Third Millenium Consultants (Supp. at 256–57); $1,800 for record review and research by David Cossman (Supp. at 264); $900 for review of materials by Joel Cohen (Supp. at 265); $525 to "get documents" and review profits by John Ward (Supp. at 266), which is also disallowed because it was incurred in preparation for the punitive damage hearing; and $5,500 for preparation of affidavit by David Bums (Supp. at 267), which is also disallowed because it was incurred in preparation for the punitive damage hearing. Additionally, the court will disallow $16,379 to Maribeth Coller (Supp. at 268–70) and $38,962 to Harrison and Rutstrom Consulting, Inc. (Supp. at 271–75) because plaintiff incurred these expenses in association with the punitive damage phase of this case, a phase in which plaintiff ultimately was not the prevailing party. The court will also disallow $2,500 to Richard Pollay (Supp. at 181) because the record does not reveal that this fee was related to his attendance at a deposition or at trial. In fact, given the early date of the check ***1083** stub (October of 1994), it appears this was probably a consultation expense.

[27] The court turns, then, to **expenses related to particular witnesses' attendance at depositions and trials.** Dr. Grunberg's deposition was taken on January 22 and 23, 1996. He is statutorily entitled to "an attendance fee of $40 per day for each day's attendance," § 1821(b), or $80 for the two days. He is also statutorily entitled to his actual "**parking fees**," § 1821(c)(3), for those two days, or $20. Thus, the court will tax Dr. Grunberg's witness fee in the amount of $100. The remainder of Dr. Grunberg's invoice (Supp. at 199), or $2,908, will be disallowed as not recoverable under § 1821.

[28] Dr. Baeke's deposition was taken on January 30, 1996. He is entitled to a $40 attendance fee. He also billed plaintiff $21.46 for his mileage, to which he is statutorily entitled. § 1821(c)(2). Thus, the court will tax Dr. Baeke's witness fee in the amount of $61.46. The remainder of Dr. Baeke's invoice (Supp. at 200), or $6,972.50, will be disallowed as not recoverable under § 1821.

[29] Dr. Grunberg's deposition was taken a second time on October 18, 2001. He is entitled to a $40 attendance fee for that day. He also billed plaintiff $50 for taxi fares, to which he is statutorily entitled. § 1821(c)(3). Thus, the court will tax Dr. Grunberg's witness fee in the amount of $90. The remainder of Dr. Grunberg's invoice (Supp. at 251), or $2,210, will be disallowed as not recoverable under § 1821.

[30] Dr. Bums traveled from San Diego, California, to testify at trial. His invoice reveals that he arrived in Kansas City the night before trial. Thus, he is entitled to a two-day attendance fee of $80. § 1821(b) (witness is paid attendance fee for each day's attendance plus attendance fee for time necessarily occupied in going to and returning from the place of attendance). He is also statutorily entitled to $122 for the **cost of "the car to and from the airport**," which appears to have been for a taxi given the absence of parking costs. Plaintiff paid $242.36 for Dr. Bums' lodging. The cost of lodging is not taxable per se, but given the overnight stay he is entitled to a subsistence allowance not to exceed the maximum per diem allowance for the Kansas City metropolitan area in February of 2002. § 1821(d)(1), (2). This would have been $123 for the day with the hotel stay and $38 for the return day. Thus, the court will tax Dr. Burns'

witness fee for his trial testimony in the amount of $363. The remainder of Dr. Burns' trial testimony invoice (Supp. at 259), or $8,501.36, will be disallowed as not recoverable under § 1821.

[31] Dr. Grunberg traveled from Bethesda, Maryland, to testify at trial. His invoice reveals that he was in Kansas City for one day and therefore is entitled to a one-day attendance fee of $40. He is also entitled to his taxi fares of $90. Although he billed **plaintiff $45 for meals, that amount is not statutorily recoverable**. It is also not recoverable as a subsistence allowance because the record does not reveal that he stayed in Kansas City overnight. *See* § 1821(d)(1) (subsistence allowance is to be paid only when an overnight stay is required). Thus, the court will tax Dr. Grunberg's witness fee for his trial testimony in the amount of $130. The remainder of his trial testimony invoice (Supp. at 261), or $9,885, will be disallowed as not recoverable under § 1821.

[32] Dr. Cossman traveled from Los Angeles, California, to testify at trial. His invoice reveals that he arrived in Kansas City at least the day prior to his testimony. Specifically, it states that he was in ***1084** Kansas City for court on February 5 and 6, 2002. The clerk's minute sheet, however, reveals that he testified at trial on February 7, 2002. Therefore, if he arrived in Kansas City on February 5, his arrival was premature and the court will not tax costs for that day. The court will, however, allow him a two-day attendance fee of $80 for February 6 and 7, 2002, and a subsistence allowance of $161 ($123 for the day with the hotel stay and $38 for the return day). Thus, the court will tax Dr. Cossman's witness fee for his trial testimony in the amount of $241. The remainder of his trial testimony invoice (Supp. at 263), or $11,759, will be disallowed as not recoverable under § 1821.

[33] Many of plaintiff's other itemized expenses are partially taxable as witness attendance fees and partially non-taxable. These include an invoice from Kathie Allison (Supp. at 201) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $897.50 for record review and meetings; an invoice from Thomas McLean (Supp. at 206–11) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $1,460 for other services rendered; an invoice from defense counsel (Supp. at 312) for which the court will allow $40 each for the depositions of Mr. Pollock, Dr. Oler, Dr. Newman, Dr. Cloninger, and Dr. Amit and $80 for Dr. Martin's deposition (at 10 hours it appears this was a 2–day deposition) and will otherwise disallow $6,620 as beyond the statutory rate; a check stub for a witness fee to Stephen Goldstone (Supp. at 217) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $20 as beyond the statutory rate [FN4]; a check stub for a witness fee to Alan Rodgman (Supp. at 218) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $20 as beyond the statutory rate; a check for a witness fee to G. Robert DiMarco (Supp. at 231–35) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $27.88 as beyond the statutory rate; a check for a witness fee to Murray Senkus (Supp. at 236–40) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $22.84 as beyond the statutory rate; an invoice from David Burns (Supp. at 252) for which the court will allow $40 as a deposition attendance fee and will otherwise disallow $1,960 as beyond the statutory rate; an invoice from Pamela Harris (Supp. at 258) for which the court will allow $40 as a trial attendance fee and will otherwise disallow $1,710 as beyond the statutory rate; an invoice from John Ward (Supp. at 260) for which the court will allow $40 as a trial attendance fee and will otherwise disallow $1,860 as beyond the statutory rate; and an invoice from Kathie Allison (Supp. at 262) for which the court will allow $40 as a trial attendance fee and will otherwise disallow $1,265 as beyond the statutory rate. Plaintiff has also included a copy of a check for a $61.25 witness fee to Alan Rodgman (Supp. at 241–45). The court will not allow the $40 attendance fee because it appears that doing so

would be duplicative of the check stub at Supp. at 218.

> FN4. The court realizes that some of these rather modest additional sums exceeding the $40 daily attendance fee by approximately $20 may be for **witnesses' mileage,** but this is not substantiated by the record and therefore the court will not tax these amounts.

All total, then, plaintiff's claimed **costs for witness fees are largely disallowed as being not recoverable** under § 1821. The court will, however, allow attendance, travel, and subsistence fees as outlined above for a total amount of $1,665.46.

1085 D.** ***Fees for Exemplification and Copies

Section 1920(4) permits the court to tax as costs "fees for exemplification and copies of papers necessarily obtained for use in the case." Plaintiff seeks essentially two categories of expenses under this category of taxable costs. First, he seeks his costs for animations that were used at trial. Second, he seeks his costs for copies made throughout the duration of this case.

1. Animations

[34][35] Plaintiff spent $40,429.85 for animations that were used during the expert testimony of Drs. Cossman and Grunberg at trial. The term "exemplification," as used in § 1920(4), has been interpreted to embrace all kinds of demonstrative exhibits, including models, charts, photographs, illustrations, and other graphic aids. *See Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 878 F.Supp. 1417, 1428 n. 10 (D.Kan.1995), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996). Thus, the reasonable cost of preparing maps, charts, graphs, and kindred material is taxable when necessarily obtained for use in the case. *Mikel v. Kerr,* 499 F.2d 1178, 1182 (10th Cir.1974). Here, the court is unpersuaded that this standard has been met. Certainly, the animations were impressive, helpful, and informative. The court, however, cannot find that they were necessary to the presentation of plaintiff's case. Rather, they merely illustrated the expert testimony of Drs. Cossman and Grunberg and thereby made the presentation of evidence at trial more effective and efficient. This is insufficient to justify an award of costs. *See Battenfeld of Am. Holding Co. v. Baird, Kurtz & Dobson,* 196 F.R.D. 613, 616–17 (D.Kan.2000) (declining to tax costs of board exhibits which made the presentation of evidence at trial more effective and efficient); *Manildra Milling Corp.,* 878 F.Supp. at 1428 (denying request to tax $12,593.49 for enlargement and transparencies which were merely illustrative of expert testimony); *Green Constr. Co. v. Kan. Power & Light Co.,* 153 F.R.D. 670, 683 (D.Kan.1994) (expense of items that merely illustrate expert testimony or other evidence are normally not taxable). Accordingly, the court will not tax plaintiff's costs for animations.

2. Copies

[36][37] A copy is "necessarily obtained" within the meaning of § 1920(4) only where the court believes that its procurement was reasonably necessary to the prevailing party's preparation of its case. *See Pehr v. Rubbermaid, Inc.,* 196 F.R.D. 404, 407–08 (D.Kan.2000). As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery because the producing party possesses the original documents and, thus, such papers are not "obtained" for purposes of § 1920(4). *See id.* at 408. Plaintiff bears the burden of establishing that the costs are taxable. *See id.* at 406–07.

[38] Plaintiff has largely failed to meet this burden based on the record currently before the court. Plaintiff's claims for copies of medical records, deposition related costs, litigation copy costs, copies of exhibits for testifying experts, and copies from the clerk, all as categorized on Exhibit B to plaintiff's response brief (Doc. 756, Attachment 3, at 2–4), are largely documented by check stubs and invoices for copies and binding. Without more meaningful explanation, the court is unable to determine the cost of

copies that were necessarily obtained for use in the case and other case. *See* *Battenfeld of Am. Holding Co.*, 196 F.R.D. at 617 (denying copy costs where prevailing parties submitted statements from copying services ***1086** for thousands of copies without identifying the use made of the copied materials); *Green Constr. Co.*, 153 F.R.D. at 683 (same). The court therefore takes these categories of costs under advisement and will allow plaintiff the opportunity to submit supplemental briefing to establish that these copies were necessarily obtained for use in the case as opposed to being made to respond to discovery requests.

[39] The court will also take under advisement the following claimed expenses because of plaintiff's failure to establish their necessity to the case based on the record currently before the court: $25 for video tapes (Supp. at 10); $4.65 to copy video (Supp. at 13); $1,354.19 for audiotapes (Supp. at 29); $21.30 for videotape regarding "general tobacco" (Supp. at 77); $21.37 for videotape (Supp. at 165); $63.14 to digitize video (Supp. at 166); $8.01 for commercials video (Supp. at 167); $347.24 for encoding and editing cigarette commercials (Supp. at 169); and $1,662.56 and $64.17 for the cost of videotaping, editing, and copying the video of John Ward's deposition on 2/11/02 (Supp. at 170–71).[FN5]

> FN5. The court does recognize that under a proper demonstration of necessity the cost of videotaping a deposition can be properly recoverable. *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1477 (10th Cir.1997) (costs associated with videotaping a deposition are taxable under § 1920(2)). But plaintiff has not met his burden of establishing the necessity of any such costs based on the record currently before the court.

[40] The court is, however, satisfied that **the costs of plaintiff's trial exhibits were necessarily obtained for use in the case.** Plaintiff's counsel did a commendable job of utilizing the numerous documents that he compiled during the course of this litigation as exhibits at trial and the court is persuaded these documents were necessary to plaintiff's presentation of his case. Thus, **the court will tax the cost of plaintiff's trial exhibits**, including copies for the jury, in the amounts of $3,460.53, $3,145.66, $1,466.15, at $4,729.52 (Supp. at 159, 161, 162, 164), for a total of $12,801.86. *See* *Owens v. Sprint/United Mgmt. Co.*, No. 03–2371–JWL, 2005 WL 147419, at *4 (D.Kan. Jan.21, 2005) ("Obviously, copies of trial exhibits were necessary for use in the case."). The court will not tax the amount of $1,034.82 (Supp. at 158) because the invoice suggests that these were trial exhibits for use in plaintiff's case against American Tobacco.

[41] For similar reasons, the court is satisfied that copies of documents plaintiff submitted to the court for in camera review were necessarily obtained for use in the case. Plaintiff overwhelmingly prevailed in his battle against defendants' claims of privilege. Counsel utilized these documents effectively at trial, and the court is persuaded that plaintiff was forced to combat defendants' claims of privilege in order to prevail in this lawsuit. Thus, the court will tax the cost of plaintiff's copies for documents submitted to the court for review in August of 2000 in the amounts of $358.01, $1,473.07, $987.76, $60.76, and $91.42 (Supp. at 126, 128–31), for a total of $2,971.02. This, combined with the cost of trial exhibits, equals $15,772.88, and the court will tax this amount for copies.

[42] The court finds no grounds to tax the following expenses based on the record currently before the court because the court is unpersuaded that these costs are recoverable under § 1920 and, in any event, they appear to have been incurred for claims upon which plaintiff ultimately did not prevail and/or against American Tobacco: $20,962.97 for Camel advertisements (Supp. at 22); $119.78 for editing commercials (Supp. at 25); $268.32 for editing***1087** commercials (Supp. at 27); $16,755.88 and $1,008.67

for reproducing video ads (Supp. at 31–36, 79); and $10,416.81 for copying Camel audio recordings (Supp. at 38). Accordingly, the court will disallow these expenses.

E. *Other Costs*

[43] Lastly, plaintiff's bill of costs includes $83,767.43 for **other costs**. The court will disallow all of the itemized costs in this category because based on the record currently before the court the court is unable to find that any of these items are taxable under § 1920. Specifically, the court will disallow plaintiff's claimed Westlaw charges. *Jones v. Unisys Corp.*, 54 F.3d 624, 633 (10th Cir.1995) ("[C]osts for computer legal research are not statutorily authorized ...." (internal quotation omitted)); *see also Sheldon v. Vermonty*, 237 F.Supp.2d 1270, 1287 (D.Kan.2002) (costs for electronic research are not taxable because they are not listed in § 1920), *aff'd as modified on other grounds*, 107 Fed.Appx. 828 (10th Cir.2004); *Albertson v. IBP, Inc.*, No. 96–2110–KHV, 1997 WL 613301, at *1 (D.Kan. Oct.1, 1997) (declining to award computer assisted research charges). The court will also disallow plaintiff's Federal Express and Airborne Express delivery charges, *see Sheldon v. Vermonty*, No. 98–2277–JWL, 2004 WL 2782817, at *6 (D.Kan. Dec.3, 2004) (Federal Express charges not recoverable under § 1920), and courier delivery charges, *see Stadtherr v. Elite Logistics, Inc.*, No. 00–2471–JAR, 2003 WL 21488269, at *3 (D.Kan. June 24, 2003) (delivery charges not recoverable); *Harris v. Oil Reclaiming Co.*, No. 97–1270–JTM, 2001 WL 395392, at *3 (D.Kan. Mar.28, 2001) (same).

The court will also disallow all **of plaintiff's counsel's travel expenses**. *Augustine v. United States*, 810 F.2d 991, 996 (10th Cir.1987) (district court did not abuse its discretion by refusing to tax counsel's travel expenses); *see also Centennial Mgmt. Servs., Inc. v. Axa Re Vie*, 196 F.R.D. 603, 607 (D.Kan.2000) (denying counsel's travel expenses). This includes the costs of airfare, meals, tips, parking, car rentals, taxicabs, hotels, toll charges, and other miscellaneous expenses incurred while traveling. **Counsel's costs for non-travel related expenses for legal research, long distance, telephone calls, postage, fax services, meals, and parking will also be disallowed**. *See Ortega v. IBP, Inc.*, 883 F.Supp. 558, 562–63 (D.Kan.1995) (denying costs for counsel's long distance phone calls, postage, fax services, mileage, and meals); *see also* 10 Charles Alan Wright et al., Federal Practice & Procedure § 2677, at 459–62 (3d ed. 1998) ("[T]axation is usually denied for expenses such as long-distance telephone calls, cables, taxi fares, messengers, travel by attorneys ... [and] postage ...."). The court will also disallow plaintiff's claimed office supply expenses because they do not fall within the bounds of § 1920. *Sheldon*, 237 F.Supp.2d at 1284.

The court will disallow the following claimed expenses because the current record is inadequate to allow the court to determine whether these items are taxable: DOC invoice for $106 (Supp. at 346); "FYI" expense invoice for $9 (Supp. at 356); photocopying and processing for $5 (Supp. at 393); "Copies / Wolfe Camera" for $54.07, $12.61 (court was unable to locate supporting documentation); trial supplies for $13 (Supp. at 631); check to Carolyn Rhodes for $40 (Supp. at 632); and trial supplies for $14 (Supp. at 634). The court will also disallow the following costs for cigarettes, which plaintiff presumably purchased for use as trial exhibits, because they do not fall within the bounds of § 1920: Norman Ritchie for $12 for "Kool Kings" (Supp. at 626); vintage Lucky Strikes for $16.49 (Supp. at 640); ***1088** and cigarettes for $381.10 from Harvey's Antiques (Supp. at 644).

III. *Supplemental Briefing*

The parties may submit supplemental briefs addressing the particular itemized costs that the court has taken under advisement and objecting to the court's proposed taxation of costs with respect to other particular itemized costs. The parties should direct their arguments to the issue of clarifying the nature of particular itemized costs in an effort to help the court understand whether those costs are taxable under the

parameters outlined above. They are also welcome to, but need not, submit any additional evidentiary material that they believe to be pertinent to this matter. They should not resubmit any supporting documentation that has already been presented to the court in conjunction with the issue of taxation of costs.

In an effort to streamline opposing counsel's and the court's review of plaintiff's contentions, those contentions should be presented in the following format: (1) a separately numbered paragraph for each cost item; (2) state the page number upon which that particular cost appears on plaintiff's itemization in support of his amended bill of costs; (3) state the page number of Reynolds' paginated courtesy copy of the supplement containing the supporting documentation for that particular cost; (4) *briefly* state why the particular cost should be allowed or disallowed; and (5) state the amount that should be allowed or disallowed. Plaintiff may file a supplemental brief no later than November 4, 2005. Reynolds may file a supplemental response brief no later than November 18, 2005, which should fairly meet the substance of plaintiff's contentions in a corresponding numbered paragraph format and present any additional contentions in the same format. Plaintiff may file a supplemental reply brief no later than December 5, 2005, which, again, continues to address these issues in numbered paragraph format.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant R.J. Reynolds Tobacco Company's Motion to Strike and Opposition to Plaintiff's Bill of Costs (Doc. 740) is granted in part, denied in part, and taken under advisement in part as set forth above.

D.Kan.,2005.
Burton v. R.J. Reynolds Tobacco Co.
395 F.Supp.2d 1065

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139 F.3d 1336
United States Court of Appeals,
Tenth Circuit.

Michael CALLICRATE, dba Callicrate Cattle Company, Plaintiff-Appellant-Cross-Appellee,
v.
FARMLAND INDUSTRIES, INC., a Kansas corporation, Defendant-Appellee,
Jim Thomas, an individual, Defendant-Appellee-Cross-Appellant,
and
The Co-Operative Union Mercantile Company, a Kansas Co-Operative, Defendant-Appellee-Cross-Appellant.

Nos. 96-3075, 96-3100 and 96-3101. | March 27, 1998.

After protein feed supplement purchaser's action alleging breach of contract, breach of warranty, strict liability, and fraud was dismissed due to lack of diversity between parties, defendants submitted bill of costs and purchaser filed objections to requested costs. The United States District Court for the District of Kansas, Patrick F. Kelly, J., awarded costs in favor of all defendants, but imposed stay of such award as to some defendants. Purchaser appealed, and defendants subject to stay filed cross-appeal. The Court of Appeals, Holloway, Circuit Judge, held that: (1) expenses covering transcribing and/or copying of depositions were properly awarded as costs to defendant who was not party to subsequent state court litigation commenced by purchaser, but (2) such costs were improper as to defendant that was party to state court litigation.

Affirmed in part, dismissed in part, and vacated and remanded in part.

West Headnotes (7)

[1] **Federal Civil Procedure**
Discretion of Court
Federal Courts
Abuse of Discretion
Federal Courts
Costs, Attorney Fees and Other Allowances

Taxing of costs rests in sound judicial discretion of district court, and district court's award of costs and order imposing stay of execution of award would be reviewed for abuse of discretion, which occurs only when trial court bases its decision on erroneous conclusion of law or where there is no rational basis in evidence for ruling. 28 U.S.C.A. § 1919.

11 Cases that cite this headnote

[2] **Federal Civil Procedure**
Amount, Rate and Items in General

Even if court finds costs sought were for materials or services necessarily obtained, amount of award requested upon dismissal for want of jurisdiction must be reasonable, and, though use at trial by counsel or court demonstrates necessity, if materials or services are reasonably necessary for use in case even though not used at trial, court can find necessity and award recovery of costs. 28 U.S.C.A. § 1919.

29 Cases that cite this headnote

[3] **Federal Civil Procedure**
Depositions

Award of expenses covering transcribing and/or copying of 20 depositions as costs to defendant, upon dismissal of action for want of jurisdiction due to lack of diversity, was not abuse of discretion, as depositions and expenses were necessary to litigation, at time they were taken, even if many of depositions were not used upon motions to dismiss. 28 U.S.C.A. § 1919.

33 Cases that cite this headnote

[4] **Federal Civil Procedure**
Depositions

Although depositions taken merely for discovery are not taxable as costs, upon dismissal for want of jurisdiction, deposition is not obtained

unnecessarily even if not strictly essential to court's resolution of case where deposition is offered into evidence, is not frivolous, and is within bounds of vigorous advocacy. 28 U.S.C.A. § 1919.

12 Cases that cite this headnote

[5] **Federal Civil Procedure**
Taxation

Whether materials are necessarily obtained for use in case, for purpose of awarding costs, is question of fact to be determined by district court, although items proposed by winning parties as costs should always be given careful scrutiny.

12 Cases that cite this headnote

[6] **Federal Civil Procedure**
Amount, Rate and Items in General

Under statute permitting award of just costs upon dismissal of action for want of jurisdiction, reasonable necessity of particular materials is to be judged in light of facts known to parties at time expenses were incurred. 28 U.S.C.A. § 1919.

21 Cases that cite this headnote

[7] **Federal Civil Procedure**
Dismissal and Nonsuit

Award of expenses for transcripts, copying, and printing expenses as costs to defendant, upon dismissal of action for want of jurisdiction due to lack of diversity, was improper where state action based upon same claims was pending, and recovery of such costs could be sought in state court. 28 U.S.C.A. § 1919.

12 Cases that cite this headnote

Attorneys and Law Firms

***1337** T.J. Carney, Bradley, Campbell, Carney & Madsen, Golden, CO (Lee Turner, Great Bend, KS, with him on the brief), for Plaintiff-Appellant-Cross-Appellee, Michael Callicrate, dba Callicrate Cattle Company.

Lee M. Smithyman, Smithyman & Zakoura, Overland Park, KS (David J. Roberts of Smithyman & Zakoura, Overland Park, KS, and John J. Joslin, Kansas City, MO, with him on the brief), for Defendant-Appellee, Farmland Industries, Inc.

Brian W. Wood, Hampton, Royce, Engleman & Nelson, Salina, KS (Clarence L. King, Jr. of Hampton, Royce, Engleman & Nelson, Salina, KS, and Timothy B. Mustaine of Foulston & Siefkin, Wichita, KS, on the brief), for Defendants-Appellees-Cross-Appellants, Jim Thomas and The Co-Operative Union Mercantile Company.

Before KELLY, HOLLOWAY and HENRY, Circuit Judges.

Opinion

HOLLOWAY, Circuit Judge.

Plaintiff-Appellant-Cross-Appellee, Michael Callicrate, brought this action against defendants Farmland Industries, Inc., Jim Thomas, and The Co-Operative Union Mercantile Company (Co-Op) in the United States District Court for the District of Kansas, alleging diversity jurisdiction pursuant to 28 U.S.C. § 1332. Callicrate asserted claims of breach of contract, breach of warranty, ***1338** strict liability, fraud, and for punitive damages. Upon finding a lack of diversity between the parties, the district court dismissed the action without prejudice on defendants' motions for want of subject matter jurisdiction.[1]

Following its order of dismissal, the district court awarded costs in favor of all defendants, but imposed a stay of such award with respect to Defendants-Appellees-CrossAppellants Jim Thomas and The Co-Operative Union Mercantile Company.[2] On appeal, in No. 96-3075 Callicrate contends that the district court clearly erred by finding the costs proper for necessary depositions and documents and abused its discretion by imposing excessive costs. In No. 96-3100 Thomas' cross-appeal seeks reversal of the stay of the cost award in his favor. The Co-Operative in its cross-appeal in No. 96-3101 says that the district court correctly taxed costs but erred in staying execution of the order taxing costs.[3] We have jurisdiction by virtue of 28 U.S.C. § 1291.

I

Plaintiff Michael Callicrate brought this action in November of 1993 alleging various state-law claims arising out of a dispute involving the sale of protein feed supplement by defendant, The Co-Operative (Co-Op), to Callicrate. Callicrate based subject matter jurisdiction on diversity of citizenship under 28 U.S.C. § 1332. In his complaint, Callicrate stated that he was a resident of Wyoming, that defendant Farmland was believed to be a Kansas corporation with its principal place of business in Kansas City, Missouri, that defendant Thomas was believed to be a resident of Kansas, and that defendant Co-Op was a Kansas corporation with its principal place of business in Kansas. Supp.App. 1.

In January and February of 1995, Callicrate filed two separate motions for partial summary judgment against Co-Op and Thomas, to which these defendants eventually filed a response. All defendants additionally filed motions to dismiss for lack of subject matter jurisdiction in March of 1995, alleging that Callicrate was, in fact, a resident of Kansas. The depositions of ten individuals were cited or used by the parties in these jurisdictional motions and briefs and in Callicrate's motions for partial summary judgment.[4] In July of 1995, the district court granted defendants' motions to dismiss for want of subject matter jurisdiction, finding that Callicrate was a citizen of Kansas rather than Wyoming and concluding that complete diversity between the parties was therefore lacking. In its order of dismissal, the district court referenced five of the depositions submitted by the parties. Callicrate subsequently refiled his action in a Kansas state court in September of 1995 against Co-Op and Thomas, but not against Farmland.

Following the district court's order of dismissal, all defendants submitted a bill of costs and Callicrate filed objections to the requested costs. In January of 1996, the Clerk awarded Farmland $8,146 for copying expenses, Thomas $31,088.69 for deposition transcripts, copying and printing expenses, and Co-Op $9,735.93 for deposition transcripts and copying expenses. Callicrate subsequently moved to retax the costs, and the district court entered an order upholding the costs assessed by the Clerk. However, recognizing that some of the assessed costs may be reassessed in the state court action, the district court imposed a stay on the execution of the award of costs with respect to Co-Op and Thomas, pending disposition of the state court action.[5] The district court ***1339** further stated that if Callicrate should prevail in state court, or if the costs are waived by defendants, no costs will be due. The district court held, however, that if defendants prevail in state court or do not waive the costs in the event a settlement is entered, the costs awarded in the federal court will be due by Callicrate.

II

[1] [2] We must keep in mind the fact that in the instant case we are dealing with what are "just costs" under 28 U.S.C. § 1919, and not with costs allowed under § 1920 or Fed.R.Civ.P. 54(d). *See Edward W. Gillen Co. v. Hartford Underwriters Ins. Co.,* 166 F.R.D. 25, 27-28 (E.D.Wis.1996). Nevertheless the standards applied under § 1920 are helpful, we feel. *See Signorile v. Quaker Oats Co.,* 499 F.2d 142, 145 (7th Cir.1974).[6] The taxing of costs rests in the sound judicial discretion of the district court, *cf. U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988) (reviewing rulings on requests for costs sought under 28 U.S.C. § 1920), and we therefore review the district court's award of costs and its order imposing the stay of execution for an abuse of discretion. *See U.S. Industries,* 854 F.2d at 1245; *Jane L. v. Bangerter,* 61 F.3d 1505, 1509 (10th Cir.1995). "An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 669 F.2d 620, 623 (10th Cir.1982). Moreover, even if the court finds the costs sought were for materials or services necessarily obtained, the amount of the award requested must be reasonable. *U.S. Industries,* 854 F.2d at 1245. And though use at trial by counsel or the court demonstrates necessity, if materials or services are reasonably necessary for use in the case even though not used at trial, the court can find necessity and award the recovery of costs. *Id.* at 1246.

[3] The costs at issue here involve expenses covering the transcribing and/or copying of twenty depositions.[7] Callicrate argues that the defendants made no showing that the depositions were necessarily obtained for use in the case. Further, Callicrate maintains that the majority, if not all, of the depositions taken by defendants were purely investigatory in nature, and, as such, should not have been taxed as costs. In support of his argument that the depositions were not necessary for use in this case, Callicrate points out that only approximately 150 pages out of 5,860 pages of deposition transcripts were submitted by defendants. Moreover, although each defendant requested costs for the transcript copies of the eleven depositions taken by Callicrate, no portion of nine of these depositions

was ever submitted to the district court. Callicrate therefore argues that the award of costs was excessive, improper, and constituted an abuse of discretion.

[4] We disagree. The costs of taking and transcribing depositions reasonably necessary for litigation are generally awarded to the prevailing party under 28 U.S.C. § 1920. As noted earlier, when an action is dismissed by a district court, or a few other enumerated courts, for want of jurisdiction as was the case here, the payment of "just costs" may be ordered. 28 U.S.C. § 1919. Although ***1340** depositions taken merely for discovery are not taxable as costs, a deposition is not obtained unnecessarily even if not strictly essential to the court's resolution of the case where the deposition is offered into evidence, is not frivolous, and is within the bounds of vigorous advocacy. *Furr v. AT & T Technologies, Inc.,* 824 F.2d 1537, 1550 (10th Cir.1987).

[5] Whether materials are necessarily obtained for use in the case is question of fact to be determined by the district court. *U.S. Industries,* 854 F.2d at 1245. However, "items proposed by winning parties as costs should always be given careful scrutiny." *Id.* (quoting *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964)). "Necessarily obtained" does not mean that the materials obtained added to the convenience of the parties or made the task of the trial judge easier, and the "most direct evidence of 'necessity' is the actual use of materials obtained by counsel or by the court." *U.S. Industries* at 1245-46. However, if materials are reasonably necessary for use in the case although not used at trial, the court is nonetheless empowered to find necessity and award costs. *Id.*

[6] We have recognized that it is ordinarily best to judge reasonable necessity under § 1920 in light of the facts known to the parties at the time the expenses were incurred, *Merrick v. Northern Natural Gas Co.,* 911 F.2d 426, 434 (10th Cir.1990) (citing *Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1099 (5th Cir.1982)), and we feel that the same test as to timing for deciding necessity applies under § 1919. *Cf. Signorile,* 499 F.2d at 145.[8] We are aware that the realities of litigation occasionally dispense with the need of much of the discovery already taken by the parties when, for instance, a dispositive motion is granted by the trial court on purely jurisdictional grounds or on grounds other than the merits. At the time that the parties engage in discovery, however, they may not know whether such a motion will be granted or whether they will be forced to proceed to trial. Hence, caution and proper advocacy may make it incumbent on counsel to prepare for all contingencies which may arise during the course of litigation which include the possibility of trial.

It would therefore be inequitable to essentially penalize a party who happens to prevail on a dispositive motion by not awarding costs associated with that portion of discovery which had no bearing on the dispositive motion, but which appeared otherwise necessary at the time it was taken for proper preparation of the case. We will not, therefore, attempt to employ the benefit of hindsight in determining whether an otherwise taxable item was necessarily obtained for use in the case. Rather, we hold that such a determination must be made based on the particular facts and circumstances at the time the expense was incurred.[9]

In its Memorandum Order upholding the award of costs, the district court found that the costs assessed pertain to depositions and expenses which were necessary during the course of this litigation. Memorandum Order at 2. Although we would have preferred a more detailed explanation from the district court regarding its decision to allow the costs, *Tilton v. Capital Cities/ABC, Inc.,* 115 F.3d 1471, 1474 (10th Cir.1997), the record sufficiently indicates the district court's reasoning ***1341** on the costs. Callicrate makes much of the fact that ten of the twenty depositions were not used by the parties in connection with their motions to dismiss. However, it is clear from the record that nine of the ten depositions not cited or used in the dispositive motions were taken by Callicrate.[10] Thus, it certainly appears that the parties or the court cited and actually used at least a portion of all but one of the depositions which defendants initiated. Further, it was also reasonable for the defendants to request copies of the depositions initiated by Callicrate, especially in light of the fact that all of the individuals deposed by Callicrate were employees or representatives of one or more of the defendants.[11]

We are therefore satisfied that the trial court properly found that the depositions for which costs are requested appeared reasonably necessary for the preparation of, and use in, litigation at the time they were taken. As we have already pointed out, all but one of the depositions initiated by defendants were used to some extent by the parties or the court in connection with the pretrial dispositive motions filed by Callicrate and defendants. The fact that ten depositions were not used by the parties or the court in these pretrial matters does not alter our thinking on this issue. Nine of these unused depositions were taken by Callicrate, and the costs requested for these depositions stem from the fact that defendants incurred expenses to obtain copies of such depositions. Defendants' request for **costs associated with such copying** is appropriate given the fact that, **at the time the copies were made, it appeared reasonably necessary that such would be**

used either in preparation for litigation or in pretrial matters. This is especially true when considering the fact that these unused depositions, taken by Callicrate, were of persons employed by or representing the several defendants. There is no suggestion that defendants requested such copies in order to increase the costs of litigation or to place any burden on Callicrate.

The fortuitous result of dismissal for lack of jurisdiction should not alter the fact that the costs requested here relate to expenses that, when incurred, appeared reasonably necessary in order to adequately prepare defendants' case for trial and to provide adequate grounds for the filing of pretrial and potentially dispositive motions. Defendants would have been remiss to have merely taken, or requested copies of, depositions directed solely to the jurisdictional issue or to Callicrate's motions for partial summary judgment. Given the nature of federal litigation, it was incumbent on defendants to fully prepare their case on the merits, even if dismissal on jurisdictional grounds seemed likely.

Additionally, it is undisputed that the depositions were taken and the copies were made prior to the parties' submission of their dispositive motions and briefs, and certainly prior to the district court's dismissal of the case on jurisdictional grounds, at a time when the parties were otherwise preparing for trial in the event the motions were denied. The fact that much of the product of discovery was rendered unnecessary for use in the district court following the dismissal is immaterial.

***1342** The judge found that "the costs assessed pertain to depositions and expenses which were necessary during the course of this litigation; moreover, the assessment is full and fair, and is due from plaintiff." Memorandum Order at 2. Plaintiff Callicrate has not shown these findings to be clearly erroneous. For the foregoing reasons, we affirm the Memorandum Order with respect to its award of costs to defendant Farmland. The findings which we uphold are sufficient to support the award of $8,146 in costs for Farmland, and we feel that the allowance of them under § 1919 was "just." This is so particularly in light of the fact that there was, at the time of their allowance, no ongoing state court litigation between Callicrate and Farmland, which was not made a party in the state court suit. Due to these circumstances, Farmland could not recover any costs in the state court suit-those covering preparations on the jurisdictional issue or those dealing with the merits of the controversy between Callicrate and Farmland.

III

[7] We feel differently with respect to the award of costs of $9,735.93 in favor of the defendant Co-Op (Grinnell) since, when the costs ruling was made below, Callicrate's state court suit, in which Co-Op was made a party, had been commenced where the costs matter could be resolved. We turn now to our consideration of Callicrate's appeal challenging that cost award.

Subsequent to the July 31, 1995, dismissal of the federal court action below without prejudice due to lack of diversity jurisdiction, on September 11, 1995, plaintiff Callicrate refiled the action in the District Court of Ford County, Kansas. Memorandum Order at 1; Aplt.App., Section 1A at 550. That state court action asserted Callicrate's claims against all defendants except Farmland Industries. As explained above, we are upholding the cost award in favor of Farmland made by the federal district court. We are persuaded, however, that we should vacate the cost award of $9,735.93 in favor of Co-Op (Grinnell) because the controversy between Callicrate and Co-Op is in active litigation in the state court, and we are advised of no resolution of that phase of the controversy. As earlier stated, after argument before us on August 18, 1997, Callicrate and Thomas notified us of a settlement of their portion of the feed supplement controversy.

Since the merits of the controversy between Callicrate and Co-Op (Grinnell) is undecided, the determination below that Co-Op should recover costs incurred respecting the merits of the feed supplement controversy is speculative and premature. Recovery of costs for the depositions and expenses of Co-Op in meeting the merits of Callicrate's claims may be sought in the **state court** if Co-Op prevails there. *Edward W. Gillen Co. v. Hartford Underwriters Ins. Co.,* 166 F.R.D. at 28. Under Kansas law the prevailing party will be entitled to an award of its costs. *See* K.S.A. § 60-2002(a) (unless otherwise provided by statute or by order of the judge, costs shall be allowed to the party in whose favor judgment is rendered). The district judge in the instant case recognized the fact that if the plaintiff Callicrate prevails in the **state court** action, no costs will be due there in favor of Co-Op. On the basis of the same reasoning, we feel that the award of costs pertaining to preparation and discovery going to the merits of the feed supplement controversy between Callicrate and Co-Op (Grinnell) should not have been awarded by the judge below to Co-Op because their recovery by Co-Op would be improper under federal law, as it would be under Kansas law, if Callicrate prevails against Co-Op on the merits of his claims.

We, therefore, vacate the entire award of costs in favor of Co-Op (Grinnell) and remand that claim for costs to the federal district court. There the court should determine,

after any proceedings it deems necessary, the portion of costs properly recoverable by Co-Op that were directed to obtaining the dismissal of the action for lack of diversity jurisdiction. That portion of the costs the district judge on remand may award, in his discretion, under § 1919 to Co-Op. However, the district court is directed to dismiss, without prejudice, the claim for costs of preparations directed to meeting the merits of Callicrate's claims in the feed supplement controversy for which the state court action is ongoing.

***1343** Those costs of the parties for preparations on the merits of their controversy can be determined in the Kansas court on the basis of which party prevails in accord with Kansas law. The award of costs to be made there in the Kansas action may include those incurred before the dismissal of the federal court action below and further costs that are incurred before the dismissal of the federal court action which pertained to preparations for litigating the merits of the feed supplement controversy. That award in the Kansas court may, of course, include further costs that are incurred in the Kansas state court proceeding. All those costs may then be allowed by the Kansas court and taxed in accordance with the provisions of Kansas law.

This disposition will avoid the possibility of double or overlapping recovery of costs for preparations on the merits of the case by a speculative federal court costs award.

Our disposition made above vacating the costs award in favor of Co-Op (Grinnell) moots the cross-appeal of Co-Op in No. 96-3101 challenging the stay entered by the district judge of the enforcement of the costs award in favor of Co-Op. No. 96-3101 is accordingly **DISMISSED** as moot.

The costs award of $9,735.93 in favor of Co-Op (Grinnell) is **VACATED** and **REMANDED**. Insofar as that costs award is found on remand to pertain to discovery and preparations below respecting the merits of the feed supplement controversy, the claim as to that portion of the costs claim will be dismissed by the federal district judge, without prejudice. This disposition will permit the District Court of Ford County, Kansas, to consider which of such costs, if any, should be allowed to Co-Op (Grinnell) if it is the prevailing party under K.S.A. § 60-2002(a). Insofar as the costs award for Co-Op (Grinnell) is found below on remand to pertain to costs that were directed to obtaining the dismissal for lack of diversity jurisdiction, the judge in his discretion may award those costs to Co-Op (Grinnell).

In light of the settlement between plaintiff Callicrate and Thomas, of which we are advised, Callicrate's appeal in No. 96-3075 as to costs awarded to Thomas, and Thomas' cross-appeal in No. 96-3100 challenging the stay, are **DISMISSED** as moot.

IT IS SO ORDERED.

IV

Accordingly, we **AFFIRM** the award of costs made in the Memorandum Order of the district court in favor of Farmland Industries, Inc. in the amount of $8,146 and appealed by Callicrate in No. 96-3075.[12]

Parallel Citations

98 CJ C.A.R. 1520

Footnotes

1 The order of dismissal is not at issue on this appeal.

2 Defendant-appellee, Farmland Industries, Inc., was not named in the stay order and is therefore not a party to the cross-appeal.

3 Following oral argument, on August 18, 1997, Callicrate and Thomas filed a notice of settlement with this court. Thus, Callicrate's appeal of the award of costs in favor of Thomas as part of its appeal in No. 96-3075, and Thomas' cross-appeal of the stay in No. 96-3100, are moot and will be dismissed.

4 During discovery, depositions were taken of twenty individuals. Callicrate initiated eleven of the depositions, Thomas initiated eight, and Co-Op initiated only one deposition. Farmland took no depositions.

5 Since defendant, Farmland, is not a party to the state court action, and because the district court did not name Farmland in its order of stay, Callicrate is presumably immediately indebted to Farmland for the assessed costs awarded to Farmland, regardless of the

outcome of the state court action.

6 The *Signorile* opinion, 499 F.2d at 144, reviews the historical background to point out that before the enactment of the statutory antecedent of 28 U.S.C. § 1919 it was held that "in all cases where the cause is dismissed for want of jurisdiction, no costs are allowed." *McIver v. Wattles,* 9 Wheat. 650, 22 U.S. 650, 6 L.Ed. 182 (1824).

7 Callicrate took the depositions of eleven persons, all of whom were employees or representatives of the several defendants: Will Schaffer, Dennis Hague, Mike Sweat, Link Boyd, Keith Dehaan, Ed Morrison, Stan Stark, William Brown, Mel Quint, Larry Deines, and Jim Thomas. Aplt. Brief at 10; Aple. (Farmland) Brief at 2, 4, 6-7; Aple. Supp.App. at 10-13, 15-16, 20-21, 23-25. Farmland took no depositions. Aplt. Brief at 11; Aple. (Farmland) Brief at 2. Thomas took the depositions of eight persons: Mike Callicrate, Vicki Callicrate, Joe Hoffman, Jr., Jennifer Hoffman, Tim Burr, Lynn Shelby, Chris Heddins, and Allen Sippel. Aplt. Brief at 10-11; Aplt.App. at 532. The Co-Op only took the deposition of one person, Gerald Calnon. Aplt. Brief at 10; Aplt.App. at 532.

8 We are mindful that there is a fundamental distinction between awarding costs under § 1919, and under § 1920 and Fed.R.Civ.P. 54(d). While Rule 54(d)(1) provides that "costs ... *shall* be allowed as of course to the prevailing party unless the court otherwise directs ..." (emphasis added), § 1919 instead states that the court "*may* order the payment of just costs" (emphasis added) when a jurisdictional dismissal occurs. It has been noted that unlike costs awarded under Rule 54, costs awarded under § 1919 are not subject to a presumption that they shall be awarded to a prevailing party. *Edward W. Gillen Co.,* 166 F.R.D. at 27.

9 *See also Sales v. Marshall,* 873 F.2d 115, 120 (6th Cir.1989) (necessity is determined as of the time of taking, and the fact that a deposition is not actually used at trial is not controlling); *Templeman v. Chris Craft Corp.,* 770 F.2d 245, 249 (1st Cir.1985) (it is within the discretion of the district court to tax deposition costs if special circumstances warrant it, even though the depositions were not put in evidence or used at trial); *Fogleman v. ARAMCO,* 920 F.2d 278, 285-286 (5th Cir.1991) (if, at the time it was taken, a deposition could reasonably be expected to be used for trial preparation or trial use, rather than merely for discovery, it may be included in the costs; the district court is accorded great latitude in this determination).

10 In their motions to dismiss, defendants cited the depositions of six persons: Mike Callicrate, Vicki Callicrate, Gerald Calnon, Lynn Shelby, Jennifer Hoffman, and Joe Hoffman, Jr. Aple. Supp.App. at 27-48. Callicrate filed motions for partial summary judgment and cited the depositions of four persons: Mike Callicrate, Chris Heddins, Lynn Shelby, and Allen Sippel. Aple. Supp.App. at 49-61. In its response to Callicrate's motion, the Co-Op cited the depositions of three persons: Jim Thomas, Chris Heddins and Mike Callicrate, and in his response, Thomas cited the depositions of four persons: Mike Callicrate, Chris Heddins, Jim Thomas and Bill Brown. Aple. Supp.App. at 62-84. The trial court cited the depositions of five persons in its order dismissing the case: Mike Callicrate, Vicki Callicrate, Gerald Calnon, Joe Hoffman, Jr., and Jennifer Hoffman. Aplt.App. at 154-166.

This leaves ten depositions not cited by either the parties or the court: Will Schaffer, Mike Sweat, Keith Dehaan, Ed Morrison, Melvin Quint, Dennis Hague, Link Boyd, Tim Burr, Stan Stark, and Larry Deines. Aple. (Farmland) Brief at 6. Of these ten, nine of the depositions were taken by Callicrate, and the remaining deposition of Tim Burr was taken by Thomas. Aplt. Brief at 10-11. We have examined Burr's deposition and feel it was material to the claim of Callicrate for liability against defendants. *See* Supp.App. at 113-120.

11 *See* note 7.

12 Farmland was not mentioned in the stay order and the enforcement of the $8,146 cost award in Farmland's favor was not affected by the stay.

69 F.3d 456
United States Court of Appeals,
Tenth Circuit.

Dan **CANTRELL** and Larry Holt,
Plaintiff-Appellees,
v.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 2021,
Defendant-Appellant.

No. 93-6037. | Oct. 30, 1995.

After dismissal with prejudice of action of two union members against their union for allegedly harassing them and not adequately pursuing their grievances against their employer, union petitioned for costs as prevailing party. The United States District Court for the Western District of Oklahoma, Ralph G. Thompson, J., denied petition, and union appealed. The Court of Appeals, 53 **F.3d** 342, affirmed. On rehearing en banc, the Court of Appeals, Henry, Circuit Judge, held that district court had discretion to award costs to union as prevailing party when members voluntarily dismissed their case with prejudice before trial.

Reversed and remanded.

West Headnotes (4)

[1] **Federal Civil Procedure**
Order

Administrative closing order dismissing claims was **voluntary dismissal**. Fed.Rules Civ.Proc.Rule 41, 28 U.S.C.A.

2 Cases that cite this headnote

[2] **Federal Civil Procedure**
Dismissal and Nonsuit

In cases not involving settlement, when party **dismisses action with or without prejudice**, district court has discretion to award costs to prevailing party; overruling *Mobile Power Enterprises, Inc. v. Power Vac., Inc.*, 496 F.2d 1311. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

92 Cases that cite this headnote

[3] **Federal Civil Procedure**
Taxation

Presumption is created under Federal Rules of Civil Procedure that district court will award costs to prevailing party. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

75 Cases that cite this headnote

[4] **Federal Civil Procedure**
Taxation

District court must provide valid reason for not awarding costs to prevailing party. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

69 Cases that cite this headnote

Attorneys and Law Firms

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George J. McCaffrey (Loren Gibson with him on the briefs), Oklahoma City, Oklahoma, for defendant-appellant IBEW Local 2021.

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, and LUCERO, Circuit Judges.

Opinion

ON REHEARING EN BANC

HENRY, Circuit Judge.

We granted en banc review to consider the district court's application of the rule announced in *Mobile Power Enterprises, Inc. v. Power Vac., Inc.,* 496 F.2d 1311 (10th Cir.1974), and to clarify whether a defendant is a prevailing party under Fed.R.Civ.P. 54(d) when a plaintiff **voluntarily dismisses its case with prejudice prior to trial**. We overrule *Mobile Power* and hold that a defendant is a prevailing party under Rule 54 when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice.

I. BACKGROUND

Plaintiffs Dan **Cantrell** and Larry Holt filed an action against their union, the International Brotherhood of Electrical Workers (IBEW) in United States district court. Mr. ***457 Cantrell** and Mr. Holt alleged that IBEW had harassed them and failed to adequately pursue their grievances against their employer. IBEW filed a motion for summary judgment, arguing that Mr. **Cantrell** and Mr. Holt's claims were barred by the statute of limitations and otherwise not valid. The district court granted IBEW's summary judgment motion in part, dismissing most of Mr. **Cantrell** and Mr. Holt's claims. *See* ***Cantrell*** *v. International Brotherhood of Electrical Workers, Local 2021,* 860 F.Supp. 783, 788 (W.D.Okl.1991), *aff'd,* 32 **F.3d** 465 (10th Cir.1994). Shortly before the remaining issues were scheduled for trial, the parties notified the district court that they were conducting negotiations and expected to settle the matter. Upon hearing of the settlement negotiations, the district court issued an Administrative Closing Order. The order terminated the matter without prejudice and allowed either party to reopen the proceedings for good cause. However, the order also stated that if neither party reopened the matter within 30 days, the action would be dismissed with prejudice. Appellant's App. at 44.

The settlement negotiations failed. Instead of reopening the matter within 30 days and proceeding to trial on the remaining issues, however, Mr. **Cantrell** and Mr. Holt waited for the matter to be dismissed with prejudice pursuant to the administrative closing order and then appealed the earlier dismissal of charges to this court. *Id.* at 178; *see also* ***Cantrell*** *v. International Brotherhood of Electrical Workers, Local 2021,* 32 **F.3d** 465, 469 (10th Cir.1994) (affirming district court). IBEW, as the prevailing party, petitioned the district court for costs under Fed.R.Civ.P. 54(d). The district court denied the motion, properly reasoning that because Mr. **Cantrell** and Mr. Holt had dismissed their action with prejudice, IBEW was not a prevailing party under *Mobile Power Enterprises, Inc. v. Power Vac, Inc.,* 496 F.2d 1311, 1312 (10th Cir.1974). Appellant's App. at 195.

In *Mobile Power,* the plaintiff filed an action against two defendants. When the plaintiff "obtained a satisfactory offer of settlement" from one defendant, it sought dismissal with prejudice against both defendants. *Mobile Power,* 496 F.2d at 1312. After the district court dismissed the charges, the non-settling defendant declared itself the prevailing party and sought costs under Rule 54(d), which allows the prevailing party to recover costs "unless the court otherwise directs." The district court denied the motion, and the nonsettling defendant appealed to this court. We held that while a district court could award costs when a plaintiff dismissed its action *without prejudice,* it could not award costs when an action was dismissed *with prejudice.* The "[district] court lacks power to allow costs, barring exceptional circumstances, if the dismissal is with prejudice." *Id.*

[1] On appeal, IBEW urged a panel of this court to overrule *Mobile Power.* Although the panel noted that IBEW had made a strong argument that the court should reconsider *Mobile Power,* the panel affirmed the district court because it found *Mobile Power* applicable, and a panel cannot overrule this court's precedent. *United States v. Rockwell,* 984 F.2d 1112, 1117 (10th Cir.), *cert. denied,* 508 U.S. 966, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993). IBEW filed a petition for rehearing with suggestion for en banc consideration, arguing that *Mobile Power* was inconsistent with the majority of courts interpreting Rule 54(d)(1)[1].

II. DISCUSSION

Rule 54 provides that a prevailing party will normally recover costs. "Except when ***458** express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d).

Our rule in *Mobile Power* may encourage settlement to the extent that a plaintiff can dispose of a case without fear of being assessed costs when dismissing its action with prejudice. *See Colombrito v. Kelly,* 764 F.2d 122, 134 (2d Cir.1985) (citing *Mobile Power* and discussing an award of attorneys fees). However, the tension between Fed.R.Civ.P. 54(d)'s pronouncement that the prevailing party is entitled to costs as a matter of course and *Mobile Power* 's distinction between dismissals with and without prejudice has not escaped the critical attention of other

courts. The Fifth Circuit criticized *Mobile Power* in *Schwarz v. Folloder,* 767 F.2d 125 (5th Cir.1985), noting that nothing in Rule 54 explains or justifies *Mobile Power* 's distinction.

> In *Mobile Power Enters., Inc. v. Power Vac, Inc.,* 496 F.2d 1311 (10th Cir.1974), the Tenth Circuit stated that while a defendant can receive an award of costs following a dismissal *without* prejudice, he cannot receive an award of costs after a dismissal *with* prejudice. *Id.* at 1312. With all due respect to the court in *Mobile Power,* we are completely at a loss to explain this distinction,.... A dismissal with prejudice affords a defendant considerably more relief than a dismissal without prejudice. Therefore, we fail to see how the latter could make the defendant a prevailing party if the former does not. *See* 6 J. Moore, W. Taggart, & J. Wicker, supra ¶ 54.70[4], at 79 n. 15 (Supp.1984-1985 J. Lucas ed.) (criticizing *Mobile Power*).

Schwarz, 767 F.2d at 131 n. 8. The Fifth Circuit concluded that when a plaintiff dismisses a matter with prejudice, the defendant is the prevailing party and "receives all that he would have received had the case been completed." *Id.* at 129. Commentators have cited *Schwarz* with approval, observing that a dismissal with prejudice is a "complete adjudication and a bar to further action between the parties." 9 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2364, at 277 (2d ed. 1994).

After closely reviewing *Mobile Power,* we also believe that we may have misread *Smoot v. Fox,* 353 F.2d 830 (6th Cir.1965), *cert. denied,* 384 U.S. 909, 86 S.Ct. 1342, 16 L.Ed.2d 361 (1966), the case we cited to distinguish between dismissals with and without prejudice. Although *Mobile Power* interpreted *Smoot* to have established a principle regarding Rule 54(d) costs, *Smoot* actually concerned an award of "attorney's fees and expenses." *Smoot,* 353 F.2d at 833. In fact, in the same dispute, the Sixth Circuit had earlier held that a dismissal with prejudice "is a complete adjudication of the issues presented by the pleadings and is a bar to further action between the parties" and ordered the dismissing party to pay court costs. *Smoot v. Fox,* 340 F.2d 301, 303 (6th Cir.1964) (per curiam); *see also Smoot,* 353 F.2d at 831 (noting that the court had earlier "ordered the District Judge to dismiss the actions with prejudice on payment of all court costs by [the plaintiff]").

[2] In addition, we note that the restrictive rule in *Mobile Power* seems inconsistent with our cases holding that a party need not prevail on every issue to be considered a Rule 54(d) prevailing party. *Roberts v. Madigan,* 921 F.2d 1047, 1058 (10th Cir.1990), *cert. denied,* 505 U.S. 1218, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992); *Howell Petroleum Corp. v. Samson Resources Co.,* 903 F.2d 778, 783 (10th Cir.1990). In *Roberts,* we emphasized that a district court has broad discretion to award costs. *Roberts,* 921 F.2d at 1058 (citing 6 James W. Moore et. al., *Moore's Federal Practice* ¶ 54.70 [4] (2d ed. 1988)). We find this authority compelling and overrule *Mobile Power* to the extent that it distinguishes between **voluntary dismissals with and without prejudice**. Thus, in cases not involving a settlement, when a party dismisses an action with or without prejudice, the district court has discretion to award costs to the prevailing party under Rule 54(d).

[3] However, we note that the district court's discretion is not unlimited. Rule 54 and those cases interpreting it limit a district court's discretion in two ways. First, it is ***459** well established that Rule 54 creates a presumption that the district court will award costs to the prevailing party. *Serna v. Manzano,* 616 F.2d 1165, 1167 (10th Cir.1980); *see also In re San Juan Dupont Plaza Hotel Fire Litigation,* 994 F.2d 956, 962 (1st Cir.1993) ("the power to deny recovery of costs that are categorically eligible for taxation under Rule 54(d) ... operates in the long shadow of a background presumption favoring cost recovery for prevailing parties."); *Baez v. United States Dep't of Justice,* 684 F.2d 999, 1004 (D.C.Cir.1982) (en banc) (per curiam); 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane § 2668, at 201 (collecting cases and observing that a district court "is not likely to exercise its discretion to deny costs to the prevailing party in the absence of a persuasive reason for doing so.... The burden is on the ... [nonprevailing party] to overcome the presumption in favor of the prevailing party.").

[4] The second restraint on a district court's discretion is that it must provide a valid reason for not awarding costs to a prevailing party. *Serna,* 616 F.2d at 1167-68; *see also In re San Juan Dupont Plaza Hotel Fire Litigation,* 994 F.2d at 963; *Schwarz,* 767 F.2d at 131; *Baez,* 684 F.2d at 1004 and n. 28 (collecting cases).

We have discussed the circumstances in which a district court may properly exercise its discretion under Rule 54(d) to deny costs to a prevailing party. We have held that it is not an abuse of discretion for a district court to refuse to award costs to a party that was only partially successful.

Howell, 903 F.2d at 783. Other circuits have held that district courts did not abuse their discretion when they refused to award costs to prevailing parties who were obstructive and acted in bad faith during the course of the litigation. *E.g., Sheets v. Yamaha Motors Corp., U.S.A.,* 891 F.2d 533, 539 (5th Cir.1990); *McFarland v. Gregory,* 425 F.2d 443, 449 (2d Cir.1970). Courts have also held that it was not an abuse of discretion for district courts to deny costs when damages were only nominal, *Richmond v. Southwire Co.,* 980 F.2d 518, 520 (8th Cir.1992), or the nonprevailing party was indigent, *Burroughs v. Hills,* 741 F.2d 1525, 1542 (7th Cir.1984), *cert. denied,* 471 U.S. 1099, 105 S.Ct. 2321, 85 L.Ed.2d 840 (1985). The Sixth Circuit has similarly held that a district court may deny a motion for costs if the costs are unreasonably high or unnecessary, a prevailing party's recovery is insignificant, or the issues are close and difficult. *White & White, Inc. v. American Hosp. Supply Co.,* 786 F.2d 728, 730 (6th Cir.1986). *See also* 10 Charles A. Wright, Arthur B. Miller & Mary Kay Kane § 2668 (collecting cases holding that district courts did not abuse their discretion by denying costs, and cases holding that district courts did abuse their discretion by denying costs).[2]

III. CONCLUSION

The district court correctly read *Mobile Power* to hold that it had no discretion to award costs to IBEW when Mr. **Cantrell** and Mr. Holt dismissed their claims with prejudice. By partially overruling *Mobile Power,* we return discretion to the district court as Rule 54 requires. We express no opinion as to whether Mr. **Cantrell** and Mr. Holt's decision not to proceed to trial on the limited issues remaining after the district court's summary judgment order should prevent IBEW from recovering costs. It is up to the district court's discretion to determine whether saving judicial resources should be dispositive in this case. We therefore remand this matter to the district court to ***460** determine whether IBEW should be awarded costs.

Parallel Citations

131 Lab.Cas. P 11,435, 33 Fed.R.Serv.3d 13

Footnotes

1 IBEW also argues that the dismissal pursuant to the administrative closing order in this case is not a voluntary dismissal, that *Mobile Power* is limited to **voluntary dismissals**, and that *Mobile Power* should therefore not apply to this case. Although perhaps administrative closing orders do not fit neatly into the conceptual scheme of Fed.R.Civ.P. 41, we have held that a plaintiff whose case is dismissed by an administrative closing order should be considered to have voluntarily dismissed its claim pursuant to Fed.R.Civ.P. 41(a)(2). *Morris v. City of Hobart,* 39 **F.3d** 1105, 1110 (10th Cir.1994), *cert. denied,* 514 U.S. 1109, 115 S.Ct. 1960, 131 L.Ed.2d 852 (1995). In *Morris,* we emphasized that the plaintiff had notice that an action would be dismissed with prejudice pursuant to an administrative closing order, but did not notify the court of settlement difficulties. *Id.* at 1109-10. We conclude that the order dismissing Mr. **Cantrell** and Mr. Holt's claims constituted a voluntary dismissal under *Morris.*

2 Limited to its facts, *Mobile Power* provides another example of a district court's proper use of discretion in the settlement context. We held that the district court did not abuse its discretion when it denied costs to the nonsettling defendant when the settling defendant had made the plaintiff whole. *Mobile Power,* 496 F.2d at 1312. Professor Moore's treatise continues to cite *Mobile Power* with approval for the proposition that a district court may properly deny costs to the prevailing party under Rule 54 in the settlement context. 6 *Moore's Federal Practice* ¶ 54.70[4] at 54-327 to 54-328 & n. 19 (1995) (citing *Mobile Power*). Thus, while we reject *Mobile Power* 's comprehensive rule against awarding costs when cases are dismissed with prejudice, we note that our emphasis upon district court discretion would allow a district court to deny costs under the facts of *Mobile Power.* Where an action will be dismissed with prejudice pursuant to a settlement agreement, we encourage the settling parties to include language in the settlement agreement specifically dealing with costs.

2001 WL 123871
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

CENTENNIAL MANAGEMENT SERVICES, INC., Plaintiff/Counterclaim Defendant,
v.
AXA RE VIE, Axa Re Life Insurance Company and Axa Reassurance, Defendants/Third–Party Plaintiffs,
v.
CENTENNIAL FINANCIAL GROUP, INC., William E. Vogel, Thomas L. Enstrom, Jardine Group Services Corporation and James A. Irwin, Third–Party Defendants.

No. 97–2509–JWL. | Feb. 5, 2001.

Opinion

MEMORANDUM & ORDER

LUNGSTRUM.

***1** Plaintiff Centennial Management Services, Inc. ("CMS"), the sole shareholder of Centennial Life Insurance Company ("CLIC"), a liquidated insurer, filed this action against CLIC's reinsurers, Axa Re Vie, Axa Reassurance, S.A. and Axa Re Life Insurance Company (collectively "Axa") alleging fraudulent misrepresentation and breach of contract in connection with various reinsurance agreements that Axa entered into with CLIC. In essence, CMS claims that Axa forced CLIC into liquidation. Axa, in turn, filed counterclaims against CMS for fraudulent misrepresentation, fraudulent omission and breach of contract in connection with the same reinsurance agreements. Axa, as a third-party plaintiff, filed these same claims against Centennial Financial Group (CFG), William Vogel and Thomas Enstrom.[1] According to Axa, CMS, CFG, Mr. Vogel and Mr. Enstrom failed to disclose to Axa material information about CLIC's financial condition during the negotiations for the reinsurance agreements. Axa also filed a third-party complaint against the reinsurance brokers, James Irwin and Jardine Group Services Corporation, alleging fraudulent misrepresentation, fraudulent omission, negligent misrepresentation and breach of contract based on the brokers' purported failure to disclose material information about CLIC to Axa during contract negotiations. Finally, the reinsurance brokers filed a counterclaim against Axa alleging that Axa breached the brokerage agreement between the parties by failing to pay certain commissions to the brokers.

The case was tried to a jury over the course of four weeks. At the conclusion of the trial, the jury found in favor of CMS on its fraud claim against Axa, but awarded no damages to CMS.[2] Similarly, the jury found in favor of Axa on its fraud claims against CMS, CFG, Mr. Vogel and Mr. Enstrom, but awarded no damages to Axa.[3] The jury found in favor of Jardine and Mr. Irwin on all of Axa's claims and found in favor of Jardine on its breach of contract claim against Axa. On this claim, the jury awarded Jardine $162,363.00—the total amount of damages sought by Jardine. The court entered judgment on the jury's verdict.

The judgment provides that Axa shall recover its costs of action against CFG.[4] In its bill of costs, Axa requests the clerk to tax as costs more than $200,000 against CFG pursuant to Federal Rule of Civil Procedure 54(d). *See* Fed.R.Civ.P. 54(d) (**costs "shall be awarded as of course to the prevailing party unless the court otherwise directs"**). This matter is presently before the court on CFG's motion to disallow costs and objections to Axa's bill of costs (doc. # 506). According to CFG, Axa is not entitled to recover costs under Rule 54(d) because Axa is not a "prevailing party" for purposes of Rule 54(d). In the alternative, CFG has raised several specific objections to certain items in Axa's bill of costs. As set forth in more detail below, the court agrees with CFG that Axa is not a prevailing party for purposes of Rule 54(d). CFG's motion is granted.

***2** It is well settled that a plaintiff, to qualify as a prevailing party, must obtain at least some relief on the merits of its claim. *See Farrar v. Hobby,* 506 U.S. 103, 111 (1992).[5] In other words, the plaintiff must obtain an enforceable judgment against the defendant from whom fees (or, in this case, costs) are sought, or comparable relief through a consent decree or settlement. *Id.* (citations omitted). Moreover, whatever relief the plaintiff obtains must directly benefit the plaintiff at the time of the judgment or settlement. *Id.* Otherwise, the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Id.* (quoting *Rhodes v. Stewart,* 488 U.S. 1, 4 (1988)). In essence, a plaintiff "prevails" when actual relief on the merits of her claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Id.* at 112.

In *Lintz v. American General Finance, Inc.,* 76 F.Supp.2d 1200 (D.Kan.1999), this court applied the Supreme

Court's decision in *Farrar* to analogous facts. In *Lintz,* the jury found that plaintiff Lintz was subjected to sexual harassment and also found that the defendants were liable to plaintiff for the harassing conduct. *See id.* at 1208. The jury, however, awarded plaintiff Lintz no damages. *See id.* Nonetheless, plaintiff Lintz maintained that she was entitled to prevailing party status and an award of attorneys' fees under Title VII. *See id.* Relying on the Supreme Court's decision in *Farrar,* this court held that plaintiff Lintz's failure to obtain any relief whatsoever rendered her ineligible for prevailing party status and ineligible for an award of attorneys' fees. *See id.* at 1210; *accord Caruthers v. Proctor & Gamble Mfg. Co.,* 177 F.R.D. 667, 669 (D.Kan.) (plaintiff's "complete failure to obtain relief ... renders his 'victory' a technical and insignificant achievement, ineligible for an attorney fee award"), *aff'd,* 161 F.3d 17 (10th Cir.1998).

Axa has not attempted to distinguish the facts here from the facts before this court in *Lintz.* Rather, Axa simply maintains that it is a prevailing party despite its failure to obtain a monetary award. In support of its argument, Axa relies on three District of Kansas cases—*Sharon v. Yellow Freight System, Inc.,* 985 F.Supp. 1274 (D.Kan.1997); *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417 (D.Kan.1995); and *Burk v. Unified School Dist. No. 329,* 116 F.R.D. 16 (D.Kan.1987). The facts of each of those cases, however, are easily distinguished from the facts presented here. In *Sharon,* for example, Judge Vratil awarded costs to the plaintiff, despite the fact that the defendant obtained summary judgment on some of the plaintiff's claims, because the plaintiff prevailed on his claims at trial and received a money judgment of $47,916.66. *See Sharon,* 985 F.Supp. at 1276. Axa's reliance on this case, then, is clearly misplaced. In *Manildra,* Judge Saffels awarded costs to the plaintiff, despite the fact that the plaintiff did not ultimately obtain a money judgment, because the plaintiff "successfully challenged several of [the defendant's] patents winning a declaration of invalidity" and essentially secured the ability to "use its production process free from risk of infringement and without the necessity of obtaining a license."

***3** *See Manildra,* 878 F.Supp. at 1424–25. As Judge Saffels emphasized, the plaintiff, in addition to seeking monetary damages, specifically sought and won a declaration that the defendant's patents were invalid and not infringed by the plaintiff. *See id.* The jury's verdict "stripped [the defendant] of a competitive edge vis-a-vis [the plaintiff] with the result that [the parties] play on a more level field." *See id.* at 1425. In other words, the relief won by the plaintiff in *Manildra* materially altered the legal relationship between the parties in a way that directly benefitted the plaintiff, *see Farrar,* 506 U.S. at 112, and the plaintiff was thus entitled to prevailing party status. Here, of course, there has been no alteration in the relationship between Axa and CFG. Axa received no monetary damages—the only form of relief it requested. Finally, in *Burk,* Judge O'Connor awarded costs to the plaintiff despite the fact that the jury awarded the plaintiff only $1.00 on his claim. *See Burk,* 116 F.R.D. at 17. In that respect, Judge O'Connor's decision anticipated the Supreme Court's ruling in *Farrar*—that an award of nominal damages renders the plaintiff a prevailing party. *See Farrar,* 506 U.S. at 113. Thus, the distinction between an award of nominal damages and an award of no damages is significant. *See Lintz,* 76 F.Supp.2d at 1210 (and cases cited therein).

Axa also relies on a case from the Southern District of Indiana, *Mary M. v. North Lawrence Community Sch. Corp.,* 951 F.Supp. 820 (S.D.Ind.), *rev'd on other grounds,* 131 F.3d 1220 (7th Cir.1997). In *Mary M.,* the district court, with virtually no analysis, held that the plaintiff was a prevailing party entitled to costs despite the fact that "plaintiff's victory on liability came with an award of zero damages." *See Mary M.,* 951 F.Supp. at 828. Perhaps recognizing that the case is not binding on this court, Axa nonetheless urges the court to apply the *Mary M.* holding because the *Mary M.* court, according to Axa, applied Tenth Circuit case law in reaching its decision. Axa's argument is unavailing.

Although the *Mary M.* court cited to the Tenth Circuit's opinion in *American Insurance Co. v. El Paso Pipe & Supply Co.,* 978 F.2d 1185 (10th Cir.1992), the Circuit's holding in that case simply does not support the conclusions of the *Mary M.* court. In *El Paso Pipe & Supply Co.,* the plaintiff brought suit against two defendants, GE and EPPSCO, for breach of contract and breach of warranties. *See* 978 F.2d at 1187. Although the jury determined that both defendants breached the relevant contract and warranties, the jury found that the plaintiff's damages of approximately $34,000 resulted from only GE's breach. *See id.* In other words, EPPSCO was not found liable for any of the plaintiff's damages. *See id.* On appeal, EPPSCO argued that it was the prevailing party because it was not found liable for any of the plaintiff's damages. *See id.* at 1192.[6] The Circuit rejected this argument, essentially concluding that the plaintiff was entitled to nominal damages from EPPSCO. Echoing the decision of the district court, the Tenth Circuit recognized that "although [the plaintiff] did not seek or receive nominal damages against EPPSCO, nominal damages are recoverable against a party who breaches a contract even where no actual damages can be proved." *See id.* at 1192–93. The Circuit then affirmed the district court's

conclusion that a party who recovers only nominal damages will be considered the prevailing party. *See id.* at 1192. Thus, the Circuit rejected EPPSCO's argument that it was the prevailing party. In other words, the Tenth Circuit's opinion in *El Paso Pipe & Supply Co.* simply anticipates one of the rules subsequently set forth by the Supreme Court in *Farrar*—that a party who receives nominal damages will generally be considered a prevailing party. Here, Axa neither obtained nor was entitled to nominal damages on its fraud claim against CFG. *See Kronos, Inc. v. AVX Corp.,* 612 N.E.2d 289, 292 (N.Y.1993) (although nominal damages are always available in breach of contract actions, they are allowed in tort only if necessary to protect an "important technical right" where no actual injury can be shown). For this reason, the Tenth Circuit's decision is not applicable here. Moreover, the *Mary M.* court's reliance on *El Paso Pipe & Supply Co.* is misplaced. In short, then, the court is simply not persuaded by the decision in *Mary M.*

***4** For all of the foregoing reasons, the court reaffirms its decision in *Lintz* that a party who fails to obtain any relief whatsoever is not a prevailing party. There has been no alteration in the relationship between Axa and CFG. Standing alone, any moral satisfaction Axa may have received from its technical victory cannot bestow prevailing party status. *See Farrar,* 506 U.S. at 112. In sum, Axa's failure to obtain any relief renders it ineligible for "prevailing party" status and ineligible for an award of costs. CFG's motion is granted.

IT IS THEREFORE ORDERED BY THE COURT THAT CFG's motion to disallow costs (doc. # 506) is granted and Axa shall not be entitled to recover its costs of action.

IT IS SO ORDERED.

Footnotes

1 CFG and Mr. Enstrom own CMS; Mr. Vogel owns CFG.

2 The jury found in favor of Axa on CMS's breach of contract claim.

3 Specifically, the jury found in favor of Axa on its fraudulent misrepresentation claim against CMS; its fraudulent misrepresentation and fraudulent omission claims against CFG; its fraudulent omission claim against William Vogel; and its fraudulent misrepresentation claim against Thomas Enstrom.

4 This award, however, is inconsistent with the rest of the judgment and appears to be an oversight by the clerk of the court. The judgment, for example, is silent as to costs with respect to Axa's fraudulent omission claim against William Vogel and with respect to Axa's fraudulent misrepresentation claim against Thomas Enstrom.

5 Although the Supreme Court's decision in *Farrar* addressed prevailing party status in the context of a party seeking attorneys' fee under 42 U.S.C. § 1988, Axa makes no argument here that a different standard should be applied in the context of a party seeking costs under Rule 54(d). Indeed, in her concurring opinion in *Farrar,* Justice O'Connor suggests that the standard for determining whether a party is a "prevailing party" would be the same under § 1988 as it would be under Rule 54(d). *See Farrar,* 506 U.S. at 120 ("Just as a Pyrrhic victor would be denied costs under Rule 54(d), so too should it be denied fees under § 1988."). Moreover, those circuits that have addressed the issue have held that the test for prevailing party status under Rule 54(d) is the same as the test for prevailing party status under § 1988. *See Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 926 (3rd Cir.1985); *Studiengesellschaft Kohle v. Eastman Kodak Co.,* 713 F.2d 128, 132 (5th Cir.1983).

6 The district court had awarded the plaintiff costs and fees pursuant to a written provision in the contract executed between the parties. *See El Paso Pipe & Supply Co.,* 978 F.2d at 1187–88. Under that provision, the seller (in this case, the defendants) was responsible for paying reasonable legal fees and costs "if the Seller [was] not the prevailing party." *See id.* at 1192. Thus, EPPSCO argued that it was the prevailing party in an effort to avoid the consequences of the fee provision in the contract. *See id.* at 1192–93.

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United States District Court,
D. Kansas.

COHEN–ESREY REAL ESTATE SERVICES, INC., Plaintiff,
v.
TWIN CITY FIRE INSURANCE COMPANY and Hartford Fire Insurance Company, Defendants.

Civil Action No. 08–2527–KHV. | Aug. 12, 2011.

Attorneys and Law Firms

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Abbigale A. Northcraft, Philip V. Sumner, W. James Foland, Foland, Wickens, Eisfelder, Roper & Hofer, P.C, Kansas City, MO, for Defendants.

Opinion

MEMORANDUM AND ORDER

KATHRYN H. VRATIL, District Judge.

***1** On June 9, 2010, after a two-day trial, a jury returned a verdict in favor of Hartford Fire Insurance Company on plaintiff's claim that Hartford breached a duty to pay plaintiff's insurance claim. The Court had previously granted summary judgment to co-defendant Twin City Fire Insurance Company, and plaintiff appealed that judgment to the Tenth Circuit Court of Appeals (No. 10–3159) on July 8, 2010. *See* Docs. # 109, 147. On March 22, 2011, the Tenth Circuit affirmed. *See* Doc. # 156. This matter is now before the Court on the *Bill Of Costs* (Doc. # 151) which defendants filed on July 26, 2010, the *Bill Of Costs* (Doc. # 155) which defendant Twin City filed on March 22, 2011, and *Defendant Twin City Fire Insurance Company's Motion For Leave To File "Memorandum In Support Of Twin City's Bill Of Costs" And Memorandum In Support* (Doc. # 160) filed April 19, 2011.

Rule 54(d), Fed.R.Civ.P., authorizes taxation of costs and 28 U.S.C. § 1920 governs the subject of costs.[1] As the prevailing parties, defendants have the burden to establish the amount of compensable costs and expenses to which they are entitled, and to prove that the expenses sought to be taxed fall within the categories of allowable costs. *See Allison v. Bank One–Denver,* 289 F.3d 1223, 1248–49 (10th Cir.2002); *Dutton v. Johnson Cnty. Bd. Of Cnty. Comm'rs,* 884 F.Supp. 431, 436 (D.Kan.1995). Where the requested costs are authorized under Section 1920, a presumption arises that costs will be awarded. *See Treaster v. HealthSouth Corp.,* 505 F.Supp.2d 898, 901 (D.Kan.2007); *Rodriguez v. Whiting Farms, Inc.,* 360 F.3d 1180, 1190 (10th Cir.2004). Once defendants have shown that particular costs are authorized by statute, plaintiff bears the burden to overcome the presumption that the costs should be taxed. *Rodriguez,* 360 F.3d at 1190. Finally, the Court has no discretion to award costs which are not specifically set forth in Section 1920. *Crawford Fitting Co. v. J .T. Gibbons, Inc.,* 482 U.S. 437, 441–42, (1987); *Sorbo v. United Parcel* ***Serv****.*, 432 F.3d 1169, 1179 (10th Cir.2005).

I. Bill of Costs by Defendants dated July 26, 2010

After trial, defendants filed a Bill of Costs in the amount of $9,419.55. *See* Doc. # 151. Plaintiff objected to $7,995.25 of that amount.[2] *See* Doc. # 153. Plaintiff did not object to $40.00 in costs to **serve** one subpoena on Brenda Phillips, $629.75 in deposition transcript fees for Brenda Phillips, $71.90 in witness fees for Brenda Phillips and $682.65 in travel costs for Lana M. Glovach, for a total of $1,424.30. Defendants then amended their request by $1,473.35 to $7,946.20.[3] *See* Doc. # 154. The Court addresses the remaining disputed costs as follows.

A. *Service of Subpoena on Brenda Phillips*

Defendants seek $120.00 in costs incurred **serving** three subpoenas on Brenda Phillips to appear for her deposition.[4] The Court may tax "[f]ees of the clerk and marshal." 28 U.S.C. § 1920(1). Although defendants did not pay these fees to the marshal, service fees to private process servers are generally taxable up to the amount that would have been incurred if the U.S. Marshal's office had effected service. *See Burton v. R.J. Reynolds Tobacco Co.,* 395 F.Supp.2d 1065, 1078 (D.Kan.2005). Plaintiff argues that it should be taxed only $40.00—the cost of service of one subpoena by the U.S. Marshal—because defendants have not justified **serving Phillips three times**. Defendants respond that (1) Phillips asked three times to reschedule her deposition because she was recovering from surgery and defendants felt obligated under Rule 45(c)(1), Fed.R.Civ.P., to accommodate her requests;[5] (2) they did not control the rescheduling; and (3) if Phillips had failed to appear for her deposition without defendants having subpoenaed her, plaintiff would have sought costs for preparing and appearing for her deposition. The Court

finds that under the circumstances, defendants were justified in **serving** Phillips three times and therefore taxes $120.00 in costs.

B. *Fees for Deposition Transcripts*

***2** Defendants seek $1,878.50 in fees for deposition transcripts.[6] The Court may tax "fees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Absent extraordinary circumstances, the costs of taking and transcribing depositions **reasonably necessary for litigation** are generally awarded to the prevailing party. *Callicrate v. Farmland Indus., Inc.,* 139 F.3d 1336, 1339 (10th Cir.1998). The depositions need not be "strictly essential to the court's resolution of the case." *Id.* at 1340. Necessity in this context means a showing that the materials were used in the case and **served** a purpose beyond merely making the task of counsel and the trial judge easier. *Seyler v. Burlington N. Santa Fe Corp.,* No. 99–2342–KHV, 2006 **WL** 3772312, at *2 (D.Kan. Dec. 20, 2006) (citing *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988)). **Depositions which were purely investigatory in nature are not taxable**, but deposition expenses may be taxed if the **deposition reasonably appeared necessary at the time it was taken.** *Kansas Teachers Credit Union v.. Mut. Guar. Corp.,* 982 F.Supp. 1445, 1447 (D.Kan.1997).

1. Use at trial

Though it concedes that courts grant costs for transcripts used in **summary judgment** motions, plaintiff objects that $735.00 for the deposition of Ryan Huffman should be disallowed because it was not used at trial. *See e.g., Burton,* 395 F.Supp.2d at 1080. As defendants note, they both used Huffman's deposition to support their respective summary judgment motions. Further, though defendants designated portions of his deposition testimony to be read if he did not appear, Huffman was deposed as a potential trial witness who ended up appearing live. The Court therefore overrules plaintiff's objection on this ground.

2. Shipping, archiving, jurat preparation and exhibits

Plaintiff argues that it should not be taxed $40.00 for shipping, archiving and jurat preparation costs related to the depositions of Huffman ($20.00) and Phillips ($20.00). Plaintiff also argues that it should not be taxed $30.00 for "related exhibits" for the deposition of Phillips. Defendants do not respond to plaintiff's argument on this point. The Court sustains it and declines to tax $70.00 for shipping, archiving, and jurat preparation costs and exhibits relating to the depositions of Huffman and Phillips. *See id.* (disallowing charges for minuscripts, keyword indices, ASCII disks, **exhibits**, and **delivery charges**) (collecting cases).

3. Transcript copies

Plaintiff contends that it should be taxed only $479.00 or approximately half of the $959.50 fees charged for original transcripts and copies of the depositions of Huffman ($595.00) and Phillips ($364.50) because the copies were not necessarily obtained for use in the case. *See Birch v. Schnuck Markets, Inc.,* No. 95–2370–GLR, 1998 **WL** 13336, at *4 (D.Kan. Jan. 5, 1998) (declining to tax fees for both original and copy of deposition transcript). Defendants' counsel responds by attaching correspondence from the court reporter. The correspondence explains that the invoiced amount reflects the charge for the original transcript. Missouri **state law requires that with every original transcript, court reporters must supply a copy at no charge.** The Court therefore overrules plaintiff's objection.

4. Non-itemized deposition transcripts

***3** Plaintiff objects to the costs for the depositions of Mike Kosednar and Adam Van Zandt because the invoices for those depositions are not itemized and the invoiced amounts likely contain nontaxable expenses.[7] In response, defendants provide revised itemized invoices which break out the deposition expenses. Of the $110.95 charged for the Van Zandt deposition, the Court taxes $101.50 (the amount of the transcript) and disallows $9.45 (the cost of exhibit copies). Of the $95.40 charged for the Kosednar deposition, the Court taxes $73.50 (the amount of the transcript) and disallows $11.90 (the cost of exhibit copies) and $10.00 (the cost of shipping and handling). *See Burton,* 395 F.Supp.2d at 1080.

5. DVD copies of videotaped depositions

Plaintiff argues that it should not be taxed $75.15 in costs for the **videotaped deposition** of Adam Van Zandt because it was prepared for the convenience of defendants.[8] As defendants note, however, the costs associated with videotaping a deposition are taxable under 28 U.S.C. § 1920(2). *Tilton v. Capital Cities/ABC, Inc.,* 115 F.3d 1471, 1477 (10th Cir.1997). Defendants showed the videotaped deposition of Van Zandt at trial, and the Court finds that defendants **necessarily obtained the videotaped deposition for use in the case**. *See Nelson,*

2007 WL 1651958, at *2 (taxing costs of videotaped deposition used at trial); *Seyler,* 2006 WL 3772312, at *3 (same). After disallowing $5.15 in mailing/handling costs, the Court taxes $70.00 for the videotaped deposition of Adam Van Zandt.

C. *Costs for Exemplification and Copies*

Defendants seek $3,865.62 in exemplification and copy fees. "Fees for exemplification and copies of papers necessarily obtained for use in the case" are taxable under Section 1920(4). See, e.g., *Treaster,* 505 F.Supp.2d at 904–905. Copies are "necessarily obtained" within the meaning of Section 1920(4) when procurement was **reasonably necessary to the prevailing party's preparation of the case.** *Id.* Materials are not "necessarily obtained" when they merely add to the convenience of the parties. *Callicrate,* 139 F.3d at 1340. The party seeking copy costs bears the burden to establish that copy costs satisfy this standard. *Id.*

1. Internal copy costs

Plaintiff objects to all of defendants' $1,875.80 internal copy costs because they do not provide an itemized accounting. While defendants need not furnish a description of copy costs so detailed as to make it impossible to economically recover them, absent an itemized statement of copying costs, the Court has discretion to reduce counsel's stated costs based on its own experience and knowledge of the case. *Seyler,* 2006 WL 3772312 at *5 (collecting cases). In response, defendants attach several pages of what appear to be redacted billing statements which contain various entries for copies made at a 10¢ rate per copy. The entries are dated and some include generic descriptors such as "deposition" and "documents." In their response brief, defendants' counsel indicates that the copies include 787 pages of Rule 26 disclosures and responses to document production requests which they produced to plaintiff, copies used to prepare witnesses for trial and during depositions and working copies of Rule 26 disclosures and discovery documents.

***4** As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery because the producing party possesses the original documents and such papers are not "obtained" for purposes of § 1920(4). *Owens v. Sprint/United Mgmt.,* No. 03–2371–JWL, 2005 WL 147419, at *4 (D.Kan. Jan. 21, 2005). Given defendants' description of the copied documents as well as the Court's knowledge of the extent of discovery, the number of pages filed by defendants, the pretrial order, motions to dismiss, motions for summary judgment and other filings, the Court finds that roughly 75 per cent of counsel's internal copying costs constituted disallowed discovery production costs or were for counsel's convenience and not reasonably necessary to present the case. Accordingly, the Court awards $468.95 for internal copy costs.

2. Outside copy costs

Plaintiff similarly objects to all of defendants' $1,989.82 external copy costs as prepared for counsel's convenience and unnecessary. Plaintiff specifically objects to $242.38 in costs for oversized trial exhibits and trial boards as disallowed under Section 1920(4). *Battenfield of Am. Holding Co. v. Baird, Kurtz & Dobson,* 196 F.R.D. 613, 616–17 (D.Kan.2000). Defendants respond as follows: (1) an invoice for $369.20 represents the cost incurred to print documents which plaintiff produced electronically in response to defendants' document requests; (2) an invoice for $853.40 represents expenses incurred to scan documents plaintiff made available for defendants to inspect at plaintiff's office; (3) the invoice for $524.84 represents costs for copies of defendants' trial exhibits and (4) the $242.38 **oversize trial exhibits (invoiced separately at $96.96 and $145.53) are authorized exemplifications** under Section 1920(4).

Regarding the $369.20 in printing expenses, defendants do not adequately explain why it was necessary for them to print hard copies of all 4,284 documents produced electronically by plaintiff. Thus, the Court finds that roughly 50 per cent of these printing expenses were incurred for counsel's convenience and were not reasonably necessary to present the case. Accordingly the Court awards $184.60 in printing expenses.

Regarding the $853.40 in scanning expenses, defendants do not adequately explain whether or how these 4,660 pages were **reasonably necessary to their case**. Absent more information, the Court cannot find that these expenses were incurred for anything more than the convenience of counsel, to enable counsel to review documents at a location of their choosing rather than at plaintiff's office. *See, e.g. Odessa Ford, LLC v. T.E.N. Investments, Inc.,* No. 07–2161–KHV, 2009 WL 1631850, at *5 (D. Kan. June 10, 2009). Accordingly, the Court disallows the entire $853.40 scanning expense.

Regarding the $524.84 in copy costs for trial exhibits and copies, defendants do not provide any information (such as the number of pages in each exhibit set) from which the Court can conclude that $524.84 is the appropriate amount to assess plaintiff for the copies. *See Owens,* 2005 WL 147419 at *4. Defendants state that they prepared copies of

trial exhibits, which were used at trial, as well as copies for plaintiff and for the Court. It appears from the invoice that the vendor prepared 8 sets of copies of 406 documents, and the Court is satisfied that these copies were necessarily obtained for use in the case. Thus, it will tax the cost of plaintiff's trial exhibits in the amount of $524.84.

***5** Regarding the $242.38 for oversized trial exhibits and trial boards, the case defendants cite directly contradicts their position. *See Manildra Mill. Corp. v. Ogilvie Mills, Inc.,* 875 F.Supp. 1417, 1418 (D.Kan.1995) (exemplification costs for demonstrative exhibits such as **enlargements** and transparencies disallowed as unnecessary and because litigants did not obtain prior authorization to incur expense); see also *Treaster,* 505 F.Supp.2d at 905 (disallowing costs for blowing up and mounting exhibits where courtroom equipped with Elmo system). Defendants did not obtain prior authorization to incur expenses for enlarged trial exhibits, and do not explain why such enlargements were necessary to their case. Thus, the Court disallows the $242.38 in costs for oversized trial exhibits and trial boards.

D. *Other Costs*

Defendants also seek to tax $2,000.18 in various "other costs," to which plaintiff objects.[9]

1. Mediation fee

Defendants seek $468.75 in mediation fees. Plaintiff correctly objects that mediation fees are not taxable under 28 U.S.C. § 1920. *See Bell v. Turner Recreation Comm'n,* No. 09–2097–JWL, 2010 **WL** 126189, at *9 (D.Kan.2010) (mediation fees and costs not covered by Section 1920) (collecting cases); *see also Seyler,* 2006 **WL** 3772312, at *2 (plaintiff concedes mediation fees not taxable); *Aerotech Resources, Inc. v. Dodson Aviation, Inc.,* 237 F.R.D. 659, 666 (D. Kan.2005 (same); *State of Kan. ex rel. Stephan v. Deffenbaugh Indus., Inc.,* 154 F.R.D. 269, 270 (D.Kan.1994) (mediator not expert and costs not taxable as such under § 1920(6); *but see Univ. of Kan. v. Sinks,* No. 06–2341–JAR, 2009 **WL** 3191707, at * 16 (D.Kan. Sept. 28, 2009). Further, the Court lacks discretion to tax costs which are not specifically set forth in Section 1920. *Crawford Fitting Co,* 482 U.S. at 441–42; *Sorbo,* 432 F.3d at 1179. The Court thus declines to tax defendants' portion of the mediator's fees.

2. Deposition travel costs

Defendants seek $1,531.43 in deposition travel costs for Adam Van Zandt ($370.93) and trial travel costs for Lana Glovach ($1,160.50).[10] With regard to Van Zandt, plaintiff objects to the full amount because defendants' share of this cost arose pursuant to a discovery order and is thus not taxable. *See Battenfield,* 196 F.R.D. at 618–19, *Phillips USA, Inc. v. Allflex USA, Inc.,* No. 94–2012–JWL, 1996 **WL** 568814, at * (D.Kan. Sept. 4, 1996). Plaintiff's obligation to pay half of the deposition expenses arises from the discovery order, and is separate and distinct from its obligation to pay costs under Rule 54 and Section 1920. *Id.* The Court therefore declines to tax the deposition travel costs for Adam Van Zandt.

With regard to Glovach, plaintiff objects to a portion of Glovach's travel expenses.[11] Under Section 1920(3), a prevailing party may recover expenses associated with witness travel to and from trial, including a subsistence allowance if the witness must stay overnight. *Sheldon v. Vermonty,* 107 Fed. Appx. 828, 836 (10th Cir.2004); see 28 U.S.C. § 1821(a), (c)(1), (d)(1).[12]

***6** Plaintiff first objects that it should only pay for a portion of Glovach's $646.80 roundtrip airline ticket from Hartford, Connecticut to Kansas City, Missouri because the flight, which departed June 6, 2010 and returned June 8, 2010, could have been booked at a lower fare. In support of this argument, plaintiff attaches what appears to be an example of a fare search between Hartford, CT and Kansas City, MO departing August 25, 2010 and returning August 30, 2010 at a rate of $277.00. Plaintiff's argument is misplaced. Section 1821(c)(1) requires a witness who appears at trial to travel using a common carrier at the most economical rate reasonably available. *Id.* The fare provided by plaintiff's counsel—for a flight of a different duration more than two months after Glovach's actual travel—has no relationship to the "most economical rate reasonably available" for travel from Hartford to Kansas City between June 6 and June 8, 2010. Without more evidence of the rates which were available on Glovach's travel dates, the Court overrules plaintiff's objection and taxes the full $646.80 **cost of her airfare.**

Plaintiff also objects that plaintiff's **subsistence charges exceed the maximum per diem allowance** for the Kansas City area and argues that it should not be taxed the overage. Under 28 U.S.C. 1821(d), the subsistence allowance for a witness should not exceed the maximum per diem allowance prescribed for official travel by federal employees. The applicable government subsistence per diem at the time of trial was $107.00 plus tax for lodging and $61.00 for meals and incidentals. Glovach's hotel expense report indicates charges of $322.26 for two nights lodging. The room rate is listed at $139.00—$32.00 more than the allowable per diem. The Court in its discretion

disallows $64.00 and awards $258.26 in lodging expenses.

Glovach's meal expenses are as follows: $59.74 on June 6, 2010; $69.36 on June 7, 2010, and $36.88 on June 8, 2010. Plaintiff exceeded the per diem rate by $8.36 on June 7. The Court therefore disallows that amount and awards $157.62 for meal expenses.

E. Summary of Costs Awarded

Category	*Original Request*	*Withdrawn/Disallowed*	*Amoun t Awarded*
Summons & Subpoena	$373.11	$253.11	$120.00
Transcripts	$2,109.98	$337.98	$1,772.00
Witnesses	$71.90	$0.00	$71.90
Exemplification	$3,865.62	$2,687.23	$1,178.39
Other Costs	$2,998.94	$1,910.80	$1,088.14
Total	$9,419.55	$5,189.12	**$4,230.43**

II. Bill of Costs by Twin City dated March 22, 2011

On March 22, 2011, Twin City filed a second Bill of Costs in the amount of $1,429.86. *See* Doc. # 155. Plaintiff objected, arguing that all costs should be disallowed because Twin City did not file a memorandum in support of its costs as required by D. Kan. Rule 54.1(a)(2) and did not make a reasonable effort to confer with plaintiff as required by D. Kan. Rule 54. 1(a)(2)(D). In the alternative, plaintiff argued that $1,251.36 of the requested costs should be disallowed. Twin City then asked the Court for leave to file its memorandum out of time. *See* Doc. # 60.

***7** In its motion, Twin City notes that on March 17, 2011—five days before it filed its Bill of Costs—D. Kan. 54. 1(a)(2)(D) was amended to require a memorandum in support of a Bill of Costs. At the time Twin City filed its motion, Lexis Nexis (the online research service which Twin City counsel used) did not reflect the rule change. Twin City argues defendants will not be unduly prejudiced if Twin City is granted leave to file a memorandum in support, which it attaches to its motion.

Plaintiff professes that ordinarily it would not oppose a motion for leave, but that Twin City's justifications for seeking leave warrant opposition. Plaintiff then scolds Twin City for not checking all legal research sources before filing its Bill of Costs and suggests that Twin City counsel lies to the Court when she represents that she primarily uses Lexis to conduct legal research. It also argues prejudice, i.e. that it incurred unnecessary expenses responding to the Bill of Costs because it lacked the memorandum in support. Plaintiff's arguments are unprofessional and without merit. The Court sustains *Defendant Twin City Fire Insurance Company's Motion For Leave To File "Memorandum In Support Of Twin City's Bill Of Costs" And Memorandum In Support* (Doc. # 160) filed April 19, 2011, and proceeds to analyze the Bill of Costs filed March 22, 2011.[13]

A. *Travel Costs*

Twin City seeks $1,206.36 in deposition travel costs for Timothy Marlin ($698.59) and Kenneth Greenwald ($507.77). Plaintiff correctly objects, arguing that these deposition costs arose pursuant to a discovery order (Doc. # 75). *See Battenfield,* 196 F.R.D. at 618–619. Again, plaintiff's obligation to pay half of the deposition expenses is governed by a discovery order and is separate and distinct from its obligation to pay costs under Rule 54 and Section 1920. Thus, while noting plaintiff's continuing obligation to abide by the **Court's prior order**, the Court sustains plaintiff's objection.

B. *Shipping and Handling Costs*

Twin City seeks $223.50 in fees for deposition transcripts of Timothy Marlin ($128.10) and Kenneth Greenwald ($60.40) and DVD copies of Kenneth Greenwald's deposition ($35.00). Plaintiff objects to the $10.00 shipping and handling charge for Greenwald's deposition. As noted above, shipping and handling charges are disallowed. *Burton,* 395 F.Supp.2d at 1080. The Court therefore sustains this objection and declines to tax the $10.00 shipping and handling charge.

Plaintiff objects to the $35.00 charge for the DVD of Greenwald's deposition. As the Court noted above, however, costs associated with videotaping a deposition are taxable under 28 U.S.C. § 1920(2). *Tilton,* 115 F.3d at 1477. Greenwald was a potential trial witness for Twin City who was not called because Twin City prevailed on summary judgment. The Court therefore overrules plaintiff's objection and taxes $35.00.

C. *Summary of Costs Awarded*

Category	*Original Request*	*Withdrawn/Disallowed*	*Amoun t Awarded*
Transcripts	$223.50	$10.00	$213.50
Other Costs	$1,206.36	$1,206.36	$0
Total	$1,429.86	$1,216.36	**$213.50**

***8 IT IS THEREFORE ORDERED THAT** *Defendant Twin City Fire Insurance Company's Motion For Leave To File "Memorandum In Support Of Twin City's Bill Of Costs" And Memorandum In Support* (Doc. # 160) filed April 19, 2011 be and hereby is sustained. With respect to the *Bill of Costs* (Doc. # 151) filed July 26, 2010 and the *Bill of Costs* (Doc. # 155) filed March 22, 2011, the Clerk is hereby directed to tax costs as follows:

Bill of Costs (Doc. # 151) filed July 26, 2010:

Summons & Subpoena	$120.00
Transcripts	$1,772.00
Witnesses	$71.90

Exemplification	$1,178.39
Other Costs	$1,088.14
Total	**$4,230.43**

AND

Bill of Costs (Doc. # 155) filed March 22, 2011:

Transcripts	$213.50
Total	**$213.50**

Footnotes

1 Rule 54(d)(1), Fed.R.Civ.P., states in relevant part that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."
28 U.S.C. § 1920 states in relevant part 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 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.

2 The summary table in plaintiff's brief, which reflects a sum of $7,876.32 in objections, contains mathematical errors. Also, the text of plaintiff's brief indicates an objection to $118.13 in costs for DVD copies of video transcripts, but plaintiff's summary table does not reflect this objection.

3 In the amended request, defendants noted that they intended to re-submit the withdrawn costs relating to certain Twin City witnesses if Twin City prevailed on appeal.

4 Defendants originally sought $373.11 in subpoena and service costs associated with use of a special process server **to serve Brenda Phillips on three separate occasions.** After plaintiff objected, defendants amended their request to $120.00 which reflects the $40.00 rate which the U.S. Marshal in the Southern District of Illinois charged and eliminates incidental charges.

5 Rule 45(c)(1), Fed.R.Civ.P., states in relevant part as follows: "A party or attorney responsible for issuing and **serving** a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena."

6 Defendants originally sought $2,109.98 in deposition transcript fees but in response to plaintiff's objections, withdrew $231.48 of costs associated with two Twin City witnesses: deposition transcript fees of $128.10 for Timothy Marlin and $60.40 for Kenneth Greenwald, and videotape fees of $42.98 for Kenneth Greenwald. Plaintiff's revised request for $1,888.50 after the $231.48 deduction contains a mathematical error and should be $1,878.50 ($2,109.98–$231.48 = $1878.50).

7 As noted, defendants withdrew their request for fees for the deposition transcripts of Timothy Marlin ($128.10) and Kenneth Greenwald ($60.40).

8 As noted, defendants withdrew their request for the DVD transcription costs for the deposition of Kenneth Greenwald in the amount of $42.98.

9 Defendants originally sought $2,998.94 in "other costs," but in response to plaintiff's objections, withdrew $998.76 in travel fees for Twin City witnesses: $698.59 for Timothy Marlin and $300.17 for Kenneth Greenwald.

10 As noted, defendants withdrew their request for deposition travel costs for Timothy Marlin ($698.59) and Kenneth Greenwald ($300.17).

11 Plaintiff does not object to $25.46 in airport parking fees, which the Court awards.

12 The taxation of witness travel expenses beyond the 100–mile limit imposed by Rule 45(e) is a matter within the Court's discretion. *Owens,* 2005 **WL** 147419, at *2 n. 1.

13 Plaintiff also complains that counsel for Twin City did not make any effort to confer with plaintiff's counsel to resolve disputes, as required by the amended rule. As noted, at the time Twin City filed its Bill of Costs, it was not aware of additional requirements under the rule and given that it filed its Bill of Costs only five days after the amendment went into effect, the Court finds nothing more than excusable neglect. Moreover, in the memorandum which the Court has granted Twin City leave to file, counsel notes that on April 14 and 18, 2011, she called and emailed plaintiff's counsel to confer about costs, and was advised by plaintiff's counsel that it was "too late" since plaintiff's objections to the Bill of Costs had already been filed.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

STEVEN D. COMPTON,

Plaintiff,

v.

SUBARU OF AMERICA, INC. and FUJI HEAVY INDUSTRIES, LTD.,

Defendants.

CIVIL ACTION

No. 90-1088-MLB

4

MEMORANDUM AND ORDER

Before the court are the following:

1. Defendants' motion to retax costs and supporting memorandum (Docs. 177 and 178); and

2. Plaintiff's opposition (Doc. 179).

The court also has reviewed plaintiff's initial motion and memorandum for costs (Docs. 167-69) and the clerk's bill of costs (Doc. 176).

Applicable Law

The standards generally applicable to taxation of costs and objections thereto are set forth in this court's orders in Griffith v. Mt. Carmel Medical Center, 157 F.R.D. 499 (1994), FDIC v. Grant Thornton, No. 86-1531, slip op. at 4-5 (D. Kan. Sept. 7, 1994) and Wayman v. Amoco, No. 91-1451, slip op. at 2-3 (D. Kan. Jan. 29, 1997). The parties do not dispute the general standards so they will not be set forth. However, there is one aspect of defendants' objections which requires discussion.

Taxing of Travel Expenses - Allowed (12.2)
Daily Transcripts - [illegible] - Not Prior Court Ordered (12.5)
Purchase, Transportation & Storage of Exhibit Vehicle - Allowed (12.7)
Rental Video Duplicating - [illegible] - Allowed (12.5)

An element present in most of defendants' objections to costs claimed under 28 U.S.C. § 1920(4), fees for exemplification and copies of papers necessarily obtained for use in the case, is plaintiff's failure to obtain leave of court prior to incurring the expenses for which costs are sought. Defendants cite Judge Saffels' opinion in Green Constr. v. Kansas Power & Light Co., 153 F.R.D. 670, 683 (D. Kan. 1994) wherein he observed:

> The term "exemplification" in 28 U.S.C. 1920(4) has been quite broadly defined by the courts to include a variety of demonstrative evidence, including models, charts, photographs, illustrations, and similar graphic aids. Bartell, 101 F.R.D. at 584-85. However, such costs are generally denied in the absence of prior court approval unless the court is persuaded that the demonstrative evidence was essential to the prevailing party's case. Id. at 585. This is the rule followed in the Tenth Circuit. See Euler v. Waller, 295 F.2d at 767 . . . . In this district, we have held that while not an absolute prerequisite, it is advisable to obtain authorization from the court prior to trial before incurring large expenses for such materials if counsel expects to have them taxed as costs. See Miller v. City of Mission, Kansas, 516 F. Supp. 1333, 1339-40 (D. Kan. 1981). Further, the expense of items that merely illustrate expert testimony or other evidence adduced at trial are normally not taxable. Id. Green did not obtain prior approval from this court for the purpose of taxing the costs of such enlargements, and does not assert that the enlargements were for any purpose other than illustrating other evidence before the jury. These claimed expenses will therefore be disallowed.

The Euler case cited by Judge Saffels has been modified in the recent Tenth Circuit decision in Tilton v. Capital Cities/ABC, Inc., 115 F.3d 1471, 1476 (June 18, 1997). The court stated:

> With respect to the costs of the trial exhibits, Tilton argues that a prevailing party may not recover costs for the preparation of trial exhibits absent advance court approval. In Euler v. Waller, 295 F.2d 765 (10th Cir. 1961), we addressed this same argument. In Euler, the district court awarded the plaintiff costs for the preparation of a map that the plaintiff had used at

trial. Reversing the award, we reasoned:

> No provision is made by the statute for the taxation of any such item as costs. The cases are not in harmony on the question of whether costs may be allowed for such items as models, wall charts, maps, and photographs. In our opinion when costs are sought for items not listed in § 1920 the procedure to be followed is an application to the court in advance of trial for an approving order. This allows the exercise of judicial discretion and at the same time conforms with the holding in Ex parte Peterson, 253 U.S. 300, 315, 40 S.Ct. 543, 548, 64 L.Ed. 919, which recognized the inclusion in taxable costs of "expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury." In the case now before us there was no advance approval. The cost of the map is disallowed.

Id. at 767; see also Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 335 (5th Cir.) ("Absent pretrial approval of the exhibits ..., a party may not later request taxation of the production costs to its opponent."), cert. denied, ___ U.S. ____, 116 S.Ct. 173, 133 L.Ed.2d 113 (1995).

Three years after our decision in Euler, the Supreme Court decided Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964). In Farmer, the Court concluded that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." Id. at 235, 85 S.Ct. at 416. **We think this language is inconsistent with Euler to the extent that Euler prohibits a district court from taxing costs for trial exhibits absent pre- trial approval. In accordance with Farmer, we reject a bright-line rule and instead examine whether the circumstances in a particular case justify an award of costs for trial exhibits.** See also U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1248 (10th Cir.1988) (affirming the district court's refusal to tax the cost of a daily transcript but noting that "if the issues in th[e] case were so complex as to justify overlooking the lack of pretrial approval, a court could have used its discretion to award the cost"); Cleverock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979) ("The awarding of costs for preparation of exhibits is committed to the discretion of the trial

court."); Mikel v. Kerr, 499 F.2d 1178, 1182-83 (10th Cir.1974) (affirming the taxation of the costs associated with preparing a trial exhibit without discussing whether the district court approved the exhibit prior to trial). The district court concluded that the circumstances in this case justified the taxation of the trial exhibit costs. We find nothing in the record to suggest that the district court abused its discretion in taxing these costs.

(Emphasis added).

Under this new standard, the fact that plaintiff did not seek prior approval for the various items now claimed as costs is not determinative.[1] Rather, when considering costs allowed by § 1920(4), infra, the court must examine the circumstances of this particular case in order to determine whether an award of costs is appropriate.

At the outset, it is appropriate for the court to restate its opinion that this case was extremely well presented by counsel for both sides. Lead counsel for plaintiff and defendants, Messrs. Johnson and Hite, are nationally recognized for their skill as trial lawyers and that skill was displayed both before and during the trial. There was much at stake in the trial. Plaintiff suffered devastating injuries in an automobile accident, allegedly because of various defects in the automobile. While the nature and extent of plaintiff's injuries were not seriously disputed, it was nevertheless necessary for plaintiff to present the evidence

[1]This is not to say that the presence or absence of prior approval cannot be considered. The court believes the better practice is for counsel to seek pre-approval so that both the court and opposing counsel will have an opportunity to consider the expenses before they are incurred. This practice will save both counsels' and the court's time when costs are claimed and/or disputed.

pertaining thereto in a clearly understandable form.

On the other hand, the issues surrounding whether the vehicle was defective and whether the defects caused plaintiff's injuries were hotly disputed. There was a substantial amount of demonstrative evidence, including an exemplar vehicle and sophisticated graphic reconstruction of the vehicle's "roof crush," which undoubtedly was helpful and persuasive to the jury. Counsel for both sides made use of each other's exhibits in direct and cross examination. Given the issues and the counsel involved in the case, it is very difficult for the court to second guess Mr. Johnson's decision that certain demonstrative evidence was essential to plaintiff's case. The court would say the same if defendants had won. In other words, the court would find it very hard to question Mr. Hite's judgment that certain demonstrative evidence was essential to his clients' case. This having been said, however, the court believes it still must consider whether exhibits claimed to be essential were more than merely illustrative of expert testimony or other evidence adduced at trial, Green, supra, at 683, as well as the reasonableness of the expenses claimed as costs.

Agreed Disallowance of Costs

Plaintiff has agreed to disallowance of transcript costs ($180) and enlargement costs ($170.40) (Doc. 179 at 2 and 8).

28 U.S.C. § 1920(2)

Defendants object to costs associated with daily copy transcripts of various trial witnesses. They rely upon U.S.

Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1248 (10th Cir. 1988) (in the absence of pre-trial approval, district court has discretion to award daily copy costs provided the transcripts proved invaluable to both counsel and the court). Plaintiff responds that while he did not obtain prior approval for daily copy, he needed the transcripts to respond to defendants' challenges to his evidence, for closing argument at the end of a lengthy trial and to respond to defendants' motion for judgment as a matter of law. Noticeably absent, however, is any suggestion that the transcripts were obtained for or utilized by the court.

This court has allowed costs for daily copy, even in the absence of prior approval. FDIC v. Grant Thornton, supra, slip op. at 6-8. FDIC v. Grant Thornton was a jury trial which lasted three months. This case lasted twelve days. While the facts of this case were at times technical, they were nothing compared to the detail and complexity of the facts in FDIC v. Thornton. Indeed, the facts in that case were so complex and the testimony so extensive that both sides ordered daily copy.

While daily transcripts of certain witnesses' trial testimony may have been useful to counsel for plaintiff, they were not useful to the court or, to any degree recalled by the court, to defendants. Accordingly, daily copy costs ($2,291) will be disallowed.

28 U.S.C. § 1920(4)

Defendant objects to costs associated with the purchase, transportation and storage of the exemplar vehicle and

transportation of the accident vehicle. Defendants rely on Bee v. Greaves, 910 F.2d 686, 690 (10th Cir. 1990). Bee v. Greaves does not address taxability of expenses pertaining to exemplar vehicles and the court assumes defendants cite it merely for the general proposition that a district court has no discretion to award items as costs which are not set out in 28 U.S.C. § 1920. Plaintiff cites no authority but correctly states that the accident and exemplar vehicles were used as exhibits during the trial by both plaintiff and defendants. It also appears that defendants initially shared in these costs (Doc. 167 at 7-8). There can be no question that both vehicles were essential to the case. An exemplar vehicle can be compared to a model. The court allows the costs associated with the purchase ($2,125), storage ($1,492.50) and transportation ($345) of the accident and exemplar vehicles.

Defendants object to the costs associated with audiovisual depictions of the vehicles. Plaintiff responds that the costs objected to actually pertain to the rental of a television and VCR used at trial. Plaintiff states that defendants already have paid half the cost. The court finds that the television and VCR were extensively used during the trial and were very helpful, it not actually essential, to effective presentation of both sides' cases. Accordingly, the fees associated with the equipment, Kent Audiovisual ($508.23) and K.C. Audiovisual ($1,573.50) are allowed.

Defendants object to the costs associated with the preparation of photographic enlargements of the accident scene, accident vehicle and the computer image roof crush. Once again, these

exhibits related to the central issue of the trial and were essential to the jury and to the court in understanding the evidence. Accordingly, the court allows the following costs: Mechanical System and Analysis, Inc. ($2,938.67) and Reproduction Systems, Inc. ($738.04 and $137.79).

Defendants object to the costs of enlargements of SAE papers utilized by witness Larry Bihlmeyer. The court finds these were not necessary and the cost ($200) is disallowed.

Defendants object to $3,000 charged by a photographer for taking and reproducing twenty-five photographs of the accident and exemplar vehicles plus some extra copies. Plaintiff contends that the fees were "not unusual for a professional photographer's services" and that professional lighting was required to accurately illustrate the things depicted in the photographs. Plaintiff also points out that the photographs were used at trial by both sides. Defendants contend that the charges are unreasonable. The court agrees and finds this to be a good example of a practical reason to obtain prior approval for expenses. The court cannot imagine how a photographer who does not boast the reputation of an Alfred Eisenstaedt or an Ansel Adams can justify charging $3,000 for twenty-five photographs of a car. In any event, the court has allowed costs for enlarged photographs of the vehicle. Accordingly, this cost item is disallowed.

Defendants object to the costs to prepare enlargements of anatomical illustrations. The court finds that the illustrations were somewhat necessary and helpful to the jury's understanding of

plaintiff's injuries. However, since his injuries were not really in dispute, the court declines to find the entire cost (Medical Legal Resources Group, Inc. $3,207.90) to be reasonable and allows only $1,000.

All other costs taxed by the clerk are approved.

IT IS SO ORDERED.

Dated this 3rd day of August 1997, at Wichita, Kansas.

Monti Belot

MONTI L. BELOT
United States District Judge

RULE 54.1 TAXATION AND PAYMENT OF COSTS

(a) Procedure for Taxation.

(1) *Form and Deadline.* The party entitled to recover costs must file a bill of costs on a form provided by the clerk (availableat the clerk's office or on the court's web site under the Formssection) within 30 days after:

(A) the expiration of time allowed for appeal of afinal judgment or decree; or

(B) receipt by the clerk of an order terminating theaction on appeal.

(2) ***Memorandum Required.*** The party seeking costs must file a memorandum in support of its costs with the bill of costs. The memorandum must:

(A) clearly and concisely itemize and describe the costs (the clerk may disallow costs for failure to itemize and verify costs);

(B) set forth the statutory and factual basis for there imbursement of those costs under 28 U.S.C. § 1920;

(C) reference and include copies of relevant invoices, receipts, and disbursement instruments in support of the requested costs; and

(D) state that the party has made a reasonable effort, in a conference with the opposing counsel or pro se party, to resolve disputes regarding costs.

(3) *Waiver.* The failure of a prevailing party to timely file a bill of costs constitutes a waiver of taxable costs.

(4) *Stipulation.* If the parties resolve costs, the party seeking costs must file a stipulation setting forth the amount of costs agreed upon within 14 days after the conference with the opposing counsel or pro se party.

(b) Objections to Bill of Costs.

(1) *Response Memorandum.* Within 14 days from the date the bill was filed, a party who objects to any item in a bill of costsmust file a memorandum setting forth such objections with supporting documentation.

(2) *Reply Memorandum.* Within 7 days from the date the response memorandum was filed, the moving party may file a reply memorandum.

(3) *Clerk's Action.* When objections are filed, the clerk will consider the objections and any reply, and will tax costs subject to review by the court. If no timely objections are filed, the clerk may tax costs as claimed in the bill.

(c) Judicial Review. Pursuant to Fed. R. Civ. P. 54(d), the court may review the clerk's action when a party files and serves amotion for review within 7 days of the date the clerk taxes costs.

(d) To Whom Payable. All costs taxed are payable directly to the party entitled thereto - not to the clerk or court - except in the following cases:

(1) where the court orders otherwise;

(2) in criminal cases;

(3) in suits for civil penalties for violations of criminal statutes; and

(4) in government cases not handled by the Department of Justice.

* * *

2005 WL 1799247
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

DODSON INTERNATIONAL **PARTS**, INC., Plaintiff,
v.
Phillip **ALTENDORF**, Jeffrey **Altendorf**, Circle H L.L.C., Resources Unlimited, Inc., Richard Moorhead, Mansfield Heliflight, Inc., and Eric Chase, Defendants.

No. **00**–**4134**–**SAC**. | June 29, **2005**.

Attorneys and Law Firms

Donald G. Scott, R. Pete Smith, McDowell, Rice, Smith & Gaar, Kansas City, MO, for Plaintiff.

Arthur E. Palmer, Goodell, Stratton, Edmonds & Palmer, Topeka, KS, Gary L Franklin, Miller, Eggleston & Cramer, Ltd., Burlington, VT, for Defendants.

Opinion

MEMORANDUM AND ORDER

CROW, Senior J.

***1** The case comes before the court on the plaintiff's motion to strike and objection to allowance of (Dk.142) the bills of costs filed by the defendants Mansfield Heliflight, Inc. and Eric Chase (Dk.141). The plaintiff contends the defendants untimely filed their bill of costs nine days after the period in D. Kan. Rule 54.1 expired. The plaintiff alternatively challenges $145.90 of the requested costs for expenses associated with computer transcripts and scanned exhibits as not allowable under 28 U.S.C. § 1920. The defendants respond conceding their bill of costs is untimely but arguing for its consideration because their delay was slight in comparison to the lengthy history of this case and did not prejudice the plaintiff and because the plaintiff made a good faith effort to submit a reasonable and timely bill of costs. (Dk.143).

Final judgment was entered on February 2, **2005**, and the thirty-day period under 28 U.S.C. § 2107(a) for appealing this final judgment expired on March 4, **2005**. The defendants then had thirty days to file their bill of costs in compliance with D. Kan. Rule 54.1:

> (a) Procedure for Taxation. The party entitled to recover costs shall file a bill of costs on a form provided by the clerk within 30 days (a) after the expiration of time allowed for appeal of a final judgment or decree, or (b) after receipt by the clerk of an order terminating the action on appeal. The clerk's action may be reviewed by the court if a motion to retax the costs is filed within five days after taxation by the clerk. The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

Having delayed until April 13, **2005**, to file their bill of costs, the defendants now must concede their filing is untimely. As has been observed by the Tenth Circuit, local rules that establish time requirements for the filing of bills of costs serve important concerns for finality in litigation. *Woods Constr. Co. Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 891 (10th Cir.1964). That the history of the instant case has been atypically long does not make the finality concerns any less important, but arguably more critical.

The defendants have not filed a formal motion for extension of time pursuant to D. Kan. Rule 6.1(a) nor cited the excusable neglect standard stated therein. The defendants, however, ask the court to accept their untimely filing and offer some reasons that resemble the considerations relevant in an excusable neglect inquiry. In applying D. Kan. Rule 6.1(a), federal courts have borrowed the meaning of "excusable neglect" articulated by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), in particular the following four relevant factors: "(1) the danger of prejudice to the nonmoving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Secure Technologies Intern. v. Block Spam Now, L.L.C.,* 2004 **WL** 2005787, at *2 (D.Kan.2004); ***see*** *O'Shea v. Yellow Technology Services, Inc.,* 208 F.R.D. 634, 635–36 (D.Kan.2002); *Walls v. International Paper Co.,* 2000 **WL** 360115, at *5 (D.Kan.2000). "Control over the circumstances of the delay is 'a very important factor-perhaps the most important single factor-in determining whether neglect is

excusable." ' *Secure Technologies Intern.,* 2004 WL 2005787 at *2 (quoting *City of Chanute, Kan. v. Williams Natural Gas Co.,* 31 F.3d 1041, 1046 (10th Cir.1994), *cert. denied,* 513 U.S. 1191, 115 S.Ct. 1254, 131 L.Ed.2d 135 (1995)).

2** The delay of nine days is relatively brief in the context of this case. Even so, it was quite reasonable for both the plaintiff and **the court to assume the case was closed when the time for filing the bill of costs expired**. While this assumption may have had little impact on the judicial process, the court will not presume to know what the plaintiff may have done in reliance on the same. Thus, the first two factors only slightly favor the defendants. The third factor weighs heavily against the defendants, as they have not articulated any reasons for their delay nor indicated whether the reasons were within their control. The court has no grounds for questioning the defendants' stated good faith in pursuing their bill of costs. There being no explanation or reasons given for the delay, the court is without any factual basis for finding excusable neglect on the defendants' **part** to justify extending the deadline for their filing of the bill of costs. By the terms of D. Kan. Rule 54.1, the court concludes that the defendants waived their claim for costs by not timely filing their bill of costs. ***See *O'Shea,* 208 F.R.D. at 636; *cf. Stanford v. Burlington Motor Carriers,* 74 F.Supp.2d 1155, 1156 (M.D.Ala.1999).

IT IS THEREFORE ORDERED that the plaintiff's motion to strike (Dk.142) the defendants' bill of costs (Dk.143) as untimely filed is granted.

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FYI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROZANNA N. ELLIOTT and the ESTATE OF WILLIAM FRANK ELLIOTT Plaintiffs, v. THEODORE KITOWSKI, M.D., Defendant.	CIV. ACTION NO. 89-1495-MLB ENTERED ON THE DOCKET DATE: 11-9-93

ORDER REGARDING COSTS

This case comes before the court on plaintiffs' motion to retax costs. (Doc. 96) This medical malpractice case was tried before a jury, which returned a verdict for the defendant. The Clerk taxed costs in the amount of $10,203.68.

Taxation of costs is authorized by Fed. R. Civ. P. 54(d) and governed by 28 U.S.C. § 1920 which provides:

> 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers 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

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allowance, included in the judgment or decree.

Plaintiffs object to the taxing of costs for daily copy, expert witness fees, copying costs for probate records, copies of photographs and X-rays, additional copies of depositions, deposition charges, and preparation of exhibits. Defendant has agreed to drop his request for expert witness fees.

DAILY COPY

To award the cost of daily transcripts, the court must find that they were not "obtained primarily for the convenience" of the parties but were "necessarily obtained for use in this case." McDowell v. Safeway Stores, Inc., 758 F.2d 1293, 1294 (8th Cir. 1985). Defendant argues that the transcripts of plaintiffs' two experts, Drs. Bradford Reeves and Dennis Moore, were necessary for purposes of argument concerning motions and instructions.

The court is persuaded that the transcripts were necessary for the defendant. See 10 Wright, Miller & Kane, § 2677, p. 351 (1983). The case involved complex medical issues and terminology. The instructions, particularly with regard to plaintiffs' causation theories, were more complicated than the average civil trial and required a sophisticated understanding of the trial testimony of plaintiffs' experts. Thus, the court finds the award of costs to the defendant was proper.

COPYING COSTS

Plaintiffs object to the defendant collecting costs for copying probate records in Marshall County. Defendant responds that these records were necessary to a determination of whether

subject matter jurisdiction was proper in Kansas.

The costs incurred to copy the probate records were necessary for use in this particular case. The defendant had good reason to wonder how diversity of citizenship could exist when the decedent and his wife had lived in Marysville, Kansas, for many years prior to his death. An analysis of probate records could shed light on the jurisdiction question. Accordingly, the court finds the copying charges for these records were necessary.

PHOTOGRAPHS AND X-RAYS

The reaches the same conclusion with respect to the costs of copying the x-rays and photographs used in the case. Complex medical issues were at issue in this case. Experts on both sides offered their opinions on those issues. The x-rays and photographs utilized by the defendant were necessary to provide the court and jury a visual aid in understanding the issues. The court finds these costs were properly assessed under § 1920(4).

DEPOSITION CHARGES

Section 1920(2) and (4) allows recovery for the costs of depositions used at trial or for purposes of deciding a motion for summary judgment. Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987); Hudson v. Nabisco Brands, Inc., 758 F.2d 1237, 1243 (7th Cir. 1985). All of the depositions listed in defendants' Exhibit C were either used at trial or in the course of deciding the summary judgment motion.[1] Thus, these costs were

[1] Defendant has agreed that the deposition costs for Dr. Spratt, in the amount of $99.75, can be excluded.

properly assessed.

Plaintiffs object to the costs for three copies of nine depositions. Expenses for copies of depositions taken by the prevailing party are not normally recoverable. Fulton Federal Sav. & Loan v. American Ins. Co., 143 F.R.D. 292, 296 (N.D.Ga. 1991) (Citations omitted). These copies appear to have been made for the convenience of defendant's counsel. There is no showing that they were necessary for use in the case. The court therefore finds these costs are not recoverable. The court will retax costs for these copies in the amount of $294.94 to the defendant.

PREPARATION OF EXHIBITS

Plaintiffs object to the costs expended in preparing models, enlargements, and related exhibits for use in the trial. The reasonable costs for these items are generally taxable when necessary for use in the case. Mikel v. Kerr, 499 F.2d 1178, 1183 (10th Cir. 1974); Northbrook Excess & Surplus v. Proctor & Gamble, 924 F.2d 633, 644 (7th Cir. 1991). In this case, the exhibits were indispensable to the jury's understanding of the issues. For example, the exhibits enabled to the jury to understand the development of cancer, how a barium enema is performed, and the functioning of the colon and lymph nodes. The court finds that the costs expended by the defendant for these items is reasonable.

The court denies plaintiffs' motion (Doc. 96) to retax costs except as to costs for copying depositions in the amount of $294.94 and the costs of Dr. Spratt's deposition in the amount of $99.75.

IT IS SO ORDERED.

At Wichita, Kansas, this 9th day of November, 1993.

Monti L. Belot
United States District Judge

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 54

Rule 54. Judgment; Costs

Currentness

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

CREDIT(S)
(Amended December 27, 1946, effective March 19, 1948; April 17, 1961, effective July 19, 1961; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 29, 2002, effective December 1, 2002; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES
1937 Adoption

Note to Subdivision (a). The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Note to Subdivision (b). This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) § 270.54; Compare N.Y.C.P.A. (1937) § 476.

Note to Subdivision (c). For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) § 7680; N.Y.C.P.A. (1937) § 479. Compare *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 13, r.r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

Note to Subdivision (d). For the present rule in common law actions, see *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in forma pauperis contained in U.S.C., Title 28, former §§ 832-836 [now 1915] are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: [former] §§ 815 (Costs; plaintiff not entitled to, when), 821 [now 1928] (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 [now 1927] (Costs; attorney liable for, when), and 830 [now 1920] (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:
U.S.C., Title 15, §§ 77v(a), 78aa, 79y (Securities and Exchange Commission)

U.S.C., Title 16, § 825p (Federal Power Commission)

U.S.C., Title 26, [former] §§ 3679(d) and 3745(d) (Internal revenue actions)

U.S.C., Title 26, [former] § 3770(b)(2) (Reimbursement of costs of recovery against revenue officers)

U.S.C., Title 28, [former] § 817 (Internal revenue actions)

U.S.C., Title 28, § 836 [now 1915] (United States--actions in *forma pauperis*)

U.S.C., Title 28, § 842 [now 2006] (Actions against revenue officers)

U.S.C., Title 28, § 870 [now 2408] (United States--in certain cases)

U.S.C., Title 28, [former] § 906 (United States--foreclosure actions)

U.S.C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, § 210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)

U.S.C., Title 7, § 499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)

U.S.C., Title 8, [former] § 45 (Action against district attorneys in certain cases)

U.S.C., Title 15, § 15 (Actions for injuries due to violation of antitrust laws)

U.S.C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)

U.S.C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)

U.S.C., Title 15, § 78i(e) (Certain actions under the Securities Exchange Act of 1934)

U.S.C., Title 15, § 78r (Similar to 78i(e))

U.S.C., Title 15, § 96 (Infringement of trade-mark--damages)

U.S.C., Title 15, § 99 (Infringement of trade-mark--injunctions)

U.S.C., Title 15, § 124 (Infringement of trade-mark--damages)

U.S.C., Title 19, § 274 (Certain actions under customs law)

U.S.C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)

U.S.C., Title 31, §§ 232 [now 3730] and 234 [former] (Action for making false claims upon United States)

U.S.C., Title 33, § 926 (Actions under Harbor Workers' Compensation Act)

U.S.C., Title 35, § 67 [now 281, 284] (Infringement of patent--damages)

U.S.C., Title 35, § 69 [now 282] (Infringement of patent--pleading and proof)

U.S.C., Title 35, § 71 [now 288] (Infringement of patent--when specification too broad)

U.S.C., Title 45, § 153p (Actions for non-compliance with an order of National R.R. Adjustment Board for payment of money)

U.S.C., Title 46, [former] § 38 (Action for penalty for failure to register vessel)

U.S.C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)

U.S.C., Title 46, § 941 (Certain actions under Ship Mortgage Act)

U.S.C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)

U.S.C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)

U.S.C., Title 49, § 16(2) [now 11705] (Action based on non-compliance with an order of I.C.C. for payment of money)

1946 Amendment

Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst v. Hamburg--American Packet Co.,* 1893, 13 S.Ct. 590, 148 U.S. 262, 37 L.Ed. 443; *Rexford v. Brunswick-Balke-Collender Co.,* 1913, 33 S.Ct. 515, 228 U.S. 339, 57 L.Ed. 864; *Collins v. Miller,* 1920, 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin v. United States,* 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911. See also *United States v. Florian,* 1941, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105; *Reeves v. Beardall,* 1942, 62 S.Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: *Atwater v. North American Coal Corp.,* C.C.A.2, 1940, 111 F.2d 125; *Rosenblum v. Dingfelder,* C.C.A.2, 1940, 111 F.2d 406; *Audi-Vision, Inc. v. RCA Mfg. Co., Inc.,* C.C.A.2, 1943, 136 F.2d 621; *Zalkind v. Scheinman,* C.C.A.2, 1943, 139 F.2d 895; *Oppenheimer v. F. J. Young & Co., Inc.,* C.C.A.2, 1944, 144 F.2d 387; *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.,* C.C.A.2, 1946, 154 F.2d 814, certiorari denied 1946, 66 S.Ct. 1353, 328 U.S. 859, 90 L.Ed. 1630; *Zarati Steamship Co. v. Park Bridge Corp.,* C.C.A.2, 1946, 154 F.2d 377; *Baltimore and Ohio R. Co. v. United Fuel Gas Co.,* C.C.A.4, 1946, 154 F.2d 545; *Jefferson Electric Co. v. Sola Electric Co.,* C.C.A.7, 1941, 122 F.2d 124; *Leonard v. Socony-Vacuum Oil Co.,* C.C.A.7, 1942, 130 F.2d 535; *Markham v. Kasper,* C.C.A.7, 1945, 152 F.2d 270; *Hanney v. Franklin Fire Ins. Co. of Philadelphia,* C.C.A.9, 1944, 142 F.2d 864; *Toomey v. Toomey,* App.D.C.1945, 149 F.2d 19, 80 U.S.App.D.C. 77.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal

approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.,* supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

1961 Amendment

This rule permitting appeal, upon the trial court's determination of "no just reason for delay," from a judgment upon one or more but less than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves v. Beardall,* 316 U.S. 283 (1942); *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.,* 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e. charged with various forms of concerted or related wrongdoing or related liability. See *Mull v. Ackerman,* 279 F.2d 25 (2d Cir. 1960); *Richards v. Smith,* 276 F.2d 652 (5th Cir. 1960); *Hardy v. Bankers Life & Cas. Co.,* 222 F.2d 827 (7th Cir. 1955); *Steiner v. 20th Century-Fox Film Corp.,* 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, cf. *United Artists Corp. v. Masterpiece Productions, Inc.,* 221 F.2d 213, 215 (2d Cir. 1955); *Bowling Machines, Inc. v. First Nat. Bank,* 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see *Pabellon v. Grace Line, Inc.,* 191 F.2d 169, 179 (2d Cir. 1951), cert. denied, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See *Reagan v. Traders & General Ins. Co.,* 255 F.2d 845 (5th Cir. 1958); *Meadows v. Greyhound Corp.,* 235 F.2d 233 (5th Cir. 1956); *Steiner v. 20th Century-Fox Film Corp.,* supra; 6 Moore's Federal Practice ¶54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1193.2 (Wright ed. 1958); *Developments in the Law--Multiparty Litigation,* 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, § 50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See *Jaftex Corp. v. Randolph Mills, Inc.,* 282 F.2d 508 (2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and § 1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See *Luckenbach Steamship Co., Inc., v. H. Muehlstein & Co., Inc.,* 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, supra, § 58.1, p. 321 (Wright ed. 1960).

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine the fees to be paid from a common fund. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorneys' fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. *Cf. West Virginia Univ. Hosp. v. Casey,* 499 U.S. 83 (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (30-day filing period).

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are agreed to. *E.g.,* Rule 5 of United States District Court for the Eastern District of New York; *cf. In re "Agent Orange" Product Liability Litigation (MDL 381),* 611 F.Supp. 1452, 1464 (E.D.N.Y.1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts frequently have required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. *Compare* Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. *See* Note, *Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records,* 64 *B.U.L.Rev.* 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Connor in *Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. 711, 733 (1987) (O'Connor, J., concurring) (how particular markets compensate for contingency). *Cf. Thompson v. Kennickell,* 710 F.Supp. 1 (D.D.C.1989) (use of findings in other cases to promote consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

The rule also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent of a dispositive pretrial matter that can be referred to a magistrate judge. For consistency and efficiency, all such matters might be referred to the same magistrate judge.

Subparagraph (E) excludes from this rule the award of fees as sanctions under these rules or under 28 U.S.C. § 1927.

2002 Amendments

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

2003 Amendments

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

2007 Amendments

The language of Rule 54 has been amended as part of the general restyling of the Civil Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The words "or class member" have been removed from Rule 54(d)(2)(C) because Rule 23(h)(2) now addresses objections by class members to attorney-fee motions. Rule 54(d)(2)(C) is amended to recognize that Rule 23(h) now controls those aspects of attorney-fee motions in class actions to which it is addressed.

2009 Amendments

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Notes of Decisions (3260)

Fed. Rules Civ. Proc. Rule 54, 28 U.S.C.A., FRCP Rule 54
Amendments received to 12-1-13

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 39, 28 U.S.C.A.
Rule 39. Costs
Currentness

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, **costs** are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, **costs** are taxed against the appellant;

(3) if a judgment is reversed, **costs** are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, **costs** are taxed only as the court orders.

(b) Costs For and Against the United States. **Costs** for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the **cost** of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants **costs** taxed must--within 14 days after entry of judgment--file with the circuit clerk, with proof of service, an itemized and verified bill of **costs**.

(2) Objections must be filed within 14 days after service of the bill of **costs**, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of **costs** for insertion in the mandate, but issuance of the mandate must not be delayed for taxing **costs**. If the mandate issues before **costs** are finally determined, the **district** clerk must--upon the circuit clerk's request--add the statement of **costs**, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following **costs on appeal** are **taxable** in the **district** court for the benefit of the party entitled to **costs** under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

CREDIT(S)
(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

ADVISORY COMMITTEE NOTES
1967 Adoption

Subdivision (a). Statutory authorization for taxation of **costs** is found in 28 U.S.C. § 1920. The provisions of this subdivision follow the usual practice in the circuits. A few statutes contain specific provisions in derogation of these general provisions. (See 28 U.S.C. § 1928, which forbids the award of **costs** to a successful plaintiff in a patent infringement action under the circumstances described by the statute). These statutes are controlling in cases to which they apply.

Subdivision (b). The rules of the courts of appeals at present commonly deny **costs** to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of **costs** against it, and they appear to be based on the view that if the United States is not subject to **costs** if it loses, it ought not be entitled to recover **costs** if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966, 80 Stat. 308 (1 U.S.Code Cong. & Ad.News, p. 349 (1966), 89th Cong., 2d Sess., which amended 28 U.S.C. § 2412, the former general bar to the award of **costs** against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of **costs** in civil cases. But the United States continues to enjoy immunity from **costs** in certain cases. By its terms amended § 2412 authorizes an award of **costs** against the United States only in civil actions, and it excepts from its general authorization of an award of **costs** against the United States cases which are "otherwise specifically provided (for) by statute." Furthermore, the Act of July 18, 1966, *supra*, provides that the amendments of § 2412 which it effects shall apply only to actions filed subsequent to the date of its enactment. The second clause continues in effect, for these and all other cases in which the United States enjoys immunity from **costs**, the presently prevailing rule that the United States may recover **costs** as the prevailing party only if it would have suffered them as the losing party.

Subdivision (c). While only five circuits (D.C.Cir. Rule 20(d) [rule 20(d), U.S.Ct. of App. **Dist**. of Col.]; 1st Cir. Rule 31(4) [rule 31(4), U.S.Ct. of App. 1st Cir.]; 3d Cir. Rule 35(4) [rule 35(4), U.S.Ct. of App. 3rd Cir.]; 4th Cir. Rule 21(4) [rule 21(4) U.S.Ct. of App. 4th Cir.]; 9th Cir. Rule 25 [rule 25, U.S.Ct. of App.9th Cir.], as amended June 2, 1967) presently tax the **cost** of printing briefs, the proposed rule makes the **cost** **taxable** in keeping with the principle of this rule that all **cost** items expended in the prosecution of a proceeding should be borne by the unsuccessful party.

Subdivision (e). The **costs** described in this subdivision are **costs** of the appeal and, as such, are within the undertaking of the appeal bond. They are made **taxable** in the **district** court for general convenience. Taxation of the **cost** of the reporter's transcript is specifically authorized by 28 U.S.C. § 1920, but in the absence of a rule some **district** courts have held themselves without authority to tax the **cost** (*Perlman v. Feldmann*, 116 F.Supp. 102 (D. Conn., 1953); *Firtag v. Gendleman*, 152 F.Supp. 226 (D.D.C., 1957); *Todd Atlantic Shipyards Corp. v. The Southport*, 100 F.Supp. 763 (E.D.S.C., 1951). Provision for taxation of the **cost** of premiums paid for supersedeas bonds is common in the local rules of **district** courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner v. British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn v. F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

1979 Amendment

Subdivision (c). The proposed amendment would permit variations among the circuits in regulating the maximum rates **taxable** as **costs** for printing or otherwise reproducing briefs, appendices, and copies of records authorized by Rule 30(f). The present rule has had a different effect in different circuits depending upon the size of the circuit, the location of the clerk's office, and the location of other cities. As a consequence there was a growing sense that strict adherence to the rule produces some unfairness in some of the circuits and the matter should be made subject to local rule.

Subdivision (d). The present rule makes no provision for objections to a bill of **costs**. The proposed amendment would allow 10 days for such objections. Cf. Rule 54(d) of the F.R.C.P. [rule 54(d), Federal Rules of Civil Procedure]. It provides further that the mandate shall not be delayed for taxation of **costs**.

1986 Amendment

The amendment to subdivision (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as **costs**. It further requires the courts of appeals to encourage **cost**-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. All references to the **cost** of "printing" have been deleted from subdivision (c) because commercial printing is so rarely used for preparation of documents filed with a court of appeals.

2009 Amendments

Subdivision (d)(2). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

CROSS REFERENCES
Costs and fees, payment by clerk into Treasury, see 28 USCA § 711.
Damages and **costs** on affirmance, see 28 USCA § 1912.
Liability of United States for **costs**, see 28 USCA § 2412.

LIBRARY REFERENCES
Corpus Juris Secundum
CJS Bankruptcy § 1214, **Costs** and Fees.

RESEARCH REFERENCES
ALR Library
81 ALR, Fed. 36, What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously So as to Warrant Imposition of Liability on Counsel Under 28 U.S.C.A. § 1927 for Excess **Costs**, Expenses, and Attorney Fees.
68 ALR, Fed. 494, Award of **Costs** in Appellate Proceedings in Federal Court Under Rule 39 of Federal Rules of Appellate Procedure.
90 ALR 2nd 448, **Taxable Costs** and Disbursements as Including Expenses for Bonds Incident to Steps Taken in Action.
72 ALR 2nd 1379, Liability of State, or Its Agency or Board, for **Costs** in Civil Action to Which it is a Party.
116 ALR 1152, Award of **Costs** by Appellate Court as Affected by Subsequent Proceedings or Course of the Action in the Lower Court.
84 ALR 252, Statute Regarding Security for **Costs** as Mandatory or Permitting Exercise of Discretion.
Encyclopedias
Am. Jur. 2d Appellate Review § 849, Right to Recover **Costs**.

Am. Jur. 2d Appellate Review § 858, Award of **Costs** Against United States or State.
Am. Jur. 2d Appellate Review § 866, Affidavit or Bill of **Costs**.
Am. Jur. 2d Appellate Review § 867, Affidavit or Bill of **Costs**--Objections.
Am. Jur. 2d Federal Courts § 446, Procedural Issues; **Costs**.
Am. Jur. 2d Patents § 997, Generally; Double **Costs**.

Forms

Am. Jur. Pl. & Pr. Forms **Costs** § 94, Bill of **Costs**--In Federal Appeals Court.
Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 1681, Bill of **Costs on Appeal**.
Federal Procedural Forms § 3:371, Appellant's Notice to Appellee to Advance **Costs** of Including Portions of Record Designated by Appellee [Fed. R. App. P. 30(B)(2)].
Federal Procedural Forms § 3:372, Objection to Taxation of Charge in Bill of **Costs** for Printing Appendix--By Appellant [Fed. R. App. P. 39(D)].
Federal Procedural Forms § 3:430, **Costs**--Who May Recover **Costs**.
Federal Procedural Forms § 3:431, **Costs**--Items Which Are **Taxable**.
Federal Procedural Forms § 3:432, **Costs**--Bill of **Costs**; Objections.
Federal Procedural Forms § 3:433, Damages and **Costs** on Affirmance for Delay.
Federal Procedural Forms § 3:436, Bill of **Costs on Appeal** [28 U.S.C.A. § 1920; Fed. R. App. P. 39(D)].
Federal Procedural Forms § 10:383, Award in **District** Court or Court of Appeals.
1B West's Federal Forms § 2:71, Motion for Supersedeas in **District** Court [Fed. R. Civ. P. 62].
1C West's Federal Forms § 7:119, Bill of **Costs**--**District** of Columbia Circuit [Fed. R. App. P. 39].
25A West's Legal Forms § 21.9, Bond for **Costs on Appeal**--Motion for.
25A West's Legal Forms § 21.46, Taxation of **Costs**--Notice of.

Treatises and Practice Aids

Bankruptcy Procedure Manual § 8014:2, Procedure for Seeking **Costs**.
Bankruptcy Procedure Manual Rule 8014, **Costs**.
Federal Procedure, Lawyers Edition § 3:783, **Costs**.
Federal Procedure, Lawyers Edition § 3:964, Items that Are **Taxable**.
Federal Procedure, Lawyers Edition § 3:966, Who May Recover **Costs**.
Federal Procedure, Lawyers Edition § 3:969, Agreement as to **Costs**.
Federal Procedure, Lawyers Edition § 3:970, Items Which Are **Taxable**.
Federal Procedure, Lawyers Edition § 3:971, Items Which Are **Taxable**--Attorney's Fees.
Federal Procedure, Lawyers Edition § 3:972, Bill of **Costs** or Other Request for Taxation of **Costs**.
Federal Procedure, Lawyers Edition § 3:973, Bill of **Costs** or Other Request for Taxation of **Costs**--Timeliness; Extensions of Time.
Federal Procedure, Lawyers Edition § 3:974, Objections to Bill of **Costs**.
Federal Procedure, Lawyers Edition § 3:975, Insertion of Bill of **Costs** in Mandate.
Federal Procedure, Lawyers Edition § 11:230, Award in **District** Court or Court of Appeals.
Federal Procedure, Lawyers Edition § 13:154, Attorney's Fees; **Costs**.
Federal Procedure, Lawyers Edition § 20:393, Taxation of **Costs** Against Indigent.
Patent Law Fundamentals § 20:67, **Costs**.
Wright & Miller: Federal Prac. & Proc. § 3985, **Costs** Generally.
Wright & Miller: Federal Prac. & Proc. § 3985.1, Procedure for Taxing **Costs**.
Wright & Miller: Federal Prac. & Proc. CIV App. C, Appendix C Advisory Committee Notes for the Federal Rules of Civil Procedure for the United States **District** Courts.

Relevant Notes of Decisions (187)
View all 195
Notes of Decisions listed below contain your search terms.

GENERALLY

Generally

Disposition of appeal is deciding factor in assessment of appellate **costs**, but it has no relevance to trial **costs** on remand.

Studiengesellschaft Kohle mbH v. Eastman Kodak Co., C.A.5 (Tex.) 1983, 713 F.2d 128, 219 U.S.P.Q. 958. Federal Civil Procedure 2743.1; Federal Civil Procedure 2744

Where Tax Court decision for Commissioner was reversed **on appeal**, and taxpayer sought to recover **cost** of trial transcript, Tax Court determined taxpayer incurred no **cost** allowable under subd. (e) of this rule since transcript necessary for appeal was furnished to Appellate Court without charge to appellant and copy purchased by taxpayer was not necessary for determination of appeal. Toner v. Commissioner of Internal Revenue, U.S.Tax Ct.1981, 76 T.C. 217, affirmed 676 F.2d 688.

Purpose

Former local court rule which related to **costs on appeal** was designed to promote substantial justice in matter of taxing **costs**. Bourazak v. North River Ins. Co., S.D.Ill.1968, 280 F.Supp. 87. Federal Civil Procedure 2743.1

Construction with statutory provisions

Provision of Endangered Species Act (ESA) permitting courts issuing final orders to award **costs**, including attorney fees, to either party controls over provision of Federal Rules of Appellate Procedure generally awarding **costs** to appellee if appeal is dismissed. Ocean Conservancy, Inc. v. National Marine Fisheries Service, C.A.9 (Hawai'i) 2004, 382 F.3d 1159. Environmental Law 722

When jurisdiction is exercised by court of appeals under authority conferred by All Writs Act, § 1651 of this title, as an original action at law, **costs** may be assessed in favor of prevailing party as in any other action at law, and clerk of the court of appeals can assess **costs** to same extent that a **district** court would do pursuant to rule 54, Federal Rules of Civil Procedure, this title. Cotler v. Inter-County Orthopaedic Ass'n, P.A., C.A.3 (N.J.) 1976, 530 F.2d 536. Federal Civil Procedure 2727

Entitlement to allowance for printing **costs** as **taxable costs** was determinable with reference to this rule rather than to § 1923 of this title restricting amount allowable. Albatross Tanker Corp. v. S.S. Amoco Delaware, C.A.2 (N.Y.) 1969, 418 F.2d 248. Federal Civil Procedure 2745

Construction with bankruptcy rules

Award of **costs** in connection with bankruptcy appeal was governed exclusively by Federal Rule of Bankruptcy Procedure applicable **on appeal** to **district** court; while jurisprudence regarding Federal Rule of Appellate Procedure applicable **on appeal** to the Court of Appeals provided useful guidance in interpreting this Bankruptcy Rule, the Federal Rule of Appellate Procedure was not, strictly speaking, applicable, nor was separate Bankruptcy Rule dealing with **cost** awards in adversary proceedings in bankruptcy court. In re Manhattan Inv. Fund Ltd., S.D.N.Y.2009, 421 B.R. 613. Bankruptcy 2189

Discretion of district court

District court's taxation of prevailing party's appellate **costs** was not abuse of discretion, despite non-prevailing party's claim that Court of Appeals' mandate did not specifically direct or order the **district** court to tax appellate **costs**. L-3 Communications Corp. v. OSI Systems, Inc., C.A.2 2010, 607 F.3d 24. Federal Civil Procedure 2743.1

District court had discretion to award **costs taxable** by it under Rule of Appellate Procedure notwithstanding that appellate court had directed that each party should bear its own **costs**, which referred only to those **costs taxable** in appellate court. Republic Tobacco Co. v. North Atlantic Trading Co., Inc., C.A.7 (Ill.) 2007, 481 F.3d 442, rehearing and rehearing en banc denied. Federal Courts 953

If Circuit Court of Appeals makes no allocation of **costs on appeal**, **district** court does not have authority to deviate from allocation prescribed by rule. Conway Groves, Inc. v. Coopers & Lybrand, M.D.Fla.1994, 158 F.R.D. 505, on remand 28 F.3d 116. Federal Civil Procedure 2743.1

Mandate of court of appeals, directing payment of **costs on appeal**, took **costs on appeal** outside area of discretion of **district** court. U.S. for Use and Benefit of Marino v. Arthur N. Olive Co., D.C.Mass.1962, 30 F.R.D. 139. Federal Civil Procedure 2743.1

Discretion of court of appeals

Though the Court of appeals has inherent power to recall mandate to prevent injustice, such action would not be taken to permit successful appellant to file untimely amended bill of **costs** to include $30 inadvertently omitted from original bill, absent showing of adequate excuse or good cause for such action. Nelson v. James, C.A.5 (Miss.) 1984, 722 F.2d 207. Federal Courts 956.1

Discretion of the court of appeals in respect to taxation of **costs** is governed by the general rule that **costs** are taxed in favor of prevailing parties and against losing parties. Matter of Penn Central Transp. Co., C.A.3 1980, 630 F.2d 183. Federal Civil Procedure 2743.1

Court of appeals has discretion to award **costs** and fees arising out of an appeal. Universal Amusement Co., Inc. v. Vance, C.A.5 (Tex.) 1977, 559 F.2d 1286, on rehearing 587 F.2d 159, probable jurisdiction noted 99 S.Ct. 2857, 442 U.S. 928, 61 L.Ed.2d 295, affirmed 100 S.Ct. 1156, 445 U.S. 308, 63 L.Ed.2d 413, rehearing denied 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804, on rehearing 587 F.2d 176, certiorari denied 99 S.Ct. 2859, 442 U.S. 929, 61 L.Ed.2d 296. See, also, Universal Amusement Co., Inc. v. Vance, C.A.Tex.1978, 587 F.2d 159, affirmed 100 S.Ct. 1156, 445 U.S. 308, 63 L.Ed.2d 413, rehearing denied 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804. Civil Rights 1492; Federal Civil Procedure 2743.1

As long as rule which deals with taxation of **costs** and which implements long established practice of taxing **costs** in favor of the prevailing party and against the losing party is complied with, taxation of **costs** is a matter within the court's discretion. Delta Air Lines, Inc. v. C.A.B., C.A.D.C.1974, 505 F.2d 386, 164 U.S.App.D.C. 279. Federal Civil Procedure 2723

Former local court rule providing that where judgment was affirmed, **costs** should be taxed against appellant unless otherwise ordered, was mandatory in direction that prevailing party should have his **taxable costs** unless otherwise ordered, but the court of appeals did have power in a proper case to exercise sound discretion opposed to that provision. Bourazak v. North River Ins. Co., S.D.Ill.1968, 280 F.Supp. 87. Federal Civil Procedure 2744

Duty of court of appeals

The unsuccessful litigant is entitled to be not unduly condemned in **costs**, and when he protests and files motion to retax **costs**, it is court's duty carefully to examine his complaint. Knutson v. Metallic Slab Form Co., C.C.A.5 (Tex.) 1942, 132 F.2d 231. Federal Civil Procedure 2742.1

Presumption of costs to prevailing party

Presumption favoring **cost** award to prevailing party applies even when the government, rather than a private litigant, is its beneficiary. Baez v. U.S. Dept. of Justice, C.A.D.C.1982, 684 F.2d 999, 221 U.S.App.D.C. 477. **Costs** 147

Admiralty appeals

Statutory limitation to $75 for **costs** allowable for printing briefs in admiralty appeal where amount involved exceeds $5,000 was wiped out by this rule. Waterman S.S. Corp. v. Gay Cottons, C.A.9 (Cal.) 1969, 419 F.2d 372. Admiralty 126

On an appeal in admiralty, the court of appeals tried the case de novo, and therefore had to deal with questions of **costs** as if they had been original questions. Pettie v. Boston Towboat Co., C.C.A.2 (N.Y.) 1891, 49 F. 464, 1 C.C.A. 314. Admiralty 117

Mandamus

If answer is requested in proceedings on mandamus petition, **costs** may be assessed in favor of prevailing petitioner or actual respondent, unless court in its discretion directs otherwise. State of Ariz. v. U.S. **Dist**. Court for **Dist**. of Ariz., C.A.9 (Ariz.) 1983, 709 F.2d 521. Mandamus 190

Matrimonial appeals

Printing and other **costs** in court of appeals **on** **appeal** by wife from divorce decree, setting aside separation agreement and not awarding continuing alimony, should be paid by divorced husband, though appeal was unsuccessful. Wiseman v. Wiseman, C.A.D.C.1954, 212 F.2d 251, 94 U.S.App.D.C. 60. Divorce 1140; Divorce 1156; Divorce 1163

Where judgment for wife in separate maintenance action was affirmed **on** **appeal**, appellee wife would be allowed her **taxable** **costs** **on** **appeal**, but matter of requiring husband to pay wife's attorney a fee for his services **on** **appeal** would be required to be submitted by wife to **district** court after mandate of court of appeals issued. Hobbs v. Hobbs, C.A.D.C.1952, 197 F.2d 412, 91 U.S.App.D.C. 68, certiorari denied 73 S.Ct. 93, 344 U.S. 855, 97 L.Ed. 664. Federal Courts 953; Husband And Wife 301

Moot appeals

Appeal from order denying temporary injunction should be dismissed without awarding appellants **costs**, when appeal became moot due to appellants' having obtained injunctive relief by renewing proceedings in trial court pursuant to leave, granted in the order appealed from. Western Elec. Co. v. Cinema Supplies, C.C.A.8 (Minn.) 1935, 80 F.2d 111. Appeal And Error 790(2)

Appeal and case being dismissed on appellant's motion because cause became moot after appeal was taken, **costs** were **taxable** against appellant. Atlantic Coast Line R. Co. v. Wells, C.C.A.5 (Fla.) 1932, 54 F.2d 633.

Partial affirmance or reversal

Once the Court of Appeals has determined that a party is entitled to **costs** under appellate procedure rule pertaining to judgments affirmed in part, reversed in part, modified, or vacated, that party is in the same position with regard to **costs** as a prevailing party; Court of Appeals need not expressly and specifically order taxation of appellate **costs** before the **district** court may tax any such **costs** against the non-prevailing party. L-3 Communications Corp. v. OSI Systems, Inc., C.A.2 2010, 607 F.3d 24. Federal Civil Procedure 2744

District court lacked authority to award, as **costs** to truck manufacturer, a portion of supersedeas bond premium payments that manufacturer incurred in appealing jury verdict in franchised truck dealer's favor when judgment was affirmed in part and reversed in part **on** **appeal**, as manufacturer did not bring motion for **costs** before Court of Appeals, such that no order was entered to trigger right to recover such **costs** in **district** court. Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., C.A.8 (Ark.) 2007, 497 F.3d 805. Federal Courts 953

Where, in respect to an appeal, the order confirming plan of railroad reorganization was affirmed in all respects but two, which were remanded for modification and further proceedings, and where the court of appeals' order of judgment did not tax **costs** inasmuch as the effect of that judgment was to render a partial affirmance and partial reversal, it would be inappropriate to now impose **costs** in the judgment with respect to that appeal. Matter of Penn Central Transp. Co., C.A.3 1980, 630 F.2d 183. Federal Civil Procedure 2743.1

Appellant was not entitled to recover from appellee entire **cost** of supersedeas bond despite appellant's success **on** **appeal**; although appellant gained reversal on substantial counterclaim judgment **on** **appeal**, other parties also gained considerably from appeal, and thus, it appeared that judgment was reversed only in part. Wal-Mart Stores, Inc. v. Crist, W.D.Ark.1988, 123 F.R.D. 590. Federal Civil Procedure 2743.1

Reversal on review

When Supreme Court reverses circuit court order, which included award of **costs** to then successful appellee, and awards **costs** for Supreme Court litigation to currently prevailing appellant, award of **costs** by circuit court must be vacated and **costs** awarded to currently successful appellant for appeals on both circuit and Supreme Court levels, as well as for **costs** incurred in **district** court. Furman v. Cirrito, C.A.2 (N.Y.) 1986, 782 F.2d 353. Federal Civil Procedure 2726.1; Federal Civil Procedure 2743.1

Breaches by appellants' counsel of court rules requiring briefs to state concisely case and errors complained of, did not affect jurisdiction of court of appeals, which did not regard such breaches as so serious as to require dismissal; but in view of the fact that defense and disposition of case had been complicated thereby, **costs** would be taxed equally between the parties, even

though reversal was had. Byrd v. Bates, C.A.5 (Tex.) 1955, 220 F.2d 480. Federal Courts 715

The fact that insurance company appealed from entire judgment against it for both face value of life insurance policy, for which it admitted liability, and double indemnity for insured's accidental death, for which it denied liability, did not subject it to liability for **costs** of appeal, where entire judgment was reversed for errors which court of appeals determined might have induced imposition of liability on disputed claim for double indemnity and appellee took no steps to enforce segregation and collection of admitted indebtedness for face amount of policy. Mutual Life Ins. Co. of N.Y. v. Hess, C.A.5 (Fla.) 1951, 191 F.2d 817. **Costs** 236

Under court rule allowing **costs** to appellant in case of reversal of any judgment or order and providing that such allowance shall be made unless otherwise ordered by court, discretion was vested in court of appeals to allow **costs** in accordance with requirements of particular case before it, requirements which were not necessarily relevant to task of determining whether a judgment had been affirmed or reversed within meaning of a supersedeas bond. Rector v. Massachusetts Bonding & Ins. Co., C.A.D.C.1951, 191 F.2d 329, 89 U.S.App.D.C. 83. Federal Civil Procedure 2744

Review of agency decisions

In proceeding seeking review of Interstate Commerce Commission rules and policy statements dealing with motor carrier authority, one group each of petitioners and intervenors would be required to bear its own **costs**, though they prevailed in part, where their broad attack failed, and the Commission was likewise to bear its own **costs** where its regulations were held partially invalid. American Trucking Associations, Inc. v. I. C. C., C.A.5 1982, 666 F.2d 167, certiorari denied 103 S.Ct. 1272, 460 U.S. 1022, 75 L.Ed.2d 493. Commerce 214

Dismissal of appeal

Costs are routinely available whenever Court of Appeals dismisses appeal, even if appellant moved for dismissal. American Auto. Mfrs. Ass'n v. Commissioner, Massachusetts Dept. of Environmental Protection, C.A.1 (Mass.) 1994, 31 F.3d 18. Federal Civil Procedure 2743.1

Persons entitled to costs--Generally

No reason exists for treating a victorious party differently with respect to **costs** merely because that party is trustee for debtor in bankruptcy proceeding. Matter of Penn Central Transp. Co., C.A.3 1980, 630 F.2d 183. Federal Civil Procedure 2727

Where plaintiff was not the prevailing party, his bill of **costs** was refused in whole. Nash v. Raun, W.D.Pa.1946, 67 F.Supp. 212. Federal Civil Procedure 2727

---- Amicus curiae, persons entitled to costs

Amicus curiae was not entitled to fee award defraying its expenses and only parties were entitled to **costs**. Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont., C.A.9 1982, 694 F.2d 203. Amicus Curiae 2; Federal Civil Procedure 2737.14

---- Intervenor, persons entitled to costs

If intervenor did not make a substantial contribution beyond that afforded by one of the parties already involved, it may be denied **costs** **on** **appeal** from agency decision despite fact that it supported the ultimate victor, while if intervenor made a substantial contribution to the resolution of the case, the value of its independent contribution should be considered, but the amount claimed by it as **costs** should be reduced to reflect in some measure the amount of material duplicative of exposition in the briefs of the party whose position it supported. American Trucking Associations, Inc. v. I. C. C., C.A.5 1982, 666 F.2d 167, certiorari denied 103 S.Ct. 1272, 460 U.S. 1022, 75 L.Ed.2d 493. Administrative Law And Procedure 685.1

In an ordinary case, the court of appeals is inclined as a matter of allocation of judicial resources to follow general practice of taxing **costs** in favor of winning intervenors, without taking time required to make more defined determination of additional or incremental contribution, but different considerations are involved in cases testing validity of general industry regulations, where number of interested intervenors is large and consumer interests have relatively modest resources. American Public Gas Ass'n v. Federal Energy Regulatory Commission, C.A.D.C.1978, 587 F.2d 1089, 190 U.S.App.D.C. 192. Federal Civil

Procedure 2743.1

Intervenors in proceedings for review of certain regulations of Interstate Commerce Commission dealing with abandonment of railroad lines and discontinuance of rail service were not entitled to recover **costs** of one proceeding where reasons for regulations in issue in that proceeding were adequately explained by Commission report accompanying challenged regulations, pertinent passages of that report were called to court's attention by Commission's brief and intervenors' brief added little or nothing of substance but were entitled to recover **costs** of another proceeding where their brief made substantial contribution to court's understanding and resolution of issues of regulations' validity. American Ry. Sup'rs Ass'n v. U. S., C.A.7 (Ill.) 1978, 582 F.2d 1066. Commerce 214

Where intervenors in Civil Aeronautics Board review proceedings contributed substantially to court of appeals resolution of the issues presented, and where intervenors' position was sustained by the court, they would be allowed to tax **costs** against the losing airlines. Delta Air Lines, Inc. v. C. A. B., C.A.D.C.1974, 505 F.2d 386, 164 U.S.App.D.C. 279. Administrative Law And Procedure 685.1; Aviation 35

---- Prevailing party, persons entitled to costs

In homeowner's civil rights action against two deputies related to warrantless search of his house, equitable considerations warranted denying deputies' request to recover **costs** incurred in litigating their appeal, even though they were prevailing party **on appeal** after it was determined that they were entitled to qualified immunity; homeowner had meager financial resources and his good faith prosecution of claims of government misconduct were enough to convince a state trial judge to suppress evidence and to lead panel of Court of Appeals to find a constitutional violation. Moore v. County of Delaware, C.A.2 (N.Y.) 2009, 586 F.3d 219. Civil Rights 1492

Prevailing parties **on appeal** are normally entitled to **costs**. American Auto. Mfrs. Ass'n v. Commissioner, Massachusetts Dept. of Environmental Protection, C.A.1 (Mass.) 1994, 31 F.3d 18. Federal Civil Procedure 2743.1

Tavern owner who prevailed in tavern patron's personal injury action was not entitled to appellate **costs** in light of possibility that key witness perjured himself in denying employment at tavern, together with conduct of counsel in repeatedly injecting issue of whether tavern patron's companions had been in prison. Owen v. Patton, C.A.8 (Mo.) 1991, 925 F.2d 1111. Federal Civil Procedure 2743.1

Successful pro se litigant in suit under section 552 of Title 5 could not recover **costs** of appeal from denial of attorney fees where litigant did not prevail on his claim for attorney fees and secured only 10 percent of total amount he sought in **district** court. Kuzma v. U.S. Postal Service, C.A.2 (N.Y.) 1984, 725 F.2d 16, certiorari denied 105 S.Ct. 119, 469 U.S. 831, 83 L.Ed.2d 62. Records 68

Government as prevailing party **on appeal** from action under section 552 of Title 5 in **district** court could not be denied award of its **costs on appeal**. Baez v. U. S. Dept. of Justice, C.A.D.C.1982, 684 F.2d 999, 221 U.S.App.D.C. 477. Records 68

Plaintiffs who were predominantly the prevailing party, even though there were some respects in which the government prevailed, were entitled to recover 75 percent of **costs** incurred **on appeal**. Quaker Action Group v. Andrus, C.A.D.C.1977, 559 F.2d 716, 182 U.S.App.D.C. 95. Federal Civil Procedure 2744

Capehart Housing Act project prime contractor which would not proceed **on appeal** as between it and carpentry subcontractors without entire transcript of testimony, 4,630 pages, being printed at approximately $1.40 per page and which took position that if subcontractors failed to designate entire record for mimeographing, it would be forced to do so, must reimburse successful subcontractors for 45 percent of **cost** of mimeographing record plus clerk's $25.00 fee paid by subcontractors for initial docketing of their main appeal. Autrey v. Williams and Dunlap, C.A.5 (La.) 1965, 346 F.2d 1007. Public Contracts 224; United States 67(12)

Where substantially one-tenth of the **costs on appeal** were incidental to or occasioned by the appeal from judgment in favor of third parties filing a counterclaim against plaintiff and defendants, appellants prevailing as to the counterclaim were entitled to recover one-tenth of their **costs** from the third-party defendants. Parker v. Title & Trust Co., C.A.9 (Or.) 1956, 233 F.2d 505, rehearing denied 237 F.2d 423. Federal Civil Procedure 2744

Plaintiff in "exceptional" Lanham Act case was prevailing party before court of appeals, which affirmed trial court's finding of liability but vacated and remanded for recalculation of damages and revision of injunction language, and thus was entitled to award its appellate **costs**; award would be reduced, however, to reflect fact that plaintiff only had prevailed on approximately 80% of issues **on appeal**, as measured by parties' written submissions on those issues. JTH Tax, Inc. v. H & R Block Eastern Tax Services, Inc., E.D.Va.2002, 245 F.Supp.2d 756. Antitrust And Trade Regulation 117

Appellate **costs** assessed to defendant under Federal Rules of Appellate Procedure 39(a) as prevailing party were not extinguished by fact that plaintiff prevailed in subsequent proceedings on retrial. Mason v. Texaco, Inc., D.Kan.1990, 131 F.R.D. 697. Federal Civil Procedure 2744

Parties assessed costs--Generally

That parties may advance their own or another litigant's **costs** in the first instances does not determine ultimate liability for those **costs**. Matter of Penn Central Transp. Co., C.A.3 1980, 630 F.2d 183. Federal Civil Procedure 2721

This rule contemplates taxation of **costs** in favor of the prevailing party and against the losing party, and there is no broadside exception for review of agency proceedings and **costs** of intervenors. American Public Gas Ass'n v. Federal Energy Regulatory Commission, C.A.D.C.1978, 587 F.2d 1089, 190 U.S.App.D.C. 192. Federal Civil Procedure 2743.1

Rule of appellate procedure expressly stating that if judgment is affirmed, **costs** shall be taxed against appellant unless otherwise ordered, applies to **costs taxable** in **district** court as **costs** of appeal. McDonald v. McCarthy, E.D.Pa.1991, 139 F.R.D. 70, reversed 966 F.2d 112, on remand. Federal Civil Procedure 2744

---- Attorney, parties assessed costs

Costs of appeal which was concededly taken by counsel without consent of his client, and **costs** of action below, which his own actions had entailed, were chargeable against attorney personally. Hafter v. Farkas, C.A.2 (N.Y.) 1974, 498 F.2d 587. Federal Civil Procedure 2731

---- In forma pauperis proceedings, parties assessed costs

Commissioner of Social Security could not recover appellate **costs** incurred in action in which claimant challenging denial of supplemental security disability benefits proceeded in forma pauperis, inasmuch as in forma pauperis statute would have precluded claimant from recovering **costs** against Commissioner had she prevailed, and therefore rule governing recovery of **costs on appeal** likewise barred Commissioner's recovery. Maida v. Callahan, C.A.2 (N.Y.) 1998, 148 F.3d 190. United States 147(22)

Imposition of **costs on appeal** against unsuccessful in forma pauperis plaintiff does not deny plaintiffs access to the circuit court nor does it chill First Amendment rights of the unsuccessful plaintiff, who has proceeded **on appeal** without prepayment of **costs**. Weaver v. Toombs, C.A.6 (Mich.) 1991, 948 F.2d 1004. Constitutional Law 1204; Constitutional Law 2317; Federal Civil Procedure 2743.1

---- Prevailing party on appeal, parties assessed costs

Defendant, even though he became prevailing party **on appeal**, would be taxed with all **costs** in court of appeals, and **district** court could consider the taxation of other **costs** to defendant, where defendant had engaged in conduct, toward both the plaintiff and the court, which prolonged the litigation and greatly increased the **costs**. Jones v. Schellenberger, C.A.7 (Ill.) 1955, 225 F.2d 784, certiorari denied 76 S.Ct. 476, 350 U.S. 989, 100 L.Ed. 855. Federal Civil Procedure 2727; Federal Civil Procedure 2743.1

Defendant in "exceptional" Lanham Act case was not prevailing party before court of appeals, which affirmed trial court's finding of liability but vacated and remanded for recalculation of damages and revision of injunction language, and thus was not entitled to award of any of its appellate **costs**. JTH Tax, Inc. v. H & R Block Eastern Tax Services, Inc., E.D.Va.2002, 245 F.Supp.2d 756. Antitrust And Trade Regulation 117

---- United States, parties assessed costs

Costs against the United States may be imposed only to the extent expressly permitted by law. Coyle Lines v. U.S., C.A.5 1952,

198 F.2d 195. United States 147(5)

---- Unsuccessful appellant, parties assessed costs

Costs in the amount of $38 for printing ten copies of appellees' brief at 20 cents per page would be assessed against an unsuccessful appellant proceeding in forma pauperis. Harris v. Forsyth, C.A.11 (Fla.) 1984, 742 F.2d 1277. Federal Civil Procedure 2743.1

Where the reorganization trustees not only prevailed but also contributed greatly to the expeditious disposition of the appeals, it would fly in the face of this rule as well as be inequitable, to deny them reimbursement for **costs**; accordingly, the unsuccessful appellants were subject to taxation of **costs** with appellee to both the appendices and appellee trustees' briefs. Matter of Penn Central Transp. Co., C.A.3 1980, 630 F.2d 183. Federal Civil Procedure 2745

Sharing of costs

Appellate **costs** for determining date that post-judgment interest accrued for punitives award to class members from oil company, based on massive oil spill from grounded supertanker, would be borne by each party on grounds that neither side was clear winner, under appellate rule providing that **costs** were taxed only as appellate court ordered for judgment that was affirmed in part, reversed in part, modified, or vacated, where oil company owed class members $507.5 million in punitives, yet award had been remitted 90% from original $5 billion, and equities fell squarely in favor of class members as victims of oil company's malfeasance resulting in oil spill. Exxon Valdez v. Exxon Mobil, C.A.9 (Alaska) 2009, 568 F.3d 1077. Federal Civil Procedure 2744

Parties to appeal from decision holding herbicide patent to be valid and infringed were to share equally the **cost** of printing combined appendix of ten volumes said to contain 9,307 pages, 5,743 of which were designated by patentee after accused infringers had initially designated balance, in light of impossibility of determining, within reason, exactly what was or what was not necessarily included in appendix in extended and complex litigation. Rohm & Haas Co. v. Crystal Chemical Co., C.A.Fed.1983, 722 F.2d 1556, 220 U.S.P.Q. 289, certiorari denied 105 S.Ct. 172, 469 U.S. 851, 83 L.Ed.2d 107. Patents 325.7

Under circumstances, court did not abuse its discretion in taxing **costs** equally against bank and its attorney in proceeding initiated by attorney against bank for recovery of attorney's fee for collection of bankrupt's note in bankruptcy proceeding. LeLaurin v. Frost Nat. Bank of San Antonio, C.A.5 (Tex.) 1968, 391 F.2d 687, certiorari denied 89 S.Ct. 447, 393 U.S. 979, 21 L.Ed.2d 440. Federal Civil Procedure 2723

In action for unfair competition and patent infringement where the court found the patents invalid and dismissed the suit because of "unclean hands" of both parties, plaintiffs and defendants, respectively, were required to share equally the **cost** of transcribing and printing the record and other **costs** **on** **appeal** shall be borne by the parties incurring them. Hall v. Wright, C.A.9 (Cal.) 1957, 240 F.2d 787, 112 U.S.P.Q. 210. Antitrust And Trade Regulation 117; Patents 325.13; Patents 325.15

Where both plaintiff and defendant appealed from judgment in patent infringement suit, and appeals were heard on common record, but defendant appealed only from portion of judgment which refused to allow defendant attorney fees as part of general **costs**, and such issue raised by defendant was infinitesimal when considered in connection with issues relevant to plaintiff's appeal, plaintiff was not entitled to apportionment of printing **costs**. Texas Co. v. Globe Oil & Refining Co., C.A.7 (Ill.) 1955, 225 F.2d 725, 106 U.S.P.Q. 241, 106 U.S.P.Q. 392. Patents 325.15

Where appellant had printed a large transcript of record, nearly two-thirds of which consisted of lawyers' briefs and arguments and discussions with judge at pretrial, and their success **on** **appeal** was only partial, justice required that appellants recover only one-half of their **costs** **on** **appeal**. Fanchon & Marco v. Paramount Pictures, C.A.2 (N.Y.) 1953, 202 F.2d 731. **Costs** 241; **Costs** 256(4)

Where appellant in patent infringement suit selectively designated, both for record and for printing, portions of record which he desired, and appellee without in any manner complaining of the excessiveness of appellant's designations proceeded to make on its own account large and expensive additional designations of matter to be included in the record and later on of additional portions of record to be printed, and there were excessive designations by appellant only as to a portion of the record, appellee's

motion to retax the whole of the printing **costs** against appellant or, in the alternative one-half thereof, would be denied and only one-fourth of the printing **cost** would be taxed against appellant and three-fourths against appellee. Gray Tool Co. v. Humble Oil & Refining Co., C.A.5 (Tex.) 1951, 190 F.2d 779. Patents 325.15

Where defendant was required to print as its own expense the papers designated by it for its cross-appeal, and that which the plaintiff printed was necessary for her own appeal, plaintiff's motion for an order requiring defendant to share the **cost** of printing the record **on appeal** as a condition of having its appeal heard on a joint record, was properly denied. Jerome v. Twentieth Century-Fox Film Corp., C.C.A.2 (N.Y.) 1948, 165 F.2d 784, 76 U.S.P.Q. 246. Federal Courts 691

Where successful appellant included in printed record the testimony taken before the master appointed in a jury action, though such evidence had no relevancy **on appeal**, successful appellant was required to bear two-thirds of the entire **costs** of the appeal. Phillips Petroleum Co. v. Williams, C.C.A.5 (Tex.) 1947, 159 F.2d 1011. Federal Civil Procedure 2746

Where numerous matters unnecessary to decision of appeal were included in record, but neither party offered to stipulate so as to eliminate certain matters, one fourth of entire **cost** of appeal was charged to successful appellant. Knutson v. Metallic Slab Form Co., C.C.A.5 (Tex.) 1942, 132 F.2d 231. Federal Civil Procedure 2743.1

Cost of materials not used in appeal

Fact that transcript was never filed with court of appeals will not in and of itself bar recovery for its **costs**. Murphy v. L & J Press Corp., C.A.8 (Mo.) 1978, 577 F.2d 27. Federal Civil Procedure 2743.1

Transcript was necessary for determination of appeal and, therefore, **district** court would direct taxation of **costs** of transcript as **costs** of appeal in favor of appellee, where appellee was placed on notice that appellant intended to pursue arguments concerning sufficiency of evidence to support jury's verdict and several evidentiary rulings by **district** court. McKelvy v. Metal Container Corp., M.D.Fla.1989, 125 F.R.D. 179. Federal Civil Procedure 2745

Excessive or unnecessary costs

Where parties submitted printed records in excess of 2800 pages, of which 2600 pages were unnecessary, so that result was to increase beyond any possible justification the expense of the parties to the action, none of the expenses incurred by the successful appellees **on appeal**, would be allowed as **costs**. Moffett v. Commerce Trust Co., C.A.8 (Mo.) 1951, 187 F.2d 242, certiorari denied 72 S.Ct. 32, 342 U.S. 818, 96 L.Ed. 618, rehearing denied 72 S.Ct. 163, 342 U.S. 879, 96 L.Ed. 661, rehearing denied 72 S.Ct. 1070, 343 U.S. 989, 96 L.Ed. 1375. Federal Civil Procedure 2746

Where railroad receivers might have been entitled to recover penalties from bondholders for taking unjustified appeal, but receivers increased **costs** of appeal by causing unnecessary matters to be printed, former court rule would have authorized withholding or dividing **costs** and justice would be done by merely assessing **costs** against appellants. Blackford v. Powell, C.C.A.4 (Va.) 1945, 151 F.2d 392, certiorari denied 66 S.Ct. 523, 327 U.S. 778, 90 L.Ed. 1006. Federal Civil Procedure 2746

Following entry of judgment against defendant in quantum meruit suit, appealing defendant would be required to post bond for **costs on appeal** in the amount of $1,373.05, despite plaintiff's claim for bond in amount of $2,500, where plaintiff failed to provide explanation of **costs** above those of $2,165.95 for which he had provided receipts, and final amount of $1,373.05 represented $792.90 reduction for diskettes which were not necessary to prepare joint appendix, given purchase of minuscript. Stillman v. InService America Inc., S.D.N.Y.2011, 838 F.Supp.2d 138. Federal Courts 661

Invalid objections

In suit by seaman for personal injury, where errors were caused by plaintiff's palpably invalid objections, **costs on appeal** were taxed against plaintiff regardless of ultimate outcome of the case. Wiseman v. Reposa, C.A.1 (R.I.) 1972, 463 F.2d 226. Federal Civil Procedure 2743.1

Stipulations

Fact that parties to appeal stipulated to sharing expense of printing joint appendix did not preclude prevailing party from

recovering such amount as **costs**. Saunders v. Washington Metropolitan Area Transit Authority, C.A.D.C.1974, 505 F.2d 331, 164 U.S.App.D.C. 224. Federal Civil Procedure 2743.1

Time for filing petition

Toy manufacturer, as prevailing party, on competitor's appeal of suit claiming copyright and trademark infringement, under Copyright Act and Lanham Act, failed to petition for **costs** of appeal within required filing period following entry of judgment, as governed by appellate rule. JCW Investments, Inc. v. Novelty, Inc., C.A.7 (Ill.) 2007, 509 F.3d 339, 85 U.S.P.Q.2d 1254. Copyrights And Intellectual Property 90(1); Trademarks 1750

Civil rights plaintiff could not recover attorney fees under appellate rule providing for taxing of **costs** when he failed to submit request for **costs** within 14 days after Court of Appeals filed its judgment in plaintiff's appeal challenging adverse summary judgment. Radvansky v. City of Olmsted Falls, C.A.6 (Ohio) 2007, 496 F.3d 609, rehearing and rehearing en banc denied. Civil Rights 1492

Appellees were entitled to leave to file a late **cost** bill where late filing was occasioned by national mail delays beyond counsel's control; Administrator of the Federal Aviation Administration temporarily closed United States airspace to commercial aviation in response to actions which occurred on September 11, 2001. Ticknor v. Choices Hotels Intern., Inc., C.A.9 2002, 275 F.3d 1164. Federal Civil Procedure 2743.1

Plaintiff's request for attorney fees, filed more than fourteen days after Court of Appeals affirmed **district** court's order, was not untimely, as fourteen day deadline applied only to **costs** of briefs, appendices and copies of records. McDonald v. McCarthy, C.A.3 (Pa.) 1992, 966 F.2d 112, on remand. Federal Civil Procedure 2742.5

Reasons offered by prevailing party in support of motion to extend time to file bill of **costs** with Court of Appeals were insufficient to demonstrate requisite "good cause"; party claimed that it inadvertently misplaced blank bill of **costs** form which accompanied copy of opinion and that it did not become aware of 14-day deadline for filing verified bill of **costs** until receiving copy of another party's motion for double **costs** and attorney fees, to which executed bill of **costs** was attached. Sims v. Great-West Life Assur. Co., C.A.5 (Tex.) 1991, 941 F.2d 368. Federal Civil Procedure 2743.1

Although fact that predominantly prevailing party **on** **appeal** was subject to automatic stay of opposing party's bankruptcy constituted good cause for failure to timely file motion for **costs**, late filing would not be allowed where movant failed to seek relief from automatic stay in bankruptcy court within 14-day period it could have otherwise moved for **costs**. Apex Oil Co. v. Belcher Co. of New York, Inc., C.A.2 1989, 865 F.2d 504. Federal Civil Procedure 2721

Colloquy between **district** court and prevailing party in granting partial judgment and indicating that attorney fees issue would be resolved at some future time, and intervening appeal by losing parties allowed prevailing party to file for attorney fees within 30 days of affirmance **on** **appeal**, despite local rule requiring fee applications to occur within 30 days of **district** court judgment. Davidson v. City of Avon Park, C.A.11 (Fla.) 1988, 848 F.2d 172. Federal Civil Procedure 2742.1

Where original opinion on merits of taxpayer's appeal from decision of United States Tax Court, which was determined to be frivolous, clarified for first time that damages in form of attorney fees and **costs** should be asserted by Government by itemized petition, Government did not, due to Christmas mailing delays, receive opinion on merits until 20 days after entry of judgment, and Government filed its petition, with itemized particulars, within seven days of receipt of judgment, Government demonstrated good cause for filing petition out of time. Knoblauch v. C.I.R., C.A.5 1985, 752 F.2d 125, certiorari denied 106 S.Ct. 95, 474 U.S. 830, 88 L.Ed.2d 78. Internal Revenue 5348

Request for award of attorney fees under Toxic Substances Control Act, section 2601 et seq. of Title 15, was not subject to 14-day limitations period for filing claims for **costs** and thus was timely even though not filed until nine months after court rendered decision on merits. Environmental Defense Fund, Inc. v. Environmental Protection Agency, C.A.D.C.1982, 672 F.2d 42, 217 U.S.App.D.C. 189. Environmental Law 720(1)

Bills of **costs** must be filed within 14 days after entry of judgment, and court looks with disfavor on motion to file bills of **costs** out of time. Texaco, Inc. v. Department of Energy, C.A.D.C.1980, 663 F.2d 158, 213 U.S.App.D.C. 394. Federal Civil Procedure 2742.1

Time limit imposed by subd. (d) of this rule governing filing of **cost** bill must be scrupulously observed by litigants. Mollura v. Miller, C.A.9 (Cal.) 1980, 621 F.2d 334. Federal Civil Procedure 2742.1

Local rule providing that within ten days after entry of final judgment or decree, party recovering **costs** shall file in office of the clerk of court a verified bill of **costs** and that specific objections to items therein contained shall be filed within ten days from date of mailing to adverse party could not be applicable to taxation of appellate **costs** in the **district** court since **district** court proceedings after an appellate judgment must wait issuance of mandate which normally follows appellate judgment of 21 days. Murphy v. L & J Press Corp., C.A.8 (Mo.) 1978, 577 F.2d 27. Federal Civil Procedure 2743.1

This rule requiring that bill for **costs** shall be filed "within 14 days after the entry of judgment" means that a bill must be filed within 14 days of judgment notwithstanding a failure by counsel to receive prompt or even timely notice of judgment. Denofre v. Transportation Ins. Rating Bureau, C.A.7 (Ill.) 1977, 560 F.2d 859. Federal Civil Procedure 2742.1

Where bill for printing joint appendix was sent to losing party which did not send bill to prevailing party for period of several months, failure of prevailing party to file bill of **costs** within 14 days did not preclude recovery of such **costs**. Saunders v. Washington Metropolitan Area Transit Authority, C.A.D.C.1974, 505 F.2d 331, 164 U.S.App.D.C. 224. Federal Civil Procedure 2743.1

Prevailing party's appellate **cost** bill was timely filed in **district** court where filed approximately two months after appellate court mandate and less than one month following **district** court's order confirming receipt of mandate. Choice Hotels Intern., Inc. v. Kaushik, M.D.Ala.2002, 203 F.Supp.2d 1281. Federal Civil Procedure 2743.1

Bill of **costs** filed on same date on which mandate from court of appeals was received and filed in **district** court was timely even though that date was more than 14 days after entry of judgment where the bill was filed pursuant to subsec. (e) of this rule referring to **costs** incurred in preparation of record and of reporter's transcript and not pursuant to subsec. (d) of this rule referring to **costs** **on** **appeal** which are included in the mandate. Sudouest Import Sales Corp. v. Union Carbide Corp., D.C.Puerto Rico 1984, 102 F.R.D. 264. Federal Civil Procedure 2742.1

Orders

Costs that are listed in appellate rule as **taxable** in **district** court are subject to appellate court ordering them to be recoverable under rule in cases in which a judgment is affirmed in part, reversed in part, modified, or vacated; in other words, in such cases, none of **costs** listed as **taxable** under rule are recoverable unless appellate court so indicates. Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., C.A.8 (Ark.) 2007, 497 F.3d 805. Federal Courts 953

Court of Appeals' express statement that each party was to bear its own **costs** precluded recovery by plaintiff's counsel of any **costs** under rule of appellate procedure providing for award of **costs**. McDonald v. McCarthy, E.D.Pa.1991, 139 F.R.D. 70, reversed 966 F.2d 112, on remand. Federal Civil Procedure 2743.1

ITEMS RECOVERABLE

Items recoverable generally

This rule governing bills of **costs** and objections thereto encompasses only usual **costs** of appeal, such as docketing fees and preparation and filing of briefs and records, and does not include attorney's fees. Seyler v. Seyler, C.A.5 (Miss.) 1982, 678 F.2d 29. Federal Civil Procedure 2743.1

"**Taxable** **costs**" are such **costs** as a party is entitled to have taxed by law, and are full indemnity for expenses of a party who is successful in a suit between party and party, whether at law or in equity. Nash v. Raun, W.D.Pa.1946, 67 F.Supp. 212. Federal Civil Procedure 2727

Matters considered, items recoverable

Whether an item is **taxable** as **costs** may be determined by statute, by rule of court of established usage equivalent to court or

established usage equivalent to such rule, or by a special order in the case. Nash v. Raun, W.D.Pa.1946, 67 F.Supp. 212. Federal Civil Procedure 2735

Appendices, items recoverable

Appellants who won a reversal were entitled to recover **costs** for docketing of appeal and for printing necessary copies of regular and special appendices of their main brief and reply brief. Phansalkar v. Andersen, Weinroth & Co., L.P., C.A.2 (N.Y.) 2004, 356 F.3d 188. Federal Civil Procedure 2743.1

Appellee that prevailed **on appeal** could not recover fees or **costs** beyond those to which it was entitled under rule providing for **costs** to be taxed against appellants in light of Court of Appeals' affirmance of judgment, notwithstanding appellee's request that Court of Appeals exercise its discretion to award it **costs** of compiling its appendix due to appellants' alleged violation of rule allocating responsibility between the parties for filing joint appendix **on appeal**. Great American Ins. Co. v. M/V HANDY LAKER, C.A.2 (N.Y.) 2003, 348 F.3d 352. Federal Civil Procedure 2743.1

Costs of printing appellate brief appendices were **taxable** against the losing parties rather than inherent expenses of the subject reorganization. Matter of Penn Central Transp. Co., C.A.3 1980, 630 F.2d 183. Federal Civil Procedure 2745

Where appendix filed in appeal served as appendix for mandamus proceeding and 50 percent of brief **on appeal** was addressed to matters properly considered on mandamus, clerk was to allow as taxed **costs**, in favor of the successful applicant for writ and against the actual respondent, the expense of printing the appendix, one-half the **cost** of printing brief, and **cost** of printing petition for mandamus. Cotler v. Inter-County Orthopaedic Ass'n, P.A., C.A.3 (N.J.) 1976, 530 F.2d 536. Mandamus 190

Where 3,311 pages of 5,054 page joint appendix designated by appellees were unnecessary to exhibit appellees' claims, **cost** of printing such unnecessary pages were **taxable** against appellees at rate charged in area where clerk's office was located. Oliver v. Michigan State Bd. of Ed., C.A.6 (Mich.) 1975, 519 F.2d 619. Federal Civil Procedure 2746

Where defendants printed more than twice as much matter as was necessary in the appendix to their brief court allowed defendants only half **cost** of printing appendix as **cost** of appeal. United Const. Workers v. Haislip Baking Co., C.A.4 (Va.) 1955, 223 F.2d 872, certiorari denied 76 S.Ct. 87, 350 U.S. 847, 100 L.Ed. 754. Federal Civil Procedure 2745

Where parties failed to include pleadings in appendix and presented several unconnected excerpts from testimony, thereby compelling court to turn to transcript to get a consecutive account of litigation, each party was denied recovery of **costs**. The Chickie, C.C.A.3 (Pa.) 1944, 141 F.2d 80. Federal Civil Procedure 2745

Costs on defendant's appeal from decree for plaintiff in suit for injunction and for declaratory judgment on validity and infringement of patents would be divided, but **costs** of printing appendix to defendant's brief would not be taxed as **costs** where defendant printed the record as the appendix without reviewing court's permission, and in court's opinion printing of a large part thereof was entirely unnecessary. U.S. Galvanizing & Plating Equipment Corp. v. Hanson-Van Winkle-Munning Co., C.C.A.4 (W.Va.) 1939, 104 F.2d 856. Federal Civil Procedure 2746

Attorney fees, items recoverable

Appellate rule providing for taxing of **costs** did not apply to permit civil rights plaintiff to recover attorney fees, given that rule provided for its framework to apply unless the law provided otherwise, and that civil rights statute provided for fees and **costs**. Radvansky v. City of Olmsted Falls, C.A.6 (Ohio) 2007, 496 F.3d 609, rehearing and rehearing en banc denied. Civil Rights 1492

Massachusetts Department of Environmental Protection (DEP) was not entitled to attorney fees on automobile manufacturers' unsuccessful appeal from denial of preliminary injunction to preclude DEP from implementing new tailpipe emissions standards, though manufacturers sought voluntary dismissal of three of four issues **on appeal**; there was no authority for awarding attorney fees as condition of voluntary dismissal, and no evidence of frivolous appeal or bad faith was present. American Auto. Mfrs. Ass'n v. Commissioner, Massachusetts Dept. of Environmental Protection, C.A.1 (Mass.) 1994, 31 F.3d 18. Federal Civil Procedure 2743.1

Court of Appeals' direction, in affirming judgment in § 1983 action, that "each party bear its own **costs**" did not foreclose plaintiff from obtaining award of attorney fees under § 1988 for successful defense of **district** court judgment in Court of Appeals, as attorney fees awarded under § 1988 were not a "**cost**" of appeal within meaning of Federal Rule of Appellate Procedure pursuant to which Court of Appeals issued its direction. McDonald v. McCarthy, C.A.3 (Pa.) 1992, 966 F.2d 112, on remand. Civil Rights 1492

Order directing **costs** to be borne by the parties **on** **appeal** did not preclude prevailing plaintiff from recovering attorney fees for services rendered on that appeal. Shimman v. International Union of Operating Engineers, Local 18, C.A.6 (Ohio) 1983, 719 F.2d 879, on rehearing 744 F.2d 1226, certiorari denied 105 S.Ct. 1191, 469 U.S. 1215, 84 L.Ed.2d 337. Federal Civil Procedure 2744

Defendant was entitled to his **costs** and attorney fees associated with defending against appeal by plaintiff of dismissal of his civil rights claim where the appeal was frivolous. Standridge Flying Service v. Department of Transp., C.A.8 (Ark.) 1983, 712 F.2d 1223. Federal Civil Procedure 2743.1

Attorney fees should not have been awarded to plaintiff who prevailed in civil rights action for totally unsuccessful appeal on the merits in which judgment of **district** court was affirmed. Buian v. Baughard, C.A.6 (Ohio) 1982, 687 F.2d 859. Civil Rights 1492

Preferred procedure of court of appeals would be to remand for determination of attorney fee award for appeal to court of appeals, but where case was old, court of appeals would fix fees. Marston v. Red River Levee and Drainage **Dist**., C.A.5 (La.) 1980, 632 F.2d 466. Federal Courts 922; Federal Courts 927

Under this rule, attorney fees were not recoverable as a part of **costs** on an appeal from Virgin Islands **district** court since 5 V.I.C. § 541 which included attorney fees in allowance of **costs** applied only to territorial and **district** courts. Vasquez v. Fleming, C.A.3 1980, 617 F.2d 334. Federal Civil Procedure 2743.1

Corporate receivers and their attorney were not entitled to additional compensation for services in **district** court after remand from court of appeals, where additional "services" consisted largely of postmortem discussions concerning the prior decision of the court of appeals. U.S. v. Larchwood Gardens, Inc., C.A.3 (Pa.) 1970, 420 F.2d 531. Receivers 197

Although appellee would be awarded **costs** upon appeal and cross appeal, appellee's motions for attorneys' fees for services rendered **on** **appeal** and cross appeal would be committed for hearing and determination by trial court. United Pac. Ins. Co. v. Idaho First Nat. Bank, C.A.9 (Idaho) 1967, 378 F.2d 62. Federal Civil Procedure 2737.5

District court would not award attorney fees to prevailing appellee for appellate services ordinarily covered by § 1988, directing that attorney fees be allowed as **costs**, where Court of Appeals had decided that prevailing party should bear its own **costs** **on** **appeal**. McDonald v. McCarthy, E.D.Pa.1991, 139 F.R.D. 70, reversed 966 F.2d 112, on remand. Civil Rights 1492

Briefs, items recoverable

Prevailing appellants could not recover, **on** **appeal**, those **costs** associated with preparing and submitting companion appendices and briefs in hyperlinked CD-ROM format, given that such **costs** were not specifically authorized by rule, substantial portion of **costs** were duplicative of **costs** incurred by appellants to produce hard copies of their appellate materials, and there was no written stipulation or understanding between parties concerning allocation of incremental **costs** of CD-ROM technology. Phansalkar v. Andersen, Weinroth & Co., L.P., C.A.2 (N.Y.) 2004, 356 F.3d 188. Federal Civil Procedure 2743.1

Plaintiffs' **costs** incurred in producing necessary copies of their second and fourth briefs **on** **appeal**, and their appendix, were allowable. Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., C.A.10 (Kan.) 1996, 103 F.3d 80. Federal Civil Procedure 2743.1

Reproduction expenses for briefs, including depreciation of equipment, which is comparable to the composition and typesetting charges of a professional printer are **taxable** as **costs**, although charges for in-house reproduction may not exceed the charges of

an outside printshop; subject to that cap, firms may recover the full costs of reproduction on its own equipment. Martin v. U.S., C.A.7 (Ind.) 1991, 931 F.2d 453. Federal Civil Procedure 2745

Fact that manual typing and photoduplication would have cost only $188 and would have been cheapest reproduction method by which appellee could have prepared briefs and appendices did not preclude award of costs on appeal for $1324.80 expense of using in-house computerized word processing system, in view of superior quality and enhanced readability of printed briefs. PepsiCo, Inc. v. Swan, Inc., C.A.2 1983, 720 F.2d 746. Federal Civil Procedure 2743.1

Documents filed in connection with mandamus proceedings were "briefs" so as to permit assessment of costs, even though documents were not originally filed as "briefs" where court ordered the documents be treated as appellate briefs. State of Ariz. v. U.S. Dist. Court for Dist. of Ariz., C.A.9 (Ariz.) 1983, 709 F.2d 521. Mandamus 190

Upon affirmance of order denying student's request for injunctive relief with respect to university's disciplinary procedures, cost of printing defendants' brief on appeal was properly taxed against student. Winnick v. Manning, C.A.2 (Conn.) 1972, 460 F.2d 545. Federal Civil Procedure 2744

Where parties treated appeal and cross-appeal as if they were independent appeals and filed six briefs instead of three, a device by which each party obtained about 18 more pages than former rule permitted, and under optional rule relating to nonprinting of record submitted four separate appendices plus another appendix bound in with one of the briefs, court would not allow either party costs on appeal. Trounstine v. Bauer, Pogue & Co., C.C.A.2 (N.Y.) 1944, 144 F.2d 379, certiorari denied 65 S.Ct. 190, 323 U.S. 777, 89 L.Ed. 621. Federal Civil Procedure 2746

Costs for printing brief of defendant successful on plaintiff's appeal were not recoverable. Bourazak v. North River Ins. Co., S.D.Ill.1968, 280 F.Supp. 87. Federal Civil Procedure 2745

Inclusion of printing costs of briefs, motions or petitions in bill of costs was not allowable and should be stricken. Chapman v. First Ins. Co. of Hawaii, D.C.Hawai'i 1966, 255 F.Supp. 710. Federal Civil Procedure 2735

The sum paid for the printing of briefs, appendix and answer to petition for writ of certiorari is properly taxable as costs in favor of prevailing party. Nash v. Raun, W.D.Pa.1946, 67 F.Supp. 212. Federal Civil Procedure 2743.1

Costs taxable in district court, items recoverable--Generally

Where cement company's opposition to petition to appeal and its reply in support of its motion to dismiss appeal were, by court order, treated as answer on the merits to mandamus petition, clerk properly allowed prevailing cement company to recover its costs of preparing those materials. State of Ariz. v. U.S. Dist. Court for Dist. of Ariz., C.A.9 (Ariz.) 1983, 709 F.2d 521. Mandamus 190

In connection with court of appeals' reversal of district court judgment in favor of plaintiff employees in sex discrimination action, the "costs" referred to in court of appeals' order providing that defendant would be awarded its "costs on appeal," would be limited only to costs taxable in court of appeals in connection with the appeal, and district court, in its discretion, would determine allowance of any cost taxable in district court. Guse v. J. C. Penney Co., Inc., C.A.7 (Wis.) 1978, 570 F.2d 679. Federal Courts 953

Generally, costs in the district court and in the court of appeals are taxed separately. Jenkins Petroleum Process Co. v. Sinclair Refining Co., D.C.Me.1939, 26 F.Supp. 845. Federal Civil Procedure 2742.1

---- Bond costs, costs taxable in district court, items recoverable

Because Rule of Appellate Procedure expressly authorizes taxation of supersedeas bond costs, it is binding on district courts regardless of whether costs statute authorizes award of those costs. Republic Tobacco Co. v. North Atlantic Trading Co., Inc., C.A.7 (Ill.) 2007, 481 F.3d 442, rehearing and rehearing en banc denied. Federal Civil Procedure 2743.1

District court properly refused to tax as costs premiums on supersedeas bonds arising from party's prior appeal, pursuant to appellate rule providing that costs were allowable only as ordered by court when judgment is affirmed in part, reversed in part,

or vacated, given that appellate court's judgment mandate did not provide for bond premiums. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, C.A.11 (Fla.) 1997, 117 F.3d 1328, rehearing denied, rehearing and suggestion for rehearing en banc denied 136 F.3d 143. Federal Civil Procedure 2743.1

Costs of a letter of credit used to secure supersedeas bond were not properly **taxable** as **costs** of appeal; **costs** paid for letter of credit were in addition to **costs** of premiums paid for supersedeas bond. Johnson v. Pacific Lighting Land Co., C.A.9 (Ariz.) 1989, 878 F.2d 297, certiorari denied 110 S.Ct. 407, 493 U.S. 965, 107 L.Ed.2d 373. Federal Civil Procedure 2732.1

Borrowing expense, sought in addition to premium on a supersedeas bond, is a permissible item of **taxable** appellate **costs**; disagreeing with *Lerman v. Flynt Distributing Co., Inc*., 789 F.2d 164 (2d Cir.). Bose Corp. v. Consumers Union of U.S., Inc., C.A.1 (Mass.) 1986, 806 F.2d 304, certiorari denied 107 S.Ct. 1894, 481 U.S. 1016, 95 L.Ed.2d 501. Federal Civil Procedure 2743.1

Interest charges incurred in borrowing funds used as collateral to secure appellate supersedeas bond were not **taxable** as appellate **costs**. Lerman v. Flynt Distributing Co., Inc., C.A.2 (N.Y.) 1986, 789 F.2d 164, certiorari denied 107 S.Ct. 404, 479 U.S. 932, 93 L.Ed.2d 357. Federal Civil Procedure 2743.1

Cost of supersedeas bond posted to state execution of large judgment against defendants in wrongful death action was proper item of **costs** to be taxed against plaintiffs following reversal by court of appeals in entry of judgment for defendant. Berner v. British Commonwealth Pac. Airlines, Limited, C.A.2 (N.Y.) 1966, 362 F.2d 799, certiorari denied 87 S.Ct. 322, 385 U.S. 948, 17 L.Ed.2d 227. Federal Civil Procedure 2743.1

Where, in patent infringement action, defendant obtained stay of judgment by giving supersedeas bond, premium paid to surety company was necessary part of defendant's **costs** and on reversal was properly allowed and taxed as such. Lunn v. F. W. Woolworth Co., C.A.9 (Cal.) 1954, 210 F.2d 159. Patents 325.15

Where respondent was subjected summarily to proceeding by trustee in bankruptcy for turnover of assets, which proceedings were found to be beyond summary jurisdiction of bankruptcy court, but nevertheless an order was directed against respondent therein and to protect his rights against such summary jurisdiction he was forced to appeal and to give supersedeas bond to retain possession of property pending proper plenary proceedings and in addition other expenses were incurred in prosecution of his appeal to court of appeals and in resisting certiorari in United States Supreme Court, **district** court properly allowed respondent reasonable premiums paid for supersedeas bond as an item of **taxable** **costs**. In re Northern Ind. Oil Co., C.A.7 (Ind.) 1951, 192 F.2d 139. Bankruptcy 2189; **Costs** 193; Supersedeas 6

An item which represented the **cost** of premiums for a supersedeas bond was properly taxed against plaintiff as an expense of the appeal after defendant had prevailed, since the premiums were a reasonable, necessary expense of the appeal, in that the erroneous judgment obtained by plaintiff made it necessary for defendants to obtain a supersedeas or run a risk of having a judgment collected by plaintiff. Land Oberoesterreich v. Gude, C.C.A.2 (N.Y.) 1937, 93 F.2d 292. **Costs** 251

Federal appellate rule governing taxation of **costs** **on** **appeal** would not permit recovery of **costs** for letter of credit obtained to secure supersedeas bond. Record Club of America, Inc. v. United Artists Records, Inc., S.D.N.Y.1990, 731 F.Supp. 602. Federal Civil Procedure 2743.1

Since appellant had already incurred and paid a substantial portion of such **costs** as might be awarded appellee **on** **appeal** and she appeared willing and apparently able to pay those remaining **costs**, bond for **cost** **on** **appeal** would be increased to principal amount of $750, rather than requested amount of $1,200. Ingle v. Sears, Roebuck and Co., E.D.Tenn.1977, 470 F.Supp. 260. Federal Courts 661

Costs paid by mineral lessee for special master to render accounting to determine net revenues of each well lessee operated during pendency of lessee's appeal of **district** court order granting summary judgment in lessor's favor in its action to enforce terms of settlement agreement did not constitute premium for supersedeas bond, and thus was not recoverable as **cost** pending entry of final judgment in matter, where lessor had moved to sequester released wells to secure potential future judgment of damages, but lessee agreed to deposit revenues into court registry. Dore Energy Corp. v. Prospective Inv. & Trading Co. Ltd., W.D.La.2010, 270 F.R.D. 262. Compromise And Settlement 21

Third-party defendant prevailing on appeal was not entitled to reimbursement of premiums paid for cost of supersedeas bonds, where Court of Appeals judgment mandated recovery only of those appellate costs to be taxed by clerk of Court of Appeals and did not refer to any costs taxable in district court. Graham v. Milky Way Barges, Inc., E.D.La.1988, 122 F.R.D. 18. Federal Civil Procedure 2743.1

Plaintiffs' claim that defendant, which successfully appealed from judgment in favor of plaintiffs, was not compelled to appeal case was not an adequate defense to taxing of costs of $5 for filing notice of appeal and $522 premium on supersedeas bond. Lloyd v. Lawrence, S.D.Tex.1973, 60 F.R.D. 116. Federal Civil Procedure 2743.1

---- Transcript, costs taxable in district court, items recoverable

Cost of reporter's transcript is taxable in the district court. Waterman S. S. Corp. v. Gay Cottons, C.A.9 (Cal.) 1969, 419 F.2d 372. Federal Civil Procedure 2740

In appeal not taken in forma pauperis, cost of procuring copy of reporter's transcript for use of counsel is necessary cost within this rule providing that cost of reporter's transcript, if necessary for determination of appeal, shall be taxed in district court, and therefore item would be disallowed as item of cost to be taxed in court of appeals, without prejudice to right of successful appellee to make proper showing before district court. Volkswagenwerk Aktiengesellschaft v. Church, C.A.9 (Cal.) 1969, 413 F.2d 1126. Federal Civil Procedure 2745

Prevailing appellee was entitled to recover cost for copy of trial transcript, ordered in addition to transcript appellant had ordered as part of record on appeal; appeal went to whether judgment was supported by evidence, and thus transcript became integral component of appeal and of preparation for that appeal. Choice Hotels Intern., Inc. v. Kaushik, M.D.Ala.2002, 203 F.Supp.2d 1281. Federal Civil Procedure 2745

Trial transcript was obtained by prevailing trademark infringement plaintiff for purposes of appeal, and thus cost was recoverable from defendant upon appellate affirmance of judgment; although defendant had also obtained copy, plaintiff had requested its copy first, and parties had used plaintiff's reduced version of transcript in joint appendix submitted to appellate court. BIC Corporations v. Far Eastern Source Corp., S.D.N.Y.2003, 2003 WL 282188, Unreported. Trademarks 1751

Docket fee, items recoverable

Appellate court docketing fee was taxable as cost to losing appellee. Winniczek v. Nagelberg, C.A.7 2005, 400 F.3d 503. Federal Civil Procedure 2743.1

Exhibits, items recoverable

Cost of copies of exhibits would be disallowed where the court of appeals had not ordered such exhibits. Volkswagenwerk Aktiengesellschaft v. Church, C.A.9 (Cal.) 1969, 413 F.2d 1126. Federal Civil Procedure 2745

Interest on allowances, items recoverable

Corporate receivers, their attorney and their accountant were not entitled to interest from date of district court's order granting original allowances for their compensation to pay prior to date of district court hearing after remand on requests for supplemental compensation, where court of appeals reduced allowances on appeal, no supersedeas bond was filed on appeal, and corporation and its sole stockholder did nothing to deter distribution or investment of fees during pendency of their appeal from original allowance of fees. U. S. v. Larchwood Gardens, Inc., C.A.3 (Pa.) 1970, 420 F.2d 531. Interest 53

Memorandum of law, items recoverable

Successful party on appeal would not be allowed cost of making copies of memoranda of law, where there was no reason why such papers should be included in record on appeal. Volkswagenwerk Aktiengesellschaft v. Church, C.A.9 (Cal.) 1969, 413 F.2d 1126. Federal Civil Procedure 2745

Hearing, items recoverable

The **costs** of fees relating to evidentiary hearing ordered by the United States Supreme Court to determine whether certain evidence used by the government at trial tainted the proceedings were not lawfully **taxable** to the defendants. U. S. v. Hoffa, C.A.7 (Ill.) 1974, 497 F.2d 294. **Costs** 310

Receivership expenses, items recoverable

Where corporation and its sole stockholder appealed from **district** court's allowances of compensation to receivers, their attorney and their accountant and receivers hired distinguished member of bar to argue the appeal and court of appeals reduced the allowance, receivers' expenses and **costs** in defending their allowances **on** **appeal** and expenses incurred in defending attorney's and accountant's fees were not proper charges against receivership estate. U. S. v. Larchwood Gardens, Inc., C.A.3 (Pa.) 1970, 420 F.2d 531. Receivers 197

Record, items recoverable--Generally

Cost of using a word processor to print or produce copies of appellate briefs, appendices, and records is reimbursable as a **cost** **on** **appeal**; however, **cost** of using word processor to produce an original of a brief, appendix, or record is not reimbursable. CTS Corp. v. Piher Intern. Corp., C.A.Fed.1984, 754 F.2d 972, 221 U.S.P.Q. 954. Federal Civil Procedure 2743.1

Where appellee was not wholly free from blame on matter of defective record, but most of fault was with appellant, **costs** of appeal would be assessed against appellant. Sani-Top, Inc. v. North Am. Aviation, Inc., C.A.9 (Cal.) 1958, 261 F.2d 342, 119 U.S.P.Q. 339. Federal Civil Procedure 2746

Where remand was made because of the state of the record for which appellee was not responsible, appellants were required to pay their own **costs**. Stauffer v. Exley, C.A.9 (Cal.) 1950, 184 F.2d 962, 87 U.S.P.Q. 40. Federal Civil Procedure 2743.1

Where in designating parts of record to be printed appellee and cross-appellant failed to comply with requirements of former court rule, the **cost** of printing the portions of record designated by such party were assessed against it. Saulsbury Oil Co. v. Phillips Petroleum Co., C.C.A.10 (Okla.) 1944, 142 F.2d 27, certiorari denied 65 S.Ct. 62, 323 U.S. 727, 89 L.Ed. 584. Federal Civil Procedure 2745

Where appellees' request that appellants furnish a more complete record is unreasonable, appellate court, to protect appellants, may withhold or impose **costs** as circumstances of case may require. In re Joshua Hendy Iron Works, D.C.Cal.1942, 2 F.R.D. 244. **Costs** 256(1); Federal Civil Procedure 2746

---- Additional or supplemental record, items recoverable

Unsuccessful appellant may be taxed with **costs** for printing additional record which contained material germane to issues and which was requested by appellee. Morehouse Mfg. Corp. v. J. Strickland & Co., Cust. & Pat.App.1969, 407 F.2d 881, 56 C.C.P.A. 946, 160 U.S.P.Q. 715. **Costs** 257

Upon review of record **on** **appeal**, where it was disclosed that appellant's narrative contained a fair statement of material evidence and that it was sufficient, together with designated exhibits for proper determination of issues, appellee's motion to assess unsuccessful appellants for **cost** of additional designation for printing substantial portion of evidence in question and answer form as well as many additional exhibits, would be denied. Heldenbrand v. Stevenson, C.A.10 (Okla.) 1957, 249 F.2d 424. Federal Civil Procedure 2745

Where, from superabundance of caution, appellee printed an elaborate supplement to the printed record, but such supplement was unnecessary and, to some extent, violative of former court rule requiring that evidence contained in printed supplement be in narrative form, **cost** of such supplement would not be taxed against the unsuccessful appellant. Milwaukee Ins. Co. v. Kogen, C.A.8 (Minn.) 1957, 240 F.2d 613. Federal Civil Procedure 2745

Motion of defendants that plaintiff, who was unsuccessful **on** **appeal**, be required to pay expense of printing supplemental record, would be denied where defendants could have obtained leave to present to the court of appeals the material which was contained in the supplemental record without having it printed. Love v. Royall, C.A.8 (Minn.) 1950, 179 F.2d 5. Federal Civil

Procedure 2746

On **appeal** from order dismissing bankruptcy proceeding, where appellant's counsel, without consulting appellees' counsel, printed narrative statement of evidence, which was inexact and unacceptable to appellees, and appellees' motion to dismiss appeal on ground that appellant's printed record was misleading was denied because of appellees' right to file supplement to such record, **cost** of printing such supplement which is not unnecessary, but which is needed for disposition of the case, will be taxed to appellant. Jordan v. Federal Land Bank of Omaha, C.C.A.8 (Neb.) 1943, 139 F.2d 203. Bankruptcy 2189

The **cost** of preparing and printing appellee's supplemental record, necessary to decision of case, was required to be taxed against unsuccessful appellant. Zander v. Lutheran Broth. of Minneapolis, Minn., C.C.A.8 (Neb.) 1943, 137 F.2d 17. Federal Civil Procedure 2745

That part of defendant's designations as "additional portions of the record" **on** **appeal** which contained pages of "colloquy between court and counsel, comment and irrelevant discourses" would not be added to record **on** **appeal**, but other part of defendant's designations which had merit would be directed to be printed at expense of plaintiff-appellant. Jerome v. Twentieth Century-Fox Film Corp., S.D.N.Y.1947, 7 F.R.D. 190, 72 U.S.P.Q. 431, affirmed 165 F.2d 784, 76 U.S.P.Q. 246. Federal Civil Procedure 2745

---- Necessity, record, items recoverable

Where appellee's counterdesignation of portions of record was not unnecessary, but, on the contrary, was necessary for disposition of case, **costs** were assessed against appellant whose contentions **on** **appeal** were not sustained. Coffey v. U.S., C.A.10 (Colo.) 1964, 333 F.2d 945. Federal Civil Procedure 2745

Where appellant alleged that he had offered a fair narrative statement of 20 printed pages of testimony of witnesses but that appellee had required 70 pages showing questions and answers from transcript, even though much of record reproduced was unnecessary to disposition of case **on** **appeal**, in view of fact that appellant did not bring before reviewing court his proposed narrative, nor a statement as to negotiations taking place between parties in attempt to settle record, there was no basis for awarding **costs** against appellee for whom judgment had been rendered **on** **appeal**. Nitzel v. Austin Co., C.A.10 (Colo.) 1957, 249 F.2d 710. Federal Civil Procedure 2745

Where, **on** **appeal** from dismissal with prejudice of third complaint, defendant had text of and proceedings had in respect to the first two complaints printed in the record, defendant would not be charged with **cost** of such printing since such complaints and proceedings indicated unlikelihood that plaintiff would be able to amend their complaint into a form which could successfully resist a motion to dismiss for failure to state a claim. Feinberg v. Leach, C.A.5 (Fla.) 1957, 243 F.2d 64. Federal Civil Procedure 2745

Where, under his statement of points and his designation of contents of record **on** **appeal**, the only matter which appellant brought forward for review was his claim that under any conceivable state of facts or circumstances most favorable to him, the giving of charges objected to and the refusing of requested charges was prejudicial error, appellee's designation of the whole of the evidence and the record was improper, and whole **cost** of compiling the record, except portion designated by appellant, was taxed against appellee. Lester v. Aetna Cas. & Sur. Co., C.A.5 (La.) 1957, 240 F.2d 676, certiorari denied 77 S.Ct. 1383, 354 U.S. 923, 1 L.Ed.2d 1437. Federal Civil Procedure 2746

Where defendant, at time it filed its designation for printing of record in patent infringement suit, could not anticipate that it would obtain in the court of appeals, as it had in **district** court, a favorable decision on issue of infringement, it had the right to rely on every defense which it had pleaded in bar in support of judgment of dismissal, even though such defenses other than that of noninfringement had been rejected by **district** court, and was within its right in designating printing of record, on which such defenses could be adequately presented, and therefore plaintiff was not entitled to apportionment of printing **costs** on ground that defendant was responsible for much unnecessary printing. Texas Co. v. Globe Oil & Refining Co., C.A.7 (Ill.) 1955, 225 F.2d 725, 106 U.S.P.Q. 241, 106 U.S.P.Q. 392. Patents 325.15

Successful appellant would be taxed for the **cost** of preparing unnecessary portions of the record just as an unsuccessful appellant would not be taxed for **cost** of printing that portion of appellees' brief for which there was no reasonable need. Consolidated Theatres v. Warner Bros. Circuit Management Corp., C.A.2 (N.Y.) 1954, 216 F.2d 920. See, also, Haddad v.

Border Exp., Inc., C.A.Mass.1962, 303 F.2d 134; Broadhead v. C.I.R., C.A.Miss.1958, 254 F.2d 169; Eisenschiml v. Fawcett Publications, Inc., C.A.Ill.1957, 246 F.2d 598, certiorari denied 78 S.Ct. 334, 355 U.S. 907, 2 L.Ed.2d 262; U.S. v. Deaton, C.A.Ala.1953, 207 F.2d 726; Buffum v. Chase Nat. Bank of City of New York, C.A.Ill.1951, 192 F.2d 58, certiorari denied 72 S.Ct. 558, 342 U.S. 944, 96 L.Ed. 702; Moffett v. Commerce Trust Co., C.A.Mo.1951, 187 F.2d 242, certiorari denied 72 S.Ct. 32, 342 U.S. 818, 96 L.Ed. 618, rehearing denied 72 S.Ct. 163, 342 U.S. 879, 96 L.Ed. 661, rehearing denied 72 S.Ct. 1070, 343 U.S. 989, 96 L.Ed. 1375; Pet Milk Co. v. Boland, C.A.Mo.1949, 175 F.2d 151; Acadian Production Corporation of Louisiana v. Land, C.A.La.1943, 136 F.2d 1; Dayton Co. v. McMahon, C.A.8, 1936, 82 F.2d 942.

On **appeal** from conviction for carrying on business of livestock dealer in posted stockyards without having registered with Secretary of Agriculture, where dealer's designation of record did not contain evidence establishing that interstate character of business was in issue and did not contain all evidence bearing on character of dealer's business, the United States was under necessity of making counterdesignation of record and **costs** of printing such additional parts of record could not be assessed to the United States. Kelley v. U. S., C.A.10 (Okla.) 1953, 202 F.2d 838. **Costs** 317; Criminal Law 1107

Even though various pleadings such as motions, answers and cross-actions, were of doubtful necessity and might well have been summarized, the printing of such pleadings in toto in the appellate record was not of sufficient gravity to justify the granting of appellant's motion that part of the **cost** **on** **appeal** be assessed to appellee. Neale Const. Co. v. U. S. Fidelity & Guaranty Co., C.A.10 (Kan.) 1952, 199 F.2d 591. Federal Civil Procedure 2746

Designation by appellee, who was successful **on** **appeal** in design patent infringement proceedings, of that part of record relating principally to the prior art was proper even though the trial court did not rely on it, and it tended to contradict the reasoning of the trial court, and appellee would not be taxed for **costs** thereof, in view of facts that the prior art designated did not serve to add to or enlarge the judgment in appellee's favor but merely supported the judgment. Moore v. C.R. Anthony Co., C.A.10 (Okla.) 1952, 198 F.2d 607, 94 U.S.P.Q. 203. Patents 325.15

In patent infringement suit, where large designations as to record and its printing seemed to find almost as much favor with appellee as with appellant, court of appeals, on motion by appellee to retax printing **costs** against appellant, would not finetooth comb the record to determine precisely the limits within which the designation for record and for printing should have been confined, but would look at the matter broadly and from standpoint of whether a particularly complained of conclusion was or was not clearly erroneous, or that it was so plainly unnecessary as to make its designation an act of improvidence, deliberate or reckless. Gray Tool Co. v. Humble Oil & Refining Co., C.A.5 (Tex.) 1951, 190 F.2d 779. Patents 325.15

Where printed record **on** **appeal**, consisting of 350 pages exclusive of index, contained at least 150 pages of immaterial matter, upon entry of judgment favorable to appellant, **cost** of printing such immaterial matter would be disallowed in taxing **costs** against appellee. Layne Minnesota Co. v. City of Beresford, S. D., C.A.8 (S.D.) 1949, 175 F.2d 161. Federal Civil Procedure 2746

Where there is a large record, court of appeals will not only entertain with sympathy motions to retax for excessiveness, but will of its own motion more often scrutinize records, for abuses in such regard with a view to impose not only on clients, whose counsel has erred, but on counsel, whose duty it is to make up the record, **costs** commensurate with the breach of duty. Phillips Petroleum Co. v. Williams, C.C.A.5 (Tex.) 1947, 159 F.2d 1011. Federal Civil Procedure 2746

Where appellant failed to designate for printing sufficient part of record for presentation of his points and failed to file statement of points and appellee designated balance of record not included in appellant's original designation, only the **cost** of printing of obviously immaterial portions of record would be taxed against appellee. Blake v. Trainer, App.D.C.1945, 148 F.2d 10, 79 U.S.App.D.C. 360. Federal Civil Procedure 2746

In patent infringement suit, unsuccessful appellant's liability for **costs** was not required to be limited to one-half the **costs** of printing the record **on** **appeal** on the ground that appellee had stuffed the record by including unnecessary evidence and patents therein. Bellavance v. Frank Morrow Co., C.C.A.1 (R.I.) 1944, 140 F.2d 419, rehearing denied 141 F.2d 378, certiorari denied 64 S.Ct. 1144, 322 U.S. 742, 88 L.Ed. 1575, rehearing denied 64 S.Ct. 1283, 322 U.S. 772, 88 L.Ed. 1596. Patents 325.15

Upon appeal from **district** court judgment, which was affirmed by court of appeals, appellants were not entitled to have **cost** retaxed on the ground that after appellants had filed a statement of points and designated all matters essential to the decision of

questions presented, appellee designated matters to be included in the record which allegedly were in no way essential to decision of the appeal, and after appellants had filed request for printing, appellee requested that all the balance of the record be printed. Dunn v. Jefferson Standard Life Ins. Co., C.C.A.5 (Tex.) 1942, 125 F.2d 98. Federal Civil Procedure 2746

Costs would not be taxed on appeal to either party where, of the 1,500-odd pages of the record, two-thirds were devoted to written documents, a large number of which should have been either omitted or merely summarized and both sides were at fault. Flakice Corp. (Delaware) v. Short, C.C.A.2 (Conn.) 1940, 115 F.2d 567. Costs 238(1)

Research, items recoverable

Appellate costs recoverable by prevailing party in "exceptional" Lanham Act suit did not include expenses for on-line legal research or fees for outside counsel. JTH Tax, Inc. v. H & R Block Eastern Tax Services, Inc., E.D.Va.2002, 245 F.Supp.2d 756. Antitrust And Trade Regulation 117

Third-party costs, items recoverable

Where defendant brought third parties into case by third-party proceedings claiming that third parties were liable to indemnify defendant if plaintiffs established their claims against defendant and judgment for plaintiffs was reversed on appeal thereby relieving third parties of any liability, plaintiffs were liable for costs relating to their controversy with defendant and defendant was liable for costs relating to the third-party controversy. Tejas Development Co. v. McGough Bros., C.C.A.5 (Tex.) 1948, 167 F.2d 268. Costs 241

F. R. A. P. Rule 39, 28 U.S.C.A., FRAP Rule 39
Amendments received to 12-1-13

End of Document

604 F.3d 1217
United States Court of Appeals,
Tenth Circuit.

Michelle K. **FRUITT**, Plaintiff–Appellant,
v.
Michael J. **ASTRUE**, Social Security Administration Commissioner, Defendant–Appellee.

No. 09–6027. | May 12, 2010.

Synopsis
Background: Claimant challenged denial of Social Security benefits by Social Security Administration Commissioner. The United States District Court for the Western District of Oklahoma, reversed and remanded, and subsequently, David L. Russell, J., 2008 WL 5273968, adopted report and recommendation of Doyle W. Argo, United States Magistrate Judge, awarding attorney fees, but not costs, under Equal Access to Justice Act (EAJA). Claimant appealed.

[Holding:] The Court of Appeals, McKay, Circuit Judge, held that local rule did not establish time limit for EAJA cost request.

Reversed and remanded.

West Headnotes (13)

[1] **United States**
Application; form, requisites, and time

Although the Equal Access to Justice Act (EAJA) sets a time limit for a prevailing party to request attorney fees, no federal provision imposes a time limit for a prevailing party seeking costs under EAJA. 28 U.S.C.A. § 2412(d)(1)(B).

[2] **Federal Courts**
Trial de novo

To the extent that the district court's order involves statutory construction, Court of Appeals reviews the order de novo.

1 Cases that cite this headnote

[3] **Federal Courts**
Weight to be accorded trial judge's holding

Generally, considerable deference is accorded to a district court's interpretation and application of its own rules of practice and procedure; however, that directive has little force when other judges in the same district construe the rule differently.

[4] **Federal Courts**
Reversal or Vacation of Judgment in General

Where Court of Appeals is convinced that the district court has misconstrued its own rules, reversal may be warranted.

[5] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

In construing a statute, Court of Appeals initially looks to the plain language of the provision at issue.

[6] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

If the words of the statute have a plain and ordinary meaning, Court of Appeals applies the text as written.

[7] **Statutes**
Dictionaries

Court of Appeals may consult a dictionary to determine the plain meaning of a term in a statute.

[8] **Statutes**
Context

In interpreting a statute, Court of Appeals takes into account the broader context of the provision as a whole.

[9] **Statutes**
Design, structure, or scheme

The overall structure of a provision can supply a substantial clue to the interpretation of a statutory term.

[10] **Costs**
Prevailing or Successful Party in General

Costs should ordinarily be awarded to prevailing parties.

[11] **United States**
Application; form, requisites, and time

Prevailing party in suit seeking Social Security benefits requested award of costs "pursuant to" Equal Access to Justice Act (EAJA), not pursuant to statute listing general types of costs taxable against unsuccessful parties, as would have established 14-day deadline for submitting bill of costs under local rule, and thus, filing deadline did not apply to cost request by prevailing party in that local district. 28 U.S.C.A. §§ 1920, 2412(a)(1); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.; U.S.Dist.Ct.Rules W.D.Okla., Civil Rule 54.1.

[12] **United States**
Application; form, requisites, and time

Local rule establishing 14-day deadline for submission of bill of costs does not apply to a cost request made pursuant to the Equal Access to Justice Act (EAJA). 28 U.S.C.A. § 2412(a)(1); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.; U.S.Dist.Ct.Rules W.D.Okla., Civil Rule 54.1.

[13] **United States**
Application; form, requisites, and time

A district court may specifically order that a prevailing party may be awarded costs, under the Equal Access to Justice Act (EAJA), by filing a bill of costs within a specified number of days. 28 U.S.C.A. § 2412(a)(1); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

Attorneys and Law Firms

***1218** Submitted on the briefs:* Mark E. Buchner, Tulsa,

OK, for Plaintiff–Appellant.

John C. Richter, United States Attorney, Michael McGaughran, Regional Chief Counsel, Region VI, James D. Sides, Special Assistant United States Attorney, Office of the General Counsel, Social Security Administration, Dallas, TX, for Defendant–Appellee.

Before MURPHY, McKAY, and BALDOCK, Circuit Judges.

Opinion

McKAY, Circuit Judge.

After the district court reversed and remanded the Commissioner's decision denying her social-security benefits, Michelle K. **Fruitt** filed a motion for attorneys' fees and costs under the **Equal Access to Justice Act** (EAJA), 28 U.S.C. § 2412. The district court awarded the requested attorneys' fees, but not the requested filing-fee cost. The cost denial was based on a determination that, though Ms. **Fruitt's** filing complied with the thirty-day EAJA deadline for an attorneys'-fees application, *see id.* § 2412(d)(1)(B), it did not meet the fourteen-day deadline for a bill of costs under the Local Rules for the United States District Court, Western District of Oklahoma, *see* W.D. Okla. L.R. 54.1.

The judges of the Western District of Oklahoma have reached differing answers on the question of whether Local Civil Rule 54.1 applies to an EAJA request for costs. We review this narrow issue de novo and determine that the local rule does not establish a time limit for an EAJA cost request. We therefore reverse and remand the case for further proceedings.

***1219 I.**

Ms. **Fruitt's** cost request is governed by inter-related rules of civil procedure and federal statutes. Federal Rule of Civil Procedure 54(d)(1) provides that "costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law." For purposes of Ms. **Fruitt's** case, the statute authorizing an award of costs against the government is EAJA, which states "a judgment for costs, as enumerated in [28 U.S.C.] § 1920, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against ... any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action." 28 U.S.C. § 2412(a)(1). The cross-referenced statute, § 1920, simply lists taxable costs, including the filing-fee amount requested by Ms. **Fruitt**.[1]

[1] No federal provision imposes a time limit for a prevailing party seeking costs under EAJA.[2] The district court, however, looked to Local Civil Rule 54.1 to establish a deadline. That rule provides:

> A prevailing party who seeks to recover costs against an unsuccessful party pursuant to 28 U.S.C. § 1920 shall file a bill of costs on the form provided by the Clerk and support the same with a brief. The bill of costs and brief shall be filed not more than 14 days after entry of judgment.

Id. Applying the local rule, the assigned magistrate judge issued a report and recommendation concluding that Ms. **Fruitt's** cost request, made in a combined motion for attorneys' fees and costs, was untimely because it was not filed within fourteen days of entry of judgment. The district court adopted the report and recommendation in its entirety and consequently denied the costs portion of Ms. **Fruitt's** request.

II.

Ms. **Fruitt** argues on appeal, as she did in the district court, that Local Civil Rule 54.1 does not apply to an EAJA request. She asserts "that she did not file her motion for attorney's fees and costs 'pursuant to 28 U.S.C. § 1920,' but timely brought that motion pursuant to the EAJA, which uses § 1920 only as a reference for the types of costs which may be taxed against the unsuccessful party." Aplt. Br. at 3 (quoting Local Rule 54.1). Ms. **Fruitt** also points out that at least one other district judge in the Western District of Oklahoma has agreed with her position. *See Belveal v. **Astrue***, No. CIV–07–731–C, 2009 WL 141879, at *1 (W.D.Okla. Jan. 20, 2009).

***1220** [2] [3] [4] To the extent that the district court's order involves statutory construction, we review it de novo. *Coffey v. Freeport McMoran Copper & Gold,* 581 **F.3d** 1240, 1245 (10th Cir.2009). We generally accord "[c]onsiderable deference" to a district court's "interpretation and application of [its] own rules of practice and procedure." *Smith v. Ford Motor Co.,* 626 F.2d 784, 796 (10th Cir.1980). That directive, however, has little force when other judges in the same district construe the rule differently. In any event, "[w]here ... we are convinced that the district court has misconstrued its own rules, reversal may be warranted." *Id.* (quotation omitted). We therefore conduct a de novo analysis of Local

Rule 54.1, applying ordinary principles of statutory interpretation.

[5] [6] [7] [8] As usual, we "look[ ] initially to the plain language" of the provision at issue. *Chamber of Commerce of U.S. v. Edmondson,* 594 F.3d 742, 765 (10th Cir.2010). "If the words of the statute have a plain and ordinary meaning, we apply the text as written. We may consult a dictionary to determine the plain meaning of a term." *Conrad v. Phone Directories Co.,* 585 F.3d 1376, 1381 (10th Cir.2009) (citation omitted). "We also take into account the broader context of the [provision] as a whole." *Id.* (quotations omitted).

The local rule pertains to a request from a party who "seeks to recover costs against an unsuccessful party pursuant to 28 U.S.C. § 1920." W.D. Okla. L.R. 54.1. The phrase to be interpreted is "*pursuant to* " § 1920. An on-point definition is that "pursuant to" means "[a]s authorized by; under," as used in "pursuant to Rule 56, the plaintiff moves for summary judgment." *Black's Law Dictionary* 1356 (9th ed.2009).[3]

[9] [10] [11] Further, the "overall structure" of the provision can supply a "substantial clue" to the interpretation of a statutory term. *Conrad,* 585 F.3d at 1382, 1383. And the relevant framework dovetails with the above *Black's Law Dictionary* definition. "[C]osts should ordinarily be awarded to prevailing parties." *U.S. ex rel. Ritchie v. Lockheed Martin Corp.,* 558 F.3d 1161, 1171 (10th Cir.2009). But costs may not be assessed against a federal agency unless the award is otherwise authorized by law. Fed.R.Civ.P. 54(d)(1). It is EAJA that provides the necessary authorization. 28 U.S.C. § 2412(a)(1). Thus, consulting with the dictionary and evaluating the statutory scheme leads to the conclusion that Local Rule 54.1 does not encompass Ms. **Fruitt's** cost request: Ms. **Fruitt** sought costs "pursuant to" or "authorized by" the specific EAJA provision, not the general § 1920 listing.

III.

[12] [13] In sum, a contextual interpretation of the Western District of Oklahoma's Local Rule 54.1 discloses that the rule does not apply to a cost request made pursuant to EAJA. As a result, prevailing litigants in that district have no filing deadline applicable to their EAJA cost requests. We note, however, other district courts in this circuit have drafted and promulgated analogous rules that are not limited to parties "seek[ing] to recover costs against an unsuccessful party *pursuant to 28 U.S.C. § 1920*." W.D. Okla. L.R. 54.1 (emphasis added). For instance, in Kansas a "party *entitled to recover costs* must file a bill of costs ... within 30 days" of specified events. D. Kan. L.R. 54.1(a) (emphasis added). Colorado's approach is to require a "party or parties ... entitled to costs" to file a bill of costs "within 14 ***1221** days after entry of the judgment or final order." D. Colo. L.R. 54.1. By their terms, the local rules of these district courts may be applied to EAJA cost requests.[4] Additionally, a district court may specifically order that a prevailing party may be awarded costs by filing a bill of costs within a specified number of days. E.g., *Quinlisk v. Astrue,* No. 08–cv–02694–PAB, 2010 WL 148279, at *4 (D.Colo. Jan. 7, 2010).

For the foregoing reasons, we REVERSE and REMAND the matter to the district court for consideration of Ms. **Fruitt's** cost request under EAJA, 28 U.S.C. § 2412(a)(1).

Parallel Citations

76 Fed.R.Serv.3d 1073, 153 Soc.Sec.Rep.Serv. 364, Unempl.Ins.Rep. (CCH) P 14635C

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

1 28 U.S.C. § 1920 states:

> 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.

2 EAJA does set a time limit for an attorneys' fee request: a party seeking an award of fees must file an application within thirty days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B). Ms. **Fruitt** filed her combined motion for costs and attorneys' fees within the thirty-day period after judgment.

3 *Black's Law Dictionary* also defines "pursuant to" as "[i]n compliance with, in accordance with; under" and "[i]n carrying out." *Id.* at 1356.

4 A district court may amend its local rules "acting by a majority of its district judges." Fed.R.Civ.P. 83(a).

P3 15. Computer disk conversions of deposition transcripts

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

FILED

SEP 07 1994

RALPH L. DeLOACH, CLERK
By _____ Deputy

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager for the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION RESOLUTION FUND, as successor to ROOKS COUNTY SAVINGS ASSOCIATION,

Plaintiff,

v.

GRANT THORNTON, formerly ALEXANDER GRANT & CO., a partnership, and FOX & COMPANY, a partnership,

Defendants.

CIVIL ACTION

No. 86-1531-MLB

ENTERED ON THE DOCKET
DATE: 9-7-94

MEMORANDUM AND ORDER

This matter comes before the court on the motion of plaintiff Federal Deposit Insurance Corporation ("FDIC") to disallow or, in the alternative, re-tax costs (Doc. 1259).

This case was tried before a jury which returned a verdict for the defendants. No appeal was taken. The Clerk taxed costs against plaintiff FDIC in the amount of $161,168.87, including $82,789.20 as court reporter fees for preparation of transcripts necessarily obtained for use in the case, $77,864.67 as fees for exemplification and copies of papers necessarily obtained for use in the case, and $515.00 as witness fees (Doc. 1256). FDIC objects to the taxation of these costs on three grounds: (1) that defendants' bill of costs was not timely filed; (2) that some of the items included in the bill of costs are improper or excessive; and (3) that any costs taxed should be offset by deposition costs that defendants were previously ordered to pay to FDIC.

AO 72A

1277

Timeliness of Bill of Costs

Local Rule 219(a) provides in pertinent part:

> The party entitled to recover costs shall file a bill of costs on a form provided by the clerk **within 30 days** (a) **after the expiration of time allowed for appeal** of a final judgment or decree, or (b) after receipt by the clerk of an order terminating the action on appeal.

(emphasis added). Under Federal Rule of Appellate Procedure 4(a)(1), a notice of appeal must ordinarily be filed within 30 days of entry of judgment. However, "if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry." Fed. R. App. P. 4(a)(1). In addition, if a party makes a timely post-trial motion for, inter alia, judgment under Federal Rule of Civil Procedure 50(b), "the time for appeal for all parties runs from the [date of] the entry of the order disposing of the last such motion outstanding." Fed. R. App. P. 4(a)(4)(A).

A review of the clerk's file in this case reveals the following pertinent information: (1) judgment was originally entered on March 31, 1993 (Doc. 1160); (2) defendants renewed their motion for judgment as a matter of law, pursuant to Rule 50(b), on April 14 (Doc. 1250); (3) the court filed a memorandum and order denying defendants' motion for judgment and declaring it moot on April 26 (Doc. 1251); and (4) defendants filed an initial bill of costs on July 9 (Doc. 1252).

Applying Federal Rule of Appellate Procedure 4(a)(1) and 4(a)(4)(A), because the FDIC is an "agency" of the United States

government,[1] and because defendants' filed a post-trial Rule 50(b) motion, the time for appeal would appear to have expired June 26, 1993, sixty days after the court entered its order denying defendants' renewed motion for judgment. Hence, looking to Local Rule 219(a), defendants had to file a bill of costs by July 26, 1993, and defendants' bill of costs filed July 9 would appear to have been timely.

FDIC contends that defendants' post-trial renewal of their motion for judgment was "moot from the outset" and, despite Federal Rule of Appellate Procedure 4(a)(4)(A), did not toll the date for filing an appeal. Consequently, FDIC argues, the time for appeal expired on May 30, sixty days after judgment was originally entered, and the last day for filing a bill of costs was June 30, 1993. FDIC does not offer any authority to support this proposition.

Defendants maintain that they renewed their motion for judgment for the following reasons: (1) in order to preserve the power of the court to enter judgment as a matter of law in the event that FDIC filed a motion for new trial and that motion was granted; and (2) in order to preserve their right of appeal on Rule 50 grounds in the event that FDIC appealed. Defendants note that,

---

[1]28 U.S.C. § 451 defines the term "agency" very broadly as including any "department, independent establishment, commission, administration, authority, board or bureau of the United States or any **corporation** in which the United States has a proprietary interest." (emphasis added). The term may be given a more narrow interpretation if the context supports it, 28 U.S.C. § 451, but no such interpretation is suggested by the language of Federal Rule of Appellate Procedure 4(a)(1).

in renewing their motion for judgment, they specifically stated that they were doing so "out of an abundance of caution" . . . "because of the possibility that this Court, or another court, might construe Rule 50(b) to require renewal by Fox and Grant even though they are the prevailing part[ies] in this case." (Doc. 1250, p. 2 n.1).

Like FDIC, this court has not found any cases or other authorities indicating that the post-trial renewal of a motion for judgment by a party that prevailed at trial does not toll the time for appeal under Federal Rule of Appellate Procedure 4. Based on the rules themselves (Fed. R. App. P. 4, Fed. R. Civ. P. 50(b), and Local Rule 219(a)), this court is of the opinion that, where a prevailing party has renewed its motion for a legitimate reason, such as preservation of the motion in a new trial or on appeal, the deadline for a notice of appeal is tolled. That being the case, the time for appeal in the present case expired on June 26, and defendants were required to file a bill of costs in accordance with Local Rule 219(a) by July 26, 1993. Their bill of costs submitted on July 9, 1993 was timely filed.

Individual Items Taxed as Costs

Taxation of costs is authorized by Fed. R. Civ. P. 54(d)(1): "[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs." 28 U.S.C. § 1920 defines "costs" and sets forth the categories of trial expenses awardable to a prevailing party under Rule 54(d):

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part

of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers 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.

The trial court has no discretion to award costs that are not set out in § 1920, Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 441-42, 107 S.Ct. 2494, 2497-98, 96 L.Ed.2d 385 (1987); Bee v. Greaves, 910 F.2d 686, 690 (10th Cir. 1990), and the prevailing party has the burden of establishing that the expenses he seeks to have taxed as costs are authorized under § 1920. Green Const. Co. v. Kansas Power & Light Co., 153 F.R.D. 670, 675 & n.4 (D. Kan. 1994). In some cases, this requires a showing that the materials were "necessarily obtained for use in the case." 28 U.S.C. § 1920(2) and (4).

If the prevailing party carries its burden and proves that a particular requested cost is statutorily authorized, there is a presumption favoring its award. U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1245 (10th Cir. 1988). The amount of such costs, however, must be carefully scrutinized to ensure that it is reasonable. Id. (citing Farmer v. Arabian American Oil Co., 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964)).

FDIC challenges a number of items included in the clerk's $161,168.87 costs award as improper (i.e., not authorized by statute) or excessive. For convenient reference in examining these

particular items of costs, the court has attached to this Order copies of the following entries in the court file: The final bill of costs (Doc. 1256), final attachment 1 (Doc. 1252, attachment 1), final attachment 2 (Doc. 1253, attachment 2), and supporting documentation (Doc. 1252, exhibits A-J). The court will attempt to go through the challenged items in an orderly fashion, identifying each with specific references to its place in the bill of costs, the attachments, and the exhibits.

1. Fees for witnesses who never actually testified-- (Bill of costs, line 5 and reverse side).

Section 1920(3) authorizes taxation of fees and disbursements for witnesses. 28 U.S.C. § 1821, which more specifically addresses witness fees and disbursements, states that costs are taxable only for a witness "**in attendance** at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition." (emphasis added).

In the present case, the clerk taxed costs in the amount of $515.00 for six non-testifying witnesses: Karen Alison-Koehn, Mimi Kruse, Phillip Rogers, James Roy, Howard Sloan, and Walter Westphall. (Doc. 1256, reverse side). FDIC objects to these costs, and defendants have not challenged this objection in their response. Accordingly, the $515.00 in fees paid to these witnesses is disallowed. (Doc. 1256, line 5).

2. Daily transcripts of trial testimony-- (Bill of costs, line 3; Attachment 1, item 1; Exhibit A).

Taxation of costs for trial transcripts is permitted under § 1920(2) if the transcripts were "necessarily obtained for use in

the case." "Whether an item is necessarily obtained for use in a case . . . calls for a factual evaluation, a task which is committed to the discretion of the trial court." Mikel v. Kerr, 499 F.2d 1178, 1183 (10th Cir. 1974) (citing United States v. Kolesar, 313 F.2d 835 (5th Cir.1963)). The most direct evidence of necessity is always the actual use of the item (e.g., the deposition, daily transcript, or exhibit) by counsel or by the court, but such use is not required. U.S. Indus., 854 F.2d at 1246.

With respect to the costs of daily transcripts in particular, the proper focus is on whether there was prior court approval for taxation of daily copy costs and whether daily copy was, at the time obtained, merely a convenience to counsel or a matter of necessity. Id. at 1248. Even in the absence of prior court approval, necessity may be evident by virtue of the complexity of the case and daily transcript costs allowed: "If the issues in [the] case [a]re so complex as to justify overlooking the lack of pretrial approval, a court [can use] its discretion to award the cost where daily copy proved invaluable to both the counsel and the court." Id. (citing Farmer, 379 U.S. at 234, 85 S.Ct. at 415; Laura B. Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553, 568 (1984) [hereinafter Bartell]). For example, in Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 663 F. Supp. 1360, 1458 (D. Kan. 1987), aff'd in part, remanded in part, 899 F.2d 951 (10th Cir. 1990), cert. denied, 497 U.S. 1005 (1990), Judge Kelly awarded the prevailing party costs for daily

transcript incurred during a long and complex antitrust trial. Judge Kelly found that the transcripts were of substantial assistance in bringing issues into focus and preparing factual testimony, cross-examinations, motions in limine, and closing arguments.

The trial of the present case was extremely complex and lasted three months. There were many witnesses, some of whom made more than one trip to the witness stand. Several witnesses testified for many days. The paper trail was endless, the facts were difficult to sort out, and the issues were difficult to understand. Given these circumstances, daily copy was not a mere convenience to counsel; it was indispensable, especially in the preparation of cross-examinations. Indeed, the fact that FDIC also ordered daily copy strongly militates against any argument that defendants' use of daily copy was somehow unreasonable. Daily transcripts were a significant help to the court as well, particularly in resolving motions that were made and other conflicts that arose during trial. Accordingly, the court finds that the stenographer's charges of $30,306.50 for daily transcripts are an entirely appropriate item in the bill of costs. (Doc. 1252, attachment 1, item 1).

3. Deposition transcripts of witnesses who did not testify at trial--(Bill of costs, line 3; Attachment 1, item 2; Exhibit B).

Section 1920(2) allows recovery for the cost of deposition transcripts, but only if they are "necessarily obtained for use in the case." See Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987) (holding deposition transcripts must be

"'reasonably necessary to the litigation of the case'") (quoting Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983)). As a general rule, depositions actually introduced in evidence or used at trial for impeachment purposes are reasonably necessary and taxable, but depositions taken solely for discovery are not. Furr, 824 F.2d at 1550 (quoting Bartell, 101 F.R.D. at 568-69). Otherwise, there is no bright line test delineating those circumstances in which a deposition transcript is reasonably necessary to litigation, and the decision rests in the sound discretion of the trial court. See Green, 153 F.R.D. at 677.

FDIC objects to being taxed the costs of 24 depositions of witnesses who did not testify at trial. The depositions were not introduced into evidence or otherwise used at trial. Defendants maintain that they are entitled to these costs because each of the 24 individuals deposed were identified as potential witnesses by FDIC.

In determining whether a deposition was reasonably necessary to the litigation, the trial court looks to the perspective of counsel when the deposition was taken. Bartell, 101 F.R.D. at 569. For example, in Reazin, Judge Kelly taxed costs for depositions of individuals who did not testify at trial, finding that because the losing party had identified them as anticipated trial witnesses in the final pretrial order, the depositions were "reasonably necessary at the time of taking." 663 F. Supp. at 1459.

In this case, FDIC's witness list in the final pretrial order (Doc. 941), filed September 17, 1992, identified each of the 24

individuals whose depositions are in question as potential witnesses. In a case of this magnitude and complexity it would seem reasonably necessary for defense counsel to depose such witnesses in preparation for trial.[2] See Marcoin, Inc. v. Edwin K. Williams & Co., Inc., 88 F.R.D. 588, 592 (E.D. Va. 1980). Indeed, it would arguably have been malpractice for defendants' counsel not to take these depositions! See Ramos v. Lamm, 539 F. Supp. 730, 754 (D. Colo. 1982), aff'd, 713 F.2d 546 (10th Cir. 1983) (Kane, J.) ("In this complex case it would be unreasonable to find that certain depositions were not necessary because they were not actually used at trial . . . . In truth, it would have constituted malpractice if the plaintiffs' attorneys had failed to take depositions."). The costs of the 24 depositions will accordingly be allowed.

4. Expedited delivery of the deposition transcript of David Martens to defense counsel--(Bill of costs, line 3; Attachment 1, item 2; Exhibit B).

FDIC objects to the taxation of $170.00 in Federal Express and fax charges for the expedited delivery of the deposition of David Martens to defendants' counsel. (Exhibit B). According to FDIC, such costs are not authorized by § 1920.

Defendants argue that Mr. Martens's deposition was taken only because FDIC objected to the admissibility of a memorandum prepared

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[2]As captions to the court's previous orders in connection with this case reveal, there were originally many more parties to this action than are currently identified. Significantly, those parties did not settle their claims until shortly before trial. Hence, during discovery, counsel likely anticipated an even more lengthy and complex trial than actually occurred.

by the Office of Thrift Supervision (OTS). Defendants claim that they needed an immediate ruling on this admissibility issue in order to effectively plan their trial strategy and that the costs of expedited delivery should therefore be allowed.

As discussed supra, only the necessary costs associated with a deposition transcript are taxable under § 1920(2). Defendants have not shown necessity with respect to the Federal Express and fax charges incurred in transporting Mr. Martens's deposition. Accordingly, these costs ($170) are disallowed.

5. Deposition videotapes that were never used at trial--(Bill of costs, line 3; Attachment 1, item 3; Exhibit C).

Under Federal Rule of Civil Procedure 30(b)(4), depositions can be recorded "other than stenographically," including through videotape. Taxation of reasonably necessary videotaping costs has accordingly been upheld under § 1920(2). See Barber v. Ruth, 7 F.3d 636, 645 (7th Cir. 1993); Meredith v. Schreiner Transp., Inc., 814 F. Supp. 1004 (D. Kan. 1993) (Belot, J.). As with other cost items, actual use of the videotape at trial is not required in order to establish necessity. Barber, 7 F.3d at 645. However, in the absence of actual use, the prevailing party must show that the facts known when the deposition was taken made it reasonably necessary to record the deposition on videotape. Id.

FDIC objects to the taxation of costs for videotapes of the depositions of David Comeau, Charles Comeau, Roger Comeau, A.J. Schwartz, George Dinkel, and Francine Coulter, all of whom appeared and testified in person at trial. In addition, FDIC objects to the costs of videotaping the deposition of David Martens. None of

these videotapes were used at trial.

In response, defendants claim that both parties agreed to videotaping the depositions. Defendants admit that each of the witnesses were in good health and residents of Kansas when their depositions were taken, but claim the witnesses could have become unavailable between the depositions and trial.

With respect to the Comeau brothers and A.J. Schwartz, the court accepts defendants' representations that they videotaped the depositions for the legitimate purpose of preserving testimony in the event that an important witness became unavailable. Although there was no indication, at the time the depositions were taken in 1989, that the witnesses might not be available for live testimony at trial, it bears repeating that this was a very complex case, with many parties and issues, and there was little likelihood that the case would be tried in the near future. Indeed, trial did not begin until January 1993. The credibility of the Comeau brothers,[3] as well as A.J. Schwartz, all of whom were still parties to this case in 1989, was obviously a foreseeable crucial matter. It is much easier to judge credibility from a video deposition than a transcript. Under these circumstances, the court finds that the costs of the original videotapes of the depositions of David Comeau ($5,956.13), Charles Comeau ($2,661.75), Roger Comeau ($2,160.38), and A.J. Schwartz ($1,071.00) are properly recoverable. (Attachment 1, item 3; Exhibit C).

[3]The ultimate lack of credibility of the Comeau brothers, particularly David Comeau, was a major reason for the defendants' verdict.

For the reasons stated by defendants (Doc. 1256, p. 20), the court will also allow costs for videotaping the deposition of David Martens ($480.00). (Attachment 1, item 3; Exhibit C).

The court denies recovery for duplicates of the videotaped depositions of George Dinkel ($60.00) and Francine Coulter ($60.00), who were employees of defendants. (Attachment 1, item 3; Exhibit C).

6. Travel and related expenses reimbursed to the photographer who videotaped Terry Rupp's deposition--(Bill of costs, line 3; Attachment 1, item 3; Exhibit C).

FDIC objects to being taxed for travel and meal expenses reimbursed to a photographer who traveled to Hays, Kansas and videotaped the deposition of Terry Rupp. A June 25, 1993 charge invoice from Action Audio-Visual in Wichita totaling $1,430.00 includes $450.00 for "travel expenses, meals." (Attachment 1, item 3; Exhibit C). FDIC does not challenge the other $980.00 charged in connection with videotaping Rupp's deposition.

Defendants claim the $450.00 in travel and meal expenses are taxable because they were incurred as part of a reasonably necessary video deposition.

The court agrees with FDIC. The bill submitted by the video technician does not explain or break down the "travel expenses [and] meals," and there is no other basis for the court to determine how $450.00 for travel from Wichita to Hays could be reasonable, even if the deposition itself was necessary. The $450.00 charge is disallowed.

7. Paper copies of daily trial and deposition transcripts--(Bill of costs, line 6; Attachment 2, items 6 & 10; Exhibit I).

Fees for "copies" of trial transcripts and depositions are authorized taxable items under § 1920(4) if, as with original transcripts, they are "necessarily obtained for use in the case." See Ramos v. Lamm, 713 F.2d at 560 (affirming award of costs for copies of depositions). The focus is on whether counsel had a reasonable need for a copy. Bartell, 101 F.R.D. at 573-74 (discussing United States v. Kolesar, 313 F.2d 835, 840 (5th Cir. 1963)).

Attachment 2 to the bill of costs (see Doc. 1253, Attachment 2, Item 10) indicates that $3,465.60 was taxed for obtaining two copies of the **daily trial transcripts** produced in this case. As stated supra, the court is fully persuaded that daily transcripts were a necessity to counsel and helpful to the court. However, obtaining two extra copies of these daily transcripts was not necessary, and the costs thereby incurred ($3,465.60) will not be allowed. (Attachment 2, item 10).

With respect to copies of **depositions**, defendants maintain that they had a reasonable need for additional copies because there were many depositions--over 30--and they had to be shared by defendant Fox's and defendant Grant's Chicago and Kansas counsel. In addition, according to defendants, deposition copies expedited the process of cross-examination as they could be given to the witness on the stand.

In the court's view, the reasons articulated by defendants are

sufficient to show that deposition copies were necessary to the effective litigation of this lengthy and complex case. The copy costs for depositions, $3,297.50 at 10¢ per page, will therefore be allowed. (Attachment 2, item 6; Exhibit I).

8. Computer disk conversions of deposition transcripts--(Bill of costs, line 3; Attachment 1, item 2; Exhibit B).

FDIC also objects to being taxed $510.60 for computer disk conversions of deposition transcripts.[4] Defendants respond that the computer disks were extremely useful in sorting out the hundreds of thousands of pages of deposition testimony in this case.

The court does not doubt the benefits of using computer technology to aid in finding pertinent deposition testimony during trial preparation and the trial itself. However, as discussed supra, this court has no discretion to tax costs which are not specifically authorized by § 1920. Judge Saffels of this court recently denied costs for computer disk conversions of depositions, noting that "several courts have held that expenditures for computerized litigation support, document retrieval, and document management are not taxable as costs." Green, 153 F.R.D. at 678 (citing numerous cases, including U.S. Indus., 854 F.2d at 1245-47). In view of the cases cited by Judge Saffels and having found

[4]For the record, the $510.60 in charges for computer disks enumerated in Exhibit B should have been included under "copies" necessarily obtained for use in the case (bill of costs, line 6), not "transcripts" (bill of costs, line 3). See Green, 153 F.R.D. at 678 ("The amounts claimed for carbon **and disk** copies of depositions should have been included under the category of copies of papers rather than printing.") (emphasis added).

no clear basis for the taxation of computer disk conversion expenses under § 1920, the costs of the deposition disks, $510.60, are disallowed.

9. Fees associated with the preparation of demonstrative exhibits--(Bill of costs, line 6; Attachment 2, items 1-2; Exhibits D-E).

Section 1920(4) authorizes taxation of fees for necessary "exemplification" of papers. The term "exemplification" has been interpreted broadly and generally includes demonstrative exhibits. See Green, 153 F.R.D. at 683 (citing Bartell, 101 F.R.D. at 584-85).

Costs of demonstrative exhibits are generally denied in the absence of prior court approval, unless the court is persuaded that the demonstrative evidence was essential to the prevailing party's case. Green, 153 F.R.D. at 676, 683 (citing Euler v. Waller, 295 F.2d 765, 767 (10th Cir. 1961) and Miller v. City of Mission, Kansas, 516 F. Supp. 1333, 1339-40 (D. Kan. 1981)); see also Bartell, 101 F.R.D. at 585. To be essential to the case, demonstrative exhibits must normally be more than a mere illustration of expert testimony or other evidence adduced at trial. Green, 153 F.R.D. at 683 (citing Miller, 516 F. Supp. at 1339-40); see also Walters v. Monarch Life Ins. Co., CIV.A. No. 91-2396-GTV, 1993 WL 256755, at *2 (same); Anderson v. United Telephone Co. of Kansas, Inc., CIV.A. No. 86-2511-O, 1991 WL 286903, at *1 (D. Kan. Dec. 4, 1991) (same).

The final bill of costs in this case includes $77,864.77 for "exemplification and copies." (Doc. 1256, line 6). $57,535.93 of

this amount is connected with enlargements, graphs, and other demonstrative exhibits prepared by defense counsel and experts for use at trial. (See Doc. 1253, Attachment 2, Items 1-2). FDIC objects to these costs, contending that many of the demonstrative exhibits were not used at trial and that most of those which were used merely restated expert testimony or were enlargements of documents that were already in the hands of the jury. According to FDIC, $14,115.05 of the $57,535.93 taxed for demonstrative exhibits is attributable to exhibits that were never used at trial, and another $11,616.16 represents costs associated with client meetings, briefings, and "reimbursables" (travel and related expenses) which are not taxable. Of the remaining $31,804.72, FDIC contends only $3,643.69 is attributable to non-illustrative, non-argumentative demonstrative exhibits.

Defendants concede that some of the demonstrative exhibits for which they seek to tax costs were "killed in process" and never used at trial. They further admit that their demonstrative exhibits were to some extent illustrative and argumentative. Defendants maintain, however, that at the time these exhibits were being made, they all appeared to be necessary to an effective and efficient presentation of their case. Defendants also claim that the client meetings and briefings concerning the preparation of demonstrative exhibits and the travel and related expenses reimbursed to defendants' graphics consultant were necessary within

the meaning of § 1920(4).[5]

The court believes that defendants use of exhibit blowups, graphs, and other visual aids was a valuable assistance to the jury and court in understanding the facts and the issues of this case. Nevertheless, the rules followed by the judges in this court are clear: (1) it is advisable to obtain prior court approval before incurring large expenses for demonstrative exhibits, the costs of which are expected to be taxed; and (2) graphs, enlargements, and other visual aids that merely illustrate or recommunicate evidence adduced at trial are not usually taxable. Here, defendants did not obtain prior court approval and, however helpful the blowups and other demonstrative items may have been, most of them appear to merely illustrate other evidence. On the other hand, the court agrees with defendants that use of blowups and graphs was essential to the effective presentation of their case given the complexity of the issues and the voluminous amounts of highly technical documentary evidence. Accordingly, the court finds that, in this unusual case, the costs of demonstrative exhibits **actually used at trial** may be taxed.

With respect to those exhibits "killed in process" or never actually used at trial, the court finds that these exhibits were unnecessary and, indeed, that some were never "obtained" as required by the language in § 1920(4). The $14,115.05 in costs

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[5]According to defendants, their graphics consultant had to travel to Wichita to prepare responsive exhibits because the FDIC did not give defendants copies of its demonstrative exhibits until just before trial.

associated with these exhibits will not be allowed. The court is disappointed with defendants' counsel for allowing the clerk to include the costs of such exhibits under the category of demonstrative exhibits "used during trial." (See Doc. 1253, Attachment 2, Items 1-2).

The fees for the client meetings and briefings concerning exhibit preparation are in the nature of attorney's or expert's fees, not exemplification costs, and are not taxable under § 1920. See Green, 153 F.R.D. at 676 (holding that expert fees are not recoverable under § 1920 under the guise of work necessary for producing exhibits). Travel and related expenses of a graphics consultant are also not taxable. When attorneys have their paralegals or other support staff attend trial to assist them with preparing and displaying exhibits, the paralegal's travel expenses are not taxable under § 1920. The court fails to see why the rule should be any different just because a so-called "graphics consultant" was hired. Accordingly, the $11,616.16 in costs attributable to these items are disallowed.

10. Copying fees associated with exhibits and putting together exhibit and jury notebooks--(Bill of costs, line 6; Attachment 2, items 3-5, 7-9; Exhibits G-I).

Section 1920(4) also authorizes taxation of fees for necessary "copies" of exhibits. FDIC objects to the following exhibit copy fees in the final bill of costs as being improper and/or excessive: (1) $6,563.88 for photocopying audit workpapers and preparing exhibit books; (2) $284.36 for copies made at courthouse for use at trial; (3) $4,571.80 for copies (20¢ per page) of trial exhibits

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made at local counsel's office; (4) $950.40 for copies (20¢ per page) for 12 jury notebooks; (5) $1,080.00 for copies (20¢ per page) for trial exhibit notebooks provided to the court, court reporter, and plaintiff's counsel; and (6) $115.20 for copies (20¢ per page) of exhibits used at trial in connection with defendants' experts' testimony. (Doc. 1253, Attachment 2, Items 3-5, 7-9). The court finds some of these charges to be improper or excessive.

First, item (2) listed above appears to involve charges for renting a copier, moving it to the courthouse, and making copies on it during trial. (Attachment 2, item 4; Exhibit G). While this is highly convenient, it is not "necessary." Item (2) is disallowed.

The remaining items appear to be copying fees associated with putting together various exhibit notebooks. Such fees are ordinarily considered expenses incident to preparing a case for trial and are not taxable. See Withrow v. Cornwell, CIV.A. No. 93-2040-KHV, 1994 WL 171849, *1 (D. Kan. April 1, 1994); Miller v. City of Mission, 516 F. Supp. 1333, 1339 (D. Kan. 1981). In this extraordinary case, however, the court ordered the parties to prepare a full set of exhibits for the court and exhibit notebooks for each of the jurors. Both the court and the jurors made extensive use of their respective copies of exhibits. Indeed, it is hard to imagine any other means of effectively dealing with the exhibits, given their number and complexity. Hence, the court finds that the exhibit copies were "necessarily obtained for use in the case." 28 U.S.C. § 1920(4). However, the court considers the 20¢ per copy charged in connection with items (3), (4), (5) and (6)

to be excessive. Although this court has no local rule or practice with respect to maximum per copy charges, other district courts, including the Western District of Missouri, limit copying costs to 10¢ per page. The costs in items (3), (4), (5) and (6) will accordingly be reduced to 10¢ per copy.

Offset for Deposition Costs Owed by Defendants

Finally, FDIC contends that the remaining costs taxed against it should be offset by the costs FDIC incurred in taking the deposition of John Owens, defendants' original proposed expert. This contention is based on a November 12, 1991 Order (Doc. 783) in which Judge Reid granted a motion by defendants to substitute a new expert for Mr. Owens who was apparently in bad health (perhaps due in some part to his involvement in this case). As a condition to granting the motion, Judge Reid ordered defendants to pay the Comeaus (formerly plaintiffs in this action) and the FDIC the costs incurred in taking Mr. Owens's deposition.

Defendants argue that FDIC is not entitled to an offset because it never submitted a timely bill for the costs of deposing Mr. Owens, but instead attempted to call Mr. Owens as a witness and used Mr. Owens's deposition as a central feature of its case against the defendants. According to defendants, having exploited Mr. Owens's deposition testimony, the FDIC is, as a matter of equity, estopped from asserting any right that it had **before** trial to obtain reimbursement for the reasonable costs of deposing Mr. Owens.

There is no indication in Judge Reid's Order of November 12,

1991 that awarding reasonable costs to the Comeaus and FDIC somehow precluded them from using Mr. Owens's deposition to their own advantage. Therefore, the court finds little merit in defendants' artful estoppel argument. On the other hand, the court believes it inappropriate to consider this issue in the context of a motion to retax costs. The court is loath to intermingle post-judgment costs under Rule 54(d) and § 1920 with costs awarded to a party in a pretrial discovery order under the pertinent discovery rules.

Accordingly, if FDIC wishes to pursue this matter further, it should submit a bill to the defendants for the **reasonable** costs incurred in actually taking Mr. Owens's deposition and, should conflict once again rear its ugly head, move to compel defendants' compliance with Judge Reid's November 12, 1991 Order. The court makes no suggestion as to whether a request for reasonable costs is appropriate at this time, nor as to how it will rule should it be required to address the issue.

IT IS ACCORDINGLY ORDERED that FDIC's motion to re-tax costs (Doc. 1260) is granted in part and denied in part, the court finding that defendants' initial bill of costs was timely filed; that FDIC's request to offset post-judgment costs by the discovery costs awarded in Judge Reid's November 12, 1991 Order cannot be considered in the context of the present motion to re-tax; and that the following items are not properly taxable under 28 U.S.C. § 1920 and shall be **eliminated** from the present bill of costs (Doc. 1256):

(1) $515.00 for witness fees--(Bill of costs, line 5).

(2) $170.00 for the expedited delivery of the deposition of David Martens--(Part of Attachment 1, item 2).

(3) $510.60 for computer disk conversions of deposition transcripts--(Part of Attachment 1, item 2).

(4) $120.00 for videotape depositions of Francine Coulter and George Dinkel--(Part of Attachment 1, item 3).

(5) $450.00 for travel and meal expenses of the video technician who taped the deposition of Terry Rupp--(Part of Attachment 1, item 3).

(6) $14,115.05 for demonstrative exhibits "killed in process" and/or never used at trial--(Part of Attachment 2, item 1).

(7) $11,616.16 for meetings and briefings concerning exhibit preparation, and travel and related expenses of graphics consultant--(Part of Attachment 2, item 1).

(8) $284.36 for renting copying machine and making copies at courthouse during trial--(Attachment 2, item 4).

(10) $2,285.90 in excessive copy costs--(Reducing costs in Attachment 2, item 5 to 10¢ per page).

(11) $475.20 in excessive copy costs--(Reducing costs in Attachment 2, item 7 to 10¢ per page).

(12) $540.00 in excessive copy costs--(Reducing costs in Attachment 2, item 8 to 10¢ per page).

(13) $57.60 in excessive copy costs--(Reducing costs in Attachment 2, item 9 to 10¢ per page).

(14) $3,465.60 for additional copies of daily trial transcripts--(Attachment 2, item 10).

Pursuant to this Order, the final bill of costs should now total $126,563.40, consisting of $81,538.60 in fees for transcripts (line 3) and $45,024.80 in fees for exemplification and copies (line 6).

At Wichita, Kansas, this 7th day of September, 1994.

Monti L. Belot
United States District Judge

153 F.R.D. 670
United States District Court,
D. **Kansas**.

GREEN CONSTRUCTION COMPANY,
Plaintiff,
v.
The **KANSAS POWER** & **LIGHT** COMPANY,
Defendant–Counterclaimant,
v.
SEABOARD SURETY COMPANY and **Green** Holdings, Inc., Counterclaim Defendants.

Civ. A. No. 87–2070–DES. | March 4, 1994.

On motion of defendant for review of costs taxed against it by clerk, the District Court, Saffels, Senior District Judge, held that: (1) expert witness fees claimed as "exemplification and copies of papers" were not recoverable as costs; (2) cost of deposition transcripts for witnesses would be disallowed in absence of showing that depositions were necessarily obtained for use in the case; (3) amount claimed for **converting depositions to computer disks** was not recoverable as costs; (4) excessive travel fees for witnesses would be disallowed.

So ordered.

West Headnotes (32)

[1] **Federal Civil Procedure**
Prevailing Party

Pursuant to civil procedure rule, costs are generally allowed as matter of course to prevailing party unless court otherwise directs. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[2] **Federal Civil Procedure**
Prevailing Party

"Prevailing party," for purposes of civil procedure rule authorizing award of cost so such party, is a party in whose favor judgment was rendered; it is party who won at trial, whether or not that party prevailed on all issues, and regardless of amount of damages awarded. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

3 Cases that cite this headnote

[3] **Federal Civil Procedure**
Attorney Fees

In conducting review of costs assessed by clerk, court makes de novo determination in exercise of its sound discretion.

6 Cases that cite this headnote

[4] **Federal Civil Procedure**
Discretion of Court

Discretion of court in determining and awarding costs is contingent on its determination that expenses requested are allowable cost items under statute, and that amounts requested are reasonable and necessary. 28 U.S.C.A. § 1920.

[5] **Federal Civil Procedure**
Taxation

Finding that a requested cost is statutorily authorized creates presumption favoring its award. 28 U.S.C.A. § 1920.

3 Cases that cite this headnote

[6] **Federal Civil Procedure**
Taxation

Burden is on prevailing party to establish to court's satisfaction that particular costs for which reimbursement is claimed are authorized by statute; for some categories of costs, there must

be showing by prevailing party that materials were necessarily obtained for use in the case. 28 U.S.C.A. § 1920.

19 Cases that cite this headnote

[7] **Federal Civil Procedure**
Witness Fees

Court does not have discretion to tax prevailing party's **expert witness fees** as costs beyond statutory per diem rate of reimbursement for witnesses specified in statute. 28 U.S.C.A. § 1821(b).

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Particular Items

Awarding of costs for preparation of exhibits is committed to discretion of trial court.

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Witness Fees

Court's award of costs of $1,009,823.93 as "fees for exemplification and copies of papers necessarily obtained for use in the case" would be disallowed, as amount represented fees for experts and consultant services which could not be recovered under guise of fees for "exemplification." 28 U.S.C.A. §§ 1821(b), 1920(4).

[10] **Federal Civil Procedure**
Depositions

Trial court has great discretion to tax cost of deposition if it determines that all or any part of deposition was necessarily obtained for use in the case, even if not actually used in trial itself. 28 U.S.C.A. § 1920(2).

6 Cases that cite this headnote

[11] **Federal Civil Procedure**
Depositions

Costs of depositions which were read into evidence at trial would be allowed, since they were deemed necessarily obtained for use in case; however, costs of other depositions would be disallowed, as prevailing plaintiff made no attempt whatsoever to demonstrate that those depositions were necessarily obtained for use in the case. 28 U.S.C.A. § 1920(2).

3 Cases that cite this headnote

[12] **Federal Civil Procedure**
Depositions

Costs amounts claimed by plaintiff for carbon and disk copies of depositions should have been included under statutory category of "copies of papers" rather than "printing." 28 U.S.C.A. § 1920(3, 4).

[13] **Federal Civil Procedure**
Depositions

Cost of copies of depositions may be allowable under certain circumstances, but costs must be supported by showing that copies were necessarily obtained for use in the case. 28 U.S.C.A. § 1920(4).

1 Cases that cite this headnote

[14] **Federal Civil Procedure**
Depositions

Award of costs to plaintiff for making copies of depositions would be disallowed, where plaintiff made no showing that copies were necessarily obtained for use in the case; moreover, several deposition copies for which costs were requested in category of printing were duplicate copies of transcripts for which costs were also requested under category of court reporter fees. 28 U.S.C.A. § 1920(2–4).

4 Cases that cite this headnote

[15] **Federal Civil Procedure**
Depositions

Expenses of converting several depositions into computer disks, in addition to expense of paper copies, were not taxable as costs. 28 U.S.C.A. § 1920(4).

[16] **Federal Civil Procedure**
Witness Fees

While expenses of witnesses who are parties to litigation normally are not taxable as costs, expenses of director or officer of corporate party who is not personally involved in the litigation may be taxable if he is testifying on behalf of the corporation he represents, and corporation is a party to suit. 28 U.S.C.A. § 1821.

5 Cases that cite this headnote

[17] **Federal Civil Procedure**
Witness Fees

Fees for witnesses who were employees of corporate party were recoverable as costs by prevailing plaintiff, where defendant did not show that witnesses had any more personal interest in the litigation than a natural concern for welfare of their corporate employer. 28 U.S.C.A. § 1821.

2 Cases that cite this headnote

[18] **Federal Civil Procedure**
Witness Fees

Attendance and subsistence allowances for witnesses are not restricted to days witness actually testifies but may also be awarded for each day witness necessarily attends trial, time spent during delays and temporary adjournments, and time necessary for travel to and from place of attendance. 28 U.S.C.A. § 1821(b), (d)(1–3).

4 Cases that cite this headnote

[19] **Federal Civil Procedure**
Witness Fees

Generally, no witness fee may be taxed as costs for person who travels to the court house but does not testify at trial. 28 U.S.C.A. § 1821(c).

2 Cases that cite this headnote

[20] **Federal Civil Procedure**
Witness Fees

In considering whether to allow expenses for a witness travelling in excess of 100 miles, court should consider length of journey, necessity of testimony, and possibility of averting the travel expense. 28 U.S.C.A. § 1821.

1 Cases that cite this headnote

[21] **Federal Civil Procedure**
Witness Fees

Amounts claimed for airfare on behalf of witness who testified at trial were excessive and were not based upon most economical rate reasonably available as required by statute, where airfare

passenger receipts submitted by witness showed that he flew first class on two round-trips. and thus amount awarded for airfare would be reduced. 28 U.S.C.A. § 1821(c)(1).

1 Cases that cite this headnote

[22] **Federal Civil Procedure**
Witness Fees

Although amount claimed for airfare for witness to attend deposition was reasonable, there was no showing that it was necessary for witness to fly from Houston to San Francisco to be deposed in case, as location was well beyond geographical limits of district court's subpoena **power**; thus, court would exercise its discretion to limit travel expenses for deposition. 28 U.S.C.A. § 1821(c)(1).

[23] **Federal Civil Procedure**
Witness Fees

Amount of airfare awarded for consultant would be disallowed as cost awarded to plaintiff, where plaintiff did not submit any documentation to support claimed amount; moreover, consultant did not testify at trial, and although he was deposed on behalf of defendant, plaintiff did not submit any proof whatsoever that amount claimed was for his appearance at deposition, and deposition was neither admitted into evidence nor read at trial. 28 U.S.C.A. § 1821(c)(1).

[24] **Federal Civil Procedure**
Witness Fees

Where witness travelled round-trip by air on three separate occasions during trial, but testified only on one day as a rebuttal witness, assessing defendant costs of three round-trips was excessive and not authorized by statute; prevailing plaintiff was statutorily entitled to recover only reasonable actual expenses of common carrier travel for witness for his attendance at trial for the time necessary for his appearance as a witness. 28 U.S.C.A. § 1821(c)(1).

3 Cases that cite this headnote

[25] **Federal Civil Procedure**
Witness Fees

Plaintiff's claim for mileage expenses for witness who travelled round-trip from San Francisco to Topeka would be limited to $50, on basis of 100 miles each way at statutory mileage rate of 25 cents per mile, where plaintiff did not establish that it was necessary to obtain testimony of witness residing so far from place of trial. 28 U.S.C.A. § 1821(c)(2).

[26] **Federal Civil Procedure**
Particular Items

Money spent to copy court filings is not recoverable under cost statute if copies are for successful litigant's own use. 28 U.S.C.A. § 1920(4).

2 Cases that cite this headnote

[27] **Federal Civil Procedure**
Stenographic Costs

Amount of $174.20 paid by plaintiff's counsel to counsel for defendant for making copies of materials allegedly lost from plaintiff's files by counsel in a mishap in transit would be disallowed as costs, where plaintiff did not show that copies were necessarily obtained for use in case; only documentation submitted in support of expense was copy of check issued in amount claimed, with notation "for copying expense." 28

U.S.C.A. § 1920(4).

5 Cases that cite this headnote

[28] **Federal Civil Procedure**
Particular Items

Costs of producing demonstrative evidence, including models, charts, photographs, illustrations, and similar graphic aids, are generally denied in absence of prior court approval unless court is persuaded that the demonstrative evidence was essential for the prevailing party's case. 28 U.S.C.A. § 1920(4).

3 Cases that cite this headnote

[29] **Federal Civil Procedure**
Particular Items

Expense of items that merely illustrate expert testimony or other evidence adduced at trial are normally not taxable as costs. 28 U.S.C.A. § 1920(4).

2 Cases that cite this headnote

[30] **Federal Civil Procedure**
Particular Items

Cost of producing enlargements used as demonstrative evidence for purpose of illustrating certain exhibits to the jury would be disallowed, where plaintiff did not obtain prior approval from court for purpose of taxing costs of such enlargements, and did not assert that enlargements were for any purpose other than illustrating other evidence before the jury. 28 U.S.C.A. § 1920(4).

[31] **Federal Civil Procedure**
Stenographic Costs

Costs claimed "for exemplification and copies of papers" would be disallowed, where plaintiff merely submitted statements from copying service for several thousand photocopies, without identifying use made of materials. 28 U.S.C.A. § 1920(4).

[32] **Federal Civil Procedure**
Particular Items

Nominal amount claimed for exhibit labels was incidental expense of trial and was not recoverable as cost by plaintiff. 28 U.S.C.A. § 1920.

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Opinion

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

This matter is before the court on the motion of defendant-counterclaimant The **Kansas Power & Light** Company ("KPL") for review of costs taxed against it by the clerk pursuant to Fed.R.Civ.P. 54(d) (Doc. 671). Plaintiff **Green Construction** Company ("**Green**") filed a bill of costs seeking a total award of $1,073,651.26. The clerk taxed costs against KPL in the full amount requested by **Green**. At the request of KPL, the court held a hearing on the motion on October 26, 1993. The court has considered the arguments of the parties and is now prepared to rule.

KPL initially contended that **Green's** bill of costs was filed out of time. At oral argument, however, KPL conceded that the bill of costs was timely filed on September 16, 1993. Having carefully reviewed the record, the court is in agreement that the bill of costs was timely filed within 30 days after receipt by the clerk of the order terminating the case on appeal. *See* D.Kan.Rule 219(a).

KPL timely submitted its motion to review costs on September 24, 1993, within five days after the clerk's order taxing costs. *See* Fed.R.Civ.P. 54(d). **Green** did not file a response, however, until October 22, 1993, well beyond the ten days permitted a party ***674** opposing a motion. *See* D.Kan.R. 206(b). The failure to file a response within the time specified in Rule 206 constitutes a waiver of the right to file such a response, except upon a showing of excusable neglect. D.Kan.R. 206(g). No such showing has been made to this court. The motion for review of costs filed by KPL will therefore be considered and decided as an uncontested motion. *See* D.Kan.R. 206(g).

[1] Pursuant to Fed.R.Civ.P. 54(d), costs are generally allowed as a matter of course to the prevailing party unless the court otherwise directs. *See Delano v. Kitch,* 663 F.2d 990, 1001 (10th Cir.1981) (when trial court refuses to award costs to prevailing party, it must state its reasons to enable appellate court to judge whether trial court acted within its discretion), *cert. denied,* 456 U.S. 946, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982); *True Temper Corp. v. CF & I Steel Corp.,* 601 F.2d 495, 509–10 (10th Cir.1979) (rule establishes presumption that prevailing party shall recover costs, unless some reason appears for penalizing the prevailing party); *Meredith v. Schreiner Transport, Inc.,* 814 F.Supp. 1004, 1005 (D.Kan.1993) (court must allow prevailing party to recover all costs authorized by statute unless some reason appears for penalizing that party) (citing *Ortega v. City of **Kansas** City, **Kansas***, 659 F.Supp. 1201, 1218 (D.Kan.1987)).

[2] In this case, the court's judgment following the jury verdict ordered that **Green** recover its costs from KPL. Despite the arguments of KPL to the contrary, **Green** was the prevailing party in this lawsuit. The jury specifically determined that KPL breached its contract with **Green**, and awarded damages to **Green** in the amount of $222,312.56. The jury also determined that **Green** had not breached its contract with KPL. A prevailing party, for purposes of Rule 54(d), is a party in whose favor judgment is rendered. *d'Hedouville v. Pioneer Hotel Co.,* 552 F.2d 886, 896 (9th Cir.1977); *Sperry Rand Corp. v. A–T–O, Inc.,* 58 F.R.D. 132, 135 (E.D.Va.1973); 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 2667, at 178 (1983) [hereinafter cited as Wright & Miller]. Traditionally, this means the party who won at trial, whether or not that party prevailed on all issues, and regardless of the amount of damages awarded. *See, e.g., American Ins. Co. v. El Paso Pipe & Supply Co.,* 978 F.2d 1185, 1192–93 (10th Cir.1992); Laura B. Bartell, *Taxation of Costs and Awards of Expenses in Federal Court,* 101 F.R.D. 553, 564 (1984) [hereinafter Bartell]; 10 Wright & Miller § 2667, at 180–87. The court concludes that **Green** is the prevailing party in this litigation and is therefore presumptively entitled to an award of authorized costs.[1] *See Serna v. Manzano,* 616 F.2d 1165, 1167 (10th Cir.1980) (prevailing party presumptively entitled to costs; it is incumbent on the losing party to overcome such presumption).

[3] [4] [5] [6] KPL argues that if costs are to be awarded, the court should carefully review the costs assessed by the clerk. In conducting such a review, the court makes a *de novo* determination in the exercise of its sound discretion. *E.g., Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 232–33, 85 S.Ct. 411, 415, 13 L.Ed.2d 248 (1964), *disapproved in part on other grounds, Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 441–42, 107 S.Ct. 2494, 2497–98, 96 L.Ed.2d 385 (1987); *Frigiquip Corp. v. Parker–Hannifin Corp.,* 75 F.R.D. 605, 613 (W.D.Okla.1976). The taxing of costs, except as otherwise provided by statute, rests largely in the sound discretion of the trial court.[2] *Euler v. Waller,* ***675** 295 F.2d 765, 766 (10th Cir.1961). The Supreme Court has specifically held, however, that the court's discretion in taxing costs is limited by 28 U.S.C. § 1920,[3] which specifies the categories of costs that may be awarded. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. at 441–42, 107 S.Ct. at 2497–98 (§ 1920, by enumerating costs that may be taxed by a federal court under the discretionary authority found in Rule 54(d), does not grant discretion to award costs beyond the limits of the items listed in § 1920). The discretion of the court in determining and awarding costs is contingent on the court's determination that the expenses requested are allowable cost items under the statute and that the amounts requested are reasonable and necessary. *See Northbrook Excess and Surplus Ins. Co. v. Proctor &*

Gamble Co., 924 F.2d 633, 642 (7th Cir.1991). A finding that a requested cost is statutorily authorized creates a presumption favoring their award. *U.S. Indus. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). Nevertheless, the fact that § 1920 requires the filing of a bill of costs necessarily implies that the burden is on the prevailing party to establish to the court's satisfaction that the particular costs for which reimbursement is claimed are authorized by statute.[4] *Cf. Farmer v. Arabian American Oil Co.,* 379 U.S. at 235, 85 S.Ct. at 415 (items proposed by winning parties as costs should always be given careful scrutiny; Rule 54(d) does not give district courts unfettered discretion to tax costs for every expense winning litigant has seen fit to incur). For some categories of costs, this includes a showing by the prevailing party that the materials were necessarily obtained for use in the case. "Whether an item is necessarily obtained for use in a case so that expense therefore may be taxed as a cost calls for a factual evaluation, a task which is committed to the discretion of the trial court." *Mikel v. Kerr,* 499 F.2d 1178, 1183 (10th Cir.1974) (citing *United States v. Kolesar,* 313 F.2d 835 (5th Cir.1963)).

1. *Expert Witness Fees Claimed As Exemplification and Copies of Papers.* KPL first challenges the award of $1,009,823.93 under the category of "fees for exemplification and copies of papers necessarily obtained for use in the case." KPL argues that **Green** has improperly included **fees for expert witnesses** under the category of "exemplification." Specifically, KPL contends that of the total amount awarded for exemplification and copies of papers necessarily obtained for use in the case, $1,006,586.99 in fact represents unrecoverable expert witness fees.

[7] It is well established that the court does not have the discretion to tax a prevailing party's expert witness fees as costs beyond the statutory per diem rate of reimbursement for witnesses specified in 28 U.S.C. § 1821(b). *See Crawford Fitting,* 482 U.S. at 442, 107 S.Ct. at 2497 (under 28 U.S.C. § 1920, court may tax expert witness fees in excess of the statutory limit per day only when the witness is court-appointed); ***676** *Miller v. Cudahy Co.,* 858 F.2d 1449, 1461 (10th Cir.1988), *cert. denied,* 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989); *Chaparral Resources, Inc. v. Monsanto Co.,* 849 F.2d 1286, 1292 (10th Cir.1988); *Ramos v. Lamm,* 713 F.2d 546, 559 (10th Cir.1983); *Meredith v. Schreiner Transport, Inc.,* 814 F.Supp. 1004, 1005 (D.Kan.1993). The Supreme Court has recently held that § 1920 limits the recovery of expert witness fees for testimonial services to the statutory per diem amount, and otherwise precludes recovery of expert **witness fees for nontestimonial services,** in the absence of other explicit statutory authority. *See West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 86–87, 111 S.Ct. 1138, 1140–41, 113 L.Ed.2d 68 (1991) ("None of the categories of expense listed in § 1920 can reasonably be read to include fees for services rendered by an expert employed by a party in a nontestimonial capacity.") *See generally* Annot., *Compensation of Expert Witness as Costs Recoverable in Federal Civil Action by Prevailing Party Against Party Other Than United States,* 71 A.L.R. Fed. 875 (1985).

The courts that have addressed this issue have generally refused to permit a prevailing party to recover expert witness fees in the guise of fees for "exemplification."[5] The Ninth Circuit, for example, has held that the statute permits an award only for the physical preparation and duplication of documents, not for the intellectual effort involved in their production. *See Romero v. City of Pomona,* 883 F.2d 1418, 1427–28 (9th Cir.1989). Similarly, the Fifth Circuit has noted that the language of § 1920 seems to preclude its extension beyond the payment of the actual costs of exemplification and reproduction of copies. *Webster v. M/V Moolchand, Sethia Liners, Ltd.,* 730 F.2d 1035, 1040 (5th Cir.1984). While taking a more liberal approach, the Second Circuit has nevertheless held that the costs of an expert's research and analysis in preparation for trial is not recoverable under § 1920 under the guise of work necessary for producing an exhibit. *In re Air Crash Disaster at John F. Kennedy Int'l Airport,* 687 F.2d 626, 631 (2d Cir.1982) (district court must scrutinize research expense requests to determine whether necessary to production of exhibits and not merely general research in preparation for trial).

The Tenth Circuit has also held that a prevailing party may not recover expert witness fees indirectly under § 1920(4) as an adjunct to the preparation of trial exhibits, explicitly refusing to interpret the statute as a vehicle for circumventing the established rule on expert witness fees. *See CleveRock Energy Corp. v. Trepel,* 609 F.2d 1358, 1363 (10th Cir.1979), *cert. denied,* 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 261 (1980).

[8] [9] The awarding of costs for preparation of exhibits is committed to the discretion of the trial court. *Id.* at 1363 (citing *Mikel v. Kerr,* 499 F.2d 1178, 1183 (10th Cir.1974)). The court has reviewed the documentation submitted by **Green** in support of its request for fees for exemplification and copies of papers necessarily obtained for use in the case. The court agrees that the amounts challenged by KPL are in fact fees for experts and consultant services, and do not qualify as fees for exemplification and copies of papers necessarily obtained for use in the case. *See Frigiquip,* 75 F.R.D. at 614 (expenses of expert witness for preparing analytic report

introduced into evidence not properly claimed as fees for exemplification).

To the extent minor portions of the amounts challenged are directly related to the production of exhibits, **Green's** documentation does not permit the court to determine whether these particular exhibits were admitted at trial, or if not, whether they were otherwise necessarily obtained for use in the case. *See U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245–46 (10th Cir.1988); *Mikel v. Kerr,* 499 F.2d at 1183. Further, since such costs are not specifically listed in § 1920, the Tenth Circuit has denied them if the prevailing party has not sought advance court approval of the exhibit as necessary for the jury's or the court's proper consideration of the case. *See Euler v. Waller,* 295 F.2d at 767; *see also* 10 Wright & Miller § 2677, at 369; *cf. U.S. Indus.,* 854 F.2d at 1248 (failure to obtain court approval of special expense ***677** prior to trial dictates against granting costs of daily transcripts). The court will therefore deduct the following amounts from the costs awarded by the clerk to **Green**:

Dames & Moore	$ 963,433.26[6]
Dow Geological	16,466.22
Peterson & Co.	20,908.00
Dr. Jack Hilf, P.E.	6,049.51
TOTAL	$1,006,856.99

KPL also contends that the court should exercise its discretion in favor of reducing several other categories of costs claimed by **Green**. These will be addressed in turn.

2. *Deposition Transcripts.* KPL challenges the award totalling $28,086.25 for court reporter fees for transcripts necessarily obtained for use in the case.[7] *See* 28 U.S.C. § 1920(2). KPL argues that **Green** has not established that the deposition transcripts claimed as such expenses were "necessarily obtained for use in the case."

[10] The trial court has great discretion to tax the cost of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself. *See Soler v. Waite,* 989 F.2d 251, 255 (7th Cir.1993); *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d at 1245–46; *Burk v. Unified School Dist. No. 329,* 116 F.R.D. 16, 18 (D.Kan.1987); *Ortega v. **Kansas** City, **Kansas**,* 659 F.Supp. 1201, 1219 (D.Kan.1987), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir.), *cert. denied,* 493 U.S. 934, 110 S.Ct. 325, 107 L.Ed.2d 315 (1989). Whether or not such materials were necessarily obtained for use in the case is a factual determination based on the existing record or the record supplemented by additional proof. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d at 1245. Use at trial by counsel or the trial court readily demonstrates necessity. *Id.* at 1246. However, if materials are reasonably necessary for use in the case even though not used at trial, the court may find necessity and allow the cost of such items. *Id.* (citations omitted); *see also Merrick v. Northern Natural Gas Co.,* 911 F.2d 426, 434 (10th Cir.1990) (local rule restricting costs to depositions received in evidence or used by court in ruling on summary judgment motion is narrower than § 1920). Even if the court determines that

the materials were necessarily obtained for use at trial, the amount of the award requested must be reasonable. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d at 1245, 1246 (citations omitted).

[11] For documentation in support of its request, **Green** submits only a list of deponents, the dates on which they were deposed, and the amount of the transcript cost. **Green** has also submitted copies of the court reporters' statements for each deposition for which costs are claimed. **Green** has made no attempt to show the court that any of these depositions were necessarily obtained for use in the case.[8]

The court has determined after conducting its own review of the file that the depositions of Otha Harper, John Van Holt, Marion Blank, Shannon Casey, Morgan Dickinson, ***678** and Don Gupta were read into evidence at trial. In addition, the depositions of John Stack and Peter Stauffer were admitted into evidence. The costs of those depositions, totalling $4,536.25, will be allowed, since they are deemed necessarily obtained for use in the case under Tenth Circuit precedent.[9] *See id.* at 1246; *see also Merrick,* 911 F.2d at 434. However, since **Green** has made no attempt whatsoever to demonstrate that any of the other depositions were necessarily obtained for use in the case, or even that the depositions were reasonably necessary in **light** of the facts known to counsel at the time they were taken, the costs of those depositions, totalling $23,550.00, will be disallowed. *See id.* at 434–35.

3. *Deposition Copies Claimed as Printing.* Next, KPL challenges the amount billed as costs for printing. **Green** claimed $9,938.45 as printing fees. KPL contends that the documentation submitted by **Green** in support of its claim shows that the amounts requested for printing were in fact costs for making copies of depositions. The court has reviewed the documentation and agrees with KPL that all of the itemized amounts for printing are for the expenses of obtaining carbon and disk copies of depositions and deposition exhibits, including $292.55 in postage and Federal Express costs.[10]

[12] [13] [14] The amounts claimed for carbon and disk copies of depositions should have been included under the category of copies of papers rather than printing. *See Ramos v. Lamm,* 713 F.2d at 560; *Ortega v. **Kansas** City,* 659 F.Supp. at 1219. The cost of copies of depositions may be allowable under certain circumstances, and this applies to copies of both an opponent's and the prevailing party's own depositions. *SCA Services, Inc. v. Lucky Stores,* 599 F.2d 178, 181 (7th Cir.1979). However, as costs associated with copies of papers, these costs must be supported by a showing that the copies were necessarily obtained for use in the case. *See* 28 U.S.C. § 1920(4); *West Wind Africa Line v. Corpus Christi Marine Services Co.,* 834 F.2d 1232, 1238 (5th Cir.1988); *Ramos v. Lamm,* 713 F.2d at 560; *SCA Services,* 599 F.2d at 181. **Green** once again has not made the requisite showing. Further, several of the specific deposition copies for which costs are requested under the category of printing are duplicate copies of transcripts for which costs were also requested by **Green** under the category of court reporter fees. For those deposition transcripts for which the court allowed costs, the amount claimed and awarded included **fees for the original deposition and one copy.** Hence, the **request for additional copies of these depositions claimed as printing expense is excessive.**

[15] Finally, the court notes that the amount requested for **deposition copies includes $1,340 for converting several depositions to computer disks,** in addition to the expense of paper copies. **Green** has made no attempt to show the court that this is an authorized, reasonable, and necessary expense. Further, several courts have held that expenditures for computerized litigation support, document retrieval, and document management are not taxable as costs. *See Northbrook Excess and Surplus Ins. Co. v. Proctor & Gamble Co.,* 924 F.2d 633, 643–44 (7th Cir.1991); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 309 n. 75 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *E.E.O.C. v. Sears, Roebuck & Co.,* 111 F.R.D. 385, 394–95 (N.D.Ill.1986); *Litton Systems, Inc. v. A.T. & T.,* 613 F.Supp. 824, 836 (S.D.N.Y.1985); *see also U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d at 1245–47 (affirming district court's disallowance of costs for computerized database for management and analysis of litigation documents); ***679** *Chicago College of Osteopathic Medicine v. George A. Fuller Co.,* 801 F.2d 908, 911–12 (7th Cir.1986) (dictum); *cf. Ortega,* 659 F.Supp. at 1219 (refusing to tax computerized legal research as costs).

The court will therefore disallow all of the costs claimed under the category of printing, a reduction of $9,938.45.

4. *Witness Fees.* Next, KPL contests the amount awarded **Green** for **witness fees. Green** sought and obtained from the clerk an award totalling $25,609.63 for attendance fees, subsistence, and mileage expenses for 23 witnesses.

KPL first challenges the award totalling $4,832.02 in witness fees for J. David McClung, Chief Executive Officer of **Green** Holdings, Inc.; Perry J. Moore, Vice–President of Finance for **Green** Holdings, Inc.; and Joseph Trio, Vice–President of **Green Construction** Company. KPL argues that fees for witnesses who are employees of a corporate party are not automatically recoverable.

[16] [17] While the expenses of witnesses who are parties to the litigation normally are not taxable, the **expenses of a director or officer of a corporate party who is not personally involved in the litigation may be taxable if he is testifying on behalf of the corporation he represents**, and that corporation is a party to the lawsuit. 10 Wright & Miller § 2678, at 376; *see Kemart Corp. v. Printing Arts Research Lab., Inc.,* 232 F.2d 897, 901–02 (9th Cir.1956); *Gelda v. R.O.I. Enterprises, Inc.,* 581 F.Supp. 553, 555 (E.D.Mo.1984); *Simmons v. McLean Trucking Co.,* 100 F.R.D. 61, 63 (D.Ga.1983); *Mastrapas v. New York Life Ins. Co.,* 93 F.R.D. 401, 405–06 (E.D.Mich.1982); *Marcoin, Inc. v. Edwin K. Williams & Co.,* 88 F.R.D. 588, 591 (E.D.Va.1980); *Dorothy K. Winston & Co. v. Town Heights Dev., Inc.,* 68 F.R.D. 431, 432–34 (D.D.C.1975); *Electronic Specialty Co. v. International Controls Corp.,* 47 F.R.D. 158, 162 (S.D.N.Y.1969). The witnesses challenged by KPL were not parties to this litigation, and KPL has not persuaded the court that these individuals had any more personal interest in the litigation than a natural concern for the welfare of their corporate employers. *See Electronic Specialty Co.,* 47 F.R.D. at 162. Consequently, **Green** will not be denied witness fees for these three individuals on the basis that they are **corporate officers and employees**.

[18] KPL next argues that **Green** has sought fees for certain witnesses for days when they were not testifying. KPL argues that the award of witness fees should be reduced for this reason by a total of $4,305.65 for Perry Moore, Clarence Nelson, and Doug Rapp. The total awarded by the clerk for these three witnesses is $5,381.22. KPL does not explain in its motion to review costs how it arrived at the amount it seeks to have excluded from the bill of costs, or which days it contends the witnesses were not testifying. Further, attendance and subsistence allowances for witnesses are not restricted to the days the witness actually testifies, but may also be awarded for each day the witness necessarily attends trial, time spent during delays and temporary adjournments, and the time necessary for travel to and from the place of attendance. 10 Wright & Miller § 2678, at 384–86; *see, e.g., Mastrapas v. New York Life Ins. Co.,* 93 F.R.D. at 405–06 (citing cases).

[19] Nevertheless, the documentation submitted in support of the costs assessed by the clerk shows that the amount claimed as fees and expenses for Clarence Nelson, $2,224.07, was solely incurred during the time of trial. However, Clarence Nelson did not testify at trial, and **Green** therefore may not claim expenses for Nelson as a necessary witness. Similarly, although Doug Rapp did not testify at trial, the documentation submitted in support of his witness fees, totalling $1,148.50, reflects expenses associated only with his attendance at trial. Finally, Perry Moore did not give live testimony at trial, but rather testified by deposition. However, the documentation submitted in support of the bill of costs claims only expenses associated with his attendance at trial, totalling $2,008.65. **As a general rule, no witness fee may be taxed for a person who travels to the courthouse but does not testify at trial.** 10 Wright & Miller § 2678, at 377. **Green** has not submitted any evidence to rebut the presumption that naturally arises under such circumstances that Nelson, Moore, and Rapp were not necessary witnesses. *See id.* Consequently, ***680** the court will disallow the witness fees claimed for Nelson, Rapp, and Moore, for a total reduction of $5,381.22.

Next, KPL argues that the per diem attendance fee should be reduced by a total of $320 because several witnesses testified prior to December 1, 1990, the effective date of the statutory increase in **per diem attendance fees from $30 to $40.** *See* 28 U.S.C.A. § 1821(b) (Historical and Statutory Notes, 1990 Amendment); Pub.L. 101–650, Title III, § 314(a), 104 Stat. 5115 (effective Dec. 1, 1990). The court agrees. Accordingly, the amount awarded **Green** will be reduced by $320 to reflect the lower statutory attendance fee in effect prior to December 1, 1990.

Next, KPL argues that certain amounts allowed for travel and mileage expenses exceed the statutory limitation in 28 U.S.C. § 1821(c)(1), which provides in part that a witness travelling by common carrier shall be paid at the most economical rate reasonably available for the shortest practical route to and from the place of attendance. In addition, KPL claims that **Green** is not entitled to recover certain travel expenses for witnesses KPL contends did not testify at trial.

[20] The court notes that KPL, in objecting to witness fees, does not invoke the "100–mile rule," a limitation traditionally imposed by courts on mileage claimed for witnesses residing outside the geographic range of the court's subpoena **power**. *See West Wind Africa Line v. Corpus Christi Marine Services Co.,* 834 F.2d at 1237 (explaining rationale for rule); *Moe v. Avions Marcel Dassault–Breguet Aviation,* 727 F.2d 917, 936 (10th Cir.) (affirming district court's application of 100–mile rule for the transportation costs of witnesses), *cert. denied,* 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984); *Fleet Inv. Co., Inc. v. Rogers,* 620 F.2d 792, 794 (10th Cir.1980) (while district court has discretion to award costs in excess of 100 miles from place where trial is held, such request appeals to the court's discretion; hence parties who obtain a witness from outside 100–mile limit without advance approval do so at their peril); *Linneman Constr., Inc. v. Montana–Dakota Utilities Co., Inc.,* 504 F.2d 1365, 1371 (8th Cir.1974) (rule after *Farmer* is to limit travel expenses

for witness outside district to 100 miles absent special circumstances). *But see Shevin v. Lederman,* 92 F.R.D. 752, 753 (D.Colo.1981) (modern litigation, with interstate and international travel of witnesses a commonplace necessity, has rendered 100–mile limit antiquated). *See generally* 10 Wright & Miller § 2678, at 379–83. Nevertheless, in exercising its discretion in taxing witness fees, the 100–mile rule is a proper and necessary consideration on the part of the district court. *Farmer v. Arabian American Oil,* 379 U.S. at 234, 85 S.Ct. at 415. In considering whether to allow expenses for travelling in excess of 100 miles, the court should consider the length of the journey, the necessity of the testimony, and the possibility of averting the travel expense. *West Wind Africa Line,* 834 F.2d at 1237.

[21] KPL first challenges the award to **Green** for airfare expenses for Harold Arthur, an expert witness from Denver. Arthur testified on November 14–15 and again on December 11, 1990. The court therefore finds that Arthur was a necessary witness, and further finds that the length of the trip was not excessive. **Green** was awarded $1,890.38 for Arthur's airfare, including $936.20 for the initial round trip[11] and $954.18 for the second round trip from Denver to **Kansas** City. KPL challenges $954.18 of this amount as excessive, contending that it represents first-class airfare.[12] The airfare passenger receipts submitted by Arthur show that he flew first class on both round trips. As previously noted, however, the statute limits recovery of travel expenses for witnesses travelling by common carrier to the most economical rate reasonably available. *See* 28 U.S.C. § 1821(c)(1); *see also* ***681** *Shevin v. Lederman,* 92 F.R.D. at 753 (although witness may have chosen to travel at some rate other than coach class, prevailing party should not be forced to pay additional costs simply to accommodate his personal preference). The court is of the opinion that the amounts claimed for airfare on behalf of Arthur are excessive and are not based upon the most economical rate reasonably available. The court will therefore reduce the amount awarded for Arthur's airfare to a total of $1,300.00 for both round trips, a reduction of $590.38 from the amount awarded.

[22] Second, KPL challenges the amount of $675.00 awarded to **Green** for Joseph Haynes' round trip airfare from Houston to San Francisco on December 1, 1987. Haynes was apparently deposed in San Francisco on or about December 3, 1987, according to other documentation supporting **Green's** bill of costs. He also testified at trial on November 7, 1990.[13] Witness fees are payable for attendance at depositions as well as for attendance at trial. *See* 28 U.S.C. § 1821(a)(1). The receipt submitted in support of the airfare award shows that Haynes flew coach class. The court finds that the amount claimed for airfare is reasonable. However, **Green** has not persuaded the court that it was necessary for Haynes to fly from Houston to San Francisco to be deposed for this case, clearly well beyond the geographical limits of this court's subpoena **power**. *See West Wind Africa Line,* 834 F.2d at 1237 (when deposition of witness who resides more than 100 miles outside district must be taken, lawyers must choose either to travel to witness or induce the witness to travel to the district). The court therefore exercises its discretion to limit the travel expenses for Joseph Haynes's deposition to $50.00, allowing 25 cents per mile for 100 miles each way, for a reduction of $625.00 from the amount assessed by the clerk.

[23] Third, KPL challenges the amount of airfare awarded for Thomas Falcey, a Seattle consultant. **Green** claimed $821.50 for Falcey's airfare, but did not submit any documentation to support the claim. The statute requires production of a receipt or other evidence of the actual cost of travel by witnesses travelling by common carrier. *See* 28 U.S.C. § 1821(c)(1). Further, Falcey did not testify at trial. Although he was deposed in **Kansas** on behalf of KPL on June 21, 1990, **Green** has not submitted any proof whatsoever that the amount claimed is for his appearance at the deposition. Further, the deposition was neither admitted into evidence nor read at trial. The court will therefore disallow in full the amount of airfare awarded for Thomas Falcey, for a reduction of $821.50 from the amount assessed by the clerk.

[24] KPL also challenges as excessive the travel expenses awarded for Robert James, an Oklahoma consultant. The documentation submitted in support of the expenses claimed for Robert James shows that he travelled round trip by air on three separate occasions during trial, but testified only on December 11, 1990, as a rebuttal witness. While no receipt was submitted in support of James' claimed airfare expenses, **Green** nevertheless claimed a total of $630.24 for his travel, including the cost of three round trips by air, airport parking for all three trips, and mileage at 24 cents per mile[14] for three round trips by car from his residence in Ada to the Oklahoma City airport. **Green** is statutorily entitled to recover only the reasonable actual expenses of common carrier travel for James for his attendance at trial for the time necessary for his appearance as a witness. *See* 28 U.S.C. § 1821(c)(1). The court finds the distance travelled to be reasonable, but assessing KPL the costs of three round trips is excessive and is certainly not authorized by statute. The court will therefore allow a total of $186.00 for Robert James' travel expenses, including airfare for one round trip ($138.00) and associated mileage to and from the airport (192 miles at the statutory rate of .25 per mile, for a total of $48.00).[15] The ***682** total amount allowed is $444.24 less than the mileage

expense awarded by the clerk for Robert James' appearance as a witness.

[25] Next, KPL challenges the amount awarded for mileage expenses of Demetrius Koutsoftas, who testified at trial on December 6–7, 1990. **Green** claimed mileage for 3,622 miles of roundtrip motor travel from San Francisco to Topeka. KPL contends that the bill of costs contains no support for the recovery of this mileage expense. However, the statute does not require documentation to be submitted in support of a claim for mileage on behalf of a witness who has travelled by privately owned vehicle. *See* 28 U.S.C. § 1821(c)(2). Further, computation of mileage is to be made in accordance with a uniform table of distances adopted by the Administrator of General Services. 28 U.S.C. § 1821(c)(2). *See Household Goods Carriers' Bureau, Mileage Guide No. 16* (Rand McNally & Co. 1993). According to that table, the mileage between Topeka and San Francisco is 1,751. At the statutory rate of 25 cents per mile, the mileage fees allowable under § 1920 therefore amount to $875.50, slightly in excess of the mileage amount claimed by **Green** on behalf of Koutsoftas, $869.28. Nevertheless, **Green** has not persuaded the court that it was necessary to obtain the testimony of a witness residing so far from the place of trial. The court will therefore limit the amount assessed KPL for mileage on behalf of Koutsoftas to $50.00, on the basis of 100 miles each way at the statutory mileage rate of 25 cents per mile, for a reduction of $819.28.

Next, KPL challenges the amount of subsistence fees claimed by **Green** for its witnesses. The applicable amount was $69.00 per day for Topeka, **Kansas**, at the time of trial. *See* 41 C.F.R. 301, Appendix A (1990); *see also* 28 U.S.C. § 1821(d)(1), (2). The court agrees that the amounts awarded **Green** for subsistence expenses of some of its witnesses exceed the applicable limits. The court will therefore reduce the amount of subsistence expenses awarded for J. David McClung by $312.02, for Jon Pattinson by $88.00, and for Joseph Trio by $1,138.10, for a total reduction of $1,538.12.[16]

5. *Copies of Papers.* Finally, KPL challenges the amount of $2,966.94 in fees assessed for exemplification and copies of papers necessarily obtained for use in the case. The documentation submitted by **Green** in support of its claim indicates that these expenses were incurred for photocopying, enlarging, and marking exhibits. KPL contends that **Green** has not made the requisite showing that any of the copies were necessarily obtained for use at trial. Further, KPL argues that $339.20 of the amount requested was in fact for extra copies of materials already available to **Green**. Of this amount, KPL contends that $174.20 was paid by **Green's** counsel to KPL's counsel for making copies of materials allegedly lost from **Green's** files by counsel in a mishap in transit to Topeka.

[26] The court will disallow the $165.00 claimed for payment to the clerk of the court for **uncertified photocopies of court records**. Of this amount, $43.00 was itemized by the clerk for copies of documents in a court file not even remotely associated with this case. Further, money spent to copy court filings is not recoverable under 28 U.S.C. § 1920(4) where the copies are for the successful litigant's own use. *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir.1990). **Green** has not demonstrated that the uncertified copies obtained from the clerk's office of the United States District Court in Topeka were necessarily obtained for use in the case. *See id.* ("for use in the case" refers to materials actually prepared for use in presenting evidence to the court).

[27] Similarly, the amount paid by **Green's** counsel to counsel for the defendant, $174.20, has not been shown to be for copies necessarily obtained for use in the case. The only documentation submitted in support of this claimed expense is a copy of a check issued in the amount claimed, with the notation "for copying expense." **Green** has not persuaded the court that this expense was incurred for copies necessary for the purpose of submitting evidence to the court, as opposed ***683** to copies for use by counsel. It will therefore be disallowed.

Green also claims a total of $925.10 for several foamcore enlargements. **Green** does not indicate whether these enlargements were for the purpose of producing trial exhibits. The court assumes they were used, if at all, as demonstrative evidence for the purpose of illustrating certain exhibits to the jury.

[28] [29] [30] The term "exemplification" in 28 U.S.C. § 1920(4) has been quite broadly defined by the courts to include a variety of demonstrative evidence, including models, charts, photographs, illustrations, and similar graphic aids. *Bartell,* 101 F.R.D. at 584–85.[17] However, such costs are generally denied in the absence of prior court approval unless the court is persuaded that the demonstrative evidence was essential to the prevailing party's case. *Id.* at 585. This is the rule followed in the Tenth Circuit. *See Euler v. Waller,* 295 F.2d at 767 (cost of map prepared by surveyor disallowed absent prior court approval). In this district, we have held that while not an absolute prerequisite, it is advisable to obtain authorization from the court prior to trial before incurring large expenses for such materials if counsel expects to have them taxed as costs. *See Miller v. City of Mission, **Kansas**,* 516 F.Supp. 1333, 1339–40 (D.Kan.1981). Further, the expense of items that merely illustrate expert testimony or other

evidence adduced at trial are normally not taxable. *Id.* **Green** did not obtain prior approval from this court for the purpose of taxing the costs of such enlargements, and does not assert that the enlargements were for any purpose other than illustrating other evidence before the jury. These claimed expenses will therefore be disallowed.

[31] [32] The remaining costs claimed for exemplification and copies of papers have not been shown by **Green** to have been necessary for use in the case. **Green** has merely submitted statements from copying services for several thousand photocopies, without identifying the use made of the photocopied materials. In the absence of such information, the court may disallow such expenses. *Ortega,* 659 F.Supp. at 1218; *see Commercial Credit Equip. Corp. v. Stamps,* 920 F.2d 1361, 1367 (7th Cir.1990) (in response to challenge of copying costs as inadequately identified, prevailing party's counsel responded with affidavit identifying documents copied and justifying their use). The nominal amount claimed for exhibit labels is an incidental expense of trial and is not recoverable. *See* 10 Wright & Miller § 2677, at 370. The court will therefore disallow in full the amount of $2,966.94 claimed by **Green** for exhibit and document enlargements, copies, and labels.

Summary. For the reasons set forth in this memorandum, the amount of costs assessed by the clerk will be reduced as follows:

Expert Witness Fees	$(1,006,856.99)
Deposition Transcripts	(23,550.00)
Deposition Copies	(9,938.45)
Witness Fees:	
Witnesses Not Testifying at Trial	(5,381.22)
Attendance Fees	(320.00)
Transportation Expenses:	
Arthur	(590.38)
Haynes	(625.00)
Falcey	(821.50)
James	(444.24)

Koutsoftas	(819.28)
Subsistence Fees	(1,538.12)
Copies of Papers	(2,966.94)
.....	
Total Reduction	$(1,053,852.12)

IT IS BY THE COURT THEREFORE ORDERED that the clerk shall retax $1,053,852.12 in previously assessed costs to plaintiff **Green Construction** Company.

IT IS FURTHER ORDERED that the total amount of costs taxed to defendant KPL is revised to $19,799.14.

Footnotes

1 KPL argues that **Green** did not succeed in its motion for an award of costs on appeal. In response to **Green's** motion, the Tenth Circuit Court of Appeals ordered each party to bear its own costs on appeal. 28 U.S.C. § 1912 and Fed.R.App.P. 39(a) govern such motions. The rule provides that if a judgment is affirmed costs shall be taxed against the appellant unless otherwise ordered. The Tenth Circuit affirmed the judgments of this court, from which appeals were taken by both **Green** and KPL. The Tenth Circuit's decision to require the parties to bear their own costs on appeal has no bearing whatsoever on this court's review of the costs incurred by **Green** as the prevailing party at trial.

2 However, should the trial court refuse to award costs to the prevailing party, or if it modifies the taxation of costs, it is incumbent on the trial court to state its reasons so the appellate court may judge whether the trial court acted within its discretion. *Moe v. Avions Marcel Dassault–Breguet Aviation,* 727 F.2d 917, 936 (10th Cir.) (citation omitted), *cert. denied,* 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984).

3 The statute 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 marshall;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers 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.

4 Placing the burden of persuasion on the prevailing party as to particular costs requested is the only equitable way to apply D.Kan.Rule 219, under which the party prevailing at trial has time on its side in preparing the bill of costs. Rule 219 provides the prevailing party 30 days to file a bill of costs, running from the later of the expiration of the time allowed for appeal, or from the time the clerk receives an order terminating the action on appeal. The trial in this case took place in late 1990. Because of the intervening

appeal, Green was not required to file its bill of costs until September, 1993, nearly three years after the conclusion of trial. In contrast, both Fed.R.Civ.P. 54(d) and D.Kan. 219(a) permit the opposing party only five days in which to file a motion to retax costs. To impose the burden of persuasion on the party opposing the assessment of particular costs under these circumstances, as urged by Green in oral argument before this court, is simply untenable.

5 The legal definition of the term "exemplification" is "[a]n official transcript of a document from public records, made in form to be used as evidence and authenticated or certified as a true copy." *Black's Law Dictionary* 571 (6th ed. 1990).

6 KPL's motion itemizes $963,163.26 in fees attributable to Dames & Moore, which is correct based upon Green's supporting documentation. However, the expense summary submitted by Green in support of the award of costs itemizes $963,433.26 in fees for Dames & Moore, and that amount is included in the clerk's assessment. The difference of $270 is due to Green's clerical error, and should not have been included in the award of costs. The court intends to deduct $963,433.26, reflecting all such fees included in the clerk's assessment of costs, including the $270 resulting from the clerical error.

7 Contrary to KPL's argument, the costs assessed by the clerk do not include court reporter appearance fees. In its untimely reply, Green acknowledges that while court reporter appearance fees were itemized in its documentation, Green failed to include appearance fees in the bill of costs. The court will not consider Green's belated attempt to claim appearance fees.

8 Even in its untimely response, Green simply asserts that "[e]ach witness submitted to this court as a taxable cost was necessarily deposed for use in the case." The court is of course not bound by the bald representations of the party claiming such costs. *See U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d at 1245 ("[i]tems proposed by winning parties as costs should always be given careful scrutiny") (citing *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 415, 13 L.Ed.2d 248 (1964)). Even if the court were to consider Green's untimely response, Green has not directed the court to any persuasive evidence to support a determination that the depositions were necessarily obtained for use in the case.

9 The documentation submitted by Green does not permit the court to isolate the specific costs associated with the depositions of Dickinson, Stack, and Stauffer. The court has therefore allowed the appropriate proportion of the total costs requested for the groups of depositions in which these deponents were included in the court reporters' statements.

10 This court has previously held that postage and Federal Express delivery expenses are not recoverable as costs. *See, e.g., Gordon v. Hercules, Inc.,* 1989 WL 8008, at *2 (D.Kan. Jan. 30, 1989); *Ortega v. Kansas City,* 659 F.Supp. at 1219 (postage not a statutorily authorized cost). Therefore, even if the amount requested for copies of depositions were recoverable, the court would exclude the costs attributable to postage ($22.40) and Federal Express ($270.15).

11 The documentation submitted by Arthur to Green reflects that Arthur returned an airfare ticket purchased by Green Holdings, Inc. for $702.00. The court assumes that Arthur made his own travel arrangements instead of travelling by the arrangements made on his behalf by Green Holdings.

12 It is not at all clear to the court why KPL does not specifically challenge the second round-trip airfare. However, the court notes that because of Green's typographical error, the itemized amount for Arthur's mileage is shown as only $1,390.38, although the total amount claimed and awarded for his witness fees included $1,890.38 in travel expenses, consistent with his supporting documentation.

13 KPL does not challenge the airfare claimed for Haynes' attendance at trial.

14 For reasons unclear to the court, Green's bill of costs consistently calculates mileage fees on the basis of 24 cents per mile, although the statutory rate is 25 cents per mile. *See* 5 U.S.C. § 5704(a)(2). The court declines to recalculate mileage for each of Green's witnesses, except for those fees that KPL has specifically challenged.

15 Although Green also requested parking fees on behalf of James, no receipt has been submitted. *See* 28 U.S.C. § 1821(c)(3) (parking fees allowable upon presentation of valid parking receipt).

16 KPL has also challenged the amount of subsistence expenses claimed for Clarence Nelson. However, the court has already disallowed Nelson's witness expenses in full since he did not testify at trial.

17 Compare the legal definition of the term in Black's Law Dictionary, *supra* note 4.

End of Document

157 F.R.D. 499
United States District Court,
D. Kansas.

Sandra Jean **GRIFFITH**, individually and on behalf of Felicia Renee **Griffith**, Benjamin Lee **Griffith**, and Jonathan Andrew **Griffith**, minors and heirs at law of Jimmy R. **Griffith**, Jr., deceased, Plaintiff,
v.
MT. **CARMEL** MEDICAL CENTER, a Kansas Corporation; Eugene Carl McCormick, an Individual, Defendants.

Civ. A. No. **92**-**1141**-MLB. | Aug. 26, 1994.

Defendants, as losing party in medical malpractice action, moved to retax costs. The District Court, Belot, J., held that: (1) costs of videotaping depositions of defendant and witness who was previously a named defendant would not be taxed against defendants, and (2) taxation of costs for special process servers is justifiable.

Motion granted in part and denied in part.

West Headnotes (17)

[1] **Federal Courts**
Trial de novo

District court reviews clerk's assessment of costs on a de novo basis in the exercise of its sound discretion.

[2] **Federal Civil Procedure**
Discretion of court

Trial court has no discretion to award costs that are not set forth in statute providing what judge or clerk of court may tax as costs. 28 U.S.C.A. § 1920.

[3] **Federal Civil Procedure**
Taxation

Prevailing party has burden of establishing that expenses he seeks to have taxed as costs are authorized by statute and in some cases, this requires showing that materials were necessarily obtained for use in the case. 28 U.S.C.A. § 1920.

23 Cases that cite this headnote

[4] **Federal Civil Procedure**
Taxation

If prevailing party carries its burden and proves that particular type of cost is statutorily authorized, there is presumption favoring its award; however, amount of such costs must be carefully scrutinized to ensure that it is reasonable. 28 U.S.C.A. § 1920.

4 Cases that cite this headnote

[5] **Federal Civil Procedure**
Depositions

Statute authorizing judge to tax as costs court reporter fees for stenographic transcript necessarily obtained for use in case includes costs of deposition transcripts that are reasonably necessary to the litigation. 28 U.S.C.A. § 1920(2).

4 Cases that cite this headnote

[6] **Federal Civil Procedure**
Depositions

To show that videotaping of deposition was reasonably necessary for purposes of statute authorizing taxation of costs, actual use of videotape at trial is not required; however, in the absence of actual use, prevailing party must show

that facts known when deposition was taken made it appear reasonably necessary to record deposition on videotape. 28 U.S.C.A. § 1920.

3 Cases that cite this headnote

[7] **Federal Civil Procedure**
Depositions

Costs of plaintiff's videotaping depositions of defendant and witness who was previously a named defendant would not be taxed against defendants, who were the losing parties; there was no indication, when plaintiff sought leave to videotape depositions, that either deponent would be unable to testify at trial, both deponents ultimately did testify, plaintiff's counsel did not use videotaped depositions at trial, and plaintiff's proposed set of rules governing videotaping stated that only stenographic recording of deposition would be taxed as costs. 28 U.S.C.A. § 1920.

3 Cases that cite this headnote

[8] **Federal Civil Procedure**
Depositions

Costs of deposition transcripts and copies thereof necessarily obtained for use in case are taxable as costs. 28 U.S.C.A. § 1920(2, 4).

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Witness fees

Witness fees are recoverable as costs, including fees for attendance at deposition. 28 U.S.C.A. § 1920(3).

2 Cases that cite this headnote

[10] **Federal Civil Procedure**
Witness fees

Plaintiff, as prevailing party, was entitled to recover only $160 ($40 for each of defendant's four experts deposed) plus any portions of defendant's experts' deposition fees that were verifiably attributable to authorized travel and subsistence expenses and not the entire $2,150 charged to plaintiff by defendant's experts for their deposition attendance. 28 U.S.C.A. §§ 1821(b), 1920(3).

2 Cases that cite this headnote

[11] **Federal Civil Procedure**
Fees and Costs

Awarding of costs is always contingent upon determination that there is statute authorizing such award.

[12] **Federal Civil Procedure**
Witness fees

Travel to and from trial site by medical doctor, who was plaintiff's expert, "necessarily occupied" doctor within meaning of statute providing that witness shall be paid attendance fee for time "necessarily occupied" in going to and returning from the place of attendance, such that doctor's travel expenses would be taxed as costs against defendants, as the losing party; doctor had obligations that took precedence over his trial testimony and that could not foreseeably be met in any manner other than to interrupt his testimony and such costs were contemplated by statute. 28 U.S.C.A. §§ 1821(b), 1920.

1 Cases that cite this headnote

[13] **Federal Civil Procedure**
Witness fees

Prevailing party would not be allowed to tax as

costs fees charged by her experts for preparation of reports, despite fact that those reports were ordered by the court. 28 U.S.C.A. § 1920.

[14] **Federal Civil Procedure**
Stenographic costs

Generally, absent prior court approval, taxation of transcription costs at the daily copy rate is not allowed; however, if issues in case were so complex as to justify overlooking the lack of pretrial approval, court can use its discretion to award the cost where daily copy proved invaluable to both counsel and the court. 28 U.S.C.A. § 1920(2).

5 Cases that cite this headnote

[15] **Federal Civil Procedure**
Stenographic costs

Subject matter of medical malpractice action was sufficiently complex that obtaining transcripts of plaintiff's experts' testimony was necessary in order for plaintiff's counsel to identify and focus in on particular areas of disagreement between the parties' experts and to conduct thorough and effective cross-examinations and thus, taxation of costs against defendants, as losing party, for transcripts of plaintiff's experts' testimony was appropriate; many expert witnesses testified, number of different and competing opinions emerged as to what caused plaintiff's husband's death and use of transcripts was reasonably necessary to keep multiple theories and distinctions between them straight and was not a mere convenience to counsel. 28 U.S.C.A. § 1920(2).

[16] **Federal Civil Procedure**
Particular items

Statute authorizing judge to tax as costs fees of the clerk and marshal is generally intended to make costs of service of process taxable; although statute refers simply to fees of the marshal, it must be read in light of another statute which states that marshals shall routinely collect and court may tax as costs, fees for serving process. 28 U.S.C.A. §§ 1920(1), 1921(a)(1).

12 Cases that cite this headnote

[17] **Federal Civil Procedure**
Particular items

Given apparent congressional intent to make service of process a taxable item and due to substitution of private process servers for United States Marshal Service in recent years, taxation of costs for special process servers is justifiable, but such costs should be taxable only to extent that they do not exceed costs that would have been incurred had marshal's office effected service, since only marshal's fee amount is actually statutorily authorized. 28 U.S.C.A. §§ 1920(1), 1921(a)(1).

19 Cases that cite this headnote

Attorneys and Law Firms

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E. Dudley Smith, Fisher, Patterson, Sayler & Smith, Overland Park, KS, for Physician Staffing Resources, Inc.

Opinion

MEMORANDUM AND ORDER

BELOT, District Judge.

This case comes before the court on defendants' motion to retax costs (Doc. 336).

[1] This case was tried before a jury which returned a verdict for plaintiff. The Clerk taxed costs against defendants in the amount of $44,100.48. Defendants object to the following items included in that amount: (1) costs incurred by plaintiff in videotaping the depositions of defendant Dr. McCormick and Nurse Judith Ulery; (2) fees paid by plaintiffs to depose four of the defendants' expert witnesses; (3) travel expenses paid to one of plaintiff's experts, Dr. Robert Prosser; (4) costs associated with plaintiff's experts preparing their own reports; (5) fees for transcribing the trial testimony of two of plaintiff's experts, Dr. Robert Prosser and ***502** Nurse Mike Martin; and (6) expenses in hiring a special process server to execute service upon the Health Care Stabilization Fund and the St. Paul Insurance Company. The court reviews the clerk's assessment of costs on a de novo basis in the exercise of its sound discretion. *Green Const. Co. v. Kansas Power & Light Co.,* 153 **F.R.D**. 670, 674 (D.Kan.1994).

GENERAL STANDARDS ON POST-JUDGMENT COSTS

[2] [3] Taxation of costs is authorized by Fed.R.Civ.P. 54(d)(1): "[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs." 28 U.S.C. § 1920 defines "costs" and sets forth the categories of trial expenses awardable to a prevailing party under Rule 54(d):

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers 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.

The trial court has no discretion to award costs that are not set out in § 1920, *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 441-42, 107 S.Ct. 2494, 2497-98, 96 L.Ed.2d 385 (1987); *Bee v. Greaves,* 910 F.2d 686, 690 (10th Cir.1990), and the prevailing party has the burden of establishing that the expenses he seeks to have taxed as costs are authorized under § 1920, *Green Const. Co. v. Kansas Power & Light Co.,* 153 **F.R.D**. 670, 675 & n. 4 (D.Kan.1994). In some cases, this requires a showing that the materials were "necessarily obtained for use in the case." 28 U.S.C. § 1920(2) and (4).

[4] If the prevailing party carries its burden and proves that a particular type of cost is statutorily authorized, there is a presumption favoring its award. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). The amount of such costs, however, must be carefully scrutinized to ensure that it is reasonable. *Id.* (citing *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964)).

Costs of Videotaping Depositions

[5] Section 1920(2) authorizes taxation of "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." This includes the costs of deposition transcripts that are " 'reasonably necessary to the litigation.' " *Furr v. AT & T Technologies, Inc.,* 824 F.2d 1537, 1550 (10th Cir.1987) (quoting *Ramos v. Lamm,* 713 F.2d 546, 560 (10th Cir.1983)). Under Federal Rule of Civil Procedure 30(b)(4), depositions can be recorded "other than stenographically," including through videotape. Hence, taxation of the costs of reasonably necessary videotaped depositions has been upheld. *Barber v. Ruth,* 7 F.3d 636, 645 (7th Cir.1993); *Meredith v. Schreiner Transp., Inc.,* 814 F.Supp. 1004 (D.Kan.1993).

[6] In order to show that the videotaping of a deposition was reasonably necessary, actual use of the videotape at trial is not required. *Barber,* 7 F.3d at 645. However, in the absence of actual use, the prevailing party must show that the facts known when the deposition was taken made it appear reasonably necessary to record the deposition on videotape. *Id.*

[7] In the present case, defendants object to the taxation of costs for videotaping the depositions of Dr. McCormick (one of the defendants) and Nurse Judith Ulery (who was previously a named defendant). Defendants claim the videotapes were unnecessary and that plaintiff's counsel represented from the beginning that the costs of the

videotaping would not be taxed against the defendants.

The court agrees with the defendants.

First, plaintiff has not shown necessity. When plaintiff sought leave to videotape the ***503** depositions of Dr. McCormick and Nurse Ulery, there was no indication that either would be unable to testify at trial. (See Doc. 35). Both Dr. McCormick and Nurse Ulery ultimately did testify, and plaintiff's counsel did not use the videotapes of their depositions at trial.

Second, in her motion seeking leave to videotape Dr. McCormick's and Nurse Ulery's depositions, plaintiff proposed a set of rules governing the videotaping, including the following: "Only the stenographic recording of the deposition shall be taxed as costs." (Doc. 35, p. 2). The court granted plaintiff's motion as presented. (Doc. 57). Plaintiff must abide by her own rules.

Accordingly, the **costs of videotaping** Dr. McCormick's and Nurse Ulery's depositions will not be taxed to the defendants. Counsel shall consult with the clerk regarding the amount of the expenses incurred in videotaping Dr. McCormick's and Nurse Ulery's depositions, and the bill of costs shall be reduced by that amount.

Deposition Fees for Defendants' Experts

Defendants object to being taxed $2,150.00 for deposition fees charged to plaintiff by four of **defendant's** expert witnesses.

[8] There are two types of taxable costs related to depositions. First, as discussed *supra,* the costs of deposition transcripts and copies thereof "necessarily obtained for use in the case" are taxable under § 1920(2) and (4). That type of deposition cost is not at issue here.

[9] Second, witness fees are recoverable as costs under § 1920(3), including fees for attendance at a deposition. Another statute, 28 U.S.C. § 1821, specifically prescribes the amounts allowable in connection with the appearance of witnesses at depositions as well as trials. *See* 28 U.S.C. § 1821(a)(1). It provides in pertinent part:

> A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance....
>
> A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance....

28 U.S.C. § 1821(b) and (d)(1).

[10] Plaintiff claims that, as prevailing party, she is entitled to recover the entire $2,150.00 charged by defendant's experts for their deposition attendance. Plaintiff does not seek such fees for her own experts. Defendants object, claiming plaintiff cannot recover **any** witness deposition fees in excess of the $40 limit specified in § 1821(b).

[11] As stated *supra,* the awarding of costs is always contingent upon a determination that there is a statute authorizing such an award. Having reviewed § 1920 and § 1821, the court can find no authority for taxing expert witness fees beyond the $40 attendance fee and travel and subsistence expenses, unless the expert is court-appointed. *See* 28 U.S.C. § 1920(6). The Supreme Court reached a similar conclusion in *Crawford Fitting, supra:* "We think the inescapable effect of these sections [§§ 1920 and 1821] in combination is that a federal court may tax expert witness fees in excess of the $30-a-day [now $40-a-day] limit set out in § 1821 only when the witness is court-appointed." 482 U.S. at 442, 107 S.Ct. at 2497. *See also West Virginia Univ. Hospital, Inc. v. Casey,* **499** U.S. 83, 86-87, 111 S.Ct. 1138, 1140-41, 113 L.Ed.2d 68 (1991); *Green Const.,* 153 **F.R.D.** at 675 (Saffels, J.); *Aguinaga v. United Food and Commercial Workers Int'l Union,* 142 **F.R.D.** 328, 339 (D.Kan.1992), *rev'd on other grounds,* 993 F.2d 1480 (10th Cir.1993) (Theis, J.). Unlike the present case, however, *Crawford Fitting* addressed only whether a prevailing party could recover "fees paid to **its own** expert witnesses." 482 U.S. at 439, 107 S.Ct. at 2496 (emphasis added). There do not appear to be any controlling cases directly addressing the issue of whether a prevailing party can recover as costs the deposition fees of the **losing** party's expert witnesses.[1]

***504** One district court has ruled that if the deposition of the losing party's expert was ordered by the court because the losing party was not providing sufficient responses to other forms of discovery, then the costs incident to taking the losing party's expert's deposition are taxable as costs. *Worley v. Massey-Ferguson, Inc.,* 79 **F.R.D.** 534, 538-43 (N.D.Miss.1978). The court looked beyond the express limitations on post-judgment costs (§§ 1920 and 1821) to the discovery rules, particularly Federal Rule of Civil Procedure 26(b)(4)(C)(i): "Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision." *Id.* at 540-42. Viewing the losing party's expert's deposition fee as a "discovery expense," the court found it had the "discretionary authority" under Rule 26(b)(4)(C) (if

"manifest injustice would result"), Rule 26(c) ("for good cause shown, the court ... may make an order ... to protect a party from ... undue burden or expense"), and Rule 54(d) to "tax a party with costs connected with discovery even though there is no specific provision in the Federal Rules of Civil Procedure authorizing the court to do so." *Id.* at 542. Given the Supreme Court's subsequent holding in *Crawford Fitting* that the assessment of post-judgment costs associated with experts are taxable only if specifically authorized by statute or contract (discussed *supra*), the court believes *Worley* rests on a faulty premise and is no longer good law.

The better reasoned opinion is that of the Northern District of Illinois in *O'Toole v. Kalmar,* 1990 WL 141431, at *3-6 (N.D.Ill. Sept. 21, 1990). In that case, the court gave exhaustive consideration to the issue of whether the defendants (prevailing parties) could recover the "Costs Incurred in **Deposing Plaintiff's Experts**." *Id.* at *3 (emphasis added). The plaintiff (losing party) argued that the entire cost of deposing his experts should be borne by the defendants because it was "unnecessary" to take the depositions and because, under Rules 26(b)(4)(A)(ii) and (b)(4)(C), the deposition costs are to be paid by the discovering parties. *Id.* The court disagreed on both counts, finding that "it was reasonably necessary for such depositions to be taken if the defendants were to adequately prepare their defense", *id.* (citing *Ramos, supra*), and that Rule 26 did not address "how [deposition] costs should be allocated **post-judgment** and in the event that the deposing party ultimately prevails in the law suit," *id.* at *4 (emphasis added) (distinguishing *Worley, supra*).[2]

Turning to Rule 54(d), the court found that "even though the defendants in the case at bar were required to pay the fees incident to the deposing of the plaintiff's expert witnesses during discovery, Rule 54(d) now allows the defendants, as the prevailing parties, to be reimbursed by the plaintiff for such costs." *Id.* The court then looked to the Supreme Court's decision in *Crawford Fitting* and 28 U.S.C. § 1821 to determine what amount of the plaintiff's expert's deposition ***505** fees could be taxed as costs against plaintiff.

> In *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* the United States Supreme Court explicitly held that costs taxable pursuant to Federal Rule 54(d) are limited to those expressly stated in the statutes, and that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920. *Id.* 482 U.S. at 445, 107 S.Ct. at 2499. Though it is argued by the plaintiff that the decision in *Crawford* disallows any awarding of expert witness fees at all under Rule 54(d) or 28 U.S.C. §§ 1920 and 1821, such an interpretation is incorrect. Nowhere in its opinion does the Supreme Court state that a prevailing party may not be reimbursed for costs incurred in deposing an opposing expert witness. Rather, the Court held that the federal courts are bound by the limitations set out in 28 U.S.C. §§ 1920 and 1821 in the absence of other explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness costs. *Id.* at 445, 107 S.Ct. at 2499. In other words, a prevailing party may recover some costs incurred by them in deposing an opposing party's expert witness, but such recovery will be strictly limited to the statutory maximum attendance fee....
>
> Under § 1821, a witness can be paid a maximum of $30.00 [now $40] per day for each day's attendance at deposition or trial, or time spent going to and returning from the deposition or trial.... Thus, when a prevailing party seeks reimbursement for fees paid to expert witnesses, that party may only recover a maximum fee of $30.00 [$40] per witness per day's attendance at either deposition or trial. [citing *Crawford*]. Any additional amounts charged by the expert witnesses in excess of the statutory allocation may not be charged against the losing party, but must be paid for by the prevailing party who initially deposed the expert witness.

Id. at *5-6 (citations omitted). The court accordingly ordered that the bill of costs include only the statutory attendance fees and allowable travel and subsistence expenses associated with plaintiff's experts' depositions. *Id.* at *6.

The court finds the analysis in *O'Toole* thorough and persuasive. Accordingly, plaintiff is entitled to recover only $160.00 **($40 for each of the four experts deposed)** plus any portions of defendants' experts' deposition fees that are verifiably attributable to authorized travel and subsistence expenses. Counsel are directed to consult with the clerk regarding these amounts.

Travel Expenses for Dr. Prosser

[12] Defendants object to plaintiff taxing as costs the **travel expenses** incurred by Dr. Prosser, one of plaintiff's experts, in traveling to and from his office in Kansas City, Kansas during the trial. Dr. Prosser had commitments in Kansas City which prevented him from appearing continuously for lengthy trial testimony. Defendants claim that Dr. Prosser's schedule should not dictate the costs assessed against them.

As noted *supra,* under 28 U.S.C. § 1821(b), "[a] witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance." Hence, plaintiff is entitled to recover expenses for Dr. Prosser's "necessary" travels to and from the trial site.

In the court's view, Dr. Prosser's travels to and from Kansas City during the trial did "necessarily occupy" him within the meaning of 28 U.S.C. § 1821(b). A medical doctor may have obligations that take precedence over his trial testimony and that cannot foreseeably be met in any manner other than to interrupt his testimony. Given that such costs are contemplated by the statute and that plaintiff does not appear to be overreaching, Dr. Prosser's travel expenses will be taxed against the defendants.

Cost of Plaintiff's Experts' Reports

Plaintiff seeks to recover the costs of **expert reports** that the court ordered be prepared and submitted to defendants as part of ***506** discovery. Defendant contends there is no statutory authorization for such taxation. Plaintiff maintains that because the **court ordered the reports**, the associated costs are taxable against the defendants.

[13] As stated *supra,* there is no statutory authority for awarding expert witness fees beyond the $40 attendance fee and allowable travel and subsistence expenses specified in 28 U.S.C. § 1821(b). Plaintiff will thus not be allowed to tax as costs the fees charged by her experts for the preparation of reports, despite the fact that those reports were ordered by the court.[3] The clerk is accordingly directed to reduce the bill of costs by $6,123.00. (Doc. 334, Exhibit F).

***Transcripts of Plaintiff's* Experts' Testimony**

Taxation of costs for preparation of daily trial transcripts by the court reporter is permitted under § 1920(2). "To award this premium cost for daily production, a court must find that daily copy was necessarily obtained, as judged at the time of transcription." *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1248 (10th Cir.1988). "Whether an item is necessarily obtained for use in a case ... calls for a factual evaluation, a task which is committed to the discretion of the trial court." *Mikel v. Kerr,* 499 F.2d 1178, 1183 (10th Cir.1974) (citing *United States v. Kolesar,* 313 F.2d 835 (5th Cir.1963)).

[14] Generally, absent prior court approval, taxation of transcription costs at the daily copy rate is not allowed. Laura B. Bartell, *Taxation of Costs and Awards of Expenses in Federal Court,* 101 F.R.D. 553, 568 (1984) [hereinafter *Bartell*]. However, "[i]f the issues in [the] case were so complex as to justify overlooking the lack of pretrial approval, a court [can use] its discretion to award the cost where daily copy proved invaluable to *both* the counsel *and* the court." *Id.* (citing *Farmer,* 379 U.S. at 234, 85 S.Ct. at 415; *Bartell,* 101 F.R.D. at 568). For example, in *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.,* 663 F.Supp. 1360, 1458 (D.Kan.1987), *aff'd in part, remanded in part,* 899 F.2d 951 (10th Cir.1990), *cert. denied,* 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), Judge Kelly awarded the prevailing party costs for daily transcript incurred during a long and complex antitrust trial. Judge Kelly found that the transcripts were of substantial assistance in bringing issues into focus and preparing factual testimony, cross-examinations, motions in limine, and closing arguments.

Defendants argue that it was not necessary for plaintiff to obtain trial transcripts of her own experts' (Dr. Prosser's and Nurse Martin's) testimony. Plaintiff responds by submitting an affidavit from her attorney, Richard Lowry, indicating that the trial transcripts were obtained by counsel for three reasons: (1) "this case was extremely complex, involved enigmatic medical terms and procedures, and took sixteen days before the jury"; (2) Dr. Prosser's and Nurse Martin's testimony "occurred on more than one day with many days intervening"; and (3) the transcripts were "used to prepare other witnesses and to cross-examine defense witnesses." (Doc. 337, Ex. A, ¶¶ 2-3).

[15] In the court's view, the subject matter of the present case was sufficiently complex that **obtaining transcripts of plaintiff's experts' testimony** was necessary in order for counsel to identify and focus in on the particular areas of disagreement between plaintiff's and defendants' experts and to conduct thorough and effective cross-examinations. Many expert witnesses testified, and a number of different, competing opinions emerged as to what caused plaintiff's husband's death. Keeping these multiple theories and the distinctions between them straight was an unenviable task, and plaintiff's counsel no doubt utilized the transcripts of plaintiff's experts' testimony to achieve it. Clearly, the use of *507 the transcripts was reasonably necessary and not a mere convenience to counsel.[4]

Accordingly, the taxation of costs for the transcripts of plaintiff's experts' testimony is upheld.

Special Process Server

Finally, defendants contend plaintiff should not be allowed to tax costs of hiring a private special process server. According to defendants, there is no statutory authorization for taxing such costs against them.

Section 1920(1) authorizes taxation of the costs of the "clerk and marshal." This clearly encompasses costs incurred in having a United States marshal serve summons and subpoenas. It does not, however, appear to cover the cost of hiring a private citizen to perform similar duties.

There is a split of authority on whether the cost of special process servers is taxable under § 1920(1). The Eighth Circuit has ruled that a prevailing party **cannot** recover the costs of hiring a special process server because § 1920 contains no provision for such expenses. *Crues v. KFC Corp.,* 768 F.2d 230, 234 (8th Cir.1985). In so ruling, the court relied on *Zdunek v. Washington Metro. Area Transit Auth.,* 100 **F.R.D**. 689, 692 (D.D.C.1983) (holding costs of hiring special process servers not recoverable because no statutory authorization) and 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2677, at 371-72 (1983) (indicating taxation is "usually denied" for "costs, other than marshal's fees, involved in serving a summons").

The Ninth Circuit, however, has rejected the Eighth Circuit's ruling in *Crues,* reasoning that because Federal Rule of Civil Procedure 4(c) expressly contemplates private parties being employed as process servers and because, in the court's view, Congress exhibited an intent to generally make service of process a taxable item under § 1920(1), the cost of private process servers should be recoverable. *Alflex Corp. v. Underwriters Labs., Inc.,* 914 F.2d 175, 178 & n. 6 (9th Cir.1990), *cert. denied,* 502 U.S. 812, 112 S.Ct. 61, 116 L.Ed.2d 36 (1991).[5] The Ninth Circuit agreed with the following rationale from *Roberts v. Homelite Div. of Textron, Inc.,* 117 **F.R.D**. 637, 641 (N.D.Ind.1987): " 'Due to the substitution of private process servers for the U.S. Marshal Service in recent years, it is appropriate to allow private process fees as costs.' " *Alflex,* 914 F.2d at 178 n. 6.

The bulk of lower court authorities favor the analysis in *Alflex* and *Roberts. Compare McGuigan v. CAE Link Corp.,* 155 **F.R.D**. 31 (N.D.N.Y.1994) (citing *Roberts*); *James v. Village of Plainfield,* 1994 WL 148673, at *2 (N.D.Ill. April 19, 1994) (citing *Alflex*); *Riofrio Anda v. Ralston Purina Co.,* 772 F.Supp. 46, 55 (D.Puerto Rico 1991), *aff'd,* 959 F.2d 1149 (1st Cir.1992) (expressly disagreeing with *Zdunek* and adhering to *Roberts*); and *Card v. State Farm Fire and Cas. Co.,* 126 **F.R.D**. 658, 662 (N.D.Miss.1989), *aff'd,* 902 F.2d 957 (5th Cir.1990) ("The expense of serving subpoenas upon witnesses is a recoverable cost.") with *Shu Chen v. Slattery,* 842 F.Supp. 597, 600 & n. 4 (D.D.C.1994) (following *Zdunek* from same district); *Sexcius v. District of Columbia,* 839 F.Supp. 919, 927-28 (D.D.C.1993) (same); and *Desisto College, Inc. v. Town of Howey-in-the-Hills,* 718 F.Supp. 906, 913 (M.D.Fla.1989) (relying on *Zdunek*).

[16] [17] This court agrees with the majority of lower court opinions and the Ninth Circuit that § 1920(1) is generally intended to make the costs of service of process taxable. Although § 1920(1) refers simply to "**fees of the marshal**," it must be read in light of § 1921 which states that "the marshals or deputy marshals shall routinely collect, and a court may tax as costs, fees for ... [s]erving ... process in any case or proceeding [and] [s]erving a subpoena or summons for a witness." 28 U.S.C. § 1921(a)(1)(A) & (B). Given the apparent congressional intent to make service of process a taxable item, *Alflex,* ***508** 914 F.2d at 178, and "due to the substitution of private process servers for the U.S. Marshal Service in recent years," *Roberts,* 117 **F.R.D**. at 641, the court believes the taxation of costs for special process servers is justifiable. However, such costs should be taxable only to the extent that they do not exceed the costs that would have been incurred had the Marshal's office effected service, since only the Marshal's fee amount is actually statutorily authorized. *See In re Air Crash Disaster at Stapleton Int'l Airport,* Nos. MDL 751, 88-F-664, 1989 WL 259995, at *4 (D.Colo. July 24, 1989) (Finesilver, C.J.) (denying costs of private process server in excess of amount which the Marshal would have charged); *Walters v. Monarch Life Ins. Co.,* Civ.A. No. 91-2396-GTV, 1993 WL 256755, at *2 (D.Kan. June 29, 1993) (citing *In re Air Crash*).

IT IS ACCORDINGLY ORDERED that defendants' motion to retax costs (Doc. 335) is hereby granted in part and denied in part. The bill of costs (Doc. 334) shall be reduced by the following: (1) **costs attributable to videotaping the depositions** of Dr. McCormick and Nurse Ulery (amount unspecified, but presumably part of the $19,611.22 listed as costs of transcripts); (2) costs attributable to the depositions of defendants' four experts (Quillen, Schlachter, Poling, and Eck), except the statutory attendance fees for each expert ($160) and verifiable travel and subsistence expenses (amount, if any, unknown); (3) costs incurred by plaintiff's experts in preparing reports ordered by the court and submitted to the defendants (listed

under "other costs" and reported to be $6,123.00); and (4) costs of special process servers which exceeded those that would have been charged by the Marshal's office (amount unknown). All other items disputed in defendants' motion shall remain part of the bill of costs.

Footnotes

1 In *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.,* 663 F.Supp. 1360, (D.Kan.1987), *aff'd in part, remanded in part,* 899 F.2d 951 (10th Cir.), *cert. denied,* 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), an anti-trust case, Judge Kelly court awarded the prevailing parties (the plaintiffs) all of their expert witness fees as well as "the costs incurred in connection with the taking of depositions of ... **the defendant's** expert witnesses." *Id.* at 1458 (emphasis added). Judge Kelly's ruling was appealed, and the Tenth Circuit reversed, holding that because the expert fees were not part of the " 'cost of suit, including a reasonable attorney's fee' " awardable to anti-trust plaintiffs under 15 U.S.C. § 15, any expert fees which exceeded the statutory limits prescribed in 28 U.S.C. §§ 1920 and 1821 were not taxable. 899 F.2d at 981-82. The court does not appear to have directly tackled how this applied with respect to **defendant's** experts' deposition fees.

Also, Judge Van Bebber recently denied a prevailing defendant the entire $600.00 fee he incurred in deposing **the plaintiff's** expert witness, but allowed a $40.00 attendance fee for **defendant's expert's** trial testimony. *Sparks v. Yorzinski,* CIV.A. No. 92-2369-GTV, 1994 WL 123619, at *3 (D.Kan. March 11, 1994).

2 The court concluded that it "must look beyond the language of Federal Rule 26 when deciding who must bear the costs of litigation since the rule only pertains to the fees paid during the actual discovery stage of the proceedings and does not address the **post-judgment** awarding of costs." *Id.* at *4.

3 Plaintiff claims that "[t]he cost of an expert witness is routinely awarded where prior court approval for such witness is obtained," citing as support *Cagle v. Cox,* 87 **F.R.D**. 467, 471 (E.D.Va.1980) and *Quy v. Air America, Inc.,* 667 F.2d 1059 (D.C.Cir.1981). (Doc. 330, p. 8). Both of these cases pre-date the Supreme Court's decision in *Crawford Fitting* and are, in this court's view, no longer good law.

4 Defendants have not challenged the transcript charges on the basis that their amount is grossly excessive. The court does not, therefore, consider that matter.

5 Even prior to this ruling, the Ninth Circuit actually had a Local Rule permitting taxation of costs for service of process **by any person.** *Id.* at 178. It is not clear how much influence this had on the court's decision.

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United States District Court,
D. Kansas.

Alice L. **HIGGINS**, Plaintiff,
v.
John E. **POTTER**, Postmaster General, United States Postal Service, Defendant.

No. 08–2646–JWL. | Aug. 22, 2011.

Attorneys and Law Firms

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Andrea L. Taylor, Office of United States Attorney, Kansas City, KS, for Defendant.

Opinion

MEMORANDUM AND ORDER

JOHN W. LUNGSTRUM, District Judge.

***1** Plaintiff filed this lawsuit against her employer, the United States Postal Service, alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The court previously granted summary judgment in favor of defendant on the grounds of judicial estoppel after concluding that plaintiff failed to disclose her claims in this case as assets in the context of her Chapter 13 bankruptcy proceeding. The Tenth Circuit Court of Appeals subsequently affirmed the dismissal of plaintiff's case. Thereafter, defendant submitted its Bill of Costs and the clerk of the court taxed costs in the amount of $3926.85. This matter is presently before the court on plaintiff's motion in opposition to defendant's bill of costs. As will be explained, the motion is denied.[1]

In her motion, plaintiff raises three arguments-she is indigent and, as a result, the court should deny costs to defendant; that any collection of costs should be stayed during the pendency of her bankruptcy case; and that taxable costs should be limited to one printed transcript of plaintiff's deposition. The court addresses each of these arguments in turn.

Federal Rule of Civil Procedure 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d). Rule 54, then, "creates a presumption that the district court will award the prevailing party costs." *Rodriguez v. Whiting Farms, Inc.,* 360 F.3d 1180, 1190 (10th Cir.2004). The burden is on the non-prevailing party to overcome this presumption. *Id.* When a district court denies costs to a prevailing party, it must provide a valid reason for the denial. *Id.*

Here, plaintiff contends that she is indigent and that her indigent status justifies a waiver of costs. The Tenth Circuit has recognized that the indigent status of the non-prevailing party is a circumstance in which a district court may properly exercise its discretion under Rule 54(d) to deny costs to a prevailing party. *Id.* The Circuit has cautioned, however, that even if a non-prevailing party is indigent, there must be "some apparent reason to penalize the prevailing party if costs are to be denied." *Id.* (no abuse of discretion for district court to award costs to defendant despite indigent status of non-prevailing party where non-prevailing party did not offer any reason why prevailing party should be penalized). Plaintiff offers no reason why the court should penalize defendant other than to state that defendant's "superior financial resources" enable it to "absorb these costs." But plaintiff directs the court to no case law suggesting that the court should penalize a party simply because a financial disparity exists between the parties. *Cf. Sauceda v. Dailey,* 1998 **WL** 709601, at *1 (D.Kan. Sept. 25, 1998) (rejecting argument that costs should be denied based on comparative wealth of prevailing party). Certainly, nothing in the language of Rule 54(d) suggests that result. In the absence of any valid reason why the court should penalize defendant, the court may not properly exercise its discretion to deny costs.

***2** Moreover, even if a valid reason existed to penalize defendant, the court would nonetheless deny plaintiff's motion. As this court has previously stated, an application of the indigence exception requires a threshold factual finding that the losing party "is incapable of paying the court-imposed costs at this time or in the future." *Treaster v. HealthSouth Corp.,* 505 F.Supp.2d 898, 902 (D.Kan.2007) (quoting *Rivera v. City of Chicago,* 469 F.3d 631, 635 (7th Cir.2006)). The evidence submitted by plaintiff in support of her motion is insufficient to permit the court to make such a finding. Significantly, plaintiff has submitted only her November 2009 voluntary bankruptcy petition and the bankruptcy court's December 2010 confirmation order directing plaintiff to make monthly payments to the trustee. Plaintiff has not

submitted any evidence updating her financial status since November 2009 or indicating her ability to pay costs in the future. In the absence of such evidence, the court cannot conclude that plaintiff is entitled to the benefit of the indigence exception even assuming a valid reason existed to penalize defendant. *See Wilkins v. Kmart Corp.,* 2009 WL 331620, at *2 (D.Kan. Feb. 10, 2009) (rejecting claim of indigence where plaintiff's evidence of financial status was affidavit that was over 18 months old).

As plaintiff has not satisfied her burden of showing that she is entitled to the benefit of the indigence exception, the court turns to plaintiff's alternative argument that the court stay any collection on the bill of costs during the pendency of plaintiff's bankruptcy case. This issue is easily resolved as defendant agrees to honor the automatic stay provisions of the bankruptcy court and will attempt to collect costs only if it obtains permission from the bankruptcy court.

Plaintiff next contends that the clerk erred in taxing costs for both the printed transcript of plaintiff's deposition and a videotape of plaintiff's deposition. According to plaintiff, defendant cannot recover costs related to both the printed transcript and the videotape of plaintiff's deposition because the express language of section 1920(2) permits costs relating to either a printed transcript or an electronically recorded transcript but not both. Pursuant to section 1920(2), the court may tax as costs "fees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Although no Circuit Court of Appeals has squarely addressed the issue, district courts interpreting the amended language of section 1920(2) have split on the statute's meaning. Some district courts have strictly interpreted Congress's use of the word "or" when it amended section 1920(2) in 2008[2] to permit taxable costs for either stenographic transcription or video-recording of depositions but not both. *See Chism v. New Holland North Am., Inc.,* 2010 WL 1961179, at *5 (E.D.Ark. May 13, 2010); *EEOC v. CRST Van Expedited, Inc.,* 2010 WL 520564, at *5 (N.D.Iowa Feb. 9, 2010); *Thomas v. Newton,* 2009 WL 1851094, at *3 (E.D. Mo. June 26, 2009). The majority of district courts, however, have interpreted the amended section 1920(2) as merely a recognition by Congress that depositions can be recorded by both stenographic and non-stenographic means rather than a limitation on the scope of taxable costs. *See Baisen v. I'm Ready Productions, Inc.,* 793 F.Supp.2d 970 2011 WL 2559943, at *4–5 (S.D. Tex. June 10, 2011); *B & B Hardware, Inc., v. Hargis Indus., Inc.,* 2010 WL 3655737, at *1 (E.D.Ark. Sept. 9, 2010); *Nilesh Enter., Inc. v. Lawyers Title Ins. Corp.,* 2010 WL 2671728, at *3 (W.D.Tex. July 1, 2010); *Daniels v. Michiana Metronet, Inc.,* 2010 WL 2680074, at *2 (N.D.Ind. July 1, 2010) (amendment to section 1920(2) broadens scope of taxable costs); *Farnsworth v. Covidient, Inc.,* 2010 WL 2160900, at *2 (E.D.Mo. May 28, 2010). According to these courts, a party may recover costs for both videotaping and transcription so long as the party demonstrates that both the video and transcript were necessarily obtained for use in the case. *See B & B Hardware,* 2010 WL 3655737, at *1 (and cases cited therein).

***3** The Tenth Circuit, applying the prior version of section 1920(2), has held that a prevailing party may recover the costs of both videotaping and transcribing depositions when both are necessarily obtained for use in the case. *See Tilton v. Capital Cities/ABC, Inc.,* 115 F.3d 1471, 1478 (10th Cir.1997). In *Tilton,* the Circuit reasoned that section 1920(2) "implicitly" allowed taxation of the costs of video depositions because Federal Rule of Civil Procedure 30(b)(2)-(3) "authorizes videotape depositions as an alternative to traditional stenographic depositions." *Id.* at 1477. The Circuit further reasoned that section 1920(2) authorized the taxation of costs for both videotaping and transcribing depositions so long as each version had a legitimate use independent from the other version. *Id.* at 1478. Indeed, the Circuit concluded that "in most cases" both a transcript and a videotape will be "necessarily obtained for use in the case."*Id.*

In light of the Circuit's reasoning in *Tilton,* the court believes that the Circuit, if faced with the amended version of section 1920(2), would reach the same result that it did in *Tilton* and would conclude that the statute permits the taxation of costs for both a transcript and videotape so long as both are necessarily obtained for use in the case. *See K–Tec, Inc. v. Vita–Mix Corp.,* 2011 WL 1899391, at *1 (D.Utah May 19, 2011) (applying *Tilton* under amended version of statute and rejecting argument that use of disjunctive phrase decides issue—key issue is whether both printed and video depositions were necessarily obtained for use in case); *Pitts v. Electrical Power Sys., Inc.,* 2009 WL 3766270, at *2 n. 2 (N.D.Okla. Nov. 10, 2009) (concluding that Circuit would continue to apply *Tilton* after amendment to section 1920(2) in light of the "expansion" of section 1920(2)). In so deciding, the court notes that both the Seventh and Fifth Circuits, while not directly addressing the issue, have suggested that the amendment to section 1920(2) was intended to clarify or expand the scope of recoverable costs under the statute. *See Shlahtichman v. 1–800 Contacts, Inc.,* 615 F.3d 794, 801–02 (7th Cir.2010) (citing amendment to section 1920(2) as an example of when Congress "has made explicit that it is including electronic media and transactions within the scope of a statute."); *S & D Trading Academy, LLC v. AAFIS Inc.,* 336 Fed. Appx. 443, 450–51 (5th Cir.2009) (suggesting that Congress expanded the scope of taxable costs when it amended section 1920(2)).

The court, then, rejects plaintiff's argument that the statute limits recoverable costs to either **videotaping or transcribing depositions.**[3]

Finally, plaintiff claims that the clerk erred in taxing as costs fees relating to printed transcripts of the depositions of defendant's employees—depositions that were taken by plaintiff of individuals who figured prominently in the allegations underlying plaintiff's claims. According to plaintiff, these transcripts were not "necessarily obtained" for defendant's litigation of the case but were obtained solely for purposes of discovery and defendant's own convenience. The court disagrees and concludes that these transcripts were necessarily obtained for use in the case as it was reasonable for defendant, at the time it incurred the expense, to assume that the transcripts would be necessary for proper preparation of the case. *See In re Williams Sec. Lit.,* 558 F.3d 1144, 1149 (10th Cir.2009) (standard in determining whether materials are necessarily obtained for use in the case is whether materials, at the time the expense is incurred, appeared reasonably necessary for proper preparation of the case); *Francisco v. Verizon South, Inc.,* 272 F.R.D. 436, 443 (E.D.Va.2011) (defendant could recover costs of transcripts of eight depositions of its employees taken by plaintiff where all deponents had relevant information to provide and defendant could not reasonably anticipate every manner in which the depositions might be used); *Sykes v. Napolitano,* 755 F.Supp.2d 118, 121 (D.D.C.2010) (defendant could recover costs of transcripts of eight depositions of its employees where those depositions were all noticed and taken by plaintiff and it was **reasonable for defendant to assume at the time the depositions were taken that they would be necessary for use in the case**).

***4 IT IS THEREFORE ORDERED BY THE COURT THAT** plaintiff's motion (doc. 105) in opposition to defendant's bill of costs (or to retax costs) is **denied.**

IT IS SO ORDERED.

Footnotes

1 As a threshold matter, defendant urges the court to deny plaintiff's motion as untimely. Indeed, plaintiff has filed her objections to the bill of costs nearly six weeks after defendant submitted its bill of costs—well outside the 14–day window prescribed in the local rule. *See* D. Kan. 54.1(b)(1). Nonetheless, the applicable rules allow for a motion to retax costs within 7 days of the date the clerk taxes costs even if objections to the bill of costs are not timely filed. Fed.R.Civ.P. 54(d)(1); D. Kan. R. 54.1(c). Plaintiff's motion was filed on the day the clerk taxed costs. The court, then, construes plaintiff's motion as a timely motion to retax costs.

2 Prior to the 2008 amendment, section 1920(2) permitted taxable costs to include "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case ."

3 Plaintiff does not suggest that both the transcript and videotape of plaintiff's deposition were not necessarily obtained for use in the case.

1999 WL 588214
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Penelope **HUTCHINGS**, Plaintiff,
v.
Kevin M. **KUEBLER**, M.D., P.A., a professional corporation, Defendant.

No. 96–2487–JWL. | July 8, 1999.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

LUNGSTRUM, J.

***1** Plaintiff Penelope **Hutchings** brought claims against defendant Kevin M. **Kuebler**, M.D., P.A., a professional corporation, under the Kansas Act Against Discrimination, under wage and hour regulations, and under various other common law theories arising out of her employment with defendant. Plaintiff accepted defendant's offer of settlement for her wage and hour claim. On April 21, 1998, the court entered summary judgment in favor of defendant on all remaining claims. Defendant subsequently moved to tax costs on May 4, 1998 in the amount of $1,984.15 (Doc. 41). This matter is presently before the court on Plaintiff's Objection to Defendant's Bill of Costs and Motion to Retax the Costs (Doc. 43). For the reasons set forth below, plaintiff's objection and motion to retax costs is denied in part and granted in part.

I. Discussion

Fed.R.Civ.P. 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs...." Rule 54(d) is governed by 28 U.S.C. § 1920 (1999), which provides that a judge or clerk of the court may tax as costs "fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case." The prevailing party has the burden of proving that the expenses sought to be taxed fall within the section 1920 categories. *Green Constr. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 675 (D.Kan.1994); *cf. Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235 (1964) (items proposed by winning parties as costs should always be given careful scrutiny; Rule 54(d) does not give district courts unfettered discretion to tax costs for every expense winning litigant has seen fit to incur). If the prevailing party carries this burden, a presumption arises in favor of taxing those costs. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). A trial court reviews de novo the clerk's assessment of costs and the final award rests in the sound discretion of the court. *Farmer,* 379 U.S. at 232–33.

A. Depositions and Transcripts

Defendant's Bill of Costs includes $1,934.15 for "[f]ees of the court reporter for all or any part of the transcript necessarily obtained for use in the case." Plaintiff makes various objections to the taxing of costs attributed to five deposition transcripts: defendant's requested costs should be restricted to those depositions and those portions of depositions actually used in support of the defendant's summary judgment motion; no deposition costs related to plaintiff's wage and hour claim, which the parties settled, should be taxed; and no deposition costs should be assigned to plaintiff where plaintiff initiated the deposition and bore the original deposition expenses. The court will address each objection to depositions and transcripts in turn.

Plaintiff asserts that defendant used the deposition of Michael Hallisey, plaintiff's fiancee, "only to a limited extent, if at all," in defendant's motion for summary judgment. The court has reviewed defendant's motion for summary judgment in detail and has found no evident use or reference to Michael Hallisey's deposition. The Tenth Circuit has recognized, however, that as long as materials are "reasonably necessary for use in the case although not used at trial, the court is nonetheless empowered to find necessity and award costs." *Callicrate v. Farmland Indus. Inc.,* 139 F.3d 1336, 1340 (10th Cir.1998) (citing *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 677 (D.Kan.1994)). Accordingly, it is not essential that defendant have used Michael Hallisey's deposition in its summary judgment motion; rather, it is essential that the deposition and the costs incurred were "reasonably necessary." The appropriate time to judge "reasonable

necessity" under section 1920 is at the time the deposition costs were incurred. *Id.* at 1340. The court finds that the deposition of Michael Hallisey was reasonably necessary at the time the deposition and transcript costs were incurred. Plaintiff listed Michael Hallisey in its Rule 26(a) disclosures as a witness with knowledge regarding the impact of defendant's actions upon plaintiff and plaintiff's alleged damages. Because defendant's counsel could not have known whether a future motion for summary judgment would be granted or whether it would later need to go to trial, it was reasonably necessary that defense counsel depose this witness for the possibility of trial.

***2** With respect to the depositions of both Michael Hallisey and Penelope **Hutchings**, plaintiff asserts that only those portions of the depositions actually used in connection with defendant's motion for summary judgment should be taxed. As stated above, the standard for determining whether a transcript is a cost to be taxed under section 1920 is whether it appeared reasonably necessary to the litigation of the case at the time the cost was incurred. At the time the costs of these depositions were incurred, defendant neither could have known that summary judgment would be granted nor could defendant have anticipated which portions of the transcript would be used in support of its summary judgment motion. The court therefore refuses to limit the taxation of these depositions to those portions used in defendant's motion for summary judgment.

Plaintiff also argues that portions of the depositions relating to plaintiff's wage and hour claims, which the parties settled, should be excluded from taxation since defendant was not the prevailing party. Under Fed.R.Civ.P. 54(d)(1) "costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs...." Although plaintiff fails to establish clearly that defendant was not the prevailing party on the settled claim, the court finds this irrelevant to the outcome of this issue. The Tenth Circuit in *Roberts v. Madigan* has held that for purposes of Rule 54(d), a defendant need not prevail on all claims in order to be considered the prevailing party. *Roberts v. Madigan,* 921 F.2d 1047, 1058 (10th Cir.1990) (allowing the taxation of costs to the defendants as they had "prevailed on the vast majority of issues and on the issues truly contested at trial...."). Accordingly, it does not matter whether defendant is, or is not, the prevailing party on the settled claim in this matter. The defendant here **prevailed on the clear majority of its claims** and the court therefore refuses to reduce the taxation of costs to plaintiff by those portions of the deposition testimony relating to the wage and hour claim.

Plaintiff also contests the taxation of costs for the depositions of Kevin **Kuebler**, M.D., Andrew Schwartz, M.D., and Brian Castlemain, M.D. Plaintiff argues she should not be taxed the costs of depositions for which she bore original deposition costs. The court agrees. Yet, defendant did not ask for costs of conducting these three depositions. Defendant merely asks for costs of transcript copies. It is reasonable for the defendant to receive copies of these three depositions initiated by plaintiff, particularly because each was either an employee or principal of the defendant. *See Callicrate,* 139 F.3d at 1340. Defendant's extensive use of these three depositions in its motion for **summary judgment** provides more than adequate reason for the court to conclude that copies of these three depositions were reasonably necessary. Costs were appropriately requested.

B. ASCII Disks and Minuscripts

***3** Plaintiff asserts that the taxation of deposition transcripts on **ASCII disk and minuscript** are "unnecessary and duplicative." Pursuant to 28 U.S.C. § 1920, these materials must have been "necessarily obtained for use in the case" in order to be included as costs. The defendant neither explains its use of ASCII disks and minuscripts nor offers any suggestion why they were necessarily obtained for use in the case. Even if the defendant had argued that the ASCII disks and minuscripts helped defendant more readily reference the trial transcript, the phrase "necessarily obtained" does not mean that the materials were simply added convenience to counsel. *See U.S. Indus., Inc.,* 854 F.2d at 1245. "Necessary" is a showing that the materials were used in the case and served a purpose beyond merely making the task of counsel and the trial judge easier. *See id.* at 1245. **Defendant fails to offer any such evidence and costs of the ASCII disks and minuscripts will not be taxed to plaintiffs.** With respect to the itemized depositions of Kevin **Kuebler**, M.D., Andrew Schwartz, M.D., and Brian Castlemain, M.D., the costs of each deposition shall be reduced by $35.00—the combined costs of the $15.00 ASCII disk and the $20.00 minuscript. Regarding the depositions of Penelope **Hutchings** and Michael Hallisey, the court is unable to discern from defendant's bill of costs what portion of the deposition costs are attributed to ASCII disks and minuscripts. Because defendant failed to appropriately itemize the Penelope **Hutchings** and Michael Hallisey depositions, the court concludes that it is reasonable to reduce the costs of each of these two depositions by $35.00—the combined costs of an ASCII disk and a minuscript.

C. Service of Summons and Subpoena

The plaintiff contends that defendant's bill of costs should not include "[f]ees for service of summons and subpoena," since Guillermo Ibarra, M.D., the **one served, was never deposed.** The court recognizes that plaintiff's counsel listed Guillermo Ibarra, M.D. as a witness in its Rule 26(a) disclosures. Nonetheless, in the absence of any explanation from defendant as to why this subpoena was issued and no deposition taken, the court is unwilling to require plaintiff to absorb the cost of service. The clerk shall not include the $50.00 service fee in the retaxation of costs.

IT IS THEREFORE ORDERED THAT plaintiff's motion to retax costs (Doc. 43) is granted in part and denied in part. The Clerk of the District Court is directed to decrease the award of costs to the defendant by $175.00—the cost of ASCII disks and minuscripts. Also, the clerk is directed to decrease the expense to the defendant by $50.00—the fee for service of subpoena. Thus, defendant's original request for taxation of $1,984.15 is to be reduced by a sum of $225.00, and the clerk is directed to tax plaintiff a total of $1,759.15.

IT IS SO ORDERED.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

LORETTA A. JACOBS, Plaintiff, v. THE BOEING COMPANY AND BOEING COMMERCIAL AIRPLANE GROUP, Defendants.	)	CIVIL ACTION No. 98-1398-MLB

MEMORANDUM AND ORDER

Before the court are the following:

1. Plaintiff's motion to retax costs or for a stay (Docs. 146 and 147);
2. Boeing's motion for review of clerk's taxation of costs (Docs. 148 and 149);
3. Plaintiff's response (Doc. 150);
4. Boeing's response (Doc. 151); and
5. Boeing's reply (Doc. 152).

Plaintiff's Motion (Docs. 146, 147 and 151)

The facts are not in dispute. Plaintiff sued Boeing, making two claims: violation of the Americans With Disabilities Act and state law retaliatory failure to hire. The case's progress through this court was long and tortuous. Following the Supreme Court's decision in Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 151 L.Ed.2d 615 (2002), plaintiff moved for dismissal of

her ADA claim. The court granted plaintiff's motion and declined supplemental jurisdiction of plaintiff's state law claim (Doc. 140). Plaintiff refiled the state law claim in the District Court of Sedgwick County, Kansas, where it is pending.

Following dismissal, the clerk taxed costs against plaintiff in the amount of $2,801.17 (Docs. 144 and 145). Plaintiff did not dispute or otherwise object to the costs when the clerk taxed them, nor does she now dispute the amount of the costs. Instead, plaintiff requests the court to exercise its discretion to deny all costs to Boeing. Plaintiff states that she "would not have known prior to the Toyota case that the United States Supreme Court would not follow the EEOC's regulations," inferentially suggesting that she should not be held responsible as a losing party due to an unexpected, but controlling, decision. In the alternative, plaintiff requests this court to stay the order of costs pending the outcome of the state case, citing Callicrate v. Farmland Industries, Inc., 139 F.3d 1336 (10th Cir. 1998).

Boeing responds that plaintiff's Toyota argument is not sufficient to rebut Fed. R. Civ. P. 54's presumption that costs should be awarded to the prevailing party. Boeing points to decisions of this and other courts decided prior to Toyota which it believes would have defeated plaintiff's ADA claim even in the absence of the Supreme Court's decision in Toyota. Boeing also objects to plaintiff's request for a stay.

The court agrees with Boeing. Plaintiff cites no authority to support her "no costs" argument based on the Toyota decision. In the absence of controlling authority to the contrary, the court concludes

that an intervening appellate decision which forecloses a party's federal claim prior to a final decision by a lower court does not affect the other party's status as a prevailing party for purposes of Rule 54 costs. Similarly, the court finds that its discretionary decision to decline supplemental jurisdiction of plaintiff's potentially novel state law claim does not affect Boeing's status as a prevailing party. Plaintiff has not rebutted the presumption that Boeing is entitled to costs.

Turning to plaintiff's alternative proposal, the court is not persuaded that Callicrate authorizes or even suggests the propriety of a stay in this case. Although plaintiff does not discuss the distinction, Callicrate involved costs allowed under 28 U.S.C. § 1919 which provides that costs may be ordered when a case is dismissed for want of jurisdiction. Plaintiff's claims were not dismissed for want of jurisdiction. The costs were properly taxed pursuant to Rule 54(d)(1) which states that "costs . . . shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." (Emphasis supplied). While the Tenth Circuit did not criticize the district court's discretionary decision to stay its award of costs pending outcome of the state action, Callicrate certainly cannot be read either as requiring or endorsing such a procedure whenever a case once pending in federal court is refiled in state court. Indeed, this court is not persuaded that the Tenth Circuit would endorse such a stay in a case involving Rule 54(d) costs.[1]

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[1]This court does not suggest that plaintiff should be required to pay duplicative costs should she lose her state court case. However, should plaintiff lose, the state court will be in a much better position to determine what costs, if any, are duplicative.

Accordingly, plaintiff's motion to retax costs (Docs. 146 and 147) is denied.

Boeing's Motion for Review of
Clerk's Taxation of Costs (Docs. 148, 149 and 150)

The clerk's office taxed copying costs at .10 per page, relying upon a 1994 decision by this judge and a 1998 decision by Judge Brown assessing costs at .10 per page. Boeing offered evidence that its actual costs were .15 per page and chides the clerk for his hypocrisy in allowing only .10 per page when the clerk's office charges .50 per page for copies made by the clerk's office personnel. The difference is $6.40.[2]

As far as Boeing's accusation of hypocrisy is concerned, Boeing is advised that the clerk's charge for copying fees is set by the Judicial Conference of the United States, not by the clerk. See 28 U.S.C. § 1914. The clerk did not have the benefit of the cases Boeing now cites in support of its position that it is entitled to its "actual costs." Nevertheless, the clerk's election to award copying costs based on decisions of Wichita judges is hardly unreasonable; on the contrary, even if he had the cases, it is logical that he would follow the rulings of local judges.

The court finds that the clerk's decision was correct when made and exercises its discretion not to change it. Boeing can make its "actual cost" argument to the clerk the next time it seeks costs as a prevailing party, supporting its arguments with the authorities on which it now relies. In all likelihood, the clerk will accept the

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[2]Note to reader: no, you did not misread that figure; truly, the additional costs sought by Boeing are $6.40!

wisdom of Boeing's position. This time, however, Boeing's motion for review (Doc. 148) is denied.

IT IS SO ORDERED.

Dated this 9th day of December 2002, at Wichita, Kansas.

Monti L. Belot
UNITED STATES DISTRICT JUDGE

229 F.3d 1163
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)
United States Court of Appeals, Tenth Circuit.

Theresa **JOHNSON**, Plaintiff-Appellant,
v.
The State of **OKLAHOMA**, ex rel., UNIVERSITY OF **OKLAHOMA** BOARD OF REGENTS, a constitutional agency; Daniel L. McNeill, in his individual capacity, Defendants-Appellees.

Nos. 99-6322, 99-6427. | Aug. 7, 2000.

Before TACHA, PORFILIO, and EBEL, Circuit Judges.

Opinion

ORDER AND JUDGMENT*

TACHA

***1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed.R.App.P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Plaintiff Theresa **Johnson** appeals from two orders of the district court, one granting summary judgment to defendants and the other awarding costs to defendants. We affirm.

Ms. **Johnson** commenced this action in district court pursuant to Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203(a), alleging retaliation.[1] Ms. **Johnson**, who has multiple sclerosis,[2] was a student in the University of **Oklahoma's** Physician Associate Program. She filed a discrimination complaint after she was denied an emergency medicine clinical rotation.[3] She later filed this action in district court alleging retaliation for filing that compliant citing nine specific incidents of retaliation, *see* App. Vol. I at 13-14, including receiving "F" 's in various rotations, being charged with academic misconduct, and being discharged from the program.

The district court, presuming that Ms. **Johnson** had established a prima facie case, held that she had not sufficiently rebutted defendants' stated legitimate non-discriminatory reasons for their actions. The court therefore granted defendants' motion for summary judgment and awarded costs to defendants.

No. 99-6322
In this appeal, Ms. **Johnson** argues that the issue of retaliatory intent is one for a jury and that the district court misapplied the substantive law. Ms. **Johnson** contends that the district court erroneously applied the "pretext-plus rule" which this court rejected in *Randle v. City of Aurora,* 69 F.3d 441, 451-53 & 452 n. 16 (10th Cir.1995). She maintains that she presented sufficient facts to show that defendants' stated reasons for their actions were pretextual.

"We review the entry of summary judgment de novo, drawing all reasonable inferences in favor of the nonmovants." *Hulsey v. Kmart, Inc.,* 43 F.3d 555, 557 (10th Cir.1994). The moving party must show there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. *See id.* To avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case. *See id.*

For purposes of this appeal, we accept that Ms. **Johnson** has established a prima facie case of ADA retaliation. *See Morgan v. Hilti, Inc.,* 108 F.3d 1319, 1324 (10th Cir.1997) (setting forth required elements). Having established a prima facie case, defendants had to come forward with a legitimate non-discriminatory reason for their actions. *See Pastran v. K-Mart Corp.,* 210 F.3d 1201, 1206 (10th Cir.2000). Ms. **Johnson** then bore the burden of showing that the defendants' proffered reason was pretextual. *See id.* Ms. **Johnson** could "demonstrate pretext by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [defendants'] proffered legitimate reasons for [their] action that a reasonable factfinder could rationally find them unworthy of credence." *Id.* (quotation omitted). While close temporal proximity between Ms. **Johnson's** filing of her complaint and defendants' adverse action is a factor in determining pretext, that alone is not sufficient to raise a triable issue of fact. *See id.*

2** Ms. **Johnson** points out that the first alleged retaliatory act occurred approximately two months after she filed her complaint. We have held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation. *See Ramirez v. **Oklahoma

Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir.1994). In contrast, we have held that a three-month period, standing alone, is insufficient to establish causation. *See Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir.1997). We need not decide where the line should be drawn, however, because Ms. **Johnson** cannot prove that defendants' proffered reasons for their actions were pretextual.

Defendants stated that Ms. **Johnson** was given an "F" on one clinical rotation because of her excessive absences. The "F" in the other rotation resulted from her dismissal from the rotation by her preceptor based on her lack of medical knowledge and inability to perform at an appropriate level. She was dismissed from the program because she received a failing grade while on probation. Defendants supported these reasons with copies of the program's policies. After her dismissal, defendants learned of Ms. **Johnson's** participation in a cheating scheme and filed an academic misconduct charge.

Ms. **Johnson** presented no evidence to contest defendants' proffered reasons for their actions. She stated that she had not missed as much of the rotation as defendants stated and that she did not participate in the cheating scheme. Ms. **Johnson** argued that a jury could disbelieve defendants' proffered explanations. Ms. **Johnson's** statements are insufficient to show that a reasonable factfinder could find defendants' proffered reasons unworthy of credence. The district court did not apply a "pretext-plus" standard in reaching this conclusion.

No. 99-6427

In this appeal, Ms. **Johnson** argues that the district court erred in awarding costs to defendants. She maintains that her evidence of indigency rebutted the presumption of awarding costs to the prevailing defendant. She appears to suggest that public policy counsels against awarding costs to a prevailing defendant in civil rights cases. Ms. **Johnson** also contends that the published opinion of another court in the same district is binding precedent on other courts in that district. She concludes that the district court was bound to follow *Martin v. Frontier Federal Savings & Loan Association,* 510 F.Supp. 1062, 1069 (W.D.Okla.1981), and not award costs.

Federal Rule of Civil Procedure 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees *shall be allowed as of course* to the prevailing party unless the court otherwise directs...." (Emphasis added.) We review the district court's ruling on awarding costs under Rule 54(d) for abuse of discretion. *See AeroTech, Inc. v. Estes,* 110 F.3d 1523, 1526 (10th Cir.1997).

***3** Courts have held that it was not an abuse of discretion for district courts to award costs when the **nonprevailing party was indigent.** *See McGill v. Faulkner,* 18 F.3d 456, 460 (7th Cir.1994) (district court may award costs against indigent losing party under Rule 54); *Flint v. Haynes,* 651 F.2d 970, 972-73 (4th Cir.1981) (noting then 28 U.S.C. § 1915(e) (now § 1915(f)) language permitting imposition of costs against indigent civil rights litigants "as in other cases"). *But see Stanley v. University of S. Cal.,* 178 F.3d 1069, 1079-80 (9th Cir.) (district court abused discretion by awarding *especially* high costs without considering whether award would cause civil rights plaintiff to become indigent), *cert. denied,* 120 S.Ct. 533 (1999). Further, Congress has provided that an award of costs may be entered against plaintiffs who have been permitted to proceed in forma pauperis. *See* 28 U.S.C. § 1915(f). Certainly, considering this factor would not be an abuse of discretion by the district court. However, we cannot hold that it is the controlling factor.

Ms. **Johnson's** public policy argument is unpersuasive. She argues that public policy counsels against awarding costs to a prevailing defendant in civil rights cases because such an award would chill future plaintiffs from bringing similar actions. We have upheld the "traditional presumption" of awarding costs to prevailing defendants in civil rights case. *Mitchell v. City of Moore,* Nos. 98-6446, 99-6101, 99-6121, 99-6177, 2000 **WL** 954930, at *11 (10th Cir. July 11, 2000). Further, relying on the

> parties' comparative economic power ... would almost always favor an individual plaintiff ... over [the] employer defendant.... [T]he plain language of Rule 54(d) does not contemplate a court basing awards on a comparison of the parties' financial strengths. To do so would not only undermine the presumption that Rule 54(d)(1) creates in prevailing parties' favor, but it would also undermine the foundation of the legal system that justice is administered to all equally, regardless of wealth or status.

Cherry v. Champion Int'l Corp., 186 F.3d 442, 448 (4th Cir.1999).

Ms. **Johnson** cites no law holding that one district court is bound by the decision of a sister district court. Further,

such a holding would imply that this court is bound by a district court's decision. Ms. **Johnson** herself has disavowed this position. *See* Appellant's Br. at 13 n. 2. We further note that the district court in *Martin* did not hold that costs could not be awarded when the defendant "has significantly larger financial resources than an individual plaintiff," but merely decided to exercise its discretion and not award costs "in view of all other circumstances." 510 F.Supp. at 1069. The court set forth no rule of law.

The judgments of the United States District Court for the Western District of **Oklahoma** are AFFIRMED.

Parallel Citations

2000 WL 1114194 (C.A.10 (Okla.)), 2000 CJ C.A.R. 4705

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

1 Ms. **Johnson** sued both the State of **Oklahoma** and the University of **Oklahoma** Board of Regents, an arm of the state. *See Hensel v. Office of Chief Admin. Hearing Officer,* 38 F.3d 505, 508 (10th Cir .1994). We have previously held that the ADA is a valid abrogation of the States' Eleventh Amendment immunity, *see Martin v. Kansas,* 190 F.3d 1120, 1125-28 (10th Cir.1999). However, since the Supreme Court decided *Kimel v. Florida Board of Regents,* 120 S.Ct. 631, 649-50 (2000), courts have split on the issue of whether Congress validly abrogated the States' immunity from suit under the ADA. The Supreme Court has accepted certiorari on this issue. *See University of Ala. at Birmingham Bd. of Trustees v. Garrett,* 120 S.Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240). Because we determine that Ms. **Johnson** cannot establish a valid claim under the ADA, we need neither address this issue nor abate this case pending the Supreme Court's determination.

2 Multiple sclerosis does not automatically qualify as a disability under the ADA. *See Sorensen v. University of Utah Hosp .,* 194 F.3d 1084, 1086-88 (10th Cir.1999). However, the parties and the district court agreed that Ms. **Johnson** was disabled within the terms of the ADA. We accept that characterization.

3 The rotation was scheduled in the University's emergency room. The supervising physicians felt that rotation would be too strenuous for her and told her she could take the emergency medicine rotation later in a less stressful and busy emergency room.

982 F.Supp. 1445
United States District Court,
D. Kansas.

KANSAS TEACHERS CREDIT UNION,
Plaintiff,
v.
MUTUAL GUARANTY CORPORATION,
Defendant.

Civil Action No. 94–1524–DES. | Oct. 29, 1997.

Plaintiff moved to re-tax costs after defendant prevailed on summary judgment motion. The District Court, Saffels, J., held that: (1) costs of deposition were properly taxed to plaintiff; (2) full amount of law firm's cost of telephone calls, letter, service of subpoena duces tecum, and preparation of return of service could not be taxed; and (3) court reporter's fee for signature on deposition and cost for pro hac vice admission could not be taxed.

Motion granted in part and denied in part.

West Headnotes (10)

[1] **Federal Civil Procedure**
Amount, Rate and Items in General

Trial court has no discretion to award costs not listed in statute outlining taxable costs. 28 U.S.C.A. § 1920.

[2] **Federal Civil Procedure**
Taxation

Prevailing party has burden of proving that expenses sought to be taxed fall within categories of statute outlining taxable costs. 28 U.S.C.A. § 1920.

[3] **Federal Civil Procedure**
Taxation

If prevailing party carries this burden of proving that expenses sought to be taxed fall within categories of statute outlining taxable costs, presumption arises in favor of taxing those costs. 28 U.S.C.A. § 1920.

[4] **Federal Civil Procedure**
Taxation

Amount of taxable costs must be carefully reviewed to ensure that it is reasonable. 28 U.S.C.A. § 1920.

[5] **Federal Civil Procedure**
Taxation

Trial court reviews de novo clerk's assessment of costs, and final award rests in sound discretion of court. 28 U.S.C.A. § 1920.

[6] **Federal Civil Procedure**
Depositions

Deposition expenses submitted to court may be taxed as costs, if deposition reasonably appeared necessary at time it was taken, but cost of depositions not necessarily obtained for use in case, such as purely investigatory ones, is not taxable. 28 U.S.C.A. § 1920(2).

4 Cases that cite this headnote

[7] **Federal Civil Procedure**
Depositions

Deposition to which defendant's summary judgment brief referred approximately 12 times reasonably appeared to be necessary when taken, and, thus, cost of it was taxable, even though court's decision in favor of defendant was not substantially premised on the deposition. 28 U.S.C.A. § 1920(2).

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Depositions

Signature fee charged by court reporter for sending deposition transcript to deponent for his review and signature was not taxable as fee for all or any part of stenographic transcript necessarily obtained for use in case. 28 U.S.C.A. § 1920(2).

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Particular Items

Exclusion of attorney's fees from statutory list of taxable costs justified decision to deny reimbursement for law firm's cost of telephone calls, letter, service of subpoena duces tecum, and preparation of return of service to extent charges exceeded amount charged by United States Marshall Service for serving process. 28 U.S.C.A. § 1920.

2 Cases that cite this headnote

[10] **Federal Civil Procedure**
Particular Items

Cost for admission of defendant's attorney pro hac vice was unnecessary and could not be taxed to plaintiff, where another attorney had been admitted pro hac vice, only pleading on which attorney's name appeared was summary judgment motion, and name was simply typed, not signed. 28 U.S.C.A. § 1920.

1 Cases that cite this headnote

Attorneys and Law Firms

***1446** Ron D. Beal, Klenda, Mitchell, Austerman & Zuercher, L.L.C., Wichita, KS, for Plaintiff.

James D. Oliver, Foulston & Siefkin L.L.P., Wichita, KS, James L. Grimes, Jr., Foulston & Siefkin, Topeka, KS, William C. Carriger, Robert Kirk Walker, Strang, Fletcher, Carriger, Walker, Hodge & Smith, Chattanooga, TN, for Defendant.

Opinion

MEMORANDUM AND ORDER

SAFFELS, District Judge.

Defendant prevailed on summary judgment. This matter is before the court on plaintiff's Motion to Re–Tax Costs (Doc. 62). Plaintiff claims that $390.76 of the $604.81 awarded defendant are not properly recoverable under 28 U.S.C. § 1920. Specifically, plaintiff claims that the clerk improperly taxed the costs of Henry Buset's deposition, the signature fee incident to the deposition of Mr. Buset, the telephone calls, letter and service relating to the subpoena duces tecum, and the expense for the admission, pro hac vice, of attorney Robert Walker.

Fed.R.Civ.P. 54(d)(1) authorizes the taxing of costs "to a prevailing party unless the court otherwise directs." Title 28 U.S.C. § 1920 outlines taxable costs by category:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witness;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under § 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.

[1] [2] [3] [4] [5] A trial court has no discretion to award costs not listed in § 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 441–42, 107 S.Ct. 2494, 2497–98, 96 L.Ed.2d 385 (1987). The prevailing party ***1447** has the burden of proving that the expenses sought to be taxed fall within the § 1920 categories. *Green Constr. Co. v. **Kansas** Power & Light Co.,* 153 F.R.D. 670, 675 (D.Kan.1994). If the prevailing party carries this burden, a presumption arises in favor of taxing those costs. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). The amount of such costs, however, must be carefully reviewed to ensure that it is reasonable. *Id.* (citation omitted). A trial court reviews de novo the clerk's assessment of costs and the final award rests in the sound discretion of the court. *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 232–33, 85 S.Ct. 411, 415, 13 L.Ed.2d 248 (1964).

1. Mr. Buset's Deposition

[6] 28 U.S.C. § 1920(2) allows the court to tax as costs the **fees of a court reporter for any part of the stenographic transcript necessarily obtained for use in the case, including deposition expenses** submitted to the court on a successful motion for summary judgment. 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2676 (1983). Deposition expenses submitted to the court may be taxed if the deposition reasonably appeared necessary at the time it was taken. *State, ex rel. Stephan v. Deffenbaugh Indus., Inc.,* 154 F.R.D. 269, 270 (D.Kan.1994). **Depositions not necessarily obtained for use in the case are not taxable as costs**. *See Felts v. National Account Sys. Assn., Inc.,* 83 F.R.D. 112, 113–14 (N.D.Miss.1979). The taxing of deposition costs will not be allowed, for example, where the deposition is "purely investigatory in nature." *Ortega v. City of **Kansas** City, **Kan**.*, 659 F.Supp. 1201, 1218 (D.Kan.1987), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir.1989).

[7] Plaintiff objects to the $282 assessed for the deposition of Mr. Buset, president of **Kansas Teachers Credit Union**. Of that sum, $272 was for the original deposition transcript and $10 was for a "signature" fee. Plaintiff argues that the deposition of Mr. Buset was not necessary for the defendant to litigate this case but was instead taken by defendant for purposes of convenience or investigation. The court disagrees. Defendant's brief in support of its Motion for Summary Judgment contained about a dozen references to Mr. Buset's testimony. That the court's decision was not substantially premised on Mr. Buset's testimony does not establish that the deposition did not reasonably appear necessary at the time it was taken. Plaintiff's argument is not convincing enough to overcome the presumption in favor of taxing the cost of Mr. Buset's deposition.

2. Signature Fee

[8] Plaintiff also challenges the $10 "**signature" fee** charged by the court reporter for sending the deposition transcript to Mr. Buset for his review and signature. Plaintiff claims this expense was "simply incident to the Buset deposition, and is not a 'cost' contemplated under § 1920(2)." Defendant does not contest this point, but argues the fee could have been avoided if plaintiff had waived signature. Defendant's argument does not explain, however, why plaintiff's failure to waive signature changes the fee into a cost covered under 28 U.S.C. § 1920(2). The cost of the "signature" fee will therefore be denied.

3. Subpoena Duces Tecum

[9] Plaintiff objects to the $83.76 assessed for defendant's costs in effecting service of a subpoena duces tecum on Mr. Buset. This fee was paid by defendant to the law offices of Randall Palmer for services which included telephone calls, a letter, serving of the subpoena, and preparing the return of service. Plaintiff argues that this fee amounted to an attorney's fee which is not contemplated under 28 U.S.C. § 1920. Plaintiff also contends that it was not necessary to subpoena Mr. Buset since he was president of the plaintiff **credit union**. Defendant claims that payment for service of a subpoena does not constitute payment for legal services. Defendant also claims that the subpoena issued was necessary because it was directed to personal documents not necessarily related to Mr. Buset's service as plaintiff's president. The court disagrees with plaintiff's argument that the subpoena was unnecessary, but in light of 28 U.S.C. § 1920's exclusion of attorney's fees, the court will reduce the amount taxed to ***1448** $40.00—the amount charged by the United States **Marshall Service for serving process.**

4. Local Counsel

[10] Finally, plaintiff objects to the $25 assessment representing the fee for the admission, **pro hac vice**, of attorney Robert Walker. Plaintiff argues that Mr. Walker's admission was unnecessary in light of attorney William Carriger's admission pro hac vice. Thus, plaintiff argues,

Mr. Walker's admission was merely for the convenience of the defendant and not covered under 28 U.S.C. § 1920. Defendant claims that Mr. Walker "appeared on all material pleadings." Apparently, however, the only pleading on which Mr. Walker's name appeared is defendant's summary judgment motion, and his name was simply typed, not signed. Nor was he present for any hearing or deposition. Under the circumstances of this particular case, the need for Mr. Walker's admission does indeed appear to have been unnecessary, and the $25 assessment representing the fee for his admission will be disallowed.

IT IS THEREFORE BY THE COURT ORDERED that plaintiff's Motion to Re–Tax Costs (Doc. 62) is granted in part and denied in part. The Clerk of the Court is hereby directed to disallow the $10 signature fee and the $25 fee for the admission, pro hac vice, of attorney Robert Walker. The fee for service on Mr. Buset of the subpoena duces tecum may be allowed up to $40. In all other respects, plaintiff's motion is denied.

End of Document

1997 WL 250456
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Calvin **KOEHN**, Plaintiff,
v.
YAMAHA **MOTOR** CORPORATION, **U.S.A.**,
Defendant.

No. 94–1112–JTM. | April 2, 1997.

Opinion

MEMORANDUM AND ORDER

MARTEN

***1** Defendant Yamaha **Motor** Corporation, **U.S.A.** asks the court to retax costs submitted by the plaintiff and assessed by the clerk after a jury verdict was entered in favor of plaintiff Calvin **Koehn**. Yamaha asserts that (1) costs should be denied based on equitable concerns; (2) costs were not incurred by a prevailing party; and (3) costs are not appropriate for taxation under Fed.R.Civ.P. 54(d).

I. DENIAL OF RULE 54(D) COSTS AS A SANCTION

Yamaha first argues **Koehn** should be denied costs on equitable grounds. This court has discretion to deny or apportion costs based on equitable considerations. *Wheeler v. John Deere Co.,* 986 F.2d 413, 416 (10th Cir.1993). *See also Olcott v. Delaware Flood Co.,* 76 F.3d 1538, 1554 (10th Cir.1996). Yamaha cites the following equitable considerations in support of its motion to retax costs: (1) **Koehn's** failure to timely produce medical records; (2) **Koehn's** failure to attend the settlement conference; and (3) actual payment of the costs by **Koehn's** employer, Helena Chemical Company. The court agrees that **Koehn** should be sanctioned for failing to timely produce medical records. It is unnecessary to consider Yamaha's other arguments for denying costs on equitable grounds.

During cross-examination at trial, **Koehn** first disclosed the existence of treatment records from Dr. Bos at Hutchinson Hospital. Yamaha moved for a mistrial, arguing the records were central to its defense. The court agreed with Yamaha that the medical records should have been disclosed, but denied the motion for mistrial. The court indicated Yamaha could raise the issue of **Koehn's** failure to timely disclose the medical records in a post trial motion.[1]

Yamaha argues it suffered substantial prejudice from **Koehn's** failure to disclose and an appropriate sanction would be denial of costs under Rule 54(d). **Koehn** argues (1) Yamaha has not complied with cost allocation agreements in this case and thus is not entitled to equitable relief; (2) he was not required to disclose the records at issue; (3) he complied with the court's discovery orders; and (4) the court previously sanctioned him by reducing his time for closing arguments.

The court previously found **Koehn** had failed to comply with the discovery rules. **Koehn's** arguments to the contrary are not persuasive. The existence of Dr. Bos's treatment records should have been disclosed to Yamaha as soon as **Koehn** became aware of them. **Koehn** basically argues that because he successfully hid the existence of the records from Yamaha through artful answers to discovery requests and negotiations regarding production of other medical records, he "complied" with the discovery rules and the orders of the court. The court does not agree and finds **Koehn** willfully hid the existence of Dr. Bos's records in violation of the letter of Rule 26 and the spirit of the court's orders.

Koehn's complaints about Yamaha's conduct are not persuasive. **Koehn** never sought intervention from the court in order to resolve the cost disputes about which he complains. Nor did the court previously sanction **Koehn**. The court reduced the time for both parties' closing arguments based on scheduling concerns, not as a sanction.

***2 Koehn** will be sanctioned for his conduct. However, a sanction must be appropriate and proportionate to the conduct warranting sanctions. *See Olcott,* 76 F.3d at 1557. There must be a sufficient nexus between the sanctionable conduct and the fees and expenses awarded. *Id.*

Here, Yamaha asks that **Koehn** be denied the costs he would normally be entitled to under Rule 54(d). Yamaha does not ask for attorney fees. The prejudice Yamaha suffered cannot be quantified in terms of increased costs of discovery. The options available to the court included declaring a mistrial or granting partial default judgment to Yamaha, sanctions much more severe than the denial of

costs under Rule 54(d).

The court finds denial of all Rule 54(d) costs would be an excessive sanction. Yamaha's main complaint is that it was unable to cross-examine witnesses based on Dr. Bos's records. Accordingly, **Koehn** will be denied all costs in the form of witness fees.

II. PREVAILING PARTY STATUS

Yamaha objects to the court's designation of **Koehn** as a prevailing party entitled to costs.[2] Yamaha argues Helena paid the costs and is the real party in interest because of its statutory right to assert a worker's compensation lien under K.S.A. 44–504. Yamaha cites no evidence to support its assertion that Helena paid the costs. Yamaha then argues that under K.S.A. 60–258a Helena is not eligible to recover because it was found more than 50% at fault.[3]

K.S.A. 44–504 governs the amount of a worker's compensation lien. It specifically permits a worker's compensation lien even where the employer is found to be partially at fault. The amount of the lien against the employee's recovery is simply reduced in proportion to the fault assessed against the employer. K.S.A. 44–504(d). To the extent K.S.A. 44–504's provisions might conflict with K.S.A. 60–258a, a conclusion which the court does not reach, K.S.A. 44–504 controls as the more specific statute. *See Kansas Racing Management, Inc. v. Kansas Racing Comm'n,* 244 Kan. 343, 353 (1989).

Accordingly, the Kansas statutes do not operate so as to bar recovery of costs when an employee is injured and his employer is more than 50% at fault. **Koehn** and Helena do not raise a cost dispute, so the court need not decide how the costs should be apportioned between them. *See* K.S.A. 44–504(b) (authorizing the district court to fix the distribution of costs and fees between the employee and employer).

III. APPROPRIATE COSTS

Yamaha objects to several of **Koehn's** costs.[4] This court reviews de novo, the taxation of costs by the clerk. *See* Fed.R.Civ.P. 54(d)(1); D. Kan. R. 54.1.

Normally, the prevailing party in a civil action is entitled to recover costs under Rule 54(d), provided the costs are authorized by 28 U.S.C. § 1920 and do not exceed the limitations of 28 U.S.C. § 1821. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 441–42 (1987). Costs allowed under Rule 54 are taxed against the losing party, unless the district court, in its discretion, directs otherwise. *Id.*

***3** Rule 54(d)(1) in relevant part provides as follows:

> Costs other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; ...

28 U.S.C. § 1920 provides 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and **copies of papers 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.

To be taxable as a cost, an item must be necessary. The best evidence of necessity is actual use. While use at trial readily demonstrates necessity, if materials or services are reasonably necessary for use in the case even though not used at trial, the court can find necessity and award the recovery of costs. *U.S. Industries Inc. v. Touche Ross & Co.,* 854 F.2d 1223 (10th Cir.1988).

A. *Deposition Transcripts*

First, Yamaha challenges costs associated with obtaining deposition transcripts which were not used at trial.

The cost of obtaining depositions of all witnesses who testify at trial is generally considered a necessary cost. *Kehm v. Proctor & Gamble Co.,* 580 F.Supp. 890, 906 (N.D.Iowa 1982), *aff'd,* 724 F.2d 613 (8th Cir.1983). *See also Furr v. AT & T Technologies, Inc.,* 824 F.2d 1537, 1550–51 (10th Cir.1987) (district court would abuse its discretion if it adopted a general policy to disallow costs of depositions not marked as exhibits at trial). The court finds the costs of obtaining copies of deposition testimony of witnesses who testified at the trial were necessary. These witnesses were subject to cross-examination based on their deposition testimony and it is reasonable that **Koehn's** counsel thought the transcripts should be reviewed prior to, and be available at, trial. These costs will be allowed.

Yamaha argues the cost of Stuart Statler's **deposition should be disallowed because he did not testify at trial.** Statler was an expert witness designated by **Koehn**. **Koehn** elected not to call him at trial. **Koehn** argues it was necessary to obtain a copy of Statler's deposition because Yamaha had noticed the deposition, presumably for use in cross-examination. The court agrees. **Koehn** could reasonably expect Yamaha to use Statler's deposition testimony for cross-examination of other witnesses as well as Statler. The cost of Statler's deposition testimony will be allowed.

***4** Yamaha next objects to taxing costs related to the depositions of Dr. Robert Edgar, Dr. Keith Bengston and Dr. Eric Oppliger. These witnesses testified at trial via videotaped depositions. Yamaha argues it did not agree to pay the cost of these depositions if **Koehn** prevailed. It further argues it should not be required to pay the cost of both videotapes and transcripts of depositions. Finally, Yamaha objects to the taxing of an extra copy of the videotape of Dr. Bengston's deposition testimony. **Koehn** argues videotaped depositions were the most economical way for these witnesses to testify and that Dr. Edgar could not be required to testify in Kansas.

The Tenth Circuit does not appear to have addressed the taxing of costs of videotaped depositions. In *Morrison v. Reichhold Chemicals, Inc.,* 97 F.3d 460 (11th Cir.1996), the Eleventh Circuit approved taxing the costs of videotaped depositions and written transcripts where the deposition was noticed for videotaping and no contemporaneous objection was raised. *Id.* at 464. The court remanded for a determination of whether the depositions had been noticed for videotaping and whether additional copies of the videotape were necessary. *Morrison,* 97 F.3d at 464–66. *See also Barber v. Ruth,* 7 F.3d 636, 644–45 (7th Cir.1993) (district court may tax costs of a videotaped deposition but may not tax costs of a transcript, following Seventh Circuit precedent). *But see Coats v. Penrod Drilling* ***Corp.****,* 5 F.3d 877, 891 (5th Cir.1993) (costs of video technician fees for videotaping deposition not recoverable because they are not specifically listed in § 1920), *cert. denied,* 510 U.S. 1195 (1994).

The Eleventh Circuit's view makes more sense in view of Rule 30(b)(2)'s authorization of videotaped depositions and Rule 32(c) requirement that a written transcript be provided **if the videotaped deposition is offered as evidence.** *See Morrison,* 97 F.3d at 464–65 n. 5 (citing *Garonzik v. Whitman Diner,* 910 F.Supp. 167, 171–72 (D.N.J.1995). *See also Meredith v. Schreiner Transport, Inc.,* 814 F.Supp. 1004, 1005–06 (D.Kan.1993) (rejecting Seventh Circuit view and allowing recovery of both the cost of videotaping a deposition and the cost of a written transcript). *But see Echostar Satellite* ***Corp****. v. Advanced Communications* ***Corp****.,* 902 F.Supp. 213 (D.Colo.1995) (following *Coats*).

Here, **Koehn** noticed the depositions for videotaping. Yamaha did not object. Accordingly, the costs of videotaping as well as the **costs of transcribing the depositions are taxable**. **Koehn** failed to identify any reason for the extra copy of the videotape of Dr. Bengston's testimony. Accordingly, this cost will not be allowed.

B. *Printing Costs*

Yamaha next objects to **Koehn's** printing costs of $2,580.04. Yamaha argues; (1) the printing costs were incurred in preparation for trial and thus are not taxable; (2) the costs are not itemized; and (3) **Koehn** should have obtained prior court approval for such a large expenditure. **Koehn** argues (1) the **printing costs** are authorized by § 1920(3); (2) the court ordered **Koehn** to compile exhibit books for the court and counsel in advance of trial; and (3) an itemization was provided.

***5** Both parties cite *Miller v. City of Mission, Kan.,* 516 F.Supp. 1333 (D.Kan.1981). Yamaha relies on *Miller* 's holding that expenses incidental to preparation for trial are not recoverable. *Id.* at 1339–40. It is unclear what point **Koehn** attempts to draw from *Miller.* The statute specifically authorizes printing expenses. Yamaha reads *Miller* as holding that costs of preparing for trial are not recoverable, even if such costs are specifically authorized in the statute. The court does not read *Miller* as

restrictively as Yamaha. In any event, the Tenth Circuit has indicated otherwise. *See U.S. Industries, supra;* and *Furr, supra.*

The itemization indicates four copies of the exhibits were prepared. The court ordered **Koehn** to provide Yamaha, Helena, and the court with copies of its exhibits prior to trial. The court finds this expense was necessary for trial. The other printing charges also seem to be related to exhibit preparation for trial and will be allowed. **Koehn** provided an adequate itemization and advance approval by the court was not necessary where the court ordered **Koehn** to provide copies of the exhibits.

IT IS ACCORDINGLY ORDERED this 2nd day of April, 1997, that Yamaha's motion to retax costs (Dkt. No. 148) is granted in part and denied in part as follows: plaintiff **Koehn** is awarded $3,590.75 in transcript costs and $2,580.04 in printing costs, for a total of $6,170.79.

Footnotes

1 The court anticipated a motion for sanctions pursuant to Rules 16 or 37. *See Olcott,* 76 F.3d at 1550–1559. Instead, Yamaha filed the present motion to retax costs.

2 Yamaha combines the equitable arguments and the statutory arguments about prevailing party status in its brief.

3 Yamaha does not cite the statutes directly, but K.S.A. 44–504 governs worker's compensation liens and K.S.A. 60–258a governs comparative negligence.

4 **It is not necessary to consider Yamaha's objections to witness fees and expenses, as these costs have been denied as a sanction.**

203 F.R.D. 486
United States District Court,
D. Kansas.

Susan **LINTZ** and Connie Diecidue, Plaintiffs,
v.
AMERICAN GENERAL FINANCE, INC. and MorEquity, Defendants.

No. 98–2213–JWL. | Sept. 17, 2001.

On defendants' motion to disallow costs for plaintiff, the District Court, Lungstrum, J., held that: (1) defendant's motion to disallow costs **was** not a motion to alter or amend judgment, and thus **was** not governed by time limitation of rule governing motions to alter or amend judgment, and (2) plaintiff's failure to obtain any relief whatsoever rendered her ineligible for prevailing party status and ineligible for an award of costs.

Motion granted.

West Headnotes (3)

[1] **Federal Civil Procedure**
Prevailing Party

Only a **prevailing party** is entitled to recover costs. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[2] **Federal Civil Procedure**
Taxation

Defendant's motion to disallow costs **was** not a motion to alter or amend judgment, and thus **was** not governed by time limitation of rule governing motions to alter or amend judgment. Fed.Rules Civ.Proc.Rules 54(d), 59(e), 28 U.S.C.A.

2 Cases that cite this headnote

[3] **Federal Civil Procedure**
Prevailing Party

Plaintiff's failure to obtain any relief whatsoever rendered her ineligible for prevailing party status and ineligible for an award of costs. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

Attorneys and Law Firms

***487** Hal D. Meltzer, Baker, Sterchi, Cowden & Rice, L.L.C., Gabrielle Rhodes, Brown & Nachman, P.C., Kansas City, MO, for Susan **Lintz**.

Michael P. Oliver, Norman I. Reichel, Wallace, Saunders, Austin, Brown & Enochs, Chartered, Overland Park, KS, Chris R. Pace, Sprint Communications Company L.P., Kansas City, MO, for Connie Diecidue.

Lisa White Hardwick, Larry M. Schumaker, Carole K. DeWald, Shook, Hardy & Bacon L.L.P., Kansas City, MO, for Defendants.

Opinion

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

Plaintiffs Susan **Lintz** and Connie Diecidue filed suit against defendants alleging sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Kansas Act Against Discrimination, K.S.A. § 44–1001 et seq. Following a trial on plaintiffs' claims, the jury found that both plaintiffs **were** subjected to sexual harassment and further found that defendants **were** liable to plaintiffs for the harassment. The jury awarded no damages to plaintiff **Lintz** and awarded plaintiff Diecidue $25,000 in compensatory damages. Although the issue of punitive damages **was** submitted to the jury, the jury declined to award punitive damages to either plaintiff.

On September 27, 1999 the clerk entered judgment "in favor of Plaintiff Susan **Lintz** against defendants ... in the amount of $0.00 and her costs of action." On October 26, 1999, plaintiff **Lintz** filed her bill of costs requesting the clerk to tax as costs $2,057.94 against defendants pursuant

to Federal Rule of Civil Procedure 54(d). *See* Fed.R.Civ.P. 54(d) (costs "shall **be** awarded as of course to the **prevailing party** unless the court otherwise directs"). On August 8, 2001, the clerk assessed costs against defendant in the amount of $1,173.75. This matter is presently before the court on defendants' motion to disallow costs for plaintiff **Lintz** (doc. # 246). According to defendants, plaintiff **Lintz** is not entitled to recover costs under Rule 54(d) because she is not a "prevailing party" for purposes of Rule 54(d). As set forth in more detail below, the court agrees with defendants that plaintiff **Lintz** is **not a prevailing party** for purposes of Rule 54(d). Defendants' motion is granted.

[1] It is well settled **that only a prevailing party is entitled to recover costs.** *See* Fed.R.Civ.P. 54(d). In November 1999, the court, in connection with its analysis of plaintiff **Lintz's** motion for attorneys' fees, held that plaintiff **Lintz's** failure to obtain any relief whatsoever rendered her ineligible for prevailing party status and ineligible for an award of attorneys' fees. *See* ***Lintz*** *v. American General Finance, Inc.,* 76 F.Supp.2d 1200, 1210 (D.Kan.1999). In February 2001, this court applied its decision regarding plaintiff **Lintz's** prevailing party status to the Rule 54(d) context and held that a party's failure to obtain any relief renders it ineligible for "prevailing party" status under Rule 54(d) and ineligible for an award of costs. *See Centennial Management Servs., Inc. v. Axa Re Vie,* No. 97–2509–JWL, 2001 WL 123871, *2–3 (D.Kan. Feb.5, 2001).

[2] Defendants' motion to disallow costs, then, is based solely on this court's earlier holding that plaintiff **Lintz** is not a prevailing party for purposes of an award of attorneys' fees and the court's subsequent application of that holding to the Rule 54(d) context in the *Centennial* case. In her response, plaintiff **Lintz** does not dispute that the court's holding in the *Centennial* case mandates the conclusion that she is not eligible for an award of costs under Rule 54(d). Rather, she argues only that defendants' motion is untimely "by approximately two years" because the September 1999 judgment awarded costs to plaintiff **Lintz** and defendants never moved to amend the judgment under Federal Rule of Civil Procedure 59(e). According to plaintiff **Lintz**, then, the clerk's assessment of costs in August 2001 merely effectuated the September 1999 judgment and, thus, defendants' motion to disallow costs is, in essence, a belated attempt to amend the September 1999 judgment.

***488** Plaintiff **Lintz** directs the court to no authority supporting her argument that defendants' motion must have **been** brought under Rule 59(e) and, as such, is untimely. Moreover, the court has not uncovered any cases supporting plaintiff's argument. The court, however, has found a Tenth Circuit case that provides significant guidance with respect to the issue raised by plaintiff. In *Utah Women's Clinic, Inc. v. Leavitt,* 75 F.3d 564 (10th Cir.1995), the district court entered a memorandum and order (dated February 1, 1994) denying the plaintiffs relief on the merits, dismissing the action, and without analysis ordering the plaintiffs to pay costs and attorneys' fees. *Id.* at 566, 568. Within ten days of the entry of that judgment, the plaintiffs filed a Rule 59(e) motion to alter or amend the judgment seeking to have the award of fees and costs rescinded. *Id.* at 566. The motion did not challenge the merits of the district court's decision on the plaintiffs' underlying claims. *Id.* In June 1994, the district court denied the plaintiffs' Rule 59(e) motion and the plaintiffs' notice of appeal **was** filed thereafter. *Id.*

On appeal, the Tenth Circuit concluded that it lacked jurisdiction over the merits of the case because the plaintiffs failed to file timely a notice of appeal as to the district court's February 1, 1994 order. *See id.* at 567–69. Specifically, the Circuit addressed the question of whether "the Rule 59(e) motion, which sought only 'to delete the award of attorneys' fees and costs to defendants' ... prior to the quantification of those fees and costs, tolled the time in which to take an appeal from the merits." *Id.* at 567. In resolving that issue, the Circuit first recognized that the "Supreme Court has held that the question of attorney's fees and costs **are** collateral to and separate from a decision on the merits." *Id.* (citing *Buchanan v. Stanships, Inc.,* 485 U.S. 265, 108 S.Ct. 1130, 99 L.Ed.2d 289 (1988) and *White v. New Hampshire,* 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982)). That is, when a judgment on the merits has **been** rendered, the Court has declined to apply Rule 59(e) to requests for attorney's fees or costs based upon the underlying merits judgment. *Id.* (citing same). Relying on these Supreme Court decisions, the Circuit easily concluded that a request for the deletion of an award for fees and costs or, more specifically, a motion questioning liability for fees or costs which had not **been** set, is a wholly collateral issue. *See id.* at 567–68. In essence, then, the Circuit clearly suggested that the plaintiffs' request for the deletion of the award of fees and costs **was** not properly considered a Rule 59(e) motion. The Supreme Court's opinion in *Buchanan* supports this conclusion as well. *See Buchanan,* 485 U.S. at 268–69, 108 S.Ct. 1130 ("[A] motion for costs filed pursuant to Rule 54(d) does not seek to alter or amend the judgment within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) **was** not intended to apply.").

[3] In light of the Supreme Court's decision in *Buchanan*

and the Circuit's application of *Buchanan* in *Leavitt,* the court concludes that defendants' motion to disallow costs is properly considered a Rule 54(d) motion rather than a rule 59(e) motion to alter or amend the judgment. Thus, defendants' motion is timely filed. *See* Fed.R.Civ.P. 54(d) (the action of the clerk may **be** reviewed by the court on motion served within 5 days thereafter). In the absence of any other objection from plaintiff **Lintz**, and in light of this court's earlier conclusion that plaintiff **Lintz** is not a prevailing party, defendants' motion is granted.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to disallow costs (doc. # 246) is **granted.**

IT IS SO ORDERED.

End of Document

951 F.Supp. 820
United States District Court,
S.D. Indiana,
New Albany Division.

MARY M., as Parent/Next Friend for Diane M., a Minor (Names are pseudonyms), Plaintiff,
v.
NORTH **LAWRENCE** COMMUNITY SCHOOL CORPORATION, Defendant.

No. NA 94–143 C D/H. | Jan. 6, 1997.

Secondary school student sued school district and former employee, alleging sexual harassment and/or abuse in violation of Title IX. Following entry of jury verdict against defendants on issue of liability but awarding student zero compensatory and zero punitive damages, student moved for new trial and to question and interview jurors on record, or in alternative to personally interview jurors, and submitted bill of costs. The District Court, Barker, Chief Judge, held that: (1) jury's verdict was not impermissible compromise; (2) verdict was not inconsistent with jury instructions on issue of damages; (3) evidence was sufficient to permit jury to conclude that student's damages were not proximately caused by employee's conduct and that student had no compensable out-of-pocket expenses; (4) notice of proposed rule making by Office for Civil Rights (OCR) did not entitle student to new trial; (5) student was not entitled to question and interview jurors following entry of verdict; (6) student was "prevailing party" entitled to award of costs; (7) cost of $.50 for black marking pen was not taxable to defendants; (8) otherwise properly justified and supported costs of student's service of complaints and subpoenas by certified mail were taxable to defendants; (9) student was not required to serve complaint against individual defendants sued solely in their official capacities or multiple copies of complaint upon individual defendants sued in both their individual and official capacities; (10) tape of sentencing hearing was not "necessarily obtained for use in case" within meaning of statute authorizing taxation of costs; (11) student was not entitled to recover costs for fees of witnesses who did not testify at trial; (12) student was not entitled to recover costs for lengthy deposition of witness; and (13) student was not entitled to recover costs of photocopies.

Motions denied; bill of costs allowed in part and disallowed in part.

West Headnotes (27)

[1] **Federal Civil Procedure**
Jury's Custody, Conduct and Deliberations

Compromise verdict results when jurors resolve their inability to make determination with any certainty or unanimity on issue of liability by finding inadequate damages.

[2] **Federal Civil Procedure**
Jury's Custody, Conduct and Deliberations

Award of low or zero damages, standing alone, does not necessarily indicate compromise verdict.

[3] **Federal Civil Procedure**
Jury's Custody, Conduct and Deliberations

Verdict might be deemed compromise where record clearly demonstrates such factors as lengthy deliberations, strongly contested issues of liability, evidence of jury confusion, or that neither party urged acceptance of verdict.

[4] **Federal Civil Procedure**
Jury's Custody, Conduct and Deliberations

To support claim that jury verdict is impermissible compromise, record viewed in its entirety must clearly demonstrate compromise character of verdict.

[5] **Federal Civil Procedure**
Jury's Custody, Conduct and Deliberations

Jury verdict with respect to student's allegations against school employee of sexual harassment and/or abuse, which verdict was against employee on issue of liability but awarded student zero compensatory and zero punitive damages, was not impermissible compromise; jury deliberated for total of approximately nine hours, jury's indication after seven hours that they had reached stalemate was not followed by attempt to explain or otherwise qualify verdict, jury was not coerced into reaching verdict, and court's instruction to jury upon jury's indication of stalemate was appropriate.

[6] **Federal Civil Procedure**
Inadequate Damages

Jury verdict with respect to student's allegations against school employee of sexual harassment and/or abuse, which verdict was against employee on issue of liability but awarded student zero compensatory and zero punitive damages, was not inconsistent with jury instructions on issue of damages and thus did not necessitate new trial; instruction providing that if jury found liability it should award any damages personally suffered by student that were proximately caused by employee's wrongful conduct permitted jury both to find liability and award zero damages.

1 Cases that cite this headnote

[7] **Civil Rights**
Mental Suffering, Emotional Distress, Humiliation, or Embarrassment
Civil Rights
Measure and Amount

Evidence presented in action by student against school employee for sexual harassment and/or abuse, which evidence concerned emotional harm suffered by student as a result of sexual abuse, indicated that student had been sexually abused as young child by her stepfather, and further indicated that employee had made restitution for any out-of-pocket medical or psychiatric expenses incurred by student as result of employee's conduct and, thus, was sufficient to permit jury to conclude that student's damages were not proximately caused by employee's conduct and that student had no compensable out-of-pocket expenses.

[8] **Federal Civil Procedure**
Sufficiency and Probable Effect of Evidence

Notice of proposed rulemaking by Office of Civil Rights (OCR) on subject of presumption of unwelcomeness of sexual contact between adult school employees and elementary school students did not entitle secondary school student to new trial in her action against school employee alleging sexual harassment and/or abuse; notice did not have force of law, notice did not apply to contact between school employee and secondary school student, jury instruction on issue of welcomeness was supported by legal authority and consistent with OCR notice's discussion of welcomeness in secondary school context, and jury found for student on issue of welcomeness.

[9] **Federal Civil Procedure**
Jury's Custody, Conduct and Deliberations

Absent competent evidence to contrary, court has no reason to assume that inconsistent or compromise verdict is not unanimous, and therefore has no justification for inquiring into logic behind jury's verdict.

[10] **Jury**
Term of Service; Post-Trial Contacts

Student who alleged sexual harassment and/or abuse by school employee was not entitled to question and interview jurors following entry of verdict against employee on issue of liability but awarding student zero compensatory and zero punitive damages, where record did not support finding that jury's verdict was impermissible compromise and verdict was not inconsistent with jury instructions given at trial.

1 Cases that cite this headnote

[11] **Civil Rights**
Costs

Student who sued school employee for sexual harassment and/or abuse under Title IX, and to whom jury awarded zero compensatory and zero punitive damages following its finding of employee's liability, was "prevailing party" entitled to award of costs, where she wholly prevailed on issue of liability with respect to her sole claim. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

2 Cases that cite this headnote

[12] **Federal Civil Procedure**
Prevailing Party

"Prevailing party," for purpose of determining entitlement to award of costs, is party in whose favor judgment is rendered, regardless of amount of damages awarded. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[13] **Federal Civil Procedure**
Taxation

While award of specific costs is within discretion of court, presumption exists that costs listed in applicable statute will be taxed; conversely, if specific cost is not so listed, court should exercise its discretion sparingly in taxing such cost. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[14] **Civil Rights**
Costs

Cost of $.50 for black marking pen, listed on prevailing party's bill of costs as "fee of clerk" and treated by court as falling within "exemplification and copies of papers," was not taxable to opposing party in civil rights action; office supply purchases did not come within category of clerk fees and were otherwise nonrecoverable under applicable statute. 28 U.S.C.A. §§ 1914, 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

2 Cases that cite this headnote

[15] **Civil Rights**
Costs

Costs of prevailing party's service of complaints and subpoenas by certified mail, which costs were otherwise properly justified and supported, were taxable to opposing party in civil rights action, despite general rule disfavoring compensation for postage costs, where such costs did not exceed cost of service of process by marshal and opposing party did not object to taxation of costs of service of process by certified mail in general. 28 U.S.C.A. §§ 1920, 1921(a); Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

1 Cases that cite this headnote

[16] **Civil Rights**
Education
Civil Rights
Costs

Student was not required to serve copies of her

complaint, in action against school district employee and school district for sexual harassment and/or abuse in violation of Title IX, against individual defendants sued solely in their official capacities, and was not required to serve multiple copies of such complaint upon individual defendants sued in both their individual and official capacities, and was thus not entitled to recover costs of such service from defendants; in official capacity suit under Title IX, real parties in interest were school board and school corporation rather than individuals. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681; 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

1 Cases that cite this headnote

[17] **Civil Rights**
Costs

Tape of sentencing hearing involving school employee later named as defendant in civil rights suit by student, which tape was excluded from civil trial as irrelevant, was not "necessarily obtained for use in case" within meaning of statute permitting taxation of certain court reporter fees to nonprevailing party. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[18] **Federal Civil Procedure**
Witness Fees

Witness fee paid to witness who is not called because he or she was on opposing party's witness list is taxable. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[19] **Federal Civil Procedure**
Witness Fees

Witness fees of witnesses who do not testify at trial may be taxable as costs if plaintiff makes some showing of good faith, including showing that witnesses were not called because necessity for their testimony could not be measured in advance, because of good-faith determination that their testimony would have been repetitive and cumulative, or because their testimony was made unnecessary because of concessions and admissions made by opposing party. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[20] **Civil Rights**
Costs

Secondary student who prevailed on issue of liability in her civil rights suit against school district and employee was not entitled to recover costs for fees of witnesses who did not testify at trial, absent showing that such witnesses were subpoenaed in good faith or that there was good-faith reason for not calling them to testify. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[21] **Federal Civil Procedure**
Particular Items

Shipping fees and postage are not generally compensable under statute allowing recovery of costs by prevailing party in civil action. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[22] **Federal Civil Procedure**
Depositions

In determining whether costs incident to taking of deposition are taxable, relevant question is

whether particular deposition was reasonably necessary to case, not whether it was actually employed in court. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[23] **Civil Rights**
Costs

Student who prevailed on issue of liability in her civil rights suit against school district and employee was not entitled to recover costs for lengthy deposition of witness, in face of defendants' contention that witness was deposed for sole purpose of discovering information about other incidents unrelated to case, absent showing that such deposition was reasonably necessary to case. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[24] **Federal Civil Procedure**
Particular Items

Costs of computer-assisted research are attorney fees and may not be recovered as costs. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[25] **Federal Civil Procedure**
Witness Fees

Expert witness fees are taxable only as part of attorney fee award, and may not be recovered as costs. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[26] **Federal Civil Procedure**
Stenographic Costs

Whether copies are recoverable as costs depends on use of copies; before court grants award of costs for copying, it must inquire as to whether copies were necessarily obtained for use in case, and burden is on party seeking such costs to offer some proof of necessity. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

1 Cases that cite this headnote

[27] **Civil Rights**
Costs

Prevailing party in civil rights action was not entitled to recover from opposing party costs of photocopies, which costs were documented only by receipts and accompanied by no indication of which papers were copied or why copies were necessary, from opposing party. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

Attorneys and Law Firms

***823** Michael K. Sutherlin, Indianapolis, IN, for Plaintiff.

Darla S. Brown, Jennifer Bauer, Kelley Belcher & Brown, P.C., Bloomington, IN, for Defendant.

Opinion

ENTRY

BARKER, Chief Judge.

In this case plaintiff alleges that her thirteen-year-old daughter was sexually harassed and/or abused by one Andrew Fields, a school cafeteria worker employed by defendant, in violation of Title IX of the Educational Amendment Act of 1972, 20 U.S.C. § 1681. A jury trial was conducted on October 21–28, 1996, resulting in a verdict in favor of plaintiff and against defendant on the issue of liability, but awarding zero compensatory

damages and zero punitive damages. Now before the court are plaintiff's Motions for a New Trial and to Question and Interview Jurors on the Record, or in the Alternative, to Personally Interview the Jurors, and plaintiff's bill of costs. For the reasons discussed below, plaintiff's motions for a new trial and to interview jurors are **denied,** and plaintiff's bill of costs is **allowed in part** and **disallowed in part.**

I. Motion for New Trial

Plaintiff argues that she is entitled to a new trial because, in her estimation, the jury's verdict is a "compromise verdict," and is inconsistent with the evidence and the Court's instructions to the jury. The test in the Seventh Circuit for reviewing a jury verdict is "whether there is a reasonable basis in the record for the verdict." *Knox v. State of Ind.,* 93 F.3d 1327, 1332 (7th Cir.1996); *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1446 (7th Cir.1995).

824** ***A. Compromise Verdict

[1] [2] [3] [4] "A compromise verdict results when jurors resolve their inability to make a determination with any certainty or unanimity on the issue of liability by finding inadequate damages." *Mekdeci v. Merrell Nat'l. Labs.,* 711 F.2d 1510, 1513 (11th Cir.1983). However, an award of low or zero damages, standing alone, does not necessarily indicate a compromise. *Id.* A verdict might be deemed a compromise verdict where the record clearly demonstrates such factors as lengthy deliberations, strongly contested issues of liability, evidence of jury confusion, or that neither party urged acceptance of the verdict. *See Bosco v. Serhant,* 1986 WL 11990, at *2 (N.D.Ill. Oct. 21, 1986). Plaintiff's burden is a heavy one, because the rule is "that the record itself viewed in its entirety must clearly demonstrate the compromise character of the verdict otherwise it is not error for the trial judge to refuse to set the verdict aside on this ground." *Maher v. Isthmian Steamship Co.,* 253 F.2d 414, 419 (2nd Cir.1958), *quoted in Luria Bros. & Co. v. Pielet Bros. Scrap Iron,* 600 F.2d 103, 115 (7th Cir.1979).

[5] In this case, plaintiff points to the following as indications of a compromise verdict: the length of the jury's deliberations; the fact that the jury sent a question to the judge; the fact that, after deliberating for seven hours, the jury reported that it was deadlocked with five jurors on one side and three on the other, and yet two hours later, reached its verdict. Plaintiff cites *Mekdeci* and *Lucas v. American Mfg. Co.,* 630 F.2d 291, 292–94 (5th Cir.1980) as examples of cases where the verdict was found to be a compromise. However, both of those cases are easily distinguishable from the facts of this case. In *Lucas,* because of an approaching hurricane, the trial court admonished the jury either to quickly finish its deliberations, or to return on a later date. The jury found the defendant liable, but awarded damages less than the minimum amount stipulated by the defendant. The Fifth Circuit held that a new trial was necessary because of the risk that the trial court's coercion produced the inadequate award of damages. *Lucas,* 630 F.2d at 292–94. In *Mekdeci,* the court's finding that the verdict was a compromise was based on the following facts: the jury deliberated for four days; the jury sent several communications to the judge indicating uncertainty on the central issue of causation; on the fourth day of deliberations, the jury attempted to qualify its verdict; and the jury announced a deadlock soon after the judge denied its request to qualify its verdict. *Mekdeci,* 711 F.2d at 1515.

In our case, the jury deliberated for a total of approximately nine hours, not an unusually long time and a significantly shorter period of time than in *Mekdeci.* The first question sent by the jury to the judge in this case merely asked for clarification of the relevant time period in which to evaluate Fields' conduct—hardly evidence of confusion on a central issue. While the jury thereafter did indicate, after seven hours of deliberations, that they were at a stalemate, they did not attempt to qualify or otherwise explain their verdict. Furthermore, there is no evidence in this case that the jury was coerced into reaching a verdict, as was the *Lucas* jury. In fact, after the jury informed the court that it was deadlocked, the judge conferred with counsel for both parties, and without objection from either side, then instructed the jury to continue its efforts to reach a unanimous verdict, referring the jury to the court's instruction number 23.[1] The Seventh ***825** Circuit approved the giving of this instruction to deadlocked juries in *U.S. v. Silvern,* 484 F.2d 879, 883 (7th Cir.1973) (requiring that any **supplemental** instruction given to juries in a deadlock situation must be in this form), and has since held that a *Silvern* charge such as this is appropriate where a jury, after deliberating for seven hours, indicates to the judge that it believed that further deliberation would be "fruitless." *U.S. v. Kwiat* 817 F.2d 440, 446 (7th Cir.1987), *cert. denied,* 484 U.S. 924, 108 S.Ct. 284, 98 L.Ed.2d 245 (1987); *see also U.S. v. Beverly,* 913 F.2d 337, 351 (7th Cir.1990) (mistrial not compelled by the fact that the jury thought it was deadlocked after approximately twelve hours of deliberations in a lengthy and complicated criminal trial), *cert. denied,* 498 U.S. 1052, 111 S.Ct. 766, 112 L.Ed.2d 786 (1991). More recently, the Seventh Circuit upheld a trial court's denial of a motion for a new trial where the jury deliberated for ten hours before announcing a deadlock, and the judge instructed them to

make another effort to arrive at a verdict. *U.S. v. Coffman,* 94 F.3d 330, 335 (7th Cir.1996).[2]

Finally, plaintiff bases her contention that the verdict was a compromise verdict in part on her assumption that the jury's early five-three vote was in her favor, and that "three men were unwilling to set aside their bias and prejudice and held out and refused to find any liability unless there was an agreement not to award any damages." (Plaintiff's Memorandum in Support of Motion for New Trial, at 1).[3] We find this assumption to be wholly unsupported and inappropriate, and therefore unacceptable as evidence of a compromise verdict. *See Thezan v. Maritime Overseas Corp.,* 708 F.2d 175, 180 (5th Cir.1983) ("It is a cardinal principal of jurisprudence that we are not allowed to speculate as to the thought processes of the jury.") *cert. denied,* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984); *U.S. v. Russo,* 796 F.2d 1443, 1450 (11th Cir.1986) ("We will not look behind the verdicts for evidence of jury confusion.").

B. Inconsistent with the evidence and with jury instructions

Plaintiff also challenges the verdict on the grounds that it is unsupported by the evidence, and that it is inconsistent with the court's jury instructions. Once again, we will only grant a new trial if we can conclude that there is no reasonable basis in the record for the verdict. *Knox,* 93 F.3d at 1332; *Gorlikowski,* 52 F.3d at 1446. Specifically, plaintiff claims that a verdict of liability without any damages is inconsistent with the evidence and with jury instruction numbers 15 and 16. In Instruction Number 15, the Court instructed the jury that:

> If you find that the Plaintiff has proved all of the essential elements of her claim against the Defendant, then the Plaintiff is entitled to recover compensatory damages against the Defendant for *any* damages which she *may have* personally suffered *as a result of* Defendant's actions. Therefore, if you decide for Plaintiff on the issue of liability, you must then fix the amount of damages that will reasonably and fairly compensate Plaintiff for *any* harm which the wrongful conduct of the Defendant *proximately caused* or was a *substantial factor* in bringing about....

Court's Instruction No. 15 (emphasis added). In Instruction Number 16, the Court instructed the jury that plaintiff was not required to prove damages with mathematical ***826** certainty, but that plaintiff was "only required to furnish evidence consisting of sufficient facts and circumstances to permit an intelligible and probable estimate thereof." *Court's Instruction No. 16.*

[6] Plaintiff is correct in arguing that, because the jury found that she had proved all of the elements required for a finding of liability, she was entitled to recover the amount of damages which would compensate for *any* harm *proximately caused* by defendant's wrongful conduct. This does not, however, mean that with a finding of liability automatically comes an award of some amount of damages. Plaintiff must furnish proof that she actually suffered damages, and that those damages were proximately caused by defendant's wrongful conduct. Plaintiff's reliance on *Thomas v. Stalter,* 20 F.3d 298 (7th Cir.1994), is misplaced. In that case, the court directed a new trial where a finding of zero damages was inconsistent with a jury instruction which "specifically required the jury to find damages before it could find liability." *Thomas,* 20 F.3d at 303. Unlike the instruction in *Thomas,* our instruction numbers 15 and 16 did not specifically require a finding of damages in order to support a finding of liability. To the contrary, our instructions merely provided that if the jury found liability, they should award *any* damages personally suffered by the plaintiff that were proximately caused by the defendant's wrongful conduct. The language of this instruction allows a jury both to find liability and to award zero damages if, for instance, it finds that there was insufficient evidence of damages, or that plaintiff did not personally suffer or experience the damages proved, or that any damages proved were not proximately caused by the defendant's wrongful conduct.

[7] Plaintiff's claim that she "furnished ample evidence of sufficient facts ... to permit the jury to determine appropriate damages" does not address the question that we must answer in reviewing the jury verdict: whether there is a reasonable basis in the record for the jury's finding of zero damages. Plaintiff did present evidence that she suffered emotional harm because she felt that the welfare department and police department disbelieved her and because, the year after she was abused, other high school students talked about her. Nevertheless, in light of the evidence presented at trial, a jury could (and perhaps did) reasonably conclude that these harms were not proximately caused by the defendant's wrongful conduct. Plaintiff also presented expert testimony that she suffered and continues to suffer from emotional harm as a result of being sexually abused; however, evidence was also introduced indicating that the majority of that harm was

likely the result of sexual abuse she suffered as a young child at the hands of her then stepfather. Therefore, we believe that there was ample basis in the record for the jury to conclude that plaintiff did not provide sufficient evidence that her damages were proximately caused by defendant's conduct. *See Luria Bros.,* 600 F.2d at 115. ("The jury is entitled to disregard the damages asked for if they do not agree with the computations or if other evidence is introduced from which jurors could draw their own conclusions."). Furthermore, the evidence supported a finding that because Andrew Fields had made restitution for any out-of-pocket medical or psychiatric expenses incurred by plaintiff as a result of defendant's conduct, that she therefore had no compensable out-of-pocket expenses.

For the reasons discussed above, we find that the jury's verdict in favor of plaintiff on the issue of liability, awarding zero damages, was not a compromise verdict, and that it is entirely consistent with the court's instructions to the jury and the evidence presented at trial. Therefore, to the extent plaintiff's motion for a new trial is based on her belief that the jury's verdict was a compromise verdict and/or inconsistent with the evidence and the jury instructions, the motion is **denied.**

C. Welcomeness

In her **Supplemental** Memorandum in Support of Plaintiff's Request for New Trial, plaintiff advances an additional argument in support of her request for a new trial. Plaintiff attached to her **Supplemental** Memorandum a copy of the Office for Civil Rights' ("OCR") notice, published in the Federal ***827** Register on October 4, 1996, regarding "Sexual Harassment Guidance: Harassment of Students by School Employees; Notice." Specifically, plaintiff points to the following language in the OCR's notice regarding the element of welcomeness as it pertains to Title IX claims based on allegations of sexual harassment of elementary school students by school employees:

> If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual.

OCR Notice, at 52173. After quoting this language, plaintiff simply states that "it seems that it would be judicially economical and fair to order a new trial immediately and to properly instruct the jury on the issue which would preclude welcomeness as an element of defense...." (Pltf.'s Suppl.Memo., at 2).[4]

[8] We resolved the legal issue of welcomeness in this case in a previous entry, signed on October 18, 1996, and entered on the docket October 21, 1996, and the above-quoted language does not change our analysis. First, we note that a notice of proposed rulemaking from the OCR does not have the binding force of law. Second, even if we were inclined to follow the directive of the OCR, the above quoted language would not apply to this case, since this case does not involve an elementary school student. Third, the conclusion we reached in our prior entry—that unwelcomeness was not established as a matter of law in this case due to plaintiff's status as a minor, but that her age would be a factor for the jury to consider in determining whether Andrew Field's advances were unwelcomed by plaintiff—was amply supported by legal authority cited in that entry, and is also consistent with the OCR notice's discussion of welcomeness in the context of claims brought by secondary school students. *OCR Notice,* at 52173. Finally, and perhaps most telling, the jury verdict was in favor of plaintiff with respect to liability, and therefore, the jury necessarily found *for* plaintiff on the issue of welcomeness. It defies logic for a party to request a new trial in order to revisit an issue on which she has already won. For the reasons discussed above, to the extent plaintiff's motion for a new trial is premised upon our previous rulings on the issue of welcomeness, as well as the OCR Notice discussion of that issue, the motion is **denied.**

II. Motion to Interview Jurors

[9] Plaintiff's motion to interview jurors is premised on her assertion that the jury's verdict in this case was a compromise verdict, and on her belief that "it is necessary and essential to question the jurors as to their motivation in order to verify the contention that the verdict was reached as a compromise." (Pltf.'s "Motion to Question ... Jurors ...," at ¶ 14). "Absent competent evidence to the contrary, a court has no reason to assume that an inconsistent or compromise verdict is not unanimous, and therefore has no justification for inquiring into the logic behind the jury's verdict." *U.S. v. Gipson,* 553 F.2d 453, 457 (5th Cir.1977) (noting that "a juror's testimony relating to the mental process by which he reached his verdict is not competent evidence for purposes of impeaching a jury's verdict."); *U.S. v. Russo,* 796 F.2d at 1450; *U.S. v. Jaskiewicz* 433 F.2d 415, 421 (3rd Cir.1970) (a court cannot go behind a jury verdict that is supported by the record), *cert. denied* 400 U.S. 1021, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971).

[10] We have already determined that the record does not

support a finding that the jury's verdict was a compromise verdict, and that the verdict is not inconsistent with the evidence or the jury instructions given at trial. Therefore, there is no justification for going behind the jury's verdict. Accordingly, ***828** plaintiff's motion to question and interview jurors is denied.

III. Bill of Costs

Plaintiff requests reimbursement for costs as a prevailing party and, to that end, has submitted a bill of costs. The Federal Rules of Civil Procedure instruct the Court that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.Proc. Rule 54(d) ("Rule 54(d)"). Defendant argues that, because plaintiff was awarded no damages, her victory was "purely technical" and she is therefore not a prevailing party entitled to costs under Rule 54(d). In the alternative, defendant has raised several specific objections to certain items in plaintiff's bill of costs.

A. Prevailing Party

Essentially, defendant argues that, because plaintiff's victory on liability came with an award of zero damages, she is not a prevailing party for the purposes of an award of costs under Rule 54(d).[5]

[11] [12] The Seventh Circuit has stated that a "prevailing party" for the purposes of a Rule 54(d) award of costs is "the party who prevails as to the substantial part of the litigation." *Testa v. Village of Mundelein, Ill.,* 89 F.3d 443, 447 (7th Cir.1996), *citing First Commodity Traders, Inc. v. Heinold Commodities, Inc.,* 766 F.2d 1007, 1015 (7th Cir.1985). The instant case involved a single Title IX claim, on which plaintiff prevailed. While it is true that plaintiff was awarded zero damages, judgment on liability was entirely for plaintiff and against defendant. Courts have consistently held that a prevailing party for the purposes of Rule 54(d) is the party "in whose favor judgment is rendered ... regardless of the amount of damages awarded." *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate–Palmolive Co.,* 153 F.R.D. 667, 669 (D.Kan.1994); *see also American Ins. Co. v. El Paso Pipe and Supply Co.,* 978 F.2d 1185, 1192 (10th Cir.1992) ("The determination of who is the prevailing or successful party is based upon success upon the merits, not upon damages.") (*quoting* 20 C.J.S. Costs § 11 (1990)); *Ganey v. Edwards,* 759 F.2d 337, 339 (4th Cir.1985) (in a prisoner action charging denial of access to law library, plaintiff was prevailing party where it was found he was denied due process, even though he was awarded no damages); *Western Elec. Co. v. William Sales Co.,* 236 F.Supp. 73, 77 (M.D.N.C.1964) (Plaintiff awarded only nominal damages was still a prevailing party for purposes of award of costs); *Bowman v. West Disinfecting Co.,* 25 F.R.D. 280, 282 (E.D.N.Y.1960) (where verdict was for plaintiff on issue of liability and for defendant on issue of damages, plaintiff was prevailing party). Accordingly, we find that plaintiff is the prevailing party, and is therefore entitled to an award of costs under Rule 54(d).

In 28 U.S.C. § 1920 ("§ 1920") Congress has set forth the costs to be awarded to a prevailing party under Rule 54(d):

> 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> ***829** (4) Fees for exemplification and copies of papers 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.

[13] Whether to award specific costs is within the discretion of the court, but it is clear that if the cost is listed in § 1920, a presumption exists that it will be taxed; conversely, if the cost is not listed in § 1920, the court should exercise its discretion sparingly in taxing such a cost. *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964); *see also, McGovern Constr. **Corp**. v. Bouchard,* No. 94 C 3679, 1996 WL 131782, at *1 (N.D.Ill. March 20, 1996); *Somat **Corp**. v. Somat **Corp**.,* No. NO 90 C–4943, 1993 WL 75155, at *1 (N.D.Ill. March 15, 1993).

B. Plaintiff's Bill of Costs

Plaintiff seeks $14,689.86 in costs related to this case. Her bill of costs lists the following:

1.	"Fees of the Clerk"		$ 71.00
2.	"Fees for service of summons and complaint"		$ 48.15
3.	"Fees of the court reporter ..."		$ 30.00
4.	"Fees for witnesses"		$ 630.00
5.	"Exemplification & copies of papers"		$ 428.60
6.	"Docket fees under 28 U.S.C. § 1923"		$ 120.00
7.	"Costs incident to taking depositions"		$ 5,120.40
8.	"Legal Research"		$ 848.55
9.	"Expert Fees"		$ 7,346.00
10.	"Certified Mail Service for service of subpoenas"		$ 47.16
		TOTAL =	$14,689.86

1. "Fees of the Clerk"

[14] Initially, we note that the $71 which plaintiff lists as "fees of the clerk" consists of moneys paid to the Clerk on November 1, 1996 for the following charges: $70.50 for 141 "copies run for Pltf's counsel" at $0.50 per copy, and $0.50 for a black magic marker. (See receipt, in appendix

to bill of costs). "Fees of the Clerk" are provided for in 28 U.S.C. § 1914, which includes, *inter alia,* "reproducing any record or paper, 50 cents per page." 28 U.S.C. § 1914(4). Thus, while the $70.50 charge is apparently a statutory "fee of the clerk," we will treat it as "exemplification and copies of papers," so that we can determine if these copying costs, along with the other "exemplification and copies" costs requested by plaintiff, meet the applicable standard for taxation of copying costs. (*See* discussion of "exemplification and copies of papers" at section 3, *infra*). The $0.50 charge for a black magic marker merely reflects a purchase of office supplies, no different than if plaintiff's counsel had purchased the black magic marker at Wal–Mart. Therefore, we will **exclude** the $0.50 charge for the black magic marker, because office supply purchases are not included in "fees of the clerk" under § 1914, and are otherwise non-recoverable under § 1920. *See Bridges v. Eastman Kodak Co.,* No. 91 CIV. 7985 (RLC), 1996 WL 47304, at *15 (S.D.N.Y. Feb. 6, 1996) ("supplies" are "more properly attributable to overhead expenses" and will not be allowed as costs) *aff'd,* 102 F.3d 56 (2nd Cir. Dec. 10, 1996); *In re Media Vision Technology Securities Litigation,* 913 F.Supp. 1362, 1371 (N.D.Cal.1996) (costs of office supplies "should be absorbed by counsel as part of the cost incurred in operating a legal practice," and are not taxable as costs under § 1920); *Hertz Corp. v. Caulfield,* 796 F.Supp. 225, 230 (E.D.La.1992) (disallowing charges for chalk, erasers and other office supplies which "should be included in attorney's hourly rate as overhead").

2. Defendant's Objections

Defendant raises a number of specific objections to items in plaintiff's bill of costs, which we will now address in turn.

a. *Postage expenses for service of subpoenas and complaint.*

Plaintiff requests reimbursement for the **costs of serving fifteen complaints, by certified mail**, at a cost of $3.21 each. Plaintiff mailed two copies each of the complaint to Andrew Fields, James Peck and Jimmy R. Pounds, and a single copy of the complaint to Dr. Deborah Craton, Richard Tallman, Jim ***830** Pittman, Eva Smith, Rodney Fish, Gene McCracken, C. Dale Robinson, the North **Lawrence** Community School Corporation and the North **Lawrence** Community School Board.[6] (See photocopies of Certified Mail Receipts, in appendix to bill of costs).

Defendant objects to plaintiff's request for these costs, contending that plaintiff need only have served three complaints: one on Andrew Fields, one on the North **Lawrence** Community School **Corp**., and one on the North **Lawrence** Community School Board. Defendant maintains that, accordingly, plaintiff is only entitled to therefore $9.63, or the cost of service for three complaints at $3.21 each. Before addressing this question, however, we must decide whether service of the complaints by certified mail is a taxable cost under § 1920.

[15] Postage costs are generally not compensable under § 1920. *Downes v. Volkswagen of America, Inc.,* 41 F.3d 1132, 1144 (7th Cir.1994) (postage expenses are part of reasonable attorney's fee under § 1988, as distinct from statutory costs under § 1920); *El–Fadl v. Central Bank of Jordan,* 163 F.R.D. 389, 390 (D.D.C.1995) ("The overwhelming weight of authority have declined to award costs for courier services, postage, telephone or fax charges") (citing cases). Costs of service of process are, however, taxable under § 1920(1), which provides for "fees of the clerk and marshal." *See* 28 U.S.C. § 1921(a)(1)(A) and (B) (providing that the United States marshals "shall routinely collect, and a court may tax as costs, fees for" service of complaints and subpoenas or summons). Traditionally, service of process was carried out by a marshal, and recovery of service of process costs was limited to the marshal's fee. *See Collins v. Gorman,* 96 F.3d 1057, 1059 (7th Cir.1996). However, in *Collins,* the Seventh Circuit approved of taxation of costs of service of process, as described in § 1921(a), not to exceed the Marshall's fee, regardless of who actually effects service. *Collins,* 96 F.3d at 1060. *Collins* interpreted § 1920(1) as permitting an award of costs "*measured by* the marshal's fees, whether or not the prevailing party *used* the marshal." *Collins,* 96 F.3d at 1060 (emphasis in original). Although *Collins* involved a private process-server, rather than service by mail, we believe that the principle applied in *Collins* applies here as well, so that an award of costs for service of process by mail is permissible, in an amount not to exceed the marshal's fee. While we do not have before us a schedule of fees indicating what fee the marshal's service would charge for service of process, we are confident that it would be at least $3.21 per service. For these reasons, and also because defendant did not object to taxation of the costs of service of process by certified mail in general, we conclude that costs for service of process by certified mail, at $3.21 each, are in general taxable items under § 1920(1).

[16] We must still address defendant's objection to service of multiple copies of the complaint on Andrew Fields, James Peck and Jimmy R. Pounds, and service on all other individual defendants. Defendant contends that because this Court ruled that plaintiff could only sue individual administrators and school board members in their official

capacities, plaintiff need only have served three complaints: one on Andrew Fields, one on the North **Lawrence** Community School Corporation, and on the North **Lawrence** Community School Board. Defendant's objection appears to rest on a faulty premise, for individual defendants Craton, Smith, Pittman, Tallman, McCraken, Fish, and Robinson were initially sued only in their official capacities. Nonetheless, defendant's objection has merit insofar as it challenges service of the complaint on individual defendants sued solely in their official capacity, and service of two copies of the complaint on parties sued in both their individual and official capacities. A seasoned civil rights lawyer such as plaintiff's counsel should know that an official ***831** capacity suit is tantamount to a suit against the organization to which the individual defendant belongs. In other words, in an official capacity suit, the real party in interest is the organization, here the school board and the school corporation, rather than the individual. *Hernandez v. O'Malley,* 98 F.3d 293, 295 (7th Cir.1996), *citing Leatherman v. Tarrant County,* 507 U.S. 163, 166, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517 (1993). Service on the official capacity defendant is therefore unnecessary to give effective service. Because defendant should not be required to pay for plaintiff counsel's abundance of caution, we **uphold** defendant's objection to the extent defendant objects to service on individual school board members sued only in their official capacities, and to service of two complaints each on Andrew Fields, James Peck and Jimmy Pounds. Accordingly, we **exclude** $32.10, the cost of service of ten complaints, at $3.21 each, from plaintiff's bill of costs.

Defendant also objects to plaintiff's request for $47.16 in postage expenses for serving eighteen subpoenas for trial, at a cost of $2.62 per subpoena. Defendant does not state its reason for this objection, other than to state conclusively that this expense is not compensable. The only ground this Court can attribute for this objection is that postage expenses are generally not recoverable under § 1920. However, as discussed above, the Seventh Circuit held in *Collins* that the costs of service of process, including service of subpoenas upon witnesses, are compensable regardless of how process was served, so long as the cost does not exceed the fee that would be charged by the marshal. *Collins,* 96 F.3d at 1060; 28 U.S.C. § 1921(a)(1)(B) (listing service of a subpoena for a witness as a fee of the marshal which may be taxed as a cost). Therefore, defendant's objection is **overruled.**

b. Fee for a copy of the tape of Andrew Fields' sentencing

[17] Plaintiff requests reimbursement of the $30 she paid to the Auditor of **Lawrence** County for a copy of the tape of Andrew Fields' sentencing hearing. Defendant objects that this cost is not compensable because the tape was not offered into evidence at trial. Section 1920 provides for taxation of "fees of the court reporter for all or any part of the stenographic transcript *necessarily obtained for use in the case.*" (emphasis added). Plaintiff did attempt to introduce the tape of Fields' sentencing hearing into evidence, but we ruled that the tape was inadmissible because it, as well as any discussion of the effect that the sentencing hearing had on plaintiff, was irrelevant. Because the tape was found to be irrelevant, we now find that it was not "necessarily obtained for use in the case." Accordingly, defendant's objection is **upheld,** and the $30 cost of the tape of Andrew Fields' sentencing hearing is **excluded** from plaintiff's bill of costs.

c. Witness Fees for witnesses not called to testify at trial

Plaintiff requests reimbursement in the amount of $630, for the witness fees of 18 witnesses, at a cost of $35 per witness. Defendant objects to reimbursement of the witness fees for nine of these witnesses, each of whom defendant claims were not actually called to testify at trial, namely: James Peck, Donna Mikels, Delbert Schulenburg, Karen Goodwine, Eva Smith, "Mrs. Cook", Rodney Fish, Donna Pierce, and Jim Pittman.

[18] Delbert Schulenburg and Karen Goodwine were called to testify, but by the defendant rather than by the plaintiff. A witness fee paid to a witness who is not called because he or she was on the opposing party's witness list is taxable. *Independence Tube* **Corp**. *v. Copperweld* **Corp**., 543 F.Supp. 706, 720 (N.D.Ill.1982). Plaintiff does not identify "Mrs. Cook," but we presume that he is referring to **Mary** M., mother of the plaintiff Diane M., since **Mary** M., in a previous marriage, was known as Mrs. Cook. Mrs. Cook, or **Mary** M., did in fact testify at trial. Furthermore, she was a nominal party, suing as next friend of her daughter, the real plaintiff. It has been held that nominal parties, specifically witnesses who bring suit as next friend of the real plaintiff, are entitled to witness fees, and that these fees are taxable as costs. *See Barber v. Ruth,* 7 F.3d 636 (7th Cir.1993) (taxing cost of witness fees for estate beneficiaries who attended trial, ***832** not to manage the litigation, but simply to testify); *The Petroleum No. 5,* 41 F.2d 268 (S.D.Tex.1930) (witness who brings suit as next friend for real plaintiff). Accordingly, we find that the witness fees paid to Delbert Schulenberg, Karen Goodwine, and Mrs. Cook are taxable as costs.

[19] [20] The other six witnesses—James Peck, Donna Mikels, Eva Smith, Rodney Fish, Donna Pierce, and Jim Pittman—were not called to testify at trial. The witness fees of witnesses who did not actually testify might still be

taxable if the plaintiff makes some showing of good faith, for example that the witnesses were not called because the necessity for the testimony could not be measured in advance, *Copperweld,* 543 F.Supp. at 722; that the witnesses were not called because of a good faith determination that their testimony would have been repetitious and cumulative, *United States v. Lynd,* 334 F.2d 13, 16 (5th Cir.1964); or that the witnesses were not called because their testimony was made unnecessary because of concessions and admissions made by the opposing party. *Mueller v. Powell,* 115 F.Supp. 744, 745 (W.D.Mo.1953). Plaintiff has made no attempt to show that the witnesses not called to testify at trial were subpoenaed in good faith, or that there was a good faith reason for not calling them to testify. Therefore, we uphold defendant's objection with regard to the witness fees for the above-named six witnesses who did not actually testify at trial. Accordingly, plaintiff's recovery of costs for witness fees is reduced by $210 (6 x $35), leaving a total recovery for witness fees of $420.

d. Printing and shipping costs of Patricia H. v. Berkeley Unified School District opinion

[21] As part of her request for copying expenses, plaintiff requests reimbursement for $31 paid to "The Print & Copy Factory" in San Francisco for printing ($10) and shipping ($21) of "one copy set of specified documents re: *Patricia H. v. Berkeley Unified School District*...." (*See* receipt, in appendix to plaintiff's bill of costs).[7] Defendant does not object to the $10 printing fee, but contends that the $21 shipping cost is not recoverable. Because shipping fees and postage are generally not compensable under § 1920, we **uphold** defendant's objection, and exclude the $21 shipping charge, leaving a total recovery of $10. *See Downes,* 41 F.3d at 1144; *El–Fadl,* 163 F.R.D. at 390; *Apostal v. City of Crystal Lake, Ill. State Police,* 165 F.R.D. 508, 511 (N.D.Ill.1996) (delivery charges not recoverable as costs under § 1920).

e. Deposition of Richard Tallman

Plaintiff requests $5,120.40 for costs incident to taking of depositions, of which $1,111.25 is related to the deposition of Richard Tallman. ($861.25 for reporting and transcribing Tallman deposition taken on January 16, 1995, $30 for one ASCII disk of the January 16 deposition, and $220 for one copy of volume II of Richard Tallman deposition, taken on May 23, 1995.)[8]

[22] In determining whether the costs incident to the taking of a deposition are taxable, the relevant question is "whether the particular deposition was reasonably necessary to the case, not whether it was actually employed in court." *Endress + Hauser, Inc. v. Hawk Measurement Sys. Pty. Ltd.,* 922 F.Supp. 158, 161 (S.D.Ind.1996); *quoting Soler v. McHenry,* 771 F.Supp. 252, 255 (N.D.Ill.1991), *aff'd sub nom Soler v. Waite,* 989 F.2d 251 (1993).

[23] Defendant objects to taxation of this cost, arguing that while the Tallman deposition was the longest of any witness, his testimony at trial was among the shortest and least important. Defendant contends that plaintiff deposed Tallman for the purpose of discovering information about other incidents unrelated to this case, specifically allegations ***833** of sexual improprieties by one Jerry Thompson and one Jan Buker, information which was later ruled inadmissible by this Court. Defendant contends that it should not have to pay for what amounted to a "fishing expedition." Because plaintiff has not provided any explanation to verify that the Tallman deposition was reasonably necessary to the case, we **uphold** defendant's objection, and **exclude** $1,111.25 from plaintiff's bill of costs.

f. Computer–Assisted Research

[24] Plaintiff requests reimbursement for $848.55 in "legal research." The documentation submitted by plaintiff reveals that this cost was entirely for on-line computer research conducted on Westlaw. It is well established that the costs of computer research "are attorney's fees and may not be recovered as costs". *Haroco, Inc. v. American Nat. Bank and Trust Co. Of Chicago,* 38 F.3d 1429, 1440 (7th Cir.1994); *see also McIlveen v. Stone Container Corp.,* 910 F.2d 1581, 1584 (7th Cir.1990) (computerized research expenses "are more akin to awards under attorneys fees provisions than under costs"); *Duckworth v. Whisenant,* 97 F.3d 1393, 1399 (11th Cir.1996) ("costs such as general copying, computerized legal research, postage, courthouse parking fees and expert witness fees ... are clearly nonrecoverable"); *Migis v. Pearle Vision, Inc.,* 944 F.Supp. 508, 518 (N.D.Tex.1996) (Westlaw charges, delivery fees and postage are "more akin to overhead costs which cannot be recovered under § 1920"). Plaintiff has submitted only a bill of costs, not a petition for attorney's fees. Therefore, because costs associated with computer-assisted research are a component of attorney's fees and not costs, we **uphold** defendant's objection, and **exclude** $848.55 from plaintiff's bill of costs.

g. Expert Fees

Plaintiff requests reimbursement for $7,346.00 in "expert fees." Defendant objects on the grounds that while the

witness fees for Dr. Martha McCarthy may be recoverable, the cost of obtaining her opinions ($3,500) is not; and that the cost ($400) of Dr. Lawlor's diagnostic exam of the plaintiff is not permitted under § 1920.

[25] In fact, expert witness fees are *not* recoverable under § 1920, because, like computerized research and postage, expert witness fees are taxable only as part of an attorney's fee award. *Whisenant,* 97 F.3d at 1399; *Migis,* 944 F.Supp. at 517–18; *Downes,* 41 F.3d 1132; *United Steelworkers of America v. Phelps Dodge Corp.,* 896 F.2d 403, 407 (9th Cir.1990) ("any request for expert witness fees should have been incorporated into plaintiff's Petition for Attorney's Fees," not into request for costs under § 1920). Therefore, we find that no part of plaintiff's expert witness fee is compensable as a cost under § 1920, and we **exclude** $7,346.00 from plaintiff's bill of costs.

3. Exemplification and Copying of Papers

[26] Finally, although defendant has not objected to plaintiff's claimed copying costs, we cannot grant these costs on the basis of the documentation provided by plaintiff. "Whether copies are recoverable as costs depends on the use of the copies." *Endress + Hauser,* 922 F.Supp. at 160, *quoting Arachnid, Inc. v. Valley Recreation Products,* 143 F.R.D. 192, 193 (N.D.Ill.1992). Before we grant an award of costs for copying, we must inquire whether the copies were "necessarily obtained for use in the case." § 1920(2). The burden is on the party seeking such costs to "offer some proof of necessity." *Migis,* 944 F.Supp. at 518, *citing Holmes v. Cessna Aircraft Co.,* 11 F.3d 63, 64 (5th Cir.1994).

[27] Plaintiff requests a total of $428.60 for "exemplification and copying of papers," plus $70.50 for copying charges paid to the Clerk of Court (*See* Section B(1), *supra*). The only documentation of these costs offered by plaintiff consists of the receipt from the Clerk of Court for $70.50 for 141 copies at 50 cents per copy, and a receipt from defense counsel for $397.60, for 1,988 copies at 20 cents per copy.[9] Plaintiff has given the ***834** court no idea as to what papers were copied or why they were necessary. Plaintiff has therefore failed to satisfy her burden to offer some proof of the necessity of the copying costs for which she seeks reimbursement. Accordingly, the $468.10 ($497.60 + $70.50) requested for unspecified copying costs is **excluded.**

IV. CONCLUSION

For the reasons discussed above, the Court finds as follows:

A) Because the record does not support a conclusion that the jury verdict was either a compromise verdict or inconsistent with the evidence or jury instructions, plaintiff's Motion for a New Trial and Motion to Question and Interview Jurors are both **denied.**

B) Plaintiff's bill of costs is **allowed in part** and **disallowed in part,** as follows:

1. The following items of cost are not recoverable and are therefore **excluded:**

a.	$ 0.50	purchase of one black magic marker;
b.	$ 32.10	service of ten complaints by certified mail;
c.	$ 30.00	tape of Andrew Fields' sentencing;
d.	$ 210.00	witness fees for six witnesses who did not testify at trial (6 x $35);
e.	$ 21.00	shipping charge for documents re: Patricia H.;

f.	$ 1,111.25	costs of Tallman deposition;
g.	$ 848.55	computer-assisted research;
h.	$ 7,346.00	expert fees;
i.	$ 468.10	unspecified copying costs
	$10,067.50	**TOTAL costs excluded.**

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2. The remaining costs listed in the bill of costs, totaling **$4,622.36, are allowed.**

Parallel Citations

Footnotes

1 Instruction number 23 reads as follows:

> Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.
>
> You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.
>
> Each of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror.
>
> Remember that you are impartial judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

2 In *Coffman,* the Seventh Circuit held that the district court committed harmless error by instructing the jury to continue its efforts to reach a verdict without first consulting with the parties and the lawyers. In contrast, in the instant case this Court did consult with counsel for both parties before instructing the jury to continue its efforts.

3 We are at a loss to explain or even understand plaintiff's basis for assuming that the five-three vote was in her favor, with three men voting against her, especially considering that the jury consisted of five men and three women. While it would be highly speculative, and inappropriate, to assume a gender split of any sort, it would seem more logical that a straight gender split would result in the five votes being those of the five male jurors and the three votes, those of the three female jurors. But, because it *is* patently inappropriate, we will not join plaintiff in any such conjecturing.

4 Plaintiff also states in her **Supplemental** Memorandum that a new trial "would serve to inhibit any misogynist tendencies by jurors who are unabashingly inclined to apply a double standard towards female students irrespective of their age." (Pltf.'s Supp.Memo., at 2). This statement inappropriately and groundlessly attributes improper motives to the jury, and altogether ignores the fact that the jury found in *favor* of plaintiff on the issue of liability. Furthermore, the excessive rhetorical tone suggests that plaintiff's counsel has

lost all professional detachment in advancing his arguments and contentions.

5 Neither case cited by defendant supports defendant's position. *Weaver v. Toombs,* 948 F.2d 1004, 1009 (6th Cir.1991), involved an award of costs against unsuccessful *in forma pauperis* plaintiffs. The Sixth Circuit held that, where an action is dismissed on appeal, the defendant is the prevailing party, and that costs can be constitutionally assessed against an indigent plaintiff. *Cartwright v. Stamper,* 7 F.3d 106 (7th Cir.1993), involved an award of attorneys' fees under 42 U.S.C. § 1988, which is based upon different standards than is an award of costs under Rule 54(d). 7 F.3d at 109–10 (concluding that plaintiff's award of nominal damages was a purely technical victory and that no attorneys' fees should be awarded). *See Dickinson v. Indiana State Election Bd.,* 817 F.Supp. 737 (S.D.Ind., 1992); *Goodwin v. M.C.I. Communications* ***Corp****.,* No. CIV. A. 94–D–1869, 1996 WL 162275 (D.Colo., Apr. 5, 1996) ("this distinction—'costs' under section 1920 versus 'attorney's fees'—is not academic. In order to be reimbursed for its expenses, a prevailing party must properly distinguish its section 1920 costs from it's attorney's fees.").

6 Andrew Fields was sued "individually" and "as an employee of the North **Lawrence** Community School Corporation." James Peck and Jimmy Pounds were sued in both their individual capacities and their official capacities as Superintendent and Principal, respectively. Carol Powell was sued in her individual capacity as school counselor for Bedford Junior High School, and all other individual defendants were sued solely in their official capacities as members of the North **Lawrence** Community School Board.

7 A receipt for this expense was included in plaintiff's appendix to her bill of costs, but Plaintiff does not indicate in which bill of costs category this expense is included. Therefore, we will examine this challenged cost separately.

8 Defendant calculated the costs of Tallman's depositions, including the ASCII disk, to be $1,296.30, but the documents submitted by plaintiff in support of her bill of costs do not support this figure.

9 Plaintiff apparently arrived at the $428.60 figure by combining the $397.60 copying charge and the $31 charge for printing and shipping documents related to the opinion in *Patricia H.* (*See* discussion at Section 2(d), *supra*). Because we have already determined that the $10 charge for printing documents related to *Patricia H.* is compensable, but that the $21 charge for shipping those documents is not, we do not include discussion of that printing cost here.

2001 WL 1464781
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

David V. McCAULEY, Plaintiff,
v.
RAYTHEON TRAVEL AIR CO., Defendant.

No. 00–2017–JWL. | Oct. 19, 2001.

Opinion

MEMORANDUM AND ORDER

JOHN W. LUNGSTRUM, District Judge.

***1** This case comes before the court on the plaintiff's motion to retax costs (Doc. 65). The plaintiff argues that Raytheon's bill of costs was untimely filed; that Raytheon has not shown that the photocopies and deposition transcripts were necessarily obtained for use in the case; that he should not be forced to pay for photocopies of discovery documents when Raytheon had the option to either photocopy the materials or allow the plaintiff to inspect them; and that he should not have to pay for Raytheon's decision to order a transcript of proceedings before the **FAA** because "a copy of the transcript would have been available through discovery."

Pursuant to 28 U.S.C. § 1920, the court may tax as costs "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case" and "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." Materials and services that serve only to add to the convenience of counsel are not "necessarily obtained." *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). "The most direct evidence of 'necessity' is the actual use of materials obtained by counsel or by the court." *Id.* at 1246.

D. Kan. Rule 54.1 provides that a party entitled to recover costs shall file a bill of costs within 30 days after the expiration of time allowed for appeal of a final judgment. Final judgment was entered in this case on February 22, 2001 and the plaintiff had 30 days from the entry of final judgment to file a notice of appeal. Fed. R.App. P. 4(a). Raytheon filed a bill of costs within 30 days of the expiration of the time allowed for filing an appeal and, thus, the filing was timely.

The plaintiff objects to the award of costs on the basis that Raytheon has not shown that the photocopies and deposition transcripts were necessarily obtained for use in the case. In its response, Raytheon addresses each item listed in the bill of costs and argues that they were necessarily obtained. The plaintiff did not file a reply. Raytheon's explanation of its costs satisfies the court that the majority of documents listed in the bill of costs were necessarily obtained. The court, however, does not believe that photocopies of documents made in response to discovery requests and copies of pleadings and other documents filed with the court were necessarily obtained.

As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery or for copies of pleadings and documents filed with the court because the party possesses the original documents and the copies are not "obtained" for purposes of section 1920(4). *Pehr v. Rubbermaid, Inc.,* 196 F.R.D. 404, 408 (D.Kan.2000); *Phillips USA, Inc. v. Allflex USA, Inc.,* 1996 **WL** 568814, at *2 (D.Kan. Sept. 4, 1996). Because Raytheon already possessed the originals, the copies were not "obtained" for use at trial and the court denies the costs. The costs denied include $6.70 for in-house photocopies and $911.37 paid to IKON Office Solutions for photocopies of documents produced by Raytheon and documents filed with the court. Subtracting these amounts from the total request yields a cost award of $2,093.06.[1]

***2** The plaintiff also argues that he should not have to pay for Raytheon's decision to order a **transcript of proceedings before the FAA** because a **copy of the transcript** could have been obtained through discovery. "Even if the court finds the costs were for material or services necessarily obtained, the amount of the award must be reasonable." *U.S. Industries,* 854 F.2d at 1245. The charge for the transcript of the hearing was $572.10. The court is not persuaded that taxing this cost is unreasonable because it would have been less expensive to obtain **a copy of the transcript through discovery**. Courts routinely tax as costs the amount charged by a court reporter for deposition transcripts. *See, e.g., Giroux v. Farm Credit Bank of Wichita,* 1999 **WL** 641246 (D.Kan. May 17, 1999); *Aramburu v. The Boeing Co.,* 1999 **WL** 477251 (D.Kan. March 31, 1999). The plaintiff has not shown how the transcript of the hearing is any different than a deposition transcript. Both contain witness testimony recorded by a court reporter and, in this case, the court is persuaded that the transcript was necessarily obtained.

IT IS THEREFORE ORDERED that the plaintiff's motion to retax costs (Doc. 65) is granted and Raytheon is awarded

costs in the amount of $2,093.06.

IT IS SO ORDERED this—day of October, 2001.

Footnotes

1 Because the court does not tax the **costs of documents photocopied** for discovery requests, the court need not address the plaintiff's argument that he should not be forced to pay for photocopies of discovery documents when Raytheon had the option to either photocopy the materials or allow the plaintiff to inspect them.

End of Document

814 F.Supp. 1004
United States District Court,
D. Kansas.

Donna **MEREDITH**, Plaintiff,
v.
SCHREINER TRANSPORT, INC., Defendant.

Civ. A. No. 91–1028–MLB. | Feb. 11, 1993.

Plaintiff filed bill of costs to which company promptly objected. The District Court, Belot, J., held that: (1) court could not tax expert witness fees as costs; but (2) plaintiff was entitled to costs of both videotaped and stenographic depositions; and (3) airfare and statutory per diem for plaintiff's economic expert would be assessed as costs, though portion of expert's testimony was disallowed at trial.

So ordered.

See also, **814** F.Supp. 1001.

West Headnotes (5)

[1] **Costs**
Experts

District court could not tax prevailing party's expert witness fees as costs, but was limited by statute establishing per diem rate for reimbursement of expert witness fees to prevailing party. 28 U.S.C.A. §§ 1821, 1920.

6 Cases that cite this headnote

[2] **Costs**
Stenographers' Fees
Costs
Discovery; Incidental Expenses

District court would allow as costs to prevailing party both the expenses of videotaped deposition, including **costs associated with showing videotape at trial**, and the costs of stenographic transcript. 28 U.S.C.A. § 1920(2).

20 Cases that cite this headnote

[3] **Costs**
Stenographers' Fees
Costs
Discovery; Incidental Expenses

Rule of Civil Procedure providing that party could arrange to have stenographic **transcription of videotaped deposition** at his own expense did not preclude award of costs of both videotaped and stenographic depositions to prevailing party. Fed.Rules Civ.Proc.Rule 30(b)(4), 28 U.S.C.A.; 28 U.S.C.A. § 1920(2).

24 Cases that cite this headnote

[4] **Costs**
Discovery; Incidental Expenses

Travel and lodging expenses of prevailing party and party's attorney could not be taxed as costs. 28 U.S.C.A. § 1920(2).

9 Cases that cite this headnote

[5] **Costs**
Experts

Prevailing party was entitled to award, as **costs, of airfare and statutory per diem for economic expert**, though portion of expert's testimony was disallowed at trial, where disallowed testimony was not advanced in bad faith and expert did give testimony which contributed to jury's verdict.

5 Cases that cite this headnote

Attorneys and Law Firms

***1004** Lelyn J. Braun, Topeka, KS, for Donna **Meredith**.

Martha Shaffer, Office of the Atty. Gen., Las Vegas, NV, State of Nevada, Lienholder.

***1005** Randy J. Troutt, Kahrs, Nelson, Fanning, Hite & Kellogg, Wichita, KS, for **Schreiner** Transport, Inc.

Opinion

ORDER REGARDING COSTS

BELOT, District Judge.

On June 18, 1992, a judgment was entered in favor of plaintiff pursuant to a jury verdict of $61,815 (Doc. 28). On July 20, 1992, plaintiff's counsel filed a bill of costs to which defendant promptly objected (Docs. 31 and 32). Plaintiff then filed a memorandum in support of her bill of costs (Doc. 39) but thereafter she filed an amended bill (Doc. 42). Defendant filed a timely motion to retax costs (Doc. 44) and that motion is now before the court. Plaintiff's counsel has indicated he will stand on his previously-filed memorandum in support of the costs (Doc. 39).

Taxation of costs is authorized by Fed.R.Civ.P. 54(d) and governed by 28 U.S.C. § 1920 which provides:

> 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers 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.

Defendant does not object to taxation of the docket fee ($120) but it does object to portions of the $5,600 claimed as witness fees and $3,232.75 claimed as "other costs."

Witness Fees

[1] According to the schedule submitted by plaintiff, the witness fees are those of **physicians** whose video depositions were shown at trial and of an economist who testified at trial. Plaintiff contends that these costs are authorized by 28 U.S.C. § 1920 citing *Ortega v. City of Kansas City, Kansas,* 659 F.Supp. 1201, 1218 (D.Kan.1987). Defendant responds that costs for expert witnesses are limited to those allowed by 28 U.S.C. § 1821(b) which provides for an attendance fee of $40 per day.

Plaintiff is correct in stating that *Ortega* holds that the court must allow the prevailing party to recover all costs authorized by 28 U.S.C. § 1920 unless some reason appears for penalizing the prevailing party. No such reason appears here. However, *Ortega* also states that where expenses are not specifically authorized by section 1920, the court should sparingly exercise its discretion in allowing such costs.

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) unequivocally holds that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821, absent contract or explicit statutory authority to the contrary. See also *Chaparral Resources, Inc. v. Monsanto Co.,* 849 F.2d 1286 (10th Cir.1988). 28 U.S.C. § 1821 limits witness fees to $40 per day for each day's attendance. There is no statute which specifically allows a court to tax expert witness fees as costs and therefore they will be disallowed.

Other Costs

[2] Plaintiff seeks taxation of costs for the taking of videotape depositions, for **rental of the equipment required to show the depositions at trial**, for the stenographic transcripts accompanying the video depositions and for travel and lodging expenses of plaintiff, counsel and her economic expert, James Evenson.

The costs associated with the taking of the videotape

depositions are not specifically authorized by 28 U.S.C. 1920(2). However, ***1006** numerous courts have held that costs associated with video deposition are nevertheless recoverable. See *Commercial Credit Equipment Corp. v. Stamps,* 920 F.2d 1361, 1368 (7th Cir.1990) and the cases cited therein. Such costs also include those associated with showing the videotapes at trial. *Deaton v. Dreis and Krump Mfg. Co.,* 134 F.R.D. 219, 222 (N.D.Ohio 1991). See also Wright & Miller, Federal Practice and Procedure: Civil, 1992 **Supp**. § 2115. It would seem a non sequitur to allow the costs of taking a videotape deposition but to disallow the costs of **showing it at trial.**

But what about the situation, such as in this case, when the prevailing party seeks the costs associated with *both* the videotape depositions *and* the accompanying stenographic transcripts? *Commercial Credit, supra* at p. 1369 disallowed costs pertaining to stenographic transcripts. The court reasoned that Fed.R.Civ.P. 30(b)(4)'s language that "A party may arrange to have a stenographic transcription made at the party's own expense" seems to remove the court's discretion to tax the costs of stenographic transcripts in addition to the costs of videotape depositions.

[3] This court respectfully disagrees with the Seventh Circuit's reasoning. Rule 30(b)(4) allows a party to have a stenographic transcript *made* at its own expense. The rule says nothing about taxation of costs for such a transcript and certainly does not expressly preclude an award of costs. The court believes the rule merely states that any party who opts for a stenographic transcript is responsible to pay the *court reporter,* even if that party did not notice the deposition. Taxation of costs, on the other hand, is a method of allocating costs among the *parties.* How a cost ultimately is allocated has no bearing on a party's responsibility to pay the person who provided the service giving rise to the cost. For example, many depositions are taken which may not become eligible for allocation as a cost under Rule 54(d) but this does not relieve the party of his responsibility to pay the court reporter.

It makes sense to read Rule 30(b)(4) in conjunction with 28 U.S.C. § 1920(2) which gives the court discretion to award costs for court reporter fees for all or any part of the stenographic transcript[1] *necessarily obtained for use in the case* (emphasis added). This language focuses the court's discretionary decision on the transcript's use in the case, i.e. whether it had a legitimate use independent from or in addition to the videotape which would justify its inclusion in an award of costs.

The practice lawyers generally follow in this court, which the court endorses, is that a **stenographic record must be made of any videotape deposition**. There are good reasons for this practice. First, **videotape depositions** are a superior means of presenting an absent witness's testimony because they allow the trier-of-fact to better judge the credibility of the witness and, in many cases, save time. However, videotapes can be lost or partially erased or otherwise fall victim to some technological problem. Second, district courts often are called upon to edit objectionable portions of videotaped testimony. It is much easier to do this from a transcript. Third, in many cases, a party insists that the opposing party arrange for a stenographic transcript as a condition for obtaining an order allowing a videotape deposition. A party who does this has little right to complain if he later is asked to pay the cost of a transcript he insisted be made. Fourth, it is probably more efficient for a reviewing court to consider claims of error relating to deposition testimony by reference to a transcript.

Therefore, this court believes the better practice is to allow the costs of both videotaped and stenographic depositions, absent some good reason not to do so. The court believes this is consistent with the "necessarily obtained for use in the case" language of 28 U.S.C. § 1920(2) and that the court's discretion to award such costs is not precluded by Rule 30(b)(4).

[4] Counsel's travel and lodging expenses associated with the taking of depositions and ***1007** during trial are disallowed because they are not authorized by statute. *Dopp v. HTP Corp.,* 755 F.Supp. 491, 502 (D.Puerto Rico 1991), *modified on other grounds,* 947 F.2d 506 (1st Cir.1991). Similarly, plaintiff's travel and lodging expenses are not allowable. *Jamison v. Cooper,* 111 F.R.D. 350, 353 (N.D.Ga.1986).

[5] Finally, the court, in its discretion, will allow **airfare and statutory per diem for economic expert** Evenson. Even though the court disallowed a portion of Evenson's testimony (Memorandum and Order of August 11, 1992, Doc. 34), the disallowed testimony was not advanced in bad faith and Evenson did give testimony which contributed to the jury's award of $25,000 for economic loss from the date of injury to trial. *Templeman v. Chris Craft Corp.,* 770 F.2d 245, 250 (1st Cir.1985) *cert. denied,* 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 556 and *Castro v. United States,* 104 F.R.D. 545, 550 (D.Puerto Rico 1985). 28 U.S.C. § 1821(a)(1).

In conclusion, the following shall be taxed as costs:

Fees of the Clerk	$120.00
Fees for Witnesses	
Dr. Roberson	40.00
Dr. Williams	40.00
Dr. Cummings	40.00
Dr. Grenn	40.00
Dr. Evenson	40.00
Dr. Evenson – airfare	402.00
Video technician expenses for Williams, Cummings, Roberson and Grenn	726.00
Expenses of showing depositions at trial	284.18
Stenographic Depositions (Court Reporter's Costs)	
Dr. Roberson	242.40
Dr. Williams	239.60

Dr. Cummings	129.60
Dr. Grenn	226.80
Exhibits and shipping	67.60

All other items requested to be taxed as costs will be denied, either because they are not authorized by statute or because they are not documented.

IT IS SO ORDERED.

Parallel Citations

25 Fed.R.Serv.3d 865

Footnotes

[1] If this section is strictly construed, costs pertaining to videotape depositions should not be allowed at all. The courts appear to have overlooked this and have broadly construed the section to cover videotape depositions.

883 F.Supp. 558
United States District Court,
D. Kansas.

Arnoldo **ORTEGA**, Plaintiff,
v.
IBP, INC., Defendant.

No. 92–2351–KHV. | March 15, 1995.

After former employee prevailed in retaliatory discharge action against former employer, and companion case involving similar claims and same attorneys was dismissed, clerk approved former employee's statement and bill of costs, and former employer moved to retax costs. The District Court, Vratil, J., held that: (1) costs of combined service of process and deposition in cases would not be retaxed to divide costs in half; (2) costs would not be taxed for depositions of witnesses who appeared only on witness list in companion case or who appeared on no witness list; (3) costs of court approved depositions would be taxed; (4) former employer was not entitled to reduction in taxing of costs for depositions used in both cases; (5) former employee could tax costs of copying his own depositions; (6) former employee could not tax cost of printing brief to state Supreme Court on certified question; and (7) former employee met burden of proving authenticity of disbursements of witness fees by providing copies of checks written.

Motion granted in part and denied in part.

West Headnotes (21)

[1] **Federal Civil Procedure**
Taxation

Court reviews clerk's assessment of costs de novo. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Federal Civil Procedure**
Amount, Rate and Items in General

If taxation of costs of statute does not specifically authorize expense, court may sparingly exercise its discretion in allowing such costs. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[3] **Federal Civil Procedure**
Taxation

Prevailing party carries burden of establishing that taxation of costs statute authorizes costs sought to be taxed. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[4] **Federal Civil Procedure**
Taxation

Once prevailing party meets burden of establishing that taxation of costs statute authorizes costs sought to be taxed, presumption in favor of awarding costs exists. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[5] **Federal Civil Procedure**
Particular Items

Court would not retax costs of service of process and subpoena, dividing costs in half, even though defendant prevailed in companion case, where plaintiff was required to issue identical service of process and subpoenas for both cases. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[6] **Labor and Employment**
Costs

Former employer would not be taxed with costs for depositions of three witnesses, after former employee prevailed in retaliatory discharge action, as two of three witnesses appeared only on witness list in companion case in which employer prevailed and third witness appeared on no witness list at all, and former employee offered no rationale for taxing of costs of those depositions. 28 U.S.C.A. §§ 1920, 1920(2, 4); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[7] **Labor and Employment**
Costs

Costs of deposition of three witnesses would be taxed to former employer, after former employee prevailed in retaliatory discharge action, as court approved depositions of two of those witnesses, and third witness appeared on former employer's witness and exhibit list. 28 U.S.C.A. §§ 1920, 1920(2, 4); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[8] **Labor and Employment**
Costs

Former employer was not entitled to reduction in taxing of costs for depositions which were used in both retaliatory discharge action in which former employee prevailed, and in companion case in which former employer prevailed. 28 U.S.C.A. §§ 1920, 1920(2, 4); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[9] **Labor and Employment**
Costs

Former employee could recover costs of his own deposition, after prevailing in retaliatory discharge action, as he needed copy of his deposition, taken by defense, to prepare for trial, and he sought to tax only cost of copying, and not of taking, the deposition. 28 U.S.C.A. §§ 1920, 1920(2, 4); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

2 Cases that cite this headnote

[10] **Labor and Employment**
Costs

Former employee could not tax postage costs associated with depositions after prevailing in retaliatory discharge action. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[11] **Labor and Employment**
Costs

Former employer would not be taxed with costs of printing brief to state Supreme Court for certified question regarding standard of proof in retaliatory discharge actions, where former employer's view prevailed. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[12] **Labor and Employment**
Costs

Former employer was not entitled to see canceled witness fee checks to insure that former employee actually delivered checks to witnesses, in connection with former employee's taxation of costs after prevailing in retaliatory discharge action; former employee met burden of proof by providing copies of checks as written. 28 U.S.C.A. §§ 1920, 1920(3); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[13] **Federal Civil Procedure**
Witness Fees

Courts may tax witness fees at $40 per day. 28 U.S.C.A. §§ 1821(b), 1920, 1920(3); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[14] **Federal Civil Procedure**
Witness Fees

Prevailing party may request court to tax costs of reasonable travel expenses for witnesses. 28 U.S.C.A. §§ 1920, 1920(3); Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

3 Cases that cite this headnote

[15] **Labor and Employment**
Costs

Former employee could not tax costs, after prevailing in retaliatory discharge action, of copying personnel and medical file of second employee, who was involved in companion case in which former employer prevailed, as former employee offered no argument as to why second employee's files were necessary to his retaliatory discharge action. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[16] **Labor and Employment**
Costs

Former employee could not tax costs of copying former employer's occupational safety and health administration (OSHA) logs, after he prevailed in retaliatory discharge action, where court ruled that OSHA logs could not be used at trial. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[17] **Federal Civil Procedure**
Stenographic Costs

One dollar per page is reasonable and common charge for documents by transmission of facsimile for purposes of taxation of costs. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

3 Cases that cite this headnote

[18] **Federal Civil Procedure**
Stenographic Costs

Cost of copies may be taxed if copies are reasonably necessary for use in case. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

5 Cases that cite this headnote

[19] **Labor and Employment**
Costs

Former employee had to submit general explanation of nature of documents copied and their necessity to retaliatory discharge action in which he prevailed, in order to tax $240.87 in copying expenses, even though $240.87 was minimal and reasonable charge for copying expenses. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

1 Cases that cite this headnote

[20] **Labor and Employment**
Costs

Former employee could not tax costs for legal research, long distance telephone calls, postage, facsimile services, mileage, and meals, after he prevailed in retaliatory discharge action. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

3 Cases that cite this headnote

[21] **Labor and Employment**
Costs

Former employee could not tax costs of expert witnesses' consulting fees, in retaliatory discharge action, but could tax $40 per day witness fee. 28 U.S.C.A. §§ 1821(b)–1920.

1 Cases that cite this headnote

Attorneys and Law Firms

***560** David W. Hauber, Boddington & Brown, Chtd., Kansas City, KS, David O. Alegria, McCullough, Wareheim & La Bunker, P.A., Topeka, KS, for plaintiff.

John J. Jurcyk Jr., Douglas M. Greenwald, McAnany, Van Cleave & Phillips, P.A., Kansas City, KS, Katherine E. Rich, Holman, McCollum & Hansen, P.C., Prairie Village, KS, for defendant.

Opinion

MEMORANDUM AND ORDER

VRATIL, District Judge.

This matter comes before the Court on defendant's *Motion to Retax Costs* (Doc. # 276), filed February 2, 1995. On September 20, 1994, the Court held a jury trial on plaintiff's claim of retaliatory discharge against his former employer, IBP, Inc. At trial, plaintiff prevailed on the question whether defendant fired plaintiff because he refused to perform work which he was unable to perform due to a work related injury. **Prior to trial, the Court dismissed *Tovar v. IBP,* Case # 94–3263–KHV, a companion case involving similar claims and the same attorneys,** granting summary judgment to defendant, IBP.

Defendant objects to plaintiff's statement and bill of costs which the clerk approved on January 27, 1995. Defendant claims that many of the costs are not recoverable under 28 U.S.C. § 1920. Specifically, defendant claims that the clerk improperly taxed it for costs incurred in *Tovar v. IBP,* service of summons and subpoena fees, certain deposition fees, printing fees, witness fees, copying fees, and other miscellaneous fees.

[1] [2] "[C]osts shall be allowed as of course to the prevailing party" under Federal Rule of Civil Procedure 54(d). Section 1920 governs what specific costs the Court may tax. 28 U.S.C. § 1920. The clerk taxes the costs upon notice by the prevailing party. Fed.R.Civ.P. 54(d)(1). The Court reviews the clerk's assessments of costs *de novo.* ***Ortega*** *v. City of Kansas City, Kan.,* 659 F.Supp. 1201, 1218 (D.Kan.1987), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir.1989). If § 1920 does not specifically authorize an expense, the Court may "sparingly exercise its discretion in allowing such costs." *Id.*

[3] [4] The prevailing party carries the burden of establishing that § 1920 authorizes the costs sought to be taxed. *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 675 (D.Kan.1994). Courts may exercise discretion in determining the necessity of the materials or services to the case. 28 U.S.C. § 1920. Once the prevailing party meets ***561** this burden, a presumption in favor of awarding the costs exists. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988).

Service of Process and Deposition Subpoena Fees

[5] As companion cases, *Tovar* and ***Ortega*** issued joint deposition **subpoenas with service occurring simultaneously.** Therefore, no distinction between the two cases exists concerning the service of process and deposition subpoena fees. Plaintiff's statement of costs reflects this combined service of process and deposition for both ***Ortega*** and *Tovar.*

Defendant objects to the taxing of costs for service of process and deposition subpoenas for *Tovar,* on the grounds that defendant prevailed in one of the cases, ***Ortega***. Applying the widely accepted reasoning that Congress intended to allow costs for private service of process, courts tax the costs of such service of process. *Griffith v. Mt. Carmel Medical Center,* 157 F.R.D. 499 (D.Kan.1994). Because plaintiff issued identical service of process and subpoenas for both cases and plaintiff's claim required such, the Court will not divide the costs in half as

defendant suggests. This reasoning follows from previous District of Kansas cases which allow full recovery of costs for the prevailing party although that party received only partial damages under a comparative negligence statute. *E.g. Weseloh–Hurtig v. Hepker,* 152 F.R.D. 198 (D.Kan.1993). Thus, the Court denies defendant's request to retax the costs of service of process and subpoena.

Deposition Costs

[6] Defendant objects to the fees for certain deposition costs. Courts have interpreted the statute, which allows "fees for the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case," to allow taxing of the costs of taking and transcribing depositions. 28 U.S.C. § 1920(2); *Ramos v. Lamm,* 713 F.2d 546 (10th Cir.1983). Courts allow the inclusion of the costs of copies of depositions reasonably necessary for trial in the taxing of costs. 28 U.S.C. § 1920(4); *City of Kansas City,* 659 F.Supp. at 1219. Concerning the Korte, Downs and Sadler depositions, the Court concludes that defendant should not be taxed these costs. Korte and Downs appear only on the *Tovar* witness list. Sadler appears on no witness list. Plaintiff offers no rationale for taxing the costs of these depositions; he merely states that the law does not require that deposition transcripts be used at trial to be a taxable cost. While he states the law correctly, he also must carry the burden of persuasion. **Without further explanation of the necessity of these three depositions**, the Court is not persuaded that they were necessary. Therefore the Court sustains defendant's objections to taxing of costs for the Korte, Downs, and Sadler depositions.

[7] In this same vein, defendant objects to the Holman, Wallace, and Devito depositions. The Court will allow taxing of the Wallace and Devito deposition costs because the record reflects that the Court approved those depositions. *Stipulation* (Doc. # 216), filed Aug. 30, 1994. As well, Holman appears on *Plaintiff's Witness and Exhibit List* (Doc. # 188), filed Aug. 1, 1994. Therefore the Court denies defendant's objections to taxing of costs for the Wallace, Devito, and Holman depositions.[1]

[8] Defendant objects to costs for the Fiehler, Brownrigg, Trout, and Dombowski depositions because they were used in both *Tovar* and ***Ortega***. Again, defendant is not entitled to a reduction in the taxing of costs because the depositions were used in both cases.

[9] Finally, defendant objects to being taxed for the costs of the **Ortega** deposition, claiming that **plaintiff had no need for his own deposition**. The Court denies this objection. First, Mr. **Ortega** reasonably needed a copy of his deposition, taken by the defense, to prepare for trial. Second, this cost does not exceed reason because plaintiff has sought only the cost of copying, and not taking, the deposition.

***562** [10] Along with these objections to deposition and copying expenses, defendant questions the mailing expenses. Defendant correctly interprets the law in this area. Federal courts in Kansas deny taxation of **postage costs** based upon a lack of statutory authority in § 1920. *City of Kansas City,* 659 F.Supp. at 1219. Thus the Court finds that the postage costs associated with the Fiehler, Brownrigg, Holman, and Trout depositions should not be taxed to defendant.[2]

Printing of Kansas Court of Appeals Brief

[11] Defendant claims it should not be taxed the cost of printing the brief to the Kansas Supreme Court for the certified question regarding standard of proof in a retaliatory discharge case. Section 1920 addresses only those matters before the federal courts. Although the certified question presented to the Kansas Supreme Court did originate with this Court, the state court addressed the issue. Regardless, on this separate issue of proof, defendant's view and argument prevailed. The Court therefore sustains defendant's objection.

Witness Fees

[12] Defendant claims it is entitled to see the canceled witness fee checks to ensure plaintiff actually delivered the checks to the witnesses. Under the above explained burden of proof, the Court finds that plaintiff meets his burden of proving the authenticity of the disbursements by providing copies of the checks, as written by plaintiff. Plaintiff has done this and is entitled to a presumption that the costs should be awarded.

[13] [14] Further, § 1920(3) allows "fees and disbursements for ... witnesses." Through reference to 28 U.S.C. § 1821(b), courts may tax witness fees at $40.00 per day. *Meredith v. Schreiner Transport, Inc.,* 814 F.Supp. 1004 (D.Kan.1993). The prevailing party may also request the court to tax the costs of reasonable travel expenses for witnesses. *Id.* at 1007. Plaintiff's requested costs comport with the statutory guidelines. Therefore the Court denies

defendant's motion.

Fees for Exemplification and Copies

[15] [16] [17] [18] Defendant claims that the costs of copying the Tovar personnel file, the Tovar medical file, and the IBP OSHA logs should not be taxed. As previously explained, the general rule establishes that the cost of copies may be taxed if those copies are reasonably necessary for use in the case. *City of Kansas City,* 659 F.Supp. at 1218. Plaintiff offers no argument as to why the Tovar files were necessary to the ***Ortega*** case. Because it also cannot identify a reason, the Court sustains defendant's motion as to the Tovar files. In its Order (Doc. # 224), filed August 31, 1994, the Court ruled that the OSHA logs could not be used at trial. Thus, the Court also sustains defendant's motion as to the OSHA files. Defendant also questions the reasonableness of plaintiff's charge of $1.00 per page for a fax which defendant requested on August 9, 1994. The Court finds that $1.00 per page is a reasonable and common charge for faxing and denies defendant's motion.

[19] Finally, defendant objects to $240.87 in copying expenses. Defendant objects on the grounds of a lack of documentation of the type and necessity of the copying. Plaintiff merely provided the date of copying and dollar amount for each copying charge. Plaintiff provides no explanation of the nature of the document being copied. Although the Court finds that $240.87 is a minimal and reasonable charge for copying expenses, it denies defendant's objection pending plaintiff's submittal of a general explanation of the nature of the documents copied and their necessity to the litigation.

Other Costs

[20] Finally, defendant claims that expenses totalling $5,996.71 should not be taxable because § 1920 does not specifically address these expenses. These expenses include legal research, long distance phone calls, postage, fax services, **mileage, and *563 meals**. The Court agrees that § 1920 does not address these types of expenses. In *City of Kansas City,* the court found that postage, **long distance telephone calls,** and **computer assisted legal research expenses** are not included in the expenses authorized to be taxed under § 1920. 659 F.Supp. at 1218. Under *Meredith,* courts may not tax travel and lodging expenses for counsel. 814 F.Supp. at 1007. Thus, the Court sustains defendant's objection to such costs.

[21] Defendant also objects to being taxed for consulting and witness fees for plaintiff's expert witnesses. Under 28 U.S.C. § 1821(b), through § 1920, courts allow the taxing of a **$40.00 per day for witness fees**. *Meredith,* 814 F.Supp. at 1005. Defendant cites *Ramos* for the proposition that § 1920 does not allow the taxing of expert witness; however, it is unclear whether the court in that case refers to the expert's billing fee for services or to the statutorily compensable fee of the expert. In light of *Meredith* and the statutory language of 28 U.S.C. § 1821, this Court interprets *Ramos* to not allow reimbursement for the fee billed by the expert. A prevailing party, however, may tax the $40.00 per day witness fee for the expert witness. *See Miller v. City of Mission, Kan.,* 516 F.Supp. 1333, 1340 (D.Kan.1981); *Miller v. Cudahy Co.,* 656 F.Supp. 316, 337 (D.Kan.1987). Thus, plaintiff may tax a fee of $40.00 per day for each witness. Under this standard, plaintiff is due $40.00 for Dr. Schulman's testimony on September 22, 1994, and $40.00 for Mr. Olson's testimony on September 22, 1994.

Finally, defendant objects to taxing of the remainder of the Boddington & Brown bill not addressed by the above discussion. The remainder should only entail copying expenses. As the Court held with respect to unsubstantiated copying expenses, plaintiff must provided a general explanation of the nature of the copies identified in Attachment 22 of Document # 275 (January 27, 1995) and their necessity to the litigation.

IT IS THEREFORE ORDERED that defendant's *Motion to Retax Costs* (Doc. # 276) filed February 2, 1995, be and is hereby granted in part and denied in part. **On or before March 26, 1995,** plaintiff shall provide a more detailed explanation of copying expenses. The Court will then evaluate the necessity of plaintiff's copying expenses. Once the Court has resolved that issue, or the Court is informed that counsel have resolved it by agreement, the Court will direct the clerk to retax the costs.

Footnotes

1 Please refer to the following discussion of mailing costs, which limits the taxed costs.

[2] Specifically, the receipts submitted by plaintiff show that these costs total $8.90, broken down as follows:
Fiehler—$2.90
Brownrigg—$3.00
Holman & Trout—$3.00

196 F.R.D. 404
United States District Court,
D. Kansas.

Harold T. **PEHR**, Plaintiff,
v.
RUBBERMAID, INC., Defendant.

No. 99-2089-JWL. | July 10, 2000.

Owner of patent for closable container's latch mechanism sued competitor for infringement. The District Court, Lungstrum, J., 87 F.Supp.2d 1222, granted defendant's motion for summary judgment. On patent holder's objection to defendant's bill of costs, the District Court, Lungstrum, J., held that: (1) costs which defendant incurred in copying prosecution histories of patents in suit, in amount of $28.88, as well as motion copying charges of $120.96, were reasonable charges that were properly taxable as costs; (2) costs that defendant incurred in its prior art searches, in amount of $9,697.30, were recoverable only in part; (3) **photocopying expenses which defendant incurred in responding to patent holder's discovery** requests were not taxable as costs; and (4) defendant failed to show that patent holder had forced it to incur **microfilm printing costs**, or that any special circumstances existed supporting award of such costs.

Objections granted in part and denied in part.

West Headnotes (15)

[1] **Federal Civil Procedure**
Amount, rate and items in general

Not all expenses that are associated with litigation are recoverable against non-prevailing party, and items proposed by winning parties as costs should always be given careful scrutiny. 28 U.S.C.A. § 1920.

[2] **Federal Civil Procedure**
Taxation

If prevailing party makes preliminary showing that its requested costs fall within statutorily enumerated categories of recoverable costs, then presumption arises in favor of taxing those costs, and burden is on nonprevailing party to overcome the presumption in favor of prevailing party. 28 U.S.C.A. § 1920.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**
Discretion of court

Allowance or disallowance of costs to prevailing party is within sound discretion of district court. 28 U.S.C.A. § 1920.

[4] **Federal Civil Procedure**
Discretion of court
Federal Civil Procedure
Prevailing party

Although allowance or disallowance of costs to prevailing party is within sound discretion of district court, that discretion is not unfettered, and is fundamentally limited by presumption that costs associated with action are to be assessed against unsuccessful litigant. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc.Rule 54(d)(1), 28 U.S.C.A.

[5] **Federal Civil Procedure**
Taxation

In event that district court chooses to deny costs to prevailing party, court is required to provide valid reason to support that denial. 28 U.S.C.A. § 1920.

[6] **Federal Civil Procedure**
Stenographic costs

Document copies are not "necessarily obtained" for use in case, within meaning of federal statute governing allowance of such copying charges as taxable cost against nonprevailing party, simply because copies add to convenience of parties and perhaps make the task of trial judge easier; item is "necessarily obtained," within meaning of costs provision, only when court believes that its procurement was reasonably necessary to prevailing party's preparation of its case. 28 U.S.C.A. § 1920.

3 Cases that cite this headnote

[7] **Federal Civil Procedure**
Amount, rate and items in general

Even if court concludes that a claimed cost was "necessarily incurred" in litigation, amount of award requested must be reasonable. 28 U.S.C.A. § 1920.

1 Cases that cite this headnote

[8] **Patents**
Charts, drawings, models, and copies

In patent infringement action, costs which defendant incurred in copying prosecution histories of patents in suit, in amount of $28.88, as well as motion copying charges of $120.96, were reasonable charges that were properly taxable against patent holder as costs, once defendant prevailed on its claims of non-infringement. 28 U.S.C.A. § 1920.

[9] **Patents**
Disbursements in General

In patent infringement action, costs that defendant incurred in its prior art searches, in amount of $9,697.30, were recoverable only in part, once defendant prevailed on its claims of non-infringement; although patent copying charges of $190.00 were taxable as costs, remaining charges in amount of $9,507.30, which defendant had paid for professional services, dispatch charges, and online searching fees, were not taxable under federal costs provision. 28 U.S.C.A. § 1920.

[10] **Federal Civil Procedure**
Taxation

Prevailing party moving for award of costs has burden of establishing that the costs sought fall within terms of federal costs provision. 28 U.S.C.A. § 1920.

[11] **Patents**
Charts, drawings, models, and copies

After defendant successfully defended patent holder's infringement claims, photocopying expenses which defendant incurred in responding to patent holder's discovery requests were not taxable as costs, as charges for copies of papers "necessarily obtained" for use in case; because defendant possessed the original documents of which photocopies were made, it did not "obtain" papers, within meaning of federal costs provision. 28 U.S.C.A. § 1920.

8 Cases that cite this headnote

[12] **Federal Civil Procedure**
Depositions

As general rule, prevailing parties are not entitled to recover costs incurred in responding to

discovery. 28 U.S.C.A. § 1920.

5 Cases that cite this headnote

[13] **Federal Civil Procedure**
Stenographic costs

Charges for microfilm reproduction do not fall within terms of federal costs provision, such that microfilm reproduction is in nature of nonstatutory cost. 28 U.S.C.A. § 1920.

[14] **Federal Civil Procedure**
Amount, rate and items in general

Court should sparingly exercise its discretion with regard to award of costs not specifically allowed by statute. 28 U.S.C.A. § 1920.

[15] **Patents**
Charts, drawings, models, and copies

In patent infringement action, alleged infringer failed to show that patent holder had forced it to incur microfilm printing costs, or that any special circumstances existed supporting an award of such costs after alleged infringer prevailed on its non-infringement claim, particularly where, once attorneys for alleged infringer advised patent holder's counsel of extreme costs associated with printing requested documents from microfilm, counsel for patent holder directed attorneys not to reproduce the microfilm on ground that it was too expensive. 28 U.S.C.A. § 1920.

Attorneys and Law Firms

***406** Michael Elbein, Kent R. Erickson, Douglas M. Weems, Spencer, Fane, Britt & Browne, Kansas City, MO, Mark M. Grossman, Lee F. Grossman, Randall G. Rueth, Grossman & Grossman, Ltd., Chicago, IL, for plaintiff.

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Opinion

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

On March 1, 1999, plaintiff filed this patent infringement action, claiming that defendant **Rubbermaid's** distribution and sale of a latch closure mechanism used on particular models of its *Action Packer* ® containers infringed certain claims of United States Patents Nos. 4,925,041 (the " '041 patent") and 5,137,260 (the " '260 patent"). **Rubbermaid** counterclaimed for a declaratory judgment of invalidity and non-infringement of the '041 and '260 patents. On March 8, 2000, this court granted defendant **Rubbermaid's** motion for summary judgment of non-infringement and dismissed plaintiff's complaint in its entirety. *See* ***Pehr*** *v.* ***Rubbermaid****, Inc.,* 87 F.Supp.2d 1222, 1238 (D.Kan.2000).[1] The ***407** matter is presently before the court on plaintiff's objections to defendant's bill of costs (doc. 68). For the reasons set forth below, the court grants plaintiff's objections in part and awards costs against plaintiff in the amount of $339.84.

I. Analysis

[1] [2] Pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure, "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs...." Fed.R.Civ.P. 54(d)(1). Rule 54(d) is governed by 28 U.S.C. § 1920, which provides that a judge or clerk of the court may tax as costs certain categories of expenses incurred during litigation, such as the costs of depositions, court transcripts, and **copying fees**. *See* 28 U.S.C. § 1920.[2] As is reflected by the language of § 1920, not all expenses associated with litigation are recoverable against the non-prevailing party, and "[i]tems proposed by winning parties as costs should always be given careful scrutiny." *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988) (quoting *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964)). If the prevailing party makes

a preliminary showing that its requested costs fall within the categories of recoverable costs enumerated in § 1920, a presumption arises in favor of taxing those costs, and "[t]he burden is on the nonprevailing party to overcome the presumption in favor of the prevailing party." *Cantrell v. IBEW Local 2021,* 69 F.3d 456, 458-59 (10th Cir.1995) (citation omitted).

[3] [4] [5] Although "[t]he allowance or disallowance of costs to a prevailing party is within the sound discretion of the district court," that discretion is not unfettered. *Zeran v. Diamond Broadcasting, Inc.,* 203 F.3d 714, 722 (10th Cir.2000). The court's discretion is fundamentally limited by Rule 54(d)(1)'s presumption that costs associated with an action are to be assessed against the unsuccessful litigant. *See id.* Further, and as an additional limitation to the court's discretion in awarding costs, in the event that the district court chooses to deny costs to the prevailing party, the court is required to provide a valid reason to support such a denial. *See id.*

[6] [7] In its bill of costs, defendant requests the clerk to tax costs in the amount of $30,762.86, all of which are claimed by defendant as falling within the scope of § 1920(4), which allows for the taxation of "fees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). As the term has been interpreted by the Tenth Circuit, " 'necessarily obtained' does not mean that the materials obtained 'added to the convenience of the parties... and perhaps...made the task of the trial judge[ ] easier.' " *U.S. Industries,* 854 F.2d at 1245 (quoting *Farmer,* 379 U.S. at 234, 85 S.Ct. 411). Instead, an item is "necessarily obtained" within the meaning of § 1920(4) only where the court believes that its procurement was reasonably necessary to the prevailing party's preparation of its case. *Id.* Even if the court concludes that a claimed cost was necessarily incurred in the litigation, "the amount of the award requested must be reasonable." *Id.*

A. Uncontested Costs

[8] In his papers, plaintiff does not object to the taxation of the following costs: (1) copies of prosecution histories of the patents-in-suit in the amount of $28.88; and (2) motion ***408** copying charges in the amount of $120.96. To the extent that these costs are unchallenged, and further because there is no evidence that these costs are unreasonable, the court concludes that the costs in the amount of $149.84 are properly taxable against plaintiff.

B. Prior Art Searches

[9] Plaintiff objects to defendant's submission of $9,697.30 as costs incurred to perform prior art **searches** relevant to defendant's patent invalidity claims. Defendant has submitted with its bill of costs two billing statements in which the charges attendant to the prior art searches are itemized. *See* Ex. 8 to Def. Bill of Costs (doc. 67). A review of those billing statements reveals four separate categories of charges related to the prior art searches: "professional services rendered" fees totaling $9400.00, dispatch charges totaling $81.30, online searching charges in the amount of $26.00, and patent copies totaling $190.00.

Defendant asserts that all of the costs associated with the prior art searches fall within § 1920(4). As set forth above, § 1920(4) allows the court to award costs "fees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). By the statute's terms, then, it appears that the costs charged for patent copies, or $190.00, are recoverable against plaintiff. With respect to the remaining $9507.30 associated with the prior art searches, however, the court concludes that defendant has failed to demonstrate that those costs are properly taxable under § 1920(4).

[10] As set forth above, defendant bears the burden to establish that the costs sought fall within the provisions of § 1920. *See, e.g., Green Construction Co. v. Kansas Power & Light Co.,* 153 **F.R.D**. 670, 675 (D.Kan.1994). Section 1920(4), the subsection under which defendant claims all costs associated with the prior art searches are recoverable, does not provide for the award of costs such as fees "for professional services rendered," dispatch charges, or online searching fees. *See* 28 U.S.C. § 1920(4); *see, e.g., Green Constr.,* 153 **F.R.D**. at 676 (consultant fees not taxable under § 1920); *Albertson v. IBP Inc.,* 1997 WL 613301, at *1-*2 (D.Kan.1997)(computer-assisted research, delivery expenses not properly recoverable under § 1920). Although defendant asserts that the costs are recoverable under § 1920(4) because they are reasonable and were necessarily incurred in the preparation of its case, defendant has failed to cite, and the court's research does not reveal, any authority to support the proposition that such fees are properly taxable pursuant to § 1920(4). The court therefore declines to award the remaining costs associated with the prior art searches, and instead limits the amount of recoverable costs related to prior art searches to $190.00.

C. Photocopying Costs in Response to Plaintiff's Discovery Requests

[11] [12] Defendant seeks costs for copies responsive to plaintiff's discovery requests in the amount of $5,845.92.

As set forth above, § 1920(4) allows the court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery; because the producing party possesses the original documents, such papers are not "obtained" for purposes of § 1920(4). *See, e.g., Phillips USA, Inc. v. Allflex USA, Inc.,* 1996 WL 568814, at *2 (D.Kan. Sept. 4, 1996). Therefore, because defendant possessed the original documents of which photocopies were made in response to plaintiff's discovery requests, the court denies these costs.[3]

***409 D. Microfilm Reproduction Costs**

Defendant claims that it should be awarded costs in the amount of $15,069.80 to cover the amount it expended in **microfilm reproduction costs.** Plaintiff "strenuously objects" to these costs, explaining that it expressly directed defendant not to reproduce the microfilm on two separate occasions, but that defendant printed the microfilm despite those requests. In response, defendant maintains that, but for plaintiff's pursuit of his motion to compel discovery, defendant would not have been required to incur such costs.

[13] [14] [15] As a preliminary matter, costs for microfilm reproduction do not fall within the provisions of § 1920. As such, microfilm reproduction is a nonstatutory cost. It is well-settled that "the court should sparingly exercise its discretion with regard to expenses not specifically allowed by statute." *U.S. Industries,* 854 F.2d at 1246. As explained below, the court concludes that no special circumstances exist to justify awarding the cost of microfilm reproduction to defendant, and thus declines to exercise its discretion to tax such costs against plaintiff. *See id.* (affirming denial of costs associated with microfilm reproduction and document analysis).

It is undisputed that both parties were well aware that the cost of printing microfilmed documents responsive to plaintiff's discovery requests would be substantial. Indeed, once counsel for defendant advised plaintiff's counsel of the extreme costs associated with printing the requested documents from microfilm, counsel for plaintiff directed **Rubbermaid's** attorneys not to reproduce the microfilm on the ground that it was too expensive to do so.

On October 1, 1999, plaintiff filed a motion to compel discovery.[4] As set forth in the order granting in part and denying in part plaintiff's motion, the fact that any costs associated with microfilm reproduction would be considerable was brought to the attention of the presiding magistrate judge. *See* Memorandum and Order dated October 14, 1999 at 4 (doc. 37). Also reflected in the order is plaintiff's agreement "to wait until defendant responds to the request after they have finished reviewing the microfilm." *Id.* Despite defendant's assertions to the contrary, that the magistrate's order nevertheless set a deadline for defendant's response does not mean that, if **Rubbermaid** was unable to meet that deadline, defendant was automatically entitled to print the microfilm, and recoup the costs from plaintiff in the event that it prevailed in the litigation. Instead, if defendant was unable to comply with the deadline set forth in the order, rather than reproducing the microfilm in contravention of the parties' agreement, **Rubbermaid** could have returned to the magistrate and requested an extension of time to comply with his order. Defendant's assertion at this juncture of the litigation that the deadline set forth in the magistrate's order was too restrictive is inappropriate; any such complaint would have been more appropriately raised and addressed during the discovery process. In short, the court finds unpersuasive defendant's argument that plaintiff "forced" it to incur the microfilm printing costs, and because it concludes that there exist no special circumstances here to warrant the assessment of such costs against plaintiff, the court in its discretion declines to award defendant ***410** any of its costs associated with microfilm reproduction in this case. Defendant's request for microfilm reproduction costs in the amount of $15,069.80 is, therefore, denied.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' objections to defendant's bill of costs (doc. 68) is granted in part and denied in part. The defendant is awarded costs against the plaintiff in the amount of $339.84.

Parallel Citations

47 Fed.R.Serv.3d 1323

Footnotes

1 On June 20, 2000, a telephone status conference in this action was held to resolve the parties' differing views regarding the effect of the court's entry of summary judgment of non-infringement on defendant's counterclaims for a declaratory judgment of non-infringement and patent invalidity. During the conference, the plaintiff accepted the defendant's position that **Rubbermaid's**

counterclaims were dismissed without prejudice by virtue of the court's March 8, 2000 entry of summary judgment of non-infringement. By that accession, counsel for plaintiff acknowledged that the time period during which plaintiff could file his notice of appeal was triggered by the March 8, 2000 order, and further stated that, because a notice of appeal was never timely filed in this case, Mr. **Pehr** has no intention to appeal the court's entry of summary judgment of non-infringement. In return, defendant formally agreed that, subject to the condition that it is not sued again for infringement of the '041 and '260 patents, it will not attempt to resurrect its counterclaims, despite the fact that their dismissal was without prejudice.

2 Specifically, § 1920 provides, in pertinent part:

> 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers 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.

28 U.S.C. § 1920.

3 Defendant cites *American Key Corp. v. Cumberland Assocs.,* 102 **F.R.D**. 496 (N.D.Ga.1984) for the proposition that, in complex cases involving large volumes of documents, courts "routinely find that... it is a practical necessity for adequate trial preparation for counsel to assemble a complete file of documents," and thus that it is entitled to recover the cost of photocopying the documents produced in response to plaintiff's discovery requests. Def. Repl. at 4 (citing *American Key,* 102 **F.R.D**. at 499). What defendant fails to mention, however, is that in making that observation, the *American Key* court was concerned with complex cases in which the originals of documents were spread amongst several co-defendants in different locations, noting that an attorney "cannot be expected to travel from place to place to examine documents which are necessary for use in the case." *Id.* Accordingly, the *American Key* court explained, "where the papers themselves are necessary for trial preparation the cost of copying them is generally going to be taxable *unless that party also has the originals.*" *Id.* In this case, because the photocopies of documents for which defendant seeks costs were of papers in defendant's possession, defendant's reliance on *American Key* is misplaced.

4 The parties appear to disagree as to whether plaintiff's motion to compel discovery was filed before or after his counsel was alerted to the cost of microfilm reproduction. Because plaintiff's agreement to wait until the documents could be reviewed through a viewing device is documented in Magistrate Reid's order deciding plaintiff's motion to compel, however, the court does not believe the precise timing of the filing of plaintiff's motion, i.e., whether it was before or after counsel for defendant explained the significant costs associated with printing the microfilm, makes any difference in the resolution of the issues presented here.

1998 WL 754614
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Ted and Debra **SCHEUFLER**, husband and wife; Paul and Elva **Scheufler**, husband and wife, Harvey Wilhaus; Alice M. Richmond; Mavel V. Colle Trust; Kenneth D. and Eileen P. Knapp, husband and wife; Pierce Knapp Farms, Inc., by Walter C. Pierce, President; and Violet Stockham, Plaintiffs,
v.
GENERAL **HOST** CORPORATION, a New York Corporation, Defendant.

No. 91–1053. | May 14, 1998.

Opinion

Memorandum and Order

BROWN, Senior District J.

***1** This matter is before the court on the parties' motions to retax costs assessed by the clerk of the court. (Docs. 481 and 482). Plaintiffs, who prevailed after a lengthy and complex trial, submitted an amended bill seeking $71,445.22 in costs. (Doc. 476). The clerk found plaintiffs were entitled to costs of $42,837.79. (Doc. 478). Both sides now assert challenges to the clerk's determination. The court finds that oral argument would not assist in deciding these motions.

I. ***Standards Governing Award of Costs.***
Federal Rule of Civil Procedure 54(d)(1) provides that costs other than attorneys' fees shall be allowed to the prevailing party unless the court directs otherwise. Section 1920, Title 28 of the U.S.Code, sets forth the costs that may be taxed under this rule. They are: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witness; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; and (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of Title 28.

A trial court has no discretion to award costs not listed in § 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). The prevailing party has the burden of proving that the expenses sought to be taxed fall within the § 1920 categories. *Green Constr. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 675 (D.Kan.1994). If the prevailing party carries this burden, a presumption arises in favor of taxing those costs. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir.1988). The amount of such costs, however, must be carefully scrutinized to ensure that it is reasonable. *Id.* A trial court reviews de novo the clerk's assessment of costs and the final award rests in the sound discretion of the court. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 232–33, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964).

II. ***Plaintiff's Motion to Retax.***
Plaintiffs first argue that they are entitled to an additional $2,668.09 for postage and long distance phone charges because Judge Theis awarded those costs in the related case of *Miller v. Cudahy Co.*, 656 F.Supp. 316 (D.Kan.1987). Plaintiffs argue that such an award is mandated by collateral estoppel. The court disagrees. Judge Theis' ruling in *Miller* was made without benefit of the Supreme Court's *Crawford Fitting* opinion, supra, which made clear that federal courts have no authority to award costs not authorized by § 1920. Since that time, numerous courts have held that postage and **long distance charges** are not within the costs authorized by § 1920. *See e.g., Ortega v. IBP, Inc.*, 883 F.Supp. 558, 563 (D.Kan.1995). This intervening change in the law precludes application of collateral estoppel. *See e.g., Montana v. United States*, 440 U.S. 147, 161–62, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Moreover, plaintiffs have not shown that these were significant expenses in the first proceeding or that the defendant had an incentive to fully challenge them. *See Murdock v. Ute Indian Tribe*, 975 F.2d 683, 689 (10th Cir.1992) (whether the party had an incentive to fully litigate the issue is a relevant factor in collateral estoppel). As such, the prior judgment does not require the taxing of these costs.

***2** Plaintiffs' second claim is for an additional $3,772.93 for Federal Express charges, facsimile and **delivery costs**. Plaintiffs cite no subsection of § 1920 to support this claim. Nor have they provided any factual basis to show that such expenses were necessary, as opposed to merely being for the convenience of counsel. Accordingly, the claim is denied.

Plaintiffs' third claim relates to witness fees for a number

of witnesses who did not testify at trial. Plaintiffs assert that it was necessary for these individuals to attend trial because it was anticipated they would be called to lay foundation or to rebut defense testimony. Pl. Mot. at 5. The court finds this explanation to be inadequate. Where a **witness does not testify**, a presumption naturally arises that the witness was not necessary to the case. *See Green Construction*, 153 F.R.D. at 679. Plaintiffs offer no specifics to overcome this presumption. Accordingly, the court denies the claim.

Plaintiffs' final claim is for copying costs of $21,373.00. This figure is based on 42,747 copies at a rate of fifty cents per page. The clerk awarded copying costs of $4,797.69 based on **a rate of ten cents per page**. Plaintiffs object to the ten cent rate, arguing that it comes from a case nearly six years old and that since that time "inflation has greatly elevated the cost of providing in-house copies...." Pl. Mot. at 5. Leaving aside plaintiffs' generous estimate of the rate of inflation, the court concludes that plaintiffs have failed to show that a rate of fifty cents per page is reasonable. *Cf. Hurley v. Atlantic City Police Dept.*, No. 93–260, 1996 WL 549298 at *4 (D.N.J., Sept. 17, 1996) ($.25 per page is excessive because there are numerous commercial services that will copy for far less). Plaintiffs have provided nothing to substantiate such a claim. Under the circumstances, the court finds that ten cents per page is reasonable.

III. ***Defendant's Motion to Retax.***

Defendant first argues that no costs should be awarded because Judge Theis' punitive damage award included an allowance for such costs. The court is not persuaded. The expenses taken into account by Judge Theis in determining punitive damages appeared to exclude allowable costs. *See* ***Scheufler*** *v. General* ***Host*** ***Corp.***, 915 F.Supp. 236, 243 (D.Kan.1995); Pl. Exh. 2. *See also* Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2666 (distinguishing between "costs" and "expenses"). Moreover, punitive damages are designed to punish and deter wrongful conduct, not to reimburse the plaintiff. Thus, even assuming the costs were considered in setting the punitive damages, the court finds that the allowance of costs in this case is proper and is compatible with the punitive damage award.

Defendant's second contention is that the clerk's allowance for copying costs should be reduced. The court concludes that the itemization submitted by plaintiffs is sufficient to show that 42,747 copies were necessarily obtained for use in the case. The court therefore rejects defendant's argument.

***3** Defendant next objects to the taxing of $8,375.00 **for renting an "Elmo" device for trial.** The "Elmo" was a closed-circuit camera device used to simultaneously display exhibits to the judge and jury. The plaintiffs bear the burden of showing that this item comes within one of the categories in § 1920. *Green Construction*, 153 F.R.D. at 675. Instead of referring to § 1920, however, plaintiffs appear to argue that the court has the equitable power to tax non-statutory costs. Pl. Resp. at 5–6. The Supreme Court has clearly rejected this line of argument. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). Morever, although the court does not doubt that the Elmo made the presentation of exhibits easier, plaintiffs have not shown that its use was reasonably necessary. Accordingly, the cost of this device will not be taxed against the defendant.

Defendant next objects to $21,254.19 in costs which, according to plaintiffs, were "spent **preparing exhibits to support and illustrate** the expert testimony of Dr. Halepaska." Pl. Resp. at 7. Defendant argues that this is really an attempt to recover fees for the services of an expert. Plaintiffs' response does nothing to show otherwise, explaining only that Dr. Halepaska assisted in preparing the exhibits and that they were necessary for trial, and citing the doctor's affidavit stating that he billed this amount for his work on the exhibits. *Id.* at 7–8; Doc. 462, Exh. 11 at p. 000129. The courts have generally refused to permit a prevailing party to recover expert witness fees in the guise of fees for "exemplification." *See Green Construction*, 153 F.R.D. at 676. The costs permitted by statute in this regard relate to the physical preparation and duplication of documents, not the intellectual effort involved in their production. *See Romero v. City of Pomona*, 883 F.2d 1418, 1427–28 (9th Cir.1989). Under the circumstances, plaintiffs have failed to show that this item is recoverable under § 1920. Accordingly, it will be excluded from the bill of costs.

IV. ***Conclusion.***

Plaintiffs' Motion To Retax Costs (Doc. 481) is hereby DENIED. Defendant's Motion To Retax Costs (Doc. 482) is hereby GRANTED IN PART and DENIED IN PART. In accordance with the foregoing findings, the taxation of costs by the clerk is amended as follows:

Fees of the Clerk	$	120.00

Fees for service of summons and subpoena	285.35
Fees of the court reporter	3,546.97
Fees and disbursements for printing	0.00
Fees for witnesses	3,884.09
Fees for exemplification and copies of papers	4,797.69
Docket fees under 28 U.S.C.1923	0.00
Costs as shown on Mandate of Court of Appeals	0.00
Compensation of court-appointed experts	0.00
Compensation of Interpreters	0.00
Other costs	0.00
TOTAL $	**12,634.10**

***4** Costs are hereby taxed in the amount of $12,634.10 plus interest as set forth in 28 U.S.C. § 1961 and included in the judgment. IT IS SO ORDERED this 14th day of May, 1998, at Wichita, Ks.

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2006 WL 3772312
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

Jacquline SEYLER, Plaintiff,
v.
BURLINGTON NORTHERN **SANTA FE** CORPORATION, **Burlington** Northern **Santa Fe** Railway Company and National Rail Passenger Corporation d/b/a Amtrak, Defendants.

Civil Action No. 99–2342–KHV. | Dec. 20, 2006.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

KATHRYN H. VRATIL, United States District Judge.

***1** Jacquline Seyler sustained injuries in a passenger train derailment near Kingman, Arizona. She filed suit against the National Railroad Passenger Corporation (Amtrak), which operated the train, and **Burlington** Northern **Santa Fe** Corporation and **Burlington** Northern **Santa Fe** Railway Company (BNSF),[1] which owned and maintained the railroad track and bridge on which the train was traveling at the time of the derailment. On June 12, 2000, a jury returned a verdict of $295,772.00 in plaintiff's favor. On August 6, 2002, after appeal and briefing on plaintiff's costs, the Clerk taxed costs of $158,910.76 in favor of defendants. *See Bill Of Costs* (Doc. # 181). Some four years later, plaintiff's counsel notified the Clerk that the costs should have been taxed in favor of plaintiff.[2] On October 16, 2006, the Clerk entered a bill of costs nunc pro tunc to reflect that costs were actually taxed in favor of plaintiff. *See Bill Of Costs* (Doc. # 182). This matter is before the Court on *Defendants' Motion To Retax Costs* (Doc. # 183) filed October 20, 2006. For reasons set forth below, defendants' motion is sustained.

Initially, plaintiff argues that the Court should not consider defendants' motion because the Clerk already decided these issues and defendants essentially seek reconsideration of the bill of costs filed four years ago. Plaintiff does not dispute that defense counsel did not receive a copy of the original bill of costs and that despite defense counsel's periodic monitoring of the case over the last four years, the bill of costs did not show up on the Court's public PACER/ECF docket. Based on the Court's review of the docket, it appears that the Clerk did not mail the bill of costs to counsel and that the public version of the docket did not indicate that the bill of costs had been entered. Moreover, the original bill of costs is clearly incorrect because it includes amounts which plaintiff conceded she could not recover, it is $100 more than the total amount plaintiff requested and it taxed the costs in favor of defendants. In these circumstances, the Court finds that defendants timely challenged the revised bill of costs entered on October 16, 2006 by filing a motion on October 20, 2006.

The taxation of costs under Rule 54(d) is governed by 28 U.S.C. § 1920.[3] The Court has no discretion to award costs which are not specifically set forth in Section 1920. *Crawford Fitting Co. v. J .T. Gibbons, Inc.*, 482 U.S. 437, 441–42, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). As the party seeking costs, plaintiff has the burden of establishing the amount of compensable costs and expenses to which she is entitled. *Allison v. Bank One–Denver,* 289 F.3d 1223, 1248–49 (10th Cir.2002). At the same time, a presumption that costs will be awarded arises where the requested costs are authorized under Section 1920. *See Whitaker v. Trans Union* ***Corp.***, No. 03–3251–CM, 2006 **WL** 2574185, at *1 (D.Kan. Aug.8, 2006); *Green Constr. Co. v. Kan. Power & Light Co.,* 153 F.R.D. 670, 674 (D.Kan.1994). Once the prevailing party shows that particular costs are authorized by statute, the non-prevailing party bears the burden to show that the costs are otherwise improper. *See Cantrell v. IBEL Local 2021,* 69 F.3d 456, 459 (10th Cir.1995); *Whitaker,* 2006 **WL** 2574185, at *1.

***2** Defendants concede that plaintiff can recover the filing fee of $150.00. In addition, plaintiff concedes that certain costs should be excluded as follows: priority charges for deposition transcripts ($105.00); trial preparation ($400.00); video copying charge and meal charges on videographer bills ($322.72); copies of depositions of plaintiff's experts ($1,207.90); and mediation fees ($1,025.94). *See Plaintiff's Response To Defendants' Objections To Plaintiff's Bill Of Costs* (Doc. # 180) filed June 5, 2002. The parties dispute whether the remaining

expenses may be taxed as costs.

I. Fees For Service Of Summons And Subpoenas

Plaintiff seeks $969.00 for service of process on defendants and service of subpoenas on third parties for records depositions. The Court may tax "[f]ees of the clerk and marshal." 28 U.S.C. § 1920(1). Although plaintiff did not pay these **fees to the marshal**, service fees to private process servers are generally taxable up to the amount that would have been incurred if the U.S. Marshal's office had effected service. *See Burton v. R.J. Reynolds Tobacco Co.,* 395 F.Supp.2d 1065, 1078 (D.Kan.2005); *Griffith v. Mt. Carmel Med. Ctr.,* 157 F.R.D. 499, 508 (D.Kan.1994); *see also Kan. Teachers Credit Union,* 982 F.Supp. 1445, 1447–48 (D.Kan.1997) (reducing taxable cost of service to amount charged by U.S. Marshal). The cost for service by the marshal at the relevant time was $45. The Court therefore awards $405 for the cost of service of two summons on defendants and service of seven subpoenas on third parties.

II. Court Reporter Fees

Plaintiff seeks $41,465.65 for **court reporter fees.** The Court may tax "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Absent extraordinary circumstances, the costs of taking and transcribing depositions reasonably necessary for litigation are generally awarded to the prevailing party. *Callicrate v. Farmland Indus., Inc.,* 139 F.3d 1336, 1339 (10th Cir.1998). The depositions need not be "strictly essential to the court's resolution of the case." *Id.* at 1340. Necessity in this context means a showing that the materials were used in the case and served a purpose beyond merely making the task of counsel and the trial judge easier. *See U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). A party may recover costs of video depositions that are necessary for the litigation including the costs of the transcript and the videotape. *See Tilton v. Cap. Cities/ABC, Inc.,* 115 F.3d 1471, 1477 (10th Cir.1997).

Defendants object to court reporter costs for more than one copy of a deposition, minuscripts, keyword indices, **ASCII disks**, exhibits, postage and **delivery**. Because these items are primarily for the convenience of counsel, the Court disallows these charges. *See Whitaker,* 2006 **WL** 2574185, at *2 (ASCII disks, condensed transcripts, additional copies of depositions not taxed); *Stadtherr v. Elite Logistics, Inc.,* No. 00–2471–JAR, 2003 **WL** 21488269, at *4 (D.Kan. June 24, 2003) (ASCII disks, minuscripts, multiple copies of depositions, **overnight delivery charges** not taxed); *Hutchings v. Kuebler,* No. 96–2487–JWL, 1999 **WL** 588214, at *3 (D.Kan. July 8, 1999) (ASCII disks and minuscripts not taxed); *Albertson v. IBP, Inc.,* No. 96–2110–KHV, 1997 **WL** 613301, at *2 (D.Kan. Oct.1, 1997) (delivery charges not taxed); *Ortega v. IBP, Inc.,* 883 F.Supp. 558, 562 (D.Kan.1995) (postage associated with depositions not taxed); *Berry v. Gen. Motors **Corp.***, No. 88–2570–JWL, 1995 **WL** 584496, at *3 (D.Kan. Sept.22, 1995) (ASCII disks not taxed).

***3** Defendants next object to court reporter costs for "real time" reporting. Plaintiff has not explained why the additional charge for "real time" reporting was necessary in this case. Accordingly, to the extent that the invoices reflect an additional charge for real time reporting, the Court disallows such expenses.

Defendants argue that the $4 per page charge for deposition transcripts from Tri–State Reporting and the $4.50 per page charge from Associated Reporting is unreasonably high. Plaintiff maintains that these charges were the going rate in Kingman, Arizona and Las Vegas, Nevada. Defendants do not offer any evidence of the market rate in these areas. Absent specific evidence on the issue, the Court must assume that plaintiff's counsel paid the market rate for court reporters. The Court therefore overrules defendants' objection on this ground.

Defendants also object that "time stamping" on the deposition transcript was for the convenience of counsel. The Court disagrees. Defendants do not specifically object to the fact that many of the depositions were videotaped. Time stamping synchronizes the video deposition to the written transcript. This feature allows counsel to show the video deposition at trial without significant delays caused by last minute edits or objections. Numerous courts have held that costs associated with videotaped depositions are recoverable. *See Tilton,* 115 F.3d at 1477; *Meredith v. Schreiner Transp., Inc.,* 814 F.Supp. 1004, 1005–06 (D.Kan.1993) (citing cases). **Time stamping** is in part for the convenience of counsel, but it is primarily a cost to show the **video deposition** at trial. Accordingly, it is recoverable under Section 1920. *See id.* (costs associated with showing deposition at trial are taxable)

Plaintiff's counsel used a videographer from Kansas City, Kansas. Plaintiff seeks to recover the videographer's travel expenses to various depositions in Arizona, Nevada and California. Defendants object to the videographer's travel expenses because plaintiff could have employed local videographers for the various depositions. Defendants have not shown that plaintiff's videographer expense would have been less by using local videographers. The travel expenses for the videographer appear to be

reasonable, but the Court finds that using a videographer from Kansas City was primarily for the convenience of plaintiff's counsel. Plaintiff has not shown that she incurred any savings (before travel expenses) by using a videographer from Kansas City. The Court therefore will disallow the travel expenses incurred by the videographer.

Defendants object to the expense of a videographer for site inspections. Plaintiff argues that **the video was a trial exhibit and was prepared to help the jury understand the terrain at the site of the derailment.** The Court finds that the videographer's fee for site inspections is not recoverable under Section 1920(2) as fees of a court reporter necessarily obtained for use in the case.[4]

***4** Defendants object to the videographer expenses itemized as "DV Deposition–Process (per hour of finished testimony. Includes MPEG–1 capture of video/audio, processing with ASCII Court Reporter text on 1 CD–ROM)." Such expense appears to be reasonably related to the preparation of the video transcript for use at trial.[5] The Court therefore allows the expense.

Defendants next object to a videographer cancellation fee of $300 because plaintiff's counsel brought an additional videographer. The Court agrees that this expense was unnecessary and excludes it.

Defendants object to a number of invoices which do not contain an adequate explanation of the services rendered. Defendants' objection is well taken and the Court has excluded charges which do not include an explanation or have such an inadequate explanation that the Court cannot ascertain whether the expenses were reasonably incurred in this case.

Based on the above rulings, the Court awards a total of $27,254.50 in court reporter costs.[6]

III. Witness Fees

Plaintiff seeks $115.00 for fees and expenses related to two potential witnesses—Bill Byers and Amy Redmond. The Court may tax fees for witnesses. *See* 28 U.S.C. § 1920(3). Defendants argue that because plaintiff did not call the two witnesses, they were not necessary. Redmond was necessary to testify as to plaintiff's work performance before defendants agreed to allow certain hearsay testimony into evidence. Plaintiff has not explained how Byers was necessary in this case. The Court therefore allows the witness fees related to Redmond ($60.00), but disallows the witness fee and expenses related to Byers.

IV. Copy Expenses

Plaintiff seeks $19,713.99 for copy expenses. The Court may tax fees for "exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4).

Initially, the Court evaluates whether the expense of a videographer for site inspections is recoverable as "exemplification" or copy costs. The term "exemplification," as used in § 1920(4), has been interpreted to embrace all kinds of demonstrative exhibits, including models, charts, photographs, illustrations, and other graphic aids. *See Burton,* 395 F.Supp.2d at 1085; *Manildra Milling* ***Corp****. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1428 n. 10 (D.Kan.1995), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996). The Tenth Circuit has not addressed whether video demonstrative exhibits such as the site inspections here are recoverable costs of exemplification. The Supreme Court, however, has held that a district court has no discretion to award costs which are not specifically set forth in Section 1920. *See Crawford Fitting,* 482 U.S. at 445. The Court agrees with the reasoning of those courts which have held that video exhibits are not recoverable costs of exemplification or copies of papers under Section 1920(4). *See, e.g., Kinzenbaw v. Case L.L.C.,* No. 05–1483, 2006 **WL** 1096683, at *4 (Fed.Cir. Apr.26, 2006) (graphics presentation at trial not exemplification) (Eighth Circuit law); *Summit Tech., Inc. v. Nidek Co.,* 435 F.3d 1371, 1377–78 (Fed.Cir.2006) (video exhibit not exemplification or copy of papers) (First Circuit law); *Kohus v. Toys R Us, Inc.,* 282 F.3d 1355, 1359 (Fed.Cir.) (same) (Sixth Circuit law), *cert. denied,* 537 U.S. 1044, 123 S.Ct. 659, 154 L.Ed.2d 515 (2002); *Arcadian Fertilizer, L.P. v. MPW Indus. Servs., Inc.,* 249 F.3d 1293, 1297 (11th Cir.2001) (demonstrative videotape exhibit is not exemplification or copy of papers). *But see Cefalu v. Vill. of Elk Grove,* 211 F.3d 416, 427–28 (7th Cir.2000) (computer generated, multimedia presentation is "exemplification" in broad sense of term).

***5** Defendants first object to counsel's internal copying costs of $7,406.00 because the attached invoice does not reflect the cost per page or what specific documents were copied. Counsel's invoice only contains charges that are multiples of 20 cents and 20 cents is the lowest itemized charge, so the Court concludes that **20 cents is the cost per page.** In addition, the Court finds that 20 cents per page is a reasonable rate.

As to defendant's objection to the lack of detail on the invoice, the Court declines to require plaintiff's counsel to give an itemization of every copy or series of copies. *See Northbrook Excess & Surplus v. Procter & Gamble,* 924 F.2d 633, 643 (7th Cir.1991) (prevailing party need not

furnish description of copy expenses "so detailed as to make it impossible economically to recover photocopying costs"); *Fogleman v. ARAMCO,* 920 F.2d 278, 286 (5th Cir.1991). Such an itemization would only further escalate the costs for all parties. At the same time, absent a more detailed accounting of counsel's internal copying costs, the Court cannot find that all of these costs were reasonably necessary to present the case. *See id.* (charges for multiple copies of documents, attorney correspondence, and other such items are not taxable as costs). Absent an itemized statement of copying costs, the Court has discretion to reduce counsel's stated costs based on its own experience and knowledge of the case. *See Summit,* 435 F.3d at 1378 (although simple 50 per cent reduction is somewhat crude method of accounting for non-necessary copies, district court acted within its discretion in awarding vendor costs based on such estimate and should have reduced internal copy costs in similar manner); *U.S. ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridan Constr.* ***Corp.***, 95 F.3d 153, 173 (2d Cir.1996) (district court acted within its discretion by awarding $5,000 of requested $17,690.78 in copying costs where such costs were not itemized); *Rice v. Sunrise Express, Inc.,* 237 F.Supp.2d 962, 981 (N.D.Ind.2002) (reducing copy cost by 20 per cent to account for possibility that some were made for convenience of counsel); *Meacham v. Knolls Atomic Power Lab.,* 185 F.Supp.2d 193, 243 (N.D.N.Y.2002) (reduction of approximately 25 per cent when copying costs lacked sufficient detail or explanation), *aff'd,* 381 F.3d 56 (2d Cir.2004), *judgment vacated on other grounds,* 544 U.S. 957, 125 S.Ct. 1731, 161 L.Ed.2d 596 (2005); *Cadena v. Pacesetter* ***Corp.***, No. 97–2659, 1999 **WL** 450891, at *8 (D.Kan.1999) (finding $462.20 in copies necessary based on court experience and knowledge of case without requiring itemization), *aff'd,* 224 F.3d 1203 (10th Cir.2000); *Jansen v. Packaging* ***Corp.*** *of Am.,* 898 F.Supp. 625, 629 (N.D.Ill.1995) (reducing catch-all category of copies by "about one-third" as most likely representing copies for convenience rather than necessity). Based on the Court's knowledge of the extent of discovery, the number of pages filed by plaintiff, the pretrial order, motions in limine and the number of trial exhibits, the Court finds that roughly 75 per cent of counsel's internal copying cost was for counsel's convenience and not reasonably necessary to present the case. Accordingly, the Court awards $1,851.40 (9,257 copies at 20 cents per page)—25 per cent of counsel's stated copying costs.

***6** Defendants have agreed to third party copying charges of $950.67.[7]

As to the remaining third party copying charges of $11,357.32, defendants argue that plaintiff has not shown that each of the expenses (including color copies of some exhibits) was reasonably necessary in this case. The Court admitted some 20 photographs at trial, and before defendants stipulated to liability shortly before trial, plaintiff identified some 208 photographs on her final exhibit list. As explained above, absent an itemized statement of copying costs, the Court has discretion to reduce the stated costs based on its own experience and knowledge of the case. Based on the complexity of this case and the volume of exhibits which plaintiff's counsel reasonably expected to use at trial before defendants stipulated to liability, the Court finds that roughly 70 per cent of third party copying costs was for counsel's convenience and not reasonably necessary in this case. The Court has awarded 30 per cent of the remaining third party invoices because the total award of copying costs will be slightly less than the Court's estimate of such costs based on its experience and knowledge of the case.[8] The Court therefore awards $3,407.20 for the remaining third party invoices—30 per cent of plaintiff's requested amount.[9]

Based on the above rulings, the Court awards a total of $6,209.27 in copying costs.

V. Other Costs

Plaintiff first seeks $313.72 for copies of x-rays of plaintiff. The Court already has awarded these costs as part of the copying costs discussed above.

Plaintiff seeks $183.15 for the cost of copies of videotapes and photographs. Plaintiff has not explained why these copies were necessary and as to the primary invoice from Custom Color Corporation for $159.58, the amount apparently was billed to defendants. The Court therefore declines to award any additional amount for copies of videotapes and photographs.

Finally, plaintiff seeks $94,874.31 in costs related to expert witnesses. Section 1920 authorizes taxation of costs only as to fees for *court appointed* experts. *See* 28 U.S.C. § 1920(6). Absent explicit statutory authorization, a trial court has no discretion under Rule 54(d) to tax the actual costs of expert witness fees. *Brown v. Butler,* 30 Fed. Appx. 870, 876 (10th Cir. Feb.15, 2002); *Chaparral Res., Inc. v. Monsanto Co.,* 849 F.2d 1286, 1292 (10th Cir.1988). Expert witness fees are taxable under Section 1920 only to the limited extent allowed under 28 U.S.C. § 1821, which generally permits a $40 per day attendance fee plus travel and subsistence expenses related to attendance. *Crawford Fitting,* 482 U.S. at 445; *Burton,* 395 F.Supp.2d at 1081. Based on the bill of costs which plaintiff submitted, the Court awards a total of $1,185.00 for expert witness attendance fees and expenses under 28 U.S.C. § 1821.[10] The Court disallows the remaining expenses related

to expert witnesses.

***7** The Court awards a total of $35,113.77 in costs taxed in favor of plaintiff.

IT IS THEREFORE ORDERED that *Defendants' Motion To Retax Costs* (Doc. # 183) filed October 20, 2006 be and hereby is **SUSTAINED.** The Court awards a total of $35,113.77 in costs taxed in favor of plaintiff.

Footnotes

1 BNSF was formed in 1995 when the **Santa Fe** Railway merged with **Burlington** Northern.

2 The Clerk apparently did not mail the bill of costs to counsel or otherwise notify them that it had been entered. Counsel for all parties apparently did not inquire about the bill of costs until some time in 2006.

3 Section 1920 provides that a judge or clerk may tax as costs the following expenses:

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers 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.
>
> 28 U.S.C. § 1920.

4 The Court addresses below whether these costs may be recovered as exemplification or copy costs under 28 U.S.C. § 1920(4).

5 The Court recognizes that the video deposition processing charge includes processing with ASCII text, but defendants have not shown that the videographer charged more for this additional processing.

6 In particular, the Court awards the following amounts for court reporter expenses which the Court finds were reasonably necessary in this case: $181.80 for AAA invoice dated 11–30–99; $1,825.50 for Performance Reporters ("PR") invoice dated 11–10–99; $1,002.00 for PR invoice dated 11–19–99; $969.00 for Tri–State invoice dated 12–6–99; $885.00 for Tri–State invoice dated 2–22–00; $380.50 for Tri–State invoice # 1 dated 5–26–00; $827.50 for Tri–State invoice # 2 dated 5–26–00; $1,477.94 for Testimonial Video ("TV") invoice dated 12–1–99; $1,206.22 for TV invoice dated 11–30–99; $2,584.08 for TV invoice dated 12–9–99; $442.76 for TV invoice dated 1–25–00; $992.42 for TV invoice dated 1–31–00; $464.14 for TV invoice dated 2–7–00; $0.00 for TV invoice dated 1–26–00; $729.33 for TV invoice dated 2–8–00; $528.28 for TV invoice dated 2–11–00; $0.00 for TV invoice dated 2–10–00; $464.14 for TV invoice dated 3–2–00; $256.56 for TV invoice dated 2–15–00; $241.04 for TV invoice # 1 dated 2–23–00; $450.00 for TV invoice # 2 dated 2–23–00; $232.75 for TV invoice # 3 dated 2–23–00; $464.14 for TV invoice dated 2–28–00; $0.00 for TV invoice # 1 dated 3–8–00; $0.00 for TV invoice # 2 dated 3–8–00; $166.04 for TV invoice dated 3–15–00; $0.00 for TV invoice dated 4–17–00; $0.00 for Bowen invoice dated 2–1–00; $427.40 for Bowen invoice dated 2–15–00; $260.80 for Bowen invoice dated 4–4–00; $343.90 for Carpenter invoice dated 1–28–00; $898.85 for Metropolitan invoice dated 2–15–00; $976.45 for Metropolitan invoice dated 2–18–00; $1,024.60 for Metropolitan invoice # 1 dated 3–29–00; $1,385.15 for Metropolitan invoice # 2 dated 3–29–00; $638.55 for Sharp–Holland invoice # 1 dated 2–29–00; $323.00 for Sharp–Holland invoice # 2 dated 2–29–00; $881.00 for Associated Reporter's invoice dated 2–2–00; $0.00 for Hostetler invoice dated 3–2–00; $120.00 for Hostetler invoice dated 6–6–00; $0.00 for Jay Suddreth invoice dated 3–9–00; $0.00 for Audrey Patrick invoice dated 3–8–00; $0.00 for Wheeler invoice dated 4–3–00; $528.28 for TV invoice # 1 dated 3–29–00; $458.82 for TV invoice # 2 dated 3–29–00; $450.00 for TV invoice # 3 dated 3–29–00; $528.28 for TV invoice dated 3–22–00; $528 .28 for TV invoice dated 2–9–00; $450.00 for TV invoice dated 2–9–00; $0.00 for Wheeler invoice dated 7–11–00; $0.00 for Don Thompson invoice dated 5–26–00; and $260.00 for district court invoice dated 6–16–00.

> The Court has excluded charges for a premium on the court reporter appearance fee for real time reporting, the additional per page premium for real time reporting where the invoices did not separately itemize real time reporting ($1.00 or $1.25 per page depending on court reporter) and additional copies of deposition transcripts or videos.

7 In particular, defendants have agreed to pay the amounts on the following invoices: $25.00 for NEU invoice dated 6–22–99; $25.00 for Dr. Carabetta invoice dated 6–18–99; $58.97 for Olathe Medical Center invoice dated 7–22–99; $23.42 for Dr. Drisko invoice dated 7–6–99; $36.50 for Department of Commerce invoice dated 9–28–99; $150.00 for Kleinfelder invoice dated 12–17–99; $25.23 for Kingman Fire Department invoice dated 1–19–00; $62.05 for FYI invoice dated 2–1–00; $230.78 for Trimmer invoice dated 6–29–00; $293.72 for Trimmer invoice dated 9–25–99; $20.00 check to Olathe Medical Center.

8 The Court has estimated total copy costs of no more than $6,460 .40, which includes internal copy costs of $1,851.40, agreed third

party copy costs (primarily official reports, medical records and x-rays) of $950.67 and other third party copy costs of $3,658.33. The amount for other third party copying charges includes $831.39 for three copies of plaintiff's summary judgment briefing and other court filings. The Court has included one copy for the Court, one copy for defense counsel and one copy for plaintiff's counsel. Plaintiff filed a total of some 1,295 pages. The Court has estimated the cost at 20 cents per page and added seven per cent sales tax for a total of $277.13 for each set of copies. The amount for third party copying charges also includes $2,826.94 for two copies of the exhibits on *Plaintiff's Final Exhibit List* (Doc. # 120). The Court has included the original and two copies which the Court requested. This amount reflects 1,915 standard copies at 20 cents per page, 40 **color copies at $1.50 per page**, 15 copies of maps and other non-standard documents at $10.00 per page and 208 **color photos at $3.50 per copy**. The Court has also added seven per cent sales tax for a total of $1,413.47 for each set of trial exhibits.

9 Defendants also complain that plaintiff did not seek pre-approval from the Court of certain trial-related costs, but such approval is not a condition for taxing costs. *See Tilton,* 115 F.3d at 1476.

10 Raymond A. Duffany attended a deposition for one day on February 28, 2000 ($40.00) and incurred travel expenses for the deposition ($555.47). A.W. Westphal attended a deposition for one day on February 28 or 29, 2000 ($40.00) and incurred travel expenses for the deposition ($469.53). Dr. Vito Carbetta and L. Kenneth Hubbell each attended trial for one day on June 9, 2000 ($40.00 each).

184 F.R.D. 634
United States District Court,
D. Kansas,
Topeka.

Cynthia **SMITH**, Plaintiff,
v.
BLUE CROSS/BLUE SHIELD, INC., Defendant.

No. 94–4053–DES. | Jan. 19, 1999.

Following affirmance of summary judgment in favor of defendant in Americans with Disabilities Act (ADA) case, plaintiff filed objections to bill of costs and motion for review of bill of costs. The District Court, Saffels, J., held that: (1) costs associated with depositions and transcripts which were not relied upon by the defendant in its successful motion for summary judgment were recoverable, and (2) plaintiff's alleged indigency did not preclude bill of costs.

Order in accordance with opinion.

West Headnotes (7)

[1] **Federal Civil Procedure**
Depositions

Costs associated with depositions and transcripts which were not relied upon by the defendant in its successful motion for summary judgment were recoverable since they were reasonably related to trial of the matter. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[2] **Federal Civil Procedure**
Particular Items

Printing costs associated with the defendant's appellate brief were properly included in the bill of costs. 28 U.S.C.A. § 1920.

[3] **Federal Civil Procedure**
Taxation

Court has discretion not to tax prevailing defendant's costs against the plaintiff. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[4] **Federal Civil Procedure**
Taxation

There is a presumption that costs should be awarded to the prevailing party. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

1 Cases that cite this headnote

[5] **Federal Civil Procedure**
Taxation

Issues presented in Americans with Disabilities Act (ADA) case did not warrant relief from the taxation of costs because they were "close and difficult." Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[6] **Federal Civil Procedure**
Taxation

Costs of approximately $3,600 assessed in case was a reasonable amount to be repaid by someone with an annual salary of approximately $14,560 a year. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

1 Cases that cite this headnote

[7] **Federal Civil Procedure**

Taxation

There were no changes in the law surrounding controlling law warranting relief from taxation of costs to nonprevailing party nor did absence of guidance from the Supreme Court on controlling law warrant relief. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

Attorneys and Law Firms

***635** James E. Benfer, Beth R. Foerster, McCullough, Wareheim & LaBunker, P.A., Topeka, KS, for Cynthia **Smith**.

Todd N. Tedesco, Foulston & Siefkin L.L.P., Wichita, KS, Jane Chandler Holt, **Blue Cross** and Blue Shield of Kansas, Inc., Topeka, KS, Alan L. Rupe, Kelly J. Johnson, Husch & Eppenberger, Wichita, KS, for **Blue Cross** and Blue Shield of Kansas, Inc.

Opinion

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on plaintiff's objections to Bill of Costs (Doc. 96) and Motion for Review of Bill of Costs (Doc. 99). Both parties have submitted briefs on these matters and the court is ready to rule.

I. BACKGROUND

The plaintiff initiated this suit seeking damages under the Americans with Disabilities Act ("ADA"). This court granted summary judgment in favor of the defendant and the Tenth Circuit Court of Appeals affirmed that ruling. The defendant then submitted a bill for costs pursuant to Rule 54(d). The Clerk of the Court assessed costs in the amount of $3,622.03 against the plaintiff. The plaintiff has filed both of the current motions seeking relief from the assessment of costs ordered by the clerk.

II. OBJECTION TO BILL OF COSTS

[1] The plaintiff makes several objections to the bill of costs submitted by the defendant. Objections one, two and four are all based upon the same legal theory—*Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir.1997), precludes the recovery of the costs associated with depositions and transcripts which were not relied upon by the defendant in its motion for summary judgment. The court finds that this argument is totally without merit.

Tilton held that the district court properly taxed costs of transcripts that were used by the court in ruling upon a motion for summary judgment. *Id.* at 1474. This appears to be the basis for the plaintiff's claim. However, the court also refused to overturn the district court's assessment of costs for deposition transcripts which were not used in the motion for summary judgment. *Id.* Nothing in the *Tilton* opinion stands for the proposition that a party is only entitled to recover their costs on items that were actually used in a motion for summary judgment that disposes of the case. Similarly, nothing in Rule 54(d) places such a limitation on the prevailing party. This court is not willing to create such a limitations in this case.

The plaintiff has not shown the court any reason why these costs should not be included in the defendant's bill of costs. They all appear to be reasonably related to the trial in this matter. Therefore, the objections relating to costs for items which were not used in the motion for summary judgment, based on the *Tilton* opinion, are denied.

The plaintiff next complains of copies for medical records which she claims were duplicative. The defendant has responded that the most of the copies were not duplicative because they were obtained prior to the plaintiff's deposition, where additional copies were provided to the defendant. However, the defendant does concede that, due to a mathematical error, the costs should be reduced by $40. The defendant claims that the ***636** remaining costs for copies complained of by the plaintiff were costs paid to the court reporter in connection with a deposition taken by the defendant.

The court finds that the costs for the copies complained of by the plaintiff are proper. The plaintiff has failed to show that these were duplicative or unnecessary costs on the part of the defendant. Therefore, the court denies the plaintiff's objections to these costs, with the exception of reducing the amount awarded by $40, as requested by the defendant.

[2] The final objection raised by the plaintiff is for the printing costs associated with the defendant's appellate brief for the Tenth Circuit. Fees and disbursements for printing is specifically authorized by 28 U.S.C. § 1920.

The court finds that the fees taxed by the clerk for the copying of the brief were properly included in the bill of costs.

III. MOTION FOR REVIEW OF BILL OF COSTS

[3] [4] The plaintiff has requested relief from the defendant's bill of costs for several reasons. Although the court has considered each of the plaintiff's basis for relief, only those which the court finds may have merit will be discussed. The court has discretion not to tax the defendant's costs against the plaintiff in this case. Fed.R.Civ.P. 54(d). However, there is a presumption that costs should awarded to the prevailing party. *AeroTech, Inc. v. Estes,* 110 F.3d 1523, 1526 (10th Cir.1997).

[5] The first basis for relief forwarded by the plaintiff is that the case presented issues that were close and difficult. The court finds that this is not the case. The court has reviewed this case and finds that the issues presented do not warrant relief from the taxation of costs because they were "close and difficult."

[6] The **plaintiff next requests relief because she is indigent**. The plaintiff claims that because she is only making approximately $14,560 a year, she should not be held to pay the defendant's costs in this case. The court disagrees. The costs assessed in this case total approximately $3,600. The court finds that this is a reasonable amount to be repaid by someone with an annual salary equal to that of the plaintiff. The plaintiff's claim of indigence is not sufficient to overcome the presumption that the plaintiff is responsible for the defendant's costs in this case.

[7] The plaintiff also claims that changes in the law surrounding the ADA warrant relief. The plaintiff points out that the Tenth Circuit Court of Appeals has ruled that the fact that a plaintiff in an ADA case has filed a Social Security Disability application is no longer dispositive on whether or not they are a "qualified individual with a disability." ***Smith*** *v. Midland Brake,* 138 F.3d 1304, 1312 (10th Cir.1998). The court fails to see how this opinion affects this case at all. Neither this court, nor the Tenth Circuit Court of Appeals, ever ruled that the plaintiff in this case was not a "qualified individual with a disability" under the ADA based upon a Social Security Disability application. The ruling that the plaintiff was not a qualified individual was based on her deposition testimony that she was not able to return to work and did not know when she would be able to do so. This argument totally lacks any merit and clearly provides no basis for relief.

The court finds that the plaintiff's claims that the Equal Employment Opportunity Commission ("EEOC") guidelines show that relief should be granted are clearly insufficient to afford relief.

The plaintiff next claims that relief should be granted because there were no Supreme Court rulings on the ADA at the time summary judgment was granted in this case. She claims that had there been guidance from the Supreme Court, certain issues in this case would not have been as difficult. The plaintiff does not discuss what issues could have been clarified by the Supreme Court. The court fails to see how guidance from the Supreme Court could have benefitted the plaintiff in this case. The facts and legal issues were neither difficult nor complicated. The fact that no Supreme Court ***637** cases were available for guidance is no basis for relief from the costs in this case.

The plaintiff next argues that the court should not assess costs in this case to penalize the defendant. None of the conduct complained of by the plaintiff warrants such a ruling. The fact that the Tenth Circuit found, when viewing the facts in a light most favorable to the plaintiff, that one of the plaintiff's supervisors may have been insensitive to her on one occasion is hardly grounds for punishing the defendant. Similarly, giving the plaintiff work that was outside of the agreed upon reduced job duties on one occasion is not severe enough conduct to make the defendant be held responsible for its own costs. Although the plaintiff brings forward other reasons for punishment, the court finds that each of them are insufficient to afford the plaintiff relief.

The plaintiff also raises the issue of not being responsible for the costs of depositions that were not used in support of the defendant's summary judgment motion. Based on the ruling earlier in this order, this is no basis for relief.

IV. CONCLUSION

The court finds no reason to grant relief to the plaintiff in her request to not have the defendant's costs assessed against her. The court has considered each of the plaintiff's reasons for requesting relief and finds that none of them individually, or taken as a while, are sufficient to overcome the burden that the prevailing party is entitled to its costs.

IT IS THEREFORE BY THIS COURT ORDERED that the plaintiff's Objections to Bill of Costs (Doc. 96) is granted in part and denied in part. The amount of costs is reduced to $3,582.03 to compensate for the defendant's

mathematical error.

IT IS FURTHER ORDERED that the plaintiff's Motion for Review of Bill of Costs (Doc. 99) is denied.

Parallel Citations

43 Fed.R.Serv.3d 619

2003 WL 21488269
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

Karen M. **STADTHERR**, et al., Plaintiffs,
v.
ELITE LOGISTICS, INC., et al., Defendants.

No. Civ.A. 00–2471–JAR. | June 24, 2003.

Opinion

MEMORANDUM AND ORDER GRANTING IN PART RECOVERY OF COSTS

ROBINSON, J.

***1** This matter is before the Court regarding the appropriateness of awarding costs to the defendant Raymond Corporation ("Raymond") in this litigation. Raymond submitted a Bill of Costs (Doc. 298) which was assessed by the Clerk in the amount of $10,845.65 (Doc. 309). Plaintiffs filed a Motion to Retax Costs pursuant to Fed.R.Civ.P. 54(d) and Local Rule 54.1 (Doc. 311) and Raymond has responded (Doc. 312). For the reasons set forth below, the Court grants plaintiffs' motion in part.

Background

This is a wrongful death action arising out of an accident that occurred on July 5, 2000, at a grocery distribution warehouse facility owned by defendant Associated Wholesale Grocers, Inc. ("AWG") in Kansas City, Kansas. The accident occurred when an employee of defendant **Elite Logistics**, Inc. ("**Elite**") was transporting plaintiff's decedent, William **Stadtherr**, and an AWG employee through the warehouse, as they stood on a work platform/basket that was attached to the forks of a Raymond Model 31 truck ("the forklift"). Raymond manufactured and sold the forklift, a piece of powered industrial equipment that is used by an operator to pick up and transport pallets of product or other large items. While traveling through the warehouse, the forks were raised, Mr. **Stadtherr's** head struck the ceiling, and he suffered fatal injuries.

Neither of plaintiffs' liability experts opined that the forklift malfunctioned, was defective or unreasonably dangerous, nor that Raymond's negligence caused Mr. **Stadtherr's** injury. **Elite** was the owner of the forklift after June 1, 2000, and was responsible for the operation, use and maintenance of the forklift.

Plaintiffs filed a complaint against **Elite**, alleging that **Elite's** employee's negligence caused Mr. **Stadtherr's** death. **Elite** sought to compare the fault of Raymond based on a theory of defective design of the forklift. Plaintiffs amended their complaint to add Raymond as a defendant.

Plaintiffs abandoned their claim of products liability against Raymond in the final Pretrial Order, but raised two additional claims against Raymond at that time: 1) *res ipsa loquitur* and 2) "adoption" of **Elite's** claim of product liability against Raymond. Raymond moved for summary judgment, which was granted (Docs. 221 and 244). The Court was not persuaded by plaintiffs' novel "adoption" argument and rejected their claim of *res ipsa* as well. Although Raymond was dismissed as a party defendant to the lawsuit, it remained a party for the limited purpose of comparative fault.

Plaintiffs, who had filed a *Daubert* motion objecting to **Elite's** expert witness incorporating Raymond's similar motion, pursued that objection once Raymond was no longer a defendant. Plaintiffs were successful, and **Elite's** product liability expert was not allowed to testify regarding the forklift. The parties subsequently settled the case prior to trial.

Raymond submitted a Bill of Costs seeking $11,749.52 from plaintiffs. The clerk assessed costs in the amount of $10,845.65 and plaintiffs request this Court to retax those costs. Plaintiffs object on two grounds: 1) Raymond's participation in this case was not ordinary; and 2) many of the expenses are not proper under 28 U.S.C. sec.1920.

Analysis

1. Discretionary denial of costs

***2** Rule 54(d)(1) provides, in relevant part, "costs other than attorneys' fees shall be awarded as of course to the prevailing party unless the court otherwise directs." "The allowance or disallowance of costs to a prevailing party is within the sound discretion of the district court."[1] The Tenth Circuit has clarified, however, that this discretion is limited in two ways. "First, it is well established that Rule 54 creates a presumption that the district court will award costs to the prevailing party."[2] Second, if the district court declines to award costs, it must state a valid reason for its denial.[3]

The Tenth Circuit has discussed various circumstances in which a district court may properly exercise its discretion to deny costs, including when the prevailing party was only partially successful, when damages were only nominal, when costs were unreasonably high or unnecessary, when recovery was insignificant, or when the issues were close or difficult.[4] The court should not consider the ability of the prevailing party to pay its own costs,[5] nor should it deny costs because it does not condone the prevailing party's extra-judicial conduct.[6]

The reasons presented by plaintiffs are insufficient to overcome the presumption that Raymond, as the prevailing party on summary judgment, is entitled to costs, and do not justify penalizing Raymond. Plaintiffs' characterization of being "forced" to join Raymond as a party defendant because of the structure of the comparative fault laws is disingenous. Plaintiffs made a calculated decision to join Raymond to avoid any "phantom" finding of fault, advancing the novel argument that it "adopted" **Elite's** product liability claim against Raymond as well as asserting a claim of *res ipsa.* Plaintiffs joined Raymond as a defendant and actively pursued claims against it, with the express intent of obtaining an enforceable monetary judgment against Raymond. After examining the litany of reasons plaintiffs cite for denying Raymond's costs, the Court declines to exercise its discretion to deny costs across-the-board.

2. Specific items challenged as untaxable

Raymond argues that if costs are to be awarded under Fed.R.Civ.P. 54(d)(1), the Court should carefully review those assessed by the clerk. In conducting such a review, the court makes a *de novo* determination.[7] Rule 54(d)(1) provides that costs shall be allowed to the prevailing party "unless the court otherwise directs ." Thus, taxation of costs rests within the court's sound discretion. Rule 54(d) is governed by 28 U.S.C. sec.1920, which provides that a judge or a clerk of the court may tax as costs certain categories of expenses incurred during litigation, including the costs of depositions, court transcripts and copying fees.[8] Not all expenses associated with litigation are recoverable against the non-prevailing party, and "[i]tems proposed by winning parties as costs should always by given careful scrutiny."[9] A finding that a requested cost is statutorily authorized creates a presumption favoring its award,[10] and "[t]he burden is on the nonprevailing party to overcome the presumption in favor of the prevailing party."[11]

***3** In its bill of costs, Raymond requests costs in the amount of $11,749.52,[12] all of which are claimed by Raymond as falling within the scope of sec.1920. The Court's review focuses on four specific categories of costs: 1) long distance, facsimile and delivery charges; 2) photocopying charges; 3) costs of deposition transcript; and 4) min-u-scripts, diskettes, overnight delivery, late fees and second copies of depositions.

a. long distance, facsimile and delivery charges

In the Clerk's taxation of costs, the following charges were disallowed: **long distance charges** of $366.92, **fax charges** of $121.60 and delivery charges of $155.53. Raymond does not respond to this issue, and the Court will also disallow these costs as they are not appropriate under sec.1920.

b. photocopying charges

Plaintiffs challenge items 3 and 4 in Raymond's bill of costs for photocopying charges in the amounts of $2,900.13 and $773.36. These **copies were responsive to Elite's discovery requests.** Section 1920(4) allows the court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." "As a general rule, prevailing parties are not entitled to recover costs incurred in responding to discovery; because the producing party possesses the original documents, such papers are not 'obtained' for purposes of sec.1920(4).[13] Thus, because Raymond possessed the original documents of which photocopies were made in response to **Elite's** discovery requests, the Court denies these costs.

c. deposition transcripts

Plaintiffs challenge the costs of deposition transcripts of 11 witnesses noticed and deposed by plaintiffs in the total amount of $928.15. Sec.1920(2) allows the court to tax as costs the fees of a court reporter for any part of the stenographic transcript necessarily obtained for use in the case, including deposition expenses submitted to the court on a successful motion for summary judgment.[14] Deposition expenses submitted to the court may be taxed if the deposition reasonably appeared necessary at the time it was taken.[15] Depositions not necessarily obtained for use in the case are not taxable as costs, and will not be allowed, for example, where the deposition is "purely investigatory in nature."[16] "Though use at trial by counsel or the court readily demonstrates necessity, if materials or services are reasonably necessary for use in the case even though not used at trial, the court can find necessity and award the recovery of costs."[17]

Plaintiffs contend that the depositions were "simply taken

for discovery and investigatory purposes," noting that Raymond did not cite any of the depositions in its motion for summary judgment. These depositions were of warehouse workers present at the time of the accident, including Mr. Ng, who was in the basket with Mr. **Stadtherr**, all of whom were potential witnesses at trial. The Court has great discretion to tax these costs and is satisfied that the referenced deposition transcripts, while not incorporated into Raymond's motion for summary judgment, were obtained for use in the case and not for general investigative purposes. The Court finds that Raymond has demonstrated that the deposition transcripts were necessarily obtained for use in the case and will be allowed in the amount of $928.15.

d. Min–U–scripts, Diskettes, Overnight Delivery, Late Fees and Second Copies of depositions

***4** Plaintiffs challenge costs for these items in the total amount of $891.33. Raymond does not respond to this issue. The Court notes that, upon review of the clerk's assessment, charges for **ASCII disks** have been excluded in the total amount of $260.00, and the Court will also exclude these charges. As for the balance of the items, the Court finds that charges for **overnight delivery** and **second copies of depositions**, including min-u-script copies, are items obtained solely for the convenience of Raymond and are not included under sec.1920 as appropriate costs.[18] Thus, the Court will exclude these costs in the total amount of $891.33.

3. Attorney fees

Raymond contends that it is entitled to attorney's fees for responding to plaintiffs' motion to retax costs under 28 U.S.C. sec.1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions under section 1927 are appropriately imposed "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court."[19] Subjective bad faith is not a necessary showing for application of sec.1927 sanctions. Instead, proper considerations for the court include whether plaintiffs' counsel's conduct, when viewed objectively, imposed "unreasonable and unwarranted burdens on the court and opposing parties," and whether plaintiffs' counsel acted "recklessly or with indifference to the law."[20] An award of sanctions under sec.1927 is appropriate only where there is a showing of "(1) a multiplication of proceedings by an attorney or other person; (2) by conduct that can be characterized as unreasonable and vexatious; and (3) a resulting increase in the costs of the proceedings."[21] Because sec.1927 is penal in nature an award should only be made " 'in instances evidencing a serious and standard disregard for the orderly process of justice' " and the court must be aware of the "need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests."[22]

Raymond claims that plaintiffs' counsel has taken "diametrically opposite positions, depending on what was at issue," and that plaintiffs' motion to retax costs is vexatious. Specifically, Raymond complains that when it moved for summary judgment, plaintiffs responded that they had claims against Raymond. Now, in their motion to retax costs, plaintiffs argue that they never made any claim against Raymond, nor did they have a factual basis for that claim because their experts found nothing wrong with the forklift. The issue of plaintiffs' novel theories of recovery against Raymond were resolved previously in this court. While plaintiffs' argument may have proved meritless, the Court declines to label it or this subsequent motion to retax costs as vexatious. As set forth above, some of plaintiffs' objections to Raymond's costs have merit. Raymond's motion for attorneys fees is denied.

***5** IT IS THEREFORE ORDERED that Raymond's motion to retax costs (Doc. 309) is GRANTED in part and DENIED in part. The motion is granted with respect to the following charges which are not recoverable in the total amount of $5,208.87: $644.05 for long distance, facsimile and delivery charges; $3,673.49 for photocopying expenses responsive to discovery; and $891.33 for min-u-scripts, diskettes, overnight delivery and second copies incurred for Raymond's convenience. The motion is denied as to the balance of charges, which are allowed in the total amount of $6,540.65. Raymond shall submit a revised bill of costs, reflecting the deductions made in this order, to the clerk within fourteen (14) days of this order.

IT IS FURTHER ORDERED that Raymond's request for attorney fees is DENIED.

IT IS SO ORDERED.

Footnotes

1 *Zeran v. Diamond Broadcasting, Inc.,* 203 F.3d 714, 722 (10th Cir.2000) (citing *Homestake Mining Co. v. Mid–Continent Exploration Co.,* 282 F.2d 787, 804 (10th Cir.1960).

2 *Cantrell v. IBEW Local 2021,* 69 F.3d 456, 458–59 (10th Cir.1995).

3 *Id.* at 459.

4 *Zeran,* 203 F.3d at 722 (citing *Cantrell,* 69 F.3d at 459).

5 *Tinkler v. U.S. by F.A.A.,* 1989 WL 35998 (D.Kan. March 30, 1989) (citing *White & White, Inc. v. American Hosp. Supply Corp.,* 786 F.2d 728, 730 (6th Cir.1986) (quotation omitted)).

6 *Zeran,* 203 F.3d at 722.

7 *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 674 (D.Kan.1994).

8 28 U.S.C. sec.1920 provides in pertinent part:
> 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 of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers 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.
> 28 U.S.C. sec.1920.

9 *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988) (quoting *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 235, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964)).

10 *Green Construction,* 153 F.R.D. at 675.

11 *Cantrell v. IBEW Local 2021,* 69 F.3d at 458–59 (citation omitted).

12 Plaintiffs point out a calculation error in Raymond's bill of costs, which Raymond attributes to omission of an invoice for a deposition, and attaches to its response. Plaintiffs do not challenge this issue in their reply and the Court accepts Raymond's total amount of costs as $11,749.52.

13 *Pehr v. Rubbermaid, Inc.,* 196 F.R.D. 404, 407 (D.Kan.2000) (citing *Phillips USA, Inc. v. Allflex USA, Inc.,* 1996 WL 568814, at *2 (D.Kan. Sept. 4, 1996).

14 *See* 10 Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure:* Civil 2d sec. 2676 (1983).

15 *State of Kan. ex rel. Stephan v. Deffenbaugh Industries., Inc.,* 154 F.R.D. 269, 270 (D.Kan.1994).

16 *Ortega v. City of Kansas City, Kan.,* 659 F.Supp. 1201, 1218 (D.Kan.1987), *rev'd on other grounds,* 875 F.2d 1497 (10th Cir.1989); *Kansas Teachers Credit Union v. Mutual Guaranty Corp.,* 982 F.Supp. 1445, 1447 (D.Kan.1997).

17 *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d at 1246.

18 *See Battenfeld of America Holding Co., Inc. v. Baird, Kurtz & Dobson,* 196 F.R.D. 613, 615 n. 1 (D.Kan.2000).

19 *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir.1987) (en banc).

20 *Id.* at 1507; *In re TCI Ltd.,* 769 F.2d 441, 445 (7th Cir.1985).

21 *Steinert v. Winn Group, Inc.,* 2003 WL 1342974, *3 (D.Kan. March 14, 2003) (quoting *Shields v. Shetler,* 120 F.R.D. 123, 127 (D.Colo.1988)).

22 *Ford Audio Video Systems, Inc. v. AMX Corp., Inc.,* 161 F.3d 17, 1998 WL 658386, at *3 (10th Cir. Sept. 15, 1998) (quoting *Dreiling v. Peugot Motors of Am., Inc.,* 768 F.2d 1159, 1165 (10th Cir.1985) (internal quotations omitted).

End of Document

154 F.R.D. 269
United States District Court,
D. Kansas.

The **STATE** OF KANSAS, **ex rel**. Robert T. **STEPHAN**, Attorney General, State of Kansas, Plaintiff,
v.
DEFFENBAUGH INDUSTRIES, INC., et al., Defendants.

Civ. No. 92–2049–KHV. | March 29, 1994.

Plaintiff moved to retax costs after court taxed costs against plaintiff following grant of summary judgment for defendant. The District Court, Vratil, J., held that: (1) defendant was entitled to award of $1,500 as costs for exemplification and copies; (2) defendant was not entitled to award of costs for mediator's fee; and (3) defendant was entitled to award of $8,463.22 for deposition transcripts, reporter fees, and witness and mileage fees for deponents.

Motion sustained.

West Headnotes (3)

[1] **Federal Civil Procedure**
Stenographic Costs

Defendant who was granted motion for summary judgment was entitled to award of $1,500 as costs for exemplification and copies; award was less than amount requested since copy of summary judgment hearing transcript was not necessary to defendant's case and because court would not consider invoices submitted by defendant, which identified neither number nor substance of copies made, sufficient to demonstrate that those copying costs were reasonably necessary to the case. 28 U.S.C.A. § 1920(4).

3 Cases that cite this headnote

[2] **Federal Civil Procedure**
Witness Fees

Defendant who was granted summary judgment was not entitled to award as costs for mediator's fee; although mediator may be "expert in the law," he or she is not expert witness whose costs are taxable. 28 U.S.C.A. § 1920(6).

7 Cases that cite this headnote

[3] **Federal Civil Procedure**
Depositions
Federal Civil Procedure
Stenographic Costs
Federal Civil Procedure
Witness Fees

Defendant who was granted summary judgment was entitled to award of $8,463.22 as costs for depositions transcripts, reporter fees, and witness and mileage fees for deponents; court was satisfied that referenced depositions, while not all incorporated into any single motion, were timely performed and obtained for use in the case and not for general investigative purposes. 28 U.S.C.A. § 1920(2).

1 Cases that cite this headnote

Attorneys and Law Firms

***269** Timothy P. Orrick, Parkinson, Foth & Reynolds, Lenexa, KS, Reid F. Holbrook, Holbrook, Heaven & Fay, P.A., Kansas City, KS, Theodore F. Fay, Holbrook, Heaven & Fay, P.A., Merriam, KS, for **State** of Kan. **ex rel**. Robert **Stephan**.

***270** Dennis W. Moore, Moriarty, Erker & Moore, Overland Park, KS, David M. Rhodus, Douglas T. Sloan, Richard D. Rhyne, Ward K. Brown, Julie F. Keith, Craft, Fridkin & Rhyne, Stephen G. Mirakian, Cheryl A. Pilate, James R. Wyrsch, Wyrsch, Atwell, Mirakian, Lee & Hobbs, Kansas City, MO, Richard J. Braun, Richard J. Braun & Associates, Nashville, TN, for **Deffenbaugh** Industries, Inc., Ronald D. **Deffenbaugh**, Joseph E. Wehmeyer.

James D. Baker, Baker & Baker, Kansas City, KS, Stephen G. Mirakian, Cheryl A. Pilate, James R. Wyrsch, Wyrsch, Atwell, Mirakian, Lee & Hobbs, John R. Campbell, Jr.,

Loughlin, Johnson, Campbell & Martin, Kansas City, MO, for AC Industries Inc., Angelo Cambiano.

Melissa Farley Sebree, Miller & Co. P.C., Kansas City, KS, Stephen G. Mirakian, Cheryl A. Pilate, James R. Wyrsch, Wyrsch, Atwell, Mirakian, Lee & Hobbs, Kansas City, MO, for Browning–Ferris Industries of Kansas City, Inc. aka BFI, Inc.

Patrick D. McAnany, McAnany, Van Cleave & Phillips, P.A., Lenexa, KS, Katherine E. Rich, McAnany, Van Cleave & Phillips, P.A., Kansas City, KS, Stephen G. Mirakian, Cheryl A. Pilate, James R. Wyrsch, Wyrsch, Atwell, Mirakian, Lee & Hobbs, Kansas City, MO, Roxann E. Henry, Ray S. Bolze, Howrey & Simon, Robert F. Ruyak, Washington, DC, for Belger Cartage Service, Inc.

John R. Shank, Jr., Gunn, Jones, Shank & Harman, Gladstone, MO, Kevin L. Walden, Gunn, Shank & Stover, Kansas City, MO, for Edgar Cordell.

Opinion

MEMORANDUM AND ORDER

VRATIL, District Judge.

This matter comes before the Court on *Plaintiff's Motion to Retax Costs* (Doc. # 249) filed September 28, 1993. On July 2, 1993, the Court granted the motion for summary judgment of defendant Belger Cartage Service, Inc. On September 21, 1993, the Clerk of the District Court taxed costs against plaintiff in the amount of $12,217.48. Plaintiff seeks review of these costs pursuant to Fed.R.Civ.P. 54(d) and Local Rule 219.

First, plaintiff challenges the award of $3,301.14[1] as costs for exemplification and copies. Although 28 U.S.C. § 1920(4) expressly identifies these as proper costs, plaintiff contends that (1) a copy of the transcript of the summary judgment hearing at which defendant prevailed was not necessary to defendant's case and (2) defendant has **failed adequately to document the bulk of the copy charges.**

[1] The Court agrees that the copy of the summary judgment hearing transcript was not necessary to defendant's case. In addition, the Court does not consider the mere invoices submitted by defendant—which identify neither the number nor substance of copies made—sufficient to demonstrate that those copying costs were reasonably necessary to the case. Based on the Court's experience and knowledge of the case, however, the Court is satisfied that the cost of copies necessary to defendant's case would total $1500. *See, e.g., Goluba v. Brunswick Corp.,* 139 **F.R.D**. 652, 655–56 (E.D.Wis.1993). Should defendant possess information sufficient to establish the necessity of the balance of the claimed coping costs, it may renew its request for costs by filing a supplemental statement breaking down the claimed expenses by type of document. *See Fulton Fed. Sav. & Loan Ass'n v. American Ins. Co.,* 143 **F.R.D**. 292, 299–300 (N.D.Ga.1991).

[2] Second, plaintiff challenges the award of $453.12 for the **mediator's fee,** which Judge Rushfelt apportioned pursuant to Local Rule 214. The legislative history to § 1920(6) expressly refers to court-appointed expert witnesses "as permitted by rule 706 of the Federal Rules of Evidence." H.R.Rep. No. 95–1687, 95th Cong.2d Sess. 13, *reprinted in* 1978 U.S.C.C.A.N. 4652, 4664; *see also National Org. for the Reform of Marijuana Laws v. Mullen,* 828 F.2d 536, 545 n. 7 (9th Cir.1987) (court-appointed master not a § 1920(6) expert). Although the mediator may be an "expert in the law," he or she is not a Rule 706 expert witness whose costs are taxable under § 1920(6).

[3] Finally, plaintiff challenges the award of $8,463.22 for deposition transcripts, reporter *271 fees, and witness and mileage fees for the deponents. The Court has great discretion to tax these costs upon finding that they were necessarily obtained for use in the case. 28 U.S.C. § 1920(2). The Court views the reasonable necessity of such costs " 'in light of the facts known to counsel at the time [the deposition] is taken.' " *Miller v. Union Pacific R.R.,* No. 84–2174–S, 1990 WL 133541, at *2 (D.Kan. Aug. 27, 1990) (quoting *Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1099 (5th Cir.1982)). The Court is satisfied that the **referenced depositions, while not all incorporated into any single motion, were timely performed and obtained for use in the case** and not for general investigative purposes. Plaintiff did note that defendants listed $260.00 for **"min-u-scripts" and diskettes of certain depositions,** which it claims are provided solely for the convenience of the parties. Because defendant does not respond to this issue, the Court adopts plaintiff's contention and disallows those costs.

IT IS THEREFORE ORDERED that *Plaintiff's Motion to Retax Costs* (Doc. # 249) be and hereby is **SUSTAINED.** The Clerk of the Court is directed to retax defendant's costs to the plaintiff in the amount of $9,150.54, which reflects the reductions detailed above.

Footnotes

1 The parties agree that the correct sum of defendant's submitted copying costs was $3,346.99.

2007 WL 625822
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

Steven T. **STEIN** and Joleen K. **Stein**, Plaintiffs,
v.
Gregory L. **STEIN**, Sharon W. **Stein**, Meridian Town Center, LLC, Meridian Place, LLC and PL West, LLC, Defendants.

No. 04–1311–JTM. | Feb. 26, 2007.

Attorneys and Law Firms

Norman R. Kelly, Norton, Wasserman, Jones & Kelly, L.L.C., Salina, KS, for Plaintiffs.

John W. Martin, O'Shea Barnard Martin PS, Bellevue, WA, Richard C. Hite, Hite, Fanning & Honeyman, LLP, Wichita, KS, for Defendants.

Opinion

MEMORANDUM AND ORDER

J. THOMAS MARTEN, Judge.

***1** This matter arises from plaintiffs' motion to retax costs (Dkt. No. 144). For the following reasons, the court denies plaintiffs' motion.

I. Transcript Fees:

A. CRS Court Reporting Service, Wichita, KS (Inv.# 5243):

Plaintiffs argue that the Min-u-scripts and E-transcripts are not recoverable and that the costs incurred in obtaining the deposition testimony of two witnesses are not recoverable. Specifically, plaintiffs argue that defendants claim $3,797.25 in costs listed on invoice number 5243 from CRS Court Reporting Service for the depositions of both plaintiffs, Morrie Soderberg, Duane Thibault, Curt Marshall, and Larry Fief. The plaintiffs believe that these costs account for the original transcription and one copy, but also**, inappropriately include the Min-u-script ("M–US") and E-transcript for each deposition.** These charges, plaintiff argues, are not authorized as costs in Kansas courts. *See Burton v. R.J. Reynolds Tobacco Co.,* 395 F.Supp.2d 1065 (D.Kan.2005). While the court agrees with plaintiff, the court notes that the clerk subtracted $162.80 to reflect the deletion of Min-u-scripts and E-transcripts. Thus, **the clerk reduced the original amount claimed by defendant, $3797.25, to $3634.45 in order to reflect that the charges are not authorized costs.** Therefore, the court will not further reduce the costs for these charges.

Additionally, plaintiffs argue that charges for the depositions of Morrie Soderberg and Duane Thibault should not be included as costs because none of the deposition transcripts could have been used in defendants' motion to dismiss as the depositions were taken after the motion was briefed and submitted. However, the court agrees with defendants in that the trial court has great discretion to tax the costs of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself. *Wabnum v. Snow,* No. 97–4101–SAC, 2001 **WL** 1718043, at *2 (D.Kan.2001). Plaintiffs listed these individuals as primary witnesses with knowledge evidencing plaintiffs' claim that the relationship of the brothers was that of partners. Because this was a key factual issue in the case, the court finds that the costs were properly included.

B. CRS Court Reporting Service, Wichita, KS (Inv.# 5218):

Plaintiffs allege that the Min-u-script and E-transcript costs for witness Robert Clubine is not properly recoverable. However, the clerk reduced the original amount claimed by defendant from $468 .05 to $451.45 in order to reflect the exclusion of these costs. Therefore, the court will not further disallow costs on this invoice.

C. MJ Productions, Wichita, KS (Inv.# 3715) (Videotaping):

Plaintiffs argue that these costs should be disallowed in that the depositions of Morrie Soderberg and Duane Thibault are not properly recoverable because their testimony was not specifically used in the motion for summary judgment. Additionally, plaintiffs argue that the invoice costs include shipping costs to defendants' counsel which are not recoverable. *See Burton,* 395 F.Supp.2d at 1065.

***2** However, the court previously ruled that the depositions of these individuals concerned a key factual issue in the case. Therefore, the court finds that the videotaping costs associated with these depositions were properly included.

Furthermore, the clerk has reduced the costs for this invoice from $1700.27 to $1672.27 in order to reflect the exclusion of postage. The court finds that the postage was properly excluded.

D. Seattle Deposition Reporters (Inv.# 33644) (Transcripts):

Plaintiffs dispute that defendant sought to include a $15.00 delivery charge, a $150.00 charge for Min-u-scripts, a $175.00 **charge for E-transcripts**, and a $56.70 charge for copying exhibits. However, the clerk excluded all charges, except for the charge for copying exhibits. Therefore, although the defendant claimed $2272.20, the clerk entered a cost of $1932.20. Furthermore, the court finds that the $56.70 charge was properly included in that plaintiffs videotaped selected Seattle depositions, a copy of which was necessary to prepare defenses to the claims because Seattle witnesses could not be compelled to attend trial in Wichita. *See Wabnum v. Snow,* No. 97–4101–SAC, 2001 **WL** 1718043, at *2 (D.Kan.2001). Therefore, the court finds that the costs were properly reflected in the clerk's itemization.

E. Royal Video Productions, Seattle (Inv.# 11620) (D VD of Video Depositions Conducted by Plaintiff in Seattle):

Plaintiffs argue that videotaped depositions are not specifically authorized by 28 U.S.C. § 1920(2) and thus, should be disallowed. However, although not specifically authorized, numerous courts have held that costs associated with video depositions are nevertheless recoverable. *See Meredith v. Schreiner,* 814 F.Supp. 1004 (D.Kan.1993). The court endorses that a stenographic record must be made of any videotape deposition and therefore, the court believes the better practice is to allow the costs of both videotaped and stenographic depositions, absent a good reason to do so. *Id.*

Plaintiff also argues that an $8.00 shipping charge should be excluded. The clerk properly excluded this charge when it reduced the amount for this invoice from $628.00 to $620.00.

II. Witness and Subpoena Fees:

A. Witness Attendance Fees and Mileage:

Plaintiffs argue that since the deposition testimony of Morrie Soderberg and Duane Thibualt was not used in defendants' motion for summary judgment, the witness fee and **mileage expense** should be disallowed.

However, the court finds that this **deposition testimony was reasonably believed to be necessary for the preparation of defendants' case and therefore, was properly included.** "The trial court has great discretion to tax the cost of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself." *Wabnum v. Snow,* No. 97–4101–SAC, 2001 **WL** 1718043, at *2 (D.Kan.2001) (quoting *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 677 (D.Kan.1994)).

B. Service of Subpoena Fees:

***3** Plaintiffs do not object to the clerk's action on this portion of the defendants' bill of costs.

III. Exemplification and Copy Fees:

A. Photocopying Costs:

Plaintiffs first argue that the clerk entered an amount of $111.28 more than what the defendants alleged they incurred under photocopying costs. However, the clerk found that the $111.28 reported by defendants in their documentation as "2. Witness Fees; 2.1 Bank of Tescott Records, Deposition Subpoena" was incorrectly included in the "Witness Fees" category. The clerk instead entered the amount into **"Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case.**" The court did not inappropriately increase the cost bill from the $7553.09 requested to the $7664.37 allowed. Rather, the clerk moved the item to a different category under the bill of costs.

Plaintiffs further argue that the copying charges sought by defendants were "not necessarily obtained for use in the case." However, the defendants obtained these copies in order to analyze the paper trails relevant to the claims of plaintiffs and the preparation of preliminary motions, including defendants' motion to dismiss for lack of jurisdiction or change of venue. The court finds that these costs for copies were "necessarily obtained for use in the case" and thus were properly included. *See Vornado Air Circulation v. Duracraft Corp.,* No. 92–1543–WEB, 1995 **WL** 794070, at *3 (D.Kan.1995).

Plaintiffs also allege that defendants seek to recover $272.24 for copying and binding of defendants' appellate brief although the costs were included in attorney's fees rendered by counsel and were not separately compensable items. Defendants argue that they have not submitted

copying costs that were included within the hourly rate fee charged to the clients. The court finds that these costs were properly included as defendants note that a charge is not billed to a client if the copy task involves less than fifty pages because these costs are included in the attorney's hourly rate. However, defendants note, the billing statements note that other "in-house" copying charges are billed to the client and were in fact paid by the clients in this case. Therefore, the costs were properly included.

Finally, plaintiffs argue that due to the parties' planning conference, in which the parties agreed that "copies of the various documents described in the parties' respective Rule 26(a)(1) disclosures shall be exchanged by December 3, 2004," voluntary production of copies should preclude defendants from seeking to recoup these costs. However, the court finds this argument unpersuasive. The court agrees with defendants who note that when a document is needed, the document is pulled from the database of records and is photocopied. The second copying is indeed necessary and is reasonable.

B. Photocopying Costs—Performed In House and Billed to Client:

Plaintiffs argue that these costs should be excluded because they should be considered a part of defendants' attorneys' fees. The court finds that these costs were properly included because the **costs reflect in-house copying charges that were billed to the client.**

IV. Clerk Fees:

***4** Plaintiffs argue that the clerk allowed defendants a $50.00 admission fee which should be excluded because defendants cannot demonstrate that it was necessary to employ **counsel outside the state of Kansas**. The court finds that the fee was properly recoverable because the fees were necessarily incurred in order to appear and defend the claims filed by plaintiffs. *See* 28 U.S.C. § 1920(1); *Burton v. R.J. Reynolds Tobacco Co.,* 395 F.Supp.2d 1065 (D.Kan.2005).

IT IS ACCORDINGLY ORDERED this 26th day of February, 2007, that plaintiffs' motion to retax costs (Dkt. No. 144) is denied.

End of Document

115 F.3d 1471, 156 A.L.R. Fed. 741, 38 Fed.R.Serv.3d 181, 25 Media L. Rep. 1917, 97 CJ C.A.R. 946
(Cite as: 115 F.3d 1471)

United States Court of Appeals,
Tenth Circuit.
Robert G. TILTON, Plaintiff-Appellant,
v.
CAPITAL CITIES/ABC, INC., a New York corporation; American Broadcasting Companies, Inc., a Delaware corporation; ABC News, Inc., a Delaware corporation; Diane Sawyer; Robbie Gordon; Kelley Sutherland, Defendants-Appellees.

No. 96-5041.
June 18, 1997.

Plaintiff sued broadcasting companies and employees for libel and false light invasion of privacy. Summary judgment was granted in defendants' favor, and defendants filed bill of costs with court clerk. Plaintiff challenged costs taxed by clerk. The United States District Court for the Northern District of Oklahoma, Michael Burrage, J., entered order taxing costs. Plaintiff appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) taxing transcription costs associated with depositions submitted in support of summary judgment motions was not abuse of discretion; (2) defendants could recover transportation mileage expenses for deponents in excess of 100 miles; (3) taxing costs of trial exhibits was not abuse of discretion; and (4) taxing costs of both preparation and transcription of videotaped depositions was not abuse of discretion.

Affirmed; motion to strike denied.

West Headnotes

[1] Federal Courts 170B 715

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk715 k. Defects, Objections and Amendments; Striking Briefs. Most Cited Cases

Court of Appeals would deny appellant's motion to strike certain exhibits from appellees' supplemental appendix where none of materials appellant found objectionable were necessary to disposition of case.

[2] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Taxing transcription costs associated with depositions submitted by parties in support of summary judgment motions was not abuse of discretion where district court expressly stated that it relied on all depositions submitted in determining whether summary judgment was appropriate. 28 U.S.C.A. § 1920(2).

[3] Federal Courts 170B 830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases

Appellate court will not disturb district court's determination regarding what deposition costs are reasonably necessary to litigation absent abuse of discretion. 28 U.S.C.A. § 1920(2).

115 F.3d 1471, 156 A.L.R. Fed. 741, 38 Fed.R.Serv.3d 181, 25 Media L. Rep. 1917, 97 CJ C.A.R. 946
(Cite as: 115 F.3d 1471)

[4] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

District court does not abuse its discretion in taxing transcription costs associated with depositions that were actually utilized by court in considering defendant's motion for summary judgment. 28 U.S.C.A. § 1920(2).

[5] Federal Courts 170B 927

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk926 Affirmance
170Bk927 k. Particular Cases. Most Cited Cases

Affirmance of costs taxed in connection with four depositions that parties did not submit with their summary judgment briefs was required when appellant challenging taxation of these costs failed to include depositions in his appendix, rendering appendix insufficient to permit assessment of claim of error. 28 U.S.C.A. § 1920(2); U.S.Ct. of App. 10th Cir.Rule 30.1.1, 28 U.S.C.A.; F.R.A.P.Rule 30, 28 U.S.C.A.

[6] Federal Courts 170B 713

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk713 k. Statement of Case or Facts; Appendix. Most Cited Cases

When challenging taxation of costs associated with particular deposition on ground that it was not necessarily obtained, appellant must include in appendix challenged deposition. 28 U.S.C.A. § 1920(2); U.S.Ct. of App. 10th Cir.Rule 30.1.1, 28 U.S.C.A.; F.R.A.P.Rule 30, 28 U.S.C.A.

[7] Federal Courts 170B 634

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk634 k. Amount or Extent of Relief; Costs; Judgment. Most Cited Cases

Appellate court would not consider arguments, raised for first time on appeal, that witness costs taxed against appellant were unrecoverable pursuant to parties' agreement and were limited by government's per diem. 28 U.S.C.A. §§ 1821(d)(2), 1920(3).

[8] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Prevailing defendants could recover transportation mileage expenses for deponents in excess of 100 miles, despite lack of special circumstances, notwithstanding plaintiff's claim that 100-mile limit imposed on service of subpoenas outside judicial district likewise restricted transportation expenses in excess of such limit. 28 U.S.C.A. § 1920(3); Fed.Rules Civ.Proc.Rule 45(e), 28 U.S.C.A.

[9] Federal Courts 170B 634

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in

Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk634 k. Amount or Extent of Relief; Costs; Judgment. Most Cited Cases

Court of Appeals would not address argument, raised for first time on appeal, that deposition exhibit costs were improperly taxed against appellant.

[10] Federal Civil Procedure 170A 2736

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2736 k. Particular Items. Most Cited Cases

Taxing costs of trial exhibits was not abuse of discretion, despite nonprevailing party's claim that advance court approval was required for such costs to be taxed. 28 U.S.C.A. § 1920(4).

[11] Federal Civil Procedure 170A 2740

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2740 k. Stenographic Costs. Most Cited Cases

Taxing costs of imaging documents and copying third-party documents was not abuse of discretion, notwithstanding nonprevailing party's claim that documents were not necessarily obtained for use in case, as required by statute for costs to be taxed. 28 U.S.C.A. § 1920(4).

[12] Federal Courts 170B 830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases

Appellate court will not disturb district court's determination regarding what costs are reasonably necessary to litigation absent abuse of discretion. 28 U.S.C.A. § 1920(4).

[13] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Costs associated with videotaping deposition are taxable under statute providing for taxation of court reporter fees for all or any part of stenographic transcript necessarily obtained for use in case. 28 U.S.C.A. § 1920(2); Fed.Rules Civ.Proc.Rule 30(b)(2, 3), 28 U.S.C.A.

[14] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

District court did not abuse its discretion in concluding that both videotaped depositions and transcripts thereof were necessarily obtained for use in case, and thus in taxing costs of both preparation and transcription of videotaped depositions. 28 U.S.C.A. § 1920(2); Fed.Rules Civ.Proc.Rules 26(a)(3)(B), 30(b)(2, 3), 32(c), 28 U.S.C.A.

[15] Federal Civil Procedure 170A 2738

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2738 k. Depositions. Most Cited Cases

Appropriate inquiry in determining whether costs associated with videotaped depositions may be taxed is whether recording method has been necessarily obtained for use in case, as mandated by statute. 28 U.S.C.A. § 1920(2).

[16] Federal Courts 170B 634

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk634 k. Amount or Extent of Relief; Costs; Judgment. Most Cited Cases

Court of Appeals would not address argument that statute permitting taxation of compensation of interpreters did not provide for recovery of translation costs, given appellant's failure to raise argument in district court. 28 U.S.C.A. § 1920(6).

***1472** Submitted on the briefs: FN*

FN* After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

J.C. Joyce, Sheila M. Bradley, Joyce and Pollard, Tulsa, OK, on the briefs, for Plaintiff-Appellant.

Floyd Abrams, Susan Buckley, David G. Januszewski, Cahill, Gordon & Reindel, New York City, Clyde A. Muchmore, Mark S. Grossman, Crowe & Dunlevy, Oklahoma City, OK, on the brief, for Defendants-Appellees.

Before TACHA, BRISCOE and MURPHY, Circuit Judges.

***1473** TACHA, Circuit Judge.

[1] Robert G. Tilton appeals the order of the district court taxing him $135,830.34 in costs pursuant to 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54(d). Tilton argues that the district court erred in taxing: (1) the transcription costs of forty-eight depositions, (2) the travel and subsistence expenses of ten deponents, (3) the copying costs of a number of deposition exhibits, trial exhibits, imaged documents, and third-party discovery documents, (4) the preparation and transcription costs of seven videotaped depositions, and (5) the translation costs for exhibits used as part of a deposition. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons set forth below, we affirm.FN1

FN1. Tilton moves to strike certain exhibits from the defendants' supplemental appendix. Because none of the materials that Tilton finds objectionable were necessary to our disposition of the case, we deny Tilton's motion. *See Osborne v. Babbitt,* 61 F.3d 810, 814 (10th Cir.1995).

BACKGROUND

In 1992, Tilton sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., ABC News, Inc., and several employees of American Broadcasting Companies, Inc., for libel and false light invasion of privacy arising out of the broadcast of two television programs in 1991 and 1992. The district court granted summary judgment in favor of all the defendants. We affirmed the orders of the district court granting summary judgment on August 27, 1996. *Tilton v. Capital Cities/ABC, Inc.,* 95 F.3d 32 (10th Cir.1996), *cert. denied,* 519 U.S. 1110, 117 S.Ct. 947, 136 L.Ed.2d 836 (1997).

On July 3, 1995, the defendants filed a bill of

costs in the amount of $144,081.47 with the clerk of the district court. Tilton objected to the defendants' bill, arguing that almost all of the items were unnecessary or unallowable. On September 14, 1995, the clerk taxed costs against Tilton in the amount of $138,700.24. Tilton sought review of the award with the district court, again arguing that almost all of the items were unnecessary or unallowable. On review, the district court reduced the costs taxed to $135,830.34, concluding that the defendants' rush charges were not recoverable. Tilton now appeals the district court's order.

DISCUSSION

I. TRANSCRIPTION COSTS FOR DEPOSITIONS

[2] Section 1920(2) provides for taxation of "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). In this case, the parties deposed sixty-nine individuals (fifty-nine by the defendants and ten by the plaintiff) for which the defendants sought transcription costs. The clerk taxed Tilton $48,614.44 for the transcription costs associated with sixty-two depositions but denied the transcription costs associated with seven depositions. In seeking review by the district court, Tilton argued that most of these depositions were unnecessary, irrelevant, and cumulative. On review, the district court upheld the taxation of costs. The court stated:

> Upon review, the Court is satisfied that the depositions which were cited in or submitted with the parties' briefs in regard to the summary judgment motions were necessarily obtained for use in this case. Although the Court did not expressly cite to each and every deposition in its written order, *the Court considered all of the depositions submitted in determining whether summary judgment in favor of Defendants was appropriate. ...*
>
> ....
>
> As to the remaining depositions which were not cited in or submitted with the parties' briefs, the Court concludes that the depositions were necessarily obtained for use in the case. The Court finds that these depositions were not taken simply for investigative purposes or for the convenience of counsel as argued by Plaintiff. Moreover, the Court finds that these depositions were relevant to the issues in the case. The court therefore finds that the costs for these depositions were properly taxed.

Tilton v. Capital Cities/ABC, Inc., No. 92-C-1032-BU, slip op. at 2-3 (N.D.Okla. Jan. 5, 1996) (emphasis added).

***1474** On appeal, Tilton argues that the district court abused its discretion in taxing the transcription costs associated with forty-eight of the sixty-two depositions. Tilton argues that the depositions were irrelevant and cumulative and thus asserts that the depositions were not "necessarily obtained for use in the case" as required by section 1920(2).

[3][4] We will not disturb the district court's determination regarding what deposition costs are reasonably necessary to the litigation absent an abuse of discretion. *Gibson v. Greater Park City Co.,* 818 F.2d 722, 725 (10th Cir.1987). A district court does not abuse its discretion in taxing transcription costs associated with depositions that were "actually utilized by the court in considering [the defendant's] motion for summary judgment." *Merrick v. Northern Natural Gas Co.,* 911 F.2d 426, 434-35 (10th Cir.1990); *see also Gibson,* 818 F.2d at 725 (finding no abuse of discretion in allowing a defendant to recover the costs of several depositions when the court relied on the depositions in deciding the case).

Of the forty-eight depositions at issue on appeal, the parties submitted all but four in support of their summary judgment briefs. The district court expressly

stated that he relied on "all of the depositions submitted in determining whether summary judgment was appropriate." Under these circumstances, we hold that the district court did not abuse its discretion in taxing the transcription costs associated with the depositions submitted by the parties in support of their summary judgment motions. Although we would have preferred a more detailed explanation of the district court's decision to allow the deposition costs, the record contains no evidence that the district court abused its discretion in taxing the cost of deposition copies to plaintiff.

[5][6] With respect to the four depositions that the parties did not submit with their summary judgment briefs (Ann Boatman, James Deaton, Barbara Miller-Volume 1, and Harold Watts), we do not consider whether the district court abused its discretion in taxing the transcription costs because the plaintiff has not included those depositions in the appellant's appendix. In this circuit and under the Federal Rules, the appellant bears the responsibility of providing this court with "an appendix sufficient for consideration and determination of the issues on appeal." 10th Cir. R. 30.1.1; *see also* Fed. R.App. P. 30; *Shearson Lehman Bros., Inc. v. M & L Inv.,* 10 F.3d 1510, 1515 (10th Cir.1993). Thus, when challenging the taxation of costs associated with a particular deposition because it was not necessarily obtained, the appellant's appendix must include the challenged deposition. Tilton has failed to provide us with the depositions of Boatman, Deaton, Miller-Volume 1, and Watts. Because the appellant's appendix is insufficient to permit assessment of this claim of error, we must affirm. *See Deines v. Vermeer Mfg. Co.,* 969 F.2d 977, 979-80 (10th Cir.1992).

II. WITNESS SUBSISTENCE EXPENSES AND TRAVEL COSTS

[7] Section 1920(3) provides for taxation of "[f]ees and disbursements for ... witnesses." 28 U.S.C. § 1920(3). In this case, the defendants sought reimbursement for the travel and subsistence expenses of twelve deponents. The clerk taxed the defendants $5,395.40 for the travel and subsistence expenses of ten deponents. Before the district court, Tilton objected to the taxation of witness travel and subsistence expenses on two grounds. First, Tilton argued that the depositions were not necessary. Second, Tilton argued that travel mileage costs in excess of 100 miles are not recoverable. On review, the district court concluded that the clerk's taxation of the witnesses' travel and subsistence expenses was appropriate.

On appeal, Tilton objects to the award on three grounds. First, Tilton contends that because he and the defendants each agreed to pay one-half of the travel costs of deponents who resided more than 100 miles from Tulsa, the defendants cannot recover the costs as a prevailing party. Second, Tilton argues that the district court should have limited the recovery of the deponent's subsistence expenses to the government's per diem amount under 28 U.S.C. § 1821(d)(2). Finally, Tilton reiterates his argument that travel ***1475** mileage costs in excess of 100 miles are not taxable.

[8] We do not address Tilton's first two arguments because he raises them for the first time on appeal. *See Sac & Fox Nation v. Hanson,* 47 F.3d 1061, 1063 (10th Cir.) (holding that an appellate court will not consider an argument for the first time on appeal "except for the most manifest error"), *cert. denied,* 516 U.S. 810, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). We therefore proceed to address Tilton's argument that the district court abused its discretion in taxing the travel mileage costs in excess of 100 miles. Tilton argues that because Federal Rule of Civil Procedure 45(e) does not permit the service of subpoenas outside the judicial district more than 100 miles from the place of trial, a party cannot recover **transportation expenses in excess of the 100-mile limit** absent special circumstances. We rejected this argument in *Fleet Inv. Co., Inc. v. Rogers,* 620 F.2d 792 (10th Cir.1980):

> [A]ppellant challenges the district court's award of travel mileage costs of four witnesses beyond the

> 100-mile limit specified in Rule 45(e) of the Federal Rules of Civil Procedure. A district court has discretion to approve travel costs in excess of 100 miles from the place at which the trial is held, *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 231-32, 85 S.Ct. 411, 414-15, 13 L.Ed.2d 248 (1964), and such costs need not be approved in advance. But since such a request appeals to the court's discretion, parties who obtain a witness from outside the 100-mile limit without advance approval do so at their peril.

Id. at 794. Thus, as in *Fleet,* we affirm the district court's taxation of witness travel expenses beyond the 100-mile limit imposed by Rule 45(e).

III. EXEMPLIFICATION AND COPYING COSTS

Section 1920(4) provides for the taxation of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). In this case, the clerk taxed Tilton $82,790.40 for exemplification and copies, which included: (1) $568.20 for summary judgment exhibits, (2) $692.40 for deposition exhibits, (3) $16,634.55 for trial exhibits, (4) $48,904.74 for imaged documents, and (5) $15,990.51 for third-party documents. Before the district court, Tilton objected to the taxation of costs for all of the above items except the deposition exhibits. On review, the district court stated:

> [T]he Court finds that Defendants are entitled to recover all of the costs of exemplification and copies taxed by the Court Clerk except for the rush charges in the amount of $2879.90. The court concludes that the **costs of copying trial exhibits and Rule 45 documents** as well as the **costs of imaging documents in the Internal Data Management warehouse** were necessarily incurred by Defendants.
>
> As to the costs for trial exhibits, the Court finds that those costs were necessarily incurred by Defendants as the Court had ordered Defendants to provide a set of trial exhibits to Plaintiff and to the Court. Although Plaintiff states that the Court did not advise Defendants in advance that Plaintiff would pay for those exhibits Plaintiff was clearly on notice under section 1920 that the prevailing party would be entitled to recover costs, including costs for trial exhibits.
>
> *Tilton,* slip op. at 3-4.

On appeal, Tilton argues that the district court abused its discretion in taxing the exemplification and copying costs of the deposition exhibits, trial exhibits, imaged documents, and third-party documents. He does not appeal the taxation of costs for the summary judgment exhibits.

A. Deposition Exhibits

[9] On appeal, Tilton argues that the deposition exhibits were not "necessarily obtained." He appeals the taxation of costs for the deposition exhibits for the same reasons that he appeals the costs for the depositions at which the exhibits were produced. We do not address this argument, however, because Tilton failed to raise it before the district court. *See Sac & Fox Nation,* 47 F.3d at 1063.

*1476 B. Trial Exhibits

[10] With respect to the costs of the trial exhibits, Tilton argues that a prevailing party may not recover costs for the preparation of trial exhibits absent advance court approval. In *Euler v. Waller,* 295 F.2d 765 (10th Cir.1961), we addressed this same argument. In *Euler,* the district court awarded the plaintiff costs for the preparation of a map that the plaintiff had used at trial. Reversing the award, we reasoned:

> No provision is made by the statute for the taxation of any such item as costs. The cases are not in harmony on the question of whether costs may be

> allowed for such items as models, wall charts, maps, and photographs. In our opinion when costs are sought for items not listed in § 1920 the procedure to be followed is an application to the court in advance of trial for an approving order. This allows the exercise of judicial discretion and at the same time conforms with the holding in *Ex parte Peterson,* 253 U.S. 300, 315, 40 S.Ct. 543, 548, 64 L.Ed. 919, which recognized the inclusion in taxable costs of "expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury." In the case now before us there was no advance approval. The cost of the map is disallowed.

Id. at 767; *see also Louisiana Power & Light Co. v. Kellstrom,* 50 F.3d 319, 335 (5th Cir.) ("Absent pretrial approval of the exhibits ..., a party may not later request taxation of the production costs to its opponent."), *cert. denied,* 516 U.S. 862, 116 S.Ct. 173, 133 L.Ed.2d 113 (1995).

Three years after our decision in *Euler,* the Supreme Court decided *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964). In *Farmer,* the Court concluded that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Id.* at 235, 85 S.Ct. at 416. We think this language is inconsistent with *Euler* to the extent that *Euler* prohibits a district court from taxing costs for trial exhibits absent pre-trial approval. In accordance with *Farmer,* we reject a bright-line rule and instead examine whether the circumstances in a particular case justify an award of costs for trial exhibits. *See also U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1248 (10th Cir.1988) (affirming the district court's refusal to tax the cost of a daily transcript but noting that "if the issues in th[e] case were so complex as to justify overlooking the lack of pretrial approval, a court could have used its discretion to award the cost"); *Cleverock Energy Corp. v. Trepel,* 609 F.2d 1358, 1363 (10th Cir.1979) ("The awarding of costs for preparation of exhibits is committed to the discretion of the trial court."); *Mikel v. Kerr,* 499 F.2d 1178, 1182-83 (10th Cir.1974) (affirming the taxation of the costs associated with preparing a trial exhibit without discussing whether the district court approved the exhibit prior to trial). The district court concluded that the circumstances in this case justified the taxation of the trial exhibit costs. We find nothing in the record to suggest that the district court abused its discretion in taxing these costs.

C. Imaged Documents and Third-Party Documents

[11][12] With respect to the costs of imaging documents stored at Internal Data Management and for the costs of copying third-party documents, Tilton argues that these documents were irrelevant to the issues in the case. Tilton also asserts that much of this information was cumulative because the defendants had the information in their possession prior to the broadcasts. Thus, Tilton claims that none of these documents could have been "necessarily obtained" as required by section 1920(4). We will not disturb the district court's determination regarding what costs are reasonably necessary to the litigation absent an abuse of discretion. *Gibson v. Greater Park City Co.,* 818 F.2d 722, 725 (10th Cir.1987). After reviewing the record, we conclude that the district court did not abuse its discretion in taxing these costs.

IV. COSTS FOR VIDEOTAPE AND STENOGRAPHIC TRANSCRIPT

Section 1920(2) provides for the taxation of "[f]ees of the court reporter for all or any ***1477** part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). In this case, the clerk taxed the costs of both videotaping and transcribing seven depositions. Before the district court, Tilton argued that section 1920(2) excludes video depositions as taxable costs because the statute provides that a court may only tax costs of a "stenographic transcript." On review, the district court con-

cluded:

> In addition to the stenographic transcript charges for the depositions cited to or submitted with the parties' briefs in regard to the summary judgment motions, Plaintiff challenges costs taxed for the taking of the videotape depositions.... Plaintiff contends that he should not be required to pay costs associated with both stenographic transcripts and videotapes of the depositions. Having reviewed the applicable authorities, the Court finds that the reasoning of *Meredith v. Schreiner Transport, Inc.,* 814 F.Supp. 1004 (D.Kan.1993), is sound. The Court therefore concludes that the expenses of these videotape depositions are recoverable.
>
> *Tilton,* slip op. at 2-3.

[13] We agree with the district court that the costs associated with videotaping a deposition are taxable under section 1920(2). In so holding, we recognize that section 1920(2) does not explicitly provide for the taxation of costs associated with video depositions. Federal Rule of Civil Procedure 30(b)(2)-(3), however, authorizes videotape depositions as an alternative to traditional stenographic depositions.[FN2] Interpreting section 1920(2) in conjunction with Rule 30(b)(2)-(3), we hold section 1920(2) implicitly permits taxation of the costs of video depositions.[FN3]

> FN2. Federal Rule of Civil Procedure 30(b)(2)-(3) provides:
>
> > (2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.
> >
> > (3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

FN3. Most courts have agreed that a district court may tax the costs of a video deposition under section 1920(2). *See Morrison v. Reichhold Chems. Inc.,* 97 F.3d 460, 464-65 (11th Cir.1996) ("[W]e hold that, when a party notices a deposition to be recorded by nonstenographic means, or by both stenographic and nonstenographic means, and no objection is raised at that time by the other party to the method of recordation pursuant to Federal Rule of Civil Procedure 26(c), it is appropriate under § 1920 to award the cost of conducting the deposition in the manner noticed."); *Barber v. Ruth,* 7 F.3d 636, 645 (7th Cir.1993) ("[A] district court may tax under Rule 54(d) the costs associated with the videotaping of a deposition."); *Commercial Credit Equip. Corp. v. Stamps,* 920 F.2d 1361, 1368 (7th Cir.1990) ("A videotaped deposition qualifies as 'other than stenographic means,' and as such is taxable as a substitute for a stenographic transcript, even though it is more expensive."); *Davis v. Puritan-Bennett Corp.,* 923 F.Supp. 179, 180 (D.Kan.1996) ("[T]his Court has held that deposition videotaping expenses are recoverable as costs."); *Meredith v. Schreiner Transp., Inc.,* 814 F.Supp. 1004, 1006 (D.Kan.1993) (noting that "numerous courts have held that costs associated with video deposition are ... recoverable"). *But see*

> *Echostar Satellite Corp. v. Advanced Communications Corp.*, 902 F.Supp. 213, 215 (D.Colo.1995) ("I do not see how a videotape can be a 'stenographic transcript.' ").

Moreover, we recognize that permitting recovery of the costs of video depositions comports with public policy. We see no reason to penalize a prevailing party because the party has chosen to preserve and present testimony through a videotape instead of a printed transcript. "[V]ideotaped depositions are a necessary and time effective method of preserving witnesses' time and allocating precious court and judicial time in this age of advanced court technology and over-crowded court calendars. [Thus, w]e must not seem reluctant to adopt any and all time-saving methods that serve to improve our system of justice." *Commercial Credit Equip. Corp. v. Stamps,* 920 F.2d 1361, 1368 (7th Cir.1990).

[14] Our conclusion that a district court may tax the costs of videotaping depositions under section 1920(2) does not end our inquiry. We must determine exactly what costs associated with a videotaped deposition are ***1478** taxable-that is, we must decide whether the defendants may recover the costs of *both* videotaping and transcribing the depositions.

In this case, the district court taxed the costs of both the preparation and transcription of seven videotaped depositions. The court relied on the reasoning of *Meredith v. Schreiner Transport,* 814 F.Supp. 1004 (D.Kan.1993). In *Meredith,* the court permitted the taxation of a videotape transcript if it was "necessarily obtained for use in the case" as required by section 1920(2). The court concluded that taxation of a transcript would be appropriate if it had "a legitimate use independent from or in addition to the videotape which would justify its inclusion in an award of costs." *Id.* at 1006. The court noted that a videotape could be lost, erased, or fall prey to technical difficulty. *Id.* The court also stressed that the parties could more easily edit objectionable portions of deposition testimony from a transcript. *Id.* In addition, the court observed that appellate courts could more efficiently review claims of error relating to deposition testimony by reference to a transcript than to a videotape deposition. *Id.* Finally, the court noted that in many cases, a party insists that the opposing party arrange to have a transcription made as a condition for obtaining an order allowing a videotape deposition. *Id.* Thus, the court found an independent, legitimate use for the transcript apart from the videotape and allowed the cost to be taxed. *Id.*

[15] We conclude that the district court did not abuse its discretion in taxing the **costs of both the preparation and transcription of the seven videotaped depositions**.[FN4] We agree, under the reasoning of *Meredith,* that in most cases, a stenographic transcript of a videotaped deposition will be "necessarily obtained for use in the case."

> FN4. In so holding, we have reviewed the applicable authority from other circuits. In two cases, the Seventh Circuit held that a transcript of a video deposition is not taxable under the pre-1993 version of Rule 30(b). *Barber v. Ruth,* 7 F.3d 636, 645 (7th Cir.1993); *Commercial Credit Equip. Corp. v. Stamps,* 920 F.2d 1361, 1369 (7th Cir.1990). Prior to 1993, Rule 30(b)(4) provided that the parties could stipulate that the testimony at a deposition be recorded by nonstenographic means but that "[a] party may arrange to have a stenographic transcription made *at the party's own expense.*" (Emphasis added). The court reasoned that this language precluded a court from taxing the costs of a stenographic transcript of a videotaped deposition. *Barber,* 7 F.3d at 645; *Commercial Credit Equip. Corp.,* 920 F.2d at 1369. The present case is distinguishable from *Barber* and *Commercial Credit* because the 1993 amendments to Rule 30 deleted the operative language. Rule 30(b)(2) now states

that "[a]ny party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means." The phrase "at the party's own expense" is conspicuously absent. *See Garonzik v. Whitman Diner*, 910 F.Supp. 167, 171-72 (D.N.J.1995) (holding that under new Rule 30(b)(2), the costs of both the preparation and transcription of a videotaped deposition is taxable).

In *Morrison v. Reichhold Chemicals, Inc.*, 97 F.3d 460, 464-65 (11th Cir.1996), the Eleventh Circuit recently discussed when a prevailing party could recover the costs of both a videotaped deposition and the transcript. The court held that "when a party notices a deposition to be recorded by nonstenographic means, or by both stenographic and nonstenographic means, and no objection is raised at that time by the other party to the method of recordation pursuant to Federal Rule of Civil Procedure 26(c), it is appropriate under § 1920 to award the cost of conducting the deposition in the manner noticed." *Id.* at 464-65. We respectfully disagree with *Morrison* to the extent that the recording method contained in the deposition notice controls whether a court may tax the costs associated with the recording method. Instead, we conclude that the appropriate inquiry is whether the recording method has been "necessarily obtained for use in the case" as mandated by section 1920(2).

We also note that our view is consistent with the obligations imposed by the Federal Rules of Civil Procedure. In particular, Rule 26 requires a party who has noticed a deposition to be taken by nonstenographic means to provide a transcript to opposing parties as part of its discovery obligations. Fed.R.Civ.P. 26(a)(3)(B).[FN5] Rule 32(c) requires a party to provide a transcript of a video deposition that the party intends to offer as evidence at trial or upon a dispositive motion. ***1479** Fed.R.Civ.P. 32(c).[FN6] Thus, in this case, the district court did not abuse its discretion in concluding that both the videotapes and transcripts were "necessarily obtained."

FN5. Rule 26(a)(3)(B) states: "[A] party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes: ... the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony."

FN6. Rule 32(c) states: "Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise."

V. COSTS OF TRANSLATING DOCUMENTS

[16] Section 1920(6) provides for taxation of "compensation of interpreters." 28 U.S.C. § 1920(6). In this case, the defendants sought to recover **the costs of translating from Tamil to English certain documents** that Daniel Dayanandhan produced at his deposition. Tilton objected to the award, asserting that the deposition exhibits were not necessary because the district court did not refer or rely on the exhibits in granting summary judgment for the defendants. The clerk disagreed and taxed Tilton $1,675.00 in translation expenses. Before the district court, Tilton again

argued that the translation expenses were not necessary. On review, the district court concluded that taxation of the translator fees was appropriate.

On appeal, Tilton claims that because section 1920(6) only provides for taxation of "compensation of interpreters," translation costs are not recoverable. *See Viacao Aerea Sao Paulo, S.A. v. International Lease Fin. Corp.*, 119 F.R.D. 435, 440 (C.D.Cal.1988) (holding that a prevailing party could not recover translation costs under section 1920(6)). We do not address Tilton's argument, however, because Tilton failed to raise this issue before the district court. *See Sac & Fox Nation*, 47 F.3d at 1063.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not abuse its discretion in taxing: (1) the transcription costs for forty-six depositions, (2) the travel and subsistence expenses of ten deponents, (3) the copying costs for numerous deposition exhibits, trial exhibits, imaged documents, and third-party documents, (4) the preparation and transcription costs for ten videotaped depositions, and (5) the translation costs for deposition exhibits. We therefore AFFIRM the order of the district court taxing Tilton $135,830.34 in costs. We DENY Tilton's motion to strike the portions of the defendants' supplemental appendix.

C.A.10 (Okl.),1997.
Tilton v. Capital Cities/ABC, Inc.
115 F.3d 1471, 156 A.L.R. Fed. 741, 38 Fed.R.Serv.3d 181, 25 Media L. Rep. 1917, 97 CJ C.A.R. 946

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505 F.Supp.2d 898
United States District Court,
D. Kansas.

Larry **TREASTER**, Plaintiff,
v.
HEALTHSOUTH CORPORATION d/b/a Mid-America Rehabilitation Hospital and Daniel R. Wilson, M.D., Defendants.

No. 05-2061-JWL. | April 3, 2007.

Synopsis
Background: Patient brought negligence action against physician seeking damages for injuries sustained in fall at hospital. Following jury verdict for physician, the district court taxed costs against patient. Patient filed motion to retax costs and to deny costs based on indigency.

Holdings: The District Court, John W. Lungstrum, J., held that:

[1] patient was incapable of paying court-imposed costs;

[2] patient was properly taxed for service of subpoena on registered nurse;

[3] court could not tax patient for costs of certain depositions;

[4] court could not tax patient for certain fees for disbursements and printing;

[5] patient acted in good faith; and

[6] denial of costs was not warranted.

Motion granted in part and denied in part.

West Headnotes (17)

[1] **Federal Civil Procedure**
Prevailing Party

The denial of costs is in the nature of a severe penalty and there must be some apparent reason to penalize the prevailing party if costs are to be denied. Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

4 Cases that cite this headnote

[2] **Federal Civil Procedure**
Prevailing Party
Federal Civil Procedure
Taxation

The allowance or disallowance of costs to a prevailing party is within the sound discretion of the court, but this discretion is limited in two ways: first, rule governing costs creates a presumption that the district court will award costs to the prevailing party and, second, the court must provide a valid reason for not awarding costs to a prevailing party. Fed.Rules Civ.Proc.Rule 54, 28 U.S.C.A.

6 Cases that cite this headnote

[3] **Federal Civil Procedure**
Taxation

The non-prevailing party has the burden to overcome the presumption in favor of awarding costs to prevailing party. Fed.Rules Civ.Proc.Rule 54, 28 U.S.C.A.

3 Cases that cite this headnote

[4] **Federal Civil Procedure**
Persons Liable

Patient was incapable of paying court-imposed costs assessed following jury verdict in favor of physician in patient's negligence action against physician, although physician alleged patient could pay costs from money received in confidential settlement with hospital; settlement proceeds were used primarily to pay patient's attorney fees and expenses, patient's income consisted of worker's compensation and social

security disability benefits in the amount of $1,780.92 per month, his monthly expenses exceeded his monthly income, he had no savings or investments, his joint checking account with his wife had an average balance around $500, and it did not appear that his dire financial circumstances were likely to improve because he was permanently and totally disabled as a result of a work-related traumatic brain injury. Fed.Rules Civ.Proc.Rule 54, 28 U.S.C.A.

1 Cases that cite this headnote

[5] **Federal Civil Procedure**
Amount, Rate and Items in General

The court has no discretion to award items as costs that are not set forth in statute governing taxation of costs. 28 U.S.C.A. § 1920.

[6] **Federal Civil Procedure**
Particular Items

Following jury verdict for physician, patient who brought negligence action against physician was properly taxed for service of subpoena on registered nurse retained as expert by patient to offer opinion that nurses at hospital did not meet standard of care in preventing patient's fall, although service was by private process server rather than marshal, and nurse was never called as witness at trial; amount taxed was consistent with amount that would have been incurred if marshal had effected service, and mere fact that nurse was under subpoena served deterrent purpose of discouraging patient's counsel from offering evidence that hospital was not at fault, which may have implicitly bolstered physician's comparative fault claim against hospital. 28 U.S.C.A. § 1920(1).

[7] **Federal Civil Procedure**
Depositions

The costs of taking and transcribing depositions reasonably necessary for litigation are generally awarded to the prevailing party; the court will allow as costs the cost of one transcript for each deposition only, but not items for the convenience of counsel such as minuscripts, keyword indices, disks, exhibits, and postage and delivery. 28 U.S.C.A. § 1920.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Depositions

Court could not tax patient for costs of certain depositions following jury verdict for physician in patient's negligence action, where invoices for depositions were not itemized, and it was unclear whether amounts taxed consisted of fees for transcripts or unrecoverable convenience items. 28 U.S.C.A. § 1920(2).

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Depositions

Court reporters' invoices for depositions are typically only partially recoverable as costs because they generally include numerous convenience items that are not allowable as costs; it is well established that the party seeking its costs has the burden of establishing the amount of compensable costs and expenses to which it is entitled. 28 U.S.C.A. § 1920(2).

[10] **Federal Civil Procedure**
Stenographic Costs

A copy is necessarily obtained within the meaning of rule governing taxation of costs only where the court believes that its procurement was

reasonably necessary to the prevailing party's preparation of its case. 28 U.S.C.A. § 1920(4).

2 Cases that cite this headnote

[11] **Federal Civil Procedure**
Stenographic Costs

Court could not tax patient for certain fees for disbursements and printing as reasonably necessary to preparation of physician's case following jury verdict for physician, where the record did not disclose the nature of the materials copied, and expenses associated with blowing up and mounting trial exhibits were not reasonably necessary in specific trial courtroom. 28 U.S.C.A. § 1920(3).

3 Cases that cite this headnote

[12] **Federal Civil Procedure**
Witness Fees

Patient who brought negligence action against physician could not be taxed for subsistence allowance for physician's witness following jury verdict for physician, where overnight stay was not required. 28 U.S.C.A. § 1821(d)(1).

[13] **Federal Civil Procedure**
Persons Liable

In determining the proper weight to be given to losing party's good faith in when determining whether to deny costs under the indigency exception, the court is mindful that the losing party's good faith is alone insufficient to justify the denial of costs to the prevailing party.

3 Cases that cite this headnote

[14] **Federal Civil Procedure**
Persons Liable

Patient who brought negligence claim against physician after he sustained injuries from fall in hospital acted in good faith in bringing lawsuit and prosecuting claim against physician at trial, as required to deny taxation of costs under indigency exception, although jury ultimately resolved issues in favor of physician; patient's claims were legitimate and evidence would have supported jury verdict in favor of either party.

[15] **Federal Civil Procedure**
Fees and Costs

The fact that a case presents close and difficult questions can serve as a valid basis to deny costs.

1 Cases that cite this headnote

[16] **Federal Civil Procedure**
Persons Liable

The court is not required to deny costs simply because a plaintiff is indigent and a case presents close and difficult questions; but this is one of the considerations that the court considers in its analysis under the indigency exception.

2 Cases that cite this headnote

[17] **Federal Civil Procedure**
Prevailing Party
Federal Civil Procedure
Persons Liable

Denial of costs was not warranted following jury verdict for physician in patient's negligence action, although patient was in dire financial situation and physician overstated his costs, where denial of costs was severe penalty and there was no apparent reason to penalize physician by denying costs.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

JOHN W. LUNGSTRUM, District Judge.

This is a medical negligence case arising from a fall plaintiff Larry **Treaster** suffered while he was a patient at defendant **HealthSouth** Corporation d/b/a Mid-America Rehabilitation Hospital ("the hospital"). Defendant Daniel R. Wilson, M.D., was plaintiff's treating physician as well as the hospital's medical director at the time of the fall. Plaintiff settled his claim against the hospital shortly before trial, then proceeded to trial on his claim against Dr. Wilson. The jury returned a verdict in favor of Dr. Wilson and the court entered judgment accordingly. This matter comes before the court on Plaintiff's Motion for Review of Taxation of Costs by Clerk (doc. # 189). In this motion, plaintiff asserts objections to specific costs taxed by the clerk and, additionally, asks the court to deny costs entirely due to plaintiff's indigency and the close and difficult nature of the case. For the reasons explained below, the court will grant plaintiff's motion in part and reduce defendant Wilson's costs to $3,776.61.

BACKGROUND

Plaintiff originally brought this lawsuit against the hospital, Dr. Wilson, his employer Rehabilitation Medicine, P.A., K. Dean Reeves, M.D., and Mohinder S. Pegany, M.D. Plaintiff subsequently dismissed ***901** his claims against Dr. Pegany, Dr. Reeves, and Rehabilitation Medicine. At the time the pretrial order was entered the only two remaining defendants were the hospital and Dr. Wilson. The case was set for jury trial beginning Tuesday, September 26, 2006. On the Friday prior, September 22, 2006, plaintiff and the hospital reached an agreement settling plaintiff's claim against the hospital. Thus, the posture of the case as it stood at the time of trial was that plaintiff claimed that defendant Wilson was negligent in failing to order adequate restraints to ensure that plaintiff was properly restrained to protect him from falling; defendant Wilson, in turn, denied that he was at fault and further asserted the hospital's comparative fault.

The case was tried to a jury beginning September 26, 2006. On October 5, 2006, the jury returned a verdict in defendant Wilson's favor, finding he was not at fault. The court entered judgment accordingly, stating that defendant Wilson should recover of plaintiff his costs of the action. After trial, defendant Wilson filed his bill of costs, seeking $8,906.19 as his costs of the action. On January 11, 2007, the clerk taxed costs against plaintiff in the amount of $7,538.47. Plaintiff then filed the current motion to retax costs, seeking this court's review of the taxation of costs assessed by the clerk. In plaintiff's motion, plaintiff objects to certain specific items that the clerk taxed as costs. Additionally, plaintiff asks the court to deny costs entirely due to plaintiff's indigency and the close and difficult nature of the case.

On February 28, 2007, the court issued a Memorandum and Order directing the parties to submit **supplemental** briefs addressing the issue of plaintiff's indigency. Defendant Wilson then filed a motion seeking an order requiring plaintiff to disclose information relating to the financial aspects of plaintiff's eve-of-trial settlement with the hospital. The court granted the motion and directed plaintiff to produce that information in camera for the court's review. The court has now reviewed plaintiff's **supplemental** brief and the settlement information plaintiff submitted to the court for in camera inspection. The deadline for defendant Wilson to file a **supplemental** response brief has passed. The court has carefully reviewed the record and is now prepared to rule.

DISCUSSION

[1] [2] [3] Federal Rule of Civil Procedure 54(d) provides that "[e]xcept when express provision therefor is made in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." This rule creates a presumption that the district court will award the prevailing party costs. *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir.2004). The denial of

costs is in the nature of a severe penalty and there must be some apparent reason to penalize the prevailing party if costs are to be denied. *Id.* The allowance or disallowance of costs to a prevailing party is within the sound discretion of this court, but this discretion is limited in two ways: first, as stated previously, Rule 54 creates a presumption that the district court will award costs to the prevailing party and, second, the court must provide a valid reason for not awarding costs to a prevailing party. *Cantrell v. Int'l Bhd. of Elec. Workers,* 69 F.3d 456, 458-59 (10th Cir.1995) (en banc). The non-prevailing party has the burden to overcome the presumption in favor of awarding costs. *Rodriguez,* 360 F.3d at 1190.

Plaintiff contends that the court should deny costs entirely because of plaintiff's indigency and the close and difficult nature of the case. The Tenth Circuit has indeed ***902** suggested that these may serve as valid reasons for denying costs. *Cantrell,* 69 F.3d at 459 (noting that the Seventh Circuit has held that it is not an abuse of discretion for the district court to deny costs where the non-prevailing party is indigent and that the Sixth Circuit has held that a district court may deny a motion for costs if the issues are close and difficult); *see also Rodriguez,* 360 F.3d at 1190 (citing *Cantrell* for the proposition that other circuits have recognized that the indigent status of the non-prevailing party and the presentation of issues that are close and difficult are both circumstances in which a district court may deny costs).

Turning first to plaintiff's claim of indigency, this court follows the Tenth Circuit's lead that the indigency exception derives from case law from the Seventh Circuit, and the court looks to the law of the Seventh Circuit in evaluating plaintiff's claim of indigency. The Seventh Circuit has held that in denying costs based on this basis, the court should first "make a threshold factual finding that the losing party is incapable of paying the court-imposed costs at this time or in the future." *Rivera v. City of Chicago,* 469 F.3d 631, 635 (7th Cir.2006) (quotation omitted). The non-prevailing party has the burden of providing the court with sufficient documentation to support such a finding. *Id.* "This documentation should include evidence in the form of an affidavit or other documentary evidence of both income and assets, as well as a schedule of expenses." *Id.* "Second, the district court should consider the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised" in deciding whether to deny costs. *Id.* Again, the non-prevailing party has the burden to establish that he or she is entitled to the benefit of the indigency exception. *Id.*

A. ***Plaintiff's Ability to Pay Costs***

[4] In this case, plaintiff has provided sufficient documentation to satisfy the court that he is incapable of paying court-imposed costs at this time or in the future. His income consists of worker's compensation and social security disability benefits in the amount of $1,780.92 per month. He has estimated his monthly expenses, which the court does not find to be unreasonable, to be $1,893. Thus, his monthly expenses exceed his monthly income. He has no savings or investments. He has a joint checking account with his wife and the average balance is normally around $500. It does not appear that plaintiff's dire financial circumstances are likely to improve in the future because he is permanently and totally disabled as a result of a work-related traumatic brain injury. In fact, it was during his hospitalized rehabilitation from that injury that he suffered the fall that was the subject of this lawsuit. Notwithstanding plaintiff's current financial circumstances, defendant contends that plaintiff should be able to pay his costs from the money he received from his settlement with the hospital. The court has reviewed the information submitted by plaintiff in camera concerning the distribution of these settlement proceeds. Without divulging confidential information concerning the amount of the settlement, suffice it to say that those settlement proceeds are gone. They were used primarily to pay plaintiff's attorneys' fees and expenses. Plaintiff used the relatively modest amount that he received to pay down a balance on a credit card. During a telephone conference in this case, counsel for defendant Wilson suggested that those settlement funds should have been used to pay defendant Wilson's costs before being used for other purposes. Defendant Wilson has not, however, cited to the court any authority which would support the proposition that defendant ***903** Wilson had priority to those funds. Those settlement proceeds are indeed gone, and plaintiff has submitted evidence which establishes that he is incapable of paying court-imposed costs at this time or in the future. This threshold showing is all that is required to potentially invoke the indigency exception. Because plaintiff has made this threshold showing, then, the court must next consider the amount of costs, the good faith of plaintiff, and the closeness and difficulty of the issues raised in deciding whether to deny costs.

B. ***Amount of Costs***

[5] The clerk taxed costs in the amount of $7,538.47. Plaintiff asks the court to reduce this amount to $3,038.48 by disallowing certain costs which, plaintiff contends, are not properly taxable. The costs allowed under Rule 54(d) is governed by 28 U.S.C. § 1920, which provides that the judge or the clerk may tax as costs certain enumerated categories of expenses. § 1920. The court has no discretion to award items as costs that are not set forth in § 1920. *Bee*

v. Greaves, 910 F.2d 686, 690 (10th Cir.1990). The party seeking its costs has the burden of establishing the amount of compensable costs and expenses to which it is entitled. *Allison v. Bank One-Denver,* 289 F.3d 1223, 1248-49 (10th Cir.2002). Following are the disputed items of costs.

1. Service of Subpoena

[6] The clerk taxed service of a subpoena on Lynda Watson, R.N. in the amount of $125.10. The cost of service of a subpoena is statutorily recoverable as "[f]ees of the ... marshal" under § 1920(1). *See Burton v. R.J. Reynolds Tobacco Co.,* 395 F.Supp.2d 1065, 1078 (D.Kan.2005). Although defendant Wilson used a private process server instead of the marshal, service fees to private process servers are generally taxable up to the amount that would have been incurred if the U.S. Marshal's office had effected service. *See id.* The cost for service by the marshal is $45 plus mileage at 44.5¢ per mile. The process server charged for 180 miles at 44.5¢ per mile, or $80.10. The clerk allowed $125.10, which is consistent with the amount that would have been incurred if the marshal had effected service ($45 + $80.10). Accordingly, the clerk properly taxed this item as costs.

Plaintiff further contends that this cost should not be allowed because Ms. Watson was never called as a witness at trial. Ms. Watson was an expert retained by plaintiff who was originally intended to offer her opinion that the nurses at the hospital did not meet the standard of care in preventing Mr. **Treaster's** fall. Once plaintiff settled his claims against the hospital, plaintiff no longer needed Ms. Watson to testify. Ms. Watson's testimony, however, presumably still would have been helpful to defendant Wilson in supporting his comparative fault claim against the hospital. As such, defendant Wilson subpoenaed Ms. Watson as a trial witness. The court does not believe that the subpoena was unnecessary (so as to support the denial of this cost) just because defendant Wilson ultimately did not call Ms. Watson as a witness at trial. The mere fact that Ms. Watson was under subpoena undoubtedly served the deterrent purpose of discouraging counsel for plaintiff from offering evidence that the hospital was not at fault, which may have implicitly bolstered defendant Wilson's comparative fault claim against the hospital. Simply because counsel for defendant Wilson ultimately decided, as a matter of trial strategy, not to call Ms. Watson as a witness does not mean that the subpoena was unnecessary. The court therefore finds plaintiff's argument that the cost of Ms. Watson's subpoena was unnecessary to be without merit.

904 *2. Fees of the Court Reporter

[7] The clerk taxed fees of the court reporter in the amount of $4,903.24. Plaintiff contends that the court should disallow defendant the costs of ten different depositions. The court may tax as costs "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." § 1920(2). "The costs of taking and transcribing depositions reasonably necessary for litigation are generally awarded to the prevailing party under 28 U.S.C. § 1920." *Callicrate v. Farmland Indus., Inc.,* 139 F.3d 1336, 1339 (10th Cir.1998). The court will allow as costs the cost of one transcript for each deposition only, but not items for the convenience of counsel such as minuscripts, keyword indices, ASCII disks, exhibits, and postage and delivery. *See Burton,* 395 F.Supp.2d at 1080.

[8] [9] In this case, plaintiff urges the court to disallow the costs of ten deposition transcripts because the court reporter invoices give a total amount without detailing whether non-recoverable services were provided. In response, defendant Wilson contends that the court should not deny these costs simply because they are not sufficiently detailed and, furthermore, he contends that the reporter service may not charge separately for items such as postage and copies, that those costs might be built into the overall fee, and that he should not be penalized for the reporter's business practices. The court disagrees. Court reporters' invoices for depositions are typically only partially recoverable as costs because they generally include numerous convenience items that are not allowable as costs. It is well established that the party seeking its costs has the burden of establishing the amount of compensable costs and expenses to which it is entitled. *Allison,* 289 F.3d at 1248-49. Consequently, a party that intends to recover its costs if it prevails at trial should prudently require its vendors to present an itemized invoice so that the clerk and/or the court can distinguish between the amounts that are recoverable and those that are not. Indeed, court reporter invoices are generally itemized in this fashion, as illustrated by the numerous other court reporter invoices submitted with defendant Wilson's bill of costs.

Defendant Wilson, then, has not met his burden of establishing that the following amounts consist of "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case," § 1920(2), as opposed to being for related convenience items that are not recoverable: depositions of Dr. Wilson ($420.90); Baindu Kamara, Inessa Sergeyeva, and Stacie Ann Blackwell ($569.90); Rugeania Coats and Teddy Reed Scott ($385.80); and Dawn Caprice Truelove and Lisa Lane ($364.90). Additionally, the invoice for the deposition of Lynda Watson, BSW ($586.73) states that it

is for the original and one copy of the deposition and that the original costs have been split as requested; again, the extent to which this amount may reflect non-recoverable costs is unclear to the court. The court, however, rejects plaintiff's challenge to the deposition costs for Darla R. Ura. That invoice states that it is for one certified copy of her deposition transcript, an item which is properly taxable. Therefore, the court will not disallow this cost. The amounts taxed by the clerk as fees of the court reporter, then, should be reduced by $2,328.23 to a total of $2,575.01.

3. Printing and Copying Costs

[10] The clerk taxed fees for disbursements and printing in the amount of $1,599.71. The court may tax as costs "[f]ees and disbursements for printing and witnesses," § 1920(3), but the expenses claimed by defendant Wilson under this ***905** category of costs would be more appropriately categorized as costs under § 1920(4), which permits the court to tax as costs "fees for exemplification and copies of papers necessarily obtained for use in the case." A copy is "necessarily obtained" within the meaning of § 1920(4) only where the court believes that its procurement was reasonably necessary to the prevailing party's preparation of its case. *See Battenfeld of Am. Holding Co. v. Baird, Kurtz & Dobson,* 196 F.R.D. 613, 617 (D.Kan.2000). Defendant Wilson, as the party seeking his costs, bears the burden of establishing that the copy costs satisfy this standard. *See id.*

[11] The court finds that defendant Wilson has met his burden with respect to the copying of materials for Dr. Barrett ($55.77), the medical record **trial exhibits** ($83.54), and the copies from the 4/29/05 invoice from Xact ($33.27). He has not, however, met his burden of establishing that the following items are recoverable costs: the remainder of the 4/29/05 invoice from Xact ($11.82) and the invoice from Office Depot ($89.10) because binders are not "printing" or "copies" as allowed by § 1920(3) as well as the other invoice from Xact ($64.17) because the record does not disclose the nature of the materials copied and therefore defendant has not shown that these copies were reasonably necessary to preparation of his case. The expenses associated with blowing up and mounting trial exhibits also were not reasonably necessary in a trial courtroom equipped with an Elmo system, as was the case here. *See, e.g., Battenfeld of Am. Holding Co.,* 196 F.R.D. at 616-17 (denying costs of board exhibits used at trial because, although they may have helped the jury understand the issues, the court could not conclude they were "necessarily obtained" for use in the case). Consequently, defendant Wilson also has not met his burden of establishing that the following items are recoverable costs: Kinkos ($251.43), Copy Center ($44.05), Kinkos ($74.14), RSI ($670), Kinkos ($222.42). The amount allowable by the clerk as "[f]ees for disbursements and printing" should therefore be reduced by $1,427.13 for a total of $172.58.

4. Witness Fee

[12] The clerk taxed a witness fee for Sandra Barrett, M.D. in the amount of $236.12. "Fees and disbursements for ... witnesses" are taxable as costs. § 1920(3). Expert witness fees are taxable under § 1920(3) only to the relatively modest extent allowed by 28 U.S.C. § 1821. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987); *Hull ex rel. Hull v. United States,* 978 F.2d 570, 572-73 (10th Cir.1992) (district court erred in awarding expert witness fees in excess of those allowed by § 1821). "Section 1821 generally allows a $40 per day attendance fee plus travel and subsistence expenses related to attendance." *Burton,* 395 F.Supp.2d at 1081.

Defendant Wilson is entitled to the following costs for Dr. Barrett's witness fee: $40 for attendance, § 1821(b); $185.12 (416 miles at 44.5¢ per mile) as a travel allowance, § 1821(c)(2); and $4.50 for toll charges, § 1821(c)(3). Defendant Wilson now admits that he is not entitled to the originally claimed $6.50 charge for meals because an overnight stay was not required for Dr. Barrett. *See* § 1821(d)(1) (subsistence allowance is to be paid only when an overnight stay is required). Thus, the amount allowable as costs for Dr. Barrett's witness fee must be reduced $6.50 to a total of $229.62.

5. Total Amount of Taxable Costs

The total amount of costs properly taxable, then, is as follows:

Fees for service of summons andsubpoena	$ 125.10
Fees of the court reporter	2,575.01

Fees and disbursements for printing	0
Fees for witnesses	229.62
Fees for exemplification and copiesof papers	846.88
Total	$3,776.61

906 C. *Good Faith of Plaintiff

[13] The Seventh Circuit has instructed that the losing party's good faith is one of the factors the court should consider in determining whether to deny costs under the indigency exception. *Rivera v. City of Chicago,* 469 F.3d 631, 635 (7th Cir.2006). In determining the proper weight to be given to this consideration, the court is mindful that the losing party's good faith is alone insufficient to justify the denial of costs to the prevailing party. *AeroTech, Inc. v. Estes,* 110 F.3d 1523, 1527 (10th Cir.1997). Perhaps it could be said more accurately that this consideration figures in the court's analysis in the sense that the losing party's good faith is an important factor because it should be a virtual prerequisite to receiving relief from the award of costs. *See Cherry v. Champion Int'l* ***Corp.***, 186 F.3d 442, 446 (4th Cir.1999).

[14] In this case, the court readily concludes that plaintiff acted in good faith in bringing this lawsuit against Dr. Wilson and in prosecuting his claim against Dr. Wilson through trial. Plaintiff's claims against Dr. Wilson were certainly legitimate. The case did not present complex legal issues, but it was permeated with genuine issues of fact that required resolution by a fact finder. The court believes that plaintiff and his counsel were genuinely surprised by the jury's verdict. Although the jury ultimately resolved those issues in favor of Dr. Wilson, the evidence would have supported a jury verdict in favor of either party. Consequently, this is not a case in which the plaintiff's lack of good faith should preclude the court's denial of costs.

D. *Closeness and Difficulty of the Issues Raised*

[15] [16] The fact that a case presents close and difficult questions can serve as a valid basis to deny costs. *Cantrell v. Int'l Bhd. of Elec. Workers,* 69 F.3d 456, 459 (10th Cir.1995) (en banc). The court is not required to deny costs simply because a plaintiff is indigent and a case presents close and difficult questions. *Rodriguez v. Whiting Farms, Inc.,* 360 F.3d 1180, 1190 (10th Cir.2004). But, this is one of the considerations that the court considers in its analysis under the indigency exception. *Rivera,* 469 F.3d at 635.

Here, the case presented close questions of fact as to whether the hospital's staff, Dr. Wilson, and/or Dr. Reeves was at fault in failing to properly restrain plaintiff. The issues were not particularly complex or difficult from a legal standpoint, but the evidence was rather complex and unusually lengthy from a factual standpoint. Ultimately, the court does not believe that this factor necessarily weighs in favor of or against the denial of costs.

E. *Summary*

[17] The court has carefully considered whether costs should be denied in this case. Ultimately, despite plaintiff's dire financial circumstances and the fact that plaintiff prosecuted his case against defendant Wilson in good faith, the court does not believe that defendant Wilson should be denied his costs because the Tenth Circuit has repeatedly stated that the denial of costs is in the nature of a severe penalty and that there must be some apparent reason to penalize the prevailing party if costs are to be denied. *See Rodriguez,* 360 F.3d at 1190; *AeroTech,* 110 F.3d at 1526-27; *Klein v. Grynberg,* 44 F.3d 1497, 1507 (10th Cir.1995). The only reason the court can surmise for

penalizing defendant Wilson in this manner would be ***907** the fact that he overstated his bill of costs. His original bill of costs sought $8,906.19. The clerk reduced this $1,367.72 to $7,538.47 based on items that clearly were not taxable, including $1,276.20 in airfare for defendant Wilson's counsel. And, upon even closer scrutiny this court has determined that defendant Wilson is really only entitled to approximately half that amount. Thus, the amount properly taxable was only forty-two percent of the original amount defendant Wilson sought to tax plaintiff. The court believes, however, that this is attributable to nothing more than zealous advocacy. This case was aggressively litigated by both sets of attorneys, and plaintiff's counsel may have taken a similar approach to costs if plaintiff had prevailed at trial. Consequently, the court will not deny defendant his costs. The court will, however, reduce defendant Wilson's costs to those items which are properly taxable as set forth in the court's discussion above.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion for Review of Taxation of Costs by Clerk (doc. # 189) is granted in part and denied in part. The court will not deny defendant Wilson his costs entirely, but will reduce his costs to $3,776.61.

IT IS SO ORDERED.

74 F.3d 191
(Cite as: 74 F.3d 191)

United States Court of Appeals,
Tenth Circuit.
Robert Shawn TREFF, Plaintiff–Appellant,
v.
Kerry GALETKA, individually and as the Mailroom Supervisor at the Utah State Prison, Defendant–Appellee.

No. 95–4012.
Jan. 10, 1996.

Prisoner filed § 1983 complaint alleging that prison mail supervisor violated his civil rights by failing to process his outgoing mail. The United States District Court for the District of Utah, David Sam, J., granted supervisor's motion for summary judgment. Prisoner appealed. The Court of Appeals, Henry, Circuit Judge, held that: (1) supervisor had qualified immunity; (2) prisoner failed to establish that supervisor failed to process prisoner's mail for delivery as required to maintain claim; and (3) improvement in prisoner's financial condition warranted imposition of payment of fees and costs on prisoner.

Affirmed.

West Headnotes

[1] Federal Courts 170B 615

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk615 k. Grounds of action. Most Cited Cases

Court of Appeals would not address issue raised by prisoner in § 1983 action of whether prison mail room supervisor interfered with his right to communicate with his legal counsel through mail, that prisoner failed to raise in trial court. 42 U.S.C.A. § 1983.

[2] Federal Courts 170B 615

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk615 k. Grounds of action. Most Cited Cases

Court of Appeals would not address issue raised by prisoner in § 1983 action of whether prison grievance procedure did not meet minimum standards required by law, since prisoner did not raise issue in district court. 42 U.S.C.A. § 1983.

[3] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Federal Courts 170B 802

170B Federal Courts
170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk802 k. Summary judgment. Most Cited Cases

Court of Appeals reviews grant of summary judgment de novo, applying same standard as did district court; Court of Appeals views record in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[4] Civil Rights 78 1094

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1089 Prisons
78k1094 k. Access to courts. Most Cited Cases
(Formerly 78k135)

For prisoner to state claim pursuant to § 1983 for denial of access to courts, prisoner must show that any denial or delay to access to court prejudiced him in pursuing litigation. 42 U.S.C.A. § 1983.

[5] Civil Rights 78 1376(7)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(7) k. Prisons, jails, and their officers; parole and probation officers. Most Cited Cases
(Formerly 78k214(7))

Prisoner was not prejudiced by failure to receive magistrate judge's initial report and recommendation in case, and so prison mail supervisor had qualified immunity from prisoner's claim that prison mail supervisor deprived prisoner of his civil rights by failing to process his mail. 42 U.S.C.A. § 1983.

[6] Civil Rights 78 1376(7)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(7) k. Prisons, jails, and their officers; parole and probation officers. Most Cited Cases
(Formerly 78k214(7))

Prisoner was not prejudiced by late reception of his objections to magistrate judge's report and recommendation that resulted in court's refusal to consider them, and so prison mail supervisor had qualified immunity from prisoner's claim that supervisor violated prisoner's civil rights by denying prisoner access to courts; if court failed to consider objections mailed in timely fashion, problem was with court, not with prison mail. 42 U.S.C.A. § 1983.

[7] Constitutional Law 92 2296

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Z) Prisons and Pretrial Detention
92k2295 Outgoing Mail
92k2296 k. In general. Most Cited Cases
(Formerly 92k90.1(1.3))

Constitutional Law 92 4821

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law

92XXVII(H)11 Imprisonment and Incidents Thereof
92k4821 k. Conditions of confinement in general. Most Cited Cases
(Formerly 92k272(2))

Prisons 310 147

310 Prisons
310II Prisoners and Inmates
310II(B) Care, Custody, Confinement, and Control
310k144 Mail and Correspondence
310k147 k. Outgoing. Most Cited Cases
(Formerly 310k9)

Correspondence between prisoner and outsider implicates guaranty of freedom of speech under First Amendment and qualified liberty interest under Fourteenth Amendment; refusal to process any mail from prisoner impermissibly interferes with addressee's rights. U.S.C.A. Const.Amends. 1, 14.

[8] Civil Rights 78 1376(7)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(7) k. Prisons, jails, and their officers; parole and probation officers. Most Cited Cases
(Formerly 78k214(7))

Prisoner failed to establish that prison mail supervisor was responsible for violation of prisoner's right to process mail to outsider, and so supervisor had qualified immunity from prisoner's claim that supervisor violated his civil rights by failing to process his mail. 42 U.S.C.A. § 1983.

[9] Federal Civil Procedure 170A 2544

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of proof. Most Cited Cases

To withstand summary judgment, nonmoving party must establish elements essential to his case on which he bears burden of proof at trial; nonmoving party is not required to produce evidence in form that would be admissible at trial, but content or substance of evidence must be admissible. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[10] Federal Civil Procedure 170A 2546

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2546 k. Weight and sufficiency. Most Cited Cases

Inadmissible hearsay evidence in affidavit will not defeat summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[11] Civil Rights 78 1098

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1089 Prisons
78k1098 k. Other particular cases and contexts. Most Cited Cases

(Formerly 78k135)

Prisoner failed to prove that his mail was not delivered, that prison mail supervisor was responsible for such nondelivery, and that supervisor acted intentionally or with deliberate indifference, as required for prisoner to maintain claim that supervisor violated his civil rights by failing to process his mail; prisoner's belief that addressees would have responded if they had received his letters was not evidence. 42 U.S.C.A. § 1983.

[12] Federal Courts 170B 830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, attorney fees and other allowances. Most Cited Cases

Court of Appeals reviews district court's award of costs for abuse of discretion. 28 U.S.C.A. § 1915; Fed.Rules Civ.Proc.Rule 54(d), 28 U.S.C.A.

[13] Federal Civil Procedure 170A 2734

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma pauperis proceedings. Most Cited Cases

Leave to proceed in civil action without prepayment of fees and costs is privilege, not right. 28 U.S.C.A. § 1915.

[14] Federal Civil Procedure 170A 2734

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma pauperis proceedings. Most Cited Cases

Courts had discretion to revoke privilege of proceeding in civil action without prepayment of fees and costs when it no longer serves its goals. 28 U.S.C.A. § 1915.

[15] Federal Civil Procedure 170A 2734

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma pauperis proceedings. Most Cited Cases

When financial condition of litigant who was unable to pay fees and costs at commencement of suit improves during course of litigation, district court may require him or her pay fees and costs. 28 U.S.C.A. § 1915.

***192** Robert Shawn Treff, pro se.

***193** Brent A. Burnett, Assistant Attorney General and Jan Graham, Utah Attorney General, Salt Lake City, Utah, for Defendant–Appellee.

Before KELLY, SETH, and HENRY, Circuit Judges.

HENRY, Circuit Judge.

After examining the briefs and the appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed.R.App.P. 34(f) and 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

I. BACKGROUND

Plaintiff Robert Shawn Treff, appearing pro se,

appeals the district court's order adopting the magistrate judge's recommendation to grant summary judgment to defendant Kerry Galetka. We affirm.

Mr. Treff, who was an inmate at a Utah state prison during the time his claims arose, filed a complaint under 42 U.S.C. § 1983 alleging that his rights guaranteed by the First, Eighth and Fourteenth Amendments were violated when Ms. Galetka, acting for herself and as the prison mail room supervisor, interfered with his outgoing mail. Mr. Treff alleged that between October 1990 and March 1992, sixteen pieces of mail were not processed by the prison mail room and consequently were never delivered to the addressees. After he filed three grievances, the prison grievance coordinator conducted an investigation by contacting at random three of the addressees Mr. Treff claims did not receive his letters. Of those, two responded that they had received the letters, but had not replied to Mr. Treff. The third inquiry was returned as undeliverable by the United States Postal Service. The grievance investigator concluded that the addressees of Mr. Treff's letters had chosen not to respond, and the investigation was closed. Mr. Treff maintains that the addressees, particularly his children and his mother, would have responded if they had received his letters.

II. DISCUSSION

On appeal, Mr. Treff claims: (1) Ms. Galetka interfered with his First Amendment rights generally to communicate by mail, to associate religiously through the mail, and to access the courts via mail; (2) Ms. Galetka was liable for her actions and those of her subordinates in failing to process his mail; (3) genuine issues of disputed material facts exist, precluding summary judgment; and (4) the district court erroneously revoked his in forma pauperis status and ordered him to pay mileage and service fees.

[1][2] Mr. Treff also attempts to raise on appeal the issue of his right to communicate with his legal counsel through the mail. Because he did not raise that issue in the district court, we decline to address it here. *See* *Rademacher v. Colorado Ass'n of Soil Conservation Dists. Medical Benefit Plan,* 11 F.3d 1567, 1571 (10th Cir.1993) (issues not argued to the district court will not be considered on appeal). For the same reason, we do not address Mr. Treff's claim that the prison grievance procedure did not meet minimum standards required by law.

[3] We review the grant of summary judgment de novo, applying the same standard as did the district court. *Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc.,* 912 F.2d 1238, 1241 (10th Cir.1990). "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Russillo v. Scarborough,* 935 F.2d 1167, 1170 (10th Cir.1991). We view the record in the light most favorable to the nonmoving party. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.,* 938 F.2d 1105, 1110 (10th Cir.1991).

A. *Qualified Immunity Defense*

Ms. Galetka raised the defense of qualified immunity. Therefore, we first address the threshold legal question of whether Mr. Treff has "demonstrate[d] that the defendant's actions violated a constitutional ... right." *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir.1995); *see also* *Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). "On summary judgment, the ***194** judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.... If the law was clearly established, the immunity defense ordinarily should fail...." *Harlow v. Fitzgerald,* 457 U.S. 800, 818–19, 102 S.Ct. 2727, 2738–39, 73 L.Ed.2d 396 (1982). In a qualified immunity inquiry, "the very action in question does not have to have previously been held unlawful, [if] 'in the light of pre-existing law the unlawfulness [was] apparent.' " *Albright,* 51 F.3d at 1535 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523

(1987)).

In this case, we must determine whether Ms. Galetka is entitled to qualified immunity from Mr. Treff's claims that she violated his right to access to the courts and his right to communicate by mail with others outside the prison. The district court found that Mr. Treff had produced no evidence that Ms. Galetka had interfered with his court mail and denied the court access claim. The district court also held that Ms. Galetka was entitled to qualified immunity because the law was not clearly established that prisoners had a First Amendment right to have their outgoing mail processed for delivery by the United States Postal Service, absent censorship or other restrictions on freedom of expression.

1. Right to Access to the Courts

[4] In analyzing Ms. Galetka's qualified immunity defense, we first conclude that a prisoner's constitutional right of access to the courts is clearly established. *Nordgren v. Milliken,* 762 F.2d 851, 853 (10th Cir.), *cert. denied,* 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985). We next address whether Mr. Treff stated a claim for denial of access to the courts. To do so, he must show that any denial or delay of access to the court prejudiced him in pursuing litigation. *Twyman v. Crisp,* 584 F.2d 352, 357 (10th Cir.1978) (denial); *Kincaid v. Vail,* 969 F.2d 594, 603 (7th Cir.1992) (delay), *cert. denied,* 506 U.S. 1062, 113 S.Ct. 1002, 122 L.Ed.2d 152 (1993).

[5][6] Here, Mr. Treff alleges two instances in which the prison mail system resulted in prejudice to his litigation: (1) he did not receive the magistrate judge's initial report and recommendation in this case, and (2) in another case, his objections to the magistrate judge's report and recommendation were received by the court after the due date, resulting in the court's refusal to consider them. Mr. Treff has not been prejudiced by any alleged prison mail room deficiencies in either instance. In the first, the court permitted him to respond to the magistrate judge's report, as if he had received it timely. In the second, if Mr. Treff's objections were mailed from the prison in a timely fashion, the court should have considered them. *Dunn v. White,* 880 F.2d 1188, 1190 (10th Cir.1989) (citing *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)), *cert. denied,* 493 U.S. 1059, 110 S.Ct. 871, 107 L.Ed.2d 954 (1990). If the court failed to do so, the problem was with the court, not with the prison mail room. Mr. Treff also alleges that mail to and from the federal district court on three occasions took four, seven, and nine days, but he claims no prejudice as a result of these delays. Therefore, Mr. Treff has not shown that the prison mail room denied him his constitutional right to access to the courts. Ms. Galetka is thus entitled to qualified immunity from Mr. Treff's claim that she denied him access to the courts.

2. Right to Have Outgoing Mail Processed

[7] We next consider Ms. Galetka's qualified immunity defense in the context of Mr. Treff's claim that a failure to process his mail violated his constitutional rights. He does not claim that his religious mail was censored because of its content. Therefore, we need not consider religious mail separately from other mail. Correspondence between a prisoner and an outsider implicates the guarantee of freedom of speech under the First Amendment and a qualified liberty interest under the Fourteenth Amendment. *Procunier v. Martinez,* 416 U.S. 396, 408, 418, 94 S.Ct. 1800, 1809, 1814, 40 L.Ed.2d 224 (1974). *Thornburgh v. Abbott,* 490 U.S. 401, 413–14, 109 S.Ct. 1874, 1881–82, 104 L.Ed.2d 459 (1989), overruled *Martinez* 's standard of review for limitations placed on a prisoner's ***195** right to incoming mail, but *Thornburgh* did not overrule *Martinez* 's holding pertaining to outgoing mail. The *Thornburgh* Court recognized that "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials," *Thornburgh,* 490 U.S. at 413, 109 S.Ct. at 1881.

Under *Martinez,* limitations on a prisoner's First

Amendment rights in his outgoing mail "must further an important or substantial governmental interest unrelated to the suppression of expression [and] ... must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez,* 416 U.S. at 413, 94 S.Ct. at 1811; *see also Leonard v. Nix,* 55 F.3d 370, 374 (8th Cir.1995) (same). There is no suggestion that denying a prisoner the privilege of sending out any mail, or refusing to mail selected pieces of mail, was necessary in this case to serve "an important or substantial interest," *Martinez,* 416 U.S. at 413, 94 S.Ct. at 1811.

[8] A refusal to process any mail from a prisoner impermissibly interferes with the addressee's First and Fourteenth Amendment rights. *See id.* at 408, 94 S.Ct. at 1809. Accordingly, we hold that a prisoner's constitutional right to have his mail processed for delivery was clearly established at the time Mr. Treff's mail was allegedly not processed. *Cf. Procunier v. Navarette,* 434 U.S. 555, 562–63, 565, 98 S.Ct. 855, 860, 861, 55 L.Ed.2d 24 (1978) (on claim alleging wrongful interference with prisoner's outgoing mail in 1971–1972, prison officials were entitled to qualified immunity defense because constitutional rights of prisoners to outgoing mail had not yet been announced). Although this right was clearly established, Mr. Treff has failed to demonstrate that Ms. Galetka was responsible for the violation of such right. *See Albright,* 51 F.3d at 1533. Therefore, we affirm the district court's finding that Ms. Galetka is entitled to the defense of qualified immunity on this issue.

B. *Failure to Establish the Elements of the Case*

[9][10] We alternatively affirm the district court's grant of summary judgment, *see Medina v. City & County of Denver,* 960 F.2d 1493, 1495 n. 1 (10th Cir.1992) (reviewing court is free to affirm lower court decision on any grounds supported by record sufficiently to permit conclusions of law), based on Mr. Treff's failure to prove essential elements of his case. To withstand summary judgment, the nonmoving party must establish the elements essential to his case on which he bears the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323, 106 S.Ct. at 2552. The nonmoving party is not required to produce evidence in a *form* that would be admissible at trial, "but the content or substance of the evidence must be admissible." *Thomas v. International Business Machs.,* 48 F.3d 478, 485 (10th Cir.1995). Inadmissible hearsay evidence in an affidavit will not defeat summary judgment. *Id.*

[11] In this case, Mr. Treff, the party bringing the lawsuit, bears the burden of proving that his mail was not delivered, that Ms. Galetka was responsible for such nondelivery, and that Ms. Galetka acted intentionally or with deliberate indifference, *see Daniels v. Williams,* 474 U.S. 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986); *Hines v. Boothe,* 841 F.2d 623, 624 (5th Cir.1988). The failure to establish any of these elements entitles Ms. Galetka to summary judgment; Mr. Treff failed to establish any of the three required elements of his case.

Mr. Treff maintains that if the mail had been delivered, the addressees would have replied. To oppose summary judgment, Mr. Treff proffered an affidavit from the paralegal for the prison contract attorneys stating that on December 30, 1992, she picked up a photocopy request for Mr. Treff consisting of an envelope that did not have a "received in mailroom" date stamped on it, and the material to be photocopied was an affidavit from Kenneth Volker. Mr. Treff has not made clear the relevance of this evidence given that Kenneth Volker is not one of the sixteen addressees Mr. Treff claims did not receive his letter.

***196** Mr. Treff also submitted United States Postal Service tracer requests for four of the sixteen pieces of mail he claims were not delivered. Of those four requests, two indicated the mail could not be

located, and two indicated the addressees did not respond to the inquiry. The information contained in the tracer forms shows only that the mail could not be located, not that it was never submitted to the Postal Service for delivery.

In his own affidavit, Mr. Treff stated that his letter to the American Jewish Congress, one of the sixteen allegedly missing pieces, was sent via registered mail, return receipt requested, but that he was not returned a receipt even though the mail room charged him for one. The mail tracer form indicated only that the addressee failed to respond to the postal inquiry, not that the letter was sent or that the receipt was returned. Mr. Treff also stated that he had asked his attorneys to send an affidavit stating that his letter to them was delayed, but no such affidavit appears in the record. Mr. Treff further claims that he sent a letter to his other attorney, who later told Mr. Treff that he had not received the letter after sixty days. Mr. Treff's statement of what the attorney told him is hearsay and cannot defeat summary judgment. Moreover, this letter was not one of the sixteen he claims were not delivered.

In response to the challenge that a number of factors, other than the prison mail room, reasonably could have caused his mail not to be delivered, Mr. Treff offers only the presumption that, generally, the United States Postal Service delivers mail. He maintains that the other possible factors, such as the addressee's decision not to respond, intervention by a third party, loss or misdelivery by the Postal Service, or loss by the addressee, would not have kept the addressees from responding to his letters.

Mr. Treff offered no evidence to support his main premise, that if his mail had been delivered, the addressees would have responded. He produced no affidavits from the intended recipients that they did not receive his mail. To the contrary, Mr. Treff does not dispute the results of the prison investigation that two of the addressees received his mail, but did not respond. He made no showing whatsoever that he had attempted to obtain affidavits by mail, telephone, or otherwise, from any of the sixteen addressees. His own belief that the addressees would have responded had they received his letters is not evidence.

Because Mr. Treff failed to establish any one of the essential elements of his case, Ms. Galetka is entitled to summary judgment. Similarly, Mr. Treff did not show that Ms. Galetka acted with the requisite deliberate indifference to state a claim under the Eighth Amendment. *See* *Wilson v. Seiter,* 501 U.S. 294, 303, 111 S.Ct. 2321, 2326–27, 115 L.Ed.2d 271 (1991) (Eighth Amendment claim requires showing of deliberate indifference to prison conditions by prison officials). The order granting summary judgment in favor of Ms. Galetka is affirmed.

C. *Assessment of Costs of Service*

We turn to Mr. Treff's claim that the district court erred in assessing against him the costs of serving Ms. Galetka with the summons and complaint. Mr. Treff admits that during the course of this litigation his **financial condition improved sufficiently so that he is no longer entitled to pauper status.** He concedes that he properly was required to pay the filing fee under the rule established by this court in *Treff v. Bartell,* 38 F.3d 1221 (10th Cir.1994) (unpublished) (affirming district court's order to pay filing fee due to Mr. Treff's changed financial condition). He claims *Bartell* required him to pay the court filing fee, no more and no less. This case, however, differs from *Bartell* in that *Bartell* did not address the question of a service and mileage fee. Mr. Treff also claims that the district court was without authority to enter an order directing him to pay the mileage and service fee of $47.50 because it was entered after the summary judgment order. Finally, Mr. Treff claims the costs were a penalty imposed to punish him for having filed a grievance against the district judge.

[12] 28 U.S.C. § 1915(a) authorizes commencement and prosecution of a civil suit by a person unable

to pay "without *prepayment* ***197** of fees and costs." *Id.* (emphasis added). Section 1915(e) permits a judgment for costs "at the conclusion of the suit or action as in other cases." "[A]llowing the commencement of a suit in forma pauperis pursuant to 28 U.S.C. § 1915(a) does not preclude the court from assessing costs at the conclusion of the suit." *Olson v. Coleman,* 997 F.2d 726, 728 (10th Cir.1993). Costs include clerk and marshal fees. 28 U.S.C. § 1920; *see also Jane L. v. Bangerter,* 61 F.3d 1505, 1517 (10th Cir.1995) (noting that costs under Fed.R.Civ.P. 54(d) include clerk and marshal fees). We review the district court's award of costs under both § 1915 and Rule 54(d) for an abuse of discretion. *Denton v. Hernandez,* 504 U.S. 25, 33, 112 S.Ct. 1728, 1733–34, 118 L.Ed.2d 340 (1992) (§ 1915); *Jane L.,* 61 F.3d at 1517 (Rule 54(d)).

[13][14] Leave to proceed without prepayment of fees and costs is a privilege, not a right. *Weaver v. Toombs,* 948 F.2d 1004, 1008 (6th Cir.1991). Courts have the discretion to revoke that privilege when it no longer serves its goals. *Murphy v. Jones,* 801 F.Supp. 283, 288–89 (E.D.Mo.1992). We have authorized the imposition of costs under § 1915 where the action is frivolous or malicious. *E.g., Olson,* 997 F.2d at 729; *Phillips v. Carey,* 638 F.2d 207, 209 (10th Cir.), *cert. denied,* 450 U.S. 985, 101 S.Ct. 1524, 67 L.Ed.2d 821 (1981). We do not apply that rule here, because neither this court nor the district court found Mr. Treff's claims malicious or frivolous.

[15] We hold that when a litigant's financial condition improves during the course of the litigation, the district court may require him or her to pay fees and costs. *See Weaver,* 948 F.2d at 1014; *Wiideman v. Harper,* 754 F.Supp. 808, 809 (D.Nev.1990); *Carter v. Telectron, Inc.,* 452 F.Supp. 939, 942 (S.D.Tex.1976). We do not reach the question of a sliding scale for indigent litigants based on their ability to pay, *see Wiideman,* 754 F.Supp. at 810–12, because Mr. Treff does not claim that he cannot afford to pay. We perceive no abuse of discretion or retaliatory motive in the district court's decision to order Mr. Treff to pay mileage and service costs of $47.50.

The judgment of the United States District Court for the District of Utah is AFFIRMED.

C.A.10 (Utah),1996.
Treff v. Galetka
74 F.3d 191

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1995 WL 794070
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

VORNADO AIR CIRCULATION SYSTEMS, INC., Plaintiff,
v.
DURACRAFT CORPORATION, Defendant.

No. 92-1543-WEB. | Nov. 29, 1995.

Opinion

MEMORANDUM AND ORDER

WESLEY E. BROWN, Senior District Judge.

***1** This matter is before the court on the plaintiff's motion for retaxation of costs. (Doc. 148). The defendant has responded to the motion and the court is now prepared to rule. Oral argument would not assist in deciding the issues presented. *See* D.Kan.R. 7.2.

Following the issuance of the Tenth Circuit's mandate in this case, the clerk of the district court imposed a total of $76,694.73 in costs against the plaintiff and in favor of the prevailing party, defendant Duracraft. Plaintiff's motion asks the court to review numerous items in the defendant's bill of costs. The court will take up the issues in the order in which they appear in plaintiff's motion.

Taxation of costs is authorized by Fed.R.Civ.P. 54(d)(1): "[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs." Section 1920 of Title 28, United States Code, sets forth the categories of trial expenses awardable under Rule 54(d): (1) Fees of the clerk and marshal; (2) **Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;** (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of [Title 28]; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of [Title 28].

A trial court has no discretion to award costs that are not set out in § 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987). The prevailing party has the burden of establishing that the expenses in question are authorized under § 1920. *Green Const. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 675 n.4 (D.Kan. 1994). In some cases, this requires a showing that the materials were "necessarily obtained for use in the case." 28 U.S.C. § 1920(2) and (4). If that burden is met, there is a presumption favoring the award. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir. 1988). The amount of such costs must be carefully scrutinized, however, to ensure that it is reasonable. *Id.*

Court's discretion to award costs. Plaintiff's first argument is that the court should order each party should bear its own costs in this case. Although the court recognizes that it has discretion in directing payment of costs under Fed.R.Civ.P. 54(d), the circumstances here do not justify a departure from the general rule that the prevailing party should be awarded costs. Plaintiff attempts to minimize defendant's status as the "prevailing party" by pointing out that Duracraft did not prevail on many disputed factual matters decided by this court. That is immaterial, however; the defendant is clearly the "prevailing party" under the Tenth Circuit's decision recognizing the right of the defendant to continue sales of the DT-7 fan in the United States. That was the ultimate issue in the case. *Green Const. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 674 (D.Kan. 1994)("Prevailing party" is a party in whose favor judgment is rendered.); *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 132 (5th Cir. 1983)("Prevailing party" must be determined in light of the entire litigation rather than from a numerical formula of success.) Nor is plaintiff's asserted good faith in bringing this litigation a sufficient reason to deny costs. *Sparks v. Yorzinski*, 1994 WL 123619, *2 (D.Kan. 1994). "A prevailing party is presumably allowed all its costs unless there are grounds for penalizing that party." *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 878 F.Supp. 1417, 1425 (D.Kan. 1995). No such grounds exist here.

A. *Clerk's Fees*

2** Plaintiff objects to taxation of a $25.00 clerk's fee for admitting defendant's **out-of-state counsel *pro hac vice. The court finds that the fee is properly taxed under § 1920(1). The court agrees with the defendant that such a cost is proper because the plaintiff selected the forum and thereby forced Duracraft to defend itself in this district.

B. *Fees for Court Reporters*

(1) *Deposition of Richard Ten Eyck* - Plaintiff argues that the cost of this deposition should not be allowed because it

was not used at trial and there is no showing that the deposition was necessarily obtained for use at trial. The prevailing party may recover costs for deposition transcripts "necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Under this standard, the court must determine whether the deposition reasonably seemed necessary at the time it was taken. *Manildra Mills,* 878 F.Supp. at 1427. As the designer of the product shape at issue in this case, Mr. Ten Eyck was an important witness, as is shown by the fact that he was extensively examined and cross-examined at trial. The use or non-use of the deposition at the trial is not dispositive on the issue of "necessity." Duracraft was certainly reasonable in concluding that the deposition was necessary at the time it was taken. The court concludes that the cost of this deposition is taxable under § 1920(2).

(2). ***Transcript of Court Proceedings***. Plaintiff objects to the cost of the trial transcript because it includes a daily transcript fee. Plaintiff argues that a daily transcript was not necessary.

Absent prior court approval, taxation of transcript costs at a daily copy rate is generally not allowed. *Griffith v. Mt. Carmel Med. Ctr.,* 157 F.R.D. 499 (D.Kan. 1994). If the issues in a case are sufficiently complex to justify overlooking the lack of prior approval, however, a court may award the cost where daily copy proved invaluable to counsel and the court. *Id.* To award this cost, the court must find that daily copy was necessarily obtained, as judged at the time of the transcription. *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1233, 1248 (10th Cir. 1988).

The court concludes that this case was sufficiently complex that a daily transcript was reasonably necessary. Much of the testimony was given by experts and focused on highly technical issues. The court believes that a daily transcript was necessary to bring into focus the areas of dispute between the experts and to conduct thorough examination and cross-examination.

Plaintiff also argues that the **cost of a transcript of the closing arguments** in this case should be reduced by half because the defendant previously agreed with the plaintiff to split the cost of that transcript. Inasmuch as Duracraft does not dispute having made the agreement, the court finds that it is proper to take this into account in taxing costs. Allowable costs for this transcript will therefore be reduced by half ($176.30).

C. *Printing*

***3** (1). *Independent Printing Service.* Plaintiff objects to the inclusion of printing costs for foam-core board "blow-ups" of paper exhibits used at trial. Defendant contends that the use of these enlargements at trial was necessary to a complete understanding of the case.

Under § 1920(4), fees for exemplification and copies of papers necessarily obtained for use in the case are taxable. Generally, the costs of demonstrative exhibits such as enlargements are denied in the absence of prior court approval, unless the court is persuaded that the materials were essential to the prevailing party's case. *Joseph v. Terminix Int'l. Co.,* 1994 **WL** 542090, *1 (D.Kan. 1994); *Manildra Mills,* 878 F.Supp. at 1428. Although the enlargements used in this bench trial made the presentation of evidence easier to follow and understand, the court cannot conclude that such reproductions of paper exhibits were "necessarily obtained" or essential to the defendant's case. *See Manildra Mills,* 878 F.Supp. at 1428 ("[T]he court is unconvinced these expenses were necessary as opposed to merely illustrative of expert testimony...."). Allowable costs for printing will therefore be reduced by $1,443.00.

(2). *International Video Services.* Plaintiff objects to an expense of $16.50 for **preparation of a videotape exhibit**. The court agrees with the defendant that this exhibit - a **Vornado** videotape advertisement - was reasonably necessary to its case and the cost incurred in dubbing work performed on the tape is properly taxed.

(3). *Engineering Animation, Inc.* Included in the bill of costs is a charge of $41,624.48 for services by Engineering Animation, Inc. The defendant incurred this cost by having EAI prepare **computer simulation exhibits** of the air stream that would result from various fan and grill combinations. Plaintiff contends that this charge represents **a fee for expert or consulting services** and is not taxable under § 1920.

The burden is on the defendant to demonstrate that this expense is authorized by § 1920. The court concludes that Duracraft has failed to demonstrate that the computer simulation exhibits fall within fees for "printing" or "exemplification and copies of papers necessarily obtained for use in the case." § 1920(3) and (4). Without reference to the statute, Duracraft simply argues that these exhibits were essential given the complex nature of the evidence and that they "allowed the Court to visualize and conceptualize, in a way no other exhibits or testimony offered in the case could, the air movements created by various fan designs." Def. Mem. at 9. The court finds this unpersuasive for three reasons. First, although **the exhibits produced by EAI could be considered helpful, in the court's view they were by no means necessary to the defendant's case.** The facts and concepts depicted in the

exhibits were based on the testimony of the experts who testified. The exhibits sought to illustrate the testimony in a more understandable form, but did not add to it substantively. *Cf. Joseph,* supra. Second, the services obtained here went beyond the ministerial "printing" or "exemplification" contemplated by § 1920(3) and (4) and involved extensive application of expertise by a computer consultant. It is clear that the costs of an expert's research and analysis in preparation for trial are not recoverable under § 1920 under the guise of work necessary for producing an exhibit. *Green Const. Co,* 153 F.R.D. at 676. The court agrees with the plaintiff that the $41,624.48 charge at issue here is in essence a fee for the services of a computer expert and is not properly allowable under § 1920. *Cf. U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1246 (10th Cir. 1988)(Affirming district court's refusal to award costs for computerized document analysis.)[1] Third, the court considers the defendant's failure to seek pretrial approval of this expense, which more than doubled the total costs involved in the case, as weighing against taxation. *See Manildra Mills,* 878 F.Supp. at 1428 (Courts generally require litigants to obtain authorization before incurring great expense for exemplification.) In sum, the court finds that the $41,624.48 fee is not properly taxable.

D. ***Trial Witnesses.***

***4** Plaintiff objects to defendant's claimed witness fees for all of the witnesses except two on the grounds that these witnesses were produced and called by the plaintiff in its case. Inasmuch as these witnesses were deemed necessary by the plaintiff for its case, the court sees no reason why they would not also be deemed necessary by the defendant. The court concludes that the witness fees are properly taxed under § 1920(3).

Plaintiff also objects to witness fees in excess of one day for Dr. Jeff Trom. Dr. Trom, vice president for Engineering Animation, Inc., developed the computer animation exhibits previously discussed. Plaintiff contends that only one day of this expert's testimony was necessary. The defendant contends that Dr. Trom was required to attend each day of the trial so that he could respond to the testimony of plaintiff's witnesses. Given the nature of Dr. Trom's testimony, which dealt almost exclusively with the exhibits generated by him,[2] the court must agree with the plaintiff that the costs of Dr. Trom's attendance in addition to the day of his testimony were not reasonably necessary and should not be taxed to the plaintiff. Accordingly, allowable costs for Dr. Trom's hotel and meals will be reduced to one day's allowance ($92.00). This causes a $373.00 reduction in witness fees.

E. ***Fees for Exemplification and Copies of Papers.***

(1) ***Copies of Papers Which Are Part of the Trial Court Record;*** *(2) Copies of Papers Served But Not Filed With the Court; (3) Correspondence; (4) Trial Exhibits; (5) Certified Copies from U.S. Patent and Trademark Office; and (6) Papers Produced by* ***Vornado****.* Plaintiff objects to copying costs associated with all of the foregoing. Having reviewed the objections and the defendant's response, the court concludes that all of these costs are fees for copies of papers "necessarily obtained for use in the case" and are properly allowable under § 1920(4). The court concludes that copies of papers not filed in the case were reasonably necessary, that the number of copies claimed by defendant was reasonably necessary, and that certified copies of the patent and file histories were reasonably necessary in light of the patent and trademark issues raised by plaintiff's claims.

(7). *Physical Exhibits.* Plaintiff objects to defendant's costs for fan packaging purchased and used at trial on the grounds that defendant has not shown that expenses were for exhibits actually used at trial. The court rejects this argument. The defendant has shown to the court's satisfaction that these items were necessarily obtained for use in the case.

Plaintiff also objects to Duracraft's claimed expenses for **preparation of prototype** fan grills used as exhibits at trial. The awarding of costs for preparation of exhibits is committed to the discretion of the trial court. *Green Constr. Co.,* 153 F.R.D. at 676. After carefully considering the issue, the court concludes that this expense is allowable under § 1920(4) as "exemplification" of exhibits necessarily obtained for use in the case. *See Manildra Mills,* 878 F.Supp. at 1428 n. 10 ("Exemplification" has been broadly defined to include models, charts and photographs.) The court finds that **production of the prototypes for testing** was necessary to address **Vornado's** contention that its fan grill design was non-functional.

***5** (8). *Wichita State University.* Plaintiff objects to fees paid to WSU for **rental of a wind tunnel test facility**. The court agrees with the plaintiff that this expense falls outside "exemplification" and is not properly taxable under § 1920(4). While the facility may have been required to conduct tests on various fan grills, it is not itself a cost of "exemplification" of an exhibit. The rental fee was part of the cost of performing the expert's tests but was not a part of the cost of producing the exhibits themselves. Accordingly, the costs for exemplification will be reduced by $2,775.00.

use of **Vornado's** interpreter impractical.

F. ***Compensation of Interpreter.***

Plaintiff objects to an expense incurred by Duracraft for hiring an interpreter to assist at Chi Hsiang Wang's deposition. Plaintiff argues that the defendant's interpreter was unnecessary because plaintiff had provided an interpreter. The court finds that the expense for Duracraft's interpreter is properly allowable under § 1920(6). The declaration of Mr. Bromberg and the deposition excerpts submitted by the defendant persuade the court that it was **necessary for the defendant to have its own interpreter** at the deposition. In this regard, the court notes that issues of confidentiality and attorney-client privilege raised in the course of the deposition would have made the defendant's

Conclusion.

In accordance with the foregoing findings, plaintiff's Motion For Retaxation of Costs (Doc. 148) is GRANTED IN PART and DENIED IN PART. In accordance with the foregoing findings by the court, the taxation of costs filed by the clerk on November 6, 1995, is amended as follows:

Fees of the Clerk	$ 130.00
Fees for service of summons and subpoena	0.00
Fees of the court reporter	11,880.62
Fees and disbursements for printing	16.50
Fees for witnesses	910.00
Fees for exemplification and copies of papers	16,499.93
Docket fees under 28 U.S.C. 1923	0.00
Costs as shown on Mandate of Court of Appeals	Pending
Compensation of court-appointed experts	0.00
Compensation of Interpreters	865.90
Other costs	0.00

.....	
TOTAL	30,302.95

Costs are hereby taxed in the amount of $30,302.95 and included in the judgment in favor of Duracraft Corporation. IT IS SO ORDERED.

Footnotes

1 *Cf. In re Air Crash Disaster at Stapleton Airport (Johnson v. Continental Airlines, Inc.,* 1989 **WL** 259995 (D.Colo. 1989) (Noting that such exhibits "are a reasonably anticipated cost of litigating air crash cases, ...") *See also In re Air Crash Disaster at John F. Kennedy Airport,* 687 F.2d 626, 631 (2nd Cir. 1982).

2 Defendant correctly points out that Dr. Trom testified that the curvature in the **Vornado** and Duracraft fans differed slightly and that this testimony rebutted the testimony of a **Vornado** witness. This isolated point in rebuttal was the only instance of which the court is aware that Dr. Trom testified with respect anything other than the exhibits prepared by him. The court's recollection is that this rebuttal testimony was duplicated other testimony in the defendant's case.

2001 WL 1718043
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

Kathryn **WABNUM**, Plaintiff,
v.
Debra J. **SNOW**, President of Communications Workers of America, Local 6401, and Communications Workers of America, Local 6401, District Six, Defendants.

No. 97–4101–SAC. | Nov. 26, 2001.

Opinion

MEMORANDUM AND ORDER

SAM A. CROW, District Senior Judge.

***1** This case comes before the court on defendant Debra J. **Snow's** "objection to award in bill of costs." (Dk.159). The court interprets that motion as a motion to retax costs.

The judgment entered in this case on October 20, 2000, included an order that defendants recover their costs from plaintiff. (Dk.146). On December 19, 2000, defendant **Snow** submitted her bill of costs in the amount of $5,565.01. (Dk.151). Plaintiff filed an objection to that bill of costs on May 24, 2001, (Dk.154), and defendant **Snow** replied to plaintiff's objection on June 12, 2001 (Dk .155). Costs were then taxed against the plaintiff in the amount of $3,435.51 in favor of defendant **Snow** on September 19, 2001. (Dk.156). Thereafter, defendant **Snow** sought and received an extension of time in which to file a motion for the retaxing of costs (Dk.157, 158), and timely filed the instant motion. (Dk.159).

Defendant first alleges that plaintiff's objection to defendant's original bill of costs was untimely because it was not filed within 10 days thereof, as required by D.Kan. R. 206. The court believes that defendant intends to refer to Local Rule 7.1, which prior to January 1, 2000, was Rule 206(a) and (b). That rule requires "a party opposing a motion other than one to dismiss or for summary judgment" to file its written response "within ten days of service of the motion upon it." D.Kan. R. 7.1(b) (captioned "Responses and Replies to Motions").

The ten day rule is inapplicable to an objection to a bill of costs for the simple reason that a bill of costs is not a motion, and is not substantially similar to a motion. By its terms, a motion is directed to and requires some action by the court. By contrast, a bill of costs is directed to and requires action only by the clerk of the court. The present issue is thus not governed by D .Kan. R. 7.1, which relates to motions, but by D.Kan. R. 54.1, which relates to "Taxation and Payment of Costs."

The relevant rule provides a specific time in which the party entitled to recover costs shall file a bill of costs, and a specific time in which a motion to retax costs shall be filed. *See* D.Kan. R. 54.1. No time period is established in the rule, however, for filing objections to a bill of costs. Defendant has not directed the court's attention to any other relevant rule limiting the time in which an objection to a bill of costs may be filed, and the court knows of none. *See* Fed.R.Civ.P. 54(d)(1) (establishing 5 day rule for motion to retax costs). Because no time limits have been established for the filing of objections to a bill of costs, such objections may be filed within a reasonable period of time after the bill of costs.

Plaintiff's objection to the bill of costs was not filed until May 24, 2001, over five months after the bill of costs was filed. Although this period of time may appear to be unreasonably long at first blush, the court understands that the clerk of the court had some communications with the parties during that period of time. Importantly, defendant has not shown that it has suffered or is likely to suffer any prejudice from the delay. Under these circumstances, the court will not find that the objection to the bill of costs was untimely, and declines defendant's invitation to decide its motion to retax costs or its original bill of costs[1] as though it were uncontested.

***2** The court will thus address the merits of the motion. Fed.R.Civ.P. 54(d)(1) authorizes the taxing of costs "to a prevailing party unless the court otherwise directs." Section 1920 of Title 28 of the United States Code "defines the term 'costs' as used in Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 441(1987).

Title 28 U.S.C. § 1920 outlines taxable costs by category:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witness;
>
> (4) Fees for exemplification and copies of papers 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 trial court has no discretion to award costs not listed in § 1920. *Crawford Fitting,* 482 U.S. at 441–42. Defendant, as the prevailing party, has the burden to show that the costs sought to be taxed fall within the categories of § 1920. *See Dutton v. Johnson County Bd. Of County Com'rs,* 884 F.Supp. 431, 436 (D.Kan.1995). The court, however, must carefully scrutinize the amount of such costs to ensure its reasonableness. *Griffith v. Mt. Carmel Medical Center,* 157 F.R.D. 499, 502 (D.Kan.1994). The final award of costs rests within the sound discretion of the court. *Dutton,* 884 F.Supp. at 436 (citing *Farmer v. Arabian Am. Oil Co.,* 379 U.S. 227, 232–33 (1964)).

Costs of Service of Process/Subpoenas

Defendant seeks fees it represents are "associated with the depositions taken in this case." (Dk.155, p. 9). Plaintiff objects to these fees, specifically to the amount of fees which represent service upon the plaintiff, who would have appeared pursuant to the Notice to Take Deposition. (Dk.154, p. 3). The court will not award fees **for service of a party in the absence of a showing that such party refused to voluntarily appear**, or that the movant reasonably believed that for some other reason, formal service was necessary. Accordingly, defendant's fees in this category will be reduced by $70.00 for the two times defendant incurred a $35.00 fee for serving the plaintiff, reducing the permissible costs in this category to $210.00.

Court Reporter / Transcript Fees

Defendant seeks the full amount of the requested award for reporter fees and transcripts, *i.e.,* $ 2463.51, in lieu of the $ 2448.51 awarded.

For fees of the court reporter for the stenographic transcript and for exemplification and copies of papers, items taxable under subparagraphs (2) and (4) of § 1920, the movant's burden includes showing that the items for which costs were incurred were "necessarily obtained" for use in this case. If the prevailing parties carry this burden, a presumption arises in favor of taxing those costs. *See U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). A party may be awarded costs for **copying a deposition** when it can make an adequate showing that the copy was reasonably necessary to defend the plaintiffs' claim, and for purposes other than convenience of counsel in investigating the facts of the case. *Morrissey v. County Tower Corp.,* 568 F.Supp. 980, 983 (E.D.Mo.1983). "The trial court has great discretion to tax the cost of depositions if it determines that all or any part of the deposition was necessarily obtained for use in the case, even if not actually used in the trial itself." *Green Const. Co. v. Kansas Power & Light Co.,* 153 F.R.D. 670, 677 (D.Kan .1994).

***3** Whether transcripts are necessarily obtained for use in the case is a question of fact for the court. *U.S. Industries,* 854 F.2d at 1245. "Necessarily obtained" does not mean merely that the material added to the convenience of counsel or made trial easier for the court. *Id.* Actual use by counsel or the court, on the other hand, is not required. *Id.* at 1246. "The court must determine whether the depositions reasonably seemed necessary at the time they were taken." *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 878 F.Supp. 1417, 1427 (D.Kan.1995), *aff'd,* 76 F.3d 1178 (Fed.Cir.1996).

Defendant provides only conclusory statements in an affidavit of counsel that it necessarily incurred the costs of the transcripts. (Dk.156, Exh. B, affidavit). When confronted with objections, a party must present more than conclusory statements that the cost was necessary. *See Green Const.Co.,* 153 F.R.D. at 677 and n. 8. Here, the clerk's decision to disallow defendant $15.00 represents a reduction for the cost of one condensed transcript. Defendant has not shown that such a transcript was reasonably necessary at the time, and the court doubts that defendant could do so, given the fact that defendant also obtained an original and a copy of the same transcript. The $15.00 reduction shall be made, and only $2448.51 shall be awarded in this category.

Witness Fees

Defendant challenges a reduction of $45.00 from the fees defendant incurred in paying **witness fees**. **Plaintiff objects to all witness fees, but particularly to those incurred for the plaintiff herself.** The records reveal that on two occasions, defendant paid $45.00 to the plaintiff for "witness fee and mileage." (Dk.156, Exh. E.) No further explanation is given as to the purpose of this fee, or as to why it was necessary to pay plaintiff to appear for her appearance in her own case. The court shall therefore reduce the bill of costs for witness fees by the amount paid to the party plaintiff, which amount is $90.00. Thus, instead of the $315.00 sought, defendant shall be awarded $225.00.

"Other costs"

Postage/Delivery

The court also declines to tax postage expenses. "Federal courts in Kansas deny taxation of postage costs based upon a lack of statutory authority in § 1920." *Ortega v. IBP, Inc.,* 883 F.Supp. 558, 562 (D.Kan.1995). "Postage expenses do not fall within section 1920 and, therefore, cannot be taxed to plaintiff." *Diskin v. Unified School Dist. No. 464,* No. Civ.A. 95–2244–EEO, 1997 **WL** 161943, at *2 (D.Kan.Mar.28, 1997). Defendant's bill of costs was and is therefore reduced by the amount of $15.75 for **"FedEx"** transportation of a deposition transcript to defendant's own expert witness. (Dk.156, Exh. C, p. 1).

Expert Witness

Defendant seeks the costs of Dr. Hutchinson, who charged $2,018.75 for various pretrial services. Plaintiff contests the taxing of this bill. The Supreme Court in *Crawford Fitting,* 482 U.S. at 445, held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." The Court continued, "[T]he inescapable effect of these sections in combination is that a federal court may tax expert witness fees in excess of the $[40]-per-day limit set out in § 1821(b) only when the witness is court-appointed." Dr. Hutchinson was not court appointed.

***4** In the absence of specific agreement between the parties, it is well settled that expert witnesses are entitled only to the regular statutory witness fees as part of taxed costs. *Cleverock Energy Corp. v. Trepel,* 609 F.2d 1358,1363 (10th Cir.1979), citing *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 284 U.S. 444 (1932); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2678, at 236–37 (1973). No specific agreement has been shown here. The Tenth Circuit has specifically held that the prevailing party is not entitled to excess fees for experts. *Euler v. Waller,* 295 F.2d 765, 766 (10th Cir.1961). *See also Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561, 586–87 (10th Cir.1961).

Defendant has not sought expert fees as witness fees, and the **court cannot determine from the documents provided by the defendant that any of the amounts charged by the expert are for the expert's deposition or other court appearance, for which witness fees could be awarded.** *See* § 1821(a). Instead, the expert's records indicate that the time was spent reviewing records, writing reports, and in "miscellaneous time." (See Dk. 156, Exh. C, bills from Dr. Hutchinson.) Accordingly, Dr. Hutchinson's fees shall not be awarded. This reduces the amount of "other costs" sought by defendant from $2,459.50 to $425.00, which represents payment of $50 .00 to Dr. Challa for plaintiff's medical report, and of $375.00 to Dr. Albott, plaintiff's treating physician. $425.00 shall be allowed in this category.

The remainder of costs sought by the defendant, i.e., $47.00 for copies of papers, is appropriate. Defendant's motion to retax costs is thus granted in part and denied in part, and defendant shall be awarded costs totaling $3355.51.

IT IS THEREFORE ORDERED THAT defendant's motion to retax costs (Dk.159) is denied. Pursuant to the terms of this memorandum, The parties shall submit to the clerk within twenty (20) days of the date of this order a revised bill of costs, reflecting the specific reductions made in this order.

IT IS SO ORDERED.

Footnotes

[1] Defendant states that "the Objection to Bill of Costs filed by Plaintiff should therefore be considered and decided as an uncontested motion." (Dk.159, p. 2–3). The court presumes that defendant errs in so stating, and intends for the court to deem defendant's bill of costs, or motion to retax costs, as uncontested instead.

1990 WL 182347
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Octavia L. **WASHINGTON**, Plaintiff,
v.
BOARD OF PUBLIC **UTILITIES** OF KANSAS CITY, KANSAS, City of Kansas City, Kansas, Ed Bortko, Robert Brown, William Ford, Irma Watts, Robert L. Sadrakula, and Terry Drake, Defendants.

Civ. A. No. 88–2312–O. | Oct. 29, 1990.

Attorneys and Law Firms

John H. Fields, Kansas City, for plaintiff.

Daniel B. Denk, McAnany, Van Cleave & Phillips, Harold T. Walker, City Attorney—Legal Dept., Kansas City, for defendants.

Opinion

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

***1** This matter is before the court on plaintiff Octavia **Washington's** motion to retax costs. Plaintiff originally brought this civil rights and employment action pursuant to the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e; and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* Following this court's May 8, 1990, entry of summary judgment in favor of defendants on all plaintiff's claims, defendants prepared and submitted a bill of costs to the clerk's office on May 16, 1990, in an amount of $645.30.

First, plaintiff disputes the clerk's taxation of these costs against her contending that the request was prematurely filed in violation of Local Rule 219. We disagree. This rule provides in pertinent part:

(a) Procedure for Taxation. The party entitled to recover costs shall file a bill of costs on a form provided by the clerk within thirty days (a) after the expiration of time allowed for appeal of final judgment or decree, or (b) after receipt by the clerk of an order terminating the action.

Footnotes

Contrary to plaintiff's contention, this rule does not prohibit the filing of a bill of costs until *after* the expiration of time allowed for appeal or more than 30 days after receipt of an order terminating the appeal. Instead, the rule merely provides deadlines beyond which the bill of costs may not be filed. Here, where judgment was entered against plaintiff on May 8, 1990, and the bill of costs was filed on May 16, 1990, the court finds the filing was timely.

Second, plaintiff asserts that taxation of the cost of taking her deposition and the cost of **copying defendants' brief and exhibits in support of the motion for summary judgment** is improper. Costs are assessed pursuant to Rule 54(d), Fed.R.Civ.P., and 28 U.S.C. § 1920. Review of the clerk's assessment of costs is a de novo review addressed to the sound discretion of the court. *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 232–33 (1964).[1] With respect to deposition costs, including the cost of the **stenographer's sitting fee** and one copy, the court has great discretion to tax these costs if it finds the deposition transcript and the copy were "necessarily obtained for use in the case." *Ortega v. Kansas City, Kansas,* 659 F.Supp. 1201, 1219 (1987), *rev'd on other grounds,* 875 F.2d 1497 (1989), *citing Ramos v. Lamm,* 713 F.2d 546, 560 (10th Cir.1983); *Miller v. City of Mission,* 516 F.Supp. 1333, 1340 (D.Kan.1981). Here, the court finds that, since plaintiff's deposition was necessary to establish whether there was any factual basis for her allegations of discrimination, the cost of the deposition was properly taxed.

The court reaches a similar result with respect to the cost of copying defendants' briefs and exhibits in support of the motion for summary judgment. Pursuant to 28 U.S.C. § 1920(4), the cost of photocopies of documents prepared for the court's consideration and necessary for the maintenance of the action may be recovered. *See Fressel v. AT & T Technologies, Inc.,* 103 F.R.D. 111, 115–16 (N.D.Ga.1984). Here, where **the copies at issue were those submitted to the court and not made solely for the convenience of defendants**, the court concludes the costs were properly taxed and affirms the clerk's assessment in the amount of $645.30.

***2** IT IS THEREFORE ORDERED that the plaintiff's motion to retax costs is denied.

[1] Since the court's review of costs is de novo, any procedural irregularity concerning the timing of plaintiff's notice regarding costs is moot.

End of Document

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

GEORGE W. WAYMAN, DALE STANISLAUS, JESS C. SMITH, ARLIN "BUD" F. ROAT, BRAD RHODES, CHARLIE REID, JOHN REENTS, STEVEN L. McKOWN, JAMES L. McKOWN, GREGORY L. McKOWN, THOMAS F. McCLERNON, DONALD B. HOWELL, BUDDY R. HILL, ROBERT HENDERSON, ROBERT C. CONNER, HAROLD CLARKE, and TROY M. BOTKIN,

Plaintiffs,

vs.

AMOCO OIL COMPANY, a Maryland corporation,

Defendant.

FILED

JAN 29 1997

RALPH L. DeLOACH, CLERK
By _____ Deputy

Docket No. 91-1451-MLB

923 F Supp 1322

MEMORANDUM AND ORDER

This matter comes before the court on Plaintiffs' Motion to Retax Costs (Doc. 247).[1]

I. NATURE OF CASE

The court entered final judgment in this case on June 27, 1996, after granting summary judgment in favor of Defendant Amoco Oil Company ("Amoco") on all counts of plaintiffs' amended complaint (Doc. 236).[2] Amoco then filed its bill of costs (Doc. 238). The clerk taxed $52,405.50 against the plaintiffs, jointly and severally (Doc. 246). The components of the award follow: Court

[1] Plaintiffs include only George W. Wayman, Jess C. Smith, Brad Rhodes, John Reents, James L. McKown, Thomas F. McClernon, Buddy R. Hill, Harold Clarke, and Troy M. Botkin, because the court dismissed Dale Stanislaus, Arlin "Bud" F. Roat, Charlie Reid, Steven L. McKown, Gregory L. McKown, Donald B. Howell, Robert Henderson, and Robert C. Conner before entry of judgment.

[2] Plaintiffs have appealed (Docs. 237 and 241).

Reporter Fees for Transcripts Necessarily Obtained - $35,667.80, Printing Fees and Disbursements - $10,152.20, Exemplification and Copying Fees of Papers Necessarily Obtained - $6,585.50. Plaintiffs' motion followed.

II. STANDARDS GOVERNING TAXATION OF COST DECISIONS

Under the Federal Rules of Civil Procedure, a court must generally award taxable costs to a prevailing party. Fed. R. Civ. P. 54(d)(1). The United States Code specifies six, and only six, types of expenses that are taxable as costs: (1) fees of the clerk and marshall, (2) fees of the court reporter for stenographic transcripts necessarily obtained for use in the case, (3) fees and disbursements for printing and witnesses, (4) fees for exemplification and copies of papers necessarily obtained for use in the case, (5) docket fees under 28 U.S.C. § 1923, and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828. 28 U.S.C. § 1920. The prevailing party must establish that the costs it seeks fall within these categories; otherwise, its request must fail. Phillips USA, Inc. v. Allflex USA, Inc., No. 94-2012-JWL, 1996 WL 568814, at *1 (D. Kan. Sept. 4, 1996) (unpublished); Green Constr. Co. v. Kansas Power & Light Co., 153 F.R.D. 670, 675 (D. Kan. 1994). As a predicate to reimbursement for court reporter fees for transcripts and for fees for exemplification and copies of papers, the prevailing party must show that it was necessary to obtain those materials for use in the case. Green Constr. Co., 153 F.R.D.

at 675; 28 U.S.C. § 1920. Such services and materials were necessarily obtained if they were "reasonably necessary in light of the facts known to counsel at the time" they were obtained. Phillips USA, Inc. v. Allflex USA, Inc., 1996 WL 568814, at *1; Vornado Air Circulation Sys., Inc. v. Duracraft Corp., No. 92-1543-WEB, 1995 WL 794070, at *2 (D. Kan. Nov. 29, 1995); Green Constr. Co., 153 F.R.D. at 677. See also Kroth v. Wal-Mart Stores, Inc., No. 92-7125, 1994 WL 75833, at *3 (10th Cir. Mar. 8, 1994) (unpublished) ("if the materials or services are reasonably necessary for use in the case even though not used at trial, the court can find necessity and award the recovery of costs"). Within this framework, the taxing of costs rests in the sound discretion of the district court. Green Constr. Co., 153 F.R.D. at 674 (citing Euler v. Waller, 295 F.2d 765, 766 (10th Cir. 1961)).

III. ANALYSIS

Plaintiffs pose six objections to the clerk's taxation of costs. First, they say, the clerk should not have taxed them for costs attributable to former plaintiffs who settled their claims prior to judgment. Second, the clerk improperly taxed costs against them jointly and severally, rather than individually. Third, they say, it is improper to tax them for the cost of depositions that were never used in the case. Fourth, the clerk's taxation of costs for certain photocopies contravenes an agreement executed between plaintiffs and Amoco, and, further, they claim to have already paid all outstanding copying costs. Fifth, the clerk should not have been taxed for the cost of postage, fax, and

Federal Express charges. Finally, the clerk taxed them for an unnecessary and unreasonable number of copies of the pleadings.

A. Settling Plaintiffs

This case originally involved seventeen separate plaintiffs. Amoco promptly deposed each of the seventeen defendants. Prior to final disposition of the case, the claims of eight plaintiffs were dismissed.[3] The court orders dismissing these plaintiffs provided that each party was responsible for its own costs. From the remaining plaintiffs Amoco has requested, and the clerk has awarded, the costs of deposing the previously dismissed plaintiffs. The plaintiffs object.

Amoco has cited four cases in support of its argument that "a party may recover all of its costs from the nonprevailing parties even when such are less than all of the parties who at one time were in the case" (Doc. 250 at 2). See Koppinger v. Cullen-Schiltz & Assoc., 513 F.2d 901, 910-11 (8th Cir. 1975); Lodges 743 & 1746, Int'l Assoc. Of Machinists & Aerospace Workers, AFL-CIO v. United Aircraft Corp., 534 F.2d 422, 447-48 (2d Cir. 1975); Mason v. Coca-Cola Bottling Co., No. 88-2636, 1989 WL 156792 (D. Kan. Nov. 30, 1989); Crumpacker v. Crumpacker, 516 F. Supp. 292, 297 (N.D. Ind. 1981). As plaintiffs point out, however, these cases state only that, under certain circumstances, a prevailing party may recover all of its costs from the losing parties, even though it has

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[3] The court ordered dismissals as follows: on 2/22/93, Gregory McKown (Doc. 76), on 10/20/93, Steven McKown (Doc. 146), on 8/24/94, Charlie Reid (Doc. 201), on 4/21/95, both Robert Henderson and Robert Conner (Doc. 216), on 6/26/96, Dale Stanislaus (Doc. 232), Don Howell (Doc. 233), and Arlin "Bud" Roat (Doc. 234).

prevailed against fewer than all parties or against parties no longer involved in the case (Doc. 251 at 8-10). They do not establish a mandatory rule, see Koppinger, 513 F.2d at 911, and they acknowledge that individual allocation could be upheld, see Lodges, 534 F.2d at 448; Crumpacker, 516 F. Supp. at 297. Having carefully reviewed each of those cases, the court adopts and incorporates plaintiffs' analysis of this authority.

More persuasive is the case of In re Air Crash Disaster, 687 F.2d 626 (2nd Cir. 1982), cited by plaintiffs. In re Air Crash Disaster arose from the crash of Eastern Air Lines' Flight No. 66 at John F. Kennedy International Airport on June 24, 1975. In that case, as here, multiple plaintiffs sued a single defendant. Unlike this case, the plaintiffs prevailed. 687 F.2d at 628. As here, some plaintiffs settled before trial. Id. at 629. Others settled after trial, but before taxation of costs. Still others settled after taxation, but prior to appeal. As here, each settlement agreement provided that the settlement was "without costs."

Like the clerk in this case, the district court in In re Air Crash Disaster taxed costs against the defendant in an amount that included the costs attributable to settling plaintiffs. 687 F.2d at 629. Interpolating the facts of this case into the words of the Second Circuit, "[t]he costs awarded by the [clerk] were not limited to allowable expenses incurred solely [with respect to] the non-settling plaintiffs but included expenses incurred [with respect to those] plaintiffs" with whom Amoco agreed to bear its own costs. Much as Amoco argues here, the district court said that "[t]he costs at issue here were incurred in connection with a

general liability trial which would have gone forward had even one plaintiff remained." Id.

On appeal, the Second Circuit noted that "the same total costs incurred for all [original plaintiffs] would have been incurred if only one plaintiff had gone to trial and that the consolidation of these cases saved the parties and the court time and money." 687 F.2d at 629. The court, however, considered those factors irrelevant. It said, "The fact is that the costs were incurred on behalf of all, not just the non-settling plaintiffs, and that the latter did not object to the provision that the settling plaintiffs expressly waived the costs to which they might have been entitled if they had not settled." This fixed-cost argument is even less availing in this case. Unlike the claims in that case, the plaintiffs' claims here involve distinct factual allegations and had to be judged on their individual merit. Based on the Second Circuit's reasoning and the particular facts of this case, the court finds that the non-settling plaintiffs should not be held liable for Amoco's costs directly attributable to its litigation with the settling parties.

The Second Circuit's analysis of the effect of the settlement agreements is also applicable here. Amoco voluntarily entered into eight settlement agreements, each of which provided that the parties would bear their individual costs. Amoco's expenses directly attributable to the settling plaintiffs and their individual claims clearly fall within the contemplation of these agreements and this court's orders of dismissal. As a result, these expenses cannot be taxed against the non-settling plaintiffs.

Policy considerations support this court's decision. Awarding costs as Amoco suggests would subvert the purpose underlying the cost-taxing provisions of the Federal Rules of Civil Procedure and the U.S. Code. Congress designed these provisions to reimburse a party for specified expenses of successful litigation, not to punish the loser or to award a windfall to the winner. 687 F.2d at 630. Forcing the non-settling plaintiffs to pay for the costs directly attributable to the settling plaintiffs would penalize them for failing to settle. Similarly, it would provide Amoco with a windfall, because Amoco already agreed to absorb these expenses. For this reason also, the clerk's taxation must be modified.

One final reason mandates rejection of Amoco's claim that the non-settling plaintiffs are responsible for the costs of deposing the settling plaintiffs. While Amoco says that deposing the settling plaintiffs was reasonably necessary for its litigation with the remaining plaintiffs, it has failed to provide satisfactory supporting evidence. Amoco baldly asserts that it sought to discover "what each plaintiff discussed with other plaintiffs concerning Amoco's alleged common representations or methods of operation" (Doc. 250 at 3).[4] Upon the facts of this case, the court finds that rationale insufficient.

For these reasons, Amoco's recovery of costs for deposition transcripts shall be as designated by the clerk, reduced by the following amounts:

Dale R. Stanislaus (9/3-4/92) $1,220.20

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[4] Amoco failed to support this statement by affidavit or otherwise.

	(7/13/93)	261.50	
			$1,481.70
Gregory L. McKown	(8/27/92)	$ 543.60	
			543.60
Steven L. McKown	(8/28/92)	$ 806.00	
	(8/24/93)	354.00	
			1,160.00
Robert C. Conner	(7/29/92)	$1,227.20	
	(7/1/93)	328.40	
			1,555.60
Robert D. Henderson	(7/31/92)	$ 139.80	
	(7/6/93)	92.20	
			232.00
Charlie Reid	(8/12-13/92)	$1,276.00	
	(7/8/93)	364.20	
			1,640.20
Arlin F. Roat	(7/16-17/92)	$1,410.80	
	(9/17/92)	791.20	
	(6/30/93)	382.80	
			2,584.80
Donald B. Howell	(7/6/93)	$ 437.00	
	(7/6/93)	172.00	
			609.00
			$9,806.90

In addition, there shall be a reduction for the cost of the transcript of Donald B. Howell's April 8-9, 1992 deposition. Amoco's attachment to its Bill of Costs lumps the cost of this deposition together with that of Harold Clarke. Amoco shall provide the court with either a stipulation or some detailed documentation showing the separate cost of Donald B. Howell's deposition. Failure to provide this information within ten days from the date of this order shall result in a reduction from the taxed costs of $2,524.40, the full amount Amoco allocated to the April 8-9 depositions of Donald Howell and Harold Clarke.

B. Individual Responsibility For Costs

Plaintiffs' second assignment of error is that the clerk failed to allocate the costs individually among the plaintiffs. The cases bearing on this question are relatively few, widely

scattered, and frequently old. The court has reviewed the cases cited by the parties, conducted its own independent research, and consulted both 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2651 et seq. (2d ed. 1983) and 20 Am. Jur. 2d Costs § 29 (1995). None of these sources provides an adequate discussion of the issue. Nevertheless, the court has distilled from these authorities the following rule: when plaintiffs who hold individual claims involving similar facts voluntarily join their cases in a single suit against the same defendant and lose, the court may either individually apportion costs among the losing parties or hold each liable for all costs, depending on the circumstances of the case.

Applying this rule to the facts of the case, the court finds that joint and several liability is appropriate. Plaintiffs brought this action jointly for their own benefit: to minimize their overall and individual expenses. Amoco would have incurred most of its taxable costs if even one plaintiff initiated suit and proceeded to trial.[5] Plaintiffs, who have prosecuted this case as a unit and through the same attorney, are in the best position to sort out individual liability. Amoco, which did not initiate this litigation and which prevailed at trial, should not have the burden of attempting to collect its costs from nine different plaintiffs. For these reasons, joint and several liability is appropriate.[6]

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[5] The obvious exceptions are the expenses of deposing the other plaintiffs and Donna Pelley.

[6] The court's ruling has no bearing on the plaintiffs' relative individual liability or their right to contribution from one another.

C. Compensability of Unused Depositions

Plaintiffs argue that because Amoco did not use in its motion for summary judgment eight of the depositions for which it seeks taxation of costs, these depositions were not reasonably necessary, and cannot, therefore, be taxed as costs. Plaintiffs misstate the law. Regardless of whether a deposition has actually been used, a deposition may be judged reasonably necessary. Willbanks v. Woodrow, No. 94-6311, 1995 WL 519157, at *4 (10th Cir. Sept. 1, 1995) (unpublished). As Amoco notes (Doc. 250 at 4), the proper test is whether the deposition was reasonably necessary in light of the facts known to counsel at the time" the deposition was taken. Phillips USA, Inc., 1996 WL 568814, at *1; Vornado Air Circulation Sys., Inc., 1995 WL 794070, at *2.

The court has no trouble finding that each of the deposition transcripts was necessarily obtained. Plaintiffs initiated and took five of the depositions. Those five depositions were taken at a point in time when liability remained an open question and when a trial appeared possible. Attending, and obtaining transcript copies of, such depositions is objectively reasonable.

The remaining three witnesses were plaintiffs' expert and damages witnesses. The testimony of these witnesses was critical to plaintiffs' cases. Amoco had to complete discovery before it filed for summary judgment, and, therefore, it needed to be prepared for the possibility of a trial on all issues. Therefore, obtaining transcripts of this deposition testimony was reasonably necessary in light of the posture of the case at the time Amoco obtained the transcripts. Helms v. Wal-Mart Stores, Inc., 808 F.

Supp. 1568, 1571 (N.D. Ga. 1992). Thus, plaintiffs' request that the costs of the transcripts of these depositions be retaxed shall be denied.

D. Photocopy Expenses

Plaintiffs claim that they had an agreement with Amoco governing the cost of photocopies that Amoco made, packed, and shipped to them at their request (Doc. 248 at 11). Plaintiffs argue that in this contract the parties agreed, among other things, that Amoco would absorb payment for all copies it made and delivered during 1992 and 1993. Additionally, plaintiffs claim that they already paid Amoco for all copies made after January 1, 1994. As a result, they claim, they owe Amoco nothing.

In support of their claim of settlement, plaintiffs ask this court to narrowly focus on Amoco's September 20, 1994 letter. See Doc. 239, Ex. B at 18-19. That letter, however, was merely the latest in a series of correspondence discussing the issue of document production. The court has reviewed the correspondence and arguments of the parties.[7] The context within which Amoco drafted and mailed the September 20, 1994 letter is illuminating.

Early on in this litigation it appears that plaintiffs requested that Amoco produce various documents (Doc. 239, Ex. B at 9-11). It is not clear whether plaintiffs technically invoked Federal Rule of Civil Procedure 34 when making these requests, but it appears from Amoco's October 7, 1993 letter (Doc. 239, Ex. B at

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[7] The only correspondence available to the court was in Doc. 239, Ex. B. The court recognizes that this represents only an incomplete portion of the relevant correspondence between the parties.

2), that the parties initially proceeded in accordance with the procedure provided by that rule. Amoco made the specified documents available for inspection and copying at its offices in Chicago. Plaintiffs' counsel traveled to Chicago to inspect them. After inspecting the documents, plaintiffs' counsel desired to make selected copies. Rule 34 provides that the requesting party may copy produced documents. For the convenience of all, the parties agreed that Amoco would copy the designated records and ship the documents to plaintiffs' counsel at plaintiffs' expense. Desiring to avoid the expense of the trip to Chicago and satisfied with the copying and shipping arrangement, the parties agreed that Amoco would copy and ship to plaintiffs' counsel all documents produced for discovery.

It is abundantly clear that the parties failed to nail down a fixed price term prior to each printing. Much of the parties correspondence focussed on this issue. Eventually the parties appear to have agreed upon ten cents per copy (Doc. 238, Ex. B at 17) and that is the amount requested by Amoco in its application for costs (Doc. 239 ¶ 6). While the pricing controversy continued, plaintiffs consistently failed to send Amoco any payment for any documents. During and after this controversy, Amoco repeatedly requested that plaintiffs pay for accumulated copying and shipping costs, but plaintiffs doggedly refused.

The September 20, 1994 letter included an offer from Amoco to absorb $5,993.10 in copying charges and to pay all deposition fees of its own experts provided that plaintiffs would agree to pay all deposition fees of their experts, including fees from depositions

taken by Amoco. Plaintiffs assert, without a supporting affidavit, that they accepted this agreement. Amoco asserts, also without support, that plaintiffs never responded to this offer and that it was not accepted (Doc. 250 at 6). Neither party has submitted evidence of whether the parties, in fact, assumed all payment obligations for their own experts. If in fact this or any other agreement absolved plaintiffs of their obligation to pay for $5,993.10 worth of copies, it is plaintiffs' obligation to prove it. Plaintiffs have not met their obligation and costs will be taxed accordingly.

Even if the parties had agreed to such an exchange, it is not at all clear to the court that the parties intended this compromise to be a final settlement of these costs in lieu of taxation, rather than a provisional arrangement for carrying costs pending resolution of the case and final taxation. The court is not convinced that plaintiffs would not have sought recovery of the costs of these photocopies had they actually paid for the copies and eventually prevailed at trial.

Amoco has requested reimbursement for 101,522 copies. As verification for its request, it has submitted the affidavit of its lead counsel, Richard C. Godfrey. In his affidavit, Godfrey declared as follows:

> Amoco claims only the amount of photocopying the documents produced by Amoco to the Wayman plaintiffs. This consists of 101,522 pages at $0.10 a page totaling $10,152.20. (Ex. B) The majority of the photocopying was undertaken by the law firm of Kirkland & Ellis on behalf of Amoco Corporation. Kirkland & Ellis charged Amoco its standard photocopying rate of $0.10 per page.

(Doc. 239 at 2). This affidavit is sufficient proof to establish

that Amoco incurred $10,152.20 in printing fees which are recoverable under 28 U.S.C. § 1920(3).

Plaintiffs' attempt to argue that they owe nothing is not credible. Plaintiffs assert that the September 20, 1994 offer related to all copies made in 1992 and 1993, and that they have paid for all copies provided by Amoco since January 1, 1994. Plaintiffs have provided no evidence of which copies the September 20, 1994 offer encompassed other than the language of the letter itself. Again, context is illuminating. At some point during the exchange of correspondence on accumulated copying charges, Amoco agreed to accept $5,993.10 for a portion of the copies (Doc. 238, Ex. B at 17). The $5,993.10 figure first appeared in a November 17, 1993 letter, and, therefore, must have been based on copies made up to or before that date. The most natural reading of the September 20, 1994 letter indicates that when Amoco wrote "the amount of $5,993.10 for copies requested by plaintiffs during 1992 and 1993" it was merely referring to the parties' prior agreement. The prior agreement related to 59,931 copies. Plaintiffs have not contradicted Amoco's claim that it provided 101,522 copies.

Plaintiffs have submitted evidence that Amoco provided only 1,414 copies after January 1, 1994, and that it tendered full payment for those copies (Doc. 249 ¶¶ 4 & 5). Amoco has not disputed these claims. Therefore, plaintiffs are entitled to a credit for those copies.

The court finds that Amoco did, in fact, supply 101,522 pages of documents to plaintiffs in response to requests for production. The court further finds that the parties agreed upon, and Amoco is

entitled to, ten cents for each page delivered for a total of $10,152.20. The court finds that plaintiffs have already paid $141.40. Therefore, costs shall be taxed against plaintiffs for printing fees in the amount of $10,010.80

E. Correspondence, Postage, Taxes and Federal Express Costs

Plaintiffs attack the compensability of certain postage, fax, and Federal Express charges (Doc. 248 at 11). They claim the clerk allowed Amoco $819.90 for such expenses. As Amoco points out (Doc. 250 at 7), plaintiffs' complaint is based on a misapprehension of the record. Amoco requested (Docs. 238 & 239 ¶¶ 2 & 5), and the clerk awarded (Doc. 246), no money for postage, fax, or Federal Express charges. Thus, the only remaining issue is Amoco's request for the cost of the paper for the letters themselves.

In Vornado Air Circulation Sys., Inc., Judge Wesley E. Brown ruled that the cost of correspondence itself can be recoverable as a fee for exemplification or copies of papers under 28 U.S.C. § 1920(4). 1995 WL 794070 at *4. In Phillips USA, Inc. v. Allflex USA, Inc., Judge John W. Lungstrum held that, as a matter of law, outgoing papers can never be "necessarily obtained" because they were not, strictly speaking, obtained. 1996 WL 568814 at *2 (considering documents produced during discovery). The court finds it unnecessary to address the competing implications of these cases, however, because it holds that the costs of printing correspondence mailed in connection with pending litigation are costs for printing recoverable under 28 U.S.C. § 1920(3). Amoco's charge of $40.10 for printing such correspondence shall be taxed against plaintiffs, but the clerk's Bill of Costs shall be modified

so that this item appears as a cost of printing rather than a fee for exemplification or copies.

F. Costs of Multiple Pleading Copies

Plaintiffs' last complaint relates to Amoco's claim for the costs of producing multiple sets of pleadings (Doc. 248 at 12). Plaintiffs argue that while Amoco claimed expenses for seven sets, it is entitled to reimbursement for no more than four. Again, plaintiffs' counsel has misread Amoco's fee request. Amoco requested payment for only six sets (Doc. 239, Ex. B at 1).

The court finds that five sets were reasonable: the original and one copy for filing, one for plaintiffs' counsel, one for Amoco itself, and one for Amoco's attorneys. Amoco itself chose to retain two sets of attorneys. This was a matter of preference and convenience, not necessity. Thus, any copies made for the second set of attorneys were also made for convenience. Accordingly, the clerk's taxation of costs for fees for exemplifications and copies of paper shall be reduced by $1,090.90, to reflect one set of unnecessary copies.

IV. CONCLUSION

The clerk's taxation of costs will be affirmed with the following modifications:

1. Amoco's recovery of costs for deposition transcripts shall be as designated by the clerk, reduced by the following amounts:

Dale R. Stanislaus	(9/3-4/92)	$1,220.20	
	(7/13/93)	261.50	
			$1,481.70
Gregory L. McKown	(8/27/92)	$ 543.60	
			543.60
Steven L. McKown	(8/28/92)	$ 806.00	

	(8/24/93)	354.00	
			1,160.00
Robert C. Conner	(7/29/92)	$1,227.20	
	(7/1/93)	328.40	
			1,555.60
Robert D. Henderson	(7/31/92)	$ 139.80	
	(7/6/93)	92.20	
			232.00
Charlie Reid	(8/12-13/92)	$1,276.00	
	(7/8/93)	364.20	
			1,640.20
Arlin F. Roat	(7/16-17/92)	$1,410.80	
	(9/17/92)	791.20	
	(6/30/93)	382.80	
			2,584.80
Donald B. Howell	(7/6/93)	$ 437.00	
	(7/6/93)	172.00	
			609.00
			$9,806.90

2. There shall be a reduction for the cost of the transcript of Donald B. Howell's April 8-9, 1992 deposition. Amoco shall provide the court with either a stipulation or some detailed documentation showing the separate cost of Donald B. Howell's deposition. Failure to provide this information within ten days from the date of this order shall result in a reduction from the taxed costs of $2,524.40, the full amount Amoco allocated to the April 8-9 depositions of Donald Howell and Harold Clarke.

3. The amount taxed for "Fees and Disbursements for Printing" shall be reduced by $141.40 to $10,010.80.

4. The clerk's taxation of $40.10 for Amoco's cost of correspondence shall be affirmed, but the clerk's Bill of Costs shall be modified so that this item appears as a cost of printing rather than as a fee for exemplification or copies.

5. The clerk's taxation of costs of fees for exemplifications and copies of paper shall be reduced by $1,090.90, to reflect one

set of unnecessary copies of Amoco's pleadings.

The clerk is directed to enter a revised Bill of Costs in accordance with this opinion.

IT IS SO ORDERED.

Dated this 21st day of January, 1997, at Wichita, Kansas.

Monti L. Belot
United States District Judge

986 F.2d 413
United States Court of Appeals,
Tenth Circuit.

Stephen Brent **WHEELER**, Plaintiff-Appellant,
v.
JOHN DEERE COMPANY, A Delaware Corporation, Defendant-Appellee.

No. 92-3171. | Feb. 22, 1993.

In a products liability action, the United States District Court for the District of Kansas, Patrick F. Kelly, Chief Judge, awarded costs to the plaintiff, but denied postjudgment interest. The plaintiff appealed. The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that: (1) **postjudgment interest** was mandated on an award of costs, and (2) interest ran from the date the award was quantified, but only on the amount of costs as subsequently reduced.

Reversed and remanded.

West Headnotes (4)

[1] **Interest**
Interest from Date of Judgment or Decree

Award of costs, which partially reimburses prevailing party for out-of-pocket expenses of litigation, is "any money judgment" within meaning of federal statute governing postjudgment interest. 28 U.S.C.A. § 1961.

11 Cases that cite this headnote

[2] **Interest**
Interest from Date of Judgment or Decree

Federal statute governing postjudgment interest mandates interest on award of costs. 28 U.S.C.A. § 1961.

1 Cases that cite this headnote

[3] **Interest**
Interest from Date of Judgment or Decree

Postjudgment interest on award of costs began to run on date district court quantified award, but only on amount of costs awarded under subsequent order that decreased award. 28 U.S.C.A. § 1961.

10 Cases that cite this headnote

[4] **Interest**
Appeal or Other Proceedings for Review

Fact that recipient of award of costs took appeal from order reducing award did not prevent postjudgment interest from running on award; any equitable considerations were to be addressed through district court's discretionary power to deny or apportion costs, not by disallowing interest. 28 U.S.C.A. § 1961.

6 Cases that cite this headnote

Attorneys and Law Firms

***414** Jefferson D. Sellers and Jack B. Sellers of Jack B. Sellers Law Associates, Inc., and Laura Emily Frossard, Tulsa, OK, for plaintiff-appellant.

Stephen O. Plunkett of Rider, Bennett, Egan & Arundel, Minneapolis, MN, for defendant-appellee.

Before ANDERSON and EBEL, Circuit Judges, and BRIMMER,[*] District Judge.

Opinion

STEPHEN H. ANDERSON, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Stephen Brent **Wheeler** lost his right arm while servicing a **John Deere** Titan series model 7720 combine. He brought this products liability suit against the manufacturer, defendant-appellee **John Deere** Company, alleging that the combine was unreasonably dangerous and any warnings were inadequate. The first jury found **Deere** 75% at fault and Mr. **Wheeler's** employer 25% at fault, and fixed Mr. **Wheeler's** damages at $3.1 million. The district court therefore entered judgment in the amount of $2.325 million against **Deere**. Because of substantive errors in the trial, we reversed the judgment and remanded for a new trial. ***Wheeler** v. **John Deere** Co.,* 862 **F.2d** 1404, 1415 (10th Cir.1988) (***Wheeler** I*). On retrial, the second jury also returned a verdict in favor of Mr. **Wheeler**, finding **Deere** 68% at fault, Mr. **Wheeler's** employer 32% at fault, and calculating Mr. **Wheeler's** damages at $2,883,407. On October 30, 1989, the district court entered judgment in the amount of $1,960,717 against **Deere**, plus interest and costs. Both parties appealed. We affirmed. ***Wheeler** v. **John Deere** Co.,* 935 **F.2d** 1090, 1105 (10th Cir.1991) (***Wheeler** II*).

This appeal concerns the district court's award of costs. A general, but unquantified, award of costs was made in the October 30, 1989, judgment. Costs were initially quantified at $21,655.95 in a bill of costs ***415** entered by the clerk of the district court on February 13, 1992. **Deere** disputed the $21,655.95 award, appealing to the district court the clerk's inclusion of Mr. **Wheeler's** costs from the first, vacated, trial. The district court then disallowed $6,597.00 of Mr. **Wheeler's** costs incurred during the first trial, and entered on March 2, 1992, a final award of costs for $15,085.95. **Deere** tendered this final amount to Mr. **Wheeler**. Mr. **Wheeler** refused to accept **Deere's** tender of $15,085.95, however, arguing that he was entitled to postjudgment interest on the cost award, running from the October 30, 1989, judgment that awarded costs generally, but did not fix the amount. The district court, in an order entered on April 8, 1992, allowed **Deere** to pay to the court the sum of $15,058.95 to discharge its liability for costs. In a "memorandum to file" entered on April 15, 1992, the district court explained that it disallowed any interest on the cost award on the basis that Mr. **Wheeler** himself had caused the delay in receiving payment by appealing the October 30 judgment. Mr. **Wheeler** appeals from the district court's April 8, 1992, order. We exercise jurisdiction under 28 U.S.C. § 1291 and reverse.

[1] It is clear that interest accrues on an award of costs under 28 U.S.C. § 1961. The language of the statute is both mandatory and broad: "Interest *shall* be allowed on *any* money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961 (emphasis supplied). An award of costs, which partially reimburses the prevailing party for the out-of-pocket expenses of litigation, is obviously "any money judgment."

[2] Although we have not previously stated that § 1961 mandates interest on an award of costs, we have stated that § 1961 mandates interest on an award of attorneys' fees. *Transpower Constructors, a Div. of Harrison Int'l Corp. v. Grand River Dam Auth.,* 905 **F.2d** 1413, 1423-24 (10th Cir.1990). That § 1961 interest also applies to cost awards follows from our discussion in that case. In *Transpower,* we relied primarily on *Perkins v. Standard Oil Co.,* 487 **F.2d** 672, 675 (9th Cir.1973), and *R.W.T. v. Dalton,* 712 **F.2d** 1225, 1234 (8th Cir.), *cert. denied,* 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983), in holding that § 1961 mandates interest on awards of attorneys' fees. *Transpower,* 905 **F.2d** at 1424. For the purposes of interest under § 1961, we see no practical difference between an award of costs, an award of attorneys' fees, or an award of damages. Indeed, in *Transpower* we noted that "there exists no real distinction between judgments for attorneys' fees and judgments for ... damages.... [O]nce a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed." *Id.* (quoting *Perkins,* 487 **F.2d** at 675, *quoted in R.W.T.,* 712 **F.2d** at 1234). The Eighth Circuit, in *R.W.T.,* specifically applied the *Perkins* holding to cost awards, 712 **F.2d** at 1234-35, and so do we.

Other circuits agree that § 1961 mandates interest on cost awards. *See Georgia Ass'n of Retarded Citizens v. McDaniel,* 855 **F.2d** 794, 799 (11th Cir.1988) (reconciling a conflict within the circuit); *Devex Corp. v. General Motors Corp.,* 749 **F.2d** 1020, 1026 (3d Cir.1984), *cert. denied,* 474 U.S. 819, 106 S.Ct. 68, 88 L.Ed.2d 55 (1985); *Copper Liquor, Inc. v. Adolph Coors Co.,* 701 **F.2d** 542, 543 (5th Cir.1983) (en banc per curiam) (overruling *Carpa, Inc. v. Ward Foods, Inc.,* 567 **F.2d** 1316 (5th Cir.1978)). **Deere** cites no case taking the contrary view, and we have found none.

Contrary to Mr. **Wheeler's** assertion, however, interest does not run from October 30, 1989, the date of the judgment awarding unquantified costs, but rather from February 13, 1992, the date of the judgment in which costs were first quantified. *Cf. MidAmerica Fed. Sav. & Loan v. Shearson/Am. Express, Inc.,* 962 **F.2d** 1470, 1476 (10th Cir.1992) **(interest on award of attorneys' fees runs from date of judgment in which they are quantified).** In *MidAmerica,* we rejected the Fifth Circuit's rule that postjudgment interest accrues from the date of the judgment conferring the *right* to attorneys' fees. *MidAmerica,* 962 **F.2d** at 1476 (discussing *Copper Liquor,* 701 **F.2d** 542, 544-45). We ***416** explained that we saw no way to reconcile that rule with the purpose of

postjudgment interest " ' "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." ' " *Id.* (quoting *Kaiser Aluminum & Chem. Co. v. Bonjorno,* 494 U.S. 827, 835-36, 110 S.Ct. 1570, 1576, 108 L.Ed.2d 842 (1990) (quoting *Poleto v. Consolidated Rail Corp.,* 826 **F.2d** 1270, 1280 (3d Cir.1987))). Until attorneys' fees are " 'meaningfully ascertained' " by being quantified in a final, appealable judgment, interest should not accrue. *Id.* at 1476-77 (citing *Kaiser,* 494 U.S. at 836, 110 S.Ct. at 1576).

[3] An award of costs must be treated the same way. In this case, the district court awarded costs generally in its judgment of October 30, 1989. The award was first quantified, at $21,655.95, in a bill of costs entered by the clerk on February 13, 1992. The district court entered a final award of costs for $15,085.95 on March 2, 1992. Where, as here, an initial quantified judgment is later decreased, interest runs from the date of the earlier quantified judgment but only on the amount ultimately allowed. In other words, postjudgment interest on Mr. **Wheeler's** award of costs runs from February 13, 1992, on the final award of $15,085.95. This holding is consistent both with our holding in *MidAmerica* that interest runs from the date a quantified judgment is entered, 962 **F.2d** at 1476, and with our discussion on postjudgment interest in ***Wheeler II,*** in which we stated that interest runs from the date of an earlier judgment when a later " 'reversal [of the judgment] is not on any basic liability errors ... but on a dollar value, a matter of degree.' " 935 **F.2d** at 1097 (quoting *Northern Natural Gas Co. v. Hegler,* 818 **F.2d** 730, 737-38 (10th Cir.1987), *cert. dismissed,* 486 U.S. 1063, 109 S.Ct. 7, 100 L.Ed.2d 937 (1988)).

[4] Finally, **Deere** argues, without statutory or case support, that it would be inequitable to allow Mr. **Wheeler postjudgment interest** on the cost award because Mr. **Wheeler** appealed from the second judgment and therefore caused the delay in payment. **Deere** also cross-appealed, however, and cannot now complain of the delay. In any case, any equitable considerations should "be addressed through the district court's discretionary power to deny or apportion costs, not by disallowing interest on the cost award." *Georgia Ass'n of Retarded Citizens,* 855 **F.2d** at 800 and n. 7 (citing generally Charles A. Wright, Arthur R. Miller & Mary K. Kane, 10 *Federal Practice and Procedure* § 2668 (1983); 6 James W. Moore, et al., *Moore's Federal Practice* ¶ 54.70[5] (1988)). In the circumstances, we decline to penalize Mr. **Wheeler** for pursuing his right to appeal by cutting off postjudgment interest mandated by § 1961.

The judgment of the United States District Court for the District of Kansas is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

Footnotes

* Honorable Clarence A. Brimmer, District Judge, United States District Court for the District of Wyoming, sitting by designation.

End of Document

2006 WL 2574185
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

Royal WHITAKER III and Susan Whitaker, Plaintiffs,
v.
TRANS UNION CORPORATION, Experian Information Solutions, Inc., and CSC Credit Services, Inc., Defendants.

Civil Action No. 03–2551–CM. | Aug. 8, 2006.

Attorneys and Law Firms

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Opinion

ORDER

CARLOS MURGUIA, District Judge.

***1** On February 4, 2005, the Honorable G. Thomas VanBebber entered judgment for defendants and against plaintiffs in this case (Doc. 214). Although the court originally disallowed costs, defendant **Trans Union** Corporation asked the court to reconsider its decision, and the court ruled that defendant **Trans Union** was entitled to its costs in an Order dated October 14, 2005. The Clerk of the Court taxed costs in the amount of $3,435.32 on February 24, 2006, and plaintiffs filed an Objection to Bill of Costs (Doc. 247) on February 28, 2006. The court construes plaintiffs' objection as a timely motion to retax costs. *See* Fed.R.Civ.P. 54(d)(1) ("On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."); D. Kan. R. 54.1(a).

Plaintiffs contend that defendant claimed excessive and unnecessary costs, including costs for unnecessary documentation, depositions, and subpoenas for creditors who were not included in plaintiffs' complaint. Plaintiffs claim that video depositions were unnecessary, and they offer to return the videos and five boxes of copied documents. According to plaintiffs, a more reasonable amount of costs is $500–$600, although plaintiffs once suggested that the court reduce the bill of costs to $688.

In reviewing the **clerk's taxation of costs,** the court makes a *de novo* determination. *See Green Constr. Co. v. Kan. Power & Light Co.,* 153 F.R.D. 670, 674 (D.Kan.1994). Taxation of costs is within the court's discretion, limited by the parameters of 28 U.S.C. § 1920, which specifies categories of costs that may be awarded. *Id.* at 675. A presumption that costs will be awarded arises, however, where requested costs are statutorily-authorized. *Id.* (citing *U.S. Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1245 (10th Cir.1988). The prevailing party bears the burden of showing that particular costs are authorized by statute. *Id.* But once the prevailing party has demonstrated that particular costs are statutorily-authorized, the non-prevailing party bears the burden of showing that costs are otherwise improper. *Cantrell v. IBEL Local 2021,* 69 F.3d 456, 459 (10th Cir.1995) (citations omitted). The court will look at each disputed category of costs individually.

I. Issuance of Subpoenas

28 U.S.C. § 1920(1) provides for taxation of "[f]ees of the clerk and marshal." Many courts have interpreted this to allow taxation of the costs of serving summons and subpoenas, even if the U.S. Marshal does not serve the summons or subpoenas. *See, e.g., United States Equal Employment Opportunity Comm'n v. W & O, Inc.,* 213 F.3d 600, 623–24 (11th Cir.2000). But here, defendant did not incur process server fees. Rather, defendant asks the court to allow it to recoup its **postage expenses for mailing subpoenas and other documents associated with subpoenas. Most of defendant's submissions are for the costs of sending documents by certified mail.** Others are for **Federal Express charges**. **Neither type of expense is recoverable.** *See Ortega v. IBP, Inc.,* 883 F.Supp. 558, 562 (D.Kan.1995) **(postage expenses);** *Burton v. R.J. Reynolds Tobacco Co.,* 395 F.Supp.2d 1065, 1087 (D.Kan.2005) (Federal Express charges). The court will not tax defendant's costs associated with issuance of subpoenas. The court will, however, allow defendant its $100 fee to appear ***pro hac vice.***

II. Depositions

***2** Section 1920(2) provides that the court may tax "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." The Tenth Circuit has held that this portion of the statute implicitly permits the court to tax the costs of video depositions. *Tilton v. Cap. Cities/ABC, Inc.,* 115 F.3d 1471, 1477 (10th Cir.1997). *Tilton* further held that a party may recover both the costs of the transcript and the videotape deposition. *Id.* at 1478.

Defendant has shown the court that the depositions taken were not merely for discovery purposes and that **videotaping the depositions** of plaintiffs was reasonably necessary. Defendant saw indications in discovery that plaintiffs might testify inconsistently in deposition and at trial, and thought it necessary to preserve plaintiffs' appearance in deposition for the jury to review. **For these reasons, defendant is entitled to the properly-supported costs of depositions and transcripts.**

But the court will not tax postage expenses. *See Ortega,* 883 F.Supp. at 562. Nor will the court tax delivery charges. *See Burton,* 395 F.Supp.2d at 1087. The court further finds that charges for **ASCII Disks, "DV Masters," "Encoding DV to MPEG onto Medium (CD)," condensed transcripts**, and **additional copies of transcripts are expenses that defendant incurred solely for its convenience, and are not appropriately taxed against plaintiffs**. *See Stadtherr v. Elite Logistics, Inc.,* No. 00–2471–JAR, 2003 **WL** 21488269, at *4 (D. Kan. June 24, 2004) (citing *Battenfeld of Am. Holding Co. v. Baird, Kurtz & Dobson,* 196 F.R.D. 613, 615 n. 1 (D.Kan.2000)). The bill for the deposition of Christopher G. Mokris shows that many of these expenses are included in the total, but the bill is not itemized. Defendant bears the burden of showing that expenses are authorized by statute, and the court finds that defendant has not met that burden with respect to Mr. Mokris's deposition. The court will therefore disallow the entire bill of $298.59. Moreover, the bill for the transcript of Alfonza Smith indicates that the transcript was shipped by **Federal Express** and that the transcript was expedited. The court cannot tell what portion of the $388.25 bill is attributable to these expenses, which are for the convenience of defendant. Because defendant has not met its burden with respect to the deposition of Mr. Smith, the court will also disallow costs in the amount of $388.25. This leaves the following deposition expenses as taxable against plaintiffs:

Susan Whitaker transcript, attendance, signature, exhibits	$517.00
Susan Whitaker videotaping	$380.00
Royal Whitaker transcript, attendance, signature, exhibits	$339.40
Royal Whitaker videotaping	$230.00
Michael Jackson transcript	$54.60
Gregory Dunbar telephone transcript, attendance, exhibits	$62.20
Alfonza Smith telephone service charges	$48.88
TOTAL ALLOWED DEPOSITION EXPENSES	$1,632.08

III. Printing

***3** Section 1920(3) allows the court to tax "[f]ees and disbursements for printing and witnesses." The clerk taxed plaintiffs $226.08, or 1,884 pages at **$0.12 a page,** for printing. Defendant explained that because plaintiffs proceeded *pro se,* defendant had to provide a copy of each filed document, totaling 1,884 pages, to plaintiffs. The court finds that the full amount was a necessary expense incurred by defendant and should be taxed to plaintiffs.

IV. Copies

Section 1920(4) provides for taxation of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." The clerk taxed plaintiffs $756.84 for copies, including $27.84 for copies that defendant made of documents to respond to plaintiffs' discovery requests and $519.56 for "copying and bates labeling of documents produced with [defendant's] disclosures." "As a general rule, prevailing parties are not entitled to recover costs incurred in **responding to discovery**; because the producing party possesses the original documents, such papers are not 'obtained' for purposes of sec.1920(4)." *Pehr v. Rubbermaid, Inc.,* 196 F.R.D. 404, 407 (D.Kan.2000) (citation omitted); *see also Burton,* 395 F.Supp.2d at 1085 (citation omitted). Defendant's own description of the documents copied and labeled suggests to the court that the documents were in the possession of defendant and not "obtained." The court will therefore disallow $547.40 of defendant's costs for copies. The remainder of the copies, however, the court finds constitute costs necessarily incurred by defendant, based on the statements in defense counsel's affidavit. The court will tax $209.44 for copies of papers necessarily obtained for use in the case.

V. Conclusion

In summary, the court allows the following costs:

Clerk Fees	$100
Depositions	$1,632.08
Printing	$226.08
Copies	$209.44
Total	$2,167.60

IT IS THEREFORE ORDERED that plaintiffs' Objection to Bill of Costs (Doc. 247), which the court construes as a motion to retax costs, is sustained in part.

The court taxes costs in the amount of $2,167.60.

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1990 WL 129463
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Julie N. **WOLF**, Plaintiff,
v.
Jerry **BURUM**, Rent–A–Center of America, Inc., and Rent–A–Center, Inc., Defendants.

No. 88–1233–C. | Aug. 30, 1990.

Attorneys and Law Firms

Kris J. Kuhn, Arn, Mullins, Unruh, Kuhn & Wilson, Wichita, Kan., for plaintiff.

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Darrell L. Warta, Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., for Jerry **Burum**.

Allen Glendenning, Turner & Boisseau, Wichita, Kan., for Thomas Devlin.

Ronald P. Williams, Morrison, Hecker, Curtis, Kuder & Parish, Wichita, Kan., for Rita M. Shaw—non-party witness.

Steven D. Ruse, Anthony F. Rupp, Shughart, Thomson & Kilroy, Overland Park, Kan., for Rent–A–Center of America, Inc., Rent–A–Center, Inc.

Opinion

MEMORANDUM AND ORDER

CROW, District Judge.

***1** The case comes before the court on the plaintiff's motion for an order denying costs to the defendants. On May 16, 1990, this court granted the defendants' motion for summary judgment on plaintiff's claims of sexual harassment under Title VII, 42 U.S.C. § 2000e–2(a)(1) and other common law actions in tort and contract. On July 16, 1990, the defendants filed their bill of costs in the amount of $3,079.59. Plaintiff filed her present motion on August 6, 1990. On August 13, 1990, the Clerk of the Court taxed costs against the plaintiff in the amount requested by defendants.

Because it is presumed the prevailing party will recover its costs, the losing party must overcome the presumption and the court must offer a reason for denying costs. *Serna v. Manzano,* 616 F.2d 1165, 1167–68 (10th Cir.1980). Plaintiff argues her case was a "close and difficult" one which justifies denial of costs. She cites *White & White, Inc. v. American Hosp. Supply Corp.,* 786 F.2d 728 (6th Cir.1986), in which the court defined this exception as follows:

The closeness of a case is judged not by whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case.

786 F.2d at 732–33. As evidence in support of this exception, plaintiff points to the facts that only one firm originally represented the defendants and two other firms also entered their appearance later on behalf of the defendants and that the defendants waited almost ten months after taking the plaintiff's deposition before filing their motion for summary judgment.

The resolution of this case upon the defendants' summary judgment motion does not qualify as a close or difficult decision. On each of the plaintiff's claims, the court found the evidence of record insufficient as a matter of law to present them to a jury. The defendants' personal motives for retaining additional counsel and delaying their summary judgment attack are too speculative for the court to base a finding that the case was considered by them to be close and difficult. Moreover, the court questions to what degree, if any, the defendants' assessment of the case, whether it is inferred from their conduct or statements, should bear upon the applicability of this exception. This is not a close and difficult case.

Plaintiff states her good faith in pursuing this action is "relevant as a basis for denying costs to the prevailing party." (Dk. 174, p. 3). A plaintiff's good faith in filing and prosecuting her action is an insufficient basis alone for denying costs to a defendant. *White & White,* 786 F.2d at 730–31; *Coyne–Delany v. Capital Dev. Bd. of State of Ill.,* 717 F.2d 385, 390 (7th Cir.1983); *Honeycutt v. Turnage,* No. 88–4124–S (D.Kan. Feb. 23, 1990). Plaintiff has failed to overcome the presumption favoring the award of costs.

The plaintiff next takes issue with assessing costs for sixteen depositions when the defendants only relied upon or cited four depositions in their motion for **summary judgment**. "A judge or clerk of any court of the United States may tax as costs the following: ... (2) Fees of the

court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; ... (4) Fees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920. The Tenth Circuit has noted that a local rule which allows costs only for those **depositions admitted into evidence or used by the court in ruling upon a motion for summary judgment** is narrower than § 1920. *Hernandez v. George,* 793 F.2d 264, 269 (10th Cir.1986). On the other hand, the trial court does not abuse its discretion in assessing **costs for only those depositions which were actually used by the court in considering the motion for summary judgment**. *E.g., Merrick v. Northern Natural Gas Co.,* No. 89–5012, 5022, 5064 (10th Cir. Aug. 23, 1990), *Gibson v. Greater Park City Co.,* 818 F.2d 722, 725 (10th Cir.1987). Because summary judgment proceedings are limited in nature, this court considers it appropriate to **allow costs for only those depositions used by the court.**

***2** Defendants emphasize that the depositions for which they seek costs were cited either by them or the plaintiff in the summary judgment proceedings. Whenever a party, whether the movant or the respondent, cites a deposition to support a factual question central to the controlling issues raised in a summary judgment pleading, the court must necessarily consider that cited testimony in deciding the motion. If considered by the court, the deposition has been "used." For that reason, a court should assess costs in favor of the party prevailing on its motion for summary judgment for each deposition that is cited and relied upon by the movant or the opposing party. As with any rule, exceptions do exist, such as when the moving party cites to a number of depositions solely in support of a superfluous argument which the court did not even refer to in its decision on the merits. The general rule applies to the present case without exception, and defendants are entitled to the costs for those depositions cited by them or plaintiffs in the summary judgment pleadings.

Plaintiff also challenges the costs for **duplicate copies of depositions** for the defendants. Defendants explain they seeks costs for one copy of eight depositions and for two copies of seven depositions. The plaintiff has offered no rule that defendants must share **copies of depositions**, particularly where they are represented by different counsel. The court finds it appropriate and within the scope of § 1920 to award the defendants the costs for those requested deposition copies.

Plaintiff's last attack is the **copying charge of $.20 per page** billed by the defendants. She believes defendants should only recover the available commercial rate of $.025 to $.05 per page. Defendants' rate for copying charges is reasonable.

IT IS THEREFORE ORDERED that the plaintiff's motion (Dk. 173) for an order denying costs to defendants is denied.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 4

Rule 4. Summons

Currentness

(a) Contents; Amendments.

(1) ***Contents.*** A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) ***Amendments.*** The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons--or a copy of a summons that is addressed to multiple defendants--must be issued for each defendant to be served.

(c) Service.

(1) ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B)the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent--or until 90 days after it was sent to the defendant

outside any judicial district of the United States.

(4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1)in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) ***Federal Claim Outside State-Court Jurisdiction.*** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) ***Federal Law.*** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) ***State Law.*** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; April 29, 1980, effective August 1, 1980; amended by Pub.L. 97-462, § 2, January 12, 1983, 96 Stat. 2527, effective 45 days after January 12, 1983; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007.)

PRACTICE COMMENTARY

by David D. Siegel

Table of Contents

Preliminary

C4-1. Introductory.

Rule 4 governs the subject of personal jurisdiction in federal civil practice. Under its caption, "Summons", it governs the summons in all its particulars: form, contents, issuance, method and place of service on various entities, amenability of the defendant to service, time of service, etc. This makes it the key instruction of the Federal Rules of Civil Procedure on the commencement of a federal civil action.

Paradoxically, it is Rule 3, not 4, that bears the caption of "Commencement of Action". But Rule 3 contains only a single sentence, "[a] civil action is commenced by filing a complaint with the court", and in practical terms the "commencement" of a civil action involves a whole congeries of requirements, of which the filing of the complaint is but the first. It is the summons and its service that really determines how the case gets going, and it is Rule 4 that governs the summons and its service. Hence it is far more accurate to remember that Rules 3 and 4 together govern the commencement of the action, and that Rule 4 is a good deal more demanding than Rule 3 is.

Against the line or two of type that Rule 3 occupies are the many lines that make up Rule 4. That ratio speaks worlds about the relative demands that the two rules make on the lawyer's attention. Add in the fact that the moment of commencement of the action is all bound up with that most talented enemy of the plaintiff--the statute of limitations--and the conclusion is plain: as demanding as Rule 4 may be, a mistake in its use can be fatal. The lawyer prone to occasional error, as all of us are, had best find some other occasion for it.

The purpose of these Commentaries is to offer a practical treatment of Rule 4, giving the lawyer a broad perspective of its demands and a word of warning at its more dangerous pitfalls. It has no small number of pitfalls. Indeed, in some instances even a lawyer with an intimate knowledge of Rule 4 can get tripped up, as in a case based on diversity of citizenship, where, for a statute of limitations measure, neither Rule 3 nor Rule 4 governs. State law does, but nothing on the face of either rule warns of that because it comes from case law. We will be especially sensitive in these Commentaries to advise about things like that.

Rule 4 was extensively overhauled in an amendment that took effect in 1983, and bench and bar spent much time and effort learning and applying the amendment. Cases applying it abound, and every circuit in the federal system has had

their occasions to go over it.

The 1983 amendment lasted hardly 10 years when another extensive overhaul was made, effective December 1st, 1993. The present Commentaries are built entirely around the 1993 rule..

Extensive interplay among various parts of Rule 4 makes the cross-reference an especially helpful tool. It will be freely used to inject relevant points and avoid unnecessary repetition. Reference will of course be made to the prior (1983) version of Rule 4 whenever the reference will help understanding of the present rule.

Treatment of the changes made in Rule 4 in the 1993 revision will be more detailed. This is notably the case, for example, with subdivision (d), the housing of the new provision on "waiver of service" (which replaces the mail method of service introduced in the 1983 amendment), and subdivision (k)(2), which purports in federal question cases to make a foreign defendant amenable to jurisdiction if its overall contacts with the United States are adequate even if its contacts with any individual state would not suffice to offer jurisdiction in that state. It's a kind of general federal longarm statute. It poses a number of questions. See Commentary C4-35 below.

Of course stress will also be laid on the time for making service, provisions on which have been shifted from subdivision (j) of the old rule to subdivision (m) of the present one. If the new rule relieves any of the rigors associated with the time provisions of the old rule, the relief may prove temporary, or, indeed, illusory. And when time is the issue, the statute of limitations often is, too. Discussion at those junctures will of course be more extensive than at others.

On other subdivisions, around for a long time and the subject of much case law, even if relettered in the 1993 revision--and most of them were--treatment will be terser and for the most part limited to pointing out trouble spots.

C4-2. Personal Jurisdiction: An Overview of Rule 4.

Occupying only one slot in the nearly one hundred that constitute the Federal Rules of Civil Procedure, Rule 4 has a broader mission than its single-rule occupancy suggests. In 1993 it was labeled "Summons". Before that it was entitled "Process" and purported to include governance of process in general (executions and attachments and the like included). It was so concentrated on the summons in particular, however, or in any event so much more frequently invoked in respect of the summons than any other "process", that many a lawyer regarded it as concerned with the summons alone. Recognizing this, the 1993 amendment shifted governance of process other than a summons to a new Rule 4.1 (also part of the 1993 revision), leaving Rule 4 now to do in terms what it was understood as a practical matter as doing before: governing just the summons.

That's job enough. The "summons" governs the whole topic of jurisdiction of the person, one of the great arenas of civil procedure, and Rule 4 regulates personal jurisdiction just about single-handedly. Its several parts roam from one end of the subject to the other. Here's a bird's-eye view:

Subdivision (a) addresses the form of the summons and supplies its contents. (Under the old [1983] rule, form was addressed by subdivision [b].) Here there is some interplay with Rule 12(a), which prescribes the defendant's answering time. Detailed treatment of subdivision (a) and the effect of the Rule 12 interplay, including a look at the official form of summons contained in the Appendix of Forms annexed to the Federal Rules of Civil Procedure, is in Commentaries C4-7 through C4-11, below.

A significant change that subdivision (a) makes in respect of form concerns the case in which extraterritorial service is being made on the authority of state law, i.e., when a state "longarm" statute is being relied on. Under the old rule, it was subdivision (e) that adopted state law for that purpose, and old subdivision (b) required that in cases of such adoption the summons "correspond as nearly as may be" to that required by state law. That provision has been omitted. State law is still adopted for authorization for extraterritorial service--see subdivision (k)(A) and Commentary C4-33 below--but even if state law is adopted for that purpose, the form of the summons will remain its federal prescription. No adjustment in form need be made to suit state law. (And under a coordinate amendment of Rule 12[a], the provision that required the answering time to correspond to what state law requires in these

"adoption" cases is also dropped, leaving the answering time as set forth in amended Rule 12 to govern in all cases.)

Subdivision (b) governs the issuance of the summons. Practice here is not substantially changed. It was the practice for the plaintiff's attorney to present the summons to the clerk all filled in, so that the clerk had only to scan it and, if it was in order, sign and seal it. The amendment clarifies that that's to continue to be the procedure. The attorney is not the person who may formally "issue" the summons, as permitted in some state practices.

Under the 1983 amendment, it was subdivision (a) that placed responsibility for service of the summons squarely on "the plaintiff or the plaintiff's attorney". Responsibility remains there, but the statement to that effect is now set forth in subdivision (c)(1), concerning service and who makes it.

Subdivision (c) also continues the requirement that the complaint be served with the summons, which had been in subdivision (d) of the old rule. Subdivision (c) lists the few instances in which the federal marshal continues to have the service obligation. What has come to be the usual rule--that any nonparty over 18 may serve the summons--continues.

Subdivision (d) introduces the procedure for seeking the defendant's "waiver of service". It displaces the old rule's provision for mail service, which had been part of subdivision (c). The procedure requires a number of observations, which are offered in Commentaries C4-15 thru C4-18, below.

The methods of service are set forth in subdivisions (e) through (j). Subdivision (d) of the old rule had contained them, addressing various categories of defendants in its several numbered paragraphs. The new rule separates these categories into distinct subdivisions.

Subdivision (e) governs service on an individual in the United States; subdivision (f), service on an individual in a foreign country. Subdivision (g) governs service on infants and incompetents.

Subdivision (h) is the provision that now governs service on various corporations and associations, in some measure referring back to and exploiting the methods set forth for individuals in subdivisions (e) and (f). Essentially what subdivision (h) is designed to do is list the persons who are to be served with the summons in behalf of these business entities. (The subdivision that was denominated [h] under the old rule dealt with "amendment" of process and proof of service. That subdivision has been dropped. The authorization to amend remains, however, now covered by the last sentence of subdivision [a] in respect of the summons and by the last sentence of subdivision [l] in respect of proof of service.)

Subdivision (i) governs service on the United States and its various agencies, corporations, and officers.

Subdivision (j) governs service on state and local governments and on foreign states and their subdivisions. (As to the latter, subdivision [j] merely cross-refers to the statute that governs service on foreign entities, 28 U.S.C.A. § 1608, and leaves § 1608 in charge.) Readers should remember this new mission of subdivision (j). The subdivision (j) contained in the old (the 1983) version of Rule 4 governed the time within which summons service had to be made. It was at the heart of most of the decisions that resulted in dismissal for untimely service and was cited in scores of important cases. The mission of restricting the time for service--and the restriction indeed continues--is now carried out by subdivision (m).

Subdivision (k) prescribes the geographical area within which the summons may be served, carrying out the function that subdivisions (e) and (f) of the old rule had carried out together. The provision adopting state bases for extraterritorial jurisdiction, ever so frequently invoked, which used to be in subdivision (e), is now in subdivision (k)(1)(A). The so-called 100-mile-bulge provision of former subdivision (f) will now be found in subdivision (k)(1)(B). The provision referring to federal laws that allow nationwide service, previously the first sentence of old subdivision (e), is now covered by paragraphs (C) and (D) of subdivision (k)(1).

The provision that made the state the basic geographical unit for summons service in a federal action, which had been part of subdivision (f) under the old rule, has been dropped, the new rule apparently relying on state law to do that job

under the adoptive provision of subdivision (k)(1)(A).

Subdivision (l) governs proof of service.

Subdivision (m) governs the time for serving the summons after the filing of the complaint. It replaces former subdivision (j) and will be just as important under the new practice as subdivision (j) was under the old.

The statute of limitations itself, incidentally, which is so often near if not on the scene when Rule 4 and its summons service is negotiated, is the subject of a separate Commentary, C4-45, under an "In General" caption that comes at the end of these Rule 4 Commentaries. On the subject of the statute of limitations, sure answers are often scarce. But a sure knowledge of the right questions can be just as beneficial to a plaintiff, who, forewarned about pitfalls, can avoid them.

The "In General" caption also offers housing for a few other subjects germane to Rule 4 but not covered in it, including the procedure for raising a jurisdictional objection (C4-43) and for vacating a default (C4-44). A final Commentary, C4-46, entitled "Leave Time for Trouble", offers a general set of warnings always appropriate to sound for plaintiffs but especially fitting because of the subdivision (m) time limits on serving the summons.

Subdivision (n) governs rem jurisdiction. Old subdivision (e) had contained the provision for allowing rem jurisdiction in a federal action if it was allowable under state law. That provision was dropped from subdivision (e) in the 1993 amendment and incorporated instead into subdivision (n)(2).

C4-3. Subject Matter Jurisdiction Distinguished.

Rule 4 is concerned only with jurisdiction of the person, including the several categories of "rem" jurisdiction (see Commentary C4-42), which are in essence subcategories of personal jurisdiction. It determines how the court obtains jurisdiction over a given individual or entity so as to make its judgment binding upon that person. It is to be distinguished from subject matter jurisdiction.

Subject matter jurisdiction is concerned with the court's power to hear a given category of case. It is a vast topic in federal practice because virtually all of the federal courts, including the district courts (which are of course of primary concern in a Rule 4 treatment), are courts of limited jurisdiction. The fact that the jurisdiction is "limited" is what makes subject matter jurisdiction so vast a topic in federal practice: whether the limit has been passed is often an issue. Almost as often it's a cloudy one, generating much dispute between the parties. And since the stakes are usually high--someone, after all, is trying to make a federal case out of this--an opportunity for the other party to oust the case for want of subject matter jurisdiction, even if the chance of success is slight, is irresistible.

It's not even necessary for the defendant to raise the objection to subject matter jurisdiction, although the defendant ordinarily should and does if such an objection exists. The court can raise it sua sponte and at any time. See Rule 12(h)(3). Hence the vastness of the subject and the acres of cases on subject matter jurisdiction that swell the annotations.

The ultimate source of federal subject matter jurisdiction is the federal constitution itself, where Article 3, § 2, lists the permissible outer limits. The contents of the list are familiar: the case "arises under" federal law (commonly called "federal question" jurisdiction), or arises in admiralty, or the parties are domiciled in different states ("diversity of citizenship" jurisdiction), or the United States is a party, etc. But the constitution is not self-executing. It takes an Act of Congress--a statute--to actually confer the jurisdiction on a district court, and the presence of subject matter jurisdiction, with a citation of the jurisdiction-conferring statute, must be demonstrated by the plaintiff in every case. As far as pleading is concerned, the plaintiff fulfills this requirement simply by choosing the appropriate paragraph from Form 2 ("Allegation of Jurisdiction") of the FRCP's Appendix of Forms, and opening the complaint with it.

Statutes that confer subject matter jurisdiction on the district court abound. Most but by no means all of them are in §§ 1330-1364 of Title 28 of the United States Code. But none are in the Federal Rules of Civil Procedure. Nor can they

be. Subject matter jurisdiction is altogether barred from address in the FRCP. See Rule 82. The reason is that in giving the U.S. Supreme Court the rule-making power in 28 U.S.C.A. § 2072, Congress wanted all rules restricted to matters of mere procedure, which subject matter jurisdiction is not.

Personal jurisdiction is, however. And with only a few exceptions, to be noted, personal jurisdiction in respect of both service of process and jurisdictional basis (sometimes described as amenability to service) has been left to the U.S. Supreme Court to govern by rule. Rule 4 is the rule adopted to do the governing.

There is an occasional overlapping between subject matter and personal jurisdiction. A doctrine long known as "pendent jurisdiction", for example, while designed to operate in the subject matter sphere, has occasionally spilled over into personal jurisdiction, creating an especially exotic species called "pendent personal jurisdiction". See Commentary C4-34. As of the adoption of § 1367 of Title 28 (effective December 1, 1990), "pendent jurisdiction" is codified as "supplemental jurisdiction", so perhaps its "personal" derivative should now be known as "supplemental personal jurisdiction".

With an occasional exception like that, however, subject matter and personal jurisdiction are separate subjects and Rule 4 is concerned only with the latter.

An important procedural distinction between the two jurisdictional categories is that while an objection to subject matter jurisdiction is unwaivable and can be raised at any time, see Rule 12(h)(3), an objection to personal jurisdiction is waivable and quite easily waived. The procedure for asserting and preserving an objection to personal jurisdiction is discussed in Commentary C4-43.

C4-4. "Process" Defined.

"Process" used to be the caption of Rule 4. The 1993 amendment changes the Rule 4 designation to "Summons" and cleanses the rule of all its references to other categories of process. The other categories of process, which would include such devices as the pre-judgment attachment and the post-judgment execution, are now found in a separate Rule 4.1.

"Process" has variable meanings, but the one meant here is any paper whereby a person is subjected to a court's jurisdiction or otherwise made to comply with the court's demands. A summons is process because its service subjects the person served to the court's jurisdiction, which is necessary to validate a judgment that the court might render against that person. A subpoena is also process, again in the sense of obtaining jurisdiction over the person served with it, but the subpoena acts only to exact testimony or obtain some document or other physical object from that person.

An execution is process because it implements a judgment by seizing property of the defendant to satisfy it. An order of attachment is process for a similar reason, here to hold the property out of the defendant's reach in anticipated satisfaction of a future judgment. When Rule 4 bore the "Process" caption, it technically applied to these and yet other papers that qualify as process, with the exception of the subpoena, which had and continues to have its own governing provisions in Rule 45.

The summons was always Rule 4's principal subject. Now it is the rule's only subject.

C4-5. A Word About Forms.

Several of the sample forms contained in the Appendix of Forms annexed to the Federal Rules of Civil Procedure concern the summons. Form 1, for example, is a suggested form of the summons itself. Forms 1A and 1B, added in 1993 in conjunction with the introduction of the procedure for seeking a waiver of service from the defendant, both address the waiver. Form 1A is the request for the waiver and Form 1B is the waiver itself.

All of the forms are suggestions only. There are hardly three dozen forms in all and all are designed, as FRCP Rule 84 explains, merely "to indicate the simplicity and brevity of statement which the rules [the FRCP] contemplate". The

lawyer can and should make use of a form whenever it is in point, but should not hesitate to make any needed or merely helpful adjustment in it to suit the case. To the "simplicity and brevity" that Rule 84 describes as an aim of the official forms we may add "clarity" as a general purpose that should be subserved by all forms. Any change that serves clarity is serving a patriotic purpose.

One of the things the summons sets forth is how much answering time the defendant has. It is usually 20 days under Rule 12(a)(1), but under Rule 12(a)(3) it becomes 60 days when the United States or its agent is the defendant. Under the pre-1993 version of the Rules, the answering time became whatever state law provided if the summons was being served extraterritorially on the authority of state law. That provision was dropped from Rule 12(a) under the 1993 amendment, making the answering time in cases of extraterritorial service the same as it is for local service within the state in which the federal court is sitting.

Superimposed on that, however, is the time reward now offered to defendants who cooperate by waiving service of the summons. For defendants who waive service, the time in which to answer is longer: either 60 or 90 days from the time the plaintiff sends the waiver request to the defendant. It's 60 days if the request for waiver is sent to the defendant within the United States, 90 if outside. See Rule 12(a)(1)(B).

In connection with service by mail, which was the major innovation of the 1983 version of Rule 4, there was a Form 18A added to the appendix of forms. With the elimination of service by mail in 1993 (in deference to the waiver system), Form 18A was abrogated.

A printed form of summons is usually available from the clerk, and photocopies of it are generally accepted, too. If the space allotment for a given item on the form is inadequate, such as to list all the parties in multi-party cases, the list can be contained on an appended typed or word-processed sheet, with a simple reference made to it in the summons. For these and all related questions an inquiry at the clerk's office is usually the most gratifying source of answers, and ultimately perhaps the most dependable one. What profit a soul to draft a perfect document if the clerk will not accept it without its customary local imperfections? In the realm of the paper of civil procedure, no higher authority has yet been found--neither law nor rule nor judge of court--to better move a piece of paper on its appointed rounds.

Form 2 of the Appendix of Forms sets forth the simple phrasings whereby to allege jurisdiction of the subject matter, an allegation that the complaint must contain. Form 2(b) was amended in 1993 to omit the references to amount in controversy in cases in which the jurisdiction of the court is based on what is known as the "general federal question" jurisdiction. Form 2(b) is regarded as the concomitant of 28 U.S.C.A. § 1331, the general federal question statute. At one time § 1331 had a monetary requirement. When that requirement was eliminated years ago, no coordinate amendment was made in Form 2(b) to recognize the change. The 1993 amendment corrects that.

C4-6. The 1983 and 1993 Amendments.

There have been various amendments of Rule 4 over the years, some of which we will have occasion to refer to in these Commentaries, but a special introductory word is in order about the extensive amendments made by Congress in two batches of amendments just a decade apart: the first effective February 26, 1983, and the second effective December 1, 1993.

The main purpose of the 1983 revision was to take the marshals out of the summons serving business except in a few instances. It placed the responsibility for service on the plaintiff. It also provided a time limit on how long the plaintiff would have, after the filing of the complaint, in which to effect summons service. The interplay of these and several other of the 1983 changes created special problems not previously met in federal practice, or made volatile certain things that had previously been quiescent. What gave them impact was that they affected the statute of limitations, and in ways the sponsors of the 1983 amendment did not anticipate.

Extensive as the 1983 revision was, in some ways the 1993 revision goes further. The marshals remain out of the general summons serving business, and, indeed, in one of the 1993 changes it would appear that the marshal's office is not even to be responsible for summons service in behalf of the United States as a plaintiff. On that, however, the

advisory committee seems to have some ambivalence, saying something in their notes that seems to belie what is said in rule. See Commentary C4-14 below.

The time limit imposed on summons service--the summons is to be served within 120 days after the complaint is filed--remains in full effect under the 1993 revision. The limit was contained in subdivision (j) of the 1983 revision. In the rule as revised in 1993, it's in subdivision (m). Essentially the same demands are made in subdivision (m) as had been earlier made in subdivision (j), and the extensive case law on the latter, many of the cases producing a dismissal too late for the plaintiff to start over under the applicable statute of limitations, therefore remains applicable. See Commentaries C4-38 through C4-41, below.

Another innovation of the 1993 amendment is its attempt to expand amenability to jurisdiction in federal question cases. A new subdivision (k)(2) purports to permit the exercise of jurisdiction against any defendant whose overall contacts with the country satisfy a constitutional "contacts" test even if the defendant has no contacts with any particular state sufficient to permit such an exercise of jurisdiction in the state courts of that state. See Commentary C4-35 below.

The 1993 amendments acknowledge for the first time the Hague Convention (a treaty, to which the United States subscribes, determining, among other things, how summons service is to be effected in foreign signatory nations). In paragraph (1), a new subdivision (f), directing how service is to be made in a foreign country, the role of the Hague Convention is addressed.

A word is in order about the proceedings that produced the 1983 and 1993 amendments. It may prove helpful in a given situation.

The substance of the 1983 amendment of Rule 4 was originally the product of the Advisory Committee on Federal Civil Rules, which recommended and drafted the changes. It was submitted, through the Standing Committee on Rules of Practice and Procedure, to the United States Supreme Court, which promulgated it pursuant to 28 U.S.C.A. § 2072 (embodying the Supreme Court's rule-making power), to take effect on August 1, 1982. It did take effect on that date, but it lived for only a day. What happened was that Congress postponed the amendment, but its law doing so didn't take effect until August 2, 1982. Then Congress, responding to various criticisms of the proposal, principally from California and New York, rejected the Supreme Court's promulgated version of Rule 4 and drafted its own. It is that Congressional draft that became law, taking effect on February 26, 1983, and enduring until December 1, 1993, when the present Rule 4 took over.

The present--the 1993--rule has its own history, as follows.

The Advisory Committee on Civil Rules proposed a number of amendments to the Federal Rules of Civil Procedure in 1990, and recommended them to the U.S. Supreme Court for promulgation. (The proposal was reprinted in late 1989 in the advance sheets of the Federal Reporter, Federal Supplement, and Federal Rules Decisions.) Among the recommendations was an extensive revision of Rule 4.

Many of the recommendations were adopted by the Court pursuant to the rule-making procedure of 28 U.S.C.A. § 2072 and submitted to Congress on April 30, 1991, but the amendment of Rule 4 was not among them. The Chief Justice's letter of transmittal of that date to the Speaker of the House stated that Rule 4 (and a few other rules) "are not transmitted at the present time pending further consideration by the Court".

The Rule 4 proposal in fact left the Court and went back to the advisory committee. It was studied further, in some measure changed, and then included in another extensive package of amendments afterwards submitted to the U.S. Supreme Court for the Court's consideration. The Court accepted the rules, including the proposed Rule 4, and submitted them all to Congress on April 22, 1993. Congress had until December 1, 1993, to reject or otherwise alter them. Congress did not act, and by this inertial process that applies to federal rule making at the Congressional stage, all of the rules became effective on December 1, 1993, Rule 4 among them.

(Rule 4 at this point, incidentally, was not controversial in Congress. The rule that did arouse controversy was Rule

26[a][1], enacting a mandatory disclosure requirement in which each side must make extensive disclosure to the other early in the action and without awaiting a demand from the other side or an order of the court. The House of Representatives voted to reject that rule, but the Senate did not go along and so the Rule 26[a][1] amendment, too, became law.)

More on background can be found in this writer's articles in 96 FRD 88 on the 1983 amendment and in 151 FRD 147 on the 1993 amendment. The latter also includes a word about transition, i.e., the applicability of the amendment to cases already commenced and pending on December 1, 1993.

Subdivision (a)

C4-7. Form of Summons.

Subdivision (a) addresses the form of the summons and recites the things it should contain. (Under the pre-1993 rule it was subdivision [b] that addressed the subject.)

An equally important guide on this is Form 1 in the Appendix of Forms annexed to the Federal Rules of Civil Procedure. It should be stressed here, as it was in Commentary C4-5 on forms in general, that the lawyer should make any adjustment in the form of summons logically suggested by the needs of the case, but should be wary about omitting something.

There is no sharp line between jurisdictional and non-jurisdictional defects in a summons, but to avoid any risk on this score the lawyer should attend to the summons carefully and use the form as a firm guide.

Defects that don't prejudice the defendant are usually held to be mere irregularities rather than jurisdictional defects. In United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371 (9th Cir. 1984), for example, the court held that the inclusion of an incorrect responding time in a summons is not a jurisdictional defect and does not warrant a dismissal. Drawing on that decision, another circuit adopted a similar posture when the defect was that the summons failed to state any responding time at all. Sanderford v. Prudential Ins. Co., 902 F.2d 897 (11th Cir. 1990). The absence of any showing of prejudice by the defendant was a key factor. Still, misstating or omitting something so plainly called for by the rule is asking for trouble.

The list of summons items set forth in subdivision (a) is for the most part self-explanatory, but there are several points to make about some of them. These are addressed in ensuing Commentaries.

C4-8. Answering Time.

One of the things the summons has to do is advise the defendant of the obligation to "appear and defend" and state the time the defendant has for doing so. The appropriate time period to include can be found in Rule 12(a). In general, the period is 20 days for all defendants except the United States or a federal officer or agency, where it is 60 days. The summons should recite whichever period is applicable.

Note also that if the defendant has waived service of the summons, a procedure described in Rule 4(d) (and discussed in Commentaries C4-15 to C4-18, below), the defendant gets a longer answering time under the terms of Rule 12(a)(1)(B). This longer time (elaborated below) is explained to the defendant in the notice that the plaintiff sends to the defendant when eliciting the waiver. The notice is explicitly laid out in Form 1A, which was added to the appendix of forms as part of the 1993 amendment.

When extraterritorial service was being made on the authority of a state longarm statute under subdivision (e) of the pre-1993 Rule 4, the answering time to be included in the summons was that allowed by the state practice, and, indeed, the form of the summons was itself required to "correspond as nearly as may be" to that used in the state practice. While exploitation of state law for authorization for extraterritorial service continues under the new Rule 4--see subdivision (k)(1)(a)--it is no longer required that the form of the summons correspond to that of state law. Nor does the answering time change to conform to state law. It remains whatever it would be in a case not invoking state

law at all.

When Does Answering Time Start When Defendant Waives Service?

Under the 1983 version of Rule 4, the courts periodically grappled with the question of when the defendant's answering time starts to run when the mail method of old Rule 4(c)(2)(C)(ii) was used. The new (1993) Rule 4 abolished the mail method and substituted for it the waiver of service appearing in subdivision (d).

What is the answering time for a defendant who obliges the plaintiff by returning the waiver? It is set forth in subdivision (d)(3). If the defendant returns the waiver within the period allowed for it and before being formally served with the summons, the defendant's answering time is 60 days (90 days if the waiver was sent to the defendant outside the United States), measured from the time the waiver was "sent". Since it may be sent by simple first-class mail, the defendant bent on using up as much as possible of the available time before answering will have to determine the date the waiver request was "sent", which will not necessarily be the time the plaintiff has dated it or, indeed, the postmark that it bears. To avoid difficulties on this score, the defendant should allow a few days or a week on the inside of the applicable period, or work the time element out with the plaintiff.

Under the pre-1993 rule, which used mail service instead of the request for waiver system introduced in the 1993 rule, it was the defendant's own act of acknowledging the mail service that started the defendant's answering time, and yet it, too, raised issues that the courts had to address. A detailed discussion of the point appears in Madden v. Cleland, 105 FRD 520 (ND Ga. 1985).

Under the waiver system in the present Rule 4(d), it is the plaintiff's act of sending the request that starts the defendant's answering time. If courts should disagree on the precise moment that the request is deemed "sent", they ought to be able in any event to agree that the rule's failure to clarify the point suffices to trigger the court's general enlargement of time powers under Rule 6(b), thus earning a time extension for the defendant--in all but the most egregious cases--if the answer should, in the confusion, come in a few days late.

A defendant who does not respond to the waiver request need not worry about answering until the plaintiff effects formal service of the summons, in which event the usual period for answering, as supplied by Rule 12(a), would apply.

The Madden case also concluded that the additional three-day period allowed by Rule 6(e) for responding to a mailed paper within a litigation does not apply to the mail service of the summons under subdivision (c)(2)(C)(ii) of the pre-1993 Rule 4. The same conclusion should apply to the answering time in conjunction with the request for waiver under the present rule, which is also sent out by mail. If things are close enough to make the Rule 6(e) three-day period relevant, however, an exercise of the court's Rule 6(b) time enlargement power should be especially appropriate.

C4-9. Defendant's Motion Before Answering.

Subdivision (a) requires that the summons tell the defendant how much time there is in which to "appear and defend". And the model summons in Form 1 of the Appendix of Forms requires the defendant "to serve ... an answer to the complaint". This can be a bit misleading to those uninitiated in federal practice. Despite the seemingly mandatory tone of those statements, the defendant does not have to serve an answer within the responding time; the defendant can make a motion instead, such as a motion to dismiss under Rule 12, whenever there is ground to support such a motion. Doing so is satisfactory to Rule 4(a) and to Form 1 as well. One of the many Rule 12 grounds is a want of jurisdiction, for example, listed in Rule 12(b), and it is usually the sounder practice for a defendant with such an objection to raise it with a Rule 12 motion before answering--an alternative would be to plead it as a defense--for the obvious reason that if the objection succeeds the action may be dismissed, obviating an answer altogether.

A defendant should, before answering, read Rule 12 thoroughly to pick out any of its enumerated grounds that might be applicable, and consider making a motion in lieu of answering at the outset. (Parenthetically, the defendant will also find a Rule 12 reading at this pre-answer juncture a good reminder about possible defenses, suggesting lines of

inquiry to the client that may not have been pursued in prior consultations. Rule 8(c) with its list of the most often encountered affirmative defenses serves a similar function.)

Rule 12 anticipates the defendant's use of its motion as an initial alternative to answering, altering the answering time accordingly. Under subdivision (a)(4) of Rule 12, a defendant accomplishes an automatic extension of its own answering time merely by making a Rule 12 motion. Even if the motion fails, Rule 12(a)(4) provides that the defendant's time to answer will be extended until 10 days "after notice of the court's action". The same Rule 12 options apply to a third-party defendant brought in under Rule 14, to a plaintiff counterclaimed against and a codefendant cross-claimed against under Rule 13, etc. All have to respond to the claim, see Rules 12(a)(2), 14(a), and all therefore have the Rule 12 motion available as an initial alternative to the service of a responsive pleading.

It is also permissible for the defendant (and the others just listed) to make a motion for summary judgment under Rule 56 before serving a responsive pleading. The consensus appears to be that as long as it is adequately supported by the strong proof needed to carry it, the summary judgment motion of Rule 56 need not await--although of course it can if the defendant chooses--the service of the defendant's answer..

C4-10. Default Notice.

Subdivision (a) of Rule 4 requires the summons to advise the defendant of the consequences of a default: that a failure to appear and defend "will result in a judgment by default against the defendant for the relief demanded in the complaint". (The complaint is served together with the summons in federal practice, so required by Rule 4[c].)

If the defendant does default, the plaintiff's application for a default judgment is made under Rule 55. In money actions, if the sum sought is a liquidated one, the default application may be made to the clerk under paragraph (1) of Rule 55(b); if it is unliquidated, as it almost always is in tort cases, for example, or if the action is for other than money, the default application must be made to the court under paragraph (2) of Rule 55(b). Further proceedings may be needed in the latter situation in respect of damages or the other relief sought.

If there is any expectation whatever that the defendant may default, the plaintiff had best see to it that the demand for judgment in the complaint advises the defendant of everything the plaintiff is seeking. Rule 54(c) provides that a judgment taken by default "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment". (If the defendant appears and defends, on the other hand, the court under Rule 15 can allow an amendment to increase a money demand or change the nature of the relief the plaintiff wants.)

Once a defendant has defaulted in appearing, the general rule is that no further papers in the action need be served on that defendant. Rule 5(a). That sounds like good news for plaintiffs. Bad news is carried by the same rule, however, in that if the plaintiff, after the default, wants to interpose any "new or additional claims" against that defendant--which includes the raising of the money demand contained in the original complaint--the pleading interposing such a claim will have to be served in the same manner as a summons. This means that the plaintiff will have to go back to the ritual of summons service under Rule 4 to notify the defaulting defendant of the changes--to which the defendant may object, not being foreclosed from doing so by the default made in respect of the original claim--whereas, had the defendant appeared, simple mail service could have been made under Rule 5(b).

C4-11. Amendment of Summons.

As long as the defendant can't show any "material prejudice" that would result from the plaintiff's being allowed to amend the summons, the court can allow the amendment at any time. Subdivision (h) had so provided under the pre-1993 version of Rule 4, and under the present rule subdivisions (a) and (l) share the job: subdivision (a) allowing amendment of the summons and subdivision (l) allowing amendment of proof of service of the summons, should need for amendment arise. The courts are liberal in allowing amendments.

A good example of the help that can be sought through an amendment of the summons is where the summons has designated the wrong person as the defendant and it would now be too late for a new action if the plaintiff had to start over. In that situation the plaintiff's case is effectively dead unless the plaintiff can amend to substitute the intended

defendant. Is the amendment permissible? It isn't, if the real defendant had no notice of the suit within the applicable statute of limitations. See, e.g., Munetz v. Eaton Yale and Towne, Inc., 57 FRD 476 (ED Pa. 1973). But it is, if the intended defendant knew of the suit in time.

Suppose, for example, that the defendant is a partnership but that the plaintiff, unaware of this, named and sued it as a corporation (or vice-versa), a not uncommon situation in litigation. If the court can conclude that the intended defendant knew of the suit within the applicable statute of limitations and knew further that it was the intended party, the amendment, which in this instance is the equivalent of an order of substitution, may be allowed. See, e.g., Hirsch v. Bruchhausen, 284 F.2d 783 (CA2 1960).

In these situations, in which the statute of limitations is on the scene--which makes them the most delicate of all amendment cases--Rule 4(a) and Rule 15(c) overlap. Rule 15(c) treats the relation back of amendments. (When an amendment is allowed to "relate back" to an earlier time, statute of limitations consequences are avoided.)

It has been held that the amendment authorized by what is presently Rule 4(a) "concerns only paper and looks only to the fact of the process and of the proof of service". Wood & Locker, Inc. v. Doran and Associates, 708 F.Supp. 684 (WD Pa. 1989). It is not designed to cure defects in service. A request by the plaintiff to make "amended service" on the authority of the earlier equivalent of Rule 4(a) was therefore denied in Wood, the court remarking that the most common illustration of the amendment rule in action is to cure the improper identification of a defendant when the defendant has been properly served and the error goes only to "form".

But it has also been held that when a proper summons did reach the hands of the defendant, but did not qualify as good service for technical reasons of method--it was served by the mail method under the pre-1993 Rule 4 and the defendant refused to acknowledge it--and the follow-up summons that was properly served was improper in form because it was unsigned and unsealed, the later (and improper) summons could be amended and new service of it allowed with nunc pro tunc effect. Reiff v. Ballard, 134 FRD 269 (D So.Dak. 1991).

Subdivision (b)

C4-12. Issuance of Summons.

In federal practice the clerk issues the summons. That was the practice under the pre-1993 rule, when the matter was governed by subdivision (a), and that remains the practice under the 1993 revision, where it is governed by subdivision (b).

The usual practice is for the plaintiff's attorney to secure a blank of the summons from the clerk, fill it in at the office when the complaint is drawn, and then take it to the clerk along with the complaint. When the clerk files the complaint, the clerk checks over the summons and if it's in order signs it and affixes the court's seal to it. It is then returned to the plaintiff for service. (It is the plaintiff who is responsible for service. Subdivision [c][1] so provides, carrying forward a provision that first appeared in subdivision [a] of the 1983 revision.)

Far reaching as the 1983 and 1993 amendments of Rule 4 were, they made no change in who issues the summons. When the 1983 revision first adopted the general procedure of making a private person over age 18 (instead of the marshal) responsible for service, a few plaintiffs, notably a few pro se plaintiffs at some state prisons, read the new service provision of subdivision (c) as in some way infiltrating the issuance procedure. They assumed that they could themselves issue the summons, and in a few federal civil rights cases they tried to. Their summonses were held void. Whoever may serve the summons, it is still the clerk who issues it.

In general, the step that starts a federal civil action is the filing of the complaint with the court. So Rule 3 of the Federal Rules of Civil Procedure provides. The service of the summons is not, as it is in some state courts, the action starter. But in a diversity case the plaintiff must always keep in mind that for statute of limitations purposes it is state law that determines the precise moment the action is commenced and that dependence on Rule 3 to determine "commencement" in that situation is therefore unwise. It can even be fatal, depending on what the particular state law provides. See Commentary C4-40 below.

Usually one summons will do, even in multi-defendant cases, because a common practice is for the process server to serve only a conformed copy or even a photostatic copy on the defendant, merely displaying the original. Sometimes several "issued" summonses are needed, as where the use of several different process servers is anticipated. (Each server should have an original to display.) The plaintiff may ask the clerk to issue as many summons copies as are needed. This is of course based largely on how many defendants there are to serve.

The plaintiff does best to secure the needed copies at the outset, thus sparing the need to apply to the clerk for the issuance of additional copies later. But if for any reason such an additional application is needed after the initial filing of the complaint, such as when more defendants have been added, or when insufficient copies were initially obtained, or some were lost, etc., such an application is permissible. A 1993 addition, appearing in subdivision (b), clarifies that the plaintiff may apply for summonses upon "or after" the filing of the complaint. Indeed, when the waiver of service procedure of Rule 4(d) is used, a summons may not have been drawn up at all when the complaint is first filed. (Subdivision [b] seems clearly to say that no summons need be presented for issuance when the complaint is filed, but if a given clerk should insist on the summons, its probably best to submit one, even if it may never be used. Obliging the clerk is not the only cure for clerkitis, but it is usually the least expensive.)

As noted, a copy of the summons will usually suffice for service, with the original merely displayed. Display becomes impractical, of course, when the summons is served by a method other than personal delivery. Any defendant wanting to see the original can inquire of the plaintiff's attorney, and in due course should in any event be able to find the original in the court's file, where the plaintiff should make sure it is, along with the process server's affidavit, after service has been made. Subdivision (l), the proof of service provision, requires the filing.

At one time, when the marshals were the chief summons servers in federal practice, the clerk would either forward the summons through channels to the marshal's office or give it to the plaintiff to deliver to the marshal. Now, with service permissible by any nonparty over the age of 18 (see Commentary C4-13), the standard practice is for the clerk, after "issuance", merely to hand the summons or summonses back to the plaintiff for service.

Problem of Delay in Issuance of Summons When Pauperis Application Made

The clerk ordinarily issues the summons when the complaint is filed, and with the filing ordinarily accompanied by the applicable fee. What happens when the plaintiff, without funds, submits the complaint without a fee, making instead an application to proceed in forma pauperis pursuant to 28 U.S.C.A. § 1915?

Assume no filing takes place and no summons is issued. There may even be a significant delay as the pauperis application is processed. The Seventh Circuit notes the problem in Robinson v. America's Best Contacts and Eyeglasses, 876 F.2d 596 (1989), citing other cases that have had occasion to address it.

The clerk in Robinson just marked the pro se plaintiff's complaint "received", postponing its formal filing and the issuance of the summons until the pauperis application could be decided. The application was ultimately denied, and now the plaintiff needed still more time to raise the money to pay the filing fee. The plaintiff finally raised the money, but there arose the question of when the 120 days of what is now Rule 4(m), in which to effect service of the summons, would start to run. If the original presentation of the complaint to the clerk started the 120-day period, the service would have been too late, which is what the district court had held. Reversing, the court of appeals held that the 120 days did not start until the summons was finally issued by the clerk. Service having been made within the 120 days as so measured, the court held that it was an abuse of discretion for the district court to dismiss the action. (The result found added support in a local rule clearly postponing the filing of the complaint and issuance of the summons until disposition of the pauperis application, but the emanations of the case suggest that the result would have been the same even in the absence of a local rule in point.)

Subdivision (c)

C4-13. Who Makes Service?

Subdivision (c)(1) starts off with the instruction that the summons and complaint are to be served together. It then places the responsibility for service on the plaintiff. The requirements were the same under the pre-1993 version of Rule 4; the one about serving the complaint with the summons was found in old subdivision (d) and the one making the plaintiff responsible for service was found in old subdivision (a).

The summons and complaint should be served together even if a state law method of service is being used on the authority of subdivision (e)(1) and state law doesn't require that the complaint accompany the summons.

The failure to serve a complaint with the summons has been held jurisdictional, at least in the sense that service may be quashed and new service required, but in federal practice, where the mere filing of the complaint marks "commencement" under Rule 3, the quashing will not necessarily require a dismissal of the action. The court can permit new service (see Commentary C4-41) and allow it to relate back to the filing of the original complaint for statute of limitations' purposes. In a diversity case, however, statute of limitations' considerations like these are governed by state law, even on what might seem minute procedural points (see the discussion of the Walker case in Commentary C4-40), and dismissal too late to start over can indeed be the result if state law so provides.

Paragraph (2) continues the general rule, first introduced as such in 1983, that process service may be made by any nonparty over the age of 18. Before that, the marshal was the usual process server unless the court made an order permitting service by someone else. (The instances in which the marshal still makes service are discussed in Commentary C4-14 below.) Some courts had rules permitting the clerk to enter an order authorizing service by someone besides the marshal, making a judge's attention to the matter unnecessary. The 1983 amendment made such local rules unnecessary by standardizing the practice of letting any nonparty adult make the service, and the 1993 revision continues the practice. This has more serious implications for the plaintiff, however, than when the marshals were doing the serving, especially when the statute of limitations is close by.

When, before 1983, the marshals were the principal summons servers, there was no provision laying the onus of process service on the plaintiff. Nor, for that matter, was there any explicit statement in the rule imposing the onus on the marshal. As a disinterested federal official, however, the marshal could be trusted to effect service with appropriate diligence and care. The major purpose of the 1983 amendment was to relieve the marshals of summons service, and this the amendment accomplished with changes making any nonparty over 18 a proper process server, severely curtailing the instances in which the marshal was to continue the service task.

It seemed reasonable to the drafters that with a private process server of the plaintiff's hiring now doing the serving, the time for service should be limited. Hence the introduction, in 1983, of a time limit, following the filing of the complaint, within which the summons had to be served. The time limit appeared in subdivision (j) of the 1983 revision. It is continued in the current rule, where it appears in subdivision (m).

The requirement is that service be made within 120 days after the filing of the complaint, an arbitrary time limit on service that did not exist before 1983. The 120 days seems time enough, but given the vagaries of litigation and the unpredictable events that can loom up out of any case, delays will be experienced from time to time and the lawyer is wise to keep alert to the question: What are the consequences of not effecting service within the 120-day period?

Discussion of the point appears in the treatment of subdivision (m) in Commentaries C4-38 through C4-41, below, but it is wise to note preliminarily, right here under subdivision (c), that the consequence of a subdivision (m) violation is often fatal and that the requirement of subdivision (c) making the plaintiff responsible for summons service plays a major role in making it so. And one point that must be made here, there, and everywhere, is that the consequence of a process server's negligence or misconduct becomes especially serious when the statute of limitations is on the scene and a new action would now be too late if the present one should be dismissed. It is in that situation that the intertwining coils of (c) and (m) can between them squeeze all life out of the plaintiff's case. For example:

Subdivision (m) permits the court to extend the 120-day period if the plaintiff can show "good cause" why service was not made within it. See Commentary C4-41. Can an omission of a process server qualify as "good cause" to earn the plaintiff an extension of the 120 days, given the agency spelled out between plaintiff and process server by

subdivision (c)(1)?

Suppose yourself the plaintiff's lawyer. You promptly turn the summons over to a process server after the clerk issues it. You give the server all the data needed to locate the defendant. You get back from the server in due course, and well within the 120 days stipulated by subdivision (m), an affidavit swearing to service on the defendant by a proper method. You are likely to put the affidavit into your file of the case and turn to something else. But now suppose that after a time you get from the defendant's lawyer, instead of an answer, a motion to dismiss based on a deficiency in service. What the defendant says about the service in an affidavit on the motion to dismiss is in direct conflict with what the server's affidavit, relaxing in your file, recites. The server says he served the defendant; the defendant says it isn't so. If this question of fact is resolved in favor of the defendant, vitiating the service, and the 120-day period has expired, can the court extend the period under subdivision (m) in view of the "responsibility" for the service placed on the plaintiff by subdivision (c)? If the court can, should it? And if it should, would it, or would all judges?

Cases have gone both ways, as might be suspected. In Smith v. Sentry Insurance, 674 F.Supp. 1459 (ND Ga. 1987), for example, where the process server made certain statements about one defendant having authority to accept service for another and the defendants effectively refuted that assertion, the court was indulgent. It could have laid the misstated return at the plaintiff's door and dismissed the case. But while acknowledging that the plaintiff could have been more diligent, the court accepted the excuse and gave the plaintiff an additional two weeks.

Unfortunately for plaintiffs, the result in Smith is not typical. Perhaps more typical is Cox v. Sandia Corp., 941 F.2d 1124 (10th Cir. 1991), in which a process server's delay (he claimed a sore foot held him up) was laid at the plaintiff's door and a time extension under what is now Rule 4(m) refused. Citing and discussing other circuit cases to similar effect, the court in Cox held that "counsel must assume responsibility for the failure of a hired process server to timely effect service" and that it is no excuse that plaintiff's counsel "had no notice of the server's unreliability". Cox also warns that cases involving pro se plaintiffs, where the courts have often been more indulgent, are not safe precedents for represented plaintiffs to rely on.

One illustrative pro se case is Romandette v. Weetabix Co., 807 F.2d 309 (2d Cir. 1986), in which the marshal was the server for the pro se plaintiff. The court held that the plaintiff was entitled to rely on the marshal's service of the summons and should not be penalized for the marshal's delay in making it. (In Romandette, there was even the added factor that the pro se plaintiff was incarcerated.) The Fifth Circuit agreed, Rochon v. Dawson, 828 F.2d 1107 (1987), but added the warning that if the marshal's failure is traceable to the plaintiff's own "dilatoriness or fault", dismissal will result (as it in fact did in Rochon).

A hope expressed when U.S.C.A. Commentaries on Rule 4 were first written in the early 1980's, before any case law developed, was that the delays of the server might be a ground for an extension of the 120-day period of what was then Rule 4(j), but with the admonition that there was no assurance of such a result and that the better practice was to oversee the process server carefully, especially when the statute of limitations was at hand. As things have worked out, those who absorbed the admonition did better than those who depended on the hope. The prevalent indications are that the sins of the process server are indeed visited on the plaintiff.

Even a private process server appointed by the court--a procedure permitted under subdivision (c)(2)--whatever may have occasioned such an appointment, has been held in effect to be the agent of the plaintiff. Hence the plaintiff's reliance on the assurances of the process server did not avail in Braxton v. United States, 817 F.2d 238 (1987), for example, where the Third Circuit said that the plaintiff knew of the server's delay and should have taken steps to assure timely service.

The plaintiff's lawyer researching these matters always does best to take as gospel the strictest cases, whatever the circuit deciding them. There's an obvious a fortiori lesson here, too. If the courts are laying the deficiencies of court-appointed process servers at the door of the plaintiff, that will also be where the faults of the usual plaintiff-designated process server end up.

The lesson is that plaintiffs' lawyers must always be prudent in their choice of process servers and in the confidence they repose in a process server's affidavit. Let that confidence not be too serene. Peruse the affidavit with both eyes,

and then immediately turn them and all other senses to the statute of limitations and where it now stands.

It is bad business for a plaintiff's lawyer to plan on judicial indulgence. The plaintiff who wants to be free of any serious consequences appending to the acts of a dishonest or negligent or lazy or mistaken process server must sue with much time to spare. Always sue, if suit is unavoidable, with at least six or eight months before the statute of limitations expires, is our suggestion. That leaves time for trouble and as a general matter--regardless of a given judge's view of Rule 4--the worst that can happen is a dismissal made early enough to permit a new and still timely action. "Leave Time for Trouble" is the caption of Commentary C4-46, below, a collection of reminders about how much sweeter is the life of a litigator who leaves ample time to correct unanticipated difficulties.

This writer suggested in an F.R.D. article on the 1983 amendment (96 F.R.D. at 113) that the lawyer might hedge bets by trying to find a bonded process server. Inquiry suggests that at least in some states that's a rare commodity, but the 1983 amendment making plaintiffs themselves responsible for service, and the 1993 revision continuing that rule, may create a new market. If a private process server, or some imaginative entrepreneur about to go into the business, obtains some kind of bond, backed by a reputable insurer or private (and manifestly solvent) surety running to the customer's protection, the process server can advertise the fact and perhaps thereby generate a lot of customers willing to pay a higher price than the going rate otherwise is for process service. Certainly the lawyer who knows that the process server will be able to make good any damages the lawyer or client may suffer because of the server's omission will rest easier in that knowledge and probably be willing to pay a higher price for the peace it offers. Again, the only lawyers who have to think about these things are those who wait until they're down to the statute of limitations wire before bringing suit. They are a small but lively fraternity, however.

Service by Plaintiff's Lawyer; How Much Weight for It?

"While service by counsel for plaintiff may not be the most preferable method, service by counsel is proper", said the court in Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48 (ND Ill. 1989). And the court saw "no reason why a return of service executed by one other than a United States Marshal should be given any less weight" than the marshal's. The result was a sustaining of service in the face of the defendants' contentions, and a refusal to vacate a default judgment.

Service by the plaintiff's attorney does carry an additional risk, however. If there is a head-on dispute on the facts, with the defendant denying service vehemently, the interest that the plaintiff's lawyer has in the matter may well count as a factor in gauging the lawyer's credibility when he attests to service. Credibility, in fact, is what counted--albeit in the plaintiff's favor--in the Trustees case. There had apparently been several incidents in the case in which credibility was involved, and the defendants didn't fare well. "If defendants urged only a single misadventure [the court said], the court might be receptive. But this in conjunction with the other events of this case the defendants relate, is too much."

The return of service is prima facie evidence of valid service, the court held, which can be overcome only by "strong and convincing evidence". Defendants with undermined credibility are less likely to be able to present that evidence, and that was the problem in the Trustees case. Hence the case can be viewed more as a conventional service-of-process dispute--an issue of fact with the defendants subverted by the low level of their own credibility--than a rule of law giving the return of the plaintiff's lawyer the same standing as that of a disinterested marshal.

In Prisoner's Civil Action, Fellow Prisoner Can Be Process Server

The description of Rule 4(c)(2), permitting service "by any person who is not a party and who is at least 18 years of age", leaves little to argue about, but there will occasionally be some interesting point to take note of. A Ninth Circuit case, Benny v. Pipes, 799 F.2d 489 (1986), cert. denied 484 U.S. 870, 108 S.Ct. 198 (1987), makes such a point, for example. In an action by a prisoner--in that case a civil rights action by two of them under 42 U.S.C.A. § 1983 against several prison guards--service was made by a fellow prisoner, not a party to the suit. The guards apparently rejected out of hand the notion that service could be effective from the hands of a prisoner--"a convicted felon", as the court recites--so they "reacted to the service by crumpling the papers and throwing them to one side as trash".

They apparently changed their minds later, moving for and getting several time extensions but apparently still not taking things seriously enough to respond. Finally the plaintiffs applied for a default. The defendants afterwards moved to vacate the default, waiting six months even to do that. Their vacatur motion failed and an evidentiary hearing on the merits resulted in a $2000 damages judgment for the plaintiffs. On appeal, the Ninth Circuit affirmed.

The court reviewed the grounds it looks for in vacating a default. One is the requirement that the defendant show that its own "culpable conduct" did not contribute to the default. These defendants failed that test.

On the process-server point, the court observed that nothing in the history of Rule 4 offers any "reason to believe that Congress intended to exclude prisoners" as process servers. The defendants argued that under state law--Arizona law in this case--prisoners were so excluded because the right to serve process was among the rights a prisoner forfeits. Even if that were so under state law, answered the court, the argument misses the point: the point is a procedural one and in a federal court must therefore be governed by federal, not state law.

C4-14. Service by Marshal or Appointee.

The surviving instances in which the marshal is to serve the summons are enumerated in paragraph (2) of subdivision (c).

The marshal can be directed to serve the summons when the plaintiff has been authorized to proceed as a poor person pursuant to § 1915 or is a seaman qualifying for a costs dispensation under § 1916 of Title 28. That §§ 1915 and 1916 are both in Title 28's "Fees and Costs" chapter (Chapter 123) clarify that in this instance the purpose of having the marshal do the serving is to recognize the economic status of the plaintiff and spare the expense of a private process server.

Under the 1983 provision in point, which was then subdivision (c)(2)(B)(ii), the marshal continued to be the process server when the United States or a federal officer or agency was the plaintiff. That provision was dropped in the 1993 revision, which can create the implication that the marshal need no longer serve the summons in actions by the government, but a comment in the committee note appears to cancel the implication. Apparently the purpose of the change is to permit the government to use a private person as process server instead of the marshal if it wishes. The prior provision could also be viewed as permitting that, but the present language firms up the point. The committee also observes, in its note of the 1993 revision of subdivision (c), that the marshal would have to continue to make service in behalf of the United States if so requested by the Department of Justice. The committee cites for the proposition § 651 of Title 28, which is not in point (it deals with arbitration, not process service); the reference intended may have been to what is now § 566 of Title 28.

When any plaintiff requests it, the court is also empowered, as a general matter under subdivision (c)(2), to direct the marshal to serve the summons. Leaving the matter in the court's discretion permits the exigencies of each case--assuming the case has any, as it should be shown to have in order to invoke this provision--to be taken into account. Cited in the committee notes on the 1993 revision as an appropriate circumstance to invoke this provision is where "a law enforcement presence appears to be necessary or advisable to keep the peace", an observation that follows through on the legislative note made on the 1983 revision, which referred to the situation in which the defendant's hostility suggests a risk of injury to a private process server.

There may be other and less obvious situations in which a court order directing the marshal to make service may prove helpful. Suppose, for example, that in a diversity case a delivery of the summons to the marshal--extrapolating from some state statute (applicable in a diversity case under the Erie doctrine, see Commentary C4-40)--tolls the statute of limitations and gives the plaintiff some extra service time. Ability to earn that toll by mere delivery of the summons to the marshal is no small gift when the statute of limitations is on the scene, as elaborated in this writer's article on the 1983 Rule 4 amendment in 96 FRD 81, 106-107, but today a marshal would probably not accept the delivery without a court order. When this was pointed out at a bar association seminar on the 1983 amendment of Rule 4, in which several U.S. district judges participated, one of them volunteered that in such an instance he would be amenable to making an order directing the marshal to serve the summons so as to require the marshal to accept its

delivery and thereby enable the plaintiff to invoke the limitations' toll. Of course, one cannot predict whether a different judge would read the provision so indulgently, or, indeed, what a court of appeals' attitude might be. The point is raised merely to illustrate that there are possible fringe benefits to court-ordered marshal service.

Suppose the marshal serves a defendant in an instance not falling under any of the enumerated categories. The plaintiff is not a pauper or seaman and has no court order directing marshal service. It is an unlikely situation, but if the service is duly established it should nevertheless be valid on the basis that the marshal was merely acting as an ordinary process server, i.e., a person over 18 and not a party.

Before the 1988 addition of what is now subdivision (c) of § 566 of Title 28, there was a kind of competition between Rule 4 and the statute then in point, § 569(b). The latter said that the marshal "shall execute all lawful ... process" of the federal courts, which would of course include the summons, while Rule 4 (as produced in 1983) severely restricted instances of summons service by the marshal. Rule 4 apparently had the upper hand in the matter, on the authority of 28 U.S.C.A. § 2072(b), the statute on the rule-making power, which purports to subordinate even statutes to the rules. It still does, but there exists now a further statutory statement of deference to the rules that would confirm Rule 4's authority to determine the marshal's summons-serving duties. The present § 566(c) (a product of a 1988 revision), in directing the marshal to serve federal process, says that it shall do so "[e]xcept as otherwise provided by law or Rule of Procedure".

A proposal to eliminate from § 2072 this "supersession" clause, incidentally, as subdivision (b) is sometimes referred to, so as to prevent a rule from superseding a statute, came close but didn't make it in the 1988 Judicial Improvements and Access to Justice Act (Pub.L. 100-702). See the Commentary on 28 U.S.C.A. § 2072.

Appointee Other Than Marshal, Including State Sheriff, Must Assent to Be Server

Since the marshal is an officer of the federal court, the court does not need the marshal's permission before directing the marshal to serve a summons. But in respect of any other proposed appointee, it was held in Potomac Leasing Co. v. Uriarte, 126 F.R.D. 526 (SD Texas 1988), that the appointee must accede to the appointment.

The process involved in the Potomac case was an execution on a judgment. (The execution would now fall under Rule 4.1, which deals with process other than a summons or subpoena.) The plaintiff (judgment creditor) wanted the local county sheriff to levy it, but the sheriff refused. The plaintiff then sought to have the federal court specially appoint the sheriff to the task on the authority of Rule 4. The court denied the motion:

This federal Court should no more exercise its power to order a County Sheriff to execute on a federal judgment than should a state court try and order the U.S. Marshal to execute on a state judgment.

If state law in the particular state offers a procedure for converting the federal judgment into a state judgment, the plaintiff should pursue the steps the state law prescribes to accomplish that. The federal judgment then becomes a state judgment and may be enforced as such. That should then permit levy on the federal judgment through the state sheriff. See, for example, § 5018(b) of the New York Civil Practice Law and Rules, which permits conversion of a federal judgment into a state judgment through the simple expedient of filing a transcript.

Subdivision (d)

C4-15. Waiver of Service, Generally.

Having addressed the form of the summons in subdivision (a), its issuance in subdivision (b), and who may serve it in subdivision (c), Rule 4 would seem poised to step right into the methods of service. But those begin with subdivision (e). Into the hiatus comes subdivision (d), with a procedure that may make a summons unnecessary. This is the new provision through which the plaintiff may seek to have the defendant waive the formal ritual of summons service altogether.

The waiver of service concept really began with the adoption of the service by mail provision of subdivision

(c)(2)(C)(ii) of the 1983 version of Rule 4, which provided for mailing summons and complaint to the defendant along with an acknowledgment form which the defendant was asked to sign and send back in an also-enclosed stamped envelope. The service by mail provision is abolished in the 1993 revision and into its place goes the "waiver" procedure of subdivision (d).

In many particulars the two procedures are the same. The mail method of the 1983 rule was designed to make formal summons service unnecessary if the defendant would just sign and return the acknowledgment. That's what the waiver provision of subdivision (d) of the new (1993) rule accomplishes, too, if the defendant just signs and returns the waiver. The defendant could frustrate the mail service of old Rule 4 and thus compel formal service merely by refusing to acknowledge. Same thing with the waiver under the new rule. If the defendant refuses to return the waiver, the plaintiff must turn to formal service. Under old Rule 4, the punishment to the defendant who made formal service necessary was that the defendant could be made to pay the costs of such service; again, the same punishment obtains under the new rule when a waiver is refused. What, then, are the attainments of this substitution of the waiver procedure for the old procedure of service by mail?

There aren't many, but there appear to be some, at least in the thinking of the advisory committee, to whom the chief benefit is that the waiver procedure is easier to use when the defendant is in a foreign country. The old provision for service by mail was nevertheless the formal "service" of judicial process and had to satisfy international conventions, formal or unwritten, by conforming to whatever the foreign sovereign had to say about such an act. To continue the mail service provision would have been to continue to dress the procedure in its "judicial process" robe and thus possibly create international difficulties by purporting to lend the imprimatur of American government to a hostile act on foreign soil.

The mere request for a waiver, on the other hand, is in the committee's eyes the private and nonjudicial act of an individual: a simple request by plaintiff P advising potential defendant D that P has commenced an action against D and is asking D to make formal service unnecessary by sending back a paper agreeing to waive it. That, in the committee's eyes, can't offend the foreign sovereign. The committee notes are quite clear about that, and between the lines one can read further that if a given sovereign should object even to that, it is not an objection that merits such deference as to keep the procedure out of the rule altogether.

A further concession to potential international objections is that the provision that requires the defendant to pay the costs of formal service, if the defendant makes formal service necessary by refusing a waiver, does not apply when the defendant is not "located within the United States". (See the last paragraph of subdivision [d][2].)

The provision uses the carrot as well as the stick. The would-be defendant--and here the defendant served abroad is included--is offered more answering time by making the waiver, subdivision (d)(3), although the interplay of that provision with several others suggests that this gift of time may be illusory. See Commentary C4-18 below.

Only individuals and private business entities are subject to the waiver procedure, which is what paragraph (2) of subdivision (d) means by its reference to subdivisions (e), (f), and (h), which govern those categories of defendant. This means the waiver procedure may not be used against infants or incompetents, service on whom is governed by subdivision (g), or on governmental units--national, state, municipal, or foreign--for which subdivisions (i) and (j) contain the service provisions.

There is a statement in the introductory notes of the advisory committee that the waiver procedure "is made available in actions against defendants who cannot be served in the districts in which the actions are brought", and in such context as might suggest that only in such instances may it be used. That is of course not the case. The waiver procedure may be used against individual and business defendants whether they are servable locally or not.

There are two reasons cited in the notes of the advisory committee for making the waiver provision inapplicable to a governmental unit. The first is that "its mail receiving facilities are inadequate", a difficult proposition to reconcile with several other facts. One is that in other parts of Rule 4 the use of mail against governmental units is significantly expanded, such as under subdivision (i)(1)(A), which applies to service on the U.S. Attorney's office in all actions against the United States or a federal agency. (See Commentary C4-27 below.) When mail is not used, moreover,

delivery in hand to some agent of the governmental unit is likely to be the method used, and it is difficult to understand how governmental "facilities" are any less imposed on when their higher echelon employees--and proper servees are usually those at or near the top echelon of the governmental structure--are made to receive a summons in hand than when an employee at any level is able to handle the same thing at a desk by just opening an envelope.

The other reason cited is one of "policy": that a governmental unit "should not be confronted with the potential for bearing costs of service". But that "policy" could have been implemented merely by dispensing with the costs-shifting feature of the waiver device, as it was in fact dispensed with in the case of service outside the country when objections were put by some foreign nations.

When the waiver procedure is used against a proper defendant, subdivision (2) obliges the defendant "to avoid unnecessary costs of serving the summons". It's in the threat of costs that the waiver procedure is supposed to have teeth, but it doesn't appear to have very sharp ones. See Commentary C4-17 below.

C4-16. Waiver of Service Waives Nothing Else.

If the plaintiff resorts to the waiver request and the defendant furnishes the waiver, the defendant concedes only the receipt of the complaint and makes efforts at further service unnecessary. Paragraph (1) of subdivision (d) states that giving the waiver does not forfeit any objection to venue or to personal jurisdiction, to which we may add that neither does it waive anything else. It concedes only the fact that the defendant has the complaint and is not insisting that a formal summons be issued or served.

If the defendant in a federal action in New York is reached with a waiver request in California and sends it back from there, an objection that the defendant is not amenable to jurisdiction in the New York action for want of New York contacts (etc.) remains available. Same thing on the foreign scene. If the defendant receives the waiver request in France and sends it back from there, but maintains that there is no basis in the action for extraterritorial service such as to make the defendant amenable to jurisdiction of an American court, the objection remains available.

All objections remain alive, in other words, except those concerning the ritual of the summons and its service. Perhaps the reason for singling out objections to personal jurisdiction and venue for assurances against inadvertent forfeiture is their association with summons service under the common roof of Rule 12(b).

Subdivision (b) of Rule 12 of the Federal Rules of Civil Procedure has seven numbered grounds of objection. Of the seven, two are waived when the request for waiver is honored by the defendant: the objections numbered 4, on insufficiency of process, and 5, on insufficiency of service of process. Since there is no summons in the picture at all when the waiver procedure is fulfilled, objection 4 has nothing to operate on, and dispensing with formal service is of course the very purpose of the waiver procedure, thus taking objection 5 out of the picture as well.

Venue and personal jurisdiction are also on the Rule 12(b) list, as items 3 and 2. It was obviously found unnecessary to offer in Rule 4(d)(1) any assurance about the possible inadvertent waiver of the other three objections on the Rule 12(b) list, which are subject matter jurisdiction (item 1), failure to state a claim (6), and failure to join a party (7). Those objections were apparently not felt to be at all in jeopardy should the service waiver of Rule 4(d) be returned, but in that light one may wonder why an objection to venue was felt to require an explicit reassurance, since agreeing to waive service would seem in no way to waive an objection to venue. Perhaps it has something to do with the interplay between venue and amenability to jurisdiction presently found in the venue statutes. See the Commentaries on 28 U.S.C.A. § 1391.

C4-17. Request for Waiver by Plaintiff.

The plaintiff who would take advantage of the waiver procedure must consult the requirements enumerated in subdivision (d)(2) of Rule 4, and should follow them to the letter, especially during the early months or even years in which the new procedure is going through its expected court tests.

There are many things to note about the waiver device. Right up front, for example, it must be observed that the time

that the plaintiff must allow the defendant for the waiver--the time periods for it are stated in paragraph (2)(F)--will come out of the overall period that the plaintiff is allowed for service by subdivision (m), which is the 120 days following the filing of the complaint. There is no automatic extension of the 120 days for service merely because the plaintiff tried to secure a waiver before resorting to formal service. Thus the plaintiff must be especially conscious of the time elements connected with the new waiver procedure if the statute of limitations is anywhere near the scene.

Should the service come too late under the statute of limitations because the plaintiff has let too much time pass in anticipating a waiver and the defendant has not obliged with one, the fact that the dismissal may ultimately lead to a barred action under the statute of limitations instead of res judicata will be little consolation to the plaintiff.

The waiver request must be in writing and addressed directly to an individual defendant, or to a specific officer or agent of a corporate or association defendant. A waiver request sent to the general address of a corporate defendant, for example, won't do. And remember that the waiver procedure does not apply to infants or incompetents or to governmental defendants of any category.

Little is left to the plaintiff's imagination in devising the waiver request because there's an official form for it: the new form 1A adopted as part of the same 1993 promulgation that adopted the revised Rule 4 itself. (The forms are in an appendix to the rules.)

The request for waiver is accompanied by the complaint, but not a summons (unlike the procedure of service by mail in the pre-1993 version of Rule 4, which included a summons). As noted in Commentary C4-15 above, anything even called a "summons" is deliberately kept out of the picture to help assure that the request will not be taken by any foreign nation--should it reach the defendant on foreign soil--as a judicial or governmental act to which the foreign nation might take umbrage.

Ordinary first-class mail may be used, as was also true of the pre-1993 service-by-mail procedure, but for the waiver procedure under the 1993 revision any "other reliable means" may be used as an alternative to ordinary mail. Registered or certified mail would be satisfactory, for example, as would express mail or a sending through any of the overnight services. Fax can be used, or a messenger can deliver it. The rule appears to be little concerned with the method of sending the waiver request for the reason that the plaintiff has every incentive to use a method that will work. After all, if the defendant doesn't get actual hold of the waiver request, the plaintiff can hardly expect to get back a waiver. (Many lawyers don't like the certified and registered mail categories, incidentally, with or without return receipts, because they require the post office to secure signatures at the other end, which often postpones delivery and even creates a limbo when the post office can't locate the defendant to secure the signature.)

The plaintiff's lawyer or the plaintiff proper, when not represented, does the mailing. The signature slot on form 1A makes this clear. Obviously the mailing does not need a process server.

The mail may be addressed to the defendant wherever the plaintiff thinks the defendant can be found. There is no requirement that it go to the defendant's residence or place of business or any other prescribed place. Since the defendant must cooperate or the waiver procedure won't work, it matters little where the defendant can be reached with the mail that elicits the waiver. The same was true of the service-by-mail procedure under the pre-1993 Rule 4, and there's case law on it. See, e.g., Jaffe v. Federal Reserve Bank of Chicago, 100 FRD 443 (ND Ill. 1983), which observed that since the requirement demands actual notice to the defendant in order to be effective, "it matters not a whit whether he or she receives [the mail] at home, at work, at play or anywhere else".

A capacious envelope should be used because it must contain several things, including the complaint and two copies of the form 1A request for waiver. Of course it must also contain a form of the waiver itself, as prescribed in official form 1B, which is also part of the 1993 revision. Curiously, Rule 4(d)(2) itself does not explicitly say that the plaintiff must include the waiver form, which would be an obvious part of the list on which the paragraph embarks, but the matter is of small moment. Form 1A, the request form, makes clear that the waiver form must also be among the enclosures.

Also included must be a "prepaid means of compliance in writing". A self-addressed and adequately stamped

envelope will ordinarily do for that.

The waiver request advises the defendant about its obligation to answer the complaint (should the defendant sign and return the waiver) and of the time the defendant has for answering. It also warns that the costs of service may be imposed on the defendant if formal service is made necessary because the waiver is refused.

The request for waiver must also include the date it is "sent", and, according to paragraph (2)(E) of Rule 4(d), that's the date that appears at the bottom of form 1A, to be filled in by the plaintiff. This can make trouble in cases unusually close to the line of the statute of limitations. The time the defendant has for returning the waiver (elaborated in the discussion of the defendant's obligations in Commentary C4-18 below), is measured from this "sent" date. It is of course anticipated that the envelope containing the waiver request and all the other required material will be dispatched on the "sent" day recited in the request itself. The attorney or plaintiff attests that this is so, in the form of an affirmation right on the request. If there should be some delay in the dispatching, however, and this is not reflected in the date recited, an argument can arise about whether the defendant is entitled to have the responding time measured by the actual day of dispatching instead of the day recited on the request. If the difference is slight, and unintentional, and there is no statute of limitations consequence that might be traced to it, it should be harmless enough.

The plaintiff should be at least a bit wary about the signature on the returned waiver form, and be sure it is the defendant's signature. It may be illegible. The plaintiff can help protect against that prospect by including on the form a line, under the signature line, for the signer to print her name. Form 1B doesn't call for that, but it's a good idea. Neither did a "print name" line appear on old form 18A, which contained the acknowledgment form of the now-superseded service-by-mail procedure, but some of the district courts added such a line to the acknowledgment forms they distributed.

The plaintiff who has any doubt about whether the signature, legible or not, is the defendant's rather than some mistaken victim's, or interloper's, or vindictive neighbor's, etc., had best ascertain the state of things. If the statute of limitations is closing in, the plaintiff should not rest at all on this front unless and until an attorney puts in an appearance for the defendant and the time for raising a jurisdictional objection passes.

The various time elements that become relevant with this waiver procedure can be sticky. But unless the statute of limitations is nearby, they shouldn't lead to any fatalities.

The plaintiff's obligations in respect of the periods allowed for the waiver's return are set forth in paragraph (2)(F) of subdivision (d). The plaintiff must give the defendant a "reasonable time to return the waiver", which must be at least 30 days (60 days for defendants served abroad). As noted at the outset of this Commentary, whatever time is offered comes out of the 120 days allowed by subdivision (m) for service. While nothing is stopping the plaintiff from waiting longer than the allotted time to see whether a waiver materializes, the longer the plaintiff waits, the less time there will be to effect service by some formal means during the declining balance of the 120 days. The period is extendable by the court for good cause (see subdivision [m]), but plaintiffs can't be too optimistic about what will qualify as "good cause". Merely hanging around in the hope that a tardy waiver will appear is not likely to be good cause, or, in a statute of limitations context, good sense.

When the time does come for the plaintiff to give up hope about getting the waiver back from the defendant, as when the plaintiff wants to do things according to the letter, or the waiver is unduly delayed, or the statute of limitations is moving towards its end and the plaintiff doesn't want to waste a moment (for which see Commentary C4-40), the plaintiff must now resort to formal service under the appropriate one of the subdivisions that run from (e) through (j) (which contain the service methods). This ordinarily means that service must now be made either by a process server or by the marshal--the latter, of course, only if the case otherwise falls within subdivision (c)(2)'s narrow permission for marshal service.

Further reference is made to the time periods in the next Commentary, C4-18, which takes a closer look at things from the defendant's point of view.

Some important questions that arise in connection with the waiver procedure can be treated under distinct captions, and we've broken them down that way for the reader's convenience. They follow.

Assessing Service Costs Against Defendants Who Fail To Waive Service; Are Attorneys' Fees Included?

The concluding portion of paragraph (2) of Rule 4(d) permits the court to impose on the defendant who refuses to waive service the costs of the formal service that must afterwards be undertaken, and paragraph (5) says that these costs may include "a reasonable attorney's fee". But an attorney's fee may be imposed only for the attorney's effort in making a motion to collect the costs of service. The time of the attorney in arranging for formal service after the defendant has refused a waiver is not a compensable item.

Under the old service-by-mail provision, no attorneys' fees were referred to at all. That offered at least some room for construction, and some courts allowed attorneys' fees to cover the time spent in arranging for service. The first decision to come to this writer's attention allowing such fees was C.I.T. Leasing Corp. v. Manth Machine & Tool Corp., WD NY (per Curtin, CJ), CIV-85-261C, Sept. 3, 1985, where the court included, as part of the cost of personal service, the fee of the plaintiff's attorney in arranging for personal service ($32) as well as bringing on the motion to get costs ($300, allowed for six hours at a $50 rate). The case, which is unreported, was incidentally noted by the Third Circuit in Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (1987).

A reported decision that cites both C.I.T. and Green and assesses an attorney's fee under the prior rule is Premier Bank, National Association v. Ward, 129 FRD 500 (MD La. 1990), where the cost of the process server was only $50, but to that was added $1237.50 as attorneys' fees incurred in both arranging for service by other means and in making the motion for the costs assessment.

Under present Rule 4(d)(5), the explicit allowance of an attorney's fee for making a motion to collect costs seems by implication to negate the award of an attorney's fee for the time spent in arranging for formal service. That's unfortunate. The amount would in most cases be small, but it can become substantial when service has been made difficult, such as where the defendant is evading service. Many lawyers can report long hours spent in trying to pin a defendant down for service. It would be a big bonus--and a grand encouragement to defendants to cooperate in the waiver procedure--if the fee assessment against the defendant could include the additional time required of the plaintiff's lawyer in arranging for personal service. But under the new subdivision (d)(5), it's apparently not to be.

No Costs at All Against Defendant Reached Abroad

Reading Rule 4(d)(5), one would conclude that the costs of service may be imposed on a refusal to waive whether the refusal is made by a defendant who receives the request to waive in the United States or abroad. This would be spelled out by the references the cited provision makes to subdivisions (e), (f), and (h) of Rule 4. The cited subdivisions are among the provisions for service looked to when a waiver does not materialize, and the reference to subdivision (f), governing defendants served in a foreign country, would seem clearly to suggest that foreign-served defendants are just as subject to the costs assessment as are domestic defendants.

But look at the last part of paragraph (2) of Rule 4(d), which speaks of allowing a costs assessment only against a defendant "located within the United States".

There's an obvious conflict here, but paragraph (2) seems to make the stronger statement on the subject. And the advisory committee notes, perhaps unmindful of the ambiguity on this point created by the reference that subdivision (d)(5) makes to subdivision (f), conclude that defendants reached abroad are not subject to the imposition of service costs for not offering a waiver (although they might have to pay the costs of service as an ordinary disbursement if they are subsequently served, and defend, and lose on the merits).

There's also this peculiarity. The last sentence of paragraph (2) of subdivision (d) allows recovery of costs (for not waiving service) in behalf of the plaintiff only if the plaintiff, too, is "located within the United States". Perhaps this seeks to bar such costs to foreign plaintiffs, but it seems awkward to describe them by their "location". Suppose, for example, that a plaintiff brings suit in the Southern District of New York and reaches the defendant with a waiver

request in the United States. May the plaintiff invoke the costs provision only if the plaintiff mailed the request to waive from the United States? Does it make any difference whether the plaintiff is an alien or a citizen? Is the word "located" to be applied to the citizenship or at least residency status of the plaintiff, or does it mean to apply only to the place where the plaintiff happens to be when mailing the request to waive? If the latter, does this mean that an alien can invoke the costs provision just by stepping across the border into the United States to post the envelope, or merely to stand by when the lawyer mails it?

The latter possibilities border on the frivolous. Requiring the plaintiff to be "located within the United States" should be taken to mean something more substantial than the mere place of posting. It should mean that the plaintiff is a citizen, or a domestic corporation or association or governmental unit; if an alien, it should at least mean an alien residing in the United States, or if a foreign nation corporation, one with an office in the United States. If this provision is to be taken as excluding alien plaintiffs from a costs award altogether, it would appear unfair, and even vindictive, since an alien defendant "located within the United States" would be subject to a costs award for not offering a waiver.

Failure to Waive Can't Confer Jurisdiction

Plaintiffs should keep in mind a salient distinction between the waiver procedure of the present Rule 4 and the service-by-mail provision of subdivision (c)(2)(C)(ii) of the pre-1993 version of the rule. If the defendant actually received the mailed papers under the old rule but deliberately refused to acknowledge them, could the actual receipt qualify as service, or was the plaintiff now absolutely obliged to put the summons and complaint into the hands of a process server so as to effect service by other means?

The question arose time and again under the prior rule. It arose so often that it sooner or later reached just about every court of appeals in the country. The holding was uniformly--with one exception--that unacknowledged mail service conferred no jurisdiction over the defendant. The point was such a key one that we note the cases so holding. They include Media Duplication Services, Ltd. v. HDG Software, Inc., 928 F.2d 1228 (CA1 1991); Stranahan Gear Co. v. NL Industries, 800 F.2d 53 (CA3 1986), and Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (CA3 1987); Armco, Inc. v. Penrod-Stauffer Building Systems, Inc., 733 F.2d 1087 (CA4 1984); McDonald v. United States, 898 F.2d 466 (CA5 1990); Friedman v. Presser, 929 F.2d 1151 (CA6 1991); Geiger v. Allen, 850 F.2d 330 (CA7 1988) (citing earlier CA7 decision in Del Raine v. Carlson, 826 F.2d 698 [1987]); Young v. Mt. Hawley Insurance Co., 864 F.2d 81 (CA8 1988), reiterated in Gulley v. Mayo Foundation, 886 F.2d 161 (1989); Worrell v. B.F. Goodrich Co., 845 F.2d 840 (CA9 1988), cert. denied 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989); Schnabel v. Wells, 922 F.2d 726 (CA11 1991); Combs v. Nick Garin Trucking, 825 F.2d 437 (DofC 1987). Standing by itself as the exception was the Second Circuit in Morse v. Elmira Country Club, 752 F.2d 35 (1984), one of the earliest decisions on the matter. It held that as long as it was shown that the defendant actually received the mail, service would be deemed made even though the defendant did not return the acknowledgment.

We refer to the matter here, and take note of the judicial energy expended in resolving it, just to stress that a similar issue should not arise under the waiver procedure of the new Rule 4, even though it is in effect a replacement of the old service-by-mail provision under which all the above cases arose.

The mail service under the old rule was a category of actual service of process, albeit (in the majority view) it took a voluntary acknowledgment to effectuate it. The waiver provision under Rule 4(d) of the present rule, on the other hand, is not process service at all and can't be taken as such in any sense. It's just a request that the defendant make formal service unnecessary. Ignoring the waiver request, while it has in common with an ignoring of the acknowledgment under the prior rule that it can invoke a costs award, does not have the prior rule's potential, even under an approach like the maverick Morse case, of itself qualifying as service and securing jurisdiction of the defendant's person by that means.

Translation of Request and Waiver Needed?

There is no stated requirement that the waiver and request for it be translated into the language of the person it's directed to. Formal service may require that, as when it turns out to be one of the requirements of the foreign nation in

which service is being made and is stipulated as a requirement under the Hague Convention (see Commentary C4-24 below).

Still, the plaintiff must consider that the purpose of using the waiver request is to convince the defendant to make the waiver. If the defendant would find it more convincing if written in the defendant's own tongue, the worthwhileness of including an accompanying translation is self-evident. If it's used with the request and waiver, moreover, it should for obvious reasons be used with the complaint itself.

Rule 11 Sanctions Applied for Plaintiff's Misconduct Connected with Summons Service

Costs that may be assessed against a defendant under Rule 4(d)(5), whether they include an attorney's fee or not, may look modest when sanctions under the infamous Rule 11 enter the picture, as they have already done. In several cases, moreover, they entered it not against the defendant for failing to respond to summons service, but against the plaintiff for dishonesty or overly clever tactics connected with summons service in the first place.

In one case, Ordower v. Feldman, 826 F.2d 1569 (CA7 1987), for example, the plaintiff, with special motivations unique to the case, adopted what the court described as "a strategy of serving the defendants piecemeal, most of them untimely". The court rejected the tactic. Quoting from Excalibur Oil, Inc. v. Gable, 105 FRD 543 at 544 (ND Ill. 1985), the court said that the 120-day period of what is now Rule 4(m) "establishes not some kind of norm, but rather an outside not-to-be-exceeded date". A sanction of $1000 imposed on the plaintiff by the trial court under Rule 11 of the FRCP and under 28 U.S.C.A. § 1927 was upheld.

Much more money--some $14,700--was exacted of the plaintiff and its lawyer as Rule 11 sanctions in Gas Reclamation, Inc. v. Jones, 113 FRD 1 (SD Texas 1985), for what the court found to be the plaintiff's lawyer's "unconscionable conduct", questionable "veracity", and "bad faith" in connection with process service. One of the main offenses taken note of was an attempt to obtain a default judgment with no notice at all to the other side.

An even heavier Rule 11 assessment, some $15,798, was made against a plaintiff's lawyer in Stinson v. American Sterilizer Co., 127 FRD 689 (MD Ala. 1989), for process-serving misconduct. The court accepted the defendant's lawyers' accounting of some 164.9 hours of additional effort engendered by the plaintiff's lawyer's conduct.

The Stinson case may illustrate with unusual force the great range of differences that can be met from court to court in applying the same rule. An analysis of the decisions in which plaintiffs have applied for enlargements of time in which to serve process (see Rule 4[m] and the Commentaries on it) would doubtless reveal many cases in which a plaintiff's lawyer not much less negligent or culpable than the lawyers in some of the above cases was subjected to no sanction at all, whatever the court's action on the enlargement motion.

C4-18. Defendant's Response to Waiver Request; Time Periods.

The duty imposed on a defendant who receives a waiver request is "to avoid unnecessary costs of serving the summons". If the defendant responds to the request and sends the waiver back, the plaintiff is spared those costs. If the defendant doesn't, and the plaintiff has to effect service by formal means, the costs of the service may be imposed on the defendant, and that is so no matter which way the case may ultimately go on the merits. The amount of the costs assessment, and what may be included in the attorney's fee that subdivision (d)(5) allows as part of costs, are discussed in Commentary C4-17 above.

Under the prior rule on mail service, the acknowledgment of service had to be made under oath. No oath is required for the waiver under the revised rule.

The time within which D is expected to respond to the waiver request is whatever P has offered in the request itself, but the time P offers may not be fewer than 30 days (60 if the waiver request is sent to the defendant outside the United States). Rule 4(d)(2)(F). (An occasional issue may arise about the precise moment the request is deemed "sent", but this should be neither a serious problem nor a frequent one. See Commentary C4-17, above, on that issue.)

If D properly responds, then, in addition to being spared the costs of service, D is entitled to a longer time to answer the complaint. A defendant served with a summons and complaint in the usual fashion has 20 days in which to answer the complaint, measured from the moment of service. Rule 12(a)(1)(A). If the defendant waives service under Rule 4(d), the answering time is the 60-day period following the initial sending of the waiver request by the plaintiff. (The period is 90 days if the request is sent to the defendant outside the United States.) So provide Rule 4(d)(3) as well as Rule 12(a)(1)(B). This may not be quite the gift it first appears to be, however, as some examples can illustrate.

If P effects formal service on D on April 1st, D has until April 21st to answer. Assume P instead sends D a waiver request on April 1st, and that it's sent to D somewhere in the United States, invoking the 60-day answering period. On the face of things, if D chooses to sign and return the waiver, D has until the very end of May in which to answer, obviously a good deal longer than had formal service been made. The suggestion is that D really does benefit from responding to the waiver.

But now assume that D does not cooperate. P sends the waiver request on April 1st, calling for D to send the waiver in by May 1st. D doesn't. P will probably wait a week or so after May 1st to see whether the waiver materializes, allowing time for the return through the mails or whatever other means is used. It is now somewhere around May 5th or May 10th. P, giving up on getting the waiver back, must now arrange for formal service. It takes P a few days to do that. In busy law offices it will take still more than that. Say it takes a week. We're now around May 15th. The process server must now find and serve D, and does, on May 25th. D is served formally on that day, and on that day starts the usual 20-day answering period. So D's time to answer does not expire until about June 14th. By not cooperating, D has gotten a total of some 2 1/2 months in which to answer, as against the two months that D would have had by cooperating and sending the waiver in. And the time periods assumed in this example, in which P awaits the waiver, gives up on it, and arranges for a process server, and the time the process server then takes to effect the service, are, in practical experience, on the short side, not the long side.

And whatever longer time D has managed to secure for answering by not offering the waiver is also extra time D gets in which to go over and think about the complaint, which, under the waiver procedure, is placed in D's hands right at the outset, arriving in the same envelope as the waiver request.

If extra answering time is supposed to be the spur that prompts D to cooperate, it would appear to be a spur that leaves no scar.

Perhaps P can counter this by offering D far more than the minimal 60 days in which to answer if D returns the waiver. P should not just add more answering time in the waiver request itself, however, because that will just give D the longer time to pursue the tactics noted above. But P might find it helpful to enclose a note with the waiver request, telling D that if D returns the request within the 30 days, P will agree to extend D's answering time substantially beyond where it would be by the operation of the Rule 4 provisions alone. In the example, P should tell D that if D returns the waiver request within the 30 days, P will allow (e.g.) an additional month or two in which to answer, or will be amenable to discussing the point with D, etc.

Unless the plaintiff does something of that sort, a wily defendant, calculating the additional time to be amassed by not cooperating, will not cooperate, and that will almost surely be the case when a statute of limitations defense might just be secured in the process. (See the caption below.)

Of course, there's that other incentive: D's saving of the costs of service. In the context of a big case, however--and federal cases tend to be big cases--such an award is likely to hold so little terror for the defendant as to become no consideration at all. (For the amounts assessable for not waiving, see Commentary C4-17 above.) So, if D can manipulate time to make it an advantage not to cooperate, and if the money threat is de minimis in context, the waiver procedure may be seen as toothless by canny defendants. And can't the defendant avoid what is most likely to be the greatest part of the award----the plaintiff's attorney's fee in making a motion for the costs----just by sending the plaintiff's lawyer a letter asking how much the cost was to effect formal service and offering to the pay the bill for it? That may not work, but it seems a nice tactical touch to take a stab at. The court can't be too happy with a plaintiff who makes a motion for something she could have had without moving. We suspect that if the waiver procedure works, it will be because the delays that a refusal to cooperate can engender will just not be that earth-shaking. P can

see that that is so by making sure that the statute of limitations is nowhere about. That's a separate question, discussed below under a distinct caption.

Another consideration will be the extent to which the plaintiff wants to pressure the defendant into answering. If applying such pressure is a factor in the case, the plaintiff does best not to invoke the waiver procedure at all. The plaintiff should file the complaint and effect its prompt service, invoking the usual 20-day answering period and then refusing voluntary time extensions that the defendant may request.

The status of the action when the defendant returns a waiver is set forth in subdivision (d)(4). The plaintiff must file the waiver and the action shall proceed, the rule says, "as if a summons and complaint had been served at the time of filing the waiver". The only difference is that the defendant has the longer answering time provided by the immediately preceding paragraph (3).

Note that this status call is not pinned to the plaintiff's receipt of the waiver from the defendant, but to the time the plaintiff files it with the court, suggesting that the plaintiff does well to file the waiver promptly.

While under Rule 5(d) the burden of filing a paper is ordinarily on the person who served it, and the defendant would logically be deemed the party who "served" the waiver, the burden under Rule 4(d)(4) is clearly on the plaintiff to effect the waiver's filing. And no proof of service is required if the defendant sends in the waiver, says the rule. In the jurisdictional sense, however, it may be more accurate to regard the waiver itself as the equivalent of proof of service.

Statute of Limitations Benefit to D by Not Cooperating

Should the defendant ever intentionally refrain from signing and returning a waiver? Some lawyers looking at things from the defendants' side suggest that if the plaintiff does not commence suit until near the expiration of the statute of limitations, so that a refusal by the defendant to furnish a waiver, thus requiring the plaintiff to resort to formal service, might just put the plaintiff out of time altogether, they might counsel refusal. A defendant's lawyer so doing should also counsel that if the plot fails, there may be a substantial bill for the plaintiff's service costs.

One may question the ethics of such conduct by a defendant--upon which we do not here reflect one way or the other--but whoever does so should note that the conduct that has put such a temptation in the path of the defendant is most often that of the plaintiff's lawyer who lets the client's case get this close to the statute of limitations in the first place.

In Commentary C4-17, above, is a caption entitled "Failure to Waive Can't Confer Jurisdiction". Under it, the question is discussed about whether, under the service-by-mail procedure of the pre-1993 version of Rule 4, a defendant's deliberate refusal to sign an acknowledgment of service (although the defendant clearly received the service by mail) could be deemed service nonetheless, thus sparing the plaintiff a dismissal. The issue became a key one under the service-by-mail procedure when the statute of limitations had expired (and would bar a new action), as it had in the Second Circuit's Morse case treated in that Commentary. Morse took the position that the unacknowledged service was service nevertheless. Just about every other circuit dissented from that view.

The point to be made here is that while there may have been a little room for a Morse case under the prior rule, on service by mail, there is no room at all for one here, under the waiver of service provision. The mailed service was service under the old rule; the request for a waiver under the present rule is only that--a request--and does not even purport to be service itself. Hence a refusal to waive can't be deemed, as the refusal to acknowledge was deemed to be in Morse, the service of summons sufficient to secure personal jurisdiction over the defendant.

In the delicate situation in which time is so critical that a decision about whether to waive service can affect the statute of limitations, the defendant under the new waiver procedure does indeed have an incentive for refusing to waive. The lesson here is therefore addressed to the plaintiff: don't ever turn to the waiver procedure when there isn't substantial time still left on the statute of limitations. Enough time, in any event, to enable a process server to make formal service in time in the event that a duly sought waiver is not returned. See Commentary C4-41.

Subdivisions (e) Through (j), Introductory

C4-19. Service, Generally.

Subdivisions (e) through (j) supply the methods of service for the various categories of defendants, a separate subdivision being allotted to each category. Under the prior rule, each category appeared merely as a paragraph under a single subdivision, which was subdivision (d) of the pre-1993 version of Rule 4.

Under the present Rule 4, subdivision (d) supplies the waiver procedure, discussed in Commentaries C4-15 through C4-18, above. If the plaintiff uses that procedure, and the defendant obliges by sending in the waiver, summons service becomes unnecessary. If the defendant doesn't return the waiver (or if the plaintiff doesn't resort to the waiver procedure at all), formal summons service becomes necessary, and subdivisions (e) through (j) supply the methods. In the absence of waiver, the service of the summons is the event that subjects the defendant to the personal jurisdiction of the court, without which the court's action would not bind the defendant.

Generally speaking, none of the methods of service that Rule 4 supplies, in subdivision (e) or anywhere else, applies to the service of papers after the summons has been served and jurisdiction of the defendant obtained. The myriad of papers that go back and forth between the parties after jurisdiction has been perfected, including those that the defendant serves in the initial response to the summons (an answer, a motion, etc.), are governed by Rule 5(b). Under Rule 5(b), ordinary mail is the method commonly used, and it is addressed to the attorney, not the party.

Before turning to the individual methods of service, a general word is appropriate about the relevance of Rule 4 and its service methods in a removed action, which is the subject of the next Commentary.

C4-20. Service in Removed Actions.

Rule 4, applicable to actions commenced in a federal court, may occasionally come into play in an action commenced in a state court but afterwards removed to federal court by the defendant. (The removability of cases is governed principally by 28 U.S.C.A. § 1441; the procedure for removal is governed by 28 U.S.C.A. §§ 1446 and 1447 and for a few particulars by Rule 81[c] of the Federal Rules of Civil Procedure.) In removal situations it's the defendant who wants federal jurisdiction and the plaintiff who resists it.

The service in the state court action will of course have followed state law, and in almost all removed cases the personal jurisdiction that it obtained will have been perfected before the removal, leaving no personal jurisdiction to be sought--and thus no business for Federal Rule 4 to handle--after the removal. But that is not always the case. If there are several named defendants in the state court action, for example, and some were served before others, the served ones may have removed the action before the others were served. This does not prevent the plaintiff from serving the others after the removal, however, and, the case now having been removed to the federal court, the plaintiff can use Rule 4 if need be to complete the service. (The plaintiff might even earn a remand to the state court in the bargain: one of the newly served defendants--and it takes only one--may prefer state jurisdiction and spoil the co-defendants' removal by insisting on the remand. The rule is that all defendants on the claim must concur in the removal, 28 U.S.C.A. § 1441[a], or removal fails.)

Rule 4 may become relevant even in an action having but a single defendant. Suppose, for example, that the defendant, ostensibly served in the state court action, has an objection to the state court's personal jurisdiction, for want of basis, defective service, etc. Instead of asserting the objection in the state court, however, the defendant chooses, if the case is removable, to remove it and raise the objection to personal jurisdiction with a dismissal motion made to the federal court after removal. The defendant can do that. The removal does not by itself waive an objection to personal jurisdiction, although a defendant so removing had best raise the objection properly (and promptly) after removal so as not to waive it. (On the way to raise a jurisdictional objection in federal practice, see Commentary C4-43.) Indeed, one of the defendant's motives in removing the action (removal is ordinarily the defendant's option) may have been to have the federal rather than the state court pass on the jurisdictional objection. If the federal court does, however, and sustains the objection, the sustaining will not necessarily result in a dismissal. If the defect was only in the mechanics of service, the federal judge may merely quash the old service and permit new service to be

made, for which Rule 4 would be used.

In yet another and perhaps more common situation the plaintiff may have occasion to invoke Rule 4 in a removed action. Under Rule 21, additional parties may be added by order of the court "at any stage", and this applies in removed as well as original actions. If the court in a removed case orders someone to be joined as a party, and that person will not appear in the action voluntarily, a summons will have to be served on that person. Rule 4 will govern that service.

With those and a few like exceptions, however, Rule 4 should be thought of as addressing the summons only in original, not removed, actions.

The relevance of Rule 4(m)'s 120-day time limit on summons service in actions that get into the federal court by removal is discussed in Commentary C4-38 below.

C4-21. Person to Be Served, Generally.

The actual mechanical methods of making service meander in and out of the several subdivisions that run from (e) to (j) under Rule 4. Sometimes enumerated methods are allowed only for the particular category of defendant being addressed in the particular subdivision. Sometimes, through cross-references, the methods stated in one subdivision are adopted for use in another.

In large measure, the function of each subdivision is to identify the individuals or offices on or through whom service may be effected on the given defendant.

Subdivision (e) governs service on individuals being served in the United States or any of its territories or associated commonwealths in which Congress has created a district as part of the federal judicial system. (We will henceforth refer to the "United States" as embracing all such districts). Here one finds the well known methods of personal delivery and the alternative of delivery to a person of suitable age and discretion at the defendant's dwelling house or place of abode, formerly found in the often cited Rule 4(d)(1). And here one also finds the authorization to use state law service methods as alternatives to those spelled out by the federal provision.

Subdivision (f) governs service on individual defendants made outside the United States. Its business is the complicated business of making service on foreign terrain without offending the foreign sovereign. Here for the first time Rule 4 acknowledges the Hague Convention, a treaty to which the United States is a party. The convention requires the plaintiff to honor any restrictions on service placed by the law of any sovereign subscribing to the treaty. Most of the world's commercial powers subscribe. See the materials on the Hague Convention appended to Rule 4.

Subdivision (g) governs service on infants and incompetents. A special indulgence appears here, carried over from prior law, in that the method used is ordinarily that of the state in which service is made. This recognizes that this category of defendant should be presumed to be a ward of the state in which the defendant is found.

Subdivision (h) governs service on corporations and associations. It sets forth its own methods of service and then, by reference back to subdivision (e)(1), permits state-law methods to be used as an alternative.

Subdivision (i) governs service on the United States and its various agencies, corporations, and officers, covering the ground previously covered in paragraphs (4) and (5) of the pre-1993 version of Rule 4(d).

Subdivision (j) addresses service on state and foreign governments and political subdivisions. The two are quite distinct entities--the individual states of the United States are the first category and foreign nations the second--and are governed by separately numbered paragraphs within subdivision (j). It would have been more consistent with the whole layout of the revised Rule 4 to assign the two categories separate subdivisions altogether, but at the rate the revision was going there may have been some fear that there would not be enough alphabet.

The Commentaries below are a broad view of subdivisions (e) through (j), and since most of the contents of these

subdivisions are carried forward from prior Rule 4, there is less to be said about them. When the particular provision has been substantially amended, however, there will be more to say.

Subdivision (e)

C4-22. Service on Individuals in U.S.; State Law Methods.

There are two separate provisions on serving individuals: subdivision (e), on serving them in the United States, and subdivision (f), on serving them outside the United States. Subdivision (e) is the subject here.

Before setting forth its own well known prescription for service, in paragraph (2), subdivision (e) of Rule 4 first announces the permission, which the revised Rule 4 continues, to use methods of service allowed by state law. This it does in paragraph (1), and with an expansion from prior law. Under the pre-1993 version of Rule 4, the state law methods adopted for use against individual defendants were those of the forum state only. Paragraph (1) expands on this, making it permissible to use any method allowed by the forum state or by the state "in which service is effected". (Previously, the state of service was used only for service on infants and incompetents, which, incidentally, continues to be the only proper mode of service on such persons. See subdivision [g].)

The state methods adopted by paragraph (1) are alternatives to the methods that paragraph (2) prescribes directly, and there is no priority between them. Either may be turned to with no attempted prior resort to the other. In essence, the rule just adds the state law methods to the federal list.

This adoptive provision of paragraph (1) makes state law methods of service available without regard to the basis of subject matter jurisdiction in the action. It has nothing to do, in other words, with the Erie doctrine, which is concerned with state substantive law. Erie's main application is in actions that depend on diversity of citizenship for federal subject matter jurisdiction (see Commentary C4-40), from which an attorney might infer that paragraph (1) adopts state law service methods only in diversity cases. Not so.

Thus the plaintiff in a federal question case, admiralty action, etc., as well as the diversity plaintiff, should not overlook an opportunity that a state law service alternative might offer at the invitation of paragraph (1). An example of such an opportunity might be a case in which there appears to be no way of effecting service on the defendant under the specific prescriptions of federal or state law, such as where the defendant has no apparent place of abode, or business agent, etc.

When service has to be made outside the country in such a case, Rule 4, in subdivision (f)(3), has a fallback provision in which the court is invited in effect to invent a method of service for the plaintiff to use, but there is no explicit counterpart authority for court-invented service under Rule 4(e) when service is made within the country. If the state law of either the forum or the place of service has such a provision, however--allowing the court to devise a method of service--that method should avail in the federal action, too, under the adoptive provision of paragraph (1) of Rule 4(e). New York procedural law contains such an authorization, for example. (See § 308[5] of the New York Civil Practice Law and Rules [CPLR].)

Does paragraph (1), in adopting state law, mean to adopt only the mechanics of service, or does it also mean to draw from state law--if state law offers it--permission to make extraterritorial service of the summons, sometimes called amenability to service? In more technical terms, is it addressed exclusively to the method of giving notice, or does it speak to jurisdictional basis, too?

The answer is that it is concerned only with mechanics. The question of where the service may be made--amenability to service or jurisdictional basis, to use other synonymous descriptions--is separately governed by subdivision (k), and insofar as adoption of state law bases is concerned, paragraph (1) of subdivision (k) adopts for federal use only the extraterritorial bases recognized by the law of the forum state, not the state of service. It is only for the mere mechanics of service that paragraph (1) of Rule 4(e) permits borrowing from either.

In using a state method, the plaintiff should of course do everything possible to see that it is carried out within the

120-day time limit imposed on summons service by subdivision (m) of Rule 4, which applies whether a state or federal method is being used. On this point, see, for example, Coutinho, Caro & Co. v. Federal Pacifica Liberia Ltd., 127 F.R.D. 150 (ND Ill. 1989), where service on the secretary of state was the state method relied on. The delivery to the secretary occurred within the 120 days but a mailing that was also required by the state statute did not occur until afterwards. The action was dismissed.

While the service-by-mail provision of the pre-1993 Rule 4, which was contained in subdivision (c)(2)(C)(ii) of that rule, was abolished by the 1993 revision, there might be a service-by-mail provision applicable under the state law of the forum state or the state of service. If that's the case, the state mail method would be available in the federal action under Rule 4(e)(1).

Under a peculiarity in the now abandoned provision on mail service--subdivision (c)(2)(C)(ii) of old Rule 4--once mail was tried and for any reason failed there was a dispute about whether any state law method of service at all could be resorted to as a follow-up. See and compare, e.g., Billy v. Ashland Oil Inc., 102 FRD 230 (WD Pa. 1984), and Humana, Inc. v. Jacobson, 804 F.2d 1390 (CA5 1986). That issue should not arise at all under the revised Rule 4. There is nothing to inhibit free resort back and forth between state law and federal law for methods of service until one is found that works, as long as time has not run out. (Time for service is governed by subdivision [m].)

C4-23. Service on Individuals in U.S.; Federal Prescription.

Paragraph (2) of subdivision (e) has been federal practice's main provision for serving individual defendants, carried over from old Rule 4, where it was subdivision (d)(1).

Paragraph (2) allows in-hand service, which always does the job. But it does not mandate that in-hand service be used, or even that it be initially tried. It allows the alternative of service by "leaving copies" at the defendant's "dwelling house or usual place of abode" with someone of "suitable age and discretion" who is "residing" there. Any one of the quoted phrases can raise an issue in a given case.

The defendant's regular residence satisfies as a "dwelling house". Generally speaking, it is perhaps the best thing for the plaintiff's lawyer to depend on. The phrase is exotic and even in the stern mind of a lawyer it can conjure up visions of trees instead of buildings, and swinging vines instead of steps. And how does a "usual place of abode" differ from a "dwelling house", or either differ from a residence? Case law explanations are not satisfactory. It has been held that a defendant can have several abodes for paragraph (2) purposes, and that a place of abode can qualify for paragraph (2) service even if the defendant is not a resident of the state and uses the place only from time to time. See, e.g., National Devel. Co. v. Triad Holding Corp., 930 F.2d 253 (CA2), cert. denied 112 S.Ct. 440 (1991).

The Triad case stressed, however, that the defendant was in residence at the time his housekeeper was served and so left open the question of whether the same result would obtain if he was not. A good counseling word here is that if the category of the defendant's living accommodation is doubtful, but it is known that he is around the place--whatever the place may be--from time to time, it is better to have the process server make in-hand service. If the affidavit of service indicates that that wasn't done, and the nature of the place at which the papers were delivered is not clear, the plaintiff should watch out for a jurisdictional objection and make sure that there is time to sue over if it prevails.

The same may be said about whether the person served was of "suitable age and discretion". The person need not be an adult. Teenage servees have been held satisfactory. The issue is often one of fact, which makes it all the less wise to depend on it, especially if time is short. Also beware the door answerer wearing overalls and carrying a monkey wrench or paint brush. He may merely be working there while the household is out, and under paragraph (2) the person served must be a person "residing" at the premises.

These points, from time to time the source of difficulty even under earlier versions of Rule 4, became potentially even more troublesome after the 1983 revision, the revision that first eliminated the marshals as process servers in all but a few cases. The marshals had a long and cumulative experience in federal summons service and were aware of these problems. And from a practical point of view their official status both discouraged defendants from taking issue with

these incidents and earned the summons serving ritual a kind of de facto judicial acceptance when the marshal was its performer. When the private process server took over, and the plaintiff was made responsible for service, defendants were expected to become all the more prone to pick on little points like this and the courts were expected to be less deferential to the process servers' statements of their proceedings. That's just about how things have turned out. Commentary C4-38, below, discusses some of the cases.

As long as the plaintiff has sued early enough to be able to commence a timely new action should the worst happen--the worst would be the dismissal of the present action for want of jurisdiction--no mistake in any of these regards should be fatal. See Commentary C4-46.

The "agent" referred to towards the end of paragraph (2) is not just an employee or business agent of some kind. It must be an agent designated for process service specifically. The designation can be made in a contract, see National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), but the more common kind would be the express or implied designation of a state or court official. A frequent example of the implied kind is under state nonresident motorist statutes. Express kinds are more commonly associated with corporations, which subdivision (h) now governs, but exist for individuals, too.

Any of the agencies under discussion here can exist pursuant to either federal or state law. Technically, paragraph (2) is an independent federal statement, but since paragraph (1) adopts state law--and state law would include service on state-law agents--as an alternative for service on individuals, which law it is would ordinarily make no difference.

Subdivision (f)

C4-24. Service on Individuals in Foreign Country.

Under the pre-1993 version of Rule 4, subdivision (i) contained the provisions for service in a foreign country. Under the current rule, subdivision (f) is the governing provision. It makes several changes in the substance of the former rule, and among other things recognizes the Hague Convention for the first time.

The Hague Convention is a treaty to which the United States is a signatory. Its formal name is Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. We'll call it simply the Hague Convention. Discussion of it appears under a separate subcaption, below.

The caption of subdivision (f), indicating that it governs service in a foreign country only on individuals, might set the reader in search of some other subdivision's caption for foreign service on corporations or associations. There is no separate subdivision for that. Service on corporations and associations generally is governed by subdivision (h), and when such entities have to be served outside the country, subdivision (h)(2) adopts the methods that subdivision (f) supplies for foreign service on individuals. Hence just about everything noted below in respect of foreign service on individuals applies to corporations and associations as well. (An exception is the personal delivery provision of paragraph [2] [C] [i] of subdivision [f], which is not adopted for extranational service.)

Another point about the old subdivision (i) is that its various methods for foreign service were mere alternatives. The usual methods set forth elsewhere in the rule for domestic service applied to foreign service, too, and even the caption of old subdivision (i) noted that its list was just some "alternative" offerings. Subdivision (f) of the current rule, on the other hand, is an independent instruction about service that does not borrow from any other part of the rule.

In going through the several provisions of subdivision (f), and especially in consulting the advisory committee notes in point, one finds much talk about whether any method alighted upon under the subdivision can ever be allowed to violate the law of the place where service is made. It may be possible to do that, as will be noted, but it is important to point out right up front that displeasing the foreign country with the manner of service used may prompt it to withhold enforcement of the judgment later, a matter the plaintiff's lawyer should keep in mind at the outset. The plaintiff should research the particular country's law before presuming to serve someone there, and pick, from the list of Rule 4(f)'s alternatives, a service method that will propitiate the nation involved.

Perhaps the only time a judgment in some ways violative of foreign law may nevertheless have some clear sailing is where the defendant has property locally out of which the judgment may be enforced, obviating dependence on the foreign nation for enforcement.

Paragraph (1): Service Abroad under the Hague Convention

Subdivision (f)'s offerings open with the instruction that if there is any "internationally agreed means" for giving notice, that means must be used. So states paragraph (1), citing the Hague Convention as the prime example. A proviso is that the means selected be "reasonably calculated to give notice", a domestic due process concept on which the rule insists whether the foreign country does or not.

The Hague Convention applies whenever service is made in a foreign country that is a party to the Convention, and it mandates (among other things) that the plaintiff fulfill any requirements and honor any restrictions the particular country has imposed on service within its territory. As will be seen, failure to inquire into whatever restrictions or instructions the nation of service has imposed can void the service, which can of course have repercussions on that most sensitive of all procedural fronts, the statute of limitations.

The Convention and its updatings are set forth following Rule 4. Depending on whether or not a given nation has ratified the Convention, and, if it has, then depending also on any conditions it may have imposed in so doing--these matters, too, are tracked in the place just cited--the Convention can have a direct impact on service made in the particular country. Lawyers contemplating service in a signatory country should therefore peruse the Convention and its accompanying materials, notably those reflecting on the steps taken by the particular nation pursuant to the prerogatives the Convention confers on it.

Note should also be taken of the forms appended to the Convention's text. They will prove helpful. The reading--which goes surprisingly fast and quickly reduces to a negotiable instrument what seems a tome at the outset--should be done with a special eye towards learning what the "central authority" is in the nation in which service is sought. Under the Convention, each nation designates a "central authority" through which service may be effected. In the United States, the Department of Justice has been designated the central authority "to receive requests for service from other Contracting States", and the marshals' offices assist by providing the certificates called for by the Convention. (See the materials at the tail end of the Convention materials cited, including the footnotes, many of which also set forth what other nations have done.)

Also to be absorbed at the outset of any Hague Convention discussion is that the whole subject can become academic--happily academic and even irrelevant for the plaintiff--if there is any way to serve the foreign defendant locally. The Hague Convention applies only when the service has to be made abroad, and very often service abroad proves unnecessary because the foreign defendant has a local presence or a local agent for service. Extended discussion of this point, including the U.S. Supreme Court's Schlunk case that speaks to it, appears below under the caption "Avoiding Hague Convention Restrictions by Finding Way to Effect Service in U.S.". Avoiding the Convention is the subject of that discussion; fulfilling the Convention is the subject of the present one.

The Convention is not, as has occasionally been supposed, automatically preemptive of all methods that may be used for service abroad. As long as the nation concerned has not, in its ratification or in any other part of its law, imposed any limits on particular methods, or made an unequivocal statement that only specifically listed methods may be used, other methods, like those set forth in paragraph (2) of Rule 4(f), may be resorted to, as the opening words of paragraph (2) recites. As the Third Circuit observed in DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (CA3), cert. denied 454 U.S. 1085, 102 S.Ct. 642 (1981), Rule 4's service methods "may be used as long as the nation receiving service has not objected to them".

In this respect Article 19 of the Convention is relevant. It says that if the internal law of the nation concerned "permits methods of transmission, other than those provided for in [the Convention]", the Convention doesn't affect them. We should be able to read the word "permits" in Article 19 to mean "does not prohibit". In order to use one of the methods Rule 4(f) authorizes in paragraph (2), for example, one should not have to show that the method has a precise counterpart (and just how precise?) in the foreign nation's internal law. It should suffice that there is nothing in the

foreign law, either explicitly or by compelling implication, to suggest that the method violates some deep-rooted policy of the nation involved. In this respect, we can draw on a well known principle often met in conflict of laws and having perhaps its most celebrated articulation in Judge Cardozo's opinion in Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918): that a state's public policy is not to be deemed violated merely because a foreign law seeking local implementation has no precise cognate in local law.

Reference to the Convention in the ensuing discussion will be made only to those parts of it relevant to the special problems raised and to the specific cases treated. Especially noteworthy among the cases are those in which service was upset for what amounted in fact or in effect to a failure to take the Convention into consideration. Or, more particularly, for a failure to check into the predilections of the foreign nation as reflected in the conditions it imposed when it ratified the Convention.

In assessing the impact of using in a foreign nation a method which--as matters evolve--that nation bars, several things have to be noted. One is the jurisdictional validity of the service as the federal court assesses it in the action. Another, already referred to briefly, is the foreign nation's willingness to recognize the judgment if enforcement of it is later needed. Still another is the consequence that the use of the particular method may have for the plaintiff and its process server if either is within the grasp of the foreign sovereign. Even if the federal court sustains the service for jurisdictional purposes, the plaintiff or process server may face some foreign penalty disproportionate to the benefit of having obtained personal jurisdiction of the defendant. When service is made in a nation that has adopted the Convention, moreover, anything that displeases the foreign sovereign is likely to void jurisdiction in the eyes of the U.S. court, too. This suggests that the prospect just mentioned--of the plaintiff having jurisdiction upheld here while still facing a penalty there--is more likely (if likely at all) when service is made in a country that has not adopted the Convention, and with which the United States has no other treaty in point.

As to those that subscribe to the Hague Convention, we can do some examples. In several cases, notably those attempting service in Germany, service was quashed because it conflicted with conditions Germany imposed in adopting the Convention. One condition Germany has imposed is that the papers served bear a German translation. Another is that service not be made by direct mail. In Vorhees v. Fischer & Krecke, 697 F.2d 574 (CA4 1983), both conditions were breached and service was quashed. Fortunately, the mere quashing avoided a dismissal, thus permitting service anew, which preserved the action from what would otherwise have been the bar of an expired statute of limitations. A similar quashing of service in Germany was the result in Harris v. Browning-Ferris Industries Chemical Services, Inc., 100 FRD 775 (MD La. 1984), where the mail method used was one authorized by state law, adopted for federal use and available even for foreign service under the pre-1993 version of Rule 4, and where again the papers served carried no translation.

State courts, of course equally bound by the Convention, hold the same way. An example is Low v. Bayerische Motoren Werke, A.G., 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982). An additional and more serious consequence becomes a possibility in a state court case if the statute of limitations has expired and if, under state procedural law, defective service brings dismissal of the action instead of a mere quashing of service. The plaintiff's attorney must be on guard against all of these prospects.

When the foreign nation recorded no objection to mail service, such service has been held permissible, as in Chrysler Corp. v. General Motors Corp., 589 F.Supp. 1182 (D D.C. 1984), involving service in Japan. Cases like Chrysler are further confirmation that Rule 4 and its methods are not preempted by the mere fact of ratification of the Convention by the foreign nation concerned. All depends on the terms of the ratification.

In proposing in 1984 to add a new provision to Rule 4, as it then was, in order to permit service "pursuant to any applicable treaty or convention", the advisory committee said that "to the extent that the procedures set out in the Hague Convention ... conflict with the Federal Rules of Civil Procedure, ... [the new provision] harmonizes them." But since all the proposed new clause would have done is mention the Convention--in fact, it mentioned only a "treaty or convention" generally--it did no harmonizing. On the contrary, it left the impression that methods authorized by other parts of Rule 4 would be permissible despite the Convention, and therefore despite the conditions a given foreign nation may have imposed in adopting the Convention. Since what the 1984 proposal sought was "harmony" between Rule 4 and the Convention, however, such an impression was probably unintended, even if we

assume--and a "dubious assumption" it is in the eyes of some courts, see Amella v. United States, 732 F.2d 711 (CA9 1984)--that a rule amendment could so casually supersede a treaty.

In another note appended to the abortive 1984 proposal, the committee suggested that it would "authorize" the use of the Hague Convention. The clause would have been a nice reminder about the Convention, but, had it gotten through in those terms, it would have been more than a mite presumptuous in purporting to "authorize" the use of the Convention. The Fourth Circuit notes in the Vorhees case (above), for example, that the Convention is a self-executing treaty carrying the weight of a statute. With those credentials, it would hardly have to depend for its validity on the indulgence of a federal rule.

Paragraph (1) of the subdivision (f) adopted in the 1993 revision abandons all such ideas about the Hague Convention and gives it its due: whatever the particular nation imposes by way of a service requirement is a requirement that paragraph (1) imposes as well. This would appear to be confirmed by the language that opens paragraph (2) of subdivision (f): an "if" clause that makes paragraph (2)'s methods available only if they are not barred by any "international agreement", and all such agreements (the Hague Convention of course among them) are recognized by paragraph (1).

Avoiding Hague Convention Restrictions by Finding Way to Effect Service in U.S.

When it applies, the Hague Convention governs service abroad in both state and federal actions. Suppose, however, that a foreign defendant maintains some kind of local presence, and that service would therefore be possible on the defendant locally. Would the Convention still be applicable? Cases in the trial and intermediate appellate courts, including state courts (e.g., Luciano v. Garvey Volkswagen, Inc., 131 A.D.2d 253, 521 N.Y.S.2d 119 [3d Dep't App.Div. 1987]), indicated that it would not; that when domestic service is possible, based on a presence that the foreign defendant maintains in this country, the Convention's prescriptions don't apply. The point remained open until the U.S. Supreme Court adopted the same position in Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). In the Schlunk case, an action for wrongful death alleged to have been caused by defects in one of its cars, the service was made on a German corporation through service on its wholly-owned American subsidiary as authorized by Illinois law. The court said that it is forum law--in this case the Illinois longarm statute and its concomitant notions of amenability to service--that determines the issue. All the Convention says, observed the court in an opinion by Justice O'Connor, is that the Convention applies when there is "occasion to transmit" a document abroad; it "does not specify the circumstances" that create the "occasion". If forum state law says that service may be made on the defendant through service on the defendant's agent or on the legal counterpart of such an agent locally, then under the Convention's own language there is no "occasion" to serve the defendant in the foreign country and the Convention's prescriptions don't apply.

A proviso throughout, of course, is that in determining who shall be served with the summons, the state law must satisfy the minimal standards of federal procedural due process (which it did in the Schlunk case):

Where service on a domestic agent [said Schlunk] is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.

The court pointedly rejected the defendant's contention that the due process clause itself requires transmittal abroad of every document served domestically on a foreign national or corporation. There is no such constitutional requirement, the court answered. The court did point out, however, that the plaintiff's voluntarily undertaking such foreign transmittal, meeting the Convention's prescription even when by its terms the forum has found it inapplicable, can enhance the prospect of getting a judgment recognized by the foreign nation afterwards.

That is of course a factor requiring consideration when the defendant lacks local assets adequate to satisfy a potential judgment and when enforcement will therefore need the cooperation of the foreign nation. But if local assets suffice, in the forum state or any sister state (which would be bound under the full faith and credit clause to recognize and lend its aid to the enforcement of the judgment), there would be no need to depend on the assistance of the foreign nation in getting the judgment enforced and voluntary fulfillment of the Convention's methods will hold no special reward.

If amenability to local jurisdiction is established under the applicable rule of federal or state law--and due process is not offended in the process--then the next step is only a matter of determining the method of service. It is only with respect to this second step that the Hague Convention becomes relevant, but it does not become applicable unless there is no one available locally--we will define below what we mean by "locally"--on whom the summons may be served in the foreign defendant's behalf.

On that point, the foreign law does not determine who the servee must be. Any person authorized by or through any provision of Rule 4 to receive the summons in the defendant's behalf may be served in a federal action if the service can be made locally--the very fact that it can be made locally removes it from the category of foreign service under subdivision (f) of Rule 4 and takes the subdivision out of the picture--and included among such persons would be state officials designated expressly or by operation of law to receive process in the defendant's behalf. The Luciano case, cited above, involves that situation, and says that the Convention

does not require that all citizens of the signatory nation be served according to its methods, as it does not state when service abroad is required but only how it is to be effectuated.

The need to follow the Convention's methods of service, including such restrictions as the foreign nation in which service is being made may have promulgated (as the Convention insists), should not be all that frequent if one carefully analyzes the interplay of the two factors that reflect on jurisdiction and service.

The first is amenability to jurisdiction. This is governed by the forum as long as the forum has some basis, agreeable to due process, for asserting jurisdiction over the foreign defendant.

The second is method of service, and here, too, the forum has the say, as long as some method is used that also satisfies due process (this time the notice aspect of it). If the forum apparatus is an imaginative one, supplying a variety of service methods, it should not be hard to find one that enables service to be made locally, thus avoiding the Hague Convention altogether. If the forum is federal, the various other service provisions of Rule 4 apply and offer a variety of methods, among them, by adoption under Rule 4(e)(1) and (h), methods allowed by the state in which the federal court happens to be sitting as well as the state in which the service is made. This is altogether quite a rich roster of alternatives, which suggests that the need to serve the defendant at its home base abroad should be limited to only the situation in which there is no possible basis, under domestic (state or federal) law, on which to find the foreign defendant amenable to service in the United States. And with the new general federal longarm statute adopted in 1993--subdivision (k)(2) of Rule 4 (discussed in Commentary C4-35 below)--amenability to domestic jurisdiction will be broader than it has ever been in the past.

As to method of service: if the forum is a state or federal court in a state like New York, which has a variety of methods capped by a provision permitting the court, if necessary, to invent a method of service on an ad hoc basis (see § 308, paragraph 5, of the New York Civil Practice Law and Rules, McKinney's New York Laws, Vol. 7B), the need to follow the Hague Convention will be rarer still, perhaps limited only to where there is nothing the court can think of, consistent with due process, that would enable service to be made in this country, so that there would be nothing for it but to have the summons served on the defendant at its foreign base. (When foreign service is necessary, a similar provision in Rule 4 [f]--paragraph [3], treated below--authorizes a court-invented method of service, but there it would have to be consistent with what the foreign nation requires if the nation subscribes to the Hague Convention. When local service in the United States is found possible, the foreign nation's pleasure need not necessarily be attended to.)

The reasoning that leads to this conclusion is the interplay between the amenability and service factors. They are really co-extensive in the sense that whenever there is basis enough for the forum to find the defendant amenable to jurisdiction, there is opportunity for the same forum to prescribe the method of service. All would thus seem to depend, if we assume constitutional amenability to jurisdiction, on how generous the forum is with methods, and on how acceptable the method chosen would be to due process requirements if it does not include service on the defendant at its foreign station.

We have spoken of "local" service several times. We use it here to mean service not only in the state in which the

court sits, but anywhere in the country, because if the defendant, though an alien or a foreign corporation, is amenable to the particular court's jurisdiction sufficient to permit service abroad (invoking the Convention), it is a fortiori subject to service anywhere in the United States, which would avoid the Convention as long as some kind of service can be effected domestically.

We must sound this practical note again, however. Unless there are assets of the foreign defendant in this country that can be turned to for enforcement should a judgment be obtained, all effort will have been for naught if the enforcement must be sought in the defendant's country and that country won't recognize the judgment (whether for want of following the Convention or any other reason). If it appears that enforcement can become a problem, therefore, the matter should be analyzed at the outset, before an action is even begun, so that any initial service step may be taken in light of what post-judgment enforcement might later insist on. That may entail, despite all this lofty analysis, throwing in the towel and undertaking the possibly distasteful effort of making service in the foreign nation, pursuant to the Convention, and fulfilling any conditions imposed on service by that nation, no matter how onerous.

Paragraph (2): Rule 4's Methods for Serving the Summons Abroad

Under its opening language, the several methods that paragraph (2) supplies for foreign service are available only if there is no treaty with the foreign nation involved to offer a means of service, or, if there is a treaty, the treaty allows other means of service than those the treaty itself specifies. (On what the Hague Convention itself prescribes or allows, especially in relation to subdivision [f] of revised Rule 4, see G. Born and A. Vollmer, The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases, 150 F.R.D. 221, 237.)

The first of paragraph (2)'s listed methods, in clause (A), is service according to the law of the nation in which service is taking place. This may seem in some measure superfluous in view of the preoccupation already witnessed in paragraph (1) with the foreign nation's wishes under an applicable treaty, but it would apply in its own right if, for example, there is no treaty in point with the particular nation.

If the method authorized by the foreign law requires a court order or other form of official authorization, but it can be applied for in that nation without involving the federal court here, clause (A) permits the foreign application. If it appears that authorization is required but that it must be requested by the federal court, clause (B) comes into play. Under it the plaintiff can apply to the federal court ex parte for a letter rogatory, or "letter of request" (which the advisory committee believes to be the more current terminology), in which the court addresses the appropriate foreign tribunal and asks for its assistance, promising to return the favor sometime.

A supervening requirement of paragraph (2), applicable to all of its lettered clauses, is that the method used be "reasonably calculated to give notice", the domestic due process concept on which Rule 4 insists for foreign as well as domestic service.

Personal delivery to an individual defendant--again, if not prohibited by the nation involved--is allowed by clause (C)(i) of paragraph (2). This is restricted to individual defendants. Under the 1993 revision, this clause does not apply to corporate or association defendants, see Rule 4(h)(2), even though personal delivery to corporate officers and agents is allowed in domestic cases. If personal delivery to such persons outside the country is to be used, it will have to find authorization outside clause (C)(i).

Clause (C)(ii) of paragraph (2) authorizes as a service method "any form of mail requiring a signed receipt", and this applies to individual as well as corporate and other business defendants, but, again, only if mail service is not prohibited by the nation involved. Under this provision it must be the clerk of the court that does the mailing.

For this method the plaintiff has to determine what kind of postal contacts exist with the foreign country, and whether there is any reasonable probability of getting the receipt back signed. Under subdivision (l), the signed receipt is part of proof of service.

An important question here is whether mail service is permitted under the Hague Convention pursuant to its own

terms (express or implied)--i.e., without looking to the law of the signatory nation involved--which of course affects all signatories to it. The issue has occupied many judges. When the Convention is not applicable, as where the nation in which service is made is not a party to it, it is of course no barrier to mail service. But when a signatory nation is involved, the availability of mail becomes more intricate. (We assume here that the nation to which the mail is addressed has not, in ratifying the Convention, asserted any specific objection to mail service. If it has, that would foreclose the issue.)

The problem is the language of Article 10 of the Convention. It has three lettered subdivisions concerned with serving "judicial documents". Subdivision (a) deals with mail, but refers to the freedom to "send" the documents by that method. Subdivisions (b) and (c) treat other methods, but here the reference is to the freedom "to effect service" by those other methods. Defendants have argued in several cases that while the "effect service" language of subdivisions (b) and (c) clearly includes the service of a summons, the mere "send" language of subdivision (a) does not; that "send" implies the serving of mere interlocutory papers within an action already commenced and pending but not the initial summons that does the commencing.

Some courts have bought that argument and held that subdivision (a) does not mean to include summons service, so that mail service of the summons is barred even if the nation involved has not objected to it. Ackermann v. Levine, 610 F.Supp. 633 (SD N.Y. 1985), so held, for example, but it was reversed, the Second Circuit holding in 788 F.2d 830 (CA2 1986) that as long as mail has not been explicitly excluded by the particular signatory nation, it is permissible on the authority of Article 10(a); that "the word 'send' in Article 10(a) was intended to mean 'service' ", and that the summons is therefore among the mail-method beneficiaries. The point is disputed, however, and many cases continue to go the other way. One such, at circuit level, acknowledging the conflict and collating the cases each way, is Bankston v. Toyota Motor Corp., 889 F.2d 172 (CA8 1989).

An incidental point in the Second Circuit's Ackermann decision is that the United States is among the nations that, in adopting the Convention, have not objected to mail service. Hence a plaintiff in a foreign litigation who has from its own local procedural law the right to make extraterritorial mail service, and has to do so upon a defendant in the United States, will find no U.S. barrier to it.

Paragraph (3): Court-Invented Method of Service

Paragraph (3) of subdivision (f) is a catch-all provision that enables the court on ex parte motion to devise a method of service responsive to the unique facts of the case. A good example is the court's use of Telex to serve Iran in New England Merchants National Bank v. Iran Power Generation and Transmission Co., 508 F.Supp. 49 (SD N.Y. 1980).

The proviso appears once again that the method alighted on by the court should not be a method "prohibited by international agreement", but note that this does not mean that the method selected by the court must be congenial to the foreign nation in every case. It is only a method barred by "international agreement", and presumably specifically barred by that agreement, that the court must stay away from. If there is no treaty with the foreign nation involved, for example, then technically the court can direct a method the foreign nation does not approve. Whether this is a good idea in the particular case is once again likely to turn on whether enforcement of the judgment will have to proceed in the foreign nation, a matter noted under the above caption about avoiding the Hague Convention.

Applicability of 120-Day Time Period to Foreign Service

The variety of problems that can be met in attempting service in a foreign nation make it inappropriate to impose an arbitrary time limit on service. Hence the 120-day period following the filing of the complaint, within which service is required by subdivision (m) in domestic cases, does not apply when service has to be made abroad under subdivision (f). Subdivision (m) explicitly exempts subdivision (f) from its time demands.

When service has not even been attempted in a foreign country, however, even though it is possible to make service there, the 120-day period has been held applicable and a dismissal for a failure to satisfy it sustained. See Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737 (CA2 1985), where the court was constrained to observe that the plaintiff "has not exactly bent over backward to effect service".

The lesson to plaintiffs who have to make service abroad is to undertake it with reasonable diligence, at least sufficient to convince the court, should the defendant raise any issue about time, that this is genuinely a case requiring foreign service and that exemption from the time requirements of subdivision (m) clearly applies to it.

If the court were not to insist on at least some showing of diligence, dilatory plaintiffs who had no real intention of making service abroad might too easily evade the 120-day time limit in every case in which the defendant merely could be served abroad, just by belatedly reciting an intention to make such foreign service even in cases in which there is no need for it at all because of the availability of the defendant for service in the United States.

Subdivision (g)

C4-25. Service on Infants and Incompetents.

The defendant who is an infant or incompetent comes in for special treatment under subdivision (g), which, under the 1993 revision of Rule 4, distinguishes between service within and service beyond the United States.

For service made on an infant or incompetent within the United States, subdivision (g), instead of prescribing a method directly, adopts the methods allowed by the state law of the state in which service is made. That was the prior rule as well.

With ordinary individuals, subdivision (e)(1) governs, and the state law adopted for service is either forum state law or state-of-service law; they're alternatives. Not so under subdivision (g), where, for infants and incompetents, it is only the law of "the state in which the service is made" that governs. It is that state which will most likely be the state of wardship and thus the one to which federal law defers. Lawyers must always be especially cautious here. In some state practices, oversights that would be disregarded as insignificant in other cases have jurisdictional impact when they touch the rights of an infant or incompetent.

The waiver-of-service procedure of subdivision (d), available for use against individuals and business organizations generally, is not available for service on infants or incompetents.

When service on an infant or incompetent has to be made outside the United States, it may be made pursuant to

(1) subdivision (f)(2)(A), which adopts the law of the foreign country in which the service is made, or

(2) subdivision (f)(2)(B), which contemplates a direction for service made by a tribunal in the foreign place pursuant to a letter rogatory issued by the federal court, or

(3) an order of the federal court.

These are set down as initial options with no prescribed priority among them.

Issues about what age constitutes infancy should be resolved by the plaintiff by taking the precaution of invoking subdivision (g), and making service pursuant to the law of the place of service, whenever the defendant would be deemed an infant by either that law or the law of the forum state, or, for that matter, any other conceivably applicable law. As to an "incompetent", there will presumably have been some person appointed by the appropriate jurisdiction to represent the incompetent's interests, such as, in the terminology of Rule 17(c), a guardian, committee, conservator, "or other like fiduciary", and it is presumably that person who will have to be served in the disabled person's behalf under the law of the place of service.

As long as service is made along the conservative lines suggested, jurisdiction should be deemed obtained and any issues about proper representation can afterwards be controlled by the court under its Rule 17(c) powers. If need be, for example, the court can appoint a guardian ad litem even for a represented person if the court finds the representation inadequate, or a conflict of interest present.

In the case of defendants who appear to be at some distance from their senses but for whom no formal adjudication of incompetency has been made, the plaintiff should consider commencing the action in due course as if the defendant were competent, but then promptly bring the defendant's difficulties to the court's attention for a possible invocation of its Rule 17(c) powers right at the outset. As a matter of both tactics and ethics, the plaintiff can take no comfort from the prospect of obtaining a default judgment against such a disabled but not formally represented defendant: the default is likely to be vacated as soon as the court is shown that the defendant was not fit to defend the action. The vacatur is not likely to be for a want of jurisdiction in that case--as long as the unrepresented defendant was properly served as an individual--but rather a discretionary vacatur designed to offer the defendant, now with proper representation, a chance to defend on the merits.

It should not matter whether the particular terminology of "incompetent" is used in the laws of the place of service or, for that matter, in the law of the district court's location. The word is stigmatic and some jurisdictions have been moving away from it. New York, for example, began to use the terminology of "conservatee" in recent years, describing persons who could manage their personal needs but not their business affairs (a lawsuit would come under the latter category), and in the early 1990's adopted the terminology of "person under a disability" as softer still.

Whatever terminology any of the related jurisdictions may use to describe what the law--including the unchanged substance of what is now subdivision (g) of Rule 4--has traditionally called an "incompetent", it is from subdivision (g) that the plaintiff's lawyer would best take instruction on summons service in all doubtful cases.

Subdivision (h)

C4-26. Service on Corporations and Other Businesses.

Subdivision (h) governs service on corporations and other business creatures, notably partnerships and unincorporated associations. Corporations are entities distinct from their owners and can be sued in their own name. Partnerships and unincorporated associations as a general rule are not; hence, in order that they be suable without the plaintiff's having to join all of their members, some law must be found to give them the equivalent of "entity" status at least for purposes of suit. Rule 17(b) defers to forum state law for resolution of that point, but adds that in federal question (as opposed to diversity) cases the partnership and association "may sue or be sued in its common name" even if forum state law does not so provide.

The first point to note under the 1993 revision is that the new waiver-of-service procedure, supplied by subdivision (d) and treated in Commentaries C4-15 through C4-18, applies to subdivision (h) defendants, and that if the waiver procedure is used, and works, service under subdivision (h) won't have to be made at all.

An important point is that the waiver request should not be addressed to the entity as such, but to one of the specific individuals who could, were formal service being made, be served in behalf of the entity. See subdivision (d)(2)(A).

The following discussion assumes the waiver procedure has not been used, or has not worked, and that formal service is needed.

Under the 1993 revision, service on business entities, like service on individuals, is divided into two categories, the first applicable when service is made within and the second applicable when service is made beyond the United States. In fact, some of the methods supplied by the subdivisions that govern individuals--subdivisions (e) and (f)--are merely adopted by subdivision (h) for business entities.

State law methods are available as service alternatives. The provision so stating under the revised rule is the opening clause of paragraph (1), with its reference back to subdivision (e)(1). The latter makes two state alternatives available, those of the forum state and those of the state of service, and both apply for business entities as well.

The balance of paragraph (1) of subdivision (h) is a verbatim carrying forward of the prior rule's methods of service. This federal prescription was then and remains now a list that the plaintiff can turn to instead of using state law.

The matter on which most dispute arises on this list is who qualifies as "a managing or general agent". The general rule is that the person served must have some measure of discretion in operating some phase of the defendant's business or in the management of a given office. The person must have at least such status that common sense would expect her to see that the summons gets promptly into the hands of the right corporate people. And she should be working for the defendant at the time of service. A former agent can't be depended on here. The question is usually sui generis and the cases on the subject are profuse.

Measuring who an "agent" is under paragraph (1) is probably a federal rather than state question, but once again the importance of the point is diminished by the alternative exploitability of state law as allowed by the reference to subdivision (e)(1) in the opening clause of the paragraph.

The above pertains to the "agent" first mentioned in paragraph (1). That one need not be an agent specifically designated for process service. The other two "agent" references in paragraph (1) do mean such an agent, and the designation can be made either voluntarily, as in a contract, or by law. The law agencies subdivide further into express and implied ones. The express one is common in corporate cases, in which a domestic or licensed foreign corporation is often required by state law to designate some state official as its agent for process service. As with the first "agent" that paragraph (1) mentions--the regular business employee discussed above--there is also with these other "agents" an overlap with the state law adopted through the reference to subdivision (e)(1). Together they make largely academic whether it is a federal or a state "law" or "statute" that accounts for the "agent" on whom service is being made.

If the particular statute relied on for the agency requires a mailing to the defendant, paragraph (1) requires that the mailing part also be carried out. A state scheme, for example, may entail the service of two copies of the summons on the state official, the official to mail one copy to the defendant at the defendant's address of record. If that's the case, the plaintiff should ascertain that that's been done. A different state scheme, often the case when the designation is implied instead of express, as under nonresident motorist legislation, is for the plaintiff to serve one copy on the state official while himself mailing another copy to the defendant.

When service has to be made on the business entity outside the country, paragraph (2) of subdivision (h) governs and adopts the methods that subdivision (f) allows for service outside the country on individuals. An exception is "delivery to the individual personally", contained in paragraph (2)(c)(i) of subdivision (f). That provision is not adopted for corporate and other categories of business defendants for the apparent reason that it applies generically only to individual defendants.

Subdivision (i)

C4-27. Service on United States and Its Agencies.

Service on the United States and on federal agencies, corporations, and officers is all centered under subdivision (i) under the 1993 revision, whose several paragraphs cover the ground previously covered by paragraphs (4) and (5) of subdivision (d) of the pre-1993 Rule 4.

The provisions are largely self-explanatory but some special attention should be paid to new matter included in the 1993 revision as well as some sticking points under the portions of the rule carried forward.

The first point to note is that the waiver-of-service procedure adopted in subdivision (d) as part of the 1993 revision does not apply to service on the United States or its agencies, corporations, or officers. See subdivision (d)(2).

Service on the United States itself is governed by paragraph (1) of subdivision (i). All three clauses under that paragraph must be fulfilled to the extent relevant.

Clause (A) is concerned with getting the summons and complaint into the U.S. Attorney's office for the district in which the action is brought. That's the office that will presumably have the primary responsibility for representing

the government. A new provision included in clause (A) allows service by registered or certified mail "addressed to the civil process clerk" of the local U.S. Attorney's office.

A provision carried forward in clause (A) entails delivery to a designee of the U.S. Attorney. When this is relied on, it is of course implied that the process server will be allowed access to such a person. Whoever is on guard at the office, such as a receptionist, must be such a designee or must at least allow access to the proper designee. Access by the "front desk" person was apparently denied in Justice v. Lyng, 716 F.Supp. 1567 (D Ariz. 1988), for example, resulting in a denial of the government's motion to dismiss and in a new chance given the plaintiff to re-serve. Under the new clause (A), this kind of problem can apparently be avoided altogether by exploiting the permission to mail the papers to the "civil process clerk".

In all cases brought against the United States or in which the United States must for any reason be joined as a defendant, it is required that a copy of the summons and complaint be mailed to the Attorney General's office in Washington, D.C. Clause (B) continues that requirement, and continues to allow registered or certified mail for it.

Clause (C) of paragraph (1) concerns the situation in which the action involves an attack on an order of a federal officer or agency that has not also been made a party. It requires that a registered or certified mailing of a copy of the summons and complaint be made to the officer or agency.

If the officer or agency has been made a party, paragraph (2) of subdivision (i) governs, but the service requirements come down to the same thing: the registered or certified mailing to the officer or agency as well as service on the United States pursuant to paragraph (1), which means service on the U.S. Attorney under clause (A) of that paragraph as well as a mailing to the Attorney General under clause (B). This may be a convoluted way of doing things, but so it has been done for a long time and the 1993 revision just carries it forward. Another way of analyzing service requirements when a federal officer's or agency's order is being attacked is that service must be made on the U.S. Attorney pursuant to paragraph (1)(A) and mailings must be made to the Attorney General and to the particular officer or agency, whether the officer or agency has been joined as a party or not.

A slightly different treatment has been made of U.S. corporations under the 1993 revision, which just adds the corporation to the paragraph (2) list and permits service on the corporation by the methods used to serve any other federal agency: service on the U.S. Attorney under paragraph (1)(A) plus mailings to the Attorney General and to the corporation. The pre-1993 requirement, contained in old Rule 4(d)(5), that the corporation be served by delivery in like manner as a private corporation, has been dropped.

The several registered or certified mailings provided for in subdivision (i) do not need a return receipt, as required, for example, under subdivision (f)(2)(C)(ii) for service in a foreign country.

As between registered and certified mail, incidentally, it is probably quite adequate for purposes of summons service to use the certified, which is the less expensive. It supplies the proof needed without the extra precautions taken with registered mail, which is more appropriate when articles of value are mailed.

Paragraph (3) of subdivision (i) was added in the 1993 revision and should prove helpful indeed to plaintiffs. It provides that as long as service was properly effected on either the U.S. Attorney or the Attorney General, the failure to effect required service on any other officer, agency, or corporation may be cured by the plaintiff through leave of court, with a time extension allowed for the purpose. The prerequisite is that service was properly made on either the U.S. Attorney or the Attorney General, and the provision should also be construed to allow late service on the other as long as proper service was made on one. In other words, the "officers" included in the phrase "multiple officers" in the provision allowing a cure should include both the U.S. Attorney and Attorney General and not just an executive or administrative officer whose order may be under attack in the case.

If that construction is given to the new paragraph (3), it should be unnecessary to try to reconcile the prior case law on the subject. There is caselaw on the pre-1993 version of Rule 4, for example, purporting to sustain service when something less than total fulfillment of the applicable requirement took place, as where the U.S. Attorney was properly served and himself sent copies to the Attorney General, but the cases have distinctions and fine points that

make dependence on them perilous. See, for example, Zankel v. U.S., 921 F.2d 432 (CA2 1990), the distinction made of it a few days later in Frasca v. U.S., 921 F.2d 450 (CA2 1990), and then the distinction made of both of them a few months after that in McGregor v. U.S., 933 F.2d 156 (CA2 1991)--all from the same court.

The plaintiff who leaves plenty of time for trouble (see Commentary C4-46, below), or who just avoids the trouble altogether by following the service requirements of Rule 4 to the letter, and on time, may have the pleasure of noting these nice distinctions in other folks' cases, as Mark Twain might say, or the even greater pleasure of not noting them at all.

The advisory committee notes urge that the new paragraph (3), on curing an omitted service, be read in conjunction with Rule 15(c) of the Federal Rules of Civil Procedure. That's the well known "relation back" rule, concerned with whether a claim interposed at some belated stage of an action may be allowed to "relate back" to the filing of the complaint so as to preserve the claim from the bar of the statute of limitations. See the Commentary on Rule 15(c) in 142 F.R.D. 359, 362.

Under Rule 12(a)(3), the time for serving an answer is a prolonged one when the United States or a federal officer or agency is the defendant. It's 60 days instead of the more usual 20. Rule 4(a) requires the summons to reflect that.

Yet another provision to keep in mind when suing a federal-status defendant is 28 U.S.C.A. § 1391(e). It expands permissible venues (i.e., choices of district to sue in) as against federal defendants, and in so doing recognizes that it must also resolve summons-serving problems that might otherwise make the venue gift an illusory one. It therefore permits service on such defendants by certified mail beyond state borders (which would otherwise confine the service). This is a matter of the territorial reach of summons service, expanded on in the Commentaries on subdivision (k), C4-29 et seq.

Subdivision (j)

C4-28. Service on Foreign, State, and Local Governments.

Subdivision (j) addresses service on foreign nations and their subdivisions and the states of the United States and their subdivisions. It governs the state entities in paragraph (2), which was carried over almost verbatim from the pre-1993 version of Rule 4, where it was paragraph (6) of subdivision (d). But on foreign nations it contains no instructions; it just offers the reminder, in paragraph (1), that the subject is governed by 28 U.S.C.A. § 1608.

Section 1608 is part of the Foreign Sovereign Immunities Act, which takes in §§ 1602-1611 of Title 28. Actions against foreign states pose obvious problems of sovereignty and therefore need special statutory guidance. The FSIA provides it, and, through a definition in § 1603, governs also in actions against the political subdivisions, agencies, and instrumentalities of the foreign state. If the plaintiff can bring her case against such a foreign defendant under the immunity-lifting provisions of §§ 1605-6, she will find the summons-serving provisions for her lawsuit in § 1608.

None of this should be confused with the mission of subdivision (f) of Rule 4. Subdivision (f), treated in Commentary C4-24 above, is addressed to service in a foreign country on individuals and business entities. (Business entities are included in the subdivision [f] methods through a cross-reference in subdivision [h][2].) It does not apply to service on the foreign country itself or to service on its agencies and political subdivisions.

When the defendant is a state or a state agency or subdivision, including any of the myriad municipalities (counties, parishes, cities, towns, villages, etc.) seen today as defendants in federal actions, service is governed by paragraph (2) of subdivision (j).

Paragraph (2) directly authorizes service on the defendant's "chief executive officer", whatever the officer's formal title, but allows in the alternative service by any method state law allows. Here the state referred to is the state which is the defendant or of which the defendant is a unit. This will not necessarily be the forum state, although of course it usually is. This alternative will often be found to make a wide variety of servees available. Here the lawyer's inquiry into state law should be for the lists of persons servable in behalf of the particular governmental entity being sued--a

given list may be a long one--as well as for the methods of service.

The waiver-of-service procedure of subdivision (d) of Rule 4 is not applicable to any of the defendants enumerated in subdivision (j), but there is nothing to prevent the plaintiff from asking the defendant to accept service without a fuss. If the defendant is willing to execute a formal admission of service, that should do in place of an affidavit, or, better still, the plaintiff's affidavit attesting to all of this can accompany the admission. Another nice part of the set would be the defendant's commitment to interpose no jurisdictional defense. Perhaps the defendant will even stipulate to summary judgment for the plaintiff, making the dream complete.

Subdivision (k)

C4-29. Geographical Area of Service, Generally.

The laity's assumption, and perhaps the inexperienced lawyer's as well, is that because a court is a federal one its process is servable anywhere in the country. That is not so. Of course Congress can, if it wishes, make the federal summons nationwide in scope, and has done so in a number of special cases, to be noted in the course of the next few Commentaries, but not as a general matter. As a general matter, the state in which the federal court sits is the basic unit in which service is permissible, or that was the way things were right up to the point of the 1993 revision of Rule 4, in any event.

Under the pre-1993 version of Rule 4, there was an explicit provision making the state the basic unit: subdivision (f) of the prior rule. Subdivision (f) also recited a few narrow instances in which the service could be made within 100 miles of the federal courthouse even if it passed the state line--the "100-mile bulge" provision, which is continued under the present rule and to which we turn in Commentary C4-31 below--but full extraterritorial service was permissible only when a federal or forum state statute or rule explicitly permitted it, and that was the instruction of old subdivision (e).

The rules are essentially still the same, but through a different route. And in one instance, set forth in subdivision (k)(2) of the revised Rule 4, the national contacts of the defendant have been made a basis for extraterritorial jurisdiction even when the defendant's contacts do not suffice to support the jurisdiction of any individual state. Subdivision (k)(2) is a far reaching innovation, literally and figuratively.

The next few Commentaries examine the territorial scope of federal judicial process in a progression. Service within the state is treated in Commentary C4-30. Service within the 100-mile bulge is treated in Commentary C4-31. Extraterritorial service in general is the subject of Commentary C4-32. Then follow separate Commentaries on extrastate service under state law (C4-33) and under federal statutes (C4-34), and finally a discussion, in Commentary C4-35, of the new subdivision (k)(2), invoking national instead of state contacts for what amounts to a new species of general federal "longarm" jurisdiction applicable in federal question cases.

Of course, no service at all is needed, and geography becomes irrelevant, if the plaintiff has used the waiver-of-service procedure of subdivision (d) and it has succeeded. (The filing of the waiver establishes service.) A reminder is in order here that the waiver device may be used only against individual and business defendants. It is not available for the plaintiff's use against infants or incompetents, or governmental units. See Commentary C4-15 above.

C4-30. Service Within State in Which Federal Court Located.

Subdivision (k) of the revised Rule 4 contains no clear statement, as old subdivision (f) did, making the forum state the basic unit of service. The forum state remains the basic unit, but the point is spelled out more by implication than explication. Clause (A) of paragraph (1) says that service of the summons establishes jurisdiction over any defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located,

and the common rule in state practice is that the service of a summons within the forum state accomplishes that. By

accomplishing that in state practice, it accomplishes it for federal practice as well, under the adoptive terms of subdivision (k)(1)(A).

It was apparently intended to make the point that way, but the cited clause is just the carrying forward of the meat of the second sentence of old subdivision (e), and that part of old subdivision (e) was designed not as the general rule about securing jurisdiction by serving the summons inside the state, but as the special rule authorizing the service of the summons outside the state. It was a new course at the jurisdictional table, enabling a federal plaintiff to dip into the bowl of "longarm" jurisdiction that the states had been dishing up since they first got the recipe for it from the International Shoe case in 1945. ("Longarm" jurisdiction is discussed in more detail in Commentary C4-33 below.)

Although slightly more labored in the pronouncement, the basic unit of service remains the state in which the federal court is sitting unless some specific provision lets service go farther. Clause (A) that we quote above is the foremost of the specific provisions that let it go farther, even though, paradoxically, we have to depend on it as well for the authorization that permits the summons to be served within the state in the first place.

In any event, jurisdictional thinking under subdivision (k) moves in stages, with the first principle, exacted after a little arm twisting from paragraph (1)(A), still being that the state remains the basic unit of service unless some other provision in either state or federal law, including other parts of subdivision (k), lets service go beyond.

This notion--that service on a defendant while the defendant is physically present within the state is its own basis for jurisdiction--comes from the common law. It's a residuum of the old capias ad respondendum, the writ whereby a civil action was started through physical seizure of the defendant. That hasn't been done for a long time, but still traceable to the practice is the idea that when the defendant is on the state scene physically, even if only in transit, delivery of the summons to the defendant is all the jurisdictional basis needed. (In at least one case even service on an airplane flying over the state was allowed to exploit this notion. See Grace v. MacArthur, 170 F.Supp. 442 [ED Ark. 1959].) Other bases of personal jurisdiction, like "contacts" or "longarm" jurisdiction, have evolved in more recent years and are more congenial to current notions of due process. These other bases are heavily exploited for federal use by several parts of subdivision (k), making the need for continued use of this "transient" basis questionable. In Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), however, the U.S. Supreme Court reviewed the matter and held that service while the defendant is physically present in the state continues to satisfy due process and thus to qualify as its own jurisdictional basis.

Whatever doubts have been expressed about the continued viability of this territorial notion of jurisdiction, therefore, have now been dispelled, at least for the time being. The transient rule remains. In Burnham, the result was that a New Jersey defendant, served while in California on business and to visit his children, was held subject to the jurisdiction of the California courts in his estranged wife's divorce action. The service on him while he was in California did the jurisdictional job, the Court held, but the Court's inability to muster a majority behind any opinion makes the reasoning for the retention of the "transient" rule largely an academic exercise.

To Justice Scalia and three other justices concurring with him, the rule remains standing because of its longevity. To Justice Brennan and three other justices, an inquiry is still necessary into the contacts that the defendant and the case have with the state. Justice Stevens is the justice who concurred in neither of his colleagues' opinions in Burnham, protesting that both said too much.

The category of jurisdiction involved in Burnham, and under discussion here, includes the corporate presence doctrine (see Commentary C4-36 below) as well as this served-in-the-state rule. These bases offer jurisdiction against the defendant on any claim, related or not to the state, and more recently the description of "general jurisdiction" has been appended to them. "General" is used to distinguish "specific" jurisdiction. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). "Specific jurisdiction" is predicated not on the defendant's presence in the state, but on the claim's arising out of some in-state event for which the defendant is responsible. It is better known as "longarm" jurisdiction. "General" jurisdiction permits the exercise of jurisdiction against the defendant without regard to the relationship the particular claim may have to the state.

Forum non conveniens rules (embodied in federal practice for the most part in the transfer provisions of 28 U.S.C.A.

§ 1404[a]) offer some protection against serious abuses in transient service cases. Other checks on the unfair use of local service as a jurisdictional basis are the immunity and enticement doctrines. The first offers immunity from service to a nondomiciliary who enters the state voluntarily to participate in judicial and other legal proceedings. The second vitiates service made on a defendant enticed from beyond to within the court's territory, such as through a fraudulent representation. Those doctrines, although still viable, are not met as often today as they once were. The reason is that they apply as a rule only when it is shown that local service is the only way the court could have obtained jurisdiction of the defendant. If the defendant was amenable to extraterritorial service, as is so often the case today (a subject covered in subsequent Commentaries), the doctrines will usually be held inapplicable.

If it is indeed found that state law is now to be the source of the authority for a federal court's exercise of jurisdiction based only on service in the forum state, a given state's abrogation of that basis would also have the effect of making it unavailable in the federal court. There would be some exceptions, however, that were probably not considered in this context. These would be the instances in which the "100-mile bulge" applies. There, independently of any state law, Rule 4 would allow service anywhere within a 100-mile radius of the courthouse. The 100-mile bulge is embodied in paragraph (1)(B) of subdivision (k) and is treated in Commentary C4-31 below.

C4-31. The "100-Mile Bulge".

Paragraph (1)(B) of subdivision (k) permits service within a 100-mile radius of the courthouse, whether it crosses state lines or not, and without depending on any other provision, federal or state, for assistance. But it applies only in certain defined and narrow instances.

It is available against third-party defendants, for example, impleaded by the main defendant under Rule 14, which is perhaps its most valuable use. If P sues D and D wants to implead X, but X is amenable to jurisdiction only in a neighboring state, D can serve the third-party summons and other papers on X in that state as long as the point at which X is served is within the 100-mile bulge.

The bulge is also available when the court under Rule 19 has ordered someone's joinder as an additional party to an action already pending.

Under Rule 13, a defendant with a counterclaim against the plaintiff or a cross-claim against a codefendant may want to join an additional party on the claim. The defendant may be allowed to do that under Rule 13(h), but would have to serve the new party with a summons. Under subdivision (f) of the pre-1993 Rule 4, bulge service explicitly included the joinder of additional parties on a counterclaim or cross-claim. The language so reciting has been dropped from the replacement provision, paragraph (1)(B) of subdivision (k), apparently as unnecessary: Rule 13(h) refers to Rule 19 and would be picked up for bulge service through the reference that subdivision (k)(1)(B) makes in turn to Rule 19.

The 100 miles is measured on a straight line, i.e., by air miles, or "as the crow flies". Surface routes with their bends and curves don't have to be considered. See, e.g., Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 FRD 630 (ED La. 1976). Paragraph (1)(B) permits service of the summons to be made anywhere within that circle even if it crosses state lines, as long as it doesn't go beyond the country.

The permission for bulge service is of course in addition to whatever other bases may be available to permit extraterritorial service, such as under a federal statute or under a state longarm statute applicable via the other clauses of paragraph (1). Because such statutes are quite often available, and are usually far more generous in their geographical stretch than clause (B)'s modest bulge is, the bulge proves superfluous in many cases. In federal question cases today, it may prove more superfluous still in view of the adoption, in subdivision (k)(2), of a general federal longarm statute. (See Commentary C4-35 below.)

The bulge has diminished utility for the obvious additional reason that it is not available for the plaintiff to use at the outset. The plaintiff can't plan an action with the idea of naming someone a defendant for whom "bulge" service is needed. The bulge applies only in the instances delineated in clause (B), and initial use by the plaintiff is not among them.

Under due process standards, need the party served within the bulge be shown to have contacts with the forum? Does it suffice that the party is amenable to jurisdiction within the bulge area of the neighboring state even if not amenable to jurisdiction in the forum state? A leading case, Sprow v. Hartford Ins. Co., 594 F.2d 412 (CA5 1979), holds that due process is satisfied if "the party served had minimum contacts with the forum state or the bulge area".

If the action is transferred for trial, such as with a change of venue under 28 U.S.C.A. § 1404(a), and occasion for bulge service arises after the transfer, the 100-mile radius would now be measured from the courthouse in the transferee district. Indeed, one of the factors the court may have considered in determining whether to make the § 1404(a) transfer is the joinder of other needed parties that a transfer might facilitate because of these geographical factors.

C4-32. Extraterritorial Service, Generally.

By "extraterritorial" service we mean service outside the state in which the federal court is sitting, although that terminology may no longer be appropriate. Territoriality can't really be discussed as "extra" until we know what's basic. The basic unit for the service of a summons in a federal civil action is still the state in which the federal court sits, but while the authority for that was explicit under the pre-1993 Rule 4, under the revised Rule 4 it comes about indirectly, through clause (A) of subdivision (k)(1), as noted in Commentary C4-30 above. But it is the same clause (A) that invokes state law for whatever bases state law offers for service outside the state, and it is that aspect of clause (A) that becomes relevant here, along with the other parts of subdivision (k) that address the scope of the federal summons.

So, in using "extraterritorial" here as a reference to situations in which the summons may be served outside the state in which the federal court sits, we do so as a matter of mere convenience.

The reach of the court's summons depends on explicit state or federal law. Nothing is left to "inherent" judicial powers, or to common law (on which note the Omni case discussed below). In so pronouncing at several points, subdivision (k) acts not so much as a source as it does a conduit. But a capacious conduit it is. In clause (A) of paragraph (1) it adopts state bases for extraterritorial service. In clauses (C) and (D) it calls attention to the existence of federal statutes that allow extraterritorial service. It is mainly with paragraph (2) that subdivision (k) becomes a direct source, authorizing extraterritorial service whenever the contacts that the defendant has had with the nation as a whole would support jurisdiction in the constitutional sense even if the defendant has not had an adequate set of contacts with any individual state.

When one of its adopted jurisdictional bases is invoked, subdivision (k) should apply to all instances of summons service, not just the plaintiff's initial service on the defendant. It should apply to service in third-party practice under Rule 14, for example, and to service made on a person being joined as an additional party on a counterclaim or cross-claim under Rules 13(h) and 19.

It is helpful always to keep in mind that subdivision (k) is concerned with only the "basis" for personal jurisdiction rather than with the method of service. It determines where service may be made. Much attention is devoted by Rule 4 to the methods of service: a half-dozen subdivisions running from (e) through (j). But all concern method, not place. Subdivision (k) is the chaperon of each, standing at the side of all process servers and telling them just how far they may go, as a matter of geography, to make service.

Another way of phrasing this is that subdivision (k) is concerned with "amenability" to jurisdiction, a subject reviewed by the U.S. Supreme Court in 1987 in Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987). There the court had occasion to review the two possibilities for extraterritorial jurisdiction afforded by subdivision (e) of the pre-1993 version of Rule 4, one adopting state law bases for extraterritorial service and the other referring to federal statutes authorizing service anywhere in the country (or beyond). The court in Omni determined that on the facts of that case there was no basis for extraterritorial service under either category and it therefore affirmed a dismissal of the action for want of personal jurisdiction.

The result in Omni was a want of jurisdiction to implead a third-party defendant, a loss felt all the more acutely by the

third-party plaintiff (the main defendant) because what it was seeking was indemnity and it is always a tactical advantage to a defendant to have its alleged indemnitor face the same jury that is being asked to impose a liability on the defendant in the first place.

The court also rejected an invitation that the judiciary undertake to establish a kind of common law of extraterritorial jurisdiction. Note that subdivision (k)(2), treated in Commentary C4-35 below, adopts by rule what the court in Omni refused to adopt through the decisional route.

C4-33. Extraterritorial Service under State Law.

Clause (A) of subdivision (k)(1) replaces the well known and often invoked second sentence of subdivision (e) of the pre-1993 version of Rule 4. It adopts for use in the federal courts all of the bases for the territorial reach of the summons recognized by the law of the state in which the federal court sits.

This takes in all of the forum state's "longarm" jurisdiction, among other things. And Clause (A) does this regardless of the basis on which subject matter jurisdiction may rest in the action. Many lawyers looking to state law to resolve an issue in a federal court automatically assume that they are doing so under the mandate of the Erie doctrine (see Commentary C4-40), which is seen mainly in diversity cases. But this provision adopts state extraterritorial bases for personal jurisdiction in all categories of federal subject matter jurisdiction. The diversity case is of course among them, but so is the federal question ("arising under") case, e.g., State of North Carolina v. Alexander & Alexander Services, Inc., 680 F.Supp. 746 (ED No.Car. 1988), the admiralty case, e.g., W.G. Bush & Co. v. Sioux City and New Orleans Barge Lines, Inc., 474 F.Supp. 537 (MD Tenn. 1977), and the case in which the United States is a party, e.g., United States v. Montreal Trust Co., 358 F.2d 239 (CA2), cert. den. 384 U.S. 919, 86 S.Ct. 1366, 16 L.Ed.2d 440 (1966).

How far reaching this aspect of clause (A) is in a given U.S. district court depends on how far the state in which it sits goes with longarm jurisdiction. There are two kinds of longarm statute. One carves out specific categories of activity, like transacting business in the state, or shipping goods into the state, or contracting to furnish goods or services in or causing tortious injury in or operating realty in the state, etc., and exercises jurisdiction only over claims rooted in such conduct. Illinois (Ill.Ann.Stat., ch.110, § 17) and New York (New York Civil Practice Law and Rules 302) are among the states with that kind of longarm statute. California (Cal.Code Civ.Proc. § 410.10) is among the states with the other kind: the one that authorizes extraterritorial jurisdiction whenever its exercise would be consistent with the requirements of due process in the particular case.

Since procedural due process with its "minimum contacts" doctrine, as pronounced in the leading case on the subject, International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154 (1945), is always on the scene when longarm jurisdiction is attempted, a dual inquiry is needed to test out longarm jurisdiction whenever the defendant raises the issue under the law of a state that does not go to the limits of due process with its longarm statute: (1) does the state statute assume to exercise jurisdiction in the case and (2) if it does, is the exercise consistent with due process? Inquiry (1) drops out with an all-the-way type of statute like California's: the constitutional inquiry is the only one. In point of sequence, the statutory issue is usually resolved first, since a statute that doesn't go all the way and whose requirements are not fulfilled in the particular case mandates a dismissal of the claim and makes a constitutional inquiry unnecessary.

Longarm jurisdiction, when the plaintiff can get it, is of inestimable value in litigation. It means that the plaintiff doesn't have to pursue the defendant; that the plaintiff will realize all of the tactical, economic, psychological, and other advantages of making the defendant come to the plaintiff's selected forum. Hence longarm jurisdiction is a frequent battle arena and nowhere more so than in the federal courts, where the high stakes usually involved in the litigation make the plaintiff try all the harder to spell out longarm jurisdiction and the defendant try all the harder to get out from under it. The battle usually comes on through a motion to dismiss by a corporate defendant--although longarm jurisdiction usually applies to all defendants it is perhaps most often seen against corporate ones--which wheels into court a cart of affidavits protesting that what it did does not fall under the state longarm statute, and if it does then the statute breaches due process. Then the plaintiff comes in with a similar vehicle but with affidavits pointing the other way. In the middle is the U.S. district judge, detoured from other obligations to the task of weighing

the contacts on her longarm scale, battered from use, or, perhaps, from an occasional rap with a hard object when no one was looking. Longarm inquiries are sui generis, very demanding, and almost entirely fact-oriented: did the defendant in this particular case do enough to fall within jurisdiction? Longarm inquiries have been termed "interminable", see Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc., 297 F.Supp. 1149, 1150 (SD NY 1969), but they are every bit as important as they may be monotonous.

Lawyers looking into longarm jurisdiction will find many cases in the Notes of Decisions following these Commentaries, where they weave in and out of the annotations. Even more fertile sources of guidance are the annotations on the particular state longarm statute relied on.

Federal judges applying a state statute will of course deem themselves bound by its scope as the highest state court has construed it. But insofar as a due process inquiry is involved, this being a product of the federal constitution, federal judges determine that issue for themselves.

"Longarm" jurisdiction, as we have been using that term, reaches for a nondomiciliary defendant based on a claim arising out of acts the nondomiciliary is accountable for in the state, but it is not the only kind of extraterritorial jurisdiction imported through clause (A). Any other basis the state exploits is similarly available in the federal court, such as where the defendant is a domiciliary of the state and the state permits service on its domiciliaries anywhere. Under its broadest definition, in fact, "longarm" jurisdiction would apply to that and to any instance in which a court's summons is being served outside the territory in and for which the court was established.

When an appropriate state longarm statute is applicable to permit extraterritorial service under clause (A), exactly how far may the summons go? The answer is, as far as the state statute being exploited allows. If the simple effect of the state statute is to lift state lines as a barrier and thus permit service throughout the universe, then the universe it is for the federal summons, too.

What Constitutional Test When State Longarm Statute Adopted in Federal Question Case?

When a state law allowing extraterritorial service is adopted, through clause (A), for use in a federal action not based on diversity of citizenship, and a due process test of the constitutionality of the jurisdictional exercise is required, which due process clause is to be looked to for the test: that of the 14th or that of the 5th Amendment? A pair of circuit level admiralty cases illustrates a dispute on the point.

Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265 (CA6 1984), says it's the 5th. This means that the test is not necessarily whether the defendant has had adequate contacts with the forum state--the test applicable in 14th amendment cases--but only "whether the ... assertion of jurisdiction unfairly burdened [the defendant] with the requirement of litigating in an inconvenient forum." Still other cases may find a 5th amendment test satisfied if the defendant has had adequate contacts with the nation as a whole, not insisting on anything more local than that. See United Rope Distributors, Inc. v. Seatriumph Marine Corp., 930 F.2d 532 (CA7 1991). (National contacts under a constitutional test will be a more frequent inquiry under the new paragraph [2] of subdivision [k], for which see Commentary C4-35 below.)

The 1981 case of DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (CA3) cert. denied 454 U.S. 1085, 102 S.Ct. 642 (1981), says it's the 14th amendment that supplies the test. The court notes that it may be "anomalous" for a federal court sitting in a nondiversity case to have 14th rather than 5th amendment standards imposed on it, but that this is the doing of Congress, which could simply have allowed national service in all such cases had it chosen to. A divided en banc decision from the Fifth Circuit agrees, disagreeing with Handley and also taking the position that nothing less than state contacts will do for a jurisdictional test even in a federal question case if it is state law that is supplying the authority for extrastate service under the adoptive provisions of what is now clause (A) of subdivision (k)(1). Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415 (CA5 1986), aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404 (1987). The court went so far as to overrule prior cases of its own to the extent they indicated otherwise on the point.

It would seem that it is indeed Congress's wish that is being fulfilled when the 14th amendment is applied in these

instances. It is applied merely because Congress has chosen to offer less in the way of territorial jurisdiction in the case than it might have, and because, instead of spelling out its preferred limits directly, Congress has chosen to act indirectly by imposing voluntarily on the federal courts the restraints that the 14th amendment imposes directly on state courts. Congress has chosen, as the point is sometimes phrased in these instances (see the Rope case above), to have the federal courts march in "lockstep" with the state courts even though the federal courts need not be so shackled and could be released for a much longer march (and for which the new subdivision (k)(2), adopted in 1993, in fact releases them, a point for which we again refer the reader to Commentary C4-35 below.) That would seem to be all that is really happening when, in a federal question or admiralty case, the federal rulemakers leave to clause (A) the determination of how far a federal district court's process can go. In yet another phrasing, the rulemakers have merely provided that state law is to control, and by that route the 14th amendment that governs in the state court under its own steam finds itself in the federal court as well with a little tow from those who make the rules.

C4-34. Extraterritorial Service under Federal Statutes.

The first sentence of subdivision (e) of the pre-1993 Rule 4 made a general reference to federal statutes that permit nationwide service in particular cases, serving essentially as a mere reminder that such statutes exist. The same task is now accomplished by clause (D) of subdivision (k)(1) of the revised rule.

Actually, clauses (C) and (D) do that job together, clause (C) for federal statutory interpleader cases specifically and clause (D) for all other federal sources of authority for nationwide service. Clause (C) is probably superfluous. The source of authority for nationwide service in cases of federal statutory interpleader, 28 U.S.C.A. § 2361, is "a statute of the United States" that would in any event fall within the embrace of clause (D).

There are a number of statutes that authorize service nationwide or beyond, of which § 2361 is just one example. Others may be found in diverse other titles of the U.S. Code. See Wright and Miller, Federal Practice and Procedure §§ 1118, 1125. Finding such a statute in a particular case comes close to doing the whole jurisdictional job on the territorial reach of the federal summons.

Necessity of 5th Amendment "Contacts" Test

There will sometimes have to be a constitutional inquiry. Under the subcaption "What Constitutional Test When State Longarm Statute Adopted in Federal Question Case?" in Commentary C4-33, above, we noted the restrictions the due process clause may impose on a judicial exercise of jurisdiction when a nondomiciliary defendant is served far from the court purporting to exercise jurisdiction. The clause requires a showing of contacts that the defendant has had with the territorial unit in which the court is set up.

When the court exercising the jurisdiction is a state court, it's the due process clause of the 14th amendment that applies, and the contacts must be demonstrated to be with the state. The inquiry in the Commentary C4-33 discussion was directed to situations in which state law was being depended on for its authorization of extrastate service, and the conclusion reached--although conflict on the matter was pointed out--is that when a federal court exercises extraterritorial jurisdiction on the authority of state law, even on a claim arising under federal law, as it does under the adoptive provision of clause (A) of subdivision (k)(1), it's the 14th amendment that applies. This means that the case must be shown to have contacts with the particular state; that a showing of sufficient contacts with the nation as a whole would not do if they can't be zeroed in on the particular state.

Perhaps such an exercise of jurisdiction--an exercise based on a state-law authorization but made in a federal court--could pass a constitutional test based on national instead of state contacts. This would be premised on the assumption that because it is a federal court that is exercising the jurisdiction, the governing provision should be the due process clause of the 5th Amendment instead of the 14th, and the 5th is a national rather than just a state guidepost. While that might be appropriate if the statute or rule at hand were shown to involve an exercise of Congress's national powers, the conclusion of the earlier Commentary is that Congress and its rulemakers had no such intention under clause (A); that by adopting state law as a standard for the jurisdiction of a federal court under clause (A), even on a claim arising under federal law, Congress intended to have the same limitations imposed on the federal court that the 14th Amendment would impose on a state court in that state.

When we turn away from clause (A), however, and arrive at clause (D), the federal court's exercise of territorial jurisdiction is based on a federal, not a state, authorization. Here Congress has not invited any narrowing through the invocation of state law, but is presumably going as far as it can when it authorizes service of process nationwide. Even there, however, there are limits on Congress's power, coming in this instance from the 5th Amendment's due process clause. The nation being the unit in this case, it is generally felt that a showing of the defendant's contacts with the United States suffices under due process criteria without more. See, e.g., Fitzsimmons v. Barton, 589 F.2d 330 (CA7 1979), and United Rope Distributors, Inc. v. Seatriumph Marine Corp., 930 F.2d 532 (CA7 1991). But there is also afoot the idea that more may be necessary, for which see Bamford v. Hobbs, 569 F.Supp. 160 (SD Texas 1983).

While the 5th Amendment is clearly the criterion under clause (D), where state law as a source of jurisdiction is not in the picture at all (as it is under clause [A]), issues may arise about the convenience of the forum even if the defendant can be shown to have the requisite national contacts for jurisdiction.

Matters of convenience are left to the governance of the venue rules. Section 1391(b) of Title 28, for example, the main venue statute in point, is structured to see to it that the action is brought in a district appropriate to the facts: the defendant's residence district, a district substantially involved with the claim, etc. (See the Commentary on 28 U.S.C.A. § 1391.) And § 1404(a), the federal courts' chief entry in the forum non conveniens realm, is always on standby to support a transfer to a more appropriate district if the court sees the one chosen as less fitting.

"Supplemental" Jurisdiction to Support Non-Federal Claim?

Suppose that the plaintiff has a federal claim, and that, under Clause (D) of subdivision (k)(1), there is a federal statute authorizing national service on it. And suppose that the plaintiff also has a nonfederal claim related to it.

If the nonfederal (i.e., state of foreign) claim arises out of the same event that the federal claim does, subject matter jurisdiction of the nonfederal claim can be supported under the doctrine of supplemental jurisdiction, as presently embodied in 28 U.S.C.A. § 1367. (The doctrine codifies as "supplemental" jurisdiction the doctrines previous known as pendent" and "ancillary" jurisdiction. See the Commentary on 28 U.S.C.A. § 1367.) Will the federal statute that authorizes national service also lend to the nonfederal claim the territorial generosity that it offers for summons service to the federal claim? If summons service on the state claim would not be able, on its own, to reach out to every part of the nation, will the wedding that the "supplemental" doctrine conducts for subject matter jurisdiction of the nonfederal claim include personal jurisdiction as one of its bridesmaids? And if the rule intends that inclusion--as the advisory committee note on subdivision (k)(2), treated in Commentary C4-35, below, seems to imply--may it constitutionally do so as a matter of contacts?

Before the 1990 enactment of § 1367, this was sometimes called "pendant personal jurisdiction" (perhaps now to be called "supplemental personal jurisdiction"). It has some support in the cases, see, e.g., In re Penn Central Securities Litigation, 338 F.Supp. 436 (ED Pa. 1972), aff'd sub nom. Robinson v. Penn Central Co., 484 F.2d 553 (CA3 1973).

If supplemental jurisdiction is applicable to offer technical jurisdictional support to the nonfederal claim, but there appears to be a good reason for not entertaining it in the case, the court has broad discretion not to. See "Discretionary Rejection of Supplemental Jurisdiction" in the Commentary on 28 U.S.C.A. § 1367. In view of that discretion, perhaps it won't be necessary, even in respect of territorial jurisdiction, to insist on too technical a construction. If there's any significant doubt about it, the nonfederal claim can simply be dismissed, without prejudice, as a matter of judicial discretion.

If the particular statute relied on for jurisdiction prescribes a method of service, that method should be used in the case. One with its own prescription, for example, is 28 U.S.C.A. § 1391(e), which, expanding venue in actions against federal officers and agencies, also expands territorial jurisdiction as a concomitant and prescribes certified mail as the method of service. If the statute has no service prescription, the usual Rule 4 methods apply.

Since the lifting of state lines is the main attainment of these statutes, we speak in terms of "nationwide" service as if

it were the ultimate gift. It may be greater. Service may reach into foreign countries as well if the statute in point so authorizes "in terms or upon proper interpretation". (The quoted words are those of the advisory committee writing on a 1963 amendment that added subdivision (i) of the pre-1993 Rule 4. The subdivision was addressed to service outside the country, a subject addressed in subdivision (f) of the revised Rule 4.)

Extraterritorial Jurisdiction Under Bankruptcy Rule

Under Bankruptcy Rule 7004(d), a federal summons and complaint may be served "anywhere in the United States". This amounts to a federal provision authorizing nationwide service, and it would avail a plaintiff well who has no longarm basis for extraterritorial jurisdiction against a given defendant under state law but who can nonetheless serve the defendant somewhere in the country.

The rule is clearly applicable to "core" proceedings in the bankruptcy court. ("Core" proceedings are defined in 28 U.S.C.A. § 157[b][2].) Will the rule also be available to subject defendants to nationwide service in non-core cases as well, and in other courts, such as in a case brought in a district court by the debtor against a third party? The Seventh Circuit says yes in an extensive review of the matter in Diamond Mortgage Corp. of Illinois v. Sugar, 913 F.2d 1233 (1990), cert. denied 498 U.S. 1089, 111 S.Ct. 968 (1991). Hence the plaintiffs in Sugar were able to obtain in a district court, under the bankruptcy rule, a personal jurisdiction of the defendants that might not have been available under a state longarm statute, adoptable pursuant to what is now clause (A) of Rule 4(k)(1) of the Federal Rules of Civil Procedure, for want of local contacts.

C4-35. The General Federal "Longarm" Statute, Rule 4(k)(2).

An innovation under the 1993 revision of Rule 4 is paragraph (2) of subdivision (k). It operates when the defendant has had contacts with the nation as a whole sufficient to support jurisdiction along the lines of a "longarm" inquiry (see Commentary C4-33 above), but when there is no federal statute authorizing nationwide service in the case through clause (D) of paragraph (1) nor any state statute that could validly authorize jurisdiction through clause (A) of that paragraph because the defendant's contacts with no single state suffice to invoke it.

Subdivision (k)(2) dissolves all sovereign lines in such a case and allows the service of the federal summons anywhere at all--state, nation, or beyond.

The provision offers this jurisdiction only to claims arising under federal law. It does not support jurisdiction if the claim is based on state law or on foreign law, although the doctrine of supplemental jurisdiction may help for such a claim if there is otherwise a federal claim in the case. (See the discussion of supplemental jurisdiction, separately captioned below.)

Subdivision (k)(2) is a kind of general longarm statute akin to those that some states have adopted, like California, whose statute (Cal.Code Civ.Proc. § 410.10) authorizes extraterritorial jurisdiction whenever its exercise would be consistent with the requirements of due process in the particular case. The U.S. Supreme Court in Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987), was invited to establish such general longarm authority for the federal courts through the decisional route, but rejected the invitation. Subdivision (k)(2) in effect adopts by rule what the U.S. Supreme Court refused to use the common law process to do in Omni.

It must be stressed that subdivision (k)(2) jurisdiction is available only when it is shown that the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state". This means that the availability of jurisdiction in any state court at all can become a bone of contention. The defendant must be a little wary of raising such an issue, however. By raising it, the defendant may be assuming to prove that jurisdiction is available in a given state court.

Who has the burden of proof on the issue? That's always a quagmire. The objection is one that the defendant must raise, but the burden presumably shifts back to the plaintiff to prove jurisdiction whenever the defendant does raise it. If that's to be the case here, will the plaintiff be put to the burden of reviewing the longarm statutes of every state in the union in order to show that none would apply to support jurisdiction?

Requiring that would impose a burden on the plaintiff so great that it could undermine the purpose of subdivision (k)(2). It seems more consistent with the latter to burden the defendant with singling out the state in which the defendant contends that jurisdiction would be available, which is not a task the defendant can turn to happily. It amounts to a concession of jurisdiction in a designated state. Perhaps the defendant had best confine its efforts to trying to show that even its presumably national contacts in the case don't suffice for jurisdiction.

From the plaintiff's point of view, it may indeed be worthwhile to prepare proof of the unavailability of jurisdiction under any state longarm statute, even if it entails a broad and expensive research. It will all depend on the value of the case, and on its merit. If the stakes are high enough, the plaintiff is likely to find the jurisdictional inquiry not such a strain after all.

Apprehensions About Validity under Rule-Making Authority

At the very outset of their notes, the revisors expressed the view that there might be some doubt about the validity of subdivision (k)(2) because of its expansion of jurisdiction. They cited the Rules Enabling Act, apparently referring to subdivision (b) of 28 U.S.C.A. § 2072, which bars the rules from affecting "any substantive right". It is submitted, however, that while the rights affected by subdivision (k)(2) of Rule 4 are obviously substantial, they are not "substantive" in the sense used in the statute, whose mission is to see that the rules are directed to the method--the "procedure"--half of law's procedure/substance duo.

The subdivision (k)(2) mission, however far reaching, is not designed to change in any particular the substantive law to be applied in the action against the defendant, but only to add the federal courts to the list of forums that can hear the action. That the provision was accepted and promulgated by the U.S. Supreme Court and then also got through Congress in any event creates a powerful presumption of the rule's proceduralness that should be hard to overcome. See Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

Nor should the rule be deemed a violation of Rule 82 of the Federal Rules of Civil Procedure, which provides that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts". "Jurisdiction" under that rule is understood to mean subject matter jurisdiction, not personal jurisdiction, and subdivision (k)(2) affects personal jurisdiction only.

Service Within Country as Itself Subdivision (k)(2) Basis?

It is not just the usual "contacts" jurisdiction that will fall within the embrace of subdivision (k)(2), i.e., a case in which the claim is shown to have arisen in the United States. If service is made somewhere in the country on a defendant servable anywhere within national borders, jurisdiction should be just as available against that person as were he served within the borders of a particular state, and without reference to where the claim arose. This is the continuing notion of physical presence within the borders of the territory serviced by the court as a basis for jurisdiction all by itself. It is discussed in Commentary C4-30 above, in the context of jurisdiction predicated on state law adopted under subdivision (k)(1)(A).

If there is a state in which the defendant can be served, and that state--as it is likely to--still exploits this "presence" basis for jurisdiction, subdivision (k)(2) should become inapplicable for that very reason: the availability of jurisdiction under any state's law makes jurisdiction unavailable under subdivision (k)(2).

But suppose that the state--and the only state (call it state S)--in which the defendant happens to be physically present and amenable to physical service has abrogated its physical presence rule about jurisdiction and will not support jurisdiction based on mere local service. Under subdivision (k)(1)(A), this means that neither can the federal court get it from that source. A tentative basis for the invoking of subdivision (k)(2) is therefore established. Suppose further that the claim arose outside the country, meaning that no state's longarm ("contacts") jurisdiction will avail, and that the defendant is not even a citizen, but an alien. Would personal delivery of the summons to the defendant in State S then be permissible under subdivision (k)(2), assuming of course that the case is a federal question case (to which the provision is restricted)? If subdivision (k)(2) means to exploit all the jurisdiction the constitution would allow it in a

federal question case, upon a showing that jurisdiction would not be available in any single state, then in the situation just put there should indeed be jurisdiction, based simply on the defendant's being physically served somewhere in the country.

It would have to be the venue rules, or the venue rules and the forum non conveniens doctrine together, that keep things in balance. (Venue is discussed under a separate caption below.)

U.S. Citizenship as Itself Subdivision (k)(2) Basis?

When defendant D is a domiciliary of State X, that state can exercise personal jurisdiction of D no matter where D is served with the summons, and it makes no difference where the claim arose. That was a basis for jurisdiction that earned constitutional approval even before the International Shoe case (see Commentary C4-33 above) approved general longarm jurisdiction in 1945. The approval of that jurisdictional ground, based in essence on the loyalty the domiciliary owes the state to respond to its processes even if served while temporarily beyond state borders, came in 1940 in Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339.

Again, however, it requires a state statute to invoke such a constitutional authorization, and if a given state doesn't have one, there's none it can lend to a federal court under subdivision (k)(1)(A).

Suppose State X, D's domicile, is such a state: it has no "domicile" basis for jurisdiction. Suppose further that the claim arose outside the country, so that no state's longarm statute would help, and that D is sojourning in France, so that D is not physically present in any state for service. Subdivision (k)(1)(A) might at first seem stripped bare in such a case: it would have nothing to offer at all.

But suppose now that D is a U.S. citizen, and that Congress has enacted a statute making citizens amenable to federal process while on sojourn overseas. Suppose also, of course, that the claim arises under federal law, so that subdivision (k)(2) is at hand to exploit whatever it can as long as the constitution is satisfied. Would it be constitutionally permissible to serve D overseas in that case, and secure personal jurisdiction of D? It would appear that it would. (See Commentary C45-17 on Rule 45 of the Federal Rules of Civil Procedure in 28 U.S.C.A., treating a federal statute, 28 U.S.C.A. § 1783, that predicates extraterritorial subpoena service on the status of the witness as a resident or national of the United States.)

If a special statute or rule of extraterritorial reach based on U.S. citizenship would be valid, then such reach should be permissible without such a special statute: it should be permissible based on the full constitutional coverage that subdivision (k)(2) was intended to afford. As long as the exercise is constitutional, Rule 4(k)(2) says it's permissible.

So, just as domicile in a state would constitutionally support a state court's power to subject a domiciliary to local jurisdiction of a state court through extrastate service even if there's nothing else in the case that would do it, then so should U.S. citizenship support a federal court's power to subject a U.S. citizen to the jurisdiction of a federal court through extranational service, on the authority of subdivision (k)(2) of Rule 4, as long as the claim arises under federal law and as long as there appears to be no state that authorizes jurisdiction under subdivision (k)(1)(A).

That's going the constitutional limit, and that's where subdivision (k)(2) wants to go.

This aspect of subdivision (k)(2)'s potential should prove especially helpful in a case in which a federal statute authorizes service anywhere in the country in the particular category of case, and where subdivision (k)(1)(D) would at first seem the provision in point, but where the federal statute does not appear to allow service outside the country even though it could constitutionally do so on the facts. Subdivision (k)(2) would leap in and allow service on the defendant in the foreign country of his present sojourn.

As under the prior caption, on physical service on a defendant located in the United States, so here with foreign-country service: the venue rules and the forum non conveniens doctrine would have to be depended on to avoid undue injustice or inconvenience.

Corporate "Presence" as Itself Subdivision (k)(2) Basis?

The situation in which the defendant is a corporation doing business in the United States and therefore subject to general jurisdiction nationally, but not doing enough in any single state to subject it to general jurisdiction in that state, should also be ripe for an application of subdivision (k)(2). This is discussed more fully in Commentary C4-36, below.

Venue in Subdivision (k)(2) Case

The venue rules, as set primarily by 28 U.S.C.A. § 1391, govern in a subdivision (k)(2) case as they do in any other. The defendant in such a case is likely to be an alien, however, which for venue purposes includes a corporation or equivalent entity incorporated or formed in a foreign nation. (If the defendant were a U.S. citizen and the resident of a state, or a corporation incorporated by any state, jurisdiction would almost certainly be available under clause [A] of subdivision [k][1] and paragraph [2] would for that reason alone be inapplicable.) Under § 1391(d), any district at all is proper venue in a suit against an alien, which means that in almost all instances in which the plaintiff can base jurisdiction on subdivision (k)(2) of Rule 4, the plaintiff may have a picnic at the venue table, being able to choose any district anywhere in the federal system.

If that broad permission should result in a plaintiff's singling out a district particularly inconvenient to the defendant, the cure will almost certainly have to be § 1404(a) of Title 28, the statute that authorizes a transfer based on convenience and fairness.

Indeed, the court may find the exercise of jurisdiction by any U.S. court at all so unfair to the defendant in a particular case that it may elect to dismiss the case altogether instead of merely transfer it. This would be in the nature of a forum non conveniens dismissal. Authority for such a dismissal survives the enactment of § 1404(a) and is turned to from time to time, especially when it is found that the most appropriate forum for the case would be a foreign one. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).

"Supplemental" Jurisdiction in Subdivision (k)(2) Cases?

Since subdivision (k)(2) applies only to a claim arising under federal law, it can't support an action in which federal subject matter jurisdiction is based on something else, such as diversity of citizenship. Suppose, however, that the plaintiff does have a federal claim, and that it does support subdivision (k)(2) jurisdiction, but that the plaintiff also has a nonfederal claim related to it.

If the nonfederal (i.e., state or foreign) claim arises out of the same event that the federal claim does, it could be supported-in respect of subject matter jurisdiction-as an adjunct of the federal claim under the doctrine of supplemental jurisdiction embodied in 28 U.S.C.A. § 1367. That should also be the case for personal (territorial) jurisdiction under Rule 4(k)(2). See Commentary C4-34, above, under the caption, " 'Supplemental' Jurisdiction to Support Non-Federal Claims?"

If supplemental jurisdiction is applicable to offer territorial support to the nonfederal claim, but there appears to be good reason for not entertaining it in the case, the court has broad discretion not to. See "Discretionary Rejection of Supplemental Jurisdiction" in the Commentary on 28 U.S.C.A. § 1367.

C4-36. The "Corporate Presence/Doing Business" Test.

Before leaving the subject of longarm jurisdiction, something should be said about the so-called "corporate presence" doctrine, to see how it differs from longarm jurisdiction and where it fits in in federal practice generally and under Rule 4 specifically.

Long before longarm jurisdiction arrived on the scene, principally in the International Shoe case in 1945 after a few heralds (like the nonresident motorist statutes) earlier in the century, the corporate presence doctrine was flourishing. The doctrine is in essence a fiction that enables the law to analogize the corporation, which lacks a body, to the

individual, who has one, for the purpose of determining whether the corporation is physically present within the territorial area serviced by the court so as to subject it to service of the process of a local court and, hence, local jurisdiction. It's the corporate counterpart of the oldest of all ways of getting personal jurisdiction over an individual defendant: by serving the individual within the court's territorial area--we'll assume it's the state--while the defendant is physically present there. (See Commentary C4-30 above.)

The presence of the individual is determined by tracing the body down to the feet to see if they are implanted on local terrain. Unable to do that with a corporation, the law did the next best thing: it devised the "doing business" test, the agent of the "corporate presence" doctrine. The test looks at the aggregate of activities being carried on in the state by the corporation through its employees to see if those activities are regular. If they are, the corporation acting on a day to day basis rather than just occasionally, then the corporation is deemed to be as "present" within the state as would an individual be who is standing there. And, as with the individual, this means that the corporation is amenable to jurisdiction on any claim whatever, related or not to the state: under this "doing business" test it is the corporation's physical presence that accounts for jurisdiction, not the relationship that the particular claim bears to the state (as is the case with longarm jurisdiction).

How much activity does it take to spell out a corporate "presence" under this test? The cases are numerous and not all states have identical tests. Some may require more activity for a "presence" holding, some a little less. Inquiries are once again sui generis.

When the case presenting the issue is in a federal court, what test does the court apply? The forum state's? A federal test? In a diversity case it has been settled, after a much publicized dispute on the point in the Second Circuit in Arrowsmith v. United Press Int'l, 320 F.2d 219 (1963, en banc decision), that it is the state test of amenability to jurisdiction that applies. That should all the more clearly be the conclusion in a diversity case today when jurisdiction rests on clause (A) of Rule 4(k)(1), which adopts state law bases of jurisdiction for use in a federal court.

In cases in which federal subject matter jurisdiction rests on the claim's arising under federal law (instead of diversity of citizenship or some other basis), "[t]he contours of amenability ... are more fluid", Terry v. Raymond Int'l, Inc., 658 F.2d 398 (5th Cir. 1981), and there appears to be a leaning toward application of a uniform federal standard. See 4 Wright and Miller, Federal Practice and Procedure § 1075. The thinking is that it would be untenable for a federal court in a federal question case to have to depend on state law to measure its jurisdiction.

But if Rule 4's sponsors--in the aggregate the Advisory Committee and the Supreme Court explicitly and Congress tacitly (it has a veto power under the rule-making procedure, 28 U.S.C.A. § 2072)--are content to have personal jurisdiction even in federal question cases depend on the particular forum state's longarm jurisdiction, then a similar dependence on the state's "doing business" test, if that's what the rulemakers want, is just as logical, and that appears to be what the rulemakers want, as least insofar as their intent can be discerned from the language of subdivision 4(k)(1)(A).

If that were also the construction given to the provision that adopted state bases of jurisdiction under prior law--subdivision (e) of the pre-1993 Rule 4--it could have denied jurisdiction to a federal court in a federal question case in any situation in which the defendant's local presence was sufficient for jurisdiction under a constitutional test but not sufficient under the narrower test elected by the particular state. This would have put it within the power of a state to affect a federal action involving a federal claim merely by adopting a restrictive jurisdictional test, on which the federal court would then have had to depend.

Note how that changes under Rule 4(k)(2), first in the situation just described, and then on an even broader front.

In the situation described, in which a state's "corporate presence" test is too narrow to support jurisdiction even though in a constitutional sense the corporation's local activities suffice for it, subdivision (k)(2) once again appears and fills the gap: it assures the jurisdiction as long as the case is in a federal court and involves a federal claim.

It goes further. Suppose that the corporation's local activities in the state, or in any individual state, do not, and cannot constitutionally, be taken to establish a corporate "presence" under any test--state or federal--and that the

state-law-adopting provision of subdivision (k)(1)(A) could therefore not help at all. But assume that the corporation's activities within the country as a whole show a "national" presence. Subdivision (k)(2) should authorize jurisdiction against the corporation based on that national presence, as long as the claim arose under federal law. And we're not at the end yet.

By analogy to what "corporate presence" based on state contacts accomplishes for a state court, "corporate presence" based on national contacts should accomplish under subdivision (k)(2) for a federal court. A corporate presence when shown to exist under state law supports jurisdiction of any claim against the corporation, related or not to the state. Under the general/specific dichotomy adopted in recent years, in other words (see Commentary C4-30 above), it supports "general" jurisdiction. It's the corporation's physical presence in the state that affords jurisdiction in this instance, not the contacts that the particular claim had with the state, which is the concept of "longarm" jurisdiction. Translated into the framework of subdivision (k)(2), finding a corporation present in the country, although not present in any individual state, should permit the federal court to entertain any federal claim at all against the corporation, even if the claim itself does not arise out of the aggregate national activities of the defendant.

Federal claims arising overseas, in other words, as long as federal law can be constitutionally applied to govern the case under choice of law standards, can also be beneficiaries of subdivision (k)(2) jurisdiction even if the claim has no relationship to the national activities of the corporation on which jurisdiction is based.

This could mean the entertaining of a claim having no roots in the United States whatever, merely because the defendant's overall activities spell out a national presence for the corporation here. (That's just what happens in state practice, too. See, e.g., Bryant v. Finnish National Airlines, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 [1965].) If this seems unfair, then the cure should be a forum non conveniens dismissal, which is a discretionary matter. As a jurisdictional matter, subdivision (k)(2) is in charge, and with its broad constitutional standard it would appear to reach for jurisdiction in this corporate presence situation. Subdivision (k)(2) may not know its own strength.

Resort to the corporate presence test is as a rule necessary only when the corporation is an unlicensed foreign one and the claim sued on lacks local contacts. Domestic corporations are always amenable to local jurisdiction, in the courts of the state of incorporation if nowhere else, and therefore to federal jurisdiction as well through the adoptive provision of subdivision (k)(1)(A). So are foreign corporations that have duly filed to do business in the forum (often with the designation of a state official on whom service may be made in court actions). This reduces dependence on the corporate presence test.

Another reducing factor is of course longarm ("specific") jurisdiction itself: if the claim has adequate longarm contacts under a state statute being adopted by subdivision (k)(1)(A), or under the federal standard newly enacted in subdivision (k)(2), longarm jurisdiction will satisfy and make a "corporate presence" test unnecessary.

Subdivision (l)

C4-37. Proof of Service.

Subdivision (l) governs proof of service, which is required only if service has not been waived. If the waiver of service procedure of subdivision (d) has been used, and succeeds, the waiver itself is filed by the plaintiff. See subdivision (d)(4).

The predecessor provision on proof of service, which was subdivision (g) of the pre-1993 Rule 4, prescribed that the proof of service had to be filed by the plaintiff "promptly", and in any event within the defendant's answering time. That's still a good rule to follow, but the provision explicitly requiring it has been omitted. The consequence of tardiness is not likely to be severe, in any event, in view of the continuance of the provision that failing to file proof of service is not jurisdictional.

If the marshal makes the service, which the marshal does today in only a few instances, see subdivision (c)(2) and Commentaries C4-13 and C4-14, above, the marshal's certificate of service suffices. Service by others requires an affidavit, but it does not have to be under oath, i.e., sworn to before a notary. Under 28 U.S.C.A. § 1746, a declaration

under the penalty of perjury suffices.

The provision stating that a failure to file proof of service doesn't affect the validity of service, and the absence of any rigid time period for the filing of proof of service, means that proof can be put together later, if need arises. It is not a good idea, however, to allow any casualness to creep into the ritual of proof of service. The plaintiff should see to obtaining all needed proof, and that it is filed in court with reasonable dispatch. If the defendant appears and defends without raising a jurisdictional objection, proof of service may of course become irrelevant. But should the defendant raise the objection, such as by motion to dismiss under Rule 12 (see Commentary C4-43), the proof of service will be a relevant (although not necessarily a decisive) paper among the plaintiff's opposing papers. And should the defendant default--not respond to the summons at all--proof of service will of course be an indispensable part of an application for a default judgment.

That subdivision (l) means what it says when it says that the validity of service is not affected by the plaintiff's failure to file proof of service is illustrated in O'Brien v. Sage Group, Inc., 136 FRD 151 (ND Ill. 1991), aff'd 998 F.2d 1394 (CA7 1993), decided on the precursor provision, subdivision (g) of the pre-1993 version of Rule 4. In O'Brien, the plaintiff effected good service but didn't file proof. The defendant defaulted. Many months passed before the plaintiff got around to seeking a default judgment, but the judgment was nevertheless granted, and it stuck. The court would not set it aside; the omission to file proof was held to be no excuse that could justify a default by the defendant.

The lesson is that a defendant can't depend on the plaintiff's proof of service as the source of information about whether service was made. If the defendant doesn't know the facts relevant to service, which is a possibility with any defendant but especially so with a corporate defendant, the defendant has to check into the facts without depending on the plaintiff's proof of service. The defendant can of course ask the plaintiff about it. If for any reason the plaintiff refuses to cooperate, however, by offering the defendant whatever proof the plaintiff has about service, the court is likely to take that into account in determining whether to vacate a default.

Of course, if the defendant was never served at all, not only will the default be vacated; the action will be dismissed as well. But if the defendant has any inkling that the plaintiff is claiming that the defendant was served with process, the defendant is put on notice to inquire further, and failing to, with or without help from the plaintiff's proof of service, runs the risk that the defendant will be defaulted and that the default will not be vacated.

If a dispute arises about whether service was made, the plaintiff contending it was but the defendant denying it, the proof of service of course takes on special importance. This was not a significant problem, or in any event not a frequent problem, when the marshals were the servers. The marshal's return was virtually inviolable and defendants either didn't bother contesting it or usually lost when they did. But the 1983 amendment of Rule 4 superseded the federal marshal with the private process server--the 1993 revision continues that--and case law has yet to define the extent to which the presumption of regularity that accompanied the marshal's proceedings will be appended to those of a private process server.

It was said in Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 FRD 48 (ND Ill. 1989), that there is "no reason why a return of service executed by one other than a United States Marshal should be given any less weight" (see Commentary C4-13 above), and perhaps that attitude will ultimately prevail. But if there is a serious dispute between the plaintiff's process server and the defendant about whether service was made, the plaintiff may find life more pleasant--should the defendant prevail in a fact contest on the point--if the plaintiff knows that the statute of limitations is still alive for a new action. (That's what we mean by the admonition to Leave Time for Trouble, the caption of Commentary C4-46 below.)

The most extensive discussion of the issue since the 1983 amendment took the marshals out of process service appears in FROF, Inc. v. Harris, 695 F.Supp. 827 (ED Pa. 1988). The court in FROF stopped short of a complete equation between private server and marshal, and may even be regarded as hinting that it would not buy such an equation if it were required to decide the issue now (which it didn't have to do in FROF), but it did hold that the defendant's mere assertion that he was not served will not suffice to refute even a private process server's return. The court said that a defendant seeking to overcome the return will have to introduce additional evidence of some kind, such as the affidavits of third persons or "receipts that placed him elsewhere at the time process was allegedly

served".

Special provisions, part of them previously found in subdivision (i) of the pre-1993 Rule 4, are made by the present subdivision (l) for proof of service made in a foreign country. These coordinate with subdivision (f), which supplies the methods of service that may be used abroad.

If service is made pursuant to the Hague Convention (for which see Commentary C4-24) or pursuant to any other treaty as recited by subdivision (f)(1), the proof of service shall be in whatever form the treaty authorizes. Under the Hague Convention, for example, each subscribing nation is required to designate a "Central Authority" through which service may be made, and Article 6 of the Convention requires the authority so designated to complete and forward to the plaintiff a "certificate" attesting to the service.

It has been held that the authority's failure to return a proper certificate is not to be imputed to the plaintiff and so cannot by itself vitiate the service. Fox v. Regie Nationale des Usines Renault, 103 FRD 453 (WD Tenn. 1984).

If service is made by the methods prescribed in paragraphs (2) or (3) of subdivision (f), a receipt signed by the addressee is proof of service, and if there's any trouble about securing such a receipt the plaintiff may seek a court order permitting some other kind of evidence of delivery to the addressee. An affidavit of a person who can state on knowledge that the addressee received the summons, for example, should be acceptable to the court.

Proof of service can be amended if occasion should arise to make it necessary or helpful. Subdivision (l) concludes with a specific authorization to that effect. It was part of a separate subdivision on amendment--subdivision (h) of the pre-1993 Rule 4--which permitted amendment of the summons as well as proof of service. (The provision allowing amendment of the summons was made part of subdivision [a] of the current Rule 4.)

Subdivision (m)

C4-38. The 120-Day Time Limit on Service.

Before 1983 there was no arbitrary time limit for summons service after the filing of the complaint. A kind of due diligence standard was applied, and it was applied flexibly. As long as the delay was not outrageous, the courts, when an issue of tardiness came before them, were disposed to allow late service, or new service to correct some perceived imperfection in the first service. The question the courts preferred to ask was whether service could yet be made, or be made right. See, for example, the Fifth Circuit's 1959 opinion in Stanga v. McCormick Shipping Corp., 268 F.2d 544, cited approvingly by the Second Circuit more than a decade later in Grammenos v. Lemos, 457 F.2d 1067 (1972). This was a healthy attitude. That the marshals were the main process servers, which they were before 1983, didn't hurt. It supported a tacit if not explicit presumption that things were proceeding reasonably.

With the removal of the marshal as the general process server in federal practice--the main purpose of Rule 4's 1983 amendment--it was thought advisable to put some kind of stated cap on the time for serving the summons. Subdivision (j) of the 1983 version of Rule 4 did that, adopting a 120-day time period, measured from the complaint's filing. The substance of that requirement is carried forward in subdivision (m) of the 1993 revision of Rule 4.

The 120 days--that's four months--seems more than enough. Given the vagaries of litigation, however, it can frequently prove insufficient. And if it appears to be generous, its very generosity may prove the plaintiff's undoing, lulling the plaintiff into casualness until the bell is about to ring. If the period lapses when the statute of limitations is near at hand, the result can be disaster. (So enmeshed is this 120-day period with the statute of limitations, in fact, that a separate Commentary, C4-40, is devoted to the subject.)

The 120-day period is not absolute; the court has the power to extend it. Whether a showing of good cause is necessary for the extension, and what qualifies as "good cause", is also the subject of a separate Commentary, C4-41, below.

Since Rule 4(m) itself empowers the court to extend the time, the plaintiff can seek the extension pursuant to that rule,

or perhaps that rule and Rule 6(b) combined--Rule 6(b) is the general provision empowering the court to extend time periods--either by motion or by way of opposing the defendant's dismissal motion. For several reasons, psychology among them, when the plaintiff knows that an extension will be needed it is best that the plaintiff take the initiative of moving for it instead of saving it for opposition to a dismissal motion.

A dismissal for failure to effect service during the 120 days, or for making service improperly if that's the ground, requires a motion. The passing of the 120 days does not result in an automatic dismissal. (See, e.g., United States v. Gluklick, 801 F.2d 834 (CA6 1986), cert. denied 480 U.S. 919, 107 S.Ct. 1376 (1987), discussed further, below, under the caption about the defendant's waiving late service.) If the motion is made by the defendant, it would of course have to be on notice to the plaintiff. Rule 5(a). If the court is disposed to dismiss sua sponte, which it can do under subdivision (m), the court itself must assure that the plaintiff has notice of its proposed action and a chance to argue against it.

In Smith-Bey v. Cripe, 852 F.2d 592 (1988), the District of Columbia Circuit stressed the requirement that the court give notice when the court is the movant. The purpose of the rule is to assure the plaintiff an opportunity to excuse a delay in service and to appeal to the court's power to grant a time extension. The plaintiff in Smith-Bey not having had such an opportunity, the dismissal ordered by the district court was vacated and the case remanded.

The unserved defendant is most likely to be the defendant who moves the dismissal. (The defendant could have found out about the pending action through a variety of means.) Or a duly served co-defendant might make the dismissal motion, with the argument that the unserved defendant is a party without whom the action should not proceed. See Rule 19.

If the dismissal is granted, it is "without prejudice". This means that it is not on the merits and that the claim cannot be met with the defense of res judicata should it be sued on anew. But if the statute of limitations has meanwhile expired it will be the limitations defense that greets a new action, which will make the case just as dead as a disposition on the merits, and with ever so much less trouble for the defendant. Hence it is to be noted that it is the statute of limitations, almost exclusively, that gives subdivision (m) its tension.

The 120-day period of subdivision (m) doesn't apply when service is made in a foreign country under subdivision (f)--which governs service abroad on individuals and applies to service on the agents of business entities as well through the adoptive provisions of subdivision (h)(2)--or when service is made on a foreign governmental unit under subdivision (j)(1).

The statement that the 120 days doesn't apply to service made abroad can mislead a plaintiff into such total laxity about service that a dismissal can result for not even attempting such foreign service within the 120 days. Otherwise, dilatory plaintiffs with no real intention of making service abroad might just evade the 120-day time limit altogether merely by putting together a showing that the defendant could be served abroad. See the concluding part of Commentary C4-24, above, discussing the Second Circuit's Montalbano case.

Many significant side issues arise in connection with the 120-day time period for service. For convenience of reference these issues will be taken up under separate captions.

The "Good Cause" Provision

The 120-day period is not absolute. It can be extended, or its being missed can be excused. But this requires a court order. The pre-1993 version of the rule required a showing of "good cause" why service wasn't made in time. Under the revised rule there is an ambiguity in the rule's language about whether good cause must be shown in all instances, and according to the notes the purpose appears to be to permit the time extension, or the excusing of late service, even when there is no "good cause" to explain it.

The "good cause" provision is explored at length in Commentary C4-41 below.

Forgiving Pro Se Plaintiffs for Marshal's Omissions

An indulgent attitude towards pro se plaintiffs suing in forma pauperis, especially when they are incarcerated, has been manifest in a number of cases, and it was the apparent purpose of the advisory committee to continue this indulgence, especially when confusion arises about time requirements because of the plaintiff's need to apply for leave to proceed in forma pauperis. (See Commentary C4-12 above.) The notes on Rule 4(m) say that the court should "take care to protect pro se plaintiffs" in that situation.

Special consideration has been given by the courts to those entitled to rely on the marshals for service pursuant to Rule 4(c)(2), which includes those proceeding in forma pauperis. Citing cases in and agreeing with the Second, Fifth, and District of Columbia circuits, the Ninth Circuit held in Puett v. Blandford, 912 F.2d 270 (1990), that

an incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint, and, having provided the necessary information to help effectuate service, plaintiff should not be penalized by having his or her action dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to perform the duties required of each of them under 28 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil Procedure.

A few months later, in Sellers v. United States, 902 F.2d 598 (1990), the Seventh Circuit stated the same proposition, citing the same cases in the same three circuits and now of course citing the Ninth Circuit's Puett case as well. The marshal's failure to carry out the tasks assigned by Rule 4 is automatically "good cause" for forgiving the plaintiff within the meaning of (what is now) Rule 4(m), the court holds.

Take note, however, that this indulgence of pro se plaintiffs who depend on the marshal by no means obtains for the represented plaintiff. Nor, for that matter, does it guarantee unconditional indulgence for all pro se plaintiffs, especially those who have not secured pauperis status. Many a pro se plaintiff has been put out of court through violation of the 120-day requirement.

Service of Complaint That Differs from Filed Complaint Doesn't Satisfy Rule

The requirement that the complaint be served within 120 days after its filing is not satisfied by the service of a complaint substantially different from the one filed. The Ninth Circuit held in in West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (1990), that

service of an incomplete draft complaint which was seven pages shorter than the complaint filed cannot be deemed to constitute compliance with [Rule 4(m)]....

The result was a dismissal as against the defendants so served.

Service by State Law Method Should Be Made Within Federal 120-Day Time Limit

Even if the plaintiff is using a state method of service, as allowed by subdivisions (e)(1) and (h)(1), the plaintiff should of course do everything possible to see that it is carried out within the 120-day time limit imposed on summons service by subdivision (m) of Rule 4. On this point, see, for example, Coutinho, Caro & Co. v. Federal Pacifica Liberia Ltd., 127 F.R.D. 150 (ND Ill. 1989). Service on the secretary of state was the state method relied on in Coutinho. The delivery to the secretary occurred within the 120 days, but the mailing also required by the state statute did not occur until afterwards. The action was dismissed.

Time Limit Applied in Bankruptcy Case

An example of the application of the 120-day time limit in an adversary proceeding in a bankruptcy case appears in In re Johannsen, 82 B.R. 547 (D Mont. 1988). The applicable Bankruptcy Rule at the time adopted FRCP Rule 4(j), the predecessor of Rule 4(m), for use in the court. Rule 4(j) was not violated in this case, but practitioners should note that the potential consequences of a violation can touch bankruptcy proceedings, too.

Operation of 120-Day Period in Cases Removed from State Court

A state court action of which there is concurrent federal/state subject-matter jurisdiction, so that the action could have been brought in the federal court at the plaintiff's option, can as a general rule be removed to the federal court by the defendant. See Commentary C4-20 above. Under 28 U.S.C.A. § 1446(b), the defendant has 30 days for the removal, measured from the service of the "initial pleading" on the defendant, or from the service of the summons if the particular state's practice doesn't require service of the pleading.

In an original federal action, the plaintiff under Rule 4(m) must effect service within 120 days after the filing of the complaint, but suppose that the practice of the particular state court, in which the assumed action is commenced, has no stated time limit or the limit imposed exceeds 120 days. Suppose now that the defendant properly removes the case from the state court during the 30-day removal period following service of the complaint, but that the complaint had not been served until after 120 days had elapsed since the commencement of the state court action. After removal, the defendant moves the federal court to dismiss the action. Should the motion be granted based on Federal Rule 4(m)?

It should not, holds Russo v. Prudential Ins. Co., 116 FRD 10 (ED Pa. 1986). The federal practice does not govern these matters in a case in which commencement and service were already effected satisfactorily to state law before removal. The main provision in point is Rule 81(c), which provides that the Federal Rules govern procedure in removed actions only "after removal".

If the service had been untimely in the state practice, and the point was still alive for the defendant to raise in the state court at the moment of removal, it can still be raised in the federal court after removal, but it will be judged by state, not federal, procedural law. (Even an objection to the personal jurisdiction of a state court can be made the basis for a federal dismissal motion after removal as long as the objection had not been waived in the state court before removal. It may even have been one of the aims of the removal to have a federal rather than a state judge pass on the jurisdictional question.)

There are instances in which the 120-day time period of Rule 4(m) may be called into play in a removed action. Suppose, for example, that after the removal the plaintiff seeks to add an additional person as a defendant, and that the court permits this, a fresh summons being issued accordingly. If the court does not prescribe time limits for the service of the new summons, the 120 days of Rule 4(m) should apply, measured from issuance of the new summons, or from the filing of an amended complaint that reflects the addition of the new defendant. Possible difficulty in determining the starting time of the 120 days in this situation can be resolved by the court.

A related point on the interplay of the removal statutes and the 120-day time period of Rule 4(m) concerns the situation in which P plans to sue several defendants in state court. After serving D1 but before serving D2, D1 removes the case. For purposes of Rule 4(m), when does the 120-day period start for service on D2? Motsinger v. Flynt, 119 FRD 373 (MD No.Car. 1988), holds that it starts from the removal of the case by D1, not from any act occurring in the state court action before removal.

Dismissal under Rule 4(m) versus Dismissal for Failure to Prosecute under Rule 41(b): Is Either Res Judicata?

Smith-Bey v. Cripe, 852 F.2d 592 (DofC 1988), noted earlier, recognizes that a delay in service of such a nature as to provoke a dismissal under what is now Rule 4(m) may additionally, or alternatively, amount to a failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure and warrant a dismissal under that provision. But the court says that a Rule 41(b) dismissal is appropriate "only when there is no reasonable probability that service can be obtained" or when there has been "[a] lengthy period of inactivity".

Ordinarily it should make no difference to a dismissed plaintiff whether the dismissal is captioned under the one or the other of the two provisions. If the statute of limitations is dead, a dismissal under either provision would be fatal.

And it should make no difference even if the statute of limitations is still alive: which provision grounds the dismissal should be irrelevant because a new action would ordinarily be permissible under either of them. A Rule 4(m) dismissal is "without prejudice", which is a shorthand way of saying that it's not on the merits. And a dismissal for a

delay in service under Rule 41(b) is a dismissal "for lack of jurisdiction" and under the explicit terms of 41(b) does not operate as "an adjudication upon the merits" for that reason. See, e.g., Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F.2d 357 (CA3 1983) ("a dismissal for want of in personam jurisdiction is not a judgment on the merits of the cause of action itself"). In either instance a new action would presumably be allowed as long as the statute of limitations is still alive.

But there may indeed be a difference based on another of Rule 41(b)'s explicit provisions. In prescribing that a jurisdictional dismissal is not on the merits, Rule 41(b) empowers the court to specify "otherwise". If such a power does not exist under Rule 4(m), but exists and is exercised under Rule 41(b) in a case in which the statute of limitations is still alive, a Rule 41(b) dismissal specifying that it is "with prejudice", or "on the merits", or using any other term to the same effect, can indeed mean an end to a case even though the case might have survived for a new day in court had Rule 4 alone grounded the dismissal.

Effect of Local Rules Requiring Service in Fewer Than 120 Days

According to Rule 83 of the Federal Rules of Civil Procedure, a local rule inconsistent with one of the Federal Rules of Civil Procedure would have to give way. Some districts have found power to sidestep this Rule 83 pronouncement, however, by relying on the powers presumably emanating from the statutory instruction that each district develop a "civil justice expense and delay reduction plan". (See 28 U.S.C.A. §§ 471-473.) The Northern District of New York, for example, in Appendix A of its rules, has cut the time for serving the summons from 120 to 60 days on the apparent authority of the cited provisions.

The plaintiff should of course follow the local rule and make service within the shorter time stipulated by the local rule, if at all possible. If the service is not made within that time, but nevertheless within the 120 days allowed by Rule 4(m), and there is any decent ground in the picture at all to explain the delay, the court should be especially sensitive to applying the broad discretion conferred on it by Rule 4(m) to accept the late service.

Defendant Can Waive Plaintiff's Delay in Service

Assume that P fails to make timely service by proper means, but believes the service was proper and takes a default judgment against D. D wants to exploit the service defect. D's remedy would be a motion to vacate the judgment and dismiss the action for insufficiency of service. If D concedes service but just wants a chance to defend on the merits, D's motion would be to vacate the judgment and open the default. Confusing those steps by moving the vacatur without asking for the dismissal can result in an inadvertent waiver of the objection to service.

A waiver of the objection will be the result a fortiori when D stipulates with P to accept the service on the condition that the default be vacated. See, e.g., United States v. Gluklick, 801 F.2d 834 (CA6 1986), cert. denied 480 U.S. 919, 107 S.Ct. 1376 (1987).

In Gluklick, D made the stipulation and afterwards moved to dismiss because the service had not been made within the 120-day period. Because of the stipulation, the court estopped D from invoking the time restriction. It held that the restriction is not self-executing, i.e., that the expiration of the period without proper service does not result in some kind of automatic dismissal, but must await a court order of dismissal, which never came about in this case because of D's waiver.

Further points about the 120-day time period of Rule 4(m) are met in the next three Commentaries, C4-39 through C4-41.

C4-39. Applying the 120-Day Time Period to Third-Party Claims, Counterclaims, Etc.

In setting forth its time limit, the time provision of the pre-1993 Rule 4, which was subdivision (j), referred to "the party on whose behalf" service is required. The reference was intended to assure that the time limit would govern summons service by any party required to effect summons service. That's usually the plaintiff, of course, but it would also take in others, such as a defendant bringing a third-party claim under Rule 14.

The revised rule refers only to the plaintiff, and it is merely assumed that it will apply to any summons service required to be carried out by any party.

There may be occasion to apply Rule 4(m) and the 120 days to a counterclaim or cross-claim. That would be the situation, discussed in Commentary C4-31, in which the defendant is adding an additional party to the claim, as permitted by Rule 13(h). Doing that requires summons service on the new party, which would invoke Rule 4(m) and its 120 days. The 120 days would presumably start from the answer's filing in court, but if the service of the answer on some already-joined party precedes the filing, the defendant would do well to count the 120 days from that service.

The same points can be made about third-party practice (impleader) under Rule 14. Impleader requires summons service under Rule 14(a). The impleading defendant (third-party plaintiff in impleader context) should see to it that the summons is served on the third-party defendant within 120 days after filing the third-party complaint in court. To implead of right--i.e., without leave of court--under Rule 14(a) requires the defendant to file the third-party complaint "not later than 10 days after serving the original answer", so the defendant who would implead another has in effect 130 days in which to serve the third-party summons and complaint, measured from the time the defendant "serves" the original answer. That's one reading, in any event. It is suggested that even if these assumptions about time are technically correct, defendants do well to proceed expeditiously so that they come nowhere near the end of the 120-day period by any measure.

The defendant should keep in mind that the plaintiff is not going to suspend all proceedings just to accommodate the defendant's plan to join additional parties. And when the defendant deems an additional party necessary, it is likely to be a situation in which the sooner the party is joined, the more comfortable things will be for the defendant. Hence, even if the defendant technically has 120 days for the joinder, the defendant should try to carry out the service promptly.

Additional persons may be ordered joined as parties even after the litigation is under way. See, e.g., Rules 19 and 21. The court in directing such additional joinder should include directions about how and when service on the new party is to be made. Absent appropriate directions, the party effecting summons service on the new party--there being no clear-cut filing of a pleading from which to measure the 120 days--might do well to measure it from the entry of the court's order directing the joinder, if not some earlier time.

C4-40. Interplay of 120-Day Period and Statute of Limitations; Special Problems in Diversity Cases.

Under Rule 3, the formal "commencement" of a federal action occurs when the complaint is filed. For limitations purposes the summons, issued thereupon but served later, is deemed to relate back to the complaint's filing. Thus, if the complaint is filed on or before the last day of the applicable statute of limitations, whatever the period may be--for what it may be see Commentary C4-45 below--the action is timely even if the summons is served later (but of course within the 120 days). That's the general rule in all but diversity of citizenship cases, where the demands may be greater and to which we return with a special warning in a moment.

Taking a closer look, precisely how does the 120-day period figure with respect to the statute of limitations? Assume throughout that the complaint is filed on the last day for commencing the action. If the summons is served within the 120 days following, the service should relate back to the complaint's filing without difficulty. If it is not served within the 120 days, but the period is extended for "good cause" (see Commentary C4-41 on that point), the extension should supply the needed link back to the complaint's filing, and there, too, the action should be preserved as timely.

If no extension is granted, the result will likely be a dismissal, and it will now be too late to sue over. It should therefore be plain to all lawyers that playing loose with the 120 days after having delayed suit until the eve of the expiration of the statute of limitations can easily have fatal consequences. Plaintiffs who manage to file the complaint just under the wire will have to atone with punctilio now for the laxity of which they were guilty before.

If the action is based on diversity of citizenship, the plaintiff must double the precautions: in the diversity case Rule 3 does not govern the moment of "commencement" for limitations purposes. State law does, under the doctrine of Erie

R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), as the Supreme Court explicitly held on this point in Walker v. Armco Steel Corp., 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980). Hence, if under forum state law the action is not deemed commenced until, for example, the summons is served on the defendant, the diversity plaintiff must be sure not only to file the complaint within the applicable statute of limitations, but also see to it that the summons is actually served on the defendant before the statute expires. Here the plaintiff can't rely on the relation-back that would help in a non-diversity case. Assuming a forum state with such a rule (requiring actual summons service to toll the statute of limitations), take this diversity example:

Today is the last day of the statute of limitations. P files the complaint and gets the summons issued today. Service is made on the defendant a month from today, well within the 120-day period of subdivision (m). No matter. State law says the action is too late, and state law governs. Extending the 120 days won't help. It's not the failure to serve within the 120 days--the requirement of Rule 4(m)--that has undone the plaintiff here. It is state law, which must be satisfied in addition to the Rule 4(m) requirement.

The diversity plaintiff must see to it, in other words, that the day on which the summons is served is within 120 days from the time the complaint was filed (the federal requirement) as well as within the applicable statute of limitations (the state requirement). These and related problems--including resort the diversity plaintiff may sometimes have to state tolling provisions in a tight spot at commencement time--are discussed more extensively in the Commentary on § 1658 in Title 28 of U.S.C.A.

When state law deems an action commenced at some different time than the filing of the complaint, the law will usually be found in a code of some kind--a compilation of statutes or rules. Converse v. General Motors Corp., 893 F.2d 513 (CA2 1990), makes the point, however, that the state law will govern even if it comes from court decisions instead of a code. In Converse, where the state involved was Connecticut and the point came from case law, the result of the action was nevertheless a statute of limitations dismissal.

A federal diversity court has to apply a whole variety of state procedural rules governing time elements that touch the statute of limitations. Even if state law has the equivalent of FRCP Rule 3 in providing that filing equals commencement, for example, but has special time requirements--different from the federal 120-day period--for linking the summons to the filing, the federal court must apply the state restrictions. See, e.g., Cambridge Mut. Fire Ins. Co. v. City of Claxton, 720 F.2d 1230 (CA11 1983).

The rule that state law governs the moment of commencement applies only in a diversity case. It does not govern when subject matter jurisdiction is founded on the claim's arising under federal law, where Rule 3 remains in charge. See footnote 4 in West v. Conrail, 481 U.S. 35, 107 S.Ct. 1538 (1987).

Time Spent on Seeking "Waiver" Comes Out of the 120 Days

The plaintiff intent on using the waiver of service procedure of subdivision (d) of Rule 4 must keep a sharp eye on subdivision (m)'s 120-day requirement. There are several points to coordinate here.

First is that the waiver is not a pre-commencement procedure. The waiver procedure can be invoked only after the complaint is filed. Subdivision (d)(2) says the plaintiff may notify the defendant of "the commencement of the action", and there is of course no commencement unless the complaint is filed. The form for the eliciting of the waiver, Official Form 1A, makes this even clearer.

Second is that the filing invokes the 120-day time period that Rule 4(m) allows for summons service. Any time taken up by the waiver procedure will come out of the 120 days, shortening the time that the plaintiff will have for summons service if the waiver doesn't materialize.

Third is that the waiver procedure will need time. The sending of the waiver request will take some time, and of course the defendant has to be given at least 30 days, from the time the waiver is "sent", in which to respond to the request. So prescribes paragraph (2)(F) of subdivision (d). Then, even if the defendant responds favorably, it will take some time for the waiver to travel back to the plaintiff.

All of this time comes out of the 120 days. If the waiver does not materialize, the plaintiff may have precious little of the 120 days left when the plaintiff finally gives up hope of getting it back. The plaintiff who sees the deadline nearing had best just give up on the waiver and arrange for formal service promptly.

The lesson is that a plaintiff using the waiver procedure must not dally. Plaintiffs who wait a month or two before using it, and another month or so waiting for it to come back, only then turning to another method when the waiver doesn't materialize, may find themselves out of time under Rule 4(m).

Of course, the court should be able to take into consideration the time spent by the plaintiff in a bona fide attempt to secure a waiver, and grant an extension of the 120 days for that reason (see Commentary C4-41 below), but that depends on an exercise of judicial discretion and the plaintiff will be more comfortable seeing to the satisfaction of the 120-day period than having to impose on the court with a request to extend it.

Interplay with Special Time Periods Applicable in Given Case

A number of cases illustrate how the 120-day period of Rule 4(m) can become intertwined with another time requirement applicable in a given case under a special statute, creating ambiguities that a plaintiff may resolve the wrong way, as happened, for example, in Amella v. United States, 732 F.2d 711 (CA9 1984).

A statutory requirement in an admiralty case provided (46 U.S.C.A. § 742) that when the United States is the defendant, service must be "forthwith". The plaintiff in Amella nevertheless assumed that the 120 days of (what is now) Rule 4(m) would apply, and that service any time within the 120 days would be "forthwith" enough. According to Amella, the plaintiff guessed wrong. The plaintiff made service on the 63d day after filing the admiralty libel but the court, acknowledging the "hidden reef" that the "forthwith" requirement could be in admiralty cases, held the service too late.

Addressing the interplay of Rule 4(m)'s 120 days and the "forthwith" requirement applicable in Amella under the special admiralty statute, the court held that Rule 4(m) merely sets the expiration of 120 days as "a presumption of unreasonable and dilatory delay". By doing so, "it fixes an outer limit on service but does not indicate what lesser time period qualifies as forthwith".

In an extensive review of the point, the Third Circuit in Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62 (CA3 1985), disagreed with the Amella case (and the Second Circuit as well, which the Ninth followed), finding that the "forthwith" requirement is not a jurisdictional one and is superseded by the Rule 4(m) 120-day period.

The foregoing merely illustrates the conflict. In circuits not on record on the matter, with respect to the "forthwith" requirement here or any similar requirement in any other case, it is obviously the safer course to make the most conservative assumption about what governs.

The six-month time period of 29 U.S.C.A. § 160(b), applicable in certain labor disputes, also occupied several circuits and produced a similar conflict. The Eleventh held that service must be made within the six months or the claim is barred. Howard v. Lockheed-Georgia Co., 742 F.2d 612 (CA11 1984). The Sixth Circuit, collating the decisions, went the other way, holding that only the filing of the complaint need occur within the six months; that service made within the following 120 days is allowable. Macon v. ITT Continental Baking Co., 779 F.2d 1166 (CA6 1985), cert. denied 481 U.S. 1013, 107 S.Ct. 1885 (1987).

The admonition to assume the worst and act quickly applies not only to the six-month provision of 29 U.S.C.A. § 160(b), which happens to put in an appearance more often than similar statutes get a chance to do, but to all such statutes that have a time provision that creates even the appearance of a competition with Rule 4(m) and its 120-day period. If the statute of limitations is anywhere near expiring, do all within the time allotment of the special statute. Having filed the complaint within that time, don't then sit back on the assumption that you now have the 120 days of Rule 4(m) in which to make service. Once the "statute of limitations" label gets appended to an issue, all mercy leaves

the scene.

C4-41. "Good Cause" for Time Extension.

The 120-day period of subdivision (m) is not absolute. The court can extend the time, or excuse the lateness, with a court order.

But on what ground should the court do so? There is an ambiguity on the face of Rule 4(m) under the 1993 revision. At one point the rule says that if the time is missed the court "shall" dismiss the action "or direct that service be effected within a specified time"; nothing about good cause is said at that juncture. But in the follow-up "provided that" clause, a separate statement is made about what the court "shall" do, and here the direction is that the court "shall extend the time" for serving the summons "if" the plaintiff shows good cause for the delay.

So there are two "shalls" on the subject of excusing the tardiness, one requiring good cause and the other not. The advisory committee notes do not explain the ambiguity, but they do confirm it with the statement that the court can excuse a subdivision (m) omission "even if there is no good cause shown". What is and what is not "good cause" as pronounced in the cases on the predecessor provision of subdivision (m)--which was subdivision (j) of the pre-1993 version of Rule 4--is surveyed in a series of separate captions, below.

If the problem is not that service wasn't made, but that it was made defectively, the court can either dismiss the action or merely quash the service. The difference is that the dismissal requires a new action and poses limitations' problems, while a mere quashing permits new service with a relation back to the time of the filing of the complaint in the present action. The step to take is in the court's discretion. It was usually held under old Rule 4(j) that the absence of a good cause showing by the plaintiff should result in a dismissal instead of a mere quashing. See, e.g., Bryant v. Rohr Industries, Inc., 116 FRD 530 (WD Wash. 1987).

In an early case, involving mail service under the old subdivision (c)(2)(C)(ii) of the pre-1993 Rule 4, the defendant's failure to return the acknowledgment called for by that provision was cited as a reason for rejecting the defendant's argument about the plaintiff's delay. Prather v. Raymond Constr. Co., 570 F.Supp. 278 (ND Ga. 1983). The same considerations would seem to bear on the equivalent situation under current Rule 4(d), when the plaintiff has elicited a waiver of service but the defendant has not volunteered it. Indeed, given the greater leniency on the "good cause" issue that appears to have been embodied in current Rule 4(m), it can be argued that anything that qualified as good cause under subdivision (j) of the old rule should a fortiori qualify as such under subdivision (m) of the current rule.

However that may be, the plaintiff is still safer by not expecting any special judicial indulgence based simply on a defendant's refusal to return a waiver: the option is entirely up to the defendant and the only consequence the rule anticipates for a defendant refusing a waiver involves costs. See Commentaries C4-17 and C4-18, above.

Effect of Plaintiff's Responsibility for Process Server

A more subtle and therefore more insidious problem for the plaintiff under the "good cause" requirement of subdivision (m) is the effect of the provision of subdivision (c)(1) that makes the plaintiff "responsible for service". This aspect of subdivision (c)(1) was first adopted in the 1983 revision of Rule 4, where it was part of subdivision (a).

It will continue to be an issue. In this writer's article on the 1983 revision of Rule 4, in 96 FRD 88, 109-113, under the caption, "Effects of a Private Process Server's Omission or Wrongdoing", the question was asked whether the tardiness or omission or even dishonesty of the process server, resulting in late service, or no service at all, must always be laid at the plaintiff's door. Can it ever be "cause" for a subdivision (m) time extension? We noted that it would be unfortunate if the plaintiff and the process server were to be deemed so fused that the server's errors could not be cited by the plaintiff to earn a time extension; that such a reading would encourage defendants to pounce on every nook and cranny of the process server's procedures by raising issues from which the federal courts were largely insulated when the marshals were doing the serving.

While a case will appear from time to time holding that the plaintiff's lawyer is not to be charged with the process

server's negligence, e.g., Smith v. Sentry Insurance, 674 F.Supp. 1459 (ND Ga. 1987), the more likely result in most cases is that the plaintiff will indeed be charged with it. That, alas, is what has happened in many cases--many of them noted under the diverse captions set forth below.

Never, before 1983, when the marshals were largely relieved of summons service, have the federal judges had to spend so much time and effort adjudicating problems of summons service and its timeliness. A defendant not prone to take on a marshal feels much less hesitation about crossing swords with a private process server. And an issue that can earn the defendant a dismissal at a time when it would now be too late for the plaintiff to bring a new action is too irresistible for the defendant to withhold, even where the chance of success on the issue is slim.

Lawyers otherwise prone to a casual reading of a process server's affidavit must read it more closely under Rule 4, and, if need be, corroborate its recitations. If the statute of limitations is near, mark well the last day and try to secure the defendant's appearance before it arrives. Try to find out, in any event, if the defendant has any objection based on service, and if so what it is. Don't just put the affidavit into the case file. That kind of luxury is restricted to lawyers who sue with years or at least months to spare. A plaintiff's lawyer might also consider the possibility, mentioned in Commentary C4-13 above, of using a bonded process server if one can be found, thus having a solvent surety to fall back on for damages should the process server's mistake bring damages to either the plaintiff or the plaintiff's lawyer.

Cases on what does and what doesn't qualify as "good cause" for a time extension are all over the lot. There is no way to reconcile all of them, but it is important that the plaintiff's lawyer have at least a perspective on the variations that can be met from court to court, case to case, and judge to judge. We set forth a sampling of them below, using separate captions for convenience of reference. And we set them forth with an important preliminary warning: that if a given excuse appears to have been accepted, the reader should not assume that another judge would also have accepted it. The examples--even those of excuses the court accepted in the given case--are by no means intended as a list of acceptable excuses generally. The happiest plaintiff's lawyer is the one who never has to negotiate the list. That would be the lawyer who has left so much time for trouble that even if the worst happens, and the case is dismissed for want of an acceptable excuse for a service delay, there will still be time left under the statute of limitations for a new action. To that point we have allotted a special Commentary, C4-46 below, and made it the note on which the Commentaries conclude.

Is Potential Statute of Limitations Bar an Automatic Ground for Excusing a Subdivision (m) Failure?

The most damaging Rule 4(m) dismissal, and in a real sense perhaps the only serious one, is the dismissal that occurs when it would now be too late under the statute of limitations to start a new action. The advisory committee notes make reference to the situation. They say that "[r]elief may be justified ... if the ... statute of limitations would bar the refiled action", but one can't determine whether that by itself is supposed to be "good cause" for an extension, or merely what the committee feels should be an acceptable reason for extending the time even if the plaintiff can't show any "good cause" for letting things go this far.

Under either conclusion, it would appear that every failure to serve within the 120 days "shall" be excused by the court as long as it is shown that the statute of limitations is now dead. Plaintiffs can live with that, and happily ever after, but is that really what the rule intends? Is the extent of the delay to count at all? Is a "good cause" for the delay, which we assume means a good reason for the delay, to play any role when the statute of limitations is on the scene? Or must a subdivision (m) application be granted--as long as the complaint was filed within the original statute of limitations--every time it appears that a Rule 4 dismissal would now bar a new action?

Perhaps the assumption we made above, that good "cause "means a good reason for the delay, is not what the rule means to say. Rather than being addressed to the excusability of the plaintiff's conduct, perhaps it's just addressed to the impact that the dismissal will have. If that was the intention, the judges would have welcomed a brighter light on the subject. Plaintiffs must bear in mind that in the experience of the law generally, "cause" implies a reason and "good cause" a good reason, a standard under which judges have not readily forgiven what they perceive as mere laxity or casualness.

What a place for an ambiguity! Here stands the plaintiff at the edge of the grave, and the rule doesn't tell the court

whether to offer the plaintiff salvation, or a push.

Plaintiffs should certainly not factor into their plans any assumption about judicial generosity about extending the time for an unexcused late service merely because the statute of limitations would now bar a new action. On the contrary, it is on that scene that the plaintiff's efforts should be at their most intense.

The further paradox, if the prospect of a statute of limitations barrier mandates the grant of a time extension to save the plaintiff's case, is that the only time it would be proper for a court to refuse a time extension is where the statute of limitations would not bar a new action. That would in turn mean that a dismissal for failure to satisfy subdivision (m) will always result at worst in the inconvenience and expense--and not a very great expense--of having to start a new action.

All the notes really say is that the passing of the statute of limitations "may" justify a time extension, along with the statement that time can be extended "even if there is no good cause shown". That combination creates a void, not a guide. Must the extension be granted automatically merely because the statute of limitations has now expired? If so, and if good cause means a good reason, then subdivision (m) is indulging the plaintiff for the last kind of conduct one would put down as "good cause": waiting to the last minute to make service and then being careless about carrying it out.

A SAMPLING OF EXCUSES TENDERED TO SHOW "GOOD CAUSE"

Plaintiff Must Assume Burden of Locating Defendant

Geiger v. Allen, 850 F.2d 330 (CA7 1988), shows judicial impatience with plaintiffs who have delayed service because they couldn't locate the defendant and who can't show the court that they made a diligent effort to. The court in a footnote lists a few of the things a diligent plaintiff might have tried, including an inquiry at the post office or at the defendant's place of employment, or an interrogatory served on someone who might know something about the defendant's whereabouts. "Failing all else", the court concluded, the plaintiff could simply "have moved for an extension of time under Federal Rule of Civil Procedure 6(b)". (The motion after the 1993 revision could be predicated directly on Rule 4[m].)

"Half-Hearted" Efforts at Service Won't Do

"Half-hearted" efforts to effect service are not acceptable. Lovelace v. Acme Markets, Inc., 820 F.2d 81 (CA3), cert. denied 484 U.S. 965, 108 S.Ct. 455 (1987). In Erickson v. Kiddie, 1986 WL 544 (ND Cal. 2/24/86, Patel, J.), many efforts were made to effect service, but the court was not convinced that the place of service was appropriate and required further data on the subject. Said the court:

Plaintiffs must also state the circumstances and nature of their attempts beyond simply stating the dates and times of attempted service.

From the Erickson case comes the lesson that pro forma lists won't do; that if a delay is to be excused, it will take some detailed affidavits and other supporting evidence to earn a "good cause" time enlargement.

Hire a "Tracer" to Locate Defendant?

Quite in contrast to the plaintiff's laxity in the Geiger case, above, is the effort to locate the defendant made in National Union Fire Ins. Co. v. Barney Associates, 130 FRD 291 (SD N.Y. 1990). L, the plaintiff's lawyer, who found out that the defendant had changed his address, had its usually dependable process server hire a tracing company and kept in touch with the tracer's progress. When the end of the available time was approaching, L prepared a motion for an enlargement of time, but deliberately held it in abeyance in the reasonable expectation that the tracing effort would shortly succeed. It didn't, and, through a miscalculation, the enlargement motion was made three days after the expiration of the 120-day time period.

Holding that the time lapse was short, L's conduct was not unreasonable, and "no cognizable prejudice" was shown by the defendant, the court denied a dismissal motion. It said that at least in its own bailiwick (the Second Circuit)

prejudice under Rule 4(j) [now (m)] involves impairment of the defendant's ability to defend on the merits, rather than merely foregoing ... a procedural or technical advantage.

"Heroic" Efforts to Serve Process Will Help

In United States v. Nuttall, 122 FRD 1643 (D Del. 1988), the defendant was so evasive and uncooperative that the court characterized the plaintiff's efforts to effect service as "heroic". Still, the defendant's failure to acknowledge mail service--the equivalent today would be the defendant's refusal of the plaintiff's waiver request under subdivision (d)--vitiated the service, and the court was constrained to vacate the default judgment that had been entered. But while it could not keep the default judgment, the plaintiff (the United States on a tax matter) found at least some reward. While the heroic efforts were not enough to sustain the service, they more than sufficed to earn the plaintiff an enlargement of time for it.

That's no small gift, at least when the statute of limitations has now expired. The denial of an enlargement of time would otherwise have meant a dismissal, and a dead case.

Pendency of Settlement Talks an Excuse for Delay?

It was held in Assad v. Liberty Chevrolet, Inc., 124 FRD 31 (D R.I. 1989), that a delay based on the pendency of settlement talks (which fell through) is good cause for a time extension. The delay was only about two weeks past the 120-day limit, and the shorter the delay the greater of course will be the district judge's discretion in granting a "good cause" extension.

Still, it is a bad idea for any plaintiff to let the 120 days pass on the strength of mere settlement talks. The plaintiff should at least get a statute of limitations extension, in writing, from the defendant. If the defendant refuses it, the plaintiff should see to it that the summons is served within the 120 days. Politeness might suggest advising the defendant that service is going to be made, and if high comity is to be observed, the summons and complaint can be served with half a dozen roses.

Counsel Too Ill to Arrange for Service Should Withdraw from Case

When the excuse tendered for not serving the summons within the 120-day period is the illness of counsel, it is suggested in Vannoni v. Tso, 120 FRD 501 (ED Pa. 1988), that counsel should withdraw from the case:

Surely an illness so serious as to prevent so unstrenuous an effort as service ... should have prompted the plaintiffs' counsel to withdraw....

The holding is doubtless influenced by the fact that the plaintiffs offered "no more than the bare allegation" of counsel's illness, explaining neither "the nature of that illness nor how that illness contributed to an impossibility to make service". With a less indifferent presentation, a debilitating illness might prompt a different judicial response.

Complications in Admiralty Case and under Hague Convention Constitute Good Cause for Delay and Bring Extension

An example of the use of Rule 4 for service in an admiralty action, complicated by the involvement of both in rem and in personam jurisdiction, is Itel Container Int'l Corp. v. Atlanttrafik Express Svc., Ltd., 686 F.Supp. 438 (SD N.Y. 1988). Also involved were delays in attempting service under the Hague Convention (for treatment of which see Commentary C4-24 above). The aggregate of the complications prompted the court to excuse a delay in service and deny a dismissal motion.

In respect of the in rem claim against the vessel, the court held that the 120-day time limit does not apply because it would be in conflict with the Supplemental Admiralty Rules, which require that in rem process be served only in the

district. To impose the time limit would enable the defendant in control of the vessel to compel a dismissal just by keeping the vessel out of the district. In this case, where there were also in personam defendants, the court held that it is open to the plaintiffs to perfect the rem service (by waiting until they can lay hands on the vessel) at any time during the pendency of the personam proceedings.

Failure to Seek Enlargement of Time Before Dismissal Motion Is "Some Evidence of Lack of Diligence"

A motion by the plaintiff for an enlargement of time for service, made before the expiration of the 120-day period, should serve as at least some indication of diligence.

Making the motion after the expiration of the 120 days obviously helps less, and it doesn't necessarily make any difference that the plaintiff makes the motion before the defendant moves to dismiss. Townsel v. County of Contra Costa, 820 F.2d 319 (CA9 1987), illustrates that. And failure of the plaintiff to make the motion at all is "at least some evidence of lack of diligence". Quann v. Whitegate-Edgewater, 112 FRD 649 (D Md. 1986). Insufficient diligence was shown by the plaintiff in Quann, resulting in a dismissal.

Conflict on Whether Prejudice to Defendant Is Factor

There is a conflict among the cases on whether prejudice to the defendant, traceable to the plaintiff's delay in making service, is a factor to be considered by the court in assessing whether to excuse the delay. In Bryant v. Rohr Industries, Inc., 116 FRD 530 (WD Wash. 1987), for example, the defendant had actual notice within the requisite time because, although the plaintiff used an improper method, the defendant received the papers. No matter, held the court; prejudice is not a factor. The case was dismissed.

Illustrative of the other side is Gordon v. Hunt, 116 FRD 313 (SD), aff'd 835 F.2d 452 (CA2 1987), cert. denied 486 U.S. 1008, 108 S.Ct. 1734 (1988), noting the conflict and citing some of the cases. Gordon holds that whether the defendant is prejudiced is a relevant factor. The same court, speaking through another judge hardly a month later, also notes the problem but hints that prejudice is not a factor. Delicata v. Bowen, 116 FRD 564 (SD N.Y. 1987). In other words, a plaintiff's case may

(1) live if the defendant can't show prejudice, or

(2) die even if the defendant can't show prejudice,

literally depending on the luck of the draw: who's the judge?

Ignorance of the Rules Is No Excuse

Counsel's ignorance of the requirements of the rules is no excuse. That, too, is an observation of Townsel v. County of Contra Costa, 820 F.2d 319 (CA9 1987), cited above.

Law Office Failure Is No Excuse, and Malpractice Action Can Follow

A "clerical error in [the lawyer's] office" is no excuse. Delicata v. Bowen, 116 FRD 564 (SD N.Y. 1987). The court suggests that if the case is dismissed and it's now too late for a new action, the plaintiff "must pursue, if so advised, a remedy against her attorney".

Intent to Hold Federal Action in Abeyance Pending Outcome of State Action No Excuse for Failure to Make Service

It is not at all uncommon in our federal system for a plaintiff to face the dilemma of having a choice--or at least a potential choice--between federal and state forums, but not being able to decide with safety whether to proceed, or to proceed first, in the one or the other. There may be a close question of federal subject matter jurisdiction, for example, which may prompt the plaintiff to opt for the federal forum but with a precautionary state action brought as a back-up should federal jurisdiction fail. Or the plaintiff may have claims under both state and federal law and attempt the state

action first, the intention being to go for the federal relief only if the state action fails.

The possible scenarios of this dilemma are numerous. The ultimate question that each presents is whether either forum will allow itself to be used as a kind of "holding action" for the other. Often it will be only the fear of the statute of limitations that prompts the plaintiff to get the second action safely commenced while the first pends.

Whatever the plaintiff's reason was in Salow v. Circus-Circus Hotels, Inc., 108 FRD 394 (D Nev. 1985), the plaintiff wanted a precautionary federal action to stand in place while his state action proceeded. To that end he filed the federal action but refrained from making service in it. He felt that under what is now Rule 4(m), this was "good cause" for not making service. The court didn't agree with him and dismissed the action. It did offer good advice, however, which we repeat here:

What the plaintiff should do in a situation like this, said the court, is either commence the action and then move for an enlargement of time before the 120 days run out, or else effect service and then move for a stay of the action. Federal courts should be especially sensitive to heed requests of this kind if they are reasonable on the facts and don't violate any discernible policy. Indeed, any court should be. Categorically refusing such relief can only foster duplication and possible inconsistency.

Mere "Inadvertence" of Counsel No Excuse

Wei v. State of Hawaii, 763 F.2d 370 (CA9 1985), holds that if the mere inadvertence of counsel could qualify as an excuse, "the good cause exception would swallow the rule". It also holds that an intention to amend the complaint is another inadequate excuse for delaying service.

Warnings to Plaintiff About Service Weaken Case for Extension

In Redding v. Essex Crane Rental Corp. of Alabama, 752 F.2d 1077 (CA5 1985), the district court several times notified the plaintiff that the action would be dismissed unless service was made. The plaintiff still delayed, and with an excuse the 5th Circuit described as "remarkable": to keep the defendant from obtaining discovery of which he might make use in a pending state proceeding. The time limit passed, the action was dismissed, and the statute of limitations had expired. A dismissal was nevertheless affirmed.

"Abuse of Discretion" Standard for Appellate Review of "Good Cause"

"Abuse of discretion" is often the standard applied by a court of appeals in reviewing determinations made under Rule 4(m): the district court's determination will be overturned only when the circuit finds it to be beyond the borders within which discretion could be deemed operable on the facts. See, e.g., the Ninth Circuit decision in United States for the Use and Benefit of DeLoss v. Kenner General Contractors, 764 F.2d 707 (1985). Since that terrain is generous, a district court's holding will not be lightly overturned.

The Fifth Circuit also uses an abuse-of-discretion standard, looking especially hard at three "aggravating factors" in determining whether to uphold a dismissal for delayed service:

(1) the extent to which the plaintiff rather than his attorney is responsible for the delay;

(2) the extent to which the defendant is prejudiced by the delay; and

(3) whether intentional conduct is involved in the delay.

The court re-articulated those factors in Fournier v. Textron, Inc., 776 F.2d 532 (CA5 1985). "Where ... the delay is tactical, and little more than gamesmanship, we are less forgiving". And so they were in Fournier, in which the action was dismissed.

It is better for the plaintiff's lawyer to take note of these cases than of those that sustain excuses and grant time

extensions, especially because such a doing by one judge may not be the doing of another. And, short of an "abuse" of discretion, each judge here is usually the final judge.

Relying on Representation by Defendant's Former Lawyer Held Good Excuse

Reliance by the plaintiff on a statement by the defendant's former lawyer that he could accept service in the defendant's behalf was held to be a decent excuse for a short delay occasioned by the lawyer's later denial of such authority: it manifested a reasonable effort to make service. Geller v. Newell, 602 F.Supp. 501 (SD N.Y. 1984). That seems to be a fair holding, but would all judges react so? And since neither a pro nor con reaction need necessarily rise to the "abuse of discretion" level so as to earn appellate intervention, the plaintiff in the position of having to depend on it is not in a good position.

Apply Rule 4 "Strictly" But Not "Harshly"?

Ruley v. Nelson, 106 FRD 514 (D Nev. 1985), said that "Rule 4(j) [now Rule 4(m)] is meant to be strictly construed" and that "[i]t has been held repeatedly that inadvertence of counsel does not qualify" as good cause to earn a Rule 4(m) extension. Ignorance of the time limit was the excuse offered in Ruley. It was rejected and the action dismissed. Shortly before, in Arroyo v. Wheat, 102 FRD 516 (D Nev. 1984), the same court said "[i]t was not intended that [Rule 4(m)] would be enforced harshly; that is why liberal extensions of time are permitted under Rule 6(b)".

One may ask here whether a statement like that in Ruley, to the effect that the rule was "meant to be strictly construed", still applies under subdivision (m) of the revised rule. As noted at the outset of this Commentary, subdivision (m) was intended to be more lenient than its predecessor was. The question is, how much more lenient?

"Good Faith Belief" That Defendants Waived Service Is Good Excuse

Among the grounds that have been found to support a time extension is the plaintiff's "good faith belief" that the defendants had waived objections to service. International Distribution Centers, Inc. v. Walsh Trucking Co., 1984 WL 545 (SD NY 6/22/84, Keenan, J.).

This may not be a sound ground for a plaintiff to rely on today, where the provision for waiver is elaborately prescribed by subdivision (d) of Rule 4 and the two official forms that implement it, Forms 1A and 1B. If there is to be a waiver in the case, it should be either of the formal kind that subdivision (d) contemplates, or at least a writing of some kind. Otherwise, the plaintiff can't rest on any "waiver" laurels unless the defendant has appeared in the action and the waiver consists of some within-the-action conduct, such as answering without including any jurisdictional objection.

Change of Lawyers Held No Excuse

In Coleman v. Greyhound Lines, Inc., 100 FRD 476 (ND Ill. 1984), the plaintiff's change of lawyers was held an unacceptable excuse and a time extension was refused. Noting that the new lawyers still had eight days left in which to make the service, and on an easily servable defendant, the court dismissed the action.

The Government, When Plaintiff, Is Also Subject to Dismissal For Want of Diligence in Making Service

The rules about diligent service apply as well when the government is the plaintiff, and a total absence of effort to effect service can bring about a dismissal even against the United States. See, e.g., U.S. v. General Int'l Marketing Group, 742 F.Supp. 1173 (Ct. Int'l Trade 1990).

Differing Attitudes Continue on What Satisfies as "Good Cause"

On this subject, lawyers on both sides have fertile fields to dig in, as the foregoing compilation--just a sampling--manifests. Cases go in all directions. The bottom line is likely to be the prevalent attitude manifested by circuit opinions. Two decisions that endeavor to collate the cases and the various accepted and rejected reasons for

late service (or nonservice) are Gordon v. Hunt, 116 FRD 313 (SD N.Y.), aff'd 835 F.2d 452 (CA2 1987), cert. denied 486 U.S. 1008, 108 S.Ct. 486 (1988), and Quann v. Whitegate-Edgewater, 112 FRD 649 (D Md. 1986).

OTHER POINTS ABOUT THE 120-DAY PERIOD

Dismissal under Rule 4(m) Must Be Without Prejudice

The Seventh Circuit offers an extensive treatment of the application of subdivision (j) of the pre-1993 Rule 4 in Powell v. Starwalt, 866 F.2d 964 (CA7 1989), holding that a dismissal under it must be without prejudice. The court adopts what it calls a "bright-line approach" to the "good cause" matter, which means that a failure to show good cause for letting the 120 days expire without service mandates dismissal, period. Whether so rigid an attitude can be sustained under the more indulgent subdivision (m) of the current Rule 4 is an open question, but the point that the court makes about a dismissal, should that be the result, should still apply: that the dismissal must be without prejudice. And that is so, adds the court, notwithstanding that the statute of limitations may have expired so that a new action by the plaintiff would presumably be barred on that ground.

The mere fact that the plaintiff has failed to show good cause for a time extension, and thus faces a dismissal for nonservice, is not to be equated with the disposition on the merits that "with prejudice" implies, the court says; "speculation about the outcome of a [subsequent] suit does not justify dismissing this one with prejudice".

The court does say, however, that the door is open to a "with prejudice" disposition if the delay entails the disobedience of a court order or if the delay is so long that it would qualify as a failure to prosecute under Rule 41(b).

Court Must Give Notice If Moving Dismissal Sua Sponte

Rule 4(m) is explicit that the court can move the dismissal for nonservice sua sponte, but it is just as explicit that the court must give notice to the plaintiff when it does. "A party can hardly enjoy an opportunity to 'show good' cause ... if that party has not been accorded notice that the matter has been put in issue", wrote the First Circuit in Varela v. Velez, 814 F.2d 821 (1987). But the court also held that the notice need not have been given before the original dismissal if, after dismissal has been granted without notice, the plaintiff then moves for reconsideration. In that situation the prior order of dismissal serves as the notice, so that the plaintiff can now arm herself on the motion to reconsider with whatever she would have put before the court as "good cause" earlier. In Varela, in fact, the plaintiff did offer an excuse for the lateness, furnishing evidence of the defendant's evasion of service. The district court may not have considered that, which resulted in a Court of Appeals vacatur and remand for a hearing.

Move for Extension While 120 Days Alive

We end on this general note, duplicating a point already made several times, but perhaps still not often enough. A plaintiff in need of an enlargement of the 120-day period of Rule 4(m) does well to apply for the enlargement while the period is still alive. The court is by no means precluded from granting the enlargement after the period's expiration, and has of course done so in many cases, but an application beforehand does go some way towards establishing the kind of diligence needed to appeal to a court's discretion.

Subdivision (n)

C4-42. "Rem" Categories of Jurisdiction.

If a court lacks in personam jurisdiction of a person but has property (real or personal) before it and seeks only to affect that person's interest in the property, it can make use of "rem" jurisdiction. The person can be named a defendant, served anywhere, and thereby subjected to the court's jurisdiction to the extent, but only to the extent, of that person's interest in the property, or "res".

The premise of rem jurisdiction in general is that the plaintiff can't get personam jurisdiction of the defendant, although, when rem jurisdiction is available and will accomplish everything the plaintiff is seeking, the plaintiff may

purport to invoke it for some special procedural benefit that the statute supplying it may provide even though personam jurisdiction is available in the action. That may sometimes be the situation under 28 U.S.C.A. § 1655, for example, as noted below.

Subdivision (n) governs rem jurisdiction in the federal courts. Paragraph (1) refers to federal sources and is just a reminder that there are such sources. Paragraph (2) refers to state sources, and adopts them for federal use. Service of the summons in either category of jurisdiction may be made by following the same rules that apply in in personam cases, or by following any special instruction about service authorized by the statute or rule relied on for the rem jurisdiction. The added advantage is that no matter where service is made, and even if there is no basis for personam jurisdiction because of where the defendant has been reached with process--in more familiar terminology, no "longarm" jurisdiction--the more limited "rem" jurisdiction would still be obtained.

We have been using "rem" jurisdiction to describe all categories of it. As brief background, we can note that there are basically three "rem" categories of action, which (acknowledging that there are other possible breakdowns) are:

1. strictly in rem;

2. in rem; and

3. quasi in rem.

The first two seek to affect interests only in a specific and identifiable property; no other will do. The first one binds the whole world, the second only those named as parties and duly notified. The third aims at no specific property at all. It seeks only money and seizes, through an attachment or the like, any property the nondomiciliary defendant may have in the state as a way to satisfy any money judgment the court may render, even if only on the defendant's default. (The quasi in rem category numbered 3 is sometimes used, such as by the Restatement 2d of Conflicts [note preceding § 56], to embrace both categories 2 and 3 above, with the "in rem" description applied to what we have put down as category 1. That has historical basis but the above division serves best for clarity of reference.)

Federal practice makes use of all of these categories to one degree or another, to whatever extent they are still used in this age of expanded personal jurisdiction. (Before turning to their federal use, however, the lawyer should note that rem jurisdiction plays a special role in admiralty actions, for which see the special Supplemental Rules for Certain Admiralty and Maritime Claims appended to the Federal Rules of Civil Procedure.)

A federal statute, 28 U.S.C.A. § 1655, does the major "rem" job in federal practice. The pre-1993 version of Rule 4 made no reference to it, or to any source of federal rem jurisdiction. Subdivision (n) of the revised rule does, in general terms, in paragraph (1).

Section 1655 offers a broad range of jurisdiction in the first and second categories listed above--principally the second because the first (strictly in rem jurisdiction) is relatively rare (and found more in the admiralty sphere than anywhere else today)--and it goes even further than its caption suggests. The caption is "Lien Enforcement" but, as its abundant case law manifests, § 1655 offers rem jurisdiction in a broad range of "in rem" actions, not just "lien" cases. It is less needed today than during the earlier years of its long history for the obvious reason of the expansion of "longarm" personal jurisdiction, heavily exploited in federal practice by what is now subdivision (k) of Rule 4. Quite often today, for example, when it can be shown that a case affects local property, which is the § 1655 jurisdictional predicate, the case is also likely to have local contacts of the kind that support longarm jurisdiction and thus may well be the subject of a state longarm statute giving full personam jurisdiction in the action. And when outright personam jurisdiction is available, on a longarm or any other basis, the need to depend on any category of rem jurisdiction declines, if it doesn't disappear altogether.

But § 1655 remains alive and well, and gainfully employed. It should be used unhesitatingly by any plaintiff who finds some benefit in its provisions. As a perusal of the statute quickly reveals, it has some advantages, such as in method of notice, but also some disadvantages, such as in the delay it entails in finalizing a judgment if personal notice is not given. The plaintiff's lawyer with a choice of using the rem jurisdiction of § 1655 or a personam basis

available through subdivision (k) of Rule 4 should appraise the advantages of each alternative as applied to the particular case and choose accordingly.

Is there any authority for using in a federal court the quasi in rem jurisdiction of category 3? There is, and that's where paragraph (2) of subdivision (n) comes in.

Many states have attachment or like statutes exploiting quasi in rem jurisdiction. Before 1963, if such an action was commenced in a state court, it could be removed to a federal court by the defendant if there was a removal basis as a matter of subject matter jurisdiction, and many such quasi in rem actions found their way into the federal courts through the removal route, which is still permissible. But there was no provision permitting the use of such jurisdiction to commence an original action in a federal court. A 1963 amendment, affecting what was subdivision (e) of the pre-1993 Rule 4, remedied that, allowing quasi in rem jurisdiction as an original federal matter whenever forum state law provided for it.

Paragraph (2) of subdivision (n) carries this forward, borrowing quasi in rem jurisdiction from the forum state, at least when personal jurisdiction is not available.

As to method of service--distinguishing it for a moment from amenability to jurisdiction--subdivision (e)(1) of the current rule borrows not just from forum state law, but also from the law of the state in which service is made. Those service options would be available even in a quasi in rem case, but authorization for the exercise of the quasi in rem jurisdiction itself must be found in the law of the state in which the federal court sits; the law of the place of service, if service should be made outside the forum, has nothing to do with that. The present situation assumes that the property is located in the forum state, and the only logical source of authority for using the property as a jurisdictional base is that state's law.

The mechanics of the attachment (or garnishment or whatever other name the state gives to its quasi in rem process) are also to follow forum state law, again the logical source. The procedure can sometimes be quite involved.

The addition of quasi in rem jurisdiction to the federal arsenal was a substantial achievement in 1963, reflecting the frequent reliance put on this category of jurisdiction over the years, but the gift was to be enjoyed for little more than a decade. In 1977, the U.S. Supreme Court, in a reconsidered application of the due process clause, drastically reduced this category of jurisdiction in all cases, affecting removal and original jurisdiction both. It did so in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683, in 1977 and then followed through in 1980 in Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516.

Quasi in rem jurisdiction, as used before the Shaffer case, could subject the defendant to the adjudication of a claim even in a court having no connection with the claim or with the defendant, on the simple basis that the defendant had property in the state. Nor was it necessary to show that the property had any connection to the claim. These were the factors to which the Shaffer case took exception. Reexamining this category of jurisdiction in light of the "minimum contacts" doctrine applicable to longarm personal jurisdiction, and relying essentially on the fact that with the growth of longarm jurisdiction there is less need to depend on quasi in rem jurisdiction, the Supreme Court struck it down in all but a few instances.

The advisory committee note on subdivision (n) suggests that when the defendant's contacts with the forum are too slight to support personam jurisdiction, they will ipso facto be too slight to support quasi in rem jurisdiction, but not all courts accept that proposition. Some find in Shaffer the recognition of a gap within the due process clause itself between what is needed for outright personam jurisdiction and what will satisfy for the less demanding quasi in rem jurisdiction. They sustain as just enough for a quasi in rem measure contacts that apparently come up short on the personam scale.

An example of such a case is Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (1978), in which the Second Circuit said that the contacts test is "narrower" for quasi in rem than for personam jurisdiction. Another is Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd., 62 N.Y.2d 65, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984). There are still others.

Should a given case find any way to squeeze itself under any of the few quasi in rem possibilities constitutionally surviving under state law today, paragraph (2) of subdivision (n) of Rule 4 stands by to support such a case in the federal court.

In General

C4-43. Raising and Preserving a Jurisdictional Objection.

Since Rule 4 governs personal jurisdiction, it is appropriate to note briefly how the defendant makes and preserves an objection to personal jurisdiction in federal practice.

Rule 12 of the Federal Rules of Civil Procedure governs. The objection may consist of an absence of a jurisdictional basis, of some defect in the summons, or of insufficient service. Rule 12(b) covers all of them under one or the other of its clauses numbered (2), (4), and (5). Whichever it is, if the objection is good it can bring on a dismissal.

Rule 12(b) gives the defendant the option of interposing the objection either in a motion to dismiss or as a defense in the answer. If the defendant wants a prompt adjudication, the Rule 12 dismissal motion should be the procedure. If she wants for any reason to preserve the objection for later adjudication, as perhaps in the tactical hope of winning a favorable outcome on the point when it would clearly be too late for the plaintiff to bring a new action, her step is to include the objection as a defense in the answer.

A defendant making any Rule 12 motion on any ground must see that this objection to personal jurisdiction is included in the motion, or the objection is lost. A special waiver provision, embodied in subdivisions (g) and (h)(1) of Rule 12, so provides. It is designed to discourage the defendant's waste of the court's time on a Rule 12 motion on other grounds while withholding a jurisdictional objection she has all the while. Hence the defendant can safely use the defense-in-the-answer route for an objection to personal jurisdiction only if she makes no Rule 12 motion at all.

If the defendant uses the answer route but then changes her mind and wants a pretrial adjudication of the jurisdictional point after all, the time for a Rule 12(b) motion will likely have expired. In that situation, the defendant can probably raise the point with a summary judgment motion under Rule 56. This is somewhat awkward--summary judgment is technically designed to dispose of a case on its merits--but Rule 12(d) dictates that jurisdictional objections (among others) be disposed of "before trial on application of any party", and the name of the "application" that brings the matter to judicial attention would seem inconsequential. Although perhaps denominated a "summary judgment" motion in this scenario, its granting will have the impact--and the res judicata effect should the point ever arise--of disposing only of the jurisdictional issue, not the merits.

The plaintiff must of course be wary of a defendant pursuing the defense-in-the-answer alternative. The defendant's reason for wanting to postpone the jurisdictional adjudication should be the plaintiff's reason for accelerating it. If there is anything to the objection, especially if it is of a possibly curable variety (e.g., a defect in the summons or in the mechanics of its service), the plaintiff should try to have the matter disposed of forthwith. His principal tool for doing this is a motion to strike the jurisdictional defense pursuant to Rule 12(f). The motion will of course succeed if the court is convinced that the jurisdictional defense is groundless as a matter of law. But even if it depends on the resolution of a factual issue, the plaintiff can now--as the defendant did above--cite Rule 12(d), which evinces Rule 12's preference for the early adjudication of jurisdictional matters. Under it the court can order a preliminary hearing of the issue of fact. But the same rule, Rule 12(d), also gives the court discretion to defer the issue until the trial if it sees fit.

If the jurisdictional objection does depend on only a factual issue, such as whether the mechanics of service were just so, and there is yet time to serve again before the statute of limitations expires, fresh service, or even a new action, may be the plaintiff's best course. Problems like these were not often met under the pre-1983 Rule 4, which had neither an arbitrary time limit on summons service, as subdivision (m) now has, nor a statement making the plaintiff responsible for summons service, as subdivision (c)(1) now has, nor a general provision prescribing private process servers instead of marshals, as subdivision (c)(2) now has. There was less opportunity and less incentive, therefore,

for defendants to raise technical points about service under Rule 4 before its 1983 amendment.

It may happen that the jurisdictional issue will require discovery proceedings. The defendant may contend, however, that discovery, too, requires personal jurisdiction and that not even discovery can proceed until jurisdiction has been sustained. The U.S. Supreme Court has rejected that proposition, holding that the simple fact of the defendant's appearance to raise the jurisdictional objection is a sufficient turn of the jurisdictional wheel to allow for the limited discovery needed for full resolution of the jurisdictional point. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

Separate captions for additional points about raising and preserving a jurisdictional objection are used below to facilitate reference.

Defendant Pleading Service Defect in Answer May Waive It by Subsequent Conduct

Rule 12(b) gives the defendant (D) the option of interposing an objection to defective service either in a motion to dismiss or as a defense in the answer. When D foregoes the motion method and uses the answer, however, D cannot safely assume that the objection will automatically be preserved through all later proceedings. If later conduct by the defendant is found inconsistent with preservation of the jurisdictional objection, the court may hold that the defendant waived it, as was held in Datskow v. Teledyne, Inc., 899 F.2d 1298 (CA2), cert. denied 498 U.S. 854, 111 S.Ct. 149 (1990).

The defendant in Datskow participated in a conference at which discovery and motion practice were scheduled and settlement discussed, but said nothing about the defective service, apparently assuming that it wasn't necessary because the objection had been duly raised as a defense in the answer. In holding the defendant to a waiver, the court noted that proper service could have been made had the defect been mentioned at the conference, because at the time the statute of limitations was still alive. And the court stressed that this was a mere objection to method of service, not to amenability to jurisdiction (jurisdictional basis):

We would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court. But here ... defendant is complaining only about a defect in the form of service....

Objection to "Jurisdiction Over the Person" Doesn't Preserve Objection to "Insufficiency of Service"

It is important in federal practice that a defendant be specific about the nature of the jurisdictional objection the defendant wants to raise. Several objections in Rule 12(b) of the Federal Rules of Civil Procedure go to the court's personal jurisdiction--numbers 2, 4, and 5 on the Rule 12(b) list--but only one of them, number 5, is addressed to "insufficiency of service of process" specifically. It is that objection that the defendant is relying on when there is some defect in service. To preserve the objection, the defendant should be explicit about it. Since Rule 12(b) differentiates the categories, the raising of the objection in the general terms of "personal jurisdiction", even when the defendant takes the objection as a defense in the answer instead of by motion, may not suffice. It didn't suffice, for example, in Roque v. U.S., 857 F.2d 20 (CA1 1988), where the court wrote that

normally we do not think insufficient service of process should be subsumed as having been raised in an answer's assertion of lack of personal jurisdiction.... If the true objection is insufficient service of process, we do not think it is too much to require a litigant to plainly say so. The [defendant] ... should not couch its true objection to the sufficiency of service in the garb of formalistic incantations of lack of personal jurisdiction....

The defendant's doing so in Roque was among the reasons cited by the court (there were others) in granting the plaintiff a time extension for service pursuant to what is now Rule 4(m).

With clause 4 of Rule 12(b) directed to defects in the summons, and clause 5 directed to defects in its service, clause 2 ends up with the mission of covering objections to jurisdictional basis (amenability to jurisdiction), as where the scope of a longarm statute or a forum's contacts with the case are disputed despite the timely service of valid process. Perhaps the defendant's best rule of thumb, in cases of doubt, is to preserve objections under all categories that are

arguably applicable, citing them all.

Is Defendant's Request for Time Extension a Waiver of Objection to Service?

Does a motion by the defendant under Rule 6(b) for an extension of time to plead waive an objection to service? Bernard v. Strang Air, Inc., 109 FRD 336 (D Neb. 1985), holds that it does not. To say that it does, noted the court, would be to re-introduce the distinction between general and special appearances, which have long since been abolished in the federal courts.

While a single request for a time extension may not waive an objection to service or any other jurisdictional objection, a progression of such requests may do it. Indeed, one alone may, if it is made under circumstances to suggest an intention to defend on the merits. The Ninth Circuit in Benny v. Pipes, 799 F.2d 489 (1986), cert. denied 484 U.S. 870, 108 S.Ct. 198 (1987), for example, found the question of whether a waiver resulted from three time enlargement motions a "close" one, but held that there was no waiver. The court said that

Generally, a motion to extend time to respond gives no hint that the answer will waive personal jurisdiction defects, and is probably best viewed as a holding maneuver while counsel consider how to proceed.

The court indicates that the point may turn on the reasons for the extension. In Benny, the first two requests were based on the prior engagements of counsel. The court said it would be "harsh" to call these a jurisdictional waiver. It suggests, however, that the defendants

would have been well advised to include statements in these two motions that they were not waiving any affirmative defenses,

and that's the advice defendants should take from the case. Whether it works in all cases or not, a time enlargement request by a defendant should note clearly whether it intends to preserve a jurisdictional objection. If it does, however, and it appears that the grant of the time extension will be the very thing that puts the plaintiff beyond the applicable statute of limitations, the plaintiff should let the court know that. It may prompt the court to exact a jurisdictional waiver from the defendant as the price of a time enlargement.

Is Rule 4(m) a Dismissal Source Independent of Rule 12?

After setting forth the objection to the sufficiency of service as a distinct dismissal ground in clause (5) of subdivision (b), Rule 12 then goes on to provide, in subdivisions (g) and (h), that the objection is waived by the defendant who raises it neither by a motion to dismiss under Rule 12 nor by way of defense in the answer. It was urged in International Distribution Centers, Inc. v. Walsh Trucking Co., 1984 WL 545 (SD NY 6/22/84, Keenan, J.), that a violation of what is now Rule 4(m) by failing to serve process within the 120 days is a source of dismissal independent of Rule 12, and that the Rule 12 waiver consequences therefore shouldn't apply to Rule 4(m) omissions. The court rejected the contention and held several defendants to a waiver. They had answered with no jurisdictional objection and only after much pretrial activity did they move, pursuant to Rule 4(m), for the dismissal on the ground of nonservice. (The situation was not as unusual as it sounds. A preliminary injunction had been issued early in the case, occasioning activity that had resulted in the service of an answer before formal summons service had been made.)

Since the purpose of the waiver provision of Rule 12 is to remove jurisdictional issues from the case once the defendant has made a response on the merits (which an answer of course does), a defendant's Rule 4(m) objection should be just as much subject to the Rule 12 waiver as any other category of objection addressed by Rule 12. Rule 4(m) is of course concerned with the timeliness of service, but an untimely service is an insufficient one and should as such fall under Rule 12(b)(5).

C4-44. Vacating Defaults.

If the defendant is in default for nonappearance--the category of default relevant to a treatment of Rule 4--and the

plaintiff is adamant in holding the defendant to it, the defendant's remedy is to move to vacate the default under Rule 55(c) or Rule 60(b) of the Federal Rules of Civil Procedure. Generally speaking, Rule 55(c) governs if no judgment has yet been entered, Rule 60(b)(1) (principally its "excusable neglect" category) if it has. Under the latter, the motion to vacate should be made within a year after the judgment is taken.

There is a strong policy in federal practice to have every case adjudicated on its merits. An adjunct of this policy is a fairly liberal attitude about vacating defaults. Rule 55(c) permits a default to be set aside for "good cause", but this is less intimidating than it sounds. The standard applied has sometimes been described as "lenient" and held to depend on "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented". See Meehan v. Snow, 652 F.2d 274, 277 (CA2 1981), noting that the Rule 55(c) standard for vacatur is "less rigorous" than the Rule 60(b) standard. The requirement about demonstrating a defense is premised on the proposition that if the defendant can't make a prima facie showing of a reasonable position on the merits, then a default judgment is as good as any other to close the case out.

The court can impose conditions on the vacatur, and is likely to if the plaintiff is faultless and has been put to trouble and expense because of the default. Rule 60(b), the FRCP's chief provision on vacating judgments, states explicitly that the court can impose "such terms as are just".

It is self-evidently preferable to seek vacatur of the default before a judgment has been entered on it. The weight of a judgment added to the fact of the default makes the onus of lifting it greater. Judicial attitudes, as Meehan shows, are more indulgent of Rule 55(c) than Rule 60(b)(1) applications.

If the default was based on the defendant's not being notified of the action, i.e., a failure of summons service, or if for any other reason the defendant claims a want of personal jurisdiction, and the default has gone to judgment, the motion to vacate should be based on clause (4) of Rule 60(b): that "the judgment is void". But lest the court disagree about whether the defect goes to jurisdiction, the defendant should hedge all bets by including in the alternative the request under clause (1) to open the default. If (4) prevails, the action may of course be dismissed. But if it doesn't, (1) can come into play, the court directing merely that the default be opened and the defendant permitted to defend on the merits.

C4-45. Finding the Statute of Limitations.

Nothing is said about the statute of limitations in Rule 4, and little--never enough, anyway--in committee and legislative studies on amendments of Rule 4. And yet the rule is enmeshed, atomically fused, with the limitations' subject. Indeed, from a practical viewpoint the phenomenon, and perhaps the only one, that gives moment to mistakes made under Rule 4 is the statute of limitations.

Generally speaking, no mistake under Rule 4 carries a serious consequence unless the statute of limitations has expired. If it is still alive, even a plaintiff tossed out of the courthouse on a mountain of Rule 4 defects can climb down, brush himself off, and begin again. Rule 4 defects give rise to a want of personal jurisdiction, and a dismissal on that ground is not a disposition on the merits. Hence a new action can't be met with the defense of res judicata. It is the interim passing of the statute of limitations that will prove the plaintiff's undoing in a new action, the obverse of which is that if the statute of limitations hasn't expired, then the plaintiff may be inconvenienced, and put to some expense, but won't be undone.

When subject matter jurisdiction in the action is based on diversity of citizenship, state law governs the statute of limitations. When jurisdiction is based on the claim's arising under federal law, the statute of limitations is whatever is supplied in the law the claim arises under. If that law does not supply a concomitant statute of limitations, complications arise and resort may have to be made, even in an "arising under" case, to state law.

A statute enacted in 1990, § 1658 of Title 28, purports to supply a uniform four-year statute of limitations to all federal claims not otherwise having one, but it applies so narrowly that it is something of a joke: it governs only claims recognized by Congress in enactments made after December 1, 1990.

A more extensive treatment of the statute of limitations in federal practice appears in the Commentary on 28 U.S.C.A. § 1658, to which the reader is referred for further discussion.

C4-46. Leave Time for Trouble.

Enough has already been said about potential time problems under Rule 4 and the statute of limitations to make the present section anti-climactic. We use the section to house just a few reminders about how much can be spared by bringing an action with plenty of time left on the applicable statute of limitations.

Plaintiffs' lawyers know to diary a potential court action so that they stay on the alert for the arrival of the last permissible day for suit. They know, too, to diary back to give themselves weeks and months of warning. Too often, though, the warnings are not used to start suit with plenty of time to spare, but merely as reassurances on the way to the last day. It is often difficult even to determine what the applicable statute of limitations is in a given federal action. (See the Commentary on 28 U.S.C.A. § 1658.) The lawyer who has made the wrong guess may very well be too late even by suing with what was thought to be much time to spare.

And how much applause does a lawyer merit merely by slipping in just under the wire? This is the kind of race that brings trouble, not applause, especially with the 120-day stated time limit on summons service under subdivision (m) of Rule 4. Dismissal is not the only possible consequence of a passing of the period without service, but it has turned out to be the principal one. It takes a positive exercise of judicial discretion to forgive tardiness or permit new service. It would always be good for a plaintiff in such a situation to know, should judicial discretion under subdivision (m) not be exercised in her favor, that she can sue over because there is still time. Indeed, the very fact that there is still time might influence the court in a case of late or defective service, psychologically if not technically, to retain the action because the statute of limitations is still alive and a new action could be brought anyway.

The committee notes on Rule 4(m), incidentally, state that the fact that the statute of limitations would now bar a new action may even be a reason for excusing the plaintiff's delays in effecting service in the original one. We hope plaintiffs don't plan their procedures on that assumption, because it is unpredictable how the courts will react to the idea. See Commentary C4-41 above. In a sense it seems almost an invitation to laxity, and has perhaps more potential for harming than helping plaintiffs by lulling them into too deep a sense of security.

Subdivision (c)(1)'s making the plaintiff responsible for the process server is another reason for suing with time to spare. If the process server errs, or even cheats, and the defendant makes an issue of it, the plaintiff who has left time for trouble will re-read the affidavit of service with equanimity, not terror. She has put herself into a comfortable position. She need not depend on the process server or on the court's indulgence. If the process server did wrong and the court won't help, the plaintiff can just suffer a dismissal and sue again.

Many of the issues that can eject a case at the threshold involve facts that the plaintiff is unaware of, only becoming aware of them when something afterwards occurs to educate her. Summons service is only one possible issue. The method the process server says he used, for example, the defendant says he didn't. Or the person served was not the defendant, or a proper person to serve in behalf of a corporate or governmental defendant. Or the activities of the defendant, blandly assumed by the plaintiff to support extraterritorial longarm jurisdiction under Rule 4(k), do not suffice for it. In each instance, a dismissal can result. In the last mentioned, not even new service will help because the problem is with respect to jurisdictional basis, not mechanics of service.

The list, in Commentary C4-41 above, of illustrative excuses tendered as purportedly "good cause" for an enlargement of time for service by desperate plaintiffs who didn't leave enough time at the outset can further illustrate the kinds of unanticipated problems that creep up out of nowhere and destroy meritorious claims at the threshold. And the cited list is just a taste. There are scores of cases on the books offering further examples. These problems, should they arise, will almost always arise during the initial stages of the action. If the plaintiff has sued with time to spare, there will yet be time to cure them all, even if the cure entails a new action, or even a new action in another forum.

It is always a good idea for the plaintiff's attorney to know at the outset what other forums might be available, and

what their statutes of limitations are, if there is any chance at all of an incurable jurisdictional dismissal of the present action, such as for a want of longarm contacts or, indeed, for a want of federal subject matter jurisdiction.

The list of problems with a dismissal potential can be extended, but the point has been made. Suing with six or eight months to go, instead of a week or two, is the best hedge against unforeseen trouble. Jurisdictional dismissals don't bar a new action, as long as the statute of limitations is still alive. The lawyer who makes certain to Leave Time for Trouble will assure that it will be.

ADVISORY COMMITTEE NOTES
1937 Adoption

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff, compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena--Time for Answer).

Note to Subdivision (b). This rule prescribes a form of summons which follows substantially the requirements stated in former Equity Rules 12 (Issue of Subpoena--Time for Answer) and 7 (Process, Mesne and Final).

U.S.C., Title 28, § 721 [now 1691] (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded. U.S.C., Title 28, [former] § 722 (Teste of process, day of) is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

Note to Subdivision (c). This rule does not affect U.S.C., Title 28, § 503 [see 566], as amended June 15, 1935 (Marshals; duties) and such statutes as the following insofar as they provide for service of process by a marshal, but modifies them in so far as they may imply service by a marshal only:

U.S.C., Title 15:
§ 5 (Bringing in additional parties) (Sherman Act)

§ 10 (Bringing in additional parties)

§ 25 (Restraining violations; procedure)

U.S.C., Title 28:
§ 45 [former] (Practice and procedure in certain cases under the interstate commerce laws)

Compare [former] Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (d). Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U.S.C., Title 28, § 109 [now 1400, 1694] (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian v. International Ass'n of Machinists,* 7 F.(2d) 481 (D.C.Ky.1925) and *Singleton v. Order of Railway Conductors of America,* 9 F.Supp. 417 (D.C.Ill.1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case,* 93 F.(2d) 56 (App.D.C.1937).

For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U.S.C., Title 6, § 7 (Surety

companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U.S.C., Title 7, §§ 217 (Proceedings for suspension of orders) 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U.S.C., Title 26, § 3679, (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U.S.C., Title 28, former §§ 45, (District Courts; practice and procedure in certain cases under the interstate commerce laws), [former] 763 (Petition in suit against the United States; service; appearance by district attorney), 766 [now 2409] (Partition suits where United States is tenant in common or joint tenant), 902 [now 2410] (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified in so far as they prescribe a different method of service or dispense with the service of a summons.

For the [former] Equity Rule on service, see [former] Equity Rule 13, Manner of Serving Subpoena.

Note to Subdivision (e). The provisions for the service of a summons or of notice or of an order in lieu of summons contained in U.S.C., Title 8, § 405 (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with State law); U.S.C., Title 28, § 118 [now 1655] (Absent defendants in suits to enforce liens); U.S.C., Title 35, § 72a [now 146, 291] (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); U.S.C., Title 38, § 445 [now 784] (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the district may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 [now title 13, § 336] of the Code of the District of Columbia (Publication against non-resident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

Note to Subdivision (f). This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

U.S.C., Title 28, §§ 113 [now 1392] (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), [former] 115 (Suits of a local nature), 116 [now 1392] (Property in different districts in same state), [former] 838 (Executions run in all districts of state); U.S.C., Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner--"upon any agent of the company found in such state"); U.S.C., Title 49, § 321(c) [now 10330(b)] (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the state) and similar statutes, allowing the running of process throughout a state, are substantially continued.

U.S.C., Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U.S.C., Title 28, §§ 44 [now 2321] (Procedure in certain cases under interstate commerce laws; service of processes of court), 117 [now 754, 1692] (Property in different states in same circuit; jurisdiction of receiver), 839 [now 2413] (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a State, are expressly continued.

Note to Subdivision (g). With the second sentence compare [former] Equity Rule 15, (Process, by Whom Served).

Note to Subdivision (h). This rule substantially continues U.S.C., Title 28, [former] § 767 (Amendment of process).

1963 Amendment

Subdivision (b). Under amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as may be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

Subdivision (d)(4). This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. Cf. N.J. Rule 4:5-2. See also the amendment of Rule 30(f)(1).

Subdivision (d)(7). Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in *McCoy v. Siler,* 205 F.2d 498, 501-2 (3d Cir.) (concurring opinion), cert. denied, 346 U.S. 872, 74 S.Ct. 120, 98 L.Ed. 380 (1953), that the effective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see *Holbrook v. Cafiero,* 18 F.R.D. 218 (D.Md.1955); *Pasternack v. Dalo,* 17 F.R.D. 420 (W.D.Pa.1955); *Super Prods. Corp. v. Parkin,* 20 F.R.D. 377 (S.D.N.Y.1957), or by reading paragraph (7) as not limited by subdivision (f). See *Giffin v. Ensign,* 234 F.2d 307 (3d Cir. 1956); 2 Moore's *Federal Practice,* ¶4.19 (2d ed. 1948); 1 Barron & Holtzoff, *Federal Practice & Procedure* § 182.1 (Wright ed. 1960); Comment, 27 U. of Chi.L.Rev. 751 (1960). See also *Olberding v. Illinois Central R.R.,* 201 F.2d 582 (6th Cir.), rev'd on other grounds, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953); *Feinsinger v. Bard,* 195 F.2d 45 (7th Cir. 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill.Ann.Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba,* 243 F.2d 342 (2d Cir. 1957); *Kappus v. Western Hills Oil, Inc.,* 24 F.R.D. 123 (E.D.Wis.1959); *Star v. Rogalny,* 162 F.Supp. 181 (E.D.Ill.1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, supra.* But *cf. Sappia v. Lauro Lines,* 130 F.Supp. 810 (S.D.N.Y.1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

Subdivision (e). For the general relation between subdivisions (d) and (e), see 2 Moore, supra, ¶4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, supra, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, supra, ¶4.32, at 1004; Smit, *International Aspects of Federal Civil Procedure,* 61 Colum.L.Rev. 1031, 1036-39 (1961). But see Commentary, 5 Fed. Rules Serv. 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. § 2361 (Interpleader; process and procedure); 28 U.S.C. § 1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. § 1450; *Rorick v. Devon Syndicate, Ltd.,* 307 U.S. 299, 59 S.Ct. 877, 83 L.Ed. 1303 (1939); *Clark v. Wells,* 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, *Attachment and Garnishment in the Federal Courts,* 59 Mich.L.Rev. 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big*

Vein Coal Co. v. Read, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1053 (1913); *Davis v. Ensign-Bickford Co.,* 139 F.2d 624 (8th Cir. 1944); 7 Moore's *Federal Practice* ¶64.05 (2d ed. 1954); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1423 (Wright ed. 1958); but cf. Note, 13 So.Calif.L.Rev. 361 (1940). The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made upon them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, supra, at 374-80; Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts,* 18 F.R.D. 105, 106 (1956); Note, 34 Corn.L.Q. 103 (1948); Note, 13 So.Calif.L.Rev. 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

Subdivision (f). The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13 (h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R. v. Erie Avenue Warehouse Co.,* 5 F.R.Serv.2d 14a.62, Case 2 (3d Cir.1962); *Dery v. Wyer,* 265 F.2d 804 (2d Cir.1959); *United Artists Corp. v. Masterpiece Productions, Inc.,* 221 F.2d 213 (2d Cir.1955); *Lesnik v. Public Industrials Corp.,* 144 F.2d 968 (2d Cir.1944); *Vaughn v. Terminal Transp. Co.,* 162 F.Supp. 647 (E.D.Tenn.1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, supra, § 4.01[13] (Supp.1960); 1 Barron & Holtzoff, supra, § 184; Note, 51 Nw.U.L.Rev. 354 (1956). But cf. Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts,* 18 F.R.D. 105, 106 (1956).

As to the need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see *Graber v. Graber,* 93 F.Supp. 281 (D.D.C.1950); *Teele Soap Mfg. Co. v. Pine Tree Products Co., Inc.,* 8 F.Supp. 546 (D.N.H.1934); *Mitchell v. Dexter,* 244 Fed. 926 (1st Cir.1917); *In re Graves,* 29 Fed. 60 (N.D.Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Pub. Corp. v. Murphree,* 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946).

Subdivision (i). The continual increase of civil litigation having international elements makes it advisable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 Yale L.J. 515 (1953); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory,* Proc.A.B.A., Sec.Int'l & Comp.L. 34 (1959); Smit, *International Aspects of Federal Civil Procedure,* 61 Colum.L.Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the United States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. § 1451(b); 35 U.S.C. §§ 146, 293; Me.Rev.Stat., ch. 22, § 70 (Supp.1961); Minn.Stat.Ann. § 303.13 (1947); N.Y.Veh. & Tfc.Law § 253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., *Chapman v. Superior Court,* 162 Cal.App.2d 421, 328 P.2d 23 (Dist.Ct.App.1958); *Sperry v. Fliegers,* 194 Misc. 438, 86 N.Y.S.2d 830 (Sup.Ct.1949); *Ewing v. Thompson,* 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing v. Bush,* 260 S.W.2d 900 (Tex.Ct.Civ.App.1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§ 77v(a), 78aa, 79y; 28 U.S.C. § 1655; 38 U.S.C. § 784(a); Ill.Ann.Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore, "sovereign," acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, supra, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Juridical Committee, *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures* 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See ibid.

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

Subdivision (i)(1). Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures,* supra.

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign courts, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See *In re Letters Rogatory out of First Civil Court of City of Mexico,* 261 Fed. 652 (S.D.N.Y.1919); Jones, supra, at 543; Comment, 44 Colum.L.Rev. 72 (1944); Note 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See *Milliken v. Meyer,* 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad, see e.g., 35 U.S.C. §§ 146, 293; 46 U.S.C. § 1292; Calif.Ins.Code § 1612; N.Y.Veh. & Tfc. Law § 253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, e.g., Hawaii Rev.Laws §§ 230-31, 230-32 (1955); Minn.Stat.Ann. § 303.13 (1947); N.Y.Civ.Prac.Act, § 229-b; N.Y.Veh. & Tfc.Law § 253, and it has been sanctioned by the courts even in the absence of statutory provision specifying that form of service. *Zurini v. United States,* 189 F.2d 722 (8th Cir.1951); *United States v. Cardillo,* 135 F.Supp. 798 (W.D.Pa.1955); *Autogiro Co. v. Kay Gyroplanes, Ltd.,* 55 F.Supp. 919 (D.D.C.1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to by the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 U.S.C. §§ 146, 293; 38 U.S.C. § 784(a); 46 U.S.C. § 1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. Cf. Rule 45(c); N.Y.Civ.Prac.Act §§ 233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country; it also may improve the changes of enforcing the judgment in the country of service. Especially is this alternative valuable when authority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another "sovereign," may be particularly offensive to the foreign country. See generally Smit, supra, at 1040-41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

Subdivision (i)(2). When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See Jones, supra, at 537; Longley, supra, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see *Aero Associates, Inc. v. La Metropolitana,* 183 F.Supp. 357 (S.D.N.Y.1960).

1966 Amendment

The wording of Rule 4(f) is changed to accord with the amendment of Rule 13(h) referring to Rule 19 as amended.

1980 Amendment

Subdivision (a). This is a technical amendment to conform this subdivision with the amendment of subdivision (c).

Subdivision (c). The purpose of this amendment is to authorize service of process to be made by any person who is authorized

to make service in actions in the courts of general jurisdiction of the state in which the district court is held or in which service is made.

There is a troublesome ambiguity in Rule 4. Rule 4(c) directs that all process is to be served by the marshal, by his deputy, or by a person specially appointed by the court. But Rule 4(d)(7) authorizes service in certain cases "in the manner prescribed by the law of the state in which the district court is held. . . ." And Rule 4(e), which authorizes service beyond the state and service in quasi in rem cases when state law permits such service, directs that "service may be made . . . under the circumstances and in the manner prescribed in the [state] statute or rule." State statutes and rules of the kind referred to in Rule 4(d)(7) and Rule 4(e) commonly designate the persons who are to make the service provided for, e.g., a sheriff or a plaintiff. When that is so, may the persons so designated by state law make service, or is service in all cases to be made by a marshal or by one specially appointed under present Rule 4(c)? The commentators have noted the ambiguity and have suggested the desirability of an amendment. See 2 Moore's *Federal Practice* ¶4.08 (1974); Wright & Miller, *Federal Practice and Procedure:* Civil § 1092 (1969). And the ambiguity has given rise to unfortunate results. See *United States for the use of Tanos v. St. Paul Mercury Ins. Co.,* 361 F.2d 838 (5th Cir. 1966); *Veeck v. Commodity Enterprises, Inc.,* 487 F.2d 423 (9th Cir.1973).

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

Purposes of Revision. The general purpose of this revision is to facilitate the service of the summons and complaint. The revised rule explicitly authorizes a means for service of the summons and complaint on any defendant. While the methods of service so authorized always provide appropriate notice to persons against whom claims are made, effective service under this rule does not assure that personal jurisdiction has been established over the defendant served.

First, the revised rule authorizes the use of any means of service provided by the law not only of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

Second, the revised rule clarifies and enhances the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing "service-by-mail," a procedure that effects economic service with cooperation of the defendant. Defendants that magnify costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

Third, the revision reduces the hazard of commencing an action against the United States or its officers, agencies, and corporations. A party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects in service.

Fourth, the revision calls attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries and favors the use of internationally agreed means of service. In some respects, these treaties have facilitated service in foreign countries but are not fully known to the bar.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendant against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. A new provision enables district courts to exercise jurisdiction, if permissible under the Constitution and not precluded by statute, when a federal claim is made against a defendant not subject to the jurisdiction of any single state.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

The Caption of the Rule. Prior to this revision, Rule 4 was entitled "Process" and applied to the service of not only the summons but also other process as well, although these are not covered by the revised rule. Service of process in eminent domain proceedings is governed by Rule 71A. Service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled "Summons" and applies only to that form of legal process. Unless service of the summons is waived, a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the former rule which relate specifically to service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

Subdivision (a). Revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be the same in all cases. Few states now employ, distinctive requirements of form for a summons and the applicability of such a requirement in federal court can only serve as a trap for an unwary party or attorney. A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See 4A Wright & Miller, Federal Practice and Procedure § 1131 (2d ed. 1987).

Subdivision (b). Revised subdivision (b) replaces the former subdivision (a). The revised text makes clear that the responsibility for filling in the summons falls on the plaintiff, not the clerk of the court. If there are multiple defendants, the plaintiff may secure issuance of a summons for each defendant, or may serve copies of a single original bearing the names of multiple defendants if the addressee of the summons is effectively identified.

Subdivision (c). Paragraph (1) of revised subdivision (c) retains language from the former subdivision (d)(1). Paragraph (2) retains language from the former subdivision (a), and adds an appropriate caution regarding the time limit for service set forth in subdivision (m).

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving the summons. Subdivision (c) eliminates the requirement for service by the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, is now permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to appoint a marshal, a deputy, or some other person to effect service of a summons in two classes of cases specified by statute: actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to appoint a process server on motion of a party. If a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals Service to perform services in actions brought by the United States. 28 U.S.C. § 651.

Subdivision (d). This text is new, but is substantially derived from the former subdivisions (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside the United States and can be

served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. See Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir.1989).

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. Mayo Foundation, 886 F.2d 161 (8th Cir.1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

The request for waiver of service may be sent only to defendants subject to service under subdivision (e), (f), or (h). The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail. Infants or incompetent persons likewise are not called upon to waive service because, due to their presumed inability to understand the request and its consequences, they must generally be served through fiduciaries.

It was unclear whether the former rule authorized, mailing of a request for "acknowledgement of service" to defendants outside the forum state. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) 5-29, 30 (1991) and cases cited. But, as Professor Casad observed, there was no reason not to employ this device in an effort to obtain service outside the state, and there are many instances in which it was in fact so used, with respect both to defendants within the United States and to defendants in other countries.

The opportunity for waiver has distinct advantages to a foreign defendant. By waiving service, the defendant can reduce the costs that may ultimately be taxed against it if unsuccessful in the lawsuit, including the sometimes substantial expense of translation that may be wholly unnecessary for defendants fluent in English. Moreover, a foreign defendant that waives service is afforded substantially more time to defend against the action than if it had been formally served: under Rule 12, a defendant ordinarily has only 20 days after service in which to file its answer or raise objections by motion, but by signing a waiver it is allowed 90 days after the date the request for waiver was mailed in which to submit its defenses. Because of the additional time needed for mailing and the unreliability of some foreign mail services, a period of 60 days (rather than the 30 days required for domestic transmissions) is provided for a return of a waiver sent to a foreign country.

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the "service-by-mail" provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. Nor are there any adverse consequences to a foreign defendant, since the provisions for shifting the expense of service to a defendant that declines to waive service apply only if the plaintiff and defendant are both located in the United States.

With respect to a defendant located in a foreign country like the United Kingdom, which accepts documents in English, whose Central Authority acts promptly in effecting service, and whose policies discourage its residents from waiving formal service, there will be little reason for a plaintiff to send the notice and request under subdivision (d) rather than use convention methods. On the other hand, the procedure offers significant potential benefits to a plaintiff when suing a defendant that, though fluent in English, is located in a country where, as a condition to formal service under a convention, documents must be translated into another language or where formal service will be otherwise costly or time-consuming.

Paragraph (1) is explicit that a timely waiver of service of a summons does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant's person, or to assert other defenses that may be available. The only issues eliminated are those involving the sufficiency of the summons or the sufficiency of the method by which it is served.

Paragraph (2) states what the present rule implies: the defendant has a duty to avoid costs associated with the service of a

summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B, which replace the former Form 18-A.

Paragraph (2)(A) is explicit that a request for waiver of service by a corporate defendant must be addressed to a person qualified to receive service. The general mail rooms of large organizations cannot be required to identify the appropriate individual recipient for an institutional summons.

Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request or was insufficiently literate in English to understand it. It should be noted that the provisions for shifting the cost of service apply only if the plaintiff and the defendant are both located in the United States, and accordingly a foreign defendant need not show "good cause" for its failure to waive service.

Paragraph (3) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay be declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is not called upon to respond to the complaint until 60 days from the date the notice was sent to it--90 days if the notice was sent to a foreign country--rather than within the 20 day period from date of service specified in Rule 12.

Paragraph (4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir.1984). Cf. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

The procedure of requesting waiver of service should also not be used if the time for service under subdivision (m) will expire before the date on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, e.g., Prather v. Raymond Constr. Co., 570 F.Supp. 278 (N.D.Ga.1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h). It may be noted that the presumptive time limit for service under subdivision (m) does not apply to service in a foreign country.

Paragraph (5) is a cost-shifting provision retained from the former rule. The costs that may be imposed on the defendant could include, for example, the cost of the time of a process server required to make contact with a defendant residing in a guarded apartment house or residential development. The paragraph is explicit that the costs of enforcing the cost-shifting provision are

themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

Subdivision (e). This subdivision replaces former subdivisions (c)(2)(C)(i) and (d)(1). It provides a means for service of summons on individuals within a judicial district of the United States. Together with subdivision (f), it provides for service on persons anywhere, subject to constitutional and statutory constraints.

Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may assert the territorial limits of the court's reach set forth in subdivision (k), including the constitutional limitations that may be imposed by the Due Process Clause of the Fifth Amendment.

Paragraph (1) authorizes service in any judicial district in conformity with state law. This paragraph sets forth the language of former subdivision (c)(2)(C)(i), which authorized the use of the law of the state in which the district court sits, but adds as an alternative the use of the law of the state in which the service is effected.

Paragraph (2) retains the text of the former subdivision (d)(1) and authorizes the use of the familiar methods of personal or abode service or service on an authorized agent in any judicial district.

To conform to these provisions, the former subdivision (e) bearing on proceedings against parties not found within the state is stricken. Likewise stricken is the first sentence of the former subdivision (f), which had restricted the authority of the federal process server to the state in which the district court sits.

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of statutory authority. E.g., Martens v. Winder, 341 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 937 (1965). This authority, however, was found to exist by implication. E.g., SEC v. VTR, Inc., 39 F.R.D. 19 (S.D.N.Y.1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

A secondary effect of this provision for foreign service of a federal summons is to facilitate the use of federal long-arm law in actions brought to enforce the federal law against defendants who cannot be served under any state law but who can be constitutionally subjected to the jurisdiction of the federal court. Such a provision is set forth in paragraph (2) of subdivision (k) of this rule, applicable only to persons not subject to the territorial jurisdiction of any particular state.

Paragraph (1) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. See 28 U.S.C.A., Fed.R.Civ.P. 4 (Supp.1986). This Convention is an important means of dealing with problems of service in a foreign country. See generally 1 B. Ristau, International Judicial Assistance §§ 4-1-1 to 4-5-2 (1990). Use of the Convention procedures, when available, is mandatory if documents must be transmitted abroad to effect service. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (noting that voluntary use of these procedures may be desirable even when service could constitutionally be effected in another manner); J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U.Pitt.L.Rev. 903 (1989). Therefore, this paragraph provides that, when service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available and if the treaty so requires.

The Hague Convention furnishes safeguards against the abridgment of rights of parties through inadequate notice. Article 15 provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows a lack of adequate notice either to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.

The Hague Convention does not specify a time within which a foreign country's Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, resort may be had to the provision set forth in subdivision (f)(3).

Two minor changes in the text reflect the Hague Convention. First, the term "letter of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subdivision (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated.

Paragraph (2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule. Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods for conforming to local practice or using a local authority. Subparagraph (C) prescribes other methods authorized by the former rule.

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit service within the time required by the circumstances. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. Levin v. Ruby Trading Corp., 248 F.Supp. 537 (S.D.N.Y.1965).

Subdivision (g). This subdivision retains the text of former subdivision (d)(2). Provision is made for service upon an infant or incompetent person in a foreign country.

Subdivision (h). This subdivision retains the text of former subdivision (d)(3), with changes reflecting those made in subdivision (e). It also contains the provisions for service on a corporation or association in a foreign country, as formerly found in subdivision (i).

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

Subdivision (i). This subdivision retains much of the text of former subdivisions (d)(4) and (d)(5). Paragraph (1) provides for service of a summons on the United States; it amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States attorney.

Paragraph (2) replaces former subdivision (d)(5). Paragraph (3) saves the plaintiff from the hazard of losing a substantive right

because of failure to comply with the complex requirements of multiple service under this subdivision. That risk has proved to be more than nominal. E.g., Whale v. United States, 792 F.2d 951 (9th Cir.1986). This provision should be read in connection with the provisions of subdivision (c) of Rule 15 to preclude the loss of substantive rights against the United States or its agencies, corporations, or officers resulting from a plaintiff's failure to correctly identify and serve all the persons who should be named or served.

Subdivision (j). This subdivision retains the text of former subdivision (d)(6) without material change. The waiver-of-service provision is also inapplicable to actions against governments subject to service pursuant to this subdivision.

The revision adds a new paragraph (1) referring to the statute governing service of a summons on a foreign state and its political subdivisions, agencies, and instrumentalities, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608. The caption of the subdivision reflects that change.

Subdivision (k). This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act. Paragraph (1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of territorial jurisdiction by all district courts with respect to specified federal actions. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f).

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Int'l. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir.1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n. 3 (3rd Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill.L.Rev. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U.S.C. §§ 1404, 1406. The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so

onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c).

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A Wright & Miller, Federal Practice and Procedure § 1132 (2d ed. 1987).

Subdivision (m). This subdivision retains much of the language of the present subdivision (j).

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D.Mich.1987). A specific instance of good cause is set forth in paragraph (3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. Robinson v. America's Best Contacts & Eyeglasses, 876 F.2d 596 (7th Cir.1989).

The 1983 revision of this subdivision referred to the "party on whose behalf such service was required," rather than to the "plaintiff," a term used generically elsewhere in this rule to refer to any party initiating a claim against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

Subdivision (n). This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (1) incorporates any requirements of 28 U.S.C. § 1655 or similar provisions bearing on seizures or liens.

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

2000 Amendment

Paragraph (2)(B) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. *See Vaccaro v. Dobre*, 81 F.3d 854, 856-857 (9th Cir.1996); *Armstrong v. Sears*, 33 F.3d 182, 185-187 (2d Cir.1994); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113, 116 (6th Cir.1988); *Light v. Wolf*, 816 F.2d 746 (D.C.Cir.1987);

see also Simpkins v. District of Columbia, 108 F.3d 366, 368-369 (D.C.Cir.1997). Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a requirement that is made explicit. Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

Paragraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

An action against a former officer or employee of the United States is covered by paragraph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

Paragraph (3) is amended to ensure that failure to serve the United States in an action governed by paragraph 2(B) does not defeat an action. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States . There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States must be allowed after the failure is pointed out. An additional change ensures that if the United States or United States attorney is served in an action governed by paragraph 2(A), additional time is to be allowed even though no officer, employee, agency, or corporation of the United States was served.

GAP Report

The most important changes were made to ensure that no one would read the seemingly independent provisions of paragraphs 2(A) and 2(B) to mean that service must be made twice both on the United States and on the United States employee when the employee is sued in both official and individual capacities. The word "only" was added in subparagraph (A) and the new phrase "whether or not the officer or employee is sued also in an individual capacity" was inserted in subparagraph (B).

Minor changes were made to include "Employees" in the catch-line for subdivision (i), and to add "or employee" in paragraph 2(A). Although it may seem awkward to think of suit against an employee in an official capacity, there is no clear definition that separates "officers" from "employees" for this purpose. The published proposal to amend Rule 12(a)(3) referred to actions against an employee sued in an official capacity, and it seemed better to make the rules parallel by adding "employee" to Rule 4(i)(2)(A) than by deleting it from Rule 12(a)(3)(A).

2007 Amendment

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a

reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

The former provision describing service on interpleader claimants [former (k)(1)(C)] is deleted as redundant in light of the general provision in (k)(1)(C) recognizing personal jurisdiction authorized by a federal statute.

LEGISLATIVE STATEMENT
1983 Amendment

128 Congressional Record H 9848, Dec. 15, 1982. Mr. EDWARDS of California. Mr. Speaker, in July Mr. McClory and I brought before the House a bill to delay the effective date of proposed changes in rule 4 of the Federal Rules of Civil Procedure dealing with service of process. The Congress enacted that legislation and delayed the effective date so that we could cure certain problems in the proposed amendments to rule 4.

Since that time, Mr. McClory and I introduced a bill, H.R. 7154, that cures those problems. It was drafted in consultation with representatives of the Department of Justice, the Judicial Conference of the United States, and others.

The Department of Justice and the Judicial Conference have endorsed the bill and have urged its prompt enactment. Indeed, the Department of Justice has indicated that the changes occasioned by the bill will facilitate its collection of debts owed to the Government.

I have a letter from the Office of Legislative Affairs of the Department of Justice supporting the bill that I will submit for the Record. Also, I am submitting for the Record a section-by-section analysis of the bill.

H.R. 7154 makes much needed changes in rule 4 of the Federal Rules of Civil Procedure and is supported by all interested parties. I urge my colleagues to support it.

U.S. DEPARTMENT OF JUSTICE,

OFFICE OF LEGISLATIVE AFFAIRS,

Washington, D.C., December 10, 1982.

Hon. Peter W. Rodino, Jr.

Chairman, Committee on the Judiciary House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is to proffer the views of the Department of Justice on H.R. 7154, the proposed Federal Rules of Civil Procedure Amendments Act of 1982. While the agenda is extremely tight and we appreciate that fact, we do reiterate that this Department strongly endorses the enactment of H.R. 7154. We would greatly appreciate your watching for any possible way to enact this legislation expeditiously.

H.R. 7154 would amend Rule 4 of the Federal Rules of Civil Procedure to relieve effectively the United States Marshals Service of the duty of routinely serving summonses and complaints for private parties in civil actions and would thus achieve a goal this Department has long sought. Experience has shown that the Marshals Service's increasing workload and limited budget require such major relief from the burdens imposed by its role as process-server in all civil actions.

The bill would also amend Rule 4 to permit certain classes of defendants to be served by first class mail with a notice and acknowledgment of receipt form enclosed. We have previously expressed a preference for the service-by-mail provisions of the proposed amendments to Rule 4 which the Supreme Court transmitted to Congress on April 28, 1982.

The amendments proposed by the Supreme Court would permit service by registered or certified mail, return receipt requested. We had regarded the Supreme Court proposal as the more efficient because it would not require an affirmative act of signing and mailing on the part of a defendant. Moreover, the Supreme Court proposal would permit the entry of a default judgment if the record contained a returned receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant and subsequent service and notice by first class mail. However, critics of that system of mail service have argued that certified mail is not an effective method of providing actual notice to defendants of claims against them because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been "unclaimed" or "refused," the latter providing the sole basis for a default judgment.

As you know, in light of these criticisms the Congress enacted Public Law 97-227 (H.R. 6663) postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983, so as to facilitate further review of the problem. This Department opposed the delay in the effective date, primarily because the Supreme Court's proposed amendments also contained urgently needed provisions designed to relieve the United States Marshals of the burden of serving summonses and complaints in private civil actions. In our view, these necessary relief provisions are readily separable from the issues of service by certified mail and the propriety of default judgment after service by certified mail which the Congress felt warranted additional review.

During the floor consideration of H.R. 6663 Congressman Edwards and other proponents of the delayed effective date pledged to expedite the review of the proposed amendments to Rule 4, given the need to provide prompt relief for the Marshals Service in the service of process area. In this spirit Judiciary Committee staff consulted with representatives of this Department, the Judicial Conference, and others who had voiced concern about the proposed amendments.

H.R. 7154 is the product of those consultations and accommodated the concerns of the Department in a very workable and acceptable manner.

Accordingly, we are satisfied that the provisions of H.R. 7154 merit the support of all three branches of the Federal Government and everyone else who has a stake in the fair and efficient service of process in civil actions. We urge prompt consideration of H.R. 7154 by the Committee.[1]

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,

Assistant Attorney General

[1] In addition to amending Rule 4, we have previously recommended: (a) amendments to 28 U.S.C. § 569(b) redefining the Marshals traditional role by eliminating the statutory requirement that they serve subpoenas, as well as summonses and complaints, and; (b) amendments to 28 U.S.C. § 1921 changing the manner and level in which marshal fees are charged for serving private civil process. These legislative changes are embodied in Section 10 of S. 2567 and the Department's proposed fiscal year 1983 Appropriations Authorization bill. If, in the Committee's judgment, efforts to incorporate these suggested amendments in H.R. 7154 would in any way impede consideration of the bill during the few remaining legislative days in the 97th Congress, we would urge that they be separately considered early in the 98th Congress.

H.R. 7154--Federal Rules of Civil Procedure Amendments Act of 1982

BACKGROUND

The Federal Rules of Civil Procedure set forth the procedures to be followed in civil actions and proceedings in United States district courts. These rules are usually amended by a process established by 28 U.S.C. 2072, often referred to as the "Rules Enabling Act". The Rules Enabling Act provides that the Supreme Court can propose new rules of "practice and procedure" and amendments to existing rules by transmitting them to Congress after the start of a regular session but not later than May 1. The

rules and amendments so proposed take effect 90 days after transmittal unless legislation to the contrary is enacted.[1]

On April 28, 1982, the Supreme Court transmitted to Congress several proposed amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure (which govern criminal cases and proceedings in Federal courts), and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code (which govern habeas corpus proceedings). These amendments were to have taken effect on August 1, 1982.

The amendments to Rule 4 of the Federal Rules of Civil Procedure were intended primarily to relieve United States marshals of the burden of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure), 16 (Advisory Committee Note). The Committee received numerous complaints that the changes not only failed to achieve that goal, but that in the process the changes saddled litigators with flawed mail service, deprived litigants of the use of effective local procedures for service, and created a time limit for service replete with ambiguities that could only be resolved by costly litigation. See House Report No. 97-662, at 2-4 (1982).

In order to consider these criticisms, Congress enacted Public Law 97-227, postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983.[2] Accordingly, in order to help shape the policy behind, and the form of, the proposed amendments, Congress must enact legislation before October 1, 1983.[3]

With that deadline and purpose in mind, consultations were held with representatives of the Judicial Conference, the Department of Justice, and others who had voiced concern about the proposed amendments. H.R. 7154 is the product of those consultations. The bill seeks to effectuate the policy of relieving the Marshals Service of the duty of routinely serving summonses and complaints. It provides a system of service by mail modeled upon a system found to be effective in California, and finally, it makes appropriate stylistic, grammatical, and other changes in Rule 4.

NEED FOR THE LEGISLATION

1. CURRENT RULE 4

Rule 4 of the Federal Rules of Civil Procedure relates to the issuance and service of process. Subsection (c) authorizes service of process by personnel of the Marshals Service, by a person specially appointed by the Court, or "by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made." Subsection (d) describes how a summons and complaint must be served and designates those persons who must be served in cases involving specified categories of defendants. Mail service is not directly authorized. Subsection (d)(7), however, authorizes service under the law of the state in which the district court sits upon defendants described in subsections (d)(1) (certain individuals) and (d)(3) (organizations). Thus, if state law authorizes service by mail of a summons and complaint upon an individual or organization described in subsections (d)(1) or (3), then subsection (d)(7) authorizes service by mail for United States district courts in that state.[4]

2. REDUCING THE ROLE OF MARSHALS

The Supreme Court's proposed modifications of Rule 4 were designed to alleviate the burden on the Marshals Service of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure), 16 (Advisory Committee Note). While the Committee received no complaints about the goal of reducing the role of the Marshals Service, the Court's proposals simply failed to achieve that goal. See House Report No. 97-662, at 2-3 (1982).

The Court's proposed Rule 4(c)(2)(B) required the Marshals Service to serve summonses and complaints "pursuant to any statutory provision expressly providing for service by a United States Marshal or his deputy."[5] One such statutory provision is 28 U.S.C. 569(b), which compels marshals to "execute *all* lawful writs, process and orders issued under authority of the United States, *including those of the courts* * * *." (emphasis added). Thus, any party could have invoked 28 U.S.C. 569(b) to utilize a marshal for service of a summons and complaint, thereby thwarting the intent of the new subsection to limit the use of marshals. The Justice Department acknowledges that the proposed subsection did not accomplish its objectives.[6]

Had 28 U.S.C. 569(b) been inconsistent with proposed Rule 4(c)(2)(B), the latter would have nullified the former under 28 U.S.C. 2072, which provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have

taken effect." Since proposed Rule 4(c)(2)(B) specifically referred to statutes such as 28 U.S.C. 569(b), however, the new subsection did not conflict with 28 U.S.C. 569(b) and did not, therefore, supersede it.

H.R. 7154 cures this problem and achieves the desired reduction in the role of the Marshals Service by authorizing marshals to serve summonses and complaints "on behalf of the United States". By so doing, H.R. 7154 eliminates the loophole in the Court's proposed language and still provides for service by marshals on behalf of the Government.[7]

3. MAIL SERVICE

The Supreme Court's proposed subsection (d)(7) and (8) authorized, as an alternative to personal service, mail service of summonses and complaints on individuals and organizations described in subsection (d)(1) and (3), but only through registered or certified mail, restricted delivery. Critics of that system of mail service argued that registered and certified mail were not necessarily effective methods of providing actual notice to defendants of claims against them. This was so, they argued, because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been "unclaimed" or "refused", the latter apparently providing the sole basis for a default judgment.[8]

H.R. 7154 provides for a system of service by mail similar to the system now used in California. See Cal.Civ.Pro. § 415.30 (West 1973). Service would be by ordinary mail with a notice and acknowledgment of receipt form enclosed. If the defendant returns the acknowledgment form to the sender within 20 days of mailing, the sender files the return and service is complete. If the acknowledgment is not returned within 20 days of mailing, then service must be effected through some other means provided for in the Rules.

This system of mail service avoids the notice problems created by the registered and certified mail procedures proposed by the Supreme Court. If the proper person receives the notice and returns the acknowledgment, service is complete. If the proper person does not receive the mailed form, or if the proper person receives the notice but fails to return the acknowledgment form, another method of service authorized by law is required.[9] In either instance, however, the defendant will receive actual notice of the claim. In order to encourage defendants to return the acknowledgment form, the court can order a defendant who does not return it to pay the costs of service unless the defendant can show good cause for the failure to return it.

4. THE LOCAL OPTION

The Court's proposed amendments to Rule 4 deleted the provision in current subsection (d)(7) that authorizes service of a summons and complaint upon individuals and organizations "in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." The Committee received a variety of complaints about the deletion of this provision. Those in favor of preserving the local option saw no reason to forego systems of service that had been successful in achieving effective notice.[10]

H.R. 7154 carries forward the policy of the current rule and permits a party to serve a summons and complaint upon individuals and organizations described in Rule 4(d)(1) and (3) in accordance with the law of the state in which the district court sits. Thus, the bill authorizes four methods of serving a summons and complaint on such defendants: (1) service by a nonparty adult (Rule 4(c)(2)(A)); (2) service by personnel of the Marshals Service, if the party qualifies, such as because the party is proceeding in forma pauperis (Rule 4(c)(2)(B)); (3) service in any manner authorized by the law of the state in which the district court is held (Rule 4(c)(2)(C)(i)); or (4) service by regular mail with a notice and acknowledgment of receipt form enclosed (Rule 4(c)(2)(C)(ii)).[11]

5. TIME LIMITS

Rule 4 does not currently provide a time limit within which service must be completed. Primarily because United States marshals currently effect service of process, no time restriction has been deemed necessary, Appendix II, at 18 (Advisory Committee Note). Along with the proposed changes to subdivisions (c) and (d) to reduce the role of the Marshals Service, however, came new subdivision (j), requiring that service of a summons and complaint be made within 120 days of the filing of the complaint. If service were not accomplished within that time, proposed subdivision (j) required that the action "be dismissed as to that defendant without prejudice upon motion or upon the court's own initiative". Service by mail was deemed

made for purposes of subdivision (j) "as of the date on which the process was accepted, refused, or returned as unclaimed".[12]

H.R. 7154 adopts a policy of limiting the time to effect service. It provides that if a summons and complaint have not been served within 120 days of the filing of the complaint and the plaintiff fails to show "good cause" for not completing service within that time, then the court must dismiss the action as to the unserved defendant. H.R. 7154 ensures that a plaintiff will be notified of an attempt to dismiss the action. If dismissal for failure to serve is raised by the court upon its own motion, the legislation requires that the court provide notice to the plaintiff. If dismissal is sought by someone else, Rule 5(a) of the Federal Rules of Civil Procedure requires that the motion be served upon the plaintiff.

Like proposed subsection (j), H.R. 7154 provides that a dismissal for failure to serve within 120 days shall be "without prejudice". Proposed subsection (j) was criticized by some for ambiguity because, it was argued, neither the text of subsection (j) nor the Advisory Committee Note indicated whether a dismissal without prejudice would toll a statute of limitation. *See* House Report 97-662, at 3-4 (1982). The problem would arise when a plaintiff files the complaint within the applicable statute of limitation period but does not effect service within 120 days. If the statute of limitation period expires during that period, and if the plaintiff's action is dismissed "without prejudice", can the plaintiff refile the complaint and maintain the action? The answer depends upon how the statute of limitation is tolled.[13]

If the law provides that the statute of limitation is tolled by filing and service of the complaint, then a dismissal under H.R. 7154 for failure to serve within the 120 days would, by the terms of the law controlling the tolling bar the plaintiff from later maintaining the cause of action.[14] If the law provides that the statute of limitation is tolled by filing alone, then the status of the plaintiff's cause of action turns upon the plaintiff's diligence. If the plaintiff has not been diligent, the court will dismiss the complaint for failure to serve within 120 days, and the plaintiff will be barred from later maintaining the cause of action because the statute of limitation has run. A dismissal without prejudice does not confer upon the plaintiff any rights that the plaintiff does otherwise possess and leaves a plaintiff whose action has been dismissed in the same position as if the action had never been filed.[15] If, on the other hand, the plaintiff has made reasonable efforts to effect service, then the plaintiff can move under Rule 6(b) to enlarge the time within which to serve or can oppose dismissal for failure to serve. A court would undoubtedly permit such a plaintiff additional time within which to effect service. Thus, a diligent plaintiff can preserve the cause of action. This result is consistent with the policy behind the time limit for service and with statutes of limitation, both of which are designed to encourage prompt movement of civil actions in the federal courts.

6. CONFORMING AND CLARIFYING SUBSECTIONS (D)(4) AND (5)

Current subsections (d)(4) and (5) prescribe which persons must be served in cases where an action is brought against the United States or an officer or agency of the United States. Under subsection (d)(4), where the United States is the named defendant, service must be made as follows: (1) personal service upon the United States attorney, an assistant United States attorney, or a designated clerical employee of the United States attorney in the district in which the action is brought; (2) registered or certified mail service to the Attorney General of the United States in Washington, D.C.; and (3) registered or certified mail service to the appropriate officer or agency if the action attacks an order of that officer or agency but does not name the officer or agency as a defendant. Under subsection (d)(5), where an officer or agency of the United States is named as a defendant, service must be made as in subsection (d)(4), except that personal service upon the officer or agency involved is required.[16]

The time limit for effecting service in H.R. 7154 would present significant difficulty to a plaintiff who has to arrange for personal service upon an officer or agency that may be thousands of miles away. There is little reason to require different types of service when the officer or agency is named as a party, and H.R. 7154 therefore conforms the manner of service under subsection (d)(5) to the manner of service under subsection (d)(4).

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 provides that the short title of the bill is the "Federal Rules of Civil Procedure Amendments Act of 1982".

SECTION 2

Section 2 of the bill consists of 7 numbered paragraphs, each amending a different part of Rule 4 of the Federal Rules of Civil Procedure.

Paragraph (1) deletes the requirement in present Rule 4(a) that a summons be delivered for service to the marshal or other person authorized to serve it. As amended by the legislation, Rule 4(a) provides that the summons be delivered to "the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and complaint". This change effectuates the policy proposed by the Supreme Court. See Appendix II, at -- (Advisory Committee Note).

Paragraph (2) amends current Rule 4(c), which deals with the service of process. New Rule 4(c)(1) requires that all process, other than a subpoena or a summons and complaint, be served by the Marshals Service or by a person especially appointed for that purpose. Thus, the Marshals Service or persons specially appointed will continue to serve all process other than subpoenas and summonses and complaints, a policy identical to that proposed by the Supreme Court. See Appendix II, at 8 (Report of the Judicial Conference Committee on Rules of Practice and Procedure). The service of subpoenas is governed by Rule 45,[17] and the service of summonses and complaints is governed by new Rule 4(c)(2).

New Rule 4(c)(2)(A) sets forth the general rule that summonses and complaints shall be served by someone who is at least 18 years old and not a party to the action or proceeding. This is consistent with the Court's proposal. Appendix II, at 16 (Advisory Committee Note). Subparagraphs (B) and (C) of new Rule 4(c)(2) set forth exceptions to this general rule.

Subparagraph (B) sets forth 3 exceptions to the general rule. First, subparagraph (B)(i) requires the Marshals Service (or someone specially appointed by the court) to serve summonses and complaints on behalf of a party proceeding in forma pauperis or a seaman authorized to proceed under 28 U.S.C. 1916. This is identical to the Supreme Court's proposal. *See* Appendix II, at 3 (text of proposed rule), 16 (Advisory Committee Note). Second, subparagraph (B)(ii) requires the Marshals Service (or someone specially appointed by the court) to serve a summons and complaint when the court orders the marshals to do so in order properly to effect service in that particular action.[18] This, except for nonsubstantive changes in phrasing, is identical to the Supreme Court's proposal. See Appendix II, at 3 (text of proposed rule), 16 (Advisory Committee Note).

Subparagraph (C) of new Rule 4(c)(2) provides 2 exceptions to the general rule of service by a nonparty adult. These exceptions apply only when the summons and complaint is to be served upon persons described in Rule 4(d)(1) (certain individuals) or Rule 4(d)(3) (organizations).[19] First, subparagraph (C)(i) permits service of a summons and complaint in a manner authorized by the law of the state in which the court sits. This restates the option to follow local law currently found in Rule 4(d)(7) and would authorize service by mail if the state law so allowed. The method of mail service in that instance would, of course, be the method permitted by state law.

Second, subparagraph (C)(ii) **permits service of a summons and complaint by regular mail.** The sender must send to the defendant, by first-class mail, postage prepaid, a copy of the summons and complaint, together with 2 copies of a notice and acknowledgment of receipt of summons and complaint form and a postage prepaid return envelope addressed to the sender. If a copy of the notice and acknowledgment form is not received by the sender within 20 days after the date of mailing, then service must be made under Rule 4(c)(2)(A) or (B) (i.e., by a nonparty adult or, if the person qualifies,[20] by personnel of the Marshals Service or a person specially appointed by the court) in the manner prescribed by Rule 4(d)(1) or (3) (i.e., personal or substituted service).

New Rule 4(c)(2)(D) permits a court to penalize a person who avoids service by mail. It authorizes the court to order a person who does not return the notice and acknowledgment form within 20 days after mailing to pay the costs of service, unless that person can show good cause for failing to return the form. The purpose of this provision is to encourage the prompt return of the form so that the action can move forward without unnecessary delay. Fairness requires that a person who causes another additional and unnecessary expense in effecting service ought to reimburse the party who was forced to bear the additional expense.

Subparagraph (E) of Rule 4(c)(2) requires that the notice and acknowledgment form described in new Rule 4(c)(2)(C)(ii) be executed under oath or affirmation. This provision tracks the language of 28 U.S.C. 1746, which permits the use of unsworn declarations under penalty of perjury whenever an oath or affirmation is required. Statements made under penalty of perjury are subject to 18 U.S.C. 1621(2), which provides felony penalties for someone who "willfully subscribes as true any material

matter which he does not believe to be true". The requirement that the form be executed under oath or affirmation is intended to encourage truthful submissions to the court, as the information contained in the form is important to the parties.[21]

New Rule 4(c)(3) authorizes the court freely to make special appointments to serve summonses and complaints under Rule 4(c)(2)(B) and all other process under Rule 4(c)(1). This carries forward the policy of present Rule 4(c).

Paragraph (3) of section 2 of the bill makes a non-substantive change in the caption of Rule 4(d) in order to reflect more accurately the provisions of Rule 4(d). Paragraph (3) also deletes a provision on service of a summons and complaint pursuant to state law. This provision is redundant in view of new Rule 4(c)(2)(C)(i).

Paragraph (4) of section 2 of the bill conforms Rule 4(d)(5) to present Rule 4(d)(4). Rule 4(d)(5) is amended to provide that service upon a named defendant agency or officer of the United States shall be made by "sending" a copy of the summons and complaint "by registered or certified mail" to the defendant.[22] Rule 4(d)(5) currently provides for service by "delivering" the copies to the defendant, but 28 U.S.C. 1391(e) authorizes delivery upon a defendant agency or officer outside of the district in which the action is brought by means of certified mail. Hence, the change is not a marked departure from current practice.

Paragraph (5) of section 2 of the bill amends the caption of Rule 4(e) in order to describe subdivision (e) more accurately.

Paragraph (6) of section 2 of the bill amends Rule 4(g), which deals with return of service. Present rule 4(g) is not changed except to provide that, if service is made pursuant to the new system of mail service (Rule 4(c)(2)(C)(ii)), the plaintiff or the plaintiff's attorney must file the court the signed acknowledgment form returned by the person served.

Paragraph (7) of section 2 of the bill adds new subsection (j) to provide a time limitation for the service of a summons and complaint. New Rule 4(j) retains the Supreme Court's requirement that a summons and complaint be served within 120 days of the filing of the complaint. See Appendix II, at 18 (Advisory Committee Note).[23] The plaintiff must be notified of an effort or intention to dismiss the action. This notification is mandated by subsection (j) if the dismissal is being raised on the court's own initiative and will be provided pursuant to Rule 5 (which requires service of motions upon the adverse party) if the dismissal is sought by someone else.[24] The plaintiff may move under Rule 6(b) to enlarge the time period. See Appendix II, at Id. (Advisory Committee Note). If service is not made within the time period or enlarged time period, however, and if the plaintiff fails to show "good cause" for not completing service, then the court must dismiss the action as to the unserved defendant. The dismissal is "without prejudice". The term "without prejudice" means that the dismissal does not constitute an adjudication of the merits of the complaint. A dismissal "without prejudice" leaves a plaintiff whose action has been dismissed in the position in which that person would have been if the action had never been filed.

SECTION 3

Section 3 of the bill amends the Appendix of Forms at the end of the Federal Rules of Civil Procedure by adding a new form 18A, "Notice and Acknowledgment for Service by Mail". This new form is required by new Rule 4(c)(2)(C)(ii), which requires that the notice and acknowledgment form used with service by regular mail conform substantially to Form 18A.

Form 18A as set forth in section 3 of the bill is modeled upon a form used in California.[25] It contains 2 parts. The first part is a notice to the person being served that tells that person that the enclosed summons and complaint is being served pursuant to Rule 4(c)(2)(C)(ii); advises that person to sign and date the acknowledgment form and indicate the authority to receive service if the person served is not the party to the action (e.g., the person served is an officer of the organization being served); and warns that failure to return the form to the sender within 20 days may result in the court ordering the party being served to pay the expenses involved in effecting service. The notice also warns that if the complaint is not responded to within 20 days, a default judgment can be entered against the party being served. The notice is dated under penalty of perjury by the plaintiff or the plaintiff's attorney.[26]

The second part of the form contains the acknowledgment of receipt of the summons and complaint. The person served must declare on this part of the form, under penalty of perjury, the date and place of service and the person's authority to receive service.

SECTION 4

Section 4 of the bill provides that the changes in Rule 4 made by H.R. 7154 will take effect 45 days after enactment, thereby giving the bench and bar, as well as other interested persons and organizations (such as the Marshals Service), an opportunity to prepare to implement the changes made by the legislation. The delayed effective date means that service of process issued before the effective date will be made in accordance with current Rule 4. Accordingly, all process in the hands of the Marshals Service prior to the effective date will be served by the Marshals Service under the present rule.

SECTION 5

Section 5 of the bill provides that the amendments to Rule 4 proposed by the Supreme Court (whose effective date was postponed by Public Law 97-227) shall not take effect. This is necessary because under Public Law 97-227 the proposed amendments will take effect on October 1, 1983.

For background information about how the Judicial Conference committees operate, see Wright, "Procedural Reform: Its Limitation and Its Future," 1 Ga.L.Rev. 563, 565-66 (1967) (civil rules); statement of United States District Judge Roszel C. Thomsen, Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess. at 25 (1974) (criminal rules); statement of United States Circuit Judge J. Edward Lumbard, id. at 203 (criminal rules); J. Weinstein, Reform of Federal Court Rulemaking Procedure (1977); Weinstein, "Reform of Federal Rulemaking Procedures," 76 Colum.L.Rev. 905 (1976).

The interpretation of Rule 4(d)(8) to require a refusal of delivery in order to have a basis for a default judgment, while undoubtedly the interpretation intended and the interpretation that reaches the fairest result, may not be the only possible interpretation. Since a default judgment can be entered for defendant's failure to respond to the complaint once defendant has been served and the time to answer the complaint has run, it can be argued that a default judgment can be obtained where the mail was unclaimed because proposed subsection (j), which authorized dismissal of a complaint not served within 120 days, provided that mail service would be deemed made "on the date on which the process was accepted, refused, or *returned as unclaimed* " (emphasis added).

In the federal question action, the courts of appeals have generally held that Rule 3 governs, so that the filing of the complaint tolls a statute of limitation. *United States v. Wahl,* 538 F.2d 285 (6th Cir. 1978); *Windbrooke Dev. Co. v. Environmental Enterprises Inc. of Fla.,* 524 F.2d 461 (5th Cir. 1975); *Metropolitan Paving Co. v. International Union of Operating Engineers,* 439 F.2d 300 (10th Cir. 1971); *Moore Co. v. Sid Richardson Carbon & Gasoline Co.,* 347 F.2d 921 (8th Cir.), cert. denied, 383 U.S. 925, reh. denied, 384 U.S. 914 (1965); *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959). The continued validity of this line of cases, however, must be questioned in light of the *Walker* case, even though the Court in that case expressly reserved judgment about federal question actions, *see Walker v. Armco Steel Corp.,* 446 U.S. 741, 751 n.11 (1980).

TREATIES AND CONVENTIONS

Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I--JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either--

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with--

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by--

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that--

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled--

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled--

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defense to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II--EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III--GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with--

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following--

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of--

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905 [99 BFSP 990], and on 1st March 1954 [286 UNTS 265], this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following--

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally

authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of The States represented at the Tenth Session of the Hague Conference on Private International Law.

[Signatures omitted.]

Service of Documents Convention

ANNEX TO THE CONVENTION

Forms *

* These forms may be obtained from the Offices of United States Marshals.

REQUEST

FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

.....

Identity and address of the applicant

Address of receiving authority

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

The undersigned applicant has the honour to transmit--in duplicate--the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e., (identity and address)
.....

(*a*) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention*.

(*b*) in accordance with the following particular method (sub-paragraph (*b*) of the first paragraph of article 5)*:

.....

(*c*) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5)*.

The authority is requested to return or to have returned to the applicant a copy of the documents--and of the annexes*--with a certificate as provided on the reverse side.
List of documents

.....
.....
.....
.....
.....
.....
.....
Done at .....,
the .....
.....
.....
Signature and/or stamp.

* Delete if inappropriate.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,

1) that the document has been served *
-- the (date). -- at (place, street, number). . -- in one of the following methods authorised by article 5--

(*a*) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention*.

(*b*) in accordance with the following particular method *: .....

(*c*) by delivery to the addressee, who accepted it voluntarily*.

The documents referred to in the request have been delivered to:
--(identity and description of person)

--relationship to the addressee (family, business or other)

2) that the document has not been served, by reason of the following facts*: .....

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement *.
Annexes

Documents returned: .....

.....

.....

.....

.....Done at ....., the .....

In appropriate cases, documents establishing the service:

.....

.....

..... Signature and/or stamp.

*Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, the 15th of November 1965.

(article 5, fourth paragraph)

Name and address of the requesting authority:.....

.....

.....

Particulars of the parties*:

.....

.....

.....

JUDICIAL DOCUMENT**

Nature and purpose of the document:

.....

.....

.....

Nature and purpose of the proceedings and, where appropriate, the amount in dispute: .....

Date and place for entering appearance**:

.....

.....

Court which has given judgment**:

.....

.....

Date of judgment**: .....

Time limits stated in the document**:

.....

.....

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document:

.....

.....

.....

Time limits stated in the document**:

.....

.....

.....

* If appropriate, identity and address of the person interested in the transmission of the document.

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters. Done at The Hague November 15, 1965; entered into force for the United States February 10, 1969. 20 UST 361; TIAS 6638; 658 UNTS 163.

_____

Notes and Annotations to the Convention

Litigants wishing to serve a person in one of the Convention countries should request copies in duplicate of the three forms

prescribed by the Convention: the "Request", the "Certificate" and the "Summary." These forms may be obtained from the offices of the United States Marshals. Upon completion of these forms, the litigants must then transmit them, together with the documents to be served--all in duplicate--to the local process server.

The local process server thereupon mails all these documents to the "Central Authority" abroad. After service has been effected, one copy of the documents served and an executed "Certificate" all be returned to the local process server, who will transmit these documents to the litigant who initiated the request.

---- Annotations

"The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters", 2 Cornell Int'l L.J. 125 (1969).

Julen v. Larson, 25 Cal.App.3d 325, 101 Cal. 796 (1972).

Shoei Kako Co., Ltd. v. Superior Court, 33 Cal.App.3d 808, 109 Cal. 402 (1973).

Notes of Decisions (2083)

Footnotes

1 The drafting of the rules and amendments is actually done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Civil Procedure, the initial draft is prepared by the Advisory Committee on Civil Rules. The Advisory Committee's draft is then reviewed by the Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft approved by that committee is forwarded to the Judicial Conference. If the Judicial Conference approves the draft, it forwards the draft to the Supreme Court. The Judicial Conference's role in the rule-making process is defined by 28 U.S.C. 331.

2 All of the other amendments, including all of the proposed amendments to the Federal Rules of Criminal Procedure and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code, took effect on August 1, 1982, as scheduled.

3 The President has urged Congress to act promptly. See President's Statement on Signing H.R. 6663 into Law, 18 Weekly Comp. of Pres. Doc. 982 (August 2, 1982).

4 Where service of a summons is to be made upon a party who is neither an inhabitant of, nor found within, the state where the district court sits, subsection (e) authorizes service under a state statute or rule of court that provides for service upon such a party. This would authorize mail service if the state statute or rule of court provided for service by mail.

5 The Court's proposal authorized service by the Marshals Service in other situations. This authority, however, was not seen as thwarting the underlying policy of limiting the use of marshals. *See* Appendix II, at 16, 17 (Advisory Committee Note).

6 Appendix I, at 2 (letter of Assistant Attorney General Robert A. McConnell).

7 The provisions of H.R. 7154 conflict with 28 U.S.C. 569(b) because the latter is a broader command to marshals to serve all federal court process. As a later statutory enactment, however, H.R. 7154 supersedes 28 U.S.C. 569(b), thereby achieving the goal of reducing the role of marshals.

8 Proposed Rule 4(d)(8) provided that "Service ... shall not be the basis for the entry of a default or a judgment by default unless the

record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant." This provision reflects a desire to preclude default judgments on unclaimed mail. See Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure).

9

See p. 15 infra.

10

Proponents of the California system of mail service, in particular, saw no reason to supplant California's proven method of mail service with a certified mail service that they believed likely to result in default judgments without actual notice to defendants. See House Report No. 97-662, at 3 (1982).

11

The parties may, of course, stipulate to service, as is frequently done now.

12

While return of the letter as unclaimed was deemed service for the purpose of determining whether the plaintiff's action could be dismissed, return of the letter as unclaimed was not service for the purpose of entry of a default judgment against the defendant. See note 8 supra.

13

The law governing the tolling of a statute of limitation depends upon the type of civil action involved. In a diversity action, state law governs tolling. *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). In *Walker,* plaintiff had filed his complaint and thereby commenced the action under Rule 3 of the Federal Rules of Civil Procedure within the statutory period. He did not, however, serve the summons and complaint until after the statutory period had run. The Court held that state law (which required both filing and service within the statutory period) governed, barring plaintiff's action.

14

The same result obtains even if service occurs within the 120 day period, if the service occurs after the statute of limitation has run.

15

See p. 19 infra.

16

See p. 17 infra.

17

Rule 45(c) provides that "A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age."

18

Some litigators have voiced concern that there may be situations in which personal service by someone other than a member of the Marshals Service may present a risk of injury to the person attempting to make the service. For example, a hostile defendant may have a history of injuring persons attempting to serve process. Federal judges undoubtedly will consider the risk of harm to private persons who would be making personal service when deciding whether to order the Marshals Service to make service under Rule 4(c)(2)(B)(iii).

19

The methods of service authorized by Rule 4(c)(2)(C) may be invoked by any person seeking to effect service. Thus, a nonparty adult who receives the summons and complaint for service under Rule 4(c)(1) may serve them personally or by mail in the manner authorized by Rule 4(c)(2)(C)(ii). Similarly, the Marshals Service may utilize the mail service authorized by Rule 4(c)(2)(C)(ii) when serving a summons and complaint under Rule 4(c)(2)(B)(i)(iii). When serving a summons and complaint under Rule 4(c)(2)(B)(ii), however, the Marshals Service must serve in the manner set forth in the court's order. If no particular manner of service is specified, then the Marshals Service may utilize Rule 4(c)(2)(C)(ii). It would not seem to be appropriate, however, for the Marshals Service to utilize Rule 4(c)(2)(C)(ii) in a situation where a previous attempt to serve by mail failed. Thus, it would not seem to be appropriate for the Marshals Service to attempt service by regular mail when serving a summons and complaint on behalf of a plaintiff who is proceeding in forma pauperis if that plaintiff previously attempted unsuccessfully to serve the defendant by mail.

20

To obtain service by personnel of the Marshals Service or someone specially appointed by the court, a plaintiff who has unsuccessfully attempted mail service under Rule 4(c)(2)(C)(ii) must meet the conditions of Rule 4(c)(2)(B)--for example, the

plaintiff must be proceeding *in forma pauperis.*

21

For example, the sender must state the date of mailing on the form. If the form is not returned to the sender within 20 days of that date, then the plaintiff must serve the defendant in another manner and the defendant may be liable for the costs of such service. Thus, a defendant would suffer the consequences of a misstatement about the date of mailing.

22

See p. 12 supra.

23

The 120 day period begins to run upon the filing of each complaint. Thus, where a defendant files a cross-claim against the plaintiff, the 120 day period begins to run upon the filing of the cross-complaint, not upon the filing of the plaintiff's complaint initiating the action.

24

The person who may move to dismiss can be the putative defendant (i.e., the person named as defendant in the complaint filed with the court) or, in multi-party actions, another party to the action. (If the putative defendant moves to dismiss and the failure to effect service is due to that person's evasion of service, a court should not dismiss because the plaintiff has "good cause" for not completing service.)

25

See Cal.Civ.Pro. § 415.30 (West 1973).

26

See p. 16 supra.

**

Delete if inappropriate.

Fed. Rules Civ. Proc. Rule 4, 28 U.S.C.A., FRCP Rule 4
Amendments received to 12-1-13

End of Document