# REPORT OF THE COMMITTEE ON COURT RULES OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR PROPOSING A NEW FEDERAL DISTRICT COURT RULE ON COSTS


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## I. INTRODUCTION

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Certain Federal statutes, chiefly 28 U.S.C. §§1821 and 1920-1924, govern some of the procedures and amounts of allowable costs. Application of Federal Rule 54(d) and these statutory provisions in the United States District Court for the District of Columbia has, to date, been governed by case law and a document entitled "Clerk's Supplemental Manual Issuance #33" provided and used by the District Court Clerk's Office.*/ Unfortunately, the taxation of costs is not included in the Local Rules. Furthermore, in certain areas the current practice setting the amounts allowable is badly outdated. Seeking costs of any substantial amount becomes virtually a second litigation with all attendant additional costs and fees.

Our Committee believes that taxation of costs should be simple and expeditious. The procedure for taxing costs should be set forth in a local rule available to all who practice in this District. For these reasons, we have drafted a proposed local rule which we suggest be added at the end of Title I, the Civil Rules, of the U.S. District Court Rules. As explained more fully in the comment in Part III, this local rule will not answer all

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*/ A copy of this Issuance #33, together with the Form AO 133 (Rev 7/82) used by the Clerk, are attached hereto as Exhibits A and B.

substantive questions for the court or the parties. However, it will set forth the procedure to be used in order to expedite the process and provide a simpler and less expensive, yet fair and just, method of taxing costs.

## II. TEXT OF PROPOSED RULE 1-33 BILL OF COSTS

### (A)(1) Filing the Bill of Costs

Costs shall be taxed as provided in Rule 54(d) of the Federal Rules of Civil Procedure. A prevailing party may serve and file a bill of costs which shall include all costs which the party seeks to have taxed. This bill of costs shall specifically designate those costs (if any) that fall within Section (B)(2) below. The party shall attach all documentation necessary to support the requested costs, including, for example, copies of invoices. In the absence of specific documentation, an affidavit specifying and verifying costs shall be submitted. The party may submit a brief statement of points and authorities supporting the necessity of the requested costs and the reasons the costs should be taxed. The bill of costs must be verified. Any bill of costs must be filed within twenty (20) days after judgment, unless time is extended. A judgment is final whenever the time to appeal the judgment has expired and no appeal has been taken or when the Court of Appeals renders its mandate on a judgment which has been appealed. Any cost not included in the bill of costs shall not be allowable by the clerk or the court, except for post-judgment costs.

### (2) Opposition

The party from whom costs are sought may file an opposition to the bill of costs. Such opposition must be filed within ten (10) days after service of the bill. Along with the opposition, the party may file a brief statement of points and authorities. Any portion of the bill of costs which is unopposed shall be treated as conceded and taxed by the Clerk.

### (3) Taxation of Costs and Motion to Retax

The clerk will tax costs promptly as appropriate either after judgment has become final or before such time if the parties agree to such taxation before final judgment or upon order of the Court.

A review of the decision of the clerk in the taxation of costs may be taken to the court on motion to retax by any party in accordance with Rule 54(d), Federal Rules of Civil Procedure. The court, on a motion to retax, for good cause shown may tax additional costs or may deny costs allowed by the clerk pursuant to Section (B)(2). A motion to retax shall specify the ruling of the clerk excepted to and no other costs will be considered, except that the opposing party may, within ten (10) days of service of the motion to retax, file an opposition and/or a cross-motion to retax.

(B)(1)

The costs set forth in Section (B)(2) shall be taxed by the clerk should a bill of costs be filed. Costs that are not included in the list of costs set forth in Section (B)(2) may be taxed by the Clerk only if they have not been opposed under Section (A)(2). If an opposition has been filed, costs not covered in Section (B)(2) may be taxed only by the court on a motion to retax.

(2)

The following costs shall be taxed by the clerk if a bill of costs conforming to Section (a)(1) properly requests such costs:

(a) fees of the clerk;

(b) costs for service of summons and complaint;

(c) fees and expenses of the Marshal specified in 28 U.S.C. §1921;

(d) docket fees and costs as specified in 28 U.S.C. §1923;

(e) the premiums paid on undertakings, bonds, or security stipulations where furnished by reason of statute or court order or where reasonably necessary to secure a right in the action or proceeding;

(f) any costs of the kind enumerated in this rule which were incurred in the District of Columbia courts prior to removal which are recoverable under the District of Columbia Code or the Rules of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia;

(g) (i) the costs of the original and one copy at the standard rate of any deposition noticed by the prevailing party and filed with the clerk; and (ii) the costs of one copy of any deposition noticed by any other party, if admitted into evidence, used for impeachment, or used on the record in any of the proceedings in the case (citations to the record must be provided when documenting these costs);

(h) the costs of the original and one copy of the reporter's transcript of proceedings at the standard rate in any trial or other hearing in the case, if the transcript: (i) is alleged by the prevailing party to be or to have been necessary for the determination of an appeal within the meaning of Rule 39(e) of the Federal Rules of Appellate Procedure; or (ii) was required by the court to be transcribed for use in preparation of proposed findings of fact and conclusions of law, or other order required by the Court;

(i) costs of preparation, explication and copying of those exhibits which are introduced into evidence, are used for impeachment, or are filed with the clerk;

(j) other costs of copying up to $300;

(k) witness fees pursuant to 28 U.S.C. §1821(b) for each witness who appears and testifies;

(l) travel and subsistence costs pursuant to 28 U.S.C. §1821(c) up to 100 miles of each witness who appears and testifies;

(m) costs of service of a subpoena on a witness in court or for a deposition for each witness who appears and testifies; and

(n) costs as shown on the Mandate of the Court of Appeals.

## III. SECTION-BY-SECTION ANALYSIS OF THE PROPOSED RULE

### A. Overview

Originally, our Committee had hoped to draft a comprehensive rule governing all procedural and substantive elements of the taxation of costs issue. This included:

(1) establishing a procedure for filing and taxing costs;

(2) defining the "prevailing party"; and

(3) determining all costs that may or may not be allowable.

After substantial study and discussion, our Committee decided that a comprehensive rule would be so complex and lengthy that it would be impossible to implement simply and expeditiously by the Clerk and would remove the proper discretion which now rests with the Court. Therefore, as an initial matter, we decided to leave the question of who is the "prevailing party" for decision by the Clerk based on established case law. See, Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553, 563-566 (1984) (hereinafter cited as "Taxation of Costs"). Review of such a decision, of course, is available to the Court.

Our Committee did believe that we could establish a procedure by which certain generally non-contested costs would be submitted to the Clerk, opposed if appropriate, and resolved by the Clerk. An appeal by either party (by a motion to retax costs) could be taken to the Court. In drafting this procedure, set forth in Rule 1-33(A)(1) and (2), the Committee did not intend to change any substantive rules. We merely sought to provide the framework, together with time limits, for submission of a bill of costs and any opposition to taxing such costs.

Finally, the Committee decided that the most expeditious method of determining which costs were allowable was to establish those costs which, in the great majority of cases, should be taxed

without dispute or contention. Many of these costs, of course, are covered by 28 U.S.C. §§1821 and 1920-1924. Costs which go beyond the "usual" costs must be submitted to the Clerk but can be granted only by the Court.*/ The Court would then decide which costs were allowable based on case law. See, e.g., Taxation of Costs, supra, 101 F.R.D. at 567-586. Similarly, any question as to which is the "prevailing party" must be resolved by the Court. Our Committee hopes this procedure will allow the taxing of costs in a more efficient and expeditious manner by the Clerk, yet allow the Court to act when appropriate.

B. The Proposed Procedure -- Subpart (A)

Subpart (A) of the proposed rule contains the procedure for filing a bill of costs. Some of the procedure is required by Rule 54(d) or by 28 U.S.C. §1920. Under subsection (A)(1), the filing of a bill of costs is voluntary but must be filed within 20 days of the entry of judgment. That time limit, however, can be extended. The party seeking costs must attach supporting documentation and may file a statement of points and authorities supporting the bill of costs. As noted in the rule, this documentation or brief must include all information necessary for the Clerk's resolution of the petition. Thus, for example, if a party seeks the costs of deposition or trial transcripts (see

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*/ The Committee believes that all costs should be included in the original bill of costs so that all parties will be aware of the costs claimed at the earliest possible time.

subsection (B)(2)(g) and (h), it is the party's responsibility to provide the citation in the record where the deposition or trial transcript was used.

The initial bill of costs must include all costs, whether the cost is the type allowable by the Clerk (set forth in subsection (B)(2)) or is the type that can be taxed only by the Court. Those costs which fall within section (B)(2) are to be specifically designated. If any cost is not included in the original bill of costs, it is waived.

Subsection (A)(2) provides a procedure for opposing a bill of costs which is more formal than the current system. Again, a brief in support of the opposition can be filed but is discretionary. Most importantly, if a party does not oppose the bill of costs, it is treated as conceded. This opposition must include those costs not allowable by the Clerk but taxable only by the Court. The Committee believes the original motion to tax costs and the opposition thereto are best submitted as comprehensive documents so all parties are aware of the potential claims or opposition at the earliest possible time.

Subsection (A)(3) provides for a two-part decision on the bill of costs and any opposition thereto. First, the Clerk will tax those "usual" costs which fall within subsection (B)(2). If either party objects to the Clerk's decision, or if a party seeks costs other than those listed in subsection (B)(2), that party may file with the Court a motion to retax within the 5

days allowed by Rule 54(d). Any opposition to the motion to retax shall be filed in 10 days. The Court, on that motion to retax, may grant costs in addition to those listed in subsection (B)(2), or the Court may deny costs falling within subsection (B)(2) which the Clerk allowed.

C. Costs Allowable by the Clerk -- Subpart (B)

Under subsection (B)(1), upon receiving the bill of costs and any opposition, the Clerk will automatically allow the "standard" costs which are set forth in subsection (B)(2). The proposed Rule provides that the list is not exclusive and other costs may be taxed. For example, subsection (B)(2)(k) allows taxation of witness fees of $30 per day for a witness who appears and testifies. Some courts have allowed recovery of such costs for witnesses who appear in good faith but do not testify. See, e.g., Quy v. Air America, Inc., 667 F.2d 1059, 1064 (D.C. Cir. 1981). Again, some courts have allowed recovery of fees in excess of $30 for expert witnesses. See, e.g., Quy v. Air America, Inc., supra, 667 F.2d at 1066 n.11; Coleman v. Omaha, 714 F.2d 804, 805 (8th Cir. 1983). Under the system of the proposed Rule, such costs may not be granted by the Clerk, but may be granted by the Court on a motion to retax.

Subsection (B)(2) provides a list of those "standard" costs that must, if requested, be taxed by the Clerk in favor of the prevailing party. Some are quite minimal, while some may be substantial. Four of the costs, set forth in subsections (a), (b), (c), and (d) are standard legal "costs" paid to the Clerk

or the Marshal. These also include costs of service of the summons which would not be handled by a special process server or by mail. All such costs are or should be easily verifiable. Subsections (e) and (f) similarly are the costs of premiums on bonds or other securities necessary for the lawsuit.

Deposition costs are covered in subsection (g) which allows the Clerk to tax the costs of an original and one copy only of those depositions noticed by the prevailing party. As for copies of depositions noticed by any other party, the cost of a copy is allowable by the Clerk if the deposition is admitted into evidence, used for impeachment, or used on the record in any proceeding. "Used on the record" includes any citation of the deposition in a memorandum or other document filed with the Court. Any other deposition costs, of course, could be granted by the Court on a motion to retax.

Trial transcript costs are allowed by the Clerk automatically under subsection (h) only if needed for an appeal or if required by the Court to be transcribed. Otherwise, such transcript costs can only be allowed by the Court.

Costs of preparing, explicating or copying exhibits are to be allowed by the Clerk under subsection (i) if the exhibits are introduced into evidence or used for impeachment. Since many judges now require filing of all proposed exhibits, such costs may be recovered if the exhibits are filed even if they are never used.

Copying costs, covered by subsection (j), are recoverable up to $300. The Committee attempted to draft a more comprehensive rule on copying costs, but any such rule was open to so much interpretation that the Committee believed that it was impossible for the Clerk to implement quickly and expeditiously. Therefore, the proposed rule allows the Clerk to allow the first $300 in copying costs (up from $100 under current practice) and any copying costs above $300 may be allowed by the Court. Of course, copying costs, as all other costs, must be verified.

Fees and costs of witnesses are discussed in subsections (k), (l) and (m). Essentially, the Clerk will automatically allow certain costs for all witnesses who appear and testify, whether lay or expert. The Clerk will allow $30 in fees and travel subsistence costs pursuant to 28 U.S.C. §1821(c). The Clerk will also allow the costs of a subpoena whether for trial or for deposition. The Committee takes no position on whether the Court should tax fees in excess of $30 for experts, or whether fees should be taxed for those witnesses who do not testify even though a few courts have, by rule, prohibited any expert witness fees in excess of $30 per day.*/ Similarly, our Committee takes

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*/ See, e.g., D. Alaska R. 21(B)(4)(c); S.D. Cal. R. 265-6. Other courts, however, have allowed fees in excess of $30 per day subject to limitations. See, e.g., D.N.M. Rule 15(d)(3) (expert witness fees limited to statutory amount "except for one expert regarding damages and one expert regarding liability"). Many courts will tax expert fees higher than statutory rate if prior court approval is obtained. See, e.g., S.D.N.Y. and E.D.N.Y. Rule 11; E.D. Wis. Rule 9.02(e); D. Wyo. Rule 15(f)(6).

no position on the substantive issue of whether a party who testifies can recover fees and travel and subsistence expenses even though some courts have adopted rules on this question.*/ Our Committee has left these issues to be resolved by the Court based on prevailing law and the circumstances of each case.

## CONCLUSION

Our Committee recognizes that the proposed Rule does not solve any of the substantive issues in the area of costs. The Committee notes that some courts have adopted more substantive rules with respect to most of these costs. See, e.g., D. Montana Rule 265; C.D. Calif. Rule 16; D. Wyoming Rule 15. As explained above, our decision was to leave these substantive areas to the trial judges' discretion. We believe, however, that by setting forth a procedure and a framework for seeking or opposing costs, and by instructing the Clerk to grant the "standard" costs as quickly as possible, most cases will be resolved with only the most exceptional taken to the Court for resolution.

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*/ See, e.g., D. Alaska Rule 21(B)(4)(c); S.D. Cal. Rule 265.6; D. Del. Rule 6.1(B)(4); D.N.J. Rule 23(G)(2). These rules are attached as Exhibit C.