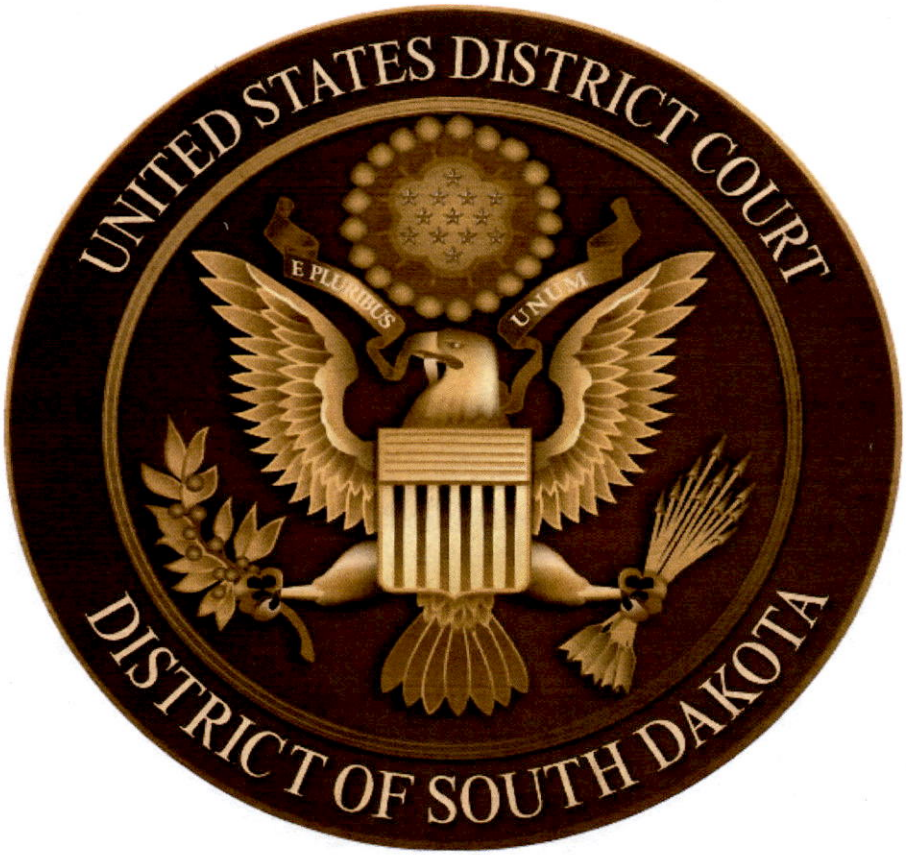

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF SOUTH DAKOTA

BILL OF COSTS GUIDE

OCTOBER 2018

This guide was prepared by the Office of the Clerk of Court to assist parties in properly filing Bills of Costs and associated documentation with this Court. This guide is not legal advice or legal authority and should not be cited as authority in any filing in this Court. This guide is to be used in conjunction with the Federal Rules of Civil Procedure and the Local Rules of this Court, and nothing in this guide creates or add to any rights, claims, or causes of action. This guide is subject to modification in the future.

INTRODUCTION

This guide has been prepared to assist parties in the preparation of bills of cost in this District. The procedure for taxing costs under Rule 54(d) of the Federal Rules of Civil Procedure and the Clerk's authority to tax costs vary among district courts. The Clerk's Office encourages parties to review this guide thoroughly and consult all applicable laws when preparing a Bill of Costs in the U.S. District Court for the District of South Dakota.

Rule 54(d)(1) states that "costs—other than attorney's fees—should be allowed to the prevailing party." Costs that may be taxed are generally outlined at 28 U.S.C. §1920.

In this district, D.S.D. Civ. LR 54.1 prescribes the procedure for taxation of costs. It requires prevailing parties to file and serve a verified Bill of Costs "within 28 calendar days after entry of judgment or an order of dismissal." Parties may then file exceptions "within 14 calendar days . . .." Thereafter, the Clerk of Court may tax costs and, "upon allowance, the costs will be included in the judgment or decree."

The Clerk's authority to tax costs is limited by statute, rule, case law, and local practice. In general, the Clerk will deny costs that are beyond the Clerk's authority to tax or where the authority to tax such costs is unclear.

PROCEDURES FOR FILING BILLS OF COST

1. How to File a Bill of Costs

   Civil Local Rule 54.1(A) outlines the procedure for taxing costs in this District. It requires the prevailing party to file and serve a verified Bill of Costs "within 28 calendar days after entry of judgment or an order of dismissal." Parties have "14 calendar days" to file exceptions, after which the Clerk may tax costs.

   The Clerk recommends using the Bill of Costs form AO 133, which is attached to this guide. Attached to the Bill of Costs should be copies of any vouchers, bills, canceled checks, or other documentation (i.e., explanatory memorandum or affidavit) showing the amount of the costs and/or their purpose. Generally, an invoice is sufficient documentation of a cost.

   - Important: The Clerk will generally not tax costs unless sufficient documentation is provided, including costs that were not objected to by the opposing party.

   All parties granted permission to electronically file documents in CM/ECF must electronically file bills of costs in CM/ECF, using the "Bill of Costs" event. All supporting documentation should be filed as separate attachments.

- Important: Redact all personal data identifiers, such as financial account numbers and tax identification numbers, from all documentation submitted in relation to a Bill of Costs in accordance with Fed. R. Civ. P. 5.2 and D.S.D. Civ. LR 5.2.

2. Only Prevailing Parties are Entitled to Taxation of Costs

   Under Rule 54(d), costs "should be allowed to the prevailing party." Generally, a party is considered a "prevailing party" when a judgment has been entered in its favor.

3. Cases Involving Multiple Parties

   In cases involving more than a single plaintiff or a single defendant, the Clerk will not award the same cost more than once.

4. Agreements Between Parties as to Costs

   Parties may agree on the amount of costs to be paid any time before the Clerk taxes costs. When such an agreement occurs, the parties, or one party on behalf of all parties, should electronically file a letter notifying the Clerk of the agreement using the "Letter Regarding Bill of Costs" event.

5. Withdrawing a Bill of Costs

   A Bill of Costs may be withdrawn by the filing party at any time before the Clerk taxes costs. To withdraw a Bill of Costs, the withdrawing party should file a letter in CM/ECF to the Clerk stating that the Bill of Costs is withdrawn using the "Letter Regarding Bill of Costs" event.

TAXABLE COSTS

1. Fees of the Clerk, 28 U.S.C. §1920(1)

Only fees paid to the Clerk of this Court are taxable by the Clerk. Typically, these include filing fees or *pro hac vice* admission fees. There is no need to submit receipts for filing fees paid to the Clerk of Court. For fees other than filing fees that were paid to the Clerk, provide receipts for the cost or a reference to the applicable docket entry in the case.

2. Fees of the Marshal, 28 U.S.C. §1920(1)

Marshal fees are recoverable under §1920, however, this does not extend to fees for service by special process servers, including county sheriffs. *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985).

3. Fees for Printed or Electronically Recorded Transcripts Necessarily Obtained for Use in the Case, 28 U.S.C. §1920(2)

   The costs of video-depositions are included under this subsection. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894, 898 (8th Cir. 2009).

   a. Trial or hearing transcripts are taxable if the transcript was:
      A. Procured at the direction of the Court; or
      B. Necessary for use in the case and the requesting party explains why the trial or hearing transcript was necessarily obtained.

   b. Deposition transcripts (printed or electronically recorded) are taxed by the Clerk if the transcript was necessarily obtained for use in the case. The Clerk may tax deposition transcripts when:
      A. The deponent testified at trial;
      B. The deposition was admitted into evidence;
      C. The deposition was submitted with an event that terminated the litigation (e.g., summary judgment); or
      D. The requesting party explains why the transcript was necessarily obtained.

      - Important: To tax the costs for an electronically recorded <u>and</u> printed deposition transcript, the party taxing the cost must explain why both types of transcripts were necessarily obtained for use in the case.

   c. If a deposition transcript is taxable, the following fees of the court reporter may be taxed applying the ordinary transcript rate:
      A. Court reporter fees for appearance at and travel to depositions;
      B. Costs of the original transcript if the prevailing party requested the deposition and incurred the stenographic costs;
      C. Costs for one copy if the prevailing party did not request the deposition and did not incur the stenographic costs;
      D. Costs of copies for papers obtained as exhibits in the depositions; and
      E. Electronic media support (e.g. disk, CD-ROM).

d. The following fees of the court reporter are not taxable by the Clerk:

A. Costs of expedited transcripts produced solely for the convenience of counsel;

B. Transcripts that do not involve witnesses who testified at trial or that were not filed at least in part in support of a dispositive motion; and

C. Court reporter postage or delivery charges for a transcript.

- Important: The requesting party must provide an explanation as to why it was necessary to have any transcript produced in an expedited manner, including Realtime trial/hearing transcript feeds.

e. Documents to be provided:

A. Transcript and/or deposition invoices indicating:

1. The case name or number;
2. The party or witness deposed;
3. The date of the deposition; and
4. An itemized bill of the court reporter's fee.

B. An explanatory memorandum or affidavit explaining how each transcript was used or why it was necessary; and, if applicable, why an expedited transcript was necessary.

4. Fees and disbursements for printing, 28 U.S.C. §1920(3)

Fees and disbursements for printing are typically taxed by the court of appeals in its mandate.

5. Fees for Witnesses, 28 U.S.C. §1920(3)

The allowable fees are set forth in 28 U.S.C. §1821.

a. Taxable witness fees

A. The attendance fee is $40.00 per day. 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...." 28 U.S.C. § 1821 (b).

B. Mileage must be calculated at the rate for official government travel in effect at the time the travel took place. 28 U.S.C. § 1821 (c)(2). The current and historical official Privately-Owned Vehicle rates can be found at www.gsa.gov/travel-resources. The Eighth Circuit has determined the proper manner to determine costs associated with travel "is to limit travel expenses for witnesses outside the district to 100 miles absent special circumstances." *Linneman Const., Inc. v. Montana-Dakota Utilities Co.,* 504 F.2d 1365, 1371 (8th Cir. 1974).

- Important: Provide the dates of travel and the applicable mileage rate with the Bill of Costs.

C. A subsistence allowance may 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. 28 U.S.C. § 1821 (d)(1). The subsistence allowance may not exceed the maximum per diem allowance for official government travel in effect at the time the stay took place. 28 U.S.C. § 1821 (d)(2). The current and historical subsistence per diem allowances by geographical area can be found at www.gsa.gov/travel-resources.

D. The actual expenses of common carrier must be substantiated by a receipt or other evidence of the cost. 28 U.S.C. § 1821 (c)(1). First-class airfare is not an allowable cost. *City of Livonia Employees' Retirement Sys. v. Hanson*, No. CIV-05-4178, 2008 WL 608319, at *3 (D.S.D. Mar. 4, 2008).

b. Non-taxable witness fees

A. Fees and expenses of parties;

B. Fees paid to any witness, including experts, beyond the statutory daily attendance fee;

C. Fees and expenses paid to witnesses who do not testify at trial; and

D. Fees and expenses paid to deponents when the cost of the deposition is not taxed by the Clerk.

6. Fees for Exemplification and the Costs of Making Copies of any Materials When the Copies are Necessarily Obtained for Use in the Case, 28 U.S.C. §1920(4)

a. Fees for Exemplification—these costs typically include the costs of producing a demonstrative aid as an exhibit

b. Costs of making copies—the Clerk will tax the costs of copies that were:

A. Exhibits used in a dispositive motion or trial;

B. Courtesy copies of such exhibits if provided to the presiding judge and opposing counsel; or

C. Other copies that were necessarily obtained for use in the case provided that the requesting party provides an explanation as to why the copies were necessarily obtained.

c. Nontaxable copy costs—the Clerk will not tax copies that were:

A. Obtained for discovery purposes;

B. Retained by counsel for counsel's use; or

C. Provided to clients.

7. Docket Fees, 28 U.S.C. §1920(5)

   Under 28 U.S.C. §1923(a), certain attorney and proctor fees may be taxed including:
   a. $20.00 on trial or final hearing, including entry of default judgment;
   b. $5.00 on discontinuance of a civil action;
   c. $5.00 on motion for judgment and other recognizances; and
   d. $2.50 for each deposition admitted into evidence.

   To recover such fees, the amount of the fee and the docket number to which the requested fee relates should be noted in an explanatory memorandum or affidavit.

8. Court-Appointed Experts and Interpreter Services, 28 U.S.C. §1920(6)

   a. Under 28 U.S.C. §1960(6), the "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under [28 U.S.C. §] 1828" may be taxed.
   b. When the Court appoints an interpreter, the Court may direct one or more of the parties to compensate the expert or interpreter and order the compensation paid to be taxed as costs, or the Court may direct that the taxed costs be used to reimburse the Administrative Office of the United States Courts for providing such special interpretation services.

NON-TAXABLE COSTS

The following costs are generally not allowed by the Clerk:

1. Travel and expenses of counsel, including investigation expenses;
2. Fees for computerized legal research;
3. Secretarial services, including word processing, typing charges, copy charges, and scanning charges that are incidental to an attorney's services;
4. Paralegal and/or investigative services;
5. Prejudgment and post-judgment interest;
6. Mediation costs;
7. Fees for postage, delivery (including delivery services such as FedEx), and notary;
8. Long-distance telephone calls and fax charges;
9. Damage surveys;
10. Accountant's expenses;
11. Office overhead; and
12. Translation services.

PROCEDURE AFTER COSTS ARE TAXED BY THE CLERK

1. Motion for review to the Court

   Civil Local Rule 54.1 provides, in relevant part:

A. **Procedure**. Before costs may be taxed, the prevailing party entitled to recover costs must file and serve a verified bill of costs within 28 calendar days after entry of judgment or an order of dismissal. The party liable for costs may within 14 calendar days thereafter file exceptions to the costs or any specific item therein.

The clerk of court may then tax costs and, upon allowance, the costs will be included in the judgment or decree. Upon motion of either party within 7 calendar days after the clerk taxes costs, the action of the clerk may be reviewed by the court.

(Emphasis added).

2. Payment for Costs

Once the Court has ruled on a motion for review or after the time for seeking review has expired, costs taxed should be paid directly to the prevailing party. Costs are not processed through the Clerk's Office.

CM/ECF PROCEDURES RELATED TO BILLS OF COSTS

The following is the list of CM/ECF events, in order of their use, related to filing a Bill of Costs.

1. Bill of Costs

File form AO 133 as the main document. This form is attached and can be found on the Court's website at www.sdd.uscourts.gov/forms. All documentation, explanatory memoranda, or affidavits should be attached as separate documents.

2. Objection to Bill of Costs

Use this event when a non-taxing party does not agree with the submitted Bill of Costs.

3. Costs Taxed

The Clerk files the Costs Taxed. Thereafter, an objecting party has seven calendar days to file a Motion to Review Costs Taxed. If there is no motion for review filed, payment should be rendered and a satisfaction of judgment filed by the taxing party.

4. Motion to Review Costs Taxed

Use this event when a party objects to the Costs Taxed by the Clerk.

5. Letter Regarding Bill of Costs

Use this event when filing a letter to notify the Clerk that the parties have reached an agreement as to costs or to withdraw a Bill of Costs.