

TAXABLE COSTS IN TEXAS COURTS

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CHAPTER 11

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Everything Geoff Gannaway does is geared toward persuading a judge and jury.

He works with each client to develop a strategy for success in the courtroom, and then weaves together every deposition taken, every motion filed, and every jury argument made. At the onset of a new case, Geoff never loses sight of the end goal: distilling factual details into persuasive themes to present to a jury, ultimately making the most complicated cases understandable and the client's position clear.

Geoff honed an attention to detail in Rice University's engineering program, and now uses an engineer's discipline to serve his clients as a lawyer. The more complex the case, the more Geoff relishes the challenge. The subject matter of cases he has handled spans a broad array of industries and legal issues.

After a successful jury verdict, Tom Moogan, CFO for Advance International, explained: "From the intense level of preparation, to his collaboration with us to understand the particular complexities of our case, it was clear that Geoff worked to make this a case that a jury would hear and decide in our favor."

REPRESENTATIVE EXPERIENCE

- **Represented Cameron International Corporation (blowout preventer manufacturer) in the Gulf Oil Spill Multidistrict Litigation.** After six weeks of trial, the United States District Court for the Eastern District of Louisiana found that Cameron was not liable to any claimant related to the Deepwater Horizon incident and entered an order completely dismissing Cameron from the litigation.
- **Represented major oil and gas company as lead counsel in confidential arbitration proceeding in which supplier claimed breach of contract.** The three-arbitrator panel returned a unanimous award in favor of Geoff's client.
- **Defended oil and gas exploration company against allegations that it agreed to enter into a partnership to manage oil and gas projects in the Fayetteville shale** after the plaintiff introduced defendant to a financing source. Joe Redden was lead counsel at trial, with Geoff presenting the opening statement, cross-examining several witnesses, and successfully arguing for directed verdict on some claims. The plaintiff sought millions of dollars in damages, claiming breach of contract, fraud, breach of fiduciary duty, and quantum meruit. After a six-day jury trial, a unanimous jury returned a defense verdict on all but one cause of action. On the plaintiff's quantum meruit cause of action, the jury awarded \$16,700. In post-judgment motions, Beck Redden argued that the quantum meruit finding should be thrown out. The Court agreed, and entered a take-nothing judgment. On appeal, the Fort Worth Court of Appeals unanimously affirmed the judgment. The case is styled *The Strickland Group, Inc. v. Pathfinder Exploration, LLC*, No. 02-12-00187-CV.
- **Obtained defense verdict for Memorial Hermann Hospital System in a major antitrust lawsuit** in Texas state court. David J. Beck was lead counsel at trial, with Geoff cross-examining a number of witnesses over the course of a trial that lasted almost two and a half months. The plaintiffs, who were physician-investors in a now defunct physician-owned hospital in West Houston, claimed that

PRACTICES

Class Action & Multi-District Litigation
Commercial Litigation
Energy Litigation
Healthcare Litigation
Professional Liability Defense

ADMISSIONS

State Bar of Texas
United States Court of Appeals for the Fifth Circuit
United States District Courts for the Eastern, Northern, Southern and Western Districts of Texas

CLERKSHIPS

Honorable Louis H. Pollak, Eastern District of Pennsylvania (2002-2003)

EDUCATION

J.D., The University of Texas School of Law, with highest honors, Grand Chancellor, 2002
B.A., Rice University, Economics & Chemical Engineering, *magna cum laude*, 1997

Memorial Hermann was responsible for their hospital's failure and asserted antitrust claims and claims for tortious interference with prospective and existing business relationships. The plaintiffs sought millions in actual damages, plus several millions in attorneys' fees. The jury entered a complete defense verdict.

- Served as lead trial lawyer in securing a favorable verdict for his client, an importer of seasonal decorations, in a breach-of-contract dispute with a major retail chain. After a three-day trial, the jury returned a complete defense verdict for Geoff's client, and, in addition, awarded damages to the client after finding on the counterclaim that the retailer had breached three separate contracts. The retail chain appealed the judgment. Houston's Fourteenth Court of Appeals affirmed the judgment with a significant holding about liquidated damages provisions under the Uniform Commercial Code. The court held that the liquidated damages provisions in the retail chain's standard vendor contracts are unenforceable penalties. The case is styled *Garden Ridge, L.P. v. Advance International, Inc.*, No. 14-11-00624-CV.
- Obtained summary judgment for major law firm accused of legal malpractice related to patent prosecution.

HONORS & AWARDS

- Named in *Best Lawyers in America* for Commercial Litigation, 2021 – 2023
- AV Preeminent Rated by Martindale Hubbell, 2018-2020
- Named in Thomson Reuters *Texas Super Lawyers* – Business Litigation, 2015 – 2020, 2022
- Recognized as a “Rising Star” in business litigation by Thomson Reuters *Super Lawyers* – Texas, 2008, 2011-2014

PUBLICATIONS & PRESENTATIONS

- Co-Presenter, “Lawyer Ethics in the Conference Room and the Courtroom,” Association of Corporate Counsel Houston Chapter, (October 2020)
- Presenter, “Ethics and Energy Transactions: How to Keep Yourself and Your Client Out of the Courtroom,” 2019 Institute for Energy Law Energy Transactions Conference (October 2019)
- Panelist, *Anti-SLAPP Panel Discussion*, 2019 HBA Bench/Bar Conference (April 2019)
- Author, “Foreign ‘Special Legal Consultant’ Rules in Question,” American Bar Association Section of Litigation (September 2019)
- Author, “[Thorny Cross-Border E-discovery Issues on the Rise](#)“, *American Bar Association Section of Litigation* (August 2019)
- Author, “[Supreme Court Rejects Service on Foreign State Via Embassy](#)“, *American Bar Association Section of Litigation* (August 2019)
- Author, “ABA Provides Ethics Advice for Disaster Preparedness,” *American Bar Association Section of Litigation* (March 2019)
- Presenter, “Jury Research: What are the Ethical Limits?” 35th Annual Litigation Update, State Bar of Texas (January 2019)
- Author, “[Poll of Potential Jurors Results in Six-Figure Sanction](#)“, *American Bar Association Section of Litigation* (October 2018)
- Author, “[New Trigger for Determining Removal Deadline](#),” *American Bar Association Section of Litigation* (June 2018)
- Judicial Panel Moderator, *Civility and Ethics in the Courtroom*, The Texas Day of

Civility in the Law 2018 (April 2018)

- Author, "[Knowledge of False Label Does Not Flush Standing for Injunction](#)," *American Bar Association Section of Litigation* (February 2018)
- Presenter, *When Juries Throw You a Curve Ball: Batson, Conflicting Verdicts, Misbehaving Jurors, and More*, 34th Annual Litigation Update, State Bar of Texas (January 2018)
- Author, "[Cloudy with a Chance of Sanctions](#)," *American Bar Association Section of Litigation* (November 2017)
- Presenter, *Damages on the Fringes-Seldom-Used Theories of Recovery*, HBA Litigation Section (May 2017)
- Presenter, *Damages on the Fringes-Seldom-Used Theories of Recovery*, TADC Spring Meeting (April 2017)
- Presenter, [Consequential Damages: Probing the Limits of What Can be Recovered](#), 9th Annual Damages in Civil Litigation, State Bar of Texas (February 2017)
- Presenter, [Anti-SLAPP and Rule 91a Motions Update: Ending The Lawsuit Before it Begins](#), 33rd Annual Litigation Update, State Bar of Texas (January 2017)
- Presenter, *Does Anti-SLAPP Apply to Your Lawsuit? You Might Be Surprised.*, Houston Paralegal Association 13th Annual Spring Conference (April 2016)
- Author, *Does the Texas Anti-SLAPP Statute Apply to Your Lawsuit? You Might Be Surprised.*, State Bar Litigation Section News for the Bar (Winter 2014)
- Author, *Communications with Your Client's Former Employees: Privileged?*, State Bar Litigation Section News for the Bar (Spring 2007)
- Co-Author, *The Vitality of Barcelo After Ten Years: When Can an Attorney Be Sued for Negligence by Someone Other than His Client?*, 58 Baylor L. Rev. 371 (Spring 2006)
- Co-Author, *House Bill 4, Class-Action Certification Requirements, and Res Judicata*, 46 S. Tex. L. Rev. 913 (Summer 2005)
- Author, *Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as it Rejects Mixed-Motive Defenses to Batson Challenges*, 21 The Rev. of Litigation 375 (Spring 2002)
- "Not Just for Trial Lawyers; Lessons from the Courtroom You Can Use in the Conference Room," Association of Corporate Counsel Houston Chapter Half-Day Seminar, December 2022 (Panelist)

PROFESSIONAL ACTIVITIES & MEMBERSHIPS

- Houston Bar Association
 - Continuing Legal Education Committee, 2017-2018, 2020-2021 (Chair 2017-2018)
 - Member, Professionalism Committee, 2017-2018, 2020-2021
- American Bar Association, Contributing Editor, Section of Litigation's [Litigation News](#) publication, 2017
- Council Member, Litigation Section of the State Bar of Texas, 2012-2021
 - Treasurer, 2020-2021
 - Secretary, 2019-2020
 - Outstanding Council Member Award, 2020
- Board Member, Texas Law Review Association

- Executive Committee Member, The University of Texas Law School Alumni Association
- Fellow, Houston Young Lawyers Association
- Board of Directors, Texas Young Lawyers Association, 2008-2012
- Fellow, Texas Bar Foundation
- Editor-in-Chief, *State Bar Litigation Section News for the Bar*, quarterly newsletter for the State Bar of Texas, 2007-2010

COMMUNITY INVOLVEMENT

- Director, Rice Engineering Alumni Board of Directors
- Member, University of Texas Law Alumni Association, Houston Steering Committee, 2013-2021
- Chair, University of Texas Law Alumni Association, Houston Young Alumni Steering Committee, 2014-2015
- Associate, Brown College, Rice University
- Active Member, First Presbyterian Church
- Interviewer, Rice Alumni Volunteers for Admission
- Chair, Board of Directors, Cho-Yeh Camp & Conference Center



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Kaitie believes in holistic advocacy. She knows that fully understanding the key facts and issues of each case is paramount to effectively representing her clients.

Before joining Beck Redden, Kaitie served as the Editor-in-Chief of the *Texas Law Review* while attending The University of Texas School of Law. In this role, she honed her legal writing skills while also becoming familiar with a diverse array of legal issues. Kaitie later clerked for the Honorable David Alan Ezra of the United States District Court for the Western District of Texas. Working on civil and criminal cases in district courts serving San Antonio, Austin, Pecos, and Waco among others provided a strong legal foundation in a complex range of cases throughout the state of Texas. She further assisted Judge Ezra with three sittings by designation on the U.S. Court of Appeals for the Ninth Circuit, allowing her to experience the appellate decision-making process.

PRACTICES

Appellate

Commercial Litigation

ADMISSIONS

- State Bar of Texas
- United States District Court for the Western District of Texas

CLERKSHIPS

- The Honorable David Alan Ezra, United States District Court for the Western District of Texas, (2021–2022)

EDUCATION

- J.D. with Honors, The University of Texas School of Law, 2021
 - *Texas Law Review*, Editor-in-Chief, Volume 99
- B.S., Texas A&M University, Bioenvironmental Science, 2017

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TAXABLE COSTS IN TEXAS COURTS

By: Kaitie Sorenson* and Geoff Gannaway**

Congratulations or condolences are in order. If you are reading this paper, you probably just got a verdict in your favor, or you are trying to fend off a recovery of costs by the party that just beat you in the trial court. It is now time to dig deep into issues that are often an afterthought – what is the procedure for cost recovery, what can be recovered, and how much. In the whirlwind of post-verdict issues, there is often last-minute research to be done and papers to be filed. We are here to help. This paper is intended to provide a roadmap to major potential stopping points and destinations on the path to recovery of costs. While every case will need to be evaluated on its own facts and circumstances, the cases and statutes cited herein can provide a starting point for your analysis. Good luck, and well done (or so sorry).

In both state and federal courts in Texas, taxable costs are awarded to the prevailing or successful party unless a statute, rule, or court order provides otherwise. *See* Fed. R. Civ. P. 54(d); Tex. R. Civ. P. 131. Taxable costs do not include attorney’s fees and generally only encompass “relatively minor, incidental expenses” that make up a small portion of a party’s total expenses in a case. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012). Taxable costs in federal court, while narrow, are actually far more liberal than those allowed in Texas state courts. The following table provides a simplified overview of costs recoverable in state and federal courts in Texas:

	<i>State Court</i>	<i>Federal Court</i>
<i>Court Fees</i>	Yes	Yes
<i>County Service Fees</i>	Yes	No
<i>Transcripts</i>	Yes	Yes
<i>Deposition Video Recordings</i>	No	Yes
<i>Copies</i>	No ¹	Yes
<i>Witnesses</i>	Yes	Yes
<i>Court-Appointed Experts</i>	No	Yes
<i>Interpreters</i>	Yes	Yes ²
<i>Ad Litem</i>	Yes	Yes ³

I. STATE COURT

Texas Rule of Civil Procedure 131 provides: “The successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided.” Tex. R. Civ. P. 131. “‘Costs’ usually refers to fees and charges required by law to be paid to the courts or some of their officers, the amount of which is fixed by statute or the court’s rules, for example filing and service fees.” *Hatfield v. Solomon*, 316 S.W.3d 50, 66 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (quoting *Sterling Bank v. Willard M, L.L.C.*, 221 S.W.3d 121, 124 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

The successful party is the party that succeeded on the merits of its claim and does not necessarily require a damages award in its favor. *Moore v. Trevino*, 94 S.W.3d 723, 729 (Tex. App.—San Antonio 2002, pet. denied); *Johns v. Ram-Forwarding Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.). However, it is possible for both parties to be successful and unsuccessful. *See, e.g., Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 587 (Tex. App.—San Antonio 2011, no pet.), *abrogated on other grounds* by *Nath v. Texas Children’s Hosp.*, 576 S.W.3d 707 (Tex. 2019) (both parties partially successful); *Mobil Producing Tex. & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi—Edinburg 2002, no pet.) (“A trial court does not abuse its discretion in taxing costs against both sides where neither party was wholly successful in that one expected to receive more while the other expected to pay less.”); *Okon v. Levy*, 612 S.W.2d 938, 944 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.) (same); *Bldg. Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 905–06 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) (holding that it was appropriate to tax costs against both parties because they both successfully prosecuted their claims).

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¹ Only as required by statute or rule.

² Only for oral translations, not written.

³ Non-attorney-work fees only.

A. Procedure to Recover Costs

To recover costs in Texas, “the successful party is responsible to submit a record of its court costs to the court clerk so that the clerk can perform its ministerial duty and tax costs in accordance with Texas Rule of Civil Procedure 622.” *Labor v. Warren*, 268 S.W.3d 273, 279 (Tex. App.—Amarillo 2008, no pet.). It is the best practice for a party to have pled for court costs; however, the Texas Supreme Court has not stated that pleading for costs is required. Most lower courts have found a general request for relief to be sufficient. *Id.*; *Thompson v. Beyer*, 91 S.W.3d 902, 904 (Tex. App.—Dallas 2002, no pet.).

There is no requirement that the successful party needs to submit an accounting of its costs to the court or opposing counsel before a judgment awarding costs can be entered. *Labor*, 268 S.W.3d at 279. After all, it is the province of the court, not the jury, to tax costs. *American Commercial Colls., Inc. v. Davis*, 821 S.W.2d 450, 454 (Tex. App.—Eastland 1991, writ denied). “A successful party need not pray for or file a written motion for costs because Rule 131 of the Texas Rules of Civil Procedure entitles the prevailing party to an award of costs regardless of whether that party moved for them.” *Labor*, 268 S.W.3d at 279 (citing *Thompson v. Beyer*, 91 S.W.3d 902, 904 (Tex. App.—Dallas 2002, no pet.); *City of Irving v. Dallas/Fort Worth Int’l Airport Bd.*, 894 S.W.2d 456, 471 (Tex. App.—Fort Worth 1995, writ denied)). If a party opposes a taxing of costs, the party may file a motion to retax costs, see *Ferry*, 204 S.W.3d at 912, or file a traditional appeal, see *Labor*, 268 S.W.3d at 275.

B. Recoverable Costs

Several rules and statutes further clarify what is traditionally included in taxable costs. Rule 203.2 provides that the clerk of court must tax as costs the “deposition officer’s charges for preparing the original deposition transcript.” Tex. R. Civ. P. 203.2. Additionally, section 31.007 of the Texas Civil Practice and Remedies Code states:

A judge of any court may include in any order or judgment all costs, including the following:

- (1) fees of the clerk and service fees due the county;
- (2) fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
- (3) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and
- (4) such other costs and fees as may be permitted by these rules and state statutes.

Tex. Civ. Prac. & Rem. Code § 31.007(b). Interestingly, Rule 140 provides that “[n]o fee for a copy of a paper not required by law or these rules to be copied shall be taxed in the bill of costs.” Tex. R. Civ. P. 140.

Clerk’s fees include both filing fees and electronic filing fees. Tex. Civ. Prac. & Rem. Code §§ 51.318, 51.851. Generally, fees incurred serving citations and subpoenas and both public and private service are also taxable costs. *Shenandoah Assocs. V. J&K Props., Inc.*, 741 S.W.2d 470, 487 (Tex. App.—Dallas 1987, writ denied); *Operation Rescue-Nat’l v. Planned Parenthood*, 937 S.W.2d 60, 87–88 (Tex. App.—Houston [14th Dist.] 1996), *aff’d as modified*, 975 S.W.2d 546 (Tex. 1998).

Court-appointed master fees are also taxable as costs. *Ferry v. Sackett*, 204 S.W.3d 911, 913 (Tex. App.—Dallas 2006, no pet.). Interpreter fees are also taxable costs. *Id.*; *Crescendo Invs. V. Brice*, 61 S.W.3d 465, 480 (Tex. App.—San Antonio 2001, pet. Denied); however, interpreter services for a hearing-impaired party cannot be taxed as costs because the services are necessary and must be available on a nondiscriminatory basis, *Tex. Atty. Gen. Op.* No. DM-411, 1996 WL 531010 (1996). Additionally, guardian ad litem fees are recoverable as court costs. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 580 (Tex. 2012). Moreover, fees for court-appointed auditors, receivers, and surveyors are recoverable costs. *Taormina v. Culicchia*, 355 S.W.2d 569, 575–76 (Tex. App.—El Paso 1962, writ ref’d n.r.e.); *Jones v. Strayhorn*, 321 S.W.2d 290, 292–93 (Tex. 1959); *Whitley v. King*, 581 S.W.2d 541, 544 (Tex. App.—Fort Worth 1979, no writ).

Courts can tax as costs up to \$10 per day for a witness subpoenaed to attend a trial or deposition. Tex. Civ. Prac. & Rem. Code § 22.001©; *Armes v. Campbell*, 603 S.W.2d 249, 254 (Tex. App.—El Paso 1980, writ ref’d n.r.e.). Expenses for taking depositions, including an original transcript, can be taxed as costs. *Ferry*, 204 S.W.3d at 913; *Allen v. Crabtree*, 936 S.W.2d 6, 8 (Tex. App.—Texarkana 1996, no writ). However, it is unlikely that a video recording of a deposition is a taxable cost. *Gumpert v. ABF Freight Sys.*, 312 S.W.3d 237, 241–42 (Tex. App.—Dallas 2010, no pet.). Fees for photocopies required by statute or rule and absolutely no other photocopies, tests and procedures required by statute, and other costs and fees permitted by other statutes are taxable costs as well. See Tex. R. Civ. P. 140; *Adams v. Stotts*, 667 S.W.2d 798, 800–01 (Tex. App.—Dallas 1983, no writ).

“Rule 141 permits a trial court, for good cause stated on the record, to ‘adjudge the costs otherwise than as provided by law or [the Rules of Civil Procedure].’” *Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003) (quoting Tex. R. Civ. P. 141). Courts have found good cause exists to tax costs against a prevailing party when the successful party prolonged proceedings unnecessarily, unreasonably increased costs, or otherwise acted in a way that ought to be punished. *Furr’s Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 377 (Tex. 2001). Potential emotional harm to the

losing (and thus usually paying) party is not good cause to tax costs against the successful party. *Id.* (“[P]otential harm to a party’s emotional state from applying a procedural rule cannot be good cause as a matter of law.”). Additionally, a party’s inability to pay court costs is not good cause under the rule. *Id.*; *Stotts*, 667 S.W.2d at 801.

However, courts have found that this rule does not permit the taxing of costs outside of those already allowed. *See, e.g., Hatfield*, 316 S.W.3d at 67 (“Rule 141 does not give the trial court discretion to assess as costs items that are not within the scope of taxable court costs under Texas statutes, rules, and common law.”); *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 487 (Tex. App.—Eastland 2009, no pet.). It merely allows them to decide who shall pay when good cause exists. *Gumpert*, 312 S.W.3d at 242. Despite a trial court finding that good cause existed to award costs for copies of deposition transcripts and video recordings, the Dallas Court of Appeals found the trial court abused its discretion because it could not tax those expenses as costs under Rule 141. *Id.*

II. FEDERAL COURT

Federal Rule of Civil Procedure 54 provides: “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.” Fed. R. Civ. P. 54(d)(1). 28 U.S.C. § 1920 further outlines which costs are taxable:

- (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.

28 U.S.C. § 1920.

The Fifth Circuit has clarified “that federal courts may only award those costs articulated in section 1920 absent explicit statutory or contractual authorization to the contrary.” *Mota v. Univ. of Texas Houston Health Sci. Ctr.*, 261 F.3d 512, 529 (5th Cir. 2001) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444–45 (1987)). The Supreme Court more recently emphasized just how narrow taxable costs are: They “are a fraction of the nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators” and “almost always amount to less than the successful litigant’s total expenses in connection with a lawsuit.” *Taniguchi*, 566 U.S. at 573. Additionally, the prevailing party may be entitled to post-judgment interest on costs awarded by the court. Fed. R. Civ. P. 1961.

“The plaintiff must obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement” in order to qualify as the prevailing party. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). Under Fifth Circuit precedent, a party does not need to prevail on all issues to properly receive costs as the prevailing party. *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983) (citing *United States v. Mitchell*, 580 F.2d 789, 793 (5th Cir. 1978)). To determine the prevailing party, courts look at the case as a whole. *Id.* In that case, the court of appeals affirmed that the trial court properly held Kodak to be the prevailing party because it successfully defended against Studiengesellschaft’s four patent infringement claims by having all four patents ruled to be noninfringed and two declared invalid. *Id.* And while district courts have “discretion to decline awarding costs to the prevailing party, Rule 54(d) does not provide the court with power to award costs to the non-prevailing party.” *Morris v. Grecon, Inc.*, 388 F. Supp. 3d 711, 715 (E.D. Tex. 2019) (citing *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 998 (5th Cir. 1976)). Further, if a court decides not to award costs to the prevailing party despite the strong presumption in favor of doing so, the court must provide a valid reason for any denial or reduction. *Pacheco v. Mineta*, 448 F.3d 783, 793–95 (5th Cir. 2006). And the losing party’s good faith in bringing claims alone is insufficient to justify denying costs to the prevailing party. *Id.*

A. Procedure to Recover Costs

The procedure for recovering costs involves filing a motion including a verified and itemized bill of costs. *See* Fed. R. Civ. P. 54(d)(1); 28 U.S.C. § 1923. The bill of costs should be served on all other parties, and the verification can be accomplished via an affidavit from the party, attorney, or party’s agent. *See* 28 U.S.C. § 1924. Generally, deadlines for filing bills of cost are set by local rule. The Southern District of Texas’s Rule 54.2 of its Local Rules requires a bill of costs be filed within fourteen days following the entry of a final judgment. *N. Assurance Co. of Am. v. Javeler Constr. Co., Inc.*, No. CV G-11-0335, 2014 WL 12600797, at *1 (S.D. Tex. Oct. 20, 2014). The Western District of Texas has an identical rule in Local Rule CV-54, *Transverse, LLC v. Iowa Wireless Servs., LLC*, No. 1:10-CV-517-LY, 2020 WL 10065757, at *1 (W.D. Tex. Mar. 4, 2020), *rev’d in part on other grounds sub nom. Transverse*,

L.L.C. v. Iowa Wireless Servs., L.L.C., 992 F.3d 336 (5th Cir. 2021), the Eastern District of Texas has the same deadline in Local Rule CV-54(a), *Williams v. Target Corp.*, No. 4:14CV62, 2015 WL 4885237, at *3 (E.D. Tex. Aug. 14, 2015), and the Northern District of Texas also has a fourteen day filing requirement. Civ. R. 54.1, N.D. Tex. Civ. R. 54.1, *Kretchmer v. Eveden, Inc.*, No. CIV.A. 3:07-CV-1068-, 2009 WL 2835777, at *1 (N.D. Tex. Sept. 3, 2009).

The clerk of court maintains the initial responsibility for taxing costs and may tax costs on fourteen days' notice. Fed. R. Civ. P. 54(d)(1). On motion served within the next seven days, the losing party may seek review of the clerk's action. *Id.* Although all four districts in Texas require filing a proposed bill of costs within fourteen days of a final judgment, they differ somewhat in the details of the procedure. For example, the Eastern and Western Districts of Texas have a meet-and-confer requirement when parties disagree on proposed bills of costs. See Local Rules Tex. (E.D.), Rule CV-54(b)(2); Local Rules Tex. (W.D.), Rule CV-54(a)(3). Local Rules also provide deadlines for objections to bill of costs. For example, the Southern District of Texas requires objections be filed within seven days after the filing of the bill of costs. Local Rules Tex. (S.D.), Rule 54.2. The Northern District does not specify a time for filing objections in its local rules. The Western District of Texas requires a party notify the party requesting costs of any disagreements and then follow a procedure for submitting a joint motion or a motion and response detailing costs still disputed within 21 days of the filing of the proposed bill of costs. Local Rules Tex. (W.D.), Rule CV-54(a)(3). The Eastern District has a similar requirement, however, it does not contain any deadlines for conferring or filing the motions. See Local Rules Tex. (E.D.), Rule CV-54(b)(2).

If a court does not modify a clerk's cost determination, it is final and appealable. *LoSacco v. City of Middletown*, 71 F.3d 88, 91 (2d Cir. 1995). Parties may file a motion to retax costs to ask the district court to review the clerk's award. Parties can challenge that the costs awarded were too high or low, that costs that are allowed under law were denied, that costs not allowed under law were awarded, and that services for which fees were charged were not actually performed. See *Baisden v. I'm Ready Prods.*, 793 F. Supp. 2d 970, 974–75 (S.D. Tex. 2011). And similar to the trial court level, "Federal Rule of Appellate Procedure 39(d) requires a party who desires taxation of costs to 'state them in an itemized and verified bill of costs, which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.'" *Nelson v. James*, 722 F.2d 207, 208 (5th Cir. 1984) (quoting Fed. R. App. P. 39(d)).

B. Recoverable Costs

a. Clerk and Marshal Fees

First, taxable costs include clerk and marshal fees. 28 U.S.C. § 1920(1). However, district courts in Texas have consistently found that pro hac vice costs are not recoverable as clerk fees. See *Motion Games, LLC v. Nintendo Co., Ltd.*, 2016 WL 9136171, at *1 (E.D. Tex. Oct. 24, 2016); *Obey v. Frisco Medical Center L.L.P.*, 2015 WL 1951581, *1 (E.D. Tex. Apr. 29, 2015); *Lofton v. McNeil Consumer & Specialty Pharms.*, No. 3:05-CV-1531-L, 2011 WL 206165, at *1 (N.D. Tex. Jan. 4, 2011), *report and recommendation adopted*, No. 3:05-CV-1531-L, 2011 WL 208391 (N.D. Tex. Jan. 21, 2011); *Knauff v. Dorel Juv. Grp., Inc.*, No. 5:08-CV-336-XR, 2010 WL 2545424, at *2 (W.D. Tex. June 21, 2010).

b. Transcript and Copies Fees

Second, taxable costs include fees for printed or electronically recorded transcripts and for exemplification and copies of any materials that are needed in a case. 28 U.S.C. § 1920(2) & (4). A prevailing party is entitled to the original deposition transcript, *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991), and to copies of deposition transcripts necessarily obtained for use in the case, *Studiengesellschaft*, 713 F.2d at 134. Copies of deposition transcripts are generally taxable "if they are obtained for use in the case or for trial preparation and not simply for the convenience of counsel." *Matter of Arbitration of Sarofim v. Tr. Co. of the W.*, No. CV H-04-4114, 2005 WL 8177561, at *2 (S.D. Tex. May 9, 2005) (citing *Fogleman*, 920 F.2d at 285–86). However, if the parties anticipated that the deposition would be used for trial preparation at the time of the deposition, then that can qualify as "necessarily obtained for use in the case." *Fogleman*, 920 F.2d at 285–86. It is not necessary to actually introduce testimony from a deposition for its transcript to be taxed as costs. *Matter of Arbitration of Sarofim*, 2005 WL 8177561, at *2 (citing *Fogleman*, 920 F.2d at 285–86). Costs for summarizing depositions or obtaining deposition transcripts in an expedited basis also are not taxable. *U.S. ex rel. Long v. GSDMidea City, L.L.C.*, 807 F.3d 125, 132–33 (5th Cir. 2015).

The cost of a video recording of a deposition is also taxable if it was necessarily obtained for use in the case, i.e., "[i]f, at the time it was taken, a deposition could reasonably be expected to be used for trial preparation, rather than merely for discovery." *Morris*, 388 F. Supp. 3d at 717 (quoting *ARAMCO*, 920 F.2d at 286); *GSDMidea City, L.L.C.*, 807 F.3d at 130–31. Courts within this Circuit have consistently held that prevailing parties can be reimbursed for both transcripts and videos: "[P]rinted or electronically recorded transcripts' does not mean that costs may be taxed for only one of the two recited types of transcripts." *Ushijima v. Samsung Elec. Co.*, No. A-12-CV-318-LY, 2015 WL 11251558, at *4 (W.D. Tex. July 30, 2015). Courts have also found that transcripts and videos are not overly duplicative: "While both capture verbal communication, videos also capture nonverbal communication." *United*

Biologics, L.L.C. v. Allergy & Asthma Network/Mothers of Asthmatics, Inc., No. 5:14-CV-35-RCL, 2021 WL 1968294, at *9 (W.D. Tex. May 17, 2021) (citing *Baisden v. I'm Ready Prod., Inc.*, 793 F. Supp. 2d 970, 977 (S.D. Tex. 2011)). Accordingly, courts have allowed recovery for “deposition costs for a written transcript and video recording when considered appropriate trial preparation under the unique circumstances of the particular case.” *Edwards v. 4JLJ, LLC*, No. 2:15-CV-299, 2019 WL 2344752, at *3 (S.D. Tex. June 3, 2019). Courts are particularly likely to tax costs for both written transcripts and video recordings where the case is complex. *United Biologics, L.L.C.*, 2021 WL 1968294, at *9.

This section also provides for costs for trial and hearing transcripts. “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.’” *Studiengesellschaft*, 713 F.2d at 133 (quoting *Brumely Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1362, 1363 (5th Cir. 1983)). To determine whether daily transcripts were reasonably necessary, courts will consider “the complexity of the issues and the length of the proceeding, whether the transcript would minimize disagreement over the testimony of the witnesses, whether portions of the transcript were actually used later in the proceeding, and whether proposed findings of fact were required.” *United Biologics, L.L.C.*, 2021 WL 1968294, at *9. Moreover, the section is not necessarily limited to deposition, trial, and hearing transcripts. The Second Circuit has permitted a transcript of a cockpit voice recording that was never introduced into evidence but reviewed by an expert to be taxed, *In re Air Crash Disaster of John F. Kennedy Int’l Airport on June 24, 1975*, 647 F.2d 626 (2d Cir. 1982), and a Southern District of Texas court allowed an arbitration hearing transcript to be taxed. *Matter of Arbitration of Sarofim*, 2005 WL 8177561, at *2.

Black’s Law Dictionary defines exemplification as “[a]n official transcript of a public record, authenticated as a true copy for use as evidence.” *Exemplification*, BLACK’S LAW DICTIONARY (11th ed. 2019). Some circuits have held exemplification costs “to include a wide variety of exhibits and demonstrative aids.” *See, e.g., Cefalu v. Village of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000). However, district courts in Texas have not agreed that audiovisual technology or other aids are included in exemplification costs. *See United Biologics, L.L.C.*, 2021 WL 1968294, at *13 (holding that the costs of an audiovisual technician are not taxable as costs); *EVM Sys., LLC v. Rex Med., L.P.*, No. 6:13-cv-184, 2016 WL 3475318, at *2 (E.D. Tex. Feb. 5, 2016) (same); *Summit 6 LLC v. Research in Motion Corp.*, No. 3:11-cv-367-O, 2013 WL 12124322, at *4 (N.D. Tex. Nov. 26, 2013) (holding that audiovisual costs are not taxable as exemplification costs). Costs for creating trial graphics or blowups are also not taxable as costs. *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993); *United Biologics, L.L.C.*, 2021 WL 1968294, at *13.

Recoverable costs of “copies” are not limited to papers and can apply to reproductions of any materials. Parties should itemize copying costs and explain why the copying was necessary for the case. Some courts have penalized parties by reducing the costs taxed for copying when parties have failed to accurately account for copying expenses. *See United States v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 173 (2d Cir. 1996). Courts in the Fifth Circuit have held that costs associated with converting scanned documents to TIFF format are taxable. *Id.* at *15.

In contrast, the costs for preparing to copy paper and electronic materials are not recoverable under the statute. *See Country Vintner of N. Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 260 (4th Cir. 2013); *Race Tires Am. Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 171 (3d Cir. 2012). Similarly, office supplies and other “incidental costs like shipping, binding, and tabbing are generally not taxable, as these costs are not listed in § 1920.” *GSDM Idea City, L.L.C.*, 807 F.3d at 133. Neither are costs for expediting services (such as expedited transcripts) taxable. *Id.* Other permissible costs include costs for scanning and converting original files into an agreed format, *United States v. Solvay Pharms*, 871 F.3d 318, 336 (5th Cir. 2017) and costs for creating forensic images of electronics and converting copies of images into a different format, *Javeler Marine Servs. LLC*, 175 F. Supp. 3d at 763–64.

c. Printing and Witnesses

Taxable costs include fees and disbursements for printing and witnesses, 28 U.S.C. § 1920(3), and docket fees as outlined in 28 U.S.C. § 1923, *id.* § 1920(5). “This includes costs of subsistence and travel of witnesses within the 100-mile zone to which process extends.” *Baum v. United States*, 432 F.2d 85, 86 (5th Cir. 1970). 28 U.S.C. § 1821 outlines what witness costs a prevailing party can recover. *Id.* Several courts have adopted local rules reflecting choices to allow or disallow witness fee payments. *See Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 679–80 (9th Cir. 2018). For example, the Eastern and Southern Districts of New York do not allow fees to be paid unless the witness testifies. The Seventh and Ninth Circuits have held that parties to the case cannot collect witness fees; however, the Fifth Circuit has not dealt with the issue. *See Stevens*, 899 F.3d at 679; *Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 38 F.3d 1429, 1442 (7th Cir. 1994).

A witness “shall be paid the fees and allowances provided by this section.” 28 U.S.C. § 1821(a)(1). The allowance includes “an attendance fee of \$40 per day for each day’s attendance,” *id.* at § 1821(b), travel expenses including parking and taxis, *id.* at § 1821(c)(3), and a “subsistence allowance . . . when an overnight stay is required at the place of attendance” because of its distance from the witness’s residence, *id.* at § 1821(d)(1). The Supreme Court has

construed § 1821's mention of a "\$40 per day" remuneration to constitute a hard cap for parties' expert witness fees, at least "when not overridden by contract or explicit statutory authority." *United Biologics, L.L.C.*, 2021 WL 1968294, at *4 (footnotes omitted).

b. Compensation of Court-Appointed Experts and Interpreters

Taxable costs include costs to compensate court-appointed experts and interpreters. 28 U.S.C. § 1920(6). Section 1920 permits compensation for expert witnesses only when those witnesses are appointed by the court. *Tyler v. Union Oil Co. of California*, 304 F.3d 379, 405 n.16 (5th Cir. 2002); *Coats*, 5 F.3d at 891 ("[E]xpert fees are not recoverable." (citing 28 U.S.C. §§ 1821, 1920; *Crawford*, 482 U.S. 437)). A prevailing party can only receive up to the statutory maximum for an expert witness's subsistence and travel as costs. *Baum*, 432 F.2d at 86. Therefore, unless expressly authorized by statute, a prevailing party cannot receive more than standard witness fees for expert witnesses. *See id.* While interpreter fees are explicitly permitted under the statute, the Supreme Court held that the cost for document translation was not recoverable as court costs, distinguishing between oral and written translation services. *Taniguchi*, 566 U.S. at 575.

e. Other Taxable Costs

There are additional costs that may be recoverable under state law in federal courts. For example, ad litem fees can be taxable costs if they do not include fees for attorney work. *Gaddis v. United States*, 381 F.3d 444, 459 (5th Cir. 2004). In addition to court-appointed experts and interpreters, courts have found that the cost of a special master is also taxable against a nonprevailing party, and such a finding does not require a factual showing of necessity. *Studiengesellschaft Kohle*, 713 F.2d at 134 (citing *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1324 (5th Cir. 1978), *overruled on other grounds* by *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983)). In contrast, fees for mediators cannot be taxed. *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt.*, 491 F.3d 266, 277 (5th Cir. 2007). And to the extent that state laws permitting the recovery of fees do not conflict with Federal Rule of Civil Procedure 54(d)(1), those costs can also be recoverable. *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1223 (3d Cir. 1995).