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Colorado Court Allows Non-Testifying Expert Witness Costs but Disallows Costs for Photocopying Client's File

In a recent Colorado Court of Appeals case, the former plaintiff in a premises liability action appealed the award of costs to defendant-owner for non-testifying expert witness fees, and the costs of photocopying defendant's client file upon a change of counsel during the litigation.

First, appellant argued that the costs for retaining an expert witness who did not ultimately testify in the litigation should not have been awarded. The Court followed their own case precedent, which permits costs for non-testifying experts who are either 1) hired to provide advisory or consulting services, or 2) did not testify due to extrinsic circumstances rendering their services unnecessary. In the case at hand, respondent's counsel did not feel that their own expert's testimony was necessary, concluding "that the cross-examination of plaintiff's experts was sufficient." Further, they argued that the advice and assistance of their expert witness contributed to the successful cross-examination. The court was convinced by this argument, thus affirming the award of costs for the non-testifying expert witness on these narrow grounds.

However, the court agreed with plaintiff-appellant that the cost of photocopying defendant's client file when defendant's first counsel was discharged constituted an improper award of fees. Following a Colorado Bar Ethics Opinion, the court determined that it was a fundamental principle that the client file is the property of the client and as such, must be surrendered upon request. Consistent with this rule, the court held that "it is the lawyer's responsibility to bear duplication costs if the lawyer believes that the lawyer should retain a copy." In the current case, the defendant agreed to pay the costs of duplication of their own file without any obligation to do so, therefore the lower court's award of costs was found to be an error and was vacated.

Implications for Legal Billing: This case affirms the award of costs for expert witnesses who do not ultimately testify at trial, but on narrow grounds.

“IT IS THE LAWYER’S RESPONSIBILITY TO BEAR DUPLICATION COSTS IF THE LAWYER BELIEVES THAT THE LAWYER SHOULD RETAIN A COPY [OF THE CLIENT’S FILE].”

In Colorado, the proponent of the award of costs must show that their expert played a significant part in advising or consulting during the litigation, or that there existed extrinsic circumstances rendering the use of the expert witness unnecessary. It will ultimately be at the court’s discretion as to whether the proponent has sufficiently proven that retaining the non-testifying expert witness was not superfluous.

Also confirmed by this decision is that when a firm duplicates a client’s file for their own protection and benefit, they do so at their own cost absent a prior agreement to the contrary. If the client agrees to pay the costs of photocopying when discharging counsel or otherwise, they are not permitted to pass on the costs they voluntarily subsumed to the

other party at the end of the litigation. Any award of costs under these circumstances will be vacated on appeal.

* *Lombard v. Colorado Outdoor Education Center, Inc.*, 266 P.3d 412 (Colo. App. 2011). Full copies of court decisions may be available through counsel or through various Internet links or paid services.

By Erin L. Sussman

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