

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HAYMOND	:	CIVIL ACTION
HAYMOND NAPOLI DIAMOND, P.C.	:	
	:	
v.	:	
	:	
MARVIN LUNDY	:	
	:	
v.	:	
	:	
JOHN HAYMOND,	:	
ROBERT HOCHBERG,	:	
HAYMOND NAPOLI DIAMOND, P.C.	:	NO. 99-5048

MEMORANDUM ON AWARD OF COSTS

Norma L. Shapiro, S.J.

AUGUST , 2002

This opinion awards costs and expenses reserved by the court’s Order of March 19, 2002, awarding attorney’s fees to Marvin Lundy, Esquire (“Lundy”), pending submission of an amended petition. The second amended petition was timely filed by Lundy as were Robert Hochberg’s (“Hochberg”) objections thereto. Upon consideration of these filings and the full record, the court makes the following award of costs and expenses:

COSTS

Lundy originally filed a petition for attorney’s fees and costs on September 17, 2001. This petition was denied “without prejudice because there was insufficient documentation.” (3/18/02 Tr. Mem. at 1 n.1.) On December 3, 2001, Lundy submitted an amended petition for attorney’s fees and costs. Hochberg filed a response on December 13, 2001. This court issued a Memorandum and Order on March 19, 2002, that awarded Lundy attorney’s fees in the amount of \$32,997.97 and held that Lundy would

be entitled to some expert witness fees and costs if he submitted an amended petition itemizing his claimed expenses. (*Id.* at 10.) Both Hochberg and Lundy filed separate Notices of Appeal from the March 19, 2002, decision awarding attorney's fees.¹

1. Trial Transcripts

The court stated that, in accordance with the practice of the Clerk of Court in taxing costs, it would award costs for deposition transcripts if necessary to the results obtained. See *In re Kulicke & Soffa Ind. Inc. Securities Litigation*, 747 F. Supp. 1136 (E.D.Pa. 1990).

Lundy claims \$4,671.50 for trial transcripts (\$2,715.00 for transcripts used in the non-jury unauthorized practice of law trial at which he prevailed against Hochberg, as well as \$1,868.50 for transcripts of the breach of contract jury trial and \$88.00 for the TRO hearing at which he did not prevail). He asserts that the transcripts for the TRO hearing and breach of contract trial were reasonably necessary to the unauthorized practice of law trial but seeks only 50% of those transcript charges. He also claims \$5,613.75 (50% of \$11,227.49) for deposition transcripts. The deponents are listed as is the total cost for each transcript. Reduced by 50%, the total claim is \$10,285.25. No dates of deposition or invoices of proof of payment have been supplied; no reason for this omission or statement of inability to provide the information has been stated.

¹

Although the court determined that awards of an expert fees and some costs were appropriate, no awards were made. Therefore, at least as to the expert fee and costs the order was not final and this court retains jurisdiction. See *Collins v. Montgomery Ct. Bd. of Prison Inspectors*, 176 F.3d 679, 682 n.3 (3d Cir. 1999). Moreover, the Court of Appeals has stayed consideration of the underlying appeal pending resolution of the matters then before this court on November 9, 2001

Hochberg objects that only the deposition transcripts of Jeffrey Lundy and Tina Foley were utilized at trial or cited in the court's Opinion. But the deposition transcripts of those who testified live at trial, especially if noticed and taken by counsel for Hochberg, were reasonably necessary to prepare witnesses for direct testimony and cross-examination at trial. The parties stipulated that the court could consider all relevant testimony and evidence from the jury trial of the cross-claims for breach of contract held January 17, 2001, to January 25, 2001, in addition to the testimony and evidence presented at the non-jury trial.

One-half the costs of the trial transcripts and deposition transcripts are deemed reasonably necessary and will be awarded. However, a mathematical error must be corrected as the total of the deposition transcripts is \$11,028.04, 50% of which is \$5,514.02.

It is true, as Hochberg contends, that Lundy did not discuss the need for these transcripts or attach invoices to verify the charges and method of delivery. But the presiding judge at a non-jury trial can make a determination of reasonable necessity based on all the circumstances. The charges were reasonable in light of the length of the transcripts. The court will award the total claimed in the amount of \$10,185.52.

2. LEXIS Research

Lundy claims \$5,226.94 for Legal Research. It is correct that such charges are taxable if claimed in sufficient detail and regularly billed in addition to attorney's fees. Here, dates, amounts, and attorneys are itemized but there is no description of research topic and no way of determining if the research was in relation to the successful

unauthorized practice of law trial or the unsuccessful breach of contract trial. There is no way of determining if this research is duplicative of that of expert Arlin Adams, Esquire. Hochberg validly objects that Lundy has had ample time and opportunity to present proper itemization of the costs he seeks as this is the third cost petition filed. Since the court has no personal knowledge of the reasonableness of these charges, no costs for LEXIS research will be awarded.

3. Duplicating

Lundy claims \$9,774.30 for duplicating and attaches an itemized exhibit listing dates, amounts and initials of the attorney presumably requesting the duplicate copies. Except for Mr. Rosen and Mr. Epstein, the court has no idea who the attorney is, whether he was involved in the unauthorized practice of law trial, whether the duplication was reasonably necessary to that trial, the number of pages, amount charged, and the amount regularly charged for this item to other clients. In view of the exorbitant charge in relation to the length of the trial and issues involved, the court declines to award the duplicating costs in the absence of adequate documentation.

4. Travel, Telephone, Fax, Federal Express, Courier Service, Postage

Charges for travel (\$115.00), telephone (\$7.35), fax (\$15.00), Federal Express (\$180.62), courier service (\$25.00) and postage (\$8.54) are unsupported by any itemization or explanation of their need in relation to the unauthorized practice of law trial. These charges are customarily included in a lawyer's hourly billing rate. Why that should not be the case here has not been explained and the court declines to award these claimed costs.

5. Witness Fees/Mileage

Witness fees and mileage have been claimed in the amount of \$510.00. Such costs are customarily awarded. While no itemization or proof of payment has been provided, the court is familiar with the number of witnesses, the required fees and can estimate the mileage. The court deems this cost reasonable and it will be awarded.

COSTS AWARDED

Costs are awarded as follows:

Transcripts	\$10,185.52
Witness Fees/Mileage	<u>510.00</u>
TOTAL	\$10,695.52

All other costs are denied as unitemized, undocumented, or properly included in the attorney's hourly rate.

EXPERT FEE

The court's Memorandum of March 19, 2002, held that Lundy was entitled to reasonable expert witness fees as a prevailing party under 42 Pa.C.S.A. § 2524(c). However, it was stated that a discretionary award of some expert witness fees was appropriate.

The reason for a partial award arises from the fact that the 115-paragraph, 53-page Adams declaration dealt with two issues: 1) whether Hochberg engaged in the unauthorized practice of law; and 2) the standard of care applicable to John Haymond ("Haymond") and to Scott Diamond ("Diamond") with regard to conduct relating to Lundy and Haymond & Lundy (Dec. P. 1). Lundy prevailed at the non-jury unauthorized practice of law claim (Issue 1) but not the jury breach of contract claim (Issue 2). Of the 115

paragraphs of the Adams Declaration, only about 66 are arguably related to Hochberg's unauthorized practice of law; 35 of the 53 pages concern this subject. The balance of the Declaration relates to Haymond and Diamond's alleged breach of the standard of care applicable to attorneys in Pennsylvania.

Prior to the jury trial, Lundy filed a Motion in Support of the Admission of Expert Testimony from Arlin M. Adams. There was a hearing on January 8, 2001, on whether Mr. Adams should be permitted to testify at the breach of contract jury trial. The motion became moot when Lundy's counsel decided that Mr. Adams would not testify at the jury trial. He did testify at the unauthorized practice of law trial at which Lundy prevailed.

The testimony of the Hon. Arlin Adams (ret.) was particularly helpful to the court's determination of the ethical and legal issues involved in determining Hochberg's past unauthorized practice of law and the need for enjoining in the future. (Mem. p. 10)

Therefore, it is obvious that some allocation is required.

Lundy requests \$30,624.62, which represents 90% of \$34,039.90 (the amount Adams billed on February 28, 2001). The letter attached as Exhibit B states that the full amount was \$39,090.90. The court accepts that figure after analyzing the billing statement. Adams did not keep separate time records with respect to the Haymond and Diamond issues and could not provide a specific number of hours allocated to those non-reimbursable issues, but he stated that less than 10% of the time was expended on matters other than Hochberg's unauthorized practice of law.

The Adams bill includes \$32,232.00 (\$28,388 plus \$3,844.00) for services rendered by Joseph Sullivan, Esq., at rates of \$275.00 and \$235.00 per hour. No biographical data

regarding Mr. Sullivan has been provided; there is no information as to his experience, expertise, or regular billing practices. The same is true for charges for Linda Hauck (\$15.00) and Annemarie Lorenzen (\$18.00). These charges cannot be part of the expert fee award, so the base charge of \$39,039.90 (45,929.29 minus 15% professional discount) must be reduced by \$27,450.00 (\$32,295.00 minus 15% professional discount). The charges for time spent by Arlin Adams, reduced by the 15% professional discount allowed Lundy, is \$11,252.50. When that sum is adjusted for the 10% Adams estimated for time spent on liability of Haymond and Diamond rather than Hochberg, the amount chargeable as an expert fee is \$10,430.24.

CONCLUSION

The court will award costs as follows:

Transcripts	\$10,185.52
Witness Fees/Mileage	510.00
Expert Fee	<u>10,430.24</u>
 TOTAL	 \$21,125.76

An appropriate Order follows.

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ORDER

AND NOW, this day of August, 2002, for the reasons set forth in the foregoing Memorandum, it is **ORDERED** that costs are awarded to Marvin Lundy, Esquire as follows:

Transcripts	\$10,185.52
Witness Fees/Mileage	510.00
Expert Fee	<u>10,430.24</u>
TOTAL	\$21,125.76

J.