

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

W23-01

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| Title | Action Requested |
| Appellate Procedure: Costs on Appeal | Review and submit comments by January 20, 2023 |
| Proposed Rules, Forms, Standards, or Statutes | Proposed Effective Date |
| Amend Cal. Rules of Court, rules 8.278 and 8.891 | September 1, 2023 |
| Proposed by | Contact |
| Appellate Advisory Committee Hon. Louis R. Mauro, Chair | Christy Simons, 415-865-7694 christy.simons@jud.ca.gov |

Executive Summary and Origin

The Appellate Advisory Committee proposes amending the rules governing costs on appeal in civil actions to clarify that the general rule for awarding costs to the prevailing party is subject to exception for statutes requiring a different or additional finding, determination, or analysis. The proposal is responsive to a recent Supreme Court decision and the constitutional principle that rules of court may not be inconsistent with statute.

Background

Rule 8.278 regarding costs on appeal in unlimited civil cases was adopted effective January 1, 2008. It was amended in 2013, 2016, and 2018, but none of those amendments has bearing on this proposal. The award-of-costs provisions in subdivision (a) have not been amended since adoption.

Similarly, rule 8.891 regarding costs on appeal in limited civil cases was adopted effective January 1, 2009. It was amended in 2011 and 2013, but these amendments are not relevant to this proposal. The rule's right-to-costs provisions in subdivision (a) have not been amended since adoption.

The Proposal

Under rule 8.278, “[e]xcept as provided in this rule, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal.” (Rule 8.278(a)(1).) The rule also defines prevailing party and allows the court to award costs in its discretion. (Rule 8.278(a).)

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

However, the rule does not account for statutes that require a different or additional finding, determination, or analysis before awarding costs on appeal. For example, in *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (*Pollock*), the Supreme Court addressed whether costs on appeal in a case under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA) were governed by rule 8.278(a) or by section 12965(c), the FEHA provision that authorizes the recovery of fees and costs. Under the statute, the court, in its discretion, may award reasonable fees and costs “to the prevailing party . . . except that . . . a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.” (*Id.*, § 12965(c)(6).) In *Pollock*, the lower court awarded fees and costs on appeal to the prevailing defendant under rule 8.278; it made no additional findings.

In reversing the award of fees and costs, the Supreme Court found that the statute was not limited to proceedings in the trial court, either by its terms or its legislative intent to encourage litigation of potentially meritorious claims. The court also rejected the argument that rule 8.278 should control because it “does not include the phrase ‘except as otherwise expressly provided by statute.’” (*Pollock, supra, 11 Cal.5th at p. 950.*) “[E]ven without such language,” the court stated, “a rule of court must yield to an applicable statute when ‘it conflicts with either the statute’s express language or its underlying legislative intent.’” (*Ibid.*; Cal. Const., art. VI, § 6(d) [rules adopted by the Judicial Council “shall not be inconsistent with statute”].) “Section 12965(b) expressly governs ‘the court’ in FEHA actions without limitation, and allowing an award of costs on appeal to a prevailing defendant without a finding that the plaintiff’s action was objectively groundless would undermine the statute’s purpose.” (*Pollock, supra, 11 Cal.5th at p. 950.*)

The Appellate Advisory Committee proposes amending rule 8.278 to clarify that the general rule for awarding costs on appeal to the prevailing party is subject to exception for statutory provisions that require the court to conduct a different or additional finding, determination, or analysis.

The parallel rule regarding entitlement to costs in limited civil actions in the appellate division provides: “Except as provided in this rule, the prevailing party in a civil appeal is entitled to costs on appeal.” (Rule 8.891(a)(1).) The committee proposes similar amendments to this rule and requests comments on whether such amendments to this or other appellate rules regarding costs would be helpful.

Alternatives Considered

The committee considered taking no action, but rejected this option in favor of clarifying the rule to provide additional guidance to appellate courts in addressing claims for costs.

Fiscal and Operational Impacts

This proposal would impose no implementation requirements on the courts, including no possible fiscal or operational impacts, other than making judicial officers aware of the changes. It is not expected to result in any costs to the courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the proposal include amending rule 8.891?
- Are there any other appellate rules pertaining to costs that should be similarly amended?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments and Links

1. Cal. Rules of Court, rules 8.278 and 8.891, at pages 4–5

Rules 8.278 and 8.891 of the California Rules of Court would be amended, effective September 1, 2023, to read:

1 **Rule 8.278. Costs on appeal**

2
3 **(a) Award of costs**

- 4
5 (1) Except as provided in this rule or by statute, the party prevailing in the Court
6 of Appeal in a civil case other than a juvenile case is entitled to costs on
7 appeal.
8
9 (2) The prevailing party is the respondent if the Court of Appeal affirms the
10 judgment without modification or dismisses the appeal. The prevailing party
11 is the appellant if the court reverses the judgment in its entirety.
12
13 (3) If the Court of Appeal reverses the judgment in part or modifies it, or if there
14 is more than one notice of appeal, the opinion must specify the award or
15 denial of costs.
16
17 (4) In probate cases, the prevailing party must be awarded costs unless the Court
18 of Appeal orders otherwise, but the superior court must decide who will pay
19 the award.
20
21 (5) In the interests of justice, the Court of Appeal may also award or deny costs
22 as it deems proper.
23

24 **(b)–(d) * * ***

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26 **Advisory Committee Comment**

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28 This rule is not intended to expand the categories of appeals subject to the award of costs. See
29 rule 8.493 for provisions addressing costs in writ proceedings.
30

31 **Subdivision (a).** The subdivision (a)(1) exception to the general rule of awarding costs to the
32 prevailing party for statutes that require further analysis or findings reflects the holding of *Pollock*
33 *v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (regarding costs on appeal in an
34 action under the California Fair Employment and Housing Act) and the constitutional mandate
35 that rules of court “shall not be inconsistent with statute” (Cal. Const., art. VI, § 6(d)).
36

37 **Subdivision (c).** * * *

38
39 **Subdivision (d).** * * *

1 **Rule 8.891. Costs and sanctions in civil appeals**

2
3 **(a) Right to costs**

- 4
5 (1) Except as provided in this rule or by statute, the prevailing party in a civil
6 appeal is entitled to costs on appeal.
7
8 (2) The prevailing party is the respondent if the appellate division affirms the
9 judgment without modification or dismisses the appeal. The prevailing party
10 is the appellant if the appellate division reverses the judgment in its entirety.
11
12 (3) If the appellate division reverses the judgment in part or modifies it, or if
13 there is more than one notice of appeal, the appellate division must specify
14 the award or denial of costs in its decision.
15
16 (4) In the interests of justice, the appellate division may also award or deny costs
17 as it deems proper.
18

19 **(b)–(e) * * ***

20
21 **Advisory Committee Comment**

22
23 **Subdivision (a).** The subdivision (a)(1) exception to the general rule of awarding costs to the
24 prevailing party for statutes that require further analysis or findings reflects the holding of *Pollock*
25 *v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (regarding costs on appeal in an
26 action under the California Fair Employment and Housing Act) and the constitutional mandate
27 that rules of court “shall not be inconsistent with statute” (Cal. Const., art. VI, § 6(d)).
28

29 **Subdivision (d).** * * *