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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 2010

Title	Agenda Item Type
Civil Cases: Time for Making a Claim for Attorney's Fees	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 3.1702	January 1, 2011
Recommended by	Date of Report
Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair	August 2, 2010
	Contact
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Executive Summary

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend the rule governing claims for attorney's fees in civil cases to expressly address what time frames apply to these claims in limited civil cases—the periods that apply only to cases appealed to the Court of Appeal or Supreme Court, or the shorter periods of time for filing a notice of appeal to the appellate division of the superior court. The proposed amendment would relate the time frame for claiming attorney's fees in limited civil actions directly to the shorter appellate time periods for such cases.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend rule 3.1702 of the California Rules of Court, effective January 1, 2011, to specify the time for claiming attorney's fees in limited civil actions.

The text of amended rule 3.1702 is attached at page 6.

Previous Council Action

As authorized in Code of Civil Procedure section 1034, the Judicial Council has developed procedures for claiming prejudgment costs and costs on appeal in civil cases, including attorney's fees authorized by contract, statute or law. (See rule 3.1702.) The rule (formerly rule 870.2) initially applied only to attorney's fees provided by contract and required that a claim for such fees be made within the time period applicable to filing a memorandum of costs (15 days after judgment or dismissal). The Judicial Council expanded the rule, effective January 1, 1994, to cover claims for statutory attorney's fees as well as contractual ones. The amended rule also provided that, except for attorney's fees that are fixed by formula (which must be claimed as part of the memorandum of costs), the time for claiming attorney's fees is the same as the time for filing a notice of appeal, and cross-referenced the rules setting such time periods in matters appealed to the Court of Appeals or Supreme Court (generally 60 days, with some exceptions).

The 1994 amendment of what is now rule 3.1702 was intended to "relate the time for claiming attorney's fees to the time for filing a notice of appeal."¹ The revised rule was to "allow[] the same time to file a motion for fees as the basic time for notice of appeal . . ." (1993 Council Report, at p. 9.) The cross-references in the rule, however, to rules 8.104 and 8.108, do not apply to limited civil cases. Rule 8.104 provides that the normal period of time to file a notice of appeal is 60 days after service of notice of entry. Rule 8.108 extends the time to file notice of appeal when certain posttrial motions are made or a cross-appeal is filed, generally by 30 days after certain events occur. The appellate rules applicable to limited civil cases provide a shorter time period for filing a notice of appeal in such cases (generally 30 days) as well as shorter extensions to that period in the event of post-trial motions. (See rules 8.822 and 8.823).

This rule on claiming attorney's fees has been renumbered since 1994 and parts of the rule have been amended, but no substantive changes have been made relating to the time for claiming attorney's fees.

Rationale for Recommendation

Currently rule 3.1702 does not expressly address what time frames apply to claiming attorney's fees in limited civil cases—the periods in the appellate rules cross-referenced in rule 3.1702, which apply only to cases appealed to the Court of Appeal or Supreme Court, or the shorter periods of time for filing a note of appeal applicable in limited civil cases which are appealed to the appellate division of superior court. A superior court has asked that rule 3.1702 be amended to specify the time for claiming attorney's fees in limited civil cases, in light of the different periods for filing notices of appeal. The amended rule will provide two different time frames in which to serve and file attorney's fee motions, clarifying that the cross-references to the appellate rules currently in rule 3.1702 apply only to claims for attorney's fees in unlimited civil cases and adding cross-references that expressly apply to such claims in limited civil cases. (See

¹ See Judicial Council of Cal., Advisory Com. Rep., *Time to Claim Attorney's Fees—Rule 870.2* (Oct. 28, 1993) (1993 Council Report), at p. 1.

amended rule 3.1702(b)(1).) The amended rule will relate the time frame for claiming attorney's fees in limited civil actions to the shorter appellate time periods for such cases. The amendment will thus provide consistency in the rules applicable to a given case.

In addition, the section of the rule permitting the parties to stipulate to extend the time for filing would be amended to add parallel provisions permitting shorter extensions in limited civil cases. (See amended rule 3.1702(b)(2).)

The rule regarding the time for claiming attorney's fees following an appeal would be amended in a similar fashion. (See amended rule 3.1702(c).) That provision currently requires that motions to claim attorney's fees on appeal be filed with the trial court within the time for filing the memorandum of costs on appeal under rule 8.278(c)(1) (40 days after notice of remittitur). The proposed amendment adds a cross-reference to the parallel appellate rule that applies in limited civil cases, rule 8.891(c)(1) (memorandum of costs to be filed 30 days after the remittitur).

Comments, Alternatives, Considered, and Policy Implications

The proposal to expressly provide for different time frames for seeking attorney's fees in limited cases was circulated for public comment during the spring 2010 comment cycle. There were five commentators: the California Judges Association, two county bar associations, the State Bar's Committee on the Administration of Justice, and the Superior Court of San Diego County.² All agreed with the proposal.

The Civil and Small Claims Advisory Committee considered and rejected three alternatives to the proposal:

- Leave the rule as is. The committee rejected this alternative in light of having received a request from a superior court to clarify a perceived ambiguity in how the rule applies to limited civil actions.
- Amend the rule to require that all motions for attorney's fees be filed within 15 days (same time frame as provided for memorandum of costs). This proposal was rejected by the committee because it had been expressly rejected by the Judicial Council when it amended the rule in 1994.³

² A chart summarizing the comments received and the committee's responses is attached at page 7.

³ This alternative was proposed by a superior court judge on the grounds that (1) the attorney's fees are a cost and so should be requested within the same time frame as all other costs; and (2) it is unfair to a losing party to not know before the deadline for noticing an appeal whether and what amount of attorney's fees are being sought. The committee disagreed.

First, while the attorney's fees are indeed a cost, the Legislature has expressly authorized the Judicial Council to establish rules and procedures for claiming costs. (Code Civ. Proc., § 1034.) The council has done so by, among other things, establishing different time periods in which to claim attorney's fees. Those that do not require a court

- Amend the rule to expressly provide that all motions for attorneys fees be brought within 60 days. That is, expressly clarify that in both limited and unlimited civil cases, motion for attorneys fees must be filed within the time for filing notice of appeal in an unlimited civil case (generally within 60 days). The committee concluded that it was more logical to have the time for claiming attorney’s fees in limited civil cases relate to the time for filing appeals in those cases.⁴

In considering this alternative, the committee noted that two years ago the Judicial Council affirmed the differing times for filing notices of appeal in unlimited and limited civil actions. When the Judicial Council adopted a reorganization of the rules for the superior court appellate division, the council considered and rejected a proposal to make the time period for filing notices of appeal for cases appealed to that division the same as for cases appealed to the Court of Appeal, i.e., generally 60 days for both. The Judicial Council left the time for filing an appeal to the appellate division at 30 days. Hence, the proposed amendment to the attorney’s fee rule would parallel that decision by the Judicial Council, providing for shorter time frames in limited civil cases.

The Appellate Advisory Committee was consulted on this issue. That committee’s Rules and Forms Subcommittee came to the same conclusion as the Civil and Small Claims Advisory Committee—that the rule should be amended so that the time frame for filing attorney’s fee claims in limited civil cases is directly related to the time frames stated in the appellate rules applicable to such cases.

Implementation Requirements, Costs, and Operational Impacts

The only implementation costs would be for education of judicial officers about the new rule amendments. There may be an impact on parties from this clarification that a shorter period for making claims applies in limited cases, but that should not adversely affect court operations.

Relevant Strategic Plan Goals and Operational Plan Objectives

Because it would eliminate a perceived ambiguity about the deadline for filing and serving motions for attorney’s fees, the proposal furthers the goal of modernizing case management and administration through statewide rules that promote the efficient processing of civil cases. (Goal III, Objective 5.)

determination must be claimed in the memorandum of costs. (Rule 3.1702(e).) For others, where a court determination of entitlement to or the amount of fees is required, the rule provides a longer period. (Rule 3.1702(b).)

The second point was expressly considered and rejected when the Judicial Council extended the time in which to bring attorney’s fee claims. (See 1993 Report to Council, page 2, comment from Santa Cruz County Counsel.)

⁴ In the uncommon instance when the attorney’s fee application in a limited civil case is complex enough to require longer time, a party may seek an extension of time from the court under rule 3.1702(d).

Attachments

1. Cal. Rules of Court, rule 3.1702, at page 6.
2. Chart of comments, at page 7.

Rule 3.1702 of the California Rules of Court is amended, effective January 1, 2011, to read:

1 **Rule 3.1702. Claiming attorney’s fees**

2
3 (a) * * *

4
5 (b) **Attorney’s fees before trial court judgment**

6
7 (1) *Time for motion*

8 A notice of motion to claim attorney’s fees for services up to and including the
9 rendition of judgment in the trial court—including attorney’s fees on an appeal
10 before the rendition of judgment in the trial court—must be served and filed within
11 the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil
12 case or under rules 8.822 and 8.823 in a limited civil case.

13
14 (2) *Stipulation for extension of time*

15 The parties may, by stipulation filed before the expiration of the time allowed under
16 (b)(1), extend the time for filing a motion for attorney’s fees:

17
18 (A) Until 60 days after the expiration of the time for filing a notice of appeal in an
19 unlimited civil case or 30 days after the expiration of the time in a limited civil
20 case; or

21
22 (B) If a notice of appeal is filed, until the time within which a memorandum of
23 costs must be served and filed under rule 8.278(c) in an unlimited civil case or
24 under rule 8.891(b)(2) in a limited civil case.

25
26 (c) **Attorney’s fees on appeal**

27
28 (1) *Time for motion*

29 A notice of motion to claim attorney’s fees on appeal—other than the attorney’s fees
30 on appeal claimed under (b)—under a statute or contract requiring the court to
31 determine entitlement to the fees, the amount of the fees, or both, must be served and
32 filed within the time for serving and filing the memorandum of costs under rule
33 8.278(c)(1) in an unlimited civil case or under rule 8.891(c)(1) in a limited civil case.

34
35 (2) *Stipulation for extension of time*

36 The parties may by stipulation filed before the expiration of the time allowed under
37 (c)(1) extend the time for filing the motion up to an additional 60 days in an
38 unlimited civil case or 30 days in a limited civil case.

39
40 (d) – (e) * * *

SPR10-17**Civil Cases: Time for Making a Claim for Attorney's Fees (amend Cal. Rules of Court, rule 3.1702)**

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	California Judges Association by Jordan O. Posamentier, Legislative Counsel	A	We support the proposed amendments, which standardize the time within which to bring motions.	No response required.
2.	Orange County Bar Association by Lei Lei Wang Ekvall, President	A	No specific comment.	No response required.
3.	Santa Clara County Bar Association by Angela F. Storey, Chair - Civil Practice Committee	A	No specific comment.	No response required.
4.	State Bar of California Committee on Administration of Justice by Saul Bercovitch, Legislative Counsel	A	CAJ supports this proposal.	No response required.
5.	Superior Court of San Diego County by Michael Roddy, Court Executive Officer	A	No specific comment.	No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.\