

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR15-07

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Title	Action Requested
Appellate Procedure: Costs on Appeal	Review and submit comments by June 17, 2015
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 8.278; revise form MC-013	January 1, 2016
Proposed by	Contact
Appellate Advisory Committee Hon. Raymond J. Ikola, Chair	Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

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### Executive Summary and Origin

Based on a suggestion received from the State Bar of California's Committee on Appellate Courts, the Appellate Advisory Committee is proposing to amend the rule governing costs on appeal to modify when a request for costs must be filed and revise the form for specifying these costs to be more consistent with the rule and better reflect appellate practice.

### The Proposal

California Rules of Court, rule 8.278 addresses costs on appeal. Subdivision (c)(1) establishes the timeframe within which a memorandum of costs must be filed. Currently, this provision requires that the memorandum be filed within 40 days after the clerk sends notice of issuance of the remittitur. However, because reviewing courts do not use a proof of service when sending the remittitur, parties do not have an easy way to determine when the remittitur was sent. This proposal would amend rule 8.278 to instead require the memorandum of costs to be filed within 40 days of the date of issuance of the remittitur. This date can easily be determined by the parties because it will be reflected on the docket and on the remittitur document itself.

Subdivision (d) of rule 8.278 identifies those costs that may be recovered on appeal.

*Memorandum of Costs on Appeal* (form MC-013), the form that must be used in requesting costs on appeal, also lists costs that may be claimed. There are, however, some differences between the list of recoverable costs in the rule and the list on the form. Rule 8.278(d) includes among the recoverable costs the amount the party paid for any portion of the record. The accompanying advisory committee comment clarifies that this provision is intended to encompass the costs for an appendix prepared by a party under rule 8.124 in lieu of a clerk's transcript. Such appendices are used quite frequently. However, while form MC-013 includes the cost of a clerk's transcript

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

on its list of recoverable costs, it does not specifically include the cost of an appendix on this list. This proposal would revise form MC-013 to specifically include the cost of an appendix among the recoverable costs listed on the form. Consistent with rule 8.278(d), the revision would also clarify that costs within this category include those for an original, a copy, or both.

Rule 8.278(d) also includes among the recoverable costs the cost to reproduce any brief. Form MC-013 lists the cost of “printing” briefs as a recoverable cost. However, briefs are commonly reproduced now through photocopying, rather than printing. This proposal would revise form MC-013 to include the cost of copying briefs among the recoverable costs listed on the form.

Both rule 8.278(d) and form MC-013 currently include notary fees on their lists of recoverable costs. However, these are relatively uncommon costs in appellate proceedings and thus, it does not seem necessary for them to be separately listed on form MC-013. Instead, if these costs occur, they can be identified in the space on form MC-013 for “other” costs. This proposal would revise form MC-013 to eliminate notary fees from among the recoverable costs specifically listed.

Form MC-013 currently separately lists “Expenses of service” and “Transmission and filing of record, briefs, and other papers” as recoverable costs. In rule 8.278(d), these costs are listed together. It is also the committee’s understanding that these costs are often paid as part of a single transaction, particularly when items are served and filed electronically. To better reflect both the rule and appellate practice, this proposal would merge these two provisions into a single line on form MC-013. However, the committee would particularly appreciate input on whether the cost of service should continue to be identified separately on the memorandum of costs to facilitate identifying and determining the reasonableness of this cost.

Form MC-013 currently includes, as a second page, an optional proof of service form. The Judicial Council has also adopted a separate proof of service form, *Proof of Service (Court of Appeal)* (form APP-009). Consistent with recent recommendations it has made relating to other forms, to reduce the need to maintain multiple proof of service provisions on separate forms, the committee is proposing that the proof of service on page 2 of MC-013 be deleted and a notice box added to the top of the form indicating that form APP-009 may be used to provide proof of service.

Form MC-013 is currently grouped among the miscellaneous Judicial Council forms (hence the MC designation in the form name). Because of this miscellaneous designation, this form may be difficult for some parties to locate. The committee is therefore proposing that this form be grouped among the appellate forms and renamed as APP-013. This would put the form in a more logical sequence with other forms used in appellate proceedings.

### **Alternatives Considered**

The committee considered not proposing the rule amendments or form revisions. However, the committee concluded that these proposed changes would improve appellate proceedings by

making the time frame for filing a memorandum of costs clearer and by making the form better reflect both the rule and practice.

### **Implementation Requirements, Costs, and Operational Impacts**

These proposed changes would not impose any implementation requirements on courts, and no operational impacts on courts are anticipated from these proposed changes.

## **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 cost of service continue to be identified separately on the memorandum of costs to facilitate identifying and determining the reasonableness of this cost?

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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rule 8.278, at pages 4–5
2. Revised *Memorandum of Costs on Appeal* (form APP-013), at page 6

Rule 8.278 of the California Rules of Court would be amended, effective January 1, 2016, to read:

**Article 4. Hearing and Decision in the Court of Appeal**

**Rule 8.278. Costs on appeal**

**(a)–(b) \* \* \***

**(c) Procedure for claiming or opposing costs**

(1) Within 40 days after ~~the clerk sends notice of~~ issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700.

**(2)–(3) \* \* \***

**(d) Recoverable costs**

(1) A party may recover only the following costs, if reasonable:

(A) Filing fees;

(B) The amount the party paid for any portion of the record, whether an original or a copy or both. The cost to copy parts of a prior record under rule 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the copying;

(C) The cost to produce additional evidence on appeal;

(D) The costs to notarize, serve, mail, and file the record, briefs, and other papers;

(E) The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply;

(F) The cost to procure a surety bond, including the premium, the cost to obtain a letter of credit as collateral, and the fees and net interest expenses incurred to borrow funds to provide security for the bond or to obtain a letter of credit, unless the trial court determines the bond was unnecessary; and

(G) The fees and net interest expenses incurred to borrow funds to deposit with the superior court in lieu of a bond or undertaking, unless the trial court determines the deposit was unnecessary.

(2) Unless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.

1 **Advisory Committee Comment**

2  
3 This rule is not intended to expand the categories of appeals subject to the award of costs. See rule 8.493  
4 for provisions addressing costs in writ proceedings.

5  
6 **Subdivision (c).** \* \* \*

7  
8 **Subdivision (d).** Subdivision (d)(1)(B) is intended to refer not only to a normal record prepared by the  
9 clerk and the reporter under rules 8.122 and 8.130 but also, for example, to an appendix prepared by a  
10 party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.

11  
12 “Net interest expenses” in subdivisions (d)(1)(F) and (G) means the interest expenses incurred to borrow  
13 the funds that are deposited minus any interest earned by the borrower on those funds while they are on  
14 deposit.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	<b>FOR COURT USE ONLY</b>  <b>DRAFT</b>  <b>Not Approved by the Judicial Council</b>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff: Defendant:	
<b>MEMORANDUM OF COSTS ON APPEAL</b>	CASE NUMBER:
<b>NOTE: You may use <i>Proof of Service (Court of Appeal)</i> (form APP-009) to provide proof that this form has been served.</b>	

Prevailing party (name):

claims from (name):

the following costs on appeal:

**TOTALS**

- |   |  |
|---|--|
| 1. Filing fees  | 1. \$ <input style="width:100%;" type="text"/> |
| 2. Preparation of the original and copies of clerk's transcript or appendix | 2. \$ <input style="width:100%;" type="text"/> |
| 3. Preparation of reporter's transcript                                     | 3. \$ <input style="width:100%;" type="text"/> |
| 4. Printing and copying of briefs   | 4. \$ <input style="width:100%;" type="text"/> |
| 5. Production of additional evidence  | 5. \$ <input style="width:100%;" type="text"/> |
| 6. Transmitting, filing, and serving of record, briefs, and other papers    | 6. \$ <input style="width:100%;" type="text"/> |
| 7. Premium on any surety bond on appeal                                     | 7. \$ <input style="width:100%;" type="text"/> |
| 8. Other expenses reasonably necessary to secure surety bond                | 8. \$ <input style="width:100%;" type="text"/> |
| 9. Other: <span style="float: right;">(specify authority):</span>           | 9. \$ <input style="width:100%;" type="text"/> |

<b>TOTAL COSTS:</b>	\$ <input style="width:100%;" type="text"/>
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I am  the party  counsel for the party  agent for the party who claims the costs listed above.

To the best of my knowledge, the items of cost are correct and were necessarily incurred in this case on appeal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

\_\_\_\_\_  
(TYPE OR PRINT NAME)



\_\_\_\_\_  
(SIGNATURE OF DECLARANT)