

**Invitation to Comment**

Title	Appellate Procedure: Remittitur, Costs and Sanctions in Appeals and Writ Proceedings (adopt new Cal. Rules of Court rules 8.278, 8.386, and 8.499, and amend rules 8.272, 8.276, 8.366, and 8.490)
Summary	This proposal would make several clarifying changes in the rules relating to remittitur, costs, and sanctions in the Courts of Appeal, including: (1) relocating the provision relating to remittitur in writ proceedings to the chapters containing rules addressing writ proceedings and clarifying when a remittitur must be issued in these proceedings; (2) clarifying when costs may be awarded in civil appeals and writ proceedings and that filing fees are among the recoverable costs; (3) clarifying that these cost provisions do not apply in juvenile or criminal appeals; and (4) clarifying that sanctions can be imposed for filing frivolous motions or writ petitions.
Source	Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair
Staff	Heather Anderson, Committee Counsel, 415-865-7691, heather.anderson@jud.ca.gov
Discussion	<p><u>Remittitur in Writ Proceedings</u></p> <p>Rule 8.272, which addresses remittitur in the Court of Appeal, is located in a chapter of the California Rules of Court that addresses civil appeals (title 8, chapter 2). Currently, subdivision (a)(2) of this rule addresses remittitur in writ proceedings. The rules that generally address writ proceedings in the Courts of Appeal, however, are not located in this chapter of the rules; they are located in chapter 4 (writs of habeas corpus) and chapter 7 (extraordinary writs and writs relating to particular state agency decisions).<sup>1</sup> Rule users who read the rules concerning writs proceedings may therefore not find the provisions relating to remittitur in these proceedings. To make it easier for rule users to find these provisions, this proposal would delete the provision relating to remittitur in writ proceedings from rule 8.272 and add new provisions relating to remittitur in writ proceedings in the chapters of the rules that relate to writ proceedings.</p> <p>This proposal would also modify the provisions concerning remittitur in writ proceedings to clarify that a remittitur must be issued only when the court issues a written opinion after having issued an order to show cause, alternative writ, or peremptory writ. Currently, rule 8.272</p>

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<sup>1</sup> There are also rules in chapter 5 – rules 8.452 and 8.456 – that address writs in juvenile proceedings, but rule 8.470 in chapter 5 already addresses remittitur in these writ proceedings by cross-referencing rule 8.272.

requires the Court of Appeal to issue a remittitur after a decision in “an original proceeding, except when the court denies a writ petition without issuing an alternative writ or order to show cause.” There are, however, other circumstances in which issuance of a remittitur is not necessary, such as when a writ petition is dismissed because it is untimely or because it has become moot. Instead of trying to list all the circumstances in which a remittitur is not required, this provision would be amended to focus instead on the proceedings in which a remittitur must be issued.

#### Costs in Appeals and Writ Proceedings

Rule 8.490 addresses costs in writ proceedings. Subdivision (m)(1) provides that, except in criminal or juvenile or other proceedings in which a party is entitled to court-appointed counsel, “the prevailing party in an original proceeding is entitled to costs if the court resolves the proceeding by written opinion after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance.” Subdivision (m)(2), in turn, provides that “[i]n the interests of justice, the court may award or deny costs as it deems proper.” Currently, some rule users may be confused about whether subdivision (m)(2) authorizes the court to exercise discretion in awarding costs only in the types of writ proceedings identified in subdivision (m)(1) or if it is intended to provide a separate and independent basis for awarding costs in writ proceedings. This proposal includes amendments that are intended to clarify that subdivision (m)(2) authorizes the court to award costs in circumstances other than those identified in (m)(1), for example, when a petition has been dismissed as moot after the appellate court has issued an alternative writ and the trial court has elected to comply with that alternative writ.

This proposal also includes several other clarifying changes to rule 8.276 and its accompanying advisory committee comment. First, to shorten this rule and make the provisions relating to costs and sanctions easier to find, this proposal would split rule 8.276’s provisions relating to costs and sanctions into two separate rules. The provisions relating to sanctions, current subdivision (e), would remain numbered as rule 8.276 and the current provisions relating to costs on appeal would be moved to new rule 8.278.

Second, this proposal would add filing fees to the list of recoverable costs. Both Code of Civil Procedure section 1033.5 and Judicial Council form MC-013, *Memorandum of Costs on Appeal*, list filing fees among the recoverable costs, but these fees are not currently listed as recoverable costs in the rule.

Finally, this proposal would amend the advisory committee comment to clarify that rule 8.278 applies to costs in civil cases other than juvenile cases. Currently, the advisory committee comment to rule 8.276 indicates that this rule applies to costs in “ordinary civil cases.” The term “ordinary civil case” is not defined in the rules and therefore may be confusing to rule users. The term “general civil case” is defined in the rules, but the definition excludes many types of cases in which costs are available on appeal, including probate cases (which are specifically mentioned in subdivision (a)(5)), conservatorship cases, family law cases, unlawful detainer cases, and civil petitions. Under this proposal, the comment to new rule 8.278 would clarify that these cost provisions apply to civil cases other than juvenile cases.

This proposal would also make an accompanying clarifying change to rule 8.366, relating to hearing and decision in criminal appeals. Currently, rule 8.366 cross-references the rules on hearing and decision in civil appeals, providing that “Rules 8.248 through 8.276 govern the hearing and decision in the Court of Appeal of an appeal in a criminal case.” Rule 8.248, however, addresses prehearing conferences in civil appeals and does not appear applicable in criminal appeals. This proposal would therefore delete the reference to rule 8.248. The proposal would also clarify that subdivision (a) of rule 8.276, which as revised under this proposal would authorize sanctions for filing frivolous appeals, does not apply in criminal appeals. The committee would particularly appreciate comments about whether, instead of cross-referencing the rules on hearing and decision in civil appeals, the rules relating to criminal appeals should repeat the full text of the applicable rules relating to hearing and decision.

### Sanctions

As noted above, to make the provisions relating to sanctions in civil appeals easier to find, this proposal would move the current provisions relating to costs out of rule 8.276 to new rule 8.278, so that rule 8.276 would address only sanctions. This proposal would also make two other changes to the sanctions portion of rule 8.276. First, it would amend the sentence that addresses the time frame for filing a motion for sanctions after a motion to dismiss the appeal is denied. The proposed amendments are intended to clarify that a party who files a motion for sanctions with a motion to dismiss may file a new motion for sanctions if the motion to dismiss is not granted. Second, the proposal would add new subdivision (a)(3) to clarify that sanctions can be imposed for the filing of a frivolous motion. This amendment would embody the holding in *Dana Commercial Credit Corp. v. Ferns*

& *Ferns*, (2001) 90 Cal.App.4th 142, 147, in which the Court of Appeal ruled it had inherent power to impose sanctions in a motion proceeding. In footnote 9 of that opinion, the court specifically suggested that the Judicial Council create a rule to make this authority explicit: “As in *Warren v. Schechter*, we suggest that the Judicial Council amend the California Rules of Court to make explicit what is currently only implicit, in this case, to expressly recognize the authority of a reviewing court to impose sanctions for the filing of a frivolous motion on appeal.”

Finally, this proposal would also add a new subdivision (n) to rule 8.490 to make clear that the court also has authority to impose sanctions for the filing of frivolous writ petitions. As explained in *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 96, appellate courts have the authority to impose sanctions in proceedings for writs of review, mandate, and prohibition under Code of Civil Procedure sections 907 and 1109.

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Attachment

Cal. Rules of Court, rules 8.278 and 8.499 would be adopted, and rules 8.272, 8.276, 8.366, 8.386, and 8.490 would be amended, effective January 1, 2008, to read:

1 **Title 8. Appellate Rules**

2  
3 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**

4  
5 **Chapter 2. Civil Appeals**

6  
7 **Rule 8.272. Remittitur**

8  
9 **(a) Proceedings requiring Issuance of remittitur**

10 A Court of Appeal must issue a remittitur after a decision in:

11  
12 (1) ~~an appeal;~~ or

13  
14  
15 (2) ~~An original proceeding, except when the court denies a writ petition without~~  
16 ~~issuing an alternative writ or order to show cause.~~

17  
18 **(b)-(d) \* \* \***

19  
20  
21 **Rule 8.276. Costs and Sanctions**

22  
23 **(a) Right to costs**

24  
25 (1) ~~Except as provided in this rule, the party prevailing in the Court of Appeal in a~~  
26 ~~civil case is entitled to costs on appeal.~~

27  
28 (2) ~~The prevailing party is the respondent if the Court of Appeal affirms the~~  
29 ~~judgment without modification or dismisses the appeal. The prevailing party is~~  
30 ~~the appellant if the court reverses the judgment in its entirety.~~

31  
32 (3) ~~If the court reverses the judgment in part or modifies it, or if there is more than~~  
33 ~~one notice of appeal, the opinion must specify the award or denial of costs.~~

34  
35 (4) ~~If the interests of justice require it, the court may award or deny costs as it~~  
36 ~~deems proper.~~

37  
38 (5) ~~In probate cases, the prevailing party must be awarded costs unless the Court~~  
39 ~~of Appeal orders otherwise, but the superior court must decide who will pay~~  
40 ~~the award.~~

1 ~~(b) Judgment for costs~~

2  
3 ~~(1) The Court of Appeal clerk must enter on the record, and insert in the remittitur,~~  
4 ~~a judgment awarding costs to the prevailing party under (a)(2) or as directed by~~  
5 ~~the court under (a)(3) or (a)(4).~~

6  
7 ~~(2) If the clerk fails to enter judgment for costs, the court may recall the remittitur~~  
8 ~~for correction on its own motion, or on a party's motion made not later than 30~~  
9 ~~days after the remittitur issues.~~

10  
11 ~~(c) Recoverable costs~~

12  
13 ~~(1) A party may recover only the following costs, if reasonable:~~

14  
15 ~~(A) The amount the party paid for any portion of the record, whether an~~  
16 ~~original or a copy or both. The cost to copy parts of a prior record under~~  
17 ~~rule 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the~~  
18 ~~copying;~~

19  
20 ~~(B) The cost to produce additional evidence on appeal;~~

21  
22 ~~(C) The costs to notarize, serve, mail, and file the record, briefs, and other~~  
23 ~~papers;~~

24  
25 ~~(D) The cost to print and reproduce any brief, including any petition for~~  
26 ~~rehearing or review, answer, or reply; and~~

27  
28 ~~(E) The cost to procure a surety bond, including the premium and the cost to~~  
29 ~~obtain a letter of credit as collateral, unless the trial court determines the~~  
30 ~~bond was unnecessary.~~

31  
32 ~~(2) Unless the court orders otherwise, an award of costs neither includes attorney's~~  
33 ~~fees on appeal nor precludes a party from seeking them under rule 3.1702.~~

34  
35 ~~(d) Procedure for claiming or opposing costs~~

36  
37 ~~(1) Within 40 days after the clerk sends notice of issuance of the remittitur, a party~~  
38 ~~claiming costs awarded by a reviewing court must serve and file in the superior~~  
39 ~~court a verified memorandum of costs under rule 3.1700.~~

40  
41 ~~(2) A party may serve and file a motion in the superior court to strike or tax costs~~  
42 ~~claimed under (1) in the manner required by rule 3.1700.~~

1  
2       ~~(3) An award of costs is enforceable as a money judgment.~~

3  
4       ~~(e)~~**(a) Grounds for Sanctions**

5  
6       ~~(1)~~ On motion of a party's or its own motion, a Court of Appeal may impose  
7 sanctions, including the award or denial of costs under 8.278, on a party or an  
8 attorney for:

9  
10       ~~(A)~~(1) Taking a frivolous appeal or appealing solely to cause delay;

11  
12       ~~(B)~~(2) Including in the record any matter not reasonably material to the appeal's  
13 determination; or

14  
15       ~~(3)~~ Filing a frivolous motion; or

16  
17       ~~(C)~~(4) Committing any other unreasonable violation of these rules.

18  
19       **(b) Motions for sanctions**

20  
21       ~~(2)~~(1) A party's motion under ~~(1)~~(a) must include a declaration supporting the  
22 amount of any monetary sanction sought and must be served and filed before  
23 any order dismissing the appeal but no later than 10 days after the appellant's  
24 reply brief is due.

25  
26       ~~(2)~~ If a party ~~moves~~ files a motion for sanctions with a motion to dismiss the  
27 appeal, ~~with or without a sanctions motion~~, and the motion to dismiss is not  
28 granted, the party may ~~move~~ file a new motion for sanctions within 10 days  
29 after the appellant's reply brief is due.

30  
31       **(c) Notice**

32  
33       ~~(3)~~ The court must give notice in writing if it is considering imposing sanctions.

34  
35       **(d) Opposition**

36  
37       Within 10 days after the court sends such notice, a party or attorney may serve and  
38 file an opposition, but failure to do so will not be deemed consent. An opposition  
39 may not be filed unless the court sends such notice.

1 **(e) Oral argument**

2  
3 (4) — Unless otherwise ordered, oral argument on the issue of sanctions must be  
4 combined with oral argument on the merits of the appeal.

5  
6 ~~Advisory Committee Comment~~

7  
8 ~~Rule 8.276 applies only to costs in appeals in ordinary civil cases; it is not intended to expand the~~  
9 ~~categories of appeals subject to the award of costs.~~

10  
11 ~~Subdivision (c). Subdivision (c)(1)(A) is intended to refer not only to a normal record prepared by the~~  
12 ~~clerk and the reporter under rules 8.120 and 8.130, but also, for example, to an appendix prepared by a~~  
13 ~~party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.~~

14  
15 ~~Subdivision (d). Subdivision (d)(2) provides the procedure for a party to move in the trial court to strike~~  
16 ~~or tax costs that another party has claimed under subdivision (d)(1). It is not intended that the trial court's~~  
17 ~~authority to strike or tax unreasonable costs be limited by any failure of the moving party to move for~~  
18 ~~sanctions in the Court of Appeal under subdivision (e); a party may seek to strike or tax costs on the~~  
19 ~~ground that an opponent included unnecessary materials in the record even if the party did not move the~~  
20 ~~Court of Appeal to sanction the opponent under subdivision (e)(1)(B).~~

21  
22 Reviser's note: The text of current rule 8.276(a) – (d) has been moved to proposed rule  
23 8.278.

24  
25  
26 **Rule 8.278. Costs**

27  
28 **(a) Award of costs**

29  
30 (1) Except as provided in this rule, the party prevailing in the Court of Appeal in a  
31 civil case is entitled to costs on appeal.

32  
33 (2) The prevailing party is the respondent if the Court of Appeal affirms the  
34 judgment without modification or dismisses the appeal. The prevailing party is  
35 the appellant if the court reverses the judgment in its entirety.

36  
37 (3) If the court reverses the judgment in part or modifies it, or if there is more than  
38 one notice of appeal, the opinion must specify the award or denial of costs.

39  
40 (4) In probate cases, the prevailing party must be awarded costs unless the Court  
41 of Appeal orders otherwise, but the superior court must decide who will pay  
42 the award.

43  
44 (5) In the interests of justice, the court may also award or deny costs as it deems  
45 proper.

1  
2 **(b) Judgment for costs**  
3

- 4 (1) The Court of Appeal clerk must enter on the record, and insert in the remittitur,  
5 a judgment awarding costs to the prevailing party under (a)(2) or as directed by  
6 the court under (a)(3), (a)(4), or (a)(5).  
7  
8 (2) If the clerk fails to enter judgment for costs, the court may recall the remittitur  
9 for correction on its own motion, or on a party's motion made not later than 30  
10 days after the remittitur issues.  
11

12 **(c) Recoverable costs**  
13

- 14 (1) A party may recover only the following costs, if reasonable:  
15  
16 (A) Filing fees;  
17  
18 (B) The amount the party paid for any portion of the record, whether an  
19 original or a copy or both. The cost to copy parts of a prior record under  
20 rule 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the  
21 copying;  
22  
23 (C) The cost to produce additional evidence on appeal;  
24  
25 (D) The costs to notarize, serve, mail, and file the record, briefs, and other  
26 papers;  
27  
28 (E) The cost to print and reproduce any brief, including any petition for  
29 rehearing or review, answer, or reply; and  
30  
31 (F) The cost to procure a surety bond, including the premium and the cost to  
32 obtain a letter of credit as collateral, unless the trial court determines the  
33 bond was unnecessary.  
34  
35 (2) Unless the court orders otherwise, an award of costs neither includes attorney's  
36 fees on appeal nor precludes a party from seeking them under rule 3.1702.  
37

1 **(d) Procedure for claiming or opposing costs**

2  
3 (1) Within 40 days after the clerk sends notice of issuance of the remittitur, a party  
4 claiming costs awarded by a reviewing court must serve and file in the superior  
5 court a verified memorandum of costs under rule 3.1700.

6  
7 (2) A party may serve and file a motion in the superior court to strike or tax costs  
8 claimed under (1) in the manner required by rule 3.1700.

9  
10 (3) An award of costs is enforceable as a money judgment.

11  
12  
13 **Advisory Committee Comment**

14  
15 Rule 8.278 applies only to costs in appeals in civil cases other than juvenile cases; it is not intended to  
16 expand the categories of appeals subject to the award of costs.

17  
18 Subdivision (c). Subdivision (c)(1)(B) is intended to refer not only to a normal record prepared by the  
19 clerk and the reporter under rules 8.122 and 8.130, but also, for example, to an appendix prepared by a  
20 party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.

21  
22 Subdivision (d). Subdivision (d)(2) provides the procedure for a party to move in the trial court to strike  
23 or tax costs that another party has claimed under subdivision (d)(1). It is not intended that the trial court's  
24 authority to strike or tax unreasonable costs be limited by any failure of the moving party to move for  
25 sanctions in the Court of Appeal under rule 8.276; a party may seek to strike or tax costs on the ground  
26 that an opponent included unnecessary materials in the record even if the party did not move the Court of  
27 Appeal to sanction the opponent under that rule.

28  
29 Reviser's note: The text of proposed rule 8.278 is take primarily from current rule  
30 8.276(a) – (d).

31  
32  
33 **Chapter 2. Criminal Appeals**

34  
35 **Rule 8.366. Hearing and decision in the Court of Appeal**

36  
37 Rules ~~8.248~~ 8.252 through ~~8.276~~ 8.272 govern the hearing and decision in the Court of  
38 Appeal of an appeal in a criminal case. Except for subdivision (a)(1), rule 8.276 also  
39 applies in criminal appeals.

1 **Chapter 4. Habeas Corpus Appeals and Writs**

2  
3 **Rule 8.386. Remittitur in habeas corpus proceedings**

4  
5 A Court of Appeal must issue a remittitur after it has issued a written opinion in a habeas  
6 corpus proceeding under this chapter when the court issues an order to show cause. Rule  
7 8.272(b)-(d) govern issuance of a remittitur in these proceedings.  
8

9  
10 **Chapter 7. Miscellaneous Writs**

11  
12 **Rule 8.490. Petitions for writ of mandate, certiorari, or prohibition**

13  
14 **(a)-(l) \* \* \***

15  
16 **(m) Costs**

17  
18 (1) Except in a criminal or juvenile or other proceeding in which a party is entitled  
19 to court-appointed counsel;

20  
21 (A) The prevailing party in an original proceeding is entitled to costs if the  
22 court resolves the proceeding by written opinion after issuing an  
23 alternative writ, an order to show cause, or a peremptory writ in the first  
24 instance.

25  
26 (2)(B) In the interests of justice, the court may also award or deny costs as it  
27 deems proper in the proceedings listed in (A) and in other circumstances.

28  
29 (3)(2) The opinion or order resolving the proceeding must specify the award or  
30 denial of costs.

31  
32 (4)(3) Rule ~~8.276~~ 8.278(b)-(d) governs the procedure for recovering costs under  
33 this rule.

34  
35 **(n) Sanctions**

36  
37 (1) On motion of a party or its own motion, a Court of Appeal may impose  
38 sanctions, including the award or denial of costs under (m), on a party or an  
39 attorney for:

40  
41 (A) Filing a frivolous petition or filing a petition solely to cause delay; or  
42

1           (B) Committing any other unreasonable violation of this rule.

2  
3           (2) The court must give notice in writing if it is considering imposing sanctions.

4  
5           (3) Within 10 days after the court sends such notice, a party or attorney may serve  
6           and file an opposition, but failure to do so will not be deemed consent. An  
7           opposition may not be filed unless the court sends such notice.

8  
9           (4) Unless otherwise ordered, oral argument on the issue of sanctions must be  
10          combined with any oral argument on the merits of the petition.

11  
12  
13   **Rule 8.499. Remittitur**

14  
15   A Court of Appeal must issue a remittitur after it has issued a written opinion in a writ  
16   proceeding under this chapter when the court issues an alternative writ, order to show  
17   cause, or peremptory writ in the first instance. Rule 8.272, subdivisions (b)–(d) governs  
18   issuance of a remittitur in these proceedings.

## Item SPR07-01 Response Form

**Title:** Appellate Procedure: Remittitur, Costs and Sanctions in Appeals and Writ Proceedings (adopt new Cal. Rules of Court rules 8.278, 8.386, and 8.499, and amend rules 8.272, 8.276, 8.366, and 8.490)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Organization: \_\_\_\_\_

- Commenting on behalf of an organization**

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Please write or fax or respond using the Internet to:

**Address:** Ms. Camilla Kieliger,  
Judicial Council, 455 Golden Gate Avenue,  
San Francisco, CA 94102  
**Fax:** (415) 865-7664      **Attention:** Camilla Kieliger  
**Internet:** [www.courtinfo.ca.gov/invitationstocomment](http://www.courtinfo.ca.gov/invitationstocomment)

**DEADLINE FOR COMMENT:** 5:00 p.m., Wednesday, June 20, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council,  
the Rules and Projects Committee, or the Policy Coordination and Liaison Committee.  
All comments will become part of the public record of the council's action.*