



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 16–17, 2017

Title

Judicial Council–Sponsored Legislation:
Authorization for Fees for Electronic Filing
and Service in the Appellate Courts

Rules, Forms, Standards, or Statutes Affected
Gov. Code, §§ 68929, 68930, and 68933

Recommended by

Policy Coordination and Liaison Committee
Hon. Kenneth K. So
Administrative Presiding Justices Advisory
Committee

Agenda Item Type

Action Required

Effective Date

November 17, 2017

Date of Report

September 15, 2017

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Executive Summary

The Policy Coordination and Liaison Committee and the Administrative Presiding Justices Advisory Committee recommend that the Judicial Council sponsor legislation to amend the Government Code sections relating to appellate court fees to (1) clarify that an appellate court or its electronic filing service provider may charge a reasonable fee for e-filing services; (2) allow an appellate court in a contract with an e-filing service provider to contract to receive a portion of the fees collected by that provider; and (3) authorize the appellate courts to charge a fee to recover costs incurred for providing e-filing. People entitled to fee waivers would not be subject to any of the fees provided for in the legislation.

Recommendation

The Policy Coordination and Liaison Committee and Administrative Presiding Justices Advisory Committee recommend, effective November 17, 2017, that the Judicial Council sponsor legislation to:

1. Amend Government Code section 68930 to provide that:
 - a. An appellate court that contracts, individually or jointly with other courts, with an electronic filing service provider to furnish and maintain an e-filing and service system may allow the provider to charge electronic filers a reasonable fee in addition to the court's filing fee and may contract with the e-filing service provider to receive a portion of those fee revenues;
 - b. The court may also charge a fee to recover its costs; and
 - c. These authorized fees may not be charged to any party who has been granted a fee waiver and may be waived in other circumstances on a finding of good cause;
2. Amend Government Code section 68929 to relocate the provision for the fee for certification from section 68930 to subdivision (a) of section 68929 and move the current provisions in section 68929 on the fee for comparing documents to subdivision (b) of that section; and
3. Amend Government Code section 68933, which establishes the Appellate Court Trust Fund and identifies the fees collected by the Courts of Appeal and the Supreme Court that are to be deposited in that fund, to specify that any fee revenue from amended section 68930(a)(1) must be placed in the fund.

The text of the proposed legislation is attached at page 7.

Previous Council Action

The Judicial Council adopted rules for e-filing and service in the Supreme Court and Courts of Appeal in 2010. (See Cal. Rules of Court, rules 8.70–8.79.) Those rules have been amended several times, most recently effective January 1, 2017 to align them with current e-filing practices in the appellate courts.

Rationale for Recommendation

California's Courts of Appeal and Supreme Court are in the final stages of instituting e-filing and service, which will improve access to the courts and expedite business processes. Currently, e-filing is in operation in five of the six appellate districts and has just been deployed in the Supreme Court.

To help finance the full implementation of electronic filing, statutory changes are needed to clarify the authority of the vendor and the courts to collect fees for these services. Fees in the Supreme Court and Courts of Appeal are the subject of article 4 of chapter 3 of title 8 of the Government Code (sections 68926–68933). This proposal would amend three of the fee statutes in that article.

Government Code section 68930

The main proposed changes to the fee statutes would be to add new subdivisions (a)(1)–(2) and (b) to Government Code section 68930.

Proposed paragraph (1) of subdivision (a). In California, a central feature of the current e-filing systems used by the appellate and trial courts is the reliance on electronic filing service providers (EFSPs) to enable parties to file their documents electronically with the courts. EFSPs assist filers not only in preparing documents and transmitting them to the courts but also in electronically serving these documents on other parties in the case. For providing these services, the EFSPs expect to be, and are, paid. The system would not operate without such compensation.

The California Rules of Court on e-filing and service recognize this situation. Appellate rule 8.73(b) provides, in part: “The court’s contract with an electronic filing service provider may allow the provider to charge electronic filers a reasonable fee in addition to the court’s filing fee.” The same provision appears in the trial court rules. (See rule 2.255(b).)

For the trial courts, the rule providing for a reasonable fee is also reflected in a statute. (See Code Civ. Proc., § 1010.6(d)(1)(B), which provides, in part, “Any fees charged by an electronic filing service provider shall be reasonable.”) The appellate courts presently have no equivalent statutory provision. Because the Judicial Council has the authority to adopt rules provided they are not inconsistent with statute and there is no statute on this subject, the appellate rule allowing providers to charge reasonable fees is legally sufficient. However, even though a statute expressly addressing the issue of providers charging reasonable fees in the appellate courts is not necessary, to have such statutory authority for the appellate as well as the trial courts seems desirable.

This proposal therefore recommends amending Government Code section 68930 to include the following provision, “The Supreme Court or a court of appeal that furnishes and maintains an electronic filing and service system or that contracts, individually or jointly with other courts, with an electronic filing service provider to do so may . . . [¶] . . . [a]llow the electronic filing service provider to charge electronic filers a reasonable fee in addition to the court’s filing fee.” (See amended Government Code, § 68930(a)(1), at page 7.)

In addition to codifying rule 8.73, this proposal recommends that section 68930(a)(1) allow the appellate courts to contract with the e-filing and service providers to receive a portion of the fee revenues collected by the providers under that paragraph. Section (a)(1) would also specify that

any revenue received by a court of appeal under that paragraph be remitted to the Appellate Court Trust Fund.

Proposed paragraph (2) of subdivision (a). The institution of electronic filing imposes direct costs not only on the e-filing service providers that assist the courts but also on the courts that are implementing e-filing. The new e-filing systems need to be integrated with the appellate courts' case management systems. Once developed and installed, the integrated e-filing processes must be operated, maintained, and updated. In addition to technology, costs for training, personnel, and other elements are associated with adopting electronic filing. To address these fiscal issues, section 68930 would be amended to include new subdivision (a)(2).

For the trial courts, the principal statute on e-filing and service already includes express authority for the courts implementing e-filing to charge fees to recover their costs. (See Code Civ. Proc., § 1010.6(d)(1)(B).) Providing similar statutory authority for the appellate courts is appropriate. Hence, this proposal recommends amending Government Code section 68930 to include a provision that an appellate court that furnishes and maintains an e-filing and service system or contracts with an e-filing service provider to do so may “[c]harge a fee to recover its costs.” (See amended Gov. Code, § 68930(a)(2), at page 7.) The statute would specify that the cost recovery fees be collected by the e-filing service provider and remitted to the court.

Proposed subdivision (b). To ensure access for low-income persons, the statute would state that the fees authorized under (a)(1) and (a)(2) not be charged to any party who has been granted a fee waiver and would also provide that these fees may be waived in other circumstances on a finding of good cause. (Amended § 68930(b).) This change reflects another provision in current rule 8.73, which provides that, “[w]henever possible, the contract [with the e-filing service provider] should require that the electronic filing service provider agree to waive a fee that normally would be charged to a party when the court orders that the fee be waived for that party.” It is also similar to language in the statute relating to e-filing in the trial courts. (See Code Civ. Proc., § 1010.6(d)(1)(B), which provides, in part, “The court, an electronic filing manager, or an electronic filing service provider shall waive any fees charged if the court deems a waiver appropriate, including in instances where a party has received a fee waiver.”)

Other statutory changes

Amended Government Code section 68929. Currently, Government Code section 68929 addresses the fee for comparing documents requiring a certificate. This fee is in addition to the fee for certification. Under this proposal, the provision for the fee for certification, which is currently in section 68930, would be relocated to subdivision (a) of section 68929. The current provisions in section 68929 on the fee for comparing documents would become subdivision (b) of that section. These changes have the benefit of locating all the certification fees in a single section while providing a place in section 68930 for the new fee provisions described above.

Amended Government Code section 68933. Government Code section 68933, which establishes the Appellate Court Trust Fund and identifies the fees collected by the Courts of Appeal and

Supreme Court that are to be deposited in that fund, would be amended to specify that any fee revenue from amended section 68930(a)(1) be placed in the fund.

Comments, Alternatives Considered, and Policy Implications

External Comments

This legislative proposal was circulated for public comment from February 28 through April 28, 2017. Five comments were received on the proposal. All the comments support the legislation, though two commenters—the Family Violence Appellate Project and the State Bar Litigation Section Appellate Courts Committee—recommend adding certain provisions.

As circulated for public comment, proposed new Government Code section 68930(b) would have required only that the fees authorized under (a)(1) and (2) not be charged for a party who has been granted a fee waiver. The two commenters that are recommending additional provisions both state that they support the proposed legislation and that this support is conditional on including this proposed provision in Government Code section 68930(b). In addition, these two commentators recommend that this exemption be expanded to include nonprofits representing parties and private attorneys representing parties pro bono. In response to these comments, the committee revised proposed section 68930(b) to include a provision that the fees under (a)(1) and (2) may also be waived in other circumstances on a finding of good cause. The committee concluded that requiring waiver of these fees for any attorney representing a party pro bono or any nonprofit organization representing a party would be overly broad and, in many circumstances, unnecessary to ensure access to justice for low-income litigants. Not all parties represented by attorneys on a pro bono basis or by nonprofit organizations are low income. When an attorney or organization is representing a low-income party, that party may seek a fee waiver. Under the proposed statutory language circulated for public comment, if the party received a fee waiver, the attorney representing that party would not be charged the e-filing fees. In addition, even if the e-filing fees were charged, they would be recoverable by the prevailing party as costs on appeal. (See the advisory committee comment to California Rules of Court, rule 8.278(d)(1)(D), which states that this provision, “allowing recovery of the ‘costs to notarize, serve, mail, and file the record, briefs, and other papers,’ is intended to include fees charged by electronic filing service providers for electronic filing and service of documents.”)

The committee also concluded, however, that the language that was circulated for public comment might be too narrow in restricting the prohibition on charging these fees to circumstances in which a fee waiver has been granted. There may be other circumstances in which a court may determine that, to ensure access to the courts, these fees should not be charged to a particular party. As noted above, the language of both rule 8.73 and the statutes relating to e-filing in the trial courts currently appears to recognize this fact by more broadly providing for waiver of these e-filing fees when a court determines it is appropriate. Therefore, the committee modified the proposal to give the court discretion to order that these fees be waived on a finding of good cause.

Internal Comments

The input of the Joint Appellate Technology Subcommittee, which is composed of members of the Appellate Advisory Committee and the Information Technology Advisory Committee, was also sought on this proposal. The subcommittee noted that, as circulated for public comment, the proposal would have authorized only those courts that contracted with an e-filing service provider to collect a court cost recovery fee. Although the appellate courts all currently contract with such a provider, the committee concluded that the courts' collection of a cost recovery fee should not be contingent on the existence of such a contract. The committee therefore revised the proposal to remove this limitation.

In reviewing the comments, it was also noted that the proposal as circulated appeared to contemplate only a contract between a single court and an e-filing service provider. Although each court currently has an independent contract, in the future, some or all of the appellate courts may develop a joint agreement with such a provider. To reflect this possibility, the committee revised the proposal to include references to such a joint agreement.

Alternatives considered

In addition to the alternatives considered in response to the comments received, one alternative to this legislative proposal would be to leave the law unchanged. In that event, appellate fee issues would continue to be addressed through rules and contracts. To provide greater certainty and transparency, the better option is to have legislation enacted that will clarify the law, provide express statutory authority for all the fees in this report, and specify how the fees collected are to be distributed.

Implementation Requirements, Costs, and Operational Impacts

The proposed legislation will require some implementation efforts. However, the legal clarity provided by the amended statutes should make it easier to identify, track, and distribute the fees collected.

Attachments

1. Text of proposed Government Code sections 68929, 68930, and 68933, at page 7
2. Chart of comments, at pages 8–11

Government Code sections 68929, 68930, and 68933 would be amended, effective January 1, 2019, to read:

1 **Government Code, § 68929.**

2 (a) The fee for each certificate under seal is one dollar (\$1).

3 (b) The fee for comparing any document requiring a certificate is five cents (\$0.05) a folio,
4 except that when the document to be compared was printed or typewritten from the same type or
5 at the same time as the original on file and has been corrected in all respects to conform with it,
6 such charge shall be one cent (\$0.01) a folio. Such fee is in addition to the fee for the certificate.

7
8 **Government Code, § 68930.**

9 ~~The fee for each certificate under seal is one dollar (\$1).~~

10 (a) The Supreme Court or a court of appeal that furnishes and maintains an electronic filing and
11 service system or that contracts, individually or jointly with other courts, with an electronic filing
12 service provider to do so may do the following:

13 (1) Allow the electronic filing service provider to charge electronic filers a reasonable fee in
14 addition to the court's filing fee. The court or courts may contract with the electronic filing service
15 provider to receive a portion of the fee revenues collected by the provider under this paragraph.
16 Any revenues received by the courts pursuant to this paragraph shall be remitted to the Appellate
17 Court Trust Fund.

18 (2) Charge a fee to recover its costs. If the court contracts with an electronic filing service provider,
19 the cost recovery fee shall be collected by the electronic filing service provider and remitted to the
20 court.

21 (b) The fees authorized under (a)(1) and (a)(2) shall not be charged to any party who has been
22 granted a fee waiver and may be waived in other circumstances on a finding of good cause.

23
24 **Government Code, § 68933.**

25 (a) There is hereby established the Appellate Court Trust Fund, the proceeds of which shall be
26 used for the purpose of funding the courts of appeal and the Supreme Court.

27 (b) The fund, upon appropriation by the Legislature, shall be apportioned by the Judicial Council
28 to the courts of appeal and the Supreme Court as determined by the Judicial Council, taking into
29 consideration all other funds available to each court and the needs of each court, in a manner that
30 promotes equal access to the courts, ensures the ability of the courts to carry out their functions,
31 and promotes implementation of statewide policies.

32 (c) Notwithstanding any other provision of law, the fees listed in subdivision (d) shall all be
33 transmitted for deposit in the Appellate Court Trust Fund within the State Treasury.

34 (d) This section applies to all fees collected pursuant to Section 68926, excluding that portion
35 subject to Section 68926.3; subdivision (b) of Section 68926.1; ~~and~~ Sections 68927, 68928, and
36 68929;; subdivision (a)(1) of Section 68930;; and Section 68932.

37 (e) The Appellate Court Trust Fund shall be invested in the Surplus Money Investment Fund, and
38 all interest earned shall be allocated to the Appellate Court Trust Fund semiannually and used as
39 specified in this section.

LEG 17-01

Authorization for Fees for Electronic Filing and Service in the Appellate Courts)

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

	Commentator	Position	Comment	[Proposed] Committee Response
1.	California Appellate Court Clerks Association (CACCA) by Daniel P. Potter, President San Jose, CA	A	The Clerks Association agrees with the proposed amendments to the Government Code sections. The proposed changes to address the goals of the legislation as well as the appropriate fee revenue distributions.	The Clerks Association’s support for the proposed amendments is duly noted.
2.	Family Violence Appellate Project (FVAP) by Erin Smith San Francisco	AM	<p>Purpose: The Administrative Presiding Justices Advisory Committee proposes amending the statutes relating to appellate court fees to clarify that an appellate court’s electronic filing service provider may charge a reasonable fee for its services, to allow an appellate court to contract with its electronic filing service provider to receive a portion of the fees collected by that provider and to authorize the appellate courts to charge a fee to recover costs incurred for providing electronic filing. Persons entitled to fee waivers would not be subject to any of the fees provided for in this proposal.</p> <p>[Responses to specific questions]: Do the proposed statutory changes achieve the goals of the legislation? Yes Are the distributions of fee revenues in amended sections 68930 and 68933 the appropriate distributions? Yes Do any other statutory changes regarding appellate court fees for electronic filing and service need to be made as part of this proposal? No</p> <p>Recommendation: FVAP supports this proposed legislation, and writes to specify that such support is conditional on the exemption</p>	<p>The Family Violence Appellate Project (FVAP) comment accurately summarizes the legislative proposal.</p> <p>The committee appreciates the responses to the specific questions asked in the invitation to comment.</p> <p>The committee notes FVAP’s general support for the proposed legislation.</p>

LEG 17-01

Authorization for Fees for Electronic Filing and Service in the Appellate Courts)

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

	Commentator	Position	Comment	[Proposed] Committee Response
			<p>proposed in Government Code section 68930(b), for people entitled to fee waivers, remaining in the bill. Such exemption will ensure equal access to the appellate courts for the state’s low-income residents.</p> <p>In addition, FVAP would like to see this exemption expanded to include nonprofits and private attorneys representing parties pro bono. Such a rule would ensure access to justice for low-income litigants, who are often reliant on pro bono representation by private attorneys and/or nonprofit organizations to present their cases competently; encourage more pro bono and nonprofit appellate representation, providing better access to justice at the appellate level; and limit the financial burden on nonprofits with limited resources. Specifically, section 68930(b) could be amended to read: (b) The fees authorized under (a)(1) and (a)(2) shall not be charged to any party who has been granted a fee waiver; to any attorney representing a party pro bono; or to any nonprofit organization representing a party.</p>	<p>For the reasons indicated below, the committee declined to include the language suggested by the commenter, but did revise proposed Government Code section 68930(b) to include a provision authorizing the fees under (a)(1) and (2) to be waived in other circumstances on a finding of good cause.</p> <p>The committee concluded that requiring waiver of these fees for any attorney representing a party pro bono or to any nonprofit organization representing a party would be overly broad and, in many circumstances, unnecessary to ensure access to justice for low-income litigants. Not all parties represented by attorneys on a pro bono basis or by nonprofit organizations are low-income. When an attorney or organization is representing a low-income party, that party may seek a fee waiver. Under the proposed statutory language circulated for public comment, if the party received a fee waiver, the attorney representing that party would not be charged the e-filing fees. In addition, even if the e-filing fees were charged, they would be recoverable by the prevailing party as costs on appeal (See the advisory committee comment to California Rules of Court, rule 8.278(d)(1)(D) which provides that this provision “allowing recovery of the ‘costs to notarize, serve, mail, and</p>

LEG 17-01

Authorization for Fees for Electronic Filing and Service in the Appellate Courts)

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

	Commentator	Position	Comment	[Proposed] Committee Response
				<p>file the record, briefs, and other papers’ is intended to include fees charged by electronic filing service providers for electronic filing and service of documents.”)</p> <p>The committee also concluded, however, that the language that was circulated for public comment might be too narrow in restricting the prohibition on charging these fees to circumstances in which a fee waiver has been granted. The language of both rule 8.73 and the statutes relating to e-filing in the trial court currently appear to recognize that there may be circumstances beyond when a party has a fee waiver when it might be appropriate to relieve a party of e-filing related fees. Therefore, the committee modified the proposal to give the court discretion to order that these fees be waived on a finding of good cause.</p>
3.	Superior Court of San Diego County by Mike Roddy	A	No specific comment.	The court’s support for the proposed amendments is duly noted. No response required.
4.	State Bar of California, Litigation Section Committee on Appellate Courts Comment on Behalf of Org. By Paula Mitchell Los Angeles	A	<p>Do the proposed statutory changes achieve the goals of the legislation? Yes</p> <p>Are the distributions of fee revenues in amended sections 68930 and 68933 the appropriate distributions? Yes</p> <p>Do any other statutory changes regarding appellate court fees for electronic filing and service need to be made as part of this proposal? No</p>	The committee appreciates the responses to the specific questions asked in the invitation to comment.

LEG 17-01**Authorization for Fees for Electronic Filing and Service in the Appellate Courts)**

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

	Commentator	Position	Comment	[Proposed] Committee Response
			<p>Our Recommendation: The Committee on Appellate Courts supports this proposed legislation, and write to specify that such support is conditional on the exemption proposed in Government Code section 68930(b), for people entitled to fee waivers, remaining in the bill. Such exemption will ensure equal access to the appellate courts for the state’s low-income residents.</p> <p>In addition, to further the purpose of ensuring to access to justice for low-income litigants, who are often reliant on court-appointed attorneys, pro bono private attorneys, and/or nonprofit organizations to present their cases competently; we would encourage the committee to consider expanding this exemption to include certain categories of attorneys who are ensuring that California’s low-income residents have access to justice in the appellate courts.</p>	<p>The committee notes the Litigation Section’s general support for the proposed legislation.</p> <p>Please see the response to the comments of the Family Violence Appellate Project above.</p>
5.	Orange County Bar Association by Michael L. Baroni	A	No specific comment.	The bar association’s support for the proposed amendments is duly noted. No response required.