



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 27, 2015

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Title	Agenda Item Type
Appellate Procedure: Costs on Appeal	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 8.278; revise form MC-013	January 1, 2016
Recommended by	Date of Report
Appellate Advisory Committee	August 13, 2015
Hon. Raymond J. Ikola, Chair	Contact
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### Executive Summary

The Appellate Advisory Committee recommends amending the rule governing costs on appeal to modify when a request for costs must be filed. It also recommends revising the form for specifying these costs so that it is more consistent with the rule and better reflects appellate practice. These changes, which are based on a suggestion received from the State Bar of California's Committee on Appellate Courts, are intended to improve the administration of appellate proceedings by making the time frame for filing a memorandum of costs clearer and by making the form easier for practitioners to complete and for courts to review.

### Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2016:

1. Amend rule 8.278 of the California Rules of Court to require the memorandum of costs to be filed within 40 days of the date of issuance of the remittitur, rather than within 40 days after the clerk sends notice of issuance of the remittitur.

2. Revise *Memorandum of Costs on Appeal* (form MC-013) to:

- Specifically include the cost of an appendix among the recoverable costs listed on the form and clarify that recoverable costs for the clerk’s transcript or appendix include costs for an original, a copy, or both;
- Specifically include the cost not only of printing, but of copying briefs among the recoverable costs listed on the form;
- Eliminate notary fees from among the recoverable costs specifically listed on the form;
- Merge “expenses of service” and “transmission and filing of record, briefs, and other papers” into a single line on the list of recoverable costs on the form;
- Delete the proof of service on page 2 of the form and add a notice to the top of the form indicating that Judicial Council forms are available to provide proof of service; and
- Rename this form as APP-013.

The text of the amended rule and revised form are attached at pages 6–8.

### **Previous Council Action**

The Judicial Council adopted the predecessor to rule 8.278, which addresses costs on appeal, effective September 1, 1928, as part of the original Rules for the Supreme Court and District Courts of Appeal. Effective July 1, 1943, the council adopted a new set of Rules on Appeal which superseded the 1928 rules. The 1943 rule on costs included a list of the specific types of costs that were recoverable. Since 1943, the council has amended this provision on a number of occasions, generally to add or clarify recoverable costs. Most recently, effective January 1, 2013, the council amended this provision to clarify the recoverable costs associated with obtaining a bond on appeal or a substitute for such a bond.

Effective January 1, 1987, the council amended the rule on costs to add a subdivision establishing the procedure for claiming costs, including the time frame within which a memorandum of costs must be filed. As originally enacted, this provision required the memorandum to be filed within 30 days from the filing of the remittitur in the trial court. However, no notice was provided of filing of the remittitur, so it was difficult for attorneys to determine when to file the memorandum of costs. Effective July 1, 1989, the council therefore amended this provision to require that the memorandum be filed within 40 days after the clerk of the reviewing court mails the notice of issuance of the remittitur.

## **Rationale for Recommendation**

### **Rule 8.278**

Rule 8.278 of the California Rules of Court 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 notice of issuance of the remittitur, parties do not have an easy way to determine when this notice was sent. The committee recommends that rule 8.278 be amended 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 in the notice of issuance of the remittitur, on the remittitur document itself, and on the docket, which is available online.

### **Memorandum of Costs on Appeal (form MC-013)**

*Memorandum of Costs on Appeal* (form MC-013) is the mandatory Judicial Council form that must be used in requesting costs on appeal. This form includes a list of recoverable costs with spaces where users can indicate the amount sought to be recovered. Subdivision (d) of rule 8.278 also identifies those costs that may be recovered on appeal. 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 appendixes are used quite frequently. However, while form MC-013 includes the cost of a clerk's transcript on its list of recoverable costs, it does not specifically include the cost of an appendix on this list. The committee recommends revising 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.

Currently, form MC-013 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.

Form MC-013 currently includes, as a second page, an optional proof of service form. The Judicial Council has also adopted several separate proof of service forms, including *Proof of Service - Civil* (form POS-040). 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 Judicial Council forms 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.

## **Comments, Alternatives Considered, and Policy Implications**

### **External comments**

The proposed amendments to rule 8.278 and revisions to form MC-013 were circulated for public comment between April 17 and June 19, 2015, as part of the regular spring comment cycle. Four individuals or organizations submitted comments on this proposal. All four commentators agreed with the proposal. A chart with the full text of the comments received and the committee’s responses is attached at pages 9–10. Based on these comments, the committee recommends adopting this proposal as circulated.

### **Alternatives**

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, which will make the form easier for practitioners to complete and courts to review.

## **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.

## **Attachments and Links**

1. Cal. Rules of Court, rule 8.248, at pages 6–7
2. Revised *Memorandum of Costs on Appeal* (form APP-013), at page 8
3. Chart of comments, at pages 9–10

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

1                                   **Article 4. Hearing and Decision in the Court of Appeal**  
2  
3

4 **Rule 8.278. Costs on appeal**  
5

6 **(a)–(b) \* \* \***  
7

8 **(c) Procedure for claiming or opposing costs**  
9

10       (1) Within 40 days after ~~the clerk sends notice of~~ issuance of the remittitur, a party  
11       claiming costs awarded by a reviewing court must serve and file in the superior court  
12       a verified memorandum of costs under rule 3.1700.  
13

14       (2)–(3) \* \* \*  
15

16 **(d) Recoverable costs**  
17

18       (1) A party may recover only the following costs, if reasonable:  
19

20           (A) Filing fees;  
21

22           (B) The amount the party paid for any portion of the record, whether an original or  
23           a copy or both. The cost to copy parts of a prior record under rule 8.147(b)(2)  
24           is not recoverable unless the Court of Appeal ordered the copying;  
25

26           (C) The cost to produce additional evidence on appeal;  
27

28           (D) The costs to notarize, serve, mail, and file the record, briefs, and other papers;  
29

30           (E) The cost to print and reproduce any brief, including any petition for rehearing  
31           or review, answer, or reply;  
32

33           (F) The cost to procure a surety bond, including the premium, the cost to obtain a  
34           letter of credit as collateral, and the fees and net interest expenses incurred to  
35           borrow funds to provide security for the bond or to obtain a letter of credit,  
36           unless the trial court determines the bond was unnecessary; and  
37

38           (G) The fees and net interest expenses incurred to borrow funds to deposit with the  
39           superior court in lieu of a bond or undertaking, unless the trial court determines  
40           the deposit was unnecessary.  
41

42       (2) Unless the court orders otherwise, an award of costs neither includes attorney’s fees  
43       on appeal nor precludes a party from seeking them under rule 3.1702.  
44

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 must file a proof of service of this document. For this purpose, Judicial Council proof of service forms are available. (See <a href="http://www.courts.ca.gov/forms.htm?filter=POS">www.courts.ca.gov/forms.htm?filter=POS</a>.) An appropriate form may be completed and filed to show proof of service.</b>	

Prevailing party (name):

claims from (name):

the following costs on appeal:

**TOTALS**

- |   |       |   |
|---|-------|---|
| 1. Filing fees  | 1. \$ | <input style="width:90%;" type="text"/> |
| 2. Preparation of the original and copies of clerk's transcript or appendix | 2. \$ | <input style="width:90%;" type="text"/> |
| 3. Preparation of reporter's transcript                                     | 3. \$ | <input style="width:90%;" type="text"/> |
| 4. Printing and copying of briefs   | 4. \$ | <input style="width:90%;" type="text"/> |
| 5. Production of additional evidence  | 5. \$ | <input style="width:90%;" type="text"/> |
| 6. Transmitting, filing, and serving of record, briefs, and other papers    | 6. \$ | <input style="width:90%;" type="text"/> |
| 7. Premium on any surety bond on appeal                                     | 7. \$ | <input style="width:90%;" type="text"/> |
| 8. Other expenses reasonably necessary to secure surety bond                | 8. \$ | <input style="width:90%;" type="text"/> |
| 9. Other: _____ (specify authority):  | 9. \$ | <input style="width:90%;" type="text"/> |

<b>TOTAL COSTS:</b>	\$ <input style="width:90%;" 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)



**SPR15-07****Appellate Procedure: Costs on Appeal** (amend rule 8.278, and revise form MC-013)

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b><i>Suggested Committee Response</i></b>
1.	Orange County Bar Association By Ashleigh Aitken, President	A	The proposal appropriately addresses the stated purpose. There is no need to separate costs of filing from costs of service.	The committee notes the commentator's support for the proposal and appreciates the response to the specific question in the invitation to comment.
2.	San Diego Bar Association Appellate Practice Session By Victoria E. Fuller, Chair	A	Our section supports the revision to Rule 8.278, to clarify that a memorandum of costs on appeal must be filed within 40 days of the date of issuance of the remittitur.	The committee notes the commentator's support for the proposal; no response required.
3.	State Bar of California Committee on Appellate Courts By John Derrick, Chair	A	The Committee supports this proposal, which is based on the Committee's suggestion. The Committee appreciates the Appellate Advisory Committee's pursuit of this proposal.	The committee notes the commentator's support for the proposal; no response required
4.	Superior Court of San Diego County By Michael M. Roddy, Executive Officer	A	<ul style="list-style-type: none"> <li>• Does the proposal appropriately address the stated purpose? <b>Yes. Specifically, the proposed changes to the Memorandum of Costs form provide clarification.</b></li> <li>• 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? <b>Yes - judicial officers and court staff are familiar with the memorandum of costs form and the process. [Note – in a subsequent communication, the commentator clarified that the court</b></li> </ul>	The committee notes the commentator's support for the proposal and appreciates the responses to the specific questions in the invitation to comment

**SPR15-07****Appellate Procedure: Costs on Appeal** (amend rule 8.278, and revise form MC-013)

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

	Commentator	Position	Comment	<i>Suggested Committee Response</i>
			<p><i>approves of modifying the form so that the cost of service is no longer separately identified on the form]</i></p> <ul style="list-style-type: none"><li>• Would the proposal provide cost savings? <b>No change in costs.</b></li><li>• What are the implementation requirements for courts? <b>None.</b></li><li>• Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? <b>Yes.</b></li></ul>	