



# Judicial Council of California

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## REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-099

For business meeting on: May 12, 2023

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**Title**

Appellate Procedure: Costs on Appeal

**Agenda Item Type**

Action Required

**Rules, Forms, Standards, or Statutes Affected**

Amend Cal. Rules of Court, rules 8.278 and 8.891

**Effective Date**

September 1, 2023

**Recommended by**

Appellate Advisory Committee  
Hon. Louis R. Mauro, Chair

**Date of Report**

April 5, 2023

**Contact**

Heather Anderson, 415-865-7803  
[heather.anderson@jud.ca.gov](mailto:heather.anderson@jud.ca.gov)  
Kendall W. Hannon, 415-865-7653  
[kendall.hannon@jud.ca.gov](mailto:kendall.hannon@jud.ca.gov)

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### Executive Summary

The Appellate Advisory Committee recommends amending the rules governing costs on appeal in civil actions to clarify that the general rule for awarding costs to the prevailing party is subject to exception for statutes requiring a different or additional finding, determination, or analysis. The proposal is responsive to a recent Supreme Court decision and the constitutional principle that rules of court may not be inconsistent with statute.

### Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective September 1, 2023:

1. Amend rules 8.278 and 8.891 of the California Rules of Court to state that the general rule for awarding costs to the prevailing party is subject to exceptions established by statutes; and
2. Amend the advisory committee comments accompanying rules 8.278 and 8.891 to indicate that subdivision (a)(1) reflects the holding of *Pollock v. Tri-Modal Distribution Services, Inc.*

(2021) 11 Cal.5th 918 and the constitutional principle that rules of court may not be inconsistent with statute.

The proposed amended rules are attached at pages 5–6.

### **Relevant Previous Council Action**

The Judicial Council adopted the predecessor to rule 8.278,<sup>1</sup> which addresses costs on appeal in civil appeals in the Court of Appeal, effective September 1, 1928, as part of the original Rules for the Supreme Court and District Courts of Appeal. Since 1928, the council has amended and renumbered the rule on numerous occasions, generally to add or clarify recoverable costs. The most recent amendments, in 2013, 2016, and 2018, have no bearing on this proposal.

The Judicial Council adopted the predecessor to rule 8.891, regarding costs on appeal in appellate division proceedings, effective September 15, 1945. The Judicial Council repealed all rules relating to the superior court appellate division and replaced them with new rules, effective January 1, 2009. The language of new rule 8.891 was modeled on rule 8.278. Rule 8.891 was amended in 2011 and 2013, but these amendments are not relevant to this proposal.

### **Analysis/Rationale**

#### **Background**

Under rule 8.278, “[e]xcept as provided in this rule, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal.” (Rule 8.278(a)(1).) As noted above, the parallel rule for limited civil actions in the appellate division was modeled on rule 8.278 and thus similarly provides: “Except as provided in this rule, the prevailing party in a civil appeal is entitled to costs on appeal.” (Rule 8.891(a).) Both rules also define *prevailing party* and allow the court to award costs in its discretion. (Rule 8.278(a)(2)–(4) and rule 8.891(a)(2), (4).)

Neither of these rules specifically addresses statutes that require a different or additional finding, determination, or analysis before awarding costs on appeal. In a recent case under the California Fair Employment and Housing Act (FEHA), *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (*Pollock*), the Supreme Court addressed whether costs on appeal were governed by rule 8.278(a) or by the FEHA provision that authorizes the recovery of fees and costs (Gov. Code, § 12965(c)). Under the statute, the court, in its discretion, may award reasonable fees and costs “to the prevailing party . . . except that . . . a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.” (*Id.*, § 12965(c)(6).) In *Pollock*, the Court of Appeal awarded fees and costs on appeal to the prevailing defendant under rule 8.278; it made no additional findings.

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<sup>1</sup> This and all subsequent rule references are to the California Rules of Court.

In reversing the award of fees and costs, the Supreme Court found that the statute was not limited to proceedings in the trial court, either by its terms or by its legislative intent to encourage litigation of potentially meritorious claims. The court also rejected the argument that rule 8.278 should control because it “does not include the phrase ‘except as otherwise expressly provided by statute.’ ” (*Pollock, supra*, 11 Cal.5th at p. 950.) “[E]ven without such language,” the court stated, “a rule of court must yield to an applicable statute when ‘it conflicts with either the statute’s express language or its underlying legislative intent.’ ” (*Ibid.*; Cal. Const., art. VI, § 6(d) [rules adopted by the Judicial Council “shall not be inconsistent with statute”].) “Section 12965(b) expressly governs ‘the court’ in FEHA actions without limitation, and allowing an award of costs on appeal to a prevailing defendant without a finding that the plaintiff’s action was objectively groundless would undermine the statute’s purpose.” (*Pollock, supra*, 11 Cal.5th at p. 950.)

To reflect the holding in *Pollock* and the constitutional principle on which it is based, the Appellate Advisory Committee recommends amending rules 8.278 and 8.891 to clarify that the general rule for awarding costs on appeal to the prevailing party is subject to exception for statutory provisions that require the court to conduct a different or additional finding, determination, or analysis. The committee also recommends amending the accompanying advisory committee comments to both rules to cite to these authorities.

### **Comments**

This proposal was circulated for public comment from December 9, 2022, to January 20, 2023, as part of the regular winter comment cycle. Given that the *Pollock* case only addressed rule 8.278, the invitation to comment specifically asked whether the proposal should include amending rule 8.891. The invitation to comment also specifically asked whether any other appellate rules pertaining to costs should be similarly amended.

Only one comment was received. The Orange County Bar Association (OCBA) submitted a comment agreeing that the proposal appropriately addresses its stated purpose. The OCBA supported amending rule 8.891 and responded that there are no other appellate rules pertaining to costs that should be similarly amended. A chart with the full text of the comment received and the committee’s response is attached at page 7.

### **Alternatives considered**

Given that the *Pollock* case specifically addressed only rule 8.278, the committee considered whether to recommend amending only that rule. Given that the reasoning of the court in *Pollock* appears applicable to both rules and the comment received supported amending rule 8.891 too, the committee concluded that recommending amendments to both rule 8.278 and rule 8.891 was best.

The committee also considered taking no action but rejected this option in favor of clarifying the rules to provide additional guidance to appellate courts in addressing claims for costs.

### **Fiscal and Operational Impacts**

This proposal would impose no fiscal or operational impacts on the courts, other than making judicial officers aware of the changes. It is not expected to result in any costs to the courts.

### **Attachments and Links**

1. Cal. Rules of Court, rules 8.278 and 8.891, at pages 5–6
2. Chart of comments, at page 7

Rules 8.278 and 8.891 of the California Rules of Court are amended, effective September 1, 2023, to read:

**Rule 8.278. Costs on appeal**

**(a) Award of costs**

- (1) Except as provided in this rule or by statute, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal.
- (2) The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal. The prevailing party is the appellant if the court reverses the judgment in its entirety.
- (3) If the Court of Appeal reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs.
- (4) In probate cases, the prevailing party must be awarded costs unless the Court of Appeal orders otherwise, but the superior court must decide who will pay the award.
- (5) In the interests of justice, the Court of Appeal may also award or deny costs as it deems proper.

**(b)–(d) \* \* \***

**Advisory Committee Comment**

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

**Subdivision (a).** The subdivision (a)(1) exception to the general rule of awarding costs to the prevailing party for statutes that require further analysis or findings reflects the holding of *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (regarding costs on appeal in an action under the California Fair Employment and Housing Act) and the constitutional mandate that rules of court “shall not be inconsistent with statute” (Cal. Const., art. VI, § 6(d)).

**Subdivision (c).** \* \* \*

**Subdivision (d).** \* \* \*

1 **Rule 8.891. Costs and sanctions in civil appeals**

2  
3 **(a) Right to costs**

- 4  
5 (1) Except as provided in this rule or by statute, the prevailing party in a civil  
6 appeal is entitled to costs on appeal.  
7  
8 (2) The prevailing party is the respondent if the appellate division affirms the  
9 judgment without modification or dismisses the appeal. The prevailing party  
10 is the appellant if the appellate division reverses the judgment in its entirety.  
11  
12 (3) If the appellate division reverses the judgment in part or modifies it, or if  
13 there is more than one notice of appeal, the appellate division must specify  
14 the award or denial of costs in its decision.  
15  
16 (4) In the interests of justice, the appellate division may also award or deny costs  
17 as it deems proper.  
18

19 **(b)–(e) \* \* \***

20  
21 **Advisory Committee Comment**

22  
23 **Subdivision (a).** The subdivision (a)(1) exception to the general rule of awarding costs to the  
24 prevailing party for statutes that require further analysis or findings reflects the holding of *Pollock*  
25 *v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (regarding costs on appeal in an  
26 action under the California Fair Employment and Housing Act) and the constitutional mandate  
27 that rules of court “shall not be inconsistent with statute” (Cal. Const., art. VI, § 6(d)).  
28

29 **Subdivision (d).** \* \* \*

## W23-01

### Appellate Procedure: Costs on Appeal (amend Cal. Rules of Court, rules 8.278 and 8.891)

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

|    | Commenter   | Position | Comment   | Committee Response    |
|----|---|----------|---|-----------------------|
| 1. | Orange County Bar Association<br>by Michael A. Gregg, President | NI       | <ul style="list-style-type: none"><li>• Does the proposal appropriately address the stated purpose? <b>Yes.</b></li><li>• Should the proposal include amending rule 8.891? <b>Yes.</b></li><li>• Are there any other appellate rules pertaining to costs that should be similarly amended? <b>No.</b></li></ul> | No response required. |