

First Supplement to Memorandum 2000-29

Award of Costs and Contractual Attorney's Fees to Prevailing Party

Attached for the Commission's review is a staff draft statute, implementing decisions on costs and contractual attorney's fees made at the February meeting. Key provisions are shown in normal text; other provisions are shown in italics. The Commission and other interested parties should carefully review the key provisions. The staff does not plan to discuss the other provisions at the Commission's meeting, unless an issue is raised.

The draft would rename and reorganize the chapter of the Code of Civil Procedure entitled "Costs," which currently consists of a disorganized jumble of provisions on costs, attorney's fees, and various other expenses. An outline showing the chapter as we propose to reorganize it precedes the staff draft statute.

The staff draft statute does not include conforming revisions. The staff will add them to its next draft.

Respectfully submitted,

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Staff Counsel

1 PROPOSED REORGANIZATION OF
2 CHAPTER 6 (COSTS) OF TITLE 14 OF PART 2
3 OF THE CODE OF CIVIL PROCEDURE

4 ☞ **Staff Note.** The staff draft statute attached to the First Supplement to Memorandum 2000-29
5 would rename and reorganize the chapter of the Code of Civil Procedure pertaining to costs. The
6 content of the chapter as the staff proposes to reorganize it is shown below.

7 CHAPTER 6. OF ATTORNEY'S FEES, COSTS, AND OTHER LITIGATION EXPENSES

8 **Article 1. General Provisions**

- 9 § 1021. Costs and attorney's fees
10 § 1021.01 (added). Nonstatutory litigation expenses

11 **Article 2. Attorney's Fees, Costs, and Other Litigation Expenses in Specific Types of**
12 **Actions**

- 13 § 1021.1. Pilot program in Riverside & San Bernardino Counties
14 § 1021.4. Attorney's fees in action for damages arising from felony
15 § 1021.5. Private attorney general
16 § 1021.6. Attorney's fees on claim for implied indemnity
17 § 1021.7. Attorney's fees in action for damages arising from
18 performance of peace officer's duties
19 § 1021.9. Attorney's fees in action for damages arising from trespass
20 § 1022. Multiple actions where defendants could have been joined in
21 one action
22 § 1024 (repealed). *Expenses due to postponement of trial [Continued*
23 *in Section 1040.80]*
24 § 1023 (repealed). *Referee's fees [Continued in Section 645.2.]*
25 § 1025. Tender of deposit to court in action on a contract or action for
26 recovery of money only
27 § 1026. Costs where trustee, guardian, conservator or other
28 representative prosecutes or defends action
29 § 1027 (repealed). *Review other than by appeal [Continued in Section*
30 *1041.20.]*
31 § 1028. Award against state
32 § 1029. Award against public entity or public officer in official
33 capacity
34 § 1028.5. Carpenter-Katz Small Business Equal Access to Justice Act
35 (permits award of reasonable litigation expenses not exceeding
36 \$7,500, which includes attorney's fees)
37 § 1029.5. Security for costs in action against architect, landscape
38 architect, engineer, building designer, or land surveyor
39 § 1029.6. Security for costs in action against medical professional
40 § 1029.8. Treble damages and attorney's fees where unlicensed person
41 harms another in providing goods or services without license
42 § 1030. Security for costs and attorney's fees in action by nonresident
43 plaintiff
44 § 1031. Attorney's fees as cost in action for recovery of wages for
45 labor performed

1 § 1032 (repealed). *Prevailing party [Subdivision (b) becomes Section*
2 *1039.10. Remainder is superseded by Sections 1039.20, 1039.30,*
3 *and 1039.50.]*

4 § 1033 (repealed). *Small recovery [Continued in Section 1040.70.]*

5 § 1033.5 (repealed). *Allowable costs [Continued in Sections 1040.10-*
6 *1040.50.]*

7 § 1034 (repealed). *Procedures for claiming prejudgment costs and*
8 *costs on appeal [Continued in Section 1041.10.]*

9 § 1034.5. Expenses of effecting eviction

10 § 1036. Reimbursement of attorney's fees, costs, and expenses in
11 inverse condemnation proceeding

12 § 1038. Attorney's fees and other defense costs in proceeding under
13 Tort Claims Act or proceeding for indemnity or contribution

14 **Article 3. Prevailing Party**

15 § 1039.10. Recovery of costs by prevailing party

16 § 1039.20. Presumptions for determining prevailing party for purposes
17 of awarding costs

18 § 1039.30. Determination of prevailing party

19 § 1039.40. Prevailing party for awarding attorney's fees or
20 nonstatutory litigation expenses pursuant to contract or pursuant to
21 Civil Code Section 1717

22 § 1039.50. Determining prevailing party where contract specifies how
23 to determine prevailing party

24 **Article 4. Amount of Award**

25 § 1040.10. Allowable costs

26 § 1040.20. Attorney's fees and nonstatutory litigation expenses as
27 costs

28 § 1040.30. Items not allowable except where expressly authorized by
29 law

30 § 1040.40. Items not expressly mentioned in Section 1040.10, 1040.20,
31 or 1040.30

32 § 1040.50. Requirements for cost award

33 § 1040.60. Partial recovery

34 § 1040.70. Small recovery

35 § 1040.80 Expenses due to postponement of trial

36 **Article 5. Procedures for Prejudgment Costs and Costs on Appeal or Other Review**

37 § 1041.10. Procedures for claiming prejudgment costs and costs on
38 appeal

§ 1041.20 Review other than by appeal

STAFF DRAFT STATUTE

1 ☞ **Staff Note.** Provisions the staff intends to discuss at the meeting are shown in normal text.
2 Other provisions are shown in italics.

3 **Civ. Code § 1717 (amended). Award of attorney’s fees in contract action**

4 SECTION 1. Section 1717 of the Civil Code is amended to read:

5 1717. (a) ~~In any action on a contract, where the~~ If a fee provision in a contract
6 specifically provides that attorney’s fees and costs which are incurred to enforce
7 that contract nonstatutory litigation expenses (as defined in Section 1021.01 of the
8 Code of Civil Procedure), or either item, incurred in enforcement of the contract or
9 in litigating a cause of action relating to or arising from the contract, shall be
10 awarded either to one of the parties or to the prevailing party, then the party who is
11 determined to be the party prevailing on the contract, whether he or she is the party
12 specified in the contract or not, shall be prevailing party on the causes of action
13 covered by the fee provision is entitled to reasonable attorney’s fees the item
14 covered by the fee provision, in addition to other costs, regardless of whether that
15 party is named in the fee provision.

16 Where a contract provides for attorney’s fees, as set forth above, that provision
17 shall be construed as applying to the entire contract, unless each party was
18 represented by counsel in the negotiation and execution of the contract, and the
19 fact of that representation is specified in the contract.

20 Reasonable attorney’s fees shall be fixed by the court, and shall be an element of
21 the costs of suit.

22 Attorney’s fees provided for by this section shall not be subject to waiver by the
23 parties to any contract which is entered into after the effective date of this section.
24 Any provision in any such contract which provides for a waiver of attorney’s fees
25 is void.

26 (b)(1) The court, upon notice and motion by a party, shall determine who is the
27 party prevailing on the contract for purposes of this section, whether or not the suit
28 proceeds to final judgment. Except as provided in paragraph (2), the party
29 prevailing on the contract shall be the party who recovered a greater relief in the
30 action on the contract. The court may also determine that there is no party
31 prevailing on the contract for purposes of this section.

32 (2) Where an action has been voluntarily dismissed or dismissed pursuant to a
33 settlement of the case, there shall be no prevailing party for purposes of this
34 section.

35 Where the defendant alleges in his or her answer that he or she tendered to the
36 plaintiff the full amount to which he or she was entitled, and thereupon deposits in
37 court for the plaintiff, the amount so tendered, and the allegation is found to be
38 true, then the defendant is deemed to be a party prevailing on the contract within
39 the meaning of this section.

1 ~~Where a deposit has been made pursuant to this section, the court shall, on the~~
2 ~~application of any party to the action, order the deposit to be invested in an~~
3 ~~insured, interest-bearing account. Interest on the amount shall be allocated to the~~
4 ~~parties in the same proportion as the original funds are allocated.~~

5 (b) Reasonable attorney's fees and nonstatutory litigation expenses shall be fixed
6 by the court, and are an element of the costs of suit.

7 (c) The court, on notice and motion by a party, shall determine who is the
8 prevailing party for purposes of this section, regardless of whether the suit
9 proceeds to final judgment. The court shall make this determination in accordance
10 with Section 1039.40 of the Code of Civil Procedure.

11 (d) Where a contract provides for attorney's fees or nonstatutory litigation
12 expenses, or both, as provided in subdivision (a), the fee provision shall be
13 construed as applying to the entire contract, unless each party was represented by
14 counsel in the negotiation and execution of the contract, and the fact of the
15 representation is specified in the contract.

16 (e) Attorney's fees and nonstatutory litigation expenses awardable pursuant to
17 this section are not subject to waiver by the parties to a contract entered into after
18 January 1, 1969. Any provision of a contract entered into after January 1, 1969,
19 that provides for a waiver of attorney's fees or nonstatutory litigation expenses is
20 void.

21 ~~(e) (f) In an action which that seeks relief in addition to that based on a contract~~
22 ~~a cause of action covered by a fee provision described in subdivision (a), if the~~
23 ~~party prevailing on the contract cause of action covered by the fee provision has~~
24 ~~damages awarded against it on causes of action not on the contract covered by the~~
25 ~~fee provision, the amounts awarded to the party prevailing on the contract under~~
26 ~~this section cause of action covered by the fee provision shall be deducted from~~
27 ~~any damages awarded in favor of the party who did not prevail on the contract that~~
28 ~~cause of action. If the amount awarded under this section exceeds the amount of~~
29 ~~damages awarded to the party not prevailing on the contract cause of action~~
30 ~~covered by the fee provision, the net amount shall be awarded to the party~~
31 ~~prevailing on the contract cause of action covered by the provision, and judgment~~
32 ~~may be entered in favor of the that party prevailing on the contract for that net~~
33 ~~amount.~~

34 **Comment.** Section 1717 is amended to incorporate the prevailing party standard of Code of
35 Civil Procedure Section 1039.40, to expressly encompass nonstatutory litigation expenses, to
36 extend the principle of reciprocity to noncontract causes of action arising from or relating to a
37 contract, and to improve organizational clarity.

38 Subdivision (a) is amended in recognition that parties may validly agree to shift attorney's fees
39 to the losing party in any litigation between themselves, regardless of whether the litigation
40 sounds in tort or in contract. *Santisas v. Goodin*, 17 Cal. 4th 599, 608, 951 P.2d 399, 71 Cal. Rptr.
41 2d 830 (1998); *Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338, 1341, 5 Cal. Rptr. 2d
42 154 (1992). As amended, subdivision (a) makes a unilateral attorney's fee clause reciprocal in
43 both tort and contract actions covered by the clause. Formerly, courts awarded fees pursuant to
44 the reciprocity requirement of Section 1717 only for a contract claim, not for a noncontract claim.

1 See *Moallem v. Coldwell Banker Commercial Group, Inc.*, 25 Cal. App. 4th 1827, 1830-32, 31
2 Cal. Rptr. 2d 253 (1994).

3 The material formerly in the second paragraph of subdivision (a) is continued in subdivision (d)
4 with revisions to expressly encompass nonstatutory litigation expenses. The material formerly in
5 the third paragraph of subdivision (a) is continued in subdivision (b), with revisions to expressly
6 encompass nonstatutory litigation expenses. The material formerly in the fourth paragraph of
7 subdivision (a) is continued in subdivision (e), with revisions to expressly encompass
8 nonstatutory litigation expenses.

9 The material formerly in the first sentence of subdivision (b)(1) is continued in the first
10 sentence of subdivision (c), with revisions to encompass determination of the prevailing party on
11 noncontract claims. The material formerly in the second and third sentences of subdivision (b)(1)
12 and the material formerly in the first paragraph of subdivision (b)(2), pertaining to determination
13 of the party prevailing on the contract, is deleted and superseded by the second sentence of
14 subdivision (c).

15 The material formerly in the second and third paragraphs of subdivision (b)(2) pertaining to
16 tender of a deposit is continued in Code of Civil Procedure Section 1025, with revisions to
17 encompass nonstatutory litigation expenses.

18 Subdivision (f) is amended to apply where attorney's fees or nonstatutory litigation expenses
19 are awarded pursuant to this section on a noncontract cause of action, as well as where attorney's
20 fees nonstatutory litigation expenses are awarded pursuant to this section in an action on a
21 contract.

22 Attorney's fees and nonstatutory litigation expenses pursuant to Section 1717 are recoverable
23 as costs pursuant to Code of Civil Procedure Section 1039.10 (recovery of costs by prevailing
24 party). See Code Civ. Proc. § 1040.20 (attorney's fees and nonstatutory litigation expenses as
25 costs). For authority to contractually allocate responsibility for attorney's fees, see Section 1021.
26 For authority to contractually allocate nonstatutory litigation expenses, see Section 1021.01.

27 Section 1717 is also amended to make technical changes.

28 ***Code Civ. Proc. § 645.1 (amended). Order for payment of referee fees***

29 *SEC. ____.* Section 645.1 of the Code of Civil Procedure is amended to read:

30 *645.1. The court may order the parties to pay the fees of referees who are not*
31 *employees or officers of the court at the time of appointment, as fixed pursuant to*
32 *Section ~~1023~~ 645.2, in any manner determined by the court to be fair and*
33 *reasonable, including an apportionment of the fees among the parties.*

34 *Comment.* Section 645.1 is amended to correct the cross-reference.

35 ***Code Civ. Proc. § 645.2 (added). Referee fees***

36 *SEC. ____.* Section 645.2 is added to the Code of Civil Procedure, to read:

37 *645.2. The fee of a referee shall be the amount that the court determines is*
38 *reasonable for the time spent on the reference. The parties may agree, in writing,*
39 *on another rate of compensation, and thereafter that rate shall be used.*

40 *Comment.* Section 645.2 continues former Section 1023 without substantive change.

41 ***Heading of Chapter 6 (commencing with Section 1021) (amended)***

42 *SEC. ____.* The heading of Chapter 6 (commencing with Section 1021) of Title
43 *14 of Part 2 of the Code of Civil Procedure is amended to read:*

1 CHAPTER 6. OF ATTORNEY'S FEES, COSTS, AND OTHER
2 LITIGATION EXPENSES

3 *Heading of Article 1 (commencing with Section 1021) (added)*

4 SEC. _____. An article heading is added immediately preceding Section 1021 of
5 the Code of Civil Procedure, to read:

6 *Article 1. General Provisions*

7 **Code Civ. Proc. § 1021.01 (added). Nonstatutory litigation expenses**

8 SEC. _____. Section 1021.01 is added to the Code of Civil Procedure, to read:
9 1021.01. (a) Nonstatutory litigation expenses are litigation expenses other than
10 he following:

11 (1) Attorney's fees.

12 (2) Costs awarded pursuant to Section 1040.10 or 1040.40.

13 (b) Except as otherwise provided by statute, payment of nonstatutory litigation
14 expenses is left to the agreement, express or implied, of the parties.

15 **Comment.** Section 1021.01 is added to expressly authorize parties to contractually allocate
16 responsibility for nonstatutory litigation expenses, such as fees for experts not ordered by the
17 court. It is drawn from Section 1021.

18 *Heading of Article 2 (commencing with Section 1021.1) (added)*

19 SEC. _____. An article heading is added immediately preceding Section 1021.1 of
20 the Code of Civil Procedure, to read:

21 *Article 2. Attorney's Fees, Costs, and Other Litigation*
22 *Expenses in Specific Types of Actions*

23 **Code Civ. Proc. § 1023 (repealed). Referee fees**

24 SEC. _____. Section 1023 of the Code of Civil Procedure is repealed.
25 ~~1023. The fees of referees are such reasonable sum as the court may fix for the~~
26 ~~time spent in the business of the reference; but the parties may agree, in writing,~~
27 ~~upon any other rate of compensation, and thereupon such rates shall be allowed.~~

28 **Comment.** Former Section 1023 is continued in Section 645.2 without substantive change.

29 **Code Civ. Proc. § 1024 (repealed). Expenses due to postponement of trial**

30 SEC. _____. Section 1024 of the Code of Civil Procedure is repealed.
31 ~~1024. When an application is made to the court or referee to postpone a trial,~~
32 ~~the payment of the expenses occasioned by the postponement may be imposed, in~~
33 ~~the discretion of the court or referee, as a condition of granting the same.~~

34 **Comment.** Former Section 1024 is continued in Section 1040.80 without substantive change.

1 **Code Civ. Proc. § 1025 (amended). Tender of deposit in action on a contract or action for**
2 **recovery of money only**

3 SEC. _____. Section 1025 of the Code of Civil Procedure is amended to read:

4 1025. ~~When, in (a) In an action on a contract or an action for the recovery of~~
5 ~~money only, where the defendant alleges in his the answer that before the~~
6 ~~commencement of the action he the defendant tendered to the plaintiff the full~~
7 ~~amount to which he the plaintiff was entitled, and thereupon at the time of filing~~
8 ~~the answer the defendant deposits in court, for the plaintiff, the amount tendered,~~
9 ~~and the allegation is found to be true, the plaintiff cannot recover costs, but must~~
10 ~~pay costs to the defendant, including any reasonable attorney's fees and~~
11 ~~nonstatutory litigation expenses pursuant to Section 1717 of the Civil Code.~~

12 (b) Where a deposit has been made pursuant to this section, the court shall, on
13 the application of a party to the action, order the deposit to be invested in an
14 insured, interest-bearing account. Interest on the amount shall be allocated to the
15 parties in the same proportion as the original funds are allocated.

16 **Comment.** Subdivision (a) of Section 1025 is amended to continue material that was formerly
17 in the second paragraph of Civil Code Section 1717(b)(2), with revisions to encompass
18 nonstatutory litigation expenses.

19 Subdivision (b) continues and broadens material that was formerly in the third paragraph of
20 Civil Code Section 1717(b)(2). The procedure is made expressly available not only in an action
21 on a contract, but also in any action for the recovery of money only.

22 Section 1025 is also amended to make technical changes.

23 **Code Civ. Proc. § 1027 (repealed). Review other than by appeal**

24 SEC. _____. Section 1027 of the Code of Civil Procedure is repealed.

25 ~~1027. When the decision of a court of inferior jurisdiction in a special~~
26 ~~proceeding is brought before a court of higher jurisdiction for a review, in any~~
27 ~~other way than by appeal, the same costs must be allowed as in cases on appeal,~~
28 ~~and may be collected in the manner provided for enforcement of money judgments~~
29 ~~generally, or in such manner as the court may direct, according to the nature of~~
30 ~~the case.~~

31 **Comment.** Former Section 1027 is continued in Section 1041.10 without substantive change.

32 **Code Civ. Proc. § 1032 (repealed). Recovery of costs by prevailing party**

33 SEC. _____. Section 1032 of the Code of Civil Procedure is repealed.

34 ~~1032. (a) As used in this section, unless the context clearly requires otherwise:~~

35 ~~(1) "Complaint" includes a cross-complaint.~~

36 ~~(2) "Defendant" includes a cross-defendant or a person against whom a~~
37 ~~complaint is filed.~~

38 ~~(3) "Plaintiff" includes a cross-complainant or a party who files a complaint in~~
39 ~~intervention.~~

40 ~~(4) "Prevailing party" includes the party with a net monetary recovery, a~~
41 ~~defendant in whose favor a dismissal is entered, a defendant where neither~~
42 ~~plaintiff nor defendant obtains any relief, and a defendant as against those~~
43 ~~plaintiffs who do not recover any relief against that defendant. When any party~~

1 ~~recovers other than monetary relief and in situations other than as specified, the~~
2 ~~“prevailing party” shall be as determined by the court, and under those~~
3 ~~circumstances, the court, in its discretion, may allow costs or not and, if allowed~~
4 ~~may apportion costs between the parties on the same or adverse sides pursuant to~~
5 ~~rules adopted under Section 1034.~~

6 ~~(b) Except as otherwise expressly provided by statute, a prevailing party is~~
7 ~~entitled as a matter of right to recover costs in any action or proceeding.~~

8 ~~(c) Nothing in this section shall prohibit parties from stipulating to alternative~~
9 ~~procedures for awarding costs in the litigation pursuant to rules adopted under~~
10 ~~Section 1034.~~

11 **Comment.** ~~Subdivisions (a) and (c) of former Section 1032 are superseded by Sections 1039.20~~
12 ~~(presumptions for determining prevailing party for purposes of awarding costs), 1039.30~~
13 ~~(determination of prevailing party), and 1039.50 (determining prevailing party where contract~~
14 ~~specifies how to determine prevailing party). Subdivision (b) of former Section 1032 is continued~~
15 ~~without change in Section 1039.10 (recovery of costs by prevailing party).~~

16 **Code Civ. Proc. § 1033 (repealed). Small recovery**

17 **SEC. ____.** ~~Section 1033 of the Code of Civil Procedure is repealed.~~

18 ~~1033. (a) Costs or any portion of claimed costs shall be as determined by the~~
19 ~~court in its discretion in a case other than a limited civil case in accordance with~~
20 ~~Section 1034 where the prevailing party recovers a judgment that could have been~~
21 ~~rendered in a limited civil case.~~

22 ~~(b) When a prevailing plaintiff in a limited civil case recovers less than the~~
23 ~~amount prescribed by law as the maximum limitation upon the jurisdiction of the~~
24 ~~small claims court, the following shall apply:~~

25 ~~(1) When the party could have brought the action in the small claims division but~~
26 ~~did not do so, the court may, in its discretion, allow or deny costs to the prevailing~~
27 ~~party, or may allow costs in part in any amount as it deems proper.~~

28 ~~(2) When the party could not have brought the action in the small claims court,~~
29 ~~costs and necessary disbursements shall be limited to the actual cost of the filing~~
30 ~~fee, the actual cost of service of process, and, when otherwise specifically allowed~~
31 ~~by law, reasonable attorneys’ fees. However, those costs shall only be awarded to~~
32 ~~the plaintiff if the court is satisfied that prior to the commencement of the action,~~
33 ~~the plaintiff informed the defendant in writing of the intended legal action against~~
34 ~~the defendant and that legal action could result in a judgment against the~~
35 ~~defendant that would include the costs and necessary disbursements allowed by~~
36 ~~this paragraph.~~

37 **Comment.** ~~Former Section 1033 is continued in Section 1040.60 without substantive change.~~

38 **Code Civ. Proc. § 1033.5 (repealed). Allowable costs**

39 **SEC. ____.** ~~Section 1033.5 of the Code of Civil Procedure is repealed.~~

40 ~~1033.5. (a) The following items are allowable as costs under Section 1032:~~

41 ~~(1) Filing, motion, and jury fees.~~

1 ~~(2) Juror food and lodging while they are kept together during trial and after the~~
2 ~~jury retires for deliberation.~~

3 ~~(3) Taking, videotaping, and transcribing necessary depositions including an~~
4 ~~original and one copy of those taken by the claimant and one copy of depositions~~
5 ~~taken by the party against whom costs are allowed, and travel expenses to attend~~
6 ~~depositions.~~

7 ~~(4) Service of process by a public officer, registered process server, or other~~
8 ~~means, as follows:~~

9 ~~(A) When service is by a public officer, the recoverable cost is the fee authorized~~
10 ~~by law at the time of service.~~

11 ~~(B) If service is by a process server registered pursuant to Chapter 16~~
12 ~~(commencing with Section 22350) of Division 8 of the Business and Professions~~
13 ~~Code, the recoverable cost is the amount actually incurred in effecting service,~~
14 ~~including, but not limited to, a stakeout or other means employed in locating the~~
15 ~~person to be served, unless such charges are successfully challenged by a party to~~
16 ~~the action.~~

17 ~~(C) When service is by publication, the recoverable cost is the sum actually~~
18 ~~incurred in effecting service.~~

19 ~~(D) When service is by a means other than that set forth in subparagraph (A),~~
20 ~~(B) or (C), the recoverable cost is the lesser of the sum actually incurred, or the~~
21 ~~amount allowed to a public officer in this state for such service, except that the~~
22 ~~court may allow the sum actually incurred in effecting service upon application~~
23 ~~pursuant to paragraph (4) of subdivision (c).~~

24 ~~(5) Expenses of attachment including keeper's fees.~~

25 ~~(6) Premiums on necessary surety bonds.~~

26 ~~(7) Ordinary witness fees pursuant to Section 68093 of the Government Code.~~

27 ~~(8) Fees of expert witnesses ordered by the court.~~

28 ~~(9) Transcripts of court proceedings ordered by the court.~~

29 ~~(10) Attorney fees, when authorized by any of the following:~~

30 ~~(A) Contract.~~

31 ~~(B) Statute.~~

32 ~~(C) Law.~~

33 ~~(11) Court reporters fees as established by statute.~~

34 ~~(12) Models and blowups of exhibits and photocopies of exhibits may be allowed~~
35 ~~if they were reasonably helpful to aid the trier of fact.~~

36 ~~(13) Any other item that is required to be awarded to the prevailing party~~
37 ~~pursuant to statute as an incident to prevailing in the action at trial or on appeal.~~

38 ~~(b) The following items are not allowable as costs, except when expressly~~
39 ~~authorized by law:~~

40 ~~(1) Fees of experts not ordered by the court.~~

41 ~~(2) Investigation expenses in preparing the case for trial.~~

42 ~~(3) Postage, telephone, and photocopying charges, except for exhibits.~~

43 ~~(4) Costs in investigation of jurors or in preparation for voir dire.~~

1 ~~(5) Transcripts of court proceedings not ordered by the court.~~

2 ~~(c) Any award of costs shall be subject to the following:~~

3 ~~(1) Costs are allowable if incurred, whether or not paid.~~

4 ~~(2) Allowable costs shall be reasonably necessary to the conduct of the litigation~~
5 ~~rather than merely convenient or beneficial to its preparation.~~

6 ~~(3) Allowable costs shall be reasonable in amount.~~

7 ~~(4) Items not mentioned in this section and items assessed upon application may~~
8 ~~be allowed or denied in the court's discretion.~~

9 ~~(5) When any statute of this state refers to the award of "costs and attorney's~~
10 ~~fees," attorney's fees are an item and component of the costs to be awarded and~~
11 ~~are allowable as costs pursuant to subparagraph (B) of paragraph (10) of~~
12 ~~subdivision (a). Any claim not based upon the court's established schedule of~~
13 ~~attorney's fees for actions on a contract shall bear the burden of proof. Attorney's~~
14 ~~fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of~~
15 ~~subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time~~
16 ~~a statement of decision is rendered, (C) upon application supported by affidavit~~
17 ~~made concurrently with a claim for other costs, or (D) upon entry of default~~
18 ~~judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C)~~
19 ~~of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or~~
20 ~~upon entry of a default judgment, unless otherwise provided by stipulation of the~~
21 ~~parties.~~

22 ~~Attorney's fees awarded pursuant to Section 1717 of the Civil Code are~~
23 ~~allowable costs under Section 1032 as authorized by subparagraph (A) of~~
24 ~~paragraph (10) of subdivision (a).~~

25 **Comment.** Paragraphs (1)-(9) and (11)-(13) of subdivision (a) of former Section 1033.5 are
26 continued in Section 1040.10 (allowable costs) without substantive change. Paragraph (10) is
27 continued in Section 1040.20(a) (attorney's fees and nonstatutory litigation expenses as costs),
28 with revisions to encompass nonstatutory litigation expenses.

29 Subdivision (b) is continued in Section 1040.30 (items not allowable except when expressly
30 authorized by law), without substantive change.

31 Subdivision (c)(1)-(2) is continued in Section 1040.50(a)-(b) (requirements for costs award)
32 without substantive change. Subdivision (c)(3) is continued in Section 1040.50(c) (requirements
33 for costs award), with revisions to make explicit that attorney's fees and nonstatutory litigation
34 expenses, as well as other costs, must be reasonable in amount. Subdivision (c)(4) is continued in
35 Section 1040.40 (items not expressly mentioned in Section 1040.10 or 1040.30) without
36 substantive change. Subdivision (c)(5) is continued in Section 1040.20(b)-(d) (attorney's fees and
37 nonstatutory litigation expenses as costs), with revisions to encompass nonstatutory litigation
38 expenses.

39 **Code Civ. Proc. § 1034 (repealed). Procedures for claiming prejudgment costs and costs on**
40 **appeal**

41 **SEC. ____.** *Section 1034 of the Code of Civil Procedure is repealed.*

42 ~~1034. (a) Prejudgment costs allowable under this chapter shall be claimed and~~
43 ~~contested in accordance with rules adopted by the Judicial Council.~~

44 ~~(b) The Judicial Council shall establish by rule allowable costs on appeal and~~
45 ~~the procedure for claiming those costs.~~

1 *Comment.* Former Section 1034 is continued in Section 1041.10 without substantive change.

2 **Code Civ. Proc. §§ 1039.10-1039.50 (added). Prevailing party**

3 SEC. _____. Article 3 (commencing with Section 1039.10) is added to Chapter 6
4 of Title 14 of Part 2 of the Code of Civil Procedure, to read:

5 Article 3. Prevailing Party

6 **§ 1039.10. Recovery of costs by prevailing party**

7 1039.10. Except as otherwise expressly provided by statute, a prevailing party is
8 entitled as a matter of right to recover costs in any action or proceeding.

9 **Comment.** Section 1039.10 continues subdivision (b) of former Section 1032 without change.

10 For determination of the prevailing party, see Section 1039.30. See also Sections 1039.20
11 (presumptions for determining prevailing party for purposes of awarding costs), 1039.50
12 (determining prevailing party where contract specifies how to determine prevailing party). For
13 awards of attorney's fees and nonstatutory litigation expenses pursuant to contract or pursuant to
14 Civil Code Section 1717, see Section 1039.40.

15 For the amount of a cost award, see Sections 1040.10-1040.80. For cost procedures, see
16 Sections 1041.10-1041.20. For authority to contractually allocate responsibility for attorney's fees
17 and nonstatutory litigation expenses, see Sections 1021-1021.01. For determination of costs and
18 attorney's fees in specific types of actions, see Sections 1021.1-1038.

19 **§ 1039.20. Presumptions for determining prevailing party for purposes of awarding costs**

20 1039.20. (a) For purposes of awarding costs, a party is presumed to be the
21 prevailing party under the following circumstances:

22 (1) In a two-party action where the plaintiff obtains a judgment for all or
23 substantially all of the relief sought, the plaintiff is the prevailing party.

24 (2) In an action with three or more parties, where the plaintiff obtains a judgment
25 for all or substantially all of the relief sought from a particular defendant, the
26 plaintiff is the prevailing party as to that defendant.

27 (3) In a two-party action where the court finds that the defendant is not liable,
28 the defendant is the prevailing party.

29 (4) In an action with three or more parties, where the court finds that a particular
30 defendant is not liable to a particular plaintiff, that defendant is the prevailing
31 party as to that plaintiff.

32 (5) Where an action is voluntarily dismissed, other than pursuant to a settlement
33 agreement, the defendant is the prevailing party.

34 (6) Where an action is tried to the court, and the court's decision states that a
35 particular party prevailed, that party is the prevailing party.

36 (b) A party claiming costs shall specify, on a form approved by the Judicial
37 Council, which of the presumptions in subdivision (a) applies, if any.

38 **Comment.** Subdivision (a) of Section 1039.20 identifies and provides guidance in commonly
39 occurring situations. The presumptions of subdivision (a) are rebuttable. See Section 1039.30
40 (determination of prevailing party).

41 Under subdivision (a)(5), the defendant ordinarily is the prevailing party in the event of a
42 voluntary dismissal. But a voluntary dismissal can result from circumstances other than an

1 impending loss on the merits. *Santisas v. Goodin*, 17 Cal. 4th 599, 621, 951 P.2d 399, 71 Cal.
2 Rptr. 2d 830 (1998); *International Indus., Inc. v. Olen*, 21 Cal. 3d 218, 224, 577 P.2d 1031, 145
3 Cal. Rptr. 691 (1978). For example, the defendant may have become insolvent, the claim may
4 have become moot, or the plaintiff may have obtained relief through voluntary corrective action
5 or insurance proceeds. Where the plaintiff moves to tax costs pursuant to Section 1039.30, the
6 court must pragmatically assess the circumstances of the voluntary dismissal in determining the
7 prevailing party. *Damian v. Tamondong*, 65 Cal. App. 4th 1115, 1129-30 & n.15, 77 Cal. Rptr. 2d
8 262 (1998).

9 Under subdivision (b), a party claiming costs must specify which presumption applies to the
10 claim, if any. If none of the presumptions in subdivision (a) applies, the prevailing party is to be
11 determined in accordance with Section 1039.30.

12 For entitlement to costs, see Section 1039.10 (recovery of costs by prevailing party). For
13 awards of attorney's fees and nonstatutory litigation expenses pursuant to contract or pursuant to
14 Civil Code Section 1717, see Section 1039.40. For determination of the prevailing party where a
15 contract specifies how to determine the prevailing party, see Section 1039.50.

16 For the amount of a cost award, see Sections 1040.10-1040.80. For cost procedures, see
17 Sections 1041.10-1041.20. For authority to contractually allocate responsibility for attorney's fees
18 and nonstatutory litigation expenses, see Sections 1021-1021.01. For determination of costs and
19 attorney's fees in specific types of actions, see Sections 1021.1-1038.

20 § 1039.30. Determination of prevailing party

21 1039.30. (a) Where a party claims to be the prevailing party pursuant to a
22 presumption in Section 1039.20, the party from whom costs are sought may
23 challenge that claim in a motion to tax costs. The motion to tax costs shall specify
24 why the party claiming costs is not the prevailing party.

25 (b) Except where none of the presumptions in Section 1039.20 applies, or where
26 a party challenges the application of a presumption in a motion to tax costs, the
27 prevailing party for purposes of awarding costs shall be determined in accordance
28 with Section 1039.20.

29 (c) Where none of the presumptions in Section 1039.20 applies, or where a party
30 challenges the application of a presumption in a motion to tax costs, the court shall
31 determine the prevailing party for purposes of awarding costs by comparing the
32 relief awarded, or otherwise obtained, with the parties' demands and the parties'
33 litigation objectives as disclosed by the pleadings, points and authorities, opening
34 statements, and other matters on record. The court shall pragmatically assess the
35 extent to which each party has succeeded and failed in its contentions and
36 objectives, and shall determine the prevailing party accordingly. The court may
37 not consider factors unrelated to litigation success. Where the result is mixed, the
38 court may determine that there is no prevailing party.

39 **Comment.** Section 1039.30 supersedes former Section 1032(a) and (c). Together, this section
40 and Section 1039.40 (prevailing party for awarding attorney's fees or nonstatutory litigation
41 expenses pursuant to contract or pursuant to Civil Code Section 1717) establish a uniform
42 standard for determining the prevailing party for purposes of awarding (1) costs other than
43 attorney's fees, (2) attorney's fees for a contract claim subject to an attorney's fee clause, and (3)
44 attorney's fees for a noncontract claim subject to an attorney's fee clause. See generally *Santisas*
45 *v. Goodin*, 17 Cal. 4th 599, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998).

46 Under subdivision (b), if a party claims to be the prevailing party pursuant to a presumption in
47 Section 1039.20, and that claim is not challenged in a motion to tax costs, the party claiming costs

1 shall be deemed the prevailing party for purposes of awarding costs. For entitlement to costs, see
2 Section 1039.10 (recovery of costs by prevailing party).

3 The rule in subdivision (c) is drawn from *Hsu v. Abbara*, 9 Cal. 4th 863, 876, 891 P.2d 804, 39
4 Cal. Rptr. 2d 824 (1995). See also *Santisas*, 17 Cal. 4th at 622; *Mustachio v. Great Western Bank*,
5 48 Cal. App. 4th 1145, 1150, 56 Cal. Rptr. 2d 33 (1996); *Bank of Idaho v. Pine Avenue Assoc.*,
6 137 Cal. App. 3d 5, 15, 186 Cal. Rptr. 695 (1982). The standard is intended to give courts
7 flexibility to reach a just result in a broad variety of contexts, including cases involving multiple
8 claims, cross-claims, multiple parties, partial victories, or mixed motives for litigation tactics such
9 as voluntary dismissal.

10 The court does not have complete discretion in determining the prevailing party under
11 subdivision (c). Its determination must be based on a pragmatic assessment of the litigation
12 success of the parties. In making this determination, the court should focus on substance rather
13 than form. *Hsu*, 9 Cal. 4th at 877; *Foothill Properties v. Lyon/Copley Corona Assoc.*, 46 Cal.
14 App. 4th 1542, 1555, 54 Cal. Rptr. 2d 488 (1996); *Sears v. Baccaglio*, 60 Cal. App. 4th
15 1136, 1152-55, 70 Cal. Rptr. 2d 769 (1998). For example, a party who is denied direct relief on a
16 claim may nonetheless be the prevailing party if “it is clear that the party has otherwise achieved
17 its main litigation objective.” *Hsu*, 9 Cal. 4th at 877; see also *Sears*, 60 Cal. App. 4th at 1155 (net
18 monetary recovery may not be best measure of who prevailed). The court may not consider
19 factors unrelated to litigation success, such as recalcitrance in discovery or lack of cooperation in
20 settlement negotiations. *Hsu*, 9 Cal. 4th at 877. It is not essential to show success on the central
21 issue or recovery of the primary relief sought. *Texas State Teachers Ass’n v. Garland Indep. Sch.*
22 *Dist.*, 489 U.S. at 784, 790-91. Where the results of the litigation are entirely one-sided, the court
23 has no discretion to deny costs and contractual attorney’s fees. *Id.* at 875-76.

24 For determination of the prevailing party where a contract specifies how to determine the
25 prevailing party, see Section 1039.50. For the amount of a cost award, see Sections 1040.10-
26 1040.80. For cost procedures, see Sections 1041.10-1041.20. For authority to contractually
27 allocate responsibility for attorney’s fees and nonstatutory litigation expenses, see Sections 1021-
28 1021.01. For determination of costs and attorney’s fees in specific types of actions, see Sections
29 1021.1-1038.

30 **§ 1039.40. Prevailing party for awarding attorney’s fees or nonstatutory litigation expenses**
31 **pursuant to contract or pursuant to Civil Code Section 1717**

32 1039.40. (a) For purposes of awarding reasonable attorney’s fees or nonstatutory
33 litigation expenses pursuant to a contract or pursuant to Section 1717 of the Civil
34 Code, the prevailing party shall be determined pursuant to Sections 1039.20 and
35 1039.30, but the determination shall be made by examining the outcome of the
36 cause of action covered by the fee provision of the contract, not other causes of
37 action.

38 (b) Where an action involves multiple causes of action covered by the same fee
39 provision, the prevailing party shall be determined by examining the collective
40 outcome of those causes of action.

41 (c) Where an action involves multiple contracts, the prevailing party shall be
42 separately determined for each contract with a fee provision.

43 **Comment.** Section 1039.40 supersedes material formerly in the second and third sentences of
44 subdivision (b)(1) and the first paragraph of subdivision (b)(2) of Civil Code Section 1717.
45 Together, this section and Section 1039.30 (determination of prevailing party) establish a uniform
46 standard for determining the prevailing party for purposes of awarding (1) costs other than
47 attorney’s fees, (2) attorney’s fees for a contract claim subject to an attorney’s fee clause, and (3)
48 attorney’s fees for a noncontract claim subject to an attorney’s fee clause. See generally *Santisas*
49 *v. Goodin*, 17 Cal. 4th 599, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998).

1 Under subdivisions (a) and (b), a court awarding contractual attorney’s fees or nonstatutory
2 litigation expenses is to determine the prevailing party by examining the outcome of all causes of
3 action covered by the fee provision. Fees are recoverable only on the causes of action covered by
4 the fee provision, not on other causes of action, even if those causes are joined with a cause of
5 action in which an award is proper. *Reynolds Metals Co. v. Alperon*, 25 Cal. 3d 124, 129, 599
6 P.2d 83, 158 Cal. Rptr. 1 (1979). Where, however, a litigant incurs fees for an issue common to
7 both a cause of action in which fees are proper and one in which they are not allowed, all of those
8 fees are recoverable. *Id.*

9 Under subdivision (c), where an action involves multiple independent contracts, each of which
10 provides for attorney’s fees, the prevailing party must be determined as to each contract
11 regardless of who prevails in the overall action. *Arntz Contracting Co. v. St. Paul Fire & Marine*
12 *Ins. Co.*, 47 Cal. App. 4th 464, 491, 54 Cal. Rptr. 2d 888 (1996).

13 For determination of the prevailing party where a contract specifies how to determine the
14 prevailing party, see Section 1039.50. For the amount of a cost award, see Sections 1040.10-
15 1040.80. For cost procedures, see Sections 1041.10-1041.20. For authority to contractually
16 allocate responsibility for attorney’s fees and nonstatutory litigation expenses, see Sections 1021-
17 1021.01. For determination of costs and attorney’s fees in specific types of actions, see Sections
18 1021.1-1038.

19 **§ 1039.50. Determining prevailing party where contract specifies how to determine**
20 **prevailing party**

21 1039.50. Where parties entering into a contract agree in advance on how to
22 determine the prevailing party in the event of litigation, their agreement is null and
23 void to the extent that it is inconsistent with Sections 1039.30 or 1039.40.

24 **Comment.** Section 1039.50 limits the authority of contracting parties to agree in advance on
25 how to determine the prevailing party in the event of litigation pertaining to their contract.

26 For entitlement to costs, see Section 1039.10 (recovery of costs by prevailing party). For the
27 amount of a cost award, see Sections 1040.10-1040.80. For cost procedures, see Sections
28 1041.10-1041.20. For authority to contractually allocate responsibility for attorney’s fees and
29 nonstatutory litigation expenses, see Sections 1021-1021.01. For determination of costs and
30 attorney’s fees in specific types of actions, see Sections 1021.1-1038.

31 *Code Civ. Proc. §§ 1040.10-1040.80 (added). Amount of award*

32 *SEC. ____.* Article 4 (commencing with Section 1040.10) is added to Chapter 6
33 of Title 14 of Part 2 of the Code of Civil Procedure, to read:

34 *Article 4. Amount of Award*

35 **§ 1040.10. Allowable costs**

36 *1040.10. The following items are allowable as costs under Section 1039.10:*

37 *(a) Filing, motion, and jury fees.*

38 *(b) Juror food and lodging while they are kept together during trial and after the*
39 *jury retires for deliberation.*

40 *(c) Taking, videotaping, and transcribing necessary depositions including an*
41 *original and one copy of those taken by the claimant and one copy of depositions*
42 *taken by the party against whom costs are allowed, and travel expenses to attend*
43 *depositions.*

1 (d) Service of process by a public officer, registered process server, or other
2 means, as follows:

3 (1) When service is by a public officer, the recoverable cost is the fee authorized
4 by law at the time of service.

5 (2) If service is by a process server registered pursuant to Chapter 16
6 (commencing with Section 22350) of Division 8 of the Business and Professions
7 Code, the recoverable cost is the amount actually incurred in effecting service,
8 including, but not limited to, a stakeout or other means employed in locating the
9 person to be served, unless such charges are successfully challenged by a party to
10 the action.

11 (3) When service is by publication, the recoverable cost is the sum actually
12 incurred in effecting service.

13 (4) When service is by a means other than that set forth in paragraph (1), (2) or
14 (3), the recoverable cost is the lesser of the sum actually incurred, or the amount
15 allowed to a public officer in this state for such service, except that the court may
16 allow the sum actually incurred in effecting service upon application pursuant to
17 Section 1040.40.

18 (e) Expenses of attachment including keeper's fees.

19 (f) Premiums on necessary surety bonds.

20 (g) Ordinary witness fees pursuant to Section 68093 of the Government Code.

21 (h) Fees of expert witnesses ordered by the court.

22 (i) Transcripts of court proceedings ordered by the court.

23 (j) Court reporters fees as established by statute.

24 (k) Models and blowups of exhibits and photocopies of exhibits may be allowed
25 if they were reasonably helpful to aid the trier of fact.

26 (l) Any other item that is required to be awarded to the prevailing party pursuant
27 to statute as an incident to prevailing in the action at trial or on appeal.

28 **Comment.** Section 1040.10 continues former Section 1033.5(a)(1)-(9) and (a)(11)-(13) without
29 substantive change.

30 **§ 1040.20. Attorney's fees and nonstatutory litigation expenses as costs**

31 1040.20. (a) Attorney fees and nonstatutory litigation expenses are allowable as
32 costs under Section 1039.10, where authorized by any of the following:

33 (1) Contract.

34 (2) Statute.

35 (3) Law.

36 (b) When any statute of this state refers to the award of "costs and attorney's
37 fees," attorney's fees are an item and component of the costs to be awarded and
38 are allowable as costs pursuant to paragraph (2) of subdivision (a). Any claim not
39 based on the court's established schedule of attorney's fees for actions on a
40 contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant
41 to paragraph (2) of subdivision (a) may be fixed as follows:

42 (1) On noticed motion.

1 (2) At the time a statement of decision is rendered.

2 (3) On application supported by affidavit made concurrently with a claim for
3 other costs.

4 (4) On entry of default judgment.

5 (c) Attorney's fees and nonstatutory litigation expenses allowable as costs
6 pursuant to paragraph (1) or (3) of subdivision (a) shall be fixed either on a noticed
7 motion or on entry of a default judgment, unless otherwise provided by stipulation
8 of the parties.

9 (d) Attorney's fees and nonstatutory litigation expenses awarded pursuant to
10 Section 1717 of the Civil Code are allowable costs under Section 1039.10 as
11 authorized by paragraph (1) of subdivision (a).

12 **Comment.** Subdivision (a) of Section 1040.20 continues former Section 1033.5(a)(10), with
13 revisions to encompass nonstatutory litigation expenses. Subdivisions (b)-(d) continue former
14 Section 1033.5(c)(5), with revisions to encompass nonstatutory litigation expenses.

15 **§ 1040.30. Items not allowable except where expressly authorized by law**

16 *1040.30. The following items are not allowable as costs, except where expressly*
17 *authorized by law:*

18 (a) *Fees of experts not ordered by the court.*

19 (b) *Investigation expenses in preparing the case for trial.*

20 (c) *Postage, telephone, and photocopying charges, except for exhibits.*

21 (d) *Costs in investigation of jurors or in preparation for voir dire.*

22 (e) *Transcripts of court proceedings not ordered by the court.*

23 **Comment.** *Section 1040.30 continues former Section 1033.5(b) without substantive change.*

24 **§ 1040.40. Items not expressly mentioned in Section 1040.10, 1040.20, or 1040.30**

25 1040.40. Items not mentioned in Section 1040.10, 1040.20, or 1040.30, and
26 items assessed on application pursuant to subdivision (d) of Section 1040.10, may
27 be allowed or denied in the court's discretion.

28 **Comment.** Section 1040.40 continues former Section 1033.5(c)(4) without substantive change.

29 **§ 1040.50. Requirements for cost award**

30 1040.50. Any award of costs shall be subject to the following:

31 (a) Costs are allowable if incurred, whether or not paid.

32 (b) Allowable costs shall be reasonably necessary to the conduct of the litigation
33 rather than merely convenient or beneficial to its preparation.

34 (c) Allowable costs, including any attorney's fees and nonstatutory litigation
35 expenses awarded pursuant to Section 1040.20, shall be reasonable in amount.

36 **Comment.** Subdivisions (a) and (b) of Section 1040.50 continue former Section 1033.5(c)(1)-
37 (2) without substantive change. Subdivision (c) continues former Section 1033.5(c)(3), with
38 revisions to make explicit that attorney's fees and nonstatutory litigation expenses, as well as
39 other costs, must be reasonable in amount.

1 **§ 1040.60. Partial recovery**

2 1040.60. Where the prevailing party obtains only partial success, the court may
3 adjust the amount of the cost award to reflect the degree of litigation success,
4 instead of awarding the full amount of costs incurred.

5 **Comment.** Section 1040.60 is added to address the problem identified in *Michell v. Olick*, 49
6 Cal. App. 4th 1194, 57 Cal. Rptr. 2d 227 (1996). Where the prevailing party obtains only a partial
7 victory, it may be inequitable to award the full amount of costs and fees incurred. *Id.* at 1200-01.

8 **§ 1040.70. Small recovery**

9 *1040.70.(a) Costs or any portion of claimed costs shall be as determined by the*
10 *court in its discretion in a case other than a limited civil case in accordance with*
11 *Section 1040.10 where the prevailing party recovers a judgment that could have*
12 *been rendered in a limited civil case.*

13 *(b) When a prevailing plaintiff in a limited civil case recovers less than the*
14 *amount prescribed by law as the maximum limitation upon the jurisdiction of the*
15 *small claims court, the following shall apply:*

16 *(1) When the party could have brought the action in the small claims division but*
17 *did not do so, the court may, in its discretion, allow or deny costs to the prevailing*
18 *party, or may allow costs in part in any amount as it deems proper.*

19 *(2) When the party could not have brought the action in the small claims court,*
20 *costs and necessary disbursements shall be limited to the actual cost of the filing*
21 *fee, the actual cost of service of process, and, when otherwise specifically allowed*
22 *by law, reasonable attorneys' fees. However, those costs shall only be awarded to*
23 *the plaintiff if the court is satisfied that before commencement of the action, the*
24 *plaintiff informed the defendant in writing of the intended legal action against the*
25 *defendant and that legal action could result in a judgment against the defendant*
26 *that would include the costs and necessary disbursements allowed by this*
27 *paragraph.*

28 **Comment.** Section 1040.70 continues former Section 1033 without substantive change.

29 **§ 1040.80. Expenses due to postponement of trial**

30 *1040.80. When an application is made to the court or referee to postpone a trial,*
31 *payment of the expenses occasioned by the postponement may be imposed, in the*
32 *discretion of the court or referee, as a condition of granting the postponement.*

33 **Comment.** Section 1040.80 continues former Section 1024 without substantive change.

34 **§§ 1041.10-1041.20 (added). Procedures for prejudgment costs and costs on appeal or other**
35 **review**

36 **SEC. ____.** Article 5 (commencing with Section 1041.10) is added to Chapter 6
37 of Title 14 of Part 2 of the Code of Civil Procedure, to read:

1 *Article 5. Procedures for Prejudgment Costs and Costs on*
2 *Appeal or Other Review*

3 **§ 1041.10. Procedures for claiming prejudgment costs and costs on appeal**

4 *1041.10. (a) Prejudgment costs allowable under this chapter shall be claimed*
5 *and contested in accordance with rules adopted by the Judicial Council.*

6 *(b) The Judicial Council shall adopt rules governing allowable costs on appeal*
7 *and the procedure for claiming those costs.*

8 **Comment.** *Section 1041.10 continues former Section 1034 without substantive change.*

9 **§ 1041.20. Review other than by appeal**

10 *1041.20. When the decision of a court of inferior jurisdiction in a special*
11 *proceeding is brought before a court of higher jurisdiction for a review, in any*
12 *other way than by appeal, the same costs must be allowed as in cases on appeal,*
13 *and may be collected in the manner provided for enforcement of money judgments*
14 *generally, or in the manner that the court directs, according to the nature of the*
15 *case.*

16 **Comment.** *Section 1041.20 continues former Section 1027 without substantive change.*
