

Study J-901

January 25, 2001

**Memorandum 2001-17****Award of Costs and Contractual Attorney's Fees to Prevailing Party  
(Staff Draft Tentative Recommendation)**

---

In its study of costs and contractual attorney's fees, the Commission is in the process of preparing a tentative recommendation. A draft, incorporating decisions made at the June and July 2000 meetings, is attached for the Commission's review. Staff Notes in the draft raise issues for the Commission's consideration. Unless interested persons desire to address specific issues at the Commission's meeting, the staff intends to discuss the provisions in the order in the draft.

Respectfully submitted,

Barbara S. Gaal  
Staff Counsel

# CALIFORNIA LAW REVISION COMMISSION

*Staff Draft* TENTATIVE RECOMMENDATION

## Costs and Contractual Attorney's Fees

February 2001

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN \_\_\_\_.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335 FAX: 650-494-1827



## SUMMARY OF TENTATIVE RECOMMENDATION

The statutes governing recovery of costs and contractual attorney's fees are confusing and generate extensive litigation. The Law Revision Commission recommends the following reforms:

- (1) Definitions of "court costs" and "nonstandard litigation expenses" should be added, to alleviate confusion resulting from inconsistent terminology.
- (2) A single standard should be used to determine the prevailing party for purposes of awarding:
  - Costs other than attorney's fees
  - Contractual attorney's fees on a contract claim covered by an attorney's fee clause
  - Contractual attorney's fees on noncontract claims covered by an attorney's fee clause.
- (3) The costs procedure should be applicable where a fee provision covers litigation expenses other than attorney's fees and traditional court costs (i.e., "nonstandard litigation expenses"). It should not be necessary to plead and prove such expenses at trial.
- (4) Civil Code Section 1717 should expressly provide that where a prevailing party is entitled to contractual attorney's fees but the party's attorney did not charge the prevailing market rate, the amount of the fee award is based on the legal services provided, not on whether or how much the prevailing party was charged for those services.
- (5) The reciprocity requirement of Civil Code Section 1717 should extend to nonstandard litigation expenses and attorney's fees for noncontract claims, not just to attorney's fees for contract claims.
- (6) To facilitate use, the chapter on "Costs" in the Code of Civil Procedure (Chapter 6 of Title 14 of Part 2) should be reorganized and renamed "Attorney's Fees and Other Litigation Expenses."

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

## Contents

AWARD OF COSTS AND CONTRACTUAL ATTORNEY’S FEES TO PREVAILING PARTY .....	1
KEY PROVISIONS .....	1
Payment of Attorney’s Fees (Code Civ. Proc. § 1021) .....	1
Recovery of Costs (Code Civ. Proc. §§ 1032, 1033.5) .....	2
Contractual Attorney’s Fees (Civ. Code § 1717) .....	2
TERMINOLOGY .....	3
DETERMINATION OF PREVAILING PARTY .....	4
Prevailing Party for Awarding Costs .....	5
Prevailing Party for Awarding Contractual Attorney’s Fees .....	5
Contrasts Between the Standards .....	6
Anomalous Results .....	8
Proposed Uniform Standard .....	10
NONSTANDARD LITIGATION EXPENSES .....	12
APPLICATION OF CIVIL CODE SECTION 1717 WHERE ATTORNEY DOES NOT CHARGE A TRADITIONAL FEE .....	13
RECIPROCITY: NONSTANDARD LITIGATION EXPENSES AND CONTRACTUAL ATTORNEY’S FEES FOR NONCONTRACT CLAIMS .....	15
NONSUBSTANTIVE CODE REORGANIZATION .....	16
PROPOSED LEGISLATION .....	17

---



## AWARD OF COSTS AND CONTRACTUAL ATTORNEY'S FEES TO PREVAILING PARTY

1 Litigation over costs and attorney's fees is all too common, draining judicial  
2 resources and diverting attention from substantive issues. Countless appellate  
3 decisions address fee disputes. Litigation may be inevitable where large sums are  
4 at stake, but the magnitude of fee disputes is exacerbated by ambiguities in the  
5 relevant statutes. Hundreds of provisions govern the recovery of costs and  
6 attorney's fees. Instead of attempting to study them all, the Law Revision  
7 Commission has focused on the general provisions relating to costs, and the  
8 statutes governing recovery of attorney's fees pursuant to contract. Having studied  
9 these areas, the Commission recommends a number of reforms to clarify and  
10 improve the law.

### 11 KEY PROVISIONS

12 Key provisions governing costs and contractual attorney's fees include (1) Code  
13 of Civil Procedure Section 1021, (2) Code of Civil Procedure Sections 1032 and  
14 1033.5, and (3) Civil Code Section 1717.

#### 15 **Payment of Attorney's Fees (Code Civ. Proc. § 1021)**

16 Code of Civil Procedure Section 1021 establishes a general rule that each party  
17 to a lawsuit has to pay its own attorney's fees.<sup>1</sup> This rule, frequently known as the  
18 "American Rule," is subject to a multitude of exceptions. "Literally hundreds" of  
19 California statutes authorize an award of attorney's fees to the prevailing party, or  
20 to one side only (plaintiff or defendant) should it prevail.<sup>2</sup>

21 Section 1021 also expressly authorizes shifting of attorney's fees pursuant to a  
22 contract between the parties (e.g., a contract providing that in the event of  
23 litigation to enforce the contract, the loser will reimburse the prevailing party's  
24 attorney's fees). Depending on how it is worded, the contractual attorney's fee  
25 clause can be limited to fees for contract claims, or can also encompass fees for  
26 noncontract claims.<sup>3</sup>

---

1. Code of Civil Procedure Section 1021 provides:

1021. Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

2. *Damian v. Tamondong*, 65 Cal. App. 4th 1115, 1124 n.11, 77 Cal. Rptr. 2d 262 (1998).

3. *Santisas v. Goodin*, 17 Cal. 4th 599, 608, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998), quoting *Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338, 1341, 5 Cal. Rptr. 2d 154 (1992); see also *Johnson v. Siegel*, 84 Cal. App. 4th 1087, 101 Cal. Rptr. 2d 412, 422 (2000).

1 **Recovery of Costs (Code Civ. Proc. §§ 1032, 1033.5)**

2 Code of Civil Procedure Section 1032 provides that the prevailing party in an  
3 action is entitled to an award of costs. The provision also defines “prevailing  
4 party” for this purpose.

5 Code of Civil Procedure Section 1033.5 specifies which litigation expenses are  
6 recoverable as statutory costs. It states that attorney’s fees are allowable as costs  
7 when authorized by contract, statute, or other law.<sup>4</sup> Thus, costs do include  
8 attorney’s fees, but “only when the party entitled to costs has a legal basis,  
9 independent of the cost statutes and grounded in an agreement, statute, or other  
10 law, upon which to claim recovery of attorney fees.”<sup>5</sup>

11 **Contractual Attorney’s Fees (Civ. Code § 1717)**

12 Civil Code Section 1717 pertains to contractual attorney’s fees.<sup>6</sup> The classic  
13 situation addressed by the statute is the unilateral attorney’s fee clause: A contract  
14 clause that gives only one of the contracting parties (typically the one with  
15 superior bargaining power) the right to recover attorney’s fees on prevailing in  
16 litigation to enforce the contract. This places the other party at a serious  
17 disadvantage, because that party must pay both sides’ fees on losing yet still bears  
18 its own attorney’s fees on winning.<sup>7</sup>

19 Section 1717 addresses such unfairness by making a unilateral fee clause  
20 reciprocal: The party who prevails on the contract is entitled to fees, regardless of  
21 whether that party is named in the fee provision. To further protect the party in the  
22 weaker bargaining position, the provision also specifies that this statutory  
23 protection cannot be waived.<sup>8</sup>

24 A second situation where Section 1717 makes an otherwise unilateral right  
25 reciprocal is where a person sued on a contract with an attorney’s fee clause  
26 successfully defends by arguing the inapplicability, invalidity, unenforceability, or  
27 nonexistence of the contract. Such arguments are inconsistent with a claim for  
28 attorney’s fees pursuant to the alleged contract, so absent Section 1717 attorney’s  
29 fees would only be available to the party seeking to enforce the contract.<sup>9</sup>

---

4. Code Civ. Proc. § 1033.5(a)(10).

5. *Santisas*, 17 Cal. 4th at 606.

6. Civil Code Section 1717 provides in key part:

1717. (a) In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.

7. *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 596, 97 Cal. Rptr. 30 (1971).

8. Code Civ. Proc. § 1717(a).

9. *Santisas*, 17 Cal. 4th at 611; *Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 128, 599 P.2d 83, 158 Cal. Rptr. 1 (1979). To achieve its goal of mutuality of remedy, Civil Code Section 1717 “generally must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed.” *Hsu v. Abbara*, 9 Cal. 4th 863, 870-71, 891

1 The goal of mutuality of remedy would also be undermined if a party with  
2 superior bargaining strength could limit an attorney’s fee provision to certain  
3 aspects of a contract (e.g., providing attorney’s fees to the prevailing party if the  
4 general contractor sues for nonpayment, but not if the homeowner sues for  
5 construction defects).<sup>10</sup> Thus, Section 1717 states that an attorney’s fee provision  
6 “shall be construed as applying to the *entire* contract, unless each party was  
7 represented by counsel in the negotiation and execution of the contract, and the  
8 fact of that representation is specified in the contract.”<sup>11</sup>

9 Given the focus on achieving mutuality of remedy in contexts of unequal  
10 bargaining strength, some courts construed Section 1717 to apply only where  
11 contractual attorney’s fees would (absent the statute) be available to only one of  
12 the parties.<sup>12</sup> Other courts interpreted the statute more broadly, applying to all  
13 contractual attorney’s fee provisions.<sup>13</sup> The California Supreme Court resolved  
14 this conflict, concluding that Section 1717 applies both to a contract with a  
15 unilateral attorney’s fee clause and to a contract with a reciprocal fee provision  
16 (e.g., a contract stating that the party who prevails in litigation relating to the  
17 contract is entitled to recover attorney’s fees from the loser).<sup>14</sup>

## 18 TERMINOLOGY

19 Provisions governing recovery of attorney’s fees and other litigation expenses  
20 contain confusing terminology. In particular, the term “costs” is used  
21 inconsistently in the codes. In some statutes, most notably Code of Civil Procedure  
22 Section 1033.5, the term is meant to encompass recoverable attorney’s fees.<sup>15</sup>

---

P.2d 804, 39 Cal. Rptr. 824 (1995); *Real Property Services Corp. v. City of Pasadena*, 25 Cal. App. 4th 375, 382, 30 Cal. Rptr. 2d 536 (1994).

10. *Myers Bldg. Industries v. Interface Technology, Inc.*, 13 Cal. App. 4th 949, 971, 17 Cal. Rptr. 2d 242 (1993).

11. Civ. Code § 1717(a) (emphasis added).

12. *See Kelley v. Bredelis*, 45 Cal. App. 4th 1819, 1828-29, 53 Cal. Rptr. 2d 536 (1996); *Honey Baked Hams, Inc. v. Dickens*, 37 Cal. App. 4th 421, 426, 43 Cal. Rptr. 2d 595 (1995); *see also Sears v. Baccaglio*, 60 Cal. App. 4th 1136, 70 Cal. Rptr. 2d 769 (1998).

13. *See Sears*, 60 Cal. App. 4th at 1143-49.

14. *Santisas*, 17 Cal. 4th at 614. The court relied on the portion of the statute referring to situations “where the contract specifically provides that attorney’s fees and costs ... shall be awarded either to one of the parties *or to the prevailing party* ...” Civ. Code ¶ 1717(a) (emphasis added). Three justices took a different view, maintaining that “section 1717 does not govern all contractual fee claims.” *Santisas*, 17 Cal. 4th at 614 (Baxter, J., concurring and dissenting).

15. There are many other examples. *See, e.g., Bus. & Prof. Code* § 14438 (registrant shall recover “costs of suit,” including a reasonable attorney’s fee); *Civ. Code* § 815.7 (court may award “costs of litigation, including reasonable attorney’s fees”); *Water Code* § 7300 (plaintiff may recover, as costs, reasonable counsel fees).

1 Other statutes differentiate “costs” from attorney’s fees.<sup>16</sup> Still other provisions use  
2 the term “costs” but do not refer to attorney’s fees.<sup>17</sup> Other variations also exist.<sup>18</sup>

3 Attempting to standardize usage of the term “costs” throughout the codes would  
4 be an enormous project, beyond the scope of this study.<sup>19</sup> To reduce confusion  
5 from inconsistent usage, however, the Commission recommends providing a clear  
6 and easy means of referring only to traditional court costs (i.e., filing fees,  
7 ordinary witness fees, and the other items listed in Code of Civil Procedure  
8 Section 1033.5, except recoverable attorney’s fees). Thus, the proposed law  
9 defines “court costs” to consist of such items.

10 This term is already used in over a hundred provisions, but is nowhere defined.  
11 In almost all instances, however, it appears to refer only to traditional court costs,  
12 not attorney’s fees.<sup>20</sup> The proposed law would make this usage explicit and would  
13 encourage use of the term.<sup>21</sup>

14 To further reduce confusion over terminology relating to litigation expenses,  
15 there should be a specific term to refer to litigation expenses that are neither  
16 attorney’s fees nor traditional court costs. The proposed law introduces the term  
17 “nonstandard litigation expenses” to refer to such expenses.

## 18 DETERMINATION OF PREVAILING PARTY

19 Code of Civil Procedure Section 1032 (governing cost awards) and Civil Code  
20 Section 1717 (governing contractual attorney’s fees) establish different standards  
21 for determining the prevailing party. This has caused confusion, generated  
22 litigation, and produced awkward results. Clarification is needed to alleviate these  
23 problems.

---

16. See, e.g., Bus. & Prof. Code § 4381 (“plaintiff shall be awarded reasonable attorney’s fees together with the costs of suit”), 7108.6 (prevailing party shall be entitled to “attorney’s fees and costs”), 16750 (injured person shall be awarded “a reasonable attorney’s fee together with the costs of the suit”); see also *Ripley v. Pappadopoulos*, 23 Cal. App. 4th 1616, 1625-26, 28 Cal. Rptr. 2d 878 (1994) (costs and attorney’s fees are distinct concepts).

17. See, e.g., Bus. & Prof. Code § 18413 (injured person may recover “costs of suit”); Lab. Code § 1122 (injured party shall recover damages and costs of suit); Water Code § 26083 (district may recover delinquent assessments, penalties, and costs of suit).

18. See, e.g., Code Civ. Proc. § 1022 (differentiating between costs and disbursements); *Jensen v. BMW of North America, Inc.*, 35 Cal. App. 4th 112, 137-38, 41 Cal. Rptr. 2d 295 (1995) (“costs and expenses” in Civil Code Section 1794 includes expert witness fees).

19. A Westlaw search for the term “costs” in the unannotated California codes resulted in over 8,000 hits. A search of the same database for “costs” and “attorney’s fees” in the same sentence yielded over 700 hits.

20. See, e.g., Bus. & Prof. Code § 7507.13 (“court costs and attorney fees”); Civ. Code § 798.56a (“reasonable attorney’s fees and court costs”); Lab. Code § 98.2 (“court costs and reasonable attorney fees”).

21. In the few instances where “court costs” is used more broadly, corrective amendments could be made. See proposed Civ. Code § 731.15 *infra*; proposed Fin. Code § 2220 *infra*; proposed Ins. Code § 11708 *infra*.

1 **Prevailing Party for Awarding Costs**

2 For purposes of awarding costs, Code of Civil Procedure Section 1032 defines  
3 “prevailing party” to include a party in any of four categories, unless the context  
4 clearly requires otherwise: (1) A party with a net monetary recovery, (2) a  
5 defendant in whose favor a dismissal is entered, (3) a defendant where neither the  
6 plaintiff nor the defendant obtains any relief, and (4) a defendant as against those  
7 plaintiffs who do not recover any relief against that defendant.<sup>22</sup> Where a party  
8 recovers nonmonetary relief, or where none of the four categories applies, the  
9 court is to determine the prevailing party and may allow or deny costs in its  
10 discretion.<sup>23</sup>

11 In determining the prevailing party under Section 1032, the court assesses who  
12 prevailed in the action as a whole, rather than determining who prevailed on a  
13 claim-by-claim basis.<sup>24</sup> The prevailing party is entitled to recover all costs  
14 incurred, even if that party did not win on every claim.<sup>25</sup>

15 **Prevailing Party for Awarding Contractual Attorney’s Fees**

16 Under Civil Code Section 1717, in an action on a contract including an  
17 attorney’s fee clause, the “party prevailing on the contract” is entitled to recover  
18 attorney’s fees.<sup>26</sup> The “party prevailing on the contract” is the party who recovered  
19 greater relief in the action on the contract.<sup>27</sup> The court is to compare the relief  
20 awarded on the claims covered by the attorney’s fee clause with the parties’  
21 demands on the same claims and their litigation objectives as disclosed by the  
22 pleadings, trial briefs, opening statements, and similar sources.<sup>28</sup> The court is to

---

22. Code Civ. Proc. § 1032(a)(4).

23. *Id.*; see also *United States Golf Ass’n v. Arroyo Software Corp.*, 69 Cal. App. 4th 607, 81 Cal. Rptr. 2d 708, 718 (1999); *Texas Commerce Bank-El Paso, N.A. v. Garamendi*, 28 Cal. App. 4th 1234, 1248-49, 34 Cal. Rptr. 2d 155 (1994). The statute provides in pertinent part:

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

....

(4) “Prevailing party” includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the “prevailing party” shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not, and if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

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

....

24. See *Michell v. Olick*, 49 Cal. App. 4th 1194, 1198, 57 Cal. Rptr. 2d 227 (1996) (when defendant and plaintiff have competing claims, “the party in whose favor the net amount is due qualifies as the prevailing party”).

25. *Id.* The loser “is not entitled to an offset, even though [it] prevailed to some (lesser) extent.” *Id.*

26. Civ. Code § 1717(a).

27. Civ. Code § 1717(b)(1).

28. *Hsu*, 9 Cal. 4th at 876.

1 base its determination of the prevailing party on an assessment of the extent to  
2 which each party succeeded or failed in its contentions.<sup>29</sup>

3 A party may recover greater relief in the action on the contract, and thus be the  
4 prevailing party under the statute, even if it does not recover a net monetary  
5 judgment.<sup>30</sup> For example, suppose a party commences an action for a large sum,  
6 but subsequently recovers substantial insurance proceeds. The court has discretion  
7 to name it the “party prevailing on the contract,” even though a nominal judgment  
8 may be entered against the party.<sup>31</sup>

9 Where a party prevails on both a cause of action covered by an attorney’s fee  
10 clause and a cause of action that is not covered, that party may only recover  
11 attorney’s fees for the cause of action covered by the attorney’s fee clause.<sup>32</sup> Fees  
12 for an issue common to both causes of action are fully recoverable.<sup>33</sup> Where an  
13 action involves several independent contracts, each of which has an attorney’s fee  
14 clause, the prevailing party must be separately determined for each contract.<sup>34</sup>

### 15 **Contrasts Between the Standards**

16 There are sharp differences between the two standards for determining the  
17 prevailing party. For example, Civil Code Section 1717 expressly gives the court  
18 the option of determining that there is no prevailing party.<sup>35</sup> But, according to most  
19 of the appellate courts addressing the issue, that option is unavailable where a  
20 party is in one of the four categories enumerated in Code of Civil Procedure  
21 Section 1032 (party with net monetary recovery, defendant in whose favor  
22 dismissal is entered, defendant where neither plaintiff nor defendant obtains relief,  
23 or defendant as against those plaintiffs who do not recover relief against that  
24 defendant). Such a party is entitled to costs as a matter of right and the court has  
25 no discretion to order each party to bear the party’s own costs.<sup>36</sup> Where none of

---

29. *Id.*

30. *Sears*, 60 Cal. App. 4th at 1139.

31. *Id.*

32. *Reynolds Metals*, 25 Cal. 3d at 129. “A litigant may not increase his recovery of attorney’s fees by joining a cause of action in which attorney’s fees are not recoverable to one in which an award is proper.” *Id.*

33. *Id.*

34. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 491, 54 Cal. Rptr. 2d 888 (1996).

35. Civ. Code § 1717(b)(1). Typically, such a determination results when both sides seek relief but neither prevails, or when one party obtains only part of the relief sought. *Hsu*, 9 Cal. 4th at 875-76. When the litigation results are not mixed (i.e., where the decision on the claims covered by the attorney’s fee clause is purely good news for one party and bad news for the other), the court has no discretion to deny attorney’s fees to the successful party. *Id.*

36. *Michell*, 49 Cal. App. 4th at 1198; *see also* *Building Maintenance Service Co. v. AIL Systems, Inc.*, 55 Cal. App. 4th 0104, 0125, 64 Cal. Rptr. 2d 353 (1997); *Chaparral Greens v. City of Chula Vista*, 50 Cal. App. 4th 1134, 1151-53, 58 Cal. Rptr. 2d 152 (1996); *Lincoln v. Schurgin*, 39 Cal. App. 4th 100, 105, 45 Cal. Rptr. 2d 874 (1995). A few judges have interpreted Code of Civil Procedure Section 1032 less rigidly, such that whether a party falls in one of the four categories is not determinative, but only a factor to be

1 the four categories applies, however, the court may determine that there is no  
2 prevailing party.<sup>37</sup>

3 Similarly, Civil Code Section 1717 states that where an action “has been  
4 voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall  
5 be no prevailing party” for awarding contractual attorney’s fees.<sup>38</sup> This rule cannot  
6 be undone by contract.<sup>39</sup> In contrast, one of the four categories of prevailing party  
7 enumerated in Code of Civil Procedure Section 1032 is “a defendant in whose  
8 favor a dismissal is entered.”<sup>40</sup> This rule may be altered by contract.<sup>41</sup> Where the  
9 relevant contract is silent as to the effects of dismissal, some courts have  
10 concluded that the defendant is automatically entitled to costs on dismissal of the  
11 plaintiff’s case, regardless of the circumstances of the dismissal.<sup>42</sup> At least one  
12 decision holds, however, that the trial court should examine the circumstances of  
13 the dismissal in determining the prevailing party (e.g., whether the dismissal was  
14 due to the defendant’s insolvency, as opposed to an impending loss on the  
15 merits).<sup>43</sup>

16 Likewise, equitable considerations are of overriding importance in construing  
17 Civil Code Section 1717. The statute “reflects legislative intent that equitable  
18 considerations must prevail over both the bargaining power of the parties and the  
19 technical rules of contractual construction.”<sup>44</sup> Thus, in determining litigation  
20 success, courts are to focus on substance rather than form.<sup>45</sup> For example, where a  
21 party is denied direct relief on a claim it may nonetheless be the prevailing party  
22 under the statute, if it clearly achieved its main litigation objective.<sup>46</sup> Courts put  
23 much less emphasis on equitable considerations in determining the prevailing

---

considered in identifying the prevailing party. *See Sears*, 60 Cal. App. 4th at 1155; *id.* at 1165-66 (Kline, P.J., concurring and dissenting).

37. Code Civ. Proc. § 1032(a)(4); see also sources cited in note 23 *supra*.

38. Civ. Code § 1717(b)(2).

39. The statute overrides or nullifies conflicting contractual provisions, “such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining ‘prevailing party’ as including parties in whose favor a dismissal has been entered.” *Santisas*, 17 Cal. 4th at 617; *Excess Electronix v. Heger Realty Corp.*, 64 Cal. App. 4th 698, 707, 75 Cal. Rptr. 2d 376 (1998).

40. Code Civ. Proc. § 1032(a)(4).

41. *Santisas*, 17 Cal. 4th at 602, 617, 622.

42. *See id.* at 606 (because plaintiffs voluntarily dismissed action with prejudice, defendants are entitled to recover costs under Section 1032); *Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.*, 47 Cal. App. 4th 886, 54 Cal. Rptr. 2d 850 (1996) (cross-defendant entitled to costs on dismissal of cross-complaint for indemnity, even though dismissal was due to cross-defendant’s good faith settlement with plaintiff).

43. *Damian*, 65 Cal. App. at 1129-30. The court of appeal explained that trial courts should fashion “efficient procedures for making a ‘pragmatic’ determination whether the defendant ‘has realized its litigation objectives’ and is, thus, the ‘prevailing party’ in a voluntary dismissal case.” *Id.* at 1129 n.15.

44. *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 224, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978).

45. *Hsu*, 9 Cal. 4th at 877; *Foothill Properties v. Lyon/Copley Corona Associates*, 46 Cal. App. 4th 1542, 1555, 54 Cal. Rptr. 2d 488 (1996); *Sears*, 60 Cal. App. 4th at 1152-55.

46. *Hsu*, 9 Cal. 4th at 877.

1 party under Code of Civil Procedure Section 1032. In some instances, however,  
2 courts have relied on such considerations even in this context.<sup>47</sup>

### 3 **Anomalous Results**

4 The different statutory standards for determining the prevailing party have  
5 yielded anomalous results. Courts have consistently held that the prevailing party  
6 for awarding costs is not necessarily the same as the prevailing party for awarding  
7 contractual attorney's fees.<sup>48</sup>

8 The California Supreme Court's decision in *Santisas* is a good example of the  
9 disparity between the standards. In *Santisas*, the plaintiffs brought, but later  
10 voluntarily dismissed, both tort and contract claims relating to the purchase of a  
11 home. The contract in question included an attorney's fee clause, which was broad  
12 enough to cover not only the plaintiffs' contract claim, but also the tort claims.

13 The Supreme Court determined that

- 14 (1) The defendants were the prevailing party for purposes of awarding *costs*  
15 *other than attorney's fees* under Code of Civil Procedure Section 1032,  
16 because they were "defendants in whose favor a dismissal has been  
17 entered."<sup>49</sup>
- 18 (2) The defendants were *not* entitled to *attorney's fees on the contract claim*,  
19 because Civil Code Section 1717 precludes a fee award in the event of a  
20 voluntary dismissal, this rule cannot be overridden by contract, and Civil  
21 Code Section 1717, not Code of Civil Procedure Section 1032, governs the  
22 recovery of contractual attorney's fees on a contract claim.<sup>50</sup>
- 23 (3) The action *would have to be remanded to determine whether the defendants*  
24 *were entitled to attorney's fees on the tort claims*. Tort claims are "outside the  
25 ambit" of Civil Code Section 1717 and are governed by Code of Civil  
26 Procedure Section 1032.<sup>51</sup> Under the latter provision, whether attorney's fees  
27 incurred in defending noncontract claims are recoverable after a voluntary

---

47. A good example is *Damian*, 65 Cal. App. 4th at 1129-30, which directs trial courts to make a pragmatic determination of the prevailing party following a voluntary dismissal. *Sears* provides another example: Instead of deciding that Code of Civil Procedure Section 1032 strictly requires a cost award to "a party with a net monetary recovery," the court concluded that the statute includes "its own broad provision for equitable relief where net monetary recovery may not be the best measure of who prevailed ...." 60 Cal. App. 4th at 1155. "While the trial court cannot arbitrarily deny fees to a less-than-sympathetic party, it remains free to consider all factors which may reasonably be considered to indicated success in the litigation." *Id. see also id.* at 1166 (Kline, P.J., concurring and dissenting) (In Section 1032, the Legislature "specifically authorized trial courts to depart from the specified criteria when it would be inequitable to adhere strictly to any particular specified criterion, such as the 'net monetary recovery' test.").

48. *Pacific Custom Pools, Inc. v. Turner Construction Co.*, 79 Cal. App. 4th 1254, 94 Cal. Rptr. 2d 756, 768 n.13 (2000); *Sears*, 60 Cal. App. 4th at 1142.

49. 17 Cal. 4th at 606.

50. *Id.* at 615-17; *see also Sears*, 60 Cal. App. 4th at 1157 (Section 1717 "is the applicable statute when determining whether and how attorney's fees should be awarded under a contract. It is the statute that expressly deals with attorney's fees under a contract, and to apply section 1032 in such cases would obviate section 1717.").

51. *Santisas*, 17 Cal. 4th at 615, 617-19.

1 dismissal depends on the terms of the attorney’s fee clause.<sup>52</sup> If, as in  
2 *Santisas*, the clause neither defines “prevailing party” nor expressly  
3 prescribes whether the prevailing party is entitled to attorney’s fees in the  
4 event of a voluntary dismissal, the court may base its fee decision “on a  
5 pragmatic definition of the extent to which each party has realized its  
6 litigation objectives, whether by judgment, settlement, or otherwise.”<sup>53</sup>

7 In other words, the court considered the same litigation outcome (voluntary  
8 dismissal) in each of three contexts: Costs other than attorney’s fees, contractual  
9 attorney’s fees on the contract claim, and contractual attorney’s fees on the tort  
10 claims. It reached a different result in each context, prompting one of the justices  
11 to plead for statutory reform.<sup>54</sup>

12 Although *Santisas* is perhaps the most example of disparate results under Code  
13 of Civil Procedure Section 1032 and Civil Code Section 1717, it is not the only  
14 example. The problem is not limited to the outcome of dismissal, but also occurs  
15 with other litigation outcomes.

16 For example, in *McLarand, Vasquez & Partners, Inc. v. Downey Savings &*  
17 *Loan Ass’n*,<sup>55</sup> the plaintiff recovered no relief on its complaint for breach of  
18 contract, “related claims,” and tortious denial of the contract, and the defendant  
19 recovered no relief on its cross-complaint against the plaintiff for breach of  
20 contract, negligence, interference with contractual relationship, and prospective  
21 economic advantage. The court determined that the defendant was entitled to costs  
22 other than attorney’s fees, because Code of Civil Procedure Section 1032 defines  
23 “prevailing party” to include “a defendant where neither plaintiff nor defendant  
24 obtains any relief.”<sup>56</sup> For purposes of awarding contractual attorney’s fees,  
25 however, the court concluded that there was no prevailing party, because neither  
26 side breached the contract.<sup>57</sup>

27 Similarly, in *Nasser v. Superior Court*<sup>58</sup> an unlawful detainer action was  
28 consolidated with a declaratory relief action concerning the terms of the lease. The  
29 trial court reached a mixed result: Although a renewal option asserted by the lessee  
30 was validated, the lessee was required to pay a rental amount that was more than

---

52. *Id.* at 602.

53. *Id.* at 622.

54. Justice Mosk joined the majority opinion, but also wrote a concurrence urging the Legislature to reconsider how Civil Code Section 1717 and Code of Civil Procedure Section 1032 treat dismissals. *Santisas*, 17 Cal. 4th at 623-24. Three other justices disagreed with the majority’s denial of attorney’s fees on the contract claim, reasoning that Civil Code Section 1717 and its bar to recovery of fees upon dismissal, is inapplicable to reciprocal fee clauses. *Santisas*, 17 Cal. 4th at 624-31 (Baxter, J., concurring and dissenting).

55. 231 Cal. App. 3d 1450, 282 Cal. Rptr. 828 (1991).

56. *Id.* at 1454. Where “neither the plaintiff nor the defendant who has filed a cross-complaint prevails, the defendant is the prevailing party entitled to costs.” *Id.* at 1454 (emphasis added).

57. *Id.* at 1456. The court “emphatically reject[ed] the contention that the prevailing party for the award of costs under section 1032 is necessarily the prevailing party for the award of attorney’s fees.” *Id.*

58. 156 Cal. App. 3d 52, 202 Cal. Rptr. 552 (1984).

1 he requested in his declaratory relief action and higher than he previously  
2 offered.<sup>59</sup> The trial court awarded costs other than attorney’s fees to the lessee  
3 pursuant to Code of Civil Procedure Section 1032, but denied the lessee’s request  
4 for contractual attorney’s fees pursuant to Civil Code Section 1717. The court of  
5 appeal affirmed, explaining:

- 6 • With regard to costs other than attorney’s fees, the award was discretionary,  
7 because the circumstances did not fit any of the four categories enumerated in  
8 Code of Civil Procedure Section 1032.<sup>60</sup>
- 9 • With regard to contractual attorney’s fees, the court did not abuse its discretion  
10 in determining that neither party was entitled to fees, because the litigation  
11 result was good news and bad news for each party.<sup>61</sup>

12 Thus, the determination of the prevailing party rested in the court’s discretion in  
13 both contexts, and the court considered the same litigation outcome in both  
14 contexts, yet it was permissible for the court to reach a different conclusion in each  
15 context.<sup>62</sup> Such an incongruous result is difficult to justify.

#### 16 **Proposed Uniform Standard**

17 To promote simplicity and consistency, the Law Revision Commission  
18 recommends that the standard for determining the prevailing party be the same for  
19 purposes of awarding costs other than attorney’s fees (court costs), contractual  
20 attorney’s fees on a contract claim covered by an attorney’s fee clause, and  
21 contractual attorney’s fees on a noncontract claim covered by an attorney’s fee  
22 clause. As under existing law, however, the standard would apply to different  
23 claims depending on the type of award sought. In determining the prevailing party  
24 for purposes of awarding costs other than attorney’s fees, the court would examine  
25 the outcome of the entire action; in determining the prevailing party for purposes  
26 of awarding contractual attorney’s fees, the court would only examine the outcome  
27 of the claims covered by the attorney’s fee clause.<sup>63</sup> A litigant should not be  
28 permitted to increase an opponent’s liability for attorney’s fees by joining a cause  
29 of action covered by an attorney’s fee clause to a cause of action that is not  
30 covered.<sup>64</sup>

---

59. *Id.* at 60.

60. *Id.*

61. *Id.* at 59-60.

62. *Sears* is another example of the tension between the definitions of prevailing party in Civil Code Section 1717 and Code of Civil Procedure Section 1032. Although the court of appeal reached the same result under both statutes, it had to strain to avoid the “net monetary recovery” category of Section 1032. *See* 60 Cal. App. 4th at 1156-58.

63. As under existing law, where a litigant incurs attorney’s fees for an issue common to a cause of action in which fees are proper and one in which they are not allowed, all of those fees would be recoverable. *Reynolds Metals*, 25 Cal. 3d at 129.

64. *Id.*

1 The proposed uniform standard for determining the prevailing party is intended  
2 to be readily applicable to routine situations, yet afford flexibility to address  
3 unusual circumstances, such as multiple claims, cross-claims, multiple parties,  
4 partial victories, and mixed motives for litigation tactics such as a voluntary  
5 dismissal. To achieve these ends, the proposed law sets forth six rebuttable  
6 presumptions for determining the prevailing party (e.g., in a two party action  
7 where the court finds that the defendant is not liable, the defendant is the  
8 prevailing party). A party seeking costs or contractual attorney's fees must specify  
9 which of those presumptions applies, if any. The other side may challenge the  
10 application of that presumption in a motion to tax costs, alleging either that (1) the  
11 presumption is inapplicable because the result was other than as alleged by the  
12 party seeking costs, or (2) application of the presumption is otherwise  
13 inappropriate under the circumstances of the case. Where a presumption applies  
14 and application of that presumption is not challenged, the prevailing party is as  
15 stated in the presumption.

16 Where none of the presumptions applies, or where a party challenges the  
17 application of a presumption in a motion to tax costs, the court is to determine the  
18 prevailing party by comparing the relief awarded, or otherwise obtained, with the  
19 parties' demands and the parties' litigation objectives as disclosed by the  
20 pleadings, points and authorities, opening statements, and other matters on record.  
21 The court is to make a pragmatic assessment of the extent to which each party has  
22 succeeded or failed in its contentions and objectives, and the circumstances of any  
23 voluntary dismissal, and determine the prevailing party accordingly.<sup>65</sup>

24 In making this determination, the court is to focus on substance rather than  
25 form.<sup>66</sup> The court may not consider factors such as recalcitrance in discovery or  
26 lack of cooperation in settlement negotiations.<sup>67</sup> It is not essential to show success  
27 on the central issue or recovery of the primary relief sought.<sup>68</sup> Where the results of  
28 the litigation are entirely one-sided, the court has no discretion to deny costs and  
29 contractual attorney's fees.<sup>69</sup>

30 A voluntary dismissal presents special considerations. Under the proposed law,  
31 the defendant would be rebuttably presumed to be the prevailing party in the event  
32 of a voluntary dismissal, other than a dismissal pursuant to a settlement agreement.

---

65. This standard is drawn from cases construing Civil Code Section 1717. See *Hsu*, 9 Cal. 4th at 876; *Santisas*, 17 Cal. 4th at 822; *Mustachio v. Great Western Bank*, 48 Cal. App. 4th 1145, 1150, 56 Cal. Rptr. 2d 33 (1996). Under existing law, the standard is not applicable where a defendant seeks contractual attorney's fees on a contract claim in the event of a voluntary dismissal. *Santisas*, 17 Cal. 4th at 606. Rather, the statute expressly provides that there is no prevailing party in that situation. Civ. Code § 1717(b)(2). In contrast, the proposed law would apply the standard to voluntary dismissals as well as other situations.

66. *Hsu*, 9 Cal. 4th at 877; *Foothill Properties*, 46 Cal. App. 4th at 1555; *Sears*, 60 Cal. App. 4th at 1152-55.

67. *Hsu*, 9 Cal. 4th at 877.

68. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 784, 790-91 (1989).

69. *Hsu*, 9 Cal. 4th at 875-76.

1 But such a dismissal can result from circumstances other than an impending loss  
2 on the merits.<sup>70</sup> For example, the defendant may have become insolvent, the claim  
3 may have become moot, or the plaintiff may have obtained relief through  
4 voluntary corrective action or insurance proceeds. Where the plaintiff moves to tax  
5 costs, the court would be required to take circumstances such as these into account  
6 in determining the prevailing party.<sup>71</sup>

7 A dismissal pursuant to a settlement agreement would be treated similarly,  
8 unless the agreement allocates responsibility for costs and attorney's fees. Where a  
9 dismissal is pursuant to a settlement agreement allocating responsibility for costs  
10 and attorney's fees, and a party thereafter seeks costs, the proposed law would  
11 give effect to the agreement of the parties. Importantly, however, any pre-litigation  
12 agreement on how to determine the prevailing party in the event of a dispute  
13 would be null and void to the extent that it conflicts with the proposed statutory  
14 standard.

#### 15 NONSTANDARD LITIGATION EXPENSES

16 Code of Civil Procedure Section 1033.5 requires the court to award certain items  
17 as costs (e.g., ordinary witness fees),<sup>72</sup> and prohibits it from awarding other items  
18 as costs, except where expressly authorized by law (e.g., fees of experts not  
19 ordered by the court),<sup>73</sup> Litigation expenses that are neither mandatory nor  
20 prohibited may be either awarded or denied, in the court's discretion.<sup>74</sup>

21 Contractual attorney's fees are among the items that the court is required to  
22 award as costs.<sup>75</sup> But some attorney's fee clauses cover all expenses of litigation,  
23 not just attorney's fees. Where such a clause applies, the costs procedure may be  
24 used to recover any item that the court is either required or permitted to award as  
25 costs.<sup>76</sup> But the costs procedure may not be used to recover items that the court is  
26 prohibited from awarding as costs, regardless of whether the attorney's fee clause  
27 covers those items.<sup>77</sup> Rather, such items must be pleaded and proved at trial.<sup>78</sup>

28 That approach is inefficient, because proof at trial is required even though the  
29 party may ultimately lose on the merits. The procedure is also contrary to common

---

70. *Santisas*, 17 Cal. 4th at 621; *Olen*, 21 Cal. 3d at 224.

71. *Damian*, 65 Cal. App. 4th at 1129-30 & n.15.

72. Code Civ. Proc. § 1033.5(a).

73. Code Civ. Proc. § 1033.5(b).

74. Code Civ. Proc. § 1033.5(c)(4).

75. Code Civ. Proc. § 1033.5(a)(10)(A).

76. *Ripley*, 23 Cal. App. 4th at 623.

77. *Id.* at 625-27; *see also* *First Nationwide Bank v. Mountain Cascade, Inc.*, 77 Cal. App. 4th 871, 92 Cal. Rptr. 2d 145 (2000); *Steiny & Co., Inc. v. California Electric Supply Co., Inc.*, 79 Cal. App. 4th 285, 293-94, 93 Cal. Rptr. 2d 920 (2000); *Robert L. Cloud & Associates v. Mikesell*, 69 Cal. App. 4th 1141, 1153-54, 82 Cal. Rptr. 2d 143 (1999).

78. *Arntz*, 47 Cal. App. 4th at 491-92.

1 expectations. Because the costs procedure applies to recovery of attorney’s fees  
2 pursuant to a contract, it is only natural to assume that the costs procedure also  
3 applies to recovery of other litigation expenses pursuant to the same contract.

4 The proposed law would address these problems by eliminating the requirement  
5 that expenses such as expert witness fees be specially pleaded and proved at trial.  
6 The costs procedure would be applicable to all litigation expenses recoverable  
7 pursuant to an attorney’s fee clause (or a combination of an attorney’s fee clause  
8 and the reciprocity requirement of Civil Code Section 1717). including items that  
9 the court is prohibited from awarding as court costs.

10 APPLICATION OF CIVIL CODE SECTION 1717 WHERE  
11 ATTORNEY DOES NOT CHARGE A TRADITIONAL FEE

12 There has been intense debate over how Civil Code Section 1717 applies where  
13 an attorney does not charge a traditional fee. This issue arises in a number of  
14 contexts, such as where a party is represented on a pro bono basis, where an  
15 attorney charges only a nominal fee, where an attorney is hired on a retainer,  
16 where a party is represented by in-house counsel, where an attorney charges less  
17 than the prevailing hourly market rate for comparable legal services, and where an  
18 attorney or other person proceeds pro se.

19 Civil Code Section 1717 provides for reciprocity where a contract “specifically  
20 provides that attorney’s fees and costs, which are *incurred* to enforce that contract,  
21 shall be awarded either to one of the parties or to the prevailing party....”<sup>79</sup> In  
22 *Trope v. Katz*,<sup>80</sup> the California Supreme Court considered whether a law firm  
23 representing itself could recover fees under the statute. The court denied recovery,  
24 explaining in part that the law firm did not “incur” any fees.<sup>81</sup>

25 Subsequently, in *San Dieguito Partnership v. San Dieguito River Valley*  
26 *Regional Open Space Park Joint Powers Authority*,<sup>82</sup> the Fourth District Court of  
27 Appeal considered how the statute applies where an attorney provides services at  
28 below market rate, instead of at the prevailing hourly market rate. Counsel for the  
29 party seeking fees charged only \$110 per hour, while the going rate for their  
30 services was \$180-\$190.<sup>83</sup> The trial court used the higher figure in awarding fees,  
31 but the court of appeal reversed and remanded for recalculation of the fee award  
32 using the lower figure.<sup>84</sup> In reaching that result, the court of appeal relied heavily  
33 on *Trope*, construing it to preclude a fee award exceeding the amount of fees that

---

79. Civ. Code § 1717(a).

80. 11 Cal. 4th 274, 902 P.2d 259, 45 Cal. Rptr. 2d 241 (1995).

81. *Id.* at 280.

82. 61 Cal. App. 4th 910, 72 Cal. Rptr. 2d 91 (1998).

83. *Id.* at 915 n.4.

84. *Id.* at 917-18.

1 the prevailing party actually incurred.<sup>85</sup> In dictum,<sup>86</sup> the court of appeal also  
2 criticized *Beverly Hills Properties v. Marcolino*,<sup>87</sup> in which attorney’s fees were  
3 awarded under Civil Code Section 1717 to a party who was represented on a pro  
4 bono basis.

5 Recently, however, the California Supreme Court ruled in *PLCM Group, Inc. v.*  
6 *Drexler*,<sup>88</sup> that a party represented by in-house counsel is entitled to recover  
7 attorney’s fees under Civil Code Section 1717. The court reasoned that denying  
8 such an award would provide a windfall to the losing party and conflict with the  
9 statutory policy of reciprocity in awarding attorney’s fees.<sup>89</sup> The court further  
10 concluded that the amount of the award may be calculated by multiplying the  
11 number of hours that counsel reasonably expended by the prevailing market rate  
12 for comparable legal services.<sup>90</sup> The court distinguished *Trope*, explaining that the  
13 Legislature may seek to discourage self-representation and that a pro se litigant  
14 (attorney or nonattorney) does not have an attorney and so is unable to invoke an  
15 attorney’s fee clause.<sup>91</sup> The court also expressly disapproved *San Dieguito*<sup>92</sup> and  
16 repeatedly cited *Marcolino* as support,<sup>93</sup> which strongly suggests that attorney’s  
17 fees under Civil Code Section 1717 are to be awarded to a prevailing party who is  
18 represented on a pro bono basis.

19 Although *PLCM* helps to clarify the law in this area, its approach should be  
20 codified to eliminate any doubt that Civil Code Section 1717 applies regardless of  
21 whether the prevailing party’s attorney charges a traditional fee. The statutory goal  
22 of mutuality of remedy would be severely undermined if the statute’s protections  
23 were unavailable under such circumstances. Indeed, a key purpose of the statute is  
24 to protect persons in disadvantageous bargaining situations.<sup>94</sup> Those are precisely  
25 the people most likely to be represented on a pro bono or other nontraditional  
26 basis.

27 Thus, the proposed law would provide that where the prevailing party was  
28 represented by an attorney, reasonable attorney’s fee shall be deemed to have been  
29 incurred for purposes of Civil Code Section 1717, even if the party’s attorney did

---

85. *Id.*

86. *Id.* at 918.

87. 221 Cal. App. 3d Supp. 7, 270 Cal. Rptr. 605 (1990).

88. 22 Cal. 4th 1084, 997 P.2d 511, 95 Cal. Rptr. 2d 198 (2000).

89. *Id.* at \_\_\_\_, 95 Cal. Rptr. 2d at 204-05.

90. *Id.* at \_\_\_\_, 95 Cal. Rptr. 2d at 205-08; *but see id.* at 209-15 (Chin, J., concurring and dissenting) (recovery by party represent in-house should be limited to actual cost of representation).

91. *Id.* at \_\_\_\_, 95 Cal. Rptr. 2d at 203-04.

92. *Id.* at \_\_\_\_, 95 Cal. Rptr. 2d at 207 n.5.

93. *Id.* at \_\_\_\_, 95 Cal. Rptr. 2d at 206-07.

94. *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 597 n.3, 97 Cal. Rptr. 30 (1971) (Civil Code Section 1717 “is part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney’s fees incurred in litigation in the event they prevail.”).

1 not charge a fee for the services provided, charged only a nominal fee, served as  
2 in-house counsel or on a retainer, or otherwise provided the services without  
3 charging the prevailing market rate. The proposed law would direct the court to  
4 focus on the legal services provided, not on the prevailing party’s fee arrangement,  
5 in determining the amount of attorney’s fees to award in those situations.

6 The law governing recovery of attorney’s fees by pro se litigants would remain  
7 unchanged. *Trope* would neither be codified nor overturned. A pro se litigant  
8 would, however, be expressly permitted to recover expenses other than attorney’s  
9 fees pursuant to Civil Code Section 1717.

10           RECIPROCITY: NONSTANDARD LITIGATION EXPENSES AND  
11           CONTRACTUAL ATTORNEY’S FEES FOR NONCONTRACT CLAIMS

12 Civil Code Section 1717 makes a contractual obligation to pay attorney’s fees on  
13 a contract claim reciprocal, even where the drafting of the attorney’s fee clause is  
14 one-sided. It is questionable, however, whether the statute compels reciprocity  
15 where an attorney’s fee clause covers attorney’s fees on a noncontract claim, or  
16 litigation expenses other than court costs and attorney’s fees (nonstandard  
17 litigation expenses).

18 The only appellate decision to address this issue in depth is *Moallem v. Coldwell*  
19 *Banker Commercial Group, Inc.*<sup>95</sup> In *Moallem*, the party who prevailed on a tort  
20 claim sought attorney’s fees pursuant to a fee clause that covered tort claims but  
21 ran only in favor of the other side. The court rejected the claim for fees,  
22 concluding that the plain language of Civil Code Section 1717 makes the  
23 provision inapplicable to a tort claim.<sup>96</sup>

24 The court recognized, however, that the policy considerations supporting  
25 reciprocity apply equally to attorney’s fees for a tort claim as to attorney’s fees for  
26 a contract claim.<sup>97</sup> The court emphasized the need for legislative reform and its  
27 inability to judicially implement such reform.<sup>98</sup>

28 Like the court of appeal in *Moallem*, the Commission recommends that Civil  
29 Code Section 1717 be revised to clarify that the requirement of reciprocity applies  
30 to all litigation expenses, not just attorney’s fees on a contract claim. Any  
31 unilateral requirement to reimburse attorney’s fees or other litigation expenses

---

95. 25 Cal. App. 4th 1827, 31 Cal. Rptr. 2d 253 (1994). In another case, the court considered the argument that “Civil Code section 1717 relates to attorney fees alone, so that a contractual cost provision authorizing one party’s recovery of litigation expenses beyond statutory costs benefits that party alone, and is not a reciprocal right.” *Arntz*, 47 Cal. App. 4th at 492. The court rejected that contention with little discussion: “We are satisfied that the Legislature’s express reference to ‘attorney’s fees *and costs*’ [in Section 1717] makes contractual provisions reciprocal as to both fees and costs.” *Id.* (emphasis in original). “Any other interpretation would render the costs reference surplusage.” *Id.*

96. 25 Cal. App. 4th at 1832.

97. *Id.* (“In section 1717, the Legislature has prescribed with clarity that the public policy *Moallem* seeks to invoke presently applies only to attorney fees for contract actions, not tort claims.”).

98. *Id.* at 1833. The court stated:

1 distorts access to the courts: It burdens one side with a financial risk that the other  
2 side does not have to bear in pursuing justice. Such manipulation of the judicial  
3 process should not be permitted.<sup>99</sup>

4 To effectively promote the policy of equal access to justice, the proposed law  
5 would not permit an attorney’s fee clause to operate in a one-sided manner, no  
6 matter how the clause is worded, which kind of expense is sought, or which type  
7 of claim is at stake. If the clause requires reimbursement of one side’s expenses in  
8 the event that it prevails, the other side would be entitled to similar  
9 reimbursement.<sup>100</sup>

10 NONSUBSTANTIVE CODE REORGANIZATION

11 The chapter on “Costs” in the Code of Civil Procedure (Chapter 6 of Title 14 of  
12 Part 2) consists of a jumble of 28 different provisions on attorney’s fees, costs,  
13 treble damages, and miscellaneous expenses (including one provision on referee’s  
14 fees).<sup>101</sup> To make the chapter more user-friendly, the Commission recommends  
15 inserting several article headings, moving a few provisions to conform to the  
16 article headings, and renaming the chapter “Attorney’s Fees and Other Litigation  
17 Expenses” so as to accurately reflect its content. To minimize disruption, most of  
18 the provisions in the chapter would be left as is (neither revised, relocated, nor  
19 renumbered). The court further concluded that the amount of such an award may  
20 be calculated by multiplying the number of hours that counsel reasonably  
21 expended by the prevailing market rate for comparable legal services.

---

In this case the asymmetry of statutory rights between contract and tort litigants painfully appears, because Moallem could have invoked section 1717 had he prevailed on his contract claim instead of his tort claims. But that situation is a consequence only of the Legislature’s enactment as it now stands. Although we can suggest that the statute be rewritten to take into account [case law establishing that an attorney’s fee clause may cover noncontract claims], we cannot perform that revision. The public policy underlying section 1717 may be clear. But a court is not free to advance the public policy that underlies a statute by extending the statute beyond its plain terms and established reach.

*See also Sears*, 60 Cal. App. 4th at 1166-67 (Kline, P.J., concurring and dissenting).

99. *See generally* *Kinney v. United Healthcare Services, Inc.*, 70 Cal. app. 4th 1322, 1332, 83 Cal. Rptr. 2d 348 (1999) (Unilateral obligation to arbitrate deprives party of benefits and protections of judicial forum and thus “is itself so one-sided as to be substantively unconscionable.”); *see also* *California Teachers Ass’n v. State of California*, 20 Cal. 4th 327, 975 P.2d 622, 84 Cal. Rptr. 2d 425 (1999) (“[R]equirement that dismissed or suspended teachers pay half the cost of the hearing, including the costs of the administrative law judge, necessarily and impermissibly deters teachers from exercising their due process right to a hearing.”).

100. The proposed law would not affect an indemnity provision covering attorney’s fees. “An indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person.” *Myers*, 13 Cal. App. 4th at 968 (emphasis added). The indemnitor’s obligation may include reimbursement of attorney’s fees that the indemnitee incurs in litigation *against a third person*. *Id.* “Indemnification agreements are intended to be unilateral agreements.” *Id.* “The Legislature has indicated no intent to make the reciprocal by operation of law.” *Building Maintenance*, 55 Cal. App. 4th at 1029.

101. Code Civ. Proc. § 1023.

## PROPOSED LEGISLATION

1 ☞ **Staff Note.** In standard bill form, proposed sections are shown numerically within each code  
2 and codes are organized alphabetically. To facilitate comprehension of the proposed reforms, this  
3 draft deviates from that practice. Proposed substantive revisions of the chapter on “Costs” in the  
4 Code of Civil Procedure are shown first, followed by revisions of Civil Code Section 1717.  
5 Conforming revisions and repeals are shown at the end.

## Contents

6	CODE OF CIVIL PROCEDURE . . . . .	18
7	Heading of Chapter 6 (commencing with Section 1021) (amended) . . . . .	18
8	Heading of Article 1 (commencing with Section 1021) (added) . . . . .	18
9	Code Civ. Proc. § 1021 (amended). Payment of attorney’s fees . . . . .	18
10	Code Civ. Proc. § 1021.01 (added). Court costs . . . . .	19
11	Code Civ. Proc. § 1021.02 (added). Nonstandard litigation expenses . . . . .	19
12	Code Civ. Proc. § 1021.03 (added). Payment of nonstandard litigation expenses . . . . .	20
13	Heading of Article 2 (commencing with Section 1021.4) (added) . . . . .	20
14	Code Civ. Proc. § 1025 (amended). Tender and deposit in action for recovery of money 15        only . . . . .	21
16	Code Civ. Proc. §§ 1039.10-1039.50 (added). Prevailing party . . . . .	23
17	§ 1039.10. Recovery of costs by prevailing party . . . . .	23
18	§ 1039.20. Rebuttable presumptions for determining prevailing party for purposes of 19                awarding costs . . . . .	24
20	§ 1039.30. Determination of prevailing party . . . . .	25
21	§ 1039.40. Prevailing party for award pursuant to contract or pursuant to Civil Code 22                Section 1717 . . . . .	27
23	§ 1039.50. Determining prevailing party where pre-litigation contract specifies how 24                to determine prevailing party . . . . .	28
25	Code Civ. Proc. §§ 1040.10-1040.90 (added). Amount and components of cost award . . . . .	29
26	§ 1040.10. Components of cost award . . . . .	29
27	§ 1040.20. Mandatory court costs . . . . .	30
28	§ 1040.30. Items not allowable as court costs unless expressly authorized . . . . .	31
29	§ 1040.40. Discretionary court costs . . . . .	32
30	§ 1040.50. Attorney’s fees and nonstandard litigation expenses as costs . . . . .	32
31	§ 1040.60. Requirements for cost award . . . . .	35
32	§ 1040.70. Partial recovery . . . . .	36
33	§ 1040.80. Small recovery . . . . .	37
34	§ 1040.90. Expenses due to postponement of trial . . . . .	37
35	Code Civ. Proc. §§ 1041.10-1041.20 (added). Procedures for prejudgment costs and costs 36        on appeal or other review . . . . .	37
37	§ 1041.10. Procedures for claiming prejudgment costs and costs on appeal . . . . .	38
38	§ 1041.20. Review other than by appeal . . . . .	38
39	CIVIL CODE . . . . .	38
40	Civ. Code § 1717 (repealed). Award of attorney’s fees in contract action . . . . .	38
41	Civ. Code § 1717 (added). Award of attorney’s fees and nonstandard litigation expenses 42        pursuant to contract . . . . .	40
43	CONFORMING REVISIONS AND REPEALS . . . . .	43
44	CIVIL CODE . . . . .	43
45	Civ. Code § 731.15 (amended). Payment of expenses . . . . .	43
46	CODE OF CIVIL PROCEDURE . . . . .	44

1	Code Civ. Proc. § 645.1 (amended). Order for payment of referee fees . . . . .	44
2	Code Civ. Proc. § 1023 (repealed). Referee fees . . . . .	44
3	Code Civ. Proc. § 1024 (repealed). Expenses due to postponement of trial . . . . .	44
4	Code Civ. Proc. § 1027 (repealed). Review other than by appeal . . . . .	44
5	Code Civ. Proc. § 1032 (repealed). Recovery of costs by prevailing party . . . . .	45
6	Code Civ. Proc. § 1033 (repealed). Small recovery . . . . .	45
7	Code Civ. Proc. § 1033.5 (repealed). Allowable costs . . . . .	46
8	Code Civ. Proc. § 1034 (repealed). Procedures for claiming prejudgment costs and costs on	
9	appeal . . . . .	48
10	FINANCIAL CODE . . . . .	48
11	Fin. Code § 22202 (amended). Charges . . . . .	48
12	INSURANCE CODE . . . . .	49
13	Ins. Code § 11708 (amended). Court costs and attorney’s fees . . . . .	49

CODE OF CIVIL PROCEDURE

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

15 SEC. \_\_\_\_\_. The heading of Chapter 6 (commencing with Section 1021) of Title  
16 14 of Part 2 of the Code of Civil Procedure is amended to read:

17 CHAPTER 6. OF COSTS ATTORNEY’S FEES AND OTHER  
18 LITIGATION EXPENSES

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

20 SEC. \_\_\_\_\_. An article heading is added immediately preceding Section 1021 of  
21 the Code of Civil Procedure, to read:

22 Article 1. General Provisions and Definitions

23 **Code Civ. Proc. § 1021 (amended). Payment of attorney’s fees**

24 SEC. \_\_\_\_\_. Section 1021 of the Code of Civil Procedure is amended to read:

25 1021. Except as attorney’s fees are specifically provided for by statute law, the  
26 measure and mode of compensation of attorneys ~~and counselors at law~~ is left to the  
27 agreement, express or implied, of the parties; ~~but parties to actions or proceedings~~  
28 ~~are entitled to their costs, as hereinafter provided.~~

29 **Comment.** Section 1021 is amended to reflect that payment of attorney’s fees may be required  
30 by equitable doctrines, as well as by statute or by contract. See, e.g., *Serrano v. Priest*, 20 Cal. 3d  
31 25, 141 Cal. Rptr. 315 (1977); *Woodland Hills Residents Ass’n v. City Council*, 23 Cal. 3d 917,  
32 154 Cal. Rptr. 503 (1979). The reference to “law” includes statutes, constitutional provisions, and  
33 decisional law. See Gov’t Code §§ 810.6 (“enactment” includes, *inter alia*, statute or  
34 constitutional provision), 811 (“law” includes enactments and decisional law).

35 Section 1021 is also amended to delete the reference to “counselors at law,” which is  
36 synonymous with “attorneys.” The clause on entitlement to costs is also deleted, because it is  
37 duplicative of Section 1039.10.

38 ☞ **Staff Note.** This amendment is included for purposes of simplification and clarification. In  
39 previous drafts, Section 1021 was left as is.

1 **Code Civ. Proc. § 1021.01 (added). Court costs**

2 SEC. \_\_\_\_\_. Section 1021.01 is added to the Code of Civil Procedure, to read:  
3 1021.01. “Court costs” means costs awarded pursuant to Section 1040.20 or  
4 1040.40.

5 **Comment.** Section 1021.01 introduces the term “court costs” to facilitate reference to  
6 traditional court costs. The term encompasses both of the following:

7 (1) Litigation expenses that the court is required to award as court costs, such as filing  
8 fees and ordinary witness fees. See Section 1040.20 (mandatory court costs).

9 (2) Items that the court is permitted but not required to award as court costs, to the  
10 extent that the court awards those items. See Section 1040.40 (discretionary court costs).

11 Any litigation expense that the court is required to award pursuant to statute or other law is a  
12 court cost, except attorney’s fees. See Section 1040.20(I).

13 A cost award consists of court costs, recoverable attorney’s fees, and nonstandard litigation  
14 expenses. See Section 1040.10 (components of cost award). For nonstandard litigation expenses,  
15 see Section 1021.02. For recovery of costs by the prevailing party, see Section 1039.10.

16 ☞ **Staff Note.** Section 1021.01 is a new addition to the draft. It would define the term “court  
17 costs” to refer to traditional court costs such as filing fees and ordinary witness fees. This is  
18 intended to help reduce confusion stemming from inconsistent usage of the term “costs.” See  
19 “Terminology” *supra*.

20 Attempting to standardize usage of the term “costs” throughout the codes would be an  
21 enormous project. Over 8,000 provisions use the term “costs” in one sense or another. More than  
22 700 provisions refer to “costs” and “attorney’s fees” in the same sentence. Rather than attempting  
23 extensive clean-up in this proposal, a first step would be to provide a ready means of referring  
24 only to traditional court costs. Section 1040.10 would do this by stating that such items may be  
25 referred to as “court costs.”

26 This term is already used in over a hundred provisions, but is nowhere defined. In almost all  
27 instances, however, it appears to refer only to traditional court costs, not attorney’s fees. See, e.g.,  
28 Bus. & Prof. Code § 7507.13 (“court costs and attorney fees”); Civ. Code § 798.56a (“reasonable  
29 attorney’s fees and court costs”); Lab. Code § 98.2 (“court costs and reasonable attorney fees”).  
30 Section 1040.10 would make this usage explicit and would encourage use of the term. In the few  
31 instances where “court costs” is used more broadly, corrective amendments could be made. See  
32 proposed Civ. Code § 731.15 *infra*; proposed Fin. Code § 2220 *infra*; proposed Ins. Code § 11708  
33 *infra*.

34 Another alternative would be to introduce a new term, such as “standard court costs” or “basic  
35 costs” to refer to traditional court costs. This approach would have advantages:

36 (1) It would eliminate any possibility of complications due to current usage. The term  
37 “standard court costs” is not used anywhere in the codes. The term “basic costs” is used in  
38 only one provision (Lab. Code § 2692), which could easily be amended to conform to the  
39 proposed usage.

40 (2) A term such as “standard court costs” or basic costs” would be more distinctive than  
41 “court costs,” and thus less likely to be confused with other terms, such as “costs.”

42 Is the Commission satisfied with the term “court costs” or would it prefer to use another term or  
43 take a different approach altogether?

44 **Code Civ. Proc. § 1021.02 (added). Nonstandard litigation expenses**

45 SEC. \_\_\_\_\_. Section 1021.02 is added to the Code of Civil Procedure, to read:  
46 1021.02. “Nonstandard litigation expenses” means litigation expenses other than  
47 the following:

1 (a) Attorney’s fees.

2 (b) Court costs, as defined in Section 1021.01.

3 **Comment.** Section 1021.02 introduces the term “nonstandard litigation expenses” to facilitate  
4 reference to litigation expenses that are neither attorney’s fees nor traditional court costs.  
5 Nonstandard litigation expenses include both of the following:

6 (1) Litigation expenses that the court cannot award as court costs, such as fees of  
7 experts not ordered by the court and not expressly authorized by law. See Section 1040.30  
8 (items not allowable as court costs unless expressly authorized).

9 (2) Items that the court is permitted but not required to award as court costs, to the  
10 extent that the court declines to award those items as court costs. See Section 1040.40  
11 (discretionary court costs).

12 Any litigation expense that the court is required to award pursuant to statute or other law is a  
13 court cost, except attorney’s fees. See Section 1040.20(*l*).

14 For payment of nonstandard litigation expenses, see Section 1021.03. For the components of a  
15 cost award, see Section 1040.10. For recovery of nonstandard litigation expenses as costs, see  
16 Section 1040.50.

17 ☞ **Staff Note.** Section 1021.02 is another provision intended to help reduce confusion over  
18 terminology relating to litigation expenses.

19 **Code Civ. Proc. § 1021.03 (added). Payment of nonstandard litigation expenses**

20 SEC. \_\_\_\_\_. Section 1021.03 is added to the Code of Civil Procedure, to read:

21 1021.03. (a) Except as otherwise provided by law, payment of nonstandard  
22 litigation expenses is left to the agreement, express or implied, of the parties.

23 (b) An agreement for payment of nonstandard litigation expenses may require  
24 payment of items that may not be awarded as court costs pursuant to Section  
25 1040.30.

26 **Comment.** Subdivision (a) of Section 1021.03 is added to expressly authorize parties to  
27 contractually allocate responsibility for nonstandard litigation expenses. It is drawn from Section  
28 1021 (payment of attorney’s fees). The reference to “law” includes statutes, constitutional  
29 provisions, and decisional law. See Gov’t Code §§ 810.6 (“enactment” includes, *inter alia*, statute  
30 or constitutional provision), 811 (“law” includes enactments and decisional law).

31 Subdivision (b) makes clear that an agreement for payment of nonstandard litigation expenses  
32 may extend to items that the court cannot award as court costs, such as fees of experts not ordered  
33 by the court and not expressly authorized by law.

34 See Section 1021.02 (nonstandard litigation expenses) & Comment. For the components of a  
35 cost award, see Section 1040.10. For recovery of nonstandard litigation expenses as costs, see  
36 Section 1040.50.

37 ☞ **Staff Note.** The State Bar Committee on Administration of Justice (“CAJ”) expressed concern  
38 that a previous draft of this provision could be interpreted to prohibit an award of expert witness  
39 fees and the other expenses listed in Section 1040.30. (Second Supplement to Memorandum  
40 2000-29, Exhibit pp. 17-18.) This draft is intended to preclude such an interpretation.

41 **Heading of Article 2 (commencing with Section 1021.4) (added)**

42 SEC. \_\_\_\_\_. An article heading is added immediately preceding Section 1021.4  
43 of the Code of Civil Procedure, to read:

1 Article 2. Awards in Specific Types of Actions or  
2 Under Specific Circumstances

3 ☞ **Staff Note.** Article 2 would consist of the following provisions, which are already in the code  
4 as indicated:

- 5 § 1021.4. Attorney's fees in action for damages arising from felony  
6 § 1021.5. Private attorney general  
7 § 1021.6. Attorney's fees on claim for implied indemnity  
8 § 1021.7. Attorney's fees in action for damages arising from performance of peace officer's  
9 duties  
10 § 1021.9. Attorney's fees in action for damages arising from trespass  
11 § 1022. Multiple actions where defendants could have been joined in one action  
12 § 1025. Tender and deposit to court in action for recovery of money only  
13 § 1026. Costs where trustee, guardian, conservator, or other representative prosecutes or  
14 defends action  
15 § 1028. Award against state  
16 § 1029. Award against public entity or public officer in official capacity  
17 § 1028.5. Carpenter-Katz Small Business Equal Access to Justice Act  
18 § 1029.5. Security for costs in action against architect, landscape architect, engineer, building  
19 designer, or land surveyor  
20 § 1029.6. Security for costs in action against medical professional  
21 § 1029.8. Treble damages and attorney's fees where unlicensed person harms another in  
22 providing goods or services without license  
23 § 1030. Security for costs and attorney's fees in action by nonresident plaintiff  
24 § 1031. Attorney's fees as cost in action for recovery of wages for labor performed  
25 § 1034.5. Expenses of effecting eviction  
26 § 1036. Reimbursement of attorney's fees, costs, and expenses in inverse condemnation  
27 proceeding  
28 § 1038. Attorney's fees and other defense costs in proceeding under Tort Claims Act or  
29 proceeding for indemnity or contribution

30 Section 1025 would be revised (see below); the remaining provisions would be left unchanged.

31 A handful of other provisions in this part of the code would be relocated to improve  
32 organizational clarity:

- 33 § 1023. Referee's fees. *Repealed and continued in proposed Section 645.1(a) without*  
34 *substantive change.*  
35 § 1024. Expenses due to postponement of trial. *Repealed and continued in proposed Section*  
36 *1040.90 without substantive change.*  
37 § 1027. Review other than by appeal. *Repealed and continued in proposed Section 1041.20*  
38 *without substantive change.*  
39 § 1032. Prevailing party. *Repealed. Subdivision (b) would be continued without change in*  
40 *proposed Section 1039.10. Subdivisions (a) and (c) would be superseded by proposed*  
41 *Sections 1039.20, 1039.30, and 1039.50.*  
42 § 1033. Small recovery. *Repealed and continued without substantive change in proposed*  
43 *Section 1040.80.*  
44 § 1033.5. Allowable costs. *Repealed and continued with revisions in proposed Sections*  
45 *1040.10-1040.50.*  
46 § 1034. Procedures for claiming prejudgment costs and costs on appeal. *Repealed and*  
47 *continued in proposed Section 1041.10 without substantive change.*

48 **Code Civ. Proc. § 1025 (amended). Tender and deposit in action for recovery of money only**

49 SEC. \_\_\_\_\_. Section 1025 of the Code of Civil Procedure is amended to read:

1 1025. ~~When, in~~ (a) Notwithstanding Section 1039.10, in an action for the  
2 recovery of money only, where the defendant alleges in his the answer that before  
3 the commencement of the action he the defendant tendered to the plaintiff the full  
4 amount to which he the plaintiff was entitled, and thereupon at the time of filing  
5 the answer the defendant deposits in court, for the plaintiff, the amount so  
6 tendered, the plaintiff cannot recover costs, but must pay costs to the defendant.

7 (b) A defendant may make a deposit with the clerk of court pursuant to this  
8 section without obtaining a court order authorizing the deposit.

9 **Comment.** To promote judicial economy, Section 1025 is amended to add subdivision (b),  
10 which clarifies that a court order is not necessary to deposit the tendered amount with the court.  
11 The provision is also amended to make technical changes.

12 ☞ **Staff Note.**

13 *Necessity of court order for deposit.* Mark Lomax alerted the Commission that questions  
14 frequently arise regarding whether a court order is necessary for a deposit pursuant to this section.  
15 He recommended that the provision be modified to clarify that a court order is not required.  
16 (Second Supplement to Memorandum 2000-29, pp. 1-2 & Exhibit pp. 1-2.) The Commission  
17 directed the staff to determine how to implement this suggestion. (Minutes (June 22-23, 2000), p.  
18 11.) Having reviewed not only Section 1025 but also other provisions relating to court deposits  
19 (Code Civ. Proc. §§ 386(c), 572-574), the staff recommends adding subdivision (b) to Section  
20 1025 as shown above. It does not appear necessary to revise any other provisions.

21 *Meaning of the term “costs.”* If a defendant satisfies the requirements of Section 1025, “the  
22 plaintiff cannot recover costs, but must pay costs to the defendant.” At the June meeting, Mr.  
23 Skaggs questioned whether the term “costs” includes attorney’s fees in this context. The answer is  
24 not entirely clear. In 1954, a court of appeal considered this point and concluded (arguably in  
25 dictum) that “costs” within the meaning of Section 1025 do not include attorney’s fees. *Cirimele*  
26 *v. Shinazy*, 124 Cal. App. 2d 46, 51-52, 268 P.2d 210 (1954). Since then, however, the  
27 Legislature has reorganized the provisions on costs and enacted Code of Civil Procedure Section  
28 1033.5, which provides that attorney’s fees (whether authorized by contract, statute, or law) are  
29 “allowable as costs under Section 1032.” Whether this definition of “costs” should now be  
30 imported into Section 1025 is debatable.

31 Notably, the provision governing contractual attorney’s fees (Civil Code Section 1717)  
32 provides in part:

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

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

41 On first impression, one might conclude that this language would be unnecessary if the reference  
42 to “costs” in Section 1025 includes attorney’s fees. Why bother to specify that a defendant who  
43 makes the necessary deposit is the prevailing party on the contract within the meaning of Section  
44 1717, if Section 1025 establishes that such a defendant is entitled to recover costs, including  
45 attorney’s fees authorized by contract, statute, or law? Inclusion of the language on deposits in  
46 Section 1717 could be construed to imply that the term “costs” in Section 1025 refers only to  
47 traditional court costs, not attorney’s fees.

1 But this reasoning is flawed. Even if the term “costs” in Section 1025 includes contractual  
2 attorney’s fees, the language on deposits in Section 1717 is not superfluous. At a minimum, it  
3 clarifies that a defendant who makes the necessary deposit may recover fees under the reciprocity  
4 principle of Section 1717. Thus, the quoted portion of Section 1717 does not help to resolve the  
5 proper interpretation of Section 1025.

6 The critical question for the Commission’s purposes, however, is not whether Section 1025  
7 *currently* extends to recovery of attorney’s fees, but whether the provision *should* govern the  
8 recovery of attorney’s fees. A further question is whether it makes sense to attempt to implement  
9 the optimal policy in this proposal.

10 Options include:

11 (1) Leaving the provision ambiguous, as in the above draft.

12 (2) Replacing the term “costs” with a reference to “court costs as defined in Section  
13 1021.01.” This would exclude attorney’s fees. See proposed Section 1021.01 (court costs) &  
14 Comment *supra*.

15 (3) Replacing the term “costs” with a reference to “costs recoverable pursuant to Section  
16 1039.10”, which include attorney’s fees authorized by contract, statute, or other law. See  
17 proposed Sections 1039.10 (recovery of costs by prevailing party) & 1040.10 (components of  
18 cost award) & Comments *infra*.

19 The staff recommends leaving the point ambiguous for purposes of the present proposal (Option  
20 #1), but perhaps clarifying the matter in a later reform. Attempting to address the issue now may  
21 unduly complicate what is already a rather ambitious proposal.

22 *Drafting issues.* The staff considered the possibility of combining the substance of Section  
23 1025 with the language on deposits in Civil Code Section 1717. We opted instead to keep these  
24 provisions separate, but move the language on deposits from Civil Code Section 1717 to proposed  
25 Section 1039.40 (prevailing party for awarding attorney’s fees or nonstandard litigation expenses  
26 pursuant to contract or pursuant to Civil Code Section 1717) *infra*. This helps show that the  
27 Commission is not changing the meaning of these provisions (except to clarify that a court order  
28 is not necessary to make a deposit pursuant to Section 1025).

29 We also considered moving the substance of Section 1025 into “Article 3. Prevailing Party”  
30 *infra*, because the effect of the provision is to make the defendant the prevailing party for  
31 purposes of recovering costs within the meaning of Section 1025. Instead of moving the  
32 provision, however, we inserted references to it in Comments to pertinent provisions of “Article  
33 3. Prevailing Party” *infra*. This should help alert interested parties to the special rule for tender  
34 and deposit, while avoiding the disruption of relocation.

35 The staff is still evaluating the merits of these drafting decisions and welcomes suggestions in  
36 this regard.

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

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

40 Article 3. Prevailing Party

41 **§ 1039.10. Recovery of costs by prevailing party**

42 1039.10. Except as otherwise expressly provided by statute, a prevailing party is  
43 entitled as a matter of right to recover costs in any action or proceeding.

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

45 For determination of the prevailing party, see Section 1039.30. See also Sections 1039.20  
46 (rebuttable presumptions for determining prevailing party for purposes of awarding costs),

1 1039.50 (determining prevailing party where pre-litigation contract specifies how to determine  
2 prevailing party). For awards of attorney’s fees and nonstandard litigation expenses pursuant to  
3 contract or pursuant to Civil Code Section 1717, see Section 1039.40.

4 For the amount of a cost award, see Sections 1040.10-1040.90. For cost procedures, see  
5 Sections 1041.10-1041.20. For authority to contractually allocate responsibility for attorney’s fees  
6 and nonstandard litigation expenses, see Sections 1021, 1021.02. For determination of costs and  
7 attorney’s fees in specific types of actions or under specific circumstances (e.g., tender and  
8 deposit in an action for recovery of money only), see Sections 1021.1-1038.

9 **§ 1039.20. Rebuttable presumptions for determining prevailing party for purposes of**  
10 **awarding costs**

11 1039.20. (a) For purposes of awarding costs, a party is rebuttably presumed to be  
12 the prevailing party under the following circumstances:

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

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

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

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

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

25 (6) Where an action is tried to the court, and the court’s decision states that a  
26 particular party prevailed, that party is the prevailing party.

27 (b) A party claiming costs shall specify, on a form approved by the Judicial  
28 Council, which of the presumptions in subdivision (a) applies, if any. A  
29 presumption pursuant to this section is rebuttable as provided in Section 1039.30.

30 **Comment.** Subdivision (a) of Section 1039.20 identifies and provides guidance in commonly  
31 occurring situations.

32 Under subdivision (a)(5), the defendant ordinarily is the prevailing party in the event of a  
33 voluntary dismissal, other than a dismissal pursuant to a settlement agreement. But such a  
34 dismissal can result from circumstances other than an impending loss on the merits. *Santisas v.*  
35 *Goodin*, 17 Cal. 4th 599, 621, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998); *International Indus.,*  
36 *Inc. v. Olen*, 21 Cal. 3d 218, 224, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978). For example, the  
37 defendant may have become insolvent, the claim may have become moot, or the plaintiff may  
38 have obtained relief through voluntary corrective action or insurance proceeds. Where the  
39 plaintiff moves to tax costs pursuant to Section 1039.30, the court must make a pragmatic  
40 assessment of the circumstances of the voluntary dismissal in determining the prevailing party.  
41 *Damian v. Tamondong*, 65 Cal. App. 4th 1115, 1129-30 & n.15, 77 Cal. Rptr. 2d 262 (1998).

42 Under subdivision (b), a party claiming costs must specify which rebuttable presumption  
43 applies to the claim, if any. If none of the presumptions in subdivision (a) applies, or if a party  
44 challenges the application of a presumption as provided in Section 1039.30(a), the prevailing  
45 party is to be determined in accordance with Section 1039.30(c)-(d).

46 For entitlement to costs, see Section 1039.10 (recovery of costs by prevailing party). For  
47 awards of attorney’s fees and nonstandard litigation expenses pursuant to contract or pursuant to

1 Civil Code Section 1717, see Section 1039.40. For determination of the prevailing party where a  
2 pre-litigation contract specifies how to determine the prevailing party, see Section 1039.50.

3 For the amount of a cost award, see Sections 1040.10-1040.90. For cost procedures, see  
4 Sections 1041.10-1041.20. For authority to contractually allocate responsibility for attorney’s fees  
5 and nonstandard litigation expenses, see Sections 1021, 1021.02. For determination of costs and  
6 attorney’s fees in specific types of actions or under specific circumstances (e.g., tender and  
7 deposit in an action for recovery of money only), see Sections 1021.1-1038.

8 ☞ **Staff Note.** To address concerns raised by CAJ (see Second Supplement to Memorandum  
9 2000-29, Exhibit pp. 5-20), the Commission directed the staff to attempt to provide greater clarity  
10 regarding the procedure for determining the prevailing party. (June Minutes, p. 11.) In addition to  
11 other steps to achieve that end, the staff made the following changes in proposed Section 1039.20:

12 (1) Revised the headline to refer to “*Rebuttable* Presumptions”, rather than simply  
13 “Presumptions”.

14 (2) Revised the first sentence of subdivision (a) to state that “a party is *rebuttably* presumed  
15 to be the prevailing party”, as opposed to “a party is presumed to be the prevailing party.”

16 (3) Added the second sentence of subdivision (b) (“A presumption pursuant to this section  
17 is rebuttable as provided in Section 1039.30.”).

18 Are these revisions acceptable to the Commission? Should any further revisions be made?

19 **§ 1039.30. Determination of prevailing party**

20 1039.30. (a) Where a party claims to be the prevailing party pursuant to a  
21 rebuttable presumption in Section 1039.20, the party from whom costs are sought  
22 may challenge that claim in a motion to tax costs. The motion to tax costs shall  
23 specify why the party claiming costs is not the prevailing party. The motion may  
24 be based on either or both of the following grounds:

25 (1) The presumption is inapplicable because the result was other than as alleged  
26 by the party seeking costs.

27 (2) Application of the presumption is otherwise inappropriate under the  
28 circumstances of the case.

29 (b) Except where none of the rebuttable presumptions in Section 1039.20  
30 applies, or where a party challenges the application of a rebuttable presumption in  
31 a motion to tax costs, the prevailing party for purposes of awarding costs shall be  
32 determined in accordance with Section 1039.20.

33 (c) Except as provided in subdivision (d), where none of the rebuttable  
34 presumptions in Section 1039.20 applies, or where a party challenges the  
35 application of a rebuttable presumption in a motion to tax costs, the court shall  
36 determine the prevailing party for purposes of awarding costs by comparing the  
37 relief awarded, or otherwise obtained, with the parties’ demands and the parties’  
38 litigation objectives as disclosed by the pleadings, points and authorities, opening  
39 statements, and other matters on record. The court shall make a pragmatic  
40 assessment of the extent to which each party has succeeded and failed in its  
41 contentions and objectives, and the circumstances of any voluntary dismissal, and  
42 shall determine the prevailing party accordingly. Where the result is mixed, the  
43 court may determine that there is no prevailing party.

1 (d) Where a case is voluntarily dismissed pursuant to a settlement agreement that  
2 specifies how attorney's fees or other litigation expenses are to be allocated, and a  
3 party thereafter seeks costs from another party, the court shall award or deny costs  
4 in accordance with the settlement agreement. To the extent, if any, that the  
5 settlement agreement fails to fully specify how attorney's fees and other litigation  
6 expenses are to be allocated, the prevailing party for purposes of awarding the  
7 unallocated costs shall be determined in accordance with Section 1039.20 and this  
8 section.

9 **Comment.** Section 1039.30 supersedes former Section 1032(a) and (c). Together, this section  
10 and Section 1039.40 (prevailing party for awarding attorney's fees or nonstandard litigation  
11 expenses pursuant to contract or pursuant to Civil Code Section 1717) establish a uniform  
12 standard for determining the prevailing party for purposes of awarding (1) costs other than  
13 attorney's fees, (2) attorney's fees for a contract claim covered by an attorney's fee clause, and  
14 (3) attorney's fees for a noncontract claim covered by an attorney's fee clause. See generally  
15 *Santisas v. Goodin*, 17 Cal. 4th 599, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998).

16 Under subdivision (b), if a party claims to be the prevailing party pursuant to a rebuttable  
17 presumption in Section 1039.20, and that claim is not challenged in a motion to tax costs, the  
18 party claiming costs shall be deemed the prevailing party for purposes of awarding costs. For  
19 entitlement to costs, see Section 1039.10 (recovery of costs by prevailing party).

20 The rule in subdivision (c) is drawn from *Hsu v. Abbara*, 9 Cal. 4th 863, 876, 891 P.2d 804, 39  
21 Cal. Rptr. 2d 824 (1995). See also *Santisas*, 17 Cal. 4th at 622; *Mustachio v. Great Western Bank*,  
22 48 Cal. App. 4th 1145, 1150, 56 Cal. Rptr. 2d 33 (1996). The standard is intended to give courts  
23 flexibility to reach a just result in a broad variety of contexts, including cases involving multiple  
24 claims, cross-claims, multiple parties, partial victories, or mixed motives for litigation tactics such  
25 as voluntary dismissal.

26 The court does not have complete discretion in determining the prevailing party under  
27 subdivision (c). Its determination must be based on a pragmatic assessment of the litigation  
28 contentions and objectives of the parties. In making this determination, the court should focus on  
29 substance rather than form. *Hsu*, 9 Cal. 4th at 877; *Foothill Properties v. Lyon/Copley Corona*  
30 *Ass'n.*, 46 Cal. App. 4th 1542, 1555, 54 Cal. Rptr. 2d 488 (1996); *Sears v. Baccaglio*, 60 Cal.  
31 App. 4th 1136, 1152-55, 70 Cal. Rptr. 2d 769 (1998). For example, a party who is denied direct  
32 relief on a claim may nonetheless be the prevailing party if "it is clear that the party has otherwise  
33 achieved its main litigation objective." *Hsu*, 9 Cal. 4th at 877; see also *Sears*, 60 Cal. App. 4th at  
34 1155 (net monetary recovery may not be best measure of who prevailed). The court may not  
35 consider factors such as recalcitrance in discovery or lack of cooperation in settlement  
36 negotiations. *Hsu*, 9 Cal. 4th at 877. It is not essential to show success on the central issue or  
37 recovery of the primary relief sought. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*,  
38 489 U.S. 782, 784, 790-91 (1989). Where the results of the litigation are entirely one-sided, the  
39 court has no discretion to deny costs and contractual attorney's fees. *Hsu*, 9 Cal. 4th at 875-76.

40 A voluntary dismissal presents special considerations. Under Section 1039.20 (a)(5), the  
41 defendant ordinarily is the prevailing party in the event of a voluntary dismissal, other than  
42 pursuant to a settlement agreement. But such a dismissal can result from circumstances other than  
43 an impending loss on the merits. *Santisas v. Goodin*, 17 Cal. 4th 599, 621, 951 P.2d 399, 71 Cal.  
44 Rptr. 2d 830 (1998); *International Indus., Inc. v. Olen*, 21 Cal. 3d 218, 224, 577 P.2d 1031, 145  
45 Cal. Rptr. 691 (1978). For example, the defendant may have become insolvent, the claim may  
46 have become moot, or the plaintiff may have obtained relief through voluntary corrective action  
47 or insurance proceeds. Where the plaintiff moves to tax costs pursuant to Section 1039.30, the  
48 court is to take circumstances such as these into account in determining the prevailing party.  
49 *Damian v. Tamondong*, 65 Cal. App. 4th 1115, 1129-30 & n.15, 77 Cal. Rptr. 2d 262 (1998).

50 Subdivision (d) makes clear that courts are to give effect to a settlement agreement that  
51 allocates responsibility for attorney's fees or other litigation expenses.

1 For determination of the prevailing party where a pre-litigation contract specifies how to  
2 determine the prevailing party, see Section 1039.50. For the amount of a cost award, see Sections  
3 1040.10-1040.90. For cost procedures, see Sections 1041.10-1041.20. For authority to  
4 contractually allocate responsibility for attorney’s fees and nonstandard litigation expenses, see  
5 Sections 1021, 1021.02. For determination of costs and attorney’s fees in specific types of actions  
6 or under specific circumstances (e.g., tender and deposit in an action for recovery of money only),  
7 see Sections 1021.1-1038.

8 ☞ **Staff Note.** To address concerns raised by CAJ, the Commission directed the staff to attempt  
9 to provide greater clarity regarding the procedure for determining the prevailing party,  
10 particularly regarding voluntary dismissals. (June Minutes, p. 11.) In addition to other steps to  
11 achieve that end, the staff made the following changes in proposed Section 1039.30:

12 (1) The last sentence of subdivision (a) is new.

13 (2) We deleted the sentence in subdivision (c) that stated: “The court may not consider  
14 factors unrelated to litigation success.” Similar language has been deleted from the Comment,  
15 but we retained the statement that “The court may not consider factors such as recalcitrance in  
16 discovery or lack of cooperation in settlement negotiations.”

17 (3) The second sentence of subdivision (c) has been revised to state that the court “shall  
18 make a pragmatic assessment of the extent to which each party has succeeded and failed in its  
19 contentions and objectives, *and the circumstances of any voluntary dismissal*, and shall  
20 determine the prevailing party accordingly.” (Emphasis added.) The new language is intended  
21 to help clarify that the court can take into account circumstances such as insolvency of the  
22 defendant in determining the prevailing party where a case has been voluntarily dismissed. A  
23 paragraph on voluntary dismissals has also been added to the Comment.

24 (4) Subdivision (d) was added to clarify how costs are to be awarded where there is a  
25 settlement agreement allocating responsibility for attorney’s fees and other litigation  
26 expenses.

27 (5) References to the “presumptions” in Section 1039.30 have been changed to refer to the  
28 “*rebuttable* presumptions” in Section 1039.30.

29 Are these revisions acceptable to the Commission? Should any further revisions be made?

30 **§ 1039.40. Prevailing party for award pursuant to contract or pursuant to Civil Code**  
31 **Section 1717**

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

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

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

42 (d) Notwithstanding subdivisions (a)-(c), where the defendant alleges in the  
43 answer that before the commencement of the action the defendant tendered to the  
44 plaintiff the full amount to which the plaintiff was entitled, and at the time of filing  
45 the answer the defendant deposits in court for the plaintiff, the amount so tendered,  
46 and the allegation is found to be true, then the defendant is deemed to be the

1 prevailing party for purposes of awarding reasonable attorney's fees or  
2 nonstandard litigation expenses pursuant to a contract or pursuant to Section 1717  
3 of the Civil Code. Where a deposit has been made pursuant to this section, the  
4 court shall, on the application of any party to the action, order the deposit to be  
5 invested in an insured, interest-bearing account. Interest on the amount shall be  
6 allocated to the parties in the same proportion as the original funds are allocated.

7 **Comment.** Subdivisions (a)-(c) of Section 1039.40 supersede material formerly in the second  
8 and third sentences of subdivision (b)(1) and the first paragraph of subdivision (b)(2) of Civil  
9 Code Section 1717. Together, this section and Section 1039.30 (determination of prevailing  
10 party) establish a uniform standard for determining the prevailing party for purposes of awarding  
11 (1) costs other than attorney's fees, (2) attorney's fees for a contract claim covered by an  
12 attorney's fee clause, and (3) attorney's fees for a noncontract claim covered by an attorney's fee  
13 clause. See generally *Santisas v. Goodin*, 17 Cal. 4th 599, 951 P.2d 399, 71 Cal. Rptr. 2d 830  
14 (1998).

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

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

27 Subdivision (d) continues without substantive change material that was formerly in the second  
28 and third paragraphs of Civil Code Section 1717(b)(2).

29 For determination of the prevailing party where a pre-litigation contract specifies how to  
30 determine the prevailing party, see Section 1039.50. For the amount of a cost award, see Sections  
31 1040.10-1040.90. For cost procedures, see Sections 1041.10-1041.20. For authority to  
32 contractually allocate responsibility for attorney's fees and nonstandard litigation expenses, see  
33 Sections 1021, 1021.02. For determination of costs and attorney's fees in specific types of actions  
34 or under specific circumstances (e.g., tender and deposit in an action for recovery of money only),  
35 see Sections 1021.1-1038.

36 ☞ **Staff Note.** The staff revised Section 1039.40 to add subdivision (d), relating to tender and  
37 deposit, which would continue the second and third paragraphs of Civil Code Section 1717(b)(2)  
38 without substantive change. Another alternative would be to move this material to Section 1025.  
39 For further discussion of this drafting decision, see the Staff Note on Section 1025 *supra*.

40 **§ 1039.50. Determining prevailing party where pre-litigation contract specifies how to**  
41 **determine prevailing party**

42 1039.50. Where parties entering into a contract agree in advance on how to  
43 determine the prevailing party in the event of litigation, their agreement is null and  
44 void to the extent that it is inconsistent with Sections 1039.30 or 1039.40.

45 **Comment.** Section 1039.50 limits the authority of contracting parties to agree in advance,  
46 before a dispute arises, on how to determine the prevailing party in the event of litigation  
47 pertaining to their contract. It is not applicable to a settlement agreement resolving litigation.  
48 Where a case is voluntarily dismissed pursuant to a settlement agreement that specifies how  
49 attorney's fees and other litigation expenses are to be allocated, and a party thereafter seeks costs

1 from another party, the court is to award or deny costs in accordance with the settlement  
2 agreement. See Section 1039.30(d).

3 For entitlement to costs, see Section 1039.10 (recovery of costs by prevailing party). For the  
4 amount of a cost award, see Sections 1040.10-1040.90. For cost procedures, see Sections  
5 1041.10-1041.20. For authority to contractually allocate responsibility for attorney's fees and  
6 nonstandard litigation expenses, see Sections 1021, 1021.02. For determination of costs and  
7 attorney's fees in specific types of actions or under specific circumstances (e.g., tender and  
8 deposit in an action for recovery of money only), see Sections 1021.1-1038.

9 ☞ **Staff Note.**

10 *Effect of provision.* The staff is still evaluating the merits and potential impact of proposed  
11 Section 1039.50. We encourage the Commissioners and other interested persons to give thought  
12 to this issue.

13 *Drafting issue.* CAJ expressed concern that Section 1039.50 could be construed to negate a  
14 provision in a settlement agreement providing that each party is to bear the party's own attorney's  
15 fees and other litigation expenses. (Second Supplement to Memorandum 2000-29, Exhibit p. 16.)  
16 The staff has not revised the statutory text to address this concern, but we have expanded the  
17 Comment to emphasize that Section 1039.50 only applies to pre-litigation contracts. Is this  
18 sufficient to make the point, or are further revisions necessary?

19 **Code Civ. Proc. §§ 1040.10-1040.90 (added). Amount and components of cost award**

20 SEC. \_\_\_\_\_. Article 4 (commencing with Section 1040.10) is added to Chapter 6  
21 of Title 14 of Part 2 of the Code of Civil Procedure, to read:

22 Article 4. Components and Amount of Cost Award

23 **§ 1040.10. Components of cost award**

24 1040.10. (a) Costs recoverable pursuant to Section 1039.10 include:

25 (1) Court costs as defined in Section 1021.01.

26 (2) Attorney's fees and nonstandard litigation expenses allowable pursuant to  
27 Section 1040.50.

28 (b) Nothing in this section implies or otherwise affects what constitutes "costs"  
29 within the meaning of any provision other than Section 1039.10.

30 **Comment.** Subdivision (a) of Section 1040.10 sets forth the components of a cost award. To  
31 facilitate reference to the different types of litigation expenses recoverable through the costs  
32 procedure, the provision differentiates between court costs, attorney's fees, and nonstandard  
33 litigation expenses.

34 Court costs are items traditionally awarded through the costs procedure, such as filing fees and  
35 ordinary witness fees. See Sections 1040.20 (mandatory court costs), 1040.30 (items not  
36 awardable as court costs unless expressly authorized), and 1040.40 (discretionary court costs).  
37 Court costs include any item that the court is required to award to the prevailing party pursuant to  
38 statute, except attorney's fees. See Section 1040.20(d).

39 Attorney's fees may be recovered through the costs procedure where a fee award is authorized  
40 by contract, statute, or other law. See Section 1040.50.

41 Nonstandard litigation expenses are litigation expenses other than attorney's fees and court  
42 costs. See Section 1021.01. Nonstandard litigation expenses may be recovered through the costs  
43 procedure where such an award is authorized by contract or by a combination of contract and the  
44 reciprocity requirement of Civil Code Section 1717. See Section 1040.50. Where the court is  
45 required to or exercises its discretion to award an item other than attorney's fees to the prevailing

1 party pursuant to statute or other law, the item is a court cost, not a nonstandard litigation  
2 expense. See Sections 1021.01 (court costs) & Comment, 1040.20(*l*) (mandatory court costs  
3 include any item that the court is required to award to the prevailing party pursuant to statute or  
4 other law as an incident to prevailing in the action at trial or on appeal, except attorney’s fees);  
5 1040.40 (discretionary court costs include any litigation expense other than attorney’s fees,  
6 mandatory court costs, and items prohibited by Section 1040.30, which is inapplicable to items  
7 expressly authorized by statute or other law).

8 Subdivision (b) limits the effect of this provision, in recognition that the term “costs” is not  
9 used consistently throughout the codes. See, e.g., Bus. & Prof. Code §§ 4381 (“plaintiff shall be  
10 awarded reasonable attorney’s fees together with the costs of suit”), 14438 (registrant shall  
11 recover “costs of suit, including a reasonable attorney’s fee”); Code Civ. Proc. § 1022  
12 (differentiating between costs and disbursements).

13 ☞ **Staff Note.** Code of Civil Procedure Section 1033.5 is a lengthy provision on the amount and  
14 components of a cost award. Consistent with the Commission’s policy favoring short, simple  
15 sections, the content of this provision would be divided into several shorter ones (proposed  
16 Sections 1040.20-1040.60). Section 1040.10 is an introductory provision to help integrate these  
17 new provisions.

18 **§ 1040.20. Mandatory court costs**

19 1040.20. The following items are allowable court costs:

20 (a) Filing, motion, and jury fees.

21 (b) Juror food and lodging while the jurors are kept together during trial and  
22 after the jury retires for deliberation.

23 (c) Taking, videotaping, and transcribing necessary depositions including an  
24 original and one copy of those taken by the claimant and one copy of depositions  
25 taken by the party against whom costs are allowed, and travel expenses to attend  
26 depositions.

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

29 (1) Where service is by a public officer, the fee authorized by law at the time of  
30 service.

31 (2) Where service is by a process server registered pursuant to Chapter 16  
32 (commencing with Section 22350) of Division 8 of the Business and Professions  
33 Code, the amount actually incurred in effecting service, including, but not limited  
34 to, a stakeout or other means employed in locating the person to be served, unless  
35 such charges are successfully challenged by a party to the action.

36 (3) Where service is by publication, the sum actually incurred in effecting  
37 service.

38 (4) Where service is by a means other than that set forth in paragraph (1), (2) or  
39 (3), the lesser of the sum actually incurred, or the amount allowed to a public  
40 officer in this state for such service, except that the court may allow the sum  
41 actually incurred in effecting service upon application pursuant to Section  
42 1040.40.

43 (e) Expenses of attachment including keeper’s fees.

44 (f) Premiums on necessary surety bonds.

- 1 (g) Ordinary witness fees pursuant to Section 68093 of the Government Code.
- 2 (h) Fees of expert witnesses ordered by the court.
- 3 (i) Transcripts of court proceedings ordered by the court.
- 4 (j) Court reporters fees as established by statute.
- 5 (k) Models and blowups of exhibits and photocopies of exhibits may be allowed
- 6 if they were reasonably helpful to aid the trier of fact.
- 7 (l) Any other item that the court is required to award to the prevailing party
- 8 pursuant to law as an incident to prevailing in the action at trial or on appeal,
- 9 except attorney's fees.

10 **Comment.** Subdivisions (a)-(k) of Section 1040.20 continue former Section 1033.5(a)(1)-(9)

11 and (a)(11)-(12) without substantive change.

12 Subdivision (l) continues former Section 1033.5(a)(13), with revisions to:

13 (1) Account for the possibility that payment of litigation expenses such as expert

14 witness fees may be required by equitable doctrines, as well as by statute, *David v. KGO-*

15 *T.V., Inc.*, 17 Cal. 4th 436, 456 n.4, 950 P.2d 567, 71 Cal. Rptr. 2d 451 (1998), The

16 reference to "law" includes statutes, constitutional provisions, and decisional law. See

17 Gov't Code §§ 810.6 ("enactment" includes, *inter alia*, statute or constitutional provision),

18 811 ("law" includes enactments and decisional law).

19 (2) Differentiate between attorney's fees and court costs. Attorney's fees are

20 recoverable as costs under the circumstances specified in Section 1040.50, but the term

21 "court costs" refers to traditional court costs and does not include attorney's fees. See

22 Section 1021.01 (court costs).

23 For the components of a cost award, see Section 1040.10. For recovery of costs by the

24 prevailing party, see Section 1039.10. For determination of the prevailing party, see Sections

25 1039.20-1039.50. For examples of limitations on recovery of costs, see Sections 1040.60

26 (requirements for cost award), 1040.70 (partial recovery), and 1040.80 (small recovery).

27 ☞ **Staff Note.** Instead of stating that the court shall award particular items as costs, Section

28 1033.5 states that certain items are "allowable." Other items are "not allowable" and still others

29 "may be allowed or denied in the court's discretion." This terminology is also used in other

30 provisions, but the staff is not quite sure why. It seems much more straightforward to say that the

31 court either shall, may, or may not award particular items as costs. The requirements that costs be

32 reasonably necessary to the conduct of the litigation and reasonable in amount could be accounted

33 for by referring to the provision that sets forth those requirements. For example, proposed Section

34 1040.20 could be rephrased to read:

35 1040.20. Subject to the limitations of Section 1040.60, the court shall award the

36 following items as court costs:

37 ....

38 Because the codes contain numerous references to "allowable" costs, the staff did not take this

39 approach in this draft. As compared to the other issues that the Commission is addressing in this

40 study, this point of terminology seems a relatively low priority, not worth tackling now given the

41 likelihood of resistance to change. Does the Commission agree?

42 **§ 1040.30. Items not allowable as court costs unless expressly authorized**

43 1040.30. Except where expressly authorized by statute or other law, the

44 following items are not allowable as court costs:

- 45 (a) Fees of experts not ordered by the court.
- 46 (b) Investigation expenses in preparing the case for trial.

- 1 (c) Postage, telephone, and photocopying charges, except for exhibits.
- 2 (d) Costs in investigation of jurors or in preparation for voir dire.
- 3 (e) Transcripts of court proceedings not ordered by the court.

4 **Comment.** Section 1040.30 continues former Section 1033.5(b) without substantive change.  
5 For authority to contractually allocate responsibility for the expenses listed in this provision, see  
6 Section 1021.03 (payment of nonstandard litigation expenses) & Comment; see also Section  
7 1021.02 Comment. For recovery of nonstandard litigation expenses as costs, see Section 1040.50.

8 ☞ **Staff Note.** CAJ expressed concern that a previous version of this provision could be  
9 interpreted to preclude parties from contractually allocating responsibility for expert witness fees  
10 and the other items listed in the provision. (Second Supplement to Memorandum 2000-29,  
11 Exhibit p. 16.) As currently drafted, the provision specifies that the items “are not allowable *as*  
12 *court costs*. (Emphasis added.) The Comment also refers to Section 1021.03, which states in part:  
13 “An agreement for payment of nonstandard litigation expenses may require payment of items that  
14 may not be awarded as court costs pursuant to Section 1040.30.” These revisions should be  
15 sufficient to address CAJ’s concerns on this point.

16 **§ 1040.40. Discretionary court costs**

17 1040.40. The court may allow the following items as court costs in its discretion:

- 18 (a) Items assessed on application pursuant to subdivision (d) of Section 1040.20.
- 19 (b) Litigation expenses other the following:
  - 20 (1) Items mentioned in Section 1040.20.
  - 21 (2) Items prohibited by Section 1040.30.
  - 22 (3) Attorney’s fees.

23 **Comment.** Section 1040.40 continues former Section 1033.5(c)(4) without substantive change.  
24 For the components of a cost award, see Section 1040.10. For recovery of costs by the prevailing  
25 party, see Section 1039.10. For examples of limitations on recovery of costs, see Sections  
26 1040.60 (requirements for cost award), 1040.70 (partial recovery), and 1040.80 (small recovery).

27 **§ 1040.50. Attorney’s fees and nonstandard litigation expenses as costs**

28 1040.50. (a) Attorney’s fees are allowable as costs under Section 1039.10 where  
29 recovery of attorney’s fees is authorized by any of the following:

- 30 (1) Contract.
- 31 (2) Statute.
- 32 (3) Other law.

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

- 39 (1) On noticed motion.
- 40 (2) At the time a statement of decision is rendered.
- 41 (3) On application supported by affidavit made concurrently with a claim for  
42 other costs.
- 43 (4) On entry of default judgment.

1 (c) Except as otherwise provided by stipulation of the parties, attorney’s fees  
2 allowable as costs pursuant to paragraph (1) or (3) of subdivision (a) shall be fixed  
3 either on a noticed motion or on entry of a default judgment.

4 (d) Attorney’s fees awarded pursuant to Section 1717 of the Civil Code are  
5 allowable as costs pursuant to paragraph (1) of subdivision (a).

6 (e) Nonstandard litigation expenses as defined in Section 1021.02 are allowable  
7 as costs under Section 1039.10 where recovery of nonstandard litigation expenses  
8 is authorized by contract or by a combination of contract and Section 1717 of the  
9 Civil Code. Except as otherwise provided by stipulation of the parties, nonstandard  
10 litigation expenses allowable as costs shall be fixed either on noticed motion or on  
11 entry of a default judgment

12 **Comment.** Subdivision (a) of Section 1040.50 continues former Section 1033.5(a)(10) without  
13 substantive change.

14 Subdivisions (b)-(d) continue former Section 1033.5(c)(5) without substantive change.

15 Subdivision (e) makes the cost procedure applicable to nonstandard litigation expenses, where  
16 recovery of such expenses is authorized by contract, or by a combination of contract and the  
17 reciprocity requirement of Civil Code Section 1717. Previously, some items (e.g., fees of experts  
18 not ordered by the court and not expressly authorized by law) were recoverable only if pleaded  
19 and proved at trial. *First Nationwide Bank v. Mountain Cascade, Inc.*, 77 Cal. App. 4th 871, 92  
20 Cal. Rptr. 2d 145 (2000); *Steiny & Co., Inc. v. California Electric Supply Co., Inc.*, 79 Cal. App.  
21 4th 285, 293-94, 93 Cal. Rptr. 2d 920 (2000); *Robert L. Cloud & Associates v. Mikesell*, 69 Cal.  
22 App. 4th 1141, 1153-54, 82 Cal. Rptr. 2d 143 (1999); *Ripley v. Pappadopoulos*, 23 Cal. App. 4th  
23 1616, 28 Cal. Rptr. 2d 878 (1994).

24 Where the court is required to or exercises its discretion to award an item other than attorney’s  
25 fees to the prevailing party pursuant to statute or other law, the item is a court cost, not a  
26 nonstandard litigation expense. See Sections 1021.01 (court costs) & Comment, 1040.20(l)  
27 (mandatory court costs include any item that the court is required to award to the prevailing party  
28 pursuant to statute or other law as an incident to prevailing in the action at trial or on appeal,  
29 except attorney’s fees); 1040.40 (discretionary court costs include any litigation expense other  
30 than attorney’s fees, mandatory court costs, and items prohibited by Section 1040.30, which is  
31 inapplicable to items authorized by statute or other law).

32 ☞ **Staff Note.**

33 *Extension of cost procedure to nonstandard litigation expenses.* CAJ supports the proposal to  
34 “nullify” cases such as *Ripley v. Pappadopoulos*, 23 Cal. App. 4th 1616, 28 Cal. Rptr. 2d 878  
35 (1994), which holds that items disallowed as costs in Code of Civil Procedure Section 1033.5 can  
36 be recovered only if specially pleaded and proved at trial. Second Supplement to Memorandum  
37 2000-29, Exhibit p. 18. CAJ explains that “requiring that items of litigation expense be specially  
38 pleaded and proved at trial is inefficient.” (*Id.*) “These cases also lay a trap for the unwary, since  
39 most attorneys probably believe that such expenses are part of the “attorney’s fees” which may be  
40 awarded on motion after trial.” (*Id.*)

41 A recent case takes a different view:

42 The reasons for this pleading and proof requirement are readily apparent. As our  
43 Supreme Court observed in *Davis*, the proper interpretation of a contractual agreement for  
44 shifting litigation costs is a question of fact that turns on the intentions of the contracting  
45 parties.” [17 Cal. 4th at 446, n.5.] Where the contractual provision is ambiguous, extrinsic  
46 evidence may be warranted. Adverse parties must be put on notice through the pleadings  
47 that this contractual theory will be asserted, and the issue must be submitted to the trier of  
48 fact for resolution pursuant to a prejudgment evidentiary proceeding, not a summary post-  
49 judgment motion.

1 First Nationwide Bank v. Mountain Cascade, Inc., 77 Cal. App. 4th 877, 879, 92 Cal. Rptr. 2d  
2 145 (2000).

3 This is an interesting argument, raising issues relating to the right to a jury trial. Cal. Const. art.  
4 I, § 16; Code Civ. Proc. § 592. To what extent does the California Constitution require that issues  
5 relating to contractual fee awards be presented to a jury? Suppose, for instance, that entitlement to  
6 an award turns on whether the parties to a contract executed an addendum with a fee provision. If  
7 there is a dispute on this factual issue, should that dispute be resolved by the court or by the jury?  
8 Should it matter whether the prevailing party seeks attorney's fees, nonstandard litigation  
9 expenses, or both?

10 The Supreme Court decision that the *Mountain Cascade* court refers to (*Davis v. KGO-TV.,*  
11 *Inc.*, 17 Cal. 4th 436, 950 P.2d 567, 17 Cal. Rptr. 2d 452 (1998)) does not shed much light on  
12 these points. It holds that "fees of experts not ordered by the court are not an allowable item of  
13 costs in a FEHA action." 17 Cal. 4th at 446. In a footnote, the Supreme Court explains that its  
14 "present analysis, which involves statutory construction, may not be dispositive in a matter  
15 involving the effect of a contractual agreement for shifting litigation costs, which turns on the  
16 intentions of the contracting parties." *Id.* at 446 n. 5. The court does not engage in further analysis  
17 of the manner of proving entitlement to expert witness fees pursuant to contract.

18 Other authorities are more instructive. In general, questions of law are to be resolved by the  
19 court (Evid. Code § 310) and questions of fact are to be resolved by the jury in a case in which  
20 there is a right to a jury trial (Evid. Code § 312). There is much law and considerable uncertainty  
21 regarding the appropriate treatment of mixed questions of fact and law. See, e.g., 20th Century  
22 Ins. Co. v. Garamendi, 8 Cal. 4th 216, 271, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (1994); Windsor  
23 Square Homeowners Ass'n v. Citation Homes, 54 Cal. App. 4th 547, 62 Cal. Rptr. 2d 818 (1997).  
24 A case on this point is pending before the California Supreme Court. See *Cornette v. Department*  
25 *of Transportation*, 95 Cal. Rptr. 2d 733 (2000), *review granted and opinion superseded*, 4 P.3d  
26 927, 98 Cal. Rptr. 2d 670 (July 19, 2000) (right to jury trial on design immunity defense).  
27 Another recent decision involved a fee provision in a contract with an arbitration clause. The  
28 court concluded that determining who was the prevailing party for purposes of awarding fees "is a  
29 mixed question of law and fact, and we simply have no power to second-guess the arbitrator's  
30 decision on that issue." *Pierotti v. Torian*, 81 Cal. App. 4th 17, 96 Cal. Rptr. 2d 553, 559 (2000).  
31 The court did not comment on how such a question is to be handled in a jury case.

32 The Legislature has, however, specifically considered the manner of proving attorney's fees. In  
33 the past, it was unclear whether a claim for contractual attorney's fees had to be pleaded and  
34 proved to the jury at trial, or could be made in a post-trial motion to be resolved by the court. In  
35 1990, the Legislature eliminated this uncertainty by clarifying that contractual attorney's fees are  
36 recoverable as costs to be awarded on noticed motion. Code Civ. Proc. § 1033.5(a)(10)(A), (c)(5);  
37 see *Sears v. Baccaglio*, 60 Cal. App. 4th 1136, 1150, 70 Cal. Rptr. 2d 769 (1998); *Bankes v.*  
38 *Lucas*, 9 Cal. App. 4th 365, 370-71, 11 Cal. Rptr. 2d 723 (1992). To the staff's knowledge, this  
39 approach has not been challenged as a violation of the right to a jury trial, perhaps because factual  
40 issues relating to contractual attorney's fees rarely arise and generally relate not to entitlement but  
41 to the amount of fees (a matter within the court's expertise and discretion, not strictly dependent  
42 on factual determinations). Even with regard to attorney's fees, however, some jurisdictions  
43 require that they be pleaded and proved to the jury at trial. See, e.g., *City of Garland v. Dallas*  
44 *Morning News*, 43 Tex. Sup. Ct. J. 303, 367, 22 S.W.2d 351 (2000). The court's point in the  
45 quote from *Mountain Cascade* seems to be that factual issues are more likely to arise with regard  
46 to nonstandard litigation expenses than with regard to attorney's fees, so it makes sense to require  
47 that claims for nonstandard litigation expenses be pleaded and proved rather than resolved on a  
48 post-trial motion.

49 The court does not say, however, that applying the cost procedure to recovery of nonstandard  
50 litigation expenses would violate the right to a jury trial. The staff is aware of no clear authority  
51 on this point and does not expect to be able to find any. As with attorney's fees, in many cases  
52 there might not be any factual dispute relating to recovery of nonstandard litigation expenses, or  
53 such a factual issue might be deeply intertwined with legal issues and appropriate for resolution  
54 by the court. If a significant, purely factual issue were to arise in awarding nonstandard litigation

1 expenses on a post-trial motion, perhaps the court could reconvene the jury or convene a new jury  
2 to consider the issue. This may seem odd and inefficient, but there does not seem to be anything  
3 precluding such an approach and it may be more inefficient to require the parties in each case to  
4 plead and prove nonstandard litigation expenses at trial, when in many cases the jury may never  
5 reach that issue at all.

6 Thus, the staff is inclined to proceed with the concept of extending the cost procedure to  
7 nonstandard litigation expenses, as CAJ recommends. Does the Commission agree? Does anyone  
8 have comments on this point?

9 *Procedural complexity.* Code of Civil Procedure Section 1033.5 establishes different  
10 procedures for attorney's fees authorized by statute and attorney's fees authorized by other law or  
11 by contract. Attorney's fees authorized by statute may be awarded (1) on noticed motion, (2) at  
12 the time a statement of decision is rendered, (3) on application supported by affidavit made  
13 concurrently with a claim for other costs, and (4) on entry of default judgment. Attorney's fees  
14 authorized by other law or by contract may be awarded only on noticed motion or on entry of  
15 default judgment. Proposed Section 1040.50 would continue this approach.

16 The staff is not sure whether this complexity is necessary. Rules 870 and 870.2 of the  
17 California Rules of Court (Exhibit pp. 1-2) only address recovery of attorney's fees and other  
18 costs on noticed motion or on entry of default judgment. Perhaps these methods should be the  
19 only options for recovery of attorney's fees authorized by statute, just as they are the only options  
20 for recovery of attorney's fees authorized by other law or by contract. The staff is investigating  
21 the pros and cons of this approach. Does anyone have input on the idea?

22 (Depending on how these procedural points are resolved, it may be possible to drastically  
23 simplify the drafting of proposed Section 1040.50. It may also make sense to divide the  
24 substantive material into two provisions, one on attorney's fees and one on nonstandard litigation  
25 expenses.)

## 26 § 1040.60. Requirements for cost award

27 1040.60. A costs award shall satisfy all of the following conditions:

28 (a) Each item awarded shall be reasonably necessary to the conduct of the  
29 litigation rather than merely convenient or beneficial to its preparation.

30 (b) Each item awarded shall be reasonable in amount, including, without  
31 limitation, any attorney's fees and nonstandard litigation expenses awarded  
32 pursuant to Section 1040.50.

33 (c) Items shall be awarded if incurred, regardless of whether payment has been  
34 made.

35 **Comment.** Subdivision (a) of Section 1040.60 continues former Section 1033.5(c)(2) without  
36 substantive change.

37 Subdivision (b) continues former Section 1033.5(c)(3), with revisions to make explicit that  
38 attorney's fees and nonstandard litigation expenses, as well as other costs, must be reasonable in  
39 amount.

40 Subdivision (c) continues former Section 1033.5(c)(1) without substantive change. [The  
41 provision clarifies that a party may recover for an item even though the party has not yet paid for  
42 the item. It does not require that all items must be incurred by a party to be recoverable. For  
43 circumstances under which a party may recover for items that were not incurred by the party, see,  
44 e.g., Civil Code Section 1717(b) (recovery of attorney's fees and nonstandard litigation expenses  
45 under Civil Code Section 1717 where prevailing party's attorney did not charge prevailing market  
46 rate).]

47  **Staff Note.** The portion of the Comment in brackets is new. It is intended to help illustrate  
48 that Section 1040.60(c) is not inconsistent with the principle of permitting recovery of attorney's

1 fees under Civil Code Section 1717 where a party’s attorney does not charge a traditional fee.  
2 Does it achieve this goal? Should it be deleted or modified? Should other revisions be made?

3 **§ 1040.70. Partial recovery**

4 1040.70. Where the prevailing party obtains only partial success, the court may  
5 adjust the amount of the cost award to reflect the degree of litigation success,  
6 instead of awarding the full amount of costs incurred.

7 **Comment.** Section 1040.70 is added to address the problem identified in *Michell v. Olick*, 49  
8 Cal. App. 4th 1194, 57 Cal. Rptr. 2d 227 (1996). Where the prevailing party obtains only a partial  
9 victory, it may be inequitable to award the full amount of costs and fees incurred. *Id.* at 1200-01.

10 ☞ **Staff Note.** If a party prevails on the central claim (or claims) in a case, but loses on other  
11 claims or otherwise fails to obtain all of the relief sought, should that party’s recovery of costs be  
12 the same as if the party had achieved total victory? In *Michell v. Olick*, 49 Cal. App. 4th 1194, 57  
13 Cal. Rptr. 2d 227 (1996), the court concluded that under Code of Civil Procedure Section 1032  
14 the prevailing party is entitled to a full costs award, despite achieving only a partial victory. The  
15 court reached this result reluctantly, and pleaded for legislative reform:

16 We ... are troubled by the fact that *Michell’s* cross-complaint was a shotgun blast; she sued  
17 for numerous unrelated grievances — legal malpractice, breach of the fee-splitting agreement,  
18 and personal injury at the vending machine. She prevailed on only one. To permit *Michell* to  
19 recover even those costs which relate solely to causes of action upon which she did not  
20 prevail would unfairly reward her for joining patently unmeritorious claims (assault and  
21 battery at the vending machine) with a single meritorious (legal malpractice) claim.

22 Nevertheless, we are compelled to apply the statutory directive. ....

23 We leave it to the Legislature to set limits on allowable costs, perhaps by imposing a  
24 requirement that the costs be related to the theories or causes of action upon which the party  
25 prevailed. We reiterate our concern that under the existing statute a prevailing plaintiff may  
26 be unjustly rewarded for joining patently unmeritorious — and expensive to prove — claims  
27 with a single meritorious claim.

28 *Id.* at 1200-01. Section 1040.70 is intended to help address the court’s concerns.

29 CAJ writes, however, that the provision “is extremely dangerous, since it provides the court  
30 with no guidance with respect to when and why cost awards, *and particularly attorneys’ fee*  
31 *awards*, may be reduced.” (Second Supplement to Memorandum 2000-29, Exhibit p. 19  
32 (emphasis in original).) Thus,

33 the provision could be interpreted to nullify existing case law, such as *Stokus v. Marsh*, 217  
34 Cal. App. 3d 647 (1990), which holds that a trial court’s responsibility in ruling on a motion  
35 for an award of attorneys’ fees in a contract case is “simply to determine whether the fees  
36 sought ... are reasonable in light of the work required to be done,” and *Reynolds Metals Co.*  
37 *v. Alperson*, 25 Cal. 3d 124 (1979), which holds that , where a litigant incurs fees for an issue  
38 which is common to both a cause of action covered by an attorneys’ fee clause and one which  
39 is not, the fees may not be reduced.

40 The statute might also be construed to give courts the discretion to reduce an award of fees  
41 or costs simply by comparing the judgment to the causes of action pled, and reducing the  
42 award proportionately for each cause of action not sustained in the judgment, even though the  
43 causes of action upon which relief was not granted were based on the same set of facts,  
44 asserted alternative bases for relief, or were based upon facts which were believed to be true,  
45 but turned out not to be supported by the evidence.

46 (*Id.*)

47 Contrary to CAJ’s assertion, Section 1040.70 *does* provide some guidance on when a cost  
48 award may be reduced: It may only be reduced “to reflect the degree of litigation success.”

1 Nonetheless, the staff wonders whether it is worth pursuing this issue as part of this reform.  
2 Should we drop the effort, delete Section 1040.70, and perhaps address this point in a future  
3 proposal? Or should we attempt to modify Section 1040.70 to address CAJ's concerns, as by  
4 pointing out in the Comment that the provision is not intended to overturn cases such as *Stokus v.*  
5 *Marsh*, 217 Cal. App. 3d 647, 266 Cal. Rptr. 90 (1990), and *Reynolds Metals Co. v. Alperson*, 25  
6 Cal. 3d 124, 599 P.2d 83, 158 Cal. Rptr. 1 (1979)? The staff does not feel strongly about how to  
7 proceed.

8 **§ 1040.80. Small recovery**

9 1040.80. (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) Where the party could have brought the action in the small claims division  
17 but did not do so, the court may, in its discretion, allow or deny costs to the  
18 prevailing party, or may allow costs in part in any amount as it deems proper.

19 (2) Where 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  **Staff Note.** The staff has ideas to simplify and improve the drafting of this provision, but will  
30 present them in a later draft.

31 **§ 1040.90. Expenses due to postponement of trial**

32 1040.90. Where an application is made to the court or referee to postpone a trial,  
33 payment of the expenses occasioned by the postponement may be imposed, in the  
34 discretion of the court or referee, as a condition of granting the postponement.

35 **Comment.** Section 1040.90 continues former Section 1024 without substantive change.

36 **Code Civ. Proc. §§ 1041.10-1041.20 (added). Procedures for prejudgment costs and costs on**  
37 **appeal or other review**

38 SEC. \_\_\_\_\_. Article 5 (commencing with Section 1041.10) is added to Chapter 6  
39 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 and  
5 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.

CIVIL CODE

17 **Civ. Code § 1717 (repealed). Award of attorney's fees in contract action**

18 SEC. \_\_\_\_\_. Section 1717 of the Civil Code is repealed.

19 ~~1717. (a) In any action on a contract, where the contract specifically provides~~  
20 ~~that attorney's fees and costs, which are incurred to enforce that contract, shall be~~  
21 ~~awarded either to one of the parties or to the prevailing party, then the party who is~~  
22 ~~determined to be the party prevailing on the contract, whether he or she is the party~~  
23 ~~specified in the contract or not, shall be entitled to reasonable attorney's fees in~~  
24 ~~addition to other costs.~~

25 ~~Where a contract provides for attorney's fees, as set forth above, that provision~~  
26 ~~shall be construed as applying to the entire contract, unless each party was~~  
27 ~~represented by counsel in the negotiation and execution of the contract, and the~~  
28 ~~fact of that representation is specified in the contract.~~

29 ~~Reasonable attorney's fees shall be fixed by the court, and shall be an element of~~  
30 ~~the costs of suit.~~

31 ~~Attorney's fees provided for by this section shall not be subject to waiver by the~~  
32 ~~parties to any contract which is entered into after the effective date of this section.~~  
33 ~~Any provision in any such contract which provides for a waiver of attorney's fees~~  
34 ~~is void.~~

35 ~~(b)(1) The court, upon notice and motion by a party, shall determine who is the~~  
36 ~~party prevailing on the contract for purposes of this section, whether or not the suit~~  
37 ~~proceeds to final judgment. Except as provided in paragraph (2), the party~~  
38 ~~prevailing on the contract shall be the party who recovered a greater relief in the~~

1 ~~action on the contract. The court may also determine that there is no party~~  
2 ~~prevailing on the contract for purposes of this section.~~

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

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

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

15 ~~(c) In an action which seeks relief in addition to that based on a contract, if the~~  
16 ~~party prevailing on the contract has damages awarded against it on causes of~~  
17 ~~action not on the contract, the amounts awarded to the party prevailing on the~~  
18 ~~contract under this section shall be deducted from any damages awarded in favor~~  
19 ~~of the party who did not prevail on the contract. If the amount awarded under this~~  
20 ~~section exceeds the amount of damages awarded the party not prevailing on the~~  
21 ~~contract, the net amount shall be awarded the party prevailing on the contract and~~  
22 ~~judgment may be entered in favor of the party prevailing on the contract for that~~  
23 ~~net amount.~~

24 **Comment.** Former Section 1717 is superseded by a new Section 1717 with revisions to  
25 incorporate the prevailing party standard of Code of Civil Procedure Section 1039.40, expressly  
26 encompass nonstandard litigation expenses and address nonstandard fee arrangements, extend the  
27 principle of reciprocity to noncontract causes of action arising from or relating to a contract, and  
28 improve organizational clarity.

29 The material in the first paragraph of former Section 1717(a) is continued in new Section  
30 1717(a), with revisions to expressly encompass nonstandard litigation expenses and make a  
31 unilateral attorney's fee clause reciprocal in both contract and noncontract actions covered by the  
32 clause.

33 The material in the second paragraph of former Section 1717(a) is continued in Section 1717(d)  
34 with revisions to expressly encompass nonstandard litigation expenses. The material in the third  
35 paragraph of former Section 1717(a) is continued in the first sentence of Section 1717(b), with  
36 revisions to expressly encompass nonstandard litigation expenses, and to clarify that litigants may  
37 allocate responsibility for attorney's fees and nonstandard litigation expenses in a settlement  
38 agreement. The material in the fourth paragraph of former Section 1717(a) is continued in Section  
39 1717(e), with revisions to expressly encompass nonstandard litigation expenses.

40 The material in former Section 1717(b)(1) and the material in the first paragraph of former  
41 Section 1717(b)(2), pertaining to determination of the party prevailing on the contract, is  
42 superseded by Section 1717(c).

43 The material in the second and third paragraphs of former Section 1717(b)(2) pertaining to  
44 tender and deposit is continued without substantive change in Code of Civil Procedure Section  
45 1039.40(d).

46 Former Section 1717(c) is continued in Section 1717(f), with revisions to apply where  
47 attorney's fees or nonstandard litigation expenses are awarded on a noncontract cause of action,

1 as well as where attorney's fees or nonstandard litigation expenses are awarded in an action on a  
2 contract.

3 **Civ. Code § 1717 (added). Award of attorney's fees and nonstandard litigation expenses**  
4 **pursuant to contract**

5 SEC. \_\_\_\_\_. Section 1717 is added to the Code of Civil Procedure, to read:

6 1717. (a) If a fee provision in a contract specifically provides that attorney's fees  
7 and nonstandard litigation expenses (as defined in Section 1021.02 of the Code of  
8 Civil Procedure), or either item, incurred in enforcement of the contract or in  
9 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 prevailing party on the causes of action covered by the fee  
12 provision is entitled to the item covered by the fee provision, in addition to other  
13 costs, regardless of whether that party is named in the fee provision.

14 (b) Reasonable attorney's fees and nonstandard litigation expenses shall be fixed  
15 by the court, or by a settlement agreement between the parties to an action, and are  
16 an element of the costs of suit. Where a party is represented by an attorney,  
17 reasonable attorney's fees shall be deemed incurred for purposes of this section  
18 even if the prevailing party's attorney did not charge the prevailing party a fee for  
19 the services provided, charged only a nominal fee, served as in-house counsel or  
20 on a retainer, or otherwise provided the services without charging the prevailing  
21 market rate. In those circumstances, the amount of the fee award shall be based on  
22 the legal services provided, not on whether or how much the prevailing party was  
23 charged for those services. A pro se attorney or other pro se prevailing party may  
24 recover nonstandard litigation expenses where the requirements of this section are  
25 satisfied.

26 (c) The prevailing party for purposes of this section shall be determined in  
27 accordance with Section 1039.40 of the Code of Civil Procedure.

28 (d) Where a contract provides for attorney's fees or nonstandard litigation  
29 expenses, or both, as provided in subdivision (a), the fee provision shall be  
30 construed as applying to the entire contract, unless each party was represented by  
31 counsel in the negotiation and execution of the contract, and the fact of the  
32 representation is specified in the contract.

33 (e) Attorney's fees and nonstandard litigation expenses awardable pursuant to  
34 this section are not subject to waiver by the parties to a contract entered into after  
35 January 1, 1969. Any provision of a contract entered into after January 1, 1969,  
36 that provides for a waiver of attorney's fees or nonstandard litigation expenses is  
37 void.

38 (f) In an action that seeks relief in addition to that based on a cause of action  
39 covered by a fee provision described in subdivision (a), if the party prevailing on  
40 the cause of action covered by the fee provision has damages awarded against it on  
41 causes of action not covered by the fee provision, the amounts awarded to the  
42 party prevailing on the cause of action covered by the fee provision shall be  
43 deducted from any damages awarded in favor of the party who did not prevail on

1 that cause of action. If the amount awarded under this section exceeds the amount  
2 of damages awarded to the party not prevailing on the cause of action covered by  
3 the fee provision, the net amount shall be awarded to the party prevailing on the  
4 cause of action covered by the provision, and judgment may be entered in favor of  
5 that party for that net amount.

6 **Comment.** Section 1717 continues former Section 1717, with revisions to incorporate the  
7 prevailing party standard of Code of Civil Procedure Section 1039.40, expressly encompass  
8 nonstandard litigation expenses and address nonstandard fee arrangements, extend the principle  
9 of reciprocity to noncontract causes of action arising from or relating to a contract, and improve  
10 organizational clarity.

11 Subdivision (a) continues the material in the first paragraph of former Section 1717(a), with  
12 revisions to make a unilateral attorney's fee clause reciprocal in both contract and noncontract  
13 actions covered by the clause. Formerly, courts applied the reciprocity requirement only to fees  
14 for a contract claim, not to fees for a noncontract claim. See *Moallem v. Coldwell Banker*  
15 *Commercial Group, Inc.*, 25 Cal. App. 4th 1827, 1830-32, 31 Cal. Rptr. 2d 253 (1994).

16 The first sentence of subdivision (b) continues the material in the third paragraph of former  
17 Section 1717(a), with revisions to expressly encompass nonstandard litigation expenses, and to  
18 clarify that litigants may allocate responsibility for attorney's fees and nonstandard litigation  
19 expenses in a settlement agreement.

20 The second sentence of subdivision (b) codifies *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th  
21 1084, 997 P.2d 511, 95 Cal. Rptr. 2d 198 (2000) (Section 1717 applies where party is represented  
22 by in-house counsel), and *Beverly Hills Properties v. Marcolino*, 221 Cal. App. 3d Supp. 7, 270  
23 Cal. Rptr. 605 (1990) (Section 1717 applies where party is represented on pro bono basis), and  
24 extends the principle of those cases to other situations where the prevailing party's attorney does  
25 not charge the prevailing market rate for legal services.

26 The third sentence of subdivision (b) directs the court to focus on the legal services provided,  
27 not on the prevailing party's fee arrangement, in determining the amount of an award in those  
28 situations. In general, the amount should be calculated by the lodestar method (multiplying the  
29 time reasonably spent on the legal services by the prevailing market rate for comparable legal  
30 services, taking into account factors specific to the case). *Serrano v. Priest*, 20 Cal. 3d 25, 48, 569  
31 P.2d 1303, 141 Cal. Rptr. 315 (1977). For factors that the court may consider, see *id.* at 49; see  
32 also *PLCM*, 22 Cal. 4th at \_\_\_, 95 Cal. Rptr. 2d at 206-07; *Lealao v. Beneficial California, Inc.*,  
33 82 Cal. App. 4th 615, 98 Cal. Rptr. 2d 388 (2000); Rule 4-200 of the State Bar Rules of  
34 Professional Conduct. In an exceptional case, the court may use another method to determine the  
35 amount of a fee award. *PLCM*, 22 Cal. 4th at \_\_\_, 95 Cal. Rptr. 2d at 208.

36 The fourth sentence of subdivision (b) permits a pro se litigant to recover nonstandard litigation  
37 expenses pursuant to this section, but does not address recovery of attorney's fees by a pro se  
38 attorney or other pro se prevailing party. It neither codifies nor overturns *Trope v. Katz*, 11 Cal.  
39 4th 272, 902 P.2d 259, 45 Cal. Rptr. 2d 241 (1995), and is not intended to affect the development  
40 of the law on recovery of attorney's fees by a pro se attorney under the statute.

41 Subdivision (c) supersedes former Section 1717(b)(1) and the material in the first paragraph of  
42 former Section 1717(b)(2), pertaining to determination of the party prevailing on the contract.  
43 The standard for determining the prevailing party is now the same for awarding statutory costs  
44 other than attorney's fees, contractual attorney's fees on a contract claim, and contractual  
45 attorney's fees on a noncontract claim. See Code Civ. Proc. §§ 1039.20-1039.40. Previously,  
46 different standards were used in each of these situations. See, e.g., *Santisas v. Goodin*, 17 Cal. 4th  
47 599, 621, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998); *Sears v. Baccaglio*, 60 Cal. App. 4th 1136,  
48 70 Cal. Rptr. 2d 769 (1998); *McLarand, Vasquez & Partners, Inc. v. Downey Svgs. & Loan*  
49 *Ass'n*, 231 Cal. App. 3d 1450, 282 Cal. Rptr. 828 (1991); *Nasser v. Superior Court*, 156 Cal.  
50 App. 3d 52, 202 Cal. Rptr. 552 (1984). For example, in *Santisas* the plaintiffs voluntarily  
51 dismissed both tort and contract claims. The Supreme Court determined that (1) the defendants  
52 were the prevailing party for purposes of awarding statutory costs other than attorney's fees, (2)

1 there was no prevailing party for purposes of awarding contractual attorney’s fees on the contract  
2 claim, and (3) remand was necessary to determine the prevailing party for purposes of awarding  
3 contractual attorney’s fees on the tort claims.

4 Subdivision (d) continues the material in the second paragraph former Section 1717(a), with  
5 revisions to expressly encompass nonstandard litigation expenses.

6 Subdivision (e) continues the material in the fourth paragraph of former Section 1717(a), with  
7 revisions to expressly encompass nonstandard litigation expenses.

8 Subdivision (f) continues former Section 1717(c), with revisions to apply where attorney’s fees  
9 or nonstandard litigation expenses are awarded on a noncontract cause of action, as well as where  
10 attorney’s fees or nonstandard litigation expenses are awarded in an action on a contract.

11 Attorney’s fees and nonstandard litigation expenses pursuant to Section 1717 are recoverable as  
12 costs pursuant to Code of Civil Procedure Section 1039.10 (recovery of costs by prevailing  
13 party). See Code Civ. Proc. § 1040.50 (attorney’s fees and nonstandard litigation expenses as  
14 costs). For authority to contractually allocate responsibility for attorney’s fees, see Section 1021.  
15 For authority to contractually allocate nonstandard litigation expenses, see Section 1021.02.

16  **Staff Note.**

17 *Pro se representation.* At the July meeting, the Commission decided:

18 (1) Where a contract includes a clause that permits a party to recover nonstatutory expenses  
19 in the event of litigation, a prevailing pro se litigant (either an attorney or a nonattorney)  
20 should be entitled to recover such expenses under Civil Code Section 1717 just like a  
21 prevailing party who is represented by counsel.

22 (2) The Comment to Section 1717 should point out that the amendment only addresses  
23 recovery of nonstatutory litigation expenses by a pro se litigant, not recovery of attorney’s  
24 fees. The Comment should further explain that the amendment neither codifies nor overturns  
25 *Trope v. Katz*, 11 Cal. 4th 272, 902 P.2d 259, 45 Cal. Rptr. 2d 241 (1995), and is not intended  
26 to affect the development of the law on recovery of attorney’s fees by a pro se attorney under  
27 the statute.

28 (July Minutes, p. 7.) Does this draft satisfactorily implement these instructions? Should the statute  
29 or the Comment state that a pro se nonattorney is not entitled to recover attorney’s fees pursuant  
30 to the statute?

31 *Amount of award where prevailing party is not charged prevailing market rate.* As currently  
32 drafted, the statutory text would not specify what method a court should use to calculate a fee  
33 award where the prevailing party has not been charged the prevailing market rate. The provision  
34 would just direct that the amount is to be based on the legal services provided, not on whether or  
35 how much the prevailing party was charged for those services.

36 The Comment refers to case law on use of the lodestar method, which is ordinarily used by the  
37 California courts. The Comment also cites *PLCM* for the proposition that “in exceptional  
38 circumstances, the trial court is not precluded from using other methodologies.” 22 Cal. 4th at  
39 \_\_\_, 95 Cal. Rptr. 2d at 208.

40 The lodestar method has been criticized, however, and other methods exist. See, e.g., *PLCM*,  
41 22 Cal. 4th at \_\_\_, 95 Cal. Rptr. 2d at \_\_\_ (Chin, J., dissenting) (in-house counsel fees should be  
42 determined by cost-plus approach, i.e., calculation of the actual salary, costs, and overhead of in-  
43 house counsel); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 615, 98 Cal. Rptr. 2d 388  
44 (2000) (discussing advantages and disadvantages of lodestar method and increased use of  
45 percentage-of-recovery method in class actions in federal courts). Does the current draft provide  
46 too much guidance on calculation of the award? Too little guidance? Would the Commission like  
47 additional analysis of this point? Should the draft include a note soliciting input on this issue?

48 *Reciprocity.* As the Commission directed earlier in this study, the draft would make a  
49 unilateral attorney’s fee clause reciprocal in both contract and noncontract actions covered by the  
50 clause. The State Bar Committee on Administration of Justice (“CAJ”) has considered this point

1 and “expresses no opinion” on it. Second Supplement to Memorandum 2000-29, Exhibit pp. 7,  
2 17.

## CONFORMING REVISIONS AND REPEALS

3 ☞ **Staff Note.** This is a partial list of conforming revisions. Additional conforming revisions are  
4 necessary, including correction of cross-references in the following provisions: Bus. & Prof. Code  
5 §§ 17550.45, 17550.53; Code Civ. Proc. §§ 488.080, 685.040, 685.095, 699.080, 706.108,  
6 715.040, 917.1, 998, 1141.21; Fin. Code §§ 17314.3, 17323, 17332, 17336; Gov’t Code § 25845;  
7 Ins. Code § 11580.9. The staff will prepare these conforming revisions when time permits. The  
8 revision of Code of Civil Procedure Section 998 may require particular care.

### CIVIL CODE

9 **Civ. Code § 731.15 (amended). Payment of expenses**

10 SEC. \_\_\_\_\_. Section 731.15 of the Civil Code is amended to read:

11 731.15. (a) All ordinary expenses incurred in connection with the principal or  
12 with its administration and management, including regularly recurring taxes  
13 assessed against any portion of the principal, water rates, premiums on insurance  
14 taken upon the estates of both tenant and remainderman, interest on mortgages on  
15 the principal, ordinary repairs, compensation of assistants and court costs on  
16 regular accountings, ~~except attorneys’ fees,~~ accountings (as distinct from  
17 attorney’s fees) shall be paid out of income. But such expenses where incurred in  
18 disposing of, or as carrying charges on, unproductive property as defined in  
19 Section 731.13, shall be paid out of principal, subject to the provisions of  
20 subdivision (b) of Section 731.13. ~~Attorneys’~~ Attorney’s fees for ordinary or  
21 current services shall be paid one-half out of income; one-half out of principal or  
22 in such other proportion as the court may direct.

23 (b) ~~Attorneys’~~ Attorney’s fees and other costs incurred in maintaining or  
24 defending any action to protect the property or assure the title thereof, unless due  
25 to the fault or cause of the tenant, costs of, or assessments for, improvements to  
26 property forming part of the principal, brokers’ commissions, title charges, and  
27 other costs incurred in connection with purchasing, selling, or leasing property, or  
28 investing or reinvesting principal, and all other expenses, except as specified in  
29 subdivision (a) of this section, shall be paid out of principal. Any tax levied by any  
30 authority, federal, state, or foreign, upon profit or gain defined under the terms of  
31 subdivision (b) of Section 731.05 shall be paid out of principal, notwithstanding  
32 such tax may be denominated a tax upon income by the taxing authority.

33 **Comment.** Section 731.15 is amended to reflect that “court costs” and attorney’s fees are  
34 distinct concepts. See Code Civ. Proc. § 1040.10.

35 Technical changes are also made for conformity with preferred drafting style.

CODE OF CIVIL PROCEDURE

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

2 SEC. \_\_\_\_\_. Section 645.1 of the Code of Civil Procedure is amended to read:

3 645.1. (a) The fee of a referee shall be the amount that the court determines is  
4 reasonable for the time spent on the reference. The parties may agree, in writing,  
5 on another rate of compensation, and thereafter that rate shall be used.

6 (b) When a referee is appointed pursuant to Section 638, the referee's fees shall  
7 be paid as agreed by the parties. If the parties do not agree on the payment of fees  
8 and request the matter to be resolved by the court, the court may order the parties  
9 to pay the referee's fees as set forth in subdivision (b) (c).

10 (b) (c) When a referee is appointed pursuant to Section 639, at any time after a  
11 determination of ability to pay is made as specified in paragraph (6) of subdivision  
12 (b) of Section 639, the court may order the parties to pay the fees of referees who  
13 are not employees or officers of the court at the time of appointment, as fixed  
14 pursuant to ~~Section 1023~~ subdivision (a), in any manner determined by the court to  
15 be fair and reasonable, including an apportionment of the fees among the parties.  
16 For purposes of this section, the term "parties" does not include parties' counsel.

17 **Comment.** Section 645.1 is amended to consolidate provisions on referee fees. Subdivision (a)  
18 continues former Section 1023 without substantive change.

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

20 SEC. \_\_\_\_\_. Section 1023 of the Code of Civil Procedure is repealed.

21 ~~1023. The fees of referees are such reasonable sum as the court may fix for the~~  
22 ~~time spent in the business of the reference; but the parties may agree, in writing,~~  
23 ~~upon any other rate of compensation, and thereupon such rates shall be allowed.~~

24 **Comment.** Former Section 1023 is continued in Section 645.1(a) without substantive change.

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

26 SEC. \_\_\_\_\_. Section 1024 of the Code of Civil Procedure is repealed.

27 ~~1024. When an application is made to the court or referee to postpone a trial, the~~  
28 ~~payment of the expenses occasioned by the postponement may be imposed, in the~~  
29 ~~discretion of the court or referee, as a condition of granting the same.~~

30 **Comment.** Former Section 1024 is continued in Section 1040.90 without substantive change.

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

32 SEC. \_\_\_\_\_. Section 1027 of the Code of Civil Procedure is repealed.

33 ~~1027. When the decision of a court of inferior jurisdiction in a special~~  
34 ~~proceeding is brought before a court of higher jurisdiction for a review, in any~~  
35 ~~other way than by appeal, the same costs must be allowed as in cases on appeal,~~  
36 ~~and may be collected in the manner provided for enforcement of money judgments~~  
37 ~~generally, or in such manner as the court may direct, according to the nature of the~~  
38 ~~case.~~

1 **Comment.** Former Section 1027 is continued in Section 1041.20 without substantive change.

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

3 SEC. \_\_\_\_\_. Section 1032 of the Code of Civil Procedure is repealed.

4 ~~1032. (a) As used in this section, unless the context clearly requires otherwise:~~

5 ~~(1) “Complaint” includes a cross-complaint.~~

6 ~~(2) “Defendant” includes a cross-defendant or a person against whom a~~  
7 ~~complaint is filed.~~

8 ~~(3) “Plaintiff” includes a cross-complainant or a party who files a complaint in~~  
9 ~~intervention.~~

10 ~~(4) “Prevailing party” includes the party with a net monetary recovery, a~~  
11 ~~defendant in whose favor a dismissal is entered, a defendant where neither plaintiff~~  
12 ~~nor defendant obtains any relief, and a defendant as against those plaintiffs who do~~  
13 ~~not recover any relief against that defendant. When any party recovers other than~~  
14 ~~monetary relief and in situations other than as specified, the “prevailing party”~~  
15 ~~shall be as determined by the court, and under those circumstances, the court, in its~~  
16 ~~discretion, may allow costs or not and, if allowed may apportion costs between the~~  
17 ~~parties on the same or adverse sides pursuant to rules adopted under Section 1034.~~

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

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

23 **Comment.** Subdivisions (a) and (c) of former Section 1032 are superseded by Sections 1039.20  
24 (rebuttable presumptions for determining prevailing party for purposes of awarding costs),  
25 1039.30 (determination of prevailing party), and 1039.50 (determining prevailing party where  
26 pre-litigation contract specifies how to determine prevailing party). Subdivision (b) of former  
27 Section 1032 is continued without change in Section 1039.10 (recovery of costs by prevailing  
28 party).

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

30 SEC. \_\_\_\_\_. Section 1033 of the Code of Civil Procedure is repealed.

31 ~~1033. (a) Costs or any portion of claimed costs shall be as determined by the~~  
32 ~~court in its discretion in a case other than a limited civil case in accordance with~~  
33 ~~Section 1034 where the prevailing party recovers a judgment that could have been~~  
34 ~~rendered in a limited civil case.~~

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

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

41 ~~(2) When the party could not have brought the action in the small claims court,~~  
42 ~~costs and necessary disbursements shall be limited to the actual cost of the filing~~

1 fee, the actual cost of service of process, and, when otherwise specifically allowed  
2 by law, reasonable attorneys' fees. However, those costs shall only be awarded to  
3 the plaintiff if the court is satisfied that prior to the commencement of the action,  
4 the plaintiff informed the defendant in writing of the intended legal action against  
5 the defendant and that legal action could result in a judgment against the defendant  
6 that would include the costs and necessary disbursements allowed by this  
7 paragraph.

8 **Comment.** Former Section 1033 is continued in Section 1040.70 without substantive change.

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

10 SEC. \_\_\_\_\_. Section 1033.5 of the Code of Civil Procedure is repealed.

11 ~~1033.5. (a) The following items are allowable as costs under Section 1032:~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 ~~(A) Contract.~~

1     ~~(B) Statute.~~

2     ~~(C) Law.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22     ~~(5) When any statute of this state refers to the award of "costs and attorney's~~  
23 ~~fees," attorney's fees are an item and component of the costs to be awarded and~~  
24 ~~are allowable as costs pursuant to subparagraph (B) of paragraph (10) of~~  
25 ~~subdivision (a). Any claim not based upon the court's established schedule of~~  
26 ~~attorney's fees for actions on a contract shall bear the burden of proof. Attorney's~~  
27 ~~fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of~~  
28 ~~subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time~~  
29 ~~a statement of decision is rendered, (C) upon application supported by affidavit~~  
30 ~~made concurrently with a claim for other costs, or (D) upon entry of default~~  
31 ~~judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C)~~  
32 ~~of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or~~  
33 ~~upon entry of a default judgment, unless otherwise provided by stipulation of the~~  
34 ~~parties.~~

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

38     **Comment.** Paragraphs (1)-(9) and (11)-(13) of subdivision (a) of former Section 1033.5 are  
39 continued in Section 1040.10 (allowable costs) without substantive change. Paragraph (10) is  
40 continued in Section 1040.50(a) (attorney's fees and nonstandard litigation expenses as costs),  
41 without substantive change.

42     Subdivision (b) is continued in Section 1040.30 (items not allowable as court costs except  
43 when expressly authorized), without substantive change.

1 Subdivision (c)(1) is continued in Section 1040.60(c) (requirements for costs award) without  
2 substantive change. Subdivision (c)(2) is continued in Section 1040.60(a) without substantive  
3 change. Subdivision (c)(3) is continued in Section 1040.60(b), with revisions to make explicit that  
4 attorney's fees and nonstandard litigation expenses, as well as other costs, must be reasonable in  
5 amount. Subdivision (c)(4) is continued in Section 1040.40 (discretionary court costs) without  
6 substantive change. Subdivision (c)(5) is continued in Section 1040.50(b)-(d) without substantive  
7 change.

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

10 SEC. \_\_\_\_\_. Section 1034 of the Code of Civil Procedure is repealed.

11 ~~1034. (a) Prejudgment costs allowable under this chapter shall be claimed and~~  
12 ~~contested in accordance with rules adopted by the Judicial Council.~~

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

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

## FINANCIAL CODE

16 **Fin. Code § 22202 (amended). Charges**

17 SEC. \_\_\_\_\_. Section 22202 of the Financial Code is amended to read:

18 22202. "Charges" do not include any of the following:

19 (a) Commissions received as a licensed insurance agent or broker in connection  
20 with insurance written as provided in Section 22313.

21 (b) Amounts not in excess of the amounts specified in subdivision (c) of Section  
22 3068 of the Civil Code paid to holders of possessory liens, imposed pursuant to  
23 Chapter 6.5 (commencing with Section 3067) of Title 14 of Part 4 of Division 3 of  
24 the Civil Code, to release motor vehicles that secure loans subject to this division.

25 (c) Court costs, excluding attorney's fees, costs (as defined in Code of Civil  
26 Procedure Section 1040.10) incurred in a suit and recovered against a debtor who  
27 defaults on his or her loan.

28 (d) Fees paid to a licensee for the privilege of participating in an open-end credit  
29 program, which fees are to cover administrative costs and are imposed upon  
30 executing the open-end loan agreement and on annual renewal dates or  
31 anniversary dates thereafter.

32 (e) Amounts received by a licensee from a seller, from whom the borrower  
33 obtains money, goods, labor, or services on credit, in connection with a transaction  
34 under an open-end credit program that are paid or deducted from the loan proceeds  
35 paid to the seller at the direction of the borrower and which are an obligation of the  
36 seller to the licensee for the privilege of allowing the seller to participate in the  
37 licensee's open-end credit program. Amounts received by a licensee from a seller  
38 pursuant to this subdivision may not exceed 6 percent of the loan proceeds paid to  
39 the seller at the direction of the borrower.

40 (f) Actual and necessary fees not exceeding five hundred dollars (\$500) paid in  
41 connection with the repossession of a motor vehicle to repossession agencies

1 licensed pursuant to Chapter 11 (commencing with Section 7500) of Division 3 of  
2 the Business and Professions Code provided that the licensee complies with  
3 Sections 22328 and 22329, and actual fees paid to a licensee in conformity with  
4 Sections 26751 and 41612 of the Government Code in an amount not exceeding  
5 the amount specified in those sections of the Government Code.

6 (g) Moneys paid to, and commissions and benefits received by, a licensee for the  
7 sale of goods, services, or insurance, whether or not the sale is in connection with  
8 a loan, that the buyer by a separately signed authorization acknowledges is  
9 optional, if sale of the goods, services, or insurance has been authorized pursuant  
10 to Section 22154.

11 **Comment.** Section 22202 is amended to reflect that “court costs” and attorney’s fees are  
12 distinct concepts. See Code Civ. Proc. § 1040.10.

### INSURANCE CODE

13 **Ins. Code § 11708 (amended). Court costs and attorney’s fees**

14 SEC. \_\_\_\_\_. Section 11708 of the Insurance Code is amended to read:

15 11708. ~~Such bond~~ Any bond filed pursuant to Section 11690 shall provide for  
16 the payment by the surety of all court costs, ~~including reasonable attorney’s fees,~~  
17 court costs and reasonable attorney’s fees of actions or proceedings taken to  
18 enforce payment, to the extent of the penal sum of the bond, of such awards or  
19 judgments against the surety.

20 **Comment.** Section 11708 is amended to reflect that “court costs” and attorney’s fees are  
21 distinct concepts. See Code Civ. Proc. § 1040.10.

22 Technical changes are also made for conformity with preferred drafting style.

---