

## RESOLUTION 01-01-2015

### DIGEST

#### Civil Procedure: Expert Witness Fees May Be Permitted on Memorandum of Costs

Amends California Rules of Court, rule 3.1700 to clarify that recoverable expert witness fees may be claimed and included on a memorandum of costs.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends California Rules of Court, rule 3.1700 to clarify that recoverable expert witness fees may be claimed and included on a memorandum of costs. This resolution should be approved in principle because it provides a clear, streamlined process to claim expert witness fees recoverable by statute or under contract.

Presently, there is no specific mechanism for a prevailing party to claim expert witness fees among their recoverable costs. A party may file a cost memorandum, but there is no place on the cost memorandum to include expert witness fees. Importantly, this resolution does not expand whether a party may recover expert witness fees. This resolution ensures a procedural mechanism for enforcing a party's entitlement to expert witness fees that is already provided by contract or statute. If a party includes expert witness fees on a costs memorandum, and are not entitled to such fees, the opposing party may bring a motion to tax these and any other costs inappropriately claimed on a memorandum of costs. While the majority of published California decisions on this issue state that it is appropriate for a prevailing party to claim expert witness fees on a memorandum of costs, other courts disagree. This leaves a prevailing party with no specific procedural mechanism through which to obtain these fees. This resolution provides a specific procedural mechanism to claim – and thus, oppose – expert witness fees through a memorandum of costs.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Association recommends that legislation be sponsored to amend California Rule of Court Rule 3.1700 to read as follows:

#### Rule 3.1700

- 1 (a) Claiming costs
- 2 (1) Trial costs
- 3 A prevailing party who claims costs, including discretionary or mandatory expert witness
- 4 fees authorized to be awarded to the prevailing party by contract or statute, must serve and file a
- 5 memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment
- 6 or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of
- 7 written notice of entry of judgment or dismissal, or within 180 days after entry of judgment,

8 whichever is first. The memorandum of costs must be verified by a statement of the party,  
9 attorney, or agent that to the best of his or her knowledge the items of cost are correct and were  
10 necessarily incurred in the case.

11 (2) Costs on default

12 A party seeking a default judgment who claims costs must request costs on the *Request*  
13 *for Entry of Default (Application to Enter Default)* (form CIV-100) at the time of applying for  
14 the judgment.

15 (b) Contesting costs

16 (1) Striking and taxing costs

17 Any notice of motion to strike or to tax costs must be served and filed 15 days after  
18 service of the cost memorandum. If the cost memorandum was served by mail, the period is  
19 extended as provided in Code of Civil Procedure section 1013.

20 (2) Form of motion

21 Unless objection is made to the entire cost memorandum, the motion to strike or tax costs  
22 must refer to each item objected to by the same number and appear in the same order as the  
23 corresponding cost item claimed on the memorandum of costs and must state why the item is  
24 objectionable.

25 (3) Extensions of time

26 The party claiming costs and the party contesting costs may agree to extend the time for  
27 serving and filing the cost memorandum and a motion to strike or tax costs. This agreement must  
28 be confirmed in writing, specify the extended date for service, and be filed with the clerk. In the  
29 absence of an agreement, the court may extend the times for serving and filing the cost  
30 memorandum or the notice of motion to strike or tax costs for a period not to exceed 30 days.

31 (4) Entry of costs

32 After the time has passed for a motion to strike or tax costs or for determination of that  
33 motion, the clerk must immediately enter the costs on the judgment.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Bar Association of Northern San Diego County

## **STATEMENT OF REASONS**

The Problem: There is no procedure in existing law on how to claim expert witness fees. Unfortunately, this has led to inconsistent decisions in both the trial and appellate level as to the proper procedure. Rule 3.1702, which requires a noticed motion, only applies to attorneys' fees claims. Expert witness fees are not typically considered a subset of attorney fees; rather, attorney fees and expert witness fees are viewed as distinct and independent subsets of the costs of litigation. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1148.) Code of Civil Procedure §1034 provides that allowable prejudgment costs must be claimed in accordance with the rules adopted by the Judicial Council. Rule 3.1700 is the only rule of court that addresses the procedure for recovering prejudgment costs other than attorneys' fees. Some cases have allowed parties to use the Memorandum of Costs procedure to claim recoverable expert witness fees. (See, *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (4th Dist. 2010) 185 Cal.App.4th 1050, 1066-1067 (review denied) [Memorandum of Costs required under contractual agreement to award prevailing party expert witness costs]; *Holman v. Altana Pharma*

*US, Inc.* (2010) 186 Cal.App.4th 262, 276—277 [where party filed only a memorandum of costs seeking expert witness fees in a FEHA case under both CCP §998 and Government Code §12965(b)].) But there are others that imply the motion procedure is appropriate. (See, *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1016.). It is important to note that the current Memorandum of Costs-Worksheet has a specific space for expert witness fees claimed under Code of Civil Procedure §998, even though those fees are discretionary.

The Solution: This clarifies that expert witness fees authorized by contract or statute can be claimed on a memorandum of costs. This gives litigants and the courts certainty as to a correct procedure which will reduce erroneous decision and appeals.

### **IMPACT STATEMENT**

This proposed resolution does not affect any other law, statute or rule.

### **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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