

## RESOLUTION 08-07-2016

### DIGEST

#### Costs: Recovery for Electronic Preservation of Evidence

Amends Code of Civil Procedure section 1033.5 to allow electronic presentation of evidence as a recoverable cost.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1033.5 to read as follows:

#### §1033.5

- 1 (a) The following items are allowable as costs under Section 1032:
- 2 (1) Filing, motion, and jury fees.
- 3 (2) Juror food and lodging while they are kept together during trial and after the jury
- 4 retires for deliberation.
- 5 (3) (A) Taking, video recording, and transcribing necessary depositions, including an
- 6 original and one copy of those taken by the claimant and one copy of depositions taken by the
- 7 party against whom costs are allowed.
- 8 (B) Fees of a certified or registered interpreter for the deposition of a party or witness
- 9 who does not proficiently speak or understand the English language.
- 10 (C) Travel expenses to attend depositions.
- 11 (4) Service of process by a public officer, registered process server, or other means, as
- 12 follows:
- 13 (A) When service is by a public officer, the recoverable cost is the fee authorized by law
- 14 at the time of service.
- 15 (B) If service is by a process server registered pursuant to Chapter 16 (commencing with
- 16 Section 22350) of Division 8 of the Business and Professions Code, the recoverable cost is the
- 17 amount actually incurred in effecting service, including, but not limited to, a stakeout or other
- 18 means employed in locating the person to be served, unless those charges are successfully
- 19 challenged by a party to the action.
- 20 (C) When service is by publication, the recoverable cost is the sum actually incurred in
- 21 effecting service.
- 22 (D) When service is by a means other than that set forth in subparagraph (A), (B), or (C),
- 23 the recoverable cost is the lesser of the sum actually incurred, or the amount allowed to a public
- 24 officer in this state for that service, except that the court may allow the sum actually incurred in
- 25 effecting service upon application pursuant to paragraph (4) of subdivision (c).
- 26 (5) Expenses of attachment including keeper's fees.
- 27 (6) Premiums on necessary surety bonds.
- 28 (7) Ordinary witness fees pursuant to Section 68093 of the Government Code.
- 29 (8) Fees of expert witnesses ordered by the court.
- 30 (9) Transcripts of court proceedings ordered by the court.
- 31 (10) Attorney's fees, when authorized by any of the following:
- 32 (A) Contract.
- 33 (B) Statute.

34 (C) Law.  
35 (11) Court reporter fees as established by statute.  
36 (12) Court interpreter fees for a qualified court interpreter authorized by the court for an  
37 indigent person represented by a qualified legal services project, as defined in Section 6213 of  
38 the Business and Professions Code or a pro bono attorney as defined in Section 8030.4 of the  
39 Business and Professions Code.  
40 (13) Models and enlargements of exhibits and photocopies of exhibits, including  
41 electronic presentation of the exhibits, which may include rental costs of the presentation  
42 equipment, preparation of the exhibits for electronic formatting and presentation and a  
43 reasonable fee for a technical consultant to operate the equipment during trial may be allowed if  
44 they were reasonably helpful to aid the trier of fact.  
45 (14) Any other item that is required to be awarded to the prevailing party pursuant to  
46 statute as an incident to prevailing in the action at trial or on appeal.  
47 (b) The following items are not allowable as costs, except when expressly authorized by  
48 law:  
49 (1) Fees of experts not ordered by the court.  
50 (2) Investigation expenses in preparing the case for trial.  
51 (3) Postage, telephone, and photocopying charges, except for exhibits.  
52 (4) Costs in investigation of jurors or in preparation for voir dire.  
53 (5) Transcripts of court proceedings not ordered by the court.  
54 (c) Any award of costs shall be subject to the following:  
55 (1) Costs are allowable if incurred, whether or not paid.  
56 (2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather  
57 than merely convenient or beneficial to its preparation.  
58 (3) Allowable costs shall be reasonable in amount.  
59 (4) Items not mentioned in this section and items assessed upon application may be  
60 allowed or denied in the court's discretion.  
61 (5) When any statute of this state refers to the award of "costs and attorney's fees,"  
62 attorney's fees are an item and component of the costs to be awarded and are allowable as costs  
63 pursuant to subparagraph (B) of paragraph (10) of subdivision (a). Any claim not based upon the  
64 court's established schedule of attorney's fees for actions on a contract shall bear the burden of  
65 proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of  
66 subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement  
67 of decision is rendered, (C) upon application supported by affidavit made concurrently with a  
68 claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs  
69 pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either  
70 upon a noticed motion or upon entry of a default judgment, unless otherwise provided by  
71 stipulation of the parties.  
72 Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs  
73 under Section 1032 of this code as authorized by subparagraph (A) of paragraph (10) of  
74 subdivision (a).

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

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

## STATEMENT OF REASONS

The Problem: It is now commonplace to utilize the electronic presentation of evidence at jury trials, and even, so a certain extent, bench trials. Although courts have held that the cost of having a technician present to assist with the electronic presentation of evidence can be a recoverable cost, it is not specifically identified in Code of Civil Procedure §1033.5. Many judges are still reluctant to award these costs to a prevailing party, even though electronic presentation of evidence is vital in jury cases where the jury otherwise would not see key documentary evidence until they reach the jury deliberation room.

The Solution: This codifies existing case law and clarifies that the cost to convert exhibits to electronic format, use electronic presentation equipment and for a technical consultant to run the electronic evidence is a recoverable cost *if reasonably helpful to a trier of fact*. The court still retains discretion to disallow these costs if they truly were not necessary or unhelpful (i.e., a simple bench trial where the judge has a copy of all of the exhibits).

## IMPACT STATEMENT

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

## CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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**RESPONSIBLE FLOOR DELEGATE:** Melissa L. Bustarde, Esq.

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## RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

### History:

No similar resolutions found.

### Reasons:

This resolution amends Code of Civil Procedure section 1033.5 to allow electronic presentation of evidence as a recoverable cost. This resolution should be approved in principle because it will increase the likelihood that courts will grant such costs by the prevailing party in a civil action, when it is reasonably helpful to aid the trier of fact.

Currently, courts have discretion to award the prevailing party any unmentioned costs under the “catch-all” provision of section 1033.5: “Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.” (Code Civ. Proc., § 1033.5, subd. (c)(4).) This includes exhibit preparation costs. (See *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal. App. 4th 612, 617 [affirming an award of \$111,063

for hourly billings for personnel employed by the prevailing party to process the raw data that went into an exhibit].) “If the cost of labor for creating an exhibit is a recoverable item, the fact that it was the labor of a paralegal, high-tech or not, makes no difference, assuming the cost was not unreasonably high.” (*Id.* at p. 620.)

However, as a general rule, many courts are reluctant to award costs under the “catch-all” provision and would be more likely to do so if the specific cost was expressly listed as being recoverable. Expressly listing the recovery of electronic presentation of evidence, including equipment rentals, formatting costs, and costs to hire technical consultants to operate the equipment, as a recoverable cost would also have the added benefit of encouraging its adoption.