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A Proposed Revision of California's Procedural Statutes and Rules For Seeking Prevailing-Party Attorney Fees

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A PROPOSED REVISION OF CALIFORNIA’S PROCEDURAL STATUTES AND RULES FOR SEEKING PREVAILING-PARTY ATTORNEY FEES

Charles Stephen Treat

ABSTRACT: California’s procedural statutes and rules governing claims for attorney fees are a mess. They create confusing and contradictory procedural requirements; they are incomplete in carrying out California’s policy of mandatory bilaterality in contractual fee provisions; and they irrationally stymie carrying out the parties’ contractual intent in some regards. This article surveys the evolution and present state of these statutes and rules, analyzes what needs fixing, and proposes amendments to fix the problems.

California’s procedural statutes and rules governing claims for attorney fees are a mess. The procedural requirements they impose can be confusingly overlapping and contradictory. In some instances they can create unreasonable (or even impossible) procedural barriers to the enforcement of clear substantive entitlements. They establish no filing deadlines at all for some claims. They work in effect to defeat the parties’ contractual intent, in ways that serve no policy purpose – while only incompletely carrying out some policies intended to modify contractual terms. They create irrational differences in result between closely related categories of fee claims, and even different results in different parts of the same case. There is little indication

* Judge of the California Superior Court for Contra Costa County.

1 At the outset there is a trivial terminological difficulty about whether the proper term is “attorney fees,” “attorney’s fees,” “attorneys’ fees,” or “attorneys fees.” Existing statutes are inconsistent in this usage. For the sake of consistency, I adopt the usage “attorney fees” for all purposes in this article and its proposed revisions. Your humble author frankly admits, however, to not really giving a damn which formulation is used, or even whether there is inconsistency on the point.
that these awkward results were consciously intended by the legislators drafting these statutes and rules.

To be sure, these statutes and rules are better than they have been in the past. In the last couple of decades there have been several amendments to one or another of them, which have ameliorated a number of previous flaws in the statutory scheme. There is work remaining to be done, however. Indeed, the prior fixes have spawned new problems. Much of the current difficulty arises from the classification of attorney fees as a subset of “costs,” even though the procedural regimes for recovering fees and costs are mostly separate from each other. The intended point of this classification is a good one: It serves (usually) to ensure that attorney fee claims need not be pleaded and proved at trial. That solution, however, has itself given rise to subsequent difficulties, arising from the ambiguous interrelationship between costs and fees.

It is not my purpose in this article to critique the results or reasoning of the case law. Some of the opinions are more convincing than others, but in nearly every case they are at least plausible constructions of the existing statutory and rule language. The solution, therefore, lies in cleaning up that language. That is the enterprise of this article. Appended to it is a proposed revision of a number of relevant statute sections and rules, with the object of improving their consistency, rationality, and fidelity to substantive objectives.

This article addresses claims for attorney fees asserted by prevailing parties in civil litigation – cases where the plaintiff asserts some other cause of action unrelated to the existence of the litigation itself (be that breach of contract, fraud, employment discrimination, antitrust, or

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2 Well, mostly not, anyway. Maybe just now and then.
whatever), and some body of law entitles the party prevailing on that claim to recover his attorney fees incurred in prosecuting (or defending) the underlying claim.

With that scope, I am excluding at least two other major areas where one side may end up paying the other side’s attorney fees. First, there are some claims in which attorney fees are themselves the damages – part of the injury alleged and sought to be recovered for. This includes, for example, duty-to-defend insurance cases, claims for breach of indemnification contracts, malicious prosecution cases, and other categories. ³ Neither this article nor my proposed revisions have anything to do with those cases, which run by different substantive and procedural rules. When the fees are the claim and the damages, the plaintiff is required to plead and prove them at trial as with any other damages. By contrast, as I will explain, part of what I aim to do in the prevailing-party setting is to secure and extend the present policy of removing attorney fee claims from the purview of jury or bench trials.

Another excluded area is that of fees awarded as sanctions for various litigation events other than victory on the merits. This includes, for example, fees awarded as discovery sanctions, fees as damages for contempt of a preliminary injunction, and so on. Those, too, have their own particular rules, and I am leaving them alone.

I. CALIFORNIA’S EXISTING STATUTES AND RULES GOVERNING ATTORNEY FEE CLAIMS

As the courts often observe, California operates generally under the “American Rule,” under which each side pays its own attorney fees, win or lose.\textsuperscript{4} The victor’s cost of litigating is reimbursed only to the extent of a limited category of “costs” – a category, however, that pointedly excludes the winner’s cost of paying his own attorney, as well as many other fairly expensive items (such as, usually, experts).

There are two broad categories of exceptions from this general rule: (1) statutory fees, where the Legislature (or Congress) has decreed that either the prevailing party, or a prevailing plaintiff, can recover fees; and (2) contractual fees, where the parties’ own contract contains a provision for recovery of fees.

A. Statutory Provisions For Attorney Fees

Both California law and federal law include a number of statutes, specific to particular substantive settings, under which some prevailing parties can recover their attorney fees on top of whatever damages or other recovery they obtain as relief on the underlying claim. Familiar examples arise under various state and federal civil-rights laws, antitrust and trade regulation laws, and so on. California also has a sort of catch-all private-attorney-general statute,\textsuperscript{5} under which fees can be awarded to successful litigants “in any action which has resulted in the enforcement of an important right affecting the public interest,” with certain other requirements.

\textsuperscript{4} See, e.g., Trope v. Katz, 902 P.2d 259, 262-63 (Cal. 1995), and cases there cited; Cal. CIV. PROC. CODE § 1021 (West Supp. 2005); WITKIN (supra note [3]) § 145; PEARL (supra note [3]), §§ 1.3, 1.4.

\textsuperscript{5} Cal. CIV. PROC. CODE § 1021.5 (West Supp. 2005).
There is also a residual category of uncodified doctrines supporting attorney fee awards, such as the “common fund” and “substantial benefit” doctrines.  

I do not propose either to catalog all such statutes or doctrines here, or to discuss them in any detail. In general, though, there are some recurring variations among them. Many of them provide for fees to a prevailing plaintiff, but not a prevailing defendant. Others are more even-handed, providing for recovery by whichever side prevails. Still others, by language or judicial gloss, operate to allow fees to prevailing plaintiffs routinely, but to prevailing defendants only in exceptional circumstances. Fee statutes also vary as to what may be recovered. Most notably for present purposes, some of them expressly allow recovery of expert fees, while most do not.

I propose to leave these variations as I find them. They are, presumptively and probably in reality, the result of conscious legislative choice. No doubt there are arguments on both sides of the issue as to whether these choices should be altered in either direction, but that is beyond the ambition of my present enterprise. (It would also pick any number of political fights that, one may hope, are largely avoided by my more neutral proposals. And in any event, some of the statutes routinely invoked in California courts are federal, and thus beyond the reach of a California legislative revision.) Thus, this article treats statutory bases for fee awards as “black boxes,” so to speak, substantively providing whatever they provide.

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6 See Witkin (supra note [3]), §§ 215-221; Pearl (supra note [3]), chapter 7.

7 California fee statutes are usefully collected in Witkin (supra note [3]), §§ 190-206, 225, and Pearl (supra note [3]), chapters 4, 5, 17.

B. Contractual Fee Clauses And Civil Code Section 1717

The other principal source of attorney fee claims is fee clauses in private contracts. Such clauses would presumably be enforceable on their own strength as contract provisions, even if there were no statute on point. There are two statutes often cited as legislative warrants for enforcing contractual fee clauses, namely section 1717 of the CIVIL CODE and section 1021 of the CODE OF CIVIL PROCEDURE. The latter statute is only indirectly on point; it codifies the “American Rule,” stating that (absent an express fee statute) fees are a matter of private contract. That might be read as referring to attorney-client contracts, but there is no harm in also taking the section as authorizing fee clauses in other contracts.

Section 1717 does more directly address the topic of contractual fee clauses. The section’s coverage is partial, however, and its main thrust is more to alter the parties’ agreement than to enforce it. “The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions.” The statute was designed to establish mutuality of remedy when a contractual provision makes recovery of attorney fees

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9 CAL. CIV. CODE § 1717 (West 1998) (hereinafter “CIV. CODE § 1717” in citations, or “CIVIL CODE section 1717” or “section 1717” in text). Because this article consists primarily of extended discussion of this section, section 1033.5 of the CODE OF CIVIL PROCEDURE, and Rule of Court 3.1702, these three provisions will be referred to throughout this article without repetitive formal citation.


available to only one party, and to prevent the oppressive use of one-sided attorney fee provisions.”¹²

After some confusion in the older case law¹³ and a clarifying amendment,¹⁴ it is now settled that section 1717 applies to both bilateral fee clauses (providing that the prevailing party recovers fees) and unilateral ones (purporting to provide that one party alone recovers fees).¹⁵

¹³ Compare Mabee v. Nurseryland Garden Centers, Inc., 152 Cal. Rptr. 31, 36 n.4 (Ct. App. 1979) (refusing to apply then-existing section 1717 to bilateral clause), and T.E.D. Bearing Co. v. Walter E. Heller & Co., 112 Cal. Rptr. 910, 913-14 (Ct. App. 1974) (treating then-existing section 1717 as applying only to unilateral contracts, though still applying where the unilaterally favored party prevailed), with Beneficial Standard Properties, Inc. v. Scharps, 136 Cal. Rptr. 549 (Ct. App. 1977) (applying then-existing section 1717 to bilateral contracts). Indeed, this confusion continued even after the 1981 amendment of section 1717. See Sears v. Baccaglio, 70 Cal. Rptr. 2d 769, 785-89 (Ct. App. 1998) (Kline, P.J., concurring and dissenting); Santisas, 951 P.2d at 408-09 (discussing and rejecting concurring opinion below); M. C. & D. Capital Corp. v. Gilmaker, 251 Cal. Rptr. 178, 181-82 (Ct. App. 1988) (discussing the conflict between T.E.D. Bearings and Beneficial Standard without recognizing that the point had been settled by the 1981 amendment).
¹⁴ 1981 Cal. Stat. ch. 888, § 1; see Santisas, 951 P.2d at 409, and Sears, 70 Cal. Rptr. 2d at 775-76, both discussing the content and effect of the 1981 amendment to section 1717.
¹⁵ Santisas, 951 P.2d at 408-09.
The principal thrust of the section (and the main respect in which it alters the result one would get from the contract alone), however, is to transform unilateral fee clauses into bilateral ones. In short, the statute provides that if a contract provides for only one party (such as a lessor, lender, or seller) to recover fees, the other party can nevertheless recover them as well if he turns out to be the prevailing party. Subdivision (a) states in part:

(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. . . .

The following paragraph of the subdivision deals (though selectively) with one obvious way to evade this bilaterality – namely by crafting one’s fee clause to cover only some subclass of litigation arising under the contract, realizing that that subclass would predictably be instigated by only one side. An example would be a provision limiting fees to actions to collect payments due for goods, rent, or services. This paragraph provides that such a clause is nevertheless construed as covering the entire contract, unless both sides were represented by counsel in negotiating the contract and such representation is recited in the contract. That gives sophisticated contracting parties some latitude to customize the scope of their fee clauses, while still (at least partially) thwarting a form of backdoor unilaterality in adhesion contracts.  

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16 See Sears, 70 Cal. Rptr. 2d at 776-77, discussing the background of this provision.
The statute also provides that any purported waiver of fees is void. Otherwise, we would predictably see contracts with unilateral fee clauses and purported waivers of fees by one side. This, moreover, has been held to be a fundamental public policy of California for purposes of conflicts-of-law issues.\textsuperscript{17} Thus, the forced bilaterality of section 1717 applies to any contract itself governed by California contract law (either through a choice-of-law provision or through ordinary conflicts principles),\textsuperscript{18} and also to any contract dispute litigated in state or federal court in California, even if the rest of the contract is governed by the law of some other jurisdiction.

The remainder of section 1717 is principally procedural, although it also deals incompletely with the criteria for determining who is the prevailing party. These aspects of the section will be discussed in more detail later on.

\textbf{C. Contractual Fee Recovery Outside Of Section 1717}

Significantly, section 1717 applies only to clauses for fees “which are incurred to enforce that contract.” One consequence of this wording – clear enough textually, but possibly not really contemplated in the drafting – is to limit the section’s coverage to causes of action for breach of contract (or, at least, to claims bearing other labels but characterizable as enforcing terms of the contract). That does not cover the entire universe of suits subject to contractual fee clauses, however. It is fairly common for fee clauses to extend to broader substantive ranges of disputes, using such phrases as “arising out of this agreement,” “relating to the contract,” “relating to the premises,” “to which the agreement gives rise,” and so on. Such language is commonly construed to include non-contractual causes of action such as fraud, products liability, and

\textsuperscript{17} ABF Capital Corp. v. Grove Properties Co., 23 Cal. Rptr. 3d 803 (Ct. App. 2005).

\textsuperscript{18} Admittedly this assumes that the forum state would not conclude that it has a fundamental public policy of allowing unilateral fee clauses.
various statutory claims.\textsuperscript{19} Broad-form fee clauses such as this are enforceable as contractual terms; the limited scope of section 1717 itself is not intended to prevent parties from contracting more broadly if they wish.\textsuperscript{20}

To the extent that a contractual clause extends beyond the reach of section 1717, however, it ceases to be governed by that section. This can lead to inconsistent results in a single lawsuit involving a single fee clause, depending on what the causes of action are. For example, the realty sales contract in \textit{Santisas v. Goodin}\textsuperscript{21} contained a broadly worded, bilateral fee clause.

\textsuperscript{19} \textit{E.g.}, Santisas, 951 P.2d at 405 (construing “arising out of the execution of th[e] agreement or the sale” to reach tort claims); Johnson v. Siegel, 101 Cal. Rptr. 2d 412, 422 (Ct. App. 2000); Allstate Ins. Co. v. Loo, 54 Cal. Rptr. 2d 541, 542-43 (Ct. App. 1996); Lerner v. Ward, 16 Cal. Rptr. 2d 486, 489 (Ct. App. 1993); Xuereb v. Marcus & Millichap, Inc., 5 Cal. Rptr. 2d 154, 157-59 (Ct. App. 1992).

\textsuperscript{20} \textit{E.g.}, Santisas, 951 P.2d at 405; Xuereb, 5 Cal. Rptr. 2d at 157. Courts sometimes speak of this as recovering fees under CAL. CIV. PROC. CODE § 1021 (West Supp. 2005), rather than recovering on the basis of the contract itself. \textit{E.g.}, Lerner, 16 Cal. Rptr. 2d at 489. Section 1021, however, does not in itself authorize fees for anyone; it simply provides that fees are a matter of private contract unless there is a statute providing for them. While that can be taken as an authorization for contractual fee clauses, it may be supposed that such clauses would be enforced as a matter of ordinary contract law, with or without section 1021. For present purposes it suffices to note that section 1021, unlike section 1717, does not dictate alteration of contractual terms.

\textsuperscript{21} 951 P.2d 399 (Cal. 1998).
The buyers sued, asserting both contract and tort claims. The buyers then voluntarily dismissed the case with prejudice. The supreme court held first held (as a matter of contract construction) that the broad-form fee clause covered both the contract claim and the tort claim, and it reaffirmed that the parties were free to adopt such a broad clause. Further, the court concluded (still as a matter of contract construction) that the buyers’ voluntary dismissal with prejudice made the sellers “prevailing parties” within the meaning of the contract. At that point, however, the court’s analysis came to a fork. Section 1717(b)(2) expressly provides that “[w]here an action has been voluntarily dismissed . . ., there shall be no prevailing party for purpose of this section.” Hence, the sellers could not recover fees as to the contract cause of action (governed by section 1717), because the parties’ contractual intent was overridden by the statute’s prohibition on finding a prevailing party in voluntary dismissal cases. “This bar, however,” the court said, “applies only to causes of action that are based on the contract and are therefore within the scope of section 1717.” Hence, the court reached the opposite result as to the tort claims. The sellers were the prevailing parties as to the tort claims, and hence entitled under the contractual fee provision to the fees incurred on those claims. Moreover, that result was not barred by section 1717’s provision that there is no prevailing party in voluntary dismissal cases, because section 1717 does not apply to contractual clauses for recovery of fees

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22 Id. at 405.

23 Id. at 405-06.

24 Id. at 406-11.

25 Id. at 411.
incurred on tort claims. Thus, the end result was a paradox: The successful sellers could invoke the contract to recover the fees they incurred in defending the tort claims, but not those incurred in defending the contract claims.

The distinction in *Santisas* between contract claims and non-contract claims was grounded on the limiting language in subdivision (a), limiting the section’s reach to contract clauses for recovery of fees “incurred to enforce that contract.” Thus, while *Santisas* itself dealt only with the section’s provision concerning voluntary dismissals, the same contract/non-contract distinction applies equally well to all aspects of section 1717. Most dramatically, it dictates the applicability of the section’s central feature – the forced-bilaterality provision in subdivision (a). Suppose a contract between Capulet and Montague includes a broad-form but unilateral fee clause – that is, a provision that in case of suit on any claim related to the contract, Capulet (but not Montague) will recover attorney fees. Capulet sues Montague to collect payment for goods; Montague cross-complains for fraud. If Capulet wins the whole suit, Capulet can collect his attorney fees incurred on both halves of the case, because the contract says so. If Montague wins the entire case, however, he will recover only his fees incurred in defending against Capulet’s collection action. Because that claim is one for enforcement of the contract, section 1717 applies, and it transforms the facially unilateral fee clause into a bilateral one. But Montague will not recover the fees he incurs in winning his fraud cross-complaint. He cannot recover those fees under the contract itself, because the contract provides for only Capulet to get

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26 *Id.* at 411-14.
fees. And the reciprocity provisions of section 1717 will not solve that problem for Montague, because the section does not apply to a fraud claim.  

Another feature that might cause similar trouble is the definition of the prevailing party in section 1717(b)(1) as “the party who recovered a greater relief in the action on the contract.”

27 This hypothetical is similar, but not identical, to *Moallem v. Coldwell Banker Commercial Group*, 31 Cal. Rptr. 2d 253 (Ct. App. 1994). The fee clause in *Moallem* was broad-form but unilateral, running in favor of the defendant. The plaintiff prevailed on tort and fiduciary-duty theories, but the defendant prevailed on the plaintiff’s contract count. Correctly anticipating *Santisas*, the court rejected a fee award for the plaintiff, because section 1717 did not render the fee clause bilateral as to the non-contract claims. (Unexplained, indeed, is why the defendant did not recover fees on the strength of having beaten the contract count. One can surmise that it did not have the nerve to claim to be the prevailing party.)

See also *Kangarlou v. Progressive Title Co.*, 27 Cal. Rptr. 3d 754 (Ct. App. 2005), allowing fees on a narrow, unilateral fee clause only after parsing the plaintiff’s various fiduciary claims to see if any of them could be forced into a contract frame. The court was fairly expansive, however, in extending a contract label to fiduciary breaches, pointing out that the escrow agent assumed the duties only by contract. Perhaps the same reasoning would have applied in *Moallem*, but for the factor (unexplained in the opinion) that the defendant actually defeated an express contract claim. See *Moallem*, 31 Cal. Rptr. 2d at 255 n.2, noting that the plaintiff made a *Kangarlou*-like argument below but abandoned it on appeal.
That is true to the overall section’s constricted coverage. It could skew the results in ways not intended by the contracting parties, however. Suppose Hatfield and McCoy have a broad-form, bilateral contractual fee clause covering any possible substantive disputes between them. On Hatfield’s multi-count suit, the jury finds that McCoy’s breach of contract caused no damages, but awards $1 million on Hatfield’s tort claims (all covered by the fee clause). Absent section 1717, no one would have any difficulty concluding that Hatfield is the sole prevailing party on the entire lawsuit, as contemplated in the parties’ contract. But section 1717(b)(1) appears to dictate that there must be two “prevailing party” determinations – one “in the action on the contract,” and the other for everything else. That would make McCoy the prevailing party on part of the action – a result neither true to the parties’ intention, nor advancing any other visible purpose.

D. Rule of Court 3.1702

Rule of Court 3.1702 (formerly Rule of Court 870.2) addresses the procedures and deadlines for seeking attorney fees on either a statutory or a contractual basis. Except for fees fixed by formula, the vehicle for seeking fees is by noticed motion.

28 Cal. Rule of Court 3.1702 (West Supp. 2007) (hereinafter “Rule 3.1702”). This Rule was formerly Rule 870.2, but was renumbered effective 2007. Because this article consists primarily of extended discussion of this Rule, section 1717 of the Civil Code, and section 1033.5 of the Code of Civil Procedure, these three provisions will be referred to throughout this article without further formal citation.

29 Subdivision (e) of the Rule provides for claiming such fixed-formula fees in a memorandum of costs rather than by motion. See infra at [pages 24-25].
The present version of the Rule, principally adopted in 1994 and amended in 1999, creates a uniform and reasonable time requirement for seeking either statutory or contractual fees.\(^{30}\) Before 1994 the deadlines were both too strict and too loose. The original version of Rule 3.1702, adopted in 1987 (then numbered Rule 870.2), applied only to fees sought under CIVIL CODE section 1717 (i.e., loosely speaking, contractual fees), and it required that a fee motion be filed no later than when a memorandum of costs was filed.\(^{31}\) Not only was that a remarkably short time in which to pull together the timesheets, invoices and so on for a complete and well-documented fee motion,\(^{32}\) but it could act as a bar to recovering fees for most post-judgment activities.\(^{33}\) For statutory fee motions, by contrast, there was no fixed deadline at all,

\(^{30}\) See Sanabria v. Embrey, 111 Cal. Rptr. 2d 837, 840-41 (Ct. App. 2001), discussing the background and purpose of the 1994 rewriting of the Rule. The 1999 amendment added the provision in Rule 870.2(b) (now Rule 3.1702(b)) concerning appeals before entry of final judgment.


\(^{32}\) The comments of the State Bar and others to this effect were instrumental in persuading the 1994 redrafters to move away from tying the fees deadline to the time to seek costs. See Sanabria, 111 Cal. Rptr. 2d at 841.

\(^{33}\) See Bankes, 11 Cal. Rptr. 2d at 725-27 (dictum or alternative holding).
only a criterion of prejudicial delay.\textsuperscript{34} Although no cases addressed the point, moreover, it would appear that the same lack of deadline would have applied to motions for contractual fees falling outside the scope of section 1717.

The 1994 amendment cleaned this up considerably. The Rule now expressly applies to both contractual and statutory fees, as recited in subdivision (a).\textsuperscript{35} The time deadlines have been liberalized, and tailored to the separate situations of prejudgment and appellate fees.

\textsuperscript{34} Citizens Against Rent Control v. Berkeley, 226 Cal. Rptr. 265, 273 (Ct. App. 1986); see Save Our Forest, 58 Cal. Rptr. 2d at 710.

\textsuperscript{35} Because Rule 3.1702 applies by its terms only to fees sought under contracts and statutes, it could be read as not covering fees sought under the third heading of \textsc{code of civil procedure} section 1033.5(a)(10)(C), namely “Law” – particularly since that third category was added to section 1033.5 the year before the 1994 broadening of then-Rule 870.2 (now Rule 3.1702). One treatise accordingly says that there is no deadline for seeking fees on that basis. P\textsc{earl} (\textit{supra} note [3]), § 14.24. While that view is true to the literal wording, however, it may be doubted whether any such result was intended. The drafting history of the 1994 Rule revision (recounted in \textsc{Sanabria}, 111 Cal. Rptr. 2d at 840-41) shows an intent to make the Rule cover all fee motions. Indeed, the \textsc{Sanabria} court concluded that the Rule provides the deadline for all fee motions even where its precise language might not fit perfectly (there, as applied to a voluntary dismissal). That suggestion of comprehensive coverage, however, was breached by the later holding in \textsc{Crespin v. Shewry}, 22 Cal. Rptr. 3d 696 (Ct. App. 2004), that the Rule creates no time deadline for post-judgment fees incurred in the trial court (discussed \textit{infra} at [page 19]).
Subdivision (b) of the Rule provides a time frame for seeking attorney fees “up to and including the rendition of judgment in the trial court.” This includes fees incurred in appeals occurring before entry of judgment – either interlocutory appeals, or appeals from final judgments but resulting in new judgments on remand.36 A motion for these fees must be filed and served within the same deadline for a notice of appeal under Rules of Court 8.104 and 8.10837 (typically sixty days from notice of judgment), with provision for extensions.

Subdivision (c) of Rule 3.1702 governs fees “on appeal” (other than the prejudgment appeals referred to in subdivision (b)). The Rule says that a motion for such appellate fees is to be filed and served within the time for a memorandum of costs on appeal under Rule 8.276(d) (again with provision for extensions). Rule 8.276(d)38 requires a memorandum of costs on appeal to be filed in superior court within 40 days after notice of issuance of the remittitur. Although Rule 3.1702(c) does not say so expressly, the intention and practice is that the motion for appellate fees is to be filed in the superior court. Not only does Rule 8.276(d) expressly

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36 See Yuba Cypress Housing Partners v. Area Developers, 120 Cal. Rptr. 2d 273 (Ct. App. 2002).
38 CAL. RULE OF COURT 8.276(d) (West 2007). Rule 8.276 was derived from prior Rule 26; it was renumbered as Rule 27 in a 2003 revision, and then renumbered as Rule 8.276 effective 2007. Not until 2006, however, was a conforming amendment made to then-Rule 870.2, which had continued to refer anachronistically to Rule 26(d).
specify that forum for the memorandum of costs, but the court of appeal would lose jurisdiction to entertain a fee motion when the remittiturb issues.\textsuperscript{39}

Not found in Rule 3.1702 is any timing (or procedural) provision for seeking fees incurred in the trial court, but after the trial court’s entry of judgment. Examples would be fees incurred in litigating routine post-trial motions such as motions for new trial or JNOV; motions for attorney fees under Rule 3.1702(c); and any later motions such as those relating to enforcement or modification of a permanent injunction. Such fees are not governed by Rule 3.1702(c), because they are not “for services up to and including the rendition of judgment in the trial court.” But neither are they governed by Rule 3.1702(d), because they are not “fees on appeal.” In some instances one might construe the “on appeal” language expansively enough to include post-judgment fees incurred in the trial court preceding or pending an appeal. That is a

\textsuperscript{39} Oddly, however, the 2003 revision to former Rule 26 (renumbered Rule 27 at the time, now Rule 8.276) deleted a prior express provision that entitlement to attorney fees on appeal was to be decided by motion in the trial court unless the court of appeal ordered otherwise. \textit{See} Yuba Cypress, 120 Cal. Rptr. 2d at 278-79, quoting the prior CAL. RULE OF COURT 26(a)(4)(ii). It may be technically possible on the present Rule for such a motion to be filed and decided in the court of appeal if that can be done before remittitur, but it is doubtful that that was intended.

Even without a full motion, however, the court of appeal may at least decide that the case is one where a fee award is called for, while remanding for determination as to amount. \textit{See} Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal., 764 P.2d 278, 305-06 (Cal. 1988).
textual stretch even where an appeal is taken, though, and it loses all plausibility when no one files any appeal. Hence, the court in *Crespin v. Shewry*\(^{40}\) concluded that post-judgment, trial-court fees are subject to neither of the deadlines in Rule 870.2 (now Rule 3.1702) – indeed, to no fixed deadline at all. Said the court:

> In our view, the rule was not intended to govern the time for bringing motions for fees arising from post-final judgment activities, such as litigation over modifications to a permanent injunction. The rule’s drafters either did not consider such postjudgment fee motions or decided not to address them in the rule.\(^{41}\)

The only timing requirement is that the motion not be delayed so far as to cause undue prejudice.\(^{42}\)

**E. Code of Civil Procedure Section 1033.5**

Section 1033.5 of the *Code of Civil Procedure*\(^{43}\) serves principally to define the items that may or may not be recovered as “costs.” It bears on attorney fees, however, in two ways.

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\(^{40}\) 22 Cal. Rptr. 3d 696 (Ct. App. 2004).

\(^{41}\) *Id.* at 700-01.

\(^{42}\) *Id.* at 705.

\(^{43}\) *Cal. Civ. Proc. Code* § 1033.5 (West Supp. 2005) (hereinafter “*Civ. Proc. Code* § 1033.5” in citations, or “*Code of Civil Procedure* section 1033.5” or “section 1033.5” in text). Because this article consists primarily of extended discussion of this section, section 1717 of the *Civil Code*, and Rule of Court 3.1702, these three provisions will be referred to throughout this article without repetitive formal citation.
First (for reasons, and with consequences, explored later in this article), it expressly classifies attorney fees as a subset of “costs.” Subdivision (a) of the section lists items recoverable as costs, and included in the list as paragraph (a)(10) are three categories of fee recoveries: “Attorney fees, when authorized by any of the following: (A) Contract. (B) Statute. (C) Law.” Later in the section, there is the slight refinement that fees awarded under Civil Code section 1717 are classified as contractual fees under (A) rather than statutory fees under (B), even if they are recovered only because of the forced-bilaterality provision of section 1717.\(^4\) The last category in subparagraph (C), “Law,” codifies the practice of awarding fees on common-fund or substantial-benefit theories.\(^4\) It serves as a catch-all, encompassing regulations, common law, equity, or whatever other source of authority for fees there might be other than contract or statute.\(^4\)

And second, section 1033.5(c)(5) lays out a separate set of procedural provisions for seeking fees – largely duplicative of Rule 3.1702, but partly conflicting. Since section 1033.5 is a statute and Rule 3.1702 merely a Rule of Court, the former presumably takes precedence. It is nevertheless confusing and inconvenient to have two separate, non-identical procedural provisions governing the same thing. Moreover, the provisions of section 1033.5(c)(5) draw various technical distinctions, for no apparent reason other than historical accident.

\(^4\) CIV. PROC. CODE § 1033.5(c)(5), 2d paragraph.

\(^4\) See Tanner v. Tanner, 67 Cal. Rptr. 2d 204, 206 (Ct. App. 1997) (discussing the addition of subparagraph (C)).

\(^4\) See Santa Paula v. Narula, 8 Cal. Rptr. 3d 75, 80-81 (Ct. App. 2003), enforcing a municipal ordinance for attorney fees as either a “statute” or a “law.”
Rule 3.1702 applies uniformly to statutory and contractual fee applications. Section 1033.5(c)(5), in contrast, provides different procedural provisions depending on whether the basis for awarding fees is a statute, a contract, or something else.

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

This peculiar paragraph requires some study to parse out. The first sentence seems simply to repeat what was already stated in fewer words in section 1033.5(a)(10)(B), namely that statutory attorney fees are treated as costs (though the sentence’s limitation to California fee statutes is odd, since subparagraph (a)(10)(B) must presumably include federal, sister-state, or foreign fee statutes too). For no apparent reason, though, this subparagraph does not include a similar, duplicative statement that contractual or “by law” fees are also costs, even though they are.
The paragraph then lays out the procedures to be used in seeking fees. All three categories of fee claims may be asserted either by noticed motion or upon entry of a default judgment. The former is the procedure prescribed in better detail in Rule 3.1702. The latter, though not mentioned in the Rule, seems sensible enough. It is not as clear as it might be, though, that this is an effective incorporation of or cross-reference to more detailed provisions governing default judgments,\textsuperscript{47} rather than constituting a freestanding separate (if vague) procedural provision.

Section 1033.5(c)(5) makes other procedures available for seeking fees, but the procedures differ depending on the source of the entitlement to fees. If fees are claimed under a statute (other than \textsc{Civil Code} section 1717), they may be fixed “at the time a statement of decision is rendered,” though no procedure is specified for how the fee claim is to be asserted or opposed. This is somewhat awkward in practice. It is usually inconvenient to file a fee claim before the underlying result is fully known, both because neither side may be sure it is the prevailing party, and because the prevailing party is not done yet incurring the fees. (Tactically, parties may also fear somehow skewing the pending result by seeming too greedy or shifting the judge’s sympathy to the opponent.) Further, whether this is a sound procedure or not, there is no evident reason why it should be available only for statutory fee claims and not contractual ones.

A claim for statutory fees may also be made by application concurrent with a memorandum of costs, supported by affidavit – another option not provided for in Rule 3.1702. There is no obvious objection to allowing that procedure, but it is unlikely to be very appealing.

\textsuperscript{47} \textit{E.g.}, \textsc{Cal. Civ. Proc. Code} § 585 (West Supp. 2005); \textsc{Cal. Rule of Court} 3.1800 (West Supp. 2007).
in most cases. The fifteen days usually allowed for a memorandum of costs\(^{48}\) is a pretty tight deadline for pulling together one’s proof of attorney fees.\(^{49}\) Indeed, that is why in 1994 the time for seeking attorney fees was largely decoupled from (and made longer than) the time for seeking costs.\(^{50}\) Again, though, there is no apparent reason why this option is available only for statutory fee claims and not others. This procedural option is also unclear on how the other party should go about opposing this “application.”

A further source of possible confusion arises from the fact that the underlying fee statutes themselves often specify a motion as the vehicle for awarding fees. Suppose, for example, a prevailing plaintiff claims fees under the private-attorney-general statute. That section starts out: “Upon motion, a court may award attorneys’ fees . . . .”\(^{51}\) The section makes no provision for any other procedure. Does that specification override section 1033.(c)(5), thus rendering unavailable the other procedures provided for in the latter statute? If so, then the availability of the alternative procedures of section 1033.5(c)(5) will be both spotty and random. Many attorney fee statutes use language such as “on motion” or “on noticed motion,” and there is no apparent policy reason why some statutes do include this language while others do not. But if,

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\(^{49}\) While a longer time is allowed to seek costs on appeal (Cal. Rule of Court 8.276(d)(1)), this provision in section 1033.5(c)(5) should not apply at all to fees on appeal, which are not classified as “costs” in the first place.

\(^{50}\) See supra at [pages 15-18 and notes 30, 32].

on the contrary, section 1033.5(c)(5) overrides (or supplements) the “on motion” language of the underlying fee statutes, it effectively negates that language entirely.\footnote{Perhaps the “on motion” language in some fee statutes has a vestigial significance in impliedly barring fee awards on the court’s own initiative.}

The procedural options are both wider and narrower for parties asserting contractual fee claims (including those created by \texttt{CIVIL CODE} section 1717). Such claimants are denied the options of seeking fees with the statement of decision or by application with the memorandum of costs. However, they are given the option of stipulating with the other side to some different procedure – apparently without textual restriction as to what that other procedure might be. It is sensible to let the parties pick a more convenient procedure, at least if the court does not mind. But what is the sense in refusing the same liberty of stipulation to parties litigating a statutory fee claim?

Finally, there is the residual category of “law,” which for procedural purposes is grouped in together with contractual fees, rather than with statutory fees. That seems odd. Some sources of “law,” such as regulations or ordinances, are functionally akin to statutes. Uncodified attorney fee doctrines are also more like statutes than contracts, in that they serve public rather than private goals.

\textbf{F. Fees Fixed By Formula Or Schedule}

A specialized situation exists for fees fixed by formula or schedule. While the second sentence of section 1033.5(c)(5) refers to such fees in discussing the burden of proof, the paragraph specifies no particular procedure for seeking such formula-fixed fees, suggesting that they are to be sought by the same methods as other fees. Rule 3.1702(e) requires that such fees are to be included in the memorandum of costs, apparently leaving no option of seeking them by
That may be a sensible procedure, but it is not one authorized in section 1033.5(c)(5). That section allows statutory fee claims to be made by application concurrent with a memorandum of costs – similar to, but not quite the same as, the procedure specified in Rule 3.1702(e). Further, the statute makes that procedure available only for statutory fees, not contractual or other fees – excluding many cases where a formula would apply.

G. The Relation Between Fees And Costs

California’s procedural rules for seeking attorney fees are intertwined in varying degrees with its rules for seeking costs. In part that is because they have an obvious interrelation in both purpose and timing. Both are means by which a losing party is called on to reimburse some of the winning side’s litigation expense. Both naturally occur at the end of a case (or a discrete phase of a case, such as an appeal), when the winner is known and the parties are (more or less) done with incurring expenses. There is substantive overlap between them as well, at least in concept (though this is sometimes debatable as a technical matter): Pretty much all the items allowable as costs are also the kind of litigation expenses one might expect to be recoverable under a contractual fee clause or fee statute.

California’s present statutes and rules expressly class most (not all) prevailing-party attorney fees as a subclass of costs. That was done for very good reasons – principally to clarify that fees need not be pleaded and proved at trial. But while fees are (mostly) categorized as costs, they are (mostly) nevertheless to be sought by separate procedures, subject to (mostly) separate time requirements. The main functional effect of classifying fees as costs has therefore been to introduce artificial limitations on the recovery of particular items of litigation expense in contractual-fee cases, in derogation of the parties’ contractual intent.
1. Fees and Costs on Appeal

With respect to appeals, the only direct connection between costs and attorney fees is one of timing and forum. Both fees and costs are sought in the trial court, subject to the same deadline. That is because the deadline for seeking appellate fees is defined by incorporation of the deadline for seeking appellate costs.\(^{53}\) Substantively, however, costs and fees are treated separately. Rule of Court 8.276, which defines appellate costs, states simply that “[u]nless the court orders otherwise, an award of costs neither includes attorney fees on appeal nor precludes a party from seeking them under rule 3.1702.”\(^ {54}\)

A further notable distinction between appellate fees and appellate costs is that they are not necessarily triggered by the same event. Costs are available on appeal for prevailing on the appeal itself, whether or not that victory also amounts to prevailing in the overall litigation.\(^ {55}\) “Prevailing party” for purposes of statutory or contractual attorney fees, by contrast, would rarely if ever be construed to mean victory on a particular procedural phase of the case; it means winning the case as a whole. Take, as a familiar example, a case where a defendant wins summary judgment, but the court of appeal (finding a triable fact issue) reverses and remands for

\(^{53}\) See Rule 3.1702(c), discussed supra at [pages 17-18]; CAL. RULE OF COURT 8.276(d) (West Supp. 2007).

\(^{54}\) CAL. RULE OF COURT 8.276(c)(2) (West Supp. 2007).

\(^{55}\) “Except as provided in this rule, the party prevailing in the Court of Appeal in a civil case is entitled to costs on appeal.” CAL. RULE OF COURT 8.276(a)(1) (West Supp. 2007). Subdivision (a)(2) of the Rule makes clear that the Rule looks only to the result in the immediate appeal, not the overall lawsuit (and especially not on remand afterwards), in determining who is the prevailing party for purposes of appellate costs.
The plaintiff has prevailed on the appeal, and will recover his costs under Rule 8.276 after remand to the superior court. However, the plaintiff is not yet entitled to the attorney fees he expended on the appeal, because he is not yet the prevailing party in the litigation as a whole – and may never become the prevailing party, if the defendant wins the trial on remand. If the plaintiff does win the trial, Rule 3.1702(b) contemplates that his fees on the intervening appeal will be sought after final judgment on remand.

2. Trial Court Fees and Costs

When it comes to fees and costs incurred in the trial court, however, the situation is less straightforward. The natural interconnection between costs and fees has been augmented – to an unhelpful degree, I will argue – by certain statutory details intended to fix a related problem. Presley of S. Cal. v. Whelan, 196 Cal. Rptr. 1 (Ct. App. 1983); Bank of Idaho v. Pine Ave. Assocs., 186 Cal. Rptr. 695, 699-703 (Ct. App. 1982). Similarly in Snyder v. Marcus & Millichap, 54 Cal. Rptr. 2d 268 (Ct. App. 1996), a defendant’s appeal was successful in reducing, but not eliminating, damages. The defendant was therefore the prevailing party on the appeal, and entitled to its appellate costs; but it was not the prevailing party on the litigation, and hence not entitled to its appellate attorney fees. And see Mustachio v. Great Western Bank, 56 Cal. Rptr. 2d 33 (Ct. App. 1996), discussed infra at [note 168].

But see Otay River Constructors v. San Diego Expressway, 70 Cal. Rptr. 3d 434 (Ct. App. 2008), awarding contractual fees to a party successfully compelling contractual arbitration, even though the other party might have later prevailed on the substance of the dispute. The court viewed a petition to compel arbitration as separate from the underlying substance, for purposes of fee awards.
Before 1990, there was considerable debate in the courts as to how a prevailing party should assert and prove a claim for contractual attorney fees. Statutory fee claims could be asserted after trial as part of costs, because CODE OF CIVIL PROCEDURE section 1033.5(a)(10) specified that statutory fees were an element of costs. There was no such mention of contractual fees, however.\footnote{See 1990 Cal. Stat. ch. 804, § 1, amending section 1033.5(a)(10) to include contractual as well as statutory fees.} An older strain of case law treated contractual attorney fees as merely a species of special damages, which had to be pleaded and proved at trial as with other damages.\footnote{E.g., Genis v. Krasne, 302 P.2d 289, 292 (Cal. 1956); Stubblefield v. Fickle, 266 P.2d 808 (Ct. App. 1954) (allowing fees as damages despite a statutory bar to costs); City Inv. Co. v. Pringle, 193 P. 504 (Ct. App. 1920); Eastman v. Sunset Park Land Co., 170 P. 642 (Ct. App. 1917); see International Industries, Inc. v. Olen, 577 P.2d 1031, 1034 (Cal. 1978).} This pleading-and-proof requirement was both a trap for the unwary (who might easily overlook the

\footnote{See also Mabee v. Nurseryland Garden Centers, Inc., 152 Cal. Rptr. 31, 34-35 (Ct. App. 1979), accepting the necessity of pleading and proof for recovery of contractual fees, but stating that one need plead only the contractual fee clause itself – not the amount or nature of fees sought. (Although Mabee came after the initial enactment of section 1717, it preceded the 1981 amendment expressly extending the statute to bilateral fee clauses; Mabee disregarded the statute because the contractual fee clause was bilateral. Id. at 36 n.4.)}
necessity of pleading and proving fees),\(^59\) and a dilemma for the wary (who might well be reluctant to parade before a jury the amounts of money they were spending to litigate the case, especially if those amounts were more than the other side was spending).

The 1968 enactment of CIVIL CODE section 1717 muddled that picture somewhat. By (at least partially) creating a statutory foundation for awarding fees on contractual fee provisions, it gave contract-based fees a sort of dual existence as both contractual and statutory, rather like the wave/particle duality of electromagnetic energy. Hence, subsequent cases suggested that a contract litigant had the option of treating his fee claim as contractual (requiring pleading and proof), or as statutory under section 1717 (and thus recoverable as costs).\(^60\) That still had some

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possible problems arising from the limited scope of section 1717, though, including the fact that before 1981 it arguably applied only to unilateral fee clauses. The 1981 amendment to section 1717 made the section expressly applicable to both unilateral and bilateral fee clauses.\textsuperscript{61} It also provided that fees under that section “are an element of the costs of suit.”\textsuperscript{62} Similarly, the original version of Rule 3.1702, adopted in 1986 (as Rule 870.2), clearly contemplated that fees sought under section 1717 were a form of costs.\textsuperscript{63} The 1981 amendment, however, also said that fees (despite being costs) should be sought by motion, which could be taken as prohibiting the practice of using a memorandum of costs to seek fees under section 1717.\textsuperscript{64}

This uncertainty was largely resolved by legislative action in 1990. The list of allowable “costs” in \textsc{Code of Civil Procedure} section 1033.5(a) was amended to include both statutory and contractual attorney fees.\textsuperscript{65} That resolved, at least for the most part, the pre-existing

\textsuperscript{61} See \textit{supra} at [page 7 and notes 13, 14].


\textsuperscript{63} See Bankes, 11 Cal. Rptr. 2d at 726, discussing the then-current Rule 870.2 as adopted in 1986. Rule 870.2 was extensively revised in 1994. See Lee v. Wells Fargo Bank, 106 Cal. Rptr. 2d 726, 734-35 (Ct. App. 2001). It was renumbered as Rule 3.1702 effective 2007.

\textsuperscript{64} See California Recreation Inds. v. Kierstead, 244 Cal. Rptr. 632, 634 (Ct. App. 1988).

\textsuperscript{65} \textsc{Civ. Proc. Code} § 1033.5(a)(10), as amended by 1990 Cal. Stat. ch. 804, § 1. See Bankes, 11 Cal. Rptr. 2d at 725-26, discussing this amendment. The section was further

(footnote cont’d)
procedural question: As costs, attorney fees need not be pleaded or proved at trial.\(^{66}\) It also clarified that fees generally must be sought by motion, not in a memorandum of costs – though

\((\text{footnote cont’d})\)

amended in 1993 to add the third, catch-all category of “Law,” section 1033.5(a)(10)(C).


\(^{66}\) *E.g.*, Harbour Landing, 55 Cal. Rptr. 2d at 643; Allstate, 54 Cal. Rptr. 2d at 542.

*Harbour Landing*, however, overlooked the distinction between trial-court and appellate fees. The latter are not “costs” at all. *See supra* at [page 26].

The pleading requirement still survives if the specific fee statute directs otherwise, however. For example, there are two California statutes that expressly require that a party plead its claim for attorney fees at the outset of the case. Both *CAL. LAB. CODE* section 218.5 (West 2003) (relating to claims for unpaid wages), and *CAL. CIV. CODE* section 1942.5(g) (West 1983) (relating to wrongful evictions), state that the prevailing party recovers fees “if any party to the action requests attorney’s fees and costs upon the initiation of the action.” There is a paucity of published case law addressing either statute. *But see* Cogent Communications, Inc. v. EBroadBandNow, Inc., Nos. A106247 and A108113, 2005 Cal. App. Unpub. LEXIS 8882 (Sept. 29, 2005) (the author was counsel in this case). The apparent intent and effect of this initial-pleading requirement are to create a sort of opt-in system, under which either side can elect to “raise the stakes” in the case by asserting an attorney fee claim – and once either side has done so, then the prevailing party recovers fees. Conversely, if neither side chooses to “opt in” to the fee provision by pleading a fee claim, the case can proceed as if there were no fee statute, and neither side will recover fees. Both statutes govern settings where the fees are apt to

\((\text{footnote cont’d})\)
courts have differed on whether noncompliance with that procedure may be overlooked. The amending act contained an uncodified expression of the Legislature’s purpose:

The Legislature finds and declares that there is great uncertainty as to the procedure to be followed in awarding attorney’s fees where entitlement thereto is provided by contract to the prevailing party. It is the intent of the Legislature in enacting this act to confirm that these attorney’s fees are costs which are to be awarded only upon noticed motion, except where the parties stipulate otherwise or judgment is entered by default. . . .

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(footnote cont’d)

dwarf the damages. The evident purpose of the initial-pleading requirement is to force this election early in the case, thus preventing either side from waiting to see how the case goes before injecting fee exposures into the case.


1990 Cal. Stat. ch. 804, § 2. The remainder of that uncodified section authorized the Judicial Council to adopt a rule governing timing, and (hint, hint) said that the existing Rule 870.2 would do just fine. Since Rule 870.2 already did what was authorized, it is not clear why the Legislature thought this necessary. Further, not until 1994 was the Rule amended to create a deadline covering motions for statutory fees.
3. The Problem of Non-Cost Expenses

While this legislative solution has largely solved the problem of having to plead or prove fees before judgment, it creates (or leaves uncured) a residual gap in bringing the enforcement of contractual fee clauses into the norm of motion practice.

The issue here is whether, and how, the prevailing party may recover out-of-pocket litigation expenditures that do not qualify as statutory “costs.” This has most often arisen as to the fees charged by expert witnesses, but the same issue can arise with respect to other items such as travel expenses, telephone charges, and postage. (For brevity and convenience I will refer to these collectively as “non-cost expenses.”)

First, consider the situation of a prevailing litigant who has no basis for seeking fees—most prevailing litigants, in other words. If a party is deemed “prevailing” under the criteria set out in CODE OF CIVIL PROCEDURE section 1032, then he is entitled to recover costs as a matter of right. The costs so recoverable are defined in section 1033.5. That section creates three categories. Subdivision (a) first sets out a number of items that are recoverable as costs, such as filing fees, surety bond premiums, ordinary witness fees, some transcript costs, and so on. Subdivision (b) specifies a number of items not recoverable as costs, such as investigation expenses, postage, telephone, and so on. Notably, expert fees are recoverable if ordered by the court (paragraph (a)(8)), but not otherwise (paragraph (b)(1)). Finally, there is an “everything

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70 Subdivision (a)(4) of section 1032 partly defines who is the prevailing party, leaving that determination to the court where not specified. Subdivision (b) provides: “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.”
else” category – items neither expressly allowed in subdivision (a), nor expressly forbidden in subdivision (b), which may be allowed or disallowed in the court’s discretion under paragraph (c)(4).

This is all fine and sensible in the absence of any basis for recovering fees. Since California generally operates under the American Rule, a prevailing party is presumptively left to bear his own litigation expenses, except to the extent the Legislature has provided otherwise. The Legislature has provided otherwise with respect to the “costs” allowable under section 1033.5 – but only as to those costs. One may debate whether this or that particular item should be provided for, but the concept of allowing recovery of only a limited category of costs is inherent in the American Rule. “‘It is axiomatic that the right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party.’”

When there is a basis for recovering attorney fees, the matter becomes more complicated. The Legislature by statute, or the parties by contract, have at least partly negated the usual no-recovery presumption of the American Rule. Hence the question becomes, how far does the right of recovery extend? In particular, does the right to recover “fees” mean only fees in the narrow sense of direct compensation for the time spent by attorneys, usually measured by the familiar lodestar method? Does it also incorporate (duplicatively) expenditures that are allowable as costs under section 1033.5? And most consequentially, does it extend also to any other out-of-pocket litigation expenditures not recoverable as costs under section 1033.5 – and if so, which expenditures?

This issue is presented somewhat differently depending whether the underlying entitlement to fees is a creation of statute or of contract. When there is no contractual fee provision, it remains the case that prevailing parties may recover only what litigation expenses the Legislature has seen fit to grant them – and so, if the Legislature has not provided for recovery of some particular expense, then so be it. Take expert fees as the most prominent example. The California supreme court has twice rejected attempts to recover expert fees under fee statutes, whether as part of “costs” \(^72\) or as part of “attorney’s fees.”\(^73\) The United States Supreme Court has reached the same holding with respect to a federal fee statute that often arises in state court.\(^74\)

While these cases decided the expert issue on three particular statutes, it is likely that their reasoning will govern most other fee statutes not expressly authorizing recovery of expert fees. For our purposes, the point is that in deciding whether a particular item of expense is or is not recoverable under a particular fee statute, one looks to the pertinent fee statute (in its language or as construed) to provide the rule on what may be recovered.


The analysis becomes murkier, however, when one turns from statutory fee awards to contractual ones. In the cases mentioned above, the courts were construing what the Legislature means when it uses the terms “fees” and “costs” in fee statutes. But as the supreme court noted in a footnote to the *Davis* opinion, “[o]ur present analysis, which involves statutory construction, may not be dispositive in a matter involving the effect of a contractual agreement for shifting litigation costs, which turns on the intentions of the contracting parties.” It is relatively common for contractual fee clauses to use broader language than merely “fees and costs” in describing what the prevailing party is to recover, and such broader clauses may often clearly (or at least plausibly) extend to expert fees and other non-cost expenses.

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75 950 P.2d at 573 n.5.


(footnote cont’d)
There is no apparent reason not to let parties contract for whatever set of litigation expenditures they see fit. If they want to agree that whichever of them wins the lawsuit should be made as whole as possible, their contractual fee clause can authorize recovery of such items as expert fees, travel expenses, telephone, postage, and so on. As the court held in Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co., “we do not discern any legislative intent to prevent sophisticated parties from freely choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.” That approach is consistent with the method in Davis and similar statutory-fee cases: Either a particular statute does allow recovery of (say) expert fees, or it does not. Either way, the statute’s substantive command should be followed, and procedural statutes and rules should not interfere with the Legislature’s (or Congress’s) substantive intent. While private contracts do not have the same jurisprudential stature as statutes, the same principle should apply. Either a particular contract does allow recovery of

(footnote cont’d)

Indeed, this interpretive result does not necessarily require using different or broader language than that used in fee statutes. “While it is reasonable to interpret a general contractual cost provision by reference to an established statutory definition of costs,” Arntz, 54 Cal. Rptr. 2d at 904, particular parties might plausibly show by parol evidence that they intended language such as “fees and costs” to include all reasonable expenses of litigation (or at least all items that the attorney bills to the client).

54 Cal. Rptr. 2d 888, 904 (Ct. App. 1996). The same court has reiterated the point in dictum: “[P]arties are free to contract for recovery of litigation costs beyond those automatically awarded . . . .” Navellier v. Sletten, 131 Cal. Rptr. 2d 201, 212 (Ct. App. 2003).
(say) expert fees, or it does not. Either way, the parties’ contractual agreement should be
honored.

Despite this seeming substantive freedom of contract, the actual result has usually been
the opposite in practice. Most reported decisions on point have rejected recovery under a
contractual fee clause of any non-cost expenses – that is, out-of-pocket expenditures that could
not be recovered as statutory “costs” under section 1033.5. Under a uniform line of cases
starting with Ripley v. Pappadopoulos, the courts have rejected recovery of any items of
expense that would be barred as costs under section 1033.5(b) – usually expert witnesses’ fees,

78 It should be noted that this “non-cost expenses” category has so far been held to include
only the specific items expressly excluded from costs in section 1033.5(b). That leaves
the discretionary category of expenses neither included in section 1033.5(a) nor excluded
by section 1033.5(b). Such items may be allowed as costs in the court’s discretion under
1994), recognized this, and affirmed the allowance of such discretionary items on the
strength of subdivision (c)(4). It is not clear that that entirely moots the issue of how to
treat such items, however. It is plausible that a trial court could be more restrictive in
allowing discretionary items under section 1033.5(c)(4) than it would be if the court
viewed the same items as clearly authorized by a contractual fee clause. Thus, it may still
make a difference at the margin whether such items are analyzed as contractual
entitlements or as discretionary statutory costs.

79 28 Cal. Rptr. 2d 878 (Ct. App. 1994). See infra at [pages 41-45 and notes 85-90] for
citation and discussion of the line of cases following Ripley.
though other forbidden items have been involved in some cases. The *Ripley* line of cases reason that, since the 1990 amendments, attorney’s fees are classified as a species of costs under section 1033.5(a)(10). Further, subdivision (b) of that section forbids recovery of expert expenses, postage, telephone, and so on as “costs.” Hence (the courts reason), such expenses may not be awarded as “costs,” even as part of that subclassification of costs known as attorney fees. The courts recognize that this result may be contrary to the parties’ contractual intentions, but that is too bad: Section 1033.5(b)’s prohibition on recovery must override private contractual arrangements.

Nor can this result be evaded, said the *Ripley* court, by having the attorneys expend the money for these items and then include those disbursements on their bills to the client, thus including them in the attorneys’ “fees.” Said the court:

> In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include such costs and costs do not include attorney fees.\(^{80}\)

The *Ripley* court cited no statute dictating this absolute mutual exclusivity between costs and fees. The statement seems odd in light of the California Legislature’s unambiguous provision in sections 1033.5(a)(10) and 1717(a) that attorney fees are actually a subset of costs: If one category is a subset of the other (one might ask), how can they be mutually exclusive of each other? That, however, is ascribing too technical a sense of the word “costs” in this part of the *Ripley* opinion. The *Ripley* court in this paragraph was not speaking of “costs” in the technical

\(^{80}\) 28 Cal. Rptr. 2d at 883.
sense of section 1033.5. Rather (and somewhat confusingly), it included the word “costs” in a discussion of expenses in a broader and less technical sense – “whether termed costs, disbursements, outlays, or something else.” 81 The court’s linguistic point was that expert fees (for example) cannot be “costs” in the technical sense, because section 1033.5(b) says they are not; and they also cannot be “attorney fees” as that term is used in section 1033.5(a)(10), because the statutory term “fees” does not include out-of-pocket expenditures no matter what noun is applied to them.

In view of the clear distinction that has always been drawn between attorney fees and the expenses of litigation, we cannot disregard the Legislature’s express prohibition against the inclusion of expert witness fees in a cost award by equating such expenses with attorney fees. 82

While not clearly expressed, then, it appears that the Ripley court’s point was really that when section 1033.5(a)(10) authorizes including “attorney fees” as an element of costs, the section means only fees in the narrow sense of hourly compensation for attorney labor, to the exclusion of other items commonly found in attorneys’ bills such as telephone and postage charges, expert fees, and so on. 83

81 Id.

82 Id. at 884.

83 This reasoning, however, may be in textual tension with the generally accepted principle of including hourly charges for paralegal time in recovery of “attorney fees.” See, e.g., Guinn v. Dotson, 28 Cal. Rptr. 2d 409, 412-14 (Ct. App. 1994); Sundance v. Municipal Ct., 237 Cal. Rptr. 269, 273 (Ct. App. 1987); Missouri v. Jenkins, 491 U.S. 274, 284-89 (footnote cont’d)
Ripley rejected a prior decision reaching the opposite conclusion. Ripley has since been adopted and followed by every published decision addressing the question, including the same

(footnote cont’d)
(1989) (construing 42 U.S.C. § 1988 (2000)). If postage is not “attorney fees” because it is not the fees charged for the labor of attorneys, then why does paralegal time qualify as “attorney fees”? Or conversely, if paralegal time is recoverable because it is commonly included in the bills, then why not allow recovery of postage too, since it is also routinely included in attorneys’ bills? Of course, a paralegal is not the same as postage – but neither of them is an attorney.

The Ninth Circuit, applying federal law, has commented that paralegal time is recoverable because it is customarily included in attorneys’ bills to their clients, which should put it on the same footing as postage, travel costs, and so on – unlike expert fees, which (the court says) are “by tradition and statute” treated separately. Constr. Ind. Trustees v. Redland Ins. Co., 460 F.3d 1253, 1256-58 (9th Cir. 2006). That solution, however, does not parse well under California law, because section 1033.5’s list of unrecoverable expenses includes several items that surely are customarily included in attorneys’ bills. [Note to editors: A Supreme Court case, Richlin 06-1717, may shed peripheral light on this peripheral point. It should be decided before the article would be published.]

Ripley, 28 Cal. Rptr. at 881-84, disapproving Bussey v. Affleck, 275 Cal. Rptr. 646 (Ct. App. 1990). Bussey was decided by the First District, which has since repudiated Bussey and adopted Ripley. Hsu v. Semiconductor Systems, 25 Cal. Rptr. 3d at 91; First Nationwide, 92 Cal. Rptr. 2d at 148-51.

(footnote cont’d)
The court of appeal that had originally held the other way. The California Supreme Court, however, has reserved the issue.

(footnote cont’d)

Interestingly, the Ripley court probably did not have to go as far as it did to reach its result. The contractual fee clause there was a narrowly drafted one, providing simply for “reasonable attorney’s fees and costs.” 28 Cal. Rptr. 2d at 880. It would have been easier and less controversial to decide, simply as a matter of contractual interpretation, that that language was intended to carry the conventional meaning of “fees” in the narrow sense and “costs” in the statutory sense (an approach later suggested in dictum in Arntz, 54 Cal. Rptr. 2d at 904). Doing so would have excluded non-cost expenses as a contractual matter, and thus avoided the necessity of deciding whether section 1033.5 requires overriding the parties’ contractual intent; indeed, no statutory issue at all would have been presented. Admittedly, however, even such a narrower basis for Ripley’s decision would still have created a tension with Bussey. Although Bussey presented a more broadly worded contractual fee clause, the Ripley court correctly observed (28 Cal. Rptr. 2d at 885 n.18) that Bussey seemed to hold that any contractual fee clause could be extended to cover out-of-pocket expenses included in the attorney’s bill, apparently without reference to the wording of the particular fee clause at issue. See Bussey, 275 Cal. Rptr. at 648.

Jones v. Union Bank, 25 Cal. Rptr. 3d 783, 790-91 (Ct. App. 2005); Hsu v. Semiconductor Systems, 25 Cal. Rptr. 3d at 90-91; Carwash of America-PO LLC v. Windswept Ventures No. I, LLC, 118 Cal. Rptr. 2d 536 (Ct. App. 2002); Steiny, 93 Cal. Rptr. 2d at 926; First Nationwide, 92 Cal. Rptr. 2d at 148-51; and see Robert L. Cloud &
Analysis of these cases brings out a significant point: The obstacle to recovery of non-cost expenses has been only procedural, not substantive. Strictly speaking, Ripley and its progeny do not hold that non-cost expenses may not be recovered. They hold that such expenses may not be recovered as costs.\textsuperscript{87} The opinions generally leave open the possibility that non-cost expenses might be recovered by a different and proper procedure — namely, the old procedure from before 1968, under which contractual fees had to be pleaded and proved as special damages. As the court held in \textit{Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.}:

> While Code of Civil Procedure section 1033.5, subdivision (b)(1)’s prohibition on the recovery of expert witness fees in a post-judgment cost award does not

(footnote cont’d)

\textsuperscript{86} \textit{Davis}, 950 P.2d at 573 n.5 (quoted supra at [page 36]).

\textsuperscript{87} In \textit{Ripley} itself, for example, in every instance where the opinion rejected recovery of non-cost expenses, it limited its holding to recovery under the procedural heading of costs. “[W]e are here concerned with the items of expense which may be included \textit{in a cost award} after judgment and are not concerned with contractual remedies.” 28 Cal. Rptr. 2d at 884; see \textit{id.} at 879 (“we hold that expert witness fees and other litigation expenses not allowed by statute are not recoverable \textit{as costs’}, 882 (“do not provide for the recovery of such expenses \textit{in a cost award’}), 883 (“may not be otherwise recovered \textit{in a cost award’}), 884 (“prohibition against the inclusion of expert witness fees \textit{in a cost award’}) (all emphases added).
demonstrate “any legislative intent to prevent sophisticated parties from freely choosing a broader [contractual] standard” governing the recovery of expert witness fees . . ., plaintiffs proceeding under such a theory must specially plead and prove their right to recover expert witness fees under an appropriate provision of their contract.88

*Arntz* is the only published post-*Ripley* case to allow recovery of non-cost expenses on a contractual fee clause. It is in harmony with *Ripley* (at least with its holding), however, because in *Arntz* the prevailing party did plead and prove the items at issue. The *Arntz* court distinguished *Ripley* on precisely this basis89 — and subsequent cases have in turn distinguished *Arntz* on the same basis.90

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88 First Nationwide, 92 Cal. Rptr. 2d at 150-51, quoting *Arntz*, 54 Cal. Rptr. 2d at 904; *accord*, Jones, 25 Cal. Rptr. 3d at 790-91; Hsu v. Semiconductor Systems, 25 Cal. Rptr. 3d at 90-91; Carwash, 118 Cal. Rptr. 2d at 538; *and see* *Ripley*, 28 Cal. Rptr. 2d at 884-85 & n.18.

89 54 Cal. Rptr. 2d at 904.

90 Jones, 25 Cal. Rptr. 3d at 790; Hsu v. Semiconductor Systems, 25 Cal. Rptr. 3d at 90-91; First Nationwide, 92 Cal. Rptr. 2d at 150-51.

The court in *Fairchild v. Park*, 109 Cal. Rptr. 2d 442 (Ct. App. 2001), took a more negative view of *Arntz*, rejecting it as incorrect (109 Cal. Rptr. 2d at 449 n.2) and using language that might suggest parties are not free to include non-cost expenses in their contractual provisions at all (109 Cal. Rptr. 2d at 449). In this respect, however, both *Fairchild* and *Arntz* addressed only a fairly narrow issue concerning how far *CIVIL* (footnote cont’d)
CODE section 1717 goes in transforming unilateral fee clauses into bilateral ones (as opposed to the broader issue of whether non-fee expenses may be recovered under a contract itself, unaided by section 1717). In both cases, the fee clauses were unilateral, and the parties disfavored by the fee clauses prevailed in the suits. *Arntz* rejected the contention that section 1717 creates reciprocity only for fees, not “costs.” 54 Cal. Rptr. 2d at 904-05. *Arntz* did not expressly address the point whether that forced reciprocity extends *also* to non-cost expenses – but the *Arntz* opinion clearly contemplated that the prevailing party could recover its non-cost expenses (*id.* at 904). It is not clear whether that was because the *Arntz* court tacitly concluded that reciprocity extends to non-cost expenses, or because the court simply overlooked that nuance.

*Fairchild* arose on similar facts – a unilateral fee clause including “costs and expenses,” with the parties not specified in the clause being the ones to prevail at trial. The court held that the trial court should have awarded fees to the prevailing parties on the basis of the reciprocity provision of section 1717. 109 Cal. Rptr. 2d at 445-48. The court, however, reversed the award to the prevailing parties of their expert fees. 109 Cal. Rptr. 2d at 448-50. The *Fairchild* court did not take issue with *Arntz’s* express holding that section 1717’s reciprocity extends to “costs” as well as “fees.” However, the court rejected the notion (implicit in *Arntz’s* result if not its reasoning) that the “costs” referred to in section 1717 can include non-cost expenses such as expert fees. 109 Cal. Rptr. 2d at 448-50. Thus, while *Fairchild* can be broadly read as rejecting *Arntz’s* holding that parties may provide contractually for recovery of non-cost expenses, a stricter reading of *Fairchild* would limit its holding only to a narrow scope of the extent of reciprocity under
This uneasy *Ripley-Arntz* compromise is not very satisfactory in itself. It partially resurrects the old pre-1968 requirement that litigation expenses, when recoverable under a contract, must be pleaded and proved at trial – a requirement that was legislatively renounced in 1990 as to traditional fees, because it did not work very well in practice. 91

Moreover, this procedural requirement creates special difficulties as applied to non-cost expenses incurred after trial. By hypothesis, such expenses cannot have been proved at trial (as *Ripley* would require). One can hardly envision a party offering (or a trial court accepting) “proof” of expenses not yet incurred: “I expect I will incur various expenses after trial; I cannot identify or quantify them, but I want the jury to award them to me all the same.” If the *Ripley* requirement is applied rigorously, then, these items simply vanish into a procedural Catch-22 – seemingly recoverable as a matter of substantive contract law under *Arntz*, and yet denied in practice under *Ripley* because there is no viable procedure by which to recover them.

Alternatively, a trial court might allow such post-trial, non-cost expenses without requiring proof at trial, on the reasoning that the court should not require what could not have been done. 92 But

(footnote cont’d)

section 1717. “[T]he reciprocity provisions of Civil Code section 1717 do not permit a contractually broadened definition of costs.” 109 Cal. Rptr. 2d at 443. (*But see* Hsu *v. Semiconductor Systems*, 25 Cal. Rptr. 3d at 90, reading *Fairchild* as rejecting any freedom of contract to provide for recovery of non-cost expenses.)

91 *See supra* at [pages 28-32 and notes 58-60, 65-67].

92 Anecdotally, that was the result the superior court reached in one case in which the author (while still in practice) was counsel for the prevailing party. That result was not appealed.
that has its weaknesses too: It effectively allows some non-cost expenses while disallowing others, depending solely on whether they were incurred before or after trial\textsuperscript{93} – an unsatisfying and irrational criterion, serving no visible relation to any policy at stake.\textsuperscript{94}

\textsuperscript{93} Indeed, if the criterion of allowability is impossibility of proof, then the timing may be cut even finer than that. For a plaintiff, for example, this resolution would seem to allow recovery of any items of non-cost expense incurred during trial, but after the plaintiff has rested.

\textsuperscript{94} In case this is not complicated enough, there is a further uncertainty whether the result would be different in a diversity case in federal court (or, similarly, in a sister-state court applying California law). The obstacle to recovering non-cost expenses in California court is procedural, not substantive, and thus may not apply in a court with different procedural rules. If so, that is yet another reason why California’s rule should be changed. The practical recoverability of expert fees, when a contract calls for them, should not depend on the accident of diversity.

It is not at all clear, however, how a federal court should come out on the Ripley-Arntz conundrum. \textit{Federal Rule of Civil Procedure} \textit{54(d)(2)} provides a motion procedure for seeking “attorneys’ fees and related non-taxable expenses”; the latter term is what I have called non-cost expenses. That motion procedure, however, does not apply if “the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.” I assume that “such fees” includes the antecedent “related non-taxable expenses.” If so, it is arguable, but not obvious, that this (footnote cont’d)
Finally, all of the foregoing discussion of non-cost expenses – and all of the pertinent case law – arise in the setting of expenses incurred in the trial court. Only such expenses raise the issue of how to interpret the provision of section 1033.5(a)(10) that statutory or contractual attorney fees are deemed a species of “costs.” On appeal, the terminology is different and more straightforward: Rule 8.276(c)(2), far from including attorney fees as a subclass of appellate costs, draws a sharp distinction between fees and costs. Thus, while the issue has not arisen in any reported case, it would seem that the logic of Ripley should not extend to the appellate arena. If so, then non-cost expenses incurred on appeal may be awardable after all, because they do not run up against the objection that fees are really “costs” and certain items of expense are forbidden as “costs.”

Yet that result is not as clear as it might be. Rules 8.276(c)(2) and 3.1702(c) speak only of awarding “attorney fees on appeal” (emphasis added); they make no express provision for recovery of “expenses on appeal.” If “attorney fees” as used in section 1033.5(a)(10) means only compensation for attorney work (and not out-of-pocket expenses), then perhaps the phrase is similarly limited as used in Rule 3.1702(c). Rule 8.276(c)(1) says that “[a] party may recover only the following costs,” itemizing five specific categories (emphasis added). Does that mean that no other “costs” may be awarded at all, or does it mean only that no other “costs” may be awarded as costs? 95

(footnote cont’d)

“element of damages” exception describes California’s treatment of non-cost expenses in the Ripley line of cases.

95 The further question of how this would apply to non-cost expenses incurred in an interlocutory appeal does not bear thinking about.
II. THE AIMS OF THE PROPOSED REVISION

As the preceding section discusses, there is much that is sound in California’s existing procedural statutes and rules for attorney fee claims - especially in contrast with the law before several rounds of curative amendments. There is much that needs work, too, however. The appended proposed revisions attempt to fix the problems I have identified above.

This article and proposed revisions are not an attempt to cover or resolve every possible aspect of California law on attorney fee claims. Even a cursory glance at the treatises on attorney fees readily reveals a host of issues that can arise in applying contractual or statutory fee provisions. Some of these are more or less settled in the case law, while others are still open. If one wished to write a “Restatement of the Law of California Attorney Fees,” one would have to condense these case-law rules into codified form, or make up solutions where the cases do not provide them. I have no intention of taking on that task, which can be left where it now lies – in the courts, as they construe the statutes and contracts that give rise to fee claims.

The substantive law of attorney fee claims – for example, what underlying causes of action are covered, who is the prevailing party, and what items are recoverable – varies as between contractual and statutory claims. Indeed, it will vary from statute to statute and from contract to contract. With a few exceptions (almost all involving broadening the coverage of CIVIL CODE section 1717), my proposal treats all those substantive sources as “black boxes,” each of which provides whatever it provides. My object is to streamline the procedures by which the intent of the Legislature (for statutory fees), and the intent of the contract parties, to the extent not modified by section 1717 (for contractual fees), can be faithfully carried out.

A. Provide A Uniform Motion Procedure For (Almost) All Fee Claims

Because the substantive law governing fee claims can vary, though, is no reason for the procedures to vary. There is little controversy that a post-judgment noticed motion is (almost
always) the best procedure for parties to seek prevailing-party attorney fees. Although there have been times in the past when certain kinds of fee claims could be asserted in a memorandum of costs, that practice has long been abandoned (except in the special case of formula- or schedule-based fees). The printed-form format used for costs does not lend itself to the kind of detailed and expository proof generally preferable (if not absolutely required) for attorney fee claims. Moreover, as the Judicial Council accepted in revising Rule 3.1702 (then Rule 870.2) in 1994, the time allowed for seeking costs is inconveniently short for fee requests.

The other alternative is worse – requiring proof at trial, as was once the case for contractual fees (and remains the case for contractually sought non-cost expenses). The courts have commented on the several reasons why it is a bad idea, for the courts and the parties, to require that trial of the underlying merits be sidetracked or confused by injecting issues about the litigation process itself.

One glancing look illustrates the incongruous situation that would develop by a requirement of a jury – midstream in the process of determining liability of the respective parties – to hear from both sides proof and argument as to the nature, extent and value of the attorney services rendered and yet to be rendered. Equally untenable would be a rule directing a trial court in a nonjury trial to assess attorney fees for the prevailing party before ascertaining who will occupy that

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96 See supra at [page 30 and note 64].

97 See supra at [page 15 and notes 30, 32].
honored status. Such tendered procedure is impractical, incapable of application.\footnote{Mabee v. Nurseryland Garden Centers, Inc., 152 Cal. Rptr. 31, 35 (Ct. App. 1979). \textit{And see}, \textit{e.g.}, P R Burke Corp. v. Victor Valley Wastewater Reclamation Auth., 120 Cal. Rptr. 2d 98, 101 (Ct. App. 2002); Beneficial Standard Props., Inc. v. Scharps, 136 Cal. Rptr. 549, 552 n.3 (Ct. App. 1977); Brandt v. Superior Ct., 693 P.2d 796, 800 (Cal. 1985) (although fees were recoverable as damages there, it would be preferable to stipulate to submission to court after trial).}

Previous amendments have made progress toward the goal of a uniform, sensible procedure for litigating attorney fee claims. The 1981 amendment of \textit{Civil Code} section 1717, together with the 1990 amendment of \textit{Code of Civil Procedure} section 1033.5, took a huge step in that direction, incorporating contractual claims into the existing practice of seeking statutory fees by post-judgment motion. The 1994 revision of Rule 3.1702 (then Rule 870.2) contributed further, by bringing statutory fee claims into a unified (and liberalized) set of time deadlines for fee motions.

There remain a few flaws in the uniformity of the existing system, however, that still need to be taken care of.

- For starters, there is not one unified set of procedural rules for fee motions, but two sets – namely Rule 3.1702, and \textit{Code of Civil Procedure} section 1033.5(c)(5). These two provisions are mostly consistent with each other, but not entirely so. Moreover, section 1033.5(c)(5) – which, as a statute, must be regarded as the more definitive of the two – continues to discriminate among
statutory, contractual, and “law” fee claims, in ways drawn from historical practice but serving no visible policy purpose. I know of no published case to date in which these inconsistencies and discriminations have been a problem, but it is bound to happen sooner or later. And in any event, there is virtue in putting all the relevant procedural requirements in a single place where a researcher can find them easily.

• Although prior amendments have mostly eliminated the unsound practice of treating contractual fees as damages (subject to pleading and proof), there is still one big gap in completing that step – namely non-cost expenses in contractual-fee cases. Under the Ripley line of cases, any out-of-pocket litigation expenditures that do not qualify as statutory costs are excluded from the post-judgment motion procedure used for recovery of conventional attorney fees. They must therefore be recovered, if at all, by the old-fashioned, pre-1968 method of pleading and proving them. The courts have correctly commented why it is not a good idea to mix litigation expense issues into the trial of the merits of a case, a general sentiment with which the Legislature has evidently concurred. Moreover, without necessarily criticizing the courts’ reading of the existing statutes in Ripley and its progeny, we can nevertheless say that there is neither any obvious indication that the Legislature consciously intended to preserve the old pleading-and-proof

99 Ripley v. Pappadopoulos, 28 Cal. Rptr. 2d 878 (Ct. App. 1994), and cases following it, discussed supra at [pages 38-45 and accompanying footnotes].
regime for non-cost expenses, nor any good policy reason why it should be preserved.

- Similarly incompletely realized is the 1994 aim of providing a single, and determinable, set of deadlines for fee motions. As *Crespin v. Shewry*\(^{100}\) held, a gap remains for fees incurred in the trial court after judgment.

The proposed revisions, however, do preserve three pre-existing departures from a unified motion procedure, concerning defaults, formula-based awards, and procedural requirements in particular fee statutes.

**B. Extend The Coverage Of Section 1717 (Including Its Forced Bilaterality) To All Contractual Fee Provisions**

*Civil Code* section 1717 embodies California’s strong public policy that contractual fee clauses should be bilateral, whether the parties agree to bilaterality or not. No doubt the policy is controversial in some quarters, but it is now well established in California law. The present state of the statute, however, recalls the lesson we all learned from our parents: If something is worth doing, it is worth doing well.

The present section 1717 does not carry out the bilaterality policy well enough, because of the language limiting the section’s reach to actions “to enforce the contract” – meaning only causes of action for breach of contract (or the like), and not other claims arising out of the same transaction on non-contract legal theories. Contractual fee clauses can and do extend their own reach further than that, and the supreme court reaffirmed in *Santisas v. Goodin*\(^{101}\) that that is perfectly permissible. The *Santisas* court, however, also confirmed that section 1717 does not

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\(^{100}\) 22 Cal. Rptr. 3d 696 (Ct. App. 2004).

\(^{101}\) 951 P.2d 399 (Cal. 1998).
apply at all to a contractual fee clause to the extent that the clause has a broader coverage than section 1717 itself does. As is shown _Moallem v. Coldwell Banker Commercial Group_, that means that a nominally unilateral fee clause turns out to be bilateral in part, and unilateral in part.

There are two reasons to eliminate that anomaly, and to cause section 1717 to apply to all contractual fee clauses in their entirety. One is that California’s policy of forced bilaterality is a good one and ought to be enforced less selectively – and that requires amendment of section 1717. The _Moallem_ court made that point, while quite properly declining to overstep its judicial bounds by ignoring the existing statutory language:

Moallem’s position sounds a strong call of fairness. The same policies that underlie section 1717’s provision for attorney fees for the prevailing party in a contract action, “whether he or she is the party specified [as entitled to recover fees] in the contract or not” (§ 1717, subd. (a)), would appear to warrant such a reciprocal allowance when the contract provides for fees not only “incurred to enforce that contract” (ibid.) but also on account of litigation, as here, “relating” to it.

. . .

. . . In this case the asymmetry of statutory rights between contract and tort litigants painfully appears, because Moallem could have invoked section 1717

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102 _Id._ at 411-14.

103 31 Cal. Rptr. 2d 253 (Ct. App. 1994).

104 _See supra_ at [pages 12-13 and note 27].
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 [cases allowing broad-form fee clauses], we cannot perform that revision.105

My proposal takes up the court’s suggestion. There is no convincing policy reason why, if California wants to require contractual fee clauses to be bilateral, it should want that result only for causes of action meeting the technical description of breach of contract.

The second reason to broaden section 1717 is that, whether you like the policy of forced bilaterality or not, it is needlessly messy to apply that policy only halfway, lending itself to unnecessary complexity and uncertainty in litigation over fee motions. For one thing, it forces parties and courts to wrestle with issues about which parts of a case can or cannot be made to fit into the contract pigeonhole.106 Further, whenever a fee entitlement applies to only part of a

105 Moallem, 31 Cal. Rptr. 2d at 256.

106 See, e.g., Drybread v. Chipain Chiropractic Corp., 60 Cal. Rptr. 3d 580 (Ct. App. 2007), holding that an unlawful detainer action is within section 1717 if the lease is still in effect, but not if the tenant is holding over (applying “voluntary dismissal” feature of section 1717); Kangarlou v. Progressive Title Co., 27 Cal. Rptr. 3d 754 (Ct. App. 2005), where the court struggled to put the “contract” label on various forms of fiduciary breach. The same kind of issue can arise in other matters near the boundaries of contract and tort (or statute), for example in cases of negligent performance of a contract, UCC warranties, fraudulent inducement, disputes arising from related documents, and so on. See generally Witkin (supra note [3]), §§ 169-177; Pearl (supra note [3]), §§ 6.26-6.30.
case, it requires allocation of fees and expenses. The allocation exercise is inevitably difficult, uncertain, and artificial; it is rare for a side’s tasks in litigation to be cleanly divisible among causes of action. These difficulties cannot be avoided entirely, because parties are free to limit their contractual fee clauses to contractual causes of action. But by hypothesis, we are here addressing parties with broad-form (though unilateral) fee clauses – parties, that is, that have evidently chosen to eliminate issues of characterization and allocation by providing that fees will be available for all parts of a litigation. The law should not go out of its way to create problems of characterization and allocation where the parties have not chosen to create them.

Extending section 1717’s reach to all contractual fee clauses will do more than merely broaden bilaterality, of course. It will extend the coverage of all of the section’s provisions – notably, its specifications for identifying the prevailing party. That includes the aspect of the statute that was actually at issue in Santisas – not bilaterality, but the provision in paragraph (b)(2) that there is no prevailing party when the action is dismissed voluntarily or pursuant to settlement. As I will explain in the next section, however, for separate reasons I propose to revise and limit that feature of the statute on its own merits. In any event, whether the voluntary-dismissal rule of paragraph (b)(2) is to be retained, scrapped, or tinkered with, there is no reason why the same rule should not apply to all claims covered by a contractual fee clause.

C. Otherwise, Let Parties Agree To Whatever Contractual Fee Clauses They Want

In broadening section 1717, I propose to further limit parties’ freedom of contract in service to the policy of bilaterality. In all other respects, however, I propose to improve parties’ ability to agree to whatever forms of contractual fee clauses they want. The principle is a familiar one: Where there is no good reason to get in the way of parties’ private agreements, the law should not do so. California has determined that bilaterality does constitute such a good
reason. Present law, however, presents other obstacles to enforcing the parties’ contractual intentions. Some of these obstacles were created for reasons that have lost persuasiveness. Others appear to have been created for no identifiable reasons at all; they are unforeseen artifacts of drafting solutions to other problems.

There is one possible criticism that may be anticipated with regard to this promotion of freedom of contract. In putting so much emphasis on enforcing private contractual rights (some may ask), am I not improperly exalting those rights over the rights conferred by the Legislature in statutory fee provisions? The criticism misapprehends the scope of the problem to be solved. I quite agree that if the Legislature or Congress, in a particular fee statute, has prescribed a particular substantive result with regard to fees (such as recoverability of expert fees (or not), or prevailing-party status upon voluntary dismissal (or not)), that legislative directive should be enforced, and procedural statutes and rules should not stand in the way. I would also agree that honoring legislative intent is more important than honoring private contractual intent. But under this heading, I am simply fixing only what is broken. No problem has arisen under present California law of enforcing the terms of substantive fee statutes. Where problems have arisen of procedural provisions blocking enforcement of substantive rights, it has been contractual rights that have been interfered with. Of course, where that interference is intended and desired as a policy matter (as in the forced bilaterality of section 1717), the interference should (and does) trump freedom of contract. Where contractual agreements are being negated without serving a public-policy goal, however, that interference should be cleared out of the way.

One such obstacle is the present treatment of non-cost expenses – the most expensive of which is usually expert fees, though the category extends to everything listed in section
1033.5(b). *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*\(^{107}\) held that there is no legislative policy forbidding parties to agree that the prevailing party will recover all its litigation expenditures, not just fees and statutory costs. Other courts have been grudging in their agreement with *Arntz*, but no court has expressed any real policy reason why parties should not be allowed to make such agreements if they want. But because of the way the Legislature went about amending section 1033.5 in 1990, the courts have held that non-cost expenses are still subject to the old procedural requirements of pleading and trial proof – ironically, the very procedure that the 1990 amendments aimed to eliminate for contractual fees generally.\(^{108}\) In practice, most of the time that means that non-cost expenses are not recovered, even where the parties’ contractual intent was clear that they should be recoverable.

A second feature of present law that thwarts contractual intent is the provision in section 1717(b)(2) that there can be no prevailing party when an action is dismissed voluntarily or pursuant to settlement. Of course, if the contract itself says (or is construed to mean) that no fees are recoverable upon dismissal or settlement, there is no statutory issue. But it is not uncommon for courts to conclude, as a matter of contract construction, that a voluntary dismissal constitutes “prevailing” as the parties intended in the contract. *Santisas v. Goodin*, for example, construed the undefined contractual term “prevailing party” to mean the defendant, when the plaintiff dismissed with prejudice.\(^{109}\) Indeed, parties are sometimes more explicit in their contracts on this point. But the *Santisas* court nevertheless refused to allow an award of fees incurred on the

\(^{107}\) 54 Cal. Rptr. 2d 888, 904 (Ct. App. 1996).

\(^{108}\) *See supra* at [pages 28-32 and notes 58-60, 65-67].

\(^{109}\) 951 P.2d 399, 405 (Cal. 1998).
contract cause of action, because section 1717(b)(2) overrode the parties’ contract and dictated that there is no prevailing party.\textsuperscript{110}

Unlike the difficulty with non-cost expenses, this contract-altering provision was clearly intended by the Legislature. It was enacted in 1981 to codify (and generalize) the holding in \textit{International Industries, Inc. v. Olen}.\textsuperscript{111} Time, however, has softened the judicial view expressed in \textit{Olen} of what a bad idea it is to designate a prevailing party in voluntary-dismissal cases. Twenty years later, in \textit{Santisas}, the supreme court candidly admitted that “upon fresh consideration of the matter, we are of the view that the practical difficulties associated with contractual attorney fee cost determinations in voluntary pretrial dismissal cases are not as great as suggested by the majority in \textit{Olen} . . .”\textsuperscript{112} While the \textit{Santisas} court saw no choice but to enforce the unqualified prohibition of section 1717(b)(2) as to the contract cause of action,\textsuperscript{113} it had little qualm about honoring a contractual attorney fee provision as to the voluntary dismissal of non-contract claims.\textsuperscript{114} The flat rule of section 1717(b)(2) also does not apply in identifying the prevailing party under other fee statutes, even where a contractual fee provision also exists.\textsuperscript{115}

\textsuperscript{110} \textit{Id.} at 406-11.

\textsuperscript{111} 577 P.2d 1031 (Cal. 1978). \textit{See} \textit{Santisas}, 951 P.2d at 408, 410 (discussing amendment).

\textsuperscript{112} 951 P.2d at 413.

\textsuperscript{113} \textit{Id.} at 406-11.

\textsuperscript{114} \textit{Id.} at 411-14.

\textsuperscript{115} \textit{E.g.}, Parrott v. Mooring Townhomes Ass’n, 6 Cal. Rptr. 3d 116 (Ct. App. 2003); Del Cerro Mobile Estates v. Proffer, 105 Cal. Rptr. 2d 5 (Ct. App. 2001) (fees awarded under statute specifying that dismissal establishes prevailing party; nevertheless, no fees on (footnote cont’d)
Section 1717(b)(2) lumps together voluntary dismissals with prejudice, voluntary dismissals without prejudice, and settlements, dictating in all three situations that there is no prevailing party. I suggest, however, that the policy and fairness considerations at issue arise differently in those three situations.

When a plaintiff voluntarily dismisses his claims with prejudice (other than in settlement), how can the defendant not be the prevailing party? The plaintiff’s claims stand defeated, as surely as if the defendant had won a judgment by verdict or dispositive motion. Perhaps one can hypothesize a situation where a plaintiff would voluntarily dismiss with prejudice, and yet not be the loser; but surely in at least the vast majority of cases a voluntary dismissal with prejudice is a clear-cut, unambiguous victory for the defendant. For example, the supreme court had no difficulty in Santisas in concluding that a voluntary dismissal with prejudice made the defendant the prevailing party within the meaning of the parties’ contract – a contractual intent that the court was quite willing to enforce where it did not run afoul of section 1717(b)(2).\footnote{Santisas, 951 P.2d at 405, 411-14. See also Lanyi v. Goldblum, 223 Cal. Rptr. 32, 40-41 (Ct. App. 1986), unpersuasively questioning whether existing section 1717(b)(2) applies to voluntary dismissals with prejudice. Santisas involved a dismissal with prejudice, though, and the court did not evince any doubt that the statute applied fully anyway.}

The question, then, is why a statute ought to prevent the same result from occurring in the part of the case most directly tied to the very contract containing the fee clause.

\footnote{Coltrain v. Shewalter, 77 Cal. Rptr. 2d 600 (Ct. App. 1998); Damian v. Tamondong, 77 Cal. Rptr. 2d 262, 264-71 (Ct. App. 1998).}
A voluntary dismissal without prejudice is more ambiguous. True, plaintiffs do
sometimes dismiss their cases for reasons other than an expectation of defeat, such as when their
objectives have been satisfied by voluntary compliance or in settlements with other parties,
where the defendant appears to be judgment-proof, or where the fight will be resumed in another
forum. But often it is clear enough that the defendant has won the case. If a plaintiff dismisses
because he is staring down the barrel of a controlling precedent, a smoking-gun document, or a
“Perry Mason moment,” the situation is one that cries out for enforcement of the defendant’s
rights under their contractual fee provision. Even on weaker facts than that, it is unjust to
deprive a defendant of the compensation he has contracted for, where there is no evident
explanation for the opponent’s dismissal other than abandonment of a losing case.

The best counterargument is that plaintiffs will be reluctant to dismiss voluntarily, if they
know that doing so will result in having to pay the defendant’s attorney fees. There is no doubt
that that incentive mechanism would affect a plaintiff’s decisions; but that is not a strong enough
reason to support an ironclad rule of no prevailing party. For one thing, the parties can discuss
that complication directly. If the plaintiff’s case retains enough long-shot viability that the
defendant is willing to forgo his fee claim in return for securing dismissal, the parties can simply
agree to that result. On the other hand, if the defendant insists on collecting his fees, it is
probably because he thinks highly of his chances of winning on the merits – and the plaintiff will
have to take into account that pressing the case to an adverse verdict will only increase the fees
he has to pay to the defendant. In any event, that choice should be for the parties to make, not
the Legislature to force on them. The defendant has bargained for recovery of his attorney fees if
he wins the case – and negation of that bargained contract right should not become the bribe the
system gives the plaintiff for acknowledging defeat.
Of course, there is a third party whose interests enter into the picture, namely the trial court itself. If it does happen that a plaintiff (who would otherwise dismiss his case) insists on going to trial rather than incur a fee award liability, that does indeed result in consuming judicial resources – to the detriment of the court, its jurors, and all other litigants in the system. As the preceding paragraph discusses, however, this may not be a routine occurrence. If it does occur, though, it represents the cost of vindicating the meritorious rights of a party who insists on pressing them, which is the civil justice system’s job. Courts rightly encourage dispositions short of adjudication, but they cannot require them. By analogy, the courts would not allow a plaintiff’s voluntary dismissal of his own claim to exonerate him from the defendant’s cross-complaint for payment of a balance due. The defendant’s contractual right to fees should stand no differently.

Where this discussion leads is to the conclusion that there should not be any ironclad statutory rule governing voluntary dismissals. Sometimes the defendant is the prevailing party, sometimes not – and the courts can make that call, the same way they routinely make prevailing-party calls in other ambiguous situations. That is already the rule applicable to statutory fee claims, and to contractual fee claims on non-contract causes of action. It is time to bring contract claims into harmony with that principle, enforcing the contract the parties made.

That is not to say, of course, that the court should make the prevailing-party determination by ascertaining who would have won the case if it had been pursued to result. That was a major bugaboo invoked by the *Olen* court, which characterized this option as “providing for application of equitable considerations, requiring use of scarce judicial resources
for trial of the merits of dismissed actions . . . “117 The court misunderstanded the exercise it was abolishing. The issue is not who would have won the case absent the dismissal, but who (if anyone) did win the case in light of the dismissal. While I do not mean to catalog or codify the criteria that should be used in varying fact situations, it seems reasonable that if a plaintiff has a good non-merits-based explanation why he is dismissing, he can tell it to the judge – and if he has none, the judge may reasonably infer that the dismissal is a defense victory. There is considerable judicial experience outside of section 1717(b)(2) in ascertaining who prevailed in voluntary dismissal cases, and the cases have evinced no special difficulty in making that call based on a “practical approach” based on “whether the party seeking attorney fees had achieved its main litigation objective.”118

117 577 P.2d at 1035.

118 Castro v. Superior Ct., 10 Cal. Rptr. 3d 865, 871-72 (Ct. App. 2004) (collecting and discussing precedents). This formulation’s focus on whether the defendant has achieved his litigation objectives, however, can be misleading in some situations. A defendant’s litigation objective is almost always to get rid of the case without liability; and thus a dismissal (with prejudice, or with no realistic prospect of refiling) almost always satisfies the defendant’s litigation objectives. Nevertheless, the courts sometimes focus on the plaintiff’s achievement of his litigation objectives. They reason that where the plaintiff has nothing really to be gained by pursuing this defendant, there is no value in forcing him to do so just to avoid being tagged with the defendant’s fee claim. See, e.g., Galan v. Wolfriver Holding Corp., 96 Cal. Rptr. 2d 112 (Ct. App. 2000); Damian, 77 Cal. Rptr. 2d at 271-72; Gilbert v. National Enquirer, Inc., 64 Cal. Rptr. 2d 659 (Ct. App. 1997); (footnote cont’d)
That leaves settlements, which are both harder and easier to deal with than non-settlement dismissals. Settlements are harder because there is no presumptive indication as to who, if anyone, has prevailed. Settlements routinely range from nuisance value to nearly full compensation, with plenty of non-cash permutations. Settlements are easier, though, because the parties are actually discussing and negotiating the terms on which they will terminate the litigation. The prospect of one side or the other recovering attorney fees is inevitably a factor in both sides’ settlement postures – and there is no reason why it should not become a substantive term of the settlement, either directly or by influencing the eventual settlement number. Thus, the burden should be put squarely on the settling parties to deal with the fee issue. Indeed, even if the fee issue itself becomes the final obstacle to settlement, the parties can agree to leave that one issue to the court – and the burden on the court is still less than if it had to try the case.\footnote{119}

(footnote cont’d)

Heather Farms Homeowners Ass’n v. Robinson, 26 Cal. Rptr. 2d 758 (Ct. App. 1994); see also Santisas, 951 P.2d at 413-14. In other words, one might say, for the defendant to “prevail” requires both that the defendant won, and that the plaintiff lost. If both sides get what they want, neither is the prevailing party.

\footnote{119} See Jackson v. Homeowners Ass’n Monte Vista Estates-East, 113 Cal. Rptr. 2d 363 (Ct. App. 2001), allowing this procedure even under the present statute – but having to do some fairly fancy footwork to reach that sensible result. See also Kim v. Euromotors West/The Auto Gallery, 54 Cal. Rptr. 3d 771 (Ct. App. 2007), allowing the same procedure on a statutory fee claim.
D. Stop Confusing Fee Entitlements With Routine Costs

This is really less a goal in itself than a strategy for fulfilling other goals. It is an important enough element of the proposed revisions, however, to call for separate comment.

As discussed above, the characterization of statutory and contractual attorney fees as “costs” in CODE OF CIVIL PROCEDURE section 1033.5(a)(10) is at the root of what I have called the non-cost expenses problem – the functional denial of recovery of various elements of litigation expense even where the parties’ contractual intent was that those items be recoverable.\(^{120}\) That serves no visible policy purpose in itself, while needlessly refusing enforcement to contractual terms.

The solution is not to try to take attorney fees entirely outside the nominal category of “costs,” for that is not feasible. California statutes, federal statutes, and private contracts are consistently inconsistent in characterizing fees as part of costs, or as something separate from and additional to costs. Moreover, as far as I can see, these inconsistencies are random artifacts of drafting styles, rarely if ever really intended to have any particular substantive consequence. We probably could track down and amend all California fee statutes to eliminate any characterization of fees as a subset of costs. Even if none were missed (and no new such characterizations were heedlessly written into future enactments), however, it would not solve the entire problem, because California statutes are not the only fee statutes at issue. For example, California courts are routinely called upon to award fees in civil rights cases under a federal fee statute that speaks of awarding “a reasonable attorney’s fee as part of the costs.”\(^{121}\) Other federal or sister-state fee statutes may come into play as well. Obviously, the California

\(^{120}\) See supra at [pages 36-45 and accompanying footnotes].

Legislature cannot change those statutes to conform to the proposed revisions. Terminological heterogeneity is inevitable, and so we must find another way of achieving uniformity of procedures and results.

The solution, then, is not to achieve uniformity in including or excluding fees nominally from the category of costs. Rather, it is to arrange things so that it does not matter whether fees are denominated as costs or not. The procedures to be followed, and the results to be obtained, should be the same whether the statute (or contract) uses words like “attorney fees as part of the costs,” or words like “attorney fees in addition to costs,” or some other description.

Existing California law has already accomplished the procedural half of this task. It is already true that there is one set of procedures for seeking “costs” as such (namely Rule 3.1700 for trial-court costs and Rule 8.276 for appellate costs\textsuperscript{122}), and a different set of procedures for seeking attorney fees (principally Rule 3.1702). The fact that attorney fees are (sometimes) denominated as “costs” does not interfere with the procedures used to seek them\textsuperscript{123}.

The remaining part of the job is to achieve substantive separation between costs and fees. The trick here, I propose, is neither to include one as a part of the other, nor to try to erect a clear and inviolable line separating the two as mutually exclusive categories (both of which, \textsuperscript{122} \textsc{Cal. Rules of Court} 3.1300, 8.276 (West Supp. 2007).

\textsuperscript{123} Federal procedure handles the issue similarly. \textit{Federal Rule of Civil Procedure} 54(d)(1) provides one procedure for seeking “costs other than attorneys’ fees,” while Rule 54(d)(2) provides a motion procedure for seeking “attorneys’ fees and related non-taxable [\textit{i.e.}, non-cost] expenses.” That clarifies that the motion procedure is to be used even where the underlying statute refers to fees as a subset of costs.
paradoxically, present California law is said to do). Instead, I suggest, each category should simply stand on its own two feet: Costs are whatever the statutes or rules allow to be recovered as costs, whether or not any part of them could (or could not) also be awarded as “fees” – and attorney fees are whatever the underlying statutes or contracts allow to be recovered as attorney fees, whether or not any part of them could (or could not) also be awarded as “costs.” If there is any overlap between the two (which there usually will be), the overlapping portion qualifies as both costs and fees, and the party seeking them may pursue those items under either heading and either procedure – or, for safety, both, provided of course that no double recovery is allowed.

III. THE PROPOSED REVISIONS

Enough, then, of talk about what is wrong, and about what ought to be done about it. Let us get to doing something about it. (Or, more accurately and modestly, suggesting to the Legislature and Judicial Council what they ought to do about it.) A set of proposed revisions is appended at the end of this article. I offer here some drafting commentary.

A. Proposed Revisions To Civil Code Section 1717

The basic goals for revising section 1717 are, first, to eliminate the anomalies that arise from application of the section to some parts of contractual fee clauses but not others; second, to extend the principle of forced unilaterality to all parts of all contractual fee clauses; and third, otherwise to maximize private parties’ ability to contract for whatever fee provisions they want.

Proposed Subdivisions (a) and (b)

Proposed subdivision (a) is a drafting convenience, providing a workably short phrase to identify the contractual clauses governed by the section.

Proposed subdivision (b) is new text, though for the most part it is old law. It provides that contractual attorney fee provisions are to be enforced according to their terms – with certain exceptions. That authorization makes express what is often ascribed to either or both of section
1717 and CODE OF CIVIL PROCEDURE section 1021, though neither of those existing statutes is this direct in saying so.

The proposed subdivision also helps to focus substantive attention where it belongs – on the contract itself, as provided in its own terms or as construed under the usual rules and tools of contract construction. It clarifies that unless there is some contrary provision or principle of law that constrains the freedom of contract for private individuals’ fee agreements, those agreements are to be construed and enforced the same way any other lawful contract term is construed and enforced. It carries out the goal of enforcing the parties’ agreed terms (except as otherwise limited in the section), including their agreements about fees for non-contract claims and recoverability of non-cost expenses.

The most important innovation of these two proposed subdivisions is their comprehensiveness. The major flaw of the existing section 1717 is that it does not reach or govern all contractual attorney fee provisions. It applies only to the extent that a contractual fee clause is invoked to recover fees “incurred in enforcing the contract.” That leaves a separate sphere in which contractual fee clauses operate without either authorization or regulation by section 1717. And worse, the boundary demarcating section 1717’s coverage is not always as clear as it might be. The proposed new subdivisions (a) and (b), by contrast, are intended to bring all contractual attorney fee provisions into the coverage of section 1717 – and thus to subject all contractual fee recoveries to the section’s provisions.

The exceptions in proposed subdivision (b), though, are critical. They spell out the particular respects in which parties’ freedom of contract is constrained. Contractual fee clauses

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are enforceable only “except as otherwise provided” by section 1717 itself (exception (i)), by other statutes (exception (ii)), or by the law of unconscionability (exception (iii)).

The proposed first exception, (b)(i), simply reflects that the provisions of section 1717 itself will trump any contrary provisions in a contractual fee clause. That means, first and foremost, the section’s command of forced bilaterality, as set out in proposed subdivisions (c), (d), and (e). But it applies equally well to the rest of section 1717’s terms, such as the provisions in subdivision (f) for determining who is the “prevailing party.”

The proposed second exception, (b)(ii), is for “any other statute.” That is obvious enough: Naturally, if a substantively applicable statute – California, federal, sister-state, or otherwise – forbids an award of attorney fees to a particular party or under particular circumstances, then no private contract can override that command. This exception staves off any argument along the lines that section 1717, by authorizing enforcement of private contractual fee clauses, should “counter-trump” other statutes.

What proposed exception (b)(ii) does not do, though, is to identify which particular other statutes do or do not bar a recovery of fees under private contract. That is a matter of reading or construing the other statutes; section 1717 is simply agnostic as to whether any particular statutory fee provision does or does not negate private contractual fee provisions. For example, Carver v. Chevron U.S.A., Inc.\textsuperscript{125} held that because the fee provision in the Cartwright Act\textsuperscript{126} authorizes attorney fees only for prevailing plaintiffs, a defendant cannot invoke a contractual fee clause to recover fees incurred in successfully defending against a Cartwright Act claim. By

\textsuperscript{125} 118 Cal. Rptr. 2d 569 (Ct. App. 2002).

\textsuperscript{126} CAL. BUS. & PROF. CODE § 16750(a) (West 1997).
contrast, Chang v. Chen stated in dictum that the unilateral fee provision in the federal RICO statute\(^{127}\) does not bar a defendant’s recovery of contractual fees incurred in defeating a RICO claim.\(^{128}\) Proposed section 1717(b)(ii) simply accepts and incorporates both of these constructions, and any other constructions of other fee statutes. Under Carver, the Cartwright Act is an “other statute” overriding a private contractual fee clause – while under Chang, RICO is not.

The same principle of agnosticism would likewise apply when the statutory and contractual fee provisions favor the same party. For example, suppose a prevailing plaintiff is entitled to recover his fees both under a contractual attorney fee provision that includes expert fees, and under a fee statute that does not. While there are many reasons why the Legislature would choose not to create a statutory entitlement to recover expert fees, offhand I cannot envision any reason why the Legislature would prohibit private parties from agreeing that expert fees may be recovered. My present point, though, is that the proposed section 1717 does not answer that question. It is a matter of construing the other fee statute, to ascertain whether it does or does not forbid contractual recovery of expert fees.

Proposed exception (b)(iii) preserves general principles of unconscionability, though those principles are applied to the contractual fee provision as modified by this section, not as originally written. The section’s aggressive forced bilaterality will itself ameliorate much of


\(^{128}\) 95 F.3d 27, 28 (9th Cir. 1996). Chang nevertheless rejected the fee claim at issue because the RICO claim did not arise out of the contracts containing the fee provisions. Id. at 28-29.
what might otherwise be deemed unconscionable. Perhaps a case of unconscionability could still arise, though, and this proposed exception is intended to avoid any inference that the section exempts fee clauses from the same principles of unconscionability that apply to any other contract term.

**Proposed Subdivisions (c), (d), and (e)**

The next three proposed subdivisions embody section 1717’s policy of forced bilaterality. Proposed subsection (c) corresponds to the first paragraph of existing section 1717(a), the section’s basic provision that all nominally unilateral fee clauses must be applied bilaterally. It broadens and rewords that command, however, so as to extend bilaterality to the entire scope of a contractual fee clause, not just the part of it covering fees “incurred to enforce the contract.” It thus avoids the kind of result reached in *Moallem v. Coldwell Banker Commercial Group*, \(^{129}\) where a unilateral fee clause was enforced only unilaterally because the plaintiff’s recovery was not on a claim for breach of contract.

The second sentence of proposed subdivision (c) makes clear, though, that the parties are still free to define the scope of their fee clause in all respects other than bilaterality (and, to an extent, also subject to the limitations in subdivision (d)). The sentence provides that when a party, disfavored by a unilateral clause, nevertheless recovers fees thanks to the forced bilaterality of section 1717, that party’s fee entitlement mirrors what the favored party would have recovered, if the favored party had prevailed. Thus, if the fee clause would have given the favored party his fees on all litigated claims, then the prevailing disfavored party likewise recovers his fees on all litigated claims. If the clause would have allowed the favored party to recover his expert fees, then the prevailing disfavored party recovers his expert fees. But if the

\(^{129}\) 31 Cal. Rptr. 2d 253 (Ct. App. 1994).
contractual fee clause would have allowed the favored party to recover only his attorney fees strictly defined, and only on the breach-of-contract claim, then that is all the disfavored party can recover by right of section 1717.

Proposed subdivision (d) likewise corresponds to the second paragraph of existing section 1717(a) – but again, it is reworded on account of the proposed broadening of the entire section’s coverage. As before, it provides that only under certain conditions will a contracting party succeed in limiting a contractual fee clause to only a specified part of the contract, such as collection of payments due. (In the interest of truthful legislating, the operative verb is changed from “construed” to “applied”; what is going on here is not construction.)

Proposed subdivision (e) corresponds to the fourth paragraph of existing section 1717(a), though it nominally broadens the section’s mandatory effect beyond waivers of fees (or bilaterality) to any attempted negation of the commands of subdivisions (c) and (d), whether attempted via waiver or other means.

The proposed revisions leave untouched the numerous judicial decisions that flesh out the substantive results that can bring forced bilaterality into play – for example, the holding that the principle of bilaterality requires fees to a defendant that beats a contract claim by disproving the contract, on one hand, or the holdings that bilaterality does not prohibit enforcement of a condition precedent to both sides’ fee entitlements, on the other.

**Proposed Subdivision (f)**

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Proposed subdivision (f) fulfills the function of existing section 1717(b), namely providing for a determination of who is the prevailing party.

At the outset, one might debate why there should be any statutory provision on this subject at all. Except for bilaterality, the substance of the parties’ entitlement to attorney fees is a matter of contractual agreement. Why should we not leave to contract construction the issue of what constitutes “prevailing” under the contract? That was what the supreme court did in Santisas, for example, for that portion of the fee clause falling outside section 1717. The court held that, as a matter of contract construction, a dismissal with prejudice made the defendant the “prevailing party” within the intent of the contract.\textsuperscript{132}

There are several answers to this. First, section 1717 itself commands that fees are to be awarded to the prevailing party, sometimes in derogation of what the contract would dictate. That requires at least some indication of how we ascertain who the prevailing party is. That problem arises particularly in nominally unilateral contractual provisions, which often take it for granted that the favored party will prevail. Second, even in bilateral provisions, in practice contracting parties do not often define winning any more precisely than by using the common phrase “prevailing party” or the like. And third, if the contract does define “prevailing” in more detail than that, the definition is apt to reflect a dominant party’s attempt to evade the statute’s forced bilaterality – for example, by defining “prevailing” as collecting on an unpaid account or the like. (If the parties do have some legitimate reason (other than one party’s dominant negotiating leverage) why some other definition of “prevailing” should be used, that can be accommodated via the “special circumstances” proviso of proposed paragraph (f)(2).)

\textsuperscript{132} Santisas v. Goodin, 951 P.2d 399, 405-06 (Cal. 1998).
The proposed revision to section 1717 cannot merely retain the existing subdivision (b). The existing language conforms to the present scope of section 1717 as limited to contract causes of action only, referring to “the party who recovered a greater relief in the action on the contract.” If (as I propose) the section is broadened to apply to all aspects of a contractual fee clause, then that formulation is too narrow. Hence, proposed section 1717(f)(2) speaks of evaluating who prevailed on “a claim as to which fees are recoverable.” That would reach, for example, a tort claim falling within a broad-form contractual fee clause. (“Recoverable” would mean either recoverable under the contractual provision as written, or recoverable because of the provisions of subdivisions (c) or (d).) With that scope in mind, proposed paragraph (f)(2) spells out in more detail than the present statute what would be more or less evident in any case.

There are two particular refinements built into the proposed subdivision. Each is a problem for which there is more than one reasonable solution. In both cases, I adopt and extend the solution found in existing law.

First, how much should the section dictate the scorekeeping rules ahead of time, versus leaving the determination to the case-by-case discretion of trial judges? The existing section 1717 is not particularly flexible about this in its text, mandating that the party recovering “a greater relief” is the prevailing party, subject only to an express discretion to find that there is no prevailing party. Case law, however, has commendably broadened the ability of trial courts to use some common sense in determining more equitably who has prevailed. As the California Supreme Court explained in Hsu v. Abbara:133

We hold that in deciding whether there is a “party prevailing on the contract,” the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by “a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.”

. . . .

. . . We agree that in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by “equitable considerations.”

This discretion is not unlimited, however, as the outcome in *Hsu v. Abbara* itself shows. The court held that a simple, unqualified win by a defendant, defeating the plaintiff’s claims entirely, means that the defendant is the prevailing party as a matter of law, leaving no discretion to find “no prevailing party.”134

The existing section’s formulation, focusing on who has “recovered a greater relief,” is not entirely satisfying, because it is unfairly inflexible in the options it gives the court when the plaintiff wins only a modest recovery. The existing section gives little textual support for the familiar concept of a defense “win” through defeating most of the claims asserted, or even through keeping damages small on a single claim. The existing formulation basically dictates that where a plaintiff has recovered some but not all of what he sought, the trial court can decree

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the plaintiff to be the prevailing party, or it can decree that there is no prevailing party. What the existing statutory language does not seem to authorize, however, is the determination that the plaintiff’s recovery is so small, relative to the realistic stakes, that the defendant has actually prevailed – thus not only defeating the plaintiff’s recovery of attorney fees, but entitling the defendant to recover fees. Suppose Coyote sues Acme for an alleged product malfunction, asserting $1 million in personal-injury damages, plus $1,000 in warranty damages for the value of the roadrunner Coyote would have caught if the product had worked properly. The jury awards only the warranty damages. On the face of it, it seems reasonable to conclude that Acme has “won the case,” defeating a huge claim while suffering only an almost nominal damages award. But on the present language, Acme cannot be the prevailing party. It did not “recover a greater relief,” and of course it cannot be the prevailing party if there is no prevailing party. Under Hsu v. Abbara, a defendant can “prevail” only if the plaintiff takes nothing at all. Otherwise, the defendant can lose or tie, but not win. That needs fixing.

135 In Scott Co. v. Blount, Inc., 979 P.2d 974 (Cal. 1999), for example, the plaintiff sought $2 million in damages, but recovered only about $440,000. The supreme court affirmed the trial court’s discretionary determination that the plaintiff was the prevailing party. Interestingly, though, the court would clearly have been open to a contrary determination. It noted that because “plaintiff here did not achieve all of its litigation objectives,” it “thus [was] not automatically a party prevailing on the contract for purposes of section 1717” (979 P.2d at 977 (emphasis added)) – even though a $440,000 recovery facially met the statutory criterion of receiving “a greater relief in the action on the contract.”
Proposed subdivision (f), however, does not purport to provide detailed answers to all such questions. There is a rich body of case law on the subject of ascertaining the “prevailing party” for purposes of awarding attorney fees, and I do not propose either to meddle with those precedents or to codify them in detail. Proposed section 1717(f) continues to give the trial courts some (but not unlimited) discretion in this regard, in three respects. First, proposed paragraph (f)(1) retains the existing provision that the court may determine that there is no prevailing party. Second, proposed paragraph (f)(2) lays out some presumptive (and fairly obvious) rules about who prevails in various situations, but qualifies all of them with the introductory language, “[a]bsent the court’s determination that special circumstances equitably dictate otherwise” – a discretion that will no doubt be guided by the existing and continuing case law. Third, the proposed presumptive rules themselves shift the criterion from “a greater recovery” to “significant relief.” That takes into account non-monetary forms of relief, while also guarding against an overly mechanical conclusion that a plaintiff who achieves any net recovery at all must be the winner. The courts can look (for example) to the sources identified in Hsu v. Abbard in figuring what is “significant” in the context of the particular case.

The second nuance has to do with cases presenting a multiplicity of claims covered by a contractual fee entitlement. Because the present section 1717 covers only claims on the contract, the present paragraph (b)(1) effectively contemplates that there will be (at most) two relevant

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136 See also Poseidon Development, Inc. v. Woodland Lane Estates, 62 Cal. Rptr. 3d 59, 69 (Ct. App. 2007), suggesting in dictum that “greater relief” in the present statute need not be monetary recovery.

137 891 P.2d at 813.
claims, one in each direction. It resolves that situation by netting the two against each other. But with the proposed section’s coverage being broadened to take in (potentially) a number of different claims within a broad-form fee clause, that raises the issue of how you determine the prevailing party when the actual results are mixed. Do you take the several “fee-bearing” claims separately, one at a time, and assess the prevailing party on each one? Or do you take all the “fee-bearing” claims cumulatively, determining only a single winner of the whole dispute (or at least the whole part of it involving fees)? For example, suppose Redford successfully sues Newman for $1 million for mismanaging their Bolivian joint venture, but Newman recovers $10,000 on a cross-complaint for salad dressing purchased and not paid for. A broad-form fee clause in their agreement covers all of the claims asserted. One rational way to handle that is to say that each party is the prevailing party on his own affirmative claim. That, however, requires the unsatisfying exercise of allocation, which is worth avoiding where possible. The proposed revision assumes, to the contrary, that generally speaking it is more sensible to say that Redford has “won the lawsuit.” Indeed, Redford may not have seriously contested the balance due, and the bottom-line effect is the same as if it had been treated as an affirmative defense of setoff.

The same principle would apply when all the claims run in the same direction, but the results go both ways. Take my Coyote v. Acme hypothetical above, in which Coyote asserts a personal injury claim for $1 million and a warranty claim for $1,000. If Coyote wins only the larger claim, it is common sense to say that Coyote is nevertheless the prevailing party on the entire suit, notwithstanding Acme’s minor victory in defeating the smaller claim. Conversely, suppose Acme loses the warranty claim but defeats the personal-injury claim. Rationally, this

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138 See supra at [page 76].
could be treated as a split decision, with Coyote prevailing on the warranty claim and Acme prevailing on the personal injury claim. I suggest, however, that it is more sensible to look at the big picture, in which Acme has “won the lawsuit” by defeating 99% of the damages claimed.

In adopting this solution, I am simply broadening the principle found in the existing statute. Existing section 1717(b) defines “prevailing party” by reference to the greater relief on the contract, meaning all contract-based claims taken as a whole. It thus does not allow parsing out the contract result into separate claims or breaches. Thus, if Giant Enterprises and Dodger Co. assert contract claims against each other, and the jury awards $20,000 to Giant and $10,000 to Dodger, then under the existing statute Giant is simply the prevailing party, period. The section does not allow the conclusion that each party prevailed as to its own claim. My proposal does the same for all claims covered by a contractual fee clause.

This principle, however, would apply only as between any two particular parties. Suppose Larry (an equipment buyer) sues Curly (the seller) for lost profits due to the equipment’s failure. Curly cross-complains for indemnification against Moe, whose defective component caused the failure. Moe cross-complains against Larry for materials provided separately. All three contracts have bilateral fee provisions, and all three parties win on their respective offensive claims. Overall, Curly is satisfied with the outcome because he has emerged harmless (or so his lawyer assures him, anyway). As between Larry and Curly alone, however, Larry is the prevailing party; after all, Larry has successfully sued Curly (and only Curly) for lost profits. Curly in turn has prevailed against Moe on his indemnification claim, and Moe has prevailed against Larry on the collection claim. That analysis will require at least some allocation, but it has the virtue of carrying out the intentions of each of the three contracts.
involved, each entered into by only two parties. It also avoids the potentially endless confusion that could follow from trying to sort out winners and losers among a large cast of parties.

Proposed paragraph (f)(3) replaces existing section 1717(b)(2). I have argued above that there should be no automatic rule one way or the other about whether there is a prevailing party when the plaintiff voluntarily dismisses the case (other than in settlement). Accordingly, the proposed paragraph deletes that provision.

As I have also argued above, however, for settlements the rule should be that if the parties want to include attorney fees (or a court determination thereof) in their settlement, they can just say so in their settlement agreement. Proposed paragraph (f)(3) reflects that view. In a new detail, however, it also covers settlements consummated not by dismissal but by entry of a judgment (such as a judgment under CODE OF CIVIL PROCEDURE section 998), which under present case law are not covered by existing section 1717(b)(2).

Proposed paragraph (f)(4) retains the existing third paragraph of section 1717(b), concerning a defendant’s tender and deposit of the full amount owed to the plaintiff. Rather than (arguably) creating a duplicative (and vague) administrative rule for such deposits, however, the proposed revision incorporates by reference the court-deposit mechanism governed in more detail by the CODE OF CIVIL PROCEDURE.

Proposed Subdivision (g)

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139 See supra at [pages 58-63].

140 See supra at [page 64].

141 CAL. CIV. PROC. CODE § 998 (West Supp. 2005).

Proposed subdivision (g) is part of the effort to centralize the procedural provisions for seeking attorney fees in one place – namely Rule 3.1702. (If there is a technical objection to cross-referencing a Rule of Court in a statute, then either the proposed Rule 3.1702 can be enacted as a section of the Code of Civil Procedure rather than a Rule (with necessary modifications), or this subdivision can refer generically to an unidentified Rule of Court adopted for the purpose, it being clear that that means Rule 3.1702.143)

Deletion of Existing Subdivision (c)

Existing subdivision (c) of section 1717 was added in 1987.144 The subdivision is an oddity, of obscure purpose and effect. On its face, it has nothing in particular to do with contractual attorney fees; indeed, its text does not limit its application to cases involving fee clauses. All it says is that when one party prevails on a contract claim but the other party prevails on a non-contract claim, the two amounts are netted against each other and judgment is entered for the net amount. That makes good sense, but it is hard to see how it makes any non-technical difference to the end result for the parties.

Perhaps this subdivision is intended to bear in some fashion on the determination of who is the prevailing party in such a mixed-result situation, for purposes of awarding attorney fees. If so, however, it is less than transparent in its guidance. Perhaps the textual reference to “the party prevailing on the contract” is an indirect endorsement of the concept that the “prevailing party”

143 That is what the Legislature did, for example, in the uncodified section of the 1990 act amending section 1033.5. The section authorized the Judicial Council to adopt a rule to govern timing of fee motions, but approved of then-existing Rule 870.2 (renumbered as Rule 3.1702 effective 2007) for that purpose. 1990 Cal. Stat. ch. 804, § 2.

under section 1717 is to be determined with reference solely to the contract cause of action – but existing paragraph (b)(1) already says that more clearly.  

If this subdivision were to be retained, its references to prevailing on the contract would presumably need to be broadened to conform to the general broadening of section 1717’s coverage. In truth, though, it is hard to ascertain what needs to be done to serve the purpose and function of existing subdivision (c), when it is difficult to perceive what that purpose and function might be. I propose to delete it as either superfluous or mischievous, if not both.

B. What To Do About Civil Code Section 1717.5

Reforming section 1717 raises the question whether similar changes should be made in the next section in the Civil Code, namely section 1717.5. The section is a hybrid between contractual and statutory fee provisions. It applies only to a narrow (if populous) category of contract actions, namely actions on book accounts where no written contracts exist. But

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145 See generally PEARL (supra note [3]) § 6.33, acknowledging that the subdivision’s effect is unclear. Cf. Oved v. Roberts, No. B142902, 2002 Cal. App. Unpub. LEXIS 3826 (Feb. 20, 2002), where the court rejected an argument that section 1717(c) alters who is the prevailing party in the overall lawsuit for purposes of costs, but entirely ignored that subdivision in holding that a defendant was entitled to contractual attorney fees when he defeated the sole claim on the contract containing the fee clause (even though the plaintiffs won substantial damages on other claims).

146 CAL. CIV. CODE § 1717.5 (West Supp. 2005).

147 Technically, the section also applies if there is a written agreement and it provides for attorney fees under Section 1717.5. That is unlikely to arise in practice; if parties have written agreement providing for attorney fees, there is little reason for them to specify (footnote cont’d)
virtually by hypothesis there is no contractual fee agreement; the entitlement to fees in such actions arises only by force of the statute. The section thus has the effect of imputing bilateral fee clauses into such contracts, by legislative fiat. It is no bonanza for creditors, however, as the section sets quite low maximum fee recoveries. In practice, then, the statute is likely to be useful mainly to merchants seeking to recover on modest trade or consumer accounts, in settings where no one bothers with form credit agreements.

Section 1717.5 is apparently modeled after section 1717, and it incorporates many of the features I propose to amend out of the latter statute. Like section 1717, this section applies only to contract-based causes of action, thus excluding coverage of any other claims that may arise in the same dispute. It is unclear, however, whether section 1717.5 is even more restrictive in its coverage than section 1717. The section extends only to “any action on a contract based on a book account.” Arguably that excludes even contract-based claims that are not “based on a book account,” such as claims for defective goods. Similarly, the section’s provision for defense fees seems to assume that the only way a defendant can prevail is by showing that he has “no obligation owing on a book account.” On the other hand, like section 1717, the statute defines the prevailing party as “the party who recovered the greater relief in the action on the contract” – not just in the claim on the book account. That would seem to mean that if a defendant recovers more for (say) defective goods than he owes on the book account, he is the prevailing party.

(footnote cont’d)

this section. Similarly, the section applies only if the contract “does not provide for attorney’s fees and costs, as provided in Section 1717…” Since the statute essentially does not apply to written contracts, this provision would come into play only if there were an oral contractual fee provision, which seems unlikely.
There are several defensible approaches one could take to this section, ranging from a major revision to doing nothing. In my view, though, little if anything should be done. It would not be a good idea to revamp and broaden section 1717.5 in the same ways that I propose for section 1717. Section 1717 differs from section 1717.5 in one crucial respect: The former applies only where there is an actual fee agreement between the parties, while the latter applies only where there is not such an agreement. There is no call, therefore, to amend it in order better to carry out the parties’ contractual intentions. Further, while the present section might be accused of imposing the same kind of backdoor, creditor-friendly unilaterality that the Legislature partly outlaws in the second paragraph of existing section 1717(a), it appears that something like that is exactly what the Legislature had in mind. Very modest fee awards make it feasible for small businesses to bring routine collection actions on ordinary, small-scale commercial or consumer debts – many of which no doubt end up as default judgments. At most, an argument can be made for clearing up the present ambiguity about what happens if a trade debtor wins his cross-complaint for damages on some contractual basis such as a defect in the products. There is little indication, however, that that unclarity has bothered anyone very much, other than the occasional meddlesome law review article author. Accordingly, I propose to apply to this section my general “black box” approach to statutory fee provisions – that is, to leave it alone.

C. Proposed Revisions To Rule Of Court 3.1702

The proposed revisions to section 1717 are principally substantive. The proposed revisions to Rule 3.1702, by contrast, are procedural. The aim is to harmonize and centralize the

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148 See supra at [page 8].
procedures for seeking attorney fees in this Rule. (Even where the procedure is defined elsewhere, as for defaults or formula-based fees, the Rule still cross-references them.)

**Proposed Subdivision (a)**

As with the existing Rule 3.1702(a), this proposed subdivision defines the Rule’s applicability. It provides, as before, that the Rule covers all claims for statutory and contractual fees (adding fees sought under “law” for technical completeness). It also provides that the procedures to be followed do not depend on whether or not the underlying statute or contract classifies the attorney fees to be awarded as “costs.”

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Existing Code of Civil Procedure section 1033.5(c)(5) already does something like this, though in the opposite direction, when it provides: “When any statute of this state refers to the award of ‘costs and attorney’s fees,’ attorney’s fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a).” A statute referring to “costs and attorney’s fees” would seem to indicate that fees are not a subset of costs, and thus should not be handled under section 1033.5, a costs statute. Yet section 1033.5(c)(5) overrides that indication by specifying that fees are part of costs whether the underlying fee statute says so or not. That is a sound method for dealing with heterogeneously worded fee statutes; but it works the wrong way around. Under the proposed revisions, fees are to be treated procedurally as outside of costs rather than being roped into costs. Note also that section 1033.5(c)(5) addresses only California fee statutes, leaving nominally unresolved what might happen if a federal or sister-state statute speaks of fees and costs as separate categories.
The proposed subdivision adds an express exclusion of cases where attorney fees are damages, modeled after a similar provision in Federal Rule of Civil Procedure 54(d)(2)(A).

Proposed paragraph (a)(3) clarifies that Rule 3.1702 is not the law governing what items of litigation expense may be recovered as part of, or along with, a claim for attorney fees. That job is left to the underlying source of the fee claim. Thus, for example, the recurring issue of “non-cost expenses” (such as expert fees)\(^{150}\) is determined not by looking to anything in this proposed Rule, but by ascertaining whether the applicable fee statute, contract, or law does or does not authorize recovery of such items. (Conforming revisions are proposed to Code of Civil Procedure section 1033.5 and Rule 8.276.) Linguistically, for purposes of this proposed Rule, expenses (to the extent they are otherwise recoverable) are simply subsumed in the Rule’s provisions for seeking fees.

**Proposed Subdivision (b)**

Subdivision (b) of the proposed Rule 3.1702 is new, though its substance is largely drawn from existing law. It says that, with certain exceptions, the proper procedure for seeking prevailing-party attorney fees is by noticed motion, with no necessity of pleading or trial proof. For the most part that is current law, based primarily on Code of Civil Procedure section 1033.5 (though the same principle was previously provided in Civil Code section 1717, and is still written into many underlying fee statutes). Present law, however, mostly excludes “non-cost expenses” from recovery via motion. This proposed subdivision, together with proposed Rule 3.1702(a)(3), brings that last category of litigation expenses into the same motion procedure as attorney fees in the narrow sense.

\(^{150}\) See supra at [pages 36-45 and accompanying notes].
There are several stated exceptions to the general motion procedure. First, proposed paragraph (b)(1) carves out any case where the underlying statute requires a different procedure.\textsuperscript{151}

Second, proposed paragraph (b)(2) retains the provision in existing Rule 3.1702(e) that fees fixed by schedule or formula may be sought in a memorandum of costs. I propose, however, to make that procedure optional rather than mandatory, by allowing use of a noticed motion instead. That leaves the memorandum procedure available for those parties that are accustomed to use it in routine collection matters, while guarding against the danger that a party might not realize (or it might not be crystal-clear) that the fee entitlement at issue falls into this category.

Third, proposed paragraph (b)(3) carves out default cases from the procedures of Rule 3.1702, providing that they are governed by the existing procedures mandated for default judgments.\textsuperscript{152} Existing Rule 3.1702 contains no such “default exception.” Existing section 1033.5 does allow seeking fees in connection with a default judgment, though it is not clear whether that is optional or mandatory in default cases. Under the proposed revision, it is mandatory.


Proposed paragraph (b)(4) provides the basic motion procedure for all other fee requests. It allows the parties to stipulate to a different procedure, though subject to court approval and under the same time restraints otherwise applicable (including provisions for extensions).

Proposed paragraph (b)(5) aims to resolve a disagreement in existing case law. The cases disagree on whether to insist on compliance with the requirement of a noticed motion.\textsuperscript{153} There is no doubt that it is in the best interests of all concerned, especially the trial courts, for a known and set procedure to be followed. But strict insistence on that procedure can result in parties being deprived of attorney fees to which they are substantively entitled, even where the procedural error does no harm to anyone. Timeliness requirements can be insisted on (subject to provisions for extensions), and of course the improper procedure should not be excused when the opponent is prejudiced (meaning, for the most part, whether the opponent has an ample opportunity to oppose). Otherwise, to cut the parties and trial courts some slack in this respect is nothing more than an application of the general principle of harmless procedural error.

Proposed paragraph (b)(6) is drawn from existing \textsc{code of civil procedure} section 1033.5(c)(5).

\textbf{Proposed Subdivisions (c), (d), (e), and (f)}

These proposed subdivisions provide the time deadlines for an attorney fee motion in various procedural settings. Proposed subdivisions (c) (Attorney fees before trial court judgment), (d) (Attorney fees on appeal), and (f) (Extensions) correspond exactly to existing subdivisions (b), (c), and (d).

\textsuperscript{153} See \textit{supra} at [note 67].
Proposed subdivision (e) fills the gap identified in *Crespin v. Shewry.* In the existing rule there is no fixed time deadline applicable to fees incurred in the trial court, but after final judgment. Identifying this gap is easier than filling it, though, because of the heterogeneity of proceedings that may fall into this category. Most, no doubt, will be the predictable types of post-trial motions, such as motions for new trial or JNOV. Those will necessarily be wrapped up within sixty days after judgment. Others, however (such as the proceedings in *Crespin* for modification of a permanent injunction), may occur years later – and there may or may not be an appeal occurring at the same time or in the meantime. There may be multiple overlapping motions from various sides, with different hearing or decision dates.

Where no appeal is taken or the post-judgment proceedings come after the conclusion of any appeal, proposed paragraph (e)(1) sets the deadline at sixty days after the proceedings are completed. That mirrors the time generally allowed in proposed subdivision (c) (existing subdivision (b)) for seeking fees after judgment for all fees through judgment. But for the same reasons that all fees incurred through judgment should be sought in a single, post-judgment motion, this proposed paragraph seeks to group post-judgment fees into as few fee motions as possible. It provides that all chronologically overlapping proceedings are considered together, with the time for the fee motion not commencing to run until all such proceedings are completed.

Proposed paragraph (e)(2) provides a sensible exception to the sixty-day deadline of proposed paragraph (e)(1). When an appeal is pending at the time that would otherwise be the deadline under proposed paragraph (e)(1), then the fee motion can be postponed until the appeal is completed. At that point, presumably, one side or the other is likely to seek appellate fees.

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22 Cal. Rptr. 3d 696 (Ct. App. 2004), discussed *supra* at [page 19].
under proposed subdivision (d) (unless the result of the appeal is a remand for more proceedings, which would place the whole case back into the realm of proposed subdivision (c)). It makes sense for all post-judgment fees to be sought together, especially as the result of the appeal may affect the parties’ claims to fees. (Indeed, existing subparagraph (b)(2) – proposed subparagraph (c)(2) – allows the parties to stipulate to this postponement even for pre-judgment fees. In this proposed paragraph (e)(2), however, the postponement is at the election of the party seeking fees, rather than by stipulation.)

**Proposed Subdivision (g)**

Finally, proposed subdivision (g) is a new procedural provision, intended to fix a theoretically knotty (if practically rare) problem by providing a predictable rule.

In *Serrano v. Unruh*, 652 P.2d 985, 987-97 (Cal. 1982), the supreme court held that when a party is entitled to attorney fees under the California private-attorney-general statute, the party may recover the fees incurred in pursuing the fee motion itself. The same result would presumably apply under most other fee statutes, and (depending on the wording and construction of the contract) under most contractual fee provisions too. The proposed subdivision (g) has nothing to say about whether the prevailing party may seek fees incurred in seeking fees, which is left to the underlying source of the fee claim.


158 *See also* Bruckman v. Parliament Escrow Corp., 235 Cal. Rptr. 813 (Ct. App. 1987), awarding fees on fees under CIVIL CODE section 1717 as a statutory matter.
However, there is an obvious practical problem involved in seeking “fees on fees” – namely, when will it ever stop? Suppose Burger successfully sues Mason, on a claim (statutory or contractual) giving rise to a claim for prevailing-party attorney fees. Burger accordingly moves for his fees as provided in Rule 3.1702, and recovers them. But of course Burger has incurred more fees in winning his first fee motion. It is neither practical nor mandatory for him to seek those “fees on fees” in the original motion: not practical because Burger has not yet finished incurring them; and not mandatory because (under either proposed Rule 3.1702(e) or the existing drafting gap) his first fees motion is a post-judgment proceeding in the trial court, and therefore not subject to the sixty-days-from-judgment deadline. So, having won his first fee motion, Burger files a second motion seeking the fees he incurred in the first motion. But then the whole problem replicates itself: When does Burger seek the fees he incurs in winning the second fee motion? At some point common sense, stipulation, or fatigue may solve the problem. But failing those, Burger and Mason face an eternity of successive fee motions.

This is admittedly not the most urgent problem in the world, or even in the world of attorney fee procedures. The supreme court has noted this possible difficulty, but dismissed it as

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159 The illustration is of course hypothetical. In reality, Burger hardly ever beats Mason.

160 See supra at [page 19].

161 Perhaps syndicated on cable. The California Supreme Court has referred to this prospect as “Kafkaesque” (Trynin, 782 P.2d at 238 (citation omitted)), but it might be better described as Nietzschean or Dickensian. See FRIEDRICH NIETZSCHE, THE GAY SCIENCE § 341 (1882), excerpted in THE PORTABLE NIETZSCHE 101-02 (trans. & ed. Walter Kaufman, 1974); CHARLES DICKENS, BLEAK HOUSE (1853).
a practical issue: “Experience in statutory fee-shifting contexts suggests that this perceived problem is largely theoretical and seldom arises in practice.”\textsuperscript{162} There is at least one unpublished appellate decision, however, where the dilemma surfaced directly. In \textit{Jolin, Inc. v. Ruegg},\textsuperscript{163} the court acknowledged that a contractual fee clause gave rise to a claim for the fees the plaintiff incurred not only in its own first fee claim, but in resisting the opponent’s fee claim. However, it affirmed the denial of those “fees on fees” on the basis that they should have been sought in the same round of motions in which they were incurred. The court dismissed somewhat lightly the practical difficulties of proof that that would have entailed. Not mentioned at all was the strong possibility that the plaintiff not only did not realize it had to seek those fees in its first motion, but indeed may well have assumed that it could not properly seek those fees until it could document them properly and comprehensively.

Proposed subdivision (g) seeks to resolve this endless spiral by requiring that a request for fees incurred on a fee motion be folded into the fee motion itself (unless the parties agree otherwise). That is the solution approved in \textit{Jolin}, though this proposed Rule will place parties on notice of the necessity of including “fees on fees” in their first and only fee motions. The solution is far from perfect. It faces the obvious practical objection of how a prevailing party can reliably quantify and prove fees he is still in the process of incurring. But at some point the merry-go-round must stop. The proposed subdivision accordingly accepts an approximation in lieu of the full exactitude that could be had only by waiting, giving the parties and the court

\begin{footnotesize}
\item[162] Trynin, 782 P.2d at 239.
\end{footnotesize}
considerable latitude about how they may reasonably estimate the fees incurred on the fee motion itself.  

D. Proposed Revisions To Code Of Civil Procedure Section 1033.5

The object of the proposed revisions to section 1033.5 is to get this costs statute out of the attorney-fee business, as far as possible. While the reasons for bringing fees into the section’s definition of costs were good ones, that solution has had undesirable (and probably unforeseen) distorting effects on the enforcement of contractual fee provisions, particularly with respect to contractual recovery of non-cost expenses. Further, because the Legislature correctly perceived that attorney fees should not be handled by the same procedures as are used for more routine items of costs (and because, at the time of the 1990 amendment to section 1033.5, Rule 870.2 (now Rule 3.1702) was neither as comprehensive or as detailed as it later became), section 1033.5 was also burdened with a set of procedural rules for attorney fees – and a needlessly complicated and contradictory set of rules at that.

Accordingly, proposed paragraph (a)(10) simply deletes nearly all attorney fees from the list of “costs.” The only remnant left in the costs list is the special case of fees calculated by formula or schedule. Under both existing and proposed Rule 3.1702 such fees can be sought as part of costs, and hence they must be included in the list of allowable costs in section 1033.5.

Likewise deleted in the proposed revision is paragraph (c)(5), in its entirety. Even if the procedural strictures of this existing paragraph were to be retained, they would no longer belong in this section. In any event, I propose to drop the needless complexity of section 1033.5(c)(5) in favor of the unified motion practice of Rule 3.1702. (The only provision of existing section

\[164\] See Trynin, 782 P.2d at 239, dumping this problem (to the extent it really exists) into trial judges’ laps.
1033.5(c)(5) not adequately accounted for elsewhere is its sentence allocating the burden of proof to the party claiming fees, which is transferred to proposed Rule 3.1702(b)(6).)

Proposed subdivision (d) is entirely new, and would change existing law. It embodies my substantive proposal that costs should be costs, and attorney fees and expenses should be attorney fees and expenses, without regard one way or the other to any overlap between them.\textsuperscript{165} This accomplishes two desirable results. First (and most important), it negates the rule of the \textit{Ripley} line of cases that if an item of litigation expense (within the fee clause’s coverage) falls with the category forbidden to be allowed as costs (section 1033.5(b)), that expense cannot be recovered as contractual attorney fees (at least not on post-trial motion).\textsuperscript{166} Under the proposed subdivision (d) (and the corresponding proposed revision to Rule 8.276), a given item’s status as being or not being allowable “costs” has no effect either way on whether that item can be recovered under a statutory or contractual attorney fee provision, which is determined instead by reading (or construing) the fee statute or contract. And second, it also clarifies that if an item qualifies as both costs and fees, it may be sought by either or both means. In other words, if a prevailing party chooses to proceed solely by fee motion in seeking his entire recoverable litigation expense, the opposing party cannot object that certain items must be disallowed because they are costs (section 1033.5(a)) and therefore could have been sought only via a timely memorandum of costs. (Of course, if the prevailing party’s fee motion is unsuccessful, he will

\textsuperscript{165} \textit{See supra} at [pages 65-67].

\textsuperscript{166} \textit{Ripley v. Pappadopoulos}, 28 Cal. Rptr. 2d 878 (Ct. App. 1994). \textit{See supra} at [pages 38-45 and accompanying footnotes].
wish he had filed a partly duplicative memorandum of costs as a backup; this is not intended to allow costs *qua* costs to be sought by motion.)

E. Proposed Revisions To Rule Of Court 8.276

While *Code of Civil Procedure* section 1033.5 governs costs in the trial court, Rule 8.276 governs costs in on appeal. Hence, the proposed revisions to Rule 8.276 directly parallel the proposed revisions to section 1033.5. There is no need for a revision corresponding to the trimming-down of section 1033.5(a)(10), since existing Rule 8.276 has no parallel provision classifying attorney fees on appeal as “costs.” Otherwise, however, the Rule is amended to include schedule- or formula-based fees as “costs,” and to include a provision parallel to proposed section 1033.5(d).

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167 *Cal. Rule of Court 8.276* (West 2007). Before 2007 this Rule was numbered Rule 27; before 2004 it was Rule 26. See *supra* at [note 38].

168 Besides resolving the non-cost expenses issue, this proposed amendment might also yield mildly different results in some cases where the criteria for “prevailing” are different as between costs and fees. For example, *Code of Civil Procedure* section 1032 requires determining the “prevailing party” for purposes of costs by a criterion different from either that presently applicable for attorney fees, or the criteria I propose under revised section 1717. Similarly, in *Mustachio v. Great Western Bank*, 56 Cal. Rptr. 2d 33 (Ct. App. 1996), and *Butler-Rupp v. Lourdeaux*, 65 Cal. Rptr. 3d 242 (Ct. App. 2007), the courts reached different results as to costs on appeal (not awarded because the appellate results were mixed), versus attorney fees on appeal (awarded because there were clear winners for the overall litigations). Under this proposed revision, however, the plaintiffs in these cases would recover their “costs” expenses, not as costs under Rule 8.276 (footnote cont’d)
Proposed Revisions To Code of Civil Procedure Section 998

Reclassifying attorney fees out of the category of “costs” has some collateral consequences, requiring collateral repairs to maintain the substantive status quo. One affected collateral arena is the practice known as “998 offers.” (There may be others I have overlooked, and if so, they should be fixed too.)

Under Code of Civil Procedure section 998, if a defendant makes a pretrial settlement offer meeting specified requirements, the offer is rejected, and then the plaintiff fails to obtain a judgment more favorable than the offer, the plaintiff must pay the defendant’s post-offer costs and the defendant is not liable for the plaintiff’s post-offer costs – even if the plaintiff would otherwise be the prevailing party, as when the plaintiff recovers a substantial verdict but less than the defendant had offered.

(footnote cont’d)

(because they did not prevail in the appeal), but as expenses under section 1717 (because they did prevail in the overall cases). That is truer to the contractual intent, where the parties intended that the winner should be made whole. Nor does it necessarily undermine the appellate courts’ decisions not to award appellate costs as such. To hold that costs should not be awarded on the basis of prevailing on the appeal, should not necessarily foreclose recovery of those expenses if another proper basis exists.


170 Cal. Civ. Proc. Code § 998(a), (c). In addition, the court is given discretion to require the plaintiff to pay the defendant’s expert witness expenses. Id.

The section also provides for “998 offers” by plaintiffs. But since an offering and prevailing plaintiff would recover his costs anyway, there is no point to providing in

(footnote cont’d)
Section 998 says nothing about attorney fees. In *Scott Co. v. Blount, Inc.*, 171 however, the supreme court held that because contractual attorney fees are part of “costs” under CODE OF CIVIL PROCEDURE section 1033.5(a)(10), attorney fees are treated as costs for purposes of the shifting required by section 998. In *Scott* the plaintiff recovered $442,054 after rejecting a 998 offer of $900,000. 172 The supreme court affirmed the trial court’s determination that that made the plaintiff the prevailing party at least as to pre-offer fees, entitling it to recover its pre-offer fees under CIVIL CODE section 1717 (rendering bilateral a unilateral contractual fee provision). 173 However, because the plaintiff had rejected an offer better than its recovery, it could not recover its post-offer costs, but had to pay the defendant’s post-offer costs under section 998(c). That, the supreme court said, included post-offer attorney fees, because fees are part of costs as defined in section 1033.5(a)(10). 174

(footnote cont’d)

section 998 for cost-shifting when a defendant rejects an offer. The remedy in this situation is therefore limited to discretionary shifting of expert fees. *See id.* § 998(d).

171 979 P.2d 974 (Cal. 1999).

172 *Id.* at 976.

173 *Id.* at 977-79.

174 *Id.* at 979-82. The same principle applies to fees sought under a fee statute; section 998 overrides the statutory fee provision, as to post-offer fees. *E.g.*, Murillo v. Fleetwood Enterprises, Inc., 953 P.2d 858 (Cal. 1998); Duale v. Mercedes-Benz USA, LLC, 54 Cal. Rptr. 3d 711 (Ct. App. 2007) (same result when fee statute favors only party not accepting offer).
Under my proposed revisions to other sections, the reasoning in *Scott* would no longer work, because fees will no longer be defined as “costs” and hence will no longer fall within section 998’s provisions for shifting “costs.” Assuming that the Legislature desires to continue the *Scott* rule, therefore, a fix is required. The most direct way to accomplish that is by amending section 998 itself, to provide directly what *Scott* had determined indirectly. That requires some care, though, to address unilateral fee statutes (that is, statutes providing that prevailing plaintiffs recover fees but prevailing defendants do not). In that situation, section 998 should not become the vehicle for the defendant to recover post-offer fees in the face of the Legislature’s refusal to grant fees to prevailing defendants. However, under the policy of section 998, a plaintiff should stand to lose his post-offer fees if he rejects an offer better than the judgment.
I. CALIFORNIA’S EXISTING STATUTES AND RULES GOVERNING ATTORNEY FEE CLAIMS

A. Statutory Provisions For Attorney Fees

B. Contractual Fee Clauses And Civil Code Section 1717

C. Contractual Fee Recovery Outside Of Section 1717

D. Rule of Court 3.1702

E. Code of Civil Procedure Section 1033.5

F. Fees Fixed By Formula Or Schedule

G. The Relation Between Fees And Costs
   1. Fees and Costs on Appeal
   2. Trial Court Fees and Costs
   3. The Problem of Non-Cost Expenses

II. THE AIMS OF THE PROPOSED REVISION

A. Provide A Uniform Motion Procedure For (Almost) All Fee Claims

B. Extend The Coverage Of Section 1717 (Including Its Forced Bilaterality) To All Contractual Fee Provisions

C. Otherwise, Let Parties Agree To Whatever Contractual Fee Clauses They Want

D. Stop Confusing Fee Entitlements With Routine Costs

III. THE PROPOSED REVISIONS

A. Proposed Revisions To Civil Code Section 1717

B. What To Do About Civil Code Section 1717.5

C. Proposed Revisions To Rule of Court 3.1702

D. Proposed Revisions To Code Of Civil Procedure Section 1033.5

E. Proposed Revisions To Rule Of Court 8.276

F. Proposed Revisions To Code of Civil Procedure Section 998
APPENDIX – PROPOSED REVISIONS

REVISED CIVIL CODE SECTION 1717

1717. Contract provision for attorney fees, costs, and expenses
(a) As used in this section, “contractual attorney fee provision” means any provision in a contract providing that a particular party or the prevailing party shall recover his or her attorney fees, costs, or expenses incurred in a proceeding or dispute arising from or relating to the contract.
(b) A contractual attorney fee provision is enforceable in accordance with its terms (including terms specifying the scope of disputes, claims, or proceedings covered, and terms specifying the scope of fees, costs, or expenses recoverable), except as otherwise provided by
(i) this section,
(ii) any other statute; or
(iii) principles of unconscionability applicable to contracts or contractual provisions generally. Unconscionability shall be determined after giving effect to this section.
(c) Attorney fees, costs, or expenses made recoverable by a contractual attorney fee provision shall be awarded to the party whom the court determines to be the prevailing party on the claims covered by the contractual attorney fee provision, even if that provision purports to provide recovery to only a specified party. The scope of fees, expenses, or costs recoverable by the prevailing party shall mirror the scope of fees, expenses, or costs that would have been recoverable by the party specified in the contract, had the party so specified been the prevailing party.
(d) Where a contractual attorney fee provision is limited to disputes arising from enforcement of only limited parts of the contract, that provision shall nevertheless be applied to disputes arising from enforcement of all parts of the contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.
(e) Any provision of a contract purporting to waive, negate, or limit the effect of the provisions of subdivisions (c) or (d) of this section is void.
(f) (1) The court shall determine who is the prevailing party for purposes of this section, whether or not the action proceeds to final judgment. The court may also determine that there is no prevailing party for purposes of this section.
(2) Absent the court’s determination that special circumstances equitably indicate otherwise:
(i) When only one party has asserted a claim as to which fees are recoverable, and that party receives significant relief from the court on that claim, that party is the prevailing party as to that claim;
(ii) When only one party has asserted a claim as to which fees are recoverable, and that party does not receive significant relief on that claim, the other party is the prevailing party as to that claim;
(iii) When two parties assert claims against each other as to which fees are recoverable, the party receiving significantly greater relief on those claims taken together is the prevailing party as to those claims;
(iv) When multiple claims are asserted (whether by one party or by both parties) as to which fees are recoverable, then as between any two parties, the court shall look to the results on all such claims taken together in determining who is the prevailing party on those claims.

(3) Where an action has been dismissed voluntarily, or the action is dismissed or judgment is entered pursuant to a settlement, there shall be no prevailing party for purposes of this section unless the settlement agreement provides that one party is the prevailing party or that the court shall determine the prevailing party.

(4) Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be the prevailing party within the meaning of this section. The deposit shall be made pursuant to Chapter 6 of Title 7 of Part 2 of the Code of Civil Procedure (beginning with section 572).

(g) Any award of fees, costs, or expenses pursuant to this section, including the court’s determination of who is the prevailing party, shall be sought and awarded by the procedures stated in Rule of Court 3.1702.
REVISED RULE OF COURT 3.1702
Rule 3.1702. Claiming attorney fees
(a) [Applicability]
   (1) Except as otherwise provided by statute, this rule applies in civil cases to claims for attorney fees based on a statute, contract, or law authorizing recovery of attorney fees on the basis that the party seeking fees is the prevailing party. Such claims are governed by the procedures in this rule notwithstanding whether or not the statute, contract, or law on which the claim rests denominates attorney fees as costs.
   (2) This rule does not apply to claims for attorney fees if the substantive law governing the claim provides for the recovery of such fees as an element of damages to be proved at trial.
   (3) The recoverability of litigation expenses as part of, or in addition to, attorney fees shall be determined according to the statute, contract, or law giving rise to the claim for such expenses. All references in this rule to attorney fees shall be construed to include such expenses to the extent they are thus recoverable.
(b) [Procedure for Claiming Attorney Fees]
   (1) Unless otherwise required by statute or other substantive law on which the claim for attorney fees is based, it is not necessary to plead a claim to attorney fees claimed under contract, statute, or law, nor to prove them as damages at trial.
   (2) If a party is entitled to attorney fees that are fixed without the necessity of a court determination, the fees may be claimed either (i) by noticed motion within the time requirements stated in this rule, or (ii) in the memorandum of costs pursuant to rule 8.276 or rule 3.1300, as the case may be, within the time requirements applicable to the memorandum of costs.
   (3) In cases of default, a claim for attorney fees shall be made as provided in statutes and rules governing default judgments.
   (4) All other claims for attorney fees shall be made by noticed motion in the trial court, within the time requirements set forth in this rule. On any such motion the court shall determine whether the movant is entitled to fees and, if so, the allowable elements and amount of fees. The court shall award only such fees as it determines to be substantively recoverable and reasonable. The parties affected may stipulate to a different procedure with the approval of the court, but such other procedure shall remain subject to the time requirements that would apply to a noticed motion.
   (5) If a party should have sought attorney fees in a noticed motion but uses a different procedure instead, the court may in its discretion treat the matter as a motion. The absence of a noticed motion shall not be grounds for reversal of an award of attorney fees if (i) the opposing party was given reasonable opportunity for opposition, (ii) the opposing party was not otherwise prejudiced, and (iii) the time requirements for a noticed motion were met.
   (6) On any claim for attorney’s fees not based upon the court’s established schedule of attorney’s fees, the claimant shall bear the burden of proof.
(c) identical to present subdivision (b)
(d) identical to present subdivision (c)
(e) [Attorney Fees in the Trial Court After Judgment]
   (1) Except as provided in paragraph (e)(2), a claim for attorney fees incurred in proceedings occurring in the trial court after that court’s rendition of judgment shall be made by noticed motion filed and served within sixty days after the completion of the trial court’s final disposition of all matters as to which fees are sought. Any motions or other proceedings that
overlap chronologically in the trial court shall be considered a single set of proceedings for purposes of this paragraph (e)(1).

(2) If an appeal is pending at the time of any proceedings described in paragraph (e)(1), or is commenced before the running of the deadline established in paragraph (e)(1), and if the proceedings in the trial court are completed before the completion of appellate proceedings, then any claim for attorney fees incurred in the trial court proceedings may be made as part of a claim for attorney fees on appeal under subdivision (c).

(3) Any deadline arising under this subdivision (e) may be extended by up to an additional 60 days, by stipulation filed before the expiration of the time allowed.

(f) [identical to present subdivision (d)]

(g) [Attorney Fees Incurred in Pursuing a Claim for Attorney Fees]
If a party claims attorney fees under this rule, and the substantive law on which such claim rests also allows recovery of fees incurred in pursuing the claim for attorney fees, then (absent a stipulation to the contrary) such fees shall be sought in the same motion in connection with which they are incurred. This portion of the motion may rest on reasonably available proof and, to the extent that specific proof is not reasonably available, on good-faith estimates of counsel. In its discretion the court may allow or require submission of supplemental proof, provided that the opposing party is given a reasonable opportunity to review and address such supplemental proof.
AMENDMENTS TO CODE OF CIVIL PROCEDURE SECTION 1033.5

[revised paragraph (a)(10):]
(10) Attorney fees if sought pursuant to Rule of Court 3.1702(b)(2)(i).

[delete paragraph (c)(5) in its entirety]

[add new subdivision (d):]
(d) If attorney fees are claimed, they shall be sought pursuant to the procedures provided in Rule of Court 3.1702, whether or not the statute, contract, or law giving rise to the attorney fee claim denominates attorney fees as costs. The allowability or nonallowability of any particular item of expense as a cost under this section shall not affect the recoverability or nonrecoverability of that item as an element of attorney fees and expenses pursuant to contract, statute, or law. If a party contends that a particular item is both allowable as costs under this section and recoverable as attorney fees and expenses, he or she may seek that item on either or both grounds, each by the procedure appropriate to it. However, only a single recovery may be had of any particular item of expense.
AMENDMENTS TO RULE OF COURT 8.276

[new subparagraph (c)(1)(F):]
(F) attorney fees if sought pursuant to Rule of Court 3.1702(b)(2)(i).

[additional sentences added to paragraph (c)(2):]
The allowability or nonallowability of any particular item of expense as a cost under this Rule shall not affect the recoverability or nonrecoverability of that item as an element of attorney fees and expenses pursuant to contract, statute, or law. If a party contends that a particular item is both allowable as costs under this section and recoverable as attorney fees and expenses, he or she may seek that item on either or both bases, each by the procedure appropriate to it. However, only a single recovery may be had of any particular item of expense.
[add new subdivision (j)]

(j) (1) If (but for the making and rejection of an offer within this section) a party would have been entitled to recover its attorney fees pursuant to contract, statute, or law as the prevailing party in the action, but that party rejected an offer within this section and failed to obtain a more favorable judgment or award, then the rejecting party shall not recover his attorney fees from the time of the offer.

(2) If (but for the making and rejection of an offer within this section) a party would have been entitled to attorney fees pursuant to contract, statute, or law if it had been the prevailing party in the action, but that party made an offer within this section and the opposing party failed to obtain a more favorable judgment or award, then the party making that offer shall be deemed to be the prevailing party for purposes of recovering attorney fees from the time of the offer.

(3) If the attorney fees recoverable by the prevailing party would otherwise have included the expense of expert witnesses, that expense shall be sought in accordance with this subdivision rather than as provided in subdivisions (c) or (d).