



Ten things to remember about getting paid on appeal

All of us like getting paid. And nothing makes a client happier than when the opponent must pay our bill. Here are my top 10 practice pointers for getting paid on appeal. I've also thrown in a bonus pointer based on a recent game-changing decision from the Fourth District.

1. File the fee request in the appellate court, not the trial court. Fla. R. App. Pro. 9.400(b). A trial court lacks jurisdiction to award fees for an appeal unless the appellate court finds entitlement and remands to establish the amount. *Real Estate Apartments, Ltd. v. Bayshore Garden Apartments, Ltd.*, 530 So.2d 977, 979 (Fla. 2d DCA 1988).
2. Be timely! Rule 9.400(b) states that a motion to establish attorney's fees must be served by the reply brief's due date. Like a notice of appeal, this is jurisdictional. See *Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054, 1056 (Fla. 5th DCA 1998). The appellate court lacks jurisdiction to award fees if not served by the reply brief. *Id.* Thus, if you wait until after the opinion issues, you are way too late!
3. Do not include the fee request in your brief. Although often filed simultaneously with your merits brief, you must seek appellate fees in a separately filed motion. Fla. R. App. P. 9.400(b). Otherwise, the Court will likely deny your fee request. *McCreary v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 696 (Fla. 4th DCA 1999). But see the bonus pointer, below.
4. Clearly state the grounds for appellate attorney's fees in the motion. Rule 9.400 is not a source for appellate fees. You must cite a statutory or contractual provision granting attorney's fee. *Israel v. Lee*, 470 So. 2d 861, 862 (Fla. 2d DCA 1985), *disapproved of on other grounds*, *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002). But it doesn't specifically have to grant appellate attorney fees. If a statute or contract supports fees at the trial level, then it will generally support fees at the appellate level. § 59.46, Fla. Stat. (2012).
5. Trial counsel messed up and did not plead fees in the complaint or answer below. Or the trial court denied your client attorney's fees for prevailing at trial, maybe because trial counsel was untimely under Florida Rule of Civil Procedure 1.525. No worries. You can still seek appellate attorney's fees on appeal even if for some reason they were foreclosed at the trial level. *Superior Protection, Inc. v. Martinez*, 930 So.2d 859, 860 (Fla. 2d DCA 2006).
6. A response to another party's fee motion is due within 10 days after the motion is served. Fla. R. App. P. 9.300(a). File a response, even if you think it is clear that they are not entitled to fees. Otherwise, you could be deemed to have waived or not preserved your challenge against appellate fees, even if your challenge has merit. *Homestead Ins. Co. v. Poole, Masters & Goldstein, C.P.A., P.A.*, 604 So. 2d 825, 827 (Fla. 4th DCA 1991).
7. When fees are awarded based on a prevailing-party provision in a statute or contract, it can be tricky to determine who qualifies. This is a heavily nuanced area. But generally, even if you win on appeal, you still ultimately have to win below. So if the appeal is interlocutory, then any fee award will be conditioned on ultimately prevailing below. *Sabina v. Dahlia Corp.*, 678 So. 2d 822 (Fla. 2d DCA 1996). Similarly, if you successfully reversed a final judgment, appellate fees are conditioned on winning below. *Termafo-roosh v. Wash*, 952 So. 2d 1247, 1250 (Fla. 5th DCA 2007). In fact, it is possible for both sides to be provisionally awarded fees for a nonfinal appeal if the statutory or contractual provision is sufficiently broad enough. *Compare Aksomitas v. Maharaj*, 771 So. 2d 541 (Fla. 4th DCA 2000) (en banc) (conditionally awarding appellate attorney's fees

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ANNOUNCEMENTS

Quarles & Brady LLP has elected two attorneys to partnership. **Benjamin B. Brown** practices in the area of commercial litigation at both the trial and appellate levels. He represents local and national lenders, loan servicers and title insurers, and focuses his practice on complex real estate disputes, including title claims, creditor rights matters, probate and trust litigation, and insurance disputes. **Kimberley A. Dillon** has a master's degree in Taxation and practices in the areas of estate planning, estate and trust administration, general business law, corporate services, tax controversy and tax planning.

Quarles & Brady LLP also announced that **Christen L. Spake** has joined the firm's Naples office as an associate in the Commercial Litigation Practice Group. She practices in the area of civil litigation with an emphasis on business, commercial, real estate, and governmental litigation. She represents business owners, major financial institutions, governmental entities, and food corporations.

The national law firm of *Quarles & Brady LLP* announced that **Tina M. Eckert**, an associate in the firm's Naples office, has been appointed to the Board of Directors of the Florida Diversity Council (FLDC). Organized in 2008 the FLDC is committed to fostering a learning environment for organizations to grow and leverage their knowledge of diversity. It is comprised of active Councils serving Southwest Florida, South Florida, Tampa Bay, Orlando, Jacksonville and Tallahassee. The FLDC serves as an opportunity for professionals, students and organizations to learn diversity best practices from top corporate leaders.

Nicole L. Goetz of *Nicole L. Goetz P.L.* is pleased to announce that she has received for the second year, the Keeper of the Flame Award from the Family Law Section of The Florida Bar for her service. Ms. Goetz also has been appointed for 2013-2014 as Chair of the Continuing Legal Education committee, Secretary of the Ad Hoc By Law committee and to a second term on the Executive Council for the Family Law Section.

Andrea L. Roark, paralegal with the law firm of *Nicole L. Goetz, P.L.*, has been awarded the prestigious Advanced Certified Paralegal designation by NALA, The Association of Legal Assistants-Paralegals. Ms. Roark completed requirements in September for advanced certification in the area of Family Law, Division of Property and Spousal Support.

Roetzel is pleased to announce that **Lisa H. Lipman** has joined the firm's Business Services group as a partner in the Naples office. She focuses her practice on estate planning, trust and estate administration, probate litigation and guardianship matters. In addition to assisting individual clients with all aspects of estate planning and family wealth transfer, her many clients include national banks and other corporate fiduciaries that require representation in matters involving estates and trusts.

Adam B. Guercio has joined *Porter Wright's* Corporate Department as an associate in the firm's Naples office. Guercio's practice focuses on a range of activities related to mergers and acquisitions, banking and financing, business growth and operation, real estate and securities transactions as well as litigation associated with these matters.

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to the losing party on appeal pursuant to a statute), with *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006) (ruling that the statute in *Aksomitas* was not sufficiently broad enough to allow the losing party on appeal to receive a provisional fee award, but leaving open the possibility that a broader contract or statutory provision could support such an award).

8. The trial court did not grant me the fees on appeal that I requested or granted opposing party an unreasonable fee amount. To seek review of the trial court's appellate-fee order, you must file a motion for review bearing the same case number as the original order granting entitlement. Fla. R. App. P. 9.400(c). Like a notice of appeal, this motion for review must be filed within 30 days of rendition. *Id.* In general, the standard of review is abuse of discretion. *Sourcetrack, LLC v. Ariba, Inc.*, 34 So. 3d 766, 768 (Fla. 2d DCA 2010).
9. Once the appellate court finds entitlement, there is no deadline for establishing the amount of the fees. *Computer Task Group, Inc. v. Palm Beach Cnty.*, 809 So. 2d 10, 12 (Fla. 4th DCA 2002). If anything, it's better to wait a bit to make sure the appellate court issues its mandate. Until the appellate court issues its mandate, the trial court technically lacks jurisdiction to establish an amount. *State v. City of Clearwater*, 146 So. 836 (Fla. 1933). The mandate typically issues 15 days after the rehearing deadline expires or 15 days after the court disposes of the rehearing. Fla. R. App. P. 9.340(a).
10. Costs are a different animal altogether. Rule 9.400(a) grants costs to the prevailing party on appeal even if not otherwise provided for in a contract or statute. *Schoettle v. State, Dep't of Admin., Div. of Ret.*, 522 So. 2d 962, 963 (Fla. 1st DCA 1988). The trial court has no discretion on entitlement; the appeal's prevailing party always gets his or her costs. *Am. Med. Int'l, Inc. v. Scheller*, 484 So. 2d 593, 594 (Fla. 4th DCA 1985). But unlike attorney fees, costs are sought in the trial court 30 days after the mandate issues. *Superior Protection, Inc. v. Martinez*, 930 So.2d 859, 860 (Fla. 2nd DCA 2006). Nothing says "I'm new at appeals" like moving for attorney's fees and costs in the appellate court simultaneously.

BONUS: Recall that in pointer three I said that fee request must be sought separate from your brief in a contemporaneously filed motion. Well, the Fourth District recently created an exception to this rule in the context of original-jurisdiction proceedings, such as petition for writ of certiorari relief under Florida Rule of Appellate Procedure 9.100. *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So. 3d 869, 870-71 (Fla. 4th DCA 2012). For these, the fee request must be included in the petition, response, or reply. *Id.* Otherwise, it is untimely and will be denied. *Id.* But stay tuned to your appellate rules, because rumor has it that this may be clarified in future rule amendments to bring original proceedings in conformity with direct appeals. In the meantime, I recommend doing both: request fees in a separate motion and in your petition, response, or reply.