

Appellate Attorney Fees: Know the Rules or Lose the Right

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Jonathan Mann of Schwartz Sladkus Reich Greenberg Atlas. Courtesy photo

Attorneys handling litigation matters undoubtedly want to obtain entitlement to attorney's fees whenever it is available. Appeals are no different in this regard, but the procedural framework in appellate court proceedings is unique. Fla. R. App. P. 9.400(b) governs requests for appellate attorney fees in Florida's state appellate courts. Appellate practitioners must be on guard to avoid a few potential pitfalls. Knowing the requirements that are specific to fee requests in the appellate courts can make the difference between

receiving an order of entitlement to appellate fees from the district court of appeal instead of a disappointing denial of a request for appellate attorney fees later.

This article discusses the essential requirements to submit a motion for appellate attorney fees in Florida's state appellate courts. It does not discuss situations in which fees are requested as a sanction. As always, do your research and consult the applicable rules of appellate procedure for your specific matter.

The first requirement is fairly obvious. Although not explicitly stated in the rule, a request for appellate attorney fees must be made in a separate motion. In other words, it is insufficient for a party to include its request for appellate attorney's fees in its appellate briefs. Requests made in that manner will be denied. See *Johansson v. Johansson*, 348 So. 3d 1153, 1156 (Fla. 4th DCA 2022).

The next crucial requirement for requesting appellate attorney fees is to timely file the motion by the deadline. For appeals, rule 9.400(b)(1) requires that a motion for appellate attorney's fees be filed at or before the time for service of the appellant's reply brief. For original proceedings such as certiorari, mandamus and prohibition, rule 9.400(b)(2) requires that a motion for appellate attorney's fees be filed at or before the time for service of the petitioner's reply to the respondent's response to the petition. The rule was also amended not long ago to require that, when an appeal is dismissed prior to the deadline for a fee motion, a party has seven days from the order of dismissal to file the motion for appellate attorney fees. Fla. R. App. P. 9.400(b)(4). These deadlines have been described as jurisdictional. See *H Greg Auto Pompano v. Raskin*, 314 So. 3d 547, 548 (Fla. 3d DCA 2020). They are strictly enforced, with one Florida appellate court having questioned why a party would even bother filing a fee motion after the deadline. See *Barrett v. Barrett*, 951 So. 2d 24, 24 (Fla. 5th DCA 2007).

The final requirement attorneys must adhere to in filing a motion for appellate attorney's fees is to cite the substantive basis on which the party is requesting entitlement to attorney's fees. This requirement is contained in rule 9.400(b), which requires that a party "state the grounds on which recovery is sought." The language in the rule refers to the substantive basis on which a party requests fees, because rule 9.400(b) merely provides the procedural mechanism to seek fees. A party's entitlement to appellate attorney's fees is a matter of substantive law that will generally be based on a contract or statute. The motion should refer to the appropriate language of the contract or statute providing entitlement to attorney fees. See *Lehigh v. Byrd*, 397 So. 2d 1202, 1205 (Fla. 1st DCA 1981). Motions for appellate attorney's fees that fail to cite the substantive grounds for fee entitlement are insufficient. See *United Services Automobile Association v. Phillips*, 775 So.

2d 921 (Fla. 2000); *Lance v. Brightwater Homeowners' Association*, 396 So. 3d 793 (Fla. 5th DCA 2024).

It is helpful to understand how appellate courts generally adjudicate requests for appellate attorney fees. The manner in which the appellate court will handle such a motion depends on the specific case. The appellate court might issue an order unconditionally granting entitlement to attorney fees. However, it is also common for the appellate court to issue an order conditionally granting a party appellate attorney fees and allowing the trial court to further address the issue of entitlement on remand. These provisional orders may be somewhat unsatisfying for the party requesting fees, but attorneys should always keep in mind that a party that wants appellate attorney fees *must* make the request in the appellate court. Trial courts have no authority to grant such fees without an order from the appellate court. See *Boca View Condominium Association v. Lepselter*, 392 So. 3d 144, 150 (Fla. 4th DCA 2024). Conversely, appellate courts have no authority to grant a motion for appellate costs, and attorneys should not include a request for costs within fee motions in the appellate court. See Fla. R. App. P. 9.400(a) ("Costs will be taxed by the lower tribunal ..."); *Superior Protection v. Martinez*, 930 So. 2d 859, 860 (Fla. 2d DCA 2006).

The appellate courts generally only address a party's entitlement to an award of appellate fees, and do not engage in a determination of the proper amount of fees to be awarded. Accordingly, appeals courts rarely award an amount certain for appellate attorney's fees. The appellate court will generally leave the reasonable amount to the trial court to determine after an evidentiary hearing on remand.

The issue of attorney fees gives rise to much litigation, as any attorney representing clients in litigation can attest. But the requirements for requesting entitlement to appellate attorney fees are fairly clear. Comply with those requirements and be diligent in drafting your motion for appellate attorney's fees, and the appeals court should consider your motion on the merits. Good luck in seeking your appellate attorney's fees!