There have been a number of recent changes in the law regarding recovery of attorneys’ fees on appeal. Some courts have become stricter in enforcing procedural requirements, while other case law creates new opportunities for fee recovery on appeal. Additionally, some of the unique procedures in appellate fee recovery are unknown to many lawyers, who may inadvertently waive a fee claim if they are not familiar with those procedures. This article will outline both the basic rules and the new issues involved in claiming prevailing party attorneys’ fees for handling an appeal in Florida state court.

Time for Filing the Motion

The most important lesson for both trial counsel and appellate counsel regarding appellate attorneys’ fees is that they must be requested during the appeal. Specifically, counsel must request a fee award by motion filed in the appellate court; the motion must be in a separate document; and the motion must be served within the time for service of the reply brief. This is somewhat counter-intuitive for most trial lawyers, who are accustomed to filing a motion for attorneys’ fees only after they have prevailed in the case. The key lesson for the trial lawyer is to make sure that the appellate lawyer knows at the beginning of the appeal whether there is any basis (or potential basis) for a fee claim, so that the proper motion can be filed.

A timely motion must be filed in order to preserve the claim for appellate attorneys’ fees, even if the award of fees is mandatory by statute. The existence of a statute providing that the court “shall” award fees does not excuse a party from filing the motion required under the appellate rules. Any response to the motion must be served within 10 days. Failure to serve a response to a motion for attorneys’ fees may amount to a waiver of the right to oppose the fees claim. An award of attorneys’ fees at the trial court level is not essential to the award of fees on appeal.

Florida’s Rules of Appellate Procedure describe the procedure for filing of a motion for attorneys’ fees, but the rules do not provide a substantive basis for an attorneys’ fees claim. A party is entitled to fees for an appeal only if there is an independent basis for such recovery. The motion must state the basis for the fee claim, or the motion will be denied. If the claim is based on statute, the statute and relevant case law should be cited. If the claim is based on a contract, the contract should be attached to the motion or a record citation provided. F. S. §59.46 provides that a contract or statute generally allowing for payment of attorneys’ fees to the prevailing party is presumed to include fees for an appeal.

Who Is the “Prevailing” Party?

There has been a change in the law, and there may be a conflict among the district courts of appeal, as to the “prevailing party” aspect of a prevailing party fee award for appeals.

It is clear that a party must “prevail” at the end of the case in order to recover fees for an appeal. In many cases, such as those involving interlocutory appeals, parties must request (and the appellate court must grant or deny) fees for the appeal before the ultimate outcome of the case is determined. In such cases, the appellate court will enter a “provisional” or “conditional” fee order, granting attorneys’ fees for the appeal to the requesting party if he prevails at the
end of the case. Even if the appellate court's order does not specifically state that it is provisional, the provisional nature of the order is implied, and it is error to assess fees for the appeal until the outcome of the case has been determined.

The long-standing rule is that a party must also prevail on the appeal to be entitled to attorneys' fees for that appeal; prevailing at the end of a case does not resurrect a fees claim for the lost appeal. As Judge Padovano explained: "Although it is not expressly stated in Rule 9.400(b), the right to recover an attorney's fee for services rendered in an appellate proceeding is limited to the prevailing party."

However, the Fourth District has recently changed this rule, apparently creating a new theory of appellate fee recovery. In Aksomitas v. Maharaj, 771 So. 2d 541 (Fla. 4th DCA 2000), the court held that parties prevailing on the "significant issues" in a case, who are entitled to recover attorneys' fees under a prevailing party attorneys' fee provision, may recover fees for appeals in which they had not prevailed. In so holding, the Fourth DCA considered Moritz v. Hoyt Enter., Inc., 604 So. 2d 807 (Fla. 1992), in which the Florida Supreme Court adopted the "significant issues" test for determining which party prevails in a prevailing party fee dispute. Although Moritz deals solely with the issue of which party prevails, the Fourth DCA in Aksomitas interprets Moritz to mean that a lost appeal can be included in the fees assessed as long as the party prevails on the "significant issues" at the end of the case. The Aksomitas court stated that the new rule was intended to make prevailing parties "whole," ostensibly even for appellate proceedings which they lost during the case.

There are some potential limitations on the Aksomitas analysis. The Aksomitas court acknowledged the long-standing rule that fees would not be recoverable for an "unnecessary" appeal. Counsel opposing a fees claim for a lost appeal should argue that the appeal was unnecessary. Furthermore, Aksomitas involved a mutual contractual right to prevailing party fees, and therefore was controlled by Moritz. The Moritz analysis does not apply to at least some one-sided attorneys' fee provisions. If Moritz does not apply to a given claim or case, counsel should question whether Aksomitas applies.

Courts following the Aksomitas decision will have to adopt a new procedure. The court will basically be required to grant any party's motion for fees under a prevailing party standard, which means that in many cases both sides will obtain a provisional fee award from the appellate court. The trial court will then apparently decide which party should be awarded appellate fees, as part of its assessment of which party prevailed on the "significant issues" in the case. This will shift to the trial courts the historical role of the appellate courts in determining entitlement to fees for the appeal. Whether fees for the appeal should be included may ultimately become a question of "amount" rather than entitlement.

In fact, allowing recovery for a lost appeal to be included in a prevailing party fee award seems to be a reversion to the "net recovery" rule rather than the "significant issues" test, since it would allow a party who does not prevail in an appeal to recover for the lost appellate proceeding solely because of the "net" outcome of the case. Until these issues are resolved, at least in the Fourth DCA, counsel can now expect provisional attorneys' fees awards even in favor of the party who loses on appeal if the ultimate outcome of the case is yet to be determined.

**Fees Under §57.105**

F. S. §57.105 can be used to award appellate attorneys' fees against a party taking a frivolous appeal. The Florida Supreme Court has explained:
A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it...

Most courts previously held that fee awards could not be made against an appellee under §57.105 because an appellee's position on appeal was, as a matter of law, not frivolous. The reasoning was that since the trial court's decision is presumed to be correct, the winning argument necessarily presents a justiciable issue of law or fact.

Recently, however, at least one court has awarded attorneys' fees under §57.105 to an appellant. In Forum v. Boca Burger, Inc., 788 So. 2d 1055 (Fla. 4th DCA 2001), the court awarded both trial court and appellate fees under §57.105 to the appellee where the appellant "plainly attempted to lead the trial judge to a result that plaintiff was needlessly forced to appeal," one "that they know—or should know—is contrary to existing law," and then "persisted in trying to uphold this patently erroneous decision." The court did not directly address much of the prior case law disallowing §57.105 awards to appellees, but explained that the 1999 amendments to §57.105 would allow attorneys' fee awards where they were previously unavailable. Thus, it appears that appellees can validly request and be awarded attorneys' fees under the post-1999 version of §57.105.

The Forum case also indicates that the previous standard for defining when a position on appeal is frivolous is no longer controlling after 1999. Under Forum and the 1999 statute, both appellants and appellees are more likely to be ex-
posed to attorneys' fee liability under §57.105 for their positions on appeal.

**Proposals for Settlement on Appeal**

Offers of judgment or proposals for settlement properly served during the trial court proceedings can serve as the basis for an award of appellate attorneys' fees. However, a proposal for settlement or offer of judgment cannot be made after judgment or during an appeal.

**Attorneys' Fee Contracts**

A new case from the Fourth District holds that appellate attorneys' fees may be deemed part of the original contingency fee contract if the contract does not clearly provide otherwise. In Arabia v. Siedlecki, 789 So. 2d 380(Fla. 4th DCA 1995), the court held that a contract to handle "court proceedings" for the plaintiff for 25 percent of the recovery was ambiguous as to whether appeals were included and would therefore be construed against the attorney. Some courts applied the general rule that the court will treat an improper mechanism of review as if the proper method of review had been sought, as long as the procedure used complies with the time deadlines and substantive requirements applicable to the proper procedure. In other cases, it appears that the issue may not have been raised. There is also a limited exception for review by plenary appeal if a single judgment disposes of issues other than appellate attorneys' fees.

However, several cases have strictly construed the requirements and refused to review an attorneys' fee order by plenary appeal. Once the improper appeal is dismissed, the time for filing the motion for review will have passed and the party will be left without review of the attorneys' fee determination. At least one court has recently refused to treat a timely notice of appeal as a motion for review because the bare notice of appeal did not state any grounds for reversal. Of course, notices of appeal cannot contain an argument, so a notice of appeal will virtually never suffice under this new case law. Likewise, several courts allowing plenary appeals have warned that counsel should use the proper procedure in the future. Thus, it is crucial to use the proper procedure for review. The standard of review of a trial court order setting the amount of fees for an appeal is abuse of discretion.

**Review of Appellate Attorneys' Fee Awards**

While the trial court has no jurisdiction to award entitlement to appellate attorneys' fees, appellate courts often remand the determination of the amount of fees to the trial court. Review of the trial court's order after remand is by motion for review filed in the appellate court in the same appellate case, not by separate appeal. The motion must be filed with the appellate court within 30 days of rendition of the lower court's attorneys' fee order. Some courts have been lenient in allowing review of an appellate fee assessment by separate appeal. Some of these courts applied the general rule that the court will treat an improper mechanism of review as if the proper method of review had been sought, as long as the procedure used complies with the time deadlines and substantive requirements applicable to the proper procedure. In other cases, it appears that the issue may not have been raised. There is also a limited exception for review by plenary appeal if a single judgment disposes of issues other than appellate attorneys' fees.

**Appellate Costs Recovery**

Counsel should be aware that costs recovery is different than fee recovery in appeals. A motion to tax appellate costs is filed in the trial court, within 30 days of issuance of mandate by the appellate court. The "prevailing party" for purposes of awarding costs is "the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs, and not necessarily the party who ultimately prevail[s] after the completion of all of the litigation."

**Conclusion**

There are a number of new issues to be considered in protecting a claim for appellate attorneys' fees. New cases may open the door to fees claims which have previously been unavailable, while other new cases require strict compliance with the Rules of Appellate Procedure to ensure recovery. Appellate counsel should be aware of these new issues in order to maximize the benefit to the client.
create a common fund from which the fee can be paid. See Kittel v. Kittel, 210 So. 2d 1, 3 (Fla. 1967); Israel v. Lee, 470 So. 2d 861, 862 (Fla. 2d D.C.A. 1985).

Florida Rule of Appellate Procedure 9.400 (Florida Appellate Procedure 9.400(b)). The court in Phillips specifically receded from Salley v. City of St. Petersburg, 511 So. 2d 975 (Fla. 1987), to the extent that it suggested that appellate fees may be awarded even if a party fails to comply with the substantive requirements of Florida Rule of Appellate Procedure 9.400(b).

See Branch v. Charlotte County, 627 So. 2d 577 (Fla. 2d D.C.A. 1993); Dooley v. Culver, 370 So. 2d 1154 (Fla. 4th D.C.A. 1978) (denying the motion because it did not state the grounds upon which the fees were claimed).


Allstate Ins. Co. v. De La Fe, 647 So. 2d 965 (Fla. 3d D.C.A. 1994).


Phillip J. Padovano, Florida Appellate Practice §20.5 (2d ed. 1997). It is sometimes difficult to determine which party “prevailed” in the appeal, especially in cases where the appellate court affirms on some issues and reverses on others. See Hallenbeck v. Rangedine Supply Corp., 697 So. 2d 876 (Fla. 4th D.C.A. 1997) (party who prevailed on appeal from portion of trial court order was prevailing party on appeal); North American Van Lines, Inc. v. Ferguson Transp., Inc., 662 So. 2d 1275 (Fla. 4th D.C.A. 1995) (appellant who reduced its liability from $14.3 million to $1.3 million by procuring reversal of punitive damages award was prevailing party on appeal); Zaremba Florida Co. v. Klinger, 550 So. 2d 1131 (Fla. 3d D.C.A. 1989) (holding that a party who prevailed on appeal on only one count out of nine would be entitled to appellate attorneys’ fees only for the count on which he prevailed).

Under this test, the party who prevailed on the “significant issues” in the case is the prevailing party for purposes of attorneys fee assessment. Courts previously applied the “net judgment” or “net recovery” rule, under which a party obtaining any recovery in its favor would be deemed the prevailing party.

It is well-established that an appellate court may deny fees if it finds that the work performed on an appeal is unnecessary. “Unnecessary” appellate work may include fees sought by an appellant for an appeal which should never have been taken and fees sought by an appellee who should have confessed error. Aksomitas, 771 So. 2d at 544. See generally Florida Patient’s Comp. Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985) (prevailing party attorneys’ fees can be reduced for work which is unnecessary).

For example, Moritz does not apply to fees claims under FLA. STAT. §627.428. See Danis Indus. Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420, 421 (Fla. 1994); Lumbermens Mut. Cas. Co. v. Percefull, 638 So. 2d 1026, 1030 (Fla. 4th D.C.A. 1994) (on rehearing). Under the one-sided provision of §627.428, the insured “prevails” against an insurer if he recovers more than the insurer’s last offer. Danis, 645 So. 2d 420; Percefull, 638 So. 2d 1026. Thus, there is no need to use the “significant issues” test.

The Supreme Court’s disposition of the petition in Aksomitas may support an argument that the case should be limited. The party who lost the appeal in Aksomitas sought review in the Florida Supreme Court, which denied review. There was no review sought of the attorney’s fee ruling. In denying review, the Florida Supreme Court also denied the petitioner’s motion for attorneys’ fees and granted the respondent’s, contingent on the latter’s prevailing at the end of the case. The Supreme Court did not follow the Fourth DCA’s fees analysis since it denied the petitioner’s fees claim outright, regardless of whether the petitioner prevailed on the significant issues at the end of the case.

Cf. Sierra v. Sierra, 505 So. 2d 432 (Fla. 1987).

Visoly v. Sec. Pacific Credit Corp., 768 So. 2d 482 (Fla. 3d D.C.A. 2000).

Treat v. State ex rel. Mitton, 121 Fla. 509, 510-511, 163 So. 883, 883-884 (Fla. 1935). See also Procacci Commercial Realty, Inc. v. Dept of Health and Re-
Courts must now interpret and apply the text passed in 1999." 788 So. 2d at 1061.

28 See, e.g., Hartley v. Guetzeo, 712 So. 2d 817, 818 (Fla. 5th D.C.A. 1998).

29 Glanzberg v. Hyattman, 71 So. 2d 60, 61 (Fla. 4th D.C.A. 2000); Delue v. Cather & Co. v. Grogs, 664 So. 2d 989, 989 (Fla. 4th D.C.A. 1995).

30 Arabia, 789 So. 2d at 238.

31 Id.

32 See, e.g., Branch v. Charlotte County, 627 So. 2d 577, 579 (Fla. 2d D.C.A. 1993); Berry v. Scotty's, Inc., 789 So. 2d 1008 (Fla. 2d D.C.A. 1998). In federal appeals, the 11th Circuit typically remands the case to the district court to determine the amount of fees to be assessed for the appeal. However, the court has found the attorneys' fees to be assessed for the appeal. However, the court has found that the movant's attorney filed an affidavit of amount and that amount was not disputed by the opposing party. Taioyo Corp. v. Sheraton Savannah Corp., 49 F.3d 1514, 1516 (11th Cir. 1995) (making the award "in the interest of judicial economy and to avoid further expenditures by the parties necessitated by a remand").


34 Florida Rule of Appellate Procedure 9.400(c). See Bell v. U.S.B. Acquisition Co., Inc., 734 So. 2d 303, 412-13 (Fla. 1997) (time runs from "rendition" of trial court order and therefore no additional time is permitted after mailing).


36 See generally Bell v. U.S.B. Acquisition Co., Inc., 734 So. 2d 403 (Fla. 1997).

37 See Pellar, 687 So. 2d at 284; Zaremba Florida Co. v. Klinger, 550 So. 2d 1131 (3d D.C.A. 1989).


40 See Browning v. New Hope South, 785 So. 2d 732 (Fla. 1st D.C.A. 2001).

41 See Browning v. New Hope South, 785 So. 2d 732 (Fla. 1st D.C.A. 2001).


44 Florida Rule of Appellate Procedure 9.400(a).


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This column is submitted on behalf of the Appellate Practice Section, Hala A. Sandridge, chair, and Jacqueline E. Shapiro, editor.