

## APPELLATE ATTORNEYS' FEES: A PRIMER

Appellate Practice Section

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**F**lorida Rule of Appellate Procedure 9.400(b) provides the procedure for seeking appellate attorneys' fees. Motions for appellate attorneys' fees must state the grounds on which an award is sought. There must be a substantive basis for the award. That basis is usually found in the form of a contractual or statutory provision providing for the payment of attorneys' fees to the prevailing party. See *White v. White*, 3 So. 3d 400, 403 (Fla. 2d DCA 2009). If your contract or statute fails to specifically mention appellate attorneys' fees, do not despair. In the absence of express language otherwise, any statute or contract that would provide for an award of prevailing party attorneys' fees at the trial-court level must be construed to include prevailing party appellate attorneys' fees. See Fla. Stat. § 59.46. In your motion, specify each contractual or statutory provision on which your claim relies, and attach or give the record citation for any contractual provisions.

Pay attention to the deadline set forth in Rule 9.400(b). Your motion for appellate attorneys' fees must be filed no later than the time to serve the reply brief. This is crucial, because untimely motions for appellate attorneys' fees can be denied on that basis alone. See, e.g., *Barrett v. Barrett*, 951 So. 2d 24, 24 (Fla. 5th DCA 2007). According to the Fifth District, "If a motion for attorney's fees is untimely, why file it?" *Id.*

It is also important to note that a timely filed motion in the appellate court will be your only opportunity to seek appellate attorneys' fees. Absent specific authorization from the appellate court, the trial court cannot award appellate attorneys' fees. *Real Estate Apartments, Ltd. v. Bayshore Garden Apartments, Ltd.*, 530 So. 2d 977 (Fla. 2d DCA 1988).

If an award of appellate attorneys' fees is made, the appellate court will generally remand the determination of the amount to the trial court. The rules do not impose a time limit for filing a motion in the trial court to seek a determination of the amount of



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appellate attorneys' fees. *Computer Task Group v. Palm Beach County*, 809 So. 2d 10, 11-12 (Fla. 4th DCA 2002).

Because motions seeking appellate attorneys' fees must be filed before the court determines who has prevailed, your opponent will also likely file a motion seeking fees. Rule 9.300(a) provides parties opposing a motion for appellate attorneys' fees a right to respond within 10 days of service of the motion.

You will want to file a response. A failure to respond has been treated as a waiver of the right to oppose an award. *Homestead Ins. Co. v. Poole, Masters & Golds*, 604 So. 2d 825, 827 (Fla. 4th DCA 1991).

Last but not least, do not forget your costs. Rule 9.400(a) provides that costs shall be taxed in favor of the prevailing party in the appeal. Motions to tax costs must be filed

in the trial court within 30 days of the appellate court's mandate.



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**Join the Appellate Practice Section for a CLE  
from 1 p.m. to 5 p.m. on May 2.**

**Watch the CLE Update for details.**