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PLEADING REQUIREMENTS FOR FEES IN ORIGINAL PROCEEDINGS

Appellate Practice Section

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Florida Rule of Appellate Procedure 9.400(b) governs the procedure for seeking attorneys' fees on appeal. It requires the party seeking fees to file a motion no later than the time for filing a reply brief. There is no rule that expressly states a different procedure for original proceedings, such as petitions for writ of

certiorari. Consequently, many practitioners simply interpret Rule 9.400(b) to require a motion for fees to be filed no later than the due date for the reply to the response to the petition. However, in *Advanced Chiropractic and Rehabilitation Center Corp. v. United Automobile Insurance Company*,¹ the Fourth District Court of Appeals held that Rule



In the wake of *Advanced*, appellate practitioners should plead entitlement to fees in original proceedings and proceed cautiously thereafter.

9.400 does not apply to original proceedings, and it imposed a "pleading requirement" for attorneys' fees in original proceedings.

In *Advanced*, the petitioner was awarded certiorari relief, then moved for fees three days later. The Fourth District denied the motion as untimely, citing cases applying Rule 9.400(b).

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The petitioner moved for rehearing, arguing that Rule 9.400(b) applied only to “a standard appeal with respect to a series of briefs,” not to original proceedings. The Fourth District agreed. Rule 9.400(b)’s plain language refers only to a “reply brief,” so the rule does not apply to original proceedings that have only a “petition,” a “response,” and a “reply.”

However, the Fourth District reaffirmed that the petitioner’s request was untimely. The court ruled, “Nothing in the appellate rules sets forth the procedure for requesting attorneys’ fees in a Rule 9.100 proceeding.” The court relied upon *Stockman v. Downs*.² In *Stockman*, the supreme court held “a claim for attorney’s fees ... must be pled.” The supreme court was concerned about notice to the opposing party. The Fourth District recognized the same concern applies to original proceedings. Therefore, the Fourth District held the petitioner was required to “plead” its entitlement to attorneys’ fees in its petition or reply, just as a trial practitioner would plead entitlement in a complaint, answer, or counterclaim.³ The petitioner’s failure to do so was fatal to his claim for fees.

The *Advanced* opinion creates two uncertainties. First, it does not detail the level of specificity necessary in the “pleading.” It is unclear whether one must establish a full legal and factual basis for fees in the pleading or simply make a request to establish notice. Second, the opinion does not establish the time within which a motion for fees — if any — should follow the pleading. *Stockman* said, “Proof of attorney’s fees may be presented after final judgment, upon motion within a reasonable time.”⁴ But in an original proceeding, there is no “judgment” from which to determine a “reasonable time.”

In the wake of *Advanced*, appellate practitioners should plead entitlement to fees in original proceedings and proceed cautiously thereafter.

¹ 103 So. 3d 869 (Fla. 4th DCA 2012), *rev. granted*, SC13-153 (Fla. June 4, 2013).

² 573 So. 2d 835, 837 (Fla. 1991).

³ See Fla. R. Civ. P. 1.100(a).

⁴ 573 So. 2d at 838.



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