A Moving Target:
How to Seek Fees in Your Original Proceedings

By Jared Michael Krukar, Esq.

Florida Rule of Appellate Procedure 9.400(b) establishes the procedure for seeking attorneys' fees on appeal. Many practitioners have long assumed that the rule similarly applies to original proceedings, there being no other rule clearly providing an alternative procedure. However, two recent opinions establish that rule 9.400(b) does not apply to original proceedings.

The Fourth District Holds That Rule 9.400(b) Does Not Apply.

The Fourth District Court of Appeal first questioned the relevance of rule 9.400(b) to original proceedings in *Advanced Chiropractic and Rehabilitation Center Corp. v. United Automobile Insurance Company*.[1] In that certiorari proceeding, the petitioner made its first request for fees in a motion filed three days *after* the court had awarded the petitioner its requested certiorari relief.[2] The Fourth District initially denied the motion for fees as untimely pursuant to rule 9.400(b), which provides that a motion "may be served not later than . . . the time for service of the reply brief."[3] The petitioner moved for rehearing, arguing that rule 9.400(b) did not apply to original proceedings, but only to "a standard appeal with respect to a series of briefs."[4]

Upon reconsideration, the Fourth District agreed that the language of rule 9.400(b) limited its application to appeals, and not to original proceedings.[5] However, the court concluded that the petitioner's request was still untimely.[6] It relied upon the supreme court's decisions in *Stockman v. Downs*[7] and *Green v. Sun Harbor Homeowners' Association, Inc*[8].—both trial court fees cases—to hold that a request for attorneys' fees must be pled in the original petition, response, or reply, in a certiorari proceeding.[9] Hence, the court likened an original proceeding in the appellate court to an original lawsuit in the trial court, where entitlement to fees usually must be pled in a plaintiff's complaint or a defendant's answer. The motion that was filed after the writ was granted was insufficient.

The Florida Supreme Court Partly Agrees With the Fourth District, but Holds a Different Procedure Applies.

The supreme court took jurisdiction over the case to review alleged express and direct conflict between the Fourth District's opinion and *Stockman* and *Green*.[10] The court agreed with the Fourth District that rule 9.400(b) "does not and was not intended to apply to rule 9.100 original proceedings . . . [so it] does not govern the time or method by which a party to a rule 9.100 original proceeding must request attorney fees."[11] However, the court "conclude[d] that the Fourth District misapplied *Stockman* and *Green*—cases that address requests for attorneys' fees at the trial level—to a situation materially at variance with the one under review—a request for appellate-level original writ attorneys' fees."[12]

After determining that rule 9.400(b) procedures do not apply in original proceedings, the court determined the proper procedure for seeking fees in an original writ. It held that Florida Rule of Appellate Procedure 9.300—the general rule for appellate motions—governs.[13] And because rule 9.300 does not set a prescribed time for a motion for fees, the court held that such motion "simply must be timely to provide the relief sought."[14]

Consequently, Florida law currently requires a party seeking an award of fees in an original writ proceeding only to file a motion for fees under rule 9.300, within sufficient time to obtain the relief requested.

The Florida Appellate Court Rules Committee Recommends Amending Rule 9.400(b) to Include Original Proceedings.

Following the Fourth District's *Advanced Chiropractic* opinion—but before the supreme court's subsequent ruling—the Florida Appellate Court Rules Committee recommended amendment to rule 9.400(b) specifically to "clarify any confusion caused by [that opinion.]"[15] The following is the committee's proposal[16]:

(b) Attorneys' Fees. With the exception of motions filed pursuant to rule 9.410(b), a motion for attorneys' fees shall state the grounds on which recovery is sought and shall ~~may~~ be served not later than:

(1) in appeals, the time for service of the reply brief ~~and shall state the grounds on which recovery is sought~~; or

(2) in original proceedings, the time for service of the petitioner's reply to the response to the petition.

The assessment of attorneys' fees may be remanded to the lower tribunal. If attorneys' fees are assessed by the court, the lower tribunal may enforce payment.

Thus, the Committee seeks to bring both original and appellate proceedings under the same rule and procedure. The supreme court has not yet acted upon this proposed amendment.

Conclusion

The process for seeking fees in original proceedings has been unsettled over the past year. If the supreme court ultimately adopts the Committee's proposed rule change, it will mark the third procedural modification in less than twelve months. Practitioners should watch upcoming

continued on page 18

ENDEARMENT
from previous page

time for appeal (such as a motion for rehearing) was filed, the date it was served, and the date it was ruled upon. Attaching the motion tolling time and the order on the motion allows the clerks to easily and quickly make a determination about jurisdiction. The clerks spend a great deal of time gathering information from the lower tribunal to determine whether the appellate court has jurisdiction, and the attorney filing the notice of appeal has all the necessary information at his or her fingertips. Share it!

6. Read The Acknowledgement Of New Case And Other Correspondence From The Court Carefully.

Correspondence is sent by the Court for a good reason. For example, the Fifth District's Clerk sends an acknowledgment of new case in every appeal. It contains important information that will inform an Appellant how the Clerk's Office has opened and categorized the case. Aside from obvious issues like spellings of names and alignment of parties, the most important item on that acknowledgment is whether the Clerk's Office has opened the case as a final or non-final appeal (which have very different briefing deadlines and record issues). The Clerk is delighted to entertain a motion if counsel disagrees with how the Clerk's Office has characterized a case. The Clerk is much less happy when he or she has to issue a show cause order for failure to file an initial brief, and receives a response stating that the brief is not due yet because the appeal is a final appeal as opposed to a non-final appeal. Every practitioner should read the acknowledgment of new case and take prompt action if she or he believes that the Clerk has opened the case incorrectly.

7. Inform The Court Promptly Concerning Settlement.

Way too often parties request a stay because they are resolving the case, but then they do not tell the Court when the case has been resolved. A motion to dismiss the appeal should be promptly filed if the appeal is rendered moot by a settlement. Unfortunately, more often than not, the Clerk's Office does not even receive a response to an order to show cause requiring an attorney to advise as to the status of the case! On some occasions, the Clerk's Office actually has to call the attorneys involved in the appeal to determine the status, which is not a good way to stay in the Clerk's good graces. An attorney's job on a case is not over when the settlement agreement is executed. Let the Court know as soon as possible about the settlement.

8. Keep the Court Informed on Matters that Required Relinquishment of Jurisdiction.

Similar to the failure to inform the Court when a case has settled is the failure to inform the Court when the purpose for a relinquishment of jurisdiction has been fulfilled. If the relinquishment has been requested to obtain a final appealable order, the proper procedure is to file the order with the Court as soon as possible after it is obtained. Practitioners should bear in mind that an order rendered by the lower tribunal after the stated period of relinquishment has expired is a nullity. Therefore, appellate lawyers must be aware of the end of the relinquishment period and move to extend the period *before it expires* if an order has not yet been rendered by the lower tribunal. It is simply bad form to request the appellate court to accommodate some procedural defect in your appeal and then not follow through, thereby creating more work in the Clerk's Office when, if the period expires and nothing has been filed, it has to issue an order to show cause.

9. Use Your Manners.

It should go without saying, but unfortunately does not, that when a lawyer or member of a lawyer's staff calls the Clerk's Office with a problem or question, the call should be conducted with courtesy and civility. The Clerk's Office receives several phone calls per month from lawyers or staff during which the clerk answering the phone is not treated with common courtesy, or even worse is yelled at or called names! The Clerk's Office is here to serve the public and takes great pride in doing so with professionalism. The same effort should be extended by appellate counsel and their staff dealing with the Clerk's Office.

In sum, keep in mind that thousands of appeals are filed each year with unique procedural issues that take time to address, research, and resolve. Every lawyer handling an appeal should be familiar with, consult and follow the rules of appellate procedure. It is also a good practice to consult the website of the district court in which you are practicing to keep abreast of new administrative orders. Finally, it is in every attorney's and every client's best interest to make a Clerk's job easier whenever possible to do so.

MOVING TARGET
from page 6

rule amendments from the Florida Supreme Court to ensure they remain in compliance with current standards, satisfy any potential new standards, and avoid unintended abandonment of fee claims in original proceedings.

Endnotes

1 103 So. 2d 869 (Fla. 4th DCA 2012).
2 *Id.* at 870.
3 *Id.*; Fla. R. App. P. 9.400(b).
4 *Advanced Chiropractic*, 103 So. 3d at 870-71.
5 *Id.*
6 *Id.* at 871.
7 573 So. 2d 835 (Fla. 1991).
8 730 So. 2d 1261 (Fla. 1998).
9 *Advanced Chiropractic*, 103 So. 2d at 870-71.
10 *Advanced Chiropractic and Rehabilitation Center, Corp. v. United Auto. Ins. Co.*, 2014 WL 2208895 (Fla. May 29, 2014).
11 *Id.* at *4.
12 *Id.*
13 *Id.* at 6.
14 *Id.*
15 Appellate Court Rules Committee, *Three-Year Cycle Report of the Appellate Court Rules Committee*, page 17 (petition filed February 3, 2014, in case number SC14-227) (available at http://www.floridasupremecourt.org/clerk/comments/2014/14-227_020314_Petition.pdf)
16 Appellate Court Rules Committee, *Appendix B to Three-Year Cycle Report of the Appellate Court Rules Committee*, page B-127 (filed February 3, 2014, in case number SC14-227) (available at http://www.floridasupremecourt.org/clerk/comments/2014/14-227_020314_Appendix%20B.pdf)