

## CHAPTER 2: ATTORNEY'S FEES AND COSTS ON APPEAL

### A. Is a Pro Se Litigant Entitled to Attorney's Fees on Appeal?

The short answer is no. A pro se litigant, meaning a party who is not an attorney and who is representing himself or herself, is not entitled to attorney's fees for his or her own time spent appealing a case. In contrast, a party represented by an attorney may be able to seek attorney's fees on appeal if there is a basis for awarding such fees. This means a pro se litigant may be responsible for the opposing party's appellate attorney's fees.

### B. Can a Pro Se Litigant Be Responsible for the Opposing Party's Attorney's Fees?

Yes. A pro se litigant may be responsible or "liable" on appeal for the opposing party's attorney's fees, if the opposing party is represented by an attorney (or is an attorney). For the opposing party to seek attorney's fees in an appeal, there has to be a basis for awarding such fees in a statute and/or in a contract between the parties. Also, a party usually has to win, or "prevail," in the appeal before he or she will be entitled to an award of appellate attorney's fees. One exception is in family law cases, where, in some cases, appellate attorney's fees may be awarded based on the parties' relative financial need and ability to pay. *See* Section 61.16, Florida Statutes.

If there is a basis in a statute or a contract for awarding attorney's fees in the lower tribunal, that same statute or contract usually can also be a basis for an award of appellate attorney's fees. *See* Section 59.46, Florida Statutes. In the case of *Dade County v. Pena*, 664 So. 2d 959 (Fla. 1995), the court explained: "In the absence of an expressed contrary intent, any provision of a statute or of a contract . . . providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal."

Just a few examples of some Florida Statutes that provide for an award of attorney's fees include:

1. Section 57.105(1), Florida Statutes (regarding attorney's fees to prevailing party for an opposing party's frivolous claims or defenses which had no basis in law or fact);

2. Section 61.16, Florida Statutes (regarding attorney's fees based on relative financial need in family law matters);
3. Section 78.20, Florida Statutes (regarding attorney's fees to prevailing defendant in a replevin action);
4. Section 83.49(3)(c), Florida Statutes (regarding attorney's fees to prevailing party in residential landlord-tenant dispute over security deposit);
5. Sections 120.69(7) and 120.595, Florida Statutes (regarding attorney's fees to prevailing party in some circumstances in certain administrative law cases);
6. Section 448.08, Florida Statutes (regarding attorney's fees to prevailing party in an employee's action for lost wages).

To seek an award of attorney's fees for an appeal, the party's attorney would file a motion for attorney's fees in the appellate court in accordance with Florida Rule of Appellate Procedure 9.400(b). Generally, a motion for attorney's fees in an appeal has to be filed no later than the time for service of the reply brief, or in original proceedings, the time for service of the petitioner's reply to the response to the petition. The motion is required to state the legal basis for seeking attorney's fees (i.e., a basis in a statute and/or contract).

C. Who is Entitled to or Responsible for Court Costs on Appeal?

The party who prevails in an appeal, including a pro se litigant, is entitled to seek an award of court costs. Thus, a pro se litigant may be entitled to court costs if he or she prevails in the appeal. But if the pro se litigant does not prevail, he or she will likely be responsible to pay the opposing party's court costs.

It is important to understand that court costs are different from attorney's fees, and different rules apply to costs. Costs include things like filing fees and the cost of the transcript or appellate record. More specifically, Florida Rule of Appellate Procedure 9.400(a) provides that the party who prevails in the appeal is entitled to recover certain costs incurred in the appeal, including: costs for filing and for service of process, charges for the lower tribunal clerk's preparation of the record, any necessary hearing or trial transcripts, bond premiums, and other costs that the law permits.

#### D. How Are Costs Incurred on Appeal Recovered?

A motion for appellate court costs is filed in the lower tribunal. To recover costs incurred on appeal, the prevailing party should file a motion for costs in the lower tribunal no later than 45 days after rendition of the appellate court's order or decision in the case. If the motion is not filed within this deadline, the right to seek costs will be lost. See Florida Rule of Appellate Procedure Rule 9.400(a).

In contrast, a motion for attorney's fees is filed in the appellate court. Then, if the appellate court awards attorney's fees, the party entitled to the fees generally has to file a motion in the trial court to determine the amount of the fees. Unlike with appellate costs, there is no set deadline in the rules for filing a motion to determine the amount of attorney's fees in the trial court after the appellate court awards entitlement to fees. But such a motion should probably still be filed within the same amount of time as a costs motion (i.e., within 45 days of the appellate court's decision).

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