

ATTORNEYS' FEES IN FLORIDA OUTLINE

1. Setting the Hook for Recovery of Attorneys' Fees. (8 minutes - Sellers)

- A. Must plead for attorneys' fees in complaint or answer or waived. Stockman v. Downs, 573 So. 2d 835 (Fla. 1991).
- B. Pleading does not have to state the basis for recovery with specificity. Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002), but watch out if you state the basis and get it wrong. Calvary Portfolio Services, LLC v. Enningham, 16 Fla. Law Weekly Supp. 141a (11th Cir. App. 2008).
- C. Amendment of pleadings to add request, Flagship Resort Dev. Corp. v. Interval Int'l, Inc., 28 So. 3d 915 (Fla. 3d DCA 2010), but fees allowed only after amendment. Trumbull Ins. Co. v. Woltenarski, 2 So. 3d 1050 (Fla. 3d DCA 2009).
- D. Exceptions to pleading requirement. Stockman v. Downs, 573 So. 2d 835 (Fla. 1991)(notice plus); 57.105/discovery abuses/inherent authority; Green v. Sun Harbor Homeowners' Ass'n, 730 So. 2d 1261 (Fla. 1998)(dismissed before answer).
- E. A motion for attorneys' fees is not a pleading. Precision Auto Care, Inc. v. Radcliffe, 815 So. 2d 708 (Fla. 4th DCA 2002).

2. The Motion for Attorneys' Fees. (8 minutes - Gwaltney))

- A. Rule 1.525.
- B. Motion must be "served" within 30 days.
- C. Retaining jurisdiction not necessary or effective. Martinez v. Giacobbe, 951 So. 2d 902 (Fla. 3d DCA 2007); Saia Motor Freight Line, Inc v. Reid, 930 So. 2d 598 (Fla. 2006).
- D. Rule 1.525 motion not needed if prevailing party determined in final judgment. AmerUs Life Ins. Co v. Lait, 2 So. 3d 203 (Fla. 2009).
- E. Party can enlarge the time for filing the 1.525 motion based on Fla. R. Civ. P. 1.090(b). Svoboda v. Bayer Corp., 946 So. 2d 1204 (Fla. 5th DCA 2006).
- F. Motion must state basis for recovery of attorneys' fees. Gulf Landings Ass'n v. Hershberger, 845 So. 2d 344 (Fla. 2d DCA 2003); European Bank Ltd v. Credit Clearing Corp., 969 So. 2d 450 (Fla. 4th DCA 2008); and you must cite the correct basis in the motion or motion denied. Gillis v. Fulford, 19 Fla. L. Weekly Supp. 411a (Santa Rosa County 2012).
- G. Motion need not state the amount of fees requested. Silver Springs Properties, LLC v. ERA Murray Realities, Inc., 874 So. 2d 712 (Fla. 4th DCA 2004).

3. What is Needed for Proof of Attorneys' Fees. (8 minutes - Thurman/Sellers)

- A. Morgan v. South Atl. Prod. Credit Ass'n, 528 So. 2d 491 (Fla. 1st DCA 1988)(general quote of required proof)
- B. Evidence of time records. M. Serra Corp v. Garcia, 426 So. 2d 1118 (Fla. 1st DCA 1983)(strongly recommended); Brevard Comm. Coll v. Barber, 488 So. 2d 93 (Fla. 1st DCA 1986)(but not required); Tucker v. Tucker, 513 So. 2d 733 (Fla. 2d DCA 1987)(records are discoverable); Brake v. Murphy, 736 So. 2d 745 (Fla. 3d DCA 1999)(reconstructed records allowed unless mere guesstimates); Braswell v Braswell, 4 So. 3d 4 (Fla. 2d DCA 2009)(testimony alone without records reversed without remand).
- C. Testimony of attorney keeping time. Markham v. Markham, 485 So. 2d 1299 (Fla. 5th DCA 1986)(attorney testimony of rate and hours required); Morgan v. South Atl. Prod. Credit Ass'n, 528 So. 2d 491 (Fla. 1st DCA 1988)(affidavit not enough); Toledo v. Wisk, 754 So. 2d 83 (Fla. 4th DCA 2000)(supervising attorney can testify for all timekeepers).
- D. Testimony of expert witness. Smith v. School Bd. Of Palm Beach Co., 981 So. 2d 6 (Fla. 4th DCA 2007)(expert must have similar case experience to give opinion).
- E. Recoverable time intertwined with non-recoverable time. Dr. Gail Van Diepen, PA v. Brown, 55 So. 3d 612 (Fla. 5th DCA 2011)(burden on prevailing party to separate recoverable time from non-recoverable time); Effective Teleservices, Inc v. Smith, 132 So. 3d 335 (Fla. 4th DCA 2014)(large fee award reversed because prevailing party could not separate time).
- F. Burden of proof. Lee Engin. & Const v. Fellows, 209 So. 2d 454 (Fla. 1968)(burden on movant to prove entitlement and amount); Centex-Rooney Const. Co v. Martin County, 725 So. 2d 1255 (Fla. 4th DCA 1999)(burden on losing party to point out specific time that is excessive or not reasonable).

4. The Judgment Granting Attorneys' Fees. (5 minutes - Judge Smith)

- A. The judgement must specify the reasonable number of hours and the reasonable hourly rate. Peacock v. Ace, 24 So. 3d 750 (Fla. 2d DCA 2009)(fundamental error).
- B. The trial court must make specific findings. Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc., 928 So. 2d 495 (Fla. 2nd DCA 2006).
- C. If a contingency bonus is added to the lodestar there must be specific additional findings in the judgment. Quanstrom (whether the relevant market required a contingency fee multiplier to obtain competent counsel, whether the attorney was able to mitigate the risk of non-payment, whether there was a contingency fee agreement between the attorney and client, and the likelihood of success at the beginning of the case).

5. Perspectives from the Bench. (10 minutes or more - Judge Smith)

Peacock v. Ace, 24 So. 3d 750 (Fla. 2d DCA 2009):

Ms. Peacock also argues that the final judgment's award of attorney's fees in favor of Ace is fundamentally erroneous on its face because it does not contain specific findings concerning the number of hours reasonably expended and the reasonableness of the attorney's hourly rate. See *Markovich v. Markovich*, 974 So.2d 600, 601 (Fla. 2d DCA 2008). We note that the record lacks a transcript of the final hearing or an approved statement of the proceedings as authorized by Florida Rule of Appellate Procedure 9.200(b)(4). "Even so, this court previously has determined that the absence of the required findings in the written order renders the order fundamentally erroneous on its face and that the lack of transcript 'does not preclude appellate review.'" *Harris v. McKinney*, 20 So.3d 400, 403 (Fla. 2d DCA 2009) (quoting *Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards*, 891 So.2d 1063, 1065 n. 4 (Fla. 2d DCA 2004)). Therefore, on remand, the circuit court must make the necessary written findings in accordance with *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985).

Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc., 928 So. 2d 495 (Fla. 2nd DCA 2006):

In Rowe, the supreme court adopted the federal lodestar approach for determining a reasonable attorney's fee under a prevailing party attorney's fee statute or contractual provision. Rowe, 472 So.2d at 1146; Freedom Sav. & Loan Ass'n v. Biltmore Constr. Co., 510 So.2d 1141, 1142 (Fla. 2d DCA 1987) (holding that Rowe applied to both statutory and contractual prevailing party fee awards). In doing so, the court recognized that while the amount of a reasonable fee had to be determined based on the facts of each case, certain factors had to be considered in every case in order to make that determination. Rowe, 472 So.2d at 1150. Thus, the Rowe court required the trial court to consider the following factors in every case:

*498 (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Id. After considering these factors, the trial court must make specific findings concerning the reasonable hourly rate, the number of hours reasonably expended, and the appropriateness of any reduction or enhancement factors. Id. at 1151; see also Abdalla v. Southwind, Inc., 561 So.2d 468, 468 (Fla. 2d DCA 1990); Biltmore Constr. Co., 510 So.2d at 1142. The failure to make these required findings constitutes reversible error. Bayer v. Global Renaissance Arts, Inc., 898 So.2d 995, 996 (Fla. 2d DCA 2005); Abdalla, 561 So.2d at 468.