MOTION PRACTICE IN FLORIDA APPELLATE COURTS

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TABLE OF CONTENTS[1]

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1. The material from this Article is adapted from Philip J. Padovano, *Florida Appellate Practice* chs. 12, 14, 15, 19, 20 (2001–2002 ed., West 2001).

I. INTRODUCTION[2]

The general procedures governing the preparation and filing of appellate motions are contained in Rule 9.300 of the Florida Rules of Appellate Procedure.[3] In some instances, these procedures must be applied in conjunction with additional requirements established by a more specific rule relating to the subject matter of the motion. This Article discusses appellate motion practice in general and the special requirements that apply to the most common types of motions.

A party may file a motion in an appellate court to resolve any matter that is not addressed by some other remedy established by the Florida Rules of Appellate Procedure. Rule 9.300(a) states that "[u]nless otherwise prescribed by these rules, an application for an order or other relief available under these rules shall be made by filing a motion therefor."[4] This broad statement authorizes the use of motions in a variety of situations.

Despite the broad scope of Rule 9.300(a), the parties should attempt to minimize the need for filing motions in an appellate court. Motion practice is necessarily more limited in appellate courts than it is in trial courts. A final judgment is entered at the trial level only after many issues have been resolved through the pretrial and trial stages of the proceeding by orders and rulings on motions. In contrast, the merits of an appeal can be decided without preliminary rulings or decisions. The parties conceivably could obtain a decision on the merits of a well-presented appeal without filing a single motion.

Given these differences, the appellate courts repeatedly have cautioned lawyers to exercise restraint when filing motions in appellate proceedings.[5] Many of the motions filed in appellate courts are unnecessary.

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2. See *id*. § 14.1 for an introduction on motions.

3. Fla. R. App. P. 9.300 (2001).

4. *Id*. 9.300(a).

5. *Sarasota County v. Ex*, 645 S.2d 7, 7–8 (Fla. Dist. App. 2d 1994); *Perez v. Perez*, 769 S.2d 389, 392 (Fla. Dist. App. 3d 1999); *Dubowitz v. Cent. Village E.*, 381 S.2d 252, 254 (Fla. Dist. App. 4th 1979). Motions should not be used to present argument that can be presented in the briefs. *Slizyk v. Smilack*, 734 S.2d 1166, 1167 (Fla. Dist. App. 5th 1999).

II. PROCEDURE FOR FILING MOTIONS

A. Proper Forum[6]

Some motions may be filed either in the appellate court or in the lower tribunal, while others may be filed only in one forum or the other. Consequently, the first step in seeking relief by motion during the course of an appellate proceeding is to determine where the motion should be filed.

Many procedural motions made during the early stages of an appellate proceeding may be filed either in the appellate court or in the lower tribunal. Rule 9.600(a) provides that the appellate court has exclusive jurisdiction to hear a motion for "extension of time for any act required by [the appellate] rules," but that the appellate court and the lower tribunal have concurrent jurisdiction to hear all other procedural motions filed "[b]efore the record is transmitted" to the appellate court.[7] It follows that any procedural motion filed after the transmittal of the record must be filed in the appellate court.

Although the date the record is transmitted controls the forum for resolving a procedural issue, the nature of the issue is more likely to determine the proper place to seek relief on a substantive matter. There are certain substantive issues that commonly are raised in the course of an appeal that must be presented by filing a motion in the lower tribunal before they may be considered in the appellate court. The following five types of motions fall in this category: (1) a motion for stay pending review in a civil case, (2) a motion for post-trial release in a criminal case, (3) a motion by an indigent party to proceed without payment of costs, (4) a motion to tax costs on review, and (5) a motion for temporary alimony or support pending an appeal in a family-law case.[8] For each of these issues, the correct procedure is to file the motion in the lower tribunal and to obtain an order, which is then subject to review in the appellate court.

A motion for stay pending review ordinarily involves factual issues that are best resolved in the lower tribunal. Because a motion for stay usually is filed soon after rendition of the judgment

6. See Padovano, *supra* n. 1, at § 14.9 for the source of the material that is in this Subsection.

7. Fla. R. App. P. 9.600(a).

8. *Infra* nn. 9–16 and accompanying text.

at issue, the trial judge also is likely to be more familiar with the parties and the issues in the case. In any event, the Rules of Appellate Procedure provide that a motion for stay pending review must be filed in the lower tribunal.[9] While the appellate courts have inherent authority to consider a request for a stay made for the first time on appeal, the most likely consequence of filing such a motion is that it would be denied without prejudice to seeking relief in the lower tribunal.

The method for postponing the enforcement of a judgment in a criminal case differs from the method for obtaining a stay of a civil judgment, but the underlying principles are the same. A defendant who has appealed a criminal conviction and who seeks to avoid incarceration during the appeal must file a motion for post-trial release in the trial court.[10] Assuming the defendant is eligible for post-trial release, the trial court may consider evidence presented by the defense or by the state. If the motion is granted, the defendant's release effectively stays the judgment and sentence pending the appeal.

The lower tribunals also are in the best position to resolve issues relating to the eligibility to proceed on review without payment of costs. For this reason, the rule governing proceedings by indigent parties requires that such motions be presented initially to the lower tribunal.[11] If the motion is denied, the lower tribunal must set forth the reasons in writing and the aggrieved party may then seek review by motion in the appellate court.[12]

Another motion that must be presented to the lower tribunal before the issue can be considered in a reviewing court is a motion to tax the costs of the appellate proceeding. The appellate rules provide that "[c]osts shall be taxed in favor of the prevailing party" and that such "[c]osts shall be taxed by the lower tribunal on motion served within thirty days" of the mandate.[13] As with

9. Rule 9.310(a) provides in material part that "a party seeking to stay a final or nonfinal order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief."

10. *Id*. 9.140(g)(1). A motion for post-trial release must be filed before the record is transmitted to the appellate court. Once the record has been forwarded to the appellate court, the trial court no longer has concurrent jurisdiction. *Taylor v. State*, 401 S.2d 811, 812 (Fla. Dist. App. 5th 1981).

11. Fla. R. App. P. 9.430.

12. *Id*.

13. *Id*. 9.400(a).

the first three types of motions, a party may seek review of an order on a motion to tax costs by filing a motion in the appellate court.

The final type of motion that must be presented initially in the lower tribunal is a motion for alimony or support in a dissolution-of-marriage case. Rule 9.600(c)(1) states that, "[i]n family-law matters[,] [t]he lower tribunal shall retain jurisdiction to enter and enforce orders awarding separate maintenance, child support, alimony . . . , or other awards necessary to protect the welfare and rights of any party pending appeal," including costs and attorneys' fees.[14] Subdivision (c)(3) provides that an order on a request for relief pending an appeal in a family-law case is reviewable by motion in the appellate court.[15] The motion for review must be filed within thirty days of rendition of the order by the trial court.[16]

B. Time Limits[17]

Another matter to consider before filing a motion in an appellate court is whether the motion will be timely. Although Rule 9.300 does not impose a general time limitation for filing appellate motions,[18] a time limit may be set by a more specific rule governing the issue raised by the motion. Moreover, an unreasonable delay in filing a motion may be grounds to deny relief, even if the motion is not one that must be filed within a certain period of time.[19]

The class of motions that is controlled by specific time periods includes a motion for rehearing, which must be filed within fifteen days of the issuance of the order of the appellate court,[20] and a motion to tax costs, which must be served in the lower tribunal within thirty days of the date on which the appellate court issues

14. *Id*. 9.600(c)(1); *Merian v. Merhige*, 690 S.2d 678, 680 (Fla. Dist. App. 3d 1997); *McPherson v. McPherson*, 775 S.2d 973, 973–974 (Fla. Dist. App. 4th 2000).

15. Fla. R. App. P. 9.600(c)(3); *Merian*, 690 S.2d at 68 (Fla. Dist. App. 3d 1997); *Taylor v. Taylor*, 734 S.2d 473, 475 (Fla. Dist. App. 4th 1999).

16. Fla. R. App. P. 9.600(c)(3).

17. For the source of the material that is adopted in this Subsection, see Padovano, *supra* n. 1, at § 14.2.

18. Fla. R. App. P. 9.300.

19. *Id*. comm. nn. 1977 amend.

20. *Id*. 9.330(a); *State Farm Mut. Auto. Ins. Co. v. Judges of the Dist. Ct. of App., Fifth Dist.*, 405 S.2d 980, 981 (Fla. 1981).

the mandate.[21] Specific time limitations also may control motions filed for the purpose of reviewing orders of the lower tribunal entered in the same appellate proceeding. For example, a motion for review of an order setting the amount of appellate attorneys' fees must be filed in the appellate court within thirty days of the lower tribunal's rendition of the order.[22] In contrast, a motion to review an order granting or denying a stay pending review is not subject to a time limit.[23]

Several other motions, although not governed by a time limitation expressed in a set number of days, are controlled by the appellate time limits for submitting other documents. For example, "[a] motion for attorneys' fees may be served not later than the time for service of the reply brief,"[24] and a request for oral argument must be served not later than the date on which a party would be entitled to file his or her last brief.[25]

Some motions are affected by practical time limits imposed by the circumstances. For example, a motion for extension of time is not directly controlled by any time limitation set out in the Rules, but it is apparent that such a motion must be filed before the expiration of the time sought to be extended. To that extent, the time period in issue also serves as a practical limitation on the time for filing the motion for extension.

Even if a motion is not subject to a fixed time limit, a delay in filing the motion might serve as an independent ground to deny the requested relief.[26] This is because the appellate courts have the inherent power to conclude that a motion is untimely under

21. Fla. R. App. P. 9.400(a); *B & L Motors, Inc. v. Bignotti*, 427 S.2d 1070, 1073 (Fla. Dist. App. 2d 1983); *Kaelbel Wholesale, Inc. v. Soderstrom*, 210 S.2d 1065, 1065 (Fla. Dist. App. 4th 2002).

22. Fla. R. App. P. 9.400(c); *Browning v. New Hope S.*, 785 S.2d 732, 733 (Fla. Dist. App. 1st 2002); *Gen. Motors Acceptance Corp. v. Laesser*, 791 S.2d 517, 519 (Fla. Dist. App. 4th 2001).

23. Fla. R. App. P. 9.310(f).

24. *Id*. 9.400(b); *see Computer Task Group, Inc. v. Palm Beach County*, 809 S.2d 10, 11 (Fla. Dist. App. 4th 2002) (following Rule 9.400(b) and affirming an order awarding attorneys' fees).

25. Fla. R. App. P. 9.320.

26. The committee notes to Rule 9.300 contain the following warning: a "delay in presenting any motion may influence the relief granted or sanctions imposed under [R]ule 9.410." *Id*. 9.300 comm. nn. 1977 amend. Although this statement was made in relation to the power of the appellate courts to reject untimely motions to dismiss, it is evident from the broad language employed that the appellate courts' general power to deny untimely motions is not limited to such motions.

the circumstances of a given case. The most important factors that a court should consider when determining whether an appellate motion is untimely are: (1) the purpose and effect of the motion, (2) the length of the delay in filing, and (3) the effect of the delay, if any, on the opposing party.

Additional time is allowed for service of motions and other pleadings by mail. If a motion must be served within a period of time in relation to the service of a previous document, and if the previous document has been served by mail, then the time period for service of the motion will be extended five days.[27]

C. Contents of Motion[28]

Motions filed under the Rules are unlike those submitted to the trial courts in that they must contain all of the information necessary for a decision. Because the Rules do not afford the moving party an opportunity to present evidence and argument in a hearing, as would ordinarily be the case at the trial level, a motion filed in an appellate court must be a self-contained statement of the claim for relief.

Rule 9.300(a) provides that an appellate motion must include an application for relief, a statement of the grounds on which the motion is based, and an argument with appropriate citations of authority.[29] A party is not entitled to file a brief in support of a motion.[30] Consequently, the proper method of presenting the legal argument in support of a motion filed in an appellate court is to include the argument in the text of the motion.

In addition to the requirements set by Rule 9.300(a), a motion filed in an appellate court should include certain formal elements. All appellate motions should contain the following basic parts: (1) a caption including the case number in both the appellate court and the lower tribunal, (2) a title describing the type of motion, (3) a body containing the factual basis and the argument,

27. *Id*. 9.420(d).

28. See Padovano, *supra* n. 1, at §§ 14.4, 14.11 for the source of the material that is adapted in this Subsection.

29. Fla. R. App. P. 9.300(a).

30. The committee notes to Rule 9.300(a) express the view that briefs on motions are cumbersome and unnecessary. *Id*. 9.300 comm. nn. 1977 amend. The notes explain further that "[a]ny matters that formerly would have been included in a brief on a motion should be included in the motion." *Id*.

(4) a request for relief, (5) a signature, and (6) a certificate of service. As prescribed by the Florida Rules of Judicial Administration, a motion filed in the appellate court must be submitted on letter-size paper measuring eight and one-half by eleven inches.[31]

If the motion is one that seeks an extension of time, it also must include a certificate stating the opposing party's position on the request.[32] Failure to include a certificate regarding the position of opposing counsel in a motion for extension of time may result in the summary denial of the motion.[33]

The appellate courts rely on the representations of counsel in routine requests for extensions of time.[34] Given the inherent ethical considerations, counsel for the moving party should exercise particular care in representing the opposing attorney's position. If the opposing attorney has orally consented to the extension or other request for relief, the movant's attorney should confirm the consent in writing. A confirmation letter may help demonstrate the accuracy of the representation in the motion if a subsequent dispute about the consent arises.[35]

The practice of consulting with opposing counsel is required with respect to motions for extensions of time, but it is a good idea to ascertain the opponent's position on any motion.[36] There are

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31. Fla. R. Jud. Admin. 2.055(a) (2002).

32. Rule 9.300(a) provides that "[a] motion for an extension of time shall, and other motions if appropriate may, contain a certificate that the movant's counsel has consulted opposing counsel and that the movant's counsel is authorized to represent that opposing counsel either has no objection or will promptly file an objection."

33. *Id*.; *Mills v. Heenan*, 382 S.2d 1317, 1318 (Fla. Dist. App. 5th 1980). A representation by an attorney that opposing counsel does not object to a motion for extension of time is a representation by the attorney and not a representation by a member of the attorney's staff. In *Publix Supermarkets, Incorporated v. Arnold*, 707 S.2d 1161 (Fla. Dist. App. 5th 1998), the court fined an attorney $250.00 for incorrectly representing that opposing counsel did not object to a motion for extension of time. *Id*. at 1161.

34. In *Hilltop Developers, Incorporated v. Masterpiece Homes, Incorporated*, 455 S.2d 1155 (Fla. Dist. App. 5th 1984), the court noted that "[i]t is essential to the expeditious handling of motions under [R]ule 9.300 that [the] court be able to rely upon the accuracy of representations of counsel." *Id*. at 1156. The court reprimanded the appellant's attorney for misrepresenting that opposing counsel had consented to a motion for extension of time. *Id*. For an example of another instance in which an attorney was personally charged for a misrepresentation, see *Merritt v. Promo Graphics, Incorporated*, 679 S.2d 1277, 1229 (Fla. Dist. App. 5th 1996), which imposed sanctions on the ground that the representation was not correct.

35. It is best to confirm the consent to a motion by a letter or memorandum. In *Hilltop Developers*, the appellant was unable to verify an alleged oral agreement that was the subject of a certificate of counsel under the provisions of Rule 9.300(a). 455 S.2d at 1156.

36. Rule 9.300(a) states that "[a] motion for an extension of time shall, *and other mo-*

other types of motions that could be simplified greatly by an agreement on one or more of the issues. In this regard, the nonmoving party should consider carefully the need to oppose an appellate motion. Opposition should not be raised merely out of the mistaken belief that the adversary process requires some form of controversy regarding every issue before the court.

It is appropriate to submit an appendix in support of an appellate motion, and, in some situations, preparing and filing an appendix would be the best method of providing a factual basis for the arguments presented to the court.[37] An appendix to a motion should be prepared in the same fashion as an appendix to an appellate brief, and it should be filed and served along with the motion, either as an attachment or as a separate document.[38] Unless the appendix contains documents or other exhibits of nonconforming sizes, it should be prepared on letter-size paper measuring eight and one-half by eleven inches.[39]

The need for an appendix often depends on the stage of the proceedings in which the motion is filed. A motion that presents a substantive issue to the appellate court before the record has been transmitted by the lower tribunal is likely to require an appendix. At that point, the appellate court would not have access to the material facts necessary to resolve the issue raised in the motion. On the other hand, a motion presented to an appellate court after the record has been transmitted is less likely to require an appendix. For example, it is unlikely that an appendix would ever be required in support of a motion for rehearing. At that point, any fact necessary to support the motion would be in the record already before the court.

An appellate motion may present a jurisdictional or procedural issue that was not addressed in the lower tribunal and thus was not based on the evidence contained in the record. To account

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tions if appropriate may, contain a certificate that the movant's counsel has consulted opposing counsel and that the movant's counsel is authorized to represent that opposing counsel either has no objection or will promptly file an objection." (Emphasis added.)

37. The material portion of Rule 9.300(a) states that "[a] motion may be accompanied by an appendix, which may include affidavits and other appropriate supporting documents not contained in the record."

38. *Id*. 9.220.

39. Although Florida Rule of Judicial Administration 2.055 provides that letter-size paper shall be used in all Florida courts, it contains an exception in Subdivision (b) that allows any "exhibit or attachment" to be filed in its original size.

for this possibility, Rule 9.300(a) authorizes the submission of an appendix containing affidavits or other documents that were not part of the record of the proceeding before the lower tribunal.[40] To illustrate, a party who seeks to dismiss an appeal on the ground that the issue has become moot may find it necessary to submit an appendix with an affidavit or other evidence showing the change in circumstance that renders the case moot. An event occurring after the appeal has been filed would not be reflected by anything in the record.

D. Notice and Service[41]

An appellate motion must be served on all parties to the review proceeding, but there is no other notice requirement.[42] Unlike a motion filed in the trial court, an appellate motion is not set for hearing. It is possible, but very unlikely, that an appellate court will hear oral argument on a motion, but even if that is to occur, the court, not counsel, will schedule the argument. Because an appellate motion is likely to be considered without a hearing or any further argument, the moving party need only serve the motion itself.

Some issues that arise in the course of an appellate proceeding must be presented to the trial court by motion before they are considered in the appellate court. Depending on the local practice, it may be proper to schedule such a motion for a hearing before the trial court. When that occurs, the party requesting the hear-

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40. According to Rule 9.300(a), an appendix to a motion "may include affidavits and other appropriate supporting documents not contained in the record." Matters that are outside the record should not be included unless they are necessary to provide a complete presentation of the motion. "Although affidavits and other documents not appearing in the record may be included in the appendix, it is to be emphasized that such materials are limited to matter[s] germane to the motion, and are not to include matters related to the merits of the case." *Id*. comm. nn. 1977 amend.

41. See Padovano, *supra* n. 1, at § 14.3 for the source of the material that is adapted in this Subsection.

42. Rule 9.420(b) provides that "[a]ll original papers shall be filed either before service or immediately thereafter. A copy of all documents filed under these rules shall, before filing or immediately thereafter, be served on each of the parties." Because an appellate motion is an original paper, it must be served on all parties of record at the time of filing. All of the acceptable methods of service are given in Rule 9.420(c). Read in conjunction with Rule 9.300(a), Rule 9.420(d) generally provides for an additional five days to serve a response to a motion served by mail. *Infra* nn. 59–60 and accompanying text. The certificate of service on a motion should indicate the method of service. *N. Fla. Regl. Med. Ctr. v. Witt*, 616 S.2d 614, 615 (Fla. Dist. App. 1st 1993).

ing also must serve a notice of hearing on all other parties to the case.[43] For example, in most jurisdictions the moving party would be required to schedule a hearing on a motion for stay pending review and to serve a notice of the hearing under the rules of civil procedure.

A special notice procedure applies to all emergency motions filed in the appellate court or in the lower tribunal during the course of an appellate proceeding.[44] Even though an emergency motion filed in the appellate court would not be set for hearing by a party, counsel should attempt some form of actual notice so that the opposing party will have an opportunity to file a written response before the appellate court's decision. Notice of a motion requesting emergency relief can be made by any practical form including actual notice by telephone. An emergency motion must include a statement explaining the nature of the emergency and a statement regarding counsel's efforts to give actual notice to all interested parties.

E. Effect of Filing Motions[45]

Florida Rule of Appellate Procedure 9.300(b) provides that the filing of certain motions will operate to "toll the time schedule of any proceeding in the court until disposition of the motion."[46] Thus, it is important to determine whether a motion is the type that will suspend the time schedule for filing or service of other papers in the appellate court.

Motions tolling the time schedule imposed by the appellate rules are identified in Rule 9.300(b) by the process of elimination.[47] The Rule states that, "[e]xcept as prescribed by subdivision (d) of this rule, service of a motion shall toll the time schedule of any [appellate] proceeding."[48] The latter section of the Rule spe-

43. Fla. R. Civ. P. 1.090(d) (2001); *id*. 1.100(b).

44. Florida Rule of Appellate Procedure 9.300(c) states that "[a] party seeking emergency relief shall, if practicable, give reasonable notice to all parties."

45. See Padovano, *supra* n. 1, at § 14.6 for the source of the material that is adapted in this Subsection.

46. Motions not listed in Rule 9.300(d) toll the time for performance of other acts under the appellate rules. A motion for extension of time tolls the time period in question until disposition of the motion. *Anderson v. Willis*, 402 S.2d 1344, 1345 (Fla. Dist. App. 1st 1981); *Kuznik v. State*, 604 S.2d 37, 37 (Fla. Dist. App. 2d 1992); *Ike's Carter Pool & Maint. Co. v. Roberts*, 432 S.2d 137, 137 (Fla. Dist. App. 4th 1983).

47. Fla. R. App. P. 9.300(b).

48. *Id*.

cifically lists those motions that do not toll the running of any time period. The exceptions listed in Rule 9.300(d) are as follows:

(1) [m]otions for post-trial release, [R]ule 9.140(g)[;]

(2) [m]otions for stay pending appeal, [R]ule 9.310[;]

(3) [m]otions relating to oral argument, [R]ule 9.320[;]

(4) [m]otions relating to joinder and substitution of parties, [R]ule 9.360[;]

(5) [m]otions relating to amicus curiae, [R]ule 9.370[;]

(6) [m]otions relating to attorney[s'] fees on appeal, [R]ule 9.400[;]

(7) [m]otions relating to service, [R]ule 9.420[;]

(8) [m]otions relating to admission or withdrawal of attorneys, [R]ule 9.440[;]

(9) [m]otions relating to expediting the appeal; [and]

(10) [a]ll motions filed in the supreme court, unless accompanied by a separate request to toll time.[49]

The final exception listed in Subsection (d) effectively limits the automatic tolling procedure in Subsection (b) to proceedings in the district courts of appeal and appellate proceedings in the circuit courts.[50] A motion in the Florida Supreme Court does not automatically toll the time for filing and serving other documents required by the Rules.[51] Counsel for the moving party must file a separate motion to toll the time periods pending resolution of the motion in question, and the matter of suspending the time is discretionary with the Supreme Court.

If the motion is in the general class of motions that operates to toll the appellate time schedule, it will have that effect even if it appears to be unmeritorious.[52] Whether the time periods will be

49. *Id*. 9.300(d).

50. *Id*. 9.300(d)(10).

51. A motion filed in the Supreme Court will not toll the appellate time periods "unless accompanied by a separate request to toll time." *Id*. 9.300(d)(10). The committee notes explain that this section of the Rule "codifies current practice in the supreme court, where motions do not toll time unless the court approves a specific request, for good cause shown, to toll time for the performance of the next act." *Id*. 9.300 comm. nn. 1977 amend. The Appellate Rules Committee further observed that "[v]ery few motions filed in [the Supreme Court] warrant a delay in further procedural steps to be taken in a case." *Id*.

52. Rule 9.300(b) does not distinguish between meritorious motions and frivolous motions. In *Anderson*, 402 S.2d at 1345, the court held that a motion to dismiss tolled the

extended automatically under Rule 9.300(b) is a question that is resolved by considering the nature of the motion and not its relative merit. However, the motion must be one that is authorized or it will not toll the time for filing other papers in the appellate court. An unauthorized appellate motion will be treated as a nullity, and it will be ineffective to toll the time periods that otherwise would apply to the case.[53]

If the appellate court has extended the time for filing the record on appeal, it is not necessary to obtain an extension for filing the initial brief. Rule 9.300(b) provides in part that "[a]n order granting an extension of time for preparation of the record, or the index to the record, or for filing of the transcript of proceedings, shall extend automatically, for a like period, the time for service of appellant's initial brief."[54] An order extending the time for filing the record is sufficient to extend the time for service of the initial brief, even though the time for service of the brief is measured from the date of filing the notice of appeal and not from the date the record is submitted. By the terms of Rule 9.300(b), the order extending the time for filing the record is an automatic extension of the time for service of the brief.[55]

F. Response by Opposing Party[56]

The proper method for the party opposing the motion to state a position on the relief is to serve a written response.[57] A response should include a complete presentation of the factual representations and legal arguments necessary to support the contention of the responding party. Briefs are not permitted in support of either

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appellate time schedule even though the motion was of questionable merit. *Id*.

53. An unauthorized motion does not toll the running of time. *State v. Kilpatrick*, 420 S.2d 868, 868 (Fla. 1982) (holding that a motion for rehearing en banc unaccompanied by a motion for rehearing directed to the panel was a nullity and was therefore ineffective to toll the jurisdictional time limit for seeking discretionary review in the Supreme Court).

54. Fla. R. App. P. 9.300(b). Before the adoption of this procedure in 1992, an order extending the time for filing the record had no effect on the time for service of the initial brief. *Id*. 9.300 comm. nn. 1992 amend.

55. *Id*. 9.300.

56. See Padovano, *supra* n. 1, at § 14.7 for the source of the material that is adapted in this Subsection.

57. A party is entitled to file one response to a motion. Fla. R. App. P. 9.300(a). The appellate court may permit a further response on its own motion or upon the party's motion. *Id*. 9.300(a) comm. nn. 1977 amend.

a motion or a response.[58] Because oral argument is unlikely, a response should be drafted with the expectation that it will be the sole form of advocacy.

A response to a motion filed in an appellate court must be served "within ten days of service of the motion."[59] However, the time for serving a response is fifteen days if the motion was served on the opposing party by mail.[60] If additional time is needed to prepare a response, counsel may file a motion for extension of time to respond. The appellate court has authority to shorten or extend the time period for filing a response.

It is proper to submit an appendix in support of the response, and that may be advisable if the circumstances warrant the consideration of documents or other relevant materials that are not yet before the appellate court.[61] As with the motion itself, an appendix to a response may include affidavits or other documents that are not a part of the record of the proceedings in the lower tribunal.[62] The form of the appendix to a response should be the same as the form of an appendix to a motion.[63]

58. There is no authority in Rule 9.300(a) for filing a brief in support of a motion or response. The drafters of the Rule intended to avoid the cumbersome and unnecessary procedure of allowing briefs in support of motions and responses. Fla. R. App. P. 9.300(a) comm. nn. 1977 amend.

59. *Id*. 9.300(a).

60. *Id*. 9.420(d); *Sebree v. Salcedo*, 390 S.2d 801, 801 (Fla. Dist. App. 3d 1980). However, additional time is not afforded if a specific rule provides that the time for responding is measured from the time the motion was filed. *E.g.* Fla. R. App. P. 9.190(e)(2)(C); *see Ludwig v. Dept. of Health*, 778 S.2d 531, 533 (Fla. Dist. App. 1st 2001) (stating that, unless an agency responds within ten days as proscribed in Rule 9.190(e)(2)(c), the court will grant a motion for stay).

61. Fla. R. App. P. 9.300(a). Rule 9.300(a) authorizes the filing of an appendix to a motion. *Id*. By implication, it also would be proper to file an appendix in support of a response to the motion. Otherwise, the opposing party may not have an effective means of rebutting the factual material set forth in support of the motion. The conclusion that an appendix to a response is permitted also is supported by Rule 9.220, the Rule governing the filing of an appendix generally, which expressly includes the term "response" in the list of appellate pleadings that may be supported by an appendix.

62. *Id*. 9.300(a). Rule 9.300(a) provides in material part that an appendix "may include affidavits and other appropriate supporting documents not contained in the record."

63. *See supra* n. 38–39 and accompanying text (discussing the form of an appendix to a motion).

G. Frivolous Motions — Sanctions[64]

A party should file a motion during the course of an appellate proceeding only when necessary to obtain relief that will not be provided by the court's decision on the merits. If a motion is filed for an improper purpose, the appellate court may sanction the offending party or attorney.[65] The court could impose sanctions for the filing of an excessive number of motions, the filing of an unnecessary motion, or the filing of a motion that is plainly without merit.

Sanctions most often are imposed against an attorney, not against the party he or she represents. Courts also have meted out disciplinary measures against attorneys who file frivolous motions.[66] As at the trial level, the severity of the penalty will depend on the nature of the violation and the intent of the offending attorney. In some cases, the appellate court has assessed attorneys' fees against the offending lawyer with a direction that the fees not be passed on to the client.[67] For more serious violations, the court may prohibit a lawyer from filing additional motions in the case.[68]

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64. See Padovano, *supra* n. 1, at § 14.8 for the source of the material that is adapted in this Subsection.

65. Fla. R. App. P. 9.410. Rule 9.410 permits the imposition of sanctions "for the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith."

66. *See Sarasota County*, 645 S.2d at 8 (declining to impose sanctions, but noting that "attorneys, as officers of the court, . . . must exercise restraint when filing motions"); *In re Order as to Sanctions*, 495 S.2d 187, 187 (Fla. Dist. App. 2d 1986) (warning that the Second District Court of Appeal will impose sanctions for frivolous motions); *Dubowitz*, 381 S.2d at 254 (serving notice on members of the bar that the Fourth District Court of Appeal will impose sanctions for filing frivolous motions).

67. The appellate court may assess attorneys' fees against a lawyer for an abuse of the right to file appellate motions. *See Howard v. Baumer*, 519 S.2d 679, 681 (Fla. Dist. App. 1st 1988) (holding that appellant's attorneys were guilty of gross abuse of the motion practice and ordering them to certify to the court that they had credited their clients for any fees incurred in connection with preparing the motions in question).

68. *E.g. Moral Majority, Inc. v. Broward County Ch. of the Natl. Org. for Women, Inc.*, 606 S.2d 630, 631 (Fla. Dist. App. 4th 1992) (addressing abusive motion practice and entering an order prohibiting the parties from filing further motions).

III. RELIEF AVAILABLE BY MOTION

A. Procedural Matters[69]

The Florida Rules of Appellate Procedure authorize parties to file a variety of routine procedural motions, but the need for many of these motions easily could be avoided. Practitioners who carefully consider the contents of the record and make a schedule of all of the time limits that will apply to the case are less likely to be forced to expend additional efforts in obtaining extensions of time or moving to supplement or correct the record. A little time well spent in the initial stages of the proceeding is likely to save a great deal of time as the case progresses.

B. Ancillary Relief — Stays[70]

A request for stay pending review involves an issue that ordinarily is presented in the lower tribunal before it is considered by the reviewing court.[71] Rule 9.310(a) states that the lower tribunal "shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief."[72] If issuance of the stay is discretionary, the proper procedure is to file the motion in the lower tribunal. The order entered on the motion is then reviewable simply by filing a motion for review in the case pending before the appellate court.[73]

There are two situations in which a stay is imposed automatically and without the need for a motion in the lower tribunal. First, a party who has appealed a judgment that is solely for the payment of money may obtain a stay of execution of the judgment under Rule 9.310(b)(1) by posting a bond with the clerk of the lower tribunal in the total amount of the judgment plus two years' interest at the statutory rate.[74] If the bond is posted in the correct

69. See Padovano, *supra* n. 1, at § 14.11 for the source of the material that is adapted in this Subsection.

70. See *id*. at ch. 12 for the source of the material that is adapted in this Subsection.

71. The procedure for obtaining a stay pending review is to file a motion in the lower tribunal. Fla. R. App. P. 9.310(a). A special procedure applies if a party is seeking a stay of an administrative order. *Id*. 9.190(e)(2)(A).

72. *Id*. 9.310(a).

73. *Id*. 9.130(f).

74. *Id*. 9.310(b)(1); *Waller v. DSA Group, Inc.*, 606 S.2d 1234, 1235 (Fla. Dist. App. 2d 1992); *Wilson v. Woodward*, 602 S.2d 545, 546–547 (Fla. Dist. App. 2d 1991).

amount, the stay is automatic.[75] The trial judge has no discretion to require the appellant to post a bond in a higher or lower amount.[76]

Second, a motion for stay also is unnecessary if the party appealing the judgment is a public officer or a public body. This exception is based on a presumption that a public litigant will be able to pay the judgment if the appeal is not successful. When an appeal is filed by a public officer or public body, the filing of the notice of appeal automatically stays the judgment.[77] The opposing party may file a motion in the lower tribunal to vacate the automatic stay, but the lower tribunal may vacate properly an automatic stay in an appeal by a public litigant only in compelling circumstances. The party moving to vacate the stay has the burden of establishing an evidentiary basis for the alleged compelling circumstances.[78]

Although a motion for a stay pending review should be directed to the lower tribunal initially, the appellate court has inherent authority to issue a stay pending review, even if the motion is presented for the first time on appeal.[79]

C. Dismissal[80]

The proper method of raising a procedural or jurisdictional bar to an appellate proceeding is to file a motion to dismiss the appeal or petition for review.[81] A motion to dismiss could be used to present any of the following arguments: (1) the appellate court lacks jurisdiction, (2) the issue raised in the review proceeding is moot, (3) the party seeking review has disobeyed the order that is

75. *Hollo v. N. Trust Bank of Fla., N.A.*, 562 S.2d 730, 731 (Fla. Dist. App. 3d 1990); *Taplin v. Salamone*, 422 S.2d 92, 93 (Fla. Dist. App. 4th 1982).

76. *Mellon United Natl. Bank v. Cochran*, 776 S.2d 964, 964 (Fla. Dist. App. 3d 2000); *Campbell v. Jones*, 648 S.2d 208, 209 (Fla. Dist. App. 3d 1994); *Proprietors Ins. Co. v. Valsecchi*, 385 S.2d 749, 751 (Fla. Dist. App. 3d 1980).

77. Fla. R. App. P. 9.310(b)(2); *City of Delray Beach v. White*, 616 S.2d 602, 602 (Fla. Dist. App. 4th 1993); *Navarro v. Bouffard*, 522 S.2d 515, 517 (Fla. Dist. App. 4th 1988).

78. *Dept. of Envtl. Protection v. Pringle*, 707 S.2d 387, 390 (Fla. Dist. App. 1st 1998); *St. Lucie County v. N. Palm Dev. Corp*., 444 S.2d 1133, 1135 (Fla. Dist. App. 4th 1984).

79. *See Perez v. Perez*, 769 S.2d 389, 393 (Fla. Dist. App. 3d 1999) (granting a stay filed directly in the appellate court without mentioning the motion and review procedures in Rule 9.310(a)–(f)).

80. See Padovano, *supra* n. 1, at ch. 15 for the source of the material that is adapted in this Subsection.

81. *McClain v. Fla. Parole & Probation Commn.*, 416 S.2d 1209, 1211 (Fla. Dist. App. 1st 1982).

the subject of the review proceeding, (4) the appeal or petition is frivolous, or (5) the party seeking review has committed a violation of the rules serious enough to warrant dismissal as a sanction.[82]

Perhaps the most frequently asserted ground in support of a motion to dismiss is that the appellate court lacks jurisdiction. This argument may be presented successfully so long as the proceeding is not within the appellate court's subject-matter jurisdiction.[83] For example, if a party appeals a nonfinal order that is not one of the orders that is subject to review by appeal, the opposing party could raise the absence of subject-matter jurisdiction by filing a motion to dismiss in the appellate court. Another class of jurisdictional issues includes those in which the order is appealable, but the party seeking review has failed to take the necessary steps to invoke appellate jurisdiction.[84] If a party files an untimely notice of appeal from a final judgment, the appellate court will lack jurisdiction to hear the appeal, even though the court otherwise has potential appellate jurisdiction to hear appeals from final orders. Many of these issues will be raised by the appellate court, but it is certainly proper for the defending party to challenge appellate jurisdiction by filing a motion to dismiss.

Closely related to the issue of appellate jurisdiction is the question of whether there is a case or controversy. This problem is commonly presented by an appeal or petition that initially was within the jurisdiction of the appellate court, but that has become moot by the expiration of time or as a result of subsequent events. Cases of this nature remain within the jurisdiction of the court in a technical sense, but they could be dismissed on the ground that the appellate court's decision would have no effect on the liti-

82. *Infra* nn. 83–93 and accompanying text.

83. *E.g. Okeelanta Corp. v. McDonald*, 730 S.2d 1283, 1284 (Fla. Dist. App. 4th 1999) (granting a motion to dismiss an appeal taken from a nonfinal, nonappealable order); *Bernstein v. First Fed. Sav. & Loan Assn. of Orlando*, 384 S.2d 301, 302–303 (Fla. Dist. App. 5th 1980) (dismissing the appeal on the ground that the order under review was not within the scope of the court's appellate jurisdiction).

84. A motion to dismiss is proper to contest jurisdiction on the ground that the appeal was not timely filed. *E.g. Blackstock v. Blackstock*, 776 S.2d 359, 359 (Fla. Dist. App. 1st 2001) (dismissing an appeal based on the appellee's motion showing that the notice of appeal was not timely filed).

gants. An appellate court may retain jurisdiction over an issue that has become moot only in limited circumstances.[85]

The proper method of asserting a claim of mootness is to file a motion to dismiss. As a practical matter, the mootness of an issue might not be apparent to the appellate court if it were not presented by a party's motion. The event that makes the issue moot might be a change in circumstances that would not be apparent from anything in the record from the trial court. For this reason, it may be necessary to prepare an appendix to the motion to establish the factual basis for the claim of mootness.

Among the contentions that properly may be asserted in a motion to dismiss is the argument that the proceeding should be dismissed because the appellant or petitioner has disobeyed the order under review. Deliberate noncompliance with the order or judgment may be treated as a waiver of the right to challenge it on review.[86] Appellate courts usually allow the offending party an opportunity to comply with the order before dismissing the case in much the same fashion as a litigant would be allowed to purge a contempt.[87]

Regarding disobedience of a civil judgment, an appellate court may dismiss a criminal appeal if the defendant has become

85. There are exceptions that allow an appellate court to decide an issue of great public importance, an issue that may become moot so quickly that it is capable of repetition yet evading review, or an issue that would have collateral legal consequences. *Mazer v. Orange County*, 811 S.2d 857, 859 (Fla. Dist. App. 5th 2002).

86. If the appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, entertain a motion to dismiss the appeal. *E.g. McLemore v. McLemore*, 567 S.2d 23, 24 (Fla. Dist. App. 1st 1990) (dismissing a husband's appeal because he failed to comply with the order appealed and because he absented himself during the period of the appeal); *Keidaish v. Smith*, 400 S.2d 90, 91 (Fla. Dist. App. 2d 1981) (dismissing an appeal because the appellant had fled the jurisdiction with certain items of personal property in violation of the injunction order he was appealing); *Simoes v. Simoes*, 790 S.2d 1221, 1223 (Fla. Dist. App. 3d 2001) (dismissing an appeal based on the appellant's flagrant noncompliance with the trial court's orders); *Rodriguez v. Rodriguez*, 640 S.2d 133, 134 (Fla. Dist. App. 3d 1994) (dismissing the appeal on the ground that the appellant had failed to pay his child support and had absconded from the jurisdiction while the appeal was pending); *Segall v. Downtown Assoc.*, 546 S.2d 11, 12 (Fla. Dist. App. 3d 1989) (dismissing the appeal because the appellant failed to follow post-judgment discovery orders during an appeal from an unsuperseded judgment).

87. If a party has not complied with the order under review, the appellate court must provide a grace period to allow the appellant an opportunity to comply before the appeal is dismissed. *Gazil v. Gazil*, 343 S.2d 595, 597 (Fla. 1977). However, it is not necessary to offer a grace period before dismissing an appeal if the appellant has absconded from the jurisdiction. *Rodriguez*, 640 S.2d at 134.

a fugitive and is no longer within the appellate court's control.[88] However, this Rule applies only if the defendant absconds after invoking the appellate court's jurisdiction.[89] A criminal defendant who becomes a fugitive before the sentencing hearing does not forfeit the right to appeal once he or she is taken back into custody and sentenced.[90]

Another ground for dismissal is that the proceeding before the appellate court is frivolous. This is not often a good basis for a motion to dismiss, given the general legal policy favoring decisions on the merits when possible, and given the fact that it often will be difficult to evaluate the case until the record is filed. After the record is filed, it might be just as easy to affirm the case. There are instances, however, in which appellate courts have dismissed proceedings on the ground that they were frivolous.[91] In Florida,

> [a] frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. . . . It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record . . . , that its character may be determined without argument or research.[92]

88. An appeal by a criminal defendant is subject to dismissal if the defendant becomes a fugitive after invoking the jurisdiction of an appellate court, but not before. *Compare Griffis v. State*, 759 S.2d 668, 672 (Fla. 2000) (noting that an appellate court may dismiss an appeal only if "a defendant absconds after filing [the] appeal") *with Abed v. State*, 806 S.2d 627, 627 (Fla. Dist. App. 4th 2002) (granting a motion to dismiss because the defendant filed an appeal before absconding).

89. *Griffis*, 759 S.2d at 672.

90. *Id*.

91. The court can dismiss an appeal that is frivolous. In *Beiswanger v. Department of Banking and Finance, Division of Securities*, 563 S.2d 700, 700 (Fla. Dist. App. 4th 1990), the appellant had advocated a statutory interpretation not supported by the legislative history or the case law and the court dismissed the appeal on the ground that it was frivolous. Likewise, in *Askew v. Gables by the Sea, Incorporated*, 258 S.2d 822, 823 (Fla. Dist. App. 1st 1972), the court determined that the appeal was dilatory and entered an order of dismissal. It appeared to the court that the appellant had appealed from a post-mandate order of the lower tribunal to relitigate issues that had been decided in the original appeal resulting in the issuance of the mandate. *Id*. As a general proposition, however, a party should not file a motion to dismiss to argue that an appeal is without merit because such arguments belong in the briefs. *Diaz v. Fla. Dept. of Corrections*, 511 S.2d 669, 670 (Fla. Dist. App. 1st 1987).

92. *Treat v. State ex rel. Mitton*, 163 S. 883, 883 (Fla. 1935) (relying on *Brahmbhatt v. Allstate Indem. Co.*, 655 S.2d 1264, 1265 (Fla. Dist. App. 4th 1995), to dismiss an appeal on

Finally, appellate courts may employ dismissal as the ultimate sanction for a failure to comply with the Rules. Although it does not occur frequently, there are instances in which the courts have dismissed a case because the record or appellate brief was not filed within the appropriate time periods.[93] In this situation, the power to dismiss an appellate proceeding should be regarded as an extreme remedy.

D. Appellate Attorneys' Fees[94]

A party that seeks to recover appellate attorneys' fees must file a timely motion for fees under Florida Rule of Appellate Procedure 9.400(b).[95] This Rule outlines the method of obtaining appellate attorneys' fees but does not provide an independent basis for an award of fees.[96] In appellate courts, as in trial courts, the right to attorneys' fees is a substantive right that is created by statute or by agreement of the parties.[97]

Unlike a motion to tax appellate costs, which is filed in the lower tribunal, a motion for appellate attorneys' fees must be filed in the appellate court.[98] If the appellate court determines that the moving party is entitled to an award of appellate attorneys' fees, the court may set the amount of fees based on affidavits or may remand the case to the lower tribunal for the assessment of an appropriate amount.[99] The lower tribunal lacks jurisdiction to

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the ground that it was frivolous. The appellant had argued for reversal citing a precedent that supported the trial court's decision.).

93. *E.g. Swicegood v. Fla. Dept. of Transp.*, 394 S.2d 1111, 1112 (Fla. Dist. App. 1st 1981).

94. See Padovano, *supra* n. 1, at ch. 20 for the source of the material that is adapted in this Subsection.

95. Fla. R. App. P. 9.400(b).

96. *Id*.

97. *United Servs. Auto. Assn. v. Phillips*, 775 S.2d 921, 922 (Fla. 2000); *Judges of the Eleventh Jud. Cir. v. Janovitz*, 635 S.2d 19, 20 (Fla. 1994).

98. Fla. R. App. P. 9.400(b). The lower tribunal has no authority to award appellate attorneys' fees in the absence of a mandate from the appellate court. *Rados v. Rados*, 791 S.2d 1130, 1131 (Fla. Dist. App. 2d 2001); *Computer Task Group, Inc.*, 809 S.2d at 11. The need to file a motion under Rule 9.400(b) is not excused merely because the applicable statute is couched in mandatory terms directing that the court shall award fees to the prevailing party. *Sch. Bd. of Alachua County v. Rhea*, 661 S.2d 331, 332 (Fla. Dist. App. 1st 1995); *Respiratory Care Servs., Inc. v. Murray D. Shear, P.A.*, 715 S.2d 1054, 1056 (Fla. Dist. App. 5th 1998).

99. In *Sierra v. Sierra*, 505 S.2d 432, 434 (Fla. 1987), the Court decided that an award of appellate attorneys' fees must rest on an evidentiary basis. After the appellate court has ruled that a party is entitled to fees, the correct procedure is to remand the case for an

determine entitlement to appellate attorneys' fees unless a case has been remanded for that purpose.

A motion for appellate attorneys' fees must be served no later than the time for service of the reply brief.[100] This general time requirement applies to appellees even though an appellee ordinarily would not have an opportunity to file a reply brief. The time limitation is keyed to the filing of the reply brief so that the motion will be available by the time the case is ready for consideration on the merits.

In the past, some lawyers simply included a motion for appellate attorneys' fees as a part of a brief, but this is not an acceptable practice. The motion must be submitted to the court as a separate document so that it can be identified and docketed.[101] A motion for appellate attorneys' fees must meet all of the general requirements that apply to appellate motions, and it also must contain a statement of the substantive ground for an award of fees.[102] If the motion is based on a statutory ground, it should re-

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evidentiary hearing on the amount of fees or allow the parties to present evidence directly to the appellate court in the form of affidavits. *Id*. Hence, the amount of appellate attorneys' fees usually is determined in the lower tribunal. *Moldthan v. Sentinel Commun. Co.*, 510 S.2d 1185, 1189 (Fla. Dist. App. 1st 1987); *Henning v. Henning*, 507 S.2d 164, 165 (Fla. Dist. App. 3d 1987); *Taggart Corp. v. Benzing Corp.*, 451 S.2d 1046, 1047 (Fla. Dist. App. 4th 1984). A remand to the lower court to determine the proper amount of appellate attorneys' fees does not open the issue of entitlement to fees. *Hernstadt v. Brickell Bay Club Condo. Assn., Inc.*, 602 S.2d 967, 968 (Fla. Dist. App. 3d 1992). If the appellate court has granted appellate attorneys' fees, the lower court subsequently cannot determine that the moving party is not entitled to fees. *Id*. In some cases it may be necessary for the trial court to determine the amount of fees only for the successful portion of the appeal. *Imperial Terrace E. Homeowners' Assn., Inc. v. Grimes*, 666 S.2d 276, 277 (Fla. Dist. App. 5th 1996).

100. Fla. R. App. P. 9.400(b); *Antennas for Commun. v. Compton*, 482 S.2d 610, 610 (Fla. Dist. App. 1st 1986); *Joseph Land & Co. v. Green*, 486 S.2d 87, 87 (Fla. Dist. App. 1st 1986); *Computer Task Group, Inc.*, 809 S.2d at 11. In *Lobel v. Southgate Condominium Association, Incorporated*, 436 S.2d 170 (Fla. Dist. App. 4th 1983), the court denied a motion for attorneys' fees filed more than five months after the date of service of the reply brief. *Id*. at 171. The court said, "Increasingly we note a tendency to seek attorney[s'] fees out of season." *Id*.

101. *Melweb Signs, Inc. v. Wright*, 394 S.2d 475, 477 (Fla. Dist. App. 1st 1981); *McCreary v. Fla. Residential Prop. & Casualty Jt. Underwriting Assn.*, 758 S.2d 692, 696 (Fla. Dist. App. 4th 1999).

102. Fla. R. App. P. 9.400(b). Rule 9.400(b) provides that a motion for appellate attorneys' fees "shall state the grounds on which recovery is sought." A motion that fails to state the ground upon which recovery is sought is insufficient. *United Servs. Auto. Assn.*, 775 S.2d at 922; *Shuler v. Darby*, 786 S.2d 627, 630 (Fla. Dist. App. 1st 2001). The presence of a statute creating the entitlement to fees does not relieve the parties of their obligation under Rule 9.400(b) of filing a timely motion for attorneys' fees in the appellate court. *See supra* n. 23 and accompanying text (discussing time requirement for filing a motion for

fer to the applicable statute and any applicable case law interpreting the statute.[103] Similarly, if the attorneys'-fee motion is based on an agreement in a note or contract, the pertinent document should be attached to the motion or cited from the record.

In family-law cases, an attorneys'-fee motion also should contain a statement about the financial needs of the moving party and the ability of the opposing party to pay. An allegation regarding the needs and abilities of the parties is necessary in family-law cases because appellate attorneys' fees in such cases are not based on the outcome of the case.[104] If the needs-and-ability determination previously has been made in the lower court or by the appellate court, the facts relating to that determination should be set out clearly in the motion.

Appellate attorneys' fees often are awarded provisionally in family-law cases on the basis of a prior judicial determination with the understanding that the lower court will assess the need for a fee award after considering any changes in the parties' financial circumstances.[105] A provisional award of appellate attorneys' fees in a family-law case does not always determine the issue of entitlement to fees.[106] Such an order merely signifies that there is a basis for a claim of attorneys' fees and directs the lower tribunal to consider the issue on remand. When the needs-and-ability test is applied on remand in view of the current financial

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attorneys' fees).

103. A motion for appellate attorneys' fees based on a statutory ground "should refer to the statute, as well as specifying the appropriate sections and subsections of the statute, along with the year of the statute." *Lehigh Corp. v. Byrd*, 397 S.2d 1202, 1205 (Fla. Dist. App. 1st 1985).

104. A motion for appellate attorneys' fees in a family-law case should contain an allegation concerning needs and ability. *Rosen v. Rosen*, 696 S.2d 697, 699–700 (Fla. 1997). Appellate attorneys' fees in family-law cases are not limited to the prevailing party, and may be awarded, in the discretion of the appellate court, on the basis of the needs of one spouse and the financial ability of the other, and to a lesser extent on other factors such as the length and scope of the litigation and the parties' behavior during the litigation. *Id*. at 700–701; *see generally Rados*, 791 S.2d at 1131–1135 (providing a detailed discussion of attorneys' fees on appeal in family-law cases).

105. The practice of provisionally awarding appellate attorneys' fees, subject to a post-mandate hearing in the lower tribunal, was popularized by *Dresser v. Dresser*, 350 S.2d 1152, 1154 (Fla. Dist. App. 1st 1977). At least one appellate court has modified the procedure to delegate the determination of a party's entitlement to fees to the trial court in certain circumstances, subject to review by the appellate court by motion. *Rados*, 791 S.2d at 1131.

106. *White v.White*, 695 S.2d 381, 383 (Fla. Dist. App. 4th 1997).

status of the parties, the trial court may determine that it is inappropriate to award appellate attorneys' fees.

Family-law cases are unique in that they may involve an award of attorneys' fees pending an appeal. Rule 9.600(c)(1) states that the trial court has continuing jurisdiction to award and enforce temporary attorneys' fees in family-law matters.[107] An order awarding temporary attorneys' fees pending an appeal or review proceeding is itself subject to review in the appellate court. Rule 9.600(c)(3) provides that a party may seek review of a temporary attorneys'-fee order by filing a motion in the appellate court within thirty days of rendition of the order.[108] As with the final determination, an order awarding temporary appellate attorneys' fees in a family-law matter is based primarily on the needs-and-ability determination.

A party may oppose a motion for attorneys' fees on appeal or review by serving a response in the appellate court within ten days of service of the motion.[109] If the motion for appellate attorneys' fees was served by mail, the opposing party has an additional five days to serve the response.[110] A response may be employed to refute the existence of a substantive ground for an award of attorneys' fees, or it may be filed simply to oppose the award of fees in the amount requested by the moving party.

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107. Fla. R. App. P. 9.600(c)(1). According to Rule 9.600(c)(1), the lower court has continuing jurisdiction to enter and enforce orders awarding temporary attorneys' fees to prosecute or defend an appeal in a family-law matter. *See Swartz v. Swartz*, 691 S.2d 2, 3 (Fla. Dist. App. 3d 1996) (applying Rule 9.600 in a dissolution-of-marriage action). Such an order is then subject to review in the appellate court under Rule 9.600(c)(3). *White v. White*, 683 S.2d 510, 511 (Fla. Dist. App. 4th 1996). The opportunity for temporary attorneys' fees is limited to family-law actions under Chapter 61 of the Florida Statutes. Consequently, a party is not entitled to temporary appellate attorneys' fees in an action to establish paternity. *Gilbertson v. Boggs*, 743 S.2d 123, 128 (Fla. Dist. App. 4th 1999).

108. Fla. R. App. P. 9.600(c)(3).

109. *Id*. 9.300(a). Failure to serve a timely response to a motion for appellate attorneys' fees may be treated as a waiver of the right to oppose an award of fees. *Homestead Ins. Co. v. Poole, Masters & Goldstein, C.P.A., P.A.*, 604 S.2d 825, 827 (Fla. Dist. App. 4th 1991).

110. Fla. R. App. 9.420(d); *see* text accompanying *supra* n. 59 (noting that responses to motions in appellate courts must be served "within ten days of service of the motion").

E. Correcting or Modifying Appellate Decisions[111]

1. Rehearing

The proper method of advising the court of an error affecting its decision is to file a motion for rehearing. Rule 9.330(a) of the Florida Rules of Appellate Procedure provides that a motion for rehearing "shall state with particularity the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended."[112] There is no other ground that properly can be used to support a request for rehearing of an appellate decision.

Rule 9.330(a) once included a statement that rehearing "shall not re-argue the merits of the court's order."[113] This prohibition was difficult to follow and even more difficult to enforce. Some lawyers used the opportunity to correct an oversight or omission as a routine step in the process of advocating their position. Appellate judges observed that rehearing motions were often nothing more than a restatement of the arguments presented in the briefs.[114]

In the 2000 revision of Rule 9.330(a), the Supreme Court deleted the prohibition against reargument of a case.[115] Under the present version of the Rule, an attorney may argue a point decided by the court. However, it is still improper to use a motion for rehearing to voice disagreement with the court. The essential

111. See Padovano, *supra* n. 1, at ch. 19 for the source of the material that is adapted in this Subsection.

112. Fla. R. App. P. 9.330(a).

113. *Id.* 9.330(a) comm. nn. 2000 amend. (quoting the former language of the Rule).

114. The prior version of Rule 9.330(a) contained an express prohibition against reargument of the merits on rehearing. *Barnes v. State*, 743 S.2d 1105, 1113 (Fla. Dist. App. 4th 1999). In *Whipple v. State*, 431 S.2d 1011, 1012–1016 (Fla. Dist. App. 2d 1983), the court wrote a detailed opinion explaining the rehearing process and warning attorneys against the use of rehearing motions to reargue the merits of a case. After reviewing statistics on the number of rehearing motions filed, the *Whipple* court noted that most attorneys have the mistaken belief that a motion for rehearing is "a routine step in appellate practice." *Id.* at 1013. Similarly, in *Jackson v. United States Aviation Underwriters, Incorporated*, 466 S.2d 1119, 1119–1120 (Fla. Dist. App. 2d 1985), the court concluded that the rehearing motion was a "paradigm" of abuse, and that each time the rule is abused "the time and effort of three judges is wasted." The motion for rehearing in *Gainesville Coca-Cola v. Young*, 632 S.2d 83, 84 (Fla. Dist. App. 1st 1993), consisted of an eight-page restatement of the law and facts contained in the appellees' brief. The court denied the motion on the ground that it contained an improper reargument of the case. *Id.*; *e.g. Jacobs v. Wainwright*, 450 S.2d 200, 201 (Fla. 1984); *Parker v. Baker*, 499 S.2d 843, 847–848 (Fla. Dist. App. 2d 1986); *Seslow v. Seslow*, 625 S.2d 1248, 1248 (Fla. Dist. App. 4th 1993).

115. Fla. R. App. P. 9.330(a) comm. nn. 2000 amend.

purpose of a motion for rehearing has not changed; it is still used to bring to the attention of the court a point that was overlooked or misapprehended.

Rule 9.300(a) now states that a motion for rehearing "shall not present issues not previously raised in the proceeding."[116] This addition, also made in 2000, incorporates a principle that had been established in the case law. An appellate court is not required to consider a point presented for the first time in a motion for rehearing, even if the point is one that might have changed the result of the case.[117] A motion for rehearing must address some error or omission in the resolution of an issue previously presented in the main argument. Allowing consideration of new issues after a case has been decided would be inconsistent with the general purpose of Rule 9.330(a); that is, to enable the court to address matters that were overlooked or misunderstood.

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116. *Id*. 9.330(a).

117. *Blinn v. Fla. Dept. of Transp.*, 781 S.2d 1103, 1110 (Fla. Dist. App. 1st 2000); *Ayer v. Bush*, 775 S.2d 368, 370 (Fla. Dist. App. 4th 2000); *see Taylor v. Johnson*, 581 S.2d 1333, 1338 (Fla. Dist. App. 1st 1990) (declining to consider a new issue raised for the first time in a motion for rehearing); *Sag Harbour Marine, Inc. v. Fickett*, 484 S.2d 1250, 1256 (Fla. Dist. App. 1st 1985) (denying rehearing because the matter was not previously presented in the brief in a meaningful way); *Fiesta Fashions, Inc. v. Capin*, 450 S.2d 1128, 1129 (Fla. Dist. App. 1st 1984) (denying a motion for rehearing when appellants raised issues not contained in their brief); *Alvarado v. State*, 466 S.2d 335, 338 (Fla. Dist. App. 2d 1985) (denying a motion for rehearing because "[t]he question of affirmative selection was not presented . . . on direct appeal"); *E. Airlines, Inc. v. King*, 561 S.2d 1220, 1221 (Fla. Dist. App. 3d 1990) (holding that an issue that was not presented in the briefs cannot be presented for the first time on rehearing); *Araujo v. State*, 452 S.2d 54, 58 (Fla. Dist. App. 3d 1984) (rejecting a claim made for the first time on rehearing and scolding the attorney for having the "effrontery" to say that the point was overlooked or misapprended by the court); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 S.2d 958, 960 (Fla. Dist. App. 4th 1983) (rejecting a meritorious contention on rehearing that the appellant had failed to make a timely objection in the lower tribunal because the argument had been presented for the first time on rehearing). A district court does not have jurisdiction on rehearing to challenge an order that was not appealed or cross-appealed. *Rety v. Green*, 546 S.2d 410, 426 (Fla. Dist. App. 3d 1989). However, in *Ratley v. Batchelor*, 599 S.2d 1298, 1303–1304 (Fla. Dist. App. 1st 1991), the court addressed a new argument on rehearing to provide guidance for the parties and the trial court on remand. The court acknowledged the general rule that an appellate court will not consider an argument that is made for the first time in a motion for rehearing. *Id*. at 1303. However, courts have discretion to consider a point made for the first time on rehearing. *See Perez v. State*, 717 S.2d 605, 606 (Fla. Dist. App. 3d 1998) (diverting from general practice to "consider[ ] an argument where" there were "recent developments in the law"); *Jaworski v. State*, 804 S.2d 415, 419 (Fla. Dist. App. 4th 2001) (acknowledging the general rule but evaluating an argument made for the first time in the appellee's motion for rehearing, based on the principle that the court must consider any basis to affirm).

It is not appropriate in any circumstance to file a motion for rehearing to attack the court or opposing counsel. The court is not likely to tolerate a motion for rehearing that is written to express disappointment or to satisfy the emotions of the unsuccessful party. Rule 9.410 authorizes the appellate court to impose sanctions for the filing of any motion that is frivolous or in bad faith.[118] The courts have used this general authority to impose sanctions for abuses of the rehearing procedure.[119]

A motion for rehearing may be directed to a decision that is not supported by an opinion, but it would be difficult to argue that the appellate court overlooked or misunderstood something about the case if there has been no written opinion and, therefore, no indication of the basis of the court's decision. Some appellate courts have discouraged rehearing motions that are directed to decisions without opinions.[120]

Generally, a party may file only one motion for rehearing in a single case.[121] However, in exceptional situations the courts have allowed a second motion to be filed. For example, successive rehearing motions were allowed in a case in which the court's opinion on the first rehearing was so different from its initial opinion

118. Fla. R. App. P. 9.410.

119. In *Elliott v. Elliott*, 648 S.2d 135, 135–136 (Fla. Dist. App. 4th 1994), the court denied an argumentative motion for rehearing that simply expressed displeasure with the court and counsel. Because the rule is clear and because there are many warnings in the case law about the limited scope of a motion for rehearing, the court entered an order directing the movant's attorney to show cause why sanctions should not be imposed. *Id*. at 136. In *Patton v. State Department of Health and Rehabilitative Services Office of Child Support Enforcement*, 597 S.2d 302, 302–304 (Fla. Dist. App. 2d 1991), the court denied a motion for rehearing on the ground that it was an attempt to reargue the case. Unprofessional accusations in the motion also prompted the court to refer the lawyer to The Florida Bar. *Id*. at 303–304. In *Lawyers Title Insurance Corporation v. Reitzes*, 631 S.2d 1100, 1100–1101 (Fla. Dist. App. 4th 1993), the court expressed its displeasure with the inordinate number of rehearing motions filed to re-argue the merits of the case. The court issued an order to show cause why sanctions should not be imposed for improper reargument. *Id*. at 1101.

120. *E.g. Snell v. State*, 522 S.2d 407, 407 (Fla. Dist. App. 5th 1988) (holding that a motion for rehearing of an affirmance without opinion was an abuse of the rehearing procedure, particularly because the motion merely restated the arguments in the initial brief); *contra Sinkfield v. State*, 592 S.2d 322, 322 (Fla. Dist. App. 1st 1992) (granting a motion for rehearing directed to a per curiam affirmance without an opinion because there had been an intervening decision of the same court to the contrary); *Patton*, 597 S.2d at 303 (suggesting that it is proper to file a motion for rehearing directed to a per curiam affirmance without opinion).

121. Fla. R. App. P. 9.330(b).

that it amounted to a totally new decision.[122] The court reasoned that it would be fair to allow the unsuccessful party another opportunity for rehearing. If a second motion for rehearing is to be filed, counsel should recognize the provisions of Rule 9.330(b) in the motion and explain the reasons the court should allow an exception to the Rule.

While an appellate decision generally is subject to only one motion for rehearing or clarification, Rule 9.330(b) expressly authorizes the filing of both a motion for rehearing and a motion for certification.[123] Rehearing and certification are remedies that may be pursued separately or in conjunction with each other.

Rule 9.330(a) provides that a motion for rehearing, clarification, or certification must be filed within fifteen days from the date of the decision of the appellate court.[124] However, the time for filing a motion for rehearing is not jurisdictional.[125] The appellate court has authority to enlarge or reduce the time before it expires.[126] Moreover, the court has authority to accept a motion

122. In *Dade Federal Savings & Loan Association v. Smith*, 403 S.2d 995, 999 (Fla. Dist. App. 1st 1981), the court allowed a second rehearing motion notwithstanding the provisions of Rule 9.330(b). The opinion on the first motion for rehearing changed the entire basis of the court's decision. *Id*. Therefore, the court reasoned that it was like a new opinion and held that it was subject to another rehearing motion. *Id*. Ordinarily a party may file only one motion for rehearing and one motion for certification and the motions must be filed within fifteen days of the decision to be certified. Fla. R. App. P. 9.330(b). However, in *DeBiasi v. Snaith*, 732 S.2d 14, 17 (Fla. Dist. App. 4th 1999), the court stated in dicta that it would entertain a subsequent motion for certification if a motion for rehearing resulted in a new opinion.

123. Fla. R. App. P. 9.330(b). Rule 9.330(b) provides that "[a] party shall not file more than [one] motion for rehearing or for clarification of decision and [one] motion for certification with respect to a particular decision."

124. *Id*. 9.330(a).

125. *Thompson v. Singletary*, 659 S.2d 435, 436 (Fla. Dist. App. 4th 1995); *Maffea v. Moe*, 483 S.2d 829, 831 (Fla. Dist. App. 4th 1986). Consequently, the appellate courts may consider belated rehearing motions. While the rule authorizes the appellate court to consider a motion out of time, a request to do so must be accompanied by a showing of good cause. *Pinecrest Lakes, Inc. v. Shidel*, 802 S.2d 486, 489 (Fla. Dist. App. 4th 2001). It should be noted, however, that an appellate court does not have jurisdiction to consider an untimely motion for rehearing filed after the expiration of the term of court in which the decision was made. *Orange Fed. Sav. & Loan Assn. v. Dykes*, 444 S.2d 1152, 1152–1153 (Fla. Dist. App. 5th 1984).

126. Fla. R. App. P. 9.330(a). Rule 9.330(a) states that "[a] motion for rehearing, clarification, or certification may be filed with [fifteen] days of an order or within such other time set by the court." Implicit in this statement is the authority of the appellate court to enlarge or reduce the fifteen-day time period. Rule 9.330(c) contains a similar statement implying that the court has authority to reduce or enlarge the ten-day period for filing a motion for rehearing in bond validation proceedings. A party has fifteen days to file a motion for rehearing or clarification. *Hoenstine v. State Farm Fire & Cas. Co.*, 742 S.2d

for rehearing filed beyond the time allowed by the Rule, even though the party filing the motion has no right to reconsideration on the merits. Of course, it would not be wise to rely on the court's authority to consider a belated motion for rehearing. The only safe way to ensure that a motion for rehearing will be considered is to file the motion within the applicable time period.

The time allotted for filing a motion for rehearing is the same for each party to the proceeding in the appellate court, and the time available to one party is not affected by the actions of another.[127] For example, the filing of a notice to invoke discretionary jurisdiction of the Florida Supreme Court before the expiration of time for filing a motion for rehearing in the district court does not cut off the rights of other parties to seek rehearing or clarification in the district court. If time remains, any other party to the proceeding in the district court has a right to seek rehearing or clarification.

A party may oppose a motion for rehearing by serving a response within ten days of service of the motion to which it is directed.[128] However, a response often is unnecessary. If the motion is nothing more than a second effort to present an argument that was fully considered and rejected, the response will not be of much value. In this situation, the response merely will add to the time the court will be required to spend in disposing of the motion. Counsel for the prevailing party may safely assume that the court will reject an improper rehearing motion on its own, without the need for a response.[129] In contrast, if the motion for rehearing

853, 854 (Fla. Dist. App. 5th 1999) (stating that a motion for rehearing must be filed within fifteen days pursuant to Rule 9.330(a)).

127. In *Portu v. State*, 654 S.2d 169, 169 (Fla. Dist. App. 3d 1995), the State filed a notice of intent to seek discretionary review in the Supreme Court before the time for filing a motion for rehearing expired. The defendant filed a motion for clarification, which the court granted. *Id*. The court held that the early filing of a notice of intent to seek discretionary review does not cut off the rights of another party to file a timely motion for rehearing. *Id*. at 170.

128. Fla. R. App. P. 9.330(a). Rule 9.330(a) provides that "[a] response may be served within ten days of service of the motion."

129. Appellate courts are aware of the fact that many attorneys file rehearing motions inappropriately. *See Whipple*, 431 S.2d at 1013 (stating that "motions for rehearing were filed in about one out of every four cases . . . heard on the merits"); *Araujo*, 452 S.2d at 58 (criticizing the Assistant Attorney General for making an argument for the first time in a motion for rehearing). In light of these cases, the prevailing party should have some degree of confidence that an improper rehearing motion will be rejected by the appellate court without the need for a response.

does raise a matter that was overlooked or misapprehended, it is advisable to file a response to persuade the appellate court to adhere to its original decision.

Preparing an effective motion for rehearing requires a different form of advocacy from that employed in writing an appellate brief. Once a decision has been made, the client's objective can be accomplished only by considering the need for rehearing from the appellate court's point of view. For that reason, the emphasis of the motion should be to show why the court should reconsider its decision, and not to explain why the client should have prevailed.

Appellate counsel must carefully and objectively consider whether there is a need for a rehearing and whether a valid ground exists. The courts increasingly have expressed intolerance of rehearing motions that amount to no more than a reargument of the issues addressed in the briefs.[130] If the appellate court has not overlooked or misunderstood some important aspect of the case, the motion should not be filed.

If a valid reason exists to justify filing a motion for rehearing, the motion should describe the reason without restating the argument on the merits of the case. It is not appropriate to express disagreement with the court, but that does not mean that the attorney must relinquish his or her role as an advocate. To the contrary, the focus of the advocacy merely shifts from demonstrating the merits of a position to revealing an error or omission worthy of the court's reconsideration. The argument should be designed to convince the court that it missed an important point, and not to reestablish the position of the unsuccessful party by more persuasive advocacy.

Rule 9.330 requires a statement of particularity regarding the points of law or fact that were overlooked or misapprehended by the court,[131] but this does not mean that a motion for rehearing should be lengthy or exhaustive. As a practical matter, a concise, yet adequately detailed motion, will stand a much better chance of success. A motion for rehearing that is too long is more likely to be viewed as an attempt to reargue the matters addressed in the brief.

130. *Supra* nn. 114, 117, 119.
131. Fla. R. App. P. 9.330(a).

A party may request that a panel decision be reconsidered by all judges serving on a district court of appeal by filing a motion for rehearing en banc. However, this is an exceptional remedy that can be employed in only limited circumstances. The motion must be based on a claim that en banc review is necessary to maintain uniformity of the court's decisions or that the case is one of exceptional importance.[132]

There are strict procedural requirements that must be met when filing a motion for rehearing en banc. First, the motion must be timely filed in conjunction with a motion for rehearing directed to the panel.[133] If the en banc motion is not accompanied by a motion for rehearing, it will be ineffective as a basis for any relief and it will be disregarded by the court.[134] The requirement that the en banc motion be filed in conjunction with a motion for rehearing ensures that the assigned panel will have an opportunity to evaluate the need for rehearing before the request is presented to the entire court.

A second essential requirement is that the attorney filing the motion include a statement certifying the existence of a proper ground for en banc consideration.[135] Depending on the ground as-

132. Rule 9.331(a) sets forth the grounds for hearings and rehearings en banc. Examples of cases in which courts granted en banc rehearing to resolve intradistrict conflict include *Jones v. State*, 790 S.2d 1194, 1196 (Fla. Dist. App. 1st 2001), *Palm Bay Towers Corporation v. Brooks*, 466 S.2d 1071, 1074 (Fla. Dist. App. 3d 1984), *Jaris v. Tucker*, 414 S.2d 1164, 1165 (Fla. Dist. App. 3d 1982), and *Puga v. Suave Shoe Corporation*, 417 S.2d 678, 678 (Fla. Dist. App. 3d 1982). In contrast, the First District denied en banc consideration in *Walker v. State*, 442 S.2d 977, 978 (Fla. Dist. App. 1st 1983), because the panel decision did not conflict with the court's prior decisions. For a discussion of Florida district courts' authority to sit en banc, see Harvey J. Sepler, *En Banc Review in Florida Appellate Courts*, 62 Fla. B.J. 37, 37–39 (May 1988). Exceptional importance and uniformity of decisions were both cited as reasons for granting rehearing en banc in *Felts v. State*, 537 S.2d 995, 1004 (Fla. Dist. App. 1st 1988). The uniformity ground was based on several inconsistent panel decisions that had not yet been released. *Id.*

133. The motion must be filed "within the time prescribed by [R]ule 9.330," which is fifteen days from the date of the decision. Fla. R. App. P. 9.331(d)(1).

134. *State v. Kilpatrick*, 420 S.2d 868, 869 (Fla. 1982) (holding that a motion for en banc review, which was filed separate from a motion for rehearing, was impermissible under Rule 9.331(c)); *La Grande v. B & L Servs., Inc.*, 436 S.2d 337, 337 (Fla. Dist. App. 1st 1983) (holding a motion for en banc review null and void because it was not filed "in conjunction with a Rule 9.330(a) motion for rehearing").

135. A motion for rehearing en banc must contain the required statement of counsel. In *Gainesville Coca-Cola*, the court questioned the propriety of the certificate in support of a motion for rehearing en banc. 632 S.2d at 84. The lawyer certified "'based on a reasoned and studied professional judgment, that the panel decision in this case is of exceptional importance,'" but the court concluded that certification was made only to meet the requirements of Rule 9.331(d)(2). *Id.* (quoting the appellee's Motion for Rehearing En Banc).

serted, Rule 9.331(d)(2) requires that the motion contain one of the following two certificates:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.
>
> [o]r
>
> I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court (citing specifically the case or cases).[136]

A motion for rehearing en banc will not be put to a vote unless requested by at least one judge on the court.[137] The request for a vote on the en banc motion need not be made by a judge on the original panel, but a judge who was not on the panel may be unaware that such a motion has been filed. As explained in the committee note to Rule 9.331(d), "non-panel judges" have no obligation to review a motion for rehearing en banc until a vote is requested by another judge.[138] Hence, it is possible that a motion for rehearing en banc will not be considered by all of the judges on the court.

If the panel denies the motion for rehearing submitted in conjunction with the motion for rehearing en banc, that denial is considered as a denial of the en banc motion as well.[139] A separate

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The opinion was a two-paragraph per curiam decision reversing on the ground that the order was not supported by competent, substantial evidence. *Id*. There was nothing about the case that could add to the jurisprudence of the state on the subject matter of the case. *Id*. Moreover, there was no explanation why counsel believed that the case was one of exceptional importance. *Id*. Although the motion was in proper form, it was totally without merit. *Id*. The court published the opinion to deter improper motions for rehearing en banc. *Id*.

A motion for rehearing en banc was denied in *Havener v. Havener*, 473 S.2d 708, 708 (Fla. Dist. App. 2d 1985), because it did not contain the required statement of counsel. The court treated the en banc motion as a motion for rehearing. *Id*. For another example of a case in which the court treated an en banc motion as a motion for rehearing, see *Thompson v. State*, 483 S.2d 1, 1 (Fla. Dist. App. 2d 1985).

136. Fla. R. App. P. 9.331(d)(2).

137. *Id*. 9.331(d)(1) (stating that a vote will not be taken on the merits of a motion for rehearing en banc "unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court").

138. *Id*. 9.331 comm. nn. 1994 amend. Rule 9.331(d)(1) provides that "[j]udges who did not sit on the panel are under no obligation to consider the motion [for rehearing en banc] unless a vote is requested."

139. The district courts of appeal can effectively deny a motion for rehearing en banc without a formal order on the motion. Under the provisions of Rule 9.331(d)(3), the denial

order on a motion for rehearing en banc is required only if the motion is granted. In that event, the district court may require the parties to submit additional briefs or limit the issues for en banc consideration.[140]

To prevail on a motion for rehearing en banc, the moving party must persuade a majority of those active judges participating and voting on the motion about the merits of the case. If there is a tie vote, the panel decision stands as the decision of the court; if there is no panel decision, a tie vote will affirm the action of the trial court.[141] If the en banc proceeding is based on intradistrict conflict, the panel decision that becomes the decision of the court as a result of a tie vote is the decision of the panel in the previous case before the district court of appeal.[142]

Rehearing en banc is regarded by the appellate courts as an extraordinary proceeding, and appellate attorneys should treat it as such. A great deal of credibility could be lost by using the rehearing en banc procedure as a routine step in the appellate process. In contrast, an attorney who employs the remedy sparingly is more likely to be successful in a case that presents a genuine ground for en banc consideration.

2. Clarification

A party who fears that an appellate decision might be interpreted more than one way may request a clarification by the court. Florida Rule of Appellate Procedure 9.330(a) provides that a motion for clarification "shall state with particularity the points of law or fact" in the decision that the moving party believes "are in need of clarification."[143] The opposing party may serve a re-

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of rehearing or the grant of rehearing without en banc consideration shall be deemed as a denial of the motion for rehearing en banc.

140. The district court can require additional briefs on a motion for rehearing en banc. *Regency Inn v. Johnson*, 422 S.2d 870, 874 (Fla. Dist. App. 1st 1982) (mentioning that additional briefs were requested in connection with a motion for rehearing en banc).

141. Fla. R. App. P. 9.331(a); *e.g. State v. Falls Chase Spec. Taxing Dist.*, 424 S.2d 787, 819 (Fla. Dist. App. 1st 1982); *State v. Bankowski*, 570 S.2d 1152, 1153 (Fla. Dist. App. 4th 1990); *O'Brien v. State*, 478 S.2d 497, 499 (Fla. Dist. App. 5th 1985). A tie vote on a motion for rehearing en banc does not suggest that the issue is one that should be certified to the Supreme Court for resolution. Fla. R. App. P. 9.331 comm. nn. 1982 amend.

142. *O'Brien*, 478 S.2d at 499.

143. Fla. R. App. P. 9.330(a). For cases addressing motions for clarification, see *Sherburne v. School Board of Suwannee County*, 455 S.2d 1057, 1062 (Fla. Dist. App. 1st 1984); *Cenvill Investors, Incorporated v. Columbus*, 483 S.2d 751, 753 (Fla. Dist. App. 4th 1986);

sponse to a motion for clarification within ten days of service of the motion.

Rehearing and clarification are different remedies. A motion for rehearing may be appropriate in a case in which the appellate court clearly stated its opinion, yet apparently missed a key point, while a motion for clarification may be called for in a case in which the appellate court failed to explain its decision adequately, but evidently did not overlook or misunderstand any of the controlling points.

Although the rules do not prohibit the filing of a motion for clarification when the appellate court has decided the case without an opinion, the moving party has a more difficult task in presenting the motion in this situation. The need for clarification implies that there is something about an opinion that requires further explanation. Asking the court to clarify a per curiam decision summarily affirming a case is tantamount to asking the court to write an opinion in the case.

A request for rehearing and a request for clarification may be made together in a single motion styled as a motion for rehearing or clarification. The practice of filing both motions may be advantageous if clarification of a district court decision would resolve an ambiguity about what should occur on remand or if clarification would provide a possible basis for supreme court review.

Rule 9.330(b) provides that a party may file only one motion for rehearing or clarification.[144] Thus, an appellate decision is subject to only one request for clarification, whether the motion for clarification is made on its own or as a part of a motion for rehearing. However, the rule does permit the filing of both a motion

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and *State v. Banks*, 499 S.2d 894, 894 (Fla. Dist. App. 5th 1986). In *Hampton v. A. Duda & Sons, Incorporated*, 511 S.2d 1104, 1104 (Fla. Dist. App. 5th 1987), the court granted a motion for clarification of a per curiam affirmance to discuss an intervening decision of the Florida Supreme Court. In *Pizza USA of Pompano, Incorporated v. R/S Associates of Florida*, 665 S.2d 237, 241 (Fla. Dist. App. 4th 1995), the court granted a motion for clarification to clear up confusion regarding the court's instructions on remand. In *Tench v. American Reliance Insurance Company*, 671 S.2d 801, 802 (Fla. Dist. App. 3d 1996), the court granted a motion for clarification to explain that an order granting a motion for appellate attorneys' fees in an appeal from a nonfinal order was conditional and that it could not be enforced unless the prevailing party in the appeal also prevailed in the case on remand. Finally, in *Allstate Insurance Company v. Bradley*, 690 S.2d 694, 694–695 (Fla. Dist. App. 1st 1997), the court granted a motion for clarification after a per curiam affirmance to explain that the court had affirmed an order granting a new trial on only one of the two grounds presented on appeal.

144. Fla. R. App. P. 9.330(b).

for clarification and a motion for certification.[145] Clarification and certification are remedies that may be pursued separately or in conjunction with each other.

If the district court's decision conflicts with decisions of other district courts, although not expressly so, it may be a good strategy to file a motion for clarification as a preliminary step in an overall plan to seek discretionary review in the Supreme Court. If there is a conflict that was not dealt with directly in the opinion, the district court may expressly acknowledge the conflict in the opinion on clarification. The danger in this strategy, however, is that the court may attempt to distinguish the conflicting cases in the process of clarifying its decision. That would make it more difficult to obtain discretionary review in the Supreme Court.

3. Certification

A party may attempt to establish a basis for Supreme Court review of a district court decision by filing a motion to certify the issue to the Supreme Court. Florida Rule of Appellate Procedure 9.330(a) includes motions for certification among the kinds of motions that can be filed to seek reconsideration or further review of an appellate decision.[146] The Rule does not require the moving party to state the ground for certification with particularity, as it does for rehearing and clarification,[147] but it is advisable to present a complete statement of the reasons for requesting certification.

The time limitations applicable to motions for rehearing and clarification also apply to motions for certification. Rule 9.330(a) provides that a motion for certification must be filed in the lower appellate court within fifteen days of the decision to be certified for review.[148] A party opposing certification may file a response within ten days of service of the motion.[149]

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145. *Id*. Rule 9.330(b) provides that "[a] party shall not file more than [one] motion for rehearing or for clarification of decision and [one] motion for certification with respect to a particular decision."

146. *Id*. 9.330(a).

147. *Id*.

148. *Id*. The time runs from the original decision and not from a subsequent order denying rehearing. Certification and rehearing are not sequential remedies. *DeBiasi*, 732 S.2d at 16.

149. Fla. R. App. P. 9.330(a).

Only one motion for certification is permitted as to a given appellate decision, but filing such a motion does not preclude alternative relief by rehearing or clarification. A motion for certification may be filed as an exclusive remedy or in conjunction with a motion for rehearing or clarification.[150]

F. Review of Orders Entered by the Lower Tribunal[151]

Many orders entered by the lower tribunal during the course of an appellate proceeding may be challenged by filing a motion for review in the appellate court. A separate appeal is not necessary because the appellate court already has jurisdiction under the original notice or petition. Appellate review is available by motion for each order discussed below.

Motions for review frequently are employed to challenge orders of the lower tribunal relating to stays and post-trial release. Rule 9.310(f) provides that an order of the lower tribunal granting or denying a stay while an appellate proceeding is pending is subject to review by motion filed in the appellate court.[152] Similarly, Rule 9.140(g)(4) allows a party who wishes to challenge the correctness of a post-trial release order in a criminal case to do so simply by filing a motion for review in the appellate court.[153]

The opportunity for appellate review by motion also exists for alimony and support orders entered by the lower court during an appeal in family-law cases. Rule 9.600(c)(1) provides that the lower court has continuing jurisdiction to enter orders on alimony, child support, and other family-law matters during appeals in dissolution-of-marriage actions.[154] All such orders can be reviewed by filing a motion in the appellate court in the pending review proceeding.[155]

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150. *Id*. 9.330(b).

151. See Padovano, *supra* n. 1, at ch. 14 for the source of the material that is adapted in this Subsection.

152. Fla. R. App. P. 9.310(f).

153. *See Peacock v. State*, 798 S.2d 909, 910 (Fla. Dist. App. 5th 2001) (treating a petition for writ of habeas corpus as a motion to review an order on a motion for post-trial release).

154. Fla. R. App. P. 9.600(c)(1).

155. Rule 9.600(c)(1) provides that in family-law matters "[t]he lower tribunal shall retain jurisdiction to enter and enforce orders awarding separate maintenance, child support, alimony" or other awards "necessary to protect the welfare and rights of any party pending appeal" including costs and attorneys' fees. Review of such orders is by motion filed in the court within thirty days of rendition of the order. *Id*. 9.600(c)(3).

An order of the lower tribunal on motions to tax costs on appeal also is subject to review by motion in the appellate court. The lower tribunals have exclusive authority to tax costs following an appeal. Although the appellate court determines the issue of entitlement to appellate attorneys' fees, the amount frequently is set by order in the lower tribunal at the direction of the appellate court. An order determining the amount of appellate attorneys' fees also is subject to review by motion in the appellate court. As in each of the previous examples, a party who is aggrieved by an order of the lower tribunal taxing costs or assessing the amount of appellate attorneys' fees may challenge the order by filing a motion for review in the appellate court.[156]

Before the record is transmitted, the lower tribunals have concurrent jurisdiction with the appellate courts to enter orders on all procedural matters except for the extension of any time period prescribed by the appellate rules. Rule 9.600(a) states that the lower tribunals may exercise their concurrent jurisdiction "subject to the control" of the appellate court.[157] Although the Rule does not explain how an appellate court would exercise control over a procedural order of the lower tribunal, the logical procedure for challenging such an order would be to file a motion for review in the appellate court.

In some situations discussed above, the opportunity to seek review by motion is governed by a time limitation, while in other situations it is not. For example, there is a thirty-day time limit for filing a motion to review an order taxing costs or attorneys' fees and all motions for review in dissolution-of-marriage cases,[158] but there is no established time limit for filing a motion to review an order granting or denying a stay pending review or an order determining the issue of post-trial release in a criminal case.[159] Because the time requirements for review by motion are not uniform, attorneys must examine the applicable rule in every case.

156. *Id*. 9.400(c).

157. *Id*. 9.600(a).

158. *Id*. 9.400(c). Likewise, Rule 9.600(c)(3) requires that a motion to review an order in a dissolution-of-marriage case must be filed in the appellate court within thirty days of rendition.

159. *Id*. 9.310(f); *id*. 9.140(g)(4).

Motions for review of orders of the lower tribunal should meet the same requirements of form and content that apply to preparing and filing of appellate motions generally.

IV. CONCLUSION

Motion practice in appellate courts requires a different approach from that customarily taken in trial courts. There are fewer case-management issues on appeal, there are rarely facts to determine, and usually there is no need to test the viability of an argument before it is presented to the court. Most of the advocacy is contained in the briefs, and it is necessarily limited to matters of record. Because motion practice serves a more limited purpose on review, appellate lawyers should be selective in filing motions in an appellate court. The opportunity to present an issue by motion should not be viewed as a routine step in the appellate process, but rather as a chance to resolve a matter that will not be addressed when the court considers the merits of the case.

Nevertheless, a party may need to file a motion in an appellate court to resolve a procedural problem or to obtain relief on issues not addressed in the briefs. The most common issues arising before the case is considered on the merits relate to the enforcement of the order in question; that is, whether it should be stayed pending the outcome of the case in the appellate court, and whether the appellate court has jurisdiction. After the case has been decided, it may be necessary to file a motion for rehearing, a motion for certification, or a motion for clarification. In more limited circumstances, a party properly may file a motion for rehearing en banc. As with other motions in appellate courts, these motions should be filed only when necessary, and not as a matter of course.