

# Attorney's Fees Nancy K. Brodzki, Esq.

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WITH DEEP  
APPRECIATION  
to  
Mark A. Sessums, Esq.  
for his materials

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## RULE #1:

### GET A SIGNIFICANT RETAINER UP FRONT

(assume it is all the money you will get)

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## RETAINERS

Think of a retainer as one hedge for the risks being undertaken when agreeing to represent someone.

Use a written retainer agreement that sets forth specific terms for all facets of the representation—including in a suit to collect on services rendered.

- If the retainer is for a prenuptial agreement, also include provisions for if you are called as a witness in future litigation regarding the prenuptial.
- Expressly notate that the retainer fee is non-refundable.

Have the client sign this retainer agreement!

In any fee hearing, use the retainer agreement as an exhibit.

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## RULE #2:

# HAVE CLIENTS SIGN A WRITTEN FEE AGREEMENT

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## RETAINERS

Accept credit cards; it's just a cost of doing business!

- If you're going to accept monthly payments from a client and otherwise agree to carry a balance, consider requiring the client to leave a card on file with your office to be automatically run on an agreed upon date for an agreed upon amount.

Send detailed invoices—preferably on a semi-monthly basis!

- This protects the firm from allegations of unreasonable charges—even more so if your signed, written retainer agreement provides that any objections not raised within a certain time period (usually a month or less) are waived.
- Use these invoices or other proof of time entries as an exhibit in any fee hearing.

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## RULE #3:

# USE EVERGREEN RETAINERS AND REQUIRE A CREDIT CARD ON FILE

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## RETAINERS: A CHECKLIST

- Hourly rate for the named lawyer being hired
- Refundability of the retainer fee
- Consider a trial retainer
- When payment is due
- What if not paid by due date (interest)
- Waiver period if no objections made to invoices
- Advancement of costs
- Granting of retaining lien
- What if collection action is necessary (client pays your fees and costs in that suit, interest on unpaid balance, waives jury trial, arbitration clause)
- Space for client to date and sign

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## FEE RECORDS

Fee records for BOTH sides are relevant and admissible in a fee hearing

Even when the opposing party is seeking a fee award, your own billing records may be obtained through discovery. *Paton v. GEICO General Ins. Co.*, 190 So. 3d 1047, 1052 (Fla. 2016).

- “[T]he entirety of the billing records are not privileged, and where the trial court specifically states that any privileged information may be redacted, the [moving party] should not be required to make an additional special showing to obtain the remaining relevant, nonprivileged information.” *Id.*
- Thus, where a fee record request expressly provides that same may be redacted for privilege, no objection may be made.
  - Incorporate “redacted for privilege” into your request to produce or subpoena *duces tecum*.

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## RULE #4:

# KEEP DETAILED CONTEMPORANEOUS TIME RECORDS

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## CHARGING LIENS

A charging lien will not be imposed merely because an attorney provided services; the services must produce a positive judgment or settlement for the client, as the lien will attach only to the tangible fruits or services.

However, note that a trial court **cannot** find that services did not benefit a client when that client received marital assets in equitable distribution. *Menz & Battista, PL v. Ramos*, 214 So. 3d 698 (Fla. 4th DCA 2017).

A charging lien may **not** be imposed against a homestead, even if such a waiver is included in a retainer agreement. See *Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007) .

➤ BUT, a lawyer can take a mortgage from a client.

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## CHARGING LIENS

A charging lien may **not** be imposed against a party's entitlement to alimony where diverting a portion of that payment would deprive that party of "daily sustenance or the minimal necessities of life." *Jaeger v. Jaeger*, 182 So. 3d 697, 699 (Fla. 4th DCA 2015).

➤ Failure of the trial court to determine whether the enforcement of the charging line would deprive the alimony recipient of such sustenance or necessities will result in the case being reversed and remanded. See *Tucker v. Tucker*, 165 So. 3d 798 (Fla. 4th DCA 2015).

Similarly, a charging lien is **not** enforceable against child support payments, BUT can be enforced against an award of expenditures made for the prenatal care and birth of the child so long as the recipient is not impecunious. *Brake v. Sanchez-Lopez*, 452 So. 2d 1071 (Fla. 3d DCA 1984).

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### CHARGING LIENS

Where a trial court reserves jurisdiction to decide an attorney's fees request, it also implicitly reserves jurisdiction over a properly filed and perfected charging lien.

> If you withdraw from a case prior to entry of the final judgment, and your efforts produced a positive result for the client, take steps to ensure that your charging lien is reserved over in any final judgment.

Note that a charging lien may **not** be used to secure fees incurred by the client's attorney in enforcing the lien. *Cole v. Kehoe*, 710 So. 2d 705, 706 (Fla. 4th DCA 1998).

Also, a charging lien may **not** be used to secure an expert's fees that were not advanced by the lawyer.

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## RULE #5: FILE A CHARGING LIEN WHEN CLIENT FIRES YOU (PERFECT IT, RECORD IT, AND SHOW UP AT THE FINAL HEARING)

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### § 57.105 AWARDS

Appropriate when the party or his attorney pursues a claim or defense that is without factual or legal merit, which includes those that are "insufficiently supported." *Gopman v. Department of Education*, 974 So. 2d 1208, 1210 (Fla. 1st DCA 2008).

Use verified pleadings to avoid personal liability for lack of factual support.

Sanctions for lack of legal support may only be imposed against an attorney, so thoroughly research issues prior to filing (or at least after the safe harbor letter is received in deciding whether to withdraw your filing).

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### §57.105 AWARDS

Safe harbor letter enclosing a copy of the motion to be filed must be served.

- Present district split as to how service of this letter must be made:
  - *Matte* (4<sup>th</sup>) and *Wheaton* (3<sup>rd</sup>) held that failure to strictly comply with e-mail service requirements is fatal to any request for such fee awards.
  - *Isla Blue* (2<sup>nd</sup>) held that e-mail service requirements do not apply so failure to comply has no impact on request for such fee awards.
- Florida Supreme Court accepted jurisdiction of *Wheaton*, so a definitive answer is coming—stay tuned!

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**RULE #6:**  
**IF YOU MUST FILE A**  
**§57.105 MOTION, SEND**  
**THE SAFE HARBOR LETTER**

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### CHAPTER 61 AWARDS & ROSEN

The *Rosen* factors are synonymous with terms such as frivolous, spurious, vexatious, and harassing.

Notwithstanding the "need and ability to pay" polestar of section 61.16, *Florida Statutes*, the impecunious spouse may still be sanctioned for any litigation misconduct. See *Rosaler v. Rosaler*, 226 So. 3d 911 (Fla. 4th DCA 2017) (finding that a fee award under *Rosen* may be appropriate even though the party being sanctioned is in the inferior financial position).

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# RULE #7: DON'T LITIGATE NONSENSE. BE REASONABLE.

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## CHAPTER 61 AWARDS: STANDARD

Four phrases are considered the standard for attorney's fee awards under section 61.16: need, ability to pay, reasonable, and necessary.

> A fee award that does not address all of these concepts is reversible.

Need and ability to pay are the threshold considerations for a finding of entitlement to an award of fees and costs. Thus, whether the fee sought is reasonable and necessary is not legally relevant until entitlement has been determined.

Once entitlement has been found, only a fee amount that is determined to be both reasonable and necessary may be awarded.

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## CHAPTER 61 AWARDS: STANDARD

In determining the total amount of attorney's fees to be awarded, the trial court should follow the formula for calculating the lodestar (i.e. the objective basis for the award) established by *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

- > Determine the number of hours reasonably expended by the attorney or paralegal; and
- > Multiply that figure by the reasonably hourly rate produces lodestar.

Once the lodestar is calculated, the trial court may add or subtract from that figure based on "any factor necessary to provide justice and ensure equity between the parties," including *but not limited to* any of the expressly enumerated *Rosen* factors. *Rosen*, at 700.

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### CHAPTER 61 AWARDS: STANDARD

In determining whether to award attorney's fees and costs under section 61.16, the proper "formula" for the trial court to use is each spouse's need and ability to pay. Trial court **cannot** simply determine the total amount of fees and costs incurred in the litigation and order each party to be responsible for a portion of that amount that is approximately equal to the percentage of that party's share of the total income. See *Rorrer v. Orban*, 215 So. 3d 148 (Fla. 3d DCA 2017).

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### CHAPTER 61 AWARDS: STANDARD

There is a district split as to what constitutes "need" as used in section 61.16:

- The 4th district interprets need to mean literal need for such relief, and not simply a showing that "the adverse party's ability to pay is greater than that of the party seeking the relief." See, e.g., *Satter v. Satter*, 709 So. 2d 617 (Fla. 4th DCA 1998) (holding that wife worth \$1.1M could not show "need" to warrant award of attorney's fees).
- The 2nd district interprets need to be relative to the other party. See, e.g., *Hummerickhouse v. Hummerickhouse*, 932 So. 2d 1142, 1145-46 (Fla. 2d DCA 2006) ("Even if a party has some means to pay, that does not disqualify [the] claim for fees where the contrast between the assets and income of the parties is so substantial as in this case.")

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### CHAPTER 61 AWARDS: STANDARD

To prove need, use a party's financial affidavit, testimony, and other documentary evidence proving the figures used in the financial affidavit.

"Ability to pay" is based on "actually available" income, *Zold v. Zold*, 911 So. 2d 1222 (Fla. 2005), and **all** of the parties' relative financial resources, including marital and non-marital assets—"not just earned income." *Hanson v. Hanson*, 217 So. 3d 1165, 1169 (Fla. 2d DCA 2017).

The time for determining the parties' financial positions for an award of either trial or appellate fees is "as of the time of the entry of the final judgment dissolving the marriage." *DiNardo v. DiNardo*, 82 So. 3d 1102, 1106 (Fla. 2d DCA 2012).

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### CHAPTER 61 AWARDS: STANDARD

"Necessary" relates to the productivity of a lawyer's efforts.

"Reasonable" is not simply the number of hours times the hourly rate.

- Also, the hourly rate itself must be reasonable, for both the location and the individual lawyer.
- Attorney's fee awards include non-clerical, meaningful work performed by paralegals. See § 57.104, *Fla. Stat.*

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### CHAPTER 61 AWARDS: STANDARD

The *Florida Bar News* published an article in the October 1, 2017 edition, entitled "A look at support staff." This article states:

- Of those surveyed "49 percent report that the billed paralegal hourly rate is more than \$120."
- Further, 42 percent "said their paralegals averaged more than 1,000 billable hours in 2016."

This is significant money for a firm, so be sure that all time entries and affidavits used at fee hearings include a reasonable rate for this necessary work being performed by paralegals.

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## RULE #8:

EMPLOY A PARALEGAL  
AND BILL FOR THEIR TIME.  
YOU WON'T REGRET IT.

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### CHAPTER 61 AWARDS: OBJECTIONS

- Travel time, absent proof of no competent local attorney.
  - If the lawyer seeking fees is not local, carefully review their time records for hearings etc. to see if they included the travel time with the time actually spent in the hearing etc. If so, ask the court to carve out the likely amount of travel time.
- Duplicative work (BUT this is not the same as simply having two lawyers work on a case).
- "Hand holding," which means work that is not reasonably necessary but performed to indulge the eccentricities of the client.
- Unit billing—this is also an ethical violation.

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### CHAPTER 61 AWARDS: FINDINGS

Findings as to need and ability to pay regarding a request for fees are required—BUT these may be made in the written judgment or orally at the hearing.

If awarding fees, must include specific written findings as to the reasonable hourly rates for all timekeepers, the number of hours reasonably expended, and the appropriateness of any enhancement or reduction.

- A generalized finding that all fees and costs sought, or the rates charged by all timekeepers and the amount of hours billed, are reasonable is inadequate and will warrant reversal. See *Duke v. Duke*, 211 So. 3d 1078, 1081-82 (Fla. 5th DCA 2017); *Hua v. Tsung*, 222 So. 3d 584 (Fla. 4th DCA 2017).

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### RESERVING FOR CHAPTER 61 AWARDS

A trial court may reserve jurisdiction as to both entitlement and amount, or only as to the amount of the award.

- Many courts prefer to address only entitlement at a final hearing for judicial economy. Thus, consider stipulating ahead of time to this bifurcation, and including such a provision in any order setting final hearing.

Just be aware that the attorney's fees issue is NOT ripe for appeal until both entitlement and amount are determined. Until then, the fee portion of the final judgment is non-final and non-appealable.

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## RULE #9:

ALWAYS PLEAD FOR FEES. ALWAYS ASK TO RESERVE ON FEES.

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## FEES TO COLLECT FEES

District split:

- > The Second, in *Wight*, reversed an award that included the time spent litigating the amount of fees.
- > The Fourth, in *Schneider*, held that the trial court must decide whether such an award is appropriate in each case.

Note that the time spent litigating the entitlement to such fees may be awarded, as that is "inextricable" from the fees incurred litigating the amount of those fees. *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 834 (Fla. 1993) (Kogan, J., dissenting).

- > Thus, the issue of any fee limitation arises when the trial court determined entitlement at the final hearing on the merits, but reserved as to the amount such that a separate fee hearing must be held.

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## PREVAILING PARTY FEE PROVISIONS

Prevailing party attorney's fee provisions are enforceable in both prenuptial agreements and marital settlement agreements. In such cases, the trial court has no discretion to decline to enforce that provision.

Whether a prevailing party provision is applicable is governed by the provision's language—draft carefully.

Prevailing party means the party that prevailed on the significant issues that were tried before the court. *Schoenlank v. Schoenlank*, 128 So. 3d 118, 121 (Fla. 3d DCA 2013) (citing *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992)).

- > If both parties won in part and lost in part, then the trial court has discretion to deny fees to both parties under this provision.

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## PREVAILING PARTY FEE PROVISIONS

The existence of a general prevailing party provision does NOT bar the court from awarding attorney's fees based on section 61.16, as long as such relief was properly requested.

> In order to eliminate a court's ability to award statutory fees, the prevailing party provision must expressly bar or limit the attorney's fees and costs available to the parties under that statute. See *Mott v. Mott*, 800 So. 2d 331, 333 (Fla. 2d DCA 2001); see generally *Talbott v. Am. Isuzu Motors, Inc.*, 934 So. 2d 643, 646 (Fla. 2d DCA 2006).

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## TEMPORARY APPELLATE FEES

Pursuant to *Florida Rule of Appellate Procedure* 9.600(c)(1), a motion for temporary appellate attorney's fees and costs **must be filed in the trial court**.

Be aware that the trial court must rule on the motion for temporary appellate fees **prior to** conclusion of the appeal because after the work in defending the appeal is completed, the fee award is no longer reasonably necessary for that work on a temporary basis. See *Kasm v. Lynnel*, 975 So. 2d 560, 563 (Fla. 2d DCA 2008).

> Thus, if you are expecting a quick PCA, or no oral argument was sought or granted, do not delay in scheduling your fee hearing.

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## FINAL APPELLATE FEES

The timing for filing a motion for final appellate fees is "the time for service of the reply brief." Fla. R. App. P. 9.400(b)(1).

These motions **must be filed in the appellate court**, although the actual decision on same may be remanded to the trial court pursuant to a subsequent order from the appellate court.

Rule 9.400 is NOT the basis for the fee request, it is simply the procedural mechanism to obtain relief. Rather, either 61.16 or a particular contractual provision is the basis for the fee request. This distinction is important because Rule 9.400 mandates that a motion for final appellate attorney's fees "state the grounds on which recovery is sought."

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### FEES TO COMPEL DISCOVERY

When discovery must be compelled, a request for fees and costs pursuant to Rule 12.380(a) should be made.

Must send a good faith letter before motion filed.

In the motion itself, must include a certification of good faith effort attempted.

Following the hearing on the motion to compel, the Court "must require" the losing person "to pay the moving party the reasonable expenses incurred in obtaining the order that may include attorney's fees, UNLESS: 1) no good faith certification (only if moving party won); 2) losing party's position was "substantially justified"; or 3) other circumstances make such award unjust.

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### CONTEMPT FEES

Fees for contempt in discovery matters may be sought under Rule 12.380(b).  
➤ In fact, the trial court "must require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorney's fees" unless substantial justification is found.

Thus, when awarding fees for civil contempt, such as discovery matters in family law cases, need or ability to pay is irrelevant. *Worthington v. Harty*, 677 So. 2d 1371, 1371 (Fla. 4th DCA 1996) ("As a general rule, attorney's fees may be awarded as a sanction in civil contempt proceedings without findings as to the parties' respective need and ability to pay."); *Lamb v. Fowler*, 574 So. 2d 262, 263 (Fla. 1st DCA 1991) ("[T]he court is empowered, in its discretion, to assess fines and award attorney's fees and costs as sanctions for civil contempt.").

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### CONTEMPT FEES

Fees for contempt due to nonpayment of support may be sought under Rule 12.615(d)(2). You should also cite *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

However, in contrast to the general rule, the rule for contempt as to all non-discovery issues in a Chapter 61 proceeding is as follows: before ordering payment of attorney's fees in contempt proceedings incident to enforcing orders relating to support or custody, **ability to pay and need must be considered by the court.** *Worthington v. Harty*, 677 So. 2d 1371, 1372 (Fla. 4th DCA 1996) (reversing award of attorney's fees for former husband's contempt in failing to attend mediation in his action to modify child support because the record contained "no findings as to need and ability to pay").

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## CONTEMPT FEES

Often overlooked or ignored bases for contempt fees include:

- section 61.13(4)(c)(2), *Florida Statutes*, when contempt is for failing to honor a timesharing schedule.
- section 61.13001(3)(e)(4), *Florida Statutes*, when contempt is due to a parent relocating in violation of the applicable statute.

It is always better to cite specific authority for the trial court to award your client contempt fees when same exists, rather than to generally rely on the vague notion of contempt.

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## RULE # 10:

# WHEN A CLIENT STOPS PAYING, STOP WORKING AND WITHDRAW.

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## THANK YOU!

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