

Broward County Bar Association's Family Law Section Presents

# NUTS & BOLTS

We will be addressing all major legislative updates/changes that just happened in Family Law!!!

**Friday, October 13, 2023**

8:00am – 5:00pm

Broward County Courthouse  
Judge Jack Tuter Ceremonial Courtroom

201 SE 6th St. Fort Lauderdale, FL  
33301



The background of the slide is a dense, repeating pattern of gold-colored currency symbols, including the dollar sign (\$), euro (€), pound sterling (£), and yen (¥). The symbols are rendered in a 3D, embossed style, creating a textured, metallic appearance. The central text is set against a plain white background.

# Attorney's Fees

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Nancy Brodski, Esq.  
Judge Elaine A. Carbuccia  
Judge Francis I. Viamontes



# Learning Objectives

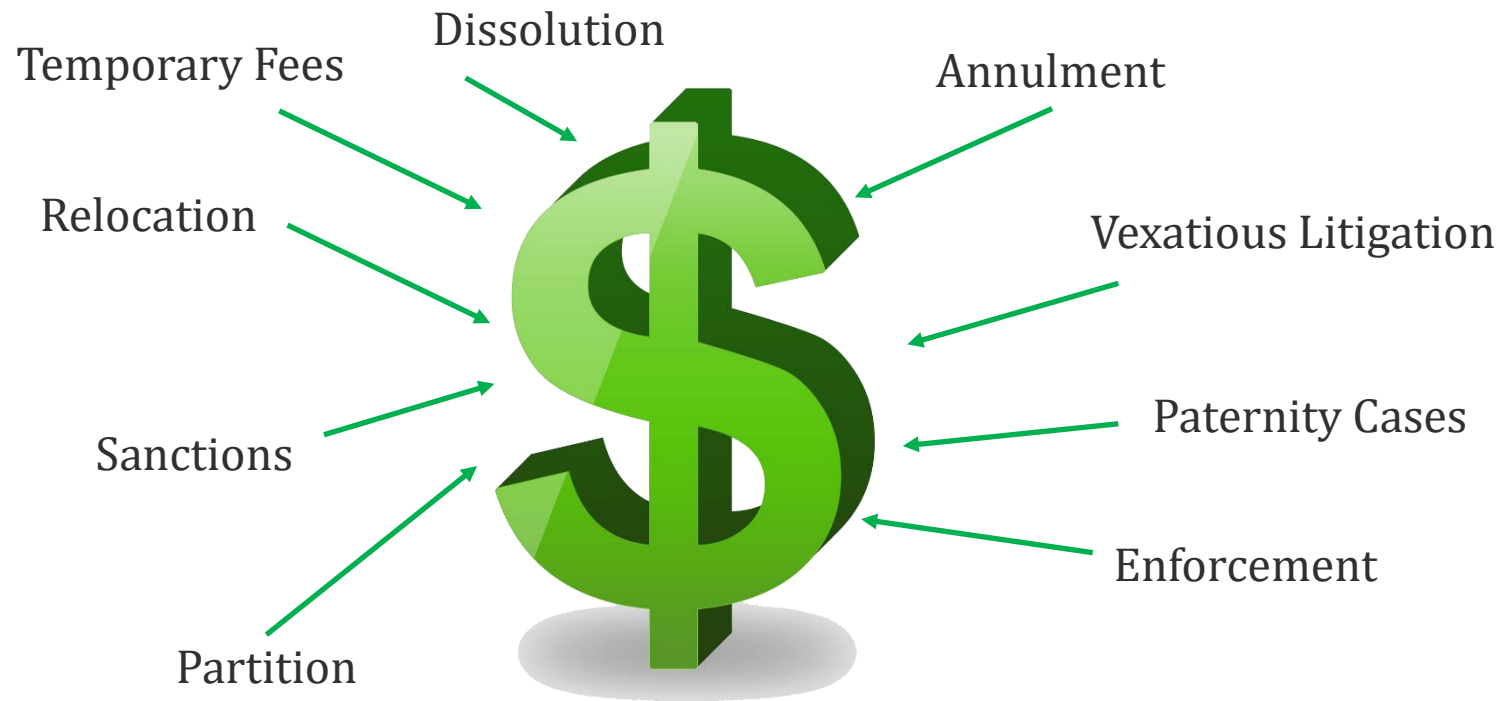
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- Differentiating and understanding the varying forms of Attorney's Fees
  - Statutory, depending on the type of action or reason for award
  - Court's Inherent Authority
  - Court's Equitable Authority
  - Contractual Provisions
- Factors Considered in Awarding Attorney's Fees
- Proving Fees

Why are there different ways of obtaining fees?

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Different Reasons  
Different Authority



# Types of Attorney's Fees

<u>TYPE OF FEES</u>	<u>PURPOSE</u>	<u>AUTHORITY</u>	<u>ELEMENTS</u>	<u>BURDEN</u>
Fees in Dissolution & Paternity Actions	Equalizing the playing field. Temporary or Final	Ch. 61 & Ch. 742 respectively	Need v. Ability to Pay ( <i>Rosen</i> Factors)	Expert not required
Prevailing Party	Discouraging Frivolous actions	Ch. 57.105	Claim or Defense not supported by material facts or law	Safe Harbor Notice Reasonable Fees (not costs)
Enforcement / Sanctions or Time Sharing of Child Support	Punishing bad conduct	Ch. 61.13 & Ch. 61.17		Expert required
Vexatious Litigation	Discouraging unnecessary fees			Expert required
Partition		Ch. 64.081		

# Attorney's Fees

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Chapter 61.16



# *Rosen v. Rosen*, 696 So. 2d 697 (Fla 1997)

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## Summary and Rational

- Need and Ability to Pay are primary elements in determining entitlement to, and amount of attorney's fees and costs.
- To ensure both parties are on an equal playing field and able to have similar counsel and suit money.

## All Relevant Factors

1. Scope and history of the litigation;
2. Duration of the litigation;
3. Merits of the respective positions;
4. Whether the litigation (or a defense) is brought or maintained primarily to harass (or frustrate and stall); and
5. The existence of prior or pending litigation.

## *Rosen Factors*

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- 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).



# Chapter 61: STANDARD

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- 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.
- 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.

# Chapter 61: ACTUAL OR RELATIVE NEED

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- ACTUAL NEED MUST BE DEMONSTRATED IN THE:
  - 4TH AND 5TH DCA
  - The 4th DCA 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).
- RELATIVE NEED/DISPARITY OF RESOURCES IN THE:
  - 1ST, 2ND, AND 3RD DCA
  - The 2nd DCA 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.”)

# Chapter 61: PROVING NEED

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- 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).

# Chapter 61: CALCULATING AMOUNT

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- 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 *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).
  - Determine the number of hours reasonably expended by the attorney or paralegal; and
  - Multiplying that figure by the reasonable 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*, 696 So. 2d at 700.

# Chapter 61: STANDARD

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- “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.

# Chapter 61: OBJECTIONS

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- Travel time, absent proof of no competent local attorney.
- 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.
- Secretarial tasks cannot be charged to the opposing party (calling the JA to schedule hearings; coordinating hearing dates)

# Chapter 61: INEQUITABLE CONDUCT

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- Against a party: *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998) (Egregious conduct or bad faith).
- Against an attorney: *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) (Express finding of bad faith, detailed factual findings, directly related to the fees and costs incurred by opposing party, due process).

# Prevailing Party

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Chapter 57.105





# Prevailing Party Fee Provisions

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- 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.

# Prevailing Party Fee Provisions

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- 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).

# Prevailing Party Fee Provisions

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- CAREFUL HOW YOU WORD THE PREVAILING PARTY ATTORNEY'S FEE CLAUSE IN YOUR AGREEMENTS!
  - Unilateral fee provisions will be “reformed” to be reciprocal; but
  - Attorney fee provisions that entitled “either party” to an award of attorney fees upon demonstrating the other party violated the agreement was held not to be unilateral, but enforceable as written, so that the party who was found NOT to have violated the agreement was NOT entitled to attorney’s fees as the prevailing party. *Levy v. Levy*, 2021 WL 4614308 (Fla. Oct. 7, 2021).

# Safe Harbor

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§ 57.105, Fla. Stat.



## § 57.105, Fla. Stat.: AWARDS

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- 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. Dep't of Educ.*, 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).

## § 57.105, Fla. Stat.: AWARDS

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- Safe harbor letter enclosing a copy of the motion to be filed must be served.
- What is good service?
  - E-mail service requirements do not apply. Florida Supreme Court ruled in *Wheaton v. Wheaton*, 261 So.3d 1236 (Fla. 2019) – offers of settlement (and by extension, safe harbor letters) can be sent by certified mail or by email, or by any method that puts the other side on actual notice, and do not have to strictly comply with 2.516(b)(1).

# Temporary Appellate Fees

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Fla. R. App. P. 9.600



# Temporary Appellate Fees

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- 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.



# Final Appellate Fees

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Fla. R. App. P. 9.400  
Chapter 61.16  
Contractual Provisions



# Appellate Fees

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- 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.”



# RETAINER

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Get a significant retainer upfront

(assume it is all the money you will receive from the client)

- 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.



# RETAINERS: Checklist

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- 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

# FEE RECORDS

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- 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*.

