

§2.A.00 | PROPER FORUM⁶

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 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 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

(Stetson Law Review © 2002 // Volume 32, Issue 2, Article 4 // Phillip J. Padovano)



Footnotes

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.

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).

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).

