



**CHAPTER 2: PROCEDURE FOR FILING MOTIONS
MOTION PRACTICE IN FLORIDA APPELLATE COURTS
(ALL-IN-ONE DOCUMENT)**

Stetson Law Review
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CHAPTER: 2 PROCEDURE FOR FILING MOTIONS

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§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

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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).

§2.B.00 | TIME LIMITS¹⁷

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 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 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

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Footnotes

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).

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.

²⁷. *Id.* 9.420(d).



§2.C.00 | CONTENTS OF MOTION²⁸

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, (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 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 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.

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Footnotes

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.

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 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.” (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.

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.

§2.D.00 | NOTICE AND SERVICE⁴¹

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 hearing 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.

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Footnotes

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).

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.”



§2.E.00 | EFFECT OF FILING MOTIONS⁴⁵

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 specifically 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 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

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Footnotes

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.*

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 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.



§2.F.00 | RESPONSE BY OPPOSING PARTY⁵⁶

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 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

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Footnotes

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.

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).

§2.G.00 | FRIVOLOUS MOTIONS — SANCTIONS⁶⁴

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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Footnotes

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).



APPENDIX



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