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# A Cure for “Acute Motion Sickness”: A Practitioner’s Guide to Motion Practice in Florida’s Appellate Courts

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# A CURE FOR “ACUTE MOTION SICKNESS”: A PRACTITIONER’S GUIDE TO MOTION PRACTICE IN FLORIDA’S APPELLATE COURTS

Kimberly Kanoff Berman, Esq. \*

## INTRODUCTION

Florida’s District Courts of Appeal are still suffering from self-proclaimed “acute motion sickness.”<sup>1</sup> Based on the excessive amount of motions filed in Florida’s District Courts of Appeal, this is rather unsurprising. In 2015 alone, over 24,000 motions were filed in the First and Third District Courts of Appeal.<sup>2</sup> Because the focus of judicial process in appellate courts rests on appellate briefs,<sup>3</sup> this number is staggering. These statistics, and various court opinions, verify that there remains a crisis among Florida’s appellate practitioners when it comes to motion practice. Courts have routinely admonished unnecessary and improper usage of motions<sup>4</sup> and have repeatedly called to the Florida Bar to correct this issue, to no avail.<sup>5</sup>

This problem may stem from the fact that motion practice is entirely different in appellate courts than in the lower tribunals.<sup>6</sup> In the lower courts, Florida Rule of Civil Procedure 1.100(b) governs motion practice.<sup>7</sup> This rule permits a wide variety of motions, which can be used for multiple purposes<sup>8</sup> and which require little more than a statement of the grounds for the motion and the relief sought.<sup>9</sup>

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<sup>1</sup> *Parker v. Baker*, 499 So. 2d 843, 848 (Fla. 2d DCA 1986) (citing *Dubowitz v. Century Vill. E., Inc.*, 381 So. 2d 252, 253 (Fla. 4th DCA 1979)).

<sup>2</sup> Statistics generously provided by First and Third DCA Clerks’ Offices.

<sup>3</sup> Kristin A. Norse, *Motion Practice in the District Courts of Appeal*, 81-APR FLA. B.J. 38, 39 (2007).

<sup>4</sup> *See State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958); *see also Goter v. Brown*, 682 So. 2d 155 (Fla. 4th DCA 1996).

<sup>5</sup> *See Parker*, 499 So. 2d at 187 (quoting *Dep’t of Revenue v. Leadership Hous., Inc.*, 322 So. 2d 7, 9 (Fla. 1975)); *see also Mills v. Heenan*, 382 So. 2d 1317 (Fla. 5th DCA 1980).

<sup>6</sup> Philip J. Padovano, *Florida Appellate Practice*, §13:11 at 271 (2015 ed. Vol. 2, West 2014) [hereinafter “*Florida Appellate Practice*”].

<sup>7</sup> *See Fla. R. Civ. P. 1.100(b)*.

<sup>8</sup> *Id.* at Authors’ Comment 1967 (“Motions are of many varieties and can be used for many purposes.”).

<sup>9</sup> Fla. R. Civ. P. 1.100(b).

In contrast, Florida Rule of Appellate Procedure 9.300(a) governs most motions in appellate court.<sup>10</sup> This rule permits motions unless otherwise prescribed by the Florida Rules of Appellate Procedure.<sup>11</sup> However, as will be detailed below, unlike blanket requirements for motions in lower courts, the Florida Rules of Appellate Procedure include particular specifications for the filing of different types of motions in the appellate court.<sup>12</sup> While Rule 9.300 governs motions in general, many motions in appellate court are governed by another, more specific rule.<sup>13</sup> Without knowing the requirements and specifications of motions in appellate court, practitioners' motions may be subject to dismissal, and practitioners themselves may be subject to sanctions.

This article serves to provide an overview of motion practice in appellate courts with the purpose of informing practitioners about the proper versus improper uses for each motion, which will, in turn, protect clients' best interests and protect justice. Part I of this article will address motion practice in the appellate courts generally, including the history of Florida's District Courts of Appeal and necessary procedural and substantive information on filing motions. Part II will concentrate on detailing specific types of motions that are appropriate to file and focus on how each district has addressed such motions. In sum, understanding the procedural and substantive requirements will help stop the appellate courts from suffering "acute motion sickness" once and for all.

## MOTION PRACTICE IN FLORIDA'S APPELLATE COURTS

### *History of the District Courts of Appeal*<sup>14</sup>

Following a rapid growth spurt of Florida's population in the 1950s, the Florida Supreme Court experienced a surge of filings that resulted in its caseload reaching over one thousand cases.<sup>15</sup> After recognizing the congestion in the court, the Judicial Council of Florida suggested the creation of the District Courts of Appeal ("DCAs"), with the purpose of

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<sup>10</sup> See Fla. R. App. P. 9.300(a).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (stating, for instance, that a motion for an extension of time must be accompanied by a certificate that opposing counsel has been consulted).

<sup>13</sup> Philip J. Padovano, *Motion Practice in Florida Appellate Courts*, 32 STETSON L. REV. 309, 310 (2003) [hereinafter "*Motion Practice in Florida Appellate Courts*"].

<sup>14</sup> This section is intended to provide the reader with a brief overview of the history of Florida's District Courts of Appeal. For a more in depth look at this subject, please visit <http://www.flcourts.org/florida-courts/district-court-appeal.stml>.

<sup>15</sup> *Whipple v. State*, 431 So. 2d 1011, 1014 (Fla. 2d DCA 1983).

restricting access to the Florida Supreme Court and making justice in the appellate courts more feasible by hearing appeals closer to the source.<sup>16</sup> Thereafter, on November 6, 1956, Florida voters passed an amendment to Article V of the Florida Constitution,<sup>17</sup> which provided for the creation of the DCAs.<sup>18</sup> The DCAs were then formally established in 1957.<sup>19</sup>

There are five DCAs in Florida, headquartered respectively in Tallahassee, Lakeland, Miami, West Palm Beach, and Daytona Beach.<sup>20</sup> Each DCA oversees two to six circuit courts within their jurisdiction. The three-judge panels of the DCAs, rather than the Florida Supreme Court, hear the majority of appealed trial court decisions.<sup>21</sup> As of 2015, the DCAs collectively had sixty-four (64) judges, each of whom serves six-year terms.<sup>22</sup> Each district also has a chief judge, who is in charge of administrative duties of the court.<sup>23</sup> This chief judge is chosen either by a majority of the district court judges or, if there is not a majority, by the chief justice.<sup>24</sup>

The DCAs primarily serve the purpose of engaging “in the so-called error-correcting function to insure that every litigant receives a fair trial.”<sup>25</sup> In addition, the DCAs serve to promote clarity and consistency in the law in order to uphold our rights and liberties.<sup>26</sup> In order to assist attorneys and parties, most DCAs have published notices informing readers of their respective preferred practices.<sup>27</sup> A prudent practitioner should review these preferred practices or notices in order to determine how to best prosecute or defend an appeal in each DCA.

<sup>16</sup> *Id.* (citing First Annual Report of the Judicial Council of Florida at 14 (June 30, 1955)).

<sup>17</sup> Art. V, §1, Fla. Const. (1998).

<sup>18</sup> *Whipple*, 431 So. 2d at 1014 (citing Fourth Annual Report of the Judicial Council of Florida, Ex. # # # 3 (June 30, 1957)).

<sup>19</sup> *Id.*

<sup>20</sup> *District Courts of Appeal*, FLORIDA COURTS, <http://www.flcourts.org/florida-courts/district-court-appeal.shtml> (last visited July 18, 2016).

<sup>21</sup> *Id.*

<sup>22</sup> Florida State Courts: 2014–2015 Annual Report, OFFICE OF THE STATE COURTS ADM’R 57 (2015), [http://www.flcourts.org/core/fileparse.php/248/urlt/annual\\_report1415.pdf](http://www.flcourts.org/core/fileparse.php/248/urlt/annual_report1415.pdf).

<sup>23</sup> *Id.* at 58.

<sup>24</sup> Art. V, §2(c), Fla. Const. (1998).

<sup>25</sup> *Whipple v. State*, 431 So. 2d 1011, 1014 (Fla. 2d DCA 1983).

<sup>26</sup> *District Courts of Appeal*, *supra* note 20.

<sup>27</sup> *See Notice to Attorneys and Parties*, FLORIDA FIRST DISTRICT COURT OF APPEAL (June 27, 2014), <http://www.1dca.org/notice.pdf>; *see also Practice Preferences*, FLORIDA SECOND DISTRICT COURT OF APPEAL (Oct. 2015), <http://www.2dca.org/Clerk/Practice%20Preferences%20amended%20Oct%2015%20formatted.pdf>; *see also Notice to Attorneys and Parties Representing Themselves*, FLORIDA FOURTH DISTRICT COURT OF APPEAL (June 10, 2016), <http://www.4dca.org/Clerk/Notice%20to%20Attorneys%20Parties%20June%202016.pdf>.

### *Filing Procedures*

As an appellate practitioner, it is imperative to know how and when to file certain motions. Most motions are denied simply because they are filed either in the wrong forum, at the wrong time, or without necessary provisions.<sup>28</sup> Exhibit 1 identifies which motions must be filed where and when. As demonstrated in the Exhibit, some motions may be filed in either the lower court or in the appellate court, but some motions must be filed in only one or the other.<sup>29</sup> For instance, motions for costs in a civil case must be filed in the lower tribunal<sup>30</sup> whereas motions for attorneys' fees must be first filed in the appellate court.<sup>31</sup>

Timeliness of a motion is also critical. While Rule 9.300 does not restrict motions to a general time limitation, motions governed by specific rules may be subject to certain time restrictions. For instance, Rule 9.330(a) requires that motions for rehearing, clarification, or certification, be filed within fifteen days of an order or within another time limitation set by the court.<sup>32</sup> Other motions may not have a set time limitation but instead may be governed by the time schedule for submitting other documents.<sup>33</sup> Though time limits may be imposed, DCAs still have discretion when considering a motion that is untimely. For instance, the Fourth DCA has acknowledged that “[w]hile rule 9.330 authorizes us to consider a motion beyond the regular 15-day period, such a request must be accompanied by a showing of good cause. . . .”<sup>34</sup>

When considering timeliness, it is also necessary to consider which motions toll time. Rule 9.300(b) states that, except as provided by subdivision (d) of Rule 9.300, service of certain motions tolls the time schedule of further proceedings in the appellate court until the disposition of the motion.<sup>35</sup> Subdivision (b) specifically states that an order allowing an

<sup>28</sup> See *Garcia v. Collazo*, 178 So. 3d 429 (Fla. 3d DCA 2015) (stating that motions for appellate costs must be filed in the lower court and not in the district court); see also *Pinecrest Lakes, Inc. v. Shidel*, 802 So. 2d 486, 487 (Fla. 4th DCA 2001) (dismissing motion for certification that was untimely filed); see also *Mills v. Heenan*, 382 So. 2d 1317, 1318 (Fla. 5th DCA 1980) (stating that motions lacking specified requirements will be summarily denied).

<sup>29</sup> *Florida Appellate Practice*, *supra* note 6, §13.11 at 271.

<sup>30</sup> Fla. R. App. P. 9.400(a).

<sup>31</sup> Fla. R. App. P. 9.400(b).

<sup>32</sup> Fla. R. App. P. 9.330(a).

<sup>33</sup> *Motion Practice in Florida Appellate Courts*, *supra* note 13, at 314; see also Fla. R. App. P. 9.400(b) (stating that motions for attorneys' fees “may be served not later than the time for service of the reply brief”).

<sup>34</sup> *Pinecrest Lakes, Inc. v. Shidel*, 802 So. 2d 486, 489 (Fla. 4th DCA 2001).

<sup>35</sup> *Florida Appellate Practice*, *supra* note 6, §13.11 at 261–62.

extension of time is an order that tolls time.<sup>36</sup> Subdivision (d) identifies certain motions which do not toll time. These motions include:

- (1) Motions for post-trial release, rule 9.140(g).
- (2) Motions for stay pending appeal, rule 9.310.
- (3) Motions relating to oral argument, rule 9.320.
- (4) Motions relating to joinder and substitution of parties, rule 9.360.
- (5) Motions relating to amicus curiae, rule 9.370.
- (6) Motions relating to attorneys’ fees on appeal, rule 9.400.
- (7) Motions relating to service, rule 9.420.
- (8) Motions relating to admission or withdrawal of attorneys, rule 9.440.
- (9) Motions relating to sanctions, rule 9.410.
- (10) Motions relating to expediting the appeal.
- (11) Motions relating to appeal proceedings to review a final order dismissing a petition for judicial waiver of parental notice of termination of pregnancy, rule 9.147.
- (12) Motions for mediation filed more than 30 days after the notice of appeal, rule 9.700(f).
- (13) All motions filed in the supreme court, unless accompanied by a separate request to toll time.<sup>37</sup>

### *Contents of Motions*

Practitioners should strive to make their arguments correspondingly stronger and more direct since they will be decided quicker than the appeal. In appellate court, parties are not entitled to oral argument on an appellate motion and, in reality, such arguments are rarely permitted.<sup>38</sup> As a result, a motion must include a self-contained statement of the claim for relief.<sup>39</sup> Rule 9.300 requires any appellate motion to state the grounds on which it is based, identify the relief sought, include an argument in support thereof, and appropriately cite necessary authority.<sup>40</sup> In addition, there are four basic formal elements that should be within every motion:

1. Caption including the case number in both the appellate

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<sup>36</sup> Fla. R. App. P. 9.300(b).

<sup>37</sup> Fla. R. App. P. 9.300(d)(1)–(13).

<sup>38</sup> *Motion Practice in Florida Appellate Courts*, *supra* note 13, at 315.

<sup>39</sup> *Florida Appellate Practice*, *supra* note 6, §13.4 at 258.

<sup>40</sup> Fla. R. App. P. 9.300(a).

- 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
  6. A certificate of service.<sup>41</sup>

Further, appendixes are permitted to accompany a motion.<sup>42</sup> The appendix may contain affidavits or other documents not already contained in the record.<sup>43</sup> In certain situations, filing an appendix is the best way to provide the court with a factual basis for an argument.<sup>44</sup> Appendixes are appropriate in situations such as on a motion for a substantive issue before the lower tribunal has transmitted the record to the appellate court.<sup>45</sup> However, in certain motions, such as a motion for rehearing, the record already contains pertinent facts to support the motion.<sup>46</sup> In such a situation, an appendix may be considered improper.

Once a motion is filed (with the exception of those filed under Rule 9.410(b)), the responding party will have an opportunity to file one response within ten days of service of the motion.<sup>47</sup> The court may shorten or extend the time for a response to the motion.<sup>48</sup> However, the movant will not be able to file a reply. Any reply, absent court approval, will be stricken without consideration.<sup>49</sup>

## TYPES OF MOTIONS

Although Rule 9.300 appears to be broad in scope, there are certain motions that are routinely filed in the DCAs. This section aims to simplify each motion by performing an in-depth analysis of possible motions to file in the DCAs, their specifications, and the different ways that the five DCAs have disposed of such motions.

<sup>41</sup> *Motion Practice in Florida Appellate Courts*, *supra* note 13, at 315–16.

<sup>42</sup> Fla. R. App. P. 9.300(a).

<sup>43</sup> *Id.*

<sup>44</sup> *Motion Practice in Florida Appellate Courts*, *supra* note 13, at 317.

<sup>45</sup> *Id.* at 317.

<sup>46</sup> *Id.*

<sup>47</sup> Fla. R. App. P. 9.300(a).

<sup>48</sup> *Id.*

<sup>49</sup> *See Notice to Attorneys and Parties*, *supra* note 27, at 7(c) (“No reply to a response will be considered unless specifically authorized by the court.”); *see also Notice to Attorneys and to Parties Representing Themselves*, *supra* note 27, at 2 (“Any unauthorized reply will be stricken without consideration.”).

*Motions for Rehearing, Clarification, and Request for Issuance of a Written Opinion*

Filing a motion for rehearing is the proper way to advise the court of an error that would affect its decision or the case’s outcome.<sup>50</sup> However, motions for rehearing are perhaps the most widely criticized motions in appellate court.<sup>51</sup> Over 20 years ago, Florida DCAs warned, “[i]f the abuse of motion practice perseveres, the fear might arise that all motions for rehearing would, at least initially, be viewed with skepticism by a busy court.”<sup>52</sup> Courts have found that these motions continue to persist as a “singular status of abuse in our court system,”<sup>53</sup> despite the warning issued. Motions for rehearing are viewed pessimistically as a result of either appellate practitioners being uninformed of the specific requirements for these motions or by simply their unwillingness to abide by them.

Rule 9.330 contains the procedures and requirements for filing a motion for rehearing, clarification, and requests for a written opinion. Only one motion for rehearing may be filed in a case.<sup>54</sup> According to Rule 9.330, a motion for rehearing must “state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding.”<sup>55</sup> “A motion for clarification shall state with particularity the points of law or fact in the court’s decision that, in the opinion of the movant, are in need of clarification.” The motion must be filed within fifteen days of an order or “within such other time set by the court.”<sup>56</sup> If not filed within this timeline, the motion will ordinarily be stricken.<sup>57</sup> However, some courts have determined that this rule is not jurisdictional and have permitted untimely filed motions in extremely limited circumstances.<sup>58</sup>

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<sup>50</sup> *Motion Practice in Florida Appellate Courts*, *supra* note 13, at 333.

<sup>51</sup> Robert Alfert, Jr., *Appellate Motions for Rehearing: When is Enough Really Enough?*, 73-APR FLA. B.J. 76, 76 (1999) (citing *Inside the Fourth District Court of Appeal*, RECORD 6 (Sept. 1998) (quoting 1993 statistics)).

<sup>52</sup> *Lawyers Title Insurance Corp. v. Reitzes*, 631 So. 2d 1100, 1101 (Fla. 4th DCA 1993) (quoting *Parker v. Baker*, 499 So. 2d 843, 848 (Fla. 2d DCA 1986)).

<sup>53</sup> *Id.* at 1100 (citing *Parker*, 499 So. 2d at 847).

<sup>54</sup> Fla. R. App. P. 9.330(b).

<sup>55</sup> Fla. R. App. P. 9.330(a).

<sup>56</sup> *Id.*

<sup>57</sup> Carol M. Rooney, *If at First You Don’t Succeed, Should You Try Again? Motions for Rehearing on Appeal*, 85-NOV FLA. B.J. 35, 35 (2011).

<sup>58</sup> *Zielke v. State*, 839 So. 2d 911, 913 (Fla. 5th DCA 2003) (holding that motion was not



Often times, decisions are entered without a written opinion—in the form of the infamous *per curiam* affirmance, which is also known as the “PCA.” The rule permits the movant to request a written opinion where the party believes that a written opinion would provide a legitimate basis for supreme court review.<sup>59</sup> If a party is requesting a written opinion, the party must include in his or her motion a statement that reads:

I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written).<sup>60</sup>

Interestingly, although the rules permit the filing of motions for rehearing, the DCAs unequivocally dissuade practitioners from filing them. In the First DCA, for instance, the court issued a “Notice to Attorneys and Parties,” which clearly states, “[t]he court strongly discourages the practice of routinely filing [motions for rehearing].”<sup>61</sup> The Fourth DCA similarly states that these motions “should be rare.”<sup>62</sup> Despite the limited circumstances under which motions for rehearing are permitted according to Rule 9.330, many practitioners instead seem to believe that filing these motions is a routine step in appellate proceedings.<sup>63</sup> However, the true, and only, purpose of a motion for rehearing is to notify the court of a fact, precedent, or rule that the court has overlooked.<sup>64</sup> To be clear, the rule permits motions for rehearing when the *court* has overlooked something—not when *counsel* has overlooked a key part of the case or precedent.<sup>65</sup>

Motions for rehearing have been permitted when there has been an intervening change in the law,<sup>66</sup> a realization of key evidence omitted from the record,<sup>67</sup> or a prevailing statute.<sup>68</sup> Aside from these limited circumstances, however, the motions are typically denied.

A recurring problem in Florida appellate courts is practitioners using motions for rehearing in order to re-argue the case. Such motions, which are typically condensed versions of the movant’s brief, may be summarily

untimely when counsel mailed it before the deadline but when it was not delivered to the court by the postal service in time).

<sup>59</sup> Fla. R. App. P. 9.330(a).

<sup>60</sup> *Id.*

<sup>61</sup> *Notice to Attorneys and Parties*, *supra* note 27.

<sup>62</sup> *Notice to Attorneys and Parties Representing Themselves*, *supra* note 27.

<sup>63</sup> *State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 818 (Fla. 1st DCA 1958).

<sup>64</sup> *Id.*

<sup>65</sup> *See Goter v. Brown*, 682 So. 2d 155 (Fla. 4th DCA 1996).

<sup>66</sup> Rooney, *supra* note 57, at 36 (citing to *State v. Bennett*, 53 So. 2d 368 (Fla. 3d DCA 2011)).

<sup>67</sup> *Id.* (citing *Kubernac v. Reid*, 656 So. 2d 930 (Fla. 1st DCA 1994)).

<sup>68</sup> *Id.* (citing *Surf Club v. Tatem Surf Club, Inc.*, 10 So. 2d 554, 557–61 (Fla. 1942)).

denied and run the risk of sanctions.<sup>69</sup> In addition, motions which simply admonish the court’s decision are usually, if not always, denied.<sup>70</sup> Finally, motions, which bring in new evidence or argue issues not previously raised, will be denied.<sup>71</sup>

The most widely cited case on this issue is *Parker v. Baker*. In *Parker*, the Second DCA found it necessary to place the Bar on notice of the requirements of Rule 9.330.<sup>72</sup> In *Parker*, a county property appraiser brought a declaratory judgment action against a former employee. The trial court entered a summary judgment in favor of the employee, and the property appraiser appealed. The Second DCA reversed and remanded the summary judgment. The Appellee filed a motion for rehearing.<sup>73</sup> The Second DCA found that “every point mentioned in the motion for rehearing was argued by Appellee in his brief and oral argument and was addressed by the panel opinion.”<sup>74</sup> The court found that the filing of the motion “constituted a flagrant violation of the rule.”<sup>75</sup> The court also noted that the overabundance of motions for rehearing unnecessarily wastes the time of the judges.<sup>76</sup> The court further stated that it is the Bar’s, and not the appellate courts’, responsibility to avoid such recurring violations of Rule 9.330.<sup>77</sup>

### *Motions for Rehearing En Banc*

Similar to motions for rehearing but even more difficult to obtain are

<sup>69</sup> Alfert, *supra* note 51, at 76; *see also Banderas v. Advance Petroleum*, 716 So. 2d 876 (Fla. 3d DCA 1998); *Lawyers Title Insurance Corp. v. Reitzes*, 631 So. 2d 1100, 1101 (Fla. 4th DCA 1993); *Gainesville Coca-Cola v. Young*, 632 So. 2d 83 (Fla. 1st DCA 1993); *Elliot v. Elliot*, 648 So. 2d 135 (Fla. 4th DCA 1994); *Patton v. State Dep’t of Health & Rehab. Servs., Office of Child Support Enf’t ex rel. D.A.R.’.*, 597 So. 2d 302 (Fla. 2d DCA 1991).

<sup>70</sup> *See McDonnell v. Sanford Airport Authority*, No. 5D13-3850, 2015 WL 2260504, at \*1 (Fla. 5th DCA May 15, 2015) (“Rather, in open defiance of Rule 9.330, [counsel’s motion] expresses displeasure with our ruling and, in the process, minces no words in attacking the trial judge, Appellee, opposing counsel, and this panel.”).

<sup>71</sup> *See Sarmiento v. State*, 371 So. 2d 1047 (Fla. 3d DCA 1979) (holding that the fact that the defendant did not file a pre-trial motion to suppress the evidence was not overlooked by the court and wasn’t even raised by the state in its brief or oral argument); *see also Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004) (“No new ground or position may be assumed in a petition for rehearing.”).

<sup>72</sup> *See Parker v. Baker*, 499 So. 2d 843, 847 (Fla. 2d DCA 1986).

<sup>73</sup> *Id.* at 844.

<sup>74</sup> *Id.* at 846.

<sup>75</sup> *Id.* at 847.

<sup>76</sup> *Id.* at 848. (“This Court is being deluged nowadays with a plethora of pleadings which have no place in any appellate court and which are causing a distressing waste of time. We are in truth suffering from acute motion sickness.” (citing *Dubowitz v. Century Vill. E., Inc.*, 381 So. 2d 252, 253 (Fla. 4th DCA 1979)).

<sup>77</sup> *Id.*

motions for rehearing en banc. As mentioned above, each DCA typically hears cases in panels of three judges. A rehearing uses this same panel system to judge the merits of the appeal. A rehearing en banc, on the other hand, utilizes a majority of the judges in regular active service on the DCA.<sup>78</sup> Because this is such an extraordinary proceeding, the standard for obtaining such a rehearing is inevitably high.<sup>79</sup>

Rule 9.331 sets out the requirements for a rehearing en banc. A party may request a rehearing or the DCA may order it on its own motion.<sup>80</sup> This motion must follow the timing requirements provided in Rule 9.330,<sup>81</sup> meaning that it must be filed within fifteen days of an order, or any other time set forth by the court.<sup>82</sup> A rehearing en banc “shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity with the court’s decisions.” Any motion that requests a rehearing en banc for different grounds will be stricken.<sup>83</sup> Further, any motions for rehearing en banc that are not filed in conjunction with a motion for rehearing will be stricken.<sup>84</sup> If the motion for rehearing is denied, the motion for rehearing en banc is considered denied as well.<sup>85</sup> Finally, when filing such a motion, the moving attorney must include one of the following statements:

I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

Or

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 decisions in this court (citing specifically the case or cases).<sup>86</sup>

In order to prevail on a motion for rehearing en banc, it is not enough to allege importance of a question<sup>87</sup> nor is it enough to simply place the

<sup>78</sup> Rooney, *supra* note 57, at 36.

<sup>79</sup> *Id.*

<sup>80</sup> Fla. R. App. P. 9.331(d)(1).

<sup>81</sup> *Id.*

<sup>82</sup> Fla. R. App. P. 9.330(a).

<sup>83</sup> Fla. R. App. P. 9.331(d)(1).

<sup>84</sup> Fla. R. App. P. 9.331 committee notes.

<sup>85</sup> *Motion Practice in Florida Appellate Courts, supra* note 13, at 340.

<sup>86</sup> Fla. R. App. P. 9.331(d)(2).

<sup>87</sup> See *Pinecrest Lakes, Inc. v. Shidel*, 802 So. 2d 486 (Fla. 4th DCA 2001) (holding that alleged importance of question was inadequate).

certification that the motion was filed upon counsel’s “reasoned and studied professional judgment.”<sup>88</sup> Similarly, allegations of necessity for uniformity are not enough if the facts of the underlying case and the alleged conflicting case are not similar enough.<sup>89</sup> Further, although a motion for rehearing en banc must be filed in conjunction with a motion for rehearing, the rehearing en banc motion must do more than simply duplicate the arguments set forth in the traditional motion for rehearing.<sup>90</sup>

It should also be noted that both motions for rehearing and motions for rehearing en banc are even more so discouraged when the underlying order was decided without an opinion.<sup>91</sup> Recently, in *McDonnell v. Sanford Airport Authority*, for instance, the Fifth DCA stated that, although there may be times where such a motion is appropriate after the filing of a Per Curiam Affirmance, “such instances are rare and are most often limited to occasions when a relevant decision of the Supreme Court or another District Court of Appeal is rendered after briefing and oral argument and not considered by the court.”<sup>92</sup> In sum, recognizing how these motions are continually abused should help practitioners truly evaluate their cases and file motions for rehearing and rehearing en banc only when they truly merit consideration.

### *Motions for Extension of Time*

On the opposite spectrum, when it comes to appellate motion, is a motion for extension of time. When properly filed, these motions will generally be granted so long as the opposing party agrees to an extension and so long as the motions are not filed multiple times.<sup>93</sup> Rule 9.300 implements the requirement that these motions “shall . . . 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.”<sup>94</sup> Additionally, service of a motion for extension of time tolls the time schedule of any

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<sup>88</sup> See *Gainesville Coca-Cola v. Young*, 632 So. 2d 83 (Fla. 1st DCA 1993) (where the court found that there was no issue of exceptional importance even though there was a statement of professional and reasoned judgment).

<sup>89</sup> See *Russo v. State*, 814 So. 2d 463, 464 (Fla. 4th DCA 2001).

<sup>90</sup> *Gainesville Coca-Cola*, 632 So. 2d at 89 (“Of somewhat more concern to this court, . . . the Motion for Rehearing En Banc tracks word for word appellee’s Motion for Rehearing and Clarification.”).

<sup>91</sup> *McDonnell v. Sanford Airport Auth.*, 40 Fla. L. Weekly D1151 (Fla. 5th DCA May 15, 2015).

<sup>92</sup> *Id.*

<sup>93</sup> *Practice Preferences*, *supra* note 27, at 2; *Notice to Attorneys and Parties Representing Themselves*, *supra* note 27, at 2.

<sup>94</sup> Fla. R. App. P. 9.300(a).

proceeding in the court until the disposition of the motion.<sup>95</sup> If an order granting an extension of time is entered, the order automatically extends the time “for all other acts that bear a time relation to it.”<sup>96</sup>

To help ease the burden of motion practice, in lieu of a formal motion, pursuant to administrative orders, every DCA, except for the First DCA, now permits the filing of an agreed notice of extension of time.<sup>97</sup> These administrative orders apply to criminal and civil appeals, including dissolutions of marriage.<sup>98</sup> However, they do not apply to appeals from adoptions, dependency, termination of parental rights, non-final orders, or any expedited or emergency appeal.<sup>99</sup> In the Second, Third, and Fifth DCAs, the orders also do not apply to any original proceedings filed in the Courts.<sup>100</sup>

These notices simply require that both parties agree to an extension of time and that they include the specific language provided in the Order.<sup>101</sup> An example of the language required the Third DCA requires is as follows:

The undersigned (Appellant/Appellee) or counsel for (Appellant/Appellee) has agreed with (Appellant/Appellee) or counsel for (Appellant/Appellee) that the time for serving Appellant’s/Appellee’s (initial, answer or reply) brief may be extended for \_\_\_\_ days to \_\_\_\_ (date).<sup>102</sup>

In the Second and Fifth DCAs, agreed notices of extensions of time are

<sup>95</sup> Fla. R. App. P. 9.300(b).

<sup>96</sup> *Id.*

<sup>97</sup> See Administrative Order 2013-1, Florida Second District Court of Appeal (June 3, 2013), <http://www.2dca.org/Clerk/Notices/Administrative%20Order%202013-1.pdf>; see also AO3D13-01: Amended Administrative Order Re: Agreed Extensions of Time for Filing Briefs in Certain Appeals, Florida Third District Court of Appeal (June 30, 2015), <http://www.3dca.flcourts.org/Clerk/AO3D13-1.pdf>; Administrative Order No. 2016-1, Florida Fourth District Court of Appeal (Feb. 2, 2016), <http://www.4dca.org/Clerk/Administrative%20Order%202016-1.pdf>; Amended AO5D13-02 Administrative Order, Florida Fifth District Court of Appeal (Mar. 8, 2013), [http://www.5dca.org/Clerk/Administrative%20Orders/AO5D13-02\\_RE\\_Agreed\\_Ext\\_of\\_Time\\_for\\_Filing\\_Briefs\\_in\\_Certain\\_Appeals.pdf](http://www.5dca.org/Clerk/Administrative%20Orders/AO5D13-02_RE_Agreed_Ext_of_Time_for_Filing_Briefs_in_Certain_Appeals.pdf).

<sup>98</sup> See Administrative Order 2013-1, *supra* note 97; see also AO3D13-01: Amended Administrative Order Re: Agreed Extensions of Time for Filing Briefs in Certain Appeals, *supra* note 97; Administrative Order No. 2016-1, *supra* note 97; Amended AO5D13-02 Administrative Order, *supra* note 97.

<sup>99</sup> See Administrative Order 2013-1, *supra* note 97; see also AO3D13-01: Amended Administrative Order Re: Agreed Extensions of Time for Filing Briefs in Certain Appeals, *supra* note 97; Administrative Order No. 2016-1, *supra* note 97; Amended AO5D13-02 Administrative Order, *supra* note 97.

<sup>100</sup> Administrative Order 2013-1, *supra* note 97; AO3D13-01: Amended Administrative Order, *supra* note 97; Amended AO5D13-02 Administrative Order, *supra* note 97.

<sup>101</sup> Administrative Order 2013-1, *supra* note 97; AO3D13-01: Amended Administrative Order, *supra* note 97; Amended AO5D13-02 Administrative Order, *supra* note 97; see also Administrative Order No. 2016-1, *supra* note 97.

<sup>102</sup> AO3D13-01: Amended Administrative Order, *supra* note 97.

accepted for up to a total of 90 days for an initial or answer brief, and for 60 days for a reply brief.<sup>103</sup> In the Third DCA, the agreed notices are accepted for an aggregate total of 120 days for an initial or answer brief and 30 days for a reply brief.<sup>104</sup> Finally, in the Fourth DCA, the notices in criminal appeals are accepted for a total of 120 days for an initial or answer brief, and 60 days for a reply brief and notices in non-criminal appeals are accepted up to a total of 90 days for an initial or answer brief, and 30 days for a reply brief.<sup>105</sup>

Motions for extensions of time have most often been denied because of counsel’s failure to adhere to the agreement requirement.<sup>106</sup> This simple requirement is often overlooked, disregarded,<sup>107</sup> or included but without proper authorization from opposing counsel.<sup>108</sup> In *Hilltop Developers, Inc. v. Masterpiece Homes, Inc.*, for instance, the Fifth DCA reprimanded the appellant’s attorney for misrepresenting that opposing counsel had agreed to an extension of time.<sup>109</sup> The court found that, though this misrepresentation was a result of a misunderstanding and thus did not rise to the level of contempt, it was still below the level of candor expected from counsel.<sup>110</sup>

### *Motions to Strike Reply Briefs or to File a Limited Response to New Argument*

In appellate court, “the only briefs permitted to be filed in any one proceeding are the initial brief, the answer brief, a reply brief, and a cross-reply brief.”<sup>111</sup> It is well known that the purpose of a reply brief is to respond to new matters argued in an appellee’s opposing brief.<sup>112</sup> As such,

<sup>103</sup> Administrative Order 2013–1, *supra* note 97; Amended AO5D13-02 Administrative Order, *supra* note 97.

<sup>104</sup> AO3D13-01: Amended Administrative Order, *supra* note 97.

<sup>105</sup> Administrative Order No. 2016–1, *supra* note 97.

<sup>106</sup> See *Mills v. Heenan*, 382 So. 2d 1317, 1318 (Fla. 5th DCA 1980) (“We have observed that the provisions of this rule are ignored by the Bar practicing before us as often as followed and we take the opportunity to call to their attention the necessity of compliance before a motion for extension will be considered.”).

<sup>107</sup> *Id.*

<sup>108</sup> See *Hilltop Developers, Inc. v. Masterpiece Homes, Inc.*, 455 So. 2d 1155 (Fla. 5th DCA 1984); see also *Merritt v. Promo Graphics, Inc.*, 679 So. 2d 1277 (Fla. 5th DCA 1996).

<sup>109</sup> See *Hilltop Developers, Inc.*, 455 So. 2d at 1155.

<sup>110</sup> *Id.* at 1156.

<sup>111</sup> Fla. R. App. P. 9.210(a).

<sup>112</sup> See *General Mortgage Assoc., Inc. v. Campolo Realty & Mortgage Corp.*, 678 So. 2d 431, 431 (Fla. 3d DCA 1996); *Snyder v. Volkswagen of America, Inc.*, 574 So. 2d 1161, 1161 (Fla. 4th DCA 1991); *St. Regis Paper Co. v. Hill*, 198 So. 2d 365, 366 (Fla. 1st DCA 1967); *Pursell v. Sumter Elec. Cop., Inc.*, 169 So. 2d 515, 518 n.2 (Fla. 2d DCA 1964).

it is inappropriate to bring in additional arguments when replying to the opposing brief. In fact, the Florida DCAs have repeatedly prohibited appellants from raising new issues in their reply briefs.<sup>113</sup> This prohibition stems from the fact that if new issues are introduced in the reply brief, there is no particular method for an appellee to respond to an inappropriate reply brief.<sup>114</sup>

Because the rules do not provide a remedy for improper reply briefs, many judges seem to agree that oral argument is the proper forum for bringing new issues to the court's attention, rather than reply briefs.<sup>115</sup> Other acceptable options include filing a motion to strike the reply brief or a motion to file a limited response to the new argument.<sup>116</sup> However, because most judges "hate cases that get into motion wars,"<sup>117</sup> these motions should typically only be used if the new argument presented in the reply brief causes harm.<sup>118</sup>

### *Motions for Attorneys' Fees*

The most common substantive motions in appellate courts are motions for attorneys' fees.<sup>119</sup> These motions are governed under Rule 9.400(b) and must be filed in the appellate court.<sup>120</sup> They must be served no later than the time of service for the reply brief.<sup>121</sup> Presumably, however, extensions of time to serve the reply brief also extend the time to serve the motion for attorneys' fees.<sup>122</sup> Additionally, this motion must be filed separately and cannot simply be a line request in a pleading.<sup>123</sup> "The motion must identify the specific contractual, statutory, or other substantive legal grounds for the fees."<sup>124</sup> It is also appropriate to attach supporting documents when applicable.<sup>125</sup> As with other motions, a response should be served by the nonmoving party within ten days of service of the motion; no replies are

<sup>113</sup> Finn Pressly, *Reply Briefs: Rules and Protocol in the Battle for the Last Word*, 80-MAR FLA. B.J. 48, 48 (2006).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 48–49.

<sup>117</sup> *Id.* at 49 (citing Judge Chris Altenbernd of the Second DCA).

<sup>118</sup> *Id.* (quoting Judge Patricia Kelly of the Second DCA).

<sup>119</sup> Norse, *supra* note 3, at 40.

<sup>120</sup> Fla. R. App. P. 9.400(b).

<sup>121</sup> Fla. R. App. P. 9.400(b)(1).

<sup>122</sup> Bretton C. Albrecht, *Fee Simple: A Procedural Primer on Appellate Attorneys' fees and costs*, 87-FEB FLA. B.J. 24, 24 (2013).

<sup>123</sup> See *Garcia v. Collazo*, 178 So. 3d 429, 430 (Fla. 3d DCA 2015).

<sup>124</sup> Albrecht, *supra* note 122, at 24.

<sup>125</sup> *Id.*

permitted.<sup>126</sup>

The appellate court has exclusive jurisdiction to award attorneys’ fees<sup>127</sup> and, as such, these motions must be filed in the appellate court. Once filed, the panel reviews the motion and response and determines whether a party is entitled to attorneys’ fees. If it is established that attorneys’ fees should be awarded, the appellate court will then remand to the lower tribunal to determine the amount.<sup>128</sup> Lower tribunals are not permitted to award appellate attorneys’ fees absent a mandate from the appellate court.<sup>129</sup> A majority of attorneys’ fees awards are based on a determination of the prevailing party.<sup>130</sup> When it is not clear who the prevailing party is, the court typically looks to which party prevailed on significant issues.<sup>131</sup>

Though it may seem like an obvious procedural requirement, many motions for attorneys’ fees are denied simply because the requesting party never actually filed a motion.<sup>132</sup> This most often happens when a party fails to file a motion for fees in an underlying appellate proceeding. For instance, the Third DCA in *Garcia v. Garcia* denied a wife her attorneys’ fees in a dissolution proceeding against her husband after finding that the wife never made a motion for attorneys’ fees in her prior appeal.<sup>133</sup> Similarly, in *Bartow HMA, LLC v. Kirkland*, the Second DCA reversed an award of attorneys’ fees by the lower court, when the moving party did not file a motion for the fees in the certiorari proceeding.<sup>134</sup>

Though the motion may be grounded in statute, the movant must do more than simply state which statute governs the motion. Instead, the party must provide substance to support the statutory basis for an award of attorneys’ fees.<sup>135</sup> In *Garcia v. Collazo*, the Third DCA analyzed an appellee’s motion for fees after the appellant’s frivolous appeal from an order to the court.<sup>136</sup> The court found that the appellee’s motion was insufficient, in part because the appellee solely relied on Rule 9.400 as the

<sup>126</sup> *Id.* (citing Fla. R. App. P. 9.300(a)).

<sup>127</sup> *Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054, 1056 (Fla. 5th DCA 1998); *see also Garcia*, 178 So. 3d at 430.

<sup>128</sup> Fla. R. App. P. 9.400(b).

<sup>129</sup> *Garcia v. Garcia*, 570 So. 2d 357, 359 (Fla. 3d DCA 1990).

<sup>130</sup> Albrecht, *supra* note 122, at 26.

<sup>131</sup> *Id.*

<sup>132</sup> *Respiratory Care Services, Inc.*, 715 So. 2d at 1056 (“Generally, the appellate court has exclusive jurisdiction to award appellate attorneys’ fees, and in order to invoke the jurisdiction of the court to award fees, the party seeking attorneys’ fees must timely file a motion, pursuant to Florida Rule of Appellate Procedure 9.400(b), in the appellate court.”).

<sup>133</sup> *Garcia*, 570 So. 2d at 359.

<sup>134</sup> *See Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213 (Fla. 2d DCA 2014).

<sup>135</sup> *See United Services Automobile Ass’n v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000).

<sup>136</sup> *See generally Garcia v. Collazo*, 178 So. 3d 429 (Fla. 3d DCA 2015).



basis for her right to such fees.<sup>137</sup> In so finding, the court stated “the rule is procedural rather than substantive and therefore cannot serve as the basis for an award of appellate attorneys’ fees.”<sup>138</sup> In sum, motions for attorney’s fees require substantive support to back up the request, but save the proof for the trial court.

### *Motions for Costs*

Like motions for attorneys’ fees, Rule 9.400 governs motions for appellate costs.<sup>139</sup> However, unlike motions for fees, these motions must be filed in the lower tribunal, rather than in the appellate court.<sup>140</sup> As such, they must be filed separately from a motion for attorneys’ fees.<sup>141</sup> Additionally, though not required, a motion for costs should include a statement or list of the costs incurred, preferably with appropriate invoices for verification.<sup>142</sup> The rule permits costs to include: “(1) fees for filing and service of process; (2) charges for preparation of the record on appeal and any hearing or trial transcripts necessary to determine the proceeding; (3) bond premiums; and (4) other costs permitted by law.”<sup>143</sup>

According to the rule, costs are typically awarded to the prevailing party, and the court generally has little, if any, discretion in denying costs to the prevailing party.<sup>144</sup> In cases involving multiple issues, the party who is awarded costs should be the one who prevailed on the overall significant issues on appeal.<sup>145</sup> Additionally, in rare cases where there is no prevailing party, costs should not be awarded to either party.<sup>146</sup>

In order to obtain an award of appellate costs, the moving party must serve a motion no later than forty-five days after the court renders an order.<sup>147</sup> This time restriction may be tolled if a party files a motion for rehearing, which would delay the rendition of a court order.<sup>148</sup> However, the

<sup>137</sup> *Id.* at 430.

<sup>138</sup> *Id.* (citing *State, Dep’t of Highway Safety & Motor Vehicles v. Trauth*, 971 So. 2d 906, 908 (Fla. 3d DCA 2007)).

<sup>139</sup> See Fla. R. App. P. 9.400(a).

<sup>140</sup> *Id.*

<sup>141</sup> Albrecht, *supra* note 122, at 25.

<sup>142</sup> Carol M. Rooney, “*But At Least You Can Recover Your Costs, Right?*” *A Practitioner’s Guide to Appellate Costs in Florida—the Good, the Bad, and the Money*, 89-AUG FLA. B.J. 81, 82 (2015) [hereinafter “*But At Least You Can Recover Your Costs, Right?*”].

<sup>143</sup> Fla. R. App. P. 400(a)(1)–(4).

<sup>144</sup> *But At Least You Can Recover Your Costs, Right?*, *supra* note 142, at 81.

<sup>145</sup> See *Markin v. Markin*, 953 So. 2d 13 (Fla. 4th DCA 2007).

<sup>146</sup> *Ariko v. Nicholson*, 632 So. 2d 174, 174 (Fla. 5th DCA 1994).

<sup>147</sup> Fla. R. App. P. 9.400(a).

<sup>148</sup> *But At Least You Can Recover Your Costs, Right?*, *supra* note 142, at 81.

time limitation is jurisdictional and, therefore, the lower court does not have authority to entertain a late filing for appellate costs.<sup>149</sup> Once filed, the parties are entitled to notice and an opportunity to be heard before the costs may be imposed.<sup>150</sup>

Finally, parties seeking to challenge the lower tribunal’s order that either grants or denies the motion for appellate costs or the motion for attorneys’ fees must file a motion within 30 days after rendition of the order.<sup>151</sup> Because the assessment of costs lies within the lower tribunal’s discretion, the appellate court will not reverse the award unless there is a clear showing of abuse.<sup>152</sup>

### *Motions for Sanctions*

The DCAs have limited ability to control the filing of excessive or frivolous motions, or motions filed in bad faith, through sanctions.<sup>153</sup> As authorized by Rule 9.410(a), a court may, on its own motion, impose sanctions such as “reprimand, contempt, striking of briefs or pleadings, dismissal of proceedings, costs, attorneys’ fees, or other sanctions.”<sup>154</sup> On the other hand, sanctions may not include dismissing a case for failure to file a timely brief.<sup>155</sup> The sanctions may only be imposed after 10 days’ notice.<sup>156</sup>

Parties may likewise move for sanctions in the form of attorneys’ fees against another party or its counsel.<sup>157</sup> This motion must be served on the party against whom sanctions are sought no later than “the time for serving any permitted response to a challenged paper or, if no response is permitted as of right, within 15 days after a challenged paper is served. . . .”

Though the Rules fail to outline what may be considered “frivolous” when assessing appeals, the DCAs have offered some guidance. The Third DCA in *Visoly v. Security Pacific Credit Corp.*, for instance, found that a

<sup>149</sup> Albrecht, *supra* note 122, at 26.

<sup>150</sup> *But At Least You Can Recover Your Costs, Right?*, *supra* note 142, at 82 (citing *Alexis v. State*, 12 So. 3d 1281, 1282 (Fla. 4th DCA 2009) (ruling that a party is entitled to notice and an opportunity to be heard before appellate costs are imposed)).

<sup>151</sup> Fla. R. App. 9.400(c).

<sup>152</sup> *Lone Star Indus., Inc. v. Liberty Mut. Ins. Co.*, 688 So. 2d 950, 952 (Fla. 3d DCA 1997); *see also General Capital Corp. v. Tel Service Co.*, 239 So. 2d 134, 135–36 (Fla. 2d DCA 1970).

<sup>153</sup> Fla. R. App. P. 9.410(a).

<sup>154</sup> *Id.*

<sup>155</sup> *Altman v. State*, 41 So. 3d 1030, 1034 (Fla. 2d DCA 2010) (holding that the circuit court departed from the essential requirements of the law when the court dismissed an appeal as a sanction for counsel’s failure to file a timely brief).

<sup>156</sup> *Id.*

<sup>157</sup> Fla. R. App. P. 9.410(b)(1).

case may be frivolous if it is found:

(a) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) to be contradicted by overwhelming evidence; (c) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or ([d]) as asserting material factual<sup>158</sup> statements that are false.<sup>159</sup>

As stated above, a court is permitted to enter sanctions upon its own initiative. In *In re A.T.H.*, the First DCA did just that, when a lawyer filed a writ of certiorari after the circuit court allowed sanctions when the lawyer filed a notice of appearance for a client who already had two court-appointed attorneys.<sup>160</sup> The court found that the appeal was so frivolous as to warrant an award of sanctions in the form of attorneys' fees to be paid to the court-appointed attorneys.<sup>161</sup> Other DCAs have likewise found sanctions of attorneys' fees proper for baseless or frivolous claims.<sup>162</sup>

#### *Additional Appropriate Appellate Motions*<sup>163</sup>

Rule 9.300 generally governs other motions not specifically addressed in a subsection above but appropriate to file in appellate court. Examples of these motions include motions to expedite an appeal, motions to strike all or part of an opponent's brief, motions to enlarge the page limit, or motions to dismiss. These motions all toll the time schedule of further proceedings in the court until disposition of the motion,<sup>164</sup> except for motions to expedite an appeal.<sup>165</sup>

Any motion that counsel wishes to file in the appellate court should be timely. For instance, when attempting to expedite an appeal, counsel should file a motion to do so at the commencement of the case and include a

<sup>158</sup> Fla. R. App. P. 9.410(b)(3).

<sup>159</sup> *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482, 491 (Fla. 3d DCA 2000).

<sup>160</sup> *In re A.T.H.*, 180 So. 3d 1212, 1216 (Fla. 1st DCA 2015).

<sup>161</sup> *Id.*

<sup>162</sup> *See Aspen Air Conditioning, Inc. v. Safeco Ins. Co. of America*, 170 So. 3d 892 (Fla. 3d DCA 2015).

<sup>163</sup> Of course, motions other than the ones addressed specifically above may be filed in the appellate courts. Depending on counsel's creativity and needs, the variety of possible motions to file may be nearly endless. As such, it is impossible to address, in-depth, every possible type of motion. This subsection instead serves to provide a brief overview of motions commonly filed in the appellate courts but which have not already been addressed above.

<sup>164</sup> Fla. R. App. P. 9.300(b).

<sup>165</sup> Fla. R. App. P. 9.300(d)(10).

proposed schedule with their motion.<sup>166</sup> Similarly, motions to dismiss should be filed as soon as possible in order to prevent unnecessary action by the court.<sup>167</sup>

Like the motions described in the above subsection, these additional types of motions should be filed with caution and only for non-frivolous matters. Because many appeals can occur without filing a single motion in the appellate court,<sup>168</sup> there are many motions that can be avoided or simplified.<sup>169</sup> Before filing any motion, a prudent practitioner should always reference the applicable rules and ensure that they are adhering to the specific requirements that attach to each rule.

## CONCLUSION

As demonstrated throughout this article, although motion practice in the appellate courts is permitted, practitioners should be mindful of the procedures and not file motions that will deluge the courts and cause them a “distressing waste of time.”<sup>170</sup> Unlike in the lower tribunals, appellate practice rarely necessitates factual or evidentiary disputes. Because the bulk of appellate practice lies in briefs, motions should never be used as a routine step in an appeal and should generally be used as seldom as possible.

When motions are necessary and appropriate, however, practitioners must be aware of the procedural and substantive requirements in order to best demonstrate their claim. A motion may be stricken without consideration, or in particularly egregious cases, grounds for sanctions if the requirements laid out above are not followed. As the Second DCA urged over twenty years ago, it is ultimately the bar that has the control to avoid the possibility that the motions filed will be viewed with skepticism by a busy court and to eliminate the DCA’s acute motion sickness.<sup>171</sup> We owe it to our clients and to the appellate courts to do heed the Second DCA’s warning now.

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<sup>166</sup> Norse, *supra* note 3, at 40.

<sup>167</sup> Norse, *supra* note 3, at 40.

<sup>168</sup> *Florida Appellate Practice*, *supra* note 6, §13:11 at 271.

<sup>169</sup> *Id.* at 272.

<sup>170</sup> *Parker v. Baker*, 499 So. 2d 843, 848 (Fla. 2d DCA 1986).

<sup>171</sup> *Id.*

**Ex. 1**

<b>Type of Motion</b>	<b>Rule</b>	<b>When to File</b>	<b>Special Requirements</b>
<b>Motion for Extension of Time</b>	Fla. R. App. P. Rule 9.300	Before the expiration of the time sought to be extended <sup>172</sup>	Shall 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. <sup>173</sup>
<b>Costs</b>	Fla. R. App. P. Rule 9.400(a)	No later than 45 days after rendition of the court's order <sup>174</sup>	Must be filed in lower tribunal <sup>175</sup>
<b>Attorneys' Fees</b>	Fla. R. App. P. Rule 9.400(b)	In appeals, motion shall be served not later than the time for service of the reply brief <sup>176</sup>	Must be filed in the appellate court <sup>177</sup>
<b>Sanctions</b>	Fla. R. App. P. Rule 9.410	On Court's motion: After 10 days' notice <sup>178</sup>	On counsel's motion: certificate of service shall

<sup>172</sup> *Florida Appellate Practice*, *supra* note 6, §13.2 at 256.

<sup>173</sup> Fla. R. App. P. 9.300(a).

<sup>174</sup> Fla. R. App. P. 9.400(a).

<sup>175</sup> *Id.*

<sup>176</sup> Fla. R. App. P. 9.400(b).

<sup>177</sup> *Id.*

<sup>178</sup> Fla. R. App. P. 9.410(a).

		On counsel’s motion: Served no later than the time for serving any permitted response to a challenged paper or, if no response is permitted, within 15 days after a challenged paper is served or a challenged claim, defense, contention, allegation, or denial is made at oral argument <sup>179</sup>	accompany the motion <sup>180</sup>
<b>Motion for Rehearing, Clarification, certification, or issuance of a written opinion</b>	Fla. R. App. P. Rule 9.330	May be filed within 15 days of an order or within such other time set by the court <sup>181</sup>	Must state points of law or fact with particularity. Must include an affirmation clause stating that the motion is based upon a reasoned and studied professional judgment. <sup>182</sup>
<b>Motion for Rehearing en banc</b>	Fla. R. App. P. Rule 9.331	May be filed within 15 days of an order or within such other time set by the court <sup>183</sup>	Must be accompanied by a motion for rehearing <sup>184</sup> ; must contain an

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<sup>179</sup> Fla. R. App. P. 9.410(b)(3).

<sup>180</sup> Fla. R. App. P. 9.410(b)(4).

<sup>181</sup> Fla. R. App. P. 9.330(a).

<sup>182</sup> *Id.*

<sup>183</sup> Fla. R. App. P. 9.331(d)(1).

			affirmation clause that the case is either of exceptional importance or that a rehearing is necessary to maintain uniformity of decisions <sup>185</sup>
<b>Motion to Dismiss</b>	Fla. R. App. P. Rule 9.300	As soon as possible to “forestall unnecessary action by the appellate court on the merits of the appeal” <sup>186</sup>	
<b>Motion to Expedite an Appeal</b>	Fla. R. App. P. Rule 9.300	At the commencement of the case <sup>187</sup>	Should include a proposed schedule for filing of briefs <sup>188</sup>
<b>Motion to Strike all or part of an opponent’s brief</b>	Fla. R. App. P. Rule 9.300	After opponent’s brief is filed, as soon as reasonably possible <sup>189</sup>	
<b>Motion to Relinquish Jurisdiction to the circuit court</b>	Fla. R. App. P. Rule 9.300	As soon as reasonably possible <sup>190</sup>	

<sup>184</sup> Fla. R. App. P. 9.331 advisory committee’s note; *see also La Grande v. B & L Services, Inc.*, 436 So. 2d 337 (Fla. 1st DCA 1983) (holding that a motion for rehearing en banc is impermissible when not filed in conjunction with a motion for rehearing).

<sup>185</sup> Fla. R. App. P. 9.331(d)(2).

<sup>186</sup> Norse, *supra* note 3, at 40.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Florida Appellate Practice, supra* note 6, §13.2 at 254.

<sup>190</sup> *Id.*