

So you want attorney fees on appeal...



BRIEFLY

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By Lisa L. Beane

There is something particularly satisfying—for clients and attorneys alike—about making the opposing party pay the attorney’s bill after winning a case. Of course, the American rule—which is also Minnesota’s common law rule—is that parties to litigation generally pay their own attorneys’ fees. See *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). But statutory and contractual fee-shifting provisions often entitle the prevailing party to recover its reasonable attorneys’ fees from the opposing party. See *Fownes v. Hubbard Broad., Inc.*, 310 Minn. 540, 246 N.W.2d 700 (1976). And in rare cases, attorneys’ fees may be available as a sanction against an opposing party. See Minn. Stat. § 549.211. Although the focus of this column is the procedure for seeking attorneys’ fees on appeal, we commend interested readers to the Minnesota House of Representatives Research Department’s useful guide outlining the fee-shifting provisions in the Minnesota Statutes. See Mary Mullen, “Attorney Fee Awards in Minnesota Statutes” (July 2015), available at <http://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf>.

So if you’ve won your case on appeal and determined that your client has a substantive basis to seek attorneys’ fees from the opposing party, what do you do? The next step is to figure out where and when to file the petition for fees. In Minnesota courts, a petition for attorneys’ fees incurred on appeal must be filed with the appellate court. Minn. R. Civ. App. P. 139.06, subd. 1. If you instead include the fees in a subsequent fee petition in the District Court, the motion for fees incurred for the appeal will be denied.

Johnson v. City of Shorewood, 531 N.W.2d 509, 511 (Minn. App. 1995).

The appellate court may decide, on its own motion or the motion of a party, to remand a request for attorneys’ fees to the district court. Minn. R. Civ. App. P. 139.06, subd. 2. Remand may be particularly appropriate when a hearing is necessary to determine the amount of the fee award. *Id.* But it is entirely up to the appellate court to decide whether it will address the motion for fees or send the issue back to the District Court, and no clear pattern emerges from the cases that would make it easy to predict which path an appellate court will choose in a given case.

After the appellate court files its opinion deciding the case in your client’s favor, you must act promptly to seek fees. The motion seeking fees is due within the time for seeking costs and disbursements—15 days after filing of the decision or order, unless the court sets a different time. Minn. R. Civ. App. P. 139.06, subd. 1, and 139.03. Any opposition to a motion seeking appellate attorneys’ fees must be filed within 10 days of the date the motion is served. Minn. R. Civ. App. P. 139.06, subd. 2.

Once you’ve determined the filing deadline and which court you need to file in, your next question is likely to be, what documentation do I need to file? The fee petition must be in the form of a motion brought under Minn. R. Civ. App. P. 127. See Minn. R. Civ. App. P. 139.06, subd. 1. A request for attorney fees on appeal that is included in a party’s brief will not be considered, and the party will typically be directed to file a separate motion in compliance with the rules. See, e.g., *Drew v. Herron*, 2013 Minn. App. Unpub. LEXIS 326, at *12-13 (Minn. App. Apr. 15, 2013);



DEPOSIT PHOTOS

March v. Crockarell, 631 N.W.2d 829, 837 (Minn. App. 2001).

Although the rule requires motions for fees to “include sufficient documentation to enable the appellate court to determine the appropriate amount of fees,” Minn. R. Civ. App. P. 139.06, subd. 3, it does not provide any guidance as to what documentation is considered sufficient. Typically, when a party has a statutory or contractual right to recover a reasonable attorney fee, the party should provide the same documentation in support of a motion to the appellate court that it would provide to the trial court under Minn. Gen. R. Prac. 119.02. That is, the motion should be accompanied by an affidavit of an attorney of record explaining the fee arrangement with the client and the hourly rates of each person for whom fees are sought. The affidavit should also describe the time spent on the appeal and the services rendered and should be supported by itemized billing records. See Minn. Gen. R. Prac. 119.02.

In the end, the necessary contents of a motion for appellate attorneys’ fees are likely to be familiar to most practitioners. The key is to keep in mind that your request for appellate fees needs to be filed in a separate motion to the appellate court. If you wait and attempt to seek fees for an appeal in the District Court after all the proceedings have concluded, you will likely have missed the opportunity to recover fees for work done on the appeal.

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