always Appealing: Recovering Attorney Fees on Appeal

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Clients quite reasonably want the other side to pay their attorney fees. What is true for the client who has lived through trial court litigation, is doubly true for the client facing an appeal. While the substantive law pertaining to attorney fee awards on appeal is substantially the same as in the trial court, the procedural aspects of securing an award of appellate fees present a trap for inexperienced counsel. This article is intended to help counsel who only occasionally practices in the appellate courts avoid those procedural pitfalls.

A. Fees on appeal are available when they are available in the trial court.

1. Attorney fees may be awarded to the prevailing party on appeal.

The Rules of Appellate Procedure (RAP) authorize an award of attorney fees if allowed by "applicable law."1 On appeal, as at trial, courts follow the "the American rule," under which attorney fees are available only "if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party is the substantially prevailing party."2 If a party is entitled to fees in the trial court, that party will usually be entitled to fees on appeal.3

Determining which party has prevailed is easy when one party obtains an unqualified affirmance or reversal. However, the court may refuse to award fees if it determines that both parties, or neither, substantially prevailed on a significant issue.4

In land use appeals under LUPA,5 simply prevailing on appeal is generally not enough to justify a fee award. Section 4.84.370 of the Revised Code of Washington (RCW) authorizes a fee award in a land use appeal only if the prevailing party on appeal was the prevailing party "in all prior judicial proceedings," or to a city or county if its decision "is upheld at superior court and on appeal."6

2. Attorney fees may be available irrespective of which party prevailed.

Some statutes authorize a fee award irrespective of which party prevailed. For instance, in dissolution actions, fees may be granted based on one party's need and the other's ability to pay.7 And section 11.96A.150(1) of the RCW grants the appellate court broad discretion to award fees under TEDRA, irrespective of which party has prevailed.8

3. Attorney fees as a sanction for frivolous appeals.

RAP 18.9 authorizes the appellate court to impose attorney fees as a sanction against frivolous appeals or the abuse of court rules and procedures.9 Appellate courts are generally loath to find an appeal frivolous:

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts . . . should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.10

Appellate court judges understandably take a dim view of knee-jerk requests for RAP 18.9 sanctions. Don't ask for them without providing some reasoned analysis addressing these criteria.

B. Practice pointers for obtaining a fee award on appeal.

1. Ensure that the trial court has clearly stated the basis for its fee award.

Because appellate courts look to whether a party was entitled to attorney fees at trial, the first tip to obtaining fees on appeal is to make sure the record is sufficiently clear to enable the appellate court to review the award of attorney fees in the trial court. This means obtaining a detailed order that both identifies the legal principles that make a fee award available and providing clear and detailed findings to enable the appellate court to review whether the amount awarded is reasonable.11

2. Devote a separate section of the brief to attorney fees.

When seeking attorney fees on appeal, RAP 18.1(b) requires a party requesting fees to devote a separate section of its brief to the request for fees or expenses, either in the appellant's opening brief or the respondent's brief.12 The section should include authority to support an appellate

fee request.13 The appellate courts frequently refuse to award fees to a party whose counsel fails to comply with RAP 18.1(b).14

3. File a declaration of financial need ten days before argument in family law cases.

In dissolution and other family law cases, RAP 18.1(c) requires a party seeking fees to file a financial affidavit in the appellate court ten days before the case is set for consideration on the merits, with or without oral argument. Because fees may be available based on need and ability to pay, the financial affidavit is directed to the party's income and assets. RAP 18.1(c) authorizes an answer to an affidavit of financial need within seven days of service of the affidavit. Again, appellate courts have not hesitated to deny fees when the requesting party failed to file a financial affidavit ten days before oral argument.15

4. Move for reconsideration if the court overlooks your fee request.

Sometimes the appellate court overlooks awarding fees in its merits decision, even when the party requesting fees has fully complied with RAP 18.1. This is a common basis for a motion for reconsideration, which must be filed within 20 days of the appellate court decision under RAP 12.4(b).

5. File a fee declaration within ten days of the decision awarding fees.

If the appellate court awards attorney fees, RAP 18.1(d) directs the party awarded fees to file an affidavit detailing the requested fees within ten days of the decision. RAP 18.1(e) allows any other party to answer a request for fees and expenses within ten days after service of the affidavit upon the party. If the requested fees are challenged, they may be justified in a reply affidavit, filed within five days after service of the answer. As in the trial court, the fee declaration should be sufficiently detailed to allow the appellate court to determine the reasonableness of the requested fees.

6. Fee awards in the Supreme Court.

A party need not separately request attorney fees in its petition for review to the Supreme Court, as RAP 18.1(b) provides that requests for fees in "the Court of Appeals will be deemed continuing requests at the Supreme Court."

RAP 18.1(j) provides an exception to this rule, however, where a party who was awarded fees by the Court of Appeals successfully opposes a petition for review in the Supreme Court. That respondent must ask for fees in its answer to the petition for review. If the Supreme Court awards fees in its order denying review, the respondent must then submit a fee declaration within ten days of the order.

If review is accepted, it is good practice for both petitioners and respondents to renew a request for fees in that party's supplemental brief.

7. Appellate fees awarded by a clerk or commissioner are reviewable by filing a motion to modify.

In both the Court of Appeals and the Supreme Court, appellate fee awards are generally made without a hearing by a clerk or commissioner in a written ruling, but a party may object to that ruling by filing a motion to modify.16 The appellate judges rarely reverse or modify a fee decision.

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1 RAP 18.1(a).

2 Hwang v. McMahill, 103 Wn. App. 945, 954, 15 P.3d 172 (2000), rev. denied, 144 Wn.2d 1011 (2001), citing Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

3 See Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 716, 9 P.3d 898 (2000) ("Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court.").

4 See, e.g., Am. Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

5 The Land Use Petition Act, ch. 36.70C RCW.

6 See Durland v. San Juan Cnty., 182 Wn.2d 55, 78, ¶ 42, 340 P.3d 191 (2014).

7 RCW 26.09.140 provides: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." See Marriage of Condie, 15 Wn. App.2d 449, 474, 475 P.3d 993 (2020); Walsh v. Reynolds, 183 Wn. App. 830, 858, 335 P.3d 984 (2014), rev. denied, 182 Wn.2d 1017 (2015).

8 The Trust and Estate Dispute Resolution Act, ch. 11.96A RCW; see In re Est. of Lowe, 191 Wn. App. 216, 240, ¶ 55, 361 P.3d 789 (2015) (declining to award fees to prevailing party in will contest who "acted within his legal rights to keep all the silver treasure, but this treasure ably allows him to afford the expense of this appeal."), rev. denied, 185 Wn.2d 1019 (2016).

9 Under RAP 18.9(a):

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

10 Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980); see also Mahoney v. Shinpoch, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987); Boyles v. Wash. State Dep't of Ret. Sys., 105 Wn.2d 499, 506-08, 716 P.2d 869 (1986); Millers Cas. Ins. Co. of Texas v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983).

11 SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014); Berryman v. Metcalf, 177 Wn. App. 644, 656-60, ¶¶ 23-33, 312 P.3d 745 (2013).

12 The request should be in the opening brief and not in the reply brief. Sacco v. Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

13 Osborne v. Seymour, 164 Wn. App. 820, 866, ¶ 90, 265 P.3d 917 (2011).

14 Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); Gardner v. First Heritage Bank, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013) (strict compliance with RAP 18.1 mandatory); Bay v. Jensen, 147 Wn. App. 641, 661, ¶ 47, 196 P.3d 753 (2008) ("RAP 18.1(b) requires more than this bald request for attorney fees on appeal.").

15 Marriage of Holmes, 128 Wn. App. 727, 742, ¶ 36, 117 P.3d 370 (2005); Scanlon v. Witrak, 110 Wn. App. 682, 689, 42 P.3d 447, rev. denied, 147 Wn.2d 1024 (2002); Marriage of Gillespie, 77 Wn. App. 342, 350, 890 P.2d 1083 (1995).

16 RAP 17.7, 18.1(g), 18.1(j)