



Your attorney's fees on appeal

Don't let your fee award fall through the cracks: Preserving it before, during and after appeal

BY HERB FOX

So you've won a CLRA, FEHA, FLSA, civil rights, lemon law or other claim that entitles your client (and you!) to a statutory attorney's fee award. Or perhaps you've won a contract dispute where the prevailing party is entitled, per that contract, to attorney's fees. But the defendant has filed a notice of appeal before you filed your fee motion. Now what do you do?

Over the years I've received many inquiries from trial counsel asking that and other questions relating to the effect of an appeal on the right to obtain and enforce an attorney's fee award. These questions include:

My client has been awarded attorney's fees but the opposing party has appealed from the judgment. Can we collect the fees notwithstanding the appeal?

We lost and the opposing party obtained an attorney fee award. Does my client need to post bond in order to stay enforcement of the fee award while we appeal?

My client is entitled to a fee award for the trial court proceedings. Is my client also entitled to attorney's fees to defend the judgment on appeal?

If my client is entitled to attorney's fees on appeal, do I bring the motion at the Court of Appeal or in the trial court? and,

My client lost in the trial court but we prevailed on appeal and the case has been remanded for a new trial. Can I apply for and collect my client's appellate-related fees now as the prevailing party on appeal?

To help answer these and related questions, here is a brief primer on attorney's fee awards before, during and after an appeal.

I won at trial and the defendant has appealed. When do I move for attorney's fees?

Now.

An attorney's fee award is a variant of a cost award (see Code Civ. Proc., § 1033.5, subd. (a)(10)), and



is collateral to the final judgment (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1289). Thus, the trial court retains jurisdiction to award attorney's fees even after the losing party has filed a Notice of Appeal. (*Hennessy v. Superior Court of California in and for City and County of San Francisco* (1924) 194 Cal. 368, 371; Code Civ. Proc., § 916.)

A motion for attorney's fees incurred up through entry of judgment must be filed within the same time period for the filing of a notice of appeal from that judgment. (Cal. Rules of Court, rule 3.1702(b)(1).) If you mistakenly assume that the time to move for pre-judgment fees is tolled because of the appeal, you may waive your client's right to seek trial court level fees! (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1640.)

The parties may, however, stipulate to extend the time to file the pre-judgment fee motion until after the appeal. (Cal. Rules of Court, rule 3.1702(b)(2)(B); 8.278(c)(1) [unlimited jurisdiction] or 8.891(c)(1) [limited jurisdiction].) But such a stipulation makes little sense for a prevailing plaintiff, who will lose the benefit of post-judgment interest on the fee award during the pendency of the appeal.

If you are in district court, the time for filing a fee motion is, generally, 14 days after entry of judgment. (Fed. Rules Civ. Proc., Rule 54(d)(2)(B)(i).) One purpose of the short deadline is to allow the district court to rule on the motion in time to allow appellate review of its decision at the same time as the appeal from the judgment. If a fee motion is filed, the court may deem the fee motion as a post-judgment motion that extends the time for filing a notice of appeal, and it also has discretion to hear and rule on the fee motion notwithstanding the filing of the notice of appeal. (Fed. Rules Civ. Proc., Rule 58(e); 59; Fed. Rules App. Proc., Rule 4(a)(4).)

I won an attorney fee award and the defendant has appealed from the judgment. Can I enforce the fee award notwithstanding the appeal?

Perhaps.

If you won a "pure" cost award – only statutory costs and fees but no damages – the award is automatically stayed by the filing of a Notice of Appeal and you cannot execute until and unless you prevail in the appeal. (Code Civ. Proc., § 917.1, subd. (d).) One important exception to this rule is an attorney's fee award following the granting of an anti-SLAPP motion to strike. (Code Civ. Proc., § 425.16). Such an order is not automatically stayed by the filing of a notice of appeal from the order, and unless a bond is posted, the order is enforceable. (*Dowling v. Zimmerman* (2001) 86 Cal.App.4th 1400, 1431-1434.)

Assuming, however, that you won a money judgment (damages) in addition to the fee award, the defendant will need to post bond or some other form of undertaking on the entire amount due – damages, fees and costs – in order to secure a stay of enforcement. (Code Civ. Proc., § 917.1, subs. (a) and (d); *Vadas v. Sosnowski* (1989) 210 Cal.App.3d 471, 473.) Absent a proper undertaking, you can execute on the entire judgment notwithstanding the appeal. Be aware, however, that if you collect on the judgment while the appeal is pending but the defendant wins reversal, your client will be subject to a restitution order that includes interest on the money collected during the appeal. (Code Civ. Proc., § 908.)

If a bond is posted, do not despair. The bond assures payment of the entire judgment plus statutory interest if the judgment is affirmed (10 percent for a state court judgment; the interest rate for a federal court judgment depends on whether jurisdiction was by way of diversity or

federal question. (*Lagstein v. Certain Underwriters at Lloyd's of London* (9th Cir. 2013) 725 F.3d 1050, 1055.)

In district court, all money judgments are automatically stayed for 30 days (Fed. Rules Civ. Proc., Rule 62 (a) and (b), eff. 12/1/18), after which a supersedeas bond is required in order to maintain the stay pending an appeal.

I lost the case and the trial court assessed a fee award against my client. Do I need to file two Notices of Appeal – one from the judgment and one from the fee award?

That is the recommended practice, assuming you have grounds to challenge the attorney fee order separate from the challenge to the judgment. A post-judgment order assessing attorney's fees is collateral to the final judgment and is a separately appealable order. (Code Civ. Proc., § 904.1, subd.(a)(2); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 648.)

Even if the court issues an amended judgment that adds the amount of fees and costs, the better practice is to file two Notices of Appeal – one from the judgment and one from the attorney's fee order – and then move to consolidate the two appeals unless the Court of Appeal does so sua sponte. (See *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.) Be sure to watch the calendar because the amending of the judgment to add fees and costs does not restart the clock to appeal from that judgment (*Ibid.*)

However, if there are no severable issues as to the attorney's fee award (i.e., there is no dispute that the opposing party prevailed, is entitled to attorney's fees, and the amount is reasonable), you need not separately appeal from the attorney's fee order. Reversal of the judgment itself will automatically vacate the order awarding attorney's fees.



(*Evans v. Southern Pacific Transportation Co.* (1989) 213 Cal.App.3d 1378, 1388.)

I won in the trial court and my client is entitled to attorney's fees for the trial court proceedings. The defendant is appealing. Is my client entitled to attorney's fees incurred in defending the judgment on appeal?

Yes, assuming that the appeal is from a final judgment and that you also prevail on appeal. The general rule in both state and federal courts is that statutory or contractual entitlement to an attorney's fee award in favor of the prevailing party applies to both trial and appellate court proceedings. (*Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621, 637; *Voice v. Stormans Inc.* (2014 9th Cir.) 757 F.3d 1015, 1016.)

Which court determines entitlement and amount of appellate attorney's fees?

The answer depends on the nature of the appeal (is it from a final judgment or is it an interlocutory appeal or writ proceeding?); the legal basis for the fee award; and whether you are in state or federal courts.

Although a state appellate court has discretion to award attorney's fees, in most cases it will not do so. (See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 901 [the "better practice" is to have trial court determine attorney fees incurred on appeal].) Usually the opinion will award costs to the prevailing party, but as a matter of law, that cost award neither includes attorney's fees nor precludes a party from seeking them in the trial court, (Cal. Rules of Court, rule 8.278(d)(2); 8.89(d)(2).)

On occasion, however, the Court of Appeal will determine entitlement to fees and the amount. This may occur when the entitlement to fees is based

on a private attorney general theory. (Code Civ. Proc., § 1021.5; see, e.g., *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 426.) The appellate court may also determine entitlement to fees on appeal, but remand the issue back to the trial court to determine the reasonable amount of the award. (See, e.g., *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 265.)

The Court of Appeal will also determine the amount of attorney's fees to be imposed as sanctions for a frivolous or otherwise sanctionable appeal. (Code Civ. Proc., § 907; see, e.g., *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 28-38.)

In most state-court appeals, however, it is the trial court that entertains the issue of attorney's fees incurred on appeal. The usual procedure is to file a motion for attorney's fees on appeal with the trial court within 40 days of the issuance of the remittitur (Cal. Rules of Court, rule 3.1702(c); 8.278(c)(1) [unlimited jurisdiction]) or within 30 days (Cal. Rules of Court, rule 8.891(c)(1) [limited jurisdiction].)

That general rule is qualified where the appellate proceeding is a writ petition or an appeal from an interlocutory order. In that situation, the party who prevails in the appellate proceedings is not necessarily the prevailing party on the action as a whole, and so is not entitled to the fees incurred in the appellate court until and unless the action later concludes in favor of that same party. (*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 894, fn. 9.)

In the Ninth Circuit, however, whether a party is entitled to appellate attorney's fees, and the amount, is usually decided by the appellate court and not by the district court. (*Cummings v. Connell* (9th Cir. 2005) 402 F.3d 936, 947.) By local rule the request must be filed with the appellate court within 14 days after the deadline for filing

a petition for Rehearing, i.e., 28 days after the opinion is issued (Fed. Rules App. Proc., Rule 40(a)(1); Ninth Circuit Rule 39-1.6(a).) Once the request is filed, you may also ask the Ninth Circuit to transfer the request back to the district court for its consideration. (Circuit Rule 39-1.8.) If an award is made or denied and the opposing party seeks reconsideration, the Court may refer the issue to its Appellate Commissioner. (Circuit Rule 39-1.9.)

Different deadlines and procedures apply if the basis for the fee award is the Equal Access to Justice Act. (28 USC § 2412(d)(1)(A,B).)

What is the measure of a reasonable award for appellate-level attorney's fees?

To some degree, the reasonableness of fees claimed for appellate work is judged by similar standards that are applied to trial level fees. (See, e.g., *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Association* (2008) 163 Cal.App.4th 550, 564.)

But appellate work is distinct from trial level efforts, and the measure of a reasonable fee award for appellate services reflects the differences. Appellate practice "entails rigorous original work in its own right" and is much more than recycling the points and authorities filed in the trial court. (*Marriage of Shaban* (2001) 88 Cal.App.4th 398; 408-409). Appellate briefs receive much more scrutiny than do trial-level pleadings, and because appellate courts are not bound by same-level appellate courts, the parties can urge modification of case law that is not permitted at the trial court level. Appellate briefing requires exhaustive research and analysis; strategic planning; and very careful drafting. (See, e.g., *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 232-236.) For these and many other reasons, appellate level work can sometimes exceed the hours incurred by trial counsel in the



proceeding below. (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 622-623).

I lost in the trial court but the Court of Appeal reversed and remanded for a new trial in a case. Can I apply for and collect my client's appellate-related fees now as the prevailing party on appeal?

No. You will need to first be the prevailing party in the new trial and then apply for your trial-level and

appellate fees in that court in accordance with California Rules of Court, rule 3.1702(b)(1), which expressly includes fees for services in the trial and “attorney’s fees on an appeal before rendition of judgment in the trial court...”

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