



# Thinking About Temporary Attorneys' Fees?

## Then Consider the Entire Picture!

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Many times in reading a legal publication, I search in vain for the message to be conveyed and not finding it, then look to the bottom line of the legal analysis being made but again it is never evident to the naked eye.

My preference is to pick up a legal publication, read the article, understand the topic and put it in one of my files for future reference. In planning this article, I have chosen to meet this criteria.

Whether new to the practice or one of those who has seen the years of trial and error pass all to quickly, remember first that when choosing temporary relief, it has many advantages but also it has decided disadvantages.

For example, when can you get a hearing date with a sufficient amount of time and will the opposing attorney cooperate with you in coordinating it? Will the time allotted be sufficient? Can the client and witnesses appear at the designated date and time or should depositions be taken in advance? How does the prospect of temporary relief in seeking temporary attorneys' fees fit into your plan of trial strategy, mediation or an early trial date? When choosing to answer these questions, would a meeting with opposing counsel not also advance your goals or a settlement conference with a retired Judge or Magistrate or a trip to family law mediation?

Why not explore these options first or if those avenues seem impractical because of the circumstances of your case then think through the consequences of such a hearing, prepare thoroughly, research the law carefully and remember the following legal

principles:

1. Exhibits to be submitted at a temporary hearing:

- a. C.V.
- b. Date of retainer, amount paid and cost deposit.
- c. Hourly rate.
- d. Copy of retainer Agreement.
- e. An expert witness is necessary if more than one attorney has been counsel of record and in order to prove that there is no duplication of legal services, *Zuckerman v. Hofrichter* 676 So. 2d 41 (Fla. 3rd DCA 1996).
- f. Expert witness testimony is required if the issue is raised that the legal services rendered were truly not beneficial, *Franklin v. Stettin*, 579 So. 2d 245 (Fla. 3rd DCA 1991) and *Tomaino v. Tomaino*, 629 So. 2d 874 (Fla. 4th DCA 1993).

g. Number of hours expended at the hourly rate and then subtracting the retainer.

h. Prepare a Memorandum of Law in support of a Motion for Temporary Attorneys' Fees.

i. Introduce exhibits as to the issues to be researched and discovery to be obtained in order to prepare for trial and with a time estimate. Also estimate preparation and attendance at mediation or a case management conference or pre-trial conference.

j. An exhibit with Financial Affidavits of each party attached and other pertinent financial information.

k. Time and billing records by service of a summary, F.S. 90.956.

l. Temporary litigation affidavit in lieu of or in addition to attorney testimony.

m. Proffer of reasonableness of hours expended and hourly charges incurred or to be incurred, Florida Patient Compensation *Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985) and *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997).

n. Be conversant with 4-1, Client-Lawyer relationship, Fla. R. Reg. Fla. Bar and Chapter 5, Bounds of Advocacy, Goals for Family Lawyers (2004).

2. Attorneys fees must have first been requested in the pleadings or motions at issue for such fees to be awarded in the first place, *Marin v. Marin*, 842 So. 2d 273 (Fla. 3rd DCA 2003), *Bull v. Bull*, 584 So. 2d 171 (Fla. 1st DCA 1991) and *Kratzer v. Reimiller*, 552 So. 2d 1188 (Fla. 5th DCA 1989).

3. The attorney must testify, *Brewer v. Solovsky*, 945 So. 2d 610 (Fla. 4th DCA 2006).

4. Client testimony alone that the fee has been agreed to and paid is insufficient, *Markham v. Markham*, 485 So. 2d 1299 (Fla. 5th DCA 1986).

5. The Court must consider one factor only on which to award fees on the basis of need versus ability to pay: look to the respective financial resources available to each party without that party having to look to and beyond those financial resources which are in the respective custody and control of each party, F.S. 61.16 and *Freid v. Freid* 717 So. 2d 145 (Fla. 5th DCA 1998).

6. Urge that both parties should have equal ability to retain competent counsel and thus to "level the playing field," *Martin v. Martin*, 959 So. 2d 803 (Fla. 1st DCA 2007), *Nichols v. Nichols* 519 So. 2d 620 (Fla. 1988) and *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997).

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7. The amount of fees awarded need not be limited to the fee arrangement between the attorney and client, *Gardner v. Edelstein*, 561 So. 2d 327 (Fla. 1st DCA 1990).

8. Parental gifts may not be imputed to a party for purposes of determining financial ability in order to pay fees, *Martin v. Martin*, 959 So. 2d 803 (Fla. 1st DCA 2007).

9. *Rowe* applies only to past legal services and has no application to prospective legal services or temporary fees pursuant to F.S. 61.071,

*Nudelman v. Nudelman*, 542 So. 2d 486 (Fla. 3rd DCA 1989) and *Martin v. Martin*, 561 So. 2d 1266 (Fla. 3rd DCA 1990).

10. Temporary fees may not be awarded for services rendered in a separate domestic violence action, *Belmont v. Belmont*, 761 So. 2d 406 (Fla. 2nd DCA 2000).

11. A needy spouse requesting temporary fees is not disqualified because he or she has received an initial loan or financial assistance from a third party in order to pay an initial retainer, *Azzarelli v. Pupello*, 555 So. 2d 1276 (Fla. 2nd DCA 1990).

12. Temporary attorneys' fees are credited to the total fees to be paid

by the adverse party, *Von Baillov v. Von Baillov*, 959 So. 2d 821 (Fla. 4th DCA 2007).

13. An award of temporary attorneys' fees may later be challenged on the grounds of necessity and reasonableness, *Couples v. Couples*, 623 So. 2d 585 (Fla. 4th DCA 1993).

14. A client may be requested to repay fees to the adverse party out of equitable distribution, *Derrevere v. Derrevere* 924 So. 2d 987 (Fla. 4th DCA 2006).

15. A party may be precluded from engaging in discovery without first paying a temporary fee, *Rahall v. Cheaig-Rahall*, 937 So. 2d 1223 (Fla. 2nd DCA 2006).

16. A higher hourly rate than the locality of the forum is generally not permitted, 4-1.5(b)(c) Fla. R. Reg. Fla. Bar, *Chandler v. Chandler*, 330 So. 2d 190 (Fla. 2nd DCA 1976).

17. The Court has discretion to award fees to a party from a separately titled marital or non-marital asset of the other party, *Kay v. Kay*, 723 So. 2d 366 (Fla. 3rd DCA 1998).

18. The Order must contain specific *Rowe* findings and also findings of fact as to respective financial ability and disparity in financial circumstances, *Gardner, supra*, *Schwartz v. Schwartz*, 965 So. 2d 832 (Fla. 1st DCA 2007) and *Elliott v. Elliott*, 867 So. 2d 1198 (Fla. 5th DCA 2004).

19. Read into evidence portions of adverse party's deposition as admissions to show the ability to pay, 1.330(a)(2) Fla.R.Civ.P. and 12.330(a)(2) Fla.Fam.L.R.P. and F.S. 90.614(2).

20. The movant must show "need" not merely that the adverse party has greater financial ability, *Satter v. Satter*, 709 So. 2d 617 (Fla. 4th DCA 1998).

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## Member Benchmarks

**Congratulations** to newlywed and Section Executive Council member, **John Schutz** of Schutz & White LLP, West Palm Beach, who married Ashley Fogg on January 3, 2009 in West Palm Beach!

**Congratulations** also go out to **Cynthia Greene** of Greene Smith and Associates, PA who was named Naifeh & Smith's 2009 Best Marital and Family Lawyer in Miami!

**Congratulations** on a job well done! **Ron Bornstein** of Palm Beach County is receiving the 2009 Family Law Award from Legal Aid Society, Palm Beach County at the Legal Aid's Pro Bono Recognition Evening, May 9th, 2009.

**Good luck** to the following Section members:

Executive Council member, and FAMSEG Editor, **Robin J. Scher**, has become associated with The Law Firm of Charles D. Jamieson, PA, located in West Palm Beach. Ms. Scher will continue to practice all aspects of Marital and Family Law. Contact Ms. Scher at 561/478-0312 or by email at [rjscher@cjamesonlaw.com](mailto:rjscher@cjamesonlaw.com) regarding FAMSEG.

Executive Council member, and Chair of the Rules & Forms Committee, **Ron Bornstein**, has joined Hodgson Russ LLP as a Partner in their Boca Raton offices. Mr. Bornstein will continue to handle complex marital and family law matters, probate and guardianship matters. Mr. Bornstein also serves as a mediator, guardian ad litem and attorney ad litem ([RBornstein@hodgsonruss.com](mailto:RBornstein@hodgsonruss.com)).

**Monica C. Pigna** has become a new member of the law firm of West, Green and Associates, P.L. in Orlando, Florida. Read Ms. Pigna's article in this issue.