July, 2015

Drafting NY Civil-Litigation Documents: Part 43—Motions for Attorney Fees

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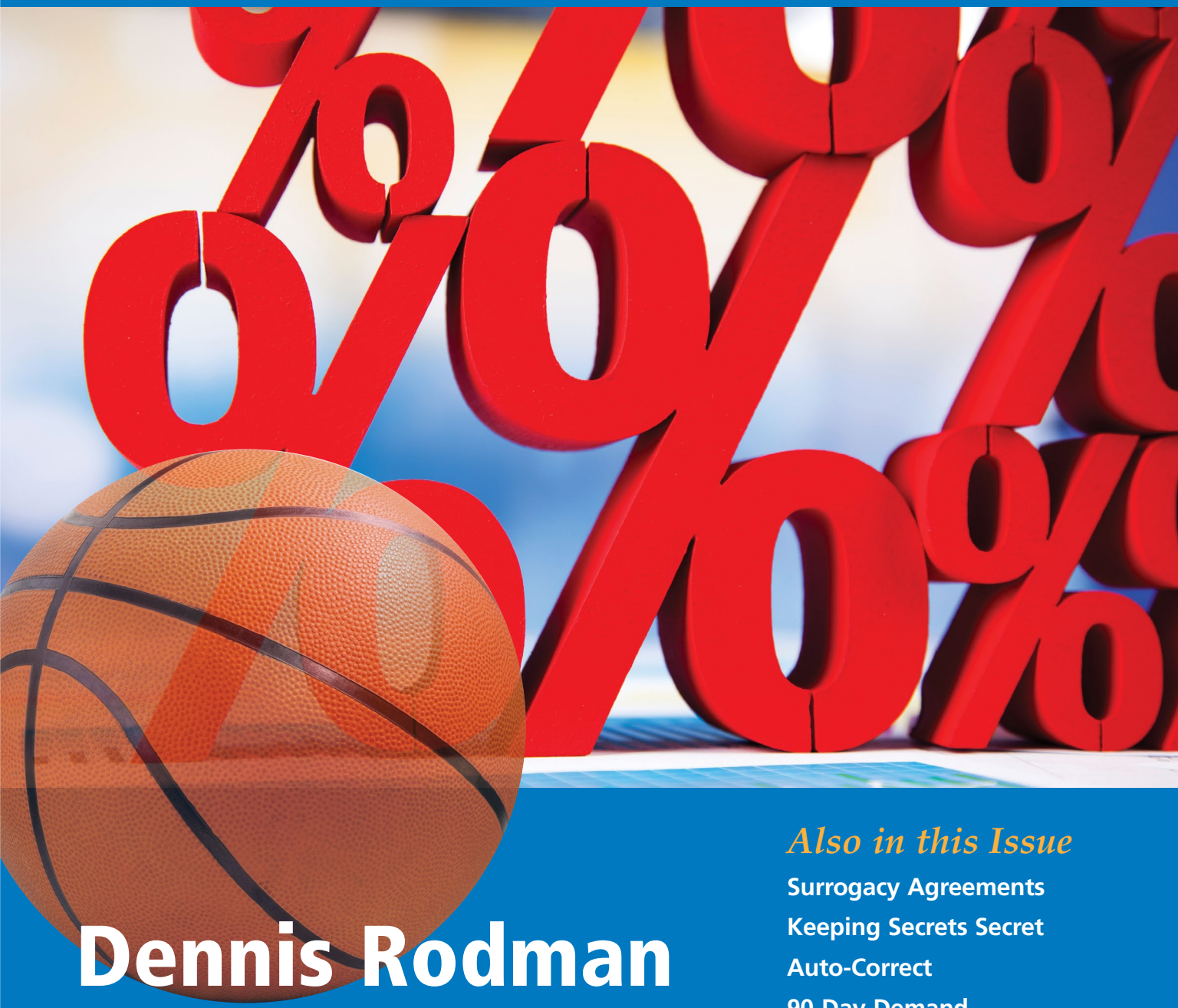
NEW YORK STATE BAR ASSOCIATION

Journal

JULY/AUGUST 2015
VOL. 87 | NO. 6



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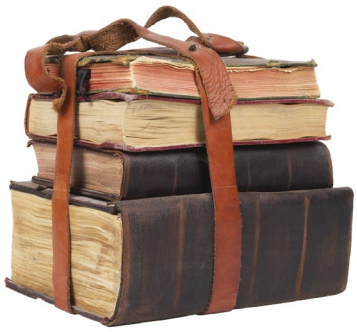

Drafting New York Civil-Litigation Documents: Part XLIII — Motions for Attorney Fees

The *Legal Writer* continues its series on civil-litigation documents. In the last issue of the *Journal*, we discussed trial and post-trial motions. In this issue and the next, we'll discuss motions for attorney fees, sometimes called attorney's fees or attorneys' fees, but which the *Legal Writer* calls attorney fees because the fees belong to the client, not the attorney. We'll provide a brief historical overview of attorney fees and how courts calculate attorney fees, including the percentage-of-recovery method, the lodestar method, and the pure factor-based method. We'll also address what it means to be a prevailing party, the contents of your attorney-fee motion, your papers opposing an attorney-fee motion, and attorney-fee hearings.

Litigating a case is expensive. For clients, attorney fees "probably comprise the greatest expense"[1] of litigation. As a practitioner, you need to know how to recover your attorney fees so that your client will be reimbursed. But moving for attorney fees can be a daunting task. The law isn't uniform; it's murky and constantly changing. Different courts, and different judges in those courts, use different methods to calculate attorney fees: "[T]he only consistent aspect of court-awarded attorneys' fees is the sheer inconsistency of the fee-setting process."[2] In this issue, the *Legal Writer* will clarify some issues arising in moving for attorney fees.

Attorney Fees: A Brief History

The United States initially followed the English rule on attorney fees: The losing party had to pay the prevailing party's attorney fees.[3] But in 1976, the Supreme Court rejected the English rule and created its own rule: Each party must pay its own attorney fees.[4] The Supreme Court recognized that "'even if [the American rule is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.'"[5] In developing the American rule, the Court considered two public policies: (1) Parties shouldn't be punished for suing; and (2) the court system would be substantially burdened if courts had to decide what constitutes reasonable attorney fees.[6] Soon, an anti-American rule movement developed. Its followers argued that "'under [the American rule,] the successful party is never fully compensated because such party must pay [its] counsel fees which may be as much or more than the total recovery in the suit.'"[7] Despite the anti-American-rule movement, the American rule still stands.

Exceptions to the American Rule

Judges and legislators across the United States have carved out six equitable exceptions to the American rule, allowing litigants to recover their legal fees.[8] The exceptions cover (1) contracts; (2) bad faith; (3) common funds; (4) substantial benefit; (5) contempt; and (6) attorney-fee statutes.[9]

Contract Exception. Parties may include an attorney-fee provision in a contract in the event they'll have to litigate on the contract. Courts will enforce a contractual attorney-fee provision unless the provision violates public policy.

Bad-Faith Exception. Courts may award attorney fees if the parties or their attorneys act in bad faith "in the filing of the lawsuit . . . [or] before or after the course of the proceeding."[10] Courts have defined "bad faith" as conduct that's unwarranted, baseless, or vexatious.[11] The bad-faith exception aims to deter "'illegitimate behavior in the courtroom, and sometimes outside it.'"[12]

Common-Fund Exception. Courts apply the common-fund exception in antitrust litigation, mass-disaster torts, and class actions. Under the common-fund exception, courts are "permit[ted] to extract the attorney's fee from the recovery fund awarded to a class of prevailing litigants."[13] Courts will "dispers[e] the litigation costs over the range of beneficiaries not involved in the litigation, but who benefit from the fund being drawn from [it] through court order."[14] Before a court disperses the litigation costs, three conditions must be met: "[A] fund must exist; . . . a court must be able to exert control over the fund; and . . . fund beneficiaries must be identifiable so the court can shift the attorney fees to those benefitting from the litigation."[15]

Substantial-Benefit Exception. The substantial-benefit exception is similar to the common-fund exception: Nonparties must share the litigation expenses; absent parties won't be enriched unjustly at the expense of the party bringing the lawsuit.[16] A court will exert control over an entity made up of "beneficiaries in order to disperse the fee award."[17] The substantial-benefit exception applies to pecuniary and non-pecuniary benefits.[18] Unlike the

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common-fund exception, no fund exists under the substantial-benefit exception.

Contempt Exception. A party who enforces a judgment in a contempt proceeding may collect its attorney fees in enforcing the contempt order.[19]

Attorney-Fee Statutes. More than 200 federal and about 2,000 state statutes provide for attorney-fee awards.[20] The statutes cover, among other things, civil rights, consumer protection, employment, and environment-protection lawsuits.[21] Under most of these statutes, only a successful party may recover its attorney fees.[22]

Read the statute carefully if you're moving to recover attorney fees under a statute. Federal, state, and city statutes differ. Some statutes allow for an attorney-fee award only in limited cases. The New York City Human Rights Law, for example, authorizes attorney fees in any civil action brought under its provisions.[23] The New York State Human Rights Law, however, provides for attorney fees only in cases alleging housing discrimination.[24]

Unless otherwise noted, the focus of this column will be on the contract exception to the American rule.

Attorney Fees: An Overview

The general rule in New York is that "attorneys' fees are incidents of litigation and a prevailing party may not collect from the loser unless an award is authorized by agreement between the parties, statute, or court rule."[25]

Demand for Attorney Fees. Before moving for attorney fees, make sure you've adequately demanded attorney fees as a claim in your complaint or as a counterclaim in your answer.[26] A court will determine that you haven't adequately pleaded your claim for attorney fees if your demand for attorney fees is contained only in your wherefore clause.[27] Move for attorney fees before entry of a judgment.[28] The *Legal Writer* will discuss the contents of your attorney-fee motion in the next issue of the *Journal*.

Ultimate Outcome. Your attorney-fee motion is premature if you've brought it before the "ultimate outcome" of a controversy has been reached irrespective whether it's on the merits.[29] An ultimate outcome is reached when it's clear that a party can't or won't commence another action on the same grounds.[30]

Different courts and different judges in the same courts use different ways to calculate attorney fees.

If your adversary brings a second case against you but on different grounds from the first case, you might be entitled to attorney fees for successfully defending the first case.[31]

Prevailing Party. Practitioners move for attorney fees based on a contract, statute, or court rule that allows a prevailing party to recover its reasonable attorney fees. After the litigation has concluded, practitioners who contend that their client is a prevailing party to the litigation will move to recover their attorney fees.

It isn't always self-evident who is the prevailing party.[32] The New York Court of Appeals has defined the prevailing party as the party who has achieved the "'central relief sought.'"[33] Whether you're a prevailing party "requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope."[34]

You might be the prevailing party even if you didn't prevail on all your claims.[35] After a court considers the true scope of the litigation, the court will likely determine that you're the prevailing party if you've obtained monetary relief and your adversary didn't.[36]

A court that ultimately dismisses your claim or counterclaim will likely determine that you're not the prevailing party.[37]

A court will likely find that you're not the prevailing party if your adversary, the plaintiff, obtained monetary relief on one of its claims but you won, in part, your motion to dismiss on the remaining claims in plaintiff's complaint.[38]

Mixed Outcome. Sometimes it's hard to determine who's the prevailing party if each party secures mixed results from the litigation. If the outcome of the litigation isn't "substantially favorable" to either side, neither party will be entitled to attorney fees.[39]

Reasonable Fees. A court may enforce an attorney-fee award only to the extent that the attorney fees are "reasonable and warranted for the services actually rendered."[40] The reason a court's calculation of attorney fees is confusing is the "amorphous concept of reasonableness. . . . With no definitive answer to this question, litigants and attorneys are left to rely on the subjective intuition of the judge rendering the fee award."[41] This subjectivity has "resulted in inconsistency, unpredictability, and a waste of judicial resources."[42]

Methods for Calculating Attorney Fees

Different courts and different judges in the same courts use different ways to calculate attorney fees.[43] Courts throughout the United States use six different methods, or variations of these methods, in calculating reasonable attorney fees: the percentage-of-recovery method; the lodestar method; the lodestar cross-check method; the pure factor-based method; the multifactor lodestar method; and the strict lodestar method. Other jurisdictions, such as Maryland and Nevada, give judges the discretion to choose the best method to calculate attorney fees.

Before you bring your motion for attorney fees (or oppose a motion for fees), look at the court's or the individual judge's earlier decisions to determine which method the court uses to calculate attorney fees.

Percentage-of-Recovery Method. Under this method, the attorney-fee award is based on a variable percentage of the amount the attorney recovered for the client. Courts that apply this method have "complete discretion

in selecting the appropriate percentage owed to the attorneys."[44] Courts determine what percentage to award an attorney by relying on such factors as the size of the attorney's monetary recovery and the "amount of benefit conferred" on the client.[45]

Lodestar Method. Under the lodestar method, courts arrive at a lodestar amount by multiplying the number of hours that an attorney spent litigating the case by the attorney's reasonable hourly rate — the time-rate calculation.[46] A court may adjust the lodestar amount "upward or downward . . . depending [] on the contingent nature of the case and the quality of the attorney's work."[47] Courts don't use the *Johnson* factors, explained below, in this calculation.[48]

Lodestar Cross-Check Method. This method combines the percentage-of-recovery method with the lodestar method.[49]

Pure Factor-Based Method. In the pure factor-based method (also referred to as the multifactor method), the court considers 12 factors:

1. the time and labor required for the litigation;
2. the novelty and difficulty of the questions presented in the case;
3. the skill required to perform the legal service properly;
4. the attorney's avoiding other work because the attorney accepted this case;
5. the customary fee charged by attorneys in the community for similar cases;
6. whether the attorney's fee is fixed or contingent;
7. the time limitations imposed by the client or the circumstances;
8. the amount involved and the results obtained;
9. the attorney's experience, reputation, and ability;
10. the undesirability of the case;
11. the nature and length of the attorney's professional relationship with the client; and
12. fee awards in similar cases.[50]

These factors are known as the *Johnson* factors.[51]

Disagreements among the courts arise in "how and when to apply the *Johnson* factors when setting an attorney's hourly compensation rate and when determining which hours were reasonably expended."[52]

Multifactor Lodestar Method. Under this method, courts determine the initial lodestar amount, excluding duplicative or remedial hours from its calculation. Courts will then adjust the time-rate calculation upward or downward based on the facts and circumstances of the case.[53] A majority of state courts, including New York courts, will then "use the *Johnson* factors to adjust the product of the time-rate lodestar calculation."[54]

A minority of states, however, use a multiplier to adjust the time-rate calculation.[55] A multiplier is a "'factor applied to the lodestar amount to arrive at the final fee award.'"[56]

Strict Lodestar Method. Under the strict lodestar method, courts incorporate the *Johnson* factors into the time-rate lodestar calculation. Under this method, "'very little room for adjustment'" exists after the court calculates the time-rate lodestar method.[57]

Discretion. Some jurisdictions leave it to the judge's discretion to decide which method to use.[58]

The Practice in Federal and State Courts

The United States Supreme Court has adopted the following approach: It combines the lodestar method with the *Johnson* factors.[59] The Court's approach is to multiply the number of hours the attorney expended in the litigation by the attorney's reasonable hourly rate. The Court has explained that courts may use the *Johnson* factors to adjust the "time-rate lodestar upward or downward."[60] The Court has noted that many of the *Johnson* factors "'usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.'"[61]

Federal and state courts "overwhelmingly use the lodestar method to calculate attorneys' fees in fee-shifting cases."[62] Federal courts use the strict lodestar method.[63] Most state courts apply the multifactor lodestar method by using the *Johnson* factors to "adjust the time-rate calculation upward or downward based on the facts of the particular case."[64]

Federal district courts in the Second Circuit now refer to the lodestar method as the "presumptively reasonable fee."[65]

In the Second Circuit, judges may use either the percentage-of-recovery method or the lodestar method in common-fund cases.[66] In other circuits, courts have the discretion to choose between the percentage-of-recovery method or the lodestar method in common-fund cases.[67] Most jurisdictions favor the percentage-of-recovery method in common-fund cases.[68]

The First, Second, Third, and Fourth Departments in New York use the multi-factor lodestar method — by applying the *Johnson* factors — to compute attorney fees.[69] In class actions, the First, Second, Third, and Fourth Departments in New York use the lodestar method to calculate attorney fees.[70]

> A court may enforce an attorney-fee award only to the extent that the attorney fees are "reasonable and warranted for the services actually rendered."

Knowing how to apply the multifactor lodestar method in New York will be the focus of the next issue of the *Journal*, including how to compose (or oppose) the attorney-fee motion, and how to conduct (or defend) an attorney-fee hearing.

In the next issue of the *Journal*, the *Legal Writer* will continue with motions for attorney fees. ■

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1. David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 Ind. Int'l & Comp. L. Rev. 583, 587 (2005) (citing John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1595 (1993)).

2. Matthew D. Klaiber, *A Uniform Fee-setting System for Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-based Mathematical Model*, 66 Md. L. Rev. 228, 231 (2007).

3. Jacob Singer, Note, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 St. John's L. Rev. 693, 695 (2010).

4. *Id*. (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796)).

5. *Id*.

6. *Id*. at 695–96 (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)).

7. *Id*. at 696 (quoting Joan Chipser, Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319, 321 (1977)).

8. *Id*. (citing Root, *supra* note 1, at 585).

9. *Id*.

10. Root, *supra* note 1, at 585.

11. *Id*. at 586.

12. *Id*. (quoting John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9, 29 (1984) available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3748&context=lcp (last visited June 15, 2015)).

13. Klaiber, *supra* note 2, at 233.

14. Root, *supra* note 1, at 586.

15. *Id*. at 587 (citing Vargo, *supra* note 1, at 1581).

16. *Id*.

17. *Id*.

18. *Id*.

19. *Id*.

20. *Id*. at 588.

21. *Id*.

22. *Id*.

23. 2 Edward L. Birnbaum, Carl T. Grasso & Ariel E. Belen, New York Trial Notebook § 38:160, at 38-66 (2010) (citing *Jattan v. Queens Coll. of City Univ. of N.Y.*, 64 A.D.3d 540, 541, 883 N.Y.S.2d 110, 112 (2d Dep't 2009)).

24. *Id*.

25. Aaron J. Broder, Trial Handbook for New York Lawyers § 34:6, at 743 (3d ed. 1996) (citing *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 366, 548 N.E.2d 903, 904 (1989); *Gottlieb v Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 464, 605 N.Y.S.2d 213, 218, 626 N.E.2d 29, 34 (1993)).

26. Birnbaum, *supra* note 23, § 38:160, at 38-66.

27. *Id*. § 38:160, at 38-64 (citing *Vertical Computer Sys., Inc. v. Ross Sys., Inc.*, 59 A.D.3d 205, 206, 873 N.Y.S.2d 551, 553 (1st Dep't 2009)).

28. *Id*. § 38:160, at 38-66 (citing *Golden v. Multigas Distrib., Ltd.*, 256 A.D.2d 215, 216, 683 N.Y.S.2d 16, 17 (1st Dep't 1998) ("As for plaintiff's claim for attorneys' fees, there is no indication in the record that plaintiff made an application to the trial court for a determination of attorneys' fees recoverable under the parties' contract at any time prior to the entry of judgment, or that the trial court made any ruling precluding plaintiff from making such an application. The omission of a provision for attorneys' fees from the judgment is therefore not due to any error by the trial court, and we have no occasion to disturb it.")).

29. *Elkins v. Cinera Realty*, 61 A.D.2d 828, 828, 402 N.Y.S.2d 432, 433 (2d Dep't 1978).

30. *Roxborough Apt. Corp. v. Becker*, 177 Misc. 2d 408, 411, 676 N.Y.S.2d 821, 822 (Hous. Part Civ. Ct. Kings County 1998) (citing *Elkins*, 61 A.D.2d at 828, 402 N.Y.S.2d at 433; *accord N.V. Madison, Inc. v. Saurwein*, 103 Misc. 2d 996, 998–99, 431 N.Y.S.2d 251, 253 (App. Term 1st Dep't 1980).

31. *Scotia Assocs. v. Bond*, 126 Misc. 2d 885, 887, 484 N.Y.S.2d 479, 482 (Civ Ct. N.Y. County 1985).

32. Birnbaum, *supra* note 23, § 38:160, at 38-64.

33. *Id*. (quoting *Nestor v. McDowell*, 81 N.Y.2d 410, 416, 599 N.Y.S.2d 507, 510, 615 N.E.2d 991, 994 (1993).

34. *Excelsior 57th Corp. v. Winters*, 227 A.D.2d 146, 147, 641 N.Y.S.2d 675, 676 (1st Dep't 1996).

35. Birnbaum, *supra* note 23, § 38:160, at 38-65 (citing *Botwinick v. Duck Corp.*, 267 A.D.2d 115, 117, 700 N.Y.S.2d 143, 145 (1st Dep't 1999)).

36. *Id*.

37. *Id*. (citing *Vertical Computer Sys.*, 59 A.D.3d at 206, 873 N.Y.S.2d at 553).

38. *Townhouse Stock LLC v. Coby Housing Corp.*, 2007 N.Y. Slip Op. 32235(U), *1, 2007 WL 2175623, at *1 (Sup. Ct. N.Y. County 2007) ("Here, defendants succeeded in their dismissal motions, but they were not awarded any monetary relief. Thus, it is the plaintiffs that are the 'prevailing parties' in this case because they prevailed on the central claim in this action and were awarded substantial relief in connection with that claim.").

39. *Chainani v. Lucchino*, 94 A.D.3d 1492, 1494, 942 N.Y.S.2d 735, 737 (4th Dep't 2012) (citing *Berman v. Dominion Mgt. Co.*, 50 A.D.3d 605, 605, 859 N.Y.S.2d 407, 408 (1st Dep't 2008)); *LGS Realty Partners LLC v. Kyle*, 29 Misc. 3d 44, 46, 909 N.Y.S.2d 859, 860 (App. Term 1st Dep't 2010) (citing *Pelli v. Connors*, 7 A.D.3d 464, 464, 777 N.Y.S.2d 805, 805 (1st Dep't 2004); *Walentas v. Johnes*, 257 A.D.2d 352, 354, 683 N.Y.S.2d 56, 59 (1st Dep't), *appeal dismissed*, 93 N.Y.2d 958, 958, 694 N.Y.S.2d 635, 635, 716 N.E.2d 700, 700 (1999)).

40. Birnbaum, *supra* note 23, § 38:160, at 38-65 (citing *Yonkers Rib House, Inc. v. 1789 Cent. Park Corp.*, 63 A.D.3d 726, 726, 880 N.Y.S.2d 148, 149 (2d Dep't 2009)).

41. Klaiber, *supra* note 2, at 229.

42. *Id*.

43. *Id*. at 228; *see generally* Michael Kao, Comment, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. Rev. 825 (2004); Justin Lamb, Comment, *The Lodestar Process of Determining Attorney's Fees: Guiding Light or Black Hole?*, 27 J. Legal Prof. 203 (2003); Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977) (cited in Klaiber, *supra* note 2, at 229, 237).

44. Klaiber, *supra* note 2, at 231.

45. *Id*. at 235.

46. *Id*. at 236 (citing *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117–18 (3d Cir. 1976) (*Lindy II*)).

47. *Id*.

48. *Id*. at 244 n. 111.

49. *Id*. at 231, 249–50.

50. *Id*. at 230–31 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)).

51. *Id*. at 237 (discussing *Johnson*, 488 F.2d at 717–20).

52. *Id*. at 242.

53. *Id*. at 242, 244.

54. *Id*. at 244.

55. *Id*. at 245.

56. *Id*. at 243 n. 102 (quoting Kao, *supra* note 43, at 829).

57. *Id*. at 243 (quoting Kao, *supra* note 43, at 834).

58. *Id*. at 231, 245 (noting that Maryland and Nevada use this approach).

59. *Id*. at 238 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983)); *Blanchard v. Bergeron*,

489 U.S. 87, 94 (1989).

60. *Id*.

61. *Id*. at 239 (quoting *Hensley*, 461 U.S. at 434 n.9).

62. *Id*. at 242.

63. *Id*.

64. *Id*.

65. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany & Albany County Bd. of Elections*, 522 F.3d 182, 183 (2d Cir. 2008).

66. Klaiber, *supra* note 2, at 246 n.130 (citing *Wal-Mart Stores, Inc., Visa U.S.A. Inc.*, 396 F.3d 96, 121–22 (2d Cir. 2005)).

67. *Id*. at 246–47.

68. *Id*.

69. *S.T.A. Parking Corp. v. Lancer Ins. Co.*, 128 A.D.3d 479, 479, 2015 WL 2237539, at *1 (1st Dep't 2015); *Morgan & Finnegan v. Howe Chem. Co., Inc.*, 210 A.D.2d 62, 63, 619 N.Y.S.2d 719, 720 (1st Dep't 1994); *In re Rahmey v. Blum*, 95 A.D.2d 294, 300–05, 466 N.Y.S.2d 350, 356–60 (2d Dep't 1983); *Katzer v. County of Rensselaer*, 1 A.D.3d 764, 766, 767 N.Y.S.2d 474, 476–77 (3d Dep't 2003); *Podhorecki v. Lauer's Furniture Stores, Inc.*, 201 A.D.2d 947, 947–48, 607 N.Y.S.2d 818, 819–20 (4th Dep't 1994).

70. *Matakov v. Kel-Tech Constr., Inc.*, 84 A.D.3d 677, 678, 924 N.Y.S.2d 344, 346 (1st Dep't 2011) (applying lodestar method in class action) (citing *Nager v. Teachers' Retirement Sys. of City of N.Y.*, 57 A.D.3d 389, 390, 869 N.Y.S.2d 492, 493 (1st Dep't 2008), *lv. denied*, 13 N.Y.3d 702, 702, 886 N.Y.S.2d 93, 93, 914 N.E.2d 1011, 1011 (2009)); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 75, 808 N.Y.S.2d 766, 776 (2d Dep't 2006); *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 165–66, 865 N.Y.S.2d 706, 708–09 (3d Dep't 2008) (applying lodestar in class action but reducing amount of attorney-fee award because it exceeded what plaintiff sought), *aff'd* ,15 N.Y.3d 375, 379, 912 N.Y.S.2d 504, 505, 938 N.E.2d 937, 938 (2010) (noting that New York does not apply common-fund exception to class actions); *Ciura v. Muto*, 24 A.D.3d 1209, 1210, 808 N.Y.S.2d 842, 843 (4th Dep't 2005) (applying lodestar method in class action but noting that courts [in the Fourth Department] should "consider factors such as 'the novelty and difficulty of the questions presented . . . [and] the skill requisite to perform the legal services properly'") (citations omitted).