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Drafting NY Civil-Litigation Documents: Part 44—Motions for Attorney Fees Continued

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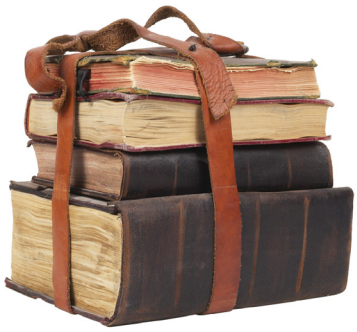

Drafting New York Civil-Litigation Documents: Part XLIV — Motions for Attorney Fees Continued

The *Legal Writer* continues its series on civil-litigation documents. In the last issue of the *Journal*, we discussed attorney-fee motions: determining prevailing-party status, resolving which method to use in calculating attorney fees, and practicing in federal and state courts. The *Legal Writer* discussed the six methods for calculating 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.

In this issue, the *Legal Writer* focuses on the multifactor lodestar method to calculate attorney fees. This column will discuss how to compose and oppose attorney-fee motions and how to conduct and defend attorney-fee hearings. This column isn't about suing your client for unpaid legal fees.[1] It's about how your clients can recoup your fees from their adversaries.

Attorney-Fee Motion

Before moving for attorney fees, make sure you're entitled to attorney fees under a contract, statute, or court rule.

Burden. In your motion papers, you must explain, with specificity, that your legal fees are reasonable.

Specificity is important because your motion papers might push your adversary to settle. And if you're specific but your adversary doesn't oppose your motion, or some aspects of your motion, you can win outright, without a hearing, or at least limit the attorney-fee hearing to the issues your adversary opposed.

Motion Papers. Your motion for attorney fees must comport with CPLR 2101 and 2214. Your papers must contain a notice of motion and an affidavit (or an attorney's affirmation).

State in your motion papers whether you're moving to enforce a contract, statute, court rule, or any other exception to the American rule. Include as an exhibit in your attorney-fee motion the contract, statute, or court rule on which you're relying.[2] In a landlord-tenant proceeding, for example, include the residential lease as an exhibit.[3]

If the contract, statute, or court rule entitled the prevailing party to recover its attorney fees, explain why your client is the prevailing party.

Include your legal bills as an exhibit in your motion. In your bills, affirmation, or both, provide the total number of hours you expended on the case and the total amount of fees you're seeking. You may include individual bills or a summary of the bills.

Many practitioners create a chart outlining all the attorney fees. A chart might include the dates the legal services were expended, the hours expended, the work completed, the individual who completed the work, that individual's hourly rate for those services, the costs and expenses, and any other explanation of those services.

Explain whether a partner, associate, or paralegal provided the services to your client. Also explain whether a senior partner supervised a junior partner and provide the hours and fees for those services.[4]

Explain how your exhibits — bills and any other documents — are admissible under the business records exception to the hearsay rule.

> In your motion papers, you must explain, with specificity, that your legal fees are reasonable.

If your bills aren't concise and self-explanatory, explain the contents of your bills in your affirmation.

Include any other exhibit that'll help the court decide the motion in your favor.

Be aware that some statutes have a cap on attorney fees.[5]

Method of Computing the Fees. Make it easy for the court to rule for your client. Compute your legal fees for the court.

Under the multifactor lodestar method, determine the initial lodestar amount. Exclude any duplicative, excessive, or unnecessary hours from the calculation.[6] Tell the court what hours you've excluded as duplicative, excessive, or unnecessary. Telling the court what charges you've excluded will show you're honest. Multiply the number of hours that you (and other attorneys or paralegals in your

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firm) spent litigating the case by that respective individual's reasonable hourly rate. Adjust the calculation upward or downward based on the facts and circumstances of the case. Then use the *Johnson* factors to adjust the calculation.[7]

In applying the *Johnson* factors, explain in your motion papers the time and labor necessary to litigate the case. If the case involved a novel or difficult legal issue, explain how the issue was novel or difficult. Tell the court what skills were required of you to perform the legal services. Explain whether some legal services required more skills than other services. Explain what cases you rejected because you accepted this case. Determine the customary fee that other attorneys in your community charge for similar cases, perhaps with an affidavit from an expert. Explain how your legal fee is similar to or different from the customary fee in your community. Explain whether your fees were fixed or contingent. Explain the time limits your client or the circumstances of the case imposed on you. Discuss the amount sought in the litigation and the results you obtained for your client. Also discuss your experience, reputation, and ability as an attorney; include the experience, reputation, and ability of any other attorneys or paralegals who worked on the case. Address the undesirability of the case. Explain the nature and length of your professional relationship with your client. Discuss fee awards in similar cases.

Discounted Fees. If you gave your client a discounted rate for your legal services, ask the court in your motion papers to award you the higher, undiscounted fee.[8] Regardless why you gave your client a discount — your client is a great client who gave you lots of business or your client has had financial setbacks — ask the court to award you the higher rate.

A court may assess an award at a rate greater than the rate in your fee agreement if the rate — the undiscounted rate — is reasonable. Argue in your motion papers that it's not about what you and your client agreed to in terms of your attorney fees but what's the reasonable fee: "The criterion for the court is not what the parties agree but what is reasonable."[9]

Argue in your motion papers that if the court awards you the discounted rate rather than the undiscounted rate, the award would result in a windfall to your adversary — the losing party.[10] Also argue that the discounted rate doesn't reflect the reasonable attorney fees to which you're entitled.

Argue that what you did in reducing your fees is similar to what other attorneys do for poor clients.

Argue that attorneys who reduce their fees for poor clients shouldn't be penalized.

Pro Bono Work. Even if you did pro bono legal work, argue in your motion papers that it's irrelevant that no one paid your fees: "What counts is whether the attorney's expenditure of time and effort lead to an obligation to pay fees, and sometimes, as in the case of pro bono work on a prevailing party's behalf, a client need not incur an obligation to pay attorney fees."[11]

Argue that just because you did pro bono work doesn't mean the court should reduce the legal-fee award.[12]

Argue for public policy reasons that you're entitled to your attorney fees irrespective whether your client is rich or poor. If you're relying on a statute for your attorney-fee motion, argue that no legislature intended compensation only for attorneys who had clients who could afford their fees.

Someone Else Paid the Fees. If someone other than your client paid your client's legal fees, explain in your motion papers that you're still entitled to the attorney fees.[13] Argue in your motion papers that it's irrelevant who paid your attorney fees. What's relevant is that your time and effort "lead to an obligation to pay fees."[14]

Fees for Appellate Work. An attorney-fee award may include an award for attorney fees incurred in doing appellate work for your client.[15] In your motion papers, argue that the court award you attorney fees for the time you spent on appellate work.[16]

Fees on Fees. In your motion papers, seek fees on fees: getting compensated for moving for attorney fees.[17] It means you're asking the court for fees for the time you expended in drafting, researching, and compiling your attorney-fee motion. If the court orders an attorney-fee hearing, it also means that you're seeking fees for the time you expend at the hearing. The rationale for obtaining fees on fees is that you should be "compensated for [the] time [you] spent proving the value of [your] services."[18]

At an attorney-fee hearing, you may call any witness with relevant and probative evidence to testify in a question-and-answer format. Most practitioners testify in the narrative.

But a court may award you fees on fees only if a statute or agreement provides for fees on fees.[19] Your agreement — such as a contract or lease — must "contain unambiguous language providing for the recovery of fees on fees."[20]

In your attorney-fee motion, seek fees on fees even if you don't yet know what hours you've expended in putting together your motion and whether

you'll need to reply to your adversary's opposition papers. Request fees on fees even if you don't yet know whether the court will order an attorney-fee hearing. In your motion papers, reserve your rights to obtain fees on fees. *Example:* "Tammy Jerome reserves her right to seek fees on fees in moving for attorney fees and any time expended at any attorney-fee hearing."

Explain what work you or anyone at your firm has done for the attorney-fee motion. Attach any bills as an exhibit to your motion.

Contingency-Fee Agreements. A contingency-fee agreement is valid and enforceable in New York.[21] A contingency-fee agreement is "[a]n agreement concerning an attorney's compensation, contingent upon [the attorney's] success and payable out of the proceeds of the litigation."[22] A contingency-fee agreement isn't a "limitation on recovery."[23] Argue in your motion papers that you're entitled to your attorney fees even if you agreed to have your client pay you a contingency fee.[24] Attach your agreement as an exhibit to your motion.

Interest on Fees. Under CPLR 5004, you're entitled to collect interest on unpaid attorney fees at the rate of nine percent, "except where otherwise provided by statute." Be aware that other statutes might calculate interest at a different rate than nine percent.

An award of attorney fees doesn't "mature until the underlying action or proceeding has been determined."[25] Thus, interest begins to accrue when the case is resolved in your favor.

Under CPLR 5001(b) "interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single intermediate date." Determine the intermediate date: the date the action or proceeding has been determined and the date of the court's decision on the attorney-fee motion.

Consider this scenario: A court dismisses a landlord-tenant proceeding on March 20, 2009. Assume that the tenants prevailed and are now seeking attorney fees for $13,874.17. Also assume that the court's decision on the attorney-fee motion is July 14, 2009. Here's how one court calculated interest on the fees:

> The intermediate date in the 116 day period between March 20, 2009 and July 14, 2009 is May 17, 2009, the 58th day. To calculate interest, the sum of $13,874.17 is multiplied by nine percent (.09) legal interest . . . for a total of $1248.67. The sum of $1248.67 is then multiplied by 58 and divided by 365, the number of days in a year, for a total interest of $198.41. Accordingly, $198.41 in interest is added to $13,874.17 in attorney fees, for a total final money judgment in [tenant] respondent's favor of $14,072.58.[26]

Assuming that the court awards you attorney fees and interest, the court will calculate the interest for you. If you want to help the court in determining the interest (and you want to impress the court), provide the calculations in your motion papers. Your impediment in providing an accurate calculation of the interest is that you don't yet know when the court will decide your attorney-fee motion.

Opposing an Attorney-Fee Motion

Generally, your burden in opposing your adversary's fee motion is to show that the attorney fees aren't reasonable. Explain — with facts — why the fees are unreasonable.

If you don't oppose your adversary's fee motion, the court will assume that you owe the fees. Whatever you don't oppose may not be raised at a hearing.

Be specific in your opposition papers. Make cogent arguments. Use your adversary's bills to challenge the fees.

In opposing your adversary's attorney-fee motion, argue that your adversary hasn't met its prima facie burden in proving that the fees are reasonable. Provide a basis for your argument.

Argue that your adversary never sought attorney fees. Argue that your adversary never asserted a claim for attorney fees in its complaint (or in its petition, if the case is a special proceeding). Or, argue that your adversary never asserted a counterclaim for attorney fees in its answer.

Argue that your adversary isn't entitled to attorney fees under a contract, statute, or court rule (or any other exception to the American rule). If true, argue that your adversary hasn't provided a copy of the contract in its motion papers.

Argue that the case hasn't yet concluded; thus your adversary isn't entitled to attorney fees.[27]

If your adversary is relying on a contract, statute, or court rule that entitles your adversary to attorney fees because it's a prevailing party, argue that your adversary isn't a prevailing party.

Attack your adversary's exhibits. If your adversary included its bills but didn't establish that they're business records under the business-records exception to the hearsay rule, argue that the documents are inadmissible.

Argue that your adversary's fees — the unsuccessful claims your adversary pursued — should be excluded.[28] Explain the unsuccessful claims.

> If you don't oppose your adversary's fee motion, the court will assume that you owe the fees.

Argue that the fees for your adversary's unsuccessful motions also be excluded.[29]

Argue that excessive, redundant, and unnecessary fees be excluded from the fee calculation.[30]

In arguing that your adversary's fees are excessive, attack your adversary's (and any other partner's, associate's, or paralegal's) hourly rate. Attack the total amount your adversary is seeking. If a senior partner

charged the partner's hourly rate for services that a paralegal could have done — made photocopies or served papers — explain how the partner's fees are excessive.

In arguing that your adversary's fees are duplicative, tell the court to exclude those fees from the attorney-fee calculation. Your adversary double-billed — your adversary billed twice for work that was done once. If your adversary billed for trial preparation even after trial had already started, argue that those fees be excluded from any fee award.[31]

In arguing that your adversary's fees are unnecessary, tell the court which fees should be excluded from the calculation. If your adversary unnecessarily moved for disclosure even though you provided all the disclosure, tell the court to exclude those fees relating to the disclosure motion. If your adversary unnecessarily took an examination before trial (EBT) of an irrelevant witness, explain how the hours your adversary spent preparing and conducting the EBT were unnecessary. If your adversary unnecessarily appealed a court order, explain why the appeal was unnecessary.

Argue that the prevailing party didn't have to hire the most expensive lawyer for a bread-and-butter case to do hundreds of hours of research.

Attack your adversary's fee computation. If your adversary used the wrong method in your jurisdiction for computing the fees, explain what method the court should use. Under that correct method, explain how you'd calculate the fees, if any. If your adversary used the appropriate method in your jurisdiction but miscalculated the fees, explain your adversary's errors.

Argue that if the court were to award attorney fees, the court should grant your adversary's discounted rate rather than the undiscounted rate. Argue that the discounted rate is the reasonable rate.

Because your adversary performed legal services pro bono, argue in your opposition papers that the court shouldn't award legal fees.

Argue in your opposition papers that your adversary's fees for any appellate work be excluded from any attorney-fee award. Argue that your adversary's pursuit of an appeal was unnecessary. Or, argue that your adversary's fees in defending an appeal are unreasonable.

Argue that the court not award fees on fees. Argue that your adversary should never have moved for attorney fees. If true, argue that no statute, contract, or court rule allows your adversary to obtain attorney fees.

Your adversary may submit reply papers. Your adversary will have the last word in addressing your arguments.

Court's Decision on the Attorney-Fee Motion

If the court determines that your adversary didn't establish that it's entitled to fees, the court may deny your adversary's motion outright.

If your adversary established that it's entitled to fees and you didn't meaningfully oppose your adversary's motion, the court will likely grant the motion.

If you sufficiently opposed the motion by creating a factual dispute about the reasonableness of the fees, the court will likely order a hearing to determine the reasonable attorney fees.

Attorney-Fee Hearing

Proving Your Reasonable Attorney Fees. At an attorney-fee hearing, you'll need to prove that you're entitled to attorney fees and that your fees are reasonable.

You may call any witness with relevant and probative evidence to testify in a question-and-answer format. Your adversary has the right to cross-examine your witnesses.

Your witnesses should have personal knowledge of the work performed. The attorney who performed the legal work may testify. The attorney who supervised the legal work may testify. An attorney who knows the legal work that the senior or junior partners, associates, or paralegals performed may also testify. You may call the junior partner to testify about the work that other members of the firm completed.

No need to call to the stand every person who worked on your client's case.[32] Calling every witness will make you appear unskilled in conducting attorney-fee hearings. Or it'll make you appear as if you're unnecessarily prolonging the hearing to get more money from any attorney-fee award.

Most practitioners testify in the narrative. Assuming you'll testify in the narrative, here are a few things you'll want to establish. Discuss your legal education: Explain what school you attended and the year you graduated. Discuss any law-school accomplishments or honors. Discuss your work experience in the law: Give the dates, the places you worked, and your title. Provide your bar-association memberships. Discuss any leadership roles you have in any legal association. Explain any expertise you have in the legal field. Explain your firm's general billing practices. Also explain the firm's hourly rates for partners, associates, other attorneys in the firm, and paralegals. Discuss your hourly rate.

If other partners, associates, other attorneys in the firm performed legal work, discuss their education, experience, and expertise and the work they performed for your client.

If you're relying on a contract for your entitlement of attorney fees, admit the contract in evidence.

Introduce in evidence your bills or any chart you've created to explain your bills. Know how to admit documents under the business-records exception to the hearsay rule. Once you've admitted the document in evidence, explain your bills. Specifically, discuss the dates you performed the legal work, the hours you billed for those dates, your hourly rate, and the work you performed. If you gave your client a discounted rate, explain the terms of the discount.

Explain how you've computed the attorney fees under the multifactor lodestar method. Adjust the calculation upward or downward based on the facts and circumstances of the case.

Use the *Johnson* factors to adjust the calculation.

In applying the *Johnson* factors, elicit testimony about the following: (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 of 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.[33]

Disputing the Fees. On cross-examination, undermine the testimony of your adversary's witnesses. Attack the witness's credibility.

Ensure that your adversary's inadmissible documents aren't admitted in evidence. Or get something in return for a stipulation in which you consent to admit your adversary's documents into evidence.

Methodically undermine your adversary's bills. If possible, get a witness to testify that the fees are excessive, redundant, or unnecessary.

Get a witness to admit to the unsuccessful motions or unsuccessful claims, or both.

Get a witness to admit to double billing. At the least, point out the possible interpretation of your adversary's bills that your adversary double billed.

Attack your adversary's computation of attorney fees. Do the math under the multifactor lodestar method.

Methodically undermine how your adversary applied the *Johnson* factors.

In rebuttal, you may call an expert witness to the stand. Qualify the witness as an expert. The witness may be an attorney in the same practice area you're in. Your witness may examine your adversary's bills and explain that the fees your adversary seeks are unreasonable. The witness should provide a basis for that opinion.

Post-Hearing Briefs. The court may require you to submit post-hearing briefs.

In your briefs, summarize the testimony.

Explain how the testimony supports your argument that the court award you attorney fees. Or explain how the testimony supports your argument that the court shouldn't award any attorney fees.

Explain how the testimony supports your argument that your fees are reasonable. Or explain how the testimony supports your argument that your adversary's fees are unreasonable.

In the next issue of the *Journal*, the *Legal Writer* will discuss motions for sanctions. ■

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1. *See generally* Gerald Lebovits, *NYCLA's Fee-Dispute Program: Part 137*, 5 N.Y. County Lawyer 4 (Apr. 2009), *available at* http://works.bepress.com/gerald_lebovits/152/ (last visited Aug. 6, 2015); Gerald Lebovits & Michael V. Gervasi, *Part 137: The Attorney-Client Fee-Dispute Program*, 8 Richmond County B.J. 7 (Winter 2009), *available at* http://works.bepress.com/gerald_lebovits/145/ (last visited Aug. 6, 2015); *Doniger & Engstrand, LLP v. Carlomagno*, 48 Misc. 3d 132(A), *1–2, 2015 WL 4390079, *1–2 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2015) ("Where an attorney has commenced an action to recover legal fees, the attorney's failure to have provided the defendant client with written notice of the right to elect to submit the fee dispute to arbitration, and/or the attorney's failure to allege in the complaint either that the defendant client received such notice and did not file a timely request for arbitration, or that the dispute is not covered by the Rules of the Chief Administrator of the Courts (22 NYCRR) part 137, will require the dismissal of the complaint.").

2. *But see Riverside Syndicate Inc. v. Richter*, 26 Misc.3d 137(A), at *1, 2010 N.Y. Slip Op. 50183(U), *1 (App. Term 1st Dep't 2010) ("Although neither party produced the written lease agreement, tenant's application for attorneys' fees should have been granted. Landlord made a formal judicial admission that the initial written lease agreement existed between the parties, identifying the date of the lease and referring to a specific clause of the lease. This admission, coupled with landlord's request in the petition for attorneys' fees against tenant, effectively established that a valid lease containing an attorneys' fee provision exists between the parties.") (citations omitted).

3. Aaron J. Broder, Trial Handbook for New York Lawyers § 34:6, at 744 (3d ed. 1996) (citing *North Star Graphics, Inc. v. Spitzer*, 135 A.D.2d 401, 403 (1st Dep't 1987) (noting that if residential lease provides that landlord may obtain attorney fees from tenant, tenant has reciprocal right under the Real Property Law § 234 to collect attorney fees from landlord if tenant prevails against the landlord)).

4. *Nestor v. Britt*, 23 Misc. 3d 1138(A), *2, 2009 N.Y. Slip Op. 51190(U), *2 (Hous. Part. Civ. Ct. N.Y. County 2009) (citing *Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir. 1997)).

5. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217, 222 (2009) (noting that in first-party no-fault benefits cases attorney fees are capped at $850).

6. 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, 257 (2007).

7. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

8. *See Ross v. Congregation B'Nai Abraham Mordechai*, 12 Misc. 3d 559, 566–67 (Hous. Part. Civ. Ct. N.Y. County 2006).

9. *Bell v. Helmsley*, 2003 WL 21057630, at *2 (Sup. Ct. N.Y. County 2003).

10. *Ross*, 12 Misc. 3d at 567.

11. *Goldman v. Rosen*, 10 Misc. 3d 1065(A), *2, 2005 N.Y. Slip Op. 52152(U), *2 (Hous. Part Civ. Ct. N.Y. County 2005); *Thomas v. Coughlin*, 194 A.D.2d 281, 283 (3d Dep't 1993) ("Initially, we reject respondent's contention that counsel fees may not be awarded to petitioner because, having been represented by Prisoners' Legal Services free of charge, he did not 'incur' any fees.") (citing *Maplewood Mgmt. v. Best*, 143 A.D.2d 978 (2d Dep't 1988)).

12. *Rourke v. N.Y. St. Dept. of Corr. Servs.*, 224 A.D.2d 815, 816 (3d Dep't 1996) ("Parenthetically, we find the fact that petitioner was represented by a law school clinic is not an appropriate ground for the automatic reduction of an award of counsel fees pursuant to 42 U.S.C. § 1988.").

13. *Goldman*, 10 Misc. 3d 1065(A), at *2, 2005 N.Y. Slip Op. 52152(U), *2.

14. *Id.* at *2, 2005 N.Y. Slip Op. 52152(U), *2.

15. 2 Edward L. Birnbaum, Carl T. Grasso & Ariel E. Belen, New York Trial Notebook, § 38:160, at 38-66 (2010) (citing *In re Landmaster Montg I LLC v. Town of Montgomery*, 72 A.D.3d 1088, 1089 (2d Dep't 2010)).

16. *Nestor v. Britt*, 16 Misc. 3d 368, 379 (Hous. Part Civ. Ct. N.Y. County 2007) (hereinafter Nestor II) ("An award of reasonable attorney fees includes the time spent on appellate work.").

17. *Lancer Indem. Co. v. JKH Realty Group, LLC*, 127 A.D.3d 1035, 1036 (2d Dep't 2015); *546-552 W. 146th St. LLC v. Arfa*, 99 A.D.3d 117, 120 (1st Dep't 2012); *Podhorecki v. Lauer's Furniture Stores, Inc.*, 201 A.D.2d 947 (4th Dep't 1994) ("Plaintiffs' statutory entitlement to a reasonable attorney's fee includes a fee for services performed on the fee application itself.").

18. *Ross*, 12 Misc. 3d at 573–74 (citing *Kumble v. Windsor Plaza Comp.*, 161 A.D.2d 259, 260–61 (1st Dep't 1990)).

19. *Baker v. Health Mgmt. Sys.*, 98 N.Y.2d 80, 87–88 (2002) ("In short, the statutory language of section 722(a) and the legislative history contain nothing indicating that the Legislature intended to provide coverage for fees on fees. . . . Finally, we observe that our holding does not leave corporate officers and directors remediless; Business Corporation Law § 721 expressly provides that article 7 is not an exclusive remedy and, thus, corporations remain free to provide indemnification of fees on fees in bylaws, employment contracts or through

insurance."); *Sage Realty Corp. v. Proskauer Rose*, 288 A.D.2d 14, 15 (1st Dep't 2001) ("[A]n award of fees on fees must be based on a statute or on an agreement."), *lv. denied*, 97 N.Y.2d 608 (2002).

20. *Batsidis v. Wallack Mgmt. Co., Inc.*, 126 A.D.3d 551, 553 (1st Dep't 2015) ("However, the court below erred in awarding defendants $17,275 in fees on fees. The alteration agreement does not contain unambiguous language providing for the recovery of fees on fees. Because it is not 'unmistakably clear' from the parties' agreement that fees on fees were contemplated, such an award is not allowed."); *Jones v. Voskresenskaya*, 125 A.D.3d 532, 534 (1st Dep't 2015) ("The Special Referee's determination denying recovery of 'fees on fees' was proper since the parties' agreement does not explicitly provide for such fees.").

21. 7 N.Y. Jur. 2d *Attorneys at Law* § 252 (2015).

22. *Id.*; Klaiber, *supra* note 6, at 253–54 ("Suppose, for instance, that an individual hires an attorney to pursue a case for a 33% contingency fee. . . . Because the terms of the contingency fee agreement specify how the fee will be calculated, the attorney specifically expects to receive 33% of any recovery amount. The client, too, forms an expectation about a future event — the payment of her attorney's fees. Again, pursuant to the contingency fee agreement, the client expects to pay the attorney 33% of any amount recovered. . . . Once an actual monetary amount is recovered in the litigation, regardless of the size of that monetary amount, the payment of the agreed-upon 33% fee causes the attorney and client's shared initial expectation to be accurate.").

23. *Bell*, 2003 WL 21057630, at *1–2 (Sup. Ct. N.Y. County 2003) ("Initially the Court notes that a contingent fee does not, in and of itself, constitute a limitation on recovery. As the United States Supreme Court noted in *Blanchard v. Bergeron* . . . . 'Whether or not [a litigant] agreed to pay a fee and in what amount is not decisive. Conceivably, a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agree but what is reasonable.'") (quoting 489 U.S. 87, 92 (1989)).

24. *Gee v. Salem Day Care Ctr.*, 47 A.D.3d 478, 479 (1st Dep't 2008) ("Although plaintiff signed a retainer agreement that stated otherwise, it is uncontested that she agreed to pay her attorneys a one-third contingency fee for services rendered in connection with her personal injury action, a fee considered reasonable in such actions. Since a fee in a personal injury case may be calculated either as a fixed percentage of the sum recovered or pursuant to a sliding scale there is no legal, policy, or logical reason to deny a contingency fee to plaintiff's attorneys simply because plaintiff inadvertently signed the wrong retainer agreement form. This is especially so because the attorneys earned the agreed fee and plaintiff clearly wishes to pay it."). For information on contingent fees in claims or actions for medical, dental, or podiatric malpractice, see Judiciary Law § 474-a (providing sliding scale cap on percentage of attorney fees).

25. *Marbru Assocs. & the Berkeley Assocs. v. White*, 24 Misc. 3d 1219(A), *4, 2009 N.Y. Slip Op. 51520(U), at *4 (Hous. Part Civ. Ct. N.Y. County 2009) (citing *119 Fifth Ave Corp. v. Berkhout*, 135 Misc. 2d 773, 774 (Civ. Ct. N.Y. County 1987)).

26. *Marbru*, 24 Misc. 3d 1219(A), *4, 2009 N.Y. Slip Op. 51520(U), at *4; *accord Nestor*, 23 Misc. 3d 1138(A), *3, 2009 N.Y. Slip Op. 51190(U), *3; *Nestor II*, 16 Misc. 3d at 381; *Ross*, 12 Misc. 3d 559, 574.

27. *Marbru*, 24 Misc. 3d 1219(A), *3, 2009 N.Y. Slip Op. 51520(U), at *3.

28. *Nestor II*, 16 Misc. 3d at 380.

29. *Id.* at 375.

30. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.").

31. *235 E. 83 Realty, L.L.C. v. Fleming*, 18 Misc. 3d 1142(A), *1 (Hous. Part Civ. Ct. N.Y. County 2008) ("Although the trial was adjourned four times and there was a gap of five and seven weeks between adjournments, the preparation before each date need not have been made anew. Respondents' attorney was in charge of this case from beginning to end and well recalled the preparation he had already done. No reason existed for him to prepare afresh each time.").

32. *407 E. 81 Realty LLC v. Creighton*, 36 Misc. 3d 1220(A), *4 (Hous. Part Civ. Ct. N.Y. County 2012) ("An attorney who worked on the case and has sufficient knowledge of the case, and the billing practices of the firm is competent to testify in support of a party's claim for legal fees. In *Nestor v. Britt*, 16 Misc. 3d 368 (2007), the court credited the testimony of one attorney, the junior partner, who worked on the case, and introduced billing records for both the junior partner and senior partner who rendered their legal services on the case.").

33. *Johnson*, 488 F.2d at 717–19.