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23-4.50. Counsel Fee awards – Presumption in favor of counsel fees to less monied spouse – Determining who is monied spouse (new)

In determining who is the monied spouse courts look in the first instance to the income of the parties and their respective financial circumstances at the time it renders the decision.¹ However, it has been held that the shift in financial resources that results from the support award rebuts the presumption of the payor spouse being the “monied” spouse.²

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See, for example *Gaetano D. v. Antoinette D.*, 37 Misc. 3d 990, 955 N.Y.S.2d 752 (Sup 2012)

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In *Scott M. v. Ilona M.*, 31 Misc. 3d 353, 915 N.Y.S.2d 834 (Sup 2011), the Supreme Court found that the mandatory pendente lite maintenance guidelines and pendente lite counsel fee statutes should be deviated from where the calculations will result in the payee spouse having more monies available than the payor spouse as a result of the calculation. The Court also determined that the shift in financial resources that results from the guideline calculation rebutted the presumption of the payor spouse being the “monied” spouse. The husband earned \$155,590 and the wife earned \$33,705.36. The husband was the monied spouse. In accordance with the statutory scheme there is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse, the wife. However, based upon the temporary maintenance and child support award, even with the deviation, the Court could no longer consider the husband as a “monied spouse.” The re-allocation of financial resources articulated in the decision shifted the burden from the husband from being considered the monied spouse and as such rebutted the presumption.

In *Margaret A. v. Shawn B.*, 31 Misc. 3d 769, 921 N.Y.S.2d 476 (Sup 2011), although the defendant earned a significant salary throughout the marriage, and the plaintiff had no earnings, the court had to consider that the defendant was not working and there were limited, if any, assets to be used for fees. Although the defendant was the monied spouse, the support award shifted the parties' finances, giving the plaintiff more available resources. Considering that the parties had few assets to consider, the shift in financial resources to the plaintiff rebutted the presumption that the defendant was the monied spouse. (See *Scott M. v. Ilona M.*, 31 Misc. 3d 353, 915 N.Y.S.2d 834 (Sup 2011).)

In *Gaetano D. v. Antoinette D.*, 37 Misc. 3d 990, 955 N.Y.S.2d 752 (Sup 2012), the Court stated that at first blush it appeared that the plaintiff would be considered the monied spouse based upon the parties' respective incomes. However, the support award shifted the parties' finances, giving the defendant more available resources than the plaintiff. Considering that the parties had few assets to consider, the shift in financial resources to the defendant rebutted the presumption that the plaintiff is the monied spouse (*Scott M. v. Ilona M.*, 31 Misc. 3d 353, 915 N.Y.S.2d 834 (Sup 2011)).

The Appellate Division has held that in determining who is the less monied spouse the court should not unduly rely upon the financial circumstances of the parties at the time it renders its decision but should weigh the historical and future earning capacities of both parties.³

23-9. Stipulation to have the issue of counsel fees determined “on affirmations” (new)

It has been said that an attorney who represents himself has a fool for a client. Unfortunately, when it comes to the counsel fee portion of the matrimonial trial, this may be the case. Counsel is required to establish a prima facie case for counsel fees and expert fees before they may be awarded. This can be accomplished by the attorney and his experts testifying and offering documents into evidence. This is the simplest, least time consuming and least costly method of establishing a case for counsel fees and experts’ fees.

Where there has been a lengthy trial that has been carried on over a period of several months, or where attorneys are anxious to complete the trial and get back to dinner with their families, their offices and other clients they frequently stipulate to have the issue of counsel fees determined “on affirmations”. This can be perilous unless the stipulation is in writing and clearly specifies the procedure that they will follow. Otherwise, the court will define it for them - much to their disliking.

A stipulation to have the issue of counsel fees decided on papers should specify what papers each party will be allowed to submit and the deadlines for the submissions. The submission should follow the usual order of the trial with the plaintiff submitting first, the defendant responding and submitting a cross-request for counsel fees, if appropriate, the plaintiff replying and the defendant replying. Under no circumstances should counsel agree to a “simultaneous submission” without the right to serve a reply and a response to the reply.

A stipulation to submit the issue of counsel fees and expert fees on affirmations, changes the procedure for the trial, but does not change the substantive law regarding the factors the court should consider in determining requests for counsel fee and expert fee awards. The counsel fee testimony or affirmation must provide the court with all of the evidence which has been deemed necessary by the Joint Appellate Division rules to enable the court to determine the reasonable value of the counsel fees and expert fees requested.

23-10. Requirement of affidavits from Experts (new)

³ Matter of Brookelyn M., v Christopher M, 161 A.D.3d 662, 77 N.Y.S.3d 390 (1st Dept. 2018). See also Saunders v. Guberman, 130 A.D.3d 510, 511, 14 N.Y.S.3d 334 [1st Dept. 2015] (in determining who is the less monied spouse, the Court should weigh the historical and future earning capacities of both parties, and the value of their assets).

Absent affidavits or testimony from the expert witnesses with regard to the services they rendered and the fees they charged, the Supreme Court lacks a sufficient basis to grant an award of expert fees. The failure of the attorneys to submit affidavits required by Domestic Relations Law '237 precludes the court from awarding attorneys' fees. ⁴

23-11. Requirement of affidavits from prior attorneys (new)

In determining the amount of counsel fees to be awarded the court may not rely on documents that constitute inadmissible hearsay, such as statements from his client's former attorney who previously represented the client in the action. ⁵

Where a party seeks counsel fees for the legal services performed by a prior attorney, he or she must establish that her prior attorneys substantially complied with 22 NYCRR 1400.2 and 1400.3 and must submit an affidavit or affirmation from that attorney in support of the request for fees.⁶

23-12. Conduct in litigation, obstruction and delaying tactics. (new)

The Court may consider a spouse's conduct in the litigation in determining an application for a counsel fee award. There are many different types of conduct that courts have considered in determining such applications. In most instances the decisions involve situations where counsel fees are awarded or increased where the conduct of the monied spouse drives up the legal fees of the less monied spouse.⁷ We have categorized them as follows:

- (a) misrepresenting income;⁸
- (b) failure to reveal all the relevant facts in seeking ex parte relief; ⁹

⁴ Greco v Greco, 161 A.D.3d 950, 77 N.Y.S.3d 160 (2d Dept., 2018) See also Piza v Baez-Piza, 145 A.D.3d 808, 43 N.Y.S.3d 450 (2d Dept., 2016) (defendant did not demonstrate, prima facie, that her attorney substantially complied with 22 NYCRR 1400.2 and 1400.3.).

⁵ Lydia D. v. Thomas B., 89 A.D.3d 630, 933 N.Y.S.2d 269 (1st Dept., 2011).

⁶ Badawi v Badawi, 135 A.D.3d 793, 24 N.Y.S.3d 354, 2016 N.Y. Slip Op. 00318 (2d Dept., 2016) (plaintiff failed to establish that her prior attorneys substantially complied with [22 NYCRR 1400.3](#))

⁷ For example, in Behan v Kornstein, 164 A.D.3d 1113, 84 N.Y.S.3d 58 (1st Dept., 2018) the Appellate Division held that the court properly awarded plaintiff counsel and expert fees which amounted to approximately 70% of the legal fees she accrued through the end of the financial trial. The court took into account defendant's role in driving up legal fees, which included changing attorneys nine times, failing to comply with court orders, and needlessly extending the trial with his belligerent behavior. Although the total fees incurred by plaintiff were high, defendant acknowledged that he had significant fees of his own. Under the circumstances, it saw no reason to disturb the counsel fee award to plaintiff

⁸ In Griggs v. Griggs, 44 A.D.3d 710, 844 N.Y.S.2d 351 (2d Dep't 2007), the Appellate Division held that in misrepresenting her income for the purpose of increasing the plaintiff's obligation to support her, the defendant forfeited any entitlement she might otherwise have had to counsel fees.

⁹ In Robert v. Robert, 51 A.D.3d 756, 858 N.Y.S.2d 700 (2d Dep't 2008) the court opined that the former wife would not have been granted ex parte relief had the issuing court known more of the facts. This did not mean that no award to the former wife was warranted. In light of the financial circumstances of both parties, together with all the other circumstances of the case, an award of 25% of the attorney's fees demanded by the former wife for her attorneys was appropriate, as well as an award of 50% of the remaining fees and costs demanded by her.

- (c) concealing or dissipating assets; ¹⁰
 - (d) uncompromising nature of the defendant; ¹¹
 - (e) misconduct with regard to marital property; ¹²
 - (f) discovery misconduct and delay; ¹³
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¹⁰ In *Solomon v. Solomon*, 276 A.D.2d 547, 714 N.Y.S.2d 304 (2d Dep't 2000), the Appellate Division held that in light of the overwhelming evidence that the defendant concealed assets, as well as the respective financial positions of the parties, the court properly awarded an attorney's fee to the plaintiff.

In *Ferina v. Ferina*, 286 A.D.2d 472, 729 N.Y.S.2d 533 (2d Dep't 2001), the Appellate Division held that Supreme Court providently exercised its discretion in awarding limited counsel fees to the plaintiff, in view of the fact that the defendant tried to conceal assets.

In *Levy v. Levy*, 289 A.D.2d 379, 734 N.Y.S.2d 247 (2d Dep't 2001), the Appellate Division affirmed a judgment which awarded counsel fees to the wife of \$18,000. The Supreme Court providently exercised its discretion in awarding counsel fees to the wife, since the husband tried to conceal his assets.

In *Brody v. Brody*, 137 A.D.3d 832, 27 N.Y.S.3d 190 (2d Dep't 2016) the Appellate Division affirmed the award of counsel fees to the defendant pursuant to Domestic Relations Law §237(a). It pointed out that in making a counsel fee determination the court may consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation, and that while a less-monied party should not be expected to exhaust all, or a large portion, of the finite resources available to her or him, the court may consider the conduct of the less-monied spouse in the dissipation of assets available during the course of the litigation. The court's award reflected consideration of the relevant factors, including the defendant's conduct in dissipating assets during the litigation rather than using available funds to pay her attorneys or to pay for necessary items for the children or herself.

¹¹ In *Unger-Matusik v. Matusik*, 276 A.D.2d 936, 715 N.Y.S.2d 449 (3d Dep't 2000) the Appellate Division found no abuse of discretion in Supreme Court's award of \$20,000 in counsel fees to plaintiff. The court specifically held that "having presided over all aspects of this action for divorce, the Court is convinced that it was the uncompromising and contentious nature of defendant, not plaintiff, which necessitated the extraordinary counsel fees incurred by plaintiff." The Appellate Division stated that it had no reason to disagree with Supreme Court's assessment of defendant's conduct or the corresponding amount of legal fees incurred by plaintiff.

¹² In *Katzman v. Katzman*, 284 A.D.2d 160, 725 N.Y.S.2d 849 (1st Dep't 2001) the Supreme Court awarded defendant wife 100% of the reasonable value of her attorneys' fees. The Appellate Division held that such discretion was properly exercised in view of the substantial disparity of income between the parties, and the husband's own persistent delaying tactics and misconduct in transferring marital property.

In *Mastrandrea v. Mastrandrea*, 268 A.D.2d 293, 702 N.Y.S.2d 19 (1st Dep't 2000), the Appellate Division held that the court properly concluded that defendant's conduct, including his inappropriate attempt to sell one of the marital residences to a friend, caused plaintiff to incur additional attorney's fees.

¹³ In *Timpone v. Timpone*, 28 A.D.3d 646, 813 N.Y.S.2d 752 (2d Dep't 2006), the Appellate Division held that the Supreme Court providently exercised its discretion in determining that the plaintiff was entitled to an award of an attorney's fee. However, given the equities and circumstances of the case, the relative merits of the parties' positions, their respective financial circumstances, and the delay in the discovery process attributable to the defendant, an award of attorney's fees to the plaintiff in the sum of \$25,000 was appropriate rather than the award of \$2,650.

In *Blay v. Blay*, 51 A.D.3d 1189, 857 N.Y.S.2d 784 (3d Dep't 2008) the Appellate Division held that Supreme Court did not abuse its discretion in awarding counsel fees to defendant, but it reduced the amount of the fee awarded. The counsel fees were partially based upon additional work required to sort out the confusing financial arrangements created by plaintiff and his family business, plaintiff's failure to advise defendant of the business restructuring and the failure to turn over complete financial documents in response to demands. The court parsed counsel's billing statements, deleting items deemed excessive, and awarded plaintiff \$24,741.50. The complexity of the case due to the confusing financial situation made an award of counsel fees to defendant appropriate but, when considering the parties' financial circumstances as a whole, it reduced the award to \$15,000.

(g) failure or refusal to comply with interim orders; ¹⁴

In *Schorr v. Schorr*, 46 A.D.3d 351, 848 N.Y.S.2d 614 (1st Dep't 2007), Supreme Court awarded plaintiff counsel fees of \$100,000. The Appellate Division affirmed. The award of \$100,000 in counsel fees, representing approximately one-half of plaintiff's counsel fees at the time of trial, was justified by the financial disparity between the parties and defendant's discovery misconduct resulting in unnecessary escalation of litigation costs.

In *Baron v. Baron*, 71 A.D.3d 807, 897 N.Y.S.2d 456 (2d Dep't 2010) the Appellate Division held that Supreme Court improvidently exercised its discretion by declining to award attorney and expert fees to the plaintiff. The Supreme Court failed to consider the defendant's obstructionist and deceptive tactics which prolonged the litigation. These tactics, which included his failures to provide full and timely disclosure that impeded a determination of the valuation of his business and his finances, and failures to appear for his own deposition and for a preliminary conference, were noted with disapproval by the court. The defendant's lack of cooperation led to the Supreme Court appointing a referee to supervise discovery. He also prolonged the trial by attempting to convince the Supreme Court through his testimony that he had transferred 49% of his business to a third party despite being unable to produce any original documentary evidence of such an agreement. It held that in consideration of all the relevant factors, including the defendant's misconduct and the financial circumstances of the parties, the plaintiff should be awarded \$125,000 as an attorney's fee and of \$50,000 as an expert fee, which was one-half of the fees sought.

¹⁴ In *Wells v. Wells*, 151 A.D.2d 474, 542 N.Y.S.2d 263 (2d Dep't 1989), the Appellate Division held that the award to the plaintiff of \$10,000 of the \$40,000 in counsel fees she incurred was appropriate because at least that much of the fees was occasioned by the defendant's failure to comply with and his repeated attempts to modify a pendente lite support order.

In *Levine v. Levine*, 24 A.D.3d 625, 807 N.Y.S.2d 384 (2d Dep't 2005), the Appellate Division held that in light of factors such as the disparity in income between the parties, the plaintiff's trial tactics which unnecessarily prolonged the litigation, as well as the plaintiff's willful failure to comply with court orders, the Supreme Court properly directed the plaintiff to pay a portion of the defendant's attorney's fees, despite the substantial equitable distribution award to the defendant.

In *Roberto v. Roberto*, 90 A.D.3d 1373, 936 N.Y.S.2d 337 (3d Dep't 2011), Supreme Court directed that the husband pay counsel fees on behalf of the wife in the amount of \$10,000. The Appellate Division affirmed. It found no abuse of discretion in the counsel fee award to the wife in view of, among other things, the disparity in the parties' earning abilities and defendant's conduct throughout the proceedings including, but not limited to, his failure to pay maintenance to the wife as directed, which necessitated a contempt application.

In *Fontanella v. Fontanella*, 167 A.D.2d 185, 561 N.Y.S.2d 576 (1st Dep't 1990), the Appellate Division affirmed an Order of the Supreme Court which conditioned the denial of the husband's motion to strike the wife's testimony upon the wife's payment of the husband's attorneys fees based upon the fact that those fees were necessitated by the wife's failure to comply with the Court's order which required her to serve and file a Net Worth Affidavit by a certain date.

In *Rodman v. Friedman*, 33 A.D.3d 400, 826 N.Y.S.2d 1 (1st Dep't 2006), the Appellate Division affirmed an Order which found plaintiff mother had alienated the child from defendant father, set a schedule for future self-executing fines against plaintiff for any possible violations of court orders, and ordered her to pay defendant \$10,000 in counsel fees incurred as a result of her failure to abide by prior orders.

In *Cotton v. Cotton*, 147 A.D.2d 436, 537 N.Y.S.2d 557 (2d Dep't 1989), the Appellate Division affirmed the \$8,500 counsel fee award to the wife noting that her high attorney's fees and other expenses were incurred "... as a result of defendant's obstructionist behavior in withdrawing approximately \$162,000 in marital assets from a bank account and then laundering it in direct contravention of a temporary restraining order."

In *Xiaokang Xu v. Xiaoling Shirley He*, 77 A.D.3d 1083, 909 N.Y.S.2d 574 (3d Dep't 2010) noting that "defendant's repeated defiance in abiding by court orders had resulted in plaintiff expending a tremendous amount of money post judgment," the court awarded plaintiff approximately \$15,000 for counsel fees. The Appellate Division found that Supreme Court properly considered defendant's dilatory and obstructionist tactics as a basis for an award of counsel fees. Defendant refused to cooperate in the sale of the marital residence following her unsuccessful appeal, and she repeatedly defied court orders. This conduct led to both her ultimate eviction and an order crediting plaintiff with all carrying charges for any month during which he also paid maintenance to defendant--i.e., subsequent to the conclusion of the appellate process. Under these circumstances, and given defendant's failure to appeal the order awarding plaintiff a credit for carrying charges paid beginning in April 2006, Supreme Court properly concluded that

- (h) lack of merit, unnecessary and repetitive motions; ¹⁵
- (i) unreasonable conduct; ¹⁶
- (j) failure to substantiate allegations that wife engaged in tactics to prolong the litigation; ¹⁷
- (k) tactics designed to harass; ¹⁸ and
- (l) bad faith litigation. ¹⁹

plaintiff was entitled to a credit for both counsel fees and carrying charges paid after completion of the appellate process.

¹⁵ In *Melnitzky v. Melnitzky*, 284 A.D.2d 240, 726 N.Y.S.2d 649 (1st Dep't 2001), the Appellate Division affirmed a Judgment which awarded plaintiff wife attorney's fees of \$19,400. Given the disparity between the resources available to each of the parties, as demonstrated by the evidence of record, and defendant husband's insistence on litigating matters in which the merit of his position was dubious at best, the award of attorneys' fees to plaintiff wife was appropriate.

In *Lerner v. Lerner*, 201 A.D.2d 375, 607 N.Y.S.2d 929 (1st Dep't 1994), the Appellate Division affirmed the award of \$50,000 legal fees. The record provided ample support for the court's criticism of the husband and his attorney including frivolous appeals that were never perfected, the belated substitution of the husband's father-in-law as lead attorney despite his admitted lack of knowledge of matrimonial law and the husband's excessive interference with his attorney's performance.

In *Yerushalmi v. Yerushalmi*, 136 A.D.3d 809, 26 N.Y.S.3d 111 (2d Dep't 2016) the Appellate Division found that Supreme Court did not abuse its discretion in granting the plaintiff's motion for attorneys' fees in light of the defendant's conduct, which included his making of repetitive motions to terminate his pendente lite obligations, and the parties' financial circumstances.

In *Denholz v. Denholz*, 147 A.D.2d 522, 537 N.Y.S.2d 607 (2d Dep't 1989), an action for divorce, the Appellate Division modified the judgment to, among other things, award the wife \$6,000 in counsel fees. It awarded her counsel fees because there was "... a marked disparity between the income and resources of the respective parties, the defendant engaged in unnecessary motion practice, and paying her own counsel fees would severely deplete the plaintiff's meager resources."

In *D.K. v. F.K.*, 20 Misc. 3d 733, 860 N.Y.S.2d 883 (Sup 2008), because of the meritless nature of the former husband's motion to declare his eldest son emancipated three months before his 21st birthday, the court awarded the former wife attorney's fees and expenses to defend the motion (Domestic Relations Law §237(b)) of \$4,000.

In *Fredericks v. Fredericks*, 85 A.D.3d 1107, 927 N.Y.S.2d 109 (2d Dep't 2011), the Appellate Division found that the record reflected that the plaintiff engaged in unnecessary litigation by contesting the defendant's motion to set aside the parties' initial stipulation of settlement, the terms of which were manifestly unfair to her. Given the equities and circumstances of the case, the Supreme Court providently exercised its discretion in awarding the defendant \$15,000 in counsel fees, which was less than one third the sum requested.

¹⁶ In *Graham v. Graham*, 175 A.D.2d 540, 572 N.Y.S.2d 800 (3d Dep't 1991), the Appellate Division affirmed the award of counsel fees of \$10,410.56 against the husband based upon the fact that the husband's unreasonable conduct in the prosecution of the action added greatly to the wife's expenses.

¹⁷ In *Ciociano v. Ciociano*, 54 A.D.3d 797, 863 N.Y.S.2d 766 (2d Dep't 2008), a matrimonial action in which the complaint was dismissed the Appellate Division reversed an order which denied the wife's motion for an award of an attorney's fee and awarded her an attorney's fee of \$25,000. In light of the great disparity in income between the parties, the lack of merit to the husband's action, and the husband's failure to substantiate his allegations that the wife engaged in tactics to prolong the litigation, it held that the wife should have been awarded an attorney's fee in the sum of \$25,000.

¹⁸ In *Cass v. Cass*, 213 A.D.2d 362, 624 N.Y.S.2d 406 (1st Dep't 1995), the evidence that the father engaged in tactics designed to harass the mother rather than further his own rights warranted the denial of counsel fees.

¹⁹ In *Cion v. Cion*, 253 A.D.2d 595, 677 N.Y.S.2d 143 (1st Dep't 1998), the Appellate Division upheld the award of counsel fees to plaintiff, but modified it to increase the award from \$20,000 to \$46,878, the full amount sought, finding

Frequently, in determining counsel fee applications, courts use the term “obstructionist conduct” as a catchall phrase for dilatory conduct and conduct which prolonged or delayed the litigation. As is apparent from many of the cases cited in the footnote the decisions do not specify the exact nature of such conduct,²⁰ Most of the

that the litigation “evidently result[ed] from a bad faith attempt by defendant, an individual of substantial means, to avoid paying any of his child’s expenses.

²⁰ In *Cinamond v. Cinamond*, 203 A.D.2d 229, 610 N.Y.S.2d 276 (2d Dep’t 1994), the Appellate Division affirmed the award of counsel fees to the wife, in light of the wife’s inability to pay her own fees, the parties’ disparate incomes and the fact that some of the wife’s legal fees were incurred because of the husband’s dilatory tactics.

In *Harrington v. Harrington*, 300 A.D.2d 861, 752 N.Y.S.2d 430 (3d Dep’t 2002), the Appellate Division found that the lengthy evidentiary hearing held to determine entitlement to counsel fees fully detailed that the award was based upon, *inter alia*, defendant’s “attempts to wear down and/or financially punish [plaintiff] by prolonging the litigation.”

In *Chamberlain v. Chamberlain*, 24 A.D.3d 589, 808 N.Y.S.2d 352 (2d Dep’t 2005), the Appellate Division stated that a party who has engaged in conduct resulting in unnecessary litigation may properly be denied an award of an attorney’s fee, and a party who was thereby caused to incur legal fees that otherwise would have been unnecessary may recover such fees. The record supported the Supreme Court’s determination to deny the plaintiff’s request for an award of an attorney’s fee and grant the defendant’s request for an award of an attorney’s fee on this basis.

In *McBride-Head v. Head*, 23 A.D.3d 1010, 804 N.Y.S.2d 170 (4th Dep’t 2005), the Appellate Division held that Supreme Court did not abuse its discretion in awarding counsel fees to plaintiff in the amount of \$10,000, in light of the disparity in the incomes of the parties and the conduct of defendant in prolonging the litigation.

In *Glick v. Glick*, 25 A.D.3d 533, 806 N.Y.S.2d 436 (2d Dep’t 2006), the Appellate Division held that considering all of the circumstances, including that the litigation resulted from the defendant’s abuse of the parties’ children and that court-ordered therapeutic supervised visitation with the defendant and the children failed three times due to the defendant’s behavior, the court providently exercised its discretion in its award of an attorney’s fees.

In *Johnson v. Chapin*, 49 A.D.3d 348, 854 N.Y.S.2d 18 (1st Dep’t 2008), *aff’d as modified*, 12 N.Y.3d 461, 881 N.Y.S.2d 373, 909 N.E.2d 66 (2009), the trial court noted that the wife and her son “have suffered day to day crises resulting from the [husband’s] harassment of them” with respect to every aspect of this protracted litigation. It awarded the wife \$800,000 for the wife’s counsel fees, and \$85,000 for her expert fees. The Appellate Division held that the court’s award was appropriate. He engaged in a pattern of obstructionist conduct which unnecessarily delayed and increased the legal fees incurred in the litigation. Given that the wife was required to hire an expert to counter the husband’s facially inaccurate valuation of the appreciation of the Claverack property, the court properly granted the wife an award for her expert’s fees. The Court of Appeals observed that when awarding the fees, the court considered the parties’ financial positions as well as the delay incurred as a result of husband’s obstructionist tactics, and declined to disturb those awards.

In *Blake v. Blake*, 83 A.D.3d 1509, 921 N.Y.S.2d 615 (4th Dep’t 2011), the Appellate Division affirmed an order which directed defendant to pay \$9,085 for counsel fees incurred by plaintiff. It held that the award of reasonable counsel fees is a matter within the sound discretion of the trial court, and such awards are intended to redress the economic disparity between the monied spouse and the non-monied spouse. When exercising its discretionary power to award such fees, a court may consider all of the circumstances of a given case, including the financial circumstances of both parties, the relative merit of the parties’ positions, the existence of any dilatory or obstructionist conduct, and “the time, effort and skill required of counsel.” Here, the record established that defendant’s income was three times that of plaintiff and that significant periods of delay were occasioned by circumstances attributable to defendant.

In *Swett v. Swett*, 89 A.D.3d 1560, 934 N.Y.S.2d 280 (4th Dep’t 2011), the Appellate Division found that the court did not abuse its discretion in awarding counsel fees to plaintiff in light of the “dilatory or obstructionist conduct” by defendant.

In *Guzzo v. Guzzo*, 110 A.D.3d 765, 973 N.Y.S.2d 265 (2d Dep’t 2013), Supreme Court granted the defendant’s application to the extent of awarding her an attorney’s fee in the sum of \$35,000. The Appellate Division increased the award to \$100,000. It found that there was a significant income disparity between the parties, and, as the Supreme Court recognized, the plaintiff’s egregious tactics unnecessarily prolonged the litigation and caused the

appellate decisions do not indicate the exact nature of the conduct the court considered obstructionist but just conclude that a party engaged in obstructionist conduct. However, decisions from the Supreme Court sometimes go into great depth in detailing a litigant's conduct when a litigant has been obstructionist.²¹

defendant to incur additional legal fees.

In *Nee v. Nee*, 240 A.D.2d 478, 658 N.Y.S.2d 440 (2d Dep't 1997) the defendant appealed from judgment which, inter alia, awarded the plaintiff counsel fees in the sum of \$15,989.95. The Appellate division held considering the disparity in the incomes of the parties and the defendant's tactics, which unnecessarily prolonged this litigation, it was appropriate for the trial court to require the defendant to pay the plaintiff's counsel fees.

In *De Bergalis v. De Bergalis*, 156 A.D.2d 963, 551 N.Y.S.2d 704 (4th Dep't 1989), the Appellate Division affirmed the award of \$100 a week child support and \$7,250 counsel fees. The defendant's conduct prolonged the litigation, thereby justifying the award of counsel fees.

In *Vicinanzo v. Vicinanzo*, 193 A.D.2d 962, 598 N.Y.S.2d 362 (3d Dep't 1993), the Appellate Division noted that Supreme Court awarded the wife the portion of her fees which it found "to have been occasioned by the husband's dilatory conduct, a retribution which is entirely proper."

In *Krigsman v. Krigsman*, 288 A.D.2d 189, 732 N.Y.S.2d 438 (2d Dep't 2001), the wife's counsel was entitled to a reasonable attorney's fee from the husband generated by his dilatory tactics.

In *Cameron v. Cameron*, 22 A.D.3d 911, 802 N.Y.S.2d 542 (3d Dep't 2005), the Appellate Division held that given plaintiff's contumacious conduct and obstructionist tactics at trial, Supreme Court did not abuse its discretion in awarding defendant counsel fees.

In *Daniel v. Friedman*, 22 A.D.3d 707, 803 N.Y.S.2d 129 (2d Dep't 2005), the Appellate Division found from the record that the defendant's obstructionist tactics substantially contributed to the protracted nature of the litigation.

In *O'Shea v. Parker*, 16 A.D.3d 510, 790 N.Y.S.2d 717 (2d Dep't 2005), the Appellate Division held that the Family Court providently exercised its discretion in directing the mother to pay the sum of \$6,000 towards the father's counsel fees, which represented approximately one-half the amount of counsel fees incurred by the father in the proceeding. Family Court made factual findings that the mother was obstructionist in changing attorneys twice and in making unsubstantiated allegations of abuse against the son of the father's girlfriend.

In *Berrada v. Berrada*, 90 A.D.3d 1195, 935 N.Y.S.2d 348 (3d Dep't 2011), Family Court awarded sole custody of the children to the mother, who moved for an award of counsel fees and various expenses. Family Court ultimately directed the father to pay 80% of those fees and expenses, and awarded \$80,508 to the mother. The Appellate Division modified by reducing the amount awarded to \$56,608. Family Court considered the relevant factors in rendering its decision, including the parties' respective financial positions, the services rendered by counsel, the complexity of the proceedings, the father's obstreperous and litigious conduct, and the end result, and it appropriately directed the father to pay 80% of the mother's counsel fees.

²¹ In *G.C. v. K.C.*, 39 Misc. 3d 1207(A), 969 N.Y.S.2d 803 (Sup 2013) a post-judgment matrimonial case, the Court observed that since Defendant's conduct resulted in a needless expenditure of time, resources, and fees by Plaintiff, Defendant bore responsibility for them under statutory and case law. The Court may consider the relative merits of the parties positions, particularly whether tactics engaged in by a party can reasonably be viewed as nothing more than stonewalling "tactics ... that unnecessarily prolonged the litigation." Such "stonewalling" was precisely the situation that obtained with respect to Defendant's conduct concerning the various motions at issue. Defendant's conduct during this period led the Court to reach the conclusion that "plaintiff's counsel was required to spend an inordinate amount of time on this case due to the defendant's unreasonable and obstructionist conduct." After the motions listed in the Courts decision were decided, Defendant persisted in his obstreperous behavior; Defendant insisted that the Court conduct a Hearing on the issue of attorneys fees, which was his right. The Hearing took place on September 12, 2012 and November 20, 2012. In light of the evidence adduced at the Hearing itself, Defendant had no cognizable defense to Plaintiff's claim for attorneys fees and the Hearing served no purpose other than delay. Defendant needlessly prolonged the Hearing by refusing to answer rudimentary questions such as where he currently resided, how much rent he paid, and the identity of his landlord. The Court held that Plaintiff was entitled to an award of legal fees to compensate her for costs incurred in prosecuting her motions to compel Defendant to abide by the terms of the parties Stipulation. The Court considered other factors, as permitted by relevant case law.

The definitions of “obstructionism” all include the element of deliberateness, such as deliberately impeding, preventing, or delaying the legal process.²² It would appear that before a court can determine that a party has engaged in obstructionist conduct it must find that the party engaged in conduct which deliberately impeded, prevented or delayed the legal process.

In *R.S. v B.L.*, 46 Misc.3d 1218(A), 9 N.Y.S.3d 595 (Table) 2015 WL 543459, 2015 N.Y. Slip Op. 50113(U)), after a 21-day trial, the Supreme Court found that the Wife was not credible. Her behavior was inappropriate, aggressive, rude and confrontational. In addition, her testimony was repeatedly inherently incredible, internally inconsistent, or just plain false. The Wife repeatedly violated the court's orders, resulting in the parties incurring additional and unnecessary expenditures for their attorneys' time and court conferences. At the conclusion of the trial Supreme Court found that the wife had already spent approximately \$850,000 in marital assets to pay attorneys' fees and other litigation expenses to: the seven law firms that represented her in this case; numerous other law firms with whom she had consulted; numerous expert witnesses who were precluded from testifying; numerous additional consultants; and for valuation work that the Courts order required the Wife to pay because she refused a neutral evaluator and a lifestyle analysis that “any high school kid could have done” because “really all it is arithmetic.” The Court observed that in determining an award of counsel fees, a court may properly consider one party's unnecessarily prolonging the litigation and escalating costs. Thus, “[a] party who has engaged in conduct resulting in unnecessary litigation may properly be denied an award of an attorney's fee.” In this case, the Wife's unreasonable conduct, which resulted in unnecessary and costly litigation, included: hiring and firing top-tier members of the matrimonial bar, each time materially increasing the cost of the proceeding to both sides; prolonging discovery by non-compliance with scheduling orders; lying on her net worth statement by inflating expenses by large amounts in 22 separate categories and lying on the witness stand over and over again, each time requiring the Husband to spend time and money disproving her lies, and the Wife's counsel to spend time and money seeking to defend what turned out to be lies; litigating the admissibility of post office records and imposing the cost on the Husband of a federal proceeding to obtain certified copies of the post office records; arguing and re-arguing over absurdly long witness lists full of names, which the Wife's counsel admitted he did not vet prior to (or even weeks into) trial, and who ultimately refused to testify, in the case of Linda Feder even after the Wife represented that she was an “essential” and “crucial” witness and even after the Wife's counsel “spent ... a good amount of time ... with her”; arguing and re-arguing over expert witnesses (including a mental health expert, a vocational expert, an actuary, a real estate appraiser, a medical insurance consultant, a forensic accountant, and a certified public accountant) not designated as expert witnesses by October 1, 2012, as required by a Stipulated Order; hiring Proskauer Rose LLP as “special Benefits counsel,” who billed the Wife \$115,000, and whose work must have been duplicative, since they did not consult with any of her prior counsel, her prior expert, the Husband's expert and ABC; paying enormous sums of money to these expert witnesses, even after the court ruled they could not testify; paying enormous sums of money to other consultants; arguing and re-arguing numerous other issues and rulings over and over again; using trial subpoenas containing over 100 blunderbuss discovery requests; engaging in long, repetitive and wasteful examinations and cross-examinations; misrepresenting the contents of supposedly identical hospital records, resulting in hours of lost trial time, two arguments on non-trial days, and briefing of an Order to Show Cause; seeking adjournments for alleged leg ailments that did not preclude the Wife's attendance at Knick games or long drives to Philadelphia and Ithaca; and refusing to allow her counsel to speak with the court, even during the lunch break, after hours or on the telephone without a court reporter present, adding the cost of the court reporter, and the cost of the attorney time spent waiting for court reporters. The Court held that the Wife's expenditure of an enormous amount of marital funds on her own unnecessary counsel and expert fees, which was a factor in the diminution of the marital assets between the date of commencement and the date of trial, far exceeded what the court would have awarded her as the ‘less monied’ spouse. In view of this history, the court denied the wife's request for further attorneys' fees.

²² Blacks Law dictionary (14th Edition, 2010) defines the term obstructionism as “The act or practice of purposely preventing or delaying a legal or political process; deliberate interference with the normal course of work, esp. in a legislative body. — obstructionist, adj. & n.”

The Oxford online dictionary defines obstructionism as “The practice of deliberately impeding or delaying the course of legal, legislative, or other procedures. See <https://en.oxforddictionaries.com/definition/obstructionism>.”

The Merriam Webster dictionary defines obstructionism as: deliberate interference with the progress or business especially of a legislative body. See <https://www.merriam-webster.com/dictionary/obstructionism>

The cases decided prior to *Silverman v Silverman*²³ hold that it is not an abuse of discretion on the part of the trial court to make an award of counsel fees,²⁴ or deny an application for counsel fees,²⁵ in whole or in part, based on a finding that the party seeking fees has engaged in obstructionist conduct. There are cases denying counsel fees on those grounds to the less monied spouse after *Silverman*²⁶ and the 2010 amendments to Domestic Relations Law §237, which created a rebuttable presumption that counsel fees should be awarded to the less monied spouse.²⁷

In *Silverman v Silverman*²⁸ the Appellate Division explained that an award of attorney's fees to the monied spouse was not proper under Domestic Relations Law § 237, because awarding attorney's fees to the monied spouse does not comport with the purpose and policies of that section of the Domestic Relations Law. It noted that the intent of Section 237 (a) is to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel, "to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the evidence". Therefore, where the parties' respective financial positions gives one of them a distinct advantage over the other, the court may direct the monied spouse to pay counsel

²³ *Silverman v Silverman*, 304 A.D.2d 41, 47–49 (1st Dept.,2003)

²⁴ See *Stern v. Stern*, 67 A.D.2d 253, 415 N.Y.S.2d 225 (1st Dep't 1979); *Riportella v. Riportella*, 75 A.D.2d 503, 426 N.Y.S.2d 738 (1st Dep't 1980); *Schussler v. Schussler*, 109 A.D.2d 875, 487 N.Y.S.2d 67 (2d Dep't 1985)

²⁵ In *Dugue v. Dugue*, 172 A.D.2d 974, 568 N.Y.S.2d 244 (3d Dep't 1991), given the fact of the wife's counsel's obstructive behavior during the course of the litigation, coupled with the parties' financial circumstances, it was not an abuse of discretion to deny the wife counsel fees.

In *Tenore v. Tenore*, 110 A.D.3d 711, 972 N.Y.S.2d 626 (2d Dep't 2013), the plaintiff commenced this action for a divorce, and asserted a tort cause of action against the defendant, alleging that he had sexually assaulted her. The parties executed a written settlement agreement; they also entered into a stipulation discontinuing the plaintiff's tort cause of action. After the settlement, the plaintiff moved for an award of an attorney's fee. After a hearing Supreme Court awarded her an attorney's fee of \$60,000, "less any and all previously satisfied awards of counsel fees paid to date or any payments made thereon." Considering all of the relevant factors, including the fact that the Supreme Court expressly found that a significant portion of the protracted litigation in this case was attributable to the plaintiff, the Appellate Division found that the court improvidently exercised its discretion in granting the plaintiff's motion for an award of an attorney's fee. The court determined that the plaintiff had unnecessarily prolonged the litigation by maintaining a "tenuous" tort claim in order to effectuate a more favorable settlement in the matrimonial case. As noted by the court, counsel for the plaintiff testified at the counsel fee hearing that the tort claim was "strictly window dressing." The court also found that the defendant was prompted to make applications to modify the pendente lite award when the plaintiff's deposition testimony showed that the net worth statement she submitted in support of her application for pendente lite relief contained "nonexistent or highly exaggerated expenses."

²⁶ *Silverman v Silverman*, 304 A.D.2d 41, 47–49 (1st Dept.,2003)

²⁷ It provides, in part: (a) In any action or proceeding brought ... (3) for a divorce, ... the court may direct either spouse..., to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. ... Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses....

²⁸ *Silverman v Silverman*, 304 A.D.2d 41, 47–49 (1st Dept.,2003)

fees to the lawyer of the nonmonied spouse. The statute's reference to “having regard to the circumstances of the case and of the respective parties” permits consideration of many factors, but focuses primarily upon the paramount factor of financial need. It explained that an award of counsel fees to the husband would not level the playing field, but rather, would serve merely to punish the wife for what the court viewed as wasteful, frivolous litigation conduct. An attorney fee award of such a punitive nature is permissible only under 22 NYCRR 130-1.1. While it is conceivable that a counsel fee award to which a nonmonied spouse might otherwise be entitled could be *reduced* to the extent that party's conduct was considered to be frivolous or wasteful, it held that it is improper to direct the nonmonied spouse to pay a portion of the other's fees under Domestic Relations Law § 237.

The First²⁹ and Second³⁰ Departments have held that it is improper to require the less monied spouse to pay a portion of the counsel fees of the monied spouse.

However, the Second Department has also held, where the wife's income was higher than the husband's income, that the court providently exercised his discretion in determining that the wife was entitled to attorneys' fees based on the finding that the husband's conduct delayed the litigation.³¹ It is impossible to reconcile decisions such

²⁹ In *Silverman v. Silverman*, 304 A.D.2d 41, 756 N.Y.S.2d 14 (1st Dep't 2003) the Appellate Division held that “[w]hile it is conceivable that a counsel fee award to which a nonmonied spouse might otherwise be entitled could be *reduced* to the extent that party's conduct was considered to be frivolous or wasteful, it is improper to direct the nonmonied spouse to pay a portion of the other's fees under Domestic Relations Law §237.”

In *Wells v. Serman*, 92 A.D.3d 555, 938 N.Y.S.2d 439 (1st Dep't 2012) the Appellate Division reversed an order which granted plaintiff's motion for an award of interim counsel fees of \$17,850. It held that Supreme Court's award of interim counsel fees to plaintiff, the monied spouse, based solely on defendant's conduct in delaying the litigation, was improper under Domestic Relations Law §237. An award of counsel fees under Domestic Relations Law §237 cannot be made merely to punish a party for claimed discovery delays or for seeking a jury trial on grounds.

In *Roddy v. Roddy*, 76 N.Y.S.3d 141, 143, 161 A.D.3d 441, 441 (1 Dept., 2018) the Appellate Division held that where a party's inappropriate litigation conduct has adversely affected the other party but both are able to pay their own counsel fees, the appropriate remedy may be a sanction (22 NYCRR 130–1.1), not an award of attorneys' fees (*Silverman v. Silverman*, 304 A.D.2d at 48–49, 756 N.Y.S.2d 14).

In *Kesavan v. Kesavan*, 78 N.Y.S.3d 345, 347 (1 Dept., 2018) the Appellate Division held that the court properly denied defendant's request for counsel fees based on plaintiff's litigation conduct (*see Wells v. Serman*, 92 A.D.3d 555, 555, 938 N.Y.S.2d 439 [1st Dept. 2012] [an award of counsel fees “merely to punish a party” is inappropriate])

³⁰ In *Hathaway v. Hathaway*, 16 A.D.3d 458, 791 N.Y.S.2d 631 (2d Dep't 2005) the Appellate Division held that the Supreme Court erred in directing that the plaintiff's “outstanding legal fees ... and those fees paid previously from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties.” This provision effectively made the defendant, the non-monied spouse, pay a substantial portion of the counsel fees of the monied spouse, the plaintiff who was worth over \$1 million, in violation of Domestic Relations Law §237 and, therefore, was improper.

³¹ In *Odermatt v. Odermatt*, 119 A.D.3d 754, 989 N.Y.S.2d 335 (2d Dep't 2014), the parties waived a hearing on the plaintiff's prospective application for attorneys' fees. The plaintiff's attorney submitted an affirmation and invoices detailing the legal services provided to the plaintiff. The plaintiff also submitted an affidavit alleging that the defendant's conduct had delayed the litigation and caused her to incur substantial fees, and requesting that she be awarded the sum of \$30,000, representing approximately one-half of the attorneys' fees she had expended in prosecuting the action. The defendant opposed the plaintiff's application for attorneys' fees, pointing out that her income was higher than his income, and alleging that it was her conduct that delayed the litigation. The Judicial

as this.

Courts may consider whether a party engages in obstructionist conduct in determining the *amount* of a counsel fee award. A counsel fee award to the less monied spouse can be reduced, based upon a party's obstructionist or delaying tactics.³²

The First Department has held that an award of counsel fees under Domestic Relations Law § 237 cannot be made merely to punish a party for its litigation conduct.³³ Where a party's inappropriate litigation conduct has adversely affected the other party but both are able to pay their own counsel fees, the appropriate remedy is a sanction, not an award of attorneys' fees.³⁴ This determination appears to impliedly overrule the First Departments holding in *Lammers v Lammers*³⁵ where that court held that the award of attorneys' fees was proper because it primarily compensated plaintiff for delays in the trial caused by defendant, the penalizing component, if any, being secondary.

Hearing Officer awarded the plaintiff as attorneys' fees the full sum expended, finding that the delays in bringing the action to conclusion were directly attributable to the defendant. The Appellate Division held that although the plaintiff's income was higher than the defendant's, the Judicial Hearing Officer providently exercised his discretion in determining that she was entitled to attorneys' fees based on his finding that the defendant's conduct delayed the litigation.

³² In *Silverman v. Silverman*, 304 A.D.2d 41, 756 N.Y.S.2d 14 (1st Dep't 2003) the Appellate Division held that “[w]hile it is conceivable that a counsel fee award to which a nonmonied spouse might otherwise be entitled could be *reduced* to the extent that party's conduct was considered to be frivolous or wasteful, it is improper to direct the nonmonied spouse to pay a portion of the other's fees under Domestic Relations Law §237.”

In *Wells v. Serman*, 92 A.D.3d 555, 938 N.Y.S.2d 439 (1st Dep't 2012) the Appellate Division reversed an order which granted plaintiff's motion for an award of interim counsel fees of \$17,850. It held that Supreme Court's award of interim counsel fees to plaintiff, the monied spouse, based solely on defendant's conduct in delaying the litigation, was improper under Domestic Relations Law §237. An award of counsel fees under Domestic Relations Law §237 cannot be made merely to punish a party for claimed discovery delays or for seeking a jury trial on grounds.

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³³ In *Roddy v Roddy*, 161 A.D.3d 441, 76 N.Y.S.3d 141 (1st Dept., 2018) the Appellate Division reversed an order of the Supreme Court which directed that plaintiff pay a portion of defendant's counsel fees. It pointed out that the Domestic Relations Law permits the court to direct a party to pay counsel fees “to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties”. (DRL § 237(a)) These provisions are intended “to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel and permit consideration of many factors, but focus primarily upon the paramount factor of financial need” Where a party's inappropriate litigation conduct has adversely affected the other party but both are able to pay their own counsel fees, the appropriate remedy may be a sanction (22 NYCRR 130–1.1), not an award of attorneys' fees. It held that Supreme Court's award of interim counsel fees to plaintiff, the monied spouse, based solely on defendant's conduct in delaying the litigation, was improper under Domestic Relations Law § 237. An award of counsel fees under Domestic Relations Law § 237 cannot be made merely to punish a party for claimed discovery delays or for seeking a jury trial on grounds.

³⁴ *Roddy v Roddy*, 161 A.D.3d 441, 76 N.Y.S.3d 141 (1st Dept., 2018)

³⁵ 227 A.D.2d 255, 255–56 (1st Dept., 1996)

The Second Department has held that a court may award sanctions and counsel fees where a party has engaged in frivolous conduct pursuant to 22 NYCRR 130-1.1³⁶

23-13. Hourly rates requested must be reasonable (new)

The application for counsel fees after trial must demonstrate that the hourly rates requested are reasonable. As a general rule, the reasonable hourly rate for an attorney should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented.³⁷ Although an award of an attorney's fee is within the discretion of the court, the award must be based upon a showing of "the hours reasonably expended and the prevailing hourly rate for similar legal work in the community".³⁸

Counsel should offer evidence with regard to her experience and reputation in the community. Counsel must offer evidence, other than a self-serving statement, that his hourly rates are based upon the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation.³⁹

A statement by counsel that they regularly bill at the rate requested is not proof as to the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented.⁴⁰

Rule 1.5 of the Rules of Professional Conduct requires that lawyer's charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Rule 1.5 also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

The Rules of Professional Conduct contains a list of factors to be considered when determining if a fee is excessive. The factors to be considered in determining whether a

³⁶ Weissman v. Weissman, 116 A.D.3d 848, 985 N.Y.S.2d 93 (2nd Dep't 2014)

³⁷ Getty Petroleum Corp. v. G.M. Triple S. Corp., 187 A.D.2d 483, 483-484, 589 N.Y.S.2d 577; see Gutierrez v. Direct Mktg. Credit Servs., 267 A.D.2d 427, 701 N.Y.S.2d 116; Matter of Rahmey v. Blum, 95 A.D.2d 294, 466 N.Y.S.2d 350

³⁸ Gutierrez v. Direct Mktg. Credit Servs., supra at 428, 701 N.Y.S.2d 116); Gamache v. Steinhaus, 776 N.Y.S.2d 310, 311-12, 7 A.D.3d 525, 527 (2 Dept.,2004)

³⁹ Gamache v. Steinhaus, 776 N.Y.S.2d 310, 311-12, 7 A.D.3d 525, 527 (2 Dept.,2004)

⁴⁰ Gamache v. Steinhaus, 776 N.Y.S.2d 310, 311-12, 7 A.D.3d 525, 527 (2 Dept.,2004) ; Getty Petroleum Corp. v. G.M. Triple S. Corp., supra at 483-484, 589 N.Y.S.2d 577; see Gutierrez v. Direct Mktg. Credit Servs., supra..

fee is excessive may include the following: (1) the time and labor required, the novelty and difficulty of the Questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.⁴¹

23-14. Court is expert on value of legal services (new)

The Court is itself an expert on the question of the value of legal services. It may consider its own knowledge and experience in appraising legal services, fixing a reasonable hourly rate,⁴² and determining the reasonable value of legal services.⁴³

⁴¹ Rules of Professional Conduct, Rule 1.5

⁴² De Bernardo v. De Bernardo, 580 N.Y.S.2d 27, 28, 180 A.D.2d 500, 502 (1 Dept.,1992).

⁴³ Delgado v. Delgado, 553 N.Y.S.2d 750, 751, 160 A.D.2d 385, 386 (1 Dept.,1990); see, McAvoy v. Harron, 26 A.D.2d 452, 454, 275 N.Y.S.2d 348, aff'd. 21 N.Y.2d 821, 288 N.Y.S.2d 906, 235 N.E.2d 910.