Successfully Litigating Attorney's Fees Claims

October 23, 2018

6:00 p.m. – 8:00 p.m.

CBA Law Center

New Britain, CT

CT Bar Institute Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (AOP)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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6:30 – 6:40 p.m.	Rules of practice for attorney's fees claims in Connecticut state and federal courts	Erick Sandler
6:40 – 7:05 p.m.	What you must be aware of from the start of the case if you are bringing an attorney's fees claim	Ed McCreery, Richard Hayber
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Faculty Biographies

Alvin W. Thompson is a United States District Judge for the District of Connecticut. He was appointed by President Clinton in October of 1994 and served as Chief Judge from 2009 to 2013.

Judge Thompson earned his B.A. degree from Princeton University in 1975 and his J.D. degree from Yale Law School in 1978. Upon completing his legal education, he was engaged in private practice with Robinson & Cole in Hartford, where he was elected Managing Partner in 1991 and remained until he was appointed to the Bench.

He is very active in the American Bar Association. His involvement has included serving as Chair of the Section of Business Law and serving on the Scholarship Committee for the ABA Legal Opportunity Scholarship Fund.

Attorney **Richard E. Hayber** founded his own law firm because of his strong beliefs in protecting the legal rights of hard-working employees. Hayber Law Firm assists employees with a variety of issues, from claims for unemployment benefits to wrongful termination, discrimination, and unpaid wages. Hayber Law firm has experience handling an array of complicated employment issues in Connecticut. We have successfully represented employees from all walks of life who were victims of illegal practices by employers. He is committed to providing his clients the best possible representation by keeping track of the latest trends, techniques and advancements in litigation.

Attorney Hayber's wage and hour practice has grown significantly over the years and the majority of the reported opinions in Connecticut state and federal courts in this area come from cases handled by the Hayber Law Firm. These cases include class and collective actions which include employees from all over the country. Over the past several years, he has obtained tens of millions of dollars in unpaid wages for employees from major corporations in cases involving automobile damages appraisers, restaurant workers, retail assistant managers, retail store managers, insurance company employees and misclassified delivery drivers. His work has forced many companies to change their pay practices and pay workers fair wages for their work.

Attorney Hayber has been selected as a *Super Lawyer*® * in the practice area of employment & labor law by *Super Lawyers Magazine* from 2010-2018. He has a perfect AVVO Rating of a 10.0 and was recognized as a 2012 AVVO Client's Choice for employment law.

He is currently licensed in Massachusetts and Connecticut as well as United States District Court for the District of Connecticut and the Second Circuit Court of Appeals. He is also a member of the National Employment Lawyers Association and the Connecticut Employment Lawyers Association.

Attorney Hayber is the author of the Connecticut Employee Rights Blog, and has written articles for the Connecticut Bar Association's Labor and Employment Quarterly and for the Connecticut Law Tribune.

Edward P. McCreery III has extensive jury and non-jury trial experience in the state and federal courts, covering a wide range of commercial litigation matters. In addition to his court experience, Ed has handled numerous matters before Connecticut state and municipal agencies. He has also represented clients in a broad range of alternative dispute forums, including arbitration and mediation, and has acted as a private and court volunteer mediator to non-client parties.

Ed has represented several municipalities throughout Connecticut, both as corporate counsel and as special counsel, on topics such as land use, construction defects, FOIA, environmental remediation, condemnation, affordable housing applications, and referenda disputes.

Ed has spoken extensively on the topics of litigation, land use, and insurance coverage for private and public seminars. He is known for his regular updates on Connecticut appellate decisions, which are linked on this page.

Erick M. Sandler is a Partner at Day Pitney LLP. Erick represents clients in complex business disputes and shareholder and securities litigation. He has handled large scale litigation matters for clients in a variety of fields, including financial services, energy, aerospace, manufacturing, e-commerce, real estate, healthcare and life sciences, education, and insurance. Erick has extensive experience handling disputes involving contracts, fiduciary duty claims, unfair trade practices, antitrust, M&A, joint ventures and closely held businesses, class actions, trusts and estates, real estate and land use, and taxation. In addition to his trial practice, Erick has handled appeals in federal and state courts.

Connecticut Bar Association

SUCCESSFULLY LITIGATING ATTORNEYS' FEE CLAIMS

Presented by: Honorable Alvin W. Thompson,
Senior United States District Judge (District of Connecticut)

Richard E. Hayber, The Hayber Law Firm, LLC

Edward P. McCreery, Pullman & Comley, LLC

Erick M. Sandler, Day Pitney LLP

I. OVERVIEW OF BASIS FOR RECOVERY

A. GENERALLY

- Contract

It is a well-established principle that courts must interpret contractual attorneys' fees provisions according to the intent of the parties and the language they used. See, e.g., *Ives v. Willimantic*, 121 Conn. 408, 411 (1936)

- Statute / Rule of Procedure
- Common Law

o B. CONNECTICUT STATE COURT

"Connecticut adheres to the American rule under which successful parties are not entitled to recover attorney's fees in the absence of statutory or contractual authority to the contrary.... Thus, a specific contractual term may provide for the recovery of attorney's fees and costs ... or a *statute* may confer such rights." *East Windsor v. East Windsor Housing, Ltd., LLC*, 150 Conn. App. 268, 274, (2014); *Tomick v. United Parcel Service, Inc.*, 324 Conn. 470, 480 (2016).

Some State Samples of Authority:

- Class Action P.B. § 9-9(f)
- Civil Rights §46a-58, et seq.
- CUTPA § 42-110g(d)
- Derivative Action § 52-572j(b)/34-271(e)
- Inherent Authority of Court
- Reverse Consumer Claim § 45-150bb
- Wage Claim § 31-68; 72
- Common Law: Fraud, Theft, Fiduciary Duty, Punitive Damage, Vexatious Litigation
- Computer Crime § 53-452
- Dissolutions Actions § 46b-62a
- Foreclosure § 52-249(a)
- Product Liability § 52-240a
- Tax Collections § 12-161a
- AAA Construction Rules 48(d)

o C. FEDERAL COURT

Some Federal Samples of Authority:

- Copyright 17 USC § 505
- Civil Rights 42 USC § 1988(b)
- ERISA 29 USC § 1132(g)(1)
- False Claims 21 USC § 3730(d)(1)
- FRCP 11
- FRCP 37(b)(2) (Discovery Sanction)
- Fair Labor Standards Act 29 USC § 201, et seq
- Civil Rights (Against the U.S. Government) 29 USC § 2412
- Patent 35 USC § 285

- **Civil Rights Litigation**
  - Federal Law: 42 U.S.C. Sec. 1988(b):

    "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, **and** 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, **may** allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction"

  - Connecticut Law: Connecticut Fair Employment Practices Act (C.G.S. Sec. 46a-60, 46a-104)

    Relief. The court may grant a complainant in an action brought in accordance with section 46a-100 such legal and equitable relief which it deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney's fees and court costs. The amount of attorney's fees allowed shall not be contingent upon the amount of damages requested by or awarded to the complainant.

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- **Wage/Hour Litigation**

  - Fair Labor Standards Act (29 U.S.C. Sec. 216(b)).

    " The court in such action **shall**, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. "

  - Connecticut Wage Act: C.G.S. Sec. 31-58, et seq. (31-68, 31-72):

    "(a) If any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled under sections 31-58, 31-59 and 31-60 or by virtue of a minimum fair wage order he or she shall recover, in a civil action, (1) twice the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court."

- **Consumer Law**
  - CUTPA C.G.S. Sec. 42a-110, *et seq*

    (d) In any action brought by a person under this section, the court **may** award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. In a class action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees. In any action brought under this section, the court may, in its discretion, order, in addition to damages or in lieu of damages, injunctive or other equitable relief.

- **Contract Law**
  - Employment contracts, landlord/tenant contracts, etc…

The Purpose of Awarding Attorneys' Fees

- "We think the policy concerns supporting an award of fees on the underlying merits of a case before a district court apply with equal force to the defense of that award on appeal. In enacting Section 1988, Congress asserted that the "'civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [those] laws contain.'" Hensley v. Eckerhart, 461 U.S. 424, 445, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)(Brennan, J., concurring in part and dissenting in part) (quoting S. Rep. No. 94-1011, at 2 (1976)); see H.R. Rep. No. 94-1558 (1976).

- "Congress enacted § 1988 solely to make certain that attorneys representing plaintiffs whose rights had been violated could expect to be paid . . . ." Hensley, 461 U.S. at 454.

- "While a court may, in exceptional circumstances, adjust the lodestar, Perdue, 130 S.Ct. at 1673, it may not disregard it entirely. Especially for claims where the financial recovery is likely to be small, calculating attorneys' fees as a proportion of damages runs directly contrary to the purpose of fee-shifting statutes: assuring that civil rights claims of modest cash value can attract competent counsel. The whole purpose of fee-shifting statutes is to generate attorneys' fees that are *disproportionate* to the plaintiff's recovery. Thus, the district court abused its discretion when it ignored the lodestar and calculated the attorneys' fee as a proportion of the damages awarded." *Millea v. Metro-North, RR*, 658 F.3d 154, 169 (2d Cir. 2011) (emphasis in the original).

What Do you Get?

- **A. Reasonable Fees: (Johnson Factors)**

  - Factors to be considered in assessing the reasonableness of an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act (42 USCS 1988) are (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases; these factors may be relevant in adjusting the "lodestar" amount, which provides an initial estimate of a reasonable fee by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate, but no one factor is a substitute for that calculation. *Blanchard v. Bergeron*, 489 U.S. 87 (1989) citing *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 718 (5th Cir. 1974).

  - Connecticut court also apply the *Johnson* factors.

- **Rule 1.5 of Rules of Professional Conduct:**

(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 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 the 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.

- **B. For Claims on Which You "Prevailed"**
  - "A plaintiff need not have won a judgment on all of his claims in the litigation in order to be a prevailing party within the meaning of § 1988; he may be said to have prevailed if he has "succeed[ed] on any significant issue in litigation which achieves some of the benefits [he] sought in bringing suit." Hensley v. Eckerhart, supra, 103 S. Ct. at 1939 (quoting *Nadeau v. Helgemoe, supra*, 581 F.2d at 278-79, and stating that "this is a generous formulation. . . .").

  - We have adopted this standard in a case involving attorney's fees under a statutory section that used language "virtually identical" to that of § 1988. *United States v. Board of Education*, 605 F.2d 573, 576 (2d Cir. 1979). We have also approved the award of fees when the litigation has produced a settlement that induced the defendant to change its policies. *See Gagne v. Maher*, 594 F.2d 336, 340-41 (2d Cir. 1979), *aff'd*, 448 U.S. 122, 129, 65 L. Ed. 2d 653, 100 S. Ct. 2570 (1980). Further, while this Court apparently has not considered a formulation more "generous" than that endorsed in *Hensley v. Eckerhart*, we note that the First Circuit has deemed a plaintiff to have prevailed within the meaning of § 1988 when the suit was a "catalyst" to further action that gave plaintiff the relief sought [**8] **without need for entry of a judgment.** *Nadeau v. Helgemoe, supra*, 581 F.2d at 279; *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 599 (1st Cir. 1982), and that at least one district court within this Circuit has referred, obiter, to the catalyst test, *see Marci v. City of New Haven*, 503 F. Supp. 6, 8 (D. Conn. 1980)." *Gingras v. Lloyd*, 740 F.2d 210 (2d Cir. 1984). spent on unsuccessful claim should be excluded, but where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorneys' fee reduced simply because the district court did not adopt each contention raised). *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (fee not limited to amount agreed to in contingency arrangement, rather initial estimate is lodestar)

- **C. For Hours That You Documented Contemporaneously**
  - *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983) ("contemporaneous time records are a prerequisite for attorney's fees in this Circuit");
  - But, no "block billing:"

    Second Circuit case law concerning block billing provides only limited guidance as to whether a reduction for block billing is appropriate, "as some authorities impose ***fee*** reductions based on this practice, and others find the practice tolerable." *United States v. Sixty-One Thousand Nine Hundred Dollars & No Cents,* 856 F. Supp. 2d 484, 490 (E.D.N.Y. 2012) (comparing *Miroglio S.P.A. v. Conway Stores, Inc.,* 629 F. Supp. 2d 307, 314 (S.D.N.Y. 2009), with *Rodriguez ex rel. Kelly v. McLoughlin,* 84 F. Supp. 2d 417, 425 (S.D.N.Y. 1999)). "The key question is whether the court, upon review of all the time entries, can determine whether the total amount of time was reasonable considering all of the activities undertaken." Id. (further explaining that "no lawyer is going to actually make a notation every six minutes as to what he [or she] did that last six minutes," and thus, "some level of reconstruction and approximation is unavoidable"). In general, courts make reductions for block billing where:

    (1) there is reason to believe that the hours billed were independently unreasonable;
    (2) the block billing involved aggregating tasks that were not all compensable; or
    (3) the number of hours block billed together was so high (such as five hours or more) so as to create an unacceptable risk that the aggregated total exceeded the reasonable hours worked on compensable tasks.

o D. You Get a "Reasonable Hourly Rate"

- Usually, this requires affidavits from other attorneys in the community who practice in the same area. Their affidavits should say what their experience is and what they charge and also that they have knowledge of your experience and that your rate should be the same.

- You can also get a stipulation as to your hourly rate from opposing counsel.

- The rate should usually be the rate of the lawyers where the court sits.

  "According to the forum rule, courts "should generally use 'the hourly rates employed in the district in which the reviewing court sits' in calculating the presumptively reasonable fee." *Arbor Hill*, 493 F.3d at 119 (quoting *In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 226, 232 (2d Cir. 1987)); *see also Blum*, 465 U.S. at 895; *Polk*, 722 F.2d at 25.

- You are not limited to the 1/3 part of your fee agreement. Lodestar is the presumptively reasonable award.

  Noel v. Ribbits, LLC, 132 Conn. App. 531 (Conn. App. 2011) (jury verdict on sexual harassment, fee initially limited to 1/3 of $1,600 award or $533.33, error, remanding for hearing on fees, reminding trial court of 12 "Johnson" factors, n. 6.) On remand, fee award was $120,548.43 (75%) out of $16,721.25 claimed). *Noel v. Ribbits, LLC*, 2012 Conn. Super LEXIS *999.*

Successfully Litigating Attorneys' Fee Claims…

- *Millea v. Metro-North RR,* 658 F.3d 154 (2d Cir. 2011) (jury verdict for P on FMLA interference but for D on two other counts. Jury awarded P $612.50. Court awarded 1/3 or $204 rather than $144,792 sought. Error to base fees on a % of the award to P.

  First, District Court should have calculated lodestar as the "presumptively reasonable fee." Second, reducing it because interference with FMLA had no public policy significance and because P was unsuccessful on retaliation and IIED claims. The hours spent "solely" on those claims should be excluded, but all others are part of the presumptively reasonable lodestar. Finally, reducing the award because the victory was "de minimus" was error.

  The $612.50 ***award*** was not de minimis; to the contrary, the ***award*** was more than 100% of the damages Millea sought on that claim.
  It was not a derisory or contemptuous rejection by the jury. The district court conflated a small damages ***award*** with a de minimis victory. True, where the plaintiff manages to prevail on a technicality in a mostly frivolous lawsuit, a court should ***award*** no ***attorneys' fees*** to discourage such lawsuits.

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- *Farrar v. Hobby,* 506 U.S. 103, 114-15, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

  However, "[t]hat is not to say that *all* nominal damages awards are *de minimis*. Nominal relief does not necessarily a nominal victory make."

- *Farrar, 506 U.S. at 120-21* (O'Connor, J., concurring). FMLA claims are often small-ticket items, and small damages awards should be expected without raising the inference that the victory was technical or de minimis. If an expense of time is required to obtain an ***award*** that is not available by voluntary compliance or offer of settlement, the expense advances the purposes of the statute.

o E. Fee Need Not be Proportional to the Award

- In Connecticut, there is a "strong public policy for giving courts discretion to award substantial attorneys' fees when the plaintiffs claim for damages and recovery is not large. Courts have recognized that the cumulative impact of small violations of one's civil rights may not be minimal to society as a whole." *Simms v. Chaisson*, 277 Conn. 319, 334 (2006).

- "While a court may, in exceptional circumstances, adjust the lodestar, Perdue, 130 S.Ct. at 1673, it may not disregard it entirely. Especially for claims where the financial recovery is likely to be small, calculating attorneys' fees as a proportion of damages runs directly contrary to the purpose of fee-shifting statutes: assuring that civil rights claims of modest cash value can attract competent counsel. The whole purpose of fee-shifting statutes is to generate attorneys' fees that are *disproportionat*e to the plaintiff's recovery. Thus, the district court abused its discretion when it ignored the lodestar and calculated the attorneys' fee as a proportion of the damages awarded." *Millea v. Metro-North, RR*, 658 F.3d 154, 169 (2d Cir. 2011) (emphasis in the original).

- **F. Discoverable Defense Records/Billings?**

  - Sometimes. Case by case basis. No hard rule. *See Costa v. Sears Home Improvement Prods.*, 178 F.Supp.3d 108, 112 (W.D.N.Y. 2016) (collecting cases).

  - *See, e.g., Serricchio v. Wachovia Sec., LLC*, 258 F.R.D. 43, 45 (D.Conn. 2009) (Jury awarded $778,906 and Plaintiff's attorneys sought $968,653 in fees. Court ordered defendant's billing records to be produced).

    "Serricchio persuasively argues, however, that the better approach is to permit discovery of an opponent's **billing records** and then, in comparing the work performed by each side's **attorneys**, regard differences in the parties' burdens and incentives as **relevant** to the weight of the records, not whether the **records** are **discoverable**."

G. Fees Spent on Successful Appeals are Compensable

- The Second Circuit has held that a "culpable defendant should not be allowed to cause the erosion of fees awarded to the plaintiff for time spent in obtaining the favorable judgment by requiring additional time to be spent thereafter without compensation." Weyant v. Okst, 198 F.3d 311, 316 (2d Cir. 1999).

  "[T]o hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals." Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979) (quotation marks omitted), aff'd, 448 U.S. 122, 100 S. Ct. 2570, 65 L. Ed. 2d 653 **[*223]** (1980).

- It would also run contrary to the "presumption that successful civil rights litigants should ordinarily recover attorneys' fees." Raishevich, 247 F.3d at 344.

  See also, Noel v. Ribbits, LLC, 132 Conn. App. 531 (Conn. App. 2011) (adding $22,000 to fee application for hours spent on appeal).

II. RULES OF PRACTICE FOR SEEKING ATTORNEYS' FEES

o A. Identify the substantive and procedural laws that govern the attorneys' fees claim

- **Conflict of law rules may need to be applied to determine which state's substantive law governs the attorneys' fees claim.** *See Ancile Inv. Co. Ltd. v. Archer Daniels Midland Co.*, 992 F. Supp. 2d 316, 318 (S.D.N.Y. 2014).

- **Federal Court Issues**
  - In diversity cases, attorneys' fees are considered substantive and controlled by state law. *See Bristol Tech., Inc. v. Microsoft Corp.*, 127 F. Supp. 2d 64, 66 (D. Conn. 2000).
  - But federal procedural rules always apply when in federal court.
  - Attorneys' fees may be awarded on a pendent state law claim if the claim permits such an award, even if the attorney's fees are not available under the federal law claim. *See Cotton v. Slone*, 4 F.3d 176, 181 (2d Cir. 1993) (attorney's fees available under Connecticut securities fraud statute but not under section 10(b) of Securities and Exchange Act). *But see Fed. Ins. Co. v. Speedboat Racing Ltd.*, 2017 WL 319170, at *7 (D. Conn. Jan. 23, 2013) (because CUTPA provisions regarding attorney's fees and punitive damages conflict with established admiralty law, they are preempted).
  - When diversity jurisdiction is claimed, "[a]ttorney's fees may be used to satisfy the amount in controversy only if they are recoverable as a matter of right pursuant to statute or contract." *Pagano v. Ruby Tuesday, Inc.*, 2016 WL 9804410, at *2 (D. Conn. Aug. 25, 2016) (citing *Kimm v. KCC Trading, Inc.*, 449 Fed. Appx. 85, 85-86 (2d Cir. 2012)).

B. Pleadings and Motion Practice

- **Always plead the basis for attorneys' fees claim. Don't assume that including a prayer for relief for attorneys' fees, without explanation, will be enough.**

- State Court
  - A motion to strike is the proper vehicle for challenging the legal sufficiency of a prayer for relief. Conn. Prac. Book § 10-39(a)(2); *Hartt v. Schwartz*, 1993 WL 104421, at *4 (Conn. Super. Ct. Mar. 25, 1993); *see City of Danbury v. Sullivan*, 1991 WL 269107, at *1, 5 Conn. L. Rptr. 325 (Conn. Super. Ct. Dec. 4, 1991) (striking claims for attorney's fees and punitive damages); *Hubbell v. Ratcliffe*, 2009 WL 2782343, at *5 (Conn. Super. Ct. July 28, 2009) (striking prayer for relief for common law punitive damages because allegation did not amount to reckless, wilful or wanton behavior).

- Federal Court
  - A motion to strike pursuant to Fed. R. Civ. P. 12(f), rather than a motion to dismiss, is the proper motion to challenge a claim for attorneys' fees at the pleadings stage. *SRSNE Site Group v. Advance Coatings Co.*, 2014 WL 671317, at *1-2 (D. Conn. Feb. 21, 2014); *see also Rosa v. TCC Commc'ns*, 2016 WL 67729, at *7 (S.D.N.Y. Jan. 5, 2016) (granting motion to strike). But…
  - "Whether or not there is merit in Defendants' motion to strike, courts in this circuit have denied a defendant's motion to strike or dismiss claims for attorney's fees even though the likelihood that plaintiff will be able to recover attorneys' fees is small, because dismissal of such claims at the pleading stage would be premature." *SRSNE Site Group*, 2014 WL 671317, at *2; *Bell v. Survey Sampling Int'l*, 2017 WL 1013294, at *8 (D. Conn. Mar. 15, 2017) (noting that attorney's fees are not available under TCPA, but declining to strike attorney's fees claim because claim may arise from possible common fund benefiting unnamed class members).

C. Case Management – State Court

- "[W]hen a court is presented with a claim for attorney's fees, the proponent must present to the court at the time of trial or, in the case of a default judgment, at the hearing in damages, a statement of the fees requested and a description of services rendered." *Smith v. Snyder*, 267 Conn. 456, 479 (2004) (affirming award of attorney's fees because the defendants did not oppose or otherwise take any action in response to the plaintiff's request for fees in their post-damages hearing brief).
    - *Stratek Plastics, Ltd. v. Ibar*, 179 Conn. App. 721, 733 (2018) (affirming award of attorney's fee on ground that the defendant had waived challenge pursuant to *Smith v. Snyder* and trial court afforded defendant ample opportunity to challenge the reasonableness of the fees requested).
- Possible to stipulate to the reservation of the attorney's fees claim for a separate proceeding and/or to bifurcate the merits and attorney's fees. *See Jacques All Trades Corp. v. Brown*, 42 Conn. App. 124, 132 (1996).

C. Case Management – Federal Court

- *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 2013 WL 3964916, at *3 (M.D. Ga. July 31, 2013) (granting motion to bifurcate trial so as to have a first phase to present evidence on liability for compensatory damages and the propriety of punitive damages and attorneys' fees, and a second phase, if the jury finds that punitive damages and attorneys' fees should be awarded, to present evidence as to the amount of punitive damages and attorneys' fees).

- Motion with Consent for Entry of Order for Discovery Schedule and Separate Trial on Plaintiff's Attorneys' Fees Claim, *Wells Fargo, N.A. v Konover*, D. Conn. 3:05-cv-1924 (Nov. 12, 2009).
  - Pre-trial: produce engagement letters and accounting of fees paid; disclose experts of fee claim
  - Bifurcate trial, with trial on attorneys' fees to follow if plaintiff prevailed on claim that gave rise to fee claim
  - Set discovery and briefing schedule for potential second trial phase on attorneys' fees

C. Motion Timing – State Court

- Practice Book § 11-21: Motions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered. If appellate attorney's fees are sought, motions for such fees shall be filed with the trial court within thirty days following the date on which the appellate court or supreme court rendered its decision disposing of the underlying appeal. Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages.
- Do not rely on a bill of costs pursuant to Practice Book § 18-5. *See Traystman, Coric and Keramidas, P.C. v. Daigle*, 282 Conn. 418, 432 (2007).
- Practice Book § 25-30(c): For family matters, file initial request for counsel fees in pre-hearing proposed orders.

C. Motion Timing – State Court (cont.)

- "Practice Book § 11-21 is directory and, therefore, affords the trial court discretion to entertain untimely motions for attorney's fees in appropriate cases." *Meadowbrook Center, Inc. v. Buchman*, 328 Conn. 586, 604 (2018).
- Connecticut adopted the "excusable neglect" standard used by federal courts as the governing law for a trial court's exercise of its discretion in determining whether to allow an untimely filing. *Meadowbrook Center*, 328 Conn. at 606.
- On remand, the Superior Court, after conducting a hearing, found that the late filing was excusable because the motion was filed only five days beyond the deadline, there was a lack of prejudice to the opposing party, and there was no allegation of bad faith. Memo. of Decision re: Excusable Neglect. *Meadowbrook Center, Inc. v. Buchman*, No. HHD-CV-10-6008121-S (Sept. 14, 2018) (Wahla, J.).

C. Motion Timing – State Court (cont.)

- Fees assessed as a component of damages
  - An award of attorneys' fees is considered an award of damages if the court's decision is premised on its exercise of its equitable powers in an effort to make the plaintiff whole. *Mangiante v. Niemiec*, 98 Conn. App. 567, 576 (2006) (holding that Section 11-21 did not govern the award of attorney's fees as damages suffered by minor beneficiary of trust resulting from trustee's depletion of trust funds in breach of fiduciary duty to beneficiary).
  - Section 11-21 not applicable to claim for attorneys' fees under mechanic's lien statute, which contemplates fees as a component of damages. *Torrance Family Ltd. P'ship v. Laser Contracting, LLC*, 94 Conn. App. 526, 527 (2006).

C. Motion Timing – Federal Court

- Fed. R. Civ. P. 54(d)(2)
  - (A) claim must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages
  - (B) Unless a statute or a court order provides otherwise, the motion must be filed no later than 14 days after the entry of judgment
    - Subject to excusable neglect standard of Fed. R. Civ. P. 6(b)(1)(B). *See Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220, 227-28 (2d Cir. 2004).
      - Danger of prejudice to the opposing party
      - Length of delay and potential impact on judicial proceedings
      - Reason for the delay, including whether it was in the reasonable control of the movant
      - Whether movant acted in good faith
    - Check local rules of the District you are in – they are standing orders for purposes of Rule 54(d)(2)(B).
  - 14 days is really short. Consider moving for extension or asking court to defer entry of judgment.

- **D. Factors**
  - It is well settled in this (Second) Circuit that courts utilize the "lodestar" method, i.e., "the product of a reasonable hourly rate and the reasonable number of hours required by the case," to determine a presumptively reasonable attorneys' fee award. *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011); Under this method, courts look to "the market rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.' " *Greathouse v. JHS Security, Inc.*, 2017 WL 4174811 at 2, quoting Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984)
  - In addition to measuring the party's success, the Federal courts will examine the same factors as the state court and can take judicial notice of prevailing rates in the district and prior awards. *Johnson v. The Guardian Life Insurance Comkpany,* 2018 WL 4623025 (Michael P. Shea U.S.D.J.)(2018)

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- A prevailing party seeking fees bears the burden of showing that the requested fee is reasonable. In calculating a reasonable fee, courts are instructed to multiply the hours reasonably expended by a reasonable hourly rate in the district in which the court sits. This is considered the "presumptively reasonable fee." "The reasonable hourly rate is the rate a paying client would be willing to pay," considering that a "paying client wishes to spend the minimum necessary to litigate the case effectively." Courts should consider "case-specific variables ... relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate." "Those variables include the time and labor required to litigate the case, the novelty and difficulty of the issues and level of skill necessary to address them, the attorneys' customary hourly rates and their experience, reputation and ability, and the nature and length of the professional relationship with the client." In determining a reasonable hourly rate, the district court can take judicial notice of local prevailing rates, based on both rates awarded in other cases and the court's own familiarity with them. A party seeking an award of fees must submit time records indicating "for each attorney, the date, the hours expended, and the nature of the work done." *Edwards v. Cornell and the City of Hartford,* 2018 WL 3381296 (William I. Garfinkel, U.S.M.J.)(internal cites omitted)

Successfully Litigating Attorneys' Fee Claims…

- A district court may award an enhancement on reasonable attorneys' fees "to compensate for delay in payment of fees previously earned." Enhancement of reasonable attorneys' fees may be permitted only in "rare and exceptional cases supported by both specific evidence on the record and detailed findings by the lower courts." Where the reason for enhancing attorneys' fees is based on the delay in payment, the delay must be exceptional and compensation "is generally made either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." It is also possible for an enhancement to be awarded "where an attorney assumes these costs in the fact of unanticipated delay, particularly where the delay is unjustifiably caused by the defense." In this situation, the court should calculate the enhancement in "using a method that is reasonable, objective, and capable of being reviewed on appeal...." *Hernandez v. Berlin Newington Associates*, 2018 WL 3599735 (Vanessa L. Bryant U.S.D.J.)

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- "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The resulting amount "is only presumptively reasonable; it is still within the court's discretion to adjust the amount upward or downward based on the case-specific factors." *Tyco Healthcare Grp. LP v. Ethicon Endo-Surgery, Inc.*, 2012 WL 4092515, at 1 (D. Conn. Sept. 17, 2012) (quotation marks and citation omitted). "Hence, the process is really a four-step one, as the court must: (1) determine the reasonable hourly rate; (2) determine the number of hours reasonably expended; (3) multiply the two to calculate the presumptively reasonable fee; and (4) make any appropriate adjustments to arrive at the final fee award." *Adorno v. Port Auth. of New York & New Jersey*, 685 F. Supp. 2d 507, 511 (S.D.N.Y. 2010).

- In determining a reasonable fee, the Court is mindful that "attorney's fees are to be awarded with an eye to moderation, seeking to avoid either the reality or the appearance of awarding windfall fees." *Tsombanidis v. City of W. Haven*, 208 F. Supp. 2d 263, 270 (D. Conn. 2002) (quotation marks and citation omitted), aff'd sub nom. *Tsombanidis v. W. Haven Fire Dep't.*, 352 F.3d 565 (2d Cir. 2003); see also *New York State Assoc. for Retarded Children v. Carey*, 711 F.2d 1136, 1139 (2d Cir. 1983).

- The Court addresses first the hourly rates requested by the SThree defendants' counsel. Determination of an appropriate hourly rate "contemplates a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel." *Farbotko v. Clinton Cty. of New York*, 433 F.3d 204, 209 (2d Cir. 2005). The Court may take "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district." Id. (collecting cases). This determination "also requires an evaluation of evidence proffered by the parties."

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- "According to the forum rule, courts should generally use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee." Simmons v. N.Y. City Transit Auth.,, 575 F.3d 170, 174, (2d Cir. 2009)(quotation marks and citations omitted); see also *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. Of Pomona*, 188 F. Supp. 3d 333, 338 (S.D.N.Y. 2016) ("A reasonable hourly rate is based on the current prevailing market rate for lawyers in the district in which the ruling court sits." (quotation marks and citation omitted)). Thus, when faced with a request for an award of higher out-of-district rates, a district court must first apply a presumption in favor of application of the forum rule. In order to overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result. *Simmons*, 575 F.3d at 175. "Mere proximity of the districts and brand name or prestige of the attorneys will not overcome the presumption. The party seeking the award must make a particularized showing that the selection of counsel was based on experience and objective factors and that use of in-district counsel would produce a substantially inferior result." *CSL Silicones, Inc. v. Midsun Grp. Inc.*, 2017 WL 1399630, at 4 (D. Conn. Apr. 18, 2017) (citations omitted).

- See *Innis Arden Golf Club v. Bowes*, 2012 WL 1108527, at 3 (D. Conn. Mar. 30, 2012) (noting that overcoming the forum rate presumption "requires a showing of subject matter specialization or law firm resources needed for the particular case which Connecticut firms could not adequately provide"). Indeed, counsel for the SThree defendants have not made any showing, let alone a particularized showing, that their clients selected them over local counsel based on their experience and other objective factors, and that the use of local counsel would have produced a "substantially inferior result." *Simmons v. N.Y. City Transit Auth.*, 575 F. 3d 170, 176 (2d Cir. 2009)

For an extensive discussion of previously approved Connecticut rates; the need to document the experience and effort of the Time Keeper; and the disallowance of higher Out-of-State Counsel Rates, See: *Friedman v. SThree PLC, et al, 2017 WL 4082678 (Sarah A. L. Merriam, U.S.M.J.)(09/15/17)*

Watch Out for Specific Rules:

1. **The 2nd Circuit applies a 5 part "Chambless factors" test in determining whether to award attorneys' fees to a prevailing plaintiff in an ERISA case.**
    i. Degree of Bad Faith
    ii. Ability to Pay
    iii. Deterrence
    iv. Benefit to Other Participants
    v. Merits of Respective Positions

Kimberly Johnson v. The Guardian Life Insurance Co., 2018 WL 4356744 (Michael P. Shea, U.S.D.J.) 09/26/2018

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2. **Prevailing Party Rules for Qui Tam / False Claims Act lawsuits.** See *United States, et al, Ex Rel. Greenwald DDS, Plaintiff/Relator v. Kool Smiles Dentistry, P.C.*, 3:10-CV-1100 (Janet Bond Arterton, U.S.D.J.) 09/12/18.

3. **Six part "Goldberg Test" for class action (common fund) Attorneys Fees with a 2nd Circuit preference for a "Percentage of Fund" calculation over the traditional 'Lodestar' method". *Edwards et al v. North American Power & Gas, LLC*, 2018 WL 3715273 (Victor A. Bolden, U.S.D.J.)(2018)**

4. In an FLSA case, a plaintiff prevails "if he 'succeed[s] on any significant issue in litigation which achieves some of the benefit ... sought in bringing suit.' " *Velasquez v. Digital Page, Inc.*, 124 F. Supp. 3d 201, 203 (E.D.N.Y. 2015) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hence, "[w]here plaintiffs obtain a favorable settlement in an action brought pursuant to the FLSA, they constitute prevailing parties and are entitled to attorney's fees." *Larrea v. FPC Coffees Realty Co.*, 2017 WL 1857246, at 5 (S.D.N.Y. May 5, 2017)

5. In order for an award of attorney's fees to enter, this Court must find (1) that plaintiff is a prevailing party, (2) that the Commissioner's position was without substantial justification, (3) that no special circumstances exist that would make an award unjust, and (4) that the fee petition was filed within thirty days of final judgment. *Richardson v. Berryhill*, 2018 WL 3218661 (Holly B. Fitzsimmons, U.S.M.J.)

III. PLANNING FOR YOUR REQUEST AT THE START OF YOUR CASE

- A. Protect your fee claim
  - If you are going to make a claim for fees at the end of the litigation, you need to conduct the litigation in a way to maximize your likelihood of success when the time comes.
- B. Plead only those cause of action you believe in. No "kitchen sink" pleading. If you have added a few extra counts early, withdraw them when you know they have no support.
- C. Make an early and reasonable demand

  - Defense attorneys will argue that the litigation wasn't necessary because it could have resolved earlier. It is usually a good idea to make a reasonable demand early in the litigation so you can show the court later that you tried to resolve it without litigation. This demand should be in writing, should explain the basis for it (legally and factually) and explain the calculation of damages.

    If Defendant makes no offer, you've done your part. You can now commence litigation knowing you tried.

Successfully Litigating Attorneys' Fee Claims…

- D. Let the defense know that your fees are a part of the claim
  - You should let defense counsel know that attorneys' fees are a part of your claim and the legal basis for that claim. You should ask defense counsel to show your letter to their client. If they ask for your fee agreement, you should give it to them.

    Remind defense counsel of the law on attorneys' fees (see above). Many of them don't understand and might mislead their client into thinking it won't be a big part of the case.

- E. Ask the defense to agree to motions before you file them
  - If you are about to file a motion that you believe has a high likelihood of success, you should write (email) defense counsel before filing it and ask them to consent to the relief you seek. Explain why you will win and why they should concede. Include in your explanation that the time your firm spends on the motion will later be paid for by their client if you win the case. When they refuse, file your motion. Keep these emails in a folder somewhere for use later with your fee application.

- F. Ask them to withdraw frivolous motions after they've filed them
  - If your opponent files a motion that you believe will be denied, ask them to withdraw it and tell them why. They probably won't, but this again lets you show the judge later that you tried to keep your fees down.

- G. How to Bill
  - 1. Be Clear:
    - Good: "Conference with client, prepare her for deposition, go over pleadings, her discovery responses, Defendant's arguments, roll play tough questions, explain process – 2.5 hours."
    - Bad: Conf w/ client – 2.5 hours.
  - 2. Make it apparent that the work needed to be done (blame defendant if possible)
    - Good: "Review Defendant's motion to strike count 3 of complaint, review Defendant's cases, prepare draft of opposition to Defendant's motion."

      OR
    - "Review email from defense counsel making settlement offer but without fair offer of attorneys' fee. Draft letter to defense counsel explaining why attorneys' fees are compensable, explaining billing record, asking for their lodestar, attempting to settle case with fair attorneys' fee."
    - Bad: "review case law."

- G. How to Bill Cont.
  - 3. No block billing
    - Good: Conference with client morning of deposition, last minute preparations, explain process, respond to questions – 1.0 hours.

      Attend and defend deposition of client (9 a.m. to 4 p.m.) - 7 hours

      Post deposition conference with client and associate, discuss testimony, next steps, how to combat threatened motion for summary judgment - .7 hours.

    - Bad: Depo – 8.7 hours.
  - 4. Write so that the reader will know what you did, why you did it, why the amount of time is reasonable, and why it wasn't your fault those hours needed to be incurred

    - Good: "Review defendant's opposition to motion to compel discovery, read cases cited by defendant, write section of Reply Brief distinguishing defendant's cases, find cases that contradict defendant's cases, insert discussion of same into Reply."

    - Bad: "write Reply"

IV. PREPARING AND PROSECUTING A REQUEST FOR ATTORNEYS' FEES

- This Circuit follows the dictates of Judge Newman's opinion in *New York State Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983), in evaluating a movant's proffered evidence supporting its attorneys' fees request: All applications for attorney's fees should normally be disallowed unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done. *Id.* at 1154. *Carey* nonetheless "sets out unequivocally that absent unusual circumstances attorneys are required to submit contemporaneous records with their fee applications." *KX Technologies, LLC v. Zuma Water Filters, Inc., et al*, 2018 WL 3302589 (07/05/18)

- Expert testimony is not required for a court's assessment of the reasonableness of attorney's fees. "[Trial] courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described.... Because of this general knowledge, [t]he court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues.... Therefore, [n]ot only is expert testimony not required, but such evidence, if offered, is not binding on the court." *Town of Greenwich v. Sakon,* 184 Conn. App. 385 (2018).

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- Include in application: references to cases awarding similar rates in the district; bio of each time keeper, including schooling, bar admissions, and experience.

- In addition to establishing reasonable rates for each time keeper, your next burden is to show the number of hours expended were reasonable. So, include in your application your argument explaining why certain elements of your case took the time they did. Next, include arguments on allocation of your fees to unsuccessful claims.

- Make sure your application addresses standards that may uniquely apply to your cause of action.

IV. PREPARING AND PROSECUTING A REQUEST FOR ATTORNEYS' FEES, cont'd.

- *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1259-60 (2d Cir. 1987) (full attorneys' fees justified where plaintiff's unsuccessful age discrimination claim was intertwined with his successful retaliatory claim).

- "'when certain claims provide for a party's recovery of contractual attorney's fees, but others do not, a party is nevertheless entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined.' " *Romag II*, 2014 WL 4073204, at 8 (quoting *Total Recycling Services of Connecticut v. Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 333 (2013)).

- It is well-established that a plaintiff can prevail even when he succeeds on only some, but not all, of his claims. *See* *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)

IV. PREPARING AND PROSECUTING A REQUEST FOR ATTORNEYS' FEES, cont'd.

Now that you've won, here is what you should do to get paid all that you've earned:

- A. Set a full and complete hearing date and time. Treat this like proving damages in the rest of the case.
- B. Obtain and review your billing records.
- C. Remove duplicates or billings that you know you won't win (including fees spent on arguments or claims you clearly lost).
- D. Obtain and review expense receipts. (maybe "lexis" bills won't be compensable?)
- E. Get a stipulation for your rate, if not, get affidavits from lawyers in your field to prove a range of reasonable fee rates.
- F. Hire an expert?

IV. PREPARING AND PROSECUTING A REQUEST FOR ATTORNEYS' FEES, cont'd.

- G. Create a binder of the documents in the file necessary to support your claim. This will be your evidence
  - 1. Initial research.
  - 2. Client meetings
  - 3. Demand letter(s)
  - 4. Response(s) from Defendant
  - 5. Documentation that you tried to settle it before litigation or early in the litigation
  - 6. Complaint
  - 7. Defense motions directed at the Complaint (Motions to strike)
  - 8. Rulings you won (denying Defense motion to strike)
  - 9. Discovery Requests and emails exchanged prior to filing a motion to compel
  - 10. Motion to compel
  - 11. Deposition outlines
  - 12. Rulings defeating motions for summary judgment
  - 13. Focus group work
  - 14. Mediation memos (showing your participation in mediation)
  - 15. Trial prep work (jury instructions, testimony outline, trial mgmt memos)
  - 16. Judgment

IV. PREPARING AND PROSECUTING A REQUEST FOR ATTORNEYS' FEES, cont'd.

- H. Your affidavit
  - Prepare an affidavit of you saying your expertise and experience, what your rate is, that the billing records were contemporaneously kept and are accurate (and maybe that you've already culled out the obviously non-compensable entries), and telling the story of the litigation. You can summarize segments of the litigation into understandable portions of your work. For example, the work you did to take in the case and get through initial negotiations, before commencing litigation, can be described like this:
  - *"Meet with client, learn facts, review documents, research latest cases on defamation, review payroll records, calculate damages, meet with client re possible settlement demand, draft demand letter, send to Defendant, review response from defense counsel (no offer), discuss next steps with client" 10.5 hours.*
  - The work you did in preparing the complaint and your first set of discovery requests, although spread out over 3 months, can be summarized like this:
  - Review latest cases, language of statutes, review model complaint from another case, review facts with client, draft complaint, review with client, conference with paralegal re cover sheet and service, serve and file complaint.
  - Review Defendant's Answer and Special Defenses, email to defendant asking them to withdraw 10 of their 34 special defenses, teleconference with defense counsel re same, prepare motion to strike 10 of 34 special defenses, draft first set of interrogatories and requests for production of documents, review defendant's discovery requests, respond to discovery, review defendant's written discovery responses, communications with defense counsel re written discovery deficiencies, motion to compel, obtain additional documents, begin preparation for depositions

IV. PREPARING AND PROSECUTING A REQUEST FOR ATTORNEYS' FEES, cont'd.

- H. Your Memorandum of Law
  - Write a memorandum of law, advocating for your fees. I usually do a powerful introduction, starting with the rule, how you tried to settle and were forced to litigate, the result you got and the amount of your fees. My next section is a powerful section on the rule (since some judges won't know how good the law is for plaintiffs in this area), and then a fact section which tells the story of a plaintiff who made a reasonable demand, tried to settle, was forced to litigate and was met with frivolous defenses.

- J. A hearing
  - I recommend making sure you ask for a full hearing on your fees early in the case. Come with all of your evidence. Treat it like any other part of the trial. Be prepared to give testimony if you think it is appropriate. Have another attorney examine you.

V. DEFENDING AGAINST A FEE APPLICATION

State and Federal decisions on when to disallow part of a claim are similar.

- *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (excessive or redundant hours should be excluded from attorney fee awards)

- A prevailing plaintiff "is not entitled to a fee for hours dedicated to prosecuting unsuccessful claims if those claims were unrelated to the claims on which the party prevailed." When, however, the unsuccessful claims are "not wholly unrelated" to the successful claim, hours spent on the unsuccessful claims do not need to be subtracted from the overall fee award. Where a plaintiff's claims involve "a common core of facts or are based on related legal theories, and are therefore not severable, attorney's fees may be awarded for unsuccessful claims as well as successful ones." (internal cites omitted). *Edwards v. Cornell, et al, 2018 WL 3381296 (William I. Garfinkel, U.S.M.J.)*

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- It is within the court's discretion to reduce an award of attorneys' fees by a specific percentage for duplicative, vague, or excessive billing entries. *See* *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 226, 237 (2d Cir. 1987) ("[T]he district court has the authority to make across-the-board percentage cuts in hours as a practical means of trimming fat from a fee application." (internal quotation omitted))

- Moreover, reduction is warranted to account for the experience of counsel and apparent efficiencies relating to the use of research and writing from prior motions.[3] Rivera v. Colvin, No. 3:14-CV-1012(WIG), 2016 WL 1363574, at *2 (D. Conn. Apr. 6, 2016)

V. DEFENDING AGAINST A FEE APPLICATION

- It is well-settled that once it is determined that a party is entitled to fees, "[i]t remains for the district court to determine what fee is 'reasonable.' " *Hensley v. Eckerhart*, 461 U.S. at 433, 103 S.Ct. 1933. In other words, "the determination of how much to trim from a claim for fees is committed to the [district] court's discretion." *Okla. Aerotronics, Inc. v. United States*, 943 F.2d 1344, 1347 (D.C. Cir. 1991). With "no precise rule or formula for making these determinations," a district court may engage in a retail-level inquiry of specific hours that should be eliminated, or, "it may simply reduce the award to account for the limited success." *Hensley*, 461 U.S. 436–37, 103 S.Ct. 1933. ("Whenever the district court augments or reduces the lodestar figure it must state its reasons for doing so as specifically as possible.") (citing *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 99 (2d Cir. 1997)).

V. DEFENDING AGAINST A FEE APPLICATION

- See: *CT River Plaza, LLC v. Citigroup,* Inc., 2018 WL 3967654 (Schuman, J.) Where the court determined plaintiff prevailing on four of twenty-nine claims amounted to a 13.8% success rate and multiplied that against the $1.4 Million fee request and awarded only$200,000 in attorneys' fees.

- Some of the problems associated with plaintiffs' request for attorney's fees included: billing for counsels' performance of non-professional secretarial work, claiming excessive time for routine tasks, making vague entries in the billing logs, failing to discount time for case-related travel, and billing an excessively large number of hours for drafting a reply to the opposition to the attorneys' fees request. *Seong Soo Ham v. Shushi Maru Express, 736 Fed.Appx. 19 (Memorandum) 2nd Circuit (2018).*

V. DEFENDING AGAINST A FEE APPLICATION

- When a court finds some attorney hours to be excessive or redundant, it "is not required to set forth item-by-item findings [of those] individual billing items. Rather, ... a court may use a percentage reduction as a practical means of trimming fat from a fee application." *Reiter v. Metro. Transp. Auth.*, 2007 WL 2775144 at 13 (S.D.N.Y. Sept. 25, 2007) (Gorenstein, M.J.).

- Because neither Defendants nor the Court are in a position to discern patent-only fees with any precision from C&D's time records, which were "block-billed or impermissibly vague as to the tasks performed," the Court finds that reducing the award by 10% reasonably accounts for fees which related solely to Plaintiff's patent claim, while abiding by its earlier finding that the large majority of the fees were intertwined such that they cannot be separated from the CUTPA claim. Therefore, the Court finds that the initial fee award should be reduced by $265,735.00. *Romag Fastners, Inc. v. Fossil, Inc., et al*, 2018 WL 3918185)(Janet B. Arterton, U.S.D.J.)

V. DEFENDING AGAINST A FEE APPLICATION

- When a court finds some attorney hours to be excessive or redundant, it "is not required to set forth item-by-item findings [of those] individual billing items. Rather, ... a court may use a percentage reduction as a practical means of trimming fat from a fee application." Reiter v. Metro. Transp. Auth., 01 Civ. 2762 (GWG), 2007 WL 2775144 at 13 (S.D.N.Y. Sept. 25, 2007) (Gorenstein, M.J.)

- Billing records reflecting attorney time for tasks such as filing, mailing, and drafting service documents are clerical in nature. Tasks such as "faxing, filing, photocopying, delivery, drafting affidavits of service, and service of papers" to be clerical and compensable at a reduced rate. *Edwards v. Cornell and the City of Hartford,* 2018 WL 3381296 (William I. Garfinkle, U.S.M.J.)

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- Look for time spent on unsuccessful motions or court arguments
- Look for time spent drafting or pursuing discovery that was not allowed in the end.
- Look for duplicate time entries between time keepers.
- Look for clerical or paralegal tasks performed by an attorney.
- Look for the filing of pleadings not specified or even permitted by rules of practice.
- Look for time to prepare the application for fees. This District often limits that to a few hours thought it could take much longer (we all know).

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- Dissolution: Our Supreme Court has stated "three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay their own fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified.... A determination of what constitutes ample liquid funds ... requires ... an examination of the total assets of the parties at the time the award is made." (Citation omitted; internal quotation marks omitted.) "[T]he availability of sufficient cash to pay one's attorney's fees, [however], is not an absolute litmus test .... [A] trial court's discretion should be guided so that its decision regarding attorney's fees does not undermine its purpose in making any other financial award." (Internal quotation marks omitted.) *Merk-Gould v Gould,* 184 Conn. App. 512 (2018)

- In making an award of attorney's fees under [§ 46b-82], [t]he court is not obligated to make express findings on each of these statutory criteria...."Courts ordinarily award counsel fees in divorce cases so that a party ... may not be deprived of [his or] her rights because of lack of funds.... Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so....

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- An exception to the rule ... is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders .... Whether to allow counsel fees [under § 46b-82], and if so in what amount, calls for the exercise of judicial discretion.... An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did. ***Conroy v. Idlibi***,183 Conn. App. 460 (2018)

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- Defending Against An Inherent Authority / Vexatious Claim For Attorneys' Fees

    1. Requires clear evidence entirely without color;
    2. Action must be taken for harassment or delay or other improper purposes;
    3. High degree of specific finding by Trial Court required.

Rinfret v. *Porter*, 173 Conn. App. 498, 507 (2017); *Fredo v. Fredo*, 185 Conn. 252 (2018)

VI. VIEWS FROM THE BENCH

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- "The standard of review of an award of attorney's fees is highly deferential to the district court." *Alderman v. Pan Am World Airways*, 169 F.3d 99, 102 (2d Cir. 1999). "What constitutes a reasonable fee is properly committed to the sound discretion of the district court and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000)

- The Supreme Court has instructed that "[t]he essential goal in shifting fees ... is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Messier v. Southbury Training School*, 2018 WL 4188476 (Bolden, J.)

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- While the Court is not required to determine a fee award with exactitude, and this determination "should not result in a second major litigation" *see* *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the fee applicant must "submit appropriate documentation to meet their burden of establishing entitlement to an award[, and] ... trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time" *Fox v. Vice*, 563 U.S. 826, 838–39 (2011) (internal quotation marks and citations omitted). Ultimately, the goal "is to do rough justice, not to achieve auditing perfection." *Romag Fastners, Inc. v. Fossil, Inc., et al,* 2018 WL 3918185 (Janet B. Arterton, U.S.D.J.)