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WHERE THE WIND BLOWS: FEE SHIFTING IN DOMESTIC RELATIONS CASES

WENONA Y. WHITFIELD*

Divorce and other domestic relations litigation has traditionally been an exception to the American rule that each party, win or lose, must pay his own attorney’s fees. In this Article, Professor Whitfield examines the history of the American rule and the derivation of the domestic relations exception. She then discusses judicial use of the American Bar Association’s Disciplinary Rule 2-106(B) as a guideline for determining an appropriate fee award. Her exploration reveals that the disciplinary rule factors are often inappropriate in the domestic relations context. The Article concludes with a suggestion for an alternative method for determining fees.

UNDER the American rule each party in a civil lawsuit generally pays his own attorney’s fee. However, courts have inherent equitable power to award attorney’s fees to an opposing party, and all states and the District of Columbia have statutory provisions allowing attorney’s fees to be awarded to an opponent in do-


mestic relations cases.² These statutes often are broadly worded and empower a court to order either party³ to pay a sum necessary


In many of these statutory schemes, counsel fees are allowed for modification of a prior decree, child support, paternity, legal separation, and annulment, in addition to divorce or dissolution of marriage. E.g., Illinois: Ill. Rev. Stat. ch. 40, ¶ 508(a) (1985); Indiana: Ind. Code § 31-1-11.5-16 (Burns 1986); Wisconsin: Wis. Stat. Ann. § 767.23(1)(d) (West 1981).

2. The term “domestic relations” refers to actions for dissolution of marriage, legal separation, separate maintenance, annulment, paternity, or actions for the collection of past due child support or alimony. Unless otherwise indicated, the cases cited concern attorney's fee awards granted in an action for divorce or dissolution of marriage.

3. In the vast majority of domestic relations cases, the husband is ordered to pay the attorney's fees for the wife. Historically, an attorney's fee award was available only to the wife unless suit money was expressly provided for the husband by statute. 1 W. Nelson, Nelson on Divorce and Annulment § 12.08 (2d ed. 1945); 3 W. Nelson, Nelson on Divorce and Annulment § 29.05 (2d ed. 1945). Most statutes have now been amended to include gender neutral language. But see Massachusetts: Mass. Gen. Laws Ann. ch. 208, § 17 (West Supp. 1986); Nebraska: Neb. Rev. Stat. § 42-367 (1984).

In what appears to be a growing number of cases, courts have ordered the wife to pay attorney's fees on behalf of her husband. In Head v. Head, 505 A.2d 868 (Md. Ct. Spec. App. 1986), the appellate court affirmed an order requiring the wife to pay her husband’s attorney’s fees resulting from her challenge of their previously agreed-upon property settlement. However, the matter was remanded to the trial court because the fees awarded were held to be excessive. See also Payne v. White, 614 S.W.2d 684 (Ark. Ct. App. 1981) (mother ordered to pay $3500 toward father’s attorney’s fees, including an amount for out-of-state counsel, where mother was found to have willfully violated custody order); Keister v. Keister, 458 So. 2d 32 (Fla. 4th DCA 1984) (wife ordered to pay $56,970 to husband's attorney's fees in dissolution action), petition for review denied, 466 So. 2d 217 (Fla. 1985); McVey v. McVey, 417 So. 2d 321 (Fla. 4th DCA 1982) (wife ordered to pay $750 toward husband’s attorney’s fees where husband’s business provided little or no income and wife had annual income of $17,000); Werk v. Werk, 416 So. 2d 483 (Fla. 4th DCA 1982) (order for wife to pay $10,000 in fees to husband’s attorney affirmed where husband had been excluded from the business and home owned by the wife so that he was without income or support); Pfohl v. Pfohl, 345 So. 2d 371 (Fla. 3d DCA 1977) (wife ordered to pay $30,000 for husband's attorney’s fees in dissolution action where wife had over $4 million in assets compared to husband’s $200,000); Hawblitzel v. Hawblitzel, 447 N.E.2d 1156 (Ind. Ct. App. 1983) (wife ordered to pay $10,288.20 attorney’s fees and costs to husband’s attorney in dissolution action because of wife’s obstreperousness during pretrial proceedings); Peters v. Peters, 46 P.2d
to enable the opposing party to maintain or defend the suit. Historically, in domestic relations litigation, the husband was ordered to pay the wife's attorney's fees based on his duty to support her. Today, however, such an order depends on the parties' circumstances. At least in theory, a husband will be ordered to pay his spouse's attorney's fees only after the court determines that he is able to pay and she is not.

After determining that one spouse is liable for the other's attorney's fees, the amount must be assessed. Most statutory provisions authorizing an award of attorney's fees in domestic relations cases offer no guidance in setting a "reasonable" fee, and thus the fee is within the court's discretion. Not surprisingly, fee awards have evoked bitter disputes, with litigants characterizing the fees as ei-

487 (Okla. 1935) (wife who owned separate property ordered to pay reasonable expenses incurred by the husband in defending divorce action, although the husband was found at fault).

4. The legal status of the litigants in most of the cases discussed in this Article is actually former husband or former wife. For convenience, the terms "husband" and "wife" will be used where the parties were legally married.

5. See infra text accompanying notes 54-77.

6. See infra text accompanying notes 78-90.

7. See, e.g., the Uniform Marriage and Divorce Act, which provides:
   The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this Act and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.


A New Jersey court rule provides that a request for an attorney's fee award must be supported by an affidavit which includes reference to 10 specific factors supporting the amount sought. Many of the factors in the New Jersey rule are similar to those listed in the American Bar Association's Model Code of Professional Responsibility, Disciplinary Rule (DR) 2-106(B), and include: (1) the nature of the services rendered; (2) the amount of the estate or fund; (3) the responsibility assumed; (4) the results obtained; (5) the amount of time spent by the attorney; (6) any particular novelty or difficulty; (7) the time spent and services rendered by paralegals; (8) other factors pertinent in the evaluation of the services rendered; (9) the amount of allowance applied for; and (10) an itemization of disbursements. N.J. Cr. Civ. Proc. R. 4:42-9 (1986).

8. See infra text accompanying notes 101-07.

9. See, e.g., Chaachou v. Chaachou, 135 So. 2d 206 (Fla. 1961); Sharp v. Sharp, 491 S.W.2d 639 (Ky. 1973), appeal after remand, 516 S.W.2d 875 (Ky. 1974); Head v. Head, 505 A.2d 868 (Md. Ct. Spec. App. 1986). Referring to appeals involving attorney's fee awards under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), one Justice has characterized such matters as "what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a
ther excessive or inadequate. At least one commentator has suggested that fee awards are uniformly inadequate.\textsuperscript{10} Often the fee award is the only issue raised on appeal\textsuperscript{11} and may generate more time-consuming litigation than the underlying dispute.\textsuperscript{12} In determining or evaluating an attorney’s fee award in domestic relations disputes, courts have considered a wide range of factors, most of which are embodied in the American Bar Association’s Code of Professional Responsibility, Disciplinary Rule (DR) 2-106(B).\textsuperscript{13} Disciplinary Rule 2-106(B) provides:

A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee 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 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.

case have been concluded.” Hensley v. Eckerhart, 461 U.S. 424, 442 (1983) (Brennan, J., concurring and dissenting).


12. The criticism that fee litigation can be more time-consuming than the underlying litigation has been made regarding public interest litigation. See Berger, \textit{Court Awarded Attorneys’ Fees: What is “Reasonable”?}, 126 U. PA. L. REV. 281, 292 & n.57 (1977).

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(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.
(8) Whether the fee is fixed or contingent.

The components listed in DR 2-106(B) have been cited in a variety of federal and state cases in which fees were awarded to the prevailing party, often pursuant to statutory authority. Such litigation has included antitrust, civil rights, deceptive trade practices, eminent domain, insurance, labor relations, landlord-tenant, mechanics lien, and worker's compensation, as well as domestic relations cases.

Courts often automatically invoke the considerations listed in DR 2-106(B) and fail to discuss how the facts of the case may or may not justify the fee awarded. Typical in this respect is Mitchell v. Mitchell, a routine divorce case in which the trial judge

16. E.g., Marchion Terrazzo, Inc. v. Altman, 372 So. 2d 512 (Fla. 3d DCA 1979).
17. E.g., Dade County v. Oolite Rock Co., 348 So. 2d 902 (Fla. 3d DCA 1977), cert. denied, 358 So. 2d 133 (Fla. 1978).
granted the divorce, gave the wife custody of the minor children, and divided the marital property. On the issue of attorney's fees the trial court ordered the parties to pay their own fees. In reversing, the South Carolina Supreme Court listed various "factors to be considered" in awarding attorney's fees, including the nature of the services performed, time spent on the case, and the results achieved. The court also stated that the respective financial conditions of the parties should be considered, finally holding that the "[w]ife's request for $750.00 attorney's fees [was] reasonable."25

It is impossible to tell from the court's mere recitation of the listed factors which, if any, the court viewed as significant. Where there is no indication that anything other than a routine level of services was rendered, a simple restatement of DR 2-106(B) gives little direction to the trial court and leads to inevitable inconsistencies in the amount awarded for similar services.

In fact, the DR 2-106(B) elements listed as guides for determining the reasonableness of fees were apparently intended for evaluating or settling fee disputes between attorney and client and not for determining reasonable fees to be assessed against an adversary.26 There is some question whether the factors are useful even for their intended purpose. As one author has suggested: "Any eight-factor formula produces a wide range of outcomes, particularly if some of the factors are indeterminate like those in the Code[.]

25. Id. at 710 (citations omitted).
26. See infra text accompanying notes 91-93.
27. G. HAZARD JR., ETHICS IN THE PRACTICE OF LAW 97 (1978). Professor Hazard further notes that,
    [l]egally, the ethical rules proscribing excessive fees are redundant. The law at large fully covers the matter. A contract for a fee is, under general principles of law, a contract between a fiduciary and his protected dependent. As such, it is unenforceable [sic] unless its terms are fair to the client. Hence, the rules in the Code go no further than the law of contract and probably stop short of it. So much for the rules.

Id. at 99. In contrast, some earlier writers and courts had expressed satisfaction with the factors listed in Canon 12 of the Canons of Professional Ethics, the predecessor to DR 2-106(B). A 1940 article contains the following assessment of the Canon 12 factors:

The problem of what constitutes "reasonable" expenses is not a new one. . . . [I]n suits by attorneys against their clients, the courts have faced this problem frequently, and have defined with some clarity the factors involved in calculating a reasonable attorney's fee. Rule 12 of the Canons of Professional Ethics of the American Bar Association mentions a number of factors . . . .Of course, the rule is necessarily elastic, and its application requires the sound discretion of the judge. But the task has not been highly complicated and in general the results have not aroused serious opposition.
Apart from their questionable utility in adjudicating a dispute between a client and his attorney, the DR 2-106(B) factors are, to a large extent, repetitive. 28 In a leading attorney's fee case, the United States Court of Appeals for the Third Circuit noted that "counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed. Thus, the quality of an attorney's work in general is a component of the reasonable hourly rate . . . ." 29 Similarly, an assessment of the novelty and difficulty of the questions involved will normally implicate the same considerations as the time and labor needed and the time limitations imposed by the client or by the circumstances. However, because courts continue to treat the DR 2-106(B) guidelines as independent, discrete considerations the discussion in this Article parallels that approach.

In this Article the author examines the propriety of an attorney's fee award in light of the recent trend toward "no fault" concepts in dissolution of marriage and other domestic relations litigation. The applicability of using DR 2-106(B) factors in determining the amount of fees assessed against the "losing" party in such cases is questioned. 30 The author also surveys the development of

Comment, Distribution of Legal Expense Among Litigants, 49 Yale L.J. 699, 711 (1940) (footnotes omitted) (emphasis added); see also In re Ososfky, 50 F.2d 925, 927 (S.D.N.Y. 1931); Carson, Attorney's Fees in Divorce, 4 Miami L.Q. 22 (1949).

28. Commenting on the use of the guidelines contained in DR 2-106(B) to determine fee awards in public interest litigation, the Supreme Court recently noted that "the 'novelty [and] complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the [number of hours spent], and thus cannot serve as independent bases for increasing the basic fee award." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S. Ct. 3088, 3098 (1986) (quoting Blum v. Stenson, 465 U.S. 886, 898-900 (1984)). Accord Hensley v. Eckerhart, 461 U.S. 424, 434 n.9 (1982) ("Many of [the factors listed in DR 2-106(B)] usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."); see also Recent Cases—Attorney and Client, 6 U. Chi. L. Rev. 484, 485 (1939).

29. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) (emphasis in original). But see Finley v. Finley, 422 N.E.2d 289, 293 (Ind. Ct. App. 1981) ("Although the number of hours expended may give an indication of the complexity of the issues it can not definitively reflect the nature and quality of work provided during that time.").

30. Even when a spouse is the "winning party" on all substantive issues in dispute, courts have assessed attorney's fees against that party. See Ritz v. Ritz, 197 A.2d 155 (D.C. 1964); Apkarian v. Apkarian, 331 N.Y.S.2d 239 (N.Y. App. Div. 1972).

31. This author does not address the use of the DR 2-106(B) factors in resolving fee disputes between a domestic relations client and his attorney. E.g., Illinois: In re Marriage of Pitulla, 491 N.E.2d 90 (Ill. App. Ct. 1986); South Carolina: Elliott v. Green, 263 S.E.2d 650 (S.C. 1980); South Dakota: Stanton v. Saks, 311 N.W.2d 584 (S.D. 1981). There is also
attorney’s fees assessments in civil litigation generally and explores why, historically, wives were almost always awarded attorney’s fees in actions for divorce or dissolution of marriage and other domestic relations cases. The increasing use of DR 2-106(B) factors to determine reasonable fee awards is examined, and the confusing manner in which courts have applied these factors in domestic relations disputes is analyzed. Because courts have often identified “the amount involved and the results obtained” as the key factors in awarding attorney’s fees, these factors are examined to ascertain whether their use is legitimate in light of the proscription of contingency fees in domestic relations cases. The author concludes by suggesting a more equitable means to determine an appropriate award of attorney’s fees against opposing parties in domestic relations disputes.

I. HISTORICAL DEVELOPMENT OF THE ASSESSMENT OF ATTORNEY’S FEES

Fee awards to a spouse’s attorney may be explored within the history of domestic relations litigation. These awards should also be examined in light of allocation of litigation costs in general.

A. The English vs. the American Rule

Two basic rules govern the assessment of attorney’s fees against an opposing party in a civil action. The English rule, which allows an attorney’s fee to be awarded to the prevailing party,32 is followed in all major common law nations except the United States.33 In contrast, American jurisdictions follow the American rule, under which each party to a civil action is responsible for his own attor-
ney's fees. Legal historians generally agree that colonial American courts initially adopted the English rule. For example, a 1745 Virginia law provided that "in county court actions there should be taxed as costs an attorney's fee of 'fifteen shillings or one hundred and fifty pounds of tobacco.'" As our judicial system developed, the English rule was gradually abandoned and "the idea that fees should not be taxed as costs to the losing party became firmly imbedded in our tradition."

No less than five theories have been advanced to account for the early American courts' uniform rejection of the English rule. One theory holds that Americans considered an attorney's services something of a luxury:

[A]t the time our judicial system was established there was a wish to maintain a system of laws and procedures in which every man would be able to represent himself adequately before the courts. The idea that the successful litigant would be reimbursed for the expense of his attorney would appear improper as the litigant himself should have been able to succeed without this unnecessary assistance. As the courts at the time discovered law rather than made it, it also appears that the court would have discovered the proper result without the assistance of the litigant's attorney. Consequently, if the litigant would have received the same treatment without an attorney, the loser should not be put to this unnecessary expense. If attorneys are considered a luxury, rather than a necessity, one who wished to utilize their services should not be compensated for this indiscretion.

37. Note, supra note 35, at 1219.

[It is] the early philosophy of intense individualism which, it is submitted, underlies the development of the American rule and the subsequent rejection of the English rule on fees. In our early days, the pioneer's very existence depended upon his individual ability to cope with the particular situation at hand. It was only natural that when legal disputes arose, he relied upon himself to achieve justice inside the courtroom, or outside it, rather than upon those 'characters of disrepute' who demanded payment for their services.
Further support for this theory is provided by the fact that most early American judges were laymen without previous legal training or experience. The law was considered "a body of rules any intelligent man could understand," making the employment of lawyers unnecessary.  

A second theory advanced to explain the development of the American rule was that as litigation was often uncertain, the English system was perceived as unjustly deterring the poor from bringing possibly meritorious actions because "if... unsuccessful they [would] have to pay their opponent’s counsel, as well as for their own."  

Ironically, the third theory offered for the development of the American rule is that early American courts believed "the time, expense, and difficulties of proof inherent in litigating... reasonable attorney's fees would pose substantial burdens for judicial administration." The Supreme Court observed in Oelrichs v. Spain, that attorneys' fees vary, as does the client's willingness to pay. Furthermore, if both the attorney and client know that fees will be paid by the adversary, abuses would be possible. Courts would then be called upon to mediate fee disputes, possibly putting the issue to a jury, producing litigation "more animated and protracted than that in the original cause."

A fourth theory propounded by some early American courts was that attorney's fees were entirely too remote from, and not directly caused by, the defendant's wrongful conduct. An early Connecticut...
cut appellate court criticized a jury charge which had implied that attorney's fees were recoverable as actual damages "if the plaintiffs had been compelled to come into court to vindicate their rights." The court found this was error as there would be no way to effectively limit such a broad interpretation of actual damages.

A final explanatory theory of the development of the American rule posits that it was purely accidental. According to Professor Ehrenzweig, the rule is not derived from a deep-rooted American common law principle or frontier attitude.

[W]hat is now so often represented as a noble postulate for restraint of the winner in a chance contest, is actually due to the simple fact that the New York legislature in 1848, in attempting to perpetuate what it considered a sound legal rule of recovery of attorneys' fees by the prevailing party, made the fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed. It was this mistake probably that caused lawyers and courts, when rising costs began to obscure the real purpose of the statutory amounts of "costs," gradually to forget the meaning of those amounts. And it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees.

Though the American rule has been widely criticized in recent years, it was reaffirmed by the Supreme Court as recently as 1975. The practical effect of the rule has been diminished however through statutory exceptions that allow attorney's fees in a variety of federal and state claims. Moreover, federal and state

45. St. Peter's Church v. Beach, 26 Conn. 354 (1857).
46. Id. at 364. See also Stickney v. Goward, 201 N.W. 630 (Minn. 1925) and cases cited therein.
48. See, e.g., id.; Kuenzel, supra note 38; McLaughlin, supra note 44; Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399 (1973); Stoeckel, Counsel Fees Included in Costs: A Logical Development, 38 U. COLO. L. REV. 202 (1966).
courts have historically recognized the "common fund," "common benefit," and "bad faith" exceptions to the American rule. In Alyeska Pipeline Service v. Wilderness Society,\(^5\) the Supreme Court provided a capsule sketch of these exceptions. Courts have historically possessed equitable powers to permit recovery of costs and attorney's fees for those parties who preserve funds which also benefit others. Also, attorney's fees traditionally could be assessed based on "willful disobedience of the court order... or when the losing party had 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"\(^5\)

Although the award of attorney's fees in domestic relations litigation generally cannot be justified by these equitable theories, an award of attorney's fees for the wife in domestic relations cases has been one of the historically accepted exceptions to the American rule. This may be due to explicit statutory provisions or as a result of the exercise of the court's inherent equitable power.


52. 421 U.S. 240 (1975).

53. Id. at 257-59 (quoting Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-38 (1923) and F.D. Rich Co. v. United States ex rel. Indust. Lumber Co., 417 U.S. 115, 129 (1974)). For a thorough discussion of the development of the court's equity powers in this area, see Berger, supra note 12, at 295-303; 1 M. Derfner & A. Wolf, supra note 34, ¶ 1.01-4.07.

B. The Evolution of the American Rule Exception for Attorney's Fee Awards in Domestic Relations Matters

The husband historically has been liable for the wife's attorney's fees in actions for divorce or legal separation. The early common law recognized two types of fees for the wife's counsel. Fees that were provided during the pendency of the matrimonial action, often referred to as "suit money," were to "insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof." "Attorney's fees," on the other hand, was the term given to fees paid to the wife's counsel by the husband as part of the final order or decree concluding the litigation. By 1932, thirty-nine states had statutes allowing the wife suit money or attorney's fees or both. But even absent express statutory authority, most jurisdictions recognized the inherent equity power of the court to grant such fees. The traditional justification for obligating the husband to pay his wife's attorney's fees turns on the special duty of the husband to provide support or necessaries.

54. See generally 2 W. Nelson, Nelson on Divorce and Annulment § 876 (1895); 2 S. Speiser, supra note 51, § 14.81; 3 Family Law and Practice § 39.01 (A. Rutkin ed. 1985).
55. "Suit money" has been defined as:
   money necessary to enable a spouse, generally the wife, to carry on or defend the matrimonial action, i.e., the necessary expenses, relating to bringing and carrying on, or defending the action . . . [and it] has been said to be broad enough to include counsel fees and all expenses of the matrimonial action.
56. Id.
57. 3 W. Nelson, supra note 3, § 29.05. In many jurisdictions, it was important to ensure that a claim for fees was included in the final decree or order because courts usually held that a husband would not be liable in an independent action for attorney's fees for legal services provided to the wife once the divorce was granted or the marital union was dissolved. See Case Comment, 21 St. Louis L. Rev. 89, 90 (1935); Note, Divorce—Liability of Husband for Wife's Attorney's Fees, 28 Va. L. Rev. 450, 451 (1932).
58. Note, Divorce—Liability of Husband For Wife's Attorney's Fees, 18 Tex. L. Rev. 87, 87 (1939) (quoting 2 Vernier, American Family Laws § 110 (1932)).
60. The term "necessaries" had a unique meaning in early matrimonial law. One writer offers the following explanation of the term:
   It was said in the older books that 'Necessaries consist only of food, drink, clothing, washing, physic, instruction, and a suitable place of residence.' But such arbitrary schedules are less in favor with modern courts; and the usual modern rule is to include whatever is necessary to her reasonable support, in view of the means of the husband and the standard of living to which they have been accustomed. The rule, however, still includes only necessaries, and not articles of mere luxury. Applying this general test to the particular cases which have come before the courts
special duty was derived from the fact that the wife had no financial status apart from her husband. An award for the wife's attorney was necessary in order to provide her with the financial means to maintain or defend the action. The wife's "disability of coverture" meant that except in limited circumstances a married woman could not convey land; execute valid contracts; purchase on her own credit; execute a will; or act as an executor, administrator, or legal guardian without her husband's consent. The wife's disability of coverture arose because "the wife's legal existence was incorporated and consolidated into that of the husband, under whose wing, protection, and cover she perform[ed] everything." The financial implications of this status were far-reaching.

for decision, it has been held that medical services, artificial teeth, jewelry of a kind suitable to the means of the family, the wages of servants, suitable furniture, the rent of lodgings, a piano under special circumstances, were necessaries; while diamonds, a pew in church, a set of Stoddard's Lectures, have been held not necessaries.

... Legal services rendered to the wife are a necessary for which the husband is liable to pay if the services were really necessary to the wife's defense against a prosecution, or even in instituting legal proceedings when such proceedings were necessary for her protection.


61. There was no corresponding duty on the wife to support her husband, "even if she is wealthy and he is feeble and in need." J. Schouler, supra note 60, § 78 (footnote omitted).


64. See M. Salmon, Women and the Law of Property in Early America 14 (1986); J. Long, supra note 63, § 140.

65. A married woman's contracts, except in a few instances, were void under the common law, because "she [was] presumed to act under the dominion of her husband, and hence to have no independent will." J. Long, supra note 63, § 134, at 215.

66. A wife could purchase as an agent of the husband when he had expressly given her authority to act on his behalf, or when he had, through his acts, clothed her with apparent authority. See W. Tiffany, supra note 60, §§ 70-71.

67. Id. § 141.

68. See J. Long, supra note 63, § 143.

69. J. Schouler, supra note 60, § 34, at 63 (emphasis added). Under the early common law, the disability of coverture extended not only to the legal and financial rights of the wife but also to control over her personhood. E. Peck, supra note 60, § 56, at 195, discusses the husband's rights at early common law. These rights included chastisement and restraint of the wife when appropriate, although "'the husband was prohibited from using any violence to his wife . . . otherwise than lawfully and reasonably belongs to the husband for the due government and correction of his wife.'" (citation omitted). This right of restraint over the wife
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ing. All of a wife's property was under her husband's control; he could sell her stocks, slaves, clothing, or jewelry, and make all the decisions concerning her lands as well as collect all rents and profits.70

Given the disability of coverture and the corresponding inability of the wife to control any significant71 assets received before or during the marital union, the practical reasons for this exception to the American rule are evident. Any other rule would have given the attorney little hope of enforcing a claim for fees.72

depends upon the proposition that the husband is dignior persona. . . . [He] must answer to others for his wife's conduct. . . . Strong instances for the exercise of this right occur where the wife has eloped with a libertine, and the husband wishes to bring her home; or where she purports an elopement, and he seeks to prevent it; or perhaps, where she goes recklessly into lewd company. . . . So, too, the husband, by virtue of his marital authority over his own household, might be allowed, . . . to regulate her movements so as to prevent her from going to places, associating with people, or engaging in pursuits, disapproved by himself on rational grounds.

Id. § 45, at 76-77.

70. M. SALMON, supra note 64, at 15.

71. Under the early common law, the wife was sometimes said to gain "title" to savings out of her housekeeping allowance. J. SCHOULER, supra note 60, § 161. She was allowed a limited interest in "pin money" and "paraphernalia." She also could maintain her property apart from her husband during coverture by use of a trust creating the wife's equitable separate estate. Id. §§ 116-17; see also P. BINGHAM, supra note 63, §§ 268-69.

72. This point was recognized by at least one early commentator:

Natural justice and the policy of the law alike demand, that, in any litigation between husband and wife, they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds. So that, if she is without means, the law having vested the acquisitions of the two in him, he should be compelled to furnish them to her, to an extent rendering her his equal in the suit. This doctrine is a part of the same whereon proceeds temporary alimony.

II J. BISHOP, supra note 59, § 387 (emphasis added); see also Comment, Counsel Fees in Matrimonial Actions, 38 Neb. L. Rev. 761 (1959). In support of this view, one nineteenth century jurist explained: "'God knows, the condition of all women, but especially of married women, is bad enough by the common law of England, and advancing civilization loudly demands its amelioration. But that law, which almost enslaves the wife, makes the husband liable for her support.' " Hindus & Withey, The Law of Husband and Wife in Nineteenth-Century America: Changing Views of Divorce, in II WOMEN AND THE LAW 133, 143 (D. Weisberg ed. 1982) (quoting Prince v. Prince, 30 S.C.L. (1 Rich.) 282 (1845)).

Disparity in the economic resources of the parties may still provide a justification for requiring husbands to pay their wives' attorney's fees. Statistically, women earn only 61% of the wages earned by men. NATIONAL COMM. ON PAY EQUITY & NAT'L INST. FOR WOMEN OF COLOR, WOMEN OF COLOR AND PAY EQUITY, reprinted in Women in the Workforce: Pay Equity: Hearings Before the Joint Economic Committee, 98th Cong., 2d Sess. 190, 198 (1984).
C. Determining When Attorney’s Fees Should be Awarded—The Common Law Approach

Under the common law, the husband’s obligation to pay his wife’s attorney’s fees in actions for divorce or legal separation was upheld if three conditions were met. First, the wife had to be without adequate funds to pay her counsel’s fees from her own separate estate. As a practical matter, given the wife’s disability of coverture, this condition seldom prohibited the wife from receiving suit money or a permanent attorney’s fee. Even if the wife had a limited separate estate, courts often noted that she was not required to exhaust her capital in order to qualify for an attorney’s fee award. Second, courts conditioned such awards upon the husband’s having sufficient funds to pay the wife’s attorney, noting that as plaintiff, the husband could not defeat his wife’s claim for fees merely because he lacked funds. If the plaintiff-husband was without sufficient means to pay his wife’s counsel’s fees, his only recourse was to dismiss the action until he was financially able to pay. Third, the wife could not be at fault in the dissolution of the marriage or otherwise guilty of a marital offense. Similarly, an award was not allowed where it appeared probable from the pleadings that the wife could not succeed.

D. Determining When Attorney’s Fees Should Be Awarded—The Modern Approach

Numerous decisions support the maxim that the party seeking an award of attorney’s fees must demonstrate financial inability to pay and the spouse’s ability to pay. Though the elements of fault, adultery or other marital offenses are ostensibly no longer considered in the determination of spousal liability for fees, there are

73. II J. Bishop, supra note 59, §§ 387, 394.
74. Miller v. Miller, 75 N.C. 70 (1876).
75. II J. Bishop, supra note 59, § 395. See also Mangels v. Mangels, 6 Mo. App. 481 (1879); Eliot v. Eliot, 46 N.W. 806 (Wis. 1890).
76. See, e.g., Scott v. Scott, 17 Ind. 309 (1861); Quincy v. Quincy, 10 N.H. 272 (1839); see also 1 W. Nelson, supra note 3, § 12.26; 3 W. Nelson, supra note 3, § 29.05; J. Schouler, supra note 60, § 61; II J. Bishop, supra note 59, § 405, at 351-52. But see Dougherty v. Dougherty, 55 A.2d 787 (Md. 1947).
77. York v. York, 34 Iowa 530 (1872); Friend v. Friend, 27 N.W. 34 (Wis. 1886).
79. In In re Marriage of Stephenson, 209 Cal. Rptr. 383, 406 (Cal. Ct. App. 1984) (citation omitted), the court commented:
many cases where relative blameworthiness or innocence of the parties have been significant in the determination of the award. In a growing number of cases, courts appear to have abandoned the early common law purpose of the attorney’s fee award—to ensure that both parties have sufficient financial ability to maintain or defend the matrimonial action—and have instead awarded fees based on which spouse is in the better financial posture. Marital dissolution proceedings may often leave both parties without sizable liquid assets. Because one spouse may have more earning potential than the other, attorney’s fees for both are shifted to the spouse with the greater earning potential. As a practical matter, this type of fee shifting is treated as a supplemental property division. Such a procedure may be justified where the relative earning potential of the parties is disparate. However, the policy must be questioned when neither spouse is in a financially superior position or when attorney’s fees are awarded to a spouse who is able to pay.

While the attorney’s fees the wife incurs as a result of the husband’s dilatory tactics is an appropriate consideration in determining the amount of an award, it is not sufficient to justify their award in the first instance. Such an award must be based solely on the respective abilities of the parties to pay. ... [A]n award of attorney’s fees based solely upon the recalcitrance of a party is in the nature of a sanction.


81. There are, of course, numerous cases which indicate that the court considered the payment of an award to be a necessity because of the wife’s nonexistent or relatively meager income and nonliquid assets—principally the former marital home—after a distribution of the marital assets. See Alabama: Isham v. Isham, 464 So. 2d 109 (Ala. Civ. App. 1985); South Carolina: Collins v. Collins, 122 S.E.2d 1 (S.C. 1961); Utah: Beals v. Beals, 682 P.2d 862 (Utah 1984).


84. See Cummings v. Cummings, 330 So. 2d 134 (Fla. 1976).
A recent Indiana decision, *Finley v. Finley*, 85 illustrates this concern. The trial court divided the marital property, giving assets including stocks and real estate valued at approximately $1.9 million to the wife and assets valued at $3.5 million to the husband. Additionally, the court awarded the wife's attorneys a fee of $350,000. The appellate court limited its fee discussion to whether the fee was excessive, thus impliedly approving the fee award even though the wife had been granted ample resources to pay her own counsel fees.86 In accord with this reasoning, an Illinois court commented on the relationship between a substantial award of alimony and attorney's fees: "[W]e reject [the husband's] assertion that the alimony award itself provided ample funds to allow [the wife] to pay her counsel. The alimony award was based on a set of criteria exclusive of attorneys' fees and any effort to connect them is misspent."87

In response to decisions such as *Finley*, a proposal to eliminate all attorney's fee awards might be seriously considered. It should be noted, however, that few awards of alimony or divisions of marital property result in the wife's having access to a magnitude of funds. According to a recent study of divorcing couples in California, divorced women with minor children experience a 73% drop in their standard of living, while their husbands experience a 42% rise, during the first year after divorce.88 The study also indicates that: the most valuable asset of most divorcing couples is the family home which they own or are buying,89 only 24% of the divorcing couples have a pension, only 11% have a business, and only 11% own other real estate which can be divided as marital property.90 Assuming the accuracy of these findings, the elimination of attorney's fee awards, requiring each party to be responsible for his own fee, will further penalize women. Unless there is a more equitable distribution of the property—one which considers the higher earning potential of the husband—fee awards must be continued,

86. Accord Adams v. Adams, 376 So. 2d 1204 (Fla. 3d DCA 1979); Abel v. Abel, 289 P.2d 724 (Wash. 1955).
89. Id. at xii.
90. Id. at 55. Weitzman also reports that a 1978 sampling of divorcing couples, most of whom were California residents, revealed that "the median value of separate property claimed by the husband was $10,000 [and] [t]he median value of separate property claimed by the wife was $2,000." Id.
particularly in cases where parties have little in the way of tangible assets.

II. USING THE Code of Professional Responsibility GUIDELINES TO DETERMINE A REASONABLE FEE IN DOMESTIC RELATIONS DISPUTES

It is difficult to determine how the guidelines contained in DR 2-106(B) came to be adopted in domestic relations cases. The explicit language of the various guidelines refers to clients, indicating that the guidelines were meant to be considered in the context of fee disputes arising between an attorney and client. This presents a different situation from cases in which the court is called upon to determine a reasonable attorney's fee to be paid by the opposing party. In one promissory note dispute the plaintiffs were awarded attorney's fees and the judge noted that DR 2-106(B) factors were appropriate in evaluating a fee based on the client's wishes, but were unrelated to the fair market value of the attorney's work. "This is because DR 2-106(B) was designed to establish the minimal conduct allowed an attorney regarding the legal fees that he charges his client. Its factors were never intended as a guideline to establish the reasonableness of an attorney fee award."93

A. Historical Development of the Code of Professional Responsibility Guidelines for Determining a Reasonable Attorney's Fee

The historical development of DR 2-106(B) guidelines does little to explain how the factors came to be misapplied to situations involving fee awards to an opposing party. The first code of professional ethics for lawyers, the Canons of Professional Ethics, was adopted by the American Bar Association (ABA) in 1907.94 However, prior to 1907 state bar associations had promulgated ethics

91. Early writers on the subject of Canon 12 of the American Bar Association Code of Legal Ethics (the predecessor to DR 2-106(B)) focused on the normal attorney-client relationship. See, e.g., Magruder, A Reasonable Fee, 19 Ga. B.J. 201 (1956); Vold, Ethics and Economics in Lawyers' Fees, 8 Marq. L. Rev. 228 (1924); Note, Canons of Legal Ethics, 1 Mass. L.Q. 184 (1916).
93. Id. at 904 (Staton, J., concurring) (footnote omitted).
codes, beginning with Alabama in 1887. Additionally, several other states, including Florida, had adopted statements, oaths, or resolutions which delineated the "duties" of attorneys. Virtually all of the state codes and the code adopted by the ABA were based on Alabama's code of ethics.

The original 1887 Alabama Code listed six elements to consider in fixing fees:

1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2d. Whether the particular case will debar the attorney's action, and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d. The customary charges of the Bar for similar services. 4th. The real amount involved and the benefits resulting from the services. 5th. Whether the compensation be contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business?

No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

A comparison of the Alabama Code with Canon 12 as promulgated in the 1907 *Canons of Professional Ethics* and the lan-
FEE SHIFTING

Language contained in the current DR 2-106(B),\(^{100}\) shows surprisingly few changes. Arguably, the only substantive change made in assessing an attorney's fee in the present Code as compared with the 1887 Alabama Code and the 1907 ABA Code of Professional Ethics, is the addition of superfluous language. For example, DR 2-106(B)(7) refers to "the experience . . . and ability of the lawyer . . . performing the services." It is difficult to see how this language adds to the already present consideration of "skill requisite to properly conduct the cause." Another substantive change resulted from the addition of DR 2-106(B)(5), which encompasses the time limitations imposed by the client or circumstances. One can assume that this factor is meant to justify additional compensation when the attorney is constrained by an unusually short time period because of the nature of the litigation. If so, the same justification can be derived from DR 2-106(B)(2), which refers to the preclusion of other employment. It can fairly be concluded that the factors listed in DR 2-106(B) are essentially unchanged from the 1907 Canons.

B. Application of the DR 2-106(B) Guidelines in Domestic Relations Disputes—The Standard of Review

Before DR 2-106(B) factors can be applied to domestic relations cases, the standard of review should be addressed. In domestic relations cases, trial courts have traditionally been accorded broad discretion in determining the amount of the fee. Generally, appellate courts will not modify an attorney's fee award absent a showing of abuse of discretion by the lower court.\(^{101}\) A Pennsylvania

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\(^{100}\) See supra text accompanying notes 13-14.

court has observed that "[t]here are no fixed rules as to the amount to be allowed."\textsuperscript{102}

Unfortunately, with no rules the standard of review for determining abuse of discretion in such cases becomes hopelessly obscure. As one judge remarked: "The phrase 'abuse of discretion' may be so used as to equally express almost opposite and contrary meanings . . . [and] [f]ew opinions of our courts have discussed the diverse meanings of the phrase."\textsuperscript{103} Some courts simply provide no rationale for finding an abuse of discretion;\textsuperscript{104} others find abuse of discretion where the record is devoid of any evidence supporting the lower court's award.\textsuperscript{105} Still other courts find an abuse of discretion only "if [the] court determines that the trial court could not have reasonably concluded as it did."\textsuperscript{106} Lastly, there are courts which merely state the obvious: "[I]t [will] require an extremely strong showing to convince this court that an award is so arbitrary as to constitute an abuse of discretion."\textsuperscript{107} Such statements do little to promote a uniform standard for review. Lower

\begin{footnotesize}


\textsuperscript{104} See, e.g., West v. West, 437 So. 2d 582 (Ala. Civ. App. 1983).

\textsuperscript{105} McKee v. McKee, 418 So. 2d 764 (Miss. 1982); Delatore v. Delatore, 680 P.2d 27 (Utah 1984). Contra Gould v. Gould, 267 N.E.2d 652 (Mass. 1971) (appellate court conceded there was no reported evidence on which the trial judge could have based an attorney's fee award, but noted "[h]is subsidiary findings support his conclusion."). Id. at 655.


\textsuperscript{107} Ritz v. Ritz, 197 A.2d 155, 156-57 (D.C. 1964).
\end{footnotesize}
court decisions thus appear to be reversed or modified by the roll of the dice whenever the appellate court disagrees with the fee awarded.

C. DR 2-106(B)(1)—The Time and Labor Required, the Novelty and Difficulty of the Questions Involved, and the Skill Requisite to Perform the Legal Service Properly

This catchall category is most conveniently analyzed in terms of its component phrases.

1. The Time and Labor Required

In reviewing fee awards in domestic relations cases, courts have taken varying positions as to the importance of the number of attorney hours spent. Often, courts consider hours expended to be of minimal importance. Some courts view an award formula of multiplying hours worked by hourly rate as too simplistic: "More must be shown to justify an award of fees than a compilation of hours and an hourly rate." Still other courts view the time and labor factor as unnecessary when the actual number of hours expended limits the amount of fees the court considers appropriate. In rejecting a claim by the husband that the attorney's fee award for the wife's attorney should have been based on an hourly

108. See Donner v. Donner, 281 So. 2d 399 (Fla. 3d DCA), cert. denied, 287 So. 2d 679 (Fla. 1973). In Donner, the court reduced an award of $85,000 to the wife's attorney to $50,000. Though the attorney testified that he spent approximately 175 to 200 hours on the case, the appellate court noted that even if the higher figure of 200 hours were accepted, "the fee would amount to approximately $425 an hour for services, which we find to be excessive." Id. at 400. The dissenting judge felt the time spent was not conclusive, "since an experienced or skilful attorney might accomplish in a very short time what another would require a much longer time to accomplish." Id. at 402 (Henry, J., dissenting) (citations omitted); see also Donnelly v. Donnelly, 400 N.E.2d 56 (Ill. App. Ct. 1980). The court finds that "the time factor is probably given the same weight or greater weight than any other factor." Id. at 59-60.


111. For example, in Darden v. Witham, 209 S.E.2d 42 (S.C. 1974), the court approved an attorney's fee award of $175,000. The wife's attorneys, without the benefit of adequate time records, estimated they had spent 750 hours on the matter. One of the dissenting judges noted that this compensation amounted to $233 per hour which, by 1974 standards, was commanded by few practitioners.
rate, the court in *Finley v. Finley*\(^\text{112}\) noted that the hours expended may not reflect the quality of the work. The court considered it important to focus on the quality of work, noting that the attorneys were required to provide a variety of complex services.\(^\text{113}\) A few courts, however, have recognized two serious shortcomings in simply using hours spent as a rationale for awarding attorney's fees. A primary weakness stems from the nature of domestic relations litigation. Influenced perhaps by motivations having little to do with the tangible assets, custody of minor children, or other issues in dispute,\(^\text{114}\) domestic relations clients often use more of the litigation process—and therefore the attorney's time—than is warranted by the factual or legal issues presented by the case. This problem was discussed in *Sharp v. Sharp*:\(^\text{115}\)

The trial court heard sixty-one witnesses—why it was so patient, we do not know. This court has been bombarded with motions by all parties, and after we had ruled we were almost always confronted with motions to reconsider. We presume that a plea to


\(^{113}\) Id. at 293; see also Pfohl v. Pfohl, 345 So. 2d 371 (Fla. 3d DCA 1977), where the appellate court held an attorney's fee award of $30,000 was not an abuse of discretion even though the attorney worked only approximately 100 hours on the matter. The resulting fee, approximately $300 an hour, was held appropriate in part because the court found the case to be unique as the husband had been awarded alimony, and because "attorney's fees should be awarded based in large measure on the quality of services rendered and not necessarily on the quantity of service." Id. at 379. Accord Barber v. Barber, 296 N.W.2d 463 (Neb. 1980).


Given the advantages of negotiated settlements, why do divorcing spouses ever require courtroom adjudication of their disputes? There are a variety of reasons why some divorce cases will be litigated:

1. *Spite*. One or both parties may be motivated in substantial measure by a desire to punish the other spouse, rather than simply to increase their own net worth.

2. *Calling the Bluff—The Breakdown of Negotiations*. If the parties get heavily engaged in strategic behavior and get carried away with making threats, a courtroom battle may result, despite both parties' preference for a settlement. Negotiations may resemble a game of "chicken" in which two teenagers set their cars on a collision course to see who turns first. Some crack-ups may result.


\(^{115}\) 491 S.W.2d 639 (Ky. 1973).
cease and desist would be as unavailing as requesting the mighty Ohio to flow upstream. Such deluge of attacks only impedes the efforts of this court to keep abreast of its business. Please, no more.\footnote{116. Id. at 641. See also Swanson v. Swanson, 355 N.E.2d 894 (Ohio Ct. App. 1976), where the court reversed a lower court award of $12,380 attorney's fees payable by the husband to the wife's counsel, stating: "[I]t is recognized that domestic relations cases tend to consume a considerable amount of time and that counsel must generally realize that he cannot always expect full compensation for the time so consumed." Id. at 899. Accord Guthrie v. Guthrie, 357 So. 2d 247 (Fla. 3d DCA 1978).}

One suspects that in cases such as Sharp, spouses would be less willing to engage in protracted legal battles if they were solely responsible for compensating their own attorneys.\footnote{117. Situations where a litigating party is expected to pay all or part of his adversary's attorney's fee should be contrasted to the paradigm where the client is responsible for his own fee on an hourly basis. According to a recent empirical study of the hourly-fee lawyer, the level of involvement and control exercised by the client can significantly reduce the amount of time the lawyer spends on the case. Thus, if the lawyer is clearly aware of the client's desires, and those desires include economical, efficient handling of the case, the lawyer is (responsible) [sic] to those desires. Kritzer, Sarat, Trubek, Bumiller & McNichol, Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer, 1984 Am. B. Found. Rss. J. 559, 593.} When the client is assured of receiving an award for attorney's fees from the opposing spouse, there is arguably less incentive for efficient use of attorney time, the court's time, or other resources.\footnote{118. In Rizzo v. Rizzo, 420 N.E.2d 555 (Ill. App. Ct. 1981), the court commented on the all-too-common practice of lawyers making needless objections throughout the litigation. "Necessarily, the time spent in acrimonious and lengthy objections and arguments on the most minor of points abound throughout. To run up chargeable attorneys' time in that type of proceeding would be inappropriate and in effect would reward an attorney for wasting time." Id. at 566. Accord Olmstead v. Murphy, 489 N.E.2d 707 (Mass. App.), review denied, 492 N.E.2d 98 (Mass. 1986).} A client may not be the only party prompted by improper motives. Although not restricted to domestic relations cases, a potential ethical issue arises when the attorney is confident that legal fees will be paid by the opposing party.\footnote{119. Several authors have noted the potential ethical problems caused by the availability of attorney's fees in public interest litigation. One commentator notes: \[W\]hen an attorney prevails in a public interest suit, the fees may be paid by the adversary, not the client. Thus the availability of attorneys' fees encourages litigation with two objectives: relief for the client, and recovery for the attorney. These interests are independent and they can be divergent, even conflicting, incentives for public interest litigation. Moreover, attorneys' fees award [sic] are determined by the work spent, not the money awarded to the client. The rate awarded is the market rate and thus the award may exceed either the amount of the recovery awarded to the plaintiff, the budget of the defendant, or other conventional constraints. Attorneys' fees awards plainly serve the public interest as both an incentive to litigate and as a sanction}
spouse has substantial assets, attorneys may be tempted to pad hours with unnecessary research,\textsuperscript{120} superfluous court appearances,\textsuperscript{131} or questionable strategy sessions,\textsuperscript{122} anticipating full compensation.

The second major problem in relying on total hours spent as a measure of compensation is that the hours are analytically meaningful only when it is clear they were productive in leading to a resolution of specific issues in the litigation.\textsuperscript{123} Not all the time spent by an attorney in domestic relations practice can reasonably

against obdurate defendants. But with this same force, they pose the clear risk of becoming ends unto themselves.

LaFrance, Public Interest Litigation, Attorneys' Fees, and Attorneys' Ethics, 16 ENVTL. L. 335, 337 (1986) (emphasis in original); see also Developments in the Law—Class Actions, 89 HARV. L. REV. 1318, 1605 (1976). The potential for independent or conflicting interests between an attorney and client may occur in domestic relations cases as easily as in cases involving public interest issues.

120. See, e.g., Davis v. Taylor, 344 S.E.2d 19 (N.C. Ct. App. 1986), a paternity action in which the child's father, a professional football player, successfully overturned an award of attorney's fees and costs totaling $45,000. Even though the father admitted paternity early in the litigation, the mother's attorneys sought compensation for "researching and preparing the novel argument that it would be in the best interest of the child to receive a lump sum for future child support." Id. at 26. The court of appeals remanded the case for a further hearing on the attorney's fees issue, stating: "The attorneys . . . sought to charge an extremely large number of hours to their adversary. . . . This presented great danger that 'billing judgment' would suffer; there is less incentive to exclude unnecessary or unreasonable hours when the adversary, as opposed to the client, will foot the bill." Id.


122. In reducing an attorney's fee award from $8,000 to $5,000 for an appeal arising out of a marriage dissolution, a Florida court noted that the attorney claimed 91 hours were spent on the appeal, 20 of which were in conference with his client. The court stated:

It was necessary, counsel testified, for him to confer with his client to determine what points should be raised on appeal and what should be included in the appendix. In addition, the client participated with counsel in redrafting the several rough drafts of appellant's briefs. . . . Work done that is not reasonably necessary but performed to indulge the eccentricities of the client should more properly be charged to the client rather than the opposing party.

Guthrie v. Guthrie, 357 So. 2d 247, 248 (Fla. 4th DCA 1978).

The case is interesting from another standpoint. The wife's counsel admitted his client helped prepare the briefs filed in the appeal. As the appeal was successful on some of the issues raised, one wonders if the court would allow the $5,000 fee assessed against the husband to be shared by the client.

123. There can be little doubt that the number of hours spent is not synonymous with the value or quality of services rendered. See generally Clermont & Currivan, Improving on the Contingent Fee, 63 CORNELL L. REV. 529, 540-43, 568-69 (1978). See also Kritzer, Sarat, Trubek, Bumiller & McNichol, supra note 117, at 588-89, where the authors conclude that hourly rates "do not appear to be a function of case-related factors (e.g., stakes, complexity, participant goals), and they appear to be minimally related to lawyer skill, qualifications, and the like."
be billed to either the client or the adversary. Referring to the perceived role of a male attorney in a matrimonial setting in the 1970’s, one evidently chauvinistic writer commented:

From the day a woman first consults a lawyer about her marital problems, until about a year after the matrimonial judgment is rendered, her attorney’s role as legal counselor also requires him to act as surrogate husband. Problems about the children and family finances become shadowed and disarranged by the breakdown of the marriage, and they are invariably presented by the wife to her lawyer for solution.\textsuperscript{124}

Although few would disagree that the matrimonial lawyer has peculiar problems because of the time-consuming nature of the services provided, the number of hours reflected in the fee to be borne by the opposing spouse should represent primarily time spent on legal matters. A few courts have appropriately condemned the practice of seeking an award of attorney’s fees for time spent which has no relevance to the unique skills of the profession.\textsuperscript{125} Given the development of family counseling and other social services agencies as adjuncts to domestic relations courts,\textsuperscript{126} the concept of the attorney as surrogate husband is unnecessary and demeaning to both the wife and the attorney. Courts called upon to determine appropriate attorney’s fees awards must acknowledge that “time spent may have been unnecessary and unproductive or entirely disproportionate to the result to be achieved.”\textsuperscript{127} An Ohio opinion catalogs 263 telephone conferences and 37 office conferences.\textsuperscript{128}

\textsuperscript{124} Spellman, supra note 10, at 54, 56.
\textsuperscript{125} Ernest v. Ernest, 407 N.Y.S.2d 294 (N.Y. App. Div. 1978), represents the type of analysis which more courts should apply. Rejecting the wife’s plea that the attorney’s fee award of $1,500 to be paid by the husband was insufficient given the hours counsel had devoted to the case, the court said,

Counsel have submitted time sheets showing extensive services to the wife. Undoubtedly, these services represent valuable advice and assistance given her by her attorneys. Much of the time billed does not appear to have been necessarily involved in protecting the wife’s interests in this matrimonial action or the legal matters preliminary to it, however, and the husband should not be obliged to pay for unrelated services.

\textsuperscript{127} In re Marriage of Cueva, 149 Cal. Rptr. 918, 926 (Cal. Ct. App. 1978).
court noted that although the facts of the case may have made many consultations necessary, "there comes a time when counsel is obliged to limit such conferences or accept the fact that he cannot always expect full renumeration for the time so consumed."  

2. The Novelty and Difficulty of the Questions Involved

One justification for considering the novelty and difficulty of litigation involving public interest issues is to "provide plaintiffs asserting specified federal rights with fees which are adequate to attract competent counsel." This justification is inappropriate as a fee consideration in most domestic relations cases. No incentive is needed to attract competent counsel to practice domestic relations law, just as little incentive is needed to attract counsel to practice in the areas of workers' compensation, medical malpractice, or products liability. However, the same cannot be said of environmental law. In litigation brought on behalf of conservationists, plaintiff's counsel is burdened by the limited span of time within which action must be taken. Litigation is often begun "in the shadow of the bulldozer." Immediate injunctions must be sought, resulting in expedited trial schedules. Discovery may be seriously abridged and difficult, as officials avoid divulging important information. The administrative record, usually crucial in such proceedings, may be an unwieldy assortment of documents. It is often impossible to schedule all needed depositions.

In addition to time constraints, plaintiffs' attorneys in environmental and other public interest litigation most often engage in extensive litigation on complex issues such as standing or challenges to institutional or bureaucratic practices. In contrast, at-

133. See Hensley v. Eckerhart, 461 U.S. 424 (1983), where the Court commented on the difficulty of questions in complex civil rights cases: "This type of litigation is lengthy and demands many hours of lawyers' services." Id. at 436. It might be argued that cases involving a substantial marital estate may be considered an exception because of the varying tax consequences of property distribution or maintenance and support which might be considered. On the other hand, if the litigation involves a private taxpayer and the Internal Revenue Service, the taxpayer's attorney's fees are generally not paid by the federal government,
Attorneys involved in domestic relations cases will normally encounter few cases involving standing or other issues which could be deemed novel or complex. Although factual matters may be hotly contested, the theories and controlling case law and statutes typically render the issues routine, albeit emotionally charged. An Illinois court illustrated this point in reversing a $6,000 fee award in a case where the only issues were child support, custody, and visitation. The court found no novel or difficult issues nor that the attorney had assumed exceptional responsibilities in the litigation. The court stressed the importance of a finding of complexity in the issues presented: “Although the question of custody, visitation and child support is highly charged in terms of emotion, it is not specifically complex in terms of the legal skills involved and the labor to be employed as would justify an award of $6,000.” In contrast, other courts have often demonstrated confusion in dealing with fees awarded on the basis of the novelty and complexity of the issues or the vitriolic tenor of the litigation.

134. Of course, where the statutory law in the jurisdiction has been recently modified, extensive research on issues which may be considered as breaking new ground should be compensated. See, e.g., In re Marriage of Thornton, 412 N.E.2d 1336 (Ill. App. Ct. 1980) (necessity of lawyers and paralegals spending extra time researching recently enacted Marriage Act to determine its effect on the litigation). Counsel also should be compensated where the case presents unusual and extreme procedural obstacles. See, e.g., Berry v. Chaplin, 169 P.2d 453 (Cal. Dist. Ct. App. 1946) (paternity proceeding against famous actor with extensive procedural motions, arguments, and briefs on two separate petitions for writ of mandate, two jury trials, and collateral criminal case).


137. E.g., Rachal v. Rachal, 489 A.2d 476 (D.C. 1985). The Rachal court criticized a lower court for considering the respective motivations of the parties, stating:

The fact that the litigation may have been burdensome or oppressive to the party requesting such fees may properly be considered by the court in deciding whether to grant the request at all, but it should not be considered in determining the amount of the award. To add to the calculus any factor such as the motivation of either party in pursuing the litigation creates the very real risk of turning an award of attorney’s fees into punitive damages, which are beyond the power of a divorce court to grant.

Id. at 478; cf. Travieso v. Travieso, 447 So. 2d 940 (Fla. 3d DCA 1984), modified on other grounds, 474 So. 2d 1184 (Fla. 1985); Beals v. Beals, 682 P.2d 862 (Utah 1984).
3. The Skill Requisite to Perform the Legal Service Properly

This factor is closely related to DR 2-106(B)(7), which provides for evaluation of “the experience, reputation, and ability of the lawyer . . . performing the services,” and thus is implicated as well by the following discussion. Courts inexplicably find that the service provided in domestic relations cases necessarily involved a great amount of skill. For example, a recent Massachusetts decision138 affirmed an award of $15,000 to be paid by the husband to the wife’s attorney. The court noted that the legal theory of insanity, used by the wife in defense of the suit brought by her husband, had “long been accepted.”139 However, in justifying the fee award the court stated that the wife’s attorney’s services “included . . . the preparation of a somewhat complicated insanity defense.”140 Even when courts purportedly take into consideration the specialized skill required of an attorney in handling a matter, the skill is inevitably and often inappropriately linked to the size of the marital estate or the total monetary or other benefit obtained for the wife.141

D. DR 2-106(B)(2)—The Likelihood, if Apparent to the Client, That the Acceptance of the Particular Employment Will Preclude Other Employment by the Lawyer

One commentator has suggested that this factor implicates two distinct theories upon which to base an attorney’s compensation: loss of billable hours and loss of potential business. A party in either party in pursuing the litigation creates the very real risk of turning an award of attorney’s fees into punitive elements which might cause the attorney to lose future business because of his association with the cause.”142 In the disciplinary rule, the conditional phrase “if apparent to the client,” obviously refers to a fee dispute between an attorney and client and not to litigation in which a

139. Id. at 1192.
140. Id.
141. Cf. Adams v. Adams, 376 So. 2d 1204 (Fla. 3d DCA 1979), cert. denied, 388 So. 2d 1109 (Fla. 1980). Compare Finley v. Finley, 422 N.E.2d 289 (Ind. Ct. App. 1981) (size of marital estate not of primary importance in determining a fee), with In re Marriage of Kathrens, 615 P.2d 1079 (Or. App. Ct. 1980) (The court approved award of $38,000 for wife’s attorney’s fees stating: “There can be no doubt about the magnitude of the wife’s interest nor the difficult questions surrounding the valuation of several active businesses and other investments and cash flow problems associated with structuring and paying a judgment of this size.”) Id. at 1085.
142. 1 S. Speiser, Attorneys’ Fees § 8.7 (1973) (footnotes omitted).
party is ordered to pay the adversary’s attorney’s fees. In any event, a fee award based in part on an attorney’s preclusion from handling other cases is illogical if the party paying the fee is the client’s adversary. Moreover, if the time and labor required and the novelty and difficulty of the questions involved are considered in assessing an appropriate attorney’s fee, those factors implicitly include consideration that the time expended on the litigation could not be billed to another client.

Although preclusion of other employment is occasionally mentioned by courts when determining attorney’s fees, it is seldom analyzed. Burke v. Burke, an early Kentucky case, exemplifies the cursory manner in which this factor is treated in domestic relations cases. In a one-page opinion, the Kentucky Court of Appeals affirmed the trial court’s order awarding $400 to the wife’s attorney. After noting the husband’s net worth and that he owned a florist shop, the court stated: “In a vigorously contested divorce case which involves people of prominence in the community, there is often present unpleasantness and quite frequently future repercussions upon the attorney’s practice.” The court gave no indication that such repercussions were present in the case. However, assuming that they were, the court failed to indicate the weight this factor should be given in determining an appropriate attorney’s fee award.

Any argument that an attorney should receive a premium for the time consumed by a particular case ignores the reality of the finite number of hours which can be billed during any given period. An example may help to illustrate this point:

Attorney A is counsel for W, the wife, in a particularly bitter, and hard-fought action for dissolution of a thirty-year marriage. The dissolution action involves valuation of a closely-held corporation and a real estate partnership, myriad tax considerations and a challenge to a pre-nuptial agreement. Given the complexity of the estate and the vitriolic dealings between H and W, the litigation consumes 75% of Attorney A’s monthly billable hours for sev-

144. 182 S.W.2d 786 (Ky. 1944).
145. Id.
146. Billable hours is emphasized here because the adversary against whom a fee is assessed should be in no worse position than if the client were paying the fee. If an attorney would not expect compensation from a client for hours spent on research which proved unnecessary or for doing routine office procedures, such as photocopying or filing routine documents in court, there is scant justification for expecting the client’s adversary to pay such
eral months. Attorney A seeks an attorney's fee award from H, which includes consideration that the case has consumed ¾ of her monthly billable hours.

Assuming that the court finds the total billable hours reasonable, one questions how Attorney A could expect an added premium when the case generated seventy-five percent of her total billable hours. Were she not engaged with this matter, it does not necessarily follow that her total monthly billable hours would increase. To the contrary, when an attorney is continuously engaged in a single case, it is reasonable to assume that the total billable hours generated will be as much or more than that which could be generated by laboring on several unrelated matters.

Loss of potential business—the second theory postulated for using preclusion of employment in determining a reasonable attorney's fee—is equally inappropriate. Using the hypothetical example above, if an attorney's fee award considered loss of potential business, H would be required to pay Attorney A a premium because A might be precluded from later representing H, or any of H's business associates. The difficulties of evaluation are clear. Would it be reasonable, for instance, to require Attorney A to present witnesses—perhaps other lawyers—who could speculate that Attorney A's involvement in this particularly bitter divorce would result in a ten percent drop in A's estimated number of new clients for a year? What if the reverse were true? Assume that the nature of the divorce proceedings was generally known in the community. Suppose Attorney A's representation of W in the contested litigation enhanced A's reputation in the community, causing an expected ten percent increase in new clients. Should the attorney's fee award which H would normally be assessed be reduced because of the business potential he has provided for A's legal practice?

charges. Referring to a fee award dispute under the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, the Supreme Court recently commented, "'In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'" Hensley v. Eckerhart, 461 U.S. 424, 434 (1982) (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original)).

147. See generally Clermont & Currivan, supra note 123, at 542-43.

148. But see Robinson v. Champion, 475 S.W.2d 677 (Ark. 1972), a suit initiated by a client to recover excess fees where the court seemed persuaded by an attorney's testimony that he "spent almost his full time on the case from the time he was employed until the trial started," despite his inability to provide documentation of the time. Id. at 684.
Though most courts would probably answer the latter question negatively, the concept of imposing a penalty on the party ordered to pay an opponent’s legal fees because of a potential loss of business to the opposing attorney is no less speculative than the idea of rewarding the opponent who indirectly enhances counsel’s fee potential.

E. DR 2-106(B)(3)—The Fee Customarily Charged in the Locality for Similar Legal Services

Advisory or voluntary fee schedules were adopted by state and local bar associations beginning in the mid-1930’s, and were in widespread use until prohibited in 1975. Accordingly, in discussing this factor, courts in early domestic relations cases frequently referred to such fee schedules in determining the fairness of a particular award. Though modern courts do not have fee schedules available for reference, courts routinely refer to the fee customarily charged in the locality for similar services. How do courts discern the usual fee charged for similar services? Two primary methods have been employed, neither of which is satisfactory.

1. The Trial Judge as Expert

One method for determining the customary local fee is that the court simply styles itself an “expert” on what constitutes a reasonable attorney’s fee. The trial judge is then able to use a veiled personal assessment of an appropriate amount for attorneys’ fees.

149. Alburn, Some Researches Into the Matter of Minimum Fees for Lawyers, 21 A.B.A. J. 56 (1935). The author reports that outside of Ohio, minimum fee schedules existed only in New Orleans, Long Beach, and the Pennsylvania counties of Alexander and Washington. Id. at 57; see also F. Mackinnon, Contingent Fees for Legal Services 22 (1964); 1 S. Speiser, Attorney’s Fees § 8.14 (1973); Nations, Minimum Fee Schedules, 11 Mo. B.J. 27 (1940).

150. Fee schedules were prohibited by the Supreme Court decision of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).


Use of this method was approved in a recent Indiana case\(^\text{154}\) in which the court stated: "[S]ince the judge is considered an expert, our decisions . . . adhere to the view that he may judicially know what constitutes a reasonable fee."\(^\text{155}\) Because not all trial court judges have domestic relations litigation experience before donning their robes, one wonders how those without such expertise come to learn what constitutes a reasonable fee. Even if trial judges had such experience as practitioners, it is questionable whether this is an accurate barometer of current economics of the practice of law.\(^\text{156}\) The court's gut feelings "doubtless reflect valuable experience, but are an inadequate basis for review"\(^\text{157}\) and do little to enhance the public's perception that attorney's fee awards are made with an eye to fairness to all parties.\(^\text{158}\)

2. Other Members of the Profession as "Experts"

Another method employed by courts in determining fee awards is the use of "expert" testimony from other members of the bar as

\[^{154}\text{Canaday v. Canaday, 467 N.E.2d 783 (Ind. Ct. App. 1984).}\]
\[^{155}\text{Id. at 785. See also Smith v. Smith, 470 So. 2d 1252 (Ala. Civ. App. 1985) (suggesting determination of attorney's fees award is unreviewable because trial court may rely on its knowledge of value of attorney's services).}\]
\[^{156}\text{As a commentator noted in 1924:}\]
\[\text{It is a fair generalization of the answers of the lawyers who have been kind enough to attempt to discuss the matter of fees . . . that the charges have been based on personal experience of what the traffic will bear, helped out as to routine matters in the beginning by the example of what others are reputed to be charging for similar services . . . . In other words, lawyers' fees are in actual practice fixed very largely on the same general experimental basis as the values of other services or commodities are fixed in the haggle of the market. The haggling is not quite so manifest on the surface as it is in a commercial auction room but it is present just the same.}\]
\[^{157}\text{Vold, supra note 91, at 230-31.}\]
\[^{158}\text{A recent Illinois decision illustrates one further potential problem of appellate review if the court determines the appropriate attorney's fee by relying on its own experience. In Gasperini v. Gasperini, 373 N.E.2d 576 (Ill. App. Ct. 1978), the court noted that the case appeared to be fairly ordinary. Without comment as to the source of the hourly rate it imposed, the court stated: "[W]e conclude that a fair overall rate in this case would be $45 per hour. We are of the opinion this would constitute adequate compensation for the necessary services performed." Id. at 582. Following this pronouncement, would trial courts within this appellate district be bound by the $45 per hour figure for routine domestic cases?}\]
fee shifting to the value of the services rendered. Not surprisingly, those testifying on behalf of the attorney seeking a large fee award are supportive of the award, and those testifying on behalf of a client seeking to limit the attorney's fee award give testimony supporting a more modest fee award. As an Ohio jurist observed in 1912:

Many attorneys act upon the principle of the French minister, Colbert, who in the matter of taxation always endeavored to pluck as many feathers off the goose as he could possibly pluck, without making the goose squeal. While it may not be known generally, it is well known to the court that it is next to impossible to procure an attorney to testify against another attorney in a claim made by him for his fees. It is easy to secure the testimony of an attorney to testify as to the reasonable value of another attorney's fees, and the public generally have come to look with distrust and disfavor upon the legal profession because of this attitude on the part of attorneys and their disposition to aid one another in securing as much fees as it is possible to secure from the client.

When "experts" give their opinion as to what a reasonable fee would be, based on their own experience and qualifications, the opinions are generally so far apart in dollar values as to render the entire process a waste of judicial time. The trial court opinion in Darden v. Witham is illustrative. The court found that the five attorneys testifying as experts were experienced in the area and had conscientiously reviewed the extensive file in the case. The attorneys stated that they had reviewed the factors listed in Canon 12 for establishing a fee. One of the wife's experts testified that a reasonable fee would be between $250,000 and $300,000. Another placed the value at $300,000 to $350,000. Two expert witnesses for


the husband concluded that $75,000 would be a reasonable fee. When such expert testimony produces a differential of $275,000, this method of assisting the trial judge in ascertaining the fee customarily charged in the community is of dubious value.

F. DR 2-106(B)(4)—The Amount Involved and the Results Obtained

Of the factors listed as guidelines for determining a reasonable attorney's fee in DR 2-106(B), none is relied upon more often than the amount involved and the results obtained. Courts may give lip service to the other elements listed in DR 2-106(B), but these two factors are often treated as the most significant for determining fee awards in domestic relations cases. Reliance on results obtained is especially evident when a reviewing court, upon reversing or modifying a trial court decision on a substantive issue, adjusts the attorney's fee or admonishes the lower court to reconsider the award in light of the new "result." For example, in a case

162. Id. at 45-46. The trial court decided that $175,000 was the reasonable value of the fee to be paid by the husband to the wife's attorney and the amount was affirmed on appeal.

163. See also Snider v. Snider, 375 So. 2d 591 (Fla. 3d DCA 1979) (difference between experts' opinions on value of services rendered was $75,000); Head v. Head, 505 A.2d 868 (Md. Ct. Spec. App. 1986) (one expert, using three methods of calculation, offered figures differing by $30,000 to $35,000).


involving a fee award to the husband, a Florida court addressed the wife's challenge to the award. The trial court had heard testimony appraising the value of the services at more than $100,000. The husband's attorney had shown that 1,360 hours were spent on the case. The appellate court held that the trial court's order requiring the wife to pay more than $50,000 toward the husband's attorney's fees was not an abuse of discretion; "[h]owever, because we have decided to reverse the husband's [property distribution] award . . . and thereby have substantially altered the results obtained . . . we must also reverse the attorney's fee award and remand for reconsideration . . . in light of the final results obtained."

Surprisingly, courts in only three jurisdictions have questioned the propriety of using results obtained in determining the amount of an attorney's fee award.

There are several reasons why use of this factor is particularly inappropriate. First, it is illogical, at least in the context of domestic relations cases, to order one spouse to pay for the beneficial result obtained for the other. This point was made by Judge Brailsford, dissenting in Darden v. Witham. He noted that the expert testimony, the trial court's order, and the appellate briefs all emphasized the fact that "exertions of esteemed . . . counsel" had saved the wife more than $1,500,000. "While benefit conferred by legal services is an important factor for consideration in fixing a fee to be paid by the benefited client, in all fairness, much less weight should be given to it when the fee is to be assessed against the client's adversary."

Second, an award based on the amount involved or the results obtained in a domestic relations dispute reinforces the inappropriate belief that one party is a winner and the other a loser. As a Florida court commented:

...
To exact fee money in an amount determined in such major part by [the wife's] financial gain from the divorce judgment does not serve the policy on which such awards are justified. Rather it implies that [the wife] was the "big winner" of a financial contest and penalizes [the husband] for being the "big loser." We do not consider that to have been the purpose of awarding fee money in divorce litigation, and it certainly is not the purpose in today's dissolution proceedings.\textsuperscript{172}

The process of assessment also gives an inaccurate view of the role of the domestic relations attorney in the litigation process. Unlike those championing a plaintiff's cause in public interest litigation or an antitrust dispute, the attorney representing a spouse in a domestic relations matter is not trying to obtain "redress for a legal injury"—at least not in a no-fault divorce jurisdiction. Accordingly, in comparison to other civil litigation, there is little justification for shifting payment of attorney's fees from one spouse to the other on the basis of the result achieved in domestic relations disputes.

The use of results obtained also should be rejected because of the logical inconsistency in acknowledging that the outcome of the litigation was extremely favorable, at least from a financial standpoint, but that the party benefited was unable to pay his own attorney's fees. This is particularly important because an attorney's fee award is, at least theoretically, based on a spouse's inability to pay the attorney's fee incurred. A Wisconsin court\textsuperscript{173} noted this contradiction:

When considering the allowance for attorney's fees, the trial court stated that it believes that the results were extremely beneficial for [the wife]. Assuming such to be a fact, and without so deciding, this would not afford a basis for directing an excessive contribution by [the husband] toward [the wife's] attorney's fees. The converse would be true because it would go directly to the question of the [the wife's] need for such assistance.\textsuperscript{174}

Another reason for rejecting results obtained stems from the unique problem of determining and evaluating "good results." A

\textsuperscript{172} Valparaiso Bank & Trust Co. v. Sims, 343 So. 2d 967, 972 (Fla. 1st DCA), cert. denied, 353 So. 2d 678 (Fla. 1977).

\textsuperscript{173} Hennen v. Hennen, 193 N.W.2d 717 (Wis. 1972).

\textsuperscript{174} Id. at 723.
good result can be fairly identifiable in the context of litigation involving a violation of antitrust, securities, or civil rights laws. The winning party proves that a particular practice is violative of federal law or policy. In contrast, the good results identified by courts hearing domestic relations disputes typically involve no violations of law. An award of alimony, a property distribution, or a child custody decision may not as readily be deemed a good result as would a treble damage award for an antitrust violation.

In awarding an attorney's fee based on the amount involved, some courts assume that the size of the marital estate bespeaks litigation complexity and the need for more skilled attorneys. Such an assumption may be unjustified. In a recent California case, the community estate was valued at approximately one million dollars, but the characterization of the property was not an issue and there was no need to trace the source of funds used to acquire the property. The court found that although estate size may be relevant to the attorney's responsibilities and the parties' ability to pay, it bears no necessary relationship to the complexity of the litigation.

There is yet another reason to avoid results obtained in determining a fee award in domestic relations cases. The prevailing party in public interest litigation may be viewed as a private attorney general who, in enforcing certain statutes or policies, makes a significant legal impact extending well beyond the named parties in the litigation. In contrast, domestic relations disputes rarely involve matters which have great significance to parties other than the individuals immediately involved.

175. See generally Note, Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 CALIF. L. REV. 1656 (1972).
178. In Welsh v. Welsh, 347 N.E.2d 512 (Ill. App. Ct. 1976), in comparing a domestic relations dispute with other types of civil litigation, the court emphasized that it was "not dealing [with] a situation in which the amount of a fund can be used as a helpful guideline in fixing the amount of fees." Id. at 516.
179. At least one court has characterized the securing of custody over a minor child and support for the child as a "good" result. See Danache v. Danache, 296 S.W.2d 821 (Tex. Civ. App. 1956).
181. Id. at 922.
182. See generally Zemans, Fee Shifting and the Implementation of Public Policy, 47 LAW & CONTEMP. PROBS. 187 (1984); Berger, supra note 12.
183. In commenting on the appropriateness of an attorney's fee award, an Illinois court noted: "[W]e wish to leave no doubt that the issues presented in this case did involve com-
The most compelling reason to reject the use of the amount involved and the results obtained in calculating an attorney's fee award is that by employing this determinate courts are actually assessing the attorney's fee on a contingency basis. A contingency agreement is one in which "the attorney for his services in litigating his client's cause is to have a percentage or portion of the recovery . . . in the event of a successful prosecution or defense of the action."\textsuperscript{184} Contingency fees in domestic relations cases have been almost universally condemned.\textsuperscript{185}

Several reasons have been offered for prohibiting attorneys from entering into contingency fee contracts with clients in domestic relations matters. Such a contract is thought to promote divorce and discourage reconciliation of the parties.\textsuperscript{186} In addition, couples seeking divorce are often upset and inexperienced in negotiating contracts, conditions which may lead to "charges of over-reaching and undue influence."\textsuperscript{187} Contingency fee contracts are also disapproved because they are unnecessary given the statutory mechanism for awarding fees which virtually assures that the needy spouse will have the means to employ an attorney.\textsuperscript{188} Concerns are also raised that contingency fee contracts can result in a windfall to the attorney as the services performed may be disproportionate to the fee received.\textsuperscript{189} Potential for conflict of interest between attorney and client\textsuperscript{190} and disruption of the schedule "carefully


\textsuperscript{186} See In re Cooper, 344 S.E.2d 27, 31-32 (N.C. App. Ct. 1986).


\textsuperscript{188} See Martin, Contingency Fees and Family Law, 5 CALIF. LAW. 23, 73 (1985).
awarded by the court for support or living expenses"191 are also cited as reasons for prohibiting contingency fee contracts in domestic relations cases.

Although the universal condemnation of contingency fee contracts has been recently questioned,192 a change in policy is unlikely. Accordingly, consistent with the prohibition of such contracts in domestic relations cases, courts should abandon any determination of a fee award based upon the result achieved by the attorney.

Many of the criticisms leveled against the contingency fee apply equally to the current method of awarding a fee based on "amount involved and the results obtained." If contingency agreements providing the attorney a percentage of the property distribution or alimony awarded the client are barred because they tend to prevent reconciliation of the parties, the same is true when the attorney's compensation is in the form of a fee assessed against the opposing spouse. The attorney has, it seems, the same incentive to make the award for the client as lucrative as possible in either instance. The fear that a contingency agreement may result in a windfall to the attorney is also equally present in a situation where the attorney fee award is primarily based on the value of the marital estate.

G. DR 2-106(B)(6)—The Nature and Length of the Professional Relationship With the Client

As with other factors listed in DR 2-106(B),193 the specific language used in DR 2-106(B)(6) negates any suggestion that it was intended to be applied in any context other than the traditional attorney-client relationship. One commentator provides a brief explanation of the relevance of this factor in determining the reasonable value of attorney's fees: "The amount of the fee to be allowed may be affected by the question whether the services were performed as an incident of regular or continuing employment or as a result of a casual hiring."194 Divorce attorneys are seldom retained on a continuing basis. Client contact is usually limited to the particular divorce or other familial dispute. However, in the context of assessing a fee award against an opposing party, the type of em-

192. See id.; Martin, supra note 190.
193. DR 2-106(5) was implicated in the discussion of DR 2-106(B)(2). See supra text accompanying notes 142-48. DR 2-106(5) provides for consideration of "the time limitations imposed by the client or by the circumstances."
194. 1 S. SPEISER, supra note 184, § 8.20.
ployment between attorney and client is irrelevant. Unfortunately, despite obvious inapplicability to assessment of an attorney’s fee award, this factor has been cited by courts.195

H. DR 2-106(B)(7)—The Experience, Reputation, and Ability of the Lawyer or Lawyers Performing the Services

It is questionable whether this factor adds any additional justification for an attorney’s fee award not already covered by consideration of the “skill requisite to perform the legal service properly,” which is included in DR 2-106(B)(1). In many cases, the factor is merely repeated with the other guidelines contained in DR 2-106(B) without comment.196 On those occasions when courts have paused to comment on the experience, reputation, standing, or abilities of the lawyers performing the service, their comments have been so uniformly favorable that it appears every attorney in a fee award dispute is a distinguished member of the bar.197

I. DR 2-106(B)(8)—Whether the Fee Is Fixed or Contingent

This factor is applied to increase an attorney’s fee award in situations where he has successfully prosecuted a claim for relief and where he would otherwise expect little, if any, compensation. It has been held that “a contingent fee should be substantially higher than a fixed fee because of the possibility that counsel, expending great time and effort, may recover nothing.”198 In domestic relations practice, few matters present the problem of the attorney expending a great deal of time and effort with the possibility of recovering no fee at all. Unlike personal injury claims or similar actions, attorneys practicing in the domestic relations area will ex-

195. See, e.g., In re Lockyear, 305 N.E.2d 440 (Ind. 1974).
198. 1 S. SPEISER, supra note 184, § 8.10; see also 2 M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES § 15.02, at 15-24 to 15-25 (1985).
pect and receive compensation from either the client or the client's adversary or both. This factor, accordingly, has little relevance to an attorney's fee award in domestic relations cases. Despite the clear intention that it serve as a guide in determining fees in a different category of cases, the factor has been cited as deserving of consideration in the determination of fees in domestic relations litigation. 199

III. Recommendations for An Alternative Method

The Uniform Marriage and Divorce Act 200 and many state statutes provide for the award of fees but supply little guidance to aid the court in determining when a fee award is appropriate. 201 One solution is for each party to pay his own fees. Under common law the wife was awarded suit money and attorney's fees as a matter of necessity. In an era of equal employment opportunities the theoretical justification for providing assistance is no longer present. Available statistical evidence suggests, however, that great economic disparity still exists between husbands and wives and thus their corresponding financial abilities to employ attorneys to maintain or defend actions. 202 Given this reality, it would be patently unfair to suggest that every litigant should pay his own attorney's fees.

One solution to the problem of providing attorney's fees to spouses for the prosecution or defense of domestic relations cases is for both parties to bear the costs. The total attorney's fees for the parties' attorneys would be determined either by stipulation of

199. See, e.g., Kerr v. Kerr, 610 P.2d 1380 (Utah 1980), where the court states:
The choice of a lawyer, and the value of his services, may depend upon a number of factors, including his background of learning and experience, his ability, his integrity and his dedication to the causes with which he identifies himself. Also to be considered is the reputation he has acquired, the nature and importance of the matter, and the amount of money or value of property involved. There is also the matter as to how the lawyer is to be paid: cash in advance, extended credit, whether a fixed amount, or contingent on success, or other conditions.

Id. at 1385.
200. See supra note 7.
201. The Illinois statutory provision for awarding attorney's fees demonstrates the lack of statutory direction. The statute provides:
The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order either spouse to pay a reasonable amount for his own costs and attorney's fees and for the costs and attorney's fees necessarily incurred by the other spouse . . .
ILL. REV. STAT. ch. 40, ¶ 508(a) (1985).
the parties\textsuperscript{203} or by the court. The amount would then be deducted from the marital estate prior to any allocations for alimony, maintenance, child support, or property distribution.\textsuperscript{204}

The current statutory provisions authorizing an award of attorney's fees provide only two options to the court. The court may hold that both parties are to be responsible for their own fees, or it may decide that the fees of one spouse are to be paid by the other. The suggestion offered here would provide the court and the parties with a third option and could be accomplished with only a slight modification in present statutory provisions. So modified, the Uniform Marriage and Divorce Act might provide:

The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this Act and for attorney's fees including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment or may provide that both parties will be responsible for the combined total of such fees with costs to be deducted from the marital estate.

This alternative solution for assessing attorney's fees could eliminate several of the problems associated with the present fee-shifting policy. First, it would eliminate the bitter disputes caused by the imposition of fee awards against a single party. Because both parties would be paying the costs of the entire litigation, the combined charges for attorneys' fees could be viewed in much the same way as the parties view a lien on marital property which is to be divided after full payment of the lien. If, for instance, the marital residence is to be sold and the proceeds divided evenly, under normal circumstances proceeds refers to the net amount received after payment of the mortgage, broker's commission, taxes, closing costs, and other items associated with disposal of the asset. The same principle could apply to a combined payment for attorneys' fees in

\textsuperscript{203} A stipulation as to the amount of both parties' attorney's fees has been approved and utilized by at least one court. See Schmidt v. Schmidt, 162 N.W.2d 618 (Wis. 1968).

\textsuperscript{204} One obvious problem with this solution is that there may be insufficient liquid assets available for payment of the agreed upon fees. On the other hand, the lack of liquid assets from which to satisfy creditors or the other spouse is commonplace. Frequently, a spouse's one-half share of the marital home can be realized only after the emancipation of all minor children and then sale of the home. There is no theoretical reason why attorney's fees could not be similarly treated.
that all assets could be distributed or allocated after the costs, including attorneys' fees, accountants' fees, transcripts, and discovery costs, are deducted.

The suggested alternative also would eliminate the need for the court to contrive reasons to compensate a spouse with substantially less earning power than the other spouse. The relative wealth and earning power of the couple would be considered rather than the wealth and earning power of the individuals who now bear the burden of the fee awards.

A related advantage is that it may diminish the resentment generated in a system which often makes one party the big "winner" and the other the big "loser" in a protracted domestic relations battle. Though it is not suggested that the attorneys' fees will be less than the fees being awarded or paid under the present system, if the fees are deducted according to the policy outlined above, both parties may feel they are "losers" in the litigation. Thus, if both spouses are cognizant that their protracted legal battles have the effect of reducing the funds ultimately available for distribution, this might shorten considerably the litigation process and promote negotiated settlements.

There is a third advantage to a combined attorney's fee award. A court, using the suggested procedure, could award the maximum fees to be charged to either party. Private retainer agreements which provide for any amounts in addition to that awarded by the court would be prohibited. Under the present system, fee awards are often made without regard to whether the client has made previous payments to the attorney receiving the award or whether an independent agreement binds the client to a payment in excess of the amount awarded by the court. Under the suggested system, all fee arrangements would be disclosed and prior payments credited. Under this procedure, the court and the paying spouse will have full confidence that carefully designed calculations for support of a spouse or dependent children will not be negated by distributions paid to legal counsel.

205. The suggestion that a court can alter the fee agreement between a client and his attorney is not new or novel. See, e.g., Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975); In re Marriage of Coltman, 500 N.E.2d 506 (Ill. App. Ct. 1986); In re Marriage of Angiuli, 480 N.E.2d 513 (Ill. App. Ct. 1985).
IV. Conclusion

The easiest method for calculating an attorney's fee would be for the parties to stipulate to the amount. If agreement cannot be reached, however, an alternative would be for the court to award attorneys' fees based on the English system of standardized fees for certain functions performed. Though the domestic relations bar may complain that marital dissolution litigation must be tailor-made, certain routine actions are performed regardless of estate size or the unique circumstances.

Just as many worker's compensation statutes contain specific provisions with respect to attorney's fees for services on behalf of a client in those proceedings, similar standardization can be accomplished in the domestic relations field. Despite early opposition, the modern trend is toward setting of child support payments based upon a schedule provided by the court. Use of the schedules does not preclude the court from awarding more than the suggested amount of support and there is no reason to suggest the same would not be true with a schedule for attorney's fees.

The present system for determining when an attorney's fee award will be made in a domestic relations case undermines the confidence of the public. Additionally, use of DR 2-106(B) in determining the reasonable value of the attorney's services is often confusing and illogical. The same laudable goals which served as the impetus for the adoption of the concept of no-fault divorce should be applied to produce a system of no-fault attorneys' fee awards.

Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social

206. Routine actions would include drafting and filing a petition for dissolution or drafting a reply to such a petition. In cases where additional pleadings are required, additional fees would be justified.

207. Standardized fees would not necessarily mean identical fees. The domestic relations bar might be persuaded to accept this proposal if a sliding scale were used in the assessment of fees.

malpractice that undermines the confidence of the public in the bench and bar.209