*To Be Argued By:*
Brian J. Shoot
*Time Requested: 30 Minutes*

APL-2013-00264

*New York County Surrogate's Clerk File No. 175/82*

# Court of Appeals

STATE OF NEW YORK

In the Matter of a Petition to Compel Payment of Legal Fees
for Services Rendered in Connection with the Estate of

SYLVAN LAWRENCE,

*Deceased.*

RICHARD S. LAWRENCE and PETER A. VLACHOS, as Executors
of the Estate of Alice Lawrence, Deceased,

*Respondents-Plaintiffs-Respondents,*

*against*

GRAUBARD MILLER,

*Petitioner-Defendant-Appellant,*

C. DANIEL CHILL, ELAINE M. REICH and STEVEN MALLIS,

*Defendants-Appellants,*

*and*

RICHARD S. LAWRENCE, SUZANNE LAWRENCE DECHAMPLAIN
and MARTA JO LAWRENCE,

*Intervenors-Respondents.*

## BRIEF FOR PETITIONER-DEFENDANT-APPELLANT GRAUBARD MILLER


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*Date Completed: November 11, 2013*

## 500.1(f) DISCLOSURE STATEMENT

Petitioner-Defendant-Appellant Graubard Miller is a general partnership and has no parents, subsidiaries or affiliates.

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**BRIEF FOR PETITIONER-DEFENDANT-APPELLANT GRAUBARD MILLER**

## Preliminary Statement

This case now appears before the Court of Appeals a second time. In its prior decision in the case, the Court ruled that Graubard Miller's ("Graubard's") 40% contingent fee retainer was not unconscionable on its face. *Lawrence v. Miller*, 11 NY3d 588 [2008]. In so ruling, the Court pointedly stated that, (i) "the power to invalidate fee agreements with hindsight should be exercised only with great caution," (ii) "[i]t is not unconscionable for an attorney [working pursuant to a contingent fee retainer] to recover much more than he or she could possibly have earned at an hourly rate," (iii) the contingency fee system would otherwise not "work," and, (iv) courts should not become "too preoccupied with the ratio of fees to hours" in determining whether an attorney's contingent fee is unconscionable. *Id.* at 596 n.4.

The case is here once again because the lower courts disregarded all of that. Far from applying the principles laid down by this Court in its 2008 decision, the Appellate Division determined that the "value" of Graubard's services was *by definition* the sum that the attorneys would have billed if the client had not refused to continue with hourly billing — in this case, "approximately $1.7 million" (XVII:A7395).[1]

Having thus conflated "value" with billable hours — precisely what this Court said should not be done — the Appellate Division ultimately ruled that Graubard's very success in securing a settlement that was much larger than anyone expected and

[1] All such citations correspond to volume and page numbers in the Joint Appendix.

came much sooner than anyone expected rendered its 40% fee unconscionable in hindsight (XVII:A7395-A7396).

Graubard submits that the ruling was wrong legally and even worse as policy.

## Summary Of The Case

It was undisputed in the courts below that client Alice Lawrence "insisted" on abandoning the existing, hourly retainer (I:A188a; VI:A669-A670), undisputed that the new contingent fee retainer conformed to industry norms in all respects (VII:A1339, A1365), undisputed that the retainer was reduced to a writing that was clear on its face (VIII:A1922, X:A2985-A2986), and undisputed that the client's personal accountant reviewed and critiqued the contract before Mrs. Lawrence signed it (VIII:A1922-A1924, A2004).

It was also undisputed that, largely in consequence of "smoking gun" evidence of executor self-dealing that Graubard discovered approximately two months after entering into the new retainer (*see* pages 32 to 35, *infra*), Graubard settled the accounting claims in the underlying Estate litigation for $111,856,468 (I:A189a).

Special Referee Howard A. Levine (the "Special Referee"), who presided at the trial of this action, concluded that the sum paid in settlement was far more than Graubard or Mrs. Lawrence could have hoped for just a few months earlier (I:A188a-A189a) and was "at least double" what the case was actually worth when it settled (I:A184a).

The client's recovery after deduction of the attorneys' contractually agreed fee would have been approximately $67 million. In another case, with a different client, the client's natural reaction might have been to revel in his or her good fortune. That is not what happened here.

In this case in which the client was about as sophisticated, imperious and outright mean as any client could be — even according to her own children[2] — the client's Estate, confidants, and the Estate's counsel instead advanced an imaginative array of stories upon trial of the dispute as to how Graubard had supposedly overborne the client's will. Such tales ranged from their assertion that Graubard's Daniel Chill exercised "Svengali-like" control over Mrs. Lawrence (XVII:A6855-A6856, A6900, A7001-A7002) to their claim that Mrs. Lawrence's knee surgery of September 2004 caused her to have a "diminished capacity" when she signed the retainer in January of 2005 (XVII:A6856-A6860, A7007).[3]

The learned Special Referee, who heard and saw the Estate's witnesses relate their respective tales, deemed their testimony "not credible" (I:A155a-A156a). The Special Referee further concluded that, (i) Graubard "submitted extensive proof that Alice was fully capable of understanding the revised Retainer Agreement and did not enter into it because Graubard exploited its existing confidential relationship with

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[2] The proof concerning Mrs. Lawrence's nature and abilities, especially including her children's testimony on that subject, is discussed at pages 12 to 16 of this brief.

[3] The Lawrences' trial claims are reviewed at pages 44 to 49 of this brief.

her" (I:A153a), (ii) Mrs. Lawrence was *not* "confused" about the terms of the retainer agreement that she had in fact reviewed with her accountant (I:A146a, A156a), and, (iii) that there was "no question" as to Mrs. Lawrence's "anticipatory breach" of the contingent fee retainer on which she had "insisted" (I:A136a, A188a).

Despite those factual findings, the Special Referee recommended reduction of the contractually owed fees on the ground that Graubard's success in obtaining a settlement that was far more than had been anticipated (I:A188a-I:A189a) and far more than the case was actually worth (I:A184a) rendered its 40% fee unconscionable in hindsight *precisely because* the enormous size of the recovery was so unexpected (I:A187a-A189a).

Based on that thesis, the Special Referee recommended that Graubard collect its contractually owed 40% fee only as to "the first $10 million of the recovery," that it should then be allowed only 30% of the "less expected next $10 million," and that it should be permitted only 10% of the $91,856,468 remainder of the settlement (I:A188a). The Special Referee's rationale for allowing Graubard only 10% of the $91.8 million remainder of the recovery was that Mrs. Lawrence "would never have anticipated and Graubard would also not have anticipated [that portion of the settlement] before the production of the critical ["smoking gun"] Epps documents" (I:A188a). Per this analysis, which was adopted in full by the Surrogate (I:A83a-A86a), Graubard's fee was reduced from its contractual entitlement of approximately $44 million to approximately $16 million (I:A187a-A188a).

Rather than correct the misapplication of this Court's 2008 directives, the Appellate Division then reduced Graubard's fee still further. In doing so, the Appellate Division rejected the Special Referee's factual finding that Mrs. Lawrence fully understood the contingent fee retainer (I:A146a, A156a). The Appellate Division instead ruled that Mrs. Lawrence's comment *during negotiation of the retainer* — to the effect that she would have to receive the "lion's share" of any recovery — should be construed to mean that she may not have understood that her personal share of the net settlement proceeds would be less than Graubard's 40% fee (XVII:A7394).[4] That the oral agreement was afterwards reduced to a clear-on-its-face writing (X:A2979-A2980) and that the writing was then reviewed and critiqued by the client's personal accountant before the client signed it (VIII:A1924, A2004-A2005) did not, evidently, make any difference at all.

Adding injury to insult, the Appellate Division then went on to conclude that the "proper remedy" was *not* to eliminate whatever portion of the contingent fee was unconscionable in hindsight but was instead "to revert to the original agreement" (XVII:A7396), an agreement that had called for hourly billing (X:A2726). So, in the end, the client's "penalty" for deliberately breaching the contract and for then advancing an array of explanations that were either abandoned or deemed untrue was

[4] As is explained below, Graubard's 40% fee exceeded Mrs. Lawrence's individual share of the recovery only because, as per her practice for more than twenty years (V:A560, A660-A661; VII:A1211-A1212), Mrs. Lawrence had decided to pay <u>all</u> the attorney's fees from her approximately 76% share of the recovery, leaving her children's approximately 24% share intact. *See* page 54, *infra*.

a return to the same hourly retainer on which she had refused to proceed when the case was in doubt. And Graubard's "reward" for agreeing to bear the risks of the litigation and then obtaining a recovery that far exceeded both the client's and its own expectations was a return to the same retainer that the client had rejected when her prospects seemed less promising.

Graubard herein submits that,

(1) the contingent fee retainer is vitally important to the civil justice system and cannot work if the retainer is binding only if that is what most benefits the client in hindsight (Point I, *infra*);

(2) although attorney fee contracts understandably are subject to greater scrutiny, such contracts should be enforced when they are not procedurally and substantively unconscionable (Point II, *infra*);

(3) the Special Referee and Surrogate had sound basis to reject as untruthful the Lawrences' various charges concerning the signing of the contingent fee retainer, and to conclude that the Agreement was not procedurally unconscionable (Point III, *infra*);

(4) there was no proof, nor even any claim, that the terms of the contingent fee retainer were substantively unconscionable or contrary to industry norms at the time of contract (Point IV, *infra*);

(5) the lower courts erred in equating "value" with billable hours, and thus further erred in concluding that the contingent fee retainer was substantively unconscionable in hindsight (Point V, *infra*);

(6) assuming, *arguendo*, the fee agreement should be deemed unconscionable in hindsight, the legally correct remedy would be to reduce the fee to a sum not unconscionable in hindsight; it would not be to permit the same client who had insisted on alternative billing to obtain a windfall by retroactively reverting to the hourly retainer she had rejected when the litigation's outcome was in doubt (Point VI, *infra*);

(7) even if deemed unconscionable in hindsight, the contingent fee should not be reduced below the one-third baseline that is presumptively reasonable in personal injury actions involving lesser complexity and risk (Point VII, *infra*).

Most of all, Graubard submits that it is not ethically improper, nor a valid basis for complaint, nor legal grounds for rescission, when a contingent fee attorney obtains a recovery that is much larger and comes much sooner than client or counsel expected.

Were this to now change, the settlement or other disposition of every contingent fee case would be the prelude to a new litigation in each instance in which, (a) the recovery is much greater, or comes much sooner, than had initially been anticipated, and, (b) the plaintiff thereafter claims not to have fully understood the terms of the written retainer agreement.

## Jurisdiction To Hear The Appeal

The two actions that were joined for trial and appellate review respectively originated in Surrogate's Court, New York County (I:A308a-A316a) and Supreme Court, New York County (I:A336a-A357a).

The Appellate Division order from which Graubard appeals was rendered and entered on May 23, 2013 (XVII:A7391-A7397). Graubard timely moved on June 21, 2013 for reargument or leave to appeal to the Court of Appeals. The Appellate Division granted the motion, by order dated and entered on September 10, 2013, to the extent of granting Graubard leave to appeal to the Court of Appeals (XVII:A7390).

Jurisdiction to hear the appeal exists pursuant to CPLR § 5602[b][1].

## Issues Presented

1. Did the Special Referee (I:A143a-A158a) and the Surrogate (I:A84a) err in *rejecting* the Estate's most recent claims of Graubard misconduct and in concluding that the contingent fee retainer vetted by both Mrs. Lawrence and her accountant was not procedurally unconscionable?

Graubard submits that the answer should be No.

2. Did the Special Referee (I:A187a) and the Surrogate (I:A84a) err in concluding that the contingent fee retainer was not substantively unconscionable at the time of contract?

Graubard submits that the answer should be No.

3. Was the contingent fee retainer unconscionable in hindsight, simply as a result of the enormity of the recovery Graubard obtained for the Lawrences, even though the contract was not procedurally or substantively unconscionable at the time of contract?

Graubard submits that the answer should be No.

4. Assuming for sake of argument that the contingent fee retainer was unconscionable in hindsight, did the Special Referee (I:A187a-A188a) and the Surrogate (A:84a-A85a) err in concluding that the correct remedy was to reduce the fee to the maximum sum that would not have been unconscionable, this as opposed to providing the client with a windfall return to the same hourly retainer agreement that she had refused to accept when the recovery was still in doubt?

Graubard submits that the answer should be No.

5. Assuming for sake of argument that the contingent fee retainer was unconscionable in hindsight, should the fee be reduced even beyond the one-third share that is presumptively reasonable in personal injury actions, which involve far less effort and risk?

Graubard submits that the answer should be No.

## Preservation Of The Issues

Graubard contended that the contingent fee retainer was not procedurally unconscionable at the following pages of the Joint Appendix: XVII:A6667-A6687 and XVII:A6733-A6749.

Graubard contended that the contingent fee retainer was not substantively unconscionable at the following pages of the Joint Appendix: XVII:A6648-A6687 and XVII:A6749-A6760.

Graubard contended that if the contingent fee retainer were deemed unconscionable the correct remedy was reduction to a not unconscionable sum, and not a return to the hourly retainer on which Mrs. Lawrence had refused to proceed, at the following pages of the Joint Appendix: XVII:A6785-A6789 and XVII:A6575-A6578.

## Statement Of Facts

### Alice Lawrence: By Her Own Assessment, "A Force To Be Reckoned With"

After sitting through trial and then sifting through more than 2,700 pages of testimony, Special Referee Levine concluded that Graubard had "adduced substantial evidence of [Mrs. Lawrence's] intelligence, sophistication in financial matters, strong willed personality and her hiring, micromanaging and firing of professionals, including lawyers" (I:A144a). The Special Referee further noted that "Alice had described herself as someone who trusted 'nobody'" (I:A145a, citing VII:A1103, A1138) and who "made her 'own decisions'" (I:A145a, citing VII:A1174 and VIII:A1195).

Regarding Mrs. Lawrence's experience with and understanding of legal matters, the Special Referee noted that there was evidence "that Alice had experience reviewing and negotiating contracts [citations omitted] and managing a very substantial investment portfolio" (I:A145a).

Regarding Mrs. Lawrence's nature and personality, the Special Referee wrote that the Record was "replete with examples of her dominating, micromanaging, vituperative behavior" (I:A109a).

If anything, the Special Referee's findings understated the proof.

In prior proceedings in which she condescended to be deposed, Mrs. Lawrence said that she "never" consulted with her attorneys on "business issues" and, instead,

kept her own counsel (VII:A1155-A1156). She also never consulted her children because, "I am supposed to know more than my children" (VII:A1155).

She had a history of firing architects (VI:A639-A640, XV:A5987, XV:A5996-A5998, XV:A6002), contractors (VI:A651, XV:A5681-A5982, XVI:A6607-A6608), and stock brokerage firms (XV:A6013, XV:A6017, XV:A6015).

She repeatedly disregarded Graubard's legal advice, often on "matters of great significance" (I:A109a-A110a [Special Referee's report]). For example, she rejected Graubard's written advice to hire a general contractor "pursuant to a fixed price contract" that would contain her costs (VI:A635, A637; XV:A5977, A5981). She instead served as her own general contractor — both for her 18,000 square foot house in Connecticut (XV:A5993-A5994) and her East Hampton retreat (VI:A636).

Within the Estate litigation itself, Graubard advised Mrs. Lawrence that she would save a substantial amount of money on estate taxes if she allowed a larger share of her husband's estate to pass directly to her children (VI:A611-A612). Mrs. Lawrence nonetheless decided, as was contemporaneously noted in a 1998 memorandum, that her children could not "handle" "overly large sums of money" and that she would "grow" the money "better than her children" (XV:A5931).

Similarly, even though the attorney in charge of Mrs. Lawrence's case had never before commenced a mandamus proceeding against a judge in 49 years of practice and did not want to do so here, Mrs. Lawrence insisted that a mandamus proceeding be brought against Surrogate Renee Roth so as to compel the Surrogate to

immediately decide a motion that had been pending longer than Mrs. Lawrence preferred (VI:A615). The attorney who did so said that he had never before "had a client that was pushing as hard with so much pressure" (VI:A615; XV:A5933-A5942).

Specifically with respect to Mrs. Lawrence's experience in reading and understanding contracts, the Court will find a proposed contract, between property owner Alice Lawrence and architect Water David Brown, at pages XV:A6262 to XV:A6272 of the Joint Appendix. The proposed contract was 12 pages long, most of it single-spaced with double columns of print.[5] The Court will find Mrs. Lawrence's seven pages of handwritten analysis of that contract, an analysis that speaks for itself, at pages XV:A6273 to XV:A6279 of the Joint Appendix.

As for Mrs. Lawrence's experience in managing a "very substantial investment portfolio" (I:A145a), she was personally managing a portfolio containing <u>more than $200 million in marketable securities</u> as of December 31, 2004 (XIV:A5155) — which was virtually the same time that she was, according to the Estate's counsel, incapable of understanding the two-page retainer agreement that is here in issue (XVII:A6841-A6843).

Mrs. Lawrence was also, to employ a euphemism, emphatic in dealing with those who displeased her. For example, when one of her architects (the aforementioned Walter Brown) wrote that his invoices were still outstanding, she

[5] By comparison, the subject retainer was five paragraphs long, and that includes the paragraph that Mrs. Lawrence added to the initial draft. *See* pages 28 to 30, *infra*.

forwarded the letter to Graubard with the handwritten directive, "KILL HIM Please!!" (VI:A640-A641; XV:A5987).

Daniel Chill, one of the three attorneys who chiefly dealt with Mrs. Lawrence during the years Graubard represented her (I:A104a), testified that Mrs. Lawrence "constantly" threatened to "fire" the firm and that her tirades were typically "abusive" and "replete with foul language" (V:A589-A590).

Elaine Reich, another of the Graubard attorneys who dealt with Mrs. Lawrence on a daily basis (VI:A874-A875), testified that Mrs. Lawrence was "controlling down to the details" and that "[s]he used profanities liberally" (VI:A876).

Mrs. Lawrence's own children said much the same thing. When deposed, Richard Lawrence testified that his mother liked to say that she "was a force to be reckoned with" (VII:A1208). He also said that "[a]ny discussion I had with my uncle [Seymour Cohn] or my mother was basically a monologue with me on the receiving end, and so with all this many years I have tried as little as possible to discuss anything with either of them" (VII:A1199).

Richard Lawrence further testified that he and his sisters would take turns telephoning their mother *specifically because* they feared being the object of her ire (VII:A1267-A1268):

> Q. Is the reason you and your sisters took turns calling your mother is because whoever called your mother could be the subject of getting yelled at by your mother?

A [Richard Lawrence]. Yes.

Q. Is that why you took turns?

A. Yes.

* * *

Q. What did she yell at when she would yell?

A. Anything and everything.

Daughter Marta Jo Lawrence added that she had never *in her entire life* verbalized any disagreement with *anything* her mother wanted to do (VII:A1526).

**Mrs. Lawrence Fires Two Other**
**Law Firms And Hires Graubard**

The events that led to this present moment began many years ago, in 1981 to be precise.

Sylvan Lawrence died on December 8, 1981 (I:A340a). Mrs. Lawrence, his widow, shortly afterwards retained counsel to represent her in what would ultimately turn out to be decades of litigation.

Mrs. Lawrence first retained and then fired the firm of Patterson Belknap (VII:A1186-A1187). When asked why she fired the Patterson firm, Mrs. Lawrence testified (in a different proceeding) that the attorney handling her case "met my children and myself at my home in the U.N. Plaza and he usually arrived drunk" (VII:A1187).

Mrs. Lawrence next hired the firm of Dreyer & Traub (VII:A1153, A1204-A1205). She fired it as well, later stating that the lead lawyer was not sufficiently "forthcoming in explaining what they were doing, what they were planning to do" (VII:A1154).

Mrs. Lawrence retained Graubard to represent her and her children in August of 1983 (V:A74-A75). The retainer, which provided for hourly billing, is reproduced at X:A2726 of the Joint Appendix.

During the more than twenty years in which Graubard would thereafter represent the Lawrences, the "children," who were actually adults at all pertinent times, collected more than $90 million dollars from the Estate litigation (X:A2727). However, they paid literally nothing in attorney's fees (V:A560) because Mrs. Lawrence had insisted from the outset that no bills be sent to her children (V:A660-A661).[6] As Richard Lawrence put it, his mother "drove the bus" and her children were "the kids in the back of the bus" (VII:A1211-A1212).

[6] She had also paid all of Patterson Belknap's fees when it was counsel (A1213, A1203-A1204) and all of Dreyer & Traub's fees when it was counsel (VII:A1204-A1205).

**Graubard Prosecutes The First Phase Of The Estate Litigation, Yielding The Lawrences More Than $350 Million**

The history of the underlying litigation concerning Sylvan Lawrence's estate cannot be fairly described within the constraints of this brief. Mr. Lawrence had presided over a real estate empire consisting of more than seventy commercial properties within the City of New York (I:A88a). The will left the residuary estate to his widow, Alice Lawrence, and their children (I:A88a). One problem amongst many was that Sylvan's wealth was in real estate that was owned in common with his brother, Seymour Cohn. Another difficulty was that Seymour did not want to sell the properties. Yet another problem was that Mrs. Lawrence and her brother-in-law were, to put it mildly, antagonistic towards each other.

To give the Court some idea of the complexity and enormity of the underlying Estate litigation, there were sixty-five (65) referee's reports and court orders just between December 7, 1990 and May 7, 2003 (XI:A3563-A3566, listing each report and order). Surrogate Renee Roth described the case as "warfare" that "required almost daily attention" (X:A2730). Special Referee Levine, who oversaw the end of the case, noted that "[c]onstant litigation followed for more than 20 years concerning virtually every aspect of the administration of the estate" (I:A88a).

By the end of 1997, Graubard had managed to work for Mrs. Lawrence for 14 years without being fired. During that same period of time, Graubard had also obtained $196,077,142.01 in Estate distributions for the Lawrence family (X:A2727),

which may be why it had not been fired. The firm also represented Mrs. Lawrence with respect to no fewer than twenty personal matters (II:A708a), matters that included the purchase and sale of multiple pieces of real estate, the purchase and sale of multiple condominiums, and "several" litigations with contractors (X:A2723).[7]

Then, in the single year of 1998, Graubard obtained an additional $124,799,500 in Estate proceeds, an enormous sum even for the Lawrences (X:A2727). Although some of those proceeds went to her children, Mrs. Lawrence personally had a net worth of $244,609,509 by March of 2000 (XIV:A5154).

By 2002, Graubard had obtained more than $350 million for Mrs. Lawrence and her children (X:A2729-2730). But the Estate litigation had by then changed.

**Graubard's Prosecution Of The Accounting**
**Claims, Up Until January of 2004**

Writing in 2002, Surrogate Roth observed that "all debts, estate taxes and pre-residuary bequests have by now been satisfied …" (X:A2729). The only thing that remained in the case were the accounting claims (IV:A1985a-A1989a; X:A2903-A2918). Each rested on the contention that Seymour Cohn had in one respect or another used his position as executor of the Sylvan Lawrence estate to engage in self-dealing.

[7] Although the proof indicated that Graubard had billed Mrs. Lawrence $21,950,673.10 from 1983 through the end of 2004 (X:A2725), that was for all twenty-plus matters, not just the Estate litigation (X:A2723-A2725).

In August of 1997, Graubard sent Mrs. Lawrence a 15-page memo analyzing each of the accounting claims and listing the "potential damages" for each claim (X:A2903-A2918). The total "potential" recovery exclusive of "RICO" damages was listed as $147,920,867.73 (X:A2918). The "95 Wall Street Fraud" claim — premised on the theory that Seymour had breached a fiduciary duty in reserving an investment in the subject building for himself — was estimated to have "potential" damages of $31,952,515.96 (X:A2909).

In June of 2000, Graubard sent Mrs. Lawrence an updated analysis of the 95 Wall Street Fraud claim, reporting that it now hoped for an award of approximately $55 million (X:A2931).

During this phase of the litigation, Graubard continued to keep Mrs. Lawrence abreast of all significant and often insignificant developments, and did so in writing (X:A2930-A2939, XI:A3408-A3611). The literally hundreds of pages of correspondence included drafts of briefs, letters, and motion papers, updates on the status of the suit, and analyses of the client's prospects as circumstances changed. *Id.*

In November of 2003, Graubard sent Mrs. Lawrence a "Tentative Trial Sequencing Plan" (X:A2936-A2939). The 95 Wall Street Fraud claim was first listed amongst the "Matters Ripe for Summary Judgment" (X:A2937). But, as 2003 ended, scarcely any discovery in the accounting proceeding had occurred.[8]

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[8] Discovery in the accounting proceeding began in earnest in June of 2004, with Graubard's receipt of approximately 150,000 pages of documents (V:A135; XI:A3753).

**The So-Called $60 Million Settlement Offer Of January 2004**

One of the Lawrences' central claims at various points in this litigation has been that there was a $60 million dollar settlement offer in the underlying action. Ignoring that the two claims are contradictory, the Estate argued in its post-trial brief both that Graubard had little risk in entering into the contingent fee retainer inasmuch as the $60 million offer that had been made directly to Mrs. Lawrence was purportedly still on the table (XVII:6880) and that Mrs. Lawrence allegedly thought that the accounting claims were worth no more than "a few million dollars" at that same time (XVII:6846).

The proof established that there had never been a real $60 million offer, but that the offer had been to pay *a gross* of $60 million at some unstated time that would, whenever paid, then be netted against Cohn business liabilities that had yet to be determined (VII:A1214-A1216). And there was no proof whatsoever that the offer was still "on the table" after the Special Referee's ruling (discussed below) of December 2004.

The meeting that gave rise to the offer occurred in January of 2004 (VIII:A1857-A1858), shortly after Seymour Cohn's death in November 2003 (XI:A3644). Richard Lawrence testified that the meeting occurred at Mrs. Lawrence's house (VII:A1214). Neither side's attorneys attended (VII:A1214).

Marc Cohn, Seymour's son, testified that Mrs. Lawrence made an "initial demand" of $90 million, that he and she "continued just to talk," and that they eventually agreed upon $60 million (VIII:A1862). Cohn's attorneys then disseminated a "Proposal of Settlement" (reproduced at X:A2941-A2943) that was claimed to incorporate the agreement (X:A2940).

Tasked with analyzing the proposal, Graubard strongly urged its rejection in a 17-page letter dated February 19, 2004 (reproduced at X:A2944-A2961). In recommending that course, Graubard did not say that $60 million was inadequate (X:A2944-A2961). The problem was that the offer was "illusory" (X:A2956). "How, when and on what terms the $60 million [would] be paid" was "not specified" (X:A2946). Further, the so-called "$60 million" offer was "subject to open-ended give-backs" resulting from, *inter alia*, "pending third-party litigations against the Lawrence/Cohn business interests" (X:A2946-A2947).

According to Richard Lawrence's own testimony, his mother had the very same opinion. She concluded that the $60 million carrot was a lure that would be nullified by all of the "conditions and qualifications" attached to the offer and that she had been down that road before (VII:A1219-A1221). Her conclusion was confirmed by the Cohns' rejection of Graubard's Alternative Proposal.

Rather than merely urging rejection of the Cohns' illusory offer, Graubard drafted and disseminated an "Alternative Proposal," reproduced in the Joint Appendix, that would not have changed the amount of the settlement but would have

made the settlement offer real, that is, without open-ended give-backs (X:A2960-A2961). When deposed, Marc Cohn admitted that he was "obviously not" successful in convincing his co-executors to agree to the Alternative Proposal (VIII:A1871-A1872).

The Record thus showed that the Cohn side was never willing to *pay* $60 million and was instead willing to *promise* $60 million, to be paid at an unstated time, netted against still unknown liabilities. And that was in January of 2004 (VIII:A1857-A1858), before the Special Referee recommended outright dismissal of the accounting claim Graubard had by then deemed more valuable than all the other claims combined (V:A142-A143)..

**The "Very Disappointing And Unanticipated" Loss Of The "95 Wall Street Fraud" Claim In December 2004**

In the aftermath of Mrs. Lawrence's rejection of the illusory $60 million offer (VII:A1219-A1221) and the Cohns' rejection of an actual $60 million settlement (VIII:A1871-A1872), Graubard continued to prepare the case for trial (X:A2968-A2969) and Mrs. Lawrence continued to pay hourly-computed attorneys' fees (X:2723-2725).

In November of 2004, Graubard wrote Mrs. Lawrence that per her instructions it had "developed a new pruned list of objection claims to be pursued" (X:A2967). Enclosed was a two-page list of such objections (X:A2968-A2969). The 95 Wall

Street Fraud claim was first listed (X:A2971), just as it had been in November of 2003 (X:A2937).

Then, on December 16, 2004, Special Referee Levine issued a 25-page report recommending outright dismissal of the 95 Wall Street Fraud claim (XIII:A4637-A4661). The Special Referee later acknowledged that the recommendation was "very disappointing" and "unanticipated" by Graubard or its client (I:A185a). With that, the claim that Graubard had earlier said had a potential recovery of $55 million (X:A2931) was now, absent reversal, worth nothing at all.

Within weeks, Mrs. Lawrence, not Graubard, wanted "to change the retainer arrangement" (I:A330a, ¶ 19 [Lawrence Answer]).

**Mrs. Lawrence's January 2005 Refusal To Continue With Hourly Billing, And Graubard's Agreement To Proceed On The Basis Of A Contingent Fee Retainer**

We now turn to January 2005 and how matters appeared as Graubard was writing Special Referee Levine (by letter dated January 10, 2005, copied to Mrs. Lawrence) for a trial date (V:A210-A212).

Mrs. Lawrence had personally tried to settle the case a year earlier and had concluded that the other side was not "serious" about doing so (VII:A1219-A1220). She next asked Graubard to prune the accounting claims so as to minimize her cost, which Graubard did (X:A2973). Then, in December of 2004, the single largest of the accounting claims came up empty (I:A171a).

Meanwhile, although Mrs. Lawrence and her family had reaped literally hundreds of millions of dollars from the Estate litigation, they had not received any dividends *lately*. And the hourly-computed fees were running well over $1 million per year. The comparison of the billings from 2001 to 2004 with the distributions over those same years follows:[9]

**Distributions And Attorney's Fees 2001-2004**

| Year | Total Attorney's Fees | Total Distribution |
|---|---|---|
| 2001 | $2,500,648.00 | $5,655,794.00 |
| 2002 | $1,799,805.50 | $ 833,056.00 |
| 2003 | $1,730,677.50 | $ 0 |
| 2004 | $2,381,842.00 | $ 0 |

Thus, while Mrs. Lawrence could plainly afford to pay hourly fees for many, many years without any return on her investment, the last several years had been costly. And the annual bill was plainly going to increase dramatically if the next year included a trial.

Furthermore, absent settlement of matters that had thus far gone 22 years without settling, the trial and the appeals from the trial would not finally determine the action. The scheduled trial would not encompass all of the remaining issues in the action (X:A2996), which is why Special Referee Levine concluded that it appeared in January of 2005 that "several more years of full-blown litigation would be required to reach … final disposition" (I:A184a).

[9] The billings can be found at X:A2723-A2725. The distributions can be found at X:A2727.

Daniel Chill testified that Mrs. Lawrence was "explicit in stating that she did not wish to pay hourly fees to continue with the litigation" and that she wanted the fee to be "on a contingency basis" (VI:A699). He suggested 50%; she countered with 30%; they agreed upon 40% subject to the approval of his firm (VI:A669-A701).

Per testimony credited by the Special Referee (I:A147a), Chill further stated that he told Mrs. Lawrence that there would likely be "[s]ome recovery that would cover at least a million two [$1.2 million] that she was going to lay out" (VI:A802).

Daniel Chill's description of the conversation that led to the contingent fee retainer was as follows:

> Q. And as best you can recall where did this conversation take place?
>
> A [Chill]. I'm not certain. It may have been on the telephone. It may have been at her house. I'm just not certain. I remember the conversation, but I do not remember where.
>
> Q. Why don't you describe to me how that conversation began on the new fee arrangement?
>
> A. Mrs. Lawrence was explicit in stating that she did not wish to pay hourly fees to continue with the litigation. She told me that she wanted to be my partner on a contingency basis and I should -- and -- contingency basis and that is what she told me first.
>
> Q. What, if anything, did you say in response to that?
>
> A. I said what do you have in mind, Alice. And she said, again, I think I said what do you have in mind 50/50, partners. She said partner. And I responded partner 50/50, and she said no, I'm always the senior partner.

> I then asked her what she had in mind, because you don't tell her. And I asked her what she had in mind. And she said 70/30, 50 for -- 70 for her and 30 for the Graubard firm on a contingency basis.
>
> Q. What, if anything, did you say in response to that?
>
> A. In response to that, I asked her if she would be willing to consider giving us a cushion on the downside of a sum of money which I picked out of my head, there was no rationale to it, $1,200,000 which would be given back to her in the event there was a recovery over and above that, only that amount of money. And she readily agreed to that.
>
> And then sua sponte on her own she said -- she said, why don't we make it 60/40.

VI:A699-A700.

> Q. And in that conversation isn't it true that Mrs. Lawrence said that she is always the senior partner in any arrangement like that?
>
> A [Chill]. Yes.
>
> Q. And that it's okay as long as she is still the senior partner and gets the lion's share of any recovery?
>
> A. That's correct.

VI:A803.

Chill sent Mrs. Lawrence a proposed retainer on January 12, 2005 via Federal Express (VI:A704-705). Mrs. Lawrence asked for an additional paragraph that specifically said that her obligations to make payments of up to $300,000 per quarter "shall not extend beyond one year" (VI:A707-A708). At trial, Mrs. Lawrence's

accountant reluctantly conceded that the new paragraph may have been his idea (VIII:A2004-A2006).

Graubard added the new paragraph and sent the revised draft, dated January 14, 2005, to Mrs. Lawrence. The Federal Express receipt shows that she received it on January 15, 2005 (X:A2984). She signed it on January 19, 2005 (VI:A708).

**The Terms Of The Contingent Fee Retainer Agreement**

The initial draft of the contingent fee contract, dated January 12, 2005, is reproduced at pages A2979 to A2980 of the Joint Appendix. As the Court can see, the facsimile banner at the top of the first page says, "Jan-13-2005 12:07pm From-ALICE LAWRENCE" (X:A2987).

Jay Wallberg was Mrs. Lawrence's accountant at the time of contract (VIII:A2022-A2023) and co-executor of her will at the time of trial (VIII:A1972-A1973). He testified that this particular copy (GP 23) of the initial draft of the contingent fee contract came from his own file (VIII:A1922), that Mrs. Lawrence had faxed it to him (VIII:A1922-A1924), and that the handwriting on the document was his (VIII:A1924). The handwritten words just above and to the right of the first numbered paragraph read, "and continuing thereafter" (VIII:A1924, A2004).

Wallberg claimed on direct examination by his own counsel that he had "no idea" why he wrote the words "and continuing thereafter" (VIII:A1924). However, on cross-examination, he admitted that the note "[p]resumably" related to the

sentence that was immediately below it (VIII:2004), a sentence that said that Graubard could send quarterly invoices "[f]or the calendar year commencing January 1, 2005" (X:2979). Wallberg admitted that he had "possibly" been concerned that the agreement did not clearly enough specify that such invoices could be sent only in 2005 and would not be "continuing thereafter" (VIII:A2004-A2005).

The executed contingent retainer that is the subject of this appeal is reproduced at pages A2985 to A2986 of Volume X of the Joint Appendix. With the new paragraph four and the "old" paragraph four now renumbered as paragraph five, the retainer states:

> 1. For the calendar year commencing January 1, 2005, the firm will continue to send you on a quarterly basis invoices for services rendered for the quarter, plus disbursements. Against each such invoice, you will pay the firm a flat sum of no more than $300,000 for that quarter. If at the end of the calendar year our invoices for services rendered for the calendar year, in the aggregate, total less than $1,200,000, exclusive of disbursements, the firm will either credit you with the overpayment or refund to you such overpayment at your option. If at the end of the calendar year, our invoices for the calendar year, in the aggregate exceed $1,200,000, exclusive of disbursements, you shall have no obligation or liability to the firm for any such excess.
>
> 2. Commencing January 1, 2005, with respect to any monies distributed to the beneficiaries of the Estate of Sylvan Lawrence, the Graubard firm will be paid from your share of such monies 40% of the total distributed to the beneficiaries, minus the total amount paid by you, including fees and disbursements, pursuant to paragraph 1 above.
>
> 3. In the event you settle the litigation with the Cohn estate, with respect to any monies distributed to the beneficiaries pursuant to said settlement, the Graubard firm shall be paid on the same basis as is set forth in paragraph 2 above. Should the

> amount due to the Graubard firm pursuant to this paragraph 3 be less than the amount of its actual time and disbursement charges commencing January 1, 2005, it is agreed between us that we will arrive at a fair resolution of the shortfall to the Graubard firm, which in all events shall be entirely in your discretion.
>
> 4. Your obligation to make quarterly payments under this agreement shall not extend beyond one year.
>
> 5. The above shall be binding upon our respective heirs, executors, successors and assigns.

Thus, under the executed retainer, Graubard could bill up to $1.2 million ($300,000 per quarter) in the first year (¶ 1) and would obtain 40% of any recovery (¶ 2). However, any billings from that first year would be deducted from the 40% fee (¶ 2).

Per the new paragraph that Mrs. Lawrence had demanded, Graubard's right to bill up to $300,000 per quarter would not "extend beyond one year" (¶ 4), at which point the risk would be borne solely by Graubard.[10]

In order to address Graubard's concern that a settlement could well cause it to earn less under the contingent fee retainer than it would have been able to bill under the prior, hourly retainer, paragraph 3 provided that it could petition Mrs. Lawrence for additional payment in that circumstance. However, it would then be "entirely in your [Mrs. Lawrence's] discretion" what she would do about any such shortfall (¶ 3). If the case was *instead lost* either on liability or damages, Graubard would not have even that recourse.

[10] Graubard regarded Mrs. Lawrence's paragraph merely as a clarification, not a change, from the initial draft (V:A200).

**The Frenetic Run-Up To The May 2005 Trial, And Graubard's Loss Of More Than A Million Dollars In Billings**

As has been noted, Graubard wrote Special Referee Levine on January 10, 2005 (copy to Mrs. Lawrence), requesting a trial date (I:A139a). That request was granted.

At a conference held on February 22, 2005, Special Referee Levine directed that trial would be held during the weeks of May 9th and May 16th with additional trial dates to be set in June (X:A2992). The parties would try eleven listed issues (X:A2992-A2996). Another seven issues would be "deferred" for a subsequent trial at a not yet determined date (X:A2996).

Although "only" eleven of the remaining issues would be tried in May and June (X:A299a-A2996), Graubard now had less than three months to prepare for trial of an action in which document discovery was far from complete and many witnesses remained to be deposed.

From January 1, 2005 until May 9, 2005, Graubard demanded and provided documents, defended three depositions, took twelve depositions, retained and prepared four expert witnesses, combed through literally tens of thousands of pages of documents, propounded and answered interrogatories, and answered a summary judgment motion with respect to one of the claims (XV:A5770-A5771).

During this period in which Graubard was now working for a contingent fee, it still kept Mrs. Lawrence informed of all developments, large and small, in the case. On March 3, 2005, Graubard sent her the scheduled dates for the next ten depositions

(XI:A3816). On March 9th, it sent her copies of the just-produced Epps documents (XI:A3823). On March 24th, it sent her expert reports (XI:A3829). On March 26th, it sent her eight deposition transcripts (XI:A3834).

Not surprisingly, Graubard's legal work during this period far exceeded the number of hours it was entitled to bill under the new retainer. During the first quarter of 2005, Graubard's attorneys had accumulated $763,664 in billable hours, but could bill only $300,000 plus disbursements under the terms of the contingent retainer (X:A3177, A3215). During the second quarter, Graubard accumulated $983,732.50 in billable hours, but could again bill only $300,000 plus disbursements (X:A3262-A3263).

Fortunately for the Lawrences if not for Graubard, the case did settle. It settled largely in consequence of an ostensibly less significant claim that Graubard had decided to pursue even in the face of an investigator's negative report.

**The $111 Million Settlement Of The Underlying Action**
**And The Work That Precipitated That Settlement**

During the years 1984 to 1988, Seymour Cohn, as executor of the Sylvan Lawrence estate, sold nine commercial properties to John E. Epps, a Bermudan citizen (I:A140a; XIII:A4917). Graubard hired an investigator to ascertain if there was some relationship between Epps and the Cohn family, but the report came up blank (V:A112).

However, as Graubard's Daniel Chill explained to Mrs. Lawrence by letter dated December 10, 1998, Graubard discovered that the Sylvan Lawrence Company was transmitting funds, channeled through three different companies, that paid for the insurance on several of the Epps-owned buildings (X:A2921). "Why," Chill wrote Alice Lawrence, "is Seymour continuing to pay insurance in 1998 for properties he ostensibly sold more than 10 years ago?" (X:A2921).

In November of 2004, Mrs. Lawrence, who was then still paying by the hour and wanted to reduce the fees, directed Graubard to "prune" the list of accounting claims (X:A2967). Notwithstanding that the Epps claim was smaller than most of the others and still could not be proven, Graubard retained it as a "Matter As to Which Determination Abides Discovery" (X:A2968).

The "smoking gun" proof emerged, post-agreement, on March 8, 2005. The Cohns' attorneys then wrote that they had "very recently" received documents that convinced them to "discuss the possible resolution" of the Epps claims (X:A3139-A3140). The documents showed that the subject buildings were owned by five different companies incorporated in New York, Delaware, the United Kingdom, and Liberia (X:A3072). All five corporations were owned by a Liberian company, which was owned by an Isle of Man company, which was owned by an Isle of Man trust … whose beneficiaries were Seymour Cohn's children (X:A3072).

Confronted with the other side's request to discuss settlement of the Epps claim (X:A3139-A3140), Graubard decided to instead exploit the Epps documents as

a means of obtaining the global settlement that had eluded the parties for 22 years (V:A253-A258).

Also, in lieu of seeking the difference between the market prices of the buildings and Cohn's artificially low sales prices, Graubard now decided to pursue a constructive trust theory that traced the profits that Epps later realized on the properties (V:A256-A257). In this manner, the damages could be estimated in the range of $12 to $13 million dollars (V:A257). However, the point was not that the damages were somewhat higher if assessed in that manner. Rather, tracking of the monies that the Cohn family secretly earned *and never declared* on their tax returns could "create a road map for the IRS somewhere down the road" (V:A263). This, Graubard felt, could create a powerful incentive for the Cohn interests to settle before that "road map" was memorialized in a trial transcript (V:A2063; *see also* I:A183a).

The trial began on May 9, 2005 (III:A951a). Graubard there made an evidentiary presentation for admission of the Epps documents, this notwithstanding that, as a result of Seymour Cohn's death, it had no witness to authenticate them. Norman Senior, who is still counsel for Richard Lawrence, contemporaneously stated "that it was the best evidentiary presentation that he had ever seen at a trial" (V:A284).

The case settled nine days later (XVI:A6444-A6445). Special Referee Levine approved the settlement on May 18, 2005 (IV:A1985a-A1989a). Writing at a time when neither Graubard nor the Special Referee was aware of any dispute concerning

the attorney's fees, Special Referee Levine said that "[t]he attorneys for the respective parties … ably and zealously represented their clients' interests" and that it would have "likely require[d] at least 30 additional trial days" to "hear and determine the remaining unresolved issues" (IV:A1985a-A1986a). He further observed that the issues were "in the main uncertain of outcome" (IV:A1989a).

The settlement called for an "immediate" payment of $100 million, plus $11,856,468 in other payments, without any "strings" or future liabilities (XVI:A6444-A6445).

Unbeknownst to Graubard, Mrs. Lawrence had no intention of paying the contractually agreed contingent fee, or any attorney's fee.

**"It's My Problem. I'll Handle It" - Mrs. Lawrence's Secret Preparations To Sue Graubard Even As It Continued To Finalize Her Unexpectedly Large Settlement**

With respect to the approximately six-month period between Mrs. Lawrence's signing of the retainer (January 19, 2005 [V:A329]) and the closing (July 25, 2005 [V:A292]), there was no evidence or claim that Mrs. Lawrence told Graubard either orally or in writing, (a) that she did not understand the retainer, or, (b) that she felt Graubard had in some way taken advantage of her.

Richard Lawrence testified that he attended the trial on the day that "the issue of potential settlement came up" and telephoned his mother to report the development (VII:A1223). She responded with "words to the effect, 'I think I made a

mistake"' (VII:A1223). She added, "It's my problem, I'll handle it" (VII:A1229-A1230).

On July 7, 2005, still weeks before the closing, Mrs. Lawrence faxed her son a copy of the amended retainer agreement (VII:A1227-A1229). Richard did nothing at that time, he testified, because his mother had already said she would "handle it" (VII:A1237).

On July 18, 2005, Mrs. Lawrence faxed a copy of the amended retainer agreement to the firm of Greenberg Traurig, the firm that would later sue Graubard on her behalf (VI:A1023).

On July 29, 2005, just four days after the closing, Greenberg Traurig's Leslie Corwin sent Daniel Chill a letter asking him or his counsel "to meet to discuss the various issues which have been brought to our attention by Mrs. Lawrence regarding your prior representation" (XII:A4453). It was the reference to "prior representation" that told Chill that Graubard no longer represented the woman who had four days earlier walked away with another $100-plus million (VI:A711-A712).

## The Dispute Concerning The Contractually Owed Attorneys' Fees

### The Commencement Of These Proceedings, And The Lawrence Family's First Set Of Inflammatory Accusations

Having been apprised that Mrs. Lawrence had no intention of honoring the fee agreement (VI:A711-A712), Graubard filed a Petition in the Surrogate's Court (I:308a-A316a). The Petition alleged the operative terms of the retainer, and that Mrs. Lawrence had breached the agreement (I:A309a-A312a).

Mrs. Lawrence's responsive answer denied most allegations of consequence, but expressly admitted that it was she who "sought to change the retainer agreement" (I:A330a, ¶ 9). Although she alleged that the retainer was "unconscionable on its face" (I:A332a, ¶ 28), she made no claim that Graubard had misrepresented the value of the case and no claim that it had exercised Svengali-like influence over her (I:A330a-A333a). Nor did Mrs. Lawrence advance either claim in the two affidavits she filed early in the case (IV:A1451a-A1455a, A1982a-A1984a).

The Lawrence Answer (I:A330a-A335a) and Affidavit in Opposition (IV:A1451a-A1455a) employed a strategy that the Lawrences would continue to use throughout the litigation. Unbeknownst to Graubard's partners, back in 1998, Mrs. Lawrence had made gifts totaling more than $5 million to the three Graubard attorneys who had principally worked on her case from 1983 until 1998 (IV:A1452a-A1453a). Although Mrs. Lawrence had not mentioned or complained about those

gifts at any time during the more than six years between the time of payment and the time of settlement, she now did so and urged that alleged improprieties concerning the 1998 gifts justified her breach of the 2005 contingent fee retainer (IV:A1452a-A1453a).[11] Indeed, the alleged improprieties concerning the 1998 gifts purportedly dictated that Graubard receive no fees at all and that Graubard should also have to refund all attorney's fees it had collected since 1983 (I:A345a, I:A347a).

In the aftermath of the Surrogate Court's denial of Mrs. Lawrence's motion to dismiss, Mrs. Lawrence and her son filed separate Appellate Division briefs, each brimming with venom as to the purportedly heinous conduct of the Graubard firm.[12] Amongst other allegations, Mrs. Lawrence and her counsel told the Appellate Division that "Graubard was already in the midst of negotiations with the attorneys for Mr. Cohn's Estate regarding a possible settlement" when Graubard negotiated the subject retainer agreement (II:A659a). Although the claim was created from whole cloth and was later abandoned, the Appellate Division dissenter prominently noted the contention in an opinion that was presumably read by a significant portion of the legal community to which Graubard belongs (II:A846a-A847a).

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[11] The Special Referee would later write that the timing of Mrs. Lawrence's first known complaint regarding the 1998 gifts "suggests that the gifts validity challenge was only devised as a defensive litigation tactic and not as a legitimate claim having merit on its own" (I:A127a).

[12] Mrs. Lawrence's Appellate Division briefs with respect to the prior appeal are reproduced at pages II:A638a-A726a and II:A727a-A786a of the Joint Appendix. Richard Lawrence's Appellate Division brief with respect to that appeal is reproduced at pages XVII:A7166-A7216 of the Joint Appendix.

**Mrs. Lawrence's Refusal To Be Deposed**

Mrs. Lawrence was never deposed and was therefore never questioned as to her claimed-by-her-counsel inability to understand the written retainer agreement. This was not due to any want of effort on Graubard's part.

Special Referee Levine penned a 38-page review of Graubard's efforts to depose Mrs. Lawrence and of all the means that she and her counsel successfully utilized to prevent that from occurring (I:A199a-A237a). We will here endeavor to summarize some of the highlights, and lowlights, of that history.

Graubard's first notice to depose Mrs. Lawrence was served on August 9, 2005, almost immediately after commencement of these proceedings (II:A495a). Special Referee Levine ruled over Mrs. Lawrence's objection (II:A518a-A520a) that Mrs. Lawrence's deposition was "critical to a resolution of the issues" (II:A493a) and that the deposition should proceed "on such dates as may be mutually agreed to by the parties" (II:A493a-A494a).

After Mrs. Lawrence and her counsel then proceeded to ignore all attempts to set a date for her deposition (II:A502a, A507a-A508a), Special Referee Levine finally directed, by order dated August 1, 2006, that Mrs. Lawrence appear for deposition on August 21, 2006 (II:A511a). Although no court granted Mrs. Lawrence a stay or permission to ignore that directive, that is precisely what Mrs. Lawrence did. When Graubard's counsel arrived on the indicated date with a reporter, Mrs. Lawrence and her counsel failed to appear (I:A205a).

Graubard was thus forced to make a motion to compel Mrs. Lawrence to do what she had already been ordered to do (II:A425a-A443a). Mrs. Lawrence's counsel opposed the motion, stating (II:A636a):

> The only possible purpose for which the Graubard Parties seek the deposition of Mrs. Lawrence in this matter is in order to further harass Mrs. Lawrence …

Mrs. Lawrence's counsel did, however, pledge that "in the unlikely event that the Appellate Division does not dismiss the Surrogate's Court Petition," Mrs. Lawrence would appear for deposition "within thirty (30) days of the decision thereof, at a date and time agreeable to all of the parties herein" (II:A636a). That promise was repeated no fewer than six different times (I:A221a) and it helped win Mrs. Lawrence an Appellate Division stay of discovery pending her appeal of the order denying her motion to dismiss (II:A829a-830a).

The Appellate Division eventually affirmed the order denying the Lawrences' motions to dismiss (II:A831a-A870a). That occurred on November 27, 2007 (*id.*). Graubard's counsel accordingly wrote Special Referee Levine, copy to Mrs. Lawrence's counsel, that "we ask Mrs. Lawrence to confirm to us and to your Honor that she will appear and to provide us with dates she is available" (II:A894a).

Unknown to Graubard at the time, Mrs. Lawrence had the prior month been diagnosed with lung cancer that "was found to have metastasized to her pleura, liver,

and lymph nodes" (II:A898a). Mrs. Lawrence's counsel nonetheless responded to the request for deposition dates with a December 5, 2007 letter that, (a) said nothing about Mrs. Lawrence's health, and, (b) declined to produce Mrs. Lawrence for a deposition on the ground that Mrs. Lawrence's just-filed motion for leave to appeal to the Court of Appeals had effected an automatic continuation of her stay (II:A896a-A897a). The repeated promises that Mrs. Lawrence would appear and be deposed within 30 days of an affirmance were no longer operative.

Graubard moved in the Appellate Division for an order vacating the automatic stay so it could depose Mrs. Lawrence. The motion was opposed both by Alice Lawrence (II:A899a-A902a) and Richard Lawrence (III:A1013a-A1017a). Neither of the opposing affirmations revealed that Mrs. Lawrence had terminal cancer. Mrs. Lawrence's counsel instead argued that "Graubard Does Not Show That Any Prejudice Will Result if the Stay is Continued" (II:A901).

The Appellate Division vacated the stay by Order dated February 6, 2008 (II:A905a). On February 7, 2008 — that is, the very next day — Mrs. Lawrence, the same party who had just a month before said that no prejudice would follow from extension of the stay (II:A901), moved to renew or reargue on the ground that she was "in the terminal stages of lung cancer" (II:A911a) and was "not physically, mentally, or emotionally competent to be deposed" (II:A912a).

Mrs. Lawrence died on February 16, 2008 (I:A60a, A93a), approximately 18 months after the deposition that she had been ordered to attend (II:A511a) was instead attended only by Graubard's counsel and a reporter (II:A518a-A520a).

**Graubard's Motion For Sanctions And The Lawrences' Cross-Motions To Instead Sanction Graubard**

Graubard moved in March of 2008 for an order "striking [Mrs. Lawrence's] pleadings" (II:A817a). "As an alternative," Graubard requested that the issues to which Mrs. Lawrence's testimony would have been relevant "be deemed resolved [against her] for purposes of the action" (II:A818a, quoting CPLR § 3126[1]) and that Mrs. Lawrence's Estate be deemed to have waived the protection of "the Dead Man's Statute" (II:A818a).

The Estate cross-moved to sanction Graubard for the very making of the motion (III:A1018a-A1040a). The Estate therein charged:

> "Graubard's dogged persistence in bringing this frivolous motion" warranted "sanctions against them in the form of attorneys fees and costs to be paid to the Estate for having to defend" (III:A1040a);
>
> Graubard had "essentially accuse[d] Mrs. Lawrence of deliberately orchestrating her own terminal illness and death" and that such "theme" was "offensive as well as baseless" inasmuch as "the true outrage" was "their own conduct toward their client of more than 20 years" (III:A1134a); and,
>
> "Graubard's last-ditch accusation that Mrs. Lawrence deliberately engaged in sanctionable behavior by becoming ill and dying at a

> time that was inconvenient for Graubard" was "truly outlandish and without merit" (III:A1145).

Special Referee Levine credited all of Graubard's factual claims on the sanctions motion but nonetheless granted Graubard the barest shadow of the relief it had sought (I:A199a-A237a). He found:

*First*, "[t]he number of [Mrs. Lawrence's applications to stay discovery] … the weakness of the arguments submitted in support of them, and the acknowledgment that the only purpose of the applications was to narrow the scope of the inquiry, all support the inference that the real purpose of the successive applications … was delay" (I:A218a).

*Second*, Mrs. Lawrence had represented "[o]n at least six occasions … that she would appear for her deposition within thirty days of a decision by the Appellate Division if that decision was not in her favor" (I:A221a). Those representations did not "contain any qualifications or conditions" (I:A221a) and "were made for the purpose of obtaining a stay of Mrs. Lawrence's deposition" (I:A222a).

*Finally*, even if one were to assume that her counsel did not know that Mrs. Lawrence was seriously ill, "[t]he implied representations by Mrs. Lawrence that she knew of no medical condition that might significantly impair her ability to testify, set forth in her counsel's affirmation submitted more than a month after she learned that she had lung cancer and had only a short time to live, constitute[d] a serious breach of her obligations of veracity and candor" (I:A225a).

Yet, after having concluded that Mrs. Lawrence and her counsel had engaged in "willful" and "contumacious" behavior (I:A233a-A234a) in depriving Graubard of testimony that was "critical to a resolution of the issues" (I:A235a), the Special Referee recommended only that "the Estate and all other parties having standing to raise an objection under CPLR 4519 [the Dead Man's statute]" be compelled to "waive their right to assert such an objection" (I:A236a).

The Special Referee gave only one reason why that Estate's pleadings should not be stricken outright: "the strong policy favoring resolution of actions on the merits whenever possible" (I:A236a). Surrogate Webber thereafter adopted the Referee's recommendations "in their entirety" (I:A196a).

**The Trial Of Graubard's Fee Claim**

The trial generated a transcript of more than 2,700 pages with approximately 269 exhibits entered into evidence (I:A100a).

Graubard's core contention was simple enough. It had a signed retainer entitling it to 40% of the recovery less any payments already made. There was nothing improper or unusual about the terms of the retainer. The firm therefore wanted to be paid.

The Estate responded with three fact witnesses — Jay Wallberg, Angel Rivas and Barbara Kling — each of whom told a different story about how Graubard had purportedly taken advantage of the client. That testimony is summarized below (*see*

pages 45 to 49, *infra*), as is the expert testimony adduced by each side (*see* pages 49 to 51, *infra*).

**The Lawrences' New-For-The-Trial Accusations of Graubard Misconduct, All "Discovered" Posthumously and All Premised Solely Upon Hearsay**

By trial, the Lawrences had abandoned the claim that Graubard had been negotiating a settlement with the Cohn estate even as it negotiated the terms of the contingent fee retainer. *See* page 38, above. However, the Estate now asserted new factual claims, all premised on hearsay, as to why Graubard's conduct was reprehensible.

Jay Wallberg, formerly Mrs. Lawrence's accountant (VIII:A1890), was co-executor of her Estate at time of trial (VIII:A1889). He had already been paid about $3 million in estate commissions (VIII:A1976) and expected "[p]robably another three million dollars" (VIII:A1976). It was Wallberg who said that Mrs. Lawrence had said that "Danny Chill" had a "Svengalli effect" on her (VIII:A1914).[13]

Wallberg testified on *direct* examination that Mrs. Lawrence received a "piece of paper" in January of 2005, that she did not know what it was, and that she faxed it to him (VIII:A1919-A1920). Wallberg told Mrs. Lawrence that the document called for Graubard to receive "a forty percent bonus if the case … settled" (VIII:A1919-

[13] The Estate's theory was that such was not hearsay (VIII:A1900-A1908).

A1920). Mrs. Lawrence purportedly "heard forty percent" and said, "'forget about it, that's crazy'" (VIII:A1920).

Wallberg's direct version of the story did not include any mention of the retainer being amended at his suggestion (VIII:A1920-A1921). On the contrary, he supposedly thought the contingent retainer was a "dead issue" until June or July of that year (VIII:A1924).

In June or July, Mrs. Lawrence faxed Wallberg a document that looked "similar" to the one he had earlier reviewed, except that this document was signed. Wallberg said that Mrs. Lawrence told him at that time, "'I never signed it. I have no recollection of signing this thing'" (VIII:A1925).

The above testimony notwithstanding, there was one difference between the version of the retainer Wallberg reviewed on January 13th and the version that Mrs. Lawrence signed on January 19th. The latter had a new fourth paragraph which read: "Your obligation to make quarterly payments under this agreement shall not extend beyond one year" (X:A2982-A2983, A2987-A2988). Wallberg grudgingly admitted on cross-examination that his contemporaneously written note ("and continuing thereafter" [X:2979]) "possibly" related to the very same point, the concern that the initial draft of the Agreement could be misconstrued as allowing Graubard to bill quarterly even after the Agreement's first year (VIII:A2004-A2006).

Angel Rivas had worked as a handyman for Mrs. Lawrence (VI:A942-A943) and had received $751,000 in "loans" from Mrs. Lawrence while in her employ

(VI:A942-A943; VIII:A2082-A2086; XVI:A5811-A5812). Her will had also left him $50,000 and a house (VIII:A1992-A1993; XVI:A6190, A6191). Her Estate had, for whatever reason, not yet given Rivas either the money or the house (VIII:A1992-A1994).

Rivas was purportedly "unavailable" to testify at the trial on the stated ground that, "He's in Connecticut. Outside of the subpoena power" (VIII:A2042). The Estate was thereby permitted to read excerpts from his deposition into evidence notwithstanding that he was at the time of trial employed by the Estate (VIII:A1994-A1995).[14]

Rivas testified that Mrs. Lawrence had knee surgery and that he remembered Chill coming over to the Lawrence home "[w]hen I [Rivas] brought her home [from the hospital]" (VIII:A2048-A2049, emphasis added). Mrs. Lawrence spoke to Rivas just after Chill left (VIII:A2060-A2061) and told Rivas that "she signed a document" that "she shouldn't have done" because "she was medicated" and "wasn't, you know, in her right mind" (VIII:A2060-A2061).

The reality, however, was that the knee surgery had occurred on September 1, 2004 (XV:A5863) and that Mrs. Lawrence had actually been discharged from the

[14] *Dailey v. Keith*, 1 NY3d 586, 587 [2004] (a *party* cannot read his or her own deposition into evidence on the ground of unavailability); *Std. Fruit & S. S. Co. v Waterfront Commn. of New York Harbor*, 43 NY2d 11, 15-16 [1977] (corporation that is itself subject to subpoena can be required to produce officers and employees who are beyond the State).

Burke Rehabilitation Hospital back on September 10, 2004 (XV:A5869) … more than four months before signing the contingent fee retainer (V:A201-A202).

Barbara Kling owned half of Lawrence Essentials (VIII:A2098-A2099, A2124-A2125), a company to which Mrs. Lawrence had given $5.7 million in never repaid loans (VIII:A2124-A2125).

Kling testified that she remembered Mrs. Lawrence stating "around 2004, 2005" that "Chill was coming up to the house" (VIII:A2109). Kling soon afterwards had a second conversation with Mrs. Lawrence in which the latter purportedly stated, "He [Chill] wore me down" (VIII:A2109).

At trial, Kling admitted that her perception at the time was that Mrs. Lawrence was *not* confused (VIII:A2140). Kling also conceded that Mrs Lawrence contemporaneously told her that the contract called for "40 percent of whatever settlement there was" (VIII:A2112).

To summarize, the Estate called one witness (Wallberg) who said that Mrs. Lawrence had no recollection of signing the retainer (XVII:A1925-A1926), another (Rivas) who said that Mrs. Lawrence knew that she had signed it but had done so because she was drugged out (VIII:A2060-A2061), and a third witness (Kling) who said that Mrs. Lawrence knew she had signed it, was perfectly lucid at the time (VIII:A2140), but did so because "Danny Chill" wore her down (VIII:A2109).

That at least two of those stories had to be untrue (since acceptance of the testimony of any one of the three witnesses compelled rejection of the testimony of

both of the other witnesses) did not constrain the Estate from advancing all three claims.

**Graubard's Uncontroverted Proof That The Terms Of The Contingent Fee Retainer, (1) Did Not Violate Any Identifiable Rule Or Standard, And, (2) Were Wholly Consistent With The Established Customs And Practices In The New York Metropolitan Area**

Graubard called David G. Keyko as an expert witness concerning the Estate's claim that the contingent fee retainer agreement was unconscionable (VII:A1312-A1812).

Keyko was a partner with the firm of Pillsbury Winthrop (VII:A1312), an executive member of his firm's Professional Responsibility Committee (VII:A1315-A1316), a member of the Ethics Committee of the Bar of the City of New York (VII:A1319-A1320), and a member of the First Department's Disciplinary Committee (VII:A1320). Part of his personal practice entailed counseling firms on matters of legal ethics (VII:A1317-A1318). Keyko had written a large number of published articles on subjects that included legal ethics and was also a regular columnist on that subject for the New York Law Journal (VII:A1321).

Keyko testified that, as opposed to personal injury law firms "that have a steady diet of handling contingency cases," most commercial firms "are not able to spread the risks" and are therefore leery of taking a case that would take its lawyers "out of

circulation" and prevent them from billing during the pendency of the case (VII:A1327-A1329).

Apart from the near certainty of decreased income during the pendency of the case, there are further risks, and not just the risk of ultimately losing on the merits (VII:A1333-A1334). Because the client always has the right to fire the law firm and to settle the case for a lower number than counsel may deem advisable, those too are risks of contingent fee representation (VII:A1333-A1334). This sharply contrasts with hourly billing in which the lawyer's only risk is that the client will stop paying the bills (VII:A1346-A1347).

Keyko testified that contingent fees in commercial cases in Manhattan range from 20% to 50% of the recovery, that "[t]he bulk of the cases are between 33 and a third and 40 percent," and that a 40% fee is "the norm in the high percentage of cases" (VII:A1339).

It was also not unusual for the contingency to be hedged against hourly fees "on a time basis with a cap" in order to provide a "backstop" for the firm (VII:A1339-A1340, A1365). The "backstop" here, allowing Graubard to bill up to $300,000 a quarter during the Agreement's first year, was "within what the firms in New York were doing at the time" (VII:A1365).

When asked whether a completely unexpected event, such as the discovery of the Epps documents, should cast doubt on the reasonableness of a fee that was reasonable at the time of contract, Keyko testified that it should not because "all kinds

of things can happen, both positive and negative, witnesses can forget things they don't recall, documents that you are counting on you can't get into evidence for whatever reason" (VII:A1369-A1370). The very nature of litigation is that there may be "substantial unexpected developments" (*id.*).

**The Estate's Expert Testimony**

Prof. Stephen Gillers, the expert called by the Estate, testified that he taught legal ethics and professional responsibility, amongst other subjects, at New York University Law School (IX:A2204-A2205). He had also written two books in that field and had lectured to various bar association groups on legal ethics (IX:A2205-A2206).

Although Gillers conspicuously avoided saying whether the terms of the retainer were themselves unethical or even unusual, he testified that the $44 million contractual fee was excessive in hindsight since, in his view, "it was no remarkable act of lawyering genius that produced [the settlement]" (IX:A2273-A2279).

In sharp contrast to the position that the Estate would assert in its post-trial papers and on appeal, the Estate's expert testified that, unless the contract was also procedurally unconscionable, the correct legal remedy when a retainer is substantively unconscionable in hindsight is to reduce the fee to a not unconscionable sum (IX:A2277-A2278):

> … [Gillers] If I assume as I suppose I'm assuming that there is not procedural unconscionability in how the firm got the agreement, <u>what does that mean if there is substantive</u>

> big to tolerate under our laws. Well, it means you reduce it.
>
> [Objection Overruled]
>
> A. You reduce it, and this is the point at which I don't think I can be of any further help because knowledge of the law firm's ingenuity in getting the documents introduced into evidence is a factor for the trier of fact and for any appellate tribunal …

Emphasis added.

On cross-examination, Gillers was forced to admit that, (a) he had earlier declined to render an opinion *in this very case* because "[c]ontests arising over midstream fee agreements, especially a shift from an hourly rate to a contingency fee, generally require a detailed command of the records" (IX:A2302), (b) he still did not know, even as he was passing judgment on the Graubard firm, *any* of "the major issues that were being litigated" in the underlying action (IX:A2305-A2306), and, (c) his knowledge of the Graubard firm came solely from looking at its website (IX:A2309).

Gillers further admitted that he had actually written in one of his books that "contingent fees are the quintessential example of value billing" (IX:A2377). He had also personally cited a New York case in which a contingent fee that reportedly amounted to "an average of $13,000 an hour per lawyer regardless of experience" had been upheld (IX:A2380-A2381).

Gillers further admitted that the documents that Graubard had sent Mrs. Lawrence concerning the viability of the accounting claims — documents that he had not been shown before rendering his opinions — actually contained "a lot of detail" concerning the individual accounting claims (IX:A2549-A2553, IX:A2557-A2564). He also conceded that he had no reason to "believe that the information that was provided to Mrs. Lawrence" "was knowingly inaccurate or incomplete" (IX:A2559).

## The Rulings Below

### The Special Referee Rejects The Estate's Various Claims Of Graubard Misconduct As Untruthful But Nonetheless Recommends A Drastic Reduction Of The Contractually Agreed Fee On The Stated Ground That *No One Expected* The Lawrences' Recovery To Be So Large

Special Referee Levine's 105-page report (at I:A87a-A191a) sided with Graubard on almost every contested factual issue, but nonetheless recommended that Graubard receive only a fraction of its contractually agreed fee.

First and foremost, the Special Referee concluded that "it was Alice who insisted on abandoning the prior hourly-rate fee arrangement" (I:A188a).

Regarding the Wallberg/Rivas/Kling testimony, Special Referee Levine found that "[t]he Estate's arguments and evidence that Alice was suffering from diminished capacity, that Chill wore her down about the Revised Retainer Agreement and had a Svengali-like influence on her are not credible" (I:A155a, emphasis added).

Regarding the Estate's claim that Mrs. Lawrence had not understood the contingent fee retainer, Special Referee Levine observed that "Alice … reviewed the Revised Retainer Agreement with Wallberg" (I:A154a). Further, "[o]ne of Wallberg's handwritten notations" was "consistent with the change in the Agreement Alice asked Reich to make on January 14, 2005" (*id.*). In all, the evidence showed that "Alice understood the Agreement, understood Wallberg's comment on that portion of the Agreement, and sought and obtained a revision to reflect Wallberg's concern" (*id.*).

As for the Estate's argument that Mrs. Lawrence's statement during negotiation that she expected to be "senior partner" with the "lion's share" of any recovery demonstrated that she was "confused" as to the terms of the later-reduced-to-writing fee agreement since her *personal* share of the recovery would of itself be less than Graubard's 40% fee (XVII:A6841-A6842),[15] the Special Referee expressly wrote why he was "unpersuaded," stating (I:A156a):

> Given all the proof in the record, I am similarly unpersuaded that Alice's statements, reported by Chill, that she expected to be the senior partner, with the lion's share and the bulk of the money, shows she was confused about the terms of the Revised Retainer Agreement. Those comments are consistent with her reduction

[15] Mrs. Lawrence's share of the recovery was 75.9378%, with the balance going to her three children (I:A130a, n.4).

Had she merely paid her own proportional share of the attorney's fees, Mrs. Lawrence would have received an individual recovery of approximately 46% of the settlement (60% of 75.9378% of the settlement), which would exceed Graubard's share.

However, since Mrs. Lawrence had decided to pay all of the fees herself, she would instead receive 75.9378% minus 40% of the recovery, amounting to 35.9378% of the settlement.

> of Graubard's percentage, in the negotiations with Chill, from 50% to 40%. Moreover, the fact that Graubard's 40% fee would come out of her share of the settlement proceeds is consistent with her insistence for decades that she, and not the Lawrence Children, pay the attorney fees for the litigation (Tr. 1203-07, 1524, 1534).

Emphasis added.

Regarding the Estate's claim that the contingent fee retainer was procedurally unconscionable, Special Referee Levine noted that there was a legal dispute as to whether Graubard bore a special, higher burden where the retainer was a "midstream" change that had been requested by the client, not the lawyers (I:A153a). There was, however, "no need to reach that question here" because Graubard had shown "by both a preponderance and clear and convincing evidence, that the Agreement was not procedurally unconscionable" (I:A153a). The Special Referee explained (I:A153a):

> Graubard has submitted extensive proof that Alice was fully capable of understanding the Revised Retainer Agreement and did not enter into it because Graubard exploited its existing confidential relationship with her … The proof also showed that Alice was kept up to date on the status of the litigation and was an active participant in charting its course.

Regarding the alleged substantive unconscionability of the retainer, the Estate had not claimed, and Special Referee Levine did not find, that the retainer was *prospectively* unconscionable. He instead credited Graubard's proof that the 40% contingency fee was within the norm for commercial cases (I:A187a).

In addition to finding in Graubard's favor with respect to all of those issues, the Special Referee further found that,

> as of the time of contract, it appeared that "several more years of full-blown litigation would be required to reach the final disposition" (I:A185a, emphasis added);
>
> "Alice was kept up to date on the status of the litigation and was an active participant in charting its course" (I:A153a, emphasis added);
>
> Mrs. Lawrence "did not want anything of importance, and indeed many things of little importance, to be done without her knowledge and approval. She reviewed drafts of documents and forcefully voiced her opinion on matters large and small …" (I:A125a, emphasis added);
>
> she "was deeply involved with the strategy and tactics of the litigation" and engaged in "micromanagement of the litigation" (I:A125a, emphasis added); and,
>
> Mrs. Lawrence "frequently verbally abused the Attorneys and threatened to fire them if they dared to not carry out her commands" (I:A127a, emphasis added).

Yet, just as with the earlier sanctions ruling (where the Special Referee had concluded that the Estate's "willful" and "contumacious" conduct deprived Graubard of "critical" evidence but declined to recommend striking of the Estate's pleadings [I:A233a-A234a]), Graubard won the battles but lost the war. The Referee deemed Graubard's contingent retainer substantively unconscionable in hindsight. In reaching that conclusion, the Special Referee repeatedly relied upon circumstances that seemingly weighed in Graubard's favor as grounds for reduction of its fee.

For example, the fact that contingency fees were disfavored "by general commercial and corporate litigating firms because the firms 'are not able to spread the risk'" (I:A187a, citing VII:A1327) did not mean that Graubard should be credited for acceding to a request that many other firms would have resisted. It meant that the unrebutted proof "that a 40% contingency is commonly charged for complex commercial cases" was "not entitled to significant weight" (I:A187a).

Likewise, the fact that Mrs. Lawrence's actual damages "could not nearly justify a recovery worth $100 million" (I:A182a) was counted *against* Graubard and *for* the client who had already obtained a windfall beyond her actual damages (I:A182a-A183a). This was so even though it surely would not have been counted in Graubard's favor if the settlement were a poor one that compensated the clients for only part of their actual loss.

In the end, the Special Referee decided that Graubard should obtain its contractually agreed 40% fee … but only as to the first $10 million of the recovery (I:A188a).

**The Surrogate's Ruling, Largely Adopting The Special Referee's Recommendations**

With respect to the issues concerning the contingent fee retainer, Surrogate Nora Anderson essentially adopted the Special Referee's recommendations *in toto*, including the aforementioned "sliding scale" (I:A83a-A84a). The Surrogate described that result — namely, that the law firm would receive approximately 36% of its fee

with respect to a retainer that was *not* unconscionable at the time of the contract — as "in effect a middle-ground remedy" (I:A84a).

**The Appellate Division's Ruling, Crediting The Same "Misunderstood The Retainer" Claim That <u>The Special Referee Had Emphatically Rejected</u>**

The Appellate Division *rejected* the Special Referee's emphatic findings that Mrs. Lawrence was not "confused" as to the retainer's terms (I:A156a-A157a). It also *rejected* the Special Referee's finding that Graubard had shown "by both a preponderance and clear and convincing evidence, that the Agreement was not procedurally unconscionable" (I:A153a).

The Appellate Division's analysis of the issue of procedural unconscionability consumed but a single paragraph and was premised on a single factual finding. The court concluded that Mrs. Lawrence's statement that she would always have to get the "lion's share" of any recovery (VI:A804) — a statement that she made during negotiation and even before there was a written agreement for her to review (VI:A699-A700, A807) — meant that she had not understood the retainer agreement inasmuch as her individual share of the proceeds would actually be less than Graubard's by virtue of the fact that she had decided to pay the entire fee out of her own share of the recovery (XVII:A7394).

The Appellate Division also ruled that the retainer agreement was substantively unconscionable in hindsight (XVII:A7394-A7396). In so ruling, the Appellate

Division did not say that the terms themselves (40% inclusive of up to $1.2 million in billings in the first year only) were unethical, unreasonable, or contrary to industry custom. Rather, it was the recovery and the consequent size of the fee, "$44 million," that made the retainer substantively unconscionable.

The Appellate Division further ruled that rather than reducing Graubard's fee to a conscionable sum, the "proper remedy" was to "revert to the original [hourly] agreement" (XVII:A7396). It "remanded for the determination of the fees due the law firm under the original retainer agreement" (XVII:A7396).

**The Appellate Division Grants Leave To Appeal To Graubard And The Individual Defendants**

In three separate orders rendered on the same day, the Appellate Division granted leave to appeal to defendants Chill and Reich (XVII:A7388), defendant Mallis (XVII:A7389), and petitioner-defendant Graubard (XVII:A7390).

**The Lawrences Fail To Seek Or Obtain Leave To Appeal**

Neither the Estate itself nor the adult children-intervenors sought or received leave to appeal from the Appellate Division modification.

Accordingly, with respect to those issues that were resolved against them (including that any improprieties concerning the gifts cannot be imputed to Graubard [XVII:A7396]), such issues are not before the Court and the Court lacks jurisdiction to award relief to the non-appealing parties. *Hecht v City of New York*, 60 NY2d 57, 61-

62 [1983]; *Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81, 89 [1995]; *Kelly's Rental, Inc. v City of New York*, 44 NY2d 700, 701 [1978].

**The Entry Of Final Judgment On Remand**

A Decree on Remand was entered in Surrogate's Court, New York County, on July 29, 2013 (XVII:A7398-A7404). The Decree provides that "pursuant to its original retainer agreement with Alice Lawrence dated August 4, 1983, Graubard is entitled to a fee, including disbursements, of $1,597,415.29 plus interest" (XVII:A7403-A7404).

## ARGUMENT

### The Applicable Standard of Review

This Court is not bound by any of the lower courts' determinations regarding issues of law. *In re Liquidation of Midland Ins. Co.*, 16 NY3d 536, 548 [2011]; *People v. Caban*, 70 NY2d 695, 697n.2 [1987].

This particularly includes the lower courts' ultimate findings as to whether the retainer was unconscionable inasmuch as such is an issue of law. *Lawrence*, 11 NY3d at 595 (acknowledging that the issue was one of law, but ruling "that the facts and circumstances surrounding the revised retainer agreement have not, at this time, been sufficiently developed" to support a determination); *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10-14 [1988]; 28 N.Y. Prac., Contract Law § 6:28 ("[t]he determination of whether a contract is unconscionable is an issue of law for the court to decide").

With respect to the lower courts' findings of fact, settled law holds that the Court is bound to accept all of the Special Referee's findings that were affirmed and were supported by "substantial evidence." *Gabriel Indus., Inc. v Defiance Indus., Inc.*, 22 NY2d 405, 408 [1968] (the Referee's "findings of fact, supported as they are by substantial evidence and affirmed by the courts below, are beyond our review"); *Cent. Hanover Bank & Trust Co. v Eisner*, 276 NY 121, 124 [1937] (same).

By contrast, where the Appellate Division reached factual determinations at odds with those of the Special Referee and the Surrogate — this would notably

include the Appellate Division's finding that Mrs. Lawrence was confused as to the terms of the contingent fee retainer that she and her accountant vetted — the standard of review calls for the Court to determine which finding "more closely comports with the evidence." *Fairbairn v State*, 66 NY2d 620, 622 [1985]; *Glenbriar Co. v Lipsman*, 5 NY3d 388, 392 [2005]. In doing so, this Court should consider that the Special Referee had the opportunity to see and hear the witnesses. *Amend v Hurley*, 293 NY 587, 594-595 [1944] ("[t]he advantages of the trial court who saw and heard the witnesses should be considered and, when truth hangs upon the credibility of witnesses, his decision should be given the greatest weight").

## POINT I

## CONTINGENT FEE RETAINERS SERVE IMPORTANT POLICY OBJECTIVES, EVEN IN COMMERCIAL CASES AND EVEN IN CASES IN WHICH THE CLIENT CAN AFFORD HOURLY BILLING.

Contingent fee retainers have long been a part of the legal landscape. *Stanton v Embrey*, 93 US 548, 557, 23 L Ed 983 [1876] ("Parties in such cases require advocates; and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation, or unfairness"); *In re Abrams & Abrams, P.A.*, 605 F3d 238, 242, 245 [4th Cir 2010] ("contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation" and "are an acknowledged feature of our legal landscape, approved by legislative and judicial bodies alike, that help secure for the impecunious access both to counsel and to court").

In New York, contingent fee retainers are expressly authorized both by statute (Judiciary Law § 474) and by rule (New York Code of Professional Responsibility Rule 1.5[c]).

Most obviously, "the contingent fee is the primary financing arrangement in personal injury and other tort litigation …" Richard M. Birnholz, *The Validity And Propriety Of Contingent Fee Controls*, 37 UCLA L. Rev. 949, 952 [1990]. However, "[c]ontingent fees are no longer, if ever they were, limited to personal injury cases.

Nor are contingent fees limited to suits involving tortious conduct. Contingent fees are now commonly offered to plaintiff-clients in collections, civil rights, securities and anti-trust class actions, real estate tax appeals and even patent litigation." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-38.

The contingent fee retainer is absolutely critical to the civil justice system because, per the now familiar expression, it is the poor person's key to the courthouse door. *Gair v Peck*, 6 NY2d 97, 103 [1959] *rearg denied, remittitur amended*, 6 NY2d 983, 161 NE2d 736 [1959] ("contingent fees are generally allowed in the United States because of their practical value in enabling a poor man with a meritorious cause of action to obtain competent counsel"); *Leonard C. Arnold, Ltd. v N. Trust Co.*, 116 Ill 2d 157, 164, 506 NE2d 1279, 1281 [1987] ("[c]ontingent fees are thus rooted in our commitment to equal justice for both those of moderate means and the wealthy"); *Sneed v. Sneed*, 1984 OK. 22, 681 P2d 754, 756 [Okla. 1984] ("[o]ften contingent fee agreements are the only means possible for litigants to receive legal services …").

Such is not the only policy objective served by contingent fee retainers. Contingent fee retainers also aid the client who could afford to pay hourly-computed bills but prefers not to pay significant legal bills that may be difficult to estimate in advance. Formal Op. 94-38, *supra*:

> … to state that contingent fees are only appropriate for the indigent would ignore the reality of how expensive present day litigation can be. It is not uncommon for expenses and legal fees to total hundreds of thousands of dollars through trial. Also, it is

> often difficult at the outset of a matter for the lawyer to estimate accurately how much time will be expended. Therefore, it may very well be in the client's best interests, whatever the client's apparent ability to pay the fee, to agree to pay a fixed percentage of any possible recovery, rather than assume liability for a possibly prohibitively expensive legal bill that will be owed even if the client recovers nothing.

*See also* Stewart Jay, *The Dilemmas Of Attorney Contingent Fees*, 2 Geo. J. Legal Ethics 813, 815 [1989]:

> it must be recognized that in a sizeable percentage of contingent fee cases today the plaintiffs could probably afford to finance the litigation on an hourly basis. This does not mean that such individuals actually would commit their own resources to pay for attorneys' fees if contingent arrangements were unavailable. On the contrary, a significant portion would not accept the risk of an unfavorable outcome, and even if they hired an attorney on an hourly basis, they might be unwilling to devote the appropriate amount of resources necessary to maximize their chances of an optimal recovery.

The client also may prefer a contingent fee as a means of assuring that the attorney is incentivized to maximize the recovery rather than the number of billable hours. Formal Op. 94-38, *supra* ("[t]he use of contingent fees in these areas, for plaintiffs and defendants, impecunious and affluent alike, reflects the desire of clients to tie a lawyer's compensation to her performance and to give the lawyer incentives to improve returns to the client"); Birnholz at 954 ("because of the lawyer's desire to minimize the expense of the litigation he finances, the contingent fee 'encourages efficiency, economy, and speed'").

Yet, as this Court earlier observed in this case, "the contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing." *Lawrence*, 11 NY3d at 596 n.4; *see also*, Jay at 835:

> [i]f attorneys were not allowed to justify fees in excess of customary rates on these bases, then compensation for contingent cases would be inadequate to encourage lawyers to take many such cases. At a minimum, it would affect the quality of attorneys gravitating toward the types of matters ordinarily handled on a contingent basis.

Also, pre-occupation with the number of hours the attorney spent on the case effectively penalizes the attorney who is more skilled or experienced and therefore needs less time to accomplish a given task. *In re Brehm's Estate*, 37 AD2d 95, 97-98 [4th Dept 1971] ("[t]he Surrogate's decision, in his words, places undue emphasis on the 'hours of time [which] were devoted to the estate' … Skilled, long-experienced, conscientious attorneys, who are leading members of the Bar, such as appellants, can render the services in substantially less time, by reason of their expertise, than could other attorneys of lesser probate experience"); Robert L. Rossi, 1 Attorneys' Fees § 5:3 (ed.) ("[i]t has been said or indicated by some courts that the time spent by an attorney is sometimes of minor importance in determining the reasonable value of his or her services, since an experienced or skillful attorney might accomplish in a very short time what another would require a much longer time to accomplish"); Roy

Simon, Simon's New York Code of Professional Responsibility Annotated (2012 ed.), p. 111 ("[a]ny artificial limit on the absolute dollar amount of a contingent fee would be unfair to more skillful lawyers and would remove the incentive for lawyers to recover as much as possible for seriously injured clients").

It is therefore appropriate and necessary that courts "exercise great caution" in employing hindsight reasoning to disallow a contingent fee retainer that was appropriate at the time of contract. *Lawrence*, 11 NY3d at 596 n.4.

Here, the lower courts did just the opposite, even to the point of erroneously equating the "value" of Graubard's services with the amount that it could have billed under the hourly retainer on which the client had refused to continue (XVII:A7395).

## POINT II

## THE CLEAR-ON-ITS-FACE CONTINGENT FEE RETAINER THAT MRS. LAWRENCE REQUESTED AND THEN SIGNED SHOULD BE ENFORCED UNLESS IT WAS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE.

The key issue in this case was whether the subject contingent fee retainer, a retainer that Mrs. Lawrence reviewed with her accountant before signing (I:A148a; VIII:A1922-A1924) and that was undisputedly consistent with industry norms (VII:A2339, A1365), was nonetheless unconscionable.

"[A]n unconscionable agreement is one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other." *King v Fox*, 7 NY3d 181, 191 [2006].

In its last decision in this case, this Court said that it was "well settled" that "an unconscionable contract" is "generally defined":

> "as one which is so grossly unreasonable as to be [unenforceable according to its literal terms] because of an absence of meaningful choice on the part of one of the parties ['procedural unconscionability'] together with contract terms which are unreasonably favorable to the other party ['substantive unconscionability']" (*King v. Fox*, 7 N.Y.3d 181, 191, 818 N.Y.S.2d 833, 851 N.E.2d 1184 [2006]; *see Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10-11, 537 N.Y.S.2d 787, 534 N.E.2d 824 [1988]).

*Lawrence*, 11 NY3d at 595.[16]

[16] The verbiage in the brackets was added by the *Lawrence* Court.

Even though these basic principles apply to any kind of contract, "as a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients." *Jacobson v Sassower*, 66 NY2d 991, 993 [1985]. In consequence, an attorney's fee agreement "can be deemed unconscionable when entered into or in retrospect." *Lawrence*, 11 NY3d at 595.

By contrast, all other contracts are judged solely as of the time of contract. 8 *Williston on Contracts*, § 18:12 [4th ed] ("The determination of whether a given clause or contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time …"). It is not, for example, a ground for rescission that the stock that the buyer expected to appreciate instead depreciated. 27 *Williston* at § 70:5.

Yet, while an attorney's fee contract can be deemed unconscionable in hindsight, the Court pointedly said in *Lawrence* that "the power to invalidate fee agreements with hindsight should be exercised only with great caution," that it is not unconscionable for an attorney working for a contingency fee to recover "much more than he or she could have earned at an hourly rate," and that the contingent fee system would otherwise not work. *Lawrence*, 11 NY3d at 596 n.4.

Indeed, while it is theoretically possible for an attorney's fee retainer to be appropriate at time of contract but unconscionable in hindsight, this Court has in its history yet to find a *contingent fee* retainer fitting that description. Nor is this surprising given the nature of contingent fee contracts.

Where the attorney is being paid by the hour, the fee is a function of the time spent on the case. It does not matter whether the client won or lost. Where the attorney is instead retained on a contingent basis, results are what matter. As Prof. Gillers, the Estate's own expert, said in a published writing that was *not* generated for this case: "contingent fees are the quintessential example of value billing" (IV:A237).

One can still devise fact patterns in which enforcement of a contingent fee that was reasonable at time of contract might be unreasonable in hindsight. One example, essentially the antithesis of this case, might be the situation in which the recovery was so much less than was warranted and so much less than the plaintiff's true damages as to make enforcement of the contract unconscionable.[17] A second example might be a situation in which, perhaps as a result of a lien, enforcement of the contract would leave the client with little or no recovery.[18]

But, absent circumstances of that kind, whether the attorney took ten years or ten days to obtain a $1,800,000 recovery, one-third of $1,800,000 will still yield a

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[17] A situation like that recently arose, but in the context of a fee dispute between two law firms.

In *Castellanos v. CBS, Inc.*, Bronx Co. Index No. 23018/05 [Sup Ct April 20, 2011], *aff'd* 89 AD3d 499 [1st Dept 2011], one law firm was substituted for another firm in a personal injury action. After the case settled for $350,000, the two firms disputed how the one-third contingent fee should be divided between them.

Supreme Court ruled that incoming counsel should receive only 60% of the fee, in part because it "appear[ed] that the case may have a larger monetary value than that for which it settled" and that the incoming counsel had settled low as a result of their misunderstanding of the law concerning the "recalcitrant worker" defense.

The Appellate Division affirmed that disposition as a proper exercise of discretion.

[18] *Wade v. Clemmons*, 84 Misc2d 822, 824-826 [Sup. Ct. 1975] (where, absent reduction of the attorney's fee, the entire $10,000 settlement would have gone to the plaintiff's attorneys and the New York City Health and Hospital Corporation).

$600,000 fee. In fact, the client would undoubtedly *prefer* that the settlement occur within ten days rather than ten years. Simon at p. 116 ("In hourly rate and fixed fee cases, the results obtained cannot normally be considered unless the lawyer and client have agreed at the outset of the case that the fee will depend on the results … In contingent fee cases, in contrast, the result is everything").

What is more, while a client who is paying hourly fees might be understandably distressed (or angry) if the fees turned out to be five or ten times what the client had been led to expect or if the fees were so large as to consume or exceed the client's recovery (the Bleak House scenario), the client who retains an attorney on a contingency basis has little cause to complain if a case that was thought to be worth $500,000 yields five times that amount and therefore five times the anticipated fee.

Equally to the point, while it is true that courts are protective of the attorney's clients, the law, to again reference Dickens, is not an ass.[19] In a dispute between the lawyer and client, it is not always the lawyer who acted badly or who afterwards bore false witness. In fact, the attorney's common law lien "'was a device invented by the courts for the protection of attorneys against the knavery of their clients …'" *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, 38 [2002], *quoting Goodrich v McDonald*, 112 NY 157, 163 [1889].

[19] Oliver Twist, ch. 51 ("If the law suppose that," said Mr. Bumble, "the law is a ass, a idiot.")

Here, Graubard pleads guilty to, (1) acceding to the client's demand for alternative billing (I:A188a; VI:A699), and, (2) obtaining the client a recovery that, as the Special Referee found, was far more than either party had expected (I:A188a-A189a) and far more than the case was really worth (I:A184a). However, for the reasons explained in Points II, III and IV of this brief, the contingent fee retainer was neither unconscionable at the time of contract nor in hindsight. Graubard therefore submits that, as with most "agreements entered into between competent adults" that are not tainted by "deception or overreaching in their making" (*Lawrence*, 11 NY3d at 596 n.4), the clear-on-its-face contract should be enforced.

## POINT III

## THE APPELLATE DIVISION ERRED IN REJECTING THE SPECIAL REFEREE'S FINDING THAT MRS. LAWRENCE'S BELATEDLY CLAIMED INABILITY TO UNDERSTAND THE CLEAR-ON-ITS-FACE CONTINGENT FEE AGREEMENT WAS "NOT CREDIBLE," AND IN RULING INSTEAD THAT THE CONTINGENT FEE RETAINER WAS PROCEDURALLY UNCONSCIONABLE.

Special Referee Levine meticulously examined the proof and claims advanced by each side with respect to the issue of procedural unconscionability, devoting fifteen pages of his report to that single issue (I:A143a-A158a). He concluded that Graubard had demonstrated by "extensive" and "clear and convincing" evidence that "Alice was fully capable of understanding the Revised Retainer Agreement and did not enter into it because Graubard exploited its existing confidential relationship with her" (I:A153a). His basis for so concluding was very straightforward. He deemed the Estate's latest claims of Graubard wrongdoing as "not credible" for reasons he explained at length (I:A153a-A158a).

The Appellate Division then reached the opposite conclusion on the sole ground that Mrs. Lawrence's comment about receiving the "lion's share" of the recovery, a comment she made even before the agreement was reduced to writing and reviewed by her accountant (VI:A803), supposedly showed that she did not fully understand the terms of a written agreement that was never claimed to be, and is not, ambiguous (XVII:A7394).

Graubard here maintains that the Special Referee's finding "more closely comports with the evidence." *Fairbairn*, 66 NY2d at 622.

More than that, if the contingent fee retainer were deemed procedurally unconscionable even in this instance in which a client who was intimately familiar with the case actually reviewed the clear-on-its-face written retainer with her accountant, then virtually every retainer would be subject to challenge since virtually every client could afterwards claim (and with far more credibility than the Estate here claimed) that he or she did not understand the terms of the retainer.

## A. A Contract Is Procedurally Unconscionable Only When There Is "An Absence Of Meaningful Choice."

In the lower courts, the Lawrences argued that the attorney bears an enhanced burden of establishing that the retainer agreement was not unconscionable when there is a "midstream" modification of the retainer agreement. Yet, the cases they cited were instances in which the initial retainer was modified at *the attorney's* behest.[20] There is no authority for the proposition that the attorney bears a greater burden of negating unconscionability where the modification of the agreement was made at the client's request. Simon, p. 327.

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[20] *In re Howell*, 215 NY 466 [1915] (where an attorney who had agreed to represent the client for a specified flat fee then wanted $1,000 more); *Naiman v New York Univ. Hospitals Ctr.*, 351 F Supp 2d 257, 261-262 [SDNY 2005] (where the attorney sought to increase his fee from one-third to one-half and tried to do so as part of the same negotiations in which the case itself was settling); *In re Stamell*, 252 BR 8, 17 [Bankr EDNY 2000] (where it was the attorneys who sought to modify the retainer, and they met their burden of proof).

Nor would imposition of an enhanced burden in those circumstances be good for the bar, or for clients, or for the public generally. If an attorney who already has a retainer agreement must meet a higher standard if he or she accedes to a client's request for a modification of the retainer, the attorney will have an incentive not to do so. Such a rule would hurt clients who, unlike in the case at bar, could no longer afford paying hourly rates. Nor would the interests of justice be served if a client is compelled to seek new counsel, unfamiliar with the case.

That said, the matter is, as the Special Referee correctly noted, not outcome-determinative in this case. The Special Referee here concluded that Graubard had presented "clear and convincing evidence that the Agreement was not procedurally unconscionable" (I:A153). He was right.

The *sine qua non* for a finding of procedural unconscionability is "an absence of meaningful choice on the part of one of the parties …" *Lawrence*, 11 NY3d at 595, *quoting King*, 7 NY3d at 191; *Jacobs v Citibank, N.A.*, 61 NY2d 869, 872 [1984].

The court may consider, amongst other factors, whether deceptive practices or language was used, any inequality of bargaining power, and any imbalance in understanding and acumen. *Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1170 [2d Dept 2012], *quoting Simar Holding Corp. v GSC*, 87 AD3d 688, 689-690 [2d Dept 2011], *quoting State v Wolowitz*, 96 AD2d 47, 68 [2d Dept 1983].

This may also entail consideration of whether the client was, at one end of the spectrum, a sophisticated businessperson, or, at the other end, mentally ill. *See, e.g.*,

*Greene v Greene*, 56 NY2d 86, 89-90 [1982] (where the client was "a college sophomore" who was then receiving "treatment for a mental illness at a New York City hospital" when she "was approached by a family lawyer … and at his urging signed a trust agreement … in which she virtually surrendered to him all management and control over her inheritance for her lifetime"). But the question in either instance is whether consideration of all the pertinent factors warrants the conclusion that the client lacked "meaningful choice." *Lawrence*, 11 NY3d at 595. This was the very opposite of that situation.

In the lower courts, the Estate seized on a phrase from this Court's decision in *Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986], where the Court said that the attorney must show that the terms of the retainer were "fully known and understood by the [] client." The Estate construed that statement, which had also figured in *Jacobson*, 66 NY2d at 993 amongst other cases, to mean that a written retainer agreement, no matter how clear on its face, can afterwards be defeated by the bare claim that the client did not understand the clear-on-its-face agreement. Indeed, the Estate went a significant step further, arguing that the retainer can be defeated by the client's *counsel's* representation that the client did not understand the agreement where, as here, the client chose not to make herself subject to cross-examination (VII:A6833-A6835). Of course, if that were true, then any retainer agreement could afterwards be claimed to be procedurally unconscionable because any client could afterwards say that he or she failed to understand some aspect of the agreement.

The point, however, is that while the attorney must show that the client "fully knew and understood" the terms of the agreement, such is practically demonstrated by proving, (1) that the retainer itself was in writing and was unambiguous, and, (2) that the client was of sound mind and capable of understanding it.

Settled law has long held that "[one] who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to his understanding of its terms." *Level Expert Corp. v. Wolz, Alken & Co.*, 305 NY82, 87 [1953], *quoting Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *see also Moran v Erk*, 11 NY3d 452, 457 [2008] (party should have understood "the plain language of the contract"); *Slater-Moore v Goeldner*, 113 So 3d 521, 529 [Miss 2013] (where the client claimed that she was unaware of the meaning of the retainer provision mandating arbitration of all disputes and that the clause was therefore "procedurally unconscionable," she was charged with "knowing the contract's contents").

Nor do any of this Court's prior rulings, or any of the cases previously cited by respondents, in any way suggest that a client who has the opportunity and ability to read the written agreement can seek rescission of a clear-on-its-face agreement on the ground that he or she chose not to read it.

In *Shaw* itself, the retainer agreement contained "no provision regarding the advance of litigation expenses" (68 NY2d at 174). This became problematic when the

client's case was lost at trial and the question then arose whether the attorney was required to advance the not inconsiderable expenses of an appeal. Noting that "equivocal contracts will be construed against the drafters" and that such certainly applied to attorney retainers (*id.* at 176), this Court held that both of the parties' respective interpretations of the retainer contract were "reasonable" and that the contract would therefore be construed in the client's favor (*id.* at 177). But the Court neither said nor suggested that the client could "beat" an unambiguous contract by the simple expedient of "playing dumb." Quite the opposite, it said that while it was sympathetic to the attorney's plight, the attorney could have avoided his predicament by drafting an unambiguous contract:

> But we are also not blind to respondent's predicament … In order to avoid the consequences suffered here both by the client and by the lawyer, it is essential that the terms of representation … be set down with clarity. And the onus is upon the lawyers who draft such agreements to do so.

*Shaw*, 68 NY2d at 179.

Here, there was no question as to whether Mrs. Lawrence read the retainer agreement. The testimony of her own accountant established that she and he <u>each</u> reviewed the retainer agreement (VIII:A1919-A1920, A2004-A2006). The issue instead devolved to the question of whether, as claimed by the Estate's counsel, Mrs. Lawrence and her accountant had not grasped that 100% of the recovery minus Graubard's 40% of the recovery left the Lawrences only 60% of the recovery. As we

now show, the proof comported with the Special Referee's finding that Mrs. Lawrence and her accountant were collectively capable of performing basic subtraction and well understood what the Agreement meant (I:A156a-A157a).

### B. The Special Referee And Surrogate Had More Than Ample Basis To Conclude That The Estate's "Misunderstood The Retainer" Defense Was "Not Credible." The Appellate Division Therefore Erred In Crediting The Claim.

Although the Appellate Division impliedly rejected all of the Lawrences' other claims of procedural unconscionability (e.g., that Daniel Chill exercised a Svengali-like influence over Mrs. Lawrence [I:A154a-A155a; VIII:A1925]), it concluded that Mrs. Lawrence's comment that she would have to receive the "lion's share" of any recovery (VI:A803) meant that she may not have fully "understood the terms" of the <u>later</u> reduced-to-writing Agreement inasmuch as she would <u>individually</u> recover only 35.9378% of the proceeds (XVII:7394).

The Special Referee's contrary finding (I:A156a-A157a) more closely comported with the proof.

<u>*First*</u>, assuming for sake of argument that Mrs. Lawrence was not personally capable of determining, (a) that 76% minus 40% equals 36%, or, (b) that 40% is greater than 36%, it remains that the person with whom she consulted before signing the retainer happened to be an accountant (VIII:A2005).

<u>*Second*</u>, the Estate's *own witnesses* testified that Mrs. Lawrence was <u>not</u> confused about the terms of the retainer. Estate witness Barbara Kling testified that she talked

to Mrs. Lawrence soon after Mrs. Lawrence signed the retainer (VIII:A2111-A2112), that Mrs. Lawrence did not appear to be "confused" (VIII:A2140), and that Mrs. Lawrence *specifically said* that "she signed an agreement to give the law firm 40 percent of whatever settlement there was" (VIII:A2112).

Estate witness Jay Wallberg testified that he reviewed the initial draft of the contingent fee retainer, that he provided Mrs. Lawrence with his views *before* she signed the retainer (VIII:A2005), and that he *specifically told her* that it called for a 40% fee "if the case … settled" (VIII:A1919-A1920).

*Third*, all of the testimony concerning Alice Lawrence's character and experience, including from her own witnesses, rendered the did-not-understand-the-retainer argument utterly incredible. This was, after all, a woman who had micromanaged the litigation and the building of two homes (I:A125a, A144a; VI:A636; XV:A5993-A5994), who personally managed a portfolio of more than $200 million in marketable securities (XIV:A5155), and who had previously conducted settlement talks without the presence or assistance of her counsel (VII:A1214). This was also a client who had expertly analyzed contracts far more detailed than the five-paragraph retainer agreement that was here in issue (XV:A6262-A6279). *See* page 14, above.

*Finally*, Mrs. Lawrence had months to raise any questions or objections to the retainer's terms. During the period from January to May of 2005, she was, as usual, overseeing every aspect of the litigation (XI:A3816, A3823, A3829, A3834). *See* pages

31 to 32, above. Yet, she raised no objection or question regarding the retainer's terms, not until after the case settled.

The Special Referee thus had sound basis to reject the Estate's claim that Mrs. Lawrence was confused as to the retainer's terms and that the retainer agreement was therefore procedurally unconscionable.

### C. Any Finding That The Agreement Was Procedurally Unconscionable In The Circumstances At Bar Would Significantly Deter Attorneys From Acceding To Client Requests For Contingent Fee Representation.

Most contingent fee clients, (i) do not have literally hundreds of millions of dollars to pay hourly legal fees, (ii) are not intimately familiar with the litigation by virtue of having micromanaged it for more than twenty years (I:A109a, A147a), and, (iii) do not have a personal accountant to review the fee retainer before signing it (I:A148a-A149a; VIII:A1972-A1974).

If a client can overturn a contingent fee agreement as procedurally unconscionable even in these circumstances simply by afterwards claiming that she did not fully understand the retainer agreement, if that can work even when there was a written agreement that was not claimed to be ambiguous, and if that can work even when the client refused to be deposed and her alleged confusion was discerned by her counsel, how would any attorney ever be protected from the knavery of a client?

The answer is that no attorney would ever be safe from an unscrupulous client who did very well in the lawsuit but could do still better by pocketing the attorney's fees as well.

The Special Referee was correct in finding (I:A153a-A158a) and the Surrogate in ruling (I:A84a-A85a) that the retainer agreement was not procedurally unconscionable. The Appellate Division erred in ruling otherwise.

## POINT IV

## THERE WAS NEITHER ANY PROOF NOR EVEN ANY CLAIM THAT THE REVISED RETAINER AGREEMENT WAS SUBSTANTIVELY UNCONSCIONABLE AT THE TIME IT WAS SIGNED.

At trial, Graubard's expert witness, David Keyko, testified that firms in Graubard's position typically do not seek or want to handle commercial cases on a contingent fee basis (VII:A1326-A1327). The reason is simple enough. If, as here, a firm operates on a profit margin of 40% but 20% of the firm works solely on a contingent fee case and is therefore not billing for the year in issue, then the firm's profit margin, and each partner's draw, is thereby halved that year (40%-20% = 20%) (VII:A1328-A1331).

Keyko further testified that where a commercial case is done on a contingent fee basis, the fee range generally "is between 20 and 50 percent" and 40% is "the norm in the high percentage of cases" (VII:A1339). The fact that the fee retainer agreement in this case had a "backstop" (up to $300,000 per quarter for Year 1 only) was "not unusual" and was "within what the firms in New York were doing at the time" (VII:A1365).

Neither the Estate nor its allies offered any proof that a 40% retainer was <u>not</u> "the norm in the high percentage of cases" or that the Year 1 "backstop" <u>was</u> unusual or contrary to standard practice. Nor did they offer any proof, or even any claim, that the terms of the retainer violated any court rule or ethical standard, or even any

unwritten standard. Quite the contrary, Estate expert Stephen Gillers grudgingly admitted that there was "no case in New York" that would hold the hybrid fee structure involved in this case "per se wrongful or unconscionable" (IX:A2333-A2334).

The Referee and Surrogate therefore did not err in impliedly concluding that the contract was not substantively unconscionable when made.

## POINT V

## THE LOWER COURTS ERRED IN RULING THAT A CONTINGENT FEE CONTRACT THAT WAS NOT UNCONSCIONABLE WHEN MADE BECAME UNCONSCIONABLE SIMPLY BECAUSE THE ATTORNEYS OBTAINED A RECOVERY THAT WAS FAR GREATER THAN ANYONE EXPECTED AND CAME MUCH SOONER THAN ANYONE EXPECTED.

Let us suppose that an attorney is retained to prosecute a personal injury action for a 25% contingent fee. The client either cannot afford to pay for hourly billing or chooses not to do so; it matters not. The attorney settles the case a few days later, after only two conferences with the putative defendant's counsel, because the defendant offers far more in settlement than could have been sustained by the proof. Perhaps the defendant settles so high because it is intimidated by the attorney's reputation, or perhaps the defendant is concerned that adverse publicity at that particular time could jeopardize a long sought merger, or perhaps it miscalculates its potential exposure to the claim. Again, it matters not. Whatever the reason or reasons for the defendant's decision, a case that could have taken years to litigate settles for more than full value after only 3.7 hours of work by the attorney. Would the one-quarter fee be unconscionable in these circumstances? The Maryland Court of Appeals thought not.[21]

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[21] *Attorney Grievance Com'n of Maryland v Ashworth*, 381 Md 561, 573-574, 851 A2d 527 [2004] (where the case settled literally days after the attorney was retained following two meetings that together lasted approximately 3.7 hours, and where client argued that 25% retainer "became unreasonable when the matter settled within days of the new agreement and when

Here, the facts differ in two principal respects from the 3.7-hour settlement. First, whereas we lacked information as to whether the personal injury plaintiff, (a) was familiar with his or her prospects, and, (b) had the practical means to pay for hourly billing or was even aware of that alternative, we here have a client who had "micromanage[d]" the litigation for two decades (I:A125a [Special Referee's report]) and was clearly capable of financing the litigation, but nonetheless "insisted on abandoning the prior hourly rate fee arrangement" (I:A188a [Special Referee's report]).

Second, while the Maryland attorney worked only 3.7 hours on the case, Graubard here devoted 4,683.55 post-retainer hours of its time (X:A3215, A3262-A3263), most of which was <u>not</u> billable under the terms of the retainer. *See* pages 107 to 109, *infra*. Further, the exigencies of an oncoming trial forced Graubard to cram that 4,638.55 hours of work into only five months, meaning that its attorneys were spending approximately <u>232 hours per week</u>, each week, for five months, just on the Lawrences' case.[22]

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the contingency, litigation, did not occur," the appellate court agreed with the hearing court's determination that the fee was not unreasonable because the argument ignored "the reality that attorneys with excellent skills and reputations often can obtain satisfactory settlements with the expenditure of less effort than those lawyers without such reputation and skill" and also because the 25% fee was "both customary and reasonable").

[22] Former Code of Professional Responsibility DR 2-106(B) stated and current Rule 1.5(a) of the New York Rules of Professional Conduct states that "[t]he time limitations imposed by the client or by circumstances" should be considered in assessing the reasonableness of the attorney's fee.

So, if the Maryland lawyer's one-quarter retainer does not become unconscionable in hindsight (inasmuch as the same attorney may be left with no fee at all in his or her next case), how could the result possibly be different here?

Admittedly, where the contract in issue is an attorney's fee retainer, the contract is subject to "hindsight" review. *King*, 7 NY3d at 192. Yet, as this Court pointedly noted in its last decision in this case, "[i]n general, agreements entered into between competent adults, where there is no deception or overreaching in their making, should be enforced as written." *Lawrence*, 11 NY3d at 594 n.4. It therefore remains that "the power to invalidate fee agreements with hindsight should be exercised only with great caution." *Id.*

In fact, courts have exhibited such "caution" in those circumstances that there has never been a New York case in which, (a) the retainer called for a contingent fee, (b) the retainer was <u>not</u> procedurally or substantively unconscionable at the time of the contract, but, (c) the agreement was nonetheless set aside as unconscionable in hindsight simply because the recovery (and therefore the fee) turned out to be much larger or was achieved much sooner than anticipated.[23]

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[23] While it is true that this Court was reviewing a contingent fee retainer in *Gair v Peck* when it said that "it is recognized throughout that there comes a point where the amounts to be received by attorneys under contingent fee contracts are large enough to be unenforceable under the circumstances of the case" (16 NY2d at 107), the issue then before the Court was whether the Appellate Division for the First Department lacked power to enact court rules that effectively capped <u>the percentage share</u> that an attorney could charge in personal injury and wrongful death actions.

The reason for this is perfectly obvious. Contingent fee retainers are hardly novel; most personal injury cases are prosecuted pursuant to such retainers. They are also "utilized in collection suits, shareholder derivative suits, antitrust suits for damages, tax cases, will contests, and condemnation proceedings." Birnholz at 952-953.

It is the nature of the beast that some contingent fee cases settle before a complaint is filed; some settle only after trial; some never settle at all; some are lost. In some instances, as when a case of clear liability settles with a telephone call, the attorney's fee could never be justified in terms of the hours spent on the case. But the point is that the next such case may involve three appeals or no recovery at all. In this sense, just as the attorney risks that he or she may work many hours for nothing at all or for much less than the attorney could have billed, the client risks that the case may settle with a motion or a phone call. *In re Smart World Tech., LLC*, 552 F3d 228, 235 [2d Cir 2009] ("the fact that contingency fees may appear excessive in retrospect is not a ground to reduce them because 'early success by counsel is always a possibility capable of being anticipated [citation omitted]'").

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Likewise, in *Ward v Orsini*, 243 NY 123, 128 [1926], where Judge Pound made the oft-quoted observation that "'It may well be that in a supposed case the amount received by the client would be so completely out of proportion to the value of the attorney's services that it would be unconscionable as matter of law to permit him to enforce his contract,'" the concern was not the dollar amount of the fee but instead that the attorney's fee was 50% of the recovery, a percentage that was there deemed reasonable under the circumstances of the case.

It is, then, easy to understand why the applicable Restatement provision specifically states that a higher than anticipated recovery is not grounds for reduction of an attorney's contingent fee. That the attorney expected to win and thus earn a large contingent fee is surely not grounds for retroactive hourly billing if the case instead fails. So too, that the recovery was greater than expected is not grounds for rescission or reduction of the fee. Restatement (Third) of Law Governing Law § 34 [2000] Comment (c) ("[a] contingent-fee contract … allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made").

It was for this reason that the Estate and its allies tried so hard to find some ethical transgression, any ethical transgression, even if seven years removed from the events in issue, and even to the extent of advancing claims that some parties would be too embarrassed to make (*e.g.*, that Mrs. Lawrence was "Svengalied" by one of the attorneys she had routinely abused).

### A. The Contingent Fee Retainer Was Not Substantively Unconscionable, Not Even In Hindsight, In The Context of The Proof Actually Adduced At Trial.

Back in *King*, 7 NY3d at 192, this Court singled out three factors to be considered in assessing whether a fee was substantively unconscionable in hindsight.

The variable that was "perhaps the most important" has already been addressed: "whether the client was fully informed upon entering into the agreement with the attorneys." The two other factors that the Court particularly noted were "'the parties' intent and the value of the attorney's services in proportion to the fees charged, in hindsight.'" *King*, 7 NY3d at 192, quoted at *Lawrence v. Miller*, 11 NY3d at 596. The Court added that the Code of Professional Responsibility DR 2-106(B) (22 NYCRR 1200.11[b]) may also "assist in determining at what point a contingent fee agreement becomes unconscionable or unreasonable."[24] *King*, 7 NY3d at 192.

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[24] The factors listed in DR 2-106(B) were as follows:

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

The same factors are now listed in Rule 1.5(a) of the New York Rules of Professional Conduct, which became effective on April 1, 2009.

Graubard did very well under the contingent fee retainer, far better than it would have done if Mrs. Lawrence had stayed the course of her 1983 retainer. However, when one reviews the case in terms of the factors that this Court has identified as most critical to the inquiry, the contingent fee retainer was not unconscionable.

### 1. The Value Of Graubard's Services: Graubard Obtained A $111 Million Settlement That Was, As The Special Referee Acknowledged, More Than Double The Case's Full Worth.

The *King* Court said that one factor that may be considered in assessing whether an attorney's fee was unconscionable is "the value of the attorney's services in proportion to the fees charged." *King*, 7 N.Y.3d at 192.

Here, Graubard's proof established, (a) that it obtained a recovery of approximately $111 million for the clients (I:A185a-A186a), and, (b) that the settlement far exceeded the case's full value at time of disposition (V:A250-A275).

Special Referee Levine accepted that the Cohns paid more than double the full value of the remaining accounting claims (I:A183a-A184a) but nonetheless denigrated the "value" of Graubard's services as not "exceptional by New York City high-stakes commercial litigation standards" (I:A187a).[25]

The Appellate Division then went in an entirely different direction, ruling that "the value of the services rendered" was "approximately $1.7 million" since that was

[25] The Estate, which was made $111 million richer by virtue of the work, spun that to mean that Graubard's work was "ordinary." Estate's 2012 App. Div. Br. at 11.

what Graubard would have billed for its time if it had still been permitted to bill for all the time it spent on the case (XVII:A7394-A7395).

The rulings were erroneous, each resting on a misconception as to what is meant by "value."

*First*, while the Appellate Division here concluded that "value" was one and the same as billable time and the Special Referee instead treated "value" as a subjective measure of the lawyers' skill (I:A187a), "value" means just that. It is a measure of what the client gained.

In a contingent fee case, the "value" of the services is typically measured by the result: the client's recovery. *Americas Mining Corp. v Theriault*, 51 A3d 1213, 1252-1255 [Del 2012], *reargument denied* (Sept. 21, 2012) (where the attorneys were awarded a 15% fee that amounted to approximately $304 million of the approximately $2 billion judgment, and where the defendants challenged the fee on the ground that it allowed counsel "'over $35,000 per hour worked and 66 times the value of their time and expenses,'" the challenge was "without merit" inasmuch as, amongst other considerations, the factor "assigned the greatest weight" was "the benefit achieved in litigation" and "[t]ypically, a-percentage-of-the-benefit approach is used if the benefit achieved is quantifiable"); I Conte, *Attorney Fee Awards*, § 2:5, p. 68 [3d Ed. 1994-2004] ("[c]ourts have … ruled on the fairness of contingent-percentage fee in individual litigations without regard to the hours expended or the effective hourly rate yielded by the percentage fee approved. These results appear reasonable because contingent fee

practitioners operate predominantly on and should be rewarded for achieving a successful result as quickly and economically as possible"); Daniel F. Sullivan, *Reasonableness of Contingent Fee in Personal Injury Action*, 46 Am. Jur. Proof of Facts 2d 1, § 5 ("the factor of the time and labor required ordinarily leads every listing of factors to be considered in determining the reasonableness of an attorney's fee … The amount of an attorney's fee under a contingent fee contract, however, is not necessarily related to the time and labor required in the particular case").

Where, as here, the attorney is working for a contingent fee, billable hours is exactly what "value" is <u>not</u>. *Matter of Potts*, 213 AD 59, 62 [4th Dept 1925], *aff'd* 241 NY 693 [1925] ("I do not think items as to time actually employed in work on the case are of much importance. It is the ability of the attorney and his capacity and success in handling large and important matters and in commanding large fees therefor, the amount involved and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge"); *In re Abrams & Abrams, P.A.*, 605 F3d at 245 ("[f]ixing a lodestar fee in this contingency case was error and threatens to nullify the considerable advantages of contingency arrangements").

To illustrate: if the attorneys run up $150,000 in time charges on a claim that is worth $25,000, that would not make the "value" of the legal services $150,000. Even if the attorney's work in obtaining the $25,000 recovery included "the best evidentiary

presentation that [the observer] had ever seen at a trial" (V:A284),[26] the services would still be worth no more than $25,000. *F.H. Krear & Co. v Nineteen Named Trustees*, 810 F2d 1250, 1264 [2d Cir 1987] ("New York courts have stated that, as a general rule, they will rarely find reasonable an award to a plaintiff [for attorney's fees] that exceeds the amount involved in the litigation"); *Wade v Clemmons*, 84 Misc 2d at 825-826 ("If the plaintiff were to receive no part of the settlement proceeds, the professional services rendered by her attorney would be of no benefit to her. His alleged 'diligence' would benefit him, but not his client … Under all the circumstances, it would be unconscionable to deny the plaintiff a fair share of the proceeds of the settlement of her case").

Indeed, while one commentator has observed that "[i]t matters little to the client … how much his or her lawyer spends in time or money to reach a successful result" (Conte at § 2:7, p. 102), the full truth is that most clients would *prefer* to obtain their recovery sooner rather than later and are therefore disadvantaged by work that serves only to delay disposition.

Nor, contrary to the Special Referee's ruling, is "value" synonymous with "skill" in a contingent fee case. Far from it, the lawyer who exercises Darrow-like skill in litigating a matter as complex as the IBM antitrust case will earn no fee, and has provided no "value," if the retainer calls for a contingent fee and the case is lost.

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[26] Such was how Richard Lawrence's counsel contemporaneously described Graubard's work at the trial before reaching the opposite conclusion for purposes of litigation (V:A284).

Conversely, where the contingent fee lawyer has successfully enriched the client, it ill behooves the client to afterwards complain that the work was simple or mundane. *McKenzie Const., Inc. v Maynard*, 823 F2d 43, 47 [3d Cir 1987] (where the client unsuccessfully sought reduction of attorney's one-third contingent retainer on the stated ground that the attorney "merely carried out 'mundane legal chores' involving nothing more than 'debt collection' in a case the government was 'desperate to settle'").

Here, irrespective of whether Graubard was lucky or smart (or both), the approximately $111 million achieved in settlement was still worth $111 million in goods and services. The Special Referee thus committed legal error in attempting to gauge "value" as a subjective measure of the attorneys' skill. And the Appellate Division committed an even greater error in equating value with billable hours, especially after this Court explicitly cautioned it not to do so. *Lawrence*, 11 NY3d at 596 n.4.

*Second*, even if one were to analyze the "value" factor as a subjective measure of the attorneys' skill (as the Special Referee here attempted to do) and not as a measure of what the client received, Graubard achieved the settlement only by virtue of a series of tactically flawless decisions.

The first decision Graubard had to make in February of 2005 was whether to continue pursuing the Epps claim at all. Up until that point, there had been no indication that Graubard would ever be able to prove that Epps was tied to the

Cohns. The investigator's report had come up negative (V:A112). Mrs. Lawrence had wanted "to drop the Epps claim altogether" (XVI:A6375). In retrospect, it is easy to understand why the Epps-Cohn connection had been so hard to find. The connection was buried beneath four layers of corporate camouflage (X:A3072). *See* page 33, above. No attorney could have been criticized for dropping the claim, but Graubard refused to give up on it, even when it could not bill for the time spent pursuing it.

Graubard was next confronted with the decision of whether to discuss a stand-alone settlement of the Epps claim (X:A3139-A1340). No lawyer could have been faulted for taking the surer and quicker stand-alone settlement. Graubard instead made the right decision. It determined to use the Epps accounting claim as the means to achieve a global settlement of all of the accounting claims.

Graubard was then confronted with the decision of how to best use the Epps documents. No lawyer could have been faulted for pursuing the obvious path and urging that the damages consisted of the differences between the market values of the subject buildings and the lesser sums that Seymour Cohn realized from his insider sales. It was only because Graubard devised a constructive trust methodology that would allow it to track the unreported-to-IRS profits that Graubard achieved the $111 million settlement. *See* page 34, above.

There were three post-retainer decisions, each with two choices, and only one set of choices — one out of eight possible paths — that led to the recovery being so

large that the client decided to renege literally within moments of learning of its size (VII:A1229-A1230, A1237).

*Finally*, what makes the Estate's present claims and this entire dispute so difficult to understand is that it was here undisputed not only that Graubard obtained a $111 million settlement but also that this was a phenomenal result.

There is an old adage amongst trial lawyers to the effect that the best way to obtain a million dollar verdict is to start with a ten million dollar case. Here, if Graubard had taken a case that was worth $150 to $200 million and turned it into a settlement of $111 million, the Estate and its allies would have surely argued that such should negatively impact on the lawyer's fee. That the opposite occurred should have been a factor in Graubard's favor, not against it.

Ultimately, the Estate and its allies can make whatever claims they like about Graubard's skill in obtaining the settlement, even if such was not their view back in May of 2005 (V:A284). It is, however, clear beyond argument that Graubard's work brought the clients a recovery of approximately $111 million (I:A189a) and that such was a good deal more than what the case was actually worth (I:A182a-A184a; V:A250-A275).

### 2. The Intent Of The Parties: Mrs. Lawrence Obtained Exactly What She Sought When She Demanded An Alternative Billing Arrangement — Continued Pursuit Of A Potentially Large Recovery, But With A Substantial Reduction Of Her Risk.

Another *King* factor to be considered in assessing whether the retainer is unconscionable in hindsight is the "intent of the parties." *King*, 7 NY3d at 192.

In the Appellate Division, the Estate argued that Mrs. Lawrence had intended to reduce the attorney's fees and any fee that exceeded hourly billing was therefore contrary to her intent. Estate's 2012 App. Div. Br. at 25-26.

If that were what is meant by "intent," then the contingent fee contract would be a device by which the attorney could lose but never win. Per that reasoning, if the contingent fee turns out to be more than what the attorney would have billed, such would be grounds for rescission. If the contingent fee turns out to be less than what the attorney would have billed, the client would magnanimously allow the retainer to stand.

The Special Referee instead envisioned the "intent" factor as going to whether the parties had intended or "anticipated" a "possible recovery of over $100 million" (I:A186a). Because there were no such expectations at time of contract and the settlement was instead "beyond any reasonable, mutual contemplation or expectation of the parties" (I:A186a), this was grounds for *reduction* of Graubard's fee.

The Appellate Division did not expressly address the intent factor and did not say which, if either, rationale it credited.

In reality, the "intent" factor does not exist to guarantee that the client pays whichever fee turns out to be less with the benefit of hindsight. Nor does it exist to punish those attorneys who do far better for their clients than they or the clients expected. The pertinent inquiry is whether the bargain struck was a reasonable choice for the parties given their circumstances and objectives. Here, it plainly was.

Of course, the most common reason that the client may prefer and benefit from a contingent fee arrangement is that he or she would otherwise not be able to afford to bring suit. *See* pages 63 to 64, above. However, such is far from the only reason why the client may rationally prefer a contingent fee retainer. Even a wealthy client may simply prefer not to risk his or her capital on the case. Formal Op. 94-38, *supra*; Jay at 815.

Quite apart from the understandable preference to shift some or all of the risk to the attorney, the client may rationally feel that the attorneys working for a contingent fee will be thus incentivized to work that much harder on the client's behalf. Formal Op. 94-38, *supra* ("The use of contingent fees in these areas, for plaintiffs and defendants, impecunious and affluent alike, reflects the desire of clients to tie a lawyer's compensation to her performance and to give the lawyer incentives to improve returns to the client. The trend also may reflect a growing dissatisfaction with hourly rate billing").

Here, from Mrs. Lawrence's perspective, she had paid Graubard $8,766,983 in fees in 2001 through 2004 (X:A2723-A2725). That figure could only go up as the case reached the first of multiple trials.

Nor was there any expectation that the case would end with the first trial or any time that year. This is why Special Referee Levine, who was obviously in a position to know, said that it appeared in January of 2005 that "several more years of full blown litigation would be required to reach … final disposition" (I:A184a). Further, while any case can settle at any time, this was a case that had not settled in 22 years.

Moreover, even as it appeared that there were many miles still to go before a resolution was reached, the prospects as to what that resolution would be had just changed for the worse. While Graubard had once estimated in a memorandum sent to Mrs. Lawrence that all of the accounting claims collectively had a potential in excess of $100 million (X:A2903-A2918), the claim that had seemed most promising (X:A2937, A2971) had just been lost outright (I:A185a; XIII:A4632-A4661).

By entering into the new retainer, Mrs. Lawrence forever capped her investment at $1.2 million; yet, the case would now go to conclusion and she and her family would still receive 60% of any recovery.

To be sure, if Mrs. Lawrence had known back in January of 2005 that the Epps documents would appear and that Graubard would then use those documents to secure a $111 million settlement, then it would have made sense for her to continue footing the hourly bills, in which event she and her Estate would never have had to

pretend that she suffered from "diminished capacity" (XVII:A6856, A6859, A7007) or that Graubard's Daniel Chill was a modern day "Svengali" (XVII:A6855-A6856, A6900, A7015, A7026). However, in terms of what the parties knew in January of 2005, Mrs. Lawrence's decision was rational and reasonable.

### 3. Graubard's Very Significant Risks In Acceding To The Client's Request That The Firm Work For A Contingent Fee.

It was undisputed that commercial firms in Graubard's position generally neither seek nor want to represent their clients on a contingent basis since a single loss can devastate the firm (VII:A1333-A1335). This notwithstanding, the Estate and its allies argued that the accounting claims had "high value" and that Graubard therefore had "no risk under the revised retainer" (XVII:A6874, A7007-A7008, A7177, A7182, A7191).

The argument, which the Appellate Division credited, melded a misunderstanding of the risk factor with a willingness to disregard documented facts.

#### (a) The True Risks Of The Retainer: Potentially Committing Graubard To Literally Years Of Litigation In A Case That Suddenly Appeared Problematic

The Estate's argument concerning "risk" primarily rested upon a so-called "internal memo" (Estate's 2012 App. Div. Br. at 33), a memo that purportedly reflected Graubard's "own optimistic view" at the time of contract (*id.* at 22).

In reality, the so-called "internal memorandum" was a one-page, handwritten worksheet, reproduced at XVI:A6374, that was written well before the December 2004 dismissal of the 95 Wall Street claim (V:A551-A555). This was established not only by uncontroverted testimony (V:A551-A555) but also by the fact that the writer had assigned the 95 Wall Street claim more than half of the total value of all the claims (XVI:A6374).

Those "details" notwithstanding, the Appellate Division bought the Estate's argument hook, line and sinker. The court wrote that Graubard "had internally assessed the Estate's claim to be worth approximately $47 million," that such meant that Graubard was essentially guaranteed "a fee of about $19 million" (since attorneys' predictions are, the court assumed, infallible), and that it was therefore "highly unlikely that the firm took a significant risk of losing a substantial number of fees" (XVII:A7395).

The reasoning was seriously flawed, logically and legally.

The argument advanced by the Estate and credited by the Appellate Division assumed, (1) that the accounting claims were sure winners even without the Epps documents, and, (2) that the risk of non-recovery — that is, that there may be no recovery at all — is the only significant risk that the attorney assumes when he or she agrees to a contingent fee retainer.

The fallacy of the first assumption, that the claims were sure winners with high value, was graphically demonstrated by the circumstance that the single claim that

Graubard had assessed as worth more than all the others combined was ultimately dismissed outright (V:A551-A555; XVI:A6374). Indeed, the Special Referee's stated view at time of settlement was that the case was "in the main uncertain of outcome" (IV:A1989a).

That aside, the very assertion that the claims were sure winners, or that Graubard thought them to be sure winners, was premised upon a misconception of the nature of commercial litigation.

When the American Bar Association's Committee on Ethics and Professional Responsibility was asked "whether it is ethical for a lawyer to accept a matter on a contingent fee basis when liability is clear and some recovery is certain," its answer was that the question itself ostensibly rested on a "faulty premise" concerning the number of cases in which recovery is certain:

> The argument put forward is that since the lawyer is sure that the matter will result in some recovery, there is no real contingency; thus, there is no justification for a contingent fee arrangement.
>
> * * *
>
> … the Committee is of the view that the argument may rest on a faulty notion as to the number of cases regarding which at the onset of the engagement the lawyer can say with certainty that the client will recover. Defendants often vigorously defend and even win cases where liability seems certain. Additionally, a previously undiscovered fact or an unexpected change in the law can suddenly transform a case that seemed a sure winner at the outset of representation into a certain loser.

Emphasis added.

The second assumption underscoring the Appellate Division's decision, that the risk of non-recovery was Graubard's only salient risk, was just as erroneous.

The Estate's only authority for its view that the purported "high value" of the claims means there was "little if any risk" was an article by Prof. Lester Brickman. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L Rev 29, 92 [1989]. Brickman has established himself as a staunch opponent of contingent fees.[27] However, even he no longer contends that the risk of nonrecovery is the only salient risk.[28]

The risk of nonrecovery — that the case will be lost — is merely one of many risks the contingent fee lawyer confronts:

> All contingent fee arrangements carry certain risks: the risk that the case will require substantially more work than the lawyer anticipated; the risk that there will be no judgment, or only an unenforceable one; the risk of changes in the law; the risk that the client will dismiss the lawyer; and the risk that the client will require the lawyer to reject what the lawyer considers a good settlement or otherwise to continue the proceedings much further than in the lawyer's judgment they should be pursued.

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[27] Herbert M. Kritzer, Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman, 82 Wash. U. L.Q. 477, 478 (2004) ("Brickman had established himself as the leading proponent of the view that contingency fees were a problem and that they needed to be substantially limited … Regrettably, while his claims make good material for journalists, they also demonstrate his inclination to let his advocacy distort his scholarship").

[28] Kritzer at 496 ("Brickman has finally acknowledged that the risks involved in the contingency fee includes more than nonrecovery; however, he has largely continued to ignore the denominator for the effective hourly rate equation").

Formal Op. 94-38, *supra*; Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 Wash ULQ 739, 776 [2002] ("The most important of these contingencies concern not whether the lawyer will be paid, but rather how much the lawyer will be paid and how much time and other resources the lawyer will have to invest to obtain that fee. The latter uncertainty has relatively little to do with the nature of the case -- or even the clarity of the case -- but rather with the actions of the opposing side").

As a practical matter, "[t]he case may require years of effort and produce no recovery. It may resolve itself within minutes of acceptance through no effort of the attorney. It may, as most cases do, fall somewhere in between these two extremes." Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 NYL Sch L Rev 773, 791 [2010].

Here,

> (a) the case had thus far gone 22 years without settling and with virtually every significant ruling going through one or two levels of appellate review (X:A2728-A2740; XI:A3563-A3566);
>
> (b) absent a settlement, the trial would not have resulted in a final disposition of the case since seven different accounting objections had been "deferred" for future resolution (X:A2996);

(c) there was no particular reason to believe that Graubard would receive documents that would change the entire complexion of the case, and,

(d) Graubard's client could be counted on to do exactly as she liked, whenever she liked, whether that entailed rejecting a settlement offer that she was advised to accept, accepting a settlement offer that Graubard deemed unwise, or firing her attorneys (I:109a).

In these circumstances, even if one were to reject the Special Referee's contrary finding (I:A185a-A186a) and instead credit the Appellate Division's finding that Graubard privately thought the remaining accounting claims were worth exactly $47 million even after outright dismissal of the 95 Wall Street Fraud claim (XVII:A7395), the case could have continued on so long that Mrs. Lawrence's win would be Graubard's loss. It could have been settled at any time for a pittance, especially if the two sides of the family reconciled in the wake of Seymour Cohn's death. The case could have been settled for a pittance if Mrs. Lawrence lost patience, as was apparently already occurring (X:A2973). The case could also have been a great victory … for Mrs. Lawrence and her next set of attorneys. Alternatively, the case could have gone the way of the 95 Wall Street Fraud claim, which Graubard had previously estimated as having a 90% chance of success (XVI:A6375).[29]

[29] In a classic example of "damned if you do and damned if you don't," whereas the Appellate Division decided that Graubard privately expected a recovery of $47 million and then reduced the contractually agreed fee on that ground (XVI:A7395), the Special Referee

The only thing that was certain was that nothing was certain, and the Graubard attorneys would have been fools to believe otherwise.

### (b) That Graubard Was Already More Than A Million Dollars In The Hole And Was Already Contributing More Than The Client By The Time The Case Settled

Amongst its other arguments, the Estate argued that the retainer's $1.2 million "cushion" "safeguarded" Graubard (Estate's App. Div. Br. at 34). Admittedly, the provision reduced Graubard's risk by exactly $1.2 million, which was why Graubard sought that provision in the first place (VI:A699-A700). Yet, the reality was that Graubard's billings had ranged from $1,730,677.50 to $2,400,648.00 per annum in years 2001 to 2004 (X:A2723-A2725). That figure was plainly going up if Graubard now had to do 15 depositions and multiple trials.

More to the point, Graubard was *already* losing money under the new retainer.

The left column of the chart below ("Dollar Value of Billable Hours") represents Graubard's actual billable hours for the first two quarters of 2005 (X:A3177, A3215, A3262-A3263). The second column of the chart ("Billing") represents what Graubard was permitted to bill (*i.e.*, $300,000 per quarter) or, put

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found that Graubard would *not* have expected any recovery even approaching that figure … but then reduced the contractually agreed fee for *that* reason.

After accepting that Graubard may have "sharply discounted" its prior estimates after the outright dismissal of the 95 Wall Street claim (I:A171a), the Special Referee expressly said that Graubard should receive only 10% of last $91 million of the recovery *because* "Alice would never have anticipated and Graubard would also not have anticipated [a recovery in excess of $20 million] before the production of the critical Epps documents …" (I:A188a).

differently, Mrs. Lawrence's monetary contribution. The third column shows the differences between those figures: the billable hours, in dollars, Graubard could not bill and was therefore losing.

**Graubard's Out-Of-Pocket Loss Under The New Retainer**

| | **Dollar Value of Billable Hours** | **Billing** | **Dollar Value of Unbilled Hours** |
|---|---|---|---|
| **First Quarter** | $763,664.00 | $300,000 | $463,664.00 |
| **Second Quarter** | $983,732.50 | $300,000 | $683,732.50 |
| **Total** | $1,747,396.50 | $600,000 | $1,147,396.50 |

Even with the case settling as early as it did, Graubard was already "down" more than a million dollars and was already contributing more ("Dollar Value of Unbilled Hours") than the client was contributing ("Billing"). Had the trial gone longer, the disparity would have been more pronounced.

Had the case gone into a second year, the figures in the second column ("Billing") would have been zeros for that entire year. Had the case gone into a third year — which is what the Special Referee had expected (I:A184a) — Graubard would have needed some good fortune to avert disaster.

Consider, if you will: Graubard was contributing $873,698 per quarter under the new retainer (X:A3177, A3215, A3262-A263). That is equivalent to $3,494,793 per year. Graubard's first year's outlay would have been offset by $1.2 million in

billings, for a net outlay of "only" $2,294,793. But there would be no such cushion after the first year.

If the case continued for three years at that rate — which understates the risk inasmuch as Graubard's second quarter outlay would have been much greater but for the settlement — Graubard would have been out of pocket $9,284,379 after deduction of the $1.2 million it could bill. It would have then needed a recovery of $26,210,940 just to break even. If the case went on for four or five years at that rate, Graubard would have been seriously below water.

### 4. The Real Public Policy At Issue Here

A client who knew exactly what she was doing and who spent her life doing whatever she wanted to do very reasonably decided that she no longer wanted to foot all the costs of a very expensive litigation that appeared as if it would continue for years.

When the case thereafter settled for more than double what it was worth, Mrs. Lawrence could have thanked the law firm that just won her another $67 million after deduction of attorney's fees. She instead secretly plotted to sue her attorneys even as they continued to faithfully represent her (VII:A1227-A1230, A1237).

In the suit itself, the client and her allies could have made their legal argument without artifice, but instead advanced inflammatory charges that they had to know were untrue (*e.g.*, the alleged secret negotiations with the Cohns) followed by even

more outlandish charges (the Wallberg-Kling-Rivas claims) that logically *had* to be untrue since they were internally inconsistent, all the while advancing holier than thou pronouncements about the ethics of the attorneys who had made their accusers so wealthy.

There is a real public policy at issue. Contingent fee retainers serve important functions. Such agreements are binding on the attorney even when the case goes longer than the attorney expected and even if the recovery is less than was expected. If the client can undo the deal *in retrospect* simply because the attorneys succeeded in obtaining a recovery far larger than they or the clients had expected, attorneys would be deterred from accepting such retainers. Such "view is akin to forcing life insurance companies to return premiums to clients who do not die while covered -- a practice that would spell the end of an industry that serves a useful social purpose." Shajnfeld at 791.

Similarly, if clients are rewarded with fee reductions when they violate court orders, make misrepresentations to the courts, and invent charges of attorney misconduct that, when exposed, are just replaced with newly manufactured charges of attorney misconduct, that too would lead to predictable and less than desirable consequences.

## POINT VI

## THE APPELLATE DIVISION ERRED IN RULING THAT THE SAME CLIENT WHO HAD REFUSED TO CONTINUE ON AN HOURLY BASIS COULD RETROACTIVELY RETURN TO HOURLY BILLING.

In the lower courts, the Estate and its allies variously argued that, (a) the correct remedy for the "crime" of obtaining a recovery so large that it rendered the fee unconscionable in hindsight was forfeiture of all fees earned under the new retainer (XVII:A6909, A7052), (b) Graubard should forfeit all fees under the new retainer <u>and</u> be forced to refund all fees earned after 1998 (XVII:A6833, A6909-A6910, A7093, A7096, A7103), (c) Graubard should have to return all fees earned <u>since 1983</u>, apparently including fees that were billed for matters unrelated to the Estate litigation (I:A347a, A352a), and, (d) "at most" Graubard should get a fee "based on time charges" (Estate's 2012 App. Div. Br. at 37).

In arguing that the correct remedy (if there was to be no outright forfeiture) should be a return to the very retainer that Mrs. Lawrence had rejected shortly after the Special Referee recommended dismissal of the 95 Wall Street claim, the Estate conceded that there were cases in which courts had reduced unconscionable fees to sums that were not unconscionable. Estate's 2012 App. Div. Br. at 43-44. However, such may occur, the Estate urged, only when there was no prior fee retainer agreement between the parties. If there was a prior fee agreement, then, according to the Estate, "the court uses the prior fee agreement as the objective measure." *Id.*

The Special Referee emphatically rejected the notion that the client who had here decided to breach even before the settlement closed (VI:A1023; VII:A1229-A1230) should be rewarded with a return to the hourly retainer that she had refused when her prospects were less rosy (A:188a). In reaching that conclusion, he wrote that a "fee reduction" rather than a fee reversion was appropriate because, amongst other factors, "it was Alice who insisted on abandoning the prior hourly-rate fee arrangement" (I:A188a). The Special Referee added that "it cannot be said that [Graubard's] risk was entirely eliminated in this complex multi-issue litigation" and that "the favorable result, not only in monetary terms, but also in giving Alice a final, full disposition separating her totally from any further legal entanglement with Seymour's Estate, justifies a fee exceeding quantum meruit" (*id.*). The Surrogate thereafter agreed with the Special Referee's recommendation (I:A84a).

However, the Appellate Division instead ruled that, "[w]here, as here, there is a preexisting valid retainer agreement, the proper remedy is to revert to the original retainer agreement" (XVII:A7396). There was no discussion or analysis apart from the statement itself.

For the reasons stated in Points II, III and IV of this brief, the contingent fee retainer was not unconscionable. However, if the Court should rule otherwise, Graubard submits that the Appellate Division erred in rewarding the breaching client with reversion to the same retainer that she refused back when the litigation took a turn for the worse. Graubard further submits that,

(1) the ruling stands contrary to general contract law, which holds that a finding of unconscionability does not dictate a return to an "abandoned" prior contract (Point VIA, *infra*);

(2) the ruling runs contrary to the settled law specifically concerning attorney fee contracts, which holds that the only correct remedy is reduction to a sum that is not excessive (Point VIB, *infra*);

(3) the ruling is unsupported by the two precedents cited by the Appellate Division (and previously cited by the Estate) (Point VIC, *infra*); and,

(4) the ruling constitutes terrible policy inasmuch as it would, (a) lead to patently illogical consequences, (b) encourage fee challenges by offering clients a potential windfall that would extend well beyond mere correction of any hindsight inequity, and, (c) affirmatively penalize attorneys for conduct that was not improper at the time it occurred (Point VID, *infra*).

## A. Reversion To The Prior Retainer Agreement Runs Contrary To General Principles Of Contract Law.

The Appellate Division credited the Lawrences' argument that general principles of contract law dictated a return to the prior contract in the event that the subject fee retainer was deemed unconscionable (XVII:A7396). Yet, the Special

Referee specifically found that the parties had abandoned the hourly retainer and that it was "Alice" who "insisted on abandoning" the hourly retainer (I:A188a).

It is well settled that, even under general contract law, courts should never dictate a return to a contract that the parties themselves had abandoned. *Matter of Rothko's Estate*, 43 NY2d 305, 323 [1977] (the Surrogate was correct in "reason[ing] that the fact that the 1970 agreements for the sale and consignment of paintings were voidable because of self-dealing did not revive the 1969 inter vivos agreements" and correct in finding "that the parties by their conduct intended to abandon and abrogate these 1969 agreements""); *Bercow v Damus*, 5 AD3d 711, 711-712 [2d Dept 2004]; 22 N.Y. Jur.2d Contracts § 498 ("An abandonment of a contract by mutual consent is effective to discharge its obligations, even when a new contract containing one or more of the same terms is simultaneously entered into").

Further, the general rule of contract law, both in New York and elsewhere, is that any court that deems a contract unconscionable "may limit the application of any unconscionable term as to avoid any unconscionable result." Restatement (Second) of Contracts § 208 [1981]; 4B N.Y.Prac., Com. Litig. In New York State Courts § 73:15 [3d ed.].

The Appellate Division's decision to resurrect a contract that the client herself had abandoned therefore ran counter to the general rules governing contracts.

## B. Reversion To The Prior Retainer Agreement Also Runs Contrary To The Settled Law Governing Attorney-Client Retainer Agreements.

This Court and other courts of this state have specifically ruled that the correct remedy when *an attorney's fee* is deemed unconscionable is an appropriate reduction of the fee, not wholesale voiding of the contract. *In re Fitzsimons*, 174 NY 15, 25 [1903] ("If, after trial, when the question has been properly presented by proof, it shall be shown that the amount claimed [by the attorney] was unconscionable, it is fair to presume that the trial court will make such disposition of the matter and establish the appellant's lien to such an extent only as shall be legal in view of the agreement between the parties"); *Spiegel v Goldfarb*, 66 AD3d 873 [2d Dept 2009] (where counsel had improperly charged the client a full third of the recovery in a case that sounded in medical malpractice, the correct remedy was reduction to the medical malpractice fee schedule, not wholesale voiding of the retainer); *Belzer v Bollea*, 150 Misc 2d 925, 927-929 [Sup Ct 1990] (where the retainer in the personal injury action called "on its face … for compensation possibly greater than the permissible limit," "the court will treat any provision with calls for compensation greater than 33% a nullity").

Such is also the rule nationally. Section 34 of the Restatement (Third) of Law Governing Lawyers § 34 [2000], entitled "Reasonable and Lawful Fees," provides, "A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law." Comment (a) provides that a fee "will not be approved to the

_____ that it violates this Section even though the parties had agreed to the fee" (emphasis added).

Even the Estate's own expert, Stephen Gillers, admitted that the correct remedy when an attorney's fee is substantively unconscionable in hindsight but was not procedurally unconscionable is reduction, not rescission (IX:A2277-A2278).

The Lawrences nonetheless argued that the rule is different if there was a prior retainer agreement and that the clients should in that instance do *even better* than an after-the-fact reduction to a fee that is not unconscionable. However, that claim was, in the parlance, a "Tuesday afternoon argument." ("Yes, the cases say what they say, but that rule doesn't apply on Tuesday afternoons.")

The Court will search in vain for any provision or comment to Restatement § 34 calling for a return to some previously abandoned contract in the event that the attorney's fee is deemed unconscionable. Nor does section 18 ("Client-Lawyer Contracts") of the Restatement (Third) of Law Governing Lawyers [2000], which encompasses contracts "made beyond a reasonable time after the lawyer has begun to represent the client in the matter," in any way authorize court-ordered revival of contracts abandoned by the client.

Nor will the Court find any caveat in *Fitzsimons*, *Spiegel*, *et al.* to the effect that one returns to the prior, abandoned-by-the-client retainer if there was one and that a fee deemed unconscionable is reduced to a not unconscionable sum only in the absence of an abandoned-by-the-client retainer.

### C. The Appellate Division's Ruling Was Not Supported By Either Of The Decisions Cited In Its Opinion.

The Estate (and, thereafter, the Appellate Division) cited two precedents for the contrary proposition that "the proper remedy" is to "revert" to the prior, abandoned agreement if there was a prior abandoned agreement.

Neither of the cited decisions was by this Court. Neither indicated any awareness of the general contractual rule regarding abandoned contracts. Neither of them indicated any awareness of *Fitzsimons* or of the general rule that an unconscionable fee is reduced to such sum as is not unconscionable. Nor was either ruling factually apposite.

In *Matter of Smith (Raymond)*, 214 AD 622 [1st Dept 1925], the attorney had agreed to challenge a will on the client's behalf. The parties agreed that the attorney would receive "one-half of the increase in the amount I [the client] shall receive over and above the will provision" in the event of "a successful contest and the breaking of the will" (214 AD at 623). If, however, the matter were to settle before trial, the attorney would instead receive "one-quarter of the amount I receive as a result of the settlement" (*id.*). The case thereafter settled without the will being set aside. It was only after the case had settled that the attorney and the client reached a new agreement that effectively raised the attorney's compensation from 25% to 28%.

The *Smith* court held that the attorney was bound by the initial contract, but the holding was premised upon the findings that the initial contract <u>had already been fully</u>

_____ and that the new agreement was "without consideration" and was thus never binding in the first place (214 AD at 625). The court did not knowingly consider and depart from the rule previously set forth in *Fitzsimons*, *supra* (calling for reduction of unconscionable fees).

Similarly, in *Naiman*, 351 F Supp 2d 257, the other decision cited by the Estate, the attorney agreed to a one-third contingent fee and later insisted that his fee be increased to 50% (351 FSupp2d at 259-260). The client denied having agreed to the increase and the court ruled that the initial retainer controlled because the alleged modification had not even been put in writing "until over seven months after the parties allegedly entered into the agreement and over two months after the case settled" (351 FSupp2d at 263). Such was a patent violation of the formal rule requiring an attorney employed in a "contingent fee matter" to "promptly … provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal" (*id.*).

As in *Smith*, the client in *Naiman* had never indicated any intent to abandon the initial agreement. As in *Smith*, the modification was never valid in the first place. As in *Smith*, the Court did not indicate any awareness of *Fitzsimons* and did not note any intent to depart from the general rule governing unconscionable retainer agreements.

Thus, while the Estate characterized *Smith* and *Naiman* as constituting some sort of deliberate departure from the rules generally governing attorney-client

retainers, that was not even arguably the case. The irony is that even if the cases actually stood for the proposition for which they were cited, the two decisions, one an almost century-old decision that was last followed in 1936 and the other a trial-level decision, would surely not provide sufficient basis to displace contrary Court of Appeals' rulings.

### D. The Reversion "Rule" Also Constitutes Bad Policy And Would Lead To Illogical Consequences.

Apart from all else, the "rule" here advocated by the Estate and adopted by the Appellate Division would punish attorneys for conduct that was not wrong at the time it occurred while providing their clients with an indefensible windfall. It would also lead to illogical results.

#### 1. Unwarranted Punishment And Indefensible Windfall

Under general principles of contract law, "[t]he determination of whether a given clause or contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time …" 8 Williston at § 18:12. It is not a ground for rescission that matters turned out differently than the parties had expected. *Blake v Biscardi*, 62 AD2d 975, 976 [2d Dept 1978] ("no matter how hard the bargain, a court will not deprive it of its validity without evidence of fraud or deception"). If that rule had been followed here, there never would have been a trial in the first place

In consequence, if the Court were to reduce an unconscionable-in-retrospect attorney's fee to whatever sum would not be unconscionable in retrospect, it would already be granting the client a remedy to which she would not have been entitled under general contract law. Correspondingly, the Court would already be imposing a result on the attorneys that would not be imposed on any "ordinary" litigant.

So, what then is achieved if the Court goes *beyond* reduction of the unconscionable-in-hindsight attorney's fee and instead imposes the terms of the prior, abandoned-by-the-client retainer?

*First*, a client who is already doing better than would be warranted under general contract principles is, by definition, now obtaining greater relief than "mere" reduction of the fee to an appropriate sum. Further, even assuming that hindsight reduction to a "reasonable" fee is dictated by the equities, the added relief of reduction to a still lesser fee is an indefensible windfall.

*Second*, if the Court reduces the fee even below whatever sum would be permissible and appropriate even in hindsight, the difference from the attorneys' perspective is pure punishment. Worse still, it is punishment for conduct that was not improper at the time it occurred.

### 2. Illogical Consequences

A rule that dictates that the attorneys receive one fee if there had been no prior retainer and a much lesser fee if there had been a prior retainer that the client "insisted on abandoning" (I:A184a) would also lead to illogical consequences.

Consider what would occur if the most that the attorneys could ethically charge in the circumstances of the subject case was one-third and if anything more was unconscionable in hindsight. If that were so, an attorney whose retainer called for one-third of the $111 million recovery could collect his or her entire fee of approximately $37 million since, per the assumption we have made, such a sum would not be unconscionable. If, however, the attorney instead charged ten dollars too much in hindsight — say, $37,000,010 of the $111 million recovery — the remedy would be a reduction to the prior retainer agreement, an agreement that could have conceivably called for a fee of only $2 or $3 million. The penalty for being $10 too high on the fee could, in this example, be more than $30 million. There is surely no justification for such a penalty when the attorney's "wrong" was that he or she achieved a recovery that was so large and unexpected that it *made* the attorney's fee unconscionable in hindsight.

From a different perspective, consider what would have occurred if the Cohns had offered, say, $20 million in settlement prior to Graubard's discovery and exploitation of the Epps documents. If, as the Estate here told the Appellate Division, Mrs. Lawrence really believed the case was worth only "a few mil" by

January of 2005 (Estate's 2012 App. Div. Br. at pp. 3-4), then she would presumably have jumped at the chance of settling for $20 million. Had that occurred, Graubard would have been entitled to $8 million under the retainer agreement, the Lawrences would not have been able to complain that Graubard was earning $11,000 an hour, and there would not have been any fee challenge.

Yet, precisely because the Appellate Division here provided the Lawrences with a remedy that went beyond any arguable injury, Graubard's fee under the Appellate Division ruling is far less than the firm would have realized from a hypothetical $20 million settlement. Strictly in terms of its self-interest, Graubard would have been better off obtaining the clients a settlement of "only" $20 million instead of the $111 million settlement that occurred.

The lesson regarding the heavy penalty that may follow from obtaining the clients a *much larger* recovery than was anticipated will surely not be lost on the next group of attorneys who find themselves with, (a) a case that is looking far better than they anticipated, and, (b) a client who does not feel bound to comply with the same norms of candor and conduct to which other people, the so-called "little people," generally subscribe.

## POINT VII

## EVEN IF ONE WERE TO ASSUME THAT THE FEE WAS UNCONSCIONABLE IN HINDSIGHT, THE FEE SHOULD NOT HAVE BEEN REDUCED BELOW THE ONE-THIRD BASELINE THAT IS PRESUMPTIVELY REASONABLE IN PERSONAL INJURY ACTIONS INVOLVING FAR LESS TIME AND RISK.

Assuming for sake of argument that the 40% fee was unconscionable in hindsight and further assuming that the correct remedy is to reduce the fee to such sum as is not unconscionable (*In re Fitzsimons*, 174 NY at 25), the question then arises as to what fee would not be unconscionable in hindsight.

Given that the litigation entailed far greater risk and involved at least as much expertise and skill than in the typical personal injury case, Graubard submits that its fee cannot on any reasonable basis be reduced below the one-third contingent fee that is presumptively reasonable in such cases.

Where, as is the case for personal injury actions, there is a court-adopted schedule, settled law holds that a fee that conforms to the fee schedule is "presumptively reasonable." *Yalango by Goldberg v Popp*, 84 NY2d 601, 607 [1994]; *Gair v Peck*, 6 NY2d 97, 114 [1959] *rearg denied, remittitur amended*, 6 NY2d 983, 161 NE2d 736 [1959], *supra*; *Dullard v Berkeley Assoc. Co.*, 606 F2d 890, 895 n.5 [2d Cir 1979] ("we note that in a wrongful death suit contingent fees of as much as one-third of the net recovery [after deducting expenses] are presumptively permissible"). The court-

adopted rule in personal injury actions caps contingent fees at one-third of the recovery. 22 NYCRR § 603.7[e]; 22 NYCRR § 691.20[e].

This was not a personal injury action, which was why the one-third cap did not apply. The unrebutted proof was that the contingent fees in commercial litigation ranged from 20% to 50% with "[t]he bulk" of those cases being between a third and 40% of the recovery (VII:A1339).

Yet, while the case was not a personal injury action, the risk to Graubard in terms of the attorney-hours that could be lost was at least as great as that in the average personal injury action even after one considers that Graubard was contractually entitled to bill up to $300,000 in time charges per quarter during the first year of litigation.

Graubard devoted $1,747,396.50 in billable hours to the case during the first two quarters of 2005, but could bill only $600,000, or roughly a third of that sum (X:A3177-A3215, A3262-3263). Put differently, approximately two-thirds of Graubard's 4,638.55 hours of work during that time frame (X:A3215, A3262-A6263) could not be billed. That amounted to approximately 1,500 unbillable hours per quarter.

Fifteen hundred hours per quarter is the mathematical equivalent of working 125 hours per week, every week, for the entire quarter. There are surely few personal injury actions that compel that kind of time investment.

Similarly, while the Estate and its allies afterwards saw fit to denigrate the legal work that enabled them to receive a recovery that was more than double the value of their claims (I:A183a-A184a), the expertise that Graubard exercised on the Lawrences' behalf was surely at least as skillful as that expended in the typical personal injury action in which a one-third fee is presumptively reasonable.

To be clear, Graubard does not minimize the risks borne by personal injury attorneys. Nor does Graubard mean to marginalize or criticize the highly skilled work that may often prove the difference between full recovery and no recovery in such actions.

That said, if one-third is presumptively reasonable in such actions, it is every bit as reasonable in this case in which, (a) Graubard was looking at literally thousands of hours that could not be billed, (b) a report had just recommended outright dismissal of the accounting claim Gaubard had previously deemed most promising (XIII:A4637-A4661; X:2931, 2937, 2971), and, (c) Graubard had agreed to the contingent fee retainer at the client's request (I:A188a; VI:A699) in circumstances in which, in contrast to personal injury practice, Graubard could not diversify its portfolio of litigation risks (VII:A1327-A1329).

## CONCLUSION

For the reasons stated above, petitioner-defendant-appellant Graubard respectfully submits:

(1) the Appellate Division's Order of May 23, 2013 should be reversed;

(2) the Surrogate's Court Decree of October 14, 2011 and Order of September 8, 2011 should be reinstated insofar as the Surrogate concluded that the revised retainer was not procedurally unconscionable but should be modified so as to further find that it was not substantively unconscionable in hindsight; but,

(3) should the Court instead conclude that the revised retainer was unconscionable in hindsight, the Court should then, (a) reduce the contractually agreed attorneys' fees to the maximum sum that would not be unconscionable in hindsight, or, (b) remand the case to the Appellate Division so that it could reduce the contractually agreed attorneys' fees to the maximum sum that would not be unconscionable in hindsight, and,

(4) in no event should Graubard's contingent fee be reduced beyond the one-third fee that is presumptively reasonable in personal injury actions that generally involve far less attorney time and far less risk than in commercial cases such as that at bar.

Dated: New York, New York
November 11, 2013

Respectfully submitted,

By: _____

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# ADDENDUM

FILED Apr 25 2011 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 5

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Castellanos

-against-

CBS Inc

Index No. 23018/05

Hon. Alison Y. Tuitt

Justice.

The following papers numbered 1 to 3 Read on this motion, OTSC Attorneys fee
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of 11/1/10

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | 2 | |
| Replying Affidavit and Exhibits | 3 | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

APR 25 2011 BRONX

APR 25 2011

Upon the foregoing papers this Order to show cause is decided in accordance with the annexed memorandum decision dated April 20, 2011

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 4/20/11

Hon. A. Y. Tuitt
J.S.C.
ALISON Y. TUITT

FILED Apr 25 2011 Bronx County Clerk

NEW YORK SUPREME COURT---------COUNTY OF BRONX

PART IA-5

ELVIS CASTELLANOS,

Plaintiff,

-against-

CBS, INC. and APA RESTORATION CORP.,

Defendants.

INDEX NUMBER: 23018/2005

Present:
ALISON Y. TUITT
*Justice*

The following papers numbered 1 to 3

Read on this Casey & Hibner, P.C.'s Order to Show Cause for a Hearing to Determine Attorney's Fees

On Calendar of 11/1/10

Order to Show Cause-Exhibits, Affirmation 1

Affirmation in Support 2

Reply Affirmation 3

Upon the foregoing papers, Keogh Crispi, P.C.'s order to show cause to set this matter down for a hearing on attorneys' fees and enforcing the contingency fee percentage of the charging lien possessed by the offices of Keogh Crispi, P.C. is decided in accordance with this decision and Order:

Movant brings the instant order to show cause seeking a determination on the amount of attorneys' fees due for legal services performed on behalf of plaintiff before the law firm was substituted as counsel by Elliot H. Taub, Esq. The within matter was settled in or about September 22, 2009 in the amount of $350,000.00. Disbursements were a total of $4,056.17. Plaintiff had loans which were to be secured by the proceeds of this lawsuit from The Law Funding Group, Inc. in the amount of $56,000.00 which were reduced to $45,000.00. In addition, plaintiff received $34,339.41 in Worker's Compensation benefits inclusive of medical and lost wages. Pursuant to the retainer statement, attorneys' fees were 33 1/3 percent of any settlement or

verdict. Therefore, the attorneys' fees in this case are $116,666.00.

The underlying matter is a personal injury action stemming from an accident on August 24, 2005 in which plaintiff slipped and fell while working on top of a dome-shaped roof. Plaintiff claims the accident occurred as a result of defendants failing to provide him with roofing brackets, crawling boards and/or safety belts. Plaintiff brought the action pursuant to the Labor Law. As a result of the accident, plaintiff sustained a trimalleolar fracture of the right ankle necessitating open reduction internal fixation with an implant of a five-hole one-third tubular plate with four 3.5mm bicortical screws; displaced lateral malleolus fracture; fracture of the posterior malleolus; distal fibular fracture; and, rupture of the medial deltoid. As a result of the injuries sustained, plaintiff was unable to return to work for approximately nine months.

Plaintiff initially retained Keough Crispi, P.C. (hereinafter "movant") on September 15, 2005. Upon retention, movant initiated an investigation to determine the potential defendants in this action, including the owner of the subject premises where the accident occurred. Thereafter, movant instituted the action by filing and service of a Summons and Complaint. Issue was joined by defendant's service. Movant then conducted research on the relevant caselaw based upon the facts and circumstances in this case in order to prepare the Bill of Particulars. Movant argues that based on their extensive and thorough research they were able to establish a case of absolute liability against the defendant in the action. Movant also states that they performed an extensive review of the voluminous medical records in order to provide detailed and specific allegations of the injuries sustained by plaintiff. Movant claims that the legal work performed by their office secured the evidentiary proof establishing a claim of a severe injury and permanent disability with progressively deteriorating physical consequences. Movant prepared and served a Verified Bill of Particulars.

Movant was substituted as counsel in or around January, 2006 when plaintiff discharged movant as counsel and retained the office of Taub & Marder, Esqs. (hereinafter "Taub") to represent him. The outgoing and incoming attorneys agreed by letter dated January 19, 2006 that movant's "firm will be entitled to a fee as a charging lien for the value of its legal services, if any, rendered prior to substitution...". The parties have been unable to amicably settle the matter and, thus, the parties turn to the Court for a decision on the division of attorneys' fees.

It is well-settled that a client may discharge an attorney at any time, with or without cause. Cheng v. Modansky Leasing Co., 73 N.Y.2d 454, 457 (1989). The discharged attorney may elect to receive

compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case. Cohen v. Grainger, Tesoriero & Bell, et. al., 81 N.Y.2d 655 (1993). If the discharged attorney does not at the time of the discharge elect the method of payment, it is presumed that a contingent fee has been chosen rather than a quantum meruit recovery. Id.

In the instant action, the stipulation between the discharged attorneys and plaintiff's new counsel specifically states that "should our respective firms not be able to amicably resolve attorneys fees at the conclusion of the litigation and seek Court intervention". Here, because the attorneys stipulated that if they could not agree, the fees would be based on the work each performed contributing to the settlement of this action, this Court is bound by that agreement. Thus, it is this Court's job to evaluate the work performed by each attorney.

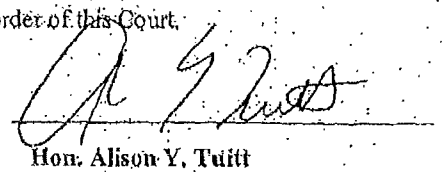
Movant contends that Taub, inadequately represented plaintiff in accepting a settlement in the amount of $350,000 when the action had a monetary value in the range of $1,000,000. Movant argues that the Taub unnecessarily delayed the action and plaintiff's deposition was not held until 19 months after the commencement of the action and defendant's deposition was not held until two and a half years after the commencement of the action. Taub allowed a period of four years to elapse without ever filing a Note of Issue and Certificate of Readiness. Moreover, movant claims that Taub erroneously accepted as valid a defense that was not applicable to the case and relied upon their misjudgment as a justification to recommend and accept an inadequate settlement. Furthermore, movant contends that Taub failed to retain an expert during the 45 months that they represented plaintiff and had to oppose a motion to dismiss plaintiff's case without the benefit of an affidavit from a qualified liability expert. The action settled while the motion was pending. Finally, movant argues that Taub engaged in unnecessary litigation by commencing another action against APA Restoration Corp. which was unproductive and wasteful as there was no legal basis to hold them responsible for plaintiff's accident.

Movant's arguments have some merit. It appears that the "recalcitrant worker" defense may not have been meritorious under these circumstances. In addition, in light of the severity of the injuries sustained by plaintiff, including a substantial future loss of earnings claim, it appears that the case may have had a larger monetary value than that for which it was settled. Movant provides this Court with comparable cases from his law office that yielded substantially better monetary awards.

In light of all of the circumstances presented, this Court finds that movant should be entitled to 40% of the attorneys' fees. Accordingly, it is hereby directed, pursuant to §475 of the Judiciary Law, that Taub release 40% of the attorneys' fees it is holding in escrow and forward same to Keough Crispi, P.C.

This constitutes the decision and order of this Court.

Dated: April 20, 2011



**Hon. Alison Y. Tuitt**