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Brian J. Shoot
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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.

REPLY BRIEF FOR PETITIONER-DEFENDANT-APPELLANT GRAUBARD MILLER

FLEMMING ZULACK WILLIAMSON ZAUDERER LLP
One Liberty Plaza
New York, New York 10006
212-412-9500
mzauderer@fzwz.com

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO P.C.
120 Broadway, 18th Floor
New York, New York 10271
212-732-9000
bshoot@triallaw1.com

Attorneys for Petitioner-Defendant-Appellant Graubard Miller

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By Process Of Elimination

Generally speaking, there are only two arguments a client can assert in order to be relieved from the necessity of honoring an attorney's retainer. Either the attorney committed legal malpractice or the attorney committed serious ethical transgressions. Here, Mrs. Lawrence and her family hardly could complain that Graubard committed legal malpractice in settling the Lawrences' claims for *only* $111 million. That left the latter alternative.

It is not difficult for any client with imagination to allege attorney misconduct. It merely requires the will to do so. That, at bottom, is what this case is all about.

The Lawrences have filed three respondents' briefs that are long on charges of misconduct but short on Record citations to support those charges. Indeed, the first ten pages of the Estate's brief do not include *a single citation* to the proof in the case. The respondents' apparent hope is that repetition of all the claims of attorney misconduct they can muster, coupled with incessant mention of the $44 million Graubard supposedly "demanded" from the Lawrences, should enable them to retroactively return to the hourly retainer on which Mrs. Lawrence flatly refused to proceed when the outcome of her case was still in doubt.

Yet, it is indisputable that Graubard did not ask to dispense with hourly billing; Mrs. Lawrence did (I:A343a, ¶ 22 [Lawrence Complaint]). It also remains that the respondents' key factual assertions are contrary to the proof, contrary to the Special

Referee's factual findings, and very often, contrary to respondents' own prior assertions in this case.

Most critically, the respondents' core contention is that Graubard was attempting to *dampen* the client's expectations at the time of contract, and it misled Mrs. Lawrence into believing that the case was worth a "few mill, at most." However, as is shown in Point I of this brief, that claim was invented posthumously and was not alleged in either of Mrs. Lawrence's own affidavits (IV:A1451a-A1455a, A1982a-A1984a) or in any other document that preceded her death. Nor is the claim consistent with the proof. Both the testimony and Graubard's contemporaneous notes establish, (a) that Mrs. Lawrence was threatening to give up on the case in January 2005 because she "was through paying legal fees" and "the claim against Epps could not be proven" (XVI:A6375), and, (b) that "CDC [Daniel Chill] persuaded her that we would pick up at least a few million [emphasis added]" (XVI:A6375; *see also* V:A487; VI:A802).

Ultimately, respondents argue that it would be horribly wrong to allow Graubard the benefit of its contract in this case in which the contingent fee so far exceeds the fee that would have arisen under the hourly retainer with which Mrs. Lawrence refused to proceed. Graubard submits that contingent fee retainers should be binding on both parties, not just the attorneys. Graubard further submits that, as is true of every other contracting party, a client who signs a written retainer that is clear on its face should, "in the absence of fraud or other wrongful act on the part of

the contracting party," be "conclusively presumed to know its contends and to assent to them."[1]

Summary Of Reply Argument

For the reasons stated in Points II and III of this brief, the Court should rule that the contingent fee retainer was not procedurally or substantively unconscionable, and should reject the respondents' arguments to the contrary.

Respondents essentially urge the Court to create a new rule of law that would effectively make each successful prosecution of a contingent fee case the prelude to a new litigation in which the client can rehearse successive claims of attorney misconduct and in which the attorney must then prove that the contingent fee did not materially exceed what he or she would have earned as a function of hourly billing.

Graubard submits it is, by definition, the result that matters in a contingent fee case. At least absent extraordinary circumstances, a contingent fee that was reasonable at time of contract should therefore be enforced even where the client receives a recovery that far exceeds anyone's expectations.

Even were the Court to find that the unexpected magnitude of the recovery should render the contract unconscionable in hindsight, Graubard contends, for the reasons stated in Point IV of this brief, that the Court should reject the respondents' "Price Is Right" game theory of attorney retainers.

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[1] *Level Expert Corp. v. Wolz, Alken & Co.*, 305 NY 82, 87 [1953], *quoting Metzger v. Aetna Ins. Co.*, 227 NY 411, 416 [1920].

Respondents argue that the attorney's penalty for earning a recovery that is so large that it retrospectively renders the fee unconscionable should be the total loss of his or her contractual entitlement to a contingent fee, not "mere" reduction to a conscionable or reasonable fee. As shown below, that thesis is unsupported by precedent or logic, and contradicts long settled principles of law.

Finally, for the reasons stated in Point V of this brief, Graubard submits that the Court should reject the "Children's" claim that they were independently "prejudiced" by a contingent fee retainer under which, by their mother's design, they would pay nothing at all.

Respondents' Current Factual Assertions: At Odds With The Proof, The Special Referee's Factual Findings, And, Very Often, With The Respondents' Own Prior Assertions

1. The Estate's Story: At Odds With The Proof, Concerning The So-Called "Internal Case Assessment Memo"

The heart of the Estate's argument for a finding of procedural unconscionability — the finding expressly *rejected* by the Special Referee (I:A152a-A158a) — is its claim that Graubard secretly thought that the case was worth tens of millions of dollars but "duped" Mrs. Lawrence into believing otherwise. Est. Br. at 72. The Estate's only "proof" that Graubard *then* believed the case was worth "almost $50 million" is what the Estate characterizes as a Graubard "internal case assessment memo." Est. Br. at 83-84.

The Estate directly or indirectly refers to the so-called "internal case assessment memo," and Graubard's supposed belief that a recovery of almost $50 million was likely, at least seven different times in its brief. Est. Br. at 8, 10, 13-14, 68, 71-72, 75, 83-84. In doing so, it expressly represents that,

> (a) the memo purportedly represented Graubard's thinking "[w]hen drafting the revised retainer" (Est. Br. at 13-14);
>
> (b) the "internal case assessment memo" was allegedly "prepared by Graubard in 2004," and Graubard supposedly said just that at page 102 of its main brief (Est. Br. at 83-84); and,
>
> (c) Graubard purportedly acted horribly when it "kept Alice in the dark" and did not share its "more complete information" regarding the "possible outcomes, the revised retainer, [and] the status of the case" (Est. Br. at 72).

Those claims have no basis in fact.

First, what the Estate artfully characterizes as an "internal case assessment memo" consists of a one-page, handwritten list that is reproduced at page XVI:A6374 of the Record. As the Court can see for itself, there was no analysis, only handwritten conclusions. The handwritten note estimated that the "95 Wall" claim was worth $49.5 mi" and that all of the other claims in the case were together worth approximately $48 million.

Second, it is undisputed that the note was not prepared during or around January of 2005, that is, when the parties entered into the new retainer. It was not even done for the purposes of the Lawrence case. At trial, Steven Mallis testified that he had attended a two-day seminar on negotiation strategy (II:A551), and that he and Elaine Reich did the calculation "as an exercise after that CLE course to see how numbers would come out if we applied one of the formulae that were presented in that [course]" (II:A551). This is *why* it was nothing more than handwritten notes.[2]

Third, the Estate knows very well that the memo did *not* represent Graubard's internal views "[w]hen drafting the revised retainer." Est. Br. at 13. Indeed, as of January of 2005, which was when Graubard drafted the contingent fee retainer, the Special Referee had already recommended outright dismissal of the 95 Wall Street claim (XIII:A4637-A4661), the very claim that the memo listed as being worth more than all of the other claims combined (XVI:A6374).[3]

Finally, unless Graubard was in the practice of sending handwritten worksheets to "impress" its clients, it is hardly surprising that it never sent Mrs. Lawrence the so-called "internal case assessment memo." However, it regularly sent her real case

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[2] Although the Estate now proclaims as fact that the so-called "internal case assessment memo" was prepared in 2004 and that Graubard so stated in its appellant's brief (Est. Br. at 83-84), Graubard stated only that it was prepared "well before the December 2004 dismissal of the 95 Wall Street claim (Graubard's Br. at 102), which is precisely what Mallis said at trial (II:A551).

[3] The Special Referee said that even the remaining assessments entailed "possibly excessive optimism" (I:A171a), and "was likely to have been further discounted" (I:A186a).

assessments (i.e., typed, without crossed-out entries), including, most recently, in November of 2004 (*i.e.*, just two months earlier) (X:A2967-A2969).

2. Respondents' Claims Regarding The Other Retainers: At Odds With The Proof And The Respondents' Own Prior Representations

All of the respondents state that Graubard had separate hourly-rate retainers with Richard Lawrence and Marta Jo Lawrence, and each states that Graubard could enforce those retainers if its contingent fee fell short of its hourly rates.[4]

Citing 116 pages of billing records that say no such thing, respondent Richard Lawrence additionally represents that Graubard "billed both Alice and Richard" for its legal services. R. Lawrence Br. at 10, citing X:A3177-A3293. The respondent sisters make the same representation, citing nothing at all. Sisters' Br. at 8.

The Record contradicts their claims.

First, while it is true that former Graubard attorney Scott E. Mollen originally sent retainers both to Richard and Marta Jo back in 1983 (X:A1726; XVI:A6318-A6319), neither the attorneys who were still with Graubard (VI:A809) nor the "children" themselves (XVII:A7181) were aware of those retainers more than twenty years into a relationship in which, as Richard Lawrence put it, his mother "drove the bus" and her children were "the kids in the back of the bus" (VI:A1211-A1212).

[4] Est. Br. at 86 ("… Graubard could always recover any shortfall in its hourly charges from Alice's adult children"); R. Lawrence Br. at 18 n.6 ("Graubard had the ability to collect its hourly time charges from Richard or Marta Jo, truly reducing its risk to zero"); Sisters' Br. at 8 ("the retainers with Richard and Marta Jo were at all times in full force and effect").

Second, Steven Mallis and Daniel Chill each testified that over the twenty-plus years of Graubard representation, the children were never sent any of the firm's bills (V:A443-A444, A560, A660). Richard Lawrence testified that he never received or paid any of the bills (VII:A1207, A1213). No one testified to the contrary. There was no proof to the contrary.

Moreover, on the last appeal, where Richard Lawrence's immediate goal was to convince the Court that he could not be held personally liable for his mother's anticipatory breach of the contingent retainer agreement, this is what the same attorneys who now say Richard was billed for Graubard's services then said on the subject (XVII:A7181):

> **Only Alice Retained Graubard**
>
> It is also undisputed that it was Alice, and not Richard, who hired Graubard in connection with the Lawrence Estate litigation. (R. 81). Throughout the time that Graubard represented Alice, she promptly paid Graubard all the fees shown on its statements, which were only billed to her. (R. 170-197, 339-471) Richard has never paid any of Graubard's legal fees.

Emphasis added.

There is, accordingly, no view of the proof that would permit respondents to now represent, (a) that Graubard ever billed Richard for its services, or, (b) that the

contracts that had been forgotten and ignored for 22 years were still enforceable.[5] Yet, all of the respondents do just that … even while announcing that the case is about "lawyer overreaching and deception" (Est. Br. at 1) and that Graubard failed "to act with integrity" (Est. Bt. at 91).

3. Respondents' Fractional Share Diversion: Premised Upon Another Trick Of Time

Searching for some way to criticize the legal services that brought them so much money (literally, tens of millions per "child") at so little cost to themselves (i.e., literally, none), the "children" focus on the one respect in which they were adverse to their mother: the "fractional share" issue concerning the manner in which they and their mother would allocate the spoils of the litigation amongst them.

Unable to deny that they were fully advised about the conflict and that Graubard repeatedly urged them in writing to retain separate counsel (I:A130a-A131a; XIII:A4536), the "children" nonetheless assert that the attorneys received the gifts "even as" the fractional share issue was being resolved. They then charge that Graubard acted improperly in not revealing the gifts at that time, and that the "children" might not have "waived" the conflict had they known the truth.[6]

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[5] 22A N.Y. Jur. 2d Contracts § 498 [2013] ("A contract duly executed and thereafter abandoned or ignored by the parties is unenforceable").

[6] Sisters' Br. at 3-4 ("In 1998, even as the Lawrence Children waived the opportunity to retain independent legal representation in calculating the allocation of estate distributions between themselves and their mother, the Graubard Attorneys concealed that Chill had

Contrary to the children's claims, there was no waiver of the fractional share conflict. Graubard repeatedly told the children that the firm would *not* represent them on that issue and that they should retain independent counsel if they wanted to be represented (XV:A6065, A6067, A6068, A6070). The children appeared in the proceeding regarding the fraction and signed consents to the fraction proposed by Alice, but they did so on a pro se basis (XIII:A4529-A4530, A4537).

Although the Estate cites to the Special Referee's report for the contrary proposition (Est. Br. at 10-11), the Special Referee expressly ruled that Graubard had *no duty* to keep the children informed regarding the fraction since the firm did not represent them on that issue (I:A130a-A131a).

That aside, the entire argument is premised upon a temporal distortion. As with the respondents' repeated (and false) claims that the so-called "internal case assessment memo" represented Graubard's thinking as of January of 2005 (*see* pages 5 to 8, above), respondents have altered the sequence of events so as to fit their invented claims of attorney misconduct.

The gifts were made in November of 1998 (I:A117a). As was noted in Referee Samuel J. Silverman's "Report Re Fractional Interest Calculation Motion" (reproduced at XIII:A4526-A4551), the "children" formally consented to the "judicial

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obtained over $5 million in putative gifts from Alice for himself, Reich and Mallis"); R. Lawrence Br. at 32 ("If Richard knew about the enormous gifts Mrs. Lawrence made to the Graubard Attorneys, he may well have decided to retain separate counsel during the time period when the conflicting fraction was being calculated").

adoption and ordering into effect of the shifting fraction computation" back in March 1998, and then did so again in June of 1998 (XIII:A4537). The Report recommending adoption of the stipulated fractional share was itself dated July 16, 1998 (XIII:A4551). Surrogate Renee Roth's order confirming the report was dated October 26, 1998 (XIII:A4552) — also before the gifts were made.

This is not a matter of opinion or an "issue" on which there can be any doubt. It is a matter of record that the fractional share issue was addressed and resolved before the gifts were made.

4. The So-Called Concealment Of The Contingent Fee Retainer: <u>Assertions With No Factual Support</u>

One of the "children's" key contentions is that Graubard concealed the contingent retainer from them and they purportedly did not discover its existence until the commencement of these proceedings.

The sisters state, without citation to the Record, that "Marta Jo and Suzanne only became aware of the 'partnership' agreement with Graubard in the wake of the present action." Sisters' Br. at 13. That allegation appears under a subheading that reads, "Graubard Conceals the Revised Retainer Agreement from the Lawrence Children," for which once again there is no citation to the Record.

Richard Lawrence goes a step further. He first insinuates that he was unaware of the contingent fee retainer (R. Lawrence Br. at 28-29) and then states that, had he known of the contingent fee retainer, "he may well have assumed an active decision-

making role, or may have explored the issues together with his siblings and/or engaged other counsel" (*id.* at 30).

However, Richard Lawrence admitted under oath that he had a copy of the contingent fee retainer — not just that he knew of the agreement (VII:A1227). He had no choice but to admit he had the agreement; Graubard discovered a copy of the agreement, admitted as Exhibit GP 104 and reproduced at XV:A5790-A5793, that had his fax number on it (VII:A1225, A1227). When asked what he *did* about the contingent fee retainer that was demonstrated to be in his possession, Richard Lawrence — the same party who now says that he might have taken other steps had he only known of the retainer (R. Lawrence Br. at 30) — said that he did nothing about it because "she [his mother] said she would handle it" (VII:A1237).

As for the sisters, Marta Jo testified that she had "rarely" talked with her mother about the litigation during its entire 20-plus years duration and had not done so "in recent memory" because her mother "got angry" with her whenever she did so (VII:A1528-A1529).[7] Marta Jo never said whether she did or did not know of the

[7] Marta Jo's testimony on the point was as follows (VII:A1528-A1529):

QUESTION: Do you ever discuss the litigation with your mother?

ANSWER: Rarely.

QUESTION: Rarely?

ANSWER: Rarely.

QUESTION: When is the last time?

contingent fee retainer. Nor did her sister Suzanne DeChamplain (VII:A1533-A1541). Although it would have been a simple matter for either sister to deny knowing of the retainer, the only people to so "testify" were their counsel.

5. The "$22 Million" In Fees And The "Eve Of Trial" Modification Of The Retainer: Both Premised Upon Indefensible Exaggerations

Respondents represent at least ten different times that Graubard billed Mrs. Lawrence $22 million in time charges between 1983 and January of 2005.[8] Respondents then proceed to argue, *inter alia*, that Graubard "had already received a king's ransom ($22 million) in fees" and that Graubard's prior receipt of that "king's ransom" purportedly reduced its risk going forward. Est. Br. at 85-86.

> ANSWER: Oh, God. Certainly not in recent memory. Maybe last year sometime. I don't bring it up. She doesn't bring it up. She gets angry. She coughs. I don't like to be yelled at. She starts yelling. Rather than her hanging up the phone, I don't ask her anything about the estate. It's not worth it."

[8] Est. Br. at 3 ("That contingency fee would have been over and above the $22 million in time charges Graubard had already received from Alice over 22 years"); *id.* at 7 ("The original time-charge retainer governed the parties' relationship for over 20 years during which Alice paid Graubard $22 million in fees"); *id.* at 13 ("By this time [January of 2005] Alice had paid to Graubard $22 million in time charges since 1983"); *id.* at 64 ("[The original retainer was] after all, what the parties agreed to and what Graubard relied on to charge and collect from the client $22 million in fees for the prior 22 years"); Sisters Br. at 1 ("Graubard seeks a contingency fee of $42 million for five months of "unexceptional" work, from a client who had already paid it nearly $22 million in fees"); *id.* at 6 (referencing Graubard's "receipt by Graubard of nearly $22 million in hourly fees"); *id.* at 8 ("Graubard had been paid approximately $22 million for its work"); R. Lawrence Br. at 1 ("After receiving in excess of $22 million in hourly legal fees over a 22-year period"); *id.* at 10 ("Through the end of 2004, Mrs. Lawrence had paid Graubard over $22 million in legal fees and disbursements"); *id.* at 17 ("By the end of 2004, Mrs. Lawrence had paid over $22 million to Graubard").

The notion that Graubard's past receipt of legal fees meant it had a reduced risk going forward is, as is demonstrated below, illogical. *See* pages 46 to 47, *infra*. By January of 2005, the Lawrences had recovered some $350 million (X:A2729-A2730). Yet, Mrs. Lawrence obviously did not feel her recovery of $350 million meant *she* had no risk going forward.

Leaving that aside, while Graubard billed Mrs. Lawrence exactly $21,950,673.10 through December of 2004, that was for more than twenty different matters, most having nothing to do with the Estate litigation (X:A2723-A2725). Once again, this is not a matter on which there is doubt, or on which reasonable people can differ. Respondents know this to be so and mentioned this in the last appeal (VI:A708).

Respondents could not argue with the proverbial straight face that Graubard should, for example, earn $10,000 less under the contingent fee retainer for every $10,000 Graubard billed for legal work on a real estate closing or an unrelated suit. And respondents could, if they wished, use the smaller figure that Graubard billed for the subject proceeding — which is right in the Special Referee's report (I:A89a) — if they actually wanted to be accurate.

Similarly, it is a matter of record that there was no trial date, much less an imminent trial, when Mrs. Lawrence demanded and Graubard agreed to contingent fee representation. Mrs. Lawrence signed the retainer on January 19, 2005 (VI:A708) and the Special Referee did not set a trial date until February 22, 2005 (X:A2992). Graubard expended more than 4,000 hours of attorney time between the time the

parties signed the new retainer and the trial itself (X:A3215, A3262-A3263). There were, amongst other proceedings, fifteen depositions that occurred between the time of contract and the start of what was to be the first of multiple trials (X:A2996; XV:A5770-A5771).[9]

There is, accordingly, no way that one could reasonably characterize the fee agreement as an "eve-of-trial" modification. Yet, respondents repeatedly do so (Est. Br. at 3, 13; R. Lawrence Br. at 4), presumably because that assertion sounds more pejorative than alleging that the modification was made "only" 4,000 attorney-hours before the first of at least two planned trials.

6. The $44 Million Demand: It Never Occurred

Striving to portray Graubard as attorneys motivated by "plain greed" who would not yield an inch from their contractual entitlement (Est. Br. at 2 n.4), the Estate alleges that this proceeding began because "Graubard sought a fee of approximately $44 million" and "Alice objected" (Est. Br. at 15).

However, that is simply not what happened. The documentary proof demonstrates that Mrs. Lawrence decided to renege long before any bill could have been sent, and that she did so without seeking any compromise.

The Special Referee approved the settlement on May 18, 2005 (IV:A1985a-A1989a), but the closing did not occur until July 25, 2005 (V:A292). Mrs. Lawrence

[9] The Special Referee directed that seven issues would *not* be part of the trial and would instead be deferred to a later date (X:A2996).

began shopping for counsel to sue Graubard *before* the closing occurred. On July 18, 2005, a week before the closing, she 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 — four days after the closing, and before Graubard had sought any fee at all — Mrs. Lawrence's newly retained counsel contacted Graubard to say that it "violated a great deal of ethics" and that Mrs. Lawrence therefore had no obligation to honor the contract (VI:A713).

This is how the dispute began: with the Lawrences using ethical accusations as a tool to evade the contract. That is still what is happening today. Only the accusations themselves have changed.

Mrs. Alice Lawrence, Her Estate, And Her Counsel

The Estate charges that this is a case in which "an elderly widow" was "duped" by a law firm that stands as "an embarrassment to the legal profession." Est. Br. at 3, 72, 92. Interestingly, when Graubard sought to depose the "elderly widow" on the ground, amongst others, that she was eighty years old, Mrs. Lawrence's counsel *then* responded as follows (II:A891a):

> As previously stated, the reference to Mrs. Lawrence's age standing alone is of no significance, and quite frankly insulting.
>
> * * *
>
> Mrs. Lawrence has made clear on more than one occasion her intention to appear for deposition should the Appellate Division not rule in her favor in the matter of the two Appeals already perfected and pending adjudication.

Emphasis added.

In fact, this is a case in which the "elderly widow," her estate, and her counsel — the same persons who write about "integrity" (Est. Br. at 91) — were found by the Special Referee to have done all of the following:

> "Mrs. Lawrence died on February 16, 2008, having successfully resisted Graubard's more than two-year effort to take her deposition … Mrs. Lawrence pursued a deliberate pattern of refusal to comply with disclosure orders and to otherwise fulfill her disclosure obligations [emphasis added]" (I:A213a);
>
> "The 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 a serious breach of her obligations of veracity and candor [emphasis added]" (I:A225a);

"In the course of this proceeding, Mrs. Lawrence demonstrated a consistent pattern of deliberate, reasoned refusal to comply with disclosure orders and to otherwise comply with her disclosure obligations. She also made misrepresentations to her adversaries, to me, to the Surrogate, and to the Appellate Division on material issues [emphasis added]" (I:A233a-A234a).

"[Mrs. Lawrence was] demanding, abusive and willing to fire them [the "professionals" she hired] when she felt that they were not following her directions or otherwise displeased her [emphasis added]" (I:A109a);

the record is "replete with examples of her dominating, micromanaging, vituperative behavior [emphasis added]" (*id.*);

"she frequently got into arguments with and fired various architects, accountants, and other professionals that she had retained" (*id.*);

"The 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 [emphasis added]" (I:A155a);

"Rivas' testimony suggesting Chill preyed on Alice when she was reduced by pain and not herself also is not credible [emphasis added]" (I:A156a).

Those statements were all made by the Special Referee, *not Graubard*, concerning the same party whose Estate now concludes its brief by stating,

> Cases like this give lawyers a bad name.
>
> * * *
>
> The Court should affirm and, in doing so, make clear that we belong to an honorable profession whose members are obliged to act with integrity.

Est. Br. at 91.

The Purportedly "Incredible" Testimony Of Chill And Mallis

Throughout their respective briefs, the Lawrences proclaim with various rhetorical flourishes that the Special Referee deemed the testimony of Daniel Chill and Steven Mallis "incredible," "implausible," etc.

Steven Mallis's testimony spanned approximately 500 pages (V:A64-A569). The Special Referee rejected his testimony on one matter: Mallis's analysis as to the impact of the Special Referee's December 2004 dismissal of the 95 Wall Street Fraud claim. And, while the Special Referee *sua sponte* found that Mallis's analysis was "contrived … after the dispute surfaced" (I:A179a), that same analysis had been set forth in Mallis's February 2005 affidavit (XVII:A6797-A6800). Graubard had not pointed that out precisely because there had, up to that point, been *no claim* that his testimony was "contrived."

Daniel Chill's testimony spanned approximately 400 pages (V:A573-VI:A872). The Special Referee rejected Chill's testimony that he orally advised Mrs. Lawrence to consult independent counsel regarding the 1998 gifts (I:A118a). Ironically, one of the reasons the Special Referee did so was that he deemed it "implausible … that [Chill] instinctively knew … that it was his duty to advise her to consult independent counsel," "a duty not actually required under EC 5-5 or elsewhere in the Code" (I:A118a). However, the Special Referee credited Chill's testimony on many other matters, including that it was Mrs. Lawrence who suggested a contingent fee retainer (I:A188a).

By contrast, Special Referee Levine rejected virtually the entire Wallberg/Kling/Rivas testimony that the Lawrences presented as "not credible" (A154a-A156a).

POINT I

ALL OF THE ESTATE'S CURRENT CLAIMS AS TO GRAUBARD'S "DECEPTIVE" AND "OUTRAGEOUS" BEHAVIOR WERE INVENTED POSTHUMOUSLY BY THE LAWRENCES' COUNSEL.

ANSWERING ESTATE'S BRIEF.

The Estate repeatedly represents, almost always without any citation to the Record, what Alice Lawrence purportedly "thought," "knew," or "believed,"[10] this notwithstanding that Mrs. Lawrence never testified and refused to be deposed as to what she thought, knew, or believed (I:A218a-A222a). Amongst those assertions, the Estate's chief claims are:

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[10] Est. Br. at 8 ("Alice erroneously believed that by entering into the revised retainer, she would reduce her overall legal fees and receive most of the proceeds from any recovery [without citation to the Record]"); Est. Br. at 8 ("Graubard knew that Alice believed she would recover a few million dollars, at most [without citation to the Record]"); Est. Br. at 10 ("Graubard knew, though Alice did not, that it assumed no additional risk by converting to a hybrid contingency arrangement [without citation to the Record]"); Est. Br. at 13 ("In December 2004, Alice felt discouraged about the prospects for her case … shortly after what she understood was an adverse ruling on one of her claims [without citation to the Record]"); Est. Br. at 13-14 ("When drafting the revised retainer, Graubard expected an upside recovery of almost $50 million, while encouraging Alice in her mistaken belief that the maximum recovery would be only 'a few mil'" [citing only the Special Referee's report, which actually reduced Graubard's contractual fee on the very ground that "Graubard would not have anticipated" any recovery beyond $22 million and that any recovery beyond $10 million was "less expected" by Graubard (I:A188a)]); Est. Br. at 64 ("Alice" had the "impression that she could expect a recovery of only "a few mil" [without citation to the Record]); Est. Br. at 68 ("Alice" had the "misconception that she, rather than Graubard, would receive the largest amount in any recovery [without citation to the Record]"); Est. Br. at 72 ("Chill duped Alice into believing that a contingency fee would be a reasonable way to proceed [without citation to the Record]"); Est. Br. at 73 ("Graubard wrongly let Alice believe that without the 95 Wall Street claim, the most she could hope for was 'a few mil' [without citation to the Record]").

(1) Mrs. Lawrence, the same individual who had elicited the so-called $60 million settlement offer (VII:A1214; VIII:A1862) that supposedly "remained on the table" (R. Lawrence Br. at 18), thought the case was worth "a few million dollars, at most," and, indeed, was "duped" into believing that (Est. Br. at 8, 72); and,

(2) Mrs. Lawrence and her accountant were collectively incapable of performing the supposedly "complicated calculation" necessary to compute her individual share of the proceeds (Est. Br. at 69-70) and she was purportedly under the misconception that her net share would exceed Graubard's even after, per her direction and insistence, all of the fees were paid solely from her distributive share.

Even on their face, neither claim makes sense. As to the first (that Mrs. Lawrence "thought" the suit was worth "a few mill, at most"), Graubard had repeatedly told Mrs. Lawrence, in writing, that the claims could potentially be tens of millions of dollars (IX:A2563; X:A2903-A2918, A2926, A2930-A2932; *see also* V:A142-A143). That aside, it was Mrs. Lawrence herself who had personally, without counsel present, conducted the January 2004 negotiations in which she had demanded $90 million for settlement of her claims and the Cohns had countered with a $60 million offer that came with caveats ([Marc Cohn] VIII:A1862), [Richard Lawrence] VII:A1214, A1219-A1221). If, as the respondents now represent, that offer "remained on the table" at the time Mrs. Lawrence signed the new retainer (R.

Lawrence Br. at 18), she would have known that better than Graubard since she, not Graubard, conducted the negotiation.

Even more fundamentally, it would have made no sense for Mrs. Lawrence to pay $1.2 million in additional attorney's fees for the *chance* to eventually recover 60% of a "few mill, at most" some years down the line. Est. Br. at 8. The testimony respondents repeatedly alter recites that Mrs. Lawrence was told she would recover "at least" a few million, and not that she would recover "at most" a few million (V:A487; VI:A802). While the Special Referee had fair basis for his finding that neither party to the contingent fee contract then *expected* a recovery of more than $10 million (I:A188a), it would have been illogical for either party to proceed with such a costly litigation unless that party thought there was *some chance* of a very substantial recovery.

Furthermore, far from deprecating Mrs. Lawrence's prospects, Graubard's contemporaneous notes of that conversation — ignored by respondents — establish that Graubard was then trying to persuade her that the case was still worth pursuing. According to the notes made at that time, Mrs. Lawrence said that she "was through paying legal fees," that "she had had enough," and that "the claim against Epps couldn't be proven" (XVI:A6375). However, "CDC [Chill] persuaded her that we would pick up <u>at least</u> a few million" (XVI:A6375, emphasis added). That version of the events — the version that appears in the contemporaneous notes rather than the

one the respondents belatedly invented — is the only one that explains why Mrs. Lawrence continued with the litigation at all.

As to the respondents' second thesis regarding what Mrs Lawrence supposedly understood or failed to understand (that Mrs. Lawrence purportedly could not figure out that Graubard's 40% share would exceed her individual 35.9378% share), the claim would surely be incredible even if the person with whom Mrs. Lawrence consulted before signing had not been her accountant .

Yet, the threshold point is not that the Estate's core factual pronouncements are, to put it charitably, improbable on their face. The threshold point is that neither claim was alleged in the Lawrences' complaint, in either of Mrs. Lawrence's affidavits, or in any other document that was written prior to Mrs. Lawrence's death on February 18, 2008. They are attorney-created contentions that were first asserted posthumously.

1. Mrs. Lawrence's Own Complaint And Affidavits, Alleging Fundamentally Different Claims Than Now Advanced Posthumously By Counsel

Although the Estate proclaims that Graubard's Daniel Chill "was the only witness to key conversations with Alice" (Estate Br. at 17), there was a second witness: Alice Lawrence herself. Mrs. Lawrence was also the only witness who could definitively say what she did or did not "believe" or "know" at any given time. She

was not deposed for the sole reason that she refused to be deposed. See Graubard's Main Brief at 39-44.

Yet, while Mrs. Lawrence refused to be deposed, she had no qualms at launching allegations of attorney misconduct from afar.

Mrs. Lawrence signed two affidavits detailing her factual claims: one, dated September 8, 2005, in opposition to Graubard's Petition (IV:A1451a-A455a), and another, dated November 22, 2005, in support of her own motion to dismiss (IV:A1982a-A1984a). Her counsel also served a Complaint, presumably based on their conversations with the client, detailing the Lawrences' then extant claims of Graubard misconduct (I:A336a-A357a).

If Mrs. Lawrence had been "duped" into believing that the accounting claims were worth a "few mill, at most," she was perfectly capable of claiming just that in her affidavits or Complaint. Similarly, if she had been unable to perform the supposedly "complicated" calculations as to her individual share of the recovery, she and her counsel could have alleged that as well. Yet, the Court will not find any such claims in those documents.

Nor is the explanation, as the Estate argued in its Appellate Division reply brief, that the Complaint and the affidavits merely advanced general claims that were later "fleshed out" with more specific allegations. Estate App. Div. Reply Br. at 29. Mrs. Lawrence's Complaint and affidavits made very specific factual claims, some of which even found their way into the newspapers and court opinions. However, those

specific allegations made while Mrs. Lawrence still lived were *different* than those alleged at trial and in the Estate's current briefs. Mrs. Lawrence and her counsel then alleged that:

> (1) Graubard "had been in the midst of negotiations with the attorneys for Mr. Cohn's Estate in connection with a possible settlement" (I:A343a [Lawrence Complaint, ¶ 24]) when it entered into the "new fee arrangement" with Mrs. Lawrence (*id.*);
>
> (2) Mrs. Lawrence had purportedly just had surgery "in or around December 2004" and "was in constant pain and receiving pain management services and medication" and was thus "often unable to perform everyday tasks" (I:A343a [Lawrence Complaint]);[11]
>
> (3) Mrs. Lawrence had supposedly not understood what "services [were] to be provided by Graubard" under the new retainer (IV:A1984 [A. Lawrence affidavit]);
>
> (4) Graubard supposedly misrepresented the time that the case would remain in litigation, stating that "the litigation would likely continue over a period of an additional two years" (IV:A1454a [A. Lawrence affidavit]) notwithstanding that Graubard was purportedly then "in the middle of negotiations" to settle the case (*id.*);
>
> (5) Graubard supposedly agreed that the contingent retainer agreement — understand please, this is the same contingent retainer

[11] The surgery, to her knee, actually occurred on September 1, 2004 (XV:A5863).

> agreement that Mrs. Lawrence is now said to have signed only because Graubard "wore her down" (Est. Br. at 80) — "would be revised to reflect that she would pay 40% of the total amount of her distributions from the Estate [emphasis added]" (I:A344a [Complaint]).

Very simply, Mrs. Lawrence never claimed to have been misled as to the worth of the case. That claim, and many others, arose posthumously, only after the Lawrences' first set of accusations was disproved and abandoned.

2. The Estate's Responsive Argument, Lacking Legal Merit

Evidently feeling that it should say something about the fact that its core claims were invented only after Mrs. Lawrence died undeposed, the Estate below charged that Mrs. Lawrence's affidavits were "hearsay" and that Graubard therefore acted "improper[ly]" in referring to them at all. Est. App. Div. Reply Br. at 25. The charge was a fitting microcosm of this entire case, a case in which reference to any fact the Lawrences deem inconvenient is answered with *ad hominem* charges of attorney misconduct.

First, the affidavits are in the Joint Appendix, (a) because Mrs. Lawrence adduced them below, and, (b) because the Estate stipulated to their inclusion in the Joint Appendix (XVII:A7383a).

Second, while a party's own pleadings are of course party admissions, Graubard is not referring to those documents for the truth thereof (and submits there is very little in them that is truthful). Graubard is using them to impeach the Estate's current

assortment of claims (IX:A2602-A2604). *Gonzalez v. Colella*, 55 AD2d 534 [1st Dept 1976] ("It has long been the law in New York that it is always competent to show contradictory statements made by a witness as bearing upon his credibility [citation omitted], and this general rule clearly applies to statements made in pleadings or affidavits").

3. The Central Question, Unanswered By Respondents

Respondents' central thesis is that Graubard "misled" or "duped" Mrs. Lawrence into believing that the case was worth a "few million, at most." Yet, in this case in which Mrs. Lawrence and her counsel were far from reticent in alleging whatever charges of misconduct seemed promising at the time, nothing of that sort was alleged in Mrs. Lawrence's own affidavits or in any of the other documents produced prior to her death.

After collectively submitting nine appellate briefs, the respondents have offered no explanation for that fact save for the argument, apparently now discarded, that it was supposedly "improper" for Graubard to cite Mrs. Lawrence's so-called "hearsay" affidavits, and thus demonstrate the claims were invented posthumously.

POINT II

THE SPECIAL REFEREE HAD SOUND BASIS TO CONCLUDE THAT THERE WAS "EXTENSIVE PROOF" THAT "ALICE WAS FULLY CAPABLE OF UNDERSTANDING THE REVISED RETAINER AGREEMENT" AND THAT THE AGREEMENT WAS NOT PROCEDURALLY UNCONSCIONABLE.

ANSWERING ESTATE'S BRIEF, POINT V.

The Estate proclaims that the contingent fee retainer "is infected with procedural unconscionability" and should therefore be vacated. Est. Br. at 66. Because the Estate's current set of ethical accusations was discussed at length in Point III of Graubard's main brief and before that in the Special Referee's report (at I:A143a to A:158a), we shall be brief.

1. The Purportedly "Complicated" Calculation

The Estate contends that "Alice" may have been unable to perform the so-called "complicated calculation" required to realize that Graubard's share would exceed her individual distribution (Est. Br. at 69-70). Yet, the "complicated calculation" was no more than the following subtraction:

75.9378%	(Mrs. Lawrence's gross share of the distribution)
- 40%	(Because Mrs. Lawrence insisted on paying all the fees)
35.9378%	

Assuming for sake of argument that the "intricacies" of those calculations were too overwhelming for a woman who was then managing approximately $200 million

in marketable securities (XIV:A5155), the man with whom she consulted before signing happened to be her accountant (VIII:A2004-A2006).

2. Gillers's Opinion

The Estate reports that its expert, Stephen Gillers, concluded that "Graubard hid key information from Alice." Est. Br. at 73. However, it fails to reveal that it extracted that opinion only by hiding key information from Gillers.

The Estate had its expert render his opinion as to sufficiency of the information provided to the client (at IX:A2252-A2254) without providing him with any of the many detailed analyses Graubard had sent to the client. When Graubard's trial counsel, Mark Zauderer, thereafter took the Estate's witness through document after document that he had never been given before rendering his opinion (at IX:A2549 to IX:A2567), all Gillers could do was sheepishly admit that Graubard had actually sent the client "[a] lot of detail" concerning the Failure to Sell claim (IX:A2551-A2552), a "tremendous amount of detail" concerning the 95 Wall Street claim (IX:A2552), and so on — until the Special Referee intervened to tell Graubard's counsel, "I certainly have your point" (IX:A2554).

Amongst the many documents that the Estate did not show its expert in this case in which it *now* contends, years after the fact, that Graubard misled the client into thinking that she would recover "a few million dollars, at most" (Est. Br. at 8), is a May 12, 2000 letter in which Graubard wrote Mrs. Lawrence, "we believe a fair

potential recovery in the case could be as much as fifty million dollars" (IX:A2563, emphasis added).

3. Purportedly "Confused," For Months On End

The Estate currently contends that Mrs. Lawrence was "confused" as to the retainer's terms and that Graubard's Daniel Chill used his "Svengali-like" influence to "wear her down" (Est. Br. at 79-81). However, Mrs. Lawrence never claimed to have been "Svengalied" in either of her affidavits or in her Complaint (where she instead said that she "inquired as to the possibility of entering a new fee agreement …" [I:A343a]). Moreover, the Estate's own witness, Barbara Kling, testified that Mrs. Lawrence did not appear to be confused when Kling spoke to her that same day (VIII:A2140).

All of that aside, Mrs. Lawrence signed the retainer on January 19, 2005 (VI:A708). Respondents did not claim, let alone prove, that Mrs. Lawrence made any complaints to Graubard or interposed any questions regarding the retainer from then until July 29, 2005, which is when she had her new counsel convey, four days after the closing, that Graubard had "violated a great deal of ethics" and that the retainer was therefore not binding (VI:A713; XII:A4452-A4453).

Respondents thus asked the Special Referee to accept, (a) that Mrs. Lawrence remained "confused" for months on end by a written retainer that was clear on its face, and, (b) that she suddenly became "unconfused" as soon as the entire recovery

was safely in her possession. That the Special Referee found otherwise was hardly surprising.

4. The "Business Transaction" Argument: Not Even Supported By The Estate's Own "Ethicist"

The Estate argues that the negotiation of the retainer was itself a "business transaction" within the meaning of DR 5-104 and that Graubard was therefore obligated "to obtain written consent from Alice regarding its conflict in entering into the revised retainer" (Est. Br. at 77). Graubard's expert testified to the contrary (VII:A1385-A1386). The Estate's own expert conspicuously failed to disagree with that opinion. For that matter, even Justice Catterson, the one judge who thought that the retainer was unconscionable on its face, rejected that argument in his 2007 dissent, stating:

> Alice and Richard also allege a violation of Code of Professional Responsibility, DR 5-104(A) (22 NYCRR 1200.23), in that Graubard entered into a business transaction with their client, and did not suggest that Alice Lawrence consult independent counsel, and did not require that she consent in writing to the terms of the transaction and inherent conflict therein.
>
> * * *
>
> The Graubard defendants argue that this rule is inapplicable since Alice did not expect Graubard to exercise professional judgment on her behalf. As evidence of same, Graubard points to Alice's averments that Chill asked for a 50% contingency fee, but Alice negotiated the fee down to 40% because she thought 50% was too high a percentage. See Roy

> Simons, *Simon's New York Code of Professional Responsibility Annotated* (2006 ed. at 69) (if clients seldom expect their lawyers to exercise professional judgment to protect them when negotiating initial or amended retainer agreements, then DR 5-104(A) will seldom apply to a modified retainer agreement).
>
> With respect to this violation, the Graubard defendants have a persuasive argument.

Lawrence v. Miller, 48 AD3d 1, 16-17 [1st Dept 2007] (dissent) *affd*, 11 NY3d 588, 901 NE2d 1268 [2008].

The Estate cites two out-of-state decisions as purportedly supporting its view that the "business transaction" rule applies even when the so-called "business transaction" consists of nothing more than the negotiation of the attorney's retainer. However, one of those purportedly supportive decisions, *Gurvey v. Legend Films*, No. 3:09-CV-00942 AJB, 2002 WL 4061773 *11 (SD Cal Sept 14, 2012], was a case in which the agreement in issue called for the attorney to "acquire an ownership interest in the [clients'] company." The other decision, in *In re Hefron*, 771 NE2d 1157, 1160 [Ind 2002], presented a case where, amongst other transgressions, the attorney insisted on renegotiation of the fee agreement and then attempted to collect his fees "[w]ithout any advance notice to the client or the other heirs of the estate" (*id.*).

The Restatement holds that negotiation of the attorney's retainer is not a "business transaction" requiring the attorney to advise the client to obtain separate counsel. Restatement (Third) of Law Governing Lawyers § 126 (2000), Comment ("[t]he requirements of this Section [the "business transaction" rule] do not apply to

ordinary client-lawyer fee agreements providing, for example, for hourly, lump-sum or contingent fees"). There is no exception in the instance in which the retainer is the second, third, or fourth such agreement between the parties.

Such is also the rule in California when, in contrast to the situation in the unreported California case cited by the Estate, the attorney is not simultaneously acquiring part of the client's company. *Chan v. Lund*, 188 Cal App 4th 1159, 1177, 116 Cal Rptr 122, 136-137 [Cal App 2010], *cert. den.*, 131 SCt 3028 [2011].

POINT III

THE CONTINGENT FEE RETAINER WAS NOT SUBSTANTIVELY UNCONSCIONABLE IN LIGHT OF THE RESULT THAT GRAUBARD ACHIEVED, THE LITERALLY THOUSANDS OF HOURS THAT IT TOOK TO ACHIEVE THAT RESULT, AND THE RISKS GRAUBARD ASSUMED IN AGREEING TO REPRESENT THE LAWRENCES ON A CONTINGENCY BASIS.

ANSWERING ESTATE'S BRIEF, POINT VI.

Respondents urge that the contingent fee retainer was substantively unconscionable. However, they do so without rebutting any of Graubard's core contentions (Point IIIA, *infra*) and without acknowledging many of the facts they deem inconvenient (Point IIIB, *infra*.).

More than that, the respondents' argument is, legally, a case of the Emperor's New Clothes. Respondents' assertions that Graubard had "virtually no risk" and that the clients "did not receive fair value" rest upon legally erroneous conceptions of the very terms "risk" and "value." See Point IIIC, *infra*.

Graubard's main brief demonstrated that, (a) contingent fee retainers are fundamentally different precisely because the fee is *a function* of the recovery, and, (b) the client legally assumes the "risk" that the recovery will be unexpectedly large, just as the attorney assumes the risk (amongst others) that there will be no recovery at all. Graubard's Main Br. at 89, 92-95; Restatement (Third) of Law Governing Lawyers § 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").

The Estate responds by proclaiming that "courts routinely hold that a retainer agreement can be deemed unconscionable in hindsight" — for which it cites a grand total of two cases, neither of which held a contingent fee retainer to be unconscionable in hindsight. Est. Br. at 89, citing *Gair v. Peck*, 6 NY2d 97 [1959], *rearg. denied, remittitur amended*, 6 NY2d 983, 161 NE2d 736 [1959] and *King v. Fox*, 7 NY3d 181 [2006].[12]

There is no precedent for the result respondents seek. Nor does the Record support the Estate's various arguments as to why this case should break new ground.

[12] In *Gair*, the only issue was whether the Appellate Division had the power to adopt a rule limiting the percentage share that an attorney may charge in a personal injury action. The case did not involve alleged unconscionability of any individual fee, let alone hindsight evaluation of an individual fee.

In *King*, the issues considered by way of certification from the United States Court of Appeals for the Second Circuit were "whether New York law permits a client to ratify an attorney's fee agreement during a period of continuous representation; whether such ratification is possible if attorney misconduct has occurred; and whether a client can ratify an unconscionable fee agreement" (7 NY3d at 183). The Court in *King* reviewed the standards for unconscionability of a contingent fee retainer, noting that "[i]t is inherently difficult to determine the unconscionability of contingent fee agreements because at the time of agreement, the precise amount of recovery is still unknown" (7 NY3d at 192). But it did not hold that the fee there in issue was unconscionable. Nor was that question before the Court.

A. Respondents Have Failed To Rebut Any Of Graubard's Core Contentions

Although the Lawrences have responded with a new flurry of insults concerning the quality of the legal work that brought them a recovery so large that Mrs. Lawrence decided to breach the retainer agreement immediately upon learning of the settlement ("I'll handle it" [VII:A1229-A1230]), they have failed to dispute any of Graubard's core contentions:

(1) There has never been a New York case in which a contingent fee that was not unconscionable at time of contract was set aside based upon hindsight.

(2) The Lawrence Complaint *admitted* it was Mrs. Lawrence who "inquired as to the possibility of entering into a new fee arrangement" (I:A343a, ¶ 22).

(3) At the time Mrs. Lawrence *asked* to change her fee arrangement, everyone knew that the 2005 trial would not cover all of the accounting claims against the Cohns (X:A2996) and it appeared that "several more years of full blown litigation would be required to reach … final disposition" (I:A184a [Referee's Report]).

(4) The terms of the hybrid contingency retainer — calling for hourly billings up to $1,200,000 (solely in the first year) that would be credited towards a 40% contingent fee (X:A2985-A2986) — were "not unusual"

and were "within what the firms in New York were doing at that time" (VI:A1365 [Keyko]).

(5) Graubard was contributing far more than Mrs. Lawrence even in the first year — the only year in which she would contribute anything. During the same two quarters that her contributions were capped at $600,000, Graubard had contributed $1,147,396.50 in attorney time *beyond* that which it could bill. Graubard Main Br. at 107-109.

(6) Graubard obtained for the Lawrences at least twice what the case was actually worth (I:A185a-A186a).

(7) While no one *expected* in January of 2005 that the case would settle six months later, much less that it would settle for $111 million, Graubard told Mrs. Lawrence in writing that the accounting claims that still remained in January of 2005 were *potentially* worth tens of millions of dollars. Graubard Main Br. at 19-20, citing X:A2903-A2918; *see also* X:A2926, A2930-A2932.

Indeed, Graubard specifically told her, in writing in May of 2000, that "we believe a fair potential recovery in the case could be as much as fifty million dollars" (IX:A2563).

(8) Mrs. Lawrence understood the *potential* for a high recovery, as is clear from the fact that she *personally* made a settlement demand of $90 million during the January 2004 discussions from which Graubard was excluded (VIII:A1862).

Assuming, arguendo, that there is some case "out there" in which the equities call for the setting aside of a contingent fee that was reasonable at time of contract, this is not that case.

B. Respondents' Argument Is Premised Upon Disregard Of Undisputed, If Inconvenient, Facts.

As below, respondents argue that the contingent fee was unconscionable for "four and a half months" of purportedly "ordinary" work. Est. Br. at 82-83. As below, the argument is premised upon outright disregard of the many uncontroverted facts that respondents deem inconvenient.

It is, for example, uncontroverted that even *with* the case settling much earlier than expected, Graubard, a firm of only twenty-one active attorneys (VII:A1503-A1504), devoted 4,683.55 post-retainer hours to the Lawrences' cause (X:A3215, A3262-A3263). That is the equivalent of a single attorney working 40 hours a week, every week, for more than two years on nothing other than that one case. However, Graubard had to compress that work into a much shorter time span, in the process involving five different attorneys, more than 20% of the firm (X:A3262-A3263).

It is also undisputable that as of the time of contract it appeared to Graubard, Mrs. Lawrence, and the Special Referee himself that "several more years of full-blown litigation would be required to reach … final disposition" (I:A184a [Special Referee's Report]), in which case the 4,683.55 hours which Graubard devoted to the Lawrences' cause in the first half of 2005 would have been merely the beginning of Graubard's

work under the new retainer. Graubard was, in other words, looking at a litigation that could monopolize the time of a substantial portion of the firm for years on end.

However, none of this fits into the respondents' world view. They therefore ignore the number of hours Graubard actually spent and would have had to spend but for the settlement, instead characterizing the new retainer as an "eve-of-trial" revision. Est. Br. at 3, 13; R. Lawrence at 4.

It is, in addition, uncontroverted not merely that Graubard settled the case for $111 million, but also that such was "at least double the value of the remaining accounting claims" even with the unanticipated emergence of the Epps documents (I:A184a [Special Referee's Report, crediting Mallis's testimony to that effect]). Had Graubard settled the case at less than full value, the respondents surely would have urged that as grounds for reduction of the fee. Since, however, the fact that Graubard settled the case for at least twice what it was worth is not one that fits well in the portrait respondents paint, they ignore that "detail" as well.

C. Respondents' Contentions Regarding "Value" And "Risk" Rest Upon Misconceptions Of Fact And Law.

1. Respondents' "Virtually No Risk" Fallacy

Respondents advance two principal arguments as to why Graubard allegedly had "Virtually No Risk" in committing to a litigation that required it to devote 178

hours *per week* to the Lawrences' cause.[13] They argue, first, that the fact that the case settled so high *after* Graubard's discovery and exploitation of the Epps documents proves that the claims had "high value" and there was little or no risk of "non-recovery" (Est. Br. at 83-84). Second, they assert that Graubard "could always recover any shortfall … from … Richard and Marta Jo with whom Graubard had existing unmodified hourly-rate retainers" (*id.* at 86).

The second argument should not detain the Court for long. As has already been demonstrated, the 1983 retainer agreements with the children had long ago been forgotten and abandoned (VI:A809; XVII:A7181). *See* pages 8 to 10, above. Mrs. Lawrence had long ago made clear that she alone would pay the attorneys' fees and Graubard never billed any of the children in its 22-year history of representing the Lawrence family (V:A660-A661). Respondents' current claims that Graubard could rely upon retainer agreements that had lain dormant for 22 years speaks for itself, as does their further representation that the same "children" who had paid literally nothing during 22 years of representation would gladly have honored those retainers and made up "any shortfall."

As for respondents' central thesis that the settlement itself demonstrated that the claims had intrinsically" "high value" and that Graubard therefore had little or no risk of non-recovery, the settlement proved only that the claims had "high value" *after*

[13] Graubard devoted 4,638 hours to the case during the first half of 2005 (X:A3215, A3262-A3263), which averages out to 178 hours a week.

receipt of the Epps documents. Indeed, the Special Referee's view at time of settlement — that is, *after* the production of the Epps documents — was that the case was even then "in the main uncertain of outcome" (IV:A1989a).

Assuming for sake of argument that the underlying claims intrinsically had "high value" even without the Epps documents, Graubard's main brief demonstrated that the risk of non-recovery is merely one of many risks that comes with a contingent fee retainer. "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" and "[t]he 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." Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 Wash ULQ 739, 776 [2002]; see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-38.

The Estate stubbornly insists that the risk of non-recovery is all that matters and that an attorney who undertakes contingent fee representation bears "Virtually No Risk" if the underlying claims have "high value." Yet, the only authority it cites for that view is a 1989 article by a single commentator who subsequently changed his opinion. Est. Br. at 84. *See* Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman*, 82 Wash ULQ 477, 496 [2004] ("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").

The fallacy inherent in the respondents' simplistic analysis is perfectly illustrated by the facts at bar. Assuming for sake of argument that the case always had an intrinsic value of $40 million, $80 million, or whatever number the Estate would prefer to use, Graubard could have been fired at any time by a client who had fired her two prior law firms (VII:A1153-A1154, A1186-A1187).

Alternatively, Mrs. Lawrence could have lost patience and abandoned the case at any time, especially since she had *already* decreed, as per Graubard's contemporaneous notes, that "she had had enough" and "was through paying legal fees" (XVI:A6375).

She might have instead settled for the proverbial song since the Cohns were, after all, "family" and her principal antagonist, Seymour Cohn, had just died (XI:A3644).

Or the case that had already gone for 22 years, with each side appealing virtually every adverse ruling, could have instead gone another four or five years or more … with Graubard contributing an average of 178 hours a week for years on end (X:A3215, A3262-A3263).

It is only in retrospect, with full knowledge of what later occurred, that one can say that Graubard had "virtually no risk."

2. Respondents' "Value of Services" Fallacy

Graubard's main brief demonstrates that one factor in assessing whether an attorney's fee is unconscionable is "the value of the attorney's services in proportion to the fees charged" (*King*, 7 NY3d at 192), and that the value of the services in a contingent fee case is typically measured by the result: the client's recovery. *Matter of Potts*, 213 AD 59, 62 [4th Dept 1925], *aff'd* 241 NY 693 [1925]; I Conte, *Attorney Fee Awards*, § 2:5, p. 68 [3d Ed. 1994-2004]; Daniel F. Sullivan, *Reasonableness of Contingent Fee in Personal Injury Action*, 46 Am. Jur. Proof of Facts 2d 1, § 5.

This Court made the latter point earlier in this very case when it stated that "[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" and that courts should not become "too preoccupied with the ratio of fees to hours" in determining whether an attorney's contingent fee is unconscionable. *Lawrence v. Miller*, 11 NY3d 588, 596 n.4 [2008].

Yet, the Estate's argument is that the fee was disproportional to the value of Graubard's services for the single reason that Graubard's services were purportedly "not worth the 'astounding rate' of $11,000 per hour." Est. Br. at 87.

The value of an attorney's services in a contingent fee case is, first and foremost, a function of the recovery in the case. Limits on the fee are imposed, first and foremost, by limitations on the percentage share, whether by court rule or court decision. Were the rule otherwise, each successful prosecution of a contingent fee

case would be the prelude to further litigation, at least in those cases in which the client was "prejudiced" by a greater than anticipated recovery and was willing to use ethical accusations as a tool to reduce or wholly evade the contractually agreed fee.

3. Respondents' "$22 Million" Argument

Amongst the more curious of respondents' arguments is their insistence that Graubard's prior receipt of "$22 million in time charges" provided it with "another safety net" and distinguishes this from "a firm taking a contingency case from the outset." Est. Br. at 85-86.

First, even were one to ignore that Graubard could not have ethically charged a contingency fee for its representation with respect to the first portion of the litigation, the Lawrences would not have wanted Graubard to do so. Put differently, if we moved the calendar back to 1983 and Graubard gave up its "$22 million in time charges" in exchange for a percentage of the entire recovery (approximately $461 million), that is an exchange that would not favor the Lawrences.

Second, the entire notion that the "$22 million in time charges" earned over the last 22 years reduced Graubard's risk going forward is falacious. Graubard had performed legal services and been paid for those services. Whether Graubard earned $22 million or $220 million, the new retainer would still require it to provide literally thousands of hours per quarter for which it could not bill, a burden that would not be lessened by virtue of money received back in 1986 or 2000, much of which went to

partners who had long since left the firm. Respondents' claim to the contrary is akin to arguing that Ford had no risk in producing the Edsel because it had done very well selling other cars in the preceding half century.

Finally, Graubard did not bill the Lawrence family for "$22 million in time charges" for its work on the subject case. It billed Alice Lawrence $21,950,673.10 for its work on *twenty different matters* (X:A2723-A2725), all of which serves only to underscore the illogic of the respondents' contention that every dollar of work for which Graubard had earlier been paid should translate to a dollar of credit going forward.

Ultimately, there is no denying Graubard would do very well under its contingent fee retainer. However, the clients also did very well in recovering far more, even after deduction of the agreed fees, than the true value of the case (I:A184a-A185a). That the clients would have done even better had they stayed the course instead of insisting that Graubard assume more of the risk does not make the fee unconscionable.

POINT IV

ASSUMING, *ARGUENDO*, THAT THE UNEXPECTED SIZE OF THE RECOVERY RENDERED THE CONTINGENT FEE UNCONSCIONABLE, THE ONLY LEGALLY APPROPRIATE REMEDY WOULD BE TO REDUCE THE FEE TO A NOT UNCONSCIONABLE SUM. RESPONDENTS' CLAIMS TO THE CONTRARY ARE UNSUPPORTED BY A SINGLE DECISION, COMMENTARY OR EVEN RESPONDENTS' OWN EXPERT WITNESS, AND ARE ALSO PATENTLY ILLOGICAL.

ANSWERING ESTATE'S BRIEF, POINT IV.

As the Estate would have it, "settled New York law" holds that an unconscionable attorney's fee is reduced to a not unconscionable sum *only* if there was no prior retainer agreement, and the prior retainer instead governs if there was one. Est. Br. at 57. Such "rule," the Estate says, also "has deep and widespread support in the law of sister states" (*id.* at 60), for which the Estate cites four cases, two of which are unreported (*id.* at 60-61).

Yet, if the Estate's "rule" were "settled New York law" and had "deep and widespread support in the law of sister states," why, then, has no court or commentator ever recited the "rule" as it is stated in the respondents' briefs, i.e., that the fee is reduced to a not unconscionable sum only if there was no prior retainer between the parties? And why was respondents' own expert unfamiliar with the so-called rule (IX:A2277-A2278)? The answer is, of course, that the "rule" is one of respondents' creation.

As demonstrated below, respondents' "rule" is unsupported by any precedent here or elsewhere, is illogical and, apart from all else, is patently unfair.

A. Respondents' Prior-Retainer-Governs "Rule" Is A Cobbled-For-The-Case Construct Unsupported By Any Precedent, Here Or Elsewhere.

The rule nationally, under section 34 of the Restatement (Third) of Law Governing Lawyers, is that "a lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law." Comment (a) then specifies that a fee "will not be approved to the extent that it violates this Section even though the parties had agreed to the fee [emphasis added]." There is no asterick, no exception, that calls for reinstatement of the prior retainer where such an animal exists.

Similarly, except for the two cases discussed and distinguished in Graubard's main brief,[14] the rule in New York has always been that an unconscionable fee is reduced to whatever sum is not unconscionable. *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

[14] *Matter of Smith (Raymond)*, 214 AD 622, 625 [1st Dept 1925] (where the initial contract had already been fully performed and the new agreement was "without consideration" and was thus never binding in the first place); *Naiman v. New York Univ. Hosp.*, 351 F Supp2d 257, 261-262 [SDNY 2005] (where the modification was not promptly provided to the client in writing and was therefore, as in *Smith*, not valid in the first place).

between the parties"); *Spiegel v. Goldfarb*, 66 AD3d 873 [2d Dept 2009]; *Belzer v. Bollea*, 150 Misc 2d 925, 927-929 [Sup Ct 1990].

Respondents cobble their composite rule — that one looks to the prior retainer where there was one and reduces for unconscionability only if there was not — by confusing two very different situations: the case in which a contract or a modification of a contract is deemed unconscionable, and the very different case in which the contract was, for whatever reason, not a valid contract in the first place. This is particularly evident from the Sisters' brief, which asks the Court not only to find the contract unconscionable but also to deem it "void *ab initio*." Sisters' Br. at 2, 15.

In the latter situation in which a contract or a modification of a contract is deemed unenforceable on the ground that it was never valid in the first place, it is impossible or at least inadvisable for the courts to write the terms of the contract that the parties themselves failed to write. So, where the parties had a valid contract and a modification of the contract was void at the outset, the contract still controls. *See, e.g.*, *Marcus Bros. Textiles, Inc. v. Avondale Mills, Inc.*, 78 AD2d 800, 800 [1st Dept 1980] (where, per the terms of the original contract, "the subsequent unexecuted sales memoranda" had "no legal effect").

Close analysis of respondents' supposedly supportive "attorney's fees" cases will show that those were cases where the modifications of the retainer were never effective in the first place, not cases in which a legally effective retainer was deemed

unconscionable.[15] Yet, such cannot alter that the rule is otherwise — and should be otherwise — where, as here, a valid contract is claimed to be unconscionable.

Respondents' own analogy to the law concerning wills nicely demonstrates the distinction. As respondents note, where an alteration of a will's terms is legally ineffective by reason of the testator's failure to comply with the statutory formalities in effecting the alteration, the alteration is without legal effect and the original will governs. *In re Tremain's Will*, 282 NY 485, 491 [1940]. Then again, this is the only sensible remedy in such an instance since it was the testator's right, and not that of the courts, to dispose of the testator's property.

But what if the will satisfied all of the statutory formalities, and was therefore not a nullity, but was legally improper *in substance* by reason of the testator's failure to

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[15] Such was the case in *Connors v. Wildstein*, 271 AD2d 633, 634 [2d Dept 2000], where the attorney's failure to file the revised retainer, as was required by 22 NYCRR 691.20(e), rendered it void at the outset.

The same was true in *Stroud v. Tunzi*, 160 Cal.App. 4th 377, 381, 72 Cal.Rptr. 756, 759 [Cal. App. 2008], where the purported modification of the fee agreement was invalid at the outset because, amongst other reasons, it was not signed by both parties, as was required by California statute.

Such was also the case in *Boyle v. Waters*, 206 Mich. 515, 521-522, 173 NW 519, 522-523 [1919], where the problem was that the person who agreed to the modification of the contract had no authorization to do so.

Such was also true in *Fischoff v. Hamilton*, 2012-Ohio-4785 [Ohio Ct App Oct. 17, 2012] (not citable as authority under Ohio's rules), where the trial court's ruling, affirmed on appeal, was that the modification "was invalid for lack of consideration," and also that the client's "failure to fulfill the terms of the amended agreement rendered it a nullity."

The sole exception amongst the "fee" cases cited by respondents is *Christian v. Gordon*, 43 U.I. 179 [Terr. V.I. June 20, 2001], where an attorney who had twice before found to have overcharged clients for excessive fees (at *4) convinced the client (not the other way around) to sign a contingent fee retainer for a legal matter that "required a mere 37 hours of his time" (*id.*).

provide his or her spouse with the elective share dictated by statute, EPTL § 5-1.1? Does one then "throw out" the properly made will and resurrect a prior will?

The answer is that the "improper" will governs but is adjusted to comply with the statute, which is done by ratably reducing all of the other legatees' shares. *In re Rosenzweig's Will*, 19 NY2d 92, 96-97 [1966]; 38 N.Y. Jur.2d Decedents' Estates § 179 ("all beneficiaries under a will must contribute ratably to the elective share of a surviving spouse"). Indeed, no one would seriously entertain the alternative remedy of instead resorting to an earlier will, perhaps five or ten years further removed, and thus thwarting both the testator's intent and the legatees' expectations.

Here, even if the Special Referee's factual findings were ignored and all of the respondents' various factual claims were credited, this would still not be a case in which the so-called modification of the retainer failed to satisfy statutory prerequisites and was therefore a nullity. It is, instead, a case in which a properly effected contract calls for fees respondents deem "unconscionable." Assuming for sake of argument that the contingent fee *was* unconscionable, there is simply no legal authority for reducing the fee *beyond* whatever reduction would be necessary to render the fee conscionable.

B. Respondents' "Rule" Is Utterly Illogical.

Graubard's main brief notes that respondents' rule would be illogical in its effects. For one thing, the attorney's penalty for having a contingent fee that ended

up being, for instance, $10,000 too high could be many times that $10,000 differential. And that would be a penalty imposed retroactively since the attorney surely could not know at the time of contract what the recovery (or contingent fee) would later be.

Apart from that, an attorney working for a contingent fee could, under respondents' "rule," make more money by obtaining a *lesser* recovery. Here, for example, had the case settled for $20 million (yielding a contingent fee of approximately $8 million), Graubard would have done much better than it in fact did per the Appellate Division's ruling.

Respondents' primary answer to this is that they will not consider "imaginary scenarios conjured by Graubard." Est. Br. at 65. Beyond that, respondents argue it is "neither appropriate nor necessary to devise a complex, arbitrary and discretionary formula to calculate Graubard's fee" (*id.* at 58) and "[o]ne major virtue of reverting to the original retainer is the predictability of the outcome and avoidance of standardless results" (*id.* at 63).

Neither argument withstands even cursory scrutiny.

Regarding the "complex, arbitrary, and discretionary formula" that respondents say they would like to avoid, the Court would inevitably have to apply some formula or other means to determine *whether* the contingent fee is unconscionable. The very assessment of *whether* the fee is unconscionable should also lead to the determination of what fee would *not* be unconscionable.

Regarding respondents' sudden preference for "predictability," the result is predictable when a clear-on-its-face contract is construed per its plain terms. *Moran v. Erk*, 11 NY3d 452, 458 [2008]. This is the key point made in the amicus brief submitted by the New York State Trial Lawyers Association.

C. Respondents' "Rule" Is Unfair.

Seeking to justify a windfall result that by definition went beyond reduction of the fee to a conscionable sum, respondents pronounce that "[a]wards based on attorney time charges are widely regarded as fair." Est. Br. at 64.

Yet, contingent fees are also widely regarded as fair. *Gair*, 6 NY2d at 103; *Stanton v. Embrey*, 93 US 548, 557, 23 L Ed 983 [1876].

It is, however, unfair if a client who "insisted on abandoning the prior hourly rate fee arrangement" when the outcome of the case was in doubt (I:A188a [Special Referee's report]) is permitted to retroactively rewrite the contract once the case is over.

POINT V

NO BASIS EXISTS IN LAW OR FACT FOR THE "CHILDREN'S" MOST CURRENT CHARGES OF ATTORNEY MISCONDUCT.

ANSWERING THE "CHILDREN'S" BRIEFS

It would be difficult to identify any prior case in which clients who (i) paid so little for their legal representation (literally nothing) and (ii) received so much (more than $100 million per "child" over the course of the case), complained so bitterly about their lawyers. It also would be difficult to find a case in which the clients made such complaints with so little regard for the facts or for their own prior factual representations.

In the prior appeal, Richard Lawrence proclaimed it was "undisputed that it was Alice, and not Richard, who hired Graubard" (XVII:A7181). The only claim Richard made with respect to any breach of Graubard's duties to him was that the very acceptance of a contingent fee agreement — any contingent fee agreement — supposedly violated DR 5-103 in that it allegedly gave Graubard "'a proprietary interest in the cause of action or subject matter of litigation …'" (XVII:A7198). There was no claim that Richard was unaware of the contingent fee agreement, nor that it was in some sense harmful to him, nor that the "heirs" clause or any other clause was violative of his rights or interests (XVII:A7166-A7216). The "sisters," meanwhile, took no position at all.

Now, after having had some years to reflect on the matter, Richard and his sisters — or more accurately their counsel — have decided that the supposedly secret retainer did them grievous injury, as did the supposedly secret gifts.

Quite simply, there is no proof that any of the children were unaware of the contingent fee retainer. None of the children so testified. Nor did any witness say that he or she *heard* one or more of the children say that they were unaware of the retainer. The only "witnesses" who said that the children were unaware of the "secret" retainer were their counsel, and they waited until after the hearing was over and the proof was closed to do so. *See* pages 12 to 14, above.

Beyond that, some of the claims now asserted in the children's briefs were not preserved even in their post-trial briefs, let alone in any pleading or other document that Graubard might have read prior to the closure of proof. In particular, Richard Lawrence's claim that Graubard mishandled the negotiations (R. Lawrence Br. at 18-19) — which is about the last argument one would ever expect in this case in which all parties had previously agreed that the settlement was more than anyone expected and far more than the case was worth (I:A184a-A186a) — first surfaced before the Surrogate on the motion to confirm the Referee's Report. That argument is advanced without any mention that the same counsel who now criticizes the settlement participated at the trial of the underlying action (V:A284-A285) and *signed* the settlement agreement (X:A3161, A3166).

However, what makes the children's appellate arguments so mystifying is not that they are mostly new and entirely unpleaded (although that is the case), nor that they are premised upon invented "facts" (although that is also true), nor even that they are inconsistent with allegations Richard made in the first appeal (although they are). The key point is that, even if considered within the context of the children's new "facts," their arguments do not make the slightest sense.

First, all three children knew very well that it was their mother who ultimately made every decision relating to the case, that she had done so for 22 years, and that Graubard would do what she directed it to do, from pruning claims to settling the case. As Richard Lawrence put it, "My mother drove the bus" and he and his sisters were "the kids in the back of the bus" (VII:A1212).

Second, far from being drafted to disadvantage the children, the new retainer was framed so that the three children would never have to pay a penny in attorney's fees.

The case could have settled the next month or never. Graubard could have lost money or made money. Mrs. Lawrence might have had to pay $1.2 million in fees or $100 million in fees, all depending on the amount of the recovery. But there were no circumstances in which the children would pay any fees at all … because that was the way their mother wanted it. Yet, the children purport to be horribly wronged.

In the pages below, Graubard demonstrates that, (a) the children lacked standing and should not have been permitted to intervene, particularly without

pleadings, and, (b) on the merits, the children's current arguments have no basis in fact, law, or logic.

A. The Children Should Not Have Been Permitted To Intervene And Assert New Claims, Specific To Them, Without So Much As A Pleading.

Although the point is ultimately inconsequential given that the children's arguments are so plainly lacking in merit (see Point IVB, *infra*), they should not have been allowed to intervene in the first place, especially in the absence of pleadings.

First, a beneficiary or legatee has no standing to bring suit apart from the estate itself. *Jackson v. Kessner*, 206 AD2d 123, 127 [1st Dept 1994], *lv. dsmd.*, 85 NY2d 967 [1995]; *Joint Properties Owners, Inc. v. Deri*, 113 AD2d 691, 695 [1st Dept 1986].

To be sure, this would not have precluded the Special Referee from allowing a child (or all of them) to participate as an *amicus*. However, that is plainly not what occurred or is now occurring. The children are not merely adding their agreement to the series of positions staked out by the Estate. They are making claims in their own right as well.

Second, even supposing that Civil Practice Law and Rules 1013 here permitted intervention "in the discretion of the court" absent "prejudice" to "the substantial rights of any party," Graubard was surely entitled to know the children's claims *before* commencement of trial and the children should have therefore been required to serve and file pleadings. *Farfan v. Rivera*, 33 AD3d 755 [2d Dept 2006] ("Denial of the

appellant's motion, among other things, for leave to intervene was justified on the ground that it was not accompanied by a proposed pleading"); *Zehnder v. State*, 266 AD2d 224 [2d Dept 1999] ("Supreme Court was correct in denying the motion of Harold Rosenbaum for leave to intervene in the absence of a proposed pleading").

Particularly in a matter of this magnitude, and particularly where the children were essentially seeking punitive sanctions, it was wrong to have "Proof First, Pleadings Later."

B. The Children's Current Claims Of Ethical Misconduct Have No Basis In Fact Or Law.

Stripped of the *ad hominem* rhetoric, the children charge Graubard with three purportedly heinous acts:

> (1) that Graubard allegedly acted improperly in failing to tell them about "secret" gifts their mother made in 1998 (R. Lawrence Br. at 31-42; Sisters' Br. at 17-20);
>
> (2) that Graubard purportedly acted improperly in acceding to Mrs. Lawrence's request for a contingent fee retainer and/or in failing to apprise them of the "secret" retainer (R. Lawrence Br. at 28-31, Sisters' Br. at 20-24); and,
>
> (3) that Graubard supposedly acted improperly in inserting the "heirs" clause (R. Lawrence Br. at 25-28; Sisters' Br. at 20-22), a provision that the children now say was harmful to them after saying the very opposite in the trial court (XVII:A7102).

The claims lack merit.

1. Graubard's Supposedly Improper Failure To Advise The Children Of The 1998 Gifts

The children argue that three attorneys received gifts from Mrs. Lawrence "even as" the fractional share issue (that is, the allocation between them and their mother) was being resolved. Sisters' Br. at 3-4; *see also* R. Lawrence Br. at 7. They further argue that they had an inherent conflict of interest with their mother (who they nonetheless allowed to make all decisions relating to the Estate case) and that Graubard "therefore" violated DR 5-101 in failing to tell them about their mother's 1998 gifts.

DR 5-101 applied where the lawyer had an interest adverse to the client and it permitted the lawyer to continue the representation only "after full disclosure of the implications of the lawyer's interest."

First, as already has been shown, the fractional share issue was fully resolved *before* Mrs. Lawrence made the gifts. *See* pages 10 to 12, above. This is not a matter of opinion or dispute. The order approving the division of the estate (XIII:A4552-A4555) was entered before any gift was made (I:A117a). Graubard could not disclose events that had yet to occur.

Second, while the children's *counsel* contend, (a) that the children did not know of the "secret" gifts, and, (b) that they might have chosen different attorneys if they did know, the Record does not support either claim.

The Special Referee here found that "[t]he evidence does not support any shroud of secrecy" (I:A127a n. 11). Nor was there any evidence that Richard Lawrence or Suzanne DeChamplain *did not* know about the gifts. The one child who said that she was unaware of the gifts until after the settlement, Marta Jo Lawrence (VII:A1530), also testified that she never discussed the gifts with her mother because, "It wasn't my position to do so. She gave money to whom she gave money to. It's her money" (VII:A1530).

Third, even where there *really is* a conflict of interest, the attorney's failure to disclose it is non-actionable unless that nondisclosure caused damage. *Coleman v. Fox Horan & Camerini, LLP*, 274 AD2d 308, 309 [1st Dept 2000], *lv. den.*, 95 NY2d 767 [2000] ("[a]ssuming that defendant attorneys breached their duty to disclose a conflict of interest … plaintiff's claims … were nonetheless properly dismissed since plaintiff failed sufficiently to set forth the manner in which the alleged breach caused him to sustain damages"); *Unger v. Paul Weiss Rifkind Wharton & Garrison*, 265 AD2d 156, 156-157 [1st Dept 1999].

Here, there was no *alleged* damage, much less actual damage.

Finally, there was no conflict of interest. Nor can the children's misquoting of David Keyko's testimony make it otherwise. Sisters' Br. at 19

As Special Referee Levine correctly observed, the interests of the children and their mother were "completely aligned" with only one exception (I:A130a). They all wanted to recover as much money as possible (I:A130a). The one exception was the "fractional share" issue relating to the manner in which they would "divide the spoils" (I:A130a). Graubard specifically and repeatedly apprised the children — in successive writings — that it could not and did not represent them on that issue (XV:A6056, A6067, A6068; XVI:A6343).

In these circumstances, settled law dictates the conclusion that Graubard had no conflict of interest in representing both the mother and the children. *Matter of Goldstick*, 177 AD2d 225, 234 [1st Dept 1992] *op mod on rearg*, 183 AD2d 684 [1st Dept 1992] ("the interests of each objectant and her children, during the administration of the estate, were identical in pursuing a maximum funding of the testamentary trusts; no conflict of interest between parent and child in this fundamental objective can be discerned").

Nor do the children cite any decision by any court that remotely suggests that an estate challenge requires separate counsel for each objectant.

Nor did plaintiff's expert, David Keyko, in any way state or suggest that there was any conflict of interest. What Keyko actually said at the cited pages was that the gift recipients would have had a duty to disclose the gifts <u>if it were first assumed that there was a conflict of interest</u> (VII:A1434-A1435).

2. Graubard's Allegedly Improper Conduct In Entering Into A Supposedly "Secret" Retainer That Guaranteed That The Children Would Never Pay A Penny In Legal Fees

Having claimed nothing of the kind in the motion-to-dismiss appeal, the children now charge that Graubard violated DR 5-104 and/or DR 5-105 and/or DR 1-102(a)(7) in entering into a "secret" contingent fee contract that, as it happened, guaranteed the children would not pay a single penny of legal fees. R. Lawrence Br. at 28-31; Sisters' Br. at 20-24.

The children's arguments are devoid of merit.

DR 5-104 governed "business transactions" between attorneys and clients and specified certain steps (*e.g.*, advising the client "to seek the advice of independent counsel") regarding "the lawyer's inherent conflict of interest."

DR 5-105 related to the situation in which a lawyer's representation of one client would be "or is likely to be adversely affected by his representation of another client." It required that the lawyer fully disclose the conflict and obtain the clients' consent to the conflicted representation.

DR 1-102(a)(7) provided that "a lawyer or law firm … shall not … [e]ngage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

Graubard did not violate any of these provisions.

First, the only "witness" who said that the children were unaware of the retainer was their counsel, not anyone who testified under oath. Richard expressly admitted he *did* know of the retainer.

When deposed, Richard *initially* claimed that he did not "specifically" learn of the new "fee arrangement" until after the closing (VII:A1222). However, after being confronted with documentary proof that his mother had faxed him the complete agreement weeks prior to the closing (VII:A1226-A1227), Lawrence "guess[ed]" that he knew of the agreement after all (VII:A1227).

Second, none of the cited disciplinary rules even remotely applied to the situation. DR-5-104, which applied to "business transactions" between client and attorney, plainly meant business transactions other than the signing of the retainer for the representation in issue. Roy Simon, *New York Rules of Professional Conduct Annotated* (2012 ed.), p. 325. Were the rule otherwise, independent counsel would be required whenever a client retained an attorney. That aside, the conflict of interest referenced in the Rule was the "inherent" conflict between lawyer and client regarding the "business transaction," not any conflict between or amongst clients.

DR 5-105, concerning conflicts amongst clients, was inapt because, as has already been shown, there was no such conflict here except with respect to the fractional share issue on which Graubard had repeatedly made clear that it could not and did not represent the children (XV:A6065, A6067, A6068, A6070). *See* pages 10 to 12, above.

Finally, Graubard's conduct in acceding to the client's request for a contingent fee did not, by any stretch of the imagination, constitute conduct that "adversely reflect[ed] on [its] fitness" to practice law within the meaning of DR 1-102(a)(7).

3. Graubard's Supposedly Improper Insertion Of The "Heirs" Clause That Mrs. Lawrence Requested

The last paragraph of the contingent fee retainer states: "The above shall be binding upon our respective heirs, executors, successors and assigns" (X:A2982-A2983).

Elaine Reich testified that, while Graubard did the drafting, Mrs. Lawrence specifically asked that the retainer include a provision to the effect that it would be binding upon her Estate if she should die (VI:A982-A983). There was no testimony or other proof to the contrary. Mrs. Lawrence did not say differently in her complaint or in either of her affidavits (I:A336a-A357a; IV:A1451a, A1455a, A1982a-A1984a). Nor did any of her family, confidants, or hirees claim to have *heard* her say differently.

Up until the trial itself, the children never contended that the provision was harmful to them. The Lawrences' own expert, Stephen Gillers, testified that he was not aware of "any claim in this litigation by the children with respect to any disadvantage that they received in this situation" (IX:A2413). That notwithstanding, the Special Referee ruled that Graubard acted improperly in "inserting" the clause and such "act of disloyalty" to the children "could provide the basis for charging violations of DR 5-101, DR 1-102(a)(7) and EC 5-1" (A132a-A133a). This was the only claim of Graubard misconduct that the Special Referee credited.

However, the Special Referee also ruled that the "courts treat the forfeiture of legal fees for an attorney's violation of the Disciplinary Rules as akin to the attorney's

discharge for cause" and it was "self-evident" that "Alice could not have discharged Graubard for cause arising from unethical conduct committed against the Lawrence children, rather than against her" (I:A134a-A135a).

Graubard submits the Referee was obviously correct in ruling that Graubard's supposedly "unethical" conduct towards the children could not have provided their mother (the only Lawrence signatory to the contingent fee retainer) with grounds to breach the contract. The very notion that a client should be entitled to wholly avoid paying a fee on the ground that her attorneys did precisely as she asked is unprecedented. That said, the Referee erred in concluding that insertion of the clause constituted an act of disloyalty.

First, as the Referee found (I:A132a-A133a), the clause is "superfluous." With or without the provision, Mrs. Lawrence's estate would be burdened by her debts. EPTL § 11-3.1. With or without the clause, Mrs. Lawrence's "heirs" (or even Mrs. Lawrence herself) could fire Graubard at any time. Indeed, the Sisters below *admitted* that "as a matter of law the provision was superfluous" (XVII:A7102).

Second, while the Referee essentially found Graubard guilty of a thought crime — the so-called "act of disloyalty" was not the inclusion of a "superfluous" clause but instead that Graubard's *motive* in including the clause was supposedly to secure its own financial interests at the expense of the Lawrence children's interests (I:A132a) — the testimony and the circumstances told a very different story.

Reich testified that Mrs. Lawrence wanted a provision like the clause in issue (VI:A983) and that Chill asked her to draft one (VI:A705-A706). However, the notion that Mrs. Lawrence's goal or purpose in doing so was *to protect Graubard's fee* is unwarranted and unrealistic. The obvious construction — particularly since Mrs. Lawrence's later actions surely demonstrated that Graubard's fee was not particularly high amongst her priorities — was that a woman who had not allowed her children to make any decisions regarding the case for twenty-two years (VII:A1155, A1212) was attempting to control "her" lawsuit even after death. That Graubard drafted and included a "superfluous" clause rather than argue with a client who did not take well to argument and was routinely "abusive" to her attorneys (I:A125a [Special Referee]) surely did not rise to the level of sanctionable behavior.

C. Apart From All Else, the Children's "Forfeiture" Argument Itself Lacks Merit.

The children's forfeiture argument consists of two parts: (1) that Graubard committed the already described acts, antithetical to their interests, in producing the $111 settlement, and, (2) that any violation of the ethical rules on the attorney's part should dictate forfeiture of the fee, and, thus a "free ride" for the clients. R. Lawrence Br. at 33-34.

The first argument has already been addressed and debunked. The second is equally lacking in merit.

Although there have been cases in which an attorneys' violations were so pervasive or repeated as to warrant forfeiture of the fees,[16] the fact that an attorney breached an ethical rule does not of itself mean that the client need not pay for the attorney's work.[17]

Nor is the Lawrences' thesis consistent with the rule stated in section 37 of the Restatement (Third) of Law Governing Lawyers (2000). That section provides that forfeiture of the fee occurs only if the transgression was "clear and serious." Even in that circumstance, forfeiture may be partial or total, depending on "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for

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[16] *Quinn v. Walsh*, 18 AD3d 638, 638 [2d Dept 2005] (where the attorney "violated Code of Professional Responsibility DR 5-105(a) by representing both the driver of the automobile involved in a collision and a passenger in that vehicle"); *Yannitelli v. D. Yannitelli & Sons Construction Corp.*, 247 AD2d 271, 272 [1st Dept 1998], *lv. den.*, 92 NY2d 875 [1998], *rearg. den.*, 92 NY2d 921 [1998], *cert. den., Heller v. Yannitelli*, 525 US 1178 [1999] ("[w]here, as here, the attorney has admitted committing numerous violations of the Code of Professional Responsibility in this case over a period of years, we agree that the attorney has, as a result, forfeited any entitlement to fees"); *Automatic Bedding Corp. v. Ortner*, 26 AD2d 664, 664 [2d Dept 1966] (undisclosed conflict of interest).

[17] *Rubenstein & Rubenstein v. Papadakos*, 31 AD2d 615 [1st Dept 1968] *affd*, 25 NY2d 751, 250 NE2d 570 [1969] (where attorneys had admittedly "failed to inform [the client] of an offer of settlement," such was "improper practice" but could not constitute grounds for non-payment since "the client must show damage from the omission"); *Orendick v. Chiodo*, 272 AD2d 901, 902 [4th Dept 2000] (where attorney Beltz was accused of divulging client confidences but the holding was that "the discharge of Beltz was <u>not</u> for cause and … Beltz is entitled to a percentage of the attorney's fee based upon the proportionate share of the work performed"); *see also Mar Oil, S.A. v. Morrissey*, 982 F2d 830, 840 [2d Cir 1993] ("[u]nder New York law, attorneys may be entitled to recover for their services, even if they have breached their fiduciary obligations"); *Musico v. Champion Credit Corp.*, 764 F2d 102, 112-114 [2d Cir 1985] (same).

the client, any other threatened or actual harm to the client, and the adequacy of other remedies."

CONCLUSION

Contrary to what is said in the sisters' brief, Graubard does not claim to be a "moral champion." Sisters' Br. at 1. Graubard instead presents itself (a) as a law firm that more than fulfilled its side of the retainer agreement, and (b) as the party that did not violate court orders in this case (I:A205a).

Graubard is also the party that did not advance a succession of different claims of wrongdoing that were unceremoniously abandoned (e.g., the Lawrences' pleaded claim that Graubard was negotiating settlement of the case as it negotiated its fee [I:A1454a-A1455a; II:A659a]) or rejected as "not credible" (e.g., the claim that Graubard's Daniel Chill used "Svengali-like influence" to "wear Mrs. Lawrence" down [I:A145a-A157a]).

But a law firm should not have to be a "moral champion" in order to enforce a retainer agreement that the client undisputedly signed (and here sought), and that undisputedly was consistent with industry practice and all court rules at time of contract (VII:A1339-A1340).

Respondents' position ultimately rests upon the thesis that a contingent fee client should be permitted to dishonor the attorney's contingent fee retainer whenever (a) the contractually agreed fee turns out to be much greater than would have occurred under hourly billing, and (b) the client, or, as here, the client's counsel, is willing to later proclaim that the attorneys "duped" the client into agreeing to contingent fee representation.

Contingent fee retainers fulfill valid and important policy objectives. Allowing respondents to dishonor the contract in these circumstances, and even in the wake of their conduct during the course of this suit, would,

> (1) discourage attorneys from acceding to contingent fee representation, especially in commercial cases;
>
> (2) encourage clients to breach such agreements, secure in the knowledge that false claims of attorney misconduct will be rewarded, not penalized; and
>
> (3) effect substantial injustice in this case.

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Respectfully submitted,

By: _____

Brian J. Shoot
SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO
Appellate Counsel for Petitioner-Defendant-Appellant Graubard Miller
120 Broadway
New York, New York 10271
(212) 732-9000
bshoot@triallaw1.com

Of Counsel

Mark C. Zauderer

FLEMMING ZULACK WILLIAMSON & ZAUDERER, LLP
Attorneys for the Petitioner-Defendant-Appellant Graubard Miller
One Liberty Plaza
New York, New York 10006
(212)412-9500
mzauderer@fzwz.com