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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF SYLVAN LAWRENCE,
DECEASED.

RICHARD S. LAWRENCE, ET AL.,

Respondents,

-against-

No. 149

GRAUBARD MILLER, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
September 9, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

1 Lawrence.

2 Counselor, would you like any rebuttal
3 time?

4 MR. CARVIN: I'd like two minutes, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead.

8 MR. CARVIN: May it please the court,
9 Michael Carvin for the individual attorneys
10 concerning the gifts. I think the easiest way to
11 resolve the gift issue is to find that the statute of
12 limitations had run, because Mrs. Lawrence waited
13 seven years after she'd given the gifts to sue.

14 CHIEF JUDGE LIPPMAN: Let's - - - let's go
15 back to whether it was a valid gift to begin with.

16 MR. CARVIN: Yeah.

17 CHIEF JUDGE LIPPMAN: What are we dealing
18 with? What - - - what is it that - - - that
19 indicates that she gave this gift by her free will?

20 MR. CARVIN: I think four undisputed facts
21 establish that quite clearly. The first is the
22 heartfelt notes that accompanied the gifts. There's
23 no dispute that this was Alice's expression of
24 gratitude, particularly when you compare that to the
25 relatively grudging note that accompanied the 400,000

1 dollar bonus to the law firm.

2 The second fact is that it's undisputed
3 Alice was a strong-willed, domineering woman, who at
4 seventy-three years old was micromanaging her own
5 vast fortune. And so it's quite improbable, as Judge
6 Levine clearly found, that the subordinate attorneys
7 could have exercised some - - - any undue influence
8 over her.

9 The third fact is she waited seven years
10 before she miraculously discovered that this gift had
11 been improperly solicited, whereas, again, Judge
12 Levine found, solely to achieve litigation advantage
13 in the fee dispute with Graubard Miller.

14 JUDGE GRAFFEO: When did she have to pay
15 the gift tax?

16 MR. CARVIN: Right within three months, and
17 that's the fourth fact, Your Honor, which is she met
18 with her financial advisor, Wallberg; discussed it at
19 length whether or not this was a bonus or a gift.
20 Mr. Wallberg, after getting the third-party advice
21 that the ethical considerations suggest should be
22 gotten, went ahead and swore under oath that this - -
23 -

24 CHIEF JUDGE LIPPMAN: Coun - - -

25 MR. CARVIN: - - - was a bonafide gift and

1 she decided - - -

2 CHIEF JUDGE LIPPMAN: Counsel, talk - - -

3 MR. CARVIN: - - - to go ahead with the
4 transaction.

5 CHIEF JUDGE LIPPMAN: - - - talking about
6 the ethics of the situation, if - - - if this was
7 such an aboveboard decision by her, why did the
8 lawyers not tell anybody about these gifts?

9 MR. CARVIN: They told - - - they didn't
10 keep it secret at all. I'll - - - they talked to Mr.
11 Wallberg. Secrecy - - -

12 JUDGE GRAFFEO: Did their law firm know?
13 Did their law firm know?

14 MR. CARVIN: That's between them and their
15 law firm. They didn't think they needed to tell
16 their law firm, because - - -

17 CHIEF JUDGE LIPPMAN: Why wouldn't you tell
18 the law firm?

19 MR. CARVIN: Well - - -

20 CHIEF JUDGE LIPPMAN: How - - - what do you
21 mean, they don't - - - you don't - - - you think that
22 that is an appropriate decision that they made, not
23 to tell their law firm that they got these gifts?

24 MR. CARVIN: Alice Lawrence told them not
25 to tell the - - -

1 JUDGE PIGOTT: Yeah, but you just said they
2 didn't keep it secret at all.

3 MR. CARVIN: Yeah, no - - - to - - -
4 secrecy bear - - - if we're speaking about the
5 relevant facts here - - -

6 JUDGE RIVERA: But they didn't tell the
7 children, did they?

8 MR. CARVIN: No, no, and I think the law
9 firm and the children are actually quite coextensive.
10 Not telling people suggests some kind of guilty
11 cover-up in the cases. If you - - - if the frail
12 donor - - - if you keep the secret from her advisor,
13 who could be thought to overrule her judgment.

14 We have the complete opposite here. They
15 did - - - two of the attorneys talked to Wallberg,
16 her closest advisor, confirmed that Alice had
17 conferred with him about the gifts and - - -

18 JUDGE PIGOTT: I think that's
19 understandable. I - - - I - - - I was - - - I want
20 to focus on what you said, though. It seemed to me
21 that they did keep it a secret. I - - - if I was one
22 of their partners, and I found out they got five
23 million bucks from one of our clients, I think I'd
24 like to know that.

25 MR. CARVIN: That - - - that may or may not

1 be legitimate grounds for dispute - - -

2 JUDGE PIGOTT: But that's keeping it a
3 secret, is my point. I don't mean to fence with you
4 over the words, but you made it sound like they put
5 it in the newspaper.

6 MR. CARVIN: Well, let me - - -

7 JUDGE RIVERA: Well, how about not telling
8 your other clients? How about not telling your other
9 clients who might think that - - - that Alice would
10 be favored over them or something else would go on?
11 Why - - - why are we not concerned about attorneys
12 who choose to keep secrets and violate ethical and
13 professional obligations at the behest of one client
14 that may endanger another client?

15 MR. CARVIN: It seems to me there's two
16 issues here. Does secrecy suggest a cover-up,
17 because there's some guilt about the transaction?

18 JUDGE RIVERA: Well, they may not be
19 guilty.

20 MR. CARVIN: No, no, that they - - - that
21 they perceive some guilt that this is an improper
22 transaction. And what I am saying is that nothing
23 they did with respect to the partners or the kids
24 suggest it.

25 JUDGE RIVERA: Did they seek - - -

1 MR. CARVIN: If they kept the - - -

2 JUDGE RIVERA: Did they seek advice? Did
3 they seek ethical - - - did they have someone - - -
4 did they consult anyone about the ethics of accepting
5 these gifts?

6 MR. CARVIN: No, I - - - be - - - I don't
7 think they had to, because it's quite clear that - -
8 -

9 JUDGE GRAFFEO: Did they put anything in
10 writing to her that she should consult another
11 attorney?

12 MR. CARVIN: Mr. Chill testified - - -

13 JUDGE GRAFFEO: Or something in writing to
14 the children - - -

15 MR. CARVIN: He - - -

16 JUDGE GRAFFEO: - - - to her children to
17 let them know that they were going to be receiving
18 these?

19 MR. CARVIN: Can I break this down into
20 three parts? They created a contemporaneous record
21 that she had given them the gift. She - - - they
22 sent her notes, which Alice actually kept. Mr.
23 Chill's note, it was found in her desk. So if they
24 were trying to keep this some big secret, they are
25 the most - - -

1 CHIEF JUDGE LIPPMAN: Counsel, assume that
2 - - - that they were unethical - - -

3 MR. CARVIN: Yeah.

4 CHIEF JUDGE LIPPMAN: - - - in not
5 revealing this. Let's assume they kept it as a
6 secret. How do you balance what you're saying, which
7 is the - - - that she wanted to give it to them,
8 versus their ethical requirements as lawyers? How do
9 the two weigh against each other?

10 MR. CARVIN: That's my bottom line in all -
11 - -

12 CHIEF JUDGE LIPPMAN: Yes, let's hear it.

13 MR. CARVIN: Which is, Judge Levine went
14 through these factors. Before - - -

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I'm
16 asking you what's the - - - what's the law in this -
17 - -

18 MR. CARVIN: Right, right. And Judge
19 Levine said - - -

20 CHIEF JUDGE LIPPMAN: - - - that free will
21 prevails over everything else?

22 MR. CARVIN: No, the common law says, if a
23 gift is voluntary and knowing, regardless of whether
24 or not we have some atmospheric concerns about the
25 gift - - -

1 CHIEF JUDGE LIPPMAN: Well, let's say,
2 ethical, not atmospheric.

3 MR. CARVIN: Well, first of all, there was
4 no ethical violation.

5 CHIEF JUDGE LIPPMAN: Let's say there was.

6 MR. CARVIN: Let's say there was? Then
7 that's something for the bar committee to deal with.
8 Then let them deal with it. I know they'll have to -
9 - -

10 CHIEF JUDGE LIPPMAN: Now you poc - - -

11 MR. CARVIN: So you don't - - -

12 CHIEF JUDGE LIPPMAN: Now you pocket the
13 gift under any circumstances, and then you deal with
14 the ethical, professional issues?

15 MR. CARVIN: Right, but A, no one's ever
16 taken them to the bar. B, the bar would not allow
17 them to unduly influence the clients, so I don't
18 think that you can blithely assume that there was
19 some ethical violation here. You can assume they
20 didn't take the prophylactic step of seeking third -
21 - - of urging her to seek third-party advice.

22 But the facts on the ground are as follows:
23 she did seek third-party advice from her closest
24 financial advisor. So I - - - and - - - and my basic
25 point is - - -

1 JUDGE RIVERA: If we uphold - - -

2 MR. CARVIN: - - - Judge Levine - - -

3 JUDGE RIVERA: - - - if we uphold the gift,
4 what message do we send to the profession and the
5 public?

6 MR. CARVIN: That it's perfectly fine to
7 accept voluntary gifts from a very wealthy woman when
8 it's freely done. That it's not proper to manipulate
9 the common law retroactively to punish attorneys who
10 have had spotless ethical records for over 140 years
11 of career practice, because there's some distaste
12 about the gift.

13 JUDGE RIVERA: What about - - - what about
14 not telling the other clients, the children?

15 MR. CARVIN: Okay, let's deal with the
16 ethical violation. Why would they need to tell the
17 kids? They didn't represent the kids on anything
18 that was adverse to Alice. Judge Levine found quite
19 clearly the only potential conflict was on the
20 fractional share issue, and they had told the
21 children well before the gifts, we are not
22 representing you on the fractional share issue.
23 Everything else - - - the children's interests were
24 absolutely coextensive with Alice's.

25 JUDGE RIVERA: You - - - you don't think -

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MR. CARVIN: So there was - - -

JUDGE RIVERA: - - - a client would want to know that another client of my lawyer gave them what is referred to as a life-altering gift?

MR. CARVIN: I'd like to know it, if I thought that they - - - it would bias my representation. My first point is, they weren't representing the kids. My second - - - on any issue that there was a conflict. My second point is, Alice had paid twenty million dollars in fees. Alice made every decision concerning the litigation.

If the kids were worried about the attorneys favoring Alice, then surely that would have raised a much more serious concern in their minds. They can't even articulate how these gifts would have affected any ongoing representation or why - - - or what the kids would have done in the face of it. When one of the daughters did hear about it, she said, that's my mother's business; that's got nothing to do with me. The son said, Alice had been the captain of the ship from the beginning of this case.

So no, Your Honor, this is a post hoc hypothetical where they're raising some strange alarm about the kids. I think the - - - what this court

1 needs to focus on, does the failure to tell the kids
2 suggest that there was something fishy about the
3 gifts? And I don't think it would have entered any
4 reasonable - - -

5 JUDGE RIVERA: So - - - so as a general
6 rule, the lawyer, him or herself, decides on his or
7 her own, whether or not the other client might want
8 to know this, and it might affect their conception of
9 this relationship and whether or not they want to
10 continue this - - -

11 MR. CARVIN: If - - -

12 JUDGE RIVERA: - - - confidential
13 relationship with this lawyer.

14 MR. CARVIN: If there are reasons - - -

15 JUDGE RIVERA: Is that the rule that we
16 would be - - -

17 MR. CARVIN: No. If there are reasonable
18 grounds for the children to say, we needed to know
19 and it would have affected us, then I think they've
20 got an argument, relative to the ethical violations
21 of the firm. But again, Judge Levine looked at this
22 very carefully and said, there was no ethical
23 violation, for the reasons I've just articulated - -
24 -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. CARVIN: - - - to you.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. CARVIN: Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks.

5 Counselor, do you want any rebuttal time?

6 MR. SHOOT: Yes, Your Honor, I'd like to
7 reserve two minutes for Mr. Zauderer, and two minutes
8 for rebuttal as well, of the ten minutes - - -

9 CHIEF JUDGE LIPPMAN: Two minutes of your
10 eight and then two minutes on rebuttal - - -

11 MR. SHOOT: Mr. Zauderer will take two.
12 I'll take six and two.

13 CHIEF JUDGE LIPPMAN: Right. Okay, go;
14 you're on.

15 MR. SHOOT: If the court allows, this is
16 the case in which a client insisted upon contingent
17 fee representation and then reneged, and it then - -
18 - it presents the important issue of whether
19 attorneys who agreed to provide contingency - - -
20 contingent fee representation should be penalized if
21 they do too well for the client.

22 JUDGE PIGOTT: Is the big issue here,
23 though, that at the time they entered into the
24 contingency agreement, they already knew there was
25 sixty million going into the bank, and they shouldn't

1 have gotten a percentage of that? Is that the issue?

2 MR. SHOOT: Not at all, Your Honor. Fir -
3 - - first of all, there wasn't sixty million going
4 into the bank. As Your Honor noted, there was a
5 sixty-million-dollar offer with strings. January,
6 February of 2004, that was negotiated, not by
7 Graubard, but by the client herself. So the one with
8 the best knowledge as to what that offer was, was the
9 one who was at the table at the time. When Graubard
10 - - -

11 JUDGE PIGOTT: But she was - - - she was
12 will - - - she was all right with the forty percent,
13 even of that - - - of that sixty? Is that your - - -
14 is that your view?

15 MR. SHOOT: I don't - - - I don't
16 understand the question.

17 JUDGE PIGOTT: In other words, you said
18 there was a settlement of sixty that had strings on
19 it - - -

20 MR. SHOOT: There was a post-settlement.

21 JUDGE PIGOTT: - - - without the - - -

22 MR. SHOOT: But actually what happened was
23 when Graubard revamped it and took the strings off,
24 the settlement evaporated. But the point is, that
25 time changes. Events change in litigation. That was

1 January and February of 2004.

2 After that occurred, in December of 2004,
3 there was a dismissal of the claim that Graubard had
4 deemed not only the most significant claim amongst
5 all of the accounting claims, but more important,
6 more valuable than all the others put together. That
7 was the 95 Wall Street claim. That occurred in
8 December of 2004.

9 And as Your Honor could surely appreciate,
10 when your best claim goes down in smoke, that does
11 not enhance your negotiating position. So that if
12 there wasn't sixty million on the table before, there
13 certainly wasn't sixty million on the table then.

14 JUDGE PIGOTT: So it was gone, and - - -
15 and the forty - - - the forty-percent contingent
16 didn't follow that, but you're saying it - - -

17 MR. SHOOT: Exactly, Your Honor. Our point
18 here is threefold. First, the - - - the special
19 referee was entirely correct in ruling that the
20 contingent fee contract was not unconscionable at the
21 time of its making for two - - - for three reasons.
22 One, Alice Lawrence insisted upon the contingent fee.
23 That's at A - - - 1188A of the record. That was the
24 - - - Judge Levine's word, "insisted" upon contingent
25 fee representation.

1 JUDGE PIGOTT: Did he distinguish between
2 substantive and procedural?

3 MR. SHOOT: I'm sorry, Your Honor?

4 JUDGE PIGOTT: Did Judge Levine distinguish
5 between substantive - - -

6 MR. SHOOT: Yes, he did, Your Honor.

7 JUDGE PIGOTT: All right, and you - - - but
8 you just said he found - - - in both cases it was not
9 unconscionable?

10 MR. SHOOT: He found that it was not
11 unconscionable in both ways at the time of the
12 making. He found it was unconscionable in some sight
13 - - -

14 CHIEF JUDGE LIPPMAN: So what - - -

15 JUDGE GRAFFEO: I - - - counsel - - -

16 MR. SHOOT: - - - which I'll get to.

17 JUDGE GRAFFEO: I - - - I understand the
18 posture of the amici, about the sanctity of
19 contingency agreements and the ramifications of this
20 case, but tell me, is there at a certain point when
21 the amount of the contingency fee can enter that
22 region of unconscionability?

23 MR. SHOOT: No, not of itself, Your Honor,
24 and let me tell you why.

25 CHIEF JUDGE LIPPMAN: Proportionality by

1 itself after the fact can't make it unconscionable?

2 MR. SHOOT: A fee should never been deemed
3 unconscionable on the sole ground that the attorneys
4 did too well, and that as a result of doing too well,
5 there is in consequence a very high or extremely high
6 hours-per-hour computation.

7 JUDGE GRAFFEO: So the - - - so the courts
8 should never look at the quantity of work done or the
9 time period over which the work is done? It's just -
10 - - it's strictly a contractual arrangement?

11 MR. SHOOT: No, I'm not saying that, Your
12 Honor. I'm saying - - - my point is very simple, and
13 that is that if the sole thing that - - - if the sole
14 factor that's alleged to make this fee unconscionable
15 is that it's too much money and it was unexpected,
16 that the attorneys did too well - - -

17 CHIEF JUDGE LIPPMAN: In what circumstances
18 would it become unconscionable?

19 MR. SHOOT: I can name several.

20 CHIEF JUDGE LIPPMAN: After the - - - yeah.

21 MR. SHOOT: Unconscionable, in hindsight.

22 CHIEF JUDGE LIPPMAN: Yes, go ahead.

23 MR. SHOOT: Situation number 1, a Wade v.
24 Clemmons case, which is one of the ones we cite in
25 our brief, where what happens is, because - - - in

1 that case there were liens on the recovery, the
2 result of the case with the contingent fee is that
3 the client would get nothing. You can think of other
4 instances where the client would get almost nothing.
5 And they - - - that instance, even if the fee was - -
6 -

7 JUDGE RIVERA: But isn't - - - isn't there
8 a difference between entering a contingency fee
9 arrangement at the beginning of the relationship,
10 versus what happened here, this mid-representation
11 arrangement, then in four-and-a-half months or so,
12 you settle, when the firm had been getting millions
13 of dollars in fees for a very long time.

14 MR. SHOOT: I've always thought that, Honor
15 - - - that, Your Honor, that - - - the argument was
16 very curious, because while there has been a lot of
17 talk about they should give up the 18 million dollars
18 they billed before, there's not a lot of offers to
19 share in the 350 million dollars that came before.
20 And if the contingency was from the - - -

21 JUDGE RIVERA: No, but I don't - - - but
22 the point is not that the prior fees were not earned;
23 I mean, this is not - - - not - - - or at least that
24 wasn't my point. The point is, isn't that - - -
25 isn't the contingency fee different when you're

1 talking about one entered at the initiation of the -
2 - - excuse me - - - lawyer-client relationship,
3 before you've done the work, and another one entered
4 midstream, and then in four-and-a-half months, you
5 settle for the big payoff. I mean, obviously she was
6 very, very tired of paying very heavy fees.

7 MR. SHOOT: Your Honor, not when it's
8 initiated - - - the request is initiated by the
9 client. And if it were different, then you'd be
10 creating an insane - - -

11 JUDGE RIVERA: So she went into it with
12 eyes wide open, is what you're saying?

13 MR. SHOOT: Not just that she went into it
14 with eyes wide open, she went into it insisting that
15 she wants to - - - a contingent fee representation.
16 And the whole notion that it might be all right for a
17 new firm to come in - - -

18 JUDGE RIVERA: But doesn't - - - doesn't
19 that mean it must be someone as savvy as this, that
20 she has made a calculation - - - and it's hard to
21 believe that that's not based on information from the
22 lawyers - - - that there's not a big payoff coming -
23 - -

24 MR. SHOOT: Well, the - - -

25 JUDGE RIVERA: - - - so it's not worth my

1 hourly fees - - - hourly payment on the fees, and
2 I'll - - - I'll go for this forty percent, but I want
3 out of paying these very heavy hourly fees.

4 MR. SHOOT: But Judge Levine's finding on
5 that particular issue, which you'll find at A1 - - -
6 188A of the record, was that at that point in time,
7 while anything was possible, neither party
8 "anticipated" there would be recovery in excess of
9 twenty million dollars.

10 CHIEF JUDGE LIPPMAN: So as long as she
11 suggested it, end of story?

12 MR. SHOOT: No, not as long as - - - are
13 you - - - are we talking now about unconscionability
14 at the time of the making?

15 CHIEF JUDGE LIPPMAN: Yeah.

16 MR. SHOOT: No, it's not just that she
17 suggested it. It was that it was undisputed that it
18 was within the norm. They had an ethicist testify,
19 Mr. Gillers; conspicuously absent from his testimony
20 was any contradictory testimony to the effect that
21 this was not within the norm at the time. And you
22 will find that there simply is no argument to be made
23 that it was within the norm at the time.

24 JUDGE GRAFFEO: Did - - - did Alice - - -
25 did Alice voice a complaint or object to the payment

1 of the contingency fee, or did she just hire other
2 attorneys to commence litigation?

3 MR. SHOOT: She was interviewing, Your
4 Honor, according to the record, the moment that it
5 was - - - that her son told her on the telephone
6 about the settlement in principle, which is May of
7 2005, and she responds, I'll handle it.

8 JUDGE GRAFFEO: Well, I guess what I'm
9 trying to find out is, did the law firm know that she
10 was unhappy with the contingency fee?

11 MR. SHOOT: Not at all. Before - - -
12 before the closing occurred, she's interviewing the
13 firm that ultimately represented her, Greenberg
14 Traurig, at the outset of the case. And the first
15 inkling that Graubard has that there's any
16 dissatisfaction in the house - - - from their
17 perspective, they just got a wonderful recovery.
18 Clients are normally - - - normal clients, little
19 people, they're happy when they get good recoveries.

20 Four days after the money changes into the
21 poor widow's hands at that point, four days
22 afterwards, they're contacted that they've had a lot
23 of ethical violations. The retainer's no good, and
24 that's their first knowledge that some - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. SHOOT: - - - no one's happy in this
2 house.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 Thanks, counsel.

5 Counselor?

6 MR. ZAUDERER: May it please the court,
7 Mark Zauderer. Thank you for the opportunity; my
8 time is brief.

9 Let me make a concrete suggestion, which I
10 hope is helpful to put some meat on the bones in
11 terms of the policy issue here, because I think
12 there's only one issue, and that's the look back on
13 substantive unconscionability. I tried this case.
14 Judge Levine had thirteen days of testimony on the
15 issue of whether this agreement was freely made. I
16 think you ought to accept his findings. It's
17 documented in an over hundred page opinion. But my -
18 - -

19 CHIEF JUDGE LIPPMAN: What about the
20 proportionality issue?

21 MR. ZAUDERER: Yes. I - - - I would
22 punctuate the point made, and I think it - - - I
23 think it would be extremely helpful for the court to
24 clarify, to pull the threads together of Lawrence I
25 and Gair v. Peck, and King v. Fox, to say, look, the

1 court always has supervisory power over attorneys'
2 fees. But when we're looking back, if we don't find
3 unconscionability, and the courts can look at that,
4 that is - - - at the time made, if it's not
5 unconscionable when made - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but what about
7 after the fact?

8 MR. ZAUDERER: I'm coming to that.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MR. ZAUDERER: And if the attorney has not
11 committed malpractice or done nothing wrong, you
12 enforce the contract as written. This is not a case
13 of the court setting fees; it's a private contract.
14 And absent that, you look - - - you do not disturb
15 the arrangement. Every day, Your Honor, and I - - -
16 we all know this as practicing attorneys, clients - -
17 - little clients - - - business people come in, and
18 they want to do their case.

19 Firms say, we'll do it on a time basis, and
20 they'll say, how much will it cost? Well, your first
21 motion will cost 25,000 dollars; maybe we can do it
22 for a few hundred thousand dollars up to trial, if
23 we're lean. Clients can't do that. Lawyers take
24 cases on contingency and have to be con - - - have to
25 expect that in the cases that don't turn out all

1 right, and all kinds of things happen in the
2 litigation - - -

3 CHIEF JUDGE LIPPMAN: But this is an
4 unusual contingency agreement. This isn't a - - - as
5 Judge Rivera's talking about, in the middle this
6 whole thing, after all these years, now this
7 contingency agreement. This is an odd case, isn't
8 it?

9 MR. ZAUDERER: It's a very odd case. But
10 that - - - but substantively, I can think of no
11 cleaner case where the client got perfect - - -
12 wonderful representation. There were no complaints
13 in twenty years. Yes, the client complained every
14 day, but there were no - - - the results speak for
15 themselves.

16 JUDGE GRAFFEO: How do you deal with the
17 public perception that this kind of enormous fee is -
18 - - is warranted? How - - - how do we explain that
19 in a - - - in an opinion if you were sitting here and
20 you had the view that you're expressing, that this is
21 legitimate?

22 MR. ZAUDERER: Well, if you'd invite me,
23 I'd be happy to do that, but seriously, the - - - the
24 public, I think, should understand that the
25 contingency system has to work where the lawyer takes

1 a risk and aligns his or her interest with the
2 client, and if the client does well, the lawyer does
3 well. And the lawyer's interest, which is the
4 client's interest, is to get the maximum amount
5 possible in the shortest period of time.

6 In your Lawrence I, footnote 4, you made a
7 very clear statement about this. Do not be overly
8 concerned with time, and many times an unex - - - a
9 result that is enormous will reward the attorney
10 unexpectedly, and that the court should be very, very
11 careful about looking back. That's in your own
12 opinion.

13 And I think in explaining this to the
14 public, they should understand that this system works
15 for them. And if you're going to have a system where
16 clients, in the thousands of cases that are done on
17 contingency, by your guidance, can challenge the
18 amount of the fee, because if this is too high, what
19 about one that's eighty percent of this? What about
20 one that's sixty percent?

21 And clients would be motivated to challenge
22 them; they have nothing to lose. Maybe we can knock
23 the fee down, and the result of that will be lawyers
24 will be very cautious about taking risk in cases.
25 They have to pay the rent in their office. They have

1 to pay their associates.

2 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

3 MR. ZAUDERER: Many of these cases do not
4 reward them. And that's essential to the balance,
5 and I think that can be communicated to the public.

6 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
7 you.

8 MR. ZAUDERER: Thank you.

9 CHIEF JUDGE LIPPMAN: Let's hear from your
10 adversary.

11 MR. KORNSTEIN: May it - - -

12 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

13 MR. KORNSTEIN: May it please the court - -
14 -

15 CHIEF JUDGE LIPPMAN: Sure.

16 MR. KORNSTEIN: I represent the estate, but
17 I'm also speaking for the children. I've been
18 delegated that responsibility.

19 JUDGE PIGOTT: You're Mr. Kornstein, right?

20 MR. KORNSTEIN: Pardon me?

21 JUDGE PIGOTT: I just didn't get your name;
22 I'm sorry.

23 MR. KORNSTEIN: Kornstein.

24 JUDGE PIGOTT: Okay.

25 MR. KORNSTEIN: There's - - -

1 JUDGE GRAFFEO: So are we shooting an arrow
2 in contingency arrangements?

3 MR. KORNSTEIN: Not at all. That's - - -
4 well, a nonsense argument. What we're shooting an
5 arrow in is abusive contingency arrangements.

6 CHIEF JUDGE LIPPMAN: But why is it - - -
7 why in this case, where she asks for the contingency
8 arrangement, why - - - why is this abusive?

9 MR. KORNSTEIN: There is a - - -

10 CHIEF JUDGE LIPPMAN: Explain it to us - -
11 -

12 MR. KORNSTEIN: There is a one-page doc - -
13 -

14 CHIEF JUDGE LIPPMAN: Again, this - - -
15 this issue which is really on both of the two
16 questions, the gifts and the contingency of the will
17 of the client versus the ethics - - - assuming that
18 there are ethical violations. How do you balance it?
19 Where's the ethical violation here in relation to the
20 contingency and - - - and explain to us how that
21 alters, you know, what the final consequence is.

22 MR. KORNSTEIN: Absolutely, Your Honor.
23 There's a one-page document in the record at 6374.
24 It's a huge record. With the court's permission, I'd
25 like to hand up copies of that document. It's the

1 internal case analysis that the law firm did but - -
2 -

3 CHIEF JUDGE LIPPMAN: Yeah, but - - -

4 MR. KORNSTEIN: - - - did not send the
5 client.

6 CHIEF JUDGE LIPPMAN: All right, tell us
7 concisely - - - you can hand up anything you want - -
8 - tell us concisely what - - - what the issue is
9 here? What's abusive about the contingency
10 agreement?

11 MR. KORNSTEIN: Before the 19 - - - the
12 2005 midstream modification - - -

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. KORNSTEIN: - - - and before the - - -

15 CHIEF JUDGE LIPPMAN: Which you acknowledge
16 she asked for? Which you acknowledge she - - - she
17 wanted?

18 MR. KORNSTEIN: She asked for a change from
19 the hourly rate. It was the law firm that raised - -
20 -

21 CHIEF JUDGE LIPPMAN: Okay, go ahead.

22 MR. KORNSTEIN: - - - contingency, but - -
23 - before the adverse decision on 95 Wall Street
24 that's referred to, the law firm, two of the three
25 lawyers working on the case, prepared an internal

1 case assessment. They went claim by claim, through
2 each of the claims in the case. They put the value,
3 and then they handicapped it. They put the chance of
4 recovery.

5 JUDGE GRAFFEO: But they and Alice came to
6 an agreement on the percentages for the contingency,
7 right?

8 MR. KORNSTEIN: They agreed on forty
9 percent.

10 JUDGE GRAFFEO: Did she - - - she - - -

11 MR. KORNSTEIN: But she didn't have this in
12 - - -

13 JUDGE GRAFFEO: She agreed to that
14 percentage, correct?

15 MR. KORNSTEIN: She agreed, but she was not
16 fully informed. The cases - - -

17 JUDGE PIGOTT: Well, let me ask you this.
18 If you got something in your file that says, you
19 know, we're going to take this on a contingency
20 basis, the plaintiff is a hothead, and he's going to
21 be a real problem during the course of the trial. We
22 still think we've got a good case, but you know, the
23 fact of the matter is, that he's going to get up
24 there and probably ruin his whole case. Maybe we
25 ought to be settling for more and/or less.

1 Are you suggesting that when you settle
2 with your ca - - - with your client, you say now
3 before I take my one-third, I want to show you this
4 where I said you were a total jerk, so you can go sue
5 me, because maybe my contingent fee is too high,
6 because according to the internal document, I really
7 didn't think our case was going to go all that well.

8 MR. KORNSTEIN: No, Your Honor, and that's
9 not this case.

10 JUDGE PIGOTT: Okay.

11 MR. KORNSTEIN: Here we have the situation
12 where the negotiation over the midstream modification
13 was based on a recovery of a few million. That is
14 the testimony from Mr. Chill.

15 JUDGE PIGOTT: But aren't you trying the
16 case after - - - afterward - - - in other words, she
17 got - - - she didn't - - - she wasn't poor, and she
18 got an awful lot of money. And now, all of a sudden
19 - - - of course, she's gone - - - the - - - the - - -
20 her beneficiaries are saying we want to nail these
21 lawyers because we think they're getting too much
22 money.

23 And can't you do that on every single
24 contingent case, except the ones where the lawyers
25 take them and lose, and end up having to eat the

1 disbursements.

2 MR. KORNSTEIN: No, Your Honor. What we -
3 - -

4 JUDGE PIGOTT: All right, straighten me
5 out.

6 MR. KORNSTEIN: No, no. What we have here
7 is a client who is not fully informed. There was a
8 misconception as to what the case was about. They -
9 - -

10 CHIEF JUDGE LIPPMAN: How exactly was she
11 not fully informed?

12 MR. KORNSTEIN: The law firm had evaluated
13 the case at a hundred million dollars and then with
14 the Wall Street issue out - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. KORNSTEIN: - - - there was fifty
17 million dollars left. They did that before this
18 negotiation - - -

19 JUDGE PIGOTT: I've had cases where I've
20 evaluated the case at a particular amount, and it all
21 went south. Or, I evaluated at a particular amount
22 and I find out there's not enough coverage. Or, my
23 client dies. Or, he or she does something stupid in
24 between the time that I signed the retainer agreement
25 and the case comes up. There's - - - you can't

1 simply go back in the file and say, oh, well, you
2 evaluated this case really high, and you took a
3 contingent fee and it's too much.

4 MR. KORNSTEIN: But when the percentage,
5 the forty-percent percentage, is being discussed in
6 terms of a few million, and that's - - -

7 CHIEF JUDGE LIPPMAN: So did they misinform
8 her with the intention of getting her to go in this
9 direction? What was the purpose - - - assuming that
10 she - - -

11 MR. KORNSTEIN: To reduce fees, Your Honor.
12 The purpose was to reduce fees, and even in their
13 testimony, it was that she would - - - said she
14 wanted to get the lion's share. She was going to be
15 the senior partner. That's not how it worked out.

16 JUDGE PIGOTT: Well, that - - - that
17 depends on the math. But - - - but it is true that
18 she asked for the contingency.

19 MR. KORNSTEIN: No, she asked for a change
20 from - - -

21 JUDGE PIGOTT: Fine.

22 MR. KORNSTEIN: - - - an hourly rate. He -
23 - -

24 JUDGE PIGOTT: What else were you going to
25 do?

1 MR. KORNSTEIN: Oh, there could be reduced
2 hourly rates. There could be - - -

3 CHIEF JUDGE LIPPMAN: But you're saying she
4 - - -

5 MR. KORNSTEIN: - - - changed billing,
6 balanced billing - - -

7 CHIEF JUDGE LIPPMAN: - - - she asked for
8 the change based on misinformation. That's your - -
9 -

10 MR. KORNSTEIN: Absolutely.

11 CHIEF JUDGE LIPPMAN: That's your argument.

12 MR. KORNSTEIN: Absolutely.

13 JUDGE GRAFFEO: Well, if - - - if she had
14 asked for the change earlier from the hourly to some
15 other compensation scheme, and if she was unhappy
16 with this forty percent, why didn't she contact them
17 and talk to them and perhaps the parties would have
18 negotiated something differently here?

19 MR. KORNSTEIN: She didn't - - -

20 JUDGE GRAFFEO: I mean, I'm very concerned
21 about us opening the Pandora's Box that all clients
22 who decide that their attorneys maybe got a fee
23 larger than what they had hoped their attorneys were
24 going to get will challenge on the basis of
25 unconscionability.

1 MR. KORNSTEIN: Your Honor, that's a false
2 issue, because the - - - the ground rules for
3 hindsight substantive unconscionability are clear
4 from the court. You have the risk. One of the
5 strongest points in our presentation is that there
6 was virtually no risk here, because of their
7 evaluation - - -

8 JUDGE PIGOTT: You say now and you say
9 based on what - - - you say they had in their pocket
10 that they didn't tell Alice.

11 MR. KORNSTEIN: Right.

12 JUDGE PIGOTT: Would it have been nice if
13 Alice had testified?

14 MR. KORNSTEIN: Yes, it would have.

15 JUDGE PIGOTT: And why didn't she testify?

16 MR. KORNSTEIN: Because she died.

17 JUDGE PIGOTT: Well, apparently there was a
18 notice to take her deposition before she died.

19 MR. KORNSTEIN: She didn't take - - - she
20 didn't submit to deposition. She was punished for
21 that. There was a sanction - - -

22 JUDGE PIGOTT: I understand that. But I -
23 - -

24 MR. KORNSTEIN: - - - that - - -

25 JUDGE PIGOTT: - - - wait. I don't think

1 that - - - you know, I was wondering who got the
2 benefit of that - - - of the waiver. But it seems to
3 me that she kept saying I'll - - - you know, I'm not
4 - - - I'm not going to be deposed until after certain
5 events. And I don't know why. I would think she'd
6 had said get me in there today. I'm going to tell
7 what these scoundrels did to me and it's going to be
8 on the record, and hopefully we'll get them
9 disbarred.

10 Somebody decided that that was not a good
11 idea, it seemed to me. And I thought, you know,
12 there might have been an inference adverse to Mrs.
13 Lawrence, the fact that she didn't testify; forget
14 the - - - forget the - - -

15 MR. KORNSTEIN: But first of all, they did
16 not appeal the sanction issue.

17 JUDGE PIGOTT: Yeah, I - - -

18 MR. KORNSTEIN: That is water under the
19 bridge.

20 JUDGE PIGOTT: Good point.

21 MR. KORNSTEIN: What - - - what we're
22 talking about, though, is the waiver issue - - - the
23 dead man's statute - - - allowed them to testify
24 uncontradicted about their conversations with Alice
25 and even then, they were not believed. It's a little

1 bit like running in an election unopposed and losing.

2 CHIEF JUDGE LIPPMAN: Counsel, so when - -
3 - when - - - you talked about the law in relation to
4 unconscionability and hindsight. Is this case
5 unusual where - - -

6 MR. KORNSTEIN: Absolutely.

7 CHIEF JUDGE LIPPMAN: - - - that - - -

8 MR. KORNSTEIN: It's - - - it's uncon - - -

9 CHIEF JUDGE LIPPMAN: What's the normal
10 rule? And what's different here that we should find
11 it unconscionable after the fact?

12 MR. KORNSTEIN: Well, we think it's
13 unconscionable both before and after - - -

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. KORNSTEIN: - - - but after the fact -
16 - -

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. KORNSTEIN: - - - in terms of the risk.
19 The - - -

20 CHIEF JUDGE LIPPMAN: What's - - - what's
21 different about this case?

22 MR. KORNSTEIN: The hybrid retainer that
23 they have a guarantee of getting hourly charges up to
24 1.2 million for the first year. They have her paying
25 expenses. And they even put in a clause nego - - -

1 saying that they'll negotiate if their fees fell
2 below - - -

3 JUDGE PIGOTT: So if we took away the 1.2
4 million, does that fix it?

5 MR. KORNSTEIN: No.

6 JUDGE PIGOTT: Well, that's what you said
7 made the difference.

8 MR. KORNSTEIN: I said all of those items.

9 JUDGE PIGOTT: Oh, okay, but - - - well,
10 disbursements are disbursements. You can't pay
11 disbursements; lawyers can.

12 MR. KORNSTEIN: No, but you can lay it out
13 and pick it up at the end.

14 JUDGE GRAFFEO: Is it possible for you to
15 articulate a rule here in general terms so that we
16 know what it is - - - what's the test of when - - -
17 when a contingency arrangement becomes
18 unconscionable, because we do want to protect the
19 vast majority of contingency arrangements, don't we?

20 MR. KORNSTEIN: Absolutely.

21 JUDGE GRAFFEO: So I'm - - - I'm missing
22 how we define that.

23 MR. KORNSTEIN: Well, the court has defined
24 it over and over again. You have set up criteria.
25 What the - - - low risk - - - you also have, in this

1 case, there were additional retainers from the grown
2 children that were still in force, that were signed
3 the same day that Alice signed the very first
4 retainer in 1983. Those children were backing up
5 whatever was happening - - -

6 JUDGE PIGOTT: So they have a claim. I
7 mean, they could get their fees back.

8 MR. KORNSTEIN: Well, they may have that
9 claim, but they hadn't - - - they had not paid under
10 those retainers.

11 JUDGE RIVERA: It sounds - - -

12 MR. KORNSTEIN: It was back-up retainers
13 for the law firm. So the law firm was bound - - -

14 CHIEF JUDGE LIPPMAN: What - - -

15 JUDGE RIVERA: It sounds like you're
16 arguing that the - - - in a contingency arrangement
17 there's some risk that's shared, but in this, there's
18 no risk shared, because they're getting an hourly
19 rate, they've always got the kids that they can go
20 back to who are still on the hourly rate, and they're
21 getting forty percent or they're not getting forty
22 percent.

23 MR. KORNSTEIN: And the - - -

24 JUDGE RIVERA: And they're getting it today
25 or they're getting it in five years.

1 MR. KORNSTEIN: And they got twenty-two
2 million dollars over twenty-two years - - -

3 JUDGE RIVERA: Already.

4 MR. KORNSTEIN: - - - that reduces the risk
5 - - -

6 CHIEF JUDGE LIPPMAN: So what is it - - -
7 so again, concisely, what is it that this case will
8 stand for if we accept your argument in terms of
9 unconscionability?

10 MR. KORNSTEIN: For a - - -

11 CHIEF JUDGE LIPPMAN: When - - - when does
12 it have - - - when is that? Is it the hybrid fee?
13 What is it? What's the rule?

14 MR. KORNSTEIN: And the disproportionality.
15 Judge Levine found that the work done here was not
16 exceptional. It was over a short amount of time, and
17 that the work that brought forth the smoking gun
18 documents was done before the change in the retainer.

19 JUDGE PIGOTT: If we put it in this fashion
20 - - - Judge Graffeo raises the point, you know, of -
21 - - of other retainers. That's it - - - I assume
22 you're familiar with Labor Law Section 240, which
23 everybody hates, because they say, he falls, he
24 collects. So someone signs him up; usually they take
25 him for a contingency of a third. They take forty

1 percent if it's an appeal, I think. They get a - - -
2 they get a - - - a decision of a million dollars
3 because that's all - - - that's all the coverage
4 there is. Maybe the guy's badly hurt, but it's - - -
5 you know, that's the most they're going to get, a
6 million bucks.

7 So they take it and they take a 400,000
8 dollar fee. The worker comes in and says, 400,000?
9 This is what I got to live on the rest of my life.
10 This is it for me; this is all my wages. This is all
11 my medical. This is all my pain and suffering. You
12 can't let them take forty percent of that fee because
13 it's a Labor Law 240, and everybody knows there - - -
14 that you just go in and file and win.

15 Should - - - should we be saying in cases
16 like that, similar to what you're arguing here, that
17 based upon proportionality and based upon how
18 difficult the case is, that a forty percent
19 contingent fee in a case like that is unconscionable?

20 MR. KORNSTEIN: The court has answered that
21 question, going back through the history of these
22 kinds of cases, it has said that, let's say, a fifty-
23 percent recovery on 1,000-dollar case. That might be
24 okay. But if it's a fifty percent recovery on a
25 500,000 dollar case, that might not be appropriate.

1 JUDGE PIGOTT: Fifty percent recovery,
2 you're saying contingent fee or the recovery for the
3 client?

4 MR. KORNSTEIN: A contingent fee.

5 JUDGE PIGOTT: Oh, contingent.

6 MR. KORNSTEIN: A contingent fee. That's
7 the example that's used in Gair v. Peck, and that's
8 the kind of example that's used throughout the cases
9 from this court, that the amount of recovery does
10 have a bearing on whether the fee is unconscionable.

11 JUDGE PIGOTT: Did you answer yes to my
12 hypothetical?

13 MR. KORNSTEIN: You can't answer yes or no
14 to that because it depends on individualized
15 circumstances. You can talk about factors that have
16 to be applied in the individual case. Here, the
17 strongest point that leaps out on both procedural and
18 substantive is the lack of information. Earlier this
19 year in the Albunio case, the court repeated those
20 kinds of factors that the client must be informed.

21 CHIEF JUDGE LIPPMAN: But wasn't the client
22 kind of bullheaded about this, even when the
23 accountant says, gee, do you really want to do this,
24 she says, yeah, I really want to do this.

25 MR. KORNSTEIN: That was based on an

1 understanding that we were talking about a few
2 million dollars. And she was interested in covering
3 her costs, and that's why the firm asked for a fifty-
4 percent recovery. Everybody - - - or at least, she
5 was made to understand that it was a modest case at
6 that point. The - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but he pointed
8 out to her that this is not necessarily a good idea
9 for you, right?

10 MR. KORNSTEIN: That's what the testimony
11 was.

12 JUDGE GRAFFEO: So can I ask you, if we
13 were to agree with you, do you want us to reinstate
14 the referee determination, or send it back for
15 another trial, or what - - - what do you want us to
16 do as a remedy if we agree with you?

17 MR. KORNSTEIN: We think that the Appellate
18 Division got it exactly right, that in a situation
19 where you have a prior retainer - - - a prior time-
20 charged retainer, and the midstream modification is
21 declared unconscionable, that it goes - - - reverts
22 back to the original retainer. That's time charges,
23 and in this case, it was time charges plus interest -
24 - -

25 CHIEF JUDGE LIPPMAN: So rather than forty-

1 four million dollars, they'd get what?

2 MR. KORNSTEIN: The total was three million
3 dollars, which is exactly what their time charges
4 were on top of the previous twenty-two million
5 dollars, which is a total of twenty-five million
6 dollars.

7 JUDGE GRAFFEO: So you invalidate the
8 contingency arrangement completely?

9 MR. KORNSTEIN: Yes, because - - -

10 JUDGE GRAFFEO: How? I mean, that was my
11 interpretation of the Appellate Division.

12 MR. KORNSTEIN: Yes, because - - -

13 JUDGE GRAFFEO: They set aside the
14 contingency arrangement.

15 MR. KORNSTEIN: Because it's - - - you have
16 to break it down. With procedural unconscionability,
17 which we think occurred here, it's as if the
18 modification never occurred.

19 CHIEF JUDGE LIPPMAN: But what if it's - -
20 - what if - - - what if we took the referee's finding
21 on this, that it's substantive, and he tries this
22 equitable solution. You're opposed to that?

23 MR. KORNSTEIN: Yes, because it is
24 subjective and arbitrary in the sense that no other
25 jurist would necessarily come up with the same

1 computation. It is something that was singular to
2 Judge Levine that - - -

3 CHIEF JUDGE LIPPMAN: Well, you could send
4 it back to look at his calculations, how he got to
5 that point, couldn't you?

6 MR. KORNSTEIN: Well, but there's no reason
7 why he would do something differently. It's much
8 simpler, and in terms of a policy - - -

9 CHIEF JUDGE LIPPMAN: To just do it by the
10 hours, end of story?

11 MR. KORNSTEIN: Yes, because that's the
12 agreement was and there was - - -

13 JUDGE RIVERA: Isn't that exactly what she
14 was trying to avoid, though? You don't think she
15 abandoned that arrangement, when she said I don't
16 want to pay this money anymore? I don't want to do
17 hourly rates anymore.

18 MR. KORNSTEIN: She had wanted to change it
19 from an hourly, but she was misled because she wasn't
20 fully informed. That's the point that I need to
21 stress - - -

22 JUDGE RIVERA: Well, even if there's - - -
23 even if there's perhaps some uncertainty about
24 whether or not - - - if she was fully informed, she'd
25 agree to this forty-percent contingency, it's

1 certainly clear on the record, that she didn't want
2 to do this hourly rate.

3 MR. KORNSTEIN: Yes, but - - -

4 JUDGE RIVERA: So why - - - why revert back
5 to what we know she does not want - - - she did not
6 want - - -

7 MR. KORNSTEIN: Well, it - - -

8 JUDGE RIVERA: - - - to be the arrangement?

9 MR. KORNSTEIN: It's a common rule in
10 contracts, in wills, generally, that if the
11 modification is deemed unenforceable, that you go
12 back to the prior agreement.

13 JUDGE PIGOTT: Well, in surrogate's court,
14 they make - - - you know, you - - - you challenge
15 what Judge Levine did, but they do that all the time.
16 I mean, you know, people will submit their bills, and
17 the judge will say, I think that's a little bit high
18 for this estate; don't you, counselor? And compute -
19 - -

20 MR. KORNSTEIN: Sure. But that proves my
21 point. That's where there is no prior agreement and
22 a second agreement. It's with the single agreement
23 and - - -

24 JUDGE PIGOTT: Right, but - - - but you
25 want to say - - - I agree with Judge Rivera on this.

1 You want to say, she wanted a contingency. We think
2 it's wrong, so give her what she didn't want, an
3 hourly, because of course, it inures to our benefit
4 now, which doesn't make sense. It just would seem to
5 me that there ought to be something else.

6 MR. KORNSTEIN: Well, I'm not saying it
7 because it inures to the client's benefit. I'm
8 saying it because I think that's what the law - - -

9 JUDGE PIGOTT: Okay.

10 MR. KORNSTEIN: - - - requires and if it
11 doesn't yet require it, it should require it in terms
12 of simplicity and how to deal with the situation.

13 We have a situation here where lawyers took
14 advantage. Yes, she wanted a change from the hourly
15 time-charged retainer. But what they did was do
16 something that was to benefit themselves without
17 telling her, and even as it developed - - - even as
18 the results were - - - the critical factor - - -
19 these Epps documents that materialized, all the work
20 to get those were done before the change in the
21 retainer.

22 So it was a lucky thing that it did happen,
23 but it was not because of the attorneys' - - -

24 JUDGE PIGOTT: Doesn't that open a
25 Pandora's - - - I mean, can - - - can you - - - I

1 know you've been practicing a long time. Can you
2 imagine any of your clients in your history coming
3 back to you and saying, you know, now that I look
4 back on it - - - and suggest to you, that maybe you
5 should give back some of the money that you've been
6 charging? Can you - - - can you picture that
7 possibly happening?

8 MR. KORNSTEIN: Sure, I can picture it,
9 Judge Pigott. But one of the reasons why the court
10 has set the rules about informing clients is to avoid
11 this sort of an autopsy. Yes, human nature being
12 what it is, it is possible that clients will try to
13 reduce a fee after the fact. But if the lawyers had
14 given full information - - - had done what they were
15 supposed to do, it would reduce the chances of that
16 happening. That's what they're supposed to do.
17 That's what we're trying to come up with. But - - -

18 JUDGE GRAFFEO: But attorneys don't always
19 have the crystal ball. I mean, parties can be dis -
20 - - dismissed from an action. Coverage may not be
21 what you initially think it is. Some - - - you know,
22 things can happen. People can say things in
23 depositions you don't anticipate. I'm a little
24 concerned when you say it all depends on what's being
25 disclosed to the client.

1 MR. KORNSTEIN: What happened here is they
2 flooded her with information. A lot of those
3 seventeen volumes of the record is stuff that they
4 sent to her. They didn't send this one document.
5 That tells you something.

6 JUDGE PIGOTT: Well, it doesn't - - -

7 MR. KORNSTEIN: It tells you - - -

8 JUDGE PIGOTT: Right.

9 MR. KORNSTEIN: - - - that it was
10 important, and we talked about secrecy in terms of
11 the gifts. Well, that seems to be the signature.
12 There's a nondisclosure element here. They didn't
13 tell her about this. Just - - -

14 JUDGE PIGOTT: Would you be opening
15 yourself up - - - not you, personally, but a lawyer
16 if they - - - if a document, such as you're
17 discussing, where they do an evaluation of a case,
18 and wouldn't that be opening themselves up to
19 malpractice if the case didn't turn out as well as
20 that indicated?

21 MR. KORNSTEIN: No, they - - - a month
22 before, in November of 2004, they had sent her a list
23 of the claims that pretty much match the claims
24 listed on this document, but they did not talk about
25 their estimated valuation of that. So that they had

1 it in mind, they were withholding the information,
2 and then when negotiating with her about the
3 modification, they don't tell her that - - - they
4 don't correct her misperception. She's saying, a few
5 mil - - -

6 JUDGE READ: So - - -

7 MR. KORNSTEIN: - - - in terms of what the
8 case is worth and - - -

9 JUDGE READ: So they really acted in bad
10 faith is what you're saying.

11 MR. KORNSTEIN: Absolutely.

12 JUDGE READ: But the - - - but the referee
13 didn't find that, correct?

14 MR. KORNSTEIN: The referee did not, but
15 the surrogate - - - well, and the Appellate Division
16 focused on a number of factors, one of which was
17 withholding this information, the other was the
18 lion's share element that she got less than what the
19 firm did, the fact that it did not reduce her fees.
20 It would only have reduced her fees if it was the
21 recovery that she was led to believe was in the
22 ballpark.

23 JUDGE RIVERA: Does - - - does your - - -

24 CHIEF JUDGE LIPPMAN: Counselor, counselor
25 - - - go ahead.

1 JUDGE RIVERA: I'm sorry. Does your - - -

2 CHIEF JUDGE LIPPMAN: Judge Rivera.

3 JUDGE RIVERA: Does your position encourage
4 less transparency from lawyers, encourages them to be
5 more vague? I mean, what - - - what really are you
6 going to tell your client about what something is
7 worth?

8 MR. KORNSTEIN: Full disclosure.

9 JUDGE RIVERA: Low ball, high ball, you're
10 in trouble. What - - - what would you say?

11 MR. KORNSTEIN: Full disclosure. You can
12 give a range. But if you have internally a document
13 that gives your good faith best estimate and then
14 you're negotiating with the client for a contingency
15 fee - - -

16 JUDGE RIVERA: Encourage them never to
17 write that down?

18 MR. KORNSTEIN: Well, but if you do write
19 it down, and it's relevant to the client being fully
20 informed - - - that's one - - -

21 CHIEF JUDGE LIPPMAN: But counselor, let me
22 ask you one final question. This is an unusual
23 client, forget that the case is unusual, right?

24 MR. KORNSTEIN: Everything about the case
25 is unusual.

1 CHIEF JUDGE LIPPMAN: Right, but this
2 client is particularly unusual that she is involved
3 twenty-four hours a day driving these lawyers crazy,
4 and I'm not saying they're not driving her crazy too.
5 But she is a particularly involved client.

6 MR. KORNSTEIN: They weren't doing it for
7 free.

8 CHIEF JUDGE LIPPMAN: Yeah, I understand
9 that. How does that play into this whole context
10 that we're looking at? This woman is all over this
11 litigation for years and years and years. There's
12 this very intimate relationship with these lawyers.

13 How does - - - how does that affect what
14 we're looking at in terms of the legal issues? Or
15 make it difficult - - - I guess what I'm saying - - -
16 how does it make it difficult to see it only one-
17 sided, that one of them is taking advantage of the
18 other, when it seems that they're both all over each
19 other for years, and years, and years. Does it come
20 down to they're lawyers and she's not?

21 MR. KORNSTEIN: Well - - -

22 CHIEF JUDGE LIPPMAN: What - - - what - - -
23 what is the impact of this particular client with her
24 particular personality and strength?

25 MR. KORNSTEIN: Chief Judge Lippman, you

1 mention the fact that they're lawyers. That does
2 create the unique fiduciary - - -

3 CHIEF JUDGE LIPPMAN: I understand.

4 MR. KORNSTEIN: - - - relationship. They
5 had the burden, both of proving that the retainer was
6 okay, the modification, but they also had the burden
7 of being open with her, of sharing with her. The
8 theme that - - -

9 CHIEF JUDGE LIPPMAN: So it comes down
10 again to the ethical rules governing lawyers? Is
11 that what this is about?

12 MR. KORNSTEIN: Well, I - - -

13 CHIEF JUDGE LIPPMAN: Versus, again, this -
14 - - this - - - the way I framed it, the free will,
15 and if the client apparently had a lot of will, and
16 the ethical rules. How from your perspective to the
17 two - - - do the two - - - how do you resolve those
18 two issues in this particular case?

19 MR. KORNSTEIN: I think they blend
20 together. I don't think that they're as distinct as
21 Your Honor is saying, that the - - -

22 CHIEF JUDGE LIPPMAN: Oh, we know they
23 intersect with each other. How so?

24 MR. KORNSTEIN: The free will depends on
25 information provided. A client - - - a human being

1 cannot have free will if they're making a false
2 choice. One needs the information in order to make a
3 meaningful choice. And that's even the language of
4 the procedural unconscionability cases, that you - -
5 - the client must have the information to make a
6 meaningful choice.

7 That's true with the gifts, because she
8 wasn't given the advice to get separate counsel. And
9 it has a gatekeeper effect in terms of everything
10 afterwards being tainted and it applies here with the
11 fee.

12 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
13 you.

14 Counselor, rebuttal?

15 MR. CARVIN: Thank you, Your Honor. I'd
16 really like to return to this question of not telling
17 the kids and the firm, because I think the discomfort
18 perhaps about whether the attorneys, who interacted
19 with them, would unfairly prejudice the way we look
20 at how they interacted with Alice. The failure to
21 tell the firm and the children is relevant only to
22 the voluntariness of the gift, if they were trying to
23 cover something up.

24 Read the briefs. They can't even
25 articulate a scenario why they thought the kids or

1 the firm would sort of come in and tell Alice - - -
2 the famously domineering Alice - - - you've made a
3 mistake, and get her to change her mind.

4 CHIEF JUDGE LIPPMAN: How does that - - -
5 let me ask the same question I just asked your
6 adversary. How does the famously domineering - - -
7 in your words - - - client, how does that impact - -
8 -

9 MR. CARVIN: Well - - -

10 CHIEF JUDGE LIPPMAN: - - - on your
11 argument?

12 MR. CARVIN: Well - - -

13 CHIEF JUDGE LIPPMAN: Are you saying it
14 says, oh, this is a woman who knows exactly what
15 she's doing and the lawyers don't have an extra
16 responsibility, even with a really difficult, strong
17 client? What's - - - what's your view of that basic
18 issue that's framed in this case?

19 MR. CARVIN: The common law and the ethics
20 have thought about this. A free-willed client, who
21 has voluntarily given a generous gift, is perfectly
22 free to do so to lawyers, just like her 1.4 million
23 dollar gift to her doctor. How it translates into it
24 is, it makes nonsense of the notion that the lawyers
25 somehow induced these gifts, or this wasn't purely a

1 product of her free will. And the court shouldn't be
2 denying her her free will.

3 CHIEF JUDGE LIPPMAN: They don't have a
4 special responsibility, the lawyers?

5 MR. CARVIN: They have a special
6 responsibility to make sure that it's a knowing and
7 understanding thing. With - - -

8 JUDGE RIVERA: But - - - so why would I not
9 advise her to - - - to have someone else counsel her
10 on this? Why not advise her to get advice?

11 MR. CARVIN: Mr. Chill did. Judge Levine,
12 because he was very skeptical of everything, accepted
13 all of the attorneys' testimony, except in this one
14 particular. But let's assume, does that really
15 affect the outcome here? Because even though Judge
16 Levine said Mr. Chill didn't say that, she did it.

17 She went to her closest advisor, the
18 accountant, Wallberg. They discussed this at length.
19 She paid a 2.7 million dollar gift tax. He swore
20 under oath, after extensive consultations with Alice,
21 that this was a product of her own voluntary free
22 will. So whatever the benefits of getting outside
23 advice were realized here. The attorneys went out of
24 their way to contact Mr. Wallberg to make sure that
25 Alice had talked to him about it. Two of them talked

1 to him. So they knew she had gotten the outside
2 advice.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 MR. CARVIN: It's very difficult to give
5 the advice before she gives the gift. But everything
6 was satisfied here.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. CARVIN: Thank you, Your Honor.

9 CHIEF JUDGE LIPPMAN: Thank you.

10 Counselor, rebuttal?

11 What about this central question in
12 relation to the contingency arraignment - - -
13 arrangement? Client, that's what she wanted, end of
14 story. How do you, again, balance the responsibility
15 of lawyers, with the client? Here, it's just a
16 straight contingency agreement, and she wanted it,
17 end of story?

18 MR. SHOOT: Your Honor, the special referee
19 found that Alice was fully informed as to the details
20 of the litigation. Volume 11 of the record contains
21 basically only documents from - - -

22 CHIEF JUDGE LIPPMAN: No information
23 withheld that she needed?

24 MR. SHOOT: Ah - - -

25 JUDGE PIGOTT: But part - - - part of the

1 point I - - - well, never mind. Go ahead. I'll - -
2 -

3 CHIEF JUDGE LIPPMAN: Go ahead, and then
4 Judge Pigott.

5 MR. SHOOT: May I answer that first, Your
6 Honor? Restatement of the Law Governing Lawyers,
7 Section 34, Comment C, "A contingent fee contract
8 allocates to the client the risk that the case will
9 require little time and produce a substantial fee,
10 events within that range of risk, such as a high
11 recovery, do not make unreasonable a contract that
12 was reasonable when made."

13 Consequently we've had claims throughout
14 the course of this litigation - - - they've changed,
15 but we've had claims throughout the course of this
16 litigation of the horrible things that Graubard did.
17 The new cast of characters is different than the old
18 one.

19 The claim you heard today: We withheld - -
20 - Graubard withheld information. The reference was
21 made to this one-page document. You'll find it at
22 Volume 16, A6374. It's a handwritten secret sheet
23 that Graubard withheld from her. It has cross-outs
24 on it. It's not the thing anyone would ever hand to
25 a client.

1 But what they did hand to the client, Your
2 Honors, is a fifteen-page analysis - - -

3 JUDGE PIGOTT: Yeah, I think the point,
4 though, is that, you know, you're still dealing with
5 a non-lawyer, and everybody gets afraid when the
6 trial's coming. And you could picture a scenario
7 here, where - - - where Alice, for all of her bravado
8 and everything else, is saying, hey, you know, if
9 we're going to go in and go to trial on this thing,
10 I'm not going to be paying you guys an arm and a leg
11 every day for witnesses and experts and everything
12 else and I need a break.

13 And Graubard is saying, don't worry; relax.
14 You know, we've done this before; don't get excited
15 and we can get this thing done.

16 MR. SHOOT: What was happening - - -

17 JUDGE PIGOTT: Does that sound - - -

18 MR. SHOOT: - - - in January 2005 was
19 almost exactly the opposite. They're trying to
20 convince her - - - even though the claim we've told
21 you was the biggest in the case just went south, stay
22 with this litigation. The information - - - the
23 secret information, Your Honor - - - was sent to her
24 in a fifteen-page memo, not a one-page handwritten
25 document. This is at Volume 10, A2904 of the record.

1 And you will see the numbers are almost the
2 same with one big exception. The line at the top of
3 this handwritten page, the big claim, the 95 Street -
4 - - Wall Street claim - - - was thirty-one million
5 only in the 1997 memo sent to Alice, and it becomes
6 fifty-five million in the handwritten sheet. Secret
7 information.

8 Except they sent her a three-page analysis
9 - - - this is at Volume 10, A2930 - - - explaining
10 how they get the fifty-five million that it's now - -
11 - they've now changed their estimate of the 95 Wall
12 Street claim from thirty-one million to fifty-five
13 million. Of course, how right were they, it ended up
14 being zero, which is the nature of litigation.

15 Our point here is, Your Honor, that you had
16 a law firm that did everything right in terms of
17 zealously representing the client and getting a great
18 recovery. You had a variety of claims - - - I'm
19 sorry, Your Honor.

20 JUDGE RIVERA: No, no.

21 MR. SHOOT: Oh. You had a variety of
22 claims throughout the course of this lawsuit,
23 diminished capacity, because of an operation a half
24 year before. Can't figure out seventy-five percent
25 minus forty percent is thirty-five percent; neither

1 can her accountant? These are the claims which are
2 being made in this case.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. SHOOT: Thank you, Your Honors.

5 CHIEF JUDGE LIPPMAN: Thank you. Thank you
6 all. Appreciate it.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Lawrence v. Graubard Miller, Matter of Estate of Sylvan Lawrence, No. 149, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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