

# THE DAILY RECORD

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## Trials&TRIBULATIONS

# When is a contingent legal fee unconscionable?

The Estate of Sylvan Lawrence has spawned a considerable amount of litigation and it appears certain to continue for some time to come. In view of the value of the estate, it was probably inevitable.

The case begins with the death of Sylvan Lawrence in 1981. He was a real estate tycoon of the first order. He and his brother Cohn owned over 90 commercial buildings and parcels of real estate. Sylvan left the estate to his wife, Alice and three children, and his brother Seymour was named executor.

There was considerable acrimony between the estate and the surviving brother Cohn, and it focused on a dispute over whether various properties, and the company that managed the properties, should be liquidated. As a result, years of litigation ensued.

Over the years, more than \$350 million in distributions were made to the beneficiaries of the estate and the Graubard Miller law firm billed Mrs. Lawrence over \$18 million in legal fees for its services. During this same time, Mrs. Lawrence also generously paid \$5 million in gifts to three of the firm's partners, and also paid \$2.7 million in taxes on these gifts.

In 2004, Mrs. Lawrence was confronted with significantly greater legal fees since the case appeared to be headed to trial. As a result, she asked the firm to consider entering into a new fee arrangement, which it agreed to do in January 2005. The revised retainer agreement provided that for one year Mrs. Lawrence would pay the firm a flat fee not exceeding \$300,000 per quarter, hourly billings would be capped at \$1.2 million and, if Mrs. Lawrence settled her case against the executor's estate, she would pay 40 percent of the total distributed to the beneficiaries.

Since timing is often critical, it so happened that five months after entering into the revised agreement, the firm, on behalf of Mrs. Lawrence, reached a settlement with the executor by which the estate would be paid \$104.8 million, and therefore Mrs. Lawrence was required to pay legal fees in excess of \$40 million.

She apparently began to have second thoughts about this new arrangement and therefore, she refused to pay. As a result, the firm of Graubard Miller commenced a proceeding in surrogate's court to compel payment of its legal fees.

The Surrogate, Rene Roth of New York County, referred the matter to the Hon. Howard A. Levine (a retired Court of Appeals judge) as a referee to hear and report.

Mrs. Lawrence also filed a separate action in supreme court against the Graubard Miller firm and the three partners who had received over \$5 million in gifts. This proceeding sought rescission of the revised retainer agreement that had resulted in the \$40 million contingent fee, and also sought the return of the \$5 million in gifts.

Judge Levine concluded that there would need to be an evidentiary hearing to determine the completeness of the attorneys' disclosure and whether "they exploited their preexisting confidential relationship with her to obtain the favorable terms of the agreement," see *Lawrence v. Miller*, 11 N.Y.3d 588, 593 (2008) (internal quotations omitted).

In a decision dated July 10, 2006, Surrogate Roth granted motions to confirm the referee's report and adopted its recommendations in their entirety, see *Estate of Sylvan Lawrence*, 2006 NY Misc LEXIS 6825 (Sur Ct New York County 2006).

### Decision from the Appellate Division

In 2007, the Appellate Division, First Department heard the matter and in a 4-1 decision upheld the surrogate's court decision that the matter should proceed to an evidentiary hearing, see *Lawrence v. Graubard Miller*, 48 AD3d 1 (First Dept. 2007). In essence, Mrs. Lawrence's claim was that the \$40 million fee was, on its face, unconscionable and that no hearing was required. The majority disagreed and concluded that:

*"There is no authority for finding a 40 percent contingent fee unconscionable on its face. Generally, before a determination of*

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## *Continued ...*

*unconscionability can be made a full trial of the issues is required,”* *Id.* at p. 5.

The decision pointed out the fact that Mrs. Lawrence had personally negotiated with the late executor's son and had received a \$60 million offer before the revised retainer agreement was adopted. Thereafter, the offer, which ultimately resulted in a settlement, was raised to \$100 million within two and a half months.

Dissenting Justice Catterson had a significantly different view. In his opinion, the \$40 million for five months' work following years of litigation, in which the firm was fully compensated, was unconscionable and he would void the retainer agreement. He also would refer the defendants to the department's Disciplinary Committee since, in his view, the firm had violated the Code of Professional Responsibility with respect to the excessive fee they were attempting to extract and the manner in which they had solicited gifts from Mrs. Lawrence.

According to Mrs. Lawrence, the three attorneys to whom she had given gifts supposedly requested them based on their purportedly "exceptional performance in the litigation." It also was revealed that the attorneys never disclosed the gifts to their law firm.

## **Decision from the Court of Appeals**

The case then moved to the Court of Appeals, and in a decision dated Dec. 2, 2008, the court unanimously affirmed the Appellate Division, see *Lawrence v. Miller*, 11 N.Y.3d 588 (2008). The court concluded that the record needed to be developed regarding the circumstances surrounding the revised retainer agreement and although the fee appeared disproportionate to the amount of work done on the matter, the court could not conclude it was unconscionable without further evidence being presented. The court also noted that following the Appellate Division's grant of leave to appeal to the Court of Appeals, Mrs. Lawrence had died and a preliminary executor for the estate had been substituted.

The court remanded the case back to the surrogate for the purpose of having an evidentiary hearing to address the issues.

The case returned to surrogate's court and it was again referred to Judge Levine acting as a referee. In a Referee's Report dated

Aug. 27, 2010, Judge Levine recommended that the contingent fee of \$40 million be reduced to \$16 million, but that the partners who were given the \$5 million in gifts be allowed to retain them, see *Matter of Sylvan Lawrence*, 175/82 NYLJ 1202471778971, at \*1 (Sur Ct New York County, decided Aug. 27, 2010).

The report was referred to Manhattan Surrogate Nora S. Anderson, and in a decision dated Sept. 8, 2011, the court confirmed the recommendation of Judge Levine regarding the reduction of the contingent fee to \$16 million, but rejected his recommendations regarding the gifts. The surrogate concluded that the gifts should be returned since her choice to give those gifts did not appear unfettered as there was:

*“a combination of dubious circumstances that omit an odor of overreaching too potent to be ignored,”* *Matter of Sylvan Lawrence*, NYLJ, Sept. 13, 2011, at 1, col. 5 (*New York County Sur Ct, Anderson, J.*) (*linked to through the New York Law Journal*).

The surrogate took particular note that the partners who received the gifts had kept them secret from Mrs. Lawrence's three children and from even their own partners. Furthermore, they had not advised Mrs. Lawrence that because of the gift taxes, the actual cost of the gifts would be greater than their face value.

Since all the parties are aggrieved by the decision they have now announced they are appealing it and it is evident that it may again reach the Court of Appeals, but this time it will come there with a complete record for the court to make a final decision.

In my view, the Appellate Division will likely affirm the decision of the surrogate both with respect to rescinding the gifts and reducing the contingent fee to \$16 million. In essence, "the odor of overreaching" as suggested by the surrogate is too blatant to be ignored.

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