Resolution of Fee Dispute Board CLE

Thursday, June 23 from 3-5 PM
SC Bar Conference Center

Panel Speakers:

James Harrison, Fifth Circuit Co-Chair

Lex Rogerson, Eleventh Circuit Chair and Regional Chair

Cindy Coker, Public Services Division Director SC Bar

Agenda:

Fee Dispute Board Rules: 2016 Update Jurisdiction- Rule 2	3-3:15
Assigned Member Reports: Write like a Judge Findings of Fact Rule 1.5 Specific Dollar Award- one way or the other- or no award	3:15-3:45
Contingent Fee Issues: Did the Contingency Occur? *Estate of Jones* *SC Pub Service Auth V. Weeks*	3:45-4:15
Discharge before settlement *Bonham V. Farmer*	4:15:- 4 30
Excessive or unconscionable fee *In re Lawrence*	
Reverse contingency Fees	4:30-4:45
Hybrid Contingency fees: Tillman V. Grant	
Value Billing Nonrefundable Retainer	4:45-5

Refreshments following in lobby

Rule 416

South Carolina Appellate Court Rules

RULES OF PROCEDURE

SOUTH CAROLINA BAR

RESOLUTION OF FEE DISPUTES BOARD

RULE 1. CREATION

There is hereby created the Resolution of Fee Disputes Board of the South Carolina Bar ("Board").

RULE 2. JURISDICTION

The purpose of the Board is to establish procedures whereby a dispute concerning fees, costs or disbursements between a client and an attorney who is a member of the South Carolina Bar (the Bar) may be resolved expeditiously, fairly and professionally, thereby furthering the administration of justice, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good. As used in these Rules, "fee" is deemed to include a legal fee, costs of litigation and disbursements associated with a legal cause, claim or matter and "client" is defined as a person on whose behalf professional legal services have been rendered by an attorney who is a member of the South Carolina Bar. A dispute exists when the parties to an employment agreement between lawyer and client have a genuine difference as to the fair and proper amount of a fee. The amount in dispute, as used in these Rules, is the dollar amount of that difference. A dispute does not exist solely because of the failure of the client to pay a fee.

Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of $50,000 or more; (2) disputes over fees which by law must be determined or approved, as between lawyer and client, by a court, commission, judge, or other tribunal. When an allegation of attorney misconduct arises out of a fee dispute other than as to the reasonableness of the fee, the Board, in its discretion, may refer the matter to the Commission on Lawyer Conduct. If the alleged misconduct does not arise out of a fee dispute, it shall be referred to the Commission on Lawyer Conduct. (3) No fee dispute may be filed with the Board more than three (3) years after the dispute arose.

If an attorney is suspended from the practice of law after a fee dispute has been filed with the Board, the Board shall retain jurisdiction over the dispute until the conclusion of the fee dispute process. This shall include all applicable appeals under Rule 20.

Jurisdictional issues shall be determined by the circuit chair.

Last Amended by Order dated December 6, 2011.

RULE 3. APPOINTMENT AND TENURE

The Board shall be appointed by the President of the Bar ("President") and shall consist of not fewer than five (5) members of the Bar of this state from each judicial circuit of the state. Members of the Board shall be appointed for terms of three (3) years or until a successor has been appointed. Where additional members are subsequently appointed, those appointments shall be on a staggered basis so that the number of terms expiring shall be approximately the same each year. The expiration of a term will coincide with the date of expiration of the term of the incumbent President in the same year. A member of the Board may be reappointed.

RULE 4. DUTIES

The Board is authorized to receive, inquire into, take proofs, and make findings and final determination of disputes between attorneys and clients. It shall be the duty of the Board to encourage the amicable resolution of fee disputes falling within its jurisdiction. Each member shall continue to serve until completion of ongoing work on the Board.

Amended by Order effective, September 7, 2007.

RULE 5. APPOINTMENT OF EXECUTIVE COUNCIL

From among the appointed Board members, the President shall appoint an Executive Council comprised of the following: One Executive Council member from each of the four Judicial Regions of the state and one at large member. The President shall designate the chair of the Executive Council.

The Executive Council shall have the authority to interpret these Rules. The duties of the Executive Council will be to oversee and assist the functioning of the Board in the respective circuits of the state and to make recommendations to the Board of Governors as to procedures to be followed and rules to be amended.

Executive Council members should be experienced in the practice of law with no fewer than seven (7) years active practice, and in the case of the chair, not fewer than ten (10) years active practice.

The terms of the Executive Council shall be for three (3) years. The expiration of a term will coincide with the date of expiration of the term of the incumbent President in the same year. Should the term of an Executive Council member on the Board expire and the member not be reappointed to the Board, the member's term on the Executive Council shall expire at the same time the member's term on the Board expires. In that event, the President shall appoint a replacement member to the Executive Council for the unexpired term. A member of the Executive Council may be reappointed.

The Executive Council shall meet at such times and places as may be called by the chair or by any four members thereof.

Amended by Order effective August 7, 2015.

RULE 6. CIRCUIT PANEL

The members of the Board within a judicial circuit comprise the circuit panel. The President shall appoint one member of the circuit panel as circuit chair and such other members as co-chairs as needed, all of whose terms shall be at the pleasure of the President. Appointment of co-chairs shall be made upon recommendation of the circuit chair.

RULE 7. HEARING PANEL

The members of the Board appointed to hear or consider a specific case or proceeding will be the hearing panel. The hearing panel will be appointed by the circuit chair from the circuit panel except as provided in Rule 18 concerning conflicts of interest.

RULE 8. ASSIGNED MEMBER

The member of the circuit panel who is assigned to conduct the initial investigation of an application shall be known as the "assigned member." The assigned member shall not be a member of the hearing panel which hears a dispute investigated by that assigned member or represent a party before that hearing panel. With the consent of the Executive Director of the Bar and as provided in Rule 11, a Bar staff person who is a Bar member or who is supervised by a Bar member may be appointed as the assigned member.

Amended by Order dated September 7, 2007.

RULE 9. RULE EXCLUSIVE UPON CONSENT

(a) Any client-applicant for the services of the Board must consent in writing to be bound by a final decision of the Board. Thereafter, the attorney is also bound.

(b) No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board. Thereafter, both parties are bound.

(c) Upon consent of the client-applicant to be bound by the final decision of the Board, exclusive jurisdiction over the fee dispute vests in the Board.

Amended by Order dated September 7, 2007.

RULE 10. COMMENCEMENT OF PROCEEDINGS

All proceedings hereunder shall be commenced by filing an application in the Office of the Bar, on forms provided by the Bar. The application shall include a written statement of the facts and circumstances surrounding the dispute, furnishing complete names and addresses.. If the materials submitted exceed twenty-five (25) pages, the client-applicant shall submit three additional sets of the materials.

If the applicant is a client, but is not the person who paid for the lawyer's services, the third party payer, with the written consent of the client-applicant may jointly file with the client-applicant with both signatures affixed to the application.

If the responding party is an attorney, the Bar shall forward the completed application, as filed, to the attorney by electronic mail, with confirmation of delivery. If the responding party is not an attorney, the Bar shall forward the completed application, as filed, to the responding party by certified mail, return receipt requested. A copy shall be sent by regular mail or email to the circuit chair in the circuit where the principal place of practice of the attorney is located. If the application involves attorneys in more than one circuit, a copy of the completed application shall be sent to the chair of the Executive Council, who shall designate which of these circuit chairs shall have jurisdiction and shall proceed with the matter.

If the amount in dispute exceeds $7,500, the circuit chair may appoint a hearing panel without assignment of the matter to an assigned member.

After the initial correspondence, all other correspondence will be sent by regular mail or, with the written consent of the client and lawyer, by email. Such written consent may be withdrawn by written notice served on all other parties or attorneys. If served by regular mail, correspondence will be deemed served upon deposit in the U.S. Mail with proper postage affixed. If served by email, service is complete upon transmission, unless the party making service learns that the attempted service did not reach the person to be served. All parties have the duty to inform the circuit chair of any change of address.

Amended by Order effective August 7, 2015

RULE 11. INVESTIGATION BY ASSIGNED MEMBER

Upon receipt of the completed application, the circuit chair shall promptly appoint the assigned member. The assigned member shall conduct an investigation sufficient to enable the rendering of an informed recommendation. The assigned member's recommendation shall be written and contain the reasons for it. This report shall be submitted to the circuit chair, with a copy to the Bar

office, as soon as possible and not later than ninety (90) days after appointment of the assigned member, unless the time is extended by the circuit chair pursuant to Rule 12. The circuit chair shall send a copy of the report to each of the parties and notification of the circuit chair's concurrence or nonconcurrence with the recommendations of the assigned member.

The attorney shall respond to the issues raised in the application within thirty (30) days of being contacted by the assigned member. The assigned member may extend the period for response once and by no more than 30 days.

The parties to the dispute and any witnesses on their behalves shall make themselves available for interview at a time and place designated by the assigned member within the time required for the assigned member to make a report. If a party or a witness cannot, for any reason, be present at the designated time and place, that witness or party shall submit a written response to the assigned member within fourteen (14) days of the date the assigned member designated as the interview date, unless the assigned member grants the party or witness an extension. The party or witness may also submit a statement in writing, provided such statement is delivered to the assigned member on or before the date designated for the interview of that party or witness. The response to questions along with the written statement, if any, together shall constitute the complete statement of the party or witness concerning the dispute. In the event a party fails to respond, then the assigned member must render a decision based upon the available materials.

The assigned member may encourage resolution of the dispute by compromise where the circumstances warrant such effort. Efforts at compromise may include mediation of the dispute by the assigned member. Compromise or consent agreements, whether written or oral, become the final decision of the Board fifteen (15) days after the date of a letter from the circuit chair to the parties confirming the agreement.

If the amount in dispute does not exceed $1,000, in lieu of appointment of an assigned member, the circuit chair may assign the dispute to the staff of the Bar for an expedited investigation and recommendation. The staff in its discretion may make findings based on written submissions by the parties or on such other information as may be necessary to render an informed recommendation. In the event of such assignment, the staff shall have the same powers and be governed by the same duties and procedures as would an assigned member.

Amended by Order effective December 6, 2011.

RULE 12. SCHEDULE OF PROCEEDINGS

(a) All fee disputes should be resolved within six (6) months. The assigned member's report should be completed within thirty (30) to ninety (90) days after being forwarded by the circuit chair. A fee dispute may not exceed six (6) months without the written consent of the circuit chair for good cause shown. Any extension of time granted by the circuit chair must be for a specified period of time which shall be the least amount of time deemed necessary to resolve the dispute.

(b) If an assigned member does not respond to reminders from the Bar office, the Bar office will notify the circuit chair.

(c) If a fee dispute has been assigned and is pending, without an extension approved by the circuit chair,

(1) more than ninety (90) days, then the circuit chair may, at his or her discretion:

(A) reassign the fee dispute;

(B) if the amount exceeds $7,500, appoint a hearing panel, which shall schedule a hearing within thirty (30) days

(2) more than six (6) months, then the circuit chair shall, with the concurrence of the Executive Council Chair:

(A) reassign the fee dispute;

(B) if the amount exceeds $7,500, appoint a hearing panel, which shall schedule a hearing within thirty (30) days; or

(C) return all investigative notes and application to the designated Bar staff member for investigation as the assigned member.

In these events, the original assigned member shall immediately turn over notes and files to the circuit chair.

(d) If the circuit chair is delinquent, then the case may be reassigned to the Executive Council Chair or the Executive Council Chair's designee.

Last Amended by Order effective December 6, 2011.

RULE 13. PROCEEDINGS OF THE BOARD

If the amount in dispute is $7,500 or less, the decision of the assigned member or Bar staff, with the concurrence of the circuit chair, shall be the final decision of the Board.

If the amount in dispute is more than $7,500, the decision of the assigned member with the concurrence of the circuit chair shall be served on the parties by first class mail, with proper postage affixed, or by email, provided the parties have consented to services by email in accordance with Rules 10. The decision is final unless a written request for a hearing panel is made by filing such request with the circuit chair within thirty (30) days after the date of mailing written notification of the decision. (For Hearing Panel Decision, see Rule 17.)

If the chair does not concur with the decision of the assigned member, a hearing panel will be appointed.

Amended by Order effective December 6, 2011.

RULE 14. APPOINTMENT OF HEARING PANEL

When appropriate, a hearing panel of three (3) members shall be appointed by the circuit chair from the circuit panel in the judicial circuit where the principal place of practice of the attorney is located. A hearing panel should be appointed within ten (10) days of the date a written request for a hearing panel is filed with the circuit chair. The procedure for appointing hearing panel members shall be established by the Executive Council. One (1) member of the hearing panel shall be designated by the circuit chair as chair of the hearing panel. Upon appointment of the hearing panel, the parties to the proceeding shall be notified in writing by the circuit chair of the appointment of the hearing panel, giving the names and addresses of the members, including the identity of the chair, and further informing the parties involved that the hearing panel will resolve the dispute. Each party may proceed without counsel or be represented by counsel of the party's choosing and at the party's own expense. The Board is not required by law to appoint an attorney to represent a party; however, upon request of a party, a member of the Board may be appointed to represent the party before the hearing panel if, in the discretion of the circuit chair, good cause is shown. Good cause may include but is not limited to (1) the income level of the party, (2) the educational level of the party, or (3) interests of parity and justice.

Last Amended by Order dated July 18, 2002, effective September 1, 2002.

RULE 15. PANEL HEARINGS

The chair of the hearing panel shall convene a hearing at a place within the circuit within forty-five (45) days of assignment by the circuit chair and at least thirty (30) days after giving notice to the parties by first class mail, with proper postage affixed, unless otherwise agreed by all parties and the panel members. The notice shall inform the parties that the hearing is *de novo* and that no reports or other information from the assigned member will be considered. The notice also shall inform the parties that they may have witnesses present and may present documentary evidence and should present all evidence they expect to present at the hearing.

If the circuit chair determines that a hearing panel or panel member is delinquent in scheduling or attending a hearing, the circuit chair has the authority to reassign the whole panel or reassign one or more panel members.

If a party or a witness cannot, for any reason, be present at the hearing, a written statement shall be submitted which shall be the complete statement of the party or witness. If a party fails to appear, then the hearing panel shall render its decision based on the available testimony and documentation.

Conduct of the hearings shall be pursuant to such rules and procedures as the Executive Council may prescribe. While it is not necessary to follow strictly the rules of evidence as generally applied in circuit court, hearings should be conducted in conformance generally with them. If the hearing cannot be completed within the allotted time, it may be adjourned by the panel chair and reconvened with no less than ten (10) days notice, unless the parties and panel members otherwise agree to a date and time certain.

A party to a fee dispute may, at the party's own expense, cause any hearing by the panel to be recorded and transcribed. The tape recording of the hearing shall be the property of the Board. If a party has a hearing transcribed, the party shall, at the party's own expense, provide a copy of the transcript to the Board.

Amended by Order effective September 7, 2007.

RULE 16. VOLUNTARY TERMINATION

Prior to the final decision of the Board, the party who initiated the process may terminate the process. Termination of the process takes effect upon receipt in the Bar office of written acknowledgement from the initiating party.

This written acknowledgement of withdrawal will have the effect of ending the availability of the procedure with prejudice to the initiating party as to that dispute so that a party who initially filed an application with the Board may not make a second filing on the same dispute after withdrawing the first filing. Should that party fail to make a written acknowledgement of the withdrawal, the Board shall proceed to resolve the matter without delay.

Nothing herein is to be construed as limiting a party from filing an amended or supplemental form pertaining to the dispute, if requested or if needed, under such conditions as the hearing panel may provide or as may be established by the Executive Council.

Amended by Order effective, September 7, 2007.

RULE 17. HEARING PANEL

Upon conclusion of the panel hearing, the hearing panel members shall forthwith proceed to reach a decision and shall, within fifteen (15) days of the hearing, issue a written decision, including a factual statement of the controversy and the reasons for the decision reached. A decision of the majority of the hearing panel shall constitute a final decision of the Board. The written decision shall be filed with the Bar, and a copy sent to the circuit chair and each party to the dispute by first class mail, with proper postage affixed, or by email, provided the parties have consented to service by email in accordance with Rule 10. Service by mail is complete upon mailing.

Amended by Order effective, September 7, 2007.

RULE 18. CONFLICTS OF INTEREST

In case of a conflict of interest or disqualification of a circuit chair and any co-chair in a given case, the circuit chair shall request assistance from the chair in another circuit and transfer the case to that circuit

In extraordinary cases where members of the circuit panel are disqualified for any reason, either voluntarily or involuntarily, in a specific dispute, and there do not remain enough members of the circuit panel to comprise the hearing panel, the chair of the Executive Council, or, in the event of the disqualification of the chair of the Executive Council, the President shall appoint the requisite number of members from the Board to the hearing panel.

Should any member of the circuit panel in a judicial circuit fail or refuse to discharge the duties of a member of the Board, the chair of the Executive Council shall appoint a substitute member from members of the Board.

Amended by Order effective, March 30, 2016.

RULE 19. COMPLIANCE

The decision of the Board shall be final and binding upon the parties and shall be enforceable in any court of competent jurisdiction. The parties shall comply with the terms of the final decision within thirty (30) days after mailing.

In case of non-compliance by either party, the circuit chair shall issue a Certificate of Non-Compliance which may be entered as a judgment pursuant to Rule 58(a), SCRCP. If the certificate is issued against a lawyer, it shall be forwarded by the Circuit chair to the Bar and then forwarded to the Commission on Lawyer Conduct under Rule 8.3 of the Rules of Professional Conduct, Rule 407, SCACR.

Last Amended by Order effective August 7, 2015

RULE 20. APPEALS

(a) A party aggrieved by the final decision of the Board may appeal the decision to the circuit court in the county where the principal place of practice of the attorney is located.

(b) To confer jurisdiction of an appeal on the circuit court, the appealing party must commence the appeal within thirty (30) days after the final decision is mailed to the appealing party, except that if based upon corruption, fraud, or other undue means, it must be commenced within thirty (30) days after such grounds are known or should have been known.

(c) In order to commence an appeal, the appealing party must:

(1) file with the clerk of the circuit court a notice of appeal along with a signed document certifying the names and addresses to which the appealing party mailed copies of the notice and the date the copies were mailed. The notice of appeal must contain (i) the names of all parties to the dispute, (ii) an indication that the appealing party is appealing from a final decision of the Resolution of Fee Disputes Board, (iii) a detailed statement of the grounds for the appeal and (iv) the name, current mailing address, and telephone number of the appealing party;

(2) pay the required filing fee to the clerk of court;

(3) mail each other party to the dispute a copy of the notice of appeal; and

(4) mail a copy of the notice to the South Carolina Bar Resolution of Fee Disputes Board.*

A notice of appeal is sufficient if it is in writing, is signed by the appealing party, and contains the information required in sub-paragraph (c)(1).

(d) Filing an appeal does not stay the issuance of a Certificate of Non-Compliance. However, if, upon the filing of a notice of appeal, a party pays the disputed sum to the Bar to be held in trust pending resolution of the appeal, no Certificate of Non-Compliance shall be issued. The Bar shall remit the disputed sum to the prevailing party within ten (10) days of the final disposition of the dispute.

(e) The Board shall supply to the circuit court a record on appeal, which shall include such of the following materials as were involved in the proceedings of the Board: the application, the decision of the assigned member, the concurrence or non-concurrence of the circuit chair, and the decision of the hearing panel.

(f) The court shall affirm or vacate the final decision of the Board. The court may vacate only where:

(1) the decision was procured by corruption, fraud, or other undue means;

(2) there was evident partiality or corruption in an assigned member or hearing panel member, or misconduct prejudicing the rights of any party;

(3) the assigned member or hearing panel members exceeded their powers;

(4) the hearing panel members refused to postpone the hearing, if any, upon sufficient cause being shown therefore, or the assigned member or hearing panel members refused to hear evidence material to the controversy, or otherwise conducted the proceeding so as to substantially prejudice the rights of a party; or

(5) the hearing panel chair did not provide notice of the hearing as required under Rule 15.

(g) In vacating the final decision, the court may order a reconsideration by a new assigned member appointed by the circuit chair or, if vacating the decision of a hearing panel, a rehearing before a new hearing panel appointed by the circuit chair. Any reconsideration or rehearing shall be de novo, and no reports or decisions of any prior assigned member or hearing panel shall be considered. When a final decision of the Board is vacated, any judgment which may have been entered pursuant to that decision also is vacated.

(h) The parties and the circuit court shall provide the Board notice of all proceedings on appeal and the final disposition of the appeal.

* The current address of the Board is Post Office Box 608, Columbia, SC 29202.

Last Amended by Order effective, December 6, 2011.

RULE 21. PROCEEDINGS CONFIDENTIAL

All proceedings shall be confidential, except that where a party to a proceeding subsequently resorts to legal proceedings in a court of record to appeal or to enforce the final decision of the Board, compliance with these Rules concerning appeal or enforcement does not constitute a violation of the confidentiality of the proceeding.

RULE 22. AMENDMENTS TO RULES

Upon approval by the Bar's House of Delegates, amendments to these Rules shall be submitted to the Supreme Court of South Carolina for approval. Any amendment to these rules is effective as to any fee dispute filed after the date of approval by the Supreme Court.

Amended by Order effective, December 6, 2011.

Assigned Member Report
Write like a judge, or at least a judge's clerk!

Under the Rules of our Board, an assigned member is obligated to look at the jurisdictional issue and contact the Chair with any concerns. Circuit Chairs determine jurisdiction under Rule 2, but give the issue a second look. Next the AM is charged with making a sufficient investigation into the facts so as to enable the AM to prepare a report and recommendation to the Chair explaining what the decision should be and why.

AM's should prepare the report as if a judge (or judge's clerk) writing an Order which is going to be appealed to a Circuit Court, which will need to have a sufficient factual and legal basis to conduct a meaningful review of the Board's decision in the case. Most importantly, the decision HAS to make a ruling as to how much money is to be paid, if any by one party to the other, and why.

The Board has had several instances over the last few years where critical facts or findings of facts were lacking, in the opinion of this writer, making the decision sufficient to allow for a meaningful review at the Circuit Court level.

When writing reports for your respective Chairs, make sure in the first instance you have ascertained the facts of the case, both disputed and undisputed, and organize the report so that a disinterested third party lawyer or judge would be able to understand the what the dispute is about, what the parties agree upon, the positions of the parties with respect to the dispute, the keys issues presented, and how and why you recommend the result offered, that is the payment or non- payment of money from one party to another. (Lawyers can also initiate a Fee Dispute Application under certain circumstances).
This includes setting forth why you found disputed issues of fact the way in which you did. With perhaps some exceptions, but not many, the eight factors set forth in Rule 1.5 (A) are the "GO TO,, factors to determine the reasonableness of attorney fees. A review of your recommendations will be made easier by your analysis of these factors, at least those which are relevant.

The factors for determining the reasonableness of counsel fees are as follows: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) the likelihood that acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (9) whether the fee is fixed or contingent. S.C. App. Ct. R. 407:1.5.

Regardless of the type of case or matter for which legal services are rendered by the attorney, the fees must be reasonable.

Remember too, that in South Carolina, our Courts look to attorney client fee contracts with scrutiny, often-construing ambiguous or unclear terms and provisions against the attorney. Likewise, an attorney who ventures off into representation without a written fee contract does so at his/her own peril. Generally, the client is going to get the benefit of disputed issues which arose and could have been addressed in a written fee contract. Also, a client has an absolute right to choose his or her own counsel, and to fire counsel with or without cause. Rule 1.16 comment [4]. The effect of the firing (for cause vs.

without cause) on the fee the attorney earned or didn't earn is the subject of another section of this program.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to the client, preferably in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof,

provided that a lawyer may charge a contingency fee in collection of past due alimony or child support; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) A lawyer may charge an advance fee, which may be paid in whole or in part in advance of the lawyer providing those services, and treat the fee as immediately earned if the lawyer and client agree in advance in a written fee agreement which notifies the client:

(1) of the nature of the fee arrangement and the scope of the services to be provided;

(2) of the total amount of the fee and the terms of payment;

(3) that the fee will not be held in a trust account until earned;

(4) that the client has the right to terminate the lawyer-client relationship and discharge the lawyer; and

(5) that the client may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. The South Carolina version of the rule differs from the Model Rule by making the test in paragraph (a)(2) objective rather than subjective. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be

responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established, preferably in writing. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer who assumes joint responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Also, when a client has hired two or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, paragraph (e) should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. See Rule 416, SCACR. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Payment of Fees in Advance of Providing Services

[10] A lawyer may treat a fee paid in advance of providing services as the property of the lawyer and deposit the fee in the lawyer's operating account, rather than hold the fee in trust, if the client agrees in a written fee agreement which complies with Paragraph (f)(1) through (5), and the fee is reasonable under the factors listed in Rule 1.5(a). The language describing such arrangements varies, and includes terms such as flat fee, fixed fee, earned on receipt, or nonrefundable retainer, but all such fees are subject to refund if the lawyer fails to perform the agreed-upon legal services.

[11] When the lawyer has regularly represented a particular client, the written fee requirement in Paragraph (f) may be satisfied by a single agreement with the particular client that is applicable to

multiple current or future matters or files, without the need for the lawyer and client to enter into a new written agreement for each individual matter.

Amended by Order dated July 30, 2012.

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Reverse Contingency Fees

What is it?

A reverse contingency fee arrangement is an attorney fee contract between a client who is defending a claim or lawsuit brought against the client and the attorney defending the claim. The fee ,or at least the "contingency fee" part of the fee (an hourly rate of some amount, usually less than standard rates, may a lso be charged) is computed based on a n agreed upon percentage of an amount "saved" by the attorney from an agreed upon amount which is "in dispute".

Where are these Fee Arrangements Recognized?

Research through Lexis of all the available South Carolina databases yielded no "hits" for the terms Reverse Contingency Fee. There have been 4 or 5 cases from other jurisdiction where the terms appear, and one had these type fee arrangements as the issue in the case. Wunschel Law Firm PC v. Clabaugh, 291 N.W. 2nd 331 (Iowa 1980). Ethical issues relating to entering into a contract where the amount was unliquidated as it was a tort claim, in the court's view it was pure speculation, which in the court's view could not be reasonable required by the Code. Therefore, the court relegated the lawyer to a Quantum Meruit recovery.

These arrangements are recognized by the ABA Standing Committee on Ethics and Professional Responsibility in a 1993 Formal Opinion 93-373, and, provided that the amount in controversy was reasonably determinable, the fee is reasonable and the client gives informed consent, the committee found no public policy rational that would prohibit a reverse contingent fee. Likewise, ABA Informal Opinion 86-1521 discusses Rule 1.5 as it relates to what is a reasonable fee under these circumstances. The "fair amount of the Plaintiff's claim" to which the fee applies is the key to whether the arrangement is reasonable. It agreed that the Plaintiff's prayer for relief was not a reasonable number because these were found to often be inflated. Conversely, the defense lawyer enhances his fee potential if he exaggerates the Plaintiff's claim.

In the end the committee, recommends that before resorting to this contingent fee arrangement, the client should be offered the opportunity to engage counsel on a reasonable "fixed" fee. And as always, if challenged, the attorney bears the obligation to demonstrate the reasonableness of the fee charged in the particular case. See also: Kentucky Bar Opinion E-359 (1993) and Pennsylvania state bar opinion 87-182 (1998), (holding they may violate the Code of Responsibility). Later opinion 92-76 (1992) (arrangement condoned in tax appeals case)

What if the Client Won't Accept a Reasonable Offer?

A 2008 study cited by Nathan Crystal in his article appearing in the South Carolina Lawyer suggest that Plaintiffs do worse at trial 61 percent of the time, losing an average of $43,000!
Defendants lost less often, 24% of the time, but it cost substantially more, $1.1 million dollars on average. Error rates are even higher for plaintiffs in contingency cases. Defendants error rates increase when there is no insurance. (litigation risks may be less controlled without insurance involvement)

What happens when the plaintiff in a contingency injury case either refuses a favorable settlement, or repudiates a settlement before it is consummated?

Attorneys work as agents of the client, who is the decision- maker, right or wrong. Therefore, other than to advise the client the best course of action, the decision is the client's whether to accept a settlement. The client is not paying the costs and has no "skin in the game." A free shot at it. What else can the lawyer do if the client rejects a favorable settlement? While the attorney could "accept" the settlement because it was in the best interest of the client, the attorney is asking for trouble by not following the client's directive. This will, at a minimum, bring a grievance or a malpractice claim against the attorney, or the client could go to the court and complain by way of motion or otherwise.

What if the attorney attempts to withdraw from representation? What are the potential outcomes? First, the lawyer has fiduciary and ethical obligations, not to mention was happens as a practical matter if he withdraws. The withdrawing lawyer may have a very hard time in collecting his fee, as well as any costs which have been advanced. The lawyer will face client claims that his withdrawal was without just cause, when in fact that may be true. Those attorneys withdrawing without cause certainly don't fare as well financially. The abandonment of the cause by the agent attorney, who refuses to follow the principal's directives to reject settlement, when it is the client's call to make, is questionable as a breach of his fiduciary duty. As professor Crystal points out in the cited article, SCRPC 1.16 (b) (4) allows a lawyer to withdraw if there is a fundamental disagreement with the client. The attorney client relation implies that it is the client's sole decision to make. It is hard to see how a lawyers refusal to comply with a directive from his superior (the client) while on the job for the client, is acceptable. In any reasonable business operation, the failure of an employee to comply with the boss' directive could lead to the employee's termination.

Why should it be any different when the employee is a lawyer? And then the client's case can suffer prejudice because he is without a lawyer, and maybe the case is approaching trial, and the client is not skilled enough to present the case. Other lawyers may not want the job either because of the red flag presented by the refusal to accept the settlement. Maybe the chances of recovery are diminished in the eyes of any new lawyer, opening up claims against the withdrawing attorney for abandonment and loss of the case.

The cited article points out an Oregon case suggesting that withdrawal under these circumstances would not be ethical under a similar rule. The court cautioned that the lawyer does run risks in withdrawal and should" suck it up" and continue the representation.

Provisions in the fee contract providing escape for the lawyer do not seem to help. Some have incorporated hourly fee conversions for non-cooperation with the lawyer's advice. These provisions

interfere with the client's absolute right to decide whether to settle the case. Compton v Kittleson, 171 P. 3rd 172 (Alaska 2007) (against public policy and ethically unsound) But see Tillman v. Grant, No. 2006-UP -340 Ct App. 2006) The lawyer's contract contained both hourly fee and contingency alternatives, "whichever amount is greater".

Tillman had a 40% contingency on a $90,000 settlement that the client repudiated and fired Tillman. Not satisfied with the $36,000 contingency fee, he sued the client (never a good idea) for his hourly rate, $175.00 times the number of hours which equaled nearly $62,000. Not to be outdone, his fee contract provided for costs and attorney fees if suit was necessary to collect his attorney fees. He sued and Grant went into default on the suit. The trial court refused to enforce the "whichever is greater" provision holding it to be excessive, unreasonable and unconscionable, applying the factors of Rule 1.15. The hourly method amounted to a 50% plus increase over the initial 40% contingency. The Appeals Court affirmed the trial court's reduction to the contingency amount, primarily focusing on the issue of public perception, calling attention to the nature of the relationship between lawyer and client: "... relationship has an exacting and confidential character, requiring a high degree of fidelity and good faith." - "courts will examine agreements between attorneys and clients with the utmost care to avoid any improper advantage to the attorney." "... It will not allow attorneys to impose excessive charges on their clients because attorneys owe the public a duty of trust."

Professor Crystal opines that if the attorney ties the withdrawal, and other reasons triggering the refusal of the attorney to advance any more money in costs of the case, with advance notice to the client to allow time for alternate financing of the case, the courts would not likely hold the lawyer is ethically required to spend his own money when the agreement does not require the lawyer to do so.

Ethics Watch

"Let's Make a Deal"—Settlement Ethics

By Nathan M. Crystal

Plaintiffs who reject settlement offers and go to trial do worse 61 percent of the time, losing an average of $43,000 according to a study published in the September issue of the *Journal of Empirical Legal Studies*. Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. Empirical Legal Studies 551 (2008). Defendants were wrong in rejecting settlement offers less often, 24 percent of the time, but the wrong decision was more costly, resulting in an average loss to the defendant of $1.1 million. *Id.* at 566. The results come from a study of more than 2000 trials in the California state courts from 2002 through 2005. *Id.* at 552. Error rates for plaintiffs are higher in contingency fee cases; for defendants error rates increase when the defendant lacks insurance. *Id.* at 577. So, it looks like both plaintiffs and defendants would generally fare better by settling rather than going to trial. But what happens if the client refuses to accept a "reasonable" settlement recommended by counsel or reneges on a settlement agreement made by counsel?

1. How should a lawyer ethically handle a client who unreasonably refuses to accept a settlement offer?

Lawyers are agents of their clients. Under agency law and the rules of professional conduct, clients have the right to decide whether to accept or reject an offer of settlement in a civil case or an offer of a plea agreement in a criminal case. *See* S.C. Rule of Professional Conduct (SCRPC) 1.2(a). In making this decision clients do not always make the best choice, as the empirical evidence mentioned above indicates. In addition, the particular circumstances of plaintiffs and defendants may influence them to make decisions that may appear unwise from the perspective of a reasonable person not affected by such factors. Take the situation of a plaintiff in a personal injury case. A plaintiff who is in need of funds may be willing to accept an offer of settlement that the plaintiff's lawyer considers inadequate. On the other hand, a plaintiff who is not desperate for funds may be willing to reject a good settlement offer and take the risk of a trial in the hope of a big recovery; when the plaintiff's lawyer is handling the case on a contingency fee basis and fronting the expenses, the trial costs a plaintiff nothing. A defendant without substantial insurance may be willing to reject a good settlement offer and risk a trial because the defendant cannot afford to pay the settlement and plans to bankrupt against any judgment if it loses.

So what can a lawyer do if a client acts unreasonably with regard to a settlement offer? One possibility is to move to withdraw from the representation. Withdrawal, however, is questionable both practically and ethically. Practically, if the lawyer moves to withdraw, the lawyer may find it difficult to collect his or her fee. The lawyer's claim for a fee will be reduced to a quantum meruit recovery, rather than the amount set forth in the fee agreement. *See* Robert M. Wilcox & Nathan M. Crystal, Annotated South Carolina Rules of Professional Conduct 52 (2005 ed.). In addition, the lawyer will not have a claim against any insurance company or successor counsel unless the lawyer's engagement agreement has a charging lien. *Id.* at 121. Finally, the client will almost certainly claim that the withdrawal was unjustified, resulting in a forfeiture of the fee.

Ethically, withdrawal is also questionable. A recent ethics opinion from the Oregon State Bar addresses this issue. 68-May Or. St. B. Bull. 9. The opinion considers whether a lawyer may permissibly withdraw under the equivalent SCRPC 1.16(b) if a client rejects a settlement offer. With some qualifications the opinion concludes that withdrawal would not be ethically permissible under any of the subdivisions of the rule. For example, the rule that is most directly applicable is SCRPC 1.16(b)(4), which allows a lawyer to withdraw if there is a fundamental disagreement with the client. However, the opinion concludes that a lawyer does not have a fundamental disagreement "merely because the client refuses to follow the lawyer's advice or chooses a course the lawyer believes is unwise, particularly where the decision (settlement) is one that is squarely within the client's sole control." The opinion indicates that in many instances the lawyer must "suck it up" and "continue the representation if withdrawal will be more harmful to the client than continuing the representation would be for the lawyer."

The opinion attempts to soothe the psyche of a lawyer who faces such a situation: "We can avoid some of the angst of the situation by endeavoring not to take the client's repudiation personally, and by reminding ourselves that our obligation is to do the client's bidding and pursue the client's interest." While some lawyers may find the counselor's couch comforting, most will be interested in more tangible advice. What can a lawyer do with the "unreasonable" client who refuses to accept an offer that the lawyer strongly believes is favorable? Consider the following:

Aggressive counseling. With regard to the decision to settle,

lawyers have the right and the obligation to counsel their clients about all aspects of the proposed settlement. SCRPC 2.1. However, the rules provide no guidance on how a lawyer counsels a client. Lawyers have discretion to be matter-of-fact and relatively neutral with regard to giving advice about a settlement, or they can be more aggressive, strongly counseling the client that rejection of the settlement offer would be unreasonable and foolish. "About half of the practice of a decent lawyer is telling would-be clients they are damned fools and should stop," remarked Elihu Root, a prominent New York lawyer of the early 20th century. Of course, a lawyer who is too aggressive crosses the line from counseling to coercion, but where the line lies is a matter of judgment. In counseling a client, whether neutrally or aggressively, the attorney must take into account the particular circumstances of the client like the ones mentioned above. Lawyers should also consider the insights drawn from psychological studies of the impact of gain or loss on decision making. See *Mind Control: The Psychology of Settlement, How to Get What You Want* (ABA Annual Meeting 2008), www.abanet.org/media/youraba/200808/article04.html (visited September 21, 2008).

Provisions in engagement agreements. Some lawyers have attempted to deal with the problem of the unreasonable client by including in their engagement agreements provisions that transform the contingency fee into an hourly fee if the client rejects a settlement offer recommended by the lawyer (sometimes called "conversion agreements"). Most courts and ethics advisory committees have concluded that such provisions are improper because they interfere with the client's right to decide whether to settle the case. See *Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007) (rejecting hybrid fee agreement as against public policy and citing ethics opinions from several jurisdictions that are in accord).

However, a different provision may meet ethical standards. Suppose the lawyer will be handling the case on a contingency fee basis and advancing expenses. The agreement could provide that the lawyer has total discretion about advancement of expenses. If the lawyer decides not to advance expenses, the lawyer must give the client reasonable notice so that the client has the opportunity to seek funds to pay the expenses. Suppose the client is considering rejecting a settlement offer in a medical malpractice case. (The empirical study cited above finds that the plaintiff's error rate in medical malpractice cases is 81 percent. 5 Journal of Empirical Legal Studies at 577.) If the client refuses the offer, the case can only proceed to trial if the fees of expert witnesses who must testify have been paid. The lawyer could inform the client that the lawyer has decided not to pay the expenses of any experts and that if the client wants to reject the settlement offer, the client will need to come up with the funds to pay the experts or the case will be dismissed. Coercive? Yes, of course it is, but in a different way than an agreement that converts the fee of the lawyer from contingent fee to hourly basis if the client rejects the settlement offer. First, the expense provision is not triggered solely by the client's decision to refuse to settle. The client's rejection of a settlement offer is only one circumstance in which the lawyer could refuse to advance expenses. Second, under a conversion agreement the client would be subject to a "fee surprise" where the amount of the fee owed the lawyer could exceed the settlement. *See Compton v. Kittleson* above. Under the expense provision the client would not owe the lawyer anything. Finally, it seems unlikely that a court would say that a lawyer is ethically required to spend his own money to pay expenses for the client when the fee agreement does not require the lawyer to do so.

Limited engagement agreements. If a lawyer anticipates before the representation begins that the client may be difficult, the lawyer can simply reject the engagement. Another possibility is to represent the client under a limited engagement agreement in which the lawyer agrees to investigate the case and negotiate a settlement, but does not agree to file suit. If a settlement cannot be reached and suit must be filed, the lawyer's engagement for that aspect of the case would be subject to separate agreement. Limited engagement agreements are generally permissible provided they are reasonable under the circumstances. *See* SCRPC 1.2, comments 6-7. One major advantage of the limited engagement agreement is that the lawyer will not be required to obtain court permission to withdraw from the representation because suit has not been filed. *See* S.C. Bar Ethics Advisory Op. #08-01 (advising that lawyer must obtain court permission to withdraw when matter is pending in court). Of course, in many cases meaningful settlement discussions cannot be conducted until after substantial discovery, which generally can only take place after the lawyer files suit.

2. When is a client bound by a settlement agreement made by counsel?

In South Carolina the beginning point for answering this question is Rule 43(k) of the Rules of Civil Procedure, which provides:

> (k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Under this rule a client would not be bound unless the settlement agreement complied with the rule. To comply with the rule, the consent order or written stipulation must specify the terms of the agreement.

Continued on page 17

Ethics Watch
(continued from page 9)

See Ashfort Corp. v. Palmetto Const. Group, Inc., 318 S.C. 492, 458 S.E.2d 533 (1995) (holding that entry stating that "court advised case settled" did not comply with rule).

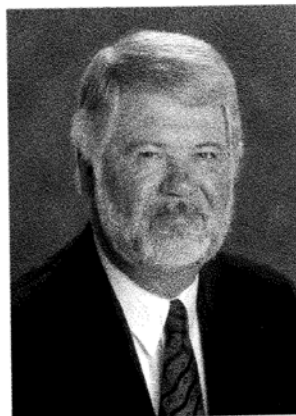
So far, so clear, but what happens if counsel enters into an agreement that complies with the rule and the client later changes his or her mind? Two situations should be distinguished. Suppose the client had approved the settlement but simply has a change of heart. In that case the lawyer entered into the settlement with actual authority and the client is bound. Opposing counsel could seek a court order to enforce the settlement or bring an independent action on the agreement.

Suppose, however, that the client claims that the lawyer entered into the settlement without authority from the client. What then? The acts of attorneys are binding on their clients through principles of agency law. *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). Lawyers have authority to settle cases on behalf of their clients. Such settlements are binding absent fraud or mistake. *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (S.C. Ct. App. 2007). The lawyer's authority is limited, however, to claims set forth in the pleadings, and any settlement that goes beyond the pleadings must be expressly agreed to by the client. *Graves v. Serbin Farms, Inc.*, 295 S.C. 391, 368 S.E.2d 682 (Ct. App. 1988). A lawyer who enters into a settlement without client authority may be liable to the client for negligent advice with regard to the settlement. *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997).

In other jurisdictions, the situation may be different. *See Makins v. District of Columbia,* 389 F.3d 1303 (D.C. Cir. 2004) (holding that client is not bound by settlement agreement negotiated by attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms). By the way, with regard to authority to enter into settlement negotiations (rather than the authority to enter into settlement agreements), prudent lawyers will include in their engagement agreements a provision authorizing them to enter into settlement negotiations at any time that the attorney believes to be advantageous to the client.

Settlement presents a number of other ethical problems, some of which I will discuss in later columns. One such issue is the scope of the ethical duty to disclose material information during settlement negotiations, as the following story illustrates:

> A big-city lawyer was representing the railroad in a lawsuit filed by an old rancher. The rancher's prize bull was missing from the section through which the railroad passed. The rancher only wanted to be paid the fair value of the bull. The case was scheduled to be tried before the justice of the peace in the back room of the general store. The attorney for the railroad immediately cornered the rancher and tried to get him to settle out of court. The lawyer did his best selling job, and finally the rancher agreed to take half of what he was asking. After the rancher had signed the release and took the check, the young lawyer couldn't resist gloating a little over his success, telling the rancher, "You know, I hate to tell you this, old man, but I put one over on you in there. I couldn't have won the case. The engineer was asleep and the fireman was in the caboose when the train went through your ranch that morning. I didn't have one witness to put on the stand. I bluffed you!" The old rancher replied, "Well, I'll tell you, young feller, I was a little worried about winning that case myself, because that durned bull came home this morning." ■



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Ethics Advisory Opinions

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Ethics Advisory Opinion 96-05My law firm was consulted in the fall of last year by an old friend and client of mine whose sister had received serious injuries in an automobile wreck. I met with my friend and her sister. The sister was in the hospital and I did not ask her to sign a contract, but both of them authorized me and my firm to represent her in connection with the wreck on a contingency fee basis of twenty-five (25%) per cent of the amount recovered. During the meeting, we discussed the fact that we would need a written fee agreement. One was prepared and forwarded to my friends. We immediately undertook an extensive investigation and active representation of this injured lady. We employed an accident reconstruction expert to whom we have advanced a considerable sum. We have expended a great deal of time investigating this incident, negotiating with insurance carriers, effecting a sizeable discount of the health insurance subrogation and otherwise handling the case. After not receiving the signed fee agreement within several weeks, my office contacted my friend who stated that the agreement had been signed and mailed. We have now obtained a tender of all applicable insurance and have proposed a settlement for the plaintiff. Because the wreck arose out of the negligent operation of an automobile owned by a municipality, the South Carolina Tort Claims Act, and its limit of liability, apply. Because of the liability limit and the severe injuries sustained by the plaintiff, the total amount of insurance is inadequate to compensate the plaintiff fully for her injuries. Our repeated attempts to locate the fee agreement and replace it has been of no avail. Even though we have obtained a huge discount of the health insurance subrogation lien and have offered to reduce our fee by one-half in order to provide more net proceeds to the plaintiff, she and her sister are so frustrated by the lack of available funds, they have ceased any contact with us and do not respond to any communication. We have even been able to arrange for the plaintiff to collect her entire underinsurance benefits, which are substantial in this case, from which we would expect no fee. We have kept costs to a minimum. If these tenders are refused, we fully expect the insurance carriers to interplead their money and would not expect the case to ever be tried. We have explained all of this to our clients fully, but at this point, we have received no response. We are unable to proceed with the case. No litigation has been commenced.

1) Should we terminate our representation of the plaintiff? If so, how? 2) Can we recover any of our fees or costs if the representation is terminated? If so, how? 3) Do we have any further duty to the plaintiff?

Summary:
1) If you continue to disagree with the client as to the course of handling the case, you should terminate the representation by writing to the client and giving reasonable notice and information. 2) You can request recovery of fees and costs. Whether you are able to collect is a matter of substantive law. 3) If the client is competent, you owe no further duty.

Opinion:

1) Although, as discussed below, you may not have been formally retained by the plaintiff, you should consider terminating any representation in accordance with South Carolina Appellate Court Rule 407 Paragraph 1.16 (hereafter "Rule"). It appears that you consider not accepting the amounts being tendered to be imprudent. Consequently, you would have grounds to withdraw under either Rule 1.16(b)(3) or 1.16(b)(6). Since litigation has not been commenced and the matter is not therefore before a court, we would advise writing a full letter to the client (not her sister), setting forth the situation and notifying the client that you intend to withdraw and take no further action if you do not hear from the client by a certain date, allowing a reasonable time to respond. 2) Rule 1.5(c) requires that a contingency fee be in writing. Since you apparently do not have a written fee agreement with this client, any claim for recovery of fees or costs may be on a quantum meruit basis. Whether or not you are able recover these is a matter of substantive law, beyond the purview of this committee. There is no ethical prohibition to requesting fees and costs of the client. Retaining any portion of the file pursuant to Rule 1.16(d) may not be advisable in the absence of a written contingency fee contract. 3) If you believe the client is incompetent, the provisions of Rule 1.14 may apply. Since it does not appear that the client is under any disability in this case, you will owe the client no further duty once the suggestions of paragraph (1) above have been followed.

Ethics Advisory Opinions

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Ethics Advisory Opinion 83-25

A sustains personal injuries as the result of a car accident and retains Attorney D to represent all claims arising therefrom. Attorney D prepares a contingency fee agreement which he and A sign. A becomes dissatisfied with Attorney D and requests that he withdraw from the case. Attorney D releases the file to Attorney C, together with the agreement which calls for one-third of the amount recovered.

Questions

(1) Is the contingency agreement binding once Attorney D is discharged?

(2) What rights, if any, does Attorney D have following discharge?

(3) What are the responsibilities of Attorney C to Attorney D?

Opinion

(1) The contingency contact is not binding upon discharge.

(2) Attorney D may seek compensation from A based upon quantum meruit.

(3) Attorney C should ascertain the relationship between A and Attorney D prior to undertaking representation.

Attention is directed to Disciplinary Rule 2-110(B)(4) and Ethical Considerations 2-20, 2-23, 2-30 and 2-32.

Contingent fee agreements are commonly accepted in South Carolina civil practice. EC 2-20. An attorney must withdraw from representation, however, upon discharge by his client. DR 2-110(B)(4). Following withdrawal, an attorney should refund any compensation not earned during employment. EC 2-32.

Although a dwindling minority of jurisdictions would permit Attorney D to recover compensation agreed upon in the contingency contract, the modern trend, and better view, recognizes the client's right of discharge as incorporated into any fee agreement. Accordingly, a discharged attorney may collect no more than the value of services actually performed. See generally, 7A, C.J.S., Attorney and Client <290(b). Both North Carolina and Virginia have adopted this view. Covington v. Rhodes, 247 S.E.2d 305 (N.C. App. Ct. 1978); Heinzman v. Fine, et al., 234 S.E.2d 282 (Va. S. Ct. 1977).

Attorney C's responsibilities arise initially in determining whether the original attorney/client relationship has been finally terminated. EC 2-30. Upon receipt of Attorney D's file, and discovery of the outstanding contingency contract, Attorney C should advise A as to potential liability. The better view would also dictate, within representational bounds, Attorney C cooperate in the amicable resolution of any fee dispute between A and Attorney D. EC 2-23.

Ethics Watch

A-B-Cs of Legal Fees

By John Freeman

The "law of legal fees" is drawn from the fields of legal ethics, contract law, and fiduciary duty law, with a large overlay of common sense. Collected below are some pointers.

- **A**—Always be sensitive to conflicts of interest when undertaking representation. Conflicted representation puts in jeopardy your right to **any** fee. After all, clients are entitled to demand their lawyers be 100 percent loyal. Where a potential conflict looms, make sure that appropriate written waivers are obtained, and the fee contract itself is a good place to memorialize the requisite disclosures and assent.
- **B**—Be positive and professional in the way you bill. Your invoices are a major factor determining how you are perceived by your clients. Realize that your present client base is your best source of new business in the future.
- **C**—Contingent fee cases arise in "straight" contingency matters, or, depending on the facts, where compensation in part is based on a bonus to be determined, and when the fee amount is left open to be set based on the results obtained. The latter two types of arrangements may be viewed by the Attorney General as contingent fee matters and could lead to discipline if the mandatory writing requirements of 1.5(c) were not followed.
- **D**—Do **not** sue for unpaid fees unless you have absolutely no other choice. This is a very fine way to get into trouble. One of two things is likely to happen: The client will get a lawyer who will counterclaim against you (bad result), or the client will counterclaim against you pro se (worse result).
- **E**—Ethics counts. Lawyers are being grieved against with increasing frequency over fee-related matters. A wise lawyer will not engage in any action that may be ethically suspect (such as demanding a non-refundable fee or sharing fees as "bonuses" to lay staff who bring in cases) without carefully researching the propriety of the transaction *in advance*. Remember the old stock market adage: "Bulls make money, bears make money, but pigs just get slaughtered."
- **F**—Fee splits need to comply with Rule of Professional Conduct 1.5(e). It is now ethical to allocate fees other than in proportion to the services performed by each lawyer, provided each lawyer assumes joint responsibility for the representation, the client consents to the fee sharing, and the total fee is reasonable.
- **G**—Get the client's express permission to associate outside consultants or lawyers from other firms to help you on the case and make sure the client understands how their efforts will be billed. Do not bill their time as your time; bill it separately and do not mark up their billing rates without disclosing the rate differential to the client.
- **H**—Help your client understand the scope and difficulty of your representation by including in your invoices detailed explanations of the actions you took on the client's behalf.
- **I**—In the event of a fee dispute, do everything possible to have the dispute resolved in the quickest, fairest, cheapest way possible. Present the client with the option of having the dispute adjudicated by the Resolution of Fee Disputes Board (contact Sarah Steen at 803-799-6653), or via mediation or arbitration. Consider adding to your retainer agreement a provision requiring submission of any fee dispute to the Fee Disputes Board.
- **J**—Joint clients need to have a clear understanding in advance how fees and expenses are being allocated. If, for example, fees, expenses, and proceeds of the representation are going to be split based on the ratio of damages suffered, this needs to be spelled out. Also account in advance for client voting on settlement offers; will it be per capita, based on a damage ratio, or what?
- **K**—Keep current in your billing. This can help minimize collectibility problems. Large uncollected bills can lead to claims that the lawyer's independence of judgment in facilitating a transaction was compromised by a desire to help the client get cash needed by both the client and the unpaid lawyer.
- **L**—Let the client know you appreciate the client's past prompt payment of invoices. In the opening paragraph of your current invoice, express thanks for the client's quick attention to your prior bill.
- **M**—Make out and present a receipt immediately if a client tenders you a cash fee. If the fee may be subject to currency reporting requirements, counsel the client about the applicability of such laws.
- **N**—Neither a borrower nor a lender be, at least in most cases. Business dealings between a lawyer and client should be avoided. Period. The requirements of Rule 1.8(a) are almost impossible to satisfy. Advancing living costs to clients in connection with pending or threatened litigation continues to be unethical. *See* Rule 1.8(e).

• **O**—Orders awarding fees need to be sought within required time limits. For example, South Carolina Code Ann. § 15-77-310 (Supp. 1991) allows a party to petition for attorney fees under § 15-77-300 within 30 days after final disposition of the case. The "final disposition" occurs when the clerk of the lower court files the remittitur after the appellate court disposes of the case. *McDowell v. Dept. of Social Servs.*, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989). In South Carolina District Court, absent a controlling statute or court order, fee petitions likewise must be submitted within 30 days of the entry of final judgment. Local Rule 16.00. Petitions need to address the pertinent legal grounds for the fee award. Under *Baron Data Systems. Inc. v. Loter*, 297 S.C. 382,384, 377 S.E.2d 296, 297 (1989), courts awarding reasonable attorney fees need to consider six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. In South Carolina District Court, fee petitions need to address the requirements of *Barber v. Kimbrell, Inc.*, 577 F.2d 216 (4th Cir. 1978).

• **P**—"Protecting" another's fee, such as payment to a medical care provider, is an undertaking fraught with danger. For example, in *Solon Family Physicians, Inc. v. Buckles*, 96 Ohio App.3d 468, 645 N.E.2d 150 (1994), the lawyer signed the doctor's lien agreement and, in addition, wrote the client's doctor and promised "to protect any outstanding bill for your services . . . and see to it that your fee is paid promptly from the proceeds of the settlement." The court in *Buckles* held that the lawyer's undertaking to "protect any outstanding bill" made the lawyer a surety and thus primarily and jointly liable with the client-principal. The court held that the lawyer's obligation to the doctor "was not extinguished by a supposed ethical dilemma."

• **Q**—Quitting the representation can place your fee in jeopardy. If it is determined that your withdrawal was not proper under the terms of your employment contract or Rule 1.15, you risk fee disgorgement, a damage claim for breach of contract and breach of fiduciary duty, and a grievance. Never withdraw from a matter pending before a tribunal without complying with the applicable rules of procedure.

• **R**—Retaining liens are for the birds. The value of the lien to the lawyer is in direct proportion to the misery visited on the client. The conflict of interest is patent. Assertion of the lien invites a grievance. Never invoke a retaining lien without first reading *In re An Anonymous Member of the South Carolina Bar*, 287 S.C. 250, 335 S.E.2d 803 (1985) (retaining lien generally recognized in South Carolina; no lien if lawyer discharged for good cause; in certain cases it may be unethical to assert lien, for example, if the client would be seriously prejudiced in asserting an important right).

• **S**—Securing your fee, by a mortgage on the client's property or otherwise, may seem sensible and innocuous, but it is fraught with danger. Never take a security interest in the client's property without complying with Rule 1.8(a).

• **T**—Tax deductible expenses are more valuable than the other kind. To the extent possible, make an effort to show your clients how your bill may be deductible for tax purposes.

• **U**—Unearned fees and unspent advanced costs need to be accounted for and promptly returned to the client when representation terminates. Rule 1.16(d).

• **V**—Verbalize your fee agreement at the outset of representation, in the clearest possible terms. It is best to use a written fee agreement. They are mandatory in contingent fee cases, of course. (*See below*.) Use examples; do

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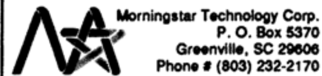

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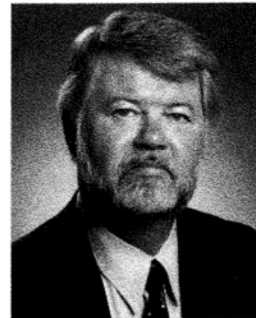

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not make guarantees or promises about outcomes. It would also be smart to create charging lien rights in your favor, to acknowledge that unjustified non-payment would be grounds for withdrawal, and to address the issue of your rights if you are dismissed without cause (such as *quantum meruit*) in writing.

- **W**—Written fee agreements are mandatory in contingent fee cases. Rule 1.5(c) has some specific requirements for contingent fee agreements:

    1. the agreement must be in writing;
    2. the agreement must specify the method of computing the contingent fee, including the percentages at various stages of the proceeding, the expenses to be deducted, and whether expenses are to be deducted before or after the fee is charged; and
    3. the client must be given a written settlement statement at the conclusion of the matter.

- **X**—Xerox or other copier charges, process server fees, etc., need to be reasonable. This means the client should be billed no more than cost plus a fair overhead charge. ABA Formal Opinion 93-379 (Dec. 6, 1993) reached the following conclusions: (1) Where the client has been told that he or she will be charged for in-house services rendered by the lawyer, "the lawyer is obliged to charge the client no more than the direct cost associated with the service (*i.e.*, the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (*e.g.*, the salary of a photocopy machine operator)." (2) "[I]n the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services."
- **Y**—You need a license to collect a legal fee. Fee splitting with non-lawyers continues to be forbidden except in limited cases. *See* Rule 5.4.
- **Z**—Zero sympathy is what you must expect to receive in the event of a fee dispute arising over the interpretation of a vague or ambiguous written fee agreement you drafted. Count on the document being construed against you, with your client given every break possible. Hence, do everything possible to make your fee agreements clear and complete.

John P. Freeman is a professor at the University of South Carolina School of Law in Columbia.

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Ethics Watch

Fee agreement enforceability

By John Freeman

On October 5, 2006, the Court of Appeals issued an unpublished opinion that turned out to be, among lawyers at least, one of the most discussed opinions of the year. The case was *Tillman v. Grant,* No. 2006-UP-340 (Ct. App. 2006), *available at* http://tinyurl.com/2xdhoc. The case involved a problem every experienced attorney has dealt with at one time or another, efforts to collect under the fee contract from a recalcitrant client.

A basic rule of lawyering is that you should not sue a client over fees. The risks you run are huge, starting with the strong likelihood, if not the inevitability, that you will be on the receiving end of a counterclaim filed on behalf of the client. In *Tillman*, the suing lawyer, Wheeler Tillman of North Charleston, did not get tagged with a counterclaim. He actually collected the contingent fee set according to his fee contract. Further, he received a fee award for suing to collect his fee, also in accordance with his retainer agreement. Nonetheless, the outcome left Tillman unhappy and has been viewed with some concern by various lawyers.

The reason lawyer Tillman was not pleased with the Court of Appeals' ruling is he wanted more than the $36,000 his 40 percent contingent fee would have yielded based on his client's $90,000 settlement. Specifically, Tillman sought a $61,915 fee based on time spent on the matter at his hourly rate of $175 per hour. Tillman contended he was entitled to the extra money because a clause in his contract required his client, Grant, to pay him either the contingent fee or a fee based on hours invested at $175, "whichever amount is greater," in the event the client fired him before settlement or verdict.

The $90,000 recovery in question flowed from a personal injury settlement that was agreed to at the close of the first day of trial. At that time, in open court, the "terms of the settlement were placed on the record and the parties acknowledged their consent to settle." The insurance company subsequently tendered a settlement check and a release. Up to this point, things were fine, but then the situation changed.

Evidently suffering from buyer's remorse, Grant refused to sign the release and fired Tillman. This led to Tillman suing Grant under the hourly fee proviso, seeking $61,915 plus $8,320.12 in costs. Grant failed to answer. Though he was in default, paving the way for Tillman to recover a 2/3 fee plus costs of collection, the trial court refused to give Tillman his "whichever is greater" relief, which would have yielded a 50+ percent increase over the 40 percent contingent fee.

The trial court ruled that the amount Tillman was seeking under the hourly rate was excessive, unreasonable and unconscionable. It applied the following five factors customarily weighed in evaluating fee petitions: "(1) nature, extent, and difficulty of the case; (2) time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of the compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services."

The Court of Appeals upheld the trial court's fee reduction focusing on the issue of public perception. The reviewing court prefaced its ruling by calling attention to fiduciary nature of the relationship between an attorney and client, citing *Hotz v. Minyard*, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (1991). Relying on *Weatherford v. Price*, 340 S.C. 572, 582, 532 S.E.2d 310, 315 (Ct. App. 2000), the reviewing court emphasized that this relationship has an "exacting and confidential character, requiring a high degree of fidelity and good faith." The court then emphasized that courts will "examine agreements between attorneys and clients with the utmost care to avoid any improper advantage to the attorney," citing *Royal Crown Bottling Co. v. Chandler*, 226 S.C. 94, 105, 83 S.E.2d 745, 750 (1954). Quoting from *Bank of Enoree v. Yarborough*, 120 S.C. 385, 393, 113 S.E. 313, 315 (1922), the court added that "the court has the jurisdiction 'to see that an attorney will not lower his profession by cheapness, nor promote his own interest by extortion, as well as to the safeguarding of the trust relation which an attorney bears to the public.'" In summing up, the court observed it "will not allow attorneys to impose excessive charges on their clients because attorneys owe the public a duty of trust."

Several things are odd about the *Tillman* case. For one thing, it is strange that lawyer Tillman was viewed as eligible to invoke the hourly fee clause at all since, by its terms, the provision only applied if he was fired "before settlement." Grant's recalcitrance occurred after the case had been settled, with the parties putting their settlement on the record in open court. At that point there was an enforceable settlement, with the paperwork completion to follow. It was in processing the paperwork that Grant balked. Perhaps this objection to invoking the "either/or, whichever is greater" clause was never made because Grant had lost his right to object due to going into default. Another objection that could have been raised to the "either/or, whichever is greater" fee provision

is that it is contrary to public policy because it paves the way for punishing a client for asserting a right the client indisputably has, namely, to fire his or her lawyer at any time without cause.

In any event, the key to understanding the case is found in footnote five of the opinion. There the Court of Appeals observed, "Tillman originally sought only the contingency fee. It was not until Grant refused to release Tillman's payment from the settlement that Tillman sought the hourly fees. It is apparent from the record that Tillman grew frustrated with Grant, and this suit arose out of that frustration." The implication is that the appellate court viewed Tillman as satisfied with his $36,000 fee, thereby affirming its reasonableness, until he lost patience with his recalcitrant client.

Some lawyers may read *Tillman* and argue from it that lawyer Tillman was treated unfairly in comparison to other bargaining parties for whom "a contract is a contract." The Court of Appeals minced no words in suggesting there *is* a double standard when it comes to lawyer-client contracts. It expressly stated it was holding lawyers to a high standard. It also made clear its policy view that lawyers *deserve* to be held to high standards. After all, unlike most contracting parties, lawyers alone hold monopoly licenses to practice law. Lawyers, above used car and aluminum siding salesmen, are expected to always put their clients' interests first. And this ranking holds even where the client is recalcitrant or pig-headed.

Though he lost much of what he sought in suing Grant, lawyer Tillman still deserves credit for giving us a case that drives home to the Bar the utility of key retainer agreement provisions. First, as Tillman did, always include in your retainer agreement a provision giving yourself a right to fair compensation in the event you are fired without cause. You can specify some fair payment method, such as payment at an hourly rate or based on the contingent fee percentage applied against on the last offer made prior to being fired, or based on some other formula. But the smart lawyer must always make sure that whatever method is chosen will yield a reasonable fee. Next, always back up your payment right with a provision giving you a *charging lien* securing your right to payment. Accompany this charging lien right with a provision whereby the client acknowledges your right to notify third parties of your lien rights after you are dismissed. Finally, always include a provision giving you a right to fees and costs arising from collection efforts in the unfortunate event that you, like lawyer Tillman, are unlucky enough to end up in a fee dispute with the client.

One final point worth noting in the opinion is that Grant was not Tillman's only client in the accident case. Tillman also represented Grant's brother-in-law whose personal injury case was settled for $12,000. As with Grant, the settlement was put on the record in open court, and the brother-in-law refused to execute the release. He also was sued by Tillman, and he also defaulted. As with client Grant, Tillman also had a "whichever is greater" clause in the brother-in-law's fee contract and invoked it. Like Grant, the brother-in-law went into default; unlike Grant, the brother-in-law never subsequently contested the fee escalation in court.

The net yield from the brother-in-law's personal injury action for Tillman was a judgment for an hourly fee of $12,800 (versus a contingent fee of $4,800), meaning the recalcitrant brother-in-law client's net return from his personal injury case in which $12,000 was recovered was minus $800. No appeal was ever taken from this result.

A contract may be a contract, but a lawyer's retainer agreement invokes strong ethical and fiduciary obligations. Rule 1.5's command that fees be reasonable applies to, and is an implied term in, every single contract between a lawyer and a client. No matter what the contract's verbiage, the size of the lawyer's fee is always subject to being second-guessed in court. ■

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22 S.E.2d 249

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY.
v.
WEEKS et al.

No. 15454.

Supreme Court of South Carolina.

Oct. 13, 1942.

[22 S.E.2d 249]

Appeal from Court of Common Pleas, Berkeley County; Wm. H. Grimball, Judge.

Action by South Carolina Public Service Authority against Joseph C. Weeks and others for condemnation of 4.6 acres of land, more or less, in Berkeley County, known as Tract No. PR-437 as shown on Harza Land Map made for South Carolina Public Service Authority. Plaintiff abandoned the proceedings before taking possession of such property. From a judgment for defendants for costs, plaintiff appeals.

Modified.

Wm. M. Wilson and Ben Hill Brown, both of Charleston, for appellant.

Norval N. Newell and Marion F. Winter, both of Monck's Corner, and Stoney, Crosland & Pritchard, of Charleston, for respondents.

STUKES, Justice.

This appeal requires the construction and application to the facts of the case of Section 10 of the State Authorities Eminent Domain Act, approved May 31, 1939, 41 Stat. 265, which is as follows: "§ 10. Abandon or dismiss condemnation proceedings. --At any time prior to the final conclusion of the condemnation proceeding provided for in this Act and prior to entry into possession by such State Authority, it may abandon, withdraw or dismiss such condemnation proceedings upon payment by it to the owner of all costs and expenses incurred by the owner, and the amount of such costs and expenses shall constitute a lien, for the payment thereof, upon any award theretofore deposited in said proceeding by said Authority."

Appellant undertook to condemn a parcel of real estate belonging to respondents and a Board of Referees was appointed pursuant to the terms of the aforementioned Act, took testimony and made an award which was signed by two members of the Board. Thereafter appellant, which had not taken possession of the property, elected to, and did, abandon the condemnation. Then a reference was had to ascertain the "costs and expenses incurred by the owner, " the words of the Act, and the condemnor appealed from the inclusion in the findings of an item of $30 paid to one Ira C. Cox for his services, according to the testimony, in obtaining witnesses for the landowner, inspecting and appraising the property, etc, before the hearing by the Board, and an allowance of the sum of $400 for the fees of the attorneys for the landowners.

[22 S.E.2d 250]

Appellant's exceptions were overruled by the Circuit Court and the sums mentioned were ordered to be paid by the condemnor which now appeals to this Court upon appropriate exceptions.

We agree with the disposition of the item of $30 which appears to be a most reasonable expenditure by the landowners for the services mentioned and it undoubtedly comes within the broad term, "expenses, " used in the Act. Appellant complains that the recipient served afterward upon the Board of Referees as the member appointed by the landowners, but its strong argument in that connection is aimed rather at his competency as a referee (a question not presented by the appeal) than at the alleged impropriety of the incurring and payment of this item of expense by the condemnees. The exception relating to its allowance is overruled.

The questioned allowance of attorneys' fees presents a more difficult question. Appellant argues that such do not come within the quoted clause of the Act under construction for the lack of express reference therein to attorney's or counsel fees. However, under the facts of this case we do not' think that question necessarily arises and, therefore, it is not decided.

One of the condemnees' counsel testified that there was a contract between the landowners and their attorneys that the latter were to receive as compensation "one-half of the amount recovered over and above what the Authority offered * * *." Thus the agreement was for a contingent fee, contingent upon recovery and, incidentally, recovery of more than the amount offered for the land by the condemnor. This contingency never occurred, the event of recovery did not transpire, because the condemnation was abandoned, and the right to that course by the condemnor is not challenged.

The lower Court sustained the allowance of attorneys' fees upon the basis of quantum meruit, that under that theory the landowners were liable to the attorneys and the condemnor was held, therefore, liable to the former upon the authority of the decisions which uphold the recovery of counsel fees for dissolution of injunctions where plaintiffs' bonds indemnify against damages flowing from the injunctions, which the learned Circuit Judge considered language less broad than that of the quoted Act. But appellant well argues that even if counsel or attorneys' fees are included in the expression "costs and expenses, " none may be recovered in this case because of the contingent fee agreement and because the contingency never occurred; in short, that on that account the landowners incurred no liability and therefore no recovery can be made of the condemnor for such fees.

Undoubtedly, generally where an attorney is discharged without cause by his client after they have entered into a contingent fee agreement, he is entitled to compensation. 5 Am.Jur, 364. South Carolina cases touching the question are found in 4 West's S.E.Dig. 565 et seq. Attorney and Client, 134-149.

The latter, however, is not the case now presented. No action on the part of the landowners prevented the happening of the contingency; it failed because of the abandonment of the condemnation by the appellant. The inevitable result is that the attorneys by force of the terms of their contract, voluntarily entered into, are entitled to no compensation. The case is novel in this jurisdiction, but the issue has been squarely met and so decided by eminent courts elsewhere, whose reasoning is clear and convincing, and no contrary decisions have been cited. And it appears that in the cases to which we shall refer the statutes involved provided expressly for the recovery of attorneys' fees upon abandonment of the proceedings or no question was made of the failure to include them eo nomine in the statutes.

In City of Long Beach v. O'Donnell et al, 91 Cal.App. 760, 267 P. 585, 586, it appeared that the City of Long Beach had commenced condemnation proceedings against property belonging to one O'Donnell, one Bird, and others, and thereafter abandoned such proceedings. Section 1255a of the California Code of Civil Procedure reads as follows: "Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees * * *." One of the attorneys for the landowners in speaking of his fee arrangement with the landowner Bird testified that he said: " Well, Mr. Bird, it is a little stiffer fee, being a contingent fee; as you know, it is a little

[22 S.E.2d 251]

more than if you gave us a per diem, which we would much rather have; the fees will he 20 to 30 per cent, '" and that the landowner "just nodded his head up and down and said, 'Well, all right, go ahead.'" The landowner testified, "that this was correct; that nothing was said at all about what was to be paid in case there was an abandonment; that he had paid no attorney fees in this proceeding; and that the only obligation which he had with the attorneys was to pay them 20 to 30 per cent, of the value of the property in case it were condemned." The Court interpreted the Statute in the following language: "We have no doubt at all that the object of this provision as to attorney fees is merely to reimburse a defendant for attorney fees which he has paid, or to indemnify him for such fees for which he has become liable, provided the fees so paid or incurred are reasonable. * * * It has also been uniformly held that mortgages and other agreements providing for the allowance of attorney fees to a party in litigation arising thereon did not extend to a case where the party has neither paid nor incurred a liability to pay such fees, * * *" and then, after quoting the substance of the testimony as to the fee as above set out, ruled as follows: "This testimony shows that the agreement was for a contingent fee, and that the appellants never incurred any liability to their attorneys for a fee in this proceeding; the contingency on which the fee was payable not having occurred." The attorneys' fee claimed was accordingly disallowed.

The same point arose in the New York Court of Appeals in Re Boardwalk Amusement Co., 271 N.Y. 341, 3 N.E.2d 448, 449. The City of New York commenced condemnation proceedings against property of Boardwalk Amusement Company and thereafter abandoned the same. Section 992 of the Greater New York City Charter provided for such abandonment and discontinuance and then went on: "But in case of such discontinuance the reasonable actual cash disbursements, necessarily incurred and made in good faith by any party interested, shall be paid by the city of New York, after the same shall have been taxed." The Boardwalk Company retained an attorney who proved the Company's title to the tract before the proceeding was abandoned, and it was found as a fact that the attorney's services were reasonably worth $4500.00. The City appealed from a ruling that such item could be taxed under the quoted charter provision. The contract between the attorney and the client provided: "We agree to pay and hereby assign to said attorney for his services 33 1/3% of any award that may be made in connection with the acquiring of title by the City of New York in said proceeding. It is further understood that said attorney's compensation is to be paid when said award is paid by the City of New York." The Court said:

"The Courts below have held that the essential object of this provision having been frustrated by the discontinuance of the condemnation proceeding, the respondent [Boardwalk Amusement Co.] is to pay for the services of its attorney on a quantum meruit. We construe the instrument of retainer differently.

" * * * Any arrangement to be made between them [the attorney and the client] would necessarily regulate in some way the assumption of the manifest risk of a discontinuance of the condemnation proceeding. They might have stipulated that in that event the respondent (although it would receive

nothing) was nevertheless to pay the fair value of the services of the attorney. Instead the stipulation made was that the attorney was to have a share 'of any award that may be made * * * to be paid when said award is paid.'

* * * * * *

"It is true that the respondent's full title had been vindicated by its attorney before the condemnation proceeding was discontinued. That this was an important service is not to be denied. But there is also no denying that the achievement was one to which the attorney had pledged himself on terms of his own choosing and that the inference of ultimate advantage therefrom to the respondent is now remote and conjectural. 'The question to be determined is not the value of the work considered by itself and unrelated to the contract. The question to be determined is the benefit to the owner in advancement of the ends to be promoted by the contract.' Buccini v. Paterno Construction Co, supra, 253 N.Y. 256, at page 259, 170 N.E. 910, 911.

"We conclude that the attorney took the chance that his right to look to the respondent for any compensation would be annulled by the contingency that has happened."

[22 S.E.2d 252]

These decisions are more briefly summarized along with In re Jay Street, 1938, 254 App.Div. 889, 5 N.Y.S.2d 262 (to the same effect), in the exhaustive annotation upon the whole subject of the right and effect of abandonment of condemnation proceedings in 121 A.L.R. 12, appended to the report of our case of South Carolina State Highway Department v. Bobotes, 180 S.C. 183, 185 S.E. 165, 121 A.L.R. 1. They are simply applications to the particular facts involved of the general rule that liability for the payment of a contingent fee arises only upon the happening of the contingency. 7 C.J.S, Attorney and Client, § 188, pp. 1071, 1072. This controversy is upon similar facts and is governed by the stated rule.

In accordance with the foregoing, the judgment appealed from is modified, the allowance of the expense item of $30 is affirmed, but the award of attorneys' fees is reversed.

Modified.

BONHAM, C. J, and BAKER and FISHBURNE, JJ, concur.

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441 S.W.2d 841

MANDELL & WRIGHT, Petitioners,

v.

Enola M. THOMAS, Respondent.

No. B--1214.

Supreme Court of Texas.

April 16, 1969.

Rehearing Denied June 4, 1969.

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Barrow, Bland & Rehmet, David Bland, Houston, for petitioners.

Mack H. Hannah, III, Port Arthur, Newton B. Schwartz, Houston, for respondent.

McGEE, Justice.

Enola M. Thomas filed suit to rescind a contingent fee contract employing the law partnership of Mandell & Wright to prosecute the claim arising out of the death of her husband. Mrs. Thomas Alternatively sought a judgment declaring the contract null and void or that Mandell & Wright be limited to a recovery in quantum meruit for services performed prior to the notification of discharge. Mandell & Wright also sought a declaratory judgment that the contract vested them with a one-third interest in any cause of action for the death of Joseph Thomas and a one-third interest in the proceeds of any settlement of the death claim.

Both parties moved for summary judgment. The trial court overruled the motion filed by Mrs. Thomas and entered summary judgment in favor of Mandell & Wright. The First Court of Civil Appeals at Houston reversed the judgment of the trial court and remanded the cause for trial. 433 S.W.2d 219.

Will will review the testimony from Mrs. Thomas' deposition before discussing the points of error raised by the parties.

Early on the morning of October 24, 1966 Mrs. Thomas heard that her husband, Joseph, who was an employee aboard the 'Gulfstag' had lost his life when the vessel sank. Surviving Mr.

Thomas were his wife and seven children, one of whom was serving in the Armed Forces overseas. About noon of the same day Johnson, of the National Maritime Union, and Wright called at her home. Thomas had been a member of this union. Wright was introduced as the attorney for the union and was recommended to Mrs. Thomas. There was very little conversation on this occasion. Mrs. Thomas stated that her son would be home on leave soon and that she would take no action until he arrived.

Three days later her son did arrive home on emergency leave. On October 27, 1966, Patton, another representative of the union, and Wright called at her home. Patton explained benefits which would be received from the union and assured her that she need not worry about them. Wright asked the names and ages of the children and

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wrote them down. He told her that his fee would be one-third of the claim and related that he represented others; but, she said that she did not see their names. Wright handed the contract to her in the presence of Patton and her son. She glanced over the contract but did not remember reading it. She could not remember whether or not her son read the contract. Her son was present at this time. She acknowledged that she signed the contract of October 27, 1966. After she signed the contract she remembers Wright saying, 'Now we are going to represent you folks.'

On November 2, 1966 Mrs. Thomas called Mack Hannah III and asked if she could change lawyers and was advised: 'That is your privilege.' She then telephoned Mandell & Wright and told them that she did not want them to represent her. She then went to Mr. Hannah's office and he dictated a letter, which she signed, notifying Mandell & Wright that they had been discharged. She then signed a one-third contingent fee contract with Hannah, and he called in Newton Schwartz as co-counsel. No reason for the discharge was stated in the letter to Mandell & Wright. Later, in her deposition, Mrs. Thomas gave as her reason for discharging Mandell & Wright the fact that she wanted to be represented alone and not with a group.

In reversing the summary judgment, the Court of Civil Appeals held that material issues of fact were raised concerning the identity of the claim in which Mandell & Wright were assigned an interest. Mandell & Wright assign error to this ruing and contend that the contract described with sufficient certainty the only claim to be prosecuted as a result of the death of Thomas at sea. We sustain this contention.

The claim is described in the contract as follows: 'Mandell & Wright, a law partnership, are hereby employed to represent the undersigned in the prosecution of the following claim: Joseph Thomas (deceased husband) Gulfstag. * * * That said attorneys are authorized to sue for and recover all damages and compensation to which the undersigned may be entitled * * *.'

The contract sufficiently identifies the claim arising out of the death of Thomas, because the only cause of action which Mrs. Thomas and her children possessed as the result of the Death of her husband at sea is defined by Federal Statutes. The cause of action for the death of Thomas at sea can be asserted only by virtue of the Jones Act, 46 U.S.C.A. § 688, or the Death on the High Seas Act, 46 U.S.C.A. § 761 et seq. The Jones Act gives a cause of action to the 'personal representative' of any seaman whose death is caused by personal injury in the course of his employment. The Death on the High Seas Act gives a cause of action to the 'personal representative' of a person whose death is caused by wrongful act or negligence occurring on the high seas. Our State's Wrongful Death Act, as well as any common law remedy which Mrs. Thomas may have had for the death of her husband at sea, has been superseded by Federal Statute. Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686 (1929).

We stress the fact that the death action is vested by statute in the 'personal representative.' The right of Mrs. Thomas, as the surviving wife, to qualify as 'personal representative' was fixed at the time she signed the contract, and this right could not have been pre-empted by any other person without her consent. V.A.T.S. Probate Code, Sec. 77. In this case Mrs. Thomas has not waived her right.

The 'personal representative' who asserts a cause of action under the Jones Act or the Death on the High Seas Act is not suing for the benefit of the decedent's estate or as a representative thereof, nor does any amount which the 'personal representative' may recover become an asset of the estate. The Probate Court has no interest in either the claim of damages recovered thereunder. Petition of Southern Steamship Co., 135 F.Supp. 358 (D.Del.,

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1955). The 'personal representative' sues as trustee for the benefit of those for whom the statute authorizes recovery. Lindgren v. United States, supra; Hassan v. A. M. Landry & Son, Inc., 321 F.2d 570 (5th Cir., 1963); Stark v. Chicago, North Shore & Milwaukee Ry. Co., 203 F.2d 786 (7th Cir., 1953); Petition of Keystone Tankship Corporation, 237 F.Supp. 689 (W.D.Wash., 1965); Petition of Southern Steamship Co., 135 F.Supp. 358 (D.Del., 1935); Feliu v. Grace Line Inc., 97 F.Supp. 441 (S.D.N.Y., 1951); The Pan Two, 26 F.Supp. 990 (D.C.Md., 1939); Thornton v. Puget Sound Power & Light Co., 49 F.2d 347 (W.D.Wash., 1930).

The statutory beneficiaries in this case are the surviving wife and children. Wright recorded the names and ages of the children and then Mrs. Thomas signed the contract. We hold that under the undisputed facts of this case and the law applicable thereto, the claim in which Mandell & Wright were assigned an interest was identified and understood by the parties as a matter of law.

The Court of Civil Appeals reversed the summary judgment for the further reason that, in its opinion, the deposition testimony of Mrs. Thomas that she was 'in shock' created a fact issue concerning her mental capacity at the time she signed the contract. Mandell & Wright contend that the summary judgment proof conclusively shows that Mrs. Thomas had the requisite mental capacity to execute the contract in question. This contention is sustained.

Mrs. Thomas had the mental capacity to contract if she appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting. Missouri-Pacific Ry. Co. v. Brazzil, 72 Tex. 233, 10 S.W. 403 (1888); 17 C.J.S. Contracts § 133(1)a; 13 Tex.Jur.2d, Contracts, § 10.

The record in this case conclusively demonstrates that Mrs. Thomas understood and agreed to the essential terms of the contract. Mrs. Thomas testified by deposition that she was 'in shock' on October 24, 1966, which was the day she learned of her husband's death. That she was possibly 'in shock' on that date is completely understandable and believable. But October 24, 1966 was not the date on which Mrs. Thomas signed the contract with Mandell & Wright. The contract was executed on October 27, 1966. Though Mrs. Thomas testified to being 'in shock' on that date, her deposition testimony nevertheless conclusively shows that she understood the nature and consequences of her actions, for she in fact testified that on October 27, 1966 she did understand that she was employing lawyers to file suit for damages for the death of her husband and was agreeing to pay them one-third of any sum recovered. Her only complaint stated in the deposition was that she did not want to be represented in a group.

We hold that as a matter of law Mrs. Thomas possessed the mental capacity to contract at the time she executed the agreement with Mandell & Wright.

At the time Mrs. Thomas signed the contract in question, Mandell & Wright already represented another claimant by the name of James Hiott. The Court of Civil Appeals overruled the contention of Mrs. Thomas that a conflict of interest existed by reason of Mandell & Wright's representation of another claimant. We likewise overrule that contention and hold that as a matter of law, there was no conflict of interest at the time Mrs. Thomas signed the contract on October 27, 1966. While neither party has briefed the question of what effect such a conflict might have on the contractual rights and obligations of Mrs. Thomas, we think the question is immaterial in view of our holding under the record of this case that no conflict of interest existed between Mrs. Thomas and the other claimant. This is not to say that a conflict of interest could never arise in the representation of several claimants by a single attorney in a proceeding where liability is limited as provided in 46 U.S.C.A.

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§ 183 et seq. The rights and obligations of the attorney in that situation will be considered when the question is presented for decision.

Both of the claimants represented by Mandell & Wright were asserting claims against the owners of the Gulfstag, a common defendant. But that fact, standing alone, could not possibly lead to the inference that their respective interests were adverse and hostile, and that is what is required before the interests can be said to conflict. 7 C.J.S. Attorney and Client § 47. Mrs. Thomas' attorneys contend, however, that at the time she signed the contract there existed the probability that the shipowners would file a petition for limitation of liability as authorized by 46 U.S.C.A. § 183 et seq., and that the limitation fund established in that proceeding would in all probability be inadequate to satisfy all the claims against the fund. Mrs. Thomas urges that the claimant's respective interests necessarily conflicted due to the possibility, if not probability, that they would be seeking satisfaction out of a limited fund.

A petition to limit liability has actually been filed by the owners of the Gulfstag in the United States District Court for the Eastern District of Texas. Wright knew, when Mrs. Thomas signed the contract, that such a petition would probably be filed and that the limitation fund might well be inadequate to satisfy the many claims which would be asserted against the fund. We nevertheless hold that in representing James Hiott and Mrs. Thomas, Mandell & Wright did not represent conflicting interests within the meaning of Texas Canon of Ethics Number Six.

If the limitation fund exceeds the aggregate amount of all claims which are and which may be asserted against it, there cannot possibly be conflicting interests among the claimants. On the other hand, if the district court determines that the fund is inadequate to pay the total amount of damages which may be awarded, then the court will enforce a concursus and reduce proportionately the amount awarded each claimant. 46 U.S.C.A. § 184, Hartford Accident § Indemnity Co. of Hartford v. Southern Pacific Co., 273 U.S. 207, 47 S.Ct. 357, 71 L.Ed. 612 (1927); Maryland Casualty Co. v. Cushing, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); Petition of Texas Co., 213 F.2d 479 (2d Cir.1954); Petition of Trinidad Corporation, 229 F.2d 423 (2d Cir.1955).

We find no cases decisive of the exact point we are deciding here, but as illustrative of the cases which attest to the practice of multiple claimant representation, even when the limitation fund is inadequate to pay all the claims, we cite the case of Petition of Southern Steamship Company, 135 F.Supp. 358 (D.Del., 1955).

Since we have held that there was no conflict of interest at the time Mrs. Thomas signed the contract with Mandell & Wright, it is not necessary to discuss whether full disclosure of the conflict was made to Mrs. Thomas. It is, however, undisputed that Wright, at the time the contract was signed, told Mrs. Thomas that his firm was representing other claimants. Mrs.

Thomas made no protest at that time, nor did she mention the firm's representation of Hiott at the time she actually discharged Mandell & Wright.

Mrs. Thomas contended in the Court of Civil Appeals, and renews the contention here, that the contract is void as being against public policy because it authorizes Mandell & Wright to compromise and settle the claim and to execute '* * * all necessary releases, receipts, acquittances, settlements discharges, notices or satisfaction of awards, judgments or recoveries of whatsoever character, and generally do all acts and things which in their judgment are essential to the handling of this matter.'

This provision, which constitutes a general power of attorney with respect to the claim described in the contract, does not render the contract void. It simply accentuates the fiduciary relationship of attorney

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and client and places upon the attorney, who occupies the position of a trustee, the very highest duty to act in accordance with that relationship. A breach of that duty to act in the utmost good faith would not leave Mrs. Thomas without a remedy. Thigpen v. Locke, 363 S.W.2d 247 (Tex.1962); Flanagan v. Pearson, 42 Tex. 1 (1874); Arrington v. Sneed, 18 Tex. 135 (1856); Bell v. Ramirez, 299 S.W. 655 (Tex.Civ.App., 1927, writ ref'd); Jinks v. Whitaker, 195 S.W.2d 814 (Tex.Civ.App., 1946, writ ref'd n.r.e.).

When, as in this case, an attorney has been expressly authorized to bind his client by a compromise or settlement of the claim, such a grant of power is valid in the absence of fraud of the attorney. Edge v. Business Men's Assurance Co. of America, 15 S.W.2d 44 (Tex.Civ.App., 1929, writ dism'd); 7 C.J.S. Attorney and Client § 105.

The summary judgment proof conclusively shows a complete lack of fraud or misrepresentation on the part of Mandell & Wright or the union representatives.

We reject respondent's contention that Mandell & Wright's recovery should be limited to one of quantum meruit for the value of work performed between the date of employment and date of discharge. Her refusal to cooperate in their prosecution of the claim made it impossible for them to proceed further. In Texas, when the client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation. Myers v. Crockett, 14 Tex. 257 (1855); White v. Burch, 19 S.W.2d 404 (Tex.Civ.App., 1929, writ ref'd); White v. Burch, 33 S.W.2d 512 (Tix.Civ.App., 1930, writ ref'd); Cottle County v. McClintock & Robertson, 150 S.W.2d 134 (Tex.Civ.App., 1941, writ dism'd, judgment correct).

The trial court's judgment awarded Mandell & Wright an undivided one-third interest in '* * * all claims, actions, demands, or causes of action arising by operation of law for damages or other amounts due and owing to plaintiff, Mrs. Joseph (Enola M.) Thomas, or the Estate of Joseph Thomas, deceased, husband of plaintiff, because of the death of said Joseph Thomas.' We hold that Mandell & Wright's contract embraces only the statutory claim arising out of the death of Thomas. This claim has been settled and the settlement fund is now on deposit with the federal district court in Beaumont in Civil Action Number 5343.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

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495 S.E.2d 450
329 S.C. 97
In the Matter of the ESTATE OF Frank Preston JONES, Jr., Deceased.
In Re Claim of LEATHERWOOD, WALKER, TODD & MANN, P.C., Attorneys, Estate File 56, Drawer 548, Respondent,
v.
The ESTATE OF Frank Preston JONES, Jr., Petitioner.
No. 24748.
Supreme Court of South Carolina.
Heard Dec. 16, 1997.
Decided Jan. 19, 1998.
Rehearing Denied Feb. 4, 1998.

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[329 S.C. 98] C. Rauch Wise, Greenwood, and Ken Suggs, of Suggs & Kelly, Columbia, both for petitioner.

J.D. Todd, Jr., of Leatherwood, Walker, Todd & Mann, P.C., Greenville, for respondent.

TOAL, Acting Chief Justice:

The Court of Appeals affirmed in result the award of attorneys' fees to Leatherwood, Walker, Todd & Mann, P.C. ("Law Firm"). We granted a writ of certiorari to review the question of whether the express fee contract was contingent on the successful recovery of a tax refund in federal court. We now reverse.

FACTUAL/PROCEDURAL BACKGROUND

Frank P. Jones, Jr. died in 1979. Elliott, Davis & Company ("Accounting Firm") represented the Jones estate in filing estate tax returns with federal and state authorities. Accounting Firm claimed a marital deduction for the estate because a woman named Eleanor Stickles lived with Jones. This deduction was disallowed by the Internal Revenue Service ("IRS") and the S.C. State Tax Commission. The estate paid the taxes due.

[329 S.C. 99] The estate then petitioned a probate court to determine the marital status of Stickles. The court found a valid common law marriage between Jones and Stickles. After this determination, Accounting Firm prepared, on the basis of a marital deduction, a claim for a refund from both the IRS and the S.C. Tax Commission. The claims were denied. The state refund was denied because it was not filed within three years of the due date of the return.

Accounting Firm then contacted Law Firm with which it had a longstanding professional relationship. Correspondence between the two firms indicates that Law Firm was handling two different matters for Accounting Firm: (1) initially representing Accounting Firm against a potential professional liability suit in relation to the Jones estate; and (2) seeking a refund for the estate. Law Firm did pursue these matters, by writing letters to Accounting Firm's carrier reporting the potential professional liability claim, and seeking a refund from the S.C. Tax Commission and the IRS. On October 20, 1987, Law Firm argued the

refund matter before the S.C. Tax Commission. On December 22, 1987, the Commission ordered a $30,695 refund.

The record contains copies of bills sent by Law Firm to Accounting Firm detailing fees owed. The final bill is dated August 9, 1988 and reflects over $14,500 in fees. As of August, no part of Law Firm's bill for services regarding the processing of the refund had been paid. On August 23, 1988, Law Firm wrote to the administrator of the estate, proposing a contract to proceed with litigation in federal court. The letter provides, in part:

We are willing to go forward with preparing the case and handling it in United States District Court on a contingent fee basis. We think that a contingent fee of one-third of the total amount recovered (including both principal and interest) would be reasonable. In setting this contingent fee, we will agree for it to include the total amount of our charges for all legal services rendered to this date. We will file the suit and pursue it through the Fourth Circuit (if the District Court opinion is appealed) for one-third of the total amount recovered (taxes plus interest) from the IRS and SCTC. Of course, the Estate would reimburse us for all costs and [329 S.C. 100] expenses incurred in the representation (including those already paid or incurred, i.e. $310.38).

The administrator did not respond, so on September 27, 1988, Law Firm again wrote

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him: "After having done considerable work in behalf of your brother's estate (the Estate) with no compensation, we cannot and will not do any further work without a contract for specific compensation signed by you as Administrator of the Estate." An attorney for the estate contacted Law Firm a few days later to discuss the federal action. Law Firm wrote a letter to the administrator on October 11, 1988, confirming the initiation of an action in federal court: "As you are well aware and in accord with your direction, [attorney for the estate] telephoned me on yesterday ... and advised your request that we proceed with filing suit in United States District Court for the District of South Carolina by you as Administrator of the Estate of Frank P. Jones, Jr. against the United States of America."

Law Firm initiated the action in federal court against the IRS. The action was not successful. In communicating with the administrator about the adverse results, Law Firm stated the chances of success on appeal would be "nil." It further advised the administrator of the time for appeal. The administrator did not respond, and there was no appeal of the matter to the Fourth Circuit Court of Appeals.

Eventually, Law Firm elected to file a claim against the estate for attorneys' fees in connection with the procurement of the state tax refund. It sought one-third of the $30,650 state tax refund. The estate denied it was liable for any attorneys' fees. Law Firm presented four alternate theories to the probate court to justify its claim to attorneys' fees: (1) an express contract was created through the correspondence to the administrator (August 23, 1988; September 27, 1988) and the call of the attorney for the estate to Law Firm; (2) an implied contract was created by notice to the estate through Law Firm's correspondence which evidenced its efforts to secure a refund, and the failure of the estate to object to such actions; (3) Law Firm acted as authorized agent of Accounting Firm, which had been given a power of attorney by the estate; and (4) Law Firm was owed fees under the equitable doctrine of quantum meruit.

[329 S.C. 101] The probate court disallowed the claim. First, it found that the express contract included the contingency of success in federal district court. Law Firm was not successful in that action; therefore, it could not seek to reform the contract.

Second, the probate court found that Law Firm should not be allowed to recover on an implied contract basis. Nearly all of Law Firm's correspondence about this matter was directed to Accounting Firm, not to the estate. Moreover, there was a potential conflict between the interests of the estate and those of Accounting Firm. The court noted that a lawyer may represent clients with adverse interests only with the consent of each client after full disclosure of the possible effects of such representation. See In re Anonymous Member of the S.C. Bar, 315 S.C. 141, 432 S.E.2d 467 (1993). This conflict was not disclosed to the estate.

Third, the probate court considered Law Firm's power of attorney argument. The estate had given a power of attorney to Accounting Firm to act on its behalf. Accounting Firm in turn had given Law Firm a power of attorney to act on its behalf. After analyzing the relevant documents, the probate court concluded that the power of attorney given to Accounting Firm did not authorize it to hire anyone else; nor was the estate aware that its power of attorney was being used to hire Law Firm.

Finally, the probate court found that the elements of quantum meruit had not been satisfied: The services were not performed under such circumstances as would have reasonably notified the estate that Law Firm expected to be paid for its services by the estate, as opposed to Accounting Firm. Accordingly, the court disallowed Law Firm's claim for attorneys' fees.

Law Firm appealed to the circuit court, which then reversed the holding of the probate court. The circuit court's order addressed only one issue, namely, quantum meruit. The court did not consider Law Firm's other theories for seeking fees. The estate appealed, and in an unpublished opinion, the Court of Appeals affirmed in result. In re Estate of Frank Preston Jones, Jr., Op. No. 96-UP-380 (S.C.Ct.App. filed October 29,

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1996). It found that there was not a basis for awarding fees under quantum meruit; however, it held that the parties had [329 S.C. 102] entered into an express contract, the terms of which were set out in the August 23, 1988 letter to the administrator. This Court granted the estate's petition for a writ of certiorari to review a single question:

Did the Court of Appeals err in failing to find the express contract was contingent upon the successful recovery of a tax refund in federal court?

LAW/ANALYSIS

The estate argues that the contract between Law Firm and the estate was contingent on the recovery of a tax refund in federal court. We agree.

The contractual provision between the parties must be read within the broader context of Law Firm's August 23, 1988 letter to the estate. The letter, authored by Law Firm's senior partner Wesley Walker, states that Mac Walters, an attorney with Law Firm, has done considerable work on and was instrumental in obtaining the refund from the S.C. Tax Commission. It further states:

You are aware that Mac Walters submitted a statement for services to the interested parties but no one appears to have any interest in making payment. I will not belabor in this letter all the work that has been done but I must say that--like any other law firm or individual lawyer practitioner would be--we are not very happy about not being compensated for our services. In lieu of recounting our labors and services, I

propose in this letter a plan for further procedure which will please everyone if we are successful in a refund action against the United States (IRS) in Federal District Court.

In view of the extensive work previously done by Mac Walters in this case, we feel that we are in a position to recommend proceeding with a refund action in the United States District Court.... We believe that we are well qualified to go forward with this matter and with an appropriate compensation agreement, we are prepared to proceed forthwith.

[329 S.C. 103] Naturally, we will not undertake the litigation without an appropriate compensation agreement. Such an agreement will properly take into consideration the work already done which resulted in the refund by the SCTC. We are willing to go forward with preparing the case and handling it in United States District Court on a contingent fee basis. We think that a contingent fee of one-third of the total amount recovered (including both principal and interest) would be reasonable. In setting this contingent fee, we will agree for it to include the total amount of our charges for all legal services rendered to this date. We will file the suit and pursue it through the Fourth Circuit (if the District Court opinion is appealed) for one-third of the total amount recovered (taxes plus interest) from the IRS and SCTC. Of course, the Estate would reimburse us for all costs and expenses incurred in the representation (including those already paid or incurred, i.e. $310.38).

"A contingent fee is one which is made to depend upon the success or failure in the effort to enforce a supposed right, whether doubtful or not." Adair v. First Nat. Bank, 139 S.C. 1, 5, 137 S.E. 192, 193 (1927); see also City of Burlington v. Dague, 505 U.S. 557, 560-61, 112 S.Ct. 2638, 2640, 120 L.Ed.2d 449, 455 (1992) ("Fees for legal services in litigation may be either 'certain' or 'contingent' {or some hybrid of the two}. A fee is certain if it is payable without regard to the outcome of the suit; it is contingent if the obligation to pay depends on a particular result's being obtained."); Alexander v. Inman, 903 S.W.2d 686, 696 (Tenn.Ct.App.1995) ("Most jurisdictions would agree that a contingent fee arrangement is an agreement for legal services under which the amount or payment of the fee depends, in whole or in part, on the outcome of the proceedings for which the services were rendered."); Martin v. Buckman, 883 P.2d 185, 192 (Okla.App.1994) ("In simple terms, a contingent fee contract is one in which a client engages an attorney to represent her in the recovery of, say, a certain sum of money she claims is owed to her, and the attorney agrees to accept for his services a certain percentage of what he recovers either by settlement or

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by judgment."); Black's Law Dictionary 614 (6th ed. 1990) (defining "contingent fees" as "[a]rrangement between attorney and client [329 S.C. 104] whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered....").

If we assume, in the present case, that the parties entered into a contract [1] through the August 23, 1988 letter, then the contractual language clearly evidences a contingent fee agreement. As the above authorities explain, a contingent fee agreement necessarily requires that a successful result be achieved before the fee is paid. In this case, the contract and other evidence in the record reveal that the contingency was success in procuring a refund in the federal litigation and that if that action was not successful, then there would be no fee paid. For example, the letter itself declares: "... I propose in this letter a plan for further procedure which will please everyone if we are successful in a refund action against the United States (IRS) in Federal District Court." (emphasis added). Moreover, an inter-office memo between members of Law Firm states: "In the final analysis, we will not file suit against Bill Jones as Administrator even though the failure to pursue an appeal will jeopardize our chances of collecting the fee on the South Carolina refund."

Law Firm argues that the prosecution of the claim was itself the fulfillment of the contingency; the one-third fee had already been earned, and it should have been paid by the estate when Law Firm proceeded with the federal action. This is an untenable position because under this interpretation, there would, in fact, be no contingency; the prosecution of the action, regardless of the results, would trigger the contingency. If the outcome of the suit is irrelevant to the fee to be extracted, then the agreement would not be contingent, but would be certain. Because the contractual language here set forth a contingency--one which ultimately was not fulfilled--Law Firm is entitled to no fee under the contract.

[329 S.C. 105] CONCLUSION

Based on the foregoing, we REVERSE the holding of the Court of Appeals inasmuch as the contingency of the contingent fee agreement was not satisfied. Accordingly, Law Firm is not entitled to the award of attorneys' fees.

WALLER and BURNETT, JJ., and GEORGE T. GREGORY Jr., and L. CASEY MANNING, Acting Associate Justices, concur.

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1 The question before this Court assumes a valid contract between the parties. Here, we have not been directly presented with the issue of whether a contract in fact existed. Accordingly, our decision should not be read to sanction the legal arrangement between Law Firm and the estate in the present case. The fact that an attorney's services have inured to the benefit of others does not necessarily give rise to a contractual relationship, absent a clear agreement between the parties. See Rankin v. Superior Auto. Ins. Co., 237 S.C. 380, 117 S.E.2d 525 (1960); see also Bowen & Smoot v. Plumlee, III, 301 S.C. 262, 391 S.E.2d 558 (1990).

New Ruling Makes a Major Change in Contingent Fee Dispute Resolution

By Retired Judge Stan Billingsley

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One way to invite a malpractice claim or be accused of an ethics violation is to have a fee dispute with a client. An angry client sued for a fee is very likely to fight back with allegations of malpractice and misconduct. The Kentucky Supreme Court in *Wo Sin Chiu v. Shapero* made a significant change in the method for calculating an attorney's lien for legal fees involving a contingency fee contract that should be carefully considered when deciding to sue a client for contingency fees.

In a fee dispute arising out of a personal injury case, the attorneys were found to have been discharged "without cause" by Chiu who subsequently recovered $175,000. The discharged attorneys had a contingent fee contract for their services and filed a civil action claiming entitlement to the contingency fee as set forth in the employment agreement. In the course of litigation Chiu raised the issue of whether there was an unethical solicitation of his case because he had signed the employment contract while in his hospital bed soon after being injured.

The Court found no unethical solicitation and overruled prior Kentucky case law that held damages for wrongful breach of a contingent fee employment agreement is determined by the terms of the agreement. See *LaBach v. Hampton*, 585 S.W.2d 434 (Ky. App. 1979). The Court in *Chiu* created a new doctrine to be applied in Kentucky:

"...when an attorney employed under a contingency fee contract is discharged without cause before completion of the contract, he or she is entitled to fee recovery on a quantum meruit basis only, and not on the terms of the contract."

Under the quantum meruit theory adopted by the Court, litigation concerning attorney's fees will be a fact question to be determined according to the standard set out in *Inn-Group Management Servs., Inc. v. Greer,* 71 S.W.3d 125 (2002). There the Court ruled that "[w]hat constitutes a reasonable attorney fee is an issue of fact when the action is between an attorney and client to collect or defend a fee for representation." I*d*. at 130.

Several Kentucky cases suggest that the recovery for an attorney's fee under a quantum meruit theory "... should be the amount of the contingent fee less such proportion of that sum as is reasonably represented by the labor and attention and expense that would have been required of plaintiffs to complete their undertaking, but which they did not do." See *Henry v. Vance*, 111 Ky. 72, 63 S.W. 273 at 275-276 (1901), which was cited in *Labach v. Hampton*, 585 S.W.2d 434 (Ky.App. 1979). See also *Gilbert v. Walbeck*, Ky., 339 S.W.2d 450 (1960).

This new ruling makes it even more imperative that attorneys carefully document in detail all of their work in a contingency fee case even though not paid on an hourly basis. Thorough documentation is key to the defense of a malpractice claim arising out of a contingency fee dispute and is the surest way of proving the value of legal services. Far too often attorneys find themselves in the awkward position of having spent considerable time in preparing a contingency fee case prior to discharge, but with a file containing only a few documents and no hourly record of work performed.

In "*Avoiding Malpractice*" Stephen M. Blumberg provides this useful risk management analysis of determining whether to sue a client for fees:

Avoid Suing Clients for Fees
Experience has shown that a great many legal malpractice cross-complaints are filed in response to the attorney's suit for unpaid fees. Often, the fees were not properly established, billed or collected prior to the litigation.

1. As a general rule, avoid suing clients for fees.
2. The preventive fee arrangement: By carefully handling your fees from the outset of a new case, the need to sue a client can often be avoided.
    - Enter a written fee agreement early in the course of representation.
    - In the fee arrangement, clearly spell out the method of billing and the scope of engagement.
    - Use itemized billings so that the client can tell what is being done on his behalf.
    - Bill periodically, preferably monthly.
    - Keep an accurate time log reflecting daily efforts expended on behalf of the client.
    - Do not attempt to change your method of compensation in the middle of the case.
3. If you are determined to sue a client for fees, first consider the following checklist:
    - Is a substantial amount of money involved insofar as your law firm is concerned?
    - Was a good result obtained in the underlying case?
    - Has an uninvolved attorney of experience reviewed the file for possible malpractice?
    - Does your State have statutory arbitration requirements that must precede litigation?
    - Will any judgment obtained be collectible?

Minnesota Contingent Fee Lawyers: Is it Time To Include A "Stowman Clause" In Your Contingent Fee Agreements?

- By Seth Leventhal
- May 4, 2015
- No Comments

Update (May 4, 2015): The Minnesota Supreme Court heard argument this morning in the Petition for Distribution of Attorney's Fees between Stowman Law Firm, P.A., and Lori Peterson Law Firm case, which is discussed in earlier posts below. The issue in the case is whether Stowman should get part of a contingent fee award when he did much of the work on the case but he withdrew before the client negotiated a settlement with a successor lawyer. There was nothing in the Stowman contingent fee agreement providing for any such scenario.

Erik Hansen argued for the Stowman Law Firm. Based on the the questions that the hot bench laid on Hansen, I think we can predict that the Stowman law firm will lose. The Court's concern is that litigants in contingent fee cases will be badly prejudiced if a string of contingent fee lawyers can all make "extracontractual claims" on any ultimate recovery even if such a deal is not set out in the lawyers' contingent fee agreements (under theories of "quantum meruit" or "unjust enrichment"). Zenas Baerargued for the Lori Peterson Law Firm.

So, it seems to me there might be an easy fix going forward (but no recourse for Stowman, if I am right as to how the Minnesota Supreme Court is leaning). The original contingent fee agreement

could set out an express condition that the attorney will be entitled to a fair share of an ultimately recovery in the event the event that the lawyer has to withdraw before final settlement or resolution for any reason. But this might lead to later litigation as to whether any such a contractual provision is too vague to be enforceable. But it would rescue the firm in Stowman's position who seeks to be paid even when there was no applicable provision in the contingent fee.

Update (January 22, 2015): (under headline: "Attorney Withdrawal From Case Because of Attorney/Client Disconnect Re: Settlement ≠ "Good Cause""): The Minnesota Supreme Court has granted a petition for review in the published Minnesota Court of Appeals' attorneys' fee dispute decision described (and called into question) below.

Original post (November 7, 2014): Let's say a client comes to you with a claim and, based on your experience, you assess the claim to have a value of between $0 and $250,000 and a most likely recovery of less than $100,000 in your best estimate. (Let's say the range has to do with complications with regard to liability and with regard to claimed damages, as well.)

You take the case on a contingent fee and the defendant offers your client $100,000 in a settlement mediation.

You want your client to take it. Your client wants to hold out.

What are you going to do about it?

One thing you might think about doing is withdrawing from the case. You're a contingent fee lawyer. Your time is your capital. And this client might be forcing you to invest a lot more than would be rational.

This week's decision in In Re Petition for Distribution of Attorneys' Fees between Stowman Law Firm, P.A. and Lori Peterson Law Firm will make the decision to withdraw a little tougher for the contingent fee lawyer.

In a published Minnesota Court of Appeals decision, the Court held that a lawyer who withdraws because of irreconcilable differences of opinion on the desirability of a settlement offer has to walk away from any recovery in the case.

So, it would seem that the following, in theory, could occur:

1. A client might reject a settlement offer;

2. Then, plaintiff's lawyer might withdraw from the case out of a concern that the client has unrealistic expectations and that the lawyer would be taking on excess risk taking the case to trial, and
3. The client could change her mind, accept the previously rejected settlement offer, and the plaintiff's lawyer would have surrendered her claim to her contingent fee?

If the rule is taken this far, it seems potentially extremely unfair (and dangerous) to contingent fee lawyers. On the other hand, it certainly has the benefit of clarity and ease of application.

The position of the Stowman Law Firm in the linked decision threatened uncertainty and high cost in determining the fair distribution of fees to which it would have been entitled under a theory of "quantum meruit" (versus the later successful contingent fee lawyers, presumably). The Court of Appeals decision is probably the least expensive solution, at the expense, maybe, of fairness.

Big Stakes Contingency Litigation: In Re: The Matter of Lawrence.

In 1981, a New York real estate mogul who was one of the largest landowners of Downtown Manhattan real estate (commercial real estate valued at one billion) passed away. The billionaire left a widow who was 80 and three children.

The widow was of sound mind, not subject to any undue influence and was found later by the Court to be " intelligent, tough and sophisticated in business matters, having managed a real estate portfolio worth more than $200 million.

In 1983, the widow retained the Graubard Miller law firm in New York to represent the husband's estate in a claim against the decedent's brother and equal business partner, Cohn, who was also Executor of the estate. Cohn resisted selling decedent's properties and distributing the proceeds to Lawrence and her children, and litigation ensued. Lawrence participated in almost every detail of the litigation.

The litigation battle went on for more than two decades until Cohn died in 2003. By the end of 2004, Lawrence had paid $18 million in legal fees on an hourly basis since 1983 in connection with the estate litigation. By 2002, most of the contested issues in the litigation had ended and those that remained related to Cohn's alleged self-dealing in the estate.

Positive outcomes at this stage were uncertain and costly to pursue. Lawrence had spent $4.88 million in fees between 2003 and 2004.

Also in early 2004, the widow tried to reach a settlement directly with Cohn's children. She received a $60 million offer, but it was subject to numerous open-ended give-backs.

Lawrence did not consider this a bona-fide offer due to the fact of not only the uncertainty of the give-backs but also going forward in business together until the contingencies, including remaining as business partners going forward until the loose ends wound up, according to her son's testimony later in court. This defeated the very reason the case was brought - to end the relationship.

Weary of paying millions in hourly fees for years, coupled with an adverse ruling by the Referee concerning some Wall Street property, Lawrence complained about her legal fees and sought an amendment to the hourly fee contract. She and counsel agreed to a 400/o contingency of the net recovery after deduction of up to $1.2 million in time charges for 2005.

Graubard sent a contract to her which was reviewed by her long time accountant. Her accountant even recommended small changes, which were accepted, and she executed it. The case proceeded forward on that basis.

In May, 2005 Graubard uncovered a "smoking gun" in discovery that demonstrated that Cohn indeed had engaged in egregious self-dealing in connection with the sale of several properties, the "Epps claim".

Previously, Lawrence thought there was not much to this claim and had decided it was not worth pursing, criticizing the attorneys for wasting time "dogging it" earlier.

As a result of this evidence, the case quickly settled in May 2005 for $100 million dollars. This was about twice what the remaining claims were estimated to be worth by Graubard.

Lawrence had not told her children about the amendment to the fee contract until July, 2005, and stated at the time the son reported to her the terms of the settlement at the approval hearing which she did not attend, "I think I made a mistake" ... "it's my problem- I'll handle it".

The estate closed in July, 2005 and thereafter the widow discharged and refused to pay the agreed 40% to Graubard under the revised agreement. Graubard filed suit to recover the fee in August 2005 against Lawrence and she filed claims for return of all legal fees she had paid from 1983, and return of gifts she made to certain of the firm's partners in 1998.

The case was referred eventually to the same Referee as had handled discovery and other pre-trial matters during the original action, After extensive motion and appellate practice and completion of discovery, the Referee heard 15 days of testimony over 3 months beginning in October 2009. (Ms. Lawrence died in 2008) The only issue relevant to our group is the enforceability of the revised fee agreement.

He ruled that the revised agreement was not initially unconscionable when made, but became so in hindsight because of its sheer size, disproportion to Graubard's efforts and relatively small risk to Graubard. He allowed Graubard $15.8 million under the revised agreement, computing what the attorney was owed in quantum meruit under a graduated fee structure, in which he applied 40% contingency to an initial portion of the recovery and then reduced the percentage for the additional and unanticipated portion of the award. (40% to first ten million recovery (which Lawrence anticipated), 30% to the next ten million and 10% to the remaining $91.8 million (the smoking gun" money) which was unanticipated.

An appeal followed and was decided May 2013 (106 AD 3rd 607, 965 NYS 2na 495, 1st Dept. 2013), which affirmed the Referee's decision because Graubard failed to show that Lawrence "fully knew and understood the terms of the agreement", stating the firm had internally assed the estate's claims to be worth $47 million, so that the contingency fee provision in the revised retainer would have meant a fee of about $19 million. And it further said it was highly unlikely the firm took very much risk of losing substantial fees as a result of the revised contract. The Court noted a disproportionment of compensation for the number of hours expended during the relevant time (3795 hours divided into the $44million (40% of 100 million) is $11,000 per hour)) the agreement was in effect.

The appeals court further reverted back to the original agreement (hourly rate method) and remanded for the lower court to make findings consistent with the opinion.

The law firm made motion for leave to appeal, during which time the parties stipulated to a final decree on remand that resolved the fee dispute in accordance with the Appellate Divisions Order, and the Court agreed to accept the certified question anyway.

The Court then reversed the Appellate Divisions decision, holding that even though the agreement was changed in mid- stream, and even though that in and of itself heightens the scrutiny courts should use in determining the issue, both procedurally and substantively, that the revised agreement was not unconscionable.

Procedural unconscionability means whether there was a meaningful choice, that is to say was the client fully informed upon entering the agreement, free from fraud or undue influence. The Court found the client did ask for the change in the method of payment for legal services, that Lawrence fully understood the retainer agreement and was involved "in every detail of the case." She had her trusted accountant review the agreement. The accountant testified he explained the 40o/o contingency and "exactly what it required of her." From the testimony and evidence, neither party had any knowledge of the "smoking gun" until the revised agreement was in place.

Substantively, the Court noted that while agreements like the one at bar may not be unconscionable at the outset; they could in hindsight "if the amount becomes large enough to be out of proportion to the value of the legal services rendered." The Court then noted that if the agreement was not void at inception, the court should "exercise great caution" because it is not "unconscionable for an attorney to recover much more than he or she could possibly could have earned at an hourly rate."

The Court went on to say: "In fact: the contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk - a risk that often becomes reality - that they will do much work and earn nothing ..."

One risk the Graubard firm took was the risk that the client could terminate the retainer agreement at any time, and reject a favorable settlement, leaving the law firm with no cause of action for breach of contract (many courts, including New York, hold since the client has an absolute right to fire his/her attorney at any time, cause or not, public policy would not allow the termination to constitute a breach of the agreement , entitling the lawyer to contract damages for the breach) and the only remedy for payment is under Quantum Meruit. [note: South Carolina is in the minority, holding an attorney termination without cause allows the attorney to recover on the contract. Tillman v. Grant, 2006 UP 340 (CT. App. 2006)]

The Court analyzed whether $44 million was unreasonably excessive, given the risk taken by the attorney and the value of the attorney's services in proportion to the overall fee. The Court noted here that Lawrence had already fired two firms she had hired in the same estate matter before hiring

Graubard's firm, a firing which could certainly be repeated again. Following the change to a contingency, the firm had invested nearly 4000 hours in less than 6 months. The litigation had been going on since 1984, 21 years at the time of settlement; And it could have dragged on for another decade had the "smoking gun" never been found.

The Court cautioned making decisions concerning unconscionability solely by the size of the amount recovered due to the work of the attorney, even if short in duration. Early success of the attorney "through skill or luck, or a combination thereof may achieve a favorable result in short order." And "conversely, the lawyer may put in many years of work for no or a modest reward. Most cases, of course fall somewhere between these extremes." (See Restatement [Third] of Law Governing Lawyer Sec. 34, comment c [2000] "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."}

24 N.Y.3d 320
23 N.E.3d 965
998 N.Y.S.2d 698
2014 N.Y. Slip Op. 07291

In the Matter of Sylvan LAWRENCE, Deceased.
Richard S. Lawrence et al., Respondents,
v.
Graubard Miller et al., Appellants,
and
Richard S. Lawrence et al., Intervenors–Respondents.

Court of Appeals of New York.

Oct. 28, 2014.

[998 N.Y.S.2d 701]

Sullivan Papain Block McGrath & Cannavo P.C., New York City (Brian J. Shoot of counsel), and Flemming Zulack Williamson & Zauderer LLP, New York City (Mark C. Zauderer of counsel), for Graubard Miller, appellant.

Jones Day (Michael A. Carvin, of the District of Columbia bar, admitted pro hac vice, and Jacob M. Roth, of the District of Columbia bar, admitted pro hac vice, of counsel), for C. Daniel Chill and others, appellants.

Kornstein Veisz Wexler & Pollard, LLP, New York City (Daniel J. Kornstein, Ina R. Bort and Amy C. Gross of counsel), for respondents and intervenor-respondents.

[998 N.Y.S.2d 702]

Berchem, Moses & Devlin, P.C., Milford, Connecticut (Robert L. Berchem and Michelle Devlin Long of counsel), and Akin Gump Strauss & Feld LLP, New York City (Kim Koopersmith of counsel), for Marta Jo Lawrence and another, intervenors-respondents.

Greenfield Stein & Senior, LLP, New York City (Norman A. Senior and Angelo M. Grasso of counsel), for Richard S. Lawrence, intervenor-respondent.

Pollack Pollack Isaac & DeCicco, New York City (Brian J. Isaac of counsel), for New York State Trial Lawyers Association, amicus curiae.

OPINION OF THE COURT

READ, J.

Beginning in 1983, defendant law firm Graubard Miller (Graubard or the law firm) represented Alice Lawrence (Lawrence) and her three children in litigation arising from the death of her husband and their father, Sylvan Lawrence (decedent), a real estate developer. At the time of decedent's death in 1981, his company owned commercial real estate in New York City valued at an estimated $1 billion. Decedent's brother and lifelong equal business partner, Seymour Cohn (Cohn), was executor of the estate. Cohn resisted selling decedent's properties and distributing the proceeds to Lawrence and the children, which caused Lawrence to bring suit in 1983. For over two decades, she and Cohn (and after he died in November 2003, his estate) battled in court (hereafter, the estate litigation).

Lawrence, who died in February 2008, has been portrayed as intelligent, tough and sophisticated in business matters, having personally managed an investment portfolio worth more than $200 million. She described herself in prior proceedings [1] as a “force to be reckoned with”; her “own person” who made her “own decisions”; and someone who “never” consulted with her attorneys or children about business matters, but rather kept her own counsel and “trust[e]d nobody.” Consistent with this persona, Lawrence participated in almost every detail of the estate litigation—large and small—and reviewed all of the documents and motions her attorneys filed. She demanded to be the “senior partner” in the litigation and threatened on numerous occasions to fire Graubard when she thought that the law firm was not carrying out her wishes. She had no qualms about rejecting Graubard's advice outright.

The estate litigation came to an abrupt and unexpected end on May 18, 2005, when the Cohn estate agreed to settle for over

[998 N.Y.S.2d 703]

$100 million, a sum about twice what Graubard assessed the remaining claims to be worth. There quickly followed, though, this dispute between Lawrence and Graubard with respect to the law firm's fee, and the validity of certain gifts made by Lawrence to three Graubard partners in 1998. For the reasons that follow, we hold that the parties' revised retainer agreement was neither procedurally nor substantively unconscionable and is therefore enforceable; and that the Lawrence estate's claim for return of the gifts is time-barred.

I
The Revised Retainer Agreement

By the end of 2004, Lawrence had paid Graubard approximately $18 million in legal fees on an hourly fee basis since 1983 in connection with the estate litigation. After 2002, the major remaining contested claims involved accounting objections. These claims rested on the contention that Cohn had in one way or another abused his position as executor to engage in self-dealing. Positive outcomes in this phase of the litigation were uncertain and costly to pursue. Indeed, Lawrence spent a total of $4.88 million in legal fees in 2003 and 2004. There were no distributions to the Lawrence family during those two years.

In early 2004, soon after Cohn died, Lawrence tried to negotiate a settlement directly with Cohn's children. Her efforts resulted in a $60 million offer,[2] but it was subject to numerous open-ended givebacks. Lawrence's son, later (and still) coexecutor of her estate, testified that his mother did not consider this a bona fide offer that would achieve a complete and definitive financial separation of the Lawrences from the Cohns, her goal ever since the inception of the estate litigation in 1983. In her son's telling, Lawrence likened the $60 million offer to an earlier proposal made by Cohn in which he “purportedly wanted to buy her share [in a particular building] ... presented her with a simple offer and

then proceeded to add so many conditions and qualifications ... that it was obvious that he had no intention of concluding the deal."

Then on December 16, 2004, the Referee ruled against Lawrence with respect to her single largest accounting objection by far, which related to a Manhattan office building known as 95 Wall Street. This unexpected loss was quite a blow, and prompted Lawrence to complain about her legal fees and ask for a new fee arrangement going forward. She and C. Daniel Chill (Chill), the lead attorney at Graubard for Lawrence-related matters, discussed the possibility of a contingency fee arrangement. Lawrence proposed a 30% contingency; Chill countered with 50%. They eventually agreed upon a fee of 40% of the net recovery after deduction of up to $1.2 million in time charges for calendar year 2005.

Graubard sent Lawrence a proposed revised retainer agreement on January 12, 2005. She received the agreement the next day and reviewed it with her longtime accountant, Jay Wallberg (Wallberg). The notes of Wallberg's conversation with Lawrence suggest that he was the source of a paragraph that Graubard added to the final version of the agreement forwarded to Lawrence for signature on January 14, 2005, which she received the following day. The added paragraph clarified that hourly billing was to continue for one year only.

Lawrence executed the revised retainer agreement on January 19, 2005; as relevant, the agreement states as follows:

[998 N.Y.S.2d 704]

"1. For the calendar year commencing January 1, 2005, [Graubard] will continue to send you on a quarterly basis invoices for services rendered for the quarter, plus disbursements. Against each such invoice, [Lawrence] will pay the firm a flat sum of no more than $300,000 for that quarter. If at the end of the calendar year [Graubard's] invoices for services rendered for the calendar year, in the aggregate, total less than $1,200,000, exclusive of disbursements, [Graubard] will either credit [Lawrence] with the overpayment or refund to [Lawrence] such overpayment at [her] option. If at the end of the calendar year, [Graubard's] invoices for the calendar year, in the aggregate exceed $1,200,000, exclusive of disbursements, [Lawrence] shall have no obligation or liability to [Graubard] for any such excess.

"2. Commencing January 1, 2005, with respect to any monies distributed to the beneficiaries of [decedent's estate], [Graubard] will be paid from [Lawrence's] share of such monies 40% of the total distributed to the beneficiaries, minus the total amount paid by [Lawrence], including fees and disbursements, pursuant to paragraph 1 above.[3]

"3. In the event [Lawrence] settle[s] the litigation with [Cohn's estate], with respect to any monies distributed to the beneficiaries pursuant to said settlement, [Graubard] shall be paid on the same basis as is set forth in paragraph 2 above. Should the amount due to [Graubard] pursuant to this paragraph 3 be less than the amount of its actual time and disbursement charges commencing January 1, 2005, it is agreed between [Lawrence and Graubard] that [Lawrence and Graubard] will arrive at a fair resolution of the shortfall to [Graubard], which in all events shall be entirely in [Lawrence's] discretion.

"4. [Lawrence's] obligation to make quarterly payments under this agreement shall not extend beyond one year."

The case settled on May 18, 2005 in the midst of an evidentiary hearing to resolve certain of the outstanding accounting objections raised by Lawrence. This sudden turn of events came about on the

heels of a “smoking gun” discovery made by Graubard that Cohn had engaged in egregious self-dealing in connection with the sale of several properties (the so-called “Epps claim”). This “smoking gun” did not exactly drop into Graubard's lap: the law firm makes the point, which appears to be uncontested, that it had doggedly pursued the Epps claim even though earlier attempts to trace Cohn's malfeasance had proven fruitless and Lawrence had expressed skepticism about whether this particular claim (not one of the larger accounting objections) was worth continued time and effort.

Once the “smoking gun” surfaced, the Cohn estate offered Lawrence and the children over $100 million to dispose of the estate litigation. This figure was about twice what Graubard estimated the remaining claims to be worth; essentially, the “smoking gun” revelation was so damaging that the Cohn estate paid a substantial premium to bring the litigation to a swift and certain conclusion. At the time, the Referee estimated that

“[t]o hear and determine the remaining unresolved issues would likely require at least 30 additional trial days, the submission of post hearing legal memoranda, and [the] rendering of an extensive report on the law and the facts on the

[998 N.Y.S.2d 705]

issues that are the subject of the present hearing as well as additional reports on the pending summary judgment motions. Then, the final resolution of the dispute would entail litigation before the Surrogate regarding confirmation of these reports and, consistent with the prior history of the case, exhaustion of the appellate process.”

He added that these remaining unresolved issues were “serious, in the main uncertain of outcome, and involve[d] exceptionally high financial stakes for both estates.”

Lawrence did not attend the hearings before the Referee; however, she directed her son, who did, to report back “what was happening ... once a day or thereabouts.” On the day the case settled, he apprised his mother of this development by a telephone call placed from the conference room where the hearing was taking place. She reacted in “words to the effect, ‘I think I made a mistake’ ” and “ ‘[i]t's my problem. I'll handle it.’ ” At the time, Lawrence's son was not aware of the revised retainer agreement, which his mother did not share with him until July 7, 2005.

The Gifts

In 1998, 15 years after the estate litigation began, Cohn sold the real estate company's remaining properties and distributed the proceeds to Lawrence and the children. Lawrence received $84 million and the children, $40 million. [4] This distribution marked Lawrence's self-professed liberation from Cohn's “control” and “whims.” She received these monies in two checks, one deposited November 16, 1998 and the other, November 30, 1998. Lawrence, whose net worth was already about $220 million before this distribution , was so delighted that she framed copies of the checks.

After this hard-fought victory, Lawrence advised Chill of her desire and intention to make substantial gifts to her legal team of Chill, Elaine M. Reich (Reich) and Steven Mallis (Mallis) (collectively, the attorneys). Like Chill, Reich and Mallis were partners at Graubard. This conversation took place on November 25, 1998, the day before Thanksgiving. According to Chill, he advised Lawrence to make the

gift to the law firm instead, but she would not hear of it, and was insulted that he dared to second-guess her wishes.

Lawrence subsequently mailed Chill an envelope marked “Personal” containing a handwritten cover note and three smaller envelopes addressed to each of the attorneys. The envelopes were dated November 30, 1998—five days after Lawrence talked to Chill, and the day the second distribution check was deposited. The cover note stated: “Danny—You were kind to suggest you distribute the enclosed envelopes for me. Thank you again and yet again! From *all* the Lawrences.—Alice.”

The smaller envelope addressed to Chill contained a check for $2 million, postdated December 2, 1998, and a handwritten note from Lawrence, which said

“Dear Danny—Without you—what? You've stood by me all these years—buoyed me up with unflagging optimism and persistence—and kept all the team actively functioning despite continual frustration—knowing we all would prevail one day. You are my friend of all friends,

“Most affectionately,

“Alice”

[998 N.Y.S.2d 706]

The envelope addressed to Reich contained a check for $1.55 million, accompanied by a handwritten note that read “For Elaine My Friend—my children's friend. All of us thank you! Appreciatively, Alice.” And the handwritten note to Mallis read

“Dear Steve, Justice seemed to be blinded forever but with just such a shove as you, Elaine and Danny have made in my behalf, she came through after all. My most grateful thanks for *all* your unprecedented efforts— *all* these years.

“Affectionately,

“Alice”

A check for $1.5 million was tucked inside the note.

On December 7, 1998, Lawrence also made a gift of $400,000 to the law firm, but the companion handwritten note expressed substantially less gratitude. She wrote “Danny—I'm not sure just what I should be thanking the firm for. (Keeping me on as a client?) *You* write my thank you. A.” The authenticity of these handwritten notes has never been challenged.

Within days of making the gifts, Lawrence discussed them with Wallberg, who told her that gift taxes would total roughly $2.7 million. Wallberg advised Lawrence that she could either pay the gift taxes or report the transfers as bonuses, in which case the attorneys would be required to report the amounts as income and Lawrence would be entitled to a tax deduction. After vacillating for awhile, Lawrence eventually decided to report the amounts as gifts and to pay the $2.7 million in gift taxes.

The Post–Settlement Litigation

The closing under the settlement of the estate litigation took place on July 25, 2005. Soon after, Lawrence discharged Graubard and refused to pay the 40% contingency fee due under the revised retainer agreement (roughly $44 million). On August 5, 2005, Graubard commenced a proceeding in Surrogate's Court to compel payment of its legal fees. On September 13, 2005, Lawrence countered by filing suit in Supreme Court against Graubard and the attorneys. She sought rescission of the revised retainer agreement, return of all legal fees she had paid Graubard since 1983 and the monies she had given to the attorneys in 1998. Supreme Court directed that this action be removed to Surrogate's Court; the Surrogate referred both the Graubard and the Lawrence actions to the same Referee who had handled the estate litigation.

After extensive motion and appellate practice and completion of discovery, the Referee heard 15 days of testimony over three months, beginning on October 5, 2009. The only issues remaining to be decided at the evidentiary hearing were the enforceability of the revised retainer agreement and the validity of the gifts to the attorneys. In his report dated August 27, 2010, the Referee concluded that the revised retainer agreement was not procedurally or substantively unconscionable when made, but became substantively unconscionable in hindsight because of its sheer size, disproportion to Graubard's efforts and the relatively small risk to Graubard. The Referee recommended granting Graubard's claim seeking an order compelling the Lawrence estate to pay fees under the revised retainer agreement to the extent of ordering payment of $15.8 million.

The Referee reached this figure by computing what Graubard was owed in quantum meruit under a graduated fee structure in which he applied the 40% contingency to an initial portion of the recovery and then reduced the percentage for the additional, unanticipated portion of the award. Thus, he applied 40% to the first $10 million recovery (which Lawrence anticipated), 30% to the less expected next

[998 N.Y.S.2d 707]

$10 million and 10% to the remaining $91.8 million, which neither Lawrence nor Graubard expected prior to production of the “smoking gun.” Finally, the Referee subtracted from the resulting calculation of $16.1 million the $348,000 Lawrence paid to Graubard for services rendered in the first quarter of 2005.

The Referee further concluded that the attorneys had shown “by strong, convincing and satisfactory proof that the gifts were free from undue influence and that the gift transaction was fully understood by [Lawrence],” and therefore was valid. He identified five factors that underpinned his conclusion; specifically, (1) Lawrence's handwritten notes, which expressed sincere gratitude and whose authenticity was not challenged; (2) her seven-year delay in challenging the gifts; (3) her history of hiring and firing professionals at will (including Graubard), whenever they displeased her; (4) her election to pay gift taxes on the gifts rather than count them as bonuses; and (5) her aggressive, domineering, “vituperative” personality, which even frightened her adult children.

In a decision dated September 8, 2011, the Surrogate affirmed the Referee's recommendations with respect to attorneys' fees; however, she concluded that the gifts to the attorneys should be set aside and the funds returned to the Lawrence estate (*Matter of Lawrence,* 33 Misc.3d 1206[A], 2011 N.Y. Slip Op. 51796[U] [Sur.Ct.N.Y.County 2011]). In the Surrogate's view, the attorneys did not satisfy “their burden ‘to show by ... strong, convincing and satisfactory proof ... that the conveyance to [them] was entirely honest, legitimate and free from taint’ ” (2011 N.Y. Slip Op. 51796[U], at *6, quoting *Howland v. Smith,* 9 A.D.2d 197, 200, 193 N.Y.S.2d 140 [3d Dept.1959]).

She emphasized that Lawrence was an octogenarian [5] who had depended on the attorneys for over 16 years to "champion her interests in [the] highly contentious" estate litigation (*id.*). Since the $400,000 gift to the law firm had clearly "gone against the grain of [Lawrence's] feelings and judgment," the Surrogate surmised that "it would take an unwarranted leap of faith to conclude that the multi-million-dollar checks written at about the same time to the lawyers had not likewise been extracted from her by some degree of pressure, whether express or tacit, patent or subtle, from at least one of the [attorneys]." (*Id.*) Moreover, there were no neutral witnesses to Chill's private discussions with Lawrence, the gifts were more generous than other major lifetime gifts bestowed by Lawrence and the attorneys kept the gifts secret from their partners, the Lawrence children and even, in one case, a spouse. This "combination of dubious circumstances ... emit[ted] an odor of overreaching too potent to be ignored," and convinced the Surrogate that the gifts were not voluntarily made (*id.* at *7).

In a decision handed down on May 23, 2013, the Appellate Division modified the Surrogate's order (106 A.D.3d 607, 965 N.Y.S.2d 495 [1st Dept.2013]). Citing (*Glamm v. Allen,* 57 N.Y.2d 87, 93–94, 453 N.Y.S.2d 674, 439 N.E.2d 390 [1982]), the court first held that the Lawrence estate's claims relating to the gifts were tolled under the doctrine of continuous representation (106 A.D.3d at 608, 965 N.Y.S.2d 495). In its only discussion of this issue, the court simply stated that

"[c]ontrary to [the attorneys'] contention, the doctrine applies where, as here, the claims involve self-dealing at the expense of a client in connection with a particular subject matter (*cf.*

[998 N.Y.S.2d 708]

Woyciesjes v. Schering–Plough Corp., 151 A.D.2d 1014, 1014–1015 [542 N.Y.S.2d 80] [4th Dept.1989], *appeal dismissed,*74 N.Y.2d 894 [548 N.Y.S.2d 426, 547 N.E.2d 953] [1989])." (*Id.*)

On the merits, the Appellate Division concluded that the attorneys did not satisfy their burden of showing by clear and convincing evidence that the gifts were given willingly and knowingly, without undue influence. In particular, the "secrecy surrounding the gifts, and their extraordinary amounts, which the [attorneys] accepted without advising the widow to seek independent counsel" precluded a favorable finding (*id.* at 608609, 965 N.Y.S.2d 495). The court decided, though, that because the attorneys acted alone and in secret, Graubard was not required to forfeit its lawful fees from the date in 1998 when the attorneys received the gifts.

Next, the Appellate Division held that the revised retainer agreement was both procedurally and substantively unconscionable. In the court's view, Graubard failed to show that Lawrence fully knew and understood the terms of the agreement (*id.* at 609, 965 N.Y.S.2d 495). With respect to substantive unconscionability, the Appellate Division commented that Graubard had

"internally assessed the estate's claims to be worth approximately $47 million[6] so that the contingency fee provision in the revised retainer would have meant a fee of about $19 million. [Accordingly,] it seems highly unlikely that the firm undertook a significant risk of losing a substantial amount of fees as a result of the revised retainer agreement's contingency provision" (*id.*).

Additionally, the court considered the sought-after contingency fee to be disproportionate compensation for the number of hours spent by the law firm on the estate litigation after the revised retainer agreement went into effect.

The Appellate Division, however, disagreed with the Referee and the Surrogate about the proper remedy. The court held that "[w]here, as here, there is a preexisting, valid retainer agreement, the proper remedy is to revert to the original agreement" (*id.* at 609–610, 965 N.Y.S.2d 495). The Appellate Division therefore remanded for the Surrogate to determine the fees due under the original hourly fee agreement, plus prejudgment interest from the date of the breach.

Graubard, Chill and Reich, and Mallis separately asked the Appellate Division for leave to appeal to us. While their motions for leave to appeal were pending, the parties stipulated to a final decree on remand that resolved the fee dispute in accordance with the Appellate Division's order, and directed the attorneys to return the gifts. The Surrogate entered the final decree on remand on July 29, 2013. On September 10, 2013, the Appellate Division granted all three motions seeking leave to appeal, certifying to us the following question of law: "Was the order of [the Appellate Division], which modified the decree of the Surrogate's Court and affirmed a previous order of the Surrogate's Court, properly made?" We now reverse and answer the certified question in the negative.

II
The Revised Retainer Agreement

Courts "give particular scrutiny to fee arrangements between attorneys

[998 N.Y.S.2d 709]

and clients," placing the burden on attorneys to show the retainer agreement is "fair, reasonable, and fully known and understood by their clients" (*Shaw v. Manufacturers Hanover Trust Co.,* 68 N.Y.2d 172, 176, 507 N.Y.S.2d 610, 499 N.E.2d 864 [1986]). A revised fee agreement entered into after the attorney has already begun to provide legal services is reviewed with even heightened scrutiny, because a confidential relationship has been established and the opportunity for exploitation of the client is enhanced (*Matter of Howell,* 215 N.Y. 466, 472, 109 N.E. 572 [1915]). As we explained in this case's earlier trip here, an unconscionable contract is generally defined as "one which is so grossly unreasonable as to be [unenforceable according to its literal terms] because of an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability]" (*Lawrence v. Graubard Miller,* 11 N.Y.3d 588, 595, 873 N.Y.S.2d 517, 901 N.E.2d 1268 [2008]).

The parties and the lower courts agree that the *percentage* of the fee (40%) is not automatically unconscionable. Rather, the Lawrence estate argues that the revised retainer agreement is void procedurally because Lawrence did not fully know and understand its nature, and void substantively because Graubard took no risk in entering into the agreement and $44 million, in hindsight, is disproportionately excessive in light of the work Graubard put into the case.

1. Procedural Unconscionability

To determine whether the agreement is procedurally unconscionable, we must examine the contract formation process for a lack of meaningful choice. The most important factor is whether the client was fully informed upon entering the agreement (*King v. Fox,* 7 N.Y.3d 181, 192, 818 N.Y.S.2d 833, 851 N.E.2d 1184 [2006]). Even in the absence of fraud or undue influence, the attorney must show that the client executed the contract with "full knowledge of all the material circumstances known to the attorney ... and that the contract was one free from fraud on [the attorney's] part or misconception on the part of [the client]" (*Howell,* 215 N.Y. at 473–474, 109 N.E. 572).

The hearing evidence demonstrated that Lawrence fully understood the revised retainer agreement, which she herself sought. Lawrence was abreast of the status of the litigation because, as the Referee found, she was involved in every detail of the case. She also sent the proposed agreement to Wallberg, her trusted accountant, who reviewed it, explained it to Lawrence, and even proposed that Graubard clarify the duration of the hourly charges capped at $1.2 million. Graubard made the changes Lawrence requested, and she signed the agreement four days after she received the revised version.

Contrary to the Lawrence estate's assertions, the mathematical calculations required to understand the 40% contingency fee are not so difficult for a layperson to comprehend, let alone a sophisticated businesswoman. Any doubt about Lawrence's understanding of the proposed fee was dispelled by Wallberg, the estate's own witness, who testified that he explained to Lawrence exactly what the 40% contingency fee required of her.

Moreover, the Referee discredited the Lawrence estate's contention that Chill had a “svengali-like” influence over Lawrence and overcame her will. Given Lawrence's history of hiring and firing attorneys and other professionals, it is implausible to think that anyone would have been able to force or cajole her to enter into any agreement against her will. There was no evidence to suggest that

[998 N.Y.S.2d 710]

Lawrence was not fully in command of her faculties when she executed the revised retainer agreement in January 2005.

The Lawrence estate propounds that Graubard did not fully inform Lawrence about the potential “up-sides” of the litigation, and so she did not have “full knowledge of all the material circumstances known to the attorney” (*Howell,* 215 N.Y. at 473, 109 N.E. 572). In particular, the estate stresses that Lawrence never saw the undated handwritten worksheet, which set out Graubard's evaluation of the value of each claim, its likelihood of success and the potential recovery. But this evaluation estimated a $97 million recovery *before* the Referee dismissed the largest claim on the list, the 95 Wall Street claim, valued at $49.5 million. And conspicuously, the worksheet overly optimistically assigned a 90% chance of recovery to this dismissed claim. This just points out the hazards of predicting outcomes in highly complex litigation.

Although Graubard did not provide this internal document to Lawrence in 2004, Chill informed her when they negotiated the revised retainer agreement that the recovery would probably be at least a few million dollars (enough to cover the capped hourly charges for 2005). Further, the estate's own expert witness testified that Graubard provided Lawrence a “tremendous amount of detail” concerning the various claims, including their likelihood of success and potential recoveries. As the Referee noted, “before the 2005 modified retainer agreement [Lawrence] had in her possession a lot of the information that [the Lawrence estate's expert] thinks she should have had at the time of that agreement.”

Of course, in January 2005 neither Graubard nor Lawrence anticipated the size of the eventual recovery. They did not know that there was a “smoking gun” that would change the whole complexion of the estate litigation once it came to light. In sum, Graubard did not hide from Lawrence an anticipated recovery of over $100 million, as was actually achieved.

2. <u>Substantive Unconscionability</u>

Agreements that are not unconscionable at inception may become unconscionable in hindsight, if "the amount becomes large enough to be out of all proportion to the value of the professional services rendered" (*King,* 7 N.Y.3d at 191, 818 N.Y.S.2d 833, 851 N.E.2d 1184). A close reading of the cases that create this "hindsight" review, however, seem to limit the principle to a more narrow application. Although "[t]he word 'unconscionable' has frequently been applied to contracts made by lawyers for what were deemed exorbitant contingent fees," what is meant is that "the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated upon him" (*Gair v. Peck,* 6 N.Y.2d 97, 106, 188 N.Y.S.2d 491, 160 N.E.2d 43 [1959] [internal quotation marks and citation omitted]).

Absent incompetence, deception or overreaching, contingent fee agreements that are not void at the time of inception should be enforced as written (*Lawrence,* 11 N.Y.3d at 596, 873 N.Y.S.2d 517, 901 N.E.2d 1268 n. 4). As we further observed on the prior appeal in this case, "the power to invalidate fee agreements with hindsight should be exercised only with great caution" because it is not "unconscionable for an attorney to recover much more than he or she could possibly have earned at an hourly rate" (*id.*). In fact,

> "the contingency system cannot work if lawyers do not sometimes get very lucrative
>
> [998 N.Y.S.2d 711]

fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing. If courts become too preoccupied with the ratio of fees to hours, contingency fee lawyers may run up hours just to justify their fees, or may lose interest in getting the largest possible recoveries for their clients" (*id.*).

Whether $44 million is an unreasonably excessive fee depends on a number of factors, primarily the risk to the attorneys and the value of their services in proportion to the overall fee. Here, Graubard undertook significant risk in entering into a contingency fee arrangement with Lawrence. The risk to an attorney in any retainer agreement is that the client may terminate it at any time, "leaving the lawyer no cause of action for breach of contract but only the right to recover on *quantum meruit* for services previously rendered" (*Gair,* 6 N.Y.2d at 106, 188 N.Y.S.2d 491, 160 N.E.2d 43). This danger is amplified in the context of a client who frequently fires professionals (including attorneys), as Lawrence had done in the past and threatened to do once again.[7]

Beyond the ever-present risk that Lawrence would lose interest in the case or fire Graubard, the law firm faced the prospect that this decades-long litigation would drag on for several more years (as the Referee predicted might happen), through a lengthy trial and appeals, with the non-hourly fee as its only compensation for many hours of work. In just the five months after entering into the contingency fee arrangement, Graubard lawyers spent nearly 4,000 hours preparing for the trial in May 2005, the first of the many trials that were envisaged before the case so unexpectedly settled. In sum, Graubard ran the risk that its fees would not cover costs over a period of years, and that Lawrence would fire them or decide to drop the claims. Especially given a client who frequently castigated and ignored her lawyers, the law firm also took the chance that Lawrence would reject a settlement agreement that she was advised to accept, or, conversely, accept an offer that Graubard deemed to be unwise.

In addition to Graubard's risk in entering the revised retainer agreement, we also must consider the proportionality of the value of Graubard's services to the fee it now seeks. As we stated in the prior appeal, the value of Graubard's services should not be measured merely by the time it devoted to prosecuting the

claims (*Lawrence,* 11 N.Y.3d at 596 n. 4, 873 N.Y.S.2d 517, 901 N.E.2d 1268). Rather, the value of Graubard's services (for the purpose of hindsight analysis) should be the $111 million recovery it obtained for Lawrence.

We agree with Graubard that a hindsight analysis of contingent fee agreements not unconscionable when made is a dangerous business, especially when a determination of unconscionability is made solely on the basis that the size of the fee seems too high to be fair (*see In re Smart World Tech., LLC,* 552 F.3d 228, 235 [2d Cir.2009] ["the fact that contingency fees may appear excessive in retrospect is not a ground to reduce them because early success by counsel is always a possibility capable of being anticipated" (internal quotation marks omitted)]). It is in the nature of a contingency fee that a lawyer, through skill or luck (or some combination thereof), may achieve a very favorable result in short order; conversely, the lawyer may put in many years of work for no or a modest reward. Most cases, of course, fall somewhere in between these two extremes (*see*

[998 N.Y.S.2d 712]

Restatement [Third] of Law Governing Lawyers § 34, Comment *c* [2000] ["(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"]).

Finally, it bears reemphasizing that Lawrence was no naif. She was a competent and shrewd woman who made a business judgment that was reasonable at the time, but which turned out in retrospect to be disadvantageous, or at least less advantageous than it might have been.[8] As a general rule, we enforce clear and complete documents, like the revised retainer agreement, according to their terms (*see Vermont Teddy Bear Co. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 [2004]).

III
The Gifts

The parties agree that the longest relevant period of limitations with respect to the Lawrence estate's claims for refund of the gifts is six years (*see*CPLR 213[1] [the catchall six-year statute of limitations]). These claims are therefore time-barred unless the statute of limitations is tolled by the continuous representation rule or doctrine.

The two prerequisites for continuous representation tolling are a claim of misconduct concerning the manner in which professional services were performed, and the ongoing provision of professional services with respect to the contested matter or transaction (*see Williamson v. PricewaterhouseCoopers LLP,* 9 N.Y.3d 1, 9, 11, 840 N.Y.S.2d 730, 872 N.E.2d 842 [2007] [the doctrine is inapplicable where "plaintiff's allegations establish defendant's failures within a continuing professional relationship, not a course of representation as to the particular problems (conditions) that gave rise to plaintiff's malpractice claims"]; *McCoy v. Feinman,* 99 N.Y.2d 295, 306, 755 N.Y.S.2d 693, 785 N.E.2d 714 [2002] [continuous representation tolling applies "only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim"]; *accord Shumsky v. Eisenstein,* 96 N.Y.2d 164, 167–168, 726 N.Y.S.2d 365, 750 N.E.2d 67 [2001] [continuous representation tolling applies "only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice"]; *Glamm,* 57 N.Y.2d at 94, 453 N.Y.S.2d 674, 439 N.E.2d 390 [the application of the continuous representation rule is "limited to situations in which the attorney

who allegedly was responsible for the malpractice continues to represent the client in that case"]). The rule does not apply to a continuing general relationship between a client and professional (*Williamson,* 9 N.Y.3d at 9, 840 N.Y.S.2d 730, 872 N.E.2d 842).

There is a difference between an attorney's alleged malfeasance in the provision of professional services on his client's behalf, and a dispute between an attorney and his client over a financial transaction, such as legal fees or, in this case, a gift. Simply put, when an attorney engages in a financial transaction *with* a

[998 N.Y.S.2d 713]

client, by charging a fee or, as in this case, accepting a gift, the attorney is not representing the client in that transaction *at all,* much less representing the client continuously with respect to "the particular problems (conditions) that gave rise to plaintiff's malpractice claims" against the attorney (*id.* at 11, 840 N.Y.S.2d 730, 872 N.E.2d 842). The attorney and client are engaging in a transaction that is separate and distinct from the attorney's rendition of professional services on the client's behalf (*see e.g. Woyciesjes,* 151 A.D.2d at 1014–1015, 542 N.Y.S.2d 80 [rejecting applicability of the continuous representation doctrine to the plaintiff's claim that his former attorney improperly charged him a fee of 50% rather than one third]).

We have never endorsed continuous representation tolling for disputes between professionals and their clients over fees and the like, as opposed to claims of deficient performance where the professional continues to render services to the client with respect to the objected-to matter or transaction. Nor do the rationales underlying continuous representation tolling support its extension beyond current limits.

Two rationales inform the rule. First, a layperson "realistically cannot be expected to question and assess the techniques employed or the manner in which [professional] services are rendered"; specifically, a client cannot "be expected, in the normal course, to oversee or supervise the attorney's handling of the matter" (*Greene v. Greene,* 56 N.Y.2d 86, 94, 451 N.Y.S.2d 46, 436 N.E.2d 496 [1982]). Thus, the client should not be burdened with the obligation to identify the professional's errors in the midst of the representation as "[t]he client is hardly in a position to know the intricacies of the practice or whether the necessary steps in the action have been taken" (*Siegel v. Kranis,* 29 A.D.2d 477, 480, 288 N.Y.S.2d 831 [2d Dept.1968]). Relatedly, a client cannot be "expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person" as to the matter giving rise to the malpractice claim (*Glamm,* 57 N.Y.2d at 94, 453 N.Y.S.2d 674, 439 N.E.2d 390). Second, a client who becomes aware of an error should not be required to sue immediately since that would only "interrupt corrective efforts" (*Borgia v. City of New York,* 12 N.Y.2d 151, 156, 237 N.Y.S.2d 319, 187 N.E.2d 777 [1962] [establishing the continuous treatment rule for medical malpractice]).

When a client pays a lawyer or gives the lawyer a gift, the lawyer is not—in that transaction—"perform[ing] legal services on the [client's] behalf" (*Greene,* 56 N.Y.2d at 95, 451 N.Y.S.2d 46, 436 N.E.2d 496). As a result, requiring the client to dispute the payment or seek return of the gift within the ordinary limitations period does not force a layperson to undertake actions that he is ill-equipped to carry out; i.e., to "question and assess the techniques employed" by the professional, or evaluate "the manner in which the services are rendered" or "oversee or supervise the attorney's handling of the matter" (*id.* at 94, 451 N.Y.S.2d 46, 436 N.E.2d 496). Notably, clients are obligated to review attorney's invoices on a timely basis, rather than wait until the representation ends before raising objections (*see Whiteman, Osterman & Hanna, LLP v. Oppitz,* 105 A.D.3d 1162, 1163, 963 N.Y.S.2d 432 [2013] [an attorney or law firm may

recover on a cause of action for an account stated "with proof that a bill, even if unitemized, was issued to a client and held by the client without objection for an unreasonable period of time(,) (and) need not establish the reasonableness of the fee since the client's act of holding the statement

[998 N.Y.S.2d 714]

without objection will be construed as acquiescence as to its correctness" (internal quotation marks omitted)]).

Second, unlike ongoing professional matters, disputes over fees or gifts involve no "mutual understanding of the need for further representation" regarding that transaction (*McCoy,* 99 N.Y.2d at 306, 755 N.Y.S.2d 693, 785 N.E.2d 714). Since the disputed act is not the subject of any prior or ongoing representation, there is no risk that contesting a payment or seeking return of a gift would interrupt "corrective efforts" (*Borgia,* 12 N.Y.2d at 156, 237 N.Y.S.2d 319, 187 N.E.2d 777). Delaying litigation would therefore not permit the attorney to "correct his or her mal-practice," and so avoid suit (*McDermott v. Torre,* 56 N.Y.2d 399, 408, 452 N.Y.S.2d 351, 437 N.E.2d 1108 [1982]). There was certainly no "mutual understanding of the need for further representation" regarding the gifts, as the attorneys did not represent Lawrence with respect to the gifts in the first place. Similarly, having done nothing on the client's behalf in the gift transaction, there was nothing for the attorneys to correct through provision of ongoing professional services. Consequently, "the purpose[s] underlying the continuous representation doctrine would not be served by its application here" (*Williamson,* 9 N.Y.3d at 11, 840 N.Y.S.2d 730, 872 N.E.2d 842).

The estate portrays our decision in *Greene* as indicating that the continuous representation doctrine applies to all types of claims by clients against attorneys. In *Greene,* a lawyer who drafted an agreement and then acted as trustee and attorney under the agreement was sued by the trust beneficiary for mismanaging trust assets entrusted to him "for professional assistance" (56 N.Y.2d at 94, 451 N.Y.S.2d 46, 436 N.E.2d 496). We observed that the continuous representation rule was not confined to negligence claims, meaning merely that the doctrine could toll equitable, as well as legal claims. As we stated,

"[t]he [doctrine's] operative principle may also be applicable in other situations, including claims for equitable relief. A client who entrusts his assets to an attorney for professional assistance often faces the same dilemma as the client who entrusts his case to an attorney for possible litigation. In neither instance can the client be expected, in the normal course, to oversee or supervise the attorney's handling of the matter, and thus in neither case is it realistic to say that the client's right of action accrued before he terminated the relationship with the attorney" (*id.* at 94–95, 451 N.Y.S.2d 46, 436 N.E.2d 496 [citation omitted]).

Additionally, although the attorneys' acceptance of the checks may fairly be (and has been) characterized in many unflattering ways, they did not thereby engage in self-dealing, as the Appellate Division commented. Self-dealing occurs when an attorney (or other fiduciary) takes advantage of his position in a transaction and acts in his own interests rather than in the best interests of the client. Continuous representation tolling can apply to claims of self-dealing, but only where its basic elements—a disputed transaction that is the subject of ongoing professional representation—are present (*see Greene, supra; see also Schlanger v. Flaton,* 218 A.D.2d 597, 631 N.Y.S.2d 293 [1st Dept.1995] [client alleged that his attorney violated professional and fiduciary obligations when he prepared lease agreements and entered into contracts on behalf of the client in properties in which the attorney personally maintained an interest]).

In sum, we decline to expand the continuous representation rule to encompass a financial dispute between a professional and his client. To do so would

[998 N.Y.S.2d 715]

fundamentally alter the doctrine, which requires a claim of misconduct concerning the manner in which professional services were performed, and the ongoing provision of professional services with respect to the complained-of matter or transaction. Because the statute of limitations is not tolled by the continuous representation rule, the Lawrence estate's claims seeking to recoup the gifts are time-barred.

We have reviewed the Lawrence estate's remaining arguments and consider them to be unavailing. Accordingly, the order of the Appellate Division should be reversed, with costs, the matter remitted to Surrogate's Court for entry of a decree in accordance with this opinion, and the certified question answered in the negative.

RIVERA, J. (concurring in part and dissenting in part).

I concur with the majority that the retainer agreement is enforceable. However, I disagree with the majority that the estate's claim seeking a return of the gifts is untimely, and therefore I dissent from this portion of the opinion. I would hold that the continuous representation doctrine tolled the estate's claim. As the Special Referee stated, which the Surrogate confirmed, "the nexus between the attorneys' conduct complained of (the 1998 gifts) and the subject of their representation both before and for many years afterward is sufficient to apply the continuing representation doctrine for tolling purposes" (*see* Ref. Rep. Estate of Alice Lawrence's Motion for Partial Summary Judgment and Cross Motions of Graubard Miller and of Defendants C. Daniel Chill, Elaine M. Reich and Steven Mallis for Partial Summary Judgment, Sept. 23, 2009 at 18; *Matter of Lawrence,* Sur. Ct., N.Y. County, Oct. 1, 2009, Webber, S.). Additionally, as the Appellate Division noted, "the doctrine applies where, as here, the claims involve self-dealing at the expense of a client in connection with a particular subject matter" (*Matter of Lawrence,* 106 A.D.3d 607, 608, 965 N.Y.S.2d 495 [1st Dept.2013]).

As to the merits, I would hold that the challenged gifts are not valid for the reasons stated by the Appellate Division and the Surrogate, except insofar as the Surrogate suggests that Mrs. Lawrence's age, by itself, is a factor weighing against finding the gifts were freely given (*see Matter of Lawrence,* Sur. Ct., N.Y. County, Sept. 8, 2011, Anderson, S.). Moreover, the attorneys' failure to act in a manner that comported with ethical considerations and their fiduciary duties lends additional support for finding these gifts invalid.

First, the attorneys acted in a manner that suggests they elevated their own interests above those of their clients. Both the Appellate Division and Referee noted that the attorneys came up short of their ethical obligations (*see Lawrence,* 106 A.D.3d at 608–609, 965 N.Y.S.2d 495 ["the secrecy surrounding the gifts, and their extraordinary amounts, which the individual defendants accepted without advising the widow to seek independent counsel, preclude a finding in the individual defendants' favor"], citing Code of Professional Responsibility EC 5–5). As the Referee concluded, the attorneys violated Code of Professional Responsibility EC 5–5 by "failing to advise Alice to 'secure advice from an independent, competent person cognizant of all the circumstances' " (Ref. Rep. on the Oct. 5, 2009 Hearing, Aug. 27, 2010 at 31, citing Code of Professional Responsibility EC 5–5). I agree with the Appellate Division that this was not the determining factor. However, even if such a violation was not a per se basis for invalidating the gifts, it suggests that the attorneys were more concerned with their own interests in the money than with ensuring Mrs. Lawrence's gift was "fair and fully intended" (

[998 N.Y.S.2d 716]

Radin v. Opperman, 64 A.D.2d 820, 820, 407 N.Y.S.2d 303 [4th Dept.1978], citing *Nesbitt v. Lockman,* 34 N.Y. 167, 169–170 [1866], *Howland v. Smith,* 9 A.D.2d 197, 199–200, 193 N.Y.S.2d 140 [3d Dept.1959], *Reoux v. Reoux,* 3 A.D.2d 560, 562–564, 163 N.Y.S.2d 212 [3d Dept.1957], *Snook v. Sullivan,* 53 App.Div. 602, 606–607, 66 N.Y.S. 24 [4th Dept.1900], *Matter of Bartel,* 33 A.D.2d 987, 307 N.Y.S.2d 260 [4th Dept.1970], and *Matter of Eckert,* 93 Misc.2d 677, 679–681, 403 N.Y.S.2d 633 [Sur.Ct.N.Y.County 1978]). This is not mere speculation as to the attorneys' motivation, for here the attorneys failed to even investigate their ethical duties to the Lawrence children, further suggesting the primacy of their personal interests.

Second, the attorneys may have had an ethical responsibility to disclose the gifts because Mrs. Lawrence was not their sole client. As the record establishes, the estate's expert and Graubard's expert each agreed that the attorneys had an ethical duty to disclose the gifts to the Lawrence children. The experts testified that because the gifts were made by a co-client, disclosure was necessary to allow the children to assess potential conflicts raised by the gifts so that they might determine whether the attorneys were able to continue providing them with zealous representation , untainted by these life-altering gifts. Third, the gifts implicated the attorneys' fiduciary duties to the firm's partners regarding their shared compensation. All of this suggests that there was a significant question as to whether the attorneys could comply with their ethical and fiduciary duties while at the same time maintain the silence Mrs. Lawrence demanded and expected as a caveat to her generosity. Thus, they should have informed Mrs. Lawrence that their obligations as attorneys might well require them to disclose the gifts. Having failed to do so, knowing all the while that maintaining secrecy about the gifts was important to Mrs. Lawrence, it would seem that she was deprived of information necessary to make a truly informed and voluntary choice (*see Radin,* 64 A.D.2d at 820, 407 N.Y.S.2d 303; *Matter of Henderson,* 80 N.Y.2d 388, 392–393, 590 N.Y.S.2d 836, 605 N.E.2d 323 [1992]; *Howland,* 9 A.D.2d at 199, 193 N.Y.S.2d 140; *Nesbitt,* 34 N.Y. at 169–170).

Chief Judge LIPPMAN and Judges GRAFFEO and PIGOTT concur; Judge RIVERA dissents in part in an opinion; Judges SMITH and ABDUS–SALAAM taking no part.

Order reversed, with costs, matter remitted to Surrogate's Court, New York County, for entry of a decree in accordance with the opinion herein, and certified question answered in the negative.

Notes:

[1] Lawrence was never deposed in this case. As discussed later, the Surrogate appointed a referee to hear and report on the estate litigation and then this lawsuit. In connection with a sanctions motion brought by Graubard, the Referee found that although Lawrence “was a critical witness whose testimony was highly relevant and necessary to the issues presented” in this lawsuit, she pursued a two-year course of resistance. She filed duplicative, meritless requests for reconsideration of the decision to permit her deposition, the “real purpose [of which] was delay.” When that failed, Lawrence defaulted in appearing for a deposition the Referee had ordered; she then filed meritless appeals. She also made “repeated representations to [the courts] that she would appear for her deposition within thirty days of an adverse decision by the Appellate Division” on her interlocutory appeals, and then “reneg[ed] on her

commitment.” Further, Lawrence, “at least implicitly if not explicitly,” represented that “she knew of no medical condition that would impair her ability to testify,” even after being informed in November 2007 that she was terminally ill and only had months to live. As a consequence, the Referee recommended that the Surrogate grant Graubard's motion to strike Lawrence's pleadings unless the Lawrence estate waived the protection of the Dead Man's Statute; the Surrogate confirmed the Referee's report and imposed this sanction.

2. According to Lawrence's nephew, his aunt's initial demand was $90 million and his counteroffer was $25 million.

3. Lawrence always insisted that the attorneys' fees come from her share of the estate (not the children's), which was fixed at 75.9%.

4. In the 14 years from 1983, when Lawrence retained Graubard, through the end of 1997, Graubard achieved roughly $196 million in estate distributions for the Lawrence family.

5. In an affidavit dated September 8, 2005, almost seven years after she gave the gifts to the attorneys, Lawrence stated that she was then 80 years old.

6. This figure comes from a handwritten worksheet from Graubard's files, which was admitted into evidence at the hearing. The worksheet includes cross-outs and marginal notes; it is undated, but since the 95 Wall Street claim appears on it, the document is thought to have been created sometime before the Referee's unfavorable decision in that matter on December 16, 2004.

7. Lawrence fired the first two law firms she retained to handle the estate litigation.

8. Lawrence did, after all, recover over $100 million. This sum far exceeded her reasonable expectations at the time she entered into the revised retainer agreement. She just had to share more of the windfall with her lawyers than would have been the case if she had not sought to change the original hourly fee arrangement.

POSTED ON MAY 28, 2013 BY MAX KENNERLY, ESQ.

$44 Million Contingency Fee In Estate Litigation Thrown Out As “Unconscionable”

The incomparable ability of estate litigation to drag on is literally a joke, a joke so old and so well-known that more than 150 years ago Charles Dickens opened the novel *Bleak House* with reference to the fictional *Jarndyce and Jarndyce* estate proceeding that had been going on for generations.

Sylvan Lawrence was one of the largest owners of real estate in downtown Manhattan when he died in December 1981. Last week, a mere 31 years, 5 months, and 2 weeks later, an appellate court in New York decided the fee dispute between his estate and Graubard Miller, the firm his wife (who died in 2008) hired in 1983 to represent the estate in litigation against one of his partners (who died in 2003). *New York Law Journal* articlehere; New York Appellate Division opinion here.

By the end of 2004, Lawrence’s widow, Alice Lawrence, had paid approximately $22 million in legal fees on an hourly fee basis for the estate litigation. Though by that point there was a $60 million offer to settle the case, and her attorneys had internally valued the case at $47 million, Lawrence thought she deserved more, but she was tired of those bills and the uncertainty. Lawrence thus asked the firm to represent her on a contingency fee agreement (40%) and they agreed.

Five months later, in May 2005, after the firm had put another 3,795 hours into the case, the case settled for $111 million.

Lawrence refused to pay the 40%. I wrote about the case before, back in 2007, noting “Ms. Lawrence obviously had the funds available to hire a large corporate firm on an hourly (or flat fee) basis, and to pay all costs of the litigation herself upfront. In so doing, she would have borne all the risk of spending enormous sums of money without a guaranteed return. Instead, she contracted with a firm to bear all of that risk; within five months, it had achieved a result with which she was content.”

I am quite sympathetic to claims of “unconscionability” when they involve, for example, consumers cheated by large corporations hiding behind arbitration agreements and class action waivers snuck into form agreements that are uniformly adopted across an industry. But a billionaire trying to score a deal on legal services while pursuing a large settlement? If she didn’t want to pay more in legal fees, she could have taken the $60 million offer. If she wanted to take on the risk of pursuing a large settlement or verdict — and the possibility that the case could drag on for many more years, with thousands of more hours of attorney time required — she already had the means to do so. She didn’t want to take the risk of investing her money into what could be another *Jarndyce and Jarndyce*, so she chose to minimize her costs and her risks, while the firm chose to take on those costs and risks for a chance at a larger recovery.

But contingency fee practitioners don’t make the law, courts do. Lawrence’s estate argued the firm should take home approximately $1.7 million, the hourly value of its services. The firm argued they were entitled to the agreed-upon 40%, or $44 million. A “referee” appointed by the court tried to reach a

compromise, reasoning that $44 million for 3,795 hours of work, or $11,000 an hour, was "an astounding rate of return for legal services," while mere market rate wouldn't account for the risk of the contingency fee, and so awarded the firm about $16 million. The New York Appellate Division just reversed, saying that was too much, and that the firm was entitled "the fees due the law firm under the original retainer agreement," i.e., the hourly fee, plus prejudgment interest. The prejudgment interest, which is mandated by law, helps somewhat, but let's not forget that the firm hasn't been paid a dime on the case in eight years.

The opinion is a disappointment for contingent fee practitioners. As I wrote before, "Maybe there's some mischief not identified by these stories; maybe she's mentally impaired and the firm took advantage of her. That would be a different story." It seems that, back in 1998, Alice Lawrence paid some of the attorneys sizable cash "gifts," and that's suspicious, but the court's decision was *not* based on any sort of finding that the widow was mentally incompetent or that she was manipulated into the fee agreement. Rather, the court simply looked at her claimed subjective beliefs about the agreement — e.g., "The evidence shows that the widow believed that under the contingency arrangement, she would receive the "lion's share" of any recovery" and "the law firm failed to show that the widow fully knew and understood the terms of the retainer agreement" — and took that as reason enough to throw out the firm's contingency fee agreement.

But to me the most disturbing part is the reference to the "$11,000 an hour" effective rate. Sure, it ended up being "$11,000 an hour," but it could just as easily been $11 an hour, or $0 an hour, if the litigation had turned out differently. Looking at the fee and calculating an hourly rate *in retrospect* ignores the very essence of the contingency fee bargain: the law firm agreed to take on all the future risk of the case, including the risk that Lawrence would refuse to settle at a reasonable amount, with the hope that it would be resolved favorably in a way that warranted the contingency fee agreement as compared to an hourly rate. As I've written before, even $35,000 an hour retroactive rate isn't an unreasonable contingency fee if the case is risky enough and the benefit to the client is large enough.

After all, a contingency fee lawyer never knows if they have just signed onto the beginning of *Jarndyce and Jarndyce*.

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Excessive Fees Revisited: Enforcement of Lucrative Retainers After “Lawrence”

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By *Richard M. Maltz* It has long been the rule in New York that when a client challenges a legal fee after a representation has ended the burden is on the lawyer to establish the fee was not unconscionable. Stated another way, the lawyer must prove the fee agreement was entered into fairly and the fee was not excessive (i.e., fair and reasonable). The New York Court of Appeals has labeled these concepts, respectively, as procedural and substantive unconscionability. Using 20/20 hindsight, in cases such as *King v. Fox,* 7 N.Y.3d 181 (2006), the Court had allowed a challenge to fees on these grounds years after a representation had ended, notwithstanding the fact that the fee was stated in a written retainer agreement. This appeared to give clients a great incentive and advantage to challenge their fees based upon strong case law supporting such an approach. The tide has now changed with the Court of Appeals decision in *Matter of Lawrence,* N.Y. (2014), 2014 WL 5430622.

The *Lawrence* case does not alter the legal landscape by reversing well-established precedent. To the contrary, it confirms that the burden in a fee dispute remains on the lawyer. Nevertheless, the Court’s tone and factual analysis sends a clear message that the prior approach must incorporate other overarching considerations that are more favorable to upholding a lucrative fee arrangement. As before, applying the law to the facts may be difficult in certain cases. This is evidenced by *Lawrence’s* tortured procedural history that includes disagreements among a highly respected Referee (a former Court of Appeals judge), a Surrogate, a majority opinion of the Appellate Division (with an outraged dissenter) and ultimately the decision from the Court of Appeals.

After the many twists in the *Lawrence* case, one thing is clear, “sophisticated clients” must be cautious when entering into, or modifying, retainer agreements. As indicated by the *Lawrence* decision, such agreements should be fully enforced and difficult to set aside even if there is strong perception that the final fee is unfair and disproportionate to the services performed.

The Legal Fees

The *Lawrence* case was complex, but it can be distilled to a few basic facts. In 1983 Graubard Miller (Graubard or Firm) represented Alice Lawrence and her children in estate litigation arising from a dispute with her deceased husband’s brother, the estate’s executor, over an estimated $1 billion real estate empire. The litigation continued over 22 years and the Firm was paid approximately $18 million under its original hourly fee arrangement.

In or about Jan. 19, 2005, Graubard and Ms. Lawrence, who was approximately 80 years old but, purportedly willful and savvy, agreed to a modification of the fee arrangement into a hybrid fee arrangement. Under the new arrangement, Ms. Lawrence's hourly fees for work in 2005 were capped at $1.2 million. In return, Graubard agreed to switch the arrangement to a contingency, under which they would receive 40% of all monies distributed to the beneficiaries, minus the $1.2 million already paid in 2005 hourly fees. A little over four months later, on May 18, 2005, the matter settled for $100 million, purportedly as the result of the disclosure of an unexpected "smoking gun" document. This resulted in an approximate $40 million fee for a little more than four months of work. This translates, using Graubard's fee structure, into a fee of $11,000 per hour.

The Gifts

In 1998, after a partial victory in the litigation, which resulted in a significant payment to Ms. Lawrence and her children, Ms. Lawrence allegedly advised her "legal team" that she wanted to make a gift to them and she wanted them to receive it personally and not the firm. (Under prior legal rulings, the protections of the Dead Man's statute [CPLR §4519] had been deemed waived and the firm's explanation was uncontroverted.) The gifts consisted of $2 million to one attorney, $1.55 million to another attorney and $1.5 million to a third attorney. The attorneys and Ms. Lawrence discussed the substantial gift tax on these payments and she was informed she could pay the gift tax or she could deem the payment a bonus and they would pay the income tax. Ms. Lawrence paid $2.7 million in gift taxes in order to allow the attorneys to receive the full gift without any tax. Stunningly, the attorneys never informed the Firm of the gifts.

The Fee Litigation

Upon completion of the estate litigation, Ms. Lawrence discharged the Firm and refused to pay the $40 million legal fee. The Firm commenced an action in Surrogate's Court in August 2005. A motion to have the legal fees and gifts declared unconscionable on their face led to an appeal, but the Appellate Division remanded for more fact-finding. (Justice James M. Catterson's dissent is particularly interesting because he presents a scathing account of the Firm's conduct, and suggests referring the matter to the Departmental Disciplinary Committee.) The Court of Appeals agreed with the First Department, and the case was returned to Surrogate's Court.

On the remand, the Surrogate referred the fee issues to former Court of Appeals Judge Howard Levine to act as a Referee and to Hear and Report. The Referee concluded that the revised retainer was not procedurally unconscionable when made but became substantively unconscionable in hindsight because of its sheer size. He found it to be disproportionate to the work performed and the fee could not be justified because there was only a small risk to the Firm not receiving a fee in the underlying case. The Referee determined that Ms. Lawrence should pay just $15.8 million based upon an ad hoc formula he devised. The Referee nevertheless approved

the gifts based upon evidence that they were “free from undue influence.”

The Surrogate affirmed the Referee’s recommendations as to the legal fee, but set aside the gifts. The Surrogate emphasized that Ms. Lawrence was an octogenarian who depended upon her attorneys for more than 15 years. The Surrogate alluded to some degree of pressure by the Firm and commented that a “combination of dubious circumstances emit[ted] an odor of overreaching too potent to be ignored.” The Court did not find Ms. Lawrence’s claim to unwind the gifts time barred even though the gifts had been made in 1998.

The Appellate Division reversed the Surrogate and found the modified retainer was invalid, concluding that the proper remedy was to revert to the original hourly arrangement. The Appellate Division remanded the matter to the Surrogate to determine the amount of the fee based on the hourly rate contained in the original retainer. The Court also invalidated the gifts, finding the Estate’s claim to unwind them not time barred pursuant to the doctrine of “continuous representation.”

The Court of Appeals

In the Firm’s appeal of the decision, the Court of Appeals was presented with two issues: whether the $40 million legal fee was excessive; and whether the gifts could withstand scrutiny. The Court began the opinion confirming long-standing precedent regarding attorney-client fee arrangements. First, the Court confirmed that the burden was on the attorneys to establish their agreements as “fair, reasonable, and fully known and understood by their clients.” The Court also stated that the revision of an agreement after the representation was underway must be given heightened scrutiny. As a threshold issue, the Court explained that a 40% contingency fee in a commercial or estate litigation is not per se unconscionable. (Court Rules govern contingency rates for various types of other cases.)

In broad terms the Court reiterated that:

[a]n unconscionable contact is generally defined as “one which is so grossly unreasonable as to be unenforceable according to its literal terms because of an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability]” [citation omitted]

The Court explained that to avoid procedural unconscionability a lawyer must prove that the retainer was free from fraud by the attorney and free from misconception on the part of the client. As to substantive unconscionability, the Court stressed that the fee must be proportionate to the value of the legal services. There was also reference to the fact that contingency fees involve “risk” and such risk it is a factor to be taken into consideration in deciding whether a fee is excessive.

All of these concepts were well established, but the Court presented a thorough analysis of the facts to support upholding the $40 million fee. With respect to procedural unconscionability, the Court emphasized more than once the sophistication of the client and her willingness to question and overrule her lawyers. This was necessary, in part, because Ms. Lawrence was 80 years old. The Court also stressed the detailed information given her by the firm.

The Court changed the legal landscape in its analysis of substantive unconscionability, by sharply limiting the basis for a retrospective review of a contingency fee. The Court clarified that it does not support a broad, unlimited review of fees when there is a written retainer that is not void at the time of inception. In other words, a retainer should generally be enforced as written. This viewpoint became the fulcrum of the entire opinion.

The Court held that there are two primary factors in determining whether a contingency fee is unreasonable: the risk to the attorneys, and the value of their services proportionate to the overall fee.

With respect to risk, the Court stressed that a contingency client could lose interest in the case, the firm could be fired, or the case could take a very long time. Why these risks were of importance here was left unclear. The Court did not mention that years before settlement Ms. Lawrence was offered a settlement of $60 million and refused it. The Court also did not mention that the Firm would have a charging lien if it was fired. Moreover, it seems dubious that Ms. Lawrence or her family would lose interest in a claim for which $60 million was already offered.

More important, the Court seemed uninterested in reviewing the fee for sheer size. Although the Court stated it must consider the proportionality of the value of the legal services, it refused to give much weight to the fact that a $40 million fee was earned in a little more than four months, or that it amounted to an $11,000 per hour rate.

It is also interesting that the Court mentioned the heightened scrutiny of a midstream fee modification. Yet, it did not delve into the details and refused to adopt Judge Catterson's view that such a modification should be deemed the equivalent of a business transaction with a client that would create a much heavier burden for the lawyer.

With respect to the gifts, the Court did not evaluate their propriety because it simply found that the claim was time barred. The Court held the "continuous representation" doctrine (which tolls limitations) applied only to malpractice claims, not one for legal fees.

Conclusion

Although the Court of Appeals did not overrule long-standing precedent, the tone and factual analysis in *Lawrence* appears to have turned the tide on retroactive fee evaluations. In short, a "sophisticated client" who has sufficient information to evaluate a fee agreement should not be able to rescind an otherwise extremely lucrative, arguably unfair, retainer or modified retainer. Notwithstanding the stricter standard for sophisticated clients, lawyers must be mindful that

courts still have great discretion in setting aside a fee. Consequently, for "ordinary," and even sophisticated clients, lawyers should make sure their retainers are clear and fully explained to avoid any argument that there was a misunderstanding as to its terms. Legalese should be avoided, particularly with clients with limited education.

Lawyers must be particularly cautious when modifying a retainer, even if it is at the request of the client. Since the Courts have uniformly held that modifications must be given heightened scrutiny, there is no question that there must be full disclosure and informed consent. It is also advisable to discuss the advantages and disadvantages of any modification and, depending on the scope of the modification, advising clients to consult counsel if they deem it appropriate. Although not required by *Lawrence*, but alluded to in the Catterson dissent, lawyers could avoid any issue if the requirements of the business transaction rule, Rule 1.8(a), are fully followed. This would include the modification being fair and reasonable to the client.

A review of a fee based upon the sheer size and proportionality has been greatly limited when there is a retainer entered into properly at the inception of the relationship. Nonetheless, lawyers must always consider the global context of the fee arrangement. For instance, was the client warned of the potential size of the fee in relation to the ultimate potential resolution (e.g., damages incurred or received)? Did the lawyer create a client's misconception, by requesting a small retainer even though the final projected fee would inevitably be disproportionate to the initial payment. A court's visceral reaction to these types of issues may drive the final result in a fee dispute.

Notwithstanding *Lawrence*, courts still have great discretion in rescinding unfair retainer agreements and therefore, lawyers must be vigilant in following the letter and spirit of the law because the burden in a fee dispute remains on the lawyer.

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September 1, 2010

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New York's Contingency Fee System Upheld in Fee Dispute Case

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A recent New York Law Journal story, **"$44 Million Contingency Fee Upheld Graubard Miller,"** reports that a contingency fee agreement that netted Graubard Miller $44 million for five months' work was valid and must be adhered to, the state Court of Appeals ruled. The law firm took substantial risk by making the agreement with Alice Lawrence in January 2005, and the fact that the real estate matter on which it had long represented Lawrence unexpectedly settled in May 2005 did not make it unconscionable, the court decided.

Judge Susan Phillips Read wrote that it was "dangerous business" to assess the fairness of a contingency fee arrangement, especially when the objection is that "the size of the fee seems too high to be fair." "It is the nature of a contingency fee that a lawyer, through skill or luck (or some combination thereof), may achieve a very favorable result in short order; conversely, the lawyer may put in many years of work for no or a modest reward," Read wrote in *Matter of Lawrence, Deceased*, 149.

She added, "Absent incompetence, deception or overreaching, contingent fee agreements that are not void at the time of inception should be enforced as written." Read said invalidating agreements in hindsight should be done with great caution because it is "not unconscionable for an attorney to recover much more than he or she could possibly have earned at an hourly rate."

"Whether $44 million is an unreasonably excessive fee depends on a number of factors, primarily the risk to the attorneys and the value of their services in proportion to the overall fee," she wrote. Here, Read said, Graubard spent nearly 4,000 hours preparing for trial in May 2005 that was averted by the surprise settlement, and the firm risked several more years on litigation with no guarantee of payments beyond the hourly fees guaranteed during the first year of the agreement.

NALFA also reported on this case in **"New York Fee Dispute Case Can Effect State's Contingency Fee System"**

New York Court of Appeals Upholds Large Contingency Fee in Estate Dispute Representation

Posted on January 21st, 2015 by Legal Fee Advisors

On October 28, 2014, The New York Court of Appeals reversed an appellate court's ruling that a contingent fee agreement was "unconscionable when made" thereby ordering the firm's payout be paid in an hourly rate thereby significantly reducing their reward.[1]

Since 1983, Alice Lawrence, the widow of commercial real estate tycoon, Sylvan Lawrence, had been in a battle with the executor of her husband's estate. Her attorney, Graubard Miller, had originally been charging on an hourly basis and, according to the New York Court of Appeals, by 2004 he had received "approximately $18 million in legal fees on an hourly basis."[2] However, after further developments in the case a contingency agreement was executed in which Ms. Lawrence agreed to paying Graubard 40% of any future recovery. Subsequently, the case was settled for more than $100 million after it was exposed that the executor did appear to have engaged in "egregious self-dealing."[3] Thus, Graubard's payment was to be $44 million, which Ms. Lawrence successfully disputed at the appellate court level when the court found the contingency agreement unconscionable and reduced Graubard's fees to an hourly rate rather than a percentage.[4] The New York Court of Appeals disagreed with the lower court's "hindsight analysis" and warned of the danger of basing its decision merely on the fact that "the fee seems too high to be fair." The Court also noted that Ms. Lawrence is an astute business woman and entered into the agreement with her business judgment.[5]

This illustrates that regardless of the apparent exorbitant nature of the fees payment borne out of a contingency agreement, these agreements will be upheld if the courts decide that the parties entered into it with reasonable business judgment. It would flow from that logic that the courts would protect an individual where circumstances show they possess little business savvy when entering into such large fee payment agreements with their attorney.

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[1] Ellen Rose, *Small New York Firm Wins Epic Fee Fight: Business of Law,* Bloomberg,http://www.bloomberg.com/news/2014-10-30/small-new-york-firm-wins-epic-fee-fight-business-of-law.html (October 30, 2014).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*