

Searching for the Facts In *Lawrence v. Graubard*

BY LAZAR EMANUEL

DR 2-106 (22 NYCRR 1200.11) is the only Rule in the Code dealing specifically with fees for legal services, including contingent fees. The Rule prohibits (1) contingent fees in all criminal cases; (2) fees in domestic relations matters contingent on securing a divorce or determined by reference to the amount of maintenance, support, equitable distribution, or property settlement; and (3) a fee proscribed by law or rule of court. In cases involving a claim for personal injuries or wrongful death, the Courts have extended the impact of DR 2-106 by adopting a schedule limiting the range of contingent fees which will be considered reasonable under the Rule.

The text of DR 2-106 was not intended to prohibit contingent fees in civil claims or actions. Under DR 2-106(B), whether the fee is fixed or contingent is only one of eight elements to be considered in judging whether a fee is reasonable. And under DR 2-106(C), when the fee is contingent, the lawyer is required to do two things: (1) provide the client with a writing stating the method by which the fee is to be determined; and (2) upon conclusion of the matter, provide the client with a written statement describing the outcome and showing the distribution of proceeds.

Under DR 2-106(A), a lawyer may not enter into an agreement for, charge or collect an illegal or excessive fee. In determining whether a fee is excessive, DR 2-106(B) requires a review of the facts. Only after such a review can we determine whether a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

The recent case of *Lawrence v. Graubard Miller et al.* (App. Div. 1st Dept., 603257/05), *New York Law Journal*, 11/28/07 *Graubard*)) provided a laboratory in which to test these principles.

Because the majority in *Graubard* applied the standards of DR 2-106 and recognized the need for additional facts to test whether contingent fees charged by the *Graubard* firm were reasonable, I think that its decision to return the matter to the trial court (Surrogate s Court, New York County) was correct. As a result, I think Judge Catterson was wrong, in his minority opinion, to declare the firm s agreement embodying that fee void as a matter of law.

The essential facts of *Graubard* are not in dispute. Alice Lawrence (Lawrence), widow of Sylvan Lawrence, a successful New York realtor who died in 1981, retained the *Graubard* firm in 1983 to represent her in her continuing disputes with her brother-in-law over his administration as executor of the Lawrence estate. The disputes continued over a period of 22+ years and resulted in litigation which was not consummated until a \$104.8 million settlement in May 2005. By that time, Lawrence s brother-in-law had died and his son had been substituted as executor of the estate.

In the intervening 22 years, two major events occurred: more than \$350 million was distributed to the beneficiaries of the estate (to Lawrence and her children) and the *Graubard* firm received more than \$18 million in legal fees. The legal fees were computed and paid on an hourly basis. The original retainer agreement, executed in 1983, provided for hourly fees as follows: for attorneys and legal assistants, \$55-\$195 per hour; for the time of the *Graubard* partner handling the matter, \$175 per hour. There is no indication in either opinion whether the same hourly charges persisted throughout the 22 years of the engagement.

In November 2004, Lawrence noted that Graubards bills were averaging \$1 million per quarter. According to the majority opinion in *Graubard* (by Presiding Judge Andrias), she asked Graubard about the possibility of entering into a new fee arrangement. In January 2005, Lawrence and Graubard entered into a written retainer agreement (described by the court as a modified retainer agreement) which provided that Graubard would continue to bill on an hourly basis, but under an annual cap of \$1.2 million, exclusive of disbursements. For the first time in their relationship, the retainer agreement also provided for a contingent fee to Graubard of 40% of any settlement in excess of the hourly compensation under the agreement. The contingent fee was to come out of Lawrence s share of any settlement.

As the Court noted, the new agreement created what has been called a modified contingent fee or a hybrid fee. Under a hybrid fee agreement, the lawyer charges both an hourly fee irrespective of the outcome and, in the event of recovery~ by settlement or verdict, a percentage of the net recovery. Hybrid fee agreements are not improper, provided they meet the test of overall reasonableness. We believe a hybrid or modified contingent fee is permissible as a matter of ethics as long as the total fee is not excessive. See, NYSBA Ethics Opinion 697, 12/30/97; ABA Formal Op. 94-389.

One element in *Graubard* which caused the most concern to Judge Catterson was an offer of settlement amounting to \$60 million which, according to the majority, was personally negotiated by Lawrence with her nephew, the new executor, prior to the new retainer agreement. The majority simply commented that the offer did not result in a settlement, but Judge Catterson characterized the situation as follows:

It is...undisputed that five and a half months after signing the modified retainer agreement containing the 40% contingency fee provision, Graubard finalized a settlement of approximately \$100 million on the claim. It then sought \$40 million as its contingent fee.

In other words, having billed Alice [Lawrence I for every hour expended on work in connection with the claim after Alice left \$60 million on the table, Graubard now seeks to retain every dollar over that amount as its contingent fee, essentially divesting Alice of any benefit she may have gained from Graubards legal services. The majority s contention that the circumstances underlying the agreement must be further fully developed is incomprehensible in the face of this substantive unconscionability.

But what if Graubard can show that the facts were not as construed by Judge Catterson? What if it can show that the \$60 million offer received by Lawrence had so many strings and conditions attached to it that it was not truly a viable offer? What if it can show that some of the conditions could not be satisfied under the circumstances? What if it can show that its services before the offer induced the executor to make the offer? What if it can show that many unproductive offers and counter-offers had been

exchanged over the years of litigation? What if Graubard can show that Lawrence herself had caused the negotiations to break down and that its efforts had restored and revitalized it?

(*Graubard* is complicated by the actions of some of its lawyers in their own relationships with Lawrence. On December 2, 1998, three of its lawyers apparently visited Lawrence at her home and induced her to write checks to their order as individuals and to note in bold letters on each check that it was a gift from her. The checks totaled over \$5 million and were deposited separately by each lawyer to his or her account. Later, one of the lawyers called Lawrence and persuaded her to file a gift tax return and to pay an additional \$2.7 million in gift taxes. There is nothing in either opinion to suggest that any inquiry has been prompted by these facts.)

What does cry out for resolution are the facts surrounding the offer of \$60 million ostensibly received by Lawrence before her execution of the hybrid fee agreement in January 2005.

The litigation by Graubard to collect its contingent fee (40% of not less than \$110.3 million less \$348,273 paid by Lawrence to Graubard under the agreement) was initiated by petition to the Surrogate's Court on August 5, 2005. Surrogate Roth referred the petition to the Honorable Howard A. Levine (formerly, Associate Judge, Court of Appeals) to hear and report. Lawrence countered by bringing an action in Supreme Court, NY County, asking for rescission, unjust enrichment, conversion and breach of duty. Supreme Court Judge Freedman transferred the Lawrence action to the Surrogate's Court and

Surrogate Roth referred it as well to Referee Levine. Referee Levine disposed of both matters by recommending denial of all motions for summary disposition on the ground that the various issues before him could not be resolved on motion. The motion court confirmed his report and recommendations in their entirety.

On appeal, the Appellate Division majority affirmed the decision of Judge Freedman removing the Lawrence action to the Surrogate's Court, affirmed the decision of the Surrogate's Court to confirm the Referee's report recommending dismissal of the Lawrence petition, and denied Lawrence's challenge of an order of the Referee directing her to appear at her deposition.

The Court also held that the Graubard hybrid agreement was not unconscionable on its face.

Generally, before a determination of unconscionability can be made, a full trial of the issues is required. The basic requirement in any retainer agreement is that it be fair and reasonable. In the case of an amended agreement, the attorney has the burden of showing that the client understood the terms of the agreement and that the attorney did not exploit the client's confidences in negotiating [its] terms. As the Referee found: Resolution of these issues will require evidence concerning all factors relevant to Mrs. Lawrence's capacity, her understanding of the terms of the revised agreement, the completeness of her attorney's disclosures, and whether they exploited their preexisting confidential relationship with her to obtain the favorable terms of the agreement.

In reaching their opinions, both the majority and Judge Catterson cited *King v. Fox*, (7 NY3d 181 [2006]). The majority was satisfied that *King* demonstrated that neither the percentage of a contingent fee nor the duration of services before recovery makes a contingent fee unconscionable, but the facts and circumstances surrounding the agreement, including the parties intent and the value, in hindsight of the attorney s services in proportion to the fee. Judge Catterson, on the other hand, found support under *King* for his determination that the Graubard fee was unconscionable *per se*.

I think Graubard is entitled to prove that its agreement and its fee were both fair and reasonable under the circumstances. I think, also, that the majority was wise to reject a decision on the merits before the facts are all in. A full resolution of the facts is essential to a matter involving the reputation of a law firm.

Lazar Emanuel is the publisher of NYPRR. The opinions expressed in this article are his own.