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[LEGAL ethics]

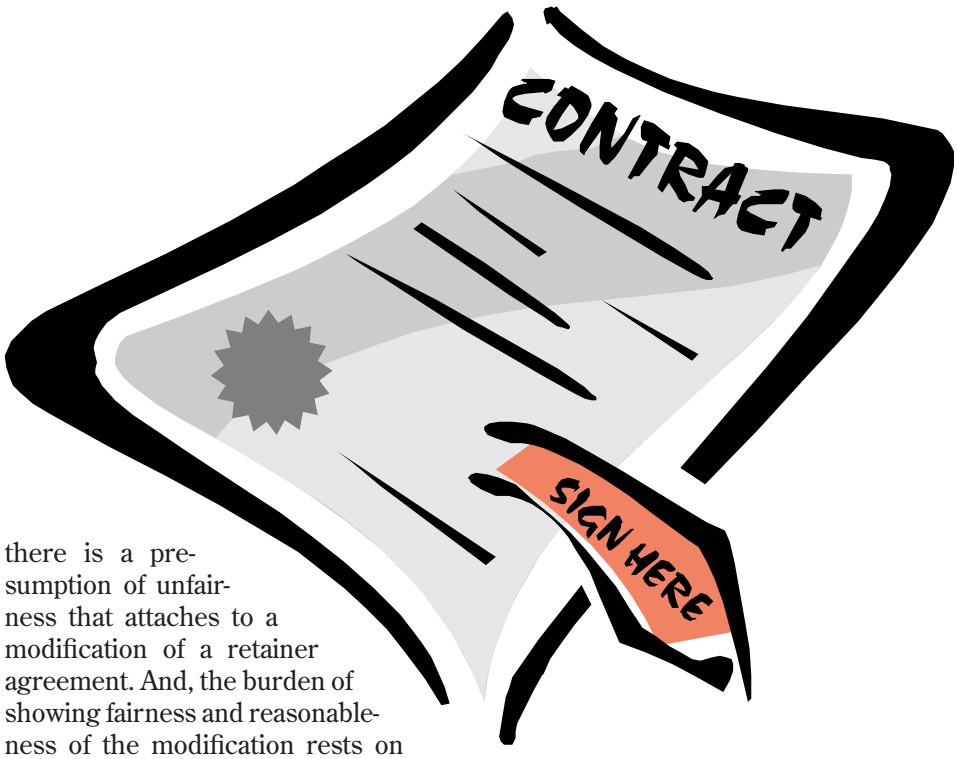
GOING UP

Elevator Clauses, Client Consent and Increased Billing Rates

by BRUCE A. CAMPBELL

With 2009 upon us and the cost of operating a firm rising steadily, many lawyers may wonder how to increase billing rates for existing clients. What must a firm do before it increases the billing rate for clients who already have signed a retainer agreement? Can the firm increase its hourly rate without notifying the client? If the firm must give notice of rising rates, can notice be verbal or must it be written? If the client consents to the proposed rate increase can that client still challenge the modification later?

In *Archer v. Griffith* (1965) the Texas Supreme Court considered whether an agreement between an attorney and a client could be modified during the existence of an attorney-client relationship and whether the modification was so unreasonable that it was unenforceable. The court pointed out that although an attorney is not prohibited from contracting with his client for additional compensation after an attorney-client relationship has formed, a court will scrutinize a modification because of the unique relationship between the attorney and client. The court further stated that there is a presumption of unfairness that attaches to a modification of a retainer agreement. And, the burden of showing fairness and reasonableness of the modification rests on the attorney.



Ultimately, in *Archer*, the court overturned the modification because the value conferred on the lawyer was of greater value than the legal services performed. Nevertheless, the court did recognize that the attorney would still be entitled to additional payment. The court awarded the attorney an additional sum of $400 above the amount of the $100 fee. After *Archer*, it has been imperative that modifications of a fee agreement overcome the presumption of unfairness and be reasonable.

Quite a few retainer agreements include provisions advising the client that the firm periodically will increase its rates, dubbed "elevator clauses." Recently, the 5th Court of Appeals in Dallas considered an oral retainer agreement that included an oral statement that the firm's rates would increase over time. According to the opinion in *McGuire, Craddock, Strother & Hale v. Transconti-*

nental Realty Investors Inc. (2008), a firm entered into an oral agreement to represent a client against a third party allegedly responsible for damages to an office building.

In *McGuire*, the court noted that, previously, under a written agreement, the firm had represented the client in an action against the client's insurer. In the second suit, the firm and the client orally agreed the firm would bill as it had in the original action. At some point, the firm verbally informed the client that it periodically raised its rates. From 1996 until October 1999, the client paid the firm's invoices without complaint. Some of the invoices contained time descriptions that were "block billed," which meant the individual time increments and rates were not identified. In some instances, the invoices did not list individual attorney billing rates. In November 1999, the client stopped paying the firm's invoices.

However, as alleged in the Respondent's Response to Petition for Review filed with the Texas Supreme Court, the client continued to indicate that it intended to pay the invoices.

The 5th Court's opinion noted that, about eight months later, with no fees forthcoming, the firm brought suit to collect its fees. As a counterclaim, the client alleged, among other things, breach of fiduciary duty and professional negligence against the firm.

At trial, a jury found in favor of the firm and found no breach of fiduciary duty and no professional negligence. Nevertheless, the 5th Court continued, the trial court granted the client's motion for judgment notwithstanding the verdict on the grounds that the firm breached its fiduciary duty to its client by raising its billing rates during the course of the representation without written notice. On appeal, the 5th Court held that the trial court erred in setting aside the verdict because there was sufficient evidence to show that the firm orally informed the client that the firm periodically raised its rates.

The 5th Court decision in *McGuire* seems to suggest that as long as a client is informed and the rates are reasonable, a firm periodically may raise its rates, even if the notice is not in writing. However, *McGuire*, which took nearly a decade to litigate, also seems to suggest that an attorney may have to wait a long time to collect payment when a client, after the fact, disputes the bill.

Transcontinental Realty Investors petitioned the Texas Supreme Court for review, a petition the court denied Nov. 14, 2008. However, rehearing was sought Dec. 16, 2008.

On Notice?

Courts in several states, including California and New York, have found that a firm must give a client notice before it increases its billing rates. For example, in *Severson & Werson v. Bolinger* (1991), California's 1st District Court of Appeals issued an opinion involving a firm that, throughout the course of representation, increased the billing rates for services without notifying the client of the changes. The court noted that the retainer agreement did not include an "elevator clause" that would advise the client of potential future rate changes. The court determined, as a matter of law, the firm could not unilaterally change the hourly rates of its attorneys without the client's consent.

In contrast, in *Morrison, Cohen, Singer & Weinstein LLP v. Brophy* (2005) the New York Supreme Court, Appellate Division, appeared willing to give effect to an elevator clause, but the firm failed to establish that its notice to the client complied with the elevator clause and was properly addressed and mailed to the client. Based on the flawed notice, the court rejected the notion that the client's silence was assent to the rate hikes. The court reasoned that while several of the invoices reflected the increased billing rate, there was no proof the firm notified the client or the client consented to the rate hikes.

Changing the hourly rates of a fee agreement during the course of a representation can be a risky proposition for lawyers. An elevator clause in the retention agreement may help put a client on notice of possible future increases. It is wise to obtain a signed writing from the client approving the rate increase. Nevertheless, even if the client consents in writing to the rate increase, there is still a risk that the client can challenge the fee later because the change was unreasonable or was insufficiently explained.

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