

Texas Court Rejects Claims against Law Firm for Exceeding Litigation Budget and Raising Fees



ETHICS COLUMN: FRANCIS G.X. PILEGGI

This is a short summary of a decision by the Court of Appeals for Fifth District of Texas that rejected claims brought against a law firm based on allegations that the firm breached its fiduciary duties to a client for failing to keep its fees within an estimated litigation budget and also for raising fees during the representation without giving written notice to the client. In *McGuire, Craddock, Strother & Hale, P.C. v. TransContinental Realty Investors, Inc., et al.*, No. 05-07-00050-CV (April 8, 2008), the appellate court reviewed a jury verdict in favor of the law firm in its lawsuit to collect attorneys' fees that the trial judge had set aside notwithstanding the verdict.

The background facts involved a group of office buildings in Dallas that suffered water and fire damage. The law firm represented the managers of the office buildings in claims against their insurer which resulted in a \$17.1 million payment from the insurer.

After the litigation began against the insurance company, the client also requested that claims be pursued against the parties responsible for the losses at the office buildings. The law firm agreed to the additional representation on the same fee terms as were agreed to in the litigation against the insurance company. Approximately a year after the representation began, the realty company hired a new assistant general counsel who was responsible for monitoring all of its outside litigation. At a meeting in September 1997, that person requested the law firm to prepare a litigation budget, which estimated fees between \$530,000 to \$650,000 to complete the litigation through trial. At some point during the year 1999, the "second" litigation against third-parties intensified and became very contentious. During a pre-mediation meeting in December 1999, the new assistant general counsel allegedly first became aware that the fees were approaching \$1.25 million (although monthly bills were sent). In April of 2000, after trying unsuccessfully to work out a payment plan for the fees that exceeded the budgeted amount, the client terminated the law firm.

The law firm sued for its attorneys' fees, alleging claims for breach of the fee agreement and fraudulent inducement. The client counterclaimed for breach of contract, fraud, breach of fiduciary duty, negligence and negligent misrepresentation. The jury found in favor of the law firm on both its breach of contract and fraudulent inducement claims, and against the client on their counterclaims. The trial judge, however, granted a judgment notwithstanding the verdict and the parties appealed.

On appeal, the law firm argued that the verdict in its favor was supported by legally sufficient evidence that the law firm complied with its fiduciary duty and the appellate court agreed. The appellate court noted that the essence of a claim for breach of fiduciary duty focuses on whether an attorney obtained an improper benefit from representing the client and whether he breached that duty by subordinating his client's interests to his own.

Among the primary arguments of the client on appeal were that the law firm did not advise the client in writing when it raised hourly rates and that the law firm failed to manage the underlying litigation within the proposed litigation budget or update the proposed budget.

The appellate court observed that the written engagement letter for the initial lawsuit against the insurance company was fully complied with by the law firm when they submitted monthly bills and the client paid them without complaint. The bills did not list the hourly rates of the attorneys and included some block-billing but did describe the service performed and the name of the person performing the service, as well as the number of hours billed for the service. When the second litigation was requested, the parties orally agreed to continue to bill as they had in the initial matter and those payments were also submitted and paid in the same format on a monthly basis without complaint until October of 1999 when the client stopped paying.

Justice Carolyn Wright, writing for the Court of Appeals, noted that even if the Texas Rules of Professional Conduct support the argument that an increase in the hourly rate should have been more clearly brought to the attention of the client, those rules do not define standards of civil liability for lawyers, nor does the violation of these rules give rise to a private cause of action. Moreover, any such violation does not create a presumption that a legal duty to a client has been breached. Moreover, Justice Wright emphasized that the evidence at trial demonstrated that the law firm did make the client aware that it periodically increased its rates.

Regarding the litigation budget allegedly being exceeded, the court found evidence in the record that the law firm emphasized in writing when it submitted the litigation budget that there was an inherent difficulty in forecasting "legal expenses with any degree of accuracy, and it is quite possible that legal fees could be substantially more or less than this estimate." Moreover, the law firm emphasized in writing that the "budget projection does not represent any form of guarantee or assurance of a maximum fee or that the legal fees will not exceed the projected amounts, nor does it represent a guarantee or assurance of any particular outcome."

(Continued on Page 17...)

(Ethics Column continued from Page 5...)

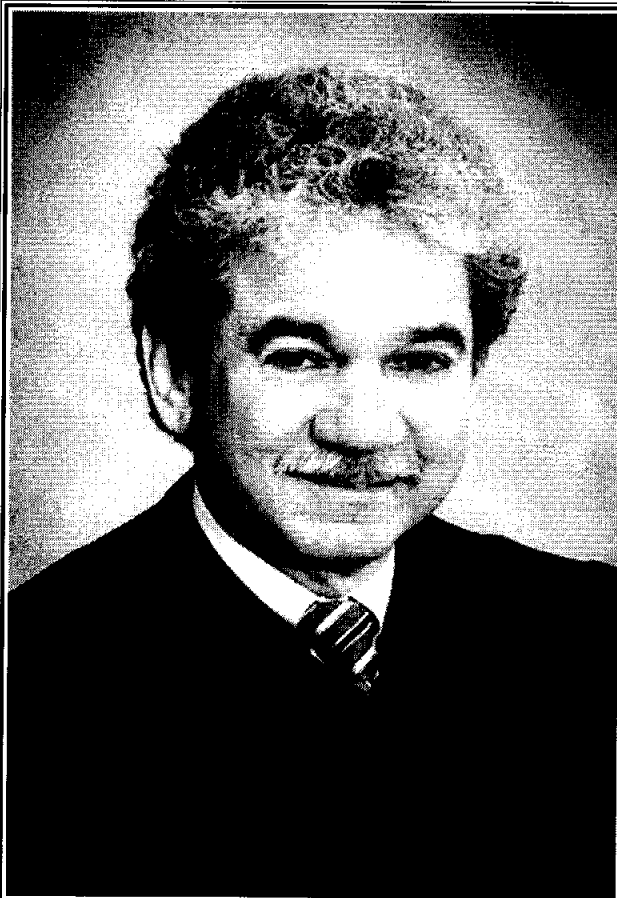
In sum, the appellate court concluded that the trial court erred in granting judgment notwithstanding the verdict because there was sufficient evidence to support the finding of the jury that the law firm did not breach any fiduciary duty owed to its client. Among the many observations that could be made about this case is that the dynamics of the client relationship seem to have changed in the middle of the representation when a new assistant general counsel was hired and assumed the responsibility for overseeing the litigation. It is not uncommon when representing companies that the client's "contact person" may change after litigation has been authorized and it is not always true that the new person responsible for the client relationship is as enthusiastic about the litigation as the original person who authorized it.

It is well settled that courts have supervisory power to determine the reasonableness of fees. See generally, *In Re Savell*, 876 So. 2d 308, 19 Law. Man. Prof. Conduct 200 (Miss. 2004). See also *Alaska Electrical Pension Fund v. Brown*, 941 A.2d 1011 (Del. 2007) (reviewing attorneys' fees in class action settlements). Of historical interest is that one author has traced

the custom of hourly billing by attorneys to a study in the 1960s that those who recorded their time on a daily basis generated more revenue than those who did not. See *Shepherd, Discovery Leads to Hourly Billing*, 1999 U. Ill. L. Rev. 91 (1999). Cf. *Restatement of the Law Governing Lawyers*, Section 34 (2000) (overarching guideline for attorneys' fees is reasonableness).

I suppose one lesson from this case is to make sure that any new contact person at a client's company who becomes responsible for overseeing litigation midway through a lawsuit is updated on the original terms of the engagement agreed to by his predecessor, although in the end there is no certain way to avoid client claims.

Francis G.X. Pileggi is the founding partner of the Wilmington, Delaware, office of Fox Rothschild LLP, an AmLaw 200 firm. His blog at www.delawarelitigation.com summarizes all the key decisions on corporate and commercial law from the Delaware Court of Chancery and Delaware Supreme Court, and includes posts on legal ethics. His e-mail address is: fpileggi@foxrothschild.com.



LOUIS D. BRANDEIS
AMERICAN INN OF COURT
LOUISVILLE, KENTUCKY

Congratulations to our Master!!

The Honorable Martin E. Johnstone, Retired Justice of the Supreme Court of Kentucky, recipient of the American Inns of Court's 2008 Professionalism Award for the Sixth Circuit.

