These are tough economic times for wall and ceiling contractors as well as for the construction industry in general. With the limited amount of work going on and the significantly reduced margins on the work they have, general contractors are cutting costs by not paying subcontractors their retainage and all or part of their last draw. Some general contractors are doing this knowing full well that it costs a lot of money to hire attorneys to litigate claims. Wall and ceiling contractors, as well as other subcontractors, are discovering that they either have no money to pay attorneys to litigate the claims, or if they did take the money and pay the attorneys, it could bankrupt the company.

How you as wall and ceiling contractors compensate your attorneys may have an impact on preserving your claims. For example, there are three traditional methods of employing attorneys. The first is on an hourly fee basis where the client pays the attorney based on the number of hours expended at a previously agreed hourly rate. This is most common in the construction industry. The second fee arrangement is a fixed fee where the clients and the attorneys agree on a single flat payment at the initiation of the legal work. This method is not very commonly used to compensate attorneys in construction claim matters. The third method of compensating attorneys is on a contingency basis; although this fee arrangement is more commonly used than the flat fee arrangement, it is considerably less common than the standard hourly fee arrangement.

Under the typical contingency fee arrangement, the attorney’s fee is not paid until funds are collected.

Under the typical contingency fee arrangement, the attorney’s fee is not paid until funds are collected. This means that if no funds are collected, or if the case is lost, no fee is paid. When funds are collected, the fee is paid out of those collected funds, based upon the agreed upon percentage. Percentages typically range from 20 to 25 percent for a pre-filing settlement, to 33 percent through trial, and 40 to 45 percent through an appeal or if post judgment collection activities are initiated. Costs of the litigation, such as copy costs, depositions, federal express, telephone, travel costs, and the like, are paid as the case develops. If the parties start to discuss settlement, the client always maintains the right to decide on whether to settle.

There are significant benefits to using a contingency fee arrangement. One of those benefits deals with a Supreme Court of Florida case called Florida Patients Compensation Fund vs. Rowe, 472 So.2d 1145 (Fla. 1985). In Florida Patients Compensation Fund vs. Rowe, the Supreme Court of Florida determined that when attorneys take cases under a contingency fee arrangement, where payment of attorneys fees is called for either by contract or by a
Contingency - cont'd from page 38

Contingent statute, an attorney is entitled not only to a contingency fee arrangement, but a contingency fee multiplier. The way this works is the court determines the reasonable number of hours spent on the case, the reasonable hourly rate for the attorney representing the client, and then the court multiplies those two numbers to obtain what it calls the "lodestar." After determining the lodestar, the court determines the complexity of the case. Based on the complexity, courts in the state of Florida under such contingency arrangements are required to award a contingency risk "multiplier" of between 1.5 and 2.5. If the case is complex, then the multiplier would be in the 2.5 range.

The net impact of the contingency fee multiplier is that an attorney who works for an hourly rate of $160, in a case where attorneys fees are collectable from the owner or general contractor by contract or state statute, can recover under the contingency multiplier rule an hourly fee of $400, more than most clients can afford to pay on an hourly basis. This money is paid by the defendant, not the wall and ceiling contractor.

The net impact of the contingency fee multiplier is that an attorney who works for an hourly rate of $160, in a case where attorneys fees are collectable from the owner or general contractor by contract or state statute, can recover under the contingency multiplier rule an hourly fee of $400, more than most clients can afford to pay on an hourly basis. This money is paid by the defendant, not the wall and ceiling contractor.

... Consult your attorney about the possibility of a contingency fee arrangement.

The contingency fee multiplier is a significant factor which would encourage attorneys to: a) take the case to begin with, and b) move the case along as quickly as possible. For this reason, it would seem that a contingency fee arrangement would be very attractive to both the attorney and the wall and ceiling contractor.

There are some limitations on use of the "multiplier" arguments. The Florida Patients Compensation Fund vs. Rowe decision appears to be a fairly closely guarded secret within the state of Florida, and very few courts across the nation have adopted the analysis of the case. On the other hand, very few courts have room for creative attorneys to make new law in the states in which they practice based upon the well-reasoned arguments in Florida Patients Compensation Fund vs. Rowe.

If you have a construction claim and are faced with the economic reality of not being able to pay attorneys fees, consult your attorney about the possibility of a contingency fee arrangement. Although you would both bear some of the risks, you would certainly both reap the benefits of the rewards.