Approved: _____
Date

MINUTES OF THE HOUSE TAXATION COMMITTEE.

The meeting was called to order by Chairperson Wagle at 9:00 a.m. on February 14, 2000, in Room 519-S of the Capitol.

All members were present except: Rep.Howell, excused
Rep. Tomlinson, excused

Committee staff present: Chris Courtwright, Legislative Research Department
Don Hayward, Revisor of Statutes
Shirley Sicilian, Department of Revenue
Ann Deitcher, Committee Secretary
Edith Beaty, Taxation Secretary

Conferees appearing before the committee: Carla Stovall, Attorney General of Kansas

HB 2893 - an act relating to property taxation; requiring certain actions relating to the levying thereof.

A copy of a balloon bill and a copy of the proposed amendment for **HB 2893** was passed out to members of the Committee. (Attachments 1 and 2).
Representative Gregory explained the balloon amendments.

Representative Gregory moved and Representative Long seconded the motion to adopt the balloon amendments to **HB 2893.** The motion carried on a voice vote.

Representative Gatewood moved for a conceptual amendment be made to **HB 2893** to have the state pay for elections so the counties wouldn't be responsible for the expenses. The motion was seconded by Representative Gregory and passed on a show of hands.

It was moved by Representative Wilk and seconded by Representative Gregory to adopt **HB 2893** as amended. The motion failed on a show of hands.

HB 2987, an act concernng the equus beds region; prohibiting issuance of certain permits for confined feeding facilities for swine, water supply systems, waste water treatment facilities and public water supply systems was introduced by the Chair and seconded by Representative Aurand. The motion carried on a voice vote.

The Chair recognized Attorney General Carla Stovall who was asked to give a brief history of the state's tobacco litigation. (Attachment 3).

The entire transcript of General Stovall's testimony was taken verbatim by a court reporter. These minutes are attached. (Attachment 4).

The meeting was adjourned at 10:50 a.m. The next meeting is scheduled for Wednesday, February 15, 2000.

Session of 2000

HOUSE BILL No. 2893

By Committee on Taxation

2-8

AN ACT relating to property taxation; requiring certain actions relating to the levying thereof; amending K.S.A. 1999 Supp. 79-2925b and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1999 Supp. 79-2925b is hereby amended to read as follows: 79-2925b. (a) Without adoption of a [*charter*] resolution or [*charter*] ordinance so providing, the governing body of any taxing subdivision shall not approve any appropriation or budget, as the case requires, which may be funded by revenue produced from property taxes, and which provides for funding with such revenue in an amount exceeding *the product of* that of the next preceding year, ~~except with regard to revenue~~ *multiplied by a fraction the numerator of which is the average consumer price index for all urban consumers published by the federal department of labor as of the close of the 12-month period ending on August 31 of the first calendar year preceding the appropriate budget year and the denominator of which is such index as of such period ending on August 31 of the second calendar year preceding the appropriate budget year. Revenue* produced and attributable to the taxation of *the following shall not be considered in determining such amount*: (1) New improvements to real property;

(2) increased personal property valuation, other than increased valuation of oil and gas leaseholds and mobile homes;

(3) property located within added jurisdictional territory; and

(4) property which has changed in use.

(b) The provisions of this section shall be applicable to all fiscal and budget years commencing on and after the effective date of this act.

(c) The provisions of this section shall not apply to ~~community colleges or unified school districts.~~

~~(d) The provisions of this section shall not apply to~~ revenue received from property tax levied:

(1) Pursuant to the provisions of K.S.A. 1999 Supp. 72-6431, and amendments thereto, and K.S.A. 1999 Supp. 72-6433, and amendments thereto; [*and*] *(2)* for the sole purpose of repayment of the principal of and interest upon bonded indebtedness, temporary notes and no-fund

by the voting majority required by K.S.A. 12-153, and amendments thereto, in the case of a city, and by K.S.A. 19-101b, and amendments thereto, in the case of all other taxing subdivisions.

If a petition containing the signatures of not less than 5% of the registered voters of a city or not less than 1% of the registered voters of any other taxing subdivision is filed within 30 days after the date of the final publication of the budget with the appropriate county election officer requesting an election on whether the budget shall be funded by such increased ad valorem taxes, an election thereon shall be called and conducted within 30 days after the certification of the validity of such petition in the same manner as prescribed for elections under the mail ballot election act, K.S.A. 25-431 et seq., and amendments thereto, except that ballots may be sent to electors at any time not less than three days preceding the date of the election. If such an election is held, no ad valorem taxes shall be levied in excess of the amount allowed pursuant to this section unless approved by a majority of the electors voting in such election.

House Taxation
Date 2/14/00
Attachment # 1-1

warrants

Sec. 2. K.S.A. 1999 Supp. 79-2925b is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

; and (3) for the sole purpose of replacing revenue lost due to the operations of the provisions of K.S.A. 79-2959, 79-2964 and 79-3425, and amendments to such sections

PROPOSED AMENDMENT TO HB2893

(d) In the event that an election in any year required pursuant to this section may not be held prior to the date on which the submission of property tax statements is required pursuant to K.S.A. 79-2001, and amendments thereto, the amount of revenue produced from property taxes as a source for funding of a budget or appropriation of the affected taxing subdivision the next succeeding year shall be reduced by the protested amount which was to be the subject of such election.

House Taxation
Date: 2/14/00
Attachment #: 2

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2ND FLOOR, TOPEKA, KANSAS 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
FAX: 296-6296

HOUSE TAX COMMITTEE

February 14, 2000

THE HISTORY OF TOBACCO LITIGATION

by

Carla J. Stovall
Attorney General

Pursuant to the Chairperson's request of February 2, 2000, I, with the assistance of staff, have compiled a brief history of tobacco litigation. That history can best be viewed in three parts: the past, the present and the future. Of special concern is the future because, as you will see, the tobacco litigation is not over.

1954-1993

Cigarettes kill 450,000 Americans a year. There has been no serious debate in the scientific community for nearly forty years that cigarettes are highly addictive and cause cancer, emphysema and vascular disease. Yet for most of that same time period, courts have refused to give money damages to those, or the families of those, who have died as a result of smoking cigarettes.

Starting in the mid-1950s, dozens of product liability suits were filed against tobacco companies. The first was brought by a St. Louis factory worker, Ira C. Lowe, who had lost his larynx to cancer. The world's largest tobacco manufacturer, Philip Morris, hired a lawyer named David Hardy to defend the company. This case was the beginning of PM's association with the law firm of Shook, Hardy & Bacon. The firm now has more than 350 attorneys with offices in Kansas City, Overland Park, Houston, Miami, Buenos Aires, London, Melbourne, Zurich and Geneva. It is Philip Morris' number one law firm and has profited from that association many hundreds of millions of dollars.

Like all of the others who brought product liability cases against the major tobacco companies, Lowe failed. Hardy won the case. Even famed attorney Melvin Belli, who in 1958 argued the first tobacco case ever to reach a jury, could not prevail.

A new surge of litigation came in the 1980s. Courts were becoming increasingly sensitive to cases involving products that, by their very nature, are dangerous. Examples of this new awareness are found in the asbestos litigation, as well as cases involving Agent Orange and the Daikon Shield.

The most noteworthy case in this new effort to find the tobacco companies at least partially responsible for harm caused by selling a product they knew would kill a third of their customers was *Rose Cipollone v. Liggett, et al.* Mrs. Cipollone began smoking when she was 17 years old. She later developed lung cancer and sued the cigarette manufacturer, Liggett. During the more than a decade of court proceedings, she died of lung cancer at the age of 58. Her family continued the suit, at least until the years of litigation expense took its toll and they dropped the case.

Cipollone is important, not because it actually obtained money for the plaintiff (none of the 1980s lawsuit did that), but because it worked its way to the United States Supreme Court. In 1992, the Court, by reversing the two lower federal courts, found in a plurality opinion authored by Justice Stevens that at least some state law claims, federal law did not bar suit against the cigarette manufacturers.

Starting in the 1950s and continuing up through the end of 1993, the cigarette manufacturers had a 100 percent success rate in defending hundreds of cigarette lawsuits. By the end of 1993, Philip Morris was the nation's number two or "second largest" advertiser. Cigarette industry promotional expenditures reach $6.03 billion a year, an increase of 15.4 percent from1992. *Financial World* Magazine ranked Marlboro as the most valuable brand name in the world at $39.5 billion.

1994-1998

The hope brought about by *Cipollone* lead to the 1994 case of *Castano v. American Tobacco Company, et al.* In *Castano* a 60-attorney coalition attempted to bring the nation's largest class-action lawsuit. They charged that the tobacco companies hid their knowledge of the addicting qualities of tobacco and were liable for damages to a class consisting of all smokers and nicotine dependant people as well as their families.

Class certification was the key to the case. At the district court level the class was certified. However, by May of 1996 the United States Court of Appeals for the 5th Circuit decertified the class and the *Castano* group broke up. Attempts at "little *Castanos*" failed in Kansas, *Emig v. American Tobacco Company, et al.*, as well as in other states.

Decision to File & Selection of Kansas' Counsel

In February 1995, Representative Henry Helgerson, a tobacco foe, introduced House Bill No. 2388 "directing the attorney general to appoint a special assistant attorney general to commence a civil action against tobacco companies and related enterprises for damages caused by tobacco products to the citizens and taxpayers of the state of Kansas." The bill was referred to the Health and Human Services Committee but the committee took no action.

The following year, Representative Helgerson introduced House Resolution No. 6019 providing that " . . . the Attorney General is hereby required to join with the attorneys general of the states of Florida, Massachusetts, Louisiana, Mississippi and West Virginia in commencing a civil action in the name of the state of Kansas against tobacco companies . . . " The bill was referred to the committee but apparently languished there as well.

Representative Helgerson was clearly not in the majority on this issue, and may, in fact, have been the only voice in the Legislature in these early days in support of Kansas getting into the litigation fray. He was certainly ahead of me on this issue at that time.

Perhaps in response to Representative Helgerson's House Resolution, an April 2, 1996-article appearing in the *Wichita Eagle* was titled "Attorney general undecided on joining tobacco lawsuit." The AP reporter who interviewed me for the story noted that my office "was reviewing the possibility of joining other states in federal litigation." I indicated I was concerned about the costs involved and whether Kansas law would allow me to bring the causes of action.

The article also discussed a recent Tobacco Institute white paper that concluded that in "Kansas 'supporters of litigation are overly optimistic' about its chances for success and that Kansas law creates 'many significant obstacles.'"

Representative Helgerson was interviewed for this article and said, "there are lawyers in Kansas who would take such a case and be willing to accept fees if they win. Stovall is skeptical, saying she thinks their expenses would have to be paid as they worked on the case."

The article concluded with a comment from then Senator Mark Parkinson who said, " . . . it would be a mistake for legislators to force Stovall to intervene. 'The legislature is not equipped to make that kind of decision,' he said. 'That is the attorney general's call.'"

During the late spring and early summer of 1996, I began to perceive the tobacco litigation in a different light. As I read and talked to knowledgeable people, I began to understand the actions of the tobacco companies for what they were. My thinking moved from "they manufacture a legal product" to "they target children and have lied." I also came to understand the devastating health consequences of tobacco use to Kansans and to our economy.

In May of 1996, many Attorneys General and staff met in Chicago for another in-depth briefing on the tobacco litigation. Members of the national media were voraciously covering this topic and, at this Chicago meeting, I agreed to be interviewed on CNN and announced that I would be filing the Kansas case. Once back home in Kansas, many people said they'd seen or heard my broadcast on CNN. Kansas media followed up with interviews.

In-House or Outside Counsel

Having made the decision to sue Big Tobacco, how was I going to accomplish it? Handle the case in-house, or retain outside counsel? At this point in time, no state that had sued tobacco was handling the case in-house, although several that filed very late in the game managed to not hire outside counsel because settlement was imminent and those particular Attorneys General correctly calculated that no trial would ever take place. These included Arkansas, Colorado, Delaware, Georgia, Nebraska, North and South Dakota, Virginia, and Wyoming. Had the calculation proved wrong, those Attorneys General offices would have had to turn to outside counsel - or substantially increase their staffs. California was the only state, to my knowledge, that decided to handle the case in-house with the anticipation they would try it in-house. Their staff increased by at least 25 lawyers and even more support staff.

In Fiscal Year 1996, when the tobacco litigation attorney contract was being negotiated, the Office of Attorney General had a regular employee FTE limitation of 80.8. The entire agency state operations budget (money spent on us as opposed to claims and grants), as demonstrated by the actual expenditures reported in the Fiscal Year 1998 budget, was $5.9 million. The agency general fund expenditures, including money to finance the office's most expensive case ever, *Kansas v. Colorado,* was $3.9 million.

In Fiscal Year 1996, the Office had a Civil Litigation Division FTE count of 16 employees. That year we successfully fought for two more attorney positions for Fiscal Year 1997 to be paid from the tort claims fund to reduce the expensive reliance on outside counsel who were compensated on an hourly basis. The Civil Litigation payroll in Fiscal Year 1996 was $618,058, which included employment of 12 attorneys.

This is contrasted with a budget we prepared to handle the tobacco litigation which included 37 employees, 15 of them attorneys. It was estimated the combined salaries and benefits of these skilled litigation specialists would be $1.7 million a year, and the total costs of the litigation, including these employees for more than three years, was estimated at $7.2 million. Additionally it was not clear that putting together such a team would have been possible given the restraints of state government budgets, hiring and purchasing laws.

With the staff available in 1996, there was no any conceivable way in which we could have managed to handle litigation of this magnitude using in-house counsel. Each of the attorneys in each division had a full-time caseload. In the entire office there was only one paralegal, and in Civil

Litigation only one secretary for every four attorneys. In Washington state's case, the state was requested to produce more than 27 million pages of documents. The tobacco companies engage in a "scorched earth" defense of cases filed against them. They spent between $30 and $40 million in the *Cipollone* case while the plaintiffs spent $2 million.

Given the lack of legislative enthusiasm for the tobacco suit and the enormous general fund expense involved in handling such a case in-house, it was not realistic to think the Legislature would appropriate the funding necessary in the 1997 session to allow me to increase staff sufficiently to manage this case. Thus, as did all of the first twenty states to sue big tobacco, I was left to consider using outside counsel.

As later explained by the Minnesota Attorney General, Hubert Humphrey III,

> "It soon became clear, however, that retaining outside help was not only the right way to approach the case, it was the *only* way to approach the case."

Outside Counsel

After ruling out the in-house counsel option, we had to look to outside counsel. Through my attendance at meetings of the National Association of Attorneys General since December 1994, I had come to know and respect Mississippi Attorney General Mike Moore. He was the first state's Attorney General to sue big tobacco and it was his vision and leadership that were responsible for each and every tobacco case. Every AG who sued, at least prior to the end-game in 1998, did so out of their respect of and trust in Mike Moore.

The Mississippi case was being handled by the law firm from Pascagoula of Scruggs, Millette. Mike's best friend, Dick Scruggs, was taking the lead in not just the Mississippi case but in other states that had followed Mississippi's lead. Scruggs, Millette had advanced millions of dollars in expenses in litigation. Because of the trusting relationship Mike had with Dick, no contract existed to formalize the firm's representation of Mississippi.

I had come to know Dick through the various meetings I had attended on tobacco. My Senior Deputy, John Campbell, had also come to know him. If I were going to sue Big Tobacco, I knew I needed Dick Scruggs on our team, but it was not until June of 1996 that he would commit to spending millions of his own dollars to finance a Kansas lawsuit. Without that commitment, I could not hire him to be the Kansas Attorney.

On March 15, 1996, I received a letter from Andrew Hutton of the Wichita firm Hutton & Hutton (previously provided to the Tax Committee Chair) expressing interest in representing Kansas in the tobacco litigation. My Senior Deputy John Campbell and I met with Andy and Mark Hutton

on April 8, in my office. The Huttons described their involvement in the *Castano* class action case, a suit they filed as part of a group of sixty lawyers, on behalf of everyone addicted to nicotine.

Andy believed the state should file causes of action to include unjust enrichment, conspiracy by the Council on Tobacco Research, and fraud. He did not suggest a product liability count. Most important, at that time Hutton & Hutton agreed to front expenses of the litigation in return for a contingency fee of 25 percent. In a follow-up letter from Andy Hutton to me dated April 10, (previously provided to the Tax Committee Chair) he reiterated that they would be willing to bear the expenses of the litigation for a 25% contingency fee.

In addition to meeting with the Huttons, I met with Mary Barrier and Bob Vancrum of the Morrison & Hecker firm. Mary outlined the firm's ideas on causes of action. These included: fraud, deceit, deception, conspiracy, strict liability, and consumer protection. But, again, there was no mention of a product liability theory (previously provided to the Tax Committee Chair).

Mary and Bob reiterated what John and I had known: Tobacco Research Council had suppressed negative research studies and the companies had abandoned efforts to produce a "safer" cigarette because that necessarily would admit that their current products were unsafe or less safe. They also mentioned the *Castano* case that Hutton & Hutton was participating in. They described *Castano* as a plaintiff's class action in Louisiana involving nicotine addiction, and the tobacco company's defenses to the causes of action as assumption of risk and comparative negligence. In their opinion, the tobacco companies wanted the states to plead causes of action that allowed them to defend based upon the individual smoker's decision to smoke (assumption of the risk) and this is what the states had to steadfastly avoid.

We were advised that the question of taking the case would be presented to the firm's Executive Committee which would formally evaluate the case. Their evaluation would be made available to us whether or not they eventually represented us. The Committee would determine whether they would agree to handle the case at an hourly rate with a small contingency or on an hourly, but discounted, rate.

Morrison & Hecker were unwilling to consider a straight contingency approach; at best they would consider a 10 percent contingency, plus a discounted hourly rate. They believed that 2-3 partners and 5-6 associates would be needed to represent the state. John and I made it clear that any expenses would have been borne by the firm. However, they did not seem interested in that and estimated that expenses and attorney fees would cost the state $1 million annually for about five years. This was not even feasible from our standpoint.

Later in April, Mary called John and told him that the firm could not "be responsible for expenses that could potentially run so high." From that time until June, Hutton and Hutton was the only firm willing to both take the case and completely finance it.

On April 19, John Campbell received a fax from Hutton & Hutton along with a proposed one-page Attorney-Client Agreement (previously provided to the Tax Committee Chair). The pertinent terms of the proposal would have obligated Hutton & Hutton to advance all expenses of the litigation. In exchange, they would "receive a fee of Twenty-Five Percent (25%) of whatever amounts are recovered either by way of settlement and/or judgment in this litigation."

On June 10th, John received another fax from Hutton & Hutton (previously provided to the Tax Committee Chair). Understanding the case involved reimbursement of the state's Medicaid payments, Andy wrote " . . . when a private attorney in Kansas is responsible for recoveries of money in an action where Medicaid is reimbursed, there is statutory authority that the attorneys' fees be one-third for cases settled prior to trial or 40 percent when the trial is convened." A copy of the relevant statute was also faxed to John.

While John continued to talk off-and-on with Hutton & Hutton during the months of April through June, we realized that they were insisting on a contract term and that it would not be prudent. They insisted that I specify a percent in the contract to which they would be entitled. While initially proposing a 25% contingency, they indicated they would negotiate downward, but were adamant that a specific percent by guaranteed.

There was a great likelihood that we would not receive any monies in settlement or judgment, but obligating the state to a certain percent in this untested and untried legal arena would have been irresponsible. What John and I insisted upon was a ceiling or cap on fees. As the Huttons explained to the Legislative Post-Audit, "having the phrase 'up to . . . ' in the contract was akin to not having a contract, that there was no guarantee of what you would be paid" and they were unwilling to accept a contract with that language.

At the June NAAG summer meeting in St. Louis Mike Moore called for a special meeting of those states that were interested in speaking with his tobacco counsel. Many states did not attend. The subject of tobacco was still a very contemptuous issue with the Attorneys General who opposed the suits. So much so, in fact, that in order to preserve unity, as well as civility, the subject of tobacco litigation was intentionally not discussed at the regular meetings of the Attorneys General.

At that June meeting, Dick Scruggs and Ron Motley told the Attorneys General and staff present that they would assume the full and complete responsibility for financing any state that wanted to initiate litigation against big tobacco. In a later private meeting with Dick, he agreed that he would take the case based on the same fee that he had agreed to in Mississippi, whatever the court determines to be fair and reasonable. It was a pivotal moment for the Kansas tobacco case. (Previously provided to the Tax Committee Chair).

We now had our national counsel. It had always been my hope that we could get the leading attorney of the states' tobacco litigation, Dick Scruggs, to represent us. Before finances had made that impossible, but now it could happen. The question now was how the suit could best be advanced.

Local Counsel

By Rules of the Kansas Supreme Court, only lawyers who have been admitted to practice in Kansas or have formally associated themselves with a Kansas attorney can file pleadings in any Kansas District or Appellate Court. A lawyer who has not been admitted to the Kansas bar cannot appear before a Kansas court without local counsel. This ensures that the out-of-state lawyer is advised on points of Kansas law.

While we had secured Scruggs Millette and Ness Motley, two outstanding national firms to represent us, none of their lawyers were admitted to practice in Kansas. This was also true in many of the other 29 states that retained their services. It was essential to have local counsel - and lawyers in Kansas knew this.

In the summer of 1996, having secured the best national counsel I could hope for, I began to consider the issue of local counsel. I also began to realize the risk I was taking by filing the suit. Public opinion, as expressed to me, was not in favor of the suit. Senator Bob Dole, running for President, was not a proponent of the lawsuits or of tobacco regulation. In fact, Senator Dole had been one of 32 U.S. Senators in 1995 who signed a letter protesting the FDA crackdown on tobacco advertising and he had announced publicly in September of 1995 that David Kessler, the FDA Commissioner, would be fired if Dole were elected President. Kessler was a strong tobacco control proponent and was viewed as friendly to the suits.

Having a sense of the personal, political, and professional risk I was taking - in addition to the legal uncertainties of any litigation - I realized it was important to select a Kansas firm that I knew and trusted. I was personally well-acquainted with Bob Vancrum, of Morrison & Hecker, and would have been pleased for him to represent Kansas. John Campbell contacted the firm to ask if they would serve as local counsel with Scruggs, Millette and Ness, Motley if the national firms fronted the expenses. Mary Barrier told us that the firm had "considered the offer, but decided they had a possible appearance of conflict and declined." (Previously provided to the Tax Committee Chair).

I needed a firm I personally trusted and one in whose legal abilities I was confident. The solution came to me one morning and I picked up the phone and dialed Jeff Chanay. Jeff and I had become acquainted in the late 1980's when I joined the Rotary Club of which he was a member. We had a mutual interest in the international programs of Rotary because of our own personal experiences: his as a Rotary Scholar in Scotland and mine as a member of a Group Study Exchange team to Australia. We also served together on the Board of Directors of this Rotary club.

When I first met Jeff, I was on the Kansas Parole Board, serving an appointment of Governor Mike Hayden. My term expired in May of 1992 and Governor Joan Finney did not reappoint me. I decided to work full-time on the Masters in Public Administration that I had begun while on the Board. In the summer of 1992, knowing I was no longer on the Parole Board, Jeff asked me at a

Rotary board meeting if I would be interested in coming to work at his small firm. An associate had recently left and they were looking to hire another lawyer. I appreciated his interest, but had made a commitment to myself to concentrate on finishing the course work for the graduate degree. However, in the fall I realized I could no longer afford the luxury of not working while I attended graduate school. A friend mentioned to me that Jeff had recently inquired again about my interest in working for his firm, so I called to follow up.

I met Stu Entz for the first time at my job interview and talked further with Jeff about their practice. Jeff represented nursing homes in regulatory matters and businesses defending workers' compensation claims. He was an adjunct professor at the Washburn Law School and served on the Board of Editors for the Kansas Bar Journal. Stu represented corporations, many involved in construction, as well as the Kansas East Methodist Conference. Jeff's mother was the office receptionist. Stu and Jeff were both Republicans and had been active in the Kansas Chamber of Commerce & Industry (KCCI).

I joined Stu and Jeff and their wives one evening for dinner at Steak & Ale. I had known Jeff's wife, Kris, through social activities with Rotary. They had one son and have since had a second. Kris gave up her employment at the United Methodist Homes, Inc. to stay home with the young boys. Stu's wife, Elinor, was a kindergarten teacher. They had three grown children, one of whom was in law school.

I was thrilled when Stu and Jeff offered me a position with their firm and I believe I began work in the late fall of 1992. I generally assisted Stu in discovery on his construction litigation cases and took over a large home construction defect case from Jeff. I continued my Master's course work and finished the degree program in May 1993.

At some point during this time, Kansas Attorney General Robert T. Stephan announced he would not seek reelection. Over the years, several people had asked if I would ever consider running for Attorney General but I never considered it seriously. However, in the early part of 1993, Bob Stephan himself asked me as did other well-placed politicos. I was first flattered, then excited, and ultimately committed to run.

I was concerned that my campaign plan would not fit well with my new employers, however. They were both overworked and needed an associate to help with that load. Having their new associate off campaigning would not be of any benefit to them. But they were very supportive and encouraging to me. We reduced my work hours to only part-time because of the demands campaigning would require.

In 1993, as I commenced my campaign, I had no personal or family money or statewide name recognition. This was in sharp contrast to my principle primary opponent. Many thought there was no way that I could win the Republican primary in 1994. While I lacked many things, I did have a tremendous energy and commitment to winning. My parents, many friends, and my employers

contributed generously financially and emotionally to my effort. I also housed the campaign office in the basement of the law firm where I worked and this was calculated as an in-kind campaign contribution. This location was tremendously convenient for me and allowed me to combine practicing law and campaigning. As it turns out, I did win the Republican primary and Democratic general election in 1995.

When I turned to Stu and Jeff to consider representing the state in the tobacco litigation, it was not to "reward" them, as some have suggested. Instead, I was once again calling upon friends who had come through for me in the past, who I knew could be trusted for their personal loyalty and their professional abilities. I asked Jeff "as a favor" to take this case - front expenses, forego hourly payment, receive nothing if we don't settle or prevail at trial, and have a judge determine what, if anything, they should be paid assuming we settle or win. There was absolutely no thought that this would result in the *largest settlement of commercial litigation in the history of the world!*

Additionally, another factor that led to Entz & Chanay was that they were *not* plaintiffs' attorneys. Being a "plaintiff's attorney" generally describes lawyers who take contingency fee contracts regularly and frequently on issues like products' liability, medical malpractice, personal injury. (E.g., slip on a banana peel at the grocery store and sue IGA's.)

Suing an industry like tobacco that produced a legal product was "going out on a limb" philosophically and politically. Remember, I am a Republican. Republicans tend to be averse to plaintiffs' lawyers, who generally speaking, are more affiliated with the Democratic party. Hiring a traditional plaintiff's firm would be giving fodder to those averse to the lawsuit that I was "defecting to the other side" and had no Republican values.

Hutton & Hutton had a deserved reputation for being fine trial attorneys. It was my understanding that they had been involved in asbestos, breast implant, and other medical related lawsuits on behalf of the consumer/patient. Indeed, as mentioned earlier, they were one of 60+ firms in a consortium of trial attorneys on the *Castano* class-action case involving nicotine addiction.

Having the "Republican State of Kansas" represented in our Medicaid recoupment case by lawyers in the *Castano* case would have presented another problem for me in the court of public opinion. I knew it would be difficult enough to "sell" our case to the public - as a state's right to reimbursement - and not getting tied to any of the causes of action in the private plaintiff cases. I correctly anticipated that one of the most frequently heard criticisms of the state suit was "they chose to smoke, they knew it was a health hazard, why should tobacco pay?" It would be easy for me to respond to that line of thinking because I could say, "Our suit is about the state's obligation to pay for those health hazards and the *state* didn't have a choice in the matter of whether Medicaid recipients smoked. I'm not recovering money for the smoker - but for the state." Had our lawyers also been representing individual smokers, whose own behavior contributed to their illness and addiction, it would have been much more difficult to distinguish between the critically distinct theories of the case.

It is important to note that I had previously contracted with Entz & Chanay. I offered a particular contract to them after Shook, Hardy, & Bacon declined to accept the standard $85/hour. Entz & Chanay accepted at those standard terms. A former professor at the University of Kansas School of Law filed a lawsuit for wrongful termination against six categories of defendants totaling 34 separate defendants. The groups included certain professors at KU, the Board of Regents, and others. Because some groups of defendants could conceivably have different defenses, "we didn't do anything wrong, but you might have," my office could not represent all defendants. We "farmed out" five of the six groups of defendants. Entz & Chanay agreed to represent the upper administration at KU (the chancellor and others) on behalf of the State of Kansas.

While this case has been subjected to significant delays due to a discovery stay and an appeal to the 10th Circuit, the work of Entz & Chanay has been more than satisfactory. The contract for defense of the suit involving KU, like all contracts, was public. The plaintiff and his lawyers, all the defendants and their lawyers, were aware of Entz & Chanay's involvement. To my knowledge, there was never a complaint raised in any quarter - in the legal community, in the press, or in the legislative - about my retention of them because of our prior association.

I E-mailed John Campbell on June 28, presumably shortly after the conversation with Jeff, and notified him that Stu and Jeff were "on board." The e-mail clarifies that Jeff and I visited about financial arrangements and that "he understands the contract would say 'whatever court's award.'" I instructed John to notify Dick Scruggs of our choice of local counsel and to notify Hutton & Hutton we had made our selection. (Previously provided to the Tax Committee Chair).

In informing John that we were going with Entz & Chanay I did use a phrase that in hindsight was not the best. There are some who would make much of that fact. But, in view of all of the facts, it clearly was the right decision. Hutton and Hutton would not accept a contract without a firm percentage and I would not offer one.

Stu and Jeff began working on the case in July without a contract. John drafted a proposed contract and delivered it to Entz & Chanay. We were sent a copy of a letter from Stu to Scruggs, Millette and Ness, Motley in which the draft proposed agreement was enclosed. On August 14, Stu wrote my office and outlined the proposed contract revisions dealing with the fee. (Previously provided to the Tax Committee Chair).

1. If the State receives nothing, there is no fee.
2. If any judgment is entered, the Court can determine the fee Pursuant to Rule 1.5.

3. If there is a settlement, the fee shall be part of the settlement and the State must approve any settlement.

4. There is an absolute 'cap' on Counsel's fee at less than the normal contingent fee.

This understanding that Stu and Jeff had of the fee provisions was consistent with the tobacco litigation contract. The contract (previously provided to the Tax Committee Chair) did not require any of the firms to keep track of hours. Neither Scruggs Millette nor Ness Motley has a billing system. If you don't win settlement or judgment, you don't get paid regardless of the number of hours spent on the case. The proposed draft of the contract Hutton & Hutton sent us did not include any provision for the keeping of hours worked; I saw no reason to insist on one with the three firms we hired.

On the day I held the press conference announcing the lawsuit's filing (August 20, 1996), we distributed a press release and a Q&A sheet. This anticipated questions that would be asked by skeptics of the suit, e.g., "Is this an anti-business lawsuit?" "Are you trying to put the tobacco companies out of business?"

From Day One, I was very open about whom I had hired to represent Kansas. I did not hide the information that I had formerly been associated with Entz & Chanay. I indicated one of the important reasons they were retained was because of the level of trust I had in them. Virtually no one expressed concern over my choice of counsel that day or in the aftermath of filing. I presume that is because no one thought there was any problem with my choices.

Of the news articles that covered the filing of the suit, I find that only the *Anderson Countian* in Garnet found the selection of counsel noteworthy. In an article entitled, "State's Tobacco Lawsuit Misdirected" the editor discusses the issue. "Apparently, attorneys somewhere have strung together enough loosely affiliated legal precedents to think the lawsuits have some merit. And they have good reason - if they're successful, the Kansas lawyers involved will pocket a cool 25 percent of the settlement. One of the Kansas firms that will be handling the suit is Stovall's former Topeka boss, Entz & Chanay."

Many of the other editorials which appeared around the state subsequent to the filing of the suit, were critical of my decision. None, however, mentioned the selection of lawyers, but found philosophical reasons to criticize the suit.

From the *Great Bend Tribune*'s editorial, "Smoke gets in your eyes":

> "We detect not the smell of cigarette butts being crushed out but the sulfurous smell of yet another gimmick designed to roll voters."
> "Pardon us if we clap with one hand."

From the *Clay Center Dispatch's* editorial, "Mining votes":

> "If we didn't know her better, we'd say she's mining the same political motherlode Big Bubba [President Clinton] went after yesterday when he decreed nicotine will be regulated as a drug."
>
> "Kansas has not only allowed tobacco sales, but has profited handsomely from those kickbacks [of taxes] for decades. It allsours the moral tone of the lawsuit. Hell, it's the skunk telling the polecat his breath stinks."

From the *Olathe Daily News's* editorial, "Fighting Tobacco: Rewarding those whose choice to smoke left them ill seems a very illogical outcome":

> "Taking up the fight against the tobacco industry in the eyes of most people might be a noble cause, but is it worth taxpayer money to fund the legal battle?"
>
> "The burden of prosecuting the tobacco industry for the decisions those
> adults make should not be shouldered by taxpayers."

From the *Wilson County Citizen's* editorial, "Whose responsibility?"

> "The anti-tobacco campaign is reminiscent of the prevailing attitude which gave birth to the Volstead Act earlier in the century. The target was not tobacco but alcohol and it was thought that if alcohol were presented as enough of a villain, the American public would understand such laws were for their own good and would change their behavior patterns."
>
> "Different tactics are being used against tobacco, but it's the same campaign."

From the *Manhattan Mercury's* editorial, "Smokers are accomplices":

> "But this rush to punish the tobacco industry omits, or overlooks, a crucial element that elsewhere is on the ascent: the role of individuals - the responsibility people bear for the choices they make."

From the *Kansas City Star's* Business Editorial, "Tobacco crusade is all smoke",

> "Kansas this week became the latest government to discredit itself by suing the tobacco industry to recover state outlays attributable to smoking- related health problems. This cynical predatory attack against law abiding corporate citizens by Kansas and numerous other states is an act of economic and political opportunism unworthy of any government constituted to broadly act in the best interests of all those in whose name it governs."

The broad-brush, negative cast on the lawyers I hired to represent Kansas, which has now become so familiar, did not come until it appeared that a national settlement might take place - and that the law firms might be compensated. When no one expected Kansas to receive any money from Big Tobacco - whether by settlement or trial judgment - no one cared what lawyers would not be paid for their work.

Kansas Tobacco Litigation

To date, the only Kansas cases known to have actually recovered money from the tobacco industry have been those suits brought by the Attorney General. However, there were other efforts in Kansas the most notable being *Emig v. American Tobacco Company*, 184 F.R.D. 379 (D. Kan. 1998) and *Burton v. RJ Reynolds Tobacco Co., et al.,* 884 F.Supp. 1515 (D. Kan 1995); see also *Burton* at 916 F. Supp. 1102 (D. Kan 1996); *Burton* at 167 F.R.D. 134 (D. Kan 1996); *Burton* at 170 F.R.D. 481 (D. Kan. 1997); *Burton* at 175 F.R.D. 321 (D. Kan. 1997); and 177 F.R.D. 491 (D. Kan. 1997).

From 1996 to 1998, the State of Kansas filed three lawsuits against cigarette and smokeless tobacco manufacturers. The first was *State of Kansas, ex rel. Stovall v. RJ Reynolds Tobacco Company, et al*, Shawnee County District Court Case No. 96-CV-919. The second was *State of Kansas, ex rel. Stovall v. Brooke Group Limited, et al.,* (Liggett), Shawnee County District Court Case No. 97-CV-319. The third was *State of Kansas, ex rel. Attorney General v. United States Tobacco Company*, 98-CV 1582.

RJR Case

Having decided to sue Big Tobacco, I was eager to get the case filed to avoid a pre-emptive strike by the tobacco companies. They had previously sued Connecticut and Utah to bar those Attorneys General from suing the tobacco companies, and I did not want to begin this battle in a defensive posture.

But I also felt I needed to be sensitive to Senator Bob Dole's campaign for President and insisted we defer filing until the Republican National Convention had ended. I did not want a tobacco suit from his home state to cause him any political embarrassment.

On August 20, 1996 (after the GOP Convention) the case of *State of Kansas, ex rel. Carla J. Stovall v. R.J. Reynolds Tobacco Company; Philip Morris, Inc.; Brown & Williamson Tobacco Corp.; B.A.T. Industries, P.L.C.; Lorrilard Tobacco Company; American Tobacco Company; Hill & Knowlton, Inc.; The Council for Tobacco Research-USA, Inc.; and The Tobacco Institute, Inc.*, was filed in Shawnee County District Court. (We did not initially sue Liggett and this became a critical element to our later success.)

The case was assigned to Judge Fred Jackson. The Petition, which commenced the suit, was 264 paragraphs and contained seven specific causes of action. We alleged violations of the Consumer Protection Act, Restraint of Trade, Unjust Enrichment, Indemnity, Breach of a Voluntarily Undertaken Duty, Civil Conspiracy to Commit Breach of a Voluntarily Undertaken Duty, Injunctive and Declaratory Relief, and Interference with Obligation.

The crux of our complaint was medical reimbursement for tobacco-related costs to Kansas based upon the morbidity and mortality of indigent citizens; it was a taxpayer recovery case. We alleged that cigarette manufacturers had suppressed the truth concerning the hazards of smoking and, as a result, Kansas citizens who smoked, without knowing all the information the tobacco companies knew, contracted smoking-related diseases. The fiscal burden to Kansas and its taxpayers for those smokers who received Medicaid benefits should rightfully be borne by the tobacco companies.

We alleged that the companies engaged in a conspiracy with one another to carry out fraudulent and unlawful acts. Some of those acts included telling the public in 1954 they would establish a research center and fund scientists to engage in objective research about the health hazards of smoking and share the research results with the public; directing and controlling the research and preventing any negative results from coming from this "objective" research organization; destroying and concealing incriminating evidence of research which demonstrated the addictive nature of nicotine; making false statements to Congress and other government agencies and members of the public regarding the addictive nature of nicotine; using monopoly power to suppress research, development and marketing of "safe" cigarettes; and intentionally marketing their products so as to appeal to minors.

Cigarettes were - and are - a legal product. The companies were not being sued for manufacturing and marketing a legal product. The companies were being sued because they engaged in illegal practices before, during, and after the manufacturing and marketing processes.

In the Kansas suit, the defendants were served and began to retain counsel; approximately 70 lawyers were soon defending the tobacco companies from the Kansas' claims. All defendants had national counsel, as well as Kansas firms, representing them.

In answering the Petition we filed against them, the defendants made it immediately clear that they were going to fight the Kansas allegations aggressively. In addition to denying our claims of wrongdoing, they each offered defenses to our claims.

The first substantive pleading filed by the tobacco companies (subsequent to their Answers) was a Joint Motion to Dismiss. This Motion was expected and challenged the state's ability to bring the suit. The particular issues raised in the 32-page memorandum were:

I. The State Cannot Circumvent the Exclusive Statutory Remedy of Assignment/Subrogation.

a) The Statutory Medicaid Scheme in Kansas

b) Assignment/Subrogation is the State's Exclusive Remedy

c) If the State is Dissatisfied with its Exclusive Remedy of Subrogation, It Must Direct Its Arguments to the Legislature.

II. The State Improperly Attempts to Recover for Remote and Derivative Injuries.

a) Denial of Recovery for Indirect Economic Injuries is a Firmly Rooted Principle of American Law.

b) Courts have Dismissed Claims to Recover Remote and Derivative Injuries Allegedly Caused by Tobacco Products.

c) The Rule Prohibiting Recovery for Remote Injuries Reflects Sound Policy

Kansas' memorandum in response to the defendant's issues in their Motion to Dismiss discussed the following:

I. Arguments & Authorities

a) Nature of the State's Lawsuit

b) The Subrogation Provision of the Kansas Medicaid Statute is Not the State's Exclusive Remedy in Recovering Taxpayer Expenditures Made Through Medicaid

c) The Kansas Attorney General is Allowed to Assert Common Law Claims for Relief on Behalf of the State

d) The State is Entitled to Pursue all Remedies Available under the Statutory and Common Law

e) Defendant's Reliance on *Associated Industries of Florida* is Misplaced and Inappropriate

f) The State has Sustained Direct Damages that are Neither Remote Nor Derivative

g) Defendant's Joint Motion to Dismiss, Even if Credited, is Not Dispositive of the Entire Litigation

The oral argument on the defendant's motion was June 5, 1997. I made the first portion of the State's argument and Steve Bozeman, of Scruggs, Millette, followed arguing the remaining issues. Dan Webb, of a Chicago firm, argued on behalf of the defendants.

Judge Jackson took the Motion under advisement. During the pendency of the case, ---- months, he never ruled on the Motion.

Liggett Case

As mentioned earlier, Kansas did not initially file a lawsuit against Liggett or include them as a defendant in the RJR suit. Because Liggett I (settlement between Liggett and five states) had occurred in March of 1996, preceding my lawsuit, there was some thought that Liggett would probably settle with the states that had filed subsequent to the first settlement. We decided to wait and see how the settlement possibilities unfolded instead of suing from the beginning. As predicted, negotiations with Liggett began anew as additional states entered the litigation arena and on March 20, 1997, Liggett II was announced in Washington, D.C. In exchange for dismissal of the states' suits, Liggett agreed to turn over its secret cache of documents. Additionally, Liggett's CEO, Bennet LeBow, publicly conceded that "smoking causes lung cancer and other diseases and that the cigarette companies market to youths, including those under age 18." Liggett also agreed to label its cigarette packages with a warning of "smoking is addictive."

In support of the allegations of youth marketing, the Kansas City Star on April 4, 1997, printed a story entitled, "Liggett papers divulge targets."

> "In a separate, undated document, the 'photo packaging modification objectives' Of the L&M brand are outlined: ... 'modify picture packaging so as to have more appeal to youth.'
>
> "The tobacco industry has consistently denied it aims at young people. In its settlement, Liggett admitted that young people were in fact targeted so they developed brand loyalty from the beginning."

When the Liggett II settlement was announced, Mississippi Attorney General Mike Moore was quoted as saying, "I think this will bring the tobacco industry to its knees." (The Heartland Institute, Policy Study, No. 83, June 4, 1997, page 1.) Although it took more than two years, and a tremendous amount of time and energy, Mike's prediction came true.

The most critical component of Liggett II was Liggett's agreement to turn over to the states its documents regarding nicotine and addiction research and development. "Lawyers for the attorneys general said the real value of the settlement will be the documents, which Liggett has until now withheld as privileged attorney-client communications." (*Wall Street Journal).* Public health advocates and the states' attorneys believed the secret to winning the litigation against the tobacco industry was to use the companies' own knowledge against them. It would take the documents to prove the companies knew nicotine was addictive and that they scuttled research on safer cigarettes and they manipulated nicotine levels to ensure the amount in each cigarette reached a desired level.

"Moreover, Liggett agreed to release all current and former employees from employment agreements that would prevent them from being interviewed or from testifying in depositions about Liggett's involvement in the cigarette industry." (*Wall Street Journal).*

While a defendant's documents can generally be gained in the process of discovery, privileged documents do not have to be disclosed to the other side. Documents prepared by attorneys are protected by the "attorney/client privilege" and people familiar with the tobacco industry had reason to believe the companies labeled any sensitive or incriminating document with "attorney/client privilege" in an attempt to protect it from disclosure. As long as plaintiffs could not get at these documents, however, it could not prove the wrongful use of the privilege.

However, Liggett's willingness to turn over documents would give almost the first glimpse into the records of tobacco companies and attorneys and public health advocates were eager to begin examining the records. It was not to be so easy, however.

The tobacco companies had in the general course of business years ago formed a Committee of Counsel, comprised of their attorneys. This Committee of lawyers developed strategies, planned defenses and worked together in combating the suits that were being filed by

individuals and classes of smokers. In this process, they also shared documents they believed were subject to privilege. Because the "attorney/client privilege" is void when one of the parties shares a privileged document, the Committee of Counsel relied on what they called a "joint defense agreement privilege." The thinking was that confidential documents shared with other parties in litigation preparation should be similarly protected.

When Liggett announced it intended to release documents in its possession, the other tobacco manufacturers quickly asserted their right to have the joint defense agreement documents protected.

> "The four biggest tobacco companies, meanwhile, raced into state court in Winston-Salem, N.C., yesterday morning and won an emergency order temporarily barring Liggett from turning over any documents that might violate the industry's joint defense privilege on attorney-client communications." *(Wall Street Journal)*

In Kansas, however, the saga unfolded differently because of the manner in which the suits had been kept separate and distinct. All other states (and individual plaintiffs) began discovery from a different posture. The norm was to request documents, to which the companies would protest "attorney-client privilege." The plaintiffs would then frequently alleged that the privilege was being misapplied to documents that actually showed evidence of crime/fraud. If the documents did show evidence of crime/fraud, the plaintiffs would be entitled to the records. All of these issues were litigated and appealed - consuming considerable time and effort.

Because Kansas had filed against Liggett separately, we had a more direct avenue to the documents. Shortly after Liggett II was announced, we filed a Motion to Enforce the Provisions of Settlement, Stipulation and Order of Confidentiality. On April 16, 1997, Judge Jackson granted our Motion to Enforce and signed an order giving effect to that ruling.

The effect of this decision was to open the door - in a way never before imagined - to the documents in Liggett's possession that had never been viewed by anyone outside the industry! It is difficult to describe what a significant decision this was. "There are legal battles . . . over whether potentially damaging documents released by the Liggett Group after its settlement last month with some opponents can be used in lawsuits against other companies. . . ." (*The New York Times*, April 17, 1997).

Realizing the Kansas lawyers had made a brilliant tactical move with devastating consequences to the defendants, on April 17, defense lawyers obtained an *ex parte* Emergency Motion to Vacate the April 16, 1997 Order signed by a judge other than to whom the cases had been assigned. In a further display of irregularity, defendants obtained an order in a case in which they were not parties. This case was between only the State and Liggett - not RJR, Philip Morris and the other manufacturers.

On April 22nd , Kansas filed a Stipulated Order, signed by the State and counsel for Liggett, dealing with the documents. The order explained that Liggett officials had examined the 13 boxes of documents that it intended to turn over to Kansas pursuant to the settlement. In boxes 1-5 were documents that only Liggett could claim were subject to privilege and boxes 6-13 contained documents that Liggett had reason to believe other companies or individuals would attempt to assert a privilege. The Court gave the "interested third parties" the right to inspect the contents of boxes 6-13 to determine which might be subject to claims of privilege and, for those documents, Liggett would submit them under seal to the Clerk of the Court. Documents to which the "interested third parties" did not claim privilege were to be given to the State.

On May 28, Kansas filed a Motion to Enforce Provisions of Settlement Agreement and for In Camera Inspection and Release of Documents Filed Under Seal. Eight of the 23 documents the "interested third parties" objected to Liggett releasing were documents that a court in Florida had previously determined fell within the crime/fraud exception to privilege and should be released. Kansas asserted in this same Motion that ". . . the State of Kansas does not recognize a statutory or common law joint defense privilege. . . ." and that even if we did it was waived by Liggett's settlement agreement.

At this point in time, none of the cigarette manufacturers other than Liggett were party to this particular lawsuit. On June 3, Philip Morris, RJR, Brown & Williamson, and Lorillard moved to formally intervene in the Liggett suit. This, despite the fact the court had an Order of Dismissal before it.

On June 4, Brown & Williamson filed an Objection To Exhibits that supplemented Kansas' Motion for In Camera Inspection. The tobacco company claimed that some of the documents "are privileged and confidential documents that were stolen from Brown & Williamson's counsel" by a former paralegal for Brown & Williamson. [Kansas' response to these accusations was filed on July 18th. "The exhibits Brown & Williamson charges were improperly obtained are, in reality, in the public domain. They are legitimately available to and readily accessible to the general public, including the State of Kansas." We asserted the documents were available on the Internet, at the University of Southern California at San Francisco, in the Journal of the American Medical Association and had been discussed at length in the media (television, radio, and press).]

On June 6, Judge Jackson signed the Order of Dismissal in the Liggett case finding that "on March 20, 1997, the parties entered into a Settlement Agreement whereby the parties fully settled plaintiff's action filed on March 17, 1997." The court retained jurisdiction for purposes of enforcement of the settlement provisions.

On July 7, the tobacco companies submitted their Memorandum In Support of the Recognition of the Joint Defense Privilege. Although plaintiffs' lawyers had long battled for the tobacco company documents and tried to contest whether certain documents were actually privileged, no one had challenged the very existence of the joint defense privilege until Kansas'

case. Local counsel, familiar with Kansas constitutional, statutory and common law, believed no joint defense privilege existed in Kansas.

The tobacco companies were very sure of their position. "Despite the clear authority establishing the existence of a joint defense privilege under Kansas law, the State argues that this Court should ignore this authority and hold that no such privilege exists. In so doing, the State engages in a mistaken and misguided game of semantics."

The oral arguments on August 1, 1997, were made by Jeff Chanay for the State of Kansas and Tom Wright, of Wright, Henson, Somers, Sebelius, Clark & Baker, local counsel for Philip Morris.

Despite the company's certitude that a joint defense privilege existed in Kansas, the Shawnee County District Court found otherwise in its Memorandum Decision and Order issued October 15, 1997. "This case presents an issue of first impression in Kansas. That is whether or not Kansas law recognizes what the parties deem 'the joint-defense privilege.'"

The judge concluded: "The Court finds that the common law joint-defense privilege is not recognized in Kansas. Nor are the Interested Parties entitled to seek work product protection for another's documents. Even if the Interested Parties could have claimed a privilege to the documents at some point, their disclosure to Liggett waived the privilege." The Judge directed the clerk to provide ***all documents under seal*** to Kansas within thirty days.

The Washington Post on October 16, 1997, wrote about the decision in an article titled "Kansas Court Orders Liggett Papers Released: Tobacco Industry Lawyers Attack Ruling on Sensitive Documents." The article described the Judge's decision which ". . . ordered the release of some 2,500 of the most sensitive internal tobacco industry documents held by industry renegade Liggett Group, Inc."

> "The industry has consistently claimed that the disputed documents are protected by 'joint defense privilege,' which means that the documents were produced by the companies together in preparation of lawsuits and so should not be revealed to the industry's opponents in court. But in yesterday's ruling, Kansas District Judge Fred S. Jackson ruled that the state does not recognize claims of joint privilege."
>
> "The ruling could have implications for other shielded tobacco documents, including a million pages in dispute in Minnesota's case against the industry.

"The decision marks a crucial moment in tobacco litigation, said Matthew L. Myers of the National Center for Tobacco-Free Kids. 'This breaks the logjam on the documents that the

industry has fought the hardest to keep secret. . . . If there's a smoking gun in it, for the first time in history a plaintiff's lawyer will finally know it."

The story hit the other coast too. *The L.A. Times*, also on October 16, 1997, ran this headline: "Tobacco Firms Must Release Documents; Litigation: Kansas judge's ruling rejecting companies' bid to keep internal papers a secret turns up heat on industry."

> "The ruling by Shawnee County District Judge Fred S. Jackson further ratchets up the pressure on an embattled industry that, its critics claim, hid the dangers and health effects of smoking from the American public for several decades."
>
> "The case is not expected to go to trial until 1999, but if these documents are released, they could damage the industry's legal position and generate additional adverse publicity as Congress considers the proposed $368.5 billion national tobacco settlement."
>
> "A 160-page log of the documents, obtained by The Times, shows that it includes letters, memos and notes made by Liggett attorneys during the meetings of the Committee of Counsel, a lawyer's group that played a key role in formulating legal strategy for the industry."
>
> "The log also indicates that it contains material concerning the Council for Tobacco Research, the industry's research arm, and the Tobacco Institute, the industry's lobbying organization. All the other cigarette companies objected to release of the material, contending that it should remain confidential because of several traditional legal defenses, including one known as the 'joint defense privilege.' Since late March litigation over the documents has ensued in states around the country."

An assessment of the likely fallout from Judge Jackson's decision was described in an *amicus* brief filed with the Kansas appellate courts challenging the decision. The Products Liability Advisory Council wrote:

> "Like Chicken Little, appellate lawyers should be cautious about claiming that the sky is falling. *And yet*, we respectfully suggest that allowing the district court's ruling to stand here would have truly staggering consequences that would go far beyond the parties in this case."
>
> "No Kansas court has ever before held that a party waives either the attorney-client privilege or work-product privilege merely by

> communicating the information to another party with a common interest in joint litigation."
>
> "Frankly, no one has ever had the chutzpah to claim waiver."
>
> "The draconian consequences of the district court's ruling would not even be limited to Kansas."
>
> "So the sky really would fall."

The Kansas Association of Defense Counsel also filed an *amicus* brief on behalf of the tobacco industry claiming Judge Jackson's decision was wrong. However, in a December 1998 publication for the defense bar, the same firm took a different view of the decision.

> "Although the *Maxwell* court seems to clearly embrace the joint defense doctrine, **the State in *State ex rel. Stovall* [the tobacco case] correctly noted that *Maxwell* does not find support for recognition of the joint defense doctrine in statutory language."** (Emphasis added.) It was a significant - and correct - decision that Judge Jackson made. Even allies of the defense recognized that it was likely to be upheld by the Kansas Supreme Court.

After a series of motions and responses aimed at clarifying the official status of the major tobacco manufacturers in the Liggett case, the District Court on December 22, granted the manufacturers the legal status of "interveners" but denied their motion to amend his October 15 decision finding no joint-defense privilege.

The tobacco manufacturers filed their notice of appeal to the Court of Appeals on December 12. They were challenging the trial court's find that no joint defense privilege existed in Kansas. Kansas filed its Notice of Appeal on December 31 challenging the Court's decision to grant the manufacturers intervener status. The parties and amici briefed the issues for the appellate court but intervening events at the national level rendered moot the legal challenges in Kansas.

UST Case

The third case in the state's tobacco litigation was filed against US Tobacco after settlement had been reached with that company. *State of Kansas, ex rel. Attorney General v. United States Tobacco Company*, 98-CV 1582. US Tobacco manufactured smokeless tobacco and, while not discussed as much as cigarettes, still involved significant issues because of the number of youth who bought and used their products. No attorneys' fees or money damages were awarded to Kansas in that case. The injunctive relief obtained by those who had sued UST and other smokeless tobacco company was extended to Kansas.

National Developments Subsequent to August 1996

National events had not been standing still while the Kansas suits were developing. The same week I filed the Kansas case, Michigan, Oklahoma and Arizona also filed their suits. By March of 1997, twenty-two state suits had been lodged against tobacco companies.

In February of 1997, Business Week reported that trial preparations by the Attorneys General were underway. "After months of preparation, powerful state attorneys general who have declared war on the tobacco industry are girding for battle in the courtroom. Mississippi Attorney General Mike Moore will deliver opening arguments this June in his suit against seven cigarette makers to recover hundreds of millions of dollars in state Medicaid costs for smoking-related illnesses. Copycat cases in Florida and Texas will begin in September, while Washington Attorney General Christine O. Gregoire has a court date in October. On January 27, New York became the 19th state to sue the industry."

Still, however, not all state Attorneys Generals were inclined to sue. Ohio's Attorney General was quoted in the National Law Journal, April 28, 1997, as saying, "many of the legal theories being used in the lawsuits are untested and unproven." The article indicated that AGs in Nevada, Colorado, and Georgia were reluctant to enter litigation saying the "legal theories are weak." Alabama's Deputy Attorney General (currently the Attorney General), in October 1996, issued an 88-page report saying the states' claims are "at best weak and at worst bizarre."

Liggett II, the settlement which created the furor in Kansas and elsewhere over access to previously unseen documents, touched off events which led the major cigarette manufacturers to come to the table with the state Attorneys General. On April 16, 1997, the Wall Street Journal headlined a front page story "Phillip Morris, RJR, and Tobacco Plaintiffs Discuss a Settlement." The article disclosed bits of information from secret negotiations that would settle the states' claims against the tobacco industry. "The talks by Phillip Morris Cos. and RJR Nabisco Holdings Corp. represent an extraordinary turning point in the four-decade-long controversy over cigarettes' toll on the nation's health."

Discussions continued for months, however, before eventually leading to what is called "June 23rd," the name for the settlement agreement which was reached on that date. In this agreement, Big Tobacco would have succumbed to FDA regulation, given up the Marlboro Man, Joe Camel and other advertising symbols, and would have paid unprecedented amounts of money to the states and the federal government. In exchange, the tobacco industry would have received protection from class actions and immunity from past actions.

Believing settlement was imminent, suits that had come up to previously scheduled trial dates were settled by state Attorneys General and the tobacco defendants. These included Mississippi, Florida and Texas.

To effectuate some of the provisions of June 23 (*e.g.*, FDA regulation, civil action immunity), Congress and the White House were required to approve the agreement. Several Congressional hearings were held on the settlement and I testified before the Senate Committee on Environment and Public Works and the Senate Commerce Committee.

The White House, however, remained silent, giving no indication to Congress or the American public, as to the position they would take on the agreement. The September 18, 1997 edition of the *Topeka Capital-Journal* reports the position President Clinton eventually took. "His decision leaves the summertime tobacco deal an orphan, with no action this year and questions about how Congress could address the issue in 1998. By January, cigarette makers probably will be deep into lawsuits in Texas and Minnesota that could remove their desire to compromise."

In the same edition of the Topeka paper, I criticized the President's timing. "Had Clinton spelled out more quickly his concerns over the settlement reached last March between the nation's attorneys general and tobacco companies, amendments might have been made and legislation approved by Congress this fall, Stovall said."

The newspaper article memorializes a prediction that demonstrates how ineffective my crystal ball is. "She remains optimistic that Congress will enact tobacco legislation. 'I believe there is a commitment by the congressional leadership,' she said. 'There is a lot of pressure from folks out there, and I think Congress will listen."

Congress did not, however, feel sufficient pressure to pass tobacco legislation along the lines of the June 23 agreement, and when Congress adjourned for the winter recess it was generally acknowledged that no approval would be forthcoming.

In May of 1998 Minnesota's case settled after four months of trial. In June 1998, the Attorneys General held their summer meeting in Colorado and were briefed on secret negotiations which had been taking place between some Attorneys General and the major tobacco manufacturers. The negotiations continued throughout the summer and fall. The final proposal was presented to the public in mid-November. The options to states were clear cut: In or out.

On November 20, 1998, I announced that I intended to enter the settlement agreement hammered out between the states and Big Tobacco ("Master Settlement Agreement"). The MSA provided for injunctive relief as well as monetary payments to the states, believing it was the best resolution of the Kansas case. The injunctive relief was more than any court could award and the monetary payments were assuredly greater than a Kansas damage model could support.

In the end, every state and territory - even the most ardent critics of tobacco litigation - sued the tobacco manufacturers so that they could share in the monetary settlement provisions of

the MSA. Sharing in the $206 billion payout over 25 years made many Attorneys General overcome their aversion to suing the industry.

1998 Tobacco Litigation Attorney Fee Limit Legislation

The Attorney General's Office appropriation for FY 1998 and FY 1999 contained a proviso authorizing expenditures for the purpose of renegotiation and amending the state's contract with the three law firms representing it in the tobacco litigation. The proviso, found at 1998 Kan. Sess. Laws 220 § 50, provided for a cap of $20,000,000 on the contract and contained a sentence that stated:

> "In the event a settlement is concluded with a provision for the payment of attorneys fees and expenses by award of an arbitration panel from funds provided by the defendant tobacco companies, counsel will seek the recovery of their reasonable expenses and attorney fees in accordance with that arbitration process and will elect not to seek the same from the state of Kansas pursuant to this contract."

Seeking payment of fees and expenses from the tobacco companies was not a problem. Unlike New Jersey, Maryland and Utah, our counsel never even threatened to file an attorney's lien on the proceeds of the tobacco judgement. Prior to the start of the 1998 session, Entz and Chanay had not only agreed to waive the right to recover fees and expenses from the State if a national arbitration panel determined such claims, but had allowed Kansas to deposit its $50,000 received from the Liggett II settlement with no call for fees or expenses.

The Master Settlement Agreement itself requires a waiver of contract fee rights if, and when the attorneys and tobacco companies agreed on fees and expenses. And while not required under Master Settlement Agreement, in November of 1999, before the Tobacco Fees Arbitration Panel even convened to hear the Kansas legal counsel claim, all of the attorneys agreed to waive their contractual fee rights and abide by the decision of the Panel, regardless of what that decision might be.

There were, however, two problems with renegotiating the contract as directed by L. 1995, Ch. 220, § 50, one was the cap, the other was an indication from state officials that in the 1999 Legislative session, additional amendments would be considered to further modify the contract. After the enactment of the proviso an amended contract using the wording in the appropriations bill was presented to counsel. I personally sought the local and national counsel's agreement to the amendment.

Even after the Legislative Budget Committee's meeting of September 21, 1998, during which members indicated that after the failure of the Congressional settlement the contract would again be reexamined and further demands or amendments inserted into the Office's budget, Senior Deputy Attorney General John W. Campbell went to see Dick Scruggs in an unsuccessful attempt to secure an amendment. Counsel would not agree to the amendment.

In October of 1998, with negotiations on a non-Congressional national settlement in progress, [note - Joe Rice of the Ness Motley firm was the only private attorney for the states in the negotiations] and with oral argument set for the tobacco companies motion to dismiss, the Office placed want ads in the Kansas Register, the Kansas Bar Association's Journal and the Kansas Trial Lawyers Association Journal seeking new counsel for the litigation. The ads were published in November, the earliest possible date. Shortly before the ads were published, RJ Reynolds Tobacco Company and Brown and Williamson had returned to the negotiating table and that settlement was again a real possibility.

The case was settled and Kansas was awarded its billion dollar-plus judgement, prior to negotiations with prospective new counsel.

Provisions of the National Settlement

On November 23, 1998, the Attorneys General and other representatives of 46 states, Puerto Rico, the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, Guam and the District of Columbia signed an agreement with the five largest tobacco manufacturers (Brown & Williamson Tobacco corporation, Lorillard Tobacco Company, Philip Morris Incorporated, RJ Reynolds Tobacco Company, Commonwealth Tobacco, and Liggett & Myers).

The agreement settled all antitrust, consumer protection, common law negligence, statutory, common law and equitable claims for monetary, restitution, equitable and injunctive relief alleged by any of the settling states. The states will receive hundreds of billions of dollars from the settlement which runs in perpetuity.

The settlement prohibits targeting youth in advertising, marketing and promotions by: banning cartoon characters in advertising; restricting brand-name sponsorships of events with significant youth audiences; banning outdoor advertising; banning youth access to free samples; and setting minimum cigarette package quantity at 20 cigarettes.

In addition, the settlement requires the tobacco industry to make a commitment to reducing youth access and consumption. It disbands tobacco trade associations. It restricts tobacco industry lobbying. It opens industry records and research to the public.

The settlement provides continuing court jurisdiction for implementation and enforcement. It establishes a states' enforcement fund ($50 million one-time payment) to be administered by the National Association of Attorneys General.

The settlement provides for the tobacco industry to pay the states' attorney fees (funded separately from the billions in payments to states). It requires the industry to reimburse states for in-house attorney fees. The settlement agreement does not, per se, effect contracts states have with outside counsel, but permits states to seek reimbursement from the settlement if the state has paid the fees of an outside counsel and the outside counsel failed to pursue either a liquidated fee agreement or arbitration through the settlement.

Under the settlement, outside counsel can either negotiate a liquidated fee agreement or go through arbitration. The liquidated fee agreements will be paid from a $1.25 billion pool over a four-year period. The industry will pay whatever the arbiters award, but payments will be subject to a $500 million per year cash flow cap.

Under the settlement the states will receive Initial Payments of approximately $12.742 billion. In addition, the states will receive Annual Payments, beginning April 15, 2000 estimated at $183.177 billion through 2025. The Kansas share is estimated at $1,633,317,646 or 0.8336712% of the total moneys deposited in Settling States Initial Payment and Annual Payment Escrow Accounts. The amounts stated are estimates because of the eight factors that can increase or decrease payments due from the tobacco companies. A chart is attached to this report outlining those adjustments as well as a written explanation provided last year to the Senate or House Ways and Means Committee.

In addition, the settlement established the Strategic Contribution Fund to be paid into by the tobacco companies during the years 2008-2017, estimated value - $8.61 billion. Kansas will receive an estimated $159,305,113 or 1.8502336% of the moneys deposited in the Strategic Contribution Fund. Again, the amounts stated are estimates because of the eight factors that can increase or decrease payments due from the tobacco companies. A chart is attached to this report outlining those adjustments.

In addition, the settlement established a national foundation known as the American Legacy Foundation. The Foundation was created by the National Association of Attorneys General (NAAG) and is governed by a board of directors. NAAG, the National Governors Association and the National Conference of State Legislatures each have two representatives on the board. The Foundation will study and develop methods to reduce youth use of tobacco products. The American Legacy Foundation is funded at $25 million a year for the next ten years. The Foundation will also oversee the National Public Education Fund, to be funded $300 million a year for the next five years or so long as 99.05% of the cigarettes sold in the United States are manufactured by tobacco companies who have signed onto the settlement

Arbitration of Attorneys Fees and Expenses

The June 23rd Agreement between the Attorneys General and the tobacco companies would have resulted in $368.5 billion to the states over 25 years. While it took months for the deal to implode because of lack of support from Congress and the White House, the speculation as to the Kansas attorneys fees began.

"Stovall's former firm may reap $250 million," shouted the headline of the Salina Journal on September 19, 1997. Other papers in the Harris News chain carried essentially the same article which merely took the 25% cap on attorney fees in the contract and multiplied it by the estimated $2 billion Kansas would receive in the settlement. The reporter minimizes the fee cap and the fact that, under the contract, the local court would actually determine the amount of the fees based upon reasonableness. Such a decision would be bound by the Kansas Code of Professional Conduct and the article begrudgingly mentions that "it is unlikely, legal experts say, that any Kansas judge would consider $250 million a reasonable fee. . . ." Nonetheless, this is the article that rightfully concerned legislators and members of the public.

My written response to the article, which appeared in several papers, addressed the suggestion that Entz & Chanay would receive $250 million. "It will not happen!" I wrote. I proceeded to remind readers that the contract was a contingency and the lawyers had taken the case without any promise or guarantee of payment.

"Because this was 'cutting edge' litigation, I had to have a firm I knew and trusted. I was once associated with Entz and Chanay. I had, and still have, more trust and faith in its partners that any other lawyers I've ever met. I knew they would work hard, represent the interests of Kansas expertly and would not have their judgment clouded by inappropriate influences."

My response apparently did little to calm the reactionaries and a bill was introduced in the 1998 Legislative Session to direct me to renegotiate the contracts and cap the fees at $20 million.

The unrelenting hype surrounding the likely attorneys fees prompted legislators to request a Legislative Post-Audit examination, in part for the purpose of reviewing how I came to hire Entz & Chanay for the tobacco litigation. After conducting interviews with pertinent parties, examining the correspondence, contracts, and other documents, and looking at the pleadings, the Post Audit noted that ". . . the Office made efforts to identify or advertise for, interview, compare, and select firms they thought could do the best job for the State. . . ." (Post-Audit page 25). (Previously provided to the Tax Committee Chair).

The Audit concluded:

> "When people think of conflicts of interest in awarded State contracts, they tend to include such things as awarding contracts to

> friends, business associates, or political contributors. While such contract awards don't fall under the definition of conflict of interest contained in State law, they can create at least the appearance of favoritism.
>
> "Given the nature of many professions, it would be difficult for any elected official to avoid making contracts with individuals or firms they've worked with in the past, or who've made contributions to their campaigns. The current Attorney General's Office is no exception." (Post-Audit, page 25).

On October 8, 1997, an article appeared in the *Topeka Capital Journal,* titled "Audit deems Stovall's hiring of donors legal." It quoted me responding to the audit. "I do not have an interest in any private law firm. Legislative Post Audit did not find a hint of any violation of any of the state's conflict-of-interest laws." An article in the *Kansas City Star* published the previous day was titled, "Attorney general not in conflict, auditors report." The article noted the contract for the tobacco litigation went to my previous employers but reported, "Despite that, the auditors found the awarding of the contracts did not violate the state's conflict of interest law."

Notwithstanding the explanations that I have made as to why I selected Entz & Chanay and the "seal of approval" from Legislative Post-Audit, I have heard from people who remain unhappy with my choice. Some of my explanations were overridden by inaccurate information provided by others.

> "One of the key - but least mentioned - provisions in the settlement stipulates that the tobacco industry will pay the states' lawyers. That makes it a private transaction not open to the public - even though the attorneys receiving payment were hired by Kansas Attorney General Carla Stovall to represent the people of Kansas."

The Wichita Eagle, December 13, 1998, told the Legislature, public and media that I would make the fees public as soon as they were made available. Indeed, on January –, 2000 within a couple of hours of receiving the decision of the Arbitration Panel, I called a press conference to make public the decision and answer any and all questions.

> "What she still needs to answer for is why she gave the cash coup to her old cronies and campaign supporters, passing up a nationally renowned products-liability firm that says it was ready and willing to take the case." *(The Wichita Eagle*, December 17, 2000).

"Ready and willing" demonstrates my rationale to select Entz & Chanay, as they did not require a guaranteed percent - with negotiations beginning at 25 percent.

Additionally, this was not a products liability case! The Kansas case did not allege any product liability - nor did the cases of other states. Even in the discussions with Hutton & Hutton and Morrison & Hecker, as they each listed the causes of action they thought would be appropriate, neither mentioned products liability! So why should I have hired a products liability firm?

> "At the time of the announcement, Stovall advanced two reasons for the choice of Entz & Chanay. The first was that the firm had expertise in handling Medicaid reimbursement claims. That would be well and good, retorts Tony Powell, chair of the committee that reviews the judicial budget, if this were a Medicaid case. But as he notes, the case actually involves tort theory, 'a totally different issue.'" *(Ingram's, March 1999).*

Actually, this ***was*** a Medicaid reimbursement case! A first year law student reading the pleadings could have discerned that.

As we now know, the June 23 agreement - which prompted the scrutiny of the attorneys fees - fell apart from lack of action at the federal level and a new round of negotiations got underway. This settlement was reached in November of 1998 and resulted in $206 billion for the states over 25 years. Kansas' predicted share was to be $1.6 billion.

An important part of the MSA provided an alternative means for the states' attorneys to be paid. Instead of coming out of the states' share of settlement proceeds, as is almost always the case, the tobacco companies agreed to pay the costs. Two mechanisms for payment were established. . . .

In December of 1999, *The Reader's Digest* published a story that suggested the Kansas fees to Entz & Chanay might reach $196 million. They cite no source for that guess, however, two legislators jumped upon the statement. This triggered another round of speculation about attorney fees that were just as baseless as the $250 million that was earlier touted.

All the Kansas firms agreed to release Kansas from the 1996 contract and accept whatever amount the Arbitration Panel determined was reasonable. The Release was effective on November 1, 1999.

The Release was important when one looks to events in other states where lawyers refuse to release the state from its contract. Some lawyers have filed liens against the state tobacco settlement proceeds to protect their fees.

The MSA provided that *all of the costs* of the litigation would be borne by the tobacco companies. The Kansas Attorney General's office submitted a bill for $233,000, which was paid to Kansas in 1999. The Kansas legal team will be paid by the tobacco companies as well.

This is a key - and critical - benefit of the settlement. Normally, any attorneys fees are paid by the client and the client's settlement or judgement is reduced by the amount of attorney fees. In this case the state's settlement is not reduced one dime by cost, expense, or attorney fees. The states that signed at the eleventh hour merely to participate in the payments, and had no attorney fees to be paid by the tobacco companies, are not receiving any more money than the original formula established, refuting the oft-heard argument that Kansas' share was reduced by attorneys fees. Kansas gets all of our apportionment - not reduced by any attorney fee payments.

States were also awarded a portion of the Strategic Contribution Fund, which allotted money to states based upon the efforts it contributed to the overall litigation and settlement. Kansas was awarded $159 million. This will be paid to the general fund beginning in 2008 through 2017.

As stated above, the settlement provided for the tobacco industry to pay the states' attorney fees. Acting pursuant to the provisions of the settlement's Model State Fee Payment Agreement and the appendix to said exhibit, i.e., Protocol of Panel Proceeding, Kansas' attorneys submitted a claim to a three-member arbitration panel. Various tobacco attorneys fees arbitrations panels have ordered tobacco companies to pay more than $8 billion in fees to lawyers who prosecuted the state's suits against them.

In prior rulings in tobacco attorneys' fees claims, panels had awarded the following:

ATTORNEYS' FEES FROM OTHER STATES

	State Award $ in billions	Arbitrations Fee Award $ in millions	Percent of 25 yr. payout
MS	4.1	1,430	34.9
FL	13.2	3,431	25.99
TX	17.365	3,299.4	19.00
MA	8.327	775	9.31
HI	1.383	90.2	6.52
IL	9.352	121	1.29
LA	4.645	575	12.37
IA	1.938	85	4.4
KS	1.793	54	3.0

The panel members which considered the Kansas Outside Counsel claim were truly a distinguished group. The tobacco companies chose one of the panelists, the Kansas attorneys another, and those two panel members agreed upon a third member.

The panelist chosen by agreement was Dr. John Wells, Ph.D. After graduating from the University of Kentucky, he earned a Master of Science and later his PhD from Rutgers University. Dr. Wells is the former Director of the Federal Mediation and Conciliation Service. A nationally recognized expert in dispute resolution, he is also an academician who was a Senior Research Fellow at the JFK School of Government, Harvard University and later served as President of John Gray Institute. His practical experience included a term as the Secretary of Labor in the State of Kentucky. He has published numerous articles in academic and law journals.

The panelist chosen by the tobacco companies was Judge Charles B. Renfrew (Ret.). With a BA from Princeton University, he graduated from the University of Michigan School of Law. A former President of the American College of Trial Lawyers, he was also United States District Judge for the Northern District of California, Vice President of Legal Affairs for Standard Oil Company of California and maintained a successful private practice. He has published numerous law review articles.

The panelist chosen by the attorneys was Harry Huge. With a BA from Nebraska Wesleyan University, he graduated from the Georgetown School of Law. A member of the bar of Illinois and South Carolina, as well as the District of Columbia and the United States Supreme Court, he has tried cases in New York, Mississippi, Alabama, the District of Columbia, Illinois, California, West Virginia, Texas, and Georgia. He has also argued cases before the D.C., 10, 5, 9th, and 2nd United States Circuit Courts of Appeals.

The panel considered evidence presented by both the tobacco companies and the attorneys. To the facts they applied the rules of the American Bar Association on fees, the same rules upon which the Kansas Rules of Professional Conduct are based, and made an award. It was their decision that the fee awarded to the Kansas attorneys , local and national counsel, should be $54 million, or 3 percent of the first twenty-five years of the Kansas portion of the settlement.

Attached is their written decision. (Previously provided to the Tax Committee Chair). It is based on various factors, including the results obtained, valued at more than $1.7 billion, the tobacco companies estimate that the firm of Entz & Chanay alone spent 10,000 hours on the case, and Kansas' important contribution to the national resolution of the tobacco litigation. As with any decision, there can be good faith disagreements on the results, but any attacks on the panel's qualifications to make such a decision are unjustified.

The tobacco companies must now pay all of the costs, expenses and fees of the tobacco litigation, their own, the State's cost and the fee's of all of the Kansas attorneys, both in and outside of government.

One provision of the MSA was to require the tobacco companies to fund a national foundation which would have two purposes. Payments of approximately $1.5 billion will be used by the foundation to reduce teen smoking, substance abuse and prevention of diseases associated with tobacco use. To facilitate these objectives, the foundation will engage in a nationwide

advertising and educational program to counter youth tobacco use; track and monitor youth smoking; and fund research on factors that influence youth smoking and substance abuse.

The MSA provided the framework for the foundation's governance. The Board of Directors would be comprised of two governors (selected by National Governors' Association), two legislators (selected by National Conference of State Legislators), and two Attorneys General (selected by the National Attorney General's Association).

It was my great honor to be selected by then President of NAAG, Mike Moore, to be one of two Attorneys General to serve in this post. Washington Attorney General Christine Gregoire, who was the state's lead negotiator for the November 20 agreement, is the other Attorney General.

Five additional Board members were selected by the six elected officials. They include Steve Schroeder, CEO of The Robert Woods Johnson Foundation; Dr. Ken Werner, of Michigan State University School of Public Health; Dr. Lonnie Bristow, former President of the AMA; Jenny Lee, a student at the University of Miami; and Dr. Elmer Huerta, a physician in Washington, D.C.

The Children's Cabinet

The 1999 Legislature committed nearly 100% of the tobacco proceeds to children's issues and created the Children's Cabinet to recommend funding choices to the Legislature. Governor Graves gave me the honor of being one of his appointees to the Cabinet. At the January meeting, I was elected Vice-Chair of this Cabinet.

The mission of the Cabinet is "to identify, evaluate, and recommend funding, promote, measure and re-evaluate programs, prevention services and delivery services that directly benefit the physical and mental health, welfare, safety and overall well-being of children in Kansas."

The Cabinet expects outcome measures following successful implementation of recommended programming to result in improvements in:

*Pregnant women and newborns thrive
*Children are nurtured and lie in safe, supportive families
*Children enter school ready to learn and do succeed
*Youth choose healthy behaviors
*Youth become productive adults

Inherent in the healthy behavior choices of youth is the declination to smoke cigarettes. A modest sum of money was recommended for tobacco prevention programs but it is at least a beginning for somewhat increased state expenditures in this arena. It is also a recognition as to

what lay at the heart of the tobacco litigation - protecting children from seduction by Big Tobacco.

The Cabinet has finished its Final Recommendations to the Governor and Legislature for Fiscal Year 2001 and is proud of its work.

Future Tobacco Litigation
Revenue Stream Risks

"The unusual thing here is that we do have a product that everyone knows what it does." said Justice Stephen G. Breyer at last December's oral argument in the FDA tobacco regulation case. *Brown & Williamson v. FDA.*

Future tobacco consumption patterns are uncertain.

State allotments will rise or fall depending on several factors outlined in the MSA. One of the most crucial factors is the volume adjustment that will increase or decrease state payments based on the number of domestic cigarettes shipped, compared with a 1997 baseline. The volume adjustment becomes more complicated if tobacco company revenues stay level or rise, because another calculation is then applied to that adjustment. Estimates of future settlement payments are only educated guesses.

Moody's projects consumption declines of 12 percent in 1999, 2 percent in 2000, and 1.5 percent per year thereafter. Standard and Poor's projects declines of 10 percent in 1999, 3 percent in 2000, 2.5 percent in 2001, and 2 percent per year thereafter. With an inflation adjustment linked to the Consumer Price Index or 3 percent, whichever is greater, the amounts of money payable to the state may increase over current estimates starting next year.

Other outstanding variables that could affect consumption rates or state payments include: the federal governments lawsuit against tobacco companies to recover Medicare and other smoking-related federal health costs; suits brought by foreign governments; two major antitrust suits; a possible increase in the federal cigarette tax; individual lawsuits against the industry and states; possible Food and Drug Administration regulation of tobacco products and the pending Supreme Court case on this issue; the impact of the national smoking prevention and public education campaign and MSA marketing, advertising, and lobbying restrictions.

Immediately following the filing of the settlement and order of the district court approving the settlement there were two attempts to intervene in the case, one of which sought a portion of the settlement. Via Christi Region Medical Center, along with ten other hospitals, sought intervention and a share in the settlement. While such attempts resulted in protected court hearings in other states, for example Missouri, the attempt failed in Kansas and was dismissed by the district court in six days.

The second attempt at intervention was a call for the appointment of a special master who would determine the reasonable attorneys fees in the case. Somehow this would create a pool of money which the court could then distribute to support worthy social projects. Two days after the motion was filed it was denied before we could respond.

Since that time, Kansas, along with the other parties to the settlement and the states' Attorneys Generals, are currently being sued by five importers of cigarettes. *PTI, Inc. et al. v. Philip Morris Inc., et al.* United States District Court for the Central District of California Case No. 99-08235. The cigarettes importers alleged that the settlement violates the Sherman Act, several California laws and is a violation of the Commence, Equal Protection and Due Process clauses of the United States Constitution. The suit seeks to enjoin the implementing, effectuating any and/or enforcement of provisions of the settlement.

The plaintiffs in that case sought a temporary restraining order to prevent the December's distribution of the settlements first and second Initial Payments. The states opposed the motion and the court refused to stop the flow of money. By those distributions, Kansas received over $38 million. The states have filed a united single motion to dismiss. That motion is currently before the court.

Conclusion

I am proud, and will always be proud, of the role Kansas played in the national tobacco litigation. My initial decision to file the lawsuit was met with more criticism than praise as I anticipated - but I pursued the litigation because it was the right thing to do, in my view.

The settlement will bring to Kansas more than $1.6 billion. This is historic and can, if we stay true to the 1999 Legislature's desire to dedicate the monies to children, make qualitative changes in the lives of Kansas children unlike anything we've ever dreamed of.

The injunctive relief will allow the next generation of Kansas children to grow up without being deluged with ads of the likes of Marlboro Man and Joe Camel and advertisements on billboards near schools and in magazines with teen readership.

One of the three firms I hired to represent Kansas in this case formerly employed me. This firm is being treated no differently than any other firm in the country that represented states in the tobacco litigation.

The Arbitration Panel - in one of the few votes without dissent - determined the fee that was reasonable for the Kansas work. It amounts to 1.5% for the local firm. I could not have hired any

firm in August of 1996 that would have contracted for 1.5% of any eventual judgment or settlement. Ask any lawyers you know! An editorial from *The Salina Journal* was reprinted on April 10, 1998 in the *Parsons Sun.* "When state lawsuits against tobacco companies began a few years ago, few people thought there was a chance in heck of getting any money out of them. For a quality law firm to join in tilting at those windmills, it would have to be offered a healthy, contingency fee." In August of 1996, no one would have postulated that 1.5% was "healthy."

The state of Kansas is paying nothing for our lawyers. Big Tobacco is paying 100% of the fees - and one of their representatives was on the panel making the decision, and it was a 3-0 decision.

After hearing and evaluating the criticisms lodged against me, I have concluded I made two transgressions:

1) Failing to have a quality crystal ball. Had I had one, I could have done things differently: Not filed the suit in August 1996 but waited until the dye was cast, settlement a foregone conclusion, victory obvious, and simply "cashed in," letting my more courageous colleagues take the political and legal risks and do the "heavy lifting." This would have allowed me to slide by without hiring any lawyers - in-house or outside of the office.

2) Doing business with people I knew, trusted and respected - which has resulted in cries of unethical conduct.

I believe I was elected in 1994 and re-elected in 1998 (by 75% of the vote) to exercise my judgment, to take Kansas on the legal courses I believe are in our best interests, and to not sit on the sidelines and be reactive only.

I believe fighting for the sexually violent predator law in the United States Supreme Court was appropriate. I believe taking on the ill-conceived decision of the Federal Energy Regulatory Commission against our natural gas producers was appropriate. I believe continuing the battle against Colorado over the Arkansas River is appropriate. I believe initiating the formal fight against Nebraska over the Republican River was appropriate. I believe designating KBI's Number One priority as combating methamphetamine is appropriate. I believe advocating for children with all the energy and dollars available is appropriate. I believe protecting Kansas consumers from fraudulent companies that sell prescription drugs over the Internet is appropriate. I believe suing Publisher's Clearing House is appropriate. I believe speaking out in support of the death penalty has been appropriate. I believe criticizing the decision to pay $250,000 to a convicted felon whose conviction was reversed on appeal was appropriate. I believe charging public officials who have violated the law is appropriate. And I believe taking on Big Tobacco, when and in the manner I did, was appropriate.

It is quite obvious I have made political enemies in pursuing the courses I have over the last several years. Nonetheless, I would not have made different decisions in any of these cases just to have a smoother path now. I don't believe I was elected to sit on the sidelines and let the values and preferences of my political enemies dictate the actions of the office of Kansas Attorney General. I never have and I never will.

ORIGINAL TRANSCRIPT

BEFORE THE HOUSE TAX COMMITTEE

IN THE MATTER OF

HB 2821 - Imposing a Tax Upon Income Derived From Certain State Controversy Settlement Agreements

TRANSCRIPT

OF

PROCEEDINGS

taken on the 14th day of February, 2000, beginning at 9:30 a.m., at the State Capitol Room 519 South, in the City of Topeka, County of Shawnee, and State Kansas, before the House Tax Committee.

REPRESENTATIVE WAGLE: We announced earlier that we were going to have informational and investigative hearings over tobacco litigation issues. On Wednesday, we were to have a specific hearing on a bill that is to be introduced that would be a 50 percent tax on attorney fees for litigation that the state enters into that is of a national scope. I have been in communication with the AG's office about our intentions, and on Friday, the speaker of the house authorized for this committee that we have a court reporter in attendance so we can document every word as it is spoken. In addition, the court reporter can take an oath because the people that will be speaking to this issue have different viewpoints. We wanted to make sure all sides are represented fairly and their words are documented on the record.

I had in the past couple weeks been in communication with the AG's office. It was my understanding the deputy general would be here today, John Campbell, to address the history of the tobacco litigation. I don't

feel like this committee can enter into decisions about taxes litigation until they have the history. I was going to have two days of history and questions with the deputy, and Tony Powell and the attorney general here on Wednesday to state their positions on the income tax bill. As it turned out, the AG has decided to come in on Monday. I wanted to give her a chance to speak with the understanding that what we wanted to address, first, was the history of the litigation. So since we do have a court reporter present I do want to place you under oath.

GENERAL STOVALL: Because you don't think I would tell the truth otherwise? I find this a very unusual procedure.

REPRESENTATIVE WAGLE: It's not an unusual procedure. We've done this a number of times in the legislature. If the court reporter would take a minute and place the general under oath.

CARLA STOVALL,

called as a witness on behalf of the Committee, was sworn and testified as follows:

REPRESENTATIVE WAGLE: Since we do have a court reporter here, we do have to be careful about how the dialogue goes. I only want one person speaking at the time. It's up to the lady present with us today to record it verbatim. If we all start talking at once, she will interrupt us. I've given her permission to do that so we can have an accurate record of what's being spoken. General Stovall, welcome to the committee. We do hope what you'll start with is give us a brief history of how we came about. You understand we are particularly interested in how you contracted with Entz and Chanay to do the work.

GENERAL STOVALL: I've been made aware of that.

REPRESENTATIVE WAGLE: Okay. The floor is yours.

GENERAL STOVALL: Thank you very

much. I appreciate that. I would wish you all a happy Valentine's Day. This is certainly where I wanted to be on Valentine's Day. After having listened to the first little bit of your testimony this morning, I realize this is why it's the first time I've come to the tax committee, not that what I find that you do is not riveting and fascinating. However, yeah. You have difficult work to do.

Madam Chairman, I appreciate the opportunity for you to allow me to visit today. As you know, you did not invite me to come until Wednesday. On Wednesday you wanted me to take a particular position on a tax bill that is introduced. It's not my position to take a position on a tax bill. I rarely take positions on tax bill. I would suggest if you think about taxing the attorneys that battled big tobacco, you might consider taxing the attorneys that defended they were in the mix as well. While John Campbell and my senior deputy was asked to come and give two days of testimony, it's my thought you certainly

have the right to have any questions answered by me directly. I wanted to come today. My hope is we can come and spend as much time as I talk about the litigation history itself. Certainly I understand your concern over the hiring of counsel. Legislative post audit I think did a pretty conclusory examination of that in 1997. Nonetheless, I'm happy to provide any information you want me to answer any question you have. The committee is to end at 10:30. You don't go into session until eleven. I'll stay until then. Perhaps we can wrap up a lot of this today. I know the entire week has been set aside for hearings on this. You have other important things to do and other tax bills to deal with instead of dragging this out all week long. We'll see how far we get.

Let me begin with the landscape of the tobacco lawsuits. It was in the 1950's rigidly tobacco lawsuits were being filed. They all lost without exception. There weren't any successful case. No plaintiff until 1997 had ever recovered money against

big tobacco. In 1993, Mississippi Attorney General Mike Moore filed the very first medical reimbursement lawsuit on behalf of his state. Soon after that Florida, Massachusetts, Louisiana and West Virginia entered -- I want these distributed now. If somebody from my staff could do that. What we've prepared in the last week since we knew we were asked to testify is a history of the tobacco litigation.

REPRESENTATIVE WAGLE: Would you help -- Edith, help so we can get this around so we can all see what she's discussing. I'm sorry to interrupt.

GENERAL STOVALL: Nationally as well as within the state -- what I'm going to do is certainly not read all this. It's an incredibly lengthy document. John and I have spent a tremendous amount of time this last week on this document, so I would say if you have interest, if you have questions, please take the time to read that, because it is very thorough. What I would like to do, then, is to simply summarize from that document. When I took office in 1995, I was

vaguely aware of these Medicaid lawsuits that had been filed in 1993, as a new attorney general, I had enough on my plate not worrying about getting into anything I viewed at that time as being so far afield as the Medicaid cases. By 1996, I was beginning to change my mind. I became pretty intrigued at the lawsuits, especially as I became to know the particular attorneys general involved that had filed those suits over the years.

Additionally, in March of 1996, Liggett 1 was entered. Liggett is a very small tobacco company, has the smallest percent of the market share of those that are considered the majors. Liggett had been sued with all the tobacco companies. They settled in March of 1996 with the states then that were on file, about five of them. Shortly after that then other states, Washington, Maryland, Connecticut and Louisiana filed suits in 1996. And after attending lots of meetings, reading a lot, talking to a lot of people involved, I decided it was in the best interest of

Kansas to get involved in this tobacco litigation. My rationale was twofold. No. 1, Kansas' estimate of Medicaid expenditures for smoking related is about $800 billion a year. The state didn't get to say whether or not our indigent citizens smoked or whether or not we would pay those costs. Secondly, 30 children in Kansas begin smoking every day, and ten of them will die 10 to 12 years prematurely if they continue smoking. That was higher than the national average. Those were the two reasons for the suit.

Once having made the decision to file the suit, we had to decide how it was actually going to take place. At that point in time in the spring of 1996, no state was handling the case in house, that means within their own staff. All of them had national law firms and local counsel. We tried to estimate what it would cost us internally to do this case in-house. Our estimate about $7,000,000 over three years. Hiring about 15 lawyers, 10 to 15 paralegals and secretaries and other support staff. I

think I was pretty accurate in predicting that that level of funding would not be coming from the legislature, so we ruled out that possibility. Certainly some of the states have handled the case internally, didn't hire outside counsel. Those-- let me be very, very clear, they sued when the national suit was eminent, get a petition on file, never have to do discovery, never try the case because everybody knew about the settlement. It was in all of the papers. Had those attorneys general miscalculated and we not settled, you better believe they would have hired outside counsel or put a significant number of staff on their own office payroll. But in 1996, nobody was doing it in-house.

Knowing that we needed outside counsel, I wanted to have Mississippi's lead counsel Dick Skruggs. Coincidentally he was the best friend of the Mississippi general. They had gone to law school together. Their level of trust was such there wasn't even a contract between the State of Mississippi and that law firm. The understanding always

was and what they had always told us was that whatever the court determined is what the lawyers would be paid. Any fees would have to be judged reasonable by a court. Well, John and I, my senior deputy and I, had come to know Dick through some of these meetings on tobacco, certainly had a belief if we were going to take on big tobacco, we wanted to do it with the expertise and the knowledge that Dick Skruggs brought to the table. He was the first plaintiff's lawyer to sue on behalf of a state in any of these cases, so that was very important to us. At that time, though, Dick's firm was not willing to front expenses for the Kansas litigation. It's pretty understandable, because they had fronted expenses for Mississippi and Florida, and they were running about 15 million dollars at that time.

Discussions then began with a firm you've heard a lot about in Wichita called Hutton and Hutton. Actually in March of 1996, before I had even made up my mind that I was going to sue, we had a letter from

Hutton and Hutton expressing their interest. And we subsequently met with them once I decided to sue. What they expressed to John and I was they would be willing to front the expenses of the litigation, but they wanted a 25 percent contingency fee. Well, John and I believed very strongly in the merits and the rightness of our case. We didn't know whether or not we would prevail. Remember, nobody had ever collected against big tobacco before, but even with that dismal climate, we weren't willing to guarantee a percent of anything because this was absolutely untested and untried and there were absolutely too many things nobody knew. We weren't willing to guarantee a percentage. Hutton and Hutton started at 25 percent, and they indicated they would come down from that percentage. It wouldn't be stuck there necessarily, but that they would not sign a contract if a particular percent wasn't guaranteed to them. When they were interviewed by the legislative post audit in 1997, one of the brothers, either Andy or Mark, I don't remember which, made the

phrase to the post audit interviewer that says "having the phrase up to in the contract was akin to not having a contract, that there was no guarantee of what you would be paid." So that was the distinction, the problem between our office and Hutton and Hutton. There was another law firm, Morrison and Hecker. They are from Kansas City. They expressed interest in the case, and they came and visited with John and I. John and I told them they would have to front the expenses, and they sort of heard that with one ear but on the other hand presented a couple scenarios to us, neither of which involved fronting expenses. One, they would take a ten percent contingency fee but bill us on a discounted hourly rate for all their work. The second option was there would be no contingency but simply a discounted hourly rate. Their estimate was that would run about a million dollars reach year for five years. Again, there wasn't any way that my office had the budget for that or that I thought the legislature would appropriate it. One of

the lawyers then called Morrison and Hecker -- from Morrison Hecker called us to be very clear they'd gone back and talked to their firm, but the firm was unwilling to front those expenses that "could potentially run so high." And that was the phrase that was used to legislative post audit. That left us then only with Hutton and Hutton who again were willing to front expenses with a consortium of plaintiff's firms they would put together. John continued to visit with them by telephone to see if they could get them off an insistence of a particular percent.

Then in June of 1996, at the summer meeting of attorneys general in St. Louis, John and I met with Dick Skruggs and his partner with another law firm by the name of Ron Motley. They were both representing Mississippi. For the first time at that June meeting, Dick and Ron Motley agreed they would, to get Kansas in the litigation, front the expenses for our lawsuit. That changed things dramatically as you would imagine for us. So John came back, talked

again to Morrison and Hecker. We were hopeful now that somebody would be fronting expenses that they would be willing to get involved because that had been their sticking point. In that call, though, the attorney indicated since their last conversation with us, they had determined they had a conflict of interest and could not represent us against the tobacco companies. That information was provided to legislative post audit as well. While Hutton and Hutton are fine lawyers, they didn't have experience in tobacco with the exception of one case. They had been involved in the Castano case, a case involving 60 law firms. That was a pretty innovative lawsuit, filed as a class action. In May of 1996, the class was decertified. It wasn't one big case which had been their master plan. The single case they have tried with regard to tobacco resulted in a loss. But nonetheless, we were still -- we had been discussing the cases with them.

After all of these issues, though, it became apparent to me that what I needed in

4.15

this litigation was somebody that I really trusted. It was becoming very clear from the state media, the national media and comments from people in general that I was taking an enormous legal risk and political risk in filing this lawsuit. So I wanted frankly somebody that I knew and that I trusted. Bob Vancrum who is an associate with Morrison and Hecker would have fit that bill, but Bob's firm was not interested any longer. So one morning I picked up the phone and called Jeff Chanay. I had worked for Jeff and his partner Stu Entz for approximately two years in the early 1990s. Jeff and I were in rotary together, and after I left the parole board in 1992 he offered me a job. Shortly after I took a position with them, I ran for attorney general. They allowed me to work part time while I campaigned and establish the campaign office in the basement of their office building. As some of you may remember in 1994, I had no statewide name, identification, nor any personal or family money. Unfortunately, the latter two have

4-16

not changed. This was in very sharp contrast to my principal opponent in the primary. My parents, my friends and my employers contributed generally to my campaign in 1994, and I did manage to win the primary and the general election. When I turned to Stu and Jeff in the summer of 1996 to consider representing the state and tobacco litigation, it was not as some have suggested to reward them for having supported me in the campaign. Instead, I was once again calling upon friends who had come through for me in the past who I knew could be trusted for their personal loyalty and for their professional abilities. On the phone I asked Jeff if he would take the case for me as a favor. The terms, forego any hourly payment, receive nothing if we don't prevail. If we prevail, take whatever it is that the judge sets and go up against big tobacco who has never paid a dime to a plaintiff in their history. That's what we asked them to do. There was no thought, members of this committee, that this lawsuit would eventually result in the largest

commercial settlement in the history of the world. No one knew that in August of 1996.

After that conversation, then, with Jeff in which they agreed to consider taking this case under those terms, I sent an E-mail to John confirming that discussion. We ended up and did get a contract with Stu and Jeff as well as two national law firms, Ness Motley out of North Carolina and the Dick Skruggs firm out of the Mississippi. The contract did not require counsel to record hours. This was insisted upon by the national counsel who were plaintiff's lawyers, and they had no mechanism to keep track of hours. When you do plaintiff's work and only take contingency fees, I am told, I certainly am not a plaintiff's lawyer, there is no reason to keep track of hours. It doesn't matter. You can work a jillion hours on a case, but if you don't win it doesn't matter how many hours you spent. You only get a percent of the recovery. That provision was insisted upon not by local counsel but by national counsel. That was consistent with their

contracts. The contract, by the way, Hutton and Hutton had offered us had no requirement for them to keep track of hours, either.

From day one, I have been very, very open about who I hire to represent Kansas. The day we filed the lawsuit, I distributed a Q and A sheet. It was put together with questions that we thought would be asked by people, members of the media and the public to understand what this tobacco litigation was all about. One of those questions dealt with who it was that I had hired as counsel, and I indicated that I had hired Entz and Chanay of Topeka, that I had formerly worked for them, and one of the important reasons I hired them was because of my level of trust with them personally and professionally. Who I hired to do this case for us was a non-issue for almost a year. Only when it appeared that Kansas would get money and that our lawyers might get paid did anybody care who was doing the work for us. When it looked like Kansas would get any money, nobody cared what lawyers weren't going to get paid.

Let me talk to you in particular now about the litigation in Kansas what those lawyers for us actually did. There were three separate cases. The first one-- and I might add, these are all the pleadings from the cases that have been provided to your committee. It's fascinating reading, about as fascinating as your earlier discussion when I came in this morning. The RJR case is what I call it in short form. It really involved a lawsuit against RJR which is R. J. Reynolds, Philip Morris, Brown & Williamson and Lorrilard. Our petition contains 262 paragraphs and 7 causes of action. We alleged violations of the Consumer Protection Act, Restraint of Trade, Unjust Enrichment, Indemnity, Breach of Voluntarily Undertaken Duty, Civil Conspiracy to Commit Breach of a Voluntarily Undertaken Duty, Injunctive and Declaratory Relief and Interference with Obligation. The crux of our complaint was medical reimbursement for tobacco-related costs to Kansas based upon the morbidity and mortality of indigent citizens. It was a

taxpayer recovery suit. Not a product liability case as some have suggested. After we filed our lawsuit against those four defendants, you might imagine they very quickly obtained counsel, and dozens and dozens of lawyers were hired nationally and locally to defend tobacco. The first substantive pleading they filed was a motion to dismiss. I argued it on behalf of the state along with Steve Bozeman and a Chicago lawyer, Dan Webb. The judge took it under advisement and did not rule on it the entire 18 months the case remained on file. The second case, though, is the really important one. It is that the Liggett case. Liggett was who the first five attorneys general that sued settled with in March of 1996 before our case. Although the RJR case in Kansas was very quiet during the remaining 18 months, developments were occurring on other fronts. The five states had settled before we filed. So when we sued RJR in August of 1996, we did not sue Liggett because we calculated since they had settled with five states before, they probably would

settle with anybody that came later. Well, indeed, that is what happened. On March the 20th a settlement called Liggett 2, the second settlement was announced. It provided a minuscule amount of money but other concessions that were much more important. The CEO of Liggett publicly conceded that smoking causes lung cancer and other diseases and that the cigarette companies intentionally marketed to youth all in contradiction to what tobacco executives had said for years. Even more staggering than those admissions from an insider was the release of documents in Liggett's possession. All of the tobacco litigation was essentially a battle over documents. And for the first time now we have a tobacco company agreeing to turn over their documents to the plaintiffs. Not surprisingly, though, immediately after that settlement the other companies RJR, Philip Morris and the others raced to the courthouse to get a decision from the judge saying no, no, no, no, Liggett, you cannot turn over those documents. They got their

decision from a court in North Carolina. But because we had sued Liggett separately, we had a direct avenue to those documents. And shortly after Liggett 2 was settled, we filed a motion to enforce the settlement provisions which would give us access to those documents. When the RJR defendants in Kansas realized what they accomplished, they obtained an emergency ex parte order blocking the release. They claimed the joint defense privilege allowed them to keep Liggett from releasing those documents. Our local counsel was familiar with Kansas constitutional, statutory and common law, and they believed that Kansas did not recognize this joint defense privilege. On August the 1st, 1997, Jeff Chanay argued that position for the state, and Tom Wright of Wright, Henson, Somers, Sebelius, Clark and Baker, local counsel for Philip Morris, argued on the other side. The defendants were very confident about their position, and they alleged "the state engages in a mistaken and misguided game of semantics."

Despite the arguments of counsel in

October of 1997, Judge Jackson ruled that on this case of first impression, meaning it's never been decided in Kansas before, the state was correct and that the common law joint defense privilege is not recognized in our state. That was a huge decision, folks. The news of that decision hit both coasts at the same time. The Washington Post and the L. A. Times both wrote about the decision. The ruling could have implications, one paper said for other shielded documents including a million pages in dispute in Minnesota's case against the industry. The decision marks a crucial moment in tobacco litigation said Matt Meyers of the tobacco free kits. This breaks the log jam on the documents the industry has fought the hardest to keep secret. If there is a smoking gun in it for the first time in history, a plaintiff's lawyer will know it. The ruling by Shawnee County District Court Judge Fred S. Jackson further rachets up the pressure on a battled industry who hid the dangers and health effects of smoking of the American public for several decades. Well,

not surprisingly a decision like that was appealed. And even someone writing in support of the tobacco companies wrote "like chicken little, appellate lawyers should be cautious about claiming the sky is falling, and yet we respectfully suggest allowing the district court's ruling to stand here would have truly staggering consequences." This was a big decision. We were the only state in the country to break the joint defense privilege. You may have heard a lot about Minnesota and the documents that they got, but the biggest portion of documents were denied to Minnesota because they could not break the joint defense privilege. Had this decision ultimately been decided by the Supreme Court and from all accounts we believe would have been decided in our favor, Kansas would have been able to open up 680,000 documents to the public, the only state to get into a position to do that.

While this was under way in Kansas, events on the national scene were progressing dramatically. In a never anticipated occurrence, the attorneys

general and big tobacco negotiated a settlement that has been called June 23rd after the date of its accomplishment. The settlement would have resulted in 368.5 billion dollars to the states. The companies would have agreed to bury Joe Camel and the Marlboro man and regulation of nicotine by the food and drug administration. In exchange with congressional approval, the companies would be relieved of liability in class action suits and further punitive damage awards. The settlement was unimaginable in August of 1996 when our case was filed. Big tobacco had never paid a dime to any plaintiff, and now they were agreeing to pay 368.5 billion dollars. It was truly unbelievable. Not everyone, however, was enamored with the settlement, and it eventually failed to win congressional approval. It looked as though all the lawsuits were going to go to trial after all. And indeed Minnesota's case began in 1998. And then in May after four months of trial, it settled with the tobacco defendants and with unprecedented financial

4-26

terms. Another round of settlement talks, though, began led by different attorneys general, and after several months of wrangling behind closed doors, the final proposal was presented in mid November with a clear-cut in or out decision for each attorney general. After consulting with the governor, key legislators and the interim budget committee, I announced on November 20, 1998 that Kansas was in the settlement. This proposal called a master settlement agreement provided the certainty of injunctive relief and monetary payment that was not guaranteed at trial. Indeed, much of the injunctive relief, the changes in behavior the companies agreed to could never have been awarded by a court even after a successful trial. The only way to get rid of the Marlboro man and Joe Camel and the other insidious elements of the tobacco industry was a settlement like this. The master settlement agreement, in addition to other things, made possible the payment of attorney fees of the states' lawyers by the defendants. This is a departure from the

norm in which lawyer fees are almost always subtracted from their client's recovery. The costs of Kansas' in-house counsel which was essentially John and myself plus our outside lawyers were going to be paid by the tobacco defendants. That mean's Kansas's $1.6 billion would not be reduced by a dime for the cost of getting it. All of that money was free and clear with no obligation for any costs or any expenses. To date, you may know you have already received in Kansas $38,000,000 representing the first two payments under the settlement. The bill that John and I submitted for our work has already been paid and gone into the children's trust fund where you directed last year all these monies were to go. An additional calculation of about $159,000,000 that will come to Kansas labeled a strategic contribution payment. That is in recognition of the role Kansas played in the national scene on this issue. It won't start to be paid, however, until the year 2008 and be made in installments through the year 2017.

As part of the settlement, though, a mechanism for the tobacco industry to pay was through a three-member arbitration panel. The tobacco industry would choose a member, the state's lawyers would choose a member, and the third one would be mutually agreed upon by the other two groups, the lawyers for both sides. Each side, the tobacco industry and the lawyers for the state would have an opportunity to present their case to the panel, and the panel, those three people, then, would determine a reasonable fee. While the agreement did not require the states' lawyers to walk away from the contract they had with each state, it didn't require that, it certainly gave that opportunity to happen and was very much in the state's favor for that to happen. If the lawyers took under their contract, then that meant it came out of the state's share. If they walked away from their contract and took away from the arbitration panel, big tobacco pays out of the pot they set for it the attorney fees. The three firms Kansas had released the state from its contract,

and they agreed to take whatever it was that the arbitration panel said was reasonable. They signed the release giving away any rights under the contract before they had even presented their case to the arbitration panel and had any idea of what they would get. So they gave up the contract. In my mind that is a tremendous show of good faith. Some states you should know have been sued by their lawyers who say, no, I don't want to take under the arbitration. I want my guaranteed percent under the contract. And there are states that had guarantees in their contract unlike us. Those states are now having to litigate against their lawyers who are suing the states and attaching liens to the state's share of the tobacco money. That is not what we're looking at in Kansas. As you know, in Kansas, the fee was determined just last month by the arbitration panel as -- and the decision was 54,000,000 total. As per the very first contract between -- among the parties, the national, local and my office, local counsel was going to receive

half and national counsel would receive half. That is still the way its been decided. The arbitration panel decision for Kansas was unanimous. It was a 3-0 vote, and one of the few cases I'm told decided without a dissent. The same afternoon that I got the decision from big tobacco -- from the arbitration panel, I'm sorry, I made the decision public as I promised I would from the very beginning. Local counsel, Entz and Chanay, will receive $27,000,000 over 25 years with no interest. This is about one and a half percent of the state's $1.6 billion share. In actuality, it will turn out to be much less because the state's share, as you know, is increased for inflation and volume adjustment. The lawyer's fees are not increased by nothing. It will turn out to be smaller than 1.5 percent. But as often seems to be in case over Topeka, the most frequently asked question in, for example, the Kansas v. Colorado lawsuit is how much money are we going to get from Colorado. When the lawsuit was filed in 1985 in that case, we

didn't even ask for money. All we wanted was Colorado to comply with the compact. But two years later the Supreme Court made the decision one state could ask for money for another state, so we amended our petition and asked for money. It wasn't the reason the suit was filed but seems to be the only thing that people focus on now. That is certainly how it is in the tobacco case. Injunctive relief has been overshadowed entirely by the money. Stopping the overt and covert market to children is an incredible feat. 86 percent of the young people that smoke smoke the three most heavily advertised brands of cigarettes. I don't find that to be a coincidence. We have failed to recognize the significant accomplishments of the lawsuit, ones that make me proud and always make me proud regardless of what criticism comes from my detractors over this lawsuit.

I would ask you to remember some points. The settlement resulted in the largest settlement of commercial litigation in the history of the world. The firms

signed on to represent Kansas at a time when big tobacco had never paid a dime to any plaintiff. Kansas counsel released the state from its contract without knowing what the arbitrators would decide to award them. Kansas counsel never considered suing the state or attaching liens against the state's share as they did in other states. I do not believe I could have gotten Hutton and Hutton or any law firm to sign a contract with me in August of 1996 entitling them to only 1.5 percent of whatever would come. Kansas isn't having to defend a contract against a lawyer that has a guaranteed percent in the contract. The Kansas firms did outstanding work, winning an argument of first impression, refuting the joint defense privilege. The fees for the counsel in Kansas were determined in the same manner and the same method as the lawyers for every other law firm that went the route of arbitration. Yes, Entz and Chanay contributed to my 1994 campaign, but I suggested it would have been more telling if my employers at that time had not

contributed to the campaign I was running for public office.

In 1998, to avoid any appearance of impropriety, I did not accept campaign contributions from Entz and Chanay, but they could have amounted to 12,000 plus an additional 8,000 if their wives had contributed, and I didn't take a dime from them in 1998. The independent, objective arbitration panel determined the reasonable fee for Kansas lawyers. Legislative post audit examined this entire issue in September of 1997 and determined nothing had been done wrong. The state did not pay a dime for its legal representation. It's $1.6 billion is free and clear from any expenses, costs or fees. There are those, I acknowledge, that despite the success of the litigation still believe I shouldn't have filed it.

I will tell you in conclusion that I am proud and I will always be proud of the role Kansas played in the national tobacco litigation. My initial decision to file that lawsuit was met with more criticism

than praise as I anticipated, but I pursued the litigation because I believed it was the right thing to do. The settlement will bring more than $1.6 billion to our state. It is a historic opportunity if we stay true to what you determined last year was right for that money, to dedicate it to children. It can make qualitative changes in the lives of Kansas unlike anything we've ever had the opportunity to do before. The injunctive relief will allow the next generation of Kansas children to grow up without even knowing who Joe Camel and the Marlboro man are and won't be exposed to advertisements on bill boards next to their schools or in magazines with a teen readership. One of the three firms I hired to represent Kansas formerly employed me. It's being treated no differently than anybody else. The arbitration panel determined 1.5 percent was reasonable. Nobody would have signed a contract for that in 1996. There was an editorial in April of 1998 from the Salina journal. "When state lawsuits against tobacco companies began a few years ago, few

people thought there was a chance in heck of getting any money out of them. For a quality law firm to join in tilting at those windmills, it would have had to have been offered a healthy contingency fee." In August of 1996, I don't know of anybody that would have told you 1.5 was a healthy contingency fee.

I have determined after lots of examination of this case I have made two transgressions, and I want to share those with you. No. 1, I failed to have a quality crystal ball, because if I had had one I could have done things differently. I wouldn't have had to file the lawsuit in August of 1996. I could have waited until the dye was cast, settlement a foregone conclusion, victory obvious and simply cashed in on the settlement letting my more courageous colleagues take the legal risks and do the heavy lifting. This would have allowed me not to have to hire any lawyers whether in-house or outside lawyers. 2, doing business with people I know, that I trusted and that I respected because that's

resulted in cries of unethical conduct. I believe I was elected in 1994 and reelected in 1998 to exercise my judgment, to take Kansas on the legal courses that I believe are in our best interests and not to sit on the sidelines and be reactive only. I believe that fighting for the sexually violent predator case in the United States Supreme Court was appropriate. I believe taking on the ill conceived decisions of the Federal Energy Regulatory Commission against our natural gas producers was appropriate. I believe continuing the battle against Colorado and Nebraska over water is appropriate. I believe designating methamphetamine as KBI's No. 1 priority is appropriate. I believe advocating for children with all of our energy and money is appropriate. I believe in speaking out to support the death penalty for me is appropriate. And I believe criticizing the decision to pay money to a convicted felon whose conviction was reversed on appeal was appropriate. I believe charging public officials who have violated the law is

appropriate. And I believed that taking on big tobacco in the manner that I did and when I did it was appropriate. It is quite obvious that I have made political enemies in pursuing the courses that I have. Nonetheless, I would not have made decisions differently just to have a smoother path now. I was not elected to sit on the sidelines and let the values and preferences of my political enemies dictate the course of the attorney general's office. I never have and I never will. I'd be happy to answer any questions that you might have.

REPRESENTATIVE WAGLE: Thank you, General Stovall. We are quickly approaching 10:30. I think what I'm going to do is just ask you a couple questions, and then would you mind coming back tomorrow so the whole committee could ask you some questions?

GENERAL STOVALL: I'd like for the whole committee to ask me questions until you go into session at eleven.

REPRESENTATIVE WAGLE: I think what we're going to do is just ask a couple questions, and would you mind coming back

tomorrow.

GENERAL STOVALL: I've got meetings scheduled in the morning. I'll try. I would have assumed we'd be able to start at nine o'clock when John was coming and give us more time. I regret doing that. I'll try to make myself available tomorrow, and John will be here for sure.

REPRESENTATIVE WAGLE: On January 26th, I wrote you a letter and asked you for all your documents regarding the hiring of outside counsel for tobacco litigation. I asked that you would give us copies so that the committee could look at these documents within seven days. On February 4th, I was -- I received a letter from your senior deputy, John Campbell with a number of reasons why you didn't have to turn over these documents. But.

GENERAL STOVALL: But, we did. You have everything with the exception of one. John found one last night dated July 31, 1996. It was not initially turned over to you. I would like to make it available. Everything else you've asked,

Representative, has been made available despite -- I don't know what else you think might be there. I think the disappointment is that we're not providing incriminating documents to you. I want to be very clear I can't give you what never existed, and to my knowledge the only incriminating documents in this entire case belong to the tobacco companies and not the attorney general's office.

REPRESENTATIVE WAGLE: On February 4th, I had to send you a second letter asking for all documents, all memos all conversations you had as you were out contracting for the tobacco litigation representing the State of Kansas. I must say I'm not sure what day, this was the documents you returned to me with all your communications regarding the hiring of outside counsel. Is that correct?

GENERAL STOVALL: John would have done it. I wouldn't have.

REPRESENTATIVE WAGLE: Actually, I put a couple pink sheets in there.

GENERAL STOVALL: The letters

also, Madam Chairman, have always said if there's anything that you want to ask for, if there's something you think exists that wasn't provided, your staff was invited in those letters to come over and look at absolutely everything. There is nothing to hide despite what it is that you think is out there. We've given you everything that's in your files.

REPRESENTATIVE WAGLE: I find it hard to believe, General Stovall-- I'm a business woman. I enter into contracts. I've been involved in litigation. I enter into contracts for services. When I go out and contract on behalf of my business for a service, I enter into negotiations in order to get the best product for the cost I'm going to pay. I find it very hard to believe that this is all the documents that you have regarding outside counsel and who you are going to hire. Certainly, the first thing you said when you addressed this committee that you knew the Medicaid payments were worth about $800,000,000.

GENERAL STOVALL: If we got them.

REPRESENTATIVE WAGLE: If you got them. You knew we were talking about big money, not small money.

GENERAL STOVALL: They never paid anybody --

REPRESENTATIVE WAGLE: I have a request today for all your documents.

GENERAL STOVALL: You've got everything, Representative.

REPRESENTATIVE WAGLE: Do I have everything?

GENERAL STOVALL: You have everything that we have that has to do with the retention of counsel. We certainly have drawers of information that relates to the lawsuit, and that's what John said. Come over and open up his file cabinets. You are welcome and your staff, members of the committee are welcome to anything. We are not hiding anything with the exception of the July 30, 1996 letter.

REPRESENTATIVE WAGLE: We'd like a copy of that.

MR. CAMPBELL: We found last night.

REPRESENTATIVE WAGLE: This is all your communications with law firms that you entered into to hire the best counsel of the State of Kansas.

GENERAL STOVALL: I didn't just now look at it. Is that everything we sent over in that regard?

MR. CAMPBELL: That is the written material I have found to date.

REPRESENTATIVE WAGLE: Okay.

GENERAL STOVALL: Lots of the conversations with Hutton and Hutton to try to get them off of the particular percent were phone conversations between John and them, so there aren't recordings. There is nothing in writing about those. You have everything that we have.

REPRESENTATIVE WAGLE: This is all your communications with Hutton and Hutton?

GENERAL STOVALL: Everything that we have.

MR. CAMPBELL: Let me suggest something that may help this.

REPRESENTATIVE WAGLE: Okay.

MR. CAMPBELL: When I'm doing a litigation file or a contract file, I keep what I need up front, and the rest I have clerks file it. Let me suggest this. If there is no objection of the committee, I'd like -- the secretaries are done with this project, get the secretaries, get the clerks, convert the tobacco litigation file into historical filing. What I mean by that, hey, if it's January 1, 1996, we start here, and we just build a chronological date. It's not the way we normally do litigation. Like that letter, I found last night in a correspondence file on one particular case. What I'd like to do just so we're sure, I have given you everything I've found. But I want to get the clerical staff, I'll pull half the secretaries. That's only two. We don't have any paralegals. We'll pull them and start building this historical file unless there is an objection. Normally, when one is under investigation, you shouldn't really mess with files. If there's no objection, we won't throw anything away and start that

chronology.

REPRESENTATIVE WAGLE: I think that would be a good idea.

MR. CAMPBELL: And, Don, or whoever come on with us. For the last three weeks, I've even saved the trash. I'm still getting tobacco stuff.

REPRESENTATIVE WAGLE: What we're interested in primarily is how the contract negotiations that your office went through to determine which firm could best handle the outside counsel for the tobacco litigation.

GENERAL STOVALL: Is there something in particular you think we have that we have not provided?

REPRESENTATIVE WAGLE: Specifically, I have seen a number of letters that were in communication with your office and Hutton and Hutton, and they are in excess of what you've given to me.

GENERAL STOVALL: Then that means we don't have them.

REPRESENTATIVE WAGLE: So where would they have gone?

MR. CAMPBELL: Well, you know, we've moved, and I've had four or five clerks. The fact is no litigation firm normally just has four secretaries and paralegals. I do the best I can with the resources. We hire lawyers instead of paralegals. I hope there is more stuff there.

REPRESENTATIVE WAGLE: When I enter into a contract and I'm on the phone and I'm negotiating the contract and I have a fax, a letter, a telephone call, if I have something that is dealing with that contract that is going to cost me money, I turn around in my file cabinet and I stick that communication in that file.

GENERAL STOVALL: We should only be so lucky to have someone with your abilities as a paralegal in the attorney general's office.

REPRESENTATIVE WAGLE: You're saying you don't have all the documents?

GENERAL STOVALL: We've given you what we have that we have located but have told you your staff and anybody else is

welcome to come and look at anything. We would have brought the file cabinets over if we had the dollies to do that. It was hard enough to do this. There is nothing anyone is intentionally hiding from this committee. Absolutely not.

REPRESENTATIVE WAGLE: You gave to me a copy of a contract you entered into with Entz and Chanay. That has been public to the legislature.

MR. CAMPBELL: You've got the signed contract I'll tell you.

REPRESENTATIVE WAGLE: Why is there not a date on the contract?

MR. CAMPBELL: Okay. There is. I think the reason one normally shouldn't save drafts and stuff. You have different versions of it, because we went through a -- okay. This is a February 8 letter. That is a copy of the actual contract and see --

REPRESENTATIVE CAMPBELL: Speak up.

MR. CAMPBELL: And the signature page.

REPRESENTATIVE WAGLE: Is this a

copy of the actual contract?

MR. CAMPBELL: Actual contract, a copy sent to you.

REPRESENTATIVE WAGLE: The copy you sent to me was not dated. This says you entered into the contract on the 1st of August.

GENERAL STOVALL: Well, it was effective the 1st of August.

MR. CAMPBELL: It actually took till October to get it. See. You got the post audit thing. You've got about three or four versions of that contract if you want everything in there. This is the contract -- I'm sorry. It is a copy of the contract.

REPRESENTATIVE WAGLE: This is a copy of the contract?

GENERAL STOVALL: Yes.

REPRESENTATIVE WAGLE: It took until October to get four signatures. Is that what you said.

MR. CAMPBELL: Yes.

REPRESENTATIVE WAGLE: Okay. So officially you engaged in business with Entz and Chanay on August 1st.

MR. CAMPBELL: No. The first meeting I remember with them we started going over the draft petition mid July of '96.

GENERAL STOVALL: We started work without a signed contract.

MR. CAMPBELL: We started work without the contract.

REPRESENTATIVE WAGLE: Do you have a date at which time you decided not to negotiate with any other firms and that you determined that you wanted Entz and Chanay to work?

GENERAL STOVALL: June 28th is the date I would have called Jeff. When the meeting was in St. Louis is when we learned that Dick Skruggs would front the expenses. So that was-- it's probably then we made the decision we wouldn't involve Hutton and Hutton, because we had someone who would front expenses. That's why we had been continuing discussions with them because they were the only people at that time that would be willing to do that.

REPRESENTATIVE WAGLE: General

Stovall, did you enter into any other negotiations with any other law firms besides Morrison Hecker, Hutton and Hutton and Entz and Chanay regarding this issue?

GENERAL STOVALL: John had lunch one time with Don Barry. That's mentioned in the legislative post audit.

MR. CAMPBELL: Two meetings.

GENERAL STOVALL: Two meetings. I don't think I ever talked with Don. Is there somebody I'm forgetting?

REPRESENTATIVE WAGLE: No. I just wanted to make sure as we -- this committee investigates what happened, as they decide whether or not they want to tax the 27,000,000 at 50 percent, I want to make sure they have all the documents and the track record for the negotiations that you went through to make sure you had the best firm representing Kansas.

GENERAL STOVALL: Okay. I don't know how that relates to a tax. Nonetheless, you have everything that we have, and you have access to the files. Anybody can come over eight to five Monday

through Friday, weekends if you make appointments, and see anything that you want to see.

REPRESENTATIVE WAGLE: Representative Campbell.

REPRESENTATIVE CAMPBELL: Thank you. Just to clarify something I just heard. Did the law firm begin work without a contract.

GENERAL STOVALL: They did.

REPRESENTATIVE CAMPBELL: They worked from August till October without a contract.

MR. CAMPBELL: I'd say from July.

GENERAL STOVALL: It was signed in October. I don't know when the local counsel signed it. The final signature wasn't done until October.

REPRESENTATIVE CAMPBELL: Is that highly unusual or does that happen all the time.

GENERAL STOVALL: John deals with the actual --

MR. CAMPBELL: Well, actually, it does. Almost all of our attorney contracts

are defense. So, you know, you've got 20 days to answer the lawsuit. They almost all start working before the contracts are signed.

GENERAL STOVALL: We have an oral contract.

MR. CAMPBELL: We have a commitment. They'd have a quantum merit claim.

REPRESENTATIVE CAMPBELL: There was a verbal understanding and verbal agreement to --

MR. CAMPBELL: No. There was a verbal agreement of representation. I think that's the best way to put it. I'm trying to think back. I believe it was August. The problem, they wanted to word things one way. I wanted to word them another. But I would say definitely when we filed the suit and they entered their appearance August 20th, then there is no doubt.

REPRESENTATIVE CAMPBELL: Thank you. I was just curious about that. That seems unusual.

REPRESENTATIVE WAGLE:

Representative Johnston.

REPRESENTATIVE JOHNSTON: Thank you, Madam chair. A couple things. First, I'd like to make sure that members of the committee are as soon as possible provided copies of whatever you're battering the AG for. I'd like to see them. Second of all, I wanted to ask a question of procedure. Is everybody this week going to be under oath?

REPRESENTATIVE WAGLE: Yes.

REPRESENTATIVE JOHNSTON: Great. Personally, I would like to state an objection. I think putting everyone under oath is really not necessary. This is not a trial of the attorney general, and I think it unnecessarily raises the intensity of the level of discussion, and I really don't think it was necessary. I wanted to state that objection. But having said that and listening today, I think the testimony provided by the general is a stellar example of why we need a law to require competitive bidding on professional contracts. And part of this quite honestly is a very strenuous criticism of the legislature to do that.

Part of this is a criticism of the general. I'm looking at page 10 of your testimony you provided. The middle paragraph that starts with suing an industry like tobacco.

GENERAL STOVALL: I'm with you.

REPRESENTATIVE JOHNSTON: You go on and say, "Remember I'm a Republican. Republicans tend to be averse to plaintiffs' lawyers," et cetera. Basically, it sounds like you were making a decision on how to essentially determine an issue of state concern based on partisan concerns. And it seems to me pretty clear here that in essence, and discriminating is too strong a term, you were discriminating against a heck of a lot of attorneys from even giving them the option of bidding on something like this, because they are Democrats.

GENERAL STOVALL: Certainly not bidding. Anybody was welcome to get ahold of us, and certainly that's what Morrison and Hecker and Hutton and Hutton did. There isn't any question one of my considerations was who is going to do the best job not just legally, you have to remember what it was

like -- I was the first Republican attorney general to sue big tobacco. It very much was a concern if we had a traditional plaintiff's firm that typically goes Democratic, what other Republicans were going to say. It was a big limb. I was out on a limb as a Republican attorney general.

REPRESENTATIVE JOHNSTON: I want to congratulate you on getting out on the limb. I think the end result is a tremendous achievement for you and for the State of Kansas. But, you know, this paragraph tells better than I ever could why we need a law requiring competitive bidding. That should not be a partisan consideration. The consideration should be who is the best qualified, who meets the contract obligations and so forth, and you've addressed some of those issues obviously in your testimony, but that's what so is disturbing to me about this whole problem.

GENERAL STOVALL: I understand. It's very discretionary. There are no rules. You can be assured someone had they not had the expertise and had they not

agreed to the terms we needed, it was a certainly an added benefit from my view.

REPRESENTATIVE JOHNSTON: I think I made my point.

REPRESENTATIVE WAGLE: Representative Wilk.

REPRESENTATIVE WILK: Mr. Campbell, this is a process question. I have not been involved in filing extensive lawsuit and all the contracts that go along with that. I have had some experience in other business contractual issues and have found them to be most enlightening. We've had like three different entities. We'd start out with a contract and then we'd go to the red line versions. We may have 15 different versions before we'd actually get to the signatures. And I gained a whole new appreciation for 1, 2, 3, 4. We had three different entities. I was on version 5 and somebody else didn't get that and they were on version 4. How do you when you -- I assume you do like red line versions. Procedurally, how do you keep track of it? Do you keep each one of those or try to get

rid of them so when you get down to the final draft the one that actually gets the signatures.

MR. CAMPBELL: In all candor, 99 percent of the contracts, here it is. My way or the highway. Take it or leave it.

REPRESENTATIVE WILK: You don't do a whole lot of that?

MR. CAMPBELL: We really don't. I, in all candor, I'm surprised I have any of those drafts. I try to get rid of drafts because I don't want-- and I'm sorry, the other side, I don't mean the legislature, I mean when I'm in litigation defending the state, I don't want the other side to have any chance of getting my thoughts or the process or what not. The contract that we have, the first thing it says under the attachment, the 146, that all state contracts have, the first thing it says, anything that conflicts with this written agreement, out, forget it. It doesn't exist. We can't conflict. I do like to get down to the one thing. Yes, we were trading back and forth. The Huttons sent the first

contract. It's a letter agreement. I think it's more standard plaintiff. Most of the time we don't have big disagreements. And when we do we trade versions.

REPRESENTATIVE WILK: Thank you.

REPRESENTATIVE WAGLE: Representative Jenkins.

REPRESENTATIVE JENKINS: The primary concern here today is that you hired a firm that you used to work for and gave them some sweetheart deal, but in your testimony you mentioned that post audit did some work. Does that mean the legislature has already looked into that particular issue, and if so --

GENERAL STOVALL: This was all raised -- these are all old issues. All this has been discussed before. Legislative post audit was asked by somebody in the legislature, I don't remember who, to take a look at this. In October of 1997, they would have issued their report. We've certainly referenced that. I assume the chairwoman has a copy. We can make that available, too. It was bigger than tobacco.

We looked at the lawsuit in Colorado as well as how we award contracts in general and this case in particular. Legislative post audit concluded there was certainly no violation of the law, no violation of any ethical code.

REPRESENTATIVE JENKINS: Is there any legislation proposed due to that, the findings in that audit?

GENERAL STOVALL: Not to my knowledge. I guess maybe -- there always are professional bidings of contract bills that are in the legislature. They float I think every year. Somebody may have introduced one because of that. I'm not aware that was anybody's motivation, but that's possible it was motivation for somebody to do that.

REPRESENTATIVE WAGLE: General Stovall, when we did authorize the post audit, wasn't the purpose of the post audit to look into water litigation and not specifically tobacco litigation?

GENERAL STOVALL: They looked at tobacco litigation. I don't know what the

purpose was. I think it was all.

REPRESENTATIVE WAGLE: I think the purpose was to look into contracts from your office, and specifically there was concern in the legislature about water litigation. And while the post audit was being conducted, the tobacco litigation did become an issue. I don't think the tobacco litigation was the target of the post audit. I'll be glad to get copies of the post audit for every member of the committee.

GENERAL STOVALL: I don't know what the target was. I know they looked at it very thoroughly. They interviewed people with Hutton and Hutton and Morrison and Hecker and determined there was no wrongdoing. I don't know what the target was initially except for me.

REPRESENTATIVE WAGLE: Are there further questions? Representative Flora?

REPRESENTATIVE FLORA: Thank you Madam Chair. In regard to water litigation, did you use outside counsel?

GENERAL STOVALL: We did.

REPRESENTATIVE FLORA: And how

were those decisions made?

GENERAL STOVALL: I simply kept the attorney that my predecessor Bob Stephan had hired on that. His name is John Draper out of New Mexico. The post audit was started because there was some great conspiracy theory there that he had either contributed to campaigns or getting money under the table or something. It was a particular representative who asked for that part of it. I think all of that proved pretty bogus.

REPRESENTATIVE FLORA: Is there any way to compare the compensation to the outside lawyer, tobacco to water?

GENERAL STOVALL: No. The outside lawyer in the water is paid by the hour. We've spent $13,000,000 on it today. Not all of that, of course, wont to the lawyer. It's a strict hourly basis.

REPRESENTATIVE FLORA: And what would be the amount -- we don't know for sure exactly how much we're going to get in money from Colorado.

GENERAL STOVALL: We absolutely

don't know how much money at all from Colorado if money.

REPRESENTATIVE FLORA: We can't really make a comparison.

REPRESENTATIVE WAGLE: Representative Johnston.

REPRESENTATIVE JOHNSTON: Thank you. General, I started making a little chart here, Hutton and Hutton versus Entz and Chanay. You said-- I probably missed it. Let me know. Hutton and Hutton had done one tobacco case which they had lost. Is that correct?

GENERAL STOVALL: To my knowledge, they were in one at the time. It was the major Castano litigation which was decertified in May of 1996. It was sometime after that that they tried the only one I know that they tried, and that one wasn't victorious.

REPRESENTATIVE JOHNSTON: Did they agree at some point to front expenses if they were to pursue this for the state? They did agree?

GENERAL STOVALL: They had always

agreed to front expenses.

REPRESENTATIVE JOHNSTON: Entz and Chanay obviously agreed to front expenses.

GENERAL STOVALL: But the expenses by that time were being picked up by national counsel, though.

REPRESENTATIVE JOHNSTON: Okay. Had Entz and Chanay done any tobacco work?

GENERAL STOVALL: No, they had not. They had done Medicaid reimbursement cases.

REPRESENTATIVE JOHNSTON: Which is a related issue?

GENERAL STOVALL: This was a Medicaid reimbursement case.

REPRESENTATIVE JOHNSTON: What other qualifications did Entz and Chanay have over Hutton and Hutton aside from your personal and professional relationship with them?

GENERAL STOVALL: Their general legal abilities. They were a fine firm as I'm sure Hutton and Hutton is, too. They agreed of the contract term of up to 25

percent. We could not get Hutton and Hutton to agree to any up to language. They wanted a guaranteed percent, and I just did not think that was in the State's best interest. If I had, we would now-- we'd be talking about whether they should get 25 percent of a billion six because that's where they were in the contract negotiations.

REPRESENTATIVE JOHNSTON: So that was essentially --

GENERAL STOVALL: That was the deal breaker.

REPRESENTATIVE JOHNSTON: That was the deal breaker. Thank you.

REPRESENTATIVE WAGLE: Representative Tedder?

REPRESENTATIVE TEDDER: Thank you, Madam Chairman. Can you kind of translate for me you were saying that the settlement equals one and a half percent of the 1.6 billion. Can you translate that into dollars per billable hour?

GENERAL STOVALL: I cannot. The contract didn't require them to keep hours. National counsel didn't want that. I think

there is some discussion in the arbitration decision about an estimate that the tobacco companies put forth for what local counsel -- what hours they might have worked, but that was between the arbitration panel decided there. What these guys were getting was simply something on a contingency basis.

REPRESENTATIVE TEDDER: Okay. Thank you.

REPRESENTATIVE WAGLE: Representative Wilk.

REPRESENTATIVE WILK: Thank you. Can you give us an idea where the national arbitration board is at with settlements of other states? Do you have --

GENERAL STOVALL: I do on page 32 of the document that we handed out, it's a listing of the arbitration decisions that have been made thus far. The first four are pretty astronomical. They were the first four suits filed and settled before the first national settlement. 34 percent, 26 percent, 19 percent. They are very, very big numbers. From Hawaii on down then are states that would have arbitrated after 1998

and since -- in 1998 and since. Hawaii, for example, their lawyers get a little over six and a half, Illinois, a little over 1 percent, Louisiana 12 percent, Iowa, 4.4%. The total Kansas fee is 3 percent. When I speak of 1 and a half, that's the local fee. We're in the ballpark. Almost the lowest. All the rest have yet to be decided.

REPRESENTATIVE WILK: Those other percentages, are they also having to split with the national counsel?

GENERAL STOVALL: Absolutely.

REPRESENTATIVE WILK: Is it pretty much 50/50?

GENERAL STOVALL: I don't know. Just depends on the arrangements with the firms. I would say for the ones that are represented by Ness Motley and Skruggs, it would be half and half.

REPRESENTATIVE WILK: They are just really getting started settling individual states?

GENERAL STOVALL: True.

REPRESENTATIVE WILK: How many states do they have to go through?

GENERAL STOVALL: 46.

REPRESENTATIVE WILK: 46. Thank you.

REPRESENTATIVE WAGLE: Representative Ray?

REPRESENTATIVE RAY: I have a question for staff. Does any of the staff know whether any of the state agencies take bids on professional services.

THE SPEAKER: I don't know.

REPRESENTATIVE RAY: Where would I find out?

THE SPEAKER: There is a suggestion budget division might know. We can look into it for you.

REPRESENTATIVE RAY: Thank you.

REPRESENTATIVE WILK: Department of Administration has that information. It's readily available.

GENERAL STOVALL: The legislative post audit looked at other state agencies and how they handled contracts as well. So there is some more information in that post audit, too.

REPRESENTATIVE WAGLE: Committee,

it's ten till. We do have to clear the room. General Stovall, if you would come back tomorrow, I think we will have some questions.

GENERAL STOVALL: I'm sure you will. Thank you very much for the opportunity to be here today.

C E R T I F I C A T E

STATE OF KANSAS

ss.

COUNTY OF SHAWNEE

I, Sandra S. Biggs, a Certified Shorthand Reporter, commissioned as such by the Supreme Court of the State of Kansas, and authorized to take depositions and administer oaths within said State pursuant to K.S.A. 60-228, certify that the foregoing was reported by stenographic means, which matter was held on the date, and the time and place set out on the title page hereof and that the foregoing constitutes a true and accurate transcript of the same.

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

Given under my hand and seal this 22nd day of February, 2000.

Sandra S. Biggs, C.S.R.

SANDRA S. BIGGS STATE

COSTS: _____

2955 SW WANAMAKER DR, TOPEKA, KS 66614
(785) 273 3063