

Approved: 3/3/00  
Date

## MINUTES OF THE HOUSE TAXATION COMMITTEE.

The meeting was called to order by Chairperson Wagle at 9:00 a.m. on February 18, 2000, in Room 519-S of the Capitol.

All members were present except: Rep. Wilk - excused  
Rep. Howell - excused

Committee staff present: Chris Courtwright, Legislative Research Department  
April Holman, Legislative Research Department  
Don Hayward, Revisor of Statutes  
Shirley Sicilian, Department of Revenue  
Ann Deitcher, Committee Secretary  
Edity Beath, Taxation Secretary

The Chair spoke to the Committee in regard to the actions of the last 4 days..

“Good morning, Committee. I have a few comments to wrap up – not to wrap up and not to conclude but just to address the testimony that you heard in the last four days over a very controversial and problematic issue.

First of all, I would like to compliment you. We’ve had some very tense days here in Tax and I think that you’ve all handled it very well. You have handled conflicting testimony very professionally and I appreciate the way you’ve conducted yourselves during these very tense hearings.

I would like to address the situation about the court reporter and how we came to swearing in our conferees. As Tax Chair, I have been investigating the issue of attorney fees for the tobacco litigation. I have been in meetings with John Campbell and my minority leaders and Clay, speaking with the Attorney General’s staff about the attorney fee issue. In addition to that, I have been dealing with Hutton and Hutton in Wichita. I knew their testimony and I knew their story. They wanted a chance to tell the Legislature their story and I thought it would be appropriate in this forum to allow them to.

I knew that the testimony of conferees was conflicting so I told the Speaker that I thought we’d be caught in a very difficult situation and it would be very important that we have all the testimony recorded verbatim. As I learned more information and as I spoke to more attorneys and to my colleague, Mike O’Neal, who is an attorney, it became apparent it would be very important to all to swear in witnesses.

We had arranged with the Attorney General’s office to have her come on Wednesday and respond to Representative Tony Powell who was going to advocate for the bill. We were going to have history on Monday and Tuesday. It didn’t work out that way. When I arrived at Committee on Monday, the Attorney General wanted to address us then, and being the executive statewide officer that she is, I thought it would be appropriate that she address us then. I also thought at the time that it was appropriate for me to swear her in as in a court of law where court transcribers swear in testimony – that is their job. I thought it was legal in this situation to do that.

I tried to reach the Speaker over the weekend – we could not connect. On Monday I did swear General Stovall in and since this Committee did not have the power to swear in a conferee, we had a court reporter who did have the power. Norm Furse, our head revisor and head attorney for the Legislature, said that the issue was a moot point once anyone has allowed themselves to be sworn in.

So, what I want to do is apologize to any of you that I may have offended by swearing people in. I realize that it’s very important this testimony be recorded verbatim as it was, and to have everyone sworn in. I hope I have not offended anyone.

## CONTINUATION SHEET

We do have a tax bill before the Committee but we have also been presented with testimony about ethical conduct. I have been in communication with House leadership, I've been in communication with Senate leadership. There are several options that this Committee could take. In fact, I did go to the Speaker and ask him, when I was going to take this on, to allow us to have some additional legal members placed on the Committee, representing both parties. It was discussed that possibly we do that but it was then determined that the Tax Committee should deal with the issue first.

I think that we have questions of past issues. We have questions regarding a windfall profit and we have some ethics questions facing this Committee. And there are several options that we can pursue in order to resolve the questions that are before us. We can't resolve these questions unless you take time to look at all the testimony – unless you take time to talk to your constituents. And we have to investigate all our options. There's one option of having the Speaker appoint an investigative committee that would be made up primarily of attorneys. I believe we can turn this over to the disciplinary administrator who is appointed by the Supreme Court, to oversee fee issues and attorney ethics. We could pass a windfall profit tax bill. We could do nothing.

What I want to do as a committee is try to align consensus among the Committee members. Sometimes it's been said that the Kansas Legislature is three parties. We have the Democrat party, we have conservative Republicans and we have moderate Republicans. I know that this problem exists in a lot of legislatures. What I have to try to do is process what came before us this week. I want to arrive at a consensus that involves all of us on this Committee. And in order to do that, we're going to have to do a lot of communicating between each other. We're going to have to have a lot of sharing to allow this consensus. And that's hard to do in a political environment – that's very hard to do. But, I think it's possible and I believe that the members of this Committee can do that. So what I want to do is just lay the issues on the table, find out what our options are and maybe meet in small groups about it and share our thoughts and our perceptions and just determine where we want to go from here. We will then take up the issues when we know what our options are and when we've reached a consensus.

I really think it's important that we arrive at a consensus and the only way we can do that is by talking with each other and sharing our concerns. I'm going to see that the transcripts are given to each member where you can go back through it. Then maybe we can set up meetings in my office or in any office and try to arrive at a consensus.

Another thing I want to do is lay before you some comments from Mike O'Neal. I share an office with Mike O'Neal and I've been going to him since these issues came out. When I was in leadership of the House, the issue came up of weights and measures and there was a question before the House as to whether or not our Senator, Sam Brownback, when he was Secretary of Agriculture, was allowing mis-measurement of gas. I'm sure some of you who were elected at the time remember this. When these controversies come up – they're political – they're controversial. What we did was appoint a special investigative committee that Representative O'Neal chaired. This was a solution a few years ago when we were faced with a similar problem. Representative O'Neal has gone over the transcript of the tobacco litigation issue and he wanted you to have his thoughts on them.

I don't want to arrive at a political decision with this Committee. I think we have to drop politics. And what we have to do is decide what is best for the people of Kansas. And we can only do that through a lot of communication and a lot of work. It's going to take a lot of work and it's going to take a lot of striving to hear everybody's side to this. We're going to have to open our ears and close our mouths and we're just going to have to share our thoughts. So I just hope we can arrive at a consensus within a couple of weeks. You may explore possibilities – I will explore some possibilities. I will go talk to the disciplinary administrator for the Committee. – anybody is welcome to go with me – to see what the parameters are that he has for dealing with ethical fee situations like this.

If that's okay I'd just like to close comments on this issue and allow us to talk privately as a committee and pursue justice for the people of Kansas”.

A copy of Representative O'Neal's letter was handed out to the Committee. (Attachment 1).

## CONTINUATION SHEET

Representative Johnston spoke of his feelings regarding the events of the previous four days, saying he wanted to thank the Chair for holding the hearings.

Representative Minor said he thought the Chair had been extremely fair with the Committee by keeping them informed of everything. He said he appreciated the way the Chair had handled the issues and he was certainly willing to work with her in order to come to a solution to this problem.

Additional information on the tobacco litigation provided by the Hutton and Hutton Law Firm was handed out to the Committee. (Attachment 2).

The Chair announced that **HB 2588** would be delayed until Representative Aurand completed an amendment to the bill

### **HB 2620 - Property tax evaluation appeals procedure.**

Representative Findley spoke to the Committee in regard to **HB 2620**.

A motion to amend line 25 on page 2 of **HB 2620** by striking the phrase “the findings of fact and law” and insert a written explanation of the reason was made by Representative Findley. The motion was seconded by Representative Sharp and passed by a voice vote.

It was moved by Representative Wilt and seconded by Representative Gilbert to adopt **HB 2620** as amended. The motion carried on a voice vote.

### **HB 2621 - Notification of mortgage contract obligation satisfaction to county treasurers.**

Representative Findley spoke to the Committee in regard to **HB 2621**.

Copies of the balloon amendment to **HB 2621** were handed out. (Attachment 3).

Representative Kirk made a motion to adopt a balloon amendment to **HB 2621**. The motion was seconded by Representative Findley and failed on a voice vote.

It was moved by Representative Findley and seconded by Representative Wilk to pass **HB 2621** favorably out of Committee. The motion carried on a voice vote.

The meeting was adjourned at 9:45 a.m. The next meeting is scheduled for Monday, February 21, 2000.

STATE OF KANSAS  
HOUSE OF REPRESENTATIVES

MICHAEL R. (MIKE) O'NEAL

104TH DISTRICT  
HUTCHINSON/NORTHEAST RENO COUNTY

LEGISLATIVE HOTLINE  
1-800-432-3924  
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MEMORANDUM

CHAIRMAN:  
JUDICIARY COMMITTEE  
VICE-CHAIR:  
REDISTRICTING ADVISORY COMMITTEE  
MEMBER:  
BUSINESS, COMMERCE & LABOR  
FISCAL OVERSIGHT  
STATE-TRIBAL RELATIONS  
UNIFORM LAW COMMISSION  
KANSAS JUDICIAL COUNCIL

To: House Taxation Committee  
From: Rep. Mike O'Neal  
Re: Tobacco litigation attorney fees issue  
Date: Feb.17, 2000

As I believe the Committee is aware, Chairman Wagle has been having me consult with her about some of the legal issues surrounding the tobacco litigation attorney fee issue you have been considering. Specifically, I have reviewed the material that has been provided by the Attorney General's Office, committee hearing transcripts, and related material. I reviewed the material in the context of one who is familiar with civil litigation and familiar with the issues and players involved.

In particular, I have been interested in reviewing the specific attorney fee contract entered into by an between the Attorney General, on behalf of the State of Kansas and the private law firm of Entz & Chanay. Such contracts are, of course, standard operating procedure when parties contract for legal services, whether they be by the hour or on a contingent fee basis. I understand the Committee has seen the fee contract entered into in this case.

TOPEKA ADDRESS

STATE CAPITOL BUILDING, SUITE 170-W  
STATE OFFICE BUILDING, SUITE 170-W  
TOPEKA, KS: 66612-1504  
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FAX: 785-296-5805

House Taxation  
Date 2/18/00  
Attachment # 1-1

In reviewing the contract, and the Attorney General's comments to the Committee in the hearing transcript, I believe there is an issue that was not mentioned that is relevant to your consideration of the issue. That the fee contract was contingent, i.e., based on a percentage of any recovery, and providing for no fee in the event of no recovery, is absolutely true. What has been left out of the discussion is the fact that the fee agreement also made the fee subject to the applicable ethical rules governing the reasonableness of attorney fees (MRPC 1.5).

If you refer to pages 3 & 4 of the signed contingency fee contract effective August 1, 1996, paragraphs 3.1 and 3.3 you will find the reference to the applicable ethical rule. MRPC stands for "Model Rules of Professional Conduct" and are the rules that attorneys are bound by when dealing with their clients. Kansas has specifically adopted those rules for application to Kansas attorneys. I have attached a copy of the specific rule, which was incorporated by reference in the contract.

In this situation, the "client" that Entz & Chanay were representing was the State of Kansas. The Attorney General acted as the State's agent in entering into the contract with the outside firm. As such, the State has an expectation that the fee charged and collected would and will be "reasonable", whether or not based on a fixed percentage. The percentage was an amount "not to exceed" a stated percentage and called for payment of a "reasonable" fee, i.e., one complying with our ethical rules, not to exceed the stated percentage.

MRPC 1.5 provides, among other things, that:

*“Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.” (MRPC 1.5(e))*

In determining whether a fee is reasonable, the court applies the 8 criteria set out in the rule. The Attorney General has advised the Committee that Entz & Chanay opted to seek their fees before the arbitration panel instead of pursuant to the written contract. She claims that this was in the State’s best interest. I question whether going to arbitration relieved the law firm of its ethical obligation to recover a “reasonable” attorney fee, as originally set forth in the written contract. The Attorney General told the Committee she participated by phone in the arbitration hearing and was questioned specifically about her view of what amount would be reasonable. She admitted to the Committee that she declined to give the panel a number. She testified in Committee:

*“...I told them at the beginning and despite the harsh questioning by their Mr. Renfro demanding basically that I name an amount. I refused to do so. I explained this very issue to them. Because I had worked with Stu and Jeff, I simply was not going to name number. It put me in a very uncomfortable position, and I would not do that.”*

I have some real concern about that exchange. She was there representing the State of Kansas, not her former law firm. She has basically admitted to having a conflict of interest on the fee issue. Her failure to advocate for the State left the arbitration panel with little to no independent information upon which to base an opinion.

Did the panel know, e.g., that the State's contract with the firm had the fee being subject not only to a limit on percentage but to the standards of reasonableness set out in the ethical rule (MRPC 1.5)? Had anyone other than Entz & Chanay been awarded the contract would the Attorney General have stood mute before the panel on the question of the reasonableness of the fee? Should the fact that the fees were being paid out of a separate fund excuse the Attorney General or the panel from applying the ethical standard of reasonableness? If the question of the fee were to be presented to the assigned Shawnee Co. District Judge (Judge Jackson) what would the judge have determined a reasonable fee to be when measured by the ethical standard?

Why was there no requirement for the attorneys to keep track of their time in the case? Attorney General Stovall told the Committee that the national lead counsel wouldn't agree to such a term, that they had no way of keeping track of their time. I beg to differ. I've never dealt with a plaintiffs firm that didn't keep track of time, even in their contingent fee cases. Why? Because one of the eight considerations under MRPC 1.5 for determining the reasonableness of a fee, even if contingent, is the time spent in handling the case. I understand the arbitration panel voiced concern over the fact that local counsel didn't have time records.

The panel had to make a decision based on no time records and without input from an independent Attorney General for the State as to the State's position on what the fee should be. I have reviewed the proposed contract with the Wichita firm of Hutton & Hutton and the requirement that time records be kept is present, as is the language that the fee would be subject to MRPC 1.5. This would have been true even if the Hutton & Hutton contract had been for a fixed contingent fee.

The legislation before the Committee regarding the taxation of windfall profits essentially has the Committee deciding whether the fee was "reasonable". The criteria that a court would use is before you and Chairman Wagle has attempted to gather for you the documents and facts upon which such a determination could be made. The State of Kansas remains the "client" in this scenario and it is up to the Committee to determine whether the attorneys were unjustly enriched. The State may tax windfall profits. That's a public policy decision. I do not suggest that "Big Tobacco" should benefit from a lower fee. The question is, instead, whether the "client" (State of Kansas) should receive more in the way of revenue as a result of the windfall.

For anyone who likes to read court decisions, I have attached a case with an interesting discussion of the issue. (*In Re Potter*, 263 Kan. 766). There the court had a fact situation where the contingent fee on a personal injury recovery was only around 10%, well below the "usual" rate, but would have resulted in an effective hourly rate of more than \$1000 per hour. This was a case of much smaller magnitude, obviously, but the analysis remains the same.



## TOBACCO KANSAS AG LITIGATION TIME SHEET

Who	Date	Desc	Time	Case#
SM	03/14/1996	Letter to Carla Stovall re: participation in the Medicare reimbursement litigation	0.25	TOB-AG-KS
AWH	03/14/1996	Letter to Carla Stovall re: participation in the Medicare reimbursement litigation	0.25	TOB-AG-KS
AWH	04/02/1996	Review Law Journal article from Journal of Legal Medicine	1.5	TOB-AG-KS
AWH	04/03/1996	TC A.G.'s office to John Campbell re: litigation	0.25	TOB-AG-KS
AWH	04/03/1996	TC A.G.'s office to John Campbell re: litigation	0.25	TOB-AG-KS
AWH	04/08/1996	TC Gean Schroerer re: KPERS litigation	0.5	TOB-AG-KS
SM	04/09/1996	Letter to Attorney General Stovall	0.5	TOB-AG-KS
AWH	04/09/1996	Travel to Topeka for conference among Andy Hutton, Mark Hutton and Carla Stovall	6.	TOB-AG-KS
MBH	04/09/1996	Travel to Topeka for conference among Andy Hutton, Mark Hutton and Carla Stovall	6.	TOB-AG-KS
AWH	04/10/1996	Letter to Carla Stovall re: Medicaid reimbursement	0.25	TOB-AG-KS
AWH	04/10/1996	Letter to Carla Stovall re: medicaid reimbursement and	0.5	TOB-AG-KS
AWH	04/10/1996	Letter to Carla Stovall re: research case law on theories of recovery	1.25	TOB-AG-KS
AWH	04/10/1996	Research KS Law on consumer protection violations	2.75	TOB-AG-KS
SM	04/10/1996	Letter to Carla Stovall re: research case law on theories of recovery	1.25	TOB-AG-KS
AWH	04/11/1996	Research Texas A.G. cause of action	0.75	TOB-AG-KS
AWH	04/11/1996	TC Mike Kerensky re: Texas Case	0.25	TOB-AG-KS
AWH	04/15/1996	Letter to Carla Stovall and enclosed article from the Internet re: recovering Medicaid costs	0.25	TOB-AG-KS
AWH	04/15/1996	Letter to Carla Stovall re: New Jersey Governor Christine Todd	0.25	TOB-AG-KS
AWH	04/15/1996	TC Mike Kerensky re: Texas A.G. action	0.25	TOB-AG-KS
AWH	04/15/1996	Fax to Carla Stovall re: N.J. action	0.25	TOB-AG-KS
SM	04/15/1996	Fax to Carla Stovall re: N.J. action	0.25	TOB-AG-KS
SM	04/15/1996	Letter to Carla Stovall and enclosed article from the Internet re: recovering Medicaid costs	0.25	TOB-AG-KS
SM	04/15/1996	Letter to Carla Stovall re: New Jersey Governor Christine Todd	0.25	TOB-AG-KS
AWH	04/17/1996	Letter to John Campbell, Assistant AG of KS, and enclosed letters sent to AG Stovall re: agreement between offices	0.25	TOB-AG-KS
AWH	04/17/1996	TC Campbell re: litigation possibility	0.25	TOB-AG-KS
AWH	04/17/1996	TC Campbell re: lawsuit being filed	0.25	TOB-AG-KS
AWH	04/17/1996	Fax letter to Campbell re: attorney fee contract	0.25	TOB-AG-KS
SM	04/17/1996	Fax letter to Campbell re: attorney fee contract	0.25	TOB-AG-KS
SM	04/17/1996	Letter to John Campbell, Assistant AG of KS, and enclosed letters sent to AG Stovall re: agreement between offices	0.25	TOB-AG-KS
AWH	04/18/1996	TC Ed Kellogg re: Defendant's	0.5	TOB-AG-KS
AWH	04/19/1996	Letter to Michael Kerensky and enclosed outline on smokeless tobacco	0.25	TOB-AG-KS
AWH	04/19/1996	Fax to Michael Kerensky re: State AG action filed in Texas	0.25	TOB-AG-KS
AWH	04/19/1996	Fax to John Campbell and enclosed working rough draft of Attorney-Client Agreement	0.25	TOB-AG-KS
AWH	04/19/1996	TC Campbell re: filing lawsuit	0.25	TOB-AG-KS
AWH	04/19/1996	Preparation of attorney fee contract	0.75	TOB-AG-KS
AWH	04/19/1996	TC Mike Kerensky	0.25	TOB-AG-KS

House Taxation  
Date 2/18/00  
Attachment # 2-1

## TOBACCO KANSAS AG LITIGATION TIME SHEET

Who	Date	Desc	Time	Case
SM	04/19/1996	Fax to John Campbell and enclosed working rough draft of Attorney-Client Agreement	0.25	TOB-AG-KS
SM	04/19/1996	Fax to Michael Kerensky re: State AG action filed in Texas	0.25	TOB-AG-KS
SM	04/19/1996	Letter to Michael Kerensky and enclosed outline on smokeless tobacco	0.25	TOB-AG-KS
SM	04/19/1996	Preparation of attorney fee contract	0.75	TOB-AG-KS
AWH	04/22/1996	Review Complaint and Memorandum in Support of Plaintiff's Motion to Strike Challenges to the Sufficiency of the Complaint and the Subject Matter Jurisdiction of the Chancery Court	3.	TOB-AG-KS
AWH	04/22/1996	Review Complaint from Mike Moore, A.G., State of Mississippi vs Tobacco, et al	0.5	TOB-AG-KS
AWH	04/22/1996	Review Memorandum in Support of Plaintiff's Motion to Strike Challenges to the Sufficiency of the Complaint and the Subject Matter Jurisdiction of the Chancery Court in Mike Moore, A.G., State of Mississippi vs Tobacco, et al	1.25	TOB-AG-KS
MBH	04/23/1996	Internet search re: smoking materials	5.	TOB-AG-KS
AWH	04/23/1996	Review 04/23/96 Internet article from New York re: Mississippi AG, Michael Moore said Tuesday he expects 10 more states will sue the tobacco industry in the next 30 days seeking to recoup health care costs of smokers	0.25	TOB-AG-KS
AWH	04/23/1996	Review America Online article re: Americans got some new advice on how to get tobacco out of their lungs and out of their stock portfolios	0.25	TOB-AG-KS
AWH	04/23/1996	Review America Online article re: An R.J. Reynolds research memo shows the company believes cigarette ads influence teenagers who start smoking, contrary to their assertions in public	0.25	TOB-AG-KS
AWH	04/23/1996	Review America Online article re: A key tobacco whistleblower was honored with humanist award	0.25	TOB-AG-KS
SM	04/24/1996	Letter to John Campbell re: Internet article	0.25	TOB-AG-KS
MBH	04/24/1996	Letter to John Campbell re: Reuter Wire Service	0.25	TOB-AG-KS
MBH	04/24/1996	Internet research	1.5	TOB-AG-KS
MBH	05/01/1996	Research on America Online re: Maryland AG J. Joseph Curran said the state filed a \$13 billion lawsuit against major tobacco firms and affiliated organizations, seeking punitive damages and to recover public health care expenses related to smoking		TOB-AG-KS
AWH	05/01/1996	Review America Online article re: Maryland AG J. Joseph Curran said the state filed a \$13 billion lawsuit against major tobacco firms and affiliated organizations, seeking punitive damages and to recover public health care expenses related to smoking	0.25	TOB-AG-KS
AWH	05/01/1996	Review America Online article re: An anti-tobacco lawyer said that paralegal Merrill Williams had no cash rewards in mind when he exposed secret tobacco industry papers on health damages from cigarettes	0.25	TOB-AG-KS
AWH	05/02/1996	Review 05/02/96 "Maryland Becomes Eighth State To Sue Tobacco Makers," The Wall Street Journal	0.25	TOB-AG-KS
AWH	05/02/1996	Fax letter to John Campbell re: Maryland Litigation	0.25	TOB-AG-KS
AWH	05/02/1996	Letter to John Campbell and enclosed article from Wall Street Journal, "Maryland Becomes Eighth State To Sue Tobacco Makers"	0.25	TOB-AG-KS
SM	05/02/1996	Fax letter to John Campbell re: Maryland Litigation	0.25	TOB-AG-KS

TOBACCO KANSAS AG LITIGATION TIME SHEET

Who	Date	Desc	Time	Case
AWH	05/03/1996	Review 05/03/96 Product Safety & Liability Reporter, "Maryland Sues Tobacco Industry, Seeks to Recoup \$13 Billion in Expenses".	0.25	TOB-AG-KS
AWH	05/07/1996	Fax to Edward Kellogg re: proposed letter to Attorney General Bowers	0.25	TOB-AG-KS
SM	05/07/1996	Fax to Edward Kellogg re: proposed letter to Attorney General Bowers	0.25	TOB-AG-KS
AWH	05/09/1996	Review 05/01/96 letter from John O'Quinn and enclosed Texas Tobacco lawsuit	3.	TOB-AG-KS
AWH	05/27/1996	Review 05/27/96 fax from Edward Kellogg re: class definition	0.25	TOB-AG-KS
AWH	05/28/1996	Meeting between Chris Christian and Andy Hutton re: proposed contract	0.75	TOB-AG-KS
CPC	05/28/1996	Meeting between Chris Christian and Andy Hutton re: proposed contract	0.75	TOB-AG-KS
AWH	05/28/1996	Review America Online article re: Plaintiff lawyers planning to file a wave of state class actions	0.25	TOB-AG-KS
MBH	05/28/1996	Research on America Online re: Supreme Court upheld a ruling requiring five tobacco companies and two trade groups to turn over to Minnesota extensive computerized databases that the state sought in its suit against them		TOB-AG-KS
AWH	05/28/1996	Review 05/28/96 fax from John Campbell, AG and enclosed draft of attorney-client agreement	0.5	TOB-AG-KS
AWH	05/28/1996	Review 05/28/96 fax from Joseph Kohn and enclosed press release and newspaper articles	0.5	TOB-AG-KS
AWH	05/28/1996	Review America Online article re: Supreme Court rebuff forces tobacco companies to aid antismoking lawsuit	0.25	TOB-AG-KS
MBH	05/28/1996	Research on America Online re: Supreme Court rebuff forces tobacco companies to aid antismoking lawsuit		TOB-AG-KS
MBH	05/28/1996	Research on America Online re: Plaintiff lawyers planning to file a wave of state class actions		TOB-AG-KS
AWH	05/28/1996	Review America Online article re: Supreme Court upheld a ruling requiring five tobacco companies and two trade groups to turn over to Minnesota extensive computerized databases that the state sought in its suit against them	0.25	TOB-AG-KS
SM	05/29/1996	Meeting among Andy Hutton, Mark Hutton and Suzanne Matthias re: attorney-client contract	0.5	TOB-AG-KS
SM	05/29/1996	Letter to John Campbell re: attorney-client contract	0.5	TOB-AG-KS
SM	05/29/1996	Redraft of letter to John Campbell	0.5	TOB-AG-KS
AWH	05/29/1996	Review Minnesota v. RJS Petition for review	1.75	TOB-AG-KS
MBH	05/29/1996	Meeting among Andy Hutton, Mark Hutton and Suzanne Matthias re: attorney-client contract	0.5	TOB-AG-KS
AWH	05/29/1996	Meeting among Andy Hutton, Mark Hutton and Suzanne Matthias re: attorney-client contract	0.5	TOB-AG-KS
AWH	05/30/1996	Review National Law Journal 06/03/96 article re: status of litigation	0.5	TOB-AG-KS
AWH	05/31/1996	Review 05/31/96 fax from John Campbell re: fee contract	2.	TOB-AG-KS
AWH	05/31/1996	Review 05/31/96 fax from John Campbell and enclosed Contractual Provisions Attachment	0.5	TOB-AG-KS
DM	06/03/1996	Meeting among Andy Hutton, Mark Hutton and Deb McIlhenny re: statutory violations	0.5	TOB-AG-KS
SM	06/03/1996	Redrafting of Contract	1.25	TOB-AG-KS

## TOBACCO KANSAS AG LITIGATION TIME SHEET

Who	Date	Desc	Time	Case#
SM	06/03/1996	Meeting between Mark Hutton and Suzanne Matthias re: contract draft	0.25	TOB-AG-KS
SM	06/03/1996	Fax contract draft to John Campbell	0.25	TOB-AG-KS
AWH	06/03/1996	Review 05/28/96 letter from John Campbell, AG and enclosed draft of attorney-client agreement	0.25	TOB-AG-KS
MBH	06/03/1996	Meeting between Mark Hutton and Suzanne Matthias re: contract draft	0.25	TOB-AG-KS
MBH	06/03/1996	Research Kansas Law, Causes of Action	3	TOB-AG-KS
AWH	06/03/1996	Fax to John Campbell and enclosed edits to the contract	0.25	TOB-AG-KS
AWH	06/03/1996	Meeting among Andy Hutton, Mark Hutton and Deb McElhenny re: statutory violations	0.5	TOB-AG-KS
MBH	06/03/1996	Meeting among Andy Hutton, Mark Hutton and Deb McElhenny re: statutory violations	0.5	TOB-AG-KS
AWH	06/03/1996	Meeting between Andy Hutton and Mark Hutton re: fee contract	0.5	TOB-AG-KS
MBH	06/03/1996	Meeting between Andy Hutton and Mark Hutton re: fee contract	0.5	TOB-AG-KS
MBH	06/04/1996	Research Kansas Law, Causes of Action	3	TOB-AG-KS
AWH	06/04/1996	Review 06/04/96 fax from AG Carla Stoval and enclosed approved draft of Engagement and Contingency Agreement	0.75	TOB-AG-KS
AWH	06/04/1996	TC Campbell re: fee contract	0.25	TOB-AG-KS
AWH	06/04/1996	Prepare attorney fee contract	0.75	TOB-AG-KS
AWH	06/04/1996	Research Kansas Statutory violations	2.75	TOB-AG-KS
AWH	06/04/1996	Review Proposed changes to new attorney fee contract	0.75	TOB-AG-KS
SM	06/05/1996	Drafting of Contract and letter to John Campbell	4	TOB-AG-KS
MBH	06/05/1996	Research America Online article from Seattle re: Washington state officials, declaring that cigarette makers have lied about their products' deadly effects		TOB-AG-KS
AWH	06/05/1996	Review of America Online article from Seattle re: Washington state officials, declaring that cigarette makers have lied about their products' deadly effects	0.25	TOB-AG-KS
MBH	06/05/1996	Draft fee contract and research Kansas fee law	4	TOB-AG-KS
MBH	06/05/1996	Letter to AG, John Campbell re: enclosed fee contract	0.25	TOB-AG-KS
AWH	06/05/1996	Review Mark Hutton's Letter to AG, John Campbell re: enclosed fee contract	0.25	TOB-AG-KS
AWH	06/06/1996	Review of America Online article re: Maverick Lawyers Carry on Tobacco Suits	0.25	TOB-AG-KS
MBH	06/06/1996	Research America Online article re: Maverick Lawyers Carry on Tobacco Suits		TOB-AG-KS
MBH	06/06/1996	TC x2 John Campbell re: draft fee contract and letter to AG office	5	TOB-AG-KS
AWH	06/06/1996	TC Angelo's office for Maryland Complaint	0.25	TOB-AG-KS
AWH	06/06/1996	Review Tobacco Litigation Reporter	1.25	TOB-AG-KS
MBH	06/07/1996	Research on America Online from San Francisco re: S.F. becoming first local government in the nation to sue the tobacco industry to try to recover the costs of treating smoking-related illnesses, a city attorney said		TOB-AG-KS
AWH	06/07/1996	Review of America Online article from San Francisco re: S.F. becoming first local government in the nation to sue the tobacco industry to try to recover the costs of treating smoking-related illnesses, a city attorney said	0.25	TOB-AG-KS
MBH	06/07/1996	Review Other State's Material	5	TOB-AG-KS
AWH	06/07/1996	TC John Campbell re: attorney fee	0.25	TOB-AG-KS
AWH	06/07/1996	Review "Cigarette Papers" by Dr. Stanton Glantz	4.75	TOB-AG-KS

TOBACCO KANSAS AG LITIGATION TIME SHEET

2-5

Who	Date	Desc	Time	Case#
AWH	06/08/1996	Review 06/08/96 fax from Prudy Hutton re: online information about San Francisco Joins War On Tobacco. Turns to Lieff, Cabraser	0.25	TOB-AG-KS
MBH	06/08/1996	Review 06/08/96 fax from Prudy Hutton re: online information about San Francisco Joins War On Tobacco. Turns to Lieff, Cabraser	0.25	TOB-AG-KS
AWH	06/10/1996	Legal Research re: the Law with Public Health and Welfare	0.75	TOB-AG-KS
AWH	06/10/1996	Letter to John Campbell, AG re: statutory authority of fees for attorneys responsible for recoveries of monies in KS	0.25	TOB-AG-KS
AWH	06/10/1996	Review State of Maryland vs. Philip Morris, et al from Circuit Court for Baltimore City	3.5	TOB-AG-KS
AWH	06/10/1996	Review State of Minnesota vs. Philip Morris, et al	2.5	TOB-AG-KS
MBH	06/10/1996	Review other state's Petitions	4.	TOB-AG-KS
AWH	06/10/1996	Review Maryland and Minnesota Decisions	3.	TOB-AG-KS
AWH	06/10/1996	Research on Medicaid Reimbursement Statutes	0.75	TOB-AG-KS
SM	06/10/1996	Letter to John Campbell, AG re: statutory authority of fees for attorneys responsible for recoveries of monies in KS	0.25	TOB-AG-KS
AWH	06/10/1996	Review pleading: Complaint and Election for Jury Trial from State of Maryland vs. Philip Morris, et al.	3.	TOB-AG-KS
AWH	06/10/1996	Review pleading: Complaint from State of Minnesota vs. Philip Morris, et al.	3.	TOB-AG-KS
MBH	06/11/1996	Review other state's Petitions	4.	TOB-AG-KS
AWH	06/11/1996	Review Federal Medicaid Statutes	1.75	TOB-AG-KS
AWH	06/13/1996	Review article from Business Week re: status of litigation	0.25	TOB-AG-KS
AWH	06/18/1996	TC John Campbell	0.25	TOB-AG-KS
AWH	06/19/1996	TC John Campbell	0.25	TOB-AG-KS
AWH	06/20/1996	TC John Campbell re: status	0.25	TOB-AG-KS
AWH	06/21/1996	Review "The Tobacco Industry's Imaginative But Risky Defense To State Medicaid Actions," by Charles J. Mikhail from the Mealey's Tobacco Litigation Conference 1996	4.	TOB-AG-KS
AWH	06/21/1996	Review San Francisco vs. Philip Morris, et al. Complaint and Demand for Jury Trial	3.	TOB-AG-KS
AWH	06/21/1996	Review information from Dick Sevuggs re: Mississippi Case	1.75	TOB-AG-KS
AWH	06/24/1996	Review 06/24/96 article from America Online from Jackson, Miss., (Reuter) by Beverly Pettigrew Kraft re: Former President Jimmy Carter may be called to testify against the U.S. Tobacco industry when Mississippi's landmark lawsuit against cigarette makers reaches trial, according to court documents	0.25	TOB-AG-KS
AWH	06/24/1996	Review pleading: Complaint and Demand for Jury Trial from San Francisco	2.75	TOB-AG-KS
AWH	06/27/1996	Review 06/27/96 article from America Online from Tallahassee, Fla. (Reuter) by Michael Peltier re: Supreme Court of FL. ruled that a law allows the state to sue tobacco companies for the cost of smoking-related illnesses is largely constitutional, but needs modification	0.25	TOB-AG-KS
AWH	06/27/1996	Review 06/27/96 article from America Online from Chicago (Reuter) by Brad Dorfman re: Am. Med. Association puts pressure on the tobacco industry calling for insurance companies and health maintenance organizations to divest themselves of any tobacco holdings	0.25	TOB-AG-KS

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TOBACCO KANSAS AG LITIGATION TIME SHEET

2-6

Who	Date	Desc	Time	Case#
AWH	06/27/1996	Review 06/27/96 article from America Online from Atlanta (Reuter) by Mike Cooper re: State health officials said they would expand their surveillance beyond diseases and illnesses for the first time and would begin gathering information of the prevalence of cigarette smoking	0.25	TOB-AG-KS
AWH	06/28/1996	Review other states litigation theories	2.25	TOB-AG-KS
AWH	07/02/1996	Review 07/02/96 article from America Online from Pascagoula, Miss. (Reuter) re: Mississippi judge ordered a NY public relations consultant from B&W to give a sworn deposition	0.25	TOB-AG-KS
DM	07/03/1996	Meeting between Andy Hutton and Deb McElhinny re: anti-trust violations	1.25	TOB-AG-KS
AWH	07/03/1996	Research Kansas State anti-trust law	0.25	TOB-AG-KS
AWH	07/03/1996	Meeting between Andy Hutton and Deb McElhinny re: anti-trust violations	1.25	TOB-AG-KS
AWH	07/03/1996	TC CDC re: smoking statistics	0.5	TOB-AG-KS
AWH	07/05/1996	Review Mississippi Action	0.75	TOB-AG-KS
AWH	07/08/1996	Review Andrews Publication Reporter re: State actions	1.25	TOB-AG-KS
AWH	07/08/1996	Review date from CDC	1.25	TOB-AG-KS
AWH	07/15/1996	TC John Campbell re: Status	0.25	TOB-AG-KS
AWH	07/18/1996	Review 07/18/96 article from America Online from Hartford, Conn. (Reuter) re: Connecticut suing the tobacco industry	0.25	TOB-AG-KS
AWH	07/19/1996	Review Tobacco Litigation Reporter	1.25	TOB-AG-KS
DM	07/29/1996	Meeting between Andy Hutton and Debs McElhinny re: Kansas Causes of Action	1.75	TOB-AG-KS
AWH	07/29/1996	Meeting between Andy Hutton and Debs McElhinny re: Kansas Causes of Action	1.75	TOB-AG-KS
AWH	08/07/1996	Fax to Carla Stovall re: State of Kansas representation in Kansas litigation	0.25	TOB-AG-KS

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1 year and to any follow-up required by this section.  
 2       For tax year 1998, and all tax years thereafter, after receipt of the  
 3 tax roll from the county clerk and before December 15, the treasurer  
 4 shall mail to each taxpayer, as shown by the tax rolls, a tax information  
 5 form which indicates the taxing unit, assessed value of real property for  
 6 the current and next preceding taxable year, the mill levy for the current  
 7 and next preceding taxable year and, in the case of unified school districts,  
 8 the mill levy required by K.S.A. 72-6431, and amendments thereto, shall  
 9 be separately indicated, the tax due and an itemization of each taxing  
 10 unit's mill levy for the current and next preceding taxable year and the  
 11 percentage change in the amount of revenue produced therefrom, if any.  
 12 In addition, with respect to land devoted to agricultural use, such form  
 13 shall indicate the acreage and description of each parcel of such land.  
 14 The tax information form shall also indicate separately each parcel of real  
 15 property which is separately classified for property tax purposes. The  
 16 county appraiser shall provide the information necessary for the county  
 17 treasurer to comply with the provisions of this section. The tax informa-  
 18 tion form may be separate from the tax statement or a part of the tax  
 19 statement. The tax information form shall be in a format prescribed by  
 20 the director of property valuation. The tax information form shall be  
 21 mailed to the last known address of the taxpayer. When a tax information  
 22 form is returned to the county treasurer for failure to find the addressee,  
 23 the treasurer shall make a diligent effort to find a forwarding address of  
 24 the taxpayer and mail the tax information form to the new address. All  
 25 tax information forms mailed pursuant to this section shall be mailed by  
 26 first class mail.

27       *d* For the purpose of assisting county treasurers in the performance  
 28 of ~~their~~ duty to provide taxpayers property tax statements, within 30 days  
 29 subsequent to the satisfaction of the obligation evidenced by a real estate  
 30 mortgage contract, the mortgagee shall notify the county treasurer of the  
 31 county within which the real estate is located of such satisfaction.

32       Sec. 2. K.S.A. 79-2001 is hereby repealed.

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

the

Any mortgagee who fails to comply with the provisions of this subsection shall be liable for damages to the mortgagor in the amount of any penalty or interest resulting from taxes levied upon the property subject to the mortgage being delinquent together with attorney's fees in prosecuting the action.

House Taxation  
 Date 2/18/00  
 Attachment # 3-1

violate MRPC 1.4(a) and (b), 1.5, 1.8(h), 1.15(b), 1.16(d), 3.5(d), 7.2(d), 8.2(a), and 8.4; indefinite suspension per Rule 203(a)(2). *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (1998).

95. Attorney's mishandling of personal injury, criminal, bankruptcy, and divorce cases violates MRPC 1.1, 1.3, 1.4, 1.5, 1.15, 1.16, 7.3, and 8.4(a), (c), (d), and (g) and Rule 207; panel recommended disbarment per Rule 203(a)(1); indefinite suspension. *In re Lewis*, 265 Kan. 766, 962 P.2d 534 (1998).

96. Attorney's failure to adequately communicate with his clients and his lack of due diligence in an automobile accident case violate MRPC 1.3 and 1.4; supervising attorney granted all immunities per Rule 223; two-year supervised probation. *In re Davisson*, 266 Kan. 395, 969 P.2d 892 (1998).

97. Attorney's mishandling of four divorce cases violates MRPC 1.1, 1.3, 1.4, 1.16, 3.1, 3.2, 3.3, 4.1, 8.1, and 8.4 and Rule 207; a hearing panel report deemed to be admitted per Rule 212(c) and (d); supervising attorney afforded all immunities per Rule 223; two-year supervised probation. *In re Lober*, 266 Kan. 404, 969 P.2d 885 (1998).

98. Attorney's mishandling of a divorce case and a tort case violates MRPC 1.3 and 1.4(a); attorney's inexperience in the practice of law stated as mitigating factor; published censure per Rule 203(a)(3). *In re Levy*, 266 Kan. 411, 969 P.2d 870 (1998).

99. Attorney stipulated to violations of MRPC 1.1, 1.2, 1.3, 1.4, 3.1, and 8.4(g) in his handling of child custody case, child support case, and wrongful termination case; his failure to cooperate in investigation violates Rules 207(b) and 211(b); Internal Operating Rules of the Kansas Board for Discipline of Attorneys (I.O. Rule E.8) discussed for appropriateness of probation; one-year suspension. *In re Long*, 266 Kan. 664, 972 P.2d 773 (1999).

100. Attorney's failure to notify his client of the issuance of a bench warrant for arrest violates MRPC 1.4 and his failure to cooperate with the investigation violates Rule 207; two-year supervised probation ordered; supervising attorney afforded immunity per Rule 223. *In re Islas*, 266 Kan. 679, 972 P.2d 764 (1999).

101. Plaintiff's attorneys failed to provide her with notice of a settlement hearing in violation of KRPC 1.4. *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 267 Kan. 245, 978 P.2d 922 (1999).

102. Attorney's failure to appear in court on numerous occasions and his abandonment of his law practice without making any arrangements to protect his clients violate KRPC 1.1, 1.3, 1.4, 1.15, 1.16, 8.1, and 8.4 and Rules 207 and 208(c); disbarment. *In re Ortega*, 267 Kan. 228, 978 P.2d 914 (1999).

103. Attorney's mishandling of bankruptcy case violates KRPC 1.1, 1.3, 1.4, 1.15, and 8.4; supervised probation. *In re Christians*, 267 Kan. 240, 978 P.2d 910 (1999).

104. Attorney's mishandling of personal injury case, past due taxes case, and bankruptcy case violates KRPC 1.3, 1.4, 1.15, 3.2, 8.1, and 8.4; he was arrested for DUI, possession of cocaine, possession of drug paraphernalia, battery on a law enforcement officer, battery on his former girlfriend, and other charges; failure to notify and cooperate with the disciplinary administrator in violation of Rules 203(c) and 207, defense under Rule 223 raised; indefinite suspension. *In re Parker*, 267 Kan. 779, \_\_\_\_ P.2d \_\_\_\_ (1999).

105. Attorney's mishandling of collection matters violates KRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c); allegations in the hearing panel's report deemed admitted per Rule 212(c) and (d); split panel recommendation; published censure. *In re Druten*, 267 Kan. 790, \_\_\_\_ P.2d \_\_\_\_ (1999).

### RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. The statement shall advise the client of the right to have the fee reviewed as provided in subsection (e).

(e) Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.

management for, charge, or collect:



- (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or
- (2) a contingent fee for representing a defendant in a criminal case; or
- (3) a contingent fee in any other matter in which such a fee is precluded by statute.

(g) A division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division.

(h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement. [History: (g) Am. effective March 11, 1999.]

#### Kansas Comment

##### Origin

Rule 1.5 as adopted contains 1.5(a) and (b) as promulgated in the Model Rules. (c), (d) and (e) have been modified. The Kansas Committee recommended adoption of Model Rule 1.5 with no changes. Rule 1.5 as adopted followed a study of attorney fees by a special committee of the Kansas Judicial Council formed pursuant to Concurrent Resolution 5053 of the Kansas House of Representatives adopted April 8, 1986. The rule as finally adopted took into consideration Model Rule 1.5, the Kansas Committee recommendations and the recommendations of the special committee of the Kansas Judicial Council.

##### Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

##### Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For

example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

##### Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.

##### Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. The fact that a fee may be lower than the customary fee charged in the locality for similar service shall not be a basis for finding the fee to be unreasonable.

##### Case Annotations

1. Attorney referral fee permitted under MRPC 1.5(g) without regard to services rendered. DR 2-107(A) no longer applicable. *Ryder v. Farmland Mut. Ins. Co.*, 248 Kan. 352, 807 P.2d 109 (1991).
2. Rule 1.5(e) provides a vehicle for clients to seek court intervention in attorney fee contract disputes. *Ryder v. Farmland Mut. Ins. Co.*, 248 Kan. 352, 807 P.2d 109 (1991).
3. Rule cited in appeal of contingent fee award in condemnation case. *Board of Sedgwick County Comm'rs v. Kiser Living Trust*, 250 Kan. 84, 107, 825 P.2d 130 (1992).
4. Court lists eight factors found in MRPC 1.5(a) in determining reasonableness of attorney fees in eminent domain case. *City of Wichita v. BG Products, Inc.*, 252 Kan. 367, 374, 845 P.2d 649 (1993).
5. Attorney's mishandling of employment discrimination class action and failure to inform clients as to status of case violative of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.1, and 3.2; other violations; Rule 203(a)(2) one-year suspension, Rule 203(a)(5) restitution, and Rule 218 compliance ordered. *In re King*, 253 Kan. 444, 855 P.2d 963 (1993).
6. Attorney's failure to remit client's portion in a collection matter, failure to keep client informed, misrepresentations to client as to status of collection efforts, and causing balance on trust account to repeatedly fall below amount due client violative of MRPC 1.3, 1.4(a), 1.5(d), 1.15(a), 4.1(a), and 8.4(c); aggravating and mitigating circumstances; one-year supervised probation with conditions. *In re Wisler*, 254 Kan. 600, 866 P.2d 1049 (1994).

7. Attorney fees contingent on amount of maintenance received in divorce action violative of MRPC 1.5(f)(1); censure. *In re Jarvis*, 254 Kan. 829, 869 P.2d 671 (1994).

8. Attorney's mishandling of personal injury case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.16, 3.2, 4.1, 8.4 and Rule 207; published censure. *In re Shultz*, 256 Kan. 196, 883 P.2d 779 (1994).

9. Attorney's failure to represent client in collection of foreign judgment in workers compensation case found to violate MRPC 1.1, 1.3, 1.4, 1.5(d), 1.16(d), 3.2, and 8.4(g); indefinite suspension and Rule 218 compliance ordered. *In re Griggs*, 256 Kan. 498, 886 P.2d 786 (1994).

10. Attorney previously censured disbarred for violations of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 7.1, 7.5, 8.1, 8.4, and Rules 207 and 208; Rule 218 compliance ordered. *In re Shultz*, 257 Kan. 662, 895 P.2d 603 (1995).

11. Rules of determining reasonableness of fees under MRPC 1.5(a) discussed; trial court has authority to set reasonable fees under 1.5(e), but that authority does not make the fees unliquidated for the purposes of prejudgment interest. *Miller v. Botwin*, 258 Kan. 108, 899 P.2d 1004 (1995).

12. Attorney's failure to remit personal injury protection lien to his client's insurance company, failure to keep client informed, misrepresentation to client, and creating conflict of interest violated MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.7, 4.1, and 8.4; aggravating circumstances; indefinite suspension. *In re Seck*, 258 Kan. 530, 905 P.2d 122 (1995).

13. Attorney's neglect of three different clients' cases violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 3.1, and 8.4 and Rule 207; one-year suspension. *In re Geeding*, 258 Kan. 740, 907 P.2d 124 (1995).

14. Attorney's charging unreasonable fees in an estate matter violates MRPC 1.5; ordered to abide by his agreement to repay; published censure. *In re Tuley*, 258 Kan. 762, 907 P.2d 844 (1995).

15. Attorney's mishandling of client funds, failure to supervise nonlawyer assistants, and other misconduct violate MRPC 1.3, 1.5, 1.15, 5.3, and 8.4; mitigating circumstances; published censure. *In re Krogh*, 259 Kan. 163, 910 P.2d 221 (1996).

16. Attorney's failure to keep client reasonably informed and charging of excessive fee violate MRPC 1.3, 1.4, 1.5, and 1.16; published censure. *In re Scimeca*, 259 Kan. 893, 914 P.2d 948 (1996).

17. Attorney's mishandling of client's assets in voluntary conservatorship proceeding violates MRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.14, 3.3, and 8.4; published censure. *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).

18. Attorney's handling of civil action and post-divorce proceeding and his attempt to represent a criminal defendant while attorney was in inpatient drug treatment program violate MRPC 1.3, 1.4, 1.5(b), 1.15(a) and (b), 1.16(a), 3.3(a), 4.1, and 8.4(a), (b), (d), and (g); three-year supervised probation. *In re Phillips*, 260 Kan. 909, 925 P.2d 435 (1996).

19. Attorney's failure to act with reasonable diligence and promptness in an eviction case, commingling of clients' funds with his own, and failure to cooperate with disciplinary administrator's office violate MRPC 1.4, 1.5, 1.9, 1.15, 1.16, 8.1 and 8.4 and Rule 207; one-year suspension. *In re Howlett*, 261 Kan. 167, 928 P.2d 52 (1996).

20. Attorney's mishandling of bankruptcy case violates MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.1, 3.3, and 8.4; published censure per Rule 203(a)(3). *In re Roy*, 261 Kan. 999, 933 P.2d 662 (1997).

21. Client not required to follow MRPC 1.5(e) procedure in attorney fee dispute case. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997).

22. Attorney's mishandling of personal injury case, removing disputed fee funds from his trustee account, failure to communicate with client, delaying notification to insurance com-

pany of his termination, and charging unreasonable fee violate MRPC 1.15, 1.4, 1.16(a)(3) and (d), and 1.5(a); two-year probation and restitution ordered. *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976 (1997); *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

23. Attorney's failure to file negligence action in proper court and his disappearance from his law office without notice to clients violate MRPC 1.1, 1.3, 1.4, 1.5, 3.2, and 8.4 and Rule 207; disbarment. *In re Neal*, 262 Kan. 562, 937 P.2d 1234 (1997).

24. The graduated contingency fee rates to Workers Compensation Act do not interfere with court's inherent power to regulate practice of law or unconstitutionally violate separation of powers doctrine. *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 920 P.2d 433 (1997).

25. Attorney neglected to act for client after accepting retainer; violation of MRPC 1.5; indefinite suspension. *In re Mitchell*, 263 Kan. 217, 946 P.2d 999 (1997).

26. Eight factors considered in determining reasonableness of attorney fees. *De-Spiegelaere v. Killion*, 24 Kan. App. 2d 542, 947 P.2d 1039 (1997).

27. Motion is filed per MRPC 1.5(d) requesting the court divide litigation expenses between litigants. *Gillespie v. Seymour*, 263 Kan. 650, 952 P.2d 1313 (1998).

28. Attorney violated MRPC 1.5(d) by his failure to utilize a written contingent fee arrangement and to advise his client of her right to have the arrangement and recovery reviewed by court for reasonableness; published censure. *In re Potter*, 263 Kan. 766, 952 P.2d 936 (1998).

29. Attorney's engaging in inappropriate sexual behavior with female clients violates MRPC 1.7(b), 1.8(b), 2.1, 3.7, 4.1, and 8.4(d) and (g); he was additionally charged for violations of MRPC 1.2, 1.3, 1.4, 1.5, 4.3 and 8.4(b) and (c) and Rule 207; disbarment. *In re Berg*, 264 Kan. 254, 955 P.2d 1240 (1998).

30. Attorney's charging various clients unreasonable fees, failure to refund expense deposits, failure to inform client of the status of case, failure to act with reasonable diligence and promptness, use of deceptive and fraudulent retainer agreement, and other misconduct violate MRPC 1.4(a) and (b), 1.5, 1.8(h), 1.15(b), 1.16(d), 3.5(d), 7.2(d), 8.2(a), and 8.4; indefinite suspension per Rule 203(a)(2). *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (1998).

31. Attorney's improper handling of trust account violates MRPC 1.5(b) and 1.15; 2-year suspension. *In re Barta*, 265 Kan. 762, 962 P.2d 532 (1998).

32. Attorney's mishandling of personal injury, criminal, bankruptcy, and divorce cases violates MRPC 1.1, 1.3, 1.4, 1.5, 1.15, 1.16, 7.3, and 8.4(a), (c), (d), and (g) and Rule 207; panel recommended disbarment per Rule 203(a)(1); indefinite suspension. *In re Lewis*, 265 Kan. 766, 962 P.2d 534 (1998).

33. In a wrongful death action where plaintiffs' counsel was awarded fees out of recovery, MRPC 1.7, 1.5(d) and (f), and 1.8(g) were discussed. *Baugh v. Baugh*, 266 Kan. 871, 973 P.2d 202 (1999).

### RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

3-4

*In re Potter*

No. 78,950

In the Matter of MARCUS B. POTTER, JR., *Respondent*.

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Published Censure.*

Original proceeding in discipline. Opinion filed January 23, 1998. Published censure.

*Stanton A. Hazlett*, disciplinary administrator, argued the cause and was on the formal complaint for petitioner.

*John P. Biscanin*, of Kansas City, argued the cause for respondent, and *Marcus B. Potter, Jr.*, respondent, argued the cause pro se.

*Per Curiam*: This is an original proceeding in discipline filed by the office of the Disciplinary Administrator against Marcus B. Potter, Jr., an attorney admitted to the practice of law in the state of Kansas whose business address is in Kansas City.

Procedurally, this case is in an unusual posture. Respondent did not file an answer to the formal complaint as required by Kansas Supreme Court Rule 211(b) (1997 Kan. Ct. R. Annot. 223). Although given written notice of the date of the hearing before the hearing panel, respondent failed to appear, either in person or by counsel, and offered no reason for his absence. Notwithstanding, respondent, through counsel, subsequently filed his exception as follows:

“EXCEPTION TO THE REPORT OF THE HEARING PANEL

“Comes now Marcus B. Potter, Jr., by and through his attorney, John P. Biscanin, and states as follows:

“1. That he requests the right to appear before the Supreme Court to accept the discipline it may impose upon him but wishes to be allowed the opportunity to explain his actions and to answer any questions the Court may have regarding his behavior and actions in the above-captioned matter.

“2. Further, Respondent, although accepting the Report of the State Board in general, does take exception to the finding of the Panel that he intentionally gave a false statement of material fact or misrepresented facts to the Disciplinary Administrator and, therefore, does take exception to any violations of [MRPC] 8.1(a) [1997 Kan. Ct. R. Annot. 363], 8.4(d), and 8.4(g) [1997 Kan. Ct. R. Annot. 366].”

The hearing panel made extensive, detailed findings of fact. Little would be gained from their inclusion *in toto* by virtue of the

*In re Potter*

very limited exception filed herein. For our purposes, the following summary of unchallenged findings of fact is sufficient.

The complainant, Denise Carson, was injured in an automobile accident on June 17, 1993. In October of that year, she retained respondent to represent her in connection with the accident. No written fee agreement was entered into, although respondent ultimately took a percentage of the recovery for his fee.

The same month respondent wrote a five-sentence letter to the insurance carrier for the other driver (American Family Insurance Company), advising the company he was representing complainant on her claim. There was never any issue concerning liability. American Family's insured was solely responsible for the collision. The amount of damages was the sole issue.

Respondent took no further action for months. June Pinnick, an American Family claims analyst, wrote him several times in 1994 to settle the claim. Respondent made no response. Complainant became increasingly concerned, particularly after she was notified by her insurance carrier that no further PIP payment would be made. She placed numerous telephone calls to respondent. She was never successful in reaching him, and he did not return her calls. Complainant went to respondent's office several times. He refused to meet with or see her.

Respondent's secretary set up an appointment for February 20, 1995, for complainant, but respondent did not keep the appointment.

On February 23, 1997, complainant wrote a letter of complaint to the Disciplinary Administrator's office. On March 7, 1995, respondent called Ms. Pinnick, the claims analyst, to attempt settlement. It was a short conversation. Ms. Pinnick offered \$10,000. Respondent then asked for \$12,000. They agreed on \$11,250. Respondent advised complainant he had settled for \$11,250. Respondent withheld \$1,250 for his fee.

The panel further found:

“10. Respondent did not provide the complainant with any information, let alone the written notice required by [MRPC] 1.5(d) [1997 Kan. Ct. R. Annot. 289], that she had the right to have the contingent fee arrangement and the recovery reviewed for reasonableness by a court of competent jurisdiction. The

3-5

record does not clearly indicate whether respondent's fee was reasonable. [Footnote 5. At first blush, the percentage fee charged by respondent in the complainant's case would appear to be quite reasonable, i.e., certainly it is less than the 25-40% rate often seen in personal injury litigation. But, the record indicates that respondent spent very little time (probably about one hour) working on the subject personal injury case. . . . Arguably it could be inferred from a preponderance of evidence that respondent's effective fee rate of more than \$1,000.00 per hour runs afoul of the reasonableness mandate given the nature of the case and the eight factors listed in [MRPC] 1.5(a). The panel is unprepared to find a [MRPC] 1.5 violation, as it is not supported by clear and convincing evidence in the record.]"

The panel then made the following conclusions:

#### "CONCLUSIONS OF LAW

"Based on the above-described clear and convincing evidence, the panel concludes as a matter of law that respondent's conduct violates [MRPC] 1.1 [1997 Kan. Ct. R. Annot. 268], 1.2(a) [1997 Kan. Ct. R. Annot. 273], 1.3 [1997 Kan. Ct. R. Annot. 276], 1.4(a) and (b) [1997 Kan. Ct. R. Annot. 282], 1.5(d), 8.1(a), and 8.4(d) and (g), and Kansas Supreme Court Rules 207 [1997 Kan. Ct. R. Annot. 213] and 211. These violations are explained in more detail below.

"Respondent violated [MRPC] 1.1 and 1.3 by virtue of his delay in pursuing the complainant's claim. His failure to return the complainant's calls and to answer Ms. Pinnick's letters, and his failure to deal with the denial of medical expenses and the PIP claim, demonstrate a lack of diligence, promptness, and competence (knowledge and thoroughness) necessary to represent his client.

"Respondent violated [MRPC] 1.2(a), as well as 1.4(a) and (b), when he did not consult with complainant between October 1993 and March 1995 about her claim or explain the settlement negotiations to her despite numerous phone calls from complainant.

"Respondent violated [MRPC] 1.5(d) by his failure to utilize a written agreement evidencing the contingent fee arrangement. He violated [MRPC] 1.5(d) again when he failed to advise the complainant of her right to have the contingent fee arrangement and recovery reviewed by a court for reasonableness.

"Respondent's letter in response to the initial informal complaint . . . contains a false statement of material fact, in violation of [MRPC] 8.1(a), as well as [MRPC] 8.4(d) and (g). Specifically, respondent stated that an offer and counteroffer had been made by the time the informal complaint was filed, when in fact there were no negotiations until at least one week after the informal complaint was received by the disciplinary administrator's office. Alternatively, the panel concludes that respondent's neglect of the complainant's case, his misrepresentation of the facts to the disciplinary administrator, and his lack of communication with the com-

plainant, reflect adversely on his ability to practice law. Therefore, respondent violated [MRPC] 8.4(g).

"Respondent violated Kansas Supreme Court Rules 207 and 211(b). All lawyers, including those under investigation, have a general duty to cooperate with and respond to inquiries from disciplinary authorities. See *State v. Savaiano*, 234 Kan. 268, 271, 670 P.2d 1359 (1983). The failure of a lawyer to cooperate with and respond to the disciplinary administrator, or to appear as ordered before a hearing panel, constitutes a violation of Rule 207. See *In re Price*, 241 Kan. 836, 836, 739 P.2d 938 (1987). Respondent clearly violated [Supreme Court Rules] 207 and 211(b) by failing to participate in the hearing and by failing to file an answer to the formal complaint."

#### EXCEPTION

Respondent only filed exceptions to the panel's conclusions he violated MRPC 8.1(a) and 8.4(d) and (g) as based upon respondent's February 8, 1996, letter to Kevin Koch, the attorney who was investigating the complaint herein on behalf of the Disciplinary Administrator's office. This letter states:

"It is my belief that the complaint Ms. Carson filed was made somewhat out of frustration as much as anything else. She had a claim pending with an Insurance Carrier (American Family) for several months and felt that it should have been resolved much quicker than it was. An offer and counter offer had been made at the time her complaint was filed and was subsequently accepted by Ms. Carson with settlement check issued on March 8, 1995 and payout made on March 16, 1995.

"Subsequent to that date Ms. Carson has contacted me for additional representation and I do not believe that she is dissatisfied with my work. I am enclosing documents relating to the settlement and also information regarding Ms. Carson's current address and telephone number should you desire to contact her. [Complainant's address and telephone number deleted.]

"I am available to answer questions or provide additional information as needed."

The complainant filed her initial complaint with the Disciplinary Administrator's office by letter dated February 23, 1995, which was received on March 1, 1995. Respondent did not contact Ms. Pinnick relative to settlement of the claim until March 5 or 7, 1995. Accordingly, respondent's statement relative to the settlement being made prior to the filing of the complaint by the complainant was incorrect. The panel did not determine whether this was an intentional misrepresentation of a known fact or a negligent mis-

3-6

*In re Potter*

statement of a material fact. Respondent may well have had actual knowledge that a complaint was being made in February. The evidence shows respondent's secretary gave the complainant the Disciplinary Administrator's telephone number in advance of complainant's February 23, 1995, telephone call to the Disciplinary Administrator's office and the writing of the letter the same date. Additionally, in her testimony, the complainant denied having contacted respondent subsequently for additional legal services.

The violations based upon the Koch letter are supported by the record. The alternative grounds for these violations (of which no complaint is made in respondent's brief) are also supported by the record. We find no merit in the exception filed herein.

The panel's findings relative to respondent's shabby, unprofessional treatment of the claimant are abundantly supported by the record, as are the panel's conclusions of law, and we accept them.

#### DISCIPLINE

The panel noted that respondent had been informally admonished in 1988 and 1991 for violation of MRPC 1.3 (diligence) and 1.4 (communication). The panel went through the ABA Standards on Aggravation and Mitigation and recommended that "the respondent be suspended from the practice of law." There is no indication whether suspension for a fixed period of time or indefinite suspension was deemed to be the appropriate discipline.

Since the date of the panel's final report (April 21, 1997), respondent has been involved in additional disciplinary matters. On October 6, 1997, the review committee recommended the sanctions of informal admonishment in complaint numbers A6467, A6566, and A6642. On November 24, 1997, docketed complaint number A7002 was forwarded to the review committee. At the time of this writing, there has been no further activity.

The determination of the appropriate discipline herein has been difficult. Respondent's reprehensible refusal to communicate with his client and his delay in the handling of a very simple matter were not to his advantage in any respect. Clearly if respondent felt he did not have the time or inclination to handle claimant's case efficiently and professionally, he should have declined representation

*In re Potter*

or advised the client promptly that he could no longer represent her. No reason or excuse has been proffered for respondent's actions. One can only think the scenario surfacing herein is symptomatic of some basic underlying problem. Respondent should reflect upon what was the cause of his inability or refusal to act and obtain help in making sure there is no recurrence of unethical behavior.

A minority of this court believes respondent should be suspended from the practice of law for a finite or indefinite period of time. Time may prove the minority correct. However, the majority of the court, with some reservations, concludes that the appropriate discipline is published censure. A factor in this determination is that the panel specifically declined to find that the settlement made was unreasonable. Complainant was justifiably irritated with respondent's conduct, but the panel did not find there was any financial loss.

IT IS THEREFORE ORDERED that Marcus B. Potter, Jr., be censured in accordance with Supreme Court Rule 203(a)(3) (1997 Kan. Ct. R. Annot. 201) for his violation of the Model Rules of Professional Conduct.

IT IS FURTHER ORDERED that this order shall be published in the official Kansas Reports and that the costs herein be assessed to respondent.

SIX, J., concurring and dissenting: Respondent's many disciplinary violations are set out in the majority opinion. The majority has adopted the panel's findings and acknowledged "respondent's shabby, unprofessional treatment" of and "reprehensible refusal to communicate with" his client. I agree.

I write separately to focus on respondent's violations of Rule 207 (1997 Kan. Ct. R. Annot. 213) (duty to cooperate) and Rule 211 (1997 Kan. Ct. R. Annot. 223) (formal hearings). See *In re Price* 241 Kan. 836, 739 P. 2d 938 (1987); and *State v. Savaiano*, 234 Kan. 268, 271, 670 P. 2d 1359 (1983).

The Disciplinary Administrator recommends indefinite suspension. The panel recommended suspension, without indicating whether the suspension should be for a definite or indefinite pe-

3-7

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*In re Potter*

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riod. Respondent does not address the question of an appropriate disciplinary disposition.

Respondent's disciplinary problems span a 10-year period. He was informally admonished in 1988 and in 1991 for MRPC 1.3 (diligence) and 1.4 (communication), two of his violations here. He currently is involved in additional disciplinary matters (informal admonishment recommended on October 6, 1997, in three complaints and a fourth docketed complaint forwarded to the review committee in November 1997, all as noted by the majority).

Respondent offers no explanation for his failure to either answer the formal complaint or to appear before the hearing panel. He ignores the rules of this court by refusing to participate in the disciplinary process. His attempts to mislead the investigator made it appear as though he had been working on the settlement before his client filed her complaint. Respondent's attitude toward the disciplinary process, coupled with his many MRPC violations, call for a sanction beyond published censure.

I would suspend respondent from the practice of law for a period of 1 year from this date.