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 25, 2000, in Room 519-S of the Capitol.

All members were present except: Rep. Wilk - 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
Edith Beaty, Taxation Secretary

Conferees appearing before the committee:

The Chair spoke to the Committee in regard to a resolution that would require the Attorney General to prosecute an action to determine the reasonableness of attorney fees awarded to the local outside counsel in the national tobacco settlement case. (Attachment 1).

Statute 75-702, that authorizes the legislature to pass resolutions to take issues to court. The legislature has done this on several occasions, such as when the Attorney Genera was asked to take the Kansas Nebraska water situation to court. (Attachment 2).

A copy was passed out of the determination of the arbitration panel that was heard in Texas on November 13, 1999. (Attachment 3).

Asked if this resolution were to be passed by the Committee would it then fo to the Senate, Representative Wagle said that it would have to be approved by the full house. She also stressed that the passage of this would in no way hurt the funding that is coming to the state.

Representative Tomlinson requested that more time be allowed to study the ramifications of the resolution. The Chair agreed to grant his request.

A motion was made by Representative Johnston to introduce the resolution as a house bill in order for it to be studied. The motion was seconded by Representative Sharp and it passed on a voice vote.

The Chair called their attention to the copy of the rules for professional conduct that had been handed out to each Committee member. (Attachment 4).

The Committee was reminded that if this resolution wais passed, it was then out of their hands. She asked if they wanted to set a time to meet again or just adjourn and think about it over the weekend.

Representative Minor said he was of the opinion that this issue should be brought to a conclusion before too long and he would encourage the Committee to be ready to vote on the bill by the end of the following week.

The meeting was adjourned at 10:50 a.m. The next meeting is scheduled for Thursday, March 2, 2000.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

A RESOLUTION requiring the Attorney General to prosecute an action to determine the reasonableness of attorney fees awarded to the local outside counsel in the national tobacco settlement case.

WHEREAS, The Committee on Taxation received testimony concerning the employment of local outside counsel to represent the State of Kansas in litigation against the tobacco companies; and

WHEREAS, The Committee heard testimony that if another law firm had been employed, Kansas may have received a greater amount of revenue from the National Tobacco Settlement; and

WHEREAS, According to the order issued by the Tobacco Settlement Arbitration Panel that rewarded $27,000,000 to Kansas local outside counsel, "The role of National Counsel in this state was very prominent and active," "that there was more work spent by National Counsel in Kansas than in several other states," and the National Counsel "provided most of the personnel power and resources for the Kansas effort"; and

WHEREAS, There was limited litigation in Kansas, and in fact, according to the order of the Tobacco Settlement Arbitration Panel, "There was no ruling on the industry's motion to dismiss, there was no discovery, no expert designations, no depositions and no trial date was set"; and

WHEREAS, Rule 1.5 of the Model Rules of Professional Conduct as adopted by rule of the Kansas Supreme Court requires that any fee charged by a Kansas lawyer be reasonable and subject to judicial review; and

WHEREAS, The contract entered into by the State of Kansas and local outside counsel is also subject to such rule; and

WHEREAS, The fee received by local outside counsel in the amount of $27,000,000 is unreasonable in light of the lack of expertise and effort by such counsel, and the result obtained thereby: Now, therefore,

<u>Be it resolved by the House of Representatives:</u>

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(1) That in accordance with K.S.A. 75-702 the Attorney General be directed to bring an action in the Shawnee County District Court seeking judicial review pursuant to MRPC 1.5 as to the reasonableness of the attorney fees awarded to the local outside counsel;

(2) That the Attorney General obtain a copy of the transcript and briefs submitted to the Tobacco Settlement Arbitration Panel and submit such evidence to the court or seek a subpoena from the court directing production of the same;

(3) That the Attorney General submit to the court as evidence the entire record of the proceedings of the House Committee on Taxation occurring from February 14, 1999, through February 17, 1999;

(4) That all evidence submitted to the court in such action shall be made available for review by any member of the legislative coordinating council, and the chairperson, vice-chairperson and ranking minority member of the Committee on Taxation;

(5) That the Attorney General, in the event that a conflict appears with respect to paragraph (1), shall hire special counsel who will aggressively pursue on behalf of the client, the State of Kansas, that the award of $27,000,000 for work done on the tobacco case by the local outside counsel is unreasonable and a violation of MRPC 1.5; and

(6) That, in the event any amount of such fee is declared to be unreasonable and excessive, the Attorney General shall seek from the court an order providing that upon receipt, such amount shall be remitted by the local outside counsel to the state treasurer who shall deposit the entire amount thereof in the state treasury to the credit of the children's initiatives fund; and

Be it further resolved: That the chief clerk of the House of Representatives be directed to provide an enrolled copy of this resolution to the Attorney General.

75-702. Duties in actions where state a party or interested; or when the constitutionality of a law is at issue. The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested or when the constitutionality of any law of this state is at issue and when so directed shall seek final resolution of such issue in the supreme court of the state of Kansas.

History: L. 1879, ch. 166, § 71; R.S. 1923, 75-702; L. 1975, ch. 431, § 1; May 3.

Source or prior law:

L. 1861, ch. 58, § 43; G.S. 1868, ch. 102, § 64.

Cross References to Related Sections:

Attorney general to invoke county or district attorney's assistance in certain criminal appeals, see 22-3612.

Research and Practice Aids:

Attorney General ⇐ 6.

C.J.S. Attorney General §§ 5, 6.

Am.Jur.2d Attorney General §§ 6 to 10.

Law Review and Bar Journal References:

Parole eligibility of prisoners serving consecutive sentences in Kansas, Malcolm E. Wheeler, 21 K.L.R. 167, 176 (1973).

"Collateral Challenges to Criminal Convictions," Keith G. Meyer and Larry W. Yackle, 21 K.L.R. 259, 316 (1973).

"The New Mandamus—State ex rel. Stephan v. Kansas House of Representatives," Henry E. Couchman, Jr., 33 K.L.R. 733, 740 (1985).

Attorney General's Opinions:

Kansas association of counties; definitions; municipality; cash-basis law; public agency; open records act. 95-67.

CASE ANNOTATIONS

1. Prosecution by county attorney in another county; objection of attorney general. Martin, Governor, v. The State, ex rel., 39 K. 576, 18 P. 472.

2. Attorney general under order of governor becomes prosecuting attorney of county. The State v. Bowles, 70 K. 821, 824, 79 P. 726.

3. Section cited in considering qualifications of county attorney. Hanson v. Grattan, 84 K. 843, 847, 115 P. 646.

4. Provision requiring attorney general to prosecute an order of governor mandatory. The State, ex rel., v. Dawson, 86 K. 180, 188, 193, 119 P. 360.

5. Attorney general has power to make any disposition of state's litigation. State v. Finch, 128 K. 665, 668, 280 P. 910.

6. State may contest will in interest of permanent school fund. State, ex rel., v. Rector, 134 K. 685, 688, 8 P.2d 323.

7. Respective duties of county attorney and attorney general discussed. Heinz v. Shawnee County Comm'rs, 136 K. 104, 106, 107, 12 P.2d 816.

8. Attorney general, without insurance commissioner, cannot maintain action against insurance company. State, ex rel., v. Kansas Life Ins. Co., 140 K. 267, 36 P.2d 88.

9. Cited in holding attorney general could bring receivership action against insurance company. State, ex rel., v. Bank Savings Life Ins. Co., 142 K. 899, 906, 52 P.2d 639.

10. Members of legislature may maintain mandamus action when attorney general appears for state. Coleman v. Miller, 146 K. 390, 392, 71 P.2d 518.

11. Right of county attorney to bring mandamus action discussed and determined. State v. Peterson, 147 K. 626, 629, 78 P.2d 60.

12. Cited; action by county attorney to enjoin illegal medical practice properly maintained. State, ex rel., v. Leopold, 170 K. 613, 615, 228 P.2d 538.

13. Attorney general superior to county attorney in original supreme court action and is officer of supreme court. State, ex rel., v. City of Kansas City, 186 K. 190, 192, 194, 195, 350 P.2d 37.

14. Governor without authority to direct attorney general to not dismiss case in supreme court; attorney general by intervention may supersede county attorney in supreme court case. State, ex rel., v. City of Kansas City, 186 K. 190, 192, 194, 195, 350 P.2d 37.

15. Attorney general not necessary party to probate proceeding contesting charitable trust created by will. In re Estate of Roberts, 190 K. 248, 260, 373 P.2d 165.

16. When attorney general prosecutes case at county attorney's request, attorney general can be removed only for cause. State ex rel. Stephan v. Reynolds, 234 K. 574, 576, 673 P.2d 1188 (1984).

17. Attorney general and county attorney have concurrent duty to enforce open meetings act (75-4317 et seq.); attorney general can appeal when county attorney does not. Memorial Hospital Ass'n, Inc. v. Knutson, 239 K. 663, 667, 668, 722 P.2d 1093 (1986).

75-703. Prosecution on official bonds or contracts; civil and criminal actions. The attorney general shall, at the request of the governor, secretary of state, state treasurer, or state board of education, prosecute any official bond or any contract in which the state is interested, upon a breach thereof, and prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with their departments.

History: L. 1879, ch. 166, § 72; R.S. 1923, 75-703; L. 1968, ch. 14, § 1; L. 1974, ch. 364, § 14; Jan. 13, 1975.

Source or prior law:

L. 1861, ch. 58, § 44; G.S. 1868, ch. 102, § 65.

75-704. Aid to county attorneys; opinions. The attorney general shall consult with and advise county attorneys, when requested by them, in all matters pertaining to their official duties. The attorney general shall also, when required, give his or her opinion in writing, without fee, upon all questions of law submitted to him or her by the legislature, or either branch thereof, or by

House Taxation

Date: 2/25/00

Attachment # 2

Contact:
Eric Berman
Kekst and Company
212-521-4894

FOR IMMEDIATE RELEASE

TOBACCO FEE ARBITRATION PANEL ANNOUNCES UNANIMOUS KANSAS DECISION

NEW YORK, January 31, 2000 – The Tobacco Fee Arbitration Panel announced today a unanimous decision regarding attorneys' fees for outside counsel retained by the State of Kansas in the 1998 state tobacco litigation settlement.

In this case, the Panel determined that full, reasonable compensation for these attorneys is $54,000,000.

These fees, which will be paid by the tobacco companies, are separate from – and in addition to – the $1.767 billion financial recovery Kansas will receive through its settlement with the tobacco industry over the next 25 years, and additional payments in perpetuity.

The Kansas State Fee Payment Agreement specifically granted the Panel the authority to award a fee either lower or higher than the contract stipulates. The Panel's findings are final and not appealable by any party.

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PANEL ANNOUNCES KANSAS DECISION – continued

The arbitrators for the Kansas case included the Panel's two permanent members – Dr. John Calhoun Wells, the Panel's chairman, and former U.S. District Court Judge Charles Renfrew, the industry-appointed member – and Harry Huge, Esq., the Kansas counsel-appointed member. Dr. Wells is the consensus selection of both parties and is permanent chairman.

During its consideration of the Kansas application, the Panel conducted a hearing in Houston, TX on November 13, 1999. Both parties also presented written submissions to the arbitrators.

The Panel has previously announced fee determinations for attorneys representing the states of Florida, Texas, Mississippi, Massachusetts, Hawaii, Illinois and Iowa. It is also announcing a determination today for attorneys representing the state of Louisiana. The Panel will continue its work for those states choosing to enter the arbitration process. To date, some states have opted not to enter arbitration and have reached separate agreements with the industry on attorneys' fees.

# # #

ARBITRATION PANEL
CONVENED UNDER KANSAS COUNSEL
FEE PAYMENT AGREEMENT

IN RE:

ATTORNEYS' FEE APPLICATION BY KANSAS PRIVATE OUTSIDE COUNSEL

OPINION

The Kansas Outside Counsel fee arbitration was heard by the Panel of arbitrators on November 13, 1999 in Houston, Texas. In advance of the hearing, the Panel received written submissions from Kansas Outside Counsel and the Settling Companies. This was the ninth arbitration before the Tobacco Arbitration Panel arbitrators, established to award attorneys' fees to Private Outside Counsel in connection with the settlement of the Attorney General Medicaid cases against the tobacco industry. This arbitration proceeding awards attorneys' fees to Private Outside Counsel for the State of Kansas pursuant to the Master Settlement Agreement ("MSA"). The MSA is the November 1998 global settlement of the Attorneys General litigation involving 46 states and a number of U.S. territories and Participating Tobacco Manufacturers. The State of Kansas' share in the financial proceeds of the MSA will exceed an estimated $1,767,000,000 billion. The Participating Manufacturers also agreed to pay full reasonable attorneys' fees to Counsel representing the sates over and above the settlement proceeds under the MSA. The contract governing this proceeding, the Kansas Fee Payment Agreement, charges the Panel with

the responsibility of awarding Kansas Private Outside Counsel "a full reasonable fee," taking into consideration the 'totality of the circumstances."

There was a contingent fee contract between Kansas Private Outside Counsel and the State of Kansas providing for counsel to be paid attorneys' fees "up to 25%" of the amounts recovered, with that amount being divided between Kansas local counsel and Kansas national counsel "up to 12.5%" each. Kansas National Private Counsel were responsible for all of the out-of-pocket expenses in order to prosecute this case, totaling approximately $1,000,000 or higher."

As we have noted before, each state's application has presented unique questions and there cannot be a cookie-cutter approach to determining the attorneys' fees. Kansas filed suit in August of 1996 and was the eleventh state to file suit. The Attorney General of Kansas was one of the first attorney's general to bring suit who was a member of the Republican party. The entry of Kansas into the litigation fray demonstrated that the litigation was a bipartisan effort and helped to create a "critical mass" for the litigation. Given the political atmosphere in the state of Kansas, it appears that the Kansas Attorney General took a courageous step in commencing litigation against the settling companies. Kansas was actively involved in the negotiations of the Liggett II settlement.

Two Parallel Cases in Kansas:

The main case was filed in August 1996, after the Liggett I Settlement. This main case was stayed most of the time. However, the second case — to enforce the provisions of the Liggett II Settlement — was where all of the court's activity took place. This second case was

also before the same judge as the main case. It is in the second case that the favorable decision on joint defense privilege was obtained.

The new challenge posed for the arbitrators in awarding full, reasonable compensation to Outside Counsel for Kansas is the extent to which Outside Counsel is to be rewarded for pursuing issues related to the applicability of the joint defense privilege to the documents which were to be turned over by Liggett to the states pursuant to the Liggett II settlement. Kansas (the only state to do so) commenced an ancillary suit against Liggett and was successful initially in obtaining a ruling pursuant to Kansas law that no joint defense privilege protected those documents from production. As the Kansas Court stated in one of the hearings in the second case:

> The Court never stayed discovery in the Liggett case. Discovery was stayed in the part of the other case. We're not talking about discovery issues in the Liggett case. The only issue is whether or not these interested defendants are entitled to insert a so-called joint defense privilege and there's, of course, a collateral issue, which is, if they are, has the issue been, — or has the privilege been waived.... And let me say, so that we all understand each other, the issue I want to take up — issues I want to take up are: Does Kansas recognize the so-called joint defense privilege and, if so, has it been waived, given the circumstances in this case?" (*Kansas Tobacco Arbitration hearing, p. 45-46)*

Kansas Outside Counsel asserts that this ruling in Kansas enabled national counsel to convince courts in other states to release the disputed Liggett documents to the states. We must resolve how to reward Kansas Outside Counsel for the work done relating to the privilege issue.

At the hearing, there was conflicting testimony concerning the importance of Kansas Outside Counsels' pursuit of the privilege issue. Outside Counsel argues that Kansas was the only state in which a claim could be made that no joint defense privilege existed and that

the Kansas Outside Counsel opened an additional front of attack on the Settling Companies by pursuing that argument. Outside Counsel argues that their work on the privilege issue served all states by increasing the pressure on the Settling Companies and that the additional pressure was one of the factors which brought the Settling Companies to the bargaining table. Mississippi Attorney General Michael Moore appeared before the Panel and testified, as did National Counsel Scruggs and Rice, that the attack on the joint defense privileges was part of a coordinated national strategy. The industry, in its pleadings in opposing the breaking of the joint defense privilege decision, called the Kansas case "unique." It also admitted the Kansas decision could affect future cases, even though not a single document was turned over to Plaintiffs because of the Kansas decision. However, it could have had a major impact on the national litigation if enforced and hundreds of thousands of documents were eventually turned over.

The Settling Companies, in contrast, argue that the dispute over the privilege issue had no effect on the main case against the Settling Companies. The Settling Companies point out that nothing happened in the litigation against the Settling Companies in Kansas once the suit was filed. There was no ruling on the industry's motion to dismiss, there was no discovery, no expert designations, no depositions and no trial date was set. The Settling Companies further assert that the ruling on the joint defense issue by the trial court clearly was in error and would have been reversed by the Kansas Supreme Court and that, in fact, no documents were ever produced as a result of the Kansas trial court's ruling.

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No one will ever know the outcome since as Attorney General Moore testified under cross-examination by the industry lawyers:

Industry Lawyer: Did the states get documents?
Moore: Out of "the Kansas" case?

No, you guys — y'all folded. You settled the case. You must have given up...."[1]

---

1. While no documents were actually produced into the court records in Kansas or elsewhere by the time of the MSA, Kansas local counsel was probably the first Plaintiffs' counsel to review the 2,500 Liggett-only privileged documents which were physically delivered to the Kansas courthouse pursuant to the second Kansas case. Kansas' local counsel then sent memoranda of what he had reviewed to other Plaintiffs' counsel even though he could not send copies of the documents he had revealed. Kansas' local counsel testified at the hearing:

> To the best of our knowledge, I am the first person outside the tobacco industry to ever view those documents. I personally read every single page of those documents and generated five reports regarding what those documents revealed.... Among the distinct projects that Kansas' local counsel worked on through its document review was we charted the relationship between the tobacco industry lawyers and outside company operations. We charted the work of the Tobacco Institute and its Committee of Council. We charted the Liggett's so-called safer cigarette research, and we charted the attorney-controlled funds that financed the operation of the Council for Tobacco Research.
>
> The quality and value of these Liggett only privileged documents was so impressive that Kansas counsel determined that the release of the remaining documents filed under seal was of critical importance. ... Yet, rather than starting from the premise that these documents were protected under the joint defense privilege and that the documents were discoverable only after a document-by-document crime-fraud review, we started a detailed study of whether the joint defense privilege could even be asserted at all in our state.
>
> After intensive research into the question, we reached the conclusion that the joint defense privilege does not exist in Kansas. We asserted this never-before-litigated theory in connection with a motion to have all documents that were filed under seal released to Kansas' counsel through the enforcing of the Liggett II Settlement. Although the specific challenge would reach only the 2,500 documents that remained under seal, the potential impact could have affected a pool of nearly 680,000 documents that were present in the underlying litigation. Thus, while the first case was under a discovery stay, we were laying the groundwork for the wholesale release of the industry's most sensitive secrets.

(Kansas Tobacco Arbitration hearing, pp. 82-84)

One of the criteria in determining a full, reasonable fee award is the element of risk. If "risk" is the most important criteria, the political risk and the legal risk at the time Outside Counsel was engaged was very high and the industry offered no evidence to the contrary. Attorney Generals Stovall of Kansas and Moore of Mississippi, and national counsel Scruggs, said the risk was substantial and that filing of Kansas' lawsuit was a risky and courageous thing to do. Attorney Generals Stovall and Moore, and National Counsel testified to the importance of bringing in Kansas, a Republican state, into the tobacco fray, particularly with GOP presidential nominee and Kansas native Senator Dole, who had made public comments expressing skepticism about the dangers of tobacco.

Looking at a lodestar as a starting point, Kansas counsel did not provide an estimate or an accounting of hours worked on the cases. This failure hampered the deliberations of the Panel. The industry estimated that there were 10,000 hours worked on the Kansas cases, and Kansas counsel estimated that this was a low number of hours actually worked. The role of National Counsel in this state was very prominent and active. Attorney General Moore and National Counsel Scruggs sought out Kansas, and National Counsel Ness Motley was instrumental in providing counsel and monetary support for the Kansas effort. Local counsel did not have any out-of-pocket expenses, for example, and were a small 4-5 person law firm selected by Kansas AG Stovall after several Kansas counsel refused to take the case. National Counsel Rice, however, testified that there was more work spent by National Counsel in Kansas than in several other states. That does not take away the effort or contribution of the Kansas case, as the appearance and testimony of AG Moore, National Counsel Scruggs and Rice at the Kansas hearing will illustrate. It does, however, clarify that National Counsel provided most of the personnel power and resources for the Kansas effort.

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In addition, National Counsel, played a key role in the negotiations which led to the June 20 Agreement. In these circumstances, we believe that it is appropriate to reward Outside Counsel principally for the work that was done on the national scene with a much smaller portion of the fee award being based on the work that both national and local counsel actually did in the Kansas action.

In arriving at this decision, the undersigned analyzed the role of Outside Counsel, using the factors listed in the Johnson case. The Johnson factors are identical to the criteria used by the ABA and virtually every court when called upon to determine fees to be awarded in all manner of cases. Given our prior discussions of those factors, we do not feel it would be useful to set out an extended discussion of those factors or the weight given those factors.

The undersigned have reviewed the totality of the circumstances utilizing those factors set out in Johnson and in the ABA ethics rules in consideration of what fees should be awarded to Kansas Outside Counsel.

As noted above, it was estimated that Kansas private counsel — not including National Counsel — spent a minimum of 10,000 hours working on the case. Applying a generous hourly rate in Kansas, and applying a modest multiplier to this amount, the Panel began with this analysis. It also took into consideration the fact that there was a contingency fee contract validly entered into, and negotiated at arms' length, but that such contingent fee contract provided only maximums, *i.e.*, "up to 25%." To the lodestar calculation was added a substantial amount for the compensation of the work done by National Kansas Counsel, utilizing a percentage calculation to arrive at a number.

Utilizing all of these factors, the Panel took into account the totality of the circumstances, including the lodestar calculation and a reasonable percentage for national counsel, in the setting of full, fair reasonable compensation.

The Panel thus concludes and awards a fee of $54,000,000 as full, fair reasonable compensation for Kansas outside private counsel.

S/________________________
John Calhoun Wells, Chairman

S/________________________
Hon. Charles B. Renfrew

S/________________________
Harry Huge, Esq.

Dated: January __, 2000.

of disciplinary complaint violate DR 6-101(A)(2), and MRPC 1.2(c), 1.3, 1.4(b), and 1.16(d); mitigating and aggravating circumstances; panel recommends unpublished censure; public censure. *In re Deeds*, 254 Kan. 309, 864 P.2d 1194 (1993).

37. Attorney's dilatory handling of estate matter violative of MRPC 1.3, 1.4, 1.16(a)(2), 3.2, and 8.4(g); Rule 207 violation; other violations; pending complaints; imposition of discipline suspended, supervised probation ordered. *In re Jackson*, 254 Kan. 406, 867 P.2d 278 (1994).

38. 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).

39. Attorney's failure to file personal injury claim and blaming client for delay, thereby allowing statute of limitations to run (resulting in client being granted summary judgment in subsequent malpractice claim); failure to inform client as to reduction in child support income; failure to inform client as to hearing dates; and acceptance of retainer fee from out-of-state client whom attorney knew he could not represent in divorce action violate MRPC 1.1, 1.3, 1.4(a) and (b), 1.16(d), 3.3(a)(1), and 8.4(d) and (g); Rule 207(a) and (b) violations; disbarment and Rule 218 compliance ordered. *In re Spears*, 254 Kan. 904, 869 P.2d 718 (1994).

40. Attorney's mishandling of four different probate estates and failure to timely file four different foreclosures, despite representations and billings which would indicate to the contrary, held to violate DR 1-102(A)(4), (5), and (6); 6-101(A)(3); and 7-101(A)(2) and (3); Canons 1, 6, 7, and 9; and MRPC 1.1, 1.3, 1.4, 3.2, and 8.4(c), (d), and (g); aggravating and mitigating circumstances; two-year suspension, discipline probated, and supervised probation ordered. *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994).

41. Attorney's failure to file incorporation papers and retention of retainer paid to handle such matter violate MRPC 1.3, 1.4, 1.15, 1.16, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

42. Attorney's mishandling of will and estate matter, failure to communicate with client, failure to timely handle the matter, misleading the court as to the status of the probate case, and failure to return the client's file and retainer when requested violate MRPC 1.1, 1.3, 1.4, 1.15, 1.16, 3.2, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

43. Attorney's failure to timely file backruptcy petition for clients, misrepresentations to clients as to status of case, and mishandling of bankruptcy case violate MRPC 1.1, 1.3, 1.4, 1.15, and 8.4; other violations; disbarment. *In re Jackson*, 255 Kan. 542, 874 P.2d 673 (1994).

44. Attorney's mishandling of divorce case violates MRPC 1.3 and 1.4, and use of letterhead indicating attorney is in partnership with another when such is not the case violates MRPC 7.5(d); censure. *In re Seck*, 255 Kan. 552, 874 P.2d 678 (1994).

45. Attorney's failure to notify client about the status of her case and the attorney's temporary suspension violates MRPC 1.4; other violations; indefinite suspension and Rule 218 compliance ordered. *In re Nelson*, 255 Kan. 555, 874 P.2d 1201 (1994).

46. Attorney's dilatory handling of three federal court cases violative of MRPC 1.1, 1.3, 1.4, and 3.2; failure to respond to inquiry from disciplinary authorities violative of Rule 207; two-year supervised probation. *In re Long*, 255 Kan. 792, 877 P.2d 421 (1994).

47. Attorney found to have violated MRPC 1.1, 1.3, 1.4, 1.15, 3.2, 3.4(c), 4.3, and 8.4(d) and (g) based on conduct in seven different complaints reflecting on attorney's lack of diligence and competence, miscommunication and lack of candor, and failure to return unearned fees; failure to cooperate in disciplinary investigation; attorney currently on disability inactive status; indefinite suspension and Rule 218 compliance ordered. *In re Jenkins*, 255 Kan. 797, 877 P.2d 423 (1994).

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

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(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.

(f) A lawyer shall not enter into an arrangement 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 between lawyers who are not in the same firm may be made if the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable.

(h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement.

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