

MINUTES

House Select Investigative Committee

March 23, 2010
Room 159-S, State Capitol

Members Present

Representative Clark Shultz, Chair
Representative Carl Holmes, Vice-Chair
Representative Nile Dillmore, Ranking Minority
Representative Bob Grant
Representative Jeff King
Representative Jerry Henry

Members Absent

None

Staff

Raney Gilliland, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Norm Furse, Revisor of Statutes Emeritus
Jason Long, Revisor of Statutes' Office
Gary Deeter, Committee Secretary

Conferees

Representative Mike O'Neal, Speaker, Kansas House of Representatives

Others Attending

See attached sheet

The Chairman called the meeting to order at 1:32 p.m. and welcomed Representative Mike O'Neal, Speaker of the Kansas House of Representatives.

In his introductory remarks, Speaker O'Neal requested that the Committee dismiss the Complaint, saying that, of the six members who signed the Complaint, only one appeared to testify, a failure which suggests an inadequate substantiation for the Complaint. Further, he stated that the Complaint failed to state a cause of action specific enough to show any basis for misconduct, a further reason to dismiss the Complaint. In addition, Speaker O'Neal observed that, although the Minority Leader labeled the Speaker's actions as "the appearance of impropriety," he acknowledged that the Speaker had violated no statute, no House rule, no ethics canon, and no

professional code of conduct, all of which should give the Committee reason to dismiss the Complaint.

Speaker O'Neal then traced the events that led to the filing of a lawsuit in Shawnee County on January 21, 2010, a lawsuit which contested the right of the State of Kansas to "sweep" fee funds from private entities and private citizens, an act which requires agencies to assess its members a second time to replenish the funds, an assessment which creates a double taxation. He stated that he has complied with all statutory and regulatory requirements. He noted that K.S.A. 46-233 contains a provision for legislators who seek to challenge a provision in the State Constitution: the legislator must have voted "No" on the relevant issue, and the legislator must file a formal protest regarding the issue, both of which he has done, adding further that the statute not only is not prohibitive, but contemplates such a challenge. He summarized his remarks by saying that, both as an attorney and as a legislator, he has been careful to follow all the statutory and professional rules in filing the lawsuit.

Speaker O'Neal referenced a set of documents (Attachment 1). He observed that the legislature frequently transfers funds from one agency to another—from the Highway Fund to the State General Fund (SGF) or to counties through demand transfers—most of which leave no constitutional shadow. However, when the legislature takes funds provided by fees assessed on private citizens, requiring an agency to re-assess these same citizens, the action appears to violate the state constitution; the lawsuit attempts to ascertain whether or not such actions pass constitutional muster. Speaker O'Neal noted a 1958 Kansas Supreme Court case (*Panhandle Eastern Pipe Line Company v. Fadely*, 183 K. 803 [1958]) that struck down fee sweeps, an action which led to the state charging a 20% administrative fee paid into the SGF; he said the lawsuit does not reference the administrative fee. He acknowledged that he often voted for these kinds of sweeps. However, when a 2002 Kansas Attorney General's opinion upheld the court's 1958 decision, an attempt in 2003 by the legislature to sweep funds was countered by the O'Neal amendment to make the sweeps into loans to be repaid. Therefore, when the Governor's 2009 budget not only recommended sweeps, but halted repayments, Representative O'Neal voted against the sweeps because they created inequities for private citizens. He explained that at first he tried to correct the fee sweeps through the Kansas Department of Insurance, but finally decided, upon the urging of long-time clients, to seek a declaratory judgment to test the constitutionality of the practice.

Speaker O'Neal explained that, before he filed the lawsuit, he checked with his clients and with various authorities to be assured that he was complying with relevant rules. Noting the Complaint's use of media editorials, he commented that the Complaint ignored an article in the *Lawrence Journal-World* from legal-ethics law professor Michael Hoeflich (University of Kansas School of Law) that finds the Complaint to be groundless and sets a dangerous precedent for other legislator-lawyers. Speaker

O'Neal also referenced a letter from the lead plaintiff in the lawsuit (Janet Stubbs, Administrator, Kansas Building Industry Workers' Compensation Fund) to the Topeka *Capital-Journal*, a letter which declares that private attorney O'Neal made no solicitation for clients, is not representing lobbyists, and is being compensated only for actual time at less than his standard rate. The letter notes that the 17 plaintiffs are not seeking additional money from the taxpayers, only the return of their own money which was allegedly illegally taken.

Speaker O'Neal, commenting on the Complaint's implication that the Barton County letter represents an indirect attempt by the Speaker to solicit clients on a contingency fee basis, replied that the letter from Richard Boeckman invited any counties who chose to join the proposed lawsuit to pay a percentage of the attorney's hourly rate based on the apportionment each county had in the fund. Speaker O'Neal said the counties chose to pursue a claims process first rather than join the lawsuit; in so doing, the counties could protect their administrative remedies.

Commenting from prepared remarks, Speaker O'Neal stated that the Complaint is not only meritless, but represents a concerted and vindictive campaign against him, invective using malicious and hostile words that abuse the legislative process and border on defamation of character. He said that the behavior of the complainants has been unprofessional, untruthful, uncivil, and unbecoming members of the House of Representatives. Noting that filing complaints in order to distract the work of the House in order to achieve a political advantage sets a dangerous precedent, and he asked that the Committee dismiss the Complaint.

Answering members' questions, Speaker O'Neal replied that:

- Misconduct is not subjective; but if remedies exist outside, there is no need for additional House rules to address the issue.
- Misconduct must be actionable in some fashion; there must be a line clear enough that notice can be given regarding specific actions.
- As Professor Hoeflich indicated, current ethical rules have not been violated. The complainants are entitled to their own opinions, but do not have a right to their own facts.
- The lawsuit is asking the court to recognize the 17 plaintiffs as sufficient to be certified as a class-action lawsuit. The intent of the lawsuit is to reclaim only the \$5 million that was swept from those specific fee funds.
- There was a meeting with the Kansas Department of Insurance legal counsel, but not with Commissioner Praeger. Speaker O'Neal said he recommended that his clients pay the fees under protest.
- The statutorily required protest was filed in order for attorney O'Neal to qualify to represent the clients.
- Janet Stubbs initiated contact regarding the lawsuit, with continuing

conversations from May through December 2009, during which time other administrators of fee funds expressed interest in the lawsuit.

- The lawsuit does not object to all fee sweeps, only to those fee funds originating directly from private assessments.
- One of the decisions of the court will be to determine what fees can and cannot be swept.
- As indicated by the 2002 Attorney General's opinion, the issue is not a statutory question, but whether or not the issue falls under the Kansas Constitution's prohibition against double taxation. A statutory remedy for the problem would not prohibit future sweeps.
- Clear statutes prohibit a lawsuit against the Kansas legislature; however, lawsuits against the state are allowed.
- The focus of the lawsuit addresses a narrow aspect of the constitution; the Schools for Fair Funding (Montoy lawsuit), if it addressed the narrow constitutional aspect, would be similar. Within certain parameters, there is no statutory prohibition for a legislator to be lead attorney in such a case.
- Regarding moral or ethical standards, there is no distinction between being in legislative leadership and being a legislator.
- Perhaps it would be wise to clarify what constitutes misconduct, since formal complaints can be a distraction or used as harassment.
- The 2002 Attorney General's opinion (#45) was comprehensive, thorough, and well reasoned, but it stopped short of declaring sweeps unconstitutional.
- Since the lawsuit would raise questions when being brought by a lawyer-legislator, Speaker O'Neal said he made sure from the outset that there were no ethical, statutory, or professional barriers prohibiting his filing the lawsuit.

A member noted a request for certain documents from the Speaker and asked that the same documents be provided by the Minority Leader.

The meeting was adjourned at 3:44 p.m. The next meeting is scheduled for Monday, March 29, 2010.

Prepared by Gary Deeter

Approved by the Committee on:

March 30, 2010

HOUSE SELECT INVESTIGATIVE COMMITTEE

GUEST LIST

DATE: March 23, 2010

NAME	REPRESENTING
Bob Wecksp	None
Haren Dress	NONE
GENIE MEYER	KANSAS REPORTER
Stephen Koranda	KS PUB Radio
Mike Pitman	SELF
Tim Carpenter	CS
Scott K. Haskel	SW
Martin Haun	Haun's Capitol Report
RYAN GREENLAND	PRs TEM
John Hanna	Associated Press
Burt Siegfried	
Molly Cole	
Lucas R. Glin	
Tyler Siegfried	
Phil Hermanson	
Owen Nowhere	
Sarah Doring	
Alec Richmond	
Austin Latreire	Rep. Holmes

2003 Session

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JOURNAL OF THE HOUSE

Tourism and Parks: **HB 2106**.

Transportation: **HB 2107, HB 2113, HB 2118, HB 2119, HB 2120**.

CONSENT CALENDAR

No objection was made to **HB 2031** appearing on the Consent Calendar for the first day.

FINAL ACTION ON BILLS AND CONCURRENT RESOLUTIONS

HCR 5001, Joint rules for the Senate and House of Representatives, 2003-2004, was considered on final action.

On roll call, the vote was: Yeas 122; Nays 0; Present but not voting: 0; Absent or not voting: 3.

Yeas: Aurand, Ballard, Ballou, Beggs, Bethell, Betts, Boyer, Brunk, Burgess, Burroughs, Campbell, Carlin, Carter, Compton, Cox, Craft, Crow, Dahl, Davis, DeCastro, Decker, Dillmore, Dreher, Edmonds, Faber, Feuerborn, Flaharty, Flora, Freeborn, Gatewood, Gilbert, Goering, Goico, Gordon, Grant, Hayzlett, Henderson, Henry, Hill, Holland, Holmes, Horst, Howell, Huebert, Humerickhouse, Huntington, Hutchins, Huy, Jack, D. Johnson, E. Johnson, Kassebaum, Kauffman, Kirk, Klein, Krehbiel, Kuether, Landwehr, Larkin, Light, Loganbill, M. Long, P. Long, Loyd, Mason, Mays, McCreary, McKinney, McLeland, Merrick, F. Miller, J. Miller, Minor, Jim Morrison, Judy Morrison, Myers, Neighbor, Neufeld, Newton, Nichols, Novascone, O'Malley, O'Neal, Osborne, Ostmeyer, Owens, Patterson, Pauls, Peterson, Phelps, Pottorff, Powell, Powers, Reardon, Rehorn, Reitz, Ruff, Sawyer, Schwab, Schwartz, B. Sharp, S. Sharp, Showalter, Shriver, Shultz, Siegfried, Sloan, Storm, Svaty, Swenson, Tafanelli, Thimesch, Thull, Toelkes, Vickrey, Wilk, D. Williams, J. Williams, Wilson, Winn, Yoder, Yonally.

Nays: None.

Present but not voting: None.

Absent or not voting: Barbieri-Lightner, Huff, Ward.

The resolution was adopted.

HR 6004, Rules of House of Representatives, permanent rules of the 2003-2004 biennium, was considered on final action.

On roll call, the vote was: Yeas 122; Nays 0; Present but not voting: 0; Absent or not voting: 3.

Yeas: Aurand, Ballard, Ballou, Beggs, Bethell, Betts, Boyer, Brunk, Burgess, Burroughs, Campbell, Carlin, Carter, Compton, Cox, Craft, Crow, Dahl, Davis, DeCastro, Decker, Dillmore, Dreher, Edmonds, Faber, Feuerborn, Flaharty, Flora, Freeborn, Gatewood, Gilbert, Goering, Goico, Gordon, Grant, Hayzlett, Henderson, Henry, Hill, Holland, Holmes, Horst, Howell, Huebert, Humerickhouse, Huntington, Hutchins, Huy, Jack, D. Johnson, E. Johnson, Kassebaum, Kauffman, Kirk, Klein, Krehbiel, Kuether, Landwehr, Larkin, Light, Loganbill, M. Long, P. Long, Loyd, Mason, Mays, McCreary, McKinney, McLeland, Merrick, F. Miller, J. Miller, Minor, Jim Morrison, Judy Morrison, Myers, Neighbor, Neufeld, Newton, Nichols, Novascone, O'Malley, O'Neal, Osborne, Ostmeyer, Owens, Patterson, Pauls, Peterson, Phelps, Pottorff, Powell, Powers, Reardon, Rehorn, Reitz, Ruff, Sawyer, Schwab, Schwartz, B. Sharp, S. Sharp, Showalter, Shriver, Shultz, Siegfried, Sloan, Storm, Svaty, Swenson, Tafanelli, Thimesch, Thull, Toelkes, Vickrey, Wilk, D. Williams, J. Williams, Wilson, Winn, Yoder, Yonally.

Nays: None.

Present but not voting: None.

Absent or not voting: Barbieri-Lightner, Huff, Ward.

The resolution was adopted, as amended.

On motion of Rep. Aurand, the House went into Committee of the Whole, with Rep. Hayzlett in the chair.

COMMITTEE OF THE WHOLE

On motion of Rep. Hayzlett, Committee of the Whole report, as follows, was adopted: Recommended that committee report to **HB 2026** be adopted; also, on motion of Rep. Feuerborn be amended on page 8, following line 24 by inserting:

Attachment 1
HSIC 3-23-10

"(d) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$5,000,000 from the state general fund to the underground petroleum storage tank release trust fund: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department: *Provided further*, That the transfers prescribed by this subsection from the state general fund to the underground petroleum storage tank release trust fund pursuant to this section during the fiscal year ending June 30, 2005, shall be considered to be demand transfers from the state general fund.

(e) On or before June 30, 2006, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$5,000,000 from the state general fund to the underground petroleum storage tank release trust fund: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department: *Provided further*, That the transfers prescribed by this subsection from the state general fund to the underground petroleum storage tank release trust fund pursuant to this section during the fiscal year ending June 30, 2006, shall be considered to be demand transfers from the state general fund.";

On page 1, in the title, in line 11, after "2003," by inserting "June 30, 2005, and June 30, 2006,";

Also, on motion of Rep. O'Neal, **HB 2026** he amended on page 1, in line 34, by striking "year" and inserting "years"; also in line 34, following "2003," by inserting "and June 30, 2005,";

On page 3, in line 12, before "On" by inserting "(1)"; also in line 12, following the comma, by inserting "notwithstanding the provisions of K.S.A. 2002 Supp. 44-566a and amendments thereto or any other statute,"; following line 21, by inserting the following:

"(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$4,000,000 from the state general fund to the workers compensation fund of the insurance department for the purpose of repaying the amount transferred to the state general fund pursuant to subsection (a)(1): *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.";

Also on page 3, in line 22, before "On" by inserting "(1)"; in line 23, following the comma, by inserting "notwithstanding the provisions of K.S.A. 2002 Supp. 40-112 and amendments thereto or any other statute,"; following line 34, by inserting the following:

"(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$100,000 from the state general fund to the insurance department service regulation fund of the insurance department for the purpose of repaying the amount transferred to the state general fund pursuant to subsection (b)(1): *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.";

On page 5, in line 19, following the comma, by inserting "notwithstanding the provisions of K.S.A. 38-2101 and amendments thereto or any other statute,"; in line 39, before "On" by inserting "(1)"; also in line 39, following the comma, by inserting "notwithstanding the provisions of any other statute,";

On page 6, following line 19, by inserting:

"(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer from the state general fund the amount transferred from each special revenue fund pursuant to subsection (b)(1) to the such special revenue fund for the purpose of repaying the amount transferred to the state general fund from such special revenue fund pursuant to subsection (b)(1): *Provided*, That the aggregate of the amounts transferred pursuant to this subsection (b)(2) to such special revenue funds

shall not exceed \$858,000: *Provided further*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.”;

On page 8, in line 4, before “On” by inserting “(1)”; also in line 4, following the comma, by inserting “notwithstanding the provisions of K.S.A. 65-3424g and amendments thereto or any other statute.”;

Also on page 8, following line 13, by inserting the following:

“(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$1,000,000 from the state general fund to the waste tire management fund of the department of health and environment for the purpose of repaying the amount transferred to the state general fund pursuant to subsection (b)(1): *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.”;

Also on page 8, in line 14, before “On” by inserting “(1)”, also in line 14, following the comma, by inserting “notwithstanding the provisions of K.S.A. 65-34,114 and amendments thereto or any other statute.”; following line 24, by inserting the following:

“(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$10,000,000 from the state general fund to the underground petroleum storage tank release trust fund of the department of health and environment for the purpose of repaying the amount transferred to the state general fund pursuant to subsection (c)(1): *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.”;

On page 11, in line 39, by striking all after “fund”; by striking all in lines 40 through 43;

On page 12, by striking all in lines 1 and 2; in line 3, by striking all before the period and inserting “for the purpose of repaying the state general fund for debt service payments for energy conservation capital improvements for Emporia state university”; in line 7, by striking all after “fund”; by striking all in lines 8 through 13; in line 14, by striking all before the period and inserting “for the purpose of repaying the state general fund for debt service payments for energy conservation capital improvements for Emporia state university”;

On page 13, in line 6, before “On” by inserting “(1)”; in line 7, following the comma, “notwithstanding the provisions of K.S.A. 2002 Supp. 79-4803 and amendments thereto or any other statute.”; following line 15, by inserting the following:

“(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$500,000 from the state general fund to the juvenile detention facilities fund for the purpose of repaying the amount transferred to the state general fund pursuant to subsection (a)(1): *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.”;

On page 15, following line 20, by inserting the following:

“(c) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$94,608,648 from the state general fund to the state highway fund for the purpose of repaying the amount transferred to the state general fund pursuant to section 40(a) of chapter 205 of the 2002 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department.”;

On page 1, in the title, in line 10, by striking “year” and inserting “years”; in line 11, following “2003,” by inserting “and June 30, 2005.”;

Also, on further motion of Rep. O’Neal, **HB 2026** be amended as amended by House Committee of the Whole on motion of Representative O’Neal, on page 8 of the bill printed

with amendments by House Committee, in line 14, by striking "(1)" which was inserted by the amendment by the House Committee of the Whole on motion of Representative O'Neal;

Also on page 8 of the bill printed with amendments by House Committee, by deleting the following material which was inserted by the amendment by the House Committee of the Whole on motion of Representative O'Neal and which reads as follows:

"(2) On or before June 30, 2005, on a date certified by the director of the budget, the director of accounts and reports shall transfer \$10,000,000 from the state general fund to the underground petroleum storage tank release trust fund of the department of health and environment for the purpose of repaying the amount transferred to the state general fund pursuant to subsection (c)(1): *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget shall deliver a copy of such certification to the director of the legislative research department."; and **IIB 2026** be passed as amended.

REPORTS OF STANDING COMMITTEES

The Committee on **Agriculture** recommends **IICR 5004** be adopted.

The Committee on **Ethics and Elections** recommends **IIB 2048** be amended on page 1, after line 13, by inserting a new section 1 as follows:

"Section 1. K.S.A. 25-4148 is hereby amended to read as follows: 25-4148. (a) Every treasurer shall file a report prescribed by this section. Reports filed by treasurers for candidates for state office, other than officers elected on a state-wide basis, shall be filed in both the office of the secretary of state and in the office of the county election officer of the county in which the candidate is a resident. Reports filed by treasurers for candidates for state-wide office shall be filed only with the secretary of state. Reports filed by treasurers for candidates for local office shall be filed in the office of the county election officer of the county in which the name of the candidate is on the ballot. Except as otherwise provided by subsection (h), all such reports shall be filed in time to be received in the offices required on or before each of the following days:

(1) The eighth day preceding the primary election, which report shall be for the period beginning on January 1 of the election year for the office the candidate is seeking and ending 12 days before the primary election, inclusive;

(2) the eighth day preceding a general election, which report shall be for the period beginning 11 days before the primary election and ending 12 days before the general election, inclusive;

(3) January 10 of the year after an election year, which report shall be for the period beginning 11 days before the general election and ending on ~~December 31~~ the date of the general election, inclusive;

(4) for any calendar year when no election is held, a report shall be filed on the next January 10 for the preceding calendar year period beginning the day after the preceding general election through the calendar year following such election;

(5) a treasurer shall file only the annual report required by subsection (4) for those years when the candidate is not participating in a primary or general election.

(h) Each report required by this section shall state:

(1) Cash on hand on the first day of the reporting period;

(2) the name and address of each person who has made one or more contributions in an aggregate amount or value in excess of \$50 during the election period together with the amount and date of such contributions, including the name and address of every lender, guarantor and endorser when a contribution is in the form of an advance or loan;

(3) the aggregate amount of all proceeds from bona fide sales of political materials such as, but not limited to, political campaign pins, buttons, badges, flags, emblems, hats, banners and literature;

(4) the aggregate amount of contributions for which the name and address of the contributor is not known;

(5) each contribution, rebate, refund or other receipt not otherwise listed;

(6) the total of all receipts;

(7) the name and address of each person to whom expenditures have been made in an aggregate amount or value in excess of \$50, with the amount, date, and purpose of each ;

STATE OF KANSAS
HOUSE OF REPRESENTATIVES



MICHAEL R. (MIKE) O'NEAL
SPEAKER

To: House Members and Media

From: Speaker Mike O'Neal *MS*

Date: March 3, 2010

Re: Response to February 22, 2010 Democrat Leadership letter

For the past few weeks, I've endured an unprecedented barrage of personal attacks by Democrat leadership. They have used falsehoods and innuendo to make baseless and unjustified attacks on my integrity. Democrat leadership has criticized a suit I was asked to file seeking an opinion on the legality of a bill, passed over my objection in 2009, which swept money from privately funded trust accounts into the State General Fund. Both a prior Supreme Court case and a more recent Attorney General's opinion have addressed the unconstitutionality of these sweeps. Although Democrat leadership knows that I have not violated any ethical duties, they have engaged in a series of made-for-the-media public criticisms of the suit and my involvement, making reckless allegations intended to mislead the public.

I have, up to this point, chalked the attacks up to the partisan attacks we're used to seeing from Democrat leadership in both the House and Senate. However, last week House Democrat leadership crossed the line of decency by issuing a formal letter attacking my integrity and threatening me if I did not withdraw from the case. The letter, which Democrat leadership chose to widely publicize, contains untruths and false accusations that are clearly meant to cast me in a false light and with the apparent intent to disrupt this year's legislative session.

They've offered no evidence for their claim that I solicited legal work using my public office, and this accusation is particularly outrageous and utterly false. Such baseless accusations are unbecoming to members of the Kansas Legislature. I'm deeply disappointed that Democrat leadership has resorted to such shameful behavior. They have

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done a disservice to the House and their own Democrat caucus, most, if not all of whom were unaware of their leadership's letter until after the fact.

The press and legislative colleagues alike know that I have not shied away from answering questions about the case. The details and my involvement are a matter of public record. They are also aware that I followed every applicable rule relating to my service as a citizen legislator and attorney. Our chief attorney in the Legislature, Revisor Mary Torrence, has noted that there are no prohibitions against attorney legislators representing clients in matters involving the State. In fact, such representation is clearly authorized by state law, which the Revisor has found I complied with in full. I satisfied all legal and ethical requirements dealing with a constitutional challenge by voting against the suspect legislation and filing a formal protest challenging the legality of the fee sweeps in the 2009 budget bill. I have not, in her legal opinion, engaged in any misconduct. (See attached)

The attacks by Democrat leadership are extremely disappointing because they are so disingenuous. Several members of House Democrat leadership are themselves attorneys, each with a list of clients that is, for the most part, unknown to the public. Attorney legislators can and do represent clients who are involved in proceedings involving the state, including: clients accused of crimes charged by the State, clients or constituents defending or pursuing claims in State agency administrative hearings, and school districts with business before the Legislature, to name a few examples. In fact, House Minority Leader Davis' own law firm has a case pending in the Kansas Supreme Court challenging the constitutionality of one of our tort reform statutes.

We have a citizen Legislature. Members come from all walks of life and most have jobs and professions outside of the Legislature. Some, for example, are employees or former employees of public institutions with regular business before the Legislature. Others work in private industries that have matters come before the Legislature. This has been the case since statehood, and it is a good and honorable system. The alternative is to have a full time Legislature with career politicians, something our constituents neither deserve nor desire.

By claiming in their letter that the suit has "compromised" the budget process, Democrat leaders appear to be admitting that they fear the practice of sweeping Kansas

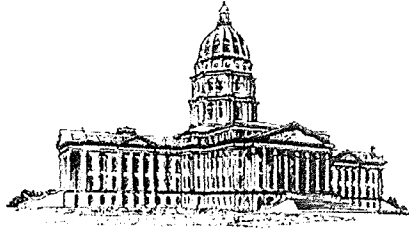
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taxpayer fee funds into the State General Fund is in jeopardy. Do they want to be able to continue taking trust funds collected for specific statutory purposes and spending that money on totally different programs? They call the suit a "special interest" lawsuit. It is telling that Democrat leadership would disparage the "special interest" Kansas taxpayers have in protecting their funds from unauthorized sweeps. This taxpayer fee suit does not seek additional State funds, just that their funds be returned to where they belong. Their claim, simply, is that the sweeps constitute an unauthorized tax. Their request for a judicial answer is much the same as the case filed by the Attorney General to question the constitutionality of state-owned and operated casinos. The court will decide, "yes" or "no", whether sweeping privately-funded fee funds into the State General Fund for a general revenue-raising purpose is legal.

At last weekend's State Democrat Party meeting, we learned that the moving force behind the attacks was probably the Labor Caucus, which was quoted as demanding that Democrat leadership take some action against me. They also called for elimination of tax exemptions for churches and such non-profit organizations as the Girl Scouts. Governor Parkinson was quoted at the meeting as saying "the public is angry and it looks like it is angry at us", meaning Democrats. He's right. He went on to say "but that's not who we are". If that's not who they are, then we call on their elected leadership to discontinue their baseless, personal attacks and work with Republicans to reach solutions for our budget woes that don't involve punishing Kansas taxpayers for the current budget shortfall.

House Rules provide that one of the duties of the Speaker is "to preserve order and decorum". Unfortunately, we've had far too little civility and decorum. If, notwithstanding the Revisor's opinion, the Democrat House leadership has credible proof of actual misconduct on my part, then they should file a complaint and follow the process so that the truth can come out, instead of waging a war in the press. I have done nothing wrong. In any event, as Speaker I will work to see that order and decorum are restored in the House. I look forward to working with Democrat leadership and the Democrat caucus to address the pressing issues facing the State in a respectful and civil manner, knowing there will be, at times, honest disagreement. It's time for the vicious and unproductive personal attacks to stop.

MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES
JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR
GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
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To: Speaker Mike O'Neal
From: Mary Torrence *MA*
Date: March 2, 2010
Re: Involvement in Kansas Building Industry Workers Compensation Fund, et al, v. State of Kansas

You have asked my opinion whether your involvement as counsel in the case of Kansas Building Industry Workers Compensation Fund, et al, v. State of Kansas violates any statute or Rule of the Kansas House of Representatives.

Kansas Statutes. The Kansas statutes clearly contemplate that a legislator who is an attorney may be involved in cases where there is potential for conflict of interest, provided that there is appropriate disclosure. For instance, K.S.A. 46-239 requires a legislator to file a disclosure statement if the legislator represents a client before a state agency or contracts with a state agency within a year after expiration of the legislator's term. Similarly, K.S.A. 2009 Supp. 46-233 provides that, if a legislative measure was passed during a legislator's term of office, the legislator may represent a person in court proceedings attacking the measure on the basis that the action is unconstitutional because of error in the legislative process if the legislator voted against the measure and during that term declared on the record that the measure was unconstitutional.

The legislative measure that is the subject of the case cited above is 2009 Senate Substitute for House Bill No. 2373. While it is my opinion that the case is not based on the theory that the measure is unconstitutional because of an error in the legislative process, that is moot because you both voted against the bill¹ and, during the term when it was

¹ See House Journal, May 7, 2009, p. 713.

enacted, declared on the record that you believed the bill to be unconstitutional on the grounds espoused in the case.² I do not believe you violated this or any other law by acting as counsel in the case.

Rules of the Kansas House of Representatives. The Rules of the Kansas House of Representatives do not prescribe standards of conduct for Representatives. Article 49 of the Rules governs reprimand, censure and expulsion of members. The grounds for these actions is “misconduct,” which is undefined. The basis for these rules is Article 2, Section 8, of the Constitution of the State of Kansas. It simply states that the House “shall provide for the expulsion or censure of members in appropriate cases.” Unable to find any instances of reprimand, censure or expulsion of a member of the Kansas Legislature, I looked to Congressional procedures for assistance in interpretation of the provision of the Kansas Constitution.

Article I, Section 5, Clause 2, of the Constitution of the United States authorizes each house of Congress to “punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” A 2005 report issued by the Congressional Research Service³ reviewed the background of this provision of the United States Constitution and the use of disciplinary proceedings in the United States House of Representatives under the provision. The report found the framers of the Constitution did not wish to limit Congress’ authority to expel members. However, the report states that in practice expulsion had been used sparingly, in only cases of disloyalty to the Union during the Civil War period and cases of commission of a crime involving abuse of a member’s office or authority.

The report found reprimand and censure have been used more frequently. According to the report, censure has been used in cases considered more serious, including use of insulting or “unparliamentary” language, assaults on other members, bribery, fraud, receipt of improper gifts, improper use of campaign funds and sexual misconduct with pages. Reprimand has been used less frequently in cases deemed less

² See House Journal, June 4, 2009, p. 781-782.

³ Maskell, Jack, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, updated January 25, 2005.

serious, such as failure to disclose personal interests in official matters and using one's office to further personal financial interests, making misrepresentations or false statements to investigating committees, failure to report campaign contributions, conversion of campaign contributions and misuse of one's political influence in administrative matters.

Of the grounds for discipline taken in the United States House of Representatives, the one that might appear applicable to your situation is using one's office to further personal financial interests. However, your case is much different from the only one cited in the Congressional Research Report as having raised this ground. That case involved Representative Robert L. F. Sikes.⁴ The United States House of Representatives found that Representative Sikes sponsored and voted on legislation affecting land and companies in which he had a financial interest. (Interestingly, the disciplinary action against him was not based on those findings.)⁵ You have said your compensation is based on a salary and hourly rate rather than on the outcome of the litigation and that your clients sought you out. Thus it would be difficult to argue that you voted to benefit your personal financial interests when you voted and filed a protest against 2009 Senate Substitute for House Bill No. 2373.

Summary. It is my opinion that your involvement as counsel in the case of Kansas Building Industry Workers Compensation Fund, et al, v. State of Kansas does not violate any statute and, based on the grounds identified in the 2005 report issued by the Congressional Research Service, is not grounds for expulsion, censure or reprimand.

Other Possible Concerns. In addition to the Kansas statutes and Rules of the House of Representatives, as an attorney you are subject to the Kansas Rules of Professional Conduct. I understand that you have conferred with the Disciplinary Administrator, who is the person responsible for determining whether actions comply with the Rules. It seems that Rule 1.11, which addresses potential conflicts of interest in cases of successive government and private employment of an attorney, would be the one in question if a violation of the Rules is alleged in your case. In reading the comment to the

⁴ In the 2005 Congressional Research Service Report, Sikes' name is spelled "Sykes." That appears to be a misspelling.

⁵ Mark Grossman, *Political Corruption in America: An Encyclopedia of Scandals, Power, and Greed*, p.302 (2003).

rule, it appears that the rule addresses conflicts that arise when a person is a government attorney and is also privately employed as an attorney. If this is so, the rule would not apply to your case.

Another concern expressed regarding your involvement in this case is that it may distract from the business of the legislative session. I would note that K.S.A. 46-125, 46-126 and 46-127 protect legislators who are involved in litigation by providing that they will not be required to appear in court during the legislative session. I assume this is intended to prevent disruption of the legislative session and should do so in your case.

Speaker within ethical lines

February 10, 2010

Mike O'Neal is in the news again, this time taking heat for his taking on a lawsuit against the state of Kansas over certain financial maneuvers the state has taken to keep its finances viable. I've known Mike for 15 years, and I probably have disagreed with him on most political issues he's taken positions on. But this time I think he's getting a raw deal.

As a matter of pure politics, I think that representing the plaintiffs in a case in which they are suing the state was probably not the smartest move he could have made, but Mike is an experienced politician and he's quite capable of making his own judgements and dealing with the fallout. From an ethical standpoint, however, I really don't think that he's acted badly.

I teach legal ethics and I'm very sensitive to charges of conflict of interests. Under the Kansas Rules of Professional Conduct a lawyer cannot represent two clients with conflicting interests. But that's not the case here. O'Neal is speaker of the Kansas House, but he does not represent the House or the Legislature and, so far as I know, never has.

A lawyer also is not permitted to represent a client if his own personal interests conflict with the client's interests. Once, again, this isn't a problem here. Under this rule, so long as the plaintiffs do not believe that his position as a legislator and speaker interfere with his representation, then there's no problem. So, from the perspective of legal ethics, there's no conflict of interest problem so far as I can see.

I'm not an expert in governmental ethics, but I really don't see any significant problem from this perspective either. The fact is that O'Neal's clients are challenging legislation that is already law; it is not currently before the Legislature. Thus, O'Neal should not have to vote on the legislation. If O'Neal finds that a conflict arises in the future, he can simply recuse himself from any debate or vote, if he feels that is appropriate. I think that it would be quite unfair to assume that he will act inappropriately in such a situation. I see no reason to believe that he would do so.

The broad problem for attacking Speaker O'Neal for his representation of the plaintiffs in this case is that it would set a dangerous precedent for any lawyers who sit in the Kansas Legislature both currently and in the future. Ours is a part-time Legislature and the salary legislators receive is quite a bit lower than most professionals can expect to earn in practicing their professions. We want well-educated, qualified professionals in the Legislature.

Are we now to decide that no professional can represent any client who may be affected by legislative actions? If we take this position, most lawyers will never run for office. Should doctors be prohibited from sitting in the Legislature because their professional interests might be affected by legislative action? Should a teacher be barred from holding legislative office because the Legislature funds public schools?

Kansas is a small state. Such broad interpretation of conflict of interest rules would almost insure that the only people who can safely run for legislative office are either retired or unemployed. I don't think that would be a desirable result.

So long as Kansas wants citizen legislators who are willing to work long hours for small pay, it seems inevitable to me that professionals in the Legislature may find themselves dealing with a public perception that they have conflicts of interest. But that is the price we pay for the legislative structure our state has adopted. We can avoid these problems by moving to a full-time, highly compensated Legislature, such as the congressional model, but, personally, I would dislike such a change.

In Mike O'Neal's case, I think we must simply assume that he has acted and will act in good faith and that his representation of the plaintiffs in this challenge to a state law will have no impact on his ability to continue to serve the state in a fair and impartial manner.

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21-4004

Chapter 21.--CRIMES AND PUNISHMENTS

PART II.--PROHIBITED CONDUCT

Article 40.--CRIMES INVOLVING VIOLATIONS OF PERSONAL RIGHTS

21-4004. Criminal defamation. (a) Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

(b) In all prosecutions under this section the truth of the information communicated shall be admitted as evidence. It shall be a defense to a charge of criminal defamation if it is found that such matter was true.

(c) Criminal defamation is a class A nonperson misdemeanor.

History: L. 1969, ch. 180, § 21-4004; L. 1992, ch. 239, § 187; L. 1993, ch. 291, § 135; L. 1995, ch. 251, § 14; July 1.



Kansas Building Industry Workers' Compensation Fund

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Phone: 785-266-4540 Fax: 785-266-7953

DATE: February 10, 2010
TO: Editor of the Topeka Capital Journal
FROM: Janet J. Stubbs, Administrator
RE: Sweep Lawsuit

It is unfortunate that your recent editorial criticizing Mike O'Neal's filing of our challenge to the sweep of fee funds by the State is a result of reckless and uninformed reporting. You and your reporter failed to grasp the actual facts and, instead, tried to politicize the issue, apparently in an attempt to discredit the Speaker.

I feel compelled to refute a few of the numerous errors made in the articles.

First, I want to make it absolutely clear that SPEAKER O'Neal did not build a coalition on this lawsuit! As Administrator of the Kansas Building Industry Workers Compensation Fund, I contacted my attorney of many years, MR. Mike O'Neal, after receiving an assessment from the Kansas Insurance Department for the Workers Compensation Fund. The assessment notice stated that the \$96,855.43 bill was the direct consequence of the State sweeping funds into the State General Fund. I asked my attorney, Mike O'Neal, whether there was anything that could be done about it and asked for his expertise. I discussed the matter with representatives of other funds and potential participants and went from there.

Second, newspaper quotes have appeared suggesting that Speaker O'Neal should not be participating in a lawsuit against the State when the State is in these difficult economic times AND when he has been critical of the school's lawsuit. That is a ridiculous, uninformed analogy. The 17 participants of our lawsuit are not seeking additional money from the taxpayers of Kansas but rather seeking the return of our money which we allege was illegally taken. Our position is supported by the Attorney General's opinion criticizing the sweep of the Workers Compensation Fund in 2002 and prior Kansas Supreme Court decisions.

We view the circumstances of this case as being no different than if an individual had embezzled money from us. Theft is theft and the State should not be immune just because it is suffering from a budget problem of its own making.

Even the amount stated in the Sunday editorial is incorrect. The \$2.355 million amount was only the amount taken from the Workers Compensation Fund. The total amount of the sweeps for the participants of the suit was \$5,047,688 million. In all, the State took

over \$21M from a whole host of fee funds last year and the Governor proposes more sweeps this year.

To print the allegations of the Democratic leadership that Mr. O'Neal stood to make hundreds of thousands of dollars from this lawsuit, prior to verifying the accuracy of the allegations of the minority leadership, is totally irresponsible. Simply asking would have revealed he's being compensated only for his actual time and at a rate less than his standard rate.

To suggest that should we be victorious in this lawsuit, participants would be paid back with "public funds" is absolutely false. We are alleging our funds were taken illegally. The money being returned is "our money"!

Background--Workers Compensation group funds are allowed to utilize 30% of the entire premium derived from all their policies written for administration of their Fund. Kansas Statutes require 70% of the entire premium to be allocated for payment of claims. To take almost \$100,000 from the 30% of the administrative allocation from my Fund, is double taxation and would increase the rates for our Fund's participants. These are members of the construction industry whose companies are already suffering from the current economic conditions.

Mr. O'Neal is not representing a group of "lobbyists" who have contributed to his political campaigns over the years. The plaintiffs in this case merely represent employers, professionals and business entities whose philosophy is the same as their attorney's. Most of the individuals your reporter chose to quote in the articles support legislation, and would support legal action, promoted by Labor, which contributes to their campaigns because of their compatible philosophies.

Because these agencies, whose funds have been swept, have the ability to go back and assess more fees to the groups they regulate to replenish the funds, we believe this to be double taxation. This has been the basis of prior court decisions striking down similar sweep practices. Recently, the Supreme Courts in New Hampshire and Kentucky have struck down such sweep practices. The Kentucky case, decided January 21, 2010, dealt with their Workers Compensation Benefit Reserve Fund. The Court there upheld their prior 1986 decision and found that assessments were clearly private funds as opposed to public funds and were not subject to control by the General Assembly. In fact, the Court noted that because the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private funds are co-mingled is unconstitutional.

In the future, I urge you and your reporters to obtain the facts before reporting. Your readers expect and deserve accurate non-sensationalized reporting. If you wish further information from me, please feel free to contact me at 785-266-4540. .