

0001

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0002

1 REPRESENTATIVE WAGLE: Good
2 morning, Committee. Today we are going to
3 begin our hearings on House Bill 2821 in
4 your books. Before we start, yesterday the
5 committee was inundated with paper, and I
6 know how much time all of to be sorting
7 through some of these. I wanted you to know
8 that what I have done is I have taken all
9 the information we have received thus far
10 and I've cataloged it, so that if you don't
11 want to have to sort through your papers,
12 you can come to my office and look through
13 anything and find anything that we've
14 addressed so far in an organized fashion.
15 Our first proponent of the bill is
16 Representative Tony Powell. And Tony, we've
17 been swearing in people. Would you mind
18 taking an oath.

19 REPRESENTATIVE POWELL:
20 Absolutely.

21
22 TONY POWELL,
23 called as a witness on behalf of the
24 Committee, was sworn and testified as
25 follows:

0003

1 REPRESENTATIVE POWELL: Thank
2 you, Madam Chairman. I appreciate the
3 committee's time to give me some time this
4 morning to talk about this legislation and
5 also to make a few remarks about what the
6 committee has heard over the past couple of
7 days.

8 At the outset, I want to make some
9 personal comments about big tobacco and
10 whether this is about defending big tobacco
11 or attacking big tobacco. I had a press
12 person make a suggestion that I was simply a
13 defender of big tobacco, and that's not
14 true. My father died of lung cancer and
15 throat cancer. In fact, he had to have
16 quadruple bypass surgery for his heart for
17 heart disease. He had to have a
18 tracheotomy. He couldn't talk in the last
19 months of his life. My father was an avid
20 singer throughout his life. He used to, in
21 fact, when he was in college, he went to
22 Notre Dame, and he sang for the Notre Dame
23 glee club. And I remember how heart
24 breaking it was for my father to lose his
25 voice. So I am one of the victims of

0004

1 smoking. So the suggestion that, well,
2 somehow I'm just a shield to protect the
3 tobacco industry couldn't be more false.
4 I'm not. But I believe this whole debate is
5 really about what's right, and I believe
6 it's about personal choices. And we can get
7 into -- I suppose some other day we can have
8 a debate about the propriety of the whole
9 tobacco settlement, whether it was good or
10 whether it was bad, but that's not really
11 what this debate about is today.

12 You know, there was one thing my father
13 used to tell me. He used to tell me march
14 to your own drummer. I think the reason he
15 told that, he didn't want me to go with the
16 flow. He wanted me to stand up and to do
17 what's right. And that's what I'm doing
18 today. In this whole effort, it's not about
19 politics or about agendas or about ambition.
20 It's about standing up to do what's right.
21 Sometimes that can be very difficult when
22 you do that. I mean all of you know, I'm
23 looking at Lynn Jenkins. She and I had a
24 battle about campaign finance last year.
25 You know, that got kind of tough at time.
0005

1 When we stand up and when we try to do what
2 we think is right, you know, here in this
3 body, that's where the clash of ideas hit.
4 Sometimes it gets tough. But that's what
5 making change, that's what challenging the
6 status quo, that's what challenging the
7 conventional wisdom is all about. That's
8 what I'm trying to do with this bill and
9 with my whole effort about questioning the
10 propriety of the fees, the attorney fees in
11 this case.

12 Before I talk about my bill, I want to
13 talk about some of the issues you've been
14 graveling about. You've gotten one side of
15 the story. I'd like to suggest a different
16 pointed of view or as they say the rest of
17 the story. I'm an attorney as I think most
18 of you. I'm a defense lawyer. I'm an
19 attorney of counsel with the firm of Martin
20 church hill in Wichita. We're a defense
21 firm. I've been proud to practice in that
22 firm for almost ten years. So I know a
23 little bit about the legal process and how
24 that works. I know a little bit about the
25 obligation of lawyers I think to act

0006

1 ethically. I think I know a little bit
2 about the obligation of lawyers to act with
3 a sense that what they do doesn't have an
4 appearance of impropriety, and I have to

5 tell you I'm very concerned about some of
6 the things with all due respect that the
7 General and her office has done in this
8 whole affair.

9 Let me talk a little bit about the
10 records issue, because I know that has been
11 a source of contention in this committee
12 about producing records, about whether
13 certain records were available to this
14 committee. I guess what bothered me the
15 most yesterday and what I thought was really
16 appalling was the fact that the General's
17 office didn't maintain or discarded
18 important correspondence and important
19 records showing the discussions and drafts
20 of contracts that her office had with the
21 Hutton and Hutton law firm. Now, I could
22 perhaps understand that if this case was not
23 an important case, but by her own admission,
24 this was the biggest case in Kansas history.
25 I mean probably the biggest case in the
0007

1 history of the world. She didn't keep all
2 her documentation for this case? I find
3 that very troubling. I think this committee
4 should, too. Now, I can only conclude since
5 I don't think you can argue that it wasn't
6 important, I can only conclude that they
7 didn't want to keep those records. Now,
8 there was some suggestion that, well, we
9 just don't have room to keep all those
10 records. Let me tell you something. Most
11 law firms, you can go by a scanner I think
12 for 80 bucks, and you can scan documents on
13 to CD's. You don't have to store the paper.
14 You can put it on CD's and it doesn't take
15 all that much space at all. So I just think
16 it's irresponsible, I think it's negligent
17 on the part of her office to not have kept
18 those records, particularly someone who
19 under the law is charged with enforcing our
20 open records law. We are having a big
21 debate about that this year. I think that
22 ought to very much disturb this committee.
23 Let me talk a little bit about the

24 choice of Entz and Chanay. You heard all
25 the arguments. I'd like to make a few
0008

1 comments about that. First of all, I don't
2 want to run down that law firm. They are a
3 good law firm. In fact, some of the work
4 that they do is actually very similar to the
5 work that our law firm does. We've had
6 association with them in terms of
7 representing nursing homes around the state.
8 We represent -- our law firm represents some
9 of the largest nursing homes in the State of
10 Kansas and we do some health care law. My
11 particular specialty is employment law which
12 I know Jeff Chanay does some of and so does
13 Stu Entz. I don't want to degrade them as
14 attorneys, but our law firm would never hold
15 ourselves out to be experts nor do I think
16 we would think it wise to undertake a case
17 such as this on behalf of the state, because
18 we would know that we wouldn't be the best
19 choice for that job. And I can understand
20 when a lot of money, the possibility of a
21 huge fee might cloud your judgment, but I
22 think the suggestion that this firm, this
23 local counsel and this firm was somehow the
24 best firm for the job, I'm sorry. I can't
25 agree with that. I want to address this
0009

1 point about, well, this was a risky venture.
2 You know, they were doing me a favor,
3 according to the General. I think it's
4 interesting back in '97 Jeff Chanay himself
5 was quoted by the Harris News Service when
6 they decided to take the case, he said he
7 thought the state would make a recovery in
8 nine figures, in the hundreds of millions of
9 dollars when they took the case. That
10 doesn't sound to me like they thought it was
11 a risky venture. In addition, and I've
12 talked to a number of trial attorneys,
13 plaintiff's lawyers, and not just the Hutton
14 firm, I've talked to others I know as ab
15 attorney that I've encountered in my
16 professional life. They will tell you the

17 biggest risk any plaintiff's firm takes in
18 any contingency fee case is the payment of
19 the expenses. It's fronting the expenses.
20 That's where the cost, the immediate cost of
21 a case that's taken under contingency is
22 born by a law firm. When they start that
23 lawsuit, there is all the costs associated
24 with the discovery, with the travel, with
25 deposing witnesses, Interrogatories, all
0010

1 those kind of things. That's where the cost
2 of a lawsuit comes in. But the fact is the
3 Entz and Chanay firm never had to bear those
4 expenses. The national lawyers in this case
5 bore the expenses. They had no risk in this
6 case. There was no risk. In addition,
7 their role as local counsel, and again I'll
8 quote Jeff Chanay in his statements that he
9 made to the post audit, normally local
10 counsel simply makes sure that out of state
11 lead counsel complies with Kansas law and
12 gives the judge a chance to see a familiar
13 face in the courtroom and simply files the
14 pleadings as they come in from the lead
15 counsel. So there is no -- they weren't
16 looking at a huge investment when they took
17 this case in terms of time and resources to
18 have to do the research in this case to
19 discover the theories of the claim. That
20 was done for them by national counsel in
21 this case. And so with all due respect, I
22 think their risk was incredibly, incredibly
23 small in this case.

24 The other thing I want to respond to is
25 the argument by the General that says the
0011

1 post audit committee looked at this and they
2 said I didn't violate the law. You know
3 what folks. You know why she didn't violate
4 the law, there was no law to break. There
5 is no law governing the hiring of outside
6 counsel. She could have hired her brother.
7 There is simply no law on that. I find that
8 appalling. I know there is an effort among
9 myself and many others in this committee to

10 require the competitive bidding of
11 professional services like lawyers, because
12 I think it's important for the credibility
13 and for the appearance of acting properly
14 when we hire counsel. I think it's
15 significant, though, that the post audit,
16 they didn't have to say this, but they did
17 say that her actions created the appearance
18 of favoritism. When you look at it
19 honestly, it certainly looks that way,
20 regardless of what spin after the fact you
21 want to put on it. I think everyone clearly
22 sees it that way. I think any fair reading
23 of the General's decision is that it is
24 exactly what we suspect it was. She was
25 doing a favor for political supporters of
0012

1 her. She hired a firm, though a reputable
2 firm, clearly had experience in this area,
3 and she turned down the services of another
4 law firm from Kansas that was nationally
5 known in this area. The other point I want
6 to make. I personally reviewed the
7 pleadings in the three cases that were filed
8 here in Kansas on tobacco. There has been a
9 suggestion, and she's repeated it, made the
10 repeated statement that this was a medicate
11 reimbursement case. Now, I invite you
12 yourselves to read the petition. I've read
13 the petition. I read it again this morning.
14 It over and over and over again talks about
15 fraud, about the failure to warn, about how
16 the tobacco companies lied to the public
17 about the safety and the dangers of their
18 product. Now, folks, in a products
19 liability case, that's what we call a tort.
20 That's an injury that someone causes to you.
21 And in products liability law, a tort can be
22 a product injures you by it was either
23 defectively designed, it was defectively
24 manufactured or they failed to warn you
25 properly about the risk of using that
0013

1 product that. Really when you boil it all
2 down, yes, they cite consumer protection, a

3 number of other things, but you read through
4 that pleading, and it's unmistakable that
5 the kernel of this case, the kernel of this
6 case was about a failure to warn, a failure
7 to tell the public about the real dangers
8 associated with tobacco. The whole
9 controversy about this joint defense thing
10 that you've probably heard about and the
11 Liggett lawsuit, it was the fight over
12 documents that would have revealed what the
13 tobacco companies were saying internally
14 about that issue. They were very damaging
15 because they revealed the tobacco companies
16 knew about the dangers of their product and
17 tried to hide them. So that is the kernel,
18 is that the crux, that is the baseline,
19 that's where this whole thing comes down to
20 the point. That's what it was about. Now,
21 the Medicaid claim theory part of this case
22 was the theory used to allow the state to
23 recover. See, the claim of injury in this
24 case is not normally held by the state.
25 It's held by individuals. But in order for
0014

1 the state to boot strap itself into this
2 case, they had to argue a theory of, well,
3 because the state incurred costs through
4 Medicare because of sicknesses and illnesses
5 resulting from tobacco by Kansans,
6 therefore, that's how the state should
7 recover. That was not the basic thrust of
8 this case. So I just think the committee
9 needs to hear that side of the story.

10 Let me talk about the fees, because
11 that's what this is really all about. Was
12 it right, was it fair, do you think it was
13 appropriate. Now, you have in front of you
14 here, here are all the boxes, these are all
15 the pleadings in the three cases that the
16 State of Kansas filed. These were provided
17 to us. I had the research department get
18 these from the attorney general's office.
19 These are four boxes right here. I have
20 personally gone through the pleadings
21 personally. I've reviewed all the pleadings

22 in this case personally. I've pulled out
23 what I regard as the substantive pleadings
24 in the file filed by the plaintiff's in this
25 case. That would be, for example, the
0015

1 memorandum of law and opposition to the
2 defendant's motion to dismiss, the
3 memorandums of law dealing with whether the
4 tobacco companies in the Liggett case should
5 produce the documents they didn't want to in
6 this case. Those are the serious issues in
7 the case. By way of disclosure, I didn't
8 put in some of the procedural motions, like
9 motions for continuances, motions to admit
10 counsel, just the substantive work that
11 would really take an effort for any lawyer
12 producing that pleading to put some serious
13 work in there. I also didn't include some
14 of the attachments to some of those
15 pleadings where they were just copies of the
16 settlement agreement that was very thick.
17 What we came up with is this right here.
18 These are the plaintiff's pleadings in the
19 case. So I ask you, you know, I trust your
20 judgment in this case. I guess I can below
21 hot air up here. It's really up to you. I
22 ask you is this worth \$54 million dollars.
23 I have a hard time with that. By way of
24 comparison, the KPERS case, I've talked to
25 the lawyers in KPERS. The pleadings in that
0016

1 case would fill a room, would fill a room.
2 Let me tell you something else about what
3 didn't happen in the tobacco cases.
4 There was no discovery. There was no
5 document production. The tobacco companies
6 never produced any of these infamous records
7 as a result of what the general claims to be
8 a big victory on this joint defense, they
9 didn't produce a single document. There was
10 no trial date ever set. No witnesses were
11 ever deposed by our state. That, again, is
12 in marked contrast to what happened in the
13 KPERS litigation. Hundreds of witnesses
14 were deposed. Hundreds of witnesses were

15 deposed. Booko discovery was done in that
16 case. 14 lawsuits were filed in the KPERS
17 case. The attorneys in that case are
18 getting far less money than the attorneys in
19 this case are getting. In fact, I talked to
20 one of the lawyers last night who said, you
21 know, Tony, we did so much work that our
22 hourly rate when we look at and they kept
23 records of how much time they spent, all the
24 time they spent, they said, you know, our
25 hourly rate is not going to be that good.

0017

1 We are probably going to break even on those
2 cases. Now, to me, that's a plaintiff's
3 work doing contingency work earning their
4 fee. With all due respect, I don't think
5 the lawyers in this case earned that fee.
6 You don't have to take my word for it. I
7 invite you to review the arbitration award
8 and what they say about what local counsel
9 did in this case. That arbitration decision
10 said this whole case was dominated by
11 national counsel. They say in their
12 decision that no documents were ever
13 produced, no discovery was ever undertaken.
14 That's the work in any lawsuit. It's the
15 discovery that's the bulk of the work in a
16 case. That wasn't done.

17 In talking with some of the tobacco
18 lawyers, and I have talked to some of them,
19 they characterize the Kansas case as a side
20 show. They would tell you their side of the
21 story is that the Kansas lawsuit had no
22 impact on the settlement. I guess we can
23 probably debate that ad nauseam about
24 whether it did or whether it didn't. It's
25 hard to know for sure. The fact is it

0018

1 settled before, you know, any of those
2 documents were produced. But I would call
3 to your attention to one document, and I'll
4 have this distributed to you. I just got it
5 this morning. It's called the Strategic
6 Contribution Fund Allocation Committee
7 report. There are two basic ways the states

8 were paid in the settlement. One was a
9 percentage of what the Medicare expenses
10 were of each state. Every state that was
11 part of the national settlement received a
12 percentage based upon that. Then there was
13 another fund called the Strategic
14 Contribution Fund that awarded states
15 additional money based upon the work they
16 did in litigating the case against tobacco
17 companies. Let me just read what their
18 criteria that they used. They said the
19 criteria to be considered by the allocation
20 committee in its allocation decision include
21 each settling state's contribution to the
22 litigation or resolution of state tobacco
23 litigation including but not limited to
24 litigation and/or settlement with tobacco
25 product manufacturers including Liggett
0019

1 Myers and its entities. Now, when I talked
2 to the tobacco companies, they said in
3 addition to the four lead states such as
4 Mississippi, Florida, Texas and Minnesota I
5 believe are the four, they received a huge
6 amount of money from the settlement.
7 Mississippi a state roughly the size of
8 Kansas, I believe their recovery was several
9 times what Kansas received. Why? They
10 aggressively pursued the litigation this
11 that state. As part of the national
12 settlement, the tobacco lawyers indicated to
13 me the state of Washington was also very
14 aggressive in their pursuit of the tobacco
15 companies. They received -- I'll give this
16 to you and I invite you to look at it. The
17 state of Washington received \$496,000,000 in
18 extra money because of their work pursuing
19 the tobacco companies. Kansas, on the other
20 hand, received 159 million dollars. What's
21 significant also is the State of Colorado
22 which did not hire local counsel in this
23 case, they received more money than we did.
24 They received 202 million dollars extra. So
25 you may not want to take my word for it. I
0020

1 think the numbers say a lot about what was
2 the so-called worth about what Entz and
3 Chanay provided to this state. I don't
4 think it was much. I'm sorry. I don't
5 think it was much. Now, should they get
6 paid, maybe get paid handsomely for what
7 they did, sure. But 27 million dollars, no
8 way. No way.

9 Also maybe the secretary could pass
10 this out for me. I want you to be the judge
11 of whether you think those these are fair.
12 I think that is what the bill is all about.
13 That's what you have to come to a judgment
14 on, is whether you believe the fees in this
15 case are right. What I'm handing out to you
16 is K.S.A. 7-121(B). The factors used to be
17 determined what fees for lawyers in certain
18 health care cases, like medical malpractice
19 cases. It's based upon the Supreme Court
20 decision talking about what fees are
21 reasonable. Look at those factors and judge
22 for yourself whether you think Entz and
23 Chanay meets the condition set out here and
24 whether \$27,000,000 really comports with
25 this. I don't think it does. I don't think
0021

1 it does.

2 Now, you've heard this figure that Entz
3 and Chanay spent 10,000 hours doing work in
4 this case. That's a figure that has no
5 basis in fact. When I talked to the lead
6 counsel for Philip Morris who represented
7 them here in Topeka, he said that just in a
8 guesstimate that he gave me over the phone,
9 it was highly unlikely he would have spent
10 half as much time, half as much time on the
11 case. Yet, I will tell you the bulk of the
12 pleadings in this file right here comes from
13 the defendants in the case. They were the
14 ones producing the paper. They were the
15 ones producing the motions to dismiss, for
16 the motions to intervene. They were working
17 hard.

18 The other thing that I might suggest to
19 you is I would go back -- I would encourage

20 you to go back and look at what the
21 legislature did, not me, this is not me
22 talking, what the legislature did in 1998.
23 That's when this story first broke was back
24 in 1998. What did the legislature do in
25 response to when they heard the Entz and
0022

1 Chanay firm and the lawyers could get 25
2 percent of our settlement. The legislature
3 back then and I think it was unanimous said
4 we think that's an outrage. They in that
5 proviso, and that appropriations proviso
6 capped the attorneys fees representing all
7 counsel at \$20,000,000. So if you want, I
8 think, well, 50 percent of 54,000,000,
9 that's probably even a little more generous.
10 So we are not going back on whatever word or
11 whatever commitments we might have made by
12 doing that. We made a statement back then
13 that said, you know, at the very most, that
14 was a figure they thought, give the skies a
15 limit kind of a figure and came up with
16 \$20,000,000. So I'd ask you again, does
17 54,000,000 sound right to you. I've talked
18 to so many people. I've had so many people
19 call me. They are talking about this at the
20 rotary clubs. They are talking about this
21 at the Quawanis clubs. I've got ladies in
22 my church calling me. I've got good
23 Republican business people calling me and
24 saying they are out raged. I have smokers
25 calling me. They have said what have we
0023

1 gotten out of this deal. You know, the
2 price of cigarettes has gone up. They are
3 paying more money as a result of this whole
4 settlement. But profits for the tobacco
5 companies, I understand they are up. I
6 guess big business, big government, they are
7 winning. I don't know about the real -- the
8 supposed victims in this thing, I'm not sure
9 they are winning. We've got a lot of good
10 intentions and we're going to spend some
11 money to try to do some things. I've got to
12 be honest with you, I'm skeptical. I'm

13 skeptical. I can't help wonder -- and I
14 have four kids of my own by the way. I
15 can't help but think but this is cash over
16 kids. I can't help wondering that.
17 Let's finally talk about the bill.
18 It's kind of an afterthought in all the
19 discussion we've had. It's really very
20 simple. I think what they are getting is
21 too much. So when I was looking at this
22 issue, the first time I heard about this
23 whole settlement and what had gone on in the
24 settlement is last year when we received a
25 briefing from the attorney general about the
0024

1 settlement. What really disturbed me in the
2 part of the settlement is the way the deal
3 was structured. It was structured in such a
4 way so the General could come to you and say
5 the state isn't paying a dime. The tobacco
6 companies are paying all the money. Let me
7 tell you something, as a defense lawyer,
8 that's maybe technically true, but in
9 practical terms, it's not true. As a
10 defendant in a case, when you represent a
11 client, you have a pot of money that you
12 make a business decision to say this is how
13 much we can afford to pay. Sometimes what
14 you do is you bribe the lawyers on the other
15 side. You know what you do, you give them
16 -- throw some money at them to get them to
17 settle the case. That's what was done here.
18 They set aside a separate pot of money
19 totally unaccountable to the legislature,
20 can't get at it through open records or
21 anything like that and say we're going to
22 set aside a pot of money, and we'll pay the
23 lawyers directly. Everyone will say, hey,
24 the state ain't paying a dime. That's how
25 they helped get this thing settled to do
0025

1 that. The attorneys in this case could get
2 paid free from interference from us because
3 they know darn good and well what would have
4 happened. Can you imagine if they had not
5 done this and we had gotten our money, we

6 would be in court right now fighting them
7 over the attorney fees. Because we'd be
8 outraged over the fact the amount of money
9 they were going to get. We would have
10 rightly said it's not right. It's not
11 right. So when I looked at this, I said,
12 gosh, the way they have structured this
13 deal, we can't get at it. I don't know how
14 we can get at this money. This is not
15 right. The other interesting thing is they
16 have a confidentiality provision in there.
17 We can't find out the truth. We can only
18 get what they are willing to tell us or by
19 subpoena, which I think this committee or
20 some other committee ought to get to find
21 out what was the record in front of the
22 arbitration panel. What did the General
23 say? What did the other witnesses in the
24 arbitration panel have to say about this
25 fee? Obviously the arbitration panel has
0026

1 an opinion. I think this committee, I think
2 this legislature, we're the only ones that
3 represent the public in this thing, not the
4 arbitration panel. We ought to have a say
5 in whether that is right or not. So as I
6 looked at it, the only way I could see to
7 get this money is through the tax code. I
8 will tell you, I'll be honest with you, I'm
9 not entirely comfortable with that approach,
10 but I see no other way that we can get at
11 this money. So we're using the tax code,
12 but I'll tell you it is not a tax bill in
13 the true sense of the word. This is a
14 recoupment bill. This is getting the
15 taxpayer's money back so we as their
16 representatives can make better judgments
17 about what that money should go for, to
18 either give it back to them, to help fund
19 some of the other initiatives that I know
20 many people care about. That's whose money
21 it is. It's the taxpayer's money. My bill
22 simply does is tax the attorney's fees at 50
23 percent. According to the adviser's office,
24 that's the most we can do and be

25 constitutional. The advisor assured me and
0027

1 I talked to other people this bill is
2 constitutional. It wouldn't shock me next
3 week we'll get an attorney general's opinion
4 saying it's not constitutional. That's
5 okay. The other assurance I want to give
6 you, this is part of the conversation I had
7 with the KPERS lawyer, my intent is not to
8 tax the KPERS attorneys in this matter.
9 We've tried to set the date at such a place
10 where they would not be affected. If we
11 have to make another change to that, I
12 certainly would urge this committee to do
13 that. It's not my intent to do that.
14 That's really what this is all about. I
15 will get to you the strategic contribution
16 fund. I also have a stack here of just
17 press clippings about this whole issue that
18 occurred over the past couple of years. I'd
19 invite you to review those pleadings and see
20 what the newspapers are saying about all
21 this issue in the past. Don't just take my
22 word for it. Madam Chairman, I'll be happy
23 to stand for questions.

24 REPRESENTATIVE WAGLE: Are there
25 questions of Representative Powell?

0028

1 Representative Gatewood.
2 REPRESENTATIVE GATEWOOD: Thank
3 you, Madam Chairman. Representative Powell
4 you asked us to be the judge and stated the
5 bill is kind of an afterthought. The courts
6 have already decided who is libel in this
7 tobacco case. An arbitrary board has
8 decided the fees that the counsel would
9 receive. Are we here as an appellate to
10 those decisions or are we hear to listen to
11 a tax bill.

12 REPRESENTATIVE POWELL: I think
13 when you make your decision about whether
14 you agree with my tax bill or whether you
15 think it's good policy to pass that tax
16 bill, I think as part of your judgment, you
17 need to make a decision in your own mind

18 about whether you think the attorney fees
19 received by Entz and Chanay is right. I
20 think that's the basis by which you should
21 make your decision. I've given you
22 guidelines from statute that can help you
23 make that decision. I'm not satisfied with
24 what I would call a private star chamber
25 making this decision. I'm not. I think the
0029

1 people ought to decide. Ultimately, that's
2 who the client is. We're the client. We
3 ought to have the right to decide whether
4 that is fair or not, not some private star
5 chamber.

6 REPRESENTATIVE GATEWOOD: So the
7 answer would be more as an appellate to
8 those decisions.

9 REPRESENTATIVE POWELL: Sure, if
10 you want to phrase it that way.

11 REPRESENTATIVE GATEWOOD: Will
12 the national counsel's settlement be
13 affected by this bill.

14 REPRESENTATIVE POWELL: I don't
15 know the answer to that question. Possibly.

16 REPRESENTATIVE GATEWOOD: Why is
17 it so relevant who received the case in
18 regards to the tax bill?

19 REPRESENTATIVE POWELL: It is
20 relevant because as you look at the figures
21 -- as the factors there, it relates to the
22 abilities of the firm and whether they have
23 expertise in this area. That's why I think
24 that's relevant.

25 REPRESENTATIVE GATEWOOD: So if
0030

1 Hutton and Hutton had received the case,
2 would we still be hearing this tax bill.

3 REPRESENTATIVE POWELL: It would
4 depend on how much work they had done. They
5 told me if they had gotten in on the case,
6 they could have gotten a lot more money for
7 the state. After meeting them and talking
8 with them, they would have pursued this case
9 with far greater vigor than what the counsel
10 in this case actually did.

11 REPRESENTATIVE GATEWOOD: That's
12 what you perceive. That's not a fact.

13 REPRESENTATIVE POWELL: That's my
14 opinion.

15 REPRESENTATIVE WAGLE:
16 Representative Ray.

17 REPRESENTATIVE RAY: Will this
18 bill apply to everyone after the effective
19 date?

20 REPRESENTATIVE POWELL: Yes.

21 REPRESENTATIVE RAY: Maybe I just
22 didn't read it. Is there a threshold amount
23 that it kicks in, a certain amount of
24 dollars or a percentage.

25 REPRESENTATIVE POWELL: No. The
0031

1 reason I didn't do that, if I could have
2 done that, if the committee wants to
3 approach it that way we can. You could
4 approach it from, well, any amount under
5 let's say 500,000 or a million, for example,
6 is not taxed at a higher rate and everything
7 above that is taxed at a 99 percent rate
8 perhaps. I'm not sure that is
9 constitutional. I don't know. I haven't
10 talked about that approach. I approached it
11 from a 50 percent overall figure as a
12 constitutional way to try to get some of
13 this money back. But I'm not wedded to the
14 particulars of the language that's drafted
15 in the bill. It's just one way to get at
16 it. If you guys look at it more carefully
17 and study it more and come up with a better
18 formula to do it, I am all ears. I'm
19 perfectly willing to support a different
20 approach to that.

21 REPRESENTATIVE RAY: Under the
22 bill, if an attorney's fee was \$1,000, they
23 would have to pay a 50 percent tax.

24 REPRESENTATIVE POWELL: That's
25 correct.

0032

1 REPRESENTATIVE RAY: You
2 mentioned that you would be basing a lot on
3 whether they earned the money. Who makes

4 the judgment on whether or not they earned.

5 REPRESENTATIVE POWELL: I think
6 as I stated to Representative Gatewood, you
7 need to make that judgment.

8 REPRESENTATIVE RAY: You mean
9 every attorney's fee will have to run
10 through the tax committee.

11 REPRESENTATIVE POWELL: No. I'm
12 saying in this case I think you should make
13 the judgment about whether it's fair or not.
14 You see, part of the difficulty in writing
15 this bill is you can't write a tax bill that
16 applies just to Entz and Chanay. That's not
17 constitutional. So you've got to write a
18 bill that technically would apply to a
19 broader class though in actuality would not.
20 That's the nuances of drafting the bill and
21 the difficulty in drafting a bill. That's
22 why I'm saying to you I'm not wetted to the
23 particulars of the draft of the bill. If
24 you can come up with a better way to do it,
25 I would invite you to do that. I don't want
0033

1 to be hemmed in on my particular approach.
2 I'm just saying I think we should get a lot
3 of this money back. The only way I can
4 figure out how to do it is through the tax
5 code. How we specifically do that, I leave
6 that up to you.

7 REPRESENTATIVE RAY: Well, I was
8 just trying to understand the bill itself.
9 I didn't quite understand the answer. If it
10 would pass, then every attorney's fee that
11 Kansas pays would have to come through this
12 committee for a judgment on whether or not
13 50 percent.

14 REPRESENTATIVE POWELL: No.

15 REPRESENTATIVE WAGLE: Let's look
16 at the language for just a minute. I think
17 we're having confusion. Look at line 11,
18 folks, on the back page of the draft. It
19 says there is here by imposed a tax upon the
20 gross income of a taxpayer derived. Okay.
21 The tobacco settlement was unique in that
22 all the money in this case came from

23 taxpayers. I know of no other legal
24 situation where the money paid to attorneys
25 is derived from taxpayers, is there? Do
0034

1 you know of any, Tony? This is a taxpayer
2 derived from attorneys fees for
3 representation of a state awarded pursuant
4 to the provisions of any settlement
5 agreement. So you have to have arrived
6 attitude a settlement.

7 REPRESENTATIVE POWELL: Madam
8 Chairman, I would invite the advisor. He
9 can probably explain it the best since he
10 drafted it as to what it does.

11 REPRESENTATIVE WAGLE: Okay.
12 Don.

13 THE SPEAKER: What this bill does
14 what this bill does very simply is impose a
15 50 percent tax on the gross income of any
16 taxpayer derived from a settlement agreement
17 entered into with this state and any private
18 entity as a result of representation of the
19 state by an attorney. That's what it does.

20 REPRESENTATIVE WAGLE: You have
21 to have represented the statement.

22 THE SPEAKER: Right. As an
23 attorney, and 50 percent of the fees will be
24 taxed.

25 REPRESENTATIVE WAGLE: On
0035

1 taxpayer derived. I was wrong.

2 THE SPEAKER: The taxpayer is the
3 attorney.

4 REPRESENTATIVE WAGLE: Okay. Of
5 any settlement agreement entered into and
6 then there's a date certain. Tony. Do you
7 have any opposition to on line 13 putting in
8 after the words provision of any settlement,
9 can we put in there the words national which
10 means it would have to be a national.

11 REPRESENTATIVE POWELL: That
12 would narrow the focus of the bill even
13 further. That would even more definitely
14 exclude KPERS, the KPERS litigation. It was
15 not a national undertaking. If you did

16 that, that would further narrow the spoke.
17 REPRESENTATIVE WAGLE: Don, would
18 you speak to the fact of putting in the word
19 national settlement.

20 THE SPEAKER: I think that's
21 possible. The caveat is the narrower the
22 application, a greater likelihood exists we
23 may have an equal protection problem. So
24 everytime you narrow it, that likelihood
25 increases. The same thing with regard to
0036

1 thresholds. In line 11 after gross income,
2 you could put in a threshold, you know,
3 gross income exceeding \$1,000,000 or
4 whatever you wanted to do.

5 REPRESENTATIVE WAGLE: There's a
6 lot of questions. Representative Aurand.

7 REPRESENTATIVE AURAND: Yeah,
8 just on this. Is it bad or good or
9 indifferent to make the charge on attorneys
10 fees, could a guy make them on contingent
11 attorney fees instead of just straight
12 contracting.

13 REPRESENTATIVE WAGLE: Does that
14 further narrow the scope, don, to make it on
15 contingency fees.

16 THE SPEAKER: You mean the income
17 derived must be based on a contingency fee
18 rather than a flat.

19 REPRESENTATIVE WAGLE: We call it
20 attorney fees. Would it further narrow the
21 scope, would it questionably be
22 constitutional if you put it on contingency
23 derived fees.

24 THE SPEAKER: No, but no more
25 than any other limitation you put on here.

0037

1 REPRESENTATIVE WAGLE: But we do
2 want to be careful if we pass a bill, it
3 will be held up in a court of law.

4 THE SPEAKER: I would think you
5 would.

6 REPRESENTATIVE WAGLE: Okay.
7 Representative Ray, you were asking
8 questions. Did you get your questions

9 answered.

10 REPRESENTATIVE RAY: I just have
11 one more if I may. It says on line 17 and
12 18 of page 2, derived from sources in Kansas
13 K we say that this money was derived from
14 sources in Kansas? I thought it came out
15 of tobacco companies.

16 THE SPEAKER: I think the
17 settlement agreement with the state was
18 consummated finally in this state. I think
19 everything that arises from that is Kansas
20 sourced income.

21 REPRESENTATIVE RAY: Okay. Thank
22 you. Thank you, Madam Chairman.

23 REPRESENTATIVE WAGLE: Okay.
24 Representative Sharp.

25 REPRESENTATIVE SHARP: Thank you
0038

1 Representative Powell. I know you've sat on
2 tax committees many more years than I have.
3 Certainly, I don't know all that there is to
4 know. I would like to either ask you or
5 Shirley to explain something to me about
6 taxation as this bill would apply. If
7 attorneys were going to get a settlement,
8 they are taxed at a certain percent anyway,
9 correct? Some of this taxation would be
10 not on gross but actually after expenses,
11 correct. So before they are even taxed that
12 way, they are going to be taxed gross 50
13 percent, then taxed again.

14 THE SPEAKER: This is in addition
15 to the ordinary income.

16 REPRESENTATIVE SHARP: So we are
17 taxing and taxing.

18 THE SPEAKER: This is a surtax.

19 REPRESENTATIVE SHARP: A surtax.

20 THE SPEAKER: In line 10, it says
21 in addition to the tax otherwise imposed
22 pursuant to this section which is the
23 ordinary income tax which is a net income
24 tax.

25 REPRESENTATIVE SHARP: Right.

0039

1 Okay. Thank you for that clarification.

2 THE SPEAKER: Double taxation is
3 avoided by giving a credit to this gross
4 income tax of the amount of tax you paid
5 under the ordinary income tax.

6 REPRESENTATIVE SHARP: Okay.
7 That's how I wondered. Thank you. Thank
8 you Don, thank you Tony.

9 REPRESENTATIVE WAGLE: Now you
10 pay under ordinary income taxes deducted in
11 order to arrive at the gross 50 percent.

12 THE SPEAKER: You determine your
13 tax on your gross income and subtract dollar
14 for dollar the ordinary income tax. That
15 will be your tax bill.

16 REPRESENTATIVE WAGLE: It would
17 not be more than 50 percent.

18 THE SPEAKER: 50 percent of your
19 gross income is tax. A credit to that is
20 whatever you paid under the ordinary income
21 tax law on your net income.

22 REPRESENTATIVE WAGLE: Okay.
23 Representative Flora.

24 REPRESENTATIVE FLORA: Thank
25 you, Madam Chair. And what is the tax, just
0040

1 for clarification, what is the rate on the
2 ordinary tax that they would be taxed.

3 THE SPEAKER: The rate would be
4 -- it depends on the filing status. On page
5 1 there, you can see what the rates are
6 probably be 7.75 percent on the ordinary
7 income. That is net income, after all
8 deductions, personal exemption, et cetera.

9 REPRESENTATIVE FLORA: So do we
10 have an estimation of how much money this
11 would bring in to the state, Tony, Shirley?

12 MS. SICILIAN: Yes, we do. We do
13 have a fiscal note. We've estimated that
14 assuming that the KPERs settlement is
15 captured under the bill, the fiscal impact
16 is at least 8.4 million in fiscal year 2001.
17 .9 million would be due to the terms of the
18 tobacco litigation. Nearly every state
19 agency does hire outside counsel at one time
20 or another. We have not tried to estimate

21 that. We can continue to work on that.
22 That's why we consider the 8.4 to be a
23 minimum number.

24 REPRESENTATIVE WAGLE: Now,
25 Shirley, why did you include KPERS in here
0041

1 when the date specific is arrived at after
2 December 31st -- entered into after January
3 1st of '97?

4 MS. SICILIAN: I understand.
5 That would be the key date. If the KPERS
6 settlement agreement were entered into
7 before that date, then we need to take it
8 out, and the fiscal impacted would be a
9 minimum of .9. Our understanding was the
10 settlement agreement could be considered to
11 be entered into after that. Just to be
12 clear, I understand you've been in contact
13 with KPERS. We will try to make sure that
14 we're correct about this.

15 REPRESENTATIVE WAGLE:
16 Representative Powell, do you understand
17 that this agreement was entered into on the
18 date that the arbitration panel gave us this
19 decision which was -- is there anyway --

20 REPRESENTATIVE POWELL: The
21 national tobacco settlement agreement was
22 entered into in I think November of '99 --
23 98, excuse me. At ward, of course, of the
24 panel was in November of '99. So it's
25 clearly after the effective date that's in
0042

1 the bill. KPERS, it was my intent to do a
2 date that would not affect KPERS, but soon
3 enough it would impact the tobacco. I may
4 be off on the date. But that was my intent.
5 If that date is not right, I would certainly
6 encourage the committee to change that date.

7 REPRESENTATIVE WAGLE: Okay.
8 We'll need to look into that.
9 Representative Edmonds.

10 REPRESENTATIVE EDMONDS: No thank
11 you.

12 REPRESENTATIVE WAGLE:
13 Representative Tomlinson.

14 REPRESENTATIVE TOMLINSON:
15 Counselor, I like that word. Better than
16 representative. I do have a couple
17 questions that are legal in nature and I
18 plead ignorance because I am not an
19 attorney. The first one is I actually
20 thought I understood the bill better before
21 people started explaining it. My problem
22 now is wouldn't an attorney represent the
23 state even with the word national in there
24 that was maybe representing the state in a
25 workers' comp claim or case with a national
0043

1 company, wouldn't they have some difficulty.
2 REPRESENTATIVE POWELL: It's hard
3 to see -- it's hard to imagine that
4 particular instance that you're talking
5 about. It would affect with the suggestion
6 that the Chairman has made, any national
7 settlement that the state would hire
8 attorneys for contingency fee on a
9 contingency basis is the other change that
10 the Chairman suggested, any case in the
11 future would be taxed.

12 REPRESENTATIVE TOMLINSON: How
13 about a firearm's settlement.

14 REPRESENTATIVE POWELL: If the
15 State of Kansas undergoes a national case
16 against the gun manufacturers and does
17 similar to what the tobacco case did, those
18 attorney fees hired by the state would be
19 impacted by the bill. That's correct.

20 REPRESENTATIVE TOMLINSON: My
21 understanding of the equal protection
22 clause, now, I'm going to test my school
23 teacher knowledge against the attorney.

24 REPRESENTATIVE POWELL: You
25 probably know it better than me.

0044

1 REPRESENTATIVE TOMLINSON: I
2 don't. My understanding is the reason we
3 have to be careful here is because under the
4 equal protection clause, we can't pass a tax
5 law that taxes me specifically, my
6 crankiness or any other reason.

7 REPRESENTATIVE POWELL: That's
8 right.

9 REPRESENTATIVE TOMLINSON: I have
10 equal protection. If we pass this
11 legislation, we're going to wind up in
12 federal court, aren't we.

13 REPRESENTATIVE POWELL: You bet.

14 REPRESENTATIVE TOMLINSON: When
15 we do wind up in federal court, legislative
16 intent will be part of the issue with equal
17 protection.

18 REPRESENTATIVE POWELL: Sure, but
19 legislative intent is primarily derived from
20 the words in the statute. That's where the
21 courts look first.

22 REPRESENTATIVE TOMLINSON: I
23 understand that. You're a smart attorney.
24 Wouldn't you if you were on the other side
25 subpoena the proceedings in this committee
0045

1 to deal with legislative intent.

2 REPRESENTATIVE POWELL: Sure.
3 You know, the lawyers on the Entz and Chanay
4 would probably go to court to strike this
5 law down if we pass it, would argue this
6 bill -- this legislation was designed to get
7 us. Therefore, it's a violation of the
8 equal protection clause and the court, you
9 ought to throw it out. That will be the
10 argument. I think we've tried to word it in
11 a way that's not going to hold water, but
12 that will be the argument, absolutely.
13 You're right on point.

14 REPRESENTATIVE TOMLINSON: And
15 these proceedings will be a part of that.

16 REPRESENTATIVE POWELL: That's
17 correct.

18 REPRESENTATIVE TOMLINSON: Okay.

19 REPRESENTATIVE WAGLE:
20 Representative Wilk.

21 REPRESENTATIVE WILK: Thank you,
22 Madam Chair. Representative Tomlinson, if
23 it happens to end up in court, you will be
24 on record. My question is for Advisor
25 Hayward. I share some of Representative

0046

1 Tomlinson's confusion. Ask you to brush off
2 your history book. I believe I worked with
3 you back in 1993 when we did the -- or '94
4 when we did the military retirement
5 settlement issue. The way this bill is
6 drafted today, won't those attorney fees --
7 this bill would apply to those fees.

8 THE SPEAKER: I believe we would
9 have captured 50 percent of them.

10 REPRESENTATIVE POWELL: Not if we
11 added the words national settlement.

12 THE SPEAKER: That's presuming
13 the present language.

14 REPRESENTATIVE WILK: I wanted to
15 get a handle on that. What about, again,
16 under the current language, the lawsuit we
17 have with Colorado. I don't know if there
18 is any money involved in that or not.
19 Certainly the state has paid, that's a
20 contract, so would those fees also fall
21 under the jurisdiction of this bill.

22 A. If that settlement occurs after
23 this particular date, the attorney fees
24 involved would be, again, subject to this.
25 I'd like to say one other thing with regard

0047

1 to equal protection. States are granted
2 great latitude by U.S. Supreme Court with
3 regard to discriminating in the tax code.
4 The test is if there is a rational basis for
5 that discrimination.

6 REPRESENTATIVE WILK: Thank you.

7 REPRESENTATIVE WAGLE: Don, if we
8 added the word national which was the
9 retiree's and the water would not be taxed
10 under this language.

11 THE SPEAKER: That's correct.

12 REPRESENTATIVE WAGLE: Water
13 would not be taxed.

14 THE SPEAKER: The water is a
15 Kansas suit. That's correct.

16 REPRESENTATIVE WAGLE:
17 Representative Howell.

18 REPRESENTATIVE HOWELL: Thank

19 you, Madam Chairman. Tony, I'm trying to
20 understand a little bit about how this
21 lawsuit was put together and who represented
22 who. Am I correct in my assumption that the
23 attorneys were representing all citizens of
24 Kansas.

25 REPRESENTATIVE POWELL: State of
0048

1 Kansas was the client. That's correct. We
2 were the client. The public was the client.

3 REPRESENTATIVE HOWELL: What good
4 does it do for members of the public to call
5 up a lawyer and ask them to proceed in a
6 particular way? Does that not occur?
7 What if I'm a member of the public and I
8 don't like how the suit is going. Can I
9 call the law firm up and ask them to
10 represent me differently as a tax peril.

11 REPRESENTATIVE POWELL: I guess
12 you could. Quite practically speaking
13 there, probably not likely to happen to take
14 that call too seriously. They really know
15 who their bread is buttered by. That is
16 usually the person in government who hired
17 them.

18 REPRESENTATIVE WAGLE:
19 Representative Aurand.

20 REPRESENTATIVE AURAND: Thank
21 you, Chairman. With regard to
22 Representative Tomlinson's question, these
23 will only show up in federal court if we can
24 file them so people can find them in three
25 years. Apparently, that hasn't happened.
0049

1 Tony, I know one of the things you're trying
2 to get at most is the ethical side of the
3 payment. I hear -- things I've heard about
4 as far as payment lawyers receive on
5 contingency as compared to what they charge
6 normally, three, four, five times as much as
7 they would on an hourly rate. If I divide
8 it right, assuming generously I guess
9 ten,000 hours put in, it would be about
10 \$2,700 an hour. The attorney general's
11 office charged 150 and 165 which would be 18

12 times as much. I was wondering if you think
13 the Entz and Chanay firm are 18 times as
14 good lawyers as the attorney general and her
15 staff.

16 REPRESENTATIVE POWELL: Well, I
17 can't say. I would say I wouldn't say even
18 Entz and Chanay is worth than much than the
19 general's legal abilities.

20 REPRESENTATIVE AURAND: Are you
21 familiar with anything in general practice
22 when people keep track of their hours, is
23 there a certain part where lawyers in
24 general tend to think, okay, this is beyond
25 what is some of the listings here as far as
0050

1 what is ethical? Is there a general rule
2 of thumb or something out there.

3 REPRESENTATIVE POWELL: There is
4 no set number in terms of an hourly rate or
5 even a total amount of money that is
6 reasonable or not reasonable. It really
7 depends upon the circumstances of each case
8 and the statute that I gave you really is
9 the guideline that would be used by a court
10 to determine whether a particular fee is
11 reasonable. I will tell you the range for
12 lawyers in the State of Kansas at an hourly
13 rate would range probably from \$100 to --
14 actually a lot of work for the state is at
15 \$85 an hour up to around \$300 an hour for a
16 quality firm doing hourly work. So \$2,700
17 certainly on its face would certainly have
18 to make you question whether that's a
19 reasonable fee.

20 REPRESENTATIVE AURAND: One other
21 question I was wondering, the whole idea of
22 kind of the separate pool of money, if you
23 as a defense lawyer have someone suing your
24 client for a million dollars and you know
25 somehow they are probably getting 30 percent
0051

1 contingency or something like that, you said
2 something about bribing or encouraging the
3 lawyers to try to get to settle, do you know
4 cases -- have you been able to set up cases

5 where you can pay the other attorneys a
6 separate pot of money? Has that happened
7 in other cases.

8 REPRESENTATIVE POWELL: Yeah,
9 we'll do that. We'll do that because the
10 lawyer -- we know that lawyer is on a
11 contingency fee basis. We will know, also,
12 the lawyer can make the most money on the
13 case if they don't have to go through all
14 the discovery, take it to trial. That costs
15 them money to do all that work to front the
16 expenses. So, in essence, we throw some
17 money at the lawyer to give an incentive for
18 that lawyer to then settle the case and
19 persuade his client to settle the case.

20 REPRESENTATIVE AURAND: That's
21 what I don't understand. On the other side,
22 what is the ethical obligation of a lawyer
23 that is suing as far as saying, all of a
24 sudden, instead of taking a pot out of the
25 whole thing and this is as much as I can
0052

1 get, all of a sudden saying the pot might be
2 this big, if I can get so much on this side,
3 we'll set up two accounts.

4 REPRESENTATIVE POWELL:
5 Personally, I think they are obligated to
6 tell their client how much they are going to
7 get. If they were offered such an
8 arrangement by the opposing side, I think a
9 lawyer would be ethically obligated to tell
10 their client what the offer from the
11 defendant would be. That's what's
12 interesting about this case. In essence,
13 the lawyers are saying we don't have to tell
14 you what we're getting paid by the
15 defendants in the case, because we've got a
16 confidentiality agreement. I think that is
17 kind of amazing myself.

18 REPRESENTATIVE AURAND: Thank
19 you.

20 REPRESENTATIVE WAGLE:
21 Representative Edmonds.

22 REPRESENTATIVE EDMONDS: Thank
23 you, Madam Chair. This subject of hours

24 cropped up earlier this week. I thought
25 about it at the time and went on. I'll

0053

1 start with the usual caveat. I'm not an
2 attorney, but I am a CPA. We do keep track
3 pretty closely in practice of the time spent
4 on various times of work because that's how
5 we bill for it. You've got an hour and 45
6 minutes in a tax return. You're going to
7 end up putting that on a time sheet some
8 place and some client is going to get build
9 for that time. The only client I have that
10 is a law firm uses software that does that
11 sort of thing for their practice, but they
12 are not involved in any way, shape or form
13 in this situation. I don't know whether to
14 extrapolate from that. You've worked with
15 at least a couple law firms in your
16 experience. Is it the practice in most
17 firms to have their partners and employees
18 and associates keep track of their time for
19 what they do as it would be in a CPA firm?
20 We account literally for every minute.

21 REPRESENTATIVE POWELL:

22 Absolutely. It is a common practice on most
23 law firms, including, I might add,
24 plaintiff's firms who take cases on a
25 contingency basis will keep their time.

0054

1 Now, when you're a defense lawyer like me
2 and you are used to billing your client on
3 an hourly basis, the reason you keep track
4 of your time is obvious. You have to keep
5 track of your time in order to give you an
6 idea of what you need to bill your client.
7 I keep track of my time. In fact, we have
8 paralegal and sometimes our legal
9 secretaries will also keep track of some
10 time on that case. We determine how much
11 work has been done on that case in order to
12 present a reasonable and fair bill to our
13 client. A plaintiff's firm will also
14 oftentimes keep time records internally of a
15 case to help them determine for a couple
16 reasons, are they making money on the case.

17 A lot of times if a plaintiff's firm is
18 spending so many hours on the case, their
19 hourly rate will dip so low, they'll see
20 they are losing money on a case. They also
21 will do it internally to determine how to
22 divide up the pot, for example. When the
23 fee comes in, how much will a particular
24 lawyer in that firm be entitled to versus
25 another depending on how much work they do
0055

1 on the case. So it's very common even among
2 plaintiff's attorneys, and they have told me
3 this, they also keep hours.

4 REPRESENTATIVE EDMONDS: Well, if
5 I were asked to tell you how many hours I
6 spent on a particular client's in the last
7 year, it would be a matter of basically
8 footing a column to tell you that. I assume
9 if I had a reason to ask you how much time
10 you spent on a particular client, you could
11 do something similar in your medical
12 practice.

13 REPRESENTATIVE POWELL: Our staff
14 and our law firm can produce pretty easily
15 an entire list of the work I've done on
16 every single case for every different client
17 over the past year, in fact over the past
18 previous years. It's all done by computer.
19 We enter our time in a computer. It's all
20 kept very simply. It's very easy to produce
21 those records in any quality law firm could
22 do that.

23 REPRESENTATIVE EDMONDS: Is this
24 true whether you're defending the client or
25 whether you're the plaintiff in the case.

0056

1 REPRESENTATIVE POWELL:
2 Absolutely.

3 REPRESENTATIVE EDMONDS:
4 Realistically if that's the practice, what
5 I'm hearing you say that is the standard of
6 practice, then I would expect any firm to be
7 able to do that if they were sufficient leap
8 inclined.

9 REPRESENTATIVE POWELL: I would

10 strongly suspect Entz and Chanay has such a
11 system and could easily produce the time
12 that they spent in this case if they had
13 simply chosen to do so.

14 REPRESENTATIVE EDMONDS: That was
15 the topic that came up. I found it
16 interesting. I appreciate your
17 observations. Thank you very much. Thank
18 you, Madam Chair.

19 REPRESENTATIVE WAGLE:
20 Representative Gregory.

21 REPRESENTATIVE GREGORY: Thank
22 you, Madam Chairman. Tony, in the -- the
23 figure we're talking about here at one point
24 in time, we were talking about limiting this
25 by having the word national in there. I'm
0057

1 wondering if it would make some sense to
2 also plug the word contingency in there.

3 REPRESENTATIVE POWELL: I think
4 that was mentioned before. I certainly
5 wouldn't have any objection to doing that.

6 REPRESENTATIVE GREGORY: Okay.
7 In the water litigation that we're in.

8 REPRESENTATIVE POWELL: They are
9 paid by an hourly basis.

10 REPRESENTATIVE GREGORY: That's
11 what I thought. Thank you.

12 REPRESENTATIVE WAGLE:
13 Representative Long.

14 REPRESENTATIVE LONG: Thank you.
15 I found the hours to be very interesting.

16 That was a question I was very curious
17 about. Also, I don't have any knowledge
18 about the attorney general's office or
19 anything. But I notice when she was
20 testifying the other day, it sounded like it
21 was just her and John and a couple
22 secretaries from the office. I was a little
23 bit shocked by their lack of staff over
24 there. Can anyone inform me as to how many
25 people actually work for the AG's office.

0058

1 Would it not be possible for them to have
2 pursued this in-house.

3 REPRESENTATIVE POWELL: Well, I
4 can only tell you what I think, my opinion.
5 Obviously, she's giving her opinion on that.
6 I do know a number of other states did do
7 this in-house. I think the results that we
8 obtained by hiring private counsel, local
9 counsel, I don't think the results are
10 justified doing that. I think we could have
11 received more money for the state had we not
12 done that and done it in-house. I think the
13 figures I've recited would suggest we didn't
14 get our money's worth hiring outside
15 counsel.

16 REPRESENTATIVE LONG: Tony, how
17 many hours would it take you to compile the
18 data you had in that folder.

19 REPRESENTATIVE POWELL: It's hard
20 to say. I made the statement before. I
21 still stick with it, I don't think this work
22 here with the research behind it probably
23 went into it writing and drafting it is
24 worth more than a couple hundred thousand
25 dollars. I don't see how it could be worth
0059

1 more than that myself. I just don't.
2 That's my opinion. It's hard to totally
3 judge that. I mean our law firm to bill
4 \$200,000 on a case for the work we'd do,
5 we'd be doing a lot more than this. I'm
6 trying to give them at least some of the
7 benefit of the doubt.

8 REPRESENTATIVE WAGLE: I have
9 four more committee members that want to ask
10 questions, and I want to get them in the
11 next few minutes if we can and we do have an
12 opponent that wants to testify.
13 Representative Johnston.

14 REPRESENTATIVE JOHNSTON: Thank
15 you, Madam Chair. Thank you representative
16 Powell for being here. I wanted to ask you
17 a couple questions real quick. You said at
18 the beginning of your testimony this morning
19 that you referred to the attorney general's
20 office by saying that they did not maintain
21 records or presumably enough records. You

22 mentioned that they discarded records. Is
23 that a matter of fact.

24 REPRESENTATIVE POWELL: I believe
25 their testimony yesterday was they either
0060

1 lost them or they threw them away. I recall
2 John Campbell saying they threw away drafts.

3 REPRESENTATIVE JOHNSTON: Rough
4 drafts.

5 REPRESENTATIVE POWELL: Rough
6 drafts, previous drafts.

7 REPRESENTATIVE JOHNSTON: I
8 wanted to clarify that. Another issue,
9 you've been talking about the amount of the
10 award that Kansas received compared with
11 other states. I would presume that the
12 decision-making process of which state would
13 get how much surely included a reflection of
14 population and surely Kansas doesn't have
15 quite the population of Colorado. Could you
16 tell me what some of those criteria were
17 that the decision-making process included.

18 REPRESENTATIVE POWELL: I'm not
19 sure that I'm capable of giving you all
20 that. My understanding in talking with
21 tobacco counsel is that the biggest criteria
22 they used was percentage of Medicaid
23 expenditures. Medicaid expenditures is
24 probably in many respects a function of
25 population depending on how many people you
0061

1 have. It's it will have a great influence
2 on what your expenditures was. A good part
3 of that settlement they got was determined
4 by a raw formula irrespective if we had gone
5 down to the courthouse three days before the
6 case had been settled, we probably would
7 have received the bulk of the money in the
8 case. The other part I talked about the
9 strategic contribution, the additional money
10 they gave to the state in their actual
11 contribution to the case.

12 REPRESENTATIVE JOHNSTON: Is
13 there anyway to break that down.

14 REPRESENTATIVE POWELL: I'll give

15 you the Strategic Contribution Fund. That
16 breaks it down. It goes through all the
17 settlements and I'd invited you to look at
18 it.

19 REPRESENTATIVE JOHNSTON: Last,
20 my interest in this is not political. My
21 interest is as I mentioned previously, the
22 need to find a solution. One of the
23 solutions might be your bill. I think it
24 clearly needs some work. Another solution
25 I'm particularly interested in is a law that
0062

1 would require competitive bidding on
2 professional contracts. I have to be honest
3 with you. I've considered myself a Stovall
4 supporter even though I'm a Democrat. I
5 made a contribution to her first campaign.
6 I want to thank you and the Chairman to
7 having these hearings. My eyes are opened.
8 I'm disturbed with the decision-making
9 process used by the attorney general. My
10 question to you is what decision-making
11 process would you recommend an attorney
12 general use to hire outside counsel? What
13 would you have done if you had been attorney
14 general, the first question being would you
15 have joined the lawsuit. I hope the answer
16 is yes. The second question, what process
17 would you establish for hiring outside
18 counsel? My concern, it's a Republican
19 attorney general or a Democratic insurance
20 commissioner, hiring outside counsel shunt
21 be a partisan decision and clearly it was.
22 I find that appalling.

23 REPRESENTATIVE POWELL: I
24 appreciate that question. Let me make a
25 couple other points about that. The post
0063

1 audit report also stated and I think you
2 hinted at it in your comments that when they
3 reviewed some 35 cases where the general had
4 hired outside counsel, she had hired 29
5 firms. In 20 of those cases, the firms had
6 contributed to her campaign. So to me I
7 think that certainly gives a suggestion that

8 the attorney general is predisposed towards
9 doling out legal work to political
10 supporters of hers. I think that's wrong.
11 My process would be a two step process. I
12 don't think you should hire a lawyer based
13 solely upon the price they are willing to
14 perform the services for you. You have to
15 approach from it a two-step process. No. 1,
16 you need to for every piece of work or class
17 of work that you need done, you should
18 select the most qualified firms that are
19 able to do that work. That should be based
20 upon the size of the firm, the expertise of
21 that firm, the credentials of the particular
22 lawyers in terms of the work they have done,
23 where they went to school, the experience
24 they have. Once you get a list of firms
25 that are qualified, the best qualified to do
0064

1 that piece of work, then I think you should
2 let them bid on that work based on price.
3 That price could be based on either an
4 hourly rate or on the total costs they are
5 willing to do the work for. In fact, I'm
6 actually working on a bill called the
7 private attorney retention sunshine act that
8 would require that very thing. It would
9 also -- the bill I'm going to introduce
10 would require legislative oversight over
11 large attorney fee contracts of a million
12 dollars or more. So whenever the state
13 wants to hire lawyers where those attorneys
14 could earn more than a million dollars,
15 shouldn't be making that decision
16 themselves. They should come to the
17 legislature and the legislature should have
18 the opportunity to review that contract. I
19 think those are some important things that
20 we ought to do to change the way to do that.

21 REPRESENTATIVE JOHNSTON: Thank
22 you. I look forward to seeing the bill.

23 REPRESENTATIVE WAGLE:
24 Representative Ray and Representative Tedder
25 and we'll go to our opponent.

0065

1 REPRESENTATIVE RAY: I want to
2 ask on the open records law, are you
3 required to keep all your drafts.

4 REPRESENTATIVE POWELL: I don't
5 know. I don't know the answer to that.
6 Probably not.

7 REPRESENTATIVE RAY: Do you think
8 we should have.

9 REPRESENTATIVE POWELL: Well,
10 it's hard to say because it's not always a
11 black and white thing. I think in fairness
12 to the general's office, it's not always a
13 black and white thing. I just think my
14 comment about these particular drafts, this
15 was not your garden variety case. This was
16 a politically very sensitive case by her own
17 admission. It's the biggest case in the
18 history. Obviously, you had to know there
19 were going to be questions about who you
20 hired to do this work. So I think any
21 documents relating to that case should have
22 been kept. That's really all I'm saying. I
23 can't tell you in every matter should every
24 single record be kept, because not every
25 single record is important. In this case, I
0066

1 think it's a fair statement it should have
2 been.

3 REPRESENTATIVE RAY: Could I have
4 a clarification for my own personal
5 information. Did I understand correctly
6 that defense attorneys can get together with
7 plaintiff's attorneys and give the money --

8 REPRESENTATIVE POWELL: Well,
9 what we do as part of the settlement in
10 essence.

11 REPRESENTATIVE RAY: You are
12 paying them personally.

13 REPRESENTATIVE POWELL: It's not
14 like it's this little bribe on the side kind
15 of thing. What it is as part of the
16 settlement you'll say we're structuring this
17 pot of money here. Part of that is going to
18 go to your client and here, we're going to
19 pay you this much in attorney fees. That is

20 sometimes done.

21 REPRESENTATIVE RAY: So the
22 opposing attorney is paid, the other one.

23 REPRESENTATIVE POWELL: No. It's
24 our client that would pay. I'm representing
25 company X. I've got Joe blow here. Here's
0067

1 suing company X for discrimination. Many
2 cases it's a contingency fee. Early on in
3 that case, we'll look at it and kind of get
4 a sense. We have usually a pretty good idea
5 of how much work we think that attorney
6 might have done in the case. As an
7 inducement to settle, we'll offer some money
8 to the client. We'll offer a greater sum
9 that he might not normally receive as a
10 contingency percentage and give him a chunk
11 of money to get him to settle the case.

12 REPRESENTATIVE RAY: So the
13 client is paying two. Thank you.

14 REPRESENTATIVE POWELL: That's
15 part of the overall pot of money that the
16 company is willing to pay.

17 REPRESENTATIVE WAGLE:
18 Representative Tedder.

19 REPRESENTATIVE TEDDER: Thank
20 you, Madam Chairman. With this bill, will
21 it put the State of Kansas at a disadvantage
22 in the future in trying to contract services
23 with attorneys.

24 REPRESENTATIVE POWELL: Yeah, in
25 those particular cases where you've got
0068

1 national settlements involving contingency
2 fees, yes, it might. I have to be honest
3 about that.

4 REPRESENTATIVE TEDDER: Okay.
5 Thank you.

6 REPRESENTATIVE WAGLE: Okay.
7 Thank you Representative Powell. Our next
8 conferee on the bill is Terri Roberts.
9 Terri, do you mind taking an oath.

10 MS. ROBERTS: No, ma'am. The
11 last time I did this was graduation from
12 nursing school.

13 REPRESENTATIVE WAGLE: Terri are
14 you representing yourself or the--

15 MS. ROBERTS: I am. I've got
16 written testimony. Good morning. My name
17 is Terri Roberts. I'm here as a private
18 citizen addressing the issue of taxing the
19 attorney fees for those that represented
20 Kansas in the tobacco litigation. First of
21 all, I want to say I'm one of those
22 individuals that has a passion about seeing
23 a world that is less harmed by addiction to
24 nicotine, clean air in the work place and
25 public places is an exception, not a hard
0069

1 one battle. Among friends and colleagues
2 that share this same passion, we offer refer
3 to ourselves as anti smoking activists or
4 cell under the circumstances. Since
5 December of 1995, I have personally invested
6 time and money to educate myself about
7 smoking as a habit and what public policies
8 could best facilitate a world with less
9 nicotine addiction. I, too, like
10 Representative Powell have reviewed the
11 three sets, the Kansas pleadings only
12 addendum as they are filed. I was in the
13 courtroom for several of the court
14 appearances. I've read the master
15 settlement agreement, some sections several
16 time. I provided analysis of the various
17 versions that went before Congress to those
18 interested in this issue. Having said this,
19 I want to add that I have only a
20 professional relationship with attorney
21 general Carla Stovall and any of her staff.
22 I have met Stu Entz only once during a
23 presentation he did for the Kansas smokeless
24 kids program and I have talked with Jeff
25 Chanay approximately five times and two of
0070

1 those were about a nursing client he was
2 representing. I know none of these
3 individuals personally nor have I shared a
4 meal with them or ever discussed my family
5 or my day with them. I'm hear because I

6 have a sign on my door which reads and
7 quotes ash ham Lincoln says to send the
8 silence when they should protest makes
9 chords of gram. Diane Graham a CEO in
10 Kansas City and women, too, so I add that.
11 I do try to speak out when I think I might
12 be able to make a difference. Like
13 Representative Powell, I'm not comfortable
14 with this proposal. In fact, I disagree
15 with it. The bill as introduced
16 retroactively will impose a tax on specific
17 proceeds that the attorneys received as
18 compensation for representing the State of
19 Kansas presumably in the tobacco litigation.
20 I'm not sure it will necessarily be limited
21 to just those who represented Kansas in the
22 tobacco settlement. You've had that
23 discussion. What about the attorneys that
24 represent KU hospital authority in
25 collections. What about KPERS and the other
0071

1 areas were attorneys are engaged to
2 represent the state. Might this have a
3 chilling affect on attorneys considering
4 representing our state. I'm not a
5 practicing attorney nor an expert in
6 constitutional law. However, one basic
7 premise of our constitution is
8 representation and fair taxation. And I
9 remember several years ago when Kansas was
10 sued on behalf of the military retirees
11 disenfranchised by a revised tax code and
12 Kansas lost that legal battle and settled
13 and to the best of my recollection it was
14 about 57 million with the court awarding
15 approximately 10 million to the attorneys
16 that represented the Kansas military retire
17 ease. Certainly, the constitutionality of
18 any provision of this nature will be
19 evaluated prior to its implementation. Why
20 is the legislature seeking a portion of the
21 attorney fees in this case. After two days
22 of hearings on the related issue of why Entz
23 and Chanay were selected, I'm not clear of
24 the public policy behind the tax proposal.

25 I do no one thing, though, for sure. The
0072

1 tobacco industry is a formidable opponent.
2 Every hour of every day. And what
3 Representative Powell said I do agree with.
4 I think they one this week. This week they
5 are winning. Okay. I strongly suspect that
6 they like seeing all of you in this much
7 conflict, this much anguish, this much time
8 spent on this issue because it's not about
9 how we can prevent tobacco addiction and
10 prevent our youth from getting access to
11 tobacco. It's a distraction, and they are
12 masters at distraction and
13 misrepresentation. I was disappointed that
14 John Campbell was not afforded the
15 opportunity to review in detail the MS A.
16 That stands for the master settlement
17 agreement. That agreement as you know made
18 history, the largest civil settlement in the
19 history of the world and as you know, the
20 largest pay out to attorneys in the history
21 of the world. The details of the MS A are
22 important, and the restrictions on the
23 tobacco industry significant. As a matter
24 of public policy, I do believe you would
25 have benefited greatly from hearing about
0073

1 them. I'm confident that the greater wisdom
2 will prevail and this tax proposal will not
3 be enacted. My hope is that it dies
4 swiftly. Tax code revision should be fair
5 and purposeful. They should not be
6 retaliatory or punitive.

7 REPRESENTATIVE WAGLE: Are there
8 questions of Terri Roberts. Representative
9 Long.

10 REPRESENTATIVE LONG: Thank you.
11 Terri, I think you and I have a lot in
12 common. We both care a lot about health
13 issues and that's why I asked to be on the
14 health and human services committee. I
15 guess my rationale is a little different
16 than yours, though, in justifying a lawsuit
17 against the tobacco company. Recently I was

18 talking to another representative and
19 there's a great concern about obesity in
20 women. We all know that chocolate, you
21 know, creates obesity. We have problems
22 with our weight, but I couldn't justify
23 going after the chocolate company, you know,
24 for my lack of discipline in staying away
25 from something that I know can be harmful to
0074

1 me and to my health. I guess that's where
2 I'm looking at an immense lawsuit against a
3 tobacco industry who we all know, we've all
4 been educated about the harm it does to us
5 and to families and everything. So I guess
6 I just wanted to make a statement that the,
7 that's taken tow control the amount of
8 profit, you know, to a law firm, I guess
9 it's just a different way of thinking
10 possibly.

11 MS. ROBERTS: I understand.
12 There will be up to 500,000,000 paid in
13 attorneys fees every year as a result of the
14 master settlement agreement. The percentage
15 that was paid out to the Kansas is -- was
16 determined to be 54,000,000 dollars. That
17 was part of the settlement. That's how our
18 legal system operates.

19 REPRESENTATIVE WAGLE:
20 Representative Aurand.

21 REPRESENTATIVE AURAND: Thank
22 you, Madam. The thing I learned this
23 morning, the thing that bothered me, setting
24 up the separate account that pays the thing.
25 When you're talking about health issues it
0075

1 started out as a Medicare system, I'm not
2 sure there is a whole lot of money going
3 back to head.

4 MS. ROBERTS: Medicaid, Medicaid
5 recoupmnt.

6 REPRESENTATIVE AURAND: What I
7 don't understand as far as the tax bill and
8 Representative Powell tried to make it
9 clear, this money if all in one pot, would
10 have been part of the Kansas pot of money.

11 What he's trying to go after is that money
12 that's out there that didn't come back to
13 the State of Kansas. Now, from a health
14 perspective or children's programs or
15 programs for smokers, would it make some
16 sense as far as the tax policy or policy
17 trying to get more of that money and don't
18 you have any problem with all the lawyers
19 setting aside this separate fund over here
20 which basically subtracts from the amount
21 that we get back to work with health issues.
22 Isn't that troubling.

23 MS. ROBERTS: I think about it.
24 I think about the hundreds of attorneys that
25 worked on this. And all the Attorney
0076

1 General's. Actually, one attorney general
2 whose state had not even filed a lawsuit was
3 allowed to negotiate the settlement. Okay.
4 I won't go there. There is a number of
5 issues related to the actual settlement.
6 Think bit. That's somewhat self-serving in
7 a sense, but it's what they did. It's what
8 they did in the best interest of getting
9 this issue settled. In the four states that
10 actually ended up going to court or settling
11 right before they did go to court, everybody
12 prepared for trial and got ready. Spent an
13 enormous amount of money and time and they
14 settled. We could see the wave of
15 settlement coming through. Those are the
16 things I monitored on behalf of my
17 colleagues that do what we do in our state
18 every day, five and ten e-mails every hour
19 about what was coming down. Do I like I I
20 don't know if I like it or not. But that's
21 what we ended up with. I never thought we'd
22 get the concessions from the industry that
23 we did. If I was negotiating it, there
24 would have been more. But I can't in
25 hindsight say what they did was bad or
0077

1 wrong. It's what we did. It's what we
2 signed and everybody knew at the press
3 conference on November 20th, we'd gone

4 through 18 months, gone to Congress with
5 another package that didn't get passed. We
6 knew what was being asked. At least I as a
7 person informed about this knew what was
8 going to happen. They didn't go into it
9 blindly. Everybody was well versed on where
10 these pots of money were and what was going
11 to happen and what the fallout was going to
12 be. It was well debated for 18 months.

13 REPRESENTATIVE AURAND: I guess
14 in the sense you said, that might have been
15 self-serving for them.

16 MS. ROBERTS: Both sites.

17 REPRESENTATIVE AURAND: This is
18 what the legislature is doing to be
19 self-serving ourselves and people in the
20 legislature thinks more of this money should
21 be going to the program.

22 MS. ROBERTS: Yeah. I'd have to
23 follow up on what Mr. Hayward says. It has
24 to have a rational basis and it has to be
25 fair and equitable. Constitutional. Don't

0078

1 want to end up in federal court arguing with
2 with your attorney general and attorneys
3 over attorney fees.

4 REPRESENTATIVE AURAND: I think
5 all of us agree it needs to be
6 constitutional.

7 REPRESENTATIVE AURAND: Thanks.

8 REPRESENTATIVE WAGLE: Terri, as
9 a matter of record, I want you to be made
10 aware the leadership of this tax committee,
11 two republicans, two Democrats, met with
12 John Campbell, asked him some tough
13 questions several weeks ago, we asked him to
14 appear before the committee to give the
15 committee a briefing on the history and the
16 master settlement. And in addition to that,
17 I understood last Friday when I left I had
18 communications from the AG's office saying
19 she would be here on Wednesday because we
20 were going to give the opportunity for Tony
21 to share his testimony first and we were
22 going to allow her to counter that which

23 they agreed to. Instead, on Monday morning,
24 the attorney general came in and I was not
25 forewarned that was going to happen. She
0079

1 chose to pick up the matters rather -- of
2 how Entz and Chanay was hired rather than
3 brief the committee on the history and the
4 settlement.

5 MS. ROBERTS: Okay.

6 REPRESENTATIVE WAGLE: With her
7 being a statewide elected official, I felt
8 like I should give her the courtesy to
9 present the information as she wanted on her
10 time line. She really overruled the
11 committee chair and said this is how I want
12 to do it. I said okay. I want you to know
13 we did offer them that.

14 MS. ROBERTS: Great. I was not
15 aware of that. Like I said, I'm not in
16 those circles.

17 REPRESENTATIVE WAGLE: Further
18 questions of Terri Roberts. I see none. We
19 will continue the hearing tomorrow
20 - committee. Nine o'clock or shortly after.

21
22
23
24
25