

No sleaze in \$20 million lawyer's fee

By RICK CASEY
Houston Chronicle

THE temperature outside the federal courthouse in Texarkana hovered in the low 90s all that July afternoon in 1998. But, emotionally, it was even hotter inside.

Attorney General Dan Morales and five big-gun plaintiff's lawyers had negotiated a settlement with tobacco companies valued at \$15.3 billion for the state of Texas.

But standing in the way were lawyers for the state's counties and county hospital districts, who believed their costs from tobacco-related diseases were more than the state's and yet they had been shut out of the settlement.

They had asked U.S. District Judge David Folsom to allow them to intervene in the case. If he did, and their demands were not met, the entire settlement could be blown, together with a huge political triumph for Morales and an estimated \$2.3 billion in fees for the five lawyers he had hired.

Wary of retribution

Folsom responded by ordering the parties into mediation. In one room at the courthouse were lawyers for the counties.

In another were several assistant attorneys general and two key legislators: Sen. Bill Ratliff, R-Mount Pleasant, and Rep. Rob Junell, D-San Angelo, finance committee chairmen of their respective houses.

Negotiations had been under way for months and had gone nowhere. Ratliff and Junell had promised to do their

best to get \$400 million for the counties. Some counties, wary of retribution from the Legislature on other issues, seemed ready to take the offer. Harris County wasn't. Just two weeks earlier, Commissioners Court unanimously agreed to then-County Attorney Michael Fleming's recommendation to hire well-known plaintiff's lawyer Richard Mithoff on a contingency fee that could pay him tens of millions.

The Minnesota 'miracle'

When he and his then-partner, Tommy Jacks, showed up to join attorneys for the other counties in that Texarkana courthouse chamber, some were excited.

"They are perceived as being, and are, among the best trial lawyers in Texas," said J. Gregory Hudson, an Austin attorney representing Montgomery County. "It made the other parties sit up and pay attention that we were serious, and had the horsepower — or Harris County did — to go to trial if we needed to."

As it turned out, they didn't need to because of what Hudson called a "miracle" and then-Special Assistant Attorney General Harry G. Potter, Morales' lead staffer on the lawsuit, called "genius" on the part of Ratliff.

The "miracle" resulted from a clause in the settlement with the tobacco companies providing that if any other state received a better settlement, Texas would get the same deal. Minnesota had done just that, and it meant an estimated \$2.3 billion more for Texas. Ratliff and Junell were in Texarkana

for the mediation at the request of Judge Folsom. They already had settled their dispute with Morales over how the \$15.3 billion would be spent, and had an interest in getting past the roadblock with the counties. They felt the judge was sympathetic to the counties.

Ratliff remembered that he learned of the Minnesota money the day before the mediation.

"It was going back and forth," he said of the mediation. "We were pretty sure the judge wasn't going to pour the counties out. We had been in that room for two or three hours. Finally, I asked Rob Junell to step out in the hall, just the two of us.

"I said we're going to get another \$1.2 billion or whatever (actually, \$2.2 billion). The counties have a legitimate complaint. Why don't we just take the Minnesota money and turn it over to them? Junell said, 'I'll buy that.' "

When they went back into the room and told the lawyers for the attorney general, one of them — Potter couldn't remember whether it was him or a colleague — said the counties would take a lot less.

"We're not going to try to squeeze them," said Ratliff.

The counties were stunned and delighted. The fight was over before Mithoff could unpack his weapons.

Ratliff, an engineer by profession, says he doesn't recall Mithoff's involvement and didn't regard it as making much difference.

Harris County Attorney Mike Stafford, who was first assistant county attorney at the time and heavily involved

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in the case, is convinced Mithoff was the key to the settlement.

"I don't think it's a coincidence at all," he said. "We lined up to fight and hired the best lawyer and that's when, in my opinion, they said 'uncle.' "

Mithoff's contingency contract was typical, except that the percentage was about a fifth the usual rate and slid down as the potential award grew. It provided that he got his percentage whether the case went to trial or settled. By Stafford's estimate, he was owed "way above \$30 million."

The calculations were never made because Mithoff decided not to enforce the contract. Instead he asked the county to come up with a substitute fee.

"I didn't want the fee to be an issue," he said. County Attorney Fleming, without input from Mithoff, came up with a fee of \$20 million and justified

it in a three-page letter to Commissioners Court.

For his part, Mithoff immediately agreed to donate \$10 million to set up a new foundation to fund children's health programs.

Commissioners Court agreed to the fee without controversy.

So there you have it. You might say that Mithoff (and a few lawyers he put to work on the issue) walked away with \$10 million for relatively little work. Or you might say he left much more than that on the table by not seeking to enforce his contract, and gave \$10 million to charity (for which the trauma center at Ben Taub General Hospital was recently named for him and his wife, Ginny, who serves on the board of the foundation and has remained active in its cause).

Nor was there evidence of politics in Mithoff's selection. It was made by the

Republican county attorney and approved by the Republican-majority Commissioners Court. This despite the fact that Mithoff had held a Democratic fundraiser at his house two weeks before Commissioners Court approved the contract — with his friend Bill Clinton as the headliner.

No, there is no corruption in this tale. If there is a moral, it is that Houston is willing to pay for top talent, and that may be why it's the economic star of Texas.

Footnote: So far, the Harris County Hospital District has received about \$122 million under the settlement, including \$14.8 million this year from a trust that will continue to pay out annually in perpetuity.

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