

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	October 4, 2004
	.	
Defendants.	.	
.	

VOLUME 8
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 (9:29 a.m.)

3 THE COURT: Good morning, everybody.

4 MS. EUBANKS: Good morning, Judge Kessler.

5 THE COURT: This is United States versus Philip Morris, CA
6 99-2496. I think I am missing something.

7 All right, Ms. Eubanks, let's proceed.

8 MS. EUBANKS: Yes, Your Honor. This is the continuation
9 of the testimony of Robert Northrip.

10 THE COURT: Sir, would you come forward.

11 And Mr. Northrip, you are still under oath this morning.

12 THE WITNESS: Your Honor, before we get started, I think I
13 should advise the Court, I have a slight hearing impediment. One
14 of my hearing aids is sort of malfunctioning today.

15 THE COURT: I understand.

16 THE WITNESS: I don't think I'll have any trouble hearing
17 you or counsel, I may have a little difficulty hearing
18 Mr. Bernick. I had a problem hearing his objections on Friday or
19 Thursday.

20 THE COURT: That surprises everyone, I think it's fair to
21 say, Mr. Northrip. All right. But we'll certainly be careful
22 about that. Ms. Eubanks, go ahead.

23 CONTINUED DIRECT EXAMINATION OF ROBERT NORTHRIP

24 BY MS. EUBANKS:

25 Q. Mr. Northrip, given what you said, let's see if we can

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1 have a test and make sure that the microphone is close to you.

2 I know on Thursday we actually had Mr. Northrip with the
3 wireless mic and that seemed to work well. Should we, Your
4 Honor, do that again today?

5 THE WITNESS: Actually, you didn't on Thursday. I used
6 this and I'll try to keep it close.

7 MS. EUBANKS: All right.

8 THE COURT: That's fine right now.

9 MS. EUBANKS: All right.

10 BY MS. EUBANKS:

11 Q. Well, Mr. Northrip, I see that you brought some things to
12 the stand with you, so just for the record, why don't you tell
13 us what you came forward with, please.

14 A. I came forward with the United States direct examination
15 of Robert Northrip as corrected by me, and I also have another
16 copy of the United States direct examination of Robert Northrip
17 as corrected by me, which I believe has pages, changes,
18 numbering, that I believe the government did.

19 Q. All right. And so your counsel gave to you the new copy
20 with the page numbers, correct?

21 A. I received it about 5 minutes ago, correct.

22 Q. Oh, all right.

23 MS. EUBANKS: Well, it might be helpful for the Court so
24 that when I refer to this, if we give Your Honor a copy of that.

25 Do we have a copy for the Court? Because what we did

1 after the examination last week was we appended numbers to the
2 pages so that the references would be easier.

3 THE COURT: All right, fine.

4 MS. EUBANKS: And we filed it as well, Your Honor.

5 THE COURT: Do you have two by chance?

6 BY MS. EUBANKS:

7 Q. All right, Mr. Northrip, then. In late 1981, you
8 believed that the issue of whether smoking caused cancer --
9 caused disease, remained an open question, didn't you?

10 A. I don't know that I would use the term "open question".
11 I believe that causation had not been proven or established at
12 that point in time.

13 Q. But you say that you wouldn't use the phrase "open
14 question". In term of defining "open question"; doesn't it mean
15 that causation hadn't been proven to your mind?

16 A. It could, and I know a lot of people use it that way. I
17 would think more in terms of open question being something where
18 there was very little evidence either way and in this instance
19 there was considerable evidence. So I wouldn't have used the
20 term "open question". Others did, and they used it with the
21 meaning you have described to it and I couldn't quarrel with
22 that.

23 MR. BERNICK: I'm sorry, could the witness be permitted to
24 finish his answer?

25 THE COURT: He may finish.

1 BY MS. EUBANKS:
2 Q. Had you finished Mr. Northrip?
3 A. Yes, I had.
4 Q. Is it your testimony that you never used the phrase "open
5 question" in the way that I have referenced it here today?
6 A. I wouldn't say that I never used the term in the way that
7 you referred to it over some 30 some years of practice, but it's
8 not a -- it's not language that I would normally have used.
9 Q. Well, you would say that the question of causation means
10 whether cigarette smoking causes disease in humans is a correct
11 definition, wouldn't you?
12 A. I'm sorry would you restate that please?
13 Q. You would say that the question of causation means
14 whether cigarette smoking causes disease in humans, that that is
15 a definition for that term, you would agree with that, wouldn't
16 you?
17 A. I would certainly agree that it was my position and
18 understanding, and I think the position taken by the cigarette
19 manufacturers that I represented, that it had not been proven
20 cigarette smoking caused any human disease.
21 Q. Well, let's just go to your testimony at page 29-1, your
22 corrected testimony. I'm looking at line 11 and the question
23 was put to you and in quotation marks: "The question of
24 causation means whether cigarette smoking causes disease in
25 humans, correct?" And the answer was, "Yes". And you didn't

1 offer any change to that; isn't that correct?

2 A. That's correct.

3 Q. So this is your testimony as set forth at page 29-1,
4 correct?

5 A. That's correct.

6 Q. Now, in terms of advice that you gave to your clients
7 with respect to addiction, I want to turn to some questions in
8 that regard. It's fair, isn't it, to say that you did give
9 advice to your clients regarding a definition to be used for the
10 word "addiction", correct?

11 A. Well, I certainly gave advice to my clients regarding
12 addiction. I think there was an established position that had
13 been in existence long before I started that cigarette smoking
14 was not addictive.

15 Q. Can we go back to my question though, Mr. Northrip,
16 because my question, though, is whether you gave advice to your
17 clients about the definition of addiction, yes or no, please?

18 A. I certainly gave advice to my clients regarding the word
19 "addiction", and it's definition.

20 Q. So that's a yes?

21 A. So that's a yes.

22 Q. All right. Now, as a lawyer with no specialized
23 scientific training, you were responsible for telling your
24 tobacco clients how they should talk about addiction,
25 dependence, and its habituation when discussing smoking; is that

1 correct?

2 A. I don't think that's quite a fair characterization of it.

3 I certainly gave --

4 Q. Can we back up, then, if it's not a fair
5 characterization. Let me ask the question again, and you can
6 tell me which part is unfair, if you would, please.

7 As a lawyer with no specific scientific training you were
8 responsible for telling your tobacco clients how they should
9 talk about addiction, dependence, and habituation when
10 discussing smoking. Now you said that's not fair as a
11 characterization, can you tell me which part is not fair?

12 A. It makes it sound as though I have created and am telling
13 the clients what the position is and should be, when, in fact,
14 what I was doing based on my experience and the work that I had
15 done with many experts and the reading I had done, was advising
16 my client in regard to a position that was long established when
17 I started representing the tobacco industry.

18 Q. But it was your role, was it not, as a lawyer, to make
19 sure that your clients knew what statements had previously been
20 made and knew how to remain consistent in those statements about
21 addiction; is that correct?

22 A. It was certainly my role as a lawyer to ensure that
23 various employees of my clients were -- understood the position
24 that the companies had taken in the past in regard to addiction
25 and the basis for that position.

1 Q. I would like to show you U.S. Exhibit 79285, please,
2 which we'll get up on the screen.

3 And if we could have the second page of the document
4 displayed, please.

5 This is an addiction statement that you authored, is it
6 not?

7 A. Yes, that's correct.

8 Q. And I believe you testified that you authored this
9 statement in 1990 -- around 1993; isn't that correct?

10 A. I don't recall the exact date, but it was in that period
11 of time, somewhere between '93 and '95. That sounds right.

12 Q. And in preparing the addiction statement that is shown at
13 U.S. Exhibit 79285 that appears on the screen, you intended this
14 statement to be used by the law firms in consulting and advising
15 Brown & Williamson about what it could say about addiction;
16 isn't that correct?

17 A. I think what I said was I intended this statement to be a
18 think piece that the law firms could use in considering what
19 might be said about addiction for subsequent advice to our
20 clients, yes.

21 Q. I'm not asking you, Mr. Northrip, about what you said in
22 your testimony. I'm asking you this question in particular, so
23 if you would focus on it. You intended the statement that
24 appears on the screen to be used by the law firms in consulting
25 and advising Brown & Williamson about what it could say about

1 addiction, didn't you?

2 A. No, I think that's a misstatement of what I said. What I
3 said was, and what is accurate, is this was a statement to be
4 used as a think piece with the law firms. Ultimately, it might
5 then be modified based on those discussions and then used in
6 some way to advise clients.

7 Q. Now, you claim that it's a "think piece", and you've also
8 testified that you had no scientific experience, and yet you
9 were obviously familiar, were you not, with the company
10 documents as indicated by the last sentence on this -- on the
11 addiction statement that you prepared that says, "Statements and
12 company documents cannot refute this conclusion", correct?

13 A. No. There are a number of things about the question that
14 I think are not correct. First, I think you said that I had no
15 scientific experience, and I think what my testimony had been is
16 that I had no formal scientific training. I also testified, I
17 believe, in my deposition, and it would be the truth, that I had
18 done fairly extensive reading in the area, that I had had
19 occasion to examine and cross-examination scientific witnesses,
20 and I had listened to testimony of those witnesses. So I think
21 it would be incorrect to say I had no scientific knowledge or
22 experience at this point.

23 Q. All right. So your testimony is that you had no formal
24 scientific training. All of your scientific knowledge, as you
25 characterize it, was received as on-the-job training as a lawyer

1 for the tobacco companies; is that correct?

2 A. That's basically correct.

3 Q. Okay. And your statement here that "statements in
4 company documents cannot refute this conclusion" indicates that
5 you had a firm grasp of the information within the company's
6 files, does it not, regarding addiction?

7 A. I would say that I had, at that point in time, a
8 reasonable -- something less than a firm grasp, perhaps, but a
9 reasonable grasp of what was in the company documents. The
10 point I think I made at my deposition was --

11 Q. Mr. Northrip, you're going to have an opportunity to be
12 questioned by your counsel and I just want to focus my time with
13 you on the questions that I have, and I'm not asking you to
14 restate what was in your deposition. So if you would work with
15 me on this, please?

16 A. I'm trying to give you a full and complete answer to your
17 questions.

18 Q. All right. Well, I have another question for you now.

19 With respect to the addiction statement that you've made,
20 it's true, isn't it, that this statement regarding addiction was
21 inconsistent with the statement in a document authored by Addison
22 Yeaman around 1963?

23 A. I don't know the exact date of the document, but that
24 is -- it is true it is inconsistent with a statement authored by
25 Addison Yeaman some time in the '60s.

1 Q. And this statement that appears on the screen is some
2 approximately 30 years after the Addison Yeaman statement that
3 we'll look at in a moment, correct?

4 A. Yes.

5 Q. All right.

6 A. Approximately.

7 Q. All right. Why don't we look at U.S. Exhibit 22034.

8 MS. EUBANKS: It's in evidence, Your Honor. It was
9 submitted, I believe, through Dr. Kessler. I'll give my -- just
10 a moment. It's 22034.

11 BY MS. EUBANKS:

12 Q. I'll tell you what, rather than ask the operator to put
13 it up on the screen, let's turn to page 35-1 of your testimony,
14 and I think we can do this rather quickly by reference there.
15 And I have extra copies of the document.

16 MS. EUBANKS: May I approach the witness, Your Honor?

17 THE COURT: Yes, you may.

18 MR. WEBB: Do you have an extra copy of the new direct?

19 MS. EUBANKS: We filed it by ECF, so you should have it.
20 It was filed -- was it Friday evening.

21 MR. WEBB: Do you have an extra copy?

22 MS. EUBANKS: I'm sorry, we don't have an extra copy.

23 MR. WEBB: Fine.

24 BY MS. EUBANKS:

25 Q. Mr. Northrip, I'd like to focus your attention on the

- 1 exhibit that I just handed you, which is U.S. Exhibit 22034.
- 2 And I just want to ascertain with respect to page 4 of that
- 3 document, that when we were speaking of the Yeaman, Addison
- 4 Yeaman statement -- and I'll give you a moment to get to page 4.
- 5 A. That's the page that ends "15", as far as the bottom
- 6 goes?
- 7 Q. The Bates number at the bottom of the page is 689033415,
- 8 correct.
- 9 A. Yes, I'm on that page.
- 10 Q. All right. Do you see the statement, "Moreover nicotine
- 11 is addictive"?
- 12 A. Yes, I do.
- 13 Q. Can you read the following paragraph from that statement?
- 14 A. "We are then in the business of selling nicotine as an
- 15 addictive drug effective in the release of stress mechanisms.
- 16 Thus, cigarettes, we will assume the Surgeon General's committee
- 17 to say despite the beneficial effects of nicotine, have certain
- 18 unattractive side effects."
- 19 Q. And what's the first one listed?
- 20 A. They make -- "they cause or predispose to lung cancer".
- 21 Q. Read on, please.
- 22 A. Okay. "They contribute to certain cardiovascular
- 23 disorders, they may well be truly causative" -- not sure of the
- 24 word -- "i.e. emphysema", et cetera et cetera.
- 25 Q. All right. That's fine.

1 Now, at your -- in your testimony that you have provided,
2 you note at page 35-1, when asked the question: "And when was
3 Mr. Yeaman's statement made?" The United States had proposed, "I
4 think the statement was made in the mid 1960s." The Yeaman
5 statement that we were referring to, is that from the document
6 that you just read into the record?

7 A. Well, I'm having a little trouble figuring that out.

8 Q. Take your time.

9 A. The first -- it may be, but I'm looking for Mr. Yeaman's
10 name somewhere and I'm not seeing it.

11 Q. Do you dispute that this is a statement that was
12 attributed to Mr. Yeaman? Because I know at your deposition you
13 seemed -- and in your testimony -- familiar with the statement?

14 A. No, I'm not disputing -- there is a statement by
15 Mr. Yeaman that says, essentially, and I think I said it in my
16 deposition, that we're in the business of selling an addictive
17 product, and that's the essence of what this is saying. I'm
18 just -- you asked me if this was by Mr. Yeaman and I was
19 looking -- it may be.

20 Q. All right. So you don't dispute --

21 A. It may be the statement I was referring to.

22 Q. Well, I want you to be sure about this. Was it or was it
23 not the statement that you were referring to in your testimony
24 at page 35-1 where you substituted, in response and "when was
25 Mr. Yeaman's statement made" the answer that you substituted for

1 the answer proposed by the United States is "it was contained --
2 it was contained in a mid-1990s document that later was actually
3 stolen from the company."

4 MR. BERNICK: I think you misspoke Sharon.

5 MS. EUBANKS: I'm sorry?

6 MR. BERNICK: You said 1990s and it was 1960s.

7 MS. EUBANKS: It was the 1960s, thank you.

8 BY MS. EUBANKS:

9 A. This could be that document. I don't know whether it is
10 or not.

11 Q. Is this the document that you referenced in your
12 testimony that was stolen? Please be sure. Take a look.

13 A. I don't know.

14 Q. You don't know. So what document you were talking about
15 that was stolen?

16 A. I thought there was a document -- I thought it would have
17 Mr. Yeaman's name on it.

18 Q. You thought, so, you were actually offering testimony and
19 you talked about a stolen document, but you don't know for sure
20 now sitting here today what document you were talking about?

21 A. My recollection is the document was one of the documents
22 stolen from Brown & Williamson. I suppose I could be wrong, but
23 that's what I believe.

24 Q. And when you say "stolen from Brown & Williamson", the
25 document that I've handed you contains a legend on the side,

- 1 doesn't it? It says: "Produced as required by the Court's
2 March 7th, 1998 order"?
- 3 A. This document has that legend.
- 4 Q. May I finish, please? That it says, "March 7th, 1998
5 Order in the State of Minnesota et al. versus Philip Morris."
6 And it is the subject of a protective order in that case.
- 7 I'm trying to refresh your recollection with respect to
8 the fact, that in your testimony offered here before this Court,
9 you're suggesting that a particular document was stolen. Does
10 this refresh your recollection as to the document of which you
11 were speaking in your testimony here that you say was stolen?
- 12 A. Well, first of all, I think I testified that this --
13 because it doesn't have Mr. Yeaman's name on it, it doesn't
14 refresh my recollection as to whether or not this was the
15 document I was talking about or not. Second, I don't think that
16 because it was produced as required by a Court order, would have
17 any necessary impact on whether or not it had been previously
18 stolen from the company.
- 19 Q. You are familiar with the crime fraud doctrine, are you
20 not, as a lawyer?
- 21 A. I'm sorry?
- 22 Q. You are familiar with the crime fraud doctrine as a
23 lawyer, are you not?
- 24 A. Yes, I am.
- 25 Q. And would it change your views if you learned that the

1 document that I showed you is a document that was produced in
2 Minnesota pursuant to a finding of crime fraud against the
3 company?

4 A. No, it wouldn't change my views as to whether or not this
5 may have been a document that was at an earlier time stolen from
6 the company.

7 Q. All right. So the Court's order to produce the document
8 with the finding of crime fraud wouldn't alter your views about
9 the fact -- or any considerations that you had in adding to your
10 testimony that the document was stolen?

11 A. If the document had been stolen at some point, it would
12 have been stolen. And whether or not it was produced, for
13 whatever reason at a later time in Court, wouldn't change that
14 fact.

15 Q. All right. I think I understand your testimony,
16 Mr. Northrip.

17 Now, I'd like to refer you, going back a little in your
18 testimony, could you turn, please, to page 23-2? And I'm
19 referring to line 20 of your testimony where the question is
20 raised: "Why was there a need for lawyer involvement in a
21 scientific project?"

22 And you have shaded the response that the United States
23 provided, and you've substituted this response: "As I said, I do
24 not recall Project Rio. Generally, from a litigation perspective
25 the benefit from lawyer involvement with scientific projects is

1 related to description of the projects. We advised against
2 assurances of safety and inadvertent admissions inconsistent with
3 the company's litigation positions". Do you see that?

4 A. Yes, I do.

5 Q. All right. My question to you is this: In terms of the
6 advice that was given, your advice really wasn't about the
7 truth, rather it was about ensuring that no company
8 representatives made admissions that were inconsistent with the
9 company's litigation positions, isn't that what you mean by your
10 statement in response to that question?

11 A. No.

12 Q. So you were not concerned in response to that question,
13 highly concerned, in fact, about the company's litigation
14 positions and remaining consistent with that with respect to
15 statements that were made or advice given about statements to be
16 made?

17 A. Well, I didn't put it in this answer, but I think if you
18 go through my deposition, you will see --

19 Q. Mr. Northrip, the Court doesn't have before it your
20 deposition, so that's why we have you here to answer some
21 questions, and we don't really need to burden the Court with
22 everything that you said in your deposition. But since you
23 raised it, let me ask you this question: In my review of your
24 testimony, it seemed very clear to me that if a statement that
25 was offered in response wasn't exactly as stated and quoted in

1 your deposition, that you changed it, right down to the
2 punctuation, am I correct about that?

3 A. No. What I said was -- well.

4 Q. But in terms of your review of the testimony that you're
5 giving in this Court, you had right beside you and had as a
6 reference piece, that deposition testimony that you gave earlier
7 in this case when you were deposed by the United States, didn't
8 you?

9 A. I certainly had that available to me, yes.

10 Q. All right. And so you also had the documents that we
11 gave you available to you, did you not?

12 A. I did.

13 Q. And you had your recollections available to you, did you
14 not?

15 A. I did.

16 Q. And you had advice of counsel available to you, did you
17 not?

18 A. I did.

19 Q. And you provided all these answers in the testimony
20 that's filed with all of that material at your fingertips,
21 correct?

22 A. Correct.

23 Q. Now, I want to return to the page that I'm referencing
24 and ask you another question about that. You gave advice to
25 your clients, and that advice in large part was focused upon

1 protecting the company's litigation positions, isn't that a
2 fact?

3 A. It was certainly an important part of it --

4 MR. BERNICK: Excuse me, excuse me. I have an objection
5 as to whether that question is focused on this document or it's
6 more general. On it's face, it seems much more general, and I
7 thought we were talking about this document.

8 MS. EUBANKS: Your Honor, I think the question is clear
9 and a fair one for the witness, and it didn't have to be on the
10 particular document. The document that's on the screen is his
11 testimony, and the question that I asked him goes to the
12 company's litigation position, which was part of his answer.
13 There's nothing that says that my question has to be focused upon
14 a document, and it certainly was clear to the witness.

15 THE COURT: The objection was simply to make it clear
16 whether it was focused on the document or a broader question.
17 And I take it it's a broader question, and the witness may
18 answer.

19 THE WITNESS: I'm sorry, can you restate the question?

20 MS. EUBANKS: I'll ask Mr. Wallace to read it back please.

21 THE COURT REPORTER: "Now, I want to return to the page
22 that I'm referencing and ask you another question about that.
23 You gave advice to your clients, and that advice in large part
24 was focused upon protecting the company's litigation positions,
25 isn't that a fact?"

1 THE WITNESS: In large part it was, yes.

2 BY MS. EUBANKS:

3 Q. I want to take you back to a document that we discussed

4 when you were on the stand last week. It's U.S. Exhibit 21005.

5 MS. EUBANKS: And I'll ask that you put that up on the

6 screen.

7 BY MS. EUBANKS:

8 Q. Do you have that before you, Mr. Northrip?

9 A. Yes, I do.

10 Q. And I believe you've already offered testimony that the

11 reference in U.S. Exhibit 21005 to "North" was a reference to

12 you; is that correct?

13 A. That's what I believe it to be, yes.

14 Q. All right. And in terms of the U.S. Exhibit 21005, just

15 for purposes of a foundation, this is, is it not, notes of a

16 meeting with Dr. Blackman, and others, for the date of December

17 28th, 1981, and it is prepared by J.K. Wells the Third, correct?

18 A. I think it appears to be prepared December 28th for a

19 meeting of December 9th.

20 Q. Let's talk about the meeting attendees so we can put this

21 in its proper context. There's a Mr. Ely, and Mr. Ely was head

22 of public affairs for BATCo; isn't that correct?

23 A. He may be. I don't recall.

24 Q. You don't recall. And there is, and I'm referring to the

25 first paragraph of Exhibit 21005, Ms. Johnson was actually --

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- 1 Anne Johnson, in-house counsel and a BATCo lawyer; isn't that
2 correct?
- 3 A. I believe that is correct.
- 4 Q. And J. Kendrick Wells was the author of the memo and he
5 was in-house counsel for Brown & Williamson; isn't that correct?
- 6 A. That is correct.
- 7 Q. And the Mr. Finnegan referenced here is Timothy Finnegan,
8 a lawyer from Jacob Medinger; isn't that correct?
- 9 A. That is correct.
- 10 Q. And who was he representing at this meeting, do you know?
- 11 A. I'm sure he was representing Brown & Williamson.
- 12 Q. All right. And there is a Mr. Hoel mentioned, H-O-E-L,
13 that's Don Hoel, another attorney from Shook, Hardy & Bacon from
14 Kansas City, correct?
- 15 A. Correct.
- 16 Q. And who was he representing at this meeting?
- 17 A. Brown & Williamson.
- 18 Q. All right. And Mr. Northrip is obviously you, correct?
- 19 A. Correct.
- 20 Q. And who were you representing at this meeting?
- 21 A. Brown & Williamson.
- 22 Q. And Mr. London that's referenced here, this was Martin
23 London, was it not, a partner at Paul Weiss?
- 24 A. Correct.
- 25 Q. And who was he representing at the meeting?

- 1 A. I'm sure he was representing Brown & Williamson.
- 2 Q. And it indicates he had an associate with him, doesn't
- 3 it?
- 4 A. Yes.
- 5 Q. Do you remember who that associate was?
- 6 A. No, I don't remember for sure.
- 7 Q. All right. And then there's a Mr. Pepples, that's Ernest
- 8 Pepples, was it not, Brown & Williamson senior vice president
- 9 and general counsel?
- 10 A. I don't know his exact title at the time. I believe he
- 11 was general counsel.
- 12 Q. All right. Then in terms of the meeting participants at
- 13 the meeting that's described in U.S. Exhibit 21005, we have two
- 14 BATCo scientists, that would be Dr. Blackman and Mr. Ely, we
- 15 have one in-house lawyer for BATCo, Anne Johnson, two in-house
- 16 lawyers for Brown & Williamson, and five lawyers with three
- 17 different firms in the United States; is that correct?
- 18 A. Sound about right.
- 19 MR. BERNICK: Your Honor, I think that counsel may have
- 20 misspoken, there's a reference to Mr. Ely as a scientist.
- 21 MS. EUBANKS: He's correct, I'm sorry.
- 22 BY MS. EUBANKS:
- 23 Q. Mr. Ely is the BATCo head of public affairs; is that
- 24 correct?
- 25 A. I told you I don't recall exactly who Mr. Ely was.

1 Q. All right. Now, in terms of the meeting that's described
2 in Exhibit 21005, the position that Dr. Blackman was
3 considering, was it not, was whether or not to give consumers
4 information so that they could take an informed risk about
5 smoking low-tar versus high-tar cigarettes?

6 A. No, I don't recall that as being the primary thrust of
7 what he wanted to do.

8 Q. Let me restate my question, because I didn't ask about
9 the primary thrust, necessarily, so my question goes to a matter
10 that was discussed and considered in that meeting, so let me ask
11 the question again.

12 It doesn't necessarily have to be the primary thrust, but
13 based upon these meeting minutes, the question -- or, a question
14 that was considered during that meeting, was it not, was whether
15 or not to give consumers information so that they could take an
16 informed risk about smoking low-tar versus high-tar cigarettes?

17 A. Well, I don't think that was -- you know, at most it
18 might have been a minor part of it, but I don't remember for
19 sure that it was.

20 Q. Well, let me refer your attention to the second page of
21 the exhibit, and the final paragraph.

22 MS. EUBANKS: If we could have that highlighted.

23 BY MS. EUBANKS:

24 Q. The statement attributed to Dr. Blackman where it says,
25 "One answer is by making both types of products, high and

1 low-tar, so that the consumer can take his own informed risk."
2 Does that refresh your recollection as to whether that was a
3 subject discussed in this meeting.

4 A. It doesn't refresh my recollection that it was a subject
5 in the sense you were speaking of it.

6 Q. Well, what sense was I speaking of it? I was referring
7 to the document. What did you understand?

8 A. Well, I don't think -- I think he is not talking of it in
9 the sense that you were talking of it, which is, the purpose of
10 his work was to provide information to consumers, and I don't
11 think that's what he was discussing.

12 Q. Well, let's talk -- we identified a number of
13 participants at the meeting where Dr. Blackman voiced certain
14 positions. And it was a discussion at the meeting, was it not,
15 whether consumers should be given certain information so that
16 they could take an informed risk about smoking certain types of
17 products, that is, low-tar versus high-tar products?

18 A. No, I don't think it was.

19 Q. So you don't -- so, you take issue with the minutes to
20 the extent that they suggest that a discussion occurred that
21 Dr. Blackman brought forward describing -- or that Dr. Blackman
22 brought forward about informed risk to consumers, you take issue
23 to that?

24 A. I take issue to the inference that what Dr. Blackman is
25 saying here is focused on whether or not to provide information

1 to consumers.

2 Q. All right. When you say "the inference", you do agree,
3 don't you, that the statement that Dr. Blackman did propose
4 was -- strike that.

5 Dr. Blackman did propose at the meeting a way to address
6 consumers being in a position to obtain information so that they
7 understood the risks that they were taking when they smoked,
8 correct?

9 A. I don't think what Dr. Blackman was talking about, and I
10 see the language you're pointing to, but I don't think what the
11 thrust of Dr. Blackman's program, or what he intended to do, was
12 based on taking information to consumers.

13 Q. You said "Dr. Blackman's program". Does this memo in any
14 way talk about a program that Dr. Blackman had?

15 A. I don't know.

16 Q. Take a close look at it, because I want you to be sure
17 about this because when you testified on Thursday, it seemed
18 that your recollection of the events described in the meeting
19 was a little bit different. So take your time and look at the
20 document, if it will help refresh your recollection about what
21 was being brought forward at the discussion table.

22 A. Well, whether you want to use the word "program" or
23 "plan", what Dr. Blackman was intending to do, as I understand
24 it, was not to make presentations or provide information to
25 consumers. His goal was to speak to members of the scientific

1 community, and government organizations, and organizations
2 involved in public health, not go to consumers.

3 Q. But the memo doesn't say that, now, does it,
4 Mr. Northrip?

5 A. I think a fair reading of the minutes, as a whole, is
6 talking about him going to organizations, talking about him
7 going to government bodies, and presenting information on
8 changes in the product.

9 Q. But that was so that the consumers, as it states here,
10 could have an awareness, was that not part of what he was
11 focusing upon?

12 A. I don't believe that it was part of what he was focusing
13 on.

14 Q. Yet, it's true that you don't have an independent
15 recollection of this meeting outside of the scope of this
16 exhibit itself; isn't that true?

17 A. I have a very limited -- I have a recollection of being
18 at the meeting, but I don't -- obviously don't recall in detail
19 the exact words used at a meeting some 23 years ago, but I do
20 have a recollection, and it's refreshed to some degree by this
21 memo, of what the subject of the discussion was.

22 Q. You don't have any reason to doubt, do you, that
23 J. Kendrick Wells accurately described the subject, and the
24 discussion that occurred at the December 28th -- or at the
25 December 9th, 1981 meeting that's described in Exhibit 21005, do

1 you?

2 A. I'm sure Mr. Wells tried to do an accurate review of what
3 went on at that meeting, but it's also obviously a much reduced
4 8 page document that summarizes comments made over a meeting
5 that lasted quite a while. And I don't think, at least in some
6 of the comments he attributes to me, that he got the full thrust
7 of what I was saying.

8 Q. Now, I want to know where that recollection is coming
9 from, because when we talked about this on Thursday, you didn't
10 have an independent recollection outside the scope of this
11 document, and yet, here today, you're suggesting that what he
12 attributed to you was incorrect.

13 MR. BERNICK: I object to the form of the question.

14 THE COURT: Sustained.

15 BY MS. EUBANKS:

16 Q. With respect to the statements as to the others, you
17 don't take issue with any of that, now, do you, as it's set
18 forth in Mr. Wells memo?

19 A. I'm not able to take issue as to others, because I don't
20 know precisely what their positions were, and I don't remember
21 the exact words used at the meeting. But, when I see statements
22 attributed to me, which I think are basically accurate but are
23 incomplete, I don't think I made those statements, I think
24 Mr. Wells may have left some things out that would have made a
25 small, but an important, distinction in what I said.

1 Q. But you did say, just so I understand your testimony and
2 that the Court understands your testimony, that the statements
3 that were attributed to you by Mr. Wells in that memo were
4 basically correct, isn't that what you just said, yet
5 incomplete?

6 A. Well, I don't think they can be both correct and
7 incomplete. If there are distinctions left out, which I think
8 make important differences, I don't think it's complete and I
9 don't think it's accurate.

10 Q. But you just stated -- well the record will reflect what
11 you just stated.

12 How long did the meeting last? Do you recall that?

13 A. Not exactly, but over a couple of hours, I would think.

14 Q. And you're not really big on taking notes at these
15 meetings, are you?

16 A. I probably jotted down some notes at the time, and
17 probably didn't keep them very long.

18 Q. And you don't recall, do you, whether you saw a copy of
19 Mr. Wells' memo, Exhibit 21005, in late December '81 or early
20 January?

21 A. I would be very surprised if I saw it. I certainly don't
22 recall seeing it.

23 Q. And there were follow up discussions about the meeting
24 that occurred, were there not?

25 A. I'm sure that there were.

1 Q. And you had the opportunity to voice your views, did you
2 not?

3 A. I certainly would have had an opportunity to voice my
4 views.

5 Q. And in doing that, you didn't do it in any writing that
6 would in any way be inconsistent with the exhibit that we just
7 looked at, now did you?

8 A. I'm sorry, I didn't -- could I hear your question again?

9 Q. Sure. In terms of voicing your views about those events
10 that are described in Exhibit 21005, you did not voice those
11 views in writing in any way that's inconsistent with that
12 exhibit, now did you?

13 A. I'm not sure that I expressed those views in writing at
14 all.

15 Q. All right. Now, I'd like to invite your attention to
16 page 55-1 of your testimony.

17 And Mr. Northrip, I'd like to direct your attention to
18 the question that begins on line 18 of the testimony, which is
19 "I'm showing you the McCabe Decision, U.S. trial Exhibit 75779.
20 Let me ask you to turn to page 27. Can you please read
21 paragraph 64 out loud"? And then let me ask you to read what
22 you stated there, if you would, please, Mr. Northrip, and I can
23 ask you to refer to your actual testimony that begins at
24 paragraph -- I'm sorry, line 21 of page 55-1. You don't really
25 have to look at the exhibit that we've just handed you right now

1 to do this.

2 A. You want me to just read what I said there?

3 Q. Please.

4 A. All right. It says, "Robyn Chalmers, a partner at
5 Mallesons Stephen Jacques, was engaged by the defendant, Wills,
6 to perform discovery for the Harrison case. She was told by
7 Mary Weir, the in-house counsel for Wills (who was succeeded
8 later by Cannar), that she should copy correspondence to
9 Schechter and to Bob Northrip. Northrip was an American
10 attorney from the Kansas City firm Shook, Hardy & Bacon --"

11 Q. And if you could continue to the next page, please.

12 A. "-- which specialized in litigation and had represented
13 Philip Morris."

14 Q. It says "which specialized in tobacco litigation",
15 doesn't it?

16 A. It does.

17 Q. All right. And when asked the next question, "Do you
18 disagree with any statement there in paragraph 64?" Your
19 response was: "I don't know any facts with respect to the
20 second sentence", and you acknowledge that sentence 3 was
21 correct.

22 Now, I want you to focus again on page 55.1 and let's
23 agree that the second sentence states: "She was told by Mary
24 Weir, the in-house counsel for Wills, who was succeeded later by
25 Cannar, that she would copy correspondence to Schechter and Bob

1 Northrip." Did I correctly read the second sentence?
2 A. You did.
3 Q. Now, it's just a short question, but you did receive
4 copies of correspondence in the Harrison case, didn't you?
5 A. I'm confident I did.
6 Q. Now, you worked with David Schechter, didn't you?
7 A. Yes.
8 Q. And you found him to be a skilled attorney?
9 A. I'm sorry?
10 Q. And you found him to be a skilled attorney?
11 A. I did.
12 Q. A good lawyer?
13 A. I believe David Schechter was a good lawyer, yes.
14 THE COURT: Now let me interrupt for a moment. Who is
15 David Schechter?
16 THE WITNESS: David Schechter was an attorney who, when I
17 first met him, was employed by BATUS, which was one of the BAT
18 affiliated companies. I'm not exactly sure BATUS's status,
19 vis-a-vis Brown & Williamson, but it was certainly an affiliated
20 company.
21 MR. BERNICK: Your Honor, he it might be important to have
22 Mr. Northrip spell BATUS, because it's close -- and when you hear
23 it to another entity that I think has been discussed it might be
24 appropriate to have Mr. Northrip clarify how he spells BATUS.
25 THE WITNESS: I believe it's B-A-T-U-S.

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1 THE COURT: All right.

2 BY MS. EUBANKS:

3 Q. And I believe you said that Mr. Northrip was a good

4 lawyer?

5 A. I hope he is. I think you meant Mr. Schechter, and I

6 thought he was a good lawyer, yes.

7 Q. Well, did you know he's been suspended from the practice

8 of law in Kentucky in 2003?

9 A. Yes, I did.

10 Q. And did you know that --

11 A. I guess I shouldn't say that. I knew he had problems

12 after I had worked with him, and that he had difficulties with

13 the authorities.

14 Q. Well, you also know, do you not, that in New York he was

15 suspended in June '03 after a federal wire tapping conviction?

16 A. I didn't know that.

17 Q. Did you know that Mr. Schechter was allowed to

18 voluntarily withdraw from the New York State Bar after issuance

19 of a show cause as to why he should not be disbarred?

20 A. I did not know that. I knew Mr. Schechter had

21 difficulties with the authorities as a result of, I think,

22 purchasing wire tapping equipment.

23 Q. Now, we talked just a -- we touched on the McCabe

24 decision a bit, and I want to understand a couple of things

25 about that with respect to your involvement.

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1 Before the decision became public, when the decision was
2 under seal, before it was released, you had discussions, did you
3 not, about the content of that decision before it was publicly
4 released, didn't you?

5 A. I'm sure I knew about it. I don't recall having
6 conversations about the content of it. I probably did have
7 discussions -- I better correct that. I probably did have
8 discussions about the content of it with lawyers for Philip
9 Morris.

10 Q. And the reasons you had those discussions, was it not
11 because your name was referenced in that decision with respect
12 to document management questions, was it not?

13 A. I'm sure that was part of it, but also I was discussing
14 with lawyers for Philip Morris in Australia and in the United
15 States anything that had to do with what was going on in
16 litigation in Australia.

17 MS. EUBANKS: May I have a moment, Your Honor?

18 BY MS. EUBANKS:

19 Q. Mr. Northrip, your clients are paying for your lawyer for
20 this proceeding, are they not?

21 A. I don't know whether they are or not.

22 Q. Well, you're not paying your lawyer, are you?

23 A. I'm not paying my lawyer.

24 Q. Okay. And who are your clients right now, insofar as
25 this proceeding is concerned?

1 A. I'm sorry, as far as?

2 Q. This proceeding is concerned, who are your clients?

3 A. I don't know that I have clients as far as this
4 proceeding is concerned. And I don't know whether my firm, my
5 insurance carrier, or some clients are paying for -- certainly
6 not for my time, but for my expenses.

7 MS. EUBANKS: Your Honor, at this time I would like to
8 move the exhibits that we filed alongside of the -- when we filed
9 the testimony of Mr. Northrip, we also filed a list of exhibits,
10 and at this time we'd move the admission of those. And right now
11 I have no further questions for Mr. Northrip.

12 THE COURT: At this point, Mr. Bernick, do you either have
13 objections to the exhibits, or if you have objections, do you
14 want me to defer ruling until you finish your cross-examination?

15 MR. BERNICK: I think that we've previously stated
16 objections to the exhibits. There are two exhibits that I would
17 pick out from among the bunch that are particularly notable, one
18 is 75779, which is the McCabe decision itself, which we believe
19 clearly should not come into evidence. And the other is 28160, a
20 letter from --

21 THE COURT: 21 --

22 MR. BERNICK: 28160. The McCabe decision was 75779. The
23 28160 is a letter from Mr. Northrip. We wouldn't have a problem
24 with the admission of the document, except that it contains a lot
25 of handwritten notes that may have been put on by one of the

1 recipients, and I don't think that there's any basis for having
2 those notes come in through Mr. Northrip. He wrote the letter,
3 but somebody who received the letter, perhaps Mr. Clarke, put a
4 bunch of notes on it.

5 THE COURT: Either you, or Ms. Eubanks on redirect, should
6 clarify what those notes are on the letter, and then I'll rule on
7 that.

8 MR. BERNICK: I am only picking out these two. We've
9 obviously made objections for the record, but in terms of whether
10 Your Honor needs to rule on these prior to my examination, I
11 don't think that that would be anything that I would ask for and
12 I'm prepared to proceed.

13 THE COURT: All right. I'll come back to those two when
14 both you and Ms. Eubanks are done.

15 MR. BERNICK: Thank you.

16 CROSS-EXAMINATION OF ROBERT NORTHRIP

17 BY MR. BERNICK:

18 Q. Good morning, Mr. Northrip.

19 A. Good morning.

20 Q. I want to go back a little bit in time, just to have you
21 describe some of the landscape that existed.

22 MR. BERNICK: May I approach, Your Honor?

23 THE COURT: Yes, you may.

24 BY MR. BERNICK:

25 Q. In 1968, which is when I think you said you first became

- 1 involved in the tobacco litigation, is that about right?
- 2 A. That's correct.
- 3 Q. Could you describe some of the arenas of activity, or the
4 areas of legal activity, that the tobacco industry was involved
5 in at that time?
- 6 A. They were certainly involved in litigation.
- 7 Q. Let me hold you up. What kind of litigation?
- 8 A. These would be cases that involved a claim by smokers
9 that cigarette smoking had caused some disease.
- 10 Q. Okay. What, if any, other areas of legal activity were
11 there at the time?
- 12 A. At that period of time, we were -- the firm and the
13 industry was preparing for congressional hearings that were
14 going on at, I think, the -- well, the Cigarette Labeling and
15 Advertising Act had been in existence, and warnings had been
16 required on products since, I think, January 1, 1966. And at
17 this point, late 1968, congressional hearings were beginning
18 that would result in a modification of that Act.
- 19 Q. And this concerns warnings?
- 20 A. It concerned warnings, yes.
- 21 Q. Any other areas of legal activity at the time?
- 22 A. Well, either around that time or shortly thereafter, and
23 our firm played a very minor role in it, there were proceedings
24 with the Federal Trade Commission.
- 25 Q. What kind of proceedings were those?

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1 A. Those were proceedings that I believe ended up in a
2 consent decree that resulted in warnings going in advertising
3 used by the industry. And somewhere I should have added under
4 the congressional hearing, I think at that point that it
5 involved a law that dealt with warnings, but it also may have
6 been the law that resulted in cigarette advertising going off
7 television.

8 Q. So the advertising component. As time progressed, and
9 we'll just take it up through, let's say 2000, were there any
10 additional areas of legal activity concerning the tobacco
11 industry that arose?

12 A. Well, when I first started, there were discussions of
13 whether or not the FDA had jurisdiction over cigarette products,
14 and I think the view was pretty consistently expressed that we
15 would come up in congressional hearings and other areas, but the
16 view was pretty consistently expressed by FDA officials and by
17 courts that dealt with it if it came up in litigation, that
18 there was no FDA jurisdiction over cigarette products unless
19 there was something in the marketing or advertising materials
20 that involved a health claim. So for the most part there was no
21 jurisdiction, and that became more of an issue, I'm going to
22 say, in '93, '94, when the FDA began some work in investigation
23 seeking to claim jurisdiction.

24 Q. Any other areas of legal activity that arose after 1968
25 that you can recall?

1 A. Well, the nature of the litigation changed some, and
2 there were continuing congressional involvement of varying
3 levels resulting in an amendment, another amendment, I think, in
4 1984 of the warnings.

5 Q. What about FTC regulation, did FTC regulatory matters --

6 MS. EUBANKS: Objection, Your Honor, this is beyond the
7 scope of the direct examination, which focused on litigation,
8 nonregulation, and these questions are far beyond the scope.

9 MR. BERNICK: I'm creating the foundation for getting back
10 to documents, this won't take very long.

11 THE COURT: The objection is overruled.

12 BY MR. BERNICK:

13 Q. Were there any other FTC proceedings that took place
14 subsequently?

15 A. Not, I think, that I was involved in or that our firm was
16 involved in. The FTC, as I said, had continuing jurisdiction
17 over advertising and marketing materials, and there would be,
18 from time to time, some FTC questions about whether the warning
19 notice was large enough, whether something in the advertising
20 was improper or not, but I had very limited involvement in that.

21 Q. There's been some reference to Barclay cigarettes. Was
22 there an issue concerning Barclay cigarettes at some point in
23 time?

24 A. There was an issue concerning Barclay cigarettes.

25 MS. EUBANKS: Objection, Your Honor. There is nothing in

1 the direct examination that was raised about Barclay. He's
2 inappropriately leading the witness, and that's beyond the scope.

3 THE COURT: Does that relate to litigation or not?

4 MR. BERNICK: Yeah, it's going relate to the low-tar issue
5 that was also raised on her exam -- on counsel's examination.

6 MS. EUBANKS: Well, Your Honor, at the same time, I mean,
7 with respect to this discussion, the statement of the witness is
8 really inappropriate, and Barclay isn't referenced at all in
9 direct.

10 THE COURT: The objection is overruled. I'll allow
11 limited questioning and see where it's going.

12 BY MR. BERNICK:

13 Q. When did Barclay arise?

14 A. Some time, I believe, between '80 and '84, and there was
15 an issue as to whether the cigarette called Barclay, that I
16 believe was manufactured -- sold by Brown & Williamson, was
17 designed in such a way that it had lower tar and nicotine
18 deliveries, by use of the FTC test method, than a consumer would
19 get when smoking a cigarette. And that does remind me, I wasn't
20 involved in it, but the FTC in 1968, or thereabouts, had been
21 involved in requiring testing by what, I think, is called -- I
22 think I'm right -- the Cambridge Method to determine tar and
23 nicotine levels of cigarettes, and that information had to be
24 provided to the public.

25 Q. Let's talk a little bit about the attorneys that were

1 involved in the smoking and health related matters for the
2 tobacco industry. There was reference, again, to them in some
3 of the documents, but when you began, what law firms were
4 involved in representing the tobacco companies in these
5 different areas?

6 A. Well, in litigation, our firm was involved, representing
7 Brown & Williamson, Philip Morris, Lorillard, and sometimes R.J.
8 Reynolds in their litigation. Liggett would have been
9 represented by Webster Sheffield. American represented by
10 Chadbourne & Parke. I think Davis-Polk did some work for R.J.
11 Reynolds, Jacob & Medinger did some work for R.J. Reynolds, and
12 some consulting for some other companies, primarily Brown &
13 Williamson, I think.

14 Q. Now, you named something less than about five firms?

15 A. Yes, and I'm talking now about firms who were involved in
16 defending product liability litigation for the companies. Other
17 firms were involved in other areas for the companies.

18 Q. As we go forward from the '60s to the '70s, and then to
19 the '80s, what, if any, changes took place in terms of number of
20 firms that became involved in litigation?

21 A. There may have been changes in the '70s, but they would
22 have been small. In the '80s there were substantial changes as
23 the litigation climate began to change. More firms began to
24 become involved, there was some changes in firms. Reynolds
25 brought in Jones-Day and Womble Carlyle. Ed Jacobs firm did not

1 continue to work, Jacob & Medinger, but they continued to do
2 some work for Brown & Williamson. Paul Weiss came in for Brown
3 & Williamson. At some point in the '80s, I believe King &
4 Spalding came in for Brown & Williamson. We continued for all
5 the clients that I had mentioned except, probably by the late
6 '70s, early '80s, we were representing Reynolds in a general
7 sense, but were not doing their litigation work.

8 Q. By the time you get to the '90s, what again had happened
9 to the number of firms and the number of lawyers that then were
10 involved in representing tobacco company defendants in
11 litigation?

12 A. By the '90s, there were further changes. I'm not sure I
13 could name them all, but there was a substantial number of
14 additional firms were coming in.

15 Q. By the mid-1990s at the height of the A.G. cases, are we
16 talking about 10 firms, 20 firms, 30 firms?

17 A. Well, it depends a little bit on what you're -- the role
18 of the firms. In the '60s, when I talked about national
19 counsel, I'm talking about firms that would have been probably
20 in every smoking and health case in the United States that that
21 company was involved in.

22 By the '90s, the litigation had grown so extensive and so
23 time-consuming, that these firms would not have been in every
24 case. There would have been areas of the country where a firm
25 might have been in every case, but to some degree, even the

1 types of cases might determine whether a firm were involved.
2 There might be one firm involved if it was an A.G. case, a
3 recoupment case, another firm if it was just a pure products
4 case.
5 Q. How many lawyers, just roughly, hundreds of lawyers, a
6 score of lawyers?
7 A. I would say hundreds of lawyers.
8 Q. I want to focus in particular on the kinds of cases that
9 you became involved in in the late 1960s and 1970s, that is
10 cases involving --
11 A. I'm sorry, Mr. Bernick, suddenly my -- I think my hearing
12 aid went out.
13 Q. Okay.
14 A. So I'm having difficulty hearing you now.
15 Q. Okay, can you hear me now?
16 A. Yes.
17 Q. Okay. By the time that we -- if we focus on the kinds of
18 cases, the individual smoker cases that you were involved in,
19 were there certain issues that were the central issues in those
20 cases?
21 A. Are we going to start back in '68, for example?
22 Q. '68 and, indeed, in the individual smoker cases going
23 forward. Were you involved personally in those cases?
24 A. Yes, I was.
25 Q. Would you just tell us, what were the basic issues that

1 were addressed in the individual smoker cases that you were
2 involved with?

3 A. Well, there were a number of issues. I would say, and it
4 cut across in a product liability type of analysis, it cut
5 across several areas. There was the knowledge, widespread
6 community knowledge, of the health risks of smoking, and there
7 was the knowledge of the individual smoker making the claim. So
8 there was, to a degree, a general and a specific awareness of
9 the health risks of smoking.

10 Q. Okay.

11 A. And then there would be the question of whether or not
12 the disease had actually been caused by cigarette smoking, so
13 there was a component of a general causation argument, did
14 cigarette smoking cause disease generally, but more importantly,
15 and the real issue in the case was, did cigarette smoking cause
16 that particular individual's health problem which involved an
17 analysis of that individual's exposures throughout their life of
18 cigarette smoking and other risk factors.

19 Q. Any other issues?

20 A. Oh, yes.

21 Q. Just focus on the big ones.

22 A. Okay. Addiction was usually an issue in cases starting
23 from the time I began and before, and the question would be
24 really, whether or not an individual could make and implement an
25 informed choice when they began smoking and when they became

1 aware of the risk, could they quit.

2 Q. Now, counsel asked you a little while ago about your
3 on-the-job training, I think it was, with respect to certain
4 scientific disciplines. What kinds of experts would testify in
5 these different areas?

6 A. Well, in the early years there would be experts,
7 certainly treating physicians would testify. If there was a
8 cancer involved and the type of cancer was an issue, you would
9 have a pathologist. You could have, in the addiction area, you
10 could have psychologists, psychiatrists, and then it depended on
11 the disease, whether or not it was a throat disease, you could
12 have specialists in that area. If it were a lung cancer, you
13 could have thoracic surgeons.

14 You could, of course, have radiologists, because there
15 would be x-rays involved, so there would be a wide spectrum of
16 medical experts. In the early years I don't think there were
17 that many experts in the marketing, advertising area. Those
18 came in the later cases.

19 Q. Did your firm, Shook, Hardy & Bacon, play a role in
20 retaining experts and developing experts for testimony in the
21 individual cases?

22 A. Yes, that was one of our responsibilities, is to be sure
23 that we would -- we would try to find people who had expertise
24 in these areas who would be available and willing to testify in
25 cases.

1 Q. Okay. Let's talk a little bit about the positions that
2 were taken in the litigation regarding causation and addiction.
3 I want to focus on those two matters.

4 Was there or was there not a core position taken in
5 litigation regarding causation among the industry defendants, at
6 least until the late 1990's?

7 A. Yes, there was.

8 Q. Was that a position that you were personally familiar
9 with?

10 A. It was a position that I became familiar with. It was in
11 existence when I came with the firm, and one of the things that
12 I did early on was do some reading, and I read not only the
13 Surgeon General's Advisory Committee report, and some other
14 publications on smoking and health, but I also read the
15 transcript of the case of Ross versus Philip Morris. I'm not
16 going to be able to tell you exactly when that was tried,
17 several years before I came with the firm, either late '50s or
18 early '60s, and a lot of these issues, including causation and
19 addiction, were litigated in that case. It involved a cancer
20 that occurred in the throat.

21 Q. Okay. Could you just tell the Court what was the
22 litigated causation position that was taken? I'm talking about
23 the general causation position that was taken during the course
24 of your work on these individual smoker cases?

25 A. The general causation position was that it had not been

1 proven cigarette smoking caused any disease.

2 Q. And what was the basis, the litigated basis for that
3 position?

4 A. Well, it's a little hard to do this without providing
5 some background, so, if I may. When the United States came out
6 of World War II, the medical community had been focused on
7 infectious diseases, diseases like pneumonia, tuberculosis, and
8 had not done much work in trying to determine the cause of
9 chronic diseases, such as the diseases associated with cigarette
10 smoking. So, traditionally the medical community had looked in
11 terms of causation in terms of infectious diseases, and I should
12 say that, in part, I'm relying on depositions that I took of
13 members of -- one member of the Surgeon General's Advisory
14 Committee, the epidemiologist on that committee, and also the
15 reporter for the Surgeon General's Committee, and they at that
16 point had a causation standard based on a high level of
17 specificity. If you find the disease, you find the
18 infectious --

19 MS. EUBANKS: Your Honor, I'm going to object to this as a
20 lot of hearsay involved in terms of the statements, there's a
21 lack of personal knowledge, and there's a relevancy objection, as
22 well, going back to prior cases, and it's beyond the scope of
23 direct.

24 MR. BERNICK: This is absolutely -- they were the ones
25 who -- the government decided to call Mr. Northrip and ask him a

1 whole bunch of questions with regard to the company's positions
2 on various issues, and whether he really had any basis for
3 advising the company. They've absolutely opened the door. And
4 all that I have asked him, very, very specifically, is to
5 articulate what the position was so that the documents that have
6 now been put before the Court, and the advise that he has given
7 as reflected in those documents, is put in its proper context.
8 We did not decide to call Mr. Northrip, it was their decision,
9 but they have most certainly opened the door to his own
10 understanding of the position that was taken in litigation.

11 MS. EUBANKS: Well Your Honor, this witness was given a
12 narrative going back for quite a --

13 THE COURT: Yes, I'm going to sustain the objection. You
14 can cover the -- you can cover the area, but I do not think you
15 need to go into the kind of detail that the witness was about to
16 go into. So go ahead, please.

17 BY MR. BERNICK:

18 Q. Well, if you could be a little bit more -- in light of
19 what the Court has, as you heard, indicated, Mr. Northrip,
20 setting aside the history, which we will explore through other
21 witnesses, by the time that you became involved, what was the
22 basis for the causation position that was being taken in the
23 litigation by the tobacco companies as you understood it?

24 A. Well, there were a number of points. The Surgeon
25 General's advisory committee had set out the criteria for

1 determining causation in the epidemiological method, and they
2 made it very clear in that report that you could not prove
3 causation solely through an association. So, epidemiological
4 studies standing alone couldn't establish causation. And they
5 set out five criteria, which they indicated scientists and
6 people making causation decisions, should consider in reaching a
7 decision.

8 They had consistency of association, strength of
9 association, specificity, temporal, reality, I think it was
10 called, temporal, and finally coherence. And there was no real
11 guidelines as to exactly how these were to be used.

12 What the Surgeon General's Advisory Committee said is we
13 have applied these criteria --

14 MS. EUBANKS: Your Honor -- I renew the objection here.
15 The witness is giving a narrative, now, going into what the
16 Surgeon General required. That's not the question that was
17 pending.

18 THE COURT: I'm going to sustain the objection. I don't
19 think it's useful testimony, Mr. Bernick. I mean you can
20 focus -- this is cross, as you well know, you can focus him in on
21 the points that you want to make that you think directly address
22 what was brought out in direct, but I don't think we need this
23 kind of long narrative. I've heard it from others who have given
24 it.

25 MR. BERNICK: That's fine.

1 BY MR. BERNICK:

2 Q. Mr. Northrip, let me cut right to this. When it came to
3 the position that was taken in the litigation with respect to
4 causation, was there -- were you familiar with the evidentiary
5 basis of that position?

6 A. Yes.

7 Q. Was that evidentiary basis subjected to challenge and
8 cross-examination in all of the different cases that you were
9 involved in?

10 A. Yes, it was.

11 Q. And the connection with the litigation, counsel asked you
12 about whether the position --

13 A. Well, I should say, it was assuming the case got tried,
14 and certainly in depositions if it did not.

15 Q. Okay. Counsel asked you whether the position taken was
16 whether there was an open question or there was some dialogue on
17 that, and I want to ask you a very specific question about the
18 causation position as it was taken. Did you, or your clients,
19 in connection with the tobacco cases, the smoker cases, take the
20 position denying that there was any risk associated with smoking
21 cigarettes?

22 A. Never.

23 Q. Turning to addiction, was there a core position that was
24 taken by defendants in the smoking and health litigation with
25 respect to addiction?

1 A. Yes, it was the position taken in smoking health
2 litigation that cigarette smoking was not addictive, although it
3 was a behavior that could be difficult to quit.

4 Q. That's what I wanted to get to. Was it that position as
5 well, that is, the addiction position, did that have an
6 evidentiary base?

7 A. Absolutely. In fact, it was the position taken by the
8 Surgeon General's Advisory Committee in 1964.

9 Q. Was that position, and was that evidence, subjected to
10 cross-examination both in the discovery process and at trial?

11 A. Yes.

12 Q. Did any of your clients, to your knowledge, in the
13 litigation ever deny that nicotine played a role in smoking?

14 A. Not to my knowledge.

15 Q. Did any of your clients ever deny that nicotine had
16 pharmacological effects?

17 MS. EUBANKS: Objection, your Honor, this is leading.

18 THE WITNESS: No.

19 THE COURT: Well, he's allowed to. This is --

20 MS. EUBANKS: Your Honor, under the Federal Rules of
21 Evidence, when cross-examination is --

22 THE COURT: Come forward, please, Ms. Eubanks.

23 MS. EUBANKS: Under the Federal Rules of Evidence, when
24 cross-examination is of an adverse or hostile witness under 611
25 the questioner may be limited to direct questions rather than

1 leading. We would ask that that rule apply here with respect to
2 an examination of a friendly witness that direct questions be
3 allowed, not leading, as if cross-examination --

4 MR. BERNICK: I'll rephrase the question just to --

5 THE COURT: All right. Go ahead.

6 BY MR. BERNICK:

7 Q. Did the industry, or did it not, in connection with the
8 work that you did in the litigation, deny that nicotine had
9 pharmacological effects in smokers?

10 A. The industry did not deny that nicotine has
11 pharmacological effects on smokers.

12 Q. Again, did the industry, or did it not deny that once
13 smokers start to smoke, once people start to smoke, it's hard to
14 quit?

15 A. The industry never denied that it can be difficult to
16 quit, to my knowledge.

17 Q. I want to turn to some of the documents that were shown
18 to you in connection with your direct examination that were the
19 subject of your direct examination testimony, and I want to turn
20 first to U.S. Exhibit 28116, which is a -- this is not really
21 terrifically focused.

22 MR. BERNICK: Your Honor, can you read that, is that all
23 right?

24 THE COURT: Now I can.

25 MR. BERNICK: Okay.

1 BY MR. BERNICK:

2 Q. This is a letter that was written by Kendrick Wells to
3 you and to Mr. Smith of King & Spalding, they also represented
4 Brown & Williamson, correct?

5 A. Correct.

6 Q. And in the subject, the re: line, it says, "How does
7 Brown & Williamson know about the science?" Could you describe
8 for the Court, just very briefly, the circumstances at Brown &
9 Williamson leading up to this letter as you understood them?

10 A. Well, this is a letter in 1993, and it is my
11 understanding they had hired Scott Appleton, a scientist who had
12 been with R.J. Reynolds and had actually, I think, given
13 testimony in depositions before they hired him, and he was to
14 play, I think three roles at Brown & Williamson. He was to be a
15 member of their department -- R & D department, and do work as a
16 scientist there. He was also to be someone who's task was to
17 keep up-to-date on smoking and health literature, have an
18 understanding of the issues, be available to testify, if needed,
19 in litigation, or perhaps other hearings, and finally, he was to
20 play a significant role in advising the executives at Brown &
21 Williamson, including the chief executive, about smoking and
22 health issues so that they would have an understanding of those
23 issues.

24 Q. Did you know what -- whether Dr. Appleton had formal
25 scientific training in the health sciences?

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 A. Yes, but I couldn't tell you what it was at this point.
- 2 Q. Okay. Now, there's a reference here to Mr. Sandefur.
- 3 Was Mr. Sandefur the then CEO of Brown & Williamson?
- 4 A. Yes, it's my understanding that Mr. Sandefur was the
- 5 chief executive officer at that time.
- 6 Q. Did he have any special scientific training,
- 7 Mr. Sandefur?
- 8 A. My recollection is he did not.
- 9 Q. What about his predecessor?
- 10 A. Well, at one time the chief executive officer at Brown &
- 11 Williamson had been a Dr. Wally Hughes, and Dr. Hughes had been
- 12 a scientist and was very knowledgeable, and his -- he died an
- 13 unexpected death, and so that meant someone else had to be in.
- 14 Q. So this letter basically is a request for advice
- 15 concerning the role that Dr. Appleton is to play?
- 16 MS. EUBANKS: Objection, Your Honor, in terms of what this
- 17 letter is. It's not authored by the witness. There's a lack of
- 18 foundation insofar as his ability to testify about whether it is
- 19 coming from, J. Kendrick Wells who we had a lot of discussion
- 20 about on direct examination.
- 21 MR. BERNICK: Your Honor, this -- that would have been a
- 22 good objection for us to make in seeking to preclude the
- 23 witness's testimony on the subject.
- 24 THE COURT: Objection's overruled. Go ahead.
- 25 THE WITNESS: I'm sorry?

1 BY MR. BERNICK:

2 Q. Essentially this letter was a request for advice about
3 what role Dr. Appleton might play as relates to Mr. Sandefur?

4 A. Yes, I think in part it was.

5 Q. Was this a request by Mr. Wells or Brown & Williamson for
6 you, as a lawyer, to decide for Mr. Sandefur what Brown &
7 Williamson should say about causation?

8 A. No.

9 Q. What role were you there to play in connection -- what
10 was your role to be in responding to this request?

11 A. Well, I think the role that Mr. Smith and I had was
12 lawyers who recognized that -- and Mr. Wells recognized, that in
13 litigation Mr. Sandefur and Mr. Appleton -- Dr. Appleton might
14 be asked about their positions, and how they had come up with
15 the information that they were presenting in testimony, and
16 Mr. Wells was asking for advice about what they should do to be
17 as prepared as possible to deal with that examination.

18 Q. Let's probe that a little bit. When there's a reference
19 to "advice", obviously there's been testimony, and there are
20 documents, dealing with advice concerning litigation strategy or
21 litigation risk. Was there any component of the role that you
22 were to play here that related to -- that related to challenging
23 or acting as a sounding board for ideas that the company had?

24 A. I suppose, although, particularly in regard to Scott
25 Appleton, I was completely confident that he had a thorough and

1 complete understanding of the science relating to smoking and
2 health based on having seen his testimony in deposition and
3 having talked with him. I would have here been thinking more
4 about how it would appear in cross-examination if he had
5 exhausted further sources, and I think that's what Mr. Wells was
6 asking about.

7 Q. Thank you. Let's turn to another document, and most of
8 the questions that I think I have here are pretty focused on the
9 particulars of this document. This is Exhibit 79285, which was
10 the addiction statement. And I think you've told us that --
11 well let me just ask you. Was this a statement, a proposed
12 statement, of a new company position with respect to addiction?

13 A. No, I think my goal, what I was requested to do, was
14 prepare a succinct statement of what the traditional company
15 position had been regarding addiction.

16 Q. There were a lot of questions about the last sentence of
17 this document. What was the statement that appears at the last
18 line desiring to say? What was it intended -- it says,
19 "Statements in company documents cannot refute this conclusion."
20 What was meant by that last sentence?

21 A. It was simply to say that the statements contained here
22 prior to the last sentence are factual and taken from sources I
23 don't think anybody could question, and as far as I'm aware,
24 there was nothing in company documents that would contradict any
25 of these statements, that they're really statements about what

1 has been said in the Surgeon General's Reports, and they were --
2 they were not controversial statements.

3 Q. Okay. You were also asked, in that regard, about another
4 exhibit, U.S. 22034, and this was the statement, or this was the
5 document from which counsel had you read as to the fact or the
6 statement that's made here, "Moreover, nicotine is addictive, we
7 are then in the business of selling nicotine." Do you recall
8 that?

9 A. Yes, I do.

10 Q. Now, you made reference in your testimony to the fact
11 that a document by -- authored by Addison Yeaman was stolen. Do
12 you recall that?

13 A. Yes.

14 Q. And just so we're clear, what were you referring to when
15 you said that that document had been stolen?

16 A. Paralegal working for a Louisville law firm that was
17 representing Brown & Williamson stole some documents from them.
18 I'm not sure the year, early '90s, and passed those documents
19 around to various people.

20 Q. Did they make their way, those documents, pretty promptly
21 to the University of California at San Francisco UCSF?

22 THE WITNESS: I believe they did.

23 MS. EUBANKS: Okay, Your Honor, this is not the exhibit
24 proffered in evidence that the United States referred to, 22034.

25 MR. BERNICK: It is.

1 MS. EUBANKS: Can I see the legend is on the side.

2 THE COURT: What's the objection, Ms. Eubanks?

3 MS. EUBANKS: I withdraw it, Your Honor.

4 BY MR. BERNICK:

5 Q. Now, the theft in the document and the dissemination to
6 the University of California in San Francisco, did that
7 ultimately result in the document being put on the Internet?

8 A. I believe it did.

9 Q. And was that before or after the ruling in Minnesota
10 that's referred to in the legend?

11 A. The document date there is 1998, and I am completely
12 confident in saying it was several years before 1998.

13 Q. Okay. Now, counsel made reference to a crime fraud
14 determination that was made in Minnesota. Do you recall that?

15 A. Yes.

16 Q. Over the years, that is in the 1990s, were there a series
17 of crime fraud hearings held in different parts of the United
18 States in different cases?

19 A. It's my understanding that there were.

20 Q. In some cases was crime fraud found and in other cases
21 crime fraud not found, or did everybody find that there had been
22 crime fraud, or do you not know?

23 A. Well, my recollection is that there were inconsistent
24 rulings on it, but I certainly couldn't give you when and where.

25 Q. Now, the last sentence of your think piece where it says,

1 "Statements in company documents cannot refute this conclusion",
2 did that have specific reference to the statement that Addison
3 Yeaman had made in a document in the 1960s saying "we're in the
4 business of selling nicotine"?

5 A. Well, I think I knew that there were some inconsistent
6 statements, and I remember particularly Mr. Yeaman's statement,
7 so I suppose the answer to that would be yes. But obviously the
8 sentence has reference to documents as opposed to document.

9 Q. Are you aware of any fact concerning Mr. Yeaman's
10 statement that is inconsistent -- any fact, any underlying fact
11 concerning that statement that is inconsistent with the facts
12 that you recite in the position?

13 A. I don't believe anything in Mr. Yeaman's statement is
14 inconsistent with anything in the statement above, other than,
15 perhaps, the conclusion that the product is addictive, because
16 the statements above, I think, are taken from Surgeon General's
17 reports, primarily, are matters about which there is no
18 controversy at all.

19 Q. I want to direct your attention to another document that
20 you were shown, U.S. Exhibit 21005, and this is the notes of the
21 meeting with Dr. Blackman and others. December 28, 1981 by
22 Mr. Wells. You were asked repeatedly whether you had the
23 opportunity to see this document, either at the time or at some
24 point shortly thereafter.

25 Could you refer to the upper left-hand corner where it

1 says "file note". Would that have any bearing on whether you
2 ever had the opportunity to take a look at that document?

3 A. Possibly. That may mean that it's a note that Mr. Wells
4 sent to the file. I don't actually know what Mr. Wells meant by
5 that.

6 Q. There's also a lot of discussion, you were asked a bunch
7 of questions about, on the bottom of page 2, whether
8 Dr. Blackman was in some fashion contemplating a statement to be
9 made to the consumer, and your attention was directed to the use
10 of the word "consumer" at the bottom of page 2, do you recall
11 that?

12 A. Yes, I do.

13 Q. What was it, what was it that Dr. Blackman was thinking
14 of issuing? Was it a statement to consumers, or was it a
15 statement to somebody else?

16 A. It was my understanding that Dr. Blackman's goal was to
17 prepare a document that he could take and use in having
18 discussions with government officials and with public health
19 organizations and people to try to start a dialogue about what
20 his company was doing in making low-tar cigarettes in accordance
21 with requests that were being made by government and public
22 health officials, and information that they were supplying to
23 the public that lowered delivery cigarettes involved less risk.

24 Q. Okay. Being very specific, there's a reference on the
25 first page to "the blue book". What was the blue book?

1 A. Well, as best I recall, the blue book was a document
2 prepared by Dr. Blackman that he wanted to take with him and
3 provide to these people he was going to be talking to to show
4 them the changes that had been made in cigarettes manufactured
5 by BAT.

6 Q. So, he wants to have a dialogue with the authorities --
7 this is a document to use in that process?

8 A. Yes.

9 Q. Okay. Now, --

10 THE COURT: Was that in the nature of a briefing book that
11 someone would carry with them to a discussion with Congress
12 people?

13 THE WITNESS: Well, yes, but probably not Congress people.
14 It would be any public health or government official -- we're
15 talking, namely, he was interested in going to UK. He was a
16 scientist in the United Kingdom, going to the government there,
17 and in Europe, and show them this blue book, leave copies with
18 them that would explain the changes that had been made in
19 cigarettes over the years in response to what many investigators
20 and government officials had said was the way changes should be
21 made in the product.

22 BY MR. BERNICK:

23 Q. Okay. Let's be very focused on this, because you were
24 asked about the company -- the discussion concerning low-tar
25 cigarettes. You've said that there was a position that was

1 taken in the litigation regarding causation, right?

2 THE COURT: Mr. Bernick, I think you're probably heading
3 into a fairly long topic and this is a good time for us to take a
4 break at this point.

5 MR. BERNICK: All right.

6 THE COURT: So we'll take a 15-minute recess, everybody.

7 (Thereupon, a break was had from 11:02 a.m. to 11:19
8 a.m.)

9 THE COURT: All right, Mr. Bernick. Go ahead.

10 MR. BERNICK: Thank you, Your Honor.

11 BY MR. BERNICK:

12 Q. Mr. Northrip, just briefly, I think we were trying to lay
13 out the idea behind the blue book and I think you were talking
14 about this being a communication between the company -- this was
15 a discussion with the British scientists who worked for what
16 company?

17 A. It was a discussion with the scientists that worked for
18 the company, yes.

19 Q. Which company was that?

20 A. BATCo.

21 Q. So basically, we have a BATCo position being conveyed to
22 outside scientists?

23 A. Outside scientists, government officials, yes.

24 Q. Okay. And I think we started out talking a little bit
25 about causation. At this time, did BATCo have a position with

1 regard to whether causation had been proven?

2 A. Yes, they did. And their position was that causation had
3 not been proven.

4 Q. Was the purpose of the blue book as you understood it
5 when you went over there to reinforce that position with --

6 MS. EUBANKS: Objection, leading, Your Honor.

7 THE COURT: Objection is overruled.

8 Go ahead, please.

9 BY MR. BERNICK:

10 Q. Was the purpose of the blue book as you understood when
11 you went over there to bring home that causation position to the
12 outside scientists?

13 A. It was my understanding that what Dr. Blackman wanted to
14 do was to convey to the outside scientists that BATCo's
15 cigarettes were a very much changed and different product, that
16 there had been substantial reductions in primarily the tar, but
17 also the nicotine delivery of those cigarettes, and that as a
18 result, he wanted to convey that, one, BATCo was acting
19 responsibly; and second, they had a product that fit what the
20 outside scientists and government officials had been saying the
21 industry should make to reduce the risks associated with
22 smoking.

23 Q. So it was on this idea of reduction of tar and reduction
24 of risk that the effort was played to establish a bridge?

25 A. I'm sorry. I'm having a little --

1 Q. It was on this idea of the reduction of tar that
2 Dr. Blackman was seeking to create a bridge with the outside
3 scientists?

4 A. Correct.

5 Q. With regard to the causation position that it is not
6 proven, was that an area where Dr. Blackman wanted to create a
7 bridge?

8 A. Dr. Blackman, as I recall it and, I think, as is
9 reflected in this memorandum, was of the opinion that causation
10 had not been proven. He wanted to convey what I've talked about
11 here and he didn't want to be conveying it in a way that would
12 mean he would not get an audience with the people he wanted to
13 talk to about the reduction of tar.

14 So it was our concern that in his blue book, he left an
15 inference that someone might draw that he was accepting
16 causation as proven.

17 Q. Okay. Just to be clear, you talked about BATCo's
18 position. What was Dr. Blackman's position as he expressed it
19 regarding causation?

20 A. Both Dr. Blackman and BATCo expressed the opinion, and
21 Dr. Blackman expressed it in this meeting, and BATCo had the
22 position that causation had not been proven.

23 Q. Okay. So the idea basically was, let's talk to the
24 outside scientists about something that's going to lead to a
25 dialogue?

1 Let's talk to the outside scientists about something
2 that's going to lead to a dialogue as opposed to a conflict?

3 A. Correct.

4 Q. Okay. Now, were you there in any way, shape or form to
5 tell Dr. Blackman what he could or could not say in the blue
6 book?

7 A. No, we were there to provide advice as to what he could
8 say in the blue book that would not result in conclusions being
9 drawn by juries or judges, either in the U.K. or the United
10 States, that he was putting out information contrary to his
11 position and the position of the company.

12 Q. Did you have any authority, either actual or as you
13 understood it in fact -- did you have any authority to tell
14 Dr. Blackman what he could or could not say in his blue book?

15 A. We had only authority to provide advice, which ultimately
16 Dr. Blackman and BATCo would accept or not accept.

17 Q. Okay. Turning to the last page of your memo, I'd like to
18 talk about the role that you -- or the concern that was
19 expressed to Dr. Blackman as reflected in this memo.

20 A. All right. Did you say of my memo?

21 Q. No, Mr. Wells' memo. I'm sorry. If I did, I misspoke.

22 "It is attributed to you at the last page that you said,
23 in essence, the message of the blue book is that lower tar
24 cigarettes are safe and that the old products are unsafe. The
25 modern product argument undercuts the position of controversy:

1 No causation, and of knowing assumption of risk defenses."

2 Let's break out the two things: The message is that
3 lower tar are safe and that the old products are unsafe. And
4 then the second sentence that goes on and talks about
5 "undercutting position of controversy."

6 When we talk about the latter message -- that is, the
7 older products are unsafe -- what was the concern that was being
8 conveyed, as reflected there?

9 A. Well, if you're limiting it just to the portion of the
10 sentence that says "the old products are unsafe," that would
11 have been a statement that, in my view, would have been
12 inconsistent with -- or a jury or judge could say was
13 inconsistent with the company's position and Dr. Blackman's
14 position that it had not been proven cigarette smoking caused
15 any disease.

16 Q. At any point, as reflected in this memo, during this
17 meeting did Dr. Blackman say, "Well, the old products really are
18 unsafe"?

19 A. No, I think to the contrary. I think Dr. Blackman
20 indicated that he believed that it had not been proven.

21 Q. The first part of the message, "The message of the blue
22 book is that lower tar cigarettes are safe" -- this now gets
23 into this area of reduction of tar and risk, right?

24 A. Yes.

25 Q. And what was the legal concern associated -- why couldn't

1 people just come out and say lower tar cigarettes are safe?

2 What's the problem?

3 A. Well, I think there would be two problems with that. One
4 is I did not think -- and in this memorandum, there are a number
5 of statements by Mr. Finnegan that are consistent with our view
6 that the science at this point in time had not reached the level
7 that one could say lower tar cigarettes were either safe or
8 safer. And I'm not sure that "safer" wouldn't have been the way
9 to put it, as opposed to "safe."

10 Q. Was it the position of Brown & Williamson, your client,
11 in this regard -- was it the position of Brown & Williamson that
12 reducing tar deliveries did not in fact reduce risk?

13 A. I don't think that was the position of Brown &
14 Williamson. I think Brown & Williamson's position at this point
15 would have been: We are reducing tar deliveries for a number of
16 reasons. I think their position would have been: There is a
17 market out there for lower tar products, undoubtedly created by
18 the statements of the government, public health officials and
19 others that lower tar cigarettes were safer and if someone was
20 going to smoke -- they would have preferred people to just quit,
21 but if someone was going to smoke, they should choose lower tar
22 cigarettes. So there was a market out there.

23 But I think as far as a medical position would have gone,
24 Brown & Williamson's position would have been: We don't know at
25 this point; the science is not clear as to whether lower tar

1 cigarettes are safe or safer.

2 Q. Was there something that -- if you take a look at the
3 last statement: "But it is important not to say that we reduced
4 the tar level because of medical opinion; direction by the
5 government would be okay."

6 What was the problem as reflected here with saying that
7 "We reduced the tar level because of medical opinion"? What's
8 the legal issue?

9 A. Well, again, I think that's one of the areas where I
10 think what I would have said, and I have to say I don't remember
11 exactly what I did say some 23 years ago, but that would have
12 not been the way I would have said it, I don't believe, in the
13 time that I was representing the company.

14 What I would have said was: If you make a statement like
15 that, then you must make sure that there is a clean, clear
16 caveat that you are not accepting causation, because if you
17 simply say we're reducing the tar level because of medical
18 opinion, then, again, a judge, a jury, others could look at it
19 and say, "Ah, you're relying on the fact that causation is
20 proven when you're making this statement, but in other arenas,
21 you're saying not proven."

22 So they could have done it; they could have lowered the
23 tar level because of medical opinion, but if they're going to do
24 it, they have to put in the caveat that we're making -- taking
25 this step because we understand there is a controversy, we

1 understand that there are differences of opinion and to be
2 prudent, we're acting in lowering the tar level, but we're not
3 accepting causation as proven.

4 Q. Well, in the United States, was there any legal
5 implication of making a claim that lower delivery meant lower
6 risk?

7 A. Well, I think the implication would have been, one, that
8 it would be safer and that I think it would not have been
9 warranted at that point in time, based on the science.

10 Q. Was there any regulatory parameter that applied to Brown
11 & Williamson making this statement as opposed to the public
12 health authorities making this statement?

13 A. Well, I suppose if --

14 MS. EUBANKS: I object, Your Honor. The regulatory
15 requirement -- that's beyond the scope of the direct examination.
16 And earlier when I raised the objection, it was sustained with
17 respect to the regulatory issues.

18 MR. BERNICK: This is completely different.

19 THE COURT: Can I hear the question again.

20 MR. BERNICK: It's completely different. I'm just asking
21 whether there was a U.S. regulatory parameter that applied to a
22 Brown & Williamson statement that a product is safer, as opposed
23 to a government statement that the product is safer.

24 MS. EUBANKS: In addition, I would add lack of foundation
25 for this witness. And there is certainly nothing in direct

1 examination going to regulatory requirements.

2 THE COURT: Objection's overruled.

3 The witness may answer if he understands the question.

4 THE WITNESS: Your Honor, I'm having --

5 THE COURT: You may answer if you understand the question.

6 THE WITNESS: I think if Brown & Williamson had made a
7 representation that a product was safer, then arguably, that
8 could have subjected them to FDA jurisdiction.

9 BY MR. BERNICK:

10 Q. Okay. The Barclay litigation that you talked about
11 earlier -- the Barclay litigation was initiated by the FTC?

12 A. Correct.

13 Q. Did the FTC have any jurisdiction over representations
14 that a lower delivery cigarette would be safer?

15 MS. EUBANKS: Objection, Your Honor, beyond the scope.

16 THE COURT: I'm going to sustain that. That was not
17 discussed at all on the direct.

18 BY MR. BERNICK:

19 Q. Let's turn to the next document. And I'd like to move on
20 promptly to conclude my examination with respect to these,
21 Dr. -- Mr. Northrip. Take a look at Exhibit Number --

22 What is the U.S. Exhibit Number to view? I have a JD
23 053707. Is that right? Is that a U.S. number?

24 Showing you JD 053707, which is the conference -- which
25 is the file note -- again, a file note from Wells relating to a

1 conference in June of 1984; you were asked some questions about
2 this in your direct examination.

3 First of all, I think this was brought out, but it would
4 be fair to say that in this meeting, it was lawyers only?

5 A. Yes.

6 Q. Now, it's been pointed out that the statements made or
7 recited by Mr. Wells and -- on page 2, that "Direct lawyer
8 involvement is needed in all BAT activities pertaining to
9 smoking and health, from conception through every step of the
10 activity."

11 Do you see that?

12 A. Yes, I do.

13 Q. But then it goes on to say in the next paragraph -- not
14 in the next paragraph, but the paragraph thereafter:

15 "Conclusions about recommendations for the structuring and
16 handling of BAT statements and programs can be made only after a
17 comprehensive review of the facts. Not enough facts are known
18 to propose conclusions at this point and fact gathering would be
19 an important immediate requirement for the development of lawyer
20 recommendations."

21 At this meeting, did you understand, Mr. Northrip, that
22 any actual final recommendations had been decided upon by this
23 group?

24 A. My recollection of conclusions from this meeting would be
25 based solely on the face of this document, because I don't have

1 an independent recollection of them. But I think that would be
2 correct.

3 Q. Do you know whether any of the ideas that were --

4 THE COURT: Excuse me. What would be correct? Were
5 conclusions reached at this meeting or were they not reached at
6 this meeting?

7 THE WITNESS: Your Honor, my recollection of that is based
8 solely on a reading of this document, so I don't have an
9 independent recollection that they were or weren't. I have no
10 reason to dispute what this document says.

11 BY MR. BERNICK:

12 Q. To your knowledge, Mr. Northrip, were any of the ideas
13 discussed at this meeting actually implemented, including the
14 reference to direct lawyer involvement?

15 A. I do not recall that being implemented.

16 Q. Turning to the next document, which is Exhibit 30481,
17 which is the memo from Mr. Wells to Mr. Pebbles regarding
18 additives, that also was the subject of questioning in
19 connection with your direct examination.

20 On page 2, there's a discussion about disclosure and
21 industry toxicologists, pro and con. It says: "The following
22 reasons support disclosure" and then "The following reasons
23 oppose disclosure."

24 At the time that this memo was written, was there a
25 requirement, as best you recall -- was there a requirement that

- 1 the cigarette companies disclose the additives used in
2 cigarettes?
- 3 A. As best I recall, there was not.
- 4 Q. Okay. Would it be fair to say that one of the purposes
5 of this meeting was to talk about pros and cons of disclosure?
- 6 A. Correct.
- 7 Q. Okay. There's been discussion about an idea of
8 appointing an independent panel of scientists. Do you see that?
- 9 A. Yes, I do.
- 10 Q. And on the first page, there's an indication that that
11 idea was actually discussed by Lorillard, appointing an
12 independent panel of reputable toxicologists. Was such a panel
13 ultimately appointed?
- 14 A. I believe that it was.
- 15 Q. There was an independent panel?
- 16 A. Yes.
- 17 Q. In connection with that discussion, there's also a
18 discussion about your suggesting that a better alternative would
19 be "company review and testing of additives."
20 Do you see that?
- 21 A. Yes.
- 22 Q. And I think you clarified your own recollection of what
23 you said at the meeting regarding company testing of additives?
- 24 A. I did.
- 25 Q. And I think there was a distinction made between

- 1 whether -- what would happen to the testing if the additives had
2 already been used in cigarettes and what would happen to the
3 testing if additives had not been used in cigarettes?
- 4 A. Correct.
- 5 Q. Did you ever advise in this meeting that under any set of
6 circumstances, research relating to additives actually used in
7 cigarettes could be intentionally destroyed?
- 8 A. No.
- 9 Q. Even where additives had not yet been used in cigarettes,
10 did you ever advise at this meeting that it would be appropriate
11 for a company intentionally to go about destroying that
12 research?
- 13 A. I'm sorry. Would you --
- 14 Q. Yes. If the additive had not been used -- had not been
15 used in cigarettes, did you actually advocate that companies
16 intentionally destroy research data related to additives that
17 had not been used?
- 18 A. I did not advocate it. I said it was something that I
19 believed they could do.
- 20 Q. Okay. Now, ultimately, did a time come when disclosure
21 of additives was required?
- 22 A. Yes.
- 23 Q. It was after this memo?
- 24 A. Several years, I believe.
- 25 Q. And did the industry disclose additives to HHS?

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- 1 A. It's my understanding that they did, yes.
- 2 Q. Okay. Are you aware of any situation where a company did
3 additives research and then went about deliberately destroying
4 the results of that research?
- 5 A. No.
- 6 Q. Let's talk a little bit about Special Projects. There
7 was some examination concerning Special Projects. Could you
8 just tell the Court in your own words what a Special Project
9 was.
- 10 A. Special Projects, to my understanding, were projects of
11 scientific merit that were funded through the mechanism of the
12 CTR, usually at the suggestion of lawyers, but did not -- were
13 not normal CTR projects in that they did not go through the
14 Scientific Advisory Board. In fact, they went through simply
15 the Scientific Director of the CTR, who made a recommendation
16 that they were good science or not. If it was determined that
17 they were good science, they were funded; if it was determined
18 they were not, then they would not have been.
- 19 Q. To be clear, we have the SAB -- those are the outside
20 scientists?
- 21 A. The SAB would be independent scientists who made up an
22 advisory board for the CTR and essentially determined what
23 scientific projects were funded.
- 24 Q. Those are the grant program?
- 25 A. The grant and, rarely, contract.

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- 1 Q. Okay. And we have a Scientific Director?
- 2 A. Correct.
- 3 Q. Were there other people who were kind of just purely
4 executives of CTR?
- 5 A. There were executives.
- 6 Q. Okay. And when it came to Special Projects, were Special
7 Projects approved by the SAB itself?
- 8 A. They were not.
- 9 Q. Does that -- just because a lawyer -- would it be fair to
10 say -- I think you've testified that Special Projects were
11 projects that did have an interest for the lawyers?
- 12 A. Correct.
- 13 Q. Just because lawyers had an interest in a Special
14 Project, did that mean that it automatically got funded through
15 CTR?
- 16 A. Absolutely not.
- 17 Q. What, if any, role did the Scientific Director play in
18 the process?
- 19 A. The Scientific Director simply advised as to whether he
20 thought the project had scientific merit or not, which provided
21 the companies and some of the people in the companies comfort
22 that what they were funding was good science.
- 23 Q. So he had an approval role?
- 24 A. He had an approval role.
- 25 Q. And if it was approved, how would the funding take place

1 for Special Projects?

2 THE COURT: I want to be clear about something. Did the
3 Scientific Director have an approval role over the Special
4 Projects as well as over the ordinary grants that went through
5 CTR?

6 THE WITNESS: I think the Scientific Director had clearly
7 an approval role over the Special Projects; I think the ordinary
8 grants and contracts that were issued by the CTR were approved by
9 the Scientific Advisory Board.

10 I'm not able to tell you what role the Scientific Director
11 had in that. I think he sat with them. I don't know whether he
12 had a vote or not.

13 BY MR. BERNICK:

14 Q. When it comes to the Special Projects that were approved
15 by the Scientific Director, did it end up that those projects
16 were projects that were performed by people who -- by
17 institutions -- people from institutions that were notable
18 institutions in the scientific community?

19 A. It's my understanding that they were.

20 Q. All right. What about the nature of the investigators --
21 what was the quality of the nature of the investigators who did
22 Special Projects?

23 A. I think they were generally high quality scientists.

24 Q. Was there co-funding for CTR Special Projects that came
25 from organizations like the American Cancer Society, the

1 American Heart Association and the National Cancer Institute?

2 A. I believe that there was, but this is an area where my
3 knowledge is not that great.

4 Q. Fair enough.

5 Let me ask you specifically about publication. Was there
6 a policy as to whether researchers who were given Special
7 Project funding -- whether they were or were not permitted to
8 publish the results of their research?

9 MS. EUBANKS: Objection, Your Honor. This is beyond the
10 scope of direct examination.

11 MR. BERNICK: To the contrary, there was specific
12 examination about publication and then also about this move of
13 the Special Projects to Shook, Hardy & Bacon, with the suggestion
14 that somehow, that affected the publication policy. And that's
15 where I'm going.

16 THE COURT: The objection is overruled.

17 You may answer the question.

18 BY MR. BERNICK:

19 Q. Was there a policy, Mr. Northrip, with respect to whether
20 Special Project researchers were permitted to publish the
21 results of their research?

22 A. It's my understanding that they were. That was their
23 decision.

24 Q. At any point in time, to the best of your knowledge, did
25 that policy change; that is, the freedom of Special Project

1 recipients to publish their research?

2 A. It's my understanding that it never changed.

3 Q. Are you aware of any express representation that was made
4 by researchers who did Special Projects that their projects not
5 only were funded by CTR, but that they actually were endorsed or
6 approved by the SAB?

7 A. I'm sorry. I -- could I have that question back, please.

8 Q. Are you aware of any representations that were made by
9 Special Project recipients that not only were their projects
10 funded by CTR, but that they carried the approval of the SAB?

11 A. No.

12 MS. EUBANKS: Objection, Your Honor. This is certainly
13 beyond the scope of direct.

14 THE COURT: I'm going to sustain that.

15 BY MR. BERNICK:

16 Q. Last subject, Mr. Northrip, which is: You were asked
17 some questions with regard to Australia. Did a time come when
18 you became involved in cases in Australia?

19 Did a time come when you became involved in cases in
20 Australia?

21 A. Yes.

22 Q. Roughly when was that?

23 A. My involvement that went beyond just being aware that
24 there were cases involved and that some other Shook lawyers were
25 involved -- my involvement really started in October of 1990.

1 Q. In connection with what case did you become involved in
2 Australian litigation in October of 1990?

3 A. A gentleman named Dan Gallagher had brought a case
4 against some asbestos companies in western Australia, alleging
5 that his lung cancer was caused by asbestos exposure. Then
6 there was a third-party claim against WD & HO Wills and
7 Rothmans.

8 Q. Who was your client in connection with that litigation
9 when you became involved in October of 1990?

10 A. WD & HO Wills.

11 Q. Okay. And after that point in time, did you become
12 involved in other specific cases for Wills in Australia?

13 A. Yes.

14 Q. At any point in time, did you ever advise your client
15 Wills with regard to their document retention policy?

16 A. I don't recall any specific advice with regard to their
17 document retention policy. Shortly after we went down to
18 Australia, a hold was put on that policy and, frankly, I can't
19 recall, sitting here today, whose idea that was. I probably
20 looked at the hold before it went out.

21 Q. What's a "hold"? I think the Court's probably
22 surmising --

23 A. It's simply advice to all the employees at Wills, I
24 believe, not to apply the document retention policy because
25 there was a pending case.

1 Q. And that case was Gallagher?

2 A. It was.

3 Q. Okay. As a result of -- strike that. Let me rephrase
4 it.

5 When did you last provide advice to your client Wills in
6 Australia in connection with their litigation?

7 A. Probably sometime in late 1994 or 1995. I don't recall
8 exactly when.

9 Q. Okay. As of the time that you last advised Wills, was
10 the hold that had been put in place earlier still in place or
11 had it been lifted?

12 A. It was my understanding that --

13 MS. EUBANKS: Objection, Your Honor. This witness has not
14 testified that the hold was in place; this witness rather
15 testified that an order for a hold was given, so there's a lack
16 of foundation.

17 MR. BERNICK: I'll certainly clear that up.

18 BY MR. BERNICK:

19 Q. Was the hold put in place?

20 A. It's my understanding, yes, it was.

21 Q. Okay. And as of the time that you last advised Wills in
22 1994, late '94, early '95, was the hold still in place or had it
23 been lifted?

24 A. To the best of my knowledge, the hold was still in place.

25 Q. When did you first learn that there had been destruction

1 of documents in Australia?

2 A. I heard about destruction of documents in Australia in
3 connection with the McCabe case.

4 Q. And that was roughly in what year did you hear that?

5 A. 2002, probably.

6 Q. Did you ever represent Brown & Williamson in connection
7 with cases down in Australia?

8 A. No.

9 Q. Questions were asked of you this morning with regard to
10 certain legal problems that Mr. Schechter had. Did any of those
11 problems, to your knowledge, relate to his activities in
12 Australia?

13 A. No.

14 MR. BERNICK: I have nothing further, Your Honor.

15 THE COURT: Ms. Eubanks, redirect, please.

16 Excuse me. Any other questions on the defense side?

17 MR. NEWBOLD: No, Your Honor.

18 MR. WEBB: No.

19 MR. McDERMOTT: No.

20 THE COURT: Redirect then.

21 MS. EUBANKS: If we could have U.S. Exhibit 28116 on the
22 screen, please.

23 THE COURT: 28 --

24 MS. EUBANKS: 28116, Your Honor.

25

1 REDIRECT EXAMINATION OF ROBERT E. NORTHRIP

2 BY MS. EUBANKS:

3 Q. You testified on cross-examination about Scott Appleton,
4 who's referenced in U.S. Exhibit 28116. Do you recall that?

5 A. Yes, I do.

6 Q. And you did not consider Scott Appleton an independent
7 scientist, did you?

8 A. I did not.

9 Q. Thank you.

10 No further questions.

11 MR. BERNICK: Your Honor, I note that I think that
12 Mr. Sundermeyer wants to address the Court on an oral motion with
13 respect to the written testimony of Mr. Northrip.

14 THE COURT: Well, Mr. Sundermeyer, I'll hear from you.

15 MR. SUNDERMEYER: Good morning, Your Honor. Mike
16 Sundermeyer. As you recall from a couple of days ago, I
17 represent Mr. Northrip.

18 I would like to ask the Court to remove from the file of
19 the case the proposed examination that the plaintiff put into the
20 record of the case before Mr. Northrip corrected it -- and this
21 document that is in the record of the case with no legend on it,
22 that it is proposed and was never seen by Mr. Northrip before it
23 was put into the record of the case -- has, because of a
24 combination of factors, resulted in a significant unfairness to
25 the witness.

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1 The -- as I understand --

2 THE COURT: Let me just be clear what you're talking
3 about. And we have changed procedures somewhat.

4 MR. SUNDERMEYER: Right. And that's part of the problem.

5 THE COURT: This was done under the original applicable
6 procedure where the government was required to file its written
7 direct examination; is that right?

8 MR. SUNDERMEYER: Yes, ma'am.

9 THE COURT: Are you essentially asking that it now be
10 struck from the record?

11 MR. SUNDERMEYER: Yes, I think that's a fair way to
12 characterize it. And here's -- the unfairness is really quite
13 remarkable.

14 The way the record will now stand because the procedures
15 have changed: The proposed uncorrected testimony is only going
16 to be in this record for two witnesses, Mr. Stevens and
17 Mr. Northrip, because from now on, it doesn't get filed until the
18 witness has a shot at it and can make it correct.

19 And what has happened to Mr. Northrip is the following:
20 The plaintiff put this proposed testimony, much of which was
21 incorrect, in the record. The press took it as his testimony.
22 And there is an absolutely astonishing article in Australia
23 saying that Mr. Northrip testified to all the things that the
24 government wrote in that proposed testimony, many of which were
25 false and he has corrected and he has disavowed those issues.

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1 And I can take you paragraph by paragraph if it's
2 necessary through this article to show you how the article that
3 says he testified to a bunch of things and he clearly has not
4 testified to those things.

5 Now, the only way to prevent this from recurring, because
6 this document is sitting there in the file, is to take it out of
7 the file. And I would further request that in the order that
8 takes it out of the file, we actually note in that order that
9 Mr. Northrip did not adopt that first proposed testimony as his
10 testimony and instead, his testimony, as actually put before the
11 Court and cross-examined, is the testimony that originally we
12 talked about in the courtroom and now the government has
13 repaginated it and put it into the record as of about 9 p.m. last
14 Friday night.

15 It seems to me that's only fair to this witness, that he
16 not be plagued by this any further.

17 THE COURT: What's the government's position?

18 MS. EUBANKS: Well, for one thing, Your Honor, the
19 government certainly acted in accordance with the provisions as
20 set forth --

21 THE COURT: That's not an issue.

22 MS. EUBANKS: Well, one of the issues that the request for
23 striking it really doesn't provide a remedy that Mr. Sundermeyer
24 raises is because that article is still out there.

25 The concern I have primarily with his motion is that this

1 witness's testimony is not limited to the written direct. We
2 spent considerable time in the courtroom with respect to oral
3 testimony from Mr. Northrip, so a statement that removes --
4 purports to remove the original filing would not really be, in
5 all fairness, informational about what it is that the witness's
6 testimony is.

7 We certainly would have no objection to the Court filing a
8 notice saying that the procedures in 471 have been altered and
9 that the witness's testimony is set forth in the filing of -- I
10 think it was the 13th of September or whatever was the date that
11 we submitted Mr. Northrip's filing -- is to be read in connection
12 with his testimony given in court and his resubmission of his
13 corrections to that testimony.

14 But I think it's fair to say, Your Honor, that his
15 corrections to that testimony -- that's not the end of the story,
16 because there was oral testimony and, to some degree, there's
17 some variance with respect to the statements that are made there
18 and his oral testimony.

19 THE COURT: Well, let me make it clear what
20 Mr. Sundermeyer is supposed to do.

21 MR. SUNDERMEYER: Yes, Your Honor.

22 THE COURT: Do any of the joint defendants have to be
23 heard on this issue?

24 MR. NEWBOLD: Your Honor, Bill Newbold for Lorillard.

25 Insofar as the situation described by Mr. Sundermeyer, it

1 would appear equally to Arthur Stevens. We don't have the
2 newspaper article to compound the problem, but we do have the
3 situation there is the uncorrected copy of Arthur Stevens
4 testimony.

5 THE COURT: Was there any publicity about his testimony?

6 MR. NEWBOLD: I heard -- I didn't see it, but I heard that
7 there were some -- I think they call them bloggers had gotten on
8 the internet who said that Arthur Stevens was forced, under
9 withering cross-examination, to change his testimony from that
10 which was originally filed. But I didn't see that myself. I
11 just heard it.

12 But so long as Arthur Stevens --

13 THE COURT: I wonder who gave the withering cross.

14 MR. NEWBOLD: I suppose it was Sharon Eubanks, who did the
15 withering cross, Your Honor.

16 MS. EUBANKS: No.

17 THE COURT: I understand that you didn't do that.

18 MR. NEWBOLD: But it's an anomaly. You have one written
19 set of questions and answers that the government submitted and
20 then you have the corrected questions and answers upon which
21 Mr. Stevens was questioned. And so long as they're both there,
22 it's unclear which the Court has accepted.

23 THE COURT: All right. This is what you should do,
24 Mr. Sundermeyer, and you can bill about 10 minutes to Mr. Stevens
25 on this.

1 I want the order to apply to both sets of testimony. I
2 want you -- and of course I will go over it very carefully when I
3 get the proposed order. You are to indicate that in full
4 conformity with Rule -- with Order Number 471, the government
5 properly submitted proposed testimony for both of these
6 witnesses. The rules for submission of proposed testimony of
7 adverse witnesses have since changed in recognition of certain
8 inadequacies contained in the procedure originally set forth in
9 Order 471.

10 In recognition of the change in the rules, the proposed
11 testimony of Messrs. Stevens and Northrip are struck from the
12 record, period. The record of their testimony now consists of
13 the direct examination submitted and corrected by the witness the
14 witness in writing, as well as any further direct, cross or
15 redirect which occurred in open court.

16 I think that pretty well covers it. Again, I'll look at
17 it very carefully when it comes in, but I think it makes the
18 essentials clear. I don't ever like to strike anything from a
19 court record, but I do think in this particular instance that it
20 did a disservice -- it will remedy a disservice to two people.

21 MR. SUNDERMEYER: Thank you very much, Your Honor.

22 THE COURT: You may step down. Thank you very much.

23 THE WITNESS: I have someone's exhibits.

24 THE COURT: I don't know whose.

25 MS. EUBANKS: Your Honor, we had moved the admission of --

1 THE COURT: Yes. Now, let me get back to exhibits.

2 MS. EUBANKS: And I should note that the one exhibit that
3 Mr. Bernick challenged, I guess, the marginalia on -- that in the
4 written objections, that was not an objection that had been
5 raised.

6 The other document that he had an objection to was itself
7 the McCabe decision. And I would submit to the Court that the
8 witness did offer some testimony on a particular provision of the
9 McCabe decision. And I think to fully complete the record, it
10 certainly would be appropriate. It's a decision of another court
11 and the Court could in any event take judicial notice of its
12 existence.

13 THE COURT: Let me focus on the letter, which is 20- -- I
14 do believe 28- -- Government's Exhibit 28160.

15 Neither one of you took me up on what I had suggested.
16 Neither one of you asked him any questions about the handwritten
17 comments.

18 MR. BERNICK: I just frankly forgot, Your Honor, and it --

19 THE COURT: Who do you think they're from? Or does nobody
20 know?

21 MR. BERNICK: I suspect that they are -- because the check
22 mark is next to one of the recipients, I suspect they are notes
23 by people at British American Tobacco.

24 THE COURT: Can they be whited out?

25 MR. BERNICK: They certainly can be whited out.

1 MS. EUBANKS: Well, Your Honor, there was no objection
2 raised to this in the whole proffer of those exhibits in the
3 first place. The first objection came at the time that the
4 witness was on the stand, and Mr. Bernick was given that
5 opportunity. And that he didn't raise these objections, I would
6 submit to the Court --

7 THE COURT: I'm going to let that exhibit in.
8 (Government's Exhibit 28160 admitted into the record.)

9 THE COURT: As to the McCabe decision, I don't see why
10 that decision needs to be an exhibit in this case. It's an
11 official trial court decision. It can be cited at any time.
12 This record's going to be big enough for the Court of Appeals.

13 So 75779 is not going to be admitted.

14 All other exhibits from Mr. -- relating to Mr. Northrip
15 will be admitted.

16 (Government's Exhibits admitted into the record.)

17 THE COURT: All right. We can certainly start the next
18 witness at this time.

19 MS. EUBANKS: Your Honor, we'll need to move around some
20 people.

21 THE COURT: All right. That's fine.

22 (Brief pause.)

23 THE COURT: All right. Counsel, please proceed.

24 MS. KELLEY: Good afternoon, Your Honor, Shannon Kelley
25 for the United States. At this time, Your Honor, the United

1 States is prepared to call Lorraine Pollice to the stand, but
2 before calling Ms. Pollice, we ask permission to argue a related
3 motion to strike certain testimony contained in Ms. Pollice's
4 direct examination. I handed your law clerk earlier this morning
5 two copies of the corrected version of Ms. Pollice's written
6 direct. I want to confirm the Court has that copy.

7 THE COURT: Yes. I have not had a chance to look at it,
8 but I have it.

9 MS. KELLEY: The one portion that we're seeking to strike,
10 Your Honor, is on page 1 of Ms. Pollice's written direct. "In
11 response to the question posed by the United States, can you
12 please state your full name for the record", contained on page 1
13 again, defendants only yesterday added practically a full page
14 nonresponsive answer going to why Ms. Pollice made so many
15 changes in her written direct, having nothing to do with "Please
16 state your name for the record".

17 The statement begins by saying the explanation provided
18 therein was at the suggestion of counsel. Your Honor, this kind
19 of communication with counsel after the examination has begun,
20 i.e. after the questions have been submitted by the Court --
21 submitted to the Court by the United States in writing to the
22 witness, it is inappropriate and does not assist the truth
23 finding function of this Court. Counsel for defendants will have
24 a full opportunity to cross this adverse witness. It is through
25 that process that they may raise these issues.

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1 Accordingly, at this time the United States moves to
2 strike all of the testimony contained on page 1, after Ms.
3 Pollice states her name, that is lines 3 through 20 on page 1.

4 THE COURT: Who, if anybody, is representing -- is it
5 Pollice; is that right?

6 MS. KELLEY: That's correct.

7 MR. FREDERICK: Your Honor, for the record, Tom Frederick
8 representing Philip Morris, I'll be examining Ms. Pollice for the
9 defendants. Ms. Pollice is represented by Steve Klugman of
10 Debevois & Plimpton, he's outside with a witness. If you would
11 like me to address the motion, I can do that is a well.

12 THE COURT: Why don't you address the motion?

13 MR. FREDERICK: Very simply, Your Honor, for the
14 convenience and benefit of the Court, at the suggestion of
15 counsel, as counsel for the United States noted, Ms. Pollice
16 included an explanation as to why there were so many changes to
17 the testimony proposed by the government. It simply is
18 information for the Court, it doesn't impact --

19 THE COURT: Everybody, it's not worth arguing about. I
20 read it already, it's very self serving and it tells me what I
21 would have guessed anyway. Let's just proceed and I'm going
22 leave it in. Let's call her in.

23 MR. FREDERIC: Thank you.

24 MS. KELLEY: Very well, Your Honor, the United States now
25 calls Lorraine Pollice to the stand.

1 THE COURT: About how long do you think your direct will
2 be of this witness?

3 MS. KELLEY: About 45 minutes, Your Honor.

4 THE COURT: We'll see if we can do it before lunch, I'm
5 not sure.

6 (LORRAINE POLLICE, GOVERNMENT'S WITNESS, SWORN)

7 DIRECT EXAMINATION OF LORRAINE POLLICE

8 BY MS. KELLEY:

9 Q. Good afternoon, Ms. Pollice.

10 A. Hi.

11 Q. Can you please state your full name for the record?

12 A. Lorraine Pollice.

13 Q. And your business address, please?

14 A. 122 East 42nd Street, New York City, 10168.

15 Q. Ms. Pollice, prior to coming here today, have you been
16 shown a document prepared by the United States entitled Written
17 Direct Examination of Lorraine Pollice?

18 A. Yes.

19 Q. And have you had the opportunity to make changes to that
20 written direct?

21 A. Yes.

22 MS. KELLEY: Permission to approach the witness, actually
23 I think Ms. McCabe, you actually have a copy of the corrected
24 written direct.

25 THE WITNESS: Thank you.

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1 BY MS. KELLEY:

2 Q. Ms. Pollice, do you recognize this as the corrected
3 examination that you have made corrections to?

4 A. Yes.

5 Q. Do you now adopt your written direct examination with
6 your corrections as your testimony in this case?

7 A. Yes, ma'am.

8 MS. KELLEY: Your Honor, at this time the United States
9 seeks to move into evidence the exhibits associated with the
10 written direct testimony of Ms. Pollice. I note for the record
11 that defendants filed no objections to the exhibits.

12 MR. FREDERICK: There is no objection, Your Honor.

13 THE COURT: All right. Those exhibits may all be admitted
14 into the record.

15 BY MS. KELLEY:

16 Q. Ms. Pollice, approximately how long did it take you to
17 make the changes to your written direct?

18 A. I would figure about 20 hours.

19 Q. Very well. Your written direct testimony was originally
20 65 pages and it's now 94 pages in length and it took you
21 approximately 20 hours, that's correct?

22 A. About 20, 25 hours around there, that's correct, yes.

23 Q. And in making your corrections to the written direct, Ms.
24 Pollice --

25 THE COURT: Let me interrupt you, counsel, for the moment,

1 because we should put this on the record. I gather from
2 Mr. Frederick's earlier comments that Ms. Pollice is represented
3 by counsel and if he's present, he should identify himself just
4 so the record is clear.

5 MR. KLUGMAN: Your Honor, Steven Klugman, Debevois &
6 Plimpton, representing Counsel for Tobacco Research, and I am
7 here today on behalf of Ms. Pollice.

8 THE COURT: All right. Thank you. Go ahead, please.

9 BY MS. KELLEY:

10 Q. And Ms. Pollice, in making those corrections to the
11 written direct, you reviewed documents in conjunction with
12 making those corrections, right?

13 A. That's correct, yes.

14 Q. And your lawyer's provided you with those documents,
15 correct?

16 A. That's correct, yes.

17 Q. Did anyone assist you in making the corrections to your
18 written direct?

19 A. Well, I explained the errors to my attorneys, and I think
20 they probably put it in this format.

21 Q. Okay. How many different lawyers have you met with
22 concerning the changes you made during the past week?

23 A. At Debevois & Plimpton, two, and I spoke with
24 Mr. Frederick on the telephone.

25 Q. Okay, and Mr. Frederick does not represent your employer,

- 1 CTR, does he?
- 2 A. No. No.
- 3 Q. And lawyers also reviewed the documents that they
- 4 provided you to help assist you making those changes; is that
- 5 correct?
- 6 A. I'm sorry, ma'am.
- 7 Q. The lawyers also looked at the documents that you
- 8 reviewed that they provided you when you made those corrections?
- 9 A. Yes, ma'am I received it from them.
- 10 Q. Very well. Ms. Pollice, I would now like to refer you to
- 11 pages 80 and 81 of your deposition in this case taken by
- 12 Ms. Kurtin of the United States in June 2002.
- 13 MS. KELLEY: Ms. McCabe, if you could hand the witness a
- 14 copy of the deposition, thank you. And if we could see pages 80
- 15 on the screen, 80 and 81.
- 16 THE WITNESS: Okay.
- 17 BY MS. KELLEY:
- 18 Q. Before we go on to pages 80 and 81, Ms. Pollice, how long
- 19 of a conversation did you have with Mr. Frederick concerning the
- 20 changes of your written direct yesterday?
- 21 A. A half hour, 45 minutes, I'm not really sure.
- 22 Q. And what was the substance of that conversation?
- 23 A. I was just going over some of the additional changes we
- 24 had made.
- 25 Q. And he was advising you to make corrections to what you

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1 had already provided?

2 A. No, I think it was really to explain something a little
3 more. I wanted it a little more, how shall I say, clear.

4 Q. You wanted the corrections to be a little more clear?

5 A. Yes.

6 Q. An explanation of why you were making these corrections?

7 A. Yes, yes.

8 Q. You were unsure as to why you were making the corrections
9 in the written direct?

10 A. No, I wasn't unsure, I'm saying I wanted what we put down
11 on paper, I just wanted it to be a little more clear so it would
12 be easier for you to understand it.

13 Q. Okay. Because you didn't completely understand it as it
14 was written originally?

15 MR. FREDERICK: Objection, Your Honor, that's not what the
16 witness said.

17 THE COURT: Now just a moment everyone. Ms. Pollice, let
18 me give you an instruction. When one of the lawyers says
19 objection, would you please stop talking and then I'll listen to
20 them and I'll make a ruling as to whether you should answer or
21 not.

22 Objection is overruled. Go ahead, please.

23 BY MS. KELLEY:

24 Q. Okay. Again, Ms. Pollice, you had said that you had read
25 your document with corrections, and that you felt that it wasn't

1 readily understandable; is that correct?

2 A. There was some things that I asked them to explain --
3 needed a little bit more explanation.

4 Q. What were those things that needed a little bit more
5 explanation?

6 A. It was regarding our board member, Janet Brown.

7 Q. Okay.

8 A. And I just kept advising Mr. Frederick and Mr. Klugman
9 that the reason why I had Chadbourne & Parke next to her name is
10 that was my way of identifying her, it was not that she was
11 representing Chadbourne & Parke, because obviously that was not
12 a member of the counsel.

13 Q. Right, but she worked for Chadbourne & Parke, correct?

14 A. That's correct.

15 Q. Okay, Ms. Pollice, let's turn to page 80 and 81 of your
16 deposition taken in June 2002 in this case. On the bottom of
17 page 80, at line 25, Ms. Kurtin is referring to the minutes of
18 the annual meeting of members on December 14th, 1984, and asks
19 you, "And above Leonard Zahn is Donald Hoel from Shook, Hardy &
20 Bacon. Do you know who that is?" And you respond, "I don't
21 think I ever met -- I don't remember Mr. Hoel. I mean,
22 obviously, he was in the same room with me, (indicating), but I
23 don't remember."

24 MR. FREDERICK: Objection, Your Honor. I'm not sure how
25 this relates to the witness's changes to her direct scope.

1 THE COURT: Well, you do have to tie it in, counsel.

2 MS. KELLEY: It will be tied in, Your Honor.

3 THE COURT: Go ahead.

4 BY MS. KELLEY:

5 Q. And then on page 81, line 17, Ms. Kurtin asks: "In
6 general, do you recall other individuals being present at those
7 meetings?" Referring to CTR Board of Director meetings. You
8 then answer at line 19: "Yes, though I will be honest with you,
9 I didn't remember such a vast list, (indicating). I don't
10 remember it, but obviously they were there."

11 Ms. Pollice, you consistently testified in your
12 deposition in this case on June 2002, that the minutes you took
13 for the CTR Board of Director meetings and CTR annual meetings
14 were accurate as to who appeared at the meetings, isn't that
15 correct?

16 A. That's correct.

17 Q. It's not your testimony today, Ms. Pollice, that the
18 individuals listed as attending CTR Board of Directors meetings
19 and CTR annual meetings somehow did not attend the meetings, is
20 it?

21 A. No, ma'am, no.

22 Q. Very good. Ms. Pollice, let's move from the deposition
23 back to your corrected written direct, specifically, let's turn
24 to page 6 of your written direct.

25 The testimony on page 6 concerns how the minutes were

1 approved, and in response to the question, "By whom were the
2 minutes approved", your corrected answer reads: "By the Board
3 of Directors at the next meeting." However, it is true that
4 Mr. Gertenbach would first review the minutes after you prepared
5 them. Isn't that correct?

6 A. That's correct.

7 Q. And after Mr. Gertenbach's review, and I think later you
8 say in the 1990s Dr. Glenn's review, the minutes were then sent
9 to Debevois & Plimpton, correct?

10 A. Correct.

11 Q. And then eventually the minutes were approved at the CTR
12 Board of Directors meeting the next -- at the subsequent
13 meeting, correct?

14 A. That's correct, yes.

15 Q. Okay. Let's turn to page 11 of your written direct
16 examination.

17 On page 11, the written direct is referring to U.S.
18 Exhibit 32597, minutes from the CTR Board of Directors meeting
19 held on December 13th, 1985. In response to the question, "Can
20 you tell me on behalf of which company each gentleman appeared
21 at the meeting", I'm going to read the first three sentences of
22 your corrected answer beginning at page -- beginning at line 11:
23 "Yes, I should explain that, in answering all of your questions
24 about on whose behalf CTR directors attended these Board of
25 Directors meetings, it was my understanding that each director

1 attended on behalf of a CTR member company. For most of the
2 time that I have been secretary of CTR, I was unclear about the
3 exact names of the companies that were the members of CTR." And
4 I stopped on line 15.

5 Ms. Pollice, you became corporate secretary of CTR in
6 1984; isn't that correct?

7 A. Correct.

8 Q. And in 1991 you became corporate treasurer and secretary?

9 A. Well treasurer, yeah.

10 Q. Treasurer? But you maintained your secretarial duties;
11 is that correct?

12 A. That's correct, yes.

13 Q. Okay. Yet your testimony as corrected is that during
14 those approximately 20 years, you were unclear about the exact
15 names of the companies that were members of CTR, correct?

16 A. No. Let me just read something.

17 Q. Line 14.

18 A. Repeat your question now. I'm sorry.

19 Q. In looking at that answer, the last sentence reads, "For
20 most of the time I have been secretary for CTR I was unclear
21 about the exact names of the companies that were members of
22 CTR." And the question I posed to you was, that although you
23 had worked in a corporate capacity for 20 years for CTR, your
24 testimony today is that you are unclear about the exact names of
25 the companies that were members of CTR; isn't that correct?

1 A. Unfortunately it is. I'm sorry, but it is.

2 Q. Okay. Returning again, Ms. Pollice, to your corrected
3 answer on page 11, again in response to that same question, "Can
4 you tell me on behalf of which company each gentleman appeared
5 at the meeting". I'm going to continue on with your answer
6 starting at line 15. "I have known since the late 1980s,
7 however, that Class A members were required to be companies that
8 manufactured cigarettes. I knew by 1984 that the Class A
9 members elected the directors of CTR, and I understood that each
10 director attended Board of Directors meetings on behalf of the
11 member company that selected him or her to be a director. In
12 recent years, I have become more familiar with the exact names
13 of the cigarette manufacturing companies that are or were Class
14 A members of CTR, and those are the names that I have used in
15 answering these questions."

16 Ms. Pollice, again, in your June 2002 deposition in this
17 case, you were asked about your understanding between the
18 difference of Class A and Class B members of CTR?

19 A. Um-hmm, right.

20 Q. I'm going to show you a clip from your deposition where
21 that question is asked about the difference between Class A and
22 Class B members, and if you would like to follow along in your
23 deposition, the clip begins at page 76, line 5.

24 (Videotape played.)

25 BY MS. KELLEY:

1 Q. Okay, Ms. Pollice. In that exchange shown in the clip in
2 response to the answer asking you to explain the difference
3 between Class A and Class B members, you don't mention any
4 specific company names in your explanation that you offered
5 Ms. Kurtin, do you?

6 MR. FREDERICK: Objection, Your Honor. If this is
7 intended as an impeachment, it's not impeaching.

8 THE COURT: It's not. What are you trying to do with this
9 witness?

10 MS. KELLEY: I'm trying to show that the evidence as it is
11 stated -- her testimony in the changed written direct is outside
12 of the scope of her knowledge that she testified to in her
13 deposition in June 2002. She gives one type of answer related to
14 Class A and Class B members, yet in the answer explaining the
15 answer she provides throughout her 95 page document, she didn't
16 appear to have that knowledge in 2002 that is in the answer in
17 this document.

18 THE COURT: Well I'll allow it to stand. Go ahead.

19 MS. KELLEY: Okay.

20 BY MS. KELLEY:

21 Q. Similarly, Ms. Pollice, you mention nothing at all in the
22 clip about understanding that each director attended Board of
23 Directors meetings on behalf of the member company that selected
24 him to be a director, do you?

25 A. Was that asked of me?

1 Q. You were asked to explain what you knew about the
2 difference between Class A and Class B members, and you didn't
3 provide that in your answer, correct?

4 A. It wasn't asked directly, so obviously I didn't provide
5 it.

6 Q. Very good. Ms. Pollice, returning, again, to your answer
7 in response to the question, "Can you tell me on behalf of which
8 company each gentleman appeared at the meeting", beginning at
9 line 22 on page 11 of the corrected written direct, you continue
10 to explain in this answer that you see the company names that
11 are different from Class A members' names are sometimes listed
12 in the minutes next to the names of the directors. And you
13 explain that at the next line, line 23: "There are two reasons
14 for this. First, the purpose of these listings was to identify
15 the directors, not to list the member companies on whose behalf
16 they attended Board of Directors meetings. I used the company
17 names that appeared on directors' business cards or addresses,
18 or that Mr. Gertenbach provided to me, even where the company
19 name obtained from those sources differed from the name of the
20 corresponding member company. Second, there were times when I
21 made mistakes in the minutes about the exact names of member
22 companies, including the American Tobacco Company and Philip
23 Morris, Incorporated."

24 Let's look more closely at U.S. Exhibit 32597, and we're
25 going to hand you a copy of the document, too.

- 1 A. Thank you.
- 2 Q. Isn't it true, Ms. Pollice, according to your corrected
3 testimony, that you prepared the list of attendees for this
4 meeting referenced in 32597, using either company names that
5 appeared on business cards you received from the attendees at
6 the meeting or company names that you received from
7 Mr. Gertenbach; isn't that true?
- 8 A. Ask the question again, I'm sorry.
- 9 Q. Your testimony that we just read indicated that you
10 prepared the list of attendees for the meeting, the list of
11 people and the name of the company name to the right of the
12 person?
- 13 A. Identifying the people, yes.
- 14 Q. Right.
- 15 A. Right.
- 16 Q. And to make that list, you either used the company names
17 from the cards that were provided, business cards that were
18 provided to you from the gentlemen attending the meeting, or
19 Mr. Gertenbach provided you the company names?
- 20 A. That's correct.
- 21 Q. That's correct.
- 22 A. Um-hmm.
- 23 Q. Okay. So when U.S. Exhibit 32597 reads that
24 Mr. Ahrensfield and Mr. Cullman attended this meeting, and the
25 company name to the right of their names on the attendee list is

1 Philip Morris Company, Inc., which is today known as Altria,
2 that means that you either received business cards from those
3 gentlemen that reflected Philip Morris Companies, Inc., what is
4 today known as Altria, or Mr. Gertenbach provided you that
5 information, correct?

6 A. And that was the way I identified them, yes.

7 Q. Very good. And you do not doubt, Ms. Pollice, do you,
8 looking at this exhibit, that Mr. Ahrensfield and Mr. Cullman
9 did, in fact, attend the CTR Board of Directors meeting
10 reflected in this exhibit?

11 A. Do I doubt it? No.

12 Q. No. Okay. And, Ms. Pollice, despite the review process
13 you mentioned earlier for the minutes, the mistakes you indicate
14 in your corrected testimony about the company names, were not
15 detected until now; isn't that correct?

16 A. I just want to explain, these are not mistakes, these are
17 not --

18 Q. I don't have a question posed to you going to that.

19 MR. FREDERICK: Objection, Your Honor.

20 THE COURT: Objection is sustained.

21 THE WITNESS: I just wanted to explain --

22 THE COURT: Excuse me, just a minutes now. The objection
23 is sustained. The witness needs to clarify. You may go ahead.

24 THE WITNESS: I certainly did not intend to list the
25 member companies here. This is not a list of the member

1 companies.

2 BY MS. KELLEY:

3 Q. Right, you received their business cards, correct?

4 A. Let's just do Ms. Brown, the easiest way to explain it.

5 Q. Okay.

6 A. Chadbourne & Parke. Not a member of the Counsel for

7 Tobacco Research.

8 Q. Right.

9 A. Not a Class A member. That it is the way -- that is

10 where I mailed them the minutes, that's how I -- that's why

11 that's indicated there, ma'am. That's it.

12 Q. Right. But even though you had this process of receiving

13 business cards or information from Mr. Gertenbach and put the

14 company names in the minutes in that fashion, when the minutes

15 were sent to Mr. Gertenbach for review, sent to Debevois &

16 Plimpton for review, and then finally approved by the Board of

17 Directors at the next meeting, no one said anything to you about

18 these being inaccurate company names, did they?

19 A. Let me think a minute. No one -- no, because they

20 understood what I was doing, obviously.

21 Q. And if you were advised of errors in the minutes, you

22 would have taken steps to correct those errors, right?

23 A. Yes.

24 Q. Okay.

25 THE COURT: Is the only error on the list that is up now

1 on the screen the error relating to Janet C. Brown?

2 THE WITNESS: That's not it. See, ma'am, what I was
3 trying to explain is, when I listed the affiliations next to the
4 gentlemen, the Board of Directors, I didn't list the company, the
5 Class A member they were representing, I listed where I mailed
6 the board minutes.

7 THE COURT: I understand that, but my question is, is line
8 2 relating to Janet C. Brown, is that the only error on that list
9 in terms of what firm the person did or did not represent?

10 THE WITNESS: No, if you're -- are you saying then, that
11 I guess I don't understand your question, ma'am. Are you asking
12 me that Thomas -- well that Mr. Ahrensfield was representing
13 Philip Morris Companies, Inc., is that what you are saying, if
14 Ms. Brown represents Chadbourne & Parke?

15 THE COURT: Correct.

16 THE WITNESS: They don't represent those companies, they
17 were attending the Board of Directors meeting representing the
18 Class A member companies. This list identifies where I mailed --

19 THE COURT: But were those the Class A member companies
20 they were there representing?

21 THE WITNESS: No. Hayes was American Tobacco. Brown
22 represented American Tobacco, Pepples and Pritchard, Brown &
23 Williamson Tobacco Corporation, Ave, Lorillard, Ahrensfield and
24 Cullman represented Philip Morris, Incorporated, and DiMarco,
25 R.J. Reynolds Tobacco and Manning, U.S. Tobacco. That's -- see

1 that's what I wanted to clarify, ma'am.

2 THE COURT: All right. Go ahead, please.

3 BY MS. KELLEY:

4 Q. One more question about this document, Ms. Pollice. You
5 don't dispute, though, that Mr. Ahrensfield and Mr. Cullman were
6 employees of Philip Morris Companies, Inc., do you?

7 A. I can't answer that, because I don't know who they were
8 employees of.

9 Q. But you wrote down Philip Morris Companies, Inc. to the
10 right of their name on --

11 A. That's where I mailed them the minutes, so as far as -- I
12 can't tell you if they are an employee there.

13 Q. Very good. Let's quickly turn to the other meeting for
14 which you prepared minutes, which is the annual meetings, and
15 look at U.S. Exhibit 32630. It's another set of minutes, and
16 the document is entitled, The Counsel for Tobacco Research USA
17 Minutes of the 16th Annual Meeting of the Members, December
18 13th, 1985.

19 A. Thank you. Yes.

20 Q. Can you read for me, Ms. Pollice, the companies listed
21 under Class A members?

22 A. Remember, I did tell you about errors, and this is what
23 we're talking about when I list members. This is members,
24 American Brands, Inc., that's incorrect, Brown & Williamson
25 Tobacco, Corporation, Lorillard, Inc., Philip Morris Companies,

1 Inc., that is incorrect, United States Tobacco Company, is
2 correct.

3 Q. So again, Ms. Pollice, the mistakes that you point to
4 with regards to American Tobacco and Philip Morris Companies,
5 Inc. --

6 A. That's correct.

7 Q. -- presently known as Altria --

8 A. Right.

9 Q. -- those mistakes were never corrected in the review
10 process of Mr. Gertenbach, in the review by Debevois & Plimpton
11 or when the minutes were finally approved?

12 A. That's correct, and Debevois did not correct this. I
13 think it's '85. They started later.

14 Q. Very good. And who are CTR's lawyers in 1985?

15 A. I believe Jacob, Medinger and Finnegan.

16 Q. And they would have reviewed it then --

17 A. I can't remember back that far, I'm sorry.

18 Q. Very good.

19 A. But I know it wasn't Debevois.

20 Q. And let's look at the list of individuals attending.

21 A. Right.

22 Q. Again, there are several references to names,
23 specifically Thomas F. Ahrensfield, Hugh Cullman, Alexander
24 Holtzman, and John A. Murphy, and to the right of their names is
25 the company, Philip Morris Companies, Inc. what is today known

1 as Altria?

2 A. Right, um-hmm.

3 Q. Isn't that correct?

4 A. That's what's there, I'm not saying it's correct.

5 Q. I'm asking what's there. Very good.

6 And you don't doubt, again, Ms. Pollice, looking at

7 Exhibit 2630, that these gentlemen, Mr. Ahrensfield, Mr. Cullman,

8 Mr. Holtzman and Mr. Murphy, you don't doubt that they did, in

9 fact, attend this annual meeting referenced in this exhibit, do

10 you?

11 A. No, I do not.

12 Q. Very good. Ms. Pollice, I have no further questions.

13 THE COURT: Will there be questions, Mr. Frederick?

14 You're going to have questions?

15 MR. FREDERICK: Your Honor, I will have questions.

16 THE COURT: And how long do you think you'll be?

17 MR. FREDERICK: Fifteen minutes to 30 minutes.

18 THE COURT: Fifteen to 30?

19 MR. FREDERICK: Yeah.

20 THE COURT: All right, let me just ask a few other

21 questions just in terms of scheduling. After this witness, who

22 is the government going to have next?

23 MR. BRODY: Your Honor, I believe the next witness is

24 Dr. Farone, and counsel for defendants have asked that they have

25 until Wednesday, and it's our expectation that Dr. Farone will be

1 on the stand all of Wednesday, all of Thursday, and possibly
2 Tuesday of next week as well, based on their initial estimates.
3 I mean, it's possible that we'll finish Thursday, but it's also
4 quite possible that his testimony will carry over.

5 THE COURT: I, having read his testimony this weekend, I
6 anticipated a fairly intense direct -- I mean cross, excuse me
7 everybody. So, what I hear is that we're not going to have
8 testimony tomorrow.

9 MR. BRODY: As the schedule stands now, Your Honor, that's
10 correct. And as you'll recall, as we discussed a week and a half
11 ago, this was a circumstance that arose as a result of several
12 things happening, in particular our decision to accommodate
13 Lorillard's request that Mr. Orlowsky not be called to testify
14 this week due to his schedule. He's the CEO of Lorillard. He
15 will be the first witness we will call after Dr. Farone.

16 THE COURT: Who again?

17 MR. BRODY: His name is Martin Orlowsky, O-R-L-O-W-S-K-Y,
18 he's the CEO of Lorillard.

19 THE COURT: I know how this arose, and I understand that
20 it was because the government was being accommodating to begin
21 with, and I certainly understand that the joint defendants needed
22 time to get ready for Dr. Farone. I want to avoid it in the
23 future. This is not to say, by the way, that I don't welcome a
24 day to spend some time on all of my other cases, but in terms of
25 moving things along efficiently we have to avoid this as much as

1 possible. All right. Let's take a lunch break now, and everyone
2 please come back at -- unless you want -- did you want to try to
3 finish Mr. Frederick now before lunch?

4 MR. FREDERICK: Your Honor, I could give it a shot, it's
5 up to a half hour, probably less.

6 THE COURT: And then do you think you're going to have
7 redirect?

8 MR. BRODY: I'll defer to Ms. Kelley, but I think --

9 THE COURT: I'm sorry, excuse me, I'm sorry.

10 MS. KELLEY: Very limited, if any.

11 THE COURT: Oh, I don't know, Mr. Frederick, I think
12 everybody gets a little uncomfortable. We'll take a short lunch
13 then.

14 MR. FREDERICK: I don't want people to be uncomfortable.

15 THE COURT: Given it won't be a long afternoon. So let's
16 try to be back, everybody, at 1:30.

17 MR. FREDERICK: Thank you, Your Honor.

18 THE COURT: And we'll finish up this witness.

19 (Thereupon, a luncheon break was had.)

20

C E R T I F I C A T E

21

22

23 I, Scott L. Wallace, RDR-CRR, certify that the
24 foregoing is a correct transcript from the record of proceedings
in the above-entitled matter.

25

Scott L. Wallace, RDR, CRR
Official Court Reporter

Scott L. Wallace, RDR, CRR
Official Court Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GSK)
	:	October 4, 2004
Plaintiff,	:	
	:	1:32 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 8
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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10 P R O C E E D I N G S

11 THE COURT: Mr. Frederick, please.

12 MR. FREDERICK: Good afternoon, Your Honor.

13 LORRAINE POLLICE, Government's witness, RESUMES

14 CROSS-EXAMINATION

15 BY MR. FREDERICK:

16 Q. For the record, my name is Tom Frederick. I represent

17 Philip Morris, Incorporated. Good afternoon, Ms. Pollice.

18 A. Good afternoon.

19 Q. Ms. Pollice, do you recall that Ms. Kelley for the
20 government asked you some questions about conversations you had
21 this past week with Mr. Klugman and me?

22 A. Yes, ma'am.

23 Q. Just so the record is clear. Is the testimony you adopted
24 today at the outset of your testimony Mr. Klugman's testimony,
25 my testimony, or your testimony?

1 A. Mine, sir.

2 Q. In particular, just so the record is clear. Did anyone tell
3 you to say that Philip Morris Companies, Inc., was never a
4 member company of CTR?

5 A. No.

6 Q. And that's your testimony; is that true?

7 A. That's correct, sir.

8 Q. Now, Ms. Pollice, let me show you what's been marked as
9 Joint Defendants' Exhibit JD-090055.

10 MR. FREDERICK: And may I approach the witness, Your
11 Honor?

12 THE COURT: Yes, you may.

13 BY MR. FREDERICK:

14 Q. Could you take a moment to review that, Ms. Pollice, and
15 tell me if you've seen that before?

16 A. Yes, sir.

17 Q. What is it?

18 A. The bylaws of the Council for Tobacco Research.

19 Q. Are you familiar with these bylaws?

20 A. Yes, sir.

21 Q. When did you first see these?

22 A. I would probably say in the '80s.

23 Q. Could you take a moment and look at article 2, section 2 on
24 the second page, please?

25 A. Yes, sir.

1 Q. Do you have that section before you?

2 A. Yes, sir.

3 Q. Does this section govern the qualifications of the member
4 companies of CTR?

5 A. Yes.

6 Q. Just so the record is clear, let me just ask you the
7 question again. Do you see before you on that page where the
8 bylaws state the qualifications for class A members of CTR?

9 A. Yes, sir.

10 Q. And do you see where among those requirements it states that
11 class A members are required to manufacture their own brand or
12 brands of cigarettes?

13 A. Yes, sir.

14 Q. Now, let me show you what's also been marked as JD-091194.

15 MR. FREDERICK: And again may I approach the witness,
16 Your Honor?

17 THE COURT: Yes, you may.

18 BY MR. FREDERICK:

19 Q. Just keep those two up there.

20 But looking at JD-091194, have you seen this document
21 before?

22 A. Yes.

23 Q. And what is it?

24 A. It's also the amended bylaws of the Council for Tobacco
25 Research USA, Inc.

1 Q. Are you familiar with these amended bylaws?

2 A. Yes, sir.

3 Q. When were they amended?

4 A. 10/14/93.

5 Q. When did you first see these amended bylaws?

6 A. Probably when they were typed up.

7 Q. Now, please take a look at article 2, section 2 of this
8 document at the bottom of the first page. Do you have that
9 before you?

10 A. Yes.

11 Q. And again that section in these amended bylaws sets forth
12 the requirements, the qualifications for class A member
13 companies; is that correct?

14 A. That's correct.

15 Q. Now, Ms. Pollice, please take whatever time you need to
16 review this document, but my question will be did the
17 qualifications for class A member companies change in these
18 amended bylaws as compared with the earlier bylaws at which you
19 looked a moment ago? And just take whatever time you need to
20 compare them.

21 A. No change that I can see, sir.

22 Q. So under the amended bylaws, class A members were still
23 required to manufacture their own brand or brands of cigarettes?

24 A. Yes, sir.

25 MR. FREDERICK: Now, Your Honor, I move the admission

1 into evidence of JD-091194 and JD-090055.

2 THE COURT: Any objection?

3 MS. KELLEY: No objection, Your Honor.

4 THE COURT: They may both be admitted.

5 MR. FREDERICK: Should I pass them up right now?

6 (Defendant's Exhibit No. JD-091194 and JD-090055 were
7 received into evidence.)

8 BY MR. FREDERICK:

9 Q. Now, Ms. Pollice, you've been asked some questions today
10 about Philip Morris Companies, Inc. and Philip Morris,
11 Incorporated. Do you recall that?

12 A. Yes, sir.

13 Q. Do you know whether or not Philip Morris Companies, Inc. is
14 a cigarette manufacturer?

15 A. I do not know.

16 Q. Do you know whether any time in the past Philip Morris
17 Companies, Inc. was a cigarette manufacturer?

18 A. I don't know.

19 Q. Now, under the CTR's bylaws, could a company, is it your
20 understanding that a company that did not -- strike the
21 question.

22 Do you know whether under CTR's bylaws a company that
23 did not manufacture cigarettes could be a class A member of CTR?

24 A. They could not be a class A member if they didn't
25 manufacture cigarettes.

1 Q. Now, was Philip Morris Companies, Inc. at any time a member
2 of CTR, to your knowledge?

3 A. Yes.

4 Q. Philip Morris Companies, Inc.?

5 A. I'm sorry. No.

6 Q. Just so the record is clear --

7 A. I'm sorry.

8 Q. -- was Philip Morris, Incorporated a cigarette manufacturer?

9 A. Yes.

10 Q. Was Philip Morris, Incorporated a member of CTR?

11 A. Philip Morris, Incorporated was a member, a class A member
12 of CTR, yes. That's correct.

13 Q. And again just so record is clear. To your knowledge, was
14 Philip Morris Companies, Inc. at any time a member of CTR?

15 A. Not to my knowledge, no, sir.

16 Q. Ms. Pollice, in your written testimony the government asked
17 you questions about the minutes of the board of directors of
18 CTR; is that correct?

19 A. Yes, sir.

20 Q. And the government also asked you questions about the
21 minutes of the annual meetings for the members of CTR; is that
22 correct?

23 A. Yes.

24 Q. Now, just so the court is clear, do these meetings have
25 anything to do whatsoever with the meetings of the CTR

1 Scientific Advisory Board?

2 A. No.

3 Q. At any meetings of the board of directors of CTR about which
4 you have testified, do you know whether or not there were
5 evaluation of proposals for scientific research?

6 MS. KELLEY: Objection, Your Honor. Outside the scope
7 of written direct.

8 THE COURT: Overruled.

9 BY MR. FREDERICK:

10 Q. Do you have the question?

11 THE COURT: You may answer the question.

12 THE WITNESS: Thank you.

13 A. No applications were ever reviewed at the board of directors
14 meeting when I was present.

15 Q. Was there ever any discussion at board of directors meetings
16 of the CTR as to whether or not the CTR should fund particular
17 proposals for scientific research?

18 A. No, sir.

19 Q. At the annual meetings of CTR about which you were asked
20 today, do you know whether or not there were ever any
21 evaluations proposals for scientific research discussed?

22 A. No, sir.

23 Q. At any of those annual meetings of CTR members, do you know
24 whether or not there was any discussion of whether or not CTR
25 should fund particular proposals for scientific research?

1 MS. KELLEY: Objection, Your Honor.

2 The written direct doesn't state anything about SAB,
3 Scientific Advisory Board meeting, references in the meetings
4 that -- for which Ms. Pollice took minutes for at all. It talks
5 about a little bit of budget information, it talks about who
6 attended the meetings, but there's nothing -- no references to
7 the SAB.

8 THE COURT: Well, she's being asked one way or the
9 other whether there was any action taken regarding scientific
10 proposals, so the objection is overruled.

11 A. No.

12 Q. Final question. Did you ever attend a meeting of the
13 Scientific Advisory Board of CTR?

14 A. No, sir.

15 MR. FREDERICK: Thank you. No further questions.

16 THE COURT: Redirect, please.

17 REDIRECT EXAMINATION

18 BY MS. KELLEY:

19 Q. Ms. Pollice, again you do not doubt, do you, that Philip
20 Morris Companies, Inc. what is currently known as Altria, was a
21 member of CTR?

22 MR. FREDERICK: Objection, Your Honor. Form of the
23 question and foundation.

24 THE COURT: Let me hear the question again, please.

25 BY MS. KELLEY:

1 Q. Ms. Pollice, during your written direct we discussed CTR
2 board of directors' meetings and CTR annual meetings in and
3 around 1985.

4 You do not dispute that Philip Morris Companies, Inc.,
5 what is currently known as Altria, was a member of CTR at that
6 time; isn't that correct.

7 A. They were not a member of CTR. I think I said it was Philip
8 Morris, Incorporated that was the member of CTR.

9 Q. You do not dispute that representatives from Philip Morris
10 Companies, Inc., attended the meetings, do you?

11 A. I think the way I explained it to you is with the list of
12 names where it had Philip Morris Companies, Inc., that is where
13 I mailed -- Philip Morris Companies, Inc., that is where I
14 mailed the minutes to. That's how I identified them, ma'am. I
15 think I put it that way.

16 Q. Very good. Can I show you one additional document at this
17 time?

18 A. Thank you.

19 Q. Ms. Pollice, this is a December 1988 document on CTR
20 letterhead that list class A members and class B members of CTR.

21 Can you read for the court the company names
22 affiliated, listed under Mr. R. William Murray, please?

23 A. Okay. I just want to tell you what this was. This was an
24 address sheet. This is the way they were filed at CTR just so
25 you know.

1 The affiliation under Mr. Murray's?

2 Q. Correct.

3 A. Philip Morris Companies, Inc.

4 Q. And under Mr. Murray H. Spring?

5 A. Philip Morris Companies, Inc. And I did reiterate this was
6 an address sheet, ma'am, and it was so filed at the council.

7 MS. KELLEY: I have no further questions, Your Honor.

8 THE COURT: All right. The witness may step down then.
9 Thank you.

10 MS. KELLEY: Your Honor, the United States seeks to
11 move into evidence U.S. Exhibit 26434 that was just shown to the
12 witness.

13 MR. FREDERICK: No objection.

14 THE COURT: That may be admitted.

15 (Government's Exhibit No. U.S. Exhibit 26434 received into
16 evidence.)

17 THE COURT: And do you have a copy, please, for our
18 clerk?

19 MS. KELLEY: Yes.

20 THE COURT: Ms. Hightower, let me give you these.

21 All right, now I gather that the joint defendants
22 wanted to raise some procedural issues before we break this
23 afternoon; is that correct? Mr. Redgrave.

24 MR. REDGRAVE: That is correct, Your Honor. Jonathan
25 Redgrave for the record.

1 We left last week with issues regarding the aggregate
2 volume and the weekly volume regarding prior transcript
3 designations. And we certainly appreciate the fact that Your
4 Honor entered Order Number 471(a) that dealt with the issue
5 regarding the weekly volume. And I just wanted to apprise the
6 court that what we were doing with respect to 471(a).

7 We had 30 transcripts that are not yet addressed and we
8 were just going to handle those in that process of eight per
9 week. We told the government this last night. They noted that
10 that would leave a backlog that's kind of running, if you will,
11 with the case.

12 I don't see that as a problem whatsoever. There are
13 already 21 transcripts where it's been designations,
14 counter-designations and replies already submitted to Your
15 Honor. You've got the boxes of cartons behind you in your jury
16 room to review of those, and by this Friday we will have 29.

17 Quite frankly, we think the prosecution can just go
18 along. If we get to the end of their case and we have to do
19 some catchup, then maybe that's the time to do it, but we should
20 be focusing now, Your Honor, with respect to the live witnesses,
21 getting those people that are coming to testify in and out.

22 We did, however, last week indicate that we would talk
23 to the government over the weekend regarding the aggregate
24 volume issue and certainly with respect to priors. And there's
25 two aspects I would like to raise with Your Honor briefly.

1 First, that is the number of pages that are actually
2 being designated from transcripts and then the number of
3 exhibits that are being designated, and I'll start with
4 exhibits.

5 Your Honor, in the course of the prior depositions and
6 the prior trial testimony, there were exhibits used with these
7 witnesses. And our understanding was that if you were
8 designating or counter-designating those exhibits that were
9 going to be included in the priors, would be those that were
10 actually used with the witness.

11 Now we have, in the course of these proceedings,
12 received guidance from Your Honor in Order Number 671 with
13 respect to the admission of documents that may not be used with
14 particular witnesses.

15 However, we believe there is an incongruity, so to
16 speak, with respect to priors because with that subset of
17 witnesses where we don't have an opportunity to examine them on
18 the stand and possibly use these other documents that the
19 government is proffering, we think that is a procedure that will
20 end up with a tremendous number of exhibits in the record as to
21 which we haven't had the opportunity to meet the proposed
22 relevance.

23 So, Your Honor, we believe that two things should be
24 done regarding the prior designations, and that is we should
25 really limit those to exhibits actually used in those prior

1 transcripts, the ones that were used with the witnesses where
2 there is a context already provided for Your Honor as opposed to
3 a document just coming in as I would say orphan documents. They
4 are just coming along.

5 With respect to those documents, if we get to the end
6 of the government's case in chief and they believe that they
7 need to address those somehow, they've suggested a document day
8 procedure or some other means by which they could explain to
9 Your Honor the proffered relevance and, of course, the hearsay
10 exception or the nonhearsay use which would give us a clearer
11 record as to what this evidence is, what the context is, and how
12 it relates to the proposed findings that will eventually follow
13 this trial.

14 Now, with respect to the idea of pages. We talked to
15 the government about a means by which each side could
16 potentially identify limits on the number of pages of
17 transcripts to be designated.

18 We don't have a specific scientific calculation of the
19 pages to be designated. We had estimated in an earlier filing
20 it's well over 20,000 pages that the government would have,
21 which we frankly submit is too much.

22 And our review of the 21 transcripts that we've already
23 filed our responses to in our view shows a tremendous amount of
24 duplication of the material that's being submitted, Your Honor,
25 and we, quite frankly, don't think that's very efficient. We

1 don't think that's very fair to the court.

2 THE COURT: Let me just say this, Mr. Redgrave. I've
3 only had a chance to review one of the government's transcripts
4 and I was not happy.

5 First of all, much of what was underlined for my
6 attention was repetitive and duplicative. Much of it was of
7 little moment. I don't know how else to say that.

8 In addition -- and I'm not sure how with solve this
9 problem -- but there were hundreds and hundreds of pages of
10 transcript with a relatively small number of pages designated
11 for reading.

12 And so the bottom line was that -- I can't estimate
13 time -- but a fair amount of aggravation time was spent turning
14 pages trying to find something that had some underlining on it,
15 even assuming it was worth reading.

16 And I wanted to be sure to get through at least one
17 transcript before this discussion this afternoon so I had some
18 idea -- and I grant you there are 20 others that are there, at
19 least one or two of which are multivolumed, and I haven't begun
20 on those.

21 So that the bottom line is, based on a review of just
22 one, I certainly am very concerned about the manner in which
23 transcripts are being designated.

24 I have an extremely unpleasant feeling that the view
25 is, "Oh, well, let's overdesignate rather than underdesignate

1 and that will be her problem and the Court of Appeals' problem."

2 Well, that's not what will happen everybody. And again
3 my comments always go both ways. What will happen is I get
4 through two or three of those transcripts and find them mostly a
5 waste of my time. And I'm sorry, everybody, you can imagine
6 what I will take from that in terms of how much time and
7 attention I'm going to give to subsequent transcripts. That's
8 the only way I can put it.

9 MR. REDGRAVE: Your Honor, I appreciate that.

10 And the reason I guess we are before you asking for
11 some sort of governor or limitation on it is because we have to
12 go through the extra 30, and they've designated yet more
13 transcripts today, and without some governor on them we have to
14 go through -- and, of course, the scope of our
15 counter-designations because we don't know what Your Honor's
16 rulings will be -- we have to meet those designations which
17 unfortunately as a function of that may expand it somewhat.

18 So we would ask that the court consider some means by
19 which you would force both parties -- we realize it's going to
20 go against us as well -- force both sides to deal with this.

21 With respect to the exhibits, Mr. Bernick reminded me
22 that the number for Your Honor of the designations they've made
23 so far from last week, the 40, plus the 11 from the week before,
24 by our count was 1771 exhibits just for those priors, which
25 included a number of what I called these orphan documents.

1 And, quite frankly, there are a few cases in the United
2 States that I've ever seen reported where 1771 exhibits came
3 into evidence. So I think there's something wrong with that
4 process as well, and I believe Mr. Bernick wanted to follow up
5 if he could.

6 MR. BERNICK: Your Honor, I'd like to make a concrete
7 suggestion to the court on how to deal with these two volume
8 problems.

9 Volume problem one is the scope of the prior
10 designations. Volume problem two is the sheer volume of the
11 exhibits and that emanates in part from the prior designations,
12 but also in part from this convention of designating in
13 connection with the live witnesses many documents that are not
14 actually spoken to on direct examination.

15 And I'm going to set to one side the pure evidentiary
16 issue of whether a so-called orphan document, that is one that's
17 not the subject of testimony, nonetheless can be admitted.

18 We can talk about that for a long time, but let's
19 assume that it's appropriate to do that under certain
20 circumstances.

21 The effect of that rule, however -- it's applied to
22 hundreds and hundreds of documents -- is much more profound than
23 simply creating evidentiary problems.

24 What it fundamentally deprives us of and really the
25 court of is the opportunity to keep track of the evidence as it

1 comes in, what it's coming in for, and then the ability of the
2 other parties to respond to it.

3 Your Honor saw this morning in connection with
4 Mr. Northrip's examination, that out of the -- I don't know --
5 maybe 50, 60 different documents that came in through his
6 testimony, there were probably, you know, maybe 10 or 15 that
7 were the subject of the direct testimony.

8 We then, in our examination, ended up focusing in about
9 five or six, and interestingly they were the same five or six
10 that actually made their way into the initial cross-examination
11 of Mr. Northrip.

12 In other words, there are probably about 10 documents
13 out of that whole bunch that really counted at the end of the
14 day. I kind of knew what they were by looking through the list
15 to begin with. I think that the government knew which ones they
16 were.

17 When we focus on that smaller collection of documents,
18 then there's a meaningful process. The government can make its
19 case through those documents and then we meaningfully can
20 respond document by document because that's really what it
21 takes.

22 The documents may be authentic, they may be relevant,
23 they may not be hearsay, but for the court to grapple with what
24 it is that they actually tend to establish, much less what other
25 evidence might there be that tends to suggest that that's not

1 so, that can't physically take place in this human process
2 unless there is greater focus on what documents are introduced
3 so that the parties to this case and the court can actually
4 focus on the documents and understand their significance.

5 That's really the fundamental problem, beyond whether
6 there's technical admissibility, is the integrity and
7 confrontational aspect of this proceeding that really is at
8 stake.

9 What we would propose is really to -- I'm picking up on
10 Mr. Redgrave's remarks -- is to focus on the live witnesses
11 first. And with respect to the live witnesses, we really think
12 that there if there are going to be orphan documents, they ought
13 to be fairly few and far between.

14 We ought not to have a hundred or a hundred and fifty
15 documents that are not even the subject of testimony. If we
16 were to go through, for example, some of the upcoming witnesses
17 and actually cross-examine the witness with respect to all the
18 documents that are not in the direct testimony, A, Your Honor
19 would not have heard any testimony whatsoever with respect to
20 those documents that we would be responding to in our
21 cross-examination.

22 We would be cross-examining with respect to a document
23 that the court has not even heard described or characterized.
24 It's just there, and then the cross-examination would go on
25 forever.

1 I think you would be very impatient with us if we were
2 to get up and cross-examine with respect to all these
3 miscellaneous documents which may be highly relevant, but
4 cross-examine with respect to these documents as we did with
5 respect to the documents that were the subject of direct
6 examination with Mr. Northrip.

7 So we think that there should be a limitation on the
8 documents introduced through direct examination to the documents
9 that are actually part of the direct testimony and then maybe a
10 small number of other significant documents that may be not
11 picked up directly by the direct testimony, but they are pretty
12 much the same thing.

13 And obviously, that's a question of judgment, but I
14 think that there's a major difference between that kind of
15 approach and what's taking place in the case to date.

16 With respect to the prior designations and with respect
17 to any other documents that the government wants to get into
18 evidence, it would really seem the best way to proceed that if
19 they don't come in during the course of proceedings on a day by
20 day basis, because that would be disruptive and probably a waste
21 of time, that that be deferred.

22 We will process those. That is, we will process the
23 prior designations and we will process whatever documents that
24 they want introduce. But after they are done with the live
25 examinations, there then ought to be a process before the court

1 in open court where the government proffers additional testimony
2 that they want the court to consider and any additional
3 documents that they want the court to consider.

4 And I would imagine that the proffer itself would be
5 instructive to the court on what is the additional significance
6 of these prior designations. To what extent are they really
7 merely cumulative or to what extent are they not really very
8 material to what's on the court's mind having heard all the live
9 testimony.

10 And that way, rather than Your Honor reviewing all
11 these transcripts for purposes of making, you know, objection by
12 objection determinations or taking it up while we're waiting for
13 the next live witness to appear, that at the time having heard
14 the live testimony Your Honor can make judgments about what
15 additional testimony is really necessary.

16 And that ought to be, again, a question of argument to
17 the court. Well, let's have so and so. What does do and so
18 say? He says this, that, and the other. Your Honor can gauge
19 to what extent that's really necessary.

20 If there are additional documents that have not been
21 sponsored through testimony, so-called orphans, that the
22 government really wants to get in, we can always take those up
23 as well and -- but then with the benefit of having heard a
24 tremendous amount of evidence in the case, and then we do have
25 the ability as part of our case to respond to those documents in

1 a meaningful fashion.

2 1771 exhibits, as you know from the time, many times
3 before when we first kind of argued this same issue is actually
4 more documents, more plaintiff's exhibits that have been
5 introduced in enormous trials in their totality. And to be at
6 that stage in this proceeding after only a couple of weeks and a
7 handful of witnesses is -- I really don't think that there's
8 been a justification that's been provided to the court.

9 So our suggestion would be let's do the live witnesses.
10 Let's cut back on the so-called orphan documents. We will go
11 through on our own the prior designations that the government
12 has orphan documents that they really want to get in, they can
13 let us know, and then after we are done with the live testimony
14 we ought to have a time out to see how much of this remaining
15 record really should come in.

16 Otherwise, Your Honor, there is no way in the world
17 that I'm going to be able to act on behalf of my client,
18 certainly, in being able to respond to all these documents.
19 It's just not physically possible.

20 THE COURT: Mr. Brody.

21 MR. BRODY: Your Honor, I want to start by correcting
22 something Mr. Redgrave said. He suggested that the United
23 States had suggested a procedure where we would have document
24 days.

25 We have never suggested that procedure either to them

1 or to the court. That's their idea. That's what they are
2 arguing for here. And, quite frankly, we think it is a bad
3 idea. I think the numbers that have been quoted to you can be
4 taken in a misleading fashion.

5 First of all, we all have to remember that this is a
6 case about a pervasive fraud which we allege affected all parts
7 and all aspects of the businesses of the nine defendants that we
8 have here.

9 And so you're talking about nine defendants, 50 years.
10 You're talking about 450 years cumulative of conduct. In terms
11 of what you have seen thus far, this number they throw out,
12 1771, that's 1771 exhibits from 51 witnesses or 35 exhibits per
13 witness, less than 4 exhibits per defendant per witness. And
14 those 51 prior designations represent more than 30 percent of
15 the prior designations that the United States is going to make
16 in this case. So I think the numbers are misleading.

17 I also think it is very misleading to suggest that --
18 and I would hate for Your Honor to get this impression -- that
19 they have no idea of what these documents relate to, why we
20 think they are relevant.

21 We filed and served first in January of 2003, then in
22 July of 2004, extensive proposed findings of fact and
23 conclusions of law. The proposed findings of fact alone in July
24 of this year totaled 2,539 pages.

25 And so, given the scope of the case, the real numbers

1 when you break it down thus far, I think that when you take
2 those numbers in isolation it can lead to a misstatement of a
3 problem where none really exists.

4 The United States planned its presentation of this case
5 based on the court's Order 471, which was entered in January, I
6 believe, of this year.

7 What defendants are suggesting is a radical departure
8 from that procedure where we would proceed through trial without
9 knowing which exhibits were going to come in, which exhibits
10 weren't going to come in, without knowing how many days or weeks
11 we are going to spend after the presentation of our case in
12 chief hearing arguments by lawyers as to the significance of
13 documents, the kind of arguments that are fully encompassed
14 within the proposed findings of fact, the kind of presentations
15 and highlighting that will be made at the point that we make an
16 interim summation and the types of arguments that will be made
17 to Your Honor in closing arguments and in post trial briefing.

18 There is no requirement that a document be specifically
19 discussed in the testimony of a witness for that document to be
20 admissible. And Your Honor has observed that on numerous
21 occasions in this case.

22 Your Honor has also observed, specifically in court
23 after the defendants' opening statement, addressing the
24 objections that were filed to the testimony of Dr. David Kessler
25 that you're going to know what's relevant, what's not relevant;

1 that when you go back after this case is over and you look at it
2 and you look at the parties' arguments and you look at the way
3 certain documents have been used and highlighted in the case,
4 when you look at certain other documents where relevance has
5 been established through a presentation of the issues in this
6 case, that given that this is a bench trial, you are going to be
7 able to, in essence, based on our presentations and based on the
8 testimony that you've heard, focus on the documents that you
9 believe are going to be most relevant to your decision.

10 But we believe that every single one of the average 35
11 documents per witness that we have submitted are relevant and
12 are important to our case, and every document that we have
13 provided is something that we feel we need to have provided.

14 If you go to a situation where you say, "Well, we're
15 going to put all those aside. We're going to wait until the end
16 of the case and then you can argue about them," we are put in a
17 position where -- Mr. Bernick stood here in -- it must have been
18 the July pretrial conference, the third one when we argued
19 about -- may have even been the April pretrial conference --
20 when we argued about whether RICO subpoenas were needed for
21 certain witnesses -- and said to his view he could not see a
22 reason that we would ever want to call a witness to testify live
23 where the witness had been deposed in this case.

24 If you adopt their proposal, if you were to take
25 seriously what they have proposed here -- and the first we heard

1 about the parameters of it was a call that I got from
2 Mr. Redgrave at about 10:15 or 10:30 last night -- that changes
3 completely the assessment of whether we need certain witnesses
4 here live, whether we need certain witnesses who are going to
5 line by line go through various documents.

6 In this type of case, given the breadth of the case,
7 given the discovery that's taken place, given the extensive
8 pretrial submissions of findings of fact and of conclusions of
9 law that the court required and that the parties presented on
10 both sides listing by exhibit number the exhibits that each side
11 relied on to support its findings; to suggest that there be an
12 artificial limitation on what can come in that is inconsistent
13 with what is needed under the Federal Rules and under the case
14 law in this circuit for admissibility of evidence will severely
15 prejudice the United States' presentation of its case in the way
16 that we have planned to present it.

17 What you didn't hear, and what I hope you wouldn't hear
18 from defendants, is that they can't handle objections and
19 counter-designations to eight transcripts a week.

20 We received from them 48 hours after filing
21 designations from 11 transcripts the first week that we filed
22 prior designations more than 2,600 objections, many of them line
23 by line.

24 I am happy to say that given the court's guidance,
25 words following the review of the David Kessler objections we

1 have seen far fewer objections from them since the objections to
2 the prior designations that first week.

3 But with the limit of eight per week, quite frankly, we
4 felt that you had addressed the issue that we faced with the
5 designations last week. And so I think that that is something
6 that has been taken care of.

7 You are not going to hear from us that we can't handle
8 counter-designations and objections to designations from
9 defendants from eight transcripts per week during their case in
10 chief.

11 You have not heard and you will not hear from us that
12 we cannot in 24 hours turn around our objections to the
13 counter-designations and our responses to their objections under
14 the procedures in Order 471, because Order 471 we have all known
15 was going to govern the trial of this case and allow us to
16 actually get through this case with 265 hours of time per side,
17 roughly 12 weeks for us, 12 weeks for them.

18 THE COURT: Mr. Brody, there are a couple of things
19 that I don't think you're taking into account or that there have
20 been misinterpretations about.

21 At one point either you or Ms. Eubanks made it clear
22 that from your perspective you were under the impression that
23 all rulings were going to be made on prior testimony as they
24 were submitted and as those pieces of testimony were in a
25 position to be ruled on and that -- these are certainly not the

1 words you used -- but that, therefore, it was essential that the
2 court keep up with your submission of prior testimony so that
3 you could make your interim summations and you would know
4 exactly where you stood on your interim summations.

5 I don't really understand where the government got that
6 idea. To the extent it was discussed, it was always discussed
7 that we would all try and get through the in-court trial days as
8 expeditiously and efficiently as we could. That, of course, it
9 makes sense for me to try and keep up with the prior witnesses
10 you designate, although that becomes more and more difficult as
11 time goes on, but that by the same token the court was going to
12 get to those submissions when I could and that might well be
13 after the trial.

14 Certainly as to the joint defendants, I'm not going to
15 get to theirs until way, way down the road. So that a certain
16 underlying assumption that the government has referred to I
17 think is not exactly on track.

18 A second great concern I have is what I started out
19 raising today. I was very distressed by the one piece of prior
20 testimony I looked at.

21 I thought that -- I never know whether to be totally
22 candid on the record in open court, but I will be. I thought
23 that the time I spent on that transcript was virtually a waste
24 of my time, and that's pretty strong language. And that wasn't
25 one of the two or three volume designations.

1 I don't think that people are keeping in mind that the
2 purpose of designation of prior testimony is to give me facts
3 and information that I am not getting from any live witnesses.
4 That it is to fill in the holes in your testimony or to give me
5 facts and evidence that can be garnered much more efficiently
6 and much more quickly by reading the majority of a deposition
7 that really lays out basic facts. And then, of course, the
8 other side counter-designates what they think is relevant to
9 those basic facts.

10 But quite frankly, to hear Dr. Little -- I shouldn't
11 say to hear -- to read Dr. Little talking for the third or
12 fourth time about his little lab in Maine and how he had been
13 president of the University of Michigan and on and on and on
14 designated two and three times did not make me happy.

15 Certain rules and certain procedures may look like they
16 will work when they are written on paper and they may sound
17 logical and efficient, but if they are not carried out in a
18 spirit of reasonableness and effort to get the job done, any set
19 of procedures is going to fall apart, and that's what I'm
20 fearful is happening here.

21 I could take what would be quote/unquote the easy way
22 out. I could let everything under the sun into the record and
23 let the poor Court of Appeals deal with that record in a year or
24 two, but I don't think that's a responsible thing for me to do
25 either. I'm not going to do that.

1 And I'm certainly not going to say that I've read
2 designations of prior transcripts if I haven't read them. As
3 you well know, my effort is to keep up with everyone and
4 certainly to read everything that gets submitted into this
5 record.

6 For a long time now it has been a concern as to whether
7 the government isn't overegging the beer and whether you're not
8 putting in more than you need, whether you're not just trying --
9 I don't mean just -- but whether out of overcaution you're not
10 putting in materials that are simply not necessary.

11 The only way -- and I spent a lot of time thinking
12 about this -- that I ultimately can curb it is by, I hate to use
13 the word arbitrary, but specific limitations, whether on numbers
14 of transcripts -- although to tell the truth, I don't think that
15 makes a lot of sense because you have could have three lines in
16 one transcripts and 500 lines in another transcript, but that's
17 one way to do it.

18 Another way to do it is certainly to limit exhibits,
19 and I don't know how much of a limitation this would be, but to
20 limit exhibits only to exhibits that are discussed by a witness,
21 whether in prior or live testimony, or specifically referred to
22 in the proposed findings of fact and conclusions of law.

23 I'm sure there are other arbitrary indicia that I can
24 come up with when I give more thought to it. But I am very
25 close to doing that at this point. We cannot let the record get

1 so bloated that it is impossible for either any one trial judge
2 or any three appellate judges to get through.

3 MR. BRODY: Well, Your Honor, that is certainly
4 something that we can focus on. We can focus on keeping us from
5 getting to that point.

6 And quite frankly, one thing that I did do -- and this
7 is a point of yours that I wanted to respond to. The first week
8 when we submitted our designations I do know that -- and I think
9 defendants probably did the same thing when they did their
10 counter-designations and filed them -- is submitted the entirety
11 of those transcripts.

12 And after that week, for two reasons, I asked our
13 support staff not to do that. One, of course for Your Honor's
14 convenience, because I actually did have a moment where I
15 just -- I thought of you and Ms. Soneji with those transcripts
16 going through page after blank page trying to find where the
17 next highlighted portion came in. So we did not do that with
18 the transcripts that we filed last week on Monday.

19 The other reason, of course, is that we have specific
20 confidentiality designations for this case that have been made;
21 not with respect to any of the transcripts that were filed in
22 the first week, but with some that were filed after that.

23 And while there are specific designations that have
24 been made pursuant to Order Number 638 to the portions that we
25 indicated we might designate from, obviously the other

1 designations that were made are something that defendants have
2 not reviewed and withdrawn, and we didn't want to have a
3 situation where we would be filing pages that, you know, page
4 after page after page, that might contain their confidential
5 information. We also didn't want to have to file everything
6 under seal.

7 So we did make that adjustment after the first week
8 principally to save Your Honor from having to go through blank
9 pages. And I don't know if defendants made any change to -- you
10 didn't submit last week, so -- because we spoke about this issue
11 on Tuesday, so it would not be an issue for you in the second
12 week, either.

13 But we can certainly take a look at the universe that
14 is out there for potential designations and make a reassessment
15 to be sure everything is focused, but at the same time I do
16 think that we have to keep in mind the fact that I started with,
17 which is it's nine defendants, it's 50 years, it's a pervasive
18 fraud that we allege impacted every aspect of these companies
19 businesses, and these are enormous companies selling trillions
20 and trillions of cigarettes every year to an incredible number
21 of consumers with, as you know, consequences that we allege that
22 require an enormous amount of testimony and evidentiary
23 foundation.

24 THE COURT: Well, let me hear from Mr. Bernick and then
25 I'll tell you where we all are.

1 MR. BERNICK: I'm trying to continue to try to get to a
2 point where we can try to figure out something that will help
3 solve the problem, and I know it's difficult.

4 First to begin with what Mr. Brody finished, the way he
5 finished his comments. Yeah, it's a very broad case, but that
6 same broad case has been tried many times.

7 And I think that if we -- when you try the case in
8 front of a jury, you have to -- everybody necessarily focuses on
9 trying to avoid putting the jury to sleep. They want to make
10 sure that they have something that's interesting and that will
11 genuinely be an incremental contribution to what they
12 understand.

13 My rough cut experience tells me that in the cases that
14 I've tried through to conclusion, and there are three of them
15 that are equal in scope to the same 50 years, same conspiracies
16 being alleged, I'd say maybe 10 percent of the total trial time
17 is devoted to transcripts or videotapes of depositions. No more
18 than that.

19 Why should the standard be all that different here?
20 Why isn't the benchmark of what the jury needs as a trier of
21 fact really, really any different? The question is what really
22 counts at the end of the day on the issues that have to be
23 decided.

24 Maybe it's a little bit more. Maybe it's 15 percent.
25 But it's the vast, vast minority, and as Your Honor indicates,

1 it's only what can't be done through live witnesses that you
2 want to take and use prior testimony for.

3 So, again, with respect to the materials that are being
4 submitted, we will do the work. Our back rooms are, as
5 Mr. Brody indicates, very capable of turning out enormous
6 volumes of work. In a sense that's not the issue. The issue is
7 Your Honor's ability to preside over a proceeding where there
8 really is confrontation with respect to those facts.

9 Maybe a way of dealing with the volume issue, if not
10 numerically, is at the close of their live witness testimony
11 Your Honor puts the question to the government, "What do I need,
12 need, need to read now so that I can be ready for the defense
13 case? What is so important in the prior testimony that it has
14 to be brought to my attention now before the defense case
15 starts?"

16 And that would also have the benefit of telling us what
17 we have to respond to in that huge volume of material as part of
18 our case. If we tried to respond to every little bit of
19 testimony in this huge volume of prior designations we would not
20 be able to do it. It would take forever. But if our live case,
21 if our case before Your Honor is to be responsive to their
22 evidence -- that's the second sticking point.

23 Your Honor's understanding and then our ability to make
24 this a meaningful adversarial proceeding we need to know what
25 they think is really of the utmost importance in those prior

1 designations. So maybe that's another way to kind of skin the
2 same cat.

3 With respect to the number of exhibits, I just did a
4 little arithmetic calculation. Mr. Brody represented 1700 was
5 about a third of what would ultimately be submitted in their
6 prior testimony by way of exhibits. That means 17 times three
7 is 52, so that's 5,200 exhibits right there. That doesn't even
8 count what comes in as part of the live testimony. Of course,
9 we've seen designations of 150, 200 documents per live witness.
10 So we are really talking about something over 10,000 exhibits.
11 That's never ever, ever happened before, not even close.

12 Their own proposed findings only have reference to
13 approximately 3,000, maybe something a little bit more than
14 that, exhibits. That might be a good benchmark, that
15 presumptively the number -- the number of exhibits in the
16 proposed findings is a guideline for where the parties are going
17 to have to come in and make a demonstration of some real showing
18 of need before they can exceed that aggregate amount. But that
19 might be a decent place to work.

20 I certainly again know that there is -- I mean the only
21 case where we even got above 2,000 was Minnesota. And in
22 Minnesota we did not have the opportunity to respond to all the
23 documents. They came in on so-called document days.

24 These are functionally exactly the same thing in the
25 sense that the opportunity to confront a given document is lost.

1 That's the only case where that's ever been done, and I think
2 that the total number of exhibits there was about two or 3,000
3 exhibits. So we are already way, way beyond that.

4 And I understand, I'm not -- no part of our perspective
5 at this point, you know, casts any stones. They are doing what
6 they doing. They feel it's appropriate. That's fine. But at
7 the end of the day, there is not going to be the kind of
8 interchange that you saw this morning unless we get a much more
9 finite group of documents.

10 THE COURT: All right, Mr. Brody, finally, please.

11 MR. BRODY: If I may, Your Honor, I have one potential
12 solution in terms of a means of focusing on certain parts. And
13 obviously, as I've said, we think that every exhibit that we've
14 submitted has been submitted for a reason, that it's relevant
15 and that it's important.

16 But in terms of focusing, we had envisioned a
17 procedure -- and I have to go back to our trial outline and see
18 how many interim summations we had initially planned on. I
19 think it's five or six.

20 With a 12-week presentation of evidence, that works out
21 to an interim summation just about every two weeks. What we
22 could do -- and I understand that you will not have had the time
23 to review all of the designations or rule on all of the
24 objections to the prior designations or the associated
25 exhibits -- but we could go ahead with those interim summations.

1 And where we're going to be referring to something in
2 the interim summation, where there's a pending objection, we can
3 provide a list at the outset at the start of the interim
4 summation that says there's an objection pending to this exhibit
5 or there's an objection pending to this part of the testimony,
6 here is what the objection is. But that will focus on the
7 testimony of certain witnesses, on certain testimony of those
8 witnesses who had been submitted by prior designations and also
9 on certain of the exhibits that are submitted with or referred
10 to in that prior testimony.

11 And if we proceed with those as planned with the same
12 number that we had initially contemplated, I think that would be
13 a way to focus on the record.

14 When I raised the issue last week you indicated that
15 you felt that it was too early and, you know, given what's
16 happened, that may certainly be true.

17 At the same time, we do have submissions of prior
18 testimony from 51 witnesses that have been provided and
19 defendants have responded to 21 of those now.

20 So there's testimony of 21 witnesses where we had
21 designations, counter-designations, objections, responses to
22 objections, as well as the testimony of three fact witnesses who
23 have testified live and two expert witnesses who have testified
24 live.

25 And so we are beginning to build a record that we

1 believe is sufficient enough to warrant an interim summation,
2 particularly an interim summation on the enterprise aspect of
3 the United States' allegations.

4 So if we could go forward this that manner noting
5 before we start each interim summation, if there are outstanding
6 objections, that would certainly be a way to focus as we go
7 along on specific transcripts, specific witnesses, specific
8 testimony, and specific exhibits that we want to highlight that
9 might not otherwise come to your attention until a later point
10 in time, and that -- well, I think that the significance of the
11 testimony and the exhibits should be clear to the defendants
12 based on the proposed findings of fact, but you know at the same
13 time, it would give them an idea as to what we want to bring the
14 court's attention to.

15 THE COURT: Your trial outline suggests six summations
16 which it seems to me to be to be probably more than is
17 necessary.

18 Your first one, if I read this correctly, is proposed
19 for a point after you have completed your testimony on -- or
20 your evidence on formation of scientific consensus, adverse
21 health effects, and the establishment of the RICO enterprise.
22 When do you contemplate having that portion of your testimony
23 done?

24 MR. BRODY: I think that with the submission of the
25 testimony of the 51 prior transcripts that we've submitted thus

1 far, that we should probably be ready for that interim summation
2 after the testimony of Mr. Orlowsky. We could do it earlier
3 than that. We could do it later than that, but approximately
4 after Mr. Orlowsky's testimony.

5 THE COURT: Do you have any sense at this point what
6 amount of time you are even requesting for a summation?

7 MR. BRODY: I think that we could probably do it in
8 90 minutes, Your Honor.

9 THE COURT: Well, I'll be thinking about all this.
10 Mr. Bernick.

11 MR. BERNICK: There are two issues.

12 One is the interim summations which I think were
13 originally proposed for the benefit of the court to synthesize
14 the evidence that had come in. I think that that remains a
15 sound idea. Frankly, 90 minutes sounds like a long time. If we
16 get equal time to respond, that's 3 hours.

17 You know, whatever the court wants would find to be
18 appropriate, we are more than happy to respond, but that really
19 is a separate issue from what comes into evidence such that
20 there is a summation.

21 And to have the summations be in a sense the tail of
22 understanding is important, as it might be, that drives the dog
23 of what the record is just doesn't make an awful lot of sense to
24 us. Particularly when you put the question that now comes back
25 is: Well, where we are at now is we've got a certain amount of

1 live testimony and 51 witnesses. That's the problem, is what do
2 we do with 51 witnesses' prior testimony?

3 Do we go pouring through all of that and all of the
4 counter-designations and does Your Honor do that for purposes of
5 then being able to understand the summation? That just doesn't
6 make any sense at all.

7 If by the time they give that summation they can
8 identify, not simply the objections that are key, but the key
9 pieces of testimony and the key documents that they would seek
10 to use in a summation, then that's progress. But that then has
11 to be done in an advance of the summations so that Your Honor
12 can then rule and that we then know what it is that we have to
13 respond to.

14 If Your Honor wants to use the fact that there's going
15 to be a summation as an opportunity to require that the
16 government focus with respect to all these documents that they
17 are proffering and all the testimony that they are proffering,
18 what do they really need, then it might be a useful way of
19 sorting out the wheat from the chaff, and then we will know what
20 is in there that really counts and so will Your Honor.

21 If, however, it's just now 51 or it's now 26 and they
22 divide it by two or something like that, that's not -- that's
23 really not going to be useful. What's only going to be useful
24 is they really pick out the kind of stuff that they would take
25 up court time with, then that might be a useful exercise and a

1 way to trim this thing down.

2 I'm very leery, though, I guess that's only a couple of
3 witnesses from where we are. Maybe we can just live with that.
4 On a going forward basis we don't want to be in the same
5 position again where we've got this huge repository of
6 designations and then these enormous exhibit designations that
7 happen with respect to each witness where they testify about
8 three documents and there are then another 50 that they don't
9 testify about. Seems to us that's a problem that really has to
10 be resolved at some point on a going forward basis. We can live
11 with it now for until Orlowsky, but at a certain point we really
12 think that has to be resolved.

13 THE COURT: Mr. Redgrave.

14 MR. REDGRAVE: Thank you, Your Honor. If I can add one
15 point to that.

16 Of course, as I started out talking about the volume on
17 a weekly basis, what we're doing we wouldn't be through those 51
18 by the time Mr. Orlowsky is on the stand on Tuesday anyway. So
19 from a practical stand it's not something I think would get
20 done.

21 But maybe in a more fundamental level perhaps the
22 government should be using that standard that was just
23 articulated by Mr. Brody as really focusing. Maybe that's where
24 they should be on those designations that haven't been given to
25 us yet and really narrow that down, and that's where we got back

1 to where we were on the limits.

2 I understand there's a lot of issues here before Your
3 Honor. I don't intend to take up any more time. Quite frankly,
4 I think Your Honor understands what's fully behind you in that
5 jury room and everything that's been submitted. I think you
6 understand that what should drive this is making it work.

7 I don't think that what we've suggested is a radical
8 change, but if it makes the system better, makes a better record
9 for Your Honor to rule and anyone who wants to look at it
10 10 years, a hundred years, whenever in the future, I think we
11 should make the adaptations that are necessary to make that
12 happen.

13 Thank you.

14 THE COURT: All right, everyone, I am not exactly sure
15 of my timing in terms of if and when I'll be making changes. I
16 know we have a little bit more time this week. We do have a
17 3-day holiday coming up this weekend.

18 I would anticipate that if any major changes are going
19 to be made, that they will be out by next Tuesday, certainly.

20 Mr. Brody. Yes.

21 MR. BRODY: Your Honor, I know that Ms. Eubanks had
22 contemplated a three-page submission to Your Honor with your
23 permission on this issue, which we could certainly submit by
24 midnight tonight.

25 THE COURT: All right. Well, you certainly ought to

1 get it in as soon as possible.

2 MR. BRODY: Thank you.

3 THE COURT: Thank you. We are in recess.

4 (Proceedings concluded at 2:33 p.m.)

5 INDEX

6 WITNESS: PAGE:

7 LORRAINE POLLICE	
CROSS-EXAMINATION	1545
8 REDIRECT EXAMINATION	1552

9 *****

10 Defendant's Exhibit No. JD-091194 and	1549
11 JD-090055	
12 Government's Exhibit No. U.S. Exhibit 26434	1554

13 *****

14 CERTIFICATE

15 I, EDWARD N. HAWKINS, Official Court Reporter, certify
16 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

17 Edward N. Hawkins, RMR

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