UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GSK)
	:	October 28, 2004
Plaintiff,	:	
	:	9:29 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	

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VOLUME 21
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE COURT: Good morning everybody. This is United States of America versus Philip Morris. CA 99-2496.

Mr. Rupp you're still under oath today.

Mr. Webb.

MR. WEBB: There is -- Mr. Cummings is here on behalf of Dr. Schwartz. Can we address that issue right now because -- let me just explain my understanding.

Dr. Schwartz who -- as you know, we've kind of been running him around a bit.

THE COURT: We have been.

MR. WEBB: And so I've talked to Mr. Cummings, and my recommendation is the following.

For a lot of scheduling reasons, Dr. Schwartz has been rescheduling things back and forth. He's prepared now to reschedule things again and be here first thing on Monday morning to testify as opposed to trying to hang around today.

The truth is, I think we're going to eat up almost the entire today, it's just my guess, with Mr. Rupp. You've got an appointment at five to 4:00. If we finish 15 minutes early we will take a break. I mean, instead of making Dr. Schwartz be on call, which is not convenient for him, but he is rescheduling certain appointments to be here first thing on Monday morning at a time certain and that's my --

THE COURT: Let me find out if that's any problem for

the government.

MR. BRODY: No problem at all, Your Honor.

THE COURT: Well, that's good. And Mr. Cummings, you can let him know that. Tell him, you know, we are sorry. We've had two witnesses this week from out of the country.

MR. CUMMINGS: He was in court.

THE COURT: When we had one of the many long discussions about this.

MR. CUMMINGS: And he's been, you know, moving things around and the tragedy is he had moved appointments he had today to Monday to open today up. So when Ms. Greif from the government was kind enough to call me yesterday afternoon, I alerted him and he was able to juggle some things.

He's ready to be here. He would prefer to be here first thing Monday morning as opposed being on call. So, if that works for everybody, I will inform him in and --

THE COURT: It will work.

MR. CUMMINGS: We will be down here 9:30 Monday morning.

THE COURT: All right. Thank you.

MR. CUMMINGS: Thank you, Your Honor.

THE COURT: All right, Mr. Webb.

JOHN P. RUPP, Government's witness, RESUMES

CROSS-EXAMINATION (Cont'd.)

BY MR. WEBB:

Q. Mr. Rupp, I'm going to try to pick up right where I left off with you yesterday and just to kind of orient all of us.

I was going to take -- I was starting to take you through, hopefully in some kind of chronological fashion, the series of events that you've touched upon in your direct examination or talked about relating to the ETS issue which you told us occurred roughly between 1981 and 1995.

So, where we left off yesterday is that we were talking about the ETS Advisory Group.

A. Right.

Q. Which I think you said existed in the mid-1980s for about 18 months to 2 years, if -- is that -- do I have that right?

A. I believe that's correct, yes.

Q. So, I was just getting ready to take you through and show the court the nature of some of the research projects so we have a record of what that group actually did do in the way of funding research. And I'm going to start with an exhibit that the government showed you yesterday which -- I can get another copy to you -- it's U.S. Exhibit 20339?

A. Yes, I have it.

Q. You have it right there. Great.

If I could put that up on the screen, U.S. -- and these are -- I think you identified yesterday with Ms. Eubanks, these are notes of a meeting that took place. I think it's February 25, 1986. Is that correct?

A. Yes.
Q. But if you go through the document -- and you will see that -- basically, there's a report being made on what's kind of pending in the way of research projects. At least that's how I interpret the document. Is that basically correct?
A. Yes. I don't know who wrote the document, but I do recognize all of the projects that are described in the document.
Q. I'm going to use this as my kind of -- my format to go through with you so we can cover the projects since I have it in front of me.

I'm going to go to the second page of the document. I'll put that up on the screen. And this talks about a project known as the Personal Nicotine Monitor, Oak Ridge National Laboratory. You began to touch upon this yesterday in your testimony, but I want to make sure I have it in the record.

Let's start with, just in simple terms and briefly, describe the nature of that project for the court.
A. Okay. The devices that had been used before this time to measure exposure to ETS were area monitors. So you have stationary equipment in a room. So it misses any measurement of activity within the room or air flow and that sort of thing.

The effort here was to develop a monitor that could be worn near the breathing zone of a person. On their lapel, for example, or the collar of their dress so that it could actually

get exposure close to the breathing zone. And what Oak Ridge was doing here was trying to incorporate material that would permit them to assess exposure to nicotine in air but also to the particle phase of ETS, which was somewhat more complicated even than nicotine.

Q. Now, as far as the researchers that were doing this project, it's the Oak Ridge National Laboratory. Can you just tell us briefly what that organization was and whether you viewed it as a qualified organization to carry out this type of research?

A. Well, it certainly was.

Oak Ridge is part of the U.S. Government. It's managed by -- I think at the time it may have been managed by Martin Marietta under contract with the U.S. Government.

But these are U.S. Government employees, I believe, and they are the equivalent -- there are a series of national laboratories spread around the United States. Lawrence Livermore is another. And I believed, and I think the other members of the advisory committee believed, that these people were uniquely qualified to do this work.

Q. Now, tell the court, again in summary form, what were the results of this particular research project that was being funded by this advisory group?

A. They were able to develop a monitor that could be worn so, in that respect they really made a quantum leap forward in the technology that was available to measure exposure to

environmental tobacco smoke.

They also, almost equally significantly, were able to develop a procedure that would permit them to capture 3-ethylpyridine and solanosol, which are two -- were thought then to be two potential markers for the particle phase of ETS. Nicotine is found in the vapor phase of ETS.

So, you had at least a chance with this personal monitor of being able to measure exposure to ETS by individuals in ways that had never been possible before.

Q. If we take a big picture look, step back for a minute and look at what has to be done to advance the ability to understand ETS science, is developing this monitor an important step forward?

A. Absolutely. It's critical, because if you -- as I explained briefly yesterday. The area monitoring equipment, in addition to being stationary, which was one large drawback, was also very intrusive, and it tended to change people's behavior in the space where measurements were being taken. You didn't want to do that.

Second, you needed equipment that could measure both -- capture both a particle phase and a gas phase component of ETS so that you had some hope of having a reasonably comprehensive view of what was going on. And so this was critical. And it's a technique now that has been used widely to measure all sorts of exposures to chemicals in the air.

Q. Let's go to the next project and I go to the next page. This is a project that, at least at the top of the page, it says, "Particulate Sampling. Dr. Salvatore Dinardi, University of Massachusetts."

Again, in very brief fashion, summarize for the court the nature of what this project was.

A. This was to be an area monitoring project. It was one of the first projects that was undertaken and, frankly, no one involved in this project was clothed in glory. It was the only project that I know of during this period or any other relating to ETS that did not result in publishable results.

What Dr. Dinardi did was to equip a van with area monitoring equipment, which gives you a sense of the size of this equipment, and then he would bring these pieces of equipment into a room and he would do area monitoring.

There were several problems with the project that really defeated it, I'm afraid. One is that there was no sampling frame agreed or developed by Dr. Dinardi at the outset. So he went around New England collecting samples, but it was so ad hoc that it resulted in a massive amount of data that was basically uninterpretable.

And it was a fairly good object lesson in why you needed a professional scientific staff to look at proposals to evaluate the proposals and then to monitor researches being conducted or you could waste great sums of money. This was not

an inexpensive project.
Q. And I guess in these early days of ETS research, there are starts and stops and failures and successes. Is that fair to say?
A. There are. I think, frankly, we should have known better than to let him go off without a clear sampling plan. That was just a failure on the part of the group. I will concede that failure. He should have known better, too. But the result was that it was an unfortunate waste of money.

By the time the project was done, though, the personal samplers were available so that no other project of this sort, to my knowledge, was ever undertaken.
Q. And I take it from your last answer, is this project, was it one of the examples that caused your group, the advisory group, to realize there needs to be -- the tobacco industry needs a more professional organization to structure and oversee these research projects?

MS. EUBANKS: Objection, Your Honor. Leading his own witness.

THE COURT: It's cross-examination. He's allowed to do it. So, overruled. Go ahead.
A. Counsel, I think this is the birth of CIAR in this project. We had $600,000, basically, that went down the drain, and it wasn't because Dr. Dinardi was not a good scientist, Dr. Dinardi is a good scientist, but these projects needed a structure and

they needed a professional staff to assist.

To be fair to everyone involved, we really were in the early days of evaluating indoor air. As a 1982 Surgeon General's report said, "These were the early days," and so mistakes were perhaps inevitable. I regret this one.

But this convinced I think everyone who had anything to do with it, that an organization like CIAR was of absolute critical importance. If the industry was going to be funding research, it needed to do it in a first-class-professional way.

Q. Let me direct your attention to next project that the ETS Advisory Group was overseeing and funded. On the next page, which at the top says, "ACVA, Office and Home Ventilation Evaluation," and then I see also a heading, "Pilot Study, Home Evaluation Survey."

Can you first of all, again in brief terms, explain to the court the essence of what that project was as you recall it now?

A. Well, I remember this one less well, but --

Q. Just tell us what you can recall. You don't have to go beyond that.

A. The investigator here, as you can tell from the page, is ACVA, and it was an effort to look at whether the ACVA experience in office buildings would be mirrored in residences.

And Florida was taken as the place for the study because it was thought that the seasonal patterns there are

reasonably constant. You could factor out seasonality, largely.

And the question was whether the materials that one would find in the air of a home would be different, either in degree or in kind, than the materials you would find in the air of an office space of the sort that ACVA typically focused on for its private clients.

Q. Now, just again briefly. What were the results of this project, if you recall?

A. I don't really recall this one very well.

Q. Now -- and the organization ACVA, that's Mr. Robertson's company; is that correct?

A. That's correct.

Q. And I'm going to come back and ask you some questions about that later as far as your contact and involvement with HBI, but at least as far as this project.

As this was being funded by the advisory group, did you and the advisory group believe that Mr. Robertson was qualified to carry out this type of project?

A. Yes, he was -- there were one of the leading companies -- they were a small company, but one of the leading companies in the field.

For example, they had the contract to do all of Oliver Carr's buildings in Washington, DC, which was at that time one of the premier developers in the District.

They had done many federal office buildings, had been

responsible for air quality monitoring in many federal office buildings including, I think, at NIH. They had been called into the Environmental Protection Agency when problems crept up there.

So, yes, we believe they were fully qualified to do this.

Q. Let me go to the next project that's in this document and it's called the portable air sampler. And again briefly describe, if you can recall -- I know this has been many years ago -- look at the document if it refreshes your memory. And can you remember generally what this project was?

A. Yes. This was going to be area sampling, again using a briefcase sampler.

So, what Reynolds had done is miniaturize much of the equipment that had been utilized by Dr. Dinardi and installed it in a briefcase. So they had eliminated much of the intrusiveness of the equipment. What they had not achieved is the transition from an area sampler to a personal sampler, so that was a limitation.

But the idea here was we were looking at a proceeding that was about to get underway at the National Academy of Sciences National Research Council on airline cabin air quality. And there were very little data available about what actually was happening in various types of aircraft, and at this time smoking was permitted in aircraft in separate sections.

So the idea was to put these small briefcase samplers at various locations in commercial aircraft, collect the data, analyze it, and then have it available to the National Academy of Sciences when they looked at airliner cabin air quality.

Q. What was with ultimate result of this project?

A. The project was completed and it was presented, in due course, to the committee.

Q. Now, I want to go to the next page, which says at the top, "epidemiology," and then there's this -- the first one has a heading Dr. E.L. -- is that Hustine?

A. Husting.

Q. I apologize. University of South Florida, Tampa. Again generally describe what this project was. What was the nature of the project?

A. There were several elements here, but one of the most difficult aspects of epidemiology when you're looking at potential low risk exposures and long latency periods for the disease, is when you look back you have to deal with all sorts of potential confounding variables. What your diet was during a 30-year period, what other the things you were exposed to, what other lifestyle characteristics you had.

And you run into a particular problem if the confounding is differential. That is, if the confounders are associated with the thing you're studying, in this case being married to a smoker.

So this project was designed to look at that issue in a rather unrelated context and to try to come up with some insights into how epidemiologists could go about controlling for confounding factors that were potentially apportioning differentially between cases and controls.

Q. What was the ultimate result of this project?

A. It resulted in a published paper, and I think quite a valuable one.

Q. And as far as the researchers carrying out the proper project, did you have every reason to believe they were very well qualified to carry out the project?

A. They were fully qualified epidemiologists at the University of Florida.

Q. Now, I notice that the second item on that page is the Hirayama study. Do you see that?

A. Yes, I do.

Q. And it says, "The objective there was to obtain access to the raw data used by Hirayama to indict ETS exposure as a potential cause of lung cancer in nonsmokers so it can be examined and reviewed by a group of objective, independent scientists."

You mentioned yesterday, I think in passing when Ms. Eubanks was asking you some questions, that there was an issue involving the Hirayama -- excuse me -- there was an issue involving Dr. Hirayama's Japanese Spousal Study about the

inability of researchers to access his data; is that correct?
A. That's correct.
Q. Would you just explain to the court your recollection of that issue as it existed back in this time period?
A. Well, it's very common for epidemiologists to share their raw data with other epidemiologists. To take an example.

The American Cancer Society's Million Persons Study has resulted in ninety or a hundred publishable papers by a variety of authors who have all looked at the same data set and done analyses. And access to raw data is one way one can determine whether the data are being interpreted in an appropriate manner.

There were other obvious problems with the way -- there were obvious problems with the way the, in the view of many scientists, in the way that Hirayama had presented his data and lots of questions about those data. And it was thought that the only way those questions could be resolved satisfactorily is if other scientists were permitted to look at the data and see what they could make of it.

It might simply have validated Dr. Hirayama's results, that's quite possible. It might have strengthened them. It might have weakened them. There was no way to tell without access to the raw data.

The failure to standardize by age of the nonsmoking wife appeared to many people to be the single most perplexing aspect of the presentation of the data.

Q. Now, this document is dated in 19 -- February 1986, which is Dr. Hirayama's study was 1981. So do I take it, at least during that 5-year period, no independent researchers had ever been able to get access to that data, at least by this time, as far as you knew?

A. I know there had been requests and he had refused, always, to permit access to the data.

Q. Did that raise some suspicions in the scientific community because of his refusal as an epidemiologist to release his data?

A. It certainly did.

Q. Now this particular project, did it succeed in getting the data?

A. No.

Q. Now, yesterday Ms. Eubanks asked you a series of questions about this and I'll remind you what she asked you on Hirayama.

She asked you whether or not -- she says, "Now, in fact, you are aware of the fact that Dr. Hirayama did provide access to his data to Dr. Adelkoffer. Are you aware of that fact?"

And your answer, "No, I'm not."

"Question: You never became aware of that fact at any point in time?"

"Answer: Correct. I'm hearing that for the first time on this, with your questio.n, I don't know it to be a fact."

She said, "Who is --"

"Answer: I've never heard of it before."

And she says, "Okay. Well, we will get to that a little bit later and perhaps I can --" and then that's where we ended. And I don't believe they came back to it, so I'm just going to make sure I can clarify.

First of all, do you know the name Dr. Adelhoffer?

A. Yes, it's Adelkoffer.

Q. I'm sorry. I apologize.

A. No. I don't mean to be prissy about this, but he was a scientist at an organization in Germany, a tobacco-affiliated organization in Germany called the VDC for short. V-D-C. And I don't know whether Dr. Adelkoffer was an epidemiologist or a chemist, but neither had I heard, as I testified yesterday, that Dr. Adelkoffer had obtained Dr. Hirayama's data. That really quite surprises me. If it's true, it surprises me.

Q. At least as far as what you knew back at the time, the data had not been released?

A. Correct, and Dr. Hirayama has since deceased.

Q. Now, let me go to the next page and try to complete this --

THE COURT: Let me ask one final question on that subject.

Would it be safe to say that since you -- or would it be accurate to say that since you didn't know the data was released, if it was, that you're not aware whether any articles of any kind, peer reviewed or not, have been written analyzing

that data?

THE WITNESS: No, Your Honor, I don't.

Sorry. No, Your Honor, I don't.

BY MR. WEBB:

Q. Now, I'm going to go to the last page of this document as far as research projects that were -- that the ETS Advisory Committee was involved with, and I'm going to just -- under miscellaneous, there's an entry there called the Tulane University Allergy Project. You started to explain that yesterday and then I don't think got through your explanation completely. I just want to make sure we have a record of this.

Explain to the court what that project was, the general nature of that project, if you would, sir.

A. Okay. That was an effort to determine whether there was a group of asthmatics, either atopic or declared smoke-sensitive asthmatics, would respond adversely -- have an asthmatic attack, basically -- if exposed to environmental tobacco smoke and to try to understand how that might occur and how often it might occur.

And Dr. Salvagio, I think with his group -- it's a large research group at Tulane that specializes in asthma -- had received government funding for early work in this area. And he came to the ETS group for supplemental funding to permit him to do chamber work with a small group of people who were declared smoke sensitive asthmatics.

And what he did was put them in a stainless steel chamber, sit them on a chair, and then pump sidestream smoke into the chamber. Now, I don't know that you could even get approval for a project of this sort today.

But -- and then he measured what reaction they had to the smoke, and what he found was that at those excessive sidestream smoke levels he could get a reaction, but in a, what seemed to me, a surprisingly small percentage.

So the theory, then, that came from that research was that there may be a group of smoke sensitive asthmatics who might react adversely to ETS and that the -- to determine whether that was so, of course, one would have to look at real world exposure levels rather than a chamber at elevated exposure levels.

The other problem with a chamber, of course, is that it induces stress. If you're asked to walk into a stainless steel chamber -- it's a little bit like sitting up here -- you become nervous and that can bring on an asthmatic attack. So, disentangling that and the environmental element was going to be a real challenge. He got part of the way there, but only part of the way.

Q. Did he publish an article, or what happened?

A. He published a series of articles from these experiments and he made presentations at a number of conferences of his results.

Q. Now, your group funded this project?

A. Yes, we funded the project.
Q. It sounds to me like the results were not overly favorable from your standpoint.
A. No, they weren't expected to be favorable because we knew that he was putting people in stainless steel chambers, which was a potential confounding factor.

And second, we knew he was going to be using unreal world, unrealistically high levels of sidestream smoke. But our view was unless -- if you couldn't get a reaction at that level, you couldn't get a reaction at a lower level.

So, it is quite common in clinical work to go to extremes when you start and then ratchet back, and that gives you a greater understanding of the phenomenon that you're looking at. So this was a perfectly acceptable way of starting. It was only a start. But from the industry's standpoint, certainly it wasn't favorable.
Q. Now, also on that page is another topic that counsel asked you quite a bit of questions about yesterday, which is called the nicotine metabolism slash body fluid measurements.

Do you see that?
A. Yes, I do.
Q. And you got into this yesterday, but I don't know that you actually completed all your answers. I want to start with -- this document is dated in February 25, 1986, and so does the fact that this -- explain to the court what is it that the

advisory group was doing at this point in time in early 1986 -- let me strike that question.

What is a nicotine metabolism body fluid measurement? What is it?

A. Well, you find nicotine in the body. First nicotine is a potential marker for ETS because it is -- it is largely unique to tobacco. It's not completely unique to tobacco. It's also found in any member of the solanaceous plant family. But when it's found in the air, you can be quite certain it's not from rutabagas, it's from tobacco smoking.

And you find it in three places in the body, typically, three places that you can get at that are unintrusive. One is in blood, taking a blood sample; the second, saliva; and the third is urine. And those are the three places that you can extract body fluid and then do analyses.

In these early days there were a great many questions that were not known. The answers were not known, including how various species, including human beings, metabolized nicotine.

That is, you knew that nicotine was not being excreted from the body, it was being discreted in the form of metabolites. It was undergoing chemical transformations in the body.

So the question -- the first question was, well, if it's not being excreted as a nicotine, what are the principal metabolites of nicotine, and it proved that cotinine was one of

the easiest to recognize and so people began to focus on cotinine.

Q. So, at least at this time, is there any specific research project proposal that you have before you in February of 1986?

A. Not yet. What this subgroup was trying to do is figure out how a proposal could be put together, and reviewing the pertinent literature to see who might be approached to actually present a proposal and do the research.

A substantial progress was made by that subcommittee, but it was overtaken by the winding up of this committee and the establishment for the Center for Indoor Air Research.

Q. I'm going to follow up on that because there are questions asked about that, so let's just take it forward.

Now, Ms. Eubanks yesterday, she showed you a document that's dated before this. It's actually -- could I hand him -- U.S. Exhibit 75225 -- and it's minutes dated November 2, 1984, about 16 months before the document I just showed you in which there is a heading on here, November 2, 1984 -- I think I'm right -- about 16 months prior to the document I just showed you where the group is talking about body fluid testing.

This entry says, "No body fluid testing for the present." And it says it's an agenda item. Do you see that?

A. Yes.

Q. Do you actually recall today if that agenda item was actually discussed on that day, if you remember?

A. I don't, but, see, it's really quite -- what my testimony yesterday was that I never felt under any -- I was not ever made aware of any ban on body fluid testing.

What this entry may have meant is that there was no proposal that was prepared that was available to be considered because the whole area hadn't progressed to that point to permit a proprossal to be considered. But when I said that I never regarded ourselves as be under any interdiction of any sort, that really is my testimony. I did not.

Q. I understand. And regardless of what an agenda item says in the document I just showed you, your group is continuing to pursue the issue 16 months later?

A. We were pursuing the issue before the document that you have mentioned.

Q. Yes.

A. It was an ongoing part of the discussion and I'll tell you why.

It was known that the primary route of exposure to ETS is through the nose and the mouth, but it was with shallow breathing, and it's very much unlike active smoking when you breathe. When you smoke actively you breathe through the mouth and you hold smoke in your lungs for a couple of seconds before expelling.

When a nonsmoker is exposed to ETS they are taking the shallow breaths that are characteristic of normal breathing, so

the deposition patterns are going to be much different and much less severe than with active smoking.

So it would have been in a way, I suppose, to the industry's advantage to be able to figure out how much -- it clearly would have been to the industry's advantage, it also would have been the just the right thing to do -- how much ETS dose people actually were receiving.

It would have been much less than the personal monitors would have shown because that only gives you out here, it doesn't tell you anything about what just came right back out through the nose and the filtering mechanism in the nose, for example.

So, this was something that was believed by all of us to be very important. And indeed, if you look at some of the research reports that were -- or evaluations of the research during this period, everyone was calling for advances in this area so actual dose of these materials could be measured.

Q. Now, I'm going to take the story a little bit further and I'm going to show you a document I don't know that you've seen recently.

But to follow the story forward, let me give you U.S. Exhibit 21089, which you will see are minutes of the ETS Advisory Committee in August of 1986. So this is about six months beyond that last meeting I just showed you. Are you with me?

A. Yes.
Q. Time-wise. Can you see that all right?
A. I have the document in front of me.
Q. And then if we go into this document, I noticed last night, if we go -- it's in -- if you go into what is marked as Roman numeral 5, it's on page that's Bates 4171. If you can find where it says proposed projects?
A. Yes.
Q. Are you on that page?
A. Yes, I am.
Q. And then I notice Roman numeral item 5-2 seems to relate to this issue; is that correct?
A. Yes, that's right.
Q. So what does it appear your committee -- your group is doing at this time in 1986?
A. Well, we were about -- the subcommittee had reached a point that it felt that it knew enough that it was able to go out and start soliciting proposals from people who, according to the literature, had done sufficient work in the area that they could be expected to come up with a reasonable proposal. So we were in the process of going out to solicit proposals.
Q. And I believe you testified yesterday that it's your recollection that after your group disbanded, CIAR picked up this project and went forward as far as trying to do research in the area; is that correct?

A. Yes, absolutely.
Q. And let me see if I can help you with that. I'm going to show you an exhibit that's marked as JD 54031, which I believe is a study that's done by, I think it's Dr. Eatough, E-a-t-o-u-g-h. Are you familiar with this study that I just handed you?
A. Yes, I'm generally familiar with it, and I am familiar with Delbert Eatough.
Q. And since you know a lot more than I do about this, is this a study that is related to the topic we're talking about?
A. Yes.
Q. What essentially did this study do?
A. Well, it was an effort --
Q. Maybe I should get the date of the record.
What is the date on this study? I think you have to turn to the second page and it tells you.
A. No. This appeared in the Journal of Chromatographic Science, Volume 28, April 1990.
Q. Thank you.
A. Delbert Eatough was one of the leading chemists in the United States at this time and he had a very large group of research scientists at Brigham Young University.
And what Eatough and his group were particularly good at doing is taking body fluids and using a chromatograph finding what was in those -- what was in those fluids and portraying

them schematically.

And the effort here was to look at nicotine and cotinine and see how it was -- how those chemicals were behaving in the body and what quantities one could find there.

Q. Now -- so at least -- is it fair to say that the questions that the government asked you yesterday about whether there was actually a ban on body fluid research, is it clear to you that that's simply not accurate?

A. We wanted to do body fluid testing if we could figure out how to do it. It was going to lead to lower numbers so far as the dose of ETS than from exposure information. The problem was trying to figure out how to do it.

Q. Now, if you look back on the ETS advisory board -- I'm sorry -- the ETS Advisory Group I think is the proper name.

A. Right.

Q. When do you remember, if you can, approximately when did that group cease to be operational or exist, as best you can recall? And to frame that, I believe CIAR, did CIAR -- strike my question. I'll start over.

THE COURT: Excuse me a minute, Mr. Webb.

There's one thing you may have covered Mr. Rupp, but I'm not sure. Was this article -- was work on this article funded in any way by the ETS Advisory Group or by any other tobacco-related group?

THE WITNESS: This would have been a tobacco-funded

project, this article.

MR. WEBB: I should show that to Your Honor. I forgot to bring that out. I can show you the page. That's my mistake.

BY MR. WEBB:

Q. If we go to the end of the article, can we show the court that it was funded by CIAR, under acknowledgements?

Sir, does that show that this research was funded by the Center for Indoor Air Research through a grant to Hart Scientific, Inc., Provo, Utah?

A. Yes, and that's his research institute at the University of Utah in Provo.

Q. When you told Ms. Eubanks yesterday that your recollection was that CIAR followed up on body fluid research after the advisory group ceased to exist, does this appear -- does your recollection appear to be accurate?

A. Yes, it's accurate.

Q. Now, am I correct, CIAR becomes operational in early 1988? Is that consistent with your recollection?

A. That's correct.

Q. Now, using that as a framework, when did the ETS Advisory Group cease to function or be operational? As best you can recall.

A. I don't -- it's -- after 16 years, it's really hard to remember exactly how the transition worked, but I think the ETS Advisory Group had begun to wind down its activities quite

significantly in the year preceding the establishment of CIAR.

The Dinardi project was one reason for that. It was just such a devastating thing that the feeling was, Let's do this right or not do it at all. And so there was not much appetite for the -- and also, not much appetite for funding a lot of new work through the ETS Advisory Group that CIAR might inherit. The thought was Let's get that organization in place and let them start almost from scratch and not load them up with a lot of carryover projects.

Q. Now, Mr. Rupp, quite frankly, I was going to ask you a series of questions about CIAR, but we have gotten notice that Dr. Eisenberg, Max Eisenberg, is going to testify next week. I'm not going to ask you many questions about CIAR because I think it will be repetitive of Dr. Eisenberg. But just to frame out your involvement, who is Dr. Max Eisenberg? Explain that to the court.

A. He was the long-time executive director of the Center for Indoor Air Research. He was the first permanent hire for the Center and he remained the executive director throughout the Center's existence.

Q. Did you work with him?

A. Very much.

Q. Did you find him to be well qualified in the job that he did?

A. He was marvelous in every respect.

Q. I'm going to leave it to him to explain the details of CIA to the court, although certainly if you need to explain something as I'm asking you questions, don't hesitate to do so. But I'm not going to go through that topic right now in order to try to keep this moving and, hopefully, get you on a plane tonight.

Ms. Eubanks did -- yesterday she showed you some memos and documents that referred to the tobacco companies' research in the area of ETS as an effort to refute or rebut studies that concluded that there was an association between ETS and lung cancer and other diseases. Let me ask you this question.

If the tobacco companies did research and development in the area of ETS and if it was valid scientific research, if it did show, in fact, that there were defects in earlier studies, is there anything wrong with that?

A. Well, that's -- that's really what perplexes me about the questions. I had thought that I was going to be asked questions about glaring defects in studies that had been funded by the tobacco companies, either individually or through CIAR, but that was not so.

I hesitated to use the word defects in studies mostly because I like to steer away from the ad hominem. The early studies were limited. They had problems. In many cases the investigators appreciated those problems.

And the goal, as I saw it, and I can really -- really

in these cases speak almost just for myself, I saw the goal to figure out what really was going on here.

Is ETS a problem and in what respects? And where? Is it a problem for children? Is it a problem for adults? Is it a problem for old people? And at what levels, and so forth.

I thought our goal was to figure out what the answers to these questions were, and I thought my clients had a responsibility to facilitate that.

Q. Now, when the government asked you questions in your deposition, when the government asked you questions in that lengthy written direct examination, and when the government asked you questions all day yesterday, do you recall any -- the government ever calling to your attention any evidence or documents of defects or things that were wrong with the studies that were funded by the tobacco industry?

A. No. I won't say that the studies funded by the tobacco industry were perfect. There is never a perfect scientific study, ever. It could always have been better. It could have always been improved in some way.

There will be another Albert Einstein and he or she will come up with with another insight that will make some of the things that are done look silly, but we did the best we could.

Q. As far as, as you look back over those years -- let me ask you this question.

As you look back over those years, are you aware of anything that you ever did or anyone else on the ETS Advisory Group ever did to interfere with the scientists that were carrying out those research projects?

A. No. We tried to encourage them. No.

Q. As you look back over those years -- strike the question.

Your Honor, may I take a couple of minute break?

THE COURT: You want a break now?

THE WITNESS: Please.

THE COURT: We will take a very short break at this point. Maybe less than 10 minutes, if we can do it.

MR. WEBB: Yes.

(Recess began at 10:16 a.m.)

(Recess ended at 10:22 a.m.)

THE COURT: Mr. Webb, I think you were posing a question.

MR. WEBB: I was. I was just -- I'm winding down. This is my last question on this ETS Advisory Group.

BY MR. WEBB:

Q. You used a phrase yesterday, I believe in answering one of Ms. Eubanks' questions about your view of the research done by the ETS Advisory Group was let the chips fall where they may. Can you please explain that to the court?

A. Well, yes.

There was an inviable rule that we imposed upon

ourself, it was an obvious rule, and that is you tried to find the very best scientist to do the best work you could and then you set them free to do it.

And we always encouraged them to publish. That was the second aspect of the inviable rule, publish whatever they wanted, whenever they wanted, however they wanted. There was no obligation to show drafts of publishable work or anything of that sort, but we wanted the work published. Work that was not published was not going to help anybody.

We also recognized, of course, that the industry could be criticized if work was funded and not published. Again, I go back to Dinardi. It's one of the things that bothered us so much about the Dinardi. It was a big project and nothing came of it.

So, scientists, the best we could find were encouraged to do the work and publish it and interpret it as they saw fit. Now, over the course of the years that I was involved in ETS, sometimes I liked the way they interpreted the work, sometimes I didn't, but it was not my interpretation, it was their interpretation.

And when I got to the point of writing a contract for CIAR, a model contract for investigators, I made sure that that contract clearly stated the work was theirs, the interpretation was theirs, basically, and they were encouraged to publish.

Q. Now, I'm going to move on in my chronological recitation of

events, but as I do I want to clean up or clear up, I want to call it a mechanical issue.

Throughout your written direct -- this relates to my client, Philip Morris. I represent Philip Morris and the other -- there's other lawyers representing other companies here.

Throughout your written direct examination the government used the name Philip Morris without distinguishing between different Philip Morris companies and you went ahead and answered the questions without making any effort to distinguish between those companies.

And so, first of all, I just want to make sure we have the record clear. You're generally aware that there are a number of different Philip Morris companies that do use the name or have used the name Philip Morris in their names over the years; is that correct?

A. Yes, I certainly am.

Q. For example, you mentioned yesterday Philip Morris International, Inc.?

A. Right.

Q. You're generally familiar with that company; is that correct?

A. Philip Morris International is headquartered in Lausanne -- or at least operationally headquartered in Lausanne, Switzerland.

Q. You're familiar with a company called Philip Morris, Incorporated that actually is now known today as Philip Morris USA that manufacturers cigarettes sold in the United States; is that correct?
A. That's correct, that's the U.S. company.
Q. You also are aware of a company that was called Philip Morris Companies, Inc. that now goes by the name of Altria; is that correct?
A. That's correct. And they make, in addition to having subsidiaries that sell tobacco products, they make beer. Kraft General Foods is part of that larger corporate umbrella. So that is moving up a tier from the entities you've described before.
Q. I think in one of your answers -- I think your written direct you referred to a company called Philip Morris Europe. Is that a separate company?
A. No, and if I did refer to that, it was a mistake.

Philip Morris International operated in Europe in two divisions. I don't know whether those were separately incorporated companies. It never was really pertinent to me. But it operated in two separate divisions, EMA and EEC.
Q. This company Philip Morris International, they are a company that manufactures cigarettes for sale in countries other than the United States; is that correct?
A. Correct, they don't sell cigarettes, as I understand it,

within the United States.
Q. And Philip Morris USA is a company that manufactures cigarettes for sale in the United States. Is that your understanding?
A. That is also my understanding.
Q. And I don't know if you're aware of this.
Are you generally aware that as far as this case is concerned that you're providing testimony in, that the Altria group, the holding company, is a party defendant, and Philip Morris USA, the domestic manufacturer, is a party defendant, and those are the only Philip Morris Companies that are in this case? Were you generally aware of that?
A. No.
Q. Well, can we have an understanding because when I use -- if I use the name Philip Morris in my questions from here on, I'm going to use that and you can interpret that as referring to Philip Morris USA, the domestic U.S. company manufacturing cigarettes in the United States unless I specify otherwise.
Is that okay with you?
A. That is okay with me.
Q. I'm going to ask you yourself if you use the name Philip Morris in answering one of my questions, I'd like to assume that you're using it to refer to Philip Morris USA unless you tell me that you want to refer to a different company. Is that okay?
A. I will do so.

Q. Now, let me go to I think in a chronological fashion the next major event, I'll call it, is the Indoor Air Pollution Advisory Group.

You were asked a lot of questions about that in your written direct examination and in your oral questioning by Ms. Eubanks yesterday.

Do you recall those areas of inquiry about that group?

A. I do.

Q. Now, this Indoor Air Pollution Advisory Group as we've established became known by its initials IAPAG, I think referred to as IAPAG; is that correct?

A. That's true.

Q. It appears to me from documents and records in Dr. Schwartz's testimony, that group basically existed from 1984 up until the fall of 1987. Is that consistent with your recollection as far as time -- where we are time-wise?

A. Generally, yes.

Q. Okay. Now, let's tell the court -- so you understand, this court has heard testimony, at least partial testimony, from Dr. Schwartz. He's not completed his testimony.

But I take it you knew and know Dr. Schwartz; is that correct.

A. I do. I haven't spoken with Dr. Schwartz in eight or ten years, but I know him, yes.

Q. And you were aware that he became the chairman --

chairperson of the IAPAG group; is that correct?
A. Yes, I am aware of that.
Q. Can you please explain to the court -- if you go back into your mind's eye that many years ago -- how did the origin or concept of IAPAG first arise? What came up and what happened?
A. Well, we were -- there were literally hundreds of smoking restriction bills that were being introduced at the state and local level and there were also proceedings that were being rumored at least, before the national academy and in other federal agencies, and then of course there was the litigation issue.

But for me, at least, the experience in the state legislative hearings was the most telling in convincing me that the industry needed access to scientific consultants.

Because when you would attend a state or local legislative hearing the science would be front and center. And just like Judge Kessler, the state legislature did not want to hear from a lawyer about the science of ETS and they didn't want to hear from the Tobacco Institute about the science of ETS. They wanted to hear from a scientist about the science of ETS.

And you just couldn't participate effectively in those discussions without consulting scientists. The Institute really had no such people on staff to do that. They had some people with scientific credentials but they were older gentlemen. They weren't -- never been hired for that purpose, and they weren't

working scientists anymore, anyway.

So, we just had a feeling of a fairly desperate need to be able to participate in those discussions which we expected to intensify across all of those levels and in all of those areas that I've described over the succeeding years. We did not expect this issue to go away. And, of course, it has not gone away.

Q. So if we go back to 1984 or so -- and as far as the concept of needing these scientific consultants to work on matters that were pending, who was your client?

A. The client there would have been the Tobacco Institute. The consultants -- the U.S. consultants were originally hired to provide consulting services to the Tobacco Institute and we explained that it could also be to the Institute's member companies, but the primary source of funding, if not the exclusive source of funding, was the Tobacco Institute, and then that was also my client.

Q. Okay. Now, we've heard Dr. Schwartz's recollection of the events of how he became involved and I'm going to ask you your recollection.

Generally, who had the idea to reach out to Dr. Schwartz to see if he might have some interest in being involved as a scientific consultant for the Tobacco Institute?

A. It was one of my partners, Ed Dunkelberger, who is now retired, had worked with Dr. Schwartz on a series of

environmental regulatory matters, I think in the late 1970s or very early 1980s, and had been impressed with him.

And Mr. Dunkelberger -- I went to Mr. Dunkelberger because I knew that the environmental group at Covington had been working significantly with scientists and environmental scientists of the sort that seemed particularly pertinent -- and Ed Dunkelberger told me that he had been impressed with Sorell Schwartz and that he would be prepared to arrange a meeting in which I could discuss what we had in mind and ask whether he would be interested in helping.

Q. What happened?

A. Well, he came over first and he said --

Q. "He" being?

A. Dr. Schwartz.

And he said, "Well, I think your client's in a lot of trouble. I've read the press reports and so forth and I'm prepared to look at the science, but I think there are difficulties here and you're going to have to come to grips with the difficulties."

Of course, we were prepared to come to grips with the difficulties, but the first part of the exercise was to actually get him to look at the science.

So we pulled together everything we knew about at that time and sent him away. And he went away for a couple of weeks, two to three weeks and then he came back.

Q. When you said you sent him everything, did you try to put together all studies that were done up to that date on the subject matter of ETS science?

A. We did, and that was -- Ms. Eubanks asked me a question yesterday along those lines that kind of suggested we -- well, let me just answer the question.

We tried to be as comprehensive in these literature packets as we could. We really wanted to get a sense of whether the scientists could deal with materials of this sort or whether it was going to be overwhelming for them.

So, we erred on the side of inclusivity, not exclusivity, and we certainly wanted to give them everything that was negative from our client's point of view because they would have to deal with that eventually, anyway, and it seemed right and appropriate to give it to them right up front.

Q. Now, just so the court -- what was there about Dr. Sorell Schwartz's background that at least indicated to you that he might have the ability or the background to analyze the type of data you were giving him?

A. Well, he's a very well-known toxicologist. He has substantial expertise in addition to that in chemistry and in risk assessment.

He's published widely in the area of epidemiology and epidemiologic methods, but outside of his core area of expertise, I think where he has really made a distinctive

reputation is in the area of risk assessment, or at least that was any view at the time, and that seemed to me to be quite pertinent here because we were talking about what is this risk? How can we get our hands around this risk? What do we need to know?

Q. So, you provided all these studies to Dr. Schwartz and he went away for a couple of weeks. What happened next?

A. Well, he came back and said, "I have happy news for you. I was wrong. There's nothing here. This is the weakest" -- basically, he said this is the weakest group of studies he had ever seen on an issue of this sort; that he was really quite surprised and that he would be delighted to become involved. He thought it was very interesting.

He also said that from a research standpoint he found it a very interesting kind of academic exercise, because we were talking here about long-term exposures to rather small amounts of a material and then trying to figure out whether that exposure over a long period had any health effects and that was going to be very complicated. He thought that was very interesting.

Q. Now, the group itself called the IAPAG group that we've talked about, explain to the court how did that get formed and developed after Dr. Schwartz had agreed to become a consultant for the Tobacco Institute?

A. Well, it happened in a variety of ways.

First, Dr. Schwartz knew a number of people with whom he had worked and whose expertise he thought to be pertinent.

One of his partners was, and I think still is, maybe still is, Dr. Phillip Witorsch. Dr. Witorsch was at that time at George Washington University and is one of the leading pulmonologist in the city, not only a clinical pulmonologist, but he also is a scientist pulmonologist. His particular expertise is with respect to lung function and lung function parameters. So, his expertise was really right in the core of what we were looking for.

And Dr. Schwartz went to the same exercise with Dr. Witorsch that I described having gone through with Dr. Schwartz. He came back with precisely the same response.

They then involved a third partner that they had, who they had, Dr. Nancy Balter. And I think Dr. Balter was a toxicologist, although I can't be entirely certain of that. I don't remember for sure.

Additionally, we looked at the literature on indoor air such as it existed at that time. It really was fairly fragmentary and rudimentary at that time. But we knew we needed to look for toxicologists, epidemiologists, pulmonologists, risk assessment people, chemists, indoor air assessors, people who have expertise out in the field actually doing studies of that sort. The number of disciplines we needed to tap into were substantial in number.

So we looked at the literature to see who the leading people were in all of those fields and then we tended to try to make contact with those people and see whether they were interested.

Q. And eventually through that process the IAPAG group was formed. Is that fair to say?

A. That's correct.

Q. Now, I'm going to briefly show you the members so you can go through and remember who was actually members. Okay?

A. Okay.

MR. WEBB: If I could give the witness 85522, it's U.S. Exhibit -- I'm sorry -- U.S. Exhibit 85522, and I think the court has seen this document before. I used it I think with Dr. Schwartz.

Q. But as this document comes up on the screen, it appears that the -- this is a letter from you enclosing to your client a list of the current IAPAG members. Do you see that?

A. Yes.

Q. And then if we go to the attachment, the first page of the attachment, if we focus on the heading -- by the way, Center for Environmental Health and Human Toxicology, Dr. Schwartz identified that as his consulting organization that he worked through. Is that your understanding?

A. Yes. That had been formed, as I understood it, as a kind of joint venture with an affiliation with both George Washington

and Georgetown University and had been in existence for a number of years for a significant number of clients, and their respective universities had made an agreement to free up some time and a financial arrangement that had money that went to the Center flowed back to the universities, or at least a portion of the money.

Q. I'm going to quickly go through the membership.

Dr. Schwartz actually told the court that some people listed on here that he doesn't think actually became a member, so the reason I tell you that I want you to use your own independent recollection. Let's start with the first page.

The people whose names are on the first page of the document under Membership, to the best of your knowledge, were those scientists and doctors part of IAPAG to the best of your recollection?

A. Yes. First page?

Q. Yes, on the first page.

A. Yes, they were, although the person who is listed here who was least active -- and I don't at this point even recall why that was so -- is Ahmed Ahmed. I think he did submit a statement at our request to the National Academy of Sciences National Research Council on either the air cabin air quality proceeding or the subsequent ETS proceeding, but with that exception, I don't know that we asked him to do anything else.

Q. Can you quickly just go down this list and I want you to

tell the court what you recollect their area of specialty to be and why you felt they were qualified to act as a scientific consultant to the client, the Tobacco Institute?

A. Right. Ahmed Ahmed was a pharmacologist and toxicologist, so his expertise would be the fate of chemicals in the body and their potential to cause adverse health effects. That is what a toxicologist does.

And he also -- or she -- would also know something about what happens to chemicals in the body, how they interact with one another and so forth. So that was obviously pertinent.

Biologists do many of the same thing. They tend to do it much more in animal models -- I'm now looking at Dr. Balter -- than they do in the way that Ahmed Ahmed would do it.

Vince Castranova, Department of Physiology in the Biochemistry section, he would be a chemist, of course. He would have substantial expertise with respect to environmental monitoring, but also substantial knowledge of just chemicals in the air and how they act.

Q. While we are on Dr. Castranova. At some point did he leave IAPAG, if you remember?

A. I don't recall that.

Q. Okay. Let's go on.

A. Salvatore Dinardi was at the University of Massachusetts in Amherst and was a -- I don't exactly know what his title was at

the University of Amherst. But his particular specialty was air quality monitoring which had begun initially with ambient air quality. That is exterior air quality monitoring.

And what we were inviting him to do was bring his expertise indoors and help us figure out what was happening indoors.

Q. Okay?

A. James Kilpatrick is a biostatistician. His particular expertise was in epidemiology in looking at large datasets and making sense of them, so he would be able to determine, for example, whether there were relationships and what the nature of the relationships would be, performing statistical tests of one sort or another to see whether any patterns were emerging.

Q. Let's go to the second page. Spell that for the court reporter.

Q. O-b-e-r-d-o-e-r-s-t-e-r. Guenter. G-u-e-n-t-e-r. He is also a toxicologist, so I won't say much more about him.

Jack Peterson was a professor of clinical medicine in preventive medicine at the Medical College of Wisconsin, and it was thought that he could help us. He had a bit of a toe in all of the areas because he actually operated out of a clinic, but it was thought that he could -- he could help us understand behavior and behavior patterns and how people were operating in interior spaces and what kind of advice they were getting.

Sorell Schwartz, of course, you will ask himself.

Kingsley Stevens. This may have been one of the people whome Dr. Schwartz had in mind. I don't recall Kingsley Stevens having been active in the group and he may never have been a member.

Q. That's fine. Go to the next page. We can go back to the previous page just for a second.

As far as Gray Robertson is concerned, Dr. Schwartz said he did not view him as an actual member of the group, but that Mr. Robertson would be present sometimes when the group met or gave testimony.

Is that consistent with your recollection?

A. Yes, that's consistent with my recollection.

Q. Go to the next page.

A. The people that you saw on this page were all basically university professors.

Q. Yes.

A. So there was a certain cohesiveness in this group in terms of their background and their university affiliations that made that appropriate.

Now, then, Dr. Weeks was a clinician in Boise, a medical doctor. He was not a member of the group because he was not a university-affiliated scientist.

He was a person who could testify in a state legislative hearing and could understand the concepts that were being described, but he wasn't a bench scientist. He wasn't an

epidemiologist, he was a medical doctor.

Myron Weinberg assisted us in identifying potential consulting scientists. He was not really a member of the group.

Dr. Phil Witorsch is listed here as a -- I guess he's listed as a member of the group and I've already spoken about him.

Q. You have. Now, looking at that group and just -- I'm not going to get into a lot of detail, but can you categorize for the court the major general activities, the different things that this group did over time as a consultant for the Tobacco Institute in the scientific ETS area?

A. Far and away the largest expenditure of time -- and this really dwarfed most everything else -- is just reviewing the literature.

As of 1981 there was really not an awful lot of literature to review. There was some, but there wasn't an awful lot. By 1984-85 it had started to become something of a torrent and it wasn't necessarily ETS specific, but it was a lot of indoor air research that had relevance and had to be taken into account.

People were beginning to look, for example, at particles released into the air by carpeting and rooms of this sort, and when the results of that would be published, you had to say, "Well, what does that mean in terms of the sources of respirable suspended particulates in places where smoking is

permitted?"

So a lot of their time was spent in reviewing the literature and talking among themselves about the literature.

Q. Okay. In connection with that, did they also maintain a database of the literature?

A. Yes, initially the database was a manual database. The people at the Center agreed that they would take responsibility for, as comprehensively as humanly possible, collect all of the relevant literature on a monthly basis. That is, the literature was sent out monthly.

And that proved to be actually quite difficult because a lot of indoor air stuff in particular was appearing in obscure journals. And other pieces of literature that were relevant were being presented as conference papers, not easily retrieveable. So, they had to do a lot of sleuthing to make sure that they were finding everything.

Over time that literature database grew very substantially and eventually it was computerized, and I think at the time, by the late 1990s, it had to be the best ETS indoor air database in the world.

I can't conceive of anybody having -- well, my client would say I can't conceive of anybody having spent more money on it than you did. That's probably true. But also a greater -- just an effort to find everything and to catalogue it in a way that could be retrieved.

Q. So they kept up on all the research. They had the database.

What else were their major functions?

A. Okay. Then initially we asked these people whether they would be available to testify at state legislative hearings which was during the very early days, the thing that was really happening, if you will. And a number of them said yes, we would do that.

Well, that didn't work very well, and it didn't work very well for several reasons. One is a little bit like the scheduling of Dr. Schwartz here.

You couldn't call Dr. Schwartz on a Thursday night and say, "I need you in Des Moines tomorrow morning. Can you be there by 10:00?" He would say, "No. You've got to be an idiot." Or Dr. Witorsch, he had patients to see and he wasn't going to cancel patients to go to Des Moines. So their availability was an issue.

State legislative hearings, I learned over the years, often are not announced until the day before they actually are going to occur. So you're either there or you miss them. You don't get advance warning.

So, availability was a major problem. The second is they didn't like the environment.

They found that they were only going to be able to speak for three to five to eight minutes, maybe, and these were serious scientists. They didn't like that. They didn't -- they

thought they were -- they were being asked to simplify things to the point that they were not comfortable any more. They just didn't like it. And then, of course, they would go out there and people would yell at them, and they didn't like that, either.

They just -- they wanted to focus on the science. They were comfortable with the science. They were comfortable in their university environment. They were comfortable with research. That's what they wanted to do.

Q. They did do some legislative testimony; is that correct?

A. Yes, they did.

Q. And what else did they do?

A. They also -- the first big U.S. proceeding that they participated in, a number of them, was the National Academy of Sciences cabin airliner air quality proceeding which would have been '83-84, I think, something of the sort.

And then they made -- many of them made presentations to the National Academy of Sciences National Research Council Committee on Environmental Tobacco Smoke about a year later. I think most of these people would have made presentations to that NAS committee at that time.

They also encouraged by us -- by me, in particular -- to prepare evaluations of the literature, written evaluations. That is, our view was you really ought to be sharing what you're concluding with the wider scientific world including your -- any

ideas you have about what research ought to look like in this area in the future. So we were encouraging them to publish.

We also knew, of course, that in the event of any real regulatory proceedings relating to ETS -- and in a court case you have to be -- to be qualified as an expert, you really have to be in the peer review literature. So it was important to us to encourage them to be in the peer review literature in this area.

Q. Okay. Any other major activities you can think of? I'm trying to get on the record what your best recollection is, what they did.

A. Well, you certainly have 99 percent, from the early days.

Q. That's fine. Now, I'm not going to get into much detail.

How much contact did you have with the IAPAG scientists in your role as counsel to the Tobacco Institute?

A. Well, it came and went. My principal contact, of course, would be with Dr. Balter, Dr. Dinardi and Dr. -- excuse me -- Dr. Balter, Dr. Schwartz and Dr. Witorsch at the center for -- CEHHT, the Center -- because they took responsibility for much of the logistics of this group, scheduling meetings, setting agendas, that sort of thing.

And my involvement tended to be in large part through them, although I would tend to attend at least part of the IAPAG meetings that they would have when they would discuss literature.

And when there was a specific proceeding -- for example, the national academy proceedings that I've described -- I would tend to talk with the scientists individually and say, What contribution do you think you can make? Where do you feel comfortable? Do you have anything that would be useful? We know what the issues are going to be. And then work with them as they prepared their presentation.

Q. How much contact did the client, the Tobacco Institute, have with the members of the IAPAG scientists on a day-to-day basis?

A. Almost none.

Q. Okay. And as far as the opinions -- the scientific opinions that this group expressed, whether it was to a legislative body, U.S. Congress, the National Academy of Sciences, whatever form they were in, to the best of your knowledge were those scientific opinions that were the independent scientific opinions of that group of scientists?

A. Absolutely. I had printed in my -- in my directed -- corrected direct, because it was in one of the documents that the government had asked me to review in connection with my testimony here -- a statement that Phil Witorsch, Dr. Phillip Witorsch, had given before a legislative body. And that was typical of what they said and it was -- and he said that with all sincerity.

It was also how they believed -- what they believed their function to be, what they believed their responsibility to

the universities to be, and indeed what they believed their responsibility to us to be, and that is to give their best most informed scientific opinion of the issues they were being asked to address. And, for me, that was plenty good enough.

Q. Now, yesterday Ms. Eubanks asked you a number of questions and in your written direct examination there was a number of questions about whether these scientists basically simply went forward with testimony that was favorable in line with the Tobacco Institute's position.

Do you recall those questions anyway?

A. I do.

Q. I want to show you an actual example of Dr. Schwartz's testimony so we can see exactly what he did do, and I want to find out if this is typical of what the IAPAG scientists did. So I'm going to show you U.S. Exhibit 21252 and ask you to examine it and -- I'll put it up on the screen.

This is a statement of Dr. Schwartz before the United States Senate Subcommittee on Civil Service, Post Office and General Services, October 2, 1985.

I don't know whether you actually -- do you have any independent recollection of this particular testimony or not?

A. I have a vague recollection. I remember this. There were hearings on the Hill during the '80s, and in some years there was a joke around the office that there would seem to be a hearing a month on the indoor air. And so these things happened

frequently.
Q. Let's just start with some fundamentals.
On the first page if you go down to the second paragraph, Dr. Schwartz in the second paragraph says, "I am chairman of a group of faculty members from a number of universities who, at the request and expense of the Tobacco Institute," and then he goes on to describe what they did.
A. Right.
Q. The disclosure that they were appearing at the expense and the request of the Tobacco Institute, was that something that, to the best of your knowledge, that the IAPAG scientists did on every occasion that they made a presentation for the Tobacco Institute in which they were being paid by the Tobacco Institute?
A. Yes, they did, and it was -- in 99 percent of the cases it was obvious from the environment. For example, on a state legislative hearing they would have to be introduced by someone and they would be introduced by the Tobacco Institute's local lobbyist or a regional affairs person for the Tobacco Institute. But they just weren't people who came in off the street. They had to describe why they were there. And so this was a very typical way they would describe that.
Q. Now, you see I'm not going to walk through this. Dr. Schwartz describes essentially what the background of his group is. If you go over to the next page, he explains what his

purpose is, and then he explains that there are some preliminary points that deserve mention because they represent the conditions for my appearance. Do you see that?

A. Yes.

Q. And then he walks through six conditions. Do you see those there?

A. Yes, I do.

Q. Let's quickly go through those.

My question is -- let's -- first of all, he makes it clear that the opinions he's presenting are presented as part of our study for the Tobacco Institute, but they are independently held opinions.

Did you ever have any reason to doubt that?

A. No.

Q. Number two. "As such, I'm appearing here as a spokesman for a group of scientists with whom I've been working. I am not a spokesman for the Tobacco Institute."

I believe either in your written direct or yesterday you explained that the IAPAG scientists felt very strongly about that issue. Is that fair to say?

A. They believe terribly strongly. It's why I kind of went on at noxious length in my written direct about quarreling with the notion of "on behalf of."

They just didn't want to hear that. They did not believe themselves testifying on behalf of anyone other than

themselves, and they made that crystal clear to me. And it was one of the first things I understood that that was the ground rule. I had to operate accordingly and treat them that way. And I did.

Q. Now, the third condition, which is that Dr. Schwartz explained to the commission very clearly what his position is on active smoking. Do you see that?

A. Yes.

Q. And was that something that all of the IAPAG scientists -- to the best of your knowledge, was it a condition that if these IAPAG scientists were going to testify for the Tobacco Institute, they were going to disclose to the group they were speaking to that they actually believed there were significant health consequences from active smoking?

A. They almost always would be asked that question.

They either dealt with the question in this way or they would almost always be asked that question, and often it was the first question, and they would state whatever their opinion was, and normally it was to the effect they simply don't question anything about the warnings on cigarette packages, that those should be taken as given.

But we're dealing here today with environmental tobacco smoke, is that a different issue, and then they would go on to explain why they believed that it was, in much the way that the Surgeon General and the national academy in 1986 said it was a

different issue.
Q. Now, as far as -- when the IAPAG group was put together with these independent scientists, I take it that neither you nor the Tobacco Institute set up any requirement that these scientists had to agree with the tobacco industry on the issue of smoking and disease causation?
A. No. No. No -- correct, we did not.
Q. And now going on down, you mentioned I think this also yesterday in your testimony, number four, that they -- Dr. Schwartz explains, "I am not going to take a position for or against the bill I'm testifying on."
A. Right.
Q. Do you see that?
A. Yes, I do.
Q. And was that something that the IAPAG scientists frequently made clear; that they were not trying to testify against the bill itself, but only addressed the science?
A. They were fairly routine about that, and they would never -- I don't recall an instance where they opposed the bill.
Now, some of the IAPAG members would go farther than this and they would say, "Look. I like to be in the nonsmoking sections of restaurants. I like to be in nonsmoking sections of the workplace, et cetera, so I can understand where you're coming from with this bill, but I'm not going to deal with those issues. I'm dealing with the science here."

And they knew they had a very short period of time to deal with the science and they tended to focus on that. But they would -- I can't recall an occasion when they would oppose actually the bill itself, which of course implicated a variety of public policy considerations in addition to scientific considerations.

Q. Okay. And then they go on -- condition number five -- they go on and explain basically that they are here to simply want to address the scientific issues. Is that correct?

A. Yes, that's right.

Q. Now, as far as -- I'm not going to walk through all of this -- but as far as the content of what these scientists -- in this case, Dr. Schwartz -- actually then communicated to these bodies they appeared in front of, if you go over to page 3 -- at the bottom of page 3, if you go to that page at the bottom, starting with the word "perhaps most importantly." Do you see that?

A. Yes.

Q. Okay. It says, "Perhaps most importantly we knew as we undertook our study that in order to arrive at an opinion we had to evaluate the available data ourselves. Anyone who has not fully evaluated all of the data and applied recognized evaluation techniques is not in a position to reach an independent conclusion; that individual can only report on other people's conclusions."

Was that an important part of what IAPAG did, was to make sure that they actually had reviewed and understood all of the data?

A. That's -- that's why this was an expensive operation, if you will. We had to -- if this was going to work, they made it clear to us from the outset that they needed to be given sufficient support that they could review the literature on an ongoing basis and comprehensively.

They also made it clear to us that not everybody in the group was a pulmonologist, not everybody was a toxicologist, not everybody was a epidemiologist, and they needed to be able to get together and exchange views and have discussions where different areas of expertise could be brought into play and those discussions could occur.

So, they were very, very insistent that this was a critical prerequisite to any work, any consulting work they would do for us, their evaluation of the literature and ability to discuss that literature on an ongoing basis among themselves. And so I had to make sure, then, that the resources were available to permit them to do that.

Q. For example, that database that they wanted to develop and maintain, how many years did that database go on? Do you know, think back and remember?

A. About 15 years, I suppose.

Q. And was it expensive for the Tobacco Institute to maintain?

A. It cost several hundred thousand dollars a year.
Q. But it was done?
A. It was done.
Q. And the scientists wanted it?
A. They wanted it and they should have had it.
Q. Now, again, let's go on just as far as the kernels of what would be communicated in these meetings.
THE COURT: The database wasn't only for the scientists, was it?
THE WITNESS: No. We also used it ourselves.
When we would have a -- for example, in the OSHA proceeding when we had to submit comments on behalf of the Tobacco Institute, we would also call the CEHHT and ask for, is there any new study relating to X, Y or Z. So we would use it. But the predominant users were the scientists because they were the people who were speaking about the science.
The exception would be, as I've described, the circumstances in which we would be asked to provide, on behalf of the institute as lawyers, comments on a proceeding that was underway.
BY MR. WEBB:
Q. Now, if you go over to page 5, at the bottom -- go down to the last paragraph on page 5, I think you will say -- there's a paragraph that begins -- "To say that it is easy to underestimate the difference." I'm sorry. "The difficulty."

Do you see that?
A. Yes.
Q. Dr. Schwartz -- I'll just read it. He says to the group, "To say that it's easy to underestimate the difficulty of doing acceptable epidemiologic research and to overestimate the meaning of a study that purports to compare a control population with an exposed population is almost an article of faith today. We have carefully reviewed in detail all of the studies relating to environmental tobacco smoke and lung cancer.

"In addition, we have submitted the studies to epidemiologists outside of our group. Those individuals did not know the purpose of the review they were being asked to undertake or the identity of the sponsor.

"Without exception, every epidemiologist who has reviewed the pertinent studies has agreed with the conclusion of our group that the studies to date do not support a causal inference relating to exposure to environmental tobacco smoke to an increased incidence of lung cancer."

Now, that statement made by Dr. Schwartz, is that -- first of all, that group of these independent epidemiologists, is he referring to epidemiologists even beyond the IAPAG group?
A. Yes. One of the things that they would do -- well, he describes it here fairly well. But they, of course, the individual members of IAPAG had a wide web of scientific contacts in the larger scientific community: the

epidemiologists with other epidemiologists, the pulmonologists with other pulmonologists and so forth.

And they would also try to check their own conclusions by sending out pieces of literature to others and then -- so that they could have discussions with people outside the group, people who they believed to be particularly imminent or insightful in areas that were of interest to them. That was an ongoing part of the process. And it was for them kind of tantamount to a peer review process. They were always trying to check their own judgments.

Q. And by the way, if we look at this, what I put on the screen here, and highlighted the conclusion from all the studies, that they did not support a causal inference.

As a lawyer, you're not an epidemiologist, but as you tried to proceed on behalf of your client in good faith over the years, if we look at what's said on this page, was that your understanding and belief at the time?

A. It was. It was. Yes, it was.

Q. By the way, as far as the database that you described, was there a time when the EPA wanted access to that database and was given access to it, if you remember?

A. Yes. I actually went to EPA -- you will have to give me a document to tell me exactly when it was, but it would have been 1990 or perhaps 1991. And we knew they were working on a compendium of literature in anticipation of their preparing an

ETS risk assessment. And one of the things we said is, "Look. Are you sure you have all of the available and pertinent literature because we have what we think to be the world's best library on this."

And they said, "Well, you know, we will think about that and get back." And they eventually did come back and ask for access to the database. We put together a very elaborate set of notebooks and indexes for them.

They then came back and asked for specific pieces of literature that they apparently either were having trouble getting or for one reason or another they wanted it from us.

So there was a process that went on for several months. Part of that process involved the contractor that EPA had hired for that purpose, a fellow named Ken Brown, but I think we also provided materials directly to the Air and Radiation Office at EPA.

Q. Now, one more Dr. Schwartz issue and then I'm going to leave IAPAG and Dr. Schwartz behind.

But as far as one issue that you talked about during your direct examination dealing with Dr. Schwartz was a 1986 proposal for ETS-related scientific conference at Georgetown University.

A. Yes.

Q. Do you recall the events related to that proposed conference?

A. Yes.
Q. Does that proposed conference have some relationship to a bit of a falling out that Dr. Schwartz eventually had with public relations people at TI? If you remember.
A. Well, I think I kind of learned that later. He didn't really say that so much to me at the time, or at least I don't have a great recollection of it now, but --
Q. If you don't remember --
A. Well, I do remember.
When the conference was cancelled --
Q. Let me take you through the sequence of events first and then I'll ask you how it may have related to a falling out. Let's just quickly walk through what happened so the court understands what happened with the Georgetown.
First of all, was this a conference that the Tobacco Institute was going to and did sponsor?
A. It was going to. We had made, we had set aside budgetary money. My client had set aside budgetary money to fund it and Georgetown University was going to be the host and the place where the conference was going to occur.
Q. And it was an ETS related conference; is that correct?
A. Yes, it was going to look at the science of environmental tobacco smoke, all of the issues that were then being discussed.
Q. Who had the idea or the the concept for that conference if you remember?

A. I think it was Dr. Schwartz. It's so long ago that it's really quite difficult to remember exactly. But I think it was Dr. Schwartz. Certainly he believed, and others of the consultants believed, that if you brought a wide range of scientists together in a single location to discuss ETS in a very interactive process, it would be a very useful thing. Because they regarded that kind of exchange of views as being critical to progress. So, they were quite excited about this.

Q. Who was responsible for organizing the conference, inviting the speakers, et cetera?

A. Dr. Schwartz was.

Q. Now, as far as you could tell from your position as the lawyer involved in connection with your, client, the Tobacco Institute, did it appear to you that Dr. Schwartz was trying to organize a fair and impartial conference?

A. It certainly did.

Q. In fact?

A. Yes, it certainly did.

Q. Let me show you the -- was -- let me show you a draft -- this conference eventually did not go forward; is that correct?

A. That's correct.

Q. I want to show you a draft of the brochure. If I could have joint Exhibit 062165 given to the witness, please.

THE COURT: You mean joint Defendant's Exhibit, I think?

MR. WEBB: I think it's --

THE COURT: Or it a joint exhibit with the United States?

MR. WEBB: JE is, JE means it's a joint exhibit by all of us.

THE COURT: All right.

MR. WEBB: I do have that right? So both sides agreed for this to be an exhibit.

BY MR. WEBB:

Q. I don't think you've ever seen this before?

A. Yes, I saw this.

Q. Okay.

A. At the time.

Q. This is a draft of the brochure for the program, is that -- for the conference?

A. Yes. And Dr. Schwartz would have collaborated on this with their public affairs and continuing medical education officials at Georgetown.

Q. At Georgetown. If we go to the third page of the document, it's Bates 319, I think we can see who the proposed participants were in this program; is that correct?

A. Yes.

Q. I highlighted the names. I highlighted there because I believe those scientists actually were authors on the 1986 Surgeon General report. Do you know if that's accurate?

A. They were either authors or reviewers of the report. I can't tell you -- I think actually Dr. Dockery, Douglas Dockery may also have been reviewer but I can't be certain of that. He certainly was not a consultant of ours.

Q. I'm not going to go through this entire list, but based on the backgrounds and positions that these scientists had taken, does it appear to you that Dr. Schwartz was trying to be fair and impartial in coming up with a conference that was balanced and that would have an intelligent discussion of the ETS science issue?

A. It was the only reason for doing the conference. If it wasn't going to be that in this circumstance, it wouldn't have been valuable. And these -- Dr. Hoffman -- should I stop?

THE COURT: Go on everybody.

THE WITNESS: I hope it's not me.

A. He was very interested in making sure that the viewpoints that were represented spanned the spectrum because he thought that if people operate in isolation in investigating the health effects of any issue they can get off track. But that the exchange of views -- and this was really still early days -- across the whole spectrum of views could produce some real insights that otherwise were going to be long delayed in coming. And that was his thought in organizing the conference as he did.

BY MR. WEBB:

Q. Did Dr. Schwartz eventually have to cancel this conference

and it did not go forward?
A. He did.
Q. I want you, in summary fashion, summarize your understanding of what happened?
A. Well, what I was told by Dr. Schwartz and others is that individuals on this list began to receive telephone calls from officials at the office of smoking and health. And letters began to appear at Georgetown asking for people to withdraw from the conference and asking Georgetown to cancel it.

Georgetown refused to cancel it. In fact, they were very strongly of the view that it should go forward. But people began to drop out because of the pressure.
Q. You mean the faculty members?
A. The faculty.
Q. Go ahead?
A. So the faculty then, it wasn't going to span the spectrum. The whole, the original purpose was undermined. And finally, I think -- I think for two reasons Dr. Schwartz decided to cancel it.

One is that reason, that it wasn't going to achieve its initial purpose of having leading people in the area come together and discuss these issues.

Second, I think it was his first real indication of how poisonous the atmosphere could be where tobacco was involved and he did not want to embarrass Georgetown University. He had been

there for many, many years, was one of the leading members of the faculty there, and he just thought, basically, I don't need this. So he cancelled it.

Q. At least was it your understanding that the reason faculty members were dropping out was because the Tobacco Institute or the tobacco industry was funding -- sponsoring the seminar?

A. No, the reason they were backing out is that, is that they were getting pressure to back out. And the reason they were getting pressure to back out is that the tobacco industry was fund funding it.

I found it so odd, though, because we knew a number of these people had raised very serious questions about ETS. They were going to write their own presentations. They were going to say whatever they wanted to say. If it was negative on ETS, they were going to have full opportunity to say it.

Why this conference would be a threat to the office of smoking and health, I can't to this day imagine.

Q. But it happened?

A. It happened.

Q. And I'm not going to go through it all. But did it become a bit of a brouhaha over the issue of whether this was interfering with academic freedom?

A. Yes, that's the part of where you started the question. And the public affairs people at the TI did want to -- this was not an isolated thing, the pressure by government officials and

others on scientists with whom we were working.

There were people at the TI in the public affairs division said look, we are never going to get beyond this unless we hold a press conference and discuss what has happened here. Dr. Schwartz did not want to do that.

And again, I think there were probably two reasons for that. One is Dr. Schwartz doesn't like press conferences because he thinks they are below him, beneath him. He's just not comfortable there.

And second, again, he did not want to see Georgetown's name in the newspaper in a controversy. So he said, no. And there were people at the TI who were extremely, extremely unhappy about that.

Q. And Dr. Schwartz explained this in his testimony. I don't intend to go further, as far as what actually happened, but sometime after that did Dr. Schwartz and the IAPAG scientists decide that they didn't see any need to continue to provide testimony? Did the IAPAG group kind of disban at some point?

A. They did but they stood together for purposes of congressional testimony. They were prepared to appear before the U.S. Congress. They were prepared to continue to consult as individuals. They were prepared to go to continue to consult as individuals. They were prepared to go to conferences and to review literature and give us the benefit of their insights and insights in many of these people you mentioned, you've seen on

this list, continued throughout my involvement to do so.

Many of them, as I've said, were involved in the OSHA proceeding in 1993-95 period that I was involved in as well. But they would -- they did not want to do press conferences. They did not want to work with the media. And for the most part, they did not want to appear before state legislatures.

And the reason was that they found it inconvenient, and second they didn't believe that the issue was going to get a serious -- they were not satisfied with the scientific contribution they could make in that environment and they were going to go just for the sheer joy of going to Des Moines.

Q. Would it be fair to stay that while there was some -- I'll call it bruising that went on between the Tobacco Institutes' PR view -- I'll call it -- and Dr. Schwartz's view of what his role should be, for years thereafter Dr. Schwartz continued to provide consulting services to TI. Is that fair to say?

A. Oh, yes.

Q. And I don't think I need to go through it in any great detail, but I covered this I think with Dr. Schwartz.

He actually participated with you and others in developing or working with what was known as the scientific witness team. Is that correct?

A. Yes, that's correct.

Q. Would you briefly tell the court what was the scientific witness team?

THE COURT: First, let me ask this. What happened to the database?

THE WITNESS: I left the United States, Your Honor, in 1995 and I didn't have any further contact with it. I think it continued to be around at least through the late 1990s. Whether it still exists, I just don't know. I imagine it does still exist, but --

MR. WEBB: Your Honor, I think Dr. Schwartz said that at sometime late in the 1990s the tobacco industry decided not to fund it any longer. I think he said it's in storage. I think he said he put it in storage and that's where it is. I can try to clear that up when Dr. Schwartz comes back.

THE COURT: All right.

BY MR. WEBB:

Q. In any event, I was asking you what was the scientific witness team?

A. Yes. Well, when the university scientists, because of the logistics and the environment, said, "Look. We don't like to do this and you need to find somebody else to do this," we still knew that the science was going to be an issue with state legislative hearings.

So, we had to respect their disinclination. They didn't want to do it. They didn't -- they didn't have to do it. And -- but we still needed people who could address the scientific issues and we needed people with scientific

credentials.

So what we knew is that our option was very probably to find people doing private consulting work in scientific areas. And there were -- there are, of course, a variety of such firms spread around the country, just as there are a variety of groups of consulting economists. These firms exist in every state, and sometimes they are individual one-person operations and sometimes it's part of a team of people.

And we began to look for those people, and we found a number of people -- I can't give you a specific number, but it may have been 12 or 15 or something of the sort. And they took over the lion's share of the state and local legislative testifying as of that time forward.

Q. Did Dr. Schwartz work with that group?

A. He did as did other members the IAPAG group because -- and the reason was that here we had a new group of people who had not necessarily been following the science of ETS or of indoor an air, generally. And -- that is, the scientific witness team if we can call them that. And then we had the IAPAG members, the university people who had been doing so for several years.

And it seemed to be just a very efficient thing to put the two groups together and have that kind of exchange of views that would occur in that environment.

At the end of the day, though, we recognized, as did the members of the scientific witness team, that they as

individuals had to review the science themselves. That is, it wasn't going to be good enough for them to sit and listen to Dr. Schwartz, and that was not the purpose, it was to give them a jump start. But eventually they had to do it themselves, they had to do the work, and they had to be able to answer the questions because the question would come, What about the Hirayama study?

Well, if they hadn't read the Hirayama study, they couldn't answer the question. If they hadn't read the Trichopolous' study, they couldn't answer the question and that would be, of course, devastating. So they had to study the literature and they had to do it themselves.

Q. Let me leave IAPAG behind and move on to another organization that the government asked you a fair amount of testimony about in your direct examination, which is the ACVA or Healthy Buildings International.

You're familiar with that organization; is that correct?

A. I am.

Q. Let me start with a few basics questions about the relationship between the Tobacco Institute and the company known as HBI.

First of all, just for the record, the company that was known as ACVA eventually changed its name to Healthy Buildings International; is that correct?

A. That's correct.
Q. And it then was sometimes frequently called HBI; is that correct?
A. That's also correct.
Q. I'm going to call it HBI and you will know what I'm talking about?
A. I will.
Q. Did you come to know the principals of that company, the gentleman by the name of Gray Robertson who has already testified in this proceeding?
A. Yes, I did.
Q. Can you tell the court in your own words your basic recollection of how Gray Robertson and his company came to be a consultant for TI on indoor quality air issues?
A. Yes. The Tobacco Institute occupied a building, an Oliver Carr building, on -- it's the International Square Building. I can't remember exactly the address, but it was the huge building called International Square over in the K Street corridor.

And Bill Clepford, who is head of public affairs, was walking down the hall one day and he saw these series of men with uniforms on poking around with scientific equipment and he said, "What are you doing?"

And Gray was among the group and said, "Look. We're checking the air quality for the entire building, including your space."

MS. EUBANKS: Objection, Your Honor, to the testimony from this witness. He certainly wasn't placed there and he's testifying --

THE COURT: I'm going to sustain the objection for reasons that I think must be apparent to counsel in terms of varying testimony we've heard on this issue, and this is clearly hearsay within hearsay within hearsay.

Why don't you get a summary from the witness in terms of just essentially what happened or how it came about?

MR. WEBB: I'll do that, Your Honor.

BY MR. WEBB:

Q. At some point -- Mr. Robertson has already testified in detail as to how it came about.

At some point were you involved in the decisionmaking for TI to hire Mr. Robertson and his company to be a consultant?

A. Yes.

Q. And just in brief terms, what did you view to be the need by your client or you as the lawyer for someone of Mr. Robertson's background?

A. Well, he had something that no one else we ever met had, which was practical experience. That is, he was called into both problem buildings and buildings that had no problems. Most of the Oliver Carr building had no problems. They were new buildings and very well maintained.

But he knew what indoor air quality problems there were

in buildings, tended to have a lot of information about how they arose and, of course, his principal function, and where he made his money, is remediating air quality problems. And that expertise was just tremendously useful, very pertinent.

If people experienced discomfort in a building and smoking was permitted there, it was often assumed that the discomfort was from the smoking, and it may have been, but Mr. Robertson and his company could tell us the other things that were going on in the building and what to do about that discomfort. That was relevant.

Q. And Mr. Robertson has described in some detail what he actually did for TI -- and I don't intend to go back through all of that with you on the stand -- but looking back over what he did for TI, from your viewpoint as the lawyer, did you find the work he did to be valuable?

A. Yes, it was very valuable.

Q. Can you generally describe why you believed that?

A. Again, because he -- he would actually go into buildings and he would take pictures of buildings. He would go into the ventilation shafts and show you where the microbes were coming from.

He had a building database of many, many, many commercial buildings and he could show you what he had done to solve the problems. And as I say, many of these were government buildings that were having problems.

Now, one of the things he lacked was he had a big database, but he didn't have on staff a statistician capable of assessing and finding patterns in a large database. And it was for that reason then eventually we suggested that he work with Dr. Allan Gross at the University of Alabama, who is a biostatistician, to try to see whether there were patterns in the database that would be illuminating, and that marriage worked very well.

Q. I'm just going to show you one document that relates to the work that he did and ask you some questions about it.

Could I have JD 080236?

You will see this is an April 1985 study for TI that Mr. Robertson did and do you recall -- if you look at that document. Do you recall this study?

A. Yes, I do.

Q. And generally describe for the court what this was.

MS. EUBANKS: Your Honor, this is beyond the scope of the direct examination, particularly with regard to this document and the subject matter contained in.

I also see that the witness himself is not identified on this document.

MR. WEBB: Actually, on the second page I think the witness is identified.

BY MR. WEBB:

Q. Are you identified on the second page of this document?

A. Yes, the memorandum was to me.

MS. EUBANKS: Still beyond the scope.

MR. WEBB: Your Honor, they covered this in some detail in their direct examination.

THE COURT: I certainly thought so.

MR. WEBB: I'm trying to shortcut it.

THE COURT: I'm not sure if this particular document was used, but certainly the subject matter was covered, so you may -- actually, this is what we will do now.

We're going to take another very short recess and then we will go until about a quarter of 1:00. I know our court reporter is ready for a recess. And we will go until about approximately quarter of 1:00, depending on the testimony. We will take a short, less than 10 minutes again, if we can.

(Recess began at 11:34 a.m.)

(Recess ended at 11:47 a.m.)

THE COURT: All right. Mr. Webb, HBI.

MR. WEBB: HBI.

THE COURT: About which I've already heard a lot, remember?

MR. WEBB: As I said, one document and one point and I'm moving on.

THE COURT: Good.

BY MR. WEBB:

Q. I had shown you -- do you still have in front of you this

document JD 80236, which appears to be in a report from Mr. Robertson in April of 1985?

A. Yes, I do.

Q. And I think I had asked you a question.

Can you generally describe what this report was, in general terms?

A. This was a summary presentation of the results of the building studies that ACVA had done for clients around the world up to the date of the report, 102 buildings. And it presented in summary form what the results of those investigations had shown.

The format that was utilized was drawn from the format that NIOSH, the National Institutes for Safety and Health, had utilized in their presentation of comparable material from -- or comparable information from problem buildings.

Q. And I'm looking at it from the standpoint of you as a lawyer, you know, representing clients and what information that you acquired.

If we look at this, just as far as the conclusion of the report, Mr. Robertson's report, out of 102 buildings five had this reported measurable amounts of tobacco. Do you see that?

A. Yes, I do.

Q. And apparently the point being made in this memo is that was consistent with a similar report from NIOSH; is that correct?

A. Well, it was higher than the NIOSH result.

NIOSH had reported a lower result, after having studied more than 200 buildings, so this one was at least marginally higher.

Q. As far as what you were learning as a lawyer about this ETS issue, is this important information for you to learn about?

A. It was important, from several perspectives.

It taught us something about what can go wrong in a building, the variety of sources of indoor air pollution. That not everyone complains about discomfort in a building, it's just complaining so that they can leave work. That there are real things that are going on and there are ways to remedy them.

Q. Now, I'm going to leave HBI behind and I want to move on to something that took up a lot large part of your written direct, which was the 1987 Downunder Conference which you talked quite a bit about in your written direct and during Ms. Eubanks' questioning. I'm going to try to avoid repeating what's already in the record on it. What I want to start with, I want to try to set the scene for where the world is as we go into 1987.

First of all, you had told the court earlier basically what has been going on in the litigation, legislative and regulatory world that lawyers tend to deal with.

Can you update us, bring us up to, let's say, 1987 and just -- in a succinct way explain where the world is on these fronts where lawyers are frequently involved on the ETS issue.

A. Well, we were dealing by 1987 with about 400 bills per year in the states and localities requiring testimony and work.

We had just completed the Second National Academy of Sciences' review, and the documents that were shown to me yesterday indicated that we already had some notice at least that EPA was going to be doing another review.

We had had repeated hearings in the U.S. Congress calling for testimony on ETS and indoor air issues which we had had to present testimony at.

And we had -- with each passing year, more and more litigation relating to ETS. Now, not much of that litigation, if any at all, involved the tobacco companies themselves, but they often involved individual smokers or a governmental entity that were calling on us to assist them in defending those cases. So litigation was very much on the horizon at that point as well, and these problems were getting worse, not better.

Q. Okay. So there was quite a bit going on for a lawyer to work on during this time frame?

A. There was plenty.

Q. Now, I want to go to the science front. I want to just update the court on where you were as a lawyer understanding science as we get ready to go into the Downunder meeting in 1987. So I'm going to pick the year 1986.

I'm going to ask you about five different events that I see referenced in your direct examination and kind of quickly

run through them to put into the record what you believed or what was going on in the scientific world if we go back in time to this time frame. So let's start in '86.

Could I show the witness JD 62010, which is a letter from Dr. Koop that I saw that you referenced in your direct examination, if you remember, and I'll get a copy of it for you. I put it on the screen, if you can see it there.

Do you recall this letter?

A. Yes, I do.

Q. And you referenced this letter during your direct examination; is that correct?

A. Yes, I did.

Q. And Dr. Koop is sending a letter, this is January 17, 1986; is that correct?

A. That's right.

Q. And we can go back. It's on the letterhead of -- well, if you go to the second page, it's from Dr. Koop who is the Surgeon General; is that correct?

A. That's also correct.

Q. Just look at the first page of this letter, and I don't know if you've seen this letter recently, but -- or have you seen it recently?

A. I have seen it recently.

Q. Okay. The part I focused on Dr. Koop down in the second paragraph is explaining that the Office on Smoking and Health

has reviewed the statement from the Center for Environmental Health and Human Toxicology. That's Dr. Schwartz's organization; is that correct?

A. Yes. What he would have reviewed is testimony given, I believe, by Dr. Schwartz, but it may have been another member of IAPAG -- of the IAPAG group before the California state legislature.

Q. I see. And the gentleman that Dr. Koop is writing to, Dr. Ward, who is the Director and Health Officer for the Department of Public Health in a certain county in California; we can tell from the first paragraph that Dr. Koop says to Dr. Ward, "Thank you for your letter in which you requested clarification of the potential hazards associated with exposure to environmental or passive smoke."

And so that's the issue that Dr. Koop is addressing in this letter in January of 1986; is that correct?

A. That's correct.

Q. And on the first page there, Dr. Koop talks about apparently certain information that originates from the Center for Environmental Health and Human Toxicology and the comments that they make in the statement; is that correct?

A. That's also correct.

Q. Now, I want to go to the conclusion. If we go over to the second page of the letter and at the end of -- on the second page, if we go down to the end of the letter, this is what

Dr. Koop says to the California official.

"In summary, the Center's" -- that's referring to Dr. Schwartz's organization; is that correct?

A. That's correct.

Q. "The Center's statement that the currently-available data do not support a conclusion that exposure to environmental tobacco smoke represents a health hazard is supportable, given the existing evidence. However, the existing evidence does not preclude the possibility that further research will provide more definitive data to support such a conclusion. For this reason, the Public Health Service's statement refers to exposure to ETS as a potential health hazard."

So far as you knew as a lawyer, did that represent Dr. Koop and the Surgeon General's Office viewpoint on the ETS issue as we go into the year 1986?

A. Yes, it did.

Q. Okay. Now, let's continue through the year 1986.

I believe you referenced in your direct examination that in 1986 a second event that occurred that was important is there was a report issued by IARC; is that correct.

A. That's also correct.

Q. Tell the court who is IARC.

A. IARC is the International Agency for Research on Cancer. It's headquartered in Lyon, France, and it focuses, as the name suggests, exclusively on cancer and its causes. It is the

scientific arm of the World Health Organization, so it's supported by governments around the world.

Q. I have that report here if you need it.

But my question is, because you talked about it in your direct and if I could shortcut this a little bit, I will. I just want you to tell the court as a lawyer working on ETS matters in 1986, what did you believe were the major take-away points from the IARC report?

A. Well, there was really only one -- or two, but it came -- it came in close conjunction.

IARC had looked at all of the epidemiology that existed as the lung cancer epidemiology, ETS lung cancer epidemiology that existed as of the date of the report which was in 1986, and said, "Look. These studies are consistent with an increase in risk or no increase in risk, that is they are inconclusive. You can't tell anything from these."

Q. That's on -- so as far as all the epidemiological studies done to that date, that was IARC's view when they issued the report?

A. Correct, that you couldn't reach any conclusion from those. They could be interpreted either way. They are inconclusive.

Q. Go ahead.

A. Then they added a sentence, a single sentence, and they said, But given chemical similarities between environmental tobacco smoke and the mainstream smoke exhaled by the -- inhaled

by the active smoker, it must be assumed that nonsmoker exposure to ETS gives rise to some -- and that was their word -- some risk of lung cancer among nonsmokers.

So that was their view at that time.

Q. Fair enough. So that's IARC. And I believe the next --

THE COURT: But let me just clarify something.

It was the Surgeon General's position, was it not -- although I don't remember as of what date -- that there was a fundamental difference between the health risks from smoking and the health -- the potential health risks from environmental tobacco smoke?

THE WITNESS: Yes, that had been discussed in a series of reports and indeed was a conclusion from the 1986 report of the Surgeon General.

He went into the same issue -- that is -- or his group went into the same issue, and he concluded on that issue that you could not reach conclusions about the health impact of ETS from one's knowledge or beliefs about the health impact of active smoking on the smoker. And he explained both in that publication, and a number of scientists were explaining in other publications at the same time, that there were a variety of reasons for that.

The National Academy of Sciences in the same year reached the same conclusion, it simply was inappropriate to reach conclusions about ETS from active smoking data.

MR. WEBB: Did you have more questions?
BY MR. WEBB:
Q. In fact, that's where I'm going next. The third event that I want to ask you about for the year 1986 was the 1986 Surgeon General's report which I -- again, I have the document if you think you need it, but I doubt if you do. That report comes out in December of 1986?
A. Yes, that's right.
Q. Is that correct?
A. That's right.
Q. And as far as the -- as far as a lawyer taking points away about ETS science from that report, you've now described for the court one take away, which is the Surgeon General disagreed with IARC on whether you could make any assumptions or conclusions from active smoking to ETS causing lung cancer; is that correct?
A. That's right. He disagreed with IARC on that fundamental point.
Q. Right.
A. And without that -- if he was correct about that, of course, IARC would have had to conclude that there was no risk shown.
Q. Okay. So -- but now we will stick with the Surgeon General in 1986. One big take away is he disagrees with IARC on that issue?
A. Right.
Q. What else did you take away from the Surgeon General's

report?
A. Well, on lung cancer, which was his other main area of conclusion, he said, Look. In my view, the epidemiology here is sufficiently strong and coherent, but I believe it to establish an association and a risk of lung cancer for nonsmokers exposed to ETS.

So he looked at the epidemiology, the same epidemiology that IARC had found was inconclusive, would not -- it was not sufficient to permit any conclusion to be drawn and he said, For me, that epidemiology is sufficient.

Q. Okay. So then if we stick with 1986, the next major event that you referred to in your written direct is a report issued by the National Academy of Science; is that correct?
A. That's correct.
Q. And that report, would you tell the court as a lawyer what were the big take-away points that you took away from looking at that report that you can share with the court?
A. Well, if we continue to focus on lung cancer -- and, of course, we participated in this proceeding, so I knew a good deal about it at the time -- what the -- what the National Academy committee concluded was based on both of the points that we've just discussed essentially the same as the Surgeon General; that is, epidemiology looks to us to be sufficient, can't reach any conclusions on the basis of active smoking data.

So you had IARC on one point and the Surgeon General

and the National Academy on the other, and you couldn't reconcile those three reports. They were simply fundamentally irreconcilable. Somebody was wrong.

Q. As far as who is wrong, then you mention another report that came out in 1986 from the Office of Technology and Assessment of Congress; is that correct?

A. Right. Congress, as I had said, Congress was having hearings at this point with some frequency, and among those I think the member of Congress who asked for that report to be prepared was Senator Ted Stevens, and he asked the Office of Technology Assessment what they believed the state of play was on the science of ETS.

And as I recall the report, it's been a few days since I've looked at it, but after having talked about the limitations of the various studies that had been done, they said we think that this is inconclusive at this juncture.

Q. In fact, let me show you that language because I don't know that the government showed you that exhibit.

Let me -- could I hand the witness JD 002540, which I believe will be the Office of Technology and Assessment of the U.S. Congress report. Is that the report you're talking about?

A. Yes, it is.

Q. And if you would go into page -- it's actually in the report. It's called page 2. You have to go in a few pages to find it. But do you find the page 2 that I put up on the

screen?
A. Yes, I have.
Q. And I highlighted the yellow portion there, and see if this captures what your recollection was, where the -- this report to Congress says:
"The most wide spread acute effects of exposure to environmental tobacco smoke are eye irritation and irritation of the mucus membranes, headaches and coughs are also commonly reported. These conditions are not life threatening or fatal, but large numbers of people, including smokers, experience them, some severely.
"There is little formal research on these acute effects, but they are often tangentially noted in reports of experimental research in this area, and are generally accepted as the result of environmental tobacco smoke exposure. They are, therefore, appropriate to consider in developing smoking policies for the workplace."
This organization, it goes on to report to Congress, "The case is less clear for the contribution of passive smoking to chronic diseases. Debate about the link between passive smoking and lung cancer is one of the most contentious in public health today, and a similar contention has arisen about the possible link with heart disease."
Do you see that?
A. I do.

Q. So is that what you're referring to when they appear to have a different view than the Surgeon General on what the studies show?

A. Yes. And they -- later in the report they go on to describe what they believe to be the principal limitations in the epidemiology as it existed to that point, and it was on that -- because of those limitations that they believed that further research was needed.

Q. So I guess if this were a fight, there's kind of a split decision in 1986 on the EPI study?

A. In 1986 people are all over the lot.

Q. Now, by the way, let me just ask this question.

Dr. Koop in January of 1996 wrote the letter --

A. 1986.

Q. 1986. Thank you. He writes the letter I just showed you in which he advises what his position was at that time in which he says what he said, okay, regarding the fact that the EPI is not there yet.

What major epidemiological studies, if you know, occurred between January of 1996 and December that caused the Surgeon General to change his opinion that was different than what had been done earlier?

A. You meant to say 1986. Beginning of 1986 and the end of 1986.

Q. Let me ask it again because I'm...

What is it that happened between January of 1986 and December of 1986 in the way any major epidemiology study that was somehow new or different than what had occurred in the past that would have caused the Surgeon General to change his mind?

A. I'd have to look specifically at publication dates, but I believe the answer is nothing.

Of course, the time frame that you're talking about is much shorter than the time frame you indicated in your question.

Q. Go ahead and explain.

A. Because the Surgeon General's report appeared in December of '96 (sic), but it was put to bed, if you will, it was sent to the printer, it was done. The committee had disbanded well before then. So the report writing had been completed over the summer, then the production of the document occurred thereafter.

So you're really talking about a very few months. I don't recall, sitting here, any significant piece of epidemiology on any issue in the early months of 1986 that would have -- you would have looked at that and said, "Aha, that's really why he's changing his view."

And in the letter that you've mentioned it's not just his view, he says, "The Office of Smoking and Health has reviewed this literature and these are our conclusions." So he's expressing his own view in the letter as well as the view of the Office of Smoking and Health as of January of 1986.

Q. And as of January of 1986, had Dr. Koop, the Surgeon

General, called for or announced his position of a smoke-free society by the year 2000?

A. That appeared to be one of the centerpieces of his incumbency.

Q. What was -- just summarize for the court, what was that plan or policy to have a smoke-free society by 2000 as you understood it?

A. Well, I don't think it really meant what he -- what the words suggest he meant.

That is, he wasn't -- I don't believe he believed that people were going to stop smoking in the United States, everybody, by the year 2000.

What he was talking about is the undertaking of a variety of programs and activities that would have a significant impact on the number of people who smoked and perhaps the frequency of their smoking. And he went out of his way in Congress and elsewhere, as indeed he was perfectly entitled to do, to make that a centerpiece of his years as Surgeon General.

THE COURT: I'm unclear on the dates for a moment.

His report was published, I believe you said in December, although completed well before December '86.

THE WITNESS: That's correct.

THE COURT: But I thought you also said that it was January of '86 that Surgeon General Koop called for the smoke-free society by 2000.

THE WITNESS: Well, I don't recall when actually Surgeon General Koop took office.

Very early when he took office he had made this call and began to release papers -- I mean, I think it was a very big thing at the time. You probably recall it yourself, Your Honor.

MR. WEBB: I'm going to show you a document that may help refresh as far as when Dr. Koop make that announcement. Could I have JD 024823 given to the witness? This is an article that appeared in I think called Health Magazine, which I think you will see, at least from the first paragraph -- if we cull it out -- at least Dr. Koop says in 1984 is when he called for a smoke-free society.

BY MR. WEBB:

Q. Do you see that?

A. Yes.

Q. Is that basically consistent with your recollection?

A. Yes.

Q. Okay.

A. Now, here he describing smoke-free society in a different way than I just defined it. And he's saying, "By a smoke-free society I mean that smokers will not smoke in the presence of nonsmokers without asking for and obtaining their permission."

Q. Now, the government in its written direct examination and to some extent during its oral examination, they asked you a number of questions, particularly in your written direct where they

said to you in the form of a question whether or not, in fact, it wasn't true that you believed as a lawyer that in -- by the time 1986 had ended, that a consensus had been reached and the issue had been resolved on smoking, ETS and disease causation.

Do you recall those questions?

A. I do.

Q. I just want you to tell the court in your own words, did you on any basis believe in good faith that the issue had been resolved at the end of 1986 on the issue of ETS and disease causation?

MS. EUBANKS: Objection, Your Honor. This is cumulative.

This is all set forth in the extensive answers in the written direct, exactly answers to this very question from this witness.

THE COURT: There was certainly questioning about it after the written direct, though, and there was questioning to challenge the written direct and, in essence -- and it was perfectly appropriate -- but in essence, it was cross-examination, so Mr. Webb can elicit on cross slash redirect an answer to the question.

You may answer the question.

THE WITNESS: Thank you, Your Honor.

A. I certainly did not think that the issue was anywhere near to being resolved as of 1986. I thought we were still at the

early stages. And not just on lung cancer.

There were other serious claims that had been made about ETS and those issues also needed ultimately to be resolved. They certainly hadn't been resolved by 1986.

Q. And I'm going to go through some of this a little bit later, but did events happen thereafter in connection with the EPA risk assessment and the OSHA rulemaking proceedings that you've described in your testimony that clearly establish that it was still an open issue?

A. Well, the OSHA proceeding, of course, is one that I know particularly well because I devoted three or four years of my life to it, such as it has been.

That began with a preliminary finding by the OSHA staff that, as it needed to begin, that exposure to environmental tobacco smoke in the workplace presented a significant risk of material health impairment. And I'm paraphrasing the pertinent statute. But that's the finding they had to be able to make: A significant finding of material health impairment.

And they then proceeded to insert in the Federal Register a quite long preliminary document trying to show why they believed that to be the case. That it did. And that was going to be the predicate for severe restrictions on smoking in the workplace in the United States, if not a ban.

Q. Can you explain what time frame we are in for the court?

A. This would be 1983, 1984, 1985, into the beginning of 1986.

And then we began to tail off after 19 -- excuse me. Those are '90s, not '80s.

Q. Explain to the court you're talking about the '90s, up to the mid-'90s, is that correct?

A. Yes, into the mid-'90s.

Q. I want you to explain to the court, just summarize in your own words, what happened in connection with the OSHA proceeding which, at least in your mind as a lawyer, vindicated the position you had been taking over the years on what the state of ETS science was.

A. Well, we and thousands of other people submitted extensive written comments to OSHA on the proposed rule and the bases cited for the proposed rule.

We then -- OSHA was obligated under the OSHA act to have a trial-type hearing, and we had such a hearing. It lasted about seven months.

Q. That was the end of '83?

A. No.

Q. End of '93 and the beginning of '94?

A. No. It would be the end of '94 into '95.

Q. Okay.

A. And again hundreds and hundreds of witnesses, thousands and thousands of pages of testimony. And the question so far as ETS is concerned is whether it presented a significant risk of material health impairment.

Q. Could I interrupt you for a minute, if I might for a second?

That trail that occurred -- for several months?

A. Yes, several months every day.

Q. Is that the only time you were aware of as a lawyer where in an actual litigation process the give and take of cross-examination, the truth-finding process, that these ETS EPI studies got torn apart in that kind of adversarial truth finding process?

MS. EUBANKS: Objection, Your Honor. If he wants to bring in those documents and those records for the court to review directly and to make an assessment of what happened there, it's proper. But it's improper questioning to ask this lawyer his legal opinion about other proceedings in another case.

This court has steadfastly rejected submissions of other cases and particular findings of other fora when we asked to do so simply taking matter of judicial notice.

It's an improper question to ask this witness who is a lawyer involved in these proceedings for his view in this matter.

MR. WEBB: Your Honor, my response is the government through its questions clearly, on their entire direct, are suggesting that he participated in a fraud scheme intentionally, willfully because he continued to pursue ETS activities throughout the remainder of the 1980s and into the 1990s because

the issue --

THE COURT: Let me interrupt you, Mr. Webb. I want to go back to the question before I definitively rule. The question was:

"Is that the only time you were aware of as a lawyer," et cetera. It's a fact question.

His recollection of events at that time. I'm not taking judicial notice of anything and I'm certainly not going to make definitive findings about it. But he can testify as to his recollection of whether any other such proceedings were held and -- to clarify, let me re-ask Mr. Webb's question.

"Is that the only time you are aware of as a lawyer where in an actual litigation process the give and take of cross-examination, the truth-finding process, that these ETS studies got torn apart, that kind of adversarial truth-finding process?"

THE WITNESS: The answer is yes. That's the only -- that's the only such proceeding of which I am aware.

BY MR. WEBB:

Q. And you participated extensively in that process?

A. Yes, I did. I examined many of the witnesses in those hearings on behalf of the Tobacco Institute on that occasion.

Q. Tell the court the result, ultimately, of that rulemaking process.

A. Ultimately, OSHA withdrew the rulemaking proposal. I am

perfectly, perfectly satisfied because they were unable to find a significant risk from workplace exposure to environmental tobacco smoke.

Q. That withdrawal occurred --

A. Well, I said in my written statement that it was -- that I believe that the withdrawal was effective as a practical matter as of 1997.

As a matter of fact, the document actually formally withdrawing did not appear, I think, until later, and that would have been 2001 or so. But it was clear to all of those of us who had been involved in the proceeding, and in discussions with Sue Sherman at OSHA and so forth, workshops that were held subsequently, that they basically had concluded by 1997 this was not going to work.

That they could not find the evidence to justify any restrictions on smoking in the workplace and that they were going to have to terminate the proceeding unless something else came into the literature that would justify a different conclusion.

Q. And you as a lawyer, who by that time had been working for a decade and a half on ETS-related issues, as an advocate and a representative of your client, did you in some ways feel vindicated by the ultimate decision that happened from OSHA as far as what you at least believed in good faith were the right way to interpret the EPI studies?

A. You know, it's very odd. I didn't feel vindicated because I hadn't been attacked yet. You know, my ethics had not been attacked as they have been by the government in this case.

So I didn't -- I didn't say to myself when OSHA said, it isn't there and we're going to stop, vindicate. I felt they made the right decision. I felt it was the appropriate and right decision and I respected them for it. I guess that's the way I'd answer.

Q. Well, as you look back over those years now, looking at what OSHA actually finally did, do you at least believe that that is strong evidence that supports your position that you acted in good faith on the ETS issue?

A. Well, I can't see how it could be viewed any other way. You had to recall what Department of Labor we were talking about this. This is Bob Reich's Department of Labor. He had had a press conference before this proceeding saying, "In a few months we're going to ban smoking in the workplace and this is going to happen."

And the proceeding happened. It went on for a long period of time. They couldn't find the data that would justify it, and they stopped it. And I think it shows that we were correct. And I would like to think the OSHA people would say we proceeded in not only good faith but as ladies and gentlemen and so forth.

Q. Now, let me -- let me go back now to the Downunder

Conference because we went through the year 1986 and the events that were occurring.

And the government, there's a lot of questions about the Downunder Conference in your -- in your direct and yesterday and, quite frankly, I think you've covered pretty much your view of what happened.

The only thing I wanted to focus on is what you told the court yesterday; that when all the dust settled, after all these -- strike the question.

Were there some ideas that were raised in Downunder Conference that you viewed to be good ideas?

A. Yes.

Q. Were there some crazy ideas?

A. Yes.

Q. As far as what happened -- as far as what happened in the world, after the Downunder Conference what ideas or concepts that were discussed during that three days ever made it out in the real world into action by anyone connected to the tobacco industry?

A. Well, there were really in my view only two.

One is, as I said in my written direct, the idea of the tobacco industry or companies in the tobacco industry advocating the separation of smokers and nonsmokers in public places and workplaces gained a certain amount of traction because Philip Morris put the idea on the table in a new way and said, We are

really behind this and we would like to see this happen. And so I think everybody took it more seriously and raised fewer objections to it than they might of. It gained traction in that sense.

But it was a small move in another way because there had been Tobacco Institute ads during the preceding years calling for freedom of choice and courtesy and so forth, but this was going to be a step forth at least and it was going to say, "Look. If you've got people who are uncomfortable or complaining, you really ought to think about separating smokers and nonsmokers and trying to accommodate both."

So, you know, that was -- that was the first part of it. The second --

Q. Let me stop you just for a minute on that.

That became known as the accommodation strategy?

A. Yes.

Q. Okay. Let me just show you one document on that issue and go on just to show. Philip Morris actually implemented that accommodation strategy; is that correct?

A. That is correct.

MR. WEBB: Could I have JD 053794 handed to the witness if I could? And I'll put that up on the screen.

Q. Is this the type -- is this a type of ad that Philip Morris went forward with to implement the accommodation strategy?

A. Yes. This is -- yes, this is precisely what they decided to

do.

And they also had a -- they also, as I recall, created a program to go into hotels and restaurants, in particular, but also other places of public accommodation and with table cards, "Don't smoke here. You can smoke there," et cetera. It was all part of this effort to find a place where smokers could be comfortable, but also make sure that nonsmokers were comfortable as well.

Q. Now -- so this -- you can take that down -- this accommodation -- by the way, that concept of accommodation that you talked about, had it been talked about before the Downunder Conference that you remember?

A. Oh, yes. Oh, good heavens, yes.

It was -- I mean, one wouldn't have had to be genius to come up with the idea. This wasn't one of those Einstein ideas I talked about earlier. That if -- we knew -- everyone knew that nonsmokers put aside health impact chronic health impact.

There are a lot of people who don't smoke who don't like being around people who are smoking. That's just a simple fact and some of them care about it quite a lot, and the only way you're going to make those people happy is to give them a place where there's no smoking.

So the idea of having separate sections, separate rooms, separate sections, divisions between, was one that had been discussed from the earliest days, and we had certainly

been -- been talking about that and even developing model legislation that might be used to implement the idea.

Q. But it was also discussed during that 3-day conference?

A. It was, indeed.

Q. And eventually came into the real world at some point?

A. Correct, it did.

Q. What was the second thing that came out of the Downunder Conference that ever actually made it into the real world?

A. Well, the second idea was to the effect that Philip Morris and perhaps the full tobacco industry ought to be spending more on ETS-related research and more with ETS consultants, scientists who could provide advice in this area that had been true in the past.

And as I said during my responses to counsel for the government, I don't know what the numbers would actually show, whether post downunder there was an absolute net increase.

I do think that post downunder because of CIAR, the funds that were being made available for ETS-related research were being used in a smarter, more efficient way than had been true earlier. I think under the ETS Advisory Group money had been wasted.

Q. Now, let me go on to another topic completely different.

You were asked a lot of questions in your written direct examination about an ETS scientific consultant project that I believe at least some people referred to as "white

coats." Do you recall the testimony?
A. It came up when?
Q. During your written direct examination.
A. Yes.
Q. As far as -- that program called white coats, was that a name you used or did other people put the name on it?
A. Well, I tended not to use it. Lay people would often use it to refer to the scientists, but I learned fairly early on that they didn't like it themselves. It was viewed as a term of derision by many of them. And I tried to steer clear of it whenever I could.

Again, I made have slipped once or twice, I hope not, but I tried not to use that term. I did not think of them as that.

Q. What I'm going to focus on is we spent quite a bit of time talking about what you did with consultants, scientific consultants in the United States.

I want to focus on the government's questions when they asked you about consultants that you had -- scientific consultants you dealt with in foreign countries.
A. Okay.
Q. And I believe from your direct examination it breaks down into Europe, Asia, and Latin America, is that correct, where you had some personal involvement?
A. That's correct.

Q. So let me just take them one an a time so you can explain to the court exactly what did happen and the time frame it happened in. And so let me start with -- let's start with Europe. Okay? Let's get the time frame.

When were you involved in Europe in connection with interviewing, retaining, or dealing with scientists that might become consultants for the tobacco industry?

A. In 1980 -- perhaps the end of 1986, certainly 1987, and my involvement would have ended in fairly early 1988, so it was a fairly short period.

Q. And I believe you explained yesterday to Ms. Eubanks that after 1988 you believe that activities went forward by your law firm, but you were not personally involved in those activities in Europe regarding consultants. Is that correct?

A. That's correct. And I wasn't consulted on what was going on. I tended not to be kept informed of what was happening.

I wasn't dealing with the same people at Philip Morris that the people in London, in our office in London were dealing with. And I did receive an occasional paper on the Europe program, but basically I had no context for those papers. I simply wasn't involved and didn't even know most of the people.

So after about 1988, as I had explained to the government, I really am just not the right witness to give them insights into what was being done or not being done.

Q. I'm not going to ask you. I'm just going to take the time

period that you were there doing something in Europe regarding foreign consultants.

Let's start with who was your client when you were involved in the process of interviewing or retaining consultants in the continent of Europe?

A. Philip Morris, and Philip Morris only, and it would have been Philip Morris International in this case.

Q. So it was Philip Morris International was your client; is that correct?

A. Yes.

Q. Okay. During that time frame can you describe for the court what that program was in Europe? What was it?

A. Well, during the period that I was involved, it was really just getting underway. The first that had to be done, of course, was to decide in what countries we should seek to identify potential consulting scientists and then begin to make contact with those scientists, see whether they were able and willing to consult, had appropriate expertise and so forth.

And by the time I -- I was living in the United States at that time, so -- and doing a fair number of other things -- so I wasn't paying -- I wasn't spending a lot of time in the effort.

But by the time I ended my involvement in 1988 we had identified a number of people who looked at least quite promising, but no activities had been undertaken and no group

had really formed or anything of that sort. We had met people who seemed promising, seemed interesting, seemed qualified. But it was really -- I think the best phrase to use is an organizational phase.

Q. During that organizational phase when you did what you just described you did, just explain to the court what was the -- at least as a lawyer -- what did you believe to be the need or the reason to pursue this process of trying to develop scientific consultants in Europe?

A. Really precisely the same as in the United States.

My initial involvement on ETS-related issues had occurred a number of years earlier in a Swedish workmens' case called Gun Palm, so we knew there was going to be litigation and indeed there has been in Europe on ETS, both in a workmens' context and outside of a workmens' context.

We knew there were going to be legislative hearings of one sort or another in various countries in Europe. And there have been. They are less frequent than they are in the United States, but they do happen. And we knew there would be regulatory proceedings.

And it was thought that you couldn't -- you couldn't bring Americans over to Europe to teach the Europeans what the science of ETS was. They don't appreciate that. They think they have their own scientists and they are pretty good.

So you can't participate in those proceedings, at least

exclusively, with Americans, you have to have local people from universities that are recognized by the people who are going to be making the decision, and that really was the nature of the activity.

Additionally, in Europe you have language issues. So some of the legal proceedings we anticipated were going to be in Swedish. They would be in Finnish. They would be in Norwegian and French and so forth. You had to have people who spoke those languages. You could not put up an English speaker and think that the Judge was going to be appreciating your efforts very much.

Q. Now, just briefly describe what is it you actually did. If you're trying to locate some consultants that can become a consultant for your client in Europe during what you called the organizational phase, just tell the court what process did you follow. What did you do?

A. Again, it was pretty much the same process that we followed in the States.

We looked at the literature. There was a developing literature on indoor air involving Europeans at this point. We, of course, knew something of what the leading universities in Europe were in the individual countries.

And Philip Morris had some ongoing relationships with scientists in Europe, and we consulted with those people and got advice from those people about how we might proceed.

And basically what we learned from all of that is that there were people in Europe and that we would -- we really should be proceeding with them in much the same way using many of the same ground rules that we had used for ourselves in the United States, and so we did.

Q. And did you follow essentially the same process, by giving a potential consultant all the studies, et cetera, to review or how did that process work?

A. Exactly the same. That's the way we did it.

Q. I won't go back through that, then, because you described that in some detail as to what you did in the U.S.

Let me go to Asia. I want to put on the record what you did in all these areas that you worked in. Let's go to Asia. Did you participate in recruiting or dealing with ETS consultants in Asia?

A. Yes.

Q. And during what time period were you doing that?

A. It would be after Europe.

Counsel for the government showed me some documents yesterday. It would have been basically the early 1990s. It would have been over, I think, by 1994-1995, that period. So, it was a period of approximately three or four years in the early 1990s, maybe very late 1980s.

Q. That's fine. Who was your client or clients from the tobacco industry in connection with the efforts to develop ETS

scientists that could be consultants in Asia?
A. In Asia there were three companies that had -- that communicated a shared interest in -- an interest in collaborating, and those were Philip Morris International, Reynolds International, R.J. Reynolds International, and JTI, the old government tobacco monopoly in Japan.

So from the outset to the conclusion of the activity, those were the companies that provided the financial support for it.

Q. Now, as far as the need or the reason as a lawyer to want consultants in Asia, were they the same or different than you've already described in connection with, for example, Europe?
A. They again were the same, really the same.

The world is remarkably similar in terms of they have regulations. They have litigation. They have legislatures or parliaments that issue rules and they consider presentations made to them and they may find them persuasive or not.

There was the same need to be able to communicate in the local language that we had in Europe or in the United States. And there was an additional feeling as well.

People tend to look at Asia and they say there's some entity known as Asia. There's no Asia. There are a lot of countries that are -- that are there and they are remarkably different. The cultures are different.

And if we take it immediately to the issue we're

talking about here. The ambient and indoor air quality issues country by country are remarkably different because of those cultural differences. So we needed Asian scientists if we were going to take part in the dialogue on indoor air and ETS that we anticipated occurring in Asia.

Q. Now, in fact, what areas of Asia did you actually locate and hire consultants in if you can now remember, if you remember?

A. Hong Kong, the Philippines, Malaysia, Singapore, Indonesia.

Did I say Indonesia already?

Japan. I think that's it. We had some contacts with consultants with scientists from other countries, including China, but -- and Thailand as well, but they never really were consultants of ours. We met with them on several occasions, but we didn't go forward with anything.

Q. As far as the process and procedure that you followed as a lawyer in identifying, talking to, and selecting consultants in Asia, did you follow the same process and procedure you've earlier described in your testimony as far as how you did it in the United States and how you did it, for example, in Europe?

A. Yes.

Q. And as you think back over those years now, when you were involved, just when you were involved, do you recall how many scientific consultants were actually brought into the program so they became a consultant for your clients, if you remember?

A. Well, the largest group by far, of course, was the United

States.
Q. I'm sorry. Only in Asia. I apologize. I'm just trying --
A. In Asia.
Q. I'm talking about Asia now. If you remember.
A. Ten or 11, something of that sort.
Q. What did they do?
A. Not an awful lot because the effort was fairly short-lived, if you will, but -- and again the early years were consumed very largely by the effort to get their hands around the pertinent literature.

A number of people we met in Asia were kind of mystified that we would have an interest in environmental tobacco smoke. They said it's basically one of the last things on their radar screen. They had people cooking with basically barbecue grilles unvented in stone houses. That's pollution if you want to see pollution in their view. Cities that were horribly polluted with no ventilation and open windows, with that exterior pollution going inside.

So, one of our challenges was to get them to focus on our issue. It may not have been one of their priority issues but we asked them to devote some time to the issues that were of concern to us and then to read the pertinent science and see what conclusions they were prepared to come to.
Q. So they read the literature?
A. Correct.

Q. Reached some level of where they understood the literature, I assume?
A. Yes.
Q. But because of what was going on in Asia, did they -- you didn't have the same type of arenas going on with litigation, regulation, et cetera; is that fair to say?
A. We didn't have any litigation during those years because the issue was not, if you will, kind of hot in Asia during those years.

There may have been a case or two in Japan. I'd have to search my memory to know whether that's true, but I think there was.

Q. Okay.
A. But the answer is there were fewer activities in Asia in part because there was less interest in this issue in Asia at that time.
Q. And at some point did this consultancy program in Asia end while you were still involved?
A. Yes.
Q. And explain to the court why did it end.
A. I think it ended -- I think it ended from -- I was never told for sure, so that's probably the best answer I can give you.

I think, though, it ended as the discussions toward the Master Settlement Agreement and the products cases was winding

its way and Philip Morris basically was coming to the view that anything we do we should do alone. We don't need the grief of working with others. And people are going to be making charges of one sort or another, and so let's just wind this up.

Q. The tobacco companies just decided not to continued to fund the program?

A. That's correct.

Q. And let's go to the last area of the world you said you recruited, consultants in which is Latin America?

THE COURT: Before you do that, Mr. Webb, you've had a good three -- oh, let's just say three hours this morning, and you had indicated three to four.

At this point what do you think you have left?

MR. WEBB: Well, I'm cutting back as I'm going. I'm a little bit -- but I'm going to try to do it in 45 minutes or so.

THE COURT: And then does the government have any sense yet how long you will be on redirect?

MS. EUBANKS: It might be as long as two hours, Your Honor.

THE COURT: What time does Mr. Rupp want to leave? If he can.

THE WITNESS: I have a 5:10, Your Honor, if I can.

THE COURT: I don't know if we're going to make that. I don't know.

THE WITNESS: The last flight to Europe tonight I'm

told leaves at 10:20.

THE COURT: We're not sitting until 8:00 o'clock. Even I draw the line on that.

Well, let's get through Latin America, then we will take a lunch break, probably, shorter than usual.

MR. WEBB: Thank you, Your Honor. Let me --

BY MR. WEBB:

Q. We will go to Latin America. I do want to get it in the record, but I recognize there's time issues here. As far as when did the Latin America consultancy program begin to the best of your recollection?

A. It would been sometime in the nineties, I believe. And again my involvement there was quite short and in the preliminary phases of the earth as recruitment was -- or identification of scientists was occurring in early meetings were being held so that they could work through the pertinent science and talk about what this issue was about and what conclusions they were -- could reach.

Q. And how long, just roughly, after you began being involved in the Latin America scientific consultant program, how long did you continue to work in that area?

A. I would think it would be about a year and a half, maybe just a bit longer, something of that sort.

Q. And just -- as far as identifying consultants, interacting with them, having them agree to become consultants, did you

follow the same process in Latin America that you've described you did elsewhere in the world?
A. Precisely.
Q. As far as the need as a lawyer for consultants in Latin America, were they essentially the same as you've already described with other parts of the world?
A. They were.
Q. Okay. And as far as what you did during that time period, did you do anything different in Latin America than you did in the other parts of the world in recruiting the consultants?
A. No.
Q. Were the consultants expected to do anything different than you've already described they did in the United States or in Europe or elsewhere?
A. No.
Q. Was there much going on in Latin America as far as ETS activity during those years?
A. Less than in the United States. Less than in the United States, much more than in Asia. Hard to compare Latin America with Europe, but it was somewhere in the middle there.
MR. WEBB: Your Honor, I'm done with Latin America.
THE COURT: Okay. I think everybody should consult over lunch in terms of the timing. I'm concerned about that. Although certainly today is Thursday, planes fly tomorrow.
MR. WEBB: As I understood it, we have to stop today by

five to 4:00.

THE COURT: We really do.

MR. WEBB: I understand that.

THE COURT: We really do. Does everybody think they can get back by 1:30?

MR. WEBB: Yes.

MS. EUBANKS: Of course.

THE COURT: 1:30 everyone, please.

(Lunch recess began at 12:47 p.m.)

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CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR

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 28, 2004
	.	
Defendants.	.	
. . . . .	.	

VOLUME 21
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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Official Court Reporter

AFTERNOON SESSION, OCTOBER 28, 2004

P R O C E E D I N G S

(1:32 p.m.)

THE COURT: All right, Mr. Webb, please.

CONTINUED CROSS-EXAMINATION OF JOHN P. RUPP

BY MR. WEBB:

Q. Mr. Rupp, if I appear to be a jet engine, I'm going to try to get through what I have left to do and leave Ms. Eubanks a couple hours, and hopefully you'll make your plane. And I know you're anxious, and that's my intent, and I'm going to try not to talk too fast for our court reporter.

I want to go to a different topic, which is -- you recall a lot of -- a number of questions in your direct examination by the government as to why it was that it was you, or lawyers at Covington & Burling, were acting as what they called a buffer entity between the client TI, or the tobacco industry, and consultants. Do you recall that series of questions?

A. Yes, I do.

Q. Now, based on -- and you might move that -- move your microphone.

A. Yes, I do.

Q. Based on your experience as a lawyer over the years, when a lawyer is working for a product manufacturer, is it common and typical that the lawyer will be the person who locates, interviews, and ultimately retains scientific experts who will

assist the client?

A. It's the almost invariable practice in my experience.

Q. And, in fact, if you look at your firm, for example, based on your experience, does your firm frequently have clients unconnected to the tobacco industry where that exact process is followed?

A. Correct, it's almost the invariable practice when it's a regulatory or litigation or legislative issue.

Q. Okay. And as far as in particular with this situation with the tobacco interests you represented and the scientific consultants, whether they were in the United States, Latin America, Europe or Asia, were the reasons essentially the same as to why you played that role of locating, interviewing, and selecting experts?

A. Yes.

Q. Okay. As I -- why don't you just tell the Court this in your own words the different reasons why you follow that process?

A. Well, the particular expertise that a lawyer brings, in the circumstances we've been discussing over the last couple of days, is the ability to focus the scientists on the issues that are likely to be particularly pertinent in the particular piece of legislation, litigation or regulatory proceeding.

And that is one function that we perform for, as you indicated, but I will testify, for a whole range of clients,

that is our work, that's the work of most law firms in Washington.

There was an additional reason here that I don't know that we discussed significantly during government -- counsel for the government's examination, and that is -- but again, it's not limited to tobacco. The scientists with whom you were working wanted to work with us, they were used to working with lawyers, they did not want to work directly with representatives of the tobacco company. The reasons for that are probably as variable as the number of scientific consultants, you know, you'd have to ask the individual consultants that, but I think their view was that they could trust us never to ask them to do something that was inappropriate or would make them uncomfortable.

And we regarded that as being one of our responsibilities to them, and if there were requests made of them that we believed to be inappropriate, or they simply were uncomfortable with, we made sure we stood between them and the client.

Q. Okay. Let me show you one particular answer that you gave. Could I have tab 43. Do you have your direct examination there?

A. Yes.

Q. If you go to page 163, it's line 8 to 11. And the government said to you: "Mr. Rupp, one of the themes of the ETS Consultancy Program that you participated" --

A. Page 163?

Q. Yeah, are you on page 163? If I have the right page?

A. I believe I am.

Q. I have line 8 to 11. Are you with me?

A. Yes, I see it.

Q. Okay. Fine. I want to call your attention, the question that was asked of you is: "Mr. Rupp, one of the themes of the ETS Consultancy Program that you participated in on behalf of the industry was non attribution to the industry, correct?" And the government proposed the answer "yes", and you answered, "No, in fact, the contrary was the case".

I would like to you to expand upon that answer to the Court and explain why it was to the contrary.

A. Well, we already have looked at one of Dr. Schwartz's testimony in a legislative hearing and that was the typical way of proceeding, and regardless of the environment, the instruction that we gave was that they should describe the source of the funding, what had made it possible for them to be there, and to evaluate the literature about which they were testifying or making a presentation about.

We were quite clear about that. They liked that, too. You don't go to a university professor and ask them to hide things from the public, from a regulatory agency, from a Court, or from anyone else. You just don't ask them to do that, and we never did. It was precisely to the contrary.

Additionally, in most of the proceedings that we have

been discussing over the past couple of days, their testimony would go to the agency, or they would be accompanied to the witness chair by someone representing the Tobacco Institute or an individual tobacco company, and would be introduced and an explanation given as to why they were there and what they were going to testify about.

So, it's just -- as I say here -- it's precisely the opposite of what the government has suggested.

Q. Okay. Now, one last point in this area. As far as the fact that your firm, Covington & Burling, was used as the entity that the bill went through to; is that correct, from the consultant -- the bill went through your firm; is that correct?

A. Often it did.

Q. Or was that the normal process?

A. That was -- yes, I would say that was normal.

Q. On the occasions that that happened, would you please explain to the Court whether were there certain logistical benefits to the consultants to have the bills go through Covington & Burling?

A. Yes.

Q. Explain that to the Court.

A. Well, first, of course, one of the things we did was look to see whether it was an appropriate bill from an appropriate person in an appropriate amount. We were not paying premium rates to anyone here, and that we made clear from the outset.

Second, when people were going to places to testify, they were incurring out-of-pocket expenses, and they could not be expected to be the banker for the tobacco industry or anyone else, so what we could do -- they also couldn't be expected to keep track of who the clients were at the particular point in time and what their proportionate obligation was to pay the bill. We took that obligation on ourselves, and so we would tend to pay the consultant fairly promptly, often within a few days, and then if we concluded that the bill was an appropriate bill -- and then we would recoup the money from our client, whoever the client happened to be.

Q. So, the consultants who -- the consultants often were not big business operations, were they?

A. Almost always they were operating as individuals. Even at the Center for Environmental Health and Human Toxicology, they were really operating as individuals, albeit they had a tie to universities.

Q. And basically they got paid more quickly by following this process; is that fair to say?

A. They got paid as much as two to three months more quickly.

Q. Now, as far as the fact that you and lawyers at your firm with the consultancy program in the U.S., Latin America, Europe, Asia, as far as your firm being the firm that contacted scientific experts, interviewed them, retained them, and

primarily dealt with them, as opposed to the client dealing with them, do you believe that you did anything different than is done by other lawyers across this country everyday?

MS. EUBANKS: Objection, Your Honor. There's a lack of foundation that he would know what other lawyers across the country have done, and it's also irrelevant.

THE COURT: Sustained.

BY MR. WEBB:

Q. Let me go to briefly another area that you were asked quite a few questions about in your written direct examination, which is the McGill Symposium.

A. Yes.

Q. I think you answered that pretty thoroughly in your written direct, but just a couple of questions.

First of all, you indicated when Ms. Eubanks was questioning you that this is what was known as a private symposium; is that correct?

A. That's correct.

Q. Would you please explain to the Court why you and the organizers of the McGill Symposium decided this would be better as a private symposium?

A. It was very largely an outgrowth, the decision that was made was an outgrowth of the experience that we had had with the Georgetown Symposium. That symposium had been organized over a period of several months. Invitations to this symposium had

gone out to the conference. It was a medical conference. And it had to be cancelled because of pressure that was placed on people to withdraw, and the university had been asked to cancel it as well. We did not want a repeat of that.

Now, a couple of years earlier, the National Institutes of Heart, Health, Lung and Blood Institute had held a symposium on the possible pulmonary effects of exposure to environmental tobacco smoke and I think that was 19 -- it would have been 19 -- approximately 1995 -- excuse me, 1985 or so.

And it's precisely the format that the National Institutes of Health followed. They identified the issues they wanted the experts to come in and discuss, they invited those experts, no one was permitted to walk in off the street, they made no public announcement, they released the report of the conference, or the symposium, at the end of the symposium, and it became at that point a public document. And at that point, of course, others could organize comparable symposia, other scientists could point out limitations in the conclusions that were reached, if there were any, and so forth. In my view that's the nature of the scientific process.

Q. And were scientists who were invited to the symposium, were there differing views, both pro and con, regarding ETS data sufficient to show a causal relationship between ETS and disease?

A. There were clearly shadings of view, but the shadings of

view tended to arise principally with respect to the possible impact of ETS on infants. It was in that area that the epidemiology was most suggestive, also most complicated.

On the issues that were really attracting attention at the time, which is lung cancer and heart disease, the scientists -- indeed this was almost our invariable experience, the scientists were just simply not persuaded -- I think it fair to say that there were shadings of view within that not persuaded category, but not persuaded is still correct.

Q. Now, I think counsel pointed out there was a Monograph, a publication that came out of this symposium; is that correct?

A. Yes, a book.

Q. A book. And I'm not going to go through that book with you, but the bottom line is, as far as you knew, anyway as a lawyer, did that appear to be a proper recitation of the state of ETS science at the time that it was published?

A. Certainly every effort that I thought the organizers reasonably could of taken to make sure that was the case was taken. Doctors Ecobichon and Wu. Dr. Ecobichon from McGill, Dr. Wu from New York University Medical Center, were top notch people in their field, and I believe they did everything they could to make sure that that was true. I believe it was true, and I don't -- there was certainly nothing in the direct examination that suggested that the government had any problem with a conclusion that was reached at McGill. Maybe I'm wrong

about that, but --

Q. Okay. Now, as far as -- counsel showed you some documents yesterday about a relationship, potentially, between the EPA Risk Assessment and the McGill Symposium. Can you address for the Court, at least in your mind, what, if any, relationship existed between those two events, the EPA Risk Assessment and the McGill Symposium?

A. Well, documents that counsel showed me yesterday indicated that there were at least some public discussions of what eventually did transpire. That is, the EPA ultimately did put together a compendium on ETS, and followed that with an ETS Risk Assessment. And the documents suggested that as of the time of McGill, that was already being discussed to some extent at least. I didn't really regard the two as being particularly connected. They were related in a way, but the point really was much more, to take a snapshot at a particular point in time, reasonable, comprehensive and fair snapshot of where the science was as of the time that the scientists were meeting at McGill.

The EPA Risk Assessment was released, of course, three years later, and the science had moved on, to some extent, on some issues at least, by that time, but to my mind that really was not the principle purpose of the McGill Symposium.

Q. Well, the McGill Symposium was in 1989; is that correct?

A. Correct, and planning had begun quite early that year.

Q. And the final EPA Risk Assessment, I believe, gets issued

in December of 1992; is that correct?

A. That's also correct.

Q. So there's a pretty big gap in there, isn't there?

A. Yes, but I think counsel for the government is correct in suggesting, as the documents tend to indicate, that at least we knew as of that time that EPA was going to be doing a risk assessment.

Q. Okay. And that's going to be my last topic, to talk about the EPA Risk Assessment, so I'll transition into that.

Before the EPA issue, what was known as the final ETS Risk Assessment in December of 1992, did you have some interactions with the EPA as a lawyer on the risk assessment issue prior to the time the report was issued?

A. Yes, I did.

Q. I don't want to get into a lot of detail. Can you just summarize for the Court, in summary fashion, what was your connection, or involvement, as a lawyer on that matter before the report was issued?

A. Well, I had two or three meetings -- two or three meetings occurred at EPA, that were scheduled at my request, with Bob Axelrad, who I don't recall today what his title was, but he was playing a very significant role in the development of the compendium and the risk assessment, and then subsequently, I believe, it was subsequently with Donald Barns, who was a political appointee at the agency in one of the senior

positions, occupying one of the senior positions, and basically we were asking, or pleading, that the review be a comprehensive one, that they take into account all of the pertinent science. We offered to make, as I think we've discussed earlier today, available to them the database as a whole, as well as individual pieces from the database. I believe I suggested to them, at some point, that I thought it would be awfully useful to them, and they might want to consider having a series of workshops on individual issues in the course of preparing the report. And then, finally, I indicated that the involvement that a particular individual had had in prior agency activities relating to ETS, I believed to be completely inappropriate and I urged them to look at that situation and see -- determine whether, in their view, his continued involvement was appropriate.

Q. I think you mentioned his name in your -- I think in your written direct, but in any event, we don't need to use his name. What was your concern about whether that particular consultant that the EPA was using was really fair?

A. Well, he had been a long time activist in the antismoking community, he had been president of Prince George's County group against smokers pollution, he had been appearing at legislative hearings. Sometimes -- always indicating that he was from EPA, but not always indicating that his views were not necessarily those of EPA. Sometimes he would say that, sometimes not.

And it -- of course, we couldn't legitimately quarrel, and we didn't quarrel with the notion that he as a citizen had a right to publish whatever he wanted and to take whatever position he wanted in legislative or regulatory hearings. That was not the issue. The issue was whether he should, then, be put in a position by the agency to participate actively in the development of the compendium, the risk assessment and policy guides where he had, what we perceived to be, a conflict of interest. The point I made to Mr. Barns and to Mr. Axelrad, it would be a little bit like having the Tobacco Institute writing your policy guide on ETS. I wouldn't think that's appropriate, and all we're asking for here is objectivity, an open mind and a commitment fairly and objectively to review the pertinent science and come to whatever conclusion you want, but with that process, so that we all, at the end of the day, can be satisfied that that was the process that was followed.

Q. And did the EPA respond to your concerns about that particular consultant and his impartiality?

A. Yes.

Q. And what was that response?

A. Well, the response was that they felt they could not exclude him from participation, and I indicated during my deposition, when the question was raised, that I thought it was because of his union membership. And as I indicated in my corrected direct examination, I think that may have been one of

the bases of the explanation that was given, but as I recalled -- as I thought about this after the deposition, I thought about it a good deal, the major reason given was that the individual was a plaintiff in a lawsuit against EPA at that time, and it was complaining about indoor air quality in the Waterside Mall building, and he was seeking damages from EPA. And Mr. Barns's view at the time, and I can't fault him for this in some respects, was that if he were excluded, he would regard -- would have a claim or could well seek to claim that there had been a sanction imposed upon him for having sued the agency for which he worked. So he was not excluded.

Q. As a lawyer, did you at least start to have some concerns about the fairness and impartiality of what the EPA was doing in the risk assessment area?

A. Well, in the 1980s they had begun to release documents, written by the fellow whom we're talking about, setting policy, suggesting policy guidance for employers and the managers of public spaces with respect to smoking.

I thought they were terribly one sided and just not remotely objective, and I also -- another point I made in my meetings with both Mr. Axelrad, as well as Mr. Barns, is that you've got the cart before the horse here. You've committed to doing a risk assessment on ETS to see whether ETS presents a health risk, but you've already issued policy guides that says this is a terrible health risk, it's a cart before the horse.

How can you reach those conclusions and then invite, before you've done the risk assessment, and then how can I convince my clients that this process has been a fair, reasonable and rational one? There was no way I could do that.

Q. Well, when the risk assessment was published in December of 1992, and if you need the document I can give it to you, but just to save a little time, can you give the Court, as a lawyer looking at the document, what were the big take away points from the EPA Risk Assessment that you took away?

A. Well, they certainly concluded that ETS was a cause of lung cancer among nonsmokers. That was the conclusion that I recall most specifically, and, of course, there was subsequent litigation about both that and the process leading to the issuance of the report.

Q. And we talked about that, and I'm not going to go through that with you. A Court in North Carolina basically threw out the EPA Risk Assessment; is that correct?

MS. EUBANKS: Objection, Your Honor, again, this is regarding a decision that we brought up before that has been vacated by the Court of Appeals.

MR. WEBB: I'm using this only to show what his -- I'll strike it. It's not that important.

BY MR. WEBB:

Q. When that EPA Risk Assessment came out, did some very responsible members of the scientific world have -- take issue

with and criticize that risk assessment?

A. Absolutely. Indeed, it's very instructive to read the statements that actually were made by members of the Science Advisory Board. There was a transcript made of those deliberations, and --

THE COURT: The Science Advisory Board?

THE WITNESS: This is the -- Your Honor, I'm referring to the Science Advisory Board of the U.S. Environmental Protection Agency.

THE COURT: All right. That's what I wanted to be clear on.

THE WITNESS: And they ultimately approved publication of the report, but if you read the course of those deliberations, you will find that there were -- the members of the Science Advisory Board had tremendous reservations about the conclusions being reached. In addition to that, one just needs to read the report itself.

On the issue, for example, of whether you could reach any conclusions extrapolating from active smoking data, the EPA reached three conclusions that were diametrically opposite, and it depended on what conclusion they needed to reach at the particular juncture, and that really, I think, was, among other things, what so irritated the District Court.

The other thing that happened, which was troubling, certainly, to me, was that some studies had appeared before the

risk assessment had been issued, and the studies that had appeared in peer reviewed literature by the time, you couldn't find a statistically significant relationship between exposure to ETS and lung cancer at a 95 percent confidence interval. And so what the EPA had done is change the confidence interval to 90 percent, which is a very odd thing to have done. It's almost unprecedented to have done. In addition to that, they ignored one of the larger studies on the U.S. population that had appeared to that date, the Brownson Study, which had found no relationship between exposure to ETS and lung cancer. And the only excuse they gave was that the Brownson article had appeared after they had basically completed their work. It hadn't appeared yet, there were several months before it appeared. They were, though, able to take into account an unpublished study by Elizabeth Fontham, which didn't appear until 1994, so it couldn't even be peer reviewed until later. I found that all extremely odd and troubling.

BY MR. WEBB:

Q. Let me show you one document, what I think pulls together what I think a lot of people were criticizing about the report, and this is -- this will be the last document I'll show you. Can I have JD 003286.

This is what is known as a Congressional Research Service Report, which I think you're generally familiar with, and I'm going to hand that document to you and if you -- first of all,

can you identify for the Court what this document is?

A. Yes, this is a statement given by Dr. Jean Gravel and Dr. Dennis Zimmerman of the Congressional Research Service before the subcommittee on Clean Air and Nuclear Regulation and Committee of Environmental Public Works of the Senate on May 11th, 1994 and the topic is environmental tobacco smoke.

There are two -- this is testimony. There are two additional documents that the Congressional Research Service wrote about this time relating to the same topic.

Q. And for ease I'm going to just try to use this one to try to illustrate what some of the problems were, or the defects in the EPA system or EPA Risk Assessment. If you would go into page -- at the top narrow numbered, go to CRS 4, please, and this is where they talk about the epidemiological studies in lung cancer. Do you see that?

A. Yes, I do.

Q. I'm going to read this, and then maybe stop and ask you a couple of questions, but what they say here in this report to Congress is that, "A number of epidemiological studies have assessed the effects of environmental tobacco smoke on specific diseases, with the largest body of research focusing on lung cancer among nonsmoking wives of smokers. Based upon these studies, several government agencies have, in the last few years, taken the position that environmental tobacco smoke causes lung cancer in nonsmoking adults, including the office of

the Surgeon General and the Environmental Protection Agency's EPA's 1992 Risk Assessment, that classifies environmental tobacco smoke as a cancer causing agent."

Next sentence. "Despite the controversy surrounding this latter report, the estimates of the risk of lung cancer deaths from passive smoking, by the EPA, are relatively small, amounting to a lifetime risk of death from lung cancer due to passive smoking from one tenth to two tenths of a percent. The positions taken on passive smoking's effects on the health by government agencies, and by the EPA 1992 Assessment in particular, have been subject to criticism by the tobacco industry and by some researchers."

It goes on to say, "Our discussion draws on evidence on both sides of the passive smoking issue with regard to statistical and scientific evidence, but based particular attention to the latest summary of the evidence in the EPA study."

It goes on to say, "The EPA study analyzed and summarized 30 studies of passive smoking lung cancer effects. Critics have questioned how a passive smoking effect can be discerned from a group of 30 studies of which six found a statistically significant, but small, effect, 24 found no statistically significant effect, and 6 of the 24 found a passive smoking effect opposite to the expected relationship."

Let me start there. Was that issue a major issue?

A. Yes, it was a major issue.

Q. Why?

A. Because what you could see from -- and they're correct about their evaluation of the literature that existed at that time -- what you had was that studies were popping around right at unity, an epidemiologist would say, right at one, some, just a bit above, some below. In the workplace there were no statistically significant relationship of any study. So what you had here was an -- was a very weak and unstable relationship even in the -- there was no study that we regarded as weak and unstable in light of what we knew about these studies.

In addition, the -- from between 1986, the release of the U.S. Surgeon General's Report and the time that these authors are writing, the epidemiology had very significantly deteriorated from the government's point of view. So, the new studies, the better studies that had been designed, actually to look at ETS, were reporting, for the most part, no statistically significant relationship. These were larger studies, better designed studies, for the most part, taking additional confounders into account, and so forth.

Q. Okay. Now the next point they make in this report, it says, "EPA attempted to standardize" -- are you on page 5 now?

A. I am.

Q. Right there. "EPA attempted to standardize this diverse group of studies to account for statistically important

differences in their methodologies. In this process EPA reduced the standard for statistical significance from the usual standard and the one generally used in the original studies. It is unusual to return to a study after the fact, lower the required significance level, and declare its results to be supportive, rather than unsupportive, of the effect one's theory suggests should be present. But our conclusion about the uncertainty of the EPA result is not dependent upon the change in significant levels." This paragraph is referring to the EPA reducing the confidence interval from 95 to 90 percent; is that correct?

THE COURT: Wait, Mr. Webb. You misspoke in a way that really could misrepresent the record. It should be, "But our conclusion about the uncertainty of the EPA results is not dependent upon this change in significance levels." And I checked the transcript and you used the word "significant", which is what I thought you had said.

MR. WEBB: I apologize.

THE COURT: That's all right, I just want to be clear.

MR. WEBB: That's fine.

THE WITNESS: That is what they were referring to in that passage. The same point had been made. There was an office within the Environmental Protection Agency, the risk assessment office. I don't -- sitting here, I don't know precisely the title, but it is a risk assessment unit within EPA. They also

had made comparable statements, and basically told the agency that from our point of view you cannot support what this report says.

BY MR. WEBB:

Q. But one of my colleagues tells me, Mr. Rupp, that in your last answer to my last question you actually, I think, said "there was no study we regarded as weak and unstable."

A. That we did not regard as -- that was not -- that would not have been regarded as weak and unstable by really, I think, anyone in this area. All of these were almost at unity.

Q. I understand. Let me just go to the conclusion of this Congressional Report. If you go to right at the end, it's marked as CRS 16. Conclusion: "Our assessment of existing evidence on passive smoking was made as a basis for drawing conclusions about the efficiency, justifications for an increase in the cigarette tax. Based on that evidence, as indicated in this testimony, our evaluation was that the statistical evidence does not appear to support a conclusion that there are substantial health effects of passive smoking. This finding flows from an analysis of the statistical methodology employed and assessing such health effects, and purports to be no technical research or conclusion on the physiology of disease causing agents."

The conclusion of this group in reporting to Congress that their evaluation was that the statistical evidence does not

appear to support a conclusion that there are substantial health effects of passive smoking, that's a position that you had taken from the epidemiology for years; is that correct?

A. That is correct. We always coupled that with a notion, though, as I think we were obligated to do, that we still regarded this to be a significant issue and one with respect to which additional research was appropriate and needed. We weren't dismissing this as the -- as claims of nutty people. We tried, always, to take this seriously, and the calls for research that we made, we really made them genuinely, and the sources that were committed to industry funding research, I think, confirms how seriously my clients, at least, took that commitment.

MR. WEBB: I have no more questions.

THE COURT: All right. Ms. Eubanks?

REDIRECT EXAMINATION OF JOHN P. RUPP

BY MS. EUBANKS:

Q. Mr. Rupp, we might as well get it out in the open, because it's in your written direct. This employee that you're talking about is Mr. Repace, isn't it?

A. Yes.

Q. And you did take actions, didn't you, to try to get Mr. Repace in trouble with the EPA while he was employed there, didn't you?

A. No, you asked me that during my deposition.

Q. I'm asking you again, and I would like you to answer the questions "yes" or "no" without reference to your deposition, if you're in a position to do that, please.

A. The answer is no.

Q. You did not take any action at all that might have led to a disciplinary action against Mr. Repace, is that your testimony?

A. That is correct. We asked -- we did not ask for disciplinary action.

Q. You asked that he be removed, did you not?

A. From the particular function with respect to ETS. We did not ask him to be fired or disciplined or otherwise disadvantaged in any way.

Q. Wait a minute, let's deal with that for a moment. Mr. Repace was working on the EPA ETS Risk Assessment project?

A. Yes.

Q. That was a major part of his activity at the time, and you knew that, isn't that so?

A. That is correct.

Q. And so --

A. That was the cause of our concern.

Q. And so, it's your testimony that you didn't undertake any action that would cause him problems with his job simply by suggesting that he be removed and work on some other project; is that correct?

A. The -- may I answer?

Q. It's a "yes" or "no" question. Is that your testimony?

A. We were not trying to cause him any problems in his job. We were trying to ask the agency -- we were asking the agency to eliminate what we perceived to be a conflict of interest. There were lots of other activities that the EPA was involved in at that time.

Q. Mr. Rupp --

A. And a number of other activities that the EPA was involved in at that time, many of the things that Mr. Repace could have done --

Q. You were not an official at the EPA at the time to be in a position to make such a judgment about an employee and what it is that that employee could do. And isn't it true, that you never once suggested to the EPA particular other projects that would be appropriate for Mr. Repace because you saw that as not an appropriate role for you; isn't that correct?

MR. WEBB: Objection, that's a compound question. There were two different -- I believe two different parts to that question.

THE COURT: I believe so, but I think you're focusing on the latter part.

MS. EUBANKS: That's correct, Your Honor.

THE WITNESS: We regarded it as inappropriate for us to tell the agency what things Mr. Repace ought to be assigned to

do, that's true. But we certainly were not asking for any disciplinary proceeding. We were not asking for him to be removed from his job. We were simply pointing out what we believed to be a conflict of interest that had developed, and urging the agency to deal with the conflict of interest before the project reached its conclusion.

BY MS. EUBANKS:

Q. Mr. Rupp, did you do any additional preparation after you testified yesterday? And by "preparation" I mean, did you do any additional preparation to offer testimony here today?

A. No, I played with my grandchildren last night.

Q. Did you read any testimony before coming here to testify, other testimony in this case?

A. I did not.

Q. Did you look at any documents yesterday?

A. No, I did not.

Q. After you testified, did you take another look at your deposition transcript?

A. No, I did not.

Q. Did you call anyone to discuss any questions that you had about particular matters after testifying yesterday?

A. No, I did not.

Q. Have you read Sorell Schwartz's testimony in this case?

A. No, I have not.

Q. Has anyone described Sorell Schwartz's testimony in this

case to you outside of this courtroom?

A. Yes.

Q. Who?

A. Mr. Goold.

Q. When?

A. Deposition testimony or trial testimony?

Q. Well, let's do first trial testimony, and then --

A. Not trial testimony. When Dr. Schwartz was deposed, Mr. Goold gave me a brief oral report of the topics that were covered, and he told me that my name had come up several times, and not much more than that.

Q. All right. You testified on cross-examination that your expertise as a lawyer suggested that there was situations where it was appropriate, if I understand your testimony correctly, for you, as a lawyer, to bring together scientists to undertake certain actions. Is that a fair statement of your testimony?

A. Well, it's a little general, it depends on what actions were being contemplated.

Q. Well, I'm talking, particularly, about your involvement in witness development, or I should say scientific witnesses in Latin America and China.

A. I believe -- in China?

Q. Yes. Well, not China, in Asia as you discussed earlier.

A. I believe the activities in which I was involved in all of those areas, and at all times, was entirely appropriate, yes.

Q. And, if I understood your testimony correctly, you said that one of the reasons that it was done that way is because individuals were used to working with lawyers and preferred that to working with individuals in the tobacco companies?

A. That was true. In all of those regions it was true.

Q. And, I believe you also said that your expertise as a lawyer was related to your work regarding legislation, litigation, and the regulatory arena?

A. And regulatory proceedings, yes.

Q. There weren't any regulatory proceedings that you were involved in in Latin America during your work with the scientific witnesses?

A. No, there were legislative activities, but not regulatory proceedings in Latin America, but I will point out --

Q. I want to talk about your particular involvement, though. You had no involvement with any of those proceedings in Latin America, did you?

A. Yes, I did.

Q. What was that?

A. Smoking restriction proceeding in Argentina.

Q. But you didn't enter an appearance and perform any direct services?

A. Yes, I did. I didn't enter an appearance, because I don't speak Spanish.

Q. Fair enough. What about with respect to litigation,

because you testified both on direct examination about the Project Down Under and the fact that litigation was arising, but not yet happening, in a number of areas. It's true, isn't it, that you didn't have any experience in working with these witnesses directly for litigation except for the horse shedding that we discussed yesterday?

A. That's incorrect, counsel.

Q. But you were involved with respect to the horse shedding activity that we addressed yesterday with these witnesses?

A. I worked with witnesses to get them ready to testify in particular pieces of litigation. I did so repeatedly over a number of years.

Q. And sometimes that was referred --

A. Inside and outside of the United States.

Q. And sometimes that was referred to by your colleagues as horse shedding, correct?

A. The writer of the document that you showed me referred to it as horse shedding. I did not regard it as horse shedding.

Q. You regarded it, rather, as getting the witnesses ready and prepared to offer testimony, correct?

A. I considered it precisely the same as my counterparts at OSHA as they prepared their witnesses to testify in the OSHA proceeding. You never ask a scientist to go into a proceeding without assisting them to prepare and focusing their attention on the issues that are going to be of concern, of course I did.

Q. I see. Let's talk a little bit more about your -- you were given some questions about the Hirayama data, and I want to take you back to that. Both on direct and cross-examination there were some questions that were raised with respect to data, Hirayama's data. If I understand your testimony, it is that one of the problems that arose, or that you were looking at addressing through the ETS -- through ETSAG was to try to get Hirayama's data to look at that to make some determinations from -- directly from that data, correct?

A. There was an effort made by the ETS Advisory Group to obtain access to Hirayama's raw data, yes.

Q. And I believe you also testified that you had never heard whether Dr. Adlkofer had actually received Hirayama's data in the past, isn't that so?

A. That is also correct.

Q. And I believe you testified earlier that Dr. Adlkofer was with the German Verband?

A. Yes, I knew him as -- I met Dr. Adlkofer on a couple of occasions over the years and it is in that capacity that I did meet him. My last meeting with him would have been in about 1982 or '83, so it's 21 years ago.

Q. All right. I want to show you a document, it's U.S. Exhibit 22318.

MS. EUBANKS: Your Honor, if I may, I'll hand up a copy to you because -- oh, do I have it on the screen? I have it on the

screen, but if you would like a copy I have one as well.

THE COURT: That's all right, it's easier.

BY MS. EUBANKS:

Q. Mr. Rupp, I'd like to -- the date of this document is July 24th, 1981, isn't it?

A. It appears to be.

Q. And it is a memo addressed to Ernie -- to E. Pepples. Who is that?

A. Ernie Pepples was a senior lawyer at Brown & Williamson at this time.

Q. And it's from A.K. Wells, he was also a senior level at Brown & Williamson, correct?

A. In 1981 I don't know how senior you would say he was, but he was a lawyer at Brown & Williamson.

Q. All right. I'd like to direct your attention to the second page of the document, please, under "interesting developments" on the Hirayama matter.

A. Um-hmm.

Q. I want to read the first part of it. It says here that Dr. Adlkofer, who is the scientific director of the German Verband has committed himself to the position that Lee and Hirayama are correct, and Mantel and TI are wrong. Adlkofer called Frank Kobe at Reynolds and said that Germany has received new data from Japan which confirms the Hirayama work. Adlkofer and Lee, and another German associate, were all asked to review

Hirayama's work and did not find the error picked up by Kastenbaum. They believe Hirayama is a good scientist and that his nonsmoking wives publication was correct."

Do you see that information?

A. I do.

Q. And Kastenbaum was a Tobacco Institute consultant?

A. No, he was a statistician at the Tobacco Institute.

Q. So he was employed by the Tobacco Institute as a statistician?

A. Correct, and Nate Mantel was a professor at American University and was the originator of the principle -- of the Mantel Haenszel test for testing statistical significance. It is his seminal work on which all work about statistical significance emanates.

Q. I see. Now, further on in that paragraph it also indicates that at a meeting of the board of research arm on July 15th, Adlkofer was asked how he could continue to support the projects if Hirayama's work was dead. He replied --

A. Hirayama's work was --

Q. Was dead. Do you see that?

A. Yes, yes I do.

Q. And the next sentence begins: "He replied with a strong statement that Hirayama was correct, that the TI knew it and that the TI published its statement about Hirayama knowing that the work was correct." Do you see that?

A. I do.

Q. Yet, it's your testimony here, if I understand it correctly, that you had no knowledge of the facts as set forth in the second page of U.S. Exhibit 22318?

A. Correct, I have no knowledge of the facts set forth in the second page, but additionally --

Q. No, that's as far --

A. Additionally counsel.

THE COURT: Everybody, one at a time. Everybody, knows better. The question has been answered. Next question, please.

BY MS. EUBANKS:

Q. Now, there was some discussion, as well, about the 1986 Surgeon General's Report, and I'm sure you remember your testimony on that.

A. I do.

Q. Both on cross, as well as in your direct testimony, I just quickly want to show you a couple of pages from the Surgeon General's Report, and let me tell you what exhibit number that is, because it's a large exhibit. It's number 63709, and what I'm going to do is put up on the screen just a couple of pages to look at. And I don't think it's necessary that we hand you the entire book, I'll tell you which pages we'll refer to because it's very large, but I'd like to look at page 73, please.

MR. WEBB: Your Honor, I don't have any question, showing

a partial exhibit to the witness, although the government is always insisting we show the full document. Do you, at least, have the page before and after so the witness can put --

MS. EUBANKS: We can give you this exhibit, but certainly we've had this exhibit many times. I'll give you the exhibit.

BY MS. EUBANKS:

Q. I just want to refer you rather quickly to -- do you see at the bottom it says the Japanese Cohort study?

A. Yes.

Q. And I just want you to -- I want to confirm that that is the Hirayama -- the Hirayama Study that we've talked about extensively here?

A. Yes.

Q. All right. Now, I'd like to refer to page 75, two pages in, please. Now, at the bottom of page 75 in the paragraph -- yes, that's right.

I want you to take notice of -- there are several scientists that are listed there, and just take a moment and review that paragraph. You needn't read it out loud, but just take a moment, please, and look at it.

A. Yes.

Q. Now, I believe your testimony has been that one of the things that was important to you about furthering your work on ETS matters was to ensure that the truth came out and that other views be considered besides what was in the Surgeon General's

Report, and some of the other reports, that actually found a causal connection between secondhand smoke and disease, is that fair?

A. Yes, that's fair.

Q. Now, there's a reference here to three individuals, all of whom have done work for the tobacco industry. Who is Kornegay?

A. Kornegay was the chairman of the Tobacco Institute. Kastenbaum was the statistician I've already described. Peter Lee is a, Lee 1982 B, would be Peter Lee, and he is a statistician from the United Kingdom and also the bridge champion of the United Kingdom.

Q. All three of those individuals have done extensive work for your clients, haven't they?

A. Well, Marvin Castlebottom worked for the Tobacco Institute, I think, on a part-time basis, but he was actually an employee. Peter Lee has done work for the Tobacco Institute, and I would imagine hundreds of other clients.

Q. Then it's actually true, isn't it, that the U.S. Surgeon General, when putting together the report, did consider dissenting views; isn't that true?

A. I never suggested the contrary.

Q. I'm just -- I just want to get your testimony on whether that's, in fact, the case in terms of the Surgeon General's Report when it was put together on the issue of Hirayama. It's

fair to say, in fact it's accurate, isn't it, that the Surgeon General considered dissenting views before reaching a conclusion regarding secondhand smoke?

A. He considered some, he didn't consider all, nor, despite the question you asked me in my direct examination, did he consider comprehensively the evidence on any of the health effect issues. It was considered in --

Q. Excuse me, sir, I didn't really ask you that question either in the written direct or here. I think we have established, and correct me if I'm wrong, that the U.S. Surgeon General's Report addressing secondhand smoke considered the views of certain tobacco industry people in terms of arriving at that report?

MR. WEBB: Objection, asked and answered.

THE COURT: It was answered and the answer was yes. Go ahead.

BY MS. EUBANKS:

Q. Now, you were shown a document, and I'm sure you still have it up there, it's joint -- JD 002540. Do you have that in the stack that Mr. Webb gave you earlier today? It would be one of the documents you were given today.

A. And give me the number again, if you would.

Q. JD 002540.

THE COURT: I believe it's the OTA Report.

THE WITNESS: Office of Technology Assessment.

THE COURT: Yes.

BY MS. EUBANKS:

Q. It's on the screen as well, Mr. Rupp.

A. 2540.

Q. 2540.

A. Yes, I have it.

Q. All right. Now, you had some discussion about this particular document. I just want to take you to a couple -- a page of that report so we can put it in its context.

This is about passive smoking in the workplace, isn't it, this report?

A. That's the title of the report.

Q. Correct. And at the bottom of page 3, the final paragraph, there's a statement that I know you didn't reference during cross-examination. I just want to call your attention to it. It's on page 3. Do you see the paragraph that says: "In summary, the evidence for an association of passive smoking with lung cancer has accumulated during the 1980s and is consistent with the biologically plausible hypotheses that passive exposure to tobacco did cause cancer. There is evidence that environmental tobacco smoke is an acute respiratory irritant in healthy adults, relatively strong evidence also supports an association of parental smoking and respiratory infections and symptoms in their children. Few studies of this type have been carried out for adults, but the evidence that exists points to a

similar relationship. People with preexisting heart or lung disease can be especially sensitive to the effects of passive smoking."

Do you see that?

A. I do.

Q. I just wanted you to focus upon that, or wanted the Court to focus upon that in the context of looking at this report. So I'll move on.

A. No question? You have no question for me?

Q. I did ask you if you read that; that was the only question I had.

Now, you offered testimony on cross-examination several times about the time for the ETS Advisory Group's existence, and I believe you said that it started in October 1984 and that it lasted for about 18 months?

A. I don't think I was quite that precise, because my recollection isn't quite that precise. I think what I said is that it lasted for 18 months or so, and that I was having difficulty putting it quite in the proper years, unless I had a document in front of me that helped me. And if you want to show me a document, I'd be happy to do that again. It certainly preceded CIAR.

Q. Let's do that, let's look at Exhibit 23555, because I do want the record to be clear about the existence of CGSAG and to ensure that the short time that you were guessing at, if it

isn't accurate, focuses on a document that helps you recollect.

Do you see the first page of the document that indicates -- what's the date, please, of 23555?

A. Well, there are two pages. The first is a transmittal letter from William Davies of Shook, Hardy & Bacon to a number of people dated -- have I already given the date? November 25, 1987.

Q. And you're one of the people it was addressed to, correct?

A. I was.

Q. And its states --

A. And it includes an agenda for an ETS Advisory Group meeting for December 7, 1987.

Q. So does that refresh your recollection that it was in existence not for 18 months, but for at least over three years, from October '84 through December '87, at least that long?

A. It's conceivable. It's conceivable.

Q. You don't dispute it, do you, based upon the document?

A. The documents will tell you precisely -- certainly more precisely than I could tell you. They'll tell you the beginning date and the end date with precision. I have no reason to doubt these documents are accurate.

Q. In fact, if we look at another Document, 25533, which is a single page, this is an agenda for the ETS Advisory Group meeting for January 28th, 1988, isn't it?

A. That's one month later, yes, basically.

Q. And it indicates, as the second item, that there is a CIAR research planning meeting. Do you see that?

A. Would you repeat that, counsel?

Q. Number 2 under project proposals is CIAR research planning meeting. Do you see that?

A. Yes, I do.

Q. All right. So at least as of January 28th, 1988, CIAR was in the planning stage and the ETS Advisory Group was still in existence, correct?

A. The ETS Advisory Group did not, as I recollect the situation, didn't go out of business, if you will, until CIAR was up and running. And the reason is, of course, that the ETS Advisory Group had funded a number of projects that had not been completed, and somebody needed to continue to watch those projects. But during the last year or so they certainly weren't funding new projects.

Q. On cross-examination you offered some testimony about Dr. Salvaggio. Do you recall that?

A. I do.

Q. And I believe what you stated regarding work that Dr. Salvaggio did, pursuant to a proposal from the ETS Advisory Group was, from the industry standpoint, not favorable?

A. I think that's fair, if "favorable" is defined as asthmatics of whatever definition do not react adversely to any

element in tobacco smoke. That would have been the most favorable, I suppose, conclusion. That was not their conclusion.

Q. Now, Dr. Salvaggio worked with two other researchers, correct?

A. Correct, Dr. Senkus and Dr. Lehrer.

Q. And they were at Tulane, correct?

A. All three were at Tulane and all were part of the project.

Q. And the study that they performed was designed to determine whether passive smoke was capable of eliciting an allergic -- an allergic reaction in declared nonsmoke sensitive asthmatics; is that correct?

A. No, there were a series of experiments, and they began with -- and some of these were not funded by the ETS Advisory Group; they were preexisting head trauma and other nonindustry funding. They started with skin sensitivity experimentation.

Q. But I want to focus on the particular project that you mentioned on cross-examination.

A. Oh, yes.

Q. Dealing with asthmatics, correct?

A. Okay.

Q. Did I correctly state that the purpose of the study, or the study was designed to determine whether passive smoking elicited a certain response in asthmatics?

A. That may have been the title. What they were exposed to is side-stream smoke, not ETS, but --

Q. So it was passive smoking going on, correct?

A. Passive smoking going on?

Q. Yes.

A. They were exposed to ETS, they are weren't exposed -- ETS is a combination of exhaled mainstream smoke and side-stream smoke as it ages and diluted. What the Salvaggio, Senkus and Lehrer people did was expose them to elevated levels of side-stream smoke and side-stream smoke only. Machine generated outside of the stainless steel compartment.

Q. Now, you did state that this was research that you considered to be not favorable to the industry, but I want to look at a particular document and show it to you here. I'm just going to put this document on the ELMO, and it was a document that I was able to put my hand on over lunch, but it has a number at the bottom, which let me just focus on that. There's a Bates number --

MR. WEBB: Your Honor, we're going to need an exhibit number for the record, aren't we?

MS. EUBANKS: We can affix an exhibit number if we decide to move into evidence, which we probably will for purposes of the record, but this is what I have at the moment, and I'm sure it's part of an exhibit, but I just don't have the rest of it with me. All I have is this particular page, which I'm happy to show the

witness and I'm happy to show you, Mr. Webb.

MR. WEBB: Is it a complete document?

THE COURT: Let the witness identify it by title and by date and by author, and before anybody leaves the courtroom, it better get a sticker on it, please, and a number.

BY MS. EUBANKS:

Q. Would you identify that document, please, Mr. Rupp?

A. This appears to be an RJR interoffice memorandum dated February 25, 1987 from Charles Nystrom, Dr. Charles Nystrom, as I knew him, to Dr. Allen Rodgman entitled Weekly Highlights.

Q. Now, in terms of "highlights" there are a couple of portions that I've highlighted on that document.

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

THE COURT: Yes.

MS. EUBANKS: Thank you.

MR. WEBB: I think I am going to object. This is a document --

THE COURT: Have you seen it yet?

MR. WEBB: I just saw it a second ago. There is only one copy, so I gave it to the witness. But it's a document, as far as I could tell. The witness was not copied on it, he has nothing to with it, and it was never disclosed on his direct examination. So cross-examining him on this document on a statement made by somebody that he's not -- if he's copied on it I could be mistaken, I couldn't see that there was any

relationship between the witness and the document.

MS. EUBANKS: Your Honor, the witness testified on cross-examination quite by surprise that he felt, at least to me, that he thought that the Salvaggio Study itself was one that was detrimental to the industry. I have a document that he's identified as an RJR interoffice memorandum that contains further information from the standpoint of other industry members that I wanted to put before the witness and get his viewpoints on. I think it's appropriate, and we just found out about this while in the courtroom.

THE COURT: If you need to look at the document, Mr. Webb, I would have Ms. Eubanks turn to it later on. I would ask Ms. Hightower to make copies of it right now. I don't know that that's the real objection, however.

MR. WEBB: No, I don't want to hold up the proceeding here.

THE COURT: But certainly on impeaching a witness, one can impeach a witness with a document --

MR. WEBB: Fine.

THE COURT: -- that hasn't been disclosed in advance and that's basically what Ms. Eubanks is trying to do.

BY MS. EUBANKS:

Q. This document, which I'll hand back to you so you can have it for purposes of reference.

MS. EUBANKS: And if the Court will permit me, if I could

work with the witness while I do this. Thank you, Your Honor.

BY MS. EUBANKS:

Q. Mr. Rupp, do you see the portion of the document that references: "Publicity on Tulane research on smoke sensitive asthmatics"?

A. I do.

Q. Is this a reference, this document a reference to the Salvaggio Study that we were discussing?

A. It is a reference to a Tulane University allergy study with asthmatics, yes, but there were a series of such studies now.

Q. Let's look at the first sentence here. Would you read that into the record, please?

A. "Initial public releases on smoke sensitive asthmatics has been handled very effectively by the Tulane researchers."

Q. All right, and you see that it references Dr. Senkus of the Tulane group, do you see that?

A. Yes, I do.

Q. And it indicates information that was set forth in the Times-Picayune pursuant to a press release, doesn't it?

A. Well, you're reading a document, and I can read the document as well. It -- I have no idea what Dr. Senkus said. You're relying on a newspaper article.

Q. I'm asking you to refer to the document.

A. The sentence that you're not reading is, "The reports

have emphasized fact that only a small percentage of smoke sensitive asthmatics showed any response to high concentrations of ETS." The point I was making --

Q. Would you read the rest of it, please?

A. -- was that they did react adversely to side-stream smoke in this case, it wasn't ETS, but side-stream smoke. The favorable reaction would have been no reaction at all. The favorable result would have been no reaction at all. That was not the result of the experiments, and, indeed, after this study was done an additional series of studies done to pursue this very issue.

Q. Well, that's fine, but I'm talking about the one that you were discussing on examination earlier today, and the reference here to a press release which states, and correct me if I read it incorrectly, so why don't you follow along. "We found that we could get them to extremely high cigarette levels and their allergic systems still didn't react, regardless of what they claimed. Then Senkus said, smoke may be an irritant, but it has nothing to do with allergic asthma." Do you see that?

A. I see what you're reading and I believe you're mischaracterizing it counsel.

Q. I'm not mischaracterizing it at all.

A. Yes, you are, you read a preceding sentence that you quoted incorrectly.

Q. Where did I --

A. -- what the sentence says is that, "The following quotation is attributed to Dr. Senkus of the Tulane University Group" in the newspaper, whether that was from a press release, whether it was appropriately attributed or not. Now, the way to find out what the results of the Senkus --

Q. I don't have a question --

THE COURT: Mr. Rupp.

THE WITNESS: -- is to look at the reports.

THE COURT: Mr. Rupp, please do not continue on and on. The question has been posed, you have responded.

Go ahead, please, is there anything further on this document? And I would like to see this document, please.

BY MS. EUBANKS:

Q. Mr. Rupp, who is R. William Murray?

A. R. William Murray was for a time one of the senior executives of Philip Morris. I don't remember which Philip Morris entity, frankly. It may have been Philip Morris USA, it may have been Philip Morris Companies, it may have been Philip Morris International. I just don't have a very good recollection of that. I may have known at one time.

Q. I see. Who is Mary Portorff?

A. Mary Portorff would have been in the public affairs unit at Philip Morris in New York. I think Philip Morris International, during a period in the 19 -- probably late 1980s through at least part of the 1990s, when I lost track of who was

in New York in Philip Morris.

Q. Now, your clients for the ETS Consultancy Program were Philip Morris -- several Philip Morris entities, correct?

A. No, the work we did in Asia, in Latin America and in Europe was all for Philip Morris International. The work that we did with Scientific Consultants in the United States was in the Tobacco Institute, of which Philip Morris USA was a member company.

Q. Now, Philip Morris Companies was also involved in the consultancy program that you worked on, wasn't it?

A. Not that I know of, because Philip Morris Companies would be the parent company, so that would be Miller Brewing, Kraft, General Foods, the various tobacco companies.

Q. Well, let me show you a document, and you can tell me if this document references the same programs that you worked on. I'm referring to U.S. Exhibit 20017. And this establishes a meeting on ETS on February 4th, 1987. Do you see that?

A. It -- this document talks about a meeting on ETS in February 4, 1987. Yes, I see that.

Q. And you've identified some of the individuals. I know you've worked with Tom Osdene?

A. I have.

Q. And you worked -- did you work with Mary Portorff?

A. Yes, a bit.

Q. And you worked with these individuals on ETS related

matters?

A. Yes. Tom Osdene was active in the Center for Indoor Air Research, as well as serving on the ETS Advisory Group. Ms. Portorff, I knew her almost exclusively with Philip Morris Freedom of Choice Program, so-called, it was their separation of smokers and nonsmokers program.

Q. And these individuals were all involved in the consultancy program on ETS that you worked on?

A. Well, I don't know who Andrew Falkowitz is at all.

R. William Murray was -- I'm surprised to see him listed in this way. I think he was, at that time, one of the principle executives of Philip Morris. I doubt that he was paying much attention to Scientific Consultants, but certain others at the company were.

Q. All right. I'd like to direct your attention to another document that you looked at during cross-examination. This is JD 062010, which you should have in the stack that Mr. Webb gave you during his examination.

A. Would you give me the number again, please?

Q. JD 062010.

A. I think I have it.

Q. All right. Now, I believe you said that you reviewed this document recently, a couple of weeks ago?

A. I don't know what I said in that connection. I reviewed this document almost simultaneously with its issuance.

Q. But I thought you said, and correct me if I'm wrong, that, on cross-examination I thought you said that you had seen this document a couple of weeks ago?

A. I think I had seen this document a couple of weeks ago. Indeed, do I not reference this document in my direct examination as corrected?

Q. It's possible, but it wasn't one of the documents that the United States provided.

A. Possibly so.

Q. So, you did look at additional documents when you were preparing your written direct?

A. Yes, I did say that.

Q. All right. Now, in terms of the testimony that you gave, I know that when you reference this document you -- the portion of it -- there was a portion of it that was highlighted, and I want to make sure that we have an understanding that Dr. Koop was quoting extensively from CEHHT's statement, and I want you to confirm that for me, please, by looking at the document.

A. You're asking me to confirm what, counsel?

Q. That in this correspondence, JD 060210, the Surgeon General Koop was actually on the first page quoting from statements from CEHHT.

A. No, I don't believe so. I think he's referring to a statement made by the Office of Smoking and Health.

Q. Well, let's look at the --

A. Because it goes on to say, "The work" -- refers to "Workshops in Geneva and Vienna cited in the center statement involved the work of many scientists" --

Q. That's it right there, where it says the Office on Smoking and Health has reviewed the statement from the Center for Environmental Health and Human Toxicology?

A. Right --

Q. They offer the following comments on the statement, so the reference there was to comments provided by CEHHT, the quote?

A. The Office of Smoking and Health is commenting on the statement given by a scientist affiliated with the Center for Environmental Health and Human Toxicology. That's how I read this letter.

Q. All right, now, you see the first line underneath the quoted portion says, "The workshops in Geneva and Vienna," do you see that?

A. Yes, I do.

Q. Now, those conferences, both the Geneva one and the Vienna one, were industry sponsored conferences, weren't they?

A. I don't know that to be the case at all.

Q. You don't know whether the conference that's referenced here in Geneva in 1983 was one that involved some sponsorship from the tobacco industry?

A. I do not.

Q. And you similarly don't know whether the conference referenced in Vienna in 1984 also received sponsorship or support from the tobacco industry?

A. I can tell you more about that one than I can about Geneva.

Q. All right. Then is it a conference that the tobacco industry supported or sponsored?

A. I don't believe so.

Q. You don't believe so?

A. No, I do not.

Q. Did you have any involvement in the Vienna conference?

A. I did not.

Q. Now, you testified on cross-examination that you believed that the work that was carried out by Mr. Robertson for ACVA, or HVI, same thing, was competently performed?

A. Yes, I do.

Q. Actually, you went a little bit farther than that, didn't you, you thought that he did superior work?

A. I thought his work was excellent, so did his private clients. Apparently, he was quite successful.

Q. And the ETS Advisory Group similarly believed that Mr. Robertson was well qualified to carry out the type of work that was set forth in the project -- one of the projects that we looked at earlier today?

A. Yes, certainly so.

Q. Who is Michael Michaelson?

A. Michael Michaelson is a -- an associate, or was at that time an associate of mine at Covington & Burling, worked with me for a period of about ten months or so in the early 1980s.

Q. All right. I want to show you a document, it's U.S. Exhibit 23476.

MS. EUBANKS: Your Honor, I can hand up a copy to you. We don't have it on the screen.

THE COURT: Does counsel have it?

MR. WEBB: I don't think we do.

MS. EUBANKS: We just handed it to you, didn't we? I'm sorry, I apologize.

MR. WEBB: No problem.

BY MS. EUBANKS:

Q. On the last page of U.S. Exhibit 23476, you see that this is the document that has Michael Michaelson's name on it?

A. I do.

Q. And this is the same Michael Michaelson, by reviewing the topic of the document, that you worked with at Covington & Burling?

A. Yes, it is.

Q. Would you identify for the record the document?

A. It's a draft of a memorandum to members of the ETS Advisory Group on preliminary results and analysis of ACVA home study, and it comments on, I think, a pilot --

Q. Before you do that, can you give the date, please?

A. Date is March 12th, 1986.

Q. Thank you.

A. And it comments, I believe, on a pilot study of the -- of a larger study that was being considered at that time that would have taken ACVA into analysis of air quality in homes.

Q. Now, let's look at the first -- the second paragraph on the first page of 23476. It states that, "The first and most fundamental flaw in what has been done to date is that there appears to have been only the vaguest justification for doing it. Goals and objectives have never been clearly articulated." Is that a reference to Gray Robertson's project with respect to the homes that you've just discussed?

A. It's a reference to the pilot.

Q. Correct. All right, but that is a reference to Gray Robertson's work, correct?

A. It's a reference to the pilot, and the purpose of the pilot, of course, was to work out precisely these kinds of issues.

Q. Now, let's refer to the last page of exhibit -- U.S. Exhibit 23476, and in the final paragraph it states that, "In summary, the data generated by the ACVA home study in Boston are deeply flawed, and consequently not subject to meaningful interpretation." It states that, doesn't it?

A. It does.

Q. And this was a reference to the pilot project that had been performed by Gray Robertson's firm, correct?

A. But again, counsel, we're talking about a pilot study who's purpose was to permit those involved in the study to focus on these methodological issues and resolve them before any larger study was undertaken, and that, of course, was done.

Q. And it was done in a poor manner in terms of the report that we just looked at --

A. No, this relates to the organization of the pilot, not of the full study which followed.

Q. Well, then, you would agree with me, wouldn't you, that the pilot indicated that there were significant flaws in the methodology, and so forth, as is illustrated in 23476?

A. Mr. Michaelson's view at the time was that the protocol needed to be substantially tightened up, made more disciplined, the objectives more clearly defined, and in all of those respects I agree with him. It was also availing of the DiNardi Study, I might add, and that was done before the full study was undertaken. The purpose of the pilot was to not have a repeat of the DiNardi study.

Q. Well, it didn't say that in any document that we've reviewed here, did it? Did the pilot --

A. You have not shown me a document.

Q. Mr. Rupp, are you familiar with any document that indicates that the ACVA study, the pilot study that we're

referring to in 23476, had anything at all whatsoever to do with the DiNardi Study?

A. That wasn't my testimony, counsel.

Q. Then that's -- it had nothing to do with the DiNardi Study, did it? The pilot study that we're references --

A. My point is that in these early days the researchers --

Q. Mr. Rupp, please, excuse me, I really --

THE COURT: Everybody, we're getting off the track. Mr. Rupp answered that one of the purposes of this larger study was to make sure that in his view it didn't make the mistakes that were contained in the --

THE WITNESS: DiNardi.

THE COURT: The DiNardi Study. That was his only reference to that, I understand that. You can go on with your cross -- with your redirect. Sorry.

BY MS. EUBANKS:

Q. And you didn't challenge Mr. Michaelson's findings, did you, in any way or have any reason to doubt them?

A. No, I agreed with them.

Q. Okay.

A. The pilot was -- the purpose of taking the pilot study was to see what needed to be done before the full study was undertaken, because we did not want to waste money.

Q. Now, 23476 is dated March 12, 1986, and I'd like to turn to U.S. Exhibit 92007.

MS. EUBANKS: It's one page, Your Honor. We don't have it for the screen, I'm sorry.

BY MS. EUBANKS:

Q. 92007 is an agenda for the ETS Advisory Group meeting on March 13th, 1986, isn't it?

A. Correct, it was.

Q. And it indicates that you were present. Do you see that?

A. It does.

Q. And the third item under "A" is home ventilation evaluation for ACVA, correct?

A. Correct.

Q. Is that the same home ventilation evaluation that we referenced in 23476 in the memorandum from Mr. Michaelson?

A. I can't be certain because -- I'm tempted to think the answer is yes, but I can't be certain because the reference to home ventilation evaluation seems to me somewhat different. The ACVA study that actually was funded and became known as the Florida study was a study of indoor air quality in homes, it wasn't really a ventilation study.

Now -- but the timing is about the same, so I don't know whether we're talking here about a different study or a different proposal or the same study.

Q. In terms of the pilot study, though, it's fair to say that, like Mr. Michaelson, you were concerned that the project information -- strike that. You were concerned that the pilot

project had methodological problems, weren't you?

A. To -- my concern was that the -- first the pilot had done precisely what we intended it to do, which was to eliminate issues that had to be addressed before the full study was undertaken. That's the whole purpose of doing the pilot. The pilot served its purpose.

The issues raised by Mr. Michaelson, I think, were issues that needed to be addressed before the full study was undertaken, and I believe they were.

Q. But you don't have any knowledge, sitting here today, as to precisely whether they were, do you?

A. I acknowledge that I would have to look at the final study report, which I have not done for a number of years, but the whole purpose of this memorandum by Mr. Michaelson was to put those issues before the committee. They would not have been ignored in light of the DiNardi experience.

Q. Let's talk about the Georgetown Symposium that you discussed in your written direct, as well as in your cross-examination earlier today.

I believe you testified that Sorell Schwartz came up with the idea of the Georgetown Symposium.

A. My testimony was that I couldn't recall whose idea, actually, it was. I believe it was his, but it's just too long ago.

Q. And in terms of the symposium itself, and I want you to

refer to a document that you were given earlier. It's joint Exhibit 062165.

A. Given to me by you, or given to me by --

Q. No, Mr. Webb gave it to you earlier.

A. And the number was what?

Q. 062165.

Now, when you discussed this earlier, and I want to invite your attention to --

A. I'm sorry, counsel, I still don't have it.

Q. I'm sorry, go ahead.

A. I have it.

Q. Now, I believe you testified regarding the third page of this exhibit about the faculty. Do you recall that testimony?

A. Yes, I do.

Q. And several members of the faculty were authors and contributors to the upcoming Surgeon General's Report, correct?

A. Some turned out to be, of course, others were not.

Q. Which ones turned out to be?

A. Well, I'd have to look, I'd have to look and see. That is, I haven't really compared this with the list of people who participated in, one way or another, in the preparation of the 1986 Surgeon General's Report. But there are, of course, several levels of participation in that report. One is as a chapter author or portion author; another is as a reviewer. Those are the principle -- and then, of course, as an editor.

Q. And I think that you testified that several of the faculty identified on the document also were IAPAG members, correct?

A. Yes, that's true.

Q. DiNardi, Balter, Schwartz, Witorsch, any others?

A. Mark Reasor.

Q. All right, and these individuals were all, according to the program, to do presentations at the conference, at the planned conference at that time?

A. No, it appears that some were giving presentations and others were not, but one would have thought that the rest would have participated, at least, by means of panel discussions.

Q. And this was a conference on passive smoking, correct?

A. Health effects of environmental tobacco smoke on the nonsmoker passive smoking.

Q. Now, you testified earlier several times about indicating when sponsorship came from the industry, and we've established that there were a number of IAPAG members, and that certainly you were involved with respect to the planning of the conference?

A. Um-hmm.

Q. Correct?

A. Yes, that's correct.

Q. In reviewing this mission, I can find no indication of any support from the Tobacco Institute, or any other tobacco

interest. And if you can, I invite you to tell me where it is on the document.

A. No, actually I discussed that issue with Dr. Sorell Schwartz at the time. This is an addenda that was prepared by the continuing medical education group at the Georgetown University, and their policy, which was represented to me as being an invariable policy, was that they did not list the sponsors until the day of the conference, and the reason was that often sponsors were added late and they want to have a complete list of sponsors. This conference, of course, was cancelled before it was ever held.

Q. And it indicates, if you will look at the page Bates Numbers 0321, that some sponsorship was indicated on the document where it states, just above "Application For Enrollment," that: "The program supports -- this program supported in part by corporate educational grants."

Do you see that?

A. Yes.

Q. So in terms of whatever policy it is that you're expressing that Georgetown had, with respect to identifying the corporate support here, it was nonspecific; isn't that true?

A. But it was going to be specific at the day of the conference.

Q. If fact, that turned out to be a bit of a problem, didn't it?

A. Why did it turn out to be a problem?

Q. Well, that the sponsorship was not made known to potential participants, including faculty members, correct?

A. I believe it was made known to them, but as I indicated to you when we discussed this issue earlier, the person who actually made the contact with everyone was Dr. Sorell Schwartz or one of his associates. And happily, he's going to be back here and it seems to me he's the appropriate person to put that question to.

Q. Well, I appreciate that, but I want to talk a bit more about your involvement because you raised this during your cross-examination when you stated that there was -- I believe it was characterized as a brouhaha over the conference that occurred and that there were calls from the office on smoking and health, correct?

A. And letters sent to the university by various groups asking to have the conference cancelled.

Q. And the reason that those groups were -- conveyed to you that they were upset about it was because there was a lack of disclosure regarding sponsorship at the outset; isn't that true?

A. No, their whole reason for opposing it was that it was sponsored by the tobacco industry. Why would they care -- well, I'll stop there.

Q. Yes, but the disclosure wasn't given in the beginning in terms of making a determination and inviting people to come,

correct?

A. No, that's -- I don't believe that is correct. We have to focus on two possible audiences.

Q. Can you back up a minute? Can you back up a moment, please.

A. Sure.

Q. The document that you've been shown, Joint Exhibit 062165, was the flyer or information that actually was sent out to potential meeting participants, correct?

A. It would have been -- it most probably --

Q. It doesn't say "Draft," does it?

A. No, it doesn't.

Q. All right.

A. It most probably was sent out to the doctors who would have been on the mailing list of the Office of Continuing Medical Education of the Georgetown University School of Medicine.

THE COURT: This was not an invitation-only symposium, right?

THE WITNESS: No, this was a continuing legal -- continuing legal -- continuing medical education part of the ongoing series of programs that Georgetown University sponsors for practicing doctors.

BY MS. EUBANKS:

Q. Let's look at another document, Mr. Rupp, U.S. Exhibit

92,006. And again, I didn't have a chance over our lunch break to get this for the screen, so I'll hand up a copy.

For the record, Mr. Rupp, would you please identify the document that I've handed you.

A. This is an interoffice -- or appears to be an interoffice memorandum from Dr. Alan Rodgman to Dr. Charles Green and it is dated May 22, 1986.

Q. Mine is dated at the top June 6th, 19- --

A. I'm sorry. That's the date of the ETS Advisory Group meeting that this document says it reports on, so the document itself is dated June 6th, 1986.

Q. And it refers to a TI ETS Advisory Group meeting, correct?

A. Yes.

Q. Now I would like to invite your attention to page 6 of the document, please.

In the middle of -- do you see the reference to "symposium sponsorship" in the middle of the page, page 6?

A. I'm getting there. "Symposium sponsorship," yes.

Q. It states, doesn't it, that the panel discussions between IAPAG members and authors of the forthcoming Surgeon General's Report proposed by Dr. Sorell Schwartz under the auspices of the American College of Toxicology are currently scheduled for Washington, D.C. and San Francisco."

And then it notes several of the authors who had agreed

to attend?

A. Yes.

Q. Now, I want to focus your attention on the last sentence of that paragraph. Would you read it, please.

A. "If more of the SG Report authors pull out, Mr. Rupp plans to cancel the discussions."

Q. Does that accurately set forth what your plans were with respect to meeting participants and actions that would be undertaken if certain people were not going to attend the conference?

A. No. The decision whether to go forward with this or not was entirely Dr. Schwartz's, as I think he will tell you. Certainly he believed it was; I believed it was. And additionally, I think he came to the view, and I agreed with his view, that what had occurred had resulted in a conference that would not have achieved its original purpose, which was to have a balanced discussion of the science of ETS.

Q. Mr. Rupp, really, wasn't it the purpose or at least a purpose of the conference to have IAPAG members interact with individuals who were working on the upcoming Surgeon General's Report so that the individuals working on the upcoming Surgeon General's Report could have the views of the IAPAG members on ETS?

A. It was thought that an exchange of views of that sort could be quite valuable, but let's remember the kind of people

we're talking about here. We're talking about --

Q. I want to ask another question, please, if I could, not so much about the kind of people we're talking about, but rather the responsibilities that they held at the time.

THE COURT: That conversation was going to go both ways, wasn't it?

THE WITNESS: Sure. Yes, Your Honor. Exactly. They were going to -- it was going to be a full and open --

THE COURT: Just briefly answer, one sentence.

THE WITNESS: -- exchange of views.

BY MS. EUBANKS:

Q. But you had particular concerns, which I know you say that it was Professor Schwartz's decision and that the two of you actually, if I understand your testimony, agreed on further actions. But it was your view, wasn't it, that it would not be a useful conference if the SG Report authors pulled out; that is, decided not to come?

A. Well, the whole -- again, the whole thing had been conceived to permit a discussion of a full range of views on the science as it existed at that time. That was its whole purpose for being. And if that wasn't going to happen, its original purpose for being had been destroyed.

Now, what I testified was that Dr. Schwartz -- that was Dr. Schwartz's view at the time, as I understood it. He decided to cancel the conference. I did not resist that because I

agreed with him that the original purpose of the conference had been destroyed.

Q. Now, you testified on cross-examination, Mr. Rupp, that the OSHA proceeding -- about OSHA proceedings in the mid 1990s?

A. Yes.

Q. And at that time, OSHA had proposed an indoor air quality regulation, hadn't it?

A. They proposed ETS-specific regulations as well as an accompanying indoor air quality regulation, yes.

Q. Now, the regulation would have governed indoor -- among other things, it would have governed indoor air quality and indoor work environments; isn't that correct?

A. Well, wherever anyone worked other than a private home, so it would have included what we would typically refer to as public places. It would have included bars, restaurants, anyplace that one was receiving money to do work.

There was a question about whether it would include homes when you had someone there cleaning or otherwise doing services -- providing services. That was never cleared up.

Q. Now, isn't it true that the reason that the proceeding was -- that the proposed regulation was withdrawn was because it was determined by OSHA that the state and local level were accomplishing proper guidelines in the workplace in that regard?

A. I understand what the notice said; I also understand why it was cancelled. That, of course, was completely nonsense.

Q. Wait a minute. Can I -- I want to ask you a question, if I could, please.

A. Okay.

Q. Are you saying that my -- you are aware -- aren't you aware that the reasons that OSHA gave for withdrawing the regulation was because the state and local governments were addressing the ETS problem in the workplace?

A. That's the reason that OSHA gave in its final notice in 2001.

Q. And you testified --

A. The actual fact, of course, is that it was unable --

Q. Mr. Rupp --

A. -- to find a significant risk of material health impairment.

Q. Mr. Rupp, is it your testimony that the reasons that OSHA gave were untrue?

A. No, it was just not the complete story, because the --

Q. Mr. Rupp, there's not another question right now. I'm going to try to complete your examination because I now you'd like to leave.

It's true, though, that OSHA never reached any causal connection regarding ETS at all; isn't that true?

A. They made a preliminary finding, which they were unable to sustain during the course of the proceeding.

Q. You testified during your cross-examination that you knew

something about -- I believe you testified about Mr. Eisenberg and his role with respect to CIAR very briefly, didn't you?

A. There was a reference to Dr. Eisenberg.

Q. I'm sorry. Dr. Eisenberg.

And in terms of Dr. Eisenberg, he was selected to be the director of the Center for Indoor -- for CIAR, correct?

A. Yes, that's correct.

Q. And you had something to do with the selection process?

A. I don't know whether I had met him before or after he was selected. I certainly was at meetings where the proposal to hire him was discussed.

Q. And you did know that Dr. Eisenberg wasn't the first person whom the CIAR Board of Directors wanted to higher, don't you?

A. I don't believe anyone else had been offered the position.

Q. Well, that's not exactly my question. In terms of determinations for competition for the position, there was a person besides Mr. Eisenberg that the Board of Directors was considering hiring at the time that Mr. Eisen- -- that Dr. Eisenberg ultimately took the job, correct?

A. But that's a different question than the one you asked.

Q. Okay.

A. There were -- there was not -- not surprisingly, Dr. Eisenberg was not the only person interviewed for the job.

Q. Do you remember a Dr. Billick?

A. I do indeed.

Q. And you met Dr. Billick before Dr. Eisenberg was hired, didn't you?

A. I did.

Q. And in reviewing Dr. Billick's qualifications, at one point in time you recommended him for the position that ultimately was offered to Dr. Eisenberg, didn't you?

A. I don't recall that, but I think that would have been before I met Dr. Eisenberg.

If you're asking whether I had a favorable reaction to Irwin Billick, the answer was generally yes. He was, as I recall, Research Director at the Gas Research Institute, so he had had a job -- had occupied a position of the sort that we were going to be talking with him about at CIAR. He would have had contracting responsibilities and responsibilities for dealing with the Science Advisory Board and so forth, so he seemed at least to have the experience that was needed for a position of this sort.

Q. And in terms of the way that the hiring was done, you actually -- or I should say CIAR was contemplating a contractual arrangement with the person who would become the executive director of CIAR; isn't that correct?

A. Well, the idea, of course, is that anyone that was hired would be given a contract.

Q. Okay.

A. And Dr. Eisenberg was given a contract.

Q. All right. I'd like to show you a document. It's U.S. Exhibit 22842. It's one page. And this is a reference -- do you see the reference to Dr. Irwin Billick?

A. Yes, um-hmm.

Q. And does this refresh your recollection insofar as whether he was -- let me just ask: He was the first choice for the job of director of CIAR, wasn't he?

A. No, I don't believe he was at all. He was interviewed.

Q. It states here that: "Stan Temko met with him afterwards and we hope that he will sign a contract with CIAR next week."

Do you see that?

A. I didn't see that. No, that's not consistent with my recollection, but it is possible that Dr. Billick was offered the position; I just did not recall that.

Q. Okay. But you do recall that you did meet and you interviewed Dr. Billick?

A. Oh, yes, I do recall that.

Q. And you were quite impressed with his credentials, correct?

A. Well, he wasn't a Nobel Prize winner, if that's what you're asking, counsel.

Q. Well, I wasn't asking about his prizes, but you were familiar with his qualifications and --

A. He was Research Director at the Gas Research Institute and seemed to me to be a quite nice fellow who had experience from his prior job that was relevant to the kind of job he would be doing at CIAR or that needed doing at CIAR.

Q. All right. I'd like to show you another document. It's U.S. Exhibit 22991.

And if you would for the record, would you identify the document I've given you.

A. This appears to be a letter to Tom Osdene, Dr. Thomas Osdene, Director of Science and Technology at Philip Morris USA, from Irv Billick -- Irwin H. Billick, dated February 4th, 1988.

Q. And in terms of the correspondence that you have, I want you to feel free to read through it, but I'm going to focus your attention on the second page of this letter that Dr. Billick wrote to Dr. Osdene.

Now, do you see the --

A. Wait a second. If I could read the letter.

Q. Sure. Let me know when you're ready.

MR. WEBB: Your Honor, I'm going to object now that I've read the letter myself. I was careful because, to save time, I did not get into anything about the structure or operation of CIAR, so I --

The only thing I asked him was whether Dr. Max Eisenberg became the Executive Director who was going to testify next week. And so I'm going to object to this because this letter seems to

go to how CIAR is structured and what it's all about as an organization, which there's no question that Dr. Eisenberg can be examined about this, but I did not get into this topic on cross-examination, so this is beyond the scope of the cross.

MS. EUBANKS: Your Honor, in fact, it isn't. This goes to the independence of the organizations that this witness was working for and on behalf of, statements that he made about the type of research that was going to continue with CIAR. And he also has testified to the fact that Max Eisenberg headed CIAR and that he's familiar with the selection process.

This is a letter from someone who was frankly made an offer to head CIAR and he certainly -- it's certainly relevant to the independence question of the research that was undertaken by the companies and this witness's testimony in that regard.

MR. WEBB: Let me just respond to that briefly.

I was going to go into that and I was going to try to, with this witness, go through a lot of the research they did and go through its independence. I chose not to do that to save -- I did not get into the topic of CIAR.

THE COURT: Certainly the issue of the independence of the research was a thread through the direct and the cross. The issue of Dr. Eisenberg being selected as the Executive Director was barely mentioned and that's not -- that won't be gone into at this point.

But the issue of independence may be explored at this

point. The objection's overruled.

BY MS. EUBANKS:

Q. Mr. Rupp, have you had an opportunity to look at the document?

A. I'm still reading it. It's quite lengthy, actually.

(Brief pause.)

THE WITNESS: Yes, I've now read it.

BY MS. EUBANKS:

Q. All right. You were counsel to CIAR, were you not?

A. I was, indeed.

Q. And your law firm was General Counsel to CIAR, correct?

A. We were the law firm that CIAR looked to and I think the only law firm that CIAR looked to to provide legal advice on legal issues.

Q. All right. With respect to the Exhibit 22991 that you've just raised, on the second page of the document, on the second paragraph, beginning: "The critical issue," doesn't this indicate that Dr. Billick was identifying certain issues regarding independence insofar as CIAR and its existence going forward was concerned?

A. Well, I've now read the letter as a whole and he appears to be raising a question predominantly about whether the executive director of CIAR or the Board of Directors should be the entity entitled to actually select projects to be funded. That appears to be the issue that he's raising.

Q. And the Board of Directors at CIAR was composed of which entities?

A. They were representatives of the founding members, which were tobacco companies.

Q. Now --

A. And so stated, of course, in the documents that were filed publicly.

Q. Now, if you'll look at the next page of the exhibit, it states that --

A. Which page now are we on, counsel?

Q. Page 3 of the same exhibit, Mr. Rupp.

It states that: "The other concern which is very critical to the success of CIAR is the policy regarding publication of results and access to the data from the research funded by the Center. The Board must make it very clear that the Executive Director has the ability and authority to ensure that the results of the research will be publishable by the investigators and will be made freely available to the public with no restrictions. Without this assurance, CIAR will never attract the quality of researchers that will be required to meet its objectives.

Do you see that?

A. I do.

Q. And in terms of the concerns that are addressed in the letter that Dr. Billick was writing, is it fair to say that he

was concerned about being able to conduct independent research if he did come -- if he did take the position as Director of CIAR?

A. No, that's not correct at all. First, on the point that you've just raised, I drafted the contracts that were entered into with individual grantees of CIAR and you will find, as you know, that there's a paragraph that guarantees their right -- unfettered right to publish the results without any review.

They were encouraged repeatedly to publish their results without any review by anybody at CIAR. So that's point one.

Q. I understand that, Mr. Rupp, but that --

MR. WEBB: Your Honor, he was answering the question, which required a narrative answer, and she's now interrupting him.

THE COURT: He may finish his answer.

THE WITNESS: My mind is so muddled that I --

MS. EUBANKS: That wasn't the question, Your Honor. I could ask it again.

THE WITNESS: Fine.

MS. EUBANKS: My question went to not his contract and what he drafted, but he took some time to read Exhibit 22991 and I was asking him about that correspondence and the applicant's concerns rather than the contract.

THE COURT: All right. State your question, please.

BY MS. EUBANKS:

Q. Isn't it fair to say that Dr. Billick was expressing in Exhibit 22991 his concerns about an ability to operate independently if he took the job as director of CIAR?

A. He was raising --

MR. WEBB: That's not --

Go ahead.

THE COURT: You may answer.

THE WITNESS: As I read the letter, he was raising two concerns. The first and most significant concern he appears to have raised was whether he, as Executive Director, or the Board would make final selection of projects to be funded.

Second, he was raising the question of whether grantees would be getting -- be given unfettered right to publish their results. Now, as to the second of those issues, the contracts that I myself drafted guaranteed that that would be the case, so that addressed the second of his concerns.

On the first of his concerns, the decision was made, rightly or wrongly, but in any event, I think lawfully, that the Board of Directors would choose which projects to fund on recommendation from the Science Advisory Board rather than the Executive Director.

Mr. Billick appears to have wanted a blank check to fund whatever he wanted. That would not have been acceptable.

BY MS. EUBANKS:

Q. His letter doesn't suggest that he wanted a blank check

and full control in that manner, does it?

A. What he says is that the question I'm raising is whether I could do my job unless -- if I were not the person deciding what research to fund.

He also raises a subsidiary issue in that connection; he says I really don't like the notion of moneys being transferred to CIAR as projects are approved. I want, basically, large sums of money put into the bank from which I can draw on as I decide what research to fund.

That was never going to fly.

Q. But it certainly doesn't refer to any blank check in that document, does it? He under- -- does it?

A. Essentially, what he's asking for is a large sum of money put into the bank from which he can draw without the Board of Directors or anyone else having much to do about how he's spending that money. I can assure you that was never going to happen.

Q. Did you actually discuss that point with him?

A. I did not -- actually, I can't recall whether I discussed it specifically with him. This point undoubtedly was discussed by the individuals who were working on the CIAR proposal and it was just not going to be acceptable.

Q. All right. We only have a little more time, so I want to hand you another document. It's a short one.

A. Okay.

Q. This is U.S. Exhibit 22844 and it's dated February 24th, 1988, a letter from Tom Osdene as Chairman, Board of Directors, CIAR, addressed to Dr. Billick, correct?

A. Yes, it appears to be.

Q. I want to focus your attention on primarily the first and the last paragraph. The first paragraph thanks him for the time that he spent with CIAR and for considering CIAR's offer to serve as Executive Director. And it states: "I regret that you have declined to accept our offer," correct?

A. Um-hmm.

Q. And it closes essentially, doesn't it, on the second page with the same sentiment, stating again: "I am sorry that you have declined to accept our offer to become CIAR's Executive Director."

Do you see that?

A. I do.

Q. Now, this February 24th, 1988 letter led to another piece of correspondence from Dr. Billick, didn't it?

A. I don't recall it, but if you want to show it to me, I would be happy to look at it.

Q. Okay. I'll give you what's been marked as U.S. Exhibit 22845.

Mr. Rupp, I've handed you what's been marked as U.S. Exhibit 22845, which is a March 4th, 1988 letter from Irwin Billick to Thomas Osdene?

A. Um-hmm. Yes, I'm sorry.

Q. Now, I would like to focus your attention on the first paragraph, which states: "I have received your letter of February 24th, 1988, and I must admit that I am somewhat mystified by its contents. Just to set the record straight, I never declined an offer to serve as the Executive Director of the Center for Indoor Air Research."

Do you see that?

A. I do see that.

Q. Now --

A. So perhaps the offer was never made.

Q. Well, I'll ask you to read the last two sentences of that same paragraph, please.

A. Yes.

Q. Out loud.

A. "I was informed by Mr. Rupp at one point that the Board of Directors had decided to terminate negotiations with me on this position. I have never been certain what Mr. Rupp's role or authority was in this matter, but I took his information at face value."

Q. And it was subsequently reported in the press, wasn't it, that you had been involved in discussions that had suggested that Dr. Billick not be accepted to head CIAR for reasons that were not made clear to him in writing?

A. I don't remember what you're talking about, but I think

it's clear why the discussions with Mr. Billick did not reach fruition, and it is that he wanted to make decisions on the selection of projects and those who were providing the money wanted themselves, operating as the Board of Directors, to make a decision.

And that is precisely the explanation that was provided to Dr. Billick by Dr. Thomas Osdene in the letter that you showed me a moment ago.

Q. Now, Mr. Rupp, you didn't have similar issues with respect to Max Eisenberg, did you?

A. Did Dr. Eisenberg want to make all of the final decision on the selection of projects?

Q. No. My question rather is with respect to Dr. Eisenberg and some of the matters that were raised regarding questions of decision making with respect to projects that CIAR would be responsible for.

That's too long a question. Let me ask it differently, okay, and try to make it clearer.

A. This morning I could have gotten it, but I was starting to waver, I agree.

Q. Okay. Max Eisenberg accepted the position with CIAR, correct?

A. Yes, he did.

Q. And the discussions with Max Eisenberg did not indicate that he had any issues with respect to the structure of the

organization, correct?

A. I don't recall any having come up.

Q. Okay. This morning you discussed on cross-examination -- or maybe it was -- at some point in your testimony, you addressed dates and involvement with respect to certain organizations. And just to set the time straight and to make sure that we have a clear record, I want to understand your testimony and, if I need to, show you a document to establish your involvement with CEHHT and the timing for that.

So that's the premise that I'm operating from and what direction I'm going, just to orient you.

A. Okay.

Q. As late as May 1998, you were still receiving communications from CEHHT, weren't you?

A. If I was receiving any communications, it would have come to Washington, to my office in Washington in the form of the monthly updates of new literature. But those updates went to my office in Washington; they were never forwarded to me. And the reason was I was not working on ETS at the time.

Q. But you never stopped anyone from providing you with information from the ETS literature database?

A. No, they weren't providing information; they were simply -- they weren't providing actual journal articles; they were just providing lists of new relevant articles that had appeared in the literature.

And you're correct; I did not ask to have those stopped.

Q. You're still counsel to CIAR, aren't you?

A. CIAR no longer exists.

Q. I'm -- well, when did you cease being counsel to CIAR?

A. When CIAR died.

Q. And for your purposes, when was that date?

A. Well, I didn't -- I wasn't significantly involved in the legal steps that were taken to dissolve CIAR. I'm not a corporate lawyer, for one thing; neither am I a tax lawyer or a benefits lawyer so I wasn't myself significantly involved, and I was in Europe. So I can't tell you exactly when it was, but I think it would have been in about 19- -- well, I can't -- about 1998 or so. 1999 perhaps.

Q. Is it fair to say that your involve- -- or you were counsel to CIAR until it was finally dissolved?

A. Yes, that is fair.

MS. EUBANKS: Nothing further, Your Honor.

THE COURT: I have a final question, Mr. Rupp.

What client is being billed for your testimony over the last few days?

THE WITNESS: I don't know, frankly, the answer to that question. I hope some client will pick it up, but I do not have an agreement with any client to cover my testimony or any extra expenses I incur in connection with this trip.

Mr. Goold and I are going to have to have a discussion

about that. Counsel raised the same kind of question during my deposition: Was anyone paying for my time during my deposition? I did not bill that time, but I'm not also in a position to tell you if anyone did. I did not bill it. I just simply didn't ask.

THE COURT: And did you make a special trip over for your deposition?

THE WITNESS: Yes, I did.

THE COURT: And do you know who paid the expenses for that trip?

THE WITNESS: No, I don't, actually. I would have thought -- well, I just simply don't know.

I'll explain further that I bought the ticket; I charged it to my law firm; it was entered on the account. If anyone billed it, it was Mr. Goold. I don't know whether Mr. Goold has billed it. I simply haven't had any conversation about billing on this case with him.

MS. EUBANKS: Your Honor, we would like to offer the exhibits and the one that I had that was unmarked, we have a number for it as well. I --

THE COURT: Well, there are a number of issues on exhibits. Can we let Mr. Rupp go at this point?

MS. EUBANKS: Certainly from our purposes, Your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: We're going to be more than five minutes on

exhibits, aren't we?

MS. EUBANKS: Yes, I think so, Your Honor. I just wanted to state for purposes of the record so that it's clear: The one page document that I handed up that didn't have a number on it now does have a number and it's U.S. Exhibit 92009.

THE COURT: 92007?

MS. EUBANKS: 92009.

THE COURT: We're looking at two different exhibits.

MS. EUBANKS: I'm sorry. This was the one that we had the one copy of initially and I was working with the witness while he was reading from it.

THE COURT: Well, where did I put my copy?

Everybody agreed it's 92009? I must have mislaid my copy.

MS. EUBANKS: It didn't have a number on it, Your Honor, and I think we only had the one copy. I don't believe you even have it there.

THE COURT: All right. Monday morning, no matter what, we are going to conclude the testimony of Professor Schwartz. Then we are going to conclude the issue of the Rupp exhibits while it's moderately fresh in everybody's mind.

And then your witness in the afternoon, your first witness is going to be who?

MS. EUBANKS: Dr. Benowitz.

MR. BRODY: It will be Dr. Benowitz, Your Honor.

THE COURT: All right. Good.

MR. BRODY: You had -- we had received word that you also wanted to address outstanding issues related to exhibits of Mr. Robertson and Mr. Orlowsky and Dr. Farone.

Well, there are demonstrative's that were related to --

THE COURT: Who was the second person you mentioned?

MR. BRODY: I believe there are some outstanding issues with respect to Mr. Robertson that we may have a couple --

THE COURT: That's correct.

MR. BRODY: -- that we weren't able to come to agreement on. And then there are also the exhibits of Dr. Farone.

THE COURT: Yes, but you mentioned someone in the middle.

MS. EUBANKS: Orlowsky.

MR. BRODY: Orlowsky. They were demonstratives.

THE COURT: Are there still issues up in the air about those?

MR. BRODY: There are issues up in the air with respect to two of them that we may not be able to resolve by --

THE COURT: Does Dr. Benowitz have travel and scheduling problems?

MR. BRODY: He does have potential travel issues. He would like to, if possible, conclude his testimony by the end of the day on Tuesday. Defendants have estimated that they have four to five hours of cross-examination for Dr. Benowitz, so I think it should be possible.

It may make sense, if we could, to push the exhibit issues

back until after Dr. Benowitz testifies so that we can get him on the stand right after Professor Schwartz's testimony is concluded.

THE COURT: Reluctantly, all right, in particular with Mr. Rupp's, when we've just done his testimony. But if you think there's a possibility that that might interfere with getting him off by the end of Tuesday, then I won't do it that way.

All right. We'll go from Professor Schwartz to Dr. Benowitz, but at some point I want to catch us up on all the exhibit issues.

MR. BRODY: Thank you, Your Honor.

THE COURT: Mr. Webb, did you have anything else?

MR. WEBB: No, nothing. Thank you, Your Honor.

THE COURT: All right.

(Proceedings adjourned at 3:53 p.m.)

C E R T I F I C A T E

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

Scott L. Wallace, RDR, CRR
Official Court Reporter

Scott L. Wallace, RDR, CRR
Official Court Reporter

I N D E X

E X H I B I T S