

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	March 22, 2005
	.	
Defendants.	.	
.	

VOLUME 80
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 MORNING SESSION, MARCH 22, 2005

2 (9:31 a.m.)

3 THE COURT: Good morning, everybody. This is United
4 States versus Philip Morris, CA99-2496. Now, a couple of things
5 in terms of scheduling and time estimates. Mr. Crane-Hirsch,
6 based on an overnight review, where do you think -- how much more
7 cross do you think you have?

8 MR. CRANE-HIRSCH: It will depend on how swiftly we're
9 able to go with the witness and the objections, but approximately
10 an hour and a half, approximately slightly longer, but about an
11 hour and a half.

12 THE COURT: And then, Mr. Bernick, what do you think?

13 MR. BERNICK: Half an hour to 45 minutes, and then
14 depending on what happens here. I still think, you know, that it
15 will probably come in maybe a little bit over an hour.

16 THE COURT: All right. As to Dr. Rowell, who is scheduled
17 next, will the defendants -- I don't know, Mr. Bernick, did you
18 say you're presenting him?

19 MR. BERNICK: Yes, I am, Your Honor.

20 THE COURT: Are you going to have a one-hour
21 demonstrative?

22 MR. BERNICK: Yes, we will have -- I don't know if it will
23 last an hour, but we will have a demonstrative presentation.

24 THE COURT: And then what does the government anticipate,
25 just roughly, on cross?

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1 MR. BRODY: It will be Mr. Goldfarb and he has about
2 three hours, Your Honor.

3 THE COURT: And then, of course, redirect, which probably
4 can't be anticipated right now unless you think you can.

5 MR. BERNICK: I -- I anticipate there will be some, but
6 you're right, I can't really provide an estimate.

7 THE COURT: So, Dr. Rowell will be some time tomorrow -- I
8 mean completed some time tomorrow, very possibly before lunch?

9 MR. BERNICK: Could well be, if I do the hour -- yeah, it
10 could well be, Your Honor.

11 THE COURT: And he's from Kentucky?

12 MR. BERNICK: He's from Kentucky, and then we have
13 Dr. Appleton, who is next and available to testify as soon as
14 Dr. Rowell is done.

15 THE COURT: All right. Now, there's another issue that's
16 come up. I gather Mr. Singer from the FTC is present. Let's
17 take care of his issues and then, of course, we will return to
18 Mr. Read.

19 MR. FREDERICK: Good morning, Your Honor, Tom Frederick
20 for Philip Morris. And the reason I raise this today, Your
21 Honor, is -- I was not in Court yesterday when the Court
22 addressed the Mulholland motion and testimony, and I just want to
23 bring two issues to the Court's attention relating thereto. The
24 first is that the proposed testimony will be filed -- it's
25 adverse testimony. So normally it would be served rather than

1 filed with the Court, and only the corrected version be filed. I
2 talked to Mr. Singer about that. I think his request is that we
3 file it under seal, and that's what I propose to do, if that's
4 okay with the Court.

5 THE COURT: Any objection from the U.S. government?

6 MR. BRODY: I assume Mr. Frederick is talking about the
7 version that's going to be appended to the motion for
8 reconsideration.

9 THE COURT: Yes.

10 MR. BRODY: And --

11 THE COURT: Mr. Frederick wasn't here for that discussion,
12 but I'm sure he knows about it by now.

13 MR. BRODY: Given the FTC's concerns about the
14 deliberative process privilege and privilege interests they may
15 have in the testimony, we do not object to that being filed under
16 seal.

17 THE COURT: All right. Now, I gather, Mr. Singer, you
18 also want to know whether you have to start correcting it right
19 away or whether you can wait until after I rule on the motion for
20 reconsideration. And I think -- I thought I made it clear
21 yesterday that you don't have to start until I rule on the motion
22 for reconsideration.

23 MR. SINGER: That was not clear to me, but if that's the
24 case, we'll await your ruling.

25 THE COURT: That's correct.

1 MR. FREDERICK: And Your Honor --

2 THE COURT: Has that motion been filed?

3 MR. FREDERICK: No, because we have to -- as I understand
4 the Court's direction, we have to file -- the motion is ready to
5 be filed, but the proposed testimony has to be filed with it.
6 That's going to take another day, tomorrow or Thursday. When
7 it -- if it's filed tomorrow or Thursday, the government's
8 response is April 4th, Monday, April 4th, and just the issue I
9 want to make sure the Court is focused on, and you know, it's
10 fine with me if the FTC doesn't correct it until the Court rules,
11 but we're probably going to run into our last witness before
12 Dr. Mulholland during the week of April 11th, so I'm just
13 pointing out to the Court, depending on what the Court rules, we
14 could run out of witnesses before there's a ruling and corrected
15 testimony from Dr. Mulholland.

16 THE COURT: Well, I know it's urgent. I'm aware that
17 these in limine motions are very urgent, along with everything
18 else, by the way, but go ahead.

19 MR. BRODY: Given the fact that defendants only filed the
20 testimony for two witnesses last night for next week, in addition
21 to what we have so far and given the number of witnesses
22 remaining on their list, I don't think there is any chance that
23 we're going to run out of witnesses before they're able to
24 present Dr. Mulholland as a witness unless they're planning on
25 cutting three-quarters of their remaining witnesses on their

1 list.

2 THE COURT: Well, that's up to them. They always told us
3 that there was a good chance of their cutting substantially. I'm
4 not surprised.

5 MR. BERNICK: Your Honor, I -- that is going to happen,
6 and I think we'll be probably submitting an amended list this
7 Thursday. We met last night to talk about the schedule for the
8 rest of the case, and based upon where we think that's going, we
9 think that there is a very real prospect that we're going to run
10 out of -- we're going to be done towards the early, maybe middle
11 part of the week of the 11th, unless the cross-examinations are
12 longer than we foresee.

13 THE COURT: Let's just deal with this week and next week.
14 We have Dr. Rowell, Dr. Appleton, Doctors -- I think they're
15 doctors -- Dietz and Albino, and then the two witnesses for next
16 week, which came in last night.

17 MR. BERNICK: Lindsley and Beasley.

18 MR. BRODY: Mr. Lindsley and Ms. Beasley.

19 THE COURT: And that will be it for next week.

20 MR. BERNICK: Let me provide the Court with a couple other
21 items of information that may be of use. First, we will be in
22 communication with the government this afternoon basically
23 raising a series of issues that are very evident from the expert
24 reports and materials that were submitted yesterday about the
25 remedies phase.

1 THE COURT: I haven't seen those, you know that.

2 MR. BERNICK: So the remedies phase materials are now in
3 and we have some very serious concerns, and we'll raise them with
4 the government first.

5 THE COURT: Oh, that the government submitted?

6 MR. BERNICK: Yes, that the government submitted.
7 Yesterday was their day for providing the expert reports and the
8 reliance materials. We now have it, we've looked through it, and
9 there are problems. We will be in communication with the
10 government, but we would like to get time on Thursday afternoon
11 to talk with the Court about those problems, because they are
12 fundamental to our ability to proceed with the discovery and
13 trial process that Your Honor's recent order contemplates, and I
14 think we'll try to work them out, but if we can't, it really is
15 critical, to keep the case moving, that we have Your Honor's
16 views on those matters. So it may be useful to reserve time on
17 Thursday, particularly because it's probably the case that
18 Mr. Dietz and Mr. Albino can get done next week in any event.

19 THE COURT: They were scheduled last, right?

20 MR. BERNICK: They were scheduled last.

21 THE COURT: I don't think we're going to get to them this
22 week, from what you all are telling me. There are other things
23 we also have to cover.

24 I know that the government wants to make a final
25 presentation on the evidentiary issues we left up in the air

1 yesterday. I don't know if the defendants do. I need to come to
2 some conclusions, obviously, and lay out some parameters, but I
3 certainly want to hear from everybody before I do that, and then
4 those will be those final presentations, I would assume, after we
5 conclude with Dr. Rowell.

6 Now, does Dr. Appleton have any scheduling or logistics
7 problems?

8 MR. BERNICK: He's been kind of hanging around a while and
9 I don't think his testimony is going to last really all that
10 long. I believe that his testimony -- well, you may even want to
11 take his testimony before Your Honor finally rules on some of the
12 issues that carry through Read --

13 THE COURT: Where is he from again?

14 MR. BERNICK: He is now at Philip Morris, but he is being
15 put on because he spent many years at Brown & Williamson.

16 THE COURT: Well, that's not what worries me. I mean just
17 physically, where is he?

18 MR. BERNICK: Physically he's here and he can be made
19 available. We'll produce him at the convenience of the Court,
20 but there may be some merit to the idea of getting done with his
21 testimony, because I think if we do that and we have some time on
22 Thursday, Your Honor can take up these other matters. Also, I
23 know that you want to get done -- the Court wants to get done
24 with any exhibit objections from some of the prior examinations.

25 THE COURT: I know that. I know that.

1 MR. BERNICK: We can take care of that as well. One of
2 the things I'm going to ask the Court on behalf of various
3 lawyers who are still focused on the Easter weekend, is that
4 maybe instead of having the half day on Monday, we just go with
5 the full day on Monday.

6 THE COURT: The full day?

7 MR. BERNICK: That is -- the Court would be dark for the
8 full day on Monday.

9 THE COURT: Where is Mr. Newbold?

10 MR. BERNICK: Mr. Newbold is the one who is,
11 unfortunately, not here but most interested in -- because he's
12 working with, obviously, on this case here but is with witnesses,
13 but he's concerned --

14 THE COURT: But he wanted the whole day off.

15 MR. BRODY: I think that's what Mr. Bernick is asking for.

16 MR. BERNICK: Yes.

17 THE COURT: I thought you just said the reverse,
18 Mr. Bernick.

19 MR. BERNICK: I'm sorry, that we be dark that day. That's
20 what I intended -- I thought I was saying. I guess I wasn't
21 clear. It may be that this was --

22 THE COURT: Well, it was ambiguous. "For those lawyers
23 who are still focused on the Easter weekend, is maybe that
24 instead of having the half day on Monday we just go with the full
25 day on Monday."

1 MR. BERNICK: As a dark day, but --

2 THE COURT: All right. You want the whole day off on
3 Monday. We'll just have to see. There are actually some other
4 issues as well, but I wanted to hear from all of you first.

5 Ms. Eubanks?

6 MS. EUBANKS: Thank you, Your Honor. In terms of
7 addressing the issue that we began the discussion on yesterday,
8 Mr. Crane-Hirsch will be addressing those issues, and given that
9 many of them are tied to Mr. Read's testimony, we think it would
10 be advantageous to discuss them after Mr. Read concludes because
11 we did go back at the break yesterday and review those cases.

12 THE COURT: I want to hear that discussion sooner rather
13 than later. Obviously, it will inform whatever I do. It doesn't
14 in any way preclude me from ruling on people I haven't yet heard
15 from or read, so I don't see any problem with that.

16 MR. BERNICK: Fine.

17 THE COURT: Mr. Singer, you're still here.

18 MR. SINGER: Two questions for clarification, if I might,
19 and I apologize because I'm not as familiar with the rules of
20 procedure in this trial as anyone else in the room.

21 THE COURT: They get a little informal as we begin the
22 day, but we shouldn't do that. Go ahead.

23 MR. SINGER: The questions I have are simply these. Once
24 Your Honor makes the ruling concerning Dr. Mulholland, when would
25 the FTC's corrected testimony be due?

1 THE COURT: Well, I will try to rule very, very quickly,
2 and my recollection from our discussion, I think yesterday, is
3 that -- I think, if I can rule within let us say two days or so,
4 that you can be slotted right back in to the ordinary procedure
5 we have, so that you get your full time under the rules or under
6 my orders to make the corrections. I wouldn't cut your time
7 back, because I do know it takes time to do that.

8 MR. SINGER: Because my understanding is generally you get
9 testimony at least the Friday before and have until the week
10 Friday, and I would want to have at least a week and that, quite
11 honestly, might be cutting it since I haven't seen it yet.

12 MS. EUBANKS: Actually, it's usually the Monday before and
13 then it's -- the corrections are filed on Friday, but we don't
14 take any opposition to the FTC's request for more time, assuming
15 that we're not going to have gaps here. I understand there are
16 limitations. The FTC will have at least a week.

17 MR. SINGER: Okay, I appreciate that, Your Honor. And the
18 other question, I haven't seen the motion and I don't know
19 exactly what will be in the motion for reconsideration. If there
20 are issues concerning privilege, would the FTC be able to file a
21 response? And again, I don't know if we would want to or not,
22 but --

23 THE COURT: All of the issues concerning privilege should
24 have been litigated a long time ago in front of the Special
25 Master; isn't that right?

1 MR. SINGER: Many of them have.

2 THE COURT: I know many of them have been, but that's not
3 the point. The point is that should have all been taken care of
4 a long time ago.

5 MR. SINGER: I think it's in this context, Your Honor,
6 what little I know about what the testimony will be, is that it's
7 going to be based very much on Dr. Mulholland's deposition
8 testimony.

9 THE COURT: Probably.

10 MR. SINGER: As you can imagine, there were a number of
11 objections interposed, some by the FTC on privilege, others by
12 the Department of Justice on whatever issues they were raising,
13 and those issues weren't resolved by the Special Master simply
14 because it was part of a deposition and those would be something
15 which could have been done, I guess, by a Special Master, but
16 they were just never brought to his attention. And more
17 typically, it would come up at the trial Court as to whether or
18 not the person is going to be able to allowed to ask particular
19 questions or not.

20 THE COURT: Mr. Frederick?

21 MR. FREDERICK: Just briefly on that, Your Honor.
22 Obviously, I can't -- I mean, Mr. Singer will have to look at the
23 testimony and see what privilege assertions the FTC maintains.
24 There will be, in addition to the deposition testimony -- I just
25 want to make sure Mr. Singer and the Court understands -- there

1 were FTC documents produced, actually during the course of this
2 trial, some of which will probably end up in the testimony.
3 Obviously, we didn't get a chance to discuss those with Dr.
4 Mulholland at his deposition, so that's another possibility, as
5 to where the FTC may have privilege issues. I don't know that
6 they will, I'm just making sure that the Court understands that,
7 as well as Mr. Singer.

8 THE COURT: Well, you can tell I'm not happy about having
9 these pop up in the middle of trial.

10 MR. FREDERICK: Nor am I, Your Honor.

11 THE COURT: Privilege issues have been, and continue to
12 be, in many instances very difficult. However, of course, I have
13 to deal with them.

14 I think we'll handle it this way, that in correcting the
15 testimony, the FTC may accompany the corrections with any
16 privilege objections it has, and, of course, the defendants will
17 respond. The question is the number of days and that gets kind
18 of complicated, and it may be that if there are privilege
19 objections, that Dr. Mulholland's testimony will have to be
20 pushed a little further back because we've always allowed more
21 time for the briefing of privilege objections, and to tell you
22 the truth, I'm more concerned about the decision making time on
23 objections. I think we'll have to see where we stand once the
24 objections come in, if there are any.

25 Again, counsel are going to confer, it may be that there's

1 only going to be one or two or three, so I'd rather not put an
2 elaborate procedure into place yet, but you'll have to come back
3 to me on that. But what is clear is, if you have any objections,
4 you will file them with your corrected testimony, and the
5 defendants, of course, will oppose.

6 MR. SINGER: That will be fine, Your Honor, and I just
7 also ask if it be okay if Your Honor would require that we be
8 served with any motions and any responses that --

9 THE COURT: Yes, of course.

10 MR. SINGER: Thank you, Your Honor.

11 THE COURT: All right. Let's proceed. Mr. Read, you're
12 still under oath this morning, and we are on cross-examination.

13 MR. CRANE-HIRSCH: Good morning, Your Honor. Daniel
14 Crane-Hirsch for the United States. At the end of the day
15 yesterday, counsel for BATCo, Mr. Sheffler, raised a privilege
16 objection, and we should ask the status of that objection.

17 MR. SHEFFLER: Yes, Your Honor. Bruce Sheffler for
18 British Tobacco Investments Limited. We did raise the objection
19 to the use of the document because it was on our privilege log,
20 and I have ascertained it is on our privilege log but in further
21 review we've also ascertained it was a part of the Bliley set of
22 documents that have been transmitted, so therefore I understand
23 the Court's rulings on that.

24 THE COURT: Therefore, it's a nonproblem.

25 MR. SHEFFLER: I'm sorry?

1 THE COURT: Therefore, it's a nonproblem.

2 MR. SHEFFLER: We have objected, but I understand your
3 ruling and it would be consistent, as it has been in the past.
4 Thank you.

5 THE COURT: Go ahead, please.

6 CONTINUED CROSS-EXAMINATION OF GRAHAM READ

7 BY MR. CRANE-HIRSCH:

8 Q. Good morning, Mr. Read.

9 A. Good morning.

10 Q. I'd like to pick up where we were at the end of the day
11 yesterday. We saw a series of different letters that are on a
12 demonstrative from U.S. Attorneys for Brown & Williamson and CTR
13 that were stating the intention to be a persuasive influence and
14 to influence the tone and even the context of the Harrogate
15 Report and saying that they hoped, admittedly, to slant the
16 outcome of the Report. So, do you recall that from yesterday
17 afternoon?

18 A. Yes, I do recall that.

19 Q. And there was a little bit of uncertainty, it sounded
20 like. I believe we did resolve that these three different
21 documents, referring to the stated intentions of the U.S.
22 Attorneys, we eventually established, I believe, referred to the
23 three-year retrospective, 1963 to '66. So if we can put that up
24 on the screen, please, JD 030989. That's the one from '63 to
25 '66, the Tobacco Research Council retrospective. So, is that

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1 correct, sir?

2 A. Yes, that's correct.

3 Q. But when we first began looking at the statements about
4 being a persuasive influence before the Harrogate Report is
5 issued and influencing the tone and even the context and
6 consulting with the people on your side concerning the way
7 Harrogate's work is presented, admittedly with the hope of
8 slanting the Report, what you took those to be referring to at
9 first was the 1967 article by Dr. Day from Harrogate that was
10 later published in the British Journal of Cancer; is that
11 correct?

12 A. That is correct, and I still believe from the documents
13 that that is still some of the primary directives of the
14 information towards that particular publication.

15 Q. So, if we can put that one up on the screen, the Day
16 article in the British Journal of Cancer, it is JD 011162. And
17 if you would like to go to the second page and blow out the
18 title, please. Yes.

19 So, we're then going to be exploring the history behind
20 the publication of this article, and more specifically, the
21 decision by U.K. Tobacco Industry about whether or not to submit
22 these research results for publication or instead to quash these
23 research results.

24 Do you recall giving testimony yesterday afternoon that
25 you were not aware that the U.K. Tobacco Industry and the TIRC

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1 sought legal advice about whether to quash Dr. Day's research
2 results? You were not aware of that?

3 A. I was not.

4 MR. BERNICK: Your Honor, just for purposes of simplifying
5 the interrogation and avoiding the objections, frequently counsel
6 has introduced a topic and made a prefatory statement, and it has
7 the effect that once the question then follows, we have to take a
8 look at the question and see whether the witness will understand
9 that question in light of counsel's statement, which really,
10 then, affects the form of the interrogation.

11 THE COURT: Mr. Crane-Hirsch, just try and state your
12 questions. These long introductions are very diverting, and
13 quite frankly, they sometimes are hard to follow. The objection
14 is sustained. What is the question you're now asking?

15 MR. CRANE-HIRSCH: Whether he recalls his testimony
16 yesterday afternoon that he was not aware that the U.K. Tobacco
17 Industry had sought legal advice about whether to quash these
18 research results. Does he recall that testimony, is the
19 question? And he's told us just now he does recall that
20 testimony.

21 THE WITNESS: Again, my understanding is that -- I thought
22 you had asked me had there been seeking counsel opinion. I had
23 no idea it was actually to quash it. I thought it was, the way
24 you presented it to me, was an opinion from Freshfields, and I
25 said I had never seen that document before and I certainly hadn't

1 read it. And, in fact, I was advised not to read it during the
2 trial yesterday. I thought it was seeking an opinion. I had no
3 idea what the purpose of that opinion was.

4 BY MR. CRANE-HIRSCH:

5 Q. Well, let's explore that. You agree with me that
6 Freshfields is a leading firm of London solicitors?

7 A. That's another legal name, but I believe that to be the
8 case, yes.

9 Q. If we turn to the opinion, it is U.S. Exhibit 93190.
10 The -- so up at the top left it has the word "confidential" and
11 then it says "Tobacco Research Council, Research Publications
12 Opinion." If we flip to the final page of the document, it is
13 dated September 28th, 1966, and it is signed by A.P. Graham
14 Dixon, who I take to be a barrister at Gray's Inn Chambers.
15 Will you agree that Gray's Inn Chambers is a distinguished
16 chambers of barristers also in London?

17 A. I believe it is, yes.

18 Q. I would like to turn to the third page of the document.
19 There's a paragraph beginning -- paragraph 2 at the top of the
20 page, and it says, "I am asked to advise whether the publication
21 of the Day/Paige Report is likely to increase the risk of
22 proceedings against the tobacco manufacturers in the U.K." And
23 then skipping two sentences, quote, one can only evaluate these
24 risks by considering the relevant likely consequences of, A,
25 publishing, or B, not publishing the Day/Paige Report in

1 substantially its present form. Did I read that correctly?

2 A. Yes, and that's the counsel's point of view, as I
3 understand it.

4 Q. And we established before that you were unaware that the
5 U.K. Tobacco Industry had even requested this advice. Do you
6 have any reason to believe that the barrister, Mr. Dixon,
7 misunderstood the question that he was asked?

8 A. No, sir, I see the question and I see accounts giving
9 opinions on how he would address the question.

10 Q. We will not be going through the details of the
11 attorney's reasoning, but I would like to look with you at the
12 final page of the document where he gives his conclusion. This
13 is in a paragraph that is numbered as paragraph 8. At the start
14 of the paragraph, Mr. Dixon advises "any action or inaction
15 which could be construed as a failure by the industry to comply
16 with its legal or moral obligations would increase the risk of
17 proceedings being commenced by some enthusiastic crusader." Did
18 I read that correctly?

19 A. Yes, you did.

20 Q. And the proceedings we're speaking about here are
21 specifically legal proceedings, correct, Mr. Read?

22 A. I believe that to be the case, yes.

23 Q. Moving to the final sentence, "but on the whole I am sure
24 that, though in either case one is probably dealing with a
25 marginal risk, the manufacturers would incur a greater risk of

1 being sued, albeit at a later date, and a greater risk of such
2 proceedings being successful, if they do not publish these data,
3 than they incur if they do publish them."

4 Did I read that correctly?

5 A. Yes, you did.

6 Q. And Mr. Dixon underlined the word "not" in "if they do
7 not publish these data," correct?

8 A. That's correct, yes. And, of course, it was published.

9 Q. And it was published only after the British Tobacco
10 Industry sought and received legal advice about whether it would
11 be more likely to face litigation if it published the research
12 results than if it quashed the research results, correct?

13 A. Of course, the publication came after this opinion, but
14 what bearing that opinion had on that opinion, how can I say?

15 Q. The question that you were asked, sir, what bearing the
16 one has on the other, how can you say, it sounds, Mr. Read, as
17 though you would agree with me that for these historic documents
18 that predate your arrival on the scene, that you are not in a
19 position to offer observations or draw inferences about the
20 events that they discuss; is that correct?

21 MR. BERNICK: Objection to the form of the question. I'm
22 not sure what the question is.

23 MR. CRANE-HIRSCH: Could we have a clarification on which
24 rule of evidence we're referring to here?

25 THE COURT: It's just that the question is very confusing.

1 "It sounds, Mr. Read, as though you would agree with me" -- just
2 ask him what your question is.

3 BY MR. CRANE-HIRSCH:

4 Q. Mr. Read, do you agree that for historic documents
5 written years or decades before your arrival on the scene, you
6 are not in a position to offer personal observations or
7 interpretations about the meanings of those historic documents?

8 MR. BERNICK: Well, first of all, can we focus on a
9 particular document and then -- what does it mean "not in a
10 position to"? Obviously, counsel is using this to produce an
11 evidentiary argument, the witness is not sensitive to the
12 meanings of these kinds of terms.

13 THE COURT: The question is overruled. The question
14 covers all documents and I will assume that in a not -- "that you
15 are not in a position to", which is a very long winded way of
16 asking the question, but what it means is you are not able to.
17 Mr. Read, do you think you understand with those amendments?

18 THE WITNESS: Yes, I think I do. And clearly I wasn't
19 present at the time. I'm seeing this document for the first
20 time, and all I can do is talk to the facts that I actually know,
21 and the consequences of actions and the outcomes. Those are
22 matters of fact. I know those. I can't say how this particular
23 document was used and when it was used and the circumstances
24 under which it was used. I simply can't give any information on
25 that.

1 BY MR. CRANE-HIRSCH:

2 Q. So, you are not able to provide us with personal
3 observations or interpretations about the meanings of historic
4 documents that predate your arrival, correct?

5 MR. BERNICK: Objection, asked and answered. That's
6 exactly the same question.

7 THE COURT: Well, this is a clear-cut question. The
8 witness may answer it.

9 THE WITNESS: I can clearly offer a view or opinion on any
10 document that you put before me, and I can talk to any document
11 and I can tell you whether I know anything about it, and I'm
12 trying to do exactly that. I thought you were being very general
13 in saying how can I express a view on any document? I can
14 express a view with my experience and my knowledge and with my
15 gathered information that I've had in reviewing all of the
16 documents and having worked with many of the scientists that
17 overlap with my career. And I'll do that on each and every
18 circumstance that you ask me, but with respect to this document,
19 I hadn't seen it before and I understand it's content, and I
20 understand the ruling, but I don't know to the extent which it
21 was used by the TIRC in its decision-making process. The point
22 that I'm making because I've seen no document that describes how
23 it was used.

24 BY MR. CRANE-HIRSCH:

25 Q. So, I appreciate that you've seen no documents describing

1 how it was used, and I want to clarify here that for the
2 publication of Dr. Day's article in the British Journal of
3 Cancer, the 1967 article, you have no views about whether or not
4 these attorney opinions influenced the decision to publish
5 versus to quash, correct?

6 A. That's correct.

7 Q. I'd like to move forward. You have said in the past that
8 the BATCo group Research and Development Center at South Hampton
9 was often referred to as, quote, the University of BAT, correct?

10 A. I have said that, yes.

11 Q. And, in fact, you've said that researchers at BATCo will
12 share information with external scientists on request so long as
13 it doesn't concern commercial information, correct?

14 A. That's essentially correct, yes.

15 Q. And you said "essentially correct"?

16 A. You said "commercial." I think you meant proprietary
17 information or competitively sensitive, so I was interpreting
18 what you meant by commercial.

19 Q. Let's look at some prior testimony so we can clarify that
20 point. You were shown yesterday the transcript of your
21 testimony at trial in the Ironworkers case. This is March 9,
22 1999, and I'd like to ask if you can turn to page 3547.

23 Mr. Read, it appears that someone may have stacked up the
24 exhibits we discussed yesterday by your right arm.

25 A. Could you remind me of the page again?

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 Q. Page 3547.

2 A. Yes, I have it.

3 Q. Halfway down the page at line 12, the end of line 12, you
4 say, quote, my whole testing experience is one of the Research
5 Center at South Hampton, was often referred to as the University
6 of BAT. We operated like a university, we were really very
7 open. We involved ourselves in discussions with many external
8 scientists. When people asked us specific questions we shared
9 our information with them, provided it wasn't of a commercially
10 sensitive nature, and it worked like the University of BAT,
11 closed quote. Did I read that correctly?

12 A. Yes, you did.

13 Q. And you were on the stand in trial in Federal U.S. Court
14 in the Ironworkers case when you gave this testimony, correct?

15 A. Yes, I was.

16 Q. And you were under oath when you gave that testimony,
17 correct?

18 A. Yes.

19 MR. BERNICK: Again, I don't believe that that impeaches
20 the prior testimony, it doesn't even use the same language.

21 THE COURT: Was it for the purpose of impeachment?

22 MR. CRANE-HIRSCH: No, Your Honor, the witness was not
23 sure whether or not his previous statements about BAT University,
24 whether the exception related to commercially sensitive
25 information.

1 THE COURT: Well, it's helpful to everybody if you would
2 just introduce the -- whatever material you're going to question
3 him about in terms of refreshing his recollection, if that's what
4 you're going to do. So, let's proceed now. If there's an
5 objection, it's overruled.

6 BY MR. CRANE-HIRSCH:

7 Q. And also yesterday afternoon we discussed BATCo's
8 interactions with the British government's Independent
9 Scientific Committee on Smoking and Health during the period of
10 1979 through '83 when the second and third reports were issued
11 and work was beginning on the 4th. Do you remember that topic?

12 A. Yes, I remember you introducing it and I widened it to
13 include all of the records.

14 Q. Yes, you did. And it's your testimony, correct, that
15 BATCo, and the other members of the U.K. Tobacco Industry,
16 cooperated wholeheartedly in that process, correct?

17 A. That is my understanding, yes.

18 Q. Well, the truth of the matter, though, is that when
19 external scientists, or independent government scientific
20 committees, asked for noncommercial information, BATCo did not
21 actually always share that information, did it?

22 A. Did you say when it was "commercial" or "not commercial"?

23 Q. "Noncommercial".

24 A. That's not my understanding.

25 MR. BERNICK: Again, the prior question related to ICOSH,

1 I-C-O-S-H; this question purports to be confronting that, but it
2 now refers to "committees," independent government scientific
3 committees.

4 THE COURT: What are you referring to in the question,
5 just to be clear?

6 MR. CRANE-HIRSCH: We can focus specifically on the
7 independent committee for -- Independent Scientific Committee for
8 Smoking and Health.

9 THE COURT: All right. Focusing on that committee, ask
10 your question again, please.

11 BY MR. CRANE-HIRSCH:

12 Q. Focusing specifically on BATCo's interactions with the
13 independent committee -- Independent Scientific Committee for
14 Smoking and Health during the period of 1979 through 1984, it's
15 true, isn't it, that BATCo did not cooperate wholeheartedly with
16 that committee, correct?

17 A. No, I don't believe that is correct.

18 Q. I'd like to have you shown U.S. Exhibit 21733. This is
19 notes of a meeting authored by a colleague of yours,
20 Dr. L.C.F. Blackman at the South Hampton Group Research and
21 Development Center, the date is February 16, 1983, and the title
22 of the document is: "Notes of a meeting of the tobacco company
23 research directors", and then I'll ask if you can confirm that,
24 among others, present were representatives of Philip Morris as
25 well as Dr. Blackman from BAT; is that correct?

- 1 A. That is correct.
- 2 Q. The first paragraph begins, quote, we met to discuss the
3 11 main research proposals contained in the impending ISC 3rd
4 Report." Did I read that correctly?
- 5 A. You did.
- 6 Q. Moving to the second paragraph, "although some of the
7 research areas are commercially sensitive, the TAC response must
8 be seen by the ISC to be constructive, a series of 'no comment'
9 will surely provoke aggression and --"
- 10 A. "Hinder" I think that is.
- 11 Q. "-- hinder future voluntary agreements." Did I read that
12 correctly?
- 13 A. Yes, you did.
- 14 Q. The next paragraph begins, quote, there are, however,
15 dangers for the industry to be seen to work in collaboration
16 with the ISC, semi colon, and also possible legal implications
17 for the industry seemingly to accept the concept underlying some
18 of the research proposals." Did I read that correctly?
- 19 A. Yes, you did.
- 20 Q. There was a reference in that second paragraph that we
21 saw to material that is commercially sensitive. Do you recall
22 that?
- 23 A. Yes.
- 24 Q. Saying that some of the topics to be explored were
25 commercially sensitive, but there are others that were not to be

- 1 commercially sensitive, correct?
- 2 A. That's how I read it, yes.
- 3 Q. Yes. And if we look at the fifth paragraph it says that
4 short aid-memoirs are to be prepared on those topics, quote, for
5 those items that are thought not to be commercially sensitive,
6 short aid-memoirs will be prepared by one or other companies for
7 use by members of the Group, i.e., not necessarily for
8 subsequent presentation to the ISC," correct?
- 9 A. That's correct.
- 10 Q. So, it's fair to conclude from this that if a short
11 aid-memoir is to be written, then it is not commercially
12 sensitive, correct?
- 13 A. That's what it says, yes.
- 14 Q. And you have no reason to disagree with what Dr. Blackman
15 wrote, do you?
- 16 A. No, and he's simply asking the other members to identify
17 what they think is not commercially sensitive.
- 18 Q. And not just other members, it's Dr. Blackman who wrote
19 up these notes, correct?
- 20 A. Of course, I include him in that.
- 21 Q. Very good. I'd like to turn to the third topic. This is
22 at the bottom of page 2. The topics here -- actually, if we
23 just flip to the last page, you'll see that the last page
24 concludes with topic number 11. I just want to confirm with you
25 that the number of topics here correspond with the 11 items that

1 Dr. Blackman said at the start of the memo were to be proposed
2 in the impending ISC 3d Report?

3 A. I believe that to be the case, yes.

4 Q. So, it's fair to assume that these topics correspond
5 precisely with the topics that the Independent Scientific
6 Committee was exploring, correct?

7 A. I believe so, yes.

8 Q. So, now, if we go back to the topic number 3 at the
9 bottom of the second page, it's titled: "The Effect of Nicotine
10 at the Levels Achieved Through smoking." And this was a topic
11 that was addressed in the third ISC Report, correct?

12 A. That's correct, yes.

13 Q. The topic here that indicates that the ISC was working
14 with the industry, was seeking the industry's cooperation in
15 providing information that would address the effect of nicotine
16 at the levels achieved through smoking, correct?

17 A. Yes.

18 Q. At the very bottom of the page, Dr. Blackman writes
19 that -- and I'm going to quote here just the first part of the
20 phrase, quote, animal experiments could probably be designed to
21 study the effect of nicotine, parentheses, either by itself or
22 as spiked additions, closed quote. That is part of
23 Dr. Blackman's sentence, correct?

24 A. Yes.

25 Q. And so, Dr. Blackman, a senior researcher at British

1 American Tobacco's Group Research and Development Center, is
2 writing that animal experiments could probably be designed on
3 this topic and you already agreed, correct, that this is a topic
4 that the U.K. government's Independent Scientific Committee was
5 seeking industry cooperation on, yes?

6 A. Yes.

7 Q. The sentence continues, "our response to the ISC should
8 be that we have nothing to offer. The little information we
9 have is already in the public domain, and we have no idea as to
10 a worthwhile research program." Did I read that correctly?

11 A. Yes, you did.

12 Q. And the next sentence states that, "Imperial will produce
13 an aid-memoir on the subject." And you agreed with me earlier
14 that the preparation of an aid-memoir indicates that this is not
15 a commercially sensitive topic, correct?

16 A. That is true, and this is, I believe, to be an accurate
17 statement.

18 THE COURT: When you say "this", Mr. Read, are you
19 referring to a particular sentence under number 3 or are you
20 referring to the entirety of what is listed under paragraph 3?

21 THE WITNESS: It's -- it is to do with the elements that
22 are listed under paragraph 3, Your Honor.

23 THE COURT: Go ahead, please.

24 BY MR. CRANE-HIRSCH:

25 Q. Further down on the third page, section 5 --

1 A. I'm sorry, if you don't mind me saying, you have to, of
2 course, look at the document. It does say "the notes of the
3 meeting" and one assumes they had some discussion, and he's
4 reflecting, I believe, and writing the minutes of what the
5 outcome of that discussion was. They obviously discussed animal
6 studies, which is a contentious issue. And certainly from a
7 scientific standing, the use of animals to determine levels of
8 exposure in humans is somewhat dubious, and I suggest that they
9 certainly discuss this and this is a summary outcome of that
10 debate.

11 And he says I have little to offer that isn't already in
12 the public domain. And therefore, if the conclusion is we have
13 nothing to offer on that subject, I see nothing improper in that
14 at all myself.

15 BY MR. CRANE-HIRSCH:

16 Q. Mr. Read, you weren't asked a question about propriety or
17 impropriety, those questions will ultimately be for the
18 fact-finder in this case. The -- you did agree with me, just to
19 clarify, the portion down at the bottom of page 2 does have
20 Dr. Blackman saying, based upon summarizing this discussion of
21 the U.K. industry, that the scientists at this meeting of the
22 U.K. industry, the consensus view was that animal experiments
23 could probably be designed to study this topic, yes?

24 A. That's what it says.

25 Q. And you've told us just now that your --

1 A. There are scientific limitations to that particular
2 approach, yes, that's what I said.

3 Q. And then at the top of page 3, what Dr. Blackman writes
4 when he says that "our response to the ISC should be that we
5 have nothing to offer", you've agreed with me that that's what
6 Dr. Blackman wrote and you've now told us that your assessment
7 is that these are the considered views of other scientists at
8 the U.K. Tobacco Industry at this meeting, correct?

9 A. This is, I understand, to be the notes generated from the
10 meeting and, therefore, I assume the outcome of the discussions
11 at that meeting. That would be my understanding of what the
12 notes of the meeting were representing.

13 Q. Let's move forward to section 5. This is titled: "The
14 Role of Nicotine at the Relevant Lower Range of Nicotine Dosage
15 in Perpetuating the Smoking Habit."

16 And you'll agree with me that this is also a topic which
17 was ultimately discussed in the third ISC Report as the
18 Independent Government Scientific Commission actually issued it,
19 yes?

20 A. Yes.

21 Q. The section here reads, and I quote, while such
22 information already exists in the literature, and it refers to
23 three authors, this is a particularly sensitive area for the
24 industry. If any future study showed that nicotine either was
25 or was not associated with perpetuating the smoking habit,

1 industry could well be called upon to reduce or eliminate
2 nicotine from the product, parentheses, a heads we loose; tails,
3 we cannot win situation, exclamation mark, closed parentheses.
4 Did I read that correctly?

5 A. Yes, you did.

6 Q. And then Dr. Blackman's conclusion for this section, "we
7 must not become involved in any collaborative study with the
8 ISC." Did I read that correctly?

9 A. You did. And he indicated that the information was
10 already in the public domain, that this was a sensitive issue
11 for the industry, and we can discuss that if you wish, but more
12 importantly, he's simply saying that they won't participate in a
13 collaborative study, not that they had anything they were hiding
14 or holding or not giving to that particular committee. And,
15 indeed, as you probably know, we had a nicotine conference the
16 very next year, which I actually chaired and generated, and we
17 spoke to all of this research.

18 Q. The conclusion here that Dr. Blackman refers to the U.K.
19 industry reaching in 1983, though, doesn't refer to existing
20 literature, does it? If we look at the second paragraph, it
21 refers to the ISC's request for collaborative studies in a
22 future study, yes?

23 A. Your question to me earlier was, were we withholding
24 information from the ISCSH, and here this is talking about a
25 future study. We were holding no information back, we were

1 discussing our participation, or not, and perhaps the issues
2 associated with doing that if we were or were not to participate
3 in the future. There's no suggestion here that information is
4 being held back from the ISCSH.

5 Q. So, Mr. Read, before we started in on this document, you
6 told us that BATCo and the other members of the British Tobacco
7 Industry cooperated wholeheartedly with the ISC. Do you
8 remember giving that testimony a few minutes ago?

9 A. Yes, I do.

10 Q. And so, is it your testimony that this is wholehearted
11 cooperation?

12 A. If you look in terms of totality, if you look at specific
13 aspects of this particular document, it's very hard for me to
14 set a context. I will, if you wish, talk to all the research
15 that we conducted with and associated with the U.K. government
16 or the research that we invested in and all the external
17 research we funded, and all the subsequent work that actually
18 emanated from these studies which we provided the funds for as
19 part of the U.K. industry for which the ISCSH were extremely
20 grateful and very receptive to everything that we had given them
21 over that period of time.

22 Q. When did BATCo first tell the ISC, if we look at topic 3,
23 that it had chosen to tell the ISC, to give the ISC a response
24 that the British Tobacco Industry has nothing to offer, when in
25 fact, some of its leading scientists believed that animal

1 experiments could probably be designed to study the topic?

2 MR. BERNICK: Objection to the form of the question.

3 THE COURT: No --

4 MR. BERNICK: It's complex and it's argumentative.

5 THE COURT: The objection's overruled. Go ahead, please.

6 BY MR. CRANE-HIRSCH:

7 Q. When did BATCo first tell the British government that
8 although leading scientists for the British Tobacco Industry
9 believed that animal experiments could probably be designed on
10 this topic, that the British Tobacco Industry's response was to
11 say we have nothing to offer? When did BATCo first tell that to
12 the British government?

13 A. Well, in essence, it told it to the world at the Smoking
14 Behavior Conference that we hosted in 1977, which was then
15 published and distributed internationally in 1978. Dr. Russell
16 was specifically at that meeting. He is the expert in this
17 particular area, and we had numerous discussions with
18 independent scientists that were participating with the ISCSH.

19 Q. So your testimony here is that the ISC was asking the
20 British Tobacco Industry for cooperation in providing
21 information into whether or not studies could be designed in the
22 future, but as of 1983 they were asking for information and
23 studies that had already been fully done at conferences seven
24 years earlier. Is that the testimony?

25 A. Well, I don't think it's seven years earlier, I think I

1 said '78, and I think the note here is '83, so a few years
2 earlier.

3 Q. So it's your testimony that the Independent Scientific
4 Committee was asking for information about future studies, but
5 the studies had already been done, is that what we're --

6 A. I think you have to understand the term of reference of
7 the ISC. This was an independent committee that was making its
8 own judgment, was working on behalf of the U.K. industry and on
9 behalf of the U.K. government, and was seeking information and
10 it had already sought information because he's commenting on the
11 third report. And he's simply giving a view as to whether we
12 think the recommendations being made in that third report have
13 scientific merit, whether we have information that can
14 supplement that or indeed the information is already in the
15 public domain.

16 Q. So, from what you're saying, Dr. Blackman is here
17 commenting upon the third ISC Report?

18 A. Well, I thought that's how you introduced it. It
19 identified the 1 to 11 items that actually came up in the
20 Report, in the draft report that the industry was asked to
21 comment on.

22 Q. And so, if we look at the first page the reference there
23 in the first paragraph is to the impending ISC 3d Report, yes?
24 It hadn't yet been issued?

25 A. That's what it says and that's my understanding, that

1 that is the nature of draft report and it was being shared
2 openly with the tobacco industry showing them their
3 recommendations.

4 Q. And the research proposals that are referenced there are
5 research proposals for ongoing cooperation between -- ongoing
6 cooperation on the part of the British Tobacco Industry with the
7 ISC, yes?

8 A. No, not at all. This is -- the ISC was making a
9 recommendation to the British government as to what research it
10 thought it was appropriate to deal with issues of smoking and
11 health. Our role, and we have clearly and we continue to do so,
12 to share any and all information with appropriate, independent
13 committees and the government. This is an independent body
14 having reviewed the science to date, making what it thought was
15 a series of appropriate recommendations for future research for
16 scientists in general, not for the industry per se. It's an
17 independent scientific committee.

18 Q. And further down on this first page we've discussed
19 the --

20 A. And I think also --

21 Q. I beg your pardon, I was in the middle of a question.

22 A. I'm terribly sorry, I didn't wish to interrupt.

23 Q. Further down on that first page in the third paragraph,
24 there's this reference to dangers for the industry to be seen to
25 work in collaboration with the ISC, and also possible legal

1 implications for the industry, seemingly to accept the concept
2 underlying some of the research proposals, yes?

3 A. That is exactly how you read it, yes.

4 Q. And so, we're just wanting to get clear here that in your
5 view, Dr. Blackman's memo reflects wholehearted cooperation on
6 the part of the British Tobacco Industry with the ISC?

7 A. Again, I believe that to be the case. I think you've
8 missed another point that this is 1983, this particular
9 document. In 1982 it was established that the Tobacco Products
10 Research Trust was to be put into operation under the same
11 chairmanship of Sir Peter Froggatt --

12 Q. Mr. Read --

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

15 THE COURT: He may, he's answering your question. Go
16 ahead, please.

17 THE WITNESS: And as part of those discussions and that
18 voluntary agreement, the industry had agreed to provide funds to
19 that charitable trust, as I've said, under the same auspices of
20 Sir Peter Froggatt in order to enable them to conduct research.
21 And all Dr. Blackman is saying here is he didn't think it was
22 appropriate, for various legal reasons, which we can discuss if
23 you wish, that it should be the industry that participated in
24 that. He took no issue with what they were saying, how they
25 chose to execute what they thought was appropriate science, and

1 indeed, the industry over Tobacco Product Research Trust provided
2 something in excess of 8 million pounds to facilitate that
3 research in the U.K. research institutions and in the U.K.
4 universities.

5 MR. CRANE-HIRSCH: Your Honor, if I may, may we move to
6 strike the portions of the answer that did not address the
7 question, which was whether or not this memo of Dr. Blackman
8 reflects wholehearted cooperation with the ISC? There were many
9 other talks. There was discussion about activities in 1982,
10 discussions about other trusts, a discussion about funding levels
11 for other programs.

12 MR. BERNICK: I think what the -- we would -- I would
13 object to that motion. The witness has said repeatedly in
14 response to this very same question this motion can only be
15 assessed and interpreted in context, and you can't -- that's the
16 witness's testimony.

17 THE COURT: The motion to strike is denied. Let's move
18 on.

19 BY MR. CRANE-HIRSCH:

20 Q. The first page of the memo does have a caution in the
21 fifth paragraph that it is -- I beg your pardon, the fourth
22 paragraph, that it summarizes the main views of the group acting
23 as individual scientists, and states that it's recognized these
24 views do not bind the respective companies. Do you see that?

25 A. Yes, I do.

1 Q. I'd like to firm up with you whether or not the views
2 that we've seen Dr. Blackman express here, the senior researcher
3 at BATCo, did indeed represent the position of BATCo. BATCo
4 believed that the tobacco industry must be united in a universal
5 stand on the issue of smoking and health, correct?

6 A. On the key issues of smoking and health, absolutely.

7 Q. And it believed that it was essential for the tobacco
8 industry to have coordinated and consistently applied self
9 discipline on the subject of smoking and health, correct?

10 A. And it did. And this is showing that it gave the freedom
11 and autonomy for an independent company to express its own view
12 on this subject matter, not that it necessarily agreed or
13 disagreed on the position of smoking and health. The position
14 on smoking and health was clear and consistent. This is talking
15 about how to respond to the recommendations of the ISC.

16 Q. And that position on smoking and health was dictated by
17 legal considerations, yes?

18 A. Certainly not in my experience, no. It related to issues
19 that could consequently finish up in Court, obviously because
20 they are matters that are sensitive, they are important to
21 public health, and they are clearly debated by any and all. But
22 we're talking about the science of smoking and health, and
23 that's the piece that I'm actually referring to.

24 Q. I'd like to ask you to be shown U.S. Exhibit 93210.
25 These are notes assembled by an attorney at BATCo, down at the

- 1 bottom of the document, H.A. Marine, that's Alex Marine, yes?
- 2 A. Alex Marine, yes.
- 3 Q. And the date is October 3rd, 1983, so that's later this
- 4 same year that we've been discussing, yes?
- 5 A. That's correct.
- 6 Q. The document is entitled: "TAC Meeting." Now, "TAC" is
- 7 the name of the organization after the --
- 8 A. It's the Tobacco Advisory Council.
- 9 Q. And I want to confirm that's the same organization which
- 10 previously had been TRC?
- 11 A. Absolutely, yes.
- 12 Q. The title is: "Smoking and Health". Quote, in BAT's
- 13 view, the biggest single threat facing the industry, in both
- 14 this country and elsewhere, is the issue of smoking and health.
- 15 Now, the reference to "threat" here, that's reference to a legal
- 16 threat, yes?
- 17 A. As it's coming from the legal director, I would imagine
- 18 that to be in his mind, yes.
- 19 Q. Continuing the quote, "because of this, we believe that
- 20 the industry must be united in its universal stand on this issue
- 21 and that no member company should seek to exploit the smoking
- 22 and health issue for its own commercial advantage." Did I read
- 23 that correctly?
- 24 A. Yes, which I think is laudable and appropriate.
- 25 Q. If we move down a paragraph, there is a title: "Product

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1 Liability." "The industry is acutely aware of the possible
2 impact on our business of the product liability laws around the
3 world, and particular those in the USA." And then skipping a
4 sentence or two, "I need not remind you that over the past 20
5 years no less than 100 civil suits in the USA have been
6 successfully defended by our industry. Continuous success has
7 not been coincidental. On the contrary, it has very largely
8 been achieved by a coordinated and consistently applied self
9 discipline on the subject of smoking and health within the
10 industry." Did I read that correctly?

11 A. Yes, you did.

12 Q. So, you'll agree with me, then, that BATCo wished
13 vigorous collaboration and cooperation with other members of the
14 tobacco industry, yes?

15 A. Well, I think the notes are clear. He's expressing his
16 legal view and opinion that he thinks it is appropriate, that it
17 should be consistent on the matter of smoking and health as it
18 relates to the science of smoking and health. I think that's
19 what he's saying.

20 Q. And the collaboration that we're speaking about here,
21 then, is driven by legal concerns, yes?

22 A. Clearly it has legal implications. He's the legal
23 director, and he's assessing the legal risks, so I believe that
24 to be the case.

25 Q. The coordination that we're speaking about here

1 manifested itself, though, in speaking to deprive government
2 authorities and the public of information that the tobacco
3 companies had about smoking and health, correct?

4 A. I don't see how you can deduce that from this note. I
5 can't comment on that.

6 Q. Let's turn the page. The topic here is the advertisement
7 that was run in Holland concerning a cigarette which resulted in
8 low yields on government tar yield tests, and there is a dispute
9 between BATCo and Philip Morris concerning the propriety of
10 running this advertisement. The Court's already heard testimony
11 about that topic, but I do want to ask if you can confirm the
12 context of this discussion about having legal considerations
13 driving the industry's stance and driving the industry to
14 collaborate together is arriving in the context of disputes
15 between the member companies of the industry and how much
16 information to provide the public and health authorities?

17 THE COURT: Mr. Crane-Hirsch, what is the question for
18 this witness?

19 BY MR. CRANE-HIRSCH:

20 Q. Can you confirm that the context of this memorandum is a
21 dispute about how much information on smoking and health BATCo,
22 and other members of the tobacco industry, are to share with
23 government officials and the public?

24 A. Categorically does not relate to that at all. There's an
25 issue of smoking and health, and the industry position is that,

1 which I think is a laudable position, is that they do not take
2 advantage on matters of smoking and health. The debate here is
3 that BATCo's interpretation of that advertisement was that this
4 was undermining that relationship. That the industry should not
5 take any commercial advantage and the advert was interpreted, at
6 least by BATCo, that this was a break from the norm and an
7 unacceptable practice from a consumer perspective.

8 Q. You'll agree with me that the advertisement in question
9 provides consumers with information about tar as measured by
10 government tests versus tar as delivered to the smoker, yes?

11 A. This was to do with the issue of the smoking of the
12 Barclay product and the particular methodology that was used to
13 do that, and whether, indeed, that actually accurately affected
14 on an ISO or FTC basis the relative ranking of that product. It
15 had nothing to do with what people actually got from the
16 product. It was about the relative ranking and whether this
17 particular product, because it's design features could be
18 appropriately measuring the delivery under the ISO or the FTC
19 procedures.

20 Q. We've been talking so far, Mr. Read, about the extent of
21 BATCo agencies wholehearted cooperation with government
22 authorities. I now want to discuss with you the issue of
23 external research that BATCo funded. Do you remember discussing
24 that topic in your written testimony?

25 A. Yes.

1 Q. Let me ask you to turn, please, to your written direct
2 testimony at page 65. On page 65 at line 7, you were asked to
3 describe in general terms the magnitude of published research
4 funded by BATCo. Do you see that?

5 A. Excuse me, I'll be there in a moment. Yes.

6 Q. And you refer in your answer to two different categories.
7 The first category is research that BATCo itself specifically
8 funded, the second category consists of jointly funded research.
9 Do you see that?

10 A. Yes, I do.

11 Q. And those are the only two categories of external
12 research funded by BATCo that you tell the Court about here,
13 correct?

14 A. Because I was answering the question that was posed to
15 me, yes, that's right.

16 Q. There was actually a third category of external research
17 funded by BATCo, correct?

18 A. If there was, I would be interested to know how you
19 categorize it, maybe I think it falls into one of two of these
20 categories. I don't know which one you're referring to.

21 Q. Let me -- well, you don't tell the Court about research
22 that BATCo funded with a requirement that the external
23 researchers publish without disclosing BATCo's involvement. You
24 don't tell the Court about that category of research, funding
25 research but requiring that no exposure be made of BATCo's role;

1 is that correct?

2 A. Because it falls within Category 1. It's research that
3 we specifically funded.

4 Q. Let's take a look at a document, U.S. Exhibit 93205.
5 This is a one-page document with Bates number 103368127. At the
6 bottom of the document this has your name on it, Graham Read,
7 correct?

8 A. Yes, it is.

9 Q. And is that your signature?

10 A. It is, yes.

11 Q. The document has a fax machine's date up at the top. It
12 appears to me to be the 18th of February 1986. Does that look
13 that way to you?

14 A. Yes, it does.

15 Q. And it's addressed to I.G.M. Anderson at R & D. That's
16 another researcher at the BATCo Group Research and Development
17 Center, yes?

18 A. Yes, he was an analyst in our research center, yes.

19 Q. Let me refer your attention to the fourth paragraph of
20 the letter. You write there that, "the working arrangement that
21 BAT had at that time, with academic groups generally, allowed
22 them to interpret and publish their findings. The only
23 stipulation requested by BAT was that they publish independently
24 of us and without acknowledgment. This allowed BAT to distance
25 itself from the findings and if necessary to defend this

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1 position by independent interpretation of "their" published
2 findings." Did I read that correctly?

3 A. That's correct, yes.

4 Q. So the funding arrangement here was that any research
5 results done by external researchers be published without
6 disclosing BATCo's role, correct?

7 A. Yes.

8 Q. And BATCo funded quite a bit of research in this matter,
9 yes?

10 A. Yes.

11 Q. This was a frequent occurrence?

12 A. Well, it does say -- of course, this is a document that
13 must have been sent to me by Mr. Anderson. It says the working
14 arrangement that he had at that time with academic groups
15 generally, so I assume someone was asking me about a particular
16 point in time. And I'm responding to whatever correspondence
17 was sent to me. And as you see, I go through the document, I
18 keep clarifying what my understanding was at that particular
19 time and what our current position is, and I assume that
20 Mr. Anderson actually asked me some questions and I'm giving him
21 my answers.

22 Q. Going back to the written testimony for the Court, if I'm
23 understanding you correctly, your first category, then, of
24 research that's funded by BATCo, you're telling us that very
25 frequently that research was funded with moneys that came with

1 the requirement that BATCo's role in funding that not be
2 disclosed, yes? If we look at page 65 of the written direct.

3 A. To the extent it refers to a particular point in time,
4 which I assume, was asked of me by Ian Anderson, I'm obviously
5 giving my honest and accurate opinion at that particular time.
6 That we're seeking independent publication, we are not seeking
7 to have our name associated with that, and allowing an
8 independent and unbiased assessment of that science in the
9 scientific arena. That is what I think is meant by that
10 particular comment.

11 Q. So the question was whether or not you had told the Court
12 about this, and the answer is yes, no?

13 A. I'm sorry told the Court about what?

14 Q. That when BATCo funded external researchers, it
15 frequently required that BATCo's role not be disclosed in any
16 results in published research?

17 A. That was certainly an event and on occasion, I can't at
18 this particular point in time say exactly when that was, because
19 I can't remember the context in which Ian Anderson asked me
20 those questions. I'm simply saying to you that the requirement
21 was that we didn't seek, and weren't seeking, endorsement for
22 our funds. We were seeking that the information was published,
23 and we would look to actually respond to independent assessment
24 of that research in the scientific literature.

25 Q. And it's true, isn't it, that when BATCo gave moneys to

1 external scientists with this requirement that BATCo's roll not
2 be disclosed in any resulting research studies, that even
3 though -- when that happened, BATCo expected to receive
4 prepublication reports on the external researchers' results,
5 yes?

6 A. As you were suggesting, and have done through a lot of
7 this discussion, we are spending a long period of time, and if
8 you're talking about the Scientific Research Group, which you
9 may well be in a moment, there is a clear document that
10 indicates what the working relationship is with our company.
11 And the wording there is that we do not seek attribution, but we
12 don't mind if we have attribution. We're giving free right for
13 the researcher to decide with Scientific Research Group
14 projects -- which was the bulk of the research projects that I
15 have been talking to, they are the bulk of the research projects
16 that led to something like 500 publications -- gave the
17 researchers the freedom and autonomy to decide whether they
18 wanted to give us attribution or not, and I don't think it's
19 inappropriate for us to see a prepublication. A prepublication
20 is when the document has actually been sent for publication, not
21 that it's been accepted for publication. We see it as the
22 finished document, so we are aware of what is being said so we
23 understand what might finish up in the public domain. I don't
24 think there is anything inappropriate in that.

25 Q. The question was not what you might consider appropriate

1 or inappropriate, Mr. Read, the --

2 MR. CRANE-HIRSCH: Your Honor, I've been going about
3 50 minutes so far, and I'm at the end of a section, shall I move
4 forward into the next section before a break or --

5 THE COURT: Yes, please.

6 MR. CRANE-HIRSCH: Let's do that.

7 BY MR. CRANE-HIRSCH:

8 Q. In your written direct testimony, Mr. Read, you
9 categorically deny that scientific research at BATCo was
10 controlled by lawyers. Do you recall that?

11 A. Yes, I do.

12 Q. And to refresh your recollection from yesterday, we
13 looked at a presentation Dr. Blackman was giving on the approach
14 for working with government and medical authorities. Do you
15 recall that?

16 A. Yes, I do.

17 Q. And we saw that an attorney in the U.S., J. Kendrick
18 Wells, wanted four paragraphs substituted in Dr. Blackman's
19 slide presentation. Do you recall that?

20 A. Well, he made that recommendation to Dr. Blackman and it
21 seems he took that recommendation.

22 Q. So we understand how you use words, when you say that
23 lawyers "did not control science", does that represent control?

24 A. I think I said scientific research, but I can go to
25 science, it's not an issue for me. Lawyers do not control the

1 science or the scientific research.

2 Q. So when a lawyer substitutes four paragraphs of a slide

3 and the scientist revises the slide and then sends it to a

4 colleague saying here is the revised slide, that was the context

5 yesterday, yes?

6 A. And my answer? Your question?

7 Q. Just clarifying that is the context, that that's what we

8 saw Dr. Blackman sending the slide to Philip Morris, yes?

9 A. Well, it seemed to be the context, yes.

10 Q. So from -- you give testimony that lawyers do not control

11 science?

12 A. Or the scientific research, yes.

13 Q. Or scientific research. You're saying that is consistent

14 with four paragraphs in a presentation being substituted by an

15 attorney?

16 MR. BERNICK: Objection to the form of that question.

17 THE COURT: Overruled, I think the question is clear at

18 this point.

19 THE WITNESS: Yes, and I keep indicating I'll be happy to

20 talk to that.

21 BY MR. CRANE-HIRSCH:

22 Q. I think we simply needed to clarify here.

23 A. Okay.

24 Q. When you refer to "control" what counts and what doesn't?

25 A. Well, to be fair, it's your definition of control. I'm

1 simply saying it doesn't accord to my understanding of "control"
2 by looking simply at those documents and Kendrick Wells through
3 Ernie Pepples making some comment on them. I don't see how
4 that's "control".

5 Q. Is it the difference that the scientist, Dr. Blackman,
6 could have resisted the attorneys' request to substitute the
7 paragraphs?

8 A. Well, quite frankly, Dr. Blackman didn't need to seek it
9 in the first place. He was the most senior man in BATCo. He
10 was the research director and it was perfectly up to him as to
11 whether he sent it to Brown & Williamson for some discussion by
12 them. He was under no obligation to send it at all. But you
13 have to understand the difference of approach of the U.K.
14 industry and the U.S. industry in terms of how they addressed
15 the matters of smoking and health. Both were appropriate, both
16 were relevant, but they were different.

17 The issue for BATCo is that BATCo was part of the BAT
18 group, and BAT had influence in two markets where there were, in
19 principle, different approaches to the smoking and health issue.
20 And of course, that brought an absolute key interface between
21 what was being conducted in the U.K. and what was being conducted
22 within the U.S. and that is why the information was frequently
23 shared so that people understood their respective positions and
24 they are complex. But when you seek to talk to them, you
25 actually have a proper understanding and a proper context in a

1 one page presentation to INFOTAB, which was a public affairs
2 group. And the legal department at Brown & Williamson was
3 concerned to understand the particular language that was being
4 used in that, not the subject matter, the particular language, so
5 that both parties understood what was being conveyed. This is a
6 very difficult area and to summarize it into one, two, three
7 elements on a slide is very challenging and Lionel exercised his
8 judgment and thought it was appropriate, because it was INFOTAB,
9 an international public affairs group, that they should have at
10 least have sight of it and it seems as though they had some
11 comment on it, and Lionel chose to actually respond to that. I
12 don't see how that's "control" at all.

13 Q. If we go to JD -- I beg your pardon, U.S. Exhibit 21006
14 and look at the first line, I just want to refresh your
15 recollection. Mr. Wells was not just providing comments but a
16 critique and revision, correct?

17 A. That is what Kendrick is saying to Ernie Pepples, yes. I
18 assume that's what he was asked to do. I don't know whether
19 Lionel asked Ernie Pepples to deal with this or he asked
20 Kendrick Wells. I haven't seen that correspondence.

21 Q. And the letter by which Dr. Blackman changed the slides
22 said he was doing so based on legal advice, yes, for both BATCo
23 and B & W?

24 A. He chose to take cognizance of what was being said and he
25 incorporated in his slide. We saw that.

- 1 Q. But it was based on legal advice, yes?
- 2 A. Yes, legal advice.
- 3 Q. I'd next like to ask you to turn to page 66 of the
4 written direct testimony you've offered. Halfway down the page
5 at line 13 you're asked a question about whether you're familiar
6 with the Vancouver Conference of 1989, and you state that you
7 are. Do you see that?
- 8 A. Yes.
- 9 Q. You weren't at that conference, were you?
- 10 A. No, I wasn't at the conference, no.
- 11 Q. You weren't working for BATCo R & D, were you?
- 12 A. I was working for BATCo's corporate R & D Department at
13 the time, yes. But not at the R & D Center at South Hampton. I
14 reported directly to Alan Heard, who was the head of corporate
15 R & D, and actually hosting this conference.
- 16 Q. The company that you worked for at the time was called
17 Advance Technologies Cambridge, correct?
- 18 A. That is correct.
- 19 Q. And --
- 20 A. Well, it's not strictly correct.
- 21 Q. What is the correct name of the company?
- 22 A. The name of the company is correct, but I was reporting
23 directly to Alan Heard, and I was splitting my time between
24 being physically at the Cambridge Research Center on the
25 Cambridge Science Park, and being in our corporate headquarters

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1 in the corporate R & D Department. I reported directly to Alan
2 Heard of corporate R & D, BATCo's corporate R & D Department.
3 It just so happened that Alan had many divisions that he was
4 dealing with. I was one of such divisions that was reporting
5 directly to him on matters of science and research
6 biotechnologies, as it happened in this case.

7 Q. So Advance Technologies Cambridge was a wholly separate
8 subsidiary of BATCo, correct?

9 A. A wholly owned subsidiary, yes.

10 Q. I didn't hear the word.

11 A. Wholly owned subsidiary.

12 Q. And wholly separate, you've used that word, correct?

13 A. Well, the facility was physically in Cambridge, some
14 50 miles from London, so, yes, it was physically separated from
15 our -- what was then our head office in Millbank.

16 Q. Going back to the 1989 Vancouver meeting, you told us
17 that you weren't there. All you know about that meeting is what
18 other people have told you about it or what you have read,
19 correct?

20 A. Yes, that's true.

21 Q. Further down on this page of your written direct, page
22 66, there is a reference to testimony about a meeting held in
23 New York City in January of 1990. To clear up one point
24 initially, the question refers you to testimony given by another
25 witness in this case, a Dr. Jeffrey Wigand. Have you seen

1 Dr. Wigand's testimony, any part of it?

2 A. No, I haven't.

3 Q. So --

4 A. Only in the sense of the questions that were put to me.

5 Q. Were you provided the opportunity to see the context of

6 any quotations from Dr. Wigand's testimony?

7 A. Sir, I'm not trying to be all correct, I don't quite

8 understand the question. Are you asking if I ever saw any Court

9 testimony? I was simply asked questions by representatives of

10 Chadbourne & Parke as those particular elements and show these

11 are the questions that they asked me and these are the questions

12 that I responded -- or gave in response to that. I hope that

13 clarifies. I'm sorry, I'm not trying to be difficult.

14 Q. So, you only saw the information about other witness's

15 testimony in so far as lawyers showed you those particular

16 sentences; is that correct?

17 MR. BERNICK: Objection to the form of the question.

18 MR. CRANE-HIRSCH: Let me reword.

19 THE WITNESS: I think the answer is yes.

20 THE COURT: And the objection was overruled, that question

21 was clear enough.

22 BY MR. CRANE-HIRSCH:

23 Q. So you did not look at the question before testimony that

24 you were referred to when you gave your answer, correct?

25 A. I didn't specifically do that, that's correct.

1 Q. Did you do that generally?

2 A. In preparation for this particular case, I reviewed
3 literally thousands and thousands of documents that I recently
4 conveyed to my colleagues to the depth of papers that stand on
5 my living room floor --

6 Q. I think --

7 A. -- has to be two inches deep.

8 Q. I think I might be able to clarify. Speaking here just
9 specifically about the information provided by Dr. Wigand in
10 this case, I wanted to clarify that you were -- when you gave
11 your answers in your written direct testimony, you did not look
12 at the context of the previous question and answer or the
13 following question and answer; is that correct?

14 A. Well, of course, I did review the document. At the time
15 the questions were put to me, I gave answers to the questions,
16 but I did review the document, so therefore, I want to be
17 completely open and honest and say I might well have when I read
18 through the whole document gone back and made some minor
19 changes. I don't --

20 Q. I think you're misunderstanding me. The question is
21 whether or not, when you were answering questions about
22 Dr. Wigand's testimony, did you look at the previous question
23 and answer or the following question and answer that -- the
24 previous question and answer or the following question and
25 answer given by Dr. Wigand in his testimony?

1 A. I'm terrible sorry, I did misunderstand, and I had no
2 sight of previous or post questions at all.

3 Q. The New York City meeting in January 1990 is referred to
4 there, and then at the next page there is a reference a few
5 lines down to a "caution in writing seminar" starting at, I
6 believe, line 7. I beg your pardon, starting on line 16. You
7 were asked a question about allegations that -- after the 1990
8 New York City meeting each company was supposed to institute a
9 "caution in writing seminar." Do you see that?

10 A. Yes, I do.

11 Q. And the testimony that you give on the following page is
12 that there were -- that you've never heard of such a thing
13 happening. Let me be more specific. You were asked a question
14 about whether lawyers would instruct scientists on how to
15 sanitize the documents they created. Do you see that portion of
16 the question at lines 17 and 18?

17 A. Caution in writing seminar, yes.

18 Q. And specifically, a reference to lawyers instructing
19 scientists on how to sanitize the documents they created. Do
20 you see that?

21 A. Yes, I do.

22 Q. And then at line 20 you answer in part, "I've never had
23 such instruction, nor have I heard of it happening." Did I read
24 that correctly?

25 A. That is correct.

1 Q. Now, in point of fact, you have awareness that scientists
2 at British American Tobacco's Group Research and Development
3 Center did meet with attorneys to discuss document problems that
4 included creating documents, correct?

5 A. Yes, that's correct.

6 Q. If we take a look at the 1992 agenda of your meeting at
7 Shook, Hardy & Bacon, U.S. Exhibit 54069, this is one of the
8 earlier items we looked at yesterday.

9 MR. CRANE-HIRSCH: I beg your pardon, Your Honor. Counsel
10 has pointed out to me the time. I don't know if you would like
11 us to --

12 THE COURT: I wasn't going to take a break because you
13 were right in the middle of a subject. Do you want to conclude
14 this line of questioning and then we'll take our morning break?

15 MR. CRANE-HIRSCH: I think I'll be another 10 minutes or
16 so. I think a break right now would probably be good timing,
17 Your Honor.

18 THE COURT: All right. We'll take 15 minutes, everyone.

19 (Thereupon, a break was had from 11:02 a.m. until
20 11:26 a.m.)

21 THE COURT: Sorry about the long delay, everyone.

22 Mr. Crane-Hirsch, please.

23 BY MR. CRANE-HIRSCH:

24 Q. Good morning again, Mr. Read.

25 A. Good morning.

1 Q. I wanted to clarify. We spoke briefly about the
2 January 1990 meeting, New York City. You weren't at that
3 meeting, correct?

4 A. No, I wasn't.

5 Q. The agenda of the meeting at Shook, Hardy & Bacon, that
6 two-day meeting with the lawyers at Shook, Hardy & Bacon in
7 London, 1992 -- we put that up right before the break. Do you
8 have that in front of you?

9 A. Yes, I do.

10 Q. And the third page of that is the one with the reference
11 to J. Kendrick Wells writing "Briefing for Graham Read." You
12 recall saying yesterday that you would assume that the briefing
13 was on Southampton regulatory issues, correct?

14 A. That's correct, yes.

15 Q. I'd like to talk with you about these meetings on the
16 Regulatory Issues Group. By 1992, you had returned to the BATCo
17 Research and Development Center and were the head of R & D,
18 correct?

19 A. For BATCo, that's correct, yes.

20 Q. And there were meetings to discuss ways to restructure
21 the research function, correct?

22 A. Not in 1992, no. 1995. And of course, I was working
23 under a brief because I reported to the Chairman at the time
24 and, of course, he had views on how he thought the functions
25 should operate. So to that end, I did look at some of the

- 1 content and how the facility was organized.
- 2 Q. Let's look at U.S. Exhibit 46571. This document is
- 3 entitled: "Note of Meeting with Alan Heard", and it is -- the
- 4 date of the meeting was June 3rd, 1992. You can see that at the
- 5 top, it has a fax imprint from the Lovell White Durrant firm,
- 6 now known as Lovells, correct?
- 7 A. Um-hmm.
- 8 Q. The document is -- has the initials on the final page KD,
- 9 and those are the initials of a paralegal who has been at
- 10 Lovells, Kim Davis, correct?
- 11 A. Yes.
- 12 Q. And Mr. Davis is now at Chadbourne & Parke and has worked
- 13 to prepare you for witness testimony in the past, correct?
- 14 A. I have worked with him in the past, but not for
- 15 preparation; for deposition. He's provided background documents
- 16 and information for me.
- 17 Q. In the context of preparing for depositions, correct?
- 18 A. Yes, yes.
- 19 Q. The first line refers to JLM. Those are the initials of
- 20 John L. Meltzer; that's a solicitor at Lovells, correct?
- 21 A. That's correct.
- 22 Q. And Mr. Meltzer worked closely with Andrew Foyle, among
- 23 others, on BATCo document issues?
- 24 A. As I understand it, they're both partners at the same
- 25 firm, so I expect they work closely together.

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1 Q. The ALH mentioned there is Mr. Heard, who you just
2 mentioned, and he had been the head of R & D up until you became
3 head, correct, in 1992?

4 A. That's correct, yes.

5 Q. The document refers then to Mr. Davis and Mr. Meltzer
6 meeting with Mr. Heard in order to discuss the impact of the
7 reorganization at Southampton R & D on future work areas and
8 reporting of research. Do you see that?

9 A. Yes.

10 Q. The only -- we'll skip that. If we move to the top of
11 page 2, it refers to you: "Graham Read is now head of BATCo
12 R & D." And the issue that I want to talk about with you is on
13 the third page. There's a paragraph that discusses the same
14 regulatory issues briefing that the Shook Hardy law firm was
15 going to be having with you in 1992, so this is a meeting
16 earlier in 1992 with Lovells. Quote, the function of the
17 Regulatory Issues Section has been mapped out in discussions
18 between Alan Heard, Graham Read and Terry Mitchell.

19 Did I read that correctly?

20 A. Yes, you did.

21 Q. So you did participate in these discussions with
22 attorneys from Lovells concerning the function of the Regulatory
23 Issues Section, yes?

24 A. I'm sorry. I may have misunderstood your question, but
25 this simply says that Alan, myself and Terry Mitchell, who is

1 the current head of the Regulatory Issues Group, had some
2 discussions. I don't see the linkage here with Shook, Hardy &
3 Bacon. It's the same Regulatory Issues Group that was
4 identified as an agenda item, but I don't see the two actually
5 being connected in that sense.

6 Q. Was -- so the meetings with the Shook, Hardy & Bacon
7 attorneys were about a different Regulatory Issues Group?

8 A. No, it was the Regulatory Issues Group. I think you have
9 to appreciate that Alan Heard actually left the company at the
10 time.

11 Q. Well, the September 1992 agenda --
12 Can we get that back up on the screen again, please.
13 That agenda doesn't have Mr. Heard's name on it --

14 A. Correct.

15 Q. -- as receiving the briefing, but your name, correct?

16 A. That's correct.

17 Q. If we go to the final page of the --

18 A. We should be absolutely open here, because I have not
19 seen this document before, but Alan Heard had actually retired
20 from the company and I assume that he had been asked to go talk
21 to Lovells about certain issues that he had responsibility for.
22 So he had actually left the company, so the date of this is --
23 just indicates the date on which I believe he met John Meltzer
24 at Lovells.

25 I have no knowledge of the discussions or -- this is the

1 first time I've seen this document and, as I say, Alan had
2 retired.

3 Q. So, when Lovells refers to "mapping out" -- if we go to
4 page 3 of the document, the paragraph that we looked at refers
5 to "mapping out the function of the Regulatory Issues Section in
6 discussions with Alan Heard, Graham Read and Terry Mitchell."

7 Do you recall those discussions?

8 A. Well, as part of the hand-over, I was offered the
9 appointment --

10 Q. I'm sorry, sir. We are short on time. The question is:
11 Do you remember those discussions?

12 A. I had a series of discussions about the R & D structure
13 which would have included the Regulatory Issues Group, yes.

14 Q. And in the memo from Lovells here, down at the bottom of
15 the page, the Lovells author writes, quote, we have yet to make
16 a final determination on the kinds of documents this department
17 will produce, closed quote.

18 So, is it correct, then -- this reference to "we" -- that
19 attorneys at Lovells were involved in making decisions about
20 what kinds of documents scientists at BATCo's R & D facility
21 were going to write?

22 A. He's simply answering a question, I assume, put to him by
23 John Meltzer about how it's organized, and he's giving him a
24 factual record of -- in response to that question, just saying
25 that we -- that's the R & D Department, I assume -- have yet to

1 make a final decision on what kinds of documents they will
2 produce.

3 Q. It sounds like the scientists at the R & D Department
4 worked closely with the lawyers at Lovells; is that right?

5 A. Not in my experience, no.

6 Q. But nonetheless, from what you say, the word "we" when
7 written by a Lovells person refers to the view within the BATCo
8 R & D group?

9 A. I think what's being said is that it's Alan Heard's
10 comment that's being recorded. I think it's Alan Heard's
11 comment, isn't it?

12 Q. Well, the interpretation of the document, I would submit,
13 is something that can be discussed by the attorneys for the
14 Court later. The document is authored by Mr. Davis at Lovells
15 and it says, as we have established, quote, We have yet to make
16 a final determination of the kinds of documents this department
17 will produce, but in the light of past experience, there may be
18 two sources of concern.

19 Do you see that?

20 A. Yes.

21 Q. And Mr. Davis goes on to discuss these two sources of
22 concern about the kinds of documents that scientists at BATCo's
23 R & D function are going to be creating within the Regulatory
24 Issues Section. Do you see where he has, at the bottom of page
25 4, a section titled "Document Problems"?

1 Do you see a section called "Document Problems"?

2 A. Yes, I do. Yes, I do. I'm sorry. I do see it.

3 Q. And Mr. Davis writes on behalf of the Lovells firm here,

4 quote, We have previously identified two continuing kinds of

5 document problem: One, sensitive comments in the text; and two,

6 footnote references to earlier sensitive documents. For some

7 time now, these problems have been considerably reduced. It

8 does appear, however, from what we now know of the

9 responsibilities of the Regulatory Issues Department that the

10 problem may persist. We have identified two potential sources

11 of difficulties, close quote.

12 Did I read that correctly?

13 A. You did.

14 Q. So is it correct to say here, then, that attorneys at

15 Lovells were concerning themselves with document problems

16 emanating from the way in which scientists wrote scientific

17 papers; is that correct?

18 A. My reading of this document is that they are commenting

19 on what they've observed.

20 Q. And they made those observations in the context of the

21 sorts of documents that were to be written in the future,

22 correct?

23 A. They certainly identified some issues. There's no doubt

24 about that. But you have to put this into context.

25 Q. That's exactly what we're asking about.

1 A. Thank you.

2 Q. The context is what kinds of documents -- if we look at
3 the bottom of page 3, the question is whether the context is
4 making "a final determination of the kinds of documents this
5 department will produce" in the future. Is that the context?

6 A. Lovells were working for BATCo in terms of preparing them
7 for discovery, and my understanding is that they're making --
8 Lovells are making some assessment because they were brought in
9 in 1986 to do a complete document review for us in anticipation
10 of potential disclosure. And they did review all the documents,
11 and from their perspective, I see them putting them into some
12 form of categorization in respect of how they saw potential
13 litigation in the future.

14 That has no bearing on how the documents were prepared.
15 It's how they saw the documents in terms of how they might be
16 seen in litigation and making some comment.

17 Q. And the comment, you agree with me, sir, is in the
18 context of making a final determination of the kinds of
19 documents that this scientific department would prepare and
20 write in the future, correct?

21 A. That is exactly what it says, and it's them determining
22 what they consider to be the kinds of documents and perhaps how
23 they classify them. It has nothing to do whatever -- Lovells
24 has never had any comment to the Regulatory Issues Department at
25 Southampton.

1 Q. The comments were instead made to the head of the -- the
2 person who supervised regulatory issues, own supervisors;
3 specifically, the comments were made with Alan Heard, yes?

4 A. Because it's emanating from a discussion with Alan Heard.
5 And it seems -- and you're very helpful in correcting me, that
6 Kim Davis is then making -- adding in his further notes, saying
7 "we" -- and now that I've had a chance to quickly piece the
8 context of this together, it seems to me that "we" is Lovells in
9 this context.

10 Q. And so at the bottom of this page, when Kim Davis makes
11 this comment, the "we" is Lovells; Lovells has yet to make the
12 "final determination on the kinds of scientific documents" that
13 people at BATCo's Regulatory Issues Department will prepare and
14 write in the future; that's the reference, yes?

15 A. It says "that the department will produce."

16 Q. And by "produce" here, you agree with me that they mean
17 prepare and write, yes?

18 A. It's very difficult to put yourself into the mind of
19 somebody else who wrote the note, but it seems to me that the
20 role that Lovells had, which was reviewing -- doing a complete
21 document review, which they started in '86 and continue to do so
22 to this day in actual fact -- they obviously involved and have
23 been involved in categorizing documents in how they will be
24 either presented or seen and whether they see them as sensitive
25 or insensitive when it comes to external litigation. And I

1 believe they probably continue to do that to this day.

2 And that's what he's saying. He's simply saying they've
3 yet to make a determination of what this department is going to
4 produce in the future and how they're going to categorize them,
5 not that they're going to tell them what to write. It doesn't
6 imply that at all to me.

7 Q. So the "kind of production" you take this to refer to,
8 then, is the specialized term within the legal field of
9 producing documents in litigation; is that correct? Turning
10 over copies of documents to litigation opponents?

11 A. No. I think it refers to the Regulatory Issues
12 Department that --

13 Q. -- the Regulatory Issues --

14 A. -- documents --

15 THE COURT REPORTER: I'm sorry, I'm sorry.

16 THE COURT: Mr. Read, continue, please.

17 THE WITNESS: It's their production of the documents, the
18 Regulatory Issues' production, the physical construction of the
19 documents. And he's simply saying they don't know how they're
20 going to determine them yet in terms of, I think, their
21 categorization when they produce them. This is a new function, a
22 newly constructed function. Alan Heard has explained to them --
23 although he left the company and actually I was running R & D
24 from the start of 1992 and determining the structure.

25 But they clearly were asking Alan for his views, which

1 he's perfectly at liberty to give, and Kim Davis is adding in --
2 for whom I don't know, but he's simply saying they're involved in
3 the process; they're looking at documents, again to categorize
4 them, but they don't know what the nature of the documents will
5 be in the future and I assume they'll make some judgment when
6 they see them. That's what I think he's saying, to me.
7 BY MR. CRANE-HIRSCH:
8 Q. So you agree with me, Mr. Davis refers to this as a
9 problem, yes, a category of documents problem?
10 A. Well, certainly it's an issue they have to deal with,
11 yes, if they were charged to categorize documents, yes.
12 Q. And the next sentence refers to reducing these document
13 problems, correct? Quote, for some time now, these problems
14 have been considerably reduced, close quote.
15 A. Yes.
16 Q. So Lovells was aiming to reduce problems in preparing and
17 writing documents, correct?
18 A. Well, I clearly don't see it that way. He's expressing a
19 comment on what he observed. And as I said, Lovells reviewed
20 all of the documents in anticipation of discovery, and I assume
21 he's making some value judgment as to whether that's -- as he
22 sees it.
23 Q. Let me turn your attention to the issue of the way that
24 research was distributed from the Group Research and Development
25 Center to Brown & Williamson. In your written direct testimony,

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1 you refer to British American Tobacco's Group Research and
2 Development Center in 1994.

3 THE COURT: Where are you in that written testimony?

4 MR. CRANE-HIRSCH: I'm not -- it's on page 57, Your Honor,
5 about halfway down the page, starting with -- let's see -- line
6 14.

7 BY MR. CRANE-HIRSCH:

8 Q. You refer to a request that "written communications not
9 be sent to Brown & Williamson until further notice." Do you see
10 that?

11 A. Yes, I do.

12 Q. The request was Brown & Williamson's request, correct?

13 A. It was a request made by Tilford Riehl at a meeting that
14 I was hosting, looking at the R & D coordination, and Tilford
15 actually works for Brown & Williamson. I assume that he was
16 acting on their behalf when he asked me not to send documents,
17 yes.

18 Q. And Tilford Riehl is a Senior Scientific Manager at Brown
19 & Williamson, correct?

20 A. In fact, at the time he was the head of their R & D
21 Center.

22 Q. I'd like to show you U.S. Exhibit 47616. This is a
23 memorandum that is dated September 15, 1994. I'm not going to
24 ask you about the handwritten comments, but simply about the
25 typed text. You're the author of the typed text, correct?

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- 1 A. Yes, I am.
- 2 Q. And you sent it to Norman Davis. He was your supervisor
3 in 1994, correct?
- 4 A. He was my line manager, yes.
- 5 Q. The Operations Director at BATCo?
- 6 A. Yes. Absolutely correct, yes.
- 7 Q. And in your memo, you tell Mr. Davis that you are
8 attaching a copy of the TSC minutes -- the British American
9 Tobacco Group Technical Steering Committee, yes?
- 10 A. That's correct.
- 11 Q. And if we turn to the second page of the document, there
12 is a list of nine items that you categorize there as "summary
13 points" arising from the TSC meeting, correct?
- 14 A. That's correct.
- 15 Q. And item number two says, quote, B & W have instructed
16 group members not to undertake written communication with them
17 until further notice; alternative communication vehicles are
18 being considered, close quote.
- 19 Did I read that correctly?
- 20 A. Absolutely, yes.
- 21 Q. Now, the reason that Brown & Williamson made this request
22 not to send communications in written form was that they had a
23 legal concern that if they received research documents, they
24 might be obliged to produce them in the legal sense of the word:
25 Produce them to litigation opponents, correct?

1 MR. BERNICK: Objection, lack of foundation.
2 THE WITNESS: I have no basis --
3 THE COURT: Excuse me. The objection's overruled.
4 THE WITNESS: I'm sorry.
5 THE COURT: You may answer the question.
6 THE WITNESS: Very sorry.
7 I have no understanding of that. All I can say is that
8 Tilford Riehl made this comment. I attribute it to him as
9 representing B & W and that's a factual statement. When I asked
10 him for the background to it, he simply indicated -- shrugged his
11 shoulders and said, "I don't really know." So I have no further
12 information than that. But I was surprised and that's why I
13 asked him.
14 BY MR. CRANE-HIRSCH:
15 Q. You've testified in the past that you do have a
16 recollection of the considerations in his mind at the time,
17 haven't you?
18 A. I think I might have been asked to speculate and I may
19 well have speculated.
20 Q. Let me ask you to look at a deposition you gave in this
21 case. This is May 1st, 2002.
22 Please turn to page 179. The question at the top of the
23 page, line 1 -- I beg your pardon -- the answer you give at line
24 1: "Answer: I do have a little recall. Yes, I do.
25 "Question: In what context did he give this

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1 instruction?"

2 There's an objection and then you answer: "Again, my
3 best recall -- and Tilford was an excellent scientist and
4 certainly was not giving legal opinion; it would have been
5 somewhere in the consideration of production of documents into
6 some litigation."

7 Your sentence does go on, but I'll stop reading here.
8 Did I read that correctly?

9 A. You did, but I think the next part of the sentence is
10 important.

11 Q. I'm happy to read it into the record. "And simply, he is
12 suggesting here that a written communication would fall into
13 that category."

14 MR. BERNICK: "But" --

15 BY MR. CRANE-HIRSCH:

16 Q. "But still requiring to find some means of communication
17 such that they are kept informed of Group activities."

18 That's the rest of the sentence, yes?

19 A. Yes, it is.

20 MR. BERNICK: Your Honor, again, by way of completeness, I
21 think the next sentence ought to, again, be read into the record.

22 THE COURT: I think that's right.

23 BY MR. CRANE-HIRSCH:

24 Q. The next sentence then, Mr. Read, states: "That's the
25 best guess I can overlay on that," correct?

1 A. Yes.

2 Q. Now, up at line 1, when you testified "I do have a little
3 recall," you were under oath when you gave this deposition, yes?

4 A. Of course.

5 Q. And you were telling the truth, yes?

6 A. Yes.

7 Q. And at line 5, when you began this answer by referring to
8 your best recall, you were testifying from your own
9 recollection, correct?

10 A. Yes. And it was my best guess, as I said.

11 Q. Were you testifying from your own recollection?

12 A. Yes, I was.

13 Q. Not from your guess at the time, but your recollection of
14 the events as they occurred in 1994, correct?

15 MR. BERNICK: Objection, argumentative.

16 THE COURT: Sustained.

17 BY MR. CRANE-HIRSCH:

18 Q. Mr. Read, was your answer here based upon your
19 recollection from 1994 or was it a guess that you made in 2002?

20 MR. BERNICK: Objection to the form of the question. The
21 witness has already testified on this very plainly.

22 THE COURT: No, objection's overruled. The witness may
23 answer.

24 THE WITNESS: I'm terribly sorry. Will you pose me the
25 question again.

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1 BY MR. CRANE-HIRSCH:

2 Q. When you gave this answer, was it based upon your
3 recollection from the events in 1994 or was it based upon a
4 guess made in 2002?

5 A. Well, to be perfectly honest, it has to lie somewhere
6 between the two. You know, I'm being asked a question; I'm
7 trying to recall the information and I qualified at the end
8 because I'm concerned that I may not have a perfect recollection
9 and a perfect recall on that, but it's the best that I can
10 recall at the time. And of course --

11 Q. That's fine.

12 A. I'm sorry.

13 MR. BERNICK: I'm sorry. If he wants to strike the
14 balance of the answer, that may be appropriate; it may not be.
15 But again, the witness was interrupted before he finished the
16 sentence.

17 THE COURT: No, he had answered the question. This
18 witness has been given ample opportunity to flesh out his
19 answers.

20 Go ahead, please.

21 BY MR. CRANE-HIRSCH:

22 Q. I'd now like to go back to the written direct testimony
23 at the same page, page 57. Slightly higher on that page, you
24 refer to an episode nine years earlier, in 1985, and in 1990 --
25 I'm misspeaking.

- 1 In 1985, you refer to a period, starting at line 7, in
2 the mid-1980s, when the chief executive of Brown & Williamson,
3 Wally Hughes, wanted to have the flow of documents from BATCo's
4 R & D Department to Brown & Williamson routed to a law firm. Do
5 you see that?
- 6 A. Yes, I do.
- 7 Q. The routing that was done here was also done at Brown &
8 Williamson's request, correct?
- 9 A. That's correct.
- 10 Q. And to be specific about the documents we're speaking
11 about, these are scientific research documents, correct?
- 12 A. Yes, they are.
- 13 Q. You do not tell the Court here that there was a practice
14 to keep off of the distribution lists and the circulation lists
15 any reference to Brown & Williamson, do you?
- 16 A. No, not there, because I didn't have a perfect recall of
17 when and if and the time period in which that happened.
- 18 Q. You had available to you the documents from 1985 when you
19 gave this answer, correct?
- 20 A. Not immediately in front of me, no.
- 21 Q. You've testified that you prepared this written testimony
22 in this case sitting down with attorneys and that they showed
23 you documents and that you discussed documents as you prepared
24 your answers. Do you remember saying that?
- 25 A. In fact, I don't believe I actually said it like that. I

1 said that I sat and had questions and answers. I'd already done
2 a lot of preparation for that meeting and I'd looked at many,
3 many documents prior to that meeting and I was using my
4 knowledge as -- in fact, it was as though I was in a deposition;
5 they were asking me questions and I was giving the best answers
6 that I can at the time that I gave them based on having read
7 many -- hundreds, if not thousands of documents and my own
8 personal recall of events.

9 Q. Do you remember that in answers to other questions in
10 your written direct testimony, you sometimes do cite to specific
11 documents to support your answer?

12 A. Yes.

13 Q. But you don't do that here, do you?

14 A. I didn't feel it was necessary for this answer.

15 Q. Because you had full recall of everything that happened
16 then?

17 A. Because I had, certainly, recall about the flow of
18 documents at that particular -- and I was talking about the flow
19 of documents. He's asking where they were routed, not who they
20 were sent to.

21 Q. Do you see that the question at lines 3 and 4 ask about
22 occasions when BATCo R & D documents were "routed to Brown &
23 Williamson in ways that departed from normal practice." Do you
24 see that?

25 A. Yes.

1 Q. The information about the circulation lists and
2 distribution lists -- there was a normal practice about
3 including recipients on distribution lists and circulation
4 lists, correct?

5 A. I'm sorry. I haven't quite followed your question. I
6 thought I was asked about how they were routed and that's what I
7 was responding to, so have you departed from that part of the
8 question?

9 Q. The --

10 A. Also, you're talking to normal practice, so the two are
11 separate. To me, the sentence is "routed" and "from normal
12 practice", and that's what I was answering.

13 Q. Let's go ahead and look at a document. We'll begin at
14 the start of January 1985 with U.S. Exhibit 26344. This is a
15 document -- a memo dated January 3rd, 1985 from Dr. Hardwick.
16 Dr. Hardwick was then the Head of Research and Development at
17 GR & DC, correct?

18 A. That's correct.

19 Q. The same position that you came to hold yourself seven
20 years later, starting in 1992?

21 A. Essentially similar, yes.

22 Q. The title of the document: "Correspondence to Brown &
23 Williamson." The bottom of the document shows a CC to Ray
24 Pritchard. Ray Pritchard was a director of BATCo at the time,
25 correct?

- 1 A. That's my understanding, yes.
- 2 Q. And is it at this same time or later in this year that he
3 becomes the CEO and Chairman of Brown & Williamson?
- 4 A. Well, certainly subsequent to this date, but he did
5 become the CEO and Chairman; that's absolutely correct.
- 6 Q. In this memo, Dr. Hardwick sets out a detailed procedure
7 for routing GR & DC materials to Brown & Williamson, correct?
- 8 A. Yes, he does.
- 9 Q. In the second paragraph, for example, he says that "any
10 information destined for B & W must be seen by one of four
11 different senior managers," correct?
- 12 A. That's correct.
- 13 Q. And he underlines the word "must," correct?
- 14 A. Yes, indeed.
- 15 Q. And then in the fifth paragraph, Dr. Hardwick writes:
16 "Where any GR & DC report is considered sensitive, the names of
17 the usual Brown & Williamson recipients must not be included in
18 the distribution list."
- 19 Did I read that correctly?
- 20 A. You did.
- 21 Q. And Dr. Heard underlined the words -- pardon --
22 Dr. Hardwick underlined the words "must not," correct?
- 23 A. Yes, true.
- 24 Q. So the idea was to make sure that any Brown & Williamson
25 recipients were not identified as CC's on circulation lists or

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1 distribution lists, correct?

2 A. That is absolutely clear from the note, yes.

3 Q. And so anyone who receives or is able to look at a copy
4 of research done at BATCo would be unable to tell from that
5 document that it had been sent to B & W, correct?

6 A. No, not at all. They wouldn't be able to determine whose
7 copy they were reading, but it was a GR & DC document, it was
8 sent to Brown & Williamson, and as we're talking, 1995, probably
9 covering the period when it got routed through Maddox, but
10 finished up at Brown & Williamson. It simply didn't identify
11 whose copy they were looking at. That's the only thing it was
12 missing, was a little flyer that went in the front of all
13 reports that had the distribution list on it and numbered copies
14 so we always knew where our documents were.

15 Q. There was not a list identifying which copies were sent
16 to Brown & Williamson, correct?

17 A. Yes, I believe that's the case.

18 Q. The front page of the document where there's a list of
19 persons who are receiving that particular research report, would
20 not include the name of Brown & Williamson or any Brown &
21 Williamson recipients, correct?

22 A. Let me be precise and give you my honest position on
23 this. I absolutely accept that this is an accurate record of
24 what was being requested. There's no doubt in my mind about
25 that. What I'm surprised -- I would be extremely surprised if

1 there was no way of identifying.

2 Q. Mr. Read, I beg your pardon. The question is not what
3 would surprise you or not surprise you. The question is whether
4 or not under the -- you agree that what's described here is
5 described as a variation from the normal practice, correct?

6 MR. BERNICK: Again, I would object to the witness being
7 interrupted.

8 THE COURT: The objection's overruled.

9 THE WITNESS: Yes.

10 BY MR. CRANE-HIRSCH:

11 Q. In the final paragraph, Dr. Hardwick says that this is an
12 absolute requirement, correct?

13 A. That is correct.

14 Q. And you've seen this memo before setting out this
15 absolute requirement?

16 A. I have read it before, yes.

17 Q. And you've never seen a memo that formally rescinds this
18 absolute requirement, correct?

19 A. No, I haven't.

20 Q. Let me show you U.S. Exhibit 20002. This is a letter
21 dated one week later, January 10, 1985. Mr. Pritchard, who
22 later this year becomes the Chairman and CEO at Brown &
23 Williamson, writes back to Dr. Hardwick. Mr. Pritchard there
24 sets out this request, quote, Would you please arrange for all
25 reports and materials for worldwide distribution emanating from

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1 GR & DC to be sent to Robert L. Maddox, Jr." -- and it gives the
2 address of the private attorney's law firm in Louisville
3 Kentucky -- "the firm should not be listed as a distributee in
4 the document nor should B & W." Did I read that correctly?
5 A. You did.
6 Q. And so once again, the requirement was to make sure that
7 the names of people at Brown & Williamson, and the name of Brown
8 & Williamson itself, would not be on the document, correct?
9 A. That's what the note indicates, yes.
10 Q. And you have no reason to disbelieve what Mr. Pritchard
11 wrote, do you?
12 A. I don't, no.
13 Q. Let me show you U.S. Exhibit 34853. This is another memo
14 from Dr. Hardwick. This one is dated January 30th, 1985. The
15 title is: "Information. Materials for the USA." Do you see
16 that?
17 A. Yes, I do.
18 Q. And it is stamped in very large letters at the top,
19 "CONFIDENTIAL" in all capital letters. Do you see that?
20 A. Yes, I do.
21 Q. And that meant that this document should not be
22 circulated outside BATCo or the BAT Group, correct?
23 A. Well, it's stamped as "CONFIDENTIAL," and it's
24 confidential to the recipient, and the recipients are
25 identified.

1 Q. So it should not be released publicly, this memo dated
2 January 30th, 1985, correct?

3 A. Indeed.

4 Q. The memo begins by referring to the January 3rd memo we
5 just saw. That one was U.S. Exhibit 22634. It says, quote,
6 Further, to my memo of the 3rd of January, the following
7 procedures for sending information or written materials to the
8 USA must now be adopted.

9 Did I read that correctly?

10 A. Yes, you did.

11 Q. And there are several sections. It's fair to say that
12 the procedures that are discussed here in this memo that
13 discusses information and materials to the USA, actually
14 affected distribution of documents worldwide, correct?

15 A. I'm sorry, I didn't quite hear the last.

16 Q. Actually affected distribution of documents from the
17 Group Research and Development Center worldwide?

18 A. Um, I don't think that it did.

19 Q. The first section is entitled: "R & D Reports." Section
20 1.1 is titled: "For countries other than the USA," correct?

21 A. Yes.

22 Q. Subsection 1.1(d) says: "The recipient list must not
23 contain the name of any B & W person, nor that of Maddox or of
24 his company. See section 1.2(c) below." Did I read that
25 correctly?

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- 1 A. Yes, you did.
- 2 Q. And this is an instruction given as a part of how R & D
3 documents should be sent to countries other than the USA,
4 correct?
- 5 A. Not how they're to be sent; they're still to be sent in
6 the normal way. They simply didn't have an identifier as to who
7 the recipients were at Brown & Williamson.
- 8 Q. So a document sent, even to other countries, would have
9 no indication that a copy was being sent at that time to Brown &
10 Williamson or to a specific scientist at Brown & Williamson or
11 Maddox or Maddox's law firm, correct?
- 12 A. That is correct, yes.
- 13 Q. Section 1.2 is titled: "For the USA." It directs that
14 three copies of reports should be sent to the USA and then in
15 Section 1.2(b) we see a cross reference to Subsection 1.1(d),
16 the one that we just saw requiring that the recipient list must
17 not contain the name of any B & W person or that of Maddox or
18 his company, correct?
- 19 A. That's correct.
- 20 Q. And then if we go to Section -- Subsection 2.3, it says
21 "we're clear, the material can then be transmitted to the named
22 recipients. The recipient list must not contain the name of any
23 B & W individual of Brown & Williamson nor that of Maddox,"
24 correct?
- 25 A. Yes.

- 1 Q. And Dr. Hardwick underlines the word "not," correct?
- 2 A. Indeed he does, yes.
- 3 Q. So, you'll agree with me that elaborate measures were set
4 up to ensure that scientific information did get sent in a way
5 that would reach scientists at B & W, but there would be no way
6 to tell from looking at the scientific document itself that that
7 had been done, correct?
- 8 A. I think the first part of your question was the correct
9 part, that the document got to Brown & Williamson and to the
10 scientists, but there weren't any identifiers on the reports as
11 to who the recipients of those reports were.
- 12 Q. To be specific, recipients in other countries were
13 identified, as was the normal practice, correct?
- 14 A. That is correct, yes.
- 15 Q. So, the variation from the normal practice is to remove
16 any reference to B & W as a company, B & W scientists, Maddox
17 and Maddox's law firm? That was the variation from the normal
18 practice, correct?
- 19 A. Two parts to that. I can absolutely confirm, you're
20 absolutely right, it did take the recipient's name off. I am
21 not certain that it actually removed B & W's name. I thought
22 that there was a B & W identifier and a number so we could
23 always identify where our report copies were.
- 24 Q. But the instruction was to make sure that B & W's name
25 does not appear, correct?

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- 1 A. That's correct, I don't dispute that at all.
- 2 Q. Now, I'd like to bring you to a set of notes that were
3 written by Dr. Richard Binns. If we look briefly at page 6 of
4 your written direct testimony in this case, you tell us that you
5 are -- have worked -- at line 13 of page 6 that you worked
6 closely with key personnel and include Dr. Richard Binns as one
7 of the key personnel whom you've worked with at BATCo's Research
8 and Development Center, correct?
- 9 A. Absolutely correct, yes.
- 10 Q. I'd like to show you U.S. Exhibit 21767. This is a
11 seven-page set of handwritten notes. You will -- you were shown
12 this document at a deposition in this case, and you testified
13 that you recognized the handwriting as being that of Dr. Richard
14 Binns. Do you recall that?
- 15 A. In the discussion at the deposition I did say that I
16 thought it was Richard Binns' handwriting and I did know Richard
17 fairly well, and I'm pretty sure this is his handwriting, but it
18 isn't signed, but I'm pretty sure it's his.
- 19 Q. And you refer to his using pens that have different kinds
20 of nibs, correct? And explained that that's sometimes why the
21 handwriting is thicker and sometimes thinner; correct?
- 22 A. That's absolutely right, he had a great interest in pens.
- 23 Q. Now, I'd like to have you look at the third page of the
24 document, and there's a reference in the middle of the page --
25 I'm sorry, on the second page of the document, Bates number

1 ending 8084. You've testified previously -- you agree with this
2 interpretation, you can confirm for me, please -- the
3 handwriting says, quote, Reports. Stop sending directly to
4 B & W in January, Maddox farce, B & W withdrawn from circulation
5 lists, but get two copies".

6 A. Correct.

7 Q. And Dr. Richard Binns, the scientist who's writing this,
8 you have described as one of the key personnel at BATCo's
9 Research and Development Center, correct?

10 A. That is correct.

11 Q. I'd now like to draw your attention to the final page of
12 the document.

13 A. And, in fact, I might add, it's my understanding he was
14 then the head of the R & D at South Hampton and actually
15 replaced Mike Hardwick, or they were in the position of
16 transitioning one to the other.

17 Q. Very good. At the final page of the documents, Bates
18 ending 8089, at the top of the page Dr. Binns writes, "I told
19 you last week of my grave concern for the way in which problems
20 remain unresolved in the interaction between research and legal
21 functions". So did I read that correctly?

22 A. You did.

23 Q. And then skipping two paragraphs, you've been able to
24 identify the handwriting for us before as saying, "I am being
25 asked to make significant and sometimes swingeing changes in

1 documents prepared recently by R & D staff. It is suggested
2 that this must be done by finding a, quote, managerial
3 explanation, closed quote, for the changes without reference to
4 the involvement of legal department, closed quote. Did I read
5 that correctly?

6 A. You did.

7 Q. Now, the word "swingeing" is more Britishism than an
8 Americanism. Would you agree with me "extreme" is --

9 A. Wide ranging, I would say. Wide ranging.

10 Q. And you'll agree with me that in this paragraph Dr. Binns
11 is referring to the interaction between legal and research,
12 correct?

13 A. That is correct.

14 Q. And in the first line he states that he is being asked to
15 make significant and sometimes swingeing changes in the
16 documents prepared by R & D staff. Will you agree with me that
17 somebody was asking him to make those changes?

18 A. Clearly that's what it implies, but he says he's being
19 asked, and I understand why you posed your question, because if
20 you look at the next sentence, he says, "I will find this
21 impossible to do," implying that he hadn't done it.

22 Q. The request that he was referring to, after the sentence
23 you pointed us to, says, "senior R & D staff will not be so
24 easily deceived," correct?

25 A. Yes.

- 1 Q. And it goes on, quote, personally, I am not prepared to
2 lie to staff for very doubtful reasons," correct?
- 3 A. That's correct.
- 4 Q. So you'll agree with me that these interactions with the
5 legal department are leading Dr. Binns to state that he is being
6 asked to lie to staff, correct?
- 7 A. I think you have to read it carefully, and certainly
8 that's a possible interpretation. He's simply saying that he's
9 not prepared to follow through on this, and more importantly, if
10 that were to occur, he couldn't find any other reason than to
11 tell them the truth as to why it was happening. That's how I
12 interpret it.
- 13 Q. You'll agree with me that the request that he was
14 responding to was to lie to his staff, correct?
- 15 A. No, that is not the truth. He was being asked, it seems,
16 that if these changes were to be implemented, that they
17 shouldn't be identified as to why they'd been asked to change
18 them, and he's saying the R & D staff aren't silly, they will
19 ask me why you're wanting me to change this document, and he's
20 saying I am not prepared to lie and say that it's me that's
21 asking to have them changed.
- 22 Q. Dr. Binns doesn't say that, now, does he?
- 23 A. Well, I think he does if you just look at the note.
- 24 Q. And what Dr. Binns does say is that senior R & D staff
25 will not be so easily deceived and he is not prepared to lie to

- 1 staff for very doubtful reasons, correct?
- 2 A. Because he says it is suggested that this must be done by
3 finding any managerial explanations in inverted commas for the
4 changes without reference to the involvement of legal
5 department. "I will find this impossible to do. Senior R & D
6 staff will not be so easily deceived." I think the language is
7 clear to me.
- 8 Q. So you agree, then, that the legal department was asking
9 changes to be made in documents prepared recently by the R & D
10 staff, correct?
- 11 A. That is the clear implication of this comment.
- 12 Q. He says that in the first line of the paragraph, correct?
- 13 A. Yes, he does.
- 14 Q. And what he says he's going to find impossible is coming
15 up with a managerial explanation for those requested changes by
16 the legal department, correct?
- 17 A. And that he's not prepared to do it, that's correct.
- 18 Q. But he says what he's going to find impossible to do is
19 come up with a managerial explanation for these attorney changes
20 to R & D reports, correct?
- 21 A. I personally think it's open to interpretation, so I
22 can't agree or disagree with you. I think the record speaks for
23 itself.
- 24 Q. Very well. Let's move to another item. You said that,
25 earlier, when we were discussing the 1992 period when there were

1 meetings with attorneys at Shook, Hardy & Bacon about the
2 Regulatory Issues Department and meetings with Lovells about the
3 scientific reports prepared by Regulatory Issues, indeed,
4 document problems, you testified that Lovells had been involved
5 in carefully reviewing scientific documents for BATCo since
6 1985, correct?

7 A. Yes, that's correct.

8 Q. And it was in that context that Lovells was making final
9 determinations about the kinds of scientific research that
10 scientists at BATCo were preparing and writing, correct?

11 A. Unfortunately, what we both have to do is look at the
12 document that's before us, and I've tried to explain it to you
13 as I think it was referring to. And because Lovells were
14 conducting this document retention exercise and their
15 characterization and classification, that is what I think it was
16 referring to and that's basically all I can do.

17 Q. And the discussion there was making a final determination
18 about the kinds of documents that the Regulatory Issues
19 Department would produce, correct?

20 A. He was indicating that he didn't know how he was going to
21 treat the documents in the future. That's what I thought it
22 said.

23 Q. The involvement of Lovells in such scientific matters
24 about document problems continues to this day, correct?

25 A. Well, as I say, how you decide document matters, they

1 were giving advice, yes.

2 Q. And more than document matters, document problems,
3 correct?

4 MR. BERNICK: Objection to the form of the question. I
5 probably should have objected to the form of the prior question
6 because it's counsel's characterization that's now being
7 perpetrated in further questions.

8 THE COURT: The objection's sustained.

9 BY MR. CRANE-HIRSCH:

10 Q. The document that Lovells prepared discussing the
11 Regulatory Issues Department discussed document problems,
12 correct?

13 A. The document included notes of an interview with Alan
14 Heard to which Kim Davis was actually adding in some additional
15 comment, and that's what the document says and that's what the
16 document is.

17 Q. Do you recall the section entitled: "Document Problems",
18 yes?

19 A. Yes, I do.

20 Q. And Lovells remained concerned to this day about
21 "document problems" in scientific documents prepared by BATCo,
22 correct?

23 A. My understanding is that they're still retained to give
24 us advice on document management and the preparation of
25 documents for disclosure, and that is what they are retained to

1 do.

2 Q. And Lovells not only does that, it's true, isn't it, that
3 Lovells keeps documents that have not been disclosed, correct?

4 MR. BERNICK: Objection, lack of foundation.

5 THE WITNESS: I have --

6 THE COURT: Excuse me, sustained. You're going to have to
7 establish whether he knows anything about this.

8 BY MR. CRANE-HIRSCH:

9 Q. Let me show you a document. This is U.S. Exhibit 93197.
10 This is a 38-page document. It is dated the 14th of September,
11 2000, and it's addressed from Lovells to you, correct?

12 A. That's correct.

13 Q. And it's titled: "Documents Not in the Public Domain,"
14 correct?

15 A. That's absolutely correct.

16 Q. And Lovells has a set of these documents, correct?

17 A. No, I don't think that's accurate. They have a record of
18 the documents that were or were not in the public domain. They
19 didn't have a record of the documents themselves, to the best of
20 my knowledge.

21 Q. The cover page here reads, "John Meltzer has asked me to
22 send you the attached listing of documents identified by us as
23 not presently being in the public domain," correct?

24 A. That's correct.

25 Q. And that's the same John Meltzer we discussed earlier who

1 had discussions with Alan Heard and others at BATCo's GR & DC
2 Center, about avoiding document problems at the Regulatory
3 Issues Department, correct?

4 A. I agree with most of your question. But to be perfectly
5 accurate, I don't think Alan Heard had his interview at the
6 R & D Center at South Hampton as you implied; I think Alan
7 Heard, as I said, left the company, and I suspect he probably
8 had the interview at Lovells' offices.

9 Q. So you're disputing the location of that meeting and not
10 that it was with Alan Heard; is that right?

11 A. Yes, because you described it as a "South Hampton R & D
12 Center", and you may have implied something in that. I don't
13 know whether you did or didn't, but I'm just trying to be
14 accurate for the record.

15 Q. And the John Meltzer here is the same John Meltzer who
16 had those meetings in 1992?

17 A. Yes, it is, absolutely.

18 Q. The 38-page document here, I think we can quickly
19 establish for the Court it refers -- I hope you'll be able to
20 agree with me -- to four different types of reports that are not
21 in the public domain. If we look at the second page, there's a
22 reference to L reports that are not in the public domain,
23 correct?

24 A. Yes.

25 Q. And then if we flip to the fifth page, there's a long

1 list of RD reports that are not in the public domain, correct?

2 A. Yes.

3 Q. And an RD report is the more formal type of research
4 report done at BATCo's R & D Center, correct, a TM Report, for
5 example?

6 A. So we can be speedy about this, the actual nomenclature
7 did change over the years, but this was clearly one of our
8 important research documents with an R & D notification on it.

9 Q. And these RD documents not in the public domain go all
10 the way back to RD number one, correct? It's at the top of page
11 5.

12 A. I'm sorry, the page number that I have with a 5 on it --

13 Q. If you look at the fax number, and it's also on the
14 screen.

15 A. Well, I'm happy to take your -- I've seen these -- the 5
16 on my page.

17 MR. BERNICK: In fairness to the government, I think a
18 "not" was omitted in the transcription of the question. The
19 question was "not in the public domain." And it was transcribed
20 without the "not", at least as I read it on realtime.

21 MR. CRANE-HIRSCH: I'll be happy for the court reporter to
22 address it later.

23 BY MR. CRANE-HIRSCH:

24 Q. The list of RD documents continues through the page that
25 is listed on the fax imprint as page 23 of 28. This is Bates

1 number ending 5357, and you'll agree with me that on that page
2 it lists 900 -- it tallies there being 996 documents that are
3 not in the public domain among the RD series alone; is that
4 right?

5 A. Yes, that's correct.

6 Q. And just very quickly, the report also goes on to list on
7 the next page T reports that are not in the public domain, and
8 then if we flip to the final page of the document, the end of
9 the list of TM reports not in the public domain, there are 555
10 of those, correct?

11 A. That's correct.

12 Q. And this is all information that Lovells sent to you in
13 September of 2000, correct?

14 A. That is absolutely correct, yes.

15 Q. And the reason that Lovells was doing this is because of
16 the interaction between attorneys at Lovells and staying on top
17 of what Lovells has called document problems at BATCo, correct?

18 A. Not at all.

19 MR. BERNICK: Objection to the form of the question.

20 THE COURT: Overruled. The witness may answer.

21 THE WITNESS: That's not the case whatsoever. I asked for
22 the list. Nobody else asked, I asked for the list because
23 consideration was being given to whether instead of fighting
24 line-by-line our information in the public domain, would it
25 really be worth us just simply publishing every single document

1 that had emanated from our R & D facility and was held in the
2 library, and I wanted to know what was currently already
3 disclosed through any litigation or had been disclosed by the
4 Master Settlement Agreement that Brown & Williamson had signed up
5 to, because, of course, it had a large number of our documents.
6 I wanted to establish the base as to what of our documents were
7 already in the public domain and, really, was it worth us arguing
8 with the external community that we're hiding, holding
9 information, and I wanted to make a judgment whether it was worth
10 recommending to our Board that instead of trying to fight this
11 tooth and nail for disclosure reasons or whatever reason, why
12 don't we just publish everything. And that's why I wanted to
13 know. That's why it was sent me to, and Lovells gave it to me
14 because they had been hired to conduct an internal assessment of
15 all of our documents. They were aware of every document that we
16 had. They had the master records of what documents we had and
17 that's why I asked them. And they also were charged to identify
18 which of these documents were actually in the public domain. I
19 asked them to do that.

20 BY MR. CRANE-HIRSCH:

21 Q. In the form we have here, this document certainly didn't
22 inform you of the contents of those documents, did it?

23 A. Well, it couldn't because they only had a record of the
24 numbers they held on a file. I'm the R & D manager, it's my job
25 to understand what the content is, and I wanted to know which

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 reports were in the public domain and which weren't, and I spent
2 some time looking through the documents to see whether it was
3 sent to me, or otherwise to simply publish them all.

4 Q. So, this 38-page fax with two empty columns, they faxed
5 that to you and then you were to do what with it?

6 A. Well, all I can say is it looked like they printed it off
7 of a database. I have not the first idea what would normally be
8 in the database line or the number of pages. I assume there are
9 a number of pages of that report. I was just interested to know
10 which documents, and this was the unique identifier of every
11 document that our library has ever held or issued, and I wanted
12 to know what proportion and which ones were in the public domain
13 and which ones weren't so I could make a managerial decision and
14 recommendation as to what we should do going forward.

15 Q. I think we can finish up with just a few questions,
16 Mr. Read. You said that the reason that you asked for this
17 information was so that you could make a recommendation as to
18 whether or not BATCo should publish all of its research and
19 development reports and stop fighting over them. That's the
20 reason you wanted the information, yes?

21 A. That's why I wanted the information. I had discussions
22 with others in our organization as to whether that was sensible
23 or logical. I felt that it was, and I was interested to know
24 to follow through on this particular issue.

25 Q. You could get the information only from the attorneys,

1 correct?

2 A. Well, I could have got it from another source, but they
3 were charged with actually identifying every single document
4 that we held. That was what we paid them to do, to do a
5 complete document audit of every document we had. Therefore,
6 they had the master record. It seemed efficient and effective
7 to ask them, and more importantly, I don't track which documents
8 are in the public domain. Others do that and I wanted to know
9 which ones.

10 Q. You said that the recommendation would be made to the
11 Board. You sat on the Board in September 2000, correct?

12 A. What I said to you is I wanted to gather the information
13 so I could make a managerial recommendation or a decision
14 potentially to the Board. That's my responsibility to decide
15 that.

16 Q. And you still sit on the Board, correct?

17 A. I am on the Board of BATCo, absolutely, yes.

18 Q. And BATCo, to this day, has not released every single one
19 of these documents in the 38 pages here, correct?

20 A. That is correct.

21 MR. CRANE-HIRSCH: No further questions.

22 THE WITNESS: They're held in --

23 THE COURT: Mr. Bernick, how long will you be?

24 MR. BERNICK: I'm sorry, Your Honor? I didn't hear you.

25 THE COURT: How long will you be?

1 MR. BERNICK: Probably about an hour and 15 minutes.

2 THE COURT: Do you want to start now or do you want to
3 take a lunch break?

4 MR. BERNICK: I'm happy to start now, but I suspect that
5 other people have growling stomachs, and perhaps the witness does
6 as well, so I will, on their behalf, express an interest in
7 taking a lunch break.

8 THE COURT: All right. Well, we did turn on the air
9 conditioning and maybe that will perk everybody up. So, we'll
10 take until a quarter of 2, please.

11 MR. BERNICK: Thank you.

12 (Proceedings adjourned at 12:31 p.m.)

13

14 C E R T I F I C A T E

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

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18 Scott L. Wallace, RDR, CRR
19 Official Court Reporter

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Scott L. Wallace, RDR, CRR
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I N D E X

Examinations

Page

CONTINUED CROSS-EXAMINATION OF GRAHAM READ
BY MR. CRANE-HIRSCH

16381

E X H I B I T S

Description

Page

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	March 22, 2005
Plaintiff,	:	
	:	1:49 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 80
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

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

2 THE COURT: Good afternoon, everyone.

3 All right. Mr. Bernick, in your usual style, you're
4 going to move things along this afternoon.

5 MR. BERNICK: In my usual style, I certainly hope so.

6 THE COURT: Good.

7 GRAHAM READ, Defendant's witness, RESUMES

8 REDIRECT EXAMINATION

9 BY MR. BERNICK:

10 Q. Good afternoon, Mr. Read.

11 A. Good afternoon.

12 Q. Everybody else is kind of settling back now, and this is the
13 time of day in my theory, Your Honor, when everyone is full,
14 that we start to have problems with folks nodding off, but you
15 and I will be very active here to try to get through things.

16 I want to begin back at the -- some of the first
17 questions that were asked of you concerning your testimonial
18 activities back beginning of 1997.

19 Do you recall that you testified that you first became
20 involved as a testimonial witness in litigation in around 1977?

21 A. Yes, I do.

22 Q. Now, at the time that you began that, did you still have
23 other responsibilities at BATCo that you had to keep track of
24 your --

25 A. I certainly did.

1 Q. Yes. And in terms of your reviews, were you or were you not
2 still expected to reach your performance goals insofar as your
3 regular job functions were concerned, even though you were now
4 testifying?

5 A. Absolutely.

6 Q. And, in fact, were you reviewed in 1998 based upon the
7 performance goals that had been set for your regular
8 nonlitigation activities?

9 A. That's correct, yes.

10 Q. Okay. Now I want to go back through a little bit the events
11 of 1998 when that review took place.

12 When approximately did you begin to talk with the
13 Rothmans' people about the possibility of joining Rothmans?

14 A. A head hunting firm approached me the end of February,
15 beginning of March that year.

16 Q. Okay. And at that time you were testifying in cases, you
17 were doing your regular work, and you were also talking about
18 the possibility of leaving. It must have been a busy time.

19 MR. CRANE-HIRSCH: Objection, Your Honor, leading.

20 MR. BERNICK: It's foundational.

21 THE COURT: Objection is overruled. Go ahead.

22 BY MR. BERNICK:

23 Q. Was it a busy time?

24 A. It certainly was, yes.

25 Q. When did you actually leave BATCo for Rothmans during 1998?

1 A. I left on the last day of November 1998.

2 Q. And I think you've told us, in connection with a document
3 that was shown you, U.S. Exhibit 93186, that you had, before you
4 left, filled out the appraisal form which you uncovered while
5 you were clearing up loose ends.

6 Do you recall that?

7 A. I do.

8 Q. Okay. And I think, if I understood your testimony
9 correctly, essentially you filled out the form in a sense to
10 complete all of your BATCo-related tasks before you left. Would
11 that be fair?

12 A. To leave my desk clean effectively, yes.

13 Q. You were asked a number of questions in this form about the
14 statement or the entry that appears at section 1.2 where you
15 make reference to contribution to scientific litigation
16 activities, completion of deposition for Minnesota.

17 Do you recall that?

18 A. Yes, I do.

19 Q. And what -- just tell us in your own words, what was the
20 purpose of your making this reference in connection with your
21 1997 review?

22 A. It was almost, to use a legal phrase, almost my pleading,
23 that I was responsible for undertaking a number of key
24 responsibilities, and this took up some of my time. And I'm not
25 sure that Earl knew that, and I put that in there to let him

1 know that I had other jobs to do over and above that which I had
2 already indicated in my previous performance review form.

3 Q. Now, there's been a suggestion by the government that
4 somehow you were rewarded for the fact of your being involved in
5 litigation.

6 Can you turn our attention to 1.3 and talk about the
7 performance review that you got and whether or not you were
8 rewarded for being involved in litigation?

9 A. Categorically not rewarded for that purpose.

10 Q. This grade here, a C plus. In the U.S. system, that's not
11 so hot. How did that stand in reference to your own history at
12 BATCo?

13 A. I'd have to say in the UK and in BAT it's not so hot,
14 either.

15 Q. Okay. Now, you were shown your prior testimony in Ohio in
16 your deposition, and I want to put this before you. You were
17 asked a number of questions relating to page 17, line 18.

18 Do you recall being asked about -- this answer where
19 you talked about your immediate superior being Earl Kohnhorst,
20 and then, in particular, this sentence.

21 "My performance review components were set in
22 discussion with Earl on an annualized basis, and they didn't
23 include any discussions in relation to giving expert witness or
24 opinion in any law case or the outcome of any law case."

25 Do you recall being asked a number of questions about

1 that particular portion of your testimony?

2 A. Yes, I do.

3 Q. Okay. I want to go back and ask you to go back to the prior
4 page, which is page 16, in order to put those questions in
5 context.

6 Do you recall being asked a number of questions leading
7 up to that section where, essentially, it was being put to you
8 about whether your compensation turned upon your performance as
9 an expert witness.

10 Do you recall that?

11 A. Yes, I do.

12 Q. And do we see at the bottom of page 16 and top of page 17
13 questions such as -- question at line 2 -- "Any bonuses that
14 were related in any way to your service as an expert?

15 "Answer: The small bonus scheme that operated with
16 BATCo was based on two components: the performance of the
17 company and my own permanent performance as assessed by my
18 immediate superior.

19 "To that extent it has nothing to do with the outcome
20 of any law case or any testimony I may give for a law case.

21 "What did assessment of you personally consist of?

22 "Answer: What was the basis of my own personal
23 performance reviews?

24 "Question: Correct."

25 And it was in that context that you gave the answer

1 that was cited by counsel for the government. When you
2 testified in that context in the Ohio case, what was your
3 understanding of the thrust of the questions that was being put
4 to you?

5 A. It was in respect of asking did I receive anything for how I
6 performed, what I contributed to litigation, and I hadn't. And
7 I was being rewarded for my particular responsibilities relating
8 to what I would call my day job, which was managing the R&D
9 Department.

10 Q. Now, when counsel pointed you to the statement that you
11 said, "My performance review components were set in discussion
12 with Earl on an annualized basis and they didn't include any
13 discussions in relation to giving expert witness or opinion in
14 any law case," what did you mean when you said that in the
15 context of the questions that were being put to you?

16 A. In my discussion with Earl I did not talk about any
17 substance whatever relating to my performance participation in
18 any litigation, other than to indicate that I had taken part of.

19 I had actually undertaken some of that work, and I
20 wanted him to know that fact in him conducting my performance
21 review. So, in essence, he could make some allowance for any
22 time that I wasn't present at the R&D Department.

23 Q. Is the testimony that you gave in Ohio truthful in that
24 regard?

25 A. Absolutely.

1 Q. Is it in any way, shape or form inconsistent with the
2 questions that were put to you and the fact that section 1.2 of
3 U.S. Exhibit 93186 you referred to the fact of your being
4 involved in litigation? Is it at all inconsistent?

5 A. That's absolutely correct, it's consistent.

6 Q. Let's fast forward. Well, let me just ask you more
7 generally.

8 Have you ever in connection with your job duties at
9 BATCo been rated, in the sense of a performance rating, based
10 upon the substance or the quality of your testimony in
11 connection with litigation?

12 A. Not in the slightest.

13 And in case it wasn't obvious, when I appeared in the
14 ironworkers' case I was no longer employed by BATCo.

15 Q. Let's move on to that. You testified in the ironworkers'
16 case subsequently; that is, in 1999?

17 A. That is correct, yes.

18 Q. In a wintry Akron, Ohio, as I recall.

19 A. It was rather cold, yes.

20 Q. At that time, Mr. Read, were you an employee any longer of
21 BATCo?

22 A. Absolutely not. I had resigned and left the company.

23 Q. But it's true, is it not, that in the Ohio case when you
24 testified both in deposition and at trial, you were testifying
25 on behalf of BATCo; correct?

1 A. That's absolutely correct.

2 Q. Did that take away from the time that was required for your
3 job at Rothmans?

4 A. Clearly it did. A significant amount of time.

5 Q. Tell me how it came to pass that Rothmans let you take that
6 time off and go testify in Ohio for BATCo.

7 A. My decision to leave BATCo and join Rothmans was a very
8 difficult one, having been with BATCo for some nearly 24 years I
9 think at the time. And I spent a lot of time discussing the
10 decision with Earl and with the chief executive of BATCo, and
11 there was a lot of discussions where they tried to persuade me
12 to stay.

13 At the end of the day Rothmans offered me what I
14 considered to be a better career opportunity in terms of other
15 business developments, and they were interested specifically in
16 my R&D skills and attracted me to the company.

17 My decision in leaving, I had a discussion with the
18 chief executive of Rothmans, Mr. Bill Ryan, and I said to him
19 that I was not prepared to join Rothmans unless they allowed me
20 at albeit BATCo's expense to pay my air fare to come to
21 litigation; that I wanted to be able to represent BATCo, should
22 it be necessary, up to two years after I had left the company.

23 For the strict purpose that I had worked in the R&D
24 Department for virtually all of my life, I was extremely
25 committed to the staff and the scientific community within

1 BATCo. I shaped, managed, directed the R&D programs for many
2 years within BATCo itself. And I felt morally obligated to be
3 able to give BAT that assurance, BATCo that assurance, before I
4 left the company.

5 Q. Did you get any credit at Rothmans for the fact that you
6 were taking this time to testify?

7 A. Certainly not.

8 Q. Did you get any money from BATCo, other than your air fare,
9 as a result of your testifying?

10 A. Absolutely nothing.

11 Q. Now when you came back -- you ultimately came back to BATCo;
12 correct?

13 A. I did, yes.

14 Q. And that was following on what probably was somewhat ironic,
15 given your career; that after you left BATCo for Rothmans,
16 Rothmans was purchased by BATCo.

17 A. It did come as a little bit of a surprise and something of a
18 disappointment to me, yes.

19 Q. I see. You don't suspect in some fashion that this was all
20 orchestrated to bring you back.

21 A. That was the joke that went around in the company, but I
22 don't believe there was any foundation, in fact, in it.

23 Q. Did your compensation change when you came back to BATCo?

24 A. Absolutely not. Under -- there are strict rules in the UK
25 with regard to mergers and acquisitions, and I was covered by

1 what was known as the TUPI arrangement, the transfer undertaking
2 provisions in employment law, that said if the acquiring company
3 takes on the employees, which it didn't have to do, if it takes
4 them on, it has to take them on with an equivalent job size and
5 with the same remuneration package.

6 Q. So, basically, you were paid more at Rothmans than you had
7 been previously at BATCo?

8 A. Yes.

9 Q. And when you came back to BATCo as part of the merger, by
10 law, BATCo had to pay you the same amount that you were paid at
11 Rothmans?

12 A. That's correct, yes.

13 Q. No sense in which your compensation was increased when you
14 came back to BATCo in light of the fact that you were now going
15 to be available to testify?

16 A. Absolutely not.

17 Q. Let's begin sequentially with some of the subjects that were
18 covered with you. And I'm going to talk, first of all, about
19 the documents that dealt or mentioned about some events back in
20 the early days, in the early mid-1960s, concerning the report
21 from Harrogate and the reference to slanting the report at
22 Harrogate. I want to cover that with you. And I want for this
23 purpose to talk about three facts. And I would like to have you
24 help me keep them straight here as you testify.

25 Fact number 1 was the lawyers message.

1 Fact number 2 is contact with the scientists at TRC.

2 And the third is impact -- was there any impact on
3 their research report?

4 First is what the lawyers were asking for. Second is
5 was there a contact with the scientists at TRC who were writing
6 up the results in the report. And third was their impact.
7 Could we focus on those three facts here for a minute?

8 You were shown a series of documents. They are Joint
9 Exhibit 54023, U.S. 54022, U.S. 30825, and U.S. 20990.

10 And Your Honor will recall that these were the various
11 reports and memos beginning July 1, 1965. That's the joint
12 exhibit.

13 And then going to August 19, 1965, that's 54022. And
14 then October of the same year, that's 30825. And then finally,
15 February 28, 1966, which is the one that talks about slanting
16 the report, and that is 20990.

17 And if you take a look at that sequence of documents,
18 would it be clear what the message was from the lawyers as
19 reflected in those documents?

20 A. My view is they had serious concerns about the biological
21 research that was being undertaken at the TRC and expressing
22 those concerns and sharing that information between themselves.

23 Q. And that message, Mr. Read, that message I think you
24 acknowledged yesterday in your testimony, there was no question
25 about that message; it was a very consistent message from the

1 same people in these various documents. Correct?

2 A. That's correct.

3 Q. Okay. Now, I want to take a step to the next fact, which is
4 contact.

5 Did you see in your review of documents any evidence of
6 there being a contact between these lawyers or people acting at
7 their request on the one hand and the scientists at the TRC who
8 were writing these reports on the other?

9 Did you see any such documentary evidence?

10 MR. CRANE-HIRSCH: Objection, Your Honor, lack of
11 foundation.

12 There's a reference to, in his review of documents, and
13 we need a specification of which review of documents when.

14 Q. Review of documents that you have done in connection with
15 your work at BATCo.

16 THE COURT: You may answer.

17 A. No, I've never seen any documentary evidence to that effect.

18 Q. Did you testify in the Ohio ironworkers' case as elicited by
19 the government, that you didn't know whether there was contact
20 or wasn't contact? Did you so testify?

21 A. I did, because I had never seen any evidence, but maybe the
22 documents were lost.

23 Q. And did you give any different testimony yesterday when
24 these same questions were put to you? That is, whether or not
25 you knew that there what was a contact.

1 A. No. I believe I gave the same answer.

2 Q. Let's now talk about impact. And I want to again go through
3 a sequence of documents with you in order to address what your
4 testimony has been concerning impact.

5 You were shown Exhibit 93190, which is the opinion by
6 counsel from Freshfields in 1966. Do you recall that?

7 A. Yes, I do.

8 Q. And if we take a look at the bottom right-hand corner, do we
9 see that there's a reference to counsel's opinion TRC, I think
10 it's letter April 11, 1966. Do you see that reference?

11 A. Yes, I do.

12 Q. Does that it, in just reading the document, that basically
13 there was a communication that solicited or asked for this
14 opinion sometime in April 1966?

15 A. Absolutely. And I believe it must have come from the
16 Tobacco Research Council board.

17 Q. Okay. So basically the sequence is we see a whole bunch of
18 documents that you were shown by the government yesterday from
19 basically July 1965 to February 1966 where the U.S. lawyers are
20 all excited, and then a couple of months after the last of those
21 the question is put to this gentleman from Freshfields, What do
22 you think about the effect of this publication; fair?

23 A. That is correct.

24 Q. Now, the question of impact. The government has focused on
25 how the article ultimately read and they've also focused on the

1 quote that appears in this opinion. But you see that this
2 opinion recites that the draft report contains this quotation
3 from the summary. That is, that the opinion is looking at a
4 draft of the document, of the report, and it's quoting from the
5 summary. And do you see where it says -- it provides them the
6 actual language. The results provide evidence that nonvolatile
7 or neutral components, et cetera, et cetera. Do you see that?
8 A. I do.

9 Q. So, basically, would it be fair to say that the opinion, in
10 order to render the opinions, this lawyer focused on the
11 particular part of the document that was kind of the contentious
12 matter and then offered an opinion?

13 MR. CRANE-HIRSCH: Objection, Your Honor, leading.

14 THE COURT: Sustained.

15 Q. How do you read the fact that this is the only quotation
16 that appears from the document?

17 MR. CRANE-HIRSCH: Objection, Your Honor, speculation
18 and lack of foundation. The witness testified yesterday that he
19 has never before seen this document.

20 MR. BERNICK: Well, that may well be true, Your Honor,
21 but now having shown him the document, the government obviously
22 has put this witness's understanding of the document at issue.

23 And in the context of all the other documents it is
24 obviously fair for me to ask, to what extent does this new
25 document really change any of the views and interpretations that

1 he expressed to the court.

2 So the first step is to go through the document -- I've
3 never gone through this document with him -- and find out well,
4 what's the significance of the quotation? And then in half a
5 moment it will be crystal clear exactly how that quotation fits
6 in.

7 MR. CRANE-HIRSCH: The question, Your Honor, yesterday
8 was in response to the witness's saying that he had never been
9 aware that the TRC sought legal advice and whether or not to
10 quash these research results before publishing them. There are
11 no questions about the witness's own understanding of the
12 opinion.

13 The questions were whether or not he had even been
14 aware of the fact of the matter that the legal advice had been
15 sought and the advice given in the final paragraph of the
16 opinion.

17 The question was not about his interpretation or his
18 personal observations or his views on the words in the document.

19 MR. BERNICK: Your Honor --

20 THE COURT: The objection is overruled. Go ahead,
21 please. The question as newly formulated.

22 MR. BERNICK: I'll reformulate the question.

23 BY MR. BERNICK:

24 Q. Does the opinion begin with the citation of a certain
25 portion of the draft report?

1 A. Yes, it does.

2 Q. Does it go on, then, to talk about what the potential
3 significance of the report might be, that in terms of its -- the
4 study involving a greater scale, a greater quality of the animal
5 husbandry, and it being a step forward in terms of the progress
6 of science?

7 A. Absolutely correct.

8 Q. Now, at the end of the day the counsel rendered the opinion,
9 basically to the effect that it would be a greater risk if the
10 study were not to be published. Do you see that?

11 A. Yes, I do.

12 Q. And we now can go to the study itself, which is JD 011162.
13 This is the British Journal of Cancer, March 1, 1967, is when it
14 came out; right?

15 A. That's correct.

16 Q. If we go to the study itself, and we say, well, let's take a
17 look at the summary to see whether the summary has been changed
18 in this critical conclusion that's rendered, do we see that
19 there's again a summary section of the article as ultimately
20 published?

21 A. Yes.

22 Q. And if you want to take the time to glance back, I want you
23 to tell me if there's any change, even in the wording of the
24 portion of the draft article that was set forth in the opinion
25 rendered before publication and in the final language of the

1 publication itself. Is there any difference?

2 A. It looks absolutely identical to me.

3 Q. Not only is the language identical, but do we know that, in
4 fact, literally on the day the solicitor's opinion was issued,
5 the very same day the article was actually submitted for
6 publication? Is there a way to determine that?

7 A. There may actually be a date on the publication itself. The
8 date when it was received for publication.

9 Q. Okay. And if we, in fact, take a look at the first page of
10 the publication, do we see that it's indicated as received for
11 publication on December (sic) 20 -- I read that, maybe because I
12 wanted to do that, Your Honor -- I read that as September 28,
13 1966. It could be September 26th, I just don't know.

14 But do we see that the article itself indicates that it
15 was received for publication December 26th or December 28, 1966?

16 A. That appears to me to be the date at which it was sent and
17 received.

18 Q. And the date of the opinion, we can see is September 28,
19 1966. Do you see that?

20 A. I do.

21 Q. Based upon this new document that you were shown by the
22 government and based upon reviewing this article, do you see any
23 evidence that, in fact, anything about the lawyers' message or
24 any contact that took place actually had an impact on the
25 substance of the article?

1 Do you see anything in these documents?

2 MR. CRANE-HIRSCH: Objection, Your Honor, relevance.

3 Whether or not this witness sees any impact of one thing or
4 another does not bear upon the facts to be determined by the
5 fact finder at this trial.

6 The relevance of the events described here to the facts
7 at issue in this case is a matter for the fact finder and not
8 for this fact witness.

9 THE COURT: I'll allow him to answer. You may.

10 A. I cannot see any possibility in looking at the time frame
11 where it could have had any effect whatsoever.

12 Q. Now, questions were then asked of you, well, wasn't there
13 then an effort to slant the Harrogate review of its activities?

14 Was there, in fact, a document that came out in 1967
15 dealing with the review of activities at Harrogate?

16 A. There was some discussion around that, yes.

17 Q. And showing you JD 010689, is this the cover page of that
18 review of activities?

19 A. Indeed, it is.

20 Q. When it comes to reviewing the results from Harrogate, isn't
21 there, in fact, a section that talks about the mouse skin
22 painting work that was done at Harrogate?

23 A. I'm absolutely certain there is.

24 Q. Well, directing your attention to the page that ends 816, do
25 we see that, in fact, by this time the Day article already has

1 been published, and all that's being done in the review is to
2 review the substance of the publication?

3 MR. CRANE-HIRSCH: Objection, Your Honor, leading and
4 characterizing the document for the witness about all that is
5 being done.

6 MR. BERNICK: I'll rephrase the question.

7 BY MR. BERNICK:

8 Q. By the time this review is published, has the Day article
9 itself been published in the literature?

10 A. Well, that's what it indicates from the text, yes.

11 Q. If the Day -- if the review, this document here, the review,
12 actually was slanted so that it misstated what the researchers
13 themselves had found, wouldn't it be kind of obvious by simply
14 comparing what had already been published with the review?

15 Can you imagine what the point could -- can you tell
16 from the documents what the point would have been to changing
17 the text of this document here, the review of activities, when
18 what it's reciting is already published in an article?

19 MR. CRANE-HIRSCH: Objection, Your Honor, speculation
20 and --

21 THE COURT: Sustained.

22 BY MR. BERNICK:

23 Q. Let me ask you this. You made reference to the fact that
24 after the Day article came out there was correspondence from
25 Dr. Wynder himself regarding the quality of that work. Do you

1 recall?

2 A. I do.

3 Q. Showing you Exhibit JD 031816, a June 16, 1967 letter. Is
4 this the letter from Dr. Wynder basically extolling the quality
5 of the research that had been done?

6 MR. CRANE-HIRSCH: Objection, Your Honor, beyond the
7 scope of cross-examination. There were no questions to this
8 witness about what Dr. Wynder thought about any of this
9 research.

10 MR. BERNICK: Well, to the contrary. It was the
11 cross-examination that elicited the testimony.

12 THE COURT: Absolutely. There's no question about
13 that, that there was cross on this subject. The objection is
14 overruled.

15 BY MR. BERNICK:

16 Q. Is this document the letter that you had reference to?

17 A. Yes, it is.

18 Q. Now, when it came -- the lawyers were concerned, do you
19 recall -- the lawyers were concerned that not only would this
20 study be viewed as being important, but it would be attributed
21 to the tobacco industry even though the researcher himself,
22 Dr. Day, was a person of some repute and note; correct? Was
23 that the concern?

24 A. That seemed to be the concern expressed, yes.

25 Q. Showing you Exhibit 46514, which is the health consequences

1 of smoking and Public Health Service review, the '67 report.

2 Do we see at page 144 that, in fact, the Surgeon
3 General's Report actually commented specifically on the work
4 that had been done by Dr. Day at the TRC?

5 MR. CRANE-HIRSCH: Objection, Your Honor. I'm afraid
6 that this is beyond the scope. The questions during the --

7 THE COURT: Sustained. This is way beyond.

8 BY MR. BERNICK:

9 Q. Well, I guess what I wanted to ask then. Let me just get to
10 this. It was designed to be foundational. I'll just put the
11 ultimate question.

12 Are you aware -- are you aware, Mr. Read, of whether
13 any effort was undertaken to change any of the substantive
14 research done at Harrogate?

15 MR. CRANE-HIRSCH: Objection, Your Honor, lack of
16 foundation. There's been no way to establish that this witness
17 actually would have any such knowledge.

18 MR. BERNICK: To the contrary. He's testified on
19 direct examination to his review of the TRC's activities, and
20 there are more, and the government has raised it repeatedly in
21 most of the documents that they showed this witness.

22 MR. CRANE-HIRSCH: We need a specification of the time
23 period, Your Honor. Efforts to change or slant research --

24 THE COURT: The objection is overruled, other than the
25 requirement that you specify the time period.

1 BY MR. BERNICK:

2 Q. Well, let's just take this period of the 1960s, and we are
3 going to go the 1970s, the 1980s. That's the cross, Your Honor,
4 the redirect. Let's begin with the '60s.

5 Are you aware of any effort that was undertaken to
6 change any aspect of the scientific research or its reporting
7 out of the TRC during this period of time?

8 A. Absolutely not.

9 Q. Now, there have been questions raised again about your
10 testimony in Ohio. Did you, in fact, testify in Ohio that you
11 did not see any impact from what the lawyers had done? I have
12 reference to page 3624 to 3625.

13 "Question: As a result of any of the discussions that
14 you have seen involving the lawyers, as shown to you by
15 plaintiff's counsel here, was there any impact on the actual
16 conduct of the continued mouse skin painting program at
17 Harrogate?"

18 Your answer, "Not in the slightest, no impact
19 whatsoever." Was that your testimony in Ohio?

20 MR. CRANE-HIRSCH: Objection, Your Honor. I don't know
21 where we are going here, why we are looking back at this
22 testimony. There were no questions about this part of the
23 testimony during the cross.

24 MR. BERNICK: That's the whole point --

25 THE COURT: Sustained. This is simply -- excuse me.

1 This is simply consistent with his testimony on cross.

2 MR. BERNICK: Well, Your Honor, I think we would
3 show -- Your Honor may recall the colloquy where he was
4 confronted with a different portion of his Ohio testimony as
5 impeachment, and I rose to say I didn't think it was impeachment
6 because it wasn't consistent.

7 Your Honor made the observation you thought it was
8 inconsistent.

9 If we focus on Ohio testimony and the part that dealt
10 with impact, our point will be through this witness it was
11 exactly what he said in Ohio and it was exactly what was said
12 yesterday, and there's no inconsistency.

13 They have put this at issue by trying to use a
14 different part of the testimony that's not germane to cast doubt
15 on this gentleman's credibility. And we ought to be able to
16 have the opportunity to point to exactly what he said that was
17 on point in Ohio and how it's exactly what he said yesterday,
18 and there is zero inconsistency.

19 MR. CRANE-HIRSCH: The testimony that we elicited
20 yesterday addressed whether or not the witness had any personal
21 knowledge about the stated intention of the U.S. attorneys to
22 slant the 1963 to '66 report and whether or not he had any
23 knowledge about whether or not those contacts had been made.
24 That takes us through the first two items on Mr. Bernick's chart
25 here.

1 Mr. Bernick is now asking, to rehabilitate his witness,
2 by pointing to testimony that addresses something in his third
3 area about whether or not there were discussions that actually
4 affected the research.

5 MR. BERNICK: I don't think that counsel is being
6 candid with the court on exactly what happened.

7 This is at page 16342 --

8 THE COURT: Counsel, I'm going to allow it in.
9 Obviously, at a later point I'm going to go over these
10 transcripts carefully.

11 I do remember the exchange yesterday. I do remember
12 making a comment about what I perceived as inconsistency. And,
13 therefore, I want it in the record so that when it comes time to
14 making final decisions it's there before me.

15 MR. BERNICK: Thank you, Your Honor.

16 BY MR. BERNICK:

17 Q. Do we see at page 16343 from the transcript yesterday, you
18 were asked by counsel for the government specifically whether
19 the Harrogate report, in fact, was influenced by the stated
20 intention of the U.S. attorneys.

21 And you -- it was put to you, "You previously testified
22 that you have no knowledge about that."

23 And your answer is, "No, I didn't say that. I said I
24 wasn't there at the time. I said I had other information that
25 led me to that particular conclusion.

1 "Question: The question is whether or not you have
2 previously testified that you have no knowledge about it.

3 "Answer: I don't believe I've testified to that
4 effect, no."

5 In fact, in your testimony in Ohio, your previous
6 testimony, did you in fact testify that there was no evidence of
7 any impact?

8 A. Yes, I did.

9 Q. Is that, in fact, completely consistent -- is that
10 consistent or inconsistent with how you responded to the
11 government at page 16343?

12 A. I believe it is.

13 Q. Okay. And if we then go through the sequence, 16343, -44,
14 -45, there's then an effort to impeach you with a different part
15 of your Ohio testimony, not dealing with impact, but dealing
16 with contact.

17 Do you recall the question being asked of you at page
18 16343 that was the quote from Ohio dealing with whether there
19 was contact? Do you remember being asked that?

20 A. Yes, I do.

21 Q. And your answer was that you had read it correctly, and then
22 you were again asked whether this was under oath.

23 Was the testimony that you gave yesterday regarding
24 your Ohio testimony and what you said there correct or not?

25 A. I believe it was correct.

1 Q. After all the discussion that took place concerning the
2 report from Harrogate in the mid-1960s, was there or was there
3 not continuing work on mouse skin painting at the Harrogate
4 laboratory?

5 A. Absolutely.

6 Q. Showing you -- showing you J-DEM 010299. I think I'm
7 getting fuzziness because of all this stuff here.

8 Is this a time line demonstrative that gives the court
9 an overview of the time sequence during which mouse skin
10 painting work was done?

11 A. Yes, it does.

12 Q. Does it reflect that the TRC itself, the Harrogate lab,
13 continued mouse skin painting work all the way up to the
14 mid-to-late 1970s?

15 A. That is correct.

16 MR. CRANE-HIRSCH: I'm going to object here, Your
17 Honor. This is one of the items that there's a pending
18 objection to from the witness's direct, I believe, about whether
19 or not there's adequate foundation laid for this demonstrative.

20 MR. BERNICK: I'll lay it right now.

21 BY MR. BERNICK:

22 Q. Mr. Read, are you familiar with the studies and documents
23 that underpin the time line entries that appear on this
24 demonstrative?

25 A. Yes, I am.

1 Q. And is this demonstrative based upon your review of the
2 documents that are referenced in the demonstrative?

3 A. Absolutely.

4 Q. Okay. Do you believe to be both accurate and helpful to the
5 court in illustrating how mouse skin painting work continued,
6 not only at Harrogate, but at BATCo and here in the United
7 States?

8 MR. CRANE-HIRSCH: Objection, Your Honor, relevance as
9 to the witness's belief about what is or isn't helpful to the
10 court.

11 THE COURT: Well, you know, the objection is overruled.
12 Obviously, the language comes straight out of the federal rules.
13 Go ahead.

14 BY MR. BERNICK:

15 Q. Did the Harrogate work on mouse skin painting, in fact,
16 continue?

17 A. Yes, it did.

18 Q. Was it reported on a regular basis?

19 A. Yes, it was, in a series of reports.

20 Q. Did BATCo itself undertake mouse skin painting work in its
21 own laboratories?

22 A. Yes, it did.

23 Q. Is that also reflected in the chart --

24 A. I'm sorry, Mr. Bernick?

25 Q. Is that also reflected on the chart as continuing through

1 the 1970s?

2 A. You asked if BATCo undertook it in its own laboratories --

3 Q. (Overtalking) Its contract work.

4 A. (Overtalking) That's actually correct.

5 Q. Okay. Did BATCo do contract work on mouse skin painting?

6 A. Yes, it did.

7 Q. And here in the United States did the National Cancer
8 Institute in its safer cigarette program also do mouse skin
9 painting work?

10 A. Yes, it did, and it produced four reports and a summary
11 report.

12 Q. The line comes down from the ISC at the top in 1979, and we
13 can see that most of these programs terminate shortly before or
14 shortly after 1979, what happened in 1979 that is reflected in
15 this demonstrative?

16 MR. CRANE-HIRSCH: Objection, Your Honor. We need some
17 foundation about who prepared this demonstrative, and if we're
18 going to be asking questions about what occurs before and after
19 certain dates and significance of particular dashed lines on the
20 demonstrative, we have no information right now about where this
21 demonstrative comes from, who prepared it or assembled it.

22 MR. BERNICK: The witness has already provided an
23 entirely appropriate foundation for the demonstrative. Under
24 the rules, he said that it was based upon a document review that
25 it's accurate and it reflects accurately those documents. It

1 doesn't make any difference if he put the numbers into the
2 machine and put the colors on the chart.

3 MR. CRANE-HIRSCH: The ISC report in 1979 in particular
4 is not represented as one of the mouse skin painting items in
5 the body of the chart.

6 MR. BERNICK: Of course not. That's why I'm going to
7 elicit his testimony on what it was.

8 THE COURT: The objection is overruled. Let's proceed.
9 BY MR. BERNICK:

10 Q. What's the ISC report in 1979?

11 A. It is a report by the Independent Scientific Committee.
12 It's their second report.

13 Q. And to refresh us, Independent Scientific Committee was
14 what?

15 A. This was a group that had been set up in cooperation with
16 the government. They were independent scientists, initially
17 were chaired by Dr. Hunter -- chaired by Lord Hunter, and these
18 scientists were charged with looking at the issue of smoking and
19 health and making a recommendation to the government by seeking
20 independent scientific knowledge and seeking information from
21 the tobacco industry at the same time.

22 Q. What, if any, relationship did the statements made in that
23 report concerning mouse skin painting -- what, if any,
24 relationship exists between those statements and what we see as
25 being the termination of this mouse skin painting research?

1 A. Well, unfortunately, it reflected a culmination of
2 scientific views. That the mouse skin painting studies and work
3 had not delivered what people had hoped and expected, a
4 sensitive bioassay for distinguishing between different types of
5 product, different product modifications, and their potential
6 impact on smoking and health.

7 Q. I want to transition now from the work that was published
8 and done -- the work that was done at Harrogate and some of
9 these other laboratories in the 1960s and early 1970s to another
10 subject, which is BATCo's relationship with the government
11 authorities and the government committees.

12 Do you recall being asked a number of questions about
13 the extent and quality of the cooperation that you say, and have
14 said, existed between BATCo and the government? Do you remember
15 those questions?

16 A. Yes, I do.

17 Q. And do you remember that a particular document -- that is
18 Exhibit 21733, which was the notes of the meeting in February
19 1983 -- that those notes were used to basically question whether
20 BATCo really was anxious to cooperate with the government
21 authorities?

22 A. I'm sorry. It's been passed the -- different document.

23 Q. I think, actually, it is one of the ones that was shown to
24 you by the government.

25 A. The only reason I raise it is because I am having trouble

1 reading it on the screen. I just find it easier in hard copy
2 form.

3 Q. Here we go.

4 Do you recall the government using that document in
5 order to call the extent of cooperation into question?

6 A. Yes.

7 Q. Now, I want to cover three things relatively quickly. I
8 want to cover items -- item 1, which is the -- excuse me -- item
9 3. These are the three that were covered by the government.
10 The effects of nicotine at the levels achieved through smoking.
11 That's item 3.

12 Item 5, and item 6, which is compensatory smoking. I
13 want to cover those three items.

14 First of all, with respect to item 3, it says, "While
15 animal experts could probably be designed to study the effect of
16 nicotine," and there is a parenthetical, "our response to the
17 ISC should be that we have nothing to offer. The little
18 information we have is already in the public domain."

19 When it's making reference to the fact that there's
20 laboratory -- animal laboratory data and studies already
21 available in the public domain, do you know what that had
22 reference to?

23 A. Well, I believe it had reference from BATCo's standpoint
24 from two pieces of work. The work that was undertaken by the
25 TRC through the '60s. It was some pharmacology that was

1 undertaken by Dr. Armitage, a leading pharmacologist of the day.
2 And BATCo had already funded and had funded some work at
3 Battelle Geneva looking at some animal models of pharmacology.

4 Q. Turning to Dr. Armitage's work.

5 Dr. Armitage, was he a pharmacologist employed at the
6 TRC, that is the Harrogate Laboratories as well?

7 A. Yes, he was.

8 Q. And showing you JD 0000452. Is this an article resulting
9 from research that Dr. Armitage did funded by the tobacco
10 industry regarding the pharmacological basis for tobacco smoking
11 habit?

12 MR. CRANE-HIRSCH: Objection, Your Honor, beyond the
13 scope.

14 There weren't questions about specific research that
15 was sponsored by TRC. There were questions about the extent of
16 BATCo's cooperation or otherwise with this particular
17 independent government scientific committee.

18 Counsel is now going into different topics about
19 research that was funded by the TRC and specific about that
20 research.

21 MR. BERNICK: This document was not introduced by the
22 witness or by us, it was introduced by them.

23 And there was a big deal made that there was somehow
24 something that was uncooperative taking place here; whereas,
25 what we are bringing out is that the documents that were already

1 in the domain were voluntarily put in the domain by people who
2 were being funded by the tobacco industry.

3 And I think that we're entitled to show the tobacco
4 industry actually was the one taking the initiative in this
5 area, not somehow holding back, which was the inference that was
6 drawn by the government.

7 THE COURT: There's no question that there was much
8 cross about the document, about that particular paragraph, and
9 certainly cross designed to elicit negative information. So
10 that the defense may proceed with the redirect on that.

11 BY MR. BERNICK:

12 Q. Is this article one of the articles that was published with
13 express acknowledgement of the sourcing by the folks at
14 Harrogate, including Dr. Armitage?

15 A. Yes, it is.

16 Q. Turning to the second page of the exhibit.

17 MR. BERNICK: I think Your Honor will recall this from
18 other witnesses.

19 Q. This is the article that says, "In 1968 it is worth noting
20 that someone smoking a cigarette has literally finger tip
21 control of how much nicotine he takes into his mouth; by
22 reducing the puff volumes or inhaling less frequently he absorbs
23 less nicotine."

24 Does that appear in the article?

25 A. Yes, it does.

1 Q. Let's take a look at the next item that you were examined
2 on, item 5, which was the role of nicotine at the relevant lower
3 range of nicotine dosage in perpetuating the smoking habit.

4 Do you again recall that you were asked about this?

5 A. Yes, I do.

6 Q. Directing your attention to the first line under that
7 section where it says, "While such information already exists in
8 the literature, parenthesis, Russell, Ashton and Stepney."

9 Let me ask you about Russell, Ashton and Stepney. Who
10 is Dr. Ashton?

11 A. A leading behaviorist.

12 Q. Did Dr. Ashton also do and publish work with the funding and
13 support of the tobacco industry?

14 A. Absolutely.

15 Q. Showing you JD 0000457. Is this a copy of an article that
16 came out many years before that, 1970, by Dr. Ashton dealing
17 essentially with the issue of compensation?

18 A. Yes, it does.

19 Q. Does it specifically acknowledge that these are people
20 who -- let's see if I can get this right -- were supported by a
21 grant from the Tobacco Research Council?

22 A. That's correct.

23 Q. Let's talk about Dr. Russell. Who is Dr. Russell?

24 A. Dr. Russell headed up the addiction research unit at the
25 Maudsley Hospital in London.

1 Q. I'm sorry?

2 A. At the Maudsley Hospital in London.

3 Q. Was he a smoking behavior scientist of some note?

4 A. Absolutely, the leading light in the UK at the time.

5 Q. What, if any, relationship did BATCo have to the research
6 that Dr. Russell was doing?

7 A. We worked with Dr. Russell, I think probably over a 10-year
8 period, through the '70s. We responded to his requests for
9 products, product modification, monitoring how people smoked
10 cigarettes.

11 We had special expertise in that area. We analyzed the
12 products that were smoked by consumers and provided him with the
13 data in relation to his studies, looking at how people smoke.
14 Deducing from his perspective the motivation as to why they
15 smoked, and determining the level of nicotine that he derives
16 from their products as part of that process.

17 Q. Was that work published?

18 A. Absolutely.

19 Q. Stepney. Was Stepney's work published?

20 A. Yes, it was.

21 Q. Was there any relationship with Stepney?

22 A. Yes. Rob Stepney actually saw funding from BATCo.

23 Q. Did he receive that funding?

24 A. Yes, he did.

25 Q. Did he publish his work?

1 A. Absolutely he did.

2 Q. Now, it says at the back end of this entry, "We must not
3 become involved in any collaborative study with the ISC." And I
4 believe you pointed out that that's collaborative.

5 Tell me whether, in fact, BATCo on its own did research
6 on an ongoing basis in this area.

7 A. Absolutely, it did. And I actually looked after the
8 research area that conducted it.

9 Q. Did a time come when BATCo actually held a conference on
10 smoking behavior?

11 A. Yes, indeed.

12 Q. Do you recall the first such -- explain to the court the
13 conference that was ultimately published in the Thornton book.

14 A. There's a big debate through the '70s as to how people
15 smoke, why people smoke, the methodologies for determining how
16 people smoke, and BAT had specific expertise and research
17 capability in that area, and it chose to host an international
18 smoking behavior conference held at that time at our management
19 training center at Chelwood.

20 Q. Were the proceedings from that conference ultimately
21 published in a book called Smoking Behavior?

22 A. That is correct. A year after --

23 MR. CRANE-HIRSCH: Objection, Your Honor. We are now
24 beyond the scope. We are talking about a 1983 memo that
25 Dr. Blackman wrote, and counsel is now going beyond the 1983

1 period, and the question is about collaboration with the ISC to
2 that date.

3 MR. BERNICK: We are not going beyond. This is 1978.
4 It was before the memo was written in 1983. It shows, as the
5 witness indicates, that BATCo was already heavily involved in
6 this area in a very public and open way, and we will establish
7 that BATCo's work in this area continued and continues today,
8 including publications.

9 MR. CRANE-HIRSCH: I was mistaken. I had -- believed
10 he was going to a 1984 conference and that's the one that not be
11 explored.

12 THE COURT: You may proceed, Mr. Bernick.

13 BY MR. BERNICK:

14 Q. Were the proceedings from this international conference
15 published in Thornton's book, which is marked as JD 030014?

16 A. Yes, it was published.

17 Q. Tell us whether or not the work on smoking behavior that
18 BATCo was pursuing continued after the 1983 memo that we've been
19 talking about.

20 A. Well, it did continue, and it continued in depth. I
21 actually took up the post to head up the human smoking behavior
22 group just around the end of 1980, beginning of 1981, and I
23 developed the program with existing scientists and I enlarged
24 the program by bringing on board a respirable physiologist.

25 Q. Who is that?

1 A. That was Dr. Mike Dixon.

2 And bringing on a pharmacologist, and that was Dr.
3 Wilma Templeton, and I put together a multidisciplinary team to
4 look at not only how the product is smoked, but the consequences
5 of the smoking process.

6 Q. I want to turn to the last item in this memo, which is
7 compensatory smoking -- and I don't want to spend a huge amount
8 of time on it.

9 Was there also work that was conducted on -- by BATCo
10 both, before and after this memo, relating to compensatory
11 smoking?

12 A. We've conducted an enormous amount of work on compensatory
13 smoking starting from the early observations of changing
14 delivery of the product, technologies that we developed to
15 actually record how people smoked the cigarettes in the early
16 '70s, and that's when we began to work closely with Russell.
17 And we've had a continuing working relationship with the smoking
18 behavior research area ever since and a very extensive one at
19 that.

20 Q. The question was raised whether -- you know, this all goes
21 by way of asking you has there been a cooperative -- really a
22 cooperative relationship?

23 If we focus on the third ISC's report, the third ISC
24 report, does this specifically address the question of whether
25 the industry has been cooperative with the government

1 authorities?

2 A. I believe that one does and some subsequent documents as
3 well.

4 Q. This is JD 000657 and directing your attention to page 5.
5 Do we see where it says, "The industry has told us, however,
6 that the level of nicotine in some cigarettes has already
7 reached a point where consumers are trying to maintain their
8 nicotine intake by methods of compensation."

9 Does this or does this not reflect the cooperation and
10 the flow of information from the industry to the ISC?

11 MR. CRANE-HIRSCH: Pardon me, Your Honor. In terms of
12 relevance, the area the witness was cross-examined about were
13 subjects 3 and 5, and number 5 is the effect of nicotine in
14 perpetuating the smoking habit.

15 Number 3 was whether or not animal studies could be
16 designed to examine the role of nicotine.

17 And we are here looking at questions about whether or
18 not there's compensation, and so I'm afraid that I don't fully
19 understand how this is tied to the scope of the
20 cross-examination.

21 MR. BERNICK: Very simple. They put out on the table
22 the proposition that it was wrong for this witness to testify
23 that there was a cooperative relationship.

24 They did focus on three and five as well as the
25 beginning, but they can't cut that, fine. This document deals

1 with the entirety of the relationship, and we are entitled to
2 probe and elicit from this witness, that not only are they wrong
3 about three and five, but on six it is particularly clear, and
4 we will establish that directly pertained to the TRPT which was
5 specifically brought out in counsel's examination.

6 So this is all part of the same basic relationship and
7 approach, and it goes to this witness's credibility and saying
8 that there was a good cooperative relationship. And I've got
9 like two documents that relate to it.

10 THE COURT: The objection is overruled. Certainly, the
11 document was discussed a good deal on cross.

12 I recognize the government's objection that the
13 specific topic of compensation was not covered on cross within
14 the context of this document, but given the fact that the -- I'm
15 sorry -- given the fact that the document itself was the subject
16 of a good deal of cross, it seems to me that the defense is
17 entitled to cover other areas of the document that relate to the
18 issue of noncooperation or cooperation.

19 So go ahead, please.

20 BY MR. BERNICK:

21 Q. Does this document, in fact, reflect the industry's bringing
22 to the government's attention what is being observed concerning
23 compensation?

24 A. Absolutely does, and there were only two companies within
25 the UK consortium that had that expertise. That was BATCo and

1 Gallaher.

2 Q. Gallaher?

3 A. Gallaher.

4 Q. We will give you the spelling of that a little bit later.

5 Did the ISC follow up on the issue of compensation with
6 the industry's cooperation?

7 A. Yes, it did.

8 Q. Showing you the fourth report which is already in evidence
9 as JD 000656. Does this contain basically the follow up of what
10 the ISC was finding in the area of compensation?

11 MR. CRANE-HIRSCH: Objection, Your Honor, leading.

12 MR. BERNICK: I'm just trying to get through this, Your
13 Honor. It's a foundational question. I'll be happy to rephrase
14 it.

15 THE COURT: Go ahead. Overruled.

16 A. Yes, it does reflect that. And it's a public document, of
17 course.

18 Q. Was there ultimately something called the Tobacco Products
19 Research Trust?

20 A. Yes, there was.

21 Q. What was the Tobacco Products Research Trust?

22 A. This was a charity that was set up as a consequence of the
23 independent scientific groups deliberations and considerations.
24 It made a series of suggestions. It arrived at a number of
25 particular agreements with the industry with respect to changing

1 tar deliveries.

2 It was also concerned with changing product deliveries
3 generally and their introduction into the market. And they
4 wanted to be able to monitor those changes, and they sought
5 funds and they were provided by the tobacco industry to actually
6 support that whole program of the tobacco research trust.

7 Q. Showing you what's called the Tobacco Products Research
8 Trust, 1982 to 1996, JD 030100. Is this a report that was
9 issued by the trust regarding their activities up through 1996?

10 A. It was a report by Froggatt and Swan that reflected what the
11 trust conducted, yes.

12 Q. In fact, does this report then deal specifically with what
13 is now the result of years of research finding -- on
14 compensation, finding that the sponsored projects and many
15 others in the scientific literature showed that while
16 compensation almost universally occurred, it was never complete,
17 figures of 60 to 70 percent being usual depending upon the
18 methodology. Was that where they came out at that time?

19 A. Absolutely.

20 Q. Sorry?

21 A. The studies led them to that conclusion and it was a similar
22 observation to ourselves.

23 Q. Now, again, you said today that the systems in Britain and
24 the United States are somewhat different. In the United States,
25 is there any control or restriction or ceiling on tar

1 deliveries?

2 A. There is not.

3 Q. What about in Britain?

4 A. There have been a series of changes through the '70s and the
5 '80s now culminating in a tar ceiling under the European tar
6 tobacco directive.

7 Q. As a result of that and that ceiling, that ceiling has been
8 put in place for what explicit purpose as set forth in these
9 reports?

10 MR. CRANE-HIRSCH: Objection, Your Honor, scope. I
11 don't know where we are going.

12 THE COURT: Sustained. Way beyond the scope, and
13 besides which, so far, this portion on the tar ceilings is in
14 the direct. But the objection is sustained.

15 MR. BERNICK: I'll just go on to something else.

16 BY MR. BERNICK:

17 Q. Let me bring it back to the question of cooperation.

18 You've mentioned that the tobacco industry supported
19 the TRPT, the Tobacco Products Research Trust, and I'm showing
20 you a time line, J-DEM 010313, that basically talks about
21 organizations that BATCo has supported. We see that there's the
22 Tobacco Research Council. You've talked about that; correct?

23 A. That's correct.

24 Q. What about the TMSC? I think that's in your direct
25 examination. Was that kind of a predecessor -- I'm sorry. Was

1 that a government basically committee that was set up in the
2 '50s to look at the issue of smoking and health?

3 A. No. It was the UK tobacco manufacturers --

4 Q. Was this funded by BATCo?

5 A. Yes. We were a contributor to the funding with the rest of
6 the industry.

7 Q. Would the same thing apply to the TRC; that is, that BATCo
8 contributed to that?

9 A. Absolutely.

10 Q. I'm going to talk about the last three. I think you've
11 already covered one, the Tobacco Products Research Trust. That
12 was supported by BATCo?

13 A. Yes.

14 Q. What about the Scientific Research Group? What was the
15 Scientific Research Group? And this is covered in your direct,
16 so please be very brief about it.

17 A. This was a group that was put into place within the company.
18 It had the leading experts, biological experts within our
19 company, to look at matters of smoking and health, and we
20 administered a fund, and we continued to administer a fund, and
21 I chaired the group today, to actually fund external research.

22 Q. The external research funded by BATCo, did it begin with the
23 SRG or was there research that was funded by BATCo that predated
24 the SRG?

25 MR. CRANE-HIRSCH: Objection, Your Honor. The

1 questions in the cross-examination about the types of external
2 research funded by BATCo simply went to whether there is a third
3 category of research that BATCo funded with the requirement that
4 BATCo's involvement not be disclosed. We are beyond the scope
5 of the cross-examination.

6 MR. BERNICK: That's the document I want to get to.
7 I'm creating a foundation for the document.

8 THE COURT: All right. Go ahead.

9 MR. CRANE-HIRSCH: We are still beyond the scope, I'm
10 afraid, Your Honor.

11 THE COURT: Well, if this question is only a
12 foundational question to get to your third category, then it may
13 be allowed, so go ahead.

14 MR. CRANE-HIRSCH: Will --

15 THE COURT: Go ahead.

16 BY MR. BERNICK:

17 Q. This document is dated -- this is Exhibit 93205, it appears
18 to be dated 1986. It appears to be dated 1986. The SRG is 1985
19 to the present. I just want to be sure.

20 Was there research that was funded by BATCo, separate
21 independent research funded by BATCo, before the SRG came into
22 existence?

23 A. Absolutely.

24 Q. Now, when BATCo funded independent researchers, both before
25 and during the SRG, was there any restriction placed on what

1 those researchers could publish?

2 A. Absolutely not, and it was a clear understanding that we had
3 an expectation that that work should be published.

4 Q. Was there any restriction whatsoever placed on how their
5 research would be conducted?

6 A. Not at all.

7 Q. Was this research, research that was being proposed for
8 litigation purposes?

9 A. No. The purpose of understanding the issues relating to
10 smoking and health so that we can actually use that information,
11 if appropriate, act on it, and consider it in part of our own
12 product modification programs.

13 Q. So, it's no strings attached, and people can publish what
14 they want, and it's being done for your scientific purposes,
15 BATCo's scientific purposes?

16 A. Absolutely.

17 Q. Now, in the face of that, let's talk about this document,
18 93205. This document actually works with a situation where, as
19 I read it in paragraph 2, BAT was to perform all nicotine and
20 cotinine measurements in connection with this project.

21 From time to time, did BATCo provide technical support
22 for people who were doing research?

23 A. Yes, we did.

24 Q. What was the purpose of providing technical support?

25 A. The purpose is where we had expertise and other research

1 groups didn't, we were not only prepared, but happy to actually
2 provide that expertise to support their studies. Of course, in
3 relation to our own interests in smoking and health and the use
4 of the product.

5 Q. If BATCo -- if BATCo is providing this technical support and
6 in other cases providing funding, and the purpose is not
7 litigation related, why didn't BATCo simply say, Sure,
8 acknowledge the fact that BATCo provided the funding? Before
9 the SRG.

10 MR. CRANE-HIRSCH: Objection, Your Honor. We need some
11 foundation about whether or not this witness has any knowledge
12 on the topic.

13 He states that he's referring to materials based on an
14 understanding. We need some foundation I think about whether or
15 not --

16 THE COURT: I think the foundation has been laid
17 already. Go ahead, please.

18 A. I'm sorry. Would you mind --

19 Q. If this work is being done for scientific purposes, BATCo
20 supplying some of the technical assistance, why does BATCo care
21 whether there's an acknowledgement of BATCo's involvement?

22 A. I have to say I can't understand why there would be any
23 concern whatever. And I'm struggling in my own mind to know
24 what the context of that particular comment was.

25 THE COURT: So was your answer that you don't know?

1 THE WITNESS: I cannot understand why that was
2 requested, Your Honor, that's correct.

3 BY MR. BERNICK:

4 Q. When the SRG was formed, what policy was adopted
5 specifically?

6 MR. CRANE-HIRSCH: Objection, Your Honor, scope. The
7 SRG was introduced as a mechanism to address this issue. But
8 I'm afraid that now that we're up to this document, we have no
9 relation to the SRG. The SRG was external research.

10 The question here was BATCo attaching strings to
11 research that it funded by itself.

12 MR. BERNICK: That's just completely wrong.

13 The whole context for this document, as the witness
14 testified, is research being done by others that is funded by
15 BATCo. And we have now got the witness acknowledging that the
16 policy up to a certain point in time was that BATCo asked there
17 not be an acknowledgement. And I just want to figure out and
18 have the witness testify to the time limits of that policy and
19 whether it changed.

20 THE COURT: I don't understand the objection.

21 MR. CRANE-HIRSCH: The objection is that the witness
22 has testified that this requirement about not disclosing BATCo's
23 involvement to the public on any published literature was, he
24 testified on cross-examination, restricted to research funded
25 solely by BATCo, and now counsel is seeking to expand and

1 explore other areas and asking whether or not -- asking the
2 witness to, I gather, simply repeat that this restriction on
3 disclosure is not applied to external research funded through
4 the SRG.

5 There weren't questions on the direct about the extent
6 to which this policy applied to research funded by the SRG--

7 THE COURT: Excuse me. Limit your question to research
8 funded by BATCo.

9 BY MR. BERNICK:

10 Q. Research funded by BATCo. Was there a policy adopted at a
11 certain point in time regarding the acknowledgement of funding
12 in the case of research funded by BATCo?

13 A. Certainly under the terms of the SRG, which has been in
14 existence for 20 years -- I think it's about 15 or 16 of them
15 I've been a participating member and currently the chairman of
16 that particular group -- we had a clear policy.

17 We left it to the individuals to decide whether they
18 wanted to give attribution or not to the fact that we provided
19 the funds for the smoking and health research which the SRG was
20 covering.

21 THE COURT: Does it have a separate policy, though,
22 apart from the SRG's policy, of leaving it to the individual
23 scientists, did BATCo have a policy that it imposed on any funds
24 that it gave to researchers?

25 THE WITNESS: I had no personal experience of that,

1 Your Honor, throughout the time I was a practicing scientist
2 until I left in '85. When I came back as the manager in the
3 beginning of '92, I was responsible for sort of signing off any
4 research projects, and I am not aware of us imposing any
5 constraints whatever on the recipients of those funds.

6 BY MR. BERNICK:

7 Q. Let me take a step back. You were asked questions about
8 cooperation. How far back does BATCo's cooperation with the
9 health authorities go as concerns smoking and health? How many
10 years back?

11 A. Of course, it goes right back to the early '50s.

12 Q. Over time you've identified a whole series of areas and
13 respects in which BATCo was supporting research. The TRC, the
14 TPRT, the SRG as well as doing its own research.

15 A. Yes.

16 Q. In terms of its profile in the scientific community as you
17 experienced it while you were at BATCo, was there any secret
18 about the fact that BATCo was sponsoring a great deal of smoking
19 and health research?

20 A. Within the UK? Absolutely not.

21 Q. In fact, was the fact that BATCo was sponsoring this
22 research, was it or was it not something that BATCo publicly
23 took credit for?

24 A. Absolutely, and took pride in it, too.

25 Q. Did it obtain praise from scientific committees from time to

1 time for the fact of providing that level of support?

2 A. Yes. I believe that certainly the Royal College of
3 Physicians acknowledged that fact.

4 Q. Finally I want to talk about the TAC --

5 MR. BERNICK: And then, Your Honor, I'll have two short
6 subjects and I hope I'll be done. I'm going to be a little bit
7 over but not much.

8 Q. The TAC, you were asked about this document here, which is
9 Exhibit 93210, and it said to be draft. Do you know whether
10 this document was ever issued in final form?

11 A. May I look at the document?

12 I have no knowledge of it being produced as a final
13 document.

14 Q. Now, counsel showed you this document. This deals with this
15 dispute between BAT and Philip Morris over their -- Philip
16 Morris's aggressive competition in Holland, and it was asked of
17 you whether -- I think counsel for the government said --
18 whether the cooperation manifested in this document among the
19 companies, in fact, deprived the government of information on
20 smoking and health.

21 Do you recall a question put to you in somewhat like
22 those terms, substantially those terms?

23 A. Yes, I do.

24 Q. Now, in point of fact, the statement that's made by BATCo in
25 the context of this document is that they have no choice as a

1 result of what Philip Morris has done but to withdraw from all
2 cooperation from INFOTAB and to withdraw from all cooperation
3 with the NMAs on matters pertaining to smoking and health. That
4 was what basically BAT was saying in that context; correct?

5 A. That is correct.

6 Q. Is it true that an exception was made, an exception was made
7 for activities that are government related?

8 Was there anything about this document that said that
9 BAT was going to withdraw from its cooperation with the
10 government committees?

11 A. Absolutely not, and I think the record speaks for itself.

12 Q. Let's turn to the role of lawyers, and I want to go through
13 this slide.

14 You remember you were asked about your questions about
15 whether the lawyers dictated the slide that was put together by
16 Dr. Blackman.

17 A. Yes.

18 Q. You were shown three memos. One from Mr. Wells dated
19 October 21, 1981, and that's Exhibit 21006. Another follow-up
20 memo was October 27, 1981, and that was 21007.

21 And I think that the essence of these documents was to
22 demonstrate that Mr. Wells's suggestions or his ideas as set
23 forth in the first memo, in fact led him to reframe what was
24 going to be said in the slide by Dr. Blackman to INFOTAB.

25 And then using Exhibit 37176, which was the letter from

1 Dr. Blackman, and the slide that was attached, basically the
2 government sought to demonstrate through these documents and
3 your testimony that Mr. Wells didn't like what Dr. Blackman had
4 written; that he dictated a replacement or a substitution, and
5 that Dr. Blackman went with Mr. Wells's substitution and
6 actually presented it.

7 Do you recall that sequence?

8 A. I do indeed, yes.

9 Q. Now, I want to go back over the sequence and supply a
10 missing document.

11 Do you see that the letter that was written by
12 Dr. Blackman to Mr. Holtzman at Philip Morris International
13 says -- Dr. Blackman says, "Dear Mr. Holtzman: At the INFOTAB
14 meeting in Baden Baden, I left with you copies of slides
15 relating to the new Stance that we are developing."

16 Is new Stance a reference to a BATCo position?

17 A. Yes. Yes, that's correct.

18 Q. "One of the slides has now been modified in the light of
19 further discussion with B&W and BATCo lawyers, and I forward to
20 you the revised version."

21 Do you see that?

22 A. I do indeed.

23 Q. Now, if we look down at the production number, it's
24 2024954637. The slide that was marked as 37177 is 2024954638.
25 So they are sequentially Bates stamped, even those they are

1 separately marked as exhibits. Do you see that?

2 A. I do.

3 Q. But the letter refers to something else. The letter says,
4 there's also a copy of the original.

5 Did the government ever show you the original of that
6 slide that was included as an attachment to the letter that they
7 showed you on cross-examination?

8 A. That seems to be the case, yes.

9 Q. But did they ever show that to you?

10 A. No, they didn't. No.

11 Q. 37, 38, 639. Do we see here the second attachment to the
12 letter which is the original version of the slide crossed out to
13 indicate that it's not being used as compared to the substituted
14 version of the slide that the government has marked as 37177?

15 A. It seems to be the case, yes.

16 Q. Now, I'd like to go through the original. This is written
17 by Dr. Blackman, apparently; correct?

18 A. That's my understanding.

19 Q. He says, "Basic approach." And I just want to try to
20 capture quickly the facts that are recited 1, 2, 3, and 4 --

21 THE COURT: And then we're going to take a recess.

22 MR. BERNICK: Okay.

23 THE COURT: Go ahead.

24 BY MR. BERNICK:

25 Q. The first one is that, basically, there's going to continue

1 to be -- going to continue to be smoking around the world.

2 A. Yes, indeed.

3 Q. Okay. That was the original.

4 The revised paragraph talks about the fact that despite
5 various antismoking movements, a substantial portion of adults
6 worldwide will continue to smoke.

7 Is there any substantive scientific difference between
8 those two entries?

9 A. Not for me there isn't.

10 Q. The original says, there's a body of medical opinion that
11 believes low delivery products have a much lower statistical
12 association with ill health. That is low delivery, associated
13 with lower ill health.

14 The revised document says, irrespective of this,
15 there's an emerging body of medical opinion that believes that
16 cigarettes of low tar content give rise to a lower incidence of
17 certain diseases.

18 Any substantive scientific difference?

19 A. Certainly not. Certain diseases feel like ill health to me.

20 Q. Now, here we've got one. The one that Mr. Wells decided
21 that he liked better says, "With regard to the smoking and
22 health issue itself, the causation issue, it says, the question
23 of cause must, therefore, be considered a controversy."

24 Do you see that?

25 A. Yes, I do.

1 Q. There's been a lot of testimony about how that was the
2 position of the U.S. lawyers, it was the position of the U.S.
3 companies that, as concerns causation, even in the early 1980s
4 there was a controversy.

5 If we take a look at the original, it says, "While
6 cause and effect has not been proven -- and is certainly not
7 implied by BAT -- it would be against the interest of the
8 consumer to ignore the medical opinion."

9 Is there any scientific difference when it came to the
10 expressed views of Dr. Blackman and the reframed language of
11 Dr. -- of Mr. Wells -- Freudian slip -- Mr. Wells, was there any
12 scientific difference expressed in those two paragraphs?
13 A. If there is, I can't see it.

14 MR. CRANE-HIRSCH: Your Honor, I'm going to need to
15 object here.

16 We are asking a fact witness questions about matters of
17 scientific substance and scientific difference.

18 And then, also, I know that counsel is hunting for it,
19 but I'm afraid we don't yet have a copy of the new exhibit that
20 Mr. Bernick has shown the witness.

21 MR. BERNICK: Well, I don't think that's really --

22 MR. CRANE-HIRSCH: But it would be helpful --

23 MR. BERNICK: I don't think that's an accurate
24 representation. The government had it. It was part of the
25 original document, and it's now been separated by them. So we

1 are happy to give them another one, but to say that somehow they
2 don't have a copy of this document I think is factually wrong.
3 I'll reput the question to the witness.

4 MR. CRANE-HIRSCH: With respect. The exhibit here is
5 being used as part of redirect. And I'm afraid that -- is there
6 a copy yet? I'm sorry. Okay.

7 MR. BERNICK: We will get you a copy on the break. I
8 think -- I'm just asking on the basis of what's up here.

9 THE COURT: There will be a break and you will get a
10 copy of it. I'm more concerned with the substantive objection
11 you raised.

12 I'm going to overrule it for this reason. Yes, this is
13 a fact witness, and it is certainly true that this is not an
14 expert opinion that he is giving.

15 Certainly, it is an opinion that falls within his base
16 of knowledge as a scientist. It is not an expert opinion.
17 Obviously, it's not an expert opinion for which Rule 26 reports
18 had to be given. But, again, as I've indicated, given who he is
19 and given his educational background, he may provide that
20 opinion. It is essentially a lay opinion under Rule 702 of an
21 individual of his education and experience.

22 Go ahead, please.

23 MR. BERNICK: Maybe in the interest of incorporating
24 that, but then framing I think a very simple question.

25 BY MR. BERNICK:

1 Q. Do you recall that counsel for the government pointed to
2 your testimony where you said that the lawyers -- you had no
3 knowledge of lawyer control, and on the basis of this document
4 and others suggested to you that that answer was wrong. Do you
5 remember that?

6 A. Yes, I do.

7 Q. Does this document -- this exchange of documents between
8 Dr. Blackman and Dr. Wells -- in any way, shape or form reflect
9 that Mr. Wells was controlling Dr. Blackman's scientific
10 substantive views as shared with the people that he was working
11 with?

12 A. I can see absolutely no evidence of that and, as I said
13 earlier, Dr. Blackman most would have sought legal advice.

14 MR. BERNICK: Now is a good time for a break, and I
15 apologize for going over. I have very little left, Your Honor.

16 THE COURT: All right. We will take 15 minutes,
17 everybody.

18 (Recess began at 3:13 p.m.)

19 (Recess ended at 3:30 p.m.)

20 MR. CRANE-HIRSCH: Your Honor, just for the record, our
21 preliminary research over the break, we were unable to confirm
22 whether or not the page that Mr. Bernick was using right before
23 the break actually has been produced to us. We will be checking
24 on that, but I wanted to just state that for the record, and we
25 will discuss it after the witness is done testifying.

1 THE COURT: All right. Go ahead.

2 BY MR. BERNICK:

3 Q. Mr. Read, Dr. Blackman's views as expressed in the third
4 paragraph of, what I guess --

5 MR. BERNICK: I guess really for the record, Your
6 Honor, we ought to provide an exhibit number for this third
7 page.

8 THE COURT: This was attached to another exhibit
9 according --

10 MR. BERNICK: There was a letter of two attachments.
11 They are sequentially Bates stamped. The document, the first
12 document, there's a letter and it recites these two attachments.
13 So we believe that they were all one document, produced as one
14 document, and they are certainly in the Bates range and itself
15 consistent.

16 The government separately marked the letter, separately
17 marked one of the attachments, didn't mark this one. So it's
18 not really part of an existing exhibit. And I think that, for
19 sake of clarity, what we ought to do is read into the record its
20 Bates stamp number, which is unique number, 2024954639, and then
21 we will provide an exhibit number for it, and the government
22 then can confirm that it's the exhibit number attached -- oh, we
23 just did. It's JD -- it is JD 013255.

24 THE COURT: Women do keep the world organized. Trains
25 running, keep the meals coming, a few other things like that.

1 Go ahead.

2 MR. BERNICK: Every once in a while, also keep me
3 honest I might add, Your Honor.

4 BY MR. BERNICK:

5 Q. Dr. Blackman's views regarding the fact that cause and
6 effect has not been proven, do you know whether the basic
7 approach to government and medical authorities' slide ever was
8 used publicly by BATCo? Do you know one way or another?

9 A. I don't know.

10 Q. Do you know whether Dr. Blackman was, in fact, involved in
11 the authorship of public statements that were issued by BATCo?

12 A. That's my understanding, yes.

13 Q. Are you familiar with the -- what was called the
14 parliamentary brief?

15 A. Yes, that does strike a chord.

16 Q. I want to show you JD 013197, which is kind of a clumsy copy
17 because it copied as the first page probably what's on the
18 inside of the cover. But do you recognize this as being the
19 parliamentary brief?

20 THE COURT: Let's wait until the government gets a
21 copy. They are look baffled.

22 A. Yes, I believe it is.

23 Q. And was Dr. Blackman --

24 THE COURT: Let me interrupt for a moment.

25 Do we have our next witness sitting in the courtroom?

1 MR. BERNICK: He's an expert witness.

2 THE COURT: That's true, he is. I thought I saw a new
3 face. Usually late in the afternoon, they don't appear.

4 Go ahead.

5 BY MR. BERNICK:

6 Q. Is that a copy of the parliamentary brief?

7 MR. CRANE-HIRSCH: Pardon me, Your Honor, as an
8 objection here. I'm afraid that I don't understand how this is
9 related to the scope of the cross-examination.

10 The scope of the cross-examination went to the slide
11 that Mr. Wells was critiquing and revising for Dr. Blackman that
12 was addressing --

13 THE COURT: Let me hear how it's relevant.

14 MR. BERNICK: Because the theme -- the whole thrust of
15 the cross-examination was that the witness was wrong in saying
16 that the lawyers didn't control the science. Mr. Wells, in
17 particular, was singled out. Dr. Blackman, in particular, was
18 singled out.

19 This document itself was not public, but I want to
20 bring out that Dr. Blackman was not precluded from issuing
21 public statements regarding his views, and in that respect he
22 was not controlled by the lawyers.

23 The government can't pick and choose what particular
24 document they are going to use to illustrate a contention on
25 cross.

1 THE COURT: You may establish it for the record.

2 BY MR. BERNICK:

3 Q. Do you believe this to be the parliamentary brief?

4 A. Yes.

5 Q. Was Dr. Blackman really the principal author of the
6 parliamentary brief?

7 A. Yes, he was.

8 Q. Was the parliamentary brief made available as the moniker
9 would indicate to members of Parliament?

10 A. That's right.

11 Q. Are you aware of any situation in which Dr. Blackman's views
12 regarding causation were censured or suppressed by any lawyer?

13 A. I have no knowledge or evidence.

14 MR. CRANE-HIRSCH: Objection, Your Honor, foundation.

15 There's been no way -- nothing established that this
16 witness will be aware of Dr. Blackman's publications or other
17 statements being influenced by attorneys.

18 MR. BERNICK: Let me establish some foundation.

19 BY MR. BERNICK:

20 Q. Were you there when Dr. Blackman was there?

21 A. Yes, I was.

22 Q. When did Dr. Blackman leave the company?

23 A. I think it was '84, early '85.

24 Q. Have you reviewed documents during Dr. Blackman's tenure in
25 connection with your own work at the company?

1 A. Absolutely.

2 Q. Based upon your contacts with Dr. Blackman and based upon
3 the documents that you have reviewed from BATCo in connection
4 with your work there, did you see any evidence that Dr. Blackman
5 was prevented from or censured with regard to the expressions of
6 his views on smoking and health?

7 A. No, I didn't.

8 THE COURT: To your knowledge, were Dr. Blackman's
9 views on smoking and health either different from or
10 inconsistent with the views that BATCo had expressed?

11 THE WITNESS: I don't believe they were inconsistent at
12 all from BATCo's point of view.

13 THE COURT: So it's a nonissue.

14 Go ahead, please.

15 BY MR. BERNICK:

16 Q. Let's take a look at the last group of documents, and this
17 will be very fast.

18 First you were shown, going back to the 1980s, a series
19 of documents -- they are 26344, 34583, and 20002 -- all relating
20 to this business beginning in January 1985 of routing documents
21 destined for Brown & Williamson through this lawyer Robert
22 Maddox. Do you recall those questions?

23 A. Yes, I do.

24 Q. I believe in your direct examination you indicated that this
25 routing procedure was not a permanent procedure.

1 A. That's correct.

2 Q. I want to show you JD 011691, and, in order to move things
3 along, JD 013189. Let's begin with the first one, JD 011691
4 which counsel does have.

5 Do you see that that's dated April 19, 1985, which
6 would be approximately four months after this, the documents
7 that you were shown by the government? Do you see that?

8 A. Yes, I do.

9 Q. It says, it's from Earl Kohnhorst to Paul Ganoway at BAT
10 Limited. Do you see that?

11 A. Yes, I do.

12 Q. Do you see where it says, number one from Mr. Kohnhorst.
13 He's Brown & Williamson; right?

14 A. Absolutely.

15 Q. We currently send research reports to the research centers
16 as follows.

17 And then number two, reports from all research centers
18 should be sent to EE Kohnhorst, two copies. Note: Reports will
19 be reviewed internally upon receipt to identify any sensitive
20 issues. And it's signed by Mr. Kohnhorst.

21 Does that indicate that in April Mr. Kohnhorst began to
22 get the documents?

23 A. It certainly does to me.

24 Q. Showing you JD 013189 --

25 MR. CRANE-HIRSCH: Pardon me, Your Honor, as foundation

1 on the previous document, was it brought out that this document
2 was sent from Mr. Kohnhorst and was referring apparently to
3 information that was coming out from Brown & Williamson? Was
4 that foundation laid?

5 MR. BERNICK: That's just counsel's interpretation of
6 the document. I don't think that that is, A, correct, and B,
7 it's not the witness's interpretation. In any event, we've got
8 another document here that will, I think, bring clarity to what
9 was going on.

10 BY MR. BERNICK:

11 Q. Do you see JD 01389?

12 A. Yes, I do.

13 Q. And is this a memo from Mr. Thornton? What was
14 Mr. Thornton's position -- Dr. Thornton's position at the time,
15 November 1985?

16 A. Ray was a senior scientist within the R&D community at the
17 time.

18 Q. And he's writing to Dr. Binns and others, we've seen some
19 notes from Dr. Binns. It says, "Circulation of reports. Please
20 note in the future copies of reports circulated to the USA
21 should be addressed to Mr. E.E. Kohnhorst and this should be
22 included on the circulation list."

23 Is that clear or is it not, Mr. Read, with regard to
24 when the routing arrangement ended?

25 MR. CRANE-HIRSCH: Objection, Your Honor. Asking the

1 witness whether something is clear or not clear is not an
2 appropriate matter to have him interpret the document.

3 In the meantime we might perhaps have some foundation
4 laid. The witness specifically testified on cross-examination
5 that he had never seen a memo rescinding the Maddox routing
6 procedure, and since he specifically testified he had never seen
7 a memo doing that, counsel, I think, should lay the foundation
8 about whether or not this is the first time that this witness
9 has seen this document.

10 MR. BERNICK: I think that will be clear from the fact
11 that he testified before that he hadn't seen it.

12 BY MR. BERNICK:

13 Q. But is this the first time that you've seen this document?

14 A. Yes, it is.

15 Q. Does that now provide document -- let me first ask you.

16 Is this the type of intercompany memo that was issued
17 from time to time in the ordinary course of BATCo's business?

18 A. Absolutely.

19 Q. And would this be a matter within Dr. Thornton's authority?

20 A. Yes, it would.

21 Q. And would the recipients be the appropriate recipients?

22 A. Absolutely.

23 THE COURT: And what was Dr. Thornton's position again?

24 THE WITNESS: Dr. Thornton was a senior research
25 scientist, and he had some administrative responsibility for the

1 reviewing and issuing of documents.

2 BY MR. BERNICK:

3 Q. Does it deal with precisely the same subject matter that
4 counsel for the government was asking you about; that is, the
5 dissemination of reports to the U.S.?

6 A. It's absolutely clear to me that that is the case, yes.

7 Q. You were asked about Exhibit 47616, which is approximately
8 10 years later, where there's reference made to the fact that
9 B&W have instructed group members not to undertake written
10 communication with them until further notice. Alternative
11 communication vehicles are being considered.

12 How long did this arrangement remain in place, to your
13 knowledge?

14 A. To my knowledge, I think less than a year, but I think
15 slightly longer than six months.

16 Q. Finally, Mr. Read, you were asked about Exhibit 93197, which
17 is this listing that Lovells provided regarding R&D reports and
18 other documents. Do you recall that?

19 A. Yes, I do.

20 Q. Do you know exactly how Lovells went about determining what
21 they felt was in the, quote, public domain, close quote?

22 A. My understanding is that they would have known which
23 documents had been called for under various legal actions and
24 which documents had been actually recovered from the Guilford
25 Depository.

1 Q. Incidentally, the Guilford Depository, is that a depository
2 that comprises a large number of these R&D reports?

3 MR. CRANE-HIRSCH: Objection, Your Honor, leading and
4 outside the scope of cross-examination.

5 MR. BERNICK: It's foundational.

6 MR. CRANE-HIRSCH: It's incidental, Your Honor.

7 THE COURT: The objection is overruled. Go ahead.

8 A. Absolutely, yes.

9 Q. Is Guilford Depository open to the public? That is, can
10 people from the public come in and review documents in the
11 Guilford Depository?

12 A. Absolutely, they can.

13 Q. With respect to the production of R&D reports in litigation,
14 to your knowledge, have the R&D reports been produced in
15 discovery -- made available in discovery -- I should say, made
16 available in discovery in connection with U.S. litigation?

17 MR. CRANE-HIRSCH: Objection, Your Honor, foundation.
18 There's been no showing that this witness has --

19 THE COURT: Sustained.

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

21 THE COURT: All right. Thank you. You may step down
22 at this time.

23 Before we start with the next witness, I want to
24 address a couple of things.

25 Counsel can reorganize all of their documents. I'm

1 going to be calling the next witness in a minute.

2 MR. CRANE-HIRSCH: I beg your pardon, Your Honor. I
3 had understood that we were going to be discussing the
4 evidentiary issues and the cases that you had suggested that we
5 look up over lunch.

6 THE COURT: We will in a couple of minutes. I just
7 want to go over some things.

8 MR. CRANE-HIRSCH: Yes, Your Honor.

9 THE COURT: All right, counsel, there are always
10 logistic difficulties, and I think for some reason as we head
11 into March and April they get more complicated. I always regret
12 them when they are on my side.

13 First of all, I gather I was getting perhaps a truly
14 meritorious motion for reconsideration regarding next Monday.
15 Is that right? Was I hearing that?

16 MR. BERNICK: Yes, a motion for reconsideration
17 regarding next Monday.

18 THE COURT: All heads are shaking on the right-hand
19 side because that's the out of DC side.

20 All right, Monday will be for all of you a recess day.

21 Now, tomorrow, I know the people from DC -- I mean, the
22 people who are not from DC are probably totally unaware of this,
23 but one of the real giants of our profession, and one of my
24 personal heroes, John Pickering, died in the last few days.
25 Much could be said about him, and I'm not going to take

1 everybody's time to do that.

2 He was a man of enormous integrity and dedication to
3 the fundamental principles of our profession, which seems to get
4 more commercialized every day. He was totally devoted to public
5 interest work, to pro bono work.

6 He had done a great deal in the civil rights area. He
7 was very active in the ABA. I don't think I've ever seen his
8 CV, so I can't begin to tell you all of his accomplishments.

9 He was also a very warm and mentoring bear of a man who
10 was very good to women lawyers in this town, when once upon a
11 time I was a young woman lawyer, and to minority lawyers, and
12 was just a very special figure.

13 His funeral is tomorrow at the National Cathedral. I
14 thought about it a lot, and I've decided that some things are
15 just important, and I'm going to go to it, and that will be a
16 long lunch. The funeral is at 1:00 o'clock.

17 We will certainly have a full morning until
18 approximately 12:20 or 12:25. The afternoon will definitely be
19 constricted. There are a couple of options I'm willing to offer
20 everybody.

21 Knowing that at a minimum what we must accomplish
22 before we close business tomorrow are a discussion of the legal
23 issues, which Mr. Crane-Hirsch was going to start with and we
24 will come to this afternoon. That's number one.

25 And number two, tomorrow a discussion, if necessary, of

1 the issues that the defendants raised regarding the government's
2 submissions on remedies.

3 Mr. Bernick, I thought you raised that this morning.

4 MS. EUBANKS: Your Honor, we haven't had a discussion
5 at all with --

6 THE COURT: I thought you were going to do that
7 tonight, though.

8 MS. EUBANKS: Well, there's tonight, and then being
9 prepared to answer tomorrow in court about it is something that
10 concerns me, not even knowing what it is nature of the alleged
11 problems are.

12 I mean, we served the reports in a timely fashion
13 yesterday. It was raised today, and earlier today you had said
14 that we would talk about this on Thursday.

15 THE COURT: That's what I just said, Thursday. I think
16 you misunderstood me.

17 MS. EUBANKS: I did, Your Honor.

18 MR. BERNICK: We thought it was tomorrow.

19 THE COURT: I said we have to get to it tomorrow. My
20 understanding was you would all be conferring this evening.

21 MR. BRODY: I hope we are able to confer this evening.
22 We don't even know what the issue is at this point, Your Honor,
23 and so I highly doubt we would be ready to address that with the
24 court tomorrow, perhaps Thursday depending on what the issue is.
25 But at this point in time --

1 THE COURT: Wait a minute. Am I on the wrong day?
2 Sometimes I lose track of days.

3 MR. BERNICK: I think that today, Tuesday afternoon --

4 THE COURT: You're right. You're right, everybody. I
5 was so concerned about tomorrow and losing time.

6 So that certainly by Thursday we will be able to
7 confer.

8 Now, in terms of tomorrow and the schedule of our
9 witness tomorrow -- let me just look at something -- and knowing
10 that he is from out of town, I think that we won't have any
11 trouble finishing his testimony, given the estimates you've
12 given me by Wednesday/Thursday. I think that's right.

13 MS. EUBANKS: I will say, Your Honor, that there are
14 some important preliminary matters that we will need to raise
15 with respect to the witness, probably would take 10 minutes or
16 so, and it's important to raise those before the witness begins
17 his testimony.

18 THE COURT: We can do that. I certainly read your
19 objections. There was only one, and I'm prepared to rule on
20 that.

21 MS. EUBANKS: There's something that has happened since
22 those objections were filed.

23 THE COURT: Does the witness need to wait outside when
24 we get to that?

25 MS. EUBANKS: When Mr. Goldfarb addresses that, that

1 would be appropriate, Your Honor.

2 THE COURT: Let's actually do that first. Is there a
3 problem with that?

4 MR. BERNICK: No, not a problem at all.

5 I would ask only that if we could -- it seems to me
6 that if we got a witness here, we ought to get the issues that
7 pertain to him resolved, ought to do his testimony.

8 We can then have argument after his testimony
9 concerning the matters that have been put before the court. We
10 will be happy to do it now, but it seems to me if we got him
11 here we may as well do the --

12 THE COURT: Let me ask. Are these legal objections
13 that should have been made as objections or has something new
14 come up that I don't know about? Obviously, I don't know about
15 it.

16 MR. GOLDFARB: I would say that they are related to the
17 objections, but the defendants filed under the guise of errata
18 on Friday afternoon. The defendants gave additional
19 demonstratives for this witness on a -- for a -- on a subject
20 matter which the United States believes was not adequately
21 disclosed in -- as part of this expert witness's reliance
22 materials previously in the case, and so that's the central
23 issue, Your Honor.

24 MR. BERNICK: I think that that's fairly easy to
25 resolve. The witness is going to be testifying about the Rose

1 study. The Rose study is an article that he reviewed. He was
2 asked specifically about it in connection with his deposition.

3 We supplied four additional demonstratives. All they
4 are, are kind of graphics, bar chart graphics, that directly
5 replicate the bar chart graphics in the article itself. We have
6 simply taken them out of the article, put them on the system in
7 color. They are the same. They should be exactly the same.
8 But it simply makes it a little bit easier to look and have on
9 the system. That's all that's happened.

10 The Rose article was not only disclosed, it was
11 specifically the subject of examination. He's testified about
12 it for years. I asked him questions about the Rose study
13 four years ago in the Ohio ironworkers' case, even in Minnesota
14 in '98. In any event, that is old, old news. So there's no --
15 no basis that the government has for excluding the Rose study.

16 MR. GOLDFARB: Your Honor, as you may have seen from
17 our papers, the Rose study was disclosed as an abstract within a
18 compilation of materials that was disclosed.

19 THE COURT: That's covered in your objection, isn't it?

20 MR. GOLDFARB: Yes.

21 THE COURT: The objection is overruled.

22 The defendants are correct that the issue has come up
23 with government witnesses. Actually, with the particular
24 government witness, the reliance material was, if anything, far
25 more obscure, as my recollection is, that it was contained in

1 somebody's CV, and the government had adequate notice of this.

2 MR. GOLDFARB: Your Honor, if I may just briefly.
3 There is a quantitative difference between the issue I think
4 what you're referring to with Dr. Weinstein --

5 THE COURT: I am.

6 MR. GOLDFARB: There were 600 -- about 650 references
7 in the compilation that defendants claimed this document was
8 disclosed in, and it doesn't seem to me that is a fair
9 disclosure for the defendants to say someone has compiled a
10 historical review of 650 and, therefore, we are on notice that
11 he's relying on everyone of those 650 references, such that when
12 his direct testimony comes in they can present -- they can
13 present demonstratives from an article that they did not produce
14 to us. It was only referenced in an abstract.

15 MR. BERNICK: Your Honor, this is -- not only did it
16 happen with respect to Dr. Weinstein, as you indicated, but in
17 all of their experts at the beginning of the case, particularly
18 Dr. Brandt and Dr. Harris, we were presented with literally
19 boxes of historical materials that they went through and they
20 so-called relied upon it.

21 What this witness had was an actual review document
22 that analyzed those different articles, talked about the
23 significance of them. The review was done in 1997. It's been
24 in his litigation ever since then.

25 THE COURT: Mr. Bernick, the objection is overruled.

1 How long is your demonstrative of him going to be?

2 MR. BERNICK: I think it will be a half-hour.

3 THE COURT: I may then, if it is only a half an hour,
4 which I hope it is, I do -- I emphasize -- want to hear argument
5 from counsel today, since I will be doing further reading
6 tonight on the issue of the inter-relationship between, as we
7 all know, 602, 701, 702, 703, about which some day I'll write a
8 Law Review article; not in the near future, however.

9 MR. GOLDFARB: Going to Your Honor's earlier point.
10 With the estimates, I can't imagine why Dr. Rowell would extend
11 beyond Thursday with the estimates that we have.

12 MR. BERNICK: I hope we get done with Dr. Appleton as
13 well.

14 MR. GOLDFARB: Your Honor raised a question --

15 THE COURT: This witness is from out of town, so I was
16 particularly concerned about him.

17 The next witness is employed, as I understand it, by
18 one of the defendants and I have to be less concerned on that
19 score. So, let's bring this witness in right now, please.

20 MS. EUBANKS: Your Honor, I just was wondering whether
21 you wanted to discuss those issues after the presentation of the
22 witness, the 701.

23 THE COURT: Yes. Let's have the witness get his
24 half-hour on and then he can go, and Mr. Crane-Hirsch can listen
25 to everybody else for a half an hour.

1 THE DEPUTY CLERK: Please remain standing and raise
2 your right hand.

3 PETER P. ROWELL, Ph.D., Defendant's witness, SWORN

4 THE DEPUTY CLERK: You may be seated.

5 DIRECT EXAMINATION

6 BY MR. BERNICK:

7 Q. Good afternoon, Dr. Rowell, if you will tell us whether you
8 have before you the written direct examination of your testimony
9 pursuant to Order 471 that's been filed with the court?

10 A. Yes, I do.

11 Q. Do you also have the errata sheet which was filed making
12 certain corrections to that testimony?

13 A. I don't see it.

14 Ah. Yes, I do.

15 Q. Do you adopt as your testimony in this case the written
16 examination filed as amended by the corrections made in the
17 errata sheet?

18 A. Yes.

19 MR. BERNICK: Your Honor, we would move that into
20 evidence.

21 THE COURT: That may be admitted into evidence.

22 MR. BERNICK: We would proffer Dr. Rowell as an expert
23 in nicotine pharmacology and the history of research into
24 nicotine pharmacology, including the connection of nicotine
25 pharmacology to smoking behavior.

1 MR. GOLDFARB: Your Honor, our only request is that it
2 be deferred, at least with respect to the last as to
3 Dr. Rowell's qualifications.

4 THE COURT: Are you raising a question at this time or
5 do you want me to defer ruling?

6 MR. GOLDFARB: I'm sorry. To defer ruling, yes.

7 THE COURT: All right.

8 BY MR. BERNICK:

9 Q. Dr. Rowell, I want to show you, in order to get your
10 examination going here, a section from the Surgeon General's
11 Report of 1988 from your direct examination. I think you
12 discussed the Surgeon General's Report of 1988, which is U.S.
13 64591.

14 A. Right.

15 Q. And I want to direct your attention specifically to the
16 third major conclusion expressed by the Surgeon General in 1988,
17 which appears at page 9, and it reads, quote, the pharmacologic
18 and behavioral processes that determine tobacco addiction are
19 similar to those that determine addiction to drugs such as
20 heroin and cocaine.

21 Do you see that?

22 A. Yes, I do.

23 Q. Do you agree or disagree with what the Surgeon General said
24 about similarities existing between the pharmacologic and
25 behavioral properties that determine tobacco addiction and those

1 that determine addiction to drugs such as heroin and cocaine?

2 A. I agree there are similarities.

3 Q. Have you prepared an animation that -- well, before we get
4 to that, let me ask you a further question.

5 When you say that there are these similarities, what is
6 the basis for your saying that there are similarities from a
7 pharmacological point of view? What are you focusing on?

8 A. The dependence properties of nicotine and more dramatically
9 cigarette smoking in regards to physical dependence, withdrawal
10 symptoms, effects of neurochemistry in the brain on
11 neurotransmitters, self-administration studies. Many of these
12 things were done in the '80s just before the Surgeon General's
13 report. So these were the similarities that led the Surgeon
14 General to indicate that there were, in fact, these similarities
15 between cigarette smoking and these other drugs.

16 Q. As a pharmacologist, do you function on the physiology of
17 pharmacological response?

18 A. Yes.

19 Q. And when it comes to the physiology, is there a common part
20 of the nervous system -- a common part of the nervous system
21 that is stimulated and affected by nicotine and by hard drugs?

22 A. Yes. And by certain, behavioral dependencies. There's one
23 area of the brain that seems all these dependencies produce
24 effects in.

25 Q. What is that area of brain?

1 A. That brain is called the nucleus accumbens.

2 Q. What part of the head is that at?

3 A. That's in the lower brain center, kind in the back of the
4 brain, underneath the cortex in what's called the limbic area.

5 Q. Do you have an animation which will help the court
6 understand your testimony concerning the physiology of the brain
7 in that location and the similarities of these different
8 stimulants?

9 A. Yes. I think it would be helpful to go through the
10 demonstrative here and talk a little bit about neurotransmitters
11 and how these drugs work.

12 Q. Is the demonstrative divided into parts kind of step wise?

13 A. Yes.

14 MR. BERNICK: Your Honor, what we're going to do is
15 just go through each part and I'll ask a question.

16 Q. I'm showing you then the first part of J-DEM 010318, which
17 is the animation. I think the first part is pretty basic
18 material.

19 So I'm sure Your Honor is familiar with it, but let's
20 begin there.

21 Can you see it? It's not -- there we go. Now, what is
22 this animation -- if you could play that, Paul, please? What is
23 this animation now showing?

24 A. That's really just going to focus in on the brain and we're
25 going to come in and see that the brain is really composed -- if

1 I could use the laser pointer here -- a complex series of nerve
2 cells that are all connected together, about a hundred million
3 or so nerve cells of all wired together.

4 And then what's going to happen is these nerve cells
5 communicate, and so we're going to see an electrical signal come
6 down this nerve cell, excite the downstream neuron which is then
7 going to send a signal to the next --

8 THE COURT: Dr. Rowell, you have to talk more slowly,
9 please.

10 THE WITNESS: Sorry.

11 A. So if we could maybe run this one more time.

12 An electrical signal is going to come down this part of
13 the nerve -- it's actually call an axon -- down to the nerve
14 terminal, or nerve ending, of this nerve and excite the
15 downstream nerve, which will then send another signal, and on
16 through the line. And depending upon how the nerves are
17 connected, that gives rise to emotions, activities, things like
18 that in our brain.

19 And so now we are going to focus in on the connection
20 between the, I would call it upstream neuron and the downstream
21 neuron.

22 Q. Stop, stop, stop.

23 Nerves communicate with each other at the synapse.

24 What's the synapse?

25 A. The synapse is the space between this nerve ending and this

1 nerve cell here.

2 Q. Okay.

3 A. So the electrical signal comes down, but the neurons are not
4 connected directly to each other. They have to communicate with
5 the next neuron across the synapse by releasing chemicals which
6 are called neurotransmitters.

7 Q. Do we have something that labels this -- we will get the
8 synapse.

9 A. We've got the synapse, and we've got the neurotransmitters
10 in this cartoon.

11 Q. Stop here. Neurotransmitters, are they chemicals? Are they
12 little particles? What are they?

13 A. They are small molecules, small chemicals.

14 Q. Now, what's a receptor?

15 A. A receptor is a large protein that exists on the membrane of
16 the downstream neuron, and those receptors are specific for the
17 neurotransmitters that's in the upstream neuron.

18 So if we have an acetylcholine neuron, for example,
19 then those receptors will be acetylcholine receptors. If we
20 have a dopamine neuron, then those would be dopamine receptors
21 and so on.

22 Q. Dr. Rowell, just slow down for a second. I know we want to
23 get through this.

24 But I think I was saying, acetylcholine is one of the
25 neurotransmitters?

1 A. Correct.

2 Q. And when you say specific, the receptors must be specific,
3 what does that mean? Slowly.

4 A. The receptors are designed -- the analogy has been a lock
5 and key model. So, the receptors would be the lock, a large
6 lock, and then the chemical, the neurotransmitter migrates
7 across the synapse and interacts with this receptor.

8 Q. And there are different neurons, different nerve channels
9 involved with different neurotransmitters?

10 A. Different receptors, right.

11 This nerve -- nerves are named on the basis of the
12 neurotransmitter they contain. So if this neurotransmitter
13 contains acetylcholine, then that is a acetylcholine nerve.

14 Q. Now, do we have -- does this animation go on to kind of
15 illustrate the motion here?

16 A. Yes.

17 Q. Let's play it going forward. Slowly.

18 A. A signal will come down and will cause the release of the
19 neurotransmitter across the synapse, interact with the receptor.
20 That caused the next excitation, and then the neurotransmitters
21 are taken back up.

22 Q. You see it going, happening again?

23 A. Correct.

24 And then the neurotransmitters are taken back up by
25 these transporters' re-uptake pumps at the nerve ending.

1 Q. Can you illustrate -- what you showed us so far is kind of a
2 generic explanation. Do you have more particular demonstrations
3 then or illustrations of how this model works for caffeine,
4 nicotine and other stimulants?

5 A. Yes.

6 Q. Let's just go forward. Next section.

7 A. Well, this is a -- these substances you just mentioned:
8 nicotine, caffeine, they are not neurotransmitters, but they can
9 fit into the receptor for the naturally-occurring
10 neurotransmitter.

11 In this case, caffeine is going to fit into an
12 adenosine receptor.

13 Q. Adenosine?

14 A. Yes.

15 Q. Okay.

16 A. So this would be an adenosine neuron. Then this could be
17 any post -- neuron.

18 Caffeine comes in, interacts with the adenosine
19 receptor, causes an excitation, and then actually diffuses out
20 of the synapse because these transporters again are specific for
21 the neurotransmitter.

22 Q. Let me ask you something. You told me that there was a
23 lock-and-key relationship between those receptors and the
24 neurotransmitter. In this case it would be a adenosine?

25 A. Yes, sir.

1 Q. How is it that -- caffeine is not adenosine, is it?

2 A. That's right.

3 Q. How does caffeine then manage to fit into the lock?

4 A. Because the locks are not completely specific, so that
5 natural substances, like caffeine and nicotine and others -- and
6 really more important for pharmacologists, we design drugs that
7 can be taken by individuals and affect the processes through
8 these receptors. Most drugs that are given therapeutically are
9 synthesized to act on some receptor.

10 Q. Do we now have the same model illustrated with respect to
11 nicotine?

12 A. Yes.

13 Q. Can we show nicotine? And why don't you go through
14 nicotine?

15 A. Okay. Nicotine is another natural substance, of course, and
16 it will migrate into the acetylcholine neuron. All of
17 nicotine's actions in the body are produced by its interacting
18 with acetylcholine receptors.

19 Q. Different set of neurons?

20 A. All of the -- this neuron would always have to be an
21 acetylcholine neuron because the receptors across the synapse
22 are always expecting to see acetylcholine.

23 Q. Now, how is it that nicotine can interact with acetylcholine
24 receptors?

25 A. Because nicotine can again take a similar conformation as

1 acetylcholine.

2 Q. Conformation with an "O"?

3 A. Right. It can take -- it can look like acetylcholine to the
4 receptor, so the receptor will be stimulated, be bound with the
5 nicotine as it would be for acetylcholine.

6 Q. Okay. Now, we've talked about caffeine, we've talked about
7 nicotine, and we've talked about two different
8 neurotransmitters: adenosine and acetylcholine.

9 What is the neurotransmitter on the basis of which it's
10 possible to compare these different kinds of drugs? If the
11 neurotransmitters are all different, as you've talked about
12 adenosine and you've talked about acetylcholine, how can you
13 compare these drugs?

14 A. Well, it turns out, as I mentioned, that most drugs -- well,
15 all drugs of dependence and dependence behaviors apparently
16 increase the neurotransmitter dopamine.

17 Q. Dopamine?

18 A. In this nucleus accumbens area, so that means that this
19 neuron could be a dopamine neuron.

20 Q. You do have an illustration of how dopamine as a
21 neurotransmitter is implicated in the interaction of nicotine
22 with the nervous system?

23 A. Yes.

24 Q. Why don't we go through the dopamine section?

25 A. Okay. Now, we have a couple of more things here.

1 First of all, because we are going to be talking about
2 dopamine in this nucleus accumbens synapse, then this is a
3 dopamine-containing neuron.

4 Q. Which means it releases dopamine?

5 A. Releases dopamine. So that's why these little balls here
6 are identified as dopamine, the dopamine chemical.

7 THE COURT: And your testimony is that dopamine is
8 linked to -- linked to is probably not an accurate term, but
9 forgive me for a moment -- but is linked to caffeine and
10 nicotine; is that correct?

11 THE WITNESS: And many other drugs of dependence

12 THE COURT: What is a more accurate term than linked
13 to?

14 Is it fair to say that it is found at the same time
15 that you would find the neurotransmitters for caffeine and
16 nicotine?

17 THE WITNESS: Probably the best way would be, I guess
18 as the Surgeon General says, that drugs of dependence produce
19 increases in dopamine in these brain areas. All of them have
20 been found to produce an increase level of dopamine in these --
21 that the dopamine synapse.

22 THE COURT: So your testimony is that it is always
23 there and always increased when you're talking about drugs of
24 dependence?

25 THE WITNESS: Right. The dopamine system is obviously

1 there normally. And so things that we do, like eating, sexual
2 activity, things like that, pleasurable activities, this system
3 of the brain is there to say this is a good thing to do. It's a
4 pleasure center, sometimes it gets called.

5 The drugs that stimulate this and produce an increase
6 in dopamine, sometimes a large increase in dopamine, have
7 dependence potential.

8 BY MR. BERNICK:

9 Q. Let's just take those steps. Dopamine and dependence
10 behaviors, are they or are they not -- I have the same word down
11 Your Honor -- linked; that is dopamine levels and dependence
12 behaviors?

13 A. Yes.

14 Q. These different substances: caffeine, nicotine, cocaine,
15 heroin, is exposure to these different substances linked with
16 increased dopamine?

17 A. Yes.

18 Q. If we just take both steps then, are you or are you not
19 examining the similarity of these different substances for their
20 dependence potential by measuring levels of dopamine associated
21 with exposure?

22 A. That's correct.

23 THE COURT: Do you have a chart in your direct that
24 indicates that there are very different levels of dopamine
25 produced for the different substances, such as caffeine and

1 nicotine on one end of the dependency-intensive spectrum and
2 heroin and cocaine on the other end of that spectrum?

3 THE WITNESS: Exactly.

4 MR. BERNICK: We're going to show these.

5 BY MR. BERNICK:

6 Q. First, do you have a couple of slides that kind of
7 illustrate how it is that nicotine, which works with
8 acetylcholine, can nonetheless stimulate dopamine?

9 Can you explain how that works using -- I think it's
10 probably the next segment. Here we go. Caffeine.

11 Could you just walk through how caffeine implicates
12 dopamine even though caffeine is associated with an adenosine
13 receptor?

14 A. Okay. Well, caffeine has mild dependence potential, cause
15 mild reinforcement and euphoria, and it does it by increasing
16 the release of dopamine in this dopamine neuron by working on
17 adenosine receptors, again that are here at the terminal.

18 Q. So you happen to have a dopamine neuron that has adenosine
19 receptors which then means?

20 A. Which then means that caffeine can interact with those
21 adenosine receptors and stimulate the release of dopamine into
22 the synapse.

23 Q. What about nicotine?

24 A. The nicotine works on always.

25 Q. Am I out of order here? Or are you out of order? No,

1 that's ahead.

2 We got caffeine. Nicotine.

3 A. I think if you run that one.

4 So, this is very similar. These have to be
5 acetylcholine receptors again, because nicotine always works
6 that way, and it's been found that there are acetylcholine
7 receptors on these dopamine neurons.

8 And when nicotine comes into the receptor binds, it
9 produces an excitation. Dopamine comes out, causes the
10 stimulation. Dopamine is taken back up by these re-uptake
11 pumps.

12 Q. Now, do we have a similar interaction with respect to
13 caffeine?

14 A. Yes, and we saw that. It's simply that caffeine interacts
15 with another type of receptor, the adenosine receptor.

16 Q. What about cocaine? Let's show cocaine.

17 A. Okay. Cocaine works differently, and we have to focus in on
18 the uptake pumps.

19 Cocaine comes in and doesn't work on receptors. It
20 blocks the removal of dopamine from the synapse. So, cocaine
21 will come in and bind to the uptake pumps that are responsible
22 for removing dopamine from the synapse.

23 So dopamine terminates -- the termination step for
24 dopamine is blocked. So we have dopamine in the synapse. A new
25 impulse can come down, more dopamine can be released. And this

1 can occur over and over again as signals come down, leading to a
2 much larger increase in dopamine. And this has been measured in
3 a number of studies.

4 Q. It's kind of common usage, people here about SSRI as
5 antidepressants, serotonin, selective re-uptake inhibitors. Are
6 those -- do those function by inhibiting the re-uptake pumps in
7 comparable fashion?

8 A. Exactly the same way, except on a serotonin neuron. They
9 would be selective re-uptake inhibitors for serotonin and they
10 work as antidepressants.

11 Q. Now you've pointed out these different similarities,
12 Dr. Rowell, between the different drugs and how they work on
13 dopamine.

14 Does this or does this not provide a basis for
15 comparing the pharmacological dependence potential of these
16 different stimulants?

17 A. Yes. Experiments have been conducted which can actually
18 measure the amount of dopamine in the synapse.

19 Q. Okay. Let me just ask you to take a step back.

20 What we're going to be talking about here are
21 laboratory studies; correct?

22 A. Yes, sir.

23 Q. These are not performed on people, they are performed on
24 laboratory animals. Is that also correct?

25 A. Yes. These are experiments cannot be performed on people.

1 Q. They are invasive?

2 A. Yes.

3 Q. This area of doing pharmacological research on animals in
4 the area of nicotine, how far back does the history of science
5 go in the area of physiological or pharmacological investigation
6 of the effects of nicotine in laboratory animals?

7 A. It goes back to the 1800s when animals were used to figure
8 out not only what nicotine did, but how nerves communicated.

9 Q. What relationship, if any, is there between how science
10 developed in the area of nicotine pharmacology in the laboratory
11 on the one hand and the development of science concerning other
12 drugs in the laboratory?

13 What relationship is any between how those sciences
14 evolved?

15 A. If I understand your question --

16 Q. It wasn't put very well. Answer it if you can.

17 A. I guess what you're saying is the animal studies always kind
18 of precede, I guess, what we know, or give us the information
19 about how things work in all animals and in the human,
20 basically.

21 So, all through investigating what drugs do -- and, of
22 course, we know that the Food and Drug Administration requires
23 large number of experiments on animals before a drug can ever be
24 put into a human being. So animal experiments are kind of the
25 foundation for figuring out not only the mechanism of action,

1 but the toxicity and the mutagenesis and the side effects.

2 Q. The nicotine pharmacology, in particular, was that one of
3 the early areas of pharmacological investigation in relation to
4 the investigation of other drugs?

5 A. For how the nervous system works --

6 Q. Yes.

7 A. Nicotine was the key to figuring out how nerves communicate.

8 The concept of receptors, which now we know for many
9 drugs and medications, was discovered by using the drug
10 nicotine. It was the first receptor discovered.

11 The synapse, the acetylcholine was the first
12 neurotransmitter. A Nobel Prize was won for the individual that
13 figured out synaptic transmission with neurotransmitters.

14 Q. Now, have there been studies done that actually quantify the
15 difference of dopamine presence in the synapse for these
16 different drugs as measured in the laboratory?

17 A. Yes.

18 Q. Can you show us some of this data?

19 And, first of all, how was it gathered?

20 A. Well, it's called -- these are called microdialysis
21 experiments. And what dialysis is, if we know the dialysis
22 technique for people that have renal failure --

23 Q. I'm doing this one -- I've got a responsibility here
24 apparently that I'm not discharging, except that I don't have
25 the demo that's got the insertion.

1 Let's just go back to what -- I want the -- we have the
2 one with the needle coming in.

3 A. It's just the last one that says "drugs."

4 Q. Does this now illustrate where we're going to do the
5 measurement?

6 A. Yes. Animals can be anesthetized, and this takes a few
7 weeks. I won't go into the details. But you have to prepare a
8 probe that will go down in a very specific area. This is going
9 to be the nucleus accumbens.

10 Dialysis is a technique where small molecules -- for
11 example, these neurotransmitters -- go across a dialysis
12 membrane and can be then taken up and measured.

13 And this developed in the 1980s to be able to insert a
14 small enough dialysis probe, about a little bit bigger than a
15 human hair, down a guide and get it down into the synaptic area
16 of the nucleus accumbens.

17 Q. Has this data now been geared on dopamine levels for these
18 different substances?

19 A. Yes, it has.

20 Q. Showing you J-DEM 010259. Does this compare -- or does this
21 show the results of measuring synaptic dopamine levels with
22 respect to these different substances?

23 A. Yes, it does. This is -- this is the amount of dopamine as
24 a percent increase over baseline, the normal dopamine, over a
25 60-minute period for the administration of a number of different

1 compounds.

2 Q. Where does nicotine -- would it be fair to say there's a
3 spectrum?

4 A. Yes, sir.

5 Q. Where does nicotine fit into that spectrum?

6 A. Well, nicotine, in my estimation, would be at the low end of
7 the spectrum for being able to stimulate increase in dopamine in
8 the synapse.

9 Q. Now, based upon this data, have you come to a basic
10 assessment about the pharmacologic dependence potential of
11 nicotine as compared to these other substances including
12 particularly hard drugs?

13 A. Well, this is just one of the things that you would use to
14 make that determination, but these neurochemical studies is one
15 of the bits of evidence of a number of bits of evidence that I
16 would use to say that on a spectrum of dependence, nicotine by
17 itself does not have an extreme amount of dependence potential.

18 Q. Let's now talk about human behavior, and this will be very
19 brief.

20 Do you or do you not as a pharmacologist look to the
21 basic features of human behavior with respect to drugs in order
22 to assess the merit or the value of your pharmacological lab
23 data?

24 A. Absolutely.

25 Q. And just to be clear. How is it that human behavior is used

1 by you as a pharmacologist in connection with your
2 pharmacological lab data?

3 THE COURT: That answer absolutely was not clear. Your
4 question was, do you or do you not?

5 MR. BERNICK: Yes, that's true.

6 BY MR. BERNICK:

7 Q. Do you use human behavioral data in connection with your
8 laboratory data as a pharmacologist?

9 A. Yes, because looking at drugs in the absence of what they do
10 in a human would be kind of irrelevant for a pharmacologist.

11 Q. Are there any particular aspects of the human behavioral
12 research that have a relationship to your finding about the weak
13 pharmacological dependence potential of nicotine?

14 A. Could you repeat the question?

15 Q. Are there particular aspects of human behavior that you've
16 looked to find out whether they are consistent or inconsistent
17 with what you've observed in the laboratory?

18 A. Well, because a lot of my research has centered on the
19 effects on dopamine, I have looked at the effects of behaviors
20 and how that can affect dopamine.

21 Q. What have you found there?

22 A. Well, positively reinforcing behaviors -- as I mentioned,
23 that's why we have this dopamine system anyway -- can produce
24 increases in dopamine in the synapse, and these same
25 microdialysis studies have been done in laboratory animals to

1 assess the increase in dopamine levels as a result of feeding a
2 hungry animal, let's say.

3 Q. You made mention of the fact withdrawal in humans. What
4 relationship, if any, does withdrawal from cigarette smoking
5 have to your findings in the laboratory?

6 A. Well, withdrawal from cigarette smoking is complex because
7 cigarette smoking is a combination of behavioral dependency and
8 pharmacological dependency.

9 We can look at the withdrawal from pure nicotine and
10 that plays an important part in another key to whether the
11 withdrawal to nicotine is a severe behavioral dependency or not,
12 and they we do have the ability to look at withdrawal from
13 cigarette smoking.

14 Q. And mark down here drug effects. I'm going to mark down
15 here behavior.

16 Drug effects of nicotine in comparison to other drugs,
17 strong or weak?

18 A. I would characterize it as weak.

19 Q. We all know, however, that it is not necessarily easy to
20 quit smoking.

21 A. That's correct.

22 Q. Does that tell you as a pharmacologist about whether smoking
23 is purely for nicotine or whether smoking also has a behavioral
24 component?

25 A. It tells me -- and I've looked at this very carefully --

1 that cigarette smoking is a complex behavior in which nicotine
2 is a key component.

3 Q. And the basis of your work, do people simply smoke for
4 getting pure nicotine into their system?

5 A. No.

6 Q. In terms of your work, are there or are there not
7 differences as well as similarities -- are there not differences
8 between nicotine and hard drugs?

9 A. Yes.

10 Q. You found that in the laboratory. Do you find confirmation
11 of that when it comes to human behavior?

12 A. Yes.

13 Q. Now, is there a particular study? I noticed you made
14 reference to the Rose study, and this will be the last thing
15 that we will cover.

16 Could you explain to the court what the Rose study is
17 and how it bears on this question of whether people are simply
18 smoking for nicotine?

19 A. Okay. The Rose study, which was conducted at the Nicotine
20 Research Center at Duke University, was the first study and, I
21 believe, still the only study that is carefully compared pulsed
22 intravenous nicotine in a vein of an individual with smoking a
23 cigarette that did not have nicotine in it and then the other
24 combinations. So --

25 Q. Tell us physically the setup.

1 A. Okay. Cigarette smokers were abstained from smoking and
2 then they were brought in. Their cigarette smoking behavior was
3 monitored before they were brought into the lab. And then it
4 was determined what, how often they smoked, and what kind of
5 nicotine delivery they got from the cigarette smoke when they
6 smoked.

7 So then Dr. Rose was able to exactly mimic that with an
8 IV pulse injection at particular puffing rates with these
9 individuals. Now the individuals all had an intravenous --

10 Q. So baseline was, people smoked, he measured the blood levels
11 of nicotine that occurred from smoking, he then rigged up a
12 pulse-injection system such that he could administer the same
13 amount of nicotine over the same period of time where they would
14 get if they smoked but to do it without their smoking?

15 MR. GOLDFARB: Objection, leading.

16 MR. BERNICK: I'm tried to get --

17 THE COURT: I will allow this much, because I was going
18 to ask these kinds of questions. Go ahead.

19 A. You explained it probably better than I did that's exactly
20 right.

21 THE COURT: So that the -- I was going to say the
22 victims -- but the patients should get -- would be getting
23 direct injections of nicotine; is that correct?

24 THE WITNESS: Correct, or saline. Because this was a
25 blind experiment with some individuals getting saline and

1 individuals getting nicotine and they didn't know what was going
2 into their arm.

3 THE COURT: Did that pass the Duke IRB?

4 THE WITNESS: Sure.

5 THE COURT: Go ahead.

6 THE WITNESS: Because these are cigarettes smoked.
7 There have been studies with giving nicotine to smokers. This
8 would not have passed the IRB, probably, if these were not
9 smokers.

10 BY MR. BERNICK:

11 Q. With this setup, did Dr. Rose run a series of comparisons to
12 see -- using scales of satisfaction, craving reduction and
13 psychological reward -- how different combinations of real
14 cigarettes with nicotine, denicotized cigarettes, and getting
15 the nicotine by injection or saline by injection, how they
16 rated, how the experience rated in terms of the scales of those
17 things?

18 A. Yes.

19 Q. And in order to cut through it, I'll give you an
20 illustration. Let's just take craving reduction. This is J-DEM
21 020270. Just explain to the court what this chart illustrates.

22 A. Okay. The blue bars are individuals who are getting a
23 saline injection. It's a placebo, basically saltwater.

24 The red bars are getting the pulsed nicotine injections
25 as if they -- as they would have gotten had they been smoking a

1 regular cigarette.

2 Now -- this addresses what Judge Kessler said --
3 individuals that did smoke a nicotine-containing cigarette did
4 not get additional nicotine. This probably would not have been
5 a good thing to do, so they don't get a double nicotine
6 administration. So, these individuals here are smoking. They
7 are allowed to engage in the behavior of smoking, but the
8 cigarette does not have nicotine in it.

9 And so this just tells the difference between what
10 giving them the IV nicotine pulse compared to the no drug
11 condition where they are just smoking.

12 This group is not smoking, and they are getting either
13 saline or an IV nicotine pulse. And so, to me, the two bars
14 that are important to compare is nicotine without smoking or
15 smoking without nicotine, which is in this case better at
16 reducing their craving.

17 Q. Just to make sure that comparison is clear.

18 The blue bar in the middle is somebody who is not
19 getting nicotine from any source whatsoever, but is smoking a
20 denicotized cigarette?

21 A. Correct.

22 Q. And when it comes to craving reduction, that person gets
23 greater craving reduction with no nicotine exposure than does
24 somebody who is not smoking at all and getting nicotine by
25 pulse?

1 A. Correct. And if they get the nicotine by pulse, it makes
2 maybe a little bit of difference, but they don't know whether
3 they are getting the nicotine or not. So when you ask them,
4 does this reduce your craving, they just give a score.

5 Q. But if somebody is smoking their usual brand, they are
6 getting tobacco and they are getting nicotine, and they then
7 do -- they got even greater craving reduction?

8 A. A little bit in this case, more in some of the others.

9 Q. Do you see the same kind of relationships when it comes to
10 satisfaction which is J-DEM 010266, psychological reward which
11 is 10272, and enjoying the sensation which is 010268?

12 A. Yes. Again, nicotine without smoking, smoking without
13 nicotine, in this short-term experiment it appears to me that in
14 all of these different criteria that individuals that are used
15 to smoking a cigarette enjoy engaging in the behavior of smoking
16 a cigarette really in the intravenous administration of nicotine
17 doesn't do it.

18 Q. Is this data consistent or inconsistent with what you told
19 us about nicotine's weak drug effects and the fact that in your
20 view smoking behavior goes way beyond nicotine?

21 A. Yes. Nicotine has weak drug effects which couples to
22 repetitive behaviors and it's the behavioral part that tends to
23 be very important for cigarette smoking.

24 MR. BERNICK: That's the end of my live direct, Your
25 Honor.

1 THE COURT: All right. Doctor, you may step down now.
2 Thank you. Your instructions for tonight are, you may not talk
3 about your testimony with any lawyer or anybody else for that
4 matter.

5 You may not do any homework about your testimony. In
6 other words, you can't reread it. You can't look back at any
7 documents upon which you may have relied or any other documents
8 for that matter that you would rely on in your testimony
9 tomorrow.

10 Do you understand that?

11 THE WITNESS: Yes. Thank you.

12 THE COURT: Thank you. You may step down.

13 I think Mr. Crane-Hirsch misunderstood. No, he is
14 here.

15 MR. CRANE-HIRSCH: Yes, Your Honor.

16 THE COURT: I saw him leave and then I wasn't sure.

17 Mr. Goldfarb, what?

18 MR. GOLDFARB: I just want the witness to leave the
19 room, Your Honor.

20 Just as a point of clarification, part of our
21 objections went to not just documents with respect to these four
22 demonstratives, but also other documents that were not
23 disclosed, and so we have -- just to clarify the scope of Your
24 Honor overruling our objections.

25 There were other documents, I think 16 other documents

1 in the objections that we believe were not disclosed and
2 therefore should -- the testimony about them from Dr. Rowell
3 should be struck. And I just want to clarify the scope, and I
4 apologize for not doing it before he took the stand.

5 THE COURT: As I understood it, and your objection was
6 only really two pages, I thought you were essentially objecting
7 to one or two documents which you allege had not been properly
8 included in the reliance materials. That's certainly what the
9 response was basically from the defendants.

10 MR. GOLDFARB: Just to clarify. I think we included as
11 the third page of our objection a chart, which I think listed 21
12 exhibits.

13 MR. BERNICK: I have a suggestion for what might
14 expedite this and enable counsel finally to get the opportunity
15 to make their presentation we want to get done.

16 Mr. Goldfarb is correct. There are additional
17 documents which we referred to in -- I think they are in
18 footnotes, essentially. We go through them.

19 But for clarity purposes what I asked my people last
20 night to do was to go back and kind of put those documents into
21 categories that would make clear with respect to each document
22 why we believe that the government has had appropriate notice.

23 And I have a copy for the court and a copy for counsel
24 that may make it easier for Your Honor to go through.

25 I will say that there are three documents that don't

1 fall into these categories, and I'll list them, and I'll
2 basically make an undertaking that I think will expedite this.

3 JD 010314 is a group exhibit comprising Medical College
4 of Virginia publications.

5 THE COURT: Wait. What page is that on?

6 MR. GOLDFARB: In our objections, Your Honor, it is in
7 the chart on page 3 and it lists the third document from the
8 top.

9 MR. BERNICK: And it's on page 16 and 17 of the direct
10 examination.

11 THE COURT: What page is it on of this response you've
12 just given me?

13 MR. BERNICK: I think it's probably --

14 MR. GOLDFARB: I don't think it's listed, Your Honor.

15 MR. BERNICK: It's probably in the footnote.

16 MR. GOLDFARB: It's not listed.

17 MR. BERNICK: In any event, we are withdrawing it in
18 order to save the time of dealing with it, because all the
19 witness is really testifying to is the fact of there being
20 extensive research. We don't need to have all the documents
21 into evidence.

22 The TRC review of activities from '70 to '74, I believe
23 already is going to come in through the examination that you've
24 just heard of Mr. Read.

25 The Battelle letter to Charles Ellis, I need to take

1 another look at. We may not need to offer that either, and I'll
2 inform counsel of that. That's at page 25 of the written
3 examination.

4 All others we've broken down into these categories.
5 They are either in a finding of fact, and there's only one of
6 those. They've already been admitted into evidence through
7 Dr. Henningfield.

8 They are exhibits cited in the Larson and Silvette
9 text, which is in evidence, or they were cited in the historical
10 review, but Your Honor can look through those and verify that.
11 And if we've made a mistake in the summary, I'm sure
12 Mr. Goldfarb will tell us about that tomorrow morning.

13 THE COURT: Do you want the look at this over night?

14 MR. GOLDFARB: Yes, I'm happy. So we can move on, I
15 will take a look at it tonight, and taking obviously Your
16 Honor's ruling with respect to certain of the documents, we will
17 see if what --

18 THE COURT: Is the Larson Silvette citation -- I think
19 I may be mixing things up -- but is that to the enormous,
20 enormous compendium of like every single article ever written on
21 nicotine?

22 MR. GOLDFARB: Up to 1961, but yes, Your Honor.

23 MR. BERNICK: The sections on nicotine are not that --
24 no, that textbook deals with all subjects in smoking and health.
25 There are two sections -- two or three sections that deal with

1 nicotine dependence, pharmacology and addiction.

2 THE COURT: Your position is --

3 MR. BERNICK: I'm sorry.

4 THE COURT: Your position is that because this witness
5 relied upon this particular major reference work, that
6 everything cited in the nicotine sections should be counted as
7 reliance materials by him?

8 MR. BERNICK: No, it's really --

9 THE COURT: I'm glad it's not your position.

10 MR. BERNICK: The historical review makes extensive use
11 of the Larson and Silvette textbook and talks about
12 specifically --

13 THE COURT: That's fine.

14 MR. BERNICK: And talks specifically about sections of
15 the Larson textbook that deal with nicotine and addiction.

16 We didn't list as reliance materials every single one
17 of the articles that are cited in that portion of the text
18 that's referenced in the historical review.

19 In other words, the historical review says here,
20 government, go here, it's in these chapters. The chapters
21 contain a number of citations.

22 Some of those citations are particularly relevant
23 because they show that the same data that was being considered
24 by the companies internally was also published data, in fact,
25 probably came from the publications. And that's the sole

1 purpose of the proffer is to support the testimony that the two
2 are the same.

3 We don't even need to offer the underlying documents
4 into evidence. All the witness is doing is saying there are
5 foundation -- they come in under 703, they are foundational to
6 the opinions that there was nothing that was known to the
7 tobacco companies that was not also known externally. That's
8 the thrust of his testimony. So, that is what it is.

9 And the whole essence of the historical review is
10 exactly that proposition. The whole essence of his testimony in
11 each of the cases beyond what you've just heard is exactly that
12 fact.

13 So, in differ cases we've got different documents that
14 come up that are internal documents. If we tried to list all of
15 the external studies that were responsible or germane to every
16 single document that might be offered, the reliance list would
17 go on forever. And we didn't do that. We submitted the
18 historical review that establishing the basic principles, the
19 important documents, and then from case to case there are
20 different documents that counsel happen to focus on. This is
21 absolutely unchanged since Minnesota in 1997.

22 THE COURT: You can look at it overnight. We will take
23 it up tomorrow morning. Everybody, I don't mean to be
24 arbitrary, but it is a quarter to 5:00. This is a legal
25 discussion that's got to be presented. I will --

1 Mr. Crane-Hirsch, I'm sorry you spent an extra hour
2 here. I'm sure you could have done other things.

3 But I'm going to take it at 9:30 tomorrow morning.
4 Before the witness I will here hear from everybody.

5 Second, after that, legal presentation, which should
6 not be more than 10 minutes or so per side, everybody, it will
7 be for Mr. Crane-Hirsch, it will be for Mr. Bernick. Then I
8 will hear from everybody on the documents. Then of course we
9 will do cross-examination.

10 Mr. Goldfarb, is your estimate still about three hours
11 for cross?

12 MR. GOLDFARB: Yes, Your Honor.

13 THE COURT: All right. Our luncheon recess will be --
14 and I'm going to err on the conservative side, so that I don't
15 keep everybody waiting. I have actually tried to find out
16 discretely how long the ceremony is anticipated to be and I
17 don't have a really reliable estimate, but I will estimate an
18 hour, which would be 1:00 to 2:00. And since things never go
19 right in this world, I'm going to say, to be safe, 3:00 o'clock.

20 We will still get an hour and a half of testimony on,
21 maybe we will go a little beyond 4:30 tomorrow. We will just
22 see how it goes. But we will still get a substantial amount of
23 testimony on tomorrow. So, I think we all need to recess at
24 this point. 9:30 tomorrow, please.

25 (Proceedings concluded at 4:46 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