

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 21, 2005
	.	
Defendants.	.	
.	

VOLUME 79
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 MORNING SESSION, MARCH 21, 2005

2 THE COURT: Good morning, everybody.

3 MS. MOLTZEN: Good morning, Your Honor.

4 THE COURT: This is United States of America versus Philip

5 Morris, CA99-2496. Would counsel who are going to be examining

6 this witness please identify themselves for the record?

7 MS. MOLTZEN: MaryJo Moltzen for the United States.

8 MR. BERNICK: David Bernick for Brown & Williamson, Your

9 Honor.

10 THE COURT: All right. I just have to tell Ms. Hightower

11 something.

12 (HARMON McALLISTER, Ph.D., DEFENSE WITNESS, SWORN)

13 CONTINUED CROSS-EXAMINATION OF HARMON McALLISTER, Ph.D.

14 BY MS. MOLTZEN:

15 Q. Good morning, Dr. McAllister.

16 A. Good morning.

17 Q. I'm going to clean up two pieces of housekeeping from

18 last Thursday. We were missing an exhibit that I couldn't show

19 you. I have asked you if you remembered the years of Liggett's

20 membership and contributions, and you said no, not by memory.

21 Could you please hand Dr. McAllister U.S. Exhibit 75927

22 and that is the response of Defendant CTR to plaintiff's first

23 set of interrogatories in the United States versus Philip Morris;

24 is that correct?

25 A. Yes, ma'am.

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- 1 Q. At page 60 of the interrogatory response, is that your
2 signature?
- 3 A. It is, yes.
- 4 Q. And your signature is below an oath you had sworn to that
5 the interrogatory answers were true and accurate to the best of
6 your knowledge and belief, correct?
- 7 A. That's correct.
- 8 Q. At page 48, in the response to interrogatory number 25 --
- 9 A. I have it.
- 10 Q. CR states that it has compiled lists of each members'
11 annual contribution to CTR and TIRC's general fund as well as
12 the separate funding that was provided for CTR Special Projects
13 and for the literature retrieval division. Those lists are
14 attached at Schedule C, end quote.
- 15 A. Yes, ma'am.
- 16 Q. Is that correct? And at the end of this document are
17 three schedules, and one is Schedule C. If you go to Bates
18 number DXA 0631017, that's the beginning of Schedule C.
- 19 A. I have what looks to be that. I didn't recognize that
20 number, but -- oh, I see, on the left-hand side, I was looking
21 on the bottom right.
- 22 Q. Yes, on the left-hand bottom right.
- 23 A. Yes, I have it.
- 24 Q. Okay. The first set of pages are titled: "Contributions
25 To the General Fund" and I'd like you to confirm that Liggett

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1 contributed to CTR's general fund according to this
2 interrogatory response from 1964 to 1969?
3 A. I just realize I did not have the right page and I
4 apologize.
5 Q. I didn't have the right exhibit last Thursday, so --
6 A. Would you please give me the number again? I realize --
7 I'll keep flipping backwards through Schedule C here. Okay.
8 Q. Schedule C should start at Bates DXA 0631017.
9 A. Now, I'm with you. I'm very sorry.
10 Q. Okay. Those first seven pages of Schedule C are titled:
11 "Contributions to the General Fund".
12 A. That's correct.
13 Q. And I would like you to confirm for me that Liggett
14 contributed to CTR's general fund from 1964 through 1969.
15 A. That was -- appears to be a blank.
16 Q. And then after those seven pages, there is a page titled
17 "Contributions to CTR Special Projects Fund". And the Bates
18 number for that one is -- ends in 1024.
19 A. I have it.
20 Q. And according to CTR's response to that interrogatory,
21 Liggett contributed to CTR Special Projects Fund from 1966 to
22 1975.
23 A. That's correct.
24 Q. And then the next page is titled: "Contributions to the
25 Literature Retrieval Division"; is that correct?

- 1 A. That's correct.
- 2 Q. I would like you to confirm that Liggett contributed to
3 CTR's retrieval division from 1971 to 1983?
- 4 A. I see that, yes, ma'am.
- 5 Q. Schedule C breaks down CTR's budget in a different manner
6 than you have broken it down in the written direct; is that
7 correct?
- 8 A. This budget, yes, ma'am.
- 9 Q. And just so the record is clear when we're comparing the
10 two, I'd like you to look at the last of the seven pages of the
11 contributions to the general fund, and that Bates will end in
12 1023.
- 13 A. I have it, yes.
- 14 Q. I want you to look in the total column over on the
15 right-hand side.
- 16 A. I see it.
- 17 Q. And the total there for the general fund is 473 million,
18 correct?
- 19 A. That's correct.
- 20 Q. And in the written direct, you talk about contract,
21 research, and grants being given 317 million, correct?
- 22 A. Yes.
- 23 Q. And that 317 million is included in the general fund; is
24 that correct?
- 25 A. Yes, ma'am.

- 1 Q. So there's 156 million that was for administrative
2 purposes and other purposes?
- 3 A. That's correct.
- 4 Q. And on the next page "Contributions to CTR's Special
5 Projects Fund", again, if we look at the total column and go to
6 the very bottom there, we have \$18,270,000, correct, for the
7 total contributions to CTR's Special Projects Fund?
- 8 A. That's correct.
- 9 Q. And that matches up with what is in your written direct,
10 you say about 18 million; is that correct?
- 11 A. Yes, ma'am.
- 12 Q. And then the next page, please. And this is
13 contributions to CTR's -- or to the literature retrieval
14 division, correct?
- 15 A. Yes, ma'am.
- 16 Q. What was the literature retrieval division?
- 17 A. It's fairly well described by its name. They kept
18 records -- I'm sorry, they kept reprints, that's my
19 understanding. It was, as you are aware, it was gone by the
20 time I got there, but the records show that it was there for
21 information relative to smoking and health in the literature.
- 22 Q. It says on that sheet that it was in existence through
23 April 15th, 1983, correct?
- 24 A. Yes.
- 25 Q. And do you know if the literature retrieval division,

1 it's purpose was to assist the cigarette manufacturers outside
2 litigation counsel by collecting the available scientific
3 literature that dealt with issues arising in cases brought
4 against the tobacco companies?

5 A. I have read -- I did -- that was not part of my personal
6 knowledge at that time, but I have read similar things.

7 Q. Do you know if the Scientific Advisory Board of the CTR
8 had anything to do with the literature retrieval division?

9 A. Not to my knowledge.

10 Q. And another left over, I had asked you on Thursday who
11 handled the function and roles of CTR's Board of Directors
12 before CTR was incorporated in 1971, and your answer was quote
13 before 1971 it was a committee and had no Board of Directors.
14 And then I asked you if Liggett was represented on that pre
15 incorporation committee and you were unsure because you weren't
16 sure of the years Liggett was a member.

17 Would you please hand Dr. McAllister U.S. Exhibit 86773?
18 Do you have it?

19 A. I have it.

20 Q. And the fifth page from the back, it's a page that is
21 headed "Verification".

22 A. I have it.

23 Q. And is that your signature on that page?

24 A. That is my signature, yes, ma'am.

25 Q. And you swore that the interrogatory answers were true

1 and accurate to the best of your knowledge, information and
2 belief, correct?

3 A. Yes, ma'am.

4 Q. And at page 67 --

5 A. I have it.

6 Q. Well, let's look at 66 first because we're talking about
7 Interrogatory 18 and the United States had asked CTR to list by
8 each year of its existence the members of CTR's executive
9 committee and CTR responds that they interpret "executive
10 committee", quote to refer to the executive committee of TIRC,
11 which CTR believes existed from 1954 until 1971, and to the
12 executive committee of the Board of Directors of CTR which
13 existed from 1971 to 2001, end of quote. Is that how it reads?

14 A. Yes, ma'am.

15 Q. Now we can turn to page 67, and I'll ask the question I
16 asked on Thursday, "According to that listing on page 67,
17 Liggett had a representative on the TIRC executive committee
18 from 1965 to 1968; is that correct?"

19 A. Yes, ma'am, I see that.

20 Q. Not only do you see it, but that is your answer to the
21 interrogatory, correct?

22 A. Oh, I'm sorry, yes, that is my answer.

23 Q. On page 20 to 23 of your written direct you discuss the
24 CTR annual reports, don't you?

25 A. Yes.

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1 Q. And on page 20, line 5 through 6, you're asked "during
2 the 40 plus years when CTR was funding scientific research, was
3 there a public available source of basic information about the
4 research that it funded?" Did I read that correctly?

5 A. Yes, ma'am.

6 Q. And your answer on line 20 -- page 20 line 8 "Yes. This
7 information was publicly available in CTR's annual reports."
8 Did I read that correctly?

9 A. Yes.

10 Q. Now, last Thursday we were talking about the two purposes
11 in the 1971 certificate of incorporation, and one of the
12 purposes was to aid and assist in funding research in tobacco
13 and health, and the other was to make available to the public
14 factual information about tobacco and health, correct?

15 A. I recall that.

16 Q. Did you consider when you were working at CTR, did you
17 consider the annual reports the vehicle that satisfied that
18 second purpose?

19 A. As I said when I started at CTR, I wasn't aware of the
20 purpose verbalized as we have just done -- it certainly was
21 clear that we were -- one of our main missions was to publish
22 the research. The primary one, of course, is to support it, but
23 the expectation is that it will result in publishable material,
24 which it did, and through that mechanism, the results of the
25 research would be made publicly available. I don't recall

1 thinking of it as going directly to the public. There was no
2 expectation on my part that the general public would read the
3 actual publications themselves, as we talked on Thursday.

4 Q. During your time at CTR, did CTR ever announce that they
5 would be using a third party to make that public information
6 available?

7 A. I don't remember -- I don't recall anything like that. I
8 know that this was the mechanism that we used. There certainly
9 was an effort to inform science writers and that was not
10 something that was codified in any way. We did distribute the
11 annual report, as well as other things, to science writers.

12 Q. How did you distribute the annual report, by the U.S.
13 mails?

14 A. Primarily.

15 Q. The factual information about smoking and health in the
16 annual reports was not meaningfully available to the American
17 public, was it?

18 A. I don't know what you mean by "meaningfully". It was
19 available to anyone who wanted to get a copy. They were freely
20 available.

21 Q. But if someone in the heartland, let's say -- I'm from
22 southern Minnesota, but we can do to the middle of the
23 country -- Kansas or Missouri, wanted to know the factual
24 information that CTR had on smoking and health issues, are you
25 not saying that that person would first of all have to get in a

1 car and head to a college community, find out which library at
2 that college campus might have the book, read the abstracts in
3 the annual reports, and try to decipher the scientific language?
4 Do you believe that is meaningfully available to the American
5 public?

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

7 THE WITNESS: Also the --

8 THE COURT: Excuse me just a minute, please.

9 THE WITNESS: I beg your pardon.

10 THE COURT: Excuse me, the objection's overruled. Go
11 ahead. You may answer now.

12 THE WITNESS: Thank you. The first part of the question
13 isn't quite right. Anyone who wanted a copy could get one by
14 asking us. So, they don't have to travel however far it is to a
15 medical center or whatever, to find a copy of the annual report.
16 It was freely available.

17 The interpretation of the material that was presented,
18 there was sometimes summarized in the early days particularly in
19 the annual report. By the time I arrived, there were no specific
20 summaries of the publications and as far as I was concerned when
21 we were there, that satisfied our obligation to make the
22 information publicly available. We certainly never failed to
23 distribute the reports to those who could interpret it to the
24 public.

25 BY MS. MOLTZEN:

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- 1 Q. So, it is your testimony that the annual reports, as you
2 said, satisfied your obligation to make the information
3 available to the public?
- 4 A. Yes, ma'am.
- 5 Q. You did testify on Thursday, and again just now, that
6 there needed to be a conveyor of the information between you and
7 the public; is that correct?
- 8 A. I don't -- that there needed to be?
- 9 Q. I believe you said on Thursday that there was -- in order
10 to get the information to the American public, you didn't do it
11 directly, you needed a, quote, conveyor of the information, end
12 of quote?
- 13 A. I could easily have said that.
- 14 Q. Is that still your testimony?
- 15 A. Yes, that was certainly in my time, that was true,
16 although there are certainly a lot of intelligent lay people out
17 there who can read for themselves.
- 18 Q. The CTR annual reports contain no information about the
19 research that was being funded by CTR Special Projects moneys,
20 did they?
- 21 A. That's correct.
- 22 Q. In fact, there was no one source the public could go to
23 to get factual information about the results of research funded
24 by CTR's special projects, correct?
- 25 A. I don't know.

1 Q. Do you know if there was one?

2 A. No.

3 Q. That was done purposefully, wasn't it?

4 MR. BERNICK: Objection, lack of foundation.

5 THE WITNESS: I have no idea.

6 THE COURT: Excuse me. When an objection is made, please

7 do not answer until I can rule.

8 You're going to have to establish a foundation.

9 BY MS. MOLTZEN:

10 Q. During your years at CTR, there was no source that anyone

11 could go to for Special Projects information; is that correct?

12 A. None to my knowledge.

13 Q. Do you know if that was done intentionally or

14 unintentionally?

15 A. By the way, I failed to say that there were obviously

16 publications, again, that people could have seen, but no single

17 source. I just wanted to amend that first answer.

18 Now, what was this question?

19 Q. The fact that there was no one source for the public to

20 find out information about CTR Special Projects when you were at

21 CTR, was that done intentionally or unintentionally, if you

22 know?

23 A. I have no idea.

24 Q. At page 182, lines 13 through 15 of your direct

25 testimony, you were asked, "While you were with CTR, did the

1 press releases that accompanied the issuance of the annual
2 report discuss the findings from the research that was
3 summarized in the annual report?" Did I read that correctly?

4 A. Yes, ma'am.

5 Q. And you answered at page 182 line 16, "No" and at page
6 182, lines 19 through 20, you testified that during your years
7 at CTR "no press releases were issued by CTR that discussed
8 smoking and health"; is that correct?

9 A. Yes, ma'am.

10 Q. In review of your CTR files, did you find any Tobacco
11 Institute press releases that discussed the findings of research
12 conducted by CTR grant recipients?

13 A. I don't remember specifically press releases. There are
14 a few documents in CTR's files that relate to Tobacco Institute,
15 TI, but I -- it's possible there might have been something in
16 the early days, but I don't recall specifically, typically not,
17 though.

18 Q. In your review of CTR's files, did you find any press
19 re -- Tobacco Institute press releases that discussed the
20 findings of research conducted by CTR Special Project
21 recipients?

22 A. I don't recall any. I don't recall any.

23 Q. Would you hand Dr. McAllister U.S. Exhibit 86005?

24 Do you have that, Dr. McAllister?

25 A. I have it, yes, ma'am.

1 Q. At page 154, lines 10 through 14 of your direct, you
2 identify this exhibit as a letter from CTR's chairman Addison
3 Yeaman to the Tobacco Institute's president Earl Clements,
4 quote, attaching some comments that Mr. Yeaman said he had just
5 made at a meeting of CTR members, end quote. Did I read that
6 correctly?

7 A. Yes.

8 Q. Please turn to the fifth page of the exhibit. It will be
9 page 4 of the attachment and it will be Bates CW 01044731.

10 A. I have it.

11 Q. And the first paragraph on that page reads, "But there's
12 another side to the coin. In a long talk with Dave Hardy, Bill
13 Shinn and Don Hoel, I preached that sermon and added -- because
14 I believe it -- that all the resources, all the knowledge, all
15 the help that CTR can give, should be available to the lawyers,
16 to the Tobacco Institute, and to any other of the troops in the
17 field. Dave gave me my text. He said, quote, what you mean is,
18 CTR should be independent but always accessible and available,
19 end quote. Right, with only this addition -- independent within
20 the policies set down by the membership". Did I read that
21 correctly?

22 A. Yes, ma'am.

23 Q. In your review of CTR files, did you find any other
24 documents indicating either a working relationship or a call for
25 cooperation between CTR and the Tobacco Institute?

- 1 A. No.
- 2 Q. Are you familiar with the Tobacco Institute College of
3 Knowledge?
- 4 A. No, ma'am.
- 5 Q. On page 19, lines 22, 23 of your written direct, you
6 testify that, quote, from 1966 until 1990, CTR also administered
7 the funding of CTR's Special Projects. Did I read that
8 correctly?
- 9 A. Yes, ma'am.
- 10 Q. And pages 159 through 178 of your written direct contain
11 details about CTR Special Projects, correct?
- 12 A. Without skimming through it, I'll take your word for it.
- 13 Q. Well, let's look at page 159 at least. And at lines 5
14 through 6, did CTR Special Projects affect the SAB grant
15 program, correct?
- 16 A. What page are you on again?
- 17 Q. 159.
- 18 A. Oh, the master heading, I see it.
- 19 Q. Roman Numeral VII, the heading is CTR Special Projects;
20 is that correct?
- 21 A. I see it. That's right.
- 22 Q. On page 162, lines 4 through 18, you discuss a procedure
23 for initiating CTR special projects; is that correct?
- 24 A. Yes.
- 25 Q. And at lines 6 through 7, the procedure reads number one,

- 1 a description of the proposed project and its cost is presented
2 to CTR by X for appraisal by the scientific director." Did I
3 read that correctly?
- 4 A. Yes, ma'am.
- 5 Q. The X in number one, the person who presents the proposed
6 project and its costs to CTR, was that company attorneys?
- 7 A. I think in some cases it was.
- 8 Q. Was that also company executives?
- 9 A. Sometimes the attorneys are executives.
- 10 Q. Non attorney executives?
- 11 A. I don't remember.
- 12 Q. Outside attorneys?
- 13 A. Yes.
- 14 Q. To your knowledge, did attorneys from Shook, Hardy &
15 Bacon ever make recommendations to CTR for Special Project
16 funding?
- 17 A. The records do show that.
- 18 Q. Were there other law firms besides Shook, Hardy & Bacon
19 that communicated to CTR concerning Special Projects funding?
- 20 A. Lesser number, but yes, I believe so.
- 21 Q. Was one of them Jacob & Medinger?
- 22 A. I believe that's correct.
- 23 Q. The primary purpose of CTR Special Projects was to give
24 tobacco companies evidence which they could use in litigation to
25 defeat the claims of smokers who were suing, wasn't it?

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1 A. Are you reading from something I said or are you just
2 asking a question?

3 Q. I'm asking a question first.

4 A. I -- would you please repeat the question? I want to
5 make sure I give you a --

6 Q. The primary purpose of CTR Special Projects, was it to
7 give tobacco companies evidence which they could use in
8 litigation to defeat the claims of persons who were suing the
9 companies?

10 A. Well, first, I don't know about "primary". I do know
11 that there were litigation interests that were addressed in
12 setting up the projects.

13 Q. Could you hand Dr. McAllister his trial testimony from
14 Engle, March 11th, 1999 and March 10th, 1999.

15 Let's start with the March 11th transcript first.

16 MR. BERNICK: Could we have a copy of the transcript,
17 please? March 11th.

18 BY MS. MOLTZEN:

19 Q. Please turn to page 27210 in the March 11th one.

20 A. I have it.

21 Q. Okay. At line 6 the question is, "Now, you understand
22 that the primary reason for doing special projects was to give
23 tobacco companies evidence which they could use in litigation to
24 defeat the claims of smokers who were suing?"

25 And your answer begins at line 15: "My understanding is

1 that Special Projects were -- did have the involvement of lawyers
2 at their inception, and certainly one of the things for which
3 they were given was to aid in litigation."

4 "Question: Aid the tobacco companies, period. Not aid
5 the public or the smoker, period. This was research to help the
6 tobacco companies in litigation?"

7 Your answer is, "Yes."

8 A. Yes.

9 Q. Is that correct?

10 MR. BERNICK: I object, Your Honor, I don't believe that
11 impeaches his prior testimony here or his testimony here.

12 THE COURT: Objection's overruled.

13 BY MS. MOLTZEN:

14 Q. You testified during the Engle trial, didn't you?

15 A. Yes.

16 Q. And you gave that testimony under oath, didn't you?

17 A. Oh, I did. I think that --

18 THE COURT: Excuse me, I do not think that we have a clear
19 answer because Dr. McAllister followed my instructions, he didn't
20 answer after the objection was made. And the last question was
21 "is that correct" referring to the reading of the transcript.
22 Could you answer that question, please?

23 BY MS. MOLTZEN:

24 Q. Did I read the transcript correctly?

25 A. Yes, ma'am.

1 Q. And please look at the March 10th at page -- and turn to
2 page 27093.

3 A. Unfortunately, it's not marked March 10th. I'm going to
4 have to stumble through here for a minute.

5 Q. Okay.

6 THE COURT: Dr. McAllister, let me ask you one question
7 again, just so that things are clear on the record. You answered
8 the question that the government counsel read the transcript
9 correctly. My question to you is, is the testimony that you gave
10 in that transcript in the Engle trial, was that testimony
11 correct?

12 THE WITNESS: Yes, I believe it's correct and also it
13 agrees with what I just testified in this trial.

14 MS. MOLTZEN: Thank you, Your Honor.

15 THE WITNESS: Can you help me with this? I'm sorry, I
16 don't know which -- this is not in a folder, and --

17 MS. MOLTZEN: Your Honor, may I approach the witness?

18 THE COURT: Yes.

19 BY MS. MOLTZEN:

20 Q. Page 27093.

21 A. Unfortunately, the one you gave me didn't have that.
22 Maybe the next one does. Yes, it's in the next one.

23 MR. BERNICK: This doesn't have it. This is March 11th.

24 THE WITNESS: I'm finally with you.

25 MR. BERNICK: I'm sorry. A, I don't have the transcript

1 from counsel. B, what's now the purpose of proffering the prior
2 testimony? We went from one excerpt, and I understand that the
3 government thought that was inconsistent with his prior answer,
4 but why now is an additional excerpt being offered?

5 MS. MOLTZEN: Your Honor, I don't believe I have to state
6 the purpose for why I'm doing this.

7 THE COURT: Not at this point, no. I'll draw my own
8 conclusions depending on what his answers are.

9 MR. BERNICK: Well --

10 THE COURT: Let me say this. I'm assuming you're offering
11 it for impeachment purposes without going into an explanation of
12 why you think it's impeaching.

13 MS. MOLTZEN: Yes, Your Honor.

14 MR. BERNICK: All I'm asking, Your Honor, is what is it
15 designed to impeach? What is the testimony designed to impeach?

16 THE COURT: At this point she doesn't have to indicate
17 that, but you are entitled to a copy of the transcript.

18 MS. MOLTZEN: Yes.

19 THE COURT: Is the government going to get that, I think
20 one of the paralegals --

21 MR. BERNICK: We can go ahead, I --

22 THE COURT: Go ahead, please.

23 BY MS. MOLTZEN:

24 Q. You testified on the day before also, on March 10th, in
25 the Engle trial, didn't you?

1 A. Yes.

2 Q. And you testified under oath on this day also, correct?

3 A. Yes, ma'am.

4 Q. The question on page 27093 at line 18 is, "Could you use
5 the information on the chart to explain the differences between
6 how CTR was involved in the funding of grants and contracts
7 versus how it was involved in the funding of Special Projects?"

8 And for the next 12 lines you describe a chart that you
9 have, but at line 9 you start, quote, the Special Projects to
10 which Mr. Moodhe is funding also, I assume the funding is a
11 mistake, comma, the source of funds comes from the tobacco
12 companies. Tobacco company lawyers are, in fact, involved in
13 the selection of some of those projects. The scientific
14 director of CTR is consulted by the tobacco companies concerning
15 whether is this research any good or not, just to pass judgment
16 on the quality of the research before the money goes to the
17 Special Project researchers themselves. Is that your testimony
18 in March 1999?

19 A. Yes.

20 Q. And is that your testimony today?

21 A. Yes, I think it all is the same.

22 MR. BERNICK: Your Honor, I -- obviously it was not really
23 designed to impeach.

24 THE COURT: It was not. Objection is sustained. That did
25 not impeach anything that Dr. McAllister said earlier. It might

- 1 have added a little more detail, but, of course, that's not a
2 proper purpose. Go ahead, please.
- 3 BY MS. MOLTZEN:
- 4 Q. According to your testimony, CTR Scientific Advisory
5 Board -- let's make another acronym clear in case we start using
6 SAB. Sometimes CTR Scientific Advisory Board is identified by
7 that acronym, SAB, correct?
- 8 A. That's correct.
- 9 Q. According to your testimony, CTR Scientific Advisory
10 Board reviewed grant applications and also reviewed contracts;
11 is that correct?
- 12 A. Yes.
- 13 Q. But the Scientific Advisory Board did not review CTR
14 Special Projects proposals, did it?
- 15 A. That's correct.
- 16 Q. Going back to the procedure on 162, in 1 and 2 it sounds
17 like the scientific director reviewed the grant applications and
18 then either approved or disapproved of the proposal -- not the,
19 did I say grant, I meant Special Project proposal?
- 20 A. Would you restate, please?
- 21 Q. The CTR scientific director reviewed the Special Project
22 proposals and either approved them or disapproved them; is that
23 correct?
- 24 A. That's what the record seems to show, yes.
- 25 Q. And Dr. Sommers was CTR scientific director until 1987;

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1 is that correct?

2 A. That's correct.

3 Q. During the time you worked with Dr. Sommers at CTR, did

4 he ever tell you his impressions with CTR Special Project

5 proposals that were coming across his desk?

6 A. No.

7 Q. According to the procedure you describe on page 162,

8 lines 8 through 10 -- and this is at number 2 -- once the

9 scientific director had approved a Special Project proposal,

10 someone had to obtain quote approval by the general counsel of

11 the participating companies". Did I read that correctly?

12 A. Yes.

13 Q. Would you hand Dr. McAllister U.S. Exhibits 26488?

14 MR. BERNICK: Your Honor, I -- in case it's not close to

15 page --

16 THE COURT: Counsel -- I found it. The pages were out of

17 order.

18 BY MS. MOLTZEN:

19 Q. And 85746 and 86273. Do you have all three letters,

20 Dr. McAllister?

21 A. I do.

22 Q. Let's look at 26488. This letter is on letterhead from

23 Jacob, Medinger & Finnegan, correct?

24 A. That's correct.

25 Q. And it's dated August 24th, 1983?

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- 1 A. Yes.
- 2 Q. And this is about a week before you start work at CTR,
3 isn't it?
- 4 A. I'm -- I have to tell you I don't remember exactly what
5 day I started, but it's very close to when I started.
- 6 Q. And this Special Project proposal is from Professor
7 Uysenck, U-Y-S-E-N-C-K, correct?
- 8 A. Yes.
- 9 Q. And at the beginning of the second paragraph it reads,
10 quote, Dr. Sommers has reviewed this proposal and recommends its
11 approval, end quote?
- 12 A. Yes.
- 13 Q. And do you recognize the seven gentlemen who this is
14 addressed to as general counsels of tobacco companies?
- 15 A. I don't recognize all those names, but some I do.
- 16 Q. And then look at 85746. And this is on letterhead from
17 Shook, Hardy & Bacon; is that correct?
- 18 A. Yes, ma'am.
- 19 Q. And it's dated January 23rd, 1984, correct?
- 20 A. Yes.
- 21 Q. And this is regarding a Special Project for Dr. Theodore
22 Sterling, correct?
- 23 A. Yes.
- 24 Q. And the first sentence of the third paragraph reads:
25 "Dr. Sterling continues to be active in a variety of research

1 areas that are of interest to the industry". Did I read that
2 correctly?

3 A. Yes, ma'am.

4 Q. And then on the last page, the first sentence of that
5 paragraph, "Finally, we have discussed the proposal with
6 Dr. Sommers who feels that it merits support." Did I read that
7 correctly?

8 A. Yes, ma'am.

9 Q. And one last letter 86273. This one is also on Shook,
10 Hardy & Bacon letterhead, correct?

11 A. Yes.

12 Q. And this is dated March 27th, 1987; is that correct?

13 A. Yes.

14 Q. And the second sentence we see that this is a special
15 project for Dr. Rodger Bick; is that correct?

16 A. Yes.

17 Q. And in the third paragraph, the last sentence, it reads:
18 "Dr. Sommers is of the view that the research is worthy of
19 further support. It is our recommendation that this project be
20 approved as a CTR Special Project."

21 And now my question about those three letters, is -- would
22 you agree that those three letters citing Dr. Sommers's approval
23 of Special Project proposals appear to be examples of the
24 requests that you discuss on -- or that you layout on page 162
25 as, quote, approval by the general counsel of the participating

1 companies?

2 A. Yes.

3 Q. At page 182 line 6, you testify that during your years
4 with CTR, CTR issued a total of about 20 press releases; is that
5 correct?

6 A. In the time that I was at CTR, yes.

7 Q. In the time during your years with CTR, yes. And those
8 20 CTR press releases issued during your years at CTR did not
9 disclose the Special Project proposals that had been approved
10 and funded that year, did they?

11 A. That's correct.

12 Q. On page 165 and 166 of your written direct, you
13 testify --

14 THE COURT: Did you say -- I'm sorry, 65?

15 MS. MOLTZEN: 165 and 166.

16 BY MS. MOLTZEN:

17 Q. You testify about a credit line that recipients who
18 received CTR Special Project funds were asked to include in any
19 publication that resulted from the Special Project research.
20 Did I read that correctly?

21 A. Yes.

22 Q. And at page 166, lines 8 through 10 you state that the,
23 quote, purpose of CTR's instruction to identify the research as
24 a special project of CTR, was to avoid any confusion with the
25 grant-in-aid program of CTR, end quote. Did I read that

1 correctly?

2 A. Yes, ma'am.

3 Q. My question is, did the credit line avoid confusion?

4 MR. BERNICK: Objection, lack of foundation and form.

5 Confusion among whom.

6 THE COURT: Sustained.

7 MS. MOLTZEN: I'm just quoting what Dr. McAllister has

8 said in his written direct at lines 8 through 10.

9 MR. BERNICK: Yeah, but that is a statement of intent.

10 Now, she is asking --

11 THE COURT: You have to establish whether he had any

12 knowledge about this.

13 BY MS. MOLTZEN:

14 Q. Dr. McAllister, when you worked at CTR, did CTR ask

15 Special Project recipients to put a certain kind of credit line

16 in their acknowledgements?

17 A. The acknowledgment line, right, the acknowledgment

18 sentence.

19 Q. And did you write any of those letters asking for that?

20 A. No.

21 Q. Did you see any of those letters asking for that?

22 A. I have seen them.

23 Q. At the time, were you aware that CTR Special Project

24 recipients were being asked to put in a special credit line?

25 A. No.

- 1 Q. So your testimony at 166 --
- 2 A. May I clarify, I just want to make sure you mean at the
3 time that I was working as a scientific director and not
4 afterwards during litigation when I had done more work on
5 studying special projects. You were speaking about when I was
6 acting as the scientific officer?
- 7 Q. I was asking at any time during your years at CTR.
- 8 A. Well, obviously later on I did when I started doing my
9 investigation of Special Project files in the late '90s, I
10 obviously was aware of that, sure.
- 11 Q. What did you mean in your testimony from lines 8 through
12 10? You say most of these letters explained that the purpose of
13 CTR's instruction to identify the research as a special project
14 of CTR was to avoid any confusion with the grant in aid of CTR.
- 15 A. Do you want me to explain it another way? To me it's
16 very clear. What's the point of confusion?
- 17 Q. What did you base this testimony on?
- 18 A. The fact that the acknowledgment lines were different.
19 One was special, one was not.
- 20 Q. But you had no personal knowledge, then, to make the next
21 statement; is that true, the purpose of those acknowledgment
22 lines? You're just basing that on review of documents instead
23 of personal knowledge?
- 24 A. It's very clear. It's quite clear that that's the
25 purpose of the different tag line or acknowledgment line.

- 1 There's no question what the purpose was. I don't see how we
2 could be confused about that.
- 3 Q. Well, in that case, did the special acknowledgment line
4 avoid confusion with the grant-in-aid program during your years
5 at CTR?
- 6 A. I'm confident that it did. As a scientist reading these
7 papers, when we look at acknowledgment line, we see who funded
8 the research. If it said that it was special, then that
9 certainly sends up a red flag to the readers of the publication.
- 10 Q. Would you hand Dr. McAllister his deposition testimony in
11 United States versus Philip Morris, May 24th, 2002?
- 12 A. By the way when I said "red flag" I didn't mean to imply
13 alarm, I simply meant different.
- 14 Q. There's no question pending, Dr. McAllister.
- 15 A. I was only clarifying my last answer.
- 16 Q. Page 148 please.
- 17 A. Of which?
- 18 Q. May 24th, 2002 deposition testimony in U.S. V Philip
19 Morris. And you did give this deposition testimony. You were
20 deposed in the United States versus Philip Morris; is that
21 correct?
- 22 A. Oh, yes.
- 23 Q. And you gave this testimony under oath; is that correct?
- 24 A. That's correct.
- 25 Q. On page 148 starting at line 13, the question is, "Again,

1 going back to something you said yesterday in that disclosure or
2 the acknowledgment line that the funding was through CTR Special
3 Projects, was there an awareness in the scientific community of
4 the distinction between CTR grant-in-aid funding and CTR Special
5 Project funding?"

6 And you answer, "We would have to restrict that to
7 scientists who knew about CTR at all."

8 "Question: Okay."

9 "Answer: And I would suspect only that they would
10 acknowledge if they looked at it, which I said yesterday was
11 probably unlikely -- if they looked at it, and if they knew about
12 Council for Tobacco Research, they would recognize that it was
13 different. How it was different would not be clarified, would
14 not be clear from the acknowledgment line."

15 Was that your testimony in U.S. V Philip Morris?

16 A. Yes.

17 MR. BERNICK: At least the rest of the answer should be
18 completed.

19 BY MS. MOLTZEN:

20 Q. "If they wanted that information, obviously, it's not
21 secret, they can call up and find out about it or call up the
22 investigator in whose paper they saw it. But again, I would
23 repeat, I'm not sure at any given time how much awareness there
24 was in the scientific community of Council for Tobacco Research
25 at all. We know it was aware, it was known to a lot of people,

1 but I didn't want to imply that every scientist had heard of the
2 Council for Tobacco Research."

3 Were you not testifying here that even in the scientific
4 community they would not understand the differences between CTR
5 Special Projects procedures and CTR grants-in-aid procedures?

6 A. If I gave that answer, if I -- if you interpreted that
7 answer that way, that is incorrect. What I was saying was,
8 first of all -- what I said, first of all, reflected the fact
9 that not many scientists looked at the acknowledgment line.
10 Those that do, as we have just discussed, look at it with a
11 specific idea of who supported the research, and if it did say
12 that, those scientists who go all the way through to look at the
13 acknowledgment line, the acknowledgement line is, obviously,
14 different. That, not as I said, raises a red flag, but
15 acknowledges that it is certainly different and to me I don't
16 know what other amplification I can give other than the fact
17 that, yes, for a scientist reading it it would show that it was
18 different. That's what I testified to you before and what I
19 still believe today.

20 Q. By the acknowledgment line, you did testify that they
21 were different?

22 A. Yes.

23 Q. But that had no meaning to the scientific reader unless
24 they knew some background; isn't that true?

25 A. No, it did have meaning. The meaning it had was that it

1 was different and it wouldn't be through a standard grant-in-aid
2 kind of program.

3 Q. But the reader of that line would not understand that
4 there were differences in how grant applications were initiated,
5 approved and funded versus how Special Project proposals were
6 reviewed and funded; isn't that correct?

7 A. I think it would be beyond belief that anybody would pack
8 that much information in an acknowledgment line. The
9 acknowledgment line really just does recognize the source of the
10 funding, "special" was added to avoid any confusion with the
11 regular program.

12 Q. The acknowledgment line does not inform anyone who reads
13 it that the Special Project proposals were not reviewed by CTR's
14 Scientific Advisory Board, does it?

15 A. Of course not. That would be totally inappropriate.
16 Editors would never allow such a lengthy acknowledgment line to
17 be published.

18 Q. Any confusion that was avoided was minimal, it was just
19 to let them know that there was a difference from what?

20 MR. BERNICK: Objection to the form of the question. I
21 think he's answered all the facts and this is now just counsel's
22 characterization as to whether it was minimal, significant or
23 substantial.

24 THE COURT: The objection's overruled, the question refers
25 to an earlier statement in the direct testimony and so you may

1 answer the question.

2 THE WITNESS: Would you restate?

3 BY MS. MOLTZEN:

4 Q. Any confusion that was avoided by the acknowledgment line
5 was minimal; isn't that correct?

6 A. I believe that would be correct, and if a person wanted
7 to follow it up, as I said, they were totally at liberty to do
8 so. They will be -- we would have a full explanation of what it
9 was if they wanted to know.

10 Q. I'd like you to look at page 113 of your testimony.
11 We're going to talk about lines 7 through 17. Do you have line
12 7, Dr. McAllister?

13 A. I do.

14 Q. Okay. The question is, "In addition to reading the
15 annual reports, how else could scientists, or other interested
16 persons, find out about the research that CTR funded at any
17 particular time?"

18 And your answer is, "They could read the publications
19 themselves or hear about them through word-of-mouth, or discuss
20 the research with the scientists to which CTR provided financial
21 support, or with others who might also know about research CTR
22 funded"; is that correct?

23 A. Yes, ma'am.

24 Q. Now, you testified yesterday that no one reads the
25 publication, did you not? I believe that you -- the quote from

1 your testimony on Thursday is the public did not read the
2 scientific literature?

3 A. That's of course --

4 MR. BERNICK: I'm sorry, I guess if the witnesses recalls
5 that's fine, but if it purports to be a quote, we should really
6 have the quote. But if he remembers, I have no objection.

7 BY MS. MOLTZEN:

8 Q. Do you remember testifying to that on Thursday?

9 A. It -- I could have said that. Of course, I was speaking
10 globally, obviously that's not totally true.

11 Q. In that case the publications that the scientists wrote
12 was not a way that the public -- let's stick with the public
13 right now -- could find out factual information because they
14 didn't read them, correct?

15 A. The non scientifically oriented public is what you're
16 talking about?

17 Q. Right now, yes.

18 A. Generally that's true.

19 Q. And then you also say "or hear about them through
20 word-of-mouth." My friend on the Kansas prairie, you really --
21 are you really saying that that was the way that kind of person
22 could get information, through word-of-mouth?

23 A. My word-of-mouth comment actually was referring to other
24 scientists, and I was thinking about meetings, corridor
25 conversations. I, perhaps, should have been more specific, but

1 I'm was specifically talking about the way scientists talk to
2 each other.

3 Q. So this was not the general public was not going to be
4 giving factual information about tobacco and health from hearing
5 about them through word-of-mouth, correct?

6 A. Generally that would be true, yes.

7 Q. And that must also apply with the next phrase, "or
8 discuss the research with scientists to which CTR provided
9 financial support". You were again talking about scientists
10 rather than the general public?

11 A. I was, yes.

12 Q. And the last one, "or discuss with others who might also
13 know about the research CTR funded". Are you in that phrase
14 talking about the scientific community rather than the general
15 public?

16 A. Well, "others", of course, could this time be information
17 derived from science writers, but the emphasis through the whole
18 questioning was my emphasis was on the scientists themselves.

19 Q. But the question does say "how else could scientists or
20 other interested persons"; does it not?

21 A. Yes.

22 Q. The next question at line 13: "What about the research
23 that CTR did not fund?" Dr. McAllister, is that a question and
24 answer that you put in this direct testimony?

25 A. I think so.

1 Q. All right. I'll read the answer, "Nothing prevented
2 anyone from talking with scientists whose grant-in-aid research
3 proposals had been turned down by CTR. Nothing prevented a
4 scientist whose grant proposal had been turned down by CTR from
5 complaining publicly about CTR's decision."

6 Is it your testimony today that scientists, or other
7 interested persons -- and I'm most interested in the other
8 interested persons -- would find out about research that CTR did
9 not fund by talking with the scientists whose research proposals
10 had been turned down?

11 A. Well, again, you're talking about the person on the
12 plains and I'm talking, really, about other scientists who are
13 free to find out about what reason the grant-in-aid was turned
14 down. But in general, yeah, they could talk to anybody.

15 Q. So if you had it to do over again today you would not
16 delete that question and answer from this testimony?

17 A. Unless there was another thrust to the question that I
18 didn't understand, I'll be glad to amplify anything you want to
19 know about that question, but maybe I misunderstood the
20 question.

21 Q. No, that's fine, you understood the question.

22 My last question and answers are on dissolution. From
23 page 10 through 15 of your written direct, you tell the Court
24 about the events that led up to CTR's dissolution; is that
25 correct.

- 1 A. Just a moment.
- 2 Q. Look at line 19. It's a subheading B?
- 3 A. I just found it.
- 4 Q. Dissolution of CTR, so that's correct?
- 5 A. I found it, yes. You read it correctly.
- 6 Q. Turn to page 11.
- 7 In discussing events that led up to CTR's dissolution, you
- 8 include the 1997 memorandum of understanding with Attorney
- 9 Generals of a handful of states. That's at page 11 lines 5
- 10 through 6. Did I read that correctly?
- 11 A. Yes.
- 12 Q. And on lines 12 through 14, you include legislation
- 13 introduced in Congress in 1997, correct?
- 14 A. Yes.
- 15 Q. And at lines 16 through 19, you include the Minnesota
- 16 Settlement Agreement in 1998?
- 17 A. Yes.
- 18 Q. And at lines 20 through 21, you include the Master
- 19 Settlement Agreement later in 1998, correct?
- 20 A. Yes.
- 21 Q. However, prior to CTR's voluntary dissolution, the New
- 22 York state Attorney General sought involuntary compulsory
- 23 corporate dissolution of CTR, didn't he?
- 24 A. You're not reading, no, right?
- 25 Q. No, this is a question.

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1 A. That is a question. Please repeat.

2 Q. Prior to CTR's voluntary dissolution, the New York state
3 Attorney General sought involuntary compulsory dissolution of
4 CTR as a corporation, didn't he?

5 MR. BERNICK: I object to the question, A, on grounds of
6 lack of foundation, and B, on grounds of hearsay, actions taken
7 by a third party offered to establish the -- some aspect about
8 CTR would be hearsay.

9 MS. MOLTZEN: Your Honor, I'm trying to find out why, of
10 all the events that were happening in 1997 and 1998 that
11 discussed CTR's dissolution, that particular series of events was
12 left out of the direct testimony.

13 MR. BERNICK: Well, I object to that characterization as
14 well. I have no objection to the question about why this isn't
15 in the direct, though.

16 THE COURT: The objection to the question as it was posed
17 is sustained. There may be other ways to properly phrase it.

18 BY MS. MOLTZEN:

19 Q. Dr. McAllister, were you aware at all in 1997 and 1998
20 that the New York Attorney General was seeking involuntary
21 compulsory corporate dissolution of CTR?

22 A. There were some discussions going on. That's a legal
23 phrase -- I don't know if that's the legal term for it.

24 Q. Would you hand Dr. McAllister U.S. Exhibit 86853 and U.S.
25 Exhibit 87584 -- I'm sorry, 87584.

- 1 Dr. McAllister, were you a corporate officer of CTR in
2 1997 and 1998?
- 3 A. Yes, I believe I was.
- 4 Q. And what were you?
- 5 A. I think I was -- to be a corporate officer I think I
6 was -- it seems like I was an Assistant Secretary or something
7 like that.
- 8 Q. In exhibit, U.S. Exhibit 86853, this is titled: "The
9 Plan of Corporate Dissolution and Distribution of Assets of the
10 Council for Tobacco Research USA, Inc.", correct?
- 11 A. Yes.
- 12 Q. And if we turn to the last page, we see that it was
13 certified -- the certification was signed by whom?
- 14 A. The last page is actually a copy of a 1981 Surgeon
15 General's Report. Just a minute.
- 16 Q. You can look at the screen.
- 17 A. Next to the last page.
- 18 Q. Yes.
- 19 A. Okay.
- 20 Q. Who was the certification --
- 21 A. I have what's on your left page but not what's on your
22 right. I do have what's on the left page there, I have that.
- 23 Q. That's right.
- 24 A. Is that right?
- 25 Q. The certification was signed by who?

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- 1 A. Lorraine Pollice.
- 2 Q. And she was?
- 3 A. Secretary.
- 4 Q. And you knew Ms. Pollice?
- 5 A. Oh, sure.
- 6 Q. And she signs this on October 20th, 1998, correct?
- 7 A. That's correct.
- 8 Q. Back to the first page, the second paragraph, number one,
- 9 quote, "New York Attorney General. On January 27, 1997, the
- 10 state of New York, by Dennis C. Vacco, Attorney General of the
- 11 State of New York, paren, the Attorney General, end paren,
- 12 brought an action that, among other things, sought the
- 13 dissolution of CTR as a New York not for profit corporation. On
- 14 April 30th, 1998, the Attorney General commenced a special
- 15 proceeding that, among other things, sought the dissolution of
- 16 CTR."
- 17 Were you involved at all in drafting the plan of
- 18 corporate dissolution?
- 19 A. No.
- 20 Q. Were you around when discussions were held about the plan
- 21 of corporate dissolution?
- 22 A. Whose discussions would that be?
- 23 Q. Who was the president at that time?
- 24 A. Dr. Glenn.
- 25 Q. Dr. Glenn. Did you have any conversations with him about

- 1 the New York state Attorney General's actions?
- 2 A. No detailed discussions.
- 3 Q. What non detailed discussions?
- 4 A. Just that -- we all knew about the action. I don't -- I
- 5 wasn't -- I wasn't involved in the preparation of responses or
- 6 anything like that. I wasn't involved in the writing of the
- 7 actual dissolution.
- 8 Q. But you were aware of the action, the New York state
- 9 Attorney General's action?
- 10 A. Oh, yes, sure.
- 11 Q. And you omitted that action from your description of
- 12 events from 1987 and 1999 that led up to CTR's dissolution; is
- 13 that correct?
- 14 A. I don't remember. I could have.
- 15 Q. Well, we can look at the testimony --
- 16 A. Sure.
- 17 Q. -- and it's at pages 10 through 15, especially at page 11
- 18 is where you in that answer from line 5 to line 22 lay out
- 19 various things that were happening among the Attorney Generals
- 20 of the various states, Congress, Minnesota, and then the Master
- 21 Settlement Agreement?
- 22 A. That's correct.
- 23 Q. You did not include in there any of the actions by the
- 24 New York state Attorney General, do you?
- 25 A. No, the memorandum of understanding was what we were

1 discussing at that point. I don't know specifically on what
2 grounds it was omitted. That's, obviously, a legal decision.

3 Q. Was it your decision to omit those actions from your
4 direct -- written direct testimony?

5 A. I -- no, I already said I wasn't part of that, part of
6 the -- I wasn't part of the decisions about the corporate
7 dissolution. I didn't voluntarily say why is this left out, no.
8 I -- to me it was perfectly clear what we were talking about.
9 The memorandum of understanding, the Minnesota settlement and
10 all the subsequent events all fell into place.

11 Q. Yes, Dr. McAllister, but you did leave out the New York
12 state Attorney General's actions from your written testimony,
13 did you not?

14 A. I don't -- yes, I did, that's true.

15 MS. MOLTZEN: No more questions, Your Honor. One moment,
16 Your Honor. No more questions.

17 THE COURT: All right, Mr. Bernick?

18 MR. BERNICK: I have to say, I'm a little surprised
19 because the estimate was for like four hours. We've been through
20 two. If Your Honor would allow us to take the morning break at
21 this point I may have a few questions, but there will be very
22 few, and that way I can gather those questions together.

23 MS. MOLTZEN: Your Honor, the reason that was decreased is
24 because of the rulings you made on the testimony on Thursday. I
25 looked back through it and realized I didn't need to ask very

1 many questions.

2 THE COURT: I never require an explanation as to why
3 lawyers take less time. But thank you for it. Anyway, all
4 right. If it will be helpful, we'll take our 15-minute recess at
5 this time.

6 (Thereupon, a break was had from 10:46 a.m. until
7 11:07 a.m.)

8 THE COURT: We'll have redirect. And I gather there's
9 some concern about getting Mr. Read over to the courthouse. I'm
10 certainly prepared to rule on the majority of the objections that
11 have been raised and that will take a few minutes. I don't
12 know --

13 How long do you think your redirect will be.

14 MR. BERNICK: I think it will probably go probably half
15 hour, 35 minutes. And the objections with respect to Read --
16 I'll be presenting Mr. Read and I -- if Your Honor's prepared to
17 rule, obviously, that's more than fine, but in light of the
18 position taken by the government with respect to Dr. McAllister
19 and the colloquy that we had about interpretation of documents,
20 which is an issue that also carries through now with respect to
21 Mr. Read, I think that there's going to be -- at least I would
22 like to address those particular issues and I think that might
23 take at least a little bit of time.

24 THE COURT: All right.

25 MR. BERNICK: So I don't know that we're going to run

1 into -- Mr. Read's coming over in any event, so whenever Your
2 Honor wants to put him on, we'll be happy to proceed, but I don't
3 think we'll have a timing problem. At least I hope not.

4 THE COURT: Okay.

5 REDIRECT EXAMINATION OF HARMON McALLISTER, Ph.D.

6 BY MR. BERNICK:

7 Q. Dr. McAllister, I want, first of all, to pick up on one
8 of the questions that you were asked at the outset -- towards
9 the end of the examination, which related to your answer at page
10 11 regarding the dissolution of CTR. The question was asked of
11 you: "When did you find out that CTR was going to be
12 dissolved?"

13 And your answer refers to a 1997 agreement with the
14 Attorney General -- Attorneys General of a handful of states and
15 then also a 1998 lawsuit which was settled, the Minnesota
16 lawsuit. So we have June of '77 (sic). Do you recall when the
17 Minnesota case was settled?

18 A. It was settled May 8th, it says here.

19 Q. Okay. So basically, we're talking about a year
20 between -- the entry of the agreement with the Attorney Generals
21 that's referred to at the first part of your answer and the time
22 that the settlement was reached with Minnesota; would that be
23 fair?

24 A. Yes, sir.

25 Q. Now, you were then shown a document, which is U.S.

1 Exhibit 86853, which was the Plan For Corporate Dissolution. Do
2 you recall that?

3 A. Yes, sir.

4 Q. And this actually is dated even later, as I see. This is
5 dated October 19, 1998 and it makes reference to the fact that
6 the Attorney General filed a lawsuit on January 27th and then a
7 special proceeding on April 30th, but there's no indication in
8 this document that there was any kind of agreement with the
9 Attorney General of New York until October; would that be fair?

10 A. Exactly.

11 Q. Now, before there was any agreement with the Attorney
12 General for the State of New York in October of 1998, had there
13 already been an agreement that basically spelled out, as the
14 question asked, that CTR was going to be dissolved?

15 A. Yes.

16 Q. Okay. What is it that happened first, the discussion
17 with the Attorney General in New York or the agreement in
18 connection with the State of Minnesota case to dissolve CTR?

19 A. Well, the Minnesota case contained all the outlines for
20 the dissolution -- not all the outlines, but the fact that it
21 would be dissolved.

22 Q. Do you know whether or not the agreement that was then
23 reached with the Attorney General for the State of New York was
24 by way of implementation?

25 A. Sure.

1 Q. I want to go back to a document that was shown to you
2 last week and cover certain aspects of it with you here this
3 morning. And the document was the "Frank Statement to Cigarette
4 Smokers."

5 And I see here that it's -- I think this is the exhibit,
6 Your Honor, that was introduced. It is JE 21418.

7 Do you recall being shown the "Frank Statement,"
8 Dr. McAllister?

9 A. Yes.

10 Q. And the "Frank Statement," is that a document that you
11 have come to review and be familiar with during the course of
12 your work at CTR before it was dissolved?

13 A. Yes, sir.

14 Q. Now, I want to focus in particular upon the undertakings
15 that were made with reference to the creation of the TIRC and
16 what ultimately became CTR.

17 THE COURT: You're using that word "undertakings" in the
18 Australian sense or the American sense?

19 MR. BERNICK: I can guess what the reference --

20 THE COURT: I'm speechless. I can't believe you're
21 speechless. All right. Go ahead. I understand.

22 MR. BERNICK: All right. Okay, okay. I'm not as familiar
23 with the Australian situation as maybe Your Honor might suspect.
24 I would love to go to Australia. They've got great wine.

25 BY MR. BERNICK:

1 Q. Are there certain undertakings in the U.S. sense that are
2 made towards the conclusion of the "Frank Statement" with regard
3 to research?

4 A. Yeah. The selection of the scientists and the board.

5 Q. Okay. Are these the three, in a sense, operative
6 paragraphs, from your point of view, of the "Frank Statement"
7 when it comes to your activities at CTR?

8 MS. MOLTZEN: Objection, leading.

9 MR. BERNICK: It's foundational, Your Honor.

10 THE COURT: Objection's overruled.

11 You may answer the question.

12 THE WITNESS: Okay. That contains the pledge. That's the
13 number one thing that starts out there, the pledge, and then how
14 they're going to implement it.

15 BY MR. BERNICK:

16 Q. And I don't mean to minimize any other aspect of the
17 "Frank Statement," but for purposes of my questions this
18 morning, I want to focus on these undertakings. I first want to
19 begin with the one that we see in number 3: "In charge of the
20 research activities of the Committee will be a scientist of
21 unimpeachable integrity and national dispute (sic)."

22 Do you see that statement?

23 A. "National reput." Yes, sir.

24 Q. Was the pledge to put in charge of the Committee "a
25 scientist of unimpeachable integrity and national reput" -- was

1 that pledge met?

2 A. Most certainly.

3 Q. Who was the first Scientific Advisor to the Committee?

4 A. You mean Dr. Little? For Scientific Director, yes.

5 Q. Scientific Director. Dr. Little?

6 A. Yes.

7 Q. I want to read to you what is already in evidence, a

8 portion of what's already in evidence as JE 76119, which was

9 written by Dr. Hammil in connection with his work for the

10 Surgeon General's Advisory Committee about a visit that he made

11 with Dr. Little of the TIRC in December 1962. He says: "My

12 impression of Dr. Little is that of one of the most estimable

13 men I have ever met. For the past four years, I have heard

14 rumors that was the soul of integrity and also that he had been

15 one of the true giants in the biological sciences, but that he

16 was nearing his dotage and was a mere figurehead in the TIRC.

17 After discussions of about 12 hours on Monday and another

18 six hours on Tuesday, my impression is that the first two items

19 were entirely accurate, but the last two items were not quite

20 accurate. Granted, he is 73 years old and I have no firsthand

21 comparative knowledge of his capacities 20 years ago, but he

22 certainly seemed remarkably alert and incisive. Furthermore,

23 I'm absolutely satisfied that he is much more than a figurehead

24 for the TIRC efforts."

25 Have you seen any documents, Dr. McAllister, that have

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1 anything less than praise for the intellectual ability, the
2 integrity and the stature of Dr. Little?

3 MS. MOLTZEN: Objection, Your Honor. He's beyond the
4 scope. I did not talk about Dr. Little at all.

5 MR. BERNICK: Your Honor, they put squarely at issue these
6 undertakings. I'm going to go through all three. I'm not going
7 to dwell in detail, but I'm going to cover them a little bit.

8 THE COURT: The objection is overruled.

9 BY MR. BERNICK:

10 Q. Do you recall my question?

11 A. No -- no other documents said anything about that. He
12 continues to be a highly respected person even today.

13 Q. Are you aware of any criticisms of any of the scientific
14 directors who followed Dr. Little on the grounds that they
15 weren't qualified, that they lacked integrity or that they
16 lacked reputation?

17 A. No, none.

18 Q. I want to go to the Advisory Board and in particular the
19 undertaking that was made. It says: "In addition, there will
20 be an Advisory Board of scientists disinterested in the
21 cigarette industry. A group of distinguished men from medicine
22 and science and education will be invited to serve on this
23 Board. These scientists will advise the Committee on research
24 activities."

25 First of all, let's talk about the composition of the

1 Board. Have you, in fact, during the course of your work become
2 familiar with and, indeed, in your direct examination, testified
3 about the composition of the Scientific Advisory Board?

4 A. Certainly.

5 Q. The commitment and the pledge that was made in paragraph
6 3 with respect to these folks being disinterested and
7 distinguished men from medicine and science -- was that pledge
8 met?

9 A. Yes.

10 Q. Have you seen any evidence, any documents that indicate
11 that any members of the SAB were anything less than
12 disinterested, anything less than distinguished men of medicine
13 and science?

14 A. No. I was impressed.

15 Q. It says at the bottom: "These scientists will advise the
16 Committee on its research activities." Do you see that?

17 A. Yes, sir.

18 Q. Was that, in fact, done by the Scientific Advisory Board?

19 A. Yes. That was their core mission.

20 Q. Let me just ask you a little bit about transparency.
21 You've had an opportunity to look at a lot of documents. Were
22 the procedures and methods that were used by the Scientific
23 Advisory Board set out in writing, transparent and accountable
24 for all those who became familiar with those documents?

25 MS. MOLTZEN: Objection, Your Honor. To the extent he's

1 asking Dr. Little (sic) to interpret anything before the time he
2 was at CTR, I object.

3 THE COURT: He -- Dr. Little (sic) can respond on the
4 basis of what he learned from any review of documents during the
5 period of time that predated his arrival at CTR, but to the
6 extent that he answers that question regarding the period prior
7 to his arrival, his answer has to be based upon his review of CTR
8 records and documents.

9 BY MR. BERNICK:

10 Q. Okay. And I'll be clear. Almost all my questions --
11 unless I ask you a question that explicitly says otherwise, for
12 the period of time prior to your arrival on the scene, all my
13 questions about history are going to be questions that ask for
14 what you know based upon documents. So if you have heard
15 something from some other place, set it to one side. I'm just
16 asking you about the documents.

17 Can we proceed on that basis, Dr. McAllister?

18 A. Certainly.

19 Q. And my question is now, going back to the scope or master
20 plan of the SAB and the methodologies that the SAB followed,
21 were they in fact set out in black and white formally as part of
22 the Proceedings of the Scientific Advisory Board?

23 A. They were totally available. I've heard the term "open
24 book" used and there's no question about that.

25 Q. I want to show you U.S. Exhibit 86073, which is an

1 October -- it's a report of a meeting on October 17 and 18,
2 1954. Are you familiar with this document?

3 A. Oh, yes.

4 Q. This says "Confidential Report of the Meeting" and it
5 says: "Dr. Little opened the meeting and read a draft of the
6 Master Plan of Operation which has gradually been formulated."
7 And we're now here in, really, the first year of operations,
8 right?

9 A. That's correct.

10 Q. And it says: "The Plan, with minor changes, was
11 approved. A copy of the Plan is attached."

12 Do we see if we flip back to the back end of this
13 document that in fact there is a statement and outline of
14 program for the Scientific Advisory Board of the Tobacco
15 Industry Research Committee"?

16 You have to answer orally.

17 A. I'm sorry. I have that.

18 Q. Does this in fact articulate the Master Plan For Research
19 Activities as approved by the SAB?

20 A. Yes, they did approve that.

21 Q. It says: "Analysis of tobacco and its derivatives,
22 exposure of living tissue to such derivatives, smoking habits in
23 relationship to health." Is that or is that not consistent with
24 the purpose that you described for the SAB program in response
25 to the government's questions last week?

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1 A. It is.

2 Q. It is consistent or inconsistent?

3 A. I'm sorry. It is very consistent. I missed the other
4 part. Of course it is, yes.

5 Q. Okay. Let me just ask you this: This kind of approach,
6 with the Scientific Advisory Board reviewing and approving --
7 recommending approval or disapproval of grants, based upon your
8 review of documents -- was this something that was unprecedented
9 in terms of a procedure or an approach to funding fundamental
10 research at the time?

11 A. At the time, that's the procedure -- most funding
12 agencies had a board of scientific advisors on whom they called
13 to make scientific judgments and evaluate their applications.

14 Q. I want to direct your attention to -- while we're on the
15 subject of this purpose of research, you were shown U.S.
16 Exhibit 88398, which was a January -- or July 1, 1954 press
17 release where a statement was made by Mr. Hartnett regarding
18 purpose, that "The tobacco industry is determined to find the
19 answers to the public's questions about smoking and health. The
20 appointment of a full-time Chairman completes an organization
21 dedicated to carrying on comprehensive and objective scientific
22 and statistical research."

23 Now, the question to you: This is what was said
24 publicly; when you take a look at the internal documents that
25 deal with the workings of the organization, what is it you find

1 back in 1954 when the organization got under way? What is it
2 you find being stated internally about whether this organization
3 was designed to fund good science?

4 A. That was from the very start, continued through and, of
5 course, even into the time I was there. The documents show that
6 very clearly.

7 Q. Showing you what's already been admitted as 88- -- U.S.
8 Exhibit 88367, which is January 1955, "Report of the Scientific
9 Advisory Board." It says here in the first paragraph:
10 "Dr. Little stressed the importance of initiating work of an
11 original nature which could be pointed at supplying missing
12 links in scientific information."

13 Is that consistent or inconsistent with the idea of
14 funding good, sound, high quality science?

15 A. That's very consistent.

16 Q. Showing you what's also admitted, 88186, June 23, 1954,
17 page 2. It says: "Dr. Little was introduced as Scientific
18 Director of the Tobacco Industry Research Committee. He told
19 the members" --

20 We're talking here about the SAB, right?

21 A. This is a meeting of the Committee.

22 Q. Of the Committee. Okay. Fine.

23 "He told the members present that they should proud of
24 the approach to the problem which was being taken and the impact
25 it can make on research generally. He sketched in his basic

1 philosophy as being one of not just spreading money around, but
2 of outlining a constructive program designed to resolve the
3 question of the effects of tobacco use upon health, of choosing
4 the personnel and the institutions best qualified to work on the
5 projects thus selected. He explained that this calls for
6 idealism, but is a great challenge and can go far beyond Tobacco
7 Industry Research Committee anticipations."

8 Again, is what was being said here anything less than an
9 aspiration to do high quality science?

10 A. Nothing less.

11 Q. Let's talk a little bit about public relations. There's
12 some questions that were asked of you regarding whether there
13 was a communication function as well for the TIRC. Do you
14 recall that?

15 A. Oh, yes.

16 Q. When the TIRC was first established, did it have a public
17 relations function?

18 A. Definitely.

19 Q. And -- so we have the Scientific Advisory Board and then
20 we have the TIRC Non-Scientific Advisory Board, which has a
21 communications function, fair?

22 A. Yes. Yes, sir.

23 Q. Did a time come when the TIRC's communication function
24 was separated out from the organization?

25 A. That was after about four years of its being in

1 existence, sort of in the 1958 area.

2 Q. Okay. And at that time when the communications function
3 was severed out, was it any longer the function of the SAB
4 program to do communication or public relations?

5 A. Not after that.

6 Q. Now, back in the early days where we had these two
7 purposes, public relations and science, have you seen any
8 documents that show that the public -- that the scientific goals
9 of the SAB program were subservient to the goal of public
10 relations?

11 A. Oh, no. No, no.

12 Q. Now, we know that there are some documents -- are you
13 familiar that later on in history, in the 1970s, 20 years later,
14 lawyers and other people wrote a bunch of documents about how
15 CTR was always a public relations effort. Do you recall seeing
16 those documents?

17 A. Oh, yes.

18 Q. Well, when you go back to the actual formation of the
19 TIRC and the CTR, is there any issue about science somehow being
20 compromised for public relations?

21 A. No. Quite the opposite.

22 Q. Showing you what's already in evidence as U.S. 33006,
23 which is a "Confidential Report of the TIRC Committee Meeting,
24 April 28, 1955," it says at page 3 of the second attachment --
25 the bottom number on the page down here is 00043; do you see

1 that?

2 A. Almost there.

3 I've got it.

4 Q. It says: "Essentially, the major purposes of the TIRC
5 are research and public relations. Our job is to maintain a
6 balance between the two and to continue to build soundly so that
7 at all times, research and public relations complement each
8 other. In that way, we intend to assume the mantle of
9 leadership and ultimately to create a condition where the public
10 will look to the TIRC for answers rather than to others."

11 Do you see that?

12 A. I do.

13 Q. Again, is that consistent or inconsistent with the idea
14 that good science was not subservient to public relations?

15 A. That's true; it was not subservient.

16 Q. I want to show you testimony that's already been given in
17 this case by Dr. Brandt on behalf of the government. It's at
18 page 753. This is a statement that's made with regard to the
19 top executives of the companies at the time. It says: "And
20 that is what they wanted" -- this is at line 19 -- "which was
21 good science, correct?"

22 His answer was: "I think in their public statements,
23 that's what they said they wanted.

24 "Question: No, in their private, internal statements
25 that we just read, they all said they wanted good science."

1 There's an objection, the witness says: "Yes, they
2 wanted good science. They said they wanted good science."

3 Is that in harmony with your own review of the historical
4 documents?

5 A. Yes.

6 Q. Was there a time the SAB -- we talked about the SAB and
7 that they had to -- they were asked to provide advice -- asked
8 to provide advice. Was there any instance that you're aware of
9 at all in the history of the CTR or TIRC Grant-In-Aid Program
10 where that advice was countermanded by the industry?

11 A. No, no record at all.

12 Q. What about the situation of lawyers providing -- lawyers
13 being concerned about the content of research? Do you recall
14 any situation where lawyers were concerned about the content of
15 research?

16 A. There was one particular time, 19- -- late 1970s where
17 they were so concerned, yes.

18 Q. Showing you 86005, which was shown to you by the
19 government a little while ago this morning. This is a memo,
20 December 1975, by Addison Yeaman. It was quoted -- you were
21 shown this following portion: "In a long talk with Dave Hardy,
22 Bill Shinn, Don Hoel -- and Don Hoel, I preached that sermon and
23 added, because I believe it, that all the resources, all the
24 knowledge, all the help that CTR can give should be available to
25 the lawyers, to the Tobacco Institute and to any other of the

1 troops in the field. Dave gave me my text. He says, 'What you
2 mean is CTR should be independent, but always accessible and
3 available,' close quote, right, with only this addition:
4 Independent within the policies set down by the membership."

5 Now, just so we're clear, as a general proposition, would
6 you agree with Dr. Brandt, again, that it was the SAB -- this is
7 at page 785: "The SAB who decided the direction that funding
8 would take in connection with the SAB program."

9 Do you agree with the government's expert?

10 A. Always.

11 Q. Okay.

12 A. No, I mean SAB was always in charge. I don't necessarily
13 always agree with the government expert.

14 Q. Okay. Now, the suggestion from the quote that was read
15 to you was that somehow, while they were independent -- CTR
16 should be independent, but somehow, there was a constraint set
17 down by the membership.

18 With the exception of the situation that arose in the
19 late 1970s, are you aware of any other area of research where
20 either the membership of CTR or the lawyers who were involved
21 with the industry told the SAB that there was something they
22 couldn't do?

23 A. Definitely not.

24 Q. Okay. Let's focus on that situation in the late 1970s.
25 That focused on central nervous system research, correct?

1 A. Basically, yes.

2 Q. Okay. And that was research involving nicotine?

3 A. Primarily.

4 Q. Okay. Let me just ask you as a preliminary matter, had
5 CTR done no -- or funded no nicotine research prior to that
6 time?

7 A. No. Nicotine research was pretty much throughout the
8 history of both the CTR and Grant-In-Aid Program from the very
9 start.

10 Q. Showing you JD 004658, which is called "Addictive Aspects
11 in Heavy Cigarette Smoking," by Peter Knapp, it says on the
12 acknowledgements: "This work was supported in part by grants
13 from the American Cancer Society, the Tobacco Industry Research
14 Committee."

15 Is this an example of early research regarding the
16 addictive aspects in heavy cigarette smoking -- early research
17 funded by CTR related to nicotine and the smoking habit?

18 A. Yes.

19 MS. MOLTZEN: Objection, Your Honor, to this line of
20 questioning. I've waited a while to see where we're going, but
21 this is outside the scope. I did not talk about CNS -- any of
22 the CNS research that took place at CTR or did not take place at
23 CTR.

24 MR. BERNICK: Well, Your Honor, we know exactly what's
25 going to happen. They're going to take his testimony in

1 response to their questions regarding this document in order to
2 suggest, obviously, that, well, CTR could do research as long as
3 the lawyers said it was okay.

4 And so what I'm bringing out is his testimony that with
5 one exception, that never happened, and the exception I want to
6 elicit from this witness so it's clear to the Court.

7 THE COURT: The objection's overruled.

8 BY MR. BERNICK:

9 Q. Beyond the Knapp work that was done in 1962, showing you
10 Exhibit 22967, which deals with Motives and Incentives in
11 Cigarette Smoking -- it's by Dr. Dunn and it talks about the
12 role of nicotine. Are you familiar with that?

13 A. Oh, yes.

14 Q. Was there, in fact, a conference that was sponsored by
15 CTR in 1972 where a lot of people got together to talk about
16 nicotine?

17 A. Oh, sure.

18 Q. Was there any secret about that conference?

19 A. No, it was -- the results were published in a book.

20 Q. And I think that -- this is JD 040795. Is this the book
21 that was published dealing with those proceedings sponsored by
22 CTR?

23 A. Yes, it is.

24 Q. If we go through this book, does it talk about the role
25 of nicotine in smoking?

- 1 A. Oh, sure.
- 2 Q. Showing you JD 095351. Is this another article resulting
- 3 from work that was sponsored by CTR in the area of nicotine?
- 4 A. Yes. That was during my time.
- 5 Q. Showing you JD 094833. Is that yet another article
- 6 sponsored by -- or the work was sponsored by CTR relating to
- 7 nicotine?
- 8 A. Yes, sir.
- 9 Q. Now, were there, in fact, certain grant proposals in
- 10 1979, 1980, 1981 that involved nicotine where the grant was not
- 11 approved because the reviewing lawyer for CTR said that it was
- 12 on the other side of what he thought was permissible for CTR?
- 13 A. There are very few instances where applications that had
- 14 gone to lawyers were not forwarded on to the Scientific Advisory
- 15 Board. Less than a dozen that fit that description.
- 16 Q. And have you reviewed those?
- 17 A. Oh, yeah.
- 18 Q. And what is your understanding, based solely upon
- 19 documents, as to which -- was it -- was it all -- strike that.
- 20 Were there nicotine-related projects that were submitted
- 21 for review by CTR's counsel and were allowed to be presented to
- 22 the SAB?
- 23 A. Oh, the great majority.
- 24 Q. Well, then, what was it that differentiated, as you look
- 25 at the documents, the nicotine-related projects that were

1 allowed to go to the SAB during this period of time from the
2 nicotine projects that were not allowed to go to the SAB?

3 MS. MOLTZEN: Objection. Now he's asking Dr. McAllister
4 to interpret those documents before his time.

5 MR. BERNICK: No. I -- well, he's --

6 THE COURT: No. He's testifying on the basis of his
7 examination of the documents. And the objection's overruled.
8 You may answer.

9 THE WITNESS: Yes. I reviewed those few that never made
10 it and, in many cases, there was, frankly, direct product
11 implication. The -- how nicotine might be used as a drug or
12 nicotine replacements or they talked about pleasurable aspects of
13 smoking. There were things that -- as a matter of fact, most of
14 those had a direct product implication.

15 BY MR. BERNICK:

16 Q. What was -- what, if any, was the significance of that in
17 terms of whether CTR could do it or not?

18 A. Well, they couldn't do that. Anything that was involving
19 a product was basically the only thing CTR couldn't do -- was
20 things involved with a product.

21 Q. When you say that they couldn't do it, I know you're not
22 a lawyer, but based upon your review of the basic documents that
23 defined the scope of research that was undertaken by CTR, what
24 is -- what was the problem with doing product-related research?

25 A. My understanding from looking at the documents is that at

1 that time, they were very cautious about doing anything that
2 might be interpreted as collusive or fair trade -- what would
3 you call it? -- anyway, things that impinged on fair trade
4 problems. They were really very careful not to do anything that
5 might have to -- that might be considered as them joining
6 together to develop something about the product -- they simply
7 promised they wouldn't do it.

8 Q. That promise -- was that promise included in the original
9 statement of origin and purpose for CTR?

10 A. Yes. That was the agreement, that they agreed not to do
11 that.

12 Q. And counsel for the government showed you correspondence
13 with the Department of Justice. Was that same limitation
14 communicated to the Department of Justice; that is, that the
15 organization would not be used to do any commercial research?

16 A. Absolutely.

17 Q. Let's talk a little bit about Special Projects. First of
18 all, let me bring out some facts about your personal involvement
19 with Special Projects because I heard you answer the
20 government's questions. Often, you said that at a certain point
21 in time, you just didn't -- up to a certain point in time, you
22 just didn't have familiarity with Special Projects. Did I get
23 that right?

24 A. Sure.

25 Q. Let's just get the timing. Did Special -- did a time

1 come when CTR no longer was involved in approving Special
2 Projects?
3 A. That would be -- yes, there was, when I was there.
4 Q. And roughly when was that?
5 A. That was in, I think, about 1990.
6 Q. Okay. Now, when did you become the medical -- when did
7 you become the Scientific Director for CTR?
8 A. At '91. I think it was after that.
9 Q. Would it be fair to say that prior to that time, Special
10 Projects was something that was simply not within your job
11 description?
12 A. Oh, definitely.
13 Q. Okay. So, in the sense of being personally involved,
14 your only involvement with Special Projects has really been to
15 review documents that relate to Special Projects, fair?
16 A. That's right.
17 Q. All right. Now, let's talk a little bit about the
18 Special Projects. When in time did the Special Projects start
19 to become -- start to be funded? Does that go all the way back
20 to the beginning or did a time come when Special Projects came
21 into existence?
22 A. That was in the '70s.
23 Q. I'm sorry?
24 A. '70s, I think.
25 Q. Okay. Now, you've told us very plainly the Special

- 1 Projects were projects that were initiated not as part of the
2 SAB process, but by lawyers. They're basically lawyers' ideas;
3 is that your testimony?
- 4 A. I'm not sure where the idea came from, but certainly they
5 were involved.
- 6 Q. Okay. In the documents, do you see any indication of the
7 purposes for which lawyers were proposing Special Projects?
- 8 A. There were a couple of instances. I have been shown
9 documents, mostly in the course of litigation, that indicated
10 there was interest on the part of lawyers for specific reasons.
- 11 Q. Litigation?
- 12 A. Primarily litigation, yes.
- 13 Q. Regulatory issues?
- 14 A. Yes.
- 15 Q. Okay. Now, based upon your experience with the SAB and
16 your knowledge of historical SAB documents, was there any way
17 that the SAB program could get involved with responding to
18 lawyer needs to get research done? Did the two functions mesh
19 at all?
- 20 A. No, they were totally separate.
- 21 Q. As it was ultimately implemented -- that is, Special
22 Projects -- did the SAB have anything to do with Special
23 Projects?
- 24 A. Just the Scientific Director.
- 25 Q. Just the Scientific Director.

1 Are you aware of any instance in which somehow the
2 Special Project activities impinged upon, influenced or limited
3 the judgment of the SAB on what grants and what contracts to
4 approve?

5 A. I saw no evidence of that.

6 Q. You have in your direct examination this chart here that,
7 I think, basically makes the same point. And I want to use this
8 to ask you a couple more questions. This is JDEM 010287.

9 It shows a function of grant applications being processed
10 by the staff, going to the Scientific Advisory Board; the
11 Scientific Advisory Board then recommending grants and contracts
12 and then the work getting done.

13 And then above it, it has on a different line Special
14 Project Group Proposals coming to the Scientific Director and,
15 as you've described in your testimony, if they're approved, then
16 being funded through CTR.

17 The question to you is this: Based upon your review of
18 the historical documents, why was it that CTR got involved as an
19 organization -- even got involved in Special Projects? What was
20 the reason why they were processed through CTR?

21 A. I think -- the records indicate that we handled the
22 administrative money distribution part of the organization -- of
23 the program; sorry -- something that we had already been doing
24 for years and we just kept the books and --

25 It was reasonable that somebody that was already doing

- 1 that work would just add that burden, just as a favor,
2 basically, to the --
- 3 Q. Well, let me -- let's be clear about this. CTR got money
4 from whom?
- 5 A. The sponsor companies, the members, yes.
- 6 Q. So through the CTR organization, there was already an
7 established method for funds coming in from all participants,
8 then sponsoring the costs of running the operation?
- 9 A. Right.
- 10 Q. Okay. And if the industry wanted to do special projects
11 with the same kind of financial grounding or procedure, was
12 there any other ready place to go where the industry could get
13 joint funding and also reviewed by a competent scientific
14 director?
- 15 A. They would have had to set up another organization to do
16 that.
- 17 Q. Was there any effort that you're aware of at any point in
18 time to conceal from scientists or to conceal from the public
19 the tie between research that was done under Special Project
20 funding and the tobacco industry?
- 21 A. No.
- 22 Q. What effort, if any, was made -- strike that. Did you
23 become familiar with the quality, the scientific quality of work
24 that was sponsored through Special Projects?
- 25 A. Yes, I read the publications that were -- that resulted

1 from the projects. They were quite high, actually.

2 Q. Okay. What kind of -- what were the indications that you
3 had about the quality of research that was conducted pursuant to
4 the Special Projects? What were the markers or properties that
5 you looked to?

6 A. Well, the awards were given to investigators of high
7 quality at very good institutions, and publications and journals
8 of the first rank.

9 Q. What about funding, were these projects funded solely by
10 the tobacco industry?

11 A. No, they were jointly funded, often by -- well, of
12 course, the largest agency is the federal government, but other
13 agencies as well, they were co-funded.

14 Q. Was the fact of there being Special Project work, was
15 that, at least, known to the SAB? Was it kept secret from the
16 SAB?

17 A. No, no secret, no big point made of it, but no secret.

18 Q. Is this, again, reflected in the documents that are part
19 of your direct examination in the case?

20 A. Yes, there are.

21 Q. There were many questions asked of you about whether
22 acknowledgements were to be given by the researchers themselves
23 when they made publication, whether acknowledgements should be
24 given indicating that there was a difference, and I've got a
25 letter here which is part of your direct, it's JD 093722, and

1 the purpose, it says, "since the funds are made available to
2 tide your project over a brief period between the expiration of
3 one grant and the acception of another, our grant -- our records
4 will designate this undertaking as a special project of the
5 Council for Tobacco Research rather than a grant-in-aid. If a
6 credit line should be inserted into any future publications, it
7 should be so worded to avoid being confused with the grant
8 program of the Scientific Advisory Board."

9 Are you aware of any other purpose, other than the purpose
10 set forth here in this document, for including this
11 acknowledgment that made this difference?

12 A. No. It's very simple.

13 MR. BERNICK: I'm almost done here, Your Honor.

14 BY MR. BERNICK:

15 Q. Going back to the Frank statement, let's go back up to
16 number one. We are pledging aid and assistance to the research
17 effort into all phases of tobacco use and health. That sounds
18 pretty broad.

19 A. Non constricting, yes.

20 Q. Non constricting. Again, who was given responsibility
21 for making sure that the research being sponsored was that
22 broad?

23 A. Always the SAB and the scientific director had the
24 ultimate authority.

25 Q. Now, are you familiar with the fact that, particularly

1 during a period of 1968 until about 1974, that different folks
2 from the companies made criticisms of the kind of work that was
3 being sponsored -- sponsored by CTR with the approval of the
4 SAB?

5 A. I've seen a variety of those documents, yes.

6 Q. Okay. Back during this period of time, that is, from
7 1968 until 1974, was this at a point in time where in terms of
8 scientific trends were headed, there was a lot of work that was
9 being done on animal models, bioassay research?

10 A. Yes, that was finally being successful, setting up the
11 models.

12 Q. Okay. Basically, at about this point in time, that is
13 the late '60s and early 1970s, did CTR begin to ramp up its
14 funding for doing large scale bioassay work involving
15 inhalation?

16 MS. MOLTZEN: Objection, Your Honor, beyond the scope of
17 my direct.

18 MR. BERNICK: I'm going to tie it back into U.S.
19 Exhibit 86005, which is the Yeaman letter to Earl Clements that
20 followed this issue, it explains where this document comes from.

21 THE COURT: You'll have to tie it up because it is beyond
22 the scope.

23 MR. BERNICK: I will tie it up.

24 BY MR. BERNICK:

25 Q. Did the CTR funding apparatus begin to ramp up it's

1 efforts in the animal model areas?

2 A. Yes, techniques became available to allow to do that.

3 Q. Now, when criticisms were made, do you recall that
4 criticisms were made by some of these company folks on the
5 grounds that the research was not directly enough related to
6 tobacco?

7 A. Sure.

8 Q. Once that research into the inhalation models and the
9 animal models began, was there any area of research at all that,
10 to your knowledge, based upon historical documents was tobacco
11 related but was not being funded in some fashion through CTR?

12 MS. MOLTZEN: Your Honor, continuing objection to outside
13 the scope.

14 THE COURT: No, the objection's overruled.

15 THE WITNESS: No.

16 BY MR. BERNICK:

17 Q. Addison Yeaman, was he one of the people who made some of
18 these early criticisms?

19 A. Oh, yes.

20 Q. By 1975 when he wrote U.S. Exhibit 86005, what was his
21 position?

22 A. In '75 was he then President of CTR?

23 Q. I was asking do you recall.

24 A. I think that was his time period.

25 Q. So he came on board at CTR itself?

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1 A. Yes.

2 Q. He says in this document in a portion that was not read
3 by -- in the prior examination, he includes as part of his
4 report from the president, he says, "In August I became
5 President and began my education in the gut question. How does
6 CTR, as an entity, see its responsibilities and how does it go
7 about discharging them? I have been very fortunate in seeing
8 over four months the full gamut of CTR's activities and how
9 Dr. Gardner organizes them. I have sat through a 2-day
10 conference of very distinguished scientists on the scientific
11 problems so esoteric that this layman didn't understand a word
12 of it. But what I did understand was that it was a discussion
13 totally germane to our problems conducted by highly qualified
14 people in an air of complete respect for their host, the CTR. I
15 sat through staff sessions preparatory to the meeting of the
16 Scientific Advisory Board, three days of a board meeting and the
17 staff sessions to organize and consider the advice given by the
18 SAB."

19 He then goes on later on to say at page 3, "The
20 reference -- the frame of reference from which one looks at a
21 problem makes a tremendous difference. When I looked at CTR
22 from the standpoint of a member, I was a very glib critic."

23 Was he, in fact, one of the people when he was at the
24 companies was a critic?

25 A. One of the major ones, yes.

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1 Q. "As a part of CTR I am not so glib." And then finally he
2 goes on to say, and this is the only part I'll read, "for a
3 general observation, while it is true that the TIRC was formed
4 to meet a public relations need, the CTR has become, in your
5 wisdom, the instrumentality for the discharge of your
6 responsibility to know all you can know about the part tobacco
7 may play in human disease. It is my sober judgment that CTR, as
8 it now operates, is the greatest public relations asset you have
9 in the problem of tobacco and health, but the moment the CTR
10 becomes or the attempt is made to use it as a public relations
11 instrumentality, your asset will lose its value because it will
12 have lost its posture in the scientific community, end of
13 sermon."

14 After Mr. Yeaman wrote that memo, and as a result of all
15 of the criticisms you have seen from the lawyers and company
16 people over time, was any effort made at CTR, based upon your
17 review of the documents, to somehow limit or change the way that
18 CTR operated to accommodate the concerns of lawyers or their
19 anxieties?

20 A. No, not at all.

21 Q. Shortly after that, are you familiar with Leon Jacobson?

22 A. I knew him quite well.

23 Q. Showing you JD 093895, are you familiar with this talk
24 that he gave once over time?

25 A. Yes, I've read it.

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1 Q. And who was Leon Jacobson?

2 A. He was a member of the Scientific Advisory Board from the
3 earliest times.

4 Q. Now, there's been, again, some criticism, has there not,
5 that while the commitment was made to do research into all
6 phases of tobacco use and health, that somehow CTR work tended
7 to be focused on fundamental research. Are you familiar with
8 that criticism?

9 A. Yes.

10 MS. MOLTZEN: Objection, Your Honor, this is outside the
11 scope of my direct. I did not talk about that entire chapter in
12 his direct that discusses basic research.

13 MR. BERNICK: This is back to the last commitment that was
14 made in the Frank statement.

15 THE COURT: And the redirect is going to the issue of
16 criticism of how CTR was functioning. The objection's overruled.

17 BY MR. BERNICK:

18 Q. Give us -- give the Court some flavor for the statute
19 expenditure of Dr. Jacobson.

20 A. Well, Dr. Jacobson was Dean of the Chicago Medical
21 School, no small thing. He was one of the leaders in the
22 Manhattan Project in the early days. He was a world renowned
23 hematologist. He's a stellar personality.

24 Q. Okay. He was a member of the SAB?

25 A. From the beginning.

1 Q. Do you recall having reviewed this presentation that he
2 gave in or about the early 1980s?

3 A. Yes.

4 Q. Was he, in fact, still on the SAB as of 1980 -- I think
5 1981 was about his last year, would that be right?

6 A. No, no, he continued on while I was there.

7 Q. Okay. Turning to page 7 of the document, he says there,
8 "As one looks at our current program and contemplates the
9 future, I think I can state categorically that we have not only
10 uncovered important facts related directly to tobacco and
11 health, but the board has been wise enough to recognize that the
12 revolution in many fields of biology and medicine provides the
13 ingredients for an expanded view and program with which to
14 pursue vigorously our original mandate. In addition, we are
15 exploring many areas that will lead to logical explanations of
16 cause and effect relationships, whether they be tobacco
17 products, environmental products, food, genes, individual human
18 psychological characteristics, immunological function, hormonal
19 makeup and powerful new central nervous system stimulants and
20 suppressors and regulators."

21 Let me ask you this question: Is there any way that a
22 person of Dr. Jacobson's stature, based upon your knowledge of
23 him, your knowledge of his credentials, your knowledge of how he
24 functioned within the SAB, is there any way that you can see from
25 the documents that somehow individuals on the SAB, like

1 Dr. Jacobson, would continue to participate in an enterprise that
2 did not have scientific integrity?

3 MS. MOLTZEN: Objection, calls for an opinion and asks for
4 speculation.

5 MR. BERNICK: Just based on the documents he looked at.

6 THE COURT: No, sustained.

7 BY MR. BERNICK:

8 Q. In the end, Dr. McAllister, do you see in any of the
9 documents that you've reviewed, in any of the work that you've
10 done over the years at CTR, have you ever seen any issue ever
11 raised regarding the quality of the research that was sponsored
12 through the SAB program?

13 A. Oh, never.

14 Q. Have you ever seen any issue raised concerning the
15 integrity of the research that was sponsored through the SAB
16 program?

17 A. No, again, no.

18 Q. Have you seen any issue regarding the independence of the
19 scientific work that was actually done pursuant to the SAB
20 program?

21 A. No.

22 Q. Let me ask you about the SAB. Have you ever seen any
23 issue taken with the quality of individuals that served on the
24 SAB?

25 A. Absolutely none.

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1 Q. Have you seen any issue taken with their integrity?

2 A. Oh, absolutely not.

3 Q. Have you ever seen any issue taken with the independence
4 of the members of the SAB who Dr. Bennett testified were in
5 control of the SAB program?

6 A. No, totally -- they were totally in control of it.

7 Q. Based upon the documents that you saw, did you see any
8 significant issue with respect to whether the undertakings that
9 were made as concerns the research program and the Frank
10 statement, whether those undertakings were not met?

11 A. I think they were completely met.

12 MR. BERNICK: Nothing further, Your Honor.

13 THE COURT: All right. Thank you, Dr. McAllister, you may
14 step down at this time.

15 MR. BERNICK: Your Honor, would the Court prefer to take
16 up the objections first?

17 THE COURT: Yes, Mr. Read may wait outside.

18 MR. BERNICK: The reason that I asked to have an
19 opportunity to address the Court, I'm happy to proceed in
20 whatever order Your Honor believes to be appropriate with regard
21 to the objections, but I want to -- after the colloquy that we
22 had last Thursday, I wanted to go back and kind of assemble what
23 is a fairly long history of matters that pertain to the question
24 of whether a fact witness -- what a fact witness can testify to
25 under the rules and under the procedures that have been adopted

1 by this Court and I won't belabor that record in its entirety,
2 but there were a couple of things that stood out. One, is that
3 the government consistently in their case asked fact witnesses to
4 interpret documents, indeed, over our repeated objections along
5 those lines. That was true in the case of Dr. Kessler where he
6 was asked to go back over a whole host of documents. And
7 remember, we objected to Dr. Kessler doing that on the grounds
8 that he wasn't an expert witness and he didn't have personal
9 knowledge. The same thing happened with respect to Dr. Wigand
10 where he went back to periods of time that predated his
11 employment at Brown & Williamson, and wasn't confined to that.

12 I can give Your Honor, and I've got them all here,
13 citations of questions that were asked of Ms. Ivey about events
14 that long predated her involvement in the matters that were the
15 subject of questions. Mr. Schindler was asked questions about
16 documents dating back to the 1950s. Ms. Smith, who you will
17 remember was a marketing employee of Brown & Williamson, also was
18 asked about documents predating her period of time, and
19 Dr. Blackie as well. And I know that there are others.

20 It was part and parcel of the government's case to ask
21 witnesses about questions about historical documents, in many
22 cases even though they hadn't seen them. Those questions also
23 related not only to what the documents reflected, but questions
24 were asked to interpret the documents and even to comment upon
25 the state of mind of a company or the state of mind of an

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1 individual.

2 It appears that now the government would prefer to have
3 fact witnesses only testify concerning what took place on their
4 watch or literally to kind repeat the verbiage that is in
5 documents that are historical documents, but that they not have
6 the latitude to make any interpretive comments with regard to
7 those documents.

8 And Your Honor, going back over the law, I think there are
9 three basic layers of cases and case law that relate to this, and
10 they're all under 602. This is a 602 issue. That is, what
11 constitutes personal knowledge that a fact witness can testify
12 to. And I think that there are three basic layers, and I hope
13 this is, at least, helpful to the Court. I found it helpful in
14 thinking about this. This is, as Your Honor indicated, it's a
15 knotty problem to wrestle with.

16 First, when we're talking about facts that predate a
17 witness's employment, just the facts, what happened, what the
18 documents say. There's no question that under the case law under
19 602 it is very permissible for a witness to testify to facts that
20 predate their employment. That's the rule that's been adopted in
21 at least three Circuits that I count up, including the D.C.
22 Circuit in the Londrigan case or Londrigan case in 1981 where the
23 Court specifically commented that under 602 it was permissible to
24 discuss facts predating a witness's employment provided that
25 those facts were set forth in documents. So, I don't think

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1 there's any question but that a witness can go back and talk
2 about facts that come from documents.

3 The question then gets raised, number two, while apart
4 from what the documents actually say, is it permissible for a
5 witness to testify under Rule 602 to the interpretation of
6 documents or inferences to be drawn from documents, and the
7 answer to that question is also yes. 5th Circuit clearly
8 addressed this issue in the Cantu case --

9 THE COURT: Now, I want some case citations. I've done a
10 lot of reading over the weekend on these issues, and we'll see
11 whether --

12 MR. BERNICK: I'm ready for it, Your Honor, I read those
13 cases myself and I don't know that I got all of them, but I got
14 at least a few. The three cases that I had referenced to for the
15 first proposition that it's permissible under 602 to go back to
16 preemployment facts are the 9th Circuit's decision in the Begay
17 case --

18 THE COURT: That's your first category?

19 MR. BERNICK: Yes.

20 THE COURT: I have no concerns about that.

21 MR. BERNICK: Okay fine. The Cantu case is at 168 -- 167
22 F. 3d 198, it's a Fifth Circuit decision, 1999, and it basically
23 addresses this question about -- this deals with the -- it's a
24 drug case, practices involved in a drug case, and a question is
25 raised about her reaching a conclusion based upon observations,

1 so it was not just simply what she saw, but the conclusion that
2 she expressed about it. And at page 198 it says that her
3 testimony consisted of a conclusion about the relationship
4 between Cantu and Cadazzo rather than a simple description of a
5 concrete fact does not render it inadmissible hearsay. "Personal
6 knowledge can include rough inferences and opinions so long as
7 they are grounded in personal observation and inexperience." And
8 this is a citation that the -- the case cited is U.S. versus
9 Neal, which is 36 F. 3d 1190 and Neal is also the First Circuit's
10 decision that is one of the ones I mentioned in the first
11 category. And that makes perfect sense, because as the 2nd
12 Circuit said in Judge Posner's decision in the Agfert case, I
13 think it is, in the end all knowledge involves an inference, you
14 can't get away from inference. I think Judge Posner made
15 reference to Emanuel Kant, and that's another Chicago
16 idiosyncrasy, but I think he was right about that one, too. In
17 any event --

18 THE COURT: Judge Posner has written many books drawing
19 from nonlegal areas. I'll leave it at that.

20 MR. BERNICK: Yes, but everybody seems to cite that
21 particular decision with comfort, as opposed to some of his other
22 decisions. And I think that it makes sense that the rule should
23 be as the Fifth Circuit articulated, because if the rule were
24 otherwise, that is you had to strip away all inference or all
25 interpretation, at the end of the day you'd only be able to say

1 one thing, which is here's what it says in the document. You
2 really couldn't testify to anything because you would be
3 constrained by the inability to draw connections. And the
4 principle that drives all of these 602 decisions at the end is
5 relatively simple. People who, as part of their job, have to go
6 back in time and review documents and even, for that matter, talk
7 with other people, do so as part of their job, and the fact that
8 it's part of their job gives an aspect of reliability and
9 personal involvement sufficient to satisfy 602. So, to adopt a
10 principle that says while it's okay for an employee to go back
11 over documents, as part of his or her work for purposes of
12 informing his or her work, but that somehow even though that
13 process inevitably will involve interpretation or inference, but
14 that somehow because it's now a legal case they can't testify
15 about the interpretation or inference that they drew during the
16 course of their work, undercuts the principle that drives all the
17 602 decisions.

18 All the 602 decisions are animated by this idea that an
19 employee who is part of their job goes back and reviews history
20 can testify to those matters as a matter of personal knowledge,
21 notwithstanding the fact that inevitably it will involve some
22 degree of connection or inference. There are some things,
23 however, that are off limits and this brings me to the third
24 category.

25 Some of the things that are off limits are to state an

1 ultimate opinion regarding an expert issue. If you're to state
2 an ultimate opinion, that is, not simply what was known or
3 understood at the time, but to go forward to today and say, gee,
4 what I said before is true based upon the full body of evidence
5 based upon my expertise. Well, at that point you've got a
6 potential 702 disclosure issue, and that, I think, in fairness
7 was part of the reason that the lay opinion Rule 701 was revised
8 in 2000.

9 I had the privilege, and still do, to be on the standing
10 committee on rules and I remember the discussion about precisely
11 that point, which was if there are going to be ultimate opinions,
12 you can't do them through a lay witness and then somehow avoid
13 the disclosure requirements of 703 if they relate to a matter
14 that is scientific or technical in nature. If they are ultimate
15 opinions as a fact witness, that's a different matter, that's lay
16 testimony.

17 That's one limitation that 602 on this basis cannot extend
18 ultimately to an expert testifying, really, to the ultimate issue
19 as an expert without having to satisfy the requirements of the
20 rules regarding experts. That's one limitation.

21 The second limitation is that state of mind testimony is
22 out. That is an area where the cases consistently have come out
23 and said you can't testify to somebody else's state of mind.
24 That's a classic jury issue. Again, I would point the Court back
25 to the Londrigan decision, where it's very interesting because

1 this really was an issue in the case. It was clear that the
2 witness whose testimony was in question was competent to
3 testify -- and Londrigan is 670 F. 2d 1164, D.C. Circuit 1981.
4 He was free to testify to his own observations upon review of the
5 documents -- that was okay -- earlier practices of which he had
6 personal knowledge -- that was okay. But, he says at this point
7 the Court says, "Wilbruski's competence terminated. He cannot
8 possibly have personal knowledge of any assumptions made by
9 persons interviewed by the FBI agents."

10 So, when it comes to state of mind of an individual, you
11 can't observe it, you can't see it, you can't deal with it, you
12 can't testify about it unless it's expressed in a document. If a
13 document comes out and says, well, I wrote so and so and so and
14 so because of this, or like we just saw with the attribution, the
15 acknowledgment letter, we are writing you as a grant recipient
16 for this purpose, would you please make -- then you can testify
17 to state of mind because it's in the document. But a state of
18 mind is not actually in the document, I think the case law says
19 you cannot ask the witness to draw an inference regarding intent
20 or state of mind. And that's in part why I objected to the
21 questions that were posed of Dr. McAllister about whether there
22 was an intent on the part of people who issued the Frank
23 Statement that others rely upon it unless he looked at a document
24 or saw that intent, he doesn't really have the competence to talk
25 about what the purpose was in somebody else's mind.

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1 So, I think that -- I think those are the basic rules of
2 the road. To the extent that the government, though, is
3 basically saying that our people, who are company people, can't
4 testify to what the documents mean because it would make them
5 into experts, the effect of that is to produce a gross unfairness
6 in yet a last way and I'll sit down, Your Honor. They put on
7 experts -- it takes one expert, like Dr. Harris, he can talk
8 about what documents mean from all of the companies who are
9 defendants in this case. He can interpret them under their rule
10 because he's an expert and he was subject to the disclosure and
11 all the rest.

12 We have to respond to Dr. Harris. It takes five people
13 from the companies to respond if we wanted to to all the aspects
14 of what Dr. Harris did. And he's only one example. We then have
15 Dr. Henningfield who talked about documents, we had any number of
16 marketing people who talked about documents, but we were
17 limited -- I'm not taking issue with the Court's limitation -- we
18 were limited by a certain number of experts we could call. So we
19 took people that, yes, we could have tendered as experts, but we
20 said let's just put him on to talk about the facts and won't
21 express ultimate opinions. So now they're here to talk about the
22 facts, including what documents mean, in response to the
23 testimony of Dr. Harris.

24 If we had to make them all into experts, we could never
25 call enough people as experts to respond to the Dr. Harris's of

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1 the world. So I think we're on the right track. The government
2 went down the same track themselves, they interpreted documents,
3 they asked our -- their witnesses to interpret documents over our
4 objection, and I think now, under the Saus Rule, as well as the
5 federal rules, we should have an opportunity to do the same
6 thing.

7 THE COURT: All right. Government, please, and counsel
8 for the record, would you identify yourself?

9 MR. CRANE-HIRSCH: Yes. Good afternoon, Your Honor,
10 Daniel Crane-Hirsch for the United States. We were not expecting
11 that this disposition would be given orally rather than in our
12 opponent's papers. My co-counsel advises me that the Cantu case
13 based on first impression does not appear to say precisely what
14 our opposing counsel said just now, so we would request, with
15 Your Honor's leave, the opportunity to look at the case, and I'll
16 be able to addresses it. I see it's getting a bit after 12:20.

17 THE COURT: And that may not be the only case you want to
18 look at, but let me say this: For now, is there any presentation
19 that you want to make on this subject?

20 MR. CRANE-HIRSCH: Yes, absolutely, Your Honor, there most
21 certainly is.

22 THE COURT: All right.

23 MR. CRANE-HIRSCH: The difficulty that the United States
24 has with the presentation just provided is that it is not tied to
25 either the rules or the intent of the rules. At the close of his

1 statements just now, opposing counsel was very clear that the
2 reason that defendants are attempting to use fact witnesses to
3 present interpretations of documents that predate their arrival
4 is because of this Court's orders limiting the number of expert
5 witnesses. Those orders affected both sides, the United States
6 was obliged to cut a number of expert witnesses whom we had
7 disclosed early in this case, provided expert reports for, put up
8 for deposition, and under this Court's orders we were obliged to
9 terminate many of those experts.

10 Defendants also were obliged to trim their expert list a
11 little bit, but they are attempting now to provide much the same
12 testimony through fact witnesses, many of whom, in fact, had
13 initially been designated as experts in this case. Scott
14 Appleton is supposed to testify later this week, he was
15 originally on defendants' expert list, but he's now appearing as
16 a fact witness only. Dr. Lance Reynolds, similarly, last week
17 Dr. Townsend, so there are a number of people who defendants
18 initially identified as experts. This Court trimmed the number
19 of people they could call as experts and we're now seeing the
20 very same witnesses offering the very same testimony, and without
21 the opportunity for us to challenge their expertise in
22 appropriate ways.

23 It is inappropriate to allow defendants to seek to rebut
24 testimony from Dr. Harris, or others, with people whom they
25 initially labeled as expert witnesses, but to evade this Court's

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1 requirements are now re labeling as well, we'll just say they're
2 fact witnesses only, but they'll give exactly the same testimony.
3 That shouldn't be countenance here, Your Honor.

4 The arguments that counsel is making on the efforts to
5 have witnesses whom the United States called but who work for the
6 defendants speak about interpretations or issues is very
7 different than defendants calling people in their own control.
8 The United States is the plaintiff in this case. We bare the
9 burden of proof and in any fraud case many of the witnesses are
10 adverse to the plaintiff. We were obliged to call as adverse
11 witnesses many people in the defendants' employ. So it was to
12 confront witnesses with positions adverse to their own companies
13 that we asked questions, Ms. Ivey, Dr. Blackie one or two others
14 whom Mr. Bernick mentioned.

15 THE COURT: Mr. Crane-Hirsch, I have problems with that
16 argument. Rule 602 is 602. It may be hard to figure out, it may
17 be hard to draw the appropriate line between 602, 702 and 703.
18 Obviously that's been an ongoing issue, but it seems to me that
19 that line can't be drawn on the basis of whether plaintiff is
20 calling defendants' adverse witnesses or defendant is calling
21 their own people who had been formerly listed as expert
22 witnesses. In other words, the rules have to have independent
23 and neutral meaning that obviously applies in all situations.

24 I think what you're asking me is to view Rule 602
25 differently as it applies to the government's calling adverse

1 witnesses.

2 MR. CRANE-HIRSCH: Not quite, Your Honor, but I'll move on
3 to a different topic and discuss the application here,
4 specifically of Rule 602. We do have some research, and I would
5 like to refer Your Honor specifically to a case from another
6 Judge in this district, much more recent than the Londrigan case
7 that counsel was citing. This is one of the BCCI Holdings
8 decisions. It was issued in 1999, the citation 184 FRD 3.

9 THE COURT: FRD what?

10 MR. CRANE-HIRSCH: 3.

11 THE COURT: Is that Judge Green's case? You said BCI
12 Holding Company?

13 MR. CRANE-HIRSCH: Yes, it is, Your Honor, exactly. At
14 page 7 Judge Green addresses the application of Rule 602 and
15 provides the text of it. "A witness may not testify to a matter
16 unless evidence is introduced sufficient to support a finding
17 that the witness has personal knowledge of the matter." So what
18 we're driving at here is that defendants' witnesses very
19 frequently lack the required personal knowledge. Judge Green
20 then goes on, "this rule applies to incorporated prior statements
21 just as it applies to other parts of live testimony. To satisfy
22 the personal knowledge requirement when incorporating a prior
23 statement into present testimony, a witness must, one, have had
24 personal matter" -- beg your pardon -- "have had personal
25 knowledge of the matter addressed by prior statement at the time

1 it was made. Two, have current personal knowledge of the
2 substance of the current statement, and three, have current
3 personal knowledge of the matter addressed by the prior
4 statement." We submit that these witnesses did not have personal
5 knowledge of the matters addressed by these historic documents at
6 the time those historic documents were continued.

7 Judge Green continues a few paragraphs down on page 7
8 "where a witness only has secondary personal knowledge of a prior
9 statement, that is, where the witness currently lacks personal
10 knowledge of the matters addressed by a prior statement but knows
11 the statement to be true, the statement cannot be incorporated as
12 part of the witness's present testimony because the witness lacks
13 personal knowledge and is unavailable for cross-examination as to
14 the prior statement."

15 THE COURT: That's referring to prior statements not prior
16 documents; isn't that correct?

17 MR. CRANE-HIRSCH: Prior documents are nothing but prior
18 statements that are written down.

19 THE COURT: Well, but everything turns on the context and
20 I obviously have to go back and look at that opinion, but I'm --
21 I don't remember whether she was referring to documents that are
22 statements, certainly the word "statements" can be used in that
23 context, or whether she was referring to actual oral statements
24 of people. Again, that's just a question of fact to look at her
25 analysis.

1 MR. CRANE-HIRSCH: The issue there was whether or not
2 various documents, which purported to be transcripts of
3 conversations, were accurate. But I certainly appreciate that
4 you'll want to look at what the decision says, but this is a '99
5 decision from another Judge in this Court.

6 I'd like to speak briefly to the issue of whether or not a
7 fact witness is entitled to speak to intent of historic actors
8 before the witness's arrival on the scene. The issue goes to
9 a -- if a witness is to be allowed to speak to historic events
10 for which they lack personal knowledge, we very strongly agree
11 with your statement at the end of the day Thursday last week that
12 a fact witness is not allowed to give their personal observations
13 or interpretations about matters that occurred before they came.
14 That was the transcript at page 16143.

15 The issue here is that a witness is limited -- there's no
16 reason to believe that a fact witness is going to be better
17 suited to interpreting the intent of historic documents than the
18 fact-finder, it's the role of the fact-finder to weigh the
19 evidence. To the extent that a witness is allowed to offer
20 interpretations, we submit that it should -- it would have very
21 limited weight at all. One example, for example, if I could ask
22 you please just very briefly, Your Honor, to put up from
23 Mr. Read's written direct testimony, at the bottom of page 62,
24 he's shown a document written in 1968, eight years before he
25 arrived on the scene, by a Dr. Sanford, and then at the top of

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1 page 63, Mr. Read is asked a series of questions about various
2 phrases, line 4 on page 63.

3 "Question: With your knowledge of the relevant science,
4 government-industry interaction and BATCo's research" -- remember
5 all this is while Mr. Read is still in school -- "what do you
6 understand the term here "health image parentheses, health
7 reassurance" closed parentheses to mean?" And he gives an
8 answer.

9 Line 8, question, "and what do you understand the term
10 here, "health oriented cigarette" to mean?" And again he gives
11 an answer.

12 We submit that these questions of interpretation of
13 historic documents are matters that the fact-finder should be
14 addressing. So we included these passages, among others, in our
15 objections to Mr. Read's written direct testimony and we would
16 further submit that it is fully inappropriate to let us -- to let
17 Mr. Read speak to his interpretation of historic documents.

18 THE COURT: I understand.

19 MR. CRANE-HIRSCH: When it's appropriate -- now, it
20 certainly is appropriate for some witnesses, expert witnesses,
21 Dr. Brandt, Dr. Harris, who addressed the appropriate
22 interpretation based upon the application of an academic field to
23 interpret historic documents and to provide an explanation of how
24 those documents should be read, based upon their professional
25 expertise, in terms of assessing historic documents, but we

1 submit that it is inappropriate to allow fact witnesses to do so.

2 Now, if Mr. Read is going to be allowed to speak to his
3 interpretation, particular phrases in historic documents, we
4 submit that intent is perfectly fair. Asking his questions about
5 isn't it a fair interpretation of the context of this memorandum
6 that what the company intended to do was such and so. Opposing
7 counsel has told us that no, these are fact witnesses, they
8 should not be allowed to --

9 THE COURT: Did I misunderstand you? Let me look back at
10 what you just said. I didn't misunderstand you unless you
11 misspoke.

12 MR. CRANE-HIRSCH: Let me see if I can make myself more
13 clear, Your Honor.

14 THE COURT: Let me ask it this way: Is it your position
15 that fact witnesses, if they are allowed to give testimony
16 interpreting documents, that they may speak to the intent of the
17 people drafting those documents?

18 MR. CRANE-HIRSCH: It's a somewhat --

19 THE COURT: I think you have to confer, Mr. Crane-Hirsch.
20 I don't think that's your position.

21 And let the record reflect that certainly I have let
22 defense counsel confer with each other at different times, indeed
23 sometimes I've had three or four defense lawyers standing up
24 talking.

25 All right, Mr. Crane-Hirsch, go ahead.

1 MR. CRANE-HIRSCH: Thank you, Your Honor, I appreciate the
2 opportunity to confer.

3 What I'm addressing here, Your Honor, is interpretations
4 of corporate intent. When he was speaking, opposing counsel, if
5 I'm recalling correctly, that fact witnesses may testify to their
6 interpretation of documents, possibly the intent of personal
7 authors, but in his submission he stated that fact witnesses
8 ought not be allowed to speak to corporate intent, so it's that
9 issue that I'm taking on. That if a fact witness is, contrary to
10 our submissions, going to be allowed to interpret historic
11 documents to give their statement about what they think the
12 author meant, and as I repeat, we do not think that ought to be
13 allowed, but if that's going to be at the way it is, we believe
14 we should be allowed to pursue the witness and ask questions
15 about doesn't this document show that the company intended such
16 and so.

17 THE COURT: Well, that is what you said on the record.
18 All right. Go ahead. I understand.

19 MR. CRANE-HIRSCH: Let me turn briefly, Your Honor, to the
20 matter about ultimate opinions, and I think it may help to
21 clarify matters here. This is, of course, Rule 704, specifying
22 that an expert witness is able to provide an opinion on an
23 ultimate issue. Opposing counsel, I think, may have attempted
24 somewhat to muddy matters by suggesting that the issues are --
25 the complication here is for witnesses who are both fact and

1 expert witnesses, and so it would be, the issue is on the -- so
2 we do want to remind the Court that a number of witnesses have
3 been proffered as both fact and expert witnesses. And so, we
4 would submit that the ultimate issue -- opinions on ultimate
5 issues does permit that where it's borne out by their expertise
6 in specific fields on which they're testifying.

7 So, the Londrigan decision, which opposing counsel
8 referred us to, is the 1981 decision about the extent to which I
9 believe FBI agents were allowed to speak to their knowledge
10 gained in the course of reviewing a file. And opposing counsel
11 cites the Londrigan decision for the proposition that a fact
12 witness is authorized to testify to facts that predate their
13 arrival on the scene so long as their knowledge is based upon
14 documents.

15 Opposing counsel made the contention, though, that this
16 should be taken further and he refers to the decisions from other
17 circuits, the 9th Circuit decision on Begay, another called
18 Cantu, and he makes the argument that it is inappropriate to
19 limit fact witnesses to what they know solely from documents
20 that, in his submission, fact witnesses must also be allowed to
21 testify to their interpretations from historic documents, and he
22 tells us that the reason for this is simply that it would require
23 otherwise bringing in an expert to testify to the meaning of a
24 document.

25 So, we circled around -- we've discussed several of the

1 other issues involved about experts and the United States
2 adherence to this Court's limitation on experts while defendants
3 are re labeling some of their experts as fact witnesses. The
4 item here, though, is that where we're talking about a historic
5 document and there's not a witness in the chair who's got
6 personal knowledge about what was going on at the time, this
7 Court, is as well equipped to interpret the words in the historic
8 document, and there is no role for a fact witness to interpret
9 the meanings of the word in the document for us.

10 Now, this issue has, of course, come up several times and
11 it's notable in his discussion opposing counsel did not go back
12 to the issues that the Court -- to the orders that the Court
13 issued earlier in the case on precisely this issue, discovery
14 order Rule 602. So in Orders 631 and 652, I'm sure the Court
15 will recall, the issues were addressed about certain witnesses
16 whom the defendants were proposing to call as fact witnesses,
17 Dr. Beales, to talk about his interpretation of various matters
18 while at FTC, and then also Dr. McHolland in Order 652.

19 The issues here begin moving into Rule 701(c), and so
20 would it be appropriate -- we also do need to discuss the
21 importance, making sure that Mr. Read, as a fact witness, is not
22 giving inappropriate opinion testimony on matters that might
23 arguably come within his scientific expertise, so I do want to be
24 clear that that topic is separate from the personal knowledge
25 issue about historic items under Rule 602.

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1 THE COURT: They're not totally separate, though.

2 MR. CRANE-HIRSCH: Absolutely.

3 THE COURT: Obviously those issues blend or blur into each
4 other. They have repeatedly, in the testimony presented, and
5 they will continue to repeatedly blend or blur into each other
6 during the defense case because so many of the defense fact
7 witnesses are scientists, and there will be issues as to whether
8 they're giving fact testimony or expert witness testimony. So if
9 you want to address that now you may, if there's anything
10 specific you want to say.

11 MR. CRANE-HIRSCH: Yes, Your Honor. In the two orders
12 that I just mentioned, 631 and 652, the Court laid out a review
13 of the amendments to Federal Rules 701 and 702 in 2000. The rule
14 was changed at that juncture to require that to specify in Rule
15 701 addressing fact witness testimony that a witness's
16 testimony -- and I'm quoting from Rule 701 now -- "the witness's
17 testimony in the form of opinions or inferences is limited to
18 those opinions or inferences which are, A, rationally based on a
19 perception of the witness, B, helpful to a clear understanding of
20 the witness's testimony or the determination of a fact in issue,
21 and C, not based on scientific, technical or other specialized
22 knowledge within the scope of Rule 702."

23 So it's this last item, subsection C, that we submit much
24 of Mr. Read's testimony impermissibly invades. The testimony
25 that Mr. Read provides includes his assessment of the scientific

1 importance or significance of mouse skin painting research.

2 THE COURT: I've looked at all the objections that the
3 government has filed.

4 MR. CRANE-HIRSCH: Yes, Your Honor. The analysis that the
5 Court provided in Orders 631 and 652, we believe, is precisely
6 the same situation right here. In Order 631, addressing
7 Dr. Beales' testimony regarding the interpretation of various
8 studies at FTC, the Court was very specific that where a fact
9 witness's tendered testimony is -- and I'm quoting from Order
10 631, "based on a review of technical data and studies he
11 conducted in his scientific and specialized knowledge, no such
12 opinion or conclusions could have been reached without his having
13 had a foundation of the kind of scientific or specialized
14 knowledge encompassed by Rule 702" -- and there is a citation to
15 Gomez versus Rodriguez. "In sum, testimony cannot be
16 characterized as Rule 701 lay witness opinion if it is based on
17 expertise and specialized knowledge and involves conclusions
18 which could not have been reached by an ordinary layperson
19 without such expertise and knowledge."

20 We submit that when Mr. Read is proffered as a fact
21 witness to testify to the importance of various kinds of
22 research, that is testimony which an ordinary layperson, without
23 such expertise and knowledge, would be incapable of giving.

24 Now, in defendants --

25 THE COURT: I think we're covering a lot that is in the

1 papers already.

2 MR. CRANE-HIRSCH: Well, let me move forward, Your Honor.
3 In defendants' responses, their primary response to our pointing
4 out the problems that a Rule 701(c) for Mr. Read is, hey, Court,
5 please, take a look at other subsections of Rule 701,
6 specifically subsection B, it would be helpful to the fact finder
7 to let this fact witness give this expert testimony. The
8 trouble, though, is that there is not a balancing standard among
9 the three criteria. Rule 701 says "and for a fact witness to be
10 allowed to give opinion testimony or inference testimony, all
11 three criteria must be satisfied" and defendants don't make any
12 strong contention that Mr. Read's opinions on scientific matters
13 are something other than that. Their primary contention is that
14 if you let them get away with violating the rule it would be
15 helpful to the fact finder.

16 I'm not going to express an opinion on whether it would be
17 helpful or not, what I am going to do is ask that the Court make
18 sure that the defendants are not allowed to escape their
19 disclosure obligations under Rule 26 and their expert disclosure
20 obligations. If they wanted to provide scientific opinion about
21 the merit of various studies that are done in the past, then they
22 needed to put on and disclose an expert witness to testify about
23 those scientific and technical matters.

24 We submit that it is fully inappropriate for them to be
25 allowed to do so through the guise of a fact witness and that we

1 would be prejudiced by their failure to disclose that. We're
2 going to be putting forward one of our scientists in our employ,
3 we'll call him a fact witness, but he's going to be giving
4 testimony about matters that it's impossible, to use the Court's
5 language in Order 631, impossible that those opinions could have
6 been reached by an ordinary layperson without such expertise and
7 knowledge.

8 So we very strongly believe we would be prejudiced to
9 allow defendants to evade the requirements of Rule 701 and 702 by
10 allowing their fact witnesses to give this kind of technical and
11 scientific opinion testimony.

12 So I see that it's quarter of 1, Your Honor, and I would
13 like the opportunity to look at the Cantu decisions and some the
14 others that were cited.

15 THE COURT: Mr. Bernick, I want to ask you one question
16 based on what the government just argued to me.

17 MR. BERNICK: Yes.

18 THE COURT: If I understood the government's argument
19 correctly, they were arguing, and they've argued this
20 consistently, and in all fairness based on rulings of mine, that
21 a fact witness -- actually the government, I believe, takes the
22 position that a fact witness can't even testify about documents
23 which predated that witness's appearance on the scene. I've
24 ruled to the contrary. Second, they take the position that if a
25 fact witness is allowed to testify about such documents, that

1 they cannot give their interpretations of the documents, and I
2 have upheld that position. And then third, they have argued that
3 if a fact witness is allowed, contrary to their views, to testify
4 about interpretations of documents which preceded their
5 appearance on the scene, that they may then be examined and
6 cross-examined about the intent of the people who drew up those
7 documents. I would assume that on that third point, the
8 defendants agree.

9 MR. BERNICK: No. I -- I don't agree with anything that
10 counsel just said, but let me take them in precisely the reverse
11 order, so we'll begin with that.

12 The basis of the rule -- and again this is a 602 problem,
13 both at the beginning, and in my view at the end, and it's the
14 only way to reconcile these cases with 701 and 702. But the
15 decisions under 602 in defining the permissible scope of
16 testimony consistently say it has to be personal knowledge of
17 documents or of other reliable statements that have been made to
18 the witness in the course of -- in the course of their job.

19 If the witness himself or herself had made one of those
20 statements or written the documents, obviously they could be
21 asked about what their intent was, but to the extent that the
22 only basis for the witness's testimony under Rule 602 is the
23 prior review, they are not in a position to directly perceive or
24 know somebody else's intent, unless it's in the documents or its
25 in the statements that were made, and that is absolutely the only

1 way to read Londrigan. In other words, 602 is -- you have to
2 have personal knowledge having seen the document or having heard
3 the statement. If you didn't hear a statement of intent or you
4 didn't see a document that reflected intent, you can't be asked
5 to surmise what that intent is because it goes beyond the
6 foundation or the knowledge that's required under 602. If that
7 requirement is not right, that is, if they're correct, then the
8 whole idea of personal knowledge goes out the window. There is
9 no limit to what a witness under 602 can say, they can draw
10 inferences about anything. They can sit in the jury box and talk
11 about what the intent of the defendant was even though he never
12 testified. And that is not permissible and that is what the
13 cases say. And it's no different if it's an expert, the Rezulin
14 case was correct. An expert can't speak to the issue of intent
15 either.

16 So 602, I think, consistently requires a foundation, that
17 is, what the witness reviewed or heard. The witness can talk
18 about those matters, but cannot talk about facts that they
19 haven't heard or they haven't seen. And that's why in common
20 parlance all the time we hear objections sustained every day when
21 someone's asked, well what do they mean by that, objection that
22 calls for speculation. Why does it call for speculation?
23 Because the witness on the stand does not have personal knowledge
24 of what was in somebody else's mind. It's a 602 problem.

25 So, we're not saying we don't believe that the cases

1 support the idea that a witness under 602 can be asked about
2 facts that they haven't heard or seen, but with respect to the
3 documents that they're reading, they can certainly interpret and
4 talk about what those documents mean because the documents are
5 there and they bring with them their job skills and their
6 experience on the job. That's the whole predicate for these
7 rulings under Rule 602.

8 Counsel's argument that says interpretations are not
9 permitted, completely ignores -- there's not a single decision
10 that says that. There's not one decision. Indeed, every single
11 one of the decisions says that of course you can interpret, you
12 can draw inferences. Why? Because as Judge Posner said, all
13 knowledge is not simply the words that were spoken, it's the
14 understanding of the words, it's the understanding of the
15 documents that a witness is testifying to. And I'll make the
16 point very simply in the following way: They say that it is only
17 an expert who can interpret. Now, what that really means is that
18 an expert can say things about the facts that trumps personal
19 knowledge. That a witness who takes the stand is less capable of
20 testifying to the facts based upon personal knowledge under 602
21 than the expert is. There is just no place in the juries
22 prudence that says that because we have the ability to call
23 experts we can't have people testify to what they know under Rule
24 602.

25 Number 2, 602 case law squarely to the contrary. Number

1 3, prior orders of this Court. For the government to be taking
2 this position now is unbelievable. After Your Honor ruled with
3 respect to Beales, we invoked Your Honor's position on the Beales
4 situation in connection with Dr. Wigand, in connection with
5 Dr. Kessler, in connection with all kinds of questions, and Your
6 Honor overruled our objections and permitted the testimony. The
7 government systematically has taken fact witnesses and had them
8 interpret documents all over the place. How in the world can
9 they now say that some of the same people can't do exactly the
10 same thing when we call them. That's the fundamental difference.
11 It's not whether they're called adversely or by us, the question
12 is personal knowledge and their own conduct in the case has given
13 rise to the orders issued by the Court in connection with a whole
14 host of witnesses that has permitted them to do exactly what they
15 say we cannot do now to defend ourselves.

16 Finally, if you take the -- they make two others points I
17 want to respond to very quickly. Corporate intent. This is a
18 big problem, Your Honor. They stood up in opening and said,
19 we're going to talk about the intent of the company generally.
20 What's the intent of the company generally? Well, Your Honor may
21 decide that issue as a matter of law, how we determine corporate
22 intent. But we're here now talking about the evidence, and the
23 only question is, can the evidence come in under the rules. And
24 for a witness who has a piece of the pie to then say wasn't it
25 the intent of Company X when they were not involved in the

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1 decision making or they were not in the area or they were not
2 there at the time, that's not admissible under the rules.

3 701(c), now this was a very interesting point, and frankly
4 I think it's the toughest intersection point. They properly
5 point out that a lay witness, the lay witness opinion rule has
6 kind of subject matter preclusion. You can't have a lay witness
7 testify to an opinion if that opinion involves scientific or
8 technical knowledge because then they're already swept up in the
9 expert thing. The key distinction here -- and therefore they say
10 well our people can't draw -- render opinions even if, well, gee
11 maybe even if we ask them to do that earlier on the case. That
12 miss reads 701. We are not tendering these people as lay experts
13 to issue lay opinions. We're not.

14 THE COURT: There's no such thing as a lay expert.

15 MR. BERNICK: Lay opinion I misspoke. We're not tendering
16 them to offer lay opinions because under 701(c) if it's
17 scientific or technical that was the whole purpose of amending
18 the rule in 2000. We're asking them to testify to their personal
19 knowledge, and their personal knowledge includes facts that they
20 ascertained, even views that they had at the time, because you
21 can't try this case divorced from views that people had at
22 different times. You can't reach the question of intent without
23 knowing what people knew and understood. We've seen witness
24 after witness, both as part of their case and ours, talk about
25 what was understood at the time, what was believed at the time.

1 That is the stuff of intent. That's the stuff -- it's factual
2 material.

3 That's what we're seeking to have them testify about.
4 What their opinions might be today, that is exactly the part of
5 their testimony that we cut out because they weren't experts.
6 When Your Honor issued the order that says you can only call a
7 certain number of experts, yeah, we tendered these people to
8 testify and we illuminated from their testimony anything that
9 they would offer by way of opinion today. We couldn't do that.
10 But certainly what they believed back at the time is the whole
11 stuff of the case. So -- and they recognize that because they
12 asked him all about it. Isn't it true Mr. Schindler that what
13 you believe and what was really being said was X? Isn't it true
14 Ms. Blackie, that was really going on was Y? Those are all
15 requests for interpretation of documents and opinions they
16 actually held at the time as reflected in the documents. If you
17 preclude that testimony, there's nothing left in the case.
18 You're talking about all the stuff that's technical matters,
19 every single bit of it there's hardly a witness called that
20 doesn't talk about a technical matter.

21 Rule 602 is separate from the expert rule and it's
22 separate from the lay opinion rule that says you can testify to
23 the facts, and now they don't want to hear the facts. Now, the
24 case law -- I just have some cites here, the Morris case is
25 another case, the D.C. Circuit 702 F. 2d 1037 says flatly under

1 602 that you can testify to documents and other things under 602,
2 even though they predated your period of time.

3 Judge Posner's decision that says all knowledge at the end
4 of the day is inferential, what we're talking about here is
5 interpretation and inferences, 879 F. 2d 1518.

6 And as far as Judge Green's decision in the BCI case is
7 concerned -- I've got that here -- it's got nothing to do with
8 the price of eggs in China. The issue there is what's involved
9 in adopting a prior statement, and that's not something that we
10 have an issue with here.

11 The question is -- it's undoubtedly true when you're
12 testifying live or adopting a prior statement, you have to have
13 personal knowledge under 602. The question is what constitutes
14 personal knowledge? And there's nothing about this decision, as
15 concerns personal knowledge that does violence to Londrigan or
16 Morris because it's the law of this Circuit.

17 At the end of the day, there's no way, Your Honor, now
18 that they have spent months trying their case asking any witness
19 any question about any document and asking for interpretations
20 from Wigand, Kessler, all of these people, that they can now with
21 any credibility -- we may as well stop trying the case, I mean
22 literally. What witness are we going to be able to call who is
23 going to be able to talk about historical documents under 602?
24 What witness is going to talk about anything without
25 interpretation and inference? It -- I couldn't begin to advise

1 my client on what it would now mean if we can't have our own
2 people read our own documents. They spent months doing it, we're
3 not going to spend nearly that long, but we should be free to try
4 our case under Rule 602 not the government's new version of what
5 602 means.

6 THE COURT: We're going to take a lunch break now. 2:05
7 everybody, please.

8 (Thereupon, a luncheon recess was had beginning at 12:54
9 p.m.)

10

11 C E R T I F I C A T E

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

14 -----
15 Scott L. Wallace, RDR, CRR
Official Court Reporter

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I N D E X

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	March 21, 2005
Plaintiff,	:	
	:	2:08 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 79
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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

2 THE COURT: All right. First of all, I want those
3 counsel who will be speaking this afternoon to identify
4 themselves for the record.

5 Second of all, we're going to proceed in the following
6 fashion.

7 This afternoon I had been alerted that Mr. Brody has
8 some issue that I don't begin to understand, so you better
9 present it quickly, Mr. Brody.

10 Then we're going to hear testimony from Mr. Read.
11 There will be no rulings by me on his testimony in advance. We
12 will just take the testimony for as long as that takes today and
13 part of tomorrow is my understanding.

14 I know the government certainly has further argument to
15 present and possibly the defense, I don't know, on the issues
16 that we discussed before lunch. And that -- I will probably
17 hear that argument at some point tomorrow when Mr. Read's
18 testimony is concluded.

19 Mr. Brody, what's your issue?

20 MR. BRODY: Your Honor, we received an e-mail from
21 Mr. Frederick on Friday indicating that the joint defendants
22 planned to file a motion for reconsideration of Order 652. That
23 related to the testimony of Dr. Mulholland. The court granted
24 in part and denied in part that motion.

25 Mr. Frederick indicated that among the bases they

1 intend to assert is that there has been an intervening change of
2 controlling law in how Rule 701(c) has been applied in this
3 case.

4 They also indicated in the e-mail that they planned to
5 file and submit Dr. Mulholland's written direct testimony
6 simultaneously with the filing of their motion for
7 reconsideration.

8 THE COURT: Is that for next week, that testimony?

9 MR. BRODY: They indicated they would be filing it,
10 submitting it today, and calling him to testify two weeks from
11 now during the week of April 4th.

12 I guess they decided to give Dr. Mulholland and the FTC
13 more time than is provided under Rule 471(a) in order to prepare
14 corrections to that testimony.

15 This is problematic for several reasons. First of all,
16 I'm sure that if they file the motion for reconsideration, they
17 will explain to us and to the court how it is that they arrive
18 at the contention that somehow the court has changed the way it
19 has applied Rule 701 to the testimony in this case.

20 I know from the extensive experience in this trial thus
21 far that the court has repeatedly referred the court to its
22 prior orders, its pretrial orders on the issue of Rule 701, and
23 so I don't know how anything that the court has done can be
24 construed as an intervening change in controlling law governing
25 Rule 701. For that reason, there's no basis for reconsideration

1 of Order 652.

2 Above and beyond that, if defendants do insist on
3 filing their motion for reconsideration -- and from discussions
4 with Mr. Webb, they plan on doing that today -- they should not
5 be permitted to simultaneously file, submit written direct
6 testimony that violates the existing orders of the court, Order
7 Number 652, for several reasons.

8 First, it imposes what may be, and what we believe will
9 be, an entirely unnecessary burden on Dr. Mulholland and on the
10 FTC in requiring that he and the FTC review testimony that has
11 been submitted in direct violation, an admitted violation, of an
12 existing court order that has not been subject to
13 reconsideration and is not subject to an order changing the
14 court's opinion.

15 From our perspective, it is severely prejudicial to us.
16 We have to prepare to cross-examine Dr. Mulholland. We should
17 be --

18 THE COURT: My recollection is that the opinions which
19 I precluded -- the expert opinions which I precluded were -- of
20 course, I never read them -- but very, very technical. Is that
21 correct?

22 MR. BRODY: They are very, very technical, and for that
23 reason it could be extremely prejudicial for us to have to
24 prepare to cross-examine Dr. Mulholland on his expert opinions
25 on these issues when the court has ruled -- and the court ruled

1 well in advance of trial -- that those opinions cannot come in
2 in this case.

3 And there is simply no reason that we should be
4 subjected to a considerable effort that will be required to
5 prepare to cross-examine Dr. Mulholland on a written direct
6 examination that will be submitted that is going to violate the
7 court's order at the same time we are briefing the motion for
8 reconsideration.

9 If they truly believed that there has been some change,
10 the motion should have been filed and could have been filed a
11 long time ago. And, in any event, even if there were some
12 reason that they were able to say, Well, we couldn't file the
13 motion until today, March 21st because this supposed intervening
14 change in controlling law didn't occur until March 18th, or
15 whenever it is they claim it to have occurred, there is no
16 reason that we should be subject to the prejudice that this will
17 entail.

18 THE COURT: And he's to testify the week of April 4th?

19 MR. BRODY: That's correct, Your Honor.

20 THE COURT: If the motion is filed today, when would it
21 be fully briefed?

22 MR. BRODY: It would be fully briefed -- if it were
23 filed today and we responded in 11 days, our response would due
24 on April 1st. Defendants have said they want to expedite it and
25 require us to respond in nine days, on March 30th.

1 If it were briefed on an expedited schedule, they have
2 then indicated they would file their reply on April 1st. Given
3 the things that are going on in the case right now and the
4 considerable number of things that we have confronting us,
5 including the expert reports that are being filed today, the
6 subsequent depositions of those experts, preparation for
7 cross-examination, and what we see as the absolute absence of
8 any basis for the motion, and in particular, the absence of
9 any -- in addition, the absence of any reason that the motion be
10 brought now, we don't think that expedited briefing is something
11 that we should be required to do.

12 If there is no expedited briefing and we file a
13 response on April 1st, the issue could be fully briefed as early
14 as April 4th, that following Monday, which is only three days
15 after what has been proposed as an expedited briefing schedule
16 by defendants.

17 We would just request that defendants not be permitted
18 to file, or submit written direct testimony that violates Order
19 652 and requires any sort of parsing as to what is covered, what
20 is not covered because it will require us to engage in
21 significant preparation efforts that we should not have to
22 engage in because the court has ruled and the court's ruling was
23 clear.

24 MR. WEBB: We have no choice but to do it the way --
25 let me respectfully.

1 We are filing a motion to reconsider. I could argue it
2 right now, but I don't intend to and I don't think you want to.
3 It deals with earlier rulings that you've made in this case and
4 it deals with interpreting 701(c), and I won't bother you with
5 the argument.

6 We have a very, I believe, profound basis to
7 respectfully ask Your Honor to reconsider part of your ruling.
8 And I wouldn't say that if I didn't in good faith believe it.

9 Number two, as far as any -- the reason that -- we're
10 going to -- Mr. Frederick is not here right now, but it is my
11 best belief as I stand here -- and I'm going to talk to
12 Mr. Frederick. I think he's on his way here. I believe we're
13 going to file the motion to reconsider tonight.

14 We are not filing Dr. Mulholland's testimony until
15 probably a couple of days from now. The only reason we're
16 filing it this week as opposed to next Monday is because the FTC
17 that is adverse to us on this issue have made a request of us,
18 because of their small staff, they need more time, they believe,
19 to correct the testimony.

20 So we were trying to accommodate the FTC's request so
21 that -- otherwise, we wouldn't have to file this testimony until
22 next Monday because he's not going on -- Dr. Mulholland would
23 not go on until the following week.

24 But the other reason to file his testimony, quite
25 frankly, is so that the court as well as the government so that

1 when you hear the motion to reconsider, we will know which
2 portions of the testimony arguably are in play based on the
3 motion to reconsider.

4 Because, Your Honor, Dr. Mulholland's testimony will
5 have portions of it which clearly are not at all impacted by
6 your ruling. There's other sections that they may argue are and
7 we're going to argue are not, and you will have to decide that.
8 And there will be one or two sections which I can say right now
9 clearly we recognize would be in violation of your earlier
10 order. And so the reason I'm filing it is so that everyone has
11 it so we know what we're shooting at.

12 And as far as any prejudice is concerned. The
13 government filed all kinds of testimony in these written directs
14 that we believed either violated earlier orders or had
15 completely irrelevant testimony.

16 We all had to go through the hoops. We had to prepare
17 cross-examination, one of which -- I'm trying to remember the --
18 you excluded one witness in his entire testimony because you
19 found the testimony to be completely irrelevant.

20 So the fact that both sides have had to respond to
21 filed testimony that they believed would ultimately not get
22 presented, we both have had to do that, and so there's nothing
23 about that that's any different with this witness.

24 And, Your Honor, quite frankly, if we don't -- and, by
25 the way, we are prepared to have this expedited as fast as we

1 can get it expedited. I know the government is busy. We're all
2 busy. But this is a very important issue on a very important
3 witness from the FTC that goes to one of the pillars of fraud,
4 which is the low tar, the low delivery fraud scheme. And I
5 don't think this is going to prejudice the government at all.

6 And, number two, it will enable to you rule on a
7 serious motion to reconsider.

8 THE COURT: Anything final for the government?

9 MR. BRODY: Your Honor, if they are to submit it on
10 Monday of next week, that doesn't solve the problem because the
11 same prejudice still exists.

12 The attempt to analogize this to the situation with
13 Dr. Watkins has to fail because defendants filed a motion to
14 preclude Dr. Watkins' testimony before trial. The court denied
15 that motion. The issue was specifically addressed.

16 Now, Your Honor, obviously in the context of objections
17 to the testimony, which was the time that defendants themselves
18 chose to seek reconsideration after the testimony had been filed
19 with the court, Your Honor did reconsider that in that context.
20 But in that case the United States did not submit testimony that
21 violated a court order, and it imposed upon defendants the
22 requirement that they prepare to cross-examine a witness whose
23 testimony had been filed in violation of a court order.

24 There's also nothing that Mr. Webb has said that would
25 eliminate the ability of defendants to push back Dr. Mulholland,

1 the filing of Dr. Mulholland's testimony until such time as they
2 have received a ruling on any motion for reconsideration. It's
3 clear based on their witness list, based on what I've heard from
4 Mr. Redgrave, which was their intention to only file two --

5 THE COURT: Mr. Frederick.

6 MR. BRODY: I heard from Mr. Redgrave this morning.
7 That they will only be submitting the testimony of two
8 additional witnesses for next week. There is plenty of time for
9 them to file a motion for reconsideration, to lay out whatever
10 basis they think there is or bases they think there are for
11 reconsideration and for the court to rule on it before the
12 testimony is submitted to Dr. Mulholland and before he comes to
13 testify.

14 There is simply no reason that we should proceed in any
15 other fashion given the existence of Order 652.

16 THE COURT: The parties should proceed in the following
17 fashion.

18 Number one, I see no reason at all to expedite the
19 briefing. I know everybody at different times has been under
20 work pressures, but at this time the government is particularly
21 busy getting its remedies testimony together, and there's no
22 reason in the world that this motion couldn't have been filed
23 earlier. So whenever it's filed it will be subject to the
24 ordinary deadlines that are contained in the other orders in
25 this case.

1 Number two. I understand Mr. Webb's argument about my
2 needing to read the entire testimony to understand the full
3 context of their argument. And certainly most of the time I
4 have read the full written direct testimonies that came in
5 almost line by line, along with your objections, whoever was
6 filing them. And so that will be useful. However, there is no
7 point in putting the government to the extra work that it may or
8 may not face.

9 So, the way it will be done is as follows.

10 The defendants will file their motion. They will
11 append to it as an attachment to the motion the testimony of
12 Mr. Mulholland, the proposed testimony.

13 It will not be filed, however, as written testimony
14 which would trigger the government's obligations under our
15 rules.

16 I will certainly address it expeditiously when I rule
17 on the motion. Then, of course, the defendants can go ahead and
18 file immediately and all of our regular deadlines will kick in.

19 All right. I hope we are ready for Mr. Read at this
20 point.

21 MR. WEBB: That's fine. Just very quickly, just one
22 additional witness scheduling issue that I wanted to raise, and
23 I'll be very, very brief so we can get on with the witness, and
24 in it relates to the following.

25 Last July, Your Honor, last year, Your Honor entered an

1 order that basically sanctioned Philip Morris because of failure
2 to print and retain e-mails.

3 THE COURT: I have been working on that motion,
4 Mr. Webb.

5 MR. WEBB: Okay. Let me just mention one thing.

6 The only thing I'm even looking for Your Honor to rule
7 on -- you excluded 11 witnesses' testimony.

8 THE COURT: I know, and you're only worried about one.

9 MR. WEBB: That is correct.

10 THE COURT: I know all the issues -- well, I think I
11 know all the issues in it. I will probably rule this week.

12 MR. WEBB: Thank you.

13 THE COURT: But I've certainly worked on it.

14 All right. Mr. Read, please.

15 THE DEPUTY CLERK: Please remain standing and raise
16 your right hand.

17 GRAHAM READ, Defendant's witness, SWORN

18 THE DEPUTY CLERK: You may be seated.

19 DIRECT EXAMINATION

20 BY MR. BERNICK:

21 Q. Good afternoon, Mr. Read.

22 A. Good afternoon.

23 Q. Do you have -- you've reminded me of something before I
24 direct your attention to that.

25 Make sure that when you speak, that microphone is

1 pretty close to you because otherwise it's very difficult to
2 hear. And you may want to try to keep your voice up a little
3 bit this afternoon. The acoustics are not terrific. But if you
4 get into that microphone and keep your voice up we can all hear.

5 Do you have before you the written direct examination
6 that was filed in this case for your testimony?

7 A. Yes, I do.

8 Q. Are there any changes or corrections that you have to that
9 testimony before its offered into evidence?

10 A. No, none.

11 Q. Do you adopt that testimony as your testimony in this case?

12 A. Yes, I do.

13 MR. BERNICK: We would move for its admission, Your
14 Honor.

15 MR. CRANE-HIRSCH: Your Honor, Daniel Crane-Hirsch.

16 We would ask whether or not there are any markings on
17 the version which the witness has in front of him. I don't
18 know --

19 THE COURT: Margins?

20 MR. CRANE-HIRSCH: Any markings.

21 THE COURT: I'm sorry.

22 MR. CRANE-HIRSCH: I don't know whether there are
23 Post-its or highlights. I don't know whether it's the same
24 version that was filed with the court.

25 MR. BERNICK: I'm not aware of any markings. If the

1 witness can verify.

2 THE COURT: Why don't you ask him Mr. Bernick?

3 MR. BERNICK: I said if the witness can verify that.

4 THE WITNESS: I just flipped through the document. I
5 can see no markings at all on the document.

6 THE COURT: It may be admitted at this time.

7 Mr. Crane-Hirsch, I don't think I asked you this
8 question. Give me a rough approximation of your cross, please.
9 How long?

10 MR. CRANE-HIRSCH: Between two and three hours, Your
11 Honor. I'll see how swiftly the questioning goes this
12 afternoon. I should be able to give you a better estimate at
13 the end of the day.

14 CROSS-EXAMINATION

15 BY MR. CRANE-HIRSCH:

16 Q. Good afternoon, Mr. Read. My name is Daniel Crane-Hirsch
17 and I'm an attorney for the United States. How are you?

18 A. I'm fine. Thanks very much.

19 Q. You began working for British American Tobacco in 1976;
20 correct?

21 A. Yes, I did.

22 Q. And since that time, this past 29 years -- I know there are
23 seven months or so you worked for a different tobacco company --
24 but aside from that, the past 29 years you were been at British
25 American Tobacco; correct?

1 A. That's correct, yes.

2 Q. Now, you've interacted with a number of lawyers for BATCo
3 over those years, both in house and also external; correct?

4 A. That's correct, yes.

5 Q. And in September of 1992 you went to a 2-day seminar that
6 was put on by attorneys at Shook, Hardy & Bacon in London;
7 correct?

8 A. I think that's correct, yes. I'm not sure of the location
9 to be honest.

10 Q. Let me have you shown U.S. Exhibit 93211. This is a note
11 dated December 14, 1992, from you to Pat Watson. And in the
12 note you asked for reimbursement for various items, including on
13 the 14th and 15th of September, quote, attending 2-day meeting
14 with BATCo Legal Department and Shook, Hardy & Bacon, close
15 quote.

16 Do you see that?

17 A. Yes, I do.

18 Q. Now, let me show you U.S. Exhibit 54069. This is entitled
19 Agenda. Meeting at offices of Shook, Hardy & Bacon. And the
20 date of the meeting is shown as the 14th and 15th of
21 September 1992. Do you have that?

22 A. I do now, yes.

23 Q. You see that it is stamped with the initials JKW at the
24 top right. Those are the initials of J. Kendrick Wells;
25 correct?

1 A. That's my understanding, yes.

2 Q. Let me ask you to turn to the final page. You will see a
3 circulation list, and the third name down is you; correct? G.A.
4 Read.

5 A. Yes, that's correct.

6 Q. And I'd like to draw your attention to the second page of
7 the document under 15th of September, there is material under
8 section 5, BATCo SRG, Scientific Research Grants.

9 And in your written direct testimony you testified that
10 this is an example of external research that BATCo funded;
11 correct?

12 A. The Scientific Research Group is actually a group of
13 individuals that monitor external research.

14 Q. And in item number C it refers to basic scientific research
15 grants being an issue in U.S. product litigation, especially for
16 Brown & Williamson; correct?

17 A. Yes, that's what it says.

18 Q. Turning the page to the third page there is on the top right
19 Mr. Wells' handwriting, Briefing for Graham Read.

20 Do you recall whether that is for item number 7,
21 witness development?

22 A. No, it wouldn't be for witness development at all, no.

23 Q. So would it be fair to conclude it would be for item 6,
24 Southampton regulatory issues group, terms of reference?

25 A. That would be my assumption.

1 Q. I'd like to move forward to the next year. The next exhibit
2 is U.S. Exhibit 93196. This is a fax addressed to you from
3 Filapa Casingena. She was an in-house attorney at BATco;
4 correct?

5 A. That's what was correct, yes.

6 Q. So the date here is 5th of July, 1993, written in the
7 British style; correct?

8 She writes to you, "Graham, please find attached agenda
9 for smoking and health seminar on July 20th to 22nd." And then
10 she asks for a copy of your CV.

11 Were you to be a presenter for this seminar?

12 A. I'm sorry. I was reading the document. Would you mind just
13 repeating that question?

14 Q. She asks for a copy of your CV. Were you to be a presenter
15 for this seminar?

16 A. I honestly couldn't say whether I was or I wasn't until I
17 perhaps see the agenda. But it's not uncommon practice to
18 invite, with attendees to a conference, one's background and
19 experience. It's probably what she was asking for.

20 Q. Very good. If we turn to the second page we see up at the
21 top, Agenda dash Dr. Graham Read. And just so we are clear
22 here, it's actually Mister rather than Doctor?

23 A. That is correct.

24 Q. The title that the in-house lawyer gave this document is The
25 Science of Smoking and Health; correct?

1 A. That's true, yes.

2 Q. And if we look at the agenda, though, it both begins and
3 ends with legal issues or so it would seem.

4 The very first item is three hours general discussion
5 slash mock cross-examination; correct?

6 A. That's correct, yes.

7 Q. If we turn to the next page, the final day of this 3-day
8 seminar with in-house attorneys includes sessions on document
9 retention, document discovery, and witness development; correct?

10 A. That's what the items say, yes.

11 Q. And you have no reason to believe that they are mistaken, do
12 you?

13 A. Absolutely not.

14 Q. Now, we're at BATCo starting in 1976. During your first 20
15 years, up through 1996, you didn't give any testimony in smoking
16 or cigarette litigation, did you?

17 A. To the best of my knowledge, no.

18 Q. We have a list of a number of times that you did give
19 testimony over the next three years, from 1997 through 2000.
20 And I hope that you might be able to swiftly to just let us get
21 that information into the record. So if we can bring up the
22 demonstrative, please.

23 In September of 1997 you gave a deposition in the
24 Minnesota case; correct?

25 A. I'm sorry. Do you mind if I receive it? Thanks. It's just

1 that it's not very clear on the screen. I can't read it.

2 Yes, that's correct.

3 Q. And in July of 1998 you gave a deposition in the Engel case;
4 correct?

5 A. Correct.

6 Q. And then over two days in November of 1998, you gave a 2-day
7 deposition for three different Attorney General cases together:
8 Massachusetts, Arizona, and Oklahoma; is that right?

9 A. I believe that's correct.

10 Q. And moving forward in January of 1999 you gave a deposition
11 in the ironworkers' case?

12 A. Yes, I did.

13 Q. And then six weeks later you testified at trial in that
14 case; correct?

15 A. That is correct, yes.

16 Q. In March of the following year, March of 2000, you gave a
17 deposition for three other cases, also done at -- one for the
18 purpose of deposition, Blue Cross and Blue Shield of New Jersey,
19 Falise, and National Asbestos Workers Medical Fund; is that
20 correct?

21 A. That's correct also, yes.

22 Q. So it is a fair summary that you've testified over those
23 three years, from '97 through 2000, in nine different cases.
24 Ironworkers was both deposition and trial?

25 A. Actually four years.

1 Q. Are there any other cases that you've given testimony in
2 regarding cigarettes or smoking and health?

3 A. No. I think that's the summary of it all.

4 Q. So the March 2000 deposition in Blue Cross and Blue Shield
5 of New Jersey is the last time that you gave testimony in
6 smoking and health litigation?

7 A. Prior to this case, of course.

8 Q. Other than this case, yes.

9 So I'd like to turn briefly to Massachusetts. You were
10 an expert in the Massachusetts' case; correct?

11 A. I believe that's the case, yes.

12 Q. I'd like to have you shown U.S. Exhibit 93185 and ask if you
13 can take a look at it. It is titled Commonwealth of
14 Massachusetts vs Philip Morris et al., August 14, 1998, Graham
15 Read.

16 So are you able to identify this as your expert report
17 in the Massachusetts case?

18 A. Yes, I am.

19 I hesitated slightly because it doesn't have my
20 signature on it which I'm surprised, but.... maybe it was an
21 early copy. But I believe it to be a record, but it hasn't got
22 my signature.

23 Q. That's true. It doesn't have your signature on it. You're
24 quite right about that.

25 The expert report here was -- let's take a look at the

1 testimony from the first day of that deposition, that's November
2 17, 1998, and I will ask you to turn to page 55 of the
3 transcript.

4 And so I want to ask Mr. Read. The expert report that
5 we're looking at was written for you by the Kirkland & Ellis law
6 firm? Is that the law firm that wrote this one?

7 A. I'm afraid I couldn't confirm which law firm it was. The
8 only fact, they didn't write it for me. I developed my own
9 testimony in this case.

10 Q. Let me ask you to look at line 9 in the transcript, page 55,
11 line 9.

12 The question is: Did you write Exhibit Number 1?

13 If you look at the top corner of what's been shown to
14 you as the expert report, U.S. Exhibit 93185, you will see it's
15 identified there as Exhibit 1 and the date is given as the first
16 day of this deposition, the 17th of November 1998. Correct?

17 A. Yes, that's correct.

18 Q. So we're talking about the same Exhibit 1, the same expert
19 report; correct?

20 A. I believe so, yes.

21 Q. Okay. So if we look at the transcript, beginning at line 8.
22 Question --

23 MR. BERNICK: I'm sorry. The use of this transcript
24 right now, again, there's not been a proper foundation
25 established for it.

1 If it's offered for impeachment, what's it impeaching?
2 It does not elicit any affirmative testimony from the witness at
3 all. And unless it's for impeachment, it's not admissible as a
4 prior statement of the witness. He's here on the stand.

5 MR. CRANE-HIRSCH: The witness has testified, Your
6 Honor, that he is unsure whether or not this is the final
7 version of his expert report for the Massachusetts case, and
8 because he's not sure we can refresh his recollection by
9 referring him to this transcript.

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

11 BY MR. CRANE-HIRSCH:

12 Q. At line 8 you were asked the question: Did you write
13 Exhibit Number 1.

14 Answer: I contributed to it. I think somebody drafted
15 it to save me time and then I read it and endorsed its content
16 and signed it. I think I signed it. If I didn't, I would be
17 happy to sign it as a record of what I am here to talk about.

18 Did I read that correctly, Mr. Read?

19 A. Yes.

20 Q. And you were under oath when you gave that answer; correct?

21 A. Yes.

22 Q. And it was truthful; correct?

23 A. Yes.

24 Q. Now, the question about which law firm wrote it for you.

25 Moving down the page, you were asked the question at line 14.

1 "Question: Who drafted that?

2 "Answer: I think it was someone in -- I think it was
3 someone in Kirkland & Ellis, certainly some legal group but
4 there are many of them. They all tend to merge as far as I'm
5 concerned. Not as individualists, but as companies."

6 Did I read that correctly?

7 A. You did.

8 Q. Does that refresh your recollection about which law firm
9 drafted the Massachusetts --

10 A. -- yes, it does.

11 Q. -- and it was Kirkland --

12 A. And in fact, I can give you perhaps a little bit of
13 background.

14 Q. No need. Thank you.

15 A. Beg your pardon?

16 Q. No need. Thank you.

17 A. Okay.

18 Q. And then after the Kirkland & Ellis law firm drafted that
19 expert report for you, your -- you looked it over, added a comma
20 here and there, possibly made some changes to the English
21 language and then signed off in what they sent you.

22 A. No, that's not quite the facts because, of course, I have
23 prepared background information before, and this is actually
24 information that I think was probably passed by Chadbourne's to
25 Kirkland & Ellis and, therefore, I had seen and indeed drafted

1 motion of the content of this document when it came to me.

2 Q. Let me ask you to turn to the bottom of page 55 and the top
3 of page 56 at line 25.

4 "Question: Do you recall were there prior drafts of
5 this document or did you accept it as submitted?

6 "Answer: I think I might have put in the odd comma or
7 changed some of the English but I certainly didn't change any
8 substance, if I changed anything at all."

9 Did I read that correctly?

10 A. You did, and that's of course because I previously prepared
11 such a document that I put into evidence with Chadbourne &
12 Parke.

13 Q. Is it fair to assume that the written direct testimony that
14 is in the binder at your hand right there for this case, was
15 that prepared through pretty much the same process?

16 A. Well, wouldn't it be better if I actually told you how it
17 was prepared and then you can decide whether it was the same
18 process or not?

19 Q. Well, in your Massachusetts testimony -- let's be clear
20 here. When you were asked the question whether or not you made
21 changes to the draft of the document or did you accept it as
22 submitted, you said nothing about its being similar to any prior
23 statement, did you?

24 A. I didn't think it was necessary at the time.

25 Q. And you said nothing about having coordinated with the

1 attorneys to work from prior reports, did you?

2 A. No, I didn't, but I would suggest how on earth would the law
3 firm actually get all of my background information than from any
4 other source than Chadbourne & Parke?

5 Q. Mr. Read, this will actually go a lot more swiftly if we
6 have the person standing here ask the questions. When
7 Mr. Bernick questions you, you can ask him the questions.

8 A. Thank you.

9 MR. BERNICK: I don't think that that's really an
10 appropriate comment for counsel to make.

11 THE COURT: Oh, no. Objection is overruled. It was
12 perfectly respectful.

13 Go ahead, please.

14 BY MR. CRANE-HIRSCH:

15 Q. So when you were asked the question in the Massachusetts
16 deposition whether or not there had been any changes to -- that
17 you made to the expert report as Kirkland & Ellis prepared it,
18 you omitted to give the full story. Is that what I'm to
19 understand?

20 A. No, not at all. I believe --

21 Q. So that is the full story.

22 MR. BERNICK: I'm sorry. Was the witness done with his
23 prior --

24 THE COURT: Everybody, one at a time. Is there an
25 objection?

1 MR. BERNICK: Yes. I think he was interrupted.

2 THE COURT: Was your question pending?

3 MR. CRANE-HIRSCH: At the time that the objection --
4 I'm sorry -- that counsel spoke?

5 The question was whether or not he had told the full
6 story in the Massachusetts deposition.

7 THE COURT: And, Mr. Read, would you answer that
8 question?

9 THE WITNESS: Yes, I will. I answered the question
10 that was put to me at that particular time as accurately and as
11 precisely as I could.

12 BY MR. CRANE-HIRSCH:

13 Q. So, in your view, the full story is that you think that you
14 put in the odd comma or changed some of the English, but
15 certainly didn't change any of the substance. That is the full
16 story; correct?

17 A. Well, it's the answer to the question which is I was asked
18 whether I made any changes to this document. I wasn't asked
19 about the genesis of the document.

20 Q. What is the genesis of -- well, more precisely, with the
21 written direct testimony for this case, is it fair to assume
22 that attorneys at a law firm sent that to you in substantially
23 the same form that it's here today?

24 A. No, it's not correct.

25 Q. So that one you did more than put in the odd comma or change

1 some of the English?

2 A. Well, I think you mischaracterized what I said. That I said
3 that I actually made small changes to this document sent to me.

4 Q. This document being the Massachusetts?

5 A. That is correct. But that isn't how the document was
6 originally generated.

7 You asked me what did I do to this document, and that's
8 what I did, I edited it in its final form that was sent to me.

9 Q. So the final form is the first form that the Kirkland &
10 Ellis attorneys sent to you as the Massachusetts expert report?

11 A. Which is absolutely representative of documents I previously
12 prepared with Chadbourne & Parke.

13 Q. And so is your testimony that the written direct testimony
14 for this case was prepared in the same fashion as that expert
15 report or a different fashion?

16 MR. BERNICK: Your Honor, I think this is about the
17 third time we've been through this. And I think the witness has
18 yet to get the question about, well, how was it done? As
19 opposed to arguing about whether it was the same or not as the
20 prior case.

21 THE COURT: What matters is how it was prepared in this
22 case, so why not just ask him how it was prepared?

23 MR. CRANE-HIRSCH: Because we would like to find out
24 whether or not as was done in Massachusetts with the -- whether
25 it's fair to assume that the witness received this document in

1 substantially the same form. But let's --

2 THE COURT: What matters --

3 MR. CRANE-HIRSCH: -- go ahead and ask the question.

4 THE COURT: What matters is how it was prepared in this
5 case. So go ahead, please.

6 MR. CRANE-HIRSCH: Very well, Your Honor.

7 BY MR. CRANE-HIRSCH:

8 Q. So, Mr. Read, the written direct testimony that you're
9 holding in your hands there, when did you first receive that?

10 A. Well, I didn't actually receive it. I actually came to New
11 York about two, two weeks ago, and at that time I worked with
12 Chadbourne & Parke, and through a series of discussions, looking
13 at documents that I've used in other testimony, and also looking
14 at the question and answers, I generated the answers that were
15 posed in respect to the questions and edited the document to
16 ultimately reflect my comments and responses to those questions.

17 Again, if you want the full story, of course I had
18 other business commitments, and I left it in draft form.

19 MR. CRANE-HIRSCH: Your Honor, I don't know if you want
20 the fuller answer here.

21 THE COURT: We're only interested in matters pertaining
22 to this litigation. Go ahead. Next question, please.

23 BY MR. CRANE-HIRSCH:

24 Q. So, I'd like to have you shown Exhibit -- U.S.

25 Exhibit 93184, and we will be discussing the extent to which

1 giving testimony, as we saw from nine or ten times in those
2 three and a half years, the extent to which giving testimony in
3 court cases is part of your job.

4 Now, as background. At BATCo you were the head of
5 research and development from 1992 through 1998, and there had
6 been a historic role profile that was written for BATCo for the
7 holder of that position, the head of R&D, correct, a historic
8 role profile?

9 A. Possibly if it was, I wasn't familiar with it. I am clearly
10 familiar with this in 1998, which was actually the year that I
11 exited from BAT, from BATCo.

12 Q. But that wasn't until November now, was it?

13 A. That's correct. That's true.

14 Q. So this document is dated the 5th of February in greater
15 style, in 1998; correct?

16 A. That's correct.

17 Q. And the title is G.A. Read dash role profile. And you're
18 the author of this document; correct?

19 A. Yes, I am.

20 Q. And the first line refers to the historic role profile,
21 doesn't it?

22 A. That's what it says, yes.

23 Q. Do you have any reason to disbelieve what you wrote?

24 A. Well, I'm not sure I actually wrote it because, as it says,
25 it was written as a consequence of Project Battalion, and that

1 was -- that was a management exercise that I should define -- it
2 was a company restructuring exercise as undertaken by a
3 management group.

4 Q. So you said that you're not certain that you actually wrote
5 it. So from what you're telling me then, sir, there are
6 documents that have your name on them as the author that you in
7 fact did not author; is that correct?

8 A. Well, if I didn't author it, it wouldn't have my name on it.
9 It would have been a generic role profile that was generated as
10 a consequence of Project Battalion which looked at the
11 restructuring of the whole group of BAT, and the management --

12 Q. (Overtalking) I'm sorry, sir. We're not talking about
13 Project Battalion. We're talking about U.S. Exhibit 93184. The
14 question is whether or not you wrote this document that has your
15 name as the From.

16 A. I think the testimony suggests --

17 MR. BERNICK: I have an objection. Objection.

18 The document refers to Project Battalion, so for
19 counsel to say, "I don't want you talking about Project
20 Battalion," asking him a question about a document that deals
21 with Project Battalion I don't think is fair to the witness.

22 And, in any event, the witness should not be
23 interrupted. If counsel believe it's not responsive he can move
24 to strike, but the witness should be permitted to finish the
25 answer.

1 THE COURT: Correct. The witness may finish his answer
2 if he remembers where he was.

3 Mr. Read, do you need anything read back to you?

4 THE WITNESS: No, I think I'm fine.

5 A. This is a role profile that I actually wrote and it has my
6 edits on it, and I assume this is the latest draft of this
7 particular document.

8 Q. In the second sentence you refer to this historic role
9 profile that previously existed for the position of head of
10 research and development, and you state that post battalion --
11 that's the management restructuring that you were speaking
12 about -- that there were a number of significant changes in or
13 enhancement of responsibilities that can be summarized as
14 follows.

15 Did I read that correctly?

16 A. Yes, you did.

17 Q. So the aim of this memorandum from the 5th of February 1998
18 was to set out significant changes to the post of head of
19 research and development changes from what the job previously
20 had been; correct?

21 A. That's not strictly correct. It actually characterizes the
22 whole job and includes any additional responsibilities that may
23 have come about since Project Battalion.

24 Q. So the items on this list, then, include the entirety of the
25 responsibilities for head of R&D, including those that had

1 existed before battalion as well as those added or changed after
2 battalion. Is that fair?

3 A. That's correct.

4 Q. Let me turn your attention to the bottom of the page, item
5 number 6.

6 "Provide the lead role in the development and
7 implementation of an R&D strategy for the group to meet the
8 current and future responses to regulatory issues that impact
9 the product, and its use (e.g., strategic R&D response to the
10 proposed U.S. settlement agreement.)"

11 And I'll ask Mr. Read, if you can make out the rest of
12 the --

13 A. Yes, I can. Ingredients and materials used.

14 Q. Thank you. Now, the proposed U.S. settlement agreement
15 that's mentioned there, that's the Master Settlement Agreement
16 in the U.S.; is that correct?

17 A. That is correct.

18 Q. BATCo is not a party to the Master Settlement Agreement;
19 correct?

20 A. That is correct.

21 Q. And, nonetheless, the post head of R&D for BATCo, one of the
22 key responsibilities was to address issues raised in the U.S.
23 settlement agreement; correct?

24 A. I think you mischaracterized what's written here, and I can
25 explain if you would like me to.

1 Q. I see. That was an example of providing lead role. That's
2 why it's in the parenthesis?

3 A. Not as an example. It's practical reality that the BAT
4 Group is in existence, and BATCo is an important part of the
5 group, and as an outcome of the proposed U.S. settlement there
6 are a number of considerations as to how ingredients and
7 materials used in the product may be looked at, assessed, and
8 reported.

9 And as Southampton, the BATCo R&D center had principal
10 responsibility for developing the guidelines for the assessment
11 and approval of additives and materials in that product. That's
12 what that element refers to. It's just a consequential act that
13 occurred within the U.S. that had an impact for how we assessed
14 our product on a global basis.

15 Q. Let me turn your attention to the following paragraph, item
16 number 7. This goes back to the topic that we were discussing,
17 the extent to which testimony in court cases was part of your
18 job for those three years, from '97 to 2000.

19 You wrote, and I quote, Identified and prepared as both
20 a fact and expert witness for the company in a number of
21 litigation cases. Close quote.

22 Did I read that correctly?

23 A. That is correct, yes.

24 Q. So as of February 1998 you considered one of your primary
25 responsibilities to list on a short one and a half page list

1 your role as being prepared as both a fact and an expert witness
2 in litigation cases; correct?

3 A. The use of the word prepared was my work in preparing myself
4 for that exercise, not being prepared by others, just to clarify
5 that point because I think I misunderstood what you said.

6 And it is clearly one of the time constraints and
7 responsibilities that I had as the job holder of this particular
8 job, which reflects my activities in the role.

9 Q. I'd like to next discuss with you the 1998 Performance
10 Appraisal and Career Enhancement performance review, so this is
11 PACE. This is BATCo's system for providing performance reviews
12 inform senior managers; is that right?

13 A. For all of its managers.

14 Q. And in January of, the early part of 1998 when you were
15 still at BATCo before going to Rothmans at the end of that year,
16 your supervisor was Earl Kohnhorst, the director of operations;
17 correct?

18 A. That's correct.

19 Q. Let me ask you to be shown U.S. Exhibit 93186. The first
20 page is an e-mail that is addressed to Mr. Kohnhorst and the
21 date is given as the 1st of May 1998 with the date written in
22 the British style; correct?

23 A. That's correct, yes.

24 Q. The subject is Note from Graham Read. And you write to
25 Mr. Kohnhorst, Attached is a copy of my appraisal form, and then

1 you asked him to please accept it as a signed copy; correct?

2 A. That is correct, yes.

3 Q. Now, the PACE review process includes an interview or
4 discussion, correct, where the appraisee meets with the
5 supervisor?

6 A. That's correct, yes.

7 Q. And so, for example, if we turn to the final page of the
8 document, Bates number ending 1203, section number 5, "Future
9 career preferences to be completed by the appraisee before
10 interview," and the text that's written there in section 5,
11 that's text that you wrote before you and Mr. Kohnhorst
12 discussed your role over the previous year and what was expected
13 for the coming year. Is that correct? That that's when you
14 wrote it, was before you had that discussion?

15 A. You could do it either way, but I genuinely believe I wrote
16 it before I met him.

17 Q. Before the meeting?

18 A. Yes.

19 Q. And in section 7 there's a reference to appraisee's comments
20 following the review, and that would be text that you would have
21 written after you and Mr. Kohnhorst had the discussion; is that
22 right?

23 A. That's correct. Yes.

24 Q. Let me turn your attention to the third page of the
25 documents, the second page of the PACE performance review.

1 Let's see. We need to move forward one page please,
2 Bates number ending 1999.

3 And in section 1.2 there is a reference to special
4 factors slash other circumstances to be taken into account, and
5 there's only one line written here; correct, Mr. Read?

6 It says, quote, contribution to scientific litigation
7 activities, completion of deposition for Minnesota, close quote.
8 Did I read that correctly?

9 A. Yes, you did.

10 Q. And this is referring to your activities the previous year,
11 in '97; correct?

12 A. That's correct, yes.

13 Q. So the only special factor, other circumstance that is
14 specifically noted for the '97 year, then, are the contribution
15 to scientific litigation activities and so on mentioned right
16 here?

17 A. Indeed. And the reason we include that in a document is
18 because, of course, we set objectives the year before, and we're
19 expected to identify why we didn't deliver on our objectives or
20 why indeed we took on other responsibilities during that period
21 of time.

22 So this is simply pointing out what happened as a
23 matter of fact during that time period and its impact on my
24 time.

25 Q. So, the previous year's case of -- would not have included

1 litigation as an expected area for you, the one that you had
2 done in '97? It sort of came up over the course of the year?

3 A. No, that isn't quite correct.

4 I indicated to you that the purpose of this particular
5 box where it says special circumstances, clearly when we set our
6 objectives as well have been set in this particular document for
7 the coming year for the new incumbent, because I was actually
8 under notice when I was filling out this document, that sets out
9 the objectives for the coming year to the best and extent to
10 which you know them. Of course, you don't know what litigation
11 is coming along or what are the job responsibilities you may
12 have in terms of special projects.

13 So simply that is the purpose of this particular box,
14 is to point out differences from that which you put into your
15 last year's objectives.

16 Q. Very good. Just one small thing.

17 When did you give notice?

18 A. I gave written notice of at least six months, and I actually
19 informed Mr. Kohnhorst the very first day that the head hunters
20 approached me, which I think was in March of that year.

21 Q. But it's not reflected in this -- we looked earlier at the
22 final page, and the career performance narrative that you said
23 you filled out before your discussion was that -- a reference to
24 your core expertise, and then would seek to aspire to the
25 highest level of technical management within BAT holdings. So

1 there's no reference there to going to Rothman's; correct?

2 A. That is true because, to be perfectly frank, BAT were
3 reluctant for me to leave the company, and they were still
4 asking me to reconsider my exit from the company or not as the
5 case may be. And I wrote this document, as you can see. I said
6 I was tidying up, which was putting into good order the
7 documentation that I had with Earl. We still had ongoing
8 discussions about whether I would stay with the company or
9 indeed leave the company to join Rothmans.

10 Q. So the way you wrote it was that you wanted the highest
11 level of technical management not within a cigarette company but
12 within BAT holdings?

13 A. Well, that was an aspiration that I had to have that
14 particular standing and status within any tobacco company, and
15 that was the offer that was being made to me by Rothmans. And I
16 had already had that discussion with Earl and that was my
17 expectation within BAT.

18 Q. And so Rothmans allowed you to come on board as a director
19 and you had not previously been a director at BATCo; right?

20 A. That's correct.

21 Q. And now that you're back at BATCo, you are a director?

22 A. I have director responsibilities for BATCo, yes, that's
23 true.

24 Q. Are you a director?

25 A. Of BATCo, yes.

1 Q. That was the question. Thank you.

2 Turning back -- so you agreed with me that, when we
3 were discussing section 1.2, which gives the special factors or
4 special circumstances from the prior year, that you mentioned
5 one role of the PACE performance appraisal is to lay out the key
6 objectives for the following year, and so I'd like to discuss
7 that with you.

8 If we turn to the page ending with Bates number 1202.
9 Up at the top of the page it's titled Section 4, objectives for
10 next year to be completed by appraiser and appraisee.

11 This page, Mr. Read, lists five different key result
12 areas for you for 1998; correct?

13 A. Yes, that's correct.

14 Q. And I'd like to focus on item number 5, Litigation
15 Activities. Prepare for U.S. litigation as both fact and expert
16 witness for BATCo in a number of nominated cases. Did I read
17 that correctly?

18 A. You did, yes.

19 Q. Now, we've discussed your starting at Rothman's Tobacco,
20 Rothman's International Tobacco, beginning in December of '98.

21 The following month, in January of '99, you gave a
22 deposition for BATCo in the ironworkers' case; correct?

23 That was one of the ones on the list we saw earlier.

24 A. That's absolutely correct, yes.

25 Q. I'd like to ask you to be given transcript -- actually,

1 before doing that. I'm sorry.

2 The litigation, section 5, the key result areas --
3 section 4 had key result areas for 1998, and item number 5 then
4 was the litigation activities and preparing for and giving
5 expert opinion in litigation cases; right?

6 A. That's correct.

7 Q. So that would have been one of the things which you and
8 Mr. Kohnhorst discussed at the review section; correct?

9 A. That's correct, yes.

10 Q. I'd like you to ask look at the transcript of the January
11 '99 ironworkers' deposition that you gave. This is dated
12 January 29, 1999. And I'll ask you to turn to page 17 --

13 MR. BERNICK: Again, I don't understand. There's not a
14 foundation for showing the witness a prior statement. There's
15 no question pending or answer as to which this is being offered
16 as impeachment.

17 THE COURT: Is this impeachment, refreshment of
18 recollection?

19 MR. CRANE-HIRSCH: This is impeachment, Your Honor.

20 MR. BERNICK: Impeachment of?

21 MR. CRANE-HIRSCH: The witness has just testified that
22 he had discussions. So at page 17, at the very bottom of the
23 page, line 24, there is a discussion about how the performance
24 review components were set.

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

1 MR. CRANE-HIRSCH: Yes, Your Honor.

2 BY MR. CRANE-HIRSCH:

3 Q. At line 24, quote, My performance review components were set
4 in discussion with Earl on an annualized basis and they didn't
5 include any discussions in relation to giving expert witness or
6 opinion in any law case or the outcome of any law case, close
7 quote.

8 Did I read that correctly?

9 A. You did.

10 Q. But that answer wasn't fully truthful, was it, sir?

11 A. Well, I believe that it was.

12 MR. BERNICK: I'm sorry. The witness is now -- this
13 was allegedly for the purposes of impeaching some prior
14 statement that he made under oath presumably here concerning his
15 performance review.

16 He's now been shown other testimony and instead of it's
17 being shown to the witness and to the court how it's
18 inconsistent with something that he said here, he's now -- it's
19 now being said to him, Well, what you said before then was
20 wrong.

21 So apparently, it's not being offered for the purposes
22 of impeaching his testimony here, it's for purposes of
23 establishing that somehow his prior sworn testimony was
24 inaccurate. This is not a prior use of prior testimony. This
25 is now the third time it's happened.

1 THE COURT: Mr. Crane-Hirsch, you have to find out
2 whether the testimony that this witness has given on whatever
3 topic you're exploring is consistent or inconsistent with the
4 prior testimony that he's given.

5 MR. CRANE-HIRSCH: Very well, Your Honor. The
6 inconsistency here goes to the witness's credibility.

7 THE COURT: I understand that.

8 MR. CRANE-HIRSCH: I beg your pardon?

9 THE COURT: I understand that. But you haven't
10 established that the testimony from the prior deposition was
11 wrong. That's what you have to establish if you're trying to
12 impeach this witness's credibility on the particular testimony
13 he just gave.

14 MR. CRANE-HIRSCH: Let me see if I can go ahead and do
15 that, Your Honor. I appreciate that.

16 BY MR. CRANE-HIRSCH:

17 Q. Mr. Read, in the ironworkers' testimony that you have in
18 front of you, you were asked a question about the way in which
19 your bonuses were computed; correct?

20 A. I think I was asked about how my performance was assessed,
21 not how my bonus was determined.

22 Q. The question is, to make it a little more clear, were there
23 particular individuals who reviewed your performance?

24 And then you give the answer that we saw earlier, that
25 you stated that your performance review components were set in

1 discussion with Earl on an annualized basis and they didn't
2 include any discussions in relation to giving expert witness or
3 opinion in any law case or the outcome of any law case.

4 That is the answer that you gave; correct?

5 A. That is the answer I gave, yes.

6 Q. And you were under oath; correct?

7 A. I am.

8 Q. And at the time in ironworkers, January of '99, you were
9 under oath then; correct?

10 A. That is correct.

11 Q. And as we've discussed earlier, the performance review for
12 the '98 year that you and Mr. Kohnhorst prepared together,
13 you've testified to this court today included discussing with
14 Mr. Kohnhorst both special factors from the previous year that
15 included contributions to scientific -- I'm sorry -- scientific
16 contributions to litigation activities and also a key result
17 area for the following year of litigation activity which
18 included giving both fact and expert testimony.

19 Is that correct, sir?

20 A. That is correct. And, of course, the document has to be an
21 accurate record of my activities over that period of time.

22 The purpose in adding in the special circumstances was
23 that in order to prepare for litigation and to be absent from my
24 primary role, it's appropriate that I identify -- and I did
25 identify -- all those activities that had an impact on my time

1 and my availability and my ability to act as head of R&D.

2 Q. And you did more than just identify them. You and
3 Mr. Kohnhorst discussed them; correct?

4 A. Well, I wrote them down. I wrote them down.

5 Q. And we've discussed earlier in your testimony here this
6 afternoon, that when you and Mr. Kohnhorst did the 1998 PACE
7 performance appraisal, there's some part that you filled out
8 before you and he sat down for your meeting. You had the
9 meeting. And there are other parts you filled out after that
10 discussion. Do you recall that testimony?

11 A. Yes, I do.

12 Q. And so you testified earlier this afternoon that the
13 discussions included, among others, the key result area of your
14 upcoming litigation activity as both a fact and an expert
15 witness. That was part of the discussions; correct?

16 A. I indicated as part of my time activities and my
17 responsibilities as I saw them.

18 Q. As part of your discussions with Mr. Kohnhorst. That was
19 your testimony this afternoon; correct?

20 A. I absolutely stand by the document as written.

21 Q. That wasn't the question, sir.

22 The question is whether or not your testimony earlier
23 this afternoon, whether you recall saying that you and
24 Mr. Kohnhorst discussed your litigation activities, and you said
25 yes to that earlier.

1 My question to you right now, do you recall saying
2 that?

3 A. I was really talking to process. I'll be honest with you.
4 I don't consider my performance review a very critical part of
5 my day-to-day activities and, as a consequence, I don't have
6 total recall of everything I discuss with Earl.

7 As I indicated, it's a perfect record. And I have the
8 opportunity to write things ahead of meeting Earl, and during
9 the meeting with Earl. And at the end of the day, as you saw
10 from my notes, I was offering it back to him as to what I
11 thought was a fair record of either what we discussed or what I
12 contributed in terms of my assessment of my performance and the
13 elements that go within my total role and activities.

14 Q. Fair enough.

15 So in the ironworkers' case in January of '99 when you
16 were asked the question about the individuals reviewing your
17 performance, your answer went to performance review components.

18 And you specifically stated in the January '99
19 ironworkers' testimony, that in those discussions your
20 performance review components did not include any discussions in
21 relation to giving expert witness or opinion in any law case.

22 You were quite emphatic there, weren't you, sir?

23 MR. BERNICK: I object to the form of the question.
24 It's now multipart.

25 THE COURT: The objection is overruled.

1 Let's hear the question, and let's try and get through
2 this.

3 BY MR. CRANE-HIRSCH:

4 Q. The question is, you were quite emphatic?

5 A. Yes, in terms of its contribution to my performance
6 assessment. The document simply identifies the activities that
7 I undertook during that year. It also identified the activities
8 I expected to undertake the following year and, as I indicated
9 to you, to have time components that restrict what I can do in
10 other parts of my job.

11 So it's a full record of what I expect to do in the
12 coming year and it's a full record of what I participated in, in
13 the previous year. And I think --

14 Q. (Overtalking) If I understand you correctly, Mr. Read, what
15 you're saying is that in January of '99 when you were asked a
16 question specifically about whether your performance review had
17 anything to do with giving testimony in court cases, you gave an
18 emphatic answer no.

19 MR. BERNICK: I'm sorry. If he's going to free frame
20 the questioning, it ought to be the actual language out of the
21 deposition.

22 THE COURT: It should. And the word "emphatic" is
23 counsel's word, it was not the witness's word. So please just
24 ask the question using the language that he used in that
25 deposition and comparing it with the testimony he gave today,

1 which I think is what you're trying to do, Mr. Crane-Hirsch.

2 MR. CRANE-HIRSCH: Yes, Your Honor.

3 BY MR. CRANE-HIRSCH:

4 Q. The question that you were asked went to the role --
5 actually, can we please blow up a few lines on the page? Up a
6 few more.

7 And at the top of the page you were asked a question
8 about bonuses, whether or not bonuses were in any way related to
9 your service as an expert, at line 3.

10 And then at line 10, part of your answer was -- and I
11 quote -- To that extent it has nothing to do with the outcome of
12 any law case or any testimony I may give for a law case. And
13 then -- close quote.

14 Moving down the few lines, you are asked the basis of
15 your own -- of your personal performance reviews. And I then
16 asked about particular individuals who reviewed your
17 performance, and it's in that answer -- the question for you,
18 sir -- is you then testified that, quote, My performance review
19 components were set in discussion with Earl on an annualized
20 basis, and they didn't include any discussions in relation to
21 giving expert witness or opinion in any law case or the outcome
22 of any law case, close quote.

23 That is the testimony you gave then; correct, sir?

24 A. That is an accurate statement.

25 Q. So you told the court in the ironworkers' case something

1 different from what you're telling the court here today; that
2 your performance evaluation, you said then, did not include any
3 reference to --

4 A. It doesn't say reference, it says discussions.

5 This is simply a record of the activities that I
6 undertook. Earl asked me no question whatever in terms of
7 litigation.

8 As you see from the notes as written, there's no
9 comment whatsoever in terms of success outcomes. It is a
10 factual statement of my time demands would be put on me in terms
11 of my participation, and in fact, my own recommended
12 participation in those particular areas of litigation to
13 actually assist the company in terms of its lawsuits.

14 Q. So I understand correctly --

15 MR. BERNICK: Excuse me. I'm not sure that counsel
16 made it clear.

17 And I think it's very important, now that it's been
18 read, that we have a page and line citation to the question that
19 began in the deposition and was the subject of that last
20 question because it hasn't been made reference to, and it's page
21 17, lines 3 all the way up through 17, which then precede the
22 question that counsel has been focusing on.

23 In other words, the witness has now been asked about
24 the entire range of that testimony. I think that we should have
25 it clear in the record that it began at page 17, line 3.

1 THE COURT: That is -- well, you state for the record
2 what you wanted the last question to encompass,
3 Mr. Crane-Hirsch.

4 MR. CRANE-HIRSCH: Yes, I did, Your Honor. That he was
5 asked the question. He gave the answer that we heard just now.
6 What I was reading from the transcript, I did state we were
7 going to the top of the page --

8 THE COURT: But when you started reading, you started
9 reading with the -- I can't read that second word on line 5 --
10 but you started reading about the bonus system.

11 MR. CRANE-HIRSCH: That was setting the context in
12 which Mr. Read was then asked about performance review, Your
13 Honor.

14 THE COURT: But I don't believe that that's the -- that
15 you wished to ask him or attempt to impeach him with testimony
16 about the bonus system. Isn't that correct?

17 MR. CRANE-HIRSCH: That's correct, Your Honor.

18 THE COURT: So all I'm asking you to do now is to
19 specifically put on the record what the lines are in this
20 deposition testimony that you wish to use as the basis for
21 attempting to impeach the witness.

22 MR. CRANE-HIRSCH: Yes, Your Honor, the lines beginning
23 at page 17, line 24 through page 18, line 4. That's where I
24 believe we began with this line of questioning, Your Honor.

25 THE COURT: Fine.

1 BY MR. CRANE-HIRSCH:

2 Q. So we established, Mr. Read, that you gave that answer, and
3 a moment ago you said that this answer hinged specifically on
4 the word discussions.

5 So from what I'm understanding, it would have been
6 accurate and correct in January of 1999 for you to say, "My
7 performance review components were set in discussion with Earl
8 on an annualized basis, and they specifically included written
9 reference in relation to giving expert witness or opinion in law
10 cases."

11 That would have been fair and accurate and complete and
12 truthful; correct. Sir.

13 MR. BERNICK: I object to the form. I've now lost the
14 scheme. That was not a repetition of anything that's in there
15 in the transcript.

16 THE COURT: It's the next page, isn't it, of the
17 transcript?

18 MR. BERNICK: No. Specific reference?

19 THE COURT: Did you follow it through,
20 Mr. Crane-Hirsch? Isn't it -- aren't you proceeding from line
21 24 and then simply going to the next page?

22 MR. CRANE-HIRSCH: Yes, I am, Your Honor.

23 MR. BERNICK: But he didn't repeat it. He used the
24 word "specific," and the word specific doesn't appear there at
25 all.

1 MR. CRANE-HIRSCH: Neither does the word "written
2 reference." The witness has testified that he places great
3 importance on his having used the word "discussions" with Earl
4 Kohnhorst when he gave his testimony in 1999.

5 And so my question is whether or not it would have been
6 fair and accurate for him to have given the answer that his
7 performance review components at the top of page 18, line 1, for
8 him to have said they did include specific written reference,
9 and then pick it up at line 2, in relation to giving expert
10 witness or opinion in law cases.

11 My question to him is whether that would have been
12 accurate, fair and truthful.

13 MR. BERNICK: Well --

14 THE COURT: Mr. Read, can you answer that question,
15 please?

16 THE WITNESS: Yes, I can.

17 A. What I can say is that you know, when you're sitting giving
18 a deposition, it's extremely difficult to be absolutely accurate
19 and precise to the last letter. I thought I was being clear in
20 my answer.

21 My discussions with Earl about my performance review
22 was about the objectives that were set with respect to being
23 head of R&D. I identified that I was undertaking other
24 activities that would include time and resources that I'd have
25 to put into that.

1 And it's absolutely accurate that any participation I
2 had with respect to any litigation had absolutely nothing to do
3 whatever with my bonuses.

4 And, as a matter of fact, of course, when I gave this
5 evidence I was an employee of Rothmans. I wasn't an employee of
6 BAT at all.

7 Q. The 1998 PACE performance review that we've been discussing,
8 you weren't shown that document during the January '99
9 deposition, were you?

10 MR. BERNICK: I object.

11 During the course of the entire deposition you're
12 asking the witness whether he recalls a particular document
13 being shown him?

14 THE COURT: The objection is overruled. He may answer,
15 and if he doesn't remember, that's fine, he can say that.

16 A. I don't believe it was shown to me. I have no recall of
17 that.

18 Q. And BATCo and B&W won that case; correct?

19 A. I believe they did.

20 Q. Let's see. So we've been discussing your role giving
21 testimony.

22 Let's see. Your educational background, if you could
23 turn, please, to page 2 of the written direct testimony.

24 MR. CRANE-HIRSCH: Pardon me. Your Honor, we are now
25 moving to a slightly different topic. This would be maybe

1 10 minutes or so, so I don't know if you want to break now or
2 10 minutes.

3 THE COURT: We will just take a 10-minute break,
4 everyone, so we don't lose too much time this afternoon.

5 (Recess began at 3:20 p.m.)

6 (Recess ended at 3:32 p.m.)

7 THE COURT: Mr. Crane-Hirsch, please.

8 BY MR. CRANE-HIRSCH:

9 Q. Good afternoon, again, Mr. Read.

10 A. Hi.

11 Q. We are at page 2 of the written direct and I want to refer
12 to your time at -- let's see at lines 7 and 8. You referred to
13 going to Leeds University for a period of four years. That was
14 from 1972 to '76; is that right?

15 A. Yes.

16 Q. And you don't mention it here, but you were working towards
17 a Ph.D. during those four years; correct?

18 A. I beg your pardon?

19 Q. You were working towards a Ph.D. during your time at Leeds
20 University; correct?

21 A. I had two responsibilities. I had a teaching responsibility
22 and I had the opportunity to conduct research and, yes, I was
23 working towards a Ph.D.

24 Q. And is that work with the Ph.D. that you don't mention here;
25 correct?

1 A. I indicate that I was conducting teaching and having
2 research responsibilities.

3 Q. So you had a Ph.D. supervisor when you were at Leeds
4 University?

5 A. Yes, I did.

6 Q. And you prepared a research program to lead to writing a
7 dissertation; is that right?

8 A. That's correct, yes.

9 Q. And your Ph.D. supervisor spoke with you and approved the
10 research methodology that you were going to use before you began
11 to do the research; correct?

12 A. Well, I would say yes, generally. But I am facing my 56th
13 birthday and recall back in those days is a bit difficult, but I
14 think as a general principle on how you develop a research
15 program, yes.

16 Q. Yes. You finished the research and wrote your dissertation,
17 didn't you?

18 A. Yes, I did.

19 Q. But your Ph.D. supervisor refused to allow you to receive
20 the degree; correct?

21 A. No, that's not true.

22 Q. And you didn't receive the degree, we've established that?

23 A. That's correct, yes.

24 Q. And your Ph.D. supervisor found it very difficult to accept
25 that your research findings were valid; correct?

1 A. I don't have any recall of that whatsoever.

2 Q. None whatsoever?

3 A. No.

4 Q. So, it would be, as far as you know, wrong to say that your
5 research supervisor found it difficult -- excuse me -- very,
6 very difficult to accept that your research findings were valid.
7 It would be wrong to say that?

8 A. Well, let's set it into context.

9 Q. The question is whether or not that would be wrong.

10 A. He found it difficult to reconcile my research findings with
11 those of some previous research students that he had, that's
12 correct, yes.

13 Q. So is the testimony, then, that your research adviser found
14 it difficult to accept the validity of your findings?

15 A. No, not at all.

16 Q. Let me ask --

17 A. Not in terms of my research findings. He had no difficulty
18 accepting my research findings at all.

19 Q. Let me ask you to turn to the transcript of your deposition
20 in the Blue Cross & Blue Shield case from March 16th of 2000.
21 I'll ask you to turn to page 297.

22 Are you there, sir? Page 297.

23 A. Yes, I am.

24 Q. And starting at line 10 you gave an answer that includes:

25 "And as it happens, I did actually prepare for a Ph.D.

1 and submitted for a Ph.D. question.

2 "Question: Did you obtain your Ph.D.?

3 "Answer: No, I didn't.

4 "Question: And why not?

5 "Answer: A couple of practical issues which I don't
6 think have any great relevance, but I'm very happy to talk about
7 them.

8 "My supervisor at that particular time had a number of
9 previous research students and some of the findings that I found
10 were contrary to some earlier findings that had been published
11 by those earlier researchers. And whilst there was no conflict
12 between me and my supervisor, he found it very, very difficult
13 to accept that my findings were valid."

14 Did I read that correctly?

15 MR. BERNICK: I'm sorry, Your Honor. Could we have the
16 rest of the sentence and answer completed here?

17 THE COURT: Yes. Just finish the sentence,
18 Mr. Crane-Hirsch, please.

19 BY MR. CRANE-HIRSCH:

20 Q. "And obviously contrary to early reports because it
21 undermined a particular working hypothesis that he had developed
22 and published on."

23 A. Based on the results, yes.

24 Q. So it is correct, then, that your research supervisor, your
25 Ph.D. supervisor, found it very, very difficult to accept that

1 your research findings were valid. That is correct, yes?

2 A. At that time that's absolutely correct, but it didn't
3 prevent us from actually publishing the data in a peer-reviewed
4 journal.

5 Q. But the reason you didn't receive your Ph.D. is the
6 difficulty he had at accepting the validity of the findings;
7 correct?

8 A. As I said, there were a number of practical difficulties,
9 and that was one of them, yes.

10 Q. When -- so after having spent four years at Leeds
11 University, among other things doing this research work, you
12 left without the degree and that's when you went to British
13 American Tobacco?

14 A. That's correct, yes.

15 Q. When you went to BATCo, did you tell them that your Ph.D.
16 supervisor had found your research results very difficult to
17 accept as valid?

18 A. Well, it didn't actually occur that way.

19 I left Leeds and once I was in the employment of BAT, I
20 actually wrote up my thesis and then submitted it to my
21 supervisor. So I was actually in the employment of BATCo.

22 Q. How long were you at BATCo before submitting the --

23 A. Probably over a year.

24 Q. Oh, okay. So when I asked earlier your time at Leeds, was
25 that 1972 to 1976, it would be more accurate to say it was '77?

1 A. No. I joined BATCo and in my spare time I actually wrote up
2 my thesis at home and then I submitted it to my supervisor
3 whilst I was in the employment of BATCo.

4 Q. Now this business about the Ph.D. supervisor difficulties
5 with your findings. The first --

6 A. The difficulty is, to be accurate -- as I said, the
7 difficulties with the findings were with respect to the previous
8 hypothesis that he developed. That's what the issue from my
9 supervisor was, not that he didn't believe my findings. They
10 were simply contrary to an earlier hypothesis that he developed
11 with a previous research student based on that student's
12 findings.

13 Q. And because of that, you didn't get the Ph.D.; correct?

14 A. No, that's not, again, strictly correct.

15 Q. Well, I'm not understanding you, but I'm not sure it's worth
16 pressing the point?

17 A. I can explain it to you if you wish.

18 Q. The first time, sir, that the -- you gave testimony about
19 the difficulties that your Ph.D. supervisor had with this
20 research -- could we have the demonstrative -- the first time
21 you gave testimony about that was in the transcript that's in
22 front of you right now, the March 2000 Blue Cross & Blue Shield
23 trip; correct?

24 A. I think that's correct. If someone had asked me the
25 question in another deposition I would have answered in a

1 similar manner. I was just answering the question that was put
2 to me.

3 Q. So that's listed as number 8 on this list here for the
4 deposition that was done, for three different cases that were
5 taken together all on the same day when you gave this testimony.
6 And we've established before, that that's the last time that you
7 have given any testimony in any case, other than this one, is
8 the one where this testimony came out about your Ph.D.
9 supervisor's difficulties with the research; correct?

10 A. I believe it was the only time the question was ever asked
11 of me, and that's where I answered it.

12 Q. So since March 2000 you gave this testimony, that's the last
13 time that you have been on -- under oath giving testimony in a
14 cigarette or smoking and health case; correct?

15 A. I believe that's correct, yes.

16 Q. All right. Let's see. I need to check on the -- some
17 financial items.

18 You testified in May of 2002 that your salary at that
19 stage was 185,000 Pounds. What is it now?

20 A. In 2002.

21 Q. Well, the question is -- just as background. Right now,
22 what is your current salary?

23 A. My current annual salary is I think 200,000 Pounds.

24 Q. 200,000 Pounds?

25 A. Yes.

1 Q. And what is your annual bonus?

2 A. There are several bonuses. I think you're probably
3 referring to the cash bonus which I think I mentioned before.

4 The cash bonus has the potential to be up to
5 40 percent, I believe, of any employee's salary that falls into
6 the bonus scheme. And, on average, because it's made up of in
7 my own case the company's performance, I think it's of the order
8 between 20 and 25 percent of my annual salary has been paid as a
9 cash bonus.

10 Q. For 2004, what was the cash bonus?

11 A. I think again from memory, I think it was about 23 percent
12 of the -- it was 190,000 at that stage, it's now 200,000.

13 Q. So a little short of 50,000 Pounds?

14 A. Yes, that's correct.

15 Q. So those two items would be 440,000 Pounds, roughly. I beg
16 your pardon. I did the math wrong.

17 A. 250-ish.

18 Q. So, that would -- so the exchange rate is a dollar ninety or
19 so to the Pound now?

20 A. Well, even if it's call it 2-to-1, just double it. It makes
21 the math easy.

22 Q. So salary, plus the basic bonus, is roughly half a million
23 dollars a year?

24 A. Yes.

25 Q. I want to move on to speak with you a little bit about

1 interactions between the BAT Group or BATCo and external
2 researchers, and we will also be coming to discuss interactions
3 with government scientific panels.

4 I'd like to start out by discussing interactions
5 between BATCo and some of the British tobacco industry groups.
6 So in your written testimony you discuss BATCo's working to
7 sponsor external research in the 1960s through a British tobacco
8 industry group that's called the Tobacco Research Council or
9 TRC. Do you recall that?

10 A. Tobacco Manufacturers Standing Committee, actually, in the
11 '50s is where it started.

12 Q. And then in the 1960s, starting in 1963, it became called
13 the Tobacco Research Council?

14 A. That's correct. The TRC, correct.

15 Q. Now, you give testimony about the scientific importance of
16 some of that research. Do you recall that?

17 A. Yes, I do.

18 Q. And so your opinion goes to scientific merit of that
19 research and that you regard it, based on your own scientific
20 expertise, as having been well designed in seeking to achieve
21 important aims; is that correct?

22 A. That is correct, yes.

23 Q. And so that's an assessment that a lay person would not be
24 able to draw; is that correct?

25 That, for example, if my training just as a lawyer, I

1 wouldn't be able to tell whether or not that was research worth
2 doing; is that right?

3 A. With all due respect, I doubt it.

4 Q. Fair enough. Thank you.

5 All right. I'd like to talk a little bit, the
6 disparity in our backgrounds notwithstanding about some of --
7 the work. The Harrogate lab, in particular, did mouse skin
8 painting research, correct?

9 A. That's absolutely correct.

10 Q. And so the court is well familiar with the procedure.

11 You -- in your written direct testimony, when you tell
12 the court about the scientific importance of that research, you
13 don't tell the court, though, that U.S. lawyers from Brown &
14 Williamson and CTR attempted, or intended to influence the tone
15 and even the context of how the Harrogate research was
16 published. You don't tell the court that, do you?

17 A. No, because I'm talking to the credibility and the substance
18 and the standing of the science.

19 Q. And you don't tell the court that the U.S. attorneys for
20 Brown & Williamson and CTR hoped to have the TRC slant its
21 Harrogate reports in particular ways. You don't tell the court
22 that, do you?

23 A. I don't, but I am familiar with that particular document if
24 you would like to discuss it.

25 Q. So you do agree that it's true that the U.S. lawyers did

1 want to influence the Harrogate research?

2 A. I'm aware of the fact that that document exists, and I have
3 to take it at face value and that is a proposition and a
4 suggestion that is made in that document. It had absolutely no
5 bearing on the research, but it was made in that document.

6 Q. You say from personal knowledge that it has no bearing on
7 the research. You were there at the time?

8 A. Well, of course, I wasn't present at Harrogate at the time,
9 but I have seen the publication. And I actually saw the written
10 communication from Ernst Wynder, who is a premier expert in this
11 particular area, who actually wrote to Harrogate saying what a
12 fine and credible piece of work that it was published in the
13 British Medical Journal, which is peer-reviewed journal. So I
14 don't see much difficulty with that piece of research, to be
15 perfectly honest with you.

16 Q. Oh, you're talking about the Day article in 1967, aren't
17 you?

18 A. Yes, I am.

19 Q. So the court is aware of what we're speaking about.

20 At the middle of page 20 of Mr. Read's testimony, if we
21 can go to that briefly, please. All right. He refers to
22 research article that Dr. Day wrote.

23 And you will agree with me, Mr. Read, you say there,
24 Dr. Day was one of the researchers at Harrogate published this
25 article in the British Journal of Cancer, and then at line 21

1 you testify, sir, that that article was especially significant
2 based upon your scientific and technical expertise; correct,
3 sir?

4 A. That's correct.

5 Q. Okay.

6 A. And not only my opinion, either.

7 Q. So to make very clear here. The Harrogate report that we're
8 speaking about is not that article. What we're talking about is
9 a summary of three years' worth of research that was done from
10 Harrogate from 1963 to '66.

11 If we could just briefly identify it for the record,
12 Your Honor. That 3-year research summary is JD 030989. So I
13 have no particular questions for you, but just to identify for
14 the record that it's a 3-year retrospective review of
15 activities.

16 This was published as a book by the Tobacco Research
17 Council, not in a peer review journal. Having set that
18 background --

19 MR. BERNICK: Your Honor, I'm not quite sure what just
20 happened. I think there was a miscommunication.

21 But, in any event, I don't think counsel's
22 characterization of what we are talking about is testimony from
23 the witness. The witness has offered testimony. Counsel has
24 now made the statement regarding a different document. I don't
25 think that document is in evidence. I don't think the witness

1 has talked about it.

2 I just don't know where we are. It seems to me that
3 counsel's recitation of what he believes to be the facts really
4 is not proper testimony and should come from the witness.

5 MR. CRANE-HIRSCH: Let me correct it, Your Honor.

6 THE COURT: Ask the witness a question, just a simple
7 straightforward question.

8 BY MR. CRANE-HIRSCH:

9 Q. You're familiar with this document, this 3-year
10 retrospective; correct?

11 A. I'm familiar with the publications of the Tobacco Research
12 Council, yes.

13 Q. You're familiar with this one right here, correct? Review
14 of activities 1963 to '66?

15 A. I have read it, yes.

16 Q. And so this is JD 030989.

17 When is the most recent time you looked at it?

18 A. Probably within the last year.

19 Q. And in what context?

20 A. I would say in putting information together, it was probably
21 at the time of an earlier deposition with the Department of
22 Justice, I was refamiliarizing myself with a number of pieces of
23 research and research publications.

24 Q. This is March 2005. Your last deposition in this case was
25 July or August 2003; correct?

1 A. I couldn't confirm. It would be a matter of record. I
2 simply can't remember.

3 Q. So -- all right. You do agree with me that this document,
4 the review of activities 1963 to '66, was published as a book by
5 the Tobacco Research Council. It was not peer-reviewed;
6 correct?

7 A. I think you are again mischaracterizing the document. It
8 actually summarizes both internal research from Harrogate and it
9 will also identify all of the research that was published --

10 Q. I asked you --

11 A. -- peer-reviewed documents within that summary. It is a
12 summary document of activities.

13 Q. So this is a book?

14 A. It is a book, correct.

15 Q. And the book was not subject to peer review; correct?

16 A. Well, it's a review of activities. There's no necessity to
17 pier review a summary of activities.

18 Q. But, in any event, you had said that you're aware of the
19 document that addresses the Dr. Day's article, the 1967 article.

20 A. Yes.

21 Q. That was published in British Journal of Cancer.

22 So, you will also agree that it's true that U.S.
23 attorneys for Brown & Williamson, CTR wanted to influence this
24 3-year retrospective as well; correct?

25 A. I think it would be helpful if I actually looked at the

1 notes because I can't remember, having looked at many, many
2 documents, which particular document that that was referring to.

3 Q. And --

4 A. I need to look at the date of the document which would help
5 me enormously set it in proper context.

6 Q. We will actually be discussing three documents here that
7 address stated intention of U.S. attorneys for B&W and CTR to
8 influence the tone and context of that 3-year retrospective.

9 The first of them is U.S. Exhibit 54022. This is a
10 memo dated August 19, 1965. It's addressed to Addison Yeaman.
11 He was the vice president for legal and the chief counsel at
12 Brown & Williamson Tobacco; correct?

13 A. That's my understanding, yes.

14 Q. At the bottom of the document it has the initials JNR. He
15 was James N. Rivlin, and he was the assistant general counsel at
16 Brown & Williamson; correct?

17 A. I believe that to be the case.

18 Q. The first paragraph mentions Ed Jacobs. Ed Jacobs was an
19 attorney at the Jacob Medinger law firm in New York City
20 representing CTR; correct?

21 A. Again, I take that as an accurate statement. I don't know
22 that to be a fact or not.

23 Q. Mr. Rivlin writes to Mr. Yeaman in the first paragraph,
24 quote, Ed Jacob phoned, assuming you were still on vacation. He
25 is concerned about two Harrogate matters.

1 And then if we go down to the fifth paragraph, there's
2 a reference to Tony McCormack. Tony McCormack was BATCo's
3 company secretary; correct?

4 A. That's my understanding, yes.

5 Q. And that's the highest in-house attorney in the company, the
6 equivalent of a U.S. general counsel; correct?

7 A. Not necessarily the case in the UK. We have many examples
8 of junior counsel acting as company secretaries. I happen to
9 think that Mr. McCormack held a high position, but that's just
10 by virtue of his background and experience.

11 Q. And then there's a reference to Geoff Todd. Geoff Todd is
12 the Executive Director of the Tobacco Research Council, the TRC
13 group; correct?

14 A. That is correct.

15 Q. They are the ones that had this lab at Harrogate; right?

16 A. Yes.

17 Q. So the fifth paragraph, Mr. Rivlin, the assistant general
18 counsel at Brown & Williamson, writes to Mr. Yeaman, who is the
19 vice president for law and general counsel, quote, In talking
20 with Tony McCormack, it was agreed that the U.S. side would be
21 given the opportunity to preview these Harrogate statements in
22 draft. I understand they are to be prepared by Geoff Todd.

23 "Ed suggested to Tony that it might be useful for the
24 U.S. side to discuss the proposed contents of the statements,
25 both at the same time or in succession, with Todd before they

1 get into draft on the basis that it is considerably easier to be
2 of persuasive influence before such a report is crystallized in
3 draft form. Tony quite agreed. Close quote.

4 Did I read that correctly?

5 A. You did, yes.

6 It certainly doesn't indicate that happened, but that's
7 an exact, correct read, yes.

8 Q. The second document is U.S. Exhibit 30825. U.S. Exhibit
9 30825 is a memo dated October 8, 1965, and it is from A.Y., the
10 same Addison Yeaman, to Mr. Finch. Mr. Finch is the president
11 of Brown & Williamson; correct?

12 A. I'm afraid I wouldn't know that to be a fact at the time.
13 I'm not familiar who the president was of Brown & Williamson at
14 the time.

15 Q. The first line mentions David Hardy. He is an attorney at
16 the Kansas City law firm Shook, Hardy & Bacon; correct?

17 A. That's my understanding, yes.

18 Q. The second paragraph begins, quote, Most of my conversations
19 with Dave centered around the work at Harrogate and, in
20 particular, dealt with the problem of publication by Harrogate,
21 expected sometime next spring concerning their work. And then
22 he goes on to describe the work a little bit.

23 Let me move down to the final paragraph on this page.
24 Quote, the American industry is deeply concerned with the matter
25 of Harrogate's approach and its research programs, and, more

1 importantly, troubled by the prospect of publication of
2 Harrogate results, close quote.

3 So, so far, we've been discussing the views given by
4 David Hardy and also Addison Yeaman's own views; correct?

5 A. That's correct.

6 Q. If we turn to the next page, we see Mr. Yeaman refers to Ed
7 Jacobs, and he's the lawyer at Jacobs Medinger in New York City
8 also for CTR.

9 He says there in the second paragraph, "Yesterday after
10 my talk with you, Ed Jacobs called me on other matters." And
11 then skipping a line or two. "He feels very strongly, as do I,
12 that it is highly desirable that there be a full exchange
13 between TRC in the person of Todd and Day, and a very small
14 group from our side prior to the commencement of preparation of
15 a Harrogate report. This, on the very simple proposition that
16 it would be far easier to influence the tone and even the
17 context of the report (if a report must be published) before it
18 is written, than it would be to rewrite a completed report,
19 close quote.

20 Did I read that correctly?

21 A. Yes, you did.

22 Q. So we have now seen two documents.

23 The third document is going to be U.S. Exhibit 20990.
24 This is a letter dated February 28, 1996, and this one goes
25 across the Atlantic. This is from Addison Yeaman, general

1 counsel at Brown & Williamson, and it's addressed to Tony
2 McCormack whom we've established was the company secretary at
3 BATCo.

4 In the third paragraph Mr. Yeaman writes, quote, First
5 of all, there is considerable interest, not to say concern, on
6 this side as to the report Harrogate may make of its activities
7 and progress at the end of its first three years.

8 "I certainly have no intention of reviving the old
9 argument which, oversimplified, centers around Harrogate's
10 emphasis on biologic activity of tar or smoke ingredients
11 assayed by animal skin painting" -- and I'm going to skip a
12 sentence -- quote, to reassure you, I have no intention of
13 agitating the question, but the difference existing we would
14 hope to be afforded the opportunity of consulting with the
15 people on your side concerning the way Harrogate's work is
16 presented, admittedly with the hope of slanting the report,
17 close quote.

18 Did I read that correctly?

19 A. You did, and it didn't happen.

20 Q. In 1966, sir, what year were you in school?

21 A. Beg your pardon?

22 Q. What year were you in school, 1966?

23 A. I was studying for my GCSEs.

24 Q. And that's the level before the A levels; correct?

25 A. That's correct.

1 Q. Were you a part of the decision making process?

2 A. Me personally, no.

3 Q. Did you speak with Addison Yeaman concerning what happened
4 in 1966 or '67?

5 A. I didn't speak with him, but I spoke with many people in
6 BAT. Not on that particular time, but when I joined the
7 company, people who still had responsibility for these programs.

8 Q. And so you have knowledge, based on your conversations with
9 those people, that the stated intentions of B&W and CTR
10 attorneys to influence the Harrogate report never happened?

11 A. That is my best understanding, yes.

12 Q. I'm not asking what the understanding is. I'm asking how
13 you know. You know that because they told that to you?

14 A. I know that because I've seen the report. I know that I've
15 never seen a draft of the report ever being sent to Addison
16 Yeaman for comment.

17 Q. Just to clarify. Have you ever seen a draft of that report
18 sent to anybody?

19 A. I think I did see an early draft actually in a records in
20 Southampton when I was there in the early '70s.

21 Q. 1963 to '66 TRC report then?

22 A. We had a very extensive -- still have a very extensive
23 library, and we have lots of records in our library, yes.

24 Q. And so you do have knowledge about whether or not there is
25 contact between the U.S. attorneys to review the report before

1 they were put in draft form?

2 A. I see this request, I see their concerns, and I see what
3 they are suggesting.

4 I'm indicating to you that as members of the UK tobacco
5 industry who actually had the responsibility for managing the
6 TRC, I can't understand how someone from within the BAT Group
7 could actually then some way or manner influence how a Harrogate
8 report was actually written when it's actually owned and managed
9 by a group that is managed by the UK tobacco industry.

10 Q. So you're basing that interpretation -- or that observation
11 on your experience with the company then?

12 A. And I've seen this comment before, and I've spoken with a
13 number of people who were present at the time and were aware of
14 the work. And I've had it indicated to me in past years that
15 this did not translate into any action with respect to -- or any
16 modification the TRC report.

17 And indeed it says it talks to both the activities and
18 the progress. Some of those activities are simply a summary of
19 the research that was supported by the TRC and published by
20 independent third parties. How could they influence that?

21 Q. So, you agree with me you had no personal knowledge about
22 what happened then?

23 A. That's correct, yes.

24 MR. BERNICK: I'm sorry. I object to the form of the
25 prior question.

1 Personal knowledge in what sense? We all know that is
2 a sensitive matter.

3 MR. CRANE-HIRSCH: In any sense, Mr. Read.

4 MR. BERNICK: Well, I think that, in fairness, the
5 question ought to be clarified than simply to ask what were the
6 sources of knowledge that he has on the subject. That way, we
7 can all find out without arguing about what's personal and
8 what's not personal.

9 THE COURT: You may ask that question.

10 BY MR. CRANE-HIRSCH:

11 Q. Mr. Read, we've established that you have no personal
12 knowledge based upon your own experience at the time dealing
13 with the actors who were there at the time; correct?

14 A. Clearly, I wasn't employed by BATCo at the time and I wasn't
15 there, that's correct.

16 Q. And we've seen three different documents discussing these
17 stated intentions of B&W and CTR attorneys to influence the
18 Harrogate report; correct?

19 A. We've seen a very consistent message from the same people,
20 yes, in three documents.

21 Q. And these prior historic documents that you're testifying
22 here about, these are very much the same sort of historic
23 documents that occur throughout much of your testimony; correct?

24 MR. BERNICK: Objection to the form of the question.
25 Very same type that occurred throughout -- he's got extensive

1 testimony covering a number of years. We focused on Harrogate
2 report or something else.

3 THE COURT: I think you have to clarify it.

4 BY MR. CRANE-HIRSCH:

5 Q. Much of your written testimony discusses historic documents,
6 by which I mean documents written years before, sometimes
7 decades before you arrived on the scene at BATCo; correct?

8 A. Well, I've been with the company 30 years, and we are
9 covering approximately a 45-year period.

10 Q. Sir, your testimony goes back to 1902 when BATCo was
11 founded, doesn't it?

12 A. That indicates the start date of the company. I thought we
13 were talking about the research. The research --

14 Q. (Overtalking) We are dealing with one question at a time if
15 I may, sir.

16 Much of your testimony deals with historic documents,
17 by which I mean documents written years or decades before you
18 arrived at the company; correct?

19 A. The majority of my testimony spans a 50-year period,
20 30 years of which I was present in the company.

21 Q. Is that a yes?

22 A. Well, it's an answer to your question, and I think that's
23 the majority of that time period.

24 Q. Well, I think I am entitled to an answer to my question,
25 Mr. Read. Let me try one more time.

1 Much of your testimony addresses historic documents, by
2 which I mean documents written years or decades before you
3 arrived at BATCo; correct?

4 A. You say much of the testimony as though it's the entirety of
5 it. A proportion of it does, indeed.

6 Q. And just as the historic documents written years or decades
7 before you arrived at BATCo that you discuss in your testimony,
8 so also the three documents that we've seen here were written
9 years before you arrived at BATCo; correct?

10 A. They certainly predate me joining BATCo, absolutely correct.

11 Q. You have previously testified, sir, haven't you, that you
12 have no knowledge whether or not the Harrogate report was, in
13 fact, influenced by the stated intention of U.S. attorneys for
14 B&W and CTR to influence that report?

15 You previously testified that you have no knowledge
16 about that; correct?

17 A. No, I didn't say that. I said I wasn't there at the time.
18 I said I had other information that led me to that particular
19 conclusion.

20 Q. The question is whether or not you have previously testified
21 that you have no knowledge about it.

22 A. I don't believe I've testified to that effect, no.

23 Q. Let me ask you to be shown the transcript of your deposition
24 in the -- I beg your pardon -- at trial in the ironworkers'
25 case. This is from March 9th of 1999. And I'm going to ask you

1 to turn to page 3585.

2 A. I have it.

3 THE COURT: Do you have the right number,
4 Mr. Crane-Hirsch, for your technical people?

5 MR. CRANE-HIRSCH: I believe we do. Just a moment, if
6 you would, please.

7 (Pause)

8 MR. BERNICK: Your Honor, maybe in an effort to avoid
9 back and forth at this point. If we can understand, again the
10 purpose, the focus -- the purpose of the proffer of this prior
11 examination and what particular part of this the witness is now
12 going to be shown so we are clear on the record.

13 THE COURT: Well, I don't think that -- let me back up.
14 Is this for impeachment purposes?

15 MR. CRANE-HIRSCH: Yes, Your Honor. This witness
16 testified just now --

17 THE COURT: I know what he testified to. Let's
18 proceed.

19 MR. CRANE-HIRSCH: Yes, Your Honor.

20 BY MR. CRANE-HIRSCH:

21 Q. At page -- so the discussion begins at the page I referred
22 you to, Mr. Read. I'd like to direct your attention now four
23 pages forward, to page 3589, the background discussion here. As
24 you saw -- let me ask you to clarify.

25 Are you agreeing the discussion, beginning at page

1 3587, does bear on one or two of the same documents we just
2 looked at; correct?

3 A. Yes, it does. Sorry.

4 MR. BERNICK: This is exactly -- could the witness be
5 focused on a question and answer so that we know what we're
6 doing?

7 THE COURT: Yes. Absolutely. Not the general
8 discussion.

9 You're trying to impeach a specific statement that he
10 made in his testimony this afternoon. I think I know what that
11 sentence is. But you don't have to telegraph that to the
12 witness, but you do have to focus him on a specific question and
13 answer which in your view, at least, is inconsistent with what
14 he testified to today before me.

15 MR. CRANE-HIRSCH: Yes, Your Honor.

16 BY MR. CRANE-HIRSCH:

17 Q. Page 3588, line 16, question. "I'm not asking you if you
18 were surprised. Are you telling this jury this attempt to
19 influence the tone and context of the report happened or didn't
20 happen, or you just don't know if it happened?"

21 And then there's an objection.

22 The court states, "There is no evidence in these
23 documents that there was a discussion about that."

24 There is further colloquy from counsel.

25 The court states "Overruled" at the top of page 3589.

1 And then at line 3.

2 "Question: The question is whether you can say, or
3 anyone can say here that it did, didn't happen, or we just
4 didn't know?

5 "Answer: All I can do is talk as a scientist.

6 "The court: Let's lay a foundation. Do you know one
7 way or the other?

8 "The witness: I'm sorry, Your Honor.

9 "The court: Do you know one way or the other whether
10 there was contact with Harrogate to review drafts or to review
11 research before they were put this draft form?

12 "The witness: I don't know whether there was contact
13 or wasn't contact." Close quote.

14 Did I read that correctly?

15 A. You did.

16 Q. You were under oath when you gave that testimony; correct?

17 A. That is correct.

18 MR. BERNICK: Again, then I don't know what it was
19 designed to impeach. The witness never testified differently
20 here today, so I would move --

21 THE COURT: That's up for me to decide whether it
22 impeaches something he said earlier or not.

23 MR. BERNICK: I understand. I'll simply make my
24 objection, Your Honor, with due respect.

25 I don't understand how what this is directed to, that

1 is what part of his testimony today that was designed to
2 impeach, and I would object because it is unclear in the record
3 why it was impeachment.

4 THE COURT: He certainly gave testimony to the contrary
5 today.

6 Go ahead, please.

7 BY MR. CRANE-HIRSCH:

8 Q. I'd like now to discuss briefly with you, Mr. Read, the
9 British Journal of Cancer article that you had initially thought
10 we were going to be talking about. That's the one that you
11 refer to in your written direct testimony and that you gave your
12 scientific and technical opinion that it was especially
13 significant.

14 Do you recall the 1967 Dr. Day report?

15 A. That's correct.

16 MR. BERNICK: Objection to the form of the question.
17 Those are counsel's words, not his.

18 THE COURT: Objection is overruled.

19 You may answer.

20 A. I think the answer was yes to your question.

21 Q. Now, you do tell the court that this article was especially
22 significant; correct?

23 And that is in the broader context of emphasizing the
24 independence of the -- both the independence and the quality of
25 the scientific work that was done at Harrogate by the UK tobacco

1 industry; correct?

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

3 A. I think --

4 THE COURT: Excuse me. Objection is overruled.

5 A. I think Dr. Wynder can only talk to the quality of the
6 document and the --

7 Q. You mentioned Dr. Wynder in your answer is what I heard just
8 now. But the article we're talking about was written by
9 Dr. Day; right?

10 A. That is correct, yes. But Dr. Wynder wrote an opinion and
11 actually wrote to Harrogate commending them on their research
12 and the caliber of the findings, and it actually accorded with
13 his own findings.

14 Q. So that the record is very clear.

15 It's not just Dr. Wynder giving his scientific
16 impression about the quality of the research, but if we go,
17 please, to page 20 at line 21, you also give your scientific
18 opinion that the publication of this article, quote, was
19 especially significant, close quote. That's also your
20 scientific opinion; right?

21 A. Yes, because I then go on to qualify it, yes.

22 Q. Yes. I appreciate that.

23 Now, what you don't tell the court here, though, is
24 that the Tobacco Research Council published this report only
25 after it sought out legal advice from some of London's leading

1 lawyers about whether or not it would be better to quash these
2 research results.

3 You don't tell the court that, do you?

4 A. I'm not aware of that, so how could I comment on it?

5 Q. I can appreciate this was years before you arrived on the
6 scene, sir. Let's go ahead and take a look at the document.

7 A. We're talking about --

8 THE COURT: Excuse me, everybody. One at a time. Let
9 the witness answer.

10 What were you saying?

11 THE WITNESS: I just want to establish that we are
12 actually talking about Dr. Day's publication in 1967.

13 BY MR. CRANE-HIRSCH:

14 Q. Yes, we are. Let's go ahead and put that up on the screen
15 just so the record is very clear. This is JD 011162.

16 No need to answer any specific questions about the
17 content, but just to put up on the screen, and you can tell us
18 if this is the one you're speaking about.

19 MR. BERNICK: At page 20?

20 THE COURT: Yes. That's what was referred to earlier.

21 BY MR. CRANE-HIRSCH:

22 Q. British Journal of Cancer.

23 A. That's the journal I'm referring to, yes. I can't see
24 whether the article is there or not because I can't read the
25 substance.

1 Yes, that's the Day article.

2 Q. So we've established we're all talking about precisely the
3 same article.

4 Now, I want to show you U.S. Exhibit 93190. This has
5 Liggett Bates numbers LG 0298894, and the title is Tobacco
6 Research Council Research Publications Opinion, and up at the
7 top left-hand corner it says Confidential.

8 On the cover page here, you see a reference, Mr. Read,
9 to Freshfields and --

10 MR. SHEFFLER: Your Honor, excuse me.

11 Could we see this document? I'm not sure exactly what
12 this is, but as counsel for one of the defendants in this case,
13 could I see the document before any question is asked about this
14 because I may have an objection with respect to it?

15 THE COURT: Yes, you may.

16 MR. CRANE-HIRSCH: Counsel's copy is being passed over
17 to Mr. Sheffler.

18 Should I ask or wait?

19 THE COURT: Go ahead.

20 BY MR. CRANE-HIRSCH:

21 Q. So you will agree Freshfields is a leading firm of
22 solicitors in London?

23 MR. SHEFFLER: Your Honor, I object. I think this
24 document is privileged.

25 THE COURT: Is what?

1 MR. SHEFFLER: Is privileged.

2 THE COURT: Frivolous?

3 MR. SHEFFLER: I believe it is privilege.

4 THE COURT: Excuse me. I'm sorry. I misunderstood
5 you.

6 MR. SHEFFLER: It's an opinion of a barrister September
7 of 1986, I do believe.

8 THE COURT: Was this document logged?

9 MR. SHEFFLER: Your Honor --

10 MR. BERNICK: It certainly should be taken off --

11 MR. CRANE-HIRSCH: If it helps clarify matters, Your
12 Honor. A duplicate version was produced by the Tobacco
13 Institute with a TI Bates number.

14 MR. SHEFFLER: I'm not aware of that, Your Honor. It
15 may be true, and if so, then I'm mistaken. But I don't believe
16 that this document was ever considered anything but privilege by
17 my client.

18 Now I could be wrong and maybe somebody else has
19 produced it and maybe the privilege is gone, but I would like at
20 least to have the few minutes to check to see if it has been
21 logged, and if we are still maintaining the privilege. And I
22 represent to Your Honor that it's my understanding -- and I
23 could be erroneous on this -- that we have not produced this
24 document as a non --

25 THE COURT: Have you double-checked on this? That the

1 Tobacco Institute did produce the document?

2 MR. CRANE-HIRSCH: Well, first this version with the
3 Liggett's Bates number was obviously produced by Liggett. The
4 version with the TI Bates number, I don't recall whether it was
5 produced as part of the additional document production in this
6 case or it was part of the --

7 THE COURT: This is what we will do to make use of
8 time. Why don't you go on to the next subject matter? We will
9 come back to this tomorrow after everybody checks on what its
10 privilege status is, please.

11 MR. CRANE-HIRSCH: It is important to note here, Your
12 Honor, that this document and also the TI version are both
13 available on public websites. And in Order 263 you did rule
14 that the tobacco companies are required to exercise, take
15 zealous steps to protect the privilege, and I'm unaware of any
16 information that any of the defendants in this case have taken
17 steps to seek to have documents removed from public document
18 websites for reasons other than simply asking that, for example,
19 employee social security numbers be redacted.

20 THE COURT: What websites is it on?

21 MR. CRANE-HIRSCH: This one is available in two
22 different places, if I recall correctly, on the tobacco
23 documents on line -- Tobacco Documents dot org website.

24 MR. SHEFFLER: That may be, Your Honor. It's a
25 plaintiff lawyer consortium have put a put of bunch of documents

1 they've gotten through all kinds of means on an internet site.
2 I don't use that site. I don't know that anybody in my firm
3 uses that site. However, we will endeavor to check and see if
4 indeed the document does appear, and if so, I will alert the
5 court accordingly tomorrow. I will endeavor to check this,
6 though.

7 THE COURT: Let's go on to something else. We will
8 come back to this tomorrow.

9 MR. CRANE-HIRSCH: Very well. Your Honor, we will also
10 be wanting to check whether this document appears on the log
11 that the defendants, including Liggett and the Tobacco
12 Institute, gave in this case under Order 51, III, section G9.

13 You may recall the defendants were required to give us
14 logs of all documents of which they had previously waived
15 privileged or all documents that had previously been required to
16 be produced in other cases.

17 And we would submit that if this document, both the
18 version with the Liggett's Bates numbers here and also the TI
19 version, do not appear on those III G9 logs submitted by Liggett
20 and the Tobacco Institute --

21 THE COURT: But, Mr. Crane-Hirsch, we are taking
22 valuable time arguing something about which there may not be any
23 disagreement. Could you go on to another subject? We will come
24 back to this.

25 MR. CRANE-HIRSCH: Yes.

1 Mr. Read, could I ask you for the moment stop reading
2 the document since I'm not going to be able to ask you any
3 questions about it right now and we will move forward.

4 This was actually to be the last document in a section,
5 Your Honor, but I can go ahead and begin the next section. Give
6 me just a moment.

7 BY MR. CRANE-HIRSCH:

8 Q. Mr. Read, you testify in your written direct testimony that
9 BATCo has also worked cooperatively with government groups
10 concerning smoking and health; correct?

11 A. That is correct.

12 Q. And, for example, you refer to interactions between the
13 tobacco industry group in the late '70s, by then it become TAC,
14 the Tobacco Advisory Council; correct?

15 A. Yes, in '78 it changed its name, yes.

16 Q. And so you refer to interactions between TAC and the Hunter
17 Committee which was the Independent Scientific Committee for
18 Smoking and Health, goes by the initial ISCSH. You refer to
19 that in your testimony as well; correct?

20 A. Yes, I do, yes.

21 Q. So to set the context, the second ISCHS report came out in
22 1979, the third one in 1983; correct?

23 A. Correct.

24 Q. And --

25 A. The fourth in '88.

1 Q. Say again sir.

2 A. And the fourth in '88, that's correct.

3 Q. In the time period from '79 onwards, there is particular
4 effort on the part of this independent government committee to
5 work with, or to attempt to secure the cooperation of the
6 tobacco industry in areas concerning two items relating to
7 smoking and health that I'll mention. One general reduction,
8 the other specific reduction. Do you agree with that?

9 A. Yes, I do.

10 Q. And so it's your testimony that BATCo and the other members
11 of the UK tobacco industry participated wholeheartedly in that
12 process; correct?

13 A. Yes, that's correct.

14 Q. That they worked to... And so you will be aware that in
15 the -- in late 1981 one of the senior BATCo researchers, Dr. LCF
16 Blackman prepared a paper setting out a Basic Approach to
17 Government and Medical Authorities; correct?

18 A. Without the document before me, I can't confirm or refute
19 that, but I have no reason to suppose it wasn't correct.

20 Q. You were there by this time, in 1981, weren't you?

21 A. Could you just give me the title of the paper again, please?

22 Q. 1981, Basic Approach to Government and Medical Authorities.

23 A. Yes, I was working for BATCo at the time, yes, that's
24 correct. And I was actually head of the smoking behavior group
25 at the time, that's also will correct.

1 Was I aware of every document that the research
2 director wrote? Not every document, no, I wasn't.

3 Q. But you are aware that Dr. Blackman was very involved in
4 efforts working with the ISCH and also formulating the nature of
5 that relationship; correct?

6 A. Well, he was part of it, but of course Dr. Blackman didn't
7 join us until, I think it was '79, and of course the Hunter
8 Committee was actually formed in '73 and issued its first report
9 in '75, and we did actually have some working relationships with
10 them prior to Dr. Blackman being there.

11 Q. So in the period 1979 through 1983, is the specific period
12 that I'm focusing on, and you will agree with me that during
13 that period in particular Dr. Blackman was instrumental in
14 formulating BATCo's working relationship with this independent
15 government scientific committee?

16 A. Clearly he would have had an input into that, yes.

17 Q. We are going to be discussing four documents here. They
18 should go fairly swiftly.

19 U.S. Exhibit 21006. This is an October 21, 1981 memo,
20 from J.K. Wells, assistant general counsel at B&W, to Ernie
21 Pepples, who is the general counsel at B&W.

22 In the first paragraph he writes, "Pursuant to your
23 request, this is a critique and revision of the BAT document
24 entitled Basic Approach to Government and Medical Authorities."
25 Did I read that correctly?

1 A. Yes, you did.

2 Q. And then in the third paragraph, he writes, "The BAT
3 document admits, despite a disclaimer, that cigarettes are
4 harmful to health in proportion to delivery" and Mr. Wells goes
5 on to give other critiques.

6 Then in the fourth paragraph he writes, "The proposed
7 position would abandon, in effect, all substantive arguments
8 that the relationship of smoking and health is unproven." And
9 gives another sentence.

10 The next paragraph, "It will be difficult to produce a
11 revision which would please the BAT. However, here is a first
12 pass out line." And Mr. Wells goes on to set out four numbered
13 paragraphs.

14 I'll ask that we keep this document up on the screen
15 for the moment, since we will be coming back to those four
16 numbered paragraphs.

17 The next exhibit is U.S. Exhibit 21007. This exhibit
18 is dated six days later. If we can pop back to 21006. At the
19 top corner you will see the handwriting that says, it has Ernie
20 Pepples' signature, JKW, fine, exclamation mark, and the date of
21 October 21st.

22 Now, moving forward to Exhibit 21007. Six days later
23 J.K. Wells writes again to Ernie Pepples, this time with the
24 title, BAT Smoking and Health Position. What he says here,
25 "Pursuant to your request, I called Dr. Blackman and was able to

1 reach him on Monday, October 26th. I discussed our concerns
2 with the slide entitled Basic Approach to Government and Medical
3 Authorities. Pursuant to our conversation, Dr. Blackman will
4 send to other INFOTAB members a substitute for the above slide
5 which will state as follows." And he sets out several
6 paragraphs.

7 There are two more exhibits which I'll ask be given to
8 you at once: U.S. Exhibit 37176, and 37177.

9 We will put up on the screen first U.S. Exhibit 37176,
10 and this is a letter that Dr. Blackman writes to Al Holtzman at
11 Philip Morris International dated a few weeks later, the 18th of
12 November 1981.

13 "Dear Dr. Holtzman:

14 "At the INFOTAB meeting at Baden Baden, I left with you
15 copies, et cetera. One of the slides has now been modified in
16 light of further discussion with B&W and BATCo lawyers, and I
17 forward to you the revised version."

18 And then if we move forward one page, to U.S.
19 Exhibit 37177, we see a slide. I'd like now to compare the
20 bullet points on the slide as revised with the letter -- with
21 the four items that Mr. Wells sent out in the first series that
22 we looked at.

23 Since time is short, we will start out with the second
24 paragraph. Mr. Wells' initial memo to Ernie Pepples, number
25 two, "several studies have shown a statistical association

1 between smoking and certain diseases. Dr. Blackman's changed
2 slides. Several studies have shown a statistical association
3 between smoking and certain diseases."

4 If we move forward to the third paragraph. So did I
5 read that correctly, sir?

6 A. Yes, but you didn't read it in full, but yes, you read that
7 part correctly.

8 Q. If we move forward to the third paragraph of Mr. Wells'
9 memo, "There is an emerging medical opinion that believes low
10 delivery products have a lower statistical association with
11 certain diseases than the higher delivery product which form the
12 basis of the epidemiological studies to date."

13 Did I read that correctly?

14 A. Yes, you did.

15 Q. And is Dr. Blackman's changed slides the same?

16 A. Which, would you --

17 Q. There are three words added at the start of the third
18 paragraph of Dr. Blackman's slide, irrespective of this.

19 So aside from those three words the remainder is
20 exactly as Mr. Wells' proposed rewriting Dr. Blackman's position
21 on approach for working with government and medical authorities;
22 correct?

23 A. That is correct, yes.

24 Q. And then if we go to the fourth paragraph, we will just do
25 the first few words. Mr. Wells suggests starting that

1 paragraph, "The tobacco industry has shown dramatically that it
2 responds quickly." Did I read that correctly?

3 A. Yes, you did.

4 Q. And then Dr. Blackman's changed slide begins the same way;
5 correct?

6 A. Yes, it does.

7 Q. So you will agree with me, then, that the interaction
8 between BATCo with Dr. Blackman and forming the approach for
9 working with the ISCSH and other government and medical
10 authorities, then, was changed at the behest of attorneys for
11 B&W; correct?

12 MR. BERNICK: Objection to the form of the question
13 because the lead in was not focused on INFOTAB. The lead in was
14 much broader. It was the ISCSH and other authorities, and I
15 object to the form of the question.

16 THE COURT: You should narrow your question down. I
17 believe your focus is on INFOTAB.

18 MR. CRANE-HIRSCH: This is a presentation to INFOTAB.

19 BY MR. CRANE-HIRSCH:

20 Q. The title of the slide here, please.

21 So you will agree with me, then, that the slide that
22 Dr. Blackman prepared on the Basic Approach to Government and
23 Medical Authorities was changed at the behest of attorneys for
24 B&W of the United States; correct?

25 A. Certainly he has responded and changed some of the wording.

1 I have quickly read the document and I can't see how any of the
2 science has changed. It's just actually a communications'
3 style.

4 THE COURT: I think at this point we will take a break
5 for the evening.

6 MR. CRANE-HIRSCH: This is a good stopping place, Your
7 Honor. Can we ask the court for the usual instruction, please?

8 THE COURT: Yes. Mr. Read, you may not discuss your
9 testimony with anybody at all, not with lawyers or anybody else
10 in the courtroom or anyone, period.

11 You may not review any testimony or do any homework
12 tonight. You may not even go back over your own direct
13 testimony. You should just not pay any attention to your
14 testimony.

15 Thank you.

16 9:30 tomorrow, everybody.

17 MR. BERNICK: Your Honor, can we get an estimate from
18 counsel regarding the continued cross-examination of this
19 witness? And then we have Dr. Rowell and also Dr. Appleton.

20 In light of how the schedule shifted this morning so
21 dramatically, I think it would be very good to get estimates
22 from counsel about how long the cross-examinations are going to
23 last.

24 THE COURT: What do you estimate?

25 MR. CRANE-HIRSCH: Well, we would certainly be done

1 well before lunch. This has been going more slowly than I
2 anticipated at the outset. But I don't expect more than an
3 additional hour, 45 minutes, or two hours in the morning.

4 THE COURT: And, Mr. Bernick, what do you expect?

5 MR. BERNICK: So far, I'd say about a half an hour, but
6 I suspect as the examination continues I'll probably have more.
7 So I'll say an hour.

8 THE COURT: Okay.

9 MR. BERNICK: And that I guess would put us to the noon
10 hours, and we have Dr. Rowell.

11 Is Your Honor's intention to take up objections for
12 other matters that will involve the court and counsel before
13 Dr. Rowell appears for his live direct or at the conclusion of
14 the day?

15 THE COURT: Probably not beforehand, no.

16 MR. BERNICK: We should be ready with Dr. Rowell after
17 lunch. Do we have an estimate for how long the cross of
18 Dr. Rowell is going to last?

19 MS. EUBANKS: It hasn't changed. I don't have an
20 update and I don't remember what we previously stated.

21 MR. BERNICK: What was it?

22 MR. REDGRAVE: Two to three.

23 MR. BERNICK: Okay.

24 (Proceedings concluded at 4:37 p.m.)

25

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10 CERTIFICATE

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

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16 Edward N. Hawkins, RMR

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