

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-CV-2496 (GK)
	)	
PHILIP MORRIS USA INC. (f/k/a	)	
PHILIP MORRIS INCORPORATED), <u>et al.</u> ,	)	
	)	
Defendants.	)	

UNITED STATES' WRITTEN DIRECT EXAMINATION OF

JOHN P. RUPP

SUBMITTED PURSUANT TO ORDER #471A

AS CORRECTED BY THE WITNESS

1 **Q: Please state your name.**

2 A: My name is John Rupp.

3 **Q: Where do you live?**

4 A: I have a residence in the United States at 3108 Pheasanton Street in Washington, D.C.
5 However, I spend most of my time in Europe, where I have residences in both London and Paris.

6 *A. At the time of my deposition, we owned a residence at 3108 Fessenden Street, N.W.,*
7 *Washington, D.C. Our house there was occupied on a part-time basis by my wife, who was a*
8 *partner at that time at Hogan & Hartson in Washington. My wife has since retired and we have*
9 *sold our house on Fessenden Street and rented an apartment in Washington on Connecticut*
10 *Avenue. I reside almost exclusively in the apartments we have rented in Paris and London.*

11 **Q: Are you currently employed?**

12 A: Yes. I am the managing partner for the London office of the law firm Covington &
13 Burling.

14 *A. Yes. I am a partner at Covington & Burling. I also serve as of counsel to August &*
15 *Debouzy, our correspondent law firm in Paris.*

16 **Q: You are an attorney, correct?**

17 A: Yes.

18 **Q: You have previously provided testimony in this case at a deposition held on June 28,**
19 **2002, correct?**

20 A: That is correct.

21 **Q: And by whom were you represented at that deposition?**

22 A: I was represented by James Goold and William Iverson, both attorneys at the Washington
23 office of Covington & Burling.

1 **Q: And you are aware that Covington & Burling represents Defendant Tobacco**
2 **Institute in this litigation, correct?**

3 A: Yes, I am aware of that.

4 **Q: In fact, your firm, Covington & Burling, has been legal counsel to and represented**
5 **the Tobacco Institute since the 1950s, correct?**

6 A: Yes.

7 *A. I believe that to be correct, although I was not hired as an associate at Covington &*
8 *Burling until 1971 and did not begin to do any tobacco work until I returned to Covington &*
9 *Burling from the US Justice Department in April 1977. As a consequence, I have only the most*
10 *superficial second-hand knowledge of Covington & Burling's representation of The Tobacco*
11 *Institute during the 1950s, 1960s and through most of the 1970s.*

12 **Q: With respect to you personally, you performed work and provided advice for the**
13 **Tobacco Institute and various cigarette manufacturers from the late 1970s to the**
14 **dissolution of the organization of TI in 1999, correct?**

15 A: That is correct. I came to Covington & Burling in 1977 and devoted at least a portion of
16 my time to tobacco work for over 25 years.

17 *A. I did not begin to do any work for The Tobacco Institute until I returned to Covington &*
18 *Burling from the US Justice Department in April 1977. My work for The Institute during the rest*
19 *of the 1970s was modest. During the late 1970s, I spent most of my time trying anti-trust cases*
20 *for companies like DuPont and Florida Power and Light. I also was deeply involved for several*
21 *years in a proceeding at the Federal Trade Commission focusing on the advertising of over the*
22 *counter medicines. My work for The Tobacco Institute was significant through the 1980s,*
23 *although I also continued to represent other clients during those years. My representation of*

1 *The Tobacco Institute essentially ended when I moved to Europe in 1995, although I did continue*
2 *thereafter to do some work for the Center for Indoor Air Research as well as individual tobacco*
3 *companies. Most of my work during the past few years has not involved tobacco. My non-*
4 *tobacco clients over the past few years have included France Telecom, Textron, Vivendi,*
5 *GlaxoSmithKline, the French National Railroad, Equity Trust, Goodyear, British Petroleum,*
6 *ExxonMobil, Newmont Mining, New Skies Satellites, a former reporter for the Washington Post*
7 *who became involved in a dispute in The Hague concerning disclosure of his sources while*
8 *covering the war in Bosnia, the Council of American Survey Research Organizations and the*
9 *European Commission. For approximately two years in the late 1990s, I served as the lead*
10 *lawyer on a study for the European Commission on the product liability implications under EU*
11 *law of satellite assisted navigation and positioning systems.*

12 **Q: And all of the work you have done for various tobacco-related entities was done as a**
13 **member of the law firm of Covington & Burling, correct?**

14 A: Yes.

15 A. No. I also have done some tobacco work as of counsel to August & Debouzy in Paris.

16 **Q: At your deposition you stated that you continue to perform legal services for certain**
17 **cigarette manufacturers. For which cigarette manufacturers and/or tobacco-related clients**
18 **are you and your firm Covington & Burling currently providing advice and/or services?**

19 A: British American Tobacco and Imperial Tobacco.

20 A. Most of my tobacco work over the past few years has been for British American Tobacco. I
21 also have provided advice on product counterfeiting to Philip Morris and Japan Tobacco
22 Incorporated. In addition, I have done a modest amount of work over the past couple of years
23 for Imperial Tobacco and UST. I do not know for sure who the principal clients are currently

1 *for our tobacco work in the United States. I do know, of course, that we represent The Tobacco*
2 *Institute in this lawsuit.*

3 **Q: I want to go back to the late 1970s, after your arrival at Covington & Burling. Who**
4 **were your tobacco clients at that time?**

5 A: The major client was the Tobacco Institute, but there were also matters in which I was
6 involved on behalf of Covington & Burling for individual tobacco companies, and those
7 companies were Philip Morris, Lorillard, Liggett, R.J. Reynolds, Brown & Williamson, and
8 American.

9 A. *I came first to Covington & Burling as a summer associate in 1970. After clerking for*
10 *Judge Frank Coffin of the First Circuit Court of Appeals in 1971-72, I joined Covington &*
11 *Burling. I remained there for three and one half years before leaving to join the Solicitor*
12 *General's Office in the Justice Department. When I returned to Covington & Burling in mid-*
13 *1977, my major assignment was the Federal Trade Commission proceeding that I already have*
14 *mentioned involving the advertising of medicines sold over the counter. I may have worked*
15 *periodically on tobacco issues during the late 1970s but have no recollection of any specific*
16 *work. I did not really begin to do substantial tobacco work until the early 1980s, as I recall.*
17 *Our clients at that time were The Tobacco Institute as well as several of the US based tobacco*
18 *manufacturers.*

19 **Q: During the late 1970s, the subjects of secondhand smoke and the adverse health**
20 **effects of secondhand smoke were becoming more and more prominent, both publicly and**
21 **among your tobacco clients, correct?**

22 A: Yes.

23 A. *I do not recall any extended discussion of environmental tobacco smoke until 1981.*

1 **Q: You recall that the first studies that found an association between passive smoking**
2 **and lung cancer in nonsmoking adults were published in 1981, correct?**

3 A: Yes.

4 A. *Your questions suggests a misunderstanding of the methodology used by epidemiologists*
5 *and the meaning of epidemiological results. The first studies of which I am aware that reported*
6 *an association between environmental tobacco smoke and lung cancer in non-smokers appeared*
7 *in 1981. Actually, neither study measured exposure to environmental tobacco smoke. A*
8 *surrogate for exposure was used in both studies -- marriage to a husband who smoked. During*
9 *the same year, a third study was published on the same issue, a study conducted by Laurence*
10 *Garfinkel of the American Cancer Society. The 1981 Garfinkel study, which was twice as large*
11 *as the Trichopolous study but a bit smaller than the Hirayama study, both of which also had*
12 *been published in 1981, did not report a statistically significant relationship between marriage*
13 *to a smoker and the incidence of lung cancer. Thus, as of the end of 1981, three ETS/spousal*
14 *smoking studies had appeared in the scientific literature, two reporting a barely statistically*
15 *significant association and one reporting no significant association.*

16 **Q: And of course I am referring to the Hirayama study from Japan and the**
17 **Trichopoulos study from Greece, correct?**

18 A: Yes.

19 A. *As I already have indicated, three studies were published in 1971 on the issue of whether*
20 *there was a statistically significant relationship between marriage to a husband who smokes and*
21 *the incidence of lung cancer. Two of the studies, the ones you've mentioned, reported a barely*
22 *statistically significant positive association, focusing respectively on Japanese and Greek*

1 women. The other study published in 1981, focusing on non-smoking wives of smoking husbands
2 living in the United States, did not report a statistically significant association.

3 **Q: Do you recall, Mr. Rupp, that those published studies from Japan and Greece**
4 **indicated that nonsmoking women married to cigarette smokers had an increased lung**
5 **cancer risk?**

6 A: Generally, yes.

7 A. Yes, although as I already have mentioned, the results of both studies were barely
8 statistically significant while the results of the Garfinkel study were not statistically significant.
9 In addition, there were major problems with all three studies, stemming in part from the fact that
10 none of these early studies had been designed originally to investigate the possible health
11 implications of exposure to environmental tobacco smoke.

12 **Q: Please review U.S. Exhibit 22963. What is this exhibit?**

13 A: U.S. Exhibit 22963 is the paper that Hirayama published in 1981, entitled "Non-Smoking
14 Wives of Heavy Smokers Have a Higher Risk of Lung-Cancer: A Study From Japan," 282
15 *British Medical Journal*, 183-85 (1981), based on a cohort study in Japan.

16 **Q: Would you agree that Hirayama's 1981 study, in general terms, was a prospective**
17 **cohort study of over 90,000 nonsmoking Japanese women, whose results showed a rising**
18 **risk for lung cancer from 1.75 for nonsmoking women with husbands who were former**
19 **smokers or who smoked less than a pack a day to 2.2 for nonsmoking women whose**
20 **husbands smoked a pack a day or more?**

21 A: Yes.

22 A. The Hirayama study was a prospective study but not one originally designed to
23 investigate non-smoker exposure to environmental tobacco smoke. The original cohort included

1 over 90,000 non-smoking wives, divided between those married to smokers and those married to
2 non-smokers. Significantly, a very substantial percentage of Hirayama's original cohort of non-
3 smoking wives were reported subsequently to have been lost to follow up -- that is, they simply
4 disappeared from the study without any explanation. The pertinent part of the cohort, as of
5 1981, was non-smoking wives who had developed lung cancer and whose husbands smoked.
6 That group, as of 1981, included 175 people or so. The dose/response data from the Hirayama
7 study, about which you have asked, was not really meaningful. Among the reasons for that is
8 that Hirayama asked about the smoking habits of the husbands only once, in 1963 --that is, at
9 the beginning of the study. What the husbands' smoking habits were as of the late 1970s, early
10 1980s is anyone's guess. In addition, Hirayama adjusted his results for the age of the husband
11 rather than the wife. He should have adjusted for the age of the wife since it is the wife's health
12 that was being reported upon. Finally, Hirayama adjusted for almost no confounders or biasing
13 factors. In particular, he did not consider what effect misclassification of smoking status would
14 have had on his results. Many of the defects in or limitations of the Hirayama study were
15 discussed in the 1986 US Surgeon General's report.

16 **Q: And you recall that the results of the Hirayama study were not only well known to**
17 **the Tobacco Institute and your other tobacco clients, but was a source of great concern for**
18 **them as well, correct?**

19 **A: Yes.**

20 *A. There certainly were people at The Tobacco Institute and in The Institute's member*
21 *companies who were aware of the Hirayama study, just as they were aware of the Trichopoulos*
22 *and Garfinkel studies. Since the issue being reported upon in all three studies related to the*
23 *possible effects on non-smokers of exposure to tobacco smoke in the air, there certainly was, as*

1 *you have suggested, a degree of concern among Institute as well as company people -- concern*
2 *to know what the true facts were.*

3 **Q: Now please look at U.S. Exhibit 50615. Can you identify this exhibit?**

4 A: Yes. This is the 1981 Trichopoulos paper, titled "Lung Cancer and Passive Smoking,"
5 published at 27 *International Journal of Cancer*, 1-4 (1981), based on a case-control study in
6 Greece.

7 **Q: And do you recall that this Greek study, similar to the Hirayama study, reported**
8 **increased lung cancer risk in nonsmoking women married to cigarette smokers compared**
9 **with nonsmoking women married to nonsmoking men, and also reported a dose-response**
10 **relationship in that the relative risk of lung cancer increased as the amount of cigarettes**
11 **that are smoked by the husband increased?**

12 A: Yes.

13 A. *As Trichopolous himself advised in his 1981 publication, one must be very careful about*
14 *relying too much on the results you've mentioned. The statement that Trichopolous made in that*
15 *connection is important: "This study has obvious limitations and is offered principally to*
16 *suggest that further investigations should be pressed." I agree with the foregoing observation,*
17 *which -- as I say -- is how Tricholopous himself characterized his study results.*

18 **Q: And again, these results were also well known to the Tobacco Institute and your**
19 **other tobacco clients, and were a source of concern for them as well, correct?**

20 A: Yes.

21 A. *I already have answered this question when discussing the results and meaning of the*
22 *Hirayama study.*

23 **Q: Now the 1981 reports of Hirayama and Trichopoulos received criticism, correct?**

1 A: Yes.

2 A. *You could use the word "criticism" in that connection but it would be more accurate to*
3 *say that there was a good deal of debate after the Hirayama, Trichopolous and Garfinkel studies*
4 *had appeared -- with their inconsistent results -- about the limitations of those studies and what*
5 *should be done in any future studies to eliminate those limitations. As I have said, none of the*
6 *three ETS/lung cancer studies that was published in 1981 had been designed initially to study*
7 *ETS. As a consequence, it is not at all surprising that all three had serious limitations as ETS*
8 *studies. I'm not sure they can be criticized for that. It's just a fact.*

9 **Q: And in fact, some of the criticism was organized by the tobacco industry, correct?**

10 A: Yes, it was.

11 A. *Most of the writing about the limitations of the Hirayama, Trichopolous and Garfinkel*
12 *studies came from scientists having nothing whatever to do with any tobacco company. The US*
13 *Surgeon General, the US National Academy of Sciences and the International Agency for*
14 *Research on Cancer are among those who criticized the Hirayama and Trichopolous studies, for*
15 *example -- or, perhaps better put, issued reports subsequently noting some of the limitations of*
16 *those studies. Several consultants to The Tobacco Institute also were aware of and commented*
17 *upon those limitations, including in presentations that they made in 1985 or so to the US*
18 *National Academy of Sciences, National Research Council. The consultants to The Institute*
19 *tended to believe at that time that much further work was needed before any firm conclusions*
20 *could be reached. I believe that to have been the almost universal view within the scientific*
21 *community at that time. It certainly was, as I have mentioned, the view expressed by*
22 *Trichopolous. In fact, Larry Garfinkel of the American Cancer Society made many of the same*

1 *points as Tricopolous concerning the need for additional and better designed studies, and he*
2 *actually proceeded to do some additional work in the area.*

3 **Q: Let's look first at the 1972 Surgeon General's Report, marked U.S. Exhibit 60597.**
4 **Chapter 8 is titled "Public Exposure to Air Pollution from Tobacco Smoke," correct?**

5 A: Yes.

6 **Q: Now turn to pages 130 and 131, where at the close of Chapter 8 the Surgeon General**
7 **made three conclusions. He found that tobacco smoke was a source of discomfort for many**
8 **persons, that carbon monoxide in rooms filled with tobacco smoke created a potential risk**
9 **for exposed persons, and that the extent of the risk, if any, caused by other smoke**
10 **components was not then known. Do you see that?**

11 A: Yes.

12 *A. I don't know that I can improve on the language the Surgeon General actually used in*
13 *1972 on the issues you're raised. He said first that "[a]n atmosphere contaminated with*
14 *tobacco smoke can contribute to the discomfort of many individuals." He then referred to*
15 *experiments, not real world situations, using rooms filled artificially with essentially maximum*
16 *possible amounts of tobacco smoke. He noted that, in such experiments, carbon monoxide levels*
17 *could be attained "on occasion, depending upon the length of exposure," that could be*
18 *problematic "for people who are already suffering from chronic bronchopulmonary disease and*
19 *coronary heart disease." With respect to other ETS components, the Surgeon General said in*
20 *1972 that "[t]he extent of [the] contributions of these substances to illness in humans exposed to*
21 *the concentrations present in an atmosphere contaminated with tobacco smoke is not presently*
22 *known." The Surgeon General's overall conclusion in 1972 was, of course, that there was a*
23 *need for data on actual human exposure to ETS in real work circumstances and that conclusions*

1 *concerning actual as opposed to theoretical or potential health effects would depend upon and*
2 *would have to await the collection and evaluation of that and other related data. I perhaps*
3 *should mention here that subsequent research has shown that carbon monoxide from cigarette*
4 *smoking, one issue raised by the Surgeon General in 1972, seldom is elevated more than*
5 *marginally in real world environments in which smoking occurs -- more specifically, that the*
6 *absolute levels of carbon monoxide from smoking very rarely would be above 3 parts per*
7 *millions, which is about 6 percent of the permissible CO exposure limit set by the US*
8 *Occupational Safety and Health Administration. In fact, I think it fair to say that one could not*
9 *reliably tell whether smoking had been occurring in a room by focusing on the level of CO in the*
10 *room, largely because the predominant sources of indoor CO have nothing whatever to do with*
11 *smoking. None of those facts were available to the Surgeon General in 1972, of course, because*
12 *the pertinent research had not yet been done.*

13 **Q: Now let's move forward in time to the 1979 Surgeon General's Report, marked U.S.**
14 **Exhibit 64071. Chapter 11 is titled "Involuntary Smoking," correct?**

15 **A: Yes.**

16 **Q: And we see that in 1979, similar to the findings in the 1972 report, secondhand**
17 **smoke was observed to be a source of annoyance and, because of carbon monoxide, was a**
18 **potential health hazard, correct?**

19 **A: Yes.**

20 *A. Yes, but by potential hazard the Surgeon General was simply suggesting again in 1979*
21 *the need for future research. That report also stated that "[h]ealthy nonsmokers exposed to*
22 *cigarette smoke have little or no physiological response to the smoke, and what response does*
23 *occur may be due to psychological factors."* He noted in addition in that report that --

1 “[a]ttention to involuntary smoking is of quite recent vintage, and only limited
2 information regarding the health effects of such exposure upon the non-smoker is
3 available. Therefore, research is needed to define these effects.”

4 **Q: And the Surgeon General also noted the potential risk of ETS to children in his 1979**
5 **report, correct?**

6 A: Yes.

7 A. Yes, but again if you read the pertinent passage carefully you’ll find that what the
8 Surgeon General actually was saying in 1979, concerning all ETS health effect issues, is that we
9 must suspend final judgment until further research of adequate quality has been completed and
10 has become available. He said essentially the same thing in his 1984 report.

11 **Q: However, the only public health recommendation with respect to secondhand smoke**
12 **was to conduct more research, correct?**

13 A: Yes.

14 A. Yes, that’s correct -- for the reasons I’ve noted and the Surgeon General himself
15 explained clearly in his 1972, 1979 and 1984 reports.

16 **Q: As a general matter, you and TI were aware of what was published in the Surgeon**
17 **General’s reports, given that they affected the tobacco business, correct?**

18 A: Yes.

19 A. I was not doing any tobacco work in 1972 and my work on tobacco in 1979, as I have
20 said, was only episodic. I did have an opportunity later, however, to read the Surgeon General’s
21 1972, 1979 and 1984 reports. I imagine that people more deeply involved in tobacco work that I
22 was in 1972 and 1979, both inside and outside the tobacco industry, read at the time and thought
23 about what the Surgeon General had said in his 1972 and 1979 reports. I also became aware

1 subsequently, of course, of the 1975 report of the Surgeon General, which said the following
2 about ETS:

3 *“In summary, the effects of cigarette smoke on healthy nonsmokers consists mainly of*
4 *minor eye and throat irritation. However, people with certain heart and lung diseases*
5 *(angina pectoris, COPD, allergic asthma) may suffer exacerbations of their symptoms as*
6 *a result of exposure to tobacco in smoked-filled environments. These effects are*
7 *dependent on the degree of individual exposure to cigarette smoke which is determined*
8 *by proximity to the source of the tobacco smoke, the type and amount of tobacco product*
9 *smoked, conditions of room size and ventilation as well as the amount of time the*
10 *individual spends in the smoke-filled environment, and his physiologic condition at the*
11 *time of the exposure.”*

12 **Q: Let’s talk about what Covington & Burling and the Tobacco Institute were doing in**
13 **the early 1980s, after the release of the first studies (Hirayama and Trichopoulos) that**
14 **found an elevated risk of lung cancer among nonsmokers married to smokers. Please**
15 **direct your attention to the document marked U.S. Exhibit 62270. This is a September 23,**
16 **1986 memorandum from Bill Kloepper to Sam Chilcote, with a subject line reading “ETS:**
17 **Our response,” correct?**

18 **A: Yes.**

19 *A. I have looked at US Exhibit 62270 and agree with your reading of the heading and*
20 *subject matter lines. But with respect, I fear that you are reading too much into the Hirayama*
21 *and Trichopolous reports. In 1982, after the Hirayama and Trichopolous studies had been*
22 *published, the Surgeon General stated -- with special reference to the Hirayama and*
23 *Trichopolous studies -- that “limitations in data and study design do not allow a judgment on*

1 causality at this time.” In addition, we must not forget that the Garfinkel study, which also was
2 published in 1981, reported no significant association between marriage to a smoker and the
3 incidence of lung cancer among non-smokers. That was, of course, the surrogate ETS exposure
4 indicator that also had been used in the Hirayama and Trichopolous studies. The Garfinkel
5 study was part of a very large study effort that had been funded by the American Cancer Society,
6 where Laurence Garfinkel was head epidemiologist. When the Garfinkel study was published,
7 the American Cancer Society issued a press release that stated in pertinent part that the
8 Garfinkel study “shows that nonsmoking women married to cigarette smokers have little if any
9 increased risk of getting lung cancer, compared to nonsmoking women whose husbands do not
10 smoke.”

11 **Q: And in 1986, Mr. Chilcote was the president of TI, and Mr. Kloefer was senior vice**
12 **president of public relations, correct?**

13 A: Yes.

14 A. I don’t recall when Sam Chilcote became head of The Tobacco Institute. The president of
15 The Tobacco Institute during my early years of doing work for The Institute was Horace
16 Kornegay. For several years, Mr. Chilcote occupied a junior position to Mr. Kornegay at The
17 Institute. I can’t tell you now precisely when Mr. Chilcote became the president of the TI. Bill
18 Kloefer did occupy the position at The Institute that you’ve mentioned as of 1986.

19 **Q: And is it a fair statement that you, as an attorney advising TI, spent a considerable**
20 **amount of time with Mr. Chilcote and Mr. Kloefer during their tenure?**

21 A: Yes.

1 **Q:** In Mr. Kloefer's first paragraph, he states, "It's been two years since we shifted
2 into 'high gear' on the ETS issue, with PR 'issue management,' ETSAG (Hoel Committee)
3 and IAPAG (Schwartz Group)." Do you see that?

4 **A:** Yes, I do.

5 **Q:** Do you recall that in 1984, two years before this memorandum, those two groups,
6 the ETS Advisory Group and IAPAG, were formed as part of the Tobacco Institute's ETS
7 "response"?

8 **A:** Yes, that is correct.

9 *A. I cannot be certain of the year but that would have been about right. I'm not entirely
10 sure what you mean to convey, however, by suggesting that the ETS Advisory Group and IAPAG
11 were formed as part of The Tobacco Institute's ETS response. In my view, the ETS Advisory
12 Group was formed and we began to seek advice and assistance from university affiliated
13 scientists in 1984 or so because serious questions had been raised concerning the possible health
14 impact of ETS on non-smokers and it seemed to many associated with the tobacco industry,
15 including me, that those issues needed to be addressed in a serious and forthright manner.*

16 **Q:** And further down Mr. Kloefer's memorandum, he states, "IAPAG is under the
17 effective control of C&B," and he mentions your name. "C&B" in this context is
18 Covington & Burling, correct?

19 **A:** Yes, it is.

20 **Q:** And did Covington & Burling "effectively control" IAPAG?

21 **A:** Yes.

1 A. I do not believe that to be a fair characterization. It is true only in the sense that I had
2 much more contact with the scientists who had joined IAPAG than anyone on the TI staff or
3 anyone working for one of the TI's member companies.

4 **Q: He then states, "No IAPAG consultant attends meetings of ETSAG, and vice versa,**
5 **except possibly for Rupp." Can you confirm that you served as a liaison between the TI**
6 **ETS Advisory Group and IAPAG?**

7 A: Yes. I attended meetings of both groups.

8 A. I attended meetings of both groups but certainly did not serve as a "liaison" between
9 them.

10 **Q: First, let's discuss the group in Mr. Kloefer's memorandum called IAPAG first.**
11 **IAPAG stood for Indoor Air Pollution Advisory Group, correct?**

12 A: Yes, that is correct.

13 **Q: And IAPAG was a group of people you organized to provide testimony at various**
14 **hearings, write articles and letters to the editor, and generally criticize scientific evidence**
15 **finding or suggesting that ETS caused adverse health effects, correct?**

16 A: Yes.

17 A. I answered this question several times, at substantial length, during my deposition. The
18 answer to the question you've asked, as you have put it, is "no."

19 **Q: And IAPAG did this on behalf of the Tobacco Institute, correct?**

20 A: Yes.

21 A. IAPAG was composed of a number of university affiliated scientists who undertook, as
22 individuals, a variety of activities relating to ETS. The support they needed for such activities
23 came from The Tobacco Institute.

1 **Q: So the positions IAPAG members took publicly were consistent with the positions of**
2 **the Tobacco Institute and its member companies, correct?**

3 A: Correct.

4 A. *The Institute opposed during the years you've mentioned many proposals, particularly*
5 *proposals at the state and local levels, that would have severely restricted where and when*
6 *people could smoke. One of its publicly stated reasons for doing so was that the pertinent*
7 *science did not show ETS posed a health risk to non-smokers. The TI also tended to point out, as*
8 *had the Surgeon General in several of the reports that we have been discussing, that any*
9 *discomfort and very possibly any health risk associated with ETS could be addressed through*
10 *improved ventilation and the separation of smokers and non-smokers in enclosed places. The*
11 *Institute urged legislators to permit such steps to be taken on a voluntary basis. The scientists*
12 *who were members of IAPAG agreed with The Institute position on the science of ETS. But when*
13 *asked at legislative hearings whether they also opposed laws that would ban or severely*
14 *restriction smoking in public places and workplaces, most IAPAG members said "no." Indeed,*
15 *IAPAG members often would volunteer at legislative hearings a statement to the effect that they*
16 *definitely should not be regarded as opposing the measure being debated, to the extent the*
17 *measure was based on public policy -- as opposed to scientific -- considerations. The positions*
18 *the IAPAG members took on issues relating to ETS were taken by them of their own volition,*
19 *after having reviewed the pertinent scientific literature. The views they expressed were their*
20 *own, not views suggested by me or anyone affiliated with The Tobacco Institute or any of The*
21 *Institute's member companies.*

22 **Q: No other industry was paying for the services of IAPAG, correct?**

23 A: That is correct, only members of the tobacco industry.

1 A. The consulting fees that were charged by individual members of IAPAG were covered
2 entirely, as I recall, by The Tobacco Institute. I should note in addition, however, that all of the
3 scientists who were members of IAPAG had a broad range of consulting clients in both the
4 public and private sectors. Many of them had spent the bulk of their careers consulting with
5 agencies of the US Government or working on research that had been financed by the US
6 Government.

7 **Q: And the members of IAPAG included Sorrell Schwartz and Nancy Balter, who**
8 **operated under the name Center for Environmental Health and Human Toxicology, or**
9 **CEHHT, correct?**

10 A: Correct.

11 A. Dr. Sorrell Schwartz and Dr. Nancy Balter were members of IAPAG. Both were on the
12 faculty of Georgetown University at that time. Dr. Schwartz and Dr. Philip Witorsch, a scientist
13 and practicing pulmonologist on the faculty of George Washington University Medical Center,
14 had formed the Center for Environmental Health and Human Toxicology well before I met them.
15 At some point before I met her, Dr. Balter had begun to do some of her consulting work through
16 the Center for Environmental Health and Human Toxicology, although I'm not sure in what
17 capacity. Dr. Witorsch also was a member of IAPAG.

18 **Q: Now direct your attention to the document marked U.S. Exhibit 85517. This is a**
19 **letter dated March 30, 1987, from the vice president of corporate affairs at Rothmans to**
20 **the Canadian Tobacco Manufacturers Council. Rothmans is a Canadian cigarette**
21 **manufacturer, and the Canadian Tobacco Manufacturers Council was the Canadian**
22 **equivalent of the Tobacco Institute, correct?**

23 A: Yes.

1 A. Rothman's was at that time an international tobacco company located in South Africa.
2 I'm not sure that Rothman's owned any shares of Rothmans Benson & Hedges, Inc., which was a
3 Canadian tobacco company. I cannot tell you whether the Canadian Tobacco Manufacturers
4 Council was the Canadian equivalent of US The Tobacco Institute. I have never reviewed the
5 charter of the Canadian Tobacco Manufacturers Council and am not by any means aware of all
6 of the activities the Canadian Tobacco Manufacturers Council has undertaken, or not
7 undertaken, over the years.

8 **Q: I want to direct you to the first paragraph of this letter. The author writes, "I would**
9 **like to draw your attention to the existence of IAPAG (Indoor Air Pollution Advisory**
10 **Group) which has been assembled by John Rupp, a partner at the legal firm of Covington**
11 **& Burling in Washington. The group includes Rupp, Gray Robertson, CEO of ACVA**
12 **Atlantic, Inc., a Washington based firm that analyzes air quality, and Philip Witorsch. . . .**
13 **The group has been formed specifically to give expert testimony at hearings on proposed**
14 **'clean air' legislation." Do you agree with that description?**

15 A: Yes, I do.

16 A. No. I don't believe that Gray Robertson was a member of the Indoor Air Pollution
17 Advisory Group, although he did occasionally attend IAPAG meetings. I was not an IAPAG
18 member either, of course. I also disagree with your characterization of the reasons IAPAG was
19 formed. I discussed those reasons at length during my deposition in this case. As I explained
20 during my deposition, you are focusing on only one of the several reasons IAPAG was formed,
21 and not necessarily even the most important. There was a widespread view at the time to which
22 you are referring among people associated with the tobacco industry, including me, that serious
23 questions had been raised concerning the health consequences of exposure to tobacco smoke in

1 *the air and that those issues needed to be addressed in a fair, balanced and forthright manner,*
2 *including in presentations to legislative bodies. I also was acutely aware at that time, of course,*
3 *of the calls by the Surgeon General and others for further research concerning ETS. Finally, but*
4 *not at all insignificantly, I certainly recognized that experts would be needed for the almost*
5 *inevitable regulatory proceedings and litigation that would be initiated. My clients recognized*
6 *that as well.*

7 **Q: So again, IAPAG was a group Covington & Burling organized to advise the**
8 **Tobacco Institute on ETS scientific matters and to provide industry-favorable testimony at**
9 **various regulatory and legislative hearings, correct?**

10 A: Yes, it was.

11 A. *If you had re-read my deposition, you would know that the foregoing statement is*
12 *inaccurate. Whenever members of IAPAG were asked to appear at legislative hearings, the*
13 *views they expressed were their own. They were never told what to say, by me or anyone else so*
14 *far as I'm aware. Frankly, I can't think of a single member of IAPAG who was remotely*
15 *interested in whether their views were "industry-favorable," whatever that means. Their sole*
16 *purpose was to provide a fair and objective assessment of the ETS science that existed at the*
17 *particular time. Indeed, I can't even think of a single occasion when a member of IAPAG asked*
18 *me what the industry's position was on ETS or whether the industry had such a position. They*
19 *simply didn't care, and I respected them for that.*

20 **Q: And according to this letter, you and the members of IAPAG put on seminars or**
21 **clinics in other countries to train others on how to publicly present the industry's response**
22 **to adverse ETS evidence. Do you recall participating in those seminars?**

23 A: Yes.

1 A. Neither I nor any member of IAPAG ever “put on seminars or clinics in other countries
2 to train others on how to publicly present the industry’s response to adverse ETS evidence.”
3 You are misreading Ms. von Maerestetten’s memorandum if that is your basis for that
4 suggestion. I also would draw your attention to the statement of Dr. Witorsch attached to Ms.
5 von Maerestetten’s note. That statement is typical of the ground rules followed by the IAPAG
6 members whenever they participated in a meeting or other session with a promise of financial
7 support from The Tobacco Institute. As Dr. Witorsch explained in his statement:

8 “The tobacco industry has requested that I discuss with you my evaluations of published
9 studies. My purpose is to discuss the scientific data and not the sociopolitical or
10 economic issues. In this connection, the following are relevant:

11 (1) I am here at the request and expense of the tobacco industry but the views
12 expressed are mine alone and neither my prepared statement nor my answers to your
13 questions should be interpreted as representing tobacco industry views.

14 (2) Under no circumstances are my statements to be interpreted as a position on any
15 public smoking legislation. I am not a citizen of this country and do not consider myself
16 to have standing to express a position on any proposed legislation. The only position I
17 am taking relates strictly to the scientific and medical validity of explicit and implied
18 assumptions underlying such legislation regarding health effects on the non-smoker
19 exposed to ETS.

20 (3) In any public medical or scientific statement I make my position at the George
21 Washington University is presented only for identification purposes. The University
22 encourages faculty members to speak out responsibly on issues, but with the

1 *understanding that faculty members doing so represent their own views and not those of*
2 *the University.*

3 (4) *Nothing I say that questions data on the health effects of ETS should be construed*
4 *to imply a similar view of active smoking. Indeed, I consider active smoking and ETS*
5 *exposure to be toxicologically distinct phenomenon.”*

6 **Q: Please review the documents marked U.S. Exhibit 65700, 65699, and 77020. These**
7 **documents provide examples of how IAPAG members provided testimony on behalf of the**
8 **Tobacco Institute at public hearings, in this instance before the National Academy of**
9 **Sciences on January 29, 1986, correct?**

10 A: Yes.

11 A. *Yes and no. US Exhibit 65,700 is simply a transmittal note from Walter Woodson to*
12 *certain of his colleagues at The Tobacco Institute not living in Washington, forwarding a copy of*
13 *a statement given by Professors Nancy Balter and Vince Castranova to the National Research*
14 *Council in 1986. I do not know whether Mr. Robertson’s statement was also presented to the*
15 *National Research Council. The more important point, though, is that neither the*
16 *Balter/Castranova statement nor the Robertson statement, if indeed that was presented to the*
17 *National Research Council, was provided to the NRC “on behalf of” The Tobacco Institute.*
18 *Drs. Balter and Castranova were paid a consulting fee, covered by The Tobacco Institute, to*
19 *prepare their NRC statement but the statement was not prepared or submitted “on behalf of”*
20 *The Tobacco Institute. I’m not just quibbling when I make the latter point. No member of*
21 *IAPAG would have remained a member of that group for a single day after having been asked to*
22 *speak “on behalf of” The Tobacco Institute. The views they were expressing were their own.*

1 **Q: And, looking at U.S. Exhibit 88585, can you verify that this document accurately**
2 **lists the members of IAPAG?**

3 A: Yes.

4 A. *US Exhibit 88,585 lists the members of IAPAG as of the date that document was written.*
5 *Gray Robertson is listed there but, as I already have mentioned, I don't believe he actually was*
6 *an IAPAG member. Mr. Robertson did attend, however, some IAPAG meetings.*

7 **Q: And do the documents marked U.S. Exhibits 85524, 85523, 85602, 87329, 65472, and**
8 **65475; and JD-080549, describe activities of IAPAG and CEHHT on behalf of the Tobacco**
9 **Institute or other industry members in the late 1980s and early 1990s?**

10 A: Yes, they do.

11 A. *No. As I have stated, the members of IAPAG and the scientists who were affiliated with*
12 *the Center for Environmental Health and Human Toxicology did not submit statements or*
13 *undertake activities "on behalf of" The Tobacco Institute or any of The Institute's member*
14 *companies. When they believed it appropriate, they would make presentations at the request of*
15 *The Tobacco Institute but the views they expressed were theirs and theirs alone. Further, they*
16 *were entirely free to decline to make a presentation for any reason they wanted or for no reason*
17 *at all. More specifically, US Exhibit 85524 describes the decision that was made in 1987 to*
18 *cease relying upon IAPAG members for legislative testimony and in connection with media*
19 *activities. I explained in my deposition why that decision was made. US Exhibit 85523 is a*
20 *document written several months before US Exhibit 85524 by Roger Mozingo, then serving as*
21 *senior vice president for state affairs at The Tobacco Institute, describing -- among other things*
22 *-- appearances made by IAPAG members during the year or so before the documents was*
23 *written. US Exhibit 85602 was not written by any member of IAPAG. It was written by one of*

1 my colleagues at Covington & Burling, Dr. Michael Michaelson. I do not recall whether that
2 document was ever released publicly. US Exhibit 87329 is a document written by someone from
3 the Center for Environmental Health and Human Toxicology, most likely either Sorrell Schwartz
4 or Nancy Balter, making recommendations concerning how we might identify possible scientific
5 consultants in Scandinavia. US Exhibit 65472 was written by Peter Sparber, at the time a public
6 affairs executive at The Tobacco Institute. I believe that I was asked about this document during
7 my deposition. Very few of the recommendations made in this document were ever implemented.
8 US Exhibit 65475 is a document written by Peter Sparber raising a number of questions about
9 the cost of scientific consultants. Finally, the first document stapled together as US Exhibit JD-
10 080549 is document that was written by Roger Mozingo in 1995 suggesting to his Tobacco
11 Institute colleagues the ground rules they should follow with respect to what he calls "scientific
12 witness appearances." The document entitled "Guidelines for Presenting Scientific Expert
13 Testimony Before State Legislators," which is attached to the Mozingo document I have just
14 described, was written by one of my partners at Covington & Burling. Its purpose was to
15 elaborate on the points made in the Mozingo document that I have just described.

16 **Q: Please take a look at the document marked U.S. Exhibit 65701. This is a Tobacco**
17 **Institute memorandum dated January 15, 1988, from Walter Woodson to Bill Cannell. Am**
18 **I correct that IAPAG also participated in training the "Scientific Witness Team," or SWT?**

19 **A:** Yes, that was one of the group's activities.

20 *A. For a time, members of IAPAG -- university affiliated scientists having first rank*
21 *credentials in all of the areas relating to the science of ETS and having been given the support*
22 *that they needed to review comprehensively all of the literature that had appeared that related to*
23 *ETS -- were given responsibility for making periodic presentations to members of the scientific*

1 witness team on ETS-related issues within their respective areas of expertise. Your use of the
2 word "training" is inappropriate, although I must acknowledge with a bit of a red face -- as I
3 believe I did during my deposition -- that I also occasionally have written documents using that
4 word. The more appropriate, and accurate, thing to say is that IAPAG members were asked to
5 share their special expertise on ETS with members of the scientific witness team -- although, as
6 had been true of the IAPAG members themselves, the conclusions reached at the end of the day
7 by the members of the scientific witness team were their conclusions and their conclusions only.

8 **Q: And we see the Scientific Witness Team mentioned in U.S. Exhibit 62247 and JD**
9 **080231 as well, correct?**

10 **A: Yes. [I haven't yet located these exhibits.]**

11 **Q: And according to the document marked U.S. Exhibit 20018, your IAPAG group**
12 **visited and made presentations to the cigarette manufacturers themselves, in this case R.J.**
13 **Reynolds, correct?**

14 **A: Yes, that was another of the group's activities.**

15 *A. For the most part, the members of IAPAG did not have any direct contact with either staff*
16 *at The Tobacco Institute or employees of The Institute's member companies. The meeting*
17 *described in this document was an exception. I recall that someone from the RJR public affairs*
18 *department called me sometime in late 1985, asking whether one or more members of IAPAG*
19 *might be willing to participate in a mock congressional hearing on ETS being organized by the*
20 *RJR public affairs department. The purpose of the session, I recall further, was to alert the RJR*
21 *people who might attend the session of the issues that were likely to arise in an ETS-related*
22 *congressional hearing. Three IAPAG members agreed to participate. I also attended the*
23 *session.*

1 **Q: And who was paying you and the other IAPAG members for your and their services**
2 **and activities?**

3 A: The Tobacco Institute.

4 A. *The Tobacco Institute covered the US-related activities of IAPAG members as well as our*
5 *fees. To the extent that IAPAG members or others agreed to attend meetings or undertake other*
6 *activities outside the United States, another funding source typically was required.*

7 **Q: And we see an example of that in the document marked U.S. Exhibit 76081, a bill**
8 **from IAPAG member Phil Witorsch of CEHHT to Covington & Burling, but approved for**
9 **payment by TI, correct?**

10 A: Yes.

11 A. *The document you've mentioned is a bill from CEHHT to Covington & Burling that we --*
12 *most probably I -- reviewed and paid. We thereafter sought and obtained funds sufficient to*
13 *cover the bill from The Tobacco Institute. You will recall that I explained during my deposition*
14 *why we handled IAPAG bills in that manner.*

15 **Q: Now let's move to the second group in Mr. Kloefer's memorandum that we saw**
16 **earlier. Are you familiar with a group in the 1980s that went by several names, including**
17 **the TI ETS Advisory Group, ETSAG, or Hoel Committee?**

18 A: Yes, I recall that group.

19 A. *Yes, I recall that group although I do not recall its ever having been referred to as the TI*
20 *ETS Advisory Group.*

21 **Q: Let's talk about the activities of that group. Please direct your attention to the**
22 **document marked U.S. Exhibit 20339. This is a February 25, 1986 document titled**
23 **"Environmental Tobacco Smoke (ETS) Advisory Group," correct?**

1 A: Yes, it is.

2 **Q: And this document lists the members of the TI ETS Advisory Group, correct?**

3 A: Yes.

4 A. *Yes, that's true as of the date the document was written.*

5 **Q: And do you recall, consistent with this document, that the TI ETS Advisory Group**
6 **consisted of representatives from Brown & Williamson, Reynolds, Lorillard, and Philip**
7 **Morris, along with you, Shook, Hardy & Bacon attorney Don Hoel, and several other**
8 **industry attorneys?**

9 A: Yes, that is correct.

10 **Q: And the group also included TI officers Marvin Kastenbaum, Bill Kloefer, and**
11 **Charles Waite, correct?**

12 A: Yes, it did.

13 A. *Representatives of The Tobacco Institute, including those you have mentioned, sometimes*
14 *attended meeting of the ETS Advisory Group. Marvin Kastenbaum was a well-known*
15 *biostatistician. Charlie Waite had been, as I recall, the chief medical officer for the US Air*
16 *Force before joining the TI in a part-time capacity. Bill Kloefer was at the time the head of*
17 *public affairs at the TI.*

18 **Q: Do you recall, consistent with this document, that the ETS Advisory Group had**
19 **been active and meeting monthly at TI since October 1984?**

20 A: Yes.

21 A. *No, I don't recall specifically but I concede that it's possible. You're asking about*
22 *meeting dates from 20 years ago.*

1 **Q: Please turn to page 6 of the document, and look at the heading “Hirayama Study.”**
2 **Under this heading is the following statement: “The Hirayama studies are the most**
3 **damaging evidence that has been cited to support a risk due to ETS exposure.” Do you see**
4 **that?**

5 A: Yes.

6 **Q: In 1986, did you agree with that assessment of the Hirayama study?**

7 A: Yes.

8 *A. Not necessarily. The results of the Hirayama study were cited often in discussions of*
9 *whether exposure to ETS had been shown to cause lung cancer among non-smokers. Like many*
10 *others, including the US Surgeon General, most members of the ETS Advisory Group believed*
11 *the Hirayama study to be badly flawed. I also recall many questions that had been asked of*
12 *Hirayama concerning his study that he refused to answer. Especially troubling was the fact that*
13 *Hirayama always steadfastly refused to permit any other scientist to have access to his raw data.*
14 *The sharing of data is common among epidemiologists. When an epidemiologist refuses to*
15 *permit others to analyze his/her data, a question naturally and almost inevitably arises*
16 *concerning the reason for the refusal.*

17 **Q: And the TI ETS Advisory Group intended to approach Japan Tobacco, or JTI,**
18 **about obtaining Dr. Hirayama’s data in order to question it, correct?**

19 A: Yes, it did.

20 *A. The Hirayama study was funded, as I recall, by an agency of the Japanese Government.*
21 *JTI also was wholly owned at that time by the Japanese Government. The possibility therefore*
22 *occurred to at least some members of the ETS Advisory Group to ask someone from JTI, most*
23 *probably from that company’s very large scientific department, to approach someone in the*

1 Japanese Government about the possibility of their asking Dr. Hirayama to reconsider his
2 decision to deny access to his raw data. The purpose was not “to question” the results
3 Hirayama had reported. The purpose was to see whether the data actually were consistent with
4 the reported results. Dr. Hirayama’s steadfast refusal to permit anyone to look at his raw data
5 suggested that the data did not support the results he had published. In addition, as I already
6 have mentioned, Hirayama made a fundamental error in analyzing his results. He adjusted them
7 for the age of the smoking husband rather than the age of the spouse whose health status was at
8 issue. That obvious error could not be corrected without access to the raw data.

9 **Q: And JTI apparently would “need to be convinced how it is also in their interest to**
10 **question Hirayama’s data” and would “need to be reminded that Hirayama is the**
11 **designated chairman of the next World Conference on Smoking and Health” according to**
12 **this document, correct?**

13 A: Yes.

14 A. Again, the purpose was not “to question” Hirayama’s results. It was to determine
15 whether he had reported his results correctly and comprehensively. In the respect I already have
16 mentioned, focusing on the age of the husband rather than the age of the wife in adjusting the
17 results of the study by age was one obvious error. I never understood why Hirayama refused to
18 correct that error, even after it had been noted widely in the scientific literature.

19 **Q: In fact, Mr. Rupp, one of the purposes of the ETS Advisory Committee and the**
20 **projects it identified and recommended for funding was to attack scientific studies finding**
21 **or suggesting adverse health effects caused by secondhand smoke?**

22 A: Yes.

1 A. *I answered this question carefully and, I hope you will agree, thoughtfully during my*
2 *deposition. I do not understand why the answer that I gave on that occasion has been ignored.*
3 *You have misperceived the purpose of the ETS Advisory Committee in a fundamental way. To*
4 *explain briefly again, during the early 1980s governments from all over the world were calling*
5 *for further research on ETS. Within the United States, the agencies that were doing so included*
6 *the Surgeon General, National Academy of Sciences, Environmental Protection Agency and*
7 *Occupational Safety and Health Administration. In many instances, the agencies calling for*
8 *additional research had taken the time to suggest research priorities. The members of the ETS*
9 *Advisory Group believed most of the recommendations that had been made by governments*
10 *around the world for further ETS-related research made sense. Most also believed that the*
11 *tobacco industry could and should contributed to filling the research gaps that existed. The*
12 *purpose of the ETS Advisory Group was, perhaps most simply put, to make funding available for*
13 *additional and improved ETS related research. I must remind you in that connection that most*
14 *of the studies that had been published on ETS in the early 1980s were not designed initially to*
15 *study ETS at all. It therefore is not terribly surprising that they tended to be notably flawed so*
16 *far as investigation of the possible health effects of ETS was concerned. That certainly was true*
17 *of both the Hirayama and Trichopolous studies that you have mentioned. The failure to control*
18 *for confounders was one of the most glaring flaws of the early research. Failing to document*
19 *actual exposure to ETS, as opposed to asking whether a woman was married to a smoker, was*
20 *another.*

21 **Q: And that is because the group represented the tobacco industry, who stood to be**
22 **economically damaged by these scientific studies, correct?**

23 A: Yes.

1 A. I don't believe you would have asked me this question, or suggested this answer, if you
2 had reviewed my deposition before preparing this document. I believed in the 1980s, and I
3 believe now, that the individual tobacco companies have a responsibility to help establish the
4 real facts relating to ETS -- on a chips-fall-where-they-may basis. During the time of my
5 involvement with the ETS issue -- that is, until I moved to Europe in 1995 and began increasingly
6 to work for other clients -- I believe that the US based tobacco companies did a commendable
7 job of shouldering that responsibility.

8 **Q: And another purpose was to generate helpful findings and data to support the**
9 **industry's position that there were no proven adverse health effects associated with**
10 **secondhand smoke, and that ETS was not a major indoor air pollutant, right?**

11 A: Yes.

12 A. Your question assumes that the companies that I represented on the ETS issue somehow
13 were committed to manipulating the science on ETS. That simply is not true. At no point during
14 my deposition did anyone point to a single study funded by one or more of the US-headquartered
15 tobacco companies that could be said to have given a distorted picture of the science of ETS. I
16 do not believe there is any such study. The objective, in fact, was to fund better science than had
17 been done -- to produce answers that would gain wide respect within the international scientific
18 community. If that science showed ETS to be a health problem, my view -- and I believe the
19 view of my colleagues on the ETS Advisory Group -- was so be it.

20 **Q: In fact, let's look back at the February 25, 1986 document that we've been**
21 **discussing. The first project was the ORNL Personal Nicotine Monitor on page 2. This**
22 **monitor was expected to show that exposure to nicotine in everyday activities is very low,**
23 **right?**

1 A: Yes.

2 A. Yes, that's true. But let's think a moment about what you're asking, and why the answer
3 to that question is "yes." In the early ETS monitoring studies, all respirable suspended
4 particulates in the indoor environment often were assumed to have come from smoking.
5 Everyone knew intuitively that to be incorrect but until additional and better work was done
6 there was no way to determine how much of the RSP found indoors was from smoking and how
7 much came from other sources. Another mistake that had been made during the early years was
8 to assume that nicotine would be found in the particle phase of ETS, which is where it is found
9 predominately when the mainstream smoke inhaled by the smoker is analyzed. By 1985/86, we
10 knew that assumption to be inaccurate. Finally, we knew that area monitoring would not
11 provide an accurate basis for measuring the amount of ETS to which individuals actually were
12 exposed. The reason, in part, is that area monitoring ignores two essential exposure elements --
13 proximity and duration of exposure. No one doing an ETS exposure study today would proceed
14 with other than personal -- as opposed to area -- monitors. The ETS Advisory Group can take
15 substantial credit for having provided funding for the kind of personal monitors that are being
16 used today -- for ETS as well as many other environmental exposures.

17 **Q: And eventually that result was exactly what was obtained from using the monitor,**
18 **correct?**

19 A: Yes.

20 A. Studies using the personal monitor developed with funding from tobacco companies by
21 Oak Ridge National Laboratory, a laboratory owned by the US Government, has shown that the
22 reports of ETS exposure from the early 1980s -- including reports by Repace and Lowery -- to
23 have been incorrect on the high side by an order of magnitude or more. Your question suggests

1 *that the defendants in this case should faulted for permitting the true scientific facts on ETS*
2 *exposure to be discovered. It is difficult to believe that you mean to have that suggestion to be*
3 *taken seriously.*

4 **Q: The next project described is the DiNardi project on page 3. The stated purpose of**
5 **this work was to “refute the oft-cited paper of Repace and Lowery,” correct?**

6 A: Yes.

7 *A. For all of the reasons I have mentioned as well as other reasons described in my*
8 *deposition, we knew intuitively that the results that had been reported by Repace and Lowery*
9 *were incorrect -- and that they were incorrect on the high side, by an order or so of magnitude.*
10 *In that sense, the purpose of the DiNardi study was to “refute” Repace and Lowery. If I had*
11 *written the document to which you have referred, I would have stated the purpose of the DiNardi*
12 *project to be to correct the errors that Repace and Lowery had made.*

13 **Q: The Repace and Lowery paper attributed a certain number of lung cancer deaths**
14 **each year to secondhand smoke, correct?**

15 A: Yes.

16 *A. You’re mixing up, I believe, the Repace and Lowery publications. The DiNardi project*
17 *covered some of the same ground as the Repace and Lowery area monitoring study, not the*
18 *Repace and Lowery risk assessment publication.*

19 **Q: Is it accurate that Dr. DiNardi was a member of your group, IAPAG?**

20 A: Yes.

21 *A. Yes, but I’m not sure why you’re asking that question. Let me explain. Individual*
22 *members of IAPAG were in the early days of that group’s existence being called upon to testify*
23 *before legislative bodies and in court cases concerning the science of ETS. It should come as no*

1 *surprise that many members of that group were anxious to obtain funding to do their own*
2 *research in the area. The members of IAPAG were university scientists, for whom research is*
3 *their lifeblood.*

4 **Q: The next project in the document, U.S. Exhibit 20339, is the ACVA ventilation**
5 **study on page 4. The premise of this study was to show that poor indoor air quality was**
6 **generally the result of poor ventilation, not the presence of smokers, correct?**

7 A: Yes.

8 *A. The purpose of the study was to investigate that premise. It turned out to be correct.*

9 **Q: And Gray Robertson, the president of ACVA, was a member of Covington &**
10 **Burling's IAPAG group as well, correct?**

11 A: Yes, he was.

12 *A. As I've said, I don't believe that he was although he did periodically attend IAPAG*
13 *meetings. Again, though, I'm mystified by the thinking behind your question. Gray Robertson*
14 *should have been faulted, I would have thought, if his modus operandi had been to present*
15 *scientific testimony without undertaking the needed research -- research designed to state-of-the-*
16 *art standards. He did not present any such testimony, in my experience, but instead sought*
17 *always to take advantage of the best science when deciding how to proceed.*

18 **Q: Didn't the ETS Advisory Group, as indicated in U.S. Exhibit 20339, "provide**
19 **assistance to ACVA, through several members of the ETS Advisory Group, to write one or**
20 **more papers for publication"?**

21 A: Yes.

22 *A. Yes but again a word or two of elaboration is in order. Gray Robertson and his*
23 *colleagues at ACVA were trained as chemists rather than statisticians. They did not have the*

1 *qualifications or experience needed to perform statistical tests on large data sets. Several*
2 *members of IAPAG were trained statisticians, had published extensively as such, and taught*
3 *statistics courses as part of their university duties. Alan Gross of the University of Alabama, a*
4 *well regarded statistician and IAPAG member, eventually agreed, as I recall, to help with the*
5 *analysis of the ACVA building study data base.*

6 **Q: And there was also an epidemiological project described on page 6, to be carried out**
7 **by a Dr. Husting, correct?**

8 A: Yes.

9 **Q: According to this document, the purpose of this study was to impugn case control**
10 **studies showing increased relative risk for disease associated with secondhand smoke,**
11 **right?**

12 A: Yes.

13 *A. Because they had not been designed to investigate the possible health effects of ETS, the*
14 *Hirayama and Trichopolous study, to which you have referred, did a wholly inadequate job of*
15 *controlling for ETS-related confounders. Trichopolous, but not Hirayama, seemed to be aware*
16 *of that fact. One of the purposes of the Hustings study, as I recall, was to demonstrate the*
17 *importance of controlling for pertinent confounders in such studies. Another of the purposes*
18 *was to demonstrate the importance of making sure that adequate attention had been paid to the*
19 *selection of the control group being utilized in a case/control study. A third purpose was to show*
20 *how confounders should be controlled in any future epidemiologic study, whether focusing on*
21 *ETS or any other environmental substance with respect to which long-term rather acute effects*
22 *were being investigated.*

1 **Q: And the three ETS epidemiological studies that Dr. Husting's project was expected**
2 **to attack were Trichopoulos, Correa, and Sandler?**

3 A: Yes.

4 *A. The Husting study was not designed to "attack" anyone. The most important purpose of*
5 *the study was to point the way toward additional and better designed studies of the possible*
6 *health effects of ETS. In part because they had not been designed initially to investigate ETS, the*
7 *Trichopolous, Correa and Sandler studies were terrible as ETS studies. I already have said*
8 *something about Trichopolous, albeit not much more than Trichopolous said himself in his*
9 *publication. Corea -- an early ETS/lung cancer study -- controlled for none of the classic lung*
10 *cancer risk factors, including risk factors known to be associated with marriage to a smoker.*
11 *That includes age, exposure to non-ETS related air pollutants, exposure to asbestos, cooking*
12 *practices, diet, education, employment, family history of lung cancer, family history of cancer at*
13 *other sites or income. The Sandler study was not much better. Among other things, Sandler --*
14 *who reported results relating to ETS and heart disease rather than cancer -- had lost to follow*
15 *up anyone who had left Washington County, Maryland, at any point during the 12-year study*
16 *period; failed to include any adjustment for household size; adjusted for none of the classic heart*
17 *disease risk factors; confined his study to Caucasians; and made no effort to investigate or*
18 *adjust for the misclassification of smoking status. Clearly, more and better epidemiological*
19 *research on ETS was needed. It was hoped that the Husting study would assist scientists in*
20 *designing such studies.*

21 **Q: Mr. Rupp, looking at U.S. Exhibit 20339, can you name one project that was being**
22 **considered by the ETS Advisory Group, of which you were a member, that was not**

1 **expected or intended to provide favorable results for the industry or to provide data to**
2 **refute scientific studies suggesting adverse health effects of ETS?**

3 A: No, I cannot.

4 A. Again, you have ignored entirely my deposition testimony in asking this question and then
5 suggesting that my answer should be "yes." The development and use of personal monitoring
6 equipment was expected to give a much more adequate measure of exposure to ETS than the
7 crude area monitoring studies that had been reported in the past. I certainly expected that the
8 exposure documented by such studies would be lower than the results reported by people like
9 Repace and Lowery, who had employed assumptions that I and many others knew to be untrue --
10 each one of which inevitably gave an inflated view of the extent to non-smoker exposure to ETS.
11 I already have discussed the Husting and ACVA study. Again, with respect to all of these
12 studies, the effort was to discover the real facts using state-of-art scientific techniques. Let me
13 also say something about the Tulane University Allergy Study, another of the studies funded by
14 the ETS Advisory Group. That study was the first significant study to investigate in a laboratory
15 setting whether ETS was capable of eliciting an allergic reaction in declared smoke-sensitive
16 asthmatics. The study design involved the construction of a stainless steel chamber and the
17 pumping into that chamber of unrealistically high levels of sidestream tobacco smoke while the
18 chamber was occupied by the smoke-sensitive asthmatic subjects. Not surprisingly, a significant
19 percentage of the subjects responded adversely -- and those adverse effects, which were hardly
20 favorable to the industry, were reported in the publications that appeared following the study.
21 The Tulane allergy study was consciously designed, in other words, to maximize the prospect of
22 finding an effect from sidestream smoke -- not to minimize that possibility.

1 **Q: You were aware that many projects initiated by the ETS Advisory Committee were**
2 **funded by the tobacco companies as CTR Special Projects and Special Account work,**
3 **correct?**

4 A: Yes.

5 *A. I have no recollection of any of the studies initiated by the ETS Advisory Group being*
6 *funded as CTR Special Projects other than the Tulane University Allergy Study, although I must*
7 *tell you that the burden of finding funding for the studies recommended by the ETS Advisory*
8 *Group did not fall to me. It fell primary on Don Hoel, the chairman of the group.*

9 **Q: And you are aware that CTR Special Projects and projects funded through the**
10 **Special Account were approved and funded through the Committee of Counsel, for**
11 **research designed for possible use in conjunction with product liability litigation and**
12 **regulatory hearings, correct?**

13 A: Yes.

14 *A. I have precious little knowledge of CTR. I never attended a CTR meeting, never*
15 *reviewed the CTR by-laws or charter, never met -- so far as I can recall -- with anyone from*
16 *CTR, and have never reviewed the list of projects funded by CTR over the years. If you are*
17 *asking me whether I'd be surprised to learn that CTR funding was obtained for studies that some*
18 *people working for tobacco companies believed would help in defending against product liability*
19 *claims, the answer is that I'd not be surprised. But you'll have to ask someone else about CTR,*
20 *for the reasons that I explained during my deposition.*

21 **Q: And both you and Don Hoel were members of the Committee of Counsel, and as**
22 **such attended committee meetings throughout the 1980s and into the 1990s, correct?**

23 A: Yes, that is true.

1 A. *I attended many but not all TI Committee of Counsel meetings during the 1980s and*
2 *early 1990s. Don Hoel attended at least some of the same meetings I attended.*

3 **Q: And U.S. Exhibits 86100, 21015, 22041, and 86344 are examples of records of a**
4 **Committee of Counsel meetings you participated in, as well as other documents related to**
5 **your membership on the committee, correct?**

6 A: Yes.

7 A. *I had not previously seen US Exhibit 86100. The initials “TEB” suggest that this*
8 *document was written by Tom Bezanson of Chadbourne & Park but I can’t be sure that is the*
9 *case. This document appears to report on discussions that occurred at a meeting of the TI*
10 *Committee of Counsel attended by the author of the document. I cannot confirm, with the*
11 *passage of some 22 years, whether the report is accurate. I will say that each meeting of the*
12 *Committee of Counsel tended to be somewhat different, and each tended to follow an agenda*
13 *prepared and circulated in advance of the particular meeting. My reactions to US Exhibit 21015*
14 *are comparable to those I’ve mentioned relating to US Exhibit 86100. I don’t see anything in US*
15 *Exhibit 21015 that strikes me as being clearly incorrect but neither can I confirm at this late date*
16 *that the memorandum is accurate in every respect. US Exhibit 22041 simply lists the members*
17 *of the TI Committee of Counsel as of the date the document was prepared -- December 13, 1990.*
18 *The listing seems to me to be correct. I appear to have received a copy of US Exhibit 86344. I*
19 *have no current recollection of the document or of the project mentioned in the document.*

20 **Q: And with respect to TI, you were also a member of the TI Communications**
21 **Committee and took part in the TI Tobacco College of Knowledge, as reflected in U.S.**
22 **Exhibits 86117, 86114, and 86159, correct?**

23 A: Yes.

1 A. I did serve on the TI Communications Committee for a time during the 1980s and also
2 during the early 1990s. I also made presentations on a couple of occasions to the so-called
3 "College of Tobacco Knowledge."

4 **Q: And the 1986 document at U.S. Exhibit 29831 shows that at one time you also served**
5 **on the Industry Technical Committee, correct?**

6 A: Yes.

7 A. No, I did not serve on the Industry Technical Committee but on at least one occasion, as
8 reflected in US Exhibit 29831, I made a presentation on the Tobacco Institute Testing
9 Laboratory to that committee. I also met frequently during the 1980s and early 1990s with staff
10 of the Federal Trade Commission to discuss the work of the Tobacco Institute Testing
11 Laboratory. The function of the Tobacco Institute Testing Laboratory -- or TITL -- was to test
12 individual cigarette brands and brand varieties for "tar," nicotine and CO. TITL had nothing
13 whatever to do with ETS, which has been the focus of your previous questions.

14 **Q: Now please review the document marked as U.S. Exhibit 20740. This is an R.J.**
15 **Reynolds internal memorandum from Alan Rodgman to Bob DiMarco dated December 18,**
16 **1985. At the bottom of page 1, Dr. Rodgman provides information from a December 11 TI**
17 **ETS committee meeting. Do you see that?**

18 A: Yes.

19 **Q: And he references two projects funded through the committee, the Oak Ridge**
20 **(ORNL) smoke measurement work and Dr. DiNardi's ETS particulate project, correct?**

21 A: Yes.

1 **Q: Dr. Rodgman writes that R.J. Reynolds scientist Dr. Charles Green was designated**
2 **by the ETS committee to serve as project officer for the ORNL and DiNardi projects,**
3 **correct?**

4 A: Yes.

5 **Q: Mr. Rupp, do you recall that the ETS Special Projects and Special Account work**
6 **initiated by the TI ETS Advisory Group were assigned project officers from the tobacco**
7 **companies to oversee or monitor the progress of the projects?**

8 A: Yes, they were.

9 *A. A company representative, always a working scientist and typically also serving as a*
10 *member of the ETS Advisory Group, tended to be designated to monitor the progress of research*
11 *funded by the ETS Advisory Group. As you know, only a few such projects were funded. The*
12 *reason for designating a company scientist as project officer is that most other members of the*
13 *ETS Advisory Group did not have the appropriate scientific qualifications to serve in that*
14 *capacity. As I explained during my deposition, the decision to create the Center for Indoor Air*
15 *Research, led by a professional scientific staff, was motivated in part by the desire to remove the*
16 *project officer burden from company scientists.*

17 **Q: Now look at the document marked U.S. Exhibit 50835. This is an R.J. Reynolds**
18 **interoffice memorandum from Charles Green to Alan Rodgman dated December 9, 1986.**
19 **The memorandum describes a November 1986 trip to Tokyo by a TI-ETS Advisory Group**
20 **delegation consisting of Mr. Hoel, Dr. Green from R.J. Reynolds, and Dr. Osdene from**
21 **Philip Morris. Do you see that?**

22 A: Yes.

1 **Q: Dr. Green describes the work sponsored and monitored by the ETS Advisory Group**
2 **on page 3 as follows: “Work covered included questionnaire studies at IITRI, health risk**
3 **studies by T. Sterling, aircraft cabin air quality, personal nicotine monitor at ORNL,**
4 **allergy and asthma by Salvaggio, home ventilation and heating evaluations by ACVA,**
5 **particulate studies by S. DiNardi, the RJR briefcase sampler, evaluation of case-control**
6 **methodology by L. Husting, and a review of all the Hirayama papers by J. Kilpatrick at**
7 **VCU.” Do you see that?**

8 A: Yes.

9 **Q: Now we see many of the same projects we have seen in other ETS Advisory Group**
10 **documents, continuing now into 1986, correct?**

11 A: Yes.

12 A. *Yes, it's certainly not unusual for scientific work to extend past the end of a calendar*
13 *year. Most scientific studies are funded for three years.*

14 **Q: Dr. Kilpatrick was a professor at Virginia Commonwealth University and a member**
15 **of your IAPAG group as well, correct?**

16 A: Yes, he was.

17 A. *Dr. Kilpatrick was a member of IAPAG. I'm not sure what you mean by “your IAPAG.”*

18 **Q: Now 1986 was a watershed year in the area of secondhand smoke, in that the**
19 **Surgeon General and two other major health organizations concluded for the first time**
20 **that exposure to environmental tobacco smoke can cause disease in nonsmokers, correct?**

21 A: Yes.

22 A. *It was in a way because of the three reports that you've mentioned. At the same time,*
23 *though, it is important to note that the three reports that appeared in 1986 were not consistent*

1 one with the other. The major issue in all three reports was the possible relationship between
2 exposure to ETS and lung cancer. The International Agency for Research on Cancer concluded
3 that the available epidemiology on that issue was inadequate to reach any conclusion -- pointing
4 out that such studies were "compatible either with an increase or an absence of risk" -- but that
5 the chemical similarity between ETS and mainstream smoke had convinced the IARC committee
6 that exposure to ETS must give rise to "some risk" of lung cancer among non-smokers. By
7 contrast, the US Surgeon General rejected -- correctly I believe -- any effort to extrapolate active
8 smoking results to ETS. He concluded, though, that the ETS epidemiology, for all of its faults,
9 was adequate to show a relationship between ETS and the incidence of lung cancer among non-
10 smokers. The National Academy of Sciences also rejected efforts to reach conclusions about the
11 health effects of ETS on the basis of active smoking study results, while agreeing with the
12 Surgeon General that the 11 ETS/lung cancer epidemiological studies that had been completed
13 to that date suggested an increase risk of lung cancer from prolonged exposure to ETS. Yet
14 another important ETS review that was published in 1986 was prepared by the Office of
15 Technology Assessment of the US Congress. That report, which was released in May 1986,
16 concluded that ETS had been shown, at least at high levels, to be capable of causing certain
17 acute effects, such as dry and itchy eyes, running nose, and so forth, but that "the case is less
18 clear for the contribution of passive smoking to chronic diseases." The Office of Technology
19 Assessment scientists also stated in their report that the possible link between "passive smoking
20 and lung cancer is one of the most contentious in public health today, and a similar contention
21 has arisen about a possible link with heart disease."

22 **Q: Please direct your attention to U.S. Exhibit 63709. What is this exhibit?**

1 A: This is a copy of the 1986 Surgeon General's Report, titled "The Health Consequences of
2 Involuntary Smoking."

3 **Q: Please turn to page 7 in the Introduction. Here we have the three major conclusions**
4 **of the Report, correct?**

5 A: Yes.

6 **Q: And those conclusions are: "1) Involuntary smoking is a cause of disease, including**
7 **lung cancer, in healthy nonsmokers; 2) The children of parents who smoke compared with**
8 **the children of nonsmoking parents have an increased frequency of respiratory infections,**
9 **increased respiratory symptoms, and slightly smaller rates of increase in lung function as**
10 **the lung matures; and 3) The simple separation of smokers and nonsmokers within the**
11 **same air space may reduce, but does not eliminate, the exposure of nonsmokers to**
12 **environmental tobacco smoke." Do you see that?**

13 A: Yes.

14 **Q: And Mr. Rupp, these are the conclusions that you, the Tobacco Institute, and the**
15 **cigarette manufacturers were faced with in 1986, correct?**

16 A: Yes, these are.

17 *A. The US Surgeon General's report on ETS was published, as you have suggested, in 1986*
18 *-- and it was, in that sense, a fact that individual tobacco companies had to take into account in*
19 *deciding what to do about the issue. You need to focus, however, on exactly what the Surgeon*
20 *General said in 1986 in the introductory section you've directed me to. Specifically, he did not*
21 *say that the increased incidence of respiratory symptoms reported in studies focusing on very*
22 *young children in households occupied by more than one smoker was due to ETS as opposed to*
23 *any number of other factors known to be present disproportionately in "smoking households."*

1 *He also did not say that ventilation, or the separation of smokers and non-smokers, would not*
2 *reduce non-smoker exposure to ETS. If you're asking whether the ETS issue was closed as of*
3 *1986, my answer would be definitely "no." In fact, as late as 1997, the US Occupational Safety*
4 *and Health Administration was unable to find -- despite trying for nearly three years -- a basis*
5 *for concluding that exposure to ETS in the workplace presented a "significant" risk to the health*
6 *of non-smokers occupying the space. A couple of years earlier, scientists at the Congressional*
7 *Research Service had concluded similarly that the epidemiological evidence on ETS and lung*
8 *cancer was too equivocal to reach any conclusion. Additionally, I think it important to focus on*
9 *the entire report issued by the US Surgeon General in 1986. Many of the study limitations that*
10 *IAPAG members had noted in the ETS/lung cancer and ETS/children's respiratory health issues*
11 *were noted in the body of the 1986 Surgeon General's report, even though they did not find their*
12 *way into the introduction to the report on which you have chosen to focus. I also recall a letter*
13 *than Surgeon General Koop wrote sometime in 1986 to a California public health official, who*
14 *had asked Surgeon General Koop whether the case against ETS was closed. Surgeon General*
15 *Koop's response, as I recall it, was in the negative. Indeed, he stated expressly in the letter that*
16 *doubts about the conclusions stated in the introduction to his 1986 reports, such as those that*
17 *had been raised by individual members of IAPAG as well as many other scientists having*
18 *nothing whatever to do with the tobacco industry, were "supportable." Finally, of course, one*
19 *must take into account here the conclusions reached in 1986 by the Office of Technology*
20 *Assessment of the US Congress, to the effect that the evidence of long-term ETS health effects*
21 *was inconclusive.*

1 **Q: And in that same year, the National Research Council's Committee on Passive**
2 **Smoking, drawn from the National Academy of Sciences, also concluded that involuntary**
3 **smoking increases the occurrence of lung cancer in nonsmokers, correct?**

4 A: Yes.

5 *A. Yes, the National Research Council/National Academy of Science reached that*
6 *conclusion on the basis of a meta-analysis of the ETS/lung cancer studies that had been*
7 *published to that point. As I have noted, the International Agency for Research on Cancer*
8 *concluded at about the same time that those studies were compatible with either an increase or*
9 *an absence of risk -- that is, that they were inconclusive, one way or the other.*

10 **Q: And finally, at the end of 1986, the GSA recognized the increased health hazards of**
11 **secondhand smoke and imposed restrictions on smoking in federal buildings, correct?**

12 A: Yes.

13 *A. The GSA did impose restrictions on smoking in federal office buildings in 1986. But the*
14 *people at GSA making the decision to restrict smoking in federal buildings were not scientists*
15 *and, so far as I am aware, they did not reach out to scientists before deciding to impose the*
16 *restrictions that they imposed. I also would point out again that the US Occupational Safety and*
17 *Health Administration was unable to find as of 1997 that smoking in the workplace presented*
18 *any significant health risks. And that certainly was not for want of trying to reach a contrary*
19 *conclusion.*

20 **Q: In fact, you yourself recognized these major occurrences, as reflected in the July 2,**
21 **1987 document marked U.S. Exhibit 88587, correct?**

22 A: Yes.

1 A. I did regard as major occurrences the issuance in 1986 of reports on ETS by the US
2 Surgeon General, National Academy of Science/National Research Council and the
3 International Agency for Research on Cancer. The 1986 report on ETS by the Office of
4 Technology Assessment of the US Congress also seemed to me to be important. By contrast, I
5 did not attach any scientific significance to the General Service Administration's decision to
6 restrict smoking in federal office buildings. I'm also not sure why you've chosen to ignore the
7 1986 IARC report. As I already have mentioned, the 1986 IARC report disagreed with the US
8 Surgeon General and National Academy of Science so far as the then available ETS
9 epidemiology is concerned -- saying that the epidemiology that was available at that time was
10 compatible with either an increase or an absence of risk.

11 **Q: And you were also aware, were you not, that in another published report that year,**
12 **the International Agency for Research on Cancer of the World Health Organization, or**
13 **IARC, found a link between secondhand smoke and lung cancer, specifically that "passive**
14 **smoking gives rise to some risk of cancer," correct?**

15 A: Yes.

16 A. As I already have tried to explain, the 1986 IARC report cannot be reconciled with the
17 1986 Surgeon General and National Academy of Sciences reports. IARC came to different
18 conclusions on the epidemiology of ETS than the Surgeon General and National Academy of
19 Sciences/National Research Council. At the same time, the Surgeon General and National
20 Academy of Sciences/National Research Council rejected the basis for IARC's conclusion that
21 exposure to ETS must give rise to "some risk" of lung cancer -- that is, active smoking data.
22 Both the Surgeon General and the National Academy of Sciences concluded that one could not
23 validly reach conclusions concerning ETS based on active smoking data, and they explained at

1 *length why they believed that to be so. In 1992, the EPA also expressed serious doubts about*
2 *any effort to reach conclusions concerning the health effects of ETS on the basis of active*
3 *smoking data.*

4 **Q: Is it fair to say, Mr. Rupp, that 1986 was a very bad year for the cigarette**
5 **manufacturers and that the cigarette industry knew it was in deep trouble?**

6 A: That is a fair statement.

7 A. *That is not for me to say. At my deposition, you showed me a document -- written by*
8 *whom, I do not know -- suggesting that I made such a statement at a meeting hosted by Philip*
9 *Morris and referred to in the document as "Operation Downunder." I deny again having made*
10 *the statement attributed to me in that document. I do not use such language, either in*
11 *professional or other settings.*

12 **Q: Let's talk about what the Tobacco Institute and the cigarette companies did after**
13 **1986. Mr. Rupp, were you counsel for not only the Tobacco Institute but also Philip**
14 **Morris in 1987?**

15 A: Yes.

16 A. *I did work for both The Tobacco Institute and Philip Morris in 1987. Many other*
17 *lawyers also did work for The Institute and Philip Morris in 1987, including with respect to ETS*
18 *and public and workplace smoking issues.*

19 **Q: Do you recall a Philip Morris conference in the Summer of 1987 named "Operation**
20 **Downunder" or "Project Downunder?"**

21 A: Yes.

1 **Q: And this was a three-day meeting of executives summoned to the Sea Pines resort on**
2 **Hilton Head Island by the Chairman and Vice Chairman of Philip Morris Companies in**
3 **June 1987, correct?**

4 **A:** Yes, it was.

5 *A. With the exception of the word “executives,” I accept your characterization. A number*
6 *of the company people who attended the meeting were not executives in the sense of having an*
7 *executive-level title.*

8 **Q: And you attended and spoke at “Operation Downunder,” correct?**

9 **A:** Yes, I did.

10 **Q: Let’s look at U.S. Exhibit 85518. This is a letter dated June 8, 1987, from Bill**
11 **Murray, the Vice Chairman of Philip Morris Companies, Inc., to Tom Osdene, the Science**
12 **and Technology Director of Philip Morris USA, correct?**

13 **A:** Yes.

14 *A. It appears to be.*

15 **Q: And on the second page, we see that Mr. Murray’s letter is copied to the Chairman**
16 **of Philip Morris Companies, Hamish Maxwell, correct?**

17 **A:** Yes.

18 *A. A copy appears to have been sent to Hamish Maxwell.*

19 **Q: And just to orient ourselves to the Defendants in this case, Philip Morris**
20 **Companies, has, as of January 2003, changed its name to Altria Group, Inc., correct?**

21 **A:** Yes.

22 *A. That is my understanding.*

1 **Q:** Now in this letter from Mr. Murray to Dr. Osdene there was an invitation or
2 **directive to attend to a meeting on Hilton Head Island from June 23-26, 1987, correct?**

3 **A:** Yes.

4 **Q:** And instead of paraphrasing Vice Chairman Murray's reasons for the meeting, I
5 **will just read some portions of the letter. The first paragraph reads, "It will come as no**
6 **surprise to you that the public policy situation affecting our industry and our company has**
7 **deteriorated in recent months. This is largely due to the recent Surgeon General's report**
8 **dealing with environmental tobacco smoke and its alleged harmfulness to nonsmokers.**
9 **Clearly the climate in which we are now operating requires that we, as a company and as**
10 **an industry, take action to at a minimum slow down the anti-smoking forces and at best**
11 **actually reverse some of their advances." So we see in this letter that the contemplated**
12 **"action" would include not only Philip Morris, but the entire industry, correct?**

13 **A:** That is what he wrote.

14 *A. I'm in no better position than you are to say what Mr. Murray had in mind in writing the*
15 *letter you've mentioned. If you're asking whether Mr. Murray would have rejected any way of*
16 *addressing ETS not embraced by all US-headquartered companies, I would greatly doubt that to*
17 *have been the case.*

18 **Q:** Mr. Murray then states at the close of the second paragraph that he "cannot
19 **overstate the importance of this activity," and at the bottom of the first page writes, "It is**
20 **important to point out that we are not embarking on this exercise to simply exchange ideas**
21 **on the ETS problem. Rather, we have been instructed to examine the problem and to**
22 **arrive at solutions that can be immediately implemented." Mr. Rupp, to whom did Mr.**
23 **Murray report?**

1 A: I would assume he reported only to the CEO and Chairman, Mr. Maxwell.

2 A. *Frankly, I have no idea. I barely knew Bill Murray and I'm not sure that I ever met*
3 *Hamish Maxwell.*

4 **Q: And you understood the “ETS problem” to be a serious threat to the tobacco**
5 **industry that the industry was at that time inadequately prepared to address, correct?**

6 A: Yes.

7 A. *I regarded the ETS issue to be important and believed that the individual tobacco*
8 *companies needed to increase the resources they were devoting to the issue.*

9 **Q: And then at the close of the letter on the second page, Mr. Murray states his hope**
10 **that Dr. Osdene and the other invitees “can find an effective solution to the ETS problem**
11 **now facing us.” Mr. Rupp, you were one of the invitees, correct?**

12 A: Yes, I was.

13 **Q: Now, with the meeting having been called by Mr. Murray and Mr. Maxwell, you**
14 **appreciated the importance of the event, correct?**

15 A: Of course.

16 A. *I have no idea whether Hamish Maxwell played any role at all in deciding whether this*
17 *meeting should be held, or whether he regarded it as being important. In fact, I am not even*
18 *sure that Bill Murray wrote -- as opposed to signed -- the letter we've been discussing. My*
19 *suspicion is that the letter was written by Guy Smith at PM. I did not regard the meeting as*
20 *having accomplished much, as I explained in my deposition, in part because of the way the*
21 *meeting had been organized. I am quite certain that the meeting was organized as it was*
22 *because of decisions made by Guy Smith.*

1 **Q:** Now please look at the document marked U.S. Exhibit 23684. This is a June 17,
2 1987 letter from Philip Morris USA Vice President of Corporate Affairs Guy Smith to all
3 “Operation Downunder Participants,” correct?

4 **A:** That is correct.

5 *A. It appears to be. I note that I am listed as having received a copy of this letter. Before*
6 *reviewing this exhibit, I had no recollection of it. In fact, I still don’t remember having received*
7 *a copy but expect that I did.*

8 **Q:** And in the first paragraph, Mr. Smith writes, “The purpose of our upcoming
9 meeting on the environmental smoke problem facing the industry, our company, and our
10 customers is quite single-minded: find a solution.” Do you see that?

11 **A:** Yes, I do.

12 **Q:** And do you see in the third paragraph of this document where he states that, “Bill
13 Murray was quite correct when he said it was not possible to overemphasize the
14 importance of this undertaking”?

15 **A:** Yes.

16 **Q:** And on the second page of this letter we see your name on the distribution list for
17 Mr. Smith’s letter, correct?

18 **A:** Yes.

19 **Q:** So you received this document, correct?

20 **A:** Yes.

21 *A. I already have answered this question the best I can.*

22 **Q:** Please direct your attention to the document marked U.S. Exhibit 75083, titled
23 “Operation Downunder Agenda.” According to the agenda, the meeting began on June 23,

1 1997 and ended on the afternoon of June 26 with a presentation of an ETS plan to senior
2 management. Also, substantive discussions began the morning of June 24. All attendees
3 were housed in private villas on the island, and all expenses were paid by the Philip Morris.

4 Do you recall that, Mr. Rupp?

5 A: Yes.

6 A. *I recall having been housed in a single room that was not as commodious as most hotel*
7 *rooms. There may have been a living room adjacent to the room that I occupied, which was also*
8 *available to another meeting participant. The quality of the accommodations reminded me of a*
9 *Marriott "suites" establishment. My expenses certainly were covered by Philip Morris.*

10 Q: And you attended all four days of "Operation Downunder," correct?

11 A: Yes, I did.

12 A. *As I recall, I attended three of the four days. My recollection is having been on business*
13 *for another client in California on the first day of the meeting.*

14 Q: I am providing you with three documents produced by Philip Morris in this
15 litigation, U.S. Exhibits 20346, 75077, and 22950. Do these documents appear to be notes
16 from the "Operation Downunder" meeting?

17 A: They appear to be, yes.

18 Q: Let's turn to the first of the three exhibits, a 33-page document marked U.S. Exhibit
19 20346 and titled "Project Down Under Conference Notes." Right at the outset of the first
20 full day of the meeting, June 24, we see the statement "We are here to do something
21 radical," correct?

22 A: Yes.

1 **Q:** Then we see that the morning session on June 24 began with the history of passive
2 smoking, from the 1972 Surgeon General's report that first mentioned ETS, to the 1981
3 Hirayama study, to the 1985 Repace/Lowrey study, to the 1986 Surgeon General's report
4 that concluded ETS posed a cancer risk to nonsmokers, correct?

5 A: Yes.

6 **Q:** Then we see some material was presented on negative perceptions and attitudes
7 toward secondhand smoke, correct?

8 A: Yes.

9 *A: Yes, that's what the document says. As I already have indicated, I don't believe that I*
10 *attended the day of the meeting at which these presentations were made.*

11 **Q:** Moving to the bottom of page 4 of the Downunder Conference Notes, we see the next
12 session, recorded as 10:07 AM on June 24, the first full day of the meeting, correct?

13 A: Yes, that is correct.

14 **Q:** And your name appears as the presenter of this session, meaning that you addressed
15 the group, correct?

16 A: Yes.

17 **Q:** And directly under your name and firm is the statement: "Where we are / In deep
18 shit." Do you see that?

19 A: Yes.

20 **Q:** Do you recall saying that, Mr. Rupp?

21 A: I am not sure, but I accept what is recorded on this document.

1 A. As I stated during my deposition, I did not make the statement attributed to me in these
2 notes. I explained during my deposition why I was so certain of that. At the same time, I will
3 acknowledge believing that the ETS issue was important to a company like Philip Morris.

4 **Q: Now if we turn to page 5, still within your June 24 presentation, we see the**
5 **paragraph near the top: “1986 NAS report and SG’s report. WATERSHED**
6 **SIGNIFICANCE. SG has been clever & successful on this issue. SG has tremendous**
7 **credibility. Scientists not prepared to challenge. SG going toward smoke-free society.**
8 **1986 SG report central event we have to talk about. Can’t stem the tide without addressing**
9 **this report.” Do you recall this part of your presentation?**

10 A: Again, I accept what is recorded in this document.

11 A. This is someone else’s report of what I said, not using necessarily the language that I
12 used. I don’t want to be seen, however, as quibbling. I certainly did believe the 1986 reports of
13 the Surgeon General and National Academy of Sciences/National Research Council to be
14 important, just as I believed the 1986 IARC and US Office of Technology Assessment reports to
15 be important. I also believed then that the Surgeon General was viewed by most people as being
16 a credible source of information on public health issues. I hope that also is true today. At the
17 same time, however, I knew then that the Surgeon General had announced publicly that he was
18 embarking on a campaign to bring about a smoke-free society in the United States by the year
19 2000. Finally, I did not see any way of talking about the ETS issue -- whether in
20 legislative/regulatory hearings or in litigation -- without discussing the 1986 reports of the
21 Surgeon General, National Academy of Sciences/National Research Council, IARC, Office of
22 Technology Assessment or the many other pertinent publications that had appeared by that time.

1 **Q:** And on the same page, you state under the heading of “Science of ETS” that the
2 industry position was “ETS not shown to be a health hazard to non-smoker,” and “We
3 cannot say ETS is ‘safe’ and if we do, this is a ‘dangerous’ statement,” correct?

4 **A:** That is what is recorded here, yes.

5 *A. That is what is recorded here, yes -- and I very probably did say something along those*
6 *lines. It is important to note why I would have made such a statement. Science can never prove*
7 *a negative. One can only conclude from studies such as those that had been reported on ETS*
8 *that ETS has or has not been shown to be a health hazard. To go further than that and say that*
9 *ETS has been shown to be “safe” exceeds what science is capable of showing.*

10 **Q:** Now let’s move to page 8, do you see the statement near the bottom of the page, “In
11 U.S., ETS issue will have devastating effect on sales. E.G., parties, planes, etc.”?

12 **A:** Yes.

13 **Q:** Did you understand that the threat to sales was the ultimate and greatest threat
14 posed by ETS issue, at least at the time of the “Operation Downunder” meeting in June
15 1987?

16 **A:** Yes.

17 *A. No.*

18 **Q:** The ETS issue threatened the very viability of the cigarette manufacturers’ market
19 in the United States, correct?

20 **A:** Yes, that was the thought at the time.

21 *A. No.*

22 **Q:** And we see this on page 9, where the statement “Problem – threatens number of
23 smokers & number of cigarettes they smoke,” right?

1 A: Yes.

2 A. *My view then is that it might or might not have an effect on sales.*

3 **Q: And the problem for the industry was, “How to alter [the] public perception that**
4 **ETS is damaging,” correct?**

5 A: Yes.

6 A. *There had been a drumbeat of headlines in the press suggesting that ETS had been shown*
7 *to be harmful to non-smokers, including in the workplace. I did not believe that to be an*
8 *accurate perception.*

9 **Q: Mr. Rupp, is it fair to observe that while the participants at this meeting viewed the**
10 **ETS issue as simply a matter of “public perception,” the Surgeon General had already**
11 **concluded that ETS causes lung cancer and other adverse health effects?**

12 A: Yes.

13 A. *I cannot speak for other participants in this meeting. I can only tell you what I believed.*
14 *Your question suggests that you believe that the issue of ETS and adverse health effects was*
15 *closed as of 1986, the date of the Surgeon General’s report on ETS. OSHA certainly reached a*
16 *different conclusion in 1997, as did -- a couple of years earlier -- the researchers I have*
17 *mentioned working for the Congressional Research Service. I also believe that most scientists*
18 *who had reviewed the pertinent evidence as of 1986 disagreed with the conclusions reached by*
19 *the Surgeon General in 1986. As I have mentioned, IARC-- also writing in 1986 -- certainly*
20 *disagreed with the views expressed by the Surgeon General on the issue of the meaning of the*
21 *epidemiological evidence on ETS and the incidence of lung cancer among non-smokers. So did*
22 *the Office of Technology Assessment of the US Congress and the Ministry of Health in Japan.*

1 **Q: On page 10 of the Conference notes we see the statement of the question of how to**
2 **“support current smokers in [the] face of overwhelming adverse information and**
3 **publicity,” and on page 11 the writer records that 10 of the 13 ETS studies showed an**
4 **“effect in the direction of harm,” correct?**

5 A: Yes.

6 A. *That does not appear to be the view of the writer of this document, or of the speaker*
7 *whose views are being summarized. The statement you’ve mentioned is preceded by the words*
8 *“devil’s advocate case,” which is another way of saying “some may argue, however*
9 *inappropriately.” In fact as of the time of the so-called Operation Downunder meeting, 18*
10 *epidemiological studies containing data concerning ETS and the incidence of lung cancer among*
11 *non-smokers had been published. Of those 18 studies, only 3 had reported statistically*
12 *significant positive results -- that is, results suggesting a statistically significant link. The studies*
13 *reporting no statistically significant link included Garfinkel, Chan, Correa, Buffler, Kabat, a*
14 *second Garfinkel study, Wu, Akiba, Lee, Brownson, Gao, Humble, Ku and Lam. We presented*
15 *information on all of the foregoing studies to the Occupational Safety and Health Administration*
16 *in 1994 and 1995. We also were able at that time to present the result of some 20 additional*
17 *studies that had appeared in the scientific literature between 1987 and 1995.*

18 **Q: Then a little more than midway down page 11 are the statements that “A scientific**
19 **battle was lost with SG’s ’86 report. Is there any way of showing SG is wrong? Yes, by**
20 **blowing Hirayama out of the water. Show it is nonsense. Also need counter and dramatic**
21 **proof of our own.” Do you see that?**

22 A: Yes, I do.

1 A. Yes, I do -- but you are misreading this document in ways that I cautioned against during
2 my deposition.

3 **Q: Now please look at pages 15-17, where the writer records a number of ideas at what**
4 **he or she calls a “Brainstorming Session.” Do you recall hearing the Philip Morris**
5 **executives at “Operation Downunder” talk about these ideas?**

6 A: Again, I have no reason to doubt what is recorded here.

7 A. Unless everyone who works at Philip Morris is properly characterized as being a “Philip
8 Morris executive,” I disagree with your characterization of the company representatives who
9 attended the so-called Operation Downunder meeting. Further, at this point I do not recall all of
10 the 116 brainstorming ideas listed on the pages you’ve mentioned. As I explained during my
11 deposition, I do not believe that a single idea of significance emerged from the so-called
12 Operation Downunder meeting. As you will recall, I explained at my deposition why I believed
13 that to be so. Perhaps the only idea that arguably gained additional traction because of the
14 Operation Downunder meeting was the notion of The Tobacco Institute and The Institute’s
15 member companies calling for the separation of smokers and non-smokers in public places and
16 workplaces. But I believe that would have occurred even without the Operation Downunder
17 meeting.

18 **Q: Would you agree that some of these 116 solution proposals are startling, such as,**
19 **“Create our own expert,” “Create a bigger monster (AIDS),” “Make it hurt (political risk)**
20 **to take us on,” “Create science journal,” “Infiltrate WHO,” “Undermine Koop et al,” and**
21 **“More movies featuring cigarette brands”?**

22 A: Yes.

1 A. You're still mischaracterizing this document. The "startling" ideas that you've
2 mentioned were not taken seriously, I am quite confident, by any of the participants at the
3 Operation Downunder meeting. I can assure you that none of the "startling" ideas you've
4 identified was ever implemented. They were never meant to be taken seriously. As I've tried to
5 explain to you, they were simply artifacts of the very odd meeting format that was employed
6 during the Operation Downunder meeting, which involved the use of a kind of New Age meeting
7 facilitator.

8 **Q: And according to the Conference notes, the 116 ideas were examined and discussed**
9 **on the following day, June 25, correct?**

10 A: Yes.

11 A. No. A few of the ideas listed on the pages of these notes that you've mentioned were
12 discussed on June 25. Most were never discussed, either then or subsequently so far as I am
13 aware.

14 **Q: And the first conclusion stated here, looking at pages 17 and 18, is that "We don't**
15 **have anything to slam them with on [the] health issue." And the short term solution posed**
16 **was to "Say what Rupp said," correct?**

17 A: Yes.

18 A. I don't know what the writer of this document is referring to at this point. I had
19 indicated, as I recall, that it never would be appropriate for anyone affiliated with The Tobacco
20 Institute or individual tobacco company to give assurances that ETS had been established
21 scientifically to be "safe." The reason, as I already have mentioned, is that science can never
22 establish negative propositions of that sort.

1 **Q:** And then we see that the group came to an agreement on the “case” that Philip
2 **Morris needed to make, a case whose first prong was, “Science has not established any risk**
3 **to non-smokers,” right?**

4 A: Yes.

5 A. *I certainly believed that to be the fact as of 1987. OSHA apparently agreed with that*
6 *conclusion so far as the workplace was concerned as of 1997.*

7 **Q:** And this conclusion was reached after the attendees at that conference, if they were
8 **not aware already, were told not only of the 1986 Surgeon General’s report but also the**
9 **scientific basis for the report, correct?**

10 A: Yes.

11 A. *The participants in the so-called Operation Downunder meeting were informed of the*
12 *conclusions on ETS reached by the Surgeon General in 1986. Many also were aware that the*
13 *body of the 1986 Surgeon General’s report was not entirely consistent with the conclusions set*
14 *forth in the introduction to that report.*

15 **Q:** And you are aware, Mr. Rupp, that the 1986 Surgeon General’s report represented
16 **the scientific consensus on the issue of ETS, correct?**

17 A: Yes.

18 A. *I do not believe that the 1986 Surgeon General’s report on ETS expressed a consensus*
19 *view among scientists concerning the possible health implications of ETS. I would be happy to*
20 *explain to you again why I believe no such consensus existed as of 1986. I also disagree with the*
21 *notion that one arrives at truth in science through a process of forcing a consensus. If that was*
22 *part and parcel of the scientific process, we’d still be laboring under the misapprehension that*
23 *the world is flat, among other items of nonsense.*

1 **Q: And you are aware that Surgeon General's conclusions are based on the totality of**
2 **scientific evidence available, correct?**

3 **A: Yes.**

4 *A. The Surgeon General seldom considers the totality of the scientific evidence on any issue.*
5 *He certainly did not consider in 1986 the totality of the scientific evidence on ETS. As of 1986,*
6 *there were approximately 11 scientific reports on ETS and lung cancer among non-smokers. By*
7 *1997, there were more than 40 such studies. If the issue was closed as of 1986, someone*
8 *definitely should have told the researchers who undertook those additional studies. They also*
9 *should have told the Occupational Safety and Health Administration in 1997 and, a couple of*
10 *years earlier, the researchers who reported to Congress on the ETS issue from the*
11 *Congressional Research Service. The premise on which you are proceeding also flies in the face*
12 *of the 1986 report of the Office of Technology Assessment of the US Congress. On ETS and*
13 *heart disease, to cite some further examples, we know that the Surgeon General did not consider*
14 *the data from the CPS-I, CPS-II and National Mortality Follow-Back Survey that were provided*
15 *to OSHA in 1994/95. The reason is that those data, while extant as of 1986, had not been*
16 *published -- apparently because they did not show any relationship between exposure to ETS and*
17 *the incidence of heart disease among non-smokers. The number of cases from the studies that*
18 *I've just mentioned exceeds by a factor of 10 the number of cases in all of the previously*
19 *published ETS/heart disease studies combined. We also know because of subsequent scientific*
20 *analyses that data on confounding existed as of 1986 that were ignored in the 1986 Surgeon*
21 *General's report, data that fundamentally undermine the conclusion reached in that report*
22 *concerning ETS and lung cancer. In my view, the Surgeon General should have sought out and*
23 *considered those data. He did not do so. Finally, Dr. Gio Gori informed OSHA in 1994/95 that*

1 a major US Government funded study relevant to ETS and heart disease -- as well as, I believe,
2 ETS and lung cancer -- had been completed while Dr. Gori was serving as one of the top
3 officials of the National Institutes of Health. The study was not published, Dr. Gori indicated to
4 OSHA, because the results did not show any problem relating to ETS. The Surgeon General also
5 ignored those study results in his 1986 report.

6 **Q: And you are aware that the Surgeon General considers scientific evidence from all**
7 **disciplines, from epidemiology to pathology, at arriving at causal conclusions, correct?**

8 A: Yes.

9 A. If you're asking me whether the various reports of the Surgeon General are either perfect
10 or perfectly comprehensive, the answer is "no" -- and it would be unreasonable to expect them
11 to be so. The reports of the Surgeon General are written by a committee. For many of the
12 reports, I doubt that the Surgeon General has himself/herself written a single word.

13 **Q: And, as recorded in the "Operation Downunder" conference notes, "A scientific**
14 **battle was lost" upon the publication of the 1986 Surgeon General's report, and the**
15 **industry had little to no evidence to counter the conclusions in the report, correct?**

16 A: That is correct.

17 A. That is most definitely incorrect.

18 **Q: In fact, the conference noted that the only two scientific solutions were to "blow**
19 **Hirayama out of the water" and obtain "counter and dramatic proof of our own," correct?**

20 A: Yes, that is correct.

21 A. That also is not correct.

1 **Q:** And we see starting on page 21 that the option of “lying low,” or doing nothing, was
2 “debated heatedly and ultimately rejected” in favor of taking a number of active steps,
3 utilizing the media, scientists, and foreign conferences, correct?

4 **A:** Yes.

5 *A. Most of the participants in Operation Downunder seemed to me to be of the view that*
6 *Philip Morris had an obligation to work actively in addressing the ETS issues that had arisen.*

7 **Q:** And then after a discussion of many, many ideas in the pages that follow, we see on
8 page 25 something we will address more fully in a few moments called “THE BIG CHILL,”
9 correct?

10 **A:** Yes.

11 *A. I have no idea at this point what the reference to “THE BIG CHILL” was intended to*
12 *convey.*

13 **Q:** And we also see in pages 29 to 31 that the Downunder attendees felt that the
14 industry needed “substantial funding in ETS via CIAR”; that the industry needed to
15 “increase [the] number of scientists up to 50 in the U.S. and also throughout world”; that
16 the “effort should be organized worldwide”; and the “science program has to be joint-
17 industry based.” Do you see those statements?

18 **A:** Yes, I do.

19 *A. You’re continuing to read selectively, and misleadingly, from this document. You’re*
20 *forgetting, for one thing, the points that I made about Operation Downunder during my*
21 *deposition. Second, when you do refer to an idea that was mentioned during the meeting, you’re*
22 *not being very careful about context or elaboration. With respect to CIAR, for example, this*
23 *participant’s note speaks of the need for CIAR to fund “sound scientific studies.”*

1 **Q:** Now on the final day of “Operation Downunder,” June 26, the conference attendees
2 presented their conclusions and recommendations to Vice Chairman Bill Murray, correct?

3 A: Yes.

4 A. *I recall that a short oral report on the meeting was presented to Bill Murray on June 26.*

5 **Q:** Please direct your attention to the document marked U.S. Exhibit 22950, titled
6 “Project Down Under – Group Presentation to Senior Management.” This document
7 summarizes the results of the conference, correct?

8 A: It appears to, yes.

9 A. *It apparently summarizes the author’s view of the conclusions reached at the conference.*

10 *I do not know who the author of this document was. I do not agree with some of the*

11 *“recommendations” made in this document. Very few of them were ever implemented.*

12 **Q:** And on the first page of this exhibit are recorded the four “Basic recommendations”
13 to the Philip Morris leadership. The first is the “Big Chill Strategy” of advocating
14 accommodation; the second is called the “NRA Strategy,” intended to “put some people out
15 of business who are trying to put us out of business”; the third is to “find a rainmaker,” or
16 spokesperson; and the fourth and final recommendation is to “Support a dramatic increase
17 in scientific activity on ETS, indoor air pollution, and positive sociological and economic
18 aspects of smoking.” Do you see those recommendations?

19 A: Yes.

20 **Q:** And then on pages 5 and 6 we see specific recommendations in the area of scientific
21 activity, recommendations including the establishment of CIAR, an increase in the number
22 of paid industry consulting scientists, both in the United States and abroad, and the
23 establishment of a “scientific journal on indoor air quality,” correct?

1 A: Yes.

2 **Q: And is it fair to say, Mr. Rupp, that attempts to implement those three**
3 **recommendations quickly came to occupy much of your time in the years that followed?**

4 A: Yes, that is a fair statement.

5 *A. No, it is not a fair statement. I did not spend, I do not think, more than 150 hours per*
6 *year or so on CIAR activities. The proposal to establish and fund CIAR did not originate at the*
7 *so-called Operation Downunder meeting. If anything, the number of scientific consultants with*
8 *whom I worked diminished rather than increased after 1987. There was never a significant*
9 *increase in the funding for consultants, from Philip Morris or anyone else, after 1987. Further,*
10 *after Operation Downunder, I never heard a further word about the possibility of any company*
11 *in the tobacco industry acquiring or establishing a scientific journal. Finally, The Tobacco*
12 *Institute and some of The Institute's members companies did suggest -- in advertising as well as*
13 *in meetings with regulators and politicians -- that consideration should be given to separating*
14 *smokers and non-smokers in public places and the workplace. But, again, that idea did not*
15 *originate at the Operation Downunder meeting. As I recall, The Tobacco Institute had placed*
16 *issue ads containing that suggestion as early as the mid-1980s.*

17 **Q: You were at the time of "Operation Downunder" already involved in some of these**
18 **recommendations via IAPAG and the projects initiated and funded by the industry via the**
19 **TI ETS Advisory Group, correct?**

20 A: Correct.

21 *A. Yes, I was involved in some of the activities discussed at the Operation Downunder*
22 *meeting as a result of my work with IAPAG and the ETS Advisory Group.*

1 **Q:** And finally, looking at U.S. Exhibit 22950, the writer recorded that Philip Morris
2 needed to tell the rest of the industry of its strategy through TI, and through a “CEO to
3 CEO, Chairman to Chairman” meeting with “RJR and the other major[]” cigarette
4 manufacturers, correct?

5 A: Yes, that is what the document says.

6 **Q:** And when Mr. Murray asked if the proposals had any risks, he was told that: “The
7 situation can't get any worse. Sales are down, can't be attributed to taxes or price
8 increases. ETS is the link between smokers and non-smokers and is, thus, the anti's silver
9 bullet.” Do you see that?

10 A: Yes.

11 **Q:** Did you agree with that assessment, Mr. Rupp, that ETS and the risk to nonsmokers
12 was a “silver bullet” threatening Philip Morris and the cigarette industry?

13 A: Yes.

14 A. *I believed the ETS issue to be important. I don't know that I would have used the phrase*
15 *“silver bullet” in that connection. I will say that it seemed to me significant that non-smokers*
16 *were being bombarded at the time by press and other reports claiming that they could die if*
17 *anyone around them lit up a cigarette. I believed that claim to be wholly without merit. It*
18 *certainly had not been proven scientifically. Indeed, I remember standing in the hall of a*
19 *congressional office building about this time next to Surgeon General Koop, who was speaking*
20 *to a group of reporters and others. I recall that Surgeon General Koop told the assembled group*
21 *on that occasion that he hoped soon to have evidence that being around people who were*
22 *smoking could cause the non-smoker to contract lung cancer and heart disease. I thought that*
23 *statement odd for two reasons. First, it was made after the 1986 Surgeon General's report,*

1 *which suggested in the introductory pages -- although not so much in the text -- that ETS had*
2 *already been shown scientifically to be capable of having those effects. Second, I was struck by*
3 *the fact that the nation's chief public health officer would feel comfortable expressing his hope*
4 *that something one day would be found to be killing people. One would have thought the*
5 *appropriate hope to be that ETS would be shown to entail either little or no risk so far as non-*
6 *smokers are concerned.*

7 **Q: At page 4 of U.S. Exhibit 22950, note the reference to “Gray Robertson material.”**
8 **Gray Robertson of ACVA/HBI was and is a proponent of attempting to solve the “ETS**
9 **problem” through better ventilation, correct?**

10 **A: Yes.**

11 *A. He was. I have not spoken with Mr. Robertson or reviewed any of his materials for the*
12 *past ten years or so. I don't know what his or his company's position is today so far as ETS is*
13 *concerned.*

14 **Q: Of course, Gray Robertson was by that time a consultant to TI and recipient of**
15 **industry Special Project funding, correct?**

16 **A: Yes.**

17 *A. Yes, although at the time he reached that conclusion he was not a consultant to TI and he*
18 *had not been given any funding from any tobacco company or tobacco related organization for*
19 *research or anything else. Gray Robertson had reached the conclusion you've mentioned*
20 *because of the building studies he had done for building owners, primarily in the Northeastern*
21 *part of the United States. The conclusions that he had reached from his building studies turned*
22 *out to be slightly less “favorable” to the tobacco industry than the conclusions published by*
23 *NIOSH as a result of the building studies undertaken by that governmental agency.*

1 **Q: And, consistent with U.S. Exhibits 56326 and 46421, HBI was later funded by CIAR**
2 **and Covington & Burling, correct?**

3 A: Yes.

4 A. *HBI subsequently received a research grant from CIAR. Covington & Burling never*
5 *actually “funded” HBI. On some non-research projects that we had been asked to supervise or*
6 *otherwise have some involvement in, HBI would send its bill to Covington & Burling, we would*
7 *bill the ultimate client in turn, and then we would disburse a firm check to pay the HBI invoice.*
8 *That was the typical pattern.*

9 **Q: U.S. Exhibit 22950 refers to “enemies.” Would it be accurate to say that the U.S.**
10 **Surgeon General was considered an “enemy”?**

11 A: Yes.

12 A. *I cannot speak on this issue for anyone but myself. I respected the Office of the US*
13 *Surgeon General at the time, and I do so today. That does not mean, however, that I believe it*
14 *unlawful ever to question a statement made by a Surgeon General.*

15 **Q: In fact, at page 3 of U.S. Exhibit 22950 we see the following option: “Direct players**
16 **in the selection of the next SG,” don’t we?**

17 A: Yes.

18 A. *That’s what US Exhibit 22950 says.*

19 **Q: Philip Morris wanted to influence the selection of the next Surgeon General, didn’t**
20 **it?**

21 A: Yes.

22 A. *I really have no idea. I’m not aware of any effort being made by Philip Morris, The*
23 *Tobacco Institute or any of The Institute’s other member companies to influence the choice of the*

1 *Surgeon General designated to replace Surgeon General Koop. If they had made such an effort*
2 *-- by talking, for example, with one or more members of Congress -- I would have thought that to*
3 *be permitted in a democracy. At the same time, however, if anyone at a tobacco company ever*
4 *thought attempting to influence the choice of Surgeon General to be a good idea, I would expect*
5 *them to have reconsidered when someone pointed out to them that their support would not*
6 *necessarily advance the cause of any candidate for that position.*

7 **Q: And we see many if not all of the conference conclusions and recommendations in**
8 **the third Downunder exhibit, marked U.S. Exhibit 75077, correct?**

9 **A: Yes.**

10 *A. I have not been able to locate this exhibit. If it is consistent with those we have been*
11 *discussing, you already know what I would say about it.*

12 **Q: Mr. Rupp, the problem from Philip Morris's and the industry's standpoint, as**
13 **identified throughout the Downunder documents, was not smoking or the health effects of**
14 **ETS, but only the "perception" of smokers, non-smokers, public officials, media, and the**
15 **scientific community, correct?**

16 **A: Yes.**

17 *A. No. And it's difficult for me to see on what you would base such an assertion. Most*
18 *people in the tobacco industry, maybe all, were of the view that active smoking had been shown*
19 *to be capable of causing disease in smokers. There were unresolved issues subsumed in that*
20 *large topic, relating in part to mechanisms and what component or components of mainstream*
21 *smoke might be problematic from a health standpoint. It also seemed odd to many people, in*
22 *light of the rather strong epidemiological link that had been reported between active smoking*
23 *and various diseases, that efforts to induce cancer in animals as a result of mainstream smoke*

1 exposure had largely failed -- or had at the very least yielded mixed results. Finally, there were
2 certain open questions in individual cases -- the issue we lawyers would refer to as "specific
3 causation." Still, as I say, my sense is that most people associated in any way with the tobacco
4 industry thought that, at least in public health terms or from a public health standpoint, active
5 smoking involved serious health risks -- and I perceived no appetite on the part of anyone in the
6 industry to challenge that view publicly. By contrast, I did not believe in 1987 that ETS had been
7 shown to present a health risk, to smokers or non-smokers, at least so long as there was
8 adequate ventilation. That is not, however, what people were being told. In fact, all sorts of
9 unsubstantiated claims were being made at the time about ETS -- claims that had led to smokers
10 being fired from their jobs and being refused permission even to compete for some positions.

11 **Q: And the increased funding of CIAR, the increased recruitment of "consulting**
12 **scientists," and the establishment of an industry "scientific journal" were to play roles in**
13 **changing that public perception, correct?**

14 **A: Yes.**

15 *A. The answer to your question is not "yes." It's more complicated than that. Let's focus*
16 *first on the establishment of a scientific journal. As I already have said, that idea was never*
17 *pursued by any company or tobacco related entity, so far as I am aware. It may not have been*
18 *the nuttiest idea that was put on the table during the Operation Downunder meeting but, in my*
19 *view, it was rather nutty -- and, as I've said, I'm quite sure the idea was never pursued. CIAR*
20 *was never conceived as a vehicle for changing public perceptions about anything. It's purpose*
21 *was to fund high quality -- really superior -- scientific research on indoor air quality, including*
22 *ETS, of the sort that no one else was funding. I certainly expected, correctly as it turned out,*
23 *that the results of CIAR funded research would be published in scientific journals -- not in the*

1 popular press. I also must note again, as I did during my deposition, that CIAR was conceived
2 and remained throughout its existence a "let the chips fall where they may" organization. That
3 is, every reasonable effort was made by those involved with CIAR to identify the best scientific
4 projects, to fund them, and to encourage publication of the results -- whatever the results might
5 turn out to be. I would be surprised indeed if more than a handful of people not involved in
6 indoor air issues from a scientific or regulatory standpoint ever heard of CIAR or any CIAR
7 funded project. I spoke extensively about the recruitment of scientific consultants at my
8 deposition and really do not have much more to say about that topic.

9 **Q: And only one week later, you took the Philip Morris Downunder message out to**
10 **other members of the industry, correct?**

11 A: Yes.

12 A. No.

13 **Q: Please direct your attention to the document marked U.S. Exhibit 85519, titled**
14 **"Report on Industry Meeting on ETS" dated July 2, 1987. You attended and spoke at this**
15 **meeting of the Tobacco Institute and company representatives from R.J. Reynolds, Philip**
16 **Morris, Liggett, and Hill & Knowlton, correct?**

17 A: Yes.

18 A. I did speak at the meeting discussed in US Exhibit 85519. But I don't believe there to
19 have been any significant connection between the Operation Downunder meeting and the
20 meeting discussed in US Exhibit 85519 -- other than the fact that the participants in both
21 meetings discussed ETS and public and workplace smoking restrictions. I attended the meeting
22 as counsel to The Tobacco Institute, not as counsel to Philip Morris.

23 **Q: This report indicates that Mary Ward of R.J. Reynolds attended, doesn't it?**

1 A: Yes, it does.

2 **Q: Now look at page 4 of this document. At the top of the page it states that you and**
3 **Mr. Weiss “shared some general objectives which were articulated at a Philip Morris**
4 **exercise a week earlier.” This obviously is a reference to “Operation Downunder,”**
5 **correct?**

6 A: Yes, it is.

7 **Q: Now look at page 6. Here it states that you recommended the establishment of a**
8 **“task force under the auspices of the Tobacco Institute to refine a plan to deal with the ETS**
9 **issue,” and that “Membership of the task force should be restricted to individuals who are**
10 **senior enough to speak for each company.” You also recommended a “dramatic” increase**
11 **in the ETS budget. Does this document accurately reflect your recommendations to the**
12 **group?**

13 A: Yes, it does.

14 *A. It appears to reflect some of my recommendations to the group. I’m not sure this*
15 *document is comprehensive.*

16 **Q: And the Philip Morris documents at U.S. Exhibits 23806 and 23807 relate to**
17 **Operation Downunder as well, correct?**

18 A: Yes.

19 *A. I’m not sure what you mean by using the word “relate.” US Exhibit 23806 appears to*
20 *summarize the discussion at a Philip Morris meeting in Europe that I attended sometime in 1987,*
21 *at which I gave a brief report on the Operation Downunder meeting. US Exhibit 23807 appears*
22 *to be someone’s views of what conclusions were reached at the Operation Downunder meeting.*

1 **Q:** And according to the document marked U.S. Exhibit 23683, the “Operation
2 Downunder” conclusions and recommendations were approved by Philip Morris
3 Companies and Philip Morris USA shortly thereafter, correct?

4 **A:** Yes, they were.

5 *A. That’s what the letter says.*

6 **Q:** In fact, according to this July 14, 1987 letter from Guy Smith to Tom Osdene, Smith
7 announced, “It is a great pleasure to inform you that Vice Chairman Murray, after
8 consulting with Chairman Maxwell and President Resnik, asked that the recommendations
9 of the Operation Downunder group proceed immediately.” He added, “As we move into
10 the executional elements of Operation Downunder, selected working groups will be
11 established to make certain that the project advances according to plan.” Do you see that?

12 **A:** Yes.

13 *A. Yes, although I am not aware that any such working groups ever were established.*

14 **Q:** Now please direct your attention to the document marked U.S. Exhibit 45866. What
15 is this document?

16 **A:** This is an October 8, 1987 memorandum from Helmut Gaisch, Science & Technology
17 Director at Philip Morris Europe in Neuchatel, Switzerland, to Lester Pollack, an in-house
18 counsel at Philip Morris in New York.

19 *A. This appears to be a memorandum from Helmut Gaisch, a Philip Morris scientist at
20 Neuchatel in Switzerland, to Lee Pollack, who was then serving in New York as counsel to Philip
21 Morris International.*

22 **Q:** And just to avoid any confusion, Philip Morris Europe was also known as FTR, and
23 was where Philip Morris Europe’s Science & Technology division was located, correct?

1 A: Yes, that is correct.

2 A. *I don't know the answer to your question.*

3 **Q: In this memorandum, Mr. Gaisch reports that Philip Morris's ETS activities in**
4 **Europe had "greatly intensified in recent months," and that their efforts overlapped with**
5 **"a particular mission initiated by Mr. R.W. Murray and headed by Mr. Guy L. Smith in**
6 **the United States, viz. 'Project Downunder.'" Do you see that?**

7 A: Yes.

8 **Q: And according to Mr. Gaisch, "Within the framework of the scientific part of**
9 **'Downunder' we are involved in the process of enlisting the assistance of scientific experts**
10 **on a world-wide basis. As there are other tobacco companies involved, eg. RJR, John**
11 **Rupp of C&B has been charged with coordinating this part of the budget." He then says**
12 **that he "personally arranged meetings of John Rupp with key 'whitecoats' in a number of**
13 **European countries." Mr. Rupp, do you recall that by this time, October 1987, Reynolds**
14 **was already on board with the Downunder plan, and that you had not only been "charged**
15 **with coordinating" the "process of enlisting" scientific experts, but had already met with a**
16 **number of experts, or as Mr. Gaisch calls them, "whitecoats"?**

17 A: Yes, that is accurate.

18 A. *No, that's not an accurate statement. In fact, I do not believe that RJR ever agreed to*
19 *work with Philip Morris in Europe in the hiring of scientific consultants. I may or may not have*
20 *met with potential scientific consultants in Europe by the time of this memorandum. I simply*
21 *can't recall. I do note that Dr. Gaisch is complaining in this memorandum that he's not getting*
22 *enough of my time.*

1 **Q:** And on the second page, Mr. Gaisch states that he is “in the process of arranging a
2 symposium on ETS in Belgium with the assistance of Shook, Hardy & Bacon attorney Don
3 Hoel, correct?

4 A: Yes.

5 A. *That’s what the memorandum says. I should tell you, however, that I’ve not previously*
6 *seen this memorandum -- I certainly don’t recall it -- and I have no idea what Dr. Gaisch may*
7 *have been referring to in his statement about Don Hoel.*

8 **Q:** And he further recalls that his guidance from Philip Morris in New York was to use
9 you for “liaising” with “whitecoats,” and Mr. Hoel for organizing symposium-type events.
10 **Do you recall that separation of duties in 1987?**

11 A: Yes.

12 A. *I recall discussions along those lines. No such plan was ever implemented, though, so*
13 *far as I am aware.*

14 **Q:** And the “Operation Downunder” plan was eventually vetted and approved by the
15 Tobacco Institute, correct?

16 A: Yes.

17 A. *No, as is confirmed by US Exhibits 65548, 65558, 75191 and 75100, reports of the*
18 *Operation Downunder meeting prompted spirited debates at The Tobacco Institute, and perhaps*
19 *also within at least some of The Institute’s member companies, concerning the most appropriate*
20 *approach to the ETS issue or issues. As is reflected by US Exhibit 75100, by the time The*
21 *Tobacco Institute got around to recommending an ETS program to The Institute’s executive*
22 *committee, not many of the original Operation Downunder ideas remained.*

1 **Q: Please review the documents marked U.S. Exhibits 65548, 65558, 75191, and 75100.**
2 **These documents all relate to the approval and adoption by the Tobacco Institute of the**
3 **Operation Downunder program or plan in early 1988, correct?**

4 **A: Yes.**

5 *A. Yes, but please recall the points I've just made.*

6 **Q: In fact, according to U.S. Exhibit 65548, the TI Executive Committee approved the**
7 **Downunder concept on January 4, 1988; according to U.S. Exhibit 65558, the TI**
8 **Communications Committee recommended the rapid development and implementation of**
9 **the "Operation Downunder" program, correct?**

10 **A: Yes.**

11 *A. That's what US Exhibit 65548 says but I'm not sure what concept related to the*
12 *Operation Downunder meeting was presented and purportedly approved by the TI executive*
13 *committee. My guess is that the TI executive committee, which tended in my experience not to*
14 *get very deeply involved in the details of issues or programs, heard a short report from a Philip*
15 *Morris representative on the Operation Downunder meeting and agreed that the TI staff should*
16 *consider whether any of the ideas discussed during the meeting made sense. US Exhibit 65559*
17 *confirms how few of the Operation Downunder ideas survived further consideration, and none of*
18 *those ideas originated at the Operation Downunder meeting. The major policy issue that was*
19 *being debated at this time was whether The Institute should attempt actively to promote the*
20 *separation of smokers and non-smokers in public places and workplaces. A subsidiary issue was*
21 *whether The Institute should agree not to oppose legislation/regulations opposing smoker/non-*
22 *smoker separation by law. As I recall, Tobacco Institute and tobacco company personnel were*
23 *all over the lot on those issues.*

1 **Q:** And in the TI memorandum dated February 18, 1998, and marked U.S. Exhibit
2 20760, the development of the “Operation Downunder” program was tasked to
3 representatives of Reynolds, Lorillard, American, Liggett, and various TI executives,
4 correct?

5 A: Yes, that is correct.

6 A. *No, the TI memorandum to which you’ve referred is dated February 18, 1988 -- not 1998.*
7 *Second, the results of the deliberations contemplated by US Exhibit 20760 are summarized in US*
8 *Exhibit 65559. The latter exhibit confirms how few of the Operation Downunder ideas survived*
9 *further examination.*

10 **Q:** In U.S. Exhibit 65548, dated February 1, 1988, three TI officers report to TI
11 president Sam Chilcote: “We have long agreed with many of Downunder's basic goals. . . .
12 Further, the aggressive industry posture evident throughout the plan is needed if we are to
13 stem the tide of legislative and private industry initiatives to ban or severely restrict
14 smoking, as well as deal with other important industry issues." Do you see that?

15 A: Yes.

16 A. *Yes, but you’ve got to be careful to extract the correct meaning from trade association*
17 *documents. It will be a rare trade association employee indeed who will write a memorandum*
18 *saying that not one of the ideas tabled by one of the association’s major members makes any*
19 *sense. What they typically will do is say that the member in question has identified worthwhile*
20 *goals, has put some interesting ideas on the table and deserves to be congratulated on both of*
21 *the foregoing scores. Only then, if the trade association employee truly does not like the ideas*
22 *the association has been asked to consider, will he or she begin to dismantle the ideas one by*
23 *one. That is exactly that the exhibit you’ve mentioned does.*

1 **Q: And Chilcote made “Operation Downunder” a major part of his June 16, 1988**
2 **presentation to the TI Executive Committee, as shown in U.S. Exhibit 65559, right?**

3 A: Yes.

4 A. *It was a major part of his presentation but, if you read carefully the document to which*
5 *you have referred, you will find that Mr. Chilcote was not proposing to implement many of the*
6 *ideas discussed at the Operation Downunder meeting and not one of the ideas that Mr. Chilcote*
7 *did endorse in US Exhibit 65559 originated at the Operation Downunder meeting.*

8 **Q: In fact, he states right at the outset, “On numerous occasions we’ve discussed Philip**
9 **Morris’ ‘Operation Downunder’” He then recalls that the Executive Committee asked the**
10 **TI staff “to move forward with an expanded comprehensive effort.” Do you see that?**

11 A: Yes.

12 A. *Yes, I see that but, please note, that’s trade-association-speak for assuring one of the*
13 *association’s member companies that the ideas it’s asked to be considered have been considered.*
14 *It doesn’t mean that any have been accepted.*

15 **Q: Let’s go back to the Operation Downunder recommendations. Isn’t it true, Mr.**
16 **Rupp, that many of the recommendations were already in the development and**
17 **implementation process in June 1987, before Downunder?**

18 A: Yes, some were.

19 A. *Yes, some were -- and that’s the point I’ve been trying to make. Nothing of significance*
20 *emerged, as it turns out, from the Operation Downunder meeting. I expected at the time that*
21 *would be the case. The proposals that Sam Chilcote made to the TI executive committee on June*
22 *16, 1988, as reflected in US Exhibit 65559, were modestly dressed up versions of very old ideas.*
23 *None of those ideas seems to me to be particularly notable.*

1 **Q: For example, the baseline ETS position as enunciated at Downunder was, “Science**
2 **has not established any risk of ETS to non-smokers.” This was already the industry’s**
3 **position with respect to ETS prior to Downunder, correct?**

4 A: Yes.

5 A. *That was certainly my view at that time.*

6 **Q: And in fact, that was exactly the position of the Tobacco Institute, Philip Morris,**
7 **and the rest of the American industry with respect to active smoking, namely that there**
8 **was no proven health risk to smokers either, correct?**

9 A: Yes.

10 A. *With respect, it seems to me that you’re mixing apples and oranges. I certainly never*
11 *saw a document in all of the years that I did work for The Tobacco Institute or individual*
12 *tobacco companies, intended to be shown to members of the general public, suggesting that*
13 *smoking did not pose a health risk to the smoker. While questions remained in that area as of*
14 *the mid-1980s, The Institute or its member companies went out of their way to avoid raising*
15 *them lest they been seen to be undercutting the Surgeon General health warnings that were*
16 *printed on individual cigarette packages and cartons. The position of The Tobacco Institute and*
17 *its member companies on ETS was **not** the same as its/their position on active smoking.*

18 **Q: And the ETS position was maintained by the companies and the Tobacco Institute,**
19 **your clients, notwithstanding the 1986 conclusions of the Surgeon General, the WHO, and**
20 **the NAS, correct?**

21 A: Yes.

22 A. *I’ve already testified at length about the 1986 reports of the Surgeon General, National*
23 *Academy of Sciences/National Research Council and the International Agency for Research on*

1 Cancer. If your question is whether I believe that those reports, with all of their inconsistencies
2 and caveats, closed the book on the health consequences of environmental tobacco smoke for
3 nonsmokers, making unlawful any subsequent activity by The Tobacco Institute or its member
4 companies to raise questions about the science or oppose proposed public/workplace smoking
5 laws, my answer is a strong “no.” As I explained at my deposition, my last major assignment
6 relating to ETS was in connection with the indoor air/ETS proceeding initiated in 1993 or so by
7 the Occupational Safety and Health Administration. OSHA began that proceeding with a
8 preliminary finding that workplace exposure to ETS presented a significant health risk. It closed
9 the proceeding without taking any action against ETS in 1997, after 8 months or so of hearings,
10 two rounds of public comment, and several workshops, when it concluded that there was no
11 basis for concluding that tobacco smoking in public places and/or workplaces presented a
12 significant health risk to anyone in public places or workplaces.

13 **Q: And another recommendation from “Operation Downunder” was to fund ETS**
14 **projects through the Center for Indoor Air Research, an organization that was already in**
15 **the formation stages, or at least already under discussion by the companies, in June 1987,**
16 **correct?**

17 A: That is correct.

18 A. I don’t disagree with your proposed answer. But I should emphasize again, as you
19 appear to recognize yourself, that consideration of the formation of CIAR predated the
20 Operation Downunder meeting and those discussions proceeded on largely separate tracks.
21 Further, the people who contributed to the final decisions about how CIAR was to be organized
22 and should operate were for the most part scientists. I don’t believe that any of those people

1 -- other than Dr. Tom Osdene at Philip Morris -- had been involved in discussions concerning
2 Operation Downunder.

3 **Q: In fact, the 1987 discussion among the companies and counsel surrounding the**
4 **formation of CIAR is shown in the documents marked 47526, 62613, 62270, 22816, 23679,**
5 **and 23003, correct?**

6 A: Yes.

7 A. We need to consider the documents you've mentioned one by one. The first document --
8 US Exhibit 47526 -- appears to be a memorandum from Dr. Chris Proctor to certain of his then
9 colleagues at British American Tobacco describing what he understood CIAR would be doing
10 and how it had been organized. I agree with the paragraph of US Exhibit 47526 in which Dr.
11 Proctor summarizes his understanding of the purposes of CIAR -- specifically, as he notes there:

12 "CIAR's aim is to attract untainted, reputable scientist to undertake objective scientific
13 studies in the area of indoor air quality, particularly with regard to ETS. These
14 scientists will be encouraged to publish and present their information, and the Centre
15 itself is intended to have a leading role in indoor air quality. Much of the effort will be
16 channeled into putting ETS into perspective."

17 US Exhibit 62613 is a letter from Bill Kleopfer of The Tobacco Institute to Don Hoel
18 complaining that CIAR was being organized so in a way that provided "no assurance that
19 [CIAR] will, unlike the CTR, provide support for the industry in the public affairs arena." Mr.
20 Kloefer suggested several amendments to the CIAR proposal to cure the problems he had
21 identified. Most of his suggestions were rejected. **[I have not been able to locate a copy of US**
22 **Exhibit 62270.]** US Exhibit 22816 appears to be a memorandum from Bob Pages, a scientist at
23 Philip Morris, to Steve Parrish, then serving in a capacity unknown to me at Philip Morris,

1 concerning a proposed Japanese study. Dr. Pages appears to be supporting the study concept
2 but raising questions about whether the study should be funded by CIAR as opposed to an ad hoc
3 collection of individual tobacco companies. Along the way, he makes a number of statements
4 with which I totally disagree. I do not recall at this point whether the study described by Dr.
5 Pages was funded by CIAR. I do know that the study was funded, it was completed, and the
6 results were published in a peer reviewed scientific journal. The copy of US Exhibit 23679 is too
7 "muddy" for me to be able to read. I had not previously seen this document, and I obviously did
8 not attend the meeting that is apparently being summarized in the meeting. Neither do I know
9 who wrote this document. Thus, I'm not able to say much at this point about it. I also do not
10 recall US Exhibit 23003, although I can at least decipher that document. I recognize many of
11 the projects described in US Exhibit 23003. I can't tell, however, who wrote this document or
12 what level of knowledge they actually had of CIAR's activities.

13 **Q: And the documents marked U.S. Exhibits 47526, 23516, and 80732 relate to the**
14 **proposed membership of BATCo in CIAR, correct?**

15 A: Yes.

16 A. **[I haven't been able to locate a copy of US Exhibit 47526.]** US Exhibit 80732 appears
17 to be a copy of US Exhibit 23516, a copy that I sent to Dr. Charles Green, who at the time was
18 serving -- as I recall -- as chairman of the CIAR Board of Directors. That undoubtedly is why I
19 sent a copy of my letter to Dr. Boyse (US Exhibit 23516) to Dr. Green. I perhaps should tell you
20 that BATCo decided ultimately not to join CIAR.

21 **Q: The Downunder recommendation to increase the number of industry-paid**
22 **consultant scientists both in the U.S. and abroad was really a recommendation to increase a**
23 **program that you had already been developing and implementing, correct?**

1 A: In large part, yes.

2 **Q: For example, in 1987 your group called IAPAG had been up and running for**
3 **approximately three years, as we saw in the IAPAG documents earlier in your testimony,**
4 **correct?**

5 A: Yes.

6 *A. It is not accurate to characterize IAPAG as “my” or “your” group.*

7 **Q: And this is consistent with the document marked U.S. Exhibit 75289, where Peter**
8 **Sparber wrote to TI president Sam Chilcote on March 19, 1987, that, with respect to the**
9 **domestic scientific witness program, “C&B clearly achieved its assignment to rapidly**
10 **create a program useful to The Institute,” correct?**

11 A: That is what he said.

12 **Q: Do you see the reference in U.S. Exhibit 75289 to the fact that “The Institute paid a**
13 **statistician \$24,000 to write an article on ETS”?**

14 A: Yes.

15 **Q: It was not uncommon for TI to pay to have articles written for publication, as part**
16 **of the ETS Scientific Witness Program, was it?**

17 A: No, it was not uncommon.

18 *A. Some articles for peer review journals were written as part of the program, and the time*
19 *scientist took from other activities to do so was in those instances compensated. In every such*
20 *instance, the scientist in question was instructed to note either in the article itself or in the*
21 *transmittal letter used to submit the article, depending upon the particular journal’s policy in the*
22 *area, that funding for the preparation of the article had been provided by The Tobacco Institute*
23 *or one or more of The Institute’s member companies, if in fact the latter was the case. I believe*

1 *that most if not all of the consulting scientists complied scrupulously with that instruction,*
2 *although I cannot be 100 percent sure since I did not tend to receive a copy of article transmittal*
3 *letters.*

4 **Q: And as shown in the May 26, 1987 memorandum titled “Minutes of EEMA/EEC**
5 **ETS Strategy Meeting,” at U.S. Exhibit 75080, the goal of identifying and training outside**
6 **scientists to assist the industry in Europe had already been identified, at least within Philip**
7 **Morris, correct?**

8 A: Yes.

9 *A. The need certainly had been identified by some people within Philip Morris.*

10 **Q: EEC and EEMA refer to Philip Morris’s geographical division of Europe into two**
11 **regions, correct?**

12 A: Yes.

13 *A. One of the regions you’ve mentioned may have included some countries outside*
14 *“Europe.” I was never very clear about that sort of thing. Neither did I follow very closely the*
15 *periodic reorganizations within Philip Morris.*

16 **Q: And in fact, you were a part of this identification and training process, correct?**

17 A: Yes, that is correct.

18 *A. I did help to identify scientists who had indicated that they would be willing to consult*
19 *with Philip Morris on ETS/indoor air issues, and seemed to me to be qualified to do so. I was*
20 *not part of any scientist “training” process, as I believe I explained during my deposition.*

21 **Q: The May 26, 1987 Minutes also state, “It is preferable to build up a coordinated,**
22 **international industry effort” on ETS. This is a principle that we also saw in the**
23 **“Operation Downunder” documents, correct?**

1 A: Yes.

2 A. *But I must tell you as well that, in Europe at least, it never happened so far as I am*
3 *aware.*

4 **Q: One aspect of that “coordinated industry effort” in the U.S. was a concept put forth**
5 **at the Downunder meeting called “The Big Chill.” Do you recall that initiative?**

6 A: Yes.

7 A. *I now know the phrase because you’ve asked me to read, and I have read, a document in*
8 *which the phrase was used. As I recall that document, the core of the “Big Chill” was the*
9 *proposed acceptance by Philip Morris of the separation of smokers and nonsmokers in public*
10 *places and workplaces.*

11 **Q: Please review the documents marked U.S. Exhibits 23681, 24244, 87328, 65476, and**
12 **65461. Do these documents appear to relate to the “Big Chill” concept introduced at**
13 **Downunder?**

14 A: Yes.

15 **Q: And the “Big Chill” was a media campaign that emphasized the industry position**
16 **that “Science has not established a health risk to non-smokers from ETS,” correct?**

17 A: Yes.

18 A. *I frankly don’t remember the campaign. To answer your question, I would have to*
19 *review the advertisements that actually were placed in various publications.*

20 **Q: And this campaign was launched in January 1988, more than one year after the**
21 **1986 Surgeon General’s report concluded that involuntary smoking was a cause of lung**
22 **cancer and certain childhood health effects, and more than a year after the NAS and IARC**
23 **published similar findings, correct?**

1 A: Correct.

2 A. *As I already have stated, there were major differences -- indeed, inconsistencies --*
3 *between the findings of the 1986 reports of the Surgeon General, National Academy of*
4 *Sciences/National Research Council and International Agency for Research on Cancer. So far*
5 *as the 1986 Surgeon General's report is concerned, there also are important differences --*
6 *indeed, again, inconsistencies -- between the introduction to the report and the detailed text that*
7 *follows. Although you appear to be comfortable ignoring those differences and inconsistencies,*
8 *no respectable scientist would do so. I also disagree with your notion that the science relating to*
9 *ETS was definitively closed as of 1986. The US Occupational Safety and Health Administration*
10 *and Congressional Research Service certainly reached a different conclusion nearly ten years*
11 *later. In fact, I have an even more fundamental problem with the question that you've asked.*
12 *Your question appears to be premised on the notion that truth in science should be established in*
13 *the United States by government edict. I cannot endorse any such notion. I note in the latter*
14 *connection that you've not yet asked me any questions about the political pressures under which*
15 *the US Surgeon General and National Academy of Sciences/National Research Council operate*
16 *-- or about the political pressures under which IARC operates.*

17 **Q: Please direct your attention to the document marked U.S. Exhibit 75086. This is a**
18 **February 21, 1988 memorandum from Helmut Gaisch titled "The European Counterpart**
19 **to 'Operation Downunder.'" Would you agree that the document describes the role and**
20 **activities of the Science & Technology (S&T) division at Philip Morris Europe, Covington**
21 **& Burling, and Shook, Hardy & Bacon with respect to ETS at that time?**

22 A: Yes.

1 A. This document appears to set forth Dr. Helmut Gaisch's views of "the European
2 Counterpart to 'Operation Downunder' -- the Role of S&T PME." A number of the items
3 mentioned in the document so far as Covington & Burling and Shook, Hardy & Bacon are
4 concerned did not occur as Dr. Gaisch apparently initially envisaged.

5 **Q: Would you agree that, according to Gaisch, the ETS "Project" had two**
6 **"components," "a corporate affairs side (i.e. Big Chill) and a scientific side (i.e. indoor air**
7 **quality research)?"**

8 A: Yes.

9 A. That seems to me to be essentially correct. The corporate affairs component appears to
10 have entailed a decision by Philip Morris to press for the separation of smokers and non-
11 smokers in public places and workplaces. The scientific side appeared to entail the funding of
12 additional ETS-related scientific research and analyses. I do not believe that any tobacco
13 company in Europe actually agreed to collaborate with Philip Morris on an ongoing basis in
14 either of those respects.

15 **Q: Mr. Rupp, from your recollection of events and a review of these documents, would**
16 **you agree that "Operation Downunder," resulted in an "expanded comprehensive effort"**
17 **among the industry to deal with the threat posed by the ETS issue?**

18 A: Yes.

19 A. No. As I have said repeatedly, very few of the ideas discussed at the so-called Operation
20 Downunder meeting were implemented, and the ideas that were implemented did not originate at
21 that meeting. Further, each of the tobacco companies continued, as I recall, to make its own
22 decisions concerning how to address ETS rather than buy into some sort of comprehensive

1 *strategy. In my view, no such comprehensive strategy emerged, in any event, from the Operation*
2 *Downunder meeting.*

3 **Q: Let's talk about your role in expanding that comprehensive effort overseas. Please**
4 **direct your attention to the document marked U.S. Exhibit 20586. This is a BATCo**
5 **document written by Dr. Sharon Boyse memorializing a "special meeting of the UK**
6 **Industry on Environmental Tobacco Smoke" held in London on February 17, 1998.**
7 **According to this document, your fellow partner at Covington & Burling, David Remes,**
8 **was present at this meeting, correct?**

9 A: Yes.

10 A. *David Remes was not a partner at Covington & Burling at that time. I believe that he*
11 *was then an associate.*

12 **Q: And you are aware that Dr. Boyse was then the Scientific Director for BATCo,**
13 **correct?**

14 A: Yes.

15 A. *I don't believe that Dr. Boyse was at that time the scientific director for BATCo. Indeed,*
16 *as I recall, she had just completed her graduate training and had joined BATCo in an entry-level*
17 *scientific position as of the time she wrote the memorandum you have mentioned.*

18 **Q: In addition, representatives of cigarette manufacturers Philip Morris, British**
19 **American Tobacco, Rothmans, Gallaher, and Imperial were also on hand. Are you**
20 **familiar with the names and companies at the top of page 1?**

21 A: Yes, I am.

22 A. *I have no recollection of about one-half of the people who apparently attended the*
23 *meeting you have mentioned. That includes Messrs. Williams, Brown, Frost and Whitaker. I*

1 *don't believe I ever have met any of those individuals and, before reviewing this document, I do*
2 *not recall having heard any of their names.*

3 **Q: Let's look at the first paragraph of Dr. Boyse's summary: "Philip Morris presented**
4 **to the UK industry their global strategy on environmental tobacco smoke. In every major**
5 **international area (USA, Europe, Australia, Far East, South America, Central America &**
6 **Spain) they are proposing, in key countries, to set up a team of scientists organised by one**
7 **national coordinating scientist and American lawyers, to review scientific literature and**
8 **carry out work on ETS to keep the controversy alive. They are spending vast sums of**
9 **money to do so, and on the European front Covington & Burling, lawyers for the Tobacco**
10 **Institute in the USA, are proposing to set up a London office from March 1988 to**
11 **coordinate these activities." Do you see that?**

12 A: Yes.

13 **Q: Mr. Rupp, did Dr. Boyse accurately summarize the Philip Morris and Covington &**
14 **Burling "global strategy" on ETS?**

15 A: Yes.

16 *A. No. Dr. Boyse's summary is inaccurate in many respects. In fact, she appears not to*
17 *have understood much of what was being proposed.*

18 **Q: And at the start of the second paragraph on page 1, Dr. Boyse writes, "Because of**
19 **the heavy financial burden, Philip Morris are inviting other companies to join them in**
20 **these activities to whatever extent individual companies deem to be appropriate." Mr.**
21 **Rupp, can you confirm that Philip Morris indeed solicited other cigarette manufacturers to**
22 **help fund the "global strategy."**

23 A: Yes, that was our aim.

1 A. I cannot say for sure what Philip Morris's aim was in the respect that you've mentioned.
2 I don't believe that any other tobacco company ever actually supported the work with scientific
3 consultants that Philip Morris supported for a time in Europe.

4 **Q: On the second page of U.S. Exhibit 20586 at number (3), , Dr. Boyse records that**
5 **Philip Morris's Dr. Gaisch told the meeting participants that the Philip Morris "strategy**
6 **on ETS had been established in the USA at a meeting between Philip Morris and**
7 **Covington & Burling." Do you have any doubt that this is a reference to the "Operation**
8 **Downunder" meeting in June 1987?**

9 A: No.

10 A. It may well have been. I cannot be sure. I did not attend this meeting so cannot be sure
11 what Dr. Gaisch said there.

12 **Q: And on the same page at number (4), Dr. Boyse describes the "Philip Morris**
13 **philosophy of ETS." The strategy "appeared to revolve around the selection, in all possible**
14 **countries of a group of scientists either to critically review the scientific literature on ETS**
15 **to maintain controversy, or to carry out research on ETS. In each country a group of**
16 **scientists would be carefully selected, and organized by a national coordinating scientist."**
17 **Do these terms accurately describe the plan at the time, Mr. Rupp?**

18 A: Yes, they do.

19 A. No. During the period about which you have asked, my understanding -- although I may
20 be wrong -- is that at least some people at Philip Morris with budgetary authority appeared to be
21 interested in supporting a full range of scientific activities relating to ETS and indoor air quality.
22 The goal, as I understood it, and I can only rely here upon my understanding, was to get at the
23 true scientific facts relating to ETS, whatever those facts might turn out to be. There was some

1 *discussions that I recall about the desirability, primarily from a logistics standpoint, of trying to*
2 *identify a lead consulting scientist in at least some countries -- not someone who would tell other*
3 *scientists what to do but someone who could handle the inevitable logistical issues.*

4 **Q: Now Dr. Boyse also records the plan as to how the scientists were to be located and**
5 **utilized to assist the industry. For example, the scientists were to be contacted by**
6 **established industry “coordinators” such as Francis Roe and George Leslie in the United**
7 **Kingdom, or by Covington & Burling lawyers. The initial contact with the scientists would**
8 **omit any reference to tobacco, instead focusing only on “Indoor Air Quality” generally.**
9 **Obvious anti-smokers and others with “unsuitable backgrounds” would be “filtered out.”**
10 **The scientists are then given a selected packet of ETS articles to read, then asked for their**
11 **opinion. Only then, assuming their opinion is favorable, would the scientists be contacted**
12 **by a Philip Morris scientist. Mr. Rupp, is this summary of steps in Dr. Boyse’s**
13 **memorandum accurate?**

14 **A: Yes, it is.**

15 *A. It is partially correct. The typical but not invariable practice after contact had been*
16 *established with a possible scientific consultant was to provide a very large packet of scientific*
17 *materials on ETS/indoor air, ask for the scientist’s opinions concerning the studies or reports*
18 *individually as well as collectively but not tell them that the potential client would be Philip*
19 *Morris. The reason that was done was to get as objective a view from the scientist as possible.*
20 *In retrospect, that appears not to have been either a necessary or particularly useful step -- that*
21 *is, withholding for purposes of the initial review the identity of the potential client. Most*
22 *possible scientific consultants seemed to know immediately who the client would be. They may*
23 *not have guessed that the client would be Philip Morris but they seemed to believe that the client*

1 *would be a tobacco company. I say that the withholding of the identity of the client did not turn*
2 *out to be necessary because, in my experience at least, the scientists who were contacted did not*
3 *show the slightest reluctance to provide their candid views of the documents they had been given.*
4 *I don't recall a single instance during the 1980s when we contacted a possible scientific*
5 *consultant and gave them a large packet of pertinent materials that the scientist concluded other*
6 *than that no scientific case against ETS appeared to them to have been established. Sometimes*
7 *they expressed surprise at that conclusion, since they had been prompted by press reports to*
8 *believe the contrary to be true. We deliberately weighted the initial packet of materials that we*
9 *distributed to possible consultants in favor of providing nearly every document we could think of*
10 *suggesting that non-smoker exposure to ETS might present a health problem.*

11 **Q: And then the scientists would be expected “to operate within the confines of**
12 **decisions taken by PM scientists,” “which would then be ‘filtered’ by lawyers to eliminate**
13 **areas of sensitivity.” Is this description also accurate?**

14 A: Yes.

15 A. *No. It is not accurate. The original conception contemplated little contact between*
16 *Philip Morris personnel and the consulting scientists. Further, Covington & Burling's role was*
17 *not to “eliminate areas of sensitivity,” whatever those might have been and however that might*
18 *have been accomplished. It was to make sure that the scientist was not asked to do anything that*
19 *might be regarded, rightly or wrongly, to be inappropriate.*

20 **Q: Finally, Dr. Boyse writes at number (10) that the “scientists should be able to**
21 **produce research or stimulate controversy in such a way that public affairs people in the**
22 **relevant countries would be able to make use of, or market, the information.” Do you see**
23 **that?**

1 A: Yes.

2 A: Yes, but again I disagree with Dr. Boyse's apparent conception of what was being
3 proposed.

4 Q: Dr. Boyse writes several times in her memorandum that Philip Morris was
5 embarking on the vast program of recruiting and marketing scientists on an international
6 basis "to keep the ETS controversy alive." Mr. Rupp, can you confirm that this was Philip
7 Morris's goal?

8 A: Yes.

9 A: If that was the goal of anyone at Philip Morris, it was never communicated to me. I do
10 not believe it ever was an operative goal of anyone at Philip Morris, and I can assure you that --
11 during the period of my involvement -- our work with scientific consultants did not seek to
12 achieve that goal.

13 Q: Similarly, one goal of your client TI was to keep the ETS controversy alive, correct?

14 A: Yes.

15 A: I answered this question at length during my deposition. I do not believe that was one of
16 the goals of anyone of significance at The Tobacco Institute. The goals, as I understood them,
17 were to stimulate the very best scientists we could find to review the pertinent scientific literature
18 relating to ETS/indoor air, to reach whatever conclusion or conclusions concerning that
19 literature they deemed to be appropriate, to share their views with others as they deemed
20 appropriate and to consider undertaking research in the area as a means of answering hitherto
21 unanswered questions.

22 Q: And, Mr. Rupp, that was part of your mission as well, wasn't it?

23 A: Yes, it was.

1 A: *The mission that I believed that I had been given by The Tobacco Institute and its*
2 *member companies was as summarized above.*

3 **Q: And did Covington & Burling thereafter set up a London office?**

4 A: Yes.

5 **Q: And was it also true, as written in this document, that “The Center for Indoor Air**
6 **Research that Philip Morris, RJR and Lorillard have set up in the US was mentioned as a**
7 **further development of this strategy”?**

8 A: Yes, it was.

9 A: *I believed CIAR’s mission to be consistent with -- indeed, to be -- the strategy I have just*
10 *described.*

11 **Q: And this meeting recorded by Dr. Boyse was recorded by Philip Morris’s Helmut**
12 **Gaisch at pages 11 and 12 in his February 1988 Monthly Report marked U.S. Exhibit**
13 **22326, correct?**

14 A: Yes.

15 A: *Dr. Gaisch appears to be talking in the document you have mentioned about the same*
16 *meeting about which Dr. Boyse was writing in US Exhibit 20586. I should say again that, to my*
17 *knowledge at least, none of the European tobacco companies who sent representatives to the*
18 *meeting discussed in these documents contributed any funding for scientific consultants in*
19 *Europe.*

20 **Q: And in Dr. Gaisch’s report of the meeting, he refers to the program as “the PM-**
21 **stimulated scheme” and the consultants as “whitecoats,” correct?**

22 A: That is what he wrote, yes.

1 **Q: And, looking at U.S. Exhibit 23807, we see the term “whitecoats” used in**
2 **conjunction with “Operation Downunder” as well, correct?**

3 **A: Yes.**

4 *A. That does not mean, however, that it is a phrase that I would use or believe to be*
5 *appropriate.*

6 **Q: Now please take a moment to review the documents marked U.S. Exhibits 24099**
7 **and 88778, where Dr. Ray Thornton of BATCo and J. Kendrick Wells of Brown &**
8 **Williamson comment on the ongoing Philip Morris/Covington & Burling program in**
9 **Europe. Have you had a chance to read these documents?**

10 **A: Yes, I have.**

11 **Q: U.S. Exhibit 88778 is an August 22, 1988 document marked “SECRET,” written by**
12 **Dr. Thornton, and titled “Some details on the Philip Morris Programme on Environmental**
13 **Tobacco Smoke.” Dr. Thornton mentions you and your firm, and writes that the**
14 **recruitment of scientists in the UK was being coordinated by Drs. Roe and Leslie “under**
15 **the cryptic name ARIA – Association for Research on Indoor Air.” Was that accurate?**

16 **A: Yes, it was.**

17 *A. No, it was not. ARIA was a group, as I recall, that had been put together by Dr. Francis*
18 *Roe and Mr. George Leslie in the United Kingdom before I met them. My recollection is that*
19 *they hoped that ARIA would serve as an umbrella organization for a wide range of consulting*
20 *activities in Europe, for a wide range of clients, relating to indoor air issues, which were at that*
21 *time being discussed increasingly in Europe just as they were being discussed increasingly in the*
22 *United States. Before any consultant was retained as part of the effort we were making in*
23 *Europe at the time for Philip Morris, I met with them, explained who the client was and*

1 *described what we contemplated doing. That also gave me a chance, of course, to determine*
2 *what there interests and expertise were. At least in the early days, the bills for time spent by the*
3 *consultants we recruited in Europe were paid through ARIA. That was done entirely for*
4 *logistical reasons -- essentially, to make sure that consultants were paid quickly and to have a*
5 *focal point to deal with exchange rate issues.*

6 **Q: And Dr. Thornton also records that the Philip Morris / Covington & Burling**
7 **consulting scientists were planning conferences, one in London in June 1988, the other in**
8 **Brussels in February 1989, correct?**

9 A: Yes.

10 *A. I was not involved in the Brussels conference referred to by Dr. Thornton, so I can't tell*
11 *you much about it. The conference in London referred to by Dr. Thornton may have been the*
12 *conference on indoor air that Professor Roger Perry at Imperial College in London had been*
13 *running for a number of years. It was not a Philip Morris sponsored conference. If the*
14 *reference is to some other conference in London, I have no knowledge of it.*

15 **Q: Finally, Dr. Thornton writes at the close of the document that Philip Morris has**
16 **requested that British American Tobacco join them in the ETS program. Mr. Rupp, do**
17 **you recall that request?**

18 A: Yes.

19 **Q: The second document, U.S. Exhibit 24099, is dated October 10, 1988 and written by**
20 **Brown & Williamson counsel J. Kendrick Wells to BATCo counsel Nick Cannar. The**
21 **memorandum is titled "John Rupp and Don Hoel Activities in Europe." In this**
22 **memorandum, Mr. Wells recounts a phone conversation he had with you about the Philip**
23 **Morris consultant program in Europe. Do you see that?**

1 A: Yes.

2 **Q: Mr. Wells writes that you were the source of the following information about the**
3 **Philip Morris program: “The assignment is to establish consulting groups in each of**
4 **several different countries. The consulting groups consist of scientists who will speak on**
5 **the issue of ETS and who have been horse-shedded by John to ensure that their opinions**
6 **support the industry’s position on ETS and that their answers to the inevitable questions**
7 **about the primary issue do not undercut the industry.” Do you have any reason to doubt**
8 **the accuracy of what Mr. Wells has recorded here?**

9 A: No I do not.

10 *A. Yes, I certainly do. This memorandum reflects a fundamental misapprehension on the*
11 *part of Mr. Wells of how we were proceeding and what we were attempting to accomplish. We*
12 *did spend a lot of time with consulting scientists but almost exclusively to make sure that they*
13 *had reviewed, in a careful and comprehensive manner, the available scientific literature on ETS*
14 *and indoor air, which had become rather voluminous by that time. We did not attempt in any*
15 *manner to affect the substance of the conclusions they reached. I would have regarded that to be*
16 *largely futile in any event. Further, I was reasonably confident of the conclusions they would*
17 *reach if they actually studied the pertinent literature. On the primary issue, we did feel some*
18 *obligation to Philip Morris -- I’m not sure in retrospect that I can say it was at the request of*
19 *Philip Morris -- to encourage the scientists not to take on, at least as part of their work with us,*
20 *the obligation to review all of the literature on active smoking. That literature would have*
21 *consumed several large rooms by the time Mr. Wells was writing the memorandum to which*
22 *you’ve directed my attention. In addition to not wanting to bear the cost of subsidizing any such*
23 *large scale review of active smoking literature, even the Surgeon General had concluded by that*

1 *time that active smoking and non-smoker exposure to ETS presented separate health effect issues*
2 *-- and had to be considered separately. Finally, as I explained during my deposition, we were*
3 *worried about the attribution doctrine under US state product liability laws if the consultants on*
4 *ETS with whom we were working began to talk about active smoking in a way that could be*
5 *attributed to any tobacco company. My greatest concern, frankly, was that one or more of the*
6 *ETS consultants with whom we were working would raise questions about the strength of the*
7 *association between smoking and the health of the smoker -- and that such questions, in addition*
8 *to being attributed to Philip Morris, would be seen as undercutting the warnings printed on*
9 *cigarette packages and cartons.*

10 **Q: And the “John” in that paragraph is you?**

11 A: Yes.

12 **Q: So it is fair to say that Philip Morris and you knew and intended that the**
13 **consultants you were recruiting in Europe would support the industry position that ETS**
14 **had not been proven to cause adverse health effects, correct?**

15 A: Yes.

16 *A. I was quite confident that if any objective scientists, possessing the requisite expertise,*
17 *reviewed carefully and comprehensively the literature that was available on ETS and indoor air*
18 *quality, they would conclude that ETS had not been shown scientifically to pose a health risk to*
19 *non-smokers. That did prove to be the case, time after time.*

20 **Q: And that if a scientist somehow did not support the industry’s position on ETS or**
21 **the “primary issue” of active smoking, he or she would not be one of your**
22 **consultants/scientists, correct?**

23 A: That is correct.

1 A. *That is incorrect. As I have mentioned, we did not ask any of the consultants with whom*
2 *we were working to make any public statements concerning the impact of smoking on the health*
3 *of the smoker. There were several reasons for that. First, we did not have sufficient funding to*
4 *cover the cost of their reviewing all of the literature on active smoking -- and we certainly did*
5 *not want our consulting scientists to be talking about tobacco related issues without being fully*
6 *informed. Second, I was concerned that one of our ETS consultants -- after having announced in*
7 *some forum that funds for their work or appearance had been provided by Philip Morris -- might*
8 *suggest doubts about some aspect of "the case against active smoking" -- that is, that they would*
9 *say something about active smoking that would undercut the US Surgeon General's warning.*
10 *Many people at Philip Morris were concerned about that -- they simply did not want anyone, at*
11 *least arguably on their behalf, to do that. I've already spoken about how we approached the*
12 *ETS issue with consultants, so that I hope you already understand why I would not agree with*
13 *the way Mr. Wells has characterized our work on that issue.*

14 **Q: So Philip Morris and you knew then, that when one of these recruited scientists**
15 **spoke at a conference, testified before a regulatory body, or wrote a letter to the editor of a**
16 **scientific journal, he or she would support the industry's positions, correct?**

17 A: Yes, we knew that.

18 A. *We knew that they would say what they truly believed to be the case, on the science, with*
19 *respect to ETS. That's all we knew for sure and, for us, that was quite enough. We told the*
20 *consultants with whom we worked on ETS repeatedly that they had to be perfectly comfortable*
21 *with anything they might say on ETS, that we understood that it was their reputation that was on*
22 *the line when they spoke about a scientific issue. We also told them that a fundamental part of*

1 *our commitment to them was that we would never suggest what they should say or what their*
2 *conclusions concerning ETS should be.*

3 **Q: And in fact, as Mr. Wells writes in this memorandum to Mr. Cannar, “The central**
4 **charge in organizing the project is to arrange public appearances and statements by the**
5 **consultants” to do exactly that, correct?**

6 A: Yes, that is correct.

7 *A. We did encourage the scientists with whom we were working on the ETS issue to*
8 *participate in the then ongoing scientific dialogue on the health effects of ETS. As I’ve said,*
9 *however, the participation was in the form of conveying their own conclusions and observations*
10 *-- not any that we had asked them to convey.*

11 **Q: He also describes the same ARIA group referenced in Dr. Thornton’s letter we just**
12 **discussed, and says that “ARIA is a group of company representatives.” Was that**
13 **accurate?**

14 A: Yes.

15 *A. No, it is not. ARIA was composed of scientists, not company representatives. The*
16 *members of ARIA did consulting work for a variety of private clients.*

17 **Q: Mr. Wells also adds, “The consultant groups operation is essentially a public**
18 **relations program, not a scientific research operation.” Would you agree with that?**

19 A: Yes.

20 *A. I agree in part with this statement by Mr. Wells. It is true that, in the early days, we did*
21 *not expect the scientists with whom we were working on ETS to do their own ETS field research.*
22 *We expected them to review comprehensively the extant literature on ETS, reach their own*
23 *conclusions concerning its meaning, and then share those conclusions -- whatever they might be*

1 -- in appropriate ways with others, in particular other scientists. Within a couple of years, I at
2 least had begun to believe that funding for basic ETS related research did need to be made
3 available to the scientists with whom we were working on the ETS issue. I perhaps should have
4 tumbled to that conclusion earlier than I did. If a scientist is going to be viewed over time as an
5 expert in a particular field, he or she typically needs to be able to talk about the research that he
6 or she has done in that field. Simply talking about the research of others is not adequate.
7 Further, most of the scientists who were consulting with us were highly critical of much of the
8 research relating to ETS that had been published to that point. When they voiced their
9 criticisms, it tended to come off very negatively. I came eventually to believe, very strongly, that
10 funding needed to be made available to scientists so that they could do additional and better
11 research on ETS -- to make a positive contribution, if you will, rather than simply a critical one,
12 which could be perceived as being rather negative.

13 **Q: By this time, in October 1988, Reynolds had joined and was sharing the cost of the**
14 **Philip Morris strategy in Europe, correct?**

15 A: Yes.

16 A. No, it was not -- and I don't believe that Reynolds ever did, although I was not
17 significantly involved in ETS consulting activities in Europe after 1988 or so. As a consequence,
18 I can't speak as knowledgably about the post-1988 period in Europe as I can about the
19 preceding 18 months or so.

20 **Q: And Mr. Wells also records that CIAR in the United States "has played a role in**
21 **organizing consultants in Europe, primarily the role of training European scientists." Was**
22 **that accurate?**

23 A: Yes, that was true.

1 A. No, it's completely inaccurate. I know for a fact that CIAR never played any role at all in
2 organizing consultants in Europe or "training" them, as you say. In fact, I would doubt that Dr.
3 Max Eisenberg, the executive director of CIAR, ever met any of the scientist with whom we were
4 consulting in Europe on the ETS issue.

5 **Q: And you were counsel for CIAR, from the time of its incorporation in January 1988**
6 **until its dissolution under the MSA in December 1999, correct?**

7 A: Yes, I was.

8 **Q: And as you wrote in the documents marked U.S. Exhibits 20373 and 23520, CIAR**
9 **was "a credible and effective vehicle for conducting the research that is needed to buttress**
10 **the industry's position" on ETS, correct?**

11 A: Yes.

12 A. You are taking a single sentence, and not a particularly well formed sentence, out of
13 context. I would direct your attention to the second paragraph of the letter to which you have
14 referred. As I said there:

15 "Scientists who receive funding from CIAR are encouraged to publish reports of their
16 research in leading scientific journals. But CIAR does not attempt in any way to
17 influence the substance of its grantees' published reports. Typically, of course, research
18 reports include a substantial amount of background information, in part to provide
19 context for the results being reported; information on the methods and/or equipment
20 utilized in the research; and discussion of the significance of the research results. As
21 with most scientific funding organizations, CIAR grantees retain full authority to
22 determine what information is included in any published reports of funded research."

1 *With respect to CIAR sponsored monographs, individual scientists serving on the CIAR board*
2 *as well as the CIAR scientific staff sometimes provided comments on the issues to be covered.*
3 *They also occasionally identified literature that otherwise might be missed by the person*
4 *preparing the monograph. At the end of the day, however, the person who was preparing the*
5 *monograph was given complete discretion in deciding what issues to cover, what research to*
6 *include and what conclusions to reach. In that connection, I would refer you to the paragraph*
7 *of my letter in which I informed Dr. Sadler that --*

8 *"I should emphasize again that the purpose of such involvement [that is, involvement in*
9 *the preparation of monographs I have just described] is to ensure that the individual*
10 *monographs cover in a reasonably comprehensive manner the topics for which they were*
11 *commissioned. Neither CIAR staff nor board members attempt to influence the*
12 *interpretation of the data summarized in the monograph or other views the monograph*
13 *authors may desire to express."*

14 **Q: And this European strategy is what Philip Morris, and now Reynolds, were paying**
15 **you and your firm to implement and carry out, correct?**

16 A: Yes.

17 A. *I believe I already have corrected the misconceptions underlying this question.*

18 **Q: And who was paying the scientists that you recruited and used in that strategy?**

19 A: Ultimately, the companies paid. At first, this was a Philip Morris program, organized out
20 of Philip Morris Europe and Philip Morris in New York, so only Philip Morris paid, but then the
21 program expanded and Reynolds and BAT joined and began paying a segment of the program
22 costs.

1 A. *So far as I am aware, funding for the scientists with whom we were consulting in Europe*
2 *was paid entirely by Philip Morris.*

3 **Q: Do we see some of what the participating companies paid for the ETS Consultancy**
4 **Program in 1990 and 1991 in the document marked U.S. Exhibit 85547?**

5 A: Yes.

6 A. *As I explained during my deposition, I was not involved in the ETS consultant program in*
7 *Europe during 1990 or 1991 -- or, indeed, at any time subsequently. Further, I have not*
8 *previously seen US Exhibit 85547 and therefore cannot tell you what it covers.*

9 **Q: It was important to engage scientists overseas to support the tobacco industry's**
10 **views on ETS because it became increasingly more difficult to find scientists to take issue**
11 **with the Surgeon General's conclusions in the 1986 Surgeon General's Report, correct?**

12 A: Yes.

13 A. *Again, we were not looking for scientists, in Europe or anywhere else, to support the*
14 *"tobacco industry's views on ETS." We were trying to find scientist who would spend the time*
15 *needed actually to review the published literature relating to ETS and indoor air quality, come to*
16 *their own conclusions, and then share those conclusions with others. After 1986 it did become*
17 *more difficult in the United States -- although not in Europe -- to find consultants willing to*
18 *become a consultant on ETS to an individual tobacco company or an entity like The Tobacco*
19 *Institute. But the reason is not the one you apparently have in mind -- that is, that they believed*
20 *that the Surgeon General had delivered the last word on ETS in his 1986 report. The reason*
21 *instead is that most scientists in the United States rely heavily on government funding for the*
22 *research they do. I remember that Morton Lippman made precisely that point when he chaired*
23 *the scientific advisory board convened to consider the draft EPA report on ETS in 1992. And*

1 *they were concerned, as a consequence, about getting at cross purposes or falling out of favor*
2 *with the agencies of the US Government that provide funding scientific research. Their concerns*
3 *in that connection were not at all academic or fanciful. In fact, a number of scientists came to*
4 *me after 1986 saying that they needed to keep to themselves their views on ETS because they had*
5 *been contacted by US Government officials either directly, or by others purporting to speak for*
6 *them, with the message that they were jeopardizing their career by consulting with the tobacco*
7 *industry. That occurred with Mark Reasor at the University of West Virginia and Sal DiNardi*
8 *at the University of Massachusetts at Amherst, among others. Increasingly during the late 1980s*
9 *and early 1990s, university affiliated scientists were not prepared to take the “heat” that tended*
10 *to be directed at them if they said anything on ETS that was inconsistent with the official US*
11 *Government position on ETS, as announced by the Surgeon General in 1986.*

12 **Q: Please take a look at the document marked U.S. Exhibit 27901. This is a Philip**
13 **Morris document describing the status of the “European Consultancy Programme” as of**
14 **March 1, 1990, written by Covington & Burling, correct?**

15 A: Yes.

16 A. *Although I am shown as having received a copy of this document, I was not directly*
17 *involved in any work done by Covington & Burling lawyers in Europe with scientific consultants*
18 *after 1988 or so. I have no current recollection of having ever read this document, although I*
19 *may have read it at the time.*

20 **Q: And according to the last page, you were copied on this memorandum , correct?**

21 A: Yes, I was.

1 A. I am shown on this document as having received a copy but, as I have said, I do not
2 recall having received it -- and I have no direct knowledge of many of the items covered in the
3 memorandum.

4 **Q: While this document reviews a number of the activities of the industry's ETS**
5 **consultants, I want to talk about only two parts of the program. First, this memorandum**
6 **chronicles a number of conferences and symposia that the industry consultants not only**
7 **attended, but also organized and conducted, correct?**

8 A: Yes.

9 A. It appears to do so.

10 **Q: Do you generally recall those conferences and symposia?**

11 A: Generally, yes.

12 A. I have some knowledge of the conferences at McGill University and in Lisbon mentioned
13 in this memorandum. I have no knowledge of the others.

14 **Q: And did you also participate in the planning and organization of symposia by the**
15 **industry ETS consultants?**

16 A: Yes.

17 A. I participated in the planning of ETS related symposia at McGill University and
18 Georgetown University. The symposium in Lisbon, as I recall, was one of an ongoing series of
19 meetings on indoor air quality in warm climates organized by Professor Roger Perry at Imperial
20 College in London. I know of that conference because I attended it. I also was at least
21 tangentially involved in the organization of ETS/indoor conferences in Tokyo and Manila.

22 **Q: And some of the symposium names we see here are McGill, Lisbon, and Hanover,**
23 **all organized by you and your industry consultants, correct?**

1 A: Yes.

2 A. I was involved in organizational discussions concerning the McGill conference. I was
3 not involved in any of the others you've mentioned.

4 **Q: And, consistent with the goal of the program in the first place, these industry ETS**
5 **consultant-organized symposia generated published results that supported the industry's**
6 **position on ETS, correct?**

7 A: Yes.

8 A. The answer to this question is not "yes," for a variety of reasons that I hope by now you
9 appreciate. Let's talk about the McGill conference, which I know the most about because I had
10 a number of discussions with the organizers of that conference. The organizers of the McGill
11 conference were Dr. Donald Ecobichon at McGill University and Dr. Joseph Wu of New York
12 University. They made all final organizational decisions concerning the conference but they did
13 consult with me about it, and Philip Morris and The Tobacco Institute provided at least part of
14 the needed funding. Between 80 and 90 scientists who were known to be working on ETS and
15 indoor air quality issues were invited to McGill for the conference. The conference was not
16 announced publicly in advance. The reason is that an earlier conference at Georgetown
17 University, also involving funding from The Tobacco Institute, had had to be cancelled after US
18 Government officials and others had put pressure on many of those who had agreed to attend to
19 withdraw. The scientists who were invited to McGill were encouraged to say whatever they
20 wanted to say, and an effort was made to deal with ETS and indoor air issues in a reasonably
21 comprehensive and scrupulously fair manner. The organizers ultimately published a monograph
22 of the conference proceedings at McGill disclosing the source of the funding. Some of the
23 scientists who participated in the McGill conference had consulted with us. Others had not.

1 **Q:** Now turn to page 5 of the Covington & Burling memorandum. Here we see that
2 your and the industry's consultants created two groups, one called Indoor Air
3 International, or IAI; the other called Associates for Research in Indoor Air, or ARIA,
4 correct?

5 A: Yes.

6 A. I already have told you what little I know about ARIA. I know even less about Indoor Air
7 International or IAI because that group was created after I had ceased having any significant
8 involvement in ETS consulting activities in Europe.

9 **Q:** And both of these groups were not only created by the industry's consultants, but
10 run by them on behalf of the industry as well, correct?

11 A: Yes, that is correct.

12 A. That certainly was not true of ARIA, which had -- I believe -- non-tobacco as well as
13 tobacco clients. I also think a number of scientists worked with ARIA who were not consulting
14 with any tobacco client. I'm sorry to say that I can't answer your question so far as IAI is
15 concerned. I simply know too little about that entity to answer the question that you've asked.

16 **Q:** Please direct your attention to the documents marked U.S. Exhibits 22017, 87334,
17 25597, 85595, 85598, 22037, 77942, 85525, and 88793. These documents also relate to the
18 industry/Covington & Burling consultancy program in Europe that you participated in
19 during the late 1980s and early 1990s, correct?

20 A: Yes, they do.

21 A. As I told you during my deposition, I was not directly involved in ETS consulting
22 activities in Europe after 1988 -- after early 1988, as I recall. I was not involved at all during
23 the 1990s. As I have mentioned, I did attend the conference in 1988 at Imperial College in

1 London organized by Professor Roger Perry. The note that I wrote after the conference -- US
2 Exhibit 85595 -- gives you another illustration of an important series of points I made earlier
3 concerning the efforts that were being made by governmental, quasi-governmental and anti-
4 smoking groups to discourage free discussion of the science of ETS. Although I do not know
5 whether Professor Perry received any funding from a tobacco company or tobacco related entity
6 to assist him with the conference, a report to that effect apparently was published in The Times
7 of London. I spoke about the events that ensued in US Exhibit 85595 as follows:

8 “On Monday, June 13, an article (attached) appeared in the (London) Times which
9 reported that the WHO had ‘withdrawn’ from the Conference due to tobacco ‘industry
10 involvement’. (Dr. M.J. Suess of WHO, Denmark served on the Technical Review
11 Committee for the Conference. We learned that members of ASH had written letters to
12 Imperial College and had contacted University of London officials in an effort to get the
13 Conference cancelled.) Nevertheless, an observer from the WHO was in attendance and
14 the Conference proceeded as scheduled.”

15 I also perhaps should point out here that at least some of the documents that you’ve mentioned
16 do not appear to have anything to do with Europe while others -- that is, those dated after 1995
17 -- speak of events that post-date my involvement with ETS consultants anywhere.

18 **Q: And we see from U.S. Exhibits 24025, 75250, 75247, and 75367 that the**
19 **administration of the European consultancy program was transferred directly to Philip**
20 **Morris Worldwide Scientific Affairs (WSA) in approximately 1997 or 1998, correct?**

21 A: Yes.

22 A. I have no idea whether that is true or not.

1 **Q:** Please review the document marked 75125, a record of an INFOTAB Board of
2 Directors meeting held on April 8, 1986. Mr. Rupp, did you routinely attend INFOTAB
3 meetings?

4 A: Yes.

5 A. *No. I believe this to be the only INOTAB board meeting I ever attended..*

6 **Q:** Let's talk about some of your and the industry's efforts in the ETS consultant
7 program in more detail. The industry ETS consultant program resulted in the
8 establishment in Europe of two organizations called ARIA and IAI in the late 1980s and
9 early 1990s, correct?

10 A: That is correct.

11 A. *As I already have mentioned, and as I informed you during my deposition, I had almost*
12 *no involvement in ETS consulting activities in Europe after 1988.*

13 **Q:** Two documents we have already discussed refer to a group called the Association
14 for Research on Indoor Air, or ARIA. Do you recall this group?

15 A: Yes.

16 **Q:** Who set up this group?

17 A: Philip Morris.

18 A. *As I have mentioned, I believe that ARIA was formed before Philip Morris began to look*
19 *for ETS consultants in Europe and had a variety of non-tobacco clients. Philip Morris became a*
20 *client, or at least began to work with some ARIA scientists, in 1987 or so.*

21 **Q:** Please direct your attention to the document marked U.S. Exhibit 47525. This is a
22 memorandum written by BATCo's Chris Proctor titled "A Presentation by ARIA" and
23 dated October 31, 1988, correct?

1 A: Yes.

2 A. *That appears to be correct.*

3 **Q: And you know Mr. Proctor as a former BATCo scientist and Covington & Burling**
4 **analyst, correct?**

5 A: Yes.

6 **Q: You did not consider Mr. Proctor an “independent scientist,” did you?**

7 A: No, I did not.

8 **Q: In this document, he refers to ARIA as the result of “the Philip Morris initiative of**
9 **setting up a group of scientists in the UK that will comment on ETS issues. The principal**
10 **members of ARIA were Francis Roe, George Leslie, and Frank Lunau.” Do you agree with**
11 **Mr. Proctor’s description?**

12 A: Yes, I do.

13 A. *You have mischaracterized this document. I do not read this document as being*
14 *inconsistent with anything I have said.*

15 **Q: On the second page, Proctor drew a diagram to describe the structure of Philip**
16 **Morris initiatives, and how ARIA fit into that structure, based on a description by ARIA**
17 **coordinator George Leslie. Do you see that diagram?**

18 A: Yes, I do.

19 **Q: At the top of the diagram is “Industry (PM),” with your firm, Covington & Burling,**
20 **directly underneath. Then under Covington & Burling are a number of entities, including**
21 **CEHHT, the group also known as IAPAG we previously spoke of, and ARIA. Do you see**
22 **that?**

23 A: Yes, I do.

1 **Q: Would you agree with Mr. Proctor's structural diagram?**

2 A: Yes.

3 *A. Not quite. Scientists at CEHHT assisted with the organization of IAPAG. But CEHHT*
4 *and IAPAG always were separate organizations. CEHHT, like ARIA, had non-tobacco clients.*
5 *In the case of CEHHT, which I know better than ARIA, the non-tobacco clients predominated.*

6 **Q: Proctor writes in the paragraph directly under the diagram, "[T]he position of**
7 **Covington and Burling allows the members of each group to remain independent of the**
8 **industry, though all know that it is tobacco money that is funding the exercise." Would**
9 **you agree with Proctor's observations?**

10 A: Yes, I would.

11 **Q: Mr. Rupp, isn't it true that while ARIA members and other industry consultants**
12 **were being paid and managed by the industry and Covington & Burling, the industry**
13 **publicly referred to them as "independent"?**

14 A: Yes, that is true.

15 *A. They were independent. The conclusions they reached relating to ETS were theirs and*
16 *theirs alone. They had non-tobacco clients. Most were employed by leading universities, which*
17 *was their "full time" occupation. When they received funding from a tobacco company or a*
18 *tobacco entity to attend a meeting, make a presentation, undertake research or write a paper,*
19 *they were instructed to disclose the source of their funding -- and I'm satisfied that they nearly*
20 *always did so. But that did not lessen their independence. I remember at the OSHA hearings in*
21 *1994/95 being required by the hearing examiner to announce at the beginning of my questioning*
22 *of any witness that I was participating in the OSHA hearings -- and had been given the right to*
23 *ask questions -- on behalf of the 20 or so "independent scientists who had submitted statements*

1 to OSHA on OSHA's ETS/indoor air proceeding at the request and expense of The Tobacco
2 Institute." I believed that formulation, which I must have repeated 500 times during the course
3 of the hearings, to have been completely appropriate. The hearing examiner apparently thought
4 so, too -- as did, apparently, the OSHA staff because it was they, as I recall, who asked that the
5 statement be made.

6 **Q: And the ARIA document marked U.S. Exhibit 85550 illustrates how Mr. Proctor**
7 **eventually worked with ARIA, in this case in conjunction with a 1989 Hong Kong proposal,**
8 **correct?**

9 A: Yes.

10 A. A quibble, I know, but it's Dr. Proctor, stemming from the Ph.D he was awarded in
11 chemistry. Dr. Proctor did work on the 1989 Hong Kong proposal, as did Mr. Leslie, who was
12 one of the principals of ARIA.

13 **Q: And the Philip Morris-FTR document marked U.S. Exhibit 85557 is an example**
14 **how the activities of ARIA were reported to the corporate leadership in Europe and New**
15 **York?**

16 A: Yes.

17 A. This document relates to Europe and was prepared after my involvement there effectively
18 ended. I'm sorry to say that I cannot tell you much about the substance of this document.

19 **Q: The documents at U.S. Exhibits 85548, 20394, 23701, and 75236 are examples of**
20 **some of ARIA's billings sent to you at Covington & Burling for payment, correct?**

21 A: Yes.

22 A. This document relates to Europe and was prepared after my involvement there effectively
23 ended. I'm sorry to say that I cannot tell you much about the substance of this document.

1 **Q: And this was for work done on behalf of the cigarette manufacturers, correct?**

2 A: Yes.

3 *A. Again, I know nothing about the substance of this document. I don't believe I had seen it*
4 *before it showed up in the packet of documents you forwarded to me, and it relates to events I*
5 *know nothing or very little about.*

6 **Q: And am I correct to assume that Covington & Burling billed certain cigarette**
7 **manufacturers for what it paid ARIA?**

8 A: Yes.

9 *A. I simply do not know how billing by consultants associated with ARIA were handled for*
10 *European activities during the period about which you are asking.*

11 **Q: And in this way, there were no direct payments from the companies to the**
12 **consultants, right?**

13 A: Correct.

14 *A. This, I can assure you, is incorrect, not because I know anything about ARIA in Europe*
15 *post-1998 but for other reasons. In the United States, where I did work with ETS scientific*
16 *consultants until 1995, individual scientists tended to bill Covington & Burling or CEHHT for*
17 *their consulting services. If they billed CEHHT, rather than Covington & Burling, CEHHT*
18 *typically would pay them, assuming the people at CEHHT believed the bill to be in order, and*
19 *then rebilled Covington & Burling. Sometimes, I imagine, the people at CEHHT withheld*
20 *payment until they had received a corresponding check from Covington & Burling. Once we at*
21 *Covington & Burling had received notice, either directly from the scientist involved or from*
22 *CEHHT that a bill from a consulting scientist had been received, we asked for funds from our*
23 *client or clients to cover the bill. Sometimes there would have been only a single client.*

1 Sometimes there were multiple clients. We devised a system, in the United States and elsewhere,
2 to pay scientific consultants before we had recouped the money from our client or clients for
3 several reasons. First, the accounts department of companies like Philip Morris often do not pay
4 bills that they receive until 60 to 90 days have passed from their receipt of the bill. Part of the
5 delay appears to stem from simply logistical complications within the company -- making sure
6 that the bill has been reviewed by the right people, who may or may not be traveling when the
7 bill is received and may or may not review it immediately. I have suspected over the years that
8 Philip Morris, like most of our other clients, also have adopted internal policies to let some time
9 pass before paying bills -- so that they can take advantage, if you will, of the float period. I don't
10 mean to be critical of Philip Morris in making that observations. All of our clients appear to be
11 doing the same thing -- as, I imagine, do the clients of most other law firms, in the United States
12 and Europe. Well, that may be fine for a firm like Covington & Burling -- but it certainly is not
13 fine for an individual scientific consultant, who may need to cover an American Express bill for
14 a trip he or she had taken at our request to testify at a legislative hearing in California.
15 Scientific consultants expected and needed to be paid promptly for their time and out of pocket
16 expenses, and the systems we devised for payment were designed to accomplish that -- and that
17 alone. They certainly were not designed to avoid having a Tobacco Institute or Philip Morris
18 check being sent to the individual consultant. If we could have figured out a way to get our
19 clients to pay scientific consultants within a week or so of their receiving a bill from the
20 consultant, we would have opted for directly client(s)-to-consultant payment, at least if the entire
21 bill was to be paid by a single client. Second, particularly in the United States and Asia, several
22 different tobacco companies had agreed to cover the cost of various scientific consulting
23 activities in which we were involved -- and the identity of those clients, as well as their agreed

1 *percentage contributions, varied substantially from one project to the next and from one period*
2 *to the next. We never could figure out a way to transfer to the individual scientific consultants*
3 *the burden of keeping track of all of that. As a consequence, we shouldered that burden*
4 *ourselves. Frankly, I cannot conceive of a reason that we would have wanted to avoid direct*
5 *client(s)/consultant payments if we could have figured out how to do that without the running*
6 *headlong into the logistical problems I have mentioned.*

7 **Q: And the documents marked as U.S. Exhibits 23690*, 23692*, 22161, 23689, 23695,**
8 **23696, 23698, 23700, 23699, 75424 and 23709-23718 are examples of how Covington &**
9 **Burling billed Philip Morris Management Corporation and Philip Morris International for**
10 **the services of the industry ETS consultants, many of whom were ARIA members, correct?**

11 A: Yes.

12 **Q: And ARIA thereby purported to maintain its “independence” from the tobacco**
13 **industry that created, funded, and sustained it, correct?**

14 A: Yes.

15 A. *With respect, I regard your suggested response to be complete nonsense.*

16 **Q: And the industry used its ARIA members not only to make statements critical of**
17 **ETS studies but also to recruit additional ETS consultants for use by the industry, but free**
18 **of industry attribution, correct?**

19 A: Yes.

20 A. *Absolutely not.*

21 **Q: And we can see examples of this practice in the publications marked U.S. Exhibits**
22 **85577 and 85544, correct?**

23 A: Yes.

1 A. *The documents you've mentioned disprove the assertion you're making. Both of these*
2 *newspaper articles were written by reporters in Hong Kong following a press conference that*
3 *was called by The Tobacco Institute of Hong Kong -- a press conference that was held in the*
4 *Hong Kong Tobacco Institute offices. The press conference was opened by the then executive*
5 *director of the Hong Kong Tobacco Institute, who introduced Mr. Leslie and me to the*
6 *journalists who had agreed to attend and told the journalist that Mr. Leslie's expenses as well as*
7 *mine were being covered by the Hong Kong Tobacco Institute. I know whereof I speak because I*
8 *attended the press conference about which you're asking. It is simply ludicrous to suggest, as*
9 *you appear to be suggesting, that the journalists did not know that Mr. Leslie was consulting*
10 *with the Hong Kong Tobacco Institute and had been paid to do so.*

11 **Q: Looking at the third page of the document marked U.S. Exhibit 27900, a Covington**
12 **& Burling summary of its initial consultancy activities in Asia, we see the following:**
13 **"ARIA paid for Dr. He to attend the Manila conference. She does not know, however, the**
14 **ultimate source of these funds. . . We will have to handle Dr. He very carefully." Do you**
15 **see that?**

16 A: Yes.

17 **Q: This is an specific example of how ARIA could function and did function as a front**
18 **to hide "the ultimate source" to the funding, the tobacco companies, correct?**

19 A: Yes.

20 A. *Not so. As this document confirms, Dr. He was not being asked to serve as a consultant*
21 *to the tobacco industry, as you put it, or any individual tobacco company. In fact, I don't believe*
22 *Dr. He ever was asked to serve as a real consultant to any tobacco company or tobacco-related*
23 *entity -- although I do recall having met her subsequently on at least one, and perhaps two,*

1 occasions. Like all scientists in China, Dr. He always was on the lookout for funds from one
2 source or another to attend scientific meetings outside China. I recall on one occasion
3 subsequent to the one you've mentioned having agreed to cover her air fare to attend another
4 meeting outside China. On that occasion, she certainly did know that the funds were coming
5 from a tobacco company because I told her. Again, however, we never asked Dr. He to consider
6 engaging in consulting activities relating to ETS or any other issue. The reason is that none of
7 our clients appeared to have any interest in identifying or recruiting ETS consultants in China.

8 **Q: Please direct your attention to the document marked U.S. Exhibit 25337. This is a**
9 **fax from Covington & Burling to Philip Morris dated October 24, 1989, correct?**

10 A: Yes.

11 A. It appears to be. I don't believe that I sent this fax and am not sure that I've ever
12 previously seen a copy.

13 **Q: Does this document accurately record the activities of ARIA and another industry**
14 **ETS consultant group, EGIL, for the years 1988 and 1989?**

15 A: Yes, it does.

16 A. I have no idea. As I've said, my involvement with Europe ended as a practical matter in
17 early 1988. I did not follow activities there after that time. My secretary in Washington
18 sometimes assisted her counterparts in our London office in processing bills. But she never
19 showed the bills to me because I had no interest in them. By the beginning of 1988, a Covington
20 & Burling office had been opened in London and the lawyers there took responsibility for our
21 Europe related work -- for tobacco and non-tobacco clients -- after that time.

1 **Q: Now look at the document marked U.S. Exhibit 22863. Do you recall that the**
2 **organization Scientific Consultancy Services was used to bill for the work of industry ETS**
3 **consultants who also worked with ARIA?**

4 **A: Yes.**

5 *A. No, for the reasons I've mentioned -- which I also explained to you during my deposition.*

6 **Q: Mr. Rupp, we saw previously, looking at the Covington & Burling memorandum at**
7 **U.S. Exhibit 27901, that the industry ETS consultants created a group calling itself "Indoor**
8 **Air International," or IAI, correct?**

9 **A: Yes.**

10 *A. I have no idea.*

11 **Q: Now please look at the document marked U.S. Exhibit 23604. This is a Monthly**
12 **Report from Helmut Gaisch at Philip Morris Europe (FTR) dated October 31, 1989. On**
13 **page 9, we see a reference to the formation of IAI, correct?**

14 **A: Yes.**

15 **Q: And according to Mr. Gaisch's report, the ETS consultant coordinators of ARIA,**
16 **Frank Lunau, George Leslie, Francis Roe, and Max Weetman met on October 3, 1989, with**
17 **Covington & Burling attorneys Charles Lister and Jenny Green to discuss the proposed**
18 **statutes of IAI, correct?**

19 **A: Yes.**

20 *A. I don't mean to be impolite but you can read this document as well as I can. I have no*
21 *knowledge of the matters described in this document.*

22 **Q: The group also discussed how to present the formation of IAI to ARIA members at**
23 **the next meeting, correct?**

1 A: Yes.

2 A. *I have no idea.*

3 **Q: And Philip Morris even knew that ETS consultant Max Weetman would be the**
4 **“Journal Secretary” for the IAI publication that was planned, correct?**

5 A: Yes.

6 A. *Again, I have no idea.*

7 **Q: Mr. Rupp, was IAI intended as a professional organization to conceal the**
8 **connection between the consultants and the tobacco industry?**

9 A: Yes, that was one reason.

10 A. *I’m having great trouble understanding why you are asking me these questions in light of*
11 *my deposition. Although I am quite confident that the answer to your question is “no,” I*
12 *acknowledge that my confidence stems entirely from my knowledge of my colleagues in London.*

13 **Q: And in fact we see that in the July 1989 Monthly Report from Helmut Gaisch,**
14 **marked U.S. Exhibit 75243, where he states that IAI would “provide a scientific ‘home’” to**
15 **the ETS consultants “to make sure that independent scientists can identify with a**
16 **professional organisation and do not have to resort to giving vague explanations as to**
17 **whom they are associated with,” correct?**

18 A: Yes.

19 A. *You’re continuing to ask me about things I know nothing about, as should have been*
20 *apparent from my deposition. You’re putting these questions to the wrong person.*

21 **Q: But Mr. Rupp, these industry consultants were not “independent” of the industry,**
22 **were they?**

23 A: No, they were not.

1 A. *Again, I cannot respond to this question.*

2 **Q: Now look at the document marked U.S. Exhibit 85552. This is a report written by**
3 **BATCo's Dr. Ray E. Thornton, who was apparently invited to an October 1989 meeting of**
4 **ARIA in France where IAI was actually agreed upon by the membership of ARIA, correct?**

5 A: Yes.

6 A. *I have no idea.*

7 **Q: And the attendees and agenda for the meeting are contained in U.S. Exhibit 85549,**
8 **showing that Mr. Lister and Ms. Green from Covington & Burling attended, correct?**

9 A: Yes.

10 A. *That appears to be the case but I cannot say from personal knowledge whether it is true*
11 *or not.*

12 **Q: Dr. Thorton points out near the start of his report that "Philip Morris funds ARIA**
13 **through the following sequence: Philip Morris → Covington & Burling → George Leslie**
14 **(ARIA)," correct?**

15 A: Yes.

16 A. *That's what this document suggests.*

17 **Q: And in the last paragraph of the report, Dr. Thornton records that everyone at the**
18 **ARIA meeting except for himself were paid consultancy fees?**

19 A: Yes.

20 A. *That's what this document says.*

21 **Q: And do you see in the middle of the report where Dr. Thornton writes that the new**
22 **international organization would "also be funded by Philip Morris unless other sponsors**
23 **can be found"?**

1 A: Yes.

2 **Q: And you can confirm that IAI was in fact established with funding from Philip**

3 **Morris, correct?**

4 A: Yes.

5 A. No.

6 **Q: But made to appear independent of the tobacco industry, right?**

7 A: Correct.

8 A. *I have no idea but I strongly doubt your suggestion is correct.*

9 **Q: And now effectively Dr. Thornton's diagram could be extended to read**

10 **Philip Morris → Covington & Burling → George Leslie (ARIA) → IAI, correct?**

11 A: Yes.

12 A. *I would like to be helpful but I simply can't answer this question.*

13 **Q: And U.S. Exhibits 85571, 85554, and 85555 are examples of Covington & Burling**

14 **statements billing Philip Morris for work its attorneys performed on behalf of Philip**

15 **Morris related to IAI and various ETS consultants in 1990 and 1991, correct?**

16 A: Yes.

17 A. *I don't know. The text of this bill undoubtedly was prepared by my colleagues in London*

18 *and processed by my secretary in Washington. I had not seen this document until it arrived in*

19 *the documents that you forwarded to me.*

20 **Q: Please direct your attention to U.S. Exhibit 85559. This exhibit is titled "Air Mail,**

21 **The Inaugural Newsletter of IAI, Indoor Air International," dated April 1990, correct?**

22 A: Yes.

1 **Q:** And we see on the first page a description of the organization, on page 4 a profile of
2 **IAI president Frank Lunau, and on page 8 a list of IAI officers, correct?**

3 **A:** Yes.

4 **Q:** And even though these names are instantly recognizable to you as industry ETS
5 consultants, and even though IAI was set up with Covington & Burling acting on behalf of
6 Philip Morris, and even though Philip Morris funded its creation, there is no indication in
7 this newsletter that IAI is connected to the tobacco industry, is there?

8 **A:** No, there is not.

9 *A. I have no idea where the funding for IAI came from or what disclosures were made, and*
10 *to whom, about such funding.*

11 **Q:** And that was no accident, was it?

12 **A:** No, it wasn't.

13 *A. I cannot answer this questions, as should have been apparent from my deposition.*

14 **Q:** The same can be said about the document marked U.S. Exhibit 85560, an IAI
15 publication titled "Promoting Indoor Air Quality," correct?

16 **A:** Yes.

17 *A. This document suggests that IAI was a learned society having members who were asked*
18 *to pay dues, on a graduated scale, to cover the society's expenses.*

19 **Q:** And about the February 1994 IAI Newsletter marked as U.S. Exhibit 23680,
20 correct?

21 **A:** Correct.

22 *A. Again, I cannot help you with these documents.*

1 **Q: And about U.S. Exhibit 65083, the 2003 webpage of the International Society of the**
2 **Built Environment (ISBE), the successor to IAI, correct?**

3 A: Yes.

4 A. *I cannot help you with this document either. You're asking the wrong person.*

5 **Q: And the publication marked U.S. Exhibit 85561, titled Indoor + Built Environment,**
6 **the journal of IAI's successor organization ISBE, correct?**

7 A: Yes.

8 A. *I have no idea.*

9 **Q: And IAI, similar to ARIA, was intended to provide industry-favorable views and**
10 **publications, correct?**

11 A: Yes.

12 A. *I cannot answer your question, for the reasons I already have described at length both*
13 *here and during my deposition.*

14 **Q: And that's exactly what it did, right?**

15 A: Yes, it did.

16 A. *Please see above.*

17 **Q: Mr. Rupp, one of the important aspects of IAI was that it had to be perceived as**
18 **independent of the industry that created it, correct?**

19 A: Yes.

20 A. *Please see above.*

21 **Q: And that is why, for example, Helmut Gaisch reports to Geoff Bible in U.S. Exhibit**
22 **23708* that most IAI and ARIA consultants "act independently and are seen to be**
23 **independent of us," correct?**

1 A: Yes.

2 A. *I do not know. I have never seen this document before and have no knowledge of the*
3 *matters it discusses.*

4 **Q: And your and the industry's efforts in recruiting and training scientists to agree**
5 **with the industry position on ETS eventually expanded to both Latin America and Asia,**
6 **correct?**

7 A: Yes, that is correct.

8 A. *I did spend time working with scientific consultants in Latin America and Asia.*

9 **Q: As detailed in U.S. Exhibit 85527, a July 11, 1989 memorandum from Andrew**
10 **Whist to Geoffrey Bible, correct?**

11 A: Yes.

12 A. *Of the matters covered in this document, I have knowledge of those relating to the Asia*
13 *Pacific Region, Latin America and Canada.*

14 **Q: And can you verify that the documents marked 22037, 22898, and 23804 also relate**
15 **to the activities of the industry's ETS consultants?**

16 A: Yes.

17 A. *On US Exhibit 22037, please see response immediately above. I don't recall having seen*
18 *previously US Exhibit 22898. I have no knowledge about how it was prepared or who, if anyone,*
19 *provided funding for it. I also have no knowledge of US Exhibit 23804. Neither, so far as I*
20 *recall, have I seen this document previously.*

21 **Q: Please direct your attention to the document marked U.S. Exhibit 22766. This is a**
22 **document titled "Latin American ETS Project: Strategy and Budget Proposal for 1994."**

1 **Would you agree that this document accurately details the history and magnitude of the**
2 **ETS program in that region?**

3 A: Yes, it does.

4 A. *I had no involvement in Latin America at the time this document was written and have*
5 *almost no knowledge of the matters discussed in this document.*

6 **Q: And in fact, the Latin American ETS Project was initiated in 1991 by British**
7 **American Tobacco and Philip Morris International, with a purpose identical to that of the**
8 **consultancy program that you and Philip Morris had already established in Europe,**
9 **correct?**

10 A: Yes.

11 A. *I was involved in the identification and work with ETS consultants in Latin America for a*
12 *couple of years. I don't recall specifically the exact years but documents to come may refresh*
13 *my recollection in that connection. BAT and Philip Morris did provide the funding for our initial*
14 *work with consultants in Latin America. By the time of US Exhibit 22766, I had no involvement*
15 *with Latin America.*

16 **Q: Covington & Burling administered this project as well, correct?**

17 A: Yes, we did.

18 **Q: The memorandum lists a number of industry consultants in several Latin American**
19 **countries, whose tasks included becoming recognized as ETS experts, writing articles in**
20 **journals, appearing on television, planning an ETS symposium, publishing the authoring**
21 **letters to the editor, and other tasks, correct?**

22 A: Yes, it does.

1 **Q:** And the documents marked U.S. Exhibits 22853 and 28138 are other Covington &
2 **Burling documents, dated November 15 and November 23, 1992, describing the activities of**
3 **the Latin American ETS Consultancy Program, correct?**

4 **A:** Yes, they are.

5 *A. I wrote both of these documents. They are accurate.*

6 **Q:** And U.S. Exhibits 22853 and 28138 were written by you, correct?

7 **A:** Yes.

8 **Q:** And in 1989 the ETS Consultancy Program was taken to Asia, where you and
9 **several European ETS industry consultants successfully located and paid local scientists to**
10 **promote the industry position on ETS, correct?**

11 **A:** Yes.

12 *A. They did not promote "the industry position on ETS". To the extent they spoke publicly*
13 *at all, they expressed their own views. If they received funding to do so, they were under clear*
14 *instructions to disclose that in the course of their presentation.*

15 **Q:** And this effort in Asia was financially supported by both Philip Morris and British
16 **American Tobacco, correct?**

17 **A:** Yes.

18 *A. At various times, RJRI and JTI also provided funding.*

19 **Q:** Please take a few minutes to review the documents marked U.S. Exhibits 27900,
20 **22857, 20550, 20549, 85568, and 23007. Do these documents describe the development of**
21 **the industry Asia ETS Consultancy Program?**

22 **A:** Yes, they do.

1 **Q: Was the Asia ETS Consultancy Program modeled after what Covington & Burling,**
2 **Philip Morris, and Reynolds were able to accomplish in Europe?**

3 A: Yes, it was.

4 A. *For the reasons I've already explained, I really can't compare the efforts in Asia with*
5 *those that occurred in Europe. The purpose of our work with ETS consultants in the Asia Region*
6 *are summarized accurately in US Exhibit 23007, as follows:*

7 *"One key objective of the [Asia] project has been to recruit and educate scientists who*
8 *then would be available to testify on ETS in legislative, regulatory or litigation*
9 *proceedings in Asia or elsewhere. This objective was based on recognition of the fact*
10 *that there were essentially no local scientists with a background in ETS issues and that*
11 *experience elsewhere has shown that it is essential to have credible, local scientists*
12 *prepared to speak out when ETS becomes an issue, which often occurs on short notice.*
13 *We have made considerable progress toward this goal, and now have a group of*
14 *scientists who could provide testimony."*

15 *I wrote the foregoing paragraph in February 1990. What I did not know at the time, but learned*
16 *shortly thereafter, is that staff at the US Occupational Safety and Health Administration in the*
17 *United States were doing precisely the same kinds of things, for the same purpose, as they*
18 *prepared for hearings on the ETS/indoor air quality rulemaking on which they already had*
19 *begun to work.*

20 **Q: In fact, you utilized George Leslie from England to assist in the selection, recruiting,**
21 **and training of the Asian scientists, correct?**

22 A: Yes.

1 A. *Training is really the wrong word, although I recognize that I've used it myself*
2 *occasionally in documents I have written relating to ETS consultants. What we found in Asia is*
3 *that, outside of Japan, Taiwan and Hong Kong, very few scientists in Asia had spent time looking*
4 *at either ETS or indoor air issues. We also found that scientists there did not possess, for the*
5 *most part, the level of scientific training at university that their counterparts in Europe and the*
6 *United States generally received. We relied upon George Leslie as well as others to assist us in*
7 *acquainting scientific consultants in Asia with the relevant terms and literature. Even the terms*
8 *sometimes were a bit difficult for some of them to grasp because of language issues.*

9 **Q: And Mr. Leslie was a founder of ARIA, founder of IAI, and one of your original**
10 **European consultants, correct?**

11 A: Yes.

12 A. *I can't say from my own personal knowledge that Leslie was a founder of IAI, although*
13 *the documents you have shown to me suggest that he was.*

14 **Q: In fact, Mr. Rupp, would you agree that during this timeframe Mr. Leslie was**
15 **essentially working full time performing a variety of consultancy tasks for the cigarette**
16 **industry and Covington & Burling?**

17 A: Yes.

18 A. *I very much doubt that but don't believe I ever have had a basis for knowing.*

19 **Q: In Asia, Covington & Burling and Mr. Leslie had to train scientists to become**
20 **consultants, scientists who had very little if any exposure to ETS issues prior to meeting**
21 **them, correct?**

22 A: Yes.

23 A. *Please see the answer given above.*

1 **Q: And you describe in the document at U.S. Exhibit 25344 some of Mr. Leslie's**
2 **assignments and activities with respect to the Asia ETS Consultancy Program, correct?**

3 A: Yes.

4 **Q: Please direct your attention to the document marked U.S. Exhibit 20550. What is**
5 **this document?**

6 A: This is a letter I wrote to John Dollison, the Area Director of Philip Morris Asia, Inc.,
7 dated May 25, 1989.

8 **Q: And in this lengthy letter, you provide Mr. Dollison an update of the Asia ETS**
9 **Consultancy Program that had begun earlier that year, correct?**

10 A: Yes.

11 **Q: And you attached the two Covington & Burling memoranda marked as U.S.**
12 **Exhibits 27900 and 22857 to your letter to Mr. Dollison, right?**

13 A: Right.

14 **Q: In those two memoranda, we see the names and countries of a number of the**
15 **industry ETS consultant recruits, we see how these persons were approached, how each**
16 **was given what you call an "ETS packet" to review, and then how each was to be trained at**
17 **a June 1989 conference, correct?**

18 A: Yes, that was the general approach.

19 *A. The words you're using suggest either a sinister purpose or sinister way of proceeding.*
20 *Neither suggestion would be accurate. We proceeded to identify and work with scientific*
21 *consultants in Asia for the purpose described in US Exhibit 23007 and in the manner, so far as*
22 *helping the consultants become familiar with the pertinent literature, that I already have*
23 *described.*

1 **Q: And this was done to gauge their reaction, and, if the scientists appeared promising,**
2 **to train them on the ETS issues and the industry's position on ETS, correct?**

3 A: Yes.

4 *A. Our first meeting with prospective consultants was a sort of appraisal meeting. We*
5 *wanted to know, in particular, whether they had relevant expertise and were willing and able to*
6 *consult. In Taiwan, we found that almost all scientists were government civil servants and that*
7 *the Taiwanese Government prohibited them from consulting with private entities.*

8 **Q: From a reading of these documents, it appears that the industry and Covington &**
9 **Burling had no one already in Asia who agreed with the industry's position on ETS that**
10 **secondhand smoke had not been proven to cause adverse health effects, and that ETS was**
11 **only a very minor indoor air pollutant, correct?**

12 A: Yes.

13 *A. Not so, from any number of perspectives. We were able to locate two scientists in Asia,*
14 *Dr. Kim from Korea and Dr. Laio from Hong Kong, who had done a fair amount of research on*
15 *indoor air quality issues. It is true that most of the others did not have a comparable level of*
16 *knowledge when we met them but that says more about Asia at the time than it does about the*
17 *scientists we met. Indoor air simply had not come on the radar screen yet in most Asian*
18 *countries as of the late 1980s. The priority issues there, for most governments as well as most*
19 *scientists educated in the relevant disciplines, was outdoor pollution, primarily from vehicles*
20 *and industrial sources. To the extent that anyone had begun to focus on indoor air quality, they*
21 *had tended to focus on the use of things like unvented kerosene heaters and unvented indoor*
22 *cooking devices, many of which used coal and animal wastes.*

1 **Q: So Covington & Burling had to essentially “create” these people in a region where**
2 **there were none, correct?**

3 A: Yes.

4 A. *This question, if you’ll permit an analogy, seems based on the notion that we were*
5 *operating as Henry Higgins in My Fair Lady. We didn’t “create” anyone in Asia. Many of the*
6 *scientists with whom we began to work in Asia had studied at universities in the United States or*
7 *Europe, generally as graduate students, and we tended to favor scientists with that kind of*
8 *background. We did so in part because we believed that, other things being equal, Asian*
9 *scientist who had completed their graduate training at one of the leading universities in the*
10 *United States or Europe would have a more solid grounding in the pertinent scientific disciplines*
11 *than those who had not. In addition, the US educated Asian scientists tended to speak much*
12 *better English than Asian scientists who had never left their own country. That was important*
13 *because most of the literature on ETS/indoor air issues at the time was in English -- and*
14 *translating that literature for them would have been an expensive nightmare.*

15 **Q: And a large part of that task was that Covington & Burling had to educate the**
16 **consultants on ETS and the industry’s position, correct?**

17 A: Yes.

18 A. *We did not educate the scientists with whom we worked in Asia on “the industry’s*
19 *position” with respect to ETS. We provided sufficient funding to permit them to work through*
20 *the pertinent literature themselves, we organized meetings at which they could discuss such*
21 *literature among themselves, and then we set up a system to ensure that they would receive*
22 *promptly any new literature on ETS/indoor air that appeared in any of the international peer*
23 *reviewed scientific journals -- as well as any pertinent governmental reports.*

1 **Q:** And that education was be in country, through other industry consultants, as well as
2 here in Washington using your Tobacco Institute IAPAG/CEHHT personnel we spoke of
3 earlier, correct?

4 **A:** Correct.

5 *A. I don't recall that anyone affiliated with IAPAG or CEHHT made any presentations to*
6 *the scientists with whom we ultimately decided to consult in Asia.*

7 **Q:** And the scientists were compensated for the time it took them to become educated
8 with the industry position on ETS, correct?

9 **A:** Yes.

10 *A. They were not paid a cent "to become educated with the industry position on ETS."*
11 *Again, I simply don't know what you're talking about when you ask a question of that sort. They*
12 *were paid their usual hourly or daily consulting rate to read the available literature and attend*
13 *meetings. We did not pay anyone a retainer. At the end of the day, they reached their own*
14 *scientific conclusions about ETS and indoor air quality.*

15 **Q:** You write in your letter to Mr. Dollison: "[W]e have invited the scientists whom we
16 have recruited to a training session in Bangkok on June 22 and 23. The assignment we
17 have given the scientists in anticipation of that meeting is to read, and to become
18 thoroughly familiar with, all of the ETS publications within their fields of expertise. We
19 have provided packets of pertinent materials to each of the scientists, and have stayed in
20 touch with them to make sure they are making progress. Our goal is to leave the meeting
21 on June 22 and 23 with a core group of scientists who are fully trained on the relevant
22 issues." Do you see that?

23 **A:** Yes.

1 A. *I'm sorry in retrospect that I used the word "training" in the Dollison letter. If read*
2 *fairly, however, I believe that the paragraph from which you have read accurately reflects how*
3 *we proceeded. We made funding available to scientists in Asia to read the pertinent literature --*
4 *all of the pertinent literature -- and to reach whatever conclusion concerning it they deemed to*
5 *be appropriate. Any suggestion to the contrary, of the sort you appear to be making, is unfair*
6 *and offensive to me.*

7 **Q: And according to pages 11 and 12 of the first enclosure to your letter, marked U.S.**
8 **Exhibit 22857, the June 22 and 23 meeting of the consultant recruits was to be run by**
9 **three of your main UK consultants, George Leslie, Francis Roe, and Roger Perry, who**
10 **would conduct the training and discussion, correct?**

11 A: Yes.

12 A. *In fact, the bulk of the presentation time at meetings of the scientists with whom we*
13 *worked in Asia was consumed by presentations by the Asian consultants themselves. The reason*
14 *we encouraged them to review the pertinent literature was to facilitate their doing that.*

15 **Q: Did that meeting actually happen?**

16 A: Yes, it did.

17 **Q: And on page 12, the writer, in this case Covington & Burling lawyer David Billings,**
18 **wrote, "Clearly, we do not want any surprises at the meeting. By reviewing in advance the**
19 **conclusions of all the consultants, we should minimize that possibility." Mr. Rupp from**
20 **your knowledge and personal participation in the industry consultancy program, is it clear**
21 **to you that by "surprises," Mr. Billings is referring to the possibility that one of the recruits**
22 **might stand up at the meeting and state that he or she disagrees with the industry's**
23 **position on ETS?**

1 A: Yes.

2 A. *I did not write the memorandum to which you have referred so cannot say for sure what*
3 *Mr. Billings meant in using the word you've picked out of the memorandum. For me, the*
4 *unpleasant surprise to be avoided would have been to find that we had gotten fairly far down the*
5 *road with a scientist in Asia who simply couldn't come to grips with the basic terms or concepts*
6 *because of language or other problems and thus would be of no value to us.*

7 **Q: So you and your firm, acting on behalf of the industry, went to three countries in**
8 **Asia and, in a matter of the months from February to June, created a team of scientists**
9 **trained and willing to support the industry position on ETS, correct?**

10 A: Yes.

11 A. *That is incorrect, as I would hope you would have concluded for yourself by now.*

12 **Q: And, as you tell Mr. Dollison in your letter, you expected them to "make a real**
13 **contribution" by "participating on our behalf at scientific meetings, joining industry people**
14 **at briefings of government officials and so forth." So clearly, Mr. Rupp, these ETS**
15 **consultants, like their industry-paid brethren in Europe, were acting on behalf of the**
16 **cigarette companies, correct?**

17 A: Yes.

18 A. *As I explained in US Exhibit 23007, our hope was to be able to identify scientists in Asia*
19 *-- fully conversant with the relevant science -- who would be able and willing "to testify on ETS*
20 *in legislative, regulatory or litigation proceedings in Asia or elsewhere." Our expectation was*
21 *that in at least some of the foregoing environments, perhaps most, they would be accompanied*
22 *by one or more representatives of the industry. In a court case, that would have been a lawyer.*
23 *In a legislative or regulatory proceeding, it may have been a lawyer or someone else. In all of*

1 *the foregoing situations, however, there would have been no doubt about who had provided*
2 *funding for their appearance -- which goes to another point that has seemed to interest you,*
3 *particularly during my deposition. In any event, and regardless of the environment, our*
4 *commitment to the scientists with whom we were working was that we would never ask them to*
5 *cover a topic or set of topics with respect to which they lacked competency and would never*
6 *suggest that they say something that they did not personally believe -- believe because they had*
7 *looked at all of the pertinent literature themselves and been able to come to their own*
8 *conclusions.*

9 **Q: And they were by no means independent, were they?**

10 A: No, they were not.

11 A. *They certainly were.*

12 **Q: Please turn to page 4 of your letter to Mr. Dollison. Do you recall, consistent with**
13 **what you wrote here, that you were carrying out the Asia ETS Consultancy Program on**
14 **behalf of Philip Morris, British American Tobacco, Brown & Williamson, and Reynolds?**

15 A: Yes, these were the companies who participated in the project.

16 A. *JTI also contributed funding at one point.*

17 **Q: Now please look at the document marked U.S. Exhibit 20549. This is a Covington &**
18 **Burling memorandum dated September 27, 1989, and titled "Asia ETS Project : Status**
19 **Report," correct?**

20 A: Yes.

21 **Q: And this Status Report was written by you and fellow Covington & Burling attorney**
22 **Mr. Billings for the participating companies, correct?**

23 A: Yes.

1 **Q:** Can you identify the document marked U.S. Exhibit 23007 as another Covington &
2 Burling “Status Report” on the Asia ETS Consultancy Program, this time dated February
3 14, 1990?

4 A: Yes.

5 **Q:** And I see that your and Mr. Billings’ names appear on the last page as the authors
6 of this document as well, correct?

7 A: Yes.

8 **Q:** And the document marked U.S. Exhibit 28168, titled “Asia ETS Consultant Project
9 Proposed 1990 Budget” was attached to the Status Report marked U.S. Exhibit 23007 and
10 provided to the contributing companies by Covington & Burling, correct?

11 A: Yes.

12 *A. Yes, although events overtook the February 1990 budget to which you have referred to*
13 *some extent.*

14 **Q:** Please take a look at the document marked U.S. Exhibit 21816. This is an April 15,
15 1991 e-mail message from Dr. Pages, whom we have already mentioned, to Steve Parrish at
16 Philip Morris Management Corporation. Do you know both of these men?

17 A: Yes, I do.

18 *A. That is not the document that I have as US Exhibit 21816. I do know Steve Parrish,*
19 *however, and I did know Dr. Robert Pages. Dr. Pages is now deceased.*

20 **Q:** In this e-mail, Dr. Pages discusses a research proposal from Covington & Burling’s
21 Chris Proctor to CIAR. Dr. Pages states that if the project is funded and approved, “Chris
22 Proctor would be the ‘behind the scenes’ study director.” Do you see that?

23 A: Yes.

1 A. No.

2 **Q: Mr. Rupp, was it common that Covington & Burling personnel would serve as**
3 **‘behind the scenes’ study directors for ETS projects approved by CIAR or funded by the**
4 **companies?**

5 A: Perhaps, depending on the project.

6 A. No.

7 **Q: Dr. Pages also writes the following with respect to how the project should be**
8 **funded: “Three concerns: 1) This is NOT a project that should be funded by CIAR,**
9 **although there MAY be (I’m not convinced yet) a reason to say it was sponsored by CIAR**
10 **so as to “hide” industry involvement (as was done in Rupp’s Asia Project). 2) Proctor (and**
11 **his fee) may be necessary to help get this done – at least he has ‘hands on’ experience with a**
12 **similar study done in the UK.” Do you see that?**

13 A: Yes.

14 A. *No. I do believe that I know, however, the research project to which you are referring.*
15 *The project, if I have the correct one, did receive funding but not from CIAR.*

16 **Q: In your experience with CIAR, was that organization ever used to “hide” industry**
17 **involvement in scientific research and other ETS-related projects?**

18 A: Yes.

19 A. *Absolutely not. In fact, more than 3000 scientists per year received mailings from CIAR*
20 *listing the companies providing funding to CIAR. Using CIAR to “hide” the fact of tobacco*
21 *industry funding would have been like parking a truck behind a pea and hoping that the truck*
22 *would not be noticed.*

1 **Q: Mr. Rupp, one element of the consultancy program in the United States, Europe,**
2 **and Asia was the organizing of ETS conferences and symposia where your consultants**
3 **would not only meet, but would generate and publish conclusions that supported the**
4 **industry's position on ETS, correct?**

5 **A: Yes.**

6 *A. No, one element of the consultancy work in Asia was to encourage scientists to attend*
7 *scientific meeting and participate in the discussions occurring there. On such occasion, we*
8 *typically paid travel and lodging costs. We tended not to cover the time spent by the scientist.*

9 **Q: I would like to talk about several of those tobacco industry conferences and**
10 **symposia. First, your September 29, 1989 Status Report on the Asia program, U.S. Exhibit**
11 **20549, addresses at the outset a planned "ETS Symposium at McGill University," correct?**

12 **A: Yes.**

13 **Q: And you state under that heading: "On November 3 and 4, 1989, approximately 60**
14 **of our consultant scientists from the United States, Canada, Asia, and Western Europe will**
15 **convene for a private symposium devoted to ETS and risk assessment. The purpose of the**
16 **symposium is to produce an authoritative monograph that will serve to neutralize two**
17 **reports that are scheduled to be released near the end of the year – an ETS risk assessment**
18 **that is being prepared by the U.S. Environmental Protection Agency and a detailed**
19 **assessment of ETS health effects that is being prepared in Canada under Professor**
20 **Spitzer's supervision." Do you see that?**

21 **A: Yes.**

22 **Q: So you knew, long before the symposium even got underway at McGill, that the**
23 **published symposium results would support the industry's position on ETS, and could**

1 **therefore be used to “neutralize” the expected adverse findings of the EPA and Canadian**
2 **group, correct?**

3 A: Yes.

4 A. *I certainly did know what the scientists with whom we had been working were likely to*
5 *say at the McGill symposium, at least in broad outline. What they actually said, however, was*
6 *up to them. In my experience, you simply don’t tell university affiliated professors what to say or*
7 *not to say. If you do, your relationship with them is likely to be a rather short one. At the same*
8 *time, I did have a pretty good idea about what the EPA report on ETS would say. There were*
9 *several reasons for that. One is that I had met with EPA officials to discuss the report. Second,*
10 *even before beginning that report, EPA had released a couple of page document, written by*
11 *James Repace, entitled “ETS in a Nutshell” or something of the sort. The latter document*
12 *purported to stake out a position for EPA on the science of ETS. I thought that rather odd since*
13 *no one at EPA had to that point taken a close look at the pertinent science. They were*
14 *purporting to do so as part of the report writing process that you’ve mentioned. It seemed to me,*
15 *in short, that EPA had gotten the proverbial cart before the horse -- and I said so in my meetings*
16 *with EPA officials. I also was unhappy, for my then tobacco clients, that the EPA “Nutshell”*
17 *document had been written by James Repace, who was serving at that time as the president of*
18 *the Prince George’s County chapter of Group Against Smokers’ Pollution. Mr. Repace also was*
19 *a long-time anti-tobacco activist, which he was of course entitled to be. I just thought it*
20 *inappropriate that a federal agency like EPA would permit Mr. Repace to draft the Nutshell*
21 *document given his background. I also was a bit troubled that Mr. Repace did not have more*
22 *than a bachelor’s degree in science at that time, and that degree was in physics, as I recall -- not*
23 *a discipline having any great relevance to the disciplines that were required for a competent*

1 *evaluation of the science of ETS. The EPA officials with whom I met ignored my protestations,*
2 *as they also were entitled to do -- as did the staff of the US Occupational Safety and Health*
3 *Administration when they asked to have Mr. Repace detailed to OSHA to assist with the*
4 *ETS/indoor air proceeding on which they were then working. At my deposition, you asked what*
5 *reason the EPA officials had given for not excluding Mr. Repace from further work on ETS on*
6 *behalf of the agency in light of his long history as an anti-smoking activist. My answer on that*
7 *occasion was that I recalled their explanation as having something to do with Mr. Repace's*
8 *position in the EPA employee union. That may or may not have been true. In fact, I have*
9 *thought about that question a good deal since my deposition and now recall precisely what*
10 *Donald Barnes of EPA told me at the time. It was that Mr. Repace was then a named plaintiff in*
11 *a case filed by a group of EPA employees complaining about the air quality at Waterside Mall,*
12 *the office building occupied at the time by EPA in Washington. His concern was that any action*
13 *on his part to exclude Mr. Repace from further efforts with respect to ETS on behalf of EPA*
14 *would be misconstrued as a sanction for Mr. Repace's having sued EPA on indoor air quality*
15 *issues.*

16 **Q: You knew what the symposium results would be because only ETS consultants paid**
17 **by the tobacco industry, many of them identified, recruited and trained by you, would take**
18 **part in the "private symposium," correct?**

19 **A: Yes.**

20 *A. I've already answered this question. The answer you've proposed is incorrect for all of*
21 *the reasons I already have given. In addition, I should point out that a number of the scientists*
22 *who attended the McGill symposium had not consulted with any tobacco company or tobacco*
23 *related entity, so far as I am aware.*

1 **Q: In fact, no dissenters were invited, correct?**

2 A: Correct.

3 A. *Yes, they were. But I will say at the same time that when we made a special effort a few*
4 *years earlier to invite people to the Georgetown seminar known to believe that ETS posed a*
5 *health risk to non-smokers, people in the US Office on Smoking and Health went essentially*
6 *ballistic. As soon as they heard of the symposium, they began -- I was told at the time -- to*
7 *pressure the "ETS dissenters," to use your phrase, to withdraw -- and many did, causing the*
8 *organizers to cancel the symposium.*

9 **Q: And that is what you meant what you said that the McGill symposium would be**
10 **"private" – invitation only, right?**

11 A: Yes.

12 A. *It was private in the sense that it was by invitation only. There was no reason, despite*
13 *McGill, that the US Office on Smoking and Health could not have convened its own symposium*
14 *on ETS and issued its own report. Indeed, that precisely is what happened with the 1986*
15 *Surgeon General's report on ETS to which you have referred. Participation in the drafting of*
16 *that report also was by invitation only -- and, unlike the McGill monograph, the 1986 Surgeon*
17 *General's report on ETS bore the imprimatur of the US Government.*

18 **Q: And we see on page 4 of the September 1989 Status Report that there was a "McGill**
19 **budget" out of which the Asia ETS Consultants would be paid to attend the symposium,**
20 **correct?**

21 A: Yes.

22 A. *Yes, they were paid for their travel and lodging expenses, as I recall, not for their time.*

1 **Q:** Please look at the document marked U.S. Exhibit 85597. This TI document is titled
2 “TI ETS/IAQ Consultant Activity, 1988-1990,” correct?

3 A: Yes.

4 **Q:** This document contains the names and activities of the TI ETS consultants in the
5 United States, correct?

6 A: Yes.

7 **Q:** And we see in looking through the document that most of the consultants were sent
8 to McGill to participate in the industry symposium, correct?

9 A: Yes, they were.

10 A. *They weren't “sent,” as you put it. If they wanted to go, we made funding for their travel*
11 *and lodging expenses available so that they could go.*

12 **Q:** Mr Rupp, your tobacco clients knew of and approved the planning and execution of
13 the McGill Symposium, correct?

14 A: Yes, they did.

15 A. *The Tobacco Institute and Philip Morris both provided funding for the McGill*
16 *symposium. The relevant people at both certainly knew of the McGill symposium in advance. I*
17 *don't know whether any of the other tobacco companies knew in advance of the McGill*
18 *symposium.*

19 **Q:** Please review the document marked U.S. Exhibit 22932. This is an internal
20 memorandum from Andrew Whist at Philip Morris International to Bill Murray at Philip
21 Morris Companies dated August 8, 1989, correct?

22 A: Yes.

23 A. *It appears to be.*

1 **Q:** And Mr. Whist echoes many of your statements expressed in your Asia Status
2 **Report, correct?**

3 A: Yes, he does.

4 **Q:** For example, he informs Mr. Murray that the McGill ETS symposium will be
5 “closed and private until the release, shortly after the symposium, of a monograph
6 summarizing the symposium,” correct?

7 A: Yes.

8 **Q:** And he states, as you did, that the goal of the symposium was to generate a
9 document to “neutralize” the upcoming EPA risk assessment and the Canadian assessment
10 at the Rockefeller University by Dr. Spitzer. He adds, “The EPA and Spitzer reports
11 would cause substantial damage unless they are somehow countered.” Did you agree with
12 that opinion?

13 A: Yes.

14 A. *As I’ve said, we had substantial reason to believe, and believe correctly as it turned out,*
15 *that neither the EPA ETS risk assessment nor the Switzer report would contain a balanced*
16 *assessment of the pertinent science. Our hope was that the McGill monograph would do so, thus*
17 *permitting scientists not involved in any of the foregoing to read all three and make up their own*
18 *mind. I must emphasize again, moreover, that the McGill monograph refers specifically to the*
19 *fact that funding for McGill was provided by tobacco companies.*

20 **Q:** Please review the documents marked U.S. Exhibits 24746 and 30103. Were you a
21 member of another TI committee in 1990 called the “ETS Coordinating Committee?”

22 A: Yes, I was.

1 **Q:** The second page of U.S. Exhibit 24746 provides a roster of the TI ETS Coordinating
2 Committee, correct?

3 A: Yes.

4 **Q:** And according to U.S. Exhibit 30103, the typed notes of Reynolds' counsel Mary
5 Ward, you briefed the ETS Coordinating Committee on the upcoming McGill symposium
6 at a meeting on September 15, 1989, correct?

7 A: Yes, I did.

8 **Q:** Ms. Ward recorded that your connection to McGill for the symposium was Don
9 Ecobichon, who had worked with you and the Canadian industry before. Is that true?

10 A: Yes.

11 **Q:** Please direct your attention back to U.S. Exhibit 23007. This is the February 14,
12 1990 Asia ETS Consultancy Program Status Report you identified earlier. At pages 9 and
13 10, you and Mr. Billings describe what happened at McGill in November 1989. Do you see
14 that?

15 A: Yes.

16 **Q:** You wrote: "In early November 1989, approximately 80 of our consulting scientists
17 from more than 20 countries participated in a major international ETS symposium that
18 was hosted by McGill University in Montreal. The proceedings of the symposium have
19 been published by Lexington Books and are available for distribution." Is that description
20 accurate?

21 A: Yes, it is.

22 A: *I haven't had time to do the counting that would be required to verify the number you've*
23 *mentioned but it seems to me to be at least close to being accurate.*

1 **Q: And in your February 14, 1990 Asia Status Report, you write, “We expect to have**
2 **within the next three weeks a reasonably comprehensive McGill publication distribution**
3 **plan for review by our supporting companies.” Do you generally recall this plan?**

4 A: Yes.

5 *A. No, but that doesn't mean that there wasn't one.*

6 **Q: Who from the tobacco industry, either directly or indirectly, paid for the McGill**
7 **ETS Symposium?**

8 A: The Tobacco Institute.

9 *A. Plus Philip Morris, as I recall. I don't think any other tobacco company contributed but*
10 *you're asking me about a detail from so long ago that I can't be sure about that.*

11 **Q: Please review the document marked 22731. What is this document?**

12 A: This is a January 19, 1990 letter from Covington & Burling's Mike Buckley to the
13 Tobacco Institute enclosing a list of expenses associated with the McGill ETS Symposium.

14 **Q: Paging through the list of expenses, you recognize the names of the industry**
15 **consultants, Special Projects researchers, CIAR “applied projects” researchers, and**
16 **industry-funded organizations such as ARIA and CEHHT, and Healthy Buildings**
17 **International, formerly ACVA, correct?**

18 A: Yes.

19 *A. I don't see any “Special Project” researchers, although I'm not sure I'd recognize them*
20 *if they were there. Roger Jenkins of Oak Ridge National Laboratory; Delbert Eatough, who*
21 *later served on the EPA science advisory board; and Gray Robertson later did receive research*
22 *funds from CIAR.*

1 **Q: Mr. Buckley states in his letter that there will be some additional expenses not**
2 **included on the list, correct?**

3 A: Yes.

4 **Q: And this list did not include the cost of printing the proceedings of the conference,**
5 **did it?**

6 A: No, it did not.

7 *A. I don't believe that we paid to have the monograph printed. My recollection is that*
8 *Lexington Books sold the books and recovered its printing expenses in that way.*

9 **Q: And some of the publicity materials for the publication of the proceedings, along**
10 **with the attendant press release, are at exhibit JD-080524, correct?**

11 A: Yes.

12 **Q: From this list of expenses, Mr. Rupp, can you confirm that the McGill Symposium**
13 **cost the cigarette manufacturers, either directly or through the Tobacco Institute, over**
14 **\$850,000?**

15 A: Yes.

16 *A. The total cost was close to the figure you've mentioned but not all of those costs were*
17 *covered by Philip Morris and The Tobacco Institute. There were other contributors but I do not*
18 *recall how much they contributed. To be sure, the bulk of the costs were covered by PM and the*
19 *TI. I'll concede that the cost of the McGill symposium was substantial. I also believe it was far*
20 *and away the best, most comprehensive and most objective evaluation of the science of ETS that*
21 *had appeared to that date.*

22 **Q: The proceedings of the McGill Symposium were quickly published in hard cover**
23 **book form, correct?**

1 A: Yes.

2 **Q: And a copy of the complete proceedings of the McGill Symposium is at U.S. Exhibit**
3 **65706, correct?**

4 A: Yes.

5 **Q: Mr. Rupp, is the role of the tobacco industry fully and fairly disclosed in the**
6 **proceedings of the symposium?**

7 A: No, it is not.

8 *A. It certainly is. I cannot frankly conceive of what additional disclosure you would have*
9 *wanted. The disclosure concerning tobacco and other funding is made prominently on a*
10 *separate page before the table of contents.*

11 **Q: In fact, the only mention of the connection to the tobacco industry is on the page just**
12 **before the contents, where the authors or editors state that the symposium “was made**
13 **possible by a tobacco industry grant and by grants and other support from the following**
14 **co-sponsors,” followed by a list of 11 organizations, correct?**

15 A: Yes.

16 **Q: Mr. Rupp, you are aware that each and every “co-sponsor” of the McGill**
17 **Conference has ties to one or more cigarette manufacturers and/or the tobacco industry,**
18 **correct?**

19 A: Yes.

20 *A. That is quite clearly incorrect. McGill University made an in-kind contribution to the*
21 *symposium by contributing space in which the conference could be held. I don't know what*
22 *other tie with the tobacco industry McGill University could be said to have. The Institute*
23 *Universitaire de Technologie de Dijon is, I think, an institution funded by the French*

1 *Government out of French taxpayer funds. I don't know of any tobacco industry tie that the*
2 *National Federation of Independent Business or the National Federation of Independent*
3 *Business Foundations might be said to have had. I don't believe there was any. I would say the*
4 *same time about a number of the other non-tobacco sponsors listed on this page.*

5 **Q: In truth, the only meaningful sponsor of the McGill Symposium was the tobacco**
6 **industry, correct?**

7 A: Yes.

8 A. *I've already said that The Tobacco Institute and Philip Morris contributed the bulk of the*
9 *funding. Beyond that, I don't know what you mean by "meaningful." You appear to be*
10 *suggesting that there is some government-approved formula for disclosing the respective*
11 *contributions of sponsoring organizations of scientific symposia. I don't believe there is any*
12 *such government-approved formula. Neither do I believe there should be one.*

13 **Q: But that fact is not disclosed in the symposium proceedings either, is it?**

14 A: No.

15 A. *I don't have any idea what "fact" you're referring to that should have been disclosed but*
16 *was not. I'm tempted to think that you believe the sponsors should have been grouped under two*
17 *headings: meaningful and less meaningful, with those terms being defined in the preamble in*
18 *some way.*

19 **Q: And nowhere in the proceedings is it disclosed that the symposium was a "private**
20 **and closed" undertaking at which every author of a paper, and every attendee at the**
21 **symposium, was a tobacco industry ETS consultant, correct?**

22 A: No, it wasn't.

23 A. *And any such statement would have been inaccurate in important respects.*

1 **Q: And the decision not to fully disclose the facts of the McGill Symposium and the role**
2 **of the tobacco industry was intentional, wasn't it?**

3 A: Yes, it was.

4 A. *I believe that the disclosure that was made was accurate.*

5 **Q: Mr. Rupp, can you confirm that the outcome of the McGill ETS Symposium was, as**
6 **predicted by you, Mr. Billings, and others within the industry at the time, in favor of the**
7 **industry's position on ETS?**

8 A: Yes, I can.

9 A. *Some aspects were and some were not. Much more importantly, though, I would*
10 *challenge you to suggest what statements made at the McGill symposium were beyond the*
11 *bounds of scientific reasonableness or accuracy.*

12 **Q: And can you also confirm that the cigarette manufacturers, you, and Covington &**
13 **Burling repeatedly cited this "scientific" symposium at McGill to support the industry**
14 **position on ETS and suggest there was a legitimate scientific controversy on the health**
15 **effects of second-hand smoke?**

16 A: Yes, we did.

17 A. *Again, I disagree with your apparent notion that the scientific book on ETS was closed*
18 *with the release of the 1986 Surgeon General's report on ETS. If that is so, OSHA clearly*
19 *should have banned workplace smoking in 1995 at the end of the OSHA ETS/indoor air*
20 *proceeding. OSHA did not do so because it was unable to find a significant health risk from*
21 *workplace exposure to ETS. If the book was closed, the Congressional Research Service should*
22 *not have said in 1994 and 1995 that the pertinent science was equivocal, a conclusion that CRS*
23 *scientists reached -- as they explained to Congress -- because they believed that so much of the*

1 science was of such low quality. Further, years later, EPA should not have called for additional
2 research on ETS, as it did -- and EPA certainly should not have released its own report on ETS
3 in 1992, a report that a district judge held a few years later to be so defective that it should be
4 withdrawn even though the conclusions reached on many issues were similar to those reached in
5 the 1986 Surgeon General's report. Finally, to take one further example, IARC should not have
6 spent \$1,500,000 to \$2,000,000 in the early to mid-1990s conducting a major epidemiological
7 study of ETS and lung cancer among non-smokers -- a study, by the way, that as I recall failed to
8 find a statistically meaningful overall relationship.

9 **Q: You recall in your September 1989 Asia ETS Consultancy Program Status Report**
10 **and in Mr. Whist's August 1989 letter to Mr. Murray, you and he wrote that the purpose of**
11 **the McGill Symposium was to generate a document to "neutralize" the upcoming EPA risk**
12 **assessment, correct?**

13 A: Yes.

14 **Q: And you recall that the EPA published a draft compendium on environmental**
15 **tobacco smoke prior to the actual risk assessment, correct?**

16 A: Yes.

17 **Q: Please direct your attention to the document marked U.S. Exhibit 85699. Under TI**
18 **president's cover memorandum to the Executive Committee, this is the February 5, 1990**
19 **submission of the Tobacco Institute in response to the EPA draft compendium, correct?**

20 A: Correct.

21 **Q: I'd like to direct your attention to the table of contents of the TI submission. The**
22 **first item is titled "Tobacco Institute Overview Comments." Do you see that?**

23 A: Yes.

1 **Q:** Now look at those comments. TI cites one piece of scientific authority in its
2 introduction to the Overview, namely a symposium: “In addition, we would like to point
3 out that in November of this past year, a symposium on ETS involving some 80 scientists
4 from 20 countries was held at McGill University in Montreal. The proceedings of the
5 symposium reflect a thorough, up-to-date discussion of relevant literature. We believe the
6 results of this conference – which concluded, overall, that ETS has not been shown to
7 present a health hazard to nonsmokers – should be carefully considered in further
8 development of the EPA Compendium. Accordingly, we are transmitting copies of the
9 McGill proceedings for use by EPA and its consulting authors.” Do you see that paragraph
10 at the close of the Overview?

11 **A:** Yes.

12 **Q:** Now look at pages 16, 19, 26, 28, 38, and 39 of the TI “Overview Comments.” On
13 each of these pages the TI cites the McGill symposium in support of its various arguments
14 against matters in the draft compendium, correct?

15 **A:** Yes.

16 **Q:** And each time, the McGill symposium is referred to only as a recent “international
17 ETS conference at McGill University,” correct?

18 **A:** Yes.

19 *A. No In fact, of course, a variety of words were used to describe the meeting, as one would*
20 *have expected.*

21 **Q:** Mr. Rupp, is the role of the tobacco industry in the McGill symposium fully and
22 fairly disclosed in the February 5, 1990 TI submission to the EPA?

23 **A:** No, it is not.

1 A. Yes, it was. We had given the pertinent EPA staff people a copy of the McGill symposium
2 monograph, which includes the disclosure we have been discussing of funding by the tobacco
3 industry. You are continuing to ask questions about the McGill symposium without making any
4 effort at all to show that the discussion at McGill was in any sense unfair, unreasonable or
5 unbalanced.

6 **Q: And nowhere in TI submission to the EPA is it disclosed that the symposium was a**
7 **“private and closed” undertaking at which every author of a paper, and every attendee at**
8 **the symposium, was a tobacco industry ETS consultant, correct?**

9 A: Correct.

10 A. I can't for the life of me understand what you're driving at. The 1986 Surgeon General's
11 report does not contain a statement confirming that only those scientists receiving a specific
12 invitation from the Surgeon General were permitted to contribute in any way to that report. I
13 know, however, that only those invited specifically by the Surgeon General were permitted to
14 write portions of the report or comment on portions of the report issued by others.

15 **Q: And the decision not to disclose the facts surrounding the McGill Symposium and**
16 **the role of the tobacco industry was intentional, wasn't it?**

17 A: Yes, it was.

18 A. A further disclosure simply didn't occur to me at the time, and I don't believe any further
19 disclosure was either needed or appropriate. If the people at EPA preparing the ETS
20 compendium were persuaded by the comprehensive, fair treatment of the pertinent science found
21 in the McGill symposium monograph, that is as it should have been. If they didn't, they should
22 have reached different conclusions. They certainly knew that the McGill symposium had been
23 made possible by tobacco money. The monograph itself said so. In addition to that, I will tell

1 *you that I had extended discussions with EPA people about the ETS compendium and the*
2 *subsequent ETS report issued by EPA, at which time we discussed the McGill symposium*
3 *monograph. To suggest now that the pertinent people at EPA were deprived of important*
4 *information about McGill is simply incorrect. I know it to be incorrect because I was at the*
5 *meetings.*

6 **Q: Now let's move to the EPA Risk Assessment. Do you recall that the EPA released a**
7 **draft policy guide and passive smoking risk assessment later in 1990?**

8 A: Yes.

9 *A. Yes, with the policy guide having been released before the risk assessment had even been*
10 *started, which seemed to me to be inappropriate at the time and still seems to me to have been*
11 *inappropriate.*

12 **Q: And the Tobacco Institute and several cigarette manufacturers made submissions to**
13 **the EPA in response to these draft documents as well, correct?**

14 A: Yes.

15 **Q: Please review the a part of the document marked US. Exhibit 87389, specifically**
16 **Bates pages 87653938-3941. The first two pages are the cover page and table of contents to**
17 **the comments by the tobacco industry to the passive smoking risk assessment, correct?**

18 A: Yes.

19 **Q: Then the remainder of the document is titled "Comments of the Tobacco Institute"**
20 **to the risk assessment, correct?**

21 A: Yes.

22 **Q: Please review pages 15, 16, 22, and 33. Do you see where the Tobacco Institute**
23 **submission cites the McGill symposium as authority for several arguments?**

1 A: Yes.

2 **Q: But again, without any attribution to the tobacco industry, correct?**

3 A: Yes, that is correct.

4 A. *I continue to be mystified by this line of questioning. Are you suggesting that the people*
5 *at EPA did not know that the McGill symposium had received tobacco funding or was by*
6 *invitation only? If so, I know the suggestion to be incorrect.*

7 **Q: TI even used the McGill symposium in press releases to the public, correct?**

8 A: Yes.

9 **Q: Please take a look at the document marked U.S. Exhibit 85586. This is a TI press**
10 **release dated June 25, 1990, in response to the EPA draft passive smoking risk assessment,**
11 **correct?**

12 A: Yes.

13 **Q: Please turn to pages 2 and 3 of the press release. Do you see where the press release**
14 **refers to findings and statements made at the McGill symposium?**

15 A: Yes.

16 **Q: And once again, there is no attribution to the industry, and no explanation at all to**
17 **the public as to the role of the tobacco industry in the symposium, correct?**

18 A: Correct.

19 A. *Correct, and it's unreasonable to suggest that any reporter would pick up on the McGill*
20 *reference without getting a report of the McGill monograph. The fact of tobacco funding would*
21 *have been among the first things he or she saw in consulting the monograph. I know of no*
22 *instance in which a reporter has simply reprinted a Tobacco Institute press release. The purpose*

1 *of such a release is, in part, to point the reporter toward documents he or she may want to*
2 *review.*

3 **Q: And the same can be said with respect to the June 10, 1992 TI press release marked**
4 **as U.S. Exhibit 88456, in that it cites the McGill symposium without any disclosure of**
5 **industry involvement, correct?**

6 A: Yes.

7 *A. And my comments about that are the same as those I have been making. If we had been*
8 *doing this testimony in live form, we now would have consumed an hour or so -- and you've yet*
9 *to point to a single sentence in the McGill monograph that you believe to be unfair, unbalanced*
10 *or otherwise unreasonable.*

11 **Q: Indeed, the TI documents marked 22367, 85698, and 65551 indicate that the use and**
12 **promotion of the McGill symposium results by TI and industry consultants were important**
13 **parts of the TI media program after the proceedings of the symposium were published,**
14 **correct?**

15 A: Yes.

16 **Q: The McGill symposium was not the only symposium organized and planned by**
17 **lawyers, consultants, and/or employees of the tobacco industry, correct?**

18 A: No it was not.

19 **Q: Please direct your attention to the document marked U.S. Exhibit 87399. This is a**
20 **copy of a 1990 book titled *Indoor Air Quality and Ventilation*, edited by Frank Lunau and**
21 **G.L. Reynolds, and is a compilation of presentations made at an April 1990 Indoor Air**
22 **Conference in Lisbon, correct?**

23 A: Yes.

1 A: *It appears to be.*

2 **Q: Mr. Lunau and Mr. Reynolds were two of your British ETS consultants, correct?**

3 A: Yes.

4 A: *Mr. Lunau was. I have no knowledge of G.I. Reynolds.*

5 **Q: So the tobacco industry's consultants, as the editors of this book, were in control of**
6 **which presentations were published, correct?**

7 A: Yes.

8 A: *I have no idea. I had nothing to do with this book. The preface of this publication*
9 *indicates that the selection of papers was made by a technical committee.*

10 **Q: And the Lisbon Conference itself was planned and organized by tobacco industry**
11 **consultants, correct?**

12 A: Yes, it was.

13 A: *I don't know that to be the case. Many of the names listed in this monograph are not*
14 *familiar to me. I do recognize other names. Further, I have no knowledge concerning funding*
15 *for this publication.*

16 **Q: Isn't it true that you and other Covington & Burling attorneys assisted and advised**
17 **these consultants in the planning and execution of the Lisbon Conference?**

18 A: Yes.

19 A: *I did not and I don't know anyone at Covington & Burling who did. I'm not saying that*
20 *someone at Covington & Burling did not have conversations with one or more of the Lisbon*
21 *organizers. I just don't know.*

22 **Q: And the tobacco industry – your clients in particular – paid the expenses of your**
23 **ETS consultants to attend the Lisbon Conference, correct?**

1 A: Yes.

2 A. *I arranged for travel and lodging expense to be paid for four or five of the several*
3 *hundred people who attending this conference.*

4 **Q: Now directing your attention back to the book from the Lisbon Conference, U.S.**
5 **Exhibit 87399, isn't it also true that there is no mention of the tobacco industry or any**
6 **cigarette manufacturer, much less funding from any tobacco source?**

7 A: Yes, that is true.

8 A. *I don't know that any tobacco funding was provided to the organizers of this conference.*
9 *But if 1000 scientists show up at an international scientific meeting, you can be quite certain that*
10 *the vast majority have received funding from some entity (public or private) to permit them to*
11 *attend. In some cases, the funding would have been part of the original research grant. In other*
12 *cases, it would have come in the form of a supplemental grant. But the question, at least in the*
13 *past, that has been deemed generally to be pertinent is not who paid or will pay for the*
14 *scientists' plane ticket or lodging expenses. The pertinent question has been the quality of the*
15 *scientists' participation in the meeting. In fact, there's typically no opportunity at such meetings*
16 *for individual scientists to disclose who paid for their plane ticket or has agreed to cover their*
17 *lodging expenses. Any assumption that some scientists' views can be bought for the price of a*
18 *plane ticket or hotel room is certainly contrary to my experience.*

19 **Q: There is no attribution to the tobacco industry at all, correct?**

20 A: Correct.

21 A. *I have not had time to read the entire monograph.*

1 **Q:** Now please look at U.S. Exhibit 87397. This is a book titled *Present and Future*
2 *Indoor Air Quality*, and is a compilation of presentations made at a February 1989
3 conference in Brussels, correct?

4 A: Yes.

5 A. *It appears to be.*

6 **Q:** And this conference, according to the foreword, followed 1987 symposia in Essen
7 and Tokyo, and a 1988 symposium in London, correct?

8 A: Yes.

9 **Q:** And isn't it true, Mr. Rupp, that all of these events – in Brussels, Essen, Tokyo, and
10 London – were tobacco industry events planned, organized, and executed by industry ETS
11 consultants and lawyers?

12 A: Yes.

13 A. *I have no idea whether any tobacco funding was provided to the organizers of any of the*
14 *symposia you've mentioned.*

15 **Q:** And Claude Bieva, the first editor named on the cover of the book, was Philip
16 Morris's ETS consultant in Belgium, as shown on page 2 of the document marked 88778,
17 correct?

18 A: Yes.

19 A. *He appears to have done consulting work for Philip Morris, if that document is accurate.*
20 *I can't confirm that, however, from personal experience. Further, I've never met Professor*
21 *Bieva.*

22 **Q:** In fact, Don Hoel from Shook, Hardy & Bacon was the lead attorney in charge of
23 planning the Brussels Conference, correct?

1 A: Yes.

2 A. *I have no idea.*

3 **Q: But again, in the book from the Brussels conference, U.S. Exhibit 87397, we see no**
4 **attribution to the tobacco industry at all, do we?**

5 A: No.

6 A. *I have not had time to read the entire monograph. But then again, I do not know whether*
7 *the organizers of this symposium received any tobacco funding.*

8 **Q: Now please look at U.S. Exhibit 87398, another book, this one titled *Indoor Air***
9 ***Quality*. This publication is a compilation of presentations at the November 1987 Tokyo**
10 **event referred to in the Brussels Conference book, correct?**

11 A: Yes, it is.

12 **Q: And yet again, in the publication arising from the Tokyo conference, U.S. Exhibit**
13 **87398, we see no attribution to the tobacco industry at all, do we?**

14 A: No.

15 **Q: But this event was also planned, organized, and executed using tobacco industry**
16 **ETS Consultants and attorneys, correct?**

17 A: Correct.

18 A. *I do not have any basis for believing that to be true.*

19 **Q: In fact, according to a February 4, 1987 Philip Morris Companies memorandum**
20 **from Mary Potorff to Bill Murray, marked U.S. Exhibit 20017, the Tokyo conference was**
21 **“requested” by Philip Morris International and coordinated with Japan Tobacco, correct?**

22 A: Yes, it was.

1 A. That's what the document you've referred to says. But I have no knowledge of this
2 conference, other than the knowledge I've acquired in looking at the exhibit you've mentioned.
3 In looking though the list of participants, I do note that a number of scientists who had suggested
4 that ETS poses a health risk to non-smokers made presentations at the conference, including
5 such well known and prestigious scientists as Dr. Wynder, Dr. Hulka, Dr. Hirayama and Dr.
6 Trichopolous.

7 **Q: And this is the memorandum where Ms. Potorff writes, "ETS is the crucial**
8 **Corporate Affairs issue in 1987. We prefer to act in concert with the Industry; however,**
9 **action cannot be delayed and PMI will act alone if necessary," correct?**

10 A: Yes.

11 A. That's what the document says.

12 **Q: And eventually Mr. Rupp, looking back at the events from that point in 1987**
13 **through the 1990s, the industry did in fact "act in concert" on the ETS issues, did it not?**

14 A: Yes, it did.

15 A. Sometimes one or more tobacco companies collaborated in varying degrees. More often,
16 they did not.

17 **Q: Please direct your attention to the document marked U.S. Exhibit 75073. This is a**
18 **memorandum from John Dollison at Philip Morris International to Steve Parrish at Philip**
19 **Morris Management Corporation dated May 3, 1990. Do you recall the meeting Mr.**
20 **Dollison describes in his first paragraph?**

21 A: Yes.

22 A. No.

1 **Q:** And in fact the notes from the January 4, 1990 ETS meeting, attached to Mr.
2 **Dollison's memorandum to Mr. Parrish, records that you and fellow Covington & Burling**
3 **attorney Charles Lister were present at that meeting, correct?**

4 **A:** Yes.

5 *A. The meeting described in US Exhibit 85562, to which you appear to be referring,*
6 *apparently was held in December 1988 -- a year or so before the meeting described in US*
7 *Exhibit 75073. I do not believe I attended either meeting.*

8 **Q:** **Mr. Rupp, one of the themes of the ETS Consultancy Program that you participated**
9 **in on behalf of the industry was non-attribution to the industry, correct?**

10 **A:** Yes.

11 *A. No. In fact, the contrary was the case.*

12 **Q:** **For example, U.S. Exhibit 85562 is a December 12, 1988 memorandum from Stig**
13 **Carlson to Covington & Burling attorney Charles Lister, and copied to you. The**
14 **memorandum relates to the ETS Consultancy Program in Scandinavia, correct?**

15 **A:** Yes.

16 *A. It appears to.*

17 **Q:** **Who was Stig Carlson?**

18 *A. Stig Carlson was the head of public affairs at Philip Morris in Stockholm.*

19 **Q:** **At the bottom of the first page, Mr. Carlson recommends that "we plan for three**
20 **different contact points to avoid the infamous 'fingerprints,'" correct?**

21 **A:** Yes.

22 *A. I see the reference to which you are referring. But I have no idea to what Mr. Carlson*
23 *was referring. I was doing nothing in Europe as of the date of this memorandum, I did not*

1 attend the meeting to which Mr. Carlson referred in the memorandum, I did not attend the
2 meeting that he suggested in the memorandum be held in the future, I have no knowledge of the
3 activities he described in the memorandum, I have no knowledge of most of the people who
4 received copies of the memorandum, and I don't recognize most of the names mentioned in the
5 body of the memorandum.

6 **Q: Mr. Rupp, from your experience in the consultancy program, you know that the**
7 **“fingerprints” Mr. Carlson is referring to are those of the tobacco industry, correct?**

8 A: Yes.

9 A. As indicated by what I already have said, I have no idea.

10 **Q: Now please look at U.S. Exhibit 75080, the minutes of a Philip Morris ETS meeting**
11 **held on May 11, 1987 that you attended and that we spoke of some time ago. On page**
12 **three, please read the paragraph that references ACVA.**

13 A: It says, “ACVA must be perceived to be at arm’s length from the industry including in
14 media briefings. Its role at most should seem as yet another third party expert amongst others.”

15 **Q: So is it fair to say that the industry attempted to avoid the “infamous fingerprints”**
16 **with respect to ACVA as well?**

17 A: Yes.

18 A. No. In fact, you’ve shown me a number of documents confirming that Gray Robertson at
19 ACVA was appearing expressly at the request and expense of a tobacco company or The
20 Tobacco Institute. I believe that many more such documents exist. If the goal had been to hide
21 ACVA/HBI’s association with The Tobacco Institute, Mr. Robertson would not have been asked
22 to appear at congressional hearings on a panel reserved for The Tobacco Institute and its
23 consultants, as he was on several occasions during the 1980s and 1990s; ACVA/HBI would not

1 have been included as a sponsor of the McGill symposium and Mr. Robertson would not have
2 given a presentation on that occasion, as it and he was; Mr. Robertson and HBI would not have
3 appeared expressly at the request and expense of The Tobacco Institute as commentators on the
4 EPA ETS Compendium and Risk Assessment, as he/it did; and Mr. Robertson would not have
5 appeared as a witness funded by The Tobacco Institute at the OSHA hearings in 1994 or
6 submitted statements to OSHA in connection with that proceeding in 1993, 1994 and 1995 by
7 means of a cover letter sent to OSHA from The Tobacco Institute, which is precisely what
8 occurred. Further, Mr. Robertson would not have appeared at literally dozens of legislative
9 hearings in the individual states over the years, being introduced to the individual committees by
10 the local lobbyist for The Tobacco Institute.

11 **Q: Even though, in reality, the industry was paying ACVA and its successor HBI**
12 **millions of dollars for industry-favorable work and data, correct?**

13 A: Yes.

14 A. I do not know how much support ACVA/HBI/Robertson received from tobacco sources
15 over the years. What I do know is that disclosure of the source or sources of his funding was
16 made repeatedly.

17 **Q: Mr. Rupp, another concept we see, either expressly or implicitly, in many of these**
18 **documents is the concept of a buffer entity between the cigarette manufacturers and the**
19 **ETS consultants, correct?**

20 A: Yes.

21 **Q: Let us look at several documents, starting with U.S. Exhibit 75266 and 75267. This**
22 **is a memorandum from Keith Ware to Helmut Gaisch, dated February 22, 1988, correct?**

23 A: Yes.

1 **Q:** At that time Mr. Ware was the Planning Director Planning for the Philip Morris
2 **EEMA Region, correct?**

3 **A:** Yes.

4 **Q:** Mr. Ware states, “Attached is my draft proposal as a contribution to the
5 organization of the Whitecoat Project. It draws upon discussions recently held, and my
6 view of the current issues and problems at this early stage in the project as seen from the
7 **EEMA perspective.” Do you see that?**

8 **A:** Yes.

9 **Q:** And attached to Mr.. Ware’s memorandum is his draft proposal entitled “Proposal
10 for the Organization of the Whitecoat Project,” marked as U.S. Exhibit 75267, correct?

11 **A;** Yes.

12 **Q:** Please look at page two of that document, third paragraph from the top. The
13 discussion of the proposed “whitecoat” organization suggests that Covington and Burling
14 be used for performing the function of the executive arm of the organization, correct?

15 **A:** That is what it states.

16 **Q:** And the proposal further states, “Covington and Burling performs this function,
17 and thus, acts at the same time as a legal buffer,” correct?

18 **A:** Yes.

19 *A. I also should say, as I explained to you during my deposition, that I do not believe that*
20 *any significant aspect of this proposal ever was implemented. Indeed, to this day I’m not sure*
21 *that I fully understand the proposal.*

22 **Q:** Now please turn to US Exhibit 24099, which is the memorandum from J. Kendrick
23 Wells at Brown & Williamson to Nick Cannar at BATCo dated October 10, 1988 we spoke

1 of some time ago. Mr. Wells relays a discussion he had with you as to why the UK industry
2 should rely on an American law firm to develop scientific consultants who would be active
3 in Europe. He reports that you told him that it was important to have a law firm play the
4 role of organizing because the firm can, in the process of organization and horse-shedding
5 individual scientists, avoid product liability problems. Do you see that?

6 A: Yes.

7 Q: Is this part of the same “legal buffer” idea?

8 A: Yes.

9 A. To some extent, yes. But it's more complicated than that, as I explained to you during my
10 deposition.

11 Q: So a benefit you saw of having a law firm organize the consultants was that the firm
12 could serve as buffer between the companies and the consulting scientists, providing both
13 “distance and opportunities for work product protection,” correct?

14 A: Yes.

15 A. Distance, yes, because many scientists preferred to deal with an intermediary lawyer
16 rather than directly with an employee of a tobacco company. That preference, in my experience,
17 is not limited to a tobacco context. It is a general preference, in my experience.. Opportunity for
18 work product protection, also yes if we were working with the consultant in connection with a
19 specific piece of litigation.

20 Q: Here is yet another document, US Exhibit 22223, written by Sharon Boyse of
21 BATCo, that outlines the ETS Consultancy Programme in Europe, in which she states that
22 “the programme was handled in such a way thanks to Covington and Burling that there

1 was no direct association between the scientists and the tobacco industry". Do you see that
2 at paragraph 6 of that document?

3 A: Yes.

4 Q: And then on page 6 of the document, Dr. Boyse writes: "For this type of programme
5 it is absolutely essential to ensure that administration of the programme and contact with
6 the consultants is made quite independently of the tobacco industry, and that no tobacco
7 industry executives have direct contact with them." Do you see that?

8 A: Yes.

9 Q: And that was your and your firm's role, to step into the shoes of those tobacco
10 industry executives, wasn't it?

11 A: Yes.

12 A. No.

13 Q: Please direct your attention to the document marked U.S. Exhibit 47526, an August
14 17, 1988 memorandum relating to BATCo possible membership in CIAR. Mr. Proctor was
15 a research scientist at BATCo's Southampton (England) laboratories at that time, correct?

16 A: Yes.

17 Q: He describes CIAR on the second page as follows: "Meetings of the board are held
18 every five weeks in Washington and, in addition to the board members, John Rupp
19 (Covington & Burling), Don Hoel (Shook Hardy & Bacon), Mary Ward (RJ Reynolds) and
20 a TI representative attend to observe. Rupp and Hoel comment on product liability
21 aspects. In terms of scientific acceptability, CIAR provides a further buffer between the
22 Company and the third party, yet allows strong control of projects without major in house
23 effort." Do you see that?

1 A: Yes.

2 Q: So CIAR served the industry within the “buffer entity” concept as well, correct?

3 A: Yes.

4 A. *In a way it did but undoubtedly not in the way you are suggesting. Further, CIAR's*
5 *primary value had nothing whatever to do with any buffering function it might or might not have*
6 *been able to provide.*

7 Q: Turn to US Exhibit 23677, dated May 26, 1987, and refer to paragraph numbered 7
8 on the third page. We previously discussed this document, but in this paragraph we see the
9 concept of the “buffer entity” again, correct?

10 A: Yes.

11 Q: In fact, the “buffer entity” issue turned into a meeting on May 12, 1987, correct?

12 A: Yes.

13 Q: And the document at US Exhibit 85531 is a memorandum of the minutes of that
14 meeting as recorded by Philip Morris counsel Frederick Dulles, correct?

15 A: Yes.

16 Q: And we see in the Dulles memorandum that you were present at the meeting,
17 correct?

18 A: Yes.

19 Q: And your statements are recorded in the following terms: “John Rupp believes that
20 the only way to keep studies, documents, and correspondence between external experts and
21 the Company from being ‘discoverable’ (available to opposing parties and eventually
22 subject to submission in court) in litigation, through the use of the ‘attorney-client
23 privilege,’ would be to have a lawyer or law firm act as an intermediary. This would

1 preferably be a lawyer admitted to the bar of the United States. In the U.S., Covington &
2 Burling pays the invoices for independent experts on ETS and rebills the U.S. Tobacco
3 Institute.” Is that account accurate?

4 A: Yes, I have no reason to doubt what Mr. Dulles has recorded here.

5 A. *The statement is accurate only insofar as it relates to our work with consultants on*
6 *pending litigation, such as the APCO case in Australia or the lawsuits in which our consultants*
7 *have provided assistance in the United States. In other contexts, I always have assumed there to*
8 *be no privilege, although that would depend, of course, upon the governing law of the particular*
9 *jurisdiction.*

10 Q: So in addition to “avoiding the infamous fingerprints” that we discussed earlier, the
11 “buffer entity” was also intended to serves as a means to keep documents from discovery in
12 litigation, wasn’t it?

13 A: Yes.

14 A. *Only to the extent that I’ve already described.*

15 Q: Mr. Rupp, I assume you had many written communications to and from the
16 industry ETS consultants while they were working for the industry, correct?

17 A: Yes.

18 A. *Your assumption is incorrect.*

19 Q: Have you or Covington & Burling ever turned those written communications over
20 to any of your past or former clients?

21 A: No.

1 A. *I have no knowledge of any substantive correspondence with any of the consultants with*
2 *whom I or other lawyers at Covington & Burling have worked over the years that we have not*
3 *shared with the relevant client or clients.*

4 **Q: To your knowledge, have you or Covington & Burling ever produced these**
5 **communications to a third party in conjunction with litigation or regulatory proceedings?**

6 A: No, we have not.

7 A. *Although I expect, but do not know for sure, that our clients have.*

8

9 END