

1999

Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation

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DECADES OF DECEIT: DOCUMENT DISCOVERY IN THE MINNESOTA TOBACCO LITIGATION

Michael V. Ciresi, Roberta B. Walburn &
Tara D. Sutton†

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I. INTRODUCTION

When the State of Minnesota and Blue Cross and Blue Shield of Minnesota (collectively "Minnesota") filed their complaint against the tobacco industry¹ in August, 1994, the industry had been profiting enormously for decades from a product that exacted a huge toll on public health, yet the industry had enjoyed a virtually

1. The defendants were Philip Morris Incorporated ("Philip Morris"), R.J. Reynolds Tobacco Company ("RJR"), Brown & Williamson Tobacco Corporation ("Brown & Williamson"), B.A.T. Industries P.L.C. ("B.A.T. Industries"), Lorillard Tobacco Company ("Lorillard"), The American Tobacco Company ("American"), Liggett Group, Inc. ("Liggett"), the Council for Tobacco Research ("CTR"), and the Tobacco Institute ("TI").

perfect record in the courtroom.² Nearly four years later, on May 8, 1998, when the industry agreed to a settlement—unprecedented in terms of monetary relief, injunctive requirements, and disclosure of internal tobacco company documents—Minnesota had achieved what former U.S. Surgeon General C. Everett Koop characterized as “one of the most significant public health achievements of the second half of the 20th century.”³

The key to the industry’s defense strategy—which had been successful for decades—was the concealment of the industry’s internal documents, including documents disclosing the industry’s secret acknowledgment of the health hazards and addictiveness of smoking, documents disclosing the industry’s manipulation of nicotine, and documents disclosing the industry’s dependence upon new generations of American youth to preserve the viability of the cigarette market. From the outset of the case, Minnesota knew that the only way to hold the cigarette industry accountable was to single-mindedly pursue documents which had not been produced in four decades of litigation against the industry. The ensuing discovery battles—which resulted in the production of approximately thirty-five million pages of internal industry documents—lasted several years and continued well into trial, when the United States Supreme Court refused the industry’s request to stay an order requiring the production of tens of thousands of documents which the industry had withheld on claims of privilege.⁴ A month later, on the eve of the case being submitted to the jury, the case settled.⁵

2. As top public health officials have pointed out, the industry’s substantial profits are due, in part, to its ability to shift the “tobacco-related health, social, and environmental costs onto the public’s shoulders.” C. Everett Koop et al., *Reinventing American Tobacco Policy*, 279 JAMA 550, 550 (1998).

3. Henry Weinstein, *Big Tobacco Settles Minnesota Lawsuit for \$6.6 Billion*, L.A. TIMES, May 9, 1998, at A1.

4. See *Philip Morris Inc. v. Minnesota ex rel. Humphrey*, 118 S. Ct. 1384 (1998) (mem.).

5. See Settlement Agreement and Stipulation For Entry of Consent Judgment, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 394331 (Minn. Dist. Ct. May 8, 1998) [hereinafter Settlement Agreement]; Consent Judgment, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 394336 (Minn. Dist. Ct. May 8, 1998). Under the settlement, the State of Minnesota will receive an estimated \$6.1 billion over a 25-year period. See Settlement Agreement, *Philip Morris*, 1998 WL 394331, at *4, *6. Blue Cross and Blue Shield of Minnesota will receive \$469 million over a five-year period. See *id.* In addition, the cigarette industry is bound by unprecedented injunctive restrictions, including injunctions against making material misrepresentations and against tar-

II. DECADES OF CONCEALMENT: THE TOBACCO INDUSTRY'S SUCCESSFUL BATTLES BEFORE 1994

There are many reasons why the tobacco industry has been so difficult to defeat in so many forums—legal and legislative—for so many decades. One principal reason has been the tobacco industry's ability to keep hidden millions of pages of internal documents which contain damning admissions.

A. *The Industry's "General Patton" Strategy of Litigation*

The surgeon general has called cigarette smoking "the most important public health issue of our time."⁶ Cigarettes kill when used as intended, and there is no known level of safe consumption.⁷ One-fourth or more of all regular cigarette smokers die of smoking-related diseases.⁸ The number of deaths caused by smoking surpasses the combined totals for alcohol, suicide, homicide, AIDS, cocaine, heroine, and motor vehicles.⁹

Notwithstanding these deadly statistics, the tobacco industry maintained an unparalleled record in the courtroom from the 1950s into the 1990s.¹⁰ The industry's strategy was based upon scorched-earth tactics.¹¹ As one tobacco industry lawyer candidly

getting children in the advertising, promotion, or marketing of cigarettes. See Consent Judgment, *Philip Morris*, 1998 WL 394336, at *2. The cigarette industry also must remove advertising billboards in Minnesota, fund smoking cessation programs, and dissolve one of its trade groups. See Settlement Agreement, *Philip Morris*, 1998 WL 394331, at *10. See also Consent Judgment, *Philip Morris*, 1998 WL 394336, at *2, *4.

6. SURGEON GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING: CANCER* xi (1982).

7. See SURGEON GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS* 490 (1989).

8. See *id.* at v.

9. See MINNESOTA DEP'T OF HEALTH, SECTION FOR NONSMOKING AND HEALTH, *THE MINNESOTA TOBACCO-USE PREVENTION INITIATIVE, A REPORT TO THE 1991 LEGISLATURE*, 22-23 (Jan., 1989-Dec., 1990).

10. See Christine Hatfield, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525, 558 (1996). "The tobacco industry has enjoyed a record of success in civil litigation unique to almost any industry, never paying one cent in settlements or awards for any injuries claimed by cigarette smokers in their civil lawsuits." *Id.*

11. See *id.* at 558-59. "The industry's strategy was simple: 'Never retreat on any position and attack whenever possible . . .'" *Id.* (citing Mark Curriden, *The Heat Is On*, 80 A.B.A. J. 58, 59 (1994). "The key to this strategy was to remain on the offensive at all times by denying every claim on the health hazards of smoking and concealing all damaging research results from the public." *Id.* at 559; see also

wrote:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making all of his.¹²

Part of the industry's "General Patton"-style litigation has been a concerted national strategy of discovery abuse:

[T]he tobacco industry has developed several evasion strategies of choice, including, but not limited to, delay, inundating an opponent with reams of useless information, use of the court system to wage a war of motions and protective orders against an adverse party, as well as filing patently false and misleading responses to discovery requests. Every strategy is designed to force the massive expenditure of frequently scarce plaintiff's resources in order to sort out the data provided or fight for the enforcement of discovery orders.¹³

The industry's lawyers ensured that it would be prohibitively expensive for plaintiffs' counsel to represent injured smokers:

They have done this by resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by getting confidentiality orders attached to the discovery materials they finally produce, thus preventing plaintiffs' counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering, through written deposition, every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert

id. at 530-34 (summarizing the industry's discovery abuse tactics).

12. *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (quoting Apr. 29, 1988, Memorandum from J. Michael Jordan, counsel for RJR).

13. Hatfield, *supra* note 10, at 527.

witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country of trivial fact witnesses, particularly in the final days before trial.¹⁴

Until recently, this litigation strategy of delay and obfuscation paid enormous dividends for the tobacco industry.

B. *The History of Tobacco Litigation*

1. *The First Wave of Tobacco Litigation*

The history of tobacco litigation is usually summarized in three waves.¹⁵ The first wave, consisting of personal injury suits by individual smokers, surfaced in the 1950s in the wake of the publication of several scientific studies, which sounded grave warnings on the health hazards of smoking.¹⁶ "The tobacco companies prevailed in these early cases because plaintiffs were unable to prove a causative link between smoking and cancer"¹⁷ In this first wave of litigation, the industry "hotly contested the causal linkage between smoking and lung cancer."¹⁸ Indeed, to this day, the tobacco companies deny that it is scientifically proven that smoking causes any disease. A central theme in these early cases was "foreseeability"—that is, whether the tobacco industry could foresee the potential health risks of smoking and whether the industry had sufficient information about the risks to research those risks and warn consumers.¹⁹

14. William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 277 (1989).

15. See Hatfield, *supra* note 10, at 561-88.

16. See E.L. Wynder & E.A. Graham, *Experimental Production of Carcinoma with Cigarette Tar*, 13 CANCER RES. 855 (1953); R. Doll & A.B. Hill, *A Study of Aetiology of Carcinoma of the Lung*, 2 BRIT. MED. J. 1271 (1952).

17. Hatfield, *supra* note 10, at 561.

18. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 858 (1992).

19. See *id.* at 859-61. This, of course, was before the surgeon general's landmark report in 1964, which concluded that smoking caused lung cancer in men, and before the surgeon general's warnings were placed on cigarette packages in

In one first-wave tobacco case that went to trial, *Lartigue v. R.J. Reynolds Tobacco Co.*,²⁰ the tobacco companies “made a convincing case for the lack of any causal connection” between smoking and Mr. Lartigue’s cancer.²¹ In fact, although the jury did not state the basis for its verdict for the industry, the trial judge wrote:

I regret now I did not propound the interrogatory with respect to the connection between the smoking and his lung cancer because I’m satisfied the jury never got beyond that question and I know—I’m sure at least that they simply decided the plaintiff had failed to prove the causal connection between his smoking and his lung cancer but that is water under the bridge now.²²

The court of appeals affirmed the jury’s finding, noting that the jury was properly instructed that a risk had to be “reasonably foreseeable” before a manufacturer could be held liable.²³ The court concluded: “Today, the manufacturer is not an insurer against the unknowable.”²⁴

Yet at the time of the *Lartigue* trial in 1960, the industry had in its files documents that surely would have changed the verdict had they been disclosed. For example, as early as 1953, an RJR scientist, Dr. Claude Teague, in a document entitled “Survey of Cancer Research with Emphasis upon Possible Carcinogens from Tobacco,” examined literature with an emphasis on studies actually or potentially related to carcinogens from tobacco.²⁵ Dr. Teague concluded:

The increased incidence of cancer of the lung in man which has occurred during the last half century is probably due to new or increased contact with carcinogenic stimuli. The closely parallel increase in cigarette smoking

1966. See SURGEON GENERAL, U.S. DEP’T OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE 1333 (Comm. print 1964).

20. 317 F.2d 19 (5th Cir. 1963).

21. *Id.* at 23.

22. *Id.* (emphasis added).

23. *Id.* at 24.

24. *Id.* at 40.

25. See RJR 501932947-68. All industry documents discovered in the course of *State ex rel. Humphrey v. Philip Morris Inc.* and cited in this article will be referenced by Bates number in order to facilitate their location in the two document depositories and Internet sites.

has led to the suspicion that tobacco smoking is an important etiologic factor in the induction of primary cancer of the lung. *Studies of clinical data tend to confirm the relationship between heavy and prolonged tobacco smoking and incidence of cancer of the lung.*²⁶

By 1958, most U.S. tobacco companies secretly believed that smoking caused lung cancer. In April and May of 1958, three British scientists (including at least one from British-American Tobacco, D.G. Felton) visited top officials and scientists in the U.S. tobacco industry.²⁷ One object of the visit was to find out "the extent in which it is accepted that cigarette smoke 'causes' lung cancer."²⁸ The British scientists reported widespread acceptance of causation:

With one exception (H.S.N. Greene) [not formally affiliated with any tobacco company], the individuals whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound.²⁹

The authors concluded that there was no serious dispute that the statistical associations constituted a "cause and effect" phenomenon: "Although there remains some doubt as to the proportion of the total lung cancer mortality which can be fairly attributed to smoking, scientific opinion in the U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship."³⁰

Industry lawyers recognized that the industry's own documents, if plaintiffs ever obtained access to them, would change the result in the courtroom. In 1970, David R. Hardy, of the law firm of Shook, Hardy & Bacon, longtime outside counsel to the indus-

26. See RJR 501932963 (emphasis added).

27. See BAT 105408491. The BAT scientists met with, among others, representatives from American, Liggett & Meyers, Philip Morris, and the Tobacco Industry Research Committee, a predecessor to CTR. See *id.*

28. BAT 105408492.

29. *Id.*

30. BAT 105408498.

try, outlined his fears to general counsel at Brown & Williamson:

Fundamental to my concern is the advantage which would accrue to a plaintiff able to offer damaging statements or admissions by persons employed by or whose work was done in whole or in part on behalf of the [tobacco] company defending the action. A plaintiff would be greatly benefited by evidence which tended to establish actual knowledge on the part of the defendant that smoking is generally dangerous to health, that certain ingredients are dangerous and should be removed, or that smoking causes a particular disease. This would not only be evidence that would substantially prove a case against the defendant company for compensatory damages, but could be considered as evidence of willfulness or recklessness sufficient to support a claim for punitive damages. The psychological effect on judge and jury would undoubtedly be devastating to the defendant.³¹

2. *The Second Wave of Tobacco Litigation*

The second wave of cigarette litigation, also composed of individual personal injury suits, began in the 1980s.³² In the wake of the 1964 and subsequent surgeon general's reports and the federally-mandated warning label on cigarettes, the tobacco industry began arguing that the hazards of smoking were "common knowledge" and, therefore, smokers who continued to smoke were merely exercising their "freedom of choice."³³ Thus the tobacco companies, not without a certain audacity, seamlessly shifted their battle cry from the first wave of litigation—"smoking doesn't cause cancer"—to their battle cry in the second wave of litigation—"everybody knows" that smoking causes cancer.³⁴

31. Peter Hanauer et al., *Lawyer Control of Internal Scientific Research to Protect Against Products Liability Lawsuits*, 274 JAMA 234, 235 (1995) (quoting a confidential letter to DeBaun Bryant).

32. See Rabin, *supra* note 18, at 854.

33. See *id.* at 870.

34. Yet while arguing that it was "common knowledge" and "everybody knows" smoking causes disease, the tobacco companies themselves continued to maintain that it was not proven that cigarettes cause disease. Even in 1998, Geoffrey C. Bible, chief executive officer of Philip Morris, testified in the Minnesota trial, as follows:

Q. Did you go to your fellow CEOs and say, "Let us join together and

This "freedom of choice" argument is eviscerated by, among other things, the fact that smokers are addicted to nicotine. As with medical causation, the tobacco companies have long been aware of (and accepted) addiction, but have hidden their internal documents evidencing this awareness for decades. For example, in 1963, Brown & Williamson's vice president and general counsel recognized nicotine's true pharmacological reality: "Moreover, *nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug* effective in the release of stress mechanisms."³⁵ Likewise, in 1980, a Tobacco Institute employee—in a document disclosed for the first time in Minnesota—wrote: "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as free choice if the person was 'addicted'."³⁶

These documents, however, remained secreted in the files of the tobacco companies throughout the second wave of litigation. Nevertheless, the second wave of litigation differed from the first in that it yielded the first significant discovery successes against the industry. The first meaningful disclosure of tobacco industry documents occurred in *Cipollone v. Liggett Group Inc.*,³⁷ the most notable second wave case: "For the first time, a pretrial ruling compelled the tobacco industry to release thousands of pages of confidential internal documents sought by the plaintiffs to prove that a conspiracy existed among the tobacco companies to prevent the release of damaging information on the health hazards of cigarette

get a blue ribbon panel of scientists to tell us does smoking cause disease?" Did you do that?

A. No, I did not do that, because I really felt that everybody in the world believes smoking causes disease.

Q. You don't; do you, sir?

A. I don't know.

...

Q. Do you know how many have died as a result of smoking?

A. How many people have died?

Q. Died.

A. I don't know if anybody has died. I just don't know, no.

Transcript of Proceedings at 5734-46, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Mar. 2, 1998).

35. B&W 689033415 (emphasis added).

36. TIMN 0107823.

37. 683 F. Supp. 1487 (D.N.J. 1988).

smoking.”³⁸ These documents offered the first glimpse of the treasures that would be found in the industry’s files.

Cipollone and its companion case, *Haines v. Liggett Group, Inc.*,³⁹ provided the first indications of the extent of the role of tobacco company lawyers in shielding documents from discovery on improper claims of privilege.⁴⁰ In *Haines*, U.S. District Judge H. Lee Sarokin wrote that the tobacco industry, “may be the king of concealment and disinformation.”⁴¹ Judge Sarokin found a prima facie showing of crime-fraud against the industry, rejecting the industry’s claims of privilege on its documents.⁴² The industry, however, appealed, and Judge Sarokin’s decision was vacated and remanded, for violations of the Federal Magistrate’s Act.⁴³ In addition, the court of appeals granted the industry’s request to remove Judge Sarokin from the case.⁴⁴

Thus, the tobacco companies continued to stonewall. Many—in fact, most—of the critical documents remained hidden in tobacco companies’ files. In 1993, after ten years of litigation, the plaintiffs’ law firm in *Cipollone* (and related cases filed in New Jersey) requested to withdraw from tobacco litigation, citing the General Patton tactics of the industry and the financial drain on the firm.⁴⁵

3. *The Third Wave of Tobacco Litigation*

The third wave of tobacco litigation began in 1994. In this wave, the fundamental nature of the claims against the tobacco industry changed. No longer was the litigation limited to individual claims by individual smokers. For the first time, states sued the tobacco industry seeking wide-scale injunctive relief and to recover the costs to the states for medical care for injured smokers. In 1994, the States of Mississippi and Minnesota were the first to file

38. Hatfield, *supra* note 10, at 565.

39. 140 F.R.D. 681 (D.N.J. 1992). See generally, Hatfield, *supra* note 10, at 566-72 (discussing *Haines* opinions in greater detail).

40. The plaintiffs in *Cipollone* and *Haines* were represented by the same group of law firms. See *Cipollone*, 683 F. Supp. at 1489; *Haines*, 140 F.R.D. at 683.

41. *Haines*, 140 F.R.D. at 683.

42. See *id.* at 684.

43. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91-94 (3d Cir. 1992), vacating 140 F.R.D. 681 (D.N.J. 1992) (finding the district court’s characterization of the Federal Magistrate’s Act erroneous).

44. See *id.* at 98.

45. See *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 418 (D.N.J. 1993).

complaints against the industry. In addition to states, other third-party payors of medical costs sued the tobacco industry. In 1994, Blue Cross and Blue Shield of Minnesota was the first private payor of health care costs to sue the industry. The Minnesota litigation was venued in Ramsey County District Court before then-Chief Judge Kenneth J. Fitzpatrick. Large class action suits on behalf of smokers also were filed against the industry in this wave of litigation.⁴⁶

The third wave of litigation was ignited by new revelations in 1994 about the tobacco industry's conduct. These included hearings chaired by U.S. Representative Henry Waxman and disclosures from Dr. David Kessler, then head of the U.S. Food and Drug Administration ("FDA"). In 1994, the "Merrell Williams documents" also were disclosed. Merrell Williams was a paralegal working for a law firm representing Brown & Williamson. Mr. Williams went public with about 4,000 pages of internal company documents from Brown & Williamson and its British corporate affiliates, the BAT Group,⁴⁷ detailing "a sophisticated legal and public relations strategy to avoid liability for the diseases induced by tobacco use."⁴⁸ The *Journal of the American Medical Association* ("JAMA") devoted an issue to the analyses of these documents, and stated:

We think that these documents and the analyses merit the careful attention of our readership because they provide massive, detailed, and damning evidence of the tactics of the tobacco industry. They show us how this industry has managed to spread confusion by suppressing, manipulating, and distorting the scientific record. They also make clear how the tobacco industry has been able to avoid paying a penny in damages and how it has managed to remain hugely profitable from the sale of a substance long known by scientists and physicians to be lethal.⁴⁹

46. See, e.g., *Castano v. American Tobacco Co.*, No. 94-1044 (E.D. La. June 1, 1994).

47. The term BAT Group refers to the British entities that, over time, have been either affiliates or the corporate parent of Brown & Williamson. These entities include B.A.T. Industries and/or British-American Tobacco Company Limited (collectively referred to herein as "BAT").

48. Stanton A. Glantz et al., *Looking Through a Keyhole at the Tobacco Industry*, 274 JAMA 219, 219 (1995); see generally Hatfield, *supra* note 10, at 575-85 (arguing that the tobacco industry lawyers abuse the attorney-client privilege as a means of evading disclosure during discovery).

49. James S. Todd et al., *The Brown and Williamson Documents: Where Do We Go*

The Merrell Williams documents also contained disclosures on the role of industry counsel in fostering research that perpetuated a “controversy” as to whether smoking caused disease and in suppressing research that established the causal link.⁵⁰

III. MINNESOTA’S DOCUMENT-INTENSIVE STRATEGY

With this historical backdrop, Minnesota set out on a determined discovery quest. Many observers believed that virtually no new discovery was needed, given the prior productions in New Jersey and the new disclosures in 1994.⁵¹ The tobacco industry first offered to comply with its discovery obligations by producing in Minnesota only those documents they had previously disclosed in litigation elsewhere. Minnesota’s refusal to accept this offer—contrary to conventional wisdom—proved correct.

Whereas Brown & Williamson, for example, had produced only 1,350 pages of documents before 1994, it would eventually produce more than four million pages in Minnesota. Philip Morris had produced only about 140,000 pages of documents in prior litigation, but in Minnesota would produce more than six million pages. And while the BAT Group in England had produced no documents prior to Minnesota filing suit, they too would turn over several millions of pages of documents to Minnesota. In sum, prior to the Minnesota litigation, the tobacco companies had produced only several million pages of documents, virtually all after 1981. Minnesota would eventually compel the production of approximately thirty-five million pages of documents from all defendants. These documents are now in two document depositories, one in Minneapolis (for the domestic defendants) and the other in Guildford, England (for the BAT Group defendants).⁵²

Minnesota would have to engage in an unprecedented effort to obtain these documents. From the beginning, the industry

From Here?, 274 JAMA 256, 256 (1995).

50. See Hanauer et al., *supra* note 31, at 236-37; Lisa Bero et al., *Lawyer Control of the Tobacco Industry’s External Research Program*, 274 JAMA 241, 244-45 (1995).

51. In 1992, one commentator stated that “[w]hile it is possible that a new wave of lawsuits would unearth egregious evidence of a cover-up, it seems unlikely.” Rabin, *supra* note 18, at 875.

52. See generally *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, slip op. at 2 (Minn. Dist. Ct. July 14, 1995). The depositories will remain open pursuant to the terms of the settlement. See Consent Judgment, *Philip Morris*, 1998 WL 394336, at *3.

fought disclosure at every turn. Minnesota was forced to bring countless motions to compel. Industry lawyers played endless word games, claiming they did not know what documents were at issue. The lawyers claimed, for example, that they did not know what the following terms meant in Minnesota's document requests: (1) "smoking and health"; (2) "the properties and effects . . . of nicotine"; (3) "addictive"; (4) "target levels of nicotine in cigarettes"; (5) "minimum dose levels of nicotine"; (6) "safer cigarettes"; (7) "advertising, marketing or promotion of cigarettes"; (8) "the effects of cigarette advertising"; (9) "the effectiveness of warning labels"; (10) "sociology or psychology of smokers"; (11) "antitrust issues in the tobacco industry"; and (12) "document destruction policies."

Another example of the word games comes from this classic response by Brown & Williamson to plaintiffs' request for documents:

Brown & Williamson objects to plaintiffs' definition of the term "smoking and health" on the grounds that it is overly broad, unduly burdensome, vague and ambiguous, and is not reasonably calculated to lead to the discovery of admissible evidence. For example, it purports to include all effects which are "potentially or possibly related to smoking" and "potential or possible effects of nicotine." The definition is further objectionable on the grounds that it is overly broad as it includes any alleged "property or effect" of nicotine, regardless of whether related to health.⁵³

Several examples of the documents wars—prior to the ultimate battle over privilege—follow.

A. *The Industry's Existing Document Indices*

A key, early battle in the Minnesota discovery focused on document indices that the tobacco industry lawyers had created to manage the millions of documents relating to smoking and health. As Minnesota learned, the industry's lawyers began to index all smoking and health documents in the wake of the *Cipollone* litigation in the 1980s. If Minnesota could obtain these indices, they

53. Responses and Objections of Brown & Williamson Tobacco Corporation to Plaintiffs' First Set of Requests for Production of Documents at 3-4, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Minn. Dist. Ct. Aug. 3, 1995).

would provide vital information regarding the massive universe of tobacco industry documents. As President Clinton later remarked, the indices were “the industry’s road map to its own documents and could improve significantly the ability of public health experts, scientists, state and federal officials, and the public to search through industry documents.”⁵⁴ The litigation over these indices lasted for sixteen months, through eight orders of the trial court, and unsuccessful appeals by the industry to the Minnesota Court of Appeals, the Minnesota Supreme Court and the U.S. Supreme Court.

The trial court first addressed the issue of indices in its first case management order, in which the court stated: “Each party shall produce an index of documents along with the production of its documents, to the extent that each party has an existing index of documents.”⁵⁵ At first, the tobacco industry claimed that it had no indices responsive to this order. In a subsequent order, the trial court ordered each side to produce any “previously prepared or produced” index of documents relative to the subject matter of this action, “provided, however, that if the producing party claims an existing index contains subjective information protected by the attorney-client or work product privileges, it shall submit such index to the court for in camera inspection and determination.”⁵⁶

The industry lawyers claimed that any such indices were shielded from discovery as attorney work product because the indices were prepared by outside counsel beginning in the mid-1980s during the second wave of tobacco litigation.⁵⁷ Attorney work product—“documents and tangible things . . . prepared in anticipation of litigation”⁵⁸—is subject to different degrees of protection

54. President’s Memorandum to the Secretary of Health and Human Services (July 17, 1998).

55. Case Management Order, *State ex rel. Humphrey v. Philip Morris Inc.*, No. CI-94-8565, slip op. at 9 (Minn. Dist. Ct. Mar. 29, 1995).

56. *State ex rel. Humphrey v. Philip Morris Inc.*, No. CI-94-8565, slip op. at 6 (Minn. Dist. Ct. July 14, 1995). These indices are generally referred to as the “4A indices” due to the enumeration of the paragraphs in the order. The industry also compiled and produced a different index—known as the “4B indices”—that list the millions of documents produced to the document depositories in Minneapolis and England. These indices are located at the Minneapolis document depository and available to the public in searchable format.

57. See Transcript of Hearing at 45-46, *State ex rel. Humphrey v. Philip Morris Inc.*, No. CI-94-8565 (Minn. Dist. Ct. Sept. 12, 1995). RJR claimed that it had spent \$90 million in compiling the indices to respond to “litigation demands.” *Id.* at 45.

58. MINN. R. CIV. P. 26.02(c).

depending on its nature. Opinion work product—the “opinions, conclusions, legal theories, or mental impressions of counsel”—is generally not discoverable.⁵⁹ In contrast, the ordinary work product of attorneys, often referred to as “fact work product,” is discoverable where the party seeking it shows substantial need and undue burden.⁶⁰

An attorney’s selection of large numbers of documents for inclusion on an index does not constitute opinion work product.⁶¹ In such a situation, the documents are “sufficiently voluminous to minimize disclosure of the attorney’s identification of some occasional wheat among the chaff.”⁶² As one court noted in similar context:

Because of the astronomical number of documents involved in this case, it is highly unlikely that [the defendant’s] mental impressions would be exposed by production of such an index or database. The sheer amount of documents involved is what led the plaintiff to seek the index and database in the first place.⁶³

The heightened protection accorded opinion work product is not triggered “unless disclosure creates a real, nonspeculative danger of revealing the lawyer’s thoughts.”⁶⁴

59. *Dennie v. Metropolitan Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986).

60. Materials prepared by a party’s attorney in anticipation of litigation or for trial are discoverable where the party seeking discovery has “substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” MINN. R. CIV. P. 26.02(c); *see also Denmie*, 387 N.W.2d at 406.

61. *See Washington Bancorp. v. Said*, 145 F.R.D. 274, 278 (D.D.C. 1992) (requiring that document indices compiled by counsel be produced because “[t]he extreme number of documents indexed here virtually eliminates the possibility that defendants could glean from this index . . . litigation strategy.”); *see also In re Shell Oil Refinery*, 125 F.R.D. 132, 134 (E.D. La. 1989) (ordering lists of documents selected by plaintiffs for copying discoverable because “it is highly unlikely that Shell will be able to discern the [plaintiffs’] ‘theory of the case’ . . . simply by knowing which 65,000 documents out of 660,000 documents have been selected for copying.”); *Scovish v. Upjohn Co.*, No. 526520, 1995 WL 731755, at *4 (Conn. Super. Ct. 1995) (“[M]ere identification of a document or files selected by [the defendant] (i.e. by title, date sent, author, recipient, etc.), to be included in the index or database constitutes ordinary work product.”).

62. *United States v. Doe*, 959 F.2d 1158, 1167 (2d Cir. 1992).

63. *Scovish*, 1995 WL 731755, at *3.

64. *In re San Juan DuPont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988).

After reviewing samples of the indices in camera, the trial court found that certain portions of the indices were discoverable, notwithstanding the fact that they were prepared in anticipation of litigation.⁶⁵ The trial court carefully segregated those portions of the indices containing “opinion work product,” from the indices’ “objective information.”⁶⁶ The trial court ordered produced only the most basic, identifying information: for example, document numbers, document dates, document authors, document recipients, verbatim titles, and document types.⁶⁷ The court found that “parties can produce indices of objective information on the millions of documents on their databases without revealing attorney opinion, mental impressions, strategies, or theories.”⁶⁸

The trial court concluded that plaintiffs had demonstrated “substantial need and inability to obtain the equivalent without undue hardship.”⁶⁹ At that time, it was estimated that the tobacco industry might produce nine million pages of documents. As the court recognized:

If five attorneys were to devote twelve hours each per day, five days per week, to the task of reviewing those nine million pages—and limit their review to one minute per page—it would take nine years to review those documents alone. Creation of a new and separate database identifying the nine million documents would be duplicative, time-consuming, and costly.⁷⁰

When finally produced,⁷¹ the indices proved invaluable to

65. See *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, slip op. at 12 (Minn. Dist. Ct. Nov. 1, 1995).

66. See *id.*

67. See *id.* (listing fields ordered produced). All subjective information was ordered redacted, even “inferred” titles and authors and certain information regarding the “subject matter” of a document. See *id.*

68. *Id.* at 16.

69. *Id.* at 13.

70. *Id.* The fact that the industry eventually produced some 35 million page of documents only served to underscore the correctness of the court’s determination.

71. The district court stayed production of the 4A indices until defendants exhausted their appellate remedies. Defendants sought a writ of prohibition from the Minnesota Court of Appeals. The court of appeals denied the writ. See *State ex rel. Humphrey v. Philip Morris Inc.*, No. CX-95-2536 (Minn. Ct. App. Dec. 26, 1995) (citing *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375, 377 (Minn. 1977)). The defendants then sought discretionary review in the Minnesota Su-

plaintiffs in analyzing documents and targeting further discovery, including discovery of documents withheld on claims of privilege. Moreover, given that the plaintiff's now had knowledge of the universe of industry documents, the tobacco industry was forced to forego its past strategy of evading meaningful document discovery.

B. *Corporate Shell Games*

In addition to fighting a war of attrition, the industry also employed a strategy of international concealment, conducting research offshore—often at affiliated corporations. There also was evidence of shipping documents overseas, or destroying them.

1. *Philip Morris International*

Philip Morris took advantage of the formalities of its intricate corporate structure to claim that it had no obligation to produce certain documents in the possession of non-party corporate affiliates, particularly those located abroad. Some of the most critical smoking and health research conducted by Philip Morris has been conducted through its foreign corporate subsidiaries and affiliates, including entities known as Institute fuer Biologische Forschung (“INBIFO”), Contract Research Center (“CRC”), and Fabrique de Tabac Reunis (“FTR”).

Cologne, Germany, where INBIFO is located, was once described by a senior Philip Morris officer as “a locale where we might do some of the things which we are reluctant to do in this country.”⁷² One of the reasons given for having INBIFO was “[c]ontrol . . . experiments can be terminated at will as required without delay.”⁷³

preme Court. The Minnesota Supreme Court denied review without comment. *See State ex rel. Humphrey v. Philip Morris Inc.*, No. CX-95-2536 (Minn. Feb. 27, 1996). The industry finally produced the indices after the United States Supreme Court denied their petition for writ of certiorari. *See R.J. Reynolds Tobacco Co. v. Minnesota*, 517 U.S. 1222 (1996).

72. PM 2022244451.

73. *Id.* Internally, Philip Morris treated INBIFO and CRC as an integral part of its research and development activities. For example, in a document describing INBIFO's importance to Philip Morris, Philip Morris states that “INBIFO/CRC is PM's center of excellence for biological research . . . INBIFO/CRC perform comprehensive biological testing as an integral part of PM's research and development network.” PM 2050975128. Another document further states that “INBIFO/CRC is embedded in PM's R&D organization,” with a chart demonstrating that R&D at Richmond, Virginia is responsible for 80% of INBIFO's budget and 100% of

Other documents demonstrate the use of Philip Morris International subsidiaries for the routing and storage of sensitive documents. For example, a handwritten document from the files of Thomas S. Osdene, the former director of Philip Morris research, states, among other things:

1. Ship all documents to Cologne. . .
2. Keep in Cologne.
3. Okay to phone & telex (these will be destroyed).
-
5. We will monitor in person every two to three months.
6. If *important* letters or *documents* have to be sent, please send to home - I will act on them and destroy.⁷⁴

Osdene pled the Fifth Amendment when asked about this document in his deposition.⁷⁵ As late as 1993, Philip Morris still appeared to be using INBIFO as an offshore repository for documents.⁷⁶

Another document, authored by Robert Seligman, Philip Morris vice president for research and development, stated that Philip Morris has “gone to great pains to eliminate any written contact with INBIFO . . . [t]he written analytical data will still have to be routed through FTR if we are to avoid direct contact with INBIFO and Philip Morris U.S.A.”⁷⁷

Well into discovery, plaintiffs learned that Philip Morris was not producing all relevant documents from its foreign affiliates. Under well-established law, however, a corporation cannot refuse to produce documents simply because they are in the possession of an affiliate.⁷⁸ Depending upon the facts of the case, documents in the possession, custody or control of a corporate affiliate may be

CRC’s budget, with R&D Neuchatel responsible for the remaining 20% of INBIFO’s budget. PM 2050975136.

74. PM 1000130803 (emphasis in original).

75. See Transcript of Deposition of Thomas Osdene, vol. 2 at 140-143, State *ex rel.* Humphrey v. Philip Morris Inc., C1-94-8565 (Minn. Dist. Ct. June 17, 1997).

76. See PM 2043725390. “[F]inal reports on PM USA product research are sent to Richmond for review and are then returned to INBIFO. Supporting data and documents are kept at INBIFO.” *Id.*

77. PM 2000512794.

78. See *Mall of Am. Co. v. County of Hennepin*, Nos. TC-16076, TC-21195, TC-16772, TC-22440, TC-18309, 1995 WL 461069, at *3 (Minn. Tax Ct. Aug. 2, 1995).

subject to discovery through a document request on the corporate entity which is a party in the litigation.⁷⁹ This is a fact-specific inquiry.⁸⁰ Thus, the specific corporate form or organization will not necessarily be a roadblock to discovery:

A corporation is required to produce documents held by its subsidiaries, even if the subsidiary is a foreign corporation and documents are located in a foreign country. This rule applies to both foreign and domestic subsidiaries and to predecessor corporations and subsidiaries. It does not apply, however, to successor corporations that are now separately owned. The rule also applies to documents in possession of a so-called sister corporation, another subsidiary of the non-party parent corporation of the party to the action.⁸¹

Likewise, as the Massachusetts Supreme Court recently recognized, the party defendant need not have "legal control" to be obligated to produce relevant documents:

We reject, as does the clear trend in the Federal cases, "legal right to control" as the test for determining whether, under Rule 34(a), a party may be made responsible for producing materials not in its actual "possession [or] custody." . . . At least in cases such as this, where the nonlitigating corporations from whom information is sought are related to the defendant through a single line of wholly common ownership, the issue of control readily resolves in favor of the party seeking that information.⁸²

The Massachusetts court fashioned the following rule:

The rule we adopt today attributes sufficient control for purposes of requiring discovery whenever the claimant has met his burden of showing that the information sought is in the possession or custody of a wholly owning

79. *See id.*

80. *See id.*

81. ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* § 5.6, at 5:8 (3d ed. Supp. 1997) (citations omitted).

82. *Strom v. American Honda Motor Co., Inc.*, 667 N.E.2d 1137, 1144 (Mass. 1996).

parent (or virtually wholly owning) or wholly owned (or virtually wholly owned) subsidiary corporation, or of a corporation affiliated through such a parent or subsidiary.⁸³

Any other rule would permit corporate defendants to hide documents amongst its corporate affiliates:

To rule otherwise would be to reward corporations that disperse potentially useful information among related entities. When it suits their purposes they will share that information, but when adverse parties seek it out, they would be able to throw up serious and perhaps impenetrable barriers to effective discovery. That is not what the rule contemplates.⁸⁴

83. *Id.*

84. *Id.* at 1145. The Massachusetts decision is consonant with well-settled law from throughout the United States. See *Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 628 (N.D. Ind. 1993) (requiring production from party's parent corporations as there was "close coordination" between them); *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441-42 (D.N.J. 1991) ("Federal courts construe 'control' very broadly under Rule 34" and that Rule 34 does not require an alter ego relationship) (citations omitted); *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 131 (D. Del. 1986) ("It is obvious that the particular form of the corporate relationship does not govern whether a party controls documents.") (emphasis added); *M.L.C., Inc. v. North Am. Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y. 1986) ("The term 'control' is broadly construed" and requiring production from non-party corporate parent"); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984) ("[A party] cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. . . . If defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents."); *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684, 686 (E.D. Wis. 1983) (upholding interrogatories requesting information from subsidiaries of parties because information "is available" to parties); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1153 (N.D. Ill. 1979). The *Uranium* court stated:

It is sufficient [to order production from U.S. party] that [the party] has, or once had, control over its directors, officers and employees who managed the . . . activities of [the party] alone or of both corporations. [The party] must produce all responsive documents held by those employees or former employees, *even if those documents have found their way into [a foreign affiliate's] files*. The formalities separating the two corporations cannot be used as a screen to disguise the coordinated nature of their . . . enterprise.

Id. (emphasis added). See also *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 637

The trial court agreed with Minnesota's argument that Philip Morris' failure to search the files of its affiliates and subsidiaries and produce all documents was "an egregious attempt to hide information relevant to this action."⁸⁵ The court stated that it would not tolerate Philip Morris' "attempts at hiding documents in the morass of interlocking related organizations."⁸⁶

2. *American Tobacco*

American attempted similar corporate shell games. The litigation over American documents involved documents in the possession of its predecessor corporation, former corporate affiliates (including one foreign affiliate), and its national law firm. The trial court granted Minnesota's motion to compel production.⁸⁷ American failed to comply with the order. The court then ordered that it would hold a sanctions hearing if American persisted in noncompliance.⁸⁸ After America's attempts to obtain appellate review of that second order proved unsuccessful,⁸⁹ Minnesota then moved for sanctions. The trial court granted that request, striking any claims of privilege over certain documents and ordering their produc-

(D. Md. 1978) ("The fact that we are dealing with separate corporate entities here is irrelevant . . . [T]he nonparty status of the wholly owned subsidiaries does not shield their documents from production."); *Sol S. Turnoff Drug Distribs. Inc. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 55 F.R.D. 347, 349 (E.D. Pa. 1972) (upholding interrogatories regarding information in possession of subsidiaries and predecessors in name of party); *American Honda Motor Co. v. Votour*, 435 So. 2d 368, 369 (Fla. Dist. Ct. App. 1983) (ordering production from subsidiaries of party is not unreasonable).

85. Order Granting Plaintiffs' Motion to Compel Regarding Philip Morris International and Denying Defendants' Motion for Protective Order, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, slip op. at 9, 15 (Minn. Dist. Ct. Mar. 25, 1997) (citing *Strom v. American Honda Motor Co.*, 667 N.E.2d 1137, 1141-45 (Mass. 1996)).

86. *Id.* at 16.

87. See Order Unsealing Certain Documents of Liggett Group, Inc., *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 8, 1997).

88. See Order Granting Plaintiffs' Motion for Enforcement of Court's Order of May 8, 1997 and Notice of Hearing Motion for Sanctions, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, slip op. at 2 (Minn. Dist. Ct. June 18, 1997).

89. See *State ex rel. Humphrey v. Philip Morris Inc.*, Nos. C2-97-1109, C9-97-1110, CO-97-1111 (Minn. Ct. App. July 22, 1997) (dismissing appeal and denying petitions for extraordinary review); *State ex rel. Humphrey v. Philip Morris Inc.*, No. C2-97-1109 (Minn. Nov. 13, 1997) (denying petition for review).

tion.⁹⁰ In the end, however, American never fully complied with the discovery orders. At the close of trial, the trial court instructed the jury that they could draw a negative inference from American's failure to produce the documents.⁹¹ Upon settlement, the court imposed an additional \$400,000 sanction upon American and B&W.⁹²

IV. DISCLOSURE OF THE TOBACCO INDUSTRY'S "PRIVILEGED" DOCUMENTS AND THE BATTLE IN MINNESOTA OVER APPLICATION OF THE CRIME-FRAUD EXCEPTION

Prior to the Minnesota litigation, the tobacco industry had successfully executed a strategy—directed by lawyers—of withholding important information on the health hazards of smoking under improper claims of attorney-client privilege and work product protection. In the Minnesota litigation, the tactics of the industry and their lawyers were exposed. After extended and intense litigation, more than twenty trial court orders, and more than five appeals, the industry's carefully-built wall of secrecy crumbled and more

90. See Order Imposing Sanctions Upon the American Tobacco Company and Brown & Williamson Tobacco Corporation as Successor by Merger to the American Tobacco Company, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 8 (Minn. Dist. Ct. Dec. 30, 1997). B&W and American were also ordered to pay the Clerk of the Court the sum of \$100,000 as a sanction. See *id.* at 9.

91. The jury was instructed:

Prior to trial plaintiffs requested certain documents and answers to certain questions regarding research on smoking and health from American Tobacco and Brown & Williamson, as successor by merger to American Tobacco. After American Tobacco and Brown & Williamson failed to produce the information, they were ordered to do so by this court. American Tobacco and Brown & Williamson then violated that order which required them to produce the documents and answer the questions in an unevasive answer. I now instruct you that you may draw a negative inference from American Tobacco's and Brown & Williamson's failures to provide the information ordered produced. You may assume that if the information about American Tobacco's and Brown & Williamson's smoking-and-health research had been produced, it would have been unfavorable to the positions taken by American Tobacco and Brown & Williamson.

Transcript of Proceedings at 15661-62, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. May 6, 1998).

92. See State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 2 (Minn. Dist. Ct. May 8, 1998).

than 39,000 documents withheld on claims of privilege were produced.⁹³

Because the "privileged" documents disclosed in Minnesota contain important scientific facts about the health consequences of smoking and the industry's knowledge of these consequences, the 39,000 documents will have significance for the public health community, governmental authorities and other litigants for decades to come.⁹⁴ The documents will also have lasting implications for the industry, particularly for its lawyers.

Leading experts on ethics and privilege have been shocked and dismayed by the abuses of privilege uncovered in Minnesota. Ethics expert Geoffrey Hazard noted that the documents disclosed in Minnesota "will haunt the legal profession for a long time" because they "show perversion of the lawyer's role in counseling business clients and exploitation of the attorney-client privilege to conceal deception."⁹⁵ The director of the Minnesota Office of Lawyer Professional Responsibility recently summed up the "misuse" of privilege that occurred in the tobacco litigation as follows:

The solution adopted by the tobacco companies was to have their "scientific" research conducted under the close consultation, and sometimes under the management, of their lawyers. The idea was that bad findings could be held back as lawyer-client confidences, whereas good findings could be described as the product of scientific inquiry.⁹⁶

The director also suggested that the attorney behavior dis-

93. With limited exceptions, copies of the "privileged" documents ordered produced in Minnesota can be found at the following Internet address: <<http://www.house.gov/commerce/TobaccoDocs/documents.html>>. The documents were placed on the Internet after the industry turned them over to Congress in response to a congressional subpoena issued as a result of the decisions in the Minnesota tobacco litigation.

94. See Richard D. Hurt & Channing R. Robertson, *Prying Open the Door to the Tobacco Industry's Secrets About Nicotine*. *The Minnesota Tobacco Trial*, 280 JAMA 1173, 1173 (1998). "The recent release of previously protected attorney-client-privileged documents, ordered to be produced [in Minnesota] on the basis of crime or fraud, shed even more light on the industry's secrets." *Id.*

95. Geoffrey C. Hazard, *Tobacco Lawyers Shame the Entire Profession*, NAT'L L.J., May 18, 1998, at A22.

96. Edward J. Cleary, *The Use and Abuse of the Attorney-Client Privilege*, BENCH & B. MINN., Sept. 1998, at 18.

closed in the Minnesota litigation was “far more than an ethical violation; such conduct may well constitute obstruction of justice in violation of the criminal code.”⁹⁷ Legal ethics experts from California agree.⁹⁸ After reviewing the documents in Minnesota, they concluded that:

[I]t is impossible, in our view, to argue credibly that lawyers are acting ethically when they *affirmatively* advise their tobacco clients to *avoid* taking steps that would substantially reduce the number of people killed by tobacco. We leave others to debate whether such advice should be termed “criminal” or “fraudulent,” but it is surely bereft of any moral or legal justification.⁹⁹

The following section of this article describes the legal doctrines employed by Minnesota’s counsel to pry open the industry’s secret “privileged” files. Particular focus is placed on the theory of crime-fraud offered by plaintiffs and ultimately adopted by the special master¹⁰⁰ and trial court. Finally, insight is provided into some of the “new” facts revealed in the 39,000 documents produced, for the first time to any litigant, on April 7, 1998.

A. *Prologue to Disclosure*

From very early on in the litigation, the industry was placed on notice that its claims of privilege would be closely scrutinized and,

97. *Id.* at 19. Similar conclusions with respect to the documents disclosed in Minnesota were reached by the author of leading treatises on attorney-client privilege:

Further proceedings against the attorneys would be appropriate. The law cannot give such a broad, absolute, and unlimited privilege to communications between clients and officers of the court and then tolerate any knowing abuse of it by those officers.

Paul R. Rice, *We Haven't Got a Secret Anymore: How the Tobacco Industry Lost Its Attorney Client Privilege*, LEGAL TIMES, Apr. 13, 1998, at 28.

98. See Richard A. Zitrin & Carol M. Langford, *Ethics in Ashes: Big Tobacco's Lawyers Hide Behind the Cloak of Privilege*, CAL. LAW., Nov. 1998, at 46.

99. *Id.* at 49.

100. On March 25, 1997, Judge Fitzpatrick, pursuant to Minn. R. Civ. P. 53, appointed Mark W. Gehan, Jr., as special master for the purpose of rendering reports regarding documents withheld from production on the grounds of privilege. See Order Referring Certain Matters to a Special Master, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 2 (Minn. Dist. Ct. Mar. 25, 1997).

if necessary, challenged by the Minnesota plaintiffs. The message to the industry from the outset was clear: the Minnesota plaintiffs would seek to hold the industry accountable for any abuse of the legal system. This issue was raised early because, even at that time, the tobacco industry and its lawyers had gained a reputation for abuse of privilege. The first court to closely examine the industry's penchant for withholding scientific information under claims of privilege was Judge Sarokin in *Haines v. Liggett Group, Inc.*¹⁰¹ In *Haines*, the district court judge found that the documents he reviewed in camera:

[S]peak for themselves in a voice filled with disdain for the consuming public and its health. Despite the industry's promise to engage independent researchers to explore the dangers of cigarette smoking and to publicize their findings, the evidence clearly suggests that the research was not independent; that potentially adverse results were shielded under the caption of "special projects;" that the attorney-client privilege was intentionally employed to guard against such unwanted disclosure; and that the promise of full disclosure was never meant to be honored and never was.¹⁰²

During the most recent wave of litigation, other courts found that the tobacco companies have made invalid claims of privilege. Indeed, virtually every court which reviewed the industry's allegedly privileged documents in camera has found that at least some of the documents are not privileged or are subject to disclosure under the crime-fraud exception.¹⁰³ Compared to Minnesota, however, only a

101. 140 F.R.D. 681, 695-96 (D.N.J. 1992).

102. *Id.* at 684. The Third Circuit reversed Judge Sarokin's decision on the grounds that the judge had violated the Federal Magistrate Act. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992). The Third Circuit also ordered the case reassigned to another judge on remand in view of statements made in the district court's prologue to its opinion. *See id.* at 98. In this prologue, the district court stated, *inter alia*, "[T]he tobacco industry may be the king of concealment and disinformation." *Id.* at 97. On remand, however, the plaintiffs' law firm, exhausted by the industry's dilatory tactics, sought permission to withdraw, before the claims of privilege were ever resolved. *See Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 416 (D.N.J. 1993).

103. *See, e.g.*, *Florida v. American Tobacco Co.*, CL 95-1466 AX, slip op. at 4 (Fla. Cir. Ct. Apr. 9, 1997) ("[The tobacco companies] utilized attorneys in carrying out and planning fraudulent activities and undertook to misuse the attorney/client relationship to keep secret research and other activities related to the

handful of documents were ultimately ordered produced to the plaintiffs in those cases.

Despite the clear warnings in Minnesota, the industry's lawyers engaged in an indiscriminate dumping of thousands upon thousands of documents on privilege logs. Before it was all over, the industry lawyers claimed privilege over more than 230,000 documents, including critical scientific documents on the health hazards of smoking. Pursuant to the case management order entered in the case during 1995, the parties were ordered to create privilege logs providing information about documents withheld from discovery on grounds of privilege.¹⁰⁴ Information required included the author, recipients, date, subject matter description and the basis for the privilege claim.¹⁰⁵

In most instances, the tobacco industry privilege logs were vague and redundant. For example, RJR cursorily described the subject matter of more than 6,800 allegedly privilege documents as

true health dangers of smoking."); *Texas v. American Tobacco Co.*, No. 5:96-CV-091, slip op. at 2 (E.D. Tex. Nov. 12, 1997) ("There is prima facie evidence that the services of the tobacco industry lawyers were sought and/or obtained to enable or aid one or more Defendants in committing or planning to commit the crimes, frauds or other misconduct."); *Washington v. American Tobacco Co.*, No. 96-2-15056-8 SEA, 1997 WL 728262, at *9 n.5 (Wash. Super. Ct. Nov. 21, 1997) ("[The] chance that the public would be misled [by CTR Special Projects] and would be unable to identify which research projects were directed by [tobacco companies] to promote their legal, business, or public relations interests was so great as to give rise to the inference of fraud."); *Sackman v. Liggett Group, Inc.*, 173 F.R.D. 358, 363 (E.D.N.Y. 1997) (finding that 305 Liggett documents were not subject to an underlying claim of privilege); *Burton v. R.J. Reynolds Tobacco Co.*, 177 F.R.D. 491, 494 (D. Kan. 1997) (ordering production of several of RJR's documents, concluding that the legal arguments proffered by RJR's counsel were clearly contrary to any reasonable application of the attorney-client privilege or work product doctrine).

104. See Case Management Order, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, slip op. at 10 (Minn. Dist. Ct. Mar. 29, 1995).

105. See *id.* Specifically, the case management order provided that the following information was to be listed for each document withheld from production on a claim of privilege:

- (a) Document production number;
- (b) Date;
- (c) Author;
- (d) Addressees and recipients of copies;
- (e) Type of document;
- (f) Subject matter of document;
- (g) Nature of claimed privilege (e.g. attorney-client; work product)

Id.

only "scientific research," "smoking and health issues," or "scientists and scientific research." Brown & Williamson provided the following worthless subject matter description for hundreds of documents: "Confidential communication reflecting legal advice/request for legal advice."

As a result of this industry tactic, it was very difficult for Minnesota's counsel to document all of the privilege abuses. Though privilege issues had been addressed since literally the first case management order, litigation of the issue intensified in the fall of 1996, when Minnesota brought a motion arguing that when a party asserting privilege provides an inadequate log, the claimed privilege is waived.¹⁰⁶ The trial court denied Minnesota's motion, but issued a warning to defendants: "[T]he Court is concerned and cautions the parties to provide sufficient information in their privilege logs so that a reasoned decision can be made without in-camera review of an unreasonable percentage of documents"¹⁰⁷ The industry and its counsel, however, failed to heed the trial court's warning and refused to describe the nature of their "privileged" documents with any more detail.

Privilege was addressed again, in the spring of 1997, when the State of Minnesota entered into a settlement agreement with the smallest (by far) of the cigarette manufacturers, Liggett. A condition of the settlement included Liggett waiving all of its claims of privilege. The non-Liggett industry defendants, however, objected to production of approximately 2,400 of the Liggett privileged documents, claiming that they were subject to a joint defense privilege which could not unilaterally be waived by Liggett.¹⁰⁸

106. Some courts have found that inadequate privilege logs result in waiver of privilege. See, e.g., *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474-75 (S.D.N.Y. 1993) (finding that there "simply [was] not enough information supplied to support the privilege claims," where a privilege log provided only "very skeletal descriptions of 'subject'"); *Willemijn Houdstermaatschaap B.V. v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1443-44 (D. Del. 1989) (finding plaintiff originally supplied "facially insufficient" descriptions of withheld documents to provoke protection and that plaintiff would not be allowed to "embellish" the descriptions later to avoid complying with defendant's discovery requests).

107. *Order Denying Plaintiffs' Motion to Waive Privilege*, State *ex rel.* *Humphrey v. Philip Morris Inc.*, No. C1-94-8565, slip op. at 3 (Minn. Dist. Ct. Nov. 8, 1996). While denying plaintiffs' motion for waiver, the trial court agreed that "the description of certain documents . . . is arguably insufficient for Plaintiffs to reasonably determine whether or not to challenge the claim . . ." *Id.* at 2-3.

108. "[T]he joint defense privilege cannot be waived without the consent of all parties to the defense." See *John Morrell & Co. v. Local Union 304A of United Food & Comm'l Workers*, 913 F.2d 544, 556 (8th Cir. 1990) (quoting *Ohio-Sealy*

By order of March 28, 1997, the trial court directed the parties to file memoranda of law in support of or in opposition to claims of privilege and joint defense.¹⁰⁹ The trial court also directed the industry to submit “such motions and affidavits as may be necessary to support any claims of privilege” over the Liggett documents.¹¹⁰ Extensive briefs, affidavits, and exhibits (literally box-loads by the industry) were filed by both sides, and two days of hearings on privilege and application of the crime-fraud exception were conducted before the trial court on April 8 and 15, 1997. A discussion of the theories advanced by Minnesota’s counsel (and ultimately adopted by the trial court) follow.

B. Legal Doctrines Employed by Minnesota to Expose Privilege

1. Purpose and Scope of Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an attorney and a client where legal advice is sought.¹¹¹ Withholding documents under a claim of privilege is, as the term reflects, a privilege which must be used with prudence to ensure that there is no abuse. The purpose of the privilege is to encourage communication between a client and attorney to “promote broader public interests in the observance of law and administration of justice.”¹¹² The elements of the attorney-client privilege are well established:

- (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in

Mattress Mfg. Co v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980).

109. See Order Relating to Privilege Claims, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 2 (Minn. Dist. Ct. Mar. 28, 1997).

110. *Id.*

111. See, e.g., EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 6-7 (3d ed. 1997). The attorney-client privilege is codified at Minnesota Statutes section 595.02, subd. 1(b), which states that privilege can apply only to a “communication by the client to the attorney or the attorney’s advice given thereon in the course of professional duty.” Minn. Stat. § 595.02 subd. 1(b) (1998).

112. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also EPSTEIN, *supra* note 111, at 2. “[T]he protection from compelled disclosure accorded to the attorney-client relationship is predicated upon the tacit assumption that lawyers are consulted for the purpose of abiding by, rather than devising means to break, the law.” *Id.*

confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) except the protection be waived.¹¹³

The industry took a very expansive view of privilege in the Minnesota litigation, arguing that privilege protects any "confidential communication" between client and counsel, between counsel, or even between client representatives. Properly viewed, however, the privilege protects only one narrow category of confidential communications, those that constitute "legal advice" from a legal adviser acting "in his capacity as such."¹¹⁴

In Minnesota, privileges are narrowly construed because their assertion results in the "suppression of relevant and essential evidence."¹¹⁵ Thus, the burden rests upon the party claiming privilege to present facts demonstrating privilege.¹¹⁶ Litigants are not excused from this burden merely because of the magnitude of their privilege claims:

Although it may be time-consuming to specifically assert the attorney-client or work product privilege in document intensive litigation, the courts nonetheless clearly require such specific identification [T]he assertion of a privilege . . . is strictly construed. If the privilege is worth protecting, a litigant must be prepared to expend some time to justify the assertion of the privilege.¹¹⁷

Whether this burden is met is a question vested in the discretion of the trial court.¹¹⁸

113. *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 33, 62 N.W.2d 688, 700 (1954).

114. *Id.*; see also *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 615 n.3 (D.D.C. 1979) (noting that, before any communication is privileged, it must "involve application of law to facts or the rendering of an opinion of law in response to the client's legal inquiries").

115. *Baskerville v. Baskerville*, 246 Minn. 496, 510, 75 N.W.2d 762, 771 (1956).

116. See *In re Parkway Manor Healthcare Ctr.*, 448 N.W.2d 116, 118 (Minn. Ct. App. 1989).

117. *Eureka Fin. Corp. v. Hartford Accident & Indemn. Co.*, 136 F.R.D. 179, 183 (E.D. Cal. 1991) (citations omitted).

118. See *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987).

2. *Only Legal Advice, Not Scientific Information, Can Be Subject to the Attorney-Client Privilege*

Based on industry conduct in prior litigation, Minnesota was aware that the industry would attempt to hide its secrets regarding the health hazards of cigarettes behind improper claims of privilege. Even though Minnesota's counsel placed the industry on notice early-on that such claims would be vigorously attacked, the industry took the imprudent path of claiming privilege over thousands upon thousands of scientific research documents. Through a meticulous review of the industry's privilege logs, plaintiffs were able to present the trial court with a litany of compelling facts regarding the industry's improper behavior. For example, plaintiffs' counsel determined that RJR had claimed privilege for more than nineteen thousand documents regarding scientific research into smoking and health, which represented approximately forty percent of its privilege claims. Philip Morris listed on its log more than five thousand documents either authored by or received by its top-ranking scientists. Similarly, American Tobacco listed on its privilege logs documents prepared by American researchers (and sent to outside counsel) on the following smoking and health topics:

- causes of lung disease
- research on chronic obstructive lung disease
- research on the alleged effect of smoking on cardiovascular disease
- research on alleged effect of smoking on carbon dioxide in the bloodstream
- research on arteriosclerosis
- ischemic heart disease and cigarette smoking¹¹⁹

Minnesota argued that scientific information should not be hidden from disclosure under claims of privilege. Such information, Minnesota argued, would establish, among other things, the knowledge the industry possessed about the hazards of cigarettes.

119. These descriptions appear in American Tobacco Company's privilege log which is available to the public in a computer-searchable format at the Minnesota Depository. The Minnesota Depository holds seven privilege logs, one for each defendant in the Minnesota litigation.

The attorney-client privilege extends solely to legal advice from a legal advisor acting in a legal capacity.¹²⁰ Similarly, the work product doctrine protects only information "primarily concerned with legal assistance."¹²¹ Thus, an attorney making or receiving the allegedly privileged communication must do so in the capacity of a lawyer. Before any communication is privileged, it must "involve application of law to facts or the rendering of an opinion of law in response to the client's legal inquiries."¹²²

Neither the attorney-client nor work product protection applies to communications made in the ordinary course of business.¹²³ When lawyers direct factual investigations, they are often acting in a business, not a legal, capacity.¹²⁴ Thus, "the attorney-client privilege does not protect client communications that relate only to business or technical data."¹²⁵ This information is discoverable because a "litigant cannot shield from discovery the knowledge it possessed by claiming it had been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer."¹²⁶ Indeed, there are "few, if any, conceivable circumstances where a scientist or engineer employed to gather data" should be viewed as falling within the privilege.¹²⁷

120. See *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 33, 62 N.W.2d 688, 700 (1954).

121. *In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 520 (N.D. Ill. 1990).

122. *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 615 n.3 (D.D.C. 1980).

123. See *Schmitt v. Emery*, 211 Minn. 547, 552-53, 2 N.W.2d 413, 416 (1942), overruled in part on other grounds by *Leer v. Chicago, St. Paul & Pac. Ry.*, 308 N.W.2d 305 (Minn. 1981).

124. See *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163-64 (D. Minn. 1986) (noting that, where the investigation by in-house counsel included non-legal opinions and thoughts about the facts, as opposed to legal or trial matters, it was "ordinary business . . . outside the scope of . . . privileges").

125. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987).

126. *Rhone-Poulenc Rorer Inc. v. Home Indemn. Co.*, 32 F.3d 851, 864 (3d Cir. 1994); see also *Crowe v. Lederle Lab.*, 510 N.Y.S.2d 228, 229 (N.Y. App. 1986) (scientific reports conducted to "monitor complaints," even if also used in litigation, are discoverable).

127. *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994).

3. *Scientific Information Simply Transferred to Attorneys Is Not Privileged*

Time and again, the industry claimed privilege over research documents that were prepared by scientists and sent to other scientists, but were also received by in-house counsel. For example, Brown & Williamson claimed privilege for approximately 6,000 documents containing underlying factual information that was simply transferred to counsel, purportedly to “facilitate the rendition of” legal advice.

Minnesota argued that the industry was abusing privilege by funneling otherwise discoverable scientific information through its lawyers. Courts have concluded that “counsel cannot suppress evidence by taking possession of it.”¹²⁸ The attorney-client and work product protections are “never available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.”¹²⁹ Information, including scientific research, does not become privileged by virtue of being filtered through attorneys.¹³⁰ Nor does scientific information become privileged merely because it is incorporated into a communication between an attorney and client.¹³¹ Legal departments “are not citadels in which public, business or technical information may be placed to defeat discovery”¹³²

4. *Limitations upon Work Product Protection over Scientific Research*

Minnesota’s review of the privilege logs also revealed that the industry was over-designating scientific research as work product. Under the work product doctrine, documents or tangible things prepared in anticipation of litigation are subject to a *qualified immunity*.¹³³ The United States Supreme Court in *Hickman v. Taylor*¹³⁴

128. PAUL RICE, *THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* § 7.11, at 525 (1993).

129. *Radiant Burners, Inc. v. American Gas Ass’n*, 320 F.2d 314, 324 (7th Cir. 1963).

130. *See id.*

131. *See Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

132. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987).

133. Minnesota Rules of Civil Procedure Rule 26.02(c), like its federal counterpart, allows discovery of work product in some circumstances:

[A] party may obtain discovery of documents and tangible things . . .

described the limited nature of this protection: "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases."¹³⁵

Thus, like the attorney-client privilege, the work product doctrine protects only information primarily concerned with legal advice.¹³⁶ Moreover, work product protection does not extend to investigations conducted in the ordinary course of business.¹³⁷ Nor do pre-existing documents become "work product" just because they were reviewed by an attorney in preparation for litigation.¹³⁸ There are two species of work product. First, fact work product (often referred to as "ordinary" work product) is discoverable if the party seeking production can show "substantial need" and "undue hardship" in obtaining the materials or their equivalent by other means.¹³⁹ The second type of work product consists of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."¹⁴⁰ This opinion work product is given heightened protection.

Whether particular information is protected, or whether quali-

prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, . . .) only upon a showing that the party seeking discovery has *substantial need of the materials . . .* and that the party is *unable without undue hardship to obtain the substantial equivalent of the materials by other means.*

Id. (emphasis added).

134. 329 U.S. 495 (1947).

135. *Id.* at 511.

136. See *In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 519 (N.D. Ill. 1990); see also *United States v. Construction Prods. Research Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (party claiming work product must show documents "were prepared principally or exclusively to assist" in litigation).

137. See *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982).

138. See, e.g., EDNA SELAN EPSTEIN & MICHAEL M. MARTIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 124 (2d ed. 1989). Other courts have also found that the mere fact that an attorney has gathered or selected documents from pre-existing documents does not convey work product protection to that activity. In *Compagnie Francaise*, the district court questioned whether documents obtained from third parties by a party's counsel were protected by the work product doctrine. See *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16, 40-41 (S.D.N.Y. 1984). Surveying the cases on this issue, the court found that pre-existing documents, even when selectively assembled by counsel in preparation for trial, are not protected. See *id.* at 41-42.

139. *Dennie v. Metropolitan Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986).

140. *Id.*

fied protection has been overcome, lies within the trial court's discretion.¹⁴¹ This discretion must be exercised with the function of work product protection in mind. The boundaries of the doctrine are mapped by balancing the interest in providing lawyers with "a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," against the societal interest in ensuring that the parties obtain "[m]utual knowledge of all the relevant facts . . . gathered."¹⁴² The policy behind the rule is not to give the attorney special protections, but rather to protect the adversary trial process.¹⁴³ The work product privilege exists "to promote the adversary process, not to pervert it."¹⁴⁴

In other words, the protection cannot be used as a sword rather than a shield. In *Boldt v. Sanders*,¹⁴⁵ the Minnesota Supreme Court found that overbroad protection will encourage "the 'poker hand' concept of litigation, rewarding artifice and camouflage."¹⁴⁶ The Minnesota Rules of Civil Procedure were promulgated to reduce exactly those types of tactics.¹⁴⁷

5. *Scientific Inquiry into Health Hazards of a Product Is Not Work Product*

Scientific inquiry concerning a product is seldom predominantly for the purposes of litigation. Merely involving an attorney in non-legal matters does not transform such information into work product.¹⁴⁸ Moreover, some courts have recognized that a manufacturer has a special duty, apart from litigation, to keep abreast of the hazards posed by its products.¹⁴⁹ Accordingly, Minnesota argued

141. See *In re Indenture of Trust*, 437 N.W.2d 430, 437 (Minn. Ct. App. 1989) (asserting that it is the trial court "familiar with the case" who is "in the best position" to determine the substantial need/undue hardship calculus of Rule 26.02).

142. *Hickman v. Taylor*, 329 U.S. 495, 507, 510-11 (1947).

143. See *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980).

144. EPSTEIN & MARTIN, *supra* note 138, at 151.

145. 261 Minn. 160, 111 N.W.2d 225 (1961).

146. *Id.* at 164, 111 N.W.2d at 227-28.

147. See *id.* at 164, 111 N.W.2d at 227.

148. See *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1051 (D. Del. 1985) ("[F]actual recitations of technical data and research experiments conducted by Carbide's employees" is not work product even if "the documents were prepared by or forwarded to Carbide's in-house counsel").

149. See *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 278 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986). The Minnesota Civil Jury Instruction Guides provide that "You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field." MINNESOTA DIST.

that research that resulted from this duty—the scientific information establishing the knowledge possessed by a manufacturer about its products—should be discoverable.¹⁵⁰

6. *The Use of "Litigation Consultants" Cannot Shield Scientific Research as Work Product*

The tobacco industry attempted to justify its claims of work product over some internal scientific documents by arguing that the company scientists who authored the documents were acting as "consultants" to their attorneys. Minnesota presented law demonstrating that the predicate of this claim—that in-house scientists or employees are somehow experts or consultants for the purposes of litigation—has disturbed many courts.¹⁵¹ "There is a legitimate concern that a party may try to immunize its employees who are actors or viewers [in or of the events giving rise to a cause of action] against proper discovery by designating them experts retained for

JUDGES ASS'N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 117 (Michael K. Steenson, rep.) in 4 MINN. PRACTICE 1, 83 (3d ed. 1986). In addition to the caselaw, Minnesota also relied on documents produced in discovery where the industry itself had recognized this duty. For instance, one Philip Morris document produced in the Minnesota litigation stated that "[t]he industry should abandon its past reticence with respect to medical research," because "failure to do such research could give rise to negligence charges." PM 1000335622.

150. In a similar circumstance in the asbestos litigation, a court required the defendant to produce information—including information in the hands of experts—concerning the manufacturer's knowledge of the health hazards of asbestos. *See* *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 299 (E.D. Pa. 1980) ("If [defendant] has knowledge of the matters requested . . . and has employed experts whom [defendant] does not expect to call at trial, the interrogatory should be answered anyway, for this information is directed at learning the extent of [defendant's] knowledge of asbestos and asbestos-related diseases . . ."); *see also* *Soeder v. General Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (holding that product investigations motivated by a desire to improve the product, guard against adverse publicity, or protect a company's economic interests are not protected); *Hensel Phelps Constr. Co. v. Southwestern Roofing & Sheeting Co.*, 29 Fed. R. Serv. 2d 1095, 1097 (D. Colo. 1980) (holding that documents regarding defective roof were not work product because their purpose was to identify roofing problems).

151. *See, e.g.,* *Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 405 (E.D. Va. 1975) ("[W]ork performed and the reports made by in-house experts was not the work product of lawyers."); *Union Carbide*, 619 F. Supp. at 1051 ("[F]actual recitations of technical data and research experiments conducted by Carbide's employees is not work product even if the documents were prepared by or forwarded to Carbide's in-house counsel.").

work on the case.”¹⁵² Thus, “courts should be exceedingly skeptical when employees who have otherwise discoverable information are designated ‘experts’ and efforts must be made to preserve the opportunity for the opposing party to discover that information.”¹⁵³ The industry also tried to shield scientific information by arguing that it was generated or used by defendants’ consulting experts. A litigant is not permitted, however, to hide facts given to a consultant or expert under a claim of work product.¹⁵⁴

C. *The Crime-Fraud Exception to Attorney-Client Privilege and Work Product Doctrine*

Even if a document is properly privileged, the crime-fraud exception to privilege may require its production. The guiding principle of the crime-fraud exception is that communications that facilitate the commission of crimes or frauds are not worthy of protection. As the United States Supreme Court stated in the seminal case of *Clark v. United States*:¹⁵⁵ “The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.”¹⁵⁶

The crime-fraud exception applies to ongoing or future crimes or fraud, the assumption being that the advice is being sought in order to achieve the illegal act.¹⁵⁷ In contrast, legal advice sought to determine how to deal with a past fraud or crime may be privileged.¹⁵⁸

152. 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2033, at 466 (2d ed. 1994); see also 2 DAVID F. HERR & ROGER S. HAYDOCK, MINN. PRACTICE § 26.02, at 28 (2d ed. 1985) (information obtained from regular employee “experts,” as opposed to specially retained experts, is available through routine discovery processes).

153. WRIGHT ET AL., *supra* note 152, § 2033, at 466.

154. See *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 994 (D.C. Cir. 1980). “[F]acts given by the party to the expert can no more be protected by that fact than facts given to counsel by a party can be brought within the attorney client privilege.” *Id.* (citing 4 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 26.66[2] (2d ed. 1976)).

155. 289 U.S. 1 (1933).

156. *Id.* at 15.

157. See, e.g., *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974), *aff’d*, 540 F.2d 1215 (4th Cir. 1976).

158. See *United States v. Zolin*, 491 U.S. 554, 572 (1989) (attorney-client privilege “ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*”) (citations omitted) (emphasis in original).

Prior to the tobacco litigation, there were few Minnesota decisions on the crime-fraud exception. In 1979, the Minnesota Supreme Court stated, without mentioning the doctrine by name, that "privilege is not permitted to prevent disclosure of communications relating to commission of future crime or fraud."¹⁵⁹ More recently, in *Levin v. C.O.M.B. Co.*,¹⁶⁰ the Minnesota Court of Appeals adopted the "prima facie" standard of proof and the common two-part test for application of the exception: "To invoke the crime-fraud exception to the attorney-client privilege, Levin must establish a prima facie showing that the communication was (1) in furtherance of a crime or fraud and (2) was closely related to the fraud."¹⁶¹

The "crime-fraud" exception is a flexible concept that courts throughout the country have applied beyond those circumstances where the technical definition of "crime" or "fraud" is met.¹⁶² For instance, other conduct such as torts or bad faith breach of duty may suffice.¹⁶³ In the Minnesota litigation, the industry strenuously argued that plaintiffs were required to prove all elements of common law fraud, including reliance, before the crime-fraud excep-

159. *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979).

160. 469 N.W.2d 512, 515 (Minn. Ct. App. 1991).

161. *Id.* Other courts have also adopted the "prima facie" standard for application of the crime-fraud exception to privilege. See *In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980) (ruling that party "is not required to prove the existence of crime or fraud" as a prima facie showing is sufficient); *In re Feldberg*, 862 F.2d 622, 625-26 (7th Cir. 1988) ("The question here is not whether the evidence supports a verdict but whether it calls for inquiry."); *Duplan*, 540 F.2d at 1220 ("[W]hile a prima facie showing need not be such as to actually prove the disputed fact, it must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left rebutted.").

162. See *In re Sealed Case*, 124 F.3d 230, 232 n.1 (D.C. Cir. 1997) ("[T]he exception applies not only to crimes and fraud, but to other intentional torts."); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (applying the exception to "crime, fraud, or other misconduct"); *United States v. American Tel. & Tel.*, 86 F.R.D. 603, 624-25 (D.D.C. 1979) (any "wrongful purpose," including "crime, fraud or tort" or antitrust violation); *Cooksey v. Hilton Int'l Co.*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994) (exception applies to "intentional torts moored in fraud"); *Volcanic Gardens Management Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex. App. 1993) (stating that, for purposes of the exception, "fraud" is "much broader" than common law and criminal fraud); *Central Constr. Co. v. Home Indem. Co.*, 794 P.2d 595, 598 (Ala. 1990) (holding that public policy demands a broader interpretation of fraud as it relates to the exception to the attorney-client privilege).

163. See *In re A.H. Robins Co.*, 107 F.R.D. 2, 14-15 (D. Kan. 1985) (finding that the crime-fraud exception applies to ongoing concealment and misrepresentation of the hazards of a product).

tion to privilege would apply.¹⁶⁴ This requirement, however, cannot be reconciled with the long line of authority holding that the crime-fraud exception does not require a completed crime or fraud, but rather can be applied where an attorney's communications enable or assist a party in planning a crime or fraud.¹⁶⁵

Typically, the party seeking discovery under the crime-fraud exception need make only a "prima facie" showing of one of these categories of wrongdoing that constitutes "crime-fraud."¹⁶⁶ Recent cases have interpreted this standard to mean that only a "foundation in fact" sufficient to support the allegation of fraud and that the communication was made in furtherance of that fraud is necessary.¹⁶⁷ This showing is less than is required to substantively prove a crime or a cause of action for fraud.¹⁶⁸ Requiring a stricter showing "may not be possible at the discovery stage, and would result in an overzealous protection of the attorney-client privilege in a context where the rationale for that privilege may be inapplicable."¹⁶⁹ Thus, a finding that the crime-fraud exception applies in the discovery context does not constitute a substantive finding that a party

164. A minority of courts have held that, to prove the crime-fraud exception in discovery, a party has to prove every element of a substantive cause of action for fraud. *See, e.g., Laser Indus., Ltd. v. Reliant Tech. Inc.*, 167 F.R.D. 417, 423 (N.D. Cal. 1996).

165. *See In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (holding that the proponent of the crime-fraud exception does not have to establish the essential elements of a crime or fraud "beyond a reasonable doubt, since the crime-fraud exception does not require a *completed* crime or fraud but only that the client ha[s] consulted the attorney in an *effort* to complete one") (emphasis in original) (citations omitted); *see also In re Andrews*, 186 B.R. 219, 222 (Bankr. E.D. Va. 1995) (explaining that the opponent "does not have to conclusively prove the elements of the purported crime or fraud" but only show client intended crime or fraud).

166. *See Levin v. C.O.M.B. Co.*, 469 N.W. 2d 512, 515 (Minn. Ct. App. 1991). Other courts have phrased the "prima facie" requirement differently. *See Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 692 (D.N.J. 1992) (noting that courts recognize the phrases "probable cause" or "prima facie showing" are interchangeable because both "require a person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." Essentially, "all of these proposed standards amount to the same basic proposition—has the party seeking discovery presented evidence which, if believed by the fact-finder, supports plaintiff's theory of fraud?").

167. *See Caldwell v. District Court*, 644 P.2d 26, 32-33 (Colo. 1982).

168. *See In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980) (party "is not required to prove existence of crime or fraud" as a prima facie showing is sufficient); *see also In re Feldberg*, 862 F.2d 622, 625-26 (7th Cir. 1988); *Duplan Corp. v. Deering Milliken*, 540 F.2d 1215, 1220 (4th Cir. 1976).

169. *Caldwell*, 644 P.2d at 32-33.

is guilty of a crime or liable for fraud.¹⁷⁰

Cases analogous to the tobacco litigation—involving the safety of a product—have established that the crime-fraud exception applies to documents related to a manufacturer's knowledge and misrepresentations regarding health hazards. In *In re A.H. Robins*,¹⁷¹ a case involving the Dalkon Shield IUD, the court found that the crime-fraud exception applied to documents relating to the following categories of behavior by the defendant:

[Robins] failed to adequately test the Dalkon Shield before marketing it; attempted to develop hard evidence that misrepresented the nature, quality, safety and efficacy of the Dalkon Shield; ignored the mounting evidence against the Dalkon Shield, with knowledge of the potential harm caused by the product; relied upon invalid studies in an effort to refute or ignore the dangers potentially caused by the Dalkon Shield; and attempted, with the assistance of counsel, to devise strategies to cover up Robins' responsibilities and lessen its liability with respect to the Dalkon Shield.¹⁷²

Additionally, attempts by Robins to "neutralize adverse publicity and comment" were found to constitute "crime-fraud."¹⁷³

Dilatory discovery tactics also was a factor considered by the court in the *A.H. Robins* decision. The court surveyed various Dalkon Shield personal injury cases, finding a pattern by the defendant of delaying discovery "with stalling tactics, such as motions for reconsideration, requests for stays or attempted appeals of discovery orders."¹⁷⁴ Finding that the ultimate goal of this pretrial posturing was to avoid producing documents, the court held that "the repeated delays and instances of nonproduction provide support for the application of the crime or fraud exception."¹⁷⁵ This portion of the *A.H. Robins* decision held great significance for the Minnesota plaintiffs, since the tobacco industry had dragged its feet and stone-

170. See *In re A.H. Robins Co.*, 107 F.R.D. 2, 15-16 (D. Kan. 1985).

171. 107 F.R.D. 2 (D. Kan. 1985).

172. *Id.* at 14-15.

173. *Id.* at 15.

174. *Id.* at 14.

175. *Id.* at 14; See also Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1064 (1978) (asserting that illegitimate litigation tactics may constitute crime-fraud).

walled in nearly every aspect of discovery—including withholding more than 230,000 documents as privileged.¹⁷⁶

In another case involving the Dalkon Shield IUD, a federal court of appeals similarly found “a pervasive picture of covering up a defective product and continuing to merchandise it by misrepresenting both its efficacy and its safety,” and stated that “this kind of continuing fraudulent misrepresentation and cover-up vitiates not only any attorney-client privilege but also any work product immunity.”¹⁷⁷

The process for adjudicating the crime-fraud exception is fairly well established. Before a court may order that allegedly privileged documents be submitted for in camera review to determine crime-fraud, the party challenging privilege usually demonstrates “‘a factual basis adequate to support a good faith belief by a reasonable person’ . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”¹⁷⁸ Whether a showing sufficient to trigger an in camera inspection has been made rests in the discretion of the trial court.¹⁷⁹

Next, the court must determine whether there is a “prima facie” showing that the allegedly privileged communications were made in furtherance of a crime or fraud.¹⁸⁰ This determination may be made based on a review of the evidence in camera.¹⁸¹ As part of the determination of a prima facie case of crime-fraud, the party asserting the privilege is afforded an opportunity to be heard.¹⁸² An opportunity to be heard does not necessarily mean mini-trials for each and every document challenged.¹⁸³ For example, in *In re A.H.*

176. See *supra* notes 6-45 and accompanying text (detailing the industry’s abusive discovery behavior).

177. *Craig v. A.H. Robins Co.*, 790 F.2d 1, 2-4 (1st Cir. 1986).

178. *United States v. Zolin*, 491 U.S. 554, 572 (1989) (citing *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)).

179. See *id.* “Once that showing is made, the decision whether to engage in in camera review rests in the sound discretion of the district court.” *Id.*

180. See *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987); *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 515 (Minn. Ct. App. 1991).

181. In *Zolin*, the United States Supreme Court ruled that an in camera review of the documents can be used to substantiate the allegations of crime or fraud sufficient to pierce privilege. *Zolin*, 491 U.S. at 572.

182. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992).

183. See EPSTEIN, *supra* note 111, at 265. “Must an adversary hearing be held to determine whether there is a prima facie case? Apparently not. At least one court has said it is not necessary to hold a mini-trial.” *Id.* (citing *In re Grand Jury Investigation* (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987)).

Robins,¹⁸⁴ the court found that the compelling interest of efficient administration of the courts justified the court's reliance on legal memoranda—as opposed to an evidentiary hearing—to find that allegedly privileged documents were discoverable under the crime-fraud exception.¹⁸⁵

Once the court determines that the required prima facie case has been demonstrated, the question becomes the extent to which privilege has been lost. Any document “closely related” to the crime or fraud loses its privilege.¹⁸⁶ Whether documents are “in furtherance of” or “closely related to” the crime-fraud is vested in the discretion of the court.¹⁸⁷ The Minnesota Court of Appeals, in *Levin*, found that “[a]pplication of the crime-fraud exception should not be based on a rigid analysis.”¹⁸⁸ Other courts also have found that the standard is flexible.¹⁸⁹ In *In re Sealed Case*,¹⁹⁰ Judge Skelly Wright stated:

The point is not to convict anyone of a crime or to anticipate the grand jury, but only to determine whether the possibility that a privileged relationship has been abused is sufficient to alter the balance of costs and benefits that supports the privilege. In making this determination courts will not be able to receive a complete adversary presentation of the issues, since one of the parties will not be privy to the information at issue. Any system that requires courts to make highly refined judgments—perhaps concerning volumes of documents—will most likely collapse under its own weight.¹⁹¹

The crime-fraud exception, once established, applies not only to the attorney-client privilege but also to the work product doctrine, including opinion work product.¹⁹² Similarly, it vitiates any

184. 107 F.R.D. 2 (D. Kan. 1986).

185. *See id.* at 15.

186. *See Levin v. C.O.M.B. Co.*, 469 N.W. 2d 512, 515 (Minn. Ct. App. 1991).

187. *See id.*

188. *Id.*

189. *In re Grand Jury Investigation*, 842 F.2d 1223, 1227 (11th Cir. 1987) (stating that the “requirement that legal advice must be related to the client’s criminal or fraudulent conduct should not be interpreted restrictively.”).

190. 676 F.2d 793 (D.C. Cir. 1982).

191. *Id.* at 814.

192. *See In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981) (“[T]here is a fraud exception to the opinion work product doctrine.”); *In re Antitrust Grand Jury*, 805

claim of joint-defense or common-interest privilege.¹⁹³

D. The Evidence of Crime-Fraud Presented in Minnesota

In the spring of 1997, after it became clear that the industry was improperly hiding thousands of documents regarding smoking and health behind claims of privilege, Minnesota's counsel set about establishing the crime-fraud exception to privilege. Using documents produced in discovery¹⁹⁴ and the privilege logs, Minnesota presented evidence that the industry had engaged in a decades-long campaign to suppress scientific knowledge about the dangers of smoking, manipulated evidence of its knowledge of those dangers to conceal it from the public and the courts, and intentionally breached its duties to the public to truthfully research and report those dangers.¹⁹⁵ This evidence, Minnesota argued, established a prima facie case of crime-fraud that defeated privilege.

1. What the Tobacco Industry Promised

The heart of the crime-fraud case was the tobacco industry's long-standing denial and minimization of the health risks of smoking. The illegal conduct and conspiracy began in the 1950s, when the industry was confronted with several scientific studies which sounded grave warnings on the health hazards of cigarettes. On January 4, 1954, the industry jointly announced the formation of the Tobacco Industry Research Committee (later known as the Council for Tobacco Research, or "CTR") in an advertisement titled "A Frank Statement to Cigarette Smokers."¹⁹⁶ This advertisement appeared in newspapers throughout the country, including Minneapolis, St. Paul, and Duluth, MN. The advertisement stated:

F.2d 155, 164 (6th Cir. 1986).

193. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94-95 (3d Cir. 1992).

194. Even though the industry had been in litigation for more than forty years, many of the documents used by Minnesota had never been produced in prior litigation.

195. Prior to the Minnesota litigation, privilege battles in other tobacco cases had focused on the Council for Tobacco Research ("CTR") and its Special Projects division. In Minnesota, however, fewer than 10% of the documents claimed as privileged directly involved these topics. It was clear from an examination of the privilege logs that the industry and its counsel were hiding thousands of documents regarding smoking and health behind a wall privilege. As a result, Minnesota advanced a much broader theory of crime-fraud.

196. See CTR MN 11309817.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

. . . .

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.
2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.
3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry¹⁹⁷

Over the years, the industry continued to renew the pledge set forth in the Frank Statement:

- In 1962: "*We in the tobacco industry recognize a special responsibility to help science determine the facts. And we believe we are fulfilling this responsibility through the Tobacco Industry Research Committee.*"¹⁹⁸
- In 1970: "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding"

197. *Id.* The Frank Statement was signed by every leading U.S. manufacturer of cigarettes, except Liggett. *See id.* Liggett did not join the rest of the industry in CTR until 1964, and resigned in the late 1960s.

198. PM 1005136955 (Tobacco Institute press release) (emphasis added).

The findings are not secret."¹⁹⁹

- In 1971: "Any organization in a position to apply resources in the search for those keys—and which fails to do so—will continue to be guilty of cruel neglect of those whom it pretends to serve."²⁰⁰

- In 1972: "If our product is harmful, we'll stop making it."²⁰¹

- In 1982: "Since the first questions were raised about smoking as a possible health factor, *the tobacco industry has believed that the American people deserve objective, scientific answers.* The industry has committed itself to this task."²⁰²

One way in which the industry publicly stated that it would fulfill the promises in the Frank Statement was through the auspices of the CTR.²⁰³ A litany of secret internal documents produced in Minnesota demonstrated, however, that top officials from the tobacco industry privately acknowledged that CTR was meant to serve primarily a public relations function and that CTR scientific research was of little value in addressing smoking and health issues:

- In 1958, the British equivalent of CTR, the Tobacco Research Council ("TRC"), concluded after a visit to the United States that "CTR supports only fundamental research of little relevance to present day problems."²⁰⁴ Moreover, TRC reported that the U.S. Tobacco industry scientists viewed the research sponsored by CTR with cynicism: "[B]oth L&M [Liggett] and Lorillard scientists told us quite bluntly that they considered TRC research was on the correct basis and CTR's largely without value. It is unlikely that company scientists would speak so frankly unless they were pretty sure their principals held views not greatly dissimilar."²⁰⁵

199. TIMN 0081352 (Tobacco Institute advertisement) (emphasis added).

200. LG 0069279 (Tobacco Institute press release).

201. RJR 500324163 (quoting James Bowling, a vice president of Philip Morris).

202. B&W 670500618 (Tobacco Institute pamphlet) (emphasis added).

203. See CTR MN 11309817. CTR stands for Council for Tobacco Research – U.S.A., Inc., an industry trade group that the industry publicly proclaimed was established to conduct independent scientific research and report the findings to the public.

204. BAT 105407190.

205. BAT 105407189.

- In 1967, a senior Liggett scientist criticized CTR research as only “peripheral” to the problem of smoking and health:

[T]he tobacco industry has a very serious problem. . . . Although this problem has public relations, business, legal and political components, it is basically a scientific one. *So far, however, the major efforts of the industry to cope with this problem have been other than scientific. Most of the CTR and AMA programs have only a peripheral connection to tobacco use.*²⁰⁶

- In 1970, a senior scientist of Philip Morris, in a memorandum to the president of that company, set forth the real purpose of CTR—to create doubt about the smoking and health charge:

It has been stated that CTR is a program to find out “the truth about smoking and health.” What is truth to one is false to another. CTR and the Industry have publicly and frequently denied what others find as “truth.” Let’s face it. We are interested in evidence which we believe denies the allegations that cigaret[te] smoking causes disease.²⁰⁷

- A 1970 document discloses that another top Philip Morris scientist also questioned the worth of CTR research: “Osdene’s view (Philip Morris’ view?) was that C.T.R. did virtually no useful work and cost a vast amount of money.”²⁰⁸

- In 1973, a BAT report on a visit to the United States called CTR a “backwater of little significance in the world of smoking and health.”²⁰⁹

206. Liggett 208294-95 (emphasis added).

207. PM 2022200161.

208. BAT 110316204. Dr. Thomas Osdene was a senior research and development scientist at Philip Morris. During his deposition in the Minnesota litigation, Dr. Osdene declined to answer more than 100 questions on Fifth Amendment grounds. See generally Transcript of Deposition of Thomas S. Osdene, vols. 1 & 2, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. June 16 & 17, 1997).

209. BAT 100227022.

- In 1975, Addison Yeaman, the director of CTR, referred cynically to CTR as “the best and cheapest insurance the tobacco industry can buy and without it the industry would have to invent CTR or would be dead.”²¹⁰

Minnesota presented extensive evidence that, rather than conducting objective research and reporting the results to the public as promised, the industry carried on a public relations effort aimed at creating doubt about the connection between smoking and disease. This strategy is described in a 1972 Tobacco Institute memorandum:

For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts—litigation, politics and public opinion. While the strategy was brilliantly conceived and executed, . . . it is not—nor was it intended to be—a vehicle for victory. *On the contrary, it has always been a holding strategy, consisting of: creating doubt about the health charge without actually denying it . . .*²¹¹

Thus, the tobacco industry issued public statements—year after year—aimed at “creating doubt about the health charge”:²¹²

- In 1969: “[T]here is no demonstrated causal relationship between smoking and any disease. If anything, the pure biological evidence is pointing away from, not toward, the causal hypothesis.”²¹³

- In 1970: “*The deficiencies of the tobacco causation hypothesis and the need of much more research are becoming clearer to increasing numbers of research scientists.*”²¹⁴

- In 1972: “After millions of dollars and over twenty years of research: *The question about smoking and health is still a question.*”²¹⁵

- In 1972: “[T]he 1972 report of the Surgeon General . . . ‘insults the scientific community’ . . . [T]he num-

210. Lorillard 03539541-42.

211. Lorillard 87657703 (emphasis added).

212. *Id.*

213. B&W 670307882 (CTR press release) (emphasis added).

214. RJR 500015902 (CTR press release) (emphasis added).

215. TIMN 81352 (Tobacco Institute advertisement) (emphasis added).

ber one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public."²¹⁶

- In 1978: "Are we on the brink of paranoia? . . . The flat assertion that smoking causes lung cancer and heart disease and that the case is proved is not supported by many of the world's leading scientists."²¹⁷

- In 1983:

It has been stated so often that smoking causes cancer, it's no wonder most people believe this is an established fact. But, in fact, it is nothing of the kind. The truth is that almost three decades of research have failed to produce scientific proof for this claim *In our opinion, the issue of smoking and lung cancer is not a closed case. It's an open controversy.*²¹⁸

- In 1984: "[S]cience has failed to establish a causal link."²¹⁹
- In 1995: "It has not been scientifically established that smoking causes any type of cancer."²²⁰

2. What the Industry Had Discovered

In striking contrast to the tobacco industry's public statements, Minnesota presented evidence—from newly-disclosed internal memos—that industry scientists had secretly recognized the health hazards and addictiveness of cigarettes. In fact, as early as 1958,²²¹ most of the industry believed that smoking causes lung cancer:

- In 1958, three British scientists visited top officials and scientists in the U.S. tobacco industry, including those at

216. TIMN 120602 (Tobacco Institute press release) (emphasis added).

217. RJR 500184776 (Tobacco Institute pamphlet) (emphasis added).

218. RJR 504638051 (RJR advertisement) (emphasis added).

219. RJR 502371215 (RJR's statement on ABC *Nightline*) (emphasis added).

220. Responses of Defendant R.J. Reynolds Tobacco Company to Plaintiffs' First Set of Requests for Admission at 2, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. undated). Similar denials were provided by all other defendants.

221. The industry knew that cigarette smoking may be hazardous to the health of the smoker even prior to the publication of the Frank Statement in 1954. See *supra* notes 25-26 accompanying text (describing 1953 Teague document).

TIRC, Liggett, Philip Morris and American Tobacco.²²² One object of this visit was to find out “the extent in which it is accepted that cigarette smoke ‘causes’ lung cancer.”²²³ These British scientists reported widespread acceptance of causation: “With one exception (H.S.N. Greene) [not formally affiliated with any tobacco company] the individuals whom we met believed that smoking causes lung cancer if by “causation” we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link.”²²⁴

- Further confirmations that smoking caused disease were found in other industry documents. For example, in 1959, a top RJR scientist, Alan Rodgman, concluded that for the polycyclic hydrocarbons identified by RJR in cigarette smoke, “*there is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system*” and that “it would be better for the consumer if cigarette smoke were devoid of such compounds.”²²⁵

- In 1962, Rodgman concluded that “the amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming,” while “[t]he evidence challenging the indictment is scant.”²²⁶

- In 1962, BAT recognized at an internal smoking and health conference, attended by its subsidiary B&W, that cigarettes were addictive: “[S]moking is a habit of addiction that is pleasurable”²²⁷

These documents are of particular significance since they were written prior to the seminal 1964 surgeon general’s report. Minnesota also presented extensive evidence of internal confirmations of causation that post-dated 1964:

- In 1964, after publication of the first surgeon general’s report, the head of research at Philip Morris, Helmut Wakeham, noted the “professional approach” of the surgeon general and recommended that Philip Morris

222. BAT 105408490.

223. BAT 105408492.

224. *Id.*

225. RJR 500945942 (emphasis added).

226. RJR 504822850.

227. BAT 110070791.

“embrace the health area” and “severely reduce[] reliance on TIRC and TI”²²⁸ Wakeham recommended that management “[a]dopt as internal policy for technical purposes the view that greater benefit will accrue from accepting the report’s findings on face value and proceeding to cure the ills, real and alleged as they may be, than from engaging in disputation and refutation of these claims.”²²⁹ Indeed, Wakeham cautioned, failure by the industry to conduct such research “could give rise to negligence charges.”²³⁰

- In 1967, the Tobacco Research Council (“TRC,” the British counterpart to CTR), described the tension between industry scientists and industry executives on the issue of causation in a letter sent to the general counsel of B&W and copied to several other U.S. cigarette manufacturers as well as CTR and the Tobacco Institute:

The only real difficulties that we encountered arose out of the unavoidable paradox at the centre of our operations—namely that, on the one hand the manufacturers control TRC’s operations and do not accept that smoking has been proved to cause lung cancer while, on the other hand, *TRC’s research programme is based on the working hypothesis that this has been sufficiently proved for research purposes. In addition, the Council senior scientists accept that causation theory. . . . We have not yet found the best way of handling this paradox.*²³¹

- In 1969, a key scientist at Philip Morris, William L. Dunn (“the Nicotine Kid”), in an internal memorandum to Helmut Wakeham, acknowledged that nicotine was a drug: “I would be more cautious in using the pharmaceutical model—do we really want to tout cigarette smoke

228. PM 1000335619.

229. *Id.*

230. PM 1000335622. In contrast to Wakeham’s internal notation of the “professional approach” of the surgeon general’s report, the industry circulated to the public a pamphlet which disparaged and distorted the report’s findings: “Has the Surgeon General’s Report established that smoking causes cancer and other diseases? No. The report of the Advisory Committee to the Surgeon General in 1964 failed to establish a cause-and-effect relationship between cigarette smoking and lung cancer.” TIMN 55130.

231. Liggett 298943 (emphasis added).

as a drug? *It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls.*"²³²

- In 1979, a long-time scientific consultant to BAT praised the new surgeon general's report.²³³ The BAT consultant called the 1979 report "an impressive document" that "was on the whole sound, scientific and unemotive."²³⁴ In fact, the BAT consultant blasted as "misleading" a Tobacco Institute publication which attempted to discredit the surgeon general's report.²³⁵ The consultant noted that the Tobacco Institute "does *not* appear to understand what causation is" and that the Tobacco Institute is "so highly selective in what material is presented that one almost gets the false impression there is hardly any case to answer at all."²³⁶

- In 1980, BAT also recognized the implausibility of the industry's position on causation:

The company's position on causation is simply not believed by the overwhelming majority of independent observers, scientists and doctors The industry is unable to argue satisfactorily for its own continued existence because *all arguments eventually lead back to the primary issue of causation and on this point our posi-*

232. PM 1003289921 (emphasis added). In 1996, the Food & Drug Administration asserted jurisdiction over tobacco products. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,398 (1996) (codified at 21 CFR pt. 801, 803, 804, 807, 820 and 897). The industry filed a lawsuit in Federal Court in North Carolina challenging the FDA's authority to regulate cigarettes. The district court found that jurisdiction was proper; the Fourth Circuit recently reversed this decision and the FDA has petitioned the Supreme Court for a writ of certiorari. See *Coyne Beahm, Inc. v. U.S. Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997), *rev'd sub nom. Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155 (4th Cir. 1998), and *petition for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1152). See also Jill Schlick, Note, *Administrative Law—The Fourth Circuit Strikes Down the FDA's Tobacco Regulations—Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998), 25 WM. MITCHELL L. REV. 741 (1999).

233. BAT 100214030.

234. *Id.*

235. BAT 100214045.

236. *Id.* The "misleading" Tobacco Institute publication referenced by the BAT consultant was titled, SMOKING AND HEALTH 1964-1979 THE CONTINUING CONTROVERSY. See TIMN 84430. In this publication, the Tobacco Institute stated, *inter alia*, "It is time for all parties to this controversy to admit that there is much that is unknown." TIMN at 84432A.

*tion is unacceptable.*²³⁷

Thus, there was a recommendation circulated to the highest levels of the company to break the industry's conspiracy of silence and admit that cigarettes cause disease and are addictive:

We now accept that the smoking of tobacco products, *combined with* other factors . . . can be a cause of lung cancer, emphysema, and other respiratory and coronary diseases, many of which are fatal.

. . . .

. . . [S]moking is addictive/habitulative in addition to being an additional risk and many smokers would like to give up the habit if they could.²³⁸

This recommended approach, however, apparently lost out to "the severe constraint of the American legal position."²³⁹

- In 1982, a long-time scientific consultant to BAT strongly criticized BAT's insistence on publicly maintaining a "controversy" on causation. Commenting on a draft BAT smoking and health position paper, the BAT consultant found the industry position on causation "short of credibility," noting that "[i]t is not really true, as the American Tobacco Industry would like to believe, that there is a raging worldwide controversy about the causal link between smoking and certain diseases."²⁴⁰

- In 1984, a BAT scientist expounded on the drug qualities of cigarettes:

A cigarette as a "drug" administration system for public use has very significant advantages Within 10 seconds of starting to smoke, nicotine is available *in*

237. BAT 109881323 (emphasis added).

238. BAT 109881335 (emphasis in the original).

239. BAT 109881322-31.

240. BAT 100432194 (emphasis added). The consultant went on to write that BAT's position paper "reads to me like a mixed marriage between traditional American lawyer exhaled gas and discretely coughed-up Anglo-Saxon phlegm." BAT 100432198.

the brain Other “drugs” such as marijuana, amphetamines, and alcohol are slower and may be mood dependent Thus we have an emerging picture of a fast, highly pharmacologically effective and cheap “drug,” tobacco, which also confers flavour and manual and oral satisfaction to the user.²⁴¹

The scientist concluded that, “All we would want then is a larger bag to carry the money to the bank.”²⁴²

To this day, with the exception of Liggett, the industry has refused to publicly acknowledge that smoking causes any disease and is addictive.

3. *How Scientific Research Was Handled*

To control the science and scientists within their companies, and to thwart discovery in smoking and health cases, industry lawyers early-on interjected themselves into the scientific process. Evidence of this activity came from the industry’s privilege logs—which listed thousands of scientific research documents²⁴³—and from the internal documents of the companies.

Minnesota presented evidence that, although the industry advertised CTR as an independent and objective scientific research body which would investigate the health hazards of smoking and report those results to the public, legal—not scientific—considerations dominated. Lawyer control of CTR was so pervasive that the chairman of CTR’s Scientific Advisory Board wrote that “*CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short.*”²⁴⁴ Similarly, a 1974 memo from Alexander Spears, a top Lorillard Tobacco Company scientist (and now chief executive officer) to the president of the company states:

Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals but rather for various purposes such as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific relevance and merit are not likely to produce

241. BAT 100503496-97 (emphasis in the original).

242. BAT 100503505.

243. See discussion *supra* Part IV.A-B.

244. CTR SF 0800031 (emphasis added).

high ratings. In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy.²⁴⁵

Moreover, Minnesota presented evidence that the industry lawyers impeded the objective scientific research function of CTR by creating a division within CTR known as Special Projects. Special Projects refers to scientific research proposals that were selected for funding, not by the independent board directing CTR, but by industry lawyers. Two types of Special Projects were funded. The first type was research designed to create results that were helpful to the industry's litigation and public relations interests. These special projects were designed to be published. A second layer of Special Projects consisted of research which might indict smoking as a cause of illness. These projects were referred to as lawyer special projects or special accounts; they were not intended to be published.²⁴⁶ One of the Liggett documents over which a claim of privilege was waived by Liggett describes the method by which CTR Special Projects became Lawyers Special Projects: "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project."²⁴⁷ The industry claimed that the research resulting from the lawyers special projects was privileged, thus protecting the adverse information from disclosure during litigation.

The public was not informed that CTR Special Projects research was specifically targeted by tobacco industry lawyers to provide research favorable to the industry's interests (including the industry's "public relations" purposes, which included denying or minimizing a causal link between smoking and disease). Minnesota

245. Lorillard 01421598.

246. See Transcript of Proceedings at 62-63, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Apr. 15, 1997). Lawyers' Special Projects were described by defense counsel at the hearing before the trial court:

And then you finally had a different kind of project, which were called the lawyer's special projects. And these are different again. They are not done through the grant program. They are not done through CTR's special projects. They don't have the approval of the scientific director. But the lawyers say we want to go ahead and do'em anyhow.

Id.

247. LG 2000745-46.

argued that the selective disclosure of certain Special Projects research presented but one more reason why claims of privilege over any remaining Special Projects documents should fail.

The extent of the takeover by lawyers of the science is remarkable. An April, 1978 memorandum from the chief executive office of Lorillard complained that lawyers maintained exclusive control over the scientific direction of the industry: "*We have again 'abdicated' the scientific research directional management of the Industry to the 'Lawyers' with virtually no involvement on the part of the scientific or business management side of the business.*"²⁴⁸

Another document presented by Minnesota during the crime-fraud proceedings further describes the control exerted by lawyers over scientists and scientific research. This document is a 1964 report by two representatives from the TRC in England, written after discussions with representatives of the U.S. tobacco industry:

In the U.S., by far the most important factor conditioning action . . . is the law suit situation and the danger of costly damages being awarded against the manufacturers in a flood of cases The leadership in the U.S. . . . lies with the powerful policy committee of senior lawyers advising the industry, and their policy, very understandably, in effect is "don't take any chances." It is a situation that does not encourage constructive or bold approaches to smoking and health problems, and it also means that the Policy Committee of lawyers exercises close control over all aspects of the problems.²⁴⁹

A 1976 internal memo by a top tobacco scientist at BAT, S.J. Green, also discusses the extent to which "legal considerations" dominated scientific research:

The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations By repudiation of a causal role for cigarette smoking in general they [the companies] hope to avoid liability in particular cases. This domination by legal consideration thus leads the industry into a public rejection in total of any

248. Lorillard 01346204 (emphasis added).

249. PM 1003119101.

causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research etc.²⁵⁰

Indeed, legal considerations were of such paramount importance that B&W recognized, in a 1983 report on smoking and health to one of its corporate affiliates, that “[t]he intense hostility of the environment places a high priority on the control of statements by the manufacturers on the issues. *An unfortunate statement could bring the house down.*”²⁵¹

E. The Trial Court’s Prima Facie Findings of Crime-Fraud and Adoption of the Category Review Procedure for Resolution of Privilege Claims

After consideration of the legal arguments and evidence regarding crime-fraud presented by both sides, the trial court issued a detailed thirty-one page order setting forth the boundaries of the attorney-client and work product doctrine.²⁵² The trial also set forth the parameters of the crime-fraud doctrine, properly noting that even privileged documents are discoverable upon a proper showing of crime-fraud:

The purpose of the crime-fraud exception to documents otherwise protected by the attorney-client privilege is “to ensure that the ‘seal of secrecy’ between *lawyer* and client does not extend to communications from the *lawyer* to the client made by the lawyer for the purpose of giving advice for the commission of a fraud or crime.” *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3rd Cir. 1992) (emphasis in the original). “The advice must relate to future illicit conduct by the client . . .” *Id.* This is exactly what the Plaintiffs argue—that counsel for the tobacco industry ad-

250. BAT 109938433.

251. B&W 51206960. Similar sentiments were expressed in a March, 1977 letter from a top official at B&W to a senior scientist at BAT: “I think you know that the position in the U.S. is still focused around the existence of high risk ‘wipe out’ liability; this leads to the continuing dominance of the legal attitude.” BAT 110078077.

252. See Order Regarding Privilege and the Crime-Fraud Exception and Setting Forth Procedures to Determine Privilege Beginning with the Liggett Documents, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. May 9, 1997) [hereinafter Privilege and Crime-Fraud Exception Order].

vised the industry to conceal documents and research harmful to the industry by depositing the documents with counsel, by routing correspondence through the industry counsel, by naming damning research projects as “special projects” purportedly ordered by counsel, etc., to cover potentially dangerous materials under a blanket of attorney-client privilege protection, and Plaintiffs wish to tear this blanket away.²⁵³

The trial court also found that Minnesota had proved a prima facie case of crime-fraud against the industry. The court cited to extensive documentation in the record as support for its findings.²⁵⁴ The scope of the crime-fraud findings included:

- The defendants’ assurances that they “would not knowingly distribute a dangerous product” and promises “to solidify such an assurance”²⁵⁵
- The defendants’ assurances “that the tobacco industry was committed to providing safe products.”²⁵⁶
- Defendants’ “intentionally den[y]ing] or minimiz[ing] known health risks”²⁵⁷
- Defendants’ use of attorneys and/or claims of privilege to suppress information and documents “which appear to be scientific in nature and specifically related to health issues.”²⁵⁸
- Defendants’ attempts “to create doubt as to a connection between smoking and illness” and “to create doubt that cigarette smoking causes illness.”²⁵⁹
- Defendants’ “safety-related” or “health-related” research”²⁶⁰

The trial court also condemned the industry’s penchant for using privilege, when it served their purposes, to withhold unfavor-

253. *Id.* at 27 (emphasis added).

254. *See id.* at 3-11.

255. *Id.* at 5.

256. *Id.*

257. *Id.* at 7.

258. *Id.* at 9.

259. *Id.* at 9, 10.

260. *Id.* at 28.

able scientific information from the public: "This Court does not believe that Defendants should be permitted to use in its advertising and public relations campaigns, health-related research which supports their economic interests, and to claim privilege for research which may lead to the opposite conclusion."²⁶¹

Adopting plaintiffs' legal position that scientific research on smoking and health and the hazards of smoking cannot be withheld as privileged, the trial court stated:

In considering whether the crime-fraud exception may be applied to the facts of this case, this Court has made several findings relating to statements made by the Defendants to the public. The Court also concludes that the Defendants had an independent obligation to conduct research into the safety of its product, and to warn the product's consumers if the research results supported negative conclusions. A manufacturer has a special duty, apart from litigation, to keep abreast of the hazards posed by its products. *See* *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 278 (E.D. Tex.), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *see also* Minnesota Civil Jury Instruction Guides, No. 117 ("You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field") and No. 119 (duty to warn). The cigarette industry itself has recognized this duty. PM 1000334622. Plaintiffs have presented evidence, and this Court has found, however, that the Defendants have claimed safety-related scientific research conducted by the Defendants has been the subject of claims of attorney-client privilege.²⁶²

Notwithstanding the extensive proceedings before the trial court, the order of May 9 also provided the industry with an additional opportunity, in proceedings before a special master, to rebut the *prima facie* findings of crime-fraud.²⁶³ The trial court also set

261. *Id.*

262. *Id.*

263. *Id.* at 19. In addition to finding that plaintiffs had established a *prima facie* case to invoke the crime-fraud exception, the trial court also found that the Minnesota plaintiffs had met the *Zolin* threshold of establishing a "good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud" sufficient to warrant in camera review of the industry's documents. *Id.* at 30 (quoting *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3d Cir. 1992)).

forth the procedure for determination of the industry's privilege claims. The staggering number of documents claimed as privileged posed a predicament for the trial court: how do you adjudicate hundreds of thousands of privilege claims in an expeditious and efficient manner while not violating the due process rights of either side? The industry proposed that the special master first review in camera approximately twenty documents and make privilege determinations as to this number only.²⁶⁴ The industry argued that it was entitled to in camera review of every document for which privilege was claimed and written findings of fact for each and every document found not to be privileged or subject to the crime-fraud exception.

The court adopted a different procedure whereby privilege determinations would be made on a category-basis, thus eliminating document-by-document in camera review. This ruling was made in light of the unparalleled number of privilege claims and the prima facie crime-fraud findings:

The extraordinary number of documents which have been designated as privileged in this case makes it impossible to conduct an in camera inspection of each document individually to determine whether it is so closely related to plaintiffs' prima facie showing of crime-fraud that any claim of privilege is lost. If each document for which privilege were claimed were to be examined individually, the trial in this matter could not commence until the next millennium. Accordingly, this Court must fashion a process and procedure which will balance the need for judicial efficiency and timeliness with due process.

264. See Transcript of Proceedings at 30-31, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Apr. 15, 1997). Counsel for Brown & Williamson advocated the following procedure:

So we would suggest, pick a number, twenty documents, let's get them selected. What then happens to those documents? I think we begin what's basically a process of in camera review The special master can, with the benefit of the documents that are selected and the arguments of counsel and principles and all these briefs and all these decisions, make a determination about whether these documents are privileged or not Now, what happens at the very end of the road? What do we do with the rest? As they say in the trade, we'll see.

Id.

In order to accommodate the competing needs of the parties in this case, it is necessary to categorize the documents subject to the claims of privilege. Such categories would necessarily include, but not be limited to the type of privilege claims (e.g., opinion work product, fact work product, attorney-client, or joint defense), the subject matter of the document, the maker of the document, and the recipient of the document, if any.²⁶⁵

Before adopting the category procedure, the trial court performed the following calculation:

Arbitrarily assuming that it would take only five minutes to retrieve a document, check it against the privilege log, read it quickly, and assign it to a 'privilege category' . . . , it would take the Special Master 750,000 minutes, or 12,500 hours, to review all the privileged documents. This is roughly 6.25 years of a lawyer's working career Thus, an in camera review of each and every individual document, not to mention briefing and arguments with respect to such documents, is not feasible. An efficient procedure by which groups of documents can be examined and dealt with, while preserving due process, must be created and implemented.²⁶⁶

The trial court also directed the parties to meet and confer to determine the categories into which the privileged documents should be placed. While the industry was obviously in the best position to propose subject-matter categories for their own documents, it refused to propose its own categories to the trial court.²⁶⁷ As a result, the trial court adopted the following subject-matter categories proposed by plaintiffs:

CATEGORY 1: Documents found not to be privileged by other courts.

CATEGORY 2: Documents that, on their face, show no evidence that they were written or received by an attorney.

265. Privilege and Crime-Fraud Exception Order, *supra* note 252, at 11.

266. *Id.* at 22-23.

267. See Order with Respect to Non-Liggett Defendants' Objections to the Special Master's Report Dated September 10, 1997, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 9 n.2 (Minn. Dist. Ct. Dec. 16, 1997).

CATEGORY 3: Scientific research or information and memos relating to smoking and health.

CATEGORY 4: Attorney involvement in smoking and health, including:

(a) All documents written by, or discussing, the Committee of Counsel or the Scientific Liaison Committee or the Research Liaison Committee.

(b) All documents relating to Special Projects (including CTR Special Projects and Lawyers' Special Projects) or any Special Account (including Special Account No. 4).

(c) All documents relating to 3i, LRD and/or LS, Inc. (including documents within the current or past possession of LS, Inc.).

CATEGORY 5: Public statements and public positions taken by defendants relating to smoking and health.

CATEGORY 6: Documents concerning ingredients, formulas and design of cigarettes.

CATEGORY 7: Documents relating to persons under age 18 (or children, adolescents or young adults).

CATEGORY 8: Documents relating to advertising, marketing or promotion.

CATEGORY 9: Documents relating to document destruction and discovery.

CATEGORY 10: Governmental regulation, including warning labels.

CATEGORY 11: Documents relating to environmental compliance, EPA regulation or patent documents (excluding materials relating to safety-related scientific issues or nicotine).

CATEGORY 12: Documents not falling in any of the above categories.²⁶⁸

The industry protested that anything less than document-by-document adjudication of privilege violated its due process rights. There is, however, no absolute right to document-by-document adjudication of privilege. Rather, the proper procedure for deter-

268. See Order Setting Forth Document Categories for Determination of Privilege Claims, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 2-3 (Minn. Dist. Ct. May 22, 1997).

mining privilege is left to the discretion of the trial court.²⁶⁹ Moreover, due process is a flexible standard which does not guarantee any particular form of procedure.²⁷⁰ The fundamental requirements of state and federal due process consist of notice and an opportunity to be heard.²⁷¹ With respect to attorney-client determinations, "the fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege."²⁷²

The situation faced by the trial court in Minnesota was unique—there was no precedent for a litigant claiming thousands upon thousands of scientific research documents on the health hazards of its product as privileged. Under the trial court's category review process, the industry would be provided repeated notice and numerous opportunities to be heard, including *ex parte* and *in camera*, regarding its claims of privilege. Moreover, other courts had adopted similar procedures. In *A. H. Robins*, the federal district court in Kansas supervising the multi-district Dalkon Shield litigation set forth a procedure for the determination of privilege by categories or "batches" of documents.²⁷³ In fact, in *A.H. Robins*, the court found that the compelling interest of efficient administration of the courts justified reliance on legal memoranda (apparently simultaneously submitted)—as opposed to an evidentiary hearing—in the crime-fraud determination.²⁷⁴

Since the Minnesota decision, several other courts have found

269. See *In re Walsh*, 623 F.2d 489, 494 n.5 (7th Cir. 1980). "The proper procedure by which to determine the existence of the privilege is left to the trial court." *Id.*; see also *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 85, 135 N.W.2d 43, 47 (1965) (indicating that, with pre-trial matters, "[m]uch must be left to the exercise of a sound judicial discretion by the trial court").

270. See *Baker v. Baker*, 494 N.W.2d 282, 287 (Minn. 1992). "The requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Id.*; see also *Humenansky v. Minnesota Bd. of Med. Examiners*, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994) ("[D]ue process is a flexible concept and the form of procedural protection varies according to the particular situation."); *In re A.H. Robins Co., Inc.*, 107 F.R.D. 2, 6 (D. Kan. 1985) ("The nature of the specific process due in a given instance . . . varies according to the factual circumstances of the case and the nature of the interests involved.")

271. See *Omdahl v. Hadler*, 459 N.W.2d 355, 360 (Minn. Ct. App. 1990); *A.H. Robins*, 107 F.R.D. at 6.

272. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992).

273. See *A.H. Robins*, 107 F.R.D. at 15; see also *In re Richardson-Merrell, Inc.*, 97 F.R.D. 481, 484-85 (S.D. Ohio 1983) (setting forth a procedure in which the court would "spot check" summaries of privileged documents submitted by defendant).

274. See *A.H. Robins*, 170 F.R.D. at 6, 15.

that a document-by-document adjudication is not always required. A Fourth Circuit judge in *In re American Honda Motor Co.*,²⁷⁵ denied a motion for a stay from a district court order requiring the production, under the crime-fraud exception, of allegedly privileged documents. The judge rejected petitioners' contention that the district court was required to review each and every document: "Honda's assertion that the district court was required to review each allegedly privileged communication in camera before ordering disclosure is without merit."²⁷⁶

Similarly, in *Sealed Appellees v. Sealed Appellants*,²⁷⁷ the Fifth Circuit defined the required process to determine the discoverability of allegedly opinion work product communications:

The preferable practice in factual patterns, such as here, is for the court to examine *a sufficient number of the contested documents to ensure the informed protection of the privilege*. . . . That examination can be conducted by the court or a special master or magistrate judge as the district court may choose.²⁷⁸

In Minnesota, the industry waited until the eve of trial to seek its first appellate review of the category procedures set by the trial court for privilege determination. The Minnesota Court of Appeals, however, held that the challenge to the categorical review process was untimely²⁷⁹ and that the industry could not establish that "the procedures they seek would have yielded any greater protection."²⁸⁰ The Minnesota Supreme Court later denied the industry's petition for discretionary review of the court of appeal's decision.²⁸¹

275. See *In re American Honda Motor Co.*, No. 98-1415 (4th Cir. Mar. 24, 1998).

276. *Id.* at 6.

277. 112 F.3d 173 (5th Cir. 1997).

278. *Id.* at 174 (emphasis added).

279. See *State ex rel. Humphrey v. Philip Morris Inc.*, No. C5-97-2349 (Minn. Ct. App. Jan. 13, 1998). "To the extent that petitioners are challenging the employment of categories rather than a line-by-line review of every document, the petition is untimely." *Id.*

280. *Id.*

281. See *State ex rel. Humphrey v. Philip Morris Inc.*, No. C5-97-2349 (Minn. Jan. 23, 1998).

F. *Privilege Proceedings Related to the Liggett Documents*

The first group of documents addressed by the special master were the approximately two thousand documents for which Liggett—as part of its settlement with the State of Minnesota—had waived any claim of privilege. In conjunction with the Liggett documents, the industry was also given an additional opportunity, before the special master, to rebut the prima facie crime-fraud findings of the trial court in the order of May 9, 1997.

The special master issued a series of orders further illuminating the category review procedure. For instance, the special master stated that “determination of privilege shall be based upon a thorough working knowledge of the documents and the characteristics therein that define privilege status within each classification.”²⁸² The special master also stated his intention to “review a considerable number of documents from each classification,”²⁸³ and granted the industry unlimited rights to present written submissions and live witnesses at an evidentiary hearing.²⁸⁴

In July, 1997, the special master conducted a three-day evidentiary hearing to determine whether: (1) the industry had successfully rebutted the crime-fraud findings, and (2) the privilege status of the Liggett documents. While the industry was given an unrestricted right to bring live witnesses to testify, including ex parte, only one witness was called to testify regarding only two Liggett documents. Counsel for the plaintiffs were also excluded from the courtroom for significant portions of time while the industry made arguments ex parte.²⁸⁵

On September 10, 1997, the special master issued a report and recommendation regarding the Liggett documents, finding numerous documents were either not privileged in the first instance or discoverable under the crime-fraud exception.²⁸⁶ Holding plain-

282. First Order Establishing Procedures for the Review of Documents Subject to Privilege Claims, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 4 (Minn. Dist. Ct. June 16, 1997).

283. *Id.*

284. *See id.* at 6-7.

285. The industry also submitted ninety exhibits to the special master ex parte during the course of the hearings. The industry was afforded virtually unlimited opportunity for ex parte submissions. Because it undermines the basic foundation of an adversary system of jurisprudence, the use of ex parte proceedings is disfavored. *See RICE, supra* note 128, § 11.15.

286. *See Report of the Special Master: Findings of Fact, Conclusions of Law and Recommendations, State ex rel. Humphrey v. Philip Morris Inc., No. C1-94-8565*

tiffs to a “preponderance of the evidence”²⁸⁷ standard on crime-fraud, the special master concluded that the industry had failed to rebut (with one small exception) the crime-fraud findings as set forth in the trial court’s order of May 9, 1997.²⁸⁸ The special master rejected the industry’s argument that Minnesota was required to prove every element of a cause of action for fraud.²⁸⁹ The special master relied, in part, on the fact that under the consumer protection statutes plead by Minnesota in its complaint, no proof of reliance was required.²⁹⁰

The special master’s report also included detailed factual findings. For example, the special master found that:

- “. . . CTR was meant to serve primarily a public relations function and . . . CTR scientific research was of little value in addressing issues relating to the causal link between smoking and health.”²⁹¹
- CTR Special Projects were selected by tobacco industry counsel “on the basis of utility in litigation, congressional testimony, administrative proceedings and for public relations purposes [T]he projects were selected for their favorable prospects.”²⁹²

(Minn. Dist. Ct. Sept. 10, 1997) [hereinafter Special Master’s Report].

287. See *id.* at 39. The special master set forth his inquiry in the crime-fraud determination as follows:

Am I satisfied by a preponderance of the evidence offered by both plaintiffs and defendants that the defendants were engaged in criminal or fraudulent conduct? Included within “criminal or fraudulent conduct” are a failure to conduct appropriate research into the safety of their products and failure to warn their products’ consumers if the research supported negative conclusions.

Second, has it been demonstrated by a preponderance of the evidence that the involvement of defendants’ attorneys was in furtherance of the conduct or was closely related to it?

Id. “Preponderance of the evidence” is a higher standard of proof than required by the majority of courts for discovery of documents pursuant to the crime-fraud exception. See *supra* notes 161 and 166 and accompanying text (citing cases that require only a “probable cause” or “prima facie” standard showing of crime or fraud).

288. See *id.* at 42.

289. See *id.* at 38.

290. See *id.*

291. *Id.* at 8.

292. *Id.* at 41.

- “Plaintiffs have presented substantial evidence showing involvement in scientific research and other scientific matters by *attorneys* for the tobacco industry, and that industry attorneys were a driving force behind the direction of and the suppression of scientific research.”²⁹³
- “It appears that one method by which attorneys may have controlled research is through maneuvers intended to ‘create’ privileges.”²⁹⁴
- “Notwithstanding these internal documents, the industry’s public relations strategy has been to deny causation and to keep the controversy alive.”²⁹⁵
- “Over the years, tobacco industry spokespersons made many comments clearly intended to create doubt as to a connection between smoking and illness.”²⁹⁶
- “These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking also were published in Minnesota.”²⁹⁷
- The industry did not acknowledge “that there was a statistical association between smoking and disease except as part of a denial of causation.” Industry’s public statements “are plainly intended to create doubt as to causation, rather than function as an ‘admission.’”²⁹⁸
- “I also conclude that this attorney-directed control of an industry’s research does, in fact, fall within the confines of the crime-fraud exception to the attorney-client privilege.”²⁹⁹

The special master concluded that the industry had not sustained its burden of proving privilege with respect to the Liggett documents in four of the subject-matter categories.³⁰⁰ In addition,

293. *Id.* at 11.

294. *Id.* at 13.

295. *Id.* at 16.

296. *Id.*

297. *Id.* at 18.

298. *Id.* at 34.

299. *Id.* at 42. The limited area which the special master carved out of the crime-fraud findings relates to one aspect of CTR: grant research approved by the CTR Scientific Advisory Board (“SAB”). *See id.* at 41.

300. The special master concluded that the industry had not sustained its burden of proving privilege for documents in categories 1, 3, 5 and 7. With respect to Category 1—documents found not privileged by other courts—the special master reviewed all 292 documents in this category, finding that they were not privileged

the special master found that the crime-fraud exception applied to three categories.³⁰¹ Thus, the special master recommended production of 834 documents—approximately thirty percent of the total Liggett documents claimed as privileged.

On December 16, 1997, the trial court adopted (with minor modification) the special master's recommendation that 834 out of approximately 2,000 Liggett documents were not privileged in the first instance or, even if privileged, were discoverable under the crime-fraud exception.³⁰² The court also concluded that industry lawyers had abused the privilege process and that "reckless or willful disregard" of court orders was evident.³⁰³ The trial court also found that the industry's abuse of the *ex parte* process had "hampered Plaintiffs in their response to the Non-Liggett Defendants' arguments before the Special Master and interfered with Plaintiffs' due process rights."³⁰⁴ The trial court asked rhetorically whether the industry had claimed privilege over clearly non-privileged material "simply to create more of a 'haystack' in which to hide their 'needles'."³⁰⁵ Thus, under Rules 11, 16.02, 26.07 and 37.02 of the Minnesota Rules of Civil Procedure, the trial court found that an

because they "reflect[ed] attorneys selecting and directing research projects" and "represent[ed] information as to the 'corporate knowledge' of the defendants at relevant times . . ." *Id.* at 43. The special master noted that "[i]f corporate research directors had selected and directed research on safety issues, the documents generated during the decision-making process would have been discoverable." *Id.* Category 3—scientific research—was found not privileged because the documents "do not demonstrate a process of a client seeking advice or an attorney providing advice." *Id.* at 45. Category 5—public statements—was found not privileged on the same grounds. *See id.* at 48-49. The special master's review of documents in Category 7—youth—revealed that the industry was claiming privilege over mere transmittal letters, not attorney communications. *See id.* at 50.

301. The crime-fraud exception was found to apply to Categories 1, 3 and 4b. Documents in Category 1 were subject to disclosure under the crime-fraud exception because "they demonstrate the actual involvement of the attorneys for the defendant companies in the selection, funding, and funding continuation for CTR special projects and because these documents provide relevant evidence of the response by the defendants to allegations from external sources to the effect that the defendants' products were unsafe." *Id.* at 43. Documents in Category 3 "reflect[ed] the involvement of the Liggett attorneys in the monitoring of that company's research function." *Id.* at 45. A similar conclusion was reached with respect to category 4b—special projects documents. *See id.* at 47.

302. *See* Order With Respect to Non-Liggett Defendants' Objections to the Special Master's Report Dated September 10, 1997, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 3 (Minn. Dist. Ct. Dec. 16, 1997).

303. *Id.* at 15.

304. *Id.* at 17.

305. *Id.* at 19.

appropriate sanction included striking the industry's claims of privilege on the 834 Liggett documents.³⁰⁶

Almost simultaneously with the trial court's December order, the cigarette companies, in response to a congressional subpoena, submitted the Liggett documents to United States Representative Thomas Bliley. Rep. Bliley then published most of the documents on the Internet for the whole world to see.³⁰⁷

G. *Privilege Proceedings Related to the Non-Liggett Documents*

Beginning in the fall of 1997, the special master shifted focus to the non-Liggett defendants' claims of privilege over more than 230,000 documents. The special master conducted four days of evidentiary hearings in October, 1997, to hear argument regarding the industry's claims of privilege over the 230,000 documents. During those hearings, the industry again was given an unrestricted right to present argument *ex parte* and call live witnesses to testify.³⁰⁸ The special master provided the industry with advance notice of each document he had randomly selected for *in camera* review, thus affording the defendants an opportunity to present individualized argument and evidence for each of these documents.³⁰⁹

306. There are a variety of sanctions available to a district court for discovery abuses, including the striking of claims. *See Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn. 1990) (citing "a variety of sanctions" available to a court, including "an order precluding the litigation of certain claims or defenses"); *see also* MINN. R. CIV. P. 37.02 (allowing the court to "make such orders . . . as are just", including "an order refusing to allow the disobedient party to support . . . designated claims or defenses"); EPSTEIN & MARTIN, *supra* note 138, at 60 (stating that waiver of the attorney-client privilege "follows from any conduct by the client that would make it unfair for him thereafter to assert the privilege"); *Applied Sys., Inc. v. Northern Ins. Co.*, No. 97-C-1565, 1997 WL 639235, at 2 (N.D. Ill. Oct. 7, 1997) (stating that abuse of process for determining privilege justifies finding that privilege is waived).

307. The documents can be found at the following Internet site: <<http://www.house.gov/commerce/TobaccoDocs/documents.html>>.

308. *See* Fifth Order Establishing Procedures for the Review of Documents Subject to Privilege Claims ¶ 6, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Minn. Dist. Ct. Sept. 12, 1997) [hereinafter *Fifth Order*]. The industry, however, failed to present a single witness during the four days of hearings to support its claims of privilege. Instead, the industry relied on lengthy oral presentations by counsel.

309. *See id.* ¶¶ 3, 10. Once the industry learned of the documents randomly selected for *in camera* review by the special master, the industry lawyers promptly withdrew many of their claims of privilege over those documents. Minnesota's counsel argued that this action by industry counsel was intentionally designed to

The industry was also granted yet another opportunity to rebut the prima facie crime-fraud findings made earlier by Judge Fitzpatrick and during the Liggett proceedings. The industry submitted more than one thousand pages of briefs and fifty boxes of supporting material—much of it ex parte—to attempt to rebut these findings.

The primary thrust of Minnesota's position continued to be that the industry was improperly shielding scientific information on the hazards of smoking. For example, Minnesota had calculated that RJR was claiming privilege over more than 2,500 scientific research reports authored by its long-time scientist Dr. Frank Colby. At the privilege hearings, RJR maintained that these reports were authored by Dr. Colby in his capacity as a consultant to the legal department. Dr. Colby's deposition, however, contradicted RJR's position and confirmed Minnesota's suspicion that the reports were merely filtered through lawyers so that RJR could later claim privilege. Minnesota presented the special master with the following testimony from Dr. Colby's deposition:

Q. And you would also agree with me, would you not, that when you conducted your analyses of this literature after 1964, that your analysis was really done for the entire company of R.J. Reynolds, not just for the lawyers; correct?

A. *It was channeled through the lawyers. The smoking and health analysis was channeled through the lawyers mostly.*³¹⁰

skew the random selection process and that consideration of these documents in camera should proceed. The special master agreed, finding that if the documents were removed from consideration, "the integrity of the entire procedure could be undermined." Report of Special Master: Findings of Fact, Conclusions of Law and Recommendations Regarding Non-Liggett Privilege Claims ¶ 207, *State ex rel. Humphrey v. Philip Morris Inc.*, C1-94-8565 (Minn. Dist. Ct. Feb. 10, 1998) [hereinafter Non-Liggett Report]. In addition, such behavior raised "concern[] that defendants have over-designated documents as privileged." *Id.* In addition to the documents randomly selected by the special master, the Fifth Order provided that Minnesota was allowed to select privileged documents for "particularized discussion" in the briefs or at the hearing. Fifth Order, *supra* note 308, ¶ 10. Pursuant to this provision, Minnesota's counsel hand-selected approximately 400 additional documents for review within subject-matter Category 1.

310. Transcript of Deposition of Dr. Frank Colby, vol. 2 at 243, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Minn. Dist. Ct. Dec. 18, 1997) (emphasis added).

1. *Additional Evidence of Crime-Fraud*

Minnesota also presented more evidence of crime-fraud conduct in two particular areas: nicotine addiction/manipulation and suppression of in-house smoking and health research, including biological research.

a. *Nicotine Addiction and Manipulation*

The evidence offered regarding nicotine addiction and manipulation included the industry's public statements concerning addiction, as well as its internal knowledge of the properties of nicotine and its conduct with respect to the design of cigarettes.³¹¹ To this day in its public statements, the industry has repeatedly denied that cigarettes and/or nicotine are addictive and has minimized the difficulties of quitting smoking. For example, in 1988 after the surgeon general declared nicotine was addictive,³¹² the Tobacco Institute issued the following press release:

Claims that cigarettes are addictive contradict common sense The claim that cigarette smoking causes physical dependence is simply an unproven attempt to find some way to differentiate smoking from other behaviors The claims that smokers are "addicts" defy common sense and contradict the fact that people quit smok-

311. The industry claimed before the special master that Minnesota's submission of additional evidence of crime-fraud was unfair. Counsel for Philip Morris stated: "I submit not General Giap and Ho Chi Minh could have conceived a better guerilla strategy for attacking us on other fronts and confounding their enemy" Transcript of Hearing at 26, *State ex rel. Humphrey v. Philip Morris Inc.*, C1-94-8565 (Minn. Dist. Ct. Oct. 15, 1997). The special master rejected defendants' characterization, finding that "[p]ursuant to the Fifth Order Establishing Procedures, plaintiffs were permitted to introduce additional evidence of crime-fraud." Non-Liggett Report, *supra* note 309, ¶ 171 (citing Fifth Order, *supra* note 308, at ¶ 4).

312. The 1988 surgeon general's report states that:

1. Cigarettes and other forms of tobacco are addicting.
2. Nicotine is the drug in tobacco that causes addiction.
3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

SURGEON GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION* 9 (1988).

ing every day.³¹³

Notwithstanding the public denials, Minnesota presented evidence that the industry has long recognized internally that nicotine is an addictive drug and that cigarettes are drug delivery or nicotine delivery devices:

- A report of discussions with industry research directors in the 1950s—as the industry prepared to publish the Frank Statement—recorded among their conclusions “[I]t’s fortunate for us that cigarettes are a habit they can’t break.”³¹⁴

- A 1961 document by Sir Charles Ellis, a top BAT scientist, stated, “smokers are nicotine addicts.”³¹⁵

- A 1972 document by Philip Morris’ Dunn stated that the majority of conferees at a recent CTR conference “accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking.”³¹⁶ Dunn continued: “The cigarette should be conceived not as a product but as a package. The product is nicotine Think of the cigarette pack as a storage container for a day’s supply of nicotine Think of the cigarette as a dispenser for a dose unit of nicotine.”³¹⁷

- A 1972 document by Claude Teague, an RJR senior scientist, stated that “the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.”³¹⁸

- A 1978 B&W document stated “[v]ery few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.”³¹⁹

313. TI 0019963. The Tobacco Institute criticized the surgeon general’s declaration as “an escalation of antismoking rhetoric . . . without medical or scientific foundation.” TI 0125189.

314. JH 000494.

315. BAT 301083863.

316. PM 2024273962.

317. PM 2024273963.

318. RJR 500915684.

319. B&W 665043966.

- A 1979 document by BAT research executive L.C.F.B. Blackman considered the hypothesis that “high profits . . . associated with the tobacco industry are directly related to the fact that the customer is dependent upon the product.”³²⁰
- A 1980 BAT document stated that “B.A.T. should learn to look at itself as a drug company rather than as a tobacco company.”³²¹
- A 1980 document by Philip Morris scientist Osdene stated, “the thing we sell most is nicotine.”³²²
- A 1983 document by RJR scientist Teague stated that “[i]n essence, a cigarette is a system for delivery of nicotine to the smoker in attractive, useful form.”³²³
- A 1991 RJR report stated, “We are basically in the nicotine business.”³²⁴

There also was extensive evidence presented that the industry intentionally controls and manipulates the level and form of nicotine in the commercial cigarette to ensure continued addiction. One process for secretly manipulating nicotine highlighted in the privilege proceeding involved manipulating the form of nicotine in cigarettes by controlling the pH of cigarette smoke through the use of ammonia compounds. The introduction of ammonia or ammonia compounds into the cigarette manufacturing process raises the pH of tobacco.³²⁵ As the pH rises, the tobacco smoke becomes more “basic” and results in an increase in the amount of “free” nicotine, also known as “free base” nicotine (as opposed to “bound” nicotine).³²⁶ Free nicotine is more volatile and physiologically active than bound nicotine. As one RJR document explained:

In essence, a cigarette is a system for delivery of nicotine to the smoker in attractive, useful form. At “normal” smoke pH, at or below about 6.0, essentially all of the smoke nicotine is chemically combined with acidic sub-

320. BAT 109872508.

321. BAT 109884190.

322. PM 1000125871.

323. RJR 511223466.

324. RJR 509479584.

325. See RJR 511223466; RJR 500606141.

326. See RJR 511223466; LOR 00776239.

stances, hence is non-volatile and relatively slowly absorbed by the smoker. As the smoke pH increases above about 6.0, an increasing proportion of the total smoke nicotine occurs in “free” form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine “kick.”³²⁷

Minnesota presented evidence demonstrating that Philip Morris was the first tobacco manufacturer to use the ammonia process in the United States, beginning in 1964 or 1965, on the heels of the first surgeon general’s report.³²⁸ At the time, Philip Morris ranked far behind RJR in domestic cigarette sales. Simultaneously with the use of ammonia in its cigarettes, sales of Philip Morris products began to rise dramatically. While RJR and the rest of the tobacco industry soon learned the reasons behind the success of Marlboro,³²⁹ the public—and smokers—were not informed. RJR soon moved its cigarette design in the same direction as Philip Morris. In 1973, RJR discussed using pH manipulation “to assure RJR a larger segment of the youth market.”³³⁰ Eventually, the use of ammonia was the norm of the industry. As B&W reported in a 1989 document, “[A]ll U.S. manufacturers except Liggett use some form of AT [ammonia technology] on some cigarettes products.”³³¹

Minnesota also presented evidence of lawyer involvement in nicotine addiction and manipulation. The industry had logged as privileged hundreds of documents written by scientists regarding nicotine and addiction. The industry recognized that the issues of nicotine addiction were potentially explosive in smoking and

327. RJR 511223466. BAT scientists also understood that “free base nicotine is the most chemically and physiologically active form because it is most rapidly absorbed.” BAT 500104408.

328. See RJR 500991002.

329. See RJR 511223463. In 1973, RJR conducted an extensive study of the design of Philip Morris Marlboro cigarettes in attempt to discover the reason for its competitor’s sharp increase in sales. RJR 511223465. A “secret” RJR report disclosed that the pH of Marlboro was consistently and significantly higher than RJR’s brands and, accordingly, Marlboro contained more free nicotine and “would be expected to show more instantaneous nicotine ‘kick’ than our brands.” RJR 511223466. RJR also found that other well-selling brands—for example B&W’s Kool—also had increased smoke pH and increased amounts of “free nicotine.” *Id.* RJR concluded that the high smoke pH attained by Philip Morris and B&W was “deliberate and controlled.” RJR 511223465.

330. RJR 501166152.

331. B&W 508104016. Minnesota presented evidence that Liggett later also began to use ammonia technology. See LG 2018563.

health litigation.³³²

Minnesota argued that the evidence concerning nicotine and addiction was closely-related to the trial court's earlier crime-fraud findings, since nicotine was clearly related to the health and safety issues in the case, i.e., nicotine in cigarettes makes it more difficult for people to quit smoking. The industry countered by arguing that Minnesota's counsel had "cherry-picked" industry documents, picking only incriminating evidence while ignoring exculpatory documents. Noting the breadth and quality of the evidence presented by Minnesota, the special master found that the industry did not "dispute[] the content of these documents," nor "present evidence from their own internal files to support their allegation that plaintiffs' selection is unrepresentative"³³³

b. Suppression of Research

During the Liggett round of privilege hearings, the special master found that there was no evidence that "the defendant companies conducted significant independent research, i.e., that which was not jointly sponsored through CTR."³³⁴ The special master also concluded: "[T]he failure on the part of defendants individually to investigate the safety of their product, coupled with their ongoing assurances that causation of illnesses was unproved and speculative, necessarily implicates the holding of *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 515 (Minn. Ct. App. 1991)"³³⁵ This issue took on even greater significance during the non-Liggett privilege proceedings.

Minnesota presented documents and testimony showing that, for many years, the U.S. manufacturing defendants failed to perform in-house smoking and health research, including biological research.³³⁶ There was also evidence that the failure of the domes-

332. See *supra* note 36 and accompanying text (recognizing that addiction is the "most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case.").

333. Non-Liggett Report, *supra* note 309, ¶ 268.

334. Special Master's Report, *supra* note 286, ¶ 140.

335. *Id.* ¶ 146.

336. Biological research is the type of research a company would undertake to examine the safety of its products with respect to humans. WEBSTER'S NEW COLLEGIATE DICTIONARY 152 (1990). Minnesota presented evidence that Brown & Williamson and American *never* conducted any in-house biological research or research related to the health effects of tobacco. See Non-Liggett Report, *supra* note 309, ¶¶ 106-07, 146-47. RJR performed in-biological testing for only three years,

tic tobacco manufacturers to conduct in-house smoking and health research was, in part, the result of a conspiracy. For example, documents produced in Minnesota described how RJR's biological research division, also known as the "mouse house," was shut down because of this industry agreement. The mouse house, opened by RJR in 1967, was a sophisticated in-house lab for conducting biological research—including inhalation tests—on animals, including rats, rabbits, mice and gerbils. Preliminary results from mouse inhalation tests in the RJR mouse house demonstrated "[a] diffuse, marked emphysema throughout the lungs"³³⁷ In 1970, RJR abruptly shut down the mouse house and fired twenty-six scientists.³³⁸ RJR argued during the privilege proceedings that the mouse house was closed for business reasons. A contemporaneous memorandum from the files of BAT, however, explains that the shutdown was related to the industry's "tacit agreement between the heads of the US companies" not to conduct "in-house biological research."³³⁹ After learning that RJR was conducting biological studies, Philip Morris president Cullman lodged a complaint with RJR president Galloway.³⁴⁰ The result of this conversation was a "sudden reorganization at Reynolds, resulting in the closure of the biological section."³⁴¹

Philip Morris scientists also complained about the restrictions imposed by the industry agreement not to conduct in-house biological research. In 1964, Helmut Wakeham—a senior Philip Morris scientist—wrote that the "[c]ompetitive pressures suggest a breakup of the common front approach of the industry through TI and TIRC."³⁴² Wakeham also recommended that "[t]he industry

1967-1970. *See id.* ¶ 114. A "large proportion" of Lorillard's in-house research was related to product development, not the health effects of smoking or nicotine. *Id.* ¶ 144.

337. RJR 515596269. A 1969 Philip Morris document reveals that this information was shared by RJR with its competitor, Philip Morris: "I met Dr. Price from R.J. Reynolds at the CTR-USA meeting of December 11 and 12, 1969. He mentioned doing chronic cigarette smoke exposure studies with rats. *The animals received up to 500 cigarettes and emphysema was produced.*" PM 1001882748 (emphasis added).

338. *See* RJR 503950747. RJR commissioned a third-party report on the closing of the mouse house, known as the Brubaker Report. *See* RJR 515597278-468. This report was withheld from the Minnesota plaintiffs under a claim of privilege.

339. BAT 110315969.

340. *See id.*

341. BAT 110315969-70.

342. PM 1000335616-17. Wakeham also confirmed in his deposition that there was an agreement not to conduct in-house smoking and health research:

should abandon its past reticence with respect to medical research," noting that "failure to do such research could give rise to negligence charges."³⁴³

2. *Special Master's Findings*

After nearly four months of consideration, the special master issued a 144-page report recommending that approximately 39,000 of the withheld documents were not privileged in the first instance or were discoverable under the crime-fraud exception to privilege.³⁴⁴ The report was issued several weeks after trial had commenced in St. Paul, Minnesota. The categories of documents ordered produced related predominately to scientific research and the industry's public statements on the health hazards of cigarettes.³⁴⁵

Q. What's the type of research that you understood that there was an understanding that the cigarette companies would not be doing in-house?

A. Studying a relationship which might exist between smoking and diseases such as were tabulated in the Surgeon General's report.

Transcript of Deposition of Helmut R.R. Wakeham, vol. 1 at 91, *State ex rel. Humphrey v. Philip Morris Inc.*, C1-94-8564 (Minn. Dist. Ct. May 29, 1997) [hereinafter *Wakeham Deposition*].

343. PM 1000335622. As of 1968, Philip Morris was still not conducting in-house biological research. See *Wakeham Deposition*, *supra* note 342, at 85. "We were—we were doing tests on some animals, again related to the irritation problem, not regarding—not relating to cancer or anything else of that nature. *Id.* at 86 (emphasis added). Minnesota presented evidence that Philip Morris turned to Europe, to a facility it purchased in Cologne known as INBIFO, for smoking and health research. See *supra* note 73 for discussion of INBIFO research.

344. See *Non-Liggett Report*, *supra* note 309.

345. The special master ordered production of four (out of fourteen) Categories of documents: Categories I, III, IVb and V. The special master found that documents in Category I—documents other courts had found discoverable and/or documents specifically selected by Minnesota's counsel—supported the inference that "attorneys manipulated or attempted to manipulate industry science," and that each of the documents "goes *directly* to the control or suppression of research, and the creation of privilege shields to conceal possession of dangerous information." See *id.* ¶¶ 315, 316. Documents in Category III—scientific research—were ordered produced because they demonstrated "what the Defendants knew and when they knew it." *Id.* ¶ 334. For Category 4b documents—special projects—the special master found that his earlier finding that the public was deceived by CTR Special Projects was un rebutted. *Id.* ¶¶ 339-342. Category V documents were discoverable because "they detail formulation of public statements aimed at minimizing or creating doubt about the risks of smoking." *Id.* ¶ 359.

Once again, the special master's report included detailed findings of fact. On the evidence of suppression of research presented by Minnesota, the special master concluded:

- The inference of a “gentleman’s agreement” has been fairly presented and not rebutted.³⁴⁶
- This failure to conduct in-house biological research was not restricted to one tobacco company. . . . [T]his failure was industry-wide. I find this fact significant, as the members of this industry have portrayed the companies as being fiercely competitive.³⁴⁷
- Plaintiffs have established to a degree of probability that Defendants collectively agreed not to conduct, or to eliminate or reduce, scientific research which related to issues of smoking and health. This evidence has not been rebutted.³⁴⁸

On nicotine and addiction, the special master concluded that “there are a large number of documents relating to addiction and nicotine manipulation for which the tobacco companies are asserting privilege.”³⁴⁹ Furthermore, the special master found evidence that the “tobacco industry intentionally maintains nicotine at certain levels because the defendants [tobacco companies] have long been aware that there is an optimum dose of nicotine needed for its pharmacological and addictive qualities to have their intended effect.”³⁵⁰ The special master found that the evidence presented “concerning nicotine and addiction” was closely related to the Court’s May 9 crime-fraud findings relating to the industry’s assurances that they “would not knowingly distribute a dangerous product,” the industry’s assurances “that the tobacco industry was committed to providing safe products” and the industry’s “use of attorneys and/or claims of privilege to suppress information and documents ‘which appear to be scientific in nature and specifically related to health issues.’”³⁵¹ Accordingly, the special master concluded that “further inquiry must be permitted and that plaintiffs

346. *See id.* ¶ 28.

347. *Id.* ¶ 150.

348. *Id.* ¶ 170.

349. *Id.* ¶ 262.

350. *Id.* ¶ 207.

351. *Id.* ¶ 302.

in this case must be permitted to inspect documents withheld on claims of privilege which relate [to] nicotine addiction and manipulation (even if such documents are privileged in the first instance).³⁵²

On lawyer involvement in scientific research, the special master concluded:

- Plaintiffs have presented substantial evidence showing involvement in scientific research and other scientific matters by attorneys for the tobacco industry, and that industry attorneys were a driving force behind the direction of and the suppression of scientific research.³⁵³

- I find that defendants' claims of privilege are overly-broad. *Defendants have asserted privilege over thousands of communications that constitute or concern scientific research.* As Judge Fitzpatrick concluded, however, defendants had an independent obligation to conduct research into the safety of their products, and to warn consumers if the research results supported negative conclusions.³⁵⁴

- I specifically find that defendants have asserted claims of privilege over information generated by counsel acting in scientific, administrative or public relations capacities, but not in a legal capacity. That information is not privileged.³⁵⁵

The special master also found that Minnesota had demonstrated "substantial need" for scientific research "designated by defendants as fact work product," because "defendants . . . contest that smoking causes disease and nicotine is addictive, yet seek to place certain research and/or scientific analysis that may provide otherwise beyond discovery."³⁵⁶ The special master found that "selectively" claiming such research as privileged while producing other types of research, "strengthened" plaintiffs' showing of substantial need.³⁵⁷

The trial court, after reviewing documents itself and allowing

352. *Id.* ¶ 306.

353. *Id.* ¶ 36.

354. *Id.* ¶ 279 (emphasis added).

355. *Id.* ¶ 281.

356. *Id.* ¶ 282.

357. *Id.* ¶¶ 283-85.

the parties to be heard, adopted the special master's recommendations.³⁵⁸ The trial court also described a "pattern of abuse" by the industry lawyers before the special master, including "in numerous instances claim[ing] privilege where none is due and blatantly abus[ing] the categorization process."³⁵⁹ The trial court held that the "intentional and repeated misuse of claims of privilege is intolerable in a court of law, and an appropriate sanction for such abuse is release of all documents for which privilege is improperly claimed."³⁶⁰ The trial court also found that the special master had properly applied the Minnesota law of privilege and the crime-fraud exception, and that the industry had been afforded full due process.³⁶¹ The trial court found that "a review less cautious and conservative than our Special Master" might have recommended even further disclosures.³⁶²

The industry sought appellate review—for the second time—of the categorical review process established by the trial court in its order of May 9. On March 17, 1998, the Minnesota Court of Appeals denied the industry's petitions for writs of prohibition and mandamus, finding that its challenge to the categorical review process employed by the trial court over the past ten months was untimely.³⁶³ The court of appeals found that the trial court had not

358. See Order with Respect to Non-Liggett Defendants' Objections to the Special Master's Report Dated February 10, 1998, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 3 (Minn. Dist. Ct. Mar. 7, 1998) [hereinafter Order Respecting Objection's to Special Master].

359. *Id.* at 5, 15. Other courts also have found that the industry has abused the judicial process. In *Burton v. R.J. Reynolds Tobacco Co., Inc.*, after examination of RJR's claims of privilege over a much smaller grouping of documents, the federal magistrate found that "[t]here are inconsistencies in the various submissions by RJR . . ." 170 F.R.D. 481, 484 (D. Kan. 1997). On RJR's motion for reconsideration, the magistrate held that "the representations of counsel . . . were clearly contrary to any reasonable application of the attorney-client privilege or work product doctrine." *Burton, on reconsideration in part*, 175 F.R.D. 321, 328 (D. Kan. 1997). The special master in *Butler v. Philip Morris Inc.* found a few documents during in camera review "which might cause particular attorneys, not involved in the instant case, to face some ethic charges regarding candor with the Court" and which "may bring requests for sanctions for delay in production in accordance with the rules." *Butler v. Philip Morris Inc.*, No. 94-5-53, at 14 (Miss. Dist. Ct. Apr. 21, 1997).

360. See Order Respecting Objection's to Special Master, *supra* note 358, at 15-16.

361. See *id.* at 3.

362. *Id.* at 16.

363. See State *ex rel.* Humphrey v. Philip Morris Inc., Nos. CX-98-414, CX-98-431, slip op. at 2 (Minn. Ct. App. Mar. 17, 1998).

exceeded its legitimate powers, and that the industry had failed to show that the documents ordered produced were *clearly* not discoverable.³⁶⁴ Thus, the standard for extraordinary relief was not satisfied.³⁶⁵ The court of appeals also found that the industry's opportunity to assert its claims was not "limited or abridged in any significant way," that the industry failed to show that the trial court had applied the wrong legal standard or that the detailed findings of the special master were inadequate support for the trial court's order.³⁶⁶ The court of appeals delayed its order for two days to afford the industry an opportunity to seek further relief, including a stay, from the Minnesota Supreme Court.

On March 18, 1998, the industry filed a motion for an emergency stay in the Minnesota Supreme Court together with two petitions for review of the court of appeals' March 17, 1998 decision. On March 19, 1998, the Minnesota Supreme Court granted the temporary stay pending final disposition of the two petitions.³⁶⁷ On March 27, 1998, the Minnesota Supreme Court denied both petitions, finding that the categorical review process adopted by the trial court "*recognized the virtually unprecedented dimension of discovery and assertion of privilege involved in this case.*"³⁶⁸ The Minnesota Supreme Court also found that the "extraordinary relief" sought by the industry—line-by-line review of each document—was "an impossibility."³⁶⁹ Moreover, the Minnesota Supreme Court noted that, by denying the request for discretionary review of a discovery order, they were not "address[ing] or decid[ing] the propriety of the process established by the trial court."³⁷⁰ The court also stayed its order until 5:00 p.m. Wednesday, April 1, 1998.

The industry then sought a stay from Justice Thomas of the United States Supreme Court. This request was denied on April 2, 1998,³⁷¹ but a temporary stay was put in effect until April 6 so that the industry could seek relief from another Justice. The industry then petitioned Justice Scalia, who referred the matter to the entire

364. *See id.* (emphasis in original).

365. *See id.*

366. *Id.* at 3.

367. *See State ex rel. Humphrey v. Philip Morris Inc.*, Nos. CX-98-414, CX-98-431, 1998 WL 154543 (Minn. Mar. 27, 1998).

368. *Id.* at *1 (emphasis added).

369. *Id.*

370. *Id.*

371. *See Philip Morris Inc. v. Minnesota ex rel. Humphrey*, No. A-722 (Apr. 2, 1998).

Court.³⁷² On the morning of April 6, the application for stay was denied by the Court and the documents were soon thereafter produced to Minnesota's counsel.³⁷³

V. REVELATIONS FROM THE "PRIVILEGED" DOCUMENTS PRODUCED IN MINNESOTA

When tens of thousands of the privileged documents were finally produced, the documents confirmed plaintiffs' counsels' long-standing belief that documents had been improperly withheld on claims of privilege. The documents also add significantly to our understanding of the tobacco industry and should be studied for years to come by legal scholars, historians, and ethicists. Many of the withheld documents were purely scientific, not legal, in nature. Many documents verified—and added new detail to the understanding of—the ubiquitous dominance of tobacco industry lawyers over smoking and health issues, including scientific research. Many documents contain extraordinary details about the concealment—and destruction—of evidence.

An example of withheld documents which were purely scientific in nature is a series of reports written by Alan Rodgman, a scientist at RJR. Beginning in the 1950s, Rodgman began to write reports on the health hazards of smoking. These reports are a detailed compendium on the health hazards of smoking. These reports do not contain legal analysis or legal advice. Yet these reports were concealed in the files of lawyers for more than forty years, shielded by claims of privilege. The title pages of the reports lists the topic—for example, "Lung Cancer"—and the author and date. There is no indication on the title pages that the reports were sent to or prepared for legal counsel. A typical privilege log entry for these reports, however, lists the legal department as the recipient of the reports and is a basic generic description which reveals virtually nothing about the nature of the document:

Report prepared by an RJR scientist performing work at the request of the legal department transmitted to RJR in-house legal counsel for the purpose of providing confi-

372. See *Philip Morris Inc. v. Minnesota ex rel. Humphrey*, 118 S. Ct. 1384 (1998) (mem.).

373. See *id.* Simultaneous with production to Minnesota's counsel, the documents were turned over to Representative Bliley in response to a congressional subpoena.

dential information in order to assist in the rendering of legal advice concerning a smoking and health issue.³⁷⁴

The particular document described in this privilege log entry was written in 1955. The actual title of this document, as revealed when the document was produced forty-three years later, is: "Lung Cancer - Smoking Studies."³⁷⁵

The actual titles of other, withheld reports in the Rodgman series, also written in the 1950s, include:

- Animal-Lung Tumor Study³⁷⁶
- Arsenic and/or Arsenic Compounds - Carcinogenesis Studies³⁷⁷
- Tobacco-Arsenic Studies³⁷⁸
- Lip Cancer - Smoking Studies³⁷⁹

By today's standards, and by today's state of scientific knowledge on the health hazards of smoking, these Rodgman reports seem to be fairly innocuous descriptions of scientific evidence on smoking and health. But it is important to keep in mind that these reports were written years before the surgeon general declared, in his seminal 1964 report, that smoking caused lung cancer in men. At the time these reports were written, there was an active debate—fueled in large part by the tobacco industry—regarding the health hazards of smoking. If these reports had been disclosed by RJR at the time they were written, the consequences—for the tobacco companies and for the public health—would have been dramatic.

The documents withheld on claims of privilege provide insight not only into the routing of scientific information through lawyers, but also into lawyers' direction and control of the scientific research itself. One colorful illustration of the dominance of tobacco company lawyers was revealed in a document which described the

374. RJR 502815280 (privilege log).

375. *Id.* All privileged documents discussed in this section of article will be referenced by Bates Number. Presently, these documents are not available to the public at the Minnesota Depository. They can, however, be located on a congressional website, *supra* note 93.

376. RJR 502815408.

377. RJR 502815461.

378. RJR 502815457.

379. RJR 502815472.

following encounter with Willard Bright, a former top scientist at RJR: "[O]nce when Bright was introduced to someone as the "senior scientist at RJRT," Bright interrupted and said, "No, Ramm is."³⁸⁰ "Ramm" is Henry Ramm, former general counsel at RJR.

The documents provide details concerning RJR's efforts to conceal unfavorable scientific research. The excerpts below are from a "fact memorandum"³⁸¹ prepared by RJR's outside counsel, Jones, Day, Reavis & Pogue, that describes RJR's research and development activities:

- In some cases, the control exerted by the Law Department or R&D Management went beyond "word-smithing" to efforts to prevent the distribution or production of certain reports. The following examples, which may be of some interest to Company critics, reflect these efforts:

(i) *1953 Teague literature survey*. In approximately 1953, Dr. Claude Teague reviewed the smoking and health literature and was surprised by the volume of material which 'indicted' cigarette smoking According to Dr. Teague, the Law Department advised that this report should not be circulated. Although copies of this report still exist, he believes that Henry Ramm advised that the report be collected and destroyed.³⁸²

. . . .

(iii) *Nitrosamine research (1965-67)*. Jim Fredrickson, who was working on identifying nitrosamines³⁸³ in smoke in approximately 1965-67, was told . . . not to prepare a final report on his research but merely to record the work in his laboratory notebooks.³⁸⁴

- Through the years, there apparently has been a general informal policy at RJRT against publication of anything that bears on the smoking and health issue. For ex-

380. RJR 515873872, n.81.

381. RJR 515873805.

382. RJR 515873896-97.

383. Nitrosamines are carcinogens found in smoke.

384. RJR 515873898.

ample, Dr. Laurene said that even though RJRT published frequently, nothing was published on the smoking and health issue while he was with the Company. According to Laurene, this practice reflected the view of top management.³⁸⁵

The documents also provide evidence of the extensive control of research into nicotine by lawyers for Philip Morris. One document withheld as privileged, written in 1980, highlights the long-standing tension between the Philip Morris scientists and the lawyers on what research could be conducted on nicotine and on smoking-caused disease. The document was written by William L. Dunn, a Philip Morris scientist also known as "the Nicotine Kid." The document is titled, "The Nicotine Receptor Program." The document states:

The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. *Yet it is where our attorneys least want us to be, for two reasons . . .* The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations within the industry from the claims of heirs and estates of deceased smokers: "We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems." That posture has moderated considerably as our attorneys have come to acknowledge that the original *carte blanche* avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.³⁸⁶

Dunn further described the second reason why the Philip Morris attorneys were concerned about research on the pharmacological activity of nicotine:

This is a more recent concern arising from increasingly

385. RJR 515873908.

386. PM 1000127789 (emphasis added).

favorable prospects for the success of a legislative effort to transfer authority for the regulation of tobacco manufacture to a Federal agency (F.D.A.) known to have interests and powers antithetical to the interests of the industry. Any action on our part, such as research on the psychopharmacology of nicotine, which implicitly or explicitly treats nicotine as a drug could well be viewed as a tacit acknowledgement that nicotine is a drug. *Such an acknowledgement, contend our attorneys, would be untimely.* Therefore, although permitted to continue the development of a three-pronged program to study the drug nicotine, *we must not be visible about it.*³⁸⁷

Dunn concluded by stressing the commercial necessity of research into nicotine; he believed, after all, “that specific action of nicotine . . . causes the smoker to repeatedly introduce nicotine into his body.”³⁸⁸ The concern of the attorneys, however, had to be accommodated. Thus, Dunn wrote: “Our attorneys . . . will likely continue to insist upon a clandestine effort in order to keep nicotine the drug in low profile.”³⁸⁹

By 1984, however, as the nicotine research progressed at Philip Morris, the attorneys grew increasingly concerned. One internal document, authored by the law firm of Shook, Hardy & Bacon, describes the shutdown of the Philip Morris Nicotine Program in 1984. The scientist mentioned in the following excerpt is Dr. Victor J. DeNoble, who researched nicotine and nicotine analogues at Philip Morris. The document states:

In July 1984, Patrick Sirridge of Shook, Hardy & Bacon wrote to Philip Morris’ Assistant General Counsel Fredric Newman transmitting an analysis of DeNoble’s published literature, unpublished manuscripts, and in-press manuscripts The analysis concluded that “[r]esearch engaged in, as well as some possibly under consideration, by Philip Morris has undesirable and dangerous implications for litigation positions the industry takes in regard to smoking behavior In the final analysis, the performing and publishing of nicotine related research seems ill-advised from a litigation point of view”

387. *Id.* (emphasis added).

388. *Id.*

389. PM 1000127790.

In the spring 1984, DeNoble was terminated and the Nicotine Program was discontinued. Although there were no internal documents found stating the reasons why DeNoble and his program were terminated, *it could be easily concluded that the unfavorable analysis of the program submitted by Philip Morris' legal counsel prompted DeNoble's termination and the program's cancellation.*³⁹⁰

This document notwithstanding, it is doubtful that Philip Morris eliminated all nicotine research from 1984 onwards. The properties of nicotine—the addictiveness of nicotine—are the foundation of the cigarette market. Thus, there is evidence of continuing nicotine research conducted by Philip Morris—including, most significantly, at INBIFO, the Philip Morris research facility in Germany.³⁹¹ Another document withheld on claims of privilege but eventually produced to plaintiffs notes that the “largest research area” at INBIFO was “PM USA product research.”³⁹² As with documents produced earlier in the litigation, this document notes the benefits of offshore research. The document states:

According to Tony, final reports on PM USA product research are sent to Richmond for a review and are then returned to INBIFO. Supporting data and documents are kept at INBIFO.

....

Tony said that *most documentation is maintained on computers and much of it is written in German.*³⁹³

A number of the withheld documents relate to CTR—and tobacco industry lawyers' control over the scientific research of this supposedly independent organization. One document, for example, describes in detail the routing of “dangerous” research proposals through the law firm of Jacob, Medinger & Finnegan, longtime counsel to the tobacco industry. The document describes the procedure used during the period when William Hoyt was CTR president, as follows: “During William Hoyt’s presidency, cases were not automatically assigned a number. All potential cases . . . which

390. PM 2021423422 (emphasis added).

391. See, e.g., PM 2025988909; PM 2025988395.

392. See PM 2043725390.

393. PM 2043725390-91 (emphasis added).

were considered ‘dangerous’ were sent to Jacob, Medinger & Finnegan for a ‘legal’ opinion.”³⁹⁴

Thus, certain proposals for research were sent first to lawyers, before the research proposals could be evaluated for funding by CTR’s Scientific Advisory Board (“SAB”). After receiving the advice of counsel, many of the research proposals were apparently “treated as a case” and forwarded to the SAB.³⁹⁵ Other proposals, however, “were apparently held indefinitely, not treated as a case, or a letter discouraging formal application was sent.”³⁹⁶ Research proposals which were “of greatest concern”³⁹⁷ included:

- Inhalation studies . . . [with] Syrian hamsters.
- Investigation of the effects of prenatal nicotine exposure . . . in the rat.
- [Study of] . . . the effects of maternal smoking on the human reproductive process, taking special account of the differences between brand and composition of the cigarettes that are smoked.
- Study of nicotine and the central nervous system.
- Study of factors associated with human bone loss. Preliminary data suggested a relationship between certain smoking habits, bone loss and age.³⁹⁸

Other documents withheld on claims of privilege provide additional examples of the manipulation of CTR research. One document ultimately produced to plaintiffs is an annotated summary of numerous documents relating to CTR, and includes some of the following examples of what the “anticipated plaintiff position” might be.³⁹⁹

- We [the tobacco industry] have deliberately isolated the SAB from those areas of research which they might consider were of a controversial or adversary nature and I see no reason why that isolation cannot and should not be

394. B&W 681879411.

395. B&W 681879412.

396. *Id.*

397. *Id.*

398. B&W 681879412-15.

399. B&W 681879417-19.

maintained.⁴⁰⁰

- CTR staff discussed, “the possible merit of having the three of us [Little, Hockett & Hoyt] screen all new applications *before* circulating them.” The screening process allowed them to weed out potentially harmful grant applications.

- Beginning in 1958 CTR staff heavily solicited grantees. This focus was on getting the “right” kind of grantee—i.e., someone whose research would not harm the industry’s position regarding smoking and health.

- As a result of this selection process, CTR reported that, in 1969 only 12% of the unsolicited grants were funded.⁴⁰¹

- In 1969 CTR established a Planning Committee. This committee wrote and designed CTR projects and told investigators what to do. Grantees were to be “given specific assignments that are part of the overall attack on the problem.” CTR grantees were no longer free to conduct their research. Instead their projects were so rigidly controlled by CTR there was no possibility that adverse smoking and health results could come to light.

....

- At the 1970 Annual Meeting Dr. Little admitted that it did not matter whether it was a grant or contract because “C.T.R. *wrote*, designed, did everything ‘but diaper the animals.’”⁴⁰²

- [R]emember that the cigarette companies in the U.S. have given the prime responsibility in the health area to their lawyers.⁴⁰³

Finally, the withheld documents also provide evidence of discussions of the potential for extensive and systematic destruction or alteration of documents. One document produced by BAT describes a high-level meeting held in 1986 to discuss the collection of internal documents in a “document review” and “discovery exercise” to prepare for “BATCO being involved in direct or indirect

400. B&W 682632038.

401. B&W 682632076.

402. B&W 682632079 (emphasis in original).

403. B&W 682632179-80.

legal action in the smoking and health arena.”⁴⁰⁴ British counsel intended to meet with U.S. lawyers—from Shook, Hardy & Bacon—to learn how similar document reviews had been conducted in the United States.⁴⁰⁵ There also was a “discussion about the destruction of documents” at the BAT research center.⁴⁰⁶ The document states:

[N.B. Cannar of the BAT legal department] said that Mr. [Patrick] Sheehy [chairman of British-American Tobacco and BAT Industries] did not wish it to be seen that BATCO had instituted a destruction policy only when the possibility of their being involved in litigation became real and after they had instructed solicitors. Thus, it was decided that no destruction policy should be adopted, rather that *R&DC [Research & Development Centre] would tidy up the loose papers held by individuals, which “spring clean” could involve the destruction of documents such as previous drafts*

. . . .

It was agreed that such a “spring clean” of all of the loose papers held outside the official filing systems is essential to enable L.W.&K.’s “task force” to carry out stages I and III (the listing and reviewing of the files).⁴⁰⁷

Similarly, documents from RJR describe systematic efforts to cleanse its files—or “invalidate”—documents. One document is titled “Invalidation of Some Reports in the Research Department,” and states:

We do not foresee any difficulty in the event a decision is reached to remove certain reports from Research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files.

. . . .

As to the reports which you are recommending be invalidated, we can cite misinterpretation of data as reason for invalidation. A further reason is that many of these

404. BAT 107443680.

405. See BAT 107443681.

406. BAT 107443682.

407. *Id.* (emphasis added).

are needless repetitions and are being removed to alleviate overcrowding of our files.

As an alternative to invalidation, we can have the authors rewrite those sections of the reports which appear objectionable.⁴⁰⁸

VI. CONCLUSION: THE IMPLICATIONS OF DOCUMENT DISCOVERY IN STATE OF MINNESOTA V. PHILIP MORRIS INCORPORATED

The lessons learned in the Minnesota discovery battle should prove valuable in the ongoing efforts to control and regulate this deadly industry. The documents disclosed in the last few years—the words of the industry itself—are the best proof of its fraud regarding: (1) what the industry knew—that smoking causes cancer; (2) when the industry knew it—in the 1950s; and (3) what the industry did about it—systematic denial and cover-up.

These documents are now available, in the Minnesota depository and on the Internet, for future trials in the United States and abroad, and for future tobacco control efforts through regulation and legislation. Hopefully, these documents can help guide future policy debate and legislative action.⁴⁰⁹

These documents—and the decades-long history of the tobacco litigation—also should aid professionals from multiple disciplines to conduct a careful review and analysis of how a renegade industry was able to escape accountability under our system of jurisprudence—with such disastrous consequences for the public health.

408. RJR 500284499.

409. See Hurt & Robertson, *supra* note 94, at 1180 (arguing that documents uncovered in Minnesota litigation should preclude any liability limitations for industry); Koop, *supra* note 2, at 550 (arguing in early 1998 against any concessions to industry as “recent and growing disclosure of past tobacco industry misconduct and mendacity” now allows “[p]olicies once thought undoable”).