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I. INTRODUCTION

Professor Finkelman and Professor Carrington were wrong in suggesting that "evil" figures like Thomas Cobb and Lucius Lamar are no longer present in the legal community.[1] Thomas Cobb, a leading slavery proponent after the Civil War, and Lucius Lamar, a proponent of slavery and southern secession, who after the Civil War became an advocate of voting rights for African-Americans, are not gone today. These men are alive and working for the tobacco industry. The tobacco companies read Thomas Cobb's works. They realized that if he could explain that African-Americans needed to be slaves, deserved to be slaves and that it was all biological, he could also explain why tobacco smoke does not cause disease. In addition, he could explain how reports that demonstrate how tobacco smoke causes cancer are faulty and in need of much more scientific confirmation.

Lucius Lamar has found an even better position in the tobacco industry. He is an executive of sorts and doing public relations. He is explaining how the industry has turned over a new leaf since they have lost major lawsuits. He is explaining how the industry has been thoroughly punished by having to pay money and raising prices, even if only a little bit. Tobacco companies have taken it to heart and are no longer going after children. As long as there is a

* Professor of Law, Northeastern University School of Law. Lecture Delivered April 16, 1999 at Roger Williams University School of Law.

1. *See* Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 Roger Williams U. L. Rev. 75 (1999); Paul D. Carrington, *Lawyers Amid the Redemption of the South*, 5 Roger Williams U. L. Rev. 41 (1999).

tobacco industry, the Cobbs and Lamars of this world will be happily employed.

II. THE "NORMAL" ROLES OF TOBACCO INDUSTRY LAWYERS

Before discussing the peculiar role that some tobacco industry lawyers have played in managing the industry's deadly conspiracies, I would like to discuss the "normal" roles of tobacco industry lawyers. There is often an acute and perhaps unresolveable tension between a lawyer's roles as a decent human being, a good citizen and a counselor to and an advocate for a truly evil person or entity. In carrying out one's professional role, it is easy to find oneself skillfully promoting an unjust cause, often enough with the result that the world is a worse place for one's efforts.

Most lawyers for the tobacco industry are in just this situation. The cigarette companies' products and behavior each year cause about a million young Americans to become addicted to nicotine, as well as more than 400,000 deaths among older American smokers.[2] But, for example, my former Civil Procedure professor, the late Paul Bator, whom I had greatly admired, brilliantly represented the tobacco industry in the 1980s on the issue of preemption.[3] The result was that a succession of United States courts of appeals ruled that plaintiffs could not introduce evidence of the industry's continued lying about the dangers of cigarettes after the passage of the Federal Cigarette Labeling and Advertising Act in 1965.[4] By the time the United States Supreme Court corrected this nonsense in 1992,[5] Professor Bator was dead, but so was the

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2. *See* Stanton A. Glantz et al., The Cigarette Papers at xvii (1996) (stating that "tobacco products kill 420,000 American smokers and 53,000 non-smokers every year"); Michael Eriksen, *Scientific Facts Support CDC Tobacco Death Estimate*, Greensboro News & Rec., July 11, 1999, at H1, *available in* 1999 WL 6953049 (stating that "more than 400,000 deaths in this country are prematurely caused by smoking-related diseases"); Patricia Guthrie, *Deadly American Export: Tobacco*, Atlanta J. & Const., May 22, 1999, at A6, *available in* 1999 WL 3772785 (stating that "[c]urrently, 400,000 American deaths—one in five—are attributed to tobacco use").

3. For an example of Paul Bator's scholarship, see Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (3d ed. 1988).

4. *See* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234-35 (6th Cir. 1988); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625-26 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186-87 (3d Cir. 1986).

5. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524-25 (1992):

"second wave" of tobacco litigation, which had offered great promise of holding the tobacco companies accountable and forcing them to change their behavior with consequent reductions in tobacco consumption, disease and death.[6]

Less illustrious lawyers than Professor Bator have labored quietly, but effectively, to keep plaintiffs suing tobacco companies from getting their day in court. As one attorney for R.J. Reynolds Tobacco Company put it in a memorandum to the company's files,

> [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 that other son of a bitch spend all of his.[7]

While this behavior may (or may not) be sanctionable under professional rules,[8] and may indeed reflect the state of the art in much

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> [I]nsofar as claims under either failure-to-warn theory require a showing that [Liggett Group's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted. The [Public Health Cigarette Smoking Act of 1969] does not, however, pre-empt [Cipollone's] claims that rely soley on [Liggett Group's] testing or research practices or other actions unrelated to advertising or promotion.

6. *See* Richard A. Daynard, *Tobacco Liability Litigation as a Cancer Control Strategy*, 80 J. Nat'l Cancer Inst. 9 (1988) (noting that '[a]s of the end of 1987 there were about 125 cases against the tobacco industry pending in 17 states").

7. Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993) (citation omitted).

8. *See, e.g.*, Model Rules of Professional Conduct Rule 3.4 (1998). Rule 3.4 states:

> A lawyer shall not:
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> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,

litigation practice today, it clearly violated the spirit of the Federal Rules of Civil Procedure[9] and predictably contributed to the same dire social consequences as Professor Bator's professionally spotless advocacy.

Even tobacco industry lawyers who are not on the front lines of the battle with public health forces, the ones who work, for example, on commercial, employment and real estate matters, are still helping a killer industry do its lethal work. Facilitation of evil can never entirely escape the taint of evil, despite the bureaucratic and professional rules that define one's job, such as, "just making the trains run on time." After all, one could have worked for a different industry or for a law firm with different clients.[10]

III. THE "GOOD" GUYS

Before discussing the lawyers who have behaved even worse than the "normal" tobacco industry lawyers, I should say something about the industry lawyers who have behaved better. This is a very short list! Marc Kasowitz, a lawyer for Brooke Group (formerly Liggett Tobacco Company), successfully counseled its CEO, Bennett LeBow, to abandon the industry's conspiracy of silence—indeed, active misrepresentation—about the dangers of its products. Brooke Group, Kasowitz and LeBow have all done very well, as well as very good, by telling the truth about what Liggett and the industry have known for decades. In addition to Kasowitz and LeBow, there are doubtless anonymous tobacco industry lawyers who have counseled their clients to behave decently, or who have

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assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonbly believes that the person's interests will not be adversely affected by refraining from giving such information.

Id.

9. *See, e.g.*, Fed. R. Civ. P. 1, 11, 37.

10. Indeed, a colleague of Professor Bator's, Laurence Tribe, reportedly received the first offer (for "seven figures") from the tobacco industry to argue the preemption issue for it. Professor Tribe turned it down. *See National Public Radio* (Morning Edition, Jan. 13, 1992).

violated their professional (though perhaps not moral) obligations by quietly sabotaging some particularly destructive industry ploy.[11]

IV. THE "BAD" GUYS

The tobacco industry has devised a role for lawyers that is unprofessional, as well as immoral, tortious and criminal. Tobacco industry lawyers do much more than advising their clients of the legal consequences of their actions and defending them in court. They actually direct and manage all aspects of the industry's disinformation campaign on smoking and health, and have been doing so for the past forty years.[12]

This situation arose because, in the words of two British tobacco executives who visited their United States counterparts in 1964:

> In the U.S., by far the most important factor conditioning action by the manufacturers is the law suit situation and the danger of costly damages being awarded against the manufacturers in a flood of cases . . . .
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> . . . .
>
> In consequence of the importance of the lawsuits, the main power on the smoking and health situation undoubtedly rest with the lawyers . . . .[13]

They added that the lawyers' control extends to "*all* smoking and health matters—research and public relations matters, for example, as well as legal matters."[14] The demonstrated reach of the tobacco industry lawyers is, indeed, extraordinarily broad. They closely monitor all in-house research, closing down projects that threaten to demonstrate adverse health effects.[15] In at least two incidents,[16] tobacco industry lawyers have shut down in-house lab-

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11. Perhaps the person who leaked the "General Patton" memorandum, *see supra* text accompanying note 7, to my office and elsewhere, was just such a lawyer.

12. *See* Glantz et al., *supra* note 2, at 339-90.

13. *Reports on Policy Aspects of the Smoking and Health Situations in U.S.A.* (visited July 28, 1999) <http://www.tobacco.neu.edu/Extra/1964memo.htm>.

14. *Id.*

15. *See* Glantz et al., *supra* note 2, at 265-67 (discussing the complete immersion of attorneys in the research process to prevent harmful information from coming to light).

16. *See Regulation of Tobacco Products (Part 2): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Com-*

oratories, seizing the laboratory notebooks, killing the laboratory animals, and pensioning off the investigators. The lawyers organized outside, "independent" researchers, hiring and coaching these undercover scientific "consultants" on the industry's official line, dispatching them to conferences, and suggesting, editing and even ghost-writing articles and letters for them to publish in scientific journals.[17] They oversaw the Counsel for Tobacco Research, the industry-funded but supposedly independent scientific funding organization that the industry claimed was devoted to determining whether smoking causes disease.[18] Their job was to make sure that truly independent scientists were not funded for projects which might reveal such connections, while keeping an eye out for weak-willed scientists who might be recruited as "consultants."[19]

A recently uncovered report from the London office of Covington & Burling, the prestigious Washington D.C. law firm, illustrates many of the non-legal, and highly unethical tasks undertaken by tobacco industry lawyers on behalf of their clients. The *Report on the European Consultancy Programme*,[20] written in March 1990, was one of approximately 39,000 documents in the Minnesota Attorney General's case against the tobacco industry that the defendants claimed were privileged, but that the trial court deprivileged on the basis that they came within the "crime-fraud" exception to the attorney-client privilege.[21] The "crime-fraud" exception applies where the attorneys participated in the commission of the crime or fraud.[22] The defendants appealed this

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merce, 103rd Cong. 55-56 (1995) (testimony of Dr. Victor DeNoble); Justin Catanoso, *Research Project in the Spotlight at Smoking Trial*, Greensboro News & Rec., Apr. 22, 1997, at B4, *available in* 1997 WL 4581061.

17. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1488-92 (1999).

18. *See id.* at 1489-90.

19. *See id.* at 1489.

20. *Report on the European Consultancy Programme* (visited Aug. 30, 1999) <http://www.tobacco.org/Documents/900301covington.html>.

21. *See generally* United States v. Zolin, 491 U.S. 554, 563 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy,' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.") (citations omitted).

22. *See generally In re* Grand Jury Subpoenas v. United States, 144 F.3d 653, 660 (10th Cir. 1998) ("To invoke the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact.") (citations omitted).

ruling all the way up to the United States Supreme Court; when their final appeals were exhausted, they handed the documents over to the House Commerce Committee, which put them on its website.[23]

Much of Covington & Burling's *European Consultancy Programme*, also known as *The Whitecoat Project*, involved secretly retaining (i.e., bribing) scientists who held or obtained positions advising public health authorities on issues involving the health effects of environmental tobacco smoke ("ETS"). Thus,

> [o]ne consultant is, for example, the advisor to a particularly relevant committee of the House of Commons. One is the executive director of a leading scientific society that considers workplace and related issues. Several are advisors to the European Community on scientific matters. Several have been members of the working groups of the International Agency for Research in Cancer. . . . One consultant is a medical advisor to several Middle Eastern governments.[24]

And one is an editor of *The Lancet*, a "very influential British medical journal, and is continuing to publish numerous reviews, editorials and comments on ETS and other issues."[25]

Covington & Burling's "consultants . . . created the world's only learned scientific society addressing questions of indoor air quality."[26] According to the report, the society "will . . . have its own scientific journal, . . . will sponsor meetings and conferences, . . . and thus can serve as an independent and accepted source of ideas and research regarding IAQ [indoor air quality] to the public and the scientific community"[27]—while, of course, concealing the tobacco industry sponsorship. Similarly, they created a for-profit consulting group to offer "consulting services to companies and governments on IAQ issues"[28]—presumably for the purpose of defrauding the group's customers by denying or downplaying the effects of ETS on the "sick buildings" they were hired to study.[29]

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23. *See Chairman Tom Bliley Releases Subpoenaed Tobacco Documents to the American People* (visited Sept. 1, 1999) <http://www.house.gov/commerce /Tobacco Docs/documents.html>.

24. *Report on the European Consultancy Programme*, *supra* note 20, at 8.

25. *Id.* at 7.

26. *Id.* at 5.

27. *Id.*

28. *Id.*

29. Similar allegations were made about Healthy Buildings International, a United States IAQ consultant. *See* Staff of Subcomm. on Health and the Environ-

Much of Covington & Burling's efforts were directed to casting doubt on the causal relationship between ETS and lung cancer, including developing competing hypotheses about lung cancer causation. These were the themes of major scientific conferences, sessions and presentations which they organized in Montreal, Lisbon, Hanover, Germany, Budapest, Visby, Sweden, Oslo, Milan and Switzerland. They arranged for their consultants to publish books on ETS and health, on IAQ and on Toxicology, as well as a variety of scientific articles, all stressing the same themes.[30] Implicit in this report, which never names any of these consultants, is that even though these consultants were working for the tobacco industry, their true employer was to be concealed from their listeners and readers. This would encourage listeners and readers to mistake these consultants' paid opinions for disinterested science.

V. The Tobacco Industry's Disinformation Campaign

Why did the tobacco companies assign primary responsibility for their disinformation campaign to their lawyers? Is it that tobacco executives shared the public's contempt for lawyers—the belief that lawyers would do whatever it takes to "win?" Perhaps, . . . but more likely it was an accident of history. When the first wave of tobacco liability suits began in 1954, the industry's lawyers were necessarily involved. While they could have confined themselves to defending the cases one by one, they would naturally have been asked for, or volunteered, their opinions as to how the industry could minimize its exposure to such suits in the future. It was a small step from devising a plan of action, to being asked to implement it.

In any event, the lawyers had some unique assets to bring to the table. In addition to hiding or destroying documents,[31] which anyone could do, the lawyers could cloak them in one of two legal "privileges:" the work product rule or the attorney-client privilege. The work product rule protects materials developed by attorneys

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ment, United States House Energy and Commerce Comm., *Environmental Tobacco Smoke: Investigation*, 9.6 Tobacco Prods. Litig. Rep. 7.249 (1994). Healthy Buildings International's tobacco-related activities were also allegedly sponsored by the tobacco industry and controlled by Covington & Burling. *See* United States *ex rel.* Seckler v. Healthy Bldgs Int'l, Inc., 9.5 Tobacco Prods. Litig. Rep. 3.695 (D.D.C. Nov. 7, 1994).

30. *See Report on the European Consultancy Programme*, *supra* note 20, at 6.

31. *See* Glantz et al., *supra* note 2, at 246-47.

in the course of preparing to bring or defend litigation from discovery.[32] The attorney-client privilege protects from discovery communications between attorneys and clients regarding legal advice.[33]

In theory, these two privileges are not supposed to be useful for running a disinformation campaign. After all, "the attorney-client privilege does not protect non-legal business advice given by a lawyer."[34] Nor does the work product rule cover such activities as promulgating document destruction policies, to say nothing of creating false science and sabotaging true science, even though all of these activities might strengthen a company's position in future litigation.[35] And, as mentioned earlier, the crime-fraud exception vitiates an otherwise valid assertion of privilege if the advice was given or the materials were created, in furtherance of an ongoing crime or fraud.[36]

But once an attorney asserts any of these privileges, it is very difficult for the opposing party to gain access to the documents in question, even if the assertions were legally baseless and made in total bad faith.[37] Assertedly privileged documents do not have to be handed over in discovery, even if they are otherwise responsive to the request.[38] While the party asserting the privilege is nor-

32. *See* Hickman v. Taylor, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.").

33. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888):

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

34. Burroughs Wellcome Co. v. Barr Labs., Inc., 143 F.R.D. 611, 618 (E.D.N.C. 1992) (citation omitted).

35. *See In re* John Doe v. United States, 662 F.2d 1073, 1079 (4th Cir. 1981) ("The work product rule recognizes the lawyer's services as an indispensable part of the judicial scheme, but it was not designed as a fringe benefit for protecting lawyers who would, for their personal advantage, abuse it.").

36. *See supra* notes 21-22 and accompanying text.

37. *See, e.g.*, Dixie Mill Supply Co. v. Continental Cas. Co., 168 F.R.D. 554, 558 (E.D.La. 1996) ("The mere fact that a claim of bad faith . . . or other claim or defense based on a party's state of mind is involved does not waive the attorney-client privilege.") (citation omitted).

38. *See, e.g.*, Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 416-17 (M.D.N.C. 1992) (describing how almost 350 documents were withheld from discovery under attorney-client privilege, work product, or another claim).

mally required to submit a privilege log to facilitate the other party's challenge of assertion, in fact, the process is quite cumbersome and inexact; judges are not eager to go through the documents "in camera" to determine the validity of the privilege, and most lawyers will not bother to press the issue. Furthermore, it is rare for judges to make a finding that the crime-fraud exception applies. Thus, as a practical matter, thousands of highly incriminating tobacco industry documents have been protected from discovery through improper assertions of the attorney-client privilege and the work product rule.

It is, of course, criminal, tortious and unprofessional to direct, manage, or even simply participate in a scheme to extract money from consumers through deception or trickery. The fact that the consumers might get sick or die as a result of the fraud only makes it worse. Being a lawyer is not supposed to provide any protection from the general commands of the law. But, although law firms were named as defendants and co-conspirators in several of the state attorney general actions that were settled last year, the law firms were not required to pay into the settlement. Nor, to my knowledge, has any professional discipline been imposed. And, of course, no criminal cases have yet been brought against them either.

VI. Conclusion

The question remains whether lawyer management of systems of evil makes things worse. To the extent that lawyers bring special tools to the job, for example, the ability to invoke special privileges or simply experience in successfully evading justice, this makes things worse. To the extent that law firms develop expertise at managing specific systems of evil, and over several decades pass this expertise from one generation of lawyers to the next, all bound by professional vows of public silence, this makes things worse. The ultimate ethical rationalization of lawyers (i.e., that all they are doing is zealously representing their clients), desensitizes some of the "best and the brightest" to the true horror of what they are doing. Thus, they are enabled to do it. This too makes things worse.