

COMMONWEALTH OF MASSACHUSETTS
Middlesex, ss. Superior Court
for
Civil Business

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff

vs. No. 95-7378

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS
TOBACCO COMPANY, BROWN AND WILLIAMSON
TOBACCO CORPORATION, B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY, NEW
ENGLAND WHOLESALE TOBACCO CO., INC.
ALBERT H. NOTINI AND SONS, INC,
THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.
and the TOBACCO INSTITUTE, INC.,
Defendants

BEFORE: Sosman, J.
BEGUN: Thursday, April 9, 1998
Civil "J" Session
Middlesex Superior Court
at Courtroom 9B, Cambridge

HEARING RE MOTIONS FOR PROTECTIVE ORDER RE DR. BLAKE CADY

COMMONWEALTH'S PRESENTATION, PRIMA FACIE
SHOWING OF CRIME-FRAUD

SETTING SCHEDULE AND PROCEDURES FOR HEARING
DEFENDANTS' REBUTTLE

APPEARANCES:

GEORGE K. WEBER, ESQ., Assistant Attorney General, on
behalf of the Commonwealth.

RONALD L. MOTELY, ESQ., SUSAN NIAL, ESQ.,
and THOMAS M. SOBOL, ESQ., Special Assistant
Attorneys General, on behalf of The Commonwealth.

THOMAS J. BUTERS, ESQ., on behalf of Dr. Cady.

BARBARA HEALY SMITH, ESQ. and THOMAS J. GRIFFN, JR.,
ESQ., on behalf of Philip Morris.

MAJORIE PRESS LINDBLOM, ESQ., on behalf of Brown and
Williamson.

MICHAEL S. KOMAR, ESQ. and JOSEPH C. MARROW, ESQ., on
behalf of B.A.T Industries.

Niles Jon Fowlkes, RMR
Official Court Reporter

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1 Thursday, April 9, 1998

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3

4 [10:12 a.m.]

5 THE CLERK: Docket No. 95-7378, Commonwealth

6 of Massachusetts versus Philip Morris, Inc., et al.

7 Honorable Martha Sosman presiding.

8 Would counsel please rise and identify

9 themselves for the record, please.

10 MR. GRIFFIN: Good morning, your Honor.

11 Thomas Griffin for Philip Morris and liason counsel for

12 the defendants.

13 MS. SMITH: Barbara Healy Smith for Philip

14 Morris.

15 MR. BUTTERS: Thomas Butters for Dr. Cady.

16 MR. SOBOL: Thomas Sobol, special assistant

17 attorney general.

18 MR. WEBER: George Weber, assistant attorney

19 general.

20 MR. MOTLEY: Ron Motley, special assistant

21 attorney general.

22 THE COURT: I got the agenda just yesterday,

23 but I think we're ready to proceed; and the first was

24 the issue of the deposition of Dr. Cady.

1 I've looked at the -- at the parties' papers.
2 Let me just ask the counsel representing the doctor and
3 the Commonwealth what is wrong with the limitations
4 that the defendants have now offered and reasons?

5 MR. BUTTERS: Your Honor, it's our position,
6 on behalf of Dr. Cady, that he should not have his
7 deposition taken at all. If you look at the original
8 subpoena, it's clear that the intent of the defendants
9 in this case was to take his expert deposition and to
10 harass him as much as possible.

11 Dr. Cady, as you know from the pleadings, is
12 a practicing surgeon. His specialty is breast cancer;
13 he's a surgeon who works every day down in Rhode
14 Island. And this would be extremely burdensome to him,
15 to make him come and sit through two days of
16 depositions where it's clear, I think, certainly, from
17 the pleading that has been filed in response to the
18 motions to quash, that the defendants have virtually
19 every piece of information that they want.

20 As limited as I understand the request, they
21 are now simply wanting to inquire and -- of Dr. Cady as
22 to what information he disseminated to legislators, or
23 to the Commonwealth; and, again, I know nothing about

24 this case. Please forgive me. But as I understand it,

1 there have been numerous document requests back and
2 forth in which they have obtained all that information.
3 In fact, it's clear the defense knows a lot more about
4 Dr. Cady than I do.

5 THE COURT: Mr. Weber.

6 MR. WEBER: Your Honor, the Commonwealth
7 finds this deposition very troubling and totally
8 unnecessary. In fact, we've been informed that a
9 series of similar depositions of the American Cancer
10 Society, American Lung Association, and American Heart
11 Association are planned by the defendants, and as your
12 Honor's well aware, all of these charitable
13 institutions and Dr. Cady are engaged in work that is
14 extremely important work, and they should not be
15 dragged into this proceeding unless it is necessary;
16 and in our view, the public interest requires no less
17 than precluding them, unless the defendants are able to
18 demonstrate some need for their depositions.

19 What particularly is troubling is that Dr.
20 Cady's deposition will add nothing to the defendants'
21 case. It will add nothing; it is totally cumulative,
22 totally redundant. It is totally redundant of the
23 information the defendants did receive and obtained

24 from the government's own employees.

1 The defendants claim that they need Dr.
2 Cady's deposition because, first, it will enable them
3 to discover information about what the Commonwealth
4 knew about smoking and health, and, secondly, what
5 types of information were available to the public about
6 smoking and health.

7 But what they failed to point out to your
8 Honor is that the defendants have scheduled depositions
9 of four former commissioners of public health of the
10 Commonwealth. Those are individuals that held that
11 position dating back to 1980, and, certainly, those
12 individuals can provide information about what the
13 Commonwealth knew about smoking and health, and what
14 kind of information was available to the public about
15 smoking and health.

16 At a minimum, it seems to me, your Honor,
17 that the deposition of Dr. Cady should not be permitted
18 to go forward until the defendants have demonstrated to
19 you that those depositions of the commissioners of
20 public health don't provide the very information that
21 they need. Your Honor, the Commonwealth understands
22 and appreciates very well that liberal discovery is
23 fundamental, but I think we do no credit to our legal

24 system by dragging into these proceedings private

1 citizens who are engaged in very critical work in the
2 community; and, therefore, we ask that you issue a
3 protective order in this case.

4 MS. SMITH: Your Honor, the crux of the
5 Commonwealth's case is about information. The majority
6 of the allegations talk about information that was
7 suppressed, concealed, distorted by the defendants. It
8 is of central importance to the defendants' development
9 of their defenses that they be allowed to inquire into
10 what information was out there. Not only what the
11 Commonwealth had and disseminated through its public
12 health employees, as Mr. Weber referred to, but what
13 other information, what -- from other sources was being
14 disseminated.

15 Dr. Cady has for years been at the forefront
16 of an educational effort. He has not always had the
17 same view as the Commonwealth's public health
18 officials, and, indeed, has often been bringing in
19 information to the Commonwealth and urging legislators
20 and public health officials to take more steps on
21 issues of smoking and health and tobacco regulation,
22 urging passage of measures.

23 He's been affiliated, indeed, with

24 organizations that have instituted, both through the

1 legislature and through the courts, measures to
2 increase the prohibitions on smoking. He has made
3 proposals to the legislature, to the public, to the
4 medical community about ways to address issues of
5 smoking and health, and, indeed, from time to time, the
6 Commonwealth itself has -- after Dr. Cady has testified
7 to a legislative committee, which testimony is not
8 publicly available -- the Commonwealth itself has then
9 disseminated a press release quoting Dr. Cady.

10 THE COURT: Let me ask you this. I see no
11 problem with the defendants' assertion that the
12 subject -- this subject matter is relevant. It
13 certainly is highly relevant. No problem with that.

14 But in trying to be efficient of the parties'
15 time and this private individual's time, how much of
16 this do you still need to uncover? I mean, it's -- I
17 have some difficulty seeing why it will take two days
18 of this man's time to ask him things that aren't just
19 redundant of what you already know. I mean, I can
20 understand some amount of time. There are going to be
21 some gaps and some clarifications, or some more
22 detailed information from him, perhaps, about, you
23 know, who -- who the audience was at a particular event

24 or something, got this information, I can see some

1 details need to be filled in potentially; but it -- I
2 do get the impression that you already know an awful
3 lot, indeed, about what this man has done.

4 Do you really have two days' worth of
5 questions?

6 MS. SMITH: I don't know that, your Honor.
7 We have two options when we're noticing substantive
8 depositions, a Class I and Class II. We noticed this
9 as a Class II, in part because of the sheer number of
10 years that Dr. Cady has been on the forefront of this
11 issue and his educational effort.

12 We now have his CV. That clearly answers a
13 lot of what might be preliminary background questions
14 that will not need to be asked. Is it going to take 12
15 hours? I doubt it. Might it take more than six?
16 Possibly. Clearly, we could talk about those kinds of
17 limitations in discussion about narrowing this.

18 THE COURT: Well, it seems to me there are
19 two subjects that are at issue. One is what did the
20 Commonwealth know. I must say, I tend to agree with
21 Mr. Weber. Asking Dr. Cady what the Commonwealth knew
22 is sort of a roundabout way to do it. The
23 Commonwealth, I don't understand their -- harking back

24 to the motion to dismiss here -- the Commonwealth is

1 not taking the position, "Oh, we didn't know about
2 this," or "We were misled in terms of the
3 Commonwealth's own officials."

4 And while there is some relevance to what the
5 Commonwealth knew and what the Commonwealth did, it's
6 not itself -- doesn't look to me like it's terribly
7 disputed, and I question the need for much from Dr.
8 Cady on that subject.

9 His efforts directed toward the general
10 public strike me as a more, uh, more critical and
11 perhaps also more -- more hotly disputed issue in the
12 case, and I can see some time on the things that his --
13 his efforts that were directed towards the general
14 public, that would not be something the Commonwealth's
15 witnesses would be able to talk about knowledgeably, or
16 provide you with reliable information.

17 But do we need to really go into what the
18 Commonwealth knew by deposing Dr. Cady as opposed to
19 the other Commonwealth witnesses?

20 MS. SMITH: It's something in-between that,
21 your Honor. Clearly, if we are going to depose former
22 commissioners of the Department of Public Health, that
23 is the obvious source for what the highest public

24 health officers were aware of.

1 In Dr. Cady's case, he was often advocating
2 steps the Commonwealth could take to reduce incidents
3 of smoking, to discourage smoking, to educate the
4 populace about smoking, that the Commonwealth may not
5 always have acted on. To the extent that we don't know
6 everything he shared with them, urged with them,
7 educated them about, that is of -- that is relevant to
8 issues of causation. It is relevant to issues of the
9 extent to which information got out there.

10 In some cases, the Commonwealth may have
11 acted on that information and disseminated it and other
12 cases it may not have. Dr. Cady's efforts have been
13 multi-pronged. We're not intending to ask him what the
14 Commonwealth knew so much as what views Dr. Cady
15 disseminated and to whom. And the Commonwealth may
16 have been the recipient of some of that information.

17 THE COURT: Is there any problem in
18 postponing his deposition until after some of these
19 others have been taken? That would seem to focus the
20 area of inquiry. If the public health officials
21 acknowledge, "Oh, yes, Dr. Cady was constantly on our
22 case telling us to do this, that and the other thing,"
23 you really need to ask Dr. Cady about the same thing.

MS. SMITH: Well, in fact, your Honor, we

1 would like his testimony first to enable us to be able
2 to focus some of the questions to the former
3 commissioners of the Department of Public Health. I
4 understand your concern about the length of this. I
5 think we have identified a way to narrow this very
6 reasonably.

7 THE COURT: I am concerned about the length,
8 and I also have a nagging concern in me about the
9 potential for harassment of one's enemies. And when
10 those enemies are not themselves involved directly in
11 this sense, in this litigation, I do want to proceed
12 with some caution here.

13 I see that there is relevant and important
14 subject matter on which Dr. Cady would, indeed, be
15 potentially a unique witness, an important witness, and
16 I would certainly allow discovery here. But I am leary
17 of opening the door to badgering someone who has been a
18 classic foe of one side or the other. It has the
19 potential for abuse and friction and difficulty that I
20 would like to minimize.

21 And it does seem to me that ascertaining what
22 it is the Commonwealth is actually going to dispute
23 about what it knew, what it was told, what it was

24 recommended to do, before we -- we proceed with all

1 these noncombatants, I think there is some merit to
2 that approach.

3 I think it will end up with the deposition of
4 Dr. Cady; I do not see this as precluding the
5 deposition of Dr. Cady. But I think that the -- the
6 scope what he needs to be asked could probably be
7 reduced and refined considerably if his deposition were
8 taken a little bit later. I'm not sure you're going to
9 find the Commonwealth's witnesses disputing this stuff
10 about what they knew, and what various recommendations
11 were made to them about more aggressive programs that
12 they could launch, or more aggressive legislation that
13 would be passed. I would be surprised if they are
14 really denying that. Maybe they will. Obviously, if
15 they do, then questions to Dr. Cady will be necessary
16 and appropriate.

17 But I really -- again, discovery, the
18 discovery schedule is tight. You have a lot to do,
19 need to prioritize things, and it seems to -- to me
20 deposing witnesses on subjects that look to me like
21 much of it is not really going to be disputed is a
22 strange way to proceed.

23 MS. SMITH: If I may, your Honor, I think

24 much of it cannot be obtained except through learning

1 from Dr. Cady to whom he spoke and when and what kind
2 of audience and over what period of time. The
3 discovery -- remaining discovery period is very short.
4 We have scheduled depositions of former commissioners
5 whose -- who have very narrow windows of availability.

6 THE COURT: All right. I understand.

7 MS. SMITH: And requested that those be later
8 in the discovery period so that we would have learned,
9 through other discovery efforts at the beginning of the
10 discovery period, the best and most appropriate area of
11 inquiries for those -- inquiry for those people. Those
12 depositions are scheduled in the -- I think the second
13 and third week of May. They are late in the period.

14 This is -- Massachusetts has a wealth of
15 antismoking activists, health -- medical health
16 professionals who have been vocal about this.
17 Defendants are not attempting to take on this army of
18 people, but, instead, have looked very carefully at
19 those who are uniquely situated because of their
20 position in educational efforts, in collaboration with
21 the Commonwealth, in their individual efforts that may
22 overlap, may be at odds with; all of that is part of
23 the picture of mix of information. Not all of that can

24 be gotten from the Commonwealth's own former or present

1 employees.

2 THE COURT: I would anticipate completion of
3 the discovery of the Commonwealth's witnesses. It is
4 not going to eliminate the need for Dr. Cady's
5 deposition, not envision grand order wholesale
6 protective order; but seems to me if the deposition was
7 after those others, there is substantial likelihood
8 that the inquiry of Dr. Cady could then be more
9 focused, and we could eliminate any unnecessary
10 expenditure of his time, and reduce, I mean, potential
11 that is there for harassment or badgering.

12 Now, obviously, to the extent that I or the
13 Commonwealth are sort of forcibly restructuring the
14 timing of depositions that -- and scheduling problems
15 are involved in that, that is certainly in my mind a
16 good basis for taking, if need be, Dr. Cady's
17 deposition after the cut-off time, both to stage it so
18 it follows Commonwealth witnesses, to accommodate Dr.
19 Cady's schedule as best as can be. I'm not going to,
20 you know, have the -- the end-of-May deadline as
21 rigidly imposed for these kind of scheduling problems.
22 I would be less concerned about that in the case of a
23 third-party witness who is -- who -- and trying to

24 accommodate that witness' concerns a little bit. So I

1 would not view that as a problem.

2 But I -- I think it would be appropriate to
3 do the discovery from the main players, and then make a
4 better assessment of exactly what subject areas you do
5 still need from Dr. Cady. I anticipate there are
6 certainly going to be some; I don't have a problem with
7 that. But I think it could be made narrower and far
8 more efficient. First, nail down what of this is the
9 Commonwealth disputing. There is no need to do
10 discovery on things that are undisputed. The mere fact
11 they are relevant doesn't totally end the inquiry. If
12 it isn't disputed, how much time are we really going to
13 spend on it?

14 Again, you know, these former commissioners,
15 if they acknowledge what they knew, what
16 recommendations they were getting from Dr. Cady, or
17 from people like Dr. Cady, or organizations like some
18 of his organizations, and you're satisfied that the
19 Commonwealth itself, as it were, owned up to all that
20 you would expect to uncover, then you don't need to go
21 get it from all these other people. The extent the
22 Commonwealth doesn't acknowledge it, or owned up to it,
23 or disputes it, or minimizes it, and you want to

24 clarify that via Dr. Cady or others of his ilk, then

1 that can be a very focused inquiry, and I will
2 certainly allow it to go forward. I do view it as
3 relevant; it is highly relevant to this case.

4 MS. SMITH: Your Honor, to the extent there
5 may be documents that speak to this, are you suggesting
6 that we would wait to proceed on those until after
7 the --

8 THE COURT: No. It would -- I gather from
9 this, reading between the lines, that Dr. Cady's own
10 documents about these is now a relatively limited
11 number, because a lot of things got destroyed over the
12 years of his various moves and things. We are talking
13 about a small volume.

14 Any problem having those turned over
15 promptly? I don't think there would be.

16 MR. BUTTERS: No, your Honor.

17 THE COURT: All right.

18 Those should be produced forthwith. No
19 reason why the defendants shouldn't have those prior to
20 the Commonwealth depositions.

21 So you would have that, do the depositions of
22 the Commonwealth witnesses, and then have Dr. Cady's
23 deposition go forward; that would seem appropriate to

24 me. And should be understood that his deposition does

1 not include any inquiry about the basis of his
2 opinions, the reasons for them, his underlying
3 research, or any of those things that would be expert
4 testimony. But that seems to be acknowledged by the
5 defendant. You are not going after that stuff?

6 MS. SMITH: Yes, your Honor; that's right.

7 THE COURT: All right.

8 I think those limitations and adjustment to
9 the timing, I'll allow the deposition to go forward.

10 Yes.

11 MR. BUTTERS: Your Honor, if I may, I would
12 also ask at this time, in light of what the Court said,
13 the Court make an order that Dr. Cady's deposition be
14 limited to one day.

15 THE COURT: I'm not going to set a time limit
16 today. If that is still a problem after this other
17 discovery, let me know about it. I see everybody once
18 a month. Let's at least -- and we'll review it then.

19 I don't -- I don't intend to set a time limit today.
20 It remains to be seen, I think, how much material does
21 need to be gone into with Dr. Cady, and if need be I'll
22 hear you on that.

23 Yes, Mr. Weber.

1 the possibility still open with your Honor that we
2 could come back to you and argue this deposition is not
3 needed? The Commonwealth feels strongly, your Honor,
4 that this deposition has a bad feel to it, that there
5 are innumerable sources of information even about what
6 the public knew about smoking and health, the Surgeon
7 General's report, public service announcement, it's
8 endless, your Honor. There is a bad feel to the
9 deposition, and we would like, after the deposition of
10 public officials, at least have opportunity to come
11 back to you and explain to you what is in the record
12 and ask for --

13 THE COURT: I am very concerned, as I say,
14 about potential harassment of people who have been
15 public foes of the other side. I am concerned about
16 that.

17 But it is a very germane issue in the case.
18 It's one way of defending the case. It's a so-what
19 defense: So what if we suppress the stuff. So what if
20 we lied about it even. So what if we did this, nobody
21 believed us. They all knew it anyway because of the
22 efforts of people like Dr. Cady, and in that sense it
23 is -- it is highly relevant. There may well be,

24 indeed, ways of getting much of it from the documentary

1 material, or from other -- other witnesses, but -- but
2 I don't think -- I don't think that that makes Dr. Cady
3 totally off limits. See, if he's the one out there
4 giving the speeches, he's the only one really that can
5 say, and it is the most efficient thing to do is ask
6 him, "Where did you give these talks? Who was the
7 audience? How big was it," anything that he recalls
8 about it.

9 The written stuff. I think the written
10 record will speak for itself. There are press
11 releases, his published works, and that sort of thing,
12 I would feel is unnecessary to really go into. It's
13 not -- at least not in any detail.

14 I get the impression he was doing more than
15 that. He was out talking with people, and that is not
16 always going to be captured by a written record or a
17 published article, and there may be some important
18 things there. I will -- I do not, as I say, I do not
19 envision granting of a wholesale protective order to
20 block his deposition in its entirety. The parties
21 cannot come to some understanding based on the general
22 principles we have discussed here about what the limits
23 are, I will certainly hear you again at a later stage

24 about limits, be they time limits or subject material

1 limits, but I think the -- I have explained my view
2 what is at stake in this deposition in a way I hope the
3 parties could work out the details amongst themselves
4 at a later stage.

5 Again, if it is necessary to do this
6 particular deposition beyond the deadline because of
7 the scheduling of the other witnesses I'm requiring go
8 first, or the doctor's own busy schedule, that is
9 something that I would certainly view as a reasonable
10 request that his deposition, if need be, be done after
11 the deadline. All right.

12 MR. WEBER: Thank you, your Honor.

13 THE COURT: Now, the next item was the -- the
14 documents crime-fraud exception.

15 Before we get into that in detail, let me
16 just ask. I know that the other, you know, motion from
17 the Commonwealth about the, uh, deeming things waived
18 based on so-called Bliley disclosure or defendants
19 other discoveries, disclosures on the Internet since
20 that time, I realize that's not being argued today,
21 because it's not ready; but it goes without saying I
22 don't want to be spinning my wheels on a
23 document-by-document analysis if the documents we're

24 going to be talking about here, or setting up

1 procedures to do rebuttal on, are already going to be
2 discovered by that other motion potentially.

3 MS. LINDBLOM: Your Honor, it may be covered
4 by the other motion. As far as I know, none of these
5 documents has been put on the Internet by our clients.

6 I'm sorry. Marjorie Lindblom for Brown and
7 Williamson.

8 THE COURT: Yes.

9 MS. LINDBLOM: I don't know if the Court has
10 seen the letter. We have a letter from Congressman
11 Bliley concerning production of that document.

12 May I hand it up to the Court?

13 THE COURT: All right.

14 [Document exhibited to the Court.]

15 MS. LINDBLOM: This is certainly something we
16 would plan on discussing at the next status conference
17 when it is timely; but as the Court will see -- I'm
18 providing copies to counsel, also -- as the Court will
19 see, this letter clearly states it's turning down the
20 claim of privilege, threatens to hold the companies in
21 contempt if they don't produce the documents.

22 THE COURT: This either some later subpoenas,
23 not the one we're discussing --

MS. LINDBLOM: This is the subpoena

1 concerning the documents I understand the plaintiffs to
2 be taking up in this new --

3 THE COURT: I assume I'll be hearing about
4 this at the next conference.

5 MR. WEBER: That's right, your Honor. In
6 fact, there was agreement this issue would not be
7 raised before you this morning, but apparently the
8 defendants have disregarded that agreement.

9 THE COURT: All right. I will not entertain
10 any further discussion of that.

11 I want to know as a practical matter -- I
12 don't want to be going through either elaborate
13 argument or setting up detailed procedures that's going
14 to be, you know, if we're going to be overtaken by
15 other events or other -- other motions.

16 But for now, the only thing I was going to do
17 on this today is give the plaintiff an opportunity to
18 make arguments with regard to those documents that I
19 did not find -- did not understand, from my review of
20 them, that there was a prima facie showing crime-fraud
21 exceptions so I could clarify am I or am I not going to
22 add any additional documents to the one where there is
23 opportunity for rebuttal.

MS. LINDBLOM: If I could be heard on a

1 couple of preliminary things?

2 First of all, I apologize to Mr. Weber if
3 I've violated any kind of agreement. I'm trying to
4 respond to the Court's question.

5 THE COURT: That's quite all right.

6 MS. LINDBLOM: Second, by putting this item
7 on the agenda, I understand the Court basically to be
8 inviting discussion before the Court of documents that
9 have thus far been found to be privileged in this
10 litigation.

11 Point No. 1, obviously, is we want to make
12 sure by participating in such a hearing we are not
13 waiving any objection. I think that goes without
14 saying, but I figure it's safer to put it on the
15 record.

16 THE COURT: All right.

17 MS. LINDBLOM: The second concern that I have
18 is that it is my understanding the discussion this
19 Court is inviting is regarding those I guess it's now
20 seven documents that have been found not to have prima
21 facie case made, and particularly with the press here
22 in the courtroom, I'm concerned about plaintiff's
23 counsel, perhaps, trying to talk about other privileged

24 documents and to get into issues I don't think are

1 appropriately taken up.

2 THE COURT: Well, again, as I understand it,
3 we are talking about these documents, you know, seven
4 or eight documents are not documents that are
5 unfamiliar to the press or the public. We are -- while
6 we are talking about privilege, we are no longer
7 talking about confidentiality, and I am -- I am -- we
8 will talk about -- we'll talk about the procedures on
9 rebuttal.

10 I am very unwilling to either close the
11 proceedings or, obviously, to entertain ex parte
12 arguments or contacts of any kind when we're dealing
13 with things that are, in fact, out there on the
14 Internet on the public record available to the press
15 through -- through whatever sources, disclosures were
16 ordered to be made in other litigation, et cetera, et
17 cetera.

18 So all I was going to be doing really, as I
19 say, was give the Commonwealth one opportunity to
20 explain to me something that I may have misunderstood
21 or overlooked in my initial assessment of the documents
22 themselves, as I say, just to see whether any documents
23 were being moved over to a category where you'll be

24 given opportunity for rebuttal.

1 I am not hearing the rebuttal today,
2 obviously. That's -- I think we're going to discuss
3 how and when we're going to do that. I am just hearing
4 argument from the Commonwealth about these specific
5 documents about why that particular document should
6 make it over the rail, at least prima facie showing. I
7 do not anticipate the Commonwealth is going to be
8 talking, or should be talking, about which other than
9 these specific documents themselves; and I gather all
10 of these, obviously, are already known to the public.
11 Everything in this -- in this notebook is known to the
12 public?

13 MS. LINDBLOM: I believe so.

14 THE COURT: All right. All right.

15 I think we can pretty much confine our
16 discussions to what is in this notebook and we'll
17 proceed.

18 Now, let me say when I reviewed these
19 documents, I was looking to make an assessment only on
20 the one thing I've been asked to make assessment of,
21 and that is: Has the Commonwealth made out a prima
22 facie showing of the crime-fraud section. I must say,
23 throughout this notebook, both on some documents I

24 found were crime-fraud, or at least prima facie showing

1 made in crime-fraud, and some of the documents -- or I
2 find there did not appear to me to be prima facie
3 showing of crime-fraud.

4 I must say, I saw some documents where I was
5 scratching my head to go, "Why is this privileged in
6 the first place?" But that's not -- I have not made
7 any such ruling. That's not what I was asked to do,
8 but I have that as a question mark on certain of these,
9 and that includes documents that are in both of the
10 categories of my -- of my findings.

11 So all I'm looking at today is crime-fraud,
12 not other arguments about why is the document
13 privileged in the first place.

14 So, yes, Mr. Motley, I'll hear you.

15 MR. MOTLEY: Ron Motley for the Commonwealth.

16 Your Honor, forgive my voice. I'm in the
17 throes of a cold, and if my voice breaks, I apologize
18 in advance.

19 Your Honor, I know, has read the briefs, and
20 I don't want to dwell here on any legal principles,
21 except to the extent they may play on the argument I am
22 directing at. At this point in time, your Honor, we're
23 only pressing a crime-fraud decision or re-decision by

24 your Honor, reconsideration, as to document No. 28 and

1 document No. 110.

2 Your Honor, I'd like to proceed, if possible,
3 as follows. By just setting forth our position briefly
4 on a few salient, legal principles, we believe underlie
5 your Honor's determination whether 28 and 110 are
6 entitled to the privilege or the work product
7 protection that's been asserted.

8 Then I would like to generally discuss,
9 particularly in the context, your Honor, of Exhibit 28,
10 matters that are relevant evidence for that
11 consideration, which, on its own, we believe your Honor
12 is entitled to consider, and has not been adjudicated
13 as privileged. So I do not intend to trespass on any
14 documents where somebody somewhere hasn't declared to
15 be not affording the protection of attorney/client
16 privilege, or work product protection for discovery. I
17 don't intend to. If I do, it won't be deliberate on my
18 part.

19 Finally, your Honor, I would then like to go
20 in some detail through these two documents, 28 and 110,
21 have truncated what we're doing here, some of the other
22 documents they've withdrawn the claim of privilege as
23 to one of them before we got here, and the others are

24 really not all that important to any decision that we

1 would be making here. Some of them were contextual,
2 some of the ones you did find privileged, for example.
3 So I want to focus just on No. 2.

4 Let me say at the start, your Honor, while
5 you are correct we only ask you to take crime-fraud
6 analysis, I believe that before you get to a
7 crime-fraud analysis, you have to determine whether the
8 asserted privilege is valid or not. So I'm responding
9 now to your Honor's observation that maybe some of
10 these documents weren't privileged in the first
11 instance.

12 I believe in a crime-fraud analysis, the
13 first issue is: Is the document privileged in the
14 first instance? So I don't want to go into that into
15 any great detail, except in my analysis of the two
16 documents in question. I will be pointing to certain
17 aspects of those documents inter se which demonstrates
18 they are not entitled to be privileged in the first
19 instance.

20 Now, I would like to, first of all, say that
21 we believe the law in Massachusetts is clear that
22 privilege is -- assertion of privilege -- the privilege
23 itself must be strictly construed and applies only to

24 legal advice and not to business, financial, technical

1 or medical, scientific advice or data, and we think
2 this is very important in the context, particularly, of
3 Exhibit 28 for the reasons I'll get into in a moment.

4 Your Honor, we also believe that you cannot
5 shelter a document by having it pass through the hands
6 of a lawyer, or have a lawyer do things that are really
7 not in the nature of legal advice but things that
8 non-lawyers could look at, analyze and give advice
9 upon. And we believe that the document itself must be
10 predominantly for the purpose of legal advice and
11 rendering of legal advice rather than for some other
12 purpose as we'll get into in a moment.

13 Exhibit 28 is a prime example as certain
14 aspects of the document might be considered legal
15 advice, but the preponderance of the information
16 contained in Exhibit 28 is not of legal advice nature,
17 and I'll get into that in greater detail when I go
18 through the document paragraph by paragraph in a
19 moment.

20 Your Honor, we believe that there's a case
21 that we cited in our brief that we believe is important
22 to the two documents we're talking about here today,
23 and that is why, all due respect to pronunciation of

24 this person's name Leonen, L E O N E N, versus

1 Johns-Manville Corporation, an asbestos case, 135 FRD,
2 Page 94, out of the District of New Jersey, 1990.

3 In that case, the Court held that documents
4 ordered disclosed and the privilege set aside where the
5 documents demonstrate corporate knowledge of health
6 risks of the product, although corporate counsel was
7 involved. In other words, your Honor, an issue in the
8 case is the extent of, breadth of and depth of
9 corporate knowledge of certain risks attendant to
10 smoking cigarettes. And, in fact, the general counsel
11 of the corporation may possess that knowledge as
12 opposed to the head of research and development, does
13 not obviate the relevance, indeed, the setting aside
14 privilege just because a particular view is held by the
15 general counsel as opposed to another employee of the
16 company, so long as that view is held not in the course
17 of giving -- rendering legal advice as to a specific
18 piece of litigation. And I'll demonstrate that to you,
19 your Honor, when we get to Exhibit 28.

20 The legal advice must be the primary
21 motivating factor, and that decision of -- another
22 Johns-Manville case, very active, which your Honor
23 knows, versus -- excuse me -- the Johns-Manville case

24 and OCAW versus American Home Products, 790 F Supp. 39,

1 page 41. I think that again is very important with
2 respect to Exhibit 28.

3 Now, I want to focus on one thing I think is
4 extremely important, your Honor, and I believe at the
5 last hearing I was at, we gave your Honor a copy of the
6 special master's report in the Minnesota case that
7 dealt with the thirty-nine thousand documents about
8 which we had abbreviated discussion a few moments.

9 On March 7th, Judge Fitzpatrick affirmed the
10 special master's findings. The Court of Appeals of
11 Minnesota and Supreme Court of Minnesota declined to
12 intervene, and did not grant more than temporary stays,
13 and the U.S. Supreme Court, likewise, declined to do
14 that.

15 Now, I bring that to your Honor's attention
16 because we believe that the decision of Judge
17 Fitzpatrick back in 1997, which we also gave your Honor
18 last time, and I have copies of those in the event --

19 THE COURT: No. I have seen those.

20 MR. MOTLEY: I found that you cannot use --
21 that is the essence of a fraud, that a corporation
22 cannot use the legal department to shelter research
23 from discovery when there is underlying public policy,

24 indeed, common law requirement that certain research be

1 conducted; that is, under Massachusetts law, like under
2 Minnesota law, manufacturer must be expert, he must
3 test his product, and he must warn and inform and
4 advise of dangers that he knows about. That's a
5 fundamental precept of product liability law.

6 This duty to test was found by Judge
7 Fitzpatrick, your Honor. Judge Fitzpatrick found in
8 his order of May 9th, 1997 -- the reason I'm going into
9 some detail is because of the documents he found
10 subject to crime-fraud is Exhibit 28. The Court
11 concludes at page 31 that the defendants had an
12 independent obligation to conduct research into the
13 safety of its product and to warn the product's
14 consumers if the research results supported negative
15 conclusions. A manufacturer has a special duty, apart
16 from litigation, to keep abreast of the hazards posed
17 by the products. And he cites law, pretty much black
18 letter law.

19 Then he cites to a document, your Honor, that
20 the cigarette industry itself has recognized this duty,
21 and he cites to a Philip Morris research center
22 document, and he cites the Bates number in which the
23 vice-president of Philip Morris for research and

24 development essentially said that it is true that the

1 onus of truth in the smoking and health issue has
2 shifted to the tobacco industry.

3 Then the industry must come forward to show
4 the products are not harmful. Medical research must be
5 done for this purpose as well as for judging the merits
6 of work done outside the industry. Indeed, failure to
7 do such research could give rise to negligence charges.

8 There's an additional document, your Honor,
9 which -- which, your Honor, is part of the Liggett
10 documents.

11 MS. LINDBLOM: Your Honor, I just overheard
12 Mr. Motley say to his associate the name of a document
13 which has been produced in Minnesota that I believe
14 he's about to address to the Court. This is a document
15 that very specifically was produced only in response to
16 a direct Court order imposed as a sanction. It is a
17 privileged document, and it has been produced nowhere
18 else. That is precisely the problem.

19 THE COURT: Is it already out there?

20 MR. MOTLEY: Yes, your Honor. It's on the
21 Internet provided to Congressman Bliley.

22 MS. LINDBLOM: No, your Honor. Mr. Motley is
23 misrepresenting what is going on here. This was

24 provided to the Court and plaintiffs in Minnesota in

1 specific response to order of the Court. It has been
2 produced in Minnesota. The problem is that is a
3 document which Brown and Williamson has not waived
4 privilege, there is no question about that, and what
5 he's trying to do here is start talking about all kinds
6 of other documents instead of addressing the documents
7 that are at issue in here --

8 MR. MOTLEY: Not trying to do that.

9 MS. LINDBLOM: -- and to address the issue of
10 crime-fraud.

11 THE COURT: Well, I do want to get to the
12 specifics of Exhibit 28, but I -- but, again, my
13 principal concern here is where the courtroom is open,
14 and open to the media, obviously, I do not want to have
15 discussed anything that isn't already out there.

16 MR. MOTLEY: Yes, your Honor.

17 THE COURT: If it's already out there, if
18 it's already out there, I -- I am not so sympathetic to
19 this need to not mention something. Again, where I'm
20 the only person in the courtroom who doesn't know what
21 you're talking about, it's a little, you know --

22 MR. MOTLEY: Your Honor, I don't think what
23 I'm about to read, your Honor, is that controversial.

24 In any event --

1 THE COURT: Well, could we get, though, to
2 the specifics of Exhibit 28, which is, indeed, a
3 fascinating document, and I would love to hear the
4 specifics on it.

5 MR. MOTLEY: Your Honor, I will do that, but
6 I think in order to provide the context that you
7 indicate was lacking, I need to go to the events that
8 led up to the July 17th 1963 memo, and give a little
9 factual context and background that maybe wasn't clear
10 from our prior papers, and under Zolin, I believe your
11 Honor is entitled to consider any relevant evidence,
12 and I believe this document that was introduced at
13 trial is relevant on the issue of why Exhibit 28 is not
14 entitled to be privileged before your Honor.

15 THE COURT: Can you answer me a few basic
16 questions.

17 MR. MOTLEY: Yes, your Honor.

18 THE COURT: Who was this exhibit prepared
19 for? It's a little hard to figure out when I was
20 reading it.

21 MR. MOTLEY: It's not clear from the four
22 corners of the document. It was prepared by Addison
23 Yeaman.

1 MR. MOTLEY: He was not at the time general
2 counsel, and later became vice-president of Brown and
3 Williamson. From the four corners of the document,
4 it's not clear for whom it was prepared. It's not also
5 clear to us from the four corners to whom it was
6 disseminated and what purpose. I would assume in the
7 rebuttal materials they submit to your Honor, they may
8 submit you transmittal letters and the like. I don't
9 know, because when this document --

10 THE COURT: Let me ask who was this prepared
11 for and sent to?

12 MS. LINDBLOM: I'm trying to check, your
13 Honor. Difficulty is that, as the Court may recall, in
14 discussing the procedures that we set out for
15 addressing this, we had suggested that the appropriate
16 thing to do was to first address facial challenges they
17 had to privilege issues. They didn't want to do it
18 that way, so we didn't understand that to be an issue.

19 THE COURT: All right. But basic things like
20 that should be on a privilege log of some kind. Who
21 was this sent to?

22 MR. LINDBLOM: I'm trying to find out.

23 [Pause.]

The problem is there are some papers that

1 relate to these things and we don't always bring them
2 with us everytime.

3 MR. MOTLEY: Your Honor, when I get to the
4 specifics of 28, that, indeed, was one of my argument
5 points.

6 THE COURT: Well, without going into other
7 documents, do you feel you know or have some insight
8 into who it was sent to?

9 MR. MOTLEY: Your Honor --

10 THE COURT: Just tell me the bottom line.

11 MR. MOTLEY: I don't know, because I believe
12 in the Florida case this information about to whom it
13 was sent, what purpose, was submitted in camera --

14 THE COURT: All right.

15 MR. MOTLEY: -- if memory serves me
16 correctly, and I don't know the privilege log indices
17 indicate that. If it does, I just don't recall it.

18 Your Honor, all I was going to say about this
19 Janet Brown document is in the document itself she
20 finds the law imposes on a manufacturer the duty to
21 know what can be known about its product. Merely
22 pointing out again that I think Judge Fitzpatrick hit
23 the nail on the head here when he said you can't -- you

24 can't hide behind attorney/client privilege when you

1 are doing research in discharge of fundamental public
2 policy, common law precept, that is, the duty to know
3 everything about your product, to test it, to know its
4 attributes, to be fully apprised so you can inform
5 consumers.

6 Your Honor, Judge Fitzpatrick went on to hold
7 that the Court does not believe that the defendants
8 should be permitted to use in its advertising and
9 public relations campaigns health-related research
10 which supports their economic interests and to claim
11 privilege for research which may lead to the opposite
12 conclusion. The defendants had obligation to disclose
13 the hazards of tobacco products, and the Court
14 concludes they had such duty, their obligation to
15 disclose cannot be eliminated by the assertion of
16 attorney/client privilege.

17 That is at the core, your Honor, of his
18 analysis of many of the documents that are going to be
19 before your Honor. Obviously, we had to start
20 somewhere, and this Exhibit 28 is a pretty good place
21 to start.

22 Now, let me go right to Exhibit 28 since I
23 know your Honor's anxious for me to do that, and I'm

24 prepared to do that.

1 Before I do that, though, factually, getting
2 off the law for a second, your Honor must -- I hope
3 that we can make your Honor appreciate that this
4 document, 28, was found to be of fundamental
5 significance to the Food and Drug Administration. And
6 I don't know if we submitted this -- this is a public
7 document, your Honor.

8 THE COURT: Right.

9 The question for me isn't whether it is
10 significant. By reading it, I can tell whether that it
11 is. As I say, it is a fascinating document. The
12 question for me today is: Did it do something, or does
13 it embody communications that were in furtherance of
14 some form of crime or fraud?

15 MR. MOTLEY: Well, in fact, your Honor,
16 that's what the FDA found, not in those terms.

17 THE COURT: Well, tell me why. Tell me
18 why -- why then. What there is in it that furthers a
19 crime or a fraud.

20 MR. MOTLEY: Your Honor, I believe you have
21 the very lengthy Minnesota special master document, and
22 the Court there went into great detail as to why these
23 nicotine is addictive documents, constituted the crime

24 of fraud, and I would just refer your Honor to the

1 special master's findings of fact specific to the
2 question you just asked. And these are paragraphs 175,
3 182, 185, which, by the way, is almost -- tracks almost
4 verbatim what Addison Yeaman did in 1963 -- 191, 193 --
5 and in 193, your Honor, that's a specific finding of
6 fact as to Exhibit 28 -- 194, 195 through 199, 201,
7 205, and then paragraph 266.

8 Now, the reason the Court went into that
9 great detail, your Honor, is he had a greater body of
10 documents before him at that time, the special master
11 did. This is after he -- this is about the thirty-nine
12 thousand documents, and, indeed, he had a vast, bigger
13 store of documents to refer to on the issue of the
14 underlying crime or fraud.

15 THE COURT: Well, let me put it this way. I
16 think I understand what the theory is, or your theories
17 are, of what the overlaying alleged underlying frauds
18 are. That's not my problem with this document. Let's
19 get to the specifics of this document. The question
20 for me is: To what extent or how did what Mr. Yeaman
21 was saying to people in this document further the
22 alleged crime or fraud? Be very specific. I mean, it
23 is a remarkable document, but, I mean, one of the

24 things he tells them to do in here, and one of the

1 things he recommends, is that the industry itself start
2 putting a warning on things.

3 MR. MOTLEY: Which they didn't do.

4 THE COURT: The question isn't whether they
5 did it or not but whether it was in furtherance of --
6 what he was trying to do, obviously, they didn't follow
7 through on it, and I get the impression Mr. Yeaman
8 ultimately came to a very different viewpoint of what
9 should be done.

10 But back in the early sixties he was
11 taking -- as I read this document, maybe I'm
12 misinterpreting it -- a very interesting position,
13 namely, he was advising them, as I read this, stop
14 fighting the causation issue because you're going to
15 lose it. Leapfrog over what they are doing, identify
16 what the carcinogens are, and then use the technology
17 of a filter to take them out.

18 MR. MOTLEY: Can we go paragraph by paragraph
19 then, your Honor?

20 THE COURT: I mean, that's what I see this
21 document as recommending. It is a recommendation that
22 they should acknowledge essentially causation and cure
23 the problem with a technological improvement. What's

24 criminal or fraudulent about that? It may have been

1 very stupid the industry didn't follow this advice, but
2 that doesn't make the advice -- that doesn't make the
3 advice fraudulent, criminal or in furtherance of a
4 crime. This document says some extraordinary things,
5 but overall, what I read it as is a form of advice to
6 try to change the direction the industry had been
7 following. He was unsuccessful in doing so apparently,
8 but it -- it was a -- if they had done what he
9 recommended in here, I mean I would have a hard time
10 viewing that as criminal or fraudulent, put it that
11 way. All right.

12 MR. MOTLEY: Well, let -- let me try to place
13 the entire document in proper context. First, your
14 Honor, it's correct to point out, we don't know who
15 this is written to.

16 We do know this. In the subject matter on
17 page 1, it doesn't say in reference to any specific
18 case, it doesn't say in reference to any particular
19 regulatory action. What it says is this is his
20 analysis of the implications of R and D efforts. HIPPO
21 I and II, which were pharmacological, toxicological and
22 other studies of nicotine, and the Briton filter which
23 he described in here is a way to -- to reduce it to its

24 essence, make a safer cigarette.

1 Now, our position, your Honor, is when you
2 take this document as a whole, as a whole, not the two
3 sentences on page 4 that I'm going to get into in a
4 second, if you take the document as a whole, the
5 preponderating -- preponderating information imparted
6 here is not legal advice, it is business advice, it is
7 technical advice, it is advice on how to maximize
8 profits, and very little this document addresses any
9 kind of legal advice at all.

10 For example, he refers to the tranquilizing
11 effect of nicotine in the context of a scientific
12 report, not in the context of any lawsuit, not in the
13 context of any regulatory efforts, but in the context
14 of his analysis of R and D information that the company
15 had performed.

16 Paragraph number -- he then talks about using
17 this research as an instrument of propaganda, his
18 words, to rebut the American Cancer Society. He says
19 the filter gives a bridge to safer cigarette research
20 to enhance the profits of the corporation. Now, what
21 kind of legal advice is that, your Honor?

22 THE COURT: Well, again, pretty much the
23 initial remark I made. I have not looked at these

24 documents for the purpose of making an assessment of

1 are they privileged in the first place. My examination
2 was of crime-fraud exception. I noted throughout these
3 puzzling questions in my own mind about some of these
4 documents, such as what was the basis for privilege,
5 and may well be that significant portions of these
6 documents are simply, indeed, not privileged in the
7 first place. And I'll hear you on that at the
8 appropriate time, something that we've got to talk
9 about in the later procedures and how we handle those
10 things; but what in here is crime-fraud?

11 MR. MOTLEY: Okay.

12 Your Honor, I must use an analogy here.
13 Crime-fraud in the context of the forty year corporate
14 conduct we're discussing is a mosaic, and if you get
15 far back from a mosaic, you can see a pattern the
16 artist wants to impart. If you get right upon it,
17 eyeball it dot by dot, you don't know what you're
18 looking at. That's why this document must be taken in
19 context with the precise question you ask with respect
20 to the various documents which deal with something
21 called the gentlemen's agreement.

22 This document is crime-fraud because Mr.
23 Yeaman is admitting in here that in the past the

24 industry has conducted itself, with respect to

1 biological research, by not doing the research that is
2 required by the common law.

3 And if you look at it in the context of it
4 being in furtherance of the conspiracy, just as one
5 dot, by making an admission that there was a
6 gentlemen's agreement, and that that gentlemen's
7 agreement prevented the sharing of information with the
8 public, with government officials, and, obviously, with
9 their customers.

10 When you look at it as just one dot, the
11 overall mosaic, if they had done what he said, it would
12 not have been in furtherance, but the fact he admitted
13 that he was trying to effectuate a change in policy
14 makes that dot part of the overall mosaic, makes it
15 more likely true than untrue that, in fact, they were
16 violating their common law duty of testing their
17 products. They were covering up unwelcomed news from
18 research that they were doing, they didn't publish this
19 particular HIPPO I and II, they didn't turn it over to
20 the government until 1994.

21 So what he has done here is he's placed a
22 very essential part of the mosaic right smack in the
23 middle, because here he is, the vice-president of the

24 company, admitting the rest of those dots are, in fact,

1 interconnected. He is a light bulb for the mosaic,
2 because he is lighting up for us exactly what went on
3 before 1963, and has given us a roadmap of how to
4 prevent what the FDA concluded in 1996, which is in the
5 executive summary, and that is that these companies
6 fraudulently withheld from the United States
7 Government, for the purpose of avoiding regulation,
8 information they had and knew, that nicotine was an
9 addictive drug.

10 So if you look at it, Judge, not from the
11 perspective of being one dot amongst a thousand but as
12 beings an illuminating dot, an admission that the other
13 dots are, in fact, properly placed on the canvas, then
14 you have our perspective, answer your specific question
15 about how is this in furtherance.

16 THE COURT: Well, I think the problem I have,
17 and this was an issue with some of the other documents,
18 I found not crime-fraud, something doesn't become
19 subject to the crime-fraud exception merely because it
20 makes damaging admissions. This document makes some
21 very damaging admissions, there is no question about
22 it; but as I say, what I read this document as doing or
23 attempting to do, be it unsuccessfully, is -- or be it

24 perhaps for cynical reasons -- encouraging the industry

1 to change its ways in some very marked respects, to
2 deal with these issues about the danger of its
3 products, alleged danger of its products, in a very
4 different way. And in the memo he acknowledges that
5 what he's recommending is so revolutionary that he's
6 about to be --

7 MR. MOTLEY: Tarred and feathered.

8 THE COURT: -- drowned out, and tarred and
9 feathered by others.

10 He's well aware of the fact that what he is
11 saying in here is directly counter to the approach that
12 the company had taken, the industry had taken, up until
13 that time. But the mere fact that it contains some
14 potentially, as I say, very damaging admissions on both
15 the issues of causation and the issue of nicotine
16 addiction, doesn't make the document crime-fraud.

17 MR. MOTLEY: Your Honor, I --

18 THE COURT: The communication has got to
19 further it, assist it, implement it, design it, do
20 something to actually help perpetrate the fraud.

21 And I view the document as an attempt to
22 prevent fraud. I mean, read that way, it -- it wasn't
23 successful, perhaps, but it was his very creative way

24 of recommending that they acknowledge the fact that

1 research was unlikely to ultimately disprove any
2 theories of causation, and that they address the
3 problem by intensifying research, not to challenge that
4 cigarette smoking causes cancer, but to try to identify
5 the precise components that were the culprits, and
6 then, through improved filter technology, take those
7 dangerous components out.

8 I don't know whether that was scientifically
9 feasible at the time. He was talking about fairly
10 preliminary research that suggested that might be a way
11 to go, and he is saying, basically, acknowledge
12 causation, find out what the culprits are, and then
13 work on a technology to filter them out and make the
14 cigarette safe.

15 MR. MOTLEY: Your Honor, if you look at this
16 document simply on the four corners of the document,
17 and not as a recitation of all that went before, and
18 not as a blueprint for changing what, unfortunately,
19 went after it, all the way up to 1994, if you look at
20 it simply in isolation like that, then it's not an
21 unfair inference to conclude, as your Honor has, that
22 he was trying to change the way they do business.

23 But I respectfully suggest that in the

24 context of the these cases, and as other courts have

1 concluded, while you must make the threshold
2 determination that there is something in here that
3 bears upon the issue of a crime or fraud being
4 committed, I respectfully suggest there is no greater
5 evidence, as one little dot in the mosaic of what went
6 on before, and no greater support for our ongoing crime
7 and fraud than what happened in the next thirty years
8 than Mr. Yeaman's blueprint for changing the face of
9 the way they do business.

10 You might find -- your Honor mentioned
11 cynical -- you might find in here that as part of this,
12 if you want to just look at something, this merely
13 furtherance, the cynicism that oozes out of this
14 document is, in fact, what they did. And that is they
15 used the Surgeon General's report, and they used --
16 wanted to change their public face ever so slightly in
17 order to aggressively continue to attack other negative
18 findings. In other words, what he's saying here is if
19 we don't address the threshold of total lack of
20 credibility, then we won't be credible when we try to
21 attack other things, and here is a way for us to
22 position ourselves so we can continue to attack further
23 negative findings.

1 original plan of 1953, your Honor, which we cited to
2 you in our proffer, which is the preplanning memo. The
3 preplanning memo, your Honor, was about how they were
4 going to set up the Frank statement and the public
5 relations ploy and tobacco company -- Council for
6 Tobacco Research, and they said their overriding
7 concern was to reassure the public, to still the
8 instinctive fears using a product that is said to cause
9 cancer.

10 So, again, if you look in that context, and
11 this is furtherance of the grand scheme of 1953, but I
12 just have a hard time, your Honor, just focusing on the
13 narrow issue that your Honor has addressed with due
14 deference, that we must look at this document in
15 isolation as being something, standing alone by itself,
16 furthers this conspiracy to commit fraud on the public.
17 Because you have to look in my -- in my view, your
18 Honor, at when it started, and all the little signposts
19 along the way. And this is a very important, very
20 important piece of information that has been utilized
21 by the FDA as a basis for their rule making, your
22 Honor.

23 They cite this document as an example of why

24 they reversed their opinion given in 1980, I believe it

1 was, that there was not sufficient evidence that would
2 allow them to regulate nicotine as a drug. They cite
3 this as an example of had they known this, Mr. Yeaman's
4 observations in 1980, they could have then satisfied
5 the FDA's rule making requirements that the
6 manufacturer knew and intended the result of the drug
7 that was in the product. That's why, your Honor, I
8 think you got to start with '53. You got to look at
9 the FDA, and then look at what Yeaman shows us one
10 decade after they launched this fraud on the public in
11 1953.

12 THE COURT: Well, I think my -- as I say, I'm
13 not going to address today -- there are other issues
14 about, uh, other reasons why this perhaps should not be
15 viewed as privileged. Maybe portions of it may not
16 have been privileged in the first place, or it may, as
17 you indicate, indicate simply corporate knowledge,
18 portions of it may end up being admissible for that
19 purpose.

20 But making my views today known only as to
21 crime-fraud, and dealing only with crime-fraud, I do
22 think I have to look at whether a particular document
23 itself furthered the fraud, implemented it, designed

24 it, planned it, did something to further it, or whether

1 the document, you know, reflects communications that
2 were for such purposes. And this one, in my own view,
3 very -- very clearly does not. It is not crime-fraud
4 to acknowledge that what you've been doing to date is
5 not a good idea, and make recommendations to fix it in
6 ways that would not be criminal or fraudulent; and
7 that's what this document was seeking in a preliminary
8 way to do.

9 And I don't see this communication from Mr.
10 Yeaman to whoever it went to as being something that
11 was done to further any crime or fraud. It was an
12 approach being recommended that, if followed, would not
13 have been criminal or fraudulent in any way. And I
14 will preserve for another day hearing arguments about
15 other reasons why this document, either in its entirety
16 or portions of it, should not be deemed as privileged.

17 I agree, seems to me, only very tiny snippets
18 of it have anything to do with legal advice. There is
19 some discussion about, you know, the effect on pending
20 litigation of taking these measures, and perhaps those
21 segments would need to be redacted if I found the other
22 parts not privileged, but we'll deal with that at a
23 later time.

I still am satisfied this is not crime-fraud.

1 May be other things, but this is not crime-fraud.

2 The other document you say is 110?

3 MR. MOTLEY: Yes, your Honor.

4 THE COURT: That's the chronology; right?

5 MR. MOTLEY: Yes, your Honor. And I have a
6 different argument for this one.

7 THE COURT: Yes. Completely different kind
8 of document.

9 Again, who was this prepared for?

10 MR. MOTLEY: My understanding, from arguments
11 in other courts, your Honor, this chronology was
12 prepared by outside counsel for Brown and Williamson
13 upon a review of their historical R and D file. I may
14 stand corrected, but I believe that summarizes its
15 genesis.

16 THE COURT: All right.

17 MR. MOTLEY: Your Honor, we argue here, in
18 addition to the arguments we make in our -- in our
19 proffer, that this document is one that we can
20 satisfy -- this is, obviously, a work product argument,
21 not a privileged argument. They make a work product
22 argument here -- that we can demonstrate satisfaction
23 of substantial need test to have this document

24 produced. And I would cite to you in the State of

1 Minnesota case, your Honor, I don't know whether we
2 provided this particular order to your Honor or not.
3 May I pass this up?

4 THE COURT: Sure.

5 [Document exhibited to the Court.]

6 MR. MOTLEY: Your Honor, among other things,
7 this order dealt with whether the defendant should be
8 required to produce certain computer-generated indices
9 created by the lawyers going through the files like
10 privileged logs and the like, and so-called 4A, 4B
11 indices that your Honor may have heard or read in some
12 of the documents.

13 And the Court, when you get into the bottom
14 line, found that although this was perhaps classical
15 work product -- this being 4B indices -- that,
16 nevertheless, there was a substantial need demonstrated
17 here by the plaintiff, and, therefore, this document he
18 would not -- he would order the document produced, the
19 4B indices, produced to the plaintiff.

20 Here I would argue to your Honor, in addition
21 to the arguments I have made about crime-fraud, from
22 the four corners of the document itself, I would argue
23 that we have the same type of substantial need for this

24 document to be produced in this case, although we've

1 already got it, obviously. This is one of the Brown
2 and Williamson documents on the Internet, that's been
3 deprivileged for crime-fraud reasons by four separate
4 courts, so we have it. But in addition to the
5 crime-fraud matters that I would urge, your Honor, we
6 believe substantial need is demonstrated for the same
7 reasons -- what page is that on?

8 THE COURT: Well, again, I want to limit
9 today's discussions, and the only rulings I'm making so
10 far are on the issue of crime-fraud. But my problem
11 ---

12 MR. MOTLEY: Page 12 of that order is where
13 it addresses substantial need document.

14 THE COURT: Yeah, but substantial need is a
15 separate issue, separate issue, and I'll hear you on
16 that when we discuss the procedures where we go from
17 here; but I mean I -- from just looking at this
18 document, I was preflexed. I wasn't sure what -- for
19 what purpose was it prepared? For whom? For what
20 purpose?

21 MR. MOTLEY: My understanding is it was
22 prepared by outside counsel, principally by an Atlanta
23 law firm at the request of Brown and Williamson to

24 collect, harvest, and look at and place in various

1 indices, research and development activities of Brown
2 and Williamson and their sister companies historically.
3 And while there are some pages missing from our copy,
4 you see some gaps in the years here, it does recite
5 substantially their efforts from 1906 --

6 THE COURT: Do you have any information about
7 why Brown and Williamson wanted this done?

8 MR. MOTLEY: Well, I can tell you what they
9 told other courts.

10 THE COURT: Yeah.

11 MR. MOTLEY: They told other courts they
12 wanted this done because they wanted to know what was
13 in the files of what activities had been conducted by R
14 and D historically for the purpose of answering
15 interrogatories and the like, preparing witnesses in
16 litigation. That's what they've told other courts.

17 THE COURT: Do you have anything to indicate
18 that is inaccurate?

19 MR. MOTLEY: No, I don't, your Honor.

20 THE COURT: I mean, again, the mere fact
21 there may be some things in here that are potentially
22 damaging does not make the document itself, or the
23 communication, the transmission of this document back

24 to the client, crime-fraud. The fact that some

1 potentially incriminating documents were being, you
2 know, analyzed, listed, to do such things as prepare
3 interrogatory answers or a framework for getting
4 witnesses oriented for their deposition, that by itself
5 is certainly not crime-fraud.

6 MR. MOTLEY: Your Honor, I would point at one
7 case, though, if I might have one further moment on
8 this.

9 I believe that there is a case involving
10 Owens-Corning Fiberglas Corporation reported at 660
11 Northeastern 2nd, page 812 Ohio 1995, where
12 Owens-Corning answered interrogatories in one way, and
13 later it came to light that there was a communication
14 to corporate counsel that would prove that the
15 interrogatory was false at the time it was given. And
16 I would cite your Honor -- and if we didn't cite this
17 in our proffer, I would like to provide your Honor with
18 copies of the answers to interrogatories in Brown and
19 Williamson in the case of federal court called Jones
20 versus Brown and Williamson, 1969.

21 Point here being they denied doing any
22 research related to certain things in their answers to
23 interrogatories in 1969, which is belied by this

24 compilation done by their outside counsel in the mid

1 1980s. In other words, they went back and looked at
2 historical files, and if you compare the answers to
3 interrogatories in that case in 1969 with what is in
4 this document, you will see, we -- we respectfully
5 contend, that the answers to interrogatories in 1969
6 were false, and this Owens-Corning case stands for the
7 proposition that --

8 THE COURT: I looked -- I looked at the first
9 page of this document. It refers to itself as revised
10 draft of October 25, 1988. In other words, this
11 document is not the basis for any false answers of
12 interrogatories back in the nineteen sixties.

13 MR. MOTLEY: No, your Honor.

14 The question that was asked, if I can
15 paraphrase it, did you do research on cigarettes, on
16 the biological affects of cigarettes, before 1968? The
17 answer was no. If you look at this document done later
18 by their outside counsel, you'll see 13 such studies
19 were done.

20 THE COURT: The privilege question and
21 crime-fraud issues of privilege go to what was this
22 document prepared for. Did it serve -- did the
23 document itself, or the communication itself, serve

24 some purpose in furthering a crime or fraud? So far,

1 it doesn't look to me like this document did that.

2 Now, obviously, in making -- as I say, I am
3 not ruling on other issues that might make something
4 not be privileged, or show substantial need, or other
5 theories by which you could use this document at trial,
6 nor, obviously, am I ruling on the discoverability of
7 any of the underlying raw data that is referred to
8 either in this or in Addison Yeaman's memo. You know,
9 you --

10 MR. MOTLEY: The only point I could make --

11 THE COURT: I'm just talking about did this
12 document, did this compilation, do anything to further
13 anybody's crime, or further anybody's fraud? And I
14 don't see that it does.

15 MR. MOTLEY: If I could address that?

16 THE COURT: Yes.

17 MR. MOTLEY: Let me address that very narrow
18 question, if I might.

19 This document is 1988. The FDA findings were
20 1996. And the FDA found that important information was
21 withheld from them. And I would say that this
22 compilation itself should have been shared with the FDA
23 at or about the time that it was created, and the

24 failure to share is in furtherance of keeping the FDA

1 in the dark about internal, non-published, scientific
2 studies by Brown and Williamson.

3 Beyond that argument, your Honor, I have no
4 argument to answer your specific question about this
5 document, other than substantial need, that they
6 shouldn't be allowed to claim a privilege to a document
7 which earlier they -- they misrepresented to another
8 court. Those kind of penal rulings that would liberate
9 the document, but to answer your narrow question --

10 THE COURT: I'll deal with those at another
11 time.

12 All right. In terms of crime-fraud, and
13 crime-fraud only, I stand by my initial rulings of the
14 two documents the Commonwealth has sought to argue. I
15 do not --

16 THE COURT REPORTER: I'm sorry, your Honor.
17 I'm not hearing you.

18 THE COURT: I'm sorry.

19 I find the Commonwealth has not made a prima
20 facie showing with regard to crime-fraud exception with
21 regard to those documents.

22 Now, we do need to address both procedures
23 for dealing with those documents where, in my view, the

24 Commonwealth did make a satisfactory prima facie

1 showing, and also a procedure for dealing with these
2 alternative arguments about certain of the -- of the
3 documents.

4 Let me hear the parties' proposals on that so
5 we can map out such a procedure. Yes.

6 MS. LINDBLOM: Since I was going on the
7 assumption that what we would be addressing would be
8 the crime-fraud issue, I was going to suggest that we
9 have 30 days to submit something.

10 I did want to bring to the Court's attention
11 that in connection with such a submission, we may
12 determine that it is appropriate to bring in other
13 information which is privileged, and, therefore, might
14 ask that such submissions be made ex parte. Zolin
15 specifically anticipates that this might be done. I
16 don't know yet whether we will or not, but I know in
17 other cases we have done that, and I just wanted to
18 make sure that that is acceptable and we wouldn't be
19 running a danger of having filings turned over to the
20 other side.

21 THE COURT: Let me first talk overall. You
22 are talking, in other words, about making a rebuttal
23 case by written submissions or hearings? I mean, map

24 out for me how we get from where we are today to my

1 final decisions on crime-fraud.

2 MS. LINDBLOM: I think it would make sense
3 for us to make written submissions, and, after the
4 Court sees them, or can determine it is appropriate to
5 determine some kind of hearing. I -- but because I
6 think some of it, at least, might have to be ex parte,
7 I don't know what that means about any kind of
8 response.

9 Now, what's happened here today raises a
10 concern for me about whether the plaintiffs are going
11 to start arguing the documents aren't privileged for
12 some other reasons. I thought we would just be
13 addressing crime-fraud, but if there are documents on
14 privilege, then we shouldn't have to get to
15 crime-fraud. So I am not quite sure where that leaves
16 us.

17 THE COURT: Well, when I was reviewing them,
18 again, my initial impression was that I had had serious
19 questions as to some of these documents as to whether
20 they were privileged in the first place. Others looked
21 to me like, yes, they are privileged, or would be
22 otherwise privileged, but they do look like crime-fraud
23 to me. So we have all possible permutations and

24 combinations. It's just it is a little bit, and now

1 that we are into the specifics of particular documents,
2 it does get a little bit inefficient to fragment the
3 arguments too much, and stretch it out all summer.

4 Oh, for everybody's information, the good
5 news is -- I think it's good news -- I am going to be
6 in a courtroom here in Cambridge from
7 May-June-July-August. So we have a little more
8 flexibility on the scheduling of hearings, arguments,
9 or, if need be, evidentiary hearings for that matter
10 this summer. So I want to map out all the things that
11 would need to be done to resolve these issues and get
12 that done over the next few months while I know I'm
13 going to be here.

14 Written submissions are obviously fine. Ex
15 parte -- let me just ask you this. I'm very concerned,
16 obviously, about ex parte submissions. I would not be
17 entertaining anything ex parte unless it would be, you
18 know, varified to me that the materials that were being
19 submitted ex parte had not been placed in the hands of
20 any plaintiffs' attorney in any of the other AG cases
21 in any fashion. I mean, I understand there have been
22 some ex parte submissions and ex parte proceedings, but
23 that afterward, some of those were then revealed or

24 revealed, in part, based on the Court's ruling. I

1 mean, I gather there is sort of mixture of what's going
2 on elsewhere.

3 I see no need to take anything ex parte, or
4 even consider taking something ex parte, if it is
5 something the Commonwealth has already seen, be it a
6 document, or from a transcript of what was initially
7 conducted as some kind of ex parte proceeding. I mean,
8 I've got to make sure there is a real need, pragmatic
9 need, that something be done ex parte as well as having
10 a legitimate basis for doing it ex parte.

11 Are you thinking about submitting things that
12 you would -- you would say to me that Mr. Motley has
13 never seen before, never heard of before? This would
14 be revolutionary news to them if they saw it?

15 MS. LINDBLOM: I can't promise anything would
16 be revolutionary to Mr. Motley, your Honor. What I can
17 say is that the only materials that we would seek to
18 submit ex parte are those that had not previously been
19 revealed to opposing counsel.

20 I, for example, there are some affidavits
21 that we have submitted ex parte under cases describing
22 certain internal issues. It is my understanding that
23 those have not been released to the other side. If we

24 think it's appropriate to submit those again, I want to

1 make sure we have the ex parte protections, and I'm
2 particularly sensitive to that where we have the
3 plaintiffs arguing waiver kind of by very remote
4 connections. You know, I always want to make sure we
5 don't run into that problem.

6 THE COURT: How about if we do this? Why
7 don't you make to me initially the submissions that you
8 would be making normally; in other words, excluding
9 anything that is ex parte. Let me review those, and I
10 would presumably hear the parties in argument, and
11 then, you know, articulate if there is anything
12 literally further that has to be done. I'm very, very
13 concerned about ex parte submissions.

14 MS. LINDBLOM: I understand what your Honor
15 is saying, but the fact is the submissions that we
16 would normally make might well include materials that
17 we think should be submitted ex parte, and may be we
18 say we can't submit our story with everything that is
19 privileged information.

20 THE COURT: No. Submit everything that you
21 would present on the record without having it be ex
22 parte and let me take a look at that, and then
23 articulate for me, you know, what else it is that, you

24 know -- I gather today you haven't made a decision

1 whether you are really going to submit some of this
2 stuff or not.

3 MS. LINDBLOM: Right. Right. We haven't
4 written our brief yet.

5 THE COURT: Right. Yeah. Yeah. All right.

6 MS. LINDBLOM: May I suggest an alternative?
7 Which is that we submit what we think needs to be
8 submitted. We'll, obviously, restrict the ex parte
9 designations to those things that we truly think needs
10 to be designated. If the Court reviews it and then
11 says, you know, "I don't understand why this thing is
12 ex parte," then we could discuss that issue with the
13 Court, and the Court could either give us an
14 opportunity if -- if it thinks it is not appropriately
15 ex parte, to either withdraw it or have it exposed to
16 the other side.

17 It seems to me that would be the most
18 efficient way of doing it, because that way we could
19 come in and present what our case is, and it may be
20 that some parts of it truly are still privileged and
21 confidential.

22 MS. NIAL: Your Honor, I wonder if I might
23 respond to all of this discussion?

1 MS. NIAL: First of all, the Commonwealth is
2 concerned about allowing the procedural briefing to go
3 on for 30 days. We have provided your Honor with --
4 with our procedural brief which contains within it how
5 we think the steps should go regarding their
6 presentation and our participation therein, and we have
7 already discussed the issue ex parte filings.

8 I would also offer to your Honor our concern
9 that grows out of the Minnesota ex parte filings
10 wherein the judge actually issued -- or the special
11 master issued orders where he criticized the ex parte
12 filings as being -- first of all, many of them not
13 needing to be ex parte, and second of all, the
14 privilege logs that you will -- that were provided to
15 the plaintiffs, were not in sufficient detail so the
16 plaintiffs could actually respond to that kind of ex
17 parte filing, at least to say they did not believe that
18 that material should be filed. So our first thing
19 would be we would like if they need to offer a written
20 procedure, then they really shouldn't need more than
21 ten to 15 days at the most, your Honor, to respond.

22 THE COURT: What you are planning to follow
23 is the substance of the rebuttle argument, not

24 procedural arguments.

1 MS. LINDBLOM: Yes, your Honor.

2 THE COURT: Yeah. This is the substance.

3 MS. NIAL: I heard she wanted first to
4 provide you with the procedure. I think the procedure
5 is very clear --

6 THE COURT: We are talking about substance
7 now.

8 MS. LINDBLOM: Yes, your Honor.

9 THE COURT: Substantive response.

10 MS. NIAL: Substantive response only, and
11 follow the procedure we've already discussed; is that
12 correct? We'll have a hearing. We'll be participating
13 in the hearing subject to your review of their offer of
14 ex parte, and I assume we'll get a privilege log on
15 that material, a privilege log telling us exactly why
16 the materials you wish to give to the judge ex parte
17 should obtain that ex parte protection.

18 Similarly, I -- because I assume major claim
19 against ex parte protection because these materials are
20 privilege and confidential. We should have some
21 indication of the kinds of materials that you are
22 producing and why you think they deserve the kinds of
23 extraordinary protection that ex parte presentation

24 would give them. So I think that this is not unusual,

1 and you have been asked to provide this before.
2 Hopefully, it will be in the form we can understand,
3 and at least attempt to respond to, so I am hopeful you
4 will provide that.

5 MS. LINDBLOM: If I understand correctly, I
6 think that would be a fairly limited amount of
7 information. It seems to me I might be offering to go
8 a step beyond, which is to say the Court can take a
9 look at it, in effect in camera review, and decide if
10 it's not appropriately ex parte.

11 MS. NIAL: But when the Court does its in
12 camera review, clearly the plaintiffs need to know
13 exactly what the judge is reviewing, at least
14 objectively, the way we would have received the
15 privilege log of the document we should have. So I
16 don't think it's --

17 THE COURT: Clarify for me, because I was a
18 little bit confused. I got the impression, at least
19 from looking at materials in other jurisdictions, that
20 some of this had taken the form of fairly extensive
21 evidentiary hearings in other jurisdictions. The
22 arguments have crystalized, you can put it in nice,
23 neat documentary package, which I'm happy to have, but

24 is that what we're now talking about?

1 MS. LINDBLOM: I can't tell you what has gone
2 on in every other jurisdiction, maybe Ms. Nial can, but
3 I can say that I know there have been arguments in some
4 other jurisdictions. I don't know if there have been
5 evidentiary hearings. It's possible there may need to
6 be. Perhaps counsel for the plaintiff could say if
7 there have been extensive evidentiary hearings. I am
8 aware of reasonably extensive arguments.

9 THE COURT: Things in master's reports about,
10 you know, 14 days. I assume it wasn't, you know, 14
11 days of argument. Is that something else?

12 MS. LINDBLOM: I'm sorry. I wasn't thinking
13 about Minnesota. I was thinking about other things.

14 THE COURT: In any event, a written
15 submission for starters, and anything in there that you
16 do submit ex parte, which I would encourage you to keep
17 to the bear minimum for obvious reasons, should be
18 sufficiently identified to the Commonwealth so that it
19 isn't a total mystery. Obviously, the contents aren't
20 revealed, but at least a sufficiently detailed log so
21 they know, have some idea, of what the nature of these
22 materials are. I think that's fair.

23 MS. NIAL: Your Honor, I would again ask that

24 we not do the 30 day procedure. I think that the

1 number of documents we're talking about is sufficiently
2 narrow, the number of documents is -- the documents
3 themselves are well known, and I think that 30 days is
4 not really necessary to put together a filing. Perhaps
5 20 days would be enough, and, otherwise, we're going to
6 get into a situation where your Honor might be away or
7 will start to talk about vacations and all that other,
8 uh, scheduling problems.

9 THE COURT: No. I'll be here. That is not a
10 problem. I mean, we can talk about when we're going to
11 hold these arguments, but I also hark back, I mean, the
12 last conference, at the last conference, I think I
13 spelled out these documents that you already have can
14 be used in discovery with the limitations, precisely so
15 that the time it takes to resolve these issues was not
16 going to come up for discovery. So go right ahead with
17 your discovery as we've outlined before.

18 And with that -- with that in place, I -- I
19 have no problem giving people the time they need.

20 Now, 30 days gets us right up to about the
21 date of the next status conference.

22 MS. LINDBLOM: I think we have a lot that is
23 going to be at the next status conference. Mr. Griffin

24 can speak to that better than I can. And so that may

1 be more than enough already.

2 THE COURT: So I would envision this then.

3 If you file it within 30 days, I would anticipate what I

4 would then do is schedule the argument sometime

5 separate from the then next following status

6 conference, but it will come sooner than the whole

7 month down. In other words, sometime later on in May,

8 before the June conference, we'd have argument on it.

9 MS. NIAL: Your Honor, I would hope the

10 scheduling of the hearing, or rebuttal hearing on these

11 documents, will not hold up any other arguments that we

12 might like to make, your Honor, regarding crime-fraud

13 as regards other documents. I wouldn't want to hold up

14 that procedure waiting for this. I forget how many

15 exactly other documents.

16 THE COURT: I mean, other crime-fraud

17 documents? Or other arguments about privilege? Go on.

18 MR. MOTELY: Your Honor --

19 THE COURT REPORTER: Excuse me. Could I

20 change my paper before he goes?

21 THE COURT: Wait a minute. The court

22 reporter needs to change his paper.

23 [Pause.]

1 MR. MOTLEY: Your Honor, having gone through
2 what some might say endured in three some odd years
3 these crime-fraud proceedings in various venues, I have
4 a concern, and perhaps this should be the subject of
5 the next meeting, and maybe think about ways of
6 streamlining the process of how we put into the hopper,
7 categories of documents and the like.

8 As your Honor probably knows from reading the
9 Minnesota orders, thirty-nine thousand documents were
10 just released. That's an awful lot of documents for
11 anybody to read one by one, and, again, we're going to
12 urge that your Honor adopt the Minnesota procedures,
13 but lay that aside for a second.

14 In addition to the group of documents of
15 thirty-nine thousand, and the State of Minnesota
16 actually lost crime-fraud rulings on three major
17 categories that we've had some success at convincing
18 judges that those documents in the categories should
19 not be protected. We've got several hundred beyond the
20 Liggett documents that we've already addressed, the
21 Bliley documents, beyond the thirty-nine thousand,
22 beyond these that are before you now, there are
23 hundreds of other documents, your Honor, that we are

24 aware of because we had them, or we've learned of them,

1 that we know will come up and be prosecuted from the
2 standpoint of the state seeking to either find the
3 documents not privileged in the first instance, or
4 subject to crime-fraud exception.

5 And I would ask your Honor to put on the
6 agenda for next month exactly how we're going to
7 address these thousands of documents in a fashion that
8 is consistent both with the interests of both sides and
9 with judicial economy. I would just urge that that be
10 place on the agenda.

11 THE COURT: Certainly an appropriate agenda
12 item. It seems to be about on the agenda virtually
13 every time we meet, some form or another. So I assume
14 it will be there next month. I'm happy to.

15 So just to decide what we're going to do here
16 then, I would then be looking for defendants' rebuttal
17 submissions in written form within 30 days. So that
18 means that would be getting to me right around the time
19 of the next status conference. So at least at that
20 conference we'll then schedule time for oral argument
21 on that. It looks like it will be particularly time
22 consuming.

23 And it seems to me appropriate to envision

24 that the oral argumnt on that would also include

1 alternative theories, such things as special need, not
2 privileged in the first place, so that while we're
3 discussing a specific document, everybody be prepared
4 to discuss, the defendants' side, why it is, in fact, a
5 privileged document in the first place, and from the
6 plaintiff's side, why not. And so, again, we're
7 dealing here now with a relatively limited number of
8 documents, and I think -- and these documents are,
9 indeed, at the tip of the iceberg, and I do sort of
10 need to move beyond them as we get into the bigger bulk
11 of documents.

12 MS. NIAL: Your Honor, the last time we met
13 and talked about procedure, we talked about the fact
14 that we, too, would be able to participate in the
15 rebuttal presentation, that is, after the defendants
16 have presented that, we would then be able to present,
17 also. I assume that intends to be your intention.

18 THE COURT: Correct. But I would assume
19 that, again, that can be rolled into the date we
20 schedule argument on this. That would bring it all to
21 a final head.

22 MS. NIAL: Yes, your Honor, within the
23 statement context.

1 done so I can get to the thirty-nine thousand. All
2 right. All right.

3 [Laughter.]

4 MS. LINDBLOM: I think once we have
5 opportunity to put together our brief, we'll be in
6 better position to talk about what the structure of
7 such an outcome might be. So if we could bring that up
8 next time.

9 My one concern is that I'm not sure I know
10 what argument we're facing. I guess we could look back
11 at plaintiff's initial submission that included what
12 are now these nineteen documents, and that that is
13 their argument to why the documents are not privileged.
14 I don't want to have to be responding, you know, making
15 up arguments against documents and responding to them,
16 that's all.

17 THE COURT: Well, I realize that, but we
18 can't sort of endlessly go on. I think, with regard to
19 at least some of these, the questions about why are
20 they privileged in the first place are sufficiently
21 obvious that they appeared to me, without anybody even
22 arguing them to me, and just sort of reading them, you
23 sort of wonder on some of them, and where these

24 arguments have been made in other jurisdictions, I

1 don't think it's that the arguments we're going to be
2 hearing from Mr. Motley are so novel and unheard of
3 that you won't be able to respond in an articulate way
4 after his oral argument, but at least next time we're
5 discussing specific documents, and I will entertain the
6 full range of arguments and counter arguments and at
7 least those.

8 All right. Now, Mr. Griffin, you wanted to
9 talk about the agenda for next time and some issues?

10 MR. GRIFFIN: Yes, your Honor. Scheduling of
11 our next get together. We had a discussion, and I
12 think I suggested in today's agenda, next target date
13 we had agreed on would be May 7th.

14 THE COURT: May 7th. That's fine. Again,
15 I'll be here, so I can even tell you today it's
16 courtroom 10A. Courtroom 10A on May 7th.

17 MR. GRIFFIN: I think it's probably likely to
18 be a busy day on May 7th. I think I can anticipate
19 several agenda items. We have -- I was just jotting
20 done my own thoughts as to what your Honor might have
21 before her by then.

22 Certainly, the subject matter of waiver
23 motion by the Commonwealth witnesses need to be

24 addressed, briefed by then. A likely motion relating

1 to the latest Bliley documents has been suggested
2 today. I think, anticipate discovery related motions
3 in terms of where we go from here on particular issues
4 which the parties are trying to work together now, and
5 have to your Honor in time to discuss that, that
6 agenda -- at that conference.

7 We are coming by May 7th, end, fact
8 discovery, as we need to address with your Honor, as we
9 approach May 7th, I don't anticipate with certainty
10 what that issue might be, but it always comes up, as
11 things tends to do, and, of course, you suggested
12 handling the procedures where we go from here on the
13 subject of crime-fraud documents. Sounds like a busy
14 day ahead on May 7th, your Honor. So I think it would
15 be a longer day than we have had recently, perhaps.

16 THE COURT: It goes without saying that the
17 earlier that the parties can get me their respective
18 motions, briefs and the agenda -- I mean, it wasn't a
19 problem today because it was a relatively short agenda
20 relative to the subject matter. I only got the agenda
21 yesterday; and if I'm going to have a busy day, I want
22 more than one day's notice of what my list is like.
23 Make sure that I have everything, and I have read it,

24 and am ready to proceed.

1 MR. GRIFFIN: We'll do everything to get that
2 to you so you can be --

3 THE COURT: And, again, I will be here in
4 courtroom 10A as of the very beginning of May. The
5 beginning of that week goes into the 7th. So at least
6 I'll be in one place for awhile.

7 Anything else the parties want to raise
8 today? I have one additional item myself, but anything
9 you have? All right.

10 I did want to make sure we don't have some
11 misunderstanding or loose ends with regard to B.A.T
12 Industries and the case management order. I don't know
13 whether there is someone here for B.A.T. Industries.

14 MR. KOMAR: Yes, your Honor. Michael Komar.

15 THE COURT: All right.

16 But all along there's been this sort of hint
17 that somehow the case management order doesn't apply to
18 B.A.T. Industries, or the B.A.T. Industries is going to
19 object to it, or the Commonwealth is going to be asking
20 for something different with regard to B.A.T.
21 Industries; and we're getting fairly deep into the case
22 management order timeframe, and both the Commonwealth
23 and B.A.T. Industries added two or three months to the

24 time they were going to be making their additional

1 proffers. So we're far deeper into it than I thought
2 we would be by the time I ruled on that motion to
3 dismiss. So anybody, either side, thinks that the case
4 management order is going to be revised in some
5 fashion, special fashion for the claims regarding
6 B.A.T. Industries, you better let me know about that
7 soon, because there's been this loose end of a hint all
8 along that they weren't agreeing to it, weren't covered
9 by it, that sort of thing.

10 There are loose ends, I want them nailed down
11 by the next status conference at the latest. Perhaps
12 be notified sooner than that if anybody thinks that the
13 case management order doesn't apply to them, or they
14 still have opportunity to object to it. So I had
15 thought I was going to be getting those additional
16 materials on the motion to dismiss, like, November or
17 December, and I didn't get them in their entirety
18 until, like, February. So we lost a lot of time in
19 there.

20 So does anybody speak intelligently on that
21 today, satisfy my worries on this subject? Yeah.

22 MR. KOMAR: Well, your Honor, for your
23 information, B.A.T. Industries filed single justice

24 appeal last week.

1 THE COURT: Right. I assumed you would.

2 MR. KOMAR: Correct.

3 And the Commonwealth has responded to that,
4 and we anticipate we'll probably get a decision on that
5 probably within a week. I spoke to Mr. Sobol a few
6 days ago. We're going to meet and confer, discuss
7 discovery issues probably within the next week or two,
8 whenever we hear on the single justice appeal.

9 MR. WEBER: Your Honor, we --

10 THE COURT: Be in position to update me on
11 that the next status conference.

12 MR. KOMAR: Yes, your Honor. Will do.

13 MR. WEBER: Certainly speaking for the
14 Commonwealth, have been proceeding under the assumption
15 the case will not be delayed in any way as a result of
16 B.A.T.'s refusal to participate in the case management.

17 THE COURT: That would certainly normally be
18 my assumption, too, but I get the impression that the
19 parties were not necessarily making the same
20 assumption. And I wanted to resolve that, as I say,
21 sooner rather than later, and hear any arguments about
22 why they should have a different schedule, sooner
23 rather than later; but it sounds like single justice

24 appeals, and so your own discussions will be dealt with

1 in time to handle that at the next conference. I would
2 want that on the next agenda to make sure it's not a
3 lingering misunderstanding, shall we say; all right.

4 All right. Anything else for today?

5 MR. WEBER: No, your Honor.

6 THE COURT: See you on the 7th.

7 OFFICER: All rise.

8 [Recess at 11:55 a.m.]

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CERTIFICATE

The foregoing pages, numbered 1 through 84,
are a true and accurate transcript of the stenotype
notes taken by me in the matter of Commonwealth of
Massachusetts vs. Philip Morris, Incorporated, et al,
No. 95-7378, heard at Cambridge on Thursday, April 9,
1998, before Sosman, J.

Niles Jon Fowlkes, RMR
Official Court Reporter

