The Sedona Conference Journal

Volume 3 2002

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Robert F. McDermott Jr.

Recommended Citation: Robert F. McDermott Jr., *The Assault on the Attorney-Client Privilege and Work Product Doctrine in the Tobacco Wars: A Dispatch from the Eastern Front*, 3 SEDONA CONF. J. 133 (2002).

THE ASSAULT ON THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN THE TOBACCO WARS: A DISPATCH FROM THE EASTERN FRONT

*Robert F. McDermott, Jr.**
Jones, Day, Reavis & Pogue
Washington, D.C.

I. INTRODUCTION

The attorney-client privilege and the work product doctrine have long been accepted as vital components of our legal system; indeed, they may be more important today than when they were first recognized, given the complex legal and regulatory environment in which individuals and businesses operate and the litigious nature of modern society.[1] The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law" and is intended "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law. . . .[2] "That purpose, of course, requires that clients be free to 'make full disclosure to their attorneys'. . . ."[3]

The work product doctrine, while not as venerable, has assumed a place of almost equal importance, even though ordinary work product receives only qualified protection.[4] The Supreme Court more than 50 years ago recognized that if work product were not afforded protection, "[a]n attorney's thoughts, heretofore inviolate, would not be his own," and "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."[5]

Both doctrines have been under sustained attack in continuous litigation brought against the tobacco industry. The cases in which these attacks have been mounted have varied widely in scope and content, and a number of truly novel theories have been advanced.[6] At bottom, however, these cases have dealt with issues that have been the subject of intense public debate and political activity for decades: How should society regulate the sale and use of tobacco and who should bear the cost?

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* The author has drawn on the work done by many lawyers in his firm, but most particularly his partner David Alden, whose contribution is gratefully acknowledged. The views expressed, however, are his own and do not necessarily represent those of his Firm, or any member thereof, or his client, R. J. Reynolds Tobacco Company.

1 Throughout this article, the terms "privileges" and "privilege claims" will be used generically to refer to both the attorney-client privilege and the work product doctrine unless otherwise indicated.

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

3 *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citation omitted).

4 Most jurisdictions recognize a distinction between opinion work product and ordinary work product, the former being absolutely privileged in most jurisdictions, the latter subject to being overruled upon a showing of particularized need or "substantial need." *See, e.g.*, Fed. R. Civ. P. 26 (b)(3).

5 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

6 The vast majority of the cases are "routine" product liability actions brought by smokers or their families and representatives with the ordinary accompaniments (e.g., negligence, strict liability, breach of warranty, etc.); others are more elaborate: class actions by injured smokers, by uninjured smokers seeking medical monitoring, by "addicted" smokers, by smokers of low-tar cigarettes claiming fraud, by people who began smoking as minors; by third parties claiming injury from exposure to environmental tobacco smoke, by health insurers, pension funds and hospitals claiming financial harm, etc.; by cities, counties and states as well as the federal government - both in *parens patriae* and seeking damages for financial harm in their own right; by foreign governments claiming industry misconduct in the United States somehow corrupted their handling of tobacco issues and regulation at home to their financial detriment, or claiming financial harm as a result of smuggling activities, etc. It is doubtful that the prospect of gaining some of the gold generated by cigarette sales has completely exhausted the vein of ingenuity which has been displayed thus far by determined seekers after truth.

In recent years, the courtroom has become the principal theater of operations for the war against tobacco - a conscious strategy selected by tobacco opponents designed to inflict severe financial injury and stigmatize both the industry and smoking in the process.[7] This litigation, particularly the cases brought by the various state attorneys general, also succeeded in substantially curtailing the ways in which the tobacco industry can conduct business.[8] Some of the more zealous proponents of the use of litigation as a tobacco control strategy hope it will ultimately lead to the disappearance of smoking altogether.[9]

All wars produce collateral damage, however, and the tobacco wars have proven no different. One of the tactics employed with considerable "success" in these cases has been to attack or otherwise evade the privilege claims asserted by the industry. In this paper I will recount some of the examples and discuss the resultant harm which has been done to the attorney-client privilege and work product doctrine.

II. SIGNIFICANT MILESTONES IN THE ASSAULT ON THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. MERRELL WILLIAMS - *Crime Does Pay*

Shortly before Mississippi filed the first of many cases brought by states seeking recoupment of funds expended to treat Medicaid recipients for smoking-related diseases,[10] it came to light that Merrell Williams, a former paralegal for one of Brown & Williamson's outside law firms, had stolen thousands of Brown & Williamson's documents, many of which were facially privileged. While it may seem intuitively obvious that the documents should have been promptly returned and the thief sanctioned, that did not happen. After his efforts to extort money from Brown & Williamson failed, Williams, in defiance of a Kentucky injunction, provided copies of the stolen documents to lawyers suing Brown & Williamson.[11] Further distribution soon followed. Copies of the stolen documents were sent anonymously to a California anti-smoking activist who, in turn, placed the documents in a university library and on the Internet and began selling copies to the public in CD format.[12] Copies were also sent to sympathetic members of Congress and the media, and copies were attached to public court filings.[13] In addition, this activist, along with others, authored a series of articles about the stolen documents which appeared in the Journal of the American Medical Association.[14]

Whether or not these efforts were carefully orchestrated, such widespread and public dissemination had the effect of making it impractical, if not impossible, to preserve the privilege and return Brown & Williamson to the *status quo ante*. Although some courts reacted negatively to what seemed to be transparent efforts to "launder" the documents and to deprive Brown & Williamson of an opportunity to assert and preserve its privilege, one federal district court saw these events in a surprising light: this court was willing to overlook the highly dubious tactics of Brown &Williamson's opponents, lambasting the company and virtually condoning the underlying theft in the process.[15]

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7 For a truly remarkable (though partisan) account of the wide-ranging litigation brought against the tobacco industry to date, *see* Dep't of Health & Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000). Chapter 5 contains a 38-page discussion entitled "Litigation Approaches" (at 223-61) which reflects the impulse toward social engineering at its apex. It paints a portrait that some will find cheering and others chilling.

8 http://www.naag.org/tobaccopublic/Detail.cfm?ID=15&Lib=33&Cat=NULL&Sub=NULL.

9 *Reducing Tobacco, supra; see also*, Roberta B. Walburn, *The Prospects for Globalizing Tobacco Litigation*, presented at The WHO International Conference on Global Tobacco Control: Towards a WHO Framework Convention on Tobacco Control (Jan. 7-9, 2000, New Delhi, India).

10 *Moore v. The American Tobacco Co.*, No. 94-1429 (Chan. Ct. of Jackson Cty, Miss. 1994).

11 *See, e.g., Maddox v. Williams*, No. 93-CI-4806, slip op. (Cir. Ct. Jefferson Cty., Ky. Nov. 22, 1996).

12 *See, e.g.*, David B. Smallman, *The Purloined Communications Exception To Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 Tort & Ins. L.J. 715, 731, 734 n.104 (1997).

13 *ee id*. at 730-31.

14 JAMA, Jul. 19, 1995, Vol. 274, No. 3, 219-24, 225-33, 234-40, 241-47, 248-58.

15 *Maddox v. Williams*, 855 F. Supp. 406, 414-15, (D.D.C. 1994), *aff'd. on other grounds sub nom., Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 417 (D.C. Cir. 1995)(disassociating itself from certain views of the district court).

As for Merrell Williams, while his efforts to extort money from Brown &Williamson proved unsuccessful, he soon began working with lawyers who not only provided him with a paying job but also co-signed a note for his car, extended him an undocumented loan to purchase a house, and helped him purchase a boat.[16] Even though no great legal principles fell victim in this sordid brushwar regarding privilege, it proved a troubling harbinger of things to come.

B. MINNESOTA I - *What's Yours is Mine*[17]

In mass tort litigation, sweeping document requests are commonplace, and tobacco litigation proved no exception. In the Minnesota recoupment litigation,[18] document discovery against the tobacco industry defendants ultimately resulted in the production of more than 30 million pages. Given the volume of documents to be produced, it is hardly remarkable that plaintiffs also sought and obtained access to databases and indices to facilitate their review. What was surprising, however, was the trial court's wholesale directive to produce not just routine business databases and indices but also databases and indices that had been prepared expressly for litigation by outside counsel.[19] To add insult to injury, even though these work product databases had required hundreds of thousands of hours and tens of millions of dollars to develop, the court compelled their production at no cost to plaintiffs.

C. MINNESOTA II - *Close Enough for Government Work*

It is to be expected that substantial document productions, covering more than four decades in the life of an industry subject to intensive litigation and regulatory scrutiny, would yield a substantial privilege log. In Minnesota, the thirty million-plus page document production was accompanied by privilege logs containing more than 200,000 entries. In keeping with the hardball tactics which seemed to characterize the Minnesota litigation beyond all others, every claim of privilege was challenged by the plaintiffs on the basis that the logs were deficient, or the documents were not privileged, or there had been a waiver, or the crime-fraud exception applied.

Some courts when confronted with significant privilege logs have confined challenges to a manageable and realistic number, seeking to concentrate the parties' efforts on a universe of documents which might have evidentiary significance at trial, e.g., placing numeric limits on the challenges which may be brought against a party in a given time interval.[20] The Minnesota trial court was not so restrained. Faced with privilege challenges to more than 200,000 documents created over more than four decades, the court did not direct plaintiffs to narrow or limit the challenges in any respect, nor did the court consider delaying a rapidly approaching trial date. Instead, it ordered the defendants to divide the privileged documents into 14 categories and directed a Special Master to determine the privilege status of entire categories based on a small "sample" of randomly selected documents within each category.[21] What precipitated this unprecedented ruling was an

16 *See* Smallman, *supra*, at 731 n.84. *See also*, Michael Orey, *A Tobacco Turncoat's Odyssey: Surprise Ending for Paralegal Who Was a Spy*. Wall St. J., Sept. 13, 1999, at B1.

17 Titus Maccius Plautus, *Trinummus*, act II, sc. ii, l. 48; "What is yours is mine, and all mine is yours;" now sometimes distorted to state "what's yours in mine, what's mine is mine."

18 *State ex rel. Humphrey v. Philip Morris, Inc.*, No. C1-94-8565 (Dist. Ct. Ramsey Cty., Minn. 1994) (hereafter "*Humphrey*").

19 *Humphrey, supra*, slip op. (Nov. 1, 1995) (ordering production of databases), *writ denied*, No. CX 95-2536 (Minn. Ct. App. Dec. 26, 1995), *pet. denied* (Minn. Feb. 27, 1996), *cert. denied*, 517 U.S. 1222 (1996). *See also Humphrey*, *supra*, slip op. (June 7, 1996) (denying motion for clarification or modification relating to outside counsel databases).

20 For example, in the case brought by the federal government against the tobacco industry, the court limited the number of privilege challenges to 500 per side per month with a further *proviso* that no more than 250 such challenges could be directed against any one defendant. *United States v. Philip Morris, Inc.*, 99-CV-02496 (GK) ((D.D.C.) (Order #51, Para II.C.1., March 27, 2001). This prevents any party (as well as the court and the special master) from being overwhelmed by innumerable privilege challenges, thereby being sidetracked from other trial preparation activities.

21 *Minnesota v. Philip Morris Inc.*, No. C1-94-8565 (Dist. Ct. Ramsey Cty., Minn., May 9, 1997, May 22, 1997).

initial determination that the plaintiffs had made a *prima facie* showing of crime-fraud, which, in the eyes of the court, was sufficient to trigger an *in camera* review of every privilege claim. The court concluded, however, that a document-by-document review was unworkable and that categorization and sampling were justified in order to balance "the rights of the parties with the real problem of the sheer volume of documents for which privilege is claimed." The court therefore ordered the Special Master to make a "random review or 'spot check'" of documents within each category.[22]

While it is undoubtedly true that certain classes of documents may be fairly evaluated without detailed individualized review of each document (e.g., periodic reports created at regular intervals which do not vary significantly in nature or substance from report to report), the corner cutting and crude butchery employed in Minnesota were truly astonishing: four days of hearings were conducted in October 1997 to consider the privilege claims of 10 non-Liggett defendants.[23] The Special Master had randomly selected 834 documents from the more than 200,000 at issue - less than one-half of one percent - to gauge the propriety of the privilege claims. In the time available, it was virtually impossible to present the factual context for each document, including a rebuttal to the crime-fraud allegations and a presentation of evidence supporting the validity of the claim of privilege. For example, Philip Morris Inc. had about 3 hours to address 175 sample documents - approximately one minute per document. How is it possible to recreate the historical context, introduce the people, and explain the settings involved with so many events, covering a 40-year period, when afforded only one minute per document?[24] In any case, based upon this review of a miniscule sample, the Special Master held that four of the 14 categories of documents were not privileged or were subject to the crime-fraud exception.[25] Since specific rulings on each of the sample documents were not made, it is impossible to know in every case which documents were found to be not-privileged, or which were found to be privileged but subject to the crime-fraud exception. Moreover, since there were ten defendants involved, it is impossible to know whether documents of one defendant within a given category were in and of themselves found to be properly privileged in whole or significant part but nonetheless became swept away on a tide created by the failures of other defendants' documents within that same category.[26] All in all, this marked a sharp departure from the deliberate document-by-document review seemingly contemplated by *Zolin*.[27]

The trial court upheld the Special Master's ruling with respect to the non-Liggett defendants, fully recognizing and frankly acknowledging that, inevitably, properly privileged documents would be disclosed as a result of category-wide determinations.[28] Indeed, some of the sample documents reviewed were cross-categorized to categories that were affirmatively found to be privileged and not subject to crime-fraud, yet these were ordered produced. Certain other documents within the "condemned categories" were called to the attention of the court and were specifically acknowledged by the court to be privileged; these, too, became casualties of war.[29]

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22 *Humphrey*, *supra*, May 9, 1997 at 30-31.

23 Liggett had earlier settled with the state, waiving any claim of privilege to its documents, and an initial proceeding had dealt with privileged documents possessed by Liggett as to which other defendants asserted joint defense privilege claims.

24 For a more extensive treatment of the unwarranted shortcuts ordered by the court in Minnesota and the impossible burdens placed on the defendant companies *see*, John J. Muldering, *et al*., *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege,* 67 Def. Counsel J. 16 (Jan. 2000). For a more complimentary view of the procedures adopted, written by plaintiffs' counsel in *Humphrey, see* Michael Ciresi, *et al., Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 William Mitchell L.R. 477 (1999).

25 *Humphrey, supra*, Report of Special Master Findings of Facts, Conclusions of Law and Recommendations Regarding Non-Liggett Privilege Claims, at 100-04 (Feb. 10, 1998).

26 For example, in his discussion of the documents placed in Category I, the special master stated that the documents he reviewed were " . . . not privileged and/or closely related to the crime-fraud findings" (emphasis added) but he only made specific reference to three documents of one of the 10 defendants. *Humphrey, supra*, Report of Special Master Findings of Facts, Conclusions of Law and Recommendations Regarding Non-Liggett Privilege Claims, at 100-04 (Feb. 10, 1998).

27 *Zolin,* footnote 3, *supra.*

28 *Humphrey, supra*, Order with Respect to Non-Liggett Defendants, Mar. 7, 1998.

29 *Id.*

D. BLILEY DOCUMENTS - *The Republic Isn't Safe When Congress is in Session*[30]

In November 1997, while the issue of privilege was still before the Minnesota court, Representative Thomas Bliley, Chairman of the House Committee on Commerce, demanded the production of the Liggett joint defense documents covered by the Minnesota Special Master's order, issued September 10, 1997. In the ensuing weeks, his office advised the tobacco companies that Rep. Bliley had decided not to recognize the companies' privilege claims and that if they failed to produce the documents, he would initiate criminal contempt proceedings. On December 4, subpoenas *duces tecum* were issued demanding production of the Liggett joint defense documents by the following day. Again, the companies were informed that Bliley would not recognize their claims of privilege and would initiate criminal contempt proceedings for non-compliance. The companies relented in the face of these threats. On December 18, Rep. Bliley, without further consultation with the companies, posted the documents on the Internet.[31]

This exercise was repeated early the following year, this time with respect to the 37,000 documents of the domestic tobacco companies covered by the Minnesota Special Master's proceedings discussed in Part II (C), *supra*.[32] Once again, Rep. Bliley formally rejected the companies' privilege claims and threatened criminal contempt. Once again, the companies were forced to yield in the face of these threats, and 16 days later most of the documents were placed on the Internet.

In the wake of these developments, many plaintiffs sought to employ some of the documents in their cases. The theory generally advanced was that, by producing the documents to Congress, the companies had waived any privilege that might otherwise exist. It was further argued that public availability of the documents effectively vitiated the privilege, and in any case, barring use under these circumstances would be contrary to public policy.[33]

Whether the production of the documents to Rep. Bliley or subsequent posting on the Internet constituted a waiver of privilege has been extensively litigated since the Spring of 1998, and the results thus far have been mixed.[34] One pending challenge brought by the United States Department of Justice merits special mention, however. In April 2001, Justice sought a ruling that the domestic tobacco companies had waived their privilege claims over the Bliley documents and specifically argued that complying with a Congressional subpoena, even though under a threat of criminal contempt,[35] still constituted a *voluntary* waiver.

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30 Attributed to Mark Twain, *see also* "It could probably be shown by facts and figures that there is no distinctly native American criminal class except Congress," Ib. 8 vol. I, *Pudd'nhead Wilson's New Calendar*, ch. 2.

31 http://www.house.gov/commerce/TobaccoDocs/documents.html.

32 Rep. Bliley's subpoenas did not seek production of the approximately 2,000 documents of a foreign defendant which were located in England.

33 Some plaintiffs also raised the additional ground that certain provisions of the consent decree which resolved the Minnesota recoupment litigation constituted a waiver of privilege; some others pointed to a statement issued by one of the companies contemporaneous with the release of the Bliley documents which also, in their view, constituted a waiver.

34 Among the courts finding no waiver: *IUOE v. Philip Morris, Inc.,* No. 3:97-0708, 1999 U.S. Dist. Lexis 21097, at *5-*7 (S.D. W. Va. June 28, 1999) (defendants took the reasonable steps required to prevent their compliance from resulting in a waiver); *Scott v. American Tobacco Co.* No. 96-8461 (Dist. Ct. Orleans Parish, La.), 4/30/01 Hearing Tr. at 11-13 (recommendation of no waiver by production to Congress for 15 specified documents); *Burton v. R.J. Reynolds*, No. 94-2202-JWL (D. Kan. July 19, 2000), Teleconference Tr. at 11-20 (no waiver by production to Congress alone; expressly disagreeing with *Falise*); *In re Tobacco Cases II*, No. JCCP-4042, slip op. at 1-2 (Super. Ct., San Diego County, Cal. Aug. 9, 1999) (preliminary ruling), *adopted* (Sept. 16, 1999) (noting the "affirmative actions taken by defendants before Congress that are consistent with assertion and preservation of their claims of privilege as well as attempts at prevention of public dissemination" and finding "unavailing" the argument that production to Congress resulted in waiver); *Huffman v. American Tobacco Co.*, No. 98-C-276, slip op. at 3 (13th Jud. Cir., Kanawha City, W. Va. Aug. 4, 1999) ("no waiver of privilege resulted from compliance with the subpoenas"); *Maryland v. Philip Morris Inc.*, No. 96122017, slip op. at 9, 12 (Cir. Ct. , Baltimore City, Md. Aug. 5, 1998) (production to Congress "was not voluntary and thus not a waiver of their attorney-client privilege;" "each Defendant took the necessary and proper steps to preserve the confidentiality of the privileged documents"); *Washington v. American Tobacco Co.,* 96-2-15056-8SEA, slip op. at 2 (Sup. Ct., King Cty., Wash. 1996), (no waiver because defendants "took all *reasonable* steps to protect their claims of privilege before the House of Representatives") (emphasis added); *Missouri ex rel. Nixon v. American Brands, Inc.*, No. 972-1465 (Cir. Ct. 22d Jud. Dist., St. Louis City, Mo. Aug. 15, 1998), Hearing Tr. at 3 (denying motion to deprivilege *Minnesota* Privileged Documents); *Wisconsin v. Philip Morris Inc.*, No. 97-CV-328, slip op. at 7 (Cir. Ct., Dane Cty., Wis. Oct. 21, 1998). Other courts, however, have found waivers: *Haines v. Liggett Group, Inc.*, No. 84-678, 14 Mealey's Litig. Rep. Tobacco 14 (D.N.J. Oct. 25, 2000); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70 (N.D.N.Y. 2000); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F. Supp. 2d 582 (N.D. Ohio 1999); *Massachusetts v. Philip Morris, Inc.*, No. 957378J, 1998 WL 1248003 (Mass. Super. Ct. July 30, 1998).

35 Criminal contempt of Congress in punishable by up to one year imprisonment. *See* 2 U.S.C. § 192. In theory, the offense is complete upon non-compliance and cannot be purged, unlike civil contempt. For a cogent discussion of the dilemma facing the recipient of a congressional subpoena for privileged documents *see* David B. Alden, *Privilege Issues - Subpoena by Congress*, Nat'l L. J. (Dec. 4, 2000).

Interestingly, however, in resisting the defendants' efforts to obtain government documents that had been produced to Congress by various departments and agencies *without* being subpoenaed, Justice maintained that there had been no privilege waiver, because Congress had a right to obtain this information. The government advanced this argument, apparently not recognizing the incongruity of its position - much less with any sense of embarrassment.

E. DEPOSITIONS OF IN-HOUSE COUNSEL - *Your tax dollars at work*

The latest attack on traditional notions of privilege is also unfolding in the lawsuit brought by the United States.[36] It involves efforts by the Department of Justice to depose numerous present and former in-house counsel of the tobacco companies.

While efforts to depose attorneys are not unknown, courts approach the subject with some caution.[37] In this case, however, the numbers of depositions sought, the breadth of the topics on which discovery is sought, the flat refusal to explore ways in which ostensibly non-privileged information known to lawyers might be as readily obtained from less sensitive sources, and the refusal to accept limitations of the sort frequently acknowledged in the case law as appropriate represent significant departures from existing practice. This issue will be presented to the court in the next few weeks and, at the time of this writing, it is too early to predict the outcome. But it is not too early to express extreme disappointment with Justice's apparent indifference to the recognized role that in-house attorneys play in providing legal advice and counseling their clients on legal and regulatory matters, as well as Justice's complete disregard for the disruptions and burdens such discovery inevitably entails.[38]

III. PECULIAR ATTRIBUTES OF TOBACCO LITIGATION

A. *All's Fair in Love and War* [39]

If one looks at litigation as a kind of ritualized/stylized warfare, then tobacco litigation can be thought of as the analog of a religious war, indeed, a crusade, at least in terms of the passions it arouses. Unfortunately, the crusading fever occasionally seems to inspire the belief that holy ends justify unholy means. While the tactics and conduct revealed in the Merrell Williams episode, Part II A, *supra,* would be roundly condemned in virtually any other context, it was met with surprising indifference and even anger directed at the wrong party - the victim - in at least one instance.[40] Some very close to the underlying events were unabashed, even offering the proud defense that those involved were "saving lives" or "saving children" or "acting in the public interest."[41] However high-minded or sincerely motivated those involved may have been, such well-meaning action would appear to be at odds with the ethical precepts which govern our profession.[42]

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36 *United States v. Philip Morris Inc.*, No. 99-CV-02496 (GK) (D.D.C. 1999).

37 *See, e.g.*, *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (setting forth a three-part test before opposing counsel may be deposed:"(1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." (citations omitted)); *Boughton v. Cotter Corp.*, 65 F. 3d 823 (10th Cir. 1995) (applying *Shelton* standards); *Landmark Legal Foundation v. EPA*, No. 00-2338 (RCL) (D.D.C.); *Sadowski v. Gudmundsson*, No. 01-MS233 (RWR/JMF), 2002 U.S. Dist. LEXIS 3287, slip op. at *4-*5 (D.D.C. Mar. 1, 2002) (Facciola, M.J.) (analyzing request to depose counsel under *Shelton*); *Jennings v. Family Management*, 201 F.R.D. 272, 276-77 (D.D.C. 2001) (Facciola, M.J.) (same); *Evans v. Atwood*, No. 96-2746 (RMV, 1999 U.S. Dist. LEXIS 17545, at *6-*13 (D.D.C. Sept. 29, 1999) (Urbina, D.J.) (same); *Corporation for Public Broadcasting v. American Automobile Centennial Commission*, No. 97-1810 (TFH), 1999 U.S. Dist. LEXIS 1072, at *3-*4 (D.D.C. Feb. 2, 1999)(Hogan, D.J.) (same).

38 *Id.*

39 F.E. Smedley, FRANK FAIRLEGH, Ch. 50 (1850).

40 *Maddox v. Williams, supra*, at 1414-15.

41 Based on private conversations with "informed sources."

42 For example, under District of Columbia Legal Ethics Opinion No. 256 (1995), an attorney who is on notice that documents received by him are confidential and contain information not intended for him cannot read the documents; he must notify the rightful owner and return the documents if requested.

The tobacco wars have also produced guerilla tactics and flank attacks to a degree which is unusual, though not unprecedented, in other litigation. For example, in the Mississippi recoupment litigation,[43] the deposition of Jeffrey Wigand - the disgruntled former employee of a tobacco company later lionized in the film "The Insider" - was placed under seal by express order of the court. Nevertheless, a copy of the transcript miraculously found its way into the hands of a reporter and became the centerpiece of a burgeoning public relations offensive against the tobacco industry.[44]

The tobacco wars have also seen the highly coordinated use of (i) government agency initiatives and investigations;[45] (ii) the fortuitous creation of government reports;[46] and (iii) the timely invocation of legislative interest,[47] all to the accompaniment of an orchestrated public relations campaign unparalleled in scope.[48]

B. *Heads I Win, Tails You Lose*[49]

One noteworthy aspect of the assault on traditional notions of privilege which confronted the tobacco industry is the marked asymmetry of the battle, whether viewed geographically, chronologically, or tactically.

The phenomenon of asymmetry is not unique to tobacco litigation, but its impact on the privilege issues under consideration has been striking. Geographically, while the right to choose one's forum (if viewed from the plaintiff's perspective) or engage in forum shopping (if viewed from the defense perspective) is well-established, attacks on privilege offer unique opportunities to capitalize on geographic diversity. Plaintiff's counsel can take advantage of favorable substantive law on relevant issues, and/or favorable judges, to secure the discovery and public dissemination of documents. The public availability of these documents thereafter will enhance the likelihood that they can be used, even in jurisdictions with a more restrictive view of the underlying legal issues, on the theory that the loss of confidentiality sharply diminishes the reasons for upholding the privilege.[50]

Chronologically, efforts to "deprivilege" documents can be brought successively in different cases and different jurisdictions based on different parties, or a different jurisdiction's law, or newly discovered facts. As a practical matter, there is never collateral estoppel or a final determination in favor of the tobacco industry — the process invariably operates as a one-way valve.

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43 *See Moore, supra* at fn.10.

44 *See* Alix M. Freedman, *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine - Wigand Claims B&W Chief 'Frequently' Mentioned Its Addictive Properties - Firm Calls Charges 'Fantasy'*, Wall St. J., Jan. 26, 1996, at A1; Elizabeth Jensen and Suein L. Hwang, *CBS Airs Some of Wigand's Interview, Accusing Tobacco Firm, Its Ex-Chief*, Wall St. J., Jan. 29, 1996 at B10.

45 For example, in 1994 the Food and Drug Administration sought to assert jurisdiction over tobacco products, a position ultimately rejected by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In 1997, in response to public pressures, the Federal Trade Commission filed a formal complaint against R. J. Reynolds Tobacco Company regarding its Joe Camel advertising campaign (*see In re R. J. Reynolds Tobacco Co.*, Docket No. 9285, 1997 WL 281337 (F.T.C. May 28, 1997), despite the fact that the Commission had closed an earlier investigation into this same subject, concluding that no empirical evidence existed proving a correlation between the campaign and youth smoking. *See* Joint Statement of Commissioners M. Azcuenaga, D. Owen, and R. Starck in R. J. Reynolds ("Joint Statement of Commissioners"), File No. 932-3162 (June 7, 1994), *available at* 1997 WL 281337. *See also, Flue-Cured Tobacco Cooperative Stabilization Corp. v. United States Environmental Protection Agency,* 6:93CV00370, slip op. (N.D. N.C. Jul. 17, 1998) (criticizing the EPA for the deeply flawed way in which it conducted its risk assessment of environmental tobacco smoke).

46 *See e.g.*, Nat'l Inst. of Health, *Risks Associated With Smoking Cigarettes With Low Machine Measured Yields of Tar & Nicotine*, Monograph 13 (2001). It is worth noting that (1) the senior editor and many of the chapter authors are plaintiffs' experts in tobacco litigation; (2) the Monograph purports to reject and reverse public health and federal government policy favoring the use of low tar cigarettes by those who continue to smoke; and (3) Chief Economist, Federal Trade Commission, 1998-2001, Jeremy Bulow, has written that Monograph 13's claim that light and low tar cigarettes are no safer than regular cigarettes is "false and misleading" and further that "if a private company made scientific claims with equally faulty backing it would be prosecuted." Jeremy Bulow, *The Antitobacco Jihad*, Forbes Magazine, Jan. 7, 2002 at 50. The timing and content of the Report coincides nicely with several major cases slated for trial in the near future.

47 *See* Parts II A, II D, *supra* and Part III D *infra*.

48 In addition to comprehensive coverage in the Wall Street Journal, New York Times, Los Angeles Times, Washington Post and the wire services, there has been extensive television coverage including "60 Minutes," several segments addressing allegations of nicotine spiking, and separate reports regarding allegations made by former employees of Philip Morris, R. J. Reynolds Tobacco Co. and Brown & Williamson. *See also*, best selling novel THE RUNAWAY JURY, by John Grisham and THE INSIDER (1999) starring Russell Crowe.

49 Corruption of a phrase which often accompanies "decision-making" by the tossing of a coin.

50 *See* cases cited in footnote 34, *supra*; *see also* footnote 54, *infra*.

Tactically, the plaintiffs in tobacco cases have virtually no privileged documents or communications to speak of, save in the cases brought by governmental entities, and even there the stakes are considerably lower in practice. As a consequence, plaintiffs and their lawyers have little reason for paying heed to the public interest considerations underlying the attorney-client privilege and work product doctrine; their short-term, selfish interests outweigh any long-term stake in policies supporting the continuing vitality of these privileges. Unfortunately, many courts also seem all too willing to embrace a short-sighted approach, perhaps swayed by the tide of political correctness which has been eroding the position of the tobacco industry on many fronts.

C. *Hard Cases Make Bad Law* [51]

The sheer scope of the tobacco litigation unquestionably puts unusual strains on the legal system and exposes flaws and limitations that might not otherwise be apparent. As noted above, the court in Minnesota supervised document discovery that resulted in the production of more than 30 million pages, the establishment of a huge public depository, and the creation of publicly available databases to search these documents, during the course of the pretrial proceedings. Although the 200,000-plus privilege claims were a small percentage of the total production, the absolute number is huge, and the task of dealing with challenges to the entirety of this privilege universe would be daunting indeed. The temptation to look for shortcuts evidently proved irresistible, but the resultant process was deeply flawed and unsatisfactory.

It is difficult to reconcile the process of categorization with traditional notions of due process, and to go one step further and require the production of documents which are found to be privileged just because they fall into a subject category is truly bizarre. The extraordinarily relaxed and non-specific notions of what constituted "fraud" and what passed for satisfactory proof of the requisite link to crime-fraud stood in marked contrast to the proof requirements placed on defendants. Even though the time and opportunity afforded the defendants to defend their privilege claims was grossly inadequate, the "inability" to substantiate all of these privilege claims in these truncated proceedings was itself viewed as evidence that privilege claims had been abused.[52] How much of this troublesome result is attributable to the fact that it involved the tobacco industry, and how much to sheer scale and difficulty of the task involved, is open to debate.

D. *It's Showtime!*[53]

The fact that legislative oversight at times runs parallel to high profile litigation is not novel: Congress (or certain of its members) has a seemingly insatiable appetite for seizing center stage, in an effort to appear to be both concerned about and relevant to issues that dominate the news. The hearings held by Congressman Waxman in April 1994 certainly produced some vivid pictures of tobacco company CEO's, but such "show trials" are not unique.[54]

What was unique in the tobacco wars, however, was the use of Congress — first with the Merrell Williams documents (Part II A) and then with the Bliley documents (Part II D) — to ignore claims of privilege and serve as the midwife to public release of privileged documents. And beyond the disclosures themselves, the use of Congress to "launder" the

51 Oliver Wendell Holmes, Jr., *Northern Securities Co. v. United States*, 193 U.S. 197, 364 (1904). "Great cases, like hard cases make bad law;" now usually truncated, as indicated.
52 *See* Mulderig, footnote 24, *supra*.
53 *Beetlejuice*.
54 The attentions recently lavished on Ford, Bridgestone/Firestone, Enron, and Arthur Anderson come readily to mind.

documents had the added effect of dramatically increasing the likelihood they could be used by private parties in litigation.[55]

E. *I'm from the federal government and I'm here to help you*[56]

The very existence of the attorney-client privilege and the work product doctrine is tangible recognition of the important role which lawyers play in the modern legal system. Above and beyond the general requirement to obey the law which is imposed on all citizens, professional codes of ethics, traditions, and the lawyers' status as officers of the court have historically been deemed sufficient to govern and constrain the professional conduct of lawyers. It is true that the crime-fraud exception to the attorney-client privilege signals recognition that lawyers can sometimes become entangled in the misconduct of their clients - hopefully unwittingly, but not always so. But it is an *exception*, and I submit, this is for good reason.

One of the ways in which the special status of lawyers has been acknowledged is found in the general reluctance of courts to treat lawyers as ordinary witnesses. While there has never been an absolute bar to obtaining testimony from a lawyer, it is viewed with disfavor; the case law is replete with references suggesting, to one degree or another, that other avenues of obtaining needed information should first be explored, and/or clear limitations should be set in advance.[57] Consistent with this cautious approach to discovery from lawyers, the United States Attorney's Manual bars subpoenaing records from lawyers relating to the representation of a client without the express approval of the Assistant Attorney General of the Criminal Division - even in a civil matter.[58]

Now the Department of Justice seems poised to abandon this traditional reticence when it comes to lawyers representing the tobacco industry. To be sure, it is certainly possible that serious misjudgments or even misconduct on the part of one or more lawyers took place over the course of the more than four decades under fire.[59]

Tobacco is an unpopular industry which produces a dangerous product; it increasingly has found itself under intense regulatory and legislative scrutiny, embroiled in massive litigation, and marginalized in the popular thinking. Yet it is precisely under these circumstances that the need for legal advice is most acute and the importance of respecting the policies underpinning the privileges most significant.[60] Unfortunately, it would seem that the usual reluctance to embroil lawyers personally in discovery without some good reason has been abandoned. At least for the tobacco industry, it would appear there is now almost a "presumption of *irregularity*," as evidenced by a blunderbuss deposition program being pursued by the Department of Justice against inside counsel.

55 "Defendants' motion to exclude evidence of, or reference to, all 'Bliley' documents is denied. Congress, having placed these materials out into the public domain as part of its public communication function, their use at trial cannot now be prohibited in the absence of a proceeding successfully challenging Congress's decision to release the documents on the internet. A collateral attack of that decision in this case is not permitted." *Falise v. American Tobacco Co.*, 2000 U.S. Dist. Lexis 10153, at *4 (E.D.N.Y. July 18, 2000).

56 According to legend and lore, one of the proverbial "three biggest lies"; a complete discussion of the other components, including local variations, is beyond the scope of this paper.

57 *See* cases cited in footnote 37, *supra*.

58 United States Attorneys' Manual, § 9-13.410; Oct. 1997.

59 This was plainly the view of the special master and the Minnesota court, as discussed in Parts II C and III C, *supra*.

60 As in the case of freedom of speech, where it is not popular speech but rather unpopular speech that is most in danger of suppression and, which, therefore calls for special vigilance. *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (". . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . .") (Holmes, dissenting.).

IV. IMPLICATIONS

It seemed like a good idea at the time.

It may be tempting for some to dismiss the concerns addressed above on the grounds that tobacco is a "rogue industry" which needs to be reined in and which can readily be distinguished from other "legitimate" business activities. And in some ways tobacco is unique, in the passion it arouses, in the harm attributed to its use, and in the money at stake.[61] But I submit things are not that simple. Enthusiasm for expediency and political correctness has a way of spreading. Once one accepts the proposition that the ends justify the means, it becomes a difficult exercise to draw meaningful distinctions between ends, or to neatly cabin questionable means to a few "important" uses. Some of the tactics that have been developed or perfected in the tobacco wars have already been applied in other litigation, and the case law, precedent, and successes which have been generated in the tobacco wars will live on.[62]

For the particular issues at hand, the prospect of having the attorney-client privilege or the work product doctrine substantially eroded should be troubling. The healthcare industry serves as an example of the counter-productive effects — or should I say "collateral damage," to return to my analogy of warfare — if the assault on privilege ultimately succeeds.

As a starting point it should be noted that shortly after the state Medicaid recoupment litigation was concluded, one of the principal plaintiff's attorneys in that litigation filed a series of cases against the managed health care industry.[63] Thinking about that defendant industry for a moment, is it socially desirable for those companies to consult with lawyers on compliance with regulations, contractual obligations to physicians and participating groups, and legal and fiduciary obligations to various interested participants affected by the system? It would seem intuitively obvious that significant lawyer involvement in understanding legal duties and constraints would be both necessary and desirable. And yet, how easy is it to charge that, at some level, the participating businesses are conducting themselves fraudulently in one or more respects and that the involvement and advice of lawyers is an integral part of this fraud? Query - Is seeking deposition discovery of lawyers and production of documents generated by lawyers the only way of investigating what actions the defendant corporations took and why? Undoubtedly not. In most instances, there should be many ways of determining necessary facts. Yet the tactic of seeking discovery against lawyers and privileged documents presents an easy way of harrying the legal defense and creating, at a minimum, significant extra work, disruption, and expense to the defendants at virtually no cost to the plaintiffs.

If some reasonable measure of protection is not afforded to the activities of lawyers, if some constraints are not placed on the tactic of challenging privilege wholesale, then the concerns voiced by the Supreme Court in *Upjohn* and *Hickman v. Taylor* will quickly be realized. One can only hope that, in environments less pressurized and politically charged than tobacco litigation, courts will take a longer and more balanced view of privilege issues.

61 Settlement with the state AG's totaling more that $240 billion payable over 25 years, and the rich pot of the attorneys fees accompanying these settlements has done little to diminish enthusiasm of the plaintiffs' bar for continuing the attack on the tobacco industry.
62 Robert F. McDermott, Jr., *The Class Action Assault on Managed Health Care: Is the Cure Worse Than the Disease?*, 1 Sedona Conf. J. 207 (2000).
63 *Id.*