RESEARCH PAPER

Tobacco industry lawyers as "disease vectors"

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Objective: Despite their obligation to do so, tobacco companies often failed to conduct product safety research or, when research was conducted, failed to disseminate the results to the medical community and to the public. The tobacco company lawyers' role in these actions was investigated with a focus on their involvement in company scientific research, claims of attorney-client privilege and work-product cover, document concealment, and litigation tactics.
Methods: Searches of previously secret internal tobacco industry documents located at Tobacco Documents Online. Additional searches included court transcripts, legal cases and articles obtained through Westlaw, PubMed, and the internet.
Results: Tobacco company lawyers have been involved in activities having little or nothing to do with the practice of law, including gauging and attempting to influence company scientists' beliefs, vetting in-house scientific research, and instructing in-house scientists not to publish potentially damaging results. Additionally, company lawyers have taken steps to manufacture attorney-client privilege and work-product cover to assist their clients in protecting sensitive documents from disclosure, have been involved in the concealment of such documents, and have employed litigation tactics that have largely prevented successful lawsuits against their client companies.
Conclusions: Tobacco related diseases have proliferated partly because of tobacco company lawyers. Their tactics have impeded the flow of information about the dangers of smoking to the public and the medical community. Additionally, their extravagantly aggressive litigation tactics have pushed many plaintiffs into dropping their cases before trial, thus reducing the opportunities for changes to be made to company policy in favour of public health. Stricter professional oversight is needed to ensure that this trend does not continue.

In the medical sense, a vector is defined generally as an organism that transmits a pathogen (*Merriam Webster Online Dictionary*, http://www.m-w.com). In the context of disease vectors, one common example is the deer tick *Ixodes scapularis*. After picking up the Lyme disease pathogen by feeding on an animal reservoir, the tick can transmit the disease to the next animal on which it feeds—often a human being.[1] In considering ways to control Lyme disease, it is essential to examine the role of ticks and to consider measures that will reduce their ability to transmit infection.

Smoking related diseases can be examined in a similar manner. These diseases "are caused by an agent; the agent being tobacco products."[2] The disease agent is spread by a vector, "something that gets the disease agent to large numbers of people."[2] This disease vector is the tobacco industry.[2] Although this type of disease vector differs from that of a communicable disease, "[t]he motivation to survive and to thrive is ... the same."[2] One group of industry vectors, the tobacco company lawyers, has helped ensure that the public would not learn the full truth about the harms of smoking and thus continue to buy cigarettes by the billions. Like any other disease vector, examination of the tobacco lawyers' role is essential to understand how to control and limit the harm they cause.

METHODS

We searched internal tobacco industry documents from Brown & Williamson (B&W), Philip Morris, RJ Reynolds (Reynolds), and Lorillard using the Tobacco Documents Online website (http://www.tobaccodocuments.org). Hundreds of documents were examined, including memos, reports, letters, and presentations. Search terms included vet, vetted, vetting, lawyer, attorney, privilege, Council for Tobacco Research, and CTR. Of particular interest were those documents written by attorneys that discussed issues such as company scientists' beliefs and the removal of sensitive documents from company files, as well as documents written by company scientists that discussed lawyers' involvement in their research projects. Further searches were conducted based on names, dates, and Bates numbers contained in documents returned from the initial searches.

Additionally, the transcripts of all government witness testimony in the US Department of Justice's racketeering suit against the tobacco industry, *United States v Philip Morris USA Inc, et al* (DOJ case), were reviewed. Transcripts were selected of former tobacco company scientists who discussed the influence of company lawyers on their opinions about smoking and health, their research agendas, and their publication efforts. Court decisions and commentary in certain major cases against the tobacco industry were also reviewed with a specific eye to document concealment and misuse of attorney-client privilege. Additional information was collected through a review of articles obtained through Westlaw, PubMed, and the internet.

RESULTS

Tobacco lawyers' role in gauging and influencing in-house scientists' beliefs

Internal tobacco industry documents and courtroom testimony reveal the company lawyers' careful efforts to gauge the beliefs of in-house research and development scientists. There is evidence that one company, B&W, went so far as to send its new scientists to coaching sessions with corporate counsel. Former B&W vice-president of research and development Jeffrey Wigand[3] testified in the DOJ case that he believed

Abbreviations: B&W, Brown & Williamson; BAT, British American Tobacco Industries; CTR, Council for Tobacco Research; S&H, smoking and health

when he was hired ''one of the foci of [his] job would be to search for safer nicotine delivery devices'' and that he was told he ''would be spending substantial energies on issues of new, safer products.'' Wigand stated, however, that in February 1989—the month after he began work at B&W—he was sent to Kansas City, Missouri, for 3 days to be coached by lawyers at the industry law firm Shook, Hardy & Bacon ''regarding the company line on smoking and health, and addiction.''[3] According to Wigand, at the coaching sessions the lawyers ''[i]n every instance ... instructed [him] that the evidence in the public health domain had not satisfactorily proven causation'' and told him ''that studies that demonstrated a link between smoking and cancer were fraught with errors.''[3] Lawyers, Wigand claimed, also focused on ''the industry position that nicotine was not addictive.''[3] Wigand said that B&W ''relied upon the assertion that causation had not been proven in lawsuits and publicly to support the conclusion that smoking was not the cause of lung cancer and other diseases'' and maintained that its position on addiction ''was important because part of [the company's] legal defense was that smoking was a free choice.''[3]

Reynolds' lawyers were also apparently concerned about the beliefs of that company's research and development head. A 10 May 1983 memorandum attributed to a Reynolds in-house lawyer discussed the company's then vice-president of research and development, G Robert DiMarco.[4] The memorandum stated that DiMarco had ''made a number of unfortunate statements ... which raised serious concerns in our minds as to (1) [his] views on causation, (2) his knowledge/expertise and (3) his program for [Research and Development]''.[4] The memorandum also asserted that ''[f]rom a legal standpoint ... there are substantial litigative risks associated with an individual as head of [Research and Development] who believes that smoking causes disease.''[4] According to the memorandum, DiMarco was advised that there was concern ''with regard to his underlying beliefs on the causation issue in the context of smoking and health litigation'' and that until lawyers resolved questions regarding his underlying beliefs, ''approval of his [proposed research] program would have to [wait].''[4]

A 12 March 1983 memorandum attributed to Reynolds' outside counsel documents a meeting at which legal counsel probed DiMarco's beliefs.[5] Rather than asking him his views outright, the lawyer presented DiMarco with a copy of a ''White paper'' laying out Reynolds' views on smoking and health and ''asked [him] what he thought about'' it.[5] Although DiMarco ''said he had no substantial problem'' with the paper, he also apparently showed ''no intention of reviewing [it] page by page'' and ''shifted the conversation to the kinds of research that he want[ed] to do.''[5] At one point, the lawyer stated, DiMarco ''emphasised the fact that most people in the company, including the upper management, try to ignore issues such as smoking and health [and that] it is his job to make people aware and focus them on this important subject.''[5] Two months later, the 10 May 1983 memorandum discussed above confirmed that such conversations with DiMarco were made in ''an effort to determine his beliefs in a backhanded manner (ie, white paper)'' and that they ''made very little progress because [they] kept getting caught in the rhetoric.''[4]

Tobacco lawyers' role in vetting scientific research

As manufacturers, the tobacco companies have a legal obligation under the common law to ''test, analyse, and inspect'' the products they sell,[6] to ''keep abreast of scientific knowledge, advances, and research in the product field,''[6] and to warn customers of potential dangers that they discover.[7] In addition, the companies specifically assumed these obligations in their famous ''Frank statement to cigarette smokers,'' published in hundreds of US newspapers in January 1954, in which they pledged ''aid and assistance to the research effort into all phases of tobacco and health.''[8]

The tobacco companies' fulfilment of their obligation to conduct and publish product safety research, however, has been impeded by lawyer ''vetting'' of scientific methods and research.[9] Unlike orthodox legal review of company projects or documents to ensure that they are in compliance with a certain law (such as Sarbanes-Oxley) or are not in violation of a law (such as copyright), this review has been conducted to ensure that research potentially exposing the link between smoking and health was not made public. This practice is unethical and involves the lawyer in the company's scientific research efforts—an area in which a lawyer obviously does not belong. Additionally, this behaviour has prevented the tobacco companies from fulfilling their obligation to warn customers of potential dangers and has prevented doctors as well as the general public from learning the full truth about the dangers of smoking.

Evidence of such lawyer vetting abounds in the tobacco industry's formerly secret internal documents. One document, a 17 January 1990 meeting agenda from B&W's British parent company, British American Tobacco Industries (BAT), suggested improving the ''quality of documents'' through ''[r]egular lawyer reviews and audits of scientific documents'' and arrangement of ''a system to ensure that all research related conference minutes involving representatives of more than one [BAT] Group company are vetted by the lawyer for the company issuing the minutes before the minutes are sent out.''[10] Another B&W memorandum—a 28 August 1984 letter from its general counsel, Ernest Pepples, to BAT deputy chairman Ray Pritchard—suggested that if certain types of documents potentially conceding that nicotine is addictive were ''not already routinely vetted with BATCo. lawyers, [Pritchard] may want to consider involving them more closely in both the conceptual and the drafting stages of these [documents].''[11]

Lawyer involvement in company scientific research sometimes went beyond such vetting and into instructing in-house scientists not to publish the results of their completed research—results that, if published, could have informed the public earlier of the harms of smoking. The testimony of former Philip Morris associate senior scientist Victor DeNoble[12] in the DOJ case provides evidence of such publication repression at that company. In his testimony, DeNoble recalled his research demonstrating that ''nicotine functioned as an [sic] weak reinforcer in rats when delivered intravenously'' and that ''the brain effects of nicotine ... were responsible for the rats' self administration.''[12] According to DeNoble, in the autumn of 1982 he sought the company's permission to publish these findings.[12] He believed that his manuscript was reviewed by his immediate manager, as well as the director of research, other directors, the vice-president of research and development, and finally by the legal department.[12] DeNoble reported being granted approval in January 1983 to submit the paper to the journal *Psychopharmacology*, where it was accepted and scheduled for publication in September 1983.[12] DeNoble testified, however, that in early 1983 several lawyers ''showed up and started reviewing and copying all of our documents .... We were told that the tobacco industry was under threat of litigation and they were reviewing the research.''[12] According to DeNoble, in July 1983 Philip Morris management told him he would have to withdraw the paper.[12]

DeNoble testified that after leaving Philip Morris, he again sought to publish his research results.[12] He reported that in response, he received letters from Philip Morris's assistant general counsel reminding him of his lifetime confidentiality agreement and threatening to take action against him.[12]

DeNoble summarised the situation as follows: ''I saw the company choose not to continue research or go further to support research that was making progress toward something they could implement or use to make the product safer.''[12]

Tobacco lawyers' improper exploitation of attorney-client privilege and work-product protection

The attorney-client privilege is a well established rule of evidence that shields certain communications between a client and an attorney from being produced in a lawsuit.[13] There are limits to this privilege, however. Because the privilege belongs to the client, not to the attorney,[14] attorneys cannot invoke it. Simply forwarding documents to an attorney, or passing them through an attorney's hands, will not automatically attach privilege to them. Thus, if a client hands a document over to an attorney whose role is ''intended merely to immunise the documents from production,'' the privilege is inapplicable.[15] Furthermore, privilege protects only legal advice, not business advice that is conveyed to or from an attorney.[16]

Privilege issues proved central in the discovery phase of *State [of Minnesota] ex rel Humphrey v Philip Morris, Inc*,[17] a case characterised by former US surgeon general C Everett Koop as ''one of the most significant public health achievements of the second half of the 20th century.''[18] The case resulted in a settlement ''unprecedented in terms of monetary relief, injunctive requirements, and disclosure of internal tobacco company documents.''[18] Before this, however, Minnesota had to wage a fierce discovery battle.

The tobacco company defendants had ''first offered to comply with [their] discovery obligations by producing ... only those documents they had previously disclosed in litigation elsewhere.''[18] Minnesota refused to accept this offer, opting instead to challenge, among other things, the defendants' claim that documents could not be produced because they were protected by the attorney-client privilege.[18] The special master appointed to review privilege claims in the case found, among other things, that ''one method by which attorneys may have controlled research is through maneuvers intended to 'create' privileges.''[19]

As a result of the special master's findings, ''the industry's carefully-built wall of secrecy crumbled and more than 39,000 documents withheld on claims of privilege were produced.''[18] The produced documents, according to legal ethics expert Geoffrey Hazard, ''show perversion of the lawyer's role in counseling business clients and exploitation of the attorney-client privilege to conceal deception.''[20]

Work-product protection, which is distinct from and broader than the attorney-client privilege, protects documents prepared by or for a client ''in anticipation of litigation or for trial.''[15] When documents ''would have been prepared independent of any anticipation of use in litigation,'' however, work-product protection does not attach.[21]

A 9 November 1979 letter between B&W's assistant general counsel, J Kendrick Wells, and its general counsel, Ernest Pepples, provides evidence of a scheme to ''create'' attorney work-product protection for research documents whose disclosure may have been damaging to the company.[22] Wells started the letter by stating that he had discussed with a company scientist ''various alternatives for handling BAT scientific reports which come to B&W in a way that would afford some degree of protection from discovery.'' This discussion, he continued, ''centered on receipt and initial treatment of the documents at B&W.'' Wells proposed that the scientist separate ''sensitive'' reports (such as those ''relevant to smoking and health'') for ''special handling.'' According to this plan, the scientist would act as Pepples's ''agent for the acquisition of materials in anticipation of litigation.'' As stated above, the test for whether a document enjoys work-product protection is whether it was prepared ''in anticipation of litigation.'' This suggests an intention to use work-product cover as a means to protect certain potentially damaging scientific research documents from disclosure where no such cover was properly available.

Tobacco lawyers' role in document concealment

Tobacco lawyers also have ordered or assisted in the concealment of sensitive company documents.[23] Many of these documents contained the results of important research on addiction and causation.[24] By aiding in their concealment, tobacco lawyers prevented the public from learning the truth about smoking.

In a 15 June 1979 letter to Ernest Pepples, J Kendrick Wells discussed document circulation practices at B&W.[25] He noted that another company lawyer had ''kept his eyes out for potentially sensitive material and ... simply held them in his office.'' Wells mentioned, specifically, the ''Janus'' project studies, which examined the carcinogenicity of smoke condensate painted on mouse skin and the effects of mouse inhalation of cigarette smoke.[26] According to Wells, ''the Janus material was never entered into the library.''[25]

In an infamous 1985 document, often referred to as the ''Deadwood Memorandum,'' Wells again discussed the handling of Janus project documents.[27] He stated that in reviewing scientific documents, he had designated certain documents as ''deadwood in the behavioral and biological studies area,'' including the Janus studies and ''studies of the chemical composition of Canadian tobacco leaf in 1966.'' Wells suggested that the research and development department should ''undertake to remove the deadwood from its files,'' and stated that no one ''should make any notes, memos or lists'' of the removed documents.

The Deadwood Memorandum also demonstrates an apparent intent to conceal certain documents by shipping them oversees to B&W's UK parent company, BAT. The memorandum states that the company ''would consider shipping the documents to BAT [in England] when we had completed segregating them....[as] part of an effort to remove deadwood from the files.'' Such practice can prevent plaintiffs from obtaining important documents in litigation while ensuring that a company can still access them when needed.[24]

Tobacco lawyers' role in the Council for Tobacco Research

The major US tobacco companies created the Council for Tobacco Research (CTR) in 1954 with the ostensible objective of funding unbiased scientific research into the health effects of smoking.[28] CTR, however, ''was actually formed for public relations purposes, to convince the public that the health dangers of smoking had not been proven'' and it ''served as a political and legal shield for the industry over the years.''[28] Tobacco company lawyers decided what research CTR should conduct and which research results it would make public.[28] For example, lawyers awarded funds for ''special projects'' whose ''primary purpose was to develop research data that could be used to defend the industry in court.''[28] A Philip Morris internal industry document admitted CTR ''acted as a 'front''' on these projects.[29] Because self serving ''legal—not scientific—considerations dominated'' CTR's agenda,[18] its research ''was of little value in addressing issues relating to the causal link between smoking and health.''[30]

Tobacco company litigation tactics

Some form of zealous client advocacy is commonly expected, and often required, by the state codes of professional conduct

for lawyers. The American Bar Association Model Rules of Professional Conduct (Model Rules) caution, however, that the ''lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.''[31] Additional Model Rules further temper the zealous advocacy principle by dictating, among other things, that lawyers: must not obstruct access to evidence, conceal or destroy documents or make frivolous discovery requests (Model Rule 3.4); must ''make reasonable efforts to expedite litigation consistent with the interest of the client'' (Model Rule 3.2); and must take reasonable measures to expose their clients' known fraudulent conduct (Model Rule 3.3).

Thus, client advocacy has its limits, and lawyers cannot overstep the boundaries of acceptable conduct in the name of professional responsibility. The litigation tactics that tobacco lawyers have long employed are a prime example of such overstepping. These tactics have resulted in many plaintiffs being unwilling to bring or unable to finance suits against the companies, thus preventing smoking and health litigation's potential to enhance tobacco control policies.[32]

For example, a 1987 *Wall Street Journal* article detailing tobacco company ''legal warfare'' tactics stated that ''[m]arriage, job histories, personal hygiene, eating habits and even church-going practices come under scrutiny'' and that investigators seek out the plaintiff's ''present and former neighbors, coworkers, supervisors, school chums, family physicians and others.''[33] According to one lawyer quoted in the article, the tobacco companies ''muck around in the past until they find something damaging like a family suicide or a venereal disease. Then they play on it until the suit is dropped.'' The article cited the deposition of one plaintiff who was asked questions about her inability to conceive children and her conversations with her husband about adoption. Another article detailed the similar experiences of a plaintiff's lawyer who filed two cases against the industry in the 1980s.[34] The lawyer stated that the defendants deposed certain witnesses for days and took ''numerous irrelevant depositions'' of a decedent's former classmates and neighbours. At the same time, he noted, the companies made it exceedingly difficult for plaintiffs to conduct their own depositions or to obtain proper discovery.

Tobacco company lawyers have had a key role in this scheme. A now infamous letter from Reynolds' inside counsel to ''S&H'' (smoking and health) lawyers discussed an opposing counsel's agreement to drop his clients' cases against the company.[35] The author claimed that one contributing factor to this was that ''the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.''

Judge Kessler's discussion of tobacco lawyer conduct in the DOJ case

Tobacco lawyers' misconduct remains a vital consideration in current litigation, as shown by Judge Gladys Kessler's 17 August 2006 decision in the DOJ case.[36] In finding that the defendants (the major US tobacco companies) engaged in a ''fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine,'' Judge Kessler made special mention of tobacco attorney misconduct. She noted: ''At every stage, lawyers played an absolutely central role in ... the implementation of [the tobacco industry's] fraudulent schemes.'' Among other things, Judge Kessler stated that lawyers ''directed scientists as to what research they should and should not undertake''; ''vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected''; subsidised ''friendly'' scientific researchers with grants from CTR; and ''devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege.'' Pointing to the conduct of an attorney in the case who had ''grossly misrepresented'' himself in the interest of representing a company ''aligned with the Defendants,'' Judge Kessler noted that it seems ''this situation continues even to the present.'' Summing up the situation eloquently, Judge Kessler proclaimed: ''What a sad and disquieting chapter in the history of an honorable and often courageous profession.''

What this paper adds

- Tobacco companies' history of obfuscating the truth about the harms of smoking is well established
- However, although targeted articles on topics such as the influence of tobacco company lawyers on second hand smoke research have been published,[39] a broad review of the many ways in which these lawyers have furthered and facilitated the tobacco companies' ability to hide the truth from the public is necessary
- This study discusses the critical part that these lawyers have played in the proliferation of tobacco related illness and suggests that better professional oversight is needed
- Furthermore, this paper is probably the first to discuss Judge Kessler's 17 August 2006 decision in the DOJ case as it relates to tobacco lawyer conduct, adding current value to a reader who is interested in learning more about the outcome of that case

DISCUSSION

Unlike the typical infectious disease vector, the role of the tobacco industry disease vector is ''mapped out in mahogany-lined boardrooms; it breeds its resistance to countermeasures in political backrooms; and it seizes its victims in adolescent bedrooms.''[37] This has resulted in a ''tragedy of epic proportions''[37]: millions of people becoming addicted to a deadly product at the hands of companies that were responsible for researching their products and disseminating the results to the public. Tobacco lawyers have played a key part in ensuring that the beliefs of in-house research scientists lined up with those of their employers and that research results that ran counter to the company's position were hidden from the public eye. In this way, some tobacco company lawyers may have violated their professional obligation to avoid ''conduct involving dishonesty, fraud, deceit or misrepresentation.''[38]

Although state boards oversee the professional discipline of the lawyers practising in their jurisdictions, more oversight is needed to ensure that activities similar to those in which tobacco company lawyers have engaged do not continue. This should involve two major components. Firstly, existing state rules of professional conduct should be enforced as to the conduct of tobacco company lawyers, and lawyers who still engage in the practices described above should be disciplined accordingly. For example, a tobacco company lawyer should be disciplined if he or she makes evidence difficult to obtain (a violation of Model Rule 3.4) or fails to take reasonable measures to expose known fraudulent client conduct (a

violation of Model Rule 3.3). Secondly, the state rules should include a new mandate obliging lawyers not to undertake actions that they know, or should know, will likely affect the public health adversely. Similar to the Hippocratic oath (''do no harm'') of doctors, such a rule would require lawyers to consider the broader health ramifications of the advice they give to clients. With their professional licensure on the line, tobacco company lawyers actually might seek to guide their employers towards full and honest disclosure.

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