

Refining Litigation as an Instrument of Tobacco Control Annotated Expert Testimony on Business Ethics

INTRODUCTION

Tobacco industry conduct has been the focus of extensive judicial scrutiny. Numerous individual and class action lawsuits also have been filed and many more lawsuits are expected both in this country and elsewhere. Judges and juries rely on expert witnesses to untangle complex scientific and technical questions in these cases.

Business ethics provides judges and jurors with a way to evaluate the legality of industry conduct, according to attorneys for plaintiffs. When attorneys for plaintiffs ask business ethicists whether the defendant violated business ethics, they are asking the witness whether the defendant acted unlawfully. The testimony shows that the regular course of business does not (and should not) include the alleged tobacco industry wrongdoing.

Relevancy is a primary point of contention in this area of testimony. Attorneys for plaintiffs believe it is relevant. They have their business ethicists review internal industry documents and evaluate whether the conduct described in those documents is ethical. Some of the conduct in question includes: misleading advertising, attempting to block the dissemination of scientific research by others; hiding or destroying evidence of industry research; denying the addictiveness of their products and industry decisions regarding efforts to produce so-called safer cigarettes, also known as reduced risk cigarettes.

Attorneys for the defendants have challenged the testimony of business ethicists in several ways. They argue that those business ethicists who lack the scientific background to evaluate smoking and health research or product design research cannot fairly evaluate the ethical correctness of any related industry conduct. In addition, they have argued that business ethicists are out-of-touch with real world business.

The following excerpts of expert trial testimony are intended to provide potential expert witnesses and other interested parties with a sense of how their research is presented and challenged in the courtrooms. The following excerpts of expert witness testimony are selected from various cases. A brief description is provided at the beginning of each excerpt along with a citation. “Focus points” are included throughout the excerpts providing insight into the questioning attorney’s motivations for asking particular questions, comments on the expert’s testimony and overall trial strategy. The cited transcripts as well as others are available at the Deposition and Trial Testimony Archive (DATTA) housed at the *Legacy Tobacco Documents Library*. DATTA contains 4,850 transcripts of depositions and trial testimony, including a total of about 820, 000 transcript pages. (www.legacy.library.ucsf.edu)¹

¹ The commentary and annotations are for educational purposes only. They do not necessarily represent the opinions of the testifying expert or other parties involved in the litigation. This work is funded by a grant from the American Legacy Foundation.

ANNOTATED TESTIMONY

The attorney for the plaintiff asks the expert witness to discuss his background and qualifications. Direct testimony of Thomas Donaldson (Plaintiff), *In re: Medical Monitoring Cases (Blankenship v. Philip Morris)*, Oct. 22, 2001, Pp. 3563-64, 3574-75, 3578-79, 3595-96.

Q. And what do you teach?

Focus Point: On direct examination, an expert witness will testify as to his or her qualifications. In this instance, the witness testified about his qualifications as a professor, academic researcher and consultant for businesses. This testimony demonstrates the witness's neutrality and shows that he did not form his theories specifically for the purpose of litigation. The testimony gives the judge and jury confidence to believe the witness. This testimony also provides opposing counsel with an opportunity to contest whether the witness is qualified to testify as an expert under applicable state or federal judicial rules.

The discussion of the witness's qualifications can be lengthy. In some instances, counsel will use this time to introduce the jury to some of the conclusions and research that will be offered into evidence.

A. Business ethics.

Q. And are you also an academic director of a special program?

A. I'm the academic director for one of our two major what we call open enrollment executive programs. It's called the executive development program, which brings executives in for further education.

Q. So do you teach regular undergraduate and graduate business students at the Wharton School of Business?

A. I do, yes. I teach at kind of all levels. M.B.A. -- most of my teaching at Wharton, but I also have taught Ph.D. students, and I also teach sometimes at the undergraduate level, which is my favorite place to teach actually.

Q. But with respect to this special program, the academic director of open enrollment and the executive development program, you're teaching-in addition to students seeking an earning degrees, you are also teaching people who come from industry and business to get advanced training in business ethics and other things?

A. Yes, exactly.

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Q. And have you had occasion to consult with in-house ethics officers?

Focus Point: The witness testifies on how his academic knowledge applies to the real world of business. Note that during cross examination in another case involving Professor Donaldson's testimony, the industry tried to portray him as out of touch with how business is actually conducted.

A. Yes. I have spoken often at the Ethics Officers Association and worked with companies that are developing programs in ethics themselves.

Q. Dr. Donaldson, are there times in your work as a teacher of students learning to move out into the business world that, in addition to just, you know, using your case books, using theory, using research, do you have occasion to bring captains of industry, for instance, business leaders, into the classroom?

A. Yes. I mean, one of the most effective ways to help people understand the relevance of business ethics if they are students is to show them successful business people, sometimes not as successful, but successful business people who have taken ethics seriously.

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Q. Thank you. Now, moving on, conversely, do you, in addition to teaching students, doing the academic exercises of going to institutions and meeting with ethics officers, do you also have an occasion to consult with and make presentations to businesses and industry?

A. Yes, I do.

The witness summarizes business ethics. Direct Testimony of Thomas Donaldson (Plaintiff), *In re: Medical Monitoring Cases (Blankenship v. Philip Morris)*, Oct. 22, 2001, Pp. Pages 3597-3600, 3602-08.

Q. This graphic that you prepared, widely accepted schools of thought in business ethics, could you please just tell the jury in a sort of nutshell fashion about the economic and I think it's also sometimes called the clavicle school of thought?

Focus Point: Although new scientific research and theories have an important role in the courtroom, the witness should stress that his or her theories are based on a solid foundation and are widely accepted, if such recognition exist. One way courts evaluate scientific evidence is by the level of recognition among the expert's peers. Often the witness will be asked to discuss dissenting views of other theoreticians or defense experts.

In the excerpt of testimony below, the witness explains the history and formation of business ethics, asserts that they are widely though not universally accepted, and states emphatically that certain economic business ethical obligations are a necessary part of a properly functioning free market system.

A. Yes. Just by way of explanation, these are not views that everybody accepts but they are widely accepted. And while they tend to converge in most instances on the same conclusions and outcomes, there are interesting ways in which they diverge sometimes as well. The economic view is the surely the oldest way of interpreting business ethics, going back at least to the late 18th century and Adam Smith. It in effect says that a market system works well only if market participants, business people, companies and so on, accept certain responsibilities; that the efficiency and ability to deliver welfare of the system depends in part on those ethical responsibilities. So, for example, intentionally

disseminating false information into the marketplace, creating a monopoly, these kinds of things would in effect be classical economic business ethics obligations.

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Q. Now, what about the stakeholder theory? I believe that's one that you are associated with quite a bit. Is that right?

A. I have written about all three of these, but I have written about the stakeholder theory and the social contract theory a fair amount. This is sort of a very plain view, at least in its rudiments. It's the simplest form.

It basically says, when you are managing a business, you need to be concerned not only about the interests of the stockholder, somebody who clearly owns a stake, has a stake in what the company does, but also other constituencies that have a stake in the company. So, for example, employers, or customers, or people in the surrounding community. And this plain-spoken notion has nonetheless, for the last forty years, since we have had surveys to survey this kind of thing, been the view that business people tend to favor more even than some of the profit-oriented notions that are more aligned with the economic view. So the literature is increasingly trying to devise more sophisticated ways to understand how companies and managers should make tradeoffs among different stakeholders if there is a conflict.

Q. When you say "stakeholders," you are talking about all kinds of people and entities, not just the stockholders, but employees and purchasers of products and others. Is that right?

A. And people who live in the community that the business works in or people who have to breathe the air that the company affects.

Q. And what about the social contract theory. Could you tell us just a little bit about that?

A. This theory also has a simple idea at its core, and it is that, in economic transactions, agreements, and the trust among people who make agreements is a critical element in understanding the obligations that businesses have. But in another sense, it derives in part from the -- our long tradition of social contract thought in the hands of people like John Locke or Rousseau or Thomas Jefferson, our own Declaration of Independence and Constitution was influenced by the social contract, ideas of the implied agreements that exist between the state and people. And then, in the last twenty years or more, there has been an increasing amount of writing on the implied agreements that exist in business. And these extend not only to sort of the general deal expectations of people about what businesses do, but inside companies, companies vary enormously in terms of their culture, what the deal is inside and in industries. And while some of these can fall afoul, can break fundamental moral elements and therefore aren't valid, increasingly we are seeing you have to pay attention to those to understand that responsibility.

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Focus Points: The expert witness will need to explain how his knowledge applies to the facts in the case. In this instance, the expert had not focused his general research on tobacco industry conduct, but nevertheless provides relevant testimony by examining tobacco industry documents and applying his knowledge to the conduct described in the documents.

Q. Now, for our purposes and for purposes of researching the tobacco industry with respect to the testimony here today, have you used the same framework, the same hypernorms, the same corporate ethics and the same sort of research analysis and

business ethics review that you would do in any of your sort of consulting work on a practical and fundamental level?

A. Yes, I have.

Q. And what have you looked at in terms of the tobacco industry?

A. Well, for the last four years, I have looked at a lot of stuff. I have looked at a lot of the documents, the kind the jury has seen. I have looked at articles that are written about the tobacco industry. I have looked at web sites. I have looked at corporate brochures, a lot of stuff.

Focus Point: On direct examination, the attorney will have his or her expert witness educate the jury and judge on some basic theories and terms used in the witness's field of expertise. Knowing exactly what the jury has heard from both sides by the time the expert witness takes the stand, the attorney is in a very good position to guide the witness through this educational process.

In this excerpt, the witness explains the framework for his theories and breaks it down into three key principles of business ethics: 1) the principle of scientific integrity; 2) the obligation to stakeholders, including customers, particularly with respect not harming the customer; and 3) the balancing of the obligation to compete with the other two principles.

Q. Okay. And in terms of the hypernorms we talked about a minute ago and I think I told you before, I don't particularly like that word, but I'm going to call them fundamental precepts, fundamental ethical principles. There are three of those; is that correct?

A. Well --

Q. With respect to your review in this case?

A. Well, there are three that I think are central at least to the issues we are talking about today.

Q. Okay. The principle of scientific integrity, would that be one of them?

A. Yes, the principle of maintaining scientific integrity is, in fact, one imported in a way from the general canons or principles of good science, good investigation. But businesses, just as individuals, are required not to corrupt that process.

Q. Okay.

A. And they also, of course, have obligations to their stakeholders not to corrupt that process to the extent that this would yield results that could harm the customer.

Q. A second fundamental ethical principle or precept, the obligation of producers to learn and know about their product, what does that mean in terms of business ethics principles?

A. Well, if you think again of the implied agreements, social contracts that you find in the business world, one of the most important, I think, is the expectation that a customer has that the person or company that produces the product will have taken care to learn as much about that product as they can, especially as regards possible harm to them. It's also a stakeholder issue and -- well, it fits, as most of the issues we are going to talk about, in all three of these schools of frameworks for ethical thought.

Q. Okay. And a third issue that we are going to talk about in this case, or third principle, the obligation to compete. What does that entail from the business ethics standpoint?

A. Well, deriving from this classical tradition of business ethics, ironically one of the first moral obligations that a business has is to compete and not in effect cut deals that

might lower the ability of the company or the industry to do right by customers and create welfare. So ironically one of the principle moral obligations is to work hard at developing the product. For example, Your Honor, let me know if I go astray here, I'm sure you will. But, if you think of the automobile industry, for example, if the automobile industry had gotten together, which it didn't, and agreed not to work for some of the safety technical advances that we now enjoy, padded dashboards, head restraints and so on, and if it hadn't been possible for some of these automobile manufacturers to come out and impress the customer with safety, we just wouldn't be as safe today.

Having provided a basic understanding of business ethics, the attorney for the plaintiff next leads the expert through the application of business ethics to specific examples of industry conduct. In this excerpt, he starts with the suppression of internal scientific research conducted by the industry. Direct Testimony of Thomas Donaldson (Plaintiff), *In re: Medical Monitoring Cases (Blankenship v. Philip Morris)*, Oct. 22, 2001. Pp. 3608-012.

Q. Okay. Now, Dr. Donaldson, based upon your education, your training and your experience in business ethics, as well as your review of the tobacco industry documents, transcripts, depositions and things, have you been able to form an opinion to a reasonable degree of certainty within the field of business ethics as to whether the tobacco industry has violated these fundamental ethical principles?

A. Yes, I have.

Focus Point: Witnesses are typically not allowed to draw general conclusions as to whether the defendant committed the alleged wrongdoing. That is a question for the jury. Testimony by expert witnesses is the exception because their training and education allow them to understand and interpret evidence that may be beyond the average person's (or jury's) understanding. Jurors are free to disagree with an expert's interpretation of the evidence or because they find the expert unreliable, but the fact that expert witnesses are allowed to offer such opinions to the jury is a testament to their importance to the judicial process.

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Q. And very generally, professor Donaldson, because I'm going to ask you about each of them specifically, but what is that opinion with respect to the three principles?

A. My opinion is that each of these principles has been violated.

Focus Point: In the following dialogue, the attorney guides his expert through specific examples of tobacco industry conduct and has the expert apply business ethics principles. The attorney starts with the so-called Gentleman's Agreement, an alleged agreement amongst the major American tobacco manufacturers not to compete to look for "safer cigarette" technology. The witness explains how business ethics principles, such as the obligation not to collude and obstruct competition, are violated by the existence of the Gentleman's Agreement.

Q. All right. Thank you. Now, have you had an occasion in terms of reviewing the tobacco industry documents to review documents referencing a gentlemen's agreement?

A. Yes, I have.

Q. And can you tell me from a business ethics point of view what is significant about the gentlemen's agreements documents that you reviewed?

A. Well, going back to what we were just talking about, namely, the obligation to compete and not collude, it stands to reason that the tobacco industry, as in any industry, hindrances to the development of products that are safer or better or the development of knowledge that is useful for the company ought not be blocked by agreements not to do certain kinds of things. And in the tobacco industry, there is a trail of convincing evidence that, in my opinion, shows that, for substantial period of time at least, the industry had kind of a gentlemen's agreement not to do in-house biological research even though some of their scientists thought that doing it out of house was not the right way to do it, and also to share the results of any safety breakthrough. Now, what that means -- I mean, that sounds very generous of the companies, but in fact that's pernicious because what it means is that there is no incentive to go ahead and invest the money to try to find the breakthrough because, as soon as you find the breakthrough, you have to share it. And that's very bad from the standpoint of business ethics and also consumer health.

Q. Okay. So let me try to make sure that we all understand this. In terms of an agreement to share information about producing a safer product, you are telling us what we might think is counterintuitive. But is what you are saying that, if there is such an agreement to share safety technology, innovative technology, then that puts a damper on any one company attempting to spend money on research to make those developments happen in a market economy?

A. Absolutely. Another aspect of this that I think is interesting too is it breaks --

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Q. In addition to the economic incentive in a market economy being diluted, if you will, with such an agreement, is there something else you were about to say that would be important from a business ethics point of view with respect to the gentlemen's agreement?

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A. Yes. The social contract or implied agreement that normally exists between researchers and companies to the effect that, if there is something that could be done and research that will help the customer, help the company in the end, it ought to be done, was also broken by this gentlemen's -- so-called gentlemen's agreement.

Focus Point: The attorney will ask an emphatic summing up question regarding the witness's conclusions.

Q. So is what you are saying that the gentlemen's agreement document actually violated all three principles?

A. It violated all three. And the third, which I haven't mentioned, is violated fairly obviously in the sense that the prevention of the development of products doesn't attend to the interest of one of the key stakeholders, namely the customer.

Focus Point: The attorney guides his expert through the application of business ethics principles to industry suppression of smoking and health research involving the exposure of animals to the tar in tobacco smoke.

Note that the attorney starts this line of inquiry by asking the expert how he knows about the particular conduct in question. This approach underscores the use of evidence in the form of documents produced by the defendant itself, highlighting the important fact that in 1998, the industry was forced to post millions of its internal documents on the Internet. This order was (and remains) unprecedented in scope.

Q. Dr. Donaldson, moving on to another area, have you also in connection with your research and work reviewed documents regarding the situation with Dr. Oscar Auerbach's smoking dogs research?

A. Yes, I have.

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Q. All right. Dr. Donaldson, this is a board that the jury has seen before. In this board we attempted to summarize a number of documents regarding the situation with Dr. Oscar Auerbach's research. Have you had an opportunity to review these documents that have been admitted into evidence now regarding his findings about emphysema and lung cancer from tobacco smoking with dogs?

A. Yes, I have.

Q. And what, from a business ethics point of view, is significant about the documents that you have read and reviewed in terms of your testimony as a business ethicist?

A. This is one of the most striking instances of business failure in business ethics that I have encountered. And it deals with the saga of a rather eccentric researcher by the name of Auerbach. You may have heard this story before, but a guy who ended up working in rather difficult conditions, very poor area of town, a Veterans Hospital, but with dogs and attempting to in effect nail down experimentally what a lot of people had already concluded. So the time frame for this study is around 1970. And keep in mind, that's about five years after the Surgeon General has already said smoking causes lung cancer. So everybody was looking for the experiment that finally nailed that down. Mr. Auerbach with more animals, more large animals, than had ever been used with an inhalation experiment came up with a finding had that some of these dogs got emphysema and some developed lesions, cancerous lesions. And the American Cancer Society was ecstatic about this. They made a business announcement. This is before his paper was published. And that was a turning point for the tobacco industry with respect to this case. They confronted the decision of what to do. The announcement by the American Cancer Society was made in January. Within a matter of days, the industry had, through its spokespeople at the Tobacco Institute and so on, begun to discredit Dr. Auerbach. Letters were exchanged between Mr. Coleman, the chairman of one of the large tobacco companies and at that time head of the committee, executive committee of the Tobacco Institute, with this gentleman asking for an impartial look at Mr. Auerbach's experiment, an impartial look which would have involved his at pointing his own scientist and having them come.

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A. At any rate, the American Cancer Society responded by saying -- they helped fund this study. So they responded by saying we don't think it would be impartial to have the tobacco industry appoint scientists, but we will go to the Surgeon General to ask him to appoint an impartial committee to look at it. And then Dr. Auerbach offered to the tobacco industry to have people come and look at the study. Now, at that point the tobacco industry sent copies of the letters but excluding the fact that Auerbach had extended an invitation and also excluding the part that said, well, we don't want you to appoint the investigators, but we would like to go to the Surgeon General and have an impartial. Those were excluded. They were sent to all physicians in the United States along with some other material attempting to discredit Auerbach. Now, this was in a context where people, as you have seen, inside these companies themselves -- while they didn't know that much about it, and there were things you could fault about this experiment, but they didn't know much about it but were saying this looks pretty good. The story ends from the standpoint of business ethics really when one of the tobacco industry representatives from an organization called the TRC -- that's actually an English group that's a counterpart to the American group came to visit Auerbach, looked at the slide that was most in question and said in his own words personally, I think this is a cancerous lesion, and there was no issue for anybody that emphysema had been produced. Now, did Mr. Sommers ever come, the tobacco industry representative, did he ever accept the invitation to come look at the slides? He did not, and many years later on the stand denied that he had been extended the invitation but, when shown a telegram in which he said thanks for the invitation, agreed that he had been invited. Now, from the standpoint of business ethics --

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A. What's most striking, I think, from the standpoint of business ethics, goes back to this principle of scientific integrity and the need to maintain it. And it's a problem from the standpoint of business ethics precisely because there was a rush to discredit in a context where the industry had an enormous obligation to attend to this particular aspect of product safety.

Q. With respect to this demonstrative and the documents that you reviewed, we have the issue of the public discrediting of Dr. Auerbach and at the same time, we do have situations where representatives of the industry have gone in, looked at the reports, looked at the slides, looked at the experiments, and made conclusions; correct?

A. Yes, that's correct.

Q. And in fact, at the same time that they are discrediting Dr. Auerbach, we have previously admitted into evidence Document 21137, a B&W document from 1970, stating: There appears to be no question that Auerbach has indeed produced an effect identical to emphysema in his studies. I think, as you noted, this was important because this is biological animal evidence in addition to the statistical studies and the causation issues; correct?

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Q. In terms of the next document, NM 18129, a B&W document already admitted into evidence, 1970:

Although open to criticism on several counts, the general standard of the paper is good. I am of the view that this shows it is now possible to produce tumors in the respiratory system of an animal by direct inhalation.

That's what was in the tobacco industry documents; correct?

A. That's correct.

Q. NM 22890, again, a BAT document, 1972:

Clear signs of emphysema seem to be associated with smoke exposure both in man and dogs.

Again, what was being said internally with the tobacco industry in the tobacco industry documents; correct?

A. That's correct.

Q. And again, NM 17772, Philip Morris, 1970:

Judging from my reading of a copy of the talk given to the American Cancer Society and from what I saw at the VA Hospital in East Orange, New Jersey, I would say that the experiment is a crude one but effective in that carcinoma in dogs has been produced. And even if the cancer production is invalidated, the obvious emphysema produced cannot be denied.

Again, an internal tobacco industry document while at the same time discrediting Dr. Auerbach; correct?

A. Correct.

Q. Another document, NM 35963, American Tobacco Company, 1970:

In spite of the qualifications in one and two, we believe that the Auerbach work proves beyond reasonable doubt that fresh whole cigarette smoke is carcinogenic to dog lungs and, therefore, it is highly likely that it is carcinogenic to human lungs.

Correct?

A. That's correct.

Q. And again, another internal tobacco industry document regarding Dr. Auerbach's work; correct?

A. Yes.

Q. While at the same time Dr. Auerbach is being publicly discredited?

A. Yes.

Q. And NM 15785, Tobacco Institute, 1970:

The CTR Scientific Director reportedly stated that he believed that the tissue produced from the experiment was actually cancerous, not the earlier precancerous changes that Auerbach had found.

Again, tobacco industry document telling us from these internal documents about the significance of this work with Dr. Auerbach and the smoking dogs, emphysema and lung cancer; correct?

A. Yes.

Q. From a business ethics point of view and the three principles you have outlined, does this violate, this episode, does this violate any fundamental ethical precepts?

A. It does, and in particular the obligation to maintain the integrity of scientific research. And I might add that this is true regardless of one's final determination of whether this experiment was perfectly well set up or not. It turns out in this instance that there were some aspect of the experiment that might have been done better, but the rush to PR in the beginning and the discrediting of a scientist is, from the standpoint of business ethics, extremely bad.

Focus Point: A common trial tactic during cross-examination of an expert witness is to explore the limitations of the witness's expertise. In other words, to talk about what the witness does not know. In the next four questions, the attorney for the plaintiff attempts to preempt the defendant from attacking the witness in this manner.

Q. And you are not a scientist?

A. No.

Q. And you are not a researcher?

A. No.

Q. And you are not here to tell us that the specifics or the details or the scientific methodology was correct; is that right?

A. That's correct.

Q. But nevertheless, the story is important from a business ethics point of view for what it tells us?

A. It's important because it represents a violation of this principle and also a violation of the company's obligation to its stakeholder, the customer.

The attorney continues guiding the expert through the application of business ethics to specific examples of industry conduct. In this excerpt, counsel has the expert discuss the Frank Statement marketing campaign, which was touted as an industry-sponsored effort to research the health effects of smoking, but actually concealed a disinformation campaign that sought to obfuscate the dissemination of valid smoking and health research. Direct Testimony of Thomas Donaldson (Plaintiff), *In re: Medical Monitoring Cases (Blankenship v. Philip Morris)*, Oct. 22, 2001, Pp. Pages 3638-45.

Q. And I would like to put up, if I may, the Frank Statement?

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Q. In your work, have you had an occasion to review and consider and rely upon the Frank Statement?

A. Yes.

Focus Point: The attorney takes a moment to remind the jury why he has called an ethicist to testify. In essence, the field of business ethics is a metric for understanding what types of conduct constitutes lawful and unlawful business behavior.

Q. Now, Professor Donaldson, I think you told us before that goals and aims and sometimes even codes might be important in terms of business ethics; is that right?

A. Goals probably more important than codes, but, yes.

Q. Okay. Why are aims and goals important?

A. Aims and goals are important because they set the metric, the set, the yardstick for people to be evaluated by inside the company, managers, all of us who work inside organizations.

Q. All right. The jury has seen the Frank Statement before several times. We have focused on some highlighted areas.

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

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

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

And we are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.

In your review from a business ethics perspective, does the Frank Statement, is it an expression of aims or goals?

A. Today that would -- it's an expression of aims and goals that, today, would actually be called a credo statement, a statement of fundamental principles or beliefs, so, yes.

Q. In business ethics, is there a concept that is known as the ethics of commitments?

A. There is. I mean, schools of thought --

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Focus Point: The attorney has the witness return to the theoretical basis of his conclusions to keep the jury reminded of the structure upon which his opinions are based.

Q. Dr. Donaldson, is there an area known as ethics of commitments, and does it have long historical roots?

A. It does, yes.

Q. What are those long historical roots, sir?

A. Well, sometimes called Deontological ethical commitments, the idea that you assign yourself additional duties by proclaiming or specifying what it is you are going to do is as old as promises, it's as old and compact or contract we find in a social contract tradition or religious traditions and so on. In fact, if I can go ahead, if you had to split the two major streams of ethical theory from the ancients on into two kinds, one would be into the commitment side, the Deontological side, and the other into the consequential utilitarian side.

Q. Now, I know this is probably the stuff of articles and teaching, but to just break it down into its most simple form to understand, is the ethics of commitment like a promise?

A. Promises would be part of that broad fabric of commitments.

Q. In business ethics, is there an obligation to fulfill your commitments, your promises?

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A. One kind of obligation we can have is certainly -- or a company could have is to fulfill a commitment that was made, sometimes informally and sometimes formally.

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Q. Now, Dr. Donaldson, isn't it just simply the truth, irregardless of the ethics of commitment, irregardless of the fundamental schools of thought in business ethics, the shareholders school, the social contract school, the classic or economic school, that the goal of business is simply to make money and that anything that meets that goal, as long as the ends is money and profits, that's in reality business? Is that not right?

A. No, that's not right. I don't know of any serious writer, including Milton Friedman, a Nobel Prize winning economist who is known for a pretty tough view of capitalism that would say that. In other words, no attention to stakeholders, no attention to contractual, implied contractual issues no attention to the mores of the community in which the business operates. This would not be a view that anybody writing seriously about ethics would maintain.

Q. Writing seriously about business ethics?

A. Writing seriously about business ethics.

Focus Point: The potential for bias of any witness is always relevant. In this excerpt, the attorney for the plaintiff addresses potential bias by having the witness acknowledge that he has consulted for tobacco manufacturers.

Note, however, that the vast majority of scientists and other experts who have testified for plaintiffs in tobacco litigation have never worked or consulted for the industry. Their neutrality is demonstrated by reviewing their research and qualifications.

Q. Now, when we talked about corporate culture as well, and you mentioned earlier that you had done some consulting for Brown & Williamson, was there anything illustrative about that experience that folds into your views today?

A. Yes. In particular with regard to cultural issues inside the tobacco industry and a company. One of the reasons why culture turns out to be so important is that, without an opportunity, for example, to air and discuss fundamental issues of concern to the industry, the industry is in effect blinded and unable to do what it needs to do. I was asked in the mid to late '80s to spend a day on two successive occasions a year apart with senior executives at Brown & Williamson. And they flew me to two very nice places, Hilton Head and Aspen, on those occasions, and I attempted to talk with these executives. I insisted, even though I wasn't able to put it on the program, that we would talk about smoking and health. That was one of the conditions I had for doing this. And I was -- when I attempted to raise the issue, in the first instance at Hilton Head, I was stunned because nobody said anything. It was just quiet; it was dead quiet. And I'm pretty good at smoking people out. I could wait out a group until somebody has enough courage to speak, until finally one person said we don't believe there is a connection between smoking and health. And that was the end of it. I realized at that point I couldn't and I realized later as I looked through a lot of these documents that what came to be called the tobacco hush, the inability because of legal constraints to talk about these issues openly, was one of the most important cultural issues preventing the industry from doing what it needed to do.

In this excerpt of cross examination testimony, counsel for the defendant reviews a portion of the expert's direct testimony on industry alleged disingenuous efforts to produce safer cigarettes. Cross Examination Testimony of Thomas Donaldson (Plaintiff), *In re: Medical Monitoring Cases (Blankenship v. Philip Morris)*, Oct. 22, 2001, Pp. 3666-74, 3676-79.

Q. Okay. And it's your view that the industry only made isolated attempts to make a safer cigarette; isn't that right?

A. That's a reasonable characterization, yes.

Q. And it's also a reasonable characterization of your testimony that the industry didn't seriously pursue attempts to make a safer cigarette; right?

A. There are instances appearing especially in late '80s and into the '90s where I think the effort was far more serious than it was earlier. So I don't mean to say that -- I don't mean to characterize the cigarette industry or tobacco industry as never attempting to make a safer product.

Q. But you felt that the industry didn't meet its ethical obligations in this regard; correct?

A. That's correct.

* * *

Q. Well, when we discussed this at your deposition, you testified, I'm sure you recall, that there are isolated instances of attempts to pursue safer products. Do you recall that testimony, sir?

A. I do recall that, yes.

Q. Okay. Well, since you mentioned tar, let's talk about tar. You are aware, I take it, of the general notion that less is better when it comes to tar?

A. Yes.

Q. And the theory is, the less tar you put into a cigarette, the safer the product would be?

A. Well, I don't know of such a theory. No.

Q. Are you aware --

A. You are talking about modern theories now?

Q. Well, Dr. Donaldson, let me do it this way. You are aware, are you not, that, since the 1950s, public health scientists have urged these companies to reduce the tar in their cigarettes?

You are aware of that?

A. I'm aware that tar is what was painted on the back of mice; and that it has carcinogenic properties, yes.

Q. Well, are you aware that the public health community asked these companies to reduce the tar content of their cigarettes?

* * *

Q. And you know that the tobacco companies did try and reduce tar; do you not?

A. As I mentioned, I think they did offer products to their customers that had lower tar through filtration mechanisms and so on.

Q. And that was an attempt to make a safer cigarette as they were requested to do by the public health officials, including the Surgeon General; correct?

A. Well, I think there are a variety of motives for what's sometimes referred to as the tar derbies, but we hope that that was one of the things in their mind, yes. I don't doubt that some people did have that in mind.

Q. And you are aware, are you not, that the sales-weighted average of FTC-measured tar and FTC-measured nicotine has fallen dramatically from the cigarettes that were sold in the 1950s?

Focus Point: The nicotine and tar levels displayed on cigarette packaging and advertising are inaccurate. They do not provide information about the smoker's actual level of exposure. Best estimates hold that actual exposure levels are higher for many brands of cigarettes. Also note that although referred to as the FTC method, the tobacco industry actually developed the standard for measuring nicotine and tar.

A. It has fallen, yes.

Q. All right.

* * *

Q. Okay. Now, you have heard of a scientist at Philip Morris by the name of William Farone; have you not?

A. Yes, I have.

Q. And in coming to your conclusions that this industry didn't meet its ethical obligations to make a safer cigarette, I assume you read Dr. Farone's testimony?

A. I don't recall reading Dr. Farone's testimony. I may have years ago. I didn't read Dr. Farone's testimony, as I recall, this round.

Focus Point: The attorney for the defendant challenges the witness as to which depositions he has read. The implication is that the witness has formed his opinions without having fully researched the conduct in question.

In preparation for trial, an expert witness should make sure he or she knows the relevant materials and can identify them. The expert should expect to receive guidance and case-specific materials from the attorney for whom he or she is testifying. Additionally, the expert may be called upon to assist in pre-trial matters, such as interpreting documents and other materials produced in discovery. (Discovery is a pre-trial process in which both parties exchange documents and other materials that are relevant to the alleged wrongdoing.)

Q. Do you think you have ever read Dr. Farone's testimony?

A. I don't recall.

Q. Have you read the testimony of any scientist at Philip Morris?

A. Yes, I have.

Q. Who have you read?

A. Well, I read, not all that long ago actually, the testimony of two -- two or three Philip Morris scientists that have actually appeared in this or will appear, I guess, in this trial or have appeared: Dr. Whidby and Dr. Carchman.

Q. You certainly didn't do that at the time you were deposed just a couple of months ago; correct?

A. I had not, when I was deposed, read those depositions, no.

Q. And yet you had come to the identical conclusion. You didn't think in fairness you needed to read their depositions or what the Philip Morris' scientists had to say before reaching your conclusions about whether they tried to make a safer cigarette?

* * *

Q. Isn't it true, sir, that when you gave your deposition testimony in this case and you formed your opinions in this case, you showed up with a list of the documents that you had relied upon in forming your opinions. Do you remember that?

A. Yes.

Q. There weren't thousands of documents on that list, were there?

A. No.

Q. There were 160; right?

A. I didn't count them, but that sounds right.

Q. And there weren't hundreds of depositions, were there? There were four; is that right?

A. That sounds right.

Q. And, included in the four, there was nobody who was a scientist at Philip Morris; is that right?

A. I think that's right, yes.

In this excerpt of cross examination testimony, the attorney for the defendant challenges the expert's ability to apply his expertise in business ethics to the question of whether the defendant purposely stalled efforts to develop a safer cigarette. Cross Examination Testimony of Thomas Donaldson (Plaintiff), *In re: Medical Monitoring Cases (Blankenship v. Philip Morris)*, Oct. 22, 2001, Pp. 3681, 3686-93, 3725-26, 3754-55, 3758-60.

Q. Okay. Now, have you tried to understand the difficulties, Dr. Donaldson, that are involved in trying to reduce tar?

Focus Point: The attorney for the defendant will try to show that the witness is not qualified to understand the science and technology involved in researching and manufacturing so-called safer cigarettes or that he has not looked closely enough at the industry's scientific documents. These arguments support the conclusion that any related ethical evaluation is premature.

Through this cross examination, the attorney focuses the court's attention on the underlying technological questions ostensibly to provide an explanation for why the defendant allegedly decided not to pursue safer cigarette technology. Note that this explanation shifts attention away from documents that discuss the potential liability of safer cigarette research.

Attorneys for the defendants have argued that the internal documents released to the public are not necessarily indicative of the defendants' true behavior. Rather many of these documents represent unauthorized actions or extreme views of a few individuals, according to the argument. The following series of questions make essentially the same argument. The attorney for the defendant is saying that he does not care about the evidence relied upon by the expert. Rather, he would expect the expert to leave no stone unturned, as it were, before concluding his evaluation of the defendant's ethics.

A. Not in detail, no.

Q. Have you made an effort to try and understand the difficulties in trying to reduce nicotine?

A. No. I mean, I read about these things, but not being a scientist, it's not so easy to know.

Q. Have you made an effort to try and understand what Dr. Farone meant when he said that these companies devoted enormous resources and scientific talent to try and make a safer cigarette?

* * *

Q. . . . Are you familiar with the work that was done by Philip Morris on filters?

A. Not to any great extent, no.

Q. Are you aware that filter design is pretty complex?

A. I am aware that it's fairly complex, yes.

Q. Have you made any effort to find out why it is complex?

A. No.

* * *

Focus Point: After the attorney for the defendant focuses his cross examination on the underlying "safer cigarette" technology, he asks a series of questions designed to show the limits of the witness's expertise. The expert correctly admits to these limitations. Any exaggeration of his expertise could be used to impeach his credibility.

Q. Have you tried to come to grips with the complexities of the various filter materials that were being used?

A. Well, not to any great extent, no.

Q. How about the filter paper that was being used?

A. Well, I have read from time to time about aspects of cigarette paper and the extent to - - but again, my inquiry has not focused on issues of the construction of the cigarette or the filter.

Q. Okay. Has it focused on the shape of the filter?

A. No, it has not focused on the shape of it.

Q. Has it focused on the density of the filter?

A. No. I mean, I read about density.

Q. Has your inquiry focused on the length of the filter?

A. No.

Q. Has your inquiry focused on the way the fibers are crossed and woven within the filter?

A. No.

Q. Do you know that some of that filter technology is used to reduce tar?

A. Yeah, I did know that, yeah.

* * *

Focus Point: The attorney for the defendant is trying to make it seem as though cigarette manufacturers, including the defendant, tried their best to make "safer cigarettes" but consumers just did not like them. The witness should not let jurors think this absolves the defendants of their duty to their customers to reduce the known risk of a product or to fully divulge the known risk. The expert responds to this argument in his direct testimony by stating that market forces do not make companies produce unsafe products.

- Q. Are you familiar that charcoal may reduce certain aldehydes in cigarettes?
- A. Yeah, may reduce things that other filters do.
- Q. And may affect the taste of the product?
- A. Sometimes.
- Q. And consumers don't seem to like it too much, do they?
- A. Well, that goes beyond a claim I could make.
- Q. Well, do filter products sell very well in the United States?
- A. They seem to.
- Q. They do? What filter -- I'm sorry, I asked you. Do charcoal filter products sell well in the United States?
- A. I don't know.
- Q. You didn't think that was significant in trying to ascertain your views as to whether these companies tried to make a safer cigarette; right?
- A. No.

* * *

Focus Point: The attorney for the defendant is trying to undercut any arguments as to the importance of business ethics by claiming that a lack of consumer acceptance of "safer cigarette" brands justifies making unsafe products. The expert might have responded by saying that the lack of consumer acceptance of "safer cigarettes" may exist, in part, because many consumers are not fully aware of the true health risks of smoking, and that this lack of awareness is partially the result of the industry's efforts to obfuscate the public dissemination of smoking and health research.

- Q. Well, you recognize, do you not, that these companies faced enormous technical and scientific obstacles in trying to create a cigarette which reduced tar, which reduced nicotine, which tried to reduce some of the bad compounds in cigarette smoke. You are familiar with that?
- A. Sure. It's an enormous issue.
- Q. And you are also familiar with the fact, are you not, that, when you do things to cigarette design, you can affect consumer acceptability?
- A. Certainly.
- Q. To the point where smokers won't smoke them?
- A. Yes. Or very few smokers will smoke them, yes.
- Q. Or very few. And in general, you would agree with me, would you not, that a safer product that nobody smokes doesn't do the public health very much good?
- A. A product that nobody will smoke won't ever, you know, so long as it's not possible for them to be sold on the idea, is not going to help the health situation, that's correct.

* * *

Focus Point: The expert's admissions as to his preparation support the defendant's case. The witness tries to counter these implications by stating that he is not an expert in "safer cigarette" technology. The witness wants to cut off the questioning altogether, rather than allowing the attorney to draw him into a series of questions on the scope of his testimony.

Q. And you are aware that there have always been efforts to selectively reduce some of the bad compounds or compounds which have been identified as potentially carcinogenic in cigarette smoke; right?

A. Sometimes, yes.

Q. And that's called selective reduction techniques?

A. I didn't recall the name, but I certainly read about it.

Q. And have you done an investigation to understand or try to understand or comprehend the difficulties which are involved in trying to selectively reduce certain compounds from cigarette smoke?

A. I focused mostly on administrative difficulties. As for scientific difficulties, I'm not in a situation to judge those.

Q. So you don't know from a scientific perspective what obstacles these companies faced, what difficulties they faced, and what they tried to do to selectively reduce some of the bad compounds from cigarette smoke; is that correct?

A. Well, I wouldn't put it that way. I mean, I know what I read, but I'm not a scientist. So I know some of these efforts never got off the ground.

* * *

Q. Are you familiar with the technology that goes into the Eclipse cigarette?

Focus Point: R.J. Reynolds marketed its Eclipse cigarette brand as a reduced-risk cigarette. Subsequent research conducted by the Massachusetts Department of Public Health, however, revealed that the reduced-risk claims may have been false. This research led several states to jointly file suit against R.J. Reynolds in Vermont. The lawsuit is currently in the discovery phase of litigation.

A. Not in the way that one should be as a scientist.

Q. Well, you are not even familiar enough with it in the way an ethicist should be, are you?

A. Well, I certainly hope so.

Q. Well, let's talk about that, Doctor. You have told this jury that you want to be fair; right?

A. I don't remember saying that, but I certainly do want to be fair.

Q. And as a matter of fact, you couldn't look yourself in the mirror if you weren't fair?

A. It would be very hard. Well, you know, I don't claim to be a saint. I don't claim always to be fair. I certainly think it's something I try to do.

Q. You make an effort to be fair?

A. I try, yes.

Q. And you come in here and tell this jury that these companies made -- your words again, let me get it right -- only isolated attempts to make a safer product, but you haven't looked to see all the things that they have done in cigarette design, in reducing specific compounds, in making these highly complex cigarettes? You haven't looked at all of that data, have you? You haven't familiarized yourself with it?

A. Well, I mean, I will say that the short answer is no. But would you mind if I go on about that?

Q. Well, I would mind, if His Honor would allow me.

A. Okay.

* * *

Focus Point: In repeatedly focusing on the witness's limited scientific expertise, the attorney for the defendant also is implying that the industry tried very hard to produce reduced-risk cigarettes. The attorney knows that the witness lacks the scientific expertise to challenge this implication.

Q. How many Ph.Ds. Does Philip Morris employ in terms of trying to make a safer cigarette?

A. I don't know how many Ph.Ds.

Q. How many analytical chemists?

A. I don't know how many.

Q. Organic chemists?

A. I don't know the number.

Q. Biologists?

A. I don't know the exact number.

Q. How many people does R. J. Reynolds Tobacco Company employ in its R&D department to try and make a safer cigarette?

A. To make a safer cigarette? I don't know.

Q. How many Ph.Ds. do they employ?

A. I don't know.

Q. How many toxicologists?

A. I don't know.

Q. How many chemists?

A. I don't know.

Q. How many biologists?

A. I don't know.

Q. And you could come in here in fairness and tell this jury that these companies didn't make an effort to make a safer cigarette when you haven't even tried to find out all of that information?

A. Well, first of all, that was not my claim. And second, yes, I can come in and say what I said with some confidence. If you will let me go on, I will --

Focus Point: The attorney for the defendant takes the subject matter of his cross-examination in a different direction. He first developed evidence to support the argument that the defendant never acted unethically. Then, he pursues the argument that even if the defendant had acted unethically, the defendant has changed. This second argument relates directly to any claims for punitive damages. If the defendant is found liable, attorneys for the defendant will very likely assert that only compensatory damages are needed, which are damages designed to compensate a plaintiff for his or her loss. Punitive damages, on the other hand, are designed to change a defendant's behavior and typically are much larger than compensatory damages. Thus, if the defendant successfully convinces the jury that it has changed for good, the jury is less likely to award punitive damages.

Q. Now, I understand, Doctor, that you have not looked at all at the current activities of these companies; is that correct?

A. I'm confused. I thought we were just talking about some current activities.

Q. Well, didn't you tell me when I took your deposition just a couple of months ago that you hadn't looked at the current activities of these companies?

A. At the time I gave that deposition, that's quite right. My focus had not been on what was done in the '90s and late '80s, that's quite right.

Q. And you are therefore not rendering an opinion as to whether these companies acted in an ethical manner in the '90s, are you?

A. No. I mean, I was glad to see in 1997 some tobacco companies said that smoking causes disease. But I'm not in a position, I haven't looked hard enough at what's going on in the late '80s and '90s to render a judgment about the ethics of the tobacco industry.

Q. So the ethics of the tobacco industry that you are talking about predate the late '80s; right?

A. For the most part. For the most part.

Q. And you are aware that this class of smokers includes smokers who bought and smoked cigarettes after January 31, 1995; correct?

A. That's my understanding, yes.

Q. Some of whom may have started smoking in January of 1995?

A. That's my understanding, yes.

Q. Okay. Maybe close to ten years after you made the determination of when the companies were acting in an unethical manner; is that right?

A. Well, that's right, but -- well, okay.

In this excerpt of direct examination testimony, the expert witness testifies that allowing attorneys to manage scientific research offends the core value of scientific integrity. Direct Testimony of Thomas Donaldson (Plaintiff), *Washington v. American Tobacco Co.*, Oct. 10, 1998, Pp. 4239-41.

Focus Points: The next question involves the use of an exhibit. The attorney conducting the examination will show the witness an exhibit, ask the witness to describe it and/or acknowledge its authenticity and, then, have the witness apply his or her theoretical concepts to it and draw a conclusion based upon his expertise. In some cases, the attorney will have the witness help introduce a document or other item into evidence. This is a ritualized process designed to ensure the item is authentic and that each party has an opportunity to challenge the introduction of the document into evidence.

Q: I want to show you Exhibit 1499, and ask you about this . . .

This is dated October of '76. And what I want to ask you about is, assuming that this is a genuine document, and what is represented in the document is accurate, the public position of tobacco companies with respect to causal explanations of the association of cigarettes smoking and diseases is dominated by legal considerations . . . This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease. It puts the industry in a particular position with respect to product safety discussions, safety evaluations, collaborative research. All Right. The question I have is, assuming the accuracy of this statement, and this memorandum, would the fact that legal considerations dominate the position the company takes, and puts them in a particular position with regard to product safety,

safety evaluations, and collaborative research, involve any core values and if so which one?

A. Yes. Well, one that is striking here, I think, is the obligation to engage in principles of scientific integrity, in other words, do real research, not fake research.

Sometimes lawyers can make it worse. There are some other examples of this in business ethics, to the extent as we have been asked to assume, lawyers are managing research, are picking projects and in effect picking them for their litigation value, because they will say the right thing so they can introduce what they want in court. This offends that core value. And speaks to the fact that sometimes lawyers -- lawyers are important in business ethics in the context of a company, but they have a special role and need to be kept in that special role by managers.

Focus Point: Unlike other witnesses, expert witnesses are allowed to present an opinion in the form of an answer to a hypothetical scenario. The use of hypothetical scenarios allows the attorneys to explore the scientific and technical information being presented by the expert as well as his or her application of such information to the facts in the case.

Q. But let me focus this more narrowly: I want you to assume that we have a situation where the legal considerations cause the company to deny things which they know are true, affects their treatment of products from a safety standpoint, affects how they research and so on. But they are getting advice from attorneys. These are the lawyers for the company, the lawyers are advising them to do this. Does that not excuse, in a business ethics sense, the company agreeing with the lawyers?

A. Not at all.

Q. Why not?

A. Not at all. I was interviewed once on National Public Radio, asked about a case where attorneys had recommended one thing, in fact in the Johnson and Johnson [makers of Tylenol which had been adulterated and caused injury] case, attorneys, outside attorneys were recommending that Johnson and Johnson not pull the product, or so I'm told. Sometimes you have to kick the attorneys out of your office if you are a manager. Now, the question of whether a good attorney would really recommend this kind of thing or not, I think is open.

The witness reviews tobacco industry strategies for perpetuating controversy on smoking and health research and, then, discusses the ethical implications. Direct Testimony of Thomas Donaldson (Plaintiff), *Washington v. American Tobacco Co.*, Oct. 28, 1998, Pp. 4255-57, 4281-89, 4290-92, 4302-04, 4332-34, 4342-45, 4351-57, 4404-06.

Q. Can you explain, if you can, why it is -- why is it from a business ethics standpoint improper for an industry to claim controversy in this fashion in order to maintain their existence? What's wrong with that?

Focus Point: Compare the manner of questioning on direct examination with that of cross-examination. During direct examination, questions range from general to specific, and the witness is given wide latitude to explain his or her answer. On cross-examination, the questions are targeted and give the witness very little latitude. Sometimes the witness is instructed to answer with only a “yes” or “no.” If the witness feels that he or she was cut off from providing a full answer, then directly after the conclusion of the cross-examination, on redirect, the witness will likely have an opportunity to explain. The attorney conducting the redirect testimony will decide what issues and questions to revisit.

A. . . . We just saw a bunch of documents, it's hard for me to remember them all. But if I recall, one of the first ones said it's not in the interest of our industry to allow the CTR to do serious research. The first thing I would say from that standpoint of business ethics is that the claim about at least the long-term interests of the tobacco industry is, in my opinion, false, that in general the supportive core values of the kind we are talking about are in the long term interest of the industry. So I think there is a business ethics mistake, of a sort, there.

Q. You mean financially?

A. I think financially, absolutely.

Q. Why do you think that?

A. Well, an industry, and we have found this often, an industry that doesn't -- that violates fundamental principles of ethics in ways that are bound eventually to offend the customer, to raise legal issues, to alienate suppliers, runs the risk of incredible damage. At Wharton, for example, for the last three years, we have had the chairman and chief counsel, that's the attorney, from Salomon Brothers come to Wharton and speak to all of our first year students. And the reason we invite them is because Salomon Brothers is the subject of a huge business ethics/legal scandal that occurred in the early '90s where Salomon Brothers tried to corner the bond market. Estimates of how much Salomon Brothers lost in terms of lost customers for this kind of ethical shenanigans, was over \$1 billion. There is a substantial cost in neglecting business ethics. And a lot of literature identifies that. Again in this instance we have with this pattern of documents, and making the assumptions you have asked me to make, the very dark pattern of doing fake research and not telling the truth to the public about an issue that is probably the most important business ethics issue that's on the plate for people in this industry. So it violates the hypernorm -- excuse me, the core value, the core value of not misleading or lying to your customers. It violates the core value of not corrupting scientific research, and it violates the core value of not paying attention to your product and finding out as much as you can about it.

* * *

Q. . . . And Dr. Osdene, after recommending subjects that were safe to be funded for research, advises that these are subjects [that] should be avoided and should not be funded and it is developing new tests for what I want you to assume represents cancer, all right?

A. Yes.

Focus Point: When an expert witness is asked to assume that something is the case, it means that either the witness is being presented with a hypothetical scenario, that the parties have agreed previously as to some factual or legal aspects of the case or that the attorney asking the question will provide evidence to support the assumption later in the trial.

Q. Now, assuming the truth of this, that the director of Philip Morris is recommending research which avoids tests that might indicate smoking causes cancer, does that involve any core value principle?

A. Yes, indeed it does. It clearly involves the issue of integrity of the research, I mean from the standpoint of business ethics what that should read is subjects to be vigorously pursued.

* * *

Q. Thank you. Which of these core values are involved, if any, Doctor, in connection with subjects to be avoided, don't do any research that might imply smoking causes cancer?

A. Principally, . . . you ought not to corrupt research, in other words you ought to openly pursue issues that are important. And second, the tobacco industry, given what we have assumed, has a special obligation to pursue the question of the biological hazard, because that's the ethical issue that confronts them as the most important.

* * *

Q. And I want you to assume for me that this is an example of what I asked you to assume as being true, that there were two parts to the CTR research, contract and peer, and that peer review was used whenever they had to defend themselves against claims they weren't doing good research, and the other was used to create controversy when they were responding to the surgeon general or somebody else.

A. All right.

Q. I want you to assume that's what's going on here. I want you to tell us whether or not any core moral value is involved when a company takes a tactic like this to avoid the research dilemma presented to a responsible manufacturer of cigarettes, which on one hand needs to know the state of the art, and on the other hand cannot afford the risk of having in-house work turn sour. I want you to assume what that means is that the responsible manufacturer, they say, has to know about their product. But, they can't afford to do research which might turn out to show that their product is dangerous to the consumer.

A. Okay.

Q. Now assuming I have correctly asked you to -- correctly identify the subject, and that it's true, does that create any kind of problem in the area of core values?

A. Well, it creates a number of problems. Now it's important to make a couple of assumptions here. One is that what they are talking about when the work turns sour means it might disclose, for example, a connection between cigarettes and disease. And I take it you want me to assume that --

Q. I do.

A. -- as a part of this. From the standpoint of business ethics, it's -- it seems to be an instance of where lawyers make it worse. I mean the driving consideration here is avoiding the law, or avoiding the penalties of the law. But it suggests a kind of mockery. We will do this research in CTR as a kind of appearance, but we don't -- we don't do real stuff inside, because that may go sour. There are a lot of problems with that, not only the core value of scientific integrity, but also to the extent they aren't doing genuine research to make the product better or safer, that violates another principle of market fairness.

They are not competing in a way which will deliver what the market is supposed to deliver.

* * *

Q. This document says historically the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, et cetera. And then it goes on to say in general these programs have provided some buffer to the public and political attack of the industry, as well as background for litigation strategy. Now assuming that this is a true statement and assuming that it's from the internal files of the company, would such an approach with regard to the CTR, and similar organizations, involve any principle of business ethics, in your opinion, that's an established principle?

Focus Point: Throughout all parts of his or her testimony, including cross-examination, the witness may ask counsel to clarify the question.

A. And I assume that we are interpreting as a background for litigious strategy to mean we will get some stuff, we will get some information, that if we are challenged in court over our products being unsafe or whatever, we can throw this evidence out which appears to make us look better.

Q. I want you to assume it means put the tobacco industry in the most favorable light.

A. Okay.

Q. Whether it's for litigation, political relations, public relations.

A. Yeah. What's at issue here from the standpoint of business ethics, is what's being left out, the most important item, meaning the stakehold of the customer, the health of the customer. An industry in crisis with these kinds of claims against it, have different ways of responding. This suggests a response entirely in terms of litigation strategy and not in terms of business ethics issues.

* * *

Focus Point: The attorney introduces a memo from Dr. Thomas Osdene, a tobacco industry director of research. The document states that if a scientist's study shows no withdrawal from nicotine they will want to pursue it vigorously, but if it shows nicotine withdrawal, they will want to "bury it."

Q. . . . Assuming this is a genuine internal memo of Philip Morris dated November 3, and the director of research, Dr. Osdene, is talking about a study that will be done and how they will treat it depends upon the results obtained. If it shows that the results of nicotine are similar to those with morphine or caffeine, they will bury it. Assuming this is true, does this involve any core value?

A. Well, it does. And I mean it obviously involves the values that we have talked about so far, especially the issue of scientific integrity. I think I would say from the standpoint of business ethics, it's interesting, it's haunting, because it reflects a syndrome that you see many times, where people because they think it's their job, and because profits are at stake, they are able, somehow, to rationalize saying things like that. We find it in the tragic instances where industries go down, often with people who are not evil people, but have just been caught up with the game of pursuing profit.

Q. But what's wrong with a company doing some confidential research, seeing how it comes out, and if it doesn't come out favorable to their product, turns out to be addictive, burying it? I mean why -- what's wrong with that? Business is business.

A. Business has to do with providing the customer with what the customer is in the market for. And if that means falsifying what you know about your product, and it means not looking into a serious challenge, one that's raised in effect a crisis for your industry, then all business ethics bets are off. That's where you crossed a pretty dramatic line.

Q. Well, suppose Dr. Osdene says to you, well, wait a minute, Dr. Donaldson. Everybody knew that it was addictive, the surgeon general has said it's been addictive since 1988, all kinds of publications and the literature says it's addictive, even the surgeon general's report talks about it being like morphine and caffeine, so what if we bury this report? We haven't done anything wrong because the world knew about it anyway. Look at the surgeon general's report. What's wrong with that argument, if anything?

A. It's not a good excuse from the standpoint of business ethics. It's not, again, in part because the stakes are so very high for key stakeholders, but it's not even the standpoint of traditional ethical theory. Even if somebody knows something, I have a responsibility under certain circumstances to reveal that.

* * *

Q. . . . Now I want you to assume that there are a number of internal documents that reflect -- from the tobacco industry, that reflect the same sorts of concessions about smoking and disease being associated.

* * *

Q. . . . Now assuming for purposes of my question that the public stance of tobacco regarding the connection between smoking and disease was entirely inconsistent with their internal documents, acknowledging that connection --

A. Okay.

Q. -- are any core values involved in that situation?

A. Well, they are. I mean, in fact a more fundamental logical principle is involved, and that is one of consistency. It's like the kid who comes home from school and pulls a Magic Marker out of his pocket and shows his father, his father is irate, furious, he said you stole that, you can't go anywhere for the next two months. By the way, if you ever need a Magic Marker in the future, let me know, because I can bring one home from the office for you. I mean, the child sees, but the father may or may not, the inconsistency. And you find this, as you examine the profiles and histories of corporations, you find not so dramatic as this, typically, an inconsistency that offends the fundamental core values, the most important being the obligation to refrain from something that is false.

* * *

Q. . . . The point here is the value of having CTR doing work in a nondirected and independent fashion, as contrasted with work either done in-house or under [Brown & Williamson] contract, which if it goes wrong, can become a smoking pistol in a lawsuit. Now I want you to assume that the subject, as you remember, is research which helps or research which hurts the industry. That's the subject.

A. Okay.

* * *

Q. Would you tell us whether or not this particular approach in this paragraph involves any core value, considering have the CTR work in a nondirected, in independent fashion, which if it goes wrong can become the smoking pistol in a lawsuit?

A. Okay. And the -- the context is one where there is concern about genuine nondirected independent research because it might show that in fact we could be taken to court and held liable for creating a product that harms somebody. And again, I mean once more, this violates the principles of scientific integrity, it violates the principle that a producer, manufacturer, should know about and inform appropriately, know about the risks of the products and inform the customers appropriately.

* * *

Q. If a corporation -- assume that a corporation elects to have research done about its product in such a fashion that if they don't like the results they can ignore it, hide it, conceal it and never tell anybody about it -- now I think you have answered this question -- isn't that okay for a business to do that because it's their own private research?

A. From the standpoint of business ethics, this is shocking, and it is probably worse than not doing anything at all, because it's manipulative. If you didn't do anything at all you then would be trying to manipulate the results into a favorable posture and mislead people. From the standpoint of business ethics, it's a serious issue on any of the three basic frameworks that we have talked about.

* * *

Focus Point: Counsel introduces a report produced for Liggett & Myers showing that there are biologically active materials present in cigarettes that are cancer-causing, cancer-promoting, poisonous, stimulating, pleasurable and flavorful.

Q. The surgeon general contacts the tobacco companies, asks them to please provide to them any research they have that would assist them.

A. Yes.

Q. The scientific board, in arriving, in conclusion, this report was within the Liggett & Myers files, it was never ever given to the surgeon general. Are you with me so far?

A. Yes.

Q. Okay. Now, can you tell me and the jury whether or not that action involves any core values?

A. And the action is refraining from providing the information to the surgeon general?

Q. You are a cigarette company, you have a document from a reputable laboratory that says your product causes cancer.

A. Yes.

Q. Your product is poisonous.

A. Yes.

Q. The surgeon general says to you, please give me anything you have on research. You know about that report. You say I ain't got anything. The question is, does that involve any core values?

A. Yes, it does. And in fact, as you may well guess, most ethicists writing about this thing have said you have an even stronger obligation if you are asked than if you are just sitting around trying to decide whether you ought to reveal something. In this instance, obviously there is a social process going on where people want this information for a

certain purpose, and if it's from a reputable firm, and I would say even probably in a context where they had contravening evidence, both sets of evidence should be provided.

* * *

A. You have an obligation. This is in part connected to the fact that often inside industries, inside industries, they have information before people outside, especially regulators, know about it. . . . Often information is available to the industry before it's available to the people. And certainly the surgeon general's committee didn't have this, business ethics suggest very strongly this should be provided.

* * *

Q. . . . Now I want you to assume this memorandum [from Lorillard CEO and scientist Alex Spears, dated 1980] marked confidential has potential long-term scientific studies, and the last page looks like this. Subjects to be avoided. The previous one, 1978, looked like this. You will see this language is identical. Now I want to repeat my questions. Assuming that these are accurate internal documents which Philip Morris never thought would ever see the light of day, marked confidential and secret, does a company have an obligation to monitor decisions like this or is it okay to make a decision at one point in time and never look at it again? That's my question.

A. Yes.

Q. Yes to what? What obligation does one have?

A. Oh. Well, I mean, one of the things that -- I think you learn, as you try to pay attention to business ethics and companies, is while they write codes of ethics in certain ways, so much as to do -- so much of whether they are doing a good job or not from the standpoint of business ethics has to do not with what the code says, but what senior people do. And in particular, how they respond at critical moments. What is stunning about this, of course, is you have a memo which is absolutely against what they should be researching from a standpoint of business ethics, and it shows up again. Now, as a business ethicist, you want to look -- there should have been a reprimand. This should not have occurred again. And as you look through documents like this, you look for traces of how people are responding. Or not responding, as the case may be.

Q. Now, I want you to assume that the Spears referred to is this gentleman, a scientist and executive at Lorillard. And the other gentleman, Seligman, is the vice-president of research and development. Does it make a difference that this correspondence that we are looking at is at that level of the company and is not just, say, a salesman out in the field making a note in a notebook? Does that make a difference?

A. Yes.

Q. And why does that make a difference?

A. Well, as a number of people who have written in this area have said, and to some extent it's intuitive, the higher you go in the organization, the more you are getting at what's been called the central internal decision making structure. This is sort of the moral guts of the organization from the standpoint of responsibility. If you and I end up -- if I, as a professor, say something about Wharton, well, I'm not the dean, that's different than the dean saying it. When we are talking at this level, and I can tell you from having looked at many business ethics cases, we are looking at the core of the policy apparatus.

Q. The policy apparatus, you mean by what?

A. I mean, the group of people who are responsible for creating strategy and policies and for articulating it. So that it's occurring at this level, that it's repeated, is especially worrisome from the standpoint of business ethics.

Q. Now if the subjects to be avoided are those which might implicate smoking and cancer, and the subjects which are permitted are those which will produce some valid research but will not get into the area of smoking and cancer, does that make a difference? The controlling of research?

A. Well, it makes a big difference, and remember, too, I take it we are still assuming that this industry, in effect, created a kind of credo that said we are actually making a commitment to look into these kinds of things. It violates principles of business ethics at a number of different levels.

* * *

Focus Point: The attorney for the plaintiff introduces another memo by Dr. Thomas Osdene instructing that sensitive documents be shipped to Cologne, Germany so that he can read and then destroy them.

Q. Assuming I have read that correctly and assuming that Philip Morris here is what -- I want you to assume that Philip Morris was party to an agreement not to do in-house research in the U.S.

A. Okay.

Q. Assume that they did so in Cologne, Germany in order to prevent the discovery of any bad research that might implicate smoking not to be discoverable?

A. Okay.

Q. Assume that that is what occurred and that the cause down below, the passage down below about I will act and destroy, dealt with documents which were intended to be concealed. Assume all that to be true.

A. Okay.

Q. If what I've said is true, assuming it's true, does it implicate any ethical standards?

A. Yes, it does.

Q. Which, what are they and why?

A. Well, there are at least a couple implicated. The ethic that a market needs to create what we need often have a lot to do with information. When economists justify the market activity as a way of arranging our society, they assume often perfect information, they assume everybody knows everything. When you destroy a piece of information, especially when it's extremely relevant with what you're selling, that messes things up in a significant way and it violates an ethical responsibility you have to fairness in market activity. There is a joke, I don't know if you have heard it, but it goes: How many economists does it take to screw in a light bulb? Answer is none, free market does it automatically.

In the next series of questions, the attorney for the plaintiff has his expert discuss the ethical implications of marketing cigarettes to children. Direct Testimony of Thomas Donaldson (Plaintiff), *Washington v. American Tobacco Co.*, Oct. 28, 1998, Pp. 4413-14.

Focus Point: The expert focuses on the industry's behavior, rather than frame it as a debate about the free market. There is a tension here between what certain aspects of the free market can encourage versus what business ethics dictate. The attorney for the plaintiff has his expert discuss this tension during direct examination so that it is not raised for the first time on cross-examination.

Well, I mean it's a joke in part because even Adam Smith, the guy who is most responsible for talking about the benefits of the market noted that it doesn't work automatically unless people follow the rules of finding information, keeping it, not destroying it, providing it, certainly keeping it internally as a competitive tool to develop better weapons, by weapons I mean market products to compete with. We have no guarantee that the same reliable product that we deserve will come to us.

Q. And does that fall within the economic school of thought, this last concept?

A. I'm drawing that out, yes, so the economic or classical approach.

* * *

Focus Point: The following question regarding tobacco industry targeting of children is also designed to address the potential defense argument that the free market should control business (as opposed to business ethics). The attorney for the plaintiff asks the witness (and vicariously the jury as well) whether morality or the free market should control whether cigarettes should be sold to children. The answer is obvious.

Q. . . . I want you to assume for me that for purposes of my question that if youth were not being targeted, the companies would be out of business in 20 to 25 years because their customers would either quit smoking or die of various diseases. [This was the assertion of Bennett LeBow, CEO and owner of Liggett & Myers, which he said in court and to Congress.]

A. All right.

Q. That's where I'm getting us to. And I perhaps have asked this in another way, but I want to ask it and make sure, assuming that to be true, would that fact, in your opinion, justify a company doing any of the thing you have said violate core values in order to survive as a company?

A. No.

Q. Why?

A. Core values, I mean fundamental principles of ethics are very much like a rock. And if they are not a rock, there is a flex in a way that's pernicious, that doesn't let the ship of the company navigate well. They have to be adhered to. They have to -- your conduct has to be away from that rock, as it were.

* * *

Focus Point: The expert discusses several industry documents showing industry marketing budgets and strategies, as well as reports criticizing marketing to underage smokers.

Q. . . . If, in fact, the tobacco industry does target under-age children through its advertising, assuming that to be true?

A. Okay.

Q. Would that fact alone involve any core value considerations?

A. Yes, it would involve the core value of not exploiting children for economic ends, something that you find, for example, written in the UN charter dealing with children's rights and something you find in a number of -- certain international documents on children and their rights.

Q. What is there ethically about this concept which implicates any core value considerations, given the fact that kids have free will, that sort of thing I mean?

A. But that's the point. I mean the political theory, ethical theory, at least the mainstream theories that have arisen in our society assume that democracy, the market, the major institutions that we have involve rational adults and until somebody reaches that age, they aren't assumed in the context of any of those traditions to be able to make informed choices. Doesn't mean you can't advertise to children and there is a big literature in business ethics on the question of advertising sugared breakfast cereals, none of this means you can't advertise, advertise not only to kids but elsewhere. Advertising often provides a very important information function. For example, if a safer cigarette comes along through advertising you get the word out. What is at issue here, of course, is the fact given the assumptions we made, the tobacco industry knows the death toll is what it is, understands that children are affected and in fact is saying things that aren't true, there is a pernicious ethical consequence.

Q. . . . If I ask you to assume that the RJR secret document discusses the importance of penetrating the 14 year old market as a smoking market in order to have them be tomorrow's cigarette business, would that implicate the concept of core value you just talked about?

A. Certainly would.

Q. Does it make a difference how old the children are who are being targeted?

A. Well, there is -- the less anyone is able to make a rational choice, the less things are under their control whether it's a function of addiction, their age, their inability to have mature judgment, there is a greater problem in targeting them for something that is likely to harm them.

In the next series of questions, the attorney has the expert discuss the ethical implications of denying the addictiveness of nicotine. Direct Testimony of Thomas Donaldson (Plaintiff), *Washington v. American Tobacco Co.*, Oct. 28, 1998, Pp. 4294-98, 4336-38.

Q: Now, assume, Doctor, that those are correct and accurate quotes from the internal documents of the tobacco companies, and assuming that for 45 years their public stance was right up through their CEOs testifying before Congress that nicotine is not addictive, not addictive.

A. Okay.

Q. Would that fact involve any core value principle?

A. Yes.

Q. And which one and why?

A. Well, at least two are at issue, and possibly three. Again the company has a responsibility to tell the truth. So to the extent it knows the product is addictive, it has to say that. Also, it has an obligation to look into and reveal information that's relevant about its product. And I might add that this extends beyond technical definition, discussions of addiction, because what's relevant from the standpoint of business ethics is not so much how you define addiction, what's really relevant is whether or not the customer is in a position to make choices on their own that will benefit them. And that -- that's at issue with whatever definition of addiction you want to give, then it's relevant from the standpoint of business ethics.

Q. But what if I come back and say, well, wait a minute, I mean every surgeon general's report says it's addictive. [*This is a false statement*] Every -- I can cite literature that's been published since before even the surgeon general of '64 that suggests that it's addictive. Therefore, the medical community, the State, the public, everybody knew it was addictive, so what harm is done with our little white lie or our position? It really didn't make any difference even if we did say something that isn't true. What's wrong with that argument with regard to core values, if anything?

* * *

A. Well, in the principle that requires a person or a company to tell the truth, is independent of the specific consequences of the action. That is to say, it applies in -- you have an obligation, I have an obligation, to tell the truth, especially about something as important as this, whether or not we think the consequence will be this or that. Now there are rare instances in which, for example, if we tell the truth to somebody who's robbing us or something like that, there may be such a catastrophic bad consequence that the white lie is justified. There are also instances in which, what's the standard case, somebody at a wedding, the father of the bride comes up to you and says doesn't the bride look beautiful? And you say well, no, I don't think so, not really. Let's hope not. But of course, those are -- those are very delicate situations. That's not, I take it, what's at issue here. What's at issue here is addiction. And it's a situation where our customer, if we are a tobacco company, may well not have as much ability to refrain from engaging in an activity that's extremely harmful to their health as we would like to.

Q. . . . Now assume for me that the . . . tobacco company here, did not want anybody to know and would not publicly admit in any way, that their product was a potent drug, because they feared FDA regulation or their product and concealed this, this is something that was confidential within the company. Would that involve any core value consideration?

A. It would.

Q. What and what?

A. Well, I mean as some background here, you can have different contexts in which the statement might be uttered. In a given industry, it may well be people genuinely believed they ought not be subject to regulation in a certain context. To then take steps to help remain free of regulation is not always morally wrong. In this context, we have words like potent, we have an issue of addiction. And again, there is a heightened responsibility because of the kids of thing that we are talking about.

Q. To further complicate your thought process, I want you to assume this jury has seen and there is evidence of multiple internal legal memorandum dealing with the fact that nicotine is a drug, that is has the same effects as many drugs within the pharmaceutical industry, that the companies were very concerned and one of the big things they wanted to avoid was FDA regulation, that they went to great lengths to make sure that the product was not seen as a, quote, drug, closed quote, and they would not be brought under regulation.

Focus Point: The FDA asserted jurisdiction to regulate tobacco in 1996 only to have the United States Supreme Court conclude in 2000 that the FDA lacked the requisite authority to do so. During the intervening four years, all regulatory action by the FDA was enjoined. See Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

A. So we have a very different scenario from the first one I painted. In other words, you're positing a situation where the company believes a product or the industry believes a product is addicting, and hence should be regulated if the ordinary standards for regulation apply, and the aim is to avoid regulation, and yes, there is a core value.

Focus Point: In the answer below, the addition of a new rule or corollary to his theoretical structure mid-stream might appear awkward, but in this case, pointing out the unethical nature of violating the law appears relevant and probative.

In fact, one that's not, I don't believe, identified and that's the core ethical value of under most circumstances, virtually all circumstances, not a violating the law. Being a good -- if you remember in the first charge that we talked about for core values, being a good citizen.

Focus Point: Using comparative examples in different contexts is a good way to illustrate to the jury the point the witness is trying to make and is common in expert witness testimony

Now there are some instances in South Africa, for example, there actually was a law that said you had to have segregated washroom facilities. Most companies didn't go along with that and that was probably the right thing to do. In Hitler's German, in extreme situations, there may be exceptions. But by and large a company has an ethical responsibility to obey the law, if it's to be subject to regulation and it believes that's true, to not avoid that regulation.

Q. Let me make it even more complicated for you, then. Let's assume that in -- that everything is being done here within the tobacco industry to conceal the fact that they know that it's a potent drug. That these are internal memos that were never supposed to see the light of day. Would it be okay to do that, to conceal, to hide this information to avoid regulation by an agency like the FDA?

A. Absolutely not.

In the next series of questions, the attorney for the plaintiff introduces several tobacco company memos acknowledging that the current method for measuring constituent levels in tobacco smoke gives inaccurate results and that the light cigarette marketing campaign, which is based on this measuring protocol, is misleading. Direct Testimony of Thomas Donaldson (Plaintiff), *Washington v. American Tobacco Co.*, Oct. 28, 1998, Pp. 4318-20, 4327-29.

Q. And the question I want to ask is the same question which is here, assuming that is the case, are there any core values involved regarding the question of whether a company has any obligation to say something about it when they believe that the FTC already knows about it?

* * *

Focus Point: Comparing the tobacco industry's conduct with that of other industries can help the jury evaluate the legality of alleged wrongdoing. The expert makes such a comparison below.

A. I guess the first thing I would say is I wouldn't want whoever is offering this moral opinion to come into my class and advise my business students. I think there clearly is a moral issue and the moral issue is fairly straightforward, you have to tell the truth about this kind of thing. A classic case, by the way, that is often done in business ethics classes has to do with Beechnut apple juice where Beechnut apple juice, it was a case where instead of real apple juice being in the bottle, it was sugar water. It turns out that tests have a great deal of difficulty distinguishing between the two. And the arguments from Beechnut executives were well, it doesn't make any difference. Customers didn't accept that rationale, and they were correct not to accept it. Difference or not, especially interpreted from the standpoint of the company, the company has a moral obligation to provide correct information. If I could also add, the focus is on what you tell the government. But of course as we have seen from the standpoint of business ethics, what is especially important not just the government, but what you tell the customer, is the customer getting the right information on the pack or wherever that information is being displayed.

* * *

*Focus Point: The industry has argued that the current standard for measuring tar and nicotine levels in cigarette smoke was mandated by government regulators. This position puts the blame on the government for failed regulatory oversight. However, it should be noted that the industry is almost totally unregulated. See *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (finding that very little regulatory oversight existed at the federal level); see also *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (finding that very little regulatory oversight exists at the state level.)*

To address the minimal oversight that exists, the witness concludes that regardless of whether the government's regulation is inadequate, the tobacco companies still have an ethical duty to disclose the dangers of their products and to correct the known inaccuracy of the information on their packages.

Q. I want you to assume that the [FTC smoking] machine, which is used to measure the level of tar and nicotine, is a machine sanctioned by the FTC. It's the -- while they don't actually do it, they oversee it. The companies do the measuring, but we are assuming the companies are doing the measuring accurately and forthrightly. But the FTC sets the standard that gives these measurements.

A. Doesn't make any difference.

Q. Doesn't make any difference?

A. Doesn't make any difference. It -- very often companies find themselves in a situation where either the government is doing something they think it ought not to, or it's not, it's just for whatever reason, good or bad, not up to monitoring. In South Africa, for example, the government tolerated segregated washroom facilities for multi-national companies for a long time. The companies still had an obligation not to segregate black and white. And no, I mean -- we are assuming here that false information is being produced. The fact it's being produced on a government machine is irrelevant.

Q. What if the people, some of the smokers, not all but some of the smokers, knew that the amount they were getting in their body of tar and nicotine was more than the pack? Forget what I showed you about what the scientific community says, that in fact most people don't believe that and have switched to smoking these cigarettes because they think they are safer, so I want to change that. Supposed some smokers actually do know they are getting more tar and nicotine than the reading on that machine. Would that relieve, in your opinion, the manufacturers of cigarettes from saying anything? I'm talking about instructions to smokers, here, instructing smokers about the ventilation holes and how to smoke the cigarette.

A. No.

In the following excerpts of cross-examination testimony, the attorney for the defendant seeks to undermine the validity of business ethics. Cross Examination Testimony of Thomas Donaldson (Plaintiff), *Washington v. American Tobacco Co.*, Oct. 28, 1998, Pp. 4454-56, 4458-59, 4462-66, 4468-73.

Q. Now, more generally, beyond the issue of a specific school of thought or a specific theory, wouldn't you agree with me generally, more broadly, that the specialized area of business ethics schools of thought that you are an expert in, whether they are called social contract or contractarian or something else, that business ethics generally has not developed an adequate normative theory, that is a theory that tells business people what's right and what's wrong to do?

Focus Point: With this question, the attorney for the defendant tries to challenge the validity of the expert's theoretical model. Such challenges often come from general criticisms of an expert's field of study or a particular school of thought within the field.

Here, the attorney for the defendant attacks business ethics as a whole as being not a sufficiently developed area of scholarship. This attack continues with the theme that the expert is simply out of touch with how real business works.

A. The stakeholder theory in particular has not yet been written about in a sophisticated way that gives it a foundation in traditional ethical theory.

Q. Well, I really wanted to broaden my questions beyond the stakeholder and ask about business ethics generally. The specialty part of business ethics that you are in. Wouldn't you agree that generally speaking business ethics has failed to develop the kind of normative theory that tells business people what's right and wrong?

A. As I explained yesterday, if you look on the economic approaches, the classical old road, there are new roads in construction and there is a fair amount of work to be done on those new roads. There is no question about it, there are some problems that are not dealt with well by those theories and people are writing about them and working on them.

Q. So the answer to my question is yes?

A. Well, I thought I answered your question.

Q. Let me restate it because I don't think you did. My question, Professor, was, wouldn't you agree that business ethics, specialty area of business ethics that you are involved in, that that area generally has failed to develop the kind of normative theory that would tell business people what's right and what's wrong to do?

A. No, I would not agree with that.

* * *

Q. Difficult moral issues in economic life such as evaluating the impact of hostile takeovers and plant relocations or determining the obligation of businesses to the environment, constitute the *raison d'être*, that means the reason for being, right?

A. Yes.

Q. The reason for being of business ethics, yet while the ultimate resolution of such issues clearly requires detailed normative analysis -- now normative analysis goes back to what you told us here, that's the telling people what to do, what's right and what's wrong.

A. Yes.

Q. Clearly requires detailed normative analysis, a shortcoming of business ethics, is that to date it has failed to develop an adequate normative theory. And then you define, so there is no mistake, what you mean by normative theory, correct?

A. Correct. In the footnote.

Q. It says the word normative refers to concepts that guide choice or conduct, and that was your definition, right?

A. Right.

Focus Point: In the previous four questions, the attorney for the defendant is not simply trying to understand the expert's theories. Rather, he introduces an article authored by the witness to impeach his credibility. During cross-examination, an attorney will often try to get the witness to contradict his own scholarship or will try to use his previous writings to contradict what he is saying now. Any publications or presentations, including prior testimony, can be used for this purpose.

* * *

Q. Now, Professor, in light of these issues that you raise and these problems that you raise with these business economic -- excuse me -- these business ethics theories, would it be fair to say that a business person who was trying to look at the business ethics theories that you told this jury about yesterday morning, to try to figure out what to do in

their business, what was right and what was wrong, would feel a little bit like Alice in Wonderland?

Focus Point: The attorney for the defendant introduces an article by the expert in which he quotes a portion of Alice in Wonderland. Again, the attorney tries to make it seem like the witness's expertise is purely academic and not applicable to real world situations.

A. I don't know where you are, I know where you are pulling that from, but no, I would say no.

Q. . . . You understand the -- if you come from the academic world of this business ethics specialty that you work in, down to the real world of the courtroom that the men and women of this jury are going to be asked a question about a violation of law, the law of Washington and whether or not the defendants in this case did or did not violate certain laws of Washington, do you understand that, Professor?

A. Well, roughly. I mean, I don't understand the legal issue, per se, but yes, I do understand this is about law.

Q. I understand you're not a legal expert, right?

A. I'm not a legal expert, no.

Q. Okay. But you understand that one of the claims that you made, just for an example, against the defendants, my client, the other defendants is a claim of -- that we violated the antitrust law of the State of Washington, do you understand that, generally?

A. That's what I have heard, yes.

Q. And you understand, don't you, even though you are not a legal expert, that if a citizen of the State of Washington, whether it's a person or it's a company, wants to know what the law is of antitrust that they have to follow to do business in this state, that they can go someplace where that law is written down, a statute passed by the people of the elected representatives of the Washington legislature, it would be written down and somebody can go and look at that statute, correct?

A. No, I don't understand that.

Q. Okay. Well, I want to ask you to assume that that's the case, can you, Professor?

A. Okay. Sure.

* * *

Focus Point: In addition to keeping with his theme that the expert is out of touch with the way actual business is conducted, the attorney for the defendant tries to make the witness's theories appear novel with the following questions. The recognition of an expert's theories by his peers is relevant in the judicial evaluation of scientific or expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, 509 US 579 (1993).

Q. Now, what group or organization has passed the principles of stakeholder or social contract or economic theory or school of thought in business ethics?

A. And just so I understand your question, you are talking about the frameworks, the theories and schools of thoughts themselves? In other words, has there been anybody that has actually ruled and said this is a school of thought that's the right school of thought? And my --

Q. Well, let's start with that question.

A. Well, there are organizations such as a co-roundtable with prominent business people and corporations and industries that have endorsed stakeholder postures. But these are academic, these are ways of thinking about the issue, they won't get passed or not passed by bodies. By legislatures.

* * *

Q. Wouldn't you agree with me, Professor, that what the social theory is that you told the jury about yesterday morning is what you would call a metaphysical abstraction?

A. No, I would say that's true of one kind of social contract theory, but there are two very different kinds of social contract theories, one -- well, I'll stop.

* * *

Q. And -- but the word metaphysical means something beyond, greater than or beyond the physical concrete.

A. Not a concrete contract that you can pull out of a drawer, that's right.

Q. And an abstraction, again something separated from concrete reality, true?

A. Yes.

Q. And you would agree with me that a social contract for business, if one exists, would be properly described as a metaphysical abstraction.

Q. Well, again, there are two very different kinds of social contracts, one is a metaphysical abstraction, that's the kind that comes -- that people have written about, that -- between all of us as consumers and the corporation. That's a kind of abstract. I have written about that. The other kind of social contract is a very relatively concrete notion, it has to do with implicit agreements inside industries, inside companies, and how the evidence that you use to find those can vary. But they are quite different. In fact, the article you just looked at before was an attempt to try to bring those two together.

Q. Now, Professor, when we get into this area of hypernorms or core values, these aren't business ethics concepts, are they?

A. They are business ethics concepts, yes.

Q. Well, Professor, one of your hypernorms is that it is -- that it is -- you have to -- you put it in a long way, but basically one of your hypernorms is that it's bad to lie, right?

A. Yes.

Focus Point: The attorney for the defendant is mocking the expert's theory with the following question. The expert might have replied by saying something like "yes, your clients acted unethically because they lied about ..."

Q. I mean, I understand that applies in business, but that's not in terms of specialty knowledge, Wharton School Department of Business ethics, that's not some special business ethics concept?

A. It's -- well, it's special to business ethics, if it derives, say from Friedman's analysis of what the market requires, that's a kind of misrepresentation that Milton Friedman, the economist, talks about. But clearly, and I think this is what you're getting at, also lying is wrong in most instances in other spheres of life.

Q. Yes. I mean the fact that it is wrong to lie was not something that was discovered at the Wharton School.

A. No.

Q. No. I mean and it didn't go back to the early '80s when you began writing about the social contract theory, it's a broader concept?

A. It's a much broader concept. It's been written about for a millennium.

Q. Indeed if we go through some others, the fact that you are not supposed to collude, which I'm not 100 percent sure what that means, but I think I get the flavor of it, you are not supposed to collude with your competitors, or corrupt science or exploit children, these are not -- none of those concepts were discovered at the Wharton School, right?

A. No, they were not discovered at the Wharton School.

Q. Nor are they concepts that are some monopoly of specialty business ethics --

A. No, except insofar as they relate to issues of economic practice where economic expertise may be important.

* * *

Q. All right. These core values represent sort of an amalgamation of religious, philosophical and cultural beliefs, true?

A. That's good enough.

Q. Now, Professor, with sincere due respect to your accomplishments, which I know are substantial, you don't contend, do you, that you have some specialized knowledge of the religious, philosophical and cultural beliefs of our society?

A. Well, I was trained as a philosopher, so to that extent I have some specialized knowledge.

Q. Well, let me come back to my question, though, because I'm not talking about the academic world of philosophy, you know, what Immanuel Kant meant by something, I'm talking about all three of these things together. The combination of the religious, philosophical and cultural values that people have in our society. Do you claim to the members of this jury that you have got some specialized knowledge by virtue of your position at the Wharton School and knowing what those are?

A. Well, I wouldn't say it's by virtue of my position at the Wharton School but I would like to think I have specialized knowledge that helps relate the concepts like this to issues that occur in economic situations, especially modern U.S. business.

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Focus Point: The attorney for the defendant is using a diversionary tactic here. He is trying to make the jurors think that anything the expert says is invalid based upon the false premise that if the witness is not from the State of Washington, his testimony is not relevant to the case, which was tried in Washington.

Q. All right. I mean, let's be more concrete here. Since this case is in the State of Washington, you don't come here from Pennsylvania and say that you have some, any specialized knowledge about what people in Washington, what their religious, philosophical and cultural beliefs are, correct?

A. No, I do not.

Q. And to be even more specific, the 18 people here on this jury collectively they have a set of religious, philosophical and cultural beliefs, whatever they may be in total and you don't claim to have any specialized knowledge about what those are.

A. No. You mean what the members of the jury --

Q. Exactly.

A. -- believe? No, I certainly don't.

Q. If it were important, and presumably it will be for the members of this jury panel to apply their own, jointly their combined religious, philosophical and cultural beliefs, to bring that to bear on this case, they would be obviously collectively in a better position to know what those beliefs are than would you, correct?

A. So in other words you are saying they would be in a better position to know how they believe about issues of ethics and so on?

Q. Correct.

A. Yes, I would agree with that.