

INTRODUCTION

On May 20, 1998, defendant Brown & Williamson Tobacco Corp. ("B&W") finally provided a letter containing a list of the documents which it says are on the Minnesota privilege logs and to which it still claims a privilege.¹ This Memorandum is in response to B&W's list of documents and is to assist the Court in its review of the documents. The structure of this Memorandum is as follows:

1. Identification of documents on the B&W list for which it in fact has previously waived its privilege claims.
2. Legal Standards And Arguments Concerning B&W's Privilege Claims Generally.
3. The Factual Context Of The Documents At Issue.
4. The Law of Privilege and Standard to be Applied in this Review. (This section contains an analysis of the documents in reference to the law of privilege and the factual context in which that analysis must be done); and
5. Document-Specific Analysis. This section is contained in Exhibit 1 hereto, along with a checklist of factors to be considered and a key to the Commonwealth's responses to defendant's privilege claims. It cross-references the Ness, Motley control numbers and the numbers used by B&W to identify these documents in its *Butler* privilege log.

The Commonwealth's analysis and document-specific arguments include references to B&W's privilege log which was previously done in the case of *Estate of Burl Butler v. Philip Morris, Inc., et al.* For the Court's convenience, a copy of each of the documents mentioned in B&W's letter is provided to the Court as a separate Appendix. These documents are tabbed according to the Ness,

¹The defendants claim that they are unable to determine which of their own documents may be vileged because certain documents do not contain Bates numbers. However, the Commonwealth offer December of 1997 to provide the defendants with copies of any documents about which they were no tain. The defendants should not be allowed to ignore this effort to resolve their privilege cla then utilize it to try to maintain a "back door" through which to assert belated privilege clai other, as yet unspecified, documents.

Motley control numbers.²

I. B&W PREVIOUSLY WAIVED ITS PRIVILEGE CLAIMS FOR MANY OF THE DOCUMENTS NOW ON ITS LETTER OF MAY 20, 1998

The Commonwealth respectfully points out that B&W previously **waived its claims of privilege to certain of the documents for which it now asserts a privilege claim in Massachusetts.**³ Those documents are listed by Ness, Motley control number is Exhibit 2 hereto, along with an indication of whether the privilege claim was waived in *Estate of Burl Butler v. Philip Morris, Inc., et al.*, Jones County 2d Judicial District, State of Mississippi, C.A. No. 94-5-53 ("*Butler*") or *State of Florida v. American Tobacco Co., et al.*, Palm Beach County, 15th Judicial Circuit, State of Florida, C.A. 95-1466 ("*Florida*"). The documents supporting the waiver in *Butler* are the Special Master's Report of November 27, 1995, at 14 (Exhibit 4 hereto), which confirms that B&W waived its claims to documents 434-749, inclusive, on the *Butler* privilege log, and a table (Exhibit 3 hereto) showing the Ness, Motley control numbers of those documents. The waiver of B&W's privilege claims in *Florida* appear in Exhibit 5. This is the pertinent portion of B&W's "Third Amended Response" to the state's document request, in which it waives privilege claims to certain documents. The Ness, Motley control numbers for the documents now on B&W's May 20, 1998, letter are written in the margin of Exhibit 5.

II. LEGAL STANDARDS AND ARGUMENTS CONCERNING B&W'S

²While the Commonwealth does not concede the viability of B&W's claims, only the Court and B&W will receive copies of the documents. All other counsel of record have been notified of its filing; if B&W wishes to provide them copies of the documents it is B&W's option to do so.

In summary, the documents to which B&W has previously waived its privilege claims are those documents with the following Ness, Motley control numbers: 51, 68, 68.01, 68.02, 58.03, 73, 90, 100, 109, 148, 273, 326, 369, 474, 526, 545, 546, 587, 693, 787, 798.

PRIVILEGE CLAIMS

As the issues concerning privilege have been previously presented to the Court, this memorandum will only highlight certain issues relative to B&W's claims. For example:

1. The attorney-client privilege does not protect a communication simply because it is made by or to a person who happens to be a lawyer. *Livingston v. Allis Chalmers*, 109 F.R.D. 546, 550 (S.D. Miss. 1985).

2. The attorney-client privilege is to be construed no more broadly than necessary to effectuate its purpose. *In Re LTV Securities*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

3. Facts in and of themselves are not privileged. *Upjohn Company v. United States*, 449 U.S. 383, 391, 101 S. Ct. 677, 685 (1981).

4. Facts do not become privileged simply because the client tells the lawyer or the lawyer tells the client. *Sendi v. Prudential Bache Securities*, 100 F.R.D. 21, 24 (D. D.C. 1983).

Under B&W's unduly expansive view of privilege, any and all documents generated by B&W's lawyers regardless of their subject would be covered by the attorney-client or work product privilege claims simply because B&W has been involved in 85 personal injury lawsuits since 1954. Such a view is totally at odds with the actual breath of the privileges claimed. These privileges should be "strictly confined within the narrowest possible limits consistent with the logic of its principle" since it impedes the full and free discovery of the truth and "is derogation of the public's right to every man's evidence." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (2nd Cir. 1984); *United States v. Dyer*, 722 F.2d 174, 177 (5th Cir. 1983).

Further, B&W's claim, that attorney-client privilege extends to all communications between B&W counsel and CTR, TI and/or any of the six major tobacco companies on the basis of the so-called common legal interest doctrine, is both absurd and ironic. The facts, as shown by the documents

themselves, establish that the six major tobacco companies used CTR and TI as the vehicles for the industry's fraud, thus making all of these communications subject to the crime/fraud exception. Indeed, B&W's "common interest" claim is consistent with the evidence that the industry's deception was a long-lived conspiracy that involved its lawyers as well as its top executives. Furthermore, much of the correspondence between these groups dealt with the funding of "independent" research which was, according to the industry's very own public statements, to be shared with the public and the government. Accordingly, no attorney-client privilege could attach to such correspondence, regardless of whether it was written by lawyers. Thus, if in fact this research was done in anticipation of litigation as is now claimed by B&W, then the industry and B&W, in particular, have two problems:

1. This claim constitutes a clear admission that CTR and TI were used as shams; i.e., part of the continuing fraud being perpetrated on the public; and
2. The members of CTR and TI which took tax credits for the funding given to CTR, TI and others for "independent" research owe the federal government back taxes because the tax benefits of such "donations" in the form of tax credits differ significantly from the tax deductions a company would be allowed to take for research done "in anticipation of litigation." Tax credits are far more valuable in reducing the tax burden because they may be deducted directly from one's tax bill on a dollar for dollar basis while research done "in anticipation of litigation" is treated only as a business expense.

This "common legal interest doctrine," as interpreted by B&W, is nothing more than another lawyer-created, *post hoc* effort to hide the truth about the industry's cynical and fraudulent control and manipulation of science. Such behavior is directly at the heart of this case.

III. THE FACTUAL CONTEXT OF DOCUMENTS AT ISSUE

In order to properly assess the privileges claimed by B&W, this Court must consider the factual context in which these documents were created, disseminated, and suppressed by B&W and its co-conspirators. This factual context involves a 40 year-long conspiracy in which the tobacco industry lawyers went beyond their roles as counselors and became involved in the very fraud and deception at

issue in this case.

In 1954, the tobacco industry issued a press statement entitled "A Frank Statement To Smokers" ("Frank Statement"). Exhibit 6. The Frank Statement appeared in over 450 newspapers. In the Frank Statement, the tobacco industry announced the formation of the Tobacco Industry Research Committee, now known as the Council for Tobacco Research ("CTR"). The tobacco industry recognized in the Frank Statement that it had a "basic responsibility" to the public and promised to learn the facts about smoking and health. The tobacco industry also promised to sponsor independent research on the subject and to make health a basic responsibility, paramount to any other consideration in its business. The tobacco industry further promised to cooperate closely with public officials. The Frank Statement reads, in part:

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

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

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. 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.

Frank Statement, January 4, 1954.

In direct contradiction to the Frank Statement and its spirit, the documents at issue expose the truth about the tobacco industry. The same industry, which promised full disclosure of all data and information generated by the joint research done under the auspices of the CTR, now argues that research was done in order to establish a defense to lawsuits, i.e., "in anticipation of litigation." The key issue in any claim of the joint defense privilege is the objective intent of the client. See, e.g., *U.S. v. Bay*

State Ambulance, 874 F.2d 20, 29 (1st Cir. 1989) (Key question is what was objective, reasonable under the circumstances). Thus, the Court need go no further than the public statements of the tobacco industry (which of course includes B&W). The tobacco industry promised disclosure, consistent with its stated and accepted public duty. B&W now wishes to hide the very information it once promised to disclose. This Court should refuse to allow such a cynical and duplicitous abuse of this privilege.

Additionally, the documents expose a calculated plan by B&W to concoct a fraudulent privilege claim through the development of "appropriate paperwork." In a November 9, 1979 letter to B&W general counsel Ernest Pepples, B&W corporate counsel J. Kendrick Wells proposed a procedure which he hoped would "provide work product coverage for sensitive documents."⁴ No distinction was to be made between those documents which were "litigation" documents and those which were not. Thus, the procedure was designed to "establish appropriate paperwork" that could be shown to a court in a (fraudulent) effort to argue that documents sought by plaintiffs in discovery were privileged work product and hence protected from discovery. Exhibit 7 (NM #573). See also Exhibit 8 (NM #572).

The documents B&W seeks to claim as privileged are so damaging that B&W not only sought to create the appearance of privilege in order to protect them from discovery, but it also engaged in the widespread purging of similar documents and suppression of research. This procedure is set out in a memo which has become known as the "deadwood memo" written by J. Kendrick Wells of B&W. Exhibit 9 (NM #471). In this memo, Wells terms documents relating to the Janus Project "deadwood" which should be removed from the files. (The Janus Project involved a procedure to test the carcinogenicity of the tars found in cigarette smoke.)

The documents at issue also show that the tobacco industry lawyers have guided, manipulated

⁴"Sensitive documents" included scientific reports relevant to smoking and health. These very same scientific reports were being used for "general business purposes" pursuant to an existing agreement between BAT and B&W.

and suppressed the truth about the health hazards associated with cigarette smoking. The documents establish that the lawyers went beyond their roles as counselors and became knowing participants in the pattern of deception that forms the basis of the Commonwealth's case against the industry. For example, Exhibit 10 (NM #188) shows Wells of B&W made specific and detailed changes to a scientific paper scheduled to be published in a British journal. In paragraph 5 on page 2 and paragraph 27 on page 5, he advised as follows:

5. Delete. The point made here might be said to run counter to arguments that cigarette smoking is not addictive Also, BAT should avoid uncritical reference to the work of Roemer, who is dedicated to anti-smoking

27. Suggest deletion of reference to work by Keys and the secondary article from the *Lancet*. In March, 1984, Keys and others published a study which concluded that "For coronary death, age, serum cholesterol, blood pressure, and smoking were highly significant in all regions except Japan, where coronary deaths were too few for evaluation." Keys, et al., The Seven Countries Study: 2289 Deaths in 15 Years, Preventive Medicine (1984), p.141. In 1983, the Tobacco Institute published a letter which cited Keys in support of the position that cigarette smoking is not a major risk factor for cardiovascular disease. Keys responded with a vitriolic letter complaining of "an unending stream of misrepresentations and distortions from the Tobacco Institute and the cigarette companies that attempt to persuade the public to disregard the overwhelming evidence that cigarette smoking is a major health hazard and cause of premature death."

J. Kendrick Wells, III, letter dated October 25, 1984 to H. A. Morini, Esq., British-American Tobacco Company Limited, p. 2, 5. Exhibit 10 (NM #188).

Other documents illustrate B&W's lawyers' involvement in the failure to provide research on addiction that it found to be "sound" to the Surgeon General because it might prove damaging. Exhibit 11 (NM #371). B&W and its lawyers' knowing participation in the coverup and deception, coupled with the creation of a scheme to deceive the public and the courts, extinguishes any claim of privilege that B&W and its lawyers may assert.

Although B&W seeks to claim a joint defense privilege in relation to all documents related to the

TIRC, its successor the CTR and The Tobacco Institute, as the documents show, CTR was created as a public relations effort not as an effort to cooperate in a joint defense to pending litigation. This fact is acknowledged by B&W's general counsel Ernest Pepples in an April 4, 1978 letter:

Originally, CTR was organized as a public relations effort. The industry told the world CTR would look at the diseases which were being associated with smoking. There was even a suggestion by our political spokesmen that if a harmful element turned up the industry would try to root it out. The research of CTR also discharged a legal responsibility. The manufacturer has a duty to know its product. The Scientific Advisory Board composed of highly reputable independent scientists constitute a place where the present state of the art is constantly being updated. Theoretically SAB is showing us the way in a highly complex field. There is another political need for research. Recently it has been suggested that CTR or industry research should enable us to give quick responses to new developments in the propaganda of the avid anti-smoking groups. For example, CTR or someone should be able to rebut the suggestion that smokers suffer from a peculiar disease, as widely alleged in the press some few months ago. A properly designed research effort should encompass the need for instant response on subjects of public interest in the smoking and health controversy. Finally the industry research effort has included special projects designed to find scientists and medical doctors who might serve as industry witnesses in lawsuits or in a legislative forum. All of these matters and more should be considered in asking what kind of research the industry should do.

Exhibit 12 (NM #504). Pepples further opined in a September 29, 1978 memo to C.I. McCarty, President, Chairman, and Chief Operating Officer of B&W, that: "The point here is the value of having CTR doing work in a non-directed and independent fashion as contrasted with work either in-house or under B&W contract which, if it goes wrong, can become the smoking pistol in a lawsuit." Exhibit 13 (NM #473).

The activities just described provide a classic example of conduct supporting the application of the crime/fraud exception. The crime/fraud exception provides that the attorney-client privilege does not attach to provide protection where the communication is "made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554, 562-63 (1989).

IV. THE LAW OF PRIVILEGE AND STANDARD TO BE APPLIED IN

RESOLVING THE DEFENDANTS' PRIVILEGE CLAIMS

A. The Documents At Issue Are Not Privileged

In the hopes of protecting the documents at issue from disclosure, B&W has created "doctrines" or privileges which do not, in fact, exist at law. The following discussion will show that the documents at issue were never protected by any privilege and that B&W's attempt to suppress them is nothing more than a continuation of a 40 year fraud upon the courts and the public.

B. Attorney-Client Privilege Does Not Apply To These Documents

As previously stated, the limits of the attorney-client privilege under Massachusetts law are as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication related to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D. Mass. 1950). See also *In re Grand Jury Subpoena*, 615 F.Supp. 958, 962 (D. Mass 1985); Proposed Mass. R. Evid. 502(d); P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE (6th Ed.) §§ 13.41-13.4.8.⁵

Massachusetts has traditionally construed the attorney-client privilege narrowly. *Comm. v. O'Brien*, 377 Mass. 772, 775 (Mass. 1979), and cases cited, including *Foster v. Hall*, 29 Mass. (12 Pick.) 89, 97-98 (1831) and *United Shoe, supra*, at 358 (noting that "the privilege should be strictly construed in accordance with its object").

⁵The Commonwealth incorporates by reference its fuller discussion of these issues (e.g., attorney-client privilege and work product, the criteria and burdens of proof for establishing them, and their waivers) which appear in its "Proposed Procedure for Resolving Privilege Claims Made by the Defendants in this Case" dated December 4, 1997.

The party asserting attorney-client privilege has the burden of demonstrating the existence of the privilege and that it has not been waived. E.g., *In the Matter of the Reorganization of Electric Mutual Liability Ins. Co. Ltd. (Bermuda)*, 425 Mass. 419, 421-422 (1997). Further, a waiver has occurred where a party fails to take "adequate steps . . . to ensure a document's confidentiality." *Electric Mutual*, at 423 (1997).⁶

B&W has failed to carry its burden with regard to the documents at issue. An improperly asserted claim of privilege is no claim of privilege at all. *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974) (emphasis added).

Of utmost importance to the existence of any of the privileges claimed by B&W is that the communication sought to be protected was made within the context of a bona fide lawyer-client relationship in which the client sought to gain professional legal advice. It is well settled that the perpetration of a fraud is outside the scope of the professional duty of an attorney and that no privilege attaches to a communication between an attorney and a client with respect to transactions constituting a false claim or the perpetration of a fraud. See *Kneale v. Williams*, 30 So.2d 284, 287 (Fla. 1947); *Sawyer v. Stanley*, 1 So.2d 21 (Ala. 1941); *Standard Fire Insurance Co. v. Smithhart*, 211 S.W. 441, 444 (Ky. 1919).

The privilege protects the communications from client to attorney made in confidence for the

⁶ In *Electrical Mutual*, the Supreme Judicial Court acknowledged that its "view of waiver appears to comport with Rule 51 Proposed Massachusetts Rules of Evidence: 'A person on whom these rules confer privilege against disclosure waives the privilege, if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter.'" *Electrical Mutual*, 425 Mass., at 423. The Supreme Judicial Court has often referred to the Proposed Rules of Evidence in determining issues of privilege. See, e.g., *Purcell v. District Attorney for the Suffolk District*, 424 Mass. 109, 115 (1997) (referring to the crime-fraud exception to the lawyer-client privilege under Proposed Rule 502); *Bishop v. Klein*, 380 Mass. 285, 290-291 (1980) (referring to Proposed Rule 510); *Wright v. Peterson*, 15 Mass.App.Ct. 622, 626-627 (1983) (referring to Proposed Rule 510).

purpose of legal advice. *United States v. Neal*, 27 F.3d 1035 (5th Cir. 1994) (emphasis added). The privilege is triggered only by a client's request for legal as opposed to business advice. *In Re John Doe Corp.*, 675 F.2d 482, 488 (2nd Cir. 1982) (emphasis added). In *United States v. Davis*, 132 F.R.D. 12 (S.D. N.Y. 1990), the court examined the issue of "business" versus "legal" advice. The court ruled that only where the advice is "predominantly legal" or "primarily legal" in nature, will the privilege attach. *Davis*, 132 F.R.D. at 15. One particular document at issue in *Davis* was determined to be primarily economic rather than legal advice and, therefore, not privileged. The court further reasoned that even if the document had been primarily legal, it would have to be disclosed under the crime/fraud exception "as it is highly relevant with respect to the basis upon which . . . one of the primary tortfeasors proceeded." *Id.*

Additionally, it has also been held that a document, which is prepared for review by both legal and non-legal personnel, is not privileged because legal advice is therefore not the primary purpose of the document. *United States v. IBM*, 66 F.R.D. 206 (S.D. N.Y. 1974). As discussed *supra*, the B&W lawyers were involved in the direction of non-litigation related product research and public relations work.

The privilege shields communications from lawyer to client only to the extent that they are based on or may disclose confidential information provided by the client and/or contains advice or opinions of the attorney. *United States v. Neal*, 27 F.3d 1035, (citing *Wells v. Rushing*, 755 F.2d 376, 379 n.2 (5th Cir. 1985)).

As discussed above, the B&W lawyers were engaged in directing on-going product research being done by either company scientists or a captive research group. At best, the advice was purely business; at worst, it was offered in furtherance of the continuing fraud being perpetrated by B&W on the public and the government.

The discovery of underlying facts from the source are not protected merely because they have been communicated to an attorney. *Industrial Clearinghouse v. Browning Manufacturing Division of Emerson Electric Company*, 953 F.2d 1004, 1007 (5th Cir. 1992) (citing *United States v. El Paso*, 682 F.2d 530, 538-39, n.10 (5th Cir. 1982)).

Privilege cannot be manufactured. "Merely because the factual information is transmitted through an attorney does not mean it takes on a confidential character." *United States v. Davis*, 132 F.R.D. 12 (S.D. N.Y. 1990). In fact, the "cc'ing" of B&W lawyers with clearly nonlegal communications was a favorite device at B&W to create an unfounded claim of attorney-client privilege. See, e.g., NM #68 and 68.03, Exhibit 14 hereto.

Where the information in the text of a document is widely known to those receiving it, the information cannot be characterized as legal advice. In *Davis*, the attorney involved was "steeped in the negotiation process," thus the court carefully scrutinized each document to ensure that "in house counsel's law degree and office are not . . . used to create a 'privileged sanctuary for corporate records.'" *Davis*, 132 F.R.D. at 15 (citation omitted). The Wells memo dated November 9, 1979 (Exhibit 9, NM #471), discussed above, clearly establishes that B&W and its lawyers attempted to create such a sanctuary.

The opinion in *In re Matter of Feldberg*, 862 F.2d 622 (7th Cir. 1988) provides a useful guidepost as this Court evaluates B&W's unfounded claims of attorney-client privilege:

The privilege is not good in itself. The legal system needs information to decide cases correctly. (Citations omitted). . . . When the privilege shelters important knowledge, accuracy declines. Litigants may use secrecy to cover up machinations, to get around the law instead of complying with it. Secrecy is useful to the extent necessary to obtain legal advice. The privilege extends no further.

Feldberg, 862 F.2d 622, 627 (7th Cir. 1988).

C. The Work Product Privilege Does Not Apply To These Documents

The work product privilege is not in the pure sense a privilege. It is, rather, a limit on the scope of discovery; moreover, it is by no means an absolute limit. Under Massachusetts law, the limit is codified in Rule 26(b)(3) of the Mass. Rules of Civil Procedure. Rule 26(b)(3) provides in pertinent part:

(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(3) **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Mass. R. Civ. P. 26(b).

The source of the so-called work product privilege codified in Rule 26(b)(3) is the case of *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The *Hickman* decision implicitly established a two-tier system of protection for an attorney's trial preparation materials. The first level protects ordinary work product such as factual material gathered by an attorney in anticipation of litigation. The second level, a level of heightened protection, protects an attorney's opinion or mental impressions about a case.

While documents generated in anticipation of litigation may be protected under this rule, case facts contained therein are not. The purpose of the work product doctrine or privilege is to protect an attorney's freedom to prepare documents and records in order to facilitate preparation of his case. See *Hickman v. Taylor*, 329 U.S. 495, 510-511, 67 S. Ct. 385 (1949).

As a general rule, in order to come within the work product privilege, the material sought to be protected must have been prepared "with an eye to litigation" and not "in the ordinary course of business." *Haynes v. Anderson*, 597 So. 2d 615, 617 (Miss. 1992), citing *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019, 1026 (S.D. N.Y. 1980); *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982), reh'g denied 688 F.2d 840 (5th Cir. 1982), cert. denied, 466 U.S. 944, 104 S. Ct. 1927 (1987).

In *Haynes*, the Court was analyzing the applicability of the work product privilege to insurance company investigations of accidents. The Mississippi Supreme Court reviewed the various views on this issue, finally choosing a case by case approach. This approach involves a consideration of "the material of the document, the nature of the litigation [and investigation], the relationship between the parties and any other fact peculiar to the case." *Haynes*, 597 So. 2d at 619, citing *Pete Rinaldi's Fast Foods*, 123 F.R.D. 198, 202 (M.D. N.C. 1988); *Carver v. Allstate*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

The party resisting discovery based on the work product privilege bears the burden of showing that the material at issue was prepared in preparation for litigation. *Haynes v. Anderson*, 597 So. 2d 615, 617 (Miss. 1992), citing *Henderson v. Zurn Industries, Inc.*, 131 F.R.D. 560, 570 (S.D. Ind. 1990). As discussed above, B&W has failed to make this showing; B&W has simply stated (in its privilege logs), without any legal or factual support, that these documents are work-product and, thereby, protected from discovery. As the content of certain documents show, B&W and its legal counsel established a cynical procedure to funnel research being done in the ordinary course of business through attorneys in order to construct an argument that those research project reports or other materials thereby generated would be protected by the work product privilege if they proved embarrassing. Exhibit 8 (NM #572) and Exhibit 7 (NM #573).

Not every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions or legal theories is protected as opinion work-product. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988). Whatever heightened protection may be conferred upon opinion work-product, that level of protection is not triggered unless disclosure creates a real non-speculative danger of revealing the lawyer's thoughts. See *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 680 (2nd Cir. 1987). In order to claim the opinion work-product shield, it must be established that it is the attorney's thought processes that are revealed. *In re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982).

An attorney cannot cloak a document under the opinion work-product privilege simply by reviewing it. *Brown v. Hart, Shaffner & Marx*, 96 F.R.D. 64, 68 (N.D. Ill. 1980). This is particularly important in view of the fact that members of the tobacco industry, as evidenced by the B&W documents, as well as other sources, had lawyers review or copied on every piece of paper for just this purpose. Exhibit 8 (NM #572) ("Continued Law Department control is essential for the best argument for privilege.") This cosmetic approach to fabricating a work product claim (or an attorney-client privilege claim) is evidence of the failure of B&W and its counsel to appreciate the importance of candor to both the Court and one's adversary.

The selection of the so-called "Merrell Williams" documents was done not by a lawyer analyzing and synthesizing them for the defense of his client; rather, according to B&W's own representation, it was done by a whistle-blowing paralegal whose mental impressions and opinions are not protected by Rule 26. Therefore, in view of the identity of the selector, it is highly unlikely that plaintiff will be able to divine from this grouping of documents any of the theory, opinions or mental impressions of B&W's

lawyers.⁷

D. The Selection/Compilation Rule Is Inapplicable In Any Action

Having totally failed to demonstrate that any specific document in the documents at issue is protected from disclosure by the attorney-client privilege or the work product doctrine, B&W instead argues that these documents allegedly "taken" by Merrell Williams were at one time gathered and reviewed by B&W attorneys, and therefore reveal the thought processes of the lawyers and are protected by the work product doctrine. This argument is factually and legally meritless and should be rejected.

According to B&W's general counsel, J. Kendrick Wells, the allegedly protected "selection" process engaged in by B&W lawyers involved "select[ing] documents which in their judgment were relevant to pending and threatened litigation in a broad sense." Exhibit 15 (Wells Deposition, pp. 24-25, 29, 34-36, 55.) The review and selection of documents to determine their relevance to litigation is, for the reasons stated below, not protectable work product.

The origin of the compilation/selection rule is the Third Circuit's opinion in *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985), cert. denied, 474 U.S. 903 (1985). Quite unlike the factual situation here, in *Sporck*, the plaintiff's lawyer asked the defendant during a deposition whether he examined any documents in preparing to give his testimony. The defendant answered affirmatively, and the plaintiffs' attorney sought the production of those documents. *Id.* at 313-314. The defendant's attorney refused to identify the documents, pointing out that they had all previously been produced, and that the "select grouping" of the documents reflected his litigation strategy and was therefore work product protected

⁷ If, in fact, there are specific documents within the group allegedly selected by Williams that may somehow justify this protection, B&W to establish that fact before the protection should be granted. If any of the documents are found by this Court to contain mental impressions of a lawyer so that a portion of a certain document is protected by the work product privilege, that material may be redacted, at the Court's direction, and the rest of the document should be produced.

from discovery by Rule 26(b)(3). *Id.* The Third Circuit agreed. *Id.* In this case, B&W has never previously produced these documents to counsel in this case or in any other case.

B&W also bases its compilation/selection argument on *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986). In *Shelton*, the defendant's in-house counsel refused to answer questions during her deposition concerning the existence or nonexistence of specific documents concerning her client's allegedly defective automobile. As in *Sporck*, the court in *Shelton* concluded that plaintiff's discovery was designed to elicit the attorney's thinking as to which documents were of particular significance in the litigation. *Id.* at 1328-1329. The plaintiff in *Shelton* had other avenues of discovering the information, such as formal document requests and interrogatories. Here, the Commonwealth is not seeking information from B&W lawyers concerning the existence or contents of any documents, or their information that would expose other litigation strategy.⁸

Unlike the situations in *Sporck* and *Shelton*, the nature of the review and selection process allegedly undertaken by B&W's lawyers concerning the documents "taken by Merrell Williams," as described by Wells and George, is similar to other types of litigation and discovery procedures which inevitably reveal certain aspects of attorney thought processes, i.e., interrogatories, document requests, requests for admission, in preparation of witness lists in a pretrial order. The law in this district is that in such situations there is "no justifiable expectation that the mental impressions revealed will remain private." *In re Shell Oil Refinery*, 125 F.R.D. at 133.

Absent facts similar to those in the *Sporck* and *Shelton* cases, and where, as here, the selection process does not reveal an attorney's litigation strategy or theory of the case, federal courts have

⁸ *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186 (8th Cir. 1992). In *Petersen*, the Eighth Circuit cites with approval the holding in *Shelton*, but emphasizes that documents are not protected under the work-product doctrine merely because they have been reviewed by attorneys or prepared in the ordinary course of business for nonlitigation purposes. *Id.* at 1189.

refused to grant work product protection based on the selection/compilation rule. See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1017 (1st Cir. 1988) (refusing to follow *Shelton* because any attorney thinking involved in disclosure of document lists is no different than disclosure of attorney's thought processes reflected in pleadings, answers to contention interrogatories, pretrial exhibit and witness list and trial memoranda); *Washington Bancorporation v. Said*, 145 F.R.D. 274, 277-78 (D.D.C. 1982) (refusing to follow *Sporck* and *Shelton* because the production of a document index was not "opinion work product" where no "sophisticated litigation theory" could be discerned from the index); *U.S. v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 698 (S.D. Fla. 1990) (refusing to follow *Sporck* and *Shelton* because their application would essentially preclude appropriate fact discovery); *Resolution Trust Corp.*, 151 F.R.D. 367, 374 (D. Colo. 1983) (rejecting *Sporck* and adopting the rationale of the First Circuit's opinion in the *San Juan Dupont Plaza Hotel* case.⁹

Moreover, if B&W is, in fact, arguing that any and all of the documents contained in the building identified by Wells as the site of a B&W document repository are protected by the alleged work product law-selection privilege, this Court should bear in mind the Fifth Circuit's admonition in *El Paso*: "[A]ttorney client privilege may not be tossed as a blanket over an undifferentiated group of documents." *El Paso*, 682 F.2d at 539 (citing *U.S. v. Davis*, 132 F.R.D. at 15); accord, *In re Matter of Feldberg*, 862 F.2d 622, 627-28 (7th Cir. 1988) ("A corporation . . . may not throw the veil of privilege over the details of how files were searched, and by whom, through the expedient of involving a lawyer in the process.")

⁹ It is well-settled that application of the selection/compilation rule "depends upon the existence of a real, rather than speculative, concern that the thought processes of [B&W] counsel in relation to pending or anticipated litigation would be exposed." *Gould, Inc. v. Sui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 680 (2nd Cir. 1987).

In short, the defendants' "lawyer-selection" argument must fail.

E. The "Common Legal Interest Privilege" Is No Protection

B&W has asserted that each and every document exchanged between and among B&W, its lawyers (in-house and outside counsel), and CTR, TI or any of the employees or counsel to any major tobacco company, is protected by the so-called "common legal interest" privilege. The common legal interest privilege is, in fact, not an independent privilege but rather an extension of the attorney-client privilege and the work product doctrine. *Metro Wastewater Reclamation Dist. v. Continental Casualty*, 142 F.R.D. 471, 476 (D. Col. 1992). Thus, alone, it can confer no independent privilege status to documents or information. *Id.* And, accordingly, to be eligible for protection, the documents sought to be protected must fall within the ambit of the attorney-client privilege or the qualified immunity afforded to work product. *In Re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990).

Further, the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 1995 W.L. 86450 (S.D. N.Y. 1995). B&W has failed to produce to this Court a written agreement which evidences a desire between B&W and its joint tortfeasors to undertake a joint or common defense of the defendants. The burden for establishing the protection of the joint defense or common interest doctrine remains on the party claiming it. Without a written agreement, courts have refused to grant the claimed protection. *United States v. Sawyer*, 1995 W.L. 64183 (D. Mass. 1995); *In re Beville, Bressler & Schulman Asset Management*, 805 F.2d 120, 126 (3rd Cir. 1986).

F. The Documents Which Are Arguably Valid Attorney-Client Communications Should Nevertheless Lose Their Protection Because of the Crime/Fraud Exception

The Commonwealth does not concede, nor has B&W established, that any of the documents sought are covered by any claim or claims of privilege. Assuming *arguendo* however, that this Court should somehow find that some of the documents are so protected, the Commonwealth's position is that the crime/fraud exception to both the attorney-client and work product privilege applies. The crime/fraud exception provides that the attorney-client privilege provides no protection where the communication is "made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554, 562-63, 109 S.Ct. 2619, 2626, 105 L.Ed.2d 469 (1989); *Prucell v. District Attorney*, 424 Mass. 109, 112 (1997) (following and quoting *Zolin*). In *Zolin*, the Supreme Court pointed out that the central concern of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.*

As the issue of crime-fraud has already been extensively briefed in this litigation, the issue will be addressed now in only the limited context of directly addressing B&W's claims.¹⁰

The phrases "fraud" or "crime" have been interpreted to mean not only criminal activities but also tortious ones. *Volcanic Gardens Management v. Poxson*, 847 S.W.2d 343 (Tex. App. 1993).

Advice sought in furtherance of a future or on-going fraud is unprivileged--therefore unprotected. *In Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1041 (2nd Cir. 1984); *In re International Systems*, 693 F.2d 1235 (5th Cir. 1982). The "Merrell Williams" Documents illustrate that none of the alleged lawyer-client communications between the tobacco companies and

¹⁰The Commonwealth respectfully points out that it previously briefed the "crime-fraud" exception to many of the documents now defendants' May 20, 1998 letter. These are were identified in the Commonwealth's prior brief by tab number and (Ness, Motley trol #): 1 (191), 2 (188), 3 (177), 4 (1976), 11 (473), 12 (572), 13 (573), 14 (140), 15 (90), 16 (104), 17 (183), 28 (284), 37 3), 39 (389), 40 (779), 41 (175), 42 (437), 45 (696), 48 (872) and 49 (507). That brief also discusses the documents and lains why they are not should not be privileged, either under the crime-fraud exception or because they are not privileged in the fi nce.

their lawyers deserve protection because they involved the giving of "legal advice" on how to commit fraud upon the court (a separate cognizable tort) in current and future litigation, as well as furthering their continuing fraud upon the American public and the government with regard to the hazards related to the smoking of cigarettes. This is so because (a) the fraud or tortious actions contemplated in those communications were, in fact, prospective in nature and (b) the fraud and tortious activity, i.e., the sale of cigarettes and the deception of the public vis-à-vis the health hazards smoking presents, are ongoing even today. See *Castano v. American Tobacco*, Minute Entry, Heebe J., September 22, 1994. (Plaintiff's allegations of fraud and deceit fit the definition of "continuing torts.")

B&W's contention that in order for the crime/fraud exception to apply, the communication must have been made with the "intent to further an unlawful act." This contention is ironic in view of the fact that the documents themselves expose the intent of B&W to improperly create paperwork that could be relied on post hoc to claim a privilege which in truth did not exist. Exhibit 7 (NM #573) and Exhibit 8 (NM #572). Objective intent is the basis for any analysis of crime-fraud. *U.S. v. Bay State Ambulance*, 874 F.2d 20, 29 (1st Cir. 1989). The following quotes from the documents illustrate this objective intent:

1979 . . . I have discussed with Gil Esterle various alternatives for handling BAT scientific reports which come to B&W in a way that would afford some degree of protection against discovery. Discussion centered on receipt and initial treatment of the documents at B&W.

. . . The cost sharing agreement between B&W and BAT, under which B&W pays for BAT scientific research and receives reports, is an obstacle because as presently written it would probably contradict the position that you were acquiring the reports for purposes of litigation . . . (. . . its language specifies the acquisition of scientific research for general business purposes).

I recommend a second alternative, which would be that all BAT scientific reports be shipped directly to Dr. Esterle under a formal arrangement that Dr. Esterle was assigned to be your agent for the acquisition of scientific materials in anticipation of litigation. Dr. Esterle would separate the reports which were relevant to smoking and health, or

otherwise sensitive, for special handling as described below and place the routine reports into regular R&D circulation.

The Esterle alternative would provide work product coverage

There would still be the matter of the cost sharing agreement. Regardless of the initial recipient of the documents, in order to be covered by the rules of civil procedure they must be "prepared in anticipation of litigation." Appropriate paper work should be established with BAT . . . paper work which would make this statement as a policy between the parent and sibling, but that in the operational context BAT would send documents without attempting to distinguish which were and were not litigation documents. . . . [It] would not adversely affect the tax consequences of the agreement.

The discussions with Dr. Esterle and Dr. Sanford would be for the purpose of establishing an agreement on a B&W protocol for the reports. Changes in the cost sharing agreement and any other papers between B&W and BAT should be approached at a later time.

Exhibit 7 (NM #573).

June 15, 1979 . . . The material should come to you under a policy statement between you and Southampton which describes the purpose of developing the documents for B&W and sending them to you as use for defense of potential litigation. It is possible that a system can be devised which would exempt the Engineering reports because it might be difficult to maintain a privilege for covering such reports under the potential litigation theory.

Continued Law Department control is essential for the best argument for privilege. . . . The general policy should be clearly stated that access to the documents and storage of the documents is under control of the Law Department and access is granted only upon approval of request. . . .

The policy should explicitly make Dr. Sanford the agent of the Law Department with regard to these procedures.

Exhibit 8 (NM #572).

Furthermore, the fraud perpetrated on the public and the government involved the hazards associated with the use of cigarettes. The very conduct at issue in this case.

The crime/fraud exception also allows an adversary to gain access to attorney work product in limited circumstances. See, "The Protected Status of Opinion Work Product," 68 Wash. 881 L. Rev.

(1993). See, e.g., *In Re Special Sept. 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980) (client continuing wrong justifies invasion); *United States v. King*, 536 F. Supp 253, 261-62 (C.D. Cal. 1982) (the wrong can be that of counsel, instead of client). Because the common interest or joint defense privilege claimed by B&W is no more than an extension of the attorney-client privilege, the crime/fraud exception applies to it with equal force.

VI. DOCUMENT-SPECIFIC ANALYSIS

In order to assist the Court, the Commonwealth has provided a item-by-item analysis of many (but not all) of the documents Exhibit 1 to this Memorandum. The analysis of the documents is provided to assist the Court. It is not meant to be all inclusive or exhaustive in terms of the factual and legal bases on which the defendant's claims of privilege should be denied. The Comments section of the Exhibit 1 incorporates by reference all of the legal and factual arguments contained in this Memorandum.

The Commonwealth reserves its right to provide supplemental briefs or arguments on these issues as appropriate or as requested by the Court pursuant to its order.

CONCLUSION

In view of the above, this Court should issue an order rejecting Brown & Williamson Tobacco Corp.'s unfounded claims of privilege and order the documents be "de-privileged."