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1999

## Minnesota v. Philip Morris, Inc.: An Important Legal Ethics Message Which Neglects the Public Interest in Product Safety Research

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### Recommended Citation

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# *Minnesota v. Philip Morris, Inc.:* An Important Legal Ethics Message Which Neglects the Public Interest in Product Safety Research

BY EDWARD J. IMWINKELRIED\*  
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### INTRODUCTION

The title of this Symposium is *Litigating Zealously Within the Bounds of the Law*. On first hearing, the title conjures up thoughts of the restrictions substantive law imposes on an attorney's conduct at trial. This idea was prominent in the proposed final draft of the American Bar Association's Model Rules of Professional Conduct, which noted that the attorney acts within "a larger legal context."<sup>1</sup> More directly, the Model Rules emphasize that even when an attorney acts in a representative capacity, he or she is not exempt from duties imposed by substantive law.<sup>2</sup> The attorney must "conform to the requirements of the law."<sup>3</sup>

For example, while an attorney has an ethical duty to his or her client to represent the client with loyalty<sup>4</sup> and vigor,<sup>5</sup> that duty does not excuse deliberate complicity in the commission of a crime at trial.<sup>6</sup> Substantive

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<sup>1</sup> MODEL RULES OF PROFESSIONAL CONDUCT 3 (Proposed Final Draft 1981).

<sup>2</sup> *See id.*

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1998).

<sup>5</sup> *See id.* Rules 1.1, 1.3.

<sup>6</sup> On the topics of perjury and false statement, it should be noted that attorneys are bound by Model Rule 3.3. This Rule establishes that an attorney who makes a misleading statement, or uses others to make misleading statements, in the representation of a client is acting unethically and is subject to discipline. *See id.*

criminal law forbids perjury,<sup>7</sup> and an attorney may not knowingly assist in the presentation of perjurious testimony.<sup>8</sup> These substantive law restrictions on representation produce a highly visible issue of legal ethics.<sup>9</sup>

In *State v. Philip Morris, Inc.*, Special Master Mark Gehan addressed a practical restriction on attorney conduct that emanates from a source other than substantive law.<sup>10</sup> His ruling produced a condign resolution of the ethical issues before him. The analysis he used, however, gave no consideration to an issue of evidence law that significantly affects the safety of products sold in the marketplace.

Master Gehan was asked to decide whether scientific research into the safety of tobacco products conducted or sponsored by cigarette manufacturers was discoverable.<sup>11</sup> When the plaintiffs sought discovery of the research, the defendants resisted on the grounds of the attorney-client and work product privileges.<sup>12</sup> The plaintiffs responded by contending that the privileges did not attach to the research in question<sup>13</sup> and that the crime-fraud exception overcame the privileges in any event.<sup>14</sup> On the crime-fraud issue, the plaintiffs urged that long before the litigation commenced, the defendants' attorneys had sought to misuse the law of evidence by

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Rule 3.3.

<sup>7</sup> See 18 U.S.C. §§ 1621-1623 (1994).

<sup>8</sup> See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.5 (1986).

<sup>9</sup> The specific limitation on representation imposed by the crime of perjury is one of the most noted and vexing issues in legal ethics. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Norman Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978).

<sup>10</sup> See Report of Special Master: Findings of Fact, Conclusions of Law and Recommendations Regarding Non-Liggett Privilege Claims, *State v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. D. Ct. 1998) [hereinafter Report of Special Master]. This report was approved and adopted with clarifications by the court in an order dated March 7, 1998. See *State v. Philip Morris, Inc.*, No. C1-94-8565, 1998 WL 25714 (Minn. D. Ct. Mar. 7, 1998). Additionally, the full text of this report is available on the World Wide Web at <<http://www.stic.neu.edu/MN/specialmaster2-10-98.html>>. Citations in this Article refer to a copy of the report obtained from the Clerk of Court, Minnesota State District Court, Second Judicial District, Room 600, 15 West Kelley Boulevard, St. Paul, Minnesota, 55102.

<sup>11</sup> See Report of Special Master, *supra* note 10, para. 5.

<sup>12</sup> See *id.* para. 7.

<sup>13</sup> See *id.* para. 5.

<sup>14</sup> See *id.* para. 8.

“wrap[ping]”<sup>15</sup> the research in spurious “privilege shields.”<sup>16</sup> For certain categories of documents, the special master accepted both of the plaintiffs’ arguments.<sup>17</sup> The resulting report in *Philip Morris* is an innovative and significant opinion concerning ethical limitations on attorney conduct because it focuses on unethical attorney conduct prior to litigation and uses adjectival evidence law rather than substantive law to sanction such conduct.

Trial court opinions rarely garner scholarly attention, much less a report by a special master on discovery issues. However, pretrial discovery opinions, such as Master Gehan’s report, control an extremely important phase of the litigation process that merits more attention than it usually receives. Roughly ninety-five percent of all civil cases are resolved without trial,<sup>18</sup> with the pretrial phase of litigation supplying the culmination of the dispute formerly expected at trial.<sup>19</sup> In most cases, an attorney’s case is effectively on trial during pretrial discovery,<sup>20</sup> which can aptly be described as “the center of gravity” in litigation.<sup>21</sup> As one text on discovery states:

From the outset of the litigation, the attorney must “try” the case and attempt to prove the case to the other side during pretrial. If the attorney does not gather enough facts to make out a prima facie case, the opposing attorney can terminate the suit by a summary judgment motion under Federal Rule of Civil Procedure 56. . . . If the attorney gathers barely enough facts to make out a submissible case, the parties may settle; but the settlement will undoubtedly be unfavorable to the attorney’s client. However, if the attorney succeeds in impressing the opponent during discovery, the likely denouement is a favorable settlement. . . . In the words of one veteran trial attorney, contemporary litigation is one-tenth trial and nine-tenths discovery.<sup>22</sup>

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<sup>15</sup> *Id.* para. 42.

<sup>16</sup> *Id.* para. 316.

<sup>17</sup> See Richard A. Zitrin & Carol M. Langford, *Ethics in Ashes: Big Tobacco’s Lawyers Hide Behind the Cloak of Privilege*, CAL. LAW., Nov. 1998, at 46; Paul R. Rice, *We Haven’t Got a Secret Anymore: How the Tobacco Industry Lost Its Attorney-Client Privilege*, LEGAL TIMES, Apr. 13, 1998, at 27.

<sup>18</sup> See Joseph Kelner, *Settlement Techniques Part One*, TRIAL, Feb. 1980, at 39.

<sup>19</sup> See Charles Maher, *Discovery Abuse*, CAL. LAW., June 1984, at 46.

<sup>20</sup> See Hicks Epton, *Effective Use of Pre-Trial Discovery*, 19 ARK. L. REV. 9, 15 (1965).

<sup>21</sup> John W. Cooley, *Puncturing Three Myths About Litigation*, A.B.A. J., Dec. 1984, at 75, 76.

<sup>22</sup> THEODORE V. BLUMOFF, MARGARET Z. JOHNS & EDWARD J. IMWINKELRIED, PRETRIAL DISCOVERY: THE DEVELOPMENT OF PROFESSIONAL JUDGMENT § 2.1, at

In recognition of that realistic perspective, we recommend that legal ethics scholars give greater attention to discovery decisions such as Master Gehan's report.

The report deals with a topic of great magnitude with a long history: the legal status of claims for compensation brought against cigarette manufacturers. As Master Gehan's report points out, the 1950s witnessed a dramatic increase in the level of regulatory activity affecting the cigarette industry.<sup>23</sup> The Federal Trade Commission and the Food and Drug Administration in particular expressed their concern about the health hazards posed by cigarette smoking.<sup>24</sup> That activity spurred legislative interest in the subject. In 1957, Congress held the "Blatnik hearings," investigating the disclosure of tar and nicotine levels in advertising.<sup>25</sup> The combination of administrative activity and congressional hearings brought the subject to the public's attention. The first of many lawsuits naming the tobacco manufacturers as defendants was filed in 1954.<sup>26</sup>

In the *Philip Morris* case in which Master Gehan submitted his report, the plaintiffs were the State of Minnesota and Blue Cross and Blue Shield of Minnesota. They sued to recover the costs incurred in providing medical care to persons afflicted by illnesses caused by cigarette smoking.<sup>27</sup> The roster of defendants in *Philip Morris* was a veritable "Who's Who" of the tobacco industry: Philip Morris, R. J. Reynolds, Brown & Williamson, British-American Tobacco Company Limited, Lorillard, the American Tobacco Company, and Liggett Group, as well as an entity which figured prominently in Master Gehan's report, the Council for Tobacco Research.

During the pretrial discovery phase of *Philip Morris*, the plaintiffs requested production of a large volume of documents, including documents reflecting scientific research into the health hazards posed by cigarette smoking.<sup>28</sup> The defendants objected to production of the research and communications regarding it on the basis of the work product and attorney-client privileges, respectively.<sup>29</sup> These objections were the catalyst for Master Gehan's report.

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12 (1993) (citations omitted).

<sup>23</sup> See Report of Special Master, *supra* note 10, para. 2.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* para. 4.

<sup>26</sup> See *id.* para. 1.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* para. 5.

<sup>29</sup> See *id.* paras. 5-6.

In his report, Master Gehan relied primarily on traditional attorney-client privilege analysis to dispose of the defendants' objections.<sup>30</sup> He initially addressed the question of whether there was a prima facie case for the application of either privilege. Noting that attorney-client communications are privileged only when the predominant purpose of the communication is "legal in nature,"<sup>31</sup> Master Gehan found that the research in question had not been generated primarily for a legal purpose.<sup>32</sup> The industry had made public representations that it would conduct and publicize research into the alleged health hazards posed by smoking.<sup>33</sup> Either by operation of tort law or by virtue of their voluntary undertaking,<sup>34</sup> the defendants had "an independent obligation to conduct research into the safety of [their] product, and to warn the product's consumers if the research results supported negative conclusions."<sup>35</sup> Since that independent obligation was sufficient to motivate the research, the prima facie claim for privilege was deficient.

As an alternative basis for his decision,<sup>36</sup> Master Gehan invoked the crime-fraud exception to the attorney-client<sup>37</sup> and work product<sup>38</sup> privileges. He construed the exception broadly. Minnesota law does not require the party seeking discovery to establish all the elements of common law

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<sup>30</sup> We realize that he did so largely because the litigants chose to argue the issue in those terms.

<sup>31</sup> Report of Special Master, *supra* note 10, para. 318.

<sup>32</sup> *See id.* paras. 328-29.

<sup>33</sup> *See id.* para. 32.

<sup>34</sup> *See id.* paras. 294, 299.

<sup>35</sup> *Id.* para. 329.

<sup>36</sup> The crime-fraud exception analysis served as an alternative basis for ordering the production of the documents reflecting the scientific research. It also functioned as a basis for ordering the disclosure of attorney-client communications related to the research.

<sup>37</sup> It is well-settled that there is a crime-fraud exception to the attorney-client privilege. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2298, at 572 (McNaughton ed., rev. ed. 1961).

<sup>38</sup> There is a split of authority over the question of whether there is a crime-fraud exception to work product protection. *See* Teresia B. Jovanovic, Annotation, *Fraud Exception to Work Product Privilege in Federal Courts*, 64 A.L.R. FED. 470 (1983). However, there is respectable authority recognizing the exception. *See In re Grand Jury Proceedings*, 102 F.3d 748, 752 (4th Cir. 1996); *In re Grand Jury Subpoena*, 615 F. Supp. 958, 965 (D. Mass. 1985).

fraud.<sup>39</sup> Cautioning against applying the exception in a “rigid” fashion,<sup>40</sup> Master Gehan held that the plaintiffs had established that the exception applied to many of the documents subject to the production request.<sup>41</sup> As Section I of this Article details, the defendants had created a committee of attorneys to monitor the scientific research.<sup>42</sup> The defendants established a distribution system in which the research was channeled through the committee.<sup>43</sup> In Master Gehan’s mind, the essential purpose of this system was to create the misleading appearance that all the research was legally inspired and therefore privileged.<sup>44</sup> The system was an essential part of the defendants’ scheme for selective disclosure of the research results.<sup>45</sup> The defendants had given ongoing assurance to the public<sup>46</sup> that they would conduct and release all relevant research.<sup>47</sup> However, the defendants had planned throughout to release only those results which supported their position that cigarette smoking is safe and to suppress any results suggesting that cigarettes are a dangerous product.<sup>48</sup> In a broad sense, this scheme was fraudulent<sup>49</sup> and triggered the crime-fraud exception to the attorney-client and work product privileges. In the words of one commentator:

The fraud was the ploy of having potentially damaging studies and scientific experiments conducted through legal counsel, so they could be suppressed if they ultimately proved unfavorable to the companies’ interests—even though the companies were representing to the public that their product was safe and that all such studies and experiments were being conducted by impartial scientists and fully disclosed, regardless of outcome.<sup>50</sup>

On several scores, we applaud Master Gehan’s report. The report sends a strong message to the bar that even before litigation commences,

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<sup>39</sup> See Report of Special Master, *supra* note 10, para. 293 (citing Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. Ct. App. 1991)).

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* para. 304.

<sup>42</sup> See *id.* para. 40.

<sup>43</sup> See *id.* para. 112.

<sup>44</sup> See *id.* paras. 42, 316.

<sup>45</sup> See *id.* para. 284.

<sup>46</sup> See *id.* para. 302.

<sup>47</sup> See *id.* paras. 16, 32.

<sup>48</sup> See *id.* para. 304.

<sup>49</sup> See *id.* para. 306.

<sup>50</sup> Rice, *supra* note 17, at 28.



attorneys must be conscious of the limitations prescribed by adjectival law such as privilege concepts in the law of evidence. We also believe Master Gehan reached the right result in ordering disclosure of the scientific research. However, the thesis of this article is that the report erred<sup>51</sup> in evaluating the discoverability of the research solely in terms of the traditional attorney-client and work product privileges. These concepts and the crime-fraud exception to the privileges were not designed for fact situations like that presented in *Philip Morris*, which facially involved long-term scientific research on complicated product safety issues. Although Master Gehan was right to order discovery, reliance on these concepts in future cases involving such research would produce results contrary to vital public policies favoring product safety research.

To develop this thesis, the Article proceeds in four sections. The first sets out the factual background of the *Philip Morris* case.<sup>52</sup> The second section describes Master Gehan's reasoned application of the attorney-client and work product privileges and the crime-fraud exception to those privileges.<sup>53</sup> The third section considers the dangers of applying traditional attorney-client privilege concepts to determine the discoverability of long-term scientific product safety research.<sup>54</sup> Finally, the fourth section proposes an alternative approach to such cases.<sup>55</sup> The essence of that approach is the application of two non-traditional legal concepts: the privilege for "self-critical analysis"<sup>56</sup> and the exception to privileges when the privilege holder puts the privileged material "in issue"<sup>57</sup> by making a misleading partial disclosure of the contents of the otherwise privileged material.<sup>58</sup> It is arguable that application of the self-critical analysis exception might have led Master Gehan to hold that the defendants had made a prima facie case for the privilege. However, the application of the

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<sup>51</sup> Again, although Master Gehan authored the report, he was analyzing the issues as framed by the litigants.

<sup>52</sup> See *infra* notes 59-103.

<sup>53</sup> See *infra* notes 104-36.

<sup>54</sup> See *infra* notes 137-56.

<sup>55</sup> See *infra* notes 157-245.

<sup>56</sup> Phillip Leahy, *The Privilege for Self-Critical Analysis in Statutory and Common Law*, 7 DICK. J. ENVTL. L. & POL'Y 49, 49 (1998).

<sup>57</sup> *Terrebonne, Ltd. of Cal. v. Murray*, 1 F. Supp. 2d 1050, 1059 (E.D. Cal. 1998); see *Rockwell Int'l Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153, 161 (Ct. App. 1994).

<sup>58</sup> See *United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998) (stating that a party's privilege "cannot be used as both a shield and a sword").

in issue exception would have defeated the privilege and supported a decision permitting discovery of the research.

### I. THE FACTUAL BACKGROUND OF THE *PHILIP MORRIS* LITIGATION

As Master Gehan's report indicates, the battle over tobacco took its modern form in the early 1950s.<sup>59</sup> From the beginning, it was clear to the industry that it had to fight in several venues simultaneously—administrative proceedings, legislative hearings, judicial cases, and the public forum.<sup>60</sup> To fight these battles, the industry developed both a public and private strategy.

The public strategy opened with the keynote event of the industry's public relations campaign, the widespread publication of *A Frank Statement to Cigarette Smokers* on January 4, 1954.<sup>61</sup> The statement announced the organization of the Tobacco Industry Research Committee, predecessor to the Council for Tobacco Research ("CTR").<sup>62</sup> Challenging "the 'theory that cigarette smoking is in some way linked with lung cancer . . .,'"<sup>63</sup> the statement pledged that in order to get at the truth, the CTR would fund a scientific "research effort into all phases of tobacco use and health."<sup>64</sup> A similar statement released later acknowledged that "the American public deserve objective scientific answers" to the questions about the alleged connection between smoking and health problems.<sup>65</sup> Through the CTR, the industry promised the public that it would "conduct and disclose objective research."<sup>66</sup> In the ensuing years, the industry avowed that it "would not knowingly distribute a dangerous product"<sup>67</sup> and frequently reiterated its ongoing assurance that it was conducting tests and would reveal the results of pertinent scientific research.<sup>68</sup>

Meanwhile, the private strategy of the industry was severely at odds with its public representations. Since the industry anticipated litigation, it

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<sup>59</sup> See Report of Special Master, *supra* note 10, para. 2.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* para. 10.

<sup>62</sup> See *id.* paras. 15-16.

<sup>63</sup> *Id.* para. 15 (quoting Hearings before Judge Fitzpatrick, Apr. 8, 15, 1997).

<sup>64</sup> *Id.* para. 16.

<sup>65</sup> *Id.* para. 17.

<sup>66</sup> *Id.* para. 22.

<sup>67</sup> *Id.* paras. 173, 302.

<sup>68</sup> See *id.* paras. 16, 32.

strove to ensure that the only scientific evidence available in the litigation would be research supporting the industry position. To that end, the industry employed several tactics to discourage and suppress negative research findings.

One tactic was for the tobacco companies, usually acting through the CTR as their agent, to control all research in order to minimize the possibility of generating unfavorable findings.<sup>69</sup> This meant that no tobacco firm should conduct research on its own. Thus, according to Master Gehan, the leading cigarette manufacturers entered into “a ‘gentlemen’s agreement’ prohibiting [internal] biological research” related to health hazards.<sup>70</sup> At one point, after Philip Morris received information that Reynolds was violating the agreement, the president of Philip Morris complained to Reynolds and requested that it shut down its biological research section.<sup>71</sup> The Reynolds section, known as “the Mouse House,”<sup>72</sup> had already completed preliminary rodent smoke inhalation tests suggesting that smoking caused emphysema.<sup>73</sup> On short notice, the section was closed and all twenty-six scientists fired.<sup>74</sup> Master Gehan inferred that the section was closed pursuant to the “gentlemen’s agreement.”<sup>75</sup> There was also deposition testimony that, at one point, industry attorneys told an outside researcher conducting a study funded by the CTR that his research was “getting too close to some things.”<sup>76</sup>

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<sup>69</sup> See *id.* para. 130.

<sup>70</sup> *Id.* para. 132. Any agreement of this type would undoubtedly violate section 1 of the Sherman Act as a “contract, combination . . . or conspiracy in restraint of trade.” Sherman Act § 1, 15 U.S.C. § 1 (1994). Removing health hazards from a product is the most basic type of product improvement, and product quality is a key component of competition. The “gentlemen’s agreement” between competitors eliminated this vital aspect of competition, apparently for the reason that such competitive research was inapposite for this market. Agreements limiting competition because agreeing competitors consider competition inappropriate always constitute unreasonable restraints on trade following the U.S. Supreme Court’s opinion in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 694-95 (1978). Also, see *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-64 (1986), and *NCAA v. Regents of University of Okla.*, 468 U.S. 85, 96-97 (1984).

<sup>71</sup> See Report of Special Master, *supra* note 10, para. 122.

<sup>72</sup> *Id.* para. 114.

<sup>73</sup> See *id.* para. 115.

<sup>74</sup> See *id.* para. 119.

<sup>75</sup> *Id.* para. 132.

<sup>76</sup> *Id.* para. 155.

A second tactic was to ensure that the CTR never came into formal custody or possession of negative scientific research which might be damaging if revealed outside the industry. Therefore, a decision was made to farm several research projects out to European laboratories.<sup>77</sup> In 1970, Philip Morris purchased INBIFO, a German research facility.<sup>78</sup> Philip Morris went to some length to ensure that there was no written contract setting out its agreement with INBIFO.<sup>79</sup> Even more to the point, while INBIFO was to submit written reports to Philip Morris, the latter made it a practice not to retain copies of the reports in its files.<sup>80</sup> Philip Morris returned all the documents to INBIFO.<sup>81</sup> Master Gehan wrote:

These unusual arrangements for handling scientific research at INBIFO have had an effect in thwarting the discovery proceedings in this case. [The judge assigned to the case] concluded that Philip Morris's failure to search the files of . . . INBIFO . . . in this action was "an egregious attempt to hide information relevant to this action."<sup>82</sup>

The third tactic was of the greatest interest to Master Gehan. When documents such as studies of the impact of varying nicotine levels<sup>83</sup> were generated and came into the defendants' custody, they were to be channeled through the defendants' attorneys.<sup>84</sup> A supervisory Committee of Counsel was created.<sup>85</sup> By funneling the studies through counsel,<sup>86</sup> the hope was that the defendants would create<sup>87</sup> "privilege shields"<sup>88</sup> for unfavorable studies. If, at the time of a production request, the research study was sitting "in an attorney's files,"<sup>89</sup> the legal privileges would enable the

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<sup>77</sup> See *id.* paras. 136-38.

<sup>78</sup> See *id.* para. 137.

<sup>79</sup> See *id.* para. 139.

<sup>80</sup> See *id.* para. 142.

<sup>81</sup> See *id.*

<sup>82</sup> *Id.* para. 143 (quoting Order Granting Plaintiff's Motion to Compel Regarding Philip Morris International, March 25, 1997, at 9 (CLAD #826)).

<sup>83</sup> See *id.* paras. 262-67.

<sup>84</sup> See *id.* para. 145.

<sup>85</sup> See *id.* paras. 40, 151, 336.

<sup>86</sup> See Rice, *supra* note 17, at 27.

<sup>87</sup> See Report of Special Master, *supra* note 10, para. 42.

<sup>88</sup> *Id.* para. 316.

<sup>89</sup> Zitron & Langford, *supra* note 17, at 46 (quoting Memorandum from the Washington, D.C., law firm of Arnold & Porter to the Committee of Counsel (1986)).

defendants to suppress the study.<sup>90</sup> The distribution system was intended to create the appearance that the documents reflecting the research were attorney-client communications.<sup>91</sup> These procedures followed the spirit of practitioner-oriented texts and articles that encourage counsel to create a paper record to support an eventual claim based on one of the legal privileges.<sup>92</sup> These authorities also recommend such steps as framing all possibly privileged communication as letters to counsel,<sup>93</sup> giving such documents a legal title,<sup>94</sup> and keeping them physically separate from unprivileged material.<sup>95</sup>

The tension between the industry's public and private strategies is evident. The industry repeatedly<sup>96</sup> represented to the public that it was conducting and disclosing objective scientific research to evaluate the hypothesis that cigarette smoking caused health problems.<sup>97</sup> Meanwhile, it did not disclose negative research findings, avoided conducting research into potentially embarrassing subjects,<sup>98</sup> and channeled research through counsel to support claims of legal privilege.<sup>99</sup> If the industry could shelter<sup>100</sup> unfavorable studies by seemingly wrapping them in legal privileges,<sup>101</sup> it would have the best of both worlds—it could reveal the scientific research supporting its position<sup>102</sup> while claiming legal privileges to suppress unfavorable studies.<sup>103</sup>

## II. MASTER GEHAN'S EXCLUSIVE RELIANCE ON THE TRADITIONAL CONCEPTS OF THE WORK PRODUCT AND THE ATTORNEY-CLIENT PRIVILEGES AND THE CRIME-FRAUD EXCEPTION IN HIS REPORT

Against the backdrop of the facts reviewed above, the Master decided the questions of whether the defendants had established a prima facie case

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<sup>90</sup> See Rice, *supra* note 17, at 27.

<sup>91</sup> See Report of Special Master, *supra* note 10, para. 112.

<sup>92</sup> See, e.g., James E. Daniels, *Managing Litigation Experts*, A.B.A. J., Dec. 1984, at 64, 65.

<sup>93</sup> See WALTER BARTHOLD, *ATTORNEY'S GUIDE TO EFFECTIVE DISCOVERY TECHNIQUES* 190 (1975).

<sup>94</sup> See Cathie A. Shattuck, *Use Written Discovery More Effectively*, *PRAC. LITIGATOR*, May 1990, at 11, 14.

<sup>95</sup> See Daniels, *supra* note 92, at 66.

<sup>96</sup> See Report of Special Master, *supra* note 10, para. 297.

<sup>97</sup> See *id.* paras. 17, 32, 56-58.

<sup>98</sup> See *id.* paras. 104, 119, 161.

<sup>99</sup> See *id.* para. 112; Rice, *supra* note 17, at 28.

<sup>100</sup> See Rice, *supra* note 17, at 28.

<sup>101</sup> See Report of Special Master, *supra* note 10, para. 42.

<sup>102</sup> See *id.* para. 291.

<sup>103</sup> See *id.*: Rice, *supra* note 17, at 28; Zitrin & Langford, *supra* note 17, at 46.

for a privilege and, if so, whether the plaintiffs had established the applicability of an exception to the privilege.

A. *The Master's Reliance on the Traditional Work Product and Attorney-Client Privileges to Assess the Defendant's Prima Facie Case*

Master Gehan initially took up the question of whether there existed a prima facie case for the application of the privileges asserted by the defendants.<sup>104</sup> He implicitly concentrated on the application of the work product privilege to the scientific research.<sup>105</sup> The work product or any other privilege applies only to evidence of an activity undertaken for the purpose the privilege was adopted to promote.<sup>106</sup> This "purpose" requirement is a corollary of the dominant instrumental rationale for privileges developed by Dean Wigmore.<sup>107</sup> The first priority in the law of evidence being to promote the discovery of truth, a privilege should apply only when the activity in question would not have occurred but for the existence of the privilege.<sup>108</sup> To apply the purpose requirement, the judge must focus on the state of mind of the party creating the document or other material or making the communication to which the privilege may apply.<sup>109</sup> Specifically regarding the work product privilege, the protection applies only if the attorney or the attorney's agent generated the document for litigation purposes.<sup>110</sup> Additionally, the requisite purpose need only be the primary

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<sup>104</sup> See Report of Special Master, *supra* note 10, paras. 275-76.

<sup>105</sup> See *id.* para. 279. The report does not distinguish between the two privileges in reviewing the basic principles of privilege law. However, the conclusions based upon that review, while directly applicable to the claim of work product privilege for the research apply only tangentially to the claim of attorney-client privilege. See *id.*

<sup>106</sup> With most privileges, the activity protected by the privilege is communication between, e.g., a client and attorney or patient and doctor. The work product privilege, on the other hand, applies to the activity of an attorney in preparing for trial. Frequently, such work product is recorded in notes made by the attorney, but it is not necessarily communicated to anyone.

<sup>107</sup> See ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS §§ 8.01, 8.06, at 384, 392-94 (1998); 8 WIGMORE, *supra* note 37, § 2285.

<sup>108</sup> See JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S FEDERAL EVIDENCE § 504.03[4][a], at 504-10-11 (Joseph M. McLaughlin ed., 2d ed. 1997).

<sup>109</sup> See 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5490, at 444 (1986).

<sup>110</sup> See *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); 2 BERNARD S. JEFFERSON, JEFFERSON'S CALIFORNIA EVIDENCE BENCHBOOK § 41.1 (3d ed. 1997).

or predominant reason for the activity<sup>111</sup> and not the sole or exclusive motivation. However, if this purpose is merely secondary, the document would have been developed without the assurance of confidentiality furnished by a privilege. In such a case, it would not serve the instrumental rationale to recognize a privilege.

In his report, Master Gehan noted the traditional purpose requirement, stating that the privilege should attach only if the protected purpose "predominate[d]."<sup>112</sup> He applied this test to the research in question and found that purposes independent of litigation preparation were the predominant causes for the research.<sup>113</sup> In support of this finding, he pointed out that under principles of tort law, the defendants "had an independent obligation to conduct research into the safety of their products, and to warn consumers if the research results supported negative conclusions."<sup>114</sup> Further, if the studies yielded favorable results, the defendants would put them to public relations uses.<sup>115</sup> Therefore, since the predominant purpose for the research was not preparation for litigation, the research was unprivileged.<sup>116</sup>

Much of the research had been systematically routed to and through attorneys for the defendants during the life of the CTR.<sup>117</sup> On the basis of this fact, the defendants claimed that both the letters of transmittal and the research transmitted were communications protected by the attorney-client privilege. As a corollary of his finding that the predominant purposes of the research were for nonlitigation uses, Master Gehan found that the communication of the research to the defendants' attorneys was made when the attorneys were "acting in scientific, administrative or public relations capacities, but not in a legal capacity."<sup>118</sup> Therefore, the purpose of

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<sup>111</sup> See *Chadbourne v. Superior Court*, 388 P.2d 700, 709-10 (Cal. 1964); *Wellpoint Health Networks v. Superior Court*, 68 Cal. Rptr. 2d 844, 850 (Ct. App. 1997); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. a (Tentative Draft No. 1, 1988); 24 WRIGHT & GRAHAM, *supra* note 109, § 5490, at 444; Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 338 (1989); Note, *The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, 39 WM. & MARY L. REV. 1397, 1433 (1998).

<sup>112</sup> Report of Special Master, *supra* note 10, para. 277.

<sup>113</sup> See *id.* para. 279.

<sup>114</sup> *Id.*

<sup>115</sup> See *id.* para. 281.

<sup>116</sup> See *id.*

<sup>117</sup> See *supra* notes 89-90 and accompanying text.

<sup>118</sup> Report of Special Master, *supra* note 10, para. 281.

transmitting the research to the attorneys was not to obtain legal advice, which is the requisite purpose of the attorney-client communications privilege.<sup>119</sup>

Assuming *arguendo* that it was appropriate to analyze the defendants' claims under the traditional legal privileges, Master Gehan stated the test correctly and applied it to the facts before him correctly. The research in question spanned decades, and the industry obviously intended to put it to multiple uses. In the leading corporate client attorney-client privilege decision,<sup>120</sup> the Supreme Court of the United States voiced the concern that corporations might attempt to extend improperly the reach of the privilege by "funneling" business communications through counsel.<sup>121</sup> That concern is hardly fanciful. In one survey of corporate counsel, the respondents indicated that, upon occasion, business documents were "filtered" through counsel "solely to protect the documents" by creating a privilege.<sup>122</sup> Master Gehan had sufficient facts before him to conclude that the Supreme Court's concern had been realized in *Philip Morris*. There were weighty motivations aside from litigation for conducting the scientific research, and his holding was well-justified if not inevitable.<sup>123</sup>

#### B. *The Master's Discussion of the Traditional Crime-Fraud Exception to the Attorney-Client Privilege*

In addition to finding that the defendants had not made a *prima facie* case for privilege protection for the CTR research, Master Gehan determined the applicability of the attorney-client privilege to communications between CTR officials and the defendants' attorneys concerning the

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<sup>119</sup> See *Wellpoint Health Networks v. Superior Ct.*, 68 Cal. Rptr. 2d 844, 850 (Ct. App. 1997); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE: DOCTRINE AND PRACTICE* § 5.9, at 464 (1995); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1073 (1978). There were communications made by the CTR officials and attorneys for the defendants in which CTR officials did seek legal advice. As to those communications, Master Gehan held that the attorney-client privilege did not attach because of the crime-fraud exception. See *infra* text accompanying notes 124-36.

<sup>120</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>121</sup> *Id.* at 395-96; see also Rice, *supra* note 17, at 27.

<sup>122</sup> Alexander, *supra* note 111, at 344.

<sup>123</sup> Master Gehan also held that the plaintiffs had made the necessary showing of exceptional circumstances warranting access to the scientific research even if the work product privilege was applicable to it. See Report of Special Master, *supra* note 10, para. 287.



research.<sup>124</sup> He held that the privilege was prima facie applicable to these communications despite the unprivileged nature of the research.<sup>125</sup> However, the special master went on to hold that the plaintiffs had established that the crime-fraud exception to the privilege applied to most of the communications, thus making them discoverable.<sup>126</sup>

A majority of American jurisdictions, including Minnesota,<sup>127</sup> agree that the crime-fraud exception exists.<sup>128</sup> Master Gehan broadly read the leading Minnesota precedent, *Levin v. C.O.M.B. Co.*,<sup>129</sup> to hold that the exception applies even if the party seeking discovery cannot establish “all elements of common law fraud.”<sup>130</sup> Unlike his finding that use in future litigation was not the predominant purpose for the CTR research, Master Gehan’s interpretation of *Levin* is questionable.<sup>131</sup> Citing federal authority, the *Levin* opinion states that the “[a]pplication of the crime-fraud exception should not be based on a rigid analysis.”<sup>132</sup> However, that language does not explicitly state that the underlying misconduct need not constitute a full-fledged fraud. The federal court in the opinion cited by *Levin* questioned whether the exception would apply absent “[a]n indispensable element of [actionable] fraud.”<sup>133</sup> On the other hand, the language in *Levin* is expansive, and several jurisdictions subscribe to “[b]roader formulations” of the exception which “include more . . . wrongdoing than crime and [technical] fraud.”<sup>134</sup>

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<sup>124</sup> See *id.* paras. 288-310.

<sup>125</sup> This holding is unremarkable. Clients frequently seek advice from attorneys concerning the effect an unprivileged document may have on the client’s legal situation. The privilege applies to the advice and to all communications made for the purpose of obtaining and rendering the advice.

<sup>126</sup> See Report of Special Master, *supra* note 10, paras. 328-30.

<sup>127</sup> See ROGER C. PARK ET AL., MINNESOTA EVIDENTIARY FOUNDATIONS 145-46 (1996).

<sup>128</sup> See WOLFRAM, *supra* note 8, § 6.4.10, at 279 (stating that the exception “seems to be recognized everywhere”).

<sup>129</sup> *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512 (Minn. Ct. App. 1991), cited in PARK ET AL., *supra* note 127, at 145 n.11.

<sup>130</sup> Report of Special Master, *supra* note 10, para. 293.

<sup>131</sup> Master Gehan candidly characterized his interpretation of *Levin* as his “reading” of the opinion. *Id.*

<sup>132</sup> *Levin*, 469 N.W.2d at 515 (citing *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 284 (8th Cir. 1984)).

<sup>133</sup> *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 n.6 (8th Cir. 1984).

<sup>134</sup> WOLFRAM, *supra* note 8, § 6.4.10, at 280; see also *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) (stating that the exception may encompass “crime,

If Master Gehan's reading of *Levin* is accepted, it is difficult to fault his treatment of the crime-fraud exception issue. In *Philip Morris*, the essential deceit was suppressing unfavorable research findings while continuing to represent to the public that objective scientific research supported the industry belief that its product was safe.<sup>135</sup> A rational consumer could rely upon that representation in choosing to use the defendants' products. Thus, the defendants' strategies appear to satisfy all of the elements of common law fraud and deceit,<sup>136</sup> much less any attenuated formulations of fraud.

### III. THE DANGER OF RELYING ON THE TRADITIONAL LEGAL PRIVILEGE CONCEPTS IN CASES INVOLVING SCIENTIFIC PRODUCT SAFETY RESEARCH

Master Gehan's rulings on the work product and attorney-client privileges and the crime-fraud privilege exception are obviously sustainable under traditional legal privilege principles. Nevertheless, the more fundamental question is whether the *Philip Morris* facts should have been analyzed solely under those principles. Upon further scrutiny, it becomes clear that there are grave dangers in placing exclusive reliance upon traditional privilege principles in cases involving product safety research similar to that found in *Philip Morris*.

#### A. *The Inaptness of Relying on the Traditional Work Product and Attorney-Client Concepts to Determine Whether a Prima Facie Case for Applying Privilege Protection Has Been Established*

Traditional legal privileges work well enough in the typical products liability case. In such a case, an accident occurs, and the defendant thereafter submits the product involved to a forensic safety expert for evaluation.<sup>137</sup> Typically, the manufacturer requests that an expert, who

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fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system").

<sup>135</sup> See Rice, *supra* note 17, at 28.

<sup>136</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 106-09 (5th ed. 1984).

<sup>137</sup> See ROBERT HABUSH, ART OF ADVOCACY: CROSS EXAM OF NON-MEDICAL EXPERTS § 4.05[1], at 4-25-27 (1981); J. E. Nichols & W. W. Allison, *Where Is Safety Expertise Found?*, TRIAL, Nov. 1979, at 70; Harry M. Philo & Linda Miller Atkinson, *Products Liability: The Expert Witness*, TRIAL, Nov. 1978, at 37.

specializes in preparing analyses to be used in litigation,<sup>138</sup> conduct an analysis in the specific context of a pending or imminent lawsuit.<sup>139</sup> In this situation, it is meaningful for the judge or special master to inquire whether litigation was the primary motivation for the request. The decision maker can focus on a limited time period and weigh the evidence indicating whether, in that time frame, a litigation-use motive was paramount in the mind of the business executives who requested the report. The issue is straightforward: Did the defendant company's executive order the report to prepare for trial, or was it ordered for a nonlegal, business reason such as product improvement? The facts in *Philip Morris* do not meet the criteria of the paradigm. The CTR research was not conducted over a short period of time in connection with the prospect of a specific lawsuit. Instead, the research dated back to 1954<sup>140</sup> and consisted of almost half a century of scientific investigation into the general topic of the health risks posed by cigarette smoking. Further, the CTR scientists were not forensic experts specifically hired to prepare a scientific analysis for use in a trial.<sup>141</sup> Although forensic experts are asked to address the question of whether the product is safe in its present condition, they are also expected to attempt to answer such litigation-related issues as whether the product's safety could have been improved prior to the accident and whether the product caused the accident in question. These issues are oriented retrospectively.

In ongoing research into product safety issues, the type of expert and the type of question addressed by that expert differ from the paradigm of litigation research. The ongoing product safety researchers are staff or consultant scientists rather than forensic specialists, and they are primarily interested in the prospective question of whether the product can be made safer in the future. Given the radical differences between the types of experts and the types of questions put to them, the application of the

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<sup>138</sup> See 2 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 20-1, at 41 (2d ed. Supp. 1998) (discussing the differences between forensic and clinical toxicologists).

<sup>139</sup> At least when the expert is asked to evaluate private information in the possession of the manufacturer and submit the evaluation to the manufacturer's attorney, many courts extend the attorney-client privilege to the expert's report setting out the evaluation. See Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 21-22 (1990). Some courts have applied this view to engineers. See *id.* at 22.

<sup>140</sup> See Report of Special Master, *supra* note 10, para. 14.

<sup>141</sup> See *id.*

traditional legal privilege concepts to product safety research will almost always lead to the result that there is no privilege protection. There is obviously a nonlegal “business” motivation for product safety research, and that motivation will dictate that such research will not satisfy the requisite purpose for either of the legal privileges.

The preceding analysis raises the policy question of whether there should be any privilege protection for product safety research. We maintain that the answer to the question should be in the affirmative. The current state of the law—conferring privilege protection on forensic experts while denying any protection to experts engaged in bona fide scientific product safety research—is anomalous. Who is the more socially responsible defendant: the manufacturer who investigates its product’s safety only after an accident and litigation, or the manufacturer who initiates a scientific inquiry to improve the safety of its product before any accident occurs? The latter manufacturer should be rewarded rather than penalized. However, the current state of the law yields the *Catch-22* outcome that the law confers more privilege protection on the manufacturer whose conduct is less socially responsible. Given the fact that the improvement of product safety is an important social goal, the focus of the law of evidentiary privileges should be the positive encouragement of ongoing systematic scientific investigation into product safety.

Considered in that perspective, the facts in *Philip Morris* indicate the probability of an American tragedy. As Master Gehan’s report states, Helmet Wakeham was a senior Philip Morris researcher.<sup>142</sup> In his deposition in *Philip Morris*, Wakeham was asked about the “gentleman’s agreement” forbidding in-house biological research by the defendant manufacturers.<sup>143</sup> Wakeham conceded that years before the litigation, he had expressed his opinion in writing that scientific expertise in the tobacco industry could have produced beneficial research on smoking and health but for the concern over forced disclosure of any negative findings of such research. On this subject, he wrote, “Unfortunately . . . the scientific expertise of the industry, because of the liability suit situation, has not been permitted to make a contribution to the problem, a contribution which I believe was and is vital.”<sup>144</sup>

The defendants’ staff researchers were in an unparalleled position to make important contributions to the scientific investigation of the health problems created by cigarette smoking. If normal competitive pressures

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<sup>142</sup> See *id.* para. 130.

<sup>143</sup> See *id.*; see also *supra* text accompanying note 70.

<sup>144</sup> Report of Special Master, *supra* note 10, para. 135.

had dictated individual firms' research, it is quite conceivable that a safer cigarette could have been produced. This development would have saved tens of thousands of lives and billions of dollars in health care expenditures. However, the manufacturers were so concerned about disclosure of possible negative findings from such research in their administrative, legislative, judicial, and public relations battles that they prohibited expert researchers in individual firms from contributing to the investigation of the health effects of smoking. Sober consideration of the loss of the possible benefits of the prohibited research should force us to confront the issue of the appropriate changes to make in the law of evidence to encourage such research.

*B. The Danger of Applying Master Gehan's Version of the Traditional Crime-Fraud Exception to Override a Prima Facie Case for Upholding a Privilege Claim*

As we have seen, applying the purpose test for legal privileges in most cases will leave scientific product safety research bereft of protection in fact patterns such as *Philip Morris*. The disincentive to engage in such research is marginally increased by Master Gehan's treatment of the crime-fraud exception to the attorney-client privilege in reaching the conclusion that communications regarding the research between the CTR and the defendants' lawyers receive no protection under the privilege.

Master Gehan embraced a broad version of the exception. A number of the early common-law decisions on the exception suggest that its scope is limited to egregious misconduct such as *malum in se* crimes and offenses involving "moral turpitude."<sup>145</sup> Nonetheless, the trend has been to expand the types of misconduct that bring the exception into play.<sup>146</sup> Some jurisdictions apply the exception to crimes and the tort of fraud, while others have widened the scope to reach any crime or tort.<sup>147</sup> Master Gehan went farther, ruling that the misconduct need not meet the requirements of a technical fraud.<sup>148</sup> He opted for a balancing test: "Instead, the focus should be on whether the detriment to justice from foreclosing inquiry into pertinent facts is outweighed by the benefits to justice from a franker

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<sup>145</sup> 1 MCCORMICK ON EVIDENCE § 95, at 352-53 (4th ed. 1992).

<sup>146</sup> See, e.g., *Fellerman v. Bradley*, 493 A.2d 1239 (N.J. 1985) (holding that the exception extends to fraud, and in this context fraud should be interpreted expansively).

<sup>147</sup> See WOLFRAM, *supra* note 8, § 6.4.10, at 280.

<sup>148</sup> See Report of Special Master, *supra* note 10, para. 293.

disclosure in the lawyer's office."<sup>149</sup> His test is thus both broad and vague.<sup>150</sup>

The vagueness of Master Gehan's version of the crime-fraud exception is troublesome. Under the prevailing instrumental rationale for privileges, any exceptions must be stated in advance in clear terms. If a privilege is to achieve the desired instrumental effect of encouraging conduct such as client revelations to attorneys, the client must be able to make a reasonable prediction as to whether the privilege will protect his or her revelation.<sup>151</sup> To make such a prediction, the attorney and client must be able to assess both the likelihood that the privilege will attach and the probability that an exception will apply. For that reason, the "contours"<sup>152</sup> of exceptions ought to be defined in "bright line" terms.<sup>153</sup> Ambiguously worded exceptions render the likelihood of privilege protection "unpredictable"<sup>154</sup> and thereby "frustrate" the instrumental rationale for creating the privilege in the first instance.<sup>155</sup> The instrumental theory views the client as a rational actor<sup>156</sup> engaged in a cost/benefit analysis when the client decides whether to reveal information to the client's attorney. The prospective benefit is the increased value to the client of the attorney's services when the attorney is fully informed by the client of the information the client considers sensitive. The countervailing cost is the detriment the client will experience if the

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<sup>149</sup> *Id.*

<sup>150</sup> Master Gehan's broad test for triggering the exception does not destroy the availability of the privilege. Whatever the breadth of the test, the majority of courts will not hold the exception applicable unless it is established that, at the time of the communication, the client was seeking advice for the specific purpose of enabling the client to commit the crime or tort in the future. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 145, § 95, at 350-51. Therefore, the exception applies only if, at the time of their communication, the client solicited the attorney's services to help the client perpetrate a crime or fraud, however defined. So long as there is a firm requirement for a showing of that specific intent at the time of the communication, the exception can be broadened to include other misconduct without undermining the privilege.

<sup>151</sup> *See* M. Brett Fulkerson, *One Step Forward, Two Steps Back: The Recognized but Undefined Federal Psychotherapist-Patient Privilege*, 62 MO. L. REV. 401, 423-24 (1997).

<sup>152</sup> *Id.* at 423.

<sup>153</sup> *Id.* at 422.

<sup>154</sup> *Id.* at 423.

<sup>155</sup> *Id.* at 424.

<sup>156</sup> *See* DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 64 (1996) (discussing the concept of "*homo rationalis*").

sensitive information is held to be unprivileged and a court compels its disclosure. When the scope of a privilege exception is phrased in ambiguous terms, the client will find it very difficult to estimate this prospective cost.

Our point is not that the indefiniteness of the scope of the exception, by itself, will deter a manufacturer from undertaking systematic product safety research. Because we are assuming that society wants to encourage scientific analysis of product safety, the pertinent issue becomes whether a vaguely worded exception tends to encourage or discourage such research. Whatever other effects a vague exception might have, its natural tendency will be to inhibit product safety research. The existence of an ambiguously defined exception that may be invoked to compel disclosure of a manufacturer's relevant communications with its attorneys will give the manufacturer further reason to pause before undertaking various research projects.

The net result is that it is hazardous for the socially responsible manufacturer to begin scientific research into the safety of its product in fact situations such as *Philip Morris*. The application of the purpose requirement for the legal privileges will ordinarily lead to the conclusion that there is not even a *prima facie* case for applying the privileges to protect the research data. To make matters worse, even if the manufacturer could persuade the judge or master that a *prima facie* case exists, the existence of a vague crime-fraud exception will make the research project a riskier proposition for the manufacturer. The upshot is that traditional legal privilege concepts do not serve the public interest in encouraging scientific product safety research. The question then arises: Are there other evidence law concepts which can be used to serve that interest?

#### IV. AN ALTERNATIVE PRIVILEGE ANALYSIS FOR CASES SUCH AS *PHILIP MORRIS* INVOLVING SIGNIFICANT PRODUCT SAFETY RESEARCH

##### A. *Statutory Privileges Shielding Self-Critical Evaluations and Analyses*

For decades, American evidence law has been affected by specific statutes establishing privileges that shield reports of certain types of self-evaluations of operations or products conducted by firms and organizations. Probably the best known statutory privilege of this type is the medical peer review evaluation privilege, which has been enacted in a majority of states.<sup>157</sup> Modern hospitals routinely have such peer review

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<sup>157</sup> See Leahy, *supra* note 56, at 55; see, e.g., *Alexander v. Superior Court*, 859 P.2d 96 (Cal. 1993); *University of S. Cal. v. Superior Court*, 53 Cal. Rptr. 2d 260

evaluation procedures in place. When a serious incident occurs at the hospital, the medical staff investigates and evaluates the conduct of all personnel involved, including the treating physicians and assigned nurses. The privilege attaches to the report of this peer review investigation. Without such a privilege, the hospital's exposure to a medical malpractice suit might make the investigators hesitant either to conduct a thorough investigation or to reduce their candid assessments to writing.<sup>158</sup> Proponents of the privilege therefore argue that it serves to improve the quality of patient care in the long term.<sup>159</sup>

Another example is the privilege enacted in twenty states that shields environmental audits by private businesses.<sup>160</sup> Although not yet the law in a majority of states, there is a "strong trend toward state establishment of [a] statutory environmental audit privilege."<sup>161</sup> The purpose of such a privilege is exemplified by the Colorado statute that begins with the following legislative finding:

The general assembly hereby finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental laws and that the public will benefit from incentives to identify and remedy environmental compliance issues. It is further declared that limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality.<sup>162</sup>

The rationale for this privilege derives from the premise that environmental quality will be enhanced if businesses undertake serious internal investigations of their compliance practices. As with medical peer evaluations, however, potential disclosure in tort suits might deter thorough investigation and candid analysis.

### 1. *The Common Law Privilege for Self-Critical Analysis*

Statutory self-evaluation privileges apply to specific types of self-analytical reports, but a more general common law privilege concept, based

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(Ct. App. 1996); *People v. Superior Ct.*, 286 Cal. Rptr. 478 (Ct. App. 1991).

<sup>158</sup> See *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

<sup>159</sup> See *id.*

<sup>160</sup> See Joan M. Fildes, *Statutory Privileges and Immunities for Voluntarily Performed Environmental Audits: Should New York State Join the Race?*, 5 BUFF. ENVTL. L.J. 257, 258 (1998); Leahy, *supra* note 56, at 49 n.1.

<sup>161</sup> Leahy, *supra* note 56, at 73.

<sup>162</sup> COLO. REV. STAT. § 13-25-126.5(1) (1998).



on the same rationale, has recently developed—the privilege for self-critical analysis.<sup>163</sup> The self-critical analysis privilege dates from the decision in *Bredice v. Doctor's Hospital, Inc.*,<sup>164</sup> rendered in 1970. The *Bredice* court held that the minutes of a hospital committee charged with conducting a monthly review of the hospital's surgical operations could not be discovered by a plaintiff alleging that an operation at the hospital had been performed negligently.<sup>165</sup> The court asserted that confidentiality was “essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients.”<sup>166</sup> The jurisdiction had no statutory privileges that were applicable, and the court announced that “the public interest” justified shielding the minutes from discovery absent a showing of “good cause.”<sup>167</sup>

Although the doctrine originated in the medical peer review setting, subsequent decisions have generalized the doctrine into a broader privilege that is potentially applicable whenever a private entity undertakes a self-critical analysis such as an evaluation of its compliance with the law<sup>168</sup> or an assessment of the safety of its products or operations.<sup>169</sup> An often-cited student note in the *Harvard Law Review* christened the doctrine as the “self-critical analysis” privilege.<sup>170</sup> Most commentators and courts continue to use that phrase,<sup>171</sup> while a few prefer to call it the “self-evaluation” privilege.<sup>172</sup>

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<sup>163</sup> See John Louis Kellogg, Note, *What's Good for the Goose . . . Differential Treatment of the Deliberative Process and Self-Critical Analysis Privileges*, 52 WASH. U. J. URB. & CONTEMP. L. 255 (1997).

<sup>164</sup> *Bredice v. Doctor's Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

<sup>165</sup> *See id.* at 251.

<sup>166</sup> *Id.* at 250.

<sup>167</sup> *Id.* at 251.

<sup>168</sup> In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court indicated that other things being equal, it favored structuring the attorney-client privilege to enable attorneys to more effectively encourage their clients to voluntarily comply with the law. *See id.* at 392-93; *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 223 (1988).

<sup>169</sup> *See Dowling v. American Haw. Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992).

<sup>170</sup> Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1083 (1983).

<sup>171</sup> *See* 6 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 26.48[2] (3d ed. 1998); Patricia L. Anel, *Inapplicability of the Self-Critical Analysis Privilege to the Drug and Medical Device Industry*, 34 SAN DIEGO L. REV. 93, 93 (1997); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 113 (1988).

<sup>172</sup> 23 WRIGHT & GRAHAM, *supra* note 109, § 5431, at 457 (Supp. 1999); *see also, e.g.*, Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality*

The policy argument for recognizing this privilege is similar to the rationale for the federal common law privilege shielding evidence of deliberative processes leading to governmental decisions.<sup>173</sup> The deliberative process privilege protects communications between executive government officials in the process of reaching a decision on a government issue.<sup>174</sup> The communication must be “predecisional”<sup>175</sup> in the sense that the officials are conducting an investigation and policy analysis with a view to making a governmental decision.<sup>176</sup> Furthermore, the privilege only protects material which clearly reflects the decision-making process, such as advisory opinions, recommendations, projections, proposals, and deliberations.<sup>177</sup> The premise of the privilege is that without protection from disclosure, government policy makers would be reluctant to engage in “uninhibited,” “candid” discussions about policy issues, resulting in lower quality governmental policy decisions.<sup>178</sup> The privilege is conditional or qualified; the party seeking discovery can override it by establishing a compelling need for the information.<sup>179</sup> The privilege has been sharply criticized as inconsistent with the tradition of open government<sup>180</sup> and as unnecessary because government officials often enjoy at least qualified

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of *Internal Corporate Investigations*, 12 J. CORP. L. 355, 357 (1987); Robert J. Bush, Comment, *Stimulating Corporate Self-Regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597, 597 (1993).

<sup>173</sup> See Kellogg, *supra* note 163, at 271, 280.

<sup>174</sup> See 26A WRIGHT & GRAHAM, *supra* note 109, § 5680.

<sup>175</sup> *New York City Managerial Employee Ass’n v. Dinkins*, 807 F. Supp. 955, 957 (S.D.N.Y. 1992).

<sup>176</sup> See *id.*

<sup>177</sup> See *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *K.L. v. Edgar*, 964 F. Supp. 1206, 1210 (N.D. Ill. 1997); Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 297 (1989). The privilege extends to factual data only when that data is inextricably intertwined with evaluations of the data and it is not feasible to segregate the data from the evaluations. See *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 296 (D.P.R. 1989); *Badhwar v. Department of Air Force*, 622 F. Supp. 1364, 1367 (D.D.C. 1985), *order vacated*, 829 F.2d 182 (D.C. Cir. 1987); *Peck v. United States*, 88 F.R.D. 65, 69 (S.D.N.Y. 1980).

<sup>178</sup> 26A WRIGHT & GRAHAM, *supra* note 109, § 5680, at 131; see also *Wilson v. Superior Court*, 59 Cal. Rptr. 2d 537, 541 (Ct. App. 1996) (discussing the need for candor and uninhibited communication).

<sup>179</sup> See *K.L.*, 964 F. Supp. at 1208.

<sup>180</sup> See 8 WIGMORE, *supra* note 37, § 2378, at 797 n.7; 26 WRIGHT & GRAHAM, *supra* note 109, § 5663, at 573-74.

immunity from civil liability.<sup>181</sup> Nevertheless, since its first articulation in 1958,<sup>182</sup> the privilege has become a fixture in federal evidence law<sup>183</sup> and has gained adherents among the state courts as well.<sup>184</sup>

The argument for the self-critical analysis privilege has an articulated dimension that goes slightly beyond the justification for the deliberative process privilege. Advocates for the self-critical analysis privilege argue in the now familiar vein that the privilege is necessary to promote candor between employees and consultants conducting the analysis.<sup>185</sup> Otherwise, the participants as a group might fear that they were creating evidence which could later be used to impose liability on the entity.<sup>186</sup> In addition, advocates argue that individual participants might worry that any subsequent judgment resulting from the analysis would ruin their prospects for advancement within the entity if their personal contribution to the self-critical analysis furnished damaging evidence.<sup>187</sup>

As a theoretical matter, the case for the self-critical analysis privilege seems stronger than the case for the well-settled deliberative process privilege.<sup>188</sup> Private sector businesses and their employees certainly have greater reason to be concerned about the use of their analyses in subsequent litigation because they do not have the absolute and qualified immunities which public sector entities and employees often enjoy.<sup>189</sup> Nonetheless, the status of the self-critical analysis privilege is less secure than that of the deliberative process privilege. Some courts have rejected the concept of a generally applicable self-critical analysis privilege,<sup>190</sup> and the privilege is

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<sup>181</sup> See *Buchwald v. University N.M. Sch. of Med.*, 159 F.3d 487, 496 (10th Cir. 1998). Some commentators have dismissed the instrumental rationale for the privilege as "puny." 26A WRIGHT & GRAHAM, *supra* note 109, § 5680, at 131.

<sup>182</sup> See *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

<sup>183</sup> See 26A WRIGHT & GRAHAM, *supra* note 109, § 5680; *Kellogg*, *supra* note 163, at 256-57, 262-68, 280.

<sup>184</sup> See *Wilson v. Superior Court*, 59 Cal. Rptr. 2d 537, 541 (Ct. App. 1996).

<sup>185</sup> See *Kellogg*, *supra* note 163, at 259.

<sup>186</sup> See *Andel*, *supra* note 171, at 146.

<sup>187</sup> See *Gerald Heller, The Important but Murky Law of the Self-Critical Analysis Privilege*, FED. LAW., May 1998, at 51.

<sup>188</sup> See *Kellogg*, *supra* note 163, at 278-79.

<sup>189</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

<sup>190</sup> See *Payton v. New Jersey Turnpike Auth.*, 691 A.2d 321, 331 (N.J. 1997) ("We decline to adopt the privilege of self-critical analysis as a full privilege, either qualified or absolute[.]").

recognized in only a minority of jurisdictions.<sup>191</sup> On the other hand, a recent federal circuit court opinion gave solid recognition to the privilege.<sup>192</sup> Therefore, the privilege seems to be a developing, though less than thoroughly accepted, concept.

Using a well-known federal rule of evidence exclusion as an analogy, the appropriateness of applying the self-critical analysis privilege to programs of scientific product safety research becomes clear. If the product safety research leads the organization to modify its product to improve its safety, the modification would qualify as a subsequent remedial measure for purposes of Federal Rule of Evidence 407.<sup>193</sup> As pertinent, the originally worded Rule 407 read:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.<sup>194</sup>

As the Advisory Committee explained, the foremost justification for Rule 407 is the social judgment which favors “encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”<sup>195</sup> In the Committee’s view, that judgment is the most “impressive” rationale for Rule 407.<sup>196</sup>

The 1997 amendment to Rule 407 is pertinent here. After the Rules of Evidence took effect in 1975, a split of authority developed over the question of whether Rule 407 and its state counterparts bar the introduction of evidence of subsequent repairs in defective product actions in which the theory of strict liability applies.<sup>197</sup> In such actions, some courts asserted that

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<sup>191</sup> See Kellogg, *supra* note 163, at 270 (stating that “most courts” reject the privilege). In the view of one commentator, judicial enthusiasm for the privilege is waning. See Andel, *supra* note 171, at 95-96, 117-20.

<sup>192</sup> See Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 425 n.1 (9th Cir. 1992); Leahy, *supra* note 56, at 53-54.

<sup>193</sup> See DAVID P. LEONARD, THE NEW WIGMORE, A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY §§ 2.1-2.9 (1996).

<sup>194</sup> FED. R. EVID. 407 (West 1984) (amended 1997).

<sup>195</sup> *Id.* advisory committee’s note.

<sup>196</sup> *Id.*

<sup>197</sup> Compare Bizzle v. McKesson Corp., 961 F.2d 719, 722 (8th Cir. 1992) (introduction not barred), and Ault v. International Harvester Co., 528 P.2d 1148, 1150 (Cal. 1974) (introduction not barred), with Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986) (introduction barred), and Prentiss & Carlisle Co. v.

the manufacturer's tort exposure for a defective product is so great that potential admissibility of the evidence of repair in a future case would not deter a national manufacturer from making a needed repair.<sup>198</sup> That assertion has been attacked as speculative,<sup>199</sup> and an "overwhelming"<sup>200</sup> "majority"<sup>201</sup> of federal courts have concluded that it serves the policy of Rule 407 to apply it to strict products liability actions. To settle the issue once and for all, the Supreme Court promulgated an amendment to Rule 407 in 1997. As amended, Rule 407 provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.<sup>202</sup>

The new 1997 Advisory Committee Note accompanying the amendment expressly approves of the decisions holding that the policy rationale of Rule 407 extends to safety improvements in products liability actions.<sup>203</sup> Considered together, the original and 1997 Advisory Committee Notes endorse the view that there is an important "social policy of [affirmatively] encouraging" manufacturers "to take . . . steps in furtherance of added safety."<sup>204</sup>

Nevertheless, Rule 407 has been read by some courts to exclude only evidence of the subsequent repair itself. It does not bar the admission of evidence of studies conducted by a manufacturer to decide whether to redesign its product for increased safety.<sup>205</sup> On its face, the rule only bars

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Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6, 10 (1st Cir. 1992) (introduction barred).

<sup>198</sup> See *Ault*, 528 P.2d at 1152.

<sup>199</sup> See J. Wesley Merritt, Comment, *Ault v. International Harvester Co.—Death Knell to the Exclusionary Rule Against Subsequent Remedial Conduct in Strict Products Liability*, 13 SAN DIEGO L. REV. 208, 222 (1975).

<sup>200</sup> *Gauthier*, 788 F.2d at 637.

<sup>201</sup> *Prentiss & Carlisle Co.*, 972 F.2d at 10.

<sup>202</sup> FED. R. EVID. 407.

<sup>203</sup> See *id.* advisory committee's note.

<sup>204</sup> FED. R. EVID. advisory committee's note on proposed rules.

<sup>205</sup> The courts divide over this question. See *Prentiss & Carlisle Co.*, 972 F.2d at 10; *In re Aircrash in Bali, Indon.*, 871 F.2d 812, 816 n.2 (9th Cir.), *cert. denied sub nom.*, *Pan Am. World Airways, Inc. v. Causey*, 493 U.S. 917 (1989); *Rocky Mountain Helicopters v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986); *Martel v. Massachusetts Bay Transp. Auth.*, 525 N.E.2d 662, 663 (Mass.

the introduction of “evidence of the subsequent measure[ ]” itself.<sup>206</sup> Thus, the policy of “encouraging . . . steps in furtherance of added safety”<sup>207</sup> supports a concept of exclusion or privilege significantly larger than that stated in the text of the statutory exclusionary rule. If the final objective is greater product safety, it can be reached most effectively by shielding any reasonably necessary steps taken by the manufacturer to redesign the product. The amended Rule 407 reflects a policy that justifies limits on the admissibility of evidence of the subsequent repair. *A fortiori*, the policy supports limits on the admissibility of evidence of reasonable preliminary steps necessary to make a rational decision on making the repair. Viewed in this light, a privilege for self-critical analysis becomes a natural complement to Rule 407.

The extension of the privilege to scientific product safety research is particularly justifiable. Society does not simply want product redesigns. As the Advisory Committee Note emphasizes, society desires redesigns which “add[ ]” to the “safety” of the product.<sup>208</sup> In many cases, it will not be self-evident whether a particular contemplated modification of the product will increase, decrease, or have no effect on product safety. The procedure for making that determination intelligently starts with a rigorous, systematic scientific investigation of the question. If society wants improved product safety, the law should facilitate and positively encourage the steps that manufacturers must take in order to decide rationally on product safety improvements. In the interest of public safety, the manufacturer should be encouraged to resort to scientific research to verify the hypothesis before modifying the product.

## 2. *The Applicability and Scope of the Self-Critical Analysis Privilege in Cases Such as Philip Morris*

A number of decisions have addressed the question of the foundation or predicate facts that the party asserting the privilege must establish. The court’s description of the necessary foundation in *Dowling v. American Hawaii Cruises, Inc.*<sup>209</sup> represents the consensus view. There the court specified that the party invoking the self-critical analysis privilege must establish: (1) the document containing the analysis was prepared with an

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1988).

<sup>206</sup> FED. R. EVID. 407.

<sup>207</sup> *Id.* advisory committee’s note.

<sup>208</sup> *Id.*

<sup>209</sup> *Dowling v. American Haw. Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992).

expectation of confidentiality; (2) the confidentiality has since been maintained; (3) the document was created as part of a bona fide self-critical analysis; (4) the public has a strong interest in fostering candor in the analysis; and (5) the type of information is such that there is a realistic danger that discovery of the information would curtail candor.<sup>210</sup>

A single but highly significant change in the facts of *Philip Morris* could have led a judge to find that these foundational requirements were satisfied by the CTR research. From the early 1950s, the cigarette manufacturers made a concerted effort to maintain the confidentiality of any unfavorable scientific research into the health risks posed by smoking. Additionally, the public interest certainly favored candor in the conduct of this research; the potential for disclosure of negative results would certainly curtail such candor. However, Master Gehan found that the CTR research was tainted by a scheme to release simultaneously favorable research while suppressing damaging findings.<sup>211</sup> Using the terms set out in *Dowling*, Master Gehan could have found that the research was not part of a bona fide self-critical analysis. Absent this finding, a judge or special master using the self-critical analysis privilege concept would probably have held that the privilege was prima facie applicable to the CTR research, and that shielding the research would advance the “social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”<sup>212</sup>

It is also possible to make a strong argument that the defendants had made a prima facie case for the application of the self-critical analysis privilege in *Philip Morris* on the facts before Master Gehan. As far as the CTR scientists were concerned, they were engaged in a bona fide effort at self-critical analysis; it is arguably the efforts and candor of the researchers that should control on the question of beneficial intent.<sup>213</sup> The fact that higher management chose to use the research in a misleading manner should not affect the prima facie application of the privilege, although, as will be seen, the misleading use should ultimately override the prima facie case and make the research discoverable.<sup>214</sup>

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<sup>210</sup> See *id.* at 425-26.

<sup>211</sup> See Report of Special Master, *supra* note 10, para. 283.

<sup>212</sup> FED. R. EVID. 407 advisory committee’s note.

<sup>213</sup> Candor of researchers will produce meaningful analysis for improvements in product safety. To promote researcher candor, the self-critical analysis privilege should be applied readily to protect the freedom of researchers to be scientifically accurate. If management chooses to act in a misleading manner with the research, which certainly was the case in *Philip Morris*, the privilege will be lost.

<sup>214</sup> See *infra* text accompanying notes 242-45.

If the party asserting the privilege persuaded the judge that the foundational facts had been shown, the scope of the application of the privilege would become an important issue. On this point, the self-critical analysis privilege is similar to the deliberative process doctrine. As previously stated, the latter doctrine cloaks only communications considered integral to the deliberative process, such as recommendations, proposals, and analyses.<sup>215</sup> Factual data typically falls outside the ambit of the deliberative process privilege.<sup>216</sup> In similar fashion, the case law applying the self-critical analysis privilege usually protects only the evaluative portions of the report documenting the analysis. The passages reflecting the analyst's subjective impressions, opinions, and mental processes qualify for protection, but factual data is routinely discoverable.<sup>217</sup>

Examination of a hypothetical report of a scientific product safety study illustrates the application of the analysis-fact distinction. The first few pages of the report describe the product being evaluated. The intermediate pages describe the research methodology and summarize the data collected during the project. The final handful of pages detail the findings of the analysis and the recommendations for enhancing the safety of the product. At one extreme, it is clear that the first few pages are discoverable. At the other extreme, the privilege would undeniably apply to the last handful of pages. The discovery battle would be waged over the pages in the middle of the report. The party seeking discovery would urge the court to classify the raw research data as factual material. However, the choice of the research methodology is evaluative, entailing the exercise of the analyst's expertise.<sup>218</sup> The party asserting the privilege, therefore, would have a strong argument that the raw data is so inextricably intertwined<sup>219</sup> with the statement of the research methodology that all the intermediate pages deserve privilege protection. A judge or special master would certainly apply the privilege to the opening and concluding pages of the report and would probably apply the privilege to the middle pages. The

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<sup>215</sup> See *supra* text accompanying note 177.

<sup>216</sup> See *supra* note 177.

<sup>217</sup> See Leahy, *supra* note 56, at 51, 55.

<sup>218</sup> For example, if the analyst decided to use the statistical technique of regression analysis in his or her research, the analyst would have to employ his or her expertise in selecting the independent variables to include in the behavioral model. See 1 GIANNELLI & IMWINKELRIED, *supra* note 138, § 15-6(B), at 456-57.

<sup>219</sup> See *Peck v. United States*, 88 F.R.D. 65, 69 (S.D.N.Y. 1980) (applying the deliberative process privilege).



final result would be that a substantial portion of the product safety research study would receive privilege protection that it would not have had under the traditional legal privileges.

*B. An Alternative Analysis for Overriding a Prima Facie Showing of the Self-Critical Analysis Privilege—The “In Issue” Exception*

As noted in the introduction, we believe that in *Philip Morris*, Master Gehan reached the right result for the wrong reason. Even when the self-critical analysis privilege attaches to a particular document, the privilege is merely conditional or qualified.<sup>220</sup> This means that the party seeking discovery can surmount the privilege by demonstrating an acute need for the privileged material. In his report, Master Gehan made an alternative ruling that the CTR research was not protected by the work product privilege.<sup>221</sup> The work product privilege is also a conditional or qualified privilege, and the Master found that the plaintiffs’ need for the research<sup>222</sup> outweighed the defendants’ interest in maintaining confidentiality of their findings.

Had the application of the self-critical analysis privilege been an issue before Master Gehan, he would have had to perform a somewhat different balancing test, one that requires weighing the plaintiffs’ need for the evidence against the long-term public interest in promoting scientific product safety research. His resolution of the conditional work product question suggests that he might have ruled similarly on a claim involving the self-critical analysis privilege.

Regardless of how the balance would have been struck under the self-critical analysis privilege, the inherent drawback to any judicial balancing

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<sup>220</sup> See Leahy, *supra* note 56, at 51, 55.

<sup>221</sup> See Report of Special Master, *supra* note 10, para. 282 (“I find that plaintiffs have demonstrated substantial need for documents concerning scientific research that have been designated by defendants as fact work product, and that plaintiffs are unable to obtain the substantial equivalent of the withheld fact work product without undue hardship.”).

<sup>222</sup> When the relevant period of time is so lengthy—dating back to the 1950s—tort law would permit the plaintiffs to establish the defendants’ knowledge of the health hazards posed by their product as a basis for arguing that the defendants’ continued marketing of the product entitled the plaintiffs to punitive damages. At several points in his report, Master Gehan stressed that on the facts, the defendants’ knowledge was in issue. See *id.* paras. 268, 288.

of intangible factors and interests is constant<sup>223</sup>—it is impossible to quantify the competing considerations.<sup>224</sup> Striking a balance when dealing with such abstractions is a “procrustean task”<sup>225</sup> due to the inherent imprecision in the factors and interests involved.<sup>226</sup> Rather than rationalizing his alternative denial of work product privilege protection under the balancing test, Master Gehan could have justified the discovery of the scientific research by invoking the “in issue” privilege exception.<sup>227</sup> This exception would also have been applicable if Master Gehan’s analysis had included the possible application of the self-critical analysis privilege.

The in issue exception should not be confused with the classic doctrine of waiver, which is an “intentional relinquishment . . . of a known right.”<sup>228</sup> Waiver would be established by evidence showing that a manufacturer, knowing that a research document is privileged, intentionally discloses the content of the document to a person outside the circle of confidence. Without proof of intentional disclosure, waiver cannot be found. The in issue exception does not require such disclosure, and it applies in certain situations in which the waiver doctrine is inappropriate.

To illustrate the difference between waiver and the in issue exception, assume that a manufacturer has two relevant, physically separate research documents. The two documents describe different phases of the same research project, and the researchers reached different conclusions in the two phases. In the first phase document, the conclusion is favorable to the manufacturer’s position. In the second phase document, the conclusion is unfavorable to the manufacturer. In pretrial discovery, the manufacturer discloses the first phase document and attempts to assert a privilege to suppress the second phase document. By intentional disclosure, the manufacturer has clearly waived any privilege for the first phase document,

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<sup>223</sup> See *United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 805 (1981).

<sup>224</sup> See Lee E. Teitelbaum & Nancy Augustus Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. REV. 423, 433 (1983).

<sup>225</sup> Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator’s Identity*, *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), 6 RUT.-CAM. L.J. 173, 177 (1975).

<sup>226</sup> See Kuhns, *supra* note 223, at 808.

<sup>227</sup> See *Terrebonne, Ltd. of Cal. v. Murray*, 1 F. Supp. 2d 1050, 1059 (E.D. Cal. 1998); *Rockwell Int’l Corp. v. Superior Ct.*, 32 Cal. Rptr. 2d 153, 161 (Ct. App. 1994).

<sup>228</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

but, equally clearly, the manufacturer has not waived any of its privileges with respect to the second phase document. Nonetheless, a court would probably issue a discovery order holding that the manufacturer could not invoke a privilege on the second phase document and therefore that the document was discoverable. Under the assumed facts, the manufacturer's simultaneous disclosure of one document and suppression of the other would create a misleading half-truth. The basis for the discovery order for the second phase document would be the patent "unfairness flowing from . . . selective use of privileged material to garble the truth . . . [such that] the opponent [should have] access to [the] related privileged material to set the record straight."<sup>229</sup> In the assumed circumstances, partial disclosure is distorting<sup>230</sup> and manipulative.<sup>231</sup> As one court put the matter, a "privilege cannot be used as both a shield and a sword."<sup>232</sup> The nexus between the two documents is so strong that fairness demands that the party seeking discovery have access to the second phase document after the privilege holder has released the first phase document.<sup>233</sup>

Just as the privilege for self-critical analysis rests on a rationale similar to that underlying Federal Rule of Evidence 407, the in issue exception shares a policy basis with Federal Rule of Evidence 106. This rule states:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.<sup>234</sup>

At first blush, Rule 106 appears to be a drastic provision.<sup>235</sup> Ordinarily, each litigant has the right to choose which items of evidence he or she will

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<sup>229</sup> Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1607 (1986).

<sup>230</sup> See *In re Southern & E. Dist. Asbestos Litig.*, 730 F. Supp. 582, 585 (S.D.N.Y. 1990) (citing Report of Master of Chancery at 17-19, *Heathman v. Owens-Corning Fiberglas Corp.* (Dist. Ct. Brazoria Cty. Tx. 1989) (No. 87-1934)).

<sup>231</sup> See *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F. Supp. 916, 918 (N.D. Ill. 1989).

<sup>232</sup> *United States v. Workman*, 138 F.3d 1261, 1264 (8th Cir. 1998).

<sup>233</sup> See *In re Von Bulow*, 828 F.2d 94, 101-03 (2d Cir. 1987); *In re Consolidated Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1153-54 (N.D. Ill. 1987).

<sup>234</sup> FED. R. EVID. 106.

<sup>235</sup> See 1 EDWARD J. IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 112, at 33 n.78 (3d ed. 1998).

submit to the trier of fact.<sup>236</sup> However, Rule 106 empowers the cross-examiner to force the direct examiner to introduce evidence which the direct examiner would prefer to omit. The Advisory Committee Note to Rule 106 explains why the drafters chose to give the cross-examiner this extraordinary right. The Note points out that when two documents are so closely connected that they “ought in fairness to be considered contemporaneously,”<sup>237</sup> reading only one document to the jury creates a “misleading impression . . . by taking matters out of context.”<sup>238</sup>

Fairness demands that the direct examiner read both documents or neither one just as, in the facts assumed above, fairness demands that the privilege-holding manufacturer reveal both documents in their entirety or neither one at all. Under Rule 106 as well as the in issue exception, the aim is to prevent the creation of a misleading impression through partial disclosure. For that matter, the risk of creating a misleading impression is greater in the privilege setting than in the Rule 106 context. Under Rule 106, if the direct examiner omits any mention of the equivalent of the second phase document, the cross-examiner has the remedy of introducing the document later.<sup>239</sup> Concerning the subsequent introduction of the omitted document, the Advisory Committee considered that alternative to be partially ineffective, noting “the inadequacy of repair work when delayed to a point later in the trial.”<sup>240</sup> However, a partial remedy is better than no remedy at all—which is the situation facing the victim of the partial disclosure in the assumed fact situation—unless the trial court invokes the in issue privilege exception.

The in issue privilege exception is well-tailored for the problem faced by Master Gehan in *Philip Morris*. Indeed, it would have been poetic justice had the exception been invoked. As pointed out above,<sup>241</sup> the record evidence convinced Master Gehan that in the early 1950s the tobacco industry decided to pursue two contradictory strategies. The public strategy featured the widespread announcements that the industry was researching

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<sup>236</sup> See STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 3 (1988).

<sup>237</sup> FED. R. EVID. 106.

<sup>238</sup> *Id.* advisory committee’s note.

<sup>239</sup> In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), the Supreme Court stated that Rule 106 “partially codified” the common law completeness doctrine. *Id.* at 155. Under the common law version of the doctrine, during cross examination the opponent may introduce the second document so long as it is relevant to the same topic. See 1 MCCORMICK ON EVIDENCE, *supra* note 145, § 56.

<sup>240</sup> FED. R. EVID. 106 advisory committee’s note.

<sup>241</sup> See *supra* text accompanying notes 59-103.

the alleged relationship between smoking and health problems,<sup>242</sup> and the available research data was either inconclusive or indicated that there was no causal nexus.<sup>243</sup> The private strategy was to place the manufacturer defendants in a position where they could disclose favorable research results while suppressing damaging findings.<sup>244</sup> Citing an earlier finding by the judge assigned to the *Philip Morris* case, Master Gehan stated that the defendants endeavored to “use [publicly] research which supports their economic interests, but claim privilege for research which may not.”<sup>245</sup> The in issue exception is the evidentiary antidote for the very type of misleading half-truth the defendants attempted to perpetrate. Therefore, even if Master Gehan had applied the self-critical analysis privilege to the CTR research, he could have reached the same final result and ordered disclosure by turning to the in issue exception. That exception would surmount the prima facie case for the privilege.

### CONCLUSION

Master Gehan’s report in *Philip Morris* is noteworthy for several reasons. The report sends an important legal ethics message to the litigation bar that advocates must maintain an ethical awareness that applies to prelitigation activities and to limitations imposed by adjectival law. In his analysis of the crime-fraud exception, Master Gehan looked to the law of evidence rather than the substantive law. In this analysis, he found a species of evidentiary fraud in the defendants’ attempts to “wrap” their scientific research in bogus legal privilege claims.<sup>246</sup> Significantly, he inferred the fraud from strategic behavior<sup>247</sup> of the defendants long before the suit was filed. The American Bar Association’s Model Rules of Professional Conduct state that an attorney acts within “a larger legal context shaping the lawyer’s role.”<sup>248</sup> That context includes adjectival as well as substantive law, and it covers an attorney’s prelitigation conduct as

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<sup>242</sup> See Report of Special Master, *supra* note 10, paras. 16, 17, 22.

<sup>243</sup> See *id.* paras. 50, 55, 57, 58.

<sup>244</sup> See *id.* paras. 283, 339.

<sup>245</sup> *Id.* para. 280.

<sup>246</sup> *Id.* para. 42; see also Rice, *supra* note 17, at 28; Zitrin & Langford, *supra* note 17, at 46.

<sup>247</sup> See generally AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE (1991).

<sup>248</sup> MODEL RULES OF PROFESSIONAL CONDUCT 3 (Proposed Final Draft 1981).

well as conduct after suit is commenced. Master Gehan's report is a useful reminder to litigators that they must bear the broader legal context in mind.

The *Philip Morris* report is perhaps even more noteworthy for what it does not say. Given the set of arguments submitted by counsel for both sides, Master Gehan analyzed the discoverability of the defendant's scientific research exclusively under traditional legal privilege concepts; his report makes no mention of the self-critical analysis privilege. The original and amended versions of Federal Rule of Evidence 407 establish that there is a material public stake in positively encouraging manufacturers to conduct scientific product safety research. While the legal privileges come into play when a manufacturer hires a forensic safety expert after the fact of an accident, those privileges afford the manufacturer little or no protection if the manufacturer is socially responsible enough to undertake scientific analysis of the safety of its products without the stimulus of a legal action.

As a matter of social policy, the law should encourage manufacturers to make product safety improvements and to resort to serious scientific investigation to identify possible improvements. Even if courts are unwilling to recognize a general self-critical analysis privilege, scientific product safety research is an ideal candidate for protection under a limited conception of that privilege. Coupled with the in issue privilege exception, the self-critical analysis privilege would enable the courts to give significant protection to bona fide research while policing abuses of the privilege.

Scientific product safety research can flourish only if researchers can be candid in the research enterprise. We submit that courts must develop new modes of analyzing evidentiary privilege claims along the lines of the principles discussed above in order to encourage candor in product safety research.

