

CONFIDENTIAL AND
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REPORT OF MEETING OF
COMMITTEE OF COUNSEL
HELD SEPTEMBER 10, 1981,
AT CHADBOURNE, PARKE,
WHITESIDE & WOLFF IN
NEW YORK CITY

Present were Messrs. Shinn, Northrip and Sirridge (Shook, Hardy), Newman (PM), Stevens and Cherry (PL), Sachs (B&W), Decker (W&S), Witt (RJR), Jacob and Finnegan (JM&F), Miss Brown and Mr. Bezanson (CPW&W).

The meeting was held to discuss subjects on the attached agenda. The next meeting is scheduled for 9:00 a.m. on September 23 at Lorillard in New York City.

1. Special Projects:

Ed Jacob said that "special projects" had been placed on the agenda at Max Crohn's suggestion. Jacob described special projects as literature reviews (useful in locating potential witnesses and consultants), as investigations in aid of particular research questions of potential witnesses or consultants and as scientific inquiries of interest to the industry. Janet Brown added that litigating attorneys cannot testify or make scientific arguments; special projects provide bases for supporting the research of medical personnel who can. Some recipients of special projects grants (Eleanor Macdonald, for example) are not potential witnesses, but, as consultants,

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have helpful ideas and provide contacts to others in the medical profession. Macdonald, it was noted, has 40 years of cancer registry data that, absent a special projects grant, would probably never be collected or published.

Sam Witt wanted to know how grantees are selected and whether or not the "field" should be broadened. Arthur Stevens said that Shook, Hardy & Bacon and Jacob, Medinger & Finnegan locate most potential grantees and that their efforts are sufficient. Bill Shinn said that all litigating lawyers automatically share names and that others, Kastenbaum for example, routinely provide leads. Stevens suggested that companies, too, should supply the litigating lawyers with names of, or leads to, possible grantees.

Stevens recognized that it is difficult to find medical witnesses, but noted his concern from "seeing the same names year after year." He emphasized that more potential witnesses have to be found. He also expressed his concern that "science becomes diluted to the extent that attorneys' interests are met" and that grantees' research must withstand hostile examination. He added that there have been no problems in the past, but that in the future he wants to "get better science for our buck" and to be able to explain more fully to management "how and why [special projects] money is spent." (Decker said that Joe Greer has expressed similar concerns.) He suggested that special projects grant applications be regularly placed on the Committee of Counsel meeting agenda.

Shinn and Jacob said that it is becoming increasingly difficult to find witnesses owing to "competition" from asbestos and drug companies and that, accordingly, the litigating lawyers must have the flexibility to act quickly. Jacob also said that special projects grants should continue to be awarded to former witnesses, such as Ted Sterling, to preserve general good will. Otherwise, "word would get around that [tobacco lawyers] drop their friends."

Janet Brown and Ed Jacob questioned Stevens' concern for "better science." Brown noted that one couldn't say that special projects research isn't worthwhile. Such research demonstrates the validity of scientific questions (20 years ago it might have lead to "answers") and makes it possible for witnesses to testify on the basis of their own research. "Wrong conclusions" -- often seen in the work of opponents -- make scientific work questionable, not the work itself.

Northrip and Witt said that special projects grants should be assessed from a litigating as well as from a scientific point of view. Brown noted that no project has been funded or would be funded that could not withstand scientific scrutiny. Jacob said that Dr. Hiram Langston, as an example, has observed a declining trend in the frequency of lung cancer by plotting hospital admissions for lung cancer over time. This research has provided a basis for

asking important questions challenging claims based on reported statistical associations of smoking and lung cancer. He added that Eysenck has a protegee whose work might not qualify, for example, for a CTR grant but might contribute significantly to data regarding differences between ex-smokers, smokers and non-smokers. He noted, too, that Janis, Evans and Hughes might produce significant work.

Jacob said that special projects grant applications used to be on the Committee of Counsel agenda but were dropped owing to more pressing matters. He and Shinn added that the grant process should not be burdened with additional administrative requirements. Sam Witt asked if the applications could be considered by the Committee once every six months, but then agreed that that would create an unworkable time lag in providing funding. Shinn emphasized that, with increasing difficulty in finding witnesses (he identified this as "the biggest single concern of our office"), "there ought to be a presumption in favor of funding researchers and consultants."

Witt suggested that the litigating lawyers be given an annual special projects fund of \$1,000,000 "without strings attached" but subject to Committee of Counsel review. Stevens said that "they have an open book now" and that the suggestion did not allow sufficient flexibility. Janet Brown also opposed the suggestion.

Northrip suggested, to agreement, that the current procedure for administering special projects be continued, but as time allows in dealing with potential grantees, that grant applications be placed on the agenda of the Committee of Counsel.

Stevens suggested that written explanations for grants be circulated periodically. Newman, Brown and others pointed out, to general agreement, that such reports would be unwarranted.

2. LRD/TLF Litigation Support:

Bill Shinn reported that a "Working Report", recommending the incorporation of LRD and TLF as two divisions of a litigation support corporation for the use of the companies' litigating lawyers, had been prepared for the Ad Hoc Committee's review (Janet Brown, Ed Jacob, Don Cohn and Shinn). He said that separating LRD from CTR would enhance work product protection, but that disagreement prevented merging LRD with TLF. Stevens said that he thought that "basic agreement" had been reached last spring. Witt said that he thought LRD "ought to stay where it is."

Janet Brown noted that all (but Ernie Pepples) had agreed months ago (Pepples agreeing later) that a litigation resource capable of handling thousands of documents was needed, that LRD has capacity and experienced personnel but currently offers doubtful work product protection, and that either LRD should promptly be reorganized so as to provide that protection or that a new organization should be promptly instituted. She added that the Working Report did

not conclude that LRD cannot be reorganized so as to provide protected, litigation support services.

Shinn said that Ed Jacob believes that the relationship of LRD to TLF is not accurately described in the Working Report and that "materials at CTR could be a problem later on if LRD is separated." He added that a wholly new support system ought to be considered since Witt wants to keep LRD as is.

Witt asked why a litigation support service is needed. Brown explained that growing numbers of plaintiffs (reported now at about 25,000) in increasing numbers of asbestos exposure actions (reported now at about 10,000) are suing approximately 200 asbestos companies which have asserted an "empty chair" defense claiming that plaintiffs' alleged ills were caused by smoking cigarettes. Suits of this sort have been litigated since about 1965 and, over the years, formidable asbestos witnesses -- with scores of publications each -- have testified. As it is dangerous to assume that cigarette companies will not become parties to this litigation, litigating lawyers must be prepared to conduct cross-examinations. As an initial step, LRD was authorized a supplemental budget of \$250,000 to collect articles by 20 potential asbestos witnesses. Brown and Shinn pointed out that this project was initiated about six months ago; at that time all understood that LRD would be "removed" from CTR. Since then, opposition to the removal and a concern for scant work product protection for work done under CTR, has caused delay. Jacob noted that the "task hasn't been done" and that "all along some assumed -- and

some didn't -- that LRD would be removed from CTR."

Decker reported that LRD is currently cross-checking collected bibliographies of the 20 potential witnesses against articles already collected by TLF so as to avoid duplication. Noting that TLF currently has little staff or time, it was agreed that Decker would find out what assistance is needed at TLF that could be provided by law firms' legal support staffs. As soon as possible, and in the meantime, LRD is to collect hard copy of all of the articles written by the 20 potential witnesses. It was noted that these witness files need not and will not be entered into a computer.

Brown emphasized that necessary litigation support projects are "beyond LRD's scope of coverage" and that, accordingly, "we have to make up our mind" to either restructure LRD as a full litigation support service or build a new one elsewhere. Shinn said that "strong feelings have been expressed" in opposition to the former. Witt asked why LRD should be used, to which Brown replied that LRD is the first choice as it has a trained staff and established facility, but that, if necessary, another organization could be set up. Shinn said that LRD would afford greater work product protection if severed from CTR and that a central location for both LRD and TLF would be an advantage.

Witt and Jacob said that LRD should stay where it is since, after removal, its functions would be unchanged. Brown pointed out that removal would make it possible to

use LRD more fully as a litigation tool and that distinct litigating functions, undertaken with TLF for example, would have greater work product protection than is currently available at LRD. Witt asked what LRD materials should be protected. Brown said that the systems for classifying and retrieving articles (not the articles themselves) are confidential.

Jacob said that the threat of adverse discovery "depends upon the question asked, not the structure of LRD." The real question he said, was how to devise a structure offering the most workable litigation tool. He noted that "no one would say that LRD is where it should be." He said that "a risk was taken 10 years ago to get the administrative functions in hand. One can question if that is still advisable." He said, however, that any expanded function for LRD would be frustrated by Fred Giller's "lack of administrative expertise" and by the difficulty of hiring a suitable administrator without upsetting him. To this, Stevens said that "we can't let the tail wag the dog -- we have a serious problem preparing for this litigation and should hire necessary people."

At Northrip's suggestion it was agreed that the Ad Hoc Committee would further consider restructuring LRD as a full litigation support service and report to the Committee of Counsel at its next meeting on September 23.

3. Miscellaneous:

a. The Ad Hoc Committee met later in the day to discuss severing LRD from CTR and organizing it as a full litigation

support service (see Report Of Meeting Of Ad Hoc Committee Held September 10, 1981, At Chadbourne, Parke, Whiteside & Wolff In New York City). At that meeting, a tentative agreement was reached (subject to Witt's changing his position) to propose restructuring LRD with TLF as two functional divisions of a litigation support corporation wholly separate from CTR, with William Hobbs as Chairman and Fred Giller as President, with the four litigating firms (CPW&W, JM&F, SH&B and W&S) owning stock and supplying directors (shares of stock to be held and voted according to each cigarette company's market percentage, with each director having veto power). Hobbs, subject to the approval of the directors, would be responsible for hiring an executive vice president for administration. Access to the new corporation's resources would be limited to the four litigating firms and to Covington & Burling. (Ed Jacob reported on the following day that Witt had agreed to the proposal.)

b. Ed Jacob reported that F. Lee Bailey has been appointed as nationwide coordinator of asbestos litigation for Commercial Union, presumably by his brother William Bailey, who is Commercial Union's Senior Vice President. Jacob also said that Brian Aherne, Standard Asbestos' California Counsel in third-party actions against cigarette companies, is no longer attending plaintiffs' depositions for Standard Asbestos.

c. Stevens reported that TOM Owens, Gori's successor at NCI, has scheduled a workshop, at Dr. Irving Selikoff's suggestion, for September 30, to consider the merits of sponsoring research regarding "side stream smoke exposure of humans." Selikoff's suggestion was reportedly prompted by NCI having turned down a research proposal by Dr. Samuel Epstein, University of Chicago, author of The Politics of Cancer. (Shinn reported that Epstein has contacted Panzer (TI) saying that his earlier claims that "side steam" smoke contains more nitrosamines than does direct smoke may have been in error.) Stevens reported that Alex Speers, invited with several others, plans to attend the workshop so as to "get industry views across." Stevens said that he is "inclined to let him attend." Shinn said that attending would be useful since "you lose intelligence by staying away." He added that the Tobacco Working Group was analogous and produced a net benefit. Jacob disagreed, pointing out that by sending a representative, the tobacco industry might be held to have endorsed whatever research protocol is developed, or -- if no protocol is developed -- to have stymied research.

Others invited to the workshop reportedly include Selikoff, MacMahon, Hammond, Wynder, Mantell, Hoffman, Garfinkel (ACS), Tso, Brown, Osidine, Gerrin (Oak Ridge) and a representative of Philip Morris.

T.E.B.