
Volume 51

Issue 2 Winter 2001: *Symposium - The Changing
Landscape of the Practice, Financing and Ethics of Civil
Litigation in the Wake of the Tobacco Wars*

Article 14

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Richard A. Daynard

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Recommended Citation

Richard A. Daynard, *"Hired Guns", Adversaries, or White-Collar Killers: Comment on Professors Green's and Redish's Views of Tobacco Lawyers*, 51 DePaul L. Rev. 449 (2001)
Available at: <https://via.library.depaul.edu/law-review/vol51/iss2/14>

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“HIRED GUNS”, ADVERSARIES, OR WHITE-COLLAR KILLERS: COMMENT ON PROFESSORS GREEN’S AND REDISH’S VIEWS OF TOBACCO LAWYERS

*Richard A. Daynard**

For very different purposes, both Professor Green¹ and Professor Redish² assume that the lawyers who worked for American tobacco companies in the 1950s, 1960s, and 1970s acted simply as “normal lawyers” in the roles of legal counselor and legal advocate. Thus characterized, these lawyers then become test cases for the authors’ larger theses. For Professor Green, the issue is the abandonment by the American Bar Association (ABA) and others of the “wise counselor” ethic for corporate lawyers (“telling would-be clients they are damned fools and should stop”). For Professor Redish, the issue is whether even despised clients are entitled to zealous advocacy.

Professor Green argues that the behavior of lawyers working for the Brown & Williamson Tobacco Company (B&W), as described in *The Cigarette Papers*,³ may come within the outer limits of the “hired gun” role for corporate lawyers that the ABA has recently espoused.⁴ He then suggests that this is a *reductio ad absurdum* (or, at least, an intolerable embarrassment) of the ABA’s position.⁵ Professor Redish takes a very different tack, constructing an abstract and elaborate defense of the position of the adversary in law and politics, and then defending the lawyers’ behavior by assuming hypothetically that it has not overstepped the proper bounds of this role.⁶ I believe that to make his case, Professor Green underplays the lawyers’ misdeeds; whereas Professor Redish’s benign hypotheses about the lawyers’ behavior are contradicted by the facts.

* Professor of Law, Northeastern University School of Law.

1. Bruce A. Green, *Thoughts about Corporate Lawyers after Reading The Cigarette Papers: Has the “Wise Counselor” given way to the “Hired Gun”?*, 51 DEPAUL L. REV. 407 (2001).

2. Martin H. Redish, *The Adversary System, Democratic Theory and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359 (2001).

3. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

4. See *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession*, Report by the ABA Working Group on Lawyers’ Representation of Regulated Clients (Discussion Draft Jan. 1993).

5. Green, *supra* note 1, at 422.

6. Redish, *supra* note 2.

Professor Green begins his analysis of the tobacco lawyers' by stating that "[t]hey assisted their client's efforts to prevent the public dissemination of unfavorable scientific studies, in part, by adopting an extreme position concerning the law governing the attorney-client privilege."⁷ I think a fair reading of the documents cited in the relevant section of *The Cigarette Papers* is that the B&W attorneys created a fraudulent attorney-client and work product cover for scientific research by channeling the smoking and health research that was being sent to B&W by its parent company for ordinary business reasons through the law department.⁸ This was not a matter of aggressive, pushing-the-envelope, legal advocacy, but of outright fraud that created a fake paper record to protect discoverable documents from discovery. Nor do I think Professor Green gets very far with his suggestion that the fake records are legally innocent because privilege claims based on them were not made during the time period covered by the book.⁹ The privilege claims were indeed made later¹⁰ and, in any event, equipping your client with bogus documents in order to enable it to complete the fraud at a later time hardly seems excusable.

Professor Green goes so far as to suggest that even B&W's own conduct may not be fraudulent and, perhaps, not even tortious (though terribly immoral).¹¹ But not only has it been found to be both fraudulent and otherwise tortious by the jury in the *Engle* class action case,¹² the entire text of *The Cigarette Papers* is an elaborately documented story of fraud, fraudulent concealment, failure to warn, and various other torts.¹³ Whether the relationship between morality and current views of legal ethics is as orthogonal as Professor Green suggests, the link with morality has not been broken in tort law. Lying to your customers about the deadly dangers of your product is still tortious.¹⁴ And, as *The Cigarette Papers* demonstrates throughout, the B&W lawyers were actively involved in crafting the company's lies and keeping employees of the company and its affiliates "on message."¹⁵

7. Green, *supra* note 1, at 425.

8. GLANTZ, *supra* note 3.

9. Green, *supra* note 1, at 427.

10. See Michael Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 509 (1999).

11. Green, *supra* note 1, at 426.

12. *Engle v. R. J. Reynolds Tobacco Company*, 14.3 TPLR 2.101 (1999).

13. GLANTZ, *supra* note 3.

14. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

15. GLANTZ, *supra* note 3.

One argument in Professor Green's article seems inconsistent with his overall thesis. He claims that "[n]ot only did the tobacco industry lawyers' conduct accord generally with the contemporary conception of the corporate lawyer's role, but that conception has become so prevalent that many lawyers today may be unable to contemplate the alternative."¹⁶ He illustrates the point with a hypothetical conversation between a tobacco lawyer and a tobacco executive, during which the lawyer attempts to give "wise counselor" advice by urging his client to tell its customers that tobacco is lethal and addictive, and perhaps to get out of the business entirely.¹⁷ He is correct in thinking that the advice would probably not be taken very well, but goes so far as to suggest that an attorney giving such advice, much less a client following it, is simply "unimaginable."¹⁸

Besides undermining his thesis that we should go back to the "wise counselor" model (if it is unimaginable, how can we go back to it?), this argument ignores a real event chronicled in *The Cigarette Papers*. On July 17, 1963, B&W's Vice President and General Counsel, Addison Yeaman, wrote a memorandum in which the most famous line was "We are, then, in the business of selling nicotine, an addictive drug"¹⁹ The purpose of this frankness apparently was to support Yeaman's proposals that the industry should support health warnings on cigarette packages and genuinely objective research into smoking and health, and that the companies should compete in developing and marketing a genuinely safer cigarette.²⁰ While his suggestions were not accepted, they were not absurd either. In the "wise counselor" mode, Yeaman was urging his client to take the long view, putting up with reduced sales and greater liability exposure in the short term, in exchange for reestablishing the industry on a solid, ethical, and, in the long run, more legally defensible posture.

Professor Redish's article, on the other hand, takes me back to my college "Introduction to Logic" class, where we studied propositions of the following form: If the moon is made of green cheese, then one equals two. Professor Redish drops a footnote at the beginning of his analysis stating, "I will confine my analysis to a set of purely hypothetical contingencies of conceivable versions of attorney behavior during that time period."²¹ It turns out that under the rules of formal logic, if

16. Green, *supra* note 1, at 427.

17. *Id.* at 427-28.

18. *Id.*

19. GLANTZ, *supra* note 3, at 74.

20. GLANTZ, *supra* note 3, at 52-56, 72-74.

21. Redish, *supra* note 2, at 360 n.1.

the assumption is false, then anything at all logically follows . . . including Professor Redish's hypothetical conclusion that the behavior of the tobacco lawyers (from 1953–1971, roughly the same period covered by *The Cigarette Papers*) was legally and ethically blameless.

In theory, Professor Redish's article is all theory, and, while I do not agree with all his theorizing, I will not discuss it. Unfortunately, I cannot end my Commentary with that observation because when he finally discusses the implications of adversary theory and constitutional democracy for the evaluation of the tobacco lawyers' behavior, Professor Redish discusses "facts" and does so in a way that I think is seriously misleading. He states that

in their capacity as adversaries acting in anticipation of legal conflict, industry lawyers could appropriately choose to support only those research efforts that they reasonably believed might lead to scientific data or conclusions supporting their client's position on the potentially outcome-determinative scientific issue. The fact that tobacco lawyers selectively supported research with this self-interested agenda in mind would have been wholly consistent with the tenets of the adversary system, adversary theory, and liberal democracy.²²

This statement is filled with truisms, but is misleading in context. Industry lawyers could indeed properly do this "in their capacity as adversaries."²³ But they could not properly do that in their capacity as managers of the tobacco industry's overall research effort on smoking and health issues because (1) companies have a common law obligation to research the actual dangers of the products they sell (and take appropriate action to protect their customers based on what the objective research shows), and (2) cigarette companies specifically assumed such an obligation in their famous "Frank Statement to Cigarette Smokers," published in hundreds of newspapers in January 1954.²⁴ There is no doubt that they functioned in the managerial capacity, as well as in the adversarial one. As one 1978 Lorillard document put it, "We have again 'abdicated' the scientific research directional management of the Industry to the 'Lawyers' with virtually no involvement on the part of the scientific or business management side of the business."²⁵ This echoes a 1964 report by British tobacco industry representatives who had visited their counterparts in the United States that "[t]he leadership [of the scientific research enterprise] in the U.S. . . . lies with the powerful policy committee of senior lawyers advising the

22. Redish, *supra* note 2, at 396.

23. *Id.*

24. GLANTZ, *supra* note 3, at 34.

25. See Ciresi, *supra* note 10, at 631.

industry, and their policy, very understandably, in effect is 'don't take any chances.'²⁶

Professor Redish actually commends as "a form of true legal brilliance" the way in which the industry purported to fulfill "its obligation under governing tort law to sponsor or conduct reasonable investigations concerning the scientific properties of its product."²⁷ The notion was that the industry would fund the Council for Tobacco Research (CTR).²⁸ "The industry itself, then, did not choose the research to be supported."²⁹ If the results favored the industry, it could trumpet them; if they came out the other way, it could trash them.³⁰

The problem is that there are three false assumptions embedded in the previous paragraph. First, CTR did not "conduct reasonable investigations concerning the scientific properties" of cigarettes.³¹ "CTR was meant to serve primarily a public relations function and . . . CTR scientific research was of little value in addressing issues relating to the causal link between smoking and health."³² In fact, the companies in the industry, in flagrant violation of the anti-trust laws as well as of their tort law obligations, created a secret "gentlemen's agreement" not to conduct in-house biological research.³³ Thus, they met their research obligations neither in-house nor through the "brilliant" device of CTR. Second, the industry did choose the research to be supported! For example, potentially "dangerous" proposals to CTR were vetted by a tobacco industry law firm, with those that might document serious health problems being diverted from the funding mechanism.³⁴ Finally, a policy of challenging all adverse results hardly meets the industry's tort obligation to protect their customers (through disclosure or product modification) where objective research demonstrates serious dangers.

Professor Redish speaks harshly about lawyers who help perpetrate fraud.³⁵ If the tobacco lawyers did *that*, he would have no problem with them. "Absent proof of such fraudulent behavior, however,"³⁶

26. *Id.*

27. Redish, *supra* note 2, at 399-400.

28. *Id.* at 400.

29. *Id.* at 399.

30. *Id.* at 400 (noting that, "the industry would remain free to challenge the validity of those results where it deemed it appropriate to do so").

31. *Id.* at 400.

32. See Ciresi, *supra* note 10, at 541 (quoting the Report of the Special Master in the Minnesota tobacco litigation).

33. *Id.* at 551-53.

34. *Id.* at 563-64.

35. Redish, *supra* note 2, at 402.

36. *Id.* at 402.

their conduct is unobjectionable, perhaps even admirable. The problem is that there *is* proof of such fraudulent behavior. For example, while he acknowledges the possibility

that industry lawyers or scientists could seek to modify the contract researcher's results or methodology in a fraudulent manner by seeking to falsely alter findings. . . . [T]he mere expression of interest in the correctness of the contract researcher's methods or conclusions does not, in and of itself, violate ethical limitations.³⁷

I have followed tobacco litigation for many years, and I have never heard a scientist complain about an expression of interest in her methods or conclusions by a tobacco industry representative. As Judge Sarokin noted in his opinion during the *Cipollone v. Liggett Group, Inc.* trial, "At least one scientist testified as to threats made to him if he published his findings, and there was other evidence of attempts to suppress or coerce others."³⁸

Similarly, after a long riff on the right of the tobacco industry to maintain an unpopular position on scientific issues and on the modesty appropriate for a lawyer in subordinating his judgment on such issues to that of his client, Professor Redish concludes that "where lawyers have personal knowledge of undisputed facts that contradict the arguments that they are making on behalf of their client . . . [,] continued attempts to make those arguments do exceed the scope of the tenets of adversary theory."³⁹ While I guess it is conceivable that lawyers of "true legal brilliance" who are charged with managing the tobacco industry's entire smoking and health research effort, might have missed the fact—undisputed by any knowledgeable scientist not in the employ of the tobacco industry—that smoking causes cancer and other fatal diseases, in fact, it did not happen that way. B&W General Counsel Addison Yeaman, in the same 1963 memorandum discussed earlier, concluded, "At the best, the probabilities are that some combination of constituents of smoke will be found conducive to the onset of cancer or to create an environment in which cancer is more like to occur."⁴⁰ Indeed, a memorandum prepared in the 1980s by R.J. Reynolds Tobacco Company's (RJR) outside counsel dates the knowledge of RJR's General Counsel Henry Ramm, ten years earlier: "In approximately 1953, Dr. Claude Teague reviewed the smoking and health literature and was surprised by the volume of material which 'indicted' cigarette smoking According to Dr. Teague, the Law

37. *Id.*

38. 683 F. Supp. 1487, 1491 (D. N.J. 1988).

39. Redish, *supra* note 2, at 405.

40. GLANTZ, *supra* note 3, at 53.

Department advised that this report should not be circulated . . . [h]e advised that the report be collected and destroyed."⁴¹

Professor Redish concludes with a passionate plea not "to exempt the tobacco industry from the process-based protections of the Constitution on the grounds of its moral reprehensibility . . ." ⁴² I would add my own plea not to exempt the tobacco industry or its lawyers from accountability in tort to their victims on the slippery grounds advanced by Professor Redish.

41. Ciresi, *supra* note 10, at 559.

42. Redish, *supra* note 2, at 406.

