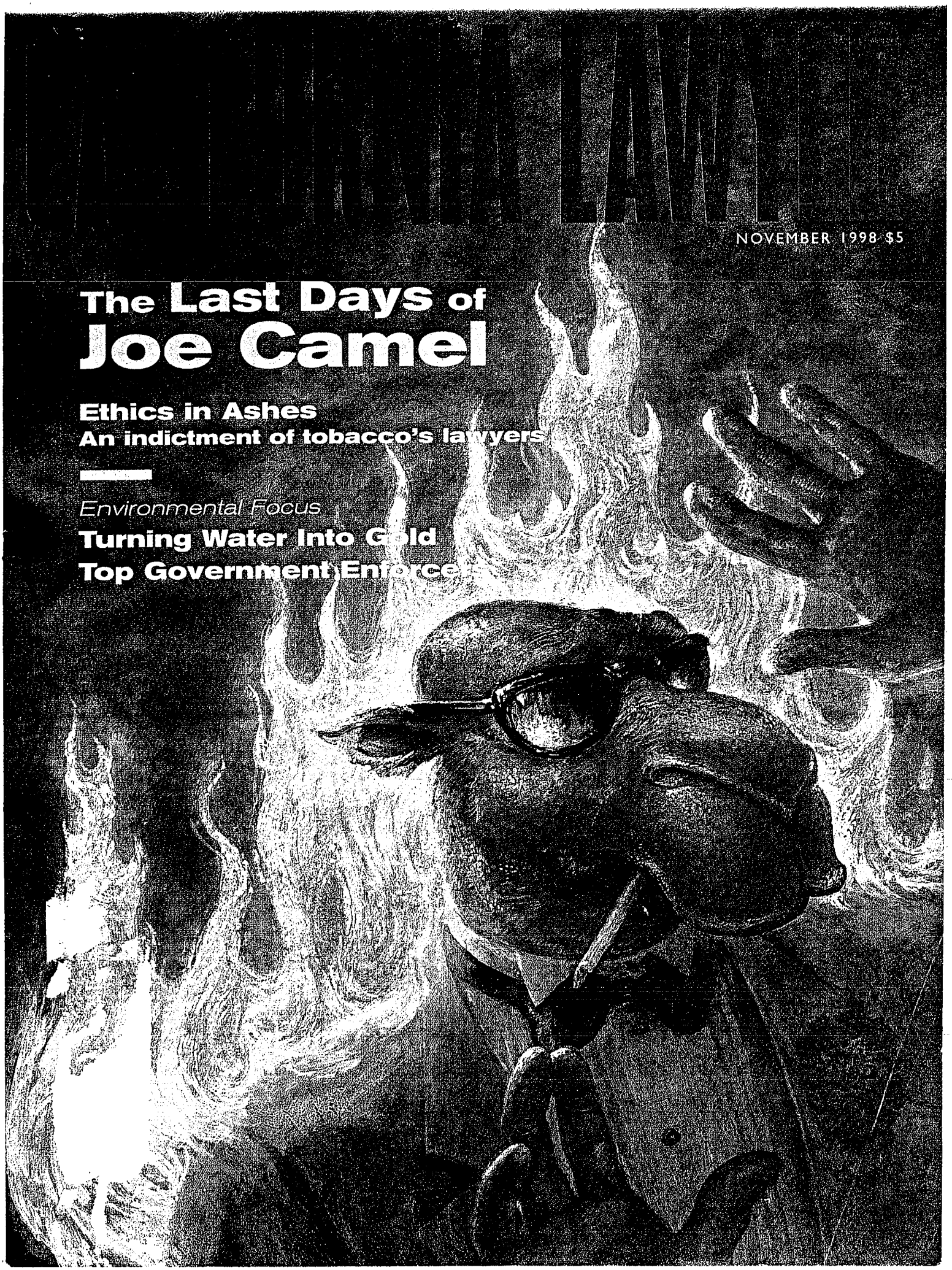
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Ethics in Ashes

Big tobacco's lawyers hide behind the cloak of privilege.

By Richard A. Zitrin and Carol M. Langford
Illustration by Jonathan Barkat

Forget the perjury. Forget the image of a parade of tobacco executives forced to appear before Rep. Henry Waxman's congressional committee, each in turn denying under oath that tobacco is addictive. Assume for the moment that they really didn't know, or at least that their lawyers didn't know, and that the executives have now changed their tune, not out of political or economic expediency but because in good faith they were mistaken. Forget obstruction of justice for the same reason. And forget any possibility that tobacco lawyers were complicit in manipulating nicotine levels to addict millions of smokers or designing ad campaigns to appeal to children. Assume, again, that they knew nothing about all of this. Even if we were to forget each of these accusations, the ethical records of many leading tobacco industry lawyers over the past 40 years would still be appalling.

Most of the factual basis for this conclusion comes from documents maintained by the tobacco companies themselves. The evidence includes lawyers advocating *for* destroying documents and *against* researching how to make safer cigarettes. It details how lawyers were put in charge of scientific research so that any "special projects" that showed smoking was dangerous would be subject to a claim of attorney-client privilege. And recently uncovered documents describe the industrywide Committee of Counsel which, according to several lawyers interviewed for a June 1998 article in *Business Week,* essentially ran the industry, reporting directly to each company's president.

The Committee of Counsel has been accused by many health advocates of institutionalizing the industry's opposition to researching safer cigarettes. According to one Lorillard Tobacco Co. employee's notes, the committee "thwarted the industry scientists' desires to assure the safety of the product by testing ingredients adequately."

When research was conducted the results were carefully controlled. According to the minutes of the Committee of Counsel's September 23, 1981, meeting, the group was faced with efforts by the federal Department of Health and Human Services to compile a list of cigarette ingredients. The solution, recommended one committee member, outside counsel from Kansas City's Shook, Hardy & Bacon, was to test whether any particular additive had "adverse results," then "remove the additive and destroy the data." In a 1968 memo to the committee, the Washington, D.C., law firm of Arnold & Porter suggested a survey to prove that most Americans were already aware of the dangers of smoking. But to avoid the risk that the results might come out the wrong way, the lawyers suggested that they directly commission and receive the survey results. "Should the results ... prove unfavorable," said the memo, "there will be nothing in the [survey takers'] records to subpoena." The memo went on to say that it would appreciably weaken the chances of discovery "if the survey were in an attorney's files."

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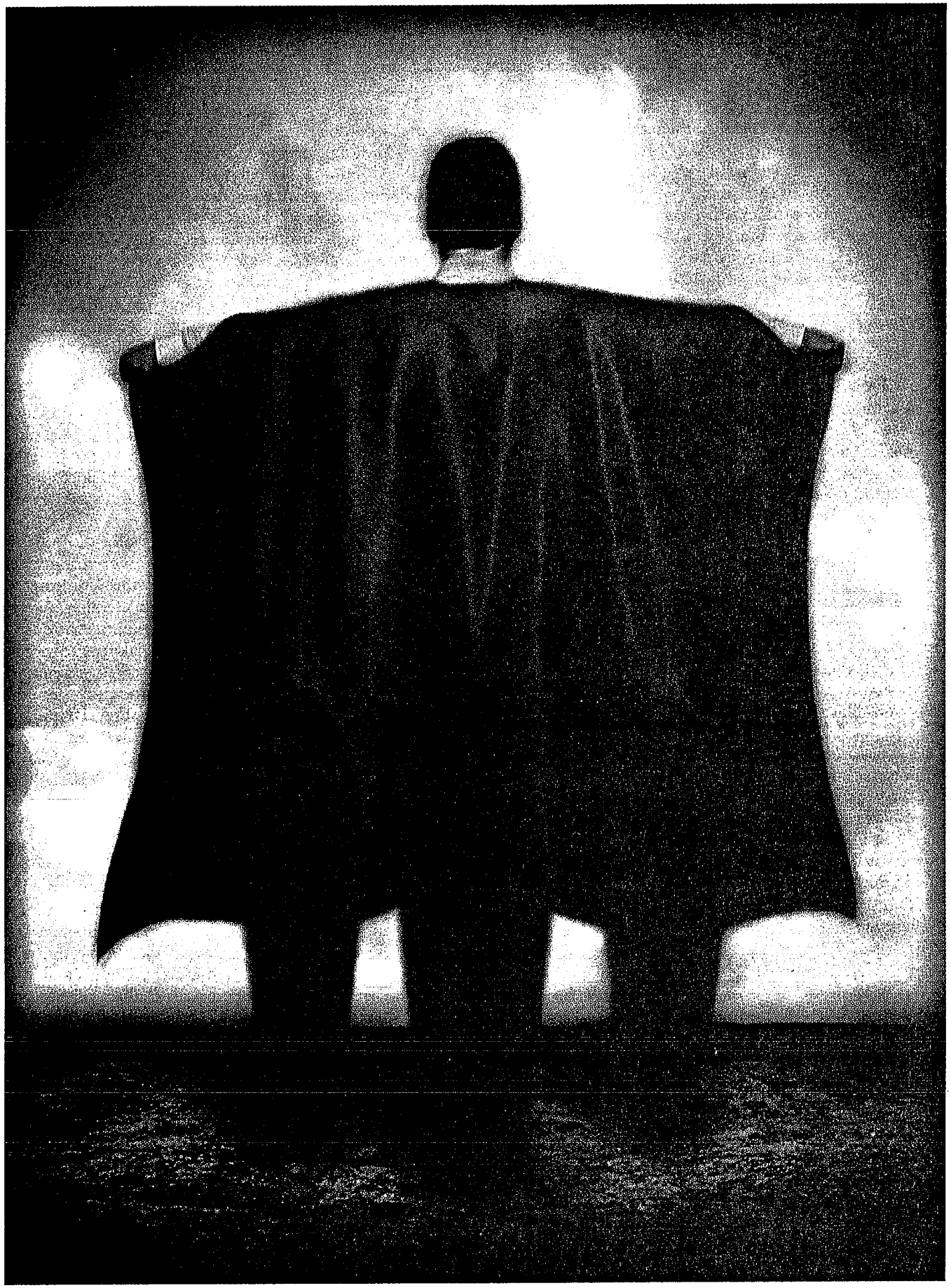
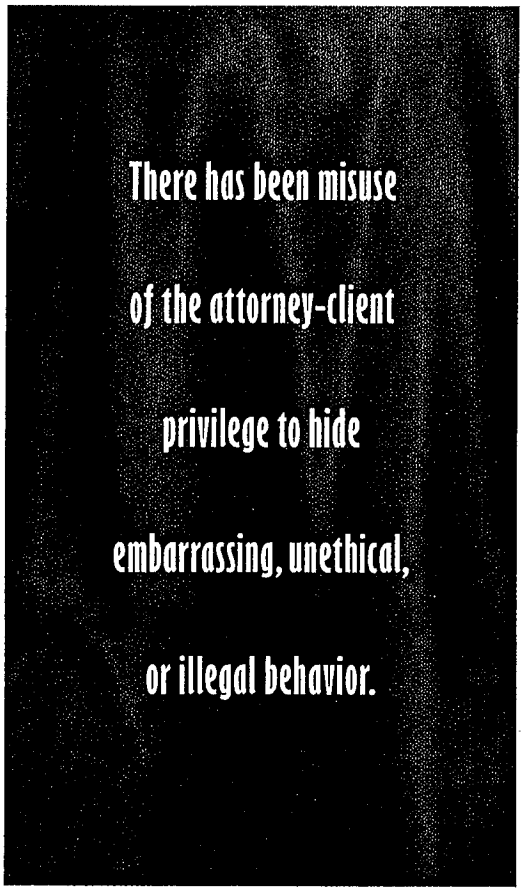


Concealing information from a survey that the tobacco industry says was ultimately never conducted pales in comparison to how lawyers were used to control much of the work of the Council on Tobacco Research (CTR). Like the Committee of Counsel, the CTR was founded in the 1950s as an industrywide effort. Unlike the secret committee, however, the CTR's existence has long been known. Its ostensible purpose was to conduct scientific research on the potential health hazards of smoking. But after the 1964 surgeon general's report linked smoking and cancer, lawyers helped the CTR set up a "special projects" unit. Much of what has been learned about the unit first came to light in *Haines v Liggett Group, Inc.* (DNJ 1992) 140 FRD 681, rev'd (3rd Cir 1992) 975 F2d 81.

Everyone agrees that lawyers were directly involved. The tobacco industry claims that the unit was created in anticipation of litigation over the claimed carcinogenic properties of cigarettes. However, health advocates insist that it was created to try to hide the results of scientific studies that proved the dangers of smoking behind a shield of attorney-client privilege. Why otherwise would lawyers be formally placed in charge of scientific research, complete with the power to hire and fire the scientists themselves? The lawyers making the decisions were not just in-house counsel but attorneys from Shook Hardy, a firm that has been described as "synonymous with tobacco," and the firm whose Committee of Counsel representative had recommended destroying adverse research results.



When the facts aren't going your way, the value of lawyers as buffers can be immeasurable. As Brown & Williamson attorney J. Kendrick Wells wrote in 1984, "direct lawyer involvement is needed in all [company] activities pertaining to smoking and health, from conception through every step of the activity," to provide maximum attorney-client protection.

H. Lee Sarokin, the judge presiding over *Haines,* quoted one CTR memo acknowledging that the CTR had been set up as "an industry 'shield' ... a 'front,' " and quoted another CTR participant who said, "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project.... [W]e wanted to protect it under the lawyers. We did not want it out in the open."

Five years after Sarokin's opinion in *Haines,* the floodgates opened, and eventually thousands of formerly secret tobacco documents became public. In December 1997 Minnesota judge Kenneth J. Fitzpatrick used the "crime-fraud" exception to the attorney-client privilege to order the release of 864 documents, citing big tobacco's "conspiracy of silence and suppression of scientific research." In April 1998, after the Supreme Court refused to reverse Fitzpatrick's order, the House Committee on Commerce released 39,000 formerly secret tobacco documents on the Internet. A few days later the New York state attorney general formally moved to dissolve the nonprofit charter of the CTR as fraudulently obtained. By early May the tobacco defendants had settled the Minnesota case for $6.1 billion.

The disclosed documents revealed how scientists routinely sought approval from lawyers for research requests—and amended them as counsel required. Some projects were simply vetoed by the attorneys, such as a study of how tobacco damages a body cell's genetic structure, because the results might help the "other side," or the "enemy." Lawyers also suppressed the mid-1970s research effort of a scientist who believed he had found a way to remove carbon monoxide from cigarettes.

Overseeing it all, pulling the strings from its secret sanctum sanctorum, was the Committee of Counsel, each member aware, according to committee minutes, that they were making "advocacy primary and science ... secondary." As Minnesota attorney general Hubert H. Humphrey III put it, "Tobacco lawyers, not scientists, were the gatekeepers controlling research on smoking and health."

The use of joint defense strategies, even joint committees, has become increasingly common. There's nothing necessarily unethical or conspiratorial about having a group of industry lawyers meet together to discuss, or even make, policy. There's nothing wrong with conveying information to in-house or outside counsel, nor with the expectation that certain information will be protected by privilege—if there is a legitimate legal purpose for using counsel in this way.

Just involving lawyers in business matters, however, isn't enough to create an attorney-client privilege. But this hasn't prevented many tobacco companies from trying. Often, the company's claim is enough for the other side to fold rather than to fight the issue at great time and expense. This makes the attorney-client privilege another weapon in discovery wars of attrition. Over the decades the tobacco companies have relied on this strategy with notable success.

Unlike individual confidentiality, corporate confidentiality has neither a long history nor uniform acceptance in Western

legal systems. In the United States corporate privilege was not firmly and finally established until 1963, in *Radiant Burners, Inc. v American Gas Ass'n* (7th Cir 1963) 320 F2d 314. In that case Chief Judge John Hastings made its limits clear: "Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."

Tobacco company lawyers clearly disagreed with Judge Hastings, who proved to be a poor prognosticator. In the years since *Radiant Burners,* the corporate attorney-client privilege has gradually broadened. In 1970—in a case that must have warmed the collective hearts of both the Committee of Counsel and the CTR—a Washington, D.C., federal court held that the minutes of a hospital's meetings covering the investigation of a patient's death could remain confidential so that the hospital would feel free to conduct a candid inquiry. *Bredice v Doctors Hosp., Inc.* (DDC 1970) 50 FRD 249, aff'd (DC Cir 1973) 479 F2d 920.

No privilege, no matter how broad, justifies the strategies considered around the table of the Committee of Counsel. Without exception, every jurisdiction makes it clear that a lawyer's participation in the destruction of evidence is unethical. ABA Model Rule 3.4 is explicit: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." California Rule of Professional Conduct 5-220 is far more narrow: No lawyer may "suppress any evidence" if the lawyer or client "has a legal obligation to reveal or to produce" it.

Several justifications have been advanced in cases where potentially important documents were destroyed. One justification—urged on the Minnesota federal court in the consolidated Dalkon Shield cases—is that the documents were not yet the subject of current court orders or discovery requests. Another is that reasonable document retention policies allowing destruction are permissible to prevent companies from having to keep every scrap of paper. But these arguments are disingenuous for those—such as tobacco and asbestos companies—that deal in deadly products where the "potential evidentiary value" of the documents is obvious. Even the California ethics rule is likely to be strictly interpreted at the tobacco lawyers' peril since the CTR existed for the very purpose of creating a privilege around damning—and thus, by definition, relevant and probative—documents.

Indeed, it's this last point—the artificial creation of privilege in the first place—that makes the lawyers' conduct unethical. No lawyers may counsel their clients to act criminally or fraudulently. (See ABA Model Rule 1.2(d) and Cal Bus & P C §6068(d).) In fact, the ABA rules explicitly state that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(d).

It's hard to imagine an ethical basis for lawyers dissuading the tobacco industry from making its products safer. A lawyer, says the first sentence of the preamble to the ABA Model Rules, is a "public citizen having special responsibility for the quality of justice." The purpose and function of the California Rules of Professional Conduct, according to the second sentence of its rules, is "to protect the public and to promote respect and confidence in the legal profession." Rule 1-100.

One might argue that lawyers can act ethically by doing nothing while their clients manufacture and promote an extremely dangerous product. But it is impossible, in our view, to argue credibly that lawyers are acting ethically when they *affirmatively* advise their tobacco clients to *avoid* taking steps that would substantially reduce the number of people killed by tobacco. We leave others to debate whether such advice should be termed "criminal" or "fraudulent," but it is surely bereft of any moral or legal justification.

What about "zealous advocacy," the principle we are all taught from the legal cradle? In overruling Judge Sarokin in *Haines,* the appellate court adopted Harvard Law School professors Charles Alan Wright and Arthur R. Miller's definition of how documents should be protected under the attorney-client privilege, citing their book on federal civil procedure.

Miller is one of the country's foremost proponents of traditional "zealous advocacy." As he wrote in a 1991 law review article, lawyers must always protect the "intensely personal and confidential information" of clients—a bizarre concept when applied to corporations. According to Miller, the rights of the public have virtually no place since our courts are designed for "private parties bringing a private dispute."

But "zealous advocacy"—a phrase that does not appear in California's ethics rules—is no longer part of the ABA rules either. While Canon 7 of the old ABA Model Code stated that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," the word "zeal" or "zealous" appears only three times in the Model Rules passed in 1983, twice to admonish lawyers to balance zeal with other duties. Model Rule 1.3 requires lawyers to act with "diligence." The rule's comment says: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client." Yet lawyers, and many courts, continue to talk and write about "zealous advocacy."

Given the change in our ethics rules over the past 15 years, unfettered zealous advocacy no longer belongs in our civil justice system. This was perhaps best understood, at least in the tobacco cases, by Judge Sarokin, writing in *Haines* in 1992—before the proofs and truths that have since come to light: "All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!"

When those people are lawyers, their actions are not "zealous"—they are unethical. ❑