

Trial Tech Smokes Out Big Tobacco

As seen in
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by *Claire Duffett*

Senior counsel Sharon Eubanks, a 22-year veteran attorney at the U.S. Department of Justice, quit her job on the cusp of the most significant legal victory of her career. She left in December 2005, just eight months before a judge would decide the huge tobacco case she had devoted six years to prosecuting.

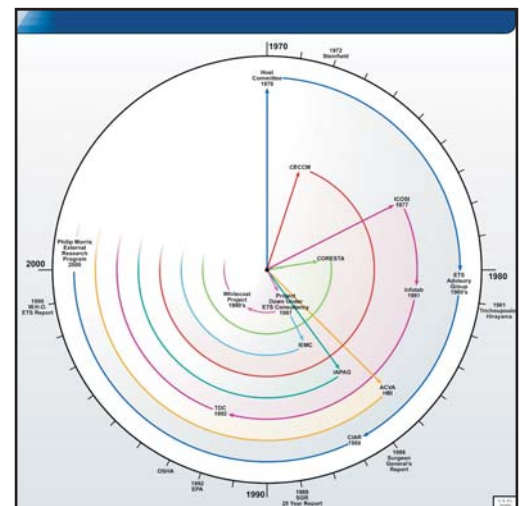
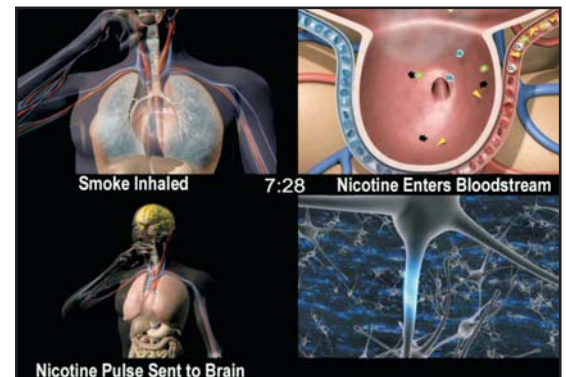
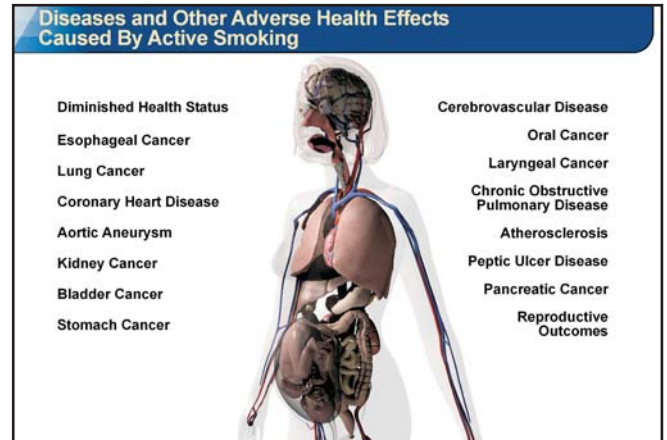
She was not the only lawyer to leave a Justice post abruptly, citing interference from politicians in the Bush administration. Echoes of Eubanks' allegations reverberated in this year's scandal involving accusations that Attorney General Alberto Gonzalez and his top deputies fired nine U.S. attorneys for failing to follow the administration's political line. Gonzalez has apologized for the manner in which the attorneys were fired, but insists that "nothing improper occurred," according to CNN.

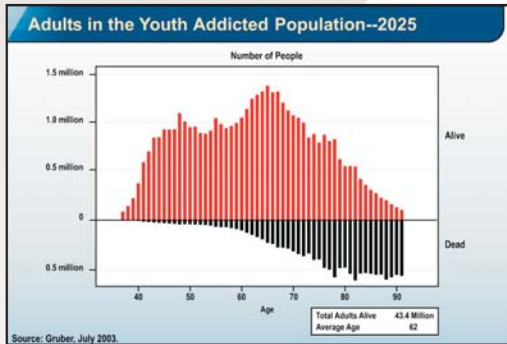
decision to leave such a high-profile case not have been easy. She led the largest civil racketeering and conspiracy case in U.S. history: United States of America v. Philip Morris Inc. et al. (Civil No. 99-CV-02496).

The massive litigation included three years of discovery and trial preparations. Both parties processed millions of documents and generated thousands of exhibits, including complex animations.

The government pursued six tobacco companies, alleging a 50-year conspiracy to addict smokers and lie about the dangers of cigarettes. The Justice Department filed the lawsuit on Sept. 22, 1999, accusing the companies of violating sections of the Racketeer Influenced and Corrupt Organizations Act. Defendants denied they concealed any information they had a duty to reveal.

Eubanks' team pursued the defendants vigorously -- until a White House directive demanded that she change course, forcing her team to abruptly reduce its financial demand from \$130 billion to \$10 billion, she says. This, and other micromanagement from above, caused her to seek refuge in retirement, Eubanks explains.





After she left, co-counsel Stephen Brody, then deputy director, took the helm. About 15 additional litigators presented oral arguments in

court, and a total of 35 Justice Department attorneys supported the case, Brody recalls.

Defendants included Philip Morris, Inc.; Liggett Group Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Corp.; Lorillard Tobacco Co. Inc.; and American Tobacco Co. The defense team of about 300 attorneys included Thomas Frederick of Chicago-based Winston & Strawn as Philip Morris' lead counsel. Key defense players included Winston & Strawn partners Dan Webb and Kevin Narko, as well as Theodore Wells Jr., of Paul, Weiss, Rifkind, Wharton & Garrison, Frederick says.

THE TRIAL

The bench trial began on Sept. 21, 2004, before Judge Gladys Kessler of the U.S. District Court for the District of Columbia. To expedite the process, Kessler had created a pretrial timeline. She set a July 2003 deadline to perform discovery; trial preparations could continue until September 2004. Without strict structure, Kessler feared the case, in which the American public had an important interest, would drag on indefinitely, she says in her timeline outline.

The trial lasted 29 weeks, and involved 85 live witnesses as well as prior testimony from 162 witnesses. During the trial, more than 14,000 exhibits were presented.

Animation was a critical component of Justice's presentation. For the five months leading up to trial, Eubanks, Brody, and several of their expert witnesses worked to create exhibits on smoking, basic respiration and other matters with Denver-based trial exhibits company Z-Axis, led by CEO Alan Triebitz.

Perhaps the most compelling of the animations was the depiction of a smoker. In cartoon fashion, a transparent body inhales a cigarette. Through the exhibit, Kessler witnessed the effects (as asserted by the prosecution) of smoking on the body, Triebitz explains.

Expert witness Dr. Jonathan Samet, an epidemiologist from Johns Hopkins Bloomberg School of Public Health, narrated the animations. Within nine seconds of inhalation, the pleasurable stimulation of nicotine reaches the brain, he explained in his testimony. As he spoke, the animation showed how the chemicals in cigarettes interact with nerves. On the way to the brain, the smoke deposits tar and carbon monoxide in the lungs and into the bloodstream, he continued, while the exhibit depicted his narrative.



Other interactive exhibits emphasized statistics and research, Eubanks says. More Americans have died from smoking than every U.S. war combined, testified biostatistician Dr. Timothy Wyant, senior adviser, The Brattle Group Inc.

An animated chart moved and changed as Wyant explained lung cancer rates. As he spoke of current addiction rates among children, an animated line predicting how many of them would die, and when, slowly inclined. Though the exhibit was simple, the presentation emphasized the reality behind dry-sounding statistics, Eubanks says.

Defense attorney Dan Webb says the courtroom technology helped keep a 116-day trial fresh and interesting. "Very little time was spent during the course of [trial] where a witness wasn't being examined about an exhibit or demonstrative, being confronted with prior testimony, or being asked to pay attention to a diagram or easel as the examining attorney wrote on it."

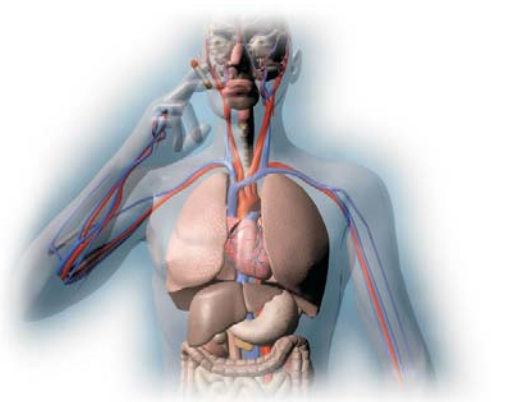
Justice and tobacco companies shared most of the courtroom equipment and split the cost, explains Jamey Johnson, senior managing director, FTI Consulting Inc., who oversaw the trial technology for the defense. The total shared equipment cost for the duration of trial was approximately \$70,000, according to another trial participant who asked not to be named.

The litigation services division of CACI International Inc. managed the Justice Department's courtroom technology. Both teams projected exhibits through an Epson America Inc. 8300 LCD Projector XGA suspended eight feet in the air and equipped with a longthrow lens to project images on the 7.5-foot by 10-foot screen located 54 feet away in the empty jury box. Eight 19-inch Dell Inc. flat-panel monitors were installed in the courtroom to display exhibits up close -- five at counsel tables, one for the judge, two for the clerks and one for the court reporter.

Two Tyco Electronics Corp. IntelliTouch 17-inch XGA touch screens -- at the witness stand and the podium -- helped the two teams do real-time document annotations. The litigators also could write comments and notes on a Mimio digital whiteboard.

The prosecution used InData Corp.'s TrialDirector to present exhibits, documents and testimony. The defense displayed its visuals through FTI's proprietary trial presentation software, TrialMax.

However, while Kessler's strongly worded decision against the tobacco companies was a moral victory for Justice, it was also a victory for the defense, because the judge denied monetary compensation.



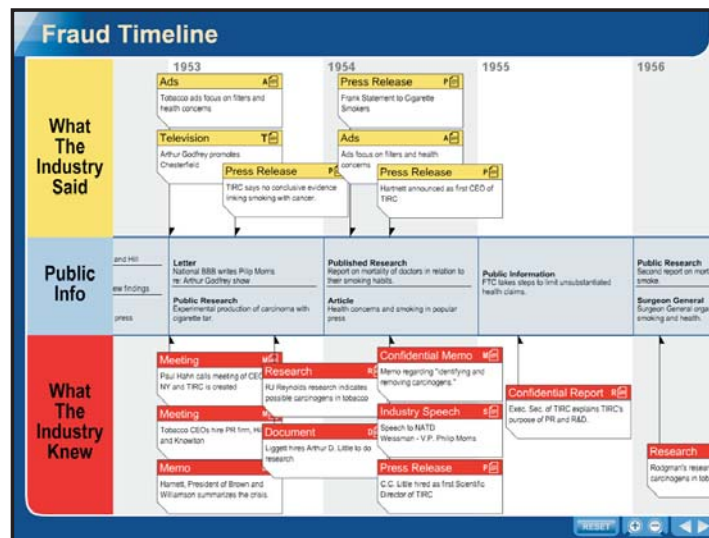
In her opinion, Kessler explained the technicality that prevented her from awarding damages. A previous court opinion held that RICO cases could only apply forward-looking remedies -- such as the above measures -- to prevent future wrongdoing. They could not, however, penalize companies for money earned during the period of corruption.

THE RESULT

The trial ended on June 12, 2005. The long and detailed case resulted in a long and detailed ruling: Kessler returned her 1,700-page decision on Aug. 17, 2006, finding in favor of the Justice Department.

Kessler levied heavy sanctions against the companies to prevent future corruption, she said. Among the sanctions, Kessler:

- placed restrictions on their advertisement language and demanded they publish corrective statements in major newspapers and the three leading television networks admitting the harmful effects of smoking
- ordered the disbandment of the scientific research divisions of the companies, which she determined had been set up to disseminate false science about smoking
- required that the tobacco companies maintain a Web-based depository of internal documents uncovered during discovery (for this case and past litigation) until 2021 -- and make it available to the public



Though disappointed, Eubanks understands why Kessler denied damages. "The judge felt that her hands were tied by precedent of the appellate court, and she explained her frustrations in her opinion quite eloquently," Eubanks says.

Although appeals and post-trial motions are pending, published news reports estimate the total cost of litigation at more than \$100 million for each side.

The dismissal of monetary penalties did not diminish Eubanks' criticisms of the Bush administration that led to her resignation. In the wake of the Justice Department prosecutors' firings, and subsequent hearings over Gonzales' actions, Eubanks has become more publicly vocal about the events leading up to her departure.

"Given the lack of support from those above me at Justice, I felt I could no longer be effective as an advocate," Eubanks says. "It was the right decision at the time, and I don't regret it."

Today, Eubanks, 51, lives just outside Washington, D.C., in McLean, Va. Of course, she's working on a book about her experience at the Department of Justice.

RESOURCES

More information about the case, *United States of America v. Philip Morris Incorporated et al.* can be found at: www.tobacco-on-trial.com

For additional information about the parties and the technology discussed in the article, visit: U.S. Department of Justice www.usdoj.gov/civil/cases/tobacco2

In addition to the technology mentioned in the article, both parties purchased and leased an abundance of equipment. This includes:

Shared equipment:

- Epson America Inc. 8300 LCD Projector XGA, 500 lumens
- 7.5-foot x 10-foot Da-Lite Screen Co. Fast Fold projector screen
- Two Tyco Electronics Corp. TouchSystems 17-inch LCD XGA touch screens
- Harman International Industries Ltd. audio mixers
- Two video graphics array amplifiers (brand unknown)
- Three wireless microphones (brand unknown)
- Three line conditioners to regulate voltage

Prosecution's equipment:

- Six Dell Inc. Inspiron 8200 laptops
- Three to five Maxtor Corp. 250 GB external USB/Firewire OneTouch hard drives
- Cisco Systems Inc. PIX Series Security Appliance firewall
- Canon U.S.A. Inc. DC100 camcorder
- Canon U.S.A. Inc. IR3200 color printer/scanner
- Eastman Kodak Co. Ektagraphic slide projector
- InFocus Corp. LitePro projector
- Panasonic Corp. projector
- Cisco Systems Inc. -- provided virtual private network access
- RSA Security Inc. -- provided virtual private network access
- Verizon T1 Internet access

Defense's equipment:

- Six IBM ThinkPad T43 notebooks
- Netgear 16-port GB switch
- Three NEC Corp. computer monitors
- Ricoh Co. Ltd. IS330DC flatbed scanner
- Dell Inc. desktop with 19-inch LCD monitor
- Oki Data Americas Inc. C5300N/5400N color laser printer
- Hewlett-Packard Co. 4300DN printer
- Two 250 GB external drives (brand unknown)
- Two laser pointers (brand unknown)
- Photocopier (brand unknown)

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