

THE TOBACCO WARS

Strategist of Smoking Assault Calls Shots from Maine Farm

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SubHead: Lawyer's roles: Spin doctor, consensus builder

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Control Central for the 35 attorneys general and 200 private lawyers pressing the vast legal assault on Big Tobacco is, incredibly, the perfect rural stillness of a weathered old farmhouse near tiny Lisbon Falls, Maine.

Up the stairs, in a small bedroom that affords a view of his neighbor's pasture and occasionally yields up the wafting fragrance of his own ancient apple trees, James E. Tierney is a one-man information clearinghouse in the wave of lawsuits that is expected to redefine the role of cigarettes in U.S. commerce and society.

This rangy, 50-year-old man wearing blue jeans, a green plaid shirt and dusty old hiking shoes - a regular Mainer, you might say - is the spin doctor, coordinator and a key strategist for the attorneys general who are suing to make tobacco companies repay Medicaid money spent to treat smoking-related diseases.

On a typical day, he is up in this bedroom at a folding metal table, operating two lap-top computers, a multiline telephone and a fax machine, clicking away with fingernails he keeps long for playing guitar. He is by turns explaining the complex daily developments in the Tobacco Wars to the nation's leading newspapers (almost always off the record), and working hard to hold together the unwieldy army of lawyers who are doing the front-line fighting.

Tierney is a private lawyer and a business consultant who doesn't have any partners. His remote venue, bony frame, denim attire and cartoon-like, doubled-up laughing postures do not immediately project an awesome presence. But as the signs on Maine's Interstate 95 warn: Watch for Moose in Roadway.

Tierney was Maine's attorney general from 1980 to 1990, "the best attorney general the state of Maine ever had," according to friend and former schoolmate Stephen King in the novel "Tommyknockers." Tierney has advised officials in Eastern Europe's emerging democracies, has supervised national elections in Croatia and Albania, and was special counsel in the investigation of the corrupt Pennsylvania Supreme Court in the early 1990s. He is a regular commentator on Court TV. His lawyer-clients call him "America's 51st Attorney General."

And although he can be a flamboyant showman, "he's the one person in the country who is trusted by every A.G.," says Jeffrey Modisett, Indiana's attorney general. "He was the perfect person to bring into the tobacco talks, which have been a little more fractional than most issues. He's a consensus builder, that's the main thing you need to know about him."

THE HOME OFFICE where the phone never stops ringing, even when Tierney is on it, is comfortable and spare. Besides the communications equipment, there's a floor-to-ceiling bookshelf heavy on historical biographies (Lincoln, Truman, Rizzo), and with a row of compact discs (Mozart, Dvorak, Jelly Roll Morton). His daughter's calm dog, Oshi, is usually in the room, perhaps to avoid the four cats. Oshi puts his chin on a visitor's knee while Tierney tries to reach Matthew Myers, general counsel for the Center for Tobacco-free Kids, who has stepped away from his desk.

"I don't accept the bathroom excuse!" Tierney thunders with mock indignation. "Doesn't he have a cellular phone? We're trying to save kids' lives here!"

The challenge this day, June 2, is to perform some damage control in dealing with The New York Times, The Wall Street Journal, The Washington Post, The Associated Press, Reuters, MSNBC and Bloomberg News.

The tobacco industry has broken off the settlement talks because the attorneys general won't cut a deal that exempts the industry from punitive damages - awards that come on top of actual damages - in future suits. Some attorneys general favor them as a way to deter corporate misbehavior; others want to eliminate punitive damages, but preferably through tort reform legislation, not the tobacco settlement talks.

Richard "Dickie" Scruggs is an aggressive private lawyer who helped Mississippi Attorney General Mike Moore file the first anti-tobacco suit, using the Medicaid reimbursement strategy that has become the linchpin of the whole assault.

Scruggs has taken it upon himself to call a couple of key reporters, apparently raising with them the possibility that he might free-lance a deal that does protect the industry against punitive damages, regardless of whether it is sanctioned by the attorneys general as a group.

So now The Wall Street Journal is telling Tierney it wants to poll the attorneys general to see whether they are for or against a settlement agreement shielding tobacco from punitive damages.

Tierney doesn't want that story to appear. Such a poll, he thinks, would be divisive for his side, have no bearing on how the settlement talks actually come out, miss the point and be misleading. Tierney wants to get the national media off this idea and onto something else.

To this end, he seizes on a news item barely mentioned in the day's stories - a report that U.S. Health and Human Services Secretary Donna Shalala says her Cabinet will review any settlement proposal and won't be pressured to finish that review before Moore's Medicaid case in Mississippi comes to trial July 7 - a deadline, of sorts, that has been driving the talks. Tierney pounces on this angle.

"That's the important thing," he tells reporters. "That's the real news, not some poll of the A.G.s. The A.G.s are back together again on this! Dickie just had a bad hair day. We had a great conference call last night, Scruggs apologized and we all sang 'Kumbaya.' Yes, tobacco left the table, but they'll be back.

"But if Shalala's going to review anything we come up with, then we aren't settling cases, we're just making a recommendation to a bureaucrat. If I were a newspaper with your resources, I'd find out if she is speaking for the president. That's the real news here."

Then he takes the dog for a walk and rides into Lisbon Falls for lunch.

AT MARIO'S RESTAURANT on Main Street, an old-time, town square kind of place with a counter and booths, Tierney tries the taco salad.

"Each attorney general knows his own case and his own office, but . . . they all have different cultures. For example, Mike Moore is working on this by himself, and with private lawyers. His assistants are not involved.

"One A.G. called me the other day and said, 'Hey, I called Mike Moore's office with one small tobacco question, said I didn't need to bother him, could one of his assistants help me, and they said I couldn't talk to anybody but Mike Moore on tobacco. What is going on?' He felt snubbed until I explained that Mike Moore is the only one who could help because nobody else in his office knows anything about the tobacco stuff. Just cultural differences I help them straighten out."

The news comes on a TV behind the lunch counter, Tierney darts from the booth to watch, then returns.

TIERNEY SAYS he got this job after the tobacco industry persuaded the National Association of Attorneys General to stay out of the whole dispute. Coordinating multistate litigation by attorneys general is the kind of thing the association does all the time, Tierney says, "but they wouldn't go against Big Tobacco."

The attorneys general filing the suits were not allowed to use any of the association's facilities or resources to coordinate their efforts.

Ed Cafasso, a spokesman for Massachusetts Attorney General Scott Harshbarger, who is the president of the association, says the group has remained neutral in the tobacco litigation "because all of its members are not suing the industry." He acknowledged, however, that the group has helped in other multistate cases that did not involve all the states.

In the absence of help from the association, Richard Daynard, the law professor at Boston's Northeastern University who heads the Tobacco Products Liability Project, lined up a grant from the Robert Wood Johnson Foundation. Individual offices of attorneys general put some money into the pool, and so did some private lawyers and The Center for Tobacco-free Kids. Tierney was hired.

ONE OF THE first things he did was to create an Internet presence so attorneys general, members of the news media and the public could get the latest information.

"I'm a big e-mail guy," Tierney says, "and I saw right away, frankly, that I couldn't handle all the press calls. And the A.G.s were saying, 'Fax me the documents,' and I was saying, 'But it's 200 pages!' " So Tierney thought up the State Tobacco Information Center (at www.stic.neu.edu), and a lawyer at Northeastern was hired to maintain the site. It has a map of the United States that shows which states have filed suit.

Indiana filed in February. Kentucky has not filed. A statement released by the office of Attorney General Ben Chandler says, "It would not be appropriate for the attorney general to attack those hard-working Kentuckians" who grow tobacco.

After lunch, Tierney returns home, launches himself up the stairs, retrieves seven messages, returns calls, faxes a document, stands up abruptly to change shirts and put on a jacket and tie over the jeans for a TV interview, then bombs along the winding state road to WMTW-Channel 8, the ABC affiliate in Auburn. Tierney remarks that he is available for this interview only because his 8-year-old daughter, the youngest of his five children, does not have a softball game tonight.

DURING THE DRIVE, Tierney acknowledges that a growing group of attorneys general and private plaintiffs' lawyers - in no way a duly constituted body of government - seems poised to set national public health policy through these settlement talks. He acknowledges that the lawyers, working on a contingent-fee basis, stand to save a tremendous amount of time and earn a tremendous amount of money if they settle - regardless of whether that settlement is in the best interest of the nation's public health.

"I wish it would be done another way," Tierney says. "In a perfect world, judges and juries would not be deciding these issues. Problem is, tobacco has had a lock on Congress forever, and a tobacco friend in every key place. Tobacco lawyers and tobacco money, until very recently, until (President) Clinton, have been successful in persuading the government that cigarettes are neither a food nor a drug and can't be regulated. So tobacco brought it on themselves by refusing to compromise, and now they're coming down like the Berlin Wall.

"We wouldn't even be here without the private lawyers. No A.G. would have filed on his own. There are warehouses with millions of documents that lawyers have to read. The private lawyers are spending millions of dollars out of their own pockets, spending hours and hours on depositions."

AT CHANNEL 8, evening anchorman Patrick Greenlaw appears on the set, shakes hands with his guest and asks: "Are you aware they've called off the tobacco talks?" Yes, replies Tierney, who has been working on that very situation all day, "I knew that."

The big question on the air is, "Why isn't Maine one of the states suing the tobacco industry?" Tierney answers with care, saying that it is his understanding the attorney general has asked the legislature to provide the resources and is waiting to hear back.

In reality, Tierney is deeply bothered. His wife, Susan, a psychiatric nurse, says he cares more about the tobacco issue than any other he has tackled, and he has tackled many, including, but not scratching the surface: bait-and-switch tactics, acid rain, hazardous materials disposal, Internet

advertising, the 1994 Major League Baseball strike and the size of nuclear power plant evacuation zones.

Tierney hates the fact that his state - so clean and natural, so environmentally sensitive that it once banned the juice box as insufficiently biodegradable - ranks as high as it does in youth smoking. In Maine 32.6 percent of youths in grades nine-12 have smoked in the past month, according to the federal Centers for Disease Control and Prevention. Among all states, the average is 30 percent.

"Jim Tierney is always with the White Hat issues," Florida Attorney General Robert A. Butterworth says. "He will never turn up on the Dark Side."

THE NEXT MORNING Tierney is sitting under his apple trees, a spot also popular with the biting black flies, drinking coffee and reading, with considerable gratification, the nation's newspapers. The stories this morning are not about a divisive poll of attorneys general on the issue of punitive damages. They are, as Tierney had wanted, about Shalala's statement that there will be "a full-scale, strict scrutiny (and) public health review" of any proposed settlement.

White House press secretary Michael McCurry says in the stories, however, that Shalala's statement reflects no change in the administration's position, that the president is not signaling any skepticism about the talks.

Tierney's gratification is short-lived. The Wall Street Journal is calling again, still interested in polling the attorneys general. The tobacco industry, he suspects, is trying to use the media to drive a wedge in the united front, singling out for blame Connecticut Attorney General Richard Blumenthal for intransigence on the issue of punitive damages.

Reporters are also seeking any information to confirm a tip that, even though the talks have officially broken off, Moore and Scruggs will soon present to the tobacco industry a proposed settlement that would limit punitive damages, whether the attorneys general are all together on it or not.

Tierney is on the phone again, trying without luck to straighten this out before a visit to a high school class in Brunswick

"The A.G.s' primary concern is regulatory," Tierney says while driving down the road to Brunswick, "and protecting kids from starting to smoke. They are interested in cessation programs. How to get the Medicaid money back. And law enforcement: We think these guys broke our conspiracy laws and should be punished civilly.

"Congress will probably want to add provisions on the international issue - exporting cancer to Africa, for example. And they will want to help the farmers."

TIERNEY IS LATE for the social studies class, but he grabs and holds the kids' attention. "We could literally fill your school from floor to ceiling with internal tobacco company documents!" he declares. He tells them what a class action suit is - a common cause of action against an allegedly defective product or marketing practice that injures a group of people. He says that tobacco causes \$2.09 in health-care costs for every pack of cigarettes sold. "That's the size of this epidemic," he booms. "AIDS? Alcohol? Drugs? Forget it! Tobacco is the single biggest health problem in the nation."

(These are claims that the tobacco industry still publicly rejects. Tom Fitzgerald, a spokesman for Louisville-based Brown & Williamson Tobacco Corp., says later that Tierney's remarks "appear to be the same regurgitated rhetoric that has been part of anti-tobacco rhetoric for years.")

After a Q & A session, Tierney runs to a pay phone to check messages, and he calls Blumenthal in Connecticut, who has left two of the five. Tierney drops his lanky body on the floor in a pile of knees and elbows.

"I can tell you exactly what it's about," he tells Blumenthal regarding a reporter's call, which Blumenthal hasn't returned yet. "Her question is going to be 'Who said among the attorneys general that punitive damages are the most important issue?' " Tierney is back on his feet now. "The other side is trying to demonize you and isolate you. I told her that it isn't one person, that six to 12 A.G.s believe as a matter of policy that punitive damages have to be there."

Then, apparently remembering Scruggs' bad hair day and the reporters' tip that Moore and Scruggs might be working on a settlement proposal, Tierney adds: "Mike and Dickie are flying to Nashville. I think they might have one more kooky thing left in them."

HEADING BACK home to Lisbon Falls, Tierney is thinking about what he will say when he addresses a Chamber of Commerce breakfast in Portland the next morning. He has an outline already. He will address the audience as neighbors and friends, because Maine isn't doing so well on this issue. He will say that, "If nothing else, the litigation brought by the attorneys general has put the truth before the public."

What truth?

"That the No. 1 health problem in the United States has been caused by hugely profitable corporations who, with full knowledge of the health risks, marketed a highly addictive drug to everyone - especially children - with the full knowledge that it was killing 450,000 Americans every year."

Tierney will tell them that the whole country is addicted to tobacco, not just the people who smoke.

"Tobacco is a most profitable item, so our retailers are addicted. It is a huge client, so our law firms and our advertising agencies and our stock brokerages are addicted. It is a good return on investment, so our pension funds - public and private - are all addicted. It's a major taxpayer, so our state and federal treasuries are addicted. It is philanthropic, so our museums and hospitals and festivals are addicted. In many states, our hard-working farmers are addicted. In many states, our candidates for public office are addicted."

"And most important of all," he will tell them, "our friends and our loved ones and our kids are addicted. And to kick this addiction we need to work together. It is a very long and hard road.

"All we have to save is ourselves."

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