

MEMORANDUM

TO: Joe Leritz
FROM: Paul Merrell
RE: Gaffey v. Montague
DATE: November 16, 1993

VIA TELEFAX

As we've discussed, we have a major scheduling problem caused by Monsanto's motion for protective order, which should be filed sometime today. By separate letter copied to you, I've notified Ken Heineman that he needs to serve both of us.

We've stacked up enough issues needing to be resolved before the discovery deadline that my ordinary reaction in federal court would be to file a motion for an expedited scheduling conference, providing a forum to discuss the problems with the Judge, establish briefing schedules, etc. I understand that Judge Hamilton is less accessible than most judges; however, I believe it's critically important that we develop a record that we at least tried to get these issues before her on a timely basis.

There is some urgency. We still need to take the Monsanto "person most knowledgeable" deposition, which will probably take at least two days itself, take the Collins deposition, go through the documents subpoenaed from each of them, prepare for the following depositions, and take them. As currently scheduled, we are set to take our next depositions on November 27, but are unable even to prepare effectively because of the Monsanto motion. A revised discovery schedule should allow us at least three weeks from the time we receive Monsanto's documents and

take the person most knowledgeable and Collins depositions to complete our other fact depositions.

I appreciate your willingness to take the lead on some kind of motion seeking a continuance in light of these problems. Carol and I have agreed to handle the relevancy and other fact issues involved with Monsanto's motion for protective order, while your firm will handle legal research.

Inventory of issues: I see the following issues that would support a motion for scheduling conference/continuance, etc.:

A. Have we mistakenly been placed on a non-jury docket?

If so, there may be no harm caused by extending discovery deadlines because we need to find a new place in line on the jury trial docket;

1. Some documents from the Court indicate that we are on a jury trial docket, while others indicate that we are on the non-jury docket;
2. My understanding is that if such a mistake has in fact been made, we are unlikely to go to trial by January;

B. Disqualification of Evans & Dixon by Monsanto disrupted defendants' litigation team at critical stage of discovery schedule;

1. Mr. Montague has a right to adequate representation; his new local counsel need time to get up to speed;

2. Monsanto's disqualification of Evans & Dixon was pre-emptive and clearly intended to disrupt Mr. Montague's defense just as he was about to begin his depositions of key witnesses, and as the discovery period drew to a close;

C. Monsanto's delaying motion for protective order:

1. Monsanto documents are crucial to other depositions scheduled by defendants; Monsanto has most if not all documents dealing with subject matter of litigation;
2. Monsanto's motion is largely frivolous; nearly everything requested has already been produced in either Kemner or Adkins cases; therefore, no need for gag order. Republic of the Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 390 (D.N.J. 1990), aff'd., 951 F.2d 1414 (3rd Cir. 1991) ("once the privileged information is disclosed to any adversary the privilege is destroyed") (emphasis added).¹ Furthermore, if the gag order required the ultimate destruction or surrender of documents that will have become

¹ Recognizing the judicial efficiencies created by cumulative discovery in different cases rather than through reinventing the wheel in every case, the Manual for Complex Litigation (2nd), pp. *_____, counsels that discovery gag orders barring access to discovery materials by attorneys in related cases are improper. There is no reason that Mr. Montague's present counsel should be subject to conditions that can not permissibly be imposed on attorneys from other cases.

incorporated into work product by the end of the case, this would create an impermissible limitation on Mr. Montague's counsel's right to practice law, i.e., impair their ability to represent interests of other or future clients. State Bar of New Mexico Advisory Opinion 1985-5 (October 23, 1985), pp. 112-114. Monsanto's effort to impose a gag order is blatantly intended to create a conflict of interest for Mr. Montague's attorneys in their representation of other clients with dioxin-related claims against Monsanto, or even in cases where Monsanto is not a party but the validity of the subject studies is an issue.²

- a. See also more detailed analysis of Monsanto motion to be prepared by Paul Merrell and Carol Van Strum.
3. It is extremely troubling that the delaying motion is being filed by a law firm with a three-way

² The conflict created would be particularly egregious for Paul Merrell, who was retained by Dr. Montague because of his expertise in the particular group of Monsanto studies at issue in this litigation, and who has published a lengthy report on the failings of the studies. The gag order sought would effectively force Mr. Merrell to withdraw from representing his other clients, such as Greenpeace USA, who have already retained him to represent them in regard to the studies. If orders such as those proposed by Monsanto were routinely granted by the Courts, then attorneys would forever be precluded from developing expertise in particular factual settings, which is undoubtedly the goal of the Monsanto motion.

conflict of interest (soon to be a four-way conflict):³

- a. Coburn, Croft & Putzell was Dr. Montague's attorney in this case. That firm has already been disqualified from continuing its representation of plaintiff William R. Gaffey because it hired one of Mr. Montague's attorneys from the Ortvals firm;⁴
- b. Coburn Croft was originally counsel for plaintiff William R. Gaffey when this case was filed;⁵
- c. Coburn Croft is now representing deponent Monsanto Company seeking relief against Dr. Montague's subpoena for testimony and documents;⁶ and

³ I heartily recommend as a general source of rules on conflicts resolution Chapter 7 of Charles W. Wofram, Modern Legal Ethics (1986).

⁴ The conflict is no mere technicality. I am advised that the Ortvals associate hired by Coburn Croft did extensive work on Dr. Montague's case.

⁵ Coburn Croft was also counsel for Monsanto in the Kemner case, a closely related case. A brief by plaintiff's counsel in Kemner was the subject of the article written by Peter Montague that sparked Mr. Gaffey's lawsuit.

⁶ Presumably, Coburn Croft was aware that discovery from Monsanto would be needed by Peter Montague from the outset of this case. Under those circumstances, one would expect that Coburn Croft early on advised Monsanto of that fact which created a potential conflict with Monsanto's interests and obtained Monsanto's consent to the potentially conflicting representation of Dr. Gaffey. Heaping inference upon inference, one could at

- d. I am advised by Ken Heineman of Coburn Croft that his firm intends to represent other deponents we have noticed who are present and former Monsanto workers and presumably will be placing objections and instructing witnesses not to answer questions posed by Dr. Montague. Query whether this creates an independent basis for disqualification. See materials from Dupont Plaza Hotel fire litigation to be faxed by Paul Merrell.
- 4. It is also troubling that these unforeseen and improper discovery delays are being created by former counsel for plaintiff on behalf of a non-party (Monsanto) which has further disrupted Mr. Montague's defense by insisting that Mr. Montague's local counsel withdraw, reasoning that the Monsanto subpoenas create a conflict of interest.
 - a. Monsanto has waived any argument and is estopped from asserting that the particular subpoenas at issue do not create a sufficient conflict to require withdrawal of firms with dual representation in this matter;

least reasonably suspect that at the beginning of this case Monsanto expected to defend any discovery requests from Peter Montague without assistance from the Coburn Croft firm.

- (1) Ken Heineman advised Paul Merrell that his firm and Monsanto believe there is no conflict because Monsanto has no stake in the outcome of this case; if this is so, then why has Monsanto disqualified Evans & Dixon because of the same subpoenas? Shouldn't Coburn Croft be subject to the same test?
 - (2) There is no blinking the fact that Coburn Croft is seeking relief against Dr. Montague, a party with whom they have a representational interest; without question Dr. Gaffey's former attorney now working at Coburn Croft will profit from his new firm's representation of Monsanto against Dr. Montague's interests;
5. Whether Mr. Montague should be required to endure the injustice of Coburn Croft -- a firm that includes one of his former attorneys in this case -- disrupting his discovery and trial preparation is an issue that should be resolved before it occurs; an injury to the appearance of justice can not be repaired after it occurs; and
7. Therefore, a prompt scheduling conference is needed to: [i] establish briefing schedules, [ii]

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rework the discovery schedule, and [iii] set a new
trial date.

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Education

University of Oregon School of Law, J.D., 1987.

U.S. Army Corps of Engineers Topographical Map Printing School, 1968.

International Typographical Union apprenticeship, 1967.

Employment

1991-	Partner, Bradley & Merrell, with Ralph A. Bradley, Eugene, Oregon
1989-1991	Solo practitioner
1987-1989	Primary dioxin consultant (along with wife) to Greenpeace International and Greenpeace USA
1984-1987	Attended law school
1981-1984	<i>pro se</i> litigant, herbicide litigation
1980-1981	Network Coordinator, Northwest Coalition for Alternatives to Pesticides
1977-1980	Study Groups Coordinator, Citizens for Alternatives to Toxic Herbicides
1978-1980	Recording secretary, executive board, National Veterans Task Force on Agent Orange (coalition of all Agent Orange groups)
1975-1977	Partner, Orchards Printing Company, Lewiston, Idaho
1974-1975	Supervisor, Central Duplicating, University of Idaho
1973-1974	Printer, Tacoma News Tribune, Lewiston Morning Tribune
1970-1973	Hospitalized and recuperating from Vietnam War disabilities
1968-1970	Combat loudspeaker teamleader, U.S. Army Republic of Vietnam, 8th Psychological Operations Battalion

- 1964-1967 Apprentice printer, Lewiston Morning Tribune
1962-1964 Apprentice printer, various job shops, Portland, Oregon
1956-1962 Apprentice printer, Clearwater Progress, Kamiah, Idaho

Principle Focus of Practice

Dioxin and PCB toxic tort litigation strategy, trial preparation, and briefwriting; related consulting work.

Major legal achievements

Developed legal theory, litigation strategy, and conducted trial preparation for first dioxin tort litigation nationally against pulp mills.

Won injunction banning use of all herbicides in National Forests until adequate health and safety tests are conducted because of widespread fraud in existing tests. 747 F.2d 1240 (9th Cir. 1984).

Assisted in developing international legal and political strategies for phasing out use of chlorine globally with Greenpeace during 1987-1991

Major publications

No Margin of Safety: Dioxin Pollution and the Need for Emergency Action in the Pulp & Paper Industry (Greenpeace, 1987) (with Carol Van Strum).

Politics of Penta (Greenpeace, 1987) (with Carol Van Strum).

Toolkit: Copy It! — an organizer's guide for the antiherbicide movement (Citizens for Alternatives to Toxic Herbicides, 1978) (with Cheryl Savage).

Numerous articles in the Journal of Pesticide Reform and predecessor publications (1978-1991).

Personal

Born: August 28, 1946, Clarkston, Washington, USA.

Married: since 1981 to Carol Van Strum, toxic substances historian and consultant.

Children: Theresa (22), Zack (16), Jordan (10), and Nikko (4).

Hobby: Living in a small piece of heaven located on 25 privately-owned acres in the middle of the Siuslaw National Forest, central Oregon Coast Range.

CAROL VAN STRUM
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Tidewater, Oregon 97390
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Education

1957-1960 University of California, Berkeley, majored in biology and English literature.

Employment

1976-1992 Freelance writer, author, scientific consultant to the legal profession, self-employed.

1988-1991 Children's book editor, U.S.A. Today.

1978-1992 Book reviewer, U.S.A. Today, The Washington Post, The New York Times, San Jose Times-Mercury (c. 200 reviews).

1976-1984 Learning editor and book reviewer, Co-Evolution Quarterly/Whole Earth Review.

1969-1976 Housewife and child-rearing.

1964-1969 Co-owner and operator of Cody's Bookstore, Berkeley, Calif.

1961-1969 Co-owned and operated Oyez Press, Berkeley, Calif.

pre-1961 Various odd jobs.

Major recent activities

Manuscript preparation for treatise on political history of dioxin (with Paul Merrell) and for two novels. Continued consulting for numerous law firms and public interest organizations on dioxins and polychlorinated biphenyls (PCBs).

Major career milestones

Assisted Greenpeace in developing international legal and political strategies for phasing out use of chlorine globally during 1987-1991.

Co-authored book that caused international regulatory action against pulp mill dioxin pollution.

Authored book that focused pesticide regulatory issues in North America on scientific fraud and health and safety testing data gaps.

Co-founded first citizen group that turned dioxin into a public policy issue nationally and internationally.

Major publications

No Margin of Safety: Dioxin Pollution and the Need for Emergency Action in the Pulp & Paper Industry (Greenpeace, 1987) (with Paul Merrell).

Politics of Penta (Greenpeace, 1989) (with Paul Merrell).

A Bitter Fog: Herbicides & Human Rights (Sierra Club Books, 1983) (syndicated in several magazines).

Numerous articles in CoEvolution Quarterly, Whole Earth Review, Journal of Pesticide Reform, Garden Magazine (N.Y. Botanical Society); op-ed pieces in several major newspapers.

Honors

1992 Rydberg Award for International Environmental Activist of the Year (with Paul Merrell), awarded by Ninth International Public Interest Law Conference.

Keynote speaker for 1989 national pesticide conference sponsored by National Coalition Against the Misuse of Pesticides.

Award for outstanding activism, Tenth Anniversary Conference, Northwest Coalition for Alternatives to Pesticides.

Christopher Award for best non-fiction book, 1983, awarded by The Christopher Society, New York City (for A Bitter Fog: Herbicides & Human Rights).

Personal

Born: December 13, 1940, Port Chester, N.Y., U.S.A.

Married: since 1981 to Paul E. Merrell, toxic torts attorney.

Children: Theresa (22), Zack (16), Jordan (10), and Nikko (4).

Interests: gardening, baking, animal husbandry, caring for wounded owls for state fish & game department.

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-ALDER HILL FARM

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