March 12, 1971

Mr. Ralph Elliott
Elliott and Nall, Attorneys at Law
213 North Travis Street
Sherman, Texas 75090

Dear Mr. Elliott:

I have received your letter and its contents and have gone over the information so supplied. I am making certain pertinent remarks below. Before doing so, however, I think it advisable to give you my reaction to the situation, as it derives from my experience in this field of litigation.

Among the serious hygienic problems which arise in the lead-using and lead-producing industries in this country, about the worst is that associated with the operation of secondary smelters, as they are usually equipped and operated. The handling of scrap metal from a variety of sources which are trucked or shipped to such smelters is so bad, as a rule, as to create a dirty, dusty and disorderly pile (or piles) of material in the yard. The margin of profit between the price of the final product (which is usually delivered to a purchaser other than the producer) and the costs of operating is usually small, so that these smelters are jerry built and poorly equipped. The result is that the drainage of wastes of high lead content into local streams, and the escape of materials into the air, locally, occur at a high level. These secondary smelters are often located in rural areas, so as to be somewhat distant from residences, and the contamination of streams and of farm lands is great.

The above situation is the usual picture of these smelters. I have seen a number of them, and, therefore, I start out with the feeling that I shall encounter such a mess whenever I am brought into contact with them. The one involved in this case seems to be different. The people in charge seem to have done a fairly good job, and yet I would not trust it to be so unless I were to have it proved to me, for it is really a difficult job to plan, construct, and operate these smelters, with the type of scrap that is available, and, unfortunately, very few people have the background of knowledge and experience that enable them to do such a job properly. Moreover, the quantities of material that escape, under unusual conditions (breakdowns of one kind or another), are such as to make up for long periods of good performance, in contaminating streams and nearby lands.

It is entirely possible that the results obtained on the land and in the water of the complainant's property are correct, and that they resulted from somewhat unsatisfactory periods of operating this smelter. It is also possible that they are erroneous, for unless this group of analysts has had good training and experience, they would be expected to obtain high results.

It is also quite possible that the complaints of the family, as to irritated eyes, noses, and throats, are correct, for the batteries contain strong acids, which, if allowed to escape into the air, would be responsible for such complaints. Again, the complaints may be very greatly at fault, and the acids may be being neutralized in the plant. The basis for complaint may be very slight, both as to such irritation, and also as to the noise.

So much for the plant. One would have to consult the operators and to see the operations in order to get any real idea of the situation. Incidentally, it is not likely that the people who operate the plant could deceive an experienced examiner of the premises, for they will not understand the problems at issue well enough to cover up, unless they really know their way about, very well.

As to the matters complained of in the "Amended Complaint", there is no doubt whatever that these are greatly overdrawn in a number of respects. The noise may be somewhat of a nuisance, but I doubt if it was anything like as bad as it is painted. The same is true of the complaints of irritation. However, when the damage to the land is assessed, this is simply foolishness. The land has not been injured, even if the analytical data are correct. Rainfall and cultivation will greatly reduce the surface contamination, while deep plowing will remove it, assuming that it will not be permitted to occur again and again. This complaint is nonsense, and it has been made ignorantly. Forage crops grown on this land will take up very little, indeed, of the lead from the soil. The problem here is the reduction of the output of lead from the stack (or stacks) in the future, so that it does not fall out of the air onto the growing vegetation.

If the appraiser is speaking of the value of the land for the use of light industrial enterprises, the modest elevation of the lead in the soil is of no significance whatever. I wonder whether his conclusion, that this land is most suitable for "light industry", has been made because in his mind it is no longer useful for agricultural purposes, or whether it is his belief that land so located will sell at a higher price for use by industry, than for use in agriculture. (I raise the latter part of this question simply because I don't know what the best agricultural lands are worth.)

One final word about the possibility of operating a smelter at the site described so as not to create any nuisance or hygienic problem. There is no doubt that this can be done. It will be difficult and costly to do so, but it can be done. If, therefore, Gould, Inc. can get through the present suit without disaster, it can so act as to avoid being vulnerable in the future to such suits. This will have to be done if the plant remains and continues to operate this secondary smelter.

On the assumption that your client can defend himself by demonstrating the facts in this case, several things need to be done.

(1) One has to do with the sampling of the soil and vegetation in such a manner as to check the results provided by the claimant. They may be correct, but it is not wise to assume that they are, for the analytical procedure requires great care in its operation. I know nothing about Dr. Norton or his associates, and while the method of analysis which he has said he used is excellent in good hands, that fact does not guarantee that, in this case, the data are either correct or truly representative of the facts.

(2) The plant should be examined critically during its operation so as to see the facilities, to ensure their proper operation, and the past (or present) difficulties should be ascertained.

(3) To avoid further complaints of injury to the family, it would be wise, if feasible, to obtain specimens of urine and blood from the individuals and to determine the extent, if any, of their absorption of lead. This is a matter that should be discussed with you, for you should decide several issues here, on the basis of what might come out of this procedure.

I think I should tell you, at this point, that I don't like the idea of being involved in this case in such a manner as to have to go to Texas and spend some time there. I am not saying that I will not do so, but that I really haven't the time, just now, to spend. I'm up to my neck in other work, some of which involves dead-line dates. I'm behind now, and I see little prospect of getting ahead. If this could be postponed in some way, for a while, I could be a bit more free. I shall not walk out on you, since you have appealed to me for help, and I shall give you as good advice as I can, but I hope that this can be done without getting me into more trouble than I am now facing with respect to work that lies ahead.

I am relatively free of out of town engagements until April 18, and for several days thereafter, except for my teaching program which will involve me on Mondays, beginning on March 29. However, I would hate to interrupt my work just now.

Very truly yours,

Robert A. Kehoe, M.D.
Professor Emeritus of
Occupational Medicine

RAK:wb