

Feb 15, 1980
Science

Ski Trips Cost Researcher His Job

Criminal conviction has also led to an attack on his research into the health effects of toxic chemicals

No one has to tell James R. Allen that toying with travel vouchers does not pay.

What started as a \$900 dip into his government grant to pay for a couple of ski trips has ended in a criminal conviction, 6 months probation, a fine of \$4000, resignation from the University of Wisconsin-Madison this coming June, and an attempt to discredit a fair portion of his life's research.

"I have shamed my family, my university, and my state," he told a U.S. district court judge before he was sentenced on 27 November. "I am seeing some of the things I most cherish gradually disappear before my eyes."

Allen, 52, a pathologist at the UW Medical School, is internationally known for his studies on the health effects of TCDD (2,3,7,8-tetrachlorodibenzo-p-dioxin). This highly toxic chemical is a contaminant of the Agent Orange defoliant used in Vietnam, of the chemical cloud that descended on Seveso, Italy, and of the common herbicides 2,4,5-T and silvex.

What makes his recent conviction es-

pecially unfortunate in the eyes of many is the fact that the Environmental Protection Agency (EPA) is soon to hold cancellation hearings on the controversial herbicides, and Allen is a key EPA witness. Fighting the proposed ban is Dow Chemical, one of the major producers of 2,4,5-T and of the chemical components of silvex. Dow is now working overtime to discredit Allen's TCDD research, lawyers for Dow recently telling the EPA administrative judge that Allen's "overall credibility and integrity is suspect in light of his recent criminal conviction."

The fact that the conviction and EPA hearing fall so close together has led some zealous environmentalists to conclude that the persons who originally blew the whistle on Allen were in cahoots with the pesticide industry. The villains in this scenario include an assistant in Allen's laboratory and Senator William Proxmire (D-Wis.), who has received two dozen bitter letters and phone calls blaming him for Allen's misfortunes. These allegations seem to be based more on the need to find a scape-

goat in what is clearly an unfortunate situation than on the facts. Allen himself denies any knowledge of mudslinging by Dow, and the particulars of the case make collusion by industry unlikely.

The story began to unfold in the fall of 1978, when a woman who worked as Allen's assistant in his 30-person laboratory wrote a letter to the UW personnel office charging that he had repeatedly violated federal grant regulations. A UW committee investigated the charges, decided they had validity, and passed the complaint to UW Medical School dean Arnold Brown. In a 2 November 1978 letter, Brown told the committee that Allen had denied most of the charges when he asked Allen about them, and that the other charges seemed to stem from a misunderstanding of the federal guidelines. "While I am fully satisfied by the explanation offered by Dr. Allen," he wrote, "I recognize that you may not be. Should you wish to pursue this matter further, it would be necessary for Dr. Allen, [the former worker], and myself to get together to discuss the problems that she described."

Such a discussion would be difficult, instead wrote to Proxmire. He passed the complaint along to the Inspector General of the Department of Health, Education, and Welfare. After an initial investigation, his office turned it over to the Department of Justice, setting in motion the process that led to criminal charges.

In October 1979, Allen pleaded guilty



James R. Allen

to stealing \$892 from a National Institute of General Medical Sciences postdoctoral training grant, for which he was the director. As part of a plea agreement, Allen provided a three-page affidavit describing his deeds. In March 1978, he attended a toxicology conference in San Francisco and stopped in Utah to ski and relax. Allen said he had hoped to interview persons at the University of Utah for postdoctoral positions but did not do so. "Nevertheless, in submitting a travel expense report for the entire trip, I included a request for reimbursement for the detour to Park City, falsely stating that the purpose of the trip to Salt Lake City was to interview postdoctoral candidates there."

In March 1978, he attended a conference in New Orleans but flew first to Colorado. He deliberately created the impression that he intended to meet a researcher in Colorado and interview candidates when seeking repayment for the trip.

From 30 May to 2 June 1978, Allen and his son visited Telluride, Colorado,

never visited Colorado State University in Fort Collins, but created the impression he did by submitting airline ticket vouchers. For his son's expenses, Allen used the name of a postdoctoral researcher on an expense report.

It is feared among some environmentalists that the conviction could affect the outcome of the EPA cancellation hearings. Last March, EPA temporarily halted most uses of 2,4,5-T and silvex when an epidemiological study linked human exposure to TCDD with increased risk of miscarriages (*Science*, 16 March 1979). The cancellation hearings, slated to start 13 February, would extend the scope of that ban and make it permanent. Of the 140 witness expected to testify, 60 are being brought by EPA, 50 by Dow. Allen is one of two researchers slated to testify for EPA on the increased risk of miscarriages in monkeys given TCDD. "The work that I have done is rather critical," Allen told *Science*. "It is a rather difficult time right now, but I am going to testify, much to my dismay."

Most troublesome is that Dow currently wants all of Allen's underlying data. "There are compelling reasons to require full production and scrutiny of Dr. Allen's work," Dow lawyers told the judge. "EPA's own laboratory auditors have criticized severely the laboratory practices employed by Dr. Allen, and toxic PCB's have been found in tissue from test animals in Dr. Allen's 500 ppt [part per trillion] monkey study, raising serious questions about the reliability of any of Dr. Allen's work. In addition, Dr. Allen's general credibility is impugned by his recent admission of guilt involving the theft of government funds."

Such a demand for underlying data is perfectly legal and even expected, although some lawyers say that Dow is being unduly rough about the exercise. "They've asked for the kitchen sink," says William Butler of the Environmental Defense Fund. "And if the truth be told, Allen has not been forthcoming with the data, not even as much as any of the other scientists. He is understandably preoccupied, and his authority with his own laboratory is somewhat blurred at the moment." A fight is now developing over how much data the EPA administrative law judge can make Allen produce. Dow lawyers want a document subpoena filed in Wisconsin. EPA lawyers question the legality of a subpoena issued by an administrative law judge and whether it can be filed for what they claim are incomplete studies. Dow lawyers say the material, even if incomplete, has already been published in one form

ature, and is therefore relevant to case. "I'm sure that Dow is glo about all this," says Butler, "and EPA is horrified."

Although Dow seems only to be applying pressure of a legal sort, a flurry of letters from environmental groups suggest that Dow bought off the whistleblowers. One letter to Vice President Mondale says an investigation should be launched into who contributed to Proxmire's last reelection fund. Proxmire's staff is a bit amused by this. They claim that in 1976 Proxmire spent only \$173 on his campaign—and that was out of his own pocket. Said one staffer: "This is a classic case of people so paranoid that they can't face the truth."

One letter to Proxmire, from the Washington office of Friends of the Earth, asks him to write a letter in support of Allen's research to UW Chancellor Irving Shain, who was to decide if Allen would be dismissed from the university or otherwise punished. "Now that the action of your staff has put Dr. Allen into this position," the letter stated, "we hope you can help him retain his tenure."

In light of Allen's announcement on 18 January that he will resign as of 30 June, tenure is no longer an issue. Still unresolved is where Allen will go and what he will do when he gets there. Some observers believe the conviction has dealt a severe blow to his chances for obtaining other grants. Allen himself is optimistic. He says that the National Institute of Environmental Health Sciences assured him that "even though I have encountered some difficulties, my successful grants will be awarded, and the things that occurred recently will not influence my ability to get grants in the future."

Also unresolved is what impact his work in the field of environmental health will have in the future. In the past, Allen's research has been cited not only by EPA but by Vietnam veterans seeking compensation for alleged health problems they suffered as a result of exposure to Agent Orange.

As made clear by the Dow lawyers, however, the credibility of his work is liable to come under fire and will probably continue to be in dispute for quite some time. For the purpose of attacking the credibility of a witness, according to the *Federal Rules of Evidence*, a lawyer is free to cite a conviction involving dishonesty or false statement, and the only time such evidence is not admissible is if a period of more than 10 years has elapsed since the date of conviction.

—WILLIAM J. BROAD

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November 30, 1982

To Call Writer Direct
202 857- 5044

Victor J. Yannacone, Jr.
Yannacone & Associates
P. O. Drawer 109
Patchogue, New York 11772

Re: United States v. Allen,
Civ. No. 80-C-133 (W.D. Wis.)

Dear Mr. Yannacone:

As I mentioned in our telephone conversation on November 24, 1982, and as I mentioned to Keith Kavenagh in an earlier conversation, we had expected to receive "the actual time and expense sheets" supporting your time statement submitted in the above-referenced action soon after November 15, 1982, as indicated in your November 8, 1982 affidavit submitted to the Court. In our conversation, you indicated that as of November 24 your computer was not operational, that you did not know whether time vouchers in this case more than a year old had been retained or destroyed, that any destroyed time vouchers would have been recorded on microfilm, and that some time charges were recorded on papers in your files rather than on time vouchers.

As you know, Judge Crabb's briefing schedule requires that Dow's brief opposing the requests of the respondents and veterans for attorneys fees be filed no later than December 20, 1982. Thus, it is imperative that I receive any records underlying your request for fees and costs as soon as possible.

Accordingly, I request that you provide me with copies of the following documents no later than December 6, two weeks before the December 20 filing deadline:

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- 1) The original time vouchers for each of the entries, for each lawyer, included in your time statement.
- 2) For time vouchers which have been destroyed or lost, a copy of the microfilm recording of such time voucher.
- 3) For entries which were recorded on papers in your files rather than on time vouchers, a copy of the document(s) on which such entry appears.

You also indicated that your computer would become operational over this past weekend, and that you would provide a copy of the computer printout for each of the entries on the time statement submitted with your affidavit. I would appreciate receiving a copy of the printout as soon as possible.

Your November 8 affidavit describes the appended time statement as a "reconstructed statement of time," but does not identify the person or persons who compiled the statement, nor the sources of information used in preparing the statement. Accordingly, please provide the following information:

- 1) Identify each person who participated or assisted in the preparation of the statement, and if more than one person participated or assisted in such preparation, specify the task or tasks performed by each.
- 2) Identify the source or sources of information used in preparing the statement, and if more than one source was used, specify the source used for each entry.

Finally, as we discussed by telephone, "Yannacone and Associates" does not appear in Martindale-Hubbell. Please provide biographical information on each lawyer for whom fees are requested, including at least the following:

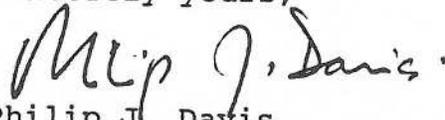
KIRKLAND & ELLIS

Victor J. Yannacone, Jr.
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- 1) Law school and date of law school graduation.
- 2) Bar memberships and the date of admission to each bar.
- 3) Legal experience, including all judicial clerkships, law firm associations, or government legal service, specifying for each the dates on which the position was assumed and relinquished. For law firm associations, specify any period during which the lawyer served as an associate with the firm, and any period during which the lawyer was a partner in the firm.
- 4) Specify each period following law school graduation during which any lawyer was not engaged in the active practice of law.

As we discussed, I expect that a resume would be sufficient to supply this information.

Sincerely yours,



Philip J. Davis
Counsel for The Dow
Chemical Company

:dr

YANNAcone & YANNAcone

Professional Corporation

Victor J. Yannacone (Dec'd)
Victor John Yannacone, jr.
W. Keith Kavenagh, Ph.D.
Michael T. Sullivan

Attorneys and Counselors at Law

December 3, 1982

FILE

Workers Compensation Division:	Area Code 516
Retirement & Social Security Division:	475-0231 (nights also)
Medical-Legal & Litigation Division:	654-0231
General Practice Division:	654-2299
Environmental, Consumer &	654-2222
Public Interest Law Division:	654-2662

Hon. Barbara Crabb
United States District Judge
United States District Court
Western District of Wisconsin
215 Monona Avenue
Madison, Wisconsin 53703

re: EPA/Dow Chemical Company v. Allen/Veterans

Dear Judge Crabb:

In addition to being professionally demeaning and beneath the dignity of an informal response, the enclosed letter from Philip J. Davis of Kirkland & Ellis representing The Dow Chemical Company raises some interesting and novel legal issues for your consideration.

The application made by and on behalf of the intervening respondent veterans is that a valuable, perhaps priceless academic perquisite -- the right to chose the time for release and publication of experimental data -- was vindicated largely through the efforts of the intervening respondents who were represented by a team of attorneys, including the undersigned. Yannacone & Associates are lead counsel for the entire class of plaintiff veterans in the "Agent Orange Product Liability Litigation (MDL 381)," the largest personal injury product liability class action in American history. Valuable time and resources were diverted from the veterans' cases to turn back the efforts of The Dow Chemical Company to accomplish through manipulation of administrative proceedings what they could not do in the laboratories or in the courtroom before your colleague, Judge Pratt.

The value of the services Yannacone & Associates has performed is not to be found in a Martindale-Hubbell listing or even a simple recital of the professional accomplishments of the undersigned and his colleagues; rather, it is to be found in the fact that the veterans won and The Dow Chemical Company lost. It is the veterans' contention that, as a matter of law, counsel for the successful party to a legal proceeding should be remunerated at no less a rate and in no less an amount than counsel for the unsuccessful party. The measure of the value of our services is to be found in some multiple of the cost of Kirkland & Ellis' services to their client. Such a contention carries additional weight when one considers that successful counsel acted in a representative capacity for a class of two and half million veterans who lack sufficient means to fund adequate legal services for themselves.

YANNACONE & YANNACONE *Attorneys and Counselors at Law*

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Also to be considered is the fact that the intervening respondent veterans and their attorneys were also asked to represent a number of graduate students whose professional futures were intimately associated with the outcome of this matter. The students also lacked any significant access to legal services. However, in order to avoid any possible appearance of impropriety, the intervening respondent veterans arranged for the firm of Aberg & Jorgenson to represent the interests of the academic respondents and is in striking contrast to Kirkland & Ellis whose Chicago office represents Monsanto and whose Washington office represents The Dow Chemical Company, both of which corporations are defendants in the Agent Orange litigation, the subject matter of which is a competitive product manufactured by each company and in which action each company has filed cross claims against the other.

We submit that before any further inquiry can be had by counsel for The Dow Chemical Company into the propriety of the fees sought for professional services by successful counsel for the respondents and respondent intervenors, full and complete disclosure should be made of the amount of the fees charged by Kirkland & Ellis to The Dow Chemical Company.

The fact that Mr. Davis is unaware of the professional attainments of his principal adversary in this case indicates that he has either led a rather sheltered life, is deaf and blind, or has reached his present professional position by overcoming the handicap of being less than literate. The mere fact that our law firm is not listed in Martindale-Hubbell is of no moment, since we were overlooked in the Book of Genesis as well.

My telephone conference with Mr. Davis, a conference which lasted 13 minutes on November 24, and for which I am not billing, was the kind of arrogant assault upon the professional integrity of a fellow attorney, albeit one more successful in public interest litigation, as to suggest that perhaps there really is a double standard in the profession, and that partners in certain large firms honestly believe that their position entitles them to behave in a manner that less than a century ago would have called for a public thrashing.

If counsel for Dow wishes to present his demands in the form of a motion and present it to Your Honor, Yannacone & Associates will make the appropriate cross-motion. Otherwise, we will ignore his improper demand and overlook the arrogance of his attempt to usurp the position of Your Honor and this Court.

YANNACONE & YANNACONE *Attorneys and Counselors at Law*

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On behalf of the intervening respondent veterans, we respectfully request Your Honor to make an award of attorneys' fees in the amount demanded, together with such other and further relief as to Your Honor shall seem just and proper under the circumstances. We herewith state, as we did in our sworn affidavit, that the amount demanded represents the fair and reasonable value of our services. Unless Kirkland & Ellis is willing to come forward and say that their total billings to The Dow Chemical Company in their unsuccessful effort amounted to less than our claim for successfully opposing their improper efforts, there is no further need for any additional material to burden the consideration of this Court. If counsel for Dow does represent that they billed their client less than we are claiming as the fair and reasonable value of our services, then a triable issue exists on the fair and reasonable value of each party's services and whether or not a multiplier should be applied to the billings of the unsuccessful attorneys in a controverted matter. At that point, Your Honor may wish to consider further evidence or conduct a hearing on the matter.

We stand ready to appear before Your Honor as required and present further evidence as Your Honor may direct in the resolution of this matter.

Thank you again for your courtesy and consideration on behalf of the intervening respondent veterans.

Respectfully yours,

YANNACONE & YANNACONE, P.C.

Victor John Yannacone, jr.

VJYjr:dw

YANNACONE & YANNACONE

Attorneys and Counselors at Law

Professional Corporation

December 3, 1982
Hon. Barbara Crabb
Page four

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December 14, 1982

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35 Baker Street
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Re: United States, et al. v. Allen, et al.,
No. 80 C 133 (W.D. Wis.)

Dear Mr. Yannacone:

We were stunned and dismayed by your letter of December 3 refusing to produce the time records and other materials relative to your request for attorneys' fees and costs in the above-referenced action. Not only were the unwarranted personal attacks in your letter in distinct contrast to the cordial conversation we had the week before regarding these matters, but the letter evidences a complete turnabout from your prior representations to the Court and to me that such materials would be forthcoming. The letter also contrasts sharply with the cooperation we have received from the other fee applicants in this case, including your co-counsel for the Vietnam Veterans.

You will recall that I had telephoned you in response to your statement in your affidavit to the Court that you would "submit for the perusal of any of the counsel involved . . . the actual time and expense sheets which support the attached statement of services." During our conversation, you reiterated your invitation to us to review your files and records.

It was at your explicit request that I described in writing the materials we thought would be useful to us in reviewing your fee application. Even though the burden is on a fee applicant to support fully and completely the application,*/ we thought

*/ See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974).

KIRKLAND & ELLIS

Victor J. Yannacone, Jr., Esq.
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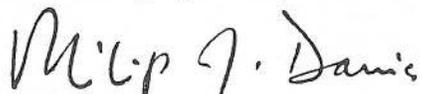
that a review of time records would prove useful in expediting this matter by narrowing the issues to be presented to the Court. This has been the case with the records provided by Robert Aberg, counsel for respondents, and the law firms of Schlegel & Trafelet and Sullivan & Associates. Moreover, we are entitled to such material "as a matter of right." National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1326-27, 1329 (D.C. Cir. 1982).

Your reference to Martindale-Hubbell misses the point altogether. While we are familiar with your credentials, none of the 12 or so otherwise unidentified lawyers has entered his appearance in this case or appeared on any pleadings. Except for you, none of the other lawyers, with one possible exception, is listed under Mineola or Patchogue, New York in Martindale-Hubbell, the standard reference for biographic data on lawyers. We were thus compelled to request information regarding your colleagues which might support your request for fees of \$250-300 per hour for these people.

In view of your refusal to cooperate in a manner comparable to that of your colleagues, we have no option but to challenge your claim for fees on a broad basis as lacking appropriate support.

So that there is no question, we understand your position now to be that you are refusing to produce your time records and related materials -- a position which is not only contrary to the law and your sworn statement to the Court, but contrary to your prior invitation to us to review your files and contrary to the position of your fellow fee applicants.

Sincerely yours,


Philip J. Davis
Counsel for The Dow Chemical
Company

cc: The Hon. Barbara B. Crabb
All Counsel of Record

PJD:dc