



Discovery of Facts Behind Video Settlement Documentaries

Heather Wilson

Frost Brown Todd (Indianapolis, IN)

hwilson@fbtlaw.com | 317.237.3805

<http://www.frostbrowntodd.com/professionals-562.html>

SHOW THEM WHAT YOUR CASE IS WORTH!

Discovery of the Facts Behind Settlement Documentaries

Presented By Heather L. Wilson

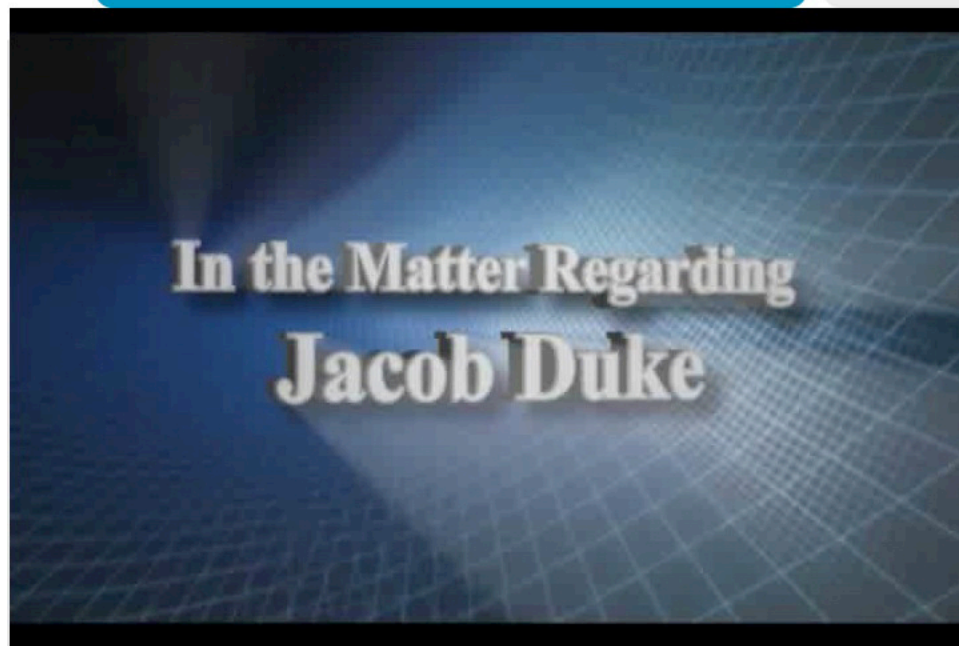


The statements and views expressed in this presentation are my own and do not reflect those of my law firm, are intended for general informational purposes only, and do not constitute legal advice or a legal opinion.

What is a Settlement Documentary?

- A video used before and during mediation in catastrophic cases.
- Format of a tabloid television news program that addresses problematic liability and damages issues in a light that is often unreasonably favorable to the injured party.
- Combines demonstrative recreations, medical imagery, day-in-the-life footage, and heavily edited videotaped interviews of key third-party witnesses, experts, and physicians.

A Typical Third-Party Witness Interview



The “Authenticity” of Third-Party Witnesses Interviews

- Despite the sensationalist way in which they are produced, the founder of one company focused on producing settlement videos boasts:
 - “[A]ll of our documentaries are authentic, ... interviews are unrehearsed and people on camera are not coached.”¹
 - “The words they’re saying are sincere, not canned; it’s not something that’s scripted. I don’t think any other medium besides video can capture that....”²
- It is this “authenticity” that renders unedited footage from third-party witness interviews potentially discoverable.

1. Dave Stafford, Settlement documentaries can be persuasive tool, THE INDIANA LAWYER, July, 18, 2012, <http://www.theindianalawyer.com/settlement-documentaries-can-be-persuasive-tool-/PARAMS/article/29233>.

2. *Id.*

Settlement Documentaries and the Federal Work Product Doctrine

- When asked to produce unedited footage, a plaintiff will fervently object on the grounds that it is shielded from discovery by the work product doctrine.
- However, federal case law from multiple jurisdictions suggests that unedited footage of witness interviews may not be subject to work product protection.

What is the Federal Work Product Doctrine?

- The federal work product doctrine is intended to maintain “legal professionalism by precluding attorneys from capitalizing on an adversary’s work efforts.”¹
- Thus, in most instances, the doctrine, which has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, precludes discovery of materials that “are prepared in anticipation of litigation or for trial by or for another party or its representative.”²
- However, it does not protect underlying facts contained within the work product.

1. *Morisky v. Pub. Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 424 (D.N.J. 2000).

2. Fed. R. Civ. Proc. 26(b)(3)(1).

Verbatim Non-Party Witness Statements Are Not Protected by the Federal Work Product Doctrine

- Federal courts consistently hold that notes and memoranda prepared by an attorney, or an attorney's agent, with respect to a witness interview are opinion work product entitled to almost absolute immunity.
- However, numerous federal courts have found that verbatim non-party witness statements are neither privileged nor work product and must be produced.
- In fact, many federal district courts have even permitted discovery of third-party witness affidavits *drafted* by opposing counsel.

Verbatim Non-Party Witness Statements Are Not Protected by the Federal Work Product Doctrine

- In *Milwaukee Concrete Studios, Ltd v. Greeley Ornamental Concrete Products*, this logic was extended one step further when the district court permitted discovery of an audio tape conversation between a third-party witness and the plaintiff's attorney.¹

1. 140 F.R.D. 373, 379 (E.D. Wis. 1991).

Overcoming Objections Based on the Work Product Doctrine

- Like the audio tape conversation in *Milwaukee Concrete Studios*, unedited footage from a witness interview is, in essence, nothing more than a verbatim recitation of the factual information known by that witness.
- Consequently, a strong argument can be made that it is not subject to work product protection and, therefore, discoverable.
- Rather than revealing an attorney's mental impression or legal strategy, the recorded witness interviews do nothing more than memorialize the relevant facts within each witnesses' personal knowledge.

WAIVER OF WORK PRODUCT PROTECTION

Implied Waiver and Subject Matter Waiver

- Generally, waiver of work-product protection occurs when covered materials are used in a manner that is inconsistent with the protection.
- Implied waiver occurs when a party injects the substance of work product into [the] litigation.
- Subject matter waiver occurs when a party makes a partial disclosure of work-product while seeking to maintain protection of work-product related to the same subject.
- Thus, by disclosing portions of a third-party witness interview to support a particular version of the facts, a plaintiff likely waives work product protection and makes the unedited footage relevant to the subject proceeding.

Typical Arguments From Plaintiffs

- Witness interviews are nothing more than statements made during the course of compromise negotiations and, as such, inadmissible under Federal Rule of Evidence Rule 408(a)(2) or state-specific rules restricting the admissibility of statements made during the course of alternative dispute resolution proceedings.
- Unedited footage is outside of the scope of discovery because its production will not lead to the discovery of admissible evidence.

Third-Party Witness Interviews in a Settlement Documentary Are Not Settlement Statement

- Ignores the plain language of Federal Rule of Evidence 408(b), which only excludes such statements when they are used to prove or disprove the validity or amount of a claim, or to impeach the party with a prior inconsistent statement.
- The rule explicitly provides that such statements may be admissible for another purpose, such as proving or disproving a witness's bias or prejudice.

Third-Party Witness Interviews in a Settlement Documentary Are Not Settlement Statement

- State courts have recognized that statements made during the course of mediation or other forms of alternative dispute resolution, while not necessarily admissible, may lead to the discovery of admissible evidence.¹

1. *Horner v. Carter*, 981 N.E.2d 1210, 1212 (Ind. 2013) ("Evidence of conduct or statements made in compromise negotiations or mediations except when offered for a purpose other than 'to prove liability for or invalidity of the claim or its amount.'"); *Gast v. Hall*, 858 N.E.2d 154, 161-162 (Ind.Ct.App. 2007) (holding that portions of affidavit which contained observations of testator made during will contest mediation session were admissible).

A Settlement Documentary is Not Equivalent to A Day-in-the-Life Video

- Despite the federal precedent in favor of discovery, at least one state supreme court has held that unedited portions of a day-in-the-life video constitute protected work-product

Cisarik v. Palos Community Hosp. 579 N.E.2d 873 (Ill. 1991)

- In *Cisarik*, plaintiff's counsel intended to produce a motion picture of the plaintiff which would depict a typical day in her life.
- Prior to filming, defendants asked for and obtained a protective order giving them advance notice of the filming, the right to be present at the filming, and a copy of the finished film as well as all edited out and unused footage.

Cisarik v. Palos Community Hosp.

579 N.E.2d 873 (Ill. 1991)

- In revisiting the trial court's order, a majority of the Illinois Supreme Court concluded that the "so-called 'Day in the Life Movie' [was] merely a type of demonstrative evidence," and, therefore, defendants had no right to intrude into the production.
- Likening the subject video to a still photograph, a graph, a chart, a drawing, and a model, the high court concluded that "[t]he preparation of such evidence falls within the work product of the lawyer who is directing and overseeing its preparation."
- As a result, the court held that the defendants' counsel has "no right to intrude into the production of this demonstrative evidence," and that "the test of this evidence will occur when and if it is offered into evidence."

Cisarik v. Palos Community Hosp.

579 N.E.2d 873 (Ill. 1991)

- In a separate written dissent, Chief Justice Miller and Justice Freeman opined that "the majority opinion ignores the proper role of discovery in the litigation process and inexplicably denies the present defendants certain minimal pretrial safeguards traditionally afforded litigants under our well-established rules of discovery."
- The dissenting justices noted that under the majority's reasoning, "litigants should have virtually no discovery rights, for all evidence is subject to tests of admissibility at trial; furthermore, if evidence is later deemed admissible, then it may be introduced even though the opposing party has had no opportunity to discover it."

Cisarik v. Palos Community Hosp.

579 N.E.2d 873 (Ill. 1991)

- The dissenting justices further stated that the possibility that certain evidence might later fail to be admissible does not mean that an opposing party is not entitled to the full range of pretrial discovery opportunities with respect to it.
- After finding the majority's analogy of the subject video to various forms of demonstrative evidence to be misleading and inaccurate, the dissenting justices concluded that "the majority opinion ignores the proper role of discovery in the litigation process and, as a result, strips the defendants . . . of the full range of discovery opportunities which they are entitled." *Id.*

A Settlement Documentary is Not Equivalent to a Day-in-the-Life Video

- Unlike day-in-the-life videos, settlement documentaries are much more than mere demonstrative evidence.
- Through the use of highly edited on-camera interviews of key witnesses, settlement documentaries attempt to skew the pertinent factual and legal issues and bolster a plaintiff's case.

A Settlement Documentary is Not Equivalent to a Day-in-the-Life Video

- As the dissent in *Cisarik* suggests, denying a defendant the opportunity to discover the unedited version of these interviews essentially eliminates the pretrial safeguards afforded by the discovery process.
- Specifically, it denies a defendant the opportunity to use the unedited footage during cross-examination to test the veracity of the witness and expose any potential biases or prejudices.
- When seeking production of unedited footage from a settlement documentary, it will be necessary for defense counsel to distinguish settlement documentaries from day-in-the-life videos.

Rosenbaum v. Freight, Lime and Sand Hauling, Inc.

Cause No. 2:10-CV-287-RL-PRC
(N.D. Ind. August 1, 2013)

- In *Rosenbaum*, the plaintiffs produced and prepared a settlement documentary in which the plaintiff, her friends, and her family were interviewed by plaintiffs' counsel.
- Defendants served on plaintiffs a request for production seeking "any and all video taken ... in creating the [settlement documentary] including all materials that were edited and did not make the final copy of said video."
- Plaintiffs' counsel objected to producing the requested footage on the basis that the information was protected by the work product doctrine and was made for the purpose of settlement negotiations.

Rosenbaum v. Freight, Lime and Sand Hauling, Inc.

Cause No. 2:10-CV-287-RL-PRC

(N.D. Ind. August 1, 2013)

- Ultimately, the district court held that the raw video footage was protected by the work product doctrine.
- However, the defendants did not raise *any* of the arguments outlined above. In fact, the defendants did not even contest plaintiff's description of the raw video footage as containing plaintiff's counsel's "mental impressions, conclusions, opinions, and legal theories."
- Furthermore, rather than merely requesting the unedited footage from third-party witness interviews, defendants requested *all* unused video.

Conclusion

- A defendant should consider requesting the unedited footage from any on-camera interviews of third-party witnesses that are contained in a settlement documentary.
- Federal case law from multiple jurisdictions supports the proposition that this footage is essentially a verbatim non-party witness statement and, therefore, not subject to work product protection.
- Furthermore, even if a court were to find that the unedited footage constitutes work-product, a strong argument can be made that a plaintiff waives work-product protection by injecting the witness interviews into the litigation and making a partial disclosure of its contents.



Heather L. Wilson
Frost Brown Todd LLC
201 N. Illinois Street, Suite 1900
Indianapolis, IN 46204
hwilson@fbtlaw.com
317-237-3805

About Heather Wilson

Member | Frost Brown Todd | Indianapolis, IN

317.237.3805 | hwilson@fbtlaw.com

<http://www.frostbrowntodd.com/professionals-562.html>

Heather is a member of the Firm, in the labor and employment practice group. She concentrates her practice in employment litigation and general business counseling. Heather represents employers in both federal and state court involving claims under Title VII, the Age Discrimination in Employment Act (ADEA), The Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), covenants not to compete and wage claims.

Heather represents employers in proceedings before the Equal Employment Opportunity Commission and the Indiana Civil Rights Commission. She also counsels employers on litigation avoidance.

Experience

- Anthony Bridges v. SVC Manufacturing, Inc.--summary judgment granted on claim under the Americans with Disabilities Act.
- Howard D. Harris v. SVC Manufacturing, Inc. et al.--summary judgment granted on race claims under Title VII.
- Timothy Runyon v. Applied Extrusion Technologies, Inc.--obtained judgment as a matter of law on claim under the Age Discrimination in Employment Act. Affirmed by the Seventh Circuit Court of Appeals.
- Krysten Overly v. KeyBank et al.--summary judgment granted on gender, harassment and retaliation claims under Title VII. Affirmed by Seventh Circuit Court of Appeals.
- Brunner v. Schwan's Home Service, Inc.--summary judgment granted on claim under the Americans with Disabilities Act.
- Jacques Jeanlouis v. Product Action International, LLC--summary judgment granted on national origin discrimination.
- Michael Childers v. Product Action International, Inc.--summary judgment granted on wrongful discharge claim. Affirmed by the Sixth Circuit Court of Appeals.
- Deborah Mayer v. Monroe County Community School Corp, et al.-- summary judgment granted on First Amendment claim and retaliation. Affirmed by the Seventh Circuit Court of Appeals.
- John Gause v. Tobias Insurance Group, Inc.--action for declaratory judgment, preliminary injunction and tortious interference involving a nonsolicitation clause.
- Brown v. Danville Community School Corp.--summary judgment granted on sexual harassment, discrimination claims.

Highlights and Recognitions

- Chambers USA® 2013
- Selected for inclusion in Indiana Super Lawyers®, 2009, 2014
- Indianapolis Bar Foundation Distinguished Fellow, 2009

Education

- Indiana University School of Law, J.D., 1997
- Indiana University, Bloomington, B.A., 1990