

- TAPE 3, AUDIO TRANSCRIPTION OF THE VIDEOTAPE -

***LESSONS FROM WOBURN:
CONDUCT AND SETTLEMENT***

A "VIDEO" COMPANION TO A CIVIL ACTION

Produced by

MARILYN J. BERGER

Professor of Law at Seattle University School of Law

FILMS FOR JUSTICE

SEATTLE UNIVERSITY SCHOOL OF LAW

WITH

**THE BERKMAN CENTER FOR INTERNET
AND SOCIETY AT HARVARD LAW SCHOOL**

DRAFT #6

9/25/2002 1:51 PM

Copyright © 2002 by Marilyn Joan Berger, Films for Justice.

All rights reserved. No part of this videotape and/or transcript may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review.

“Lessons From Woburn: Conduct and Settlement”
A Film for Justice Production

*This videotape is dedicated
to the Woburn families
who persevered for a
cleaner and safer environment
for themselves and those
that share the water, earth, and sky.*

“Lessons From Woburn: Conduct and Settlement”
A Film for Justice Production

Abbreviations

AA	=	Anne Anderson
CN	=	Charles Nesson
DLR	=	Professor Deborah L. Rhode
DR	=	Donna Robbins
JC	=	Jeanne Coulsey
JF	=	Jerome Facher
JH	=	Jonathan Harr
JS	=	Jan Schlichtmann
MB	=	Marilyn Berger
MK	=	Michael Keating
BC	=	Bill Cheeseman
WS	=	The Honorable Walter J. Skinner

Table of Contents

	<u>Page</u>
Introduction (7 minutes).....	43
Part One: <i>Attorney Conduct</i> (34 minutes)	
Section One: <i>Attorney Competency and Representation</i> (6 minutes)	46
Section Two: <i>Attorney/Client Relationship</i> (13 minutes)	48
Section Three: <i>Civility</i> (8 minutes)	52
Part Two: <i>Settlement Negotiations</i> (13 minutes total)	
Section One: <i>W. R. Grace 1982</i> (4 minutes).....	55
Section Two: <i>Beatrice Foods 1985</i> (4 minutes).....	56
Section Three: <i>Both Defendants 1986</i> (5 minutes)	58
Conclusion (3 minutes total).....	60

Opening Credits

WRITTEN, PRODUCED, AND DIRECTED BY
Marilyn J. Berger

DIGITAL VIDEOGRAPHY BY
Dan Nutu, Fotografis

DIGITAL EDITING, DESIGNER, AND GAVEL GRAPHICS BY
Pamela Taylor Waldman
VizArtz

ASSOCIATE PRODUCER
Gregg Hirakawa

INTERVIEWER
Marilyn J. Berger

NARRATED BY
Professor Deborah L. Rhode
Stanford University Law School

CONTINUITY EDITOR
Staci Gossett

PRODUCTION ACCOUNTANT
Richard Bird

PRODUCTION SECRETARY
Laurie Sleeper

COURTROOM SKETCHES
Constance Flavell Pratt

OUTREACH COORDINATORS
Steve Burnett
Steve Errick

PAST PRODUCTION OFFLINE EDITOR
Henry Wigglesworth

OFFLINE NARRATION EDITORS
William Galloway
Mimi Samuel

AUDIO VIDEO REPRODUCTION
J. Barratt Godfrey

VERY SPECIAL THANKS TO
Dean Rudy Hasl
Former Dean James E. Bond
Associate Dean Annette Clark
Seattle University School of Law

Lessons From Woburn: Conduct and Settlement
Copyright 2002
Seattle University School of Law
- All rights reserved -

FILMS FOR JUSTICE

**Seattle University
SCHOOL OF LAW**

TOGETHER WITH THE

**Berkman Center for Internet and Society
at Harvard Law School**

PRESENTS

**Lessons from Woburn:
Conduct and Settlement**

Total Time 51 minutes

Introduction (7 minutes)

AA: I think Jan forgot that we were people that had been harmed. That we had already gone through a whole lot. I think that he was kind of cavalier in his approach. I think Jan had his own agenda and his agenda was Jan first and it was detrimental to the case. I think he lost sight of the clients. He lost sight of the children. And the children, to me, was the most important part of the case. The children were the case. It wasn't Jan Schlichtmann's case. It was our case on behalf of the children. ... this is not good behavior for an attorney.

MK: I think that essentially the law is a service profession. I think if you don't like people and you don't like to help people, you probably will not be a very good lawyer, because I think so much of what we do is devoted to trying to reconcile positions that people take, sometimes which seem irreconcilable, and I think that's perhaps the most successful thing that we do.

JS: I think that for a long time I saw the lawyer's role as champion, as a warrior, and I kind of relished the role. I enjoyed it. I enjoyed going against, you know, the challenge of vindicating somebody's rights, somebody who's been abused. I really like that aspect of the law, and I saw my role, like I say, as a warrior, as a champion. But now I've come to appreciate that what I was doing is I was contributing to a war mentality, to a way of looking at the world where lawyers are problem makers, not the problem solvers.

JF: People ask, "Well, why do you settle cases if you think you are going to win them?" Well, of course, you never know whether you're going to win them, and you don't know what a jury is going to do. And you don't know what the public relation effects are going to be. And these are business decisions. So people plenty of times pay money for cases that aren't worth it.

CN: And so the question then for big companies is what do they care about, how do they count? I made the point to Jan that he was dealing with companies that count not in millions, they count in billions. And so he was going to have the opportunity to argue to the jury, take one away.

DLR: This videotape, *Lessons from Woburn: Conduct and Settlement*, explores the roles played by the attorneys, the judge, the jurors, and the clients in the litigation in *Anderson v. W.R. Grace*. *Anderson* was a complex environmental case involving unique toxic torts and scientific issues. Thirty-five plaintiffs with severe medical conditions alleged that two international companies, W.R. Grace and Beatrice Foods, improperly disposed of chemicals that contaminated two municipal wells, causing a rare form of childhood leukemia. The plaintiffs contended that the companies' pollution caused the deaths of the children. The participants share their views, philosophies, strategies, and concerns in resolving the *Anderson* case. Compare their actions in light of the duties and responsibilities imposed by the adversary system and the dictates of the model Rules of Professional Conduct.

Timeline of Events

- 1964-67 Wells Opened
- 1979 Wells Closed
- 1982 Lawsuit Filed
- 1982-90 Litigation
- 1986 Trial
- 1990 U.S. Supreme Court Cert. Denied
- 1995 "ACA" Book
- 1998-99 Interviews
- 1999 "ACA" Film

Timeline of Events:

1964-1967: WOBURN WELLS G & H OPENED

Thus begins our "Timeline of Events" that includes years of litigation in the Anderson v. W. R. Grace case, controversial court rulings, the non-fiction book, A Civil Action, and a Hollywood film.

1998-1999: INTERVIEWS WITH KEY PARTICIPANTS

The judge, plaintiff and defense attorneys, parties, jurors, witnesses, and the author of the book speak frankly about their experiences, perceptions, and insights, suggesting lessons to be learned about professional responsibility rules and their role in this complex litigation.

Part One: *Attorney Conduct*

THE SECTIONS

1. Attorney Competency and Representation
2. Attorney/Client Relationship
3. Civility

DLR: The participants express differing philosophies about the role of the lawyer and the duty of representation. Consider the views expressed by Anne Anderson: that defending the companies was inappropriate.

Do professional rules of conduct provide any guidance for this point of view?

Jerry Facher suggests that a lawyer should work to better society. Do you think that's what the lawyers in the *Anderson* case did?

MK: I think if you don't like people and you don't like to help people, you probably will not be a very good lawyer.

Part One: Attorney Conduct

SECTION 1

Attorney Competency and Representation

DLR: In this first section, we examine the issue of attorney competency and the duty of representation. What does it mean to be competent to take a case?

Jan Schlichtmann states that he was not prepared for undertaking the *Anderson* case. If Professor Nesson was correct that no one else would have undertaken the case, how should that have affected Jan Schlichtmann's conduct?

What level of trial skill, knowledge of the subject matter, and adequacy of attorney finances should an attorney possess before undertaking a case?

JS: I can say unequivocally and without doubt that I was totally unprepared, totally lacked the experience, or the wisdom, or the resources to mount that case.

CN: No one else was willing to undertake this case. I mean, it was not like there were a line up of people saying I'm better able to take this case, this was a case nobody wanted.

JS: I viewed my role as a champion for the families. That they were people that were abused and that there were powerful forces arrayed against them, and that my role was

to vindicate their interests and to win.

BC: I'm not particularly philosophical about being a lawyer. It's a profession, and I bring professional standards to my work. I think that being a lawyer, being a litigator in particular, is an example of what lawyers are supposed to do.

MK: Essentially the law is a service profession. I think if you don't like people and you don't like to help people, you probably will not be a very good lawyer.

AA: Nobody walks through these doors that's happy to be here. And that would speak for a client walking through an attorney's door. Because anybody that walks through has a problem ...

JF: I think certainly a lawyer ought to be concerned about bettering society. I think that lawyers are special people in society. They have special training. They have special skills. And every lawyer ought to do some kind of public service. Every lawyer ought to think about helping people.

AA: I used to wonder if those attorneys and those CEOs of the company knowing that all this was going on whether they could go home and look at their intact family and not ... could they divorce themselves from this and think how lucky I am? Or did they even think about it?

BC: There isn't any such thing, shouldn't be any such thing from a lawyer's point of view, as representing somebody who shouldn't be represented, because everybody's entitled to be represented, and you may get spouses and family and friends who think that you're the lowest of the low for representing whatever client you might be representing, and you've got to be able to steel yourself against that and to understand in your heart that you are doing the right thing.

AA: There was no defense, I mean, I know they had to be defended, but they just weren't good companies, and they caused too much harm. And this is why I have such a problem with the system as it is now.

BC: I don't have any patience for that point of view, and I don't think that you can effectively be a litigation lawyer, either for plaintiffs or for defendants, if that's the way you see it. Because if you see it as ... if you see the job ... if you see it as a matter of good vs. evil, you are going to overestimate - If you are on the plaintiffs' side, or the side that you think is good, you are going to overestimate the strength of your case, you're going to think that everybody else shares your view. You're going to misperceive what the issues are. You will miss opportunities, and you will not adequately represent your client.

JS: I think that for a long time I saw the lawyer's role as a champion, as a warrior, and I kind of relished the role. I enjoyed it. I enjoyed going against, you know, the

challenge of vindicating somebody's rights, somebody who's been abused. I really like that aspect of the law, and I saw my role, like I say, as a warrior, as a champion. But now I've come to appreciate that what I was doing is I was contributing to a war mentality, to a way of looking at the world where lawyers are problem makers, not problem solvers.

Part One: Attorney Conduct
SECTION 2
Attorney/Client Relationship

JS: You know, I had a lot of phone calls and hers was not at the top of the list because, you know, I didn't think that I was going to be really involved in the case and really didn't have much to report.

DLR: Section Two examines attorney-client relationships. Among the issues discussed by the attorneys and the Woburn families are communication between the attorney and the client, financing the litigation, and the presence of clients in the courtroom during the trial. The participants present differing views on each of these issues. Jan Schlichtmann suggests that he saw his role as taking control of the clients' problems. Anne Anderson expresses dissatisfaction with this manner of representation. How directive do you think an attorney should be in shaping a case? To what extent should a lawyer just "take the client's problem and solve it?"

AA: I turned on the radio, and I hear the man speaking about how an attorney ought to treat his clients, and this was an attorney that I could not reach. He just was not accessible, and I was kind of semi-enraged to hear him speaking about attorney-client relationships.

JS: I had a lot of phone calls and hers was not at the top of the list because, you know, I didn't think that I was going to be really involved in the case and really didn't have much to report.

DR: He would send out transcripts for the families to read on a daily basis to my house, and then I would disperse them

AA: Once he got his teeth into this one, I have to say that there were regular meetings. And he did keep us abreast of things that were going on. So that's to his credit. He did that. He kind of, I think, at some point, wanted to control what we said and ...

JS: I, you know, thought of my role as, you know, I'm the one who's going to take over this problem, you know, and I'm going to solve it. And I will expend all my resources, whatever it takes, you know, because that gave me control.

AA: We really didn't have a say in how the case was going to progress or how things were going to be done, and I was very frustrated by that.

CN: He is clearly someone who saw himself in larger than life terms and wanted to live a larger than life life. He was imbued with a passion that I've never seen before, and I frankly, never seen it since. What he did to take this incredibly amorphous case, wasn't a case to begin with, and mold it into something that was powerful and coherent was a huge accomplishment. And in some way I think it was almost the immensity of the accomplishment that tripped him a bit in the end.

AA: In the end, my relationship with Jan had deteriorated to such a degree that I didn't know that it had come about, the end of the trial had come about until I read about it in the paper.

DLR: Anne Anderson and the Judge expressed dissatisfaction with the manner in which money was spent on the Anderson case. Do you think the Woburn families should have been more involved in the decision-making about financial expenditures?

AA: We knew that he was spending money big time, but there was no stopping him. His clients really had no say in his behavior or how he chose to try the case.

JS: The money that we spent did not go towards croissants or orange juice, you know, or fancy hotels. The money that we spent on this case went to original scientific research and the advancement of science and medicine. We went for the best experts we could find. We did the best studies that we could do that had not been done. We did everything the only way I knew how to do it, which was the right way.

WS: Well, I certainly believe that less money could have been spent on it. I think there was ... the money was free-flowing and nobody was watching the bottom line. The plaintiffs had a fairly open view as to how the money should be spent. For instance, I raised questions about a profile plan of the Aberjona river valley, which made it look like the Grand Canyon, and which was explained by the fact that in textbooks they use a different scale for the vertical as opposed to the horizontal. Well, the very next day, he came in with this huge plan, I think it must have been 9 or 10 feet long, beautifully done, and it had been done overnight. That cost a heck of a lot of money and was a *tour de force* in getting it done and so forth, but it really was ... the

point could have been made much more cheaply.

BC: We never had the slightest clue that the plaintiffs' lawyers had financial problems.

JF: To his credit, to the plaintiffs' credit, or maybe not to the plaintiffs' credit, they gave every impression of being well-financed, and being over-financed. I mean when you set up a settlement meeting at the Four Seasons, with silverware and fruit and croissants and all the rest of the accouterments, like it was some kind of a bar mitzvah celebration...

AA: You know, and in a sense, we really weren't in a position to stop him. He was in the driver's seat.

DLR: One of the issues that the participants comment upon was the absence of the Woburn families from the courtroom during the litigation. If they had been present during the trial, do you think it would have made any difference in the outcome?

AA: One of the very first meetings, I asked if it would be beneficial if the clients, the plaintiffs, sat in on the trial as a reminder that these were real people, that real people had suffered, that real people had lost children and it was a reminder to the judge. It was a reminder to the jury that here we are. Look at us, you know. And he didn't want that. He thought it was distracting to have us in the courtroom. I just thought it was important. Again, you know, he was the director.

MK: I would have had the families in there every day. You know, we were in that courtroom for month after month after month, and usually there are a lot of people in the courtroom, but the presence of the Robbins family or the Anderson family or whatever I think would have been important to the jury.

JC: If the plaintiffs had been there. Oh, yes, I think it would have been a little more emotional than it was. 'Cause with the families being there kind of gives it a little more authenticity.

MK: Grace corporate officers were in the trial for two reasons. First of all, as a strategy or tactic that I use, I always like to have real live human beings who represent ... who work for companies in the courtroom because I usually introduce them to the jury when I make an opening statement. I want the jury to know that W. R. Grace is not just a name on a door. It's actually Mr. Eustis, or Mr. Jones, or Mr. Smith, and they're here and they're gonna be here for the trial. So that's sort of a tactical thing I do. The second reason was that it was a damn important case for Grace, and they were very interested in knowing what was going on.

JF: It struck me that perhaps it would have been not a bad idea to see a few of the

plaintiffs and the children and the mothers in the courtroom.

CN: That case was the plaintiffs' case, and they deserved to see as much of it and be as much a part of it as was possible. Now that doesn't necessarily mean being in all the legal counsels because there's just too much stuff going on. But certainly the courtroom part of it was their show, even if it wasn't a good show, and even if it was about hydrology. It was their show, and I think they should have been a part of it.

JS: The decision that we made was that ... this was going to be a very, very long trial, and either they were going to be there every day or they weren't going to be there any day because what I didn't want to happen was I didn't want them to come some days and not show up on other days and then have the jury think, "well, gee, you know, I'm here, they come and go when they please;" and so the decision was they either had to be there every single day, or not be there every single day.

DR: I think Jan felt that if the families were there and if somebody had made a face or smiled or anything like that the jurors would take it the wrong way.

JS: I do not believe that having the families in the courtroom would have made a difference in the outcome.

JH: I think Jan would be a worse person today if he'd won the case. He would be appalled to hear me say that.

AA: Jan needed to be noticed. Jan needed his ego stroked. He needed to be important.

JH: Had he been successful in this case, his ego would have been truly outsized. It was already quite large. And he would have been an insufferable person. I like Jan, but I like him the way he's turned out today.

AA: I think Jan forgot that we were people that had been harmed. That we had already gone through a whole lot. I think that he was kind of cavalier in his approach. I think Jan had his own agenda and his agenda was Jan first. It was detrimental to the case. I think he lost sight of the clients. He lost sight of the children. And the children, to me, was the most important part of the case. The children were the case. It wasn't Jan Schlichtmann's case. It was our case on behalf of the children.

JS: I've come to appreciate though, especially with cases like this, that the only model that can work and the only model that does the problem solving that I talk about, that is necessary to resolve these things, is a partnership. So that when the client comes to you, one of the things they do now that I've learned is that you have to explain that look, I can't take over your problem, and I can't solve your problem, but I can become your partner in helping to solve this problem.

DR: He made a lot of mistakes, he knows he did. I think nobody knows it better than he does. So, he learned a lot with this case. But at the same rate, it was a first case of its kind. Nobody had ever taken on a case like this. I don't think we ever would have found another lawyer to take it on if he hadn't of kept it. So, I'm grateful that he did, and I'm grateful that he had the personality that he did.

Part One: Attorney Conduct

SECTION 3

Civility

JF: My philosophy is very simple. I give other lawyers the benefit of the doubt. I assume they will be civil and collegial, and I respond. We started out perfectly agreeably.

DLR: The issue of civility is the subject for Section Three. In the *Anderson* case, the relationship between the plaintiff and the defense attorneys was problematic throughout the litigation. Correspondingly, plaintiffs' attorneys' relationship with Judge Skinner was equally fractious. Listen to the participants comment on their relationships and behavior ...

What do you think created the incivility? Was it a question of personalities on the part of the litigators? Or a question of strategy? Consider the Judge's comments. What role do you think a judge should play? How did incivility affect the outcome in the *Anderson* case? Do the professional rules of conduct provide enough guidance in this area?

WS: The deterioration of the relationship between counsel and the relationship between counsel and me was too bad. I think it impeded the orderly process of the trial.

JS: My relationship with the defense attorneys were acrimonious at times, and they wanted it to be.

JF: My philosophy is very simple. I give other lawyers the benefit of the doubt. I assume they will be civil and collegial, and I respond. We started out perfectly agreeably.

JS: It was a purposeful intentional desire on their part to antagonize, to belittle, to insult, to intimidate, to attack. This was done purposely. I mean because that was the tactic.

MK: Jerry Facher and Jan Schlichtmann locked horns. And I think it was sort of a generational thing to tell you the truth. I've known Jerry Facher for many, many years, and I think, for some reason, he had a way of getting under Jan Schlichtmann's skin, and it was based a little bit on a certain sarcasm and whatever that Jerry is capable of coming out with, and I think there was ... I don't know what it was, whether it was sort

of the old dog and the young dog, or whatever ...

WS: These two lawyers really didn't like one another. That Facher was offended by Schlichtmann's kind of wild cowboy ways and Schlichtmann was offended by what he thought of as Facher's stonewalling. And so they really were at one another from the very beginning.

MK: Certain things that Jerry would do to set Jan off, I think some of these are illustrated in the book pretty well. I mean, Jerry hits hyperbole all the time, and so Jan would do something like, let's take the exhibit that I referred to earlier, "I want to offer an exhibit in evidence". I might object to the exhibit saying, "Your Honor, I think the exhibit is irrelevant, it's prejudicial and unfair." Jerry would say, "Your Honor, this is the fifteenth time that Mr. Schlichtmann demonstrates that he does not know how to try a case because no self-respecting lawyer would try to pass that exhibit by a federal judge," and so all of a sudden Schlichtmann would go ballistic.

JH: Jan was annoying. He's a very abrasive kind of guy. He can be abrasive and persistent to an absolutely annoying, maddening degree, I think, when he wants something, and I think that that was what emerged in this case.

BC: He sometimes comes across as being just a little too full of himself, but I probably do too. I was probably the last of the defense legal team that still found it pleasant to be with him, but I reached the point where I was tired of him as well.

JF: There is a whole breed of lawyers that are just Rambo-type lawyers. They just believe that my client deserves the most aggressive, usually most offensive, kind of behavior, and I'm going to push the other side as far as I can, and that being nice, being polite, being collegial, is the equivalent of weakness.

MK: Jan was cross-examining a witness, and it was a good witness of ours, and he really wasn't getting anywhere, and he kept asking questions, and I thought that the answers were killing him, and he would keep asking the question, and he'd keep getting the answer that I thought couldn't possibly be helping. I kind of wondered what is he doing?

And Sandy Lynch leaned over to me, and she said, "Mike, he's like a Moorish warrior." I said, "What do you mean he's like a Moorish warrior?" And she said, ... this is all while he's asking questions ... she said, "The Moors thought they were invincible, and they would charge into battle, and the arrows that were coming back against them, they believed could not hurt them, because their cause was righteousness and justice, and who could be hurt by arrows in that context?" And Schlichtmann was a little bit that way.

JH: Between Jan and Jerry at the end, the answer to the question is obvious, why they hated each other. I mean Jan was accusing Jerry of the kind of misconduct that gets your license taken away, and Jerry was basically in his twilight years as a trial lawyer. And he had an impeccable reputation as a tough guy, a tough lawyer, but he had a great

reputation. He sat on boards and committees that resolved the complaints of other lawyers, the misconduct of other lawyers, and the misconduct of judges, and for Jan to accuse him of misconduct just infuriated him.

JS: Jerry Facher is an enormously talented, enormously charming, gifted human being and lawyer. And when he wishes to be charming and ingratiating, he is. And when he wishes to be antagonistic and hurtful and threatening, he is that too. And those choices he makes very intentionally, as all trial lawyers do, you know, as I do.

MK: I think in many respects Jan Schlichtmann probably felt that Jerry was the critical uncle who came in and kicked him around and tried to make him look bad. And to Jerry, Jan was this upstart guy who thought he was a trial lawyer, but in Jerry's view was not a trial lawyer.

WS: There was one situation which was reported in the book, I think it was reported in the book, where they had a bench conference and were hurling vituperations at one another. I don't know what Schlichtmann said, but I did hear Facher say, "Okay, let's go out in the corridor and settle this." And there was some response. It struck me as more comical than anything else because Facher, as you know, is a small man in his 60s, and Schlichtmann was a big tall guy in his mid-30s. So I don't know what I said but something like, "Hey guys, cut it out."

**Total Time
(34 minutes)**

FILMS FOR JUSTICE
End of Part One, Attorney Conduct

Part Two: *Settlement Negotiations*

THE SECTIONS

1. W.R. Grace 1982
2. Beatrice Foods 1985
3. Both Defendants 1986

DLR: Part Two deals with negotiation and settlement. The three sections relate to three geographic locales in which settlement of the *Anderson* case was discussed: Cape Cod, Jerry Facher's office, and The Four Seasons Hotel. These examples represent opportunities on behalf of each defendant and three different points in time in which settlement was attempted.

Part Two: Settlement Negotiations

SECTION 1

W. R. Grace 1982

BC: I carefully, casually said to Jan, "You know, Jan, we really ought to talk a little bit about whether it's possible to settle this case before we all spend too much money on it, but you should be aware, Jan, that there's no way that Grace will ever pay more than a million dollars a family."

DLR: In this section, Grace attorney, Bill Cheeseman, and Plaintiffs' attorney, Jan Schlichtmann, speak frankly about an early opportunity, in which settlement of the case against defendant W. R. Grace was discussed.

The participants express different philosophies about settlement. Can you envision circumstances in which the discussion could have lead to settlement?

JF: You just don't know, and that's why you settle. People ask "Well, why do you settle cases if you think you are going to win them?" Well, of course, you never know whether you're going to win them, and you don't know what a jury is going to do. And you don't know what the public relation effects are going to be. And these are business decisions. So people plenty of times pay money for cases that aren't worth it.

BC: Two or three years into the case, Jan and I were going to appear on a continuing legal education panel in Cape Cod about toxic tort cases. And after one of the rehearsals for this program, Jan and I walked out onto the street and down the sidewalk together--a nice summer day--and I carefully, casually said to Jan, "You know, Jan, we really ought to talk a little bit about whether it's possible to settle this case before we all spend too much money on it, but you should be aware, Jan, that there's no way that

Grace will ever pay more than a million dollars a family.”

JS: I remember just getting some sense that he was perhaps sending out some feelers of some kind, but it wasn't strong, and there was no real follow through.

BC: So Jan could have said or done a lot of things at that point. The card had been played, and I wasn't going to say another word about that.

AA: He was supposed to tell us of a settlement offer. He didn't do that.

JS: None of the defendants ever communicated a settlement offer, “here's our settlement offer, take it to your client.” I was very sensitive to that. I took my role and job as a lawyer very seriously. I believe it is the lawyer's absolute responsibility to communicate those things to clients.

BC: It's very ironic that in the end, as has been widely reported, the Grace settlement was eight million dollars, which was a million dollars per family. Only they didn't get a million dollars per family because most of the money was tied up in expert witness fees and consultants' fees and the need to pay back the Bank of Boston.

Part Two: Settlement Negotiations

SECTION TWO

Beatrice Foods 1985

JF: I intended to offer him, and suggested to him, that I could get him not quite as much as Unifirst, actually slightly under a million dollars.

DLR: Shortly after plaintiffs settled with the Unifirst Corporation in 1984, settlement discussions took place in Jerry Facher's office between the plaintiffs' attorney, Jan Schlichtmann, and defendant Beatrice's attorney, Jerry Facher. They describe their strategies about settlement and discuss the problems that they encountered. Do you agree with the attorneys' assessments about why settlement failed?

JS: Meeting in Jerry Facher's office was prior to trial, just prior to trial, and it was a meeting in which ... it was after the Unifirst settlement.

JF: I said to him, “I heard you settled and would you like some more money?” He said, “Sure.” And I said, “Come over.”

JS: I'm saying, “Well Jerry, let's sit down, let's talk, let's go have a meeting. Bring in your people.” *“I'm the decision maker. I make all the decisions.”*

JF: I intended to offer him, and suggested to him, that I could get him not quite as much as Unifirst, actually slightly under a million dollars, I had in mind, \$999,999.99,

because I, like all trial lawyers, had my own ego problems, and one of them was I was damned if I was going to pay anybody a million dollars.”

JS: Well, I mean, if I just give you a figure, you’re going to say it’s too much!

JF: I said to him, I said to the plaintiff, I think both he and Crowley and Conway were here, “Why do you want ... why do you need two deep pockets in this case?” This was at the time when they were in my office drinking coffee. “You don’t need two deep pockets, and why do you need me in the case? Why do you want, I’m just going to be the biggest pain in the ass you ever saw.”

JS: These are not two people who are talking to each other. These are two people talking at each other, you know, in different ways. A lot of noise there.

JF: And I was, indeed, tossing a ball against the wall, which I think upset him but I didn’t quite understand why; it didn’t hit him or knock over his coffee, so...

JS: Well, Jerry I think we should have a discussion and ... “Ahhh!! *All this kind of mumbo jumbo, what did you want? It’s money. It’s all money*”, and he threw down \$20. “*Yeah, you see that! Put seven zeros after that,*” you know, and then I’m saying, is he offering \$20 million dollars?

JF: Did I make him an offer, “*You are hereby offered ...*,” You know he knew he could have gotten close to a million dollars.

JS: He certainly made some noises. We certainly talked, but the kind of talk it was ... it was a very intimidating talk.

JF: We lawyers talk to each other in a form of code that everybody knows, so that if I say to you, “*If I can get you \$100,000, do you think your client would be interested?*” that’s a way of almost saying, “I think this case can be settled.”

JS: If I was back in that room now with Jerry, you know, I would have approached it just a little differently.

JF: He apparently was not interested in it. That was the last nickel I ever offered him.

CN: The fact is that the basic strategy of the case called for settlement with Beatrice. It should of. The case would have been a much cleaner case tried against the W. R. Grace Company alone and, in retrospect, it clearly would have been worth it for us to pay money to get Beatrice out of the case.

JS: Knowing the world the way I know it now, that the smartest thing would have been to settle with Beatrice Foods and just gone against Grace, which was my strongest case.

JF: If I were on the plaintiffs' side, I think I would have settled with me immediately.

Part Two: Settlement Negotiations

SECTION THREE

Both Defendants 1986

JS: Did I want a settlement? Sure, I absolutely wanted a settlement. But the problem is what kind of settlement and under what terms.

DLR: It was a week before trial when the parties' attorneys met at the suggestion of Judge Skinner. The venue, set up by the plaintiffs' attorneys, was at the Four Seasons Hotel. The defendants comment upon the opulence displayed by the plaintiffs in this meeting. What effect, if any, so you think the setting had on the discussions? Do you think the lawyers were truly interested in settling the Anderson case? What about the parties, how interested were they in settlement? Judge Skinner did not appear to play an active role in the negotiations. Was there anything else the Judge could have done to facilitate settlement? What other motives did the plaintiffs' and the defendants' attorneys have in meeting, if they were not *truly* interested in settlement?

BC: Defendants' lawyers, told Judge Skinner, one week before trial was to start, that we had never yet had a demand from the plaintiffs. And Judge Skinner was outraged to hear that. So the judge ordered the plaintiffs to make a settlement demand on us. And Jan, in characteristic style, reserved a private dining room at one of Boston's best hotel restaurants with plate glass window overlooking the public garden, a beautiful setting, with the linen tablecloth and the best silver service and croissants and everything all laid out. This was a technique that Jan ... I was aware that Jan was likely to do it this way because I had gotten my hands on a videotape of Jan speaking at a plaintiffs' lawyers seminar about how to settle cases.

JS: That was actually a tape I did at ... yeah, it was Continuing Legal Ed. at Suffolk University Law School. It became apparent to me that they had listened to this tape, and they weren't going to engage in any behavior that the tape was trying to encourage.

BC: And it was right out of Jan's background as a medical malpractice attorney. It was geared towards presenting a settlement to insurance company claims adjusters, or claims representatives.

JF: If the plaintiff had been a lawyer who knew me or who had asked about me or had asked anybody who had tried a case with me, he would have known that that was exactly the opposite of any way, any reasonable way there was to deal with me. And so it backfired in the sense that I was not impressed by it. I'm impressed by, and most lawyers are impressed by, facts and not by silverware, waiters and croissants.

BC: Jan hadn't dealt with the kinds of lawyers that he was faced with in the Woburn case. And he didn't, I think, understand that none of that meant anything to us. We had been working 300 hour months, or more than 100 hour weeks, for 12 months, it seems like--maybe less--getting ready for this case, and the trial was a week away. We had a lot of work to do. We had no time to waste on this. We just wanted a number. We didn't think it would be a number that we were going to be interested in, but we wanted to see. So we sat through this silly show.

JF: Every bit of which had some price tag on (I mentally was adding it up and I was getting to a hundred million and two hundred million)--and at that point it just was silly to continue the conversation, so I did, in fact, pick up the pen, it was a very nice little silver pen, and a croissant, because we hadn't had breakfast yet, and out we went.

BC: So we took Jan's show to be a signal that he wanted to go all the way with this case.

MK: Jan Schlichtmann's, in my opinion, view of this case was that this was a case which he would not want to settle because if he settled it, he wouldn't be famous. And I think he was always driven in his conduct of this case by the hope that he would make a great name for himself. And so I don't think settlement was in the cards.

JF: I would say one of the biggest problems was not having a realistic grasp of what your case was worth with respect to particular defendants. That was one thing that lawyers always do. You evaluate your case realistically. You don't believe your own advertising or your own P.R.

JS: Did I want a settlement? Sure, I wanted, absolutely wanted a settlement. But the problem is what kind of settlement and under what terms. And the getting there is the hardest part. How do you get to that place?

Total Time: 1
(13 minutes)

FILMS FOR JUSTICE
End of Part Two, Settlement Negotiations

Conclusion

TIMELINE OF EVENTS

1979	<i>Wells Closed</i>
1982	<i>Lawsuit Filed</i>
1982-90	<i>Litigation</i>
1986	<i>Trial</i>
1990	<i>U.S. Supreme Court Cert. Denied</i>
1995	<i>"ACA" Book</i>
1998-99	<i>Interviews</i>
1999	<i>"ACA" Film</i>

- **1986 February - July** ***Anderson trial is held. Beatrice's directed verdict motion was granted.***
- **1986 July** ***Beatrice Foods Company was found NOT LIABLE for contaminating the wells.***
- **1986 July** ***W. R. Grace was found LIABLE. Motion for new trial is filed.***
- **1986 September** ***Plaintiffs settled the case, although W. R. Grace denied any wrongdoing.***
- **1986 September** ***W. R. Grace motion for new trial dismissed. Settlement: \$8,000,000.***

DLR: In a jury trial, Beatrice Foods Company was found not liable for contaminating the wells, and W. R. Grace Company was found liable. Ultimately, the plaintiffs settled the case, although W. R. Grace denied any wrongdoing. How could the litigation and settlement process have been a more productive experience for both the plaintiffs and defendants attorneys? And for the clients?

AND WHAT LESSONS CAN YOU DRAW FROM THE ANDERSON CASE THAT WOULD AFFECT YOUR FUTURE PRACTICE?

DR: Somebody studying for a lawyer, what advice would I give them? Go look for some environmental cases. There are plenty out there that would keep you busy the rest of your life. [laughter]

AA: If you're looking to hire a lawyer, you should look for somebody that not only tells you that they're interested in your case, but that you really get a sense that they know who you are, where you're coming from, and that their interests are yours. That they're ethical. It's very important that an attorney be ethical. Because if they have a sense of ethics, then they know what the profession is all about.

WS: I felt, and I still feel, that if I talked very much about the case, I would simply provoke a response and keep the argument going. I hope this doesn't do that. I'm trying not to say something that will do that. But now it's come to the point where there's a lot of misapprehension, I think, about the case. And I consider this interview to be in furtherance of a legitimate educational goal, and that's why I'm doing it now.

JH: I'm asked to talk at law schools a fair amount and to groups of lawyers, and media, and I'm asked, you know, so what's the point of your book? What are you trying to say? That the judicial system doesn't work? And my answer to that is, I'm not trying to say anything. I didn't begin the book with the idea of writing an expose about the legal system, because I didn't know enough about the legal system to write an expose. I wrote the book because it seemed like it had a potential for being an interesting story, it had interesting characters, it was conflict, it was a drama. I leave it to others to figure out what it's all supposed to mean, if it's supposed to mean anything.

**Total Time: 3
minutes**

**FILMS FOR JUSTICE
*End of Conclusion***

CLOSING CREDITS

Seattle University School of Law

A Films for Justice Production

Written, Produced, and Directed by
Marilyn J. Berger

Digital Videography by
Dan Nutu, Fotografis

Digital Editing, Designer, and Gavel Graphics by
Pamela Taylor Waldman
VizArtz

Associate Producer
Gregg Hirakawa

Interviewer
Marilyn J. Berger

Narrated by
Professor Deborah Rhode
Stanford University Law School

Continuity Editor
Staci Gossett

Production Accountant
Richard Bird

Production Secretary
Laurie Sleeper

Courtroom Sketches
Constance Flavell Pratt

Music and Sound Effects
from Selections by
E.L.S. Productions
©1990, 1991, and 1995 E.L.S. Productions

Outreach Coordinators
Steve Burnett
Steve Errick
West Group

Past Production Offline Editor
Henry Wigglesworth

Offline Narration Editors
William Galloway
Mimi Samuel

Audio Video Reproduction
J. Barratt Godfrey

Additional Photography, and Digital Imaging by
Dorian Berger
Oscar H. Soule, Ph.D.
Pamela Taylor Waldman, VizArtz
Richard Weisser, Cape Cod Photography

File Footage courtesy of
60 Minutes, CBS Network

Newspaper Articles and Images
Boston Globe
Willa Seidenberg
Boston Business Journal
Sheila Anne Feeney
New York Daily News

Special thanks to
the following people
without whom this production would not have been possible:

Dean Rudy Hasl
Former Dean James E. Bond
Associate Dean Annette Clark
Seattle University School of Law

Participants
Anne Anderson
William Cheeseman
Jeanne Coulsey
Jerome Facher
Jonathan Harr
Michael Keating
Charles Nesson
Donna Robbins
Jan Schlichtmann
The Honorable Walter J. Skinner

A Film for Justice Production Seattle University School of Law
with the
Berkman Center for Internet and Society at Harvard Law School

Lessons From Woburn: Conduct and Settlement
Copyright 2002
Seattle University School of Law

--ALL RIGHTS RESERVED--

Copyright 2002, Marilyn J. Berger, Films for Justice. All rights reserved.