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## [Environmental Film Disaster, A Case for First Amendment Rights or Past Regrets?](#)

Posted on January 20, 2011 by [Joy S. Newborg](#)

Award winning film producer [Joseph Berlinger](#) made a documentary entitled *Crude*, which followed the case brought against [Texaco](#) by a group of civilians who allege that the oil exploration and drilling conducted by Texaco, now owned by Chevron, in Ecuador polluted the rain forest and contaminated their drinking water. The film received rave reviews at the 2009 Sundance Film Festival, but it got far more attention than Berlinger ever anticipated.

The film, in its initial screening, contained what might have seemed a harmless scene of a “supposedly” neutral court expert participating in a meeting with the plaintiffs’ lawyers. Even though this scene was subsequently edited out of its theatrical and DVD versions, Chevron became aware of its implications and served Berlinger with a subpoena for the rest of his unused footage. Chevron stated that the footage was evidence of corruption in Ecuador’s justice system in violation of an international treaty with the US and the American Convention on Civil Rights for due process, and showed improper conduct by plaintiff’s counsel with court and government officials which was important to Chevron’s case.

Berlinger opposed the request on the grounds that it violated his First Amendment rights and that the footage should be protected because it was information gathered in a journalistic investigation. Berlinger’s position has been [supported](#) by others in the film industry, including Robert Redford, the Directors Guild of America and the Writers Guild of America. Berlinger stresses that if he was forced to hand over the footage, it would breach confidentiality agreements he had with the participants and that he was concerned that if he could not promise participants confidentiality, he would not be able to continue making these kinds of films. But is this really a genuine claim in [this](#) situation?

When the plaintiffs’ attorneys invited Berlinger to do a film on their case, and gave him unlimited access to film their meetings, conversations and other activities and to show their identities, what part did the participants really expect to be kept confidential? The court could find no proof of any confidentiality agreements, but Berlinger had the participants sign a release that gave Berlinger the right to use any footage taken for use in the film. He even admitted that he had editorial control over what he included in the film. In this day and age when reality television floods the airwaves, we all know that nothing is sacred and anything can be exposed no matter how embarrassing.



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Journalist privilege is very important and should be protected, I agree, but is this really the ideal case to stand behind to represent the scope of this privilege? This was not a case where Berlinger's sources wanted their identities kept hidden in fear of retaliation for the information they were divulging, but rather it seems the participants were quite at ease and nonchalant in front of the camera. In one scene, the lead counsel for the Ecuadorian plaintiffs Steven Donziger, who is an American lawyer, brags about the pressure tactics he uses to influence the judge and acknowledges that "this is something you would never do in the United States..." but that "this is how the game is played, it's dirty." Another scene shows a representative of the plaintiffs informing Donziger that he had come from the office of the Ecuadorian President "after coordinating everything," with Donziger responding that they were now friends of the President. Donziger was obviously unconcerned having such behavior and conversations captured on film, but unfortunately it may have serious consequences for him and his clients now.

So is this more a case of regrets by the plaintiffs' counsel? Possibly regrets by Berlinger who included damaging scenes in the film not knowing the legal implications and potential consequences to the Ecuadorian plaintiffs, who are more sympathetic than the oil company, and now is trying to limit the damage to the extent he can? And should this really rise to the level of protected material by a journalist? The Second Circuit Court of Appeals did not think so in its opinion on January 13, 2011, affirming the lower court's decision that Berlinger must comply with the request and turn over his unused footage. It appears the court found that the evidentiary value of the material to Chevron outweighed Berlinger's claim of privilege due to the facts of this case. However, Chevron's request has been limited to only certain types of content, and its use is limited only for litigation purposes.

Lessons possibly learned? When shooting a documentary film, and you or the participant wants to keep certain parts of the film confidential, put it in writing... as the host of *The People's Court* would say... and better yet, restrict what you film, a lesson I know some of us have learned when friends or family members have posted a video of last night's antics on YouTube.

