

## I. Introduction

Day-in-the-life videos provide an effective method for bringing an injured plaintiff's daily struggles into the court room and hopefully into the jury room. The video is intended to show the fact finder how the injuries have come to affect the plaintiff. This is a powerful means of depicting the harsh consequences of a plaintiff's daily rituals that are now necessary to cope with and treat their injuries. "The purpose of the film is to dramatize the plaintiff's damages, and, not coincidentally, to maximize the plaintiff's recovery."<sup>1</sup> With the vast majority of potential jurors raised in a television society, video often has a better impact than live witnesses.<sup>2</sup>

Day-in-the-life videos can often demonstrate the extent of a plaintiff's injuries far better than the oral testimony of doctors or caregivers. The video allows the jury to see the reality of the plaintiff's existence throughout the course of a typical day, in real-life situations rather than second-hand recitations in a sterile court room environment. As the Balian court stated, "[a] motion picture in the eyes of the jury is one of the most

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<sup>1</sup> Chilton Davis Varner & James Matheson McGee, *Worth a Thousand Words: The Admissibility of Day-in-the-Life Videos*, 35 TORT & INS. L.J. 175, 175-189 (1999).

<sup>2</sup> Begam & Begam, *A Day in the Life of a Quadriplegic*, TRIAL, March 1978, at 25, 26 ("The average juror possesses a highly-developed cinematic sensibility, albeit unconscious, which derives from years, usually decades, of moviegoing and television watching."); Witke, Higgins & Babcock, *Video Tape Is Worth a Thousand Words: The Use of Demonstrative Evidence in the Defense of an Automobile Products Liability Case: Open Forum*, 50 INS. COUNS. J. 94, 97 (1983) ("There is something about television and the video tape that has an unspoken credibility about it since people are accustomed to it. They start their day watching "Good Morning America" and wind up at night with the 11:00 news . . . and they are accustomed to it, and they accept it, and it has more credibility than just the 8 X 10 black and white photograph or the colored glossy print.") (statement of T. A. Higgins) referenced in Douglas A. Graham and Daryl J. Lapp, *Day-In-The-Life Videos: Evolving Arguments On Their Making and Use at Trial*, 27 Tort & Ins. L.J. 574, 1992.

spectacular forms of evidence.”<sup>3</sup> The video offers a more vivid account of the plaintiff’s condition than the attorney could otherwise provide.

The difficulties an attorney faces in persuasively presenting his client’s case are partly caused by the jurors’ natural inclination to take health and mobility for granted and are further exacerbated by the plaintiff’s natural tendency to be stoic and avoid any appearance of self-pity. These natural behaviors coupled with a jury’s dread of serious injuries can prevent it from giving full attention to the plaintiff’s testimony.<sup>4</sup>

Day-in-the-life videos are also effective supplements to the plaintiff’s own testimony in that they are a means of assisting a plaintiff who may be nervous or unsettled as a witness at a trial. In this context, the video functions as an aid to the plaintiff and helps them convey to the judge and jury what their life is like, post-injury.

Videotapes often consist of images of daily wound-care, physical therapies, as well as the reliance upon others that an injured person may now have to accept as their reality.<sup>5</sup> The more severe and irreversible the injury, like severe burns or amputation, the more effective videos can be in providing visual evidence of how the plaintiff’s life has been irrevocably changed. A day-in-the-life video often includes the plaintiff’s morning events such as bathing, grooming, dressing, as well as eating, walking, undergoing therapy, and receiving bowel/bladder care. The video should also include the plaintiff’s evening processes of bathing, undressing, and

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<sup>3</sup> *Balian v. General Motors Corp.*, 296 A.2d 317, 324 (N.J. Super. Ct. App. Div. 1972).

<sup>4</sup> Joseph M. Herlihy, *Beyond Words: The Evidentiary Status of “Day In the Life” Films*, 66 B.U. L. Rev. 133, 1986.

<sup>5</sup> *Balian supra* note 3.

getting prepared for bed.<sup>6</sup> To be effective, the video should be inclusive of the events of the “daily” life of the plaintiff with concerted efforts to avoid shaming or embarrassing the plaintiff.

For many types of injuries modifications must be made to the plaintiff’s home in order to accommodate for the injuries; videos discretely, yet effectively, capture the effect of these modifications on the plaintiff’s life. Videos can also offer helpful insight into the emotional well-being of the plaintiff and how they may be dealing with their injuries without directly stating that as the intention.

In order for an attorney to present an effective day-in-the-life video, it is critical to have two things in place. First, they must have a comprehensive understanding of their client’s injury, diagnosis, and prognosis in order to best determine what the video should capture, and second, they must hire a videographer with enough skill, sensitivity, and savvy to be able to create what will be presented as evidence at trial. Extensive and thorough interviews with the client and ideally their doctors, therapists, and long-term caregivers should occur before filming begins. These meetings should give the attorney meaningful information that can be translated into an effective collaboration with the videographer.

## **II. Admissibility Generally**

The first question regarding admissibility may well be what type of evidence is a day-in-the-life video? From an

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<sup>6</sup> Salvatore J. Zambri, *A Day in the Life of Your Client*, Legal Times, March 28, 2005, Vol. XXVII, No. 13.

evidentiary standpoint, the same rules that apply to photographs usually apply to the admission of videos; the rules governing the admissibility of photographs also apply to motion pictures and videotapes.<sup>7</sup> For these evidentiary purposes, "photographs" include still photographs, X-ray films, video tapes, and motion pictures."<sup>8</sup> The Court in *Cisarik v. Palos Community Hospital* stated "Viewed in its proper light, a so-called 'Day in the Life Movie' is merely a type of demonstrative evidence. In such respect, it is comparable to a still photograph, a graph, a chart, a drawing or a model."<sup>9</sup>

Unfortunately, the case law regarding the distinction between film as demonstrative evidence and film as substantive evidence is not well-defined. There are only two references to demonstrative evidence in the Federal Rules of Evidence, and those references occur in the Advisory Committee notes rather than in the text of the rules, therefore, demonstrative evidence is often identifiable by its difference from other types of evidence.<sup>10</sup>

As opposed to real evidence, which involves tangibles, demonstrative evidence is offered for its illustrative abilities. "Unlike real evidence, demonstrative evidence plays no role in the events giving rise to the law suit."<sup>11</sup> Demonstrative evidence, the most common forms of which are testimony and documentary evidence, as it relates to Substantive evidence, is not independently probative of

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<sup>7</sup> *Pisel v. Stamford Hosp.*, 430 A.2d 1, 8 (Conn. 1980).

<sup>8</sup> FED. R. EVID. 1001(2).

<sup>9</sup> *Cisarik v. Palos Community Hospital*, 549 N.E. 2d 840 (1989), rev'd in part and aff'd in part 144 Ill. 2d 339, (1991).

<sup>10</sup> Jessica M. Silbey, *Judges As Film Critics: New Approaches to Filmic Evidence*, 37 U. Mich. J.L. Reform 493, 502, 2004.

<sup>11</sup> *Id.* at 502.

some fact at issue in the trial.<sup>12</sup> Therefore, in contrast to testimonial or documentary evidence, demonstrative evidence is “principally used to illustrate or explain other testimonial, documentary or real proof, or other judicially noted fact. It is, in short, a visual or other sensory aid.”<sup>13</sup> Melvin Belli, the “King of Torts,” described demonstrative evidence as “anything which appeals to the jurors’ senses...[It] is premised upon the theory that it is easier and much more effective simply to show the jurors what is being described, rather than to waste time and to risk possible confusion by relying solely upon oral testimony.”<sup>14</sup> In summary, demonstrative evidence, by itself, does not prove the apparent existence or nonexistence of any material fact. It has no independent probative value and only illustrates or clarifies other substantive evidence. Thus, demonstrative evidence is entirely derivative of other evidence, and its only value at trial is when it is linked to other substantive evidence.<sup>15</sup> A video of the plaintiff coping with a terrible injury does not make it any more, or less, probable that the defendant was the one who caused the injury, but rather serves to illustrate the degree to which the injuries have altered the plaintiff’s life. For this reason day-in-the-life videos can often be their most effective if offered after liability has been established as the court in *Grimes*

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<sup>12</sup> Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. Davis L. Rev. 957, 968-969, 1992.

<sup>13</sup> *Id.*

<sup>14</sup> Melvin Belli, *Demonstrative Evidence: Seeing is Believing*, 16 Trial 70 (July 1980) referenced in Jessica M. Silbey, *Judges As Film Critics: New Approaches to Filmic Evidence*, 37 U. Mich. J.L. Reform 493, 502, 2004.

<sup>15</sup> *Id.*

*v. Employers Mut. Liab. Ins. Co.* did.<sup>16</sup> This also avoids a whole host of objections defense counsel is likely to make.

For obvious reasons, there are conflicting points of view regarding day-in-the-life videos. Plaintiffs will argue that the videos communicate to the jury the real-life extent of a plaintiff's injuries, while defendants will argue that day-in-the-life videos are unnecessary, cumulative, and, most importantly, unfairly prejudicial; rather than serving as evidence of the plaintiff's injuries, they serve to inflame jurors' passions and inflate jury verdicts.<sup>17</sup>

While trial court judges routinely admit day-in-the-life videos into evidence, there are significant evidentiary issues that the attorney should be aware of while creating the video. The essential issues that should be at the forefront of the attorney's mind are the following: relevance, authentication, unfair prejudice, and hearsay.

### **III. Relevance**

Pursuant to the Federal Rules of Evidence 401 and its relevant state counterparts, courts determine admissibility of the video by first applying the relevance test.<sup>18</sup> This simply entails an examination of whether the following is true: "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

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<sup>16</sup> *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607

<sup>17</sup> Varner & McGee, *supra* note 1, at 176.

<sup>18</sup> *Zambri*, *supra* note 4.

probable than it would be without the evidence.”<sup>19</sup> As long as the video accurately depicts the nature of the injuries sustained and facilitates an understanding of any material fact (it moves the ball along so-to-speak) and thereby assists jurors in determining the proper amount of damages, it will likely be found to be relevant. To ensure relevancy, day-in-the-life videos should be “practical, instructive and calculated to assist the jury” in understanding an issue in the case.<sup>20</sup> Consequently, the relevance hurdle is easily overcome and relevancy objections, proffered as a means of excluding day-in-the-life videos, are often unsuccessful. Where relevance objections have been made, courts frequently have analyzed and phrased their rulings in terms of unfair prejudice.<sup>21</sup> In summary, if executed properly, a day-in-the-life video will more often than not be found relevant.

#### **IV. Authentication**

Another critical element required by courts will likely be that of authentication. Before the day-in-the-life video is admitted into evidence, a proper foundation must be laid in order to establish that the video is authentic and reliable.<sup>22</sup> Authentication of a video requires: (1) identification of the persons, objects, and places pictured in the film; (2) proof that the film accurately depicts what it purports to show; and (3)

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<sup>19</sup> FED. R. EVID. 401.

<sup>20</sup> *Repple v. Barnes Hosp.*, 778 S.W.2d 819, 822 (Mo. Ct. App. 1989).

<sup>21</sup> *See Grimes supra* note 16 (characterizing the defendant’s relevancy objection as “frivolous” and holding that “a day-in-the-life film of a plaintiff engaging in daily activities is relevant to the issue of the nature and extent of damages.”).

<sup>22</sup> *Balian supra* note 3 (“It is well settled that relevant motion pictures are generally admissible if properly authenticated.”).

evidence as to the circumstances of the taking, developing, and projection of the film.<sup>23</sup> In short, there must be evidence that the video accurately depicts what it purports to depict-its subject. This verification is usually provided by any person having sufficient knowledge of the film.<sup>24</sup> With few exceptions, videos have been easily authenticated; perhaps the most successful way to accomplish this is by calling the videographer to the stand in order to authenticate that the video contains what he/she saw while filming said video.<sup>25</sup>

## V. Unfair Prejudice

Another hurdle to be anticipated is that of unfair prejudice, unquestionably the most common type of objection to the introduction of a day-in-the-life video.<sup>26</sup> It is advisable to keep in mind that relevant evidence is excluded all the time under Federal Rule of Evidence 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>27</sup> Herein lies the most successful objections to day-in-the-life videos. Under this rule, the prejudice

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<sup>23</sup> *Grimes supra* note 15 at 609.

<sup>24</sup> *Id.*

<sup>25</sup> See *Bannister v. Town of Noble*, 812 F.2d 1265, 1270 (10<sup>th</sup> Cir. 1987) (finding film authenticated because it accurately portrayed plaintiff's daily routine); *Grimes supra* note 16 (stating that testimony that videographer is a professional, that camera used was in good mechanical condition, that material filmed was not rehearsed, that no special camera effects were used, that film was not edited, and that film accurately portrays what videographer observed while making the film sufficient for verification); *Reimer v. Delisio*, 442 A.2d 731, 738 (Pa. Super. Ct. 1982) (finding that testimony of medical expert that the film is a fair and accurate depiction of the scene and events it shows, coupled with liberal cross-examination, offer satisfactory assurances of verity).

<sup>26</sup> Douglas A. Graham and Daryl J. Lapp, *Day-In-The-Life Videos: Evolving Arguments On Their Making and Use at Trial*, 27 Tort & Ins. L.J. 574, 1992.

<sup>27</sup> FED. R. EVID. 403.

must substantially outweigh the probative value of the proffered evidence in order to be excluded. In essence, the balancing test that the court will perform to a 403 objection is whether the search for truth will be helped or hindered by the inclusion of evidence likely to be emotionally-charged. Rule 403 functions to protect the trial process from a range of dangers, with the serious risk of "inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme."<sup>28</sup> Factors to be considered in balancing include the probable efficacy of limiting instructions and the availability of alternative means of proof.<sup>29</sup>

Although now quite common in personal injury cases, day-in-the life films were originally perceived with skepticism and were excluded from trials. The modern debate in the case law concerning day-in-the-life videos seems to revolve around questions of how does the fact finder tell what is fact and what is fiction from these videos; and how do courts prevent evidence that can be self-serving and cause the jury to succumb to sympathy most would feel and thereby returning a sympathetic verdict.

The admissibility of a videotape, like a photograph, rests within the sound discretion of the trial court.<sup>30</sup> Once objected to, the judge should examine the video *in camera* to make his/her determination.<sup>31</sup> Furthermore, failure to do so may constitute reversible error.<sup>32</sup>

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<sup>28</sup> FED. R. EVID. 403 advisory committee note.

<sup>29</sup> *Id.*

<sup>30</sup> *Brooks v. Commonwealth*, 15 Va. App. 407 (1992) (citing *Stamper v. Commonwealth*, 220 Va. 260, 270-271 (1979), *cert. denied*, 445 U.S. 972 (1980)).

<sup>31</sup> *Bannister*, 812 F.2d at 1270.

<sup>32</sup> *See Reimer*, 442 A.2d at 738 (holding that court's exclusion of day-in-the-life video without proper *in camera* review was reversible error).

An objection based on unfair prejudice can take many forms. One example is lack of continuity. Defendants sometimes argue that the shooting of the day-in-the-life video lacks continuity because it is shot to portray instances in the plaintiff's life chosen by their attorney, and thus are inherently prejudicial to the defendant, distort reality, and are potentially not reflective of a "true" day-in-the-life of the plaintiff.<sup>33</sup> While it is true that the inherent selectivity of what is depicted in a day-in-the-life video may be objected to, *all* evidence proffered at trial is prejudicial to the opposition. However, if the film's discontinuity destroys its probative value,<sup>34</sup> it may well be a basis for exclusion, but this objection has largely been unpersuasive.<sup>35</sup>

Similar to, but slightly different from the lack of continuity objection is the inaccuracy objection. In making this objection, the defendant argues that the scenes depicted in the video are unrepresentative situations and they are staged primarily for the dramatic effects they pose to solicit from jurors. Like the lack of continuity objection, this one is often unpersuasive as well. This is especially so if the video has already been properly authenticated, thereby establishing that it depicts actual events that the plaintiff participated in during filming. In *Bannister*, the day-in-the-life video depicted the plaintiff at school, getting into his car, pumping gasoline, and performing various activities in his home.<sup>36</sup>

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<sup>33</sup> Varner & McGee, *supra* note 1, at 183.

<sup>34</sup> *Grimes supra* note 16.

<sup>35</sup> *Id.* (holding that the video's lack of continuity did not destroy the value of the film as a demonstration of the impact of the injury on the plaintiff's life); See also *Arnold v. Burlington Northern R.R.*, 748 P.2d 174, 176 (holding that although twenty-seven minute day-in-the-life film was selective and not an *actual* day in the plaintiff's life, the film's probative value outweighed its prejudicial aspects)[italics added].

<sup>36</sup> *Bannister supra* note 25.

Although the activities depicted on the video were likely to be infrequent and not all would even occur in a single day, the court held that, taken as a whole, the video fairly demonstrated the plaintiff's adjustment to his injuries.<sup>37</sup> The accuracy of day-in-the-life depictions, contra to any claimed inaccuracy, can be further bolstered by testimony from the plaintiff's doctors, therapists, and caregivers that the depictions on the day-in-the-life video were necessary activities and/or treatments for the plaintiff's injuries.

Arguably the more common objection that defendants will make pertaining to unfair prejudice focuses on excessive depictions of pain and any overt purpose of appealing to the sympathies of the jury. While making the video, the plaintiff's attorney must walk a fine line, demonstrating the true nature of the plaintiff's injuries, permanent disabilities, ongoing pain, and loss of enjoyment as fully and dramatically as possible, but without overtly appealing to the sympathies and passions of the jury so as to unfairly prejudice the defendant's right to a fair trial.<sup>38</sup> The court in *Butler v. Chrestman*, found that "where the only purpose of videos is to influence and prejudice the jury they should be excluded, but where they visualize the injury at a stage subsequent to the accident, they may not be excluded solely because they may contain emotional overtones."<sup>39</sup>

There is, indeed, a fine line in depicting what the plaintiff truly experiences as a result of their injury and going too far to garner sympathy. An example of possibly

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<sup>37</sup> *Id.*

<sup>38</sup> *Butler v. Chrestman*, 264 So.2d 812, 816 (Miss. 1972).

<sup>39</sup> *Id.* at 816.

going too far can be found in *Thomas v. C.G. Tate Construction Co.*, wherein the plaintiff's day-in-the-life video contained scenes of the severely-burned plaintiff's face contorted in continual, and seemingly severe, pain while a physical therapist removed bandages, bathed the plaintiff, and then re-bandaged the plaintiff's wounds.<sup>40</sup> In this instance the court found that the images depicted in the video would arouse extreme prejudice and inflame the average juror.<sup>41</sup> The court explained: "In this court's judgment, no amount of testimony from the attending physician, nurses, etc., could possibly offset the dramatic effect of the audio-video tape in question."<sup>42</sup> The video was excluded once the court determined that its probative value was substantially outweighed by the danger of unfair prejudice.<sup>43</sup> However, at least one court has held that the depiction of pain in a day-in-the-life video was not unfairly prejudicial.<sup>44</sup> The *Reggio* Court felt that "the admission of [the] video tape, because of its probative value and its use in instructing the jury in the type of treatment... administered to the Plaintiff, far outweighed any prejudicial affect... there was a brief glance of a facial grimace by the Plaintiff, and this Court believe [sic] that it was so quick and instantaneous, that it had

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<sup>40</sup> *Thomas v. C.G. Tate Construction Co.*, 465 F. Supp. 566 (D.S.C. 1979) (excluding day-in-the-life video and stating "the court is mindful, in making this ruling, that not only will the plaintiff be available to testify, but the doctor, the wife, and the therapist [will be as well]. There is nothing to keep them from testifying as to the pain and suffering which they witnessed.").

<sup>41</sup> *Id.* at 569.

<sup>42</sup> *Id.* at 571.

<sup>43</sup> *Id.* See also *Butler supra* note 24, 264 So. 2d 816 (Where the court found error in allowing the plaintiff to introduce a film depicting the plaintiff moving painfully from her bed to a wheelchair. "The camera zoomed in periodically to show [plaintiff's] discomfort by grimaces upon her face and ended with a parting shot of her seemingly crying from excruciating pain." "The motion picture was improperly admitted into evidence because it was one depicting excruciating pain and suffering rather than attempting to reveal the actual state of the injuries. The nature of this film was more likely to inflame and prejudice the jury rather than to serve any evidentiary purpose.").

<sup>44</sup> *Reggio v. Louisiana Gas Serv. Co.*, 333 So. 2d 395 (La. Ct. App. 1976).

no prejudicial affect... but [will] instruct the Jury to disregard any facial expressions of any type by the Plaintiff during the showing of this tape."<sup>45</sup>

There have also been courts that have found the videos to prejudice the defendant but have admitted them notwithstanding because of their probative value. In *Grimes*, the court agreed that scenes portraying pain were emotional and hard to watch, but stated "while the scenes are unpleasant, so it the plaintiff's injury."<sup>46</sup> The scenes had a greater probative value than any potentially resulting prejudice.<sup>47</sup> However, it is important to note that this case was bifurcated and liability had previously been established, thus the day-in-the-life video was only applicable to the jury's determination of damages.<sup>48</sup>

While many courts have excluded day-in-the-life videos on grounds of unfair prejudice, an equally large number of recent cases have allowed their admission over this objection.<sup>49</sup> One such case, *Georgacopoulos v. University of Chicago Hospitals & Clinics*, did not clarify the issue precisely, however.<sup>50</sup> Resulting from the trial court's decision in favor of the plaintiff, the defendant argued on appeal that the video had inflamed the jury, especially

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<sup>45</sup> *Id.* at 402.

<sup>46</sup> *Grimes supra* note 16.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Apache Ready Mix Co. v. Creed*, 653 S.W. 2d 79 (Tex. App. 1983); *Johnson v. Inv. Co. of the South, L.L.C.*, 869 So. 2d 1156 (Ala. Civ. App. 2003); *Exchange Nat'l Bank v. Air Illinois, Inc.*, 167 Ill. App. 3d 1081 (Ill. App. Ct. 1988); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312 (Tex. Sup. Ct. 1987); *Barrenbrugge v. Rich*, 490 N.E. 2d 1368 (Ill. App. Ct. 1986); *Bannister supra* note 25 at 1270; *Capara v. Chrysler Corp.*, 71 A.D. 2d 515 (N.Y. App. Div., Third Dept. 1979); *Ellingwood v. Stevens*, 564 So. 2d 932 (Ala. 1990); *Freet v. Schreiner*, 502 P.2d 133 (Alaska 1972); *Georgacopoulos v. University of Chicago Hospitals & Clinics*, 504 N.E. 2d 830 (Ill. App. Ct. 1987); *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283 (Okla. 1984); *Pisel*, 430 A.2d 1 (Conn. 1980); *Protective Casualty Ins. Co. v. Killane*, 447 So. 2d 316 (Fla Ct. App. 1984).

<sup>50</sup> *Georgacopoulos v. University of Chicago Hospitals & Clinics*, 504 N.E. 2d 830 (Ill. App. Ct. 1987).

with the depiction of a painful physical therapy session.<sup>51</sup> Although the court acknowledged the prejudicial impact of these scenes, it upheld the admission of the film on the grounds that the "objectionable physical therapy amounted to only a few minutes out of a nineteen minute videotape."<sup>52</sup> This leads one to wonder, however, if "a few minutes" of unfair prejudice does not render a video inadmissible, then just how much unfair prejudice is too much for the video to be admissible at trial.<sup>53</sup>

Although the more common objection is unfair prejudice, there are other specific grounds for objections that can be made under the Federal Rules of Evidence 403. The first example is an objection on grounds of cumulative evidence, which pertains to evidence which is not necessary to prove/disprove a material fact at issue.<sup>54</sup> The defendant can argue that day-in-the-life videos should be excluded because they are duplicative of evidence already in the record that adequately demonstrates the nature and extent of the plaintiff's injuries. In other words, the material depicted in the video can be or has been proven by other live testimony and is, therefore, not necessary. In *Bolstridge v. Central Maine Power Co.*, the defendant objected on grounds that the video only provided cumulative evidence.<sup>55</sup> The video was characteristic of typical day-in-the-life videos in that it showed the plaintiff eating, washing, etc. The court cautioned the jury with the following instruction: the video should be considered as evidence "only when the tapes convey the observations of a

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Graham & Lapp, supra* note 16, 574 (citing *Georgacopoulos v. University of Chicago Hospitals & Clinics*, 504 N.E. 2d 830 (Ill. App. Ct. 1987)).

<sup>54</sup> FED. R. EVID. 403.

<sup>55</sup> 621 F. Supp. 1202 (D. Me. 1985)

witness to the jury more fully or accurately than for some specific, articulable reason the witness can convey them through the medium of conventional in-court examination.”<sup>56</sup> Largely because the plaintiff was able to testify on her own behalf, the court held that she could have easily demonstrated the actions depicted in the video in the court room, and further, since her family and physicians were also available to testify in court, the court concluded that the videotaped evidence was merely cumulative of testimonial evidence already available.<sup>57</sup> This begs the question of how the court planned to let the plaintiff demonstrate washing her face and bathing in the court room. If the injuries sustained by the plaintiff make it more difficult to bathe, for example, or if any activity previously engaged in was made arduous because of the injury, it is a relevant point for the jury to consider in determining damages. A similar conclusion was reached in *Haley v. Byers Transportation Co.* where the plaintiff was paralyzed from the chest down in an automobile accident. The court upheld exclusion of a film depicting the plaintiff getting into and out of his bed, wheelchair and “standalone” [a device that supported the plaintiff and allowed him to move in an upright position]. Because the plaintiff had testified to these activities [the court emphasized that if the plaintiff wanted to enhance his testimony, he could have done so by introducing his special equipment as exhibits], the court concluded “the very obvious impact of these films would have been to create

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<sup>56</sup> *Bolstridge supra* note 55 at 1203 n.1.

<sup>57</sup> *Id.*

sympathy for the plaintiff out of proportion to the relevancy of the evidence.”<sup>58</sup>

Some courts have allowed the videos into evidence under the notion that video adds a unique perspective and dimension to the plaintiff’s claim. For example, in *Arnold v. Burlington Northern Railroad*,<sup>59</sup> the plaintiff’s day-in-the-life depicted him putting on his prosthetic leg, driving a specially designed truck, falling, grimacing in pain, and crossing a street. While the court acknowledged the cumulative nature of the video because it depicted events which had already been testified to, the court nevertheless allowed it on the basis that the video “communicated to the jury effectively, and perhaps better than words could do, what [the] plaintiff’s life as a double amputee was like.”<sup>60</sup>

Some courts have admitted noted cumulative films on the unavailability of the plaintiff as a witness. In *Apache Ready Mix Co. v. Creed*,<sup>61</sup> the court held that even though the plaintiff’s day-in-the-life video was repetitious of testimony already presented, because the plaintiff had not *herself* been presented to the jury, the defendant’s rights had not been unfairly prejudiced by admission of the videotape.<sup>62</sup> This is a persuasive argument to make when the extent of the plaintiff’s injuries preclude them from attending the trial.

Important to note as well is that other courts have allowed day-in-the-life videos into evidence and concluded that they are not cumulative evidence in the first place.

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<sup>58</sup> 414 S.W. 2d 777 (Mo. 1967)

<sup>59</sup> 748 P.2d 174, 176 (Or. Ct. App. 1988).

<sup>60</sup> *Id.* at 176.

<sup>61</sup> 653 S.W.2d 79 (Tex. App. 1983).

<sup>62</sup> *Id.* (emphasis added).

In *Grimes v. Employers Mutual Liability Ins. Co.*<sup>63</sup> the court held that photographic evidence could only be cumulative of other photographic evidence of the same kind.<sup>64</sup> This court reasoned that the plaintiff's day-in-the-life video served as the best evidence of the plaintiff's injuries.<sup>65</sup> Thus, following this line of reasoning, where the plaintiff has not previously shown photographs of activities or images depicted in a day-in-the-life video, a defendant's objection based on cumulative evidence will not be successful.

It is necessary to keep in mind that films seemingly calculated to inflame the jury or which are unnecessarily cumulative of oral testimony can properly be excluded. To avoid the cumulative objection, however, the plaintiff can show the video before, or simultaneously with, the oral testimony concerning it, thereby hopefully avoiding the issue entirely.<sup>66</sup>

Self-serving behavior has also been an objection launched against day-in-the-life videos. A plaintiff who is aware of being filmed may engage in self-serving behavior, whether conscious of their behavior or not.<sup>67</sup> If the plaintiff exaggerates their difficulty in negotiating everyday behaviors, then the video does present a danger of unfair prejudice. One court even found that the "obvious impact of these films would have been to create sympathy for the plaintiff out of proportion to the real relevancy

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<sup>63</sup> 73 F.R.D. 607 (D. Alaska 1977).

<sup>64</sup> *Grimes supra* note 16.

<sup>65</sup> *Id.*

<sup>66</sup> John Fay, *Video Trial Exhibits*, 11 Utah Bar J. 10, 11 (1998).

<sup>67</sup> *Bolstridge v. Central Me. Power Co.*, 621 F.Supp. 1202, 1203 (D. Me. 1985) ("[V]ideotape ... is troublesome because it dominates evidence more conventionally adduced simply because of the nature of its presentation.").

of the evidence."<sup>68</sup> This does not seem a persuasive argument however, given that sympathy should not be determinative of any verdict. Packaged with the self-serving objection, defendants may also argue that the plaintiff is a malingerer and tremendously exaggerates their injuries and the subsequent effects on their daily life. The plaintiff can always counter this objection by boldly asserting that defense counsel could have made (had the opportunity to make at any time prior to trial) a surveillance film to refute the plaintiff's video and that when defense did not take this opportunity, they waived this valuable right and should not now be heard to complain.<sup>69</sup>

## VI: Hearsay

Another common defense objection to a plaintiff's day-in-the-life video is that of hearsay. The Federal Rules of Evidence define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>70</sup> A "statement" is defined as "an oral or written assertion or non-verbal conduct of a person, if it is intended by the person as an assertion."<sup>71</sup> Most state counterparts are essentially the same, if not exactly the same.

When the plaintiff is "unavailable"<sup>72</sup> to testify in court, the hearsay objection may well be determined on

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<sup>68</sup> *Haley v. Byers Transportation Co.*, 414 S.W.2d 777, 780 (Mo. 1967).

<sup>69</sup> John Fay, *Video Trial Exhibits*, 11 Utah Bar J. 10, 1998.

<sup>70</sup> FED. R. EVID. 801(c). *See also* VA R. EVID. 801(c).

<sup>71</sup> FED. R. EVID. 801(a). *See also* VA R. EVID. 801(a).

<sup>72</sup> FED. R. EVID. 804(a).

grounds that the day-in-the-life video amounts to witness testimony that is not subject to cross examination.<sup>73</sup> Consequently, viewed in this light, the video will likely be stricken from evidence as defense counsel can make a confrontation clause objection if no witness is made available to cross-examine. This hearsay objection has been defeated by several courts that have held that videos are "offered to illustrate the plaintiff's testimony regarding his/her injuries, and as such "it is not offered to be an assertion, nor to prove the truth of the matter asserted" and accordingly, it should be treated as a photograph.<sup>74</sup> Without the plaintiff testifying, if the video's authentication witness can testify to what he/she saw, then the film is seen as a means of communicating these same observances.<sup>75</sup>

On the contrary, when the plaintiff is available for cross examination at trial, the day-in-the-life video is often found to be admissible hearsay. In these instances, it is thought that whatever prejudice results from the videos may be lessened by the defendant's ability to cross examine the witness about the instances depicted in the video. In *Bannister v. Town of Noble*,<sup>76</sup> while the court conceded the inevitable limitations of such cross examination, it concluded that the prejudice was in fact lessened when the victim could be cross-examined at trial regarding the events depicted in the film.<sup>77</sup> Therefore, because the plaintiff was available for cross examination

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<sup>73</sup> See *Aetna v. Cas. & Sur. Co. v. Cooper*, 485 So. 2d 1364 (Fla. Dist. Ct. App. 1986) ("Any benefit to the fact finding process that might have been derived from the tape was far outweighed by the unfair prejudice of admitting what amounted to *ex parte*, irrelevant testimony from absent witnesses.")

<sup>74</sup> *Strach v. St. John's Hospital*, 408 N.W.2d 441, 453 (Mich. App. 1987).

<sup>75</sup> *Grimes*, *supra* note 16.

<sup>76</sup> 812 F.2d 1265 (10th Cir. 1987).

<sup>77</sup> *Id.* at 1269-70.

at trial, the defendant's hearsay objection was properly overruled.<sup>78</sup>

Yet still, some courts will admit day-in-the-life videos under one of the hearsay exceptions. In *Grimes*, the defendant argued that the plaintiff's video was hearsay because it was "assertive conduct" intended to communicate the extent and nature of the plaintiff's injury [the truth of the matter asserted].<sup>79</sup> The court agreed that the video was hearsay<sup>80</sup> but admitted it nonetheless under the residual "catch all" exception<sup>81</sup>, which states that "a statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."<sup>82</sup> [It is important to note that this exception is not applicable in all jurisdictions, however.] The *Grimes* Court reasoned that:

Use of this exception to admit the film in evidence allows the jury to consider evidence which is more probative on the material issues of pain and suffering and loss of enjoyment of life than any other evidence which the plaintiff could procure through reasonable efforts. Guarantees of trustworthiness are provided

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<sup>78</sup> *Id.* at 1270.

<sup>79</sup> 73 F.R.D. 607, 610 (D. Alaska 1977).

<sup>80</sup> *Id.* at 611 ("A witness's testimony about observed assertive conduct when used to prove the truth of the assertion would be hearsay, and similarly, a film showing assertive conduct would be hearsay.").

<sup>81</sup> FED. R. EVID. 807

<sup>82</sup> *Id.*

by having the plaintiff-actor and the verifying witness subject to cross-examination...Use of this exception is justified in this situation where the normal hearsay problems do not exist or can be remedied. There are no problems with perception, memory, or meaning, and any sincerity problems can be solved by having the verifying witness and the plaintiff-actor subject to cross-examination.<sup>83</sup>

The last frequent ground upon which hearsay objections will be decided is that the video is not hearsay at all. Courts that follow this line of reasoning have held that day-in-the-life videos are merely demonstrative evidence and are not offered for the truth of the matter asserted. The court in *Strach v. St. John Hospital Corp.*<sup>84</sup> concluded that the videotape was merely demonstrative evidence offered to illustrate the plaintiff's testimony regarding his daily activities.<sup>85</sup> Affirming the trial court's holding, the appellate court stated that the film was not offered to prove the truth of the matter asserted but was correctly admitted and treated as if it were a photograph.<sup>86</sup>

## **VII. Problems Intrinsic To Video & Tactical Advice**

An oft-cited example of how video can be misleading is the 1960 presidential debate between Kennedy and Nixon. Nixon wore poorly-applied or no makeup, a not-so-handsome suit, and overly bright lighting gave him an obvious five o'clock shadow all of which culminated in his appearing swarthy, sinister, shifty-eyed, and nervous. In contrast,

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<sup>83</sup> *Grimes supra* note 16.

<sup>84</sup> 408 N.W.2d 441 (Mich. Ct. App. 1987).

<sup>85</sup> *Id.* at 453.

<sup>86</sup> *Id.*

Kennedy looked like a picture of vitality and confidence with his well-applied makeup, appropriate lighting, and a smart-looking suit that made him stand out from the background. From a purely aesthetic standpoint, Kennedy looked much better than Nixon.<sup>87</sup>

Attorneys, representing the plaintiff and defendant alike, should be aware of the influences video may have on its viewers. Strong lighting can emphasize or create shadows, accent facial features, and create impressions of sterility or cleanliness. Low lighting can create depressing and murky backgrounds.<sup>88</sup> Other influences to bear in mind are the angle of the camera, the closeness of the camera to the subject, the panning of the camera versus a still shot, and, in sound films, the placing of the microphone near to or far away from the subject.<sup>89</sup> Certain camera angles can accent facial features or amplify height differentials between two people. Tight camera shots suggest that the individual who is depicted is uncomfortable or ill at ease. Camera panning prevents viewers from losing interest. Microphone placement can emphasize or de-emphasize sounds to the advantage of the filmmaker.<sup>90</sup>

The influences of sound may be particularly hard to discern. "Sound can be taped on two separate tracks, picking up soft gasping or labored breathing even on a long camera shot. The product will also enable certain specific noises to be enhanced, such as the tearing sound a bandage makes on skin, the bumping of a prosthesis, or the clicking

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<sup>87</sup> Douglas A. Graham and Daryl J. Lapp, *Day-In-The-Life Videos: Evolving Arguments On Their Making and Use at Trial*, 27 Tort & Ins. L.J. 574, 1992.

<sup>88</sup> Preiser & Hoffman, *Day in the Life Films*, 17 TRIAL 41 (Sept. 1981) at 29-30 referenced in Graham & Lapp, *supra* note 16, 574.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

of a brace. All of these sounds might have a subtle and substantial impact on the viewer." Techniques such as the unusual placement of microphones may be very difficult to detect.<sup>91</sup> To be safe and avoid the pitfall of objectionable audio, it is advisable to not include audio in a day-in-the-life video if the circumstances of the plaintiff's injury makes this feasible. "An effective narration can be tremendously important. Generally, it seems best to use a doctor, nurse, or spouse of the plaintiff to narrate and authenticate the video. The video will have no audio at trial but, the narrator tells the jury exactly what is happening in the different video scenes."<sup>92</sup> If the narration is challenged, a persuasive plaintiff's argument could be that so long as the narration is accurate, factual, and not inflammatory and the narrator is present for cross-examination, the audio or narration should be admitted as it can assist the jury in understanding the video evidence.<sup>93</sup>

Defendants can also object to the admission of day-in-the-life videos on grounds that the video unfairly depicts the plaintiff by using camera tricks, self-serving editing, or improper lighting and film speeds. Using a slower film speed than proper can make the plaintiff appear to be more disabled than he/she really is. Cleverly staging the film's background or using certain lighting conditions, camera angles or telephoto lenses can foster misleading impressions.<sup>94</sup> "Defense counsel needs to show this, not just

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<sup>91</sup> See German, Merin & Rolfe, Videotape Evidence at Trial, Am. J. Trial Advoc. 209, 216 (1982) cited in Graham & Lapp, *supra* note 16, 574.

<sup>92</sup> John Fay, *Video Trial Exhibits*, 11 Utah Bar J. 10, 11 (1998).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 12.

speculate about it in objections.”<sup>95</sup> However, all outtakes [all of the film that was edited out to produce the final product] should always be kept in the event that the judge grants the defendant access to the edited footage. This provides another compelling reason to not include any audio during shooting so that defense counsel is not able to come back with objections that the film was overly staged, etc. because they have footage of the plaintiff being “directed” by their attorney or the videographer. This is also illustrative of why the attorney needs to be very selective when choosing the videographer and participates in the whole process rather than giving him/her free artistic reign.

### **VIII. Due Process and Day-in-the-Life Videos**

The due process debate ostensibly involves elements of the discovery process, with the specific debate centering on the *timing* when defense counsel can view the plaintiff’s day-in-the-life video. That stated, once it is decided that the video will be introduced at trial, the defendant has the right to discover facts about the video, e.g., film speed, date, time and lighting conditions, who was present at the filming, who did the filming, what footage was deleted from the final version and why, etc.<sup>96</sup> The plaintiff may try to invoke a “work product” privilege, but the weight of the authority seems to find this objection unpersuasive and will not deny discovery.<sup>97</sup> In summary, once a decision to admit a day-in-the-life video has been

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<sup>95</sup> *Id* at 12.

<sup>96</sup> John Fay, *Video Trial Exhibits*, 11 Utah Bar J. 10, 12 (1998).

<sup>97</sup> *Id.*

made, attorney-client privilege is usually found to be waived. At least this is true for the edited portions of the video. Where it pertains to the unedited portions, the plaintiff should object to production, arguing that what was edited out is protected from discovery by both the work-product rule and the attorney-client privilege and that producing the unedited version would reveal the attorney's impressions, opinions and conclusions which are absolutely protected from discovery.<sup>98</sup> Further, the argument can also be made that it is pure speculation to claim that the edited version improperly portrays the plaintiff and that defense counsel is merely "fishing."<sup>99</sup> Both of these objections may or may not be found persuasive.

The first reported decision to contend with the way in which a day-in-the-life film is made was *Cisarik v. Palos Community Hospital*.<sup>100</sup> The *Cisarik* plaintiff brought an action for medical malpractice on behalf of a brain damaged child. The Plaintiff intended to introduce a video depicting a day in the life of the injured child. The trial court granted a protective order regarding production of the video, giving defendant health care providers 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. The court of appeals affirmed the order, while the Illinois Supreme Court reversed the order, holding that the video was simply demonstrative evidence and that opposing counsel had no right to intrude into the production of such demonstrative

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Cisarik supra* note 9.

evidence.<sup>101</sup> The court stated that: "Viewed in its proper light, a so-called "Day in the Life Movie" is merely a type of demonstrative evidence. In such respect, it is comparable to a still photograph, a graph, a chart, a drawing or a model. The preparation of such evidence falls within the work product of the lawyer who is directing and overseeing its preparation."<sup>102</sup> The court also squarely placed day-in-the-life videos in the category of demonstrative evidence. The Court reasoned that "Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness. Because a 'Day in the Life' film is a form of motion picture it is admissible evidence on the same basis as photographs."<sup>103</sup> Consequently, before a "Day in the Life" film can become evidence at trial it must first pass a two-prong test. First, a foundation must be laid, by someone having personal knowledge of the filmed object, that the film is an accurate portrayal of what it purports to show. Second, the film is only admissible if its probative value is not substantially outweighed by the danger of unfair prejudice."<sup>104</sup>

The dissent strongly contended that the court missed the point of seeking procedural safeguards on the making of such evidence: without those safeguards, the opponent of such evidence often will be unable to challenge its admissibility at trial.<sup>105</sup> The dissent pointed out that the defects in the court's reasoning "...are at once apparent.

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<sup>101</sup> *Cisarik v. Palos Community Hosp.*, 144 Ill.2d 339 (1991).

<sup>102</sup> *Id.* at 341.

<sup>103</sup> *Id.* at 341.

<sup>104</sup> *Id.* at 342.

<sup>105</sup> *Id.* at 345 (Miller, C.J., dissenting).

Under the majority's reasoning, litigants should have virtually no discovery rights, for all evidence is subject to tests of admissibility at trial."<sup>106</sup> The dissent goes on to point out that the majority's decision contravenes the policy of encouraging a broad scope of discovery. It is clear from our case law that tests of admissibility are not a substitute for discovery rights and, moreover, that compliance with discovery will not guarantee the admission of an item of evidence at trial. Our rules of discovery reflect principles of fairness, and are designed to further the efficient and expeditious administration of justice.<sup>107</sup>

Had the court found in favor of the defendants in *Cisarik*, while benefiting defendants somewhat, allowing the defense to participate in the filming and other production elements of a day-in-the-life video, would cause significant hardships on the plaintiff and their family. Although preparing a day-in-the-life video necessarily requires some intrusion, allowing any number of defense counsel to participate in that process would add a much greater intrusion.<sup>108</sup> This is especially true since most day-in-the-life videos are shot in the plaintiff's home where their own attorney is surely welcome, but their opponent's counsel is equally unwelcome.

In another Illinois case, *Roberts v. Sisters of Saint Francis Health Services, Inc.*<sup>109</sup>, the trial court granted defendant's request that the film be shown to the panel of potential jurors prior to *voire dire*. The potential jurors were shown the day-in-the-life video depicting the plaintiff, a nine-year-old quadriplegic. At the conclusion

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<sup>106</sup> *Id.* at 345 (Miller, C.J., dissenting).

<sup>107</sup> *Monier v. Chamberlain*, 35 Ill. 2d 351, 357 (Ill. 1966).

<sup>108</sup> *Graham & Lapp*, *supra* note 16, 574.

<sup>109</sup> 556 N.E. 2d 662 (1989).

of the film, the court asked whether any of the panel members thought they would be unable to render a verdict based on the evidence.<sup>110</sup> Four potential jurors said the film aroused such strong feelings in them that they could not be fair and impartial. They were excused, and jury selection proceeded with the remainder of the panel.<sup>111</sup> The court did however, go on to add that this did not give defendants free reign to question prospective jurors about the material found within the film. As is always the case, the trial court must exercise its discretion by curtailing *voire dire* that becomes an attempt to indoctrinate jurors, or when questioning seeks to determine how that juror would decide an issue under a given set of facts.<sup>112</sup>

Therefore, following the Illinois court's reasoning, showing potential jurors the plaintiff's day-in-the-life video is a legitimate tactic defendants could choose. From the parameters laid down in the Illinois decisions, it seems that counsel must limit their questioning to basic questions such as "did the scenes in the video effect you in a way to render you unable to decide this case based on evidence alone", etc.

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<sup>110</sup> *Id.* at 668 referenced in Graham & Lapp, *supra* note 16, 574.

<sup>111</sup> *Id.* referenced in Graham & Lapp, *supra* note 16, 574.

<sup>112</sup> *Id.* at 669 referenced in Graham & Lapp, *supra* note 16 at 574.

## IX: Conclusion

It may now seem inevitable that day-in-the-life videos would become commonplace for most trial lawyers given the technological explosion that society has experienced. Nevertheless, day-in-the-life videos' entrance into the court room has not always been a smooth ride.<sup>113</sup> They are effective because they assist the jury in understanding the plaintiff's injuries.<sup>114</sup> "Because they trust and understand television as a medium, jurors also perceive day-in-the-life videos as a particularly credible evidentiary tool."<sup>115</sup> Furthermore, by condensing salient information about the plaintiff's injuries, and the suit itself, day-in-the-life videos present a very effective evidentiary tool by detailing often complex material (medical diagnoses, etc.) in a small easily understood format.

Defense counsel opposing the admission of day-in-the-life videos will frequently have little on which to base their argument. While the case history is not at all uniform, the common consensus seems to be that lacking overt, extreme prejudice, the day-in-the-life video will be allowed into evidence. Remember that the day-in-the-life video will be following the plaintiff through some humiliating moments of their life, therefore, an adequate amount of sensitivity is imperative from the attorney and the videographer alike.

To avoid a Federal Rule of Evidence Rule 403 objection, it is imperative to not aim to shock. Depicting

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<sup>113</sup> See *McCormick on Evidence* § 214, at 17 (John W. Strong et al. eds., 4th ed. 1992).

<sup>114</sup> See *Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 524 (Minn. Ct. App. 1991) (video allowed jury better understanding of plaintiff's paraplegic state); *Arnold v. Burlington N. R.R.* *supra* note 23, 89 Or. App. 245, 248, 748 P.2d 174, 176 (film illustrates and supplements the plaintiff's testimony).

<sup>115</sup> Jane Kalinski, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device*, 27 Suffolk U. L. Rev. 789 (1993).

intimate scenes, such as bathing and other personal hygiene scenes, will always be difficult, but it is crucial to do so in a respectful manner because most jurors will have no idea what it takes to bathe a paralyzed or severely injured person.

During the editing process, the attorney must always be actively involved in the process, essentially acting as the editor's director on the rules of evidence.

## **Author Biography**

John C. Shea has been in practice since 1977, focusing his practice exclusively in representation of the injured.

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- *Virginia Bar Association*
- *Faculty of Virginia College of Trial Advocacy*
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