

## A Day in the Life of Your Client

Videos can bring an injured plaintiff's struggles into the courtroom.

By Salvatore J. Zambri

**D**ay-in-the-life videos provide powerful visual evidence. They can portray the nature and extent of a plaintiff's injuries—as well as the difficulties the plaintiff encounters in his or her daily life because of those injuries—in ways that no other form of evidence can.

Better than descriptive words or even still photographs, videos let the jury see the whole story.

Many commentators have discussed the strong impact that images can have on the jury. Photographer Bill Jay may have stated it best in a 1990 article in the *Washington Journalism Review* in which he described images as “directly entering the blood stream, bypassing the brain.”

Words can fail us sometimes. Even experienced attorneys can find it challenging to vividly describe the severity of a client's injury or the adverse consequences of such injury. And clients are frequently unable to express themselves articulately in a courtroom. But a video, used as a supplement to the testimony of the plaintiff and other damages witnesses, can accurately present critical evidence to the judge and jury.

### VIDEO BASICS

Day-in-the-life videos can be used to depict the harsh consequences of an array of physical impairments.

A videotape of the wound-care ritual needed to treat a “degloving” injury (in which layers of tissue were stripped away) will reflect both the extent of the disfigurement and the victim's ongoing suffering.

Videos are also commonly used in cases of amputation or paralysis. They can show how difficult and often painful the simple activities of daily living have become for a plaintiff. Day-in-the-life videos are extremely effective in proving the long-term inconvenience the plaintiff will be forced to endure as a result of the injury, as well as the effect that the injury has on his or her overall physical and emotional well-being.

To create an effective day-in-the-life video, the attorney must do two things first: (1) obtain a comprehensive understanding of the plaintiff's injuries and (2) hire a skilled, experienced video-

grapher. Extensive interviews with the client and the client's physicians are absolutely necessary long before the production of the video. Even the best videographer will be unable to produce a valuable video unless fully informed of the plaintiff's most significant disabilities.

In general, consider showing the following activities in the video: eating, walking, undergoing therapy, and receiving bowel/bladder care. Further consider capturing the plaintiff's waking process (bathing, grooming, and dressing) and nighttime activities (undressing, grooming, and positioning in bed). The video should reflect a full day of the plaintiff's life.

Be concise, but also be thorough in the presentation of the damages evidence.

### INTO EVIDENCE

Fortunately, trial court judges recognize the value of day-in-the-life videos and routinely admit them into evidence. Yet there are several important evidentiary rules and procedures that should be heeded in preparing and presenting such evidence. The creation of a day-in-the-life video requires a considerable investment of time, energy, and resources—all of which will be wasted if the judge strikes the evidence at trial.

In general terms, the evidentiary rules are similar in both the federal court and the local courts of Maryland, Virginia, and the District of Columbia. The definition of “photograph” is set forth in Federal Rule of Evidence 1001(2) and includes “still photographs, x-rays films, videotapes and motion pictures.”

Pursuant to Federal Rule of Evidence 401 and its relevant state counterparts, courts determine the admissibility of day-in-the-life videos by, among other things, applying the test of relevance—whether the proffered evidence facilitates the determination of any fact related to a material issue. Since accurately created day-in-the-life videos demonstrate the nature of the injuries sustained by the plaintiff in an illustrative and summary form, they do properly assist jurors in determining issues of damages. Thus, courts rightly regard day-in-the-life videos as relevant evidence.

Of course, a day-in-the-life video must be authentic to be admissible. Federal Rule of Evidence 901(a) provides that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

Thus, unless the parties have stipulated to authenticity, the videographer should be designated as a witness to testify that the video fairly and accurately depicts the subject matter. In addition, it is prudent for the party intending to proffer the video at trial to keep all unedited video footage. If an authenticity challenge arises, the court and opposing counsel can review the entire raw footage to determine the genuineness of the video, as well as its accuracy.

Counsel should also be wary of Federal Rule of Evidence 403, which provides that relevant evidence may be precluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” Attempts to overly dramatize an injury and its impact on a plaintiff (referred to as “staging”) are vulnerable to sustainable objections.

Judges are mindful of the meaningful impact a day-in-the-life video can have on a jury. As a result, they are careful to ensure that the video was not staged but instead fairly depicts the plaintiff’s injury and its effects on his or her life. Having all raw footage available for inspection has the further advantage of protecting against a claim that the video was staged.

In addition, Federal Rule of Evidence 403 bars the needless presentation of cumulative evidence. Cumulative evidence is improper for two principal reasons: (1) It needlessly delays the trial, and (2) it threatens to create undue prejudice. Therefore, depicting repetitive activities in a video should be avoided.

### REMEMBER DISCOVERY

Failure to comply with discovery requests may also jeopardize the admissibility of the video. Interrogatories frequently ask for information regarding the time and place of taping, the videographer’s identity, and other such details to provide opposing parties an opportunity to challenge the authenticity and substance of the video. These discovery requests deserve comprehensive responses and should not be ignored.

In an effort to minimize effective challenges, some attorneys routinely invite opposing counsel to the filming of the video. If the opposing party declines the invitation, then objections pursuant to Rules 901 and 403 may ring hollow. If opposing counsel accepts the invitation, disputes over the production of the video can be promptly brought to the presiding judge’s attention so that modifications, if necessary, can be made during the filming process.

### KEEP IT SHORT

In preparing a day-in-the-life video, here are some final important points to bear in mind:

- Understand that the preparation of such a video will be

costly, ranging from several hundred to several thousand dollars. Consequently, be sure that the potential damages warrant the expense. Communicate with your client about this before spending the money.

- Before videotaping starts, decide whether to record with or without audio. Sound can be distracting, but it may be useful in certain cases. For instance, if a client is forced to endure a painful treatment program, depicting the pain through audio may be appropriate.

- If you decide to use a narrator, do not have a lawyer or office employee provide the narration. Otherwise, you increase the likelihood that the jury will see the video as staged. Instead, consider using a well-qualified nurse or other health-care provider to fill that role.

- Remember that a day-in-the-life video is about the multitude of everyday experiences. If your client struggles to do simple tasks, show those tasks being performed in the video.

- On the other hand, be careful not to force your client to attempt tasks that cause meaningful pain. Be illustrative but compassionate.

- Be sure the video is tastefully done. It is proper to show the anguish and impairment that your client is forced to endure as a result of his or her injuries, but do not embarrass the client needlessly.

- Keep the video as short as possible. Avoid boring the jury. Focus on the salient activities themselves, not the less-meaningful events that take place before or after.

Finally, remember that the same video footage can be effectively employed before trial in an attempt to bring about a

fair resolution of your client’s case. The use of technology in the courtroom has increased dramatically over the last decade. That same technology can, and often should, be used during mediation or other alternative dispute resolution process.

For instance, a day-in-the-life video can be incorporated into a settlement video—a video demand package—or attached as an exhibit to a written demand package. A video or a portion of it can also be incorporated in a PowerPoint presentation to the judge during a pretrial conference. By using a day-in-the-life video during pretrial phases of litigation, counsel can often promote a fair and expeditious resolution of the client’s case.

In sum, day-in-the-life videos provide the kind of powerful evidence unavailable by any other means. They are expensive to produce but, for appropriate cases, they are essential evidentiary tools. If a picture is worth a thousand words, then a day-in-the-life video is worth . . . well, that is for a jury to justly decide.

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