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"Day in the Life" and Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits

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I. Introduction

Videotape technology is now an extensively utilized civil litigation tool.[1] For years, defendants in personal injury cases have introduced surreptitiously recorded surveillance films to expose exaggerated claims of injury by plaintiffs.[2] Now, litigating plaintiffs are also using videotape in the form of sophisticated "day in the life" presentations to demonstrate to the jury exactly how severe injuries have affected their daily lives.[3]

Controversy pervades the introduction into evidence of these types of videotaped materials.[4] Videotaped evidence is an extremely powerful courtroom tool that can be manipulated easily to create

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1. The two uses of videotapes discussed in this Comment are the surveillance video and the "day in the life" video. Other uses of video technology in the courtroom include: video depositions of absent witnesses, videos of product test demonstrations, use of videotape to show mechanical principles, videotaped accident scenes, videotaped re-creations of accidents, videotaped last will and testaments, and recently, videotaping of trials to replace stenographic recording.

For cases utilizing videotaped evidence in these manners, see Brandt v. French, 638 F.2d 209 (10th Cir. 1981); Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. Ct. App. 1978); Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (W. Va. 1983). For articles discussing some of these usages of videotaped evidence, see Gerry W. Beyer, *Video Requiem: Thy Will Be Done*, 124 TR. & EST. 24 (1985); Terry Zickefoose, *Videotaped Wills: Ready for Prime Time* (Special Survey Issue), 9 *Prob. L.J.* 139 (1989); David M. Balabanian, *Medium v. Tedium: Video Depositions Come of Age*, LITIG., Fall 1980, at 25. *See generally* Stewart Wachs, *Video Technology Offers Many Legal Applications*, LEGAL TIMES, Dec. 13, 1982 at 22.

For criminal defendants' innovative but unsuccessful attempts to exploit the medium, see People v. Daniels, 802 P.2d 906 (Cal. 1991) (court denied admission at sentencing of video depicting quadriplegic convicted murderer's prospective prison life); Joseph Calve, *Heaven's Gate II*, CONN. LAW. TRIB., Jan. 14, 1991, at 16 (reciting case of admitted embezzler who introduced "tear-jerking" video at his sentencing, showing defendant caring for his quadriplegic son, who he claimed would be abandoned if he were imprisoned).

2. The first surveillance film was introduced in the 1940s in a California Supreme Court personal injury case by Josephine Heiman against the Market Street Railway Co. This premiere case is discussed in Amy Louise Kazmin, *Courtrooms Enter Video Age as Use of Taped Evidence in Trials Increases*, L.A. TIMES, Jan. 2, 1990, at B3.

3. For two excellent commentaries on "day in the life" films see Joseph M. Herlihy, Note, *Beyond Words: The Evidentiary Status of "Day in the Life" Films*, 66 B. U. L. REV. 133 (1986); Philip J. Passanante, Comment, *The Use of Clinical and "Day in the Life" Presentations in Personal Injury Litigation: A Rising Star in the American Courtroom*, 20 WAKE FOREST L. REV. 121 (1984).

4. *See* Herlihy, *supra* note 3, at 134 (examining a range of judicial attitudes towards "day in the life" films and similar video evidence).

misleading impressions.[5] Jurors view the videotape on a regular television screen like the one on which they watch the evening news, so they tend subconsciously to trust the message it delivers.[6] Furthermore, the video creates a lasting visual impression in their minds.[7] Opposing parties[8] have challenged the admissibility of these videos on grounds of inaccuracy and prejudice, but generally have been unsuccessful.[9]

While personal injury plaintiffs have deflected some of the damaging effects surveillance films have had on their cases by utilizing pretrial discovery methods,[10] "day in the life" defendants continue to grapple with the contents of these films, searching for elements of prejudice that would render the films inadmissible at trial.[11] This Comment suggests that there are fundamental safeguards which "day in the life" defendants may invoke to minimize the prejudicial effects of these videos rather than simply objecting to their admission into evidence on grounds of prejudice.

First, the Comment compares surveillance films and "day in the

5. Warren W. Willinger and Anthony H. Gair, *Obtaining Surveillance Films in Personal Injury Cases*, TRIAL LAW. Q., Spring-Summer 1990, at 26. "The camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angels, speed, editing and splicing, and chronology." *Id.* at 27.

Kazmin, *supra* note 2, discusses a California case which exemplified the manipulability of video evidence. The personal injury plaintiff introduced a videotape of a safety expert operating a wetbike, which appeared to be uncontrollable. When the unedited version was shown, it revealed that the operator had shaken the wetbike violently to make it unstable. And while the shaking of the wetbike had been edited out of the final video, the next portion of the tape—where the wetbike jumped out of the water after having been shaken—had been spliced into the tape at several points to make the vehicle appear uncontrollable. Although the video was of a different nature than the "day in the life" video or surveillance video, this example illustrates how easily videotaped evidence can be edited to change apparent facts.

6. Mark A. Dombroff, *Videotape: An Innovative Evidentiary Use of an Emerging Technology*, 33 FED'N INS. COUNS. Q. 157 (1983). *See also* Richard L. Edwards, *Using Videotape Evidence in Personal Injury Litigation*, BRIEF, Fall 1987, at 44. "The fact that almost all jurors are veteran television and movie viewers . . . gives them a natural affinity to videotaped evidence." *Id.* at 46. For a study of the advantages of videotape evidence over other forms of demonstrative evidence, see Mark A. Dombroff, *Videotapes Enter the Picture as Demonstrative Evidence Tool*, NAT'L L.J., Nov. 23, 1981, at 24.

7. *See generally* Dan L. Goldwater and Earle Giovanniello, *Accountants' Liability 1990: Trial Strategies (Objections to Documentary Evidence)*, PLI LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES, July 1, 1990. *See also* Rebecca Kuzins, *The Pros and Cons of Videotaped Evidence*, L.A. LAWYER, Nov. 1987, at 35.

8. Unless other clear reference is made, this Comment refers to the parties opposing the trial use of these types of videotaped evidence as the "surveillance plaintiff" and the " 'day in the life' defendant."

9. Monty L. Preiser & Mark L. Hoffman, *"Day in the Life" Films—Coming of Age in the Courtroom*, TRIAL, Aug. 1981, at 26. " 'Day in the Life' films are now almost routinely admitted into evidence without any major problems." (citations omitted). *Id.* at 26.

10. *See* discussion *infra* part III.A.

11. For the standards of admissibility under which "day in the life" videos are challenged, see FED. R. EVID. 401, 403.

life" videos as two loaded forms of evidence. Next, the Comment examines the rules which govern the discovery of surveillance materials and the means by which plaintiffs and defendants in personal injury actions may employ these rules in preparation of their cases. Finally, the Comment applies that analysis to "day in the life" videos, and suggests that "day in the life" defendants should assume the admissibility of the films, and focus their efforts on making beneficial use of established rules of pre-trial discovery.

II. Comparison of Surveillance Films and "Day in the Life" Videos

All visual evidence shares the advantage of dominating the evidentiary scene at trial.[12] But when comparing surveillance videos with "day in the life" presentations, the similarity ends with that single common element. Each has a distinct role in the creating party's case, and so each is only useful in limited litigation matters. Therefore, the type of case in which a plaintiff would create a "day in the life" film differs from the type of case in which a defendant would consider surveillance necessary.[13] Still, the greatest variance between the two devices is in the production.

A. "Day in the Life" Productions

Plaintiffs' attorneys create "day in the life" films to demonstrate to a jury the extent of the plaintiff's injuries and how those injuries have affected the lives of the plaintiff and his family.[14] With the video, the attorney hopes to educate the jurors—to put them in the plaintiff's shoes—so that they can understand how the plaintiff suffers on a day-to-day basis, and the nature of the strain that the injury has had on the plaintiff and the family.[15] The plaintiff hopes

12. Banniser v. Town of Noble, Okla., 812 F.2d 1265, 1269 (10th Cir. 1987) ("[a] jury will better remember, and thus give greater weight to, evidence presented in a film as opposed to more conventionally elicited testimony."). *Cf.* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 153 (3d ed. 1992) ("[L]earning and retention area several times better if information is communicated visually."). *See also* notes 6-7 *supra* and accompanying text.

13. The distinction between the types of cases in which the contrasting videotapes are used stems from the fact that plaintiffs create "day in the life" videos only when their injuries are so severe and debilitating as to have a permanent effect on their lives, while defendants usually only conduct surveillance if they think the plaintiff is exaggerating the injury. The injuries which warrant production of a "day in the life" presentation are not usually of a type that a plaintiff would be likely, or able, to feign.

14. *See* Preiser & Hoffman, *supra* note 9 (examining the difficulty of communicating the suffering caused by severe injuries and the impact on the family). *See also* Lawton v. Jewish Hosp. of St. Louis, 679 S.W.2d 370 (Mo. Ct. App. 1984) ("day in the life" film admitted where plaintiff's poor health prohibited his attendance at trial, thus allowing him, in effect, to testify where he otherwise would be unable).

15. Grimes v. Employer's Mutual Liab. Ins. Co., 73 F.R.D. 607, 610 (D. Alaska 1977)

and expects that well-informed, sympathetic jurors who have witnessed the suffering will evaluate the claim generously and award higher damages.[16]

"Day in the life" productions are expensive and exhausting, and so are practical only when large damage awards are at stake. Therefore, they are created primarily when the plaintiff suffers a disability so severe that the average juror would be completely unfamiliar with the pain and problems accompanying the injuries. In such a case, the "day in the life" presentation aids jurors who otherwise would be unable to imagine the ways in which the plaintiff's life has been affected.[17] The prototypical case is a medical malpractice action for serious, permanent conditions such as paralysis or brain damage.[18]

The filming must be precisely planned and scrupulously conducted in order to avoid admissibility problems at trial.[19] The pro-

("Films illustrate, better than words, the impact the injury has had on the plaintiff's life."). *See also* Paul Marcotte, *Putting Jury in Your Shoes*, A.B.A. J., July 1, 1987, at 20. "Letting the jurors see and experience what you are telling them goes a long way toward winning your case." *Id.* at 20.

16. For a discussion of juror skepticism and resistance, see Lawrence R. Booth, *Arguing Damages: The Power of Preparation*, TRIAL, March 1991, at 28. "Most jurors cannot imagine themselves in the plaintiff's position. Usually people who see a horribly crippled person do not wonder how they would feel in that person's situation. The usual reaction is to look away and try to avoid thinking about the person altogether." *Id.* at 33. For a guide to obtaining higher damage awards see William S. Bailey, *Videotape Evidence: Show Me, Don't Tell Me*, TRIAL, Mar. 1991, at 52 ("Videotapes present an opportunity to maximize damages in any case.").

17. *See, e.g.*, Thomas v. C.G. Tate Const. Co., Inc., 465 F. Supp. 566 (D.S.C. 1979) (plaintiff who suffered severe burns over entire body was not permitted to introduce into evidence a videotape of excruciatingly painful physical therapy session); Burke v. 12 Rothschild's Liquor Mart, 568 N.E.2d 80 (Ill. App. Ct. 1991) (plaintiff rendered quadriplegic following trip-and-fall while being forcibly ejected from defendant store).

18. For examples of cases in which extensively and permanently injured plaintiffs created "day in the life" videos, see Georgacopoulos v. University of Chicago, 504 N.E.2d 830 (Ill. App. Ct. 1987) (extensive brain damage caused by cardiac arrest due to a negligently positioned and monitored catheter); Trapp v. Cayson, 471 So.2d 375 (Miss. 1985) (plaintiff became paraplegic following a routine arteriogram); Repple v. Barnes Hosp., 778 S.W.2d 819 (Mo. Ct. App. 1989) (plaintiff rendered quadriplegic after doctors failed to diagnose a vascular malformation following a complicated pregnancy); Campbell v. Pitt County Mem. Hosp., Inc., 352 S.E.2d 902 (N.C. Ct. App. 1987) (parents of brain damaged child brought suit against hospital for negligence in connection with delivery of the child in breech position).

Although the scenarios described are typical, "day in the life" films earn some of their controversy for the atypical uses to which they have been put. *See, e.g.*, Barenbrugge v. Rich, 490 N.E.2d 1368 (Ill. App. Ct. 1986) (husband of plaintiff who died during trial introduced "day in the life" films depicting her life after radical mastectomy necessitated by doctor's failure to timely diagnose breast cancer); Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791 (W. Va. 1986) (parents of child who died as a result of non-consensual biopsy brought wrongful death action and introduced "day in the life" film, which consisted of old home movies, to show that the boy had been a normal and healthy child in a typical, happy family).

19. For a discussion of how critical the creation process is, see Preiser & Hoffman, *supra* note 9. To identify aspects of videotaped evidence that might result in its inadmissibility at trial, see FED. R. EVID. 403. Challenges to admissibility of "day in the life" films are most commonly grounded on irrelevance, prejudicial impact, cumulativeness, and hearsay. *See infra* note 43.

duction typically involves a team of people, including the attorney, plaintiff and family members, a professional "day in the life" film producer, as well as lighting, set, and sound personnel.[20]

"Day in the life" creations border on works of art. The production may include rehearsals, re-takes, special camera lenses and angles, special lighting, sound and scenery, and extensive review and editing.[21] The scenes ultimately included in the video are supposed to depict "typical" daily activities, however, the final product is dictated by the team's evaluation of what will elicit the sympathy and generosity of the jurors.[22]

Another factor that alters the authenticity of the scenes depicted is the tendency for the subjects to "perform" for the camera.[23] Such behavior could be entirely unintentional, as most people find it difficult to be natural in front of a camera.[24] However, the high stakes involved in this particular type of production generates concern among the judiciary that some of the "acting" may not be inadvertent.[25]

B. Surveillance films

In purpose, the surveillance film contrasts sharply with the "day in the life" presentation. In an era of heightened concern with fraud-

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Numerous "how-to" guides are available to aid plaintiffs' attorneys in producing the most effective, least penetrable video. *See, e.g.*, Bailey, *supra* note 16, at 52 ("The essential ingredient in the success of videotaped evidence is for the lawyer and the filmmaker to work together closely."); Edwards, *supra* note 6 (offering practice tips on production and use at trial); Gregory P. Joseph, *Demonstrative Videotape Evidence: How to Use Videotape in Trials*, TRIAL, June 1986, at 60 (discussing court decisions and providing pointers for creating and using videotape evidence at trial); Preiser & Hoffman, *supra* note 9 ("jurors will give a greater award if they watch not only the negative aspects of the plaintiff's life, but also the positive").

20. Bailey, *supra* note 16, at 52.

21. Bailey, *supra* note 16, at 52.

22. *See* Martha A. Churchill, *"Day-in-the-life" Subject to Court Challenge*, FOR DEF., Dec. 1990, at 24 (criticizing the contradictory nature of the creation process for what is supposed to be a video depicting a typical day in the plaintiff's life); Preiser & Hoffman, *supra* note 9 (discussing techniques of gaining the empathy of the jurors without repulsing them with unpleasant scenes).

23. Bolstridge v. Central Maine Power Co., 621 F. Supp. 1202 (D. Me. 1985) ("day in the life" video excluded in part because of the risk that film subjects would act in a self-serving manner).

24. Churchill, *supra* note 22, at 24.

25. The court in *Bolstridge* viewed the potential for "performances" as an unacceptable risk of prejudice, and held that a "day in the life" film would only be allowed at trial if it would "convey the observations of a 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." 621 F. Supp. at 1204. *But cf.* Bannister v. Town of Noble, Okla., 812 F.2d 1265 (10th Cir. 1987) (addressing the *Bolstridge* court's concern, but admitting the video on the ground that the scenes depicted did not appear to be exaggerated or "performed").

ulent personal injury claims,[26] defendants conduct surveillance in order to determine whether the plaintiff's complaints are genuine and whether the injury is as extensive as he asserts.[27]

If the plaintiff performs tasks that exceed his asserted physical limitations, then by filming the plaintiff's activities, the defendant can demonstrate to the jurors that the plaintiff's claim of disability is exaggerated. The evidence can be used to impeach the plaintiff's testimony, thus exposing the plaintiff as an unreliable witness and discrediting his story.[28] As a result the jury may render a verdict in favor of the defendant,[29] or award lower damages to the plaintiff.[30]

Production of a surveillance film is relatively crude as compared to the "day in the life" creation. Filmed by an investigator who has surreptitiously observed the plaintiff for some period of time, the video generally is shot from a distance. The investigator can hardly call for re-takes or adjustments in lighting or scenery. The activities captured on film are random—the plaintiff alone determines what activities he will engage in, and the photographer is interested in filming only those that contradict his professed physical limitations.[31] If the surveillance is successful, the plaintiff is completely unaware of the photographer's presence, and is more likely to act naturally and uninhibited. Unlike the "day in the life" production, there is no "performance" for the surveillance photographer, and so the film is

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26. A former Justice of the Supreme Court of Arizona, in a letter to the judicial committee considering modifications to the Arizona discovery rules, wrote:

> Fraud in personal injury cases is now so widespread as no longer even to surprise us. The exaggeration of injuries, not to say the outright manufacturing of them is commonplace. The only defense we have now against the constant perjury by plaintiffs in personal injury cases as to the nature and extent of their disabilities is the right to make secret and undercover photographic and other investigation of these people. There is no lawyer in this branch of the profession that is not fully aware of the number of occasions on which such investigation alone has prevented the grossest miscarriage of justice, based on outright perjury by alleged injured plaintiff.

Zimmerman v. Superior Court, 402 P.2d 212, 218 (Ariz. 1965) (en banc).

27. Denis Paul Juge, *Proper Use of Surveillance Film*, FOR DEF., June 1990, at 8.

28. Because the surveillance film may reveal fraud on the part of the plaintiff, it serves a legitimate public purpose. The Supreme Court of Pennsylvania articulated this view in Forster v. Manchester, 189 A.2d 147 (Pa. 1963).

29. *See, e.g.*, Ross v. West, 543 So.2d 307 (Fla. Dist. Ct. App. 1989) "The appellant . . . put on a show by moaning and limping in front of the jury. The appellee . . . was allowed to show the jury a surveillance film taken after the trial had begun. The verdict gave the better reviews to the appellee." *Id.* at 308.

30. *See, e.g.*, Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1972) (defendant's introduction of surveillance film at trial resulted in $8,000 award to plaintiff—a substantially lower figure than the damages he claimed).

31. Juge, *supra* note 27, at 8-9. "The lawyer must take the responsibility to tell the investigator the nature of the injury and the film content that will be helpful." *Id.* at 9.

more likely to depict unaltered truth.[32]

The prototypical case involving surveillance by the defendant is an automobile accident, following which plaintiff institutes a suit, complaining of physical disability such as recurrent pain or restricted movement.[33] The injury might involve the neck, back, or legs, and the defendant may doubt the severity of the injuries based on an independent medical examiner's report.[34] The defendant employs a camera-equipped investigator to observe the plaintiff in his usual activities, hoping to capture him on film performing such physical tasks as yard work, shoveling snow, or lifting heavy objects, counter to his claims of injury.[35]

Unlike the "day in the life" plaintiff, who tries to increase the damages awarded, the defendant conducting surveillance tries to decrease the amount of compensation he must pay out. Thus, while the "day in the life" film is used offensively, surveillance materials are used defensively.

III. The Discovery Analysis

As extremely powerful litigation tools,[36] both the "day in the life" film and the surveillance film will tend to dominate more conventional forms of evidence[37] and may influence jurors to weigh their content disproportionately to other evidence offered.[38] Just as the "day in the life" video has the potential to make the personal injury case, the surveillance film has the potential to break the personal injury case, and both types of videos should be treated with caution by the courts.

Most courts currently apply the same standards of admissibility to these video productions as to photographs.[39] This over-simplified

32. The main controversy surrounding use of surveillance films is the potential for inappropriate editing. *See* Collins v. Crosby Group, Inc., 551 So.2d 42 (La. Ct. App. 1989). "[E]diting alone, without any outright trickery, can be very misleading." *Id.* at 44.

33. *See, e.g.*, Shenk v. Berger, 587 A.2d 551 (Md. 1991) (plaintiff claiming neck and back injuries was filmed while not wearing his neck collar, engaging in such activities as squatting and carrying out a trash bag). For "day in the life" cases involving automobile accidents, see Zimmerman v. Superior Court, 402 P.2d 212 (Ariz. 1965) (en banc); Cabral v. Arruda, 556 A.2d 47 (R.I. 1989); Ranft v. Lyons, 471 N.W.2d 254 (Wis. Ct. App. 1991).

34. Juge, *supra* note 27, at 8.

35. Juge, *supra* note 27, at 8.

36. *See supra* notes 5-7 and accompanying text.

37. Thomas v. C.G. Tate Const. Co., Inc., 465 F. Supp. 566, 571 (D.S.C. 1979). *See supra* note 12.

38. Bolstridge v. Central Maine Power Co., 621 F. Supp. at 1204; Haley v. Byers Transp. Co., 414 S.W.2d 777, 780 (Mo. 1967).

39. For admissibility standards, see FED. R. EVID. 401, 403, 1006. Cases explicitly utilizing these standards are set forth *infra* at note 120.

approach ignores the truly unique nature of this kind of evidence, particularly of the "day in the life" film with its disturbing potential for abuses.[40] And while the best way to avoid prejudice to a party is to exclude the video, that is rarely the ruling.[41]

Once the videotape is admitted into evidence, the opposing party is limited in its ability to counter the force of the evidence.[42] But well-prepared litigants who are familiar with the contents of the videos prior to an admissibility hearing might be able to block admission,[43] or to blunt the impact of the "day in the life" presentation with counter evidence.[44] Litigants, therefore, should make beneficial use of the rules of discovery that allow them to access evidence in the opposing party's possession well in advance of trial.

A. Surveillance Films

One initial inquiry a court must make when considering the admission of videotaped evidence concerns the editing process.[45] Most

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40. *See* discussion *supra* part II.A.

41. *See* Preiser & Hoffman, *supra* note 9.

42. *See* Willinger, *supra* note 5, at 27. ("If [the videotape] is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished.").

43. *See, e.g.*, Bolstridge v. Central Maine Power Co., 621 F. Supp. 1202 (D. Me. 1985) (videotape excluded on grounds that it was self-serving, likely to dominate conventional evidence, and not subject to cross-examination); Thomas v. C.G. Tate Const. Co., Inc., 465 F. Supp. 566 (D.S.C. 1979) ("day in the life" video excluded as unfairly prejudicial); Haley v. Byers Transp. Co., 414 S.W.2d 777 (Mo. 1967) (videotape excluded on grounds that it was self-serving and essentially constituted testimony not subject to cross-examination); Repple v. Barnes Hosp., 778 S.W.2d 819 (Mo. Ct. App. 1989) (videotape properly excluded as cumulative of plaintiff's in-court testimony).

44. An example of a successful "counter-attack" is described in *Turnabout is Fair Play*, TRIAL, Sept. 1985 at 79. The editors tell of a medical malpractice case against a hospital and the neonatal care unit for injuries, including blindness, suffered by a prematurely born infant. The parents of the child introduced a "day in the life" film in support of their case. The defendants then countered with their own video, taken in the intensive care nursery of the hospital, to demonstrate to the jurors the busy atmosphere surrounding their "second-to-second, life and death decisions." *Id.* at 81. The jury returned a verdict for the defendants, who credit the video with having "foster[ed] in the jury a sense of the miracle of neonatal intensive care by showing how carefully doctors and nurses treated the delicate infants." *Id.* at 81.

45. Unscrupulous editing was a problem discussed by the court in Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973):

> [T]he camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events. An emergency situation may be made to appear commonplace. That which has occurred once, can be described as an example of an event which recurs frequently. We are all familiar with Hollywood techniques which involve stuntmen and doubles. Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false.

Id. at 150.

courts scrutinize surveillance films for indications of improper editing and will exclude them if they appear to have been edited to the plaintiff's prejudice.[46]

Recently, personal injury plaintiffs have tried to reduce the damaging effects of these films through discovery in advance of trial.[47] Only a handful of states have addressed the discoverability of surveillance films, and the vast majority permit it,[48] finding that result compelled by the modern discovery rules.

A few early decisions held the extreme view that surveillance films constitute attorney work-product and are therefore exempted from discovery.[49] Recently, the Court of Appeals of Wisconsin, in *Ranft v. Lyons*,[50] adopted that view as well, and went so far as to deny discovery of whether or not surveillance even had been conducted.[51]

An approach that would lie between the two extremes would be to allow the plaintiff to discover information regarding whether surveillance had been conducted, by whom, when, where, and what portions of plaintiff's claims the surveillance refutes, but to deny him access to any films or photographs prior to trial. Although no reported decisions take this position, a Maryland Appeals court, in *Shenk v. Berger*,[52] held that it was harmless error to admit tapes that had not been disclosed during discovery.[53]

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46. *See* Guillot v. Miller, 580 So.2d 1104 (La. Ct. App. 1991) (court entertained appeal based in part on plaintiff's contention that editing of surveillance tape prejudiced him).

47. Plaintiffs who are given pre-trial access to surveillance films can attack their accuracy, check for unscrupulous editing, and prepare to "explain" any discrepancies between the deposition or trial testimony and the film footage. For a decision that considered these needs of the plaintiff important enough to require disclosure, see Dodson v. Persell, 390 So.2d 704 (Fla. 1980).

48. Cases where courts permitted plaintiffs to discover surveillance materials include: Galumbus v. Consolidated Freightways Corp., 64 G.T.F. 468 (N.D. Ind. 1974); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973); Zimmerman v. Superior Court, 402 P.2d 212 (Ariz. 1965) (en banc); Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1972); Olszewski v. Howell, 253 A.2d 77 (Del. Super. Ct. 1969); Dodson v. Persell, 390 So.2d 704 (Fla. 1980); Ross v. West, 543 So.2d 307 (Fla. Dist. Ct. App. 1989); Shenk v. Berger, 587 A.2d 551 (Md. 1991); Boldt v. Sanders, 111 N.W.2d 225 (Minn. 1961); Williams v. Dixie Elec. Power Ass'n, 514 So.2d 332 (Miss. 1987); Jenkins v. Rainner, 350 A.2d 473 (N.J. 1976); Cabral v. Arruda, 556 A.2d 47 (R.I. 1989); Prewitt v. Beverly-50th Street Corp., 546 N.Y.S.2d 815 (N.Y. Sup. Ct. 1989).

49. Mort v. A/S D/S Svendborg, 41 F.R.D. 225 (E.D. Pa. 1966); Bogatay v. Montour R.R., 177 F. Supp. 269 (W.D. Pa. 1959); Hickel v. Abousey, 41 F.R.D. 152 (D. Md. 1966).

50. 471 N.W.2d 254 (Wis. Ct. App. 1991).

51. In *Ranft*, the plaintiff only sought discovery of whether she had been the subject of post-accident photographic or video surveillance. The court denied the request, reasoning in part that "the interrogatory questions were undoubtedly prelude to [the request for actual production of the surveillance materials]." 471 N.W.2d at 259, n.6.

52. 587 A.2d 551 (Md. 1991).

53. The court stated, "The law is settled that when a party demands of another discovery of a document or other tangible thing, the adversary, even though resisting the demand,

Analysis of the rules of discovery that plaintiffs utilize to gain pre-trial access to surveillance materials indicates that the same rules would allow "day in the life" defendants to discover those videos. By tracing the surveillance plaintiff's arguments under the rules, one learns that the same rules should govern all videotaped evidence.

1. Established Discovery Rules.[54]—The Federal Rules of Civil Procedure delineating the scope and limits of discovery[55] are relatively broad. Rule 26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged,[56] which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[57]

Under the plain language of the rule, the surveilled plaintiff is entitled to custody of the tangible film, as it is relevant to the pending action, relates to the defense of another party, and is reasonably calculated to lead to the discovery of admissible evidence. However, there are a few exceptions to the very broad general provisions, and surveillance defendants may invoke these exceptions to protect their investigatory films from disclosure.[58]

2. The Work-Product Doctrine.—Among the most crucial of these exceptions is the "work-product" doctrine. First applied in the

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should nonetheless be required to specifically answer whether it has in its possession or under its control such an item or items." 587 A.2d at 555 (*citing* Kelch v. Mass Transit Admin., 411 A.2d 449 (Md. 1980)).

54. This Comment analyzes discovery under the Federal Rules of Civil Procedure and addresses state court decisions where the state's rule is equivalent to the federal rule, unless noted otherwise.

55. FED. R. CIV. P. 26(b).

56. "Not privileged" means not entitled to the attorney-client privilege which protects confidential communications between attorney and client made for the purpose of obtaining legal advice. For a case discussing the distinction, see Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973) (citing Mitchell v. Roma, 265 F.2d 633, 636 (3d Cir. 1959)).

57. FED. R. CIV. P. 26(b)(1).

58. The exceptions discussed are embodied in FED. R. CIV. P. 26(b)(1) and 26(b)(3).

landmark case *Hickman v. Taylor*,[59] the work-product doctrine is now embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[60] The doctrine grants special status to materials prepared by a party[61] in preparation for litigation. The work-product exception bars discovery of those materials that qualify for the protection absent a showing by the seeking party that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[62]

Whether a surveillance film constitutes work product is debatable. The work-product doctrine protects "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[63] As the Wisconsin Court of Appeals noted in *Ranft*,[64] "[a] lawyer's strategic decision to invest a client's resources on photographic or video surveillance . . . reflects [his] evaluation of the strengths or weaknesses of the opponent's case . . . [and] reveals the lawyer's analysis of potentially fruitful areas of investigation."[65] Hence, in Wisconsin, surveillance films constitute work product.

Although the *Ranft* view that surveillance materials are the work-product of the attorney is not the majority view,[66] it is a very recent decision that may influence courts that have not yet addressed the issue to adopt the same reasoning. A defendant who has expended time, money and energy in preparing a surveillance film would be foolish not to argue the *Ranft* angle.

Even if a court finds that a surveillance video constitutes work-product, the defendant may not be able to block discovery. A plaintiff might still be permitted to obtain discovery of the video by demonstrating that a recognized exception to the work-product rule

59. 329 U.S. 495 (1946).

60. Work product is described in the Rules as "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." FED. R. CIV. P. 26(b)(3).

61. Materials prepared by an attorney, agent, or other representative of a party are all protected under Rule 26(b)(3). *See supra* note 60.

62. FED. R. CIV. P. 26(b)(3). In *Hickman*, the Court held that trial-preparation materials are the "work product of the lawyer" and hence are "qualifiedly immune from discovery." The Court preserved the discoverability of relevant and non-privileged facts not available elsewhere, even if otherwise constituting work-product. 329 U.S. at 511. This qualification is found in Rule 26 also.

63. FED. R. CIV. P. 26(b)(3).

64. 471 N.W.2d 254 (Wis. Ct. App. 1991).

65. *Id.* at 261.

66. *See supra* note 9 and accompanying text.

applies.

3. "Substantial Need" and "Undue Hardship" Exception.—Recently, a Connecticut trial court overruled a defendant's objection to discovery of a surveillance video upon plaintiff's showing of substantial need and undue hardship. In *Davis v. Daddona*,[67] the court found that, although the films were "clearly prepared for trial," plaintiff had a substantial need to examine the materials in preparation of his case so that he could challenge their accuracy and authenticity.[68]

Another court indicated how much of a showing of undue hardship the plaintiff must make. In *Cabral v. Arruda*,[69] the court first noted that this type of evidence attacked the very essence of plaintiff's case—the existence and extent of injuries. Next, the court considered how easily such videos can be edited to distort the truth.[70] Finally, the court concluded that a plaintiff's need to carefully scrutinize a surveillance video prior to trial renders its nondisclosure an undue hardship on the plaintiff.[71]

Essentially, the *Cabral* decision allows a plaintiff to discover whether a surveillance video exists and whether it will be presented at trial.[72] Once these facts are established, the video's mere existence constitutes a showing of undue hardship.[73] This ruling is a liberal application of the "undue hardship" principles, and virtually neutralizes the otherwise potent work-product doctrine anytime a defendant intends to use a surveillance video at trial.[74] Surveillance plaintiffs, therefore, must only establish that the videos exist, and undue hardship follows automatically.

An interesting perspective is that expressed by the Florida Su-

67. This unreported trial court opinion can be found at No. CV89 0102503 S., 1990 WL 288643 (Conn. Super. Ct. 1990).

68. *Id.* at 1. A plaintiff's need to examine the film is a genuine concern of the courts. In Guillot v. Miller, 580 So.2d 1104 (La. Ct. App. 1991), the plaintiff unsuccessfully argued "intentional misrepresentation of the taping process," claiming that the surveillance videotape was edited to his prejudice. The court found that the tape had not been edited at all, and did not have the opportunity to decide whether editing was prima facie prejudicial to plaintiff. *Id.* at 1107.

69. 556 A.2d 47 (R.I. 1989).

70. *Id.* at 49.

71. *Id.* at 50. The *Cabral* court's reasoning reflects that which supported disclosure in Jenkins v. Rainner, 350 A.2d 473 (N.J. 1974) and Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973).

72. 556 A.2d at 49.

73. *Id.*

74. Under *Cabral*, where a surveillance video is created solely for the lawyer's own use and not to be presented at trial, its mere existence does not constitute a showing of undue hardship. 556 A.2d at 50.

preme Court in *Dodson v. Persell*.[75] That court held that although surveillance materials may qualify as work-product, as soon as they are intended for trial use, they cease to be protected.[76] Without trying to dress its decision in any recognized exception to the work-product doctrine, the court merely argued from a policy standpoint that surprise tactics at trial contravene justice.[77]

Although the *Dodson* rule comports with the majority view allowing pre-trial discovery of surveillance films, the reasoning departs from the traditional statutory language analysis. The decision ignores the established exceptions to the work-product doctrine, and literally creates an additional exception. *Dodson* may properly be said to have formulated a "surveillance video" exception to the work-product doctrine.

Conceivably, a court could adopt the logical argument advanced by the *Dodson* defendants to rebut the notion of undue hardship, that is, that the information contained on the videotape is readily available to the plaintiff.[78] Indeed, the video merely explores the extent of his injuries, and the plaintiff should already possess that knowledge.

Most courts likely would decline to adopt this view, however. As indicated by the *Cabral* court, plaintiff's hardship does not stem from his need of the factual contents of the tape, but from his inability to otherwise examine the authenticity and integrity of the physical form in which those facts will be presented to the jury.[79]

4. Party's Own Statement Exception.—A surveilled plaintiff who is unable to convince the court of "undue hardship" might obtain the video under an additional exception written into Rule 26(b)(3). This exception to the work-product doctrine allows a party to discover, without demonstrating substantial need and undue hardship, any statement made by him that the opposing party possesses.[80] "Statements" under the rule can include "stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person

75. 390 So.2d 704 (Fla. 1980).
76. *Id.* at 707.
77. *Id.* at 704.
78. *Id.* at 706.
79. See *Cabral*, 556 A.2d at 49-50.
80. The Rule provides: "A party may obtain without the required showing [of substantial need and undue hardship] a statement concerning the action or its subject matter previously made by that party." FED. R. CIV. P. 26(b)(3).

making it and contemporaneously recorded."[81]

The broadness of the description leaves much room for argument by a plaintiff that his activity, captured on camera by defendant, constitutes a discoverable statement. Although the video may contain no soundtrack, and therefore lack the oral nature required by the wording of the rule, it would not be an unreasonable extension of the statute to hold that his physical activities are the equivalent of an oral statement of his physical capabilities.

Moreover, depending upon the jurisdiction of the action, the equivalent state discovery rule might not contain the same wording as the federal counterpart. For example, in *Saccente v. Toterhi*,[82] a New York appeals court allowed the surveilled plaintiff to obtain photographs taken by the defendant's insurance carrier, citing the terms of the state's discovery provision allowing that "[a] party may obtain a copy of his own statement."[83] As there was no requirement that the statement be oral, the court approved the Special Term's ruling that the photographs constituted statements made by the plaintiff.[84]

Discovery of surveillance films is also supported by the policy behind the "party's own statement" exception. The Advisory Committee's Note to Rule 26(b)(3) expresses the following concern:

> Discrepancies between [a party's] trial testimony and earlier statements may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced . . . .[85]

Arguably, surveillance plaintiffs may cite this policy objective in support of discovery. They could assert that the videotape of their actions, recorded without their knowledge, creates just the problem that the Advisory Committee was trying to eliminate: An injured plaintiff who gradually recovers will not likely be able to recall the exact dates on which he experienced relief or gained some mobility, and therefore, the details of his testimony may conflict with the evidence on videotape, perhaps through no dishonesty of the plaintiff, but merely poor memory. Hence, the tape can distort the integrity of

81. *Id.*
82. 35 A.D.2d 692 (N.Y. App. Div. 1970).
83. *Id.*
84. *Id.*
85. FED. R. CIV. P. 26 advisory committee's note.

the plaintiff, affecting his credibility with the jurors, and should be discoverable as the plaintiff's own statement.

5. Impeachment Evidence Exception.—When a court denies surveillance materials the status of work-product and permits a plaintiff to discover them,[86] the defendant may be able to keep the materials from the plaintiff's pretrial reach by arguing that they are to be used at trial for impeachment purposes only.[87] In this regard, defendants fear that a plaintiff with pretrial access to surveillance films will, at trial, dismiss any discrepancies between his claims of disability and the videotaped activity by explaining away the activity filmed as an "isolated incident" having occurred on "a good day" or as an activity that he can do but that is painful.[88] Defendants argue against disclosure on the ground that it would nullify this important evidence's ability to expose fraudulent or exaggerated personal injury claims.

Several courts have determined that surveillance films serve as substantive[89] as well as impeachment evidence, and permit discovery of the materials on that ground.[90] Still, there is a basis for exclusion if the defendant can demonstrate that the nature of the evidence requires extra protection.

The Advisory Committee Note to the 1970 Amendments to Rule 26[91] provides two examples of when courts might exercise discretion and prevent discovery of otherwise relevant and non-privileged evidence.[92] The Note states, "Rule 26(c) . . . confers broad powers on the courts to regulate or prevent discovery even though

86. For courts denying surveillance films work-product status, see Zimmerman v. Superior Court, 402 P.2d 212 (Ariz. 1965) (en banc); Prewitt v. Beverly-50th Street Corp., 546 N.Y.S.2d 815 (N.Y. Sup. Ct. 1989).

87. "Impeachment evidence" is that designed to discredit the witness, i.e., to reduce the effectiveness of his testimony by bringing froth evidence explaining why the jury should not put faith in his testimony. "Impeachment evidence" includes prior inconsistent statements, bias, attacks on character of a witness, prior felony convictions, and attacks on capacity of the witness to observe, recall, or relate. Zimmerman v. Superior Court, 402 P.2d 212 (Ariz. 1965) (en banc).

88. Juge, *supra* note 27, 8-9. A defendant can refute such testimony by videotaping the plaintiff's activities on several occasions separated by time, and by not editing out repeated activities, thereby establishing the constancy of the plaintiff's mobility. *It.* at 8.

89. "Substantive evidence" is that offered for the purpose of persuading the trier of fact as to the truth of a proposition asserted. *Zimmerman*, 402 P.2d at 215.

90. *See, e.g.*, Zimmerman v. Superior Court, 402 P.2d 212 (Ariz. 1965) (en banc); Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1972); Boldt v. Sanders, 111 N.W.2d 225 (Minn. 1961); Williams v. Dixie Elec. Power Ass'n, 514 So.2d 332 (Miss. 1987).

91. The 1970 Amendments to the Federal Rules of Civil Procedure codified the work-product doctrine. FED. R. CIV. P. 26 advisory committee's note.

92. *See* FED. R. CIV. P. 26 advisory committee note to 1970 amendments (explaining the scope of the Rules and the court's discretion).

the materials sought are within the scope of 26(b) . . . [T]he courts have in appropriate circumstances protected materials that are primarily of an impeaching character."[93]

In *Bogatay v. Montour Railroad Company*,[94] a United States District Court applied a local rule protecting impeaching evidence from disclosure.[95] Noting that surveillance materials might have value as substantive evidence, the court declined to allow such a mere possibility to control the discoverability of the materials.[96]

The court repudiated any conflict with the Federal Rules' broad discovery provisions by assuring that if and when the defendant or the court determines that the materials indeed are to be used substantively, they would be discoverable by the plaintiff.[97] Additionally, the court emphasized the fairness of its decision by minimizing the plaintiff's need for the information: "The least [the plaintiff] should be required to do is to state whether he can carry on work. He should state this honestly and not make such answer depend on whether the defendant has or has not observed his activities."[98]

Currently, the trend is for courts to allow discovery of surveillance materials even where their primary purpose is to impeach the plaintiff's testimony because it is generally held that the impeachment value can be preserved by allowing the defendant to depose the plaintiff and elicit extensive testimony with regard to his injuries prior to turning over the surveillance videotapes.[99] Such a practice by courts may not provide full protection of the impeachment value of surveillance films, since plaintiffs could discover their existence through interrogatories, and tailor their deposition accordingly.

B. "Day in the Life" Films

1. Work-Product.—By the language of Rule 26(b)(3), a "day in the life" film qualifies as work-product of the plaintiff's attorney.[100]

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93. *Id.*

94. 177 F. Supp. 269 (W.D. Pa. 1959).

95. A local court rule provided that impeachment matter is not discoverable. U.S. DIST. CT. R. W.D. PA., LOCAL RULE 5(II)(G).

96. 177 F. Supp. 269, at 270.

97. *Id.* Discovery at such a late time would likely eliminate any chance for reparation by the plaintiff.

98. *Id.*

99. Some of the cases that have preserved the impeachment value of the video in this manner include: Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973); Zimmerman v. Superior Court, 402 P.2d 212, 218 (Ariz. 1965) (en banc); Davis v. Daddona, No. CV89 0102503 S., 1990 WL 288643 (Conn. Super. Ct. 1990); Shenk v. Berger, 587 A.2d 551 (Md. 1991); Cabral v. Arruda, 556 A.2d 47 (R.I. 1989).

100. *See* discussion *supra*, part III.A.2.

It is a tangible thing prepared for trial by the party's attorney. Accordingly, the defense should be prepared to argue rules and policy to convince the court that an exception to the work-product doctrine applies.

2. The Policy of Liberal Discovery.—When the Federal Rules of Civil Procedure were substantially revised in the 1960s, the drafters had several purposes in mind: (1) to identify issues in dispute;[101] (2) to facilitate trial preparation;[102] (3) to eliminate "trial by ambush;"[103] and (4) to promote settlements without having to go to trial.[104] To best accomplish these goals, courts favor a philosophy of liberal discovery.[105] Defendants should vigorously argue this policy in support of discovery of "day in the life" videotapes.

3. "Substantial Need" and "Undue Hardship".—Although the "party's own statement" exception to the work-product rule is inapplicable to the "day in the life" video,[106] the defendant here has a much stronger argument of "substantial need" and "undue hardship" than the surveilled plaintiff.[107] In addition to the defendant's "need" for the videotape in preparation of his case in order to evaluate plaintiff's claim and prepare a defense,[108] he also, perhaps even

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101. Dodson v. Persell, 390 So.2d 704, 706 (Fla. 1980).

102. *Id.*

103. Williams v. Dixie Elec. Power Ass'n, 514 So.2d 332 (Miss. 1987).

104. Dodson v. Persell, 390 SO.2d 704 (Fla. 1980). Enabling parties to evaluate the settlement value of a case is a legitimate and important role of discovery. Daniels v. Nat'l R.R. Passenger Corp., 110 F.R.D. 160 (S.D.N.Y. 1986). FED. R. CIV. P. 26 advisory committee's note to the 1970 amendments, which addresses discovery of insurance coverage, states, "Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases . . . ." *Id.*

Disallowing pretrial discovery of "day in the life" videos could have a devastating effect on settlement possibilities. Unable to preview the plaintiff's most powerful piece of evidence, the defense might imagine the worst and hence be pressured to settle for much more than the claim is worth. On the other hand, the defense might forego any discussion of settlement, thus necessitating a trial which might have been avoided.

For cases favoring discovery of "day in the life" videos for this reason, see Crist v. Goody, 507 P.2d 478, 499 (Colo. App. 1972); Clevite Corp. v. Beckman Instruments, Inc., 257 F. Supp. 50 (D.C. Cir. 1966); Lucas v. District Court, 345 P.2d 1064 (Colo. 1959) (en banc). For a discussion of using video as a settlement negotiation technique, see Windle Turley, *The Video Documentary: A Powerful Settlement Tool*, TRIAL, July 1982, at 89.

105. WIlliams v. Dixie Elec. Power Ass'n, 514 So.2d 332, 334 (Miss. 1987).

106. This is so because, unlike the surveillance film, where the party seeking discovery is the subject of the film, the "day in the life" video's subject is the plaintiff, and the defense is seeking the video. In essence, the defense is seeking plaintiff's statement.

107. For surveillance plaintiffs' "substantial need" and "undue hardship" arguments see Davis v. Daddona, No. CV89 0102503 S., 1990 WL 288643 (Conn. Super. Ct. 1990); Cabral v. Arruda, 556 A.2d 47 (R.I. 1989).

108. FED. R. CIV. P. 26 advisory committee's note to the 1983 amendments advised that

more than the surveilled plaintiff, needs to examine the film for photographic deception, improper editing, exaggeration, inaccuracies, and misrepresentations.[109]

Once substantial need is established, the finding of "undue hardship" should follow automatically from nondisclosure, as it does in the case of surveillance films.[110] Rule 26 provides for disclosure of protected work-product upon a showing that "the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[111] By the very nature of the evidence—its form, its impact, and its permanency—there is no substantial equivalent of a "day in the life" film.[112]

4. Substantive Evidence.—The "day in the life" film constitutes substantive rather than impeachment evidence.[113] Consequently, unlike the surveillance situation, if the court determines that the requisite showings have been made, the "day in the life" plaintiff cannot argue that the film will be used as impeachment evidence.[114] Hence, once the court finds "substantial need" and "undue hardship," the defense can obtain the film[115] unless the plaintiff can demonstrate that the film contains protected mental impressions, conclusions, opinions, or legal theories of his attorney.

IV. Benefits of Pretrial Discovery in "Day in the Life" Cases

As should be evident by now, a surveillance plaintiff's best tactical resistance mechanism is intense utilization of discovery. Despite the success these plaintiffs have enjoyed in countering the impact of the crude yet telling surveillance video, defendants in "day in the life" actions continue to persevere in their misdirected efforts to have

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"the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case."

109. See discussion *supra* part III.A.3.

110. *See* discussion *supra* part III.A.3.

111. FED. R. CIV. P. Rule 26(b)(3).

112. A plaintiff might argue that the "substantial equivalent" could be obtained by deposing the plaintiff, his treating and evaluating physicians, and his family. However, that weakens the plaintiff's position at the admissibility hearing that the video is not merely cumulative. Examples of cases where "day in the life" videos were excluded on the ground that they were merely cumulative of other evidence are Butler v. Chrestman, 264 So.2d 812 (Miss. 1972); Repple v. Barnes, 778 S.W.2d 819 (Mo. Ct. App. 1989).

113. The "day in the life" film attempts to illustrate, or prove, the extent of the plaintiff's injuries, not to discredit the testimony of any witness.

114. The video is not intended to impeach the defendant's testimony, but only to illustrate the plaintiff's.

115. The same analysis and arguments should also apply if the defendant seeks to obtain the edited-out footage of the "day in the life" production.

these polished dramatizations excluded from trial.

Today, defendants' attempts to block the videos are virtually futile. In a few cases, most of which pre-date the numerous how-to guides now available to plaintiffs' attorneys,[116] defendants were able to block admission of "day in the life" films.[117] But by now, plaintiffs' attorneys are far more adept at fulfilling the creative edge without exceeding the limits for admissibility.[118] Some attorneys charge that the admissibility standards for "day in the life" films are ill-suited to serve as fair criteria because they fail to treat the inherently prejudicial nature of this type of presentation.[119]

Most courts liberally, and perhaps simplistically, apply the same standards of admission to "day in the life" films as they do to still photographs.[120] No court has formulated special admissibility rules for "day in the life" films designed to better balance the equities, but a number of courts have expressed concern about the forceful impact of these videos and have taken a variety of measures, depending on the individual case, to avoid prejudicing the defense with the presentation of the evidence.[121]

Each of the courts' protective measures occurs somewhat late. The defendant's best protection is preparation, which requires careful and repeated viewing of the videotape in advance of trial. As with the surveillance videos, only an opposing party who has studied the film in advance of trial will have any meaningful opportunity to investigate the authenticity and accuracy of the "day in the life"

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116. *See supra* note 19.

117. *See supra* note 43.

118. *See* discussion *supra* part II.A.

119. See Churchill, *supra* note 22. "Conversations and dialogue in the films are being submitted as evidence at trial, slipping past the usual discovery rules. This is accomplished simply by inviting a video camcorder operator rather than a court reporter to take it all down." *Id.* at 24.

120. For cases explicitly applying this standard, see Thomas v. C.G. Tate Const. Co., Inc., 465 F. Supp. 566 (D.S.C. 1979); Barenbrugge v. Rich, M.D., 490 N.E.2d 1368 (Ill. App. Ct. 1986); Strach v. St. John Hosp. Corp., 408 N.W.2d 441 (Mich. Ct. App. 1987); Trapp v. Cayson, 471 So.2d 375 (Miss. 1985); Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791 (W. Va. 1986). Initially, the plaintiff must lay a proper foundation for the evidence, testifying that it is a fair and accurate depiction. The videotape will be admitted if it is relevant to the action, not cumulative of other evidence, and then only if it is more probative than prejudicial. *See* FED. R. EVID. 401, 403.

121. *See, e.g.*, Morley v. Superior Court of Arizona, 638 P.2d 1331 (Ariz. 1982) (trial court properly bifurcated trial into liability phase and damage phase, preserving defendant's right to an unbiased jury); Lawton v. Jewish Hosp. of St. Louis, 679 S.W.2d 370 (Mo. Ct. App. 1984) (where tape contained inflammatory portions and audible groans and grunts, trial court properly ordered that the objectionable footage be excised and the videotape be played without sound); Campbell v. Pitt County Mem. Hosp., Inc., 352 S.E.2d 902 (N.C. Ct. App. 1987) (trial court properly gave limiting instruction to jury in order to ensure that proper weight be given to all evidence). *But see* Roberts v. Stevens Clinic Hosp. Inc., 345 S.E.2d 791 (W. Va. 1986) (failure to give limiting instruction was not erroneous as a matter of law).

videotape.

The "day in the life" defendant who has carefully combed through the tape will be able to indicate to the judge the portions that are inappropriate and what protective measure should be taken. Moreover, a prepared defense will be better able to minimize the impact of the scenes ultimately viewed by the jury without appearing unsympathetic or insensitive.

One case should quickly convince defense attorneys to assert pretrial discovery rights to their fullest. In *Roberts v. Sisters of St. Francis Health Services*,[122] the medical malpractice defendant obtained a copy of the plaintiff's "day in the life" video and showed it to the jury pool prior to *voir dire*.[123] The trial court then asked prospective jurors if what they had seen "would cause them to be biased or prejudiced in such a way that they would be unable to render a verdict based upon the evidence."[124] Four persons were excused for cause when they indicated that the film had aroused such sympathy that they did not feel able to render a fair and impartial decision.[125]

From a policy standpoint, allowing the defense to obtain the video well before trial and to prepare his admissibility arguments will save the court valuable time when the film is eventually introduced into evidence.[126] Preservation of scarce judicial resources is so important that the policy might even favor such innovation as allowing the trial judge to preview the film as well, so that she is familiar with its contents when the defense raises objection at trial.

V. The Present Threat to "Day in the Life" Defendants' Discovery Rights

In *Cisarik v. Palos Community Hosp.*,[127] the Supreme Court of Illinois declined to adopt special guidelines governing the making of "day in the life" films that would permit defendant to attend and ask questions during the filming.[128] In the course of its decision, the court also held that defendant was not entitled to obtain the video or

122. 556 N.E.2d 662 (Ill. App. Ct. 1990).
123. *Id.* at 668.
124. *Id.*
125. *Id.*
126. If the defendant has not yet viewed the film when it is introduced, he will make an objection, the court will hold an admissibility hearing or an in camera viewing, arguments will be heard, followed by the decision to exclude, admit, or admit with conditions. Such delay and attention to the film may pique the jurors' curiosity, causing them ultimately to pay greater attention to the film, if and when it is finally showed, and to weigh that evidence more heavily.
127. 579 N.E.2d 873 (Ill. 1991).
128. *Id.* at 874.

any unused footage prior to its introduction into evidence at trial.[129]

The defendant sought advance notice and permission to be present and partake in the filming.[130] In addition, the defense wanted to receive a copy of the final production and all unused footage for possible use during the defense presentation.[131] All of these requests were grouped together in the form of a motion for a protective order which the trial court granted and the Supreme Court overturned.[132]

In a one-page opinion, the higher court held, "The preparation of such evidence falls within the work-product of the lawyer who is directing and overseeing its preparation."[133] This holding, referring to the preparation of the video, addressed only those aspects of the defendant's discovery requests that related to his being present at the filming. That specific holding did not address the defendant's requests for a copy of the finished video and the unused footage. However, the court's ultimate decision reversed the entire decision of the intermediate court, including the discovery portions. Thus, the higher court not only declined to grant added protection through discovery, but also revoked most of the traditional discovery rights of the defendant. As a result, in Illinois, all "day in the life" defendants will be truly "surprised" at trial.[134]

The *Cisarik* defendant's requests were summarily denied on the basis of several cases dealing with the admissibility of—rather than

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129. *Id.* at 875.

130. *Id.* at 874. The defendant's request, while out of the ordinary, was not unheard of. *See* Herlihy, *supra* note 2, at 154 (advocating a "balanced, two-party production" of "day in the life" videos); Passanante, *supra* note 3 (advocating prior notice of taping to defendant and trial court to avoid surprise at trial).

131. 579 N.E.2d 873.

132. The Appellate Court of Illinois reversed the trial court's order requiring the presence of defendant at the filming, but upheld that portion of the order which allowed defendant to view, during pretrial discovery, all of the footage taken. The Supreme Court removed all conditions.

133. *Cisarik*, 579 N.E.2d at 874.

134. A comparison of the relative degrees of "surprise" that will be faced at trial by either the "day in the life" defendant or the surveillance plaintiff yields an interesting observation. There is a fundamental difference between the plaintiff's "need" for discovery of the surveillance video and the defendant's "need" for discovery of the "day in the life" film. Nothing depicted in the surveillance film should come as a surprise to the plaintiff. What the plaintiff seeking disclosure really wants to know is how much the defendant knows.

The defendant in the "day in the life" case is much less fortunate. He lacks the advantage of knowing the nature of plaintiff's disabilities and how they affect life for plaintiff and family members. What he really wants to know is what, exactly, he is to be held responsible for. The defendant cannot prepare a defense based on causation or fact until he learns the extent of the charge against him. Nor can he evaluate the settlement value of the case.

Yet it is the surveillance plaintiff who routinely wins the right to disclosure, and the "day in the life" defendant whose right is seriously threatened. And while the two types of films have contrasting objectives, their evidentiary statuses are alike, and they should be treated uniformly on the discovery level.

the discovery of—"day in the life" films.[135] The court reasoned, "[t]he test of this evidence will occur when and if it is offered into evidence. That is the proper time for the trial court to deal with its admissibility."[136]

Thus, in focusing on the issue of admissibility, the court sidestepped the issue of the pretrial discoverability of the videos, and yet its decision flatly denied defendant's requests.[137] Even the dissenting justice charged, "[t]he majority opinion misidentifies the issue in the present appeal, eliminating defendants' discovery rights on the ground that the proposed film must ultimately satisfy tests for admissibility at trial . . . . [T]ests of admissibility are not a substitute for discovery rights."[138]

The result is that in addition to refusing defendant extra protection, the court removed the built-in safeguards of settled rules of discovery. This may have been inadvertent in the wake of defendant's unusual requests to be present and participate in the filming. Nevertheless, the decision constitutes a new handling of pretrial discovery issues, and puts "day in the life" defendants at an obvious and remarkably unfair disadvantage.[139]

Cisarik eliminates the defendant's option of utilizing the video at *voir dire*.[140] The decision deprives "day in the life" defendants of "a meaningful opportunity to 'probe an important area of potential bias and prejudice' during *voir dire*" recognized by the Court of Appeals in *Roberts*.[141] It ignores the extraordinary nature of "day in the life" videos, and seriously impedes the defendant's right to an unbiased jury.

VI. Special Rules Governing "Day in the Life" Videotapes

A "day in the life" defendant seeking permission to be present at the filming probably would not succeed even if the court applied

135. 579 N.E.2d at 874.

136. *Id.* at 875.

137. Strategically, the defendant should have made one motion for a protective order allowing him to be present and to ask questions during the filming, and a separate request for production of discovery materials under the established rules of discovery. Perhaps then the court would have considered the latter request as the routine discovery matter that it was, separate and distinct from the admittedly unique request to attend the production. Then, the impact of the decision on defendant's ability to make his case would have been minimal.

138. *Cisarik*, 579 N.E.2d at 876 (Miller, C.J., dissenting).

139. *See supra* note 108 and accompanying text.

140. This is so because the defense will not have access to the videotape until it is admitted at trial, long after the jury has been selected.

141. 556 N.E.2d 662, at 668 (Ill. App. Ct. 1990) (citing Gasiorowski v. Homer, 365 N.E.2d 43 (Ill. App. Ct. 1977)).

the traditional discovery analysis. Such a unique request is beyond the realm of discovery, and plaintiff could counter the undue hardship claim by arguing that the finished film is the substantial equivalent of the actual filming. In at least one state, a defendant is able to attend the filming of the videotape because the production is viewed as a deposition.[142] However, few courts are likely to adopt this view, in light of the nearly universal treatment of "day in the life" video as the equivalent of photographic evidence for admission purposes.[143]

VII. Conclusion

Courts in both "day in the life" and surveillance cases stress that the videos should be treated the same as photographs for admissibility purposes. Likewise, they should be treated the same as photographs for discovery purposes. In surveillance cases, courts entertaining plaintiffs' motions to compel production have adopted such a practice. "Day in the life" defendants, however, have concentrated strictly on admissibility, and have not given the courts the occasion to set such a rule.

Notwithstanding *Cisarik* and its virtual abandonment of Rule 26, the established rules of discovery are quite accommodating to "day in the life" defendants.[144] Now that *Cisarik* poses a threat to their ability to counter the impact of the videos, it is imperative that "day in the life" defendants in every state vigorously assert their rights under the available rules of discovery.

Defendants must be more assertive in seeking pretrial discovery of the films. They should still view them carefully for possible admissibility problems, but should take a more active role in utilizing the videotapes to their own advantage. This can be accomplished by reviewing the unused footage for material which would support their own cases, and, more importantly, by screening potential jurors for bias through the use of the videotape during *voir dire*.

The courts, in turn, would be wise to recognize the unique nature of these powerful films, and allow the defense to take any necessary precautions to avoid prejudice. If defendants carefully phrase

142. Campbell v. Pitt County Mem. Hosp., 352 S.E.2d 902 (N.C. Ct. App. 1987), *rev'd on other grounds*, Johnson v. Ruark Obstetrics, 395 S.E.2d 85, 95 (N.C. 1990). *But see* Cisarik v. Palos Community Hosp., 549 N.E.2d 840, 842 (Ill. App. Ct. 1989), *rev'd in part*, 579 N.E.2d 873 (Ill. 1991) (rejecting this view on the ground that a "day in the life" video is not evidence at all until admitted at trial).

143. *See supra* notes 22 and 119 and accompanying text.

144. *See* discussion *supra* part III.B.1-4.

their requests in terms of established rules of discovery, courts can only comply with the policy of the rules of discovery by granting those requests. Only with vigilance can "day in the life" defendants combat prejudice and re-balance the equities that have been tilted by accelerated technological advancements.

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