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A Day in the Life for the Defense

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Using Day in the Life Videos to Defend Claims Both at Mediation and in Trial

While the use of day in the life videos by plaintiffs in personal injury cases is nothing new, defendants are now exploring ways they can use the same type of documentary videos to bolster their cases before mediators and juries. This article will address:

- The use of day in the life videos generally;
- Admissibility of day in the life videos at trial; and
- Other considerations for the defense prior to utilizing day in the life videos.

A Brief Introduction to Day in the Life Videos

Day in the life videos can be a valuable tool as the “video medium is unsurpassed in its ability to communicate the consequences of personal injury and disability in a totally captivating and compelling way.” In addition to 40 Am. Jur. Trials 249 *Using or Challenging a “Day-in-the-life” Documentary in a Personal Injury Lawsuit* § 1 (1990), quoted above, the reader is directed to 39 Am. Jur. Trials 261 *Planning and Producing a “Day-in-the-Life” Videotape in a Personal Injury Lawsuit* (1989), both of which contain an excellent discussion on the use of day in the life videos in litigation.

Admissibility of Day in the Life Videos

Day in the life videos present Rule 403 and hearsay concerns which may compel their exclusion from trial. See *Thompson v. TRW Auto. U.S., LLC*, 2014 WL 2612271 (D. Nev. June 11, 2014). In general, Courts are concerned with utilizing day in the life videos solely for the purpose of eliciting sympathy from a jury. From the defense standpoint, this means a promotional video promoting the defendant company or the merits of truck driving, both of which are unlikely to be admissible.

In *Bannister v. Town of Noble*, 812 F.2d 1265 (10th Cir. 1987), the Tenth Circuit considered whether a district court abused its discretion in admitting into evidence a day in the life film. In reaching its conclusion that the district court did not abuse its discretion by admitting the film, the Tenth Circuit relied on four factors: (1) whether the video “fairly represent[s] the facts with respect to the impact of the injuries on the plaintiff’s day-to-day activities;” (2) the likelihood that the plaintiff’s awareness of being video recorded would cause self-serving behavior, such as “exaggerated difficulty in performing extraordinary tasks” or “conduct that serves little purpose other than to create sympathy;” (3) “the dominating nature of film evidence;” and (4) whether the video “could distract the jury because the benefit of effective cross-examination is lost.” *Id.* at 1269-70. In *Bannister*, the video demonstrated the plaintiff’s adaptation to his injury, including him “getting around school, getting into his car, pumping gasoline for his car, and performing several different tasks in his home.” *Id.*

Federal and state courts have cited *Bannister* in ruling on the admissibility of day-in-the-life videos. See, e.g., *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 687 (7th Cir. 1995) (video depicting plaintiff’s daily routine was admissible); *Gaddy v. Terex Corp.*, 2018 WL 11350314, at *1-2 (N.D. Ga. Dec. 5, 2018) (video showing plaintiff’s day-to-day activities were admissible, after removing portions of the video showing a particularly difficult day when plaintiff still had an active wound); *Jones v. City of Los Angeles*, 20 Cal. App. 4th 436, 442, 24 Cal. Rptr. 2d 528 (1993) (video was admissible as it “graphically demonstrated” plaintiff’s “need for constant medical attention in a manner oral testimony could not convey”); *Ruiz v. Walmart Inc.*, 2022 WL 2199832 (C.D. Cal. Feb. 28, 2022) (portions of video showing plaintiff’s daily routine, without narration, were admissible); and, *Thompson v. Polaris Indus. Inc.*, 2019 WL 2173965 (D. Ariz. May 17, 2019) (video with no audio depicting plaintiff “rising in the morning, being dressed and groomed, leaving the house to attend outpatient rehabilitation before returning home where he is assisted by his caregiver with showering” was not unduly prejudicial).

A Day in the Life for the Defense

In contrast, in *Thompson v. TRW Automotive*, the district court refused to allow two day in the life videos at trial. The first video was “heavily produced,” with “dramatic narration” by both the plaintiff and her mother and a soundtrack “designed to evoke the jury’s sympathy.” *Id.* at *2. The second video was mostly in “interview format.” *Id.* Although these videos were excluded, the district court noted that video clips depicting injuries as the plaintiff was experiencing them, or videos of plaintiff’s daily routine with her son could be admissible without audio and with the aid of testimony at trial.

Unique Issues to the Use of Day in the Life Videos by the Defense

Day in the life videos could be produced to address a number of different topics, including:

- Claims of negligent hiring, training, retention, or supervision, which would likely be based principally on the deposition of a compliance expert or a safety/training manager.
- Reptile questions regarding safety.

However, even if the video is admissible under the *Thompson* factors discussed above, there are other considerations the defense should consider prior to spending the time and expense to produce a day in the life video.

Initially, it should be noted that regardless of what point in the trial you intend on utilizing the video, counsel should disclose the video well before trial. Even if the video is only for rebuttal, it would be extremely difficult to argue that you decided at the last minute to direct and record a video. Informing plaintiff of this strategy however, could have the adverse effect of providing plaintiff a roadmap of the defense. In addition, once the plaintiff becomes aware the defense intends on using a video at trial, the plaintiff is likely going to attempt to avoid opening the door to the video. This will likely require defense counsel to lay the foundation for the video well in advance, likely during depositions.

It is important to remember that counsel may be required to provide an unedited copy of the video. See *Csiszer v. Wren*, 2009 WL 10707836 (W.D. Ark. Feb. 5, 2009) (permitting plaintiffs to create another day-in-the-life video provided that defendants are given an unedited version); *Chesler v. Trinity Indust., Inc.*, 2002 WL 1822918, at *7 (ordering the plaintiff to produce a complete unedited version of a day-in-the-life video to the defendant); and, *Ruiz*, 2022 WL 2199832 at *22. Similar to surveillance, the unedited day in the life video could inadvertently create adverse evidence.

Thinking Outside the Box

Mediation and other pre-suit settlement negotiations offer additional use of such videos without being restricted by the rules of evidence. Consider the use of such videos to “humanize” the trucking industry, motor carrier, or a particular driver. It may ultimately prove to be inadmissible at trial, but it may be persuasive in another setting.

Further, you may want to consider using video to illustrate what treatment may be available and/or the potential recovery for persons with similar injuries to your plaintiff. An aggressive approach may include subpoenaing the complete video from plaintiff’s day-in-the-life presentation to show the plaintiff’s actions and abilities captured by the camera that the plaintiff may not want a jury to see. Think of it as the plaintiff performing surveillance on him or herself. This approach is gaining some traction with clients and may become more prevalent in the future.

The Bottom Line

While a day in the life video is a unique and creative way to humanize the defendant company and if done effectively could help minimize a defendant's exposure at trial, counsel must consider how they are going to get the video into evidence well in advance of any trial. In addition, counsel will need to be aware of how such a video may affect the defense strategy during depositions, and whether the potential to create adverse evidence is outweighed by the benefits of informing the jury on a certain topic through video.