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ADMISSIBILITY OF "DAY IN THE LIFE" FILMS IN VIRGINIA

Mahlon G. Funk, Jr.*
Harry J. Hicks, III**

I. INTRODUCTION

In recent years, audiovisual technology¹ has taken an increasingly prominent position in courtroom procedures.² Defense attorneys have traditionally introduced motion pictures of allegedly injured plaintiffs caught in some intense physical activity.³ More recently, courts have allowed the use of audiovisual depositions, which afford scrutiny of the characteristics and mannerisms of deposed witnesses.⁴ In the midst of this evidentiary trend, plaintiffs'

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1. The term "audiovisual technology" will sometimes be used in this article to refer to a variety of instruments including sound recordings, photographs, films, and videotapes.

2. See, e.g., Perlman, *Seeing is Believing — Making Proof More Meaningful*, TRIAL, June 1981, at 34, which provides in pertinent part:

New concepts and techniques are being used with increasing frequency to communicate the language of the suffering, maimed, and injured victims of our society. It is no longer adequate to present an injury case through testimonial evidence alone. Modern day technology now makes it possible to present evidence in such a way that all of the senses of the jury have been touched. It is a trial lawyer's obligation to educate, stimulate, and involve the jury to as great a degree as possible.

Id.

3. These films have universally been held admissible. See *Mirabile v. New York Cent. R.R.*, 230 F.2d 498 (2d Cir. 1956); *Kortz v. Guardian Life Ins. Co.*, 144 F.2d 676 (10th Cir.), cert. denied, 323 U.S. 728 (1944); *McGoorty v. Benhart*, 305 Ill. App. 458, 27 N.E.2d 289 (1940); *Balian v. General Motors*, 121 N.J. Super. 118, 296 A.2d 317 (1972); *DeBattiste v. Anthony Laudadio & Son*, 167 Pa. Super. 38, 74 A.2d 784 (1950). See generally Sweet, *The Motion Picture as a Fraud Detector*, 21 A.B.A. J. 653 (1935); Annot., 62 A.L.R.2d 686, 698 (1958).

4. The utilization of audiovisual depositions has been particularly noteworthy in the situation where a medical witness will be unavailable at trial. See *State v. Moss*, 498 S.W.2d 289 (Mo. 1973); *Rubino v. G.C. Searle & Co.*, 73 Misc. 2d 447, 340 N.Y.S.2d 574 (1973); Perlman, *supra* note 2, at 34. The *Rubino* court provided the rationale supporting the use of audiovisual depositions when it held that "the finder of fact at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audiovisual devices." 73 Misc. 2d at ____, 340 N.Y.S.2d at 576 (quoting 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE 426 (1979)).

counsel now frequently seek admission of "day in the life" films. Such films purport to depict for the jury in graphic detail the effects that a severe personal injury can have on the plaintiff's life.⁵ Admission of these films is held to be within the discretion of the trial judge.⁶ The recurrent theme of available case law is that "day in the life" films are not inadmissible as a matter of law,⁷ but rather admissibility turns upon the circumstances of each case, and the contents and presentation of each film.⁸ Successful admission of the film presents many theoretical and practical challenges to the proponent because a wide spectrum of evidentiary concepts and principles are involved in the admissibility analysis. The question of admissibility in Virginia has yet to be addressed by the state supreme court.⁹

This article will initially highlight the nature of these films,¹⁰ and outline leading authority supporting their admission.¹¹ Next, the article will examine the proponent's foundation requirements,¹² and analyze the evidentiary objections that will be raised by de-

5. See generally Begam & Begam, *A Day in the Life of a Quadriplegic*, TRIAL, Mar. 1978, at 25; Preiser & Hoffman, *Day in the Life Films — Coming of Age in the Courtroom, Part I*, TRIAL, Aug. 1981, at 26.

6. See *Reggio v. Louisiana Gas Serv. Co.*, 333 So. 2d 395, 402 (La. App. 1976); *Capara v. Chrysler Corp.*, 71 A.D.2d 515, —, 423 N.Y.S.2d 694, 698 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981); *Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79, 84 (Tex. Civ. App. 1983).

7. Proponents of "day in the life" films have enjoyed a great deal of success in admitting the films into evidence. See, e.g., *Grimes v. Employers' Mutual Liab. Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977); *Maher v. General Motors Corp.*, No. 74-1660 (10th Cir. July 2, 1975), *cited in* 19 ATLA News L. 59 (1976); *Pisel v. Stamford Hosp.*, 180 Conn. 314, 430 A.2d 1 (1980); *Capara v. Chrysler Corp.*, 71 A.D.2d 515, 423 N.Y.S.2d 694 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981); *Air Shields, Inc. v. Speers*, 590 S.W.2d 574 (Tex. Civ. App. 1979); *Farmer v. Boyles Bros. Drilling Co.*, *cited in* 18 ATLA News L. 8 (1975).

8. Despite the general tendency to admit these films, see *supra* note 7, there have been a number of instances in which the court held that the particular film involved was inadmissible. See, e.g., *Butler v. Chrestman*, 264 So. 2d 812 (Miss. 1972). See also *infra* notes 147-66 and accompanying text.

9. The Virginia Supreme Court has addressed the admissibility of several types of evidence similar to "day in the life" films. See *infra* notes 180-229 and accompanying text. However, no reported case has addressed the admissibility of these films in Virginia. Mr. Funk, one of the authors, represented the plaintiff in a case where a "day in the life" film was admitted, over defendants' objection, using the procedure outlined in this article. The case, *Talbot v. Martin*, No. LH46 (Cir. Ct. City of Richmond, Va. Sept., 1984), resulted in a \$1,000,000 verdict for the plaintiff.

10. See *infra* notes 15-20 and accompanying text.

11. Three decisions have served as the primary precedential vehicles for the admission of "day in the life" films in other jurisdictions. See *infra* notes 21-36 and accompanying text.

12. See *infra* notes 37-49 and accompanying text.

fense attorneys.¹³ This article will proceed to outline available Virginia authority and demonstrate persuasive analogies supporting the admissibility of these films.¹⁴ On the strength of these analogies, and the evidentiary tools provided the proponent, this article will conclude with the proposition that the Virginia Supreme Court would uphold the admission of a properly authenticated film.

II. PURPOSES OF "DAY IN THE LIFE" FILMS AND SUPPORTIVE AUTHORITY

As some commentators have noted, the purpose for which these films are admitted is not dramatization, but rather, illustration of the expert testimony that will be presented to the jury.¹⁵ Another commentator has noted that the pivotal value of these films rests on the inability of many lawyers to effectively convey the horror of severe injury.¹⁶ These films can fill evidentiary gaps by portraying the plaintiff in a typical day and demonstrating the constant care that his condition requires.¹⁷

A "day in the life" film is usually documentary in nature, spanning fifteen to fifty minutes of viewing time.¹⁸ It is composed of

13. There are two categories of objections that are frequently raised when a proponent seeks to admit a "day in the life" film. The first category includes traditional opponent objections which are raised against all types of evidence, although more heatedly raised against these films. See *infra* notes 50-146 and accompanying text. The second category of objections appear to be peculiar to these films due to their unusual nature as a staged reproduction introduced by the plaintiff. See *infra* notes 147-66 and accompanying text.

14. See *infra* notes 180-229 and accompanying text.

15. See, e.g., Begam & Begam, *supra* note 5, at 25, where the authors state, "the purpose of the Day in the Life film is not to dramatize the client's injury but to illustrate the evidence. This is, of course, the legal basis for its admissibility. The probative value of illustrating the expert testimony outweighs any prejudicial effect." *Id.*

16. Preiser & Hoffman, *supra* note 5, at 26.

17. Several commentators have contended that, due to the complexities involved in severe personal injury cases, it would be useful for the jurors to spend a day with the plaintiff in order to realize the impact the injury has on daily living. Such a procedure, however, would clearly be impractical, and, consequently, a "day in the life" film provides an effective substitute. See Begam & Begam, *supra* note 5, at 25; Perlman, *supra* note 2, at 37; Preiser & Hoffman, *supra* note 5, at 26.

18. See Note, *Day-in-the-Life Films: The Celluloid Witness Comes to the Aid of the Plaintiff*, 33 S.C.L. REV. 577, 577 (1982). Although this article will refer to the presentation under the generic heading of "films," these presentations can be made on videotapes or film. Distinguishing between these two types of audiovisual technology is beyond the scope of this article. Basically, a "film" will look much like a simple home movie; while a videotape will look like a television show. For an excellent discussion of the strengths and weaknesses of each method, see Preiser & Hoffman, *Day-in-the-Life Films — Coming of Age in the*

narrative units showing the plaintiff waking up, eating, undergoing physical therapy and attempting various daily activities, and typically ends with the plaintiff going to bed.¹⁹ The desired effect of this documentation is to demonstrate the tedium and frustration the plaintiff suffers in the performance of simple, routine activities.²⁰

Generally proponents have been successful in admitting these films into evidence.²¹ "Day in the life" films that have been properly authenticated,²² and structured to survive the defendant's objections,²³ are usually admissible. An outline of the leading cases in this area of the law will demonstrate the variety of factual circumstances in which these films are admitted, and will provide a starting point for an analysis of the evidentiary principles governing admission. The most noteworthy case is *Grimes v. Employers Mutual Liability Insurance Co.*²⁴ In *Grimes*, the plaintiff, having suffered severe injury in an industrial accident, had a film produced which depicted him performing a variety of daily activities.²⁵ The court held that the film was admissible and relevant in portraying the nature and extent of the plaintiff's damages.²⁶ The court's analysis exemplifies the basic theme alluded to above: "day in the life" films are generally admissible if the foundation is adequate, and if they are not barred by a specific objection addressed

Courtroom, Part II, TRIAL, Sept. 1981, at 40.

19. The purpose of these films is to portray for the jury a "typical" day in the plaintiff's life and, consequently, the film should include footage of several routine activities. See Begam & Begam, *supra* note 5, at 26; Note, *Plaintiff's Use of "Day in the Life" Films: A New Look at the Celluloid Witness*, 49 UMKC L. REV. 179, 181-82 (1981).

20. This inability to perform daily functions on his own is perhaps the least articulable element of the plaintiff's damage claim. A "day in the life" film attempts to supplement the plaintiff's presentation in order to adequately convey this loss to the jury. See Begam & Begam, *supra* note 5, at 25, where the authors describe the frustration suffered by the plaintiff:

Spend a full day with a young quadriplegic, from early morning when he awakens, to late in the evening when he goes to sleep. Live each one of those 16 hours or so with him and understand that you are witnessing his life, everyday, forever. Appreciate fully the tedium, the frustration, the helplessness, the hopelessness — the hours it takes to get out of bed, get washed, and get dressed — as contrasted with the minutes it takes the non-handicapped to accomplish the same chores.

Id. See also Perlman, *supra* note 2, at 37; Preiser & Hoffman, *supra* note 5, at 26.

21. See *infra* notes 24-36 and accompanying text.

22. See *infra* notes 37-49 and accompanying text.

23. See *infra* notes 50-146 and accompanying text.

24. 73 F.R.D. 607 (D. Alaska 1977).

25. *Id.* at 609.

26. *Id.*

to the particular film.²⁷

In *Pisel v. Stamford Hospital*,²⁸ the conservator of the decedent's estate brought a malpractice suit against the hospital for its treatment of the decedent.²⁹ The conservator offered a film depicting the decedent during her daily routine as a patient in the hospital.³⁰ The *Pisel* court upheld admission of the film stating that, "while not pleasant viewing, [the film] fairly presented to the jury Miss Pisel's condition and the type of care she was required to receive."³¹

A third case in which the court upheld admission of a "day in the life" film is *Capara v. Chrysler Corp.*³² In *Capara*, the plaintiff was severely injured in an automobile collision and brought a products liability suit against Chrysler.³³ The plaintiff sought to introduce a ten minute film purporting to document the plaintiff's daily routine as a quadriplegic.³⁴ The *Capara* court upheld admission of the film because it illustrated the injuries the plaintiff suffered, and the care he required.³⁵

These cases demonstrate the variety of factual circumstances under which admission of these films has been upheld. Gaining admission of a "day in the life" film, however, is not a simple matter. In addition to extensive foundation requirements, a wide range of legitimate objections will be raised against an improper film. Because these films constitute a powerful evidentiary tool,³⁶ most

27. The opinion's analytical structure seemed to indicate that there was a de facto presumption favoring admission of an authenticated film, and it was up to the defendant to rebut with an effectively presented objection. The defendant objected to the film as irrelevant, prejudicial, cumulative and hearsay; each objection was rejected by the court in a step-by-step fashion. *Id.* at 609-11. For a more thorough analysis of each of these objections, see *infra* 50-146 and accompanying text.

28. 180 Conn. 314, 430 A.2d 1 (1980).

29. *Id.* at _____, 430 A.2d at 5 (the decedent was suffering from a severe psychosis and, allegedly due to the negligent care of the defendant, she killed herself).

30. *Id.*

31. *Id.* at _____, 430 A.2d at 8.

32. 71 A.D.2d 515, 423 N.Y.S.2d 694 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

33. *Id.* at _____, 423 N.Y.S.2d at 696.

34. *Id.* at _____, 423 N.Y.S.2d at 698-99.

35. *Id.* at _____, 423 N.Y.S.2d at 699.

36. Plaintiffs have often recovered large damage awards in cases involving "day in the life" films. *See, e.g.*, *Munns v. Vaughan*, No. 74-5870 (3d D. Alaska Oct. 22, 1976), *cited in* 20 ATLA L. REP. 128 (1977) (9.34 million dollars); *Savage v. VanMarle*, *cited in* 15 ATLA NEWS L. 219 (1972) (1.67 million dollars); *Schnebley v. Baker*, *cited in* 14 ATLA NEWS L. 222 (1971) (1.014 million dollars); *General Elec. Co. v. Bush*, *cited in* 13 ATLA NEWS L. 474 (1970) (3.5 million dollars). Some decisions indicate that these films are simply too powerful

courts will closely analyze the merits of each objection, as well as the thoroughness of the foundation, in order to ensure that the defendant is not unduly prejudiced.

III. LAYING THE PROPER FOUNDATION

An adequate foundation has several components that counsel must demonstrate to the satisfaction of the court in order to assure admissibility. The first component involves the film's relevance to the immediate litigation.³⁷ Generally, evidence will be deemed relevant if it tends to prove or disprove some material issue in the case.³⁸ The proponents of these films typically seek admission for one of two purposes: to illustrate testimony or as direct evidence of an issue in the litigation.³⁹ Provided a proponent can demonstrate the relevance of either of these purposes to a material issue—such as pain and suffering, deprivation of enjoyment of life, extent of injury—the “relevance” prong of the foundation requirements will be satisfied.⁴⁰

A second foundation requirement is the authentication of the film by the proponent.⁴¹ At one time, this requirement could only

to admit into evidence. See *infra* notes 147-66 and accompanying text.

37. Evidence that is not relevant is not admissible in a court of law. FED. R. EVID. 402. See also *Kortz v. Guardian Life Ins. Co.*, 144 F.2d 676, 679 (10th Cir.) (photograph admissible if identified as correct likeness of person or object it purports to represent), *cert. denied*, 323 U.S. 728 (1944); *Grimes v. Employers Mutual Liab. Ins. Co.*, 73 F.R.D. 607, 609 (D. Alaska 1977) (photograph generally admissible if authenticated and relevant); *Hayward v. Ginn*, 306 P.2d 320, 324 (Okla. 1957) (photograph admissible if proven to be a correct representation of what it purports to reproduce); Note, *supra* note 18, at 578. See generally Annot., 62 A.L.R.2d 686, 691 (1958).

38. See FED. R. EVID. 401 (stating that relevant evidence is “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 probable than it would be without the evidence.”). See also MCCORMICK ON EVIDENCE § 134, at 309-10 (E. Cleary 3d ed. 1984) [hereinafter cited as MCCORMICK].

39. See Nielsen, *Admissibility of Day in the Life Films in Personal Injury Litigation*, 32 FED’N INS. COUNS. Q. 235, 238 (1982). Motion pictures have long been recognized as valuable direct and circumstantial evidence.

40. See Note, *Day in the Life Films: New Limitations on Admissibility*, 4 AM. J. TRIAL ADVOC. 357, 365 (1980). Relevant evidence has two components: probative value and materiality. MCCORMICK, *supra* note 38, § 185, at 541. Probative value is the tendency of the evidence to establish the proposition for which it is offered as proof. *Id.* Materiality involves an analysis of the relationship between this proposition and the issues involved in the case. *Id.* “What is ‘in issue’ . . . is determined mainly by the pleadings, read in light of the rules of pleading and controlled by the substantive law.” *Id.* Thus, if the film tends to prove or disprove a proposition “in issue,” it is relevant.

41. See Note, *supra* note 18, at 578. See also Annot., 62 A.L.R.2d 686, 692 (1958), where the authors have delineated several categories of information necessary to authenticate a

be satisfied by the presentation of detailed, technical testimony from an expert.⁴² Modern courts, however, now permit authenticity to be established by the testimony of an uninterested witness present during the filming.⁴³ This witness should identify the persons involved in the production of the film, and testify that the film accurately represents that which the proponent is attempting to portray.⁴⁴ Basically, this authentication procedure requires the witness to testify that the contents of the film are representative of a "typical" day in this plaintiff's life, and that the amount of staging and rehearsal were kept to a minimum.⁴⁵

Finally, the proponent should assure the court that the defendant has had an opportunity to view the entire film prior to trial. Although this is not a formal requirement of an adequate foundation,⁴⁶ this course of action has essentially become a procedural prerequisite to admission of the film.⁴⁷ By allowing the opponent

motion picture:

Although not all of the following details have been expressly required by the courts in all cases, it would seem that a proper authentication of motion pictures would consist of four parts: (1) evidence as to the circumstances surrounding the taking of the film . . . ; (2) the manner and circumstances surrounding the development of the film; (3) evidence in regard to the projection of the films, including the speed at which the projector is being run . . . ; (4) testimony by a person who was present at the time the motion pictures were taken that the pictures accurately depict the events as he saw them when they occurred.

Id.

42. See Note, *supra* note 18, at 578-79; 8 AM. JUR. PROOF OF FACTS 153 (1960).

43. See McCORMICK, *supra* note 38, § 214, at 673, which provides:

More recently . . . it appears to have become generally recognized that . . . the reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness. Under this theory, though the requisite foundation may, and usually will, be laid by the photographer, *it may also be provided by any witness who perceived the events filmed.*

(emphasis added); Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607, 609 (authentication was adequate when the witness testified that the film accurately portrayed what he had observed).

44. See Note, *supra* note 18, at 579-80.

45. Since the purpose of a "day in the life" film is to demonstrate an ordinary day in the plaintiff's life, authenticity necessarily requires that the contents accurately depict such a day. One commentator has recommended that the proponent thoroughly plan the entire film in advance, before any footage is shot, in order to more accurately portray a "typical" day. Preiser & Hoffman, *supra* note 5, at 30.

46. The most frequently enumerated foundation requirements are relevance and authenticity. See Note, *supra* note 18, at 578.

47. See 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1299, at 161 (2d ed. 1969). See also Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93, 98 (10th Cir. 1958) (implying that caution and fairness should be considered in the admission of films). In Grimes v. Employ-

to view the film prior to trial, the proponent not only demonstrates his good faith to the court,⁴⁸ but also deprives the defendant of the contention that the introduction of the film constituted an unfair surprise.⁴⁹

IV. POTENTIAL OBJECTIONS TO A "DAY IN THE LIFE" FILM

A. *Prejudicial Content*

Although evidence must be relevant to be admissible,⁵⁰ a basic evidentiary doctrine requires that all evidence, regardless of its relevance, must be balanced against its prejudicial impact.⁵¹ If the prejudice that would result from admitting the evidence outweighs its probative value, then the evidence must be excluded.⁵² As a conceptual matter, the term "prejudice" encompasses a broad range of objections. For example, if evidence is determined to be cumulative, then it is by nature unduly prejudicial.⁵³ For present purposes, however, the analysis of the objection of undue prejudice will focus upon the nature of the film's content.⁵⁴

ers Mut. Liab. Ins. Co., 73 F.R.D. 607 (D. Alaska 1977), the reported decision was actually a result of the *plaintiff* filing a motion in limine for a pretrial hearing to determine the admissibility of the film. *Id.* at 608. Thus, not only should the proponent provide the opponent with an opportunity to view the film prior to trial, but he might also consider moving for a preliminary hearing to determine admissibility. This procedure may serve to minimize the film's potential prejudice. See *infra* notes 73-77 and accompanying text.

48. Because of the powerful evidentiary nature of these films, see *supra* note 36 and accompanying text, it would be wise for the proponent to be as cooperative as possible with both the court and the opponent, while at the same time steadfastly arguing for admissibility.

49. See *Grimes*, 73 F.R.D. at 611 ("[T]he plaintiff has revealed his intention to offer the film sufficiently in advance of trial, and thus the defendant cannot claim surprise."). Courts frequently hold that unfair surprise is a strong factor favoring exclusion. See, e.g., *Balian v. General Motors*, 121 N.J. Super. 118, —, 296 A.2d 317, 323-24 (1972), *cert. denied*, 62 N.J. 195, 299 A.2d 729 (1973).

50. See *supra* note 37 and accompanying text.

51. *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 609 (D. Alaska 1977); *Balian v. General Motors*, 121 N.J. Super. 118, —, 296 A.2d 317, 321 (1972), *cert. denied*, 62 N.J. 195, 299 A.2d 729 (1973); *Capara v. Chrysler Corp.*, 71 A.D.2d 515, —, 423 N.Y.S.2d 694, 698-99, *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 251 (1981).

52. FED. R. EVID. 403 states that, "[a]lthough relevant, evidence may be excluded 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."

53. *Id.* For a separate discussion of the objection that evidence is cumulative, see *infra* notes 78-93 and accompanying text. Evidence that is held to be *ex parte* testimony can also be excluded as unduly prejudicial. See *Foster v. Crawford Shipping Co.*, 496 F.2d 788, 791-92 (3d Cir. 1974). For a discussion of the *ex parte* testimony objection, see *infra* notes 114-31 and accompanying text.

54. This distinction is important to the article's analysis because it is the contents of

Evidence will usually be excluded as prejudicial when admission would serve only to inflame the sympathy of the jury.⁵⁵ The most frequent ground for determining that a "day in the life" film is inflammatory is when the footage includes the plaintiff's expressions and utterances indicating pain.⁵⁶ In *Butler v. Chrestman*,⁵⁷ the Mississippi Supreme Court excluded a film for precisely this reason. The plaintiff, severely injured in a car accident, sought to introduce at trial a short film depicting his physical therapy session.⁵⁸ The footage included several segments showing the plaintiff grimacing, and concluded with a scene in which the plaintiff cried in agony.⁵⁹ The *Butler* court excluded the film because it was merely "depicting excruciating pain and suffering rather than attempting to reveal the actual state of the injuries."⁶⁰

A "day in the life" film often has a powerful impact upon the overall effectiveness of the plaintiff's case.⁶¹ Although it might be tempting to include sensitive scenes in hopes of a large recovery,⁶² *Butler* illustrates the danger of including expressions of pain in the presentation. The language used in *Butler*⁶³ indicates the delicate balance that exists between admissible evidence graphically portraying an injury, and inadmissible prejudicial anguish.⁶⁴ Understanding this subtle distinction can result in admission of "day in the life" films when counsel has carefully scrutinized its contents.⁶⁵

these films that will have the most powerful influence over the jurors. Consequently this will be a subject of acute concern to the trial court.

55. See, e.g., *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566, 569 (D.S.C. 1979); *Grisom v. Logan*, 334 F. Supp. 273, 279 (C.D. Cal. 1971); *Butler v. Chrestman*, 264 So. 2d 812, 816 (Miss. 1972); *Kickham v. Carter*, 314 S.W.2d 902, 908 (Mo. 1958); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, —, 577 P.2d 1322, 1331 (1978).

56. See Note, *supra* note 40, at 359-60. See also *Peters v. Hockley*, 152 Or. 434, 53 P.2d 1059 (1936) (holding that the trial court's admission of a demonstration of the plaintiff's injuries in which the plaintiff cried out in pain was an abuse of discretion).

57. 264 So.2d 812 (Miss. 1972).

58. *Id.* at 816.

59. *Id.* (noting the highly inflammatory content of the film, which included footage where the "camera zooms in periodically to show Miss Chrestman's discomfort by grimaces and ends with a parting shot of her seemingly crying from excruciating pain.").

60. *Id.* The *Butler* court went on to state, "[t]he nature of this film was more likely to inflame and prejudice the jury rather than to serve any evidentiary purpose." *Id.*

61. See *Begam & Begam*, *supra* note 5, at 25; *Perlman*, *supra* note 2, at 37; *Preiser & Hoffman*, *supra* note 5, at 26.

62. See *supra* note 36 and accompanying text.

63. See *supra* text accompanying note 60.

64. The *Butler* decision implied a distinction between inadmissible demonstrations of pain and suffering, and admissible demonstrations of the plaintiff's injury. 264 So. 2d at 816.

65. This distinction was used in the plaintiff's favor in *Swaggart v. Haney*, 363 So. 2d 251 (Miss. 1978), a case which distinguished *Butler*. In *Swaggart*, the plaintiff sought to admit

For example, in *Capara v. Chrysler Corp.*,⁶⁶ the court upheld admission of a film including footage of the plaintiff's daily routine at his parents' home.⁶⁷ Despite an objection that the film was prejudicial,⁶⁸ the court held that the footage illustrated the injury in an informative manner.⁶⁹ In upholding admission, the court indicated that a graphic portrayal of the plaintiff's injury was permissible because "while the scenes are undoubtedly unpleasant, so too is plaintiff's injury."⁷⁰

In light of the potential for prejudice, it is clear that plaintiff's counsel should closely monitor the contents of the film *during* its production. This issue is not nearly so crucial, however, if the proponent provides the court and opposing counsel an opportunity to view the entire film prior to trial.⁷¹ If such an opportunity is made available, prejudicial matter can be promptly deleted,⁷² thereby minimizing the effectiveness of an opponent's objection at trial. In

several photographs depicting in detail the burns he had suffered. Although *Swaggart* involved photographs, the grounds for distinction was not the method of presentation but the content of the evidence. The *Swaggart* court held that, in contrast to *Butler*, the evidence presented showed "no grimace or expression of pain on [the plaintiff's] face. Absent any showing of facial expression of pain, crying or the like, we do not think that the trial judge abused his discretion by allowing the jurors to see the pictures." *Id.* at 254. *Swaggart* is complemented by a line of cases which basically hold that, although the evidence presented was gruesome, it was nonetheless admissible because it accurately depicted the plaintiff's injury. See *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136, 140-41 (E.D. La. 1974) (photographs of horribly burned child admitted into evidence); *Lehmeth v. Long Beach Unified School Dist.*, 53 Cal. 2d 544, —, 348 P.2d 887, 894, 2 Cal. Rptr. 279, 286 (1960) (introduction allowed of film depicting plaintiff in hospital with a tracheotomy tube in her throat and her body unconsciously flinching); *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 580 (Tex. Civ. App. 1979) (court admitted motion pictures of child blinded by disease contracted while in defendant's incubator).

66. 71 A.D.2d 515, 423 N.Y.S.2d 694 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

67. 71 A.D.2d at —, 423 N.Y.S.2d at 698.

68. *Id.*

69. *Id.* at —, 423 N.Y.S.2d at 698-99.

70. *Id.*; see also *Pisel v. Stamford Hosp.*, 180 Conn. 314, —, 430 A.2d 1, 8 (1980) (admitting videotape of psychiatric patient's daily routine). It has been contended that in addition to the inclusion in the film of the unavoidably unpleasant scenes depicting the plaintiff's debilitation, the proponent would be wise to include footage demonstrating the plaintiff's achievements and positive actions. The argument suggests that the jury will be more willing to give a large award to a plaintiff who is trying to help himself than to a hopeless case. See *Perlman*, *supra* note 2, at 37; *Preiser & Hoffman*, *supra* note 5, at 30; Note, *supra* note 40, at 367 (suggesting that this procedure can also be used to minimize the film's potential prejudicial impact).

71. See *supra* note 47 and accompanying text.

72. Some courts have held, however, that the trial court is under no obligation to edit the film, thus implying that the proponent bears the risk of the court's discretion. See, e.g., *Morris v. E.I. Dupont De Nemours & Co.*, 346 Mo. 126, —, 139 S.W.2d 984, 988 (1940).

Grimes v. Employers Mutuality Liability Insurance Co., the plaintiff moved for a preliminary hearing to determine the admissibility of his "day in the life" film.⁷³ The film included both a delicate scene with his crippled brother,⁷⁴ and a segment portraying the plaintiff in his daily routine.⁷⁵ The *Grimes* court held that the scene with the brother was unduly prejudicial, and, consequently, required its deletion.⁷⁶ Despite finding a *portion* of the film inadmissible, the *Grimes* court found that the segment portraying routine activities was admissible because its probative value outweighed any prejudicial impact.⁷⁷ Thus, the proponent's request for a preliminary hearing can be a powerful evidentiary weapon to deprive the opponent of an objection that, otherwise, could be very effective at trial.

B. *Cumulative Evidence*

When evidence is determined to be cumulative, it is inadmissible because its introduction merely delays the proceeding without adding anything of substantive value.⁷⁸ This objection is most frequently raised when the plaintiff attempts to introduce a "day in the life" film having previously presented substantial testimony regarding his physical condition.⁷⁹ It is generally held, however, that motion pictures are only cumulative of previously introduced photographic evidence.⁸⁰ This view was slightly expanded in *Grimes v.*

73. 73 F.R.D. 607, 608 (D. Alaska 1977).

74. *Id.* at 610 (depicting the injured plaintiff putting a cigarette in the mouth of his quadriplegic brother).

75. *Id.* (the scenes included, among other things, the plaintiff driving a car, loading a gun, and operating a fishing reel).

76. *Id.* ("scenes of the plaintiff . . . with his quadriplegic brother serve little purpose other than to create sympathy for the plaintiff.")

77. *Id.* The *Grimes* court outlined the theoretical underpinnings of admitting films depicting daily activities in a realistic but noninflammatory manner: "The films illustrate, better than words, the impact the injury has had on the plaintiff's life in terms of pain and suffering and loss of enjoyment of life. *While the scenes are unpleasant, so is plaintiff's injury.*" *Id.* (emphasis added).

78. See FED. R. EVID. 403; C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* § 138, at 319 (2d ed. 1983).

79. See, e.g., *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1977); *Butler v. Chrestman*, 264 So. 2d 812, 816 (Miss. 1972); *Capara v. Chrysler Corp.*, 71 A.D.2d 515, —, 423 N.Y.S.2d 694, 698 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

80. 2 C. SCOTT, *PHOTOGRAPHIC EVIDENCE* § 1022, at 332-33 (2d ed. 1969). See also *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1979); Note, *supra* note 18, at 585. *But see* *Balian v. General Motors*, 121 N.J. Super. 118, —, 296 A.2d 317, 324 (1972) (court indicated that films were per se cumulative).

*Employers Mutual Liability Insurance Co.*⁸¹ In *Grimes*, the defendant contended that the film was cumulative of medical testimony that had been introduced.⁸² The court held that, in spite of previously presented evidence, the film was not cumulative because it was the "best evidence of the plaintiff's pain and suffering and loss of enjoyment of life."⁸³

Similar reasoning was employed in *Capara v. Chrysler Corp.*, where the trial court had rejected the defendant's claim that introduction of the film was repetitious of prior medical testimony.⁸⁴ The *Capara* court held that the presentation of a significant amount of medical testimony did not render the film cumulative evidence because the film illustrated the testimony and demonstrated the impact the injury had on the plaintiff's life.⁸⁵ These cases provide the proponent with a broad evidentiary base by allowing thorough medical testimony to be complemented and supplemented by the presentation of a "day in the life" film.⁸⁶

Despite this strong precedent favoring the proponent's position, an objection to evidence as cumulative remains one of the most effective objections at the opponent's disposal. An example of this effectiveness is found in *Haddad v. Kuriger*,⁸⁷ where the defendant appealed the admission at trial of a photograph depicting the scars on an injured infant's head.⁸⁸ The court held that the admission of the photograph was reversible error because it was cumulative evi-

81. 73 F.R.D. 607 (D. Alaska 1977).

82. *Id.* at 610.

83. *Id.* Other courts have also held that these films, although repetitive may be admitted. In *Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79 (Tex. Ct. App. 1983), the court admitted a "day in the life" film because of its value in demonstrating the plaintiff's injury, despite the court's finding that the film repeated previous testimony. *Id.* at 84.

84. 71 A.D.2d 515, —, 423 N.Y.S.2d 694, 698 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

85. *Id.* at —, 423 N.Y.S.2d at 699. The court stated:

Moreover, the mere fact that there is ample uncontradicted medical testimony concerning the nature and extent of plaintiff's injuries should not, in and of itself, prevent a plaintiff from showing to the jury a motion picture illustrating in an informative and noninflammatory manner the impact that the accident has had on his or her life.

Id. But see *infra* notes 87-90 and accompanying text.

86. If the proponent can satisfy the court that an objection of cumulative evidence is unmerited, then the proponent will be able to introduce both oral testimony from a medical expert and the "day in the life" film. This combination results in a very comprehensive presentation to the jury.

87. 437 S.W.2d 524 (Ky. 1968).

88. *Id.* at 525.

dence of previous testimony.⁸⁹ A significant body of case authority has held similar evidence to be inadmissibly cumulative.⁹⁰ Although this authority did not involve "day in the life" films, it should demonstrate, to both the opponent and proponent, the potential viability of this objection. However, with the support of *Grimes*⁹¹ and *Capara*,⁹² and a carefully tailored evidentiary presentation, most courts will probably admit the film over the objection.⁹³

C. Hearsay

Hearsay involves an out-of-court statement that is offered for the truth of the contents of that statement.⁹⁴ If the out-of-court "statement" is nonverbal, then it must constitute "assertive conduct" to be excluded as hearsay.⁹⁵ An opponent of a "day in the life" film typically attempts to prevent its admission on this ground. The opponent contends that the film, although nonverbal, involves assertive conduct on the part of the plaintiff, and is offered for the truth of its contents—to demonstrate the plaintiff's

89. *Id.* at 525-26 ("the photographer was permitted to testify to almost all of the conditions disclosed by the photographs. Under the circumstances, admission would have served no useful purpose and would have only inflamed the jury.") (quoting *Freeman v. Oliver M. Elam Jr. Co.*, 372 S.W.2d 796, 798 (Ky. 1963)).

90. *See, e.g.*, *Johnson v. William C. Ellis & Sons Iron Works*, 604 F.2d 950, 958 (5th Cir. 1979) (excluded film depicting cotton press that had injured plaintiff because of previous testimony describing the machine); *Grisom v. Logan*, 334 F. Supp. 273, 279 (C.D. Cal. 1971) (photograph of decedent who had been shot to death excluded because of previous testimony regarding the position and condition of the body); *Kickham v. Carter*, 314 S.W.2d 902, 908 (Mo. 1958) (where the court excluded photographs demonstrating an operation because there was no controverted factual issue concerning operation); *Balian v. General Motors*, 121 N.J. Super. 118, —, 296 A.2d 317, 322 (1972) (excluded motion pictures depicting tests and experiments involving allegedly defective automobile because of previous expert testimony as to the defective condition of the vehicle).

91. *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977).

92. *Capara v. Chrysler Corp.*, 71 A.D.2d 515, —, 423 N.Y.S.2d 694, 698-99 (1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

93. This is another circumstance in which plaintiff's counsel owes his client the duty to closely monitor not only the contents of the film, but the magnitude of the total presentation. If counsel is fearful of a successful objection that the evidence is cumulative, the best strategy is to introduce only necessary medical testimony prior to introduction of the film. These films leave a powerful impression upon the jury. *See Note, supra* note 18, at 586. Therefore, the proponent should make sure the film is accepted first, since additional medical testimony can always be introduced later.

94. FED. R. EVID. 801(c) ("Hearsay" is 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."). *See also* C. FRIEND, *supra* note 78, § 223, at 479; McCORMICK, *supra* note 38, § 246, at 729.

95. FED. R. EVID. 801(a)(2); McCORMICK, *supra* note 38, § 250, at 736-37.

injuries.⁹⁶

Although this line of reasoning has potential exclusionary force, there are several techniques by which the proponent can avoid exclusion of the film. First, the proponent could argue that the very nature of these films compels the conclusion that the conduct is nonassertive. Since the recorded events are designed to represent a *routine* day in the plaintiff's life, no "implied assertion" can be derived from viewing these normal activities.⁹⁷ Second, the proponent could argue that the film does not suffer from the traditional hearsay infirmities, and therefore, should not be excluded.⁹⁸ These infirmities usually involve an adversary's inability to confront or cross-examine the original speaker, or an objection that the original speaker was not under oath when the statement was made.⁹⁹ Where the plaintiff and film crew are present at trial and susceptible to cross-examination under oath, however, admission of the film does not involve traditional hearsay risks.¹⁰⁰ A third argument the proponent could raise is that the film is offered for the narrow purpose of illustrating prior testimony and, consequently, is not offered for the "truth of the matter asserted."¹⁰¹

Despite this tactical maneuvering by the proponent of a "day in the life" film, the opponent will have a substantial basis for contending that the film is hearsay. In *Grimes v. Employers Mutual Liability Insurance Co.*,¹⁰² the defendant objected to the admission of the film because it constituted hearsay evidence.¹⁰³ The court initially noted that motion pictures are generally not considered hearsay because the authenticating witnesses are available for

96. See Note, *supra* note 18, at 580. See also *Foster v. Crawford Shipping Co.*, 496 F.2d 788, 791 (3d Cir. 1974) (indicating that the film was assertive conduct by stating that it "has a communicative content other than merely pictorial").

97. See McCORMICK, *supra* note 38, § 250, at 739; Note, *supra* note 18, at 581.

98. See Note, *supra* note 18, at 581.

99. See McCORMICK, *supra* note 38, § 245, at 726-27.

100. See *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610-11 (D. Alaska 1977); *Reggio v. Louisiana Gas Serv. Co.*, 333 So. 2d 395, 396 (La. Ct. App. 1976); *Richardson v. Missouri-K.-T. Ry.*, 205 S.W.2d 819, 823 (Tex. Civ. App. 1947); Annot., 62 A.L.R.2d 686, 689 (1958).

101. Basically, this argument is derived from an evidentiary scenario where the medical testimony is used to prove the plaintiff's condition, and the film is used only as an illustration of what the testimony has proven, not as an independent source of proof. The use of these films for illustrative purposes is well established. See *supra* notes 39 & 85 and accompanying text.

102. 73 F.R.D. 607 (D. Alaska 1977).

103. *Id.* at 610.

cross-examination.¹⁰⁴ The court held, however, that since the "day in the life" film was prepared by the plaintiff, it constituted assertive conduct on his part, and, therefore, constituted hearsay evidence.¹⁰⁵

Although conceding the hearsay argument, the court did not exclude the film, but rather admitted it under one of the exceptions to the hearsay rule,¹⁰⁶ Rule 803(24) of the Federal Rules of Evidence.¹⁰⁷ Exceptions to the hearsay rule¹⁰⁸ allow evidence, although analytically hearsay, to be introduced on the strength of policy considerations supporting admission.¹⁰⁹ Rule 803(24)¹¹⁰ provides that hearsay evidence is admissible if it is the most probative evidence available, satisfies the reliability requirements of the hearsay rule, and is offered only after advance notice is given to the opponent.¹¹¹ The *Grimes* court held that admission was proper because the film was highly probative and had been viewed by the defendant prior to trial.¹¹² Thus, the hearsay objection might be obviated because the requirements of this exception can be satisfied by the same procedural hurdles that the proponent must overcome to introduce the film into evidence.¹¹³

104. *Id.* at 610-11 (rationale supporting this rule "is that the verifying witness is merely using the film as a means of communicating his observations."). See also Paradis, *The Celuloid Witness*, 37 U. COLO. L. REV. 235, 262 (1965).

105. *Grimes*, 73 F.R.D. at 611, where the court stated:

[A] film offered by the plaintiff showing the plaintiff performing tasks to exhibit his disability is like a witness testifying about assertive conduct. A witness' 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.

But see *supra* notes 97-101 and accompanying text.

106. *Grimes*, 73 F.R.D. at 611.

107. FED. R. EVID. 803(24).

108. See FED. R. EVID. 803(1)-(24), 804(b)(1)-(5).

109. See McCORMICK, *supra* note 38, § 253, at 753 (exceptions usually involve situations with recognizable guarantees of trustworthiness).

110. FED. R. EVID. 803(24).

111. FED. R. EVID. 803(24) provides that evidence can be admitted which consists of:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, 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 admitted . . . ; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial . . . his intention to offer the statement

Id.

112. *Grimes*, 73 F.R.D. at 611.

113. A "day in the life" film is highly probative of a number of material issues in the plaintiff's case. See *supra* notes 37-40 and accompanying text. The requirements of trust-

D. *Ex Parte Testimony*

The defendant may object to the film's admissibility because of the absence of defense counsel when the film was produced.¹¹⁴ In other words, the opponent would contend that the film constitutes the plaintiff's *ex parte* testimony.¹¹⁵ This objection was successfully raised in *Foster v. Crawford Shipping Co.*¹¹⁶ In *Foster*, the plaintiff was injured while unloading a ship and brought suit against the shipping company.¹¹⁷ During the trial, the plaintiff's counsel, without notifying the defendant, prepared a videotape depicting the plaintiff grunting and groaning in a futile attempt to answer questions.¹¹⁸ Although the plaintiff was not present at the trial, his counsel sought to introduce the film to illustrate medical testimony.¹¹⁹ The trial court had admitted the film, but the Third Circuit reversed on the grounds that the film was *ex parte* testimony and, consequently, unduly prejudicial.¹²⁰

Despite the possible implications of *Foster*, an objection to a "day in the life" film as *ex parte* testimony seldom succeeds. As one commentator has noted, the strategic use of medical testimony may deprive the defendant of an effective objection.¹²¹ This technique involves the introduction of medical testimony *during* the

worthiness underlying the hearsay exception are satisfied by the proponent's extensive authentication requirements. See *supra* notes 41-45 and accompanying text. The proponent is strongly advised to provide the opponent the opportunity to view the entire film prior to trial. See *supra* notes 46-49 and accompanying text. Thus, these basic requirements of an adequate foundation mirror to a large degree the elements which must be satisfied in order to trigger the hearsay exception of Rule 803(24). See *supra* note 111.

114. This objection is similar to the hearsay objection in that the opponent contends that admission of the film is the equivalent of introducing testimony that is not subject to cross-examination.

115. See Note, *supra* note 40, at 360-61.

116. 496 F.2d 788 (3d Cir. 1974).

117. *Id.* at 790.

118. *Id.* (the purpose of this videotape was to demonstrate the plaintiff's severe schizophrenia, allegedly resulting from the injury).

119. *Id.*

120. *Id.* at 792 (rejecting proponent's "illustration of medical testimony" argument by holding that "any benefit which might have been derived in the fact-finding process by such an illustration was far outweighed by the prejudice of admitting what amounted to *ex parte* testimony from the absent incompetent."). A strong argument exists, however, that might help the proponent distinguish *Foster* on the facts. In attempting to support admission of the film as illustrative of the medical testimony, the *Foster* court pointed out that the medical testimony actually indicated that the film did *not* accurately represent the plaintiff's condition. *Id.* at 791. Thus, the proponent in *Foster* did not have a legitimate basis underlying the justification he offered the court.

121. Note, *supra* note 19, at 185.

film's presentation, thereby allowing the medical personnel to testify as to the accuracy of the film's contents.¹²² The result is that the defense now has a witness subject to cross-examination.¹²³

The objection may fail, even without employing this tactic, because other key witnesses are present at trial and subject to cross-examination.¹²⁴ In *Reggio v. Louisiana Gas Service Co.*,¹²⁵ the plaintiff was injured in a gas explosion and offered a videotape portraying his extensive physical therapy.¹²⁶ The trial court viewed the videotape prior to trial, and deleted prejudicial portions at that point.¹²⁷ Nevertheless, the defendant objected to the videotape as *ex parte* testimony because it was not subject to cross-examination.¹²⁸ The *Reggio* court, however, admitted the film because the plaintiff's therapist was present at the trial and could be cross-examined.¹²⁹ In *Grimes v. Employers Mutual Liability Insurance Co.*,¹³⁰ this analysis was extended when the court held that the defendant's opportunity to cross-examine witnesses verifying the film was enough to render the *ex parte* objection ineffective.¹³¹

E. Editing

Although the production of a "day in the life" film frequently involves several hours of footage, it would be impractical, and possibly detrimental to the plaintiff, to require the jury to view the entire film.¹³² Consequently, the proponent should seek to introduce only edited versions of the actual footage.¹³³ This procedure,

122. *Id.* ("The medical witness should be able to state his opinion and simultaneously use the movie to aid and illustrate his diagnosis for the jury.")

123. This strategy has found support in a few jurisdictions. See *Munns v. Vaughn*, No. 74-5870 (3d D. Alaska Oct. 22, 1976), cited in 20 ATLA L. REP. 128 (1977); *Garcher v. City of Tamarac*, 20 ATLA L. REP. 171 (1976).

124. It should be obvious to the proponent that all witnesses even remotely connected with the making of the film should be present in court.

125. 333 So. 2d 395 (La. Ct. App. 1976).

126. *Id.* at 402.

127. *Id.*

128. *Id.*

129. *Id.*

130. 73 F.R.D. 607 (D. Alaska 1977).

131. *Id.* at 611.

132. See *Preiser & Hoffman*, *supra* note 5, at 26; Note, *supra* note 18, at 582. In order to avoid boring the jury one commentator has suggested 30 minutes as an ideal length for the film. See *Begam & Begam*, *supra* note 5, at 26.

133. See Note, *supra* note 18, at 583 (suggesting that editing is also useful in order to remove scenes which are embarrassing to the plaintiff, where the plaintiff "freezes" before the camera, and where prejudice may arise when the plaintiff has cried out in pain).

however, provides the opponent with an additional objection on the ground that an edited version conveys a distorted view of reality to the jury.¹³⁴ The theoretical underpinnings of this objection involve the alleged prejudice resulting from a selective, limited coverage of the subject matter.¹³⁵ In *Burd v. Vercruyssen*,¹³⁶ the plaintiff's decedent was killed by an automobile, and the plaintiff sought to introduce photographs of the body in order to imply the speed of the defendant's vehicle.¹³⁷ The court excluded the evidence because the photographs only portrayed a portion of the decedent's body and, therefore, any inferences would be speculative and prejudicial.¹³⁸

In spite of this contrary authority, the majority of jurisdictions hold that edited films are admissible, provided the accuracy of their contents has been established.¹³⁹ Although admissibility is not affected, many courts will hold that the presence of editing diminishes the film's evidentiary weight.¹⁴⁰ The proponent can avoid

134. See, e.g., *Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 100 (10th Cir. 1958); *Grimes*, 73 F.R.D. at 610; *International Union, United Auto., Aircraft & Agric'l Implement Workers v. Russell*, 264 Ala. 456, ___, 88 So. 2d 175, 186 (1956), *aff'd*, 356 U.S. 634 (1958); *Mercantile Bank v. Phillips*, 260 Ark. 129, ___, 538 S.W.2d 277, 282 (1976).

135. See, e.g., *Haddad v. Kuriger*, 437 S.W.2d 524, 525-26 (Ky. 1968). One commentator has formulated an excellent rebuttal to this argument by contrasting the limited coverage of "malingering plaintiff" films with the broader coverage of "day in the life" films. It is acknowledged that "malingering plaintiff" films are routinely admitted into evidence. See *supra* note 3 and accompanying text. From this judicial posture the commentator structures an argument for admitting a "day in the life" film:

It mattered not that these [malingering plaintiff] motion pictures depicted only one limited episode or activity engaged in by the plaintiff, or that the plaintiff may have been disabled for hours or days following the activity in question. The films were—and are—still admissible.

What the "Day in the Life" presentation attempts to do, however, is show an entire routine day. Logically, then, it should be admitted more readily than defense films depicting an isolated occurrence.

Preiser & Hoffman, *supra* note 5, at 28.

136. 142 N.J. Super. 344, 361 A.2d 571 (1976).

137. *Id.* at ___, 361 A.2d at 577.

138. *Id.* See also *Johnson v. William C. Ellis & Sons Iron Works*, 604 F.2d 950, 958 (5th Cir. 1979) (exclusion of film depicting a machine that injured the plaintiff because the film only showed a portion of the apparatus), *modified*, 609 F.2d 820 (1980).

139. See, e.g., *Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 100 (10th Cir. 1958) (an edited film is admissible "when it is shown that it is a correct likeness of the objects which it purports to represent."); *Mercantile Bank v. Phillips*, 260 Ark. 129, ___, 538 S.W.2d 277, 282 (1976) ("Here there is no evidence that the films do not represent an accurate reproduction or that they convey a false impression. Counsel for appellant was given an opportunity to view any edited portions of the film . . .").

140. See, e.g., *Millers' Nat'l Ins. Co.*, 257 F.2d at 100; *International Union, United Auto., Aircraft & Agric'l Implement Workers v. Russell*, 264 Ala. 456, ___, 88 So. 2d 175, 186 (1956), *aff'd*, 356 U.S. 364 (1958); *Annot.*, 62 A.L.R.2d 686, 698 (1958).

this outcome by providing the court and the defense with all edited portions prior to trial, and by providing a comprehensive foundation at trial.¹⁴¹

Ironically, the court in *Grimes*¹⁴² seemed to imply a rather harsh restriction on the use of nonjudicial editing.¹⁴³ In enumerating the requirements of an adequate foundation, the court included as a criterion the absence of any editing in the film.¹⁴⁴ Consequently, as one commentator has noted, this inclusion could be interpreted as a total prohibition against nonjudicial, pretrial editing.¹⁴⁵ Such a prohibition has been properly criticized as unduly restrictive, since a pretrial hearing in which the court views both the finished film and the edited portions can prevent prejudicial editing.¹⁴⁶

V. EXCLUSION OF THE EVIDENCE BECAUSE OF THE UNUSUAL NATURE OF "DAY IN THE LIFE" FILMS

In addition to the more traditional objections outlined above, the unusual nature of these films may raise additional arguments for exclusion. A "day in the life" film represents the plaintiff's staged reproduction of events to which the defendant is rarely invited.¹⁴⁷ This one-sided situation gives rise to several possible rationales for excluding the film. First, the reproduction aspect renders the film self-serving evidence.¹⁴⁸ Second, the novelty of the

141. Since most of the evidentiary rulings on motion pictures are left to the sound discretion of the trial judge, *see supra* note 6 and accompanying text, the more thoroughly the proponent authenticates the film the better the chance it will receive full evidentiary weight.

142. *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977).

143. *See Note, supra* note 18, at 583. The word "ironic" is used in this context because the *Grimes* decision is usually viewed as highly favorable to the proponent of a "day in the life" film.

144. *Grimes*, 73 F.R.D. at 609.

145. *Note, supra* note 18, at 583.

146. Since proponents routinely provide the opponent and the court with an opportunity to view the entire film prior to trial, *see supra* note 47 and accompanying text, it is argued that this procedure provides adequate protection. *Note, supra* note 18, at 584. If the court and the opponent view the edited film and all "out takes" at a pretrial hearing it is unreasonable to exclude the film merely because the film has been previously edited.

147. This factor has caused several courts to proceed with caution before admitting the film into evidence. *See, e.g., Pisel v. Stamford Hosp.*, 180 Conn. 314, ___, 430 A.2d 1, 8 (1980) (admitting the film but only after admonishing that "[w]hen a film represents a staged reproduction of one party's version of the facts it should be examined with care because of the danger that the filmmaker's art may blur reality in the minds of the jury."). For guidance on the mechanics involved in minimizing this potential danger, *see Preiser & Hoffman, supra* note 5, at 30.

148. *See infra* notes 147-54 and accompanying text. *See also Balian v. General Motors*, 121 N.J. Super. 118, ___, 296 A.2d 317, 322 (1972) (the court appeared to take the view

film may unreasonably dominate the other evidence introduced at trial.¹⁴⁹ In *Haley v. Byers Transportation Co.*,¹⁵⁰ the plaintiff was injured in an automobile collision and rendered a paraplegic. At trial, the plaintiff sought to introduce a film depicting him in his daily routine, including footage portraying his therapy with exercise equipment.¹⁵¹ The plaintiff did not attempt to introduce any of the equipment into evidence.¹⁵² On appeal, the *Haley* court excluded the film because it was self-serving and would overwhelm the jury.¹⁵³ The court believed that if the plaintiff wanted a more detailed presentation, he should have introduced the exercise equipment.¹⁵⁴

The *Haley* decision implies that a "day in the life" film is an inappropriate evidentiary device.¹⁵⁵ As one commentator has noted, the *Haley* court based its opinion on the unavailability of an established legal standard against which a "day in the life" film could be compared to determine if the film was a proper representation.¹⁵⁶ In other words, the proponent must first employ less drastic methods of evidentiary presentation if they are available.¹⁵⁷

In a similar fashion, *Thomas v. C. G. Tate Construction Co.*¹⁵⁸ could be interpreted as a signal that courts will exclude these films on the grounds of their unusual nature rather than on the merit of a specific objection.¹⁵⁹ In *Thomas*, the plaintiff was severely burned and sought admission of a film showing his therapy sessions.¹⁶⁰ The

that films were per se self-serving), *cert. denied*, 62 N.J. 195, 299 A.2d 729 (1973); *Orgeron v. Tri-State Road Boring, Inc.*, 434 So. 2d 70, 73 (La. Ct. App. 1982), *rev'd*, 434 So. 2d 65 (1983).

149. See *infra* notes 158-64 and accompanying text.

150. 414 S.W.2d 777 (Mo. 1967).

151. *Id.* at 780.

152. *Id.*

153. *Id.*

154. *Id.* The decision in *Haley* implies the court's suspicion of the use of a "day in the life" film as evidence. The court insisted that the plaintiff could have adequately presented his case through production of the exercise equipment or through more detailed verbal descriptions of his activities. *Id.* One court has declined to follow *Haley* by distinguishing it on the grounds that the motion picture in *Haley* was inadmissible hearsay because none of the equipment was presented at the trial. See *McWilliams v. Wright*, 460 S.W.2d 699, 705 (Mo. 1970).

155. 414 S.W.2d at 780; see also Note, *supra* note 19, at 183.

156. Note, *supra* note 19, at 183.

157. See Note, *supra* note 40, at 362-63 (author analyzes the concept which requires the exclusion of the film if the proponent has less prejudicial evidence available).

158. 465 F. Supp. 566 (D.S.C. 1979).

159. See Note, *supra* note 40, at 364. See also *infra* note 162.

160. 465 F. Supp. at 568.

court, however, refused to let the jury see it.¹⁶¹ Although the proponent of a "day in the life" film might distinguish *Thomas* because of the basis of the one-sided nature of the plaintiff's film,¹⁶² the decision to exclude the film in *Thomas* was not founded upon any particular objection.¹⁶³ Rather, the court demonstrated great reluctance toward the use of audiovisual technology generally by stating that "[t]he novelty of using a videotape in the courtroom in and of itself may make the tape stand out in the minds of the jury. Unquestionably, it will dominate the evidentiary scene."¹⁶⁴

Thus, despite a majority position admitting into evidence authenticated motion pictures,¹⁶⁵ the proponent of a "day in the life" film is clearly not faced with merely artificial evidentiary requirements. These films may be excluded through a spectrum of specific objections, or by courts, like the *Haley* and *Thomas* courts, which believe that the distinctive nature of the evidence will unjustifiably compel a jury verdict for the plaintiff. Consequently, the cautious plaintiff's counsel will meticulously follow various safeguards to assure admissibility. As previously stated, this strategy includes a thorough foundation, a request for a pretrial hearing, and providing the court and the opponent with an opportunity to view the entire film.¹⁶⁶

161. *Id.* at 571.

162. The film included footage where the plaintiff suffered through the painful therapy necessary for all burn victims. The plaintiff's body was bathed, and a cloth was used to wipe away dead skin. Throughout this process the plaintiff screamed in pain as his wife futilely attempted to comfort him. *Id.* at 568. Obviously the contents of the film were highly prejudicial and would almost certainly be excluded by most courts in balancing this prejudice against the probative value. See *supra* notes 51-70 and accompanying text.

163. Although the court spent considerable time discussing the contents of the film, the opinion lacks a formal balancing process. No particular objection was ever elaborated upon as the grounds for exclusion. See *Thomas*, 465 F. Supp. at 569-71. As one commentator has noted, "[t]he court relied more upon the overall effect of the tape, than upon specific factors which in the court's judgment rendered it prejudicial." Note, *supra* note 40, at 357-58.

164. *Thomas*, 465 F. Supp. at 571 (footnote omitted). See also *Balian*, 121 N.J. Super. at ____, 296 A.2d at 324 (court implied that motion pictures may be too spectacular in nature to be properly handled by the jury). But see *McCORMICK*, *supra* note 38, § 214, at 675 (stating that the vividness of a motion picture is of less concern today due to a higher level of sophistication in the modern juror concerning motion pictures); Perlman, *supra* note 2, at 34 ("the average person has developed a sense of comfort and security with the cinematic process, and enjoys a visual presentation much more than listening to an inanimate, boring, and sleep-provoking presentation.").

165. See *supra* notes 7 & 21-35 and accompanying text.

166. See *supra* notes 37-49 and accompanying text. But see *Thomas*, 465 F. Supp. at 571 (implying that the unusual nature of a "day in the life" film may negate all of these procedures: "The court can conceive of no way in which the defendant can possibly depict with equal impact those periods of time during the plaintiff's recovery process when he was ei-

An additional safeguard exists, however, to increase the chances of successful admission of the film. In light of the powerful influence that the film may exert, it has been suggested that the defendant move the court to bifurcate the proceeding.¹⁶⁷ This procedure involves separating the trial into two segments: first, a determination of liability; and second, if liability is found, a separate determination of the resulting damages.¹⁶⁸ This tactic allows the defendant to remove the film from the evidentiary scene while the jury determines whether the defendant is liable.¹⁶⁹ Because a "day in the life" film does not present evidence relevant to liability, but rather attempts to demonstrate the extent of the injury, the defendant is wise to limit the exposure of the film to the damages phase of the trial.¹⁷⁰

Although bifurcating the trial is usually viewed as a defense-oriented tactic, the benefits of this procedure would appear to apply with equal force to the plaintiff.¹⁷¹ Since the plaintiff can anticipate a barrage of objections to the introduction of these films, he might undermine the contention of unfair prejudice by moving to separate the trial.¹⁷² This strategy might also persuade a reluctant court to admit the film because the presentation of the film in the damages phase will minimize its influence on the jury.¹⁷³

ther free of pain or relatively speaking, free of pain."). The *Thomas* court seems to imply that even if the opponent is given advanced notice and an opportunity to view the film prior to trial, the film will be excluded because the opponent is not able to produce his own "day in the life" film. *Id.*

167. See Note, *supra* note 40, at 368; Note, *supra* note 18, at 588.

168. See *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 824 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978); *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 541 (8th Cir. 1977); *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 24 (6th Cir. 1965). In *Grimes*, the trial had been separated into a liability phase to be followed by a separate determination of the resulting damages. 73 F.R.D. at 610. This factor weighed heavily in the court's decision that the film was not unduly prejudicial. The court stated that because "liability will have to be established before the jury will be allowed to view the film, the admission of the film will not be unduly prejudicial if the plaintiff shows that the daily activities were or are typical for the plaintiff." *Id.* The *Thomas* court held that, but for the bifurcation of the proceedings in *Grimes*, the *Grimes* court would have excluded the film. *Thomas*, 465 F. Supp. at 569.

169. See Note, *supra* note 40, at 368; Note, *supra* note 18, at 588.

170. Since the film only purports to demonstrate the injuries of the plaintiff, and the impact the injuries have had on his life, it appears to be irrelevant to the issue of liability. See FED. R. EVID. 401. The film does not attempt to prove who injured the plaintiff, only the loss resulting from the injury. See Note, *supra* note 18, at 588.

171. See Note, *supra* note 40, at 369-70; Note, *supra* note 18, at 590-91.

172. See *supra* notes 50-146 and accompanying text.

173. The defendant will certainly contend that the admission of the film will effectively determine the jury's decision on liability. Therefore, by removing the film from the evidentiary scene during this determination, and only introducing it after liability is found, the

The mechanics for bifurcating a trial are relatively straightforward. Federal Rule of Civil Procedure 42(b) provides federal trial judges with authority to bifurcate the proceeding.¹⁷⁴ This authority is widely recognized as resting within the broad discretion of the trial judge.¹⁷⁵ Before exercising this discretion, the judge will usually require proof of the distinctiveness of the issues to be separated.¹⁷⁶ Although the decision to bifurcate is deferred to the discretion of the trial judge, the Advisory Committee Notes to Rule 42 indicate that the order should not be routinely granted.¹⁷⁷ Consequently, at least one court has held that the routine granting of this motion, without adequate analysis of the merits of the decision, constitutes reversible error.¹⁷⁸ Most courts, however, will not reverse the trial judge's decision without a clear showing of an abuse of discretion.¹⁷⁹

VI. ADMISSIBILITY OF "DAY IN THE LIFE" FILMS IN VIRGINIA

The materials discussed above demonstrate the considerations involved in determining the admissibility of a "day in the life" film. A proponent in Virginia, however, faces an additional obstacle

proponent has preempted much of the force of an objection for undue prejudice. *See Note, supra* note 40, at 369-70; *Note, supra* note 18, at 591.

174. FED. R. CIV. P. 42(b), which provides that:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or any separate issue or any number of claims, cross-claims, counter-claims, third-party claims, or issues

175. *See, e.g., Davis v. Freels*, 583 F.2d 337, 343 (7th Cir. 1978); *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 541 (8th Cir. 1977); *Bowie v. Sorrell*, 209 F.2d 49, 51 (4th Cir. 1953).

176. *See Kushner v. Hendon Constr., Inc.*, 81 F.R.D. 93, 99 (M.D. Pa.), *aff'd*, 609 F.2d 502 (3d Cir. 1979); *Davis v. Freels*, 583 F.2d 337, 343 (7th Cir. 1978); *Note, Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059, 1073-74 (1962); *Note, supra* note 18, at 589.

177. FED. R. CIV. P. 42 advisory committee notes.

178. *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 824 (3d Cir. 1978). In *Lis*, the court stated: Although cognizant of these competing considerations [whether to bifurcate], this court has heretofore cast its lot with the views expressed by the Advisory Committee that bifurcation "be encouraged where experience has demonstrated its worth," but that "separation of issues for trial is not to be routinely ordered"

. . . A general policy of a district judge bifurcating all negligence cases offends the philosophy that a decision must be made by a trial judge only as a result of an informed exercise of discretion of the merits of each case.

Id.

179. *See, e.g., Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 541 (8th Cir. 1977); *C.W. Regan, Inc. v. Parsons, Brickenhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969); *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 26 (6th Cir. 1965).

because no direct authority exists specifically governing the admissibility of these films. Nevertheless, a properly authenticated film should be deemed admissible on the basis of analogies to existing Virginia authority allowing the admission of similar evidence.¹⁸⁰ There are four situations where the Virginia Supreme Court's expansive view of admissibility can be used to argue for the admission of "day in the life" films: (1) the general use of illustrative evidence;¹⁸¹ (2) the use of photographs in both civil and criminal cases;¹⁸² (3) the use of videotapes in criminal cases;¹⁸³ and (4) the use of audiovisual depositions.¹⁸⁴ In all situations where these types of evidence are offered, Virginia strictly adheres to the general rule that admissibility rests within the sound discretion of the trial court.¹⁸⁵ Thus, the proponent cannot rely solely on the analogies provided below because admissibility will ultimately turn upon the careful production and presentation of each film on a case-by-case basis.

The Virginia Supreme Court has traditionally admitted illustrative evidence,¹⁸⁶ such as models, sketches and maps, provided that the evidence is relevant.¹⁸⁷ Since this type of evidence is not intended to duplicate the actual object or condition, but rather is used to explain testimony, the authentication requirements are minimal.¹⁸⁸ In fact, it is generally obvious to the jury that the evidence is merely a general representation, to be used only as an ex-

180. See *infra* notes 181-229 and accompanying text. The Virginia practitioner should also be aided by the use of the previously outlined case law as persuasive authority for the admissibility of "day in the life" films.

181. See *infra* notes 186-91 and accompanying text.

182. See *infra* notes 192-213 and accompanying text.

183. See *infra* notes 214-22 and accompanying text.

184. See *infra* notes 222-29 and accompanying text.

185. See, e.g., *Peterson v. Commonwealth*, 225 Va. 289, 294, 302 S.E.2d 520, 523 (1983); *Whitley v. Commonwealth*, 223 Va. 66, 75, 286 S.E.2d 162, 167 (1982); *Clanton v. Commonwealth*, 223 Va. 41, 51, 286 S.E.2d 172, 177 (1982); *Martin v. Commonwealth*, 221 Va. 436, 447, 271 S.E.2d 123, 130 (1980); *Evans v. Commonwealth*, 215 Va. 609, 614, 212 S.E.2d 268, 272 (1975); *Smith v. Commonwealth*, 207 Va. 459, 465, 150 S.E.2d 545, 549 (1966); *Westry v. Commonwealth*, 206 Va. 508, 513, 144 S.E.2d 427, 430 (1965).

186. See, e.g., *Moore v. Warren*, 203 Va. 117, 122 S.E.2d 879 (1961); *Peoples v. Commonwealth*, 147 Va. 692, 137 S.E. 603 (1927).

187. See *Newton v. Carpenter*, 202 Va. 347, 117 S.E.2d 109 (1960). See also C. FRIEND, *supra* note 78, § 169, at 381.

188. See, e.g., *Barber v. Commonwealth*, 206 Va. 241, 252, 142 S.E.2d 484, 493 (1965) (prosecution could use toy pistol as illustrative evidence without demonstrating that the toy was similar to the real gun); *Anchor Motor Freight, Inc. v. Paul*, 198 Va. 480, 486, 95 S.E.2d 179, 184 (1956) (use of model cars to demonstrate collision did not require proof that the models used were in precise dimension with the real automobiles).

planatory device.¹⁸⁹ Likewise, x-rays have been routinely held admissible provided the proponent demonstrates that the x-ray is of the person involved, was taken by a competent technician, and accurately portrays the condition of the person's body.¹⁹⁰ The same analysis applies even when the x-ray was prepared specifically for litigation purposes.¹⁹¹

The Virginia Supreme Court has also generally allowed photographs to be admitted into evidence.¹⁹² This general policy, however, is governed by many of the same evidentiary restraints that other states have imposed upon the admission of "day in the life" films.¹⁹³ The photograph must be relevant to a material issue in the case.¹⁹⁴ Although authentication does not require detailed technical testimony, the verifying witness must convince the court that the photograph accurately represents what that witness observed.¹⁹⁵ Finally, even if the photograph is relevant and thoroughly authenticated, it may be excluded if the trial court, in its sound discretion, concludes that admission would be unduly prejudicial.¹⁹⁶ If a photograph survives this balancing process, it is admissible in all proceedings, whether civil¹⁹⁷ or criminal.¹⁹⁸

189. See C. FRIEND, *supra* note 78, § 169, at 381, which states that:

Where the illustrative evidence's dissimilarity from the original scene or item is such that confusion, distortion, or prejudice will result, it should be excluded, of course. However, the court should consider carefully whether or not any confusion, etc. will result. In most instances, it is perfectly clear (or can be made perfectly clear) to the jury that the map or model is but a general representation, utilized as an explanatory device only.

190. See *Meade v. Belcher*, 212 Va. 796, 801, 188 S.E.2d 211, 215 (1972).

191. See *Lugo v. Joy*, 215 Va. 39, 205 S.E.2d 658 (1974); C. FRIEND, *supra* note 78, § 170 at 385.

192. See, e.g., *Bunch v. Commonwealth*, 225 Va. 423, 436, 304 S.E.2d 271, 278 (1983); *Turner v. Commonwealth*, 221 Va. 513, 531, 273 S.E.2d 36, 48 (1980), *cert. denied*, 451 U.S. 1011 (1981); *Norfolk & Western Ry. v. Anderson*, 207 Va. 567, 571, 151 S.E.2d 628, 632 (1966); *Timmons v. Commonwealth*, 204 Va. 205, 214, 129 S.E.2d 697, 703 (1963); 14B MICHIE'S JUR. *Photographs and Photographers* § 5 (Repl. Vol. 1978).

193. See *supra* notes 37-60 and accompanying text.

194. See *Wright v. Kelly*, 203 Va. 135, 141, 122 S.E.2d 670, 675 (1961); C. FRIEND, *supra* note 78, § 170, at 384; 14B MICHIE'S JUR., *supra* note 192, § 5.

195. See *Ferguson v. Commonwealth*, 212 Va. 745, 746, 187 S.E.2d 189, 190, *cert. denied*, 409 U.S. 861 (1972).

196. See *Wright v. Kelly*, 203 Va. 135, 141, 122 S.E.2d 670, 675 (1961) ("Photographs that are calculated to arouse the sympathies or prejudices of the jury are properly excluded . . ." (quoting 20 AM. JUR. *Evidence* § 729). See also 14B MICHIE'S JUR., *supra* note 192, § 5.

197. See, e.g., *Martin v. Commonwealth*, 184 Va. 1009, 1021, 37 S.E.2d 43, 48 (1946); *Staples v. Spence*, 179 Va. 359, 363, 19 S.E.2d 69, 71 (1942). The *Staples* court, in allowing photographs into evidence in a civil suit, demonstrated the similarities between admitting photographs and admitting "day in the life" films by holding that, "[t]he purpose of per-

For over a decade Virginia has followed the more expansive view governing the purposes for which a photograph may be admitted. In *Ferguson v. Commonwealth*,¹⁹⁹ the court delineated two distinct purposes supporting the admission of photographic evidence. The first permits admission to illustrate the testimony of a witness.²⁰⁰ Several states hold that this is the only purpose for which photographic evidence can be admitted.²⁰¹ The court in *Ferguson*, however, found this theory inapplicable,²⁰² and, therefore, redefined existing Virginia law to allow admission of photographs for a second purpose, namely as direct evidence of an issue in the case.²⁰³ Admission as direct evidence is supported by the "silent witness" rule under which photographic evidence is held to be sufficient to "speak for itself" without supportive oral testimony.²⁰⁴ In expanding the functions that photographic evidence could serve, the Virginia Supreme Court demonstrated a fairly permissive attitude

mitting the photograph of an object to be introduced in evidence is to furnish ocular proof or pictorial communication of the condition of the object." *Id.* Since the Virginia Supreme Court appears to appreciate the evidentiary value of visual aids it seems only a logical extension of this appreciation to admit a "day in the life" film, provided a thorough foundation is demonstrated.

198. Photographic evidence is more frequently employed in criminal prosecutions. See, e.g., *Bunch v. Commonwealth*, 225 Va. 423, 436, 304 S.E.2d 271, 278 (1983); *Whitley v. Commonwealth*, 223 Va. 66, 75, 286 S.E.2d 162, 167 (1982); *Turner v. Commonwealth*, 221 Va. 513, 531, 273 S.E.2d 36, 48 (1980); *Martin v. Commonwealth*, 221 Va. 436, 447, 271 S.E.2d 123, 130 (1980); *Evans v. Commonwealth*, 215 Va. 609, 614, 212 S.E.2d 268, 272 (1975); *Timmons v. Commonwealth*, 204 Va. 205, 214, 129 S.E.2d 697, 703 (1963); *Newberry v. Commonwealth*, 191 Va. 445, 455, 61 S.E.2d 318, 323 (1950). Although the existing case authority is dominated by criminal prosecutions, the same evidentiary restraints apply regardless of the nature of the underlying suit. It would seem reasonable to be more strict in criminal cases where the defendant's personal liberty is at stake than in civil cases.

199. 212 Va. 745; 187 S.E.2d 189 (1972).

200. *Id.* at 746, 187 S.E.2d at 190 (the court stated that it had traditionally "admitted photographs in the first category by holding that a photograph which is verified by the testimony of a witness as fairly representing what that witness has observed is admissible in evidence . . ."). See also 29 AM. JUR. 2D *Evidence* § 785 (1967).

201. See, e.g., *State v. Goins*, 120 W. Va. 605, 199 S.E. 873 (1938).

202. In *Ferguson*, the prosecution sought to admit a "Regiscope" photograph allegedly depicting the defendant in the act of forgery, but was unable to produce a verifying witness who could attest to the accuracy of the scene depicted by the photograph. Therefore, the *Ferguson* court held that the photograph could not be admitted under the "illustration of testimony" theory. 212 Va. at 746, 187 S.E.2d at 190.

203. *Id.*

204. *Id.* ("Given an adequate foundation assuring the accuracy of the process producing it, the photographs should then be received as a so-called silent witness or as a witness which 'speaks for itself.'") (quoting 3 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 790, at 219-20 (J. Chadbourn ed. 1970)); see also 29 AM. JUR. 2D, *supra* note 200, § 785, at 857; C. FRIEND, *supra* note 78, § 170, at 382.

toward the use of visual aids at trial.²⁰⁵

Although photographs admitted for either of these purposes must be balanced against the potential for prejudice, it appears that the Virginia Supreme Court is relatively broad-minded about the contents of photographic evidence. Although photographs cannot be used to inflame the jury,²⁰⁶ graphic displays of reality are admissible. In *Smith v. Commonwealth*,²⁰⁷ the prosecution offered photographs of the body of the victim in a brutal stabbing. The *Smith* court admitted the photographs because they "gave a more accurate description of the location, nature and appearance of the wounds than a mere verbal description."²⁰⁸ Thus, when bodily injuries must be described through graphic medical testimony, the Virginia Supreme Court appears ready to admit photographs that provide corroboration and amplification of that testimony.²⁰⁹ By analogy, a properly authenticated "day in the life" film should also be admissible in Virginia to illustrate medical testimony.

The Virginia Supreme Court is similarly broad-minded about the contents of photographs that are offered as direct evidence of a material issue. In *Brown v. Commonwealth*,²¹⁰ the defendant was charged with the murder of a four-year-old-boy. The prosecution offered photographs graphically depicting the brutality of the crime.²¹¹ The *Brown* court held that the photographs were "admis-

205. The *Ferguson* decision indicates that the Virginia Supreme Court has recognized that visual aids will continue to assume a more prominent evidentiary position in the courtroom. In expanding the purposes for which photographs could be used, the court noted the advancements in visual technology and recognized a photograph's utility as an evidentiary tool. 212 Va. at 746, 187 S.E.2d at 190. This enlightened perspective seems to imply that the Virginia Supreme Court would *not* be inherently suspicious about "day in the life" films. This perspective further indicates that, if the proponent carefully lays the foundation and scrutinizes the film's content, the court would likely admit the film into evidence.

206. See *supra* note 196 and accompanying text.

207. 207 Va. 459, 150 S.E.2d 545 (1966).

208. *Id.* at 465, 150 S.E.2d at 549.

209. *Id.* See also *Smith v. Commonwealth*, 219 Va. 455, 468, 248 S.E.2d 135, 143 (1978) ("We are of the opinion that the photographs depicting contusions about the victim's neck, abrasions on her back, and multiple stab wounds in her body were relevant and material . . . and that they were no more inflammatory than the medical testimony detailing the results of the autopsy.") (emphasis added); *Westry v. Commonwealth*, 206 Va. 508, 513, 144 S.E.2d 427, 431 (1965). The Virginia Supreme Court has imposed a relatively high standard which must be met before photographs will be excluded as inflammatory. See *Coleman v. Commonwealth*, 226 Va. 29, 48, 307 S.E.2d 864, 874 (1983), *cert. denied*, 104 S. Ct. 1617 (1984) ("to be inadmissible, the photographs had to be so inflammatory that they would tend to induce a guilty verdict, regardless of the other evidence in the case.").

210. 212 Va. 515, 184 S.E.2d 786 (1971), *modified*, 408 U.S. 940 (1972).

211. *Id.* at 519, 184 S.E.2d at 788.

sible to show the degree of atrociousness of the crime, or the malice with which it was committed."²¹² Analogously, a "day in the life" film is also admissible in order to prove the "atrociousness" of the plaintiff's injury.²¹³

A third analogy supporting the admissibility of these films is the recognized acceptance of videotapes prepared by the prosecution in criminal trials.²¹⁴ In *Stamper v. Commonwealth*,²¹⁵ the defendant was charged with a capital murder committed during the robbery of a restaurant. The prosecution offered a videotape and sound recording produced at the scene of the crime following arrival of the police.²¹⁶ The defendant objected to the film's introduction as inflammatory and unduly prejudicial.²¹⁷ Although the *Stamper* court conceded that the videotape depicted a scene of "indescribable violence,"²¹⁸ the court upheld its admission in reliance upon the rule, promulgated in a number of jurisdictions,²¹⁹ that films are generally admissible in criminal trials. The court believed that the videotape's probative value in depicting the events that occurred in the restaurant outweighed any potential prejudice.²²⁰

212. *Id.* at 519, 184 S.E.2d at 789. The Virginia Supreme Court has reached this same conclusion in a number of cases. *See, e.g.*, *Peterson v. Commonwealth*, 225 Va. 289, 294, 302 S.E.2d 520, 523-24 (1983); *Whitley v. Commonwealth*, 223 Va. 66, 74-75, 286 S.E.2d 162, 167 (1982); *Clanton v. Commonwealth*, 223 Va. 41, 52, 286 S.E.2d 172, 178 (1982); *Westry v. Commonwealth*, 206 Va. 508, 513, 144 S.E.2d 427, 430-31 (1965); *Timmons v. Commonwealth*, 204 Va. 205, 214, 129 S.E.2d 697, 703 (1963).

213. *Brown* may also provide the proponent of a "day in the life" film with a rebuttal to the defendant's contention that the evidence is cumulative. *See supra* notes 78-93 and accompanying text. In *Brown*, the defendant contended that the photographs were cumulative of medical testimony already presented. 212 Va. at 518, 184 S.E.2d at 788. In rejecting this claim the court held that the photographs were not cumulative, but rather served to illustrate the medical testimony. *Id.* at 519, 184 S.E.2d at 789.

214. For a comprehensive examination of the admissibility of a videotape in a criminal prosecution, see *Annot.*, 60 A.L.R.3d 333 (1974).

215. 220 Va. 260, 257 S.E.2d 808 (1979).

216. *Id.* at 270, 257 S.E.2d at 816.

217. *Id.* (the defendant contended that since he stipulated as to the position of the victims and did not object to a diagram of the restaurant, the videotape constituted cumulative evidence).

218. *Id.*

219. *Id.* *See* *People v. Mines*, 132 Ill. App. 2d 628, 270 N.E.2d 265 (1971); *State v. Johnson*, 18 N.C. App. 606, 197 S.E.2d 592 (1973); *Williams v. State*, 461 S.W.2d 614 (Tex. Crim. 1970).

220. *Stamper*, 220 Va. at 270, 257 S.E.2d at 217 (the trial judge has the same degree of discretion in admitting videotapes as he does in admitting photographs). *Stamper*, therefore, represents Virginia authority that a videotape is not necessarily cumulative of similar evidence which was previously introduced. *See supra* note 217.

More importantly, the *Stamper* court held that the admissibility of videotapes is governed by the same evidentiary principles that control the admission of photographs.²²¹ This holding provides two arguments supporting the admission of a "day in the life" film. First, the proponent could argue that since videotapes prepared exclusively by one party are admissible in criminal trials, they should likewise be admissible in civil trials. Second, the proponent could cite *Stamper* for the proposition that if the particular "day in the life" film satisfies Virginia's admissibility requirements for photographs, it should be admitted.

A final analogy upon which the proponent may rely in seeking admission of a "day in the life" film is Virginia's Uniform Audio-Visual Deposition Act of 1983.²²² This Act provides for the taking of depositions through audiovisual technology, without a stenographic record.²²³ Particularly noteworthy are the procedural safeguards provided by the Act. These safeguards, in many respects, mirror the procedural hurdles for the introduction of a "day in the life" film. The Act requires that advance notice be given to the opponent before the deposition is taken.²²⁴ It also requires that complete background information be provided, including the tape operator's name, the date of the deposition, and the names of the parties and witnesses.²²⁵ These procedures are similar to the foundation which must be laid before a film can be admitted into evidence.²²⁶ Finally, the Act provides that the complete deposition must be preserved, even when only an edited version will be used.²²⁷ In similar fashion, a proponent of a "day in the life" film is usually required to preserve the entire footage, including edits, so that the opponent may view it prior to trial.²²⁸ If the proponent can assure the court that precautions have been taken similar to those required by the Act, then a strong analogy exists supporting the admissibility of "day in the life" films.

221. *Stamper*, 220 Va. at 271, 257 S.E.2d at 816; see also *People v. Heading*, 39 Mich. App. 126, 197 N.W.2d 325 (1972); *State v. Lusk*, 452 S.W.2d 819 (Mo. 1970); *Lampley v. Waygood*, 57 Tenn. App. 610, 422 S.W.2d 708 (1967).

222. VA. CODE ANN. §§ 8.01-412.2 to -412.7 (Repl. Vol. 1984).

223. *Id.* § 8.01-412.2.

224. *Id.* § 8.01-412.3, which reads, "[t]he notice for taking a audio-visual deposition and the subpoena for attendance at that deposition shall state that the deposition will be recorded by audio-visual means."

225. *Id.* § 8.01-412.4.

226. See *supra* notes 37-45 and accompanying text.

227. VA. CODE ANN. § 8.01-412.4 (Repl. Vol. 1984).

228. See *supra* notes 46-49 and accompanying text.

VII. CONCLUSION

As a general proposition, "day in the life" films are admissible evidence. Admissibility, however, will always turn on whether the proponent has provided an adequate foundation. The film must be relevant to a material issue in the case, and must be thoroughly authenticated to guarantee the accuracy of its contents. If these foundation requirements are satisfied, the majority of courts will admit the film into evidence.

Various procedural safeguards are required, or strongly suggested, in order to assure admissibility. The proponent should always provide the opponent and the court an opportunity to view the entire film prior to trial. This procedure might take the form of a motion for a preliminary hearing in order to promptly determine admissibility. Even so, admission is far from certain as the defendant has a barrage of powerful evidentiary objections at his disposal. Furthermore, some courts, like the courts in *Haley*²²⁹ and *Thomas*,²³⁰ may exclude these films because of an alleged inappropriateness in general, without relying on a specific objection. In order to minimize the possibility of exclusion, the proponent is advised to take the initiative by bifurcating the trial.

Despite the absence of direct Virginia authority, several analogies exist that provide the Virginia practitioner with support for admissibility. The Virginia Supreme Court has previously admitted a wide range of visual aids, provided that the evidence is accurate and relevant. The court has demonstrated its broad-mindedness both with respect to the contents of photographic evidence and the purpose for which it is admitted. Particularly significant is *Stamper*,²³¹ which admitted a videotape in a criminal case, and held that the same evidentiary rules govern the admissibility of photographs and videotapes. In light of these analogies, admission of a "day in the life" film in a civil suit does not constitute a marked departure from established Virginia procedures.

229. *Haley v. Byers Transp. Co.*, 414 S.W.2d 777 (Mo. 1967).

230. *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566 (D.S.C. 1979).

231. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979).