Surveillance & Social Media in Civil Litigation

By Alice Spitz*

We live in an age of instant media and pervasive social networking. Any event, public or private, has the potential to be recorded as it happens. Events which give rise to claims and litigation are no exception. Incidents are now more frequently recorded by private surveillance cameras – for example, a slip and fall may be captured on a security camera, or a car accident recorded by a driver’s dash camera. Similarly, events may be commented upon and photos or video uploaded to social media, often as it happens. For example, Twitter allows users to broadcast in real time, even without a computer. The details of any accident can be immediately captured and shared via smart phone by the injured party, his friend, co-worker and/or supervisor, or witness who may or may not have the potential parties’ interests at heart.

Surveillance and social media are also frequently utilized by attorneys during litigation. Defense attorneys can have videotaped surveillance conducted on the allegedly injured plaintiff for years, and are now also gathering information from social networking sites to determine whether or not a plaintiff’s claimed injuries are legitimate. A plaintiff’s attorney has recently employed surveillance during litigation by surreptitiously videotaping the plaintiff’s independent medical examination in an effort to discredit the examining doctor.

The Duty to Preserve a Recorded Incident

Once it is discovered that a recording of an incident exists, it is important to determine whether a duty to preserve that recording applies. There is no separate cause of action for spoliation in New York, however, the failure to preserve the recording of an incident may result in sanctions and/or special charges to the jury.
Under the common law doctrine of spoliation, “when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading.” Where the missing evidence does not “deprive the moving party of the ability to establish his or her defense or case,” less severe sanctions, such as a negative inference charge to the jury, is appropriate. In Jennings, for example, plaintiff’s counsel wrote to the defendant, requesting that all videotape footage be preserved. However, their letter never reached the defendant’s risk management department, and as such, any potential footage was taped over in the ordinary course of business. The Court held that a negative inference charge was appropriate, because the plaintiff was not left “prejudicially bereft” – as she could still subpoena witnesses, and testify about the incident herself.

However, a party should not be sanctioned for discarding evidence if such evidence was discarded in good faith, pursuant to that party’s usual business practices, and without notice of pending litigation or a specific claim. The Fourth Department has held that sanctions were not warranted, where the surveillance videotape, which may have recorded plaintiff’s slip and fall, was taped over in good faith, according to regular business practices, and before litigation was pending.

**Post-Claim Videotaped Surveillance**

When defense counsel suspect that a plaintiff is either exaggerating or completely feigning injuries to inflate their damages claim, and thus the value of the case, post-claim videotaped surveillance of the plaintiff can be a helpful tool. Surveillance may expose the plaintiff by demonstrating that the plaintiff is, in fact, capable of engaging in activities that contradict their claimed injuries.
However, defense counsel must be aware that while surveillance can be effective, many times the surveillance videotape does not show any “smoking gun” evidence or any major inconsistencies between the plaintiff’s claim and what the tape reveals, and New York law requires that, if demanded, all videotape and/or audio tape surveillance is to be exchanged with the adversary, inclusive of all out-takes and logs, which includes video that might support a plaintiff’s damages claim.

**Disclosure of Videotaped Surveillance Under New York Law**

In the 1980’s, the CPLR did not initially explicitly address videotaped surveillance. Instead, CPLR §3101 contained conflicting sections, including CPLR §3101(a), (d)(2), and (e), which resulted in extensive motion practice regarding the disclosure of videos. These issues caused a major split in the Appellate Divisions.

In 1992, the Court of Appeals in *DiMichel* settled the conflict and ruled that defense surveillance films made to undermine a plaintiff’s personal injury claims must be disclosed before trial. The Court held, however, that disclosure was not required until after the plaintiff had been deposed. As a result of *DiMichel*, counsel could obtain video of the plaintiff, depose them hoping their sworn testimony would contradict the video evidence, and thereafter exchange the video.

In 1993, the New York Legislature responded to *DiMichel* by enacting a new subdivision to CPLR §3101, which required full disclosure of all surveillance photographs, videos and supporting documents made of a party, or its officer, director, member agent or employee, including outtakes. Notably, however, this addition to the CPLR still did not address the question of the timing of when the disclosure of all of this surveillance material was to be exchanged. This omission once again fractured the Appellate Divisions.
It took another ten years for the issue of the timing of the exchange of surveillance to be reached by the Court of Appeals. In *Tran v. New Rochelle Hospital Medial Center*, the Court held that CPLR §3101(i) required full disclosure with *no limitation as to timing*, unless and until the legislature declares otherwise. The Court ruled that once the plaintiff makes a demand for the surveillance, it must be provided, *regardless of whether or not the plaintiff has been deposed.*

*Admissibility of Surveillance at Trial*

Surveillance can be used at trial in two different ways: to impeach the plaintiff’s credibility, or as part of the defense’s direct case to provide the foundation for an expert’s testimony who may opine about plaintiff’s activity demonstrated in a video.

Foundation for the admissibility of the tape is required. Absent a stipulation, the only way to get the videotape into evidence is to have the actual videographer in court to testify that they were the one who conducted the surveillance, and that the video being shown is the original tape made.

*Social Media Monitoring*

In the past, if a defendant’s attorney suspected that a plaintiff was being less than forthright about their alleged injury, defendant’s counsel could have traditional surveillance conducted by an investigator. Now, however, with the proliferation of social media networks, the defendant can also find information to undermine the plaintiff’s claims by simply performing a search on Facebook, MySpace, Youtube and the like, where the plaintiff or one of his/her ‘friends’ may have posted information, pictures or video which completely contradict plaintiff’s claims.
Social Media Disclosure

Comments made by a party on a social media website may be construed as a party statement. For that reason, it may be wise to exchange those statements, pursuant to CPLR §3101(e), including photographs and/or video which are obtained from a party’s social media profiles and intended to be used at trial. Failure to do so may be potential grounds for their preclusion at trial. Additionally, CPLR §3101(i) requires the “full disclosure of any films, photographs, videotapes or audiotapes” involving among others, a party, and information sourced from social media websites may be required to be disclosed under this subsection also.

Obtaining a Party’s Private Information From a Social Media Website

There have been a number of cases which address the issue of obtaining an authorization from the plaintiff to view the private portions of plaintiff’s social networking sites. In certain circumstances, Courts may require a party to provide such an authorization for private, deleted, and/or archived material as well.

In a Suffolk county case, a Judge held that private material included in a plaintiff’s social networking website was material and necessary for the defendant’s defense of a personal injury action. In that case, plaintiff claimed to have been injured when a chair she attempted to sit in collapsed. She sued the manufacturer for personal injuries and claimed she suffered a “loss of her enjoyment of life” due to her injuries and was now bedridden in severe pain and discomfort. She then proceeded, however, to post pictures of herself on her Facebook page standing in front of her home smiling and looking quite happy. Since security on her Facebook page was not set to the privacy setting, the defendant’s attorneys were able to view her photos, and found her standing and smiling for the camera. The defense attorneys asked the Court for access to the private portions of her Facebook page and plaintiff was ordered to provide defense counsel with
an authorization to obtain the private, deleted, and archived portions of her social networking sites. The court reasoned as follows:

[I]t is reasonable to infer from the limited postings on plaintiff’s public Facebook and MySpace profile pages, that her private pages may contain material and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny defendant an opportunity to access these sites not only would go against the liberal discovery policies of New York favoring pretrial disclosure, but would condone plaintiff’s attempt to hide relevant information behind self-regulated privacy settings.6

Similarly, a District Court in Colorado held that the private contents of plaintiffs’ social networking sites were discoverable when the information posted on the public portions of the sites contradicted the plaintiffs’ claims about the loss of enjoyment of life due to the accident that was the subject of their personal injury case.7

In contrast, a federal judge in California held that messages sent on Facebook and MySpace are considered private and need not be exchanged during the discovery process, and that other postings to the social networking sites were protected from disclosure depending on the user’s privacy settings.8

Subpoenas For Social Media Information

It is now Facebook’s position regarding authorizations that “[i]f you seek the contents of a users’ (sic) account, you will need to seek that information directly from the user via a subpoena or party discovery on that user.” Facebook maintains that pursuant to the Stored Communications Act, the “U.S. federal law limits what information Facebook can provide in response to requests from both private parties and law enforcement.9 Subpoenas and court orders for the contents of users’ accounts are unenforceable.” Facebook “content” is a user’s messages, “wall timeline” posts, photos, etc. Consequently, in response to a subpoena, Facebook will now only provide ‘basic subscriber information’, not “content”.

6

7

8

9
MySpace also invokes the Stored Communications Act. MySpace has similar requirements as Facebook for the processing of information, and it too argues that “Federal law prohibits MySpace from disclosing the contents of user communications” to “civil litigants”.

**Admissibility of Social Media Information at Trial**

Presently, there are no specific rules as to the discoverability of information obtained from social networking sites. However, Courts are becoming more open to permitting access to a person’s social media account as these websites become more and more ubiquitous. While individuals may have an expectation of privacy, Facebook, or any other site, cannot ensure that the information users share will not become publicly available. In fact, these sites disclaim responsibility if such information does become available.

Given the relatively recent explosion of social media, there is still limited case law dealing with issues of its admissibility at trial. The concerns regarding the authentication of such material involve whether a communication was actually made or sent by the party to whom it is attributed. Impersonation of another who has left their profile logged in is such a common prank, it even has a name. Within Facebook, it is known as “fraping”, or “to frape”, someone. With respect to photographs and videos, dating is an issue, as the fact that a photograph was uploaded to a website today, does not preclude the possibility that it was taken some time ago, possibly prior to the incident at issue. There is also the additional consideration as to whether an image has been digitally manipulated.10

**Ethical Considerations**

Some personal information on social media websites can only be viewed if one becomes the target’s “friend”, by “friending” someone. However, this raises serious ethical considerations. As is well known, a lawyer may not contact another party to a lawsuit directly, if
that party is represented by counsel. Also, when dealing with a person who is not represented by counsel, a lawyer may not state or imply that he or she is disinterested, and if the un-represented person misunderstands the lawyer’s role, the lawyer must make reasonable efforts to correct the misunderstanding. What is clear from the foregoing is that a lawyer may not “friend” a represented party on Facebook to gain access to the possibly relevant information that may be found there.

It may be possible however for an attorney, provided that they do not misrepresent themselves in any way, to ‘friend’ a friend of the plaintiff, and discover whether further information becomes visible as a result, while still staying within ethical boundaries. This approach has not yet been tested or examined by the State Bar, but may very well be deemed unethical.

**Videotape Recording of IME’s**

While a defendant is permitted by statute to surreptitiously conduct video surveillance on a plaintiff involved in a personal injury action\(^1\), there is no statutory authority for a plaintiff to surreptitiously videotape their Independent Medical Examination (IME) – and case law prohibits any videotaping absent “special circumstances.”

A plaintiff’s attorney has unfettered opportunity to build their client’s damages case during the pre-trial stage. They can “suggest” that a plaintiff continue to receive treatment regardless of medical necessity; “steer” them to certain doctors who are well known for working with plaintiff attorneys to develop a case; “encourage” plaintiffs to undergo surgical procedures, which absent the secondary gain of litigation they might not undertake; and otherwise “control” the plaintiffs’ duration and course of medical treatment throughout the number of years a case is pending.
Contrast that with CPLR §3121, which permits a party, typically the defendant, to notice the plaintiff to submit to a physical by a designated physician and Uniform Rule §202.17, which permits a defendant to have the plaintiff examined by a doctor selected to evaluate the plaintiff’s medical condition only one time (with limited inapplicable exceptions).

Unlike the videotaping of a plaintiff who places their medical and physical condition into issue by the commencement of a suit, which has been directly addressed by statute, there is no companion legislative provision for videotaping IME’s.

Furthermore, there is a body of case law in New York which prohibits the videotaping of IME’s even when it is attempted to be done on notice to the adversary, absent a showing of “special or unusual circumstances.”\(^\text{12}\) Three out of four Appellate Divisions, as well as several lower Courts have ruled that the videotaping of an IME was appropriately prohibited.\(^\text{13}\) The standard applied is whether the party seeking to videotape the IME can show that “special or unusual circumstances” warrant the examination being videotaped. The burden of proving “special or unusual circumstances” is extremely high. Limited examples where the burden was satisfied include where the party being examined is incompetent or comatose and “unable to review the examination with his attorney or testify at trial as to the manner in which the examination was conducted.”\(^\text{14}\)

It would be an inconsistent and illogical application of the law to allow plaintiff attorneys the ability to secretly videotape IME’s, while imposing strict requirements on parties who attempt to do the same permissively and with notice to all other parties. The relevant case law in New York makes clear that the practice of videotaping IME’s is generally disfavored, and requires that a proponent of such overcome a considerable burden.
Conclusion

The days when surveillance was in the sole purview of private investigators are over! Having someone secretly videotaped was once the primary tool of litigators attempting to dispute a party’s damages claim. Although still widely used, investigation has now progressed to a more wide ranging “real time” search through the evidence found in the increased use of cameras at locations, within vehicles, and through postings on social media sites.

*Alice Spitz, a Cardozo alumni (1981), is a member of the firm of Molod Spitz & DeSantis, P.C. She is a trial attorney who represents insurance carriers and self insured clients in the defense of personal injury and commercial lines cases. She can be reached at aspitz@molodspitz.com.

1  Jennings v. Orange Regional Medical Ctr, 102 A.D.3d 654 (2nd Dept. 2013)
3  DiMichel v. South Buffalo, 80 N.Y.2D 184, 590 N.Y.S.2D 1 (1992)
6  Romano v. Steelcase Inc. 907 N.Y.S.2d 381, 655, 2010 WL 3703242, 5 (N.Y.Sup.) (N.Y.Sup.,2010)
9  See The Stored Communications Act, 18 U.S.C. § 2701 et seq.
10  See, e.g., People v. Lenihan, 30 Misc.3d 289 (N.Y. Sup. Ct. 2010)
11  CPLR §3101(i)