

Going Where Experts Can't: Viability and Admissibility Issues For Firms and Experts Relying Upon Drone-Obtained Evidence

Advances in technology have transformed the legal landscape in innumerable ways, from smart phones to metadata and everything in between. One issue within this broad and rapidly changing realm is the increasing use of drones to obtain information, whether data-based or visual in nature. Drones have raised concerning questions about maintaining privacy in a world which is increasingly eviscerating it. However, in putting aside fundamental, constitutional issues such as privacy for a moment, a more technical question arises: Are drones a viable tool for inspection and evidence collection and, if so, are the materials obtained actually admissible?

Both precedent and scholarship have eagerly confronted questions of drone use, both in a criminal¹ and a civil² context. However, there has been a surprising dearth of inquiry, much less a definitive holding, as to admissibility of drone-obtained material outside of a privacy violation inquiry. Are materials obtained in this way hearsay? Can they be authenticated? Most importantly, in an increasingly restrictive regulatory environment concerning drone use, is it even practical to utilize drones for this purpose?

One can envision any number of situations in which use of a drone could enable an inspection of an area that would otherwise be either inaccessible or highly burdensome to reach. For instance, examination of the inside of an elevator shaft or a defective condition on the exterior of a skyscraper would be rendered nearly impossible without non-human intervention. The recent litigation against the California power company related to their liability for wildfires seems tailor-made for drone use in the collection of evidence and creation in inaccessible and

¹ Florida v. Riley, §488 U.S. 445 (1989)

² “Prying Eyes in the Sky: Visual Aerial Surveillance of Private Residence as a Tort”, Jeremy Friedman, Columbia Science and Technology Law Review

treacherous areas. Without non-human intervention, some information would inevitably be lost or rendered highly impractical to access. In fact, evidence collection and preparation of compelling expert reports are often even more critical in cases that involve great heights or vast areas of damage, both due to statutory schemes³ and potentially heavy exposure.

Though drone use generally can often run up against privacy rights, the scenarios described here would implicate few, if any, such concerns. Moreover, given the small size and relatively inexpensive cost of commercially available drones, these devices are ideal for accessing such critical locations. So, are drones the simple answer to these challenging questions? The still-developing laws pertaining to drone use offer less definitive answers and unfortunately suggest that these issues cannot be solved by a simple trip to the electronics store. Rather, the questions of whether drone use is even allowed in a given jurisdiction and in what context, as well as whether evidence obtained through such use is admissible are still largely unsettled.

The intersection of drones and the law is far from an academic question. Not only can drones be used by a law firm for evidence collection and preparation of expert reports, but some firms have actually incorporated drone law into their practices.⁴ In fact, there are reportedly over 49,000 commercial drones and over 650,000 hobbyist drones in operation.

Restrictions Upon the Use of Drones

Any legal analysis of drone use must begin by defining what a drone is under the law. On March 6, 2014, the Administrator of the Federal Aviation Administration (FAA) appealed an

³ See e.g. Labor Law 240(1) concerning injuries relating to falls from a height, which not only provides for strict liability against defendants, but also often involves catastrophic injury or death.

⁴ Ricker, Darlene, “Navigating Drone Laws Has Become a Growing and Lucrative Legal Niche”, *ABA Journal*, July 1, 2017.

order from Administrative Law Judge Patrick G. Geraghty vacating a \$10,000 civil penalty imposed by the FAA Administrator.⁵ Such penalty was imposed upon an individual who flew a remotely piloted, unmanned aircraft around the University of Virginia campus in Charlottesville, Virginia on behalf of a third party seeking to obtain video of the campus and surrounding area. The operator allegedly flew the drone in an unsafe manner, including through a tunnel, under a pedestrian bridge, and within 100 feet of an active heliport.⁶

On appeal of the fine, the Administrative Law Judge found the drone to be a model aircraft under Federal Aviation Regulation 14 C.F.R. §91.13.⁷ The Administrative Law Judge, in striking down the FAA-imposed penalty, cited the FAA's 1981 safety standards for model aircraft.⁸ The Administrative Law Judge's holding was then reviewed on appeal by the National Transportation Safety Bureau (NTSB).

There, the NTSB reversed the Administrative Law Judge's decisional order, holding that it was reasonable for the FAA to consider the subject unmanned drone an "aircraft" in the context of FAA rules.^{9 10} The NTSB then remanded the case back to the Administrative Law Judge to determine if the drone operator's use of the drone was indeed reckless, in light of the determination that it could be considered an aircraft under FAA regulations.

This decision is of paramount importance in assessing the viability and legality of the use of drones. Attorneys familiar exclusively with the laws and precedents concerning drones in a

⁵ Michael P. Huerta, Administrator, Federal Aviation Administrator v. Pirker, NTSB Order No. EA-5730

⁶ Id. at 2

⁷ Id. at 4

⁸ Id. at 3

⁹ Id. at 12

¹⁰ Notably, in reviewing the application of FAA rules and their applicability to drones as "aircraft", the NTSB noted that, when the FAA was created by Congress in 1958, "drones" were "largely the currency of science fiction", See Id. at 6

privacy context may be unaware that FAA regulations can apply to the use of drones even in unmistakably public areas. This can become particularly complex in certain jurisdictions and areas in which the FAA has imposed special rules, such near airports, in certain “restricted air space”, near stadiums and in and around Washington, D.C.¹¹

The passage of the FAA Modernization and Reform Act then complicated the question of defining drones, creating an exception based upon recreational use.¹² While an exception was carved out for recreational use, drones used for commercial purposes remained subject to FAA regulations. Then, in 2016, the FAA enacted new regulations, specifically FAA Regulation Part 107 (Small Unmanned Aircraft Rules), dealing directly with drones.¹³ While these new regulations do allow drone use generally, they impose upon operators significant restrictions and safety requirements.¹⁴ As such, the operator of the drone, particularly when operating a drone for commercial use, must be well trained and knowledgeable with all pertinent FAA regulations.

More importantly, operating a drone in a densely populated urban area may raise safety issues that would place the operator in violation of FAA regulations, similar to the penalty imposed upon the operator in Pirker.¹⁵ In fact, the \$10,000 civil penalty imposed against Pirker,¹⁶ is paltry compared to the \$2,000,000 fine sought by the FAA against a company for operating drones for a real estate business on a regular basis without the proper equipment and

¹¹ “Airspace Restrictions” *FAA.gov*, August 7, 2019, https://www.faa.gov/uas/recreational_fliers/where_can_i_fly/airspace_restrictions/

¹² H.R. §658 (2012), Section 336, FAA Modernization and Reform Act

¹³ FAA Regulations, Part 107 (2016)

¹⁴ *Id.*

¹⁵ Michael P. Huerta, Administrator, Federal Aviation Administrator v. Pirker, NTSB Order No. EA-5730

¹⁶ *Id.*

certifications.¹⁷ The FAA's case there was recently settled for the still severe penalty of \$200,000.¹⁸

Of course, in some jurisdictions, the question of the viability of drone use is rendered entirely moot. New York City, for example, disallows such aircraft to take off or land within the city limits, rendering drone use essentially illegal.^{19 20} Similarly, Iowa City, Iowa has passed an ordinance, at least preliminarily, banning drones within its city limits²¹ and Charlottesville, Virginia has passed a resolution asking Congress to enact anti-drone protections.²² Laws addressing drone use, albeit largely in the context of law enforcement, have also appeared in Florida, Idaho, Montana, Oregon, North Carolina, Tennessee, Virginia, Texas, Wisconsin, Illinois, Indiana and Utah.²³ Even the small town of St. Bonifacius, Minnesota has passed an ordinance banning the use of drones.²⁴ There is a question of whether and to what extent individual cities or states can legally pass such laws and ordinances,²⁵ but the fact that they have

¹⁷ Vanian, Jonathan, "Aerial Photography Company Settles with FAA Over Illegally Flying Drones" *Fortune*, January 17, 2017

¹⁸ *Id.*

¹⁹ New York City Administrative Code §10-126

²⁰ This prohibition in New York City has not stopped the NYPD from creating a drone pilot program, albeit one where each drone usage must be documented and categorized. Not surprisingly, one such category is "Evidence Collection at Large or Inaccessible Scenes", taken from a quarterly sample of NYPD Excel chart of drone usage. See "Unmanned Aircraft Systems (UAS) Operations Report" NYC.gov <https://www1.nyc.gov/site/nypd/stats/reports-analysis/uas-drones.page>

²¹ 'Awesome': Iowa City Bans Drones, Red Light Cameras and License Plate Readers", Douglas Ernst, *Washington Times*. June 6, 2013

²² "City in Virginia Becomes First to Pass Anti-Drone Legislation", Jason Koebler, *U.S. News & World Report*. February 3, 2013

²³ See FL. STAT. § 934.50 (2013); IDAHO CODE ANN. § 21-213 (2013); MONT. CODE ANN. § 46-5-109 (2013); OR. REV. STAT. § 837.310 et. seq. (2013); 2013 N.C. Sess. Laws. 1040; TENN. CODE ANN. § 39-13-609 (2013); TEXAS GOV. CODE ANN. § 423.002 (2013); 2013 Va. Acts 1408.; 4 WIS. STAT. § 175.55 (2014); 725 ILL. COMP. STAT. 167/10 et seq. (2014); IND. CODE § 35-33-5-9 (2014); UTAH CODE ANN. § 63G-18-103 (2014); IOWA CODE ANN. §§ 321.492B, 808.15 (2014).

²⁴ "St. Bonifacius Says No to Drones", Tom Meersman, *Star Tribune*. April 6, 2013

²⁵ See generally *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Skysign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002); *American Airlines v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968); *American Airlines v. City of Audubon Park*, 407 F.2d 1306 (6th Cir. 1969).

See also Federal Aviation Administration, Office of the Chief Counsel. "State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet", December 17, 2015

attempted to do so indicates the legal and regulatory hassle that may follow for drone operators in certain jurisdictions.

A law firm seeking to use a drone to obtain evidence collection or site inspection therefore begins with the question of viability and a cost-benefit analysis. Depending upon the jurisdiction in which the firm finds itself, the option might be entirely precluded before it can even be properly considered if drone use is banned in that locality. Assuming a friendlier jurisdiction, a prospective drone-using firm must still remember that their use would almost certainly be considered commercial by the FAA. That means that Part 107 of the FAA regulations must be followed. The regulations imposed by Part 107 can be onerous.²⁶ At minimum, they require a drone operator to have a proper certification and for the drone itself to be properly inspected. Moreover, FAA regulations restrict the nature of the operation of the drone as well. Violations of these regulations could result in substantial fines, especially since the operation would be commercial in the context of use by a law firm or expert retained by such firm.²⁷

Admissibility of Drone Obtained Evidence (If Improperly Obtained)

Once drone-obtained information or an expert report reliant upon such information is acquired, the question becomes whether a court will admit it into evidence. It seems natural that the question of admissibility relies upon the assumption that the drone-obtained material was successfully obtained by navigating the proverbial minefield of laws, ordinances, regulations, and even constitutional rights discussed herein. However, the illegality of obtaining the material does not necessarily preclude its admissibility.

²⁶ FAA Regulations, Part 107 (2016)

²⁷ See generally Michael P. Huerta, Administrator, Federal Aviation Administrator v. Pirker, NTSB Order No. EA-5730, See also H.R. §658 (2012), Section 336, FAA Modernization and Reform Act

The United States Supreme Court has held that the exclusionary rule does not preclude illegally obtained evidence from being used in other contexts, such as civil litigation²⁸ or probationary hearings.²⁹ Some states have subsequently used these holdings to support the admission into evidence of illegally obtained evidence,³⁰ while others have attempted to circumvent this holding with laws restricting admissibility of such evidence except in certain circumstances.³¹ While it does not appear that any Court has specifically dealt with admissibility of illegally drone-obtained evidence by a private individual rather than a state actor, these cases do suggest that the legality of the method of obtaining evidence would not be a complete bar to its admissibility.³²

Of course, such conduct in attempting to knowingly obtain evidence in violation of the various applicable regulations and ordinances should not be encouraged. First, a prospective Court considering such a case might preclude such evidence anyway if the party attempting to admit it is the illegal actor.³³ Second, seeking to violate laws in order to obtain evidence would likely and justifiably run afoul of the national and state bar associations. Depending upon the type of use of the drone, tort liability can also arise against the drone operator.³⁴ The intention of including this caveat here, therefore, is for practicing attorneys to be aware that their adversary's

²⁸ U.S. v. Janis, 428 U.S. 433 (1976)

²⁹ Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998)

³⁰ State v. Scarlet, 800 So.2d 220 (Fla. Supreme Ct. 2001)

³¹ Texas Government Code 423 (2013)

³² Of note, the Indiana Court of Appeals permitted drone-obtained video footage of drug transactions found on her property, taken by an apparently unknown third party, in the context of finding probable cause, Byers v. State, 709 N.E.2d 1024 (Ind. 1999)

³³ Such a finding would likely be based on a variation of the doctrine of unclean hands, whereby the bad actor cannot benefit from the bad act through maintaining an action or, in this case, offering knowingly tainted evidence.

³⁴ Matthews, Benjamin, *Potential Tort Liability For Personal Use of Drone Aircraft*, 46 St. Mary's L.J. 573 (2015)

illegal or improper means of obtaining evidence, particularly in the context of drone usage, does not necessarily mean such evidence will be excluded.

Admissibility of Drone Obtained Evidence (If Properly Obtained)

Assuming that the methods and use of a drone was in accordance with all applicable federal regulations and permissible in the jurisdiction, the question finally becomes whether the information obtained is admissible under the rules of evidence. Despite the relatively recent advent of drone and other advanced data-capturing technology, courts have had substantial occasion to consider the evidentiary fruits of similar technologies.

An opinion from a District Court in Maryland provides an excellent analysis, under the Federal Rules of Evidence, regarding admission of Electronically Stored Evidence (ESI).³⁵ In broad strokes, the considerations under the federal rules outlined by this Court were as follows:³⁶

(1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.

While not directly concerning drone-obtained material, this foundational analysis presents a framework for practitioners seeking to admit evidence gathered by electronic rather than human means. However, admitting electronically stored information, such as photographs,

³⁵ Lorraine v. Markel American Insurance Co., 241 F.R.D. 534 (U.S. Dist. Ct. Maryland 2007)

³⁶ *Id.*

videos, or other data into evidence without an individual to lay proper foundation can be a challenge.

Photographic Evidence

In 2009, the New York Appellate Division had occasion to confront a case which centrally involved the admission of aerial photography into evidence.³⁷ Though the method of exactly how these aerial photographs were taken is unclear, the facts of this case are nevertheless highly comparable to the type of evidence likely to be obtained by drone. That case involved a claim of adverse possession by an adjacent landowner over a segment of property purchased by the Town of Bedford in New York State. At issue was the admission of aerial photographs taken of the area in question which purported to show the lack of improvements on the land by the claimant.

The Court excluded a set of photographs at issue there, as lacking foundation.³⁸ Those photographs were only referenced by the Town's aerial photography expert who testified that they were culled from photographs available to them "by various people who fly by".³⁹ There was no evidence offered as to the manner and purpose with which the photographs were taken.⁴⁰

It is clear from both this holding and from the outline of Federal Rules of Evidence as applied to Electronically Stored Information⁴¹ that laying proper foundation for authenticity is paramount for the admission of any photograph, whether obtained by a human cameraman or some non-human means. The most difficult issue for attorneys seeking to admit photographic

³⁷ *Corsi v. Town of Bedford*, 58 AD3d 225, 228 (2d Dept 2008), lv denied 12 NY3d 714 (2009).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Lorraine*, *Id.*

evidence taken by a machine, though, is the fact that there is no witness to testify as to the accuracy of the images. In the case of drone-obtained photographs, it is likely that the image taken was in a location that the human operator of the drone could not physically access or see.⁴²

Recently, New York sought to alleviate the burden of admitting machine-obtained photographic images, at least in one context. Specifically, the New York CPLR was amended to state as follows:⁴³

"Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented."

While this amendment, allowing images and maps obtained by a machine rather than a human seems to be supportive of the admissibility of drone-obtained evidence, this amendment may ultimately be unhelpful in this effort. New York's CPLR amendment specifically concerns images taken from "a web mapping service, a global satellite imaging site, or an internet mapping tool." A drone, controlled by a law firm or expert would be unable to qualify under any of these categories.

The avenue most likely to be successful in seeking admission of photographs without a witness with personal knowledge to authenticate it is the "silent witness" theory.⁴⁴ The exact law as to the applicability of this theory varies in many jurisdictions. For instance, the 11th Circuit

⁴² Many of the issues here would be dispensed with if the expert in question was simply using the drone to obtain photographs and videos from a different vantage point, but was physically present such that he could still testify as the photographer of the images.

⁴³ CPLR §4511

⁴⁴ Tracy Bateman Farrell, *Construction and Application of Silent Witness Theory*, 116 A.L.R.5th 373, § 2(a) (2004). See also Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, in 16 Am. Jur. Proof of Facts 3d 493, § 25, at 537 (1992)

Court of Appeals has held that “the trial court has broad discretion to allow [media] into evidence without such a showing so long as there is independent evidence of accuracy.”⁴⁵ Similarly, Alabama has adopted its own multi-part test, generally focusing upon chain of custody and the capabilities of the system which took the images.⁴⁶ Arizona has adopted a flexible test to consider the unique facts of each case⁴⁷ while Florida created a five-factor test, including evidence of time and date, presence or absence of evidence of tampering, operating condition and capability of equipment as it relates to accuracy and reliability of product, operating, testing, and security procedures, and identification of participants depicted in recording.⁴⁸ Indiana⁴⁹ and Maryland⁵⁰ also adopted tests focused on the operation and chain of custody of the system.

The “silent witness” theory, therefore, seems to be the most supportive approach for attorneys seeking to admit drone-obtained evidence. As tests for admitting such evidence vary in many jurisdictions, local evidentiary law must still be monitored. However, one issue as to authentication of drone-obtained photographs remains a concern. Existing case law as to admissibility of photographs seems to break down into two categories: 1) photographs where the photographer or an eyewitness to the photograph’s depiction is available to testify, and 2) photographs taken by automated means that can be proven to be reliable. Drone-obtained photographs do not neatly fit into either of these categories.

⁴⁵ *United States v. Reed*, 887 F.2d 1398, 1405 (11th Cir. 1989)

⁴⁶ *Ex Parte Fuller*, 620 So. 2d 675, 678 (Ala. 1993)

⁴⁷ *State v. Haight-Gyuro*, 186 P.3d 33 (Ariz. Ct. App. 2008)

⁴⁸ *Wagner v. State*, 707 So. 2d 827, 831 (Fla. Dist. Ct. App. 1998)

⁴⁹ *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002)

⁵⁰ *Washington v. State*, 961 A.2d 1110, 1116 (Md. 2008)

While the foundation of the reliability of a device such as a drone should be no different from that of a security camera, the fact that the drone is being affirmatively sent to obtain photographs in a particular situation seems to be a critical distinction. It is unclear how courts would assess machine-obtained material which was not created as part of an automatic process but rather with specific intention. Can a drone, which is ultimately still human-operated be considered as inherently reliable as an automated, pre-programmed camera? This apparently as yet unresolved question resurfaces within numerous aspects of the considerations of admissibility of drone-obtained materials.

The intentionality implicit within this distinction also raises another potential hurdle as to the admissibility of drone-obtained photographs: hearsay. Returning to the New York Appellate Division case discussed earlier, while one set of photographs there was excluded as lacking foundation, a hearsay inquiry was conducted as to a second set of photographs. Testimony elicited from a town representative indicated that the aerial photographs were taken as a result of a town practice of taking such photographs of the county every five to six years. As a result, the Court held that the photographs, which would be considered hearsay, were nevertheless admissible under the business record exception to hearsay, even though the attesting witness did not personally take the photographs.⁵¹

Again, however, this holding would not necessarily apply to drone-obtained photographs, at least in the context that the operator was related to a law firm or expert. As an inherently case-by-case endeavor, it would be difficult to establish that the taking of photographs through use of a drone could be considered a regular course of business. In New York, therefore,

⁵¹ Corsi, Id.

overcoming the hearsay of drone-obtained photographs without an independent witness to substantiate their contents may prove difficult.

Luckily for practitioners, the issue of photographs as hearsay is not an issue that must be confronted in every jurisdiction. California's highest court rejected a challenge to an image from a red-light camera, refusing to consider it hearsay at all. The Court there held that "Because the computer controlling the ATES digital camera automatically generates and imprints data information on the photographic image, there is similarly no statement being made by a person regarding the data information so recorded."⁵² In jurisdictions such as California, therefore, authenticating the photographs should be sufficient to establish grounds for admission into evidence.

Video Evidence

Generally, video is treated largely the same as photographs in terms of admissibility considerations. In a New York Court of Appeals case,⁵³ the Court held as follows:

"Similar to a photograph, a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted... Testimony, expert or otherwise, may also establish that a videotape 'truly and accurately represents what was before the camera'... Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering."

Establishing admissibility under this standard may not be as easy as it appears though, particularly in the case of drone-obtained evidence. In fact, the same issues as applied to photographs would need to be addressed. There would likely be no witness available to testify

⁵² The People of California v. Goldsmith, 59 Cal.4th 258 (2014),

⁵³ People v. Patterson, 93 N.Y.2d 80, 84

as to the accuracy of the contents of the video. Instead, an attorney seeking to admit video evidence obtained by a drone would return to the silent witness theory in attempting to establish the reliability and operation of the drone through testimony from its operator, installer, or maintainer.

Such testimony or affidavit, however, must offer sufficient detail to satisfy the Court. In another case before the Appellate Division of the State of New York,⁵⁴ the Court held that video surveillance from a bank was inadmissible as the authenticating affidavit failed to sufficiently explain to relationship between the bank and the burglar alarm company which installed and maintained it. Therefore, any testimony or affidavits seeking to authenticate video obtained through automated means must include a detailed explanation of the method and means in obtaining the video. Practitioners would be wise to establish that such video has not been tampered with as well.

There is one essential distinction though between admissibility of photographic and video evidence, specifically that some video evidence would include audio. A comparable evidentiary issue implicating both the visual and audio components of video evidence whose legal framework is only beginning to catch up to its technological capabilities concerns police body cameras. Audio, including statements, captured on a police body camera would clearly constitute hearsay statements. Certainly, drone-obtained material could contain audio which a party seeks to admit into evidence as well.

A recent Fordham Law Review article suggests that statements captured by a police body camera could be admitted under one of several hearsay exceptions, such as present sense

⁵⁴ Read v. Ellenville National Bank, 20 A.D.3d 408 (2d Dept. 2005)

impression, excited utterance, and recorded recollection.⁵⁵ These exceptions, however, are all applicable due to the nature of the body cameras themselves: that they are intended to capture real time events as they unfold. It is unlikely that a Court would admit audio recorded by a drone under these exceptions, as the information gathered thereby would likely be made long after the actual cause of action arose and recorded related to an expert inspection or report.

Ultimately, the issue of audio information obtained by a drone is likely not at the forefront of most practitioners concerns, as drone-obtained material is much more likely to include photographic or video material. The major question then is whether video, regardless of any audio information included therein, would be admissible.

Returning to the issue of police body camera footage, while statements heard thereupon are certainly hearsay, it is less clear is whether the footage captured by such body cameras could be considered hearsay itself. A Vanderbilt Law Journal analysis suggested that such video itself could be held to be assertive, as “choosing to record is assertive.”⁵⁶ One example used for comparison in this analysis is the issue of “day in the life” videos, often used to depict a plaintiff’s injuries demonstratively. Such videos have been permitted by courts, but have also been held to be assertive, and thus hearsay, depending upon the video’s content.⁵⁷

In terms of precedent, simple surveillance video, as a much older and more commonly used technology, offers substantial case law concerning it. Generally, surveillance video is admissible in most circumstances. Surveillance videos are in fact not considered hearsay in most

⁵⁵ Bellin, Jeffrey & Shavarma Pemberton, *Policing the Admissibility of Body Camera Evidence*, 87 Fordham L.J. 4 (2019)

⁵⁶ Pike, Natalie, *When Discretion to Record Becomes Assertive: Body Camera Footage as Hearsay*, 20 Vand. J. Ent. & Tech. 1259 (2018) at 1290.

⁵⁷ Id. at 1290, See also, *Grimes v. Employers Mut. Liability Ins. Co.*, 73 F.R.D. 607 (U.S. District Ct. Alaska 1977) at 611

jurisdictions because there is no statement or assertion being made.⁵⁸ The distinction yet again arises, however, between automated video and video that is intentionally created, as these decisions rest upon the inherently non-hearsay nature of a machine automatically recording something.

Metadata Evidence

A final consideration related to drone-obtained material is the metadata imbedded within and critical to the substantive data. Metadata, which is the information generated by a computer relating to data, is another area in itself which courts must increasingly grapple with. Basic metadata can include, for example, the time and location a photograph was taken or the user who created a document. In terms of drone-obtained material, this information could prove invaluable. A drone used to take photographs and video of an accident scene for use by an accident reconstructionist, for instance, could include the height and angle of the drone at the time the pictures were taken, the time of day, or even potentially the temperature. This data is essential for an expert to develop an accurate assessment of an accident and how it occurred.

Fortunately, the precedents related to the admissibility of metadata are much more straight-forward. As with the photographs and videos themselves, the first step is authentication. However, this is not a high hurdle to overcome, as much of this data is self-authenticating, provided its proponent can establish that it has not been altered or manipulated in some way.⁵⁹

⁵⁸ Holmes v. United States, 92 A.3d 328 (D.C. 2014); Feather River Lumber Co. v. United States, 30 F.2d 642 (9th Cir. 1929); Miles Laboratories, Inc. v. Frolich, 195 F. Supp. 256 (S.D. Cal. 1961), aff'd 296 F.2d 740 (9th Cir. 1961), cert. denied, 369 U.S. 865, 82 S.Ct. 1030, 8 L.E.2d 84 (1962).

⁵⁹ CA, Inc. v. Simple.com, Inc., 780 F. Supp.2d 196 (EDNY 2009)

Even hearsay is far less complicated when it comes to metadata. Federal Courts have broadly admitted metadata as it does not fall under the category of hearsay.⁶⁰ Taking for example the New York Eastern District federal which held as follows:

Computer-generated data, which includes metadata, ... are extrajudicial statements that are not hearsay. In these circumstances, there is no declarant making a statement. The computer is itself performing the transaction at issue. Thus, a hearsay foundation is unnecessary and the evidence can be admitted upon a proper authentication foundation under Rule 901(b)(9).⁶¹

In a state law context, some jurisdictions have also had occasion to confront issues of metadata. Illinois, for instance, held that metadata is not hearsay as it reflects an automatic, computer-generated process as early as 1985,⁶² and have affirmed such a holding numerous times since.⁶³ Similarly, California has actually codified that a machine cannot be a declarant,⁶⁴ and has reinforced this principle numerous times, including in the red-light traffic camera case earlier referenced.⁶⁵ As such, proponents in most, if not all, jurisdictions should have little difficulty entering metadata into evidence.

Expert Reliance

As should be clear, navigating the admissibility of photographs or video obtained by drone, or any other non-human means, is rife with potential pitfalls. However, all may not be lost even if such evidence is excluded by the Court. Though it seems counterintuitive, courts

⁶⁰ 1st Fin. SD, LLC v. Lewis, No. 2:11-cv-00481-MMD-VCF, 2012 U.S. Dist. LEXIS 144334, at *6 (D. Nev. Oct. 5, 2012), citing CA, Inc., 780 F. Supp.2d at 224 (E.D.N.Y. 2009); United States v. Khorozian, 333 F.3d 498, 505 (3d Cir. 2003).

⁶¹ CA, Inc., Id.

⁶² People v. Holowko, 109 Ill.2d 187 (Ill. 1985)

⁶³ Aliano v. Sears, Roebuck & Co., 2015 IL App (1st) 143367 (Ill. App. Ct. December 30, 2015).

⁶⁴ California Evid.Code §§ 175, 225

⁶⁵ People v. Goldsmith, Id.

nationally have well-established precedents which allow expert opinions to rely upon otherwise inadmissible evidence.

Federal Rule of Evidence 703 reads as follows:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

This rule has been referenced and upheld consistently in opinions across the federal court system.⁶⁶ The American Bar Association further explains “Technical experts often rely, necessarily, on the opinions of other experts with different expertise. In a nonlitigation context, experts may rely on research, surveys, or experiments performed by their own support teams or by third-party contractors when rendering professional services.”

It is debatable whether the use of drones falls under the scope of facts and data typically relied upon by experts in the field. However, a seemingly strong argument could be based upon a drone being used to collect photographs, measurements, videos, and readings typically used in the formation of an expert opinion. Moreover, this federal rule creates the basis for a self-fulfilling doctrine, as the more experts begin to rely upon drones for collection of critical information, the more these drone-obtained materials will qualify under the standard of “facts and data typically relied upon by experts in the field.” A New Hampshire District Court similarly allowed an expert to rely upon inadmissible hearsay, specifically certain adverse

⁶⁶ See West v. Bell Helicopter Textron, Inc., 967 F. Supp. 2d 479, 505 (D.N.H. 2013); Bartlett v. Mut. Pharm. Co., No. 08-CV-358-JL, 2010 WL 3092649, at *1 (D.N.H. Aug. 2, 2010); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993) ; Fed. R. Evid. 703.

incident reports, but prohibited the proponent from revealing the contents of the report to the jury.⁶⁷

Outside of the federal framework, variations on this allowance for experts to rely upon inadmissible evidence can be broadly found. In New York, experts cannot rely upon inadmissible evidence unless it is “the kind generally accepted in the profession as reliable in forming a professional opinion.”⁶⁸ New York has even created an exception in situations where the inadmissible hearsay does not form the sole basis for the expert opinion but confirms an independently created opinion.⁶⁹

California, however, recently trended in the opposite direction by imposing a significant restriction upon what an expert can rely upon. The California Supreme Court overturned a long-held rule that an expert can rely upon inadmissible hearsay provided the jury is told that the inadmissible evidence is being offered only as a basis for the expert opinion and not for its truth.⁷⁰ In so doing, the California Supreme Court found such logic to be untenable and declared that an expert opinion must rely upon evidence in an admissible form.⁷¹

Generally, outside of California, these cases are encouraging for attorneys seeking to admit drone-obtained evidence, which is not expected to pass admissibility muster under their jurisdiction’s applicable precedents. Do these rules allowing experts to rely on inadmissible evidence render the discussion of admissibility of drone-obtained evidence moot? Not necessarily.

⁶⁷ Bartlett, Id.

⁶⁸ see *Weinstein v. New York Hosp.*, 280 A.D.2d 333 (1st Dep’t 2001)

⁶⁹ Id.

⁷⁰ *People v. Sanchez*, (2016) 63 Cal.4th 665

⁷¹ Id.

The primary reason direct admission into evidence of drone-obtained material is because visual evidence which a jury can see and examine is always best from any litigator's point of view. Second, the restrictions upon exactly what an expert reliant upon inadmissible evidence is allowed to reveal could render the expert opinion less compelling. Lastly, until drone-obtained materials are more prevalently utilized by expert witnesses, it is highly uncertain whether a particular judge will choose to consider any inadmissible evidence to be of the kind relied upon by experts in the field. Therefore, while the leeway courts have generally granted to experts relying upon inadmissible evidence to form their opinions provides a helpful safety net, the preference should always be direct admission of any evidence an expert is expected to rely upon.

Conclusion

In considering whether to use drones to obtain information and potential evidence, both legal viability and admissibility must be carefully assessed. While ample precedent exists as to many forms of electronically stored information, there are critical distinctions that make drones an entirely different animal. Unlike surveillance cameras and other generally accepted means of electronically or digitally recording evidence, drone operators must first evaluate whether their actions are even legal. Many jurisdictions have either outlawed drone operation or imposed restrictive limits, not to mention the fact that the FAA remains heavily invested in regulating this growing field.

The inquiry into the legality and viability of drone use, as well as the limits imposed upon operators of drone operators is still shifting. There are dozens of active or recently resolved lawsuits concerning everything from physical injury caused by a drone,⁷² and criminal charges

⁷² Philadelphia Indemnity Insurance Company v. Hollycal Production, Inc., et al., 5:18-cv-00768

for shooting a neighbor's drone,⁷³ to a class action attempt to abolish the FAA Drone Registry⁷⁴ It is clear, based upon the increasing number of cases which concern drone use, that the state of the law might appear entirely different in just a few years.

The issue of whether evidence obtained by drone is admissible is only slightly clearer. While precedent is well-established in authenticating and overcoming hearsay regarding numerous types of electronically stored information, drone use again presents unique challenges. These differences complicate the questions of admissibility of drone-obtained material. Authentication, assuming a proper foundation is laid and a common drone model is used, is generally accepted in most jurisdictions. However, the intentionality inherent in using a drone to obtain evidence or prepare an expert report raises the question of whether it assertive conduct. Similarly, drone-obtained evidence does not fall into the neat categories created for so many other types of hearsay material.

Reliance upon technology such as drones is an inevitable consequence of the advancement of technology. The tremendous benefits of using such technology in gathering information and building a strong case or defense is obvious. With its increased prevalence, courts will undoubtedly begin crafting a more consistent and comprehensive framework to deal with evidence derived from the use of drones. Until that time, attorneys seeking to obtain and admit evidence collected by drone will have to continue to navigate a complex, heavily regulated and often contradictory legal landscape.

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⁷³ Commonwealth of Kentucky v. Meredith (citation not found), Note: Charges were dismissed as the defendant was declared legally allowed to shoot the drone.

⁷⁴ Reichert v. FAA, 4:17-cv-389-BRW

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