

## **7 FACTORS TO CONSIDER when Utilizing Remote Surveillance for Claims Investigations** **By Mario Pecoraro, CEO, Alliance Worldwide Investigative Group**

According to the Coalition Against Insurance Fraud, fraud accounts for 5-10 percent of claim costs for US and Canadian insurers. Claims and legal professionals throughout the United States continue to work together to negotiate and settle claims. When there is potential fraud, they may move to suspend benefits, and at times even pursue criminal action. Employers and insurers continue to face pressure to settle open claims and determine which require investigation without wasting resources. The latest trends include the use of remote surveillance technology in attempts to secure video evidence, without compromising the investigation, but at what cost?

Prior to engaging in a claims investigation, it is critical to implement a comprehensive review of all public record sources with emphasis on social media. Most individuals are subject to some type of exposure to social media and often without direct consent. This leaves a huge opportunity for qualified investigators to gather intelligence to help build a quality investigation. The process unfortunately does not stop there - it is just the beginning of a comprehensive surveillance plan.

The act of securing video evidence while investigating claims continues to be a legal and acceptable method throughout the United States. The general rule is that anyone (specifically in this matter, a licensed private investigator) may take video and photographs in a public place absent of any statute or local ordinance prohibiting such activity. It is important to keep in mind that a subject's reasonable expectation of privacy should be taken into consideration. One's reasonable expectation of privacy is to be at risk when in a public place.

A great example is that there are no rights in garbage left for collection in a public place. Once left at the curb, an individual has relinquished their rights to the contents which often can be a great source of intelligence, at a costly smell! Any item that is observable in "plain sight" without the use of devices that can enhance the sighting and quality of the subject is fair game. For example, if someone is in their fenced backyard, there is a reasonable degree of privacy to be expected. If they are observed carrying out activity that can contradict an alleged injury, the question remains whether a licensed investigator can secure evidence legally without violating their right to privacy. From our perspective, if the investigator can observe the activity without the use of enhancement devices (climbing a tree or using a ladder) then the information obtained can be utilized and entered into evidence in a court of law. In addition, if the line of site to a subject's residence or backyard is in line with a nearby elevated roadway, where observations can be clearly made, the expectation of privacy by a subject is also reduced exponentially.

According to Sean Nicolette, Esq., a partner with Walsh and Hacker, a law firm specializing in workers' compensation defense, "remote surveillance is the wave of the future for comprehensive investigations." From a cost savings standpoint, remote surveillance would reduce the costs associated with having a live body stake out the subject under investigation. It also allows for more consistent surveillance of the subject which can be critical in defending claims. Often an injured worker will claim that the surveillance "caught them on a good day" when the investigation is damaging to their case. They will argue that there was not video catching them on their "bad days." Remote surveillance helps refute this argument. In addition, Nicolette feels that the most important aspect of remote surveillance is establishing a proper chain of custody and obeying constitutional rights. This will have to be addressed by the investigative companies and the tactics that they utilize. It is critical to consider the following 7 CRITICAL FACTORS when engaging in the use of remote surveillance technology to secure evidence.

## **FACTOR 1: Type of Device: Drones and Remote Cameras**

### **Drones**

Beware of the type of device that is used and the legality surrounding the use of the device. Drones, also known as Unmanned Aircraft Systems (UAS), for instance, are now regulated by the Federal Aviation Administration (FAA). FAA rules govern a variety of considerations including weight, the remote pilot's visual line-of-sight on the craft, the proximity to the pilot and proper piloting certifications to name a few. Drones require specific regulations including flying under 400 feet and during daylight hours. In addition, they must also yield the right of way to manned aircraft and per the FAA "Must not fly over people or from a moving vehicle." In addition, each state has its own set of laws which can complicate matters further. For example, a municipal law bans the use of drones in Syracuse and a city restriction makes it illegal to fly them in New York City. The Town of Orchard Park revised its municipal ordinance which restricts when and where drones can take off and land within the town limits. Other recently passed New York State laws relate to conducting unlawful surveillance by use of a drone. To summarize, it is not allowed to record another person by means of aerial imaging technology at a place and time that the person has a reasonable expectation of privacy. In general, drones can be flown for commercial use including incidental to business. The interpretation around the law about flying over people may come into question during an insurance investigation, however, technology now allows for the devices to be versatile and effective without flying directly over people.

### **Remote Cameras**

Remote camera technology has evolved significantly over the past few years. Devices have become more and more automated and the ability to secure uninhibited video for prolonged periods of time has been instrumental. If we think through the eyes of a hunter, most utilize remote cameras to learn specific patterns and tracking of their prey. This video is utilized as a "tool" to help them secure the hunted. This same process applies in the claims investigations space. Remote cameras are now tiny and packed with tons of potential. The average size of a modern remote camera today is less than one square inch and surrounded in a covert box or packaging. From the traditional orange traffic cones, to wooden posts that are in many areas, the ability to use this technology can become endless. Most devices are operated from a battery along with a video storage card that can be manually updated, or in some cases remotely monitored with proper WIFI access. The challenges lie in securing the proper angle and line of site to secure the best possible outcome(s). A claimant could easily enter or exit a residence without being in the line of site of the camera. In addition, if using a motion-based camera, it would require constant monitoring or review of multiple days of footage in attempts to secure the video for a claimant. Lastly, mother nature plays into this process. If weather is not conducive, it may cause challenges with the actual camera and integrity of the video secured. While these are great tools, they cannot replace good old-fashioned investigative work, especially when a claimant goes mobile.

## **FACTOR 2: Location/Placement of Device**

Once a decision has been made to utilize a device, placement and location is critical. It is illegal to place a device on private property without the express consent/authorization of the property owner. If a neighbor of a claimant authorizes the use of their property, that would be ideal, but we know that in the life of claims, that is generally not the case. In many instances, the neighbors are friends or relatives and could potentially inhibit an investigation. In addition, many claimants reside in metropolitan areas where it may not be conducive to place a device. Areas that are dense in population and frequently travelled make it challenging to effectively conduct investigations. Let us also remember that placement of a device also requires the ability to return on a regular basis to change batteries, memory cards and retrieval. When placed in a public place, the objective would be to secure the footage without causing disruption to the surroundings and preserve the integrity of the video, as well as the security of the camera. Careful analysis of each location should be conducted to ensure that placement can be made without causing legal issues, both for the Chain of Custody, along with Invasion of Privacy.

### **FACTOR 3: Expectation of Privacy**

Expectation of Privacy....is it reasonable? In the United States, an individual has a reasonable expectation of privacy around their residence. According to the Fourth Amendment of the United States Constitution, an individual is protected from warrantless searches of places, and of seizures of persons or objects in which they have a subjective expectation of privacy that is deemed reasonable in public places. What does this mean? Unfortunately, the reasonableness is construed upon the totality of the circumstances on a case by case basis. In claims related matters, an investigator is retained to establish the legitimacy of the claim. This could mean that a variety of steps may be taken to determine if a claim is legitimate, including complete investigation and surveillance. The key here is to ensure that the investigator is not violating someone's right to privacy. What does that right to privacy look like? It is nearly impossible to paint all scenarios with one color, however, there are some basic questions around what is reasonable. A question such as.... Can an investigator look in the window of a claimant and secure video footage? Most likely not as an individual has a reasonable expectation of privacy. If we add an additional element to that which includes the claimant having his/her window open and in plain view it is quite possible that the expectation of privacy is lessened. New York State Governor Mario Cuomo signed legislation in August of 2017 cracking down on unlawful surveillance and the issue is now whether or not surveillance for the purposes of fraud mitigation is applicable under this new legislation! While there is a reasonable expectation of privacy, (i.e., an investigator should not have to climb a fence or a tree to observe a subject), if the investigator is able to observe activity from an adjacent area in plain view, the expectation is minimized significantly. (Our office is in contact with the Governor's office for an opinion regarding the insurance investigations industry). ANY UPDATE ON THIS TO INCLUDE?

### **FACTOR 4: Chain of Custody**

How is Chain of Custody relevant to remote technology? Should an investigator be required to testify, it is critical to understand the process that was undertaken to do so. If it is a remote camera, who is certifying that the video secured is intact and has not been edited in any way? It is extremely challenging to do so when the video device has not been in the custody of the investigator the entire time. The investigator may be questioned surrounding the legitimacy of the video at which time it is critical to have an established process in place for the setup and retrieval of the video evidence. The process should include the setup, maintenance and monitoring of the evidence. In addition, other tools to support remote technology are critical. Should an investigator be called to testify, they can only testify to the periods in which they were physically on site with the evidence. As a result, we always recommend supplemental surveillance by a field investigator once patterns have been established.

### **FACTOR 5: A tool for further investigation**

Remote cameras are not the only source for the best outcomes in the surveillance process. They are a great TOOL to use in addition to the investigative practices. It is nearly impossible to rely solely on a remote camera to secure adequate evidence to refute a claim. Many factors can impact whether the tool is sufficient including weather, traffic, neighborhood, line of site, various individual(s) at a claimant address, multiple points of entry/egress and more. While the technology is a great resource, it is a tool to supplement true investigative work.

### **FACTOR 6: Complications and LEGAL implications**

Complications can arise out of the use of remote technology. In most cases, it involves placement of the device along with the ability to find an adequate location that will not compromise the outcome. With placement comes the legal implications of trespassing and authorization. It should not be assumed that an investigative firm is accessing "public property" or has proper authorization for placement. You should be sure that each matter is carefully reviewed to determine where placement is to occur and if there are legal grounds to record from the placement location. The legal implications could be severe including the dismissal of the evidence, or worse, a possible criminal action for trespassing. To be safe, ensure that your investigative partner is not violating any laws.

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## **FACTOR 7: Testimony and Admission into Evidence**

Once evidence is secured it must be placed into a secure tracking method and testimony by the investigator is needed in most cases. Ensure that your investigative partner is prepared to discuss the process utilized and deployed for remote technology particularly on the aspect of video review. Ensure that the firm has a process and a method that is supported by an affidavit signed by all parties who have accessed and reviewed the video. It is also important that the investigator is well versed in the privacy laws on a local, state and federal level. It is critical that any remote video evidence is also supported by actual investigative practices along with corresponding video from additional sources. If the key source of evidence is solely remote technology, be prepared to properly defend the process. While there is nothing wrong with using this as the only source of evidence, having further supporting documentation will enhance the outcome. Further information surrounding best practices in investigations along with remote technology and deployment of this technology for various investigative practices may be found by visiting [www.allianceinvestigative.com/](http://www.allianceinvestigative.com/).

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