



### Use of Drone-Acquired Evidence in Civil Cases

by Christopher B. Hopkins

As the year 2014 draws to a close, holiday gift-giving is abuzz with the sounds of quadcopters since drones have landed on many wish lists. Legal issues are poised to take flight over models which can top

\$1,000 or more, such as the Parrot BeBop or DJI Phantom II, which can fly outside of the pilot's line-of-sight, stream in-flight video or photos, and even automatically return "home" via GPS. Will 2015 be the year where lawyers obtain and submit drone-acquired evidence in court?

According to a December 2014 article in the *New Jersey Law Journal*, at least one firm outside of Florida has purchased a drone to shoot overhead video of a fire casualty and, in another instance, a parking lot in a premises liability case. Would that type of evidence be admissible in Florida?

Florida has a drone statute but it appears to carve out an exception allowing drone evidence in civil cases. Florida Statute 934.50 prevents law enforcement from gathering evidence (except in limited circumstances) and disallows drone evidence "in a criminal prosecution in any court of law in this state." Notably, the statute does not prevent: (a) non-law enforcement agencies from using drones; (b) private companies or citizens from using drones; nor (c) admission of drone evidence in non-"criminal prosecution" matters such as administrative and civil suits.

Before taking to the air, law firms should be aware of *Michael Huerta, Admin., FAA v. Raphael Pirker*, a November 2014 decision by the NTSB which held that drones fall into the broad definition of "aircraft" and that the FAA prohibits careless and reckless operation. In the *Pirker* case, the operator was shooting commercial video and flew in a manner that the FAA deemed in violation of airspace rules. Once aloft, drone operators need to be aware that certain locations and flying techniques may violate federal law.

Additionally, drone-equipped law firms should be cognizant of the FAA Modernization and Reform Act of 2012 which specifically prohibits the commercial use of drones absent an exemption. In short, a law firm which flies a drone to acquire evidence would likely be alleged to be operating the drone for commercial purposes, not unlike the situation in *Pirker* (of note, *Pirker* was a pre-Act case). The FAA is not expected to provide additional "drone rules" until 2016-2017 which means current regulations may be unclear and are subject to overhaul in the coming months.

So what steps would a lawyer consider for admitting drone-acquired evidence? Under Florida Rule of Evidence 402, all relevant evidence is admissible, except as provided by law. To that end, drone-operators will want to protect against challenges that the evidence was obtained contrary to law. Obviously, in the appropriate context, parties have certain Fourth Amendment rights and, under the Florida Constitution, practitioners need to consider the broader rights in Article I, sections 12 and 23 (these provisions may have limited practical application given F.S. 934.50). In *U.S. v. Javis*, the U.S. Supreme Court held that

improperly-obtained evidence in a criminal case could, however, be admitted in a subsequent civil case. Similarly, in *State v. Scarlet*, the Florida Supreme Court confirmed that illegally-obtained evidence could be used in non-criminal, administrative hearings.

In approaching how to admit drone evidence, counsel should review *Lorraine v. Markel American Ins.*, 241 F.D.R. 534 (D. Md. 2007) which provides a near step-by-step analysis for admitting several forms of electronic evidence.

Interesting questions arise whether evidence obtained illegally – such as a drone trespassing, invading privacy, or violating FAA regulations – would be admissible in civil cases. Case law regarding the use of private investigators who obtain evidence while trespassing could provide persuasive guidance.

Lawyers using or relying on drones need to be especially mindful not to intercept communications in violation of state and federal wiretapping laws (consider muting or disabling the drone's microphone). An instructive criminal case is *McDade v. State*, where the Florida Supreme Court threw out incriminating recordings which violated the wiretapping statute. In *O'brien v. O'brien*, the Fifth District held that a former spouse's interception of email was illegal and refused to admit such evidence (note the discussion in *O'brien* of a possible defect in Chapter 934). Outside of Florida, in *Collins v. Collins*, a spouse was illegally recorded however the Texas wiretap statute, unlike Florida's, does not prohibit admissibility. Nonetheless, the *Collins* court held that the statute's prohibition against dissemination, alone, made the recording inadmissible. The dissent in the Third District case, *Burgmann v. State*, includes some discussion of privacy as well as the distinctions between the Florida and federal wiretap laws.

Lawyers also should be aware that evidence obtained in violation of the Rules of Professional Conduct may be stricken as a sanction. In *Golden Door v. Lloyds*, the District Court (S.D. Florida) confirmed that a violation of Rule 4-3.4 warranted the exclusion of tainted evidence. Likewise, the mis-use of drones may lead to tort liability.

Looking ahead, drones may re-write privacy laws much like other technology advancements have influenced the "what society is prepared to recognize" test for privacy. Recent examples include *U.S. v. Jones*, where GPS data was inadmissible because the Supreme Court revived a dormant "physical intrusion" test (see also *Florida v. Jardines*). In *State v. Gibson*, the Third District held that it was not a privacy violation while a person submitted a DNA sample to be ruled out as a suspect in one crime but law enforcement then placed his genetic code in a permanent, nationwide CODIS database.

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