

## **Leveraging Your Expert in Drafting of Marital Settlement Agreements**

*By Gregory Kohr, Partner, and Noel Capuano, Director*

Imagine you and your client have just spent months, maybe even years, attempting to negotiate a settlement in their matrimonial matter, and FINALLY, an agreement has been reached. The hard part should be over, right? Unfortunately, that may be far from the case.

While it may seem that the preparation of the Marital Settlement Agreement (“MSA”) is a straightforward process of memorializing the terms that the parties have spent months to years negotiating, the fact is “the devil is in the details.” Choice of terminology, references to specific calculations/methods (or omission of same), and a variety of potential pitfalls can, and have, caused misunderstandings and misinterpretations, landing the parties right back where they started - in court.

It goes without saying that the provisions memorialized in the MSA should be thoroughly explained to the parties in advance. What we often encounter, however, is that while the parties will agree to issues in theory, they often don’t perform a detailed review of the MSA, don’t ask questions, and, as a result, frequently get bogged down in the actual mechanics of effectuating the agreement. Additionally, we often see financial terms such as “net income” used in ways that may or may not be appropriate to the given circumstance. In these instances, if the MSA itself isn’t very clear...welcome back to litigation!

This article discusses different scenarios, but certainly not all, where vague or missing language in a MSA may lead to unforeseen complications down the road. In almost all of these cases, leveraging the services of the financial expert can be an invaluable resource.

### Business Valuation

When one spouse owns an interest in a business, all or part of the business is considered part of the marital estate and may be subject to equitable distribution. In almost all of these instances, a business valuation, whether formal or informal, is recommended for several reasons. First and foremost, while the owner spouse will likely retain the business, the non-recipient spouse needs an understanding of what their equitable “share” of the business is worth to understand what they will receive.

Often, an MSA will reference the value of the asset received in lieu of the business interest but does not reference the business value itself. Why does this matter? It is quite simple. When the topic comes up in conversation, and the non-owner spouse thinks, “Wait, I didn’t get a piece of the business,” they may refer back to the MSA, a reasonable response. If the MSA states they received a brokerage account worth \$50,000 instead, what conclusion do they draw? Does that mean the business was worth \$100,000 under the presumption that all the assets were divided equally? The MSA should clearly state the actual percentage awarded and the valuation conclusion for the business. If factors impact the percentage awarded to the non-owner spouse, such as consideration for a pre-marital value, those factors should also be clearly explained. Regardless of the reason, the parties can agree to anything that works for them, but the terms should be explicitly referenced

in the agreement so that the parties are prevented from having "selective memory" years down the road.

It should also be noted that some businesses have no value; they provide a job for the owner and nothing more. This does not mean the business should not be referenced in the MSA; rather, it should be noted that 1) the business was considered, but 2) it was determined to have no value and was therefore not considered in determining the marital estate.

### Alimony/Income Determination

Determining alimony should be relatively straightforward in cases where one or both parties are W-2 wage earners. The challenge comes when a spouse is self-employed or has a more complex compensation structure.

If a spouse is self-employed, their income may come in the form of various expenses paid through the business, such as auto, credit cards, insurance, etc. They may own the building in which the company operates. All of these economic benefits need to be considered for alimony purposes. Additionally, recognition needs to be given to the fact that the business owner can potentially manipulate their income in the process of what is commonly referred to as "divorce planning." An example would be a sudden decline in revenue that the owner attributes to external factors (competition, economy, etc.) when, in reality, they are simply working less. An accountant is frequently engaged in these cases to determine the business owners' true economic benefit.

Now let us say one spouse receives a base salary as well as some combination of an annual bonus, performance incentives, or equity-based compensation such as stock options ("SOs") or restricted stock units ("RSU"). In most cases, the only constant year-to-year is the base salary, as the other components of compensation are typically predicated on the employer's financial performance and/or the employee's annual performance review. Often, we see that alimony is comprised of two distinct parts: (1) a percentage of the base salary and (2) a percentage of the additional compensation (bonus/non-cash compensation) if and when it is awarded. While this appears relatively straightforward, there is a "wrinkle." With equity-based compensation, many factors would render the awards as assets that would be considered available for equitable distribution instead of income. Additionally, there are circumstances where the award of non-cash compensation is a non-recurring event. All of these circumstances need to be reviewed and quantified in order to arrive at an agreement that is advantageous for both parties.

### Equity-Based Compensation

This issue comes up so frequently that it deserves further discussion. It is imperative to understand the type of equity-based compensation, how it is awarded/granted, how/when it vests, and how it is ultimately received. We have seen instances where equity-based compensation was defined incorrectly in the MSA, leading to complications when facilitating equitable distribution. Further, it should be noted that the existence of a grant/award of stock options or RSUs does not guarantee receipt of the same, as these forms of equity-based compensation can be subject to both vesting schedules and forfeitures. If the recipient spouse's employment is terminated prior to vesting, they cannot monetize the awards, and alimony or equitable distribution could be impacted. The MSA

should include language that explicitly addresses these potential situations to avoid surprises in the years to come.

### Conclusion

While accountants are often involved in the determination of business value and income, their experience and familiarity with the case can be a valuable resource when drafting the MSA and can minimize the potential for post-judgement disputes in the future.

Gregory Kohr is a partner and a member of Marcum's Valuation, Forensic & Litigation Support Services Group. His clients include businesses in the professional and medical sectors, individuals, trusts, estates, and partnerships. Gregory supports clients in commercial and matrimonial litigation, as well as those needing assistance with gift and estate tax or business planning. His skills in business valuation, litigation support; and forensic services are instrumental in a variety of high stakes contexts, including the negotiation of financing arrangements, family and estate planning, and matrimonial dissolution litigations, among others.

**Speaker: 5 Minutes**

Mike Fonseca – National Sales Manager

**Course Name: Leveraging Technology to Mitigate Conflict**

**Course Description:**

This course is designed to give Family Law Professionals specific knowledge on how to manage cases that involves one or both parents being accused of abusing alcohol while parenting child(ren). The presentation will start with first-hand examples that document knowledge and understanding of the dynamics involved with successful parenting when Alcohol Use Disorder is presented. This course explores the facts around the disease of Alcohol Use Disorder and how it plays into developing parenting plans around child custody decisions and safety. Lastly, best practices will be reviewed around testing and both compliant and non-compliant behavior. Ultimately the attendees will leave with an enriched knowledge base of how to implement new technology that meets specific goals of parenting and child safety while maintaining the Best Interest of the Child and not weaponizing the disease of Alcohol Use Disorder.

**Mike Fonseca**, National Sales Manager:  
SOBERLINK Healthcare.

Mike Fonseca has been the National Sales Manager for Soberlink Healthcare since 2011. He manages National Matrimonial Organizations like AAML, AFCC, and ABA Family Law Section.

He dedicates his efforts educating matrimonial professionals on Soberlink's alcohol monitoring technology for Child Custody Cases.

Mike and his wife Amber are proud parents to son's Roman and Lincoln residing in North Texas.

Mike holds his degree from Santa Ana College with emphasis in science and technology.

**SOBERLINK, Inc.'s Mission Statement:**

SOBERLINK's mission is to become the global leader in the development of leading-edge wireless diagnostic technology that monitors addiction related diseases to aid in the reduction of relapse rates.

**About SOBERLINK, Inc.**

SOBERLINK is a technology-based company that develops innovative products to help automate the alcohol monitoring process. SOBERLINK strives to provide exactly what is stated in the company's name: a link between a person and sobriety. To achieve this goal, SOBERLINK's DOT certified breathalyzer uses a built-in camera and wireless technology to send a person's blood alcohol content (BAC), GPS location, verification photo, and time of report to cloud storage on a secure Monitoring Web Portal.

# Why Bitcoin?

Alex Pron, CFP<sup>®</sup>, CBDA

## Bio: Alex Pron, CFP<sup>®</sup>, CBDA



- Bucknell University, B.S. in Accounting
- Wharton School of UPenn – Blockchain Analytics and Digital Assets certificate program
- CERTIFIED FINANCIAL PLANNER<sup>™</sup> (CFP<sup>®</sup>)
- Certification in Blockchain and Digital Assets via Digital Asset Council of Financial Professionals (CBDA)
- Certified Public Accountant (CPA) – currently inactive
- Forbes 2022 “Top Next-Gen Wealth Advisors Best-in-State” — #14 in New Jersey
- Forbes 2021 “America’s Net Gen Advisors” — #353 in the US
- Forbes 2019 “Best in State Next-Generation Wealth Advisors”



# Why Now: Bitcoin's Historical Four-Year Cycle

Market performance has historically moved in 4-year cycles based around the halving schedule

- Cycle 1 2009 - 2013
  - rough November 2012
  - Peak November 2013 ~\$1242
- Cycle 2 2014 - 2017
  - rough January 2017
  - Peak December 2017 ~\$19,400
- Cycle 3 2018 - 2021
  - rough December 2020
  - Peak November 2021 ~\$69,000
- Cycle 4 2022 - 2025
  - rough December 2022
  - Peak ~\$100,000

Source: <https://twitter.com/AltcoinDaily/status/1726230091162861789>, <https://cointelegraph.com/news/a-brief-history-of-bitcoin-crashes-and-bear-markets-2009-2022>, [Bitcoin: A review of past price cycles for the world's oldest cryptocurrency \(cityindex.com\)](https://www.cityindex.com)

2011-2013

ACCUMULATION

2014-2017

ACCUMULATION

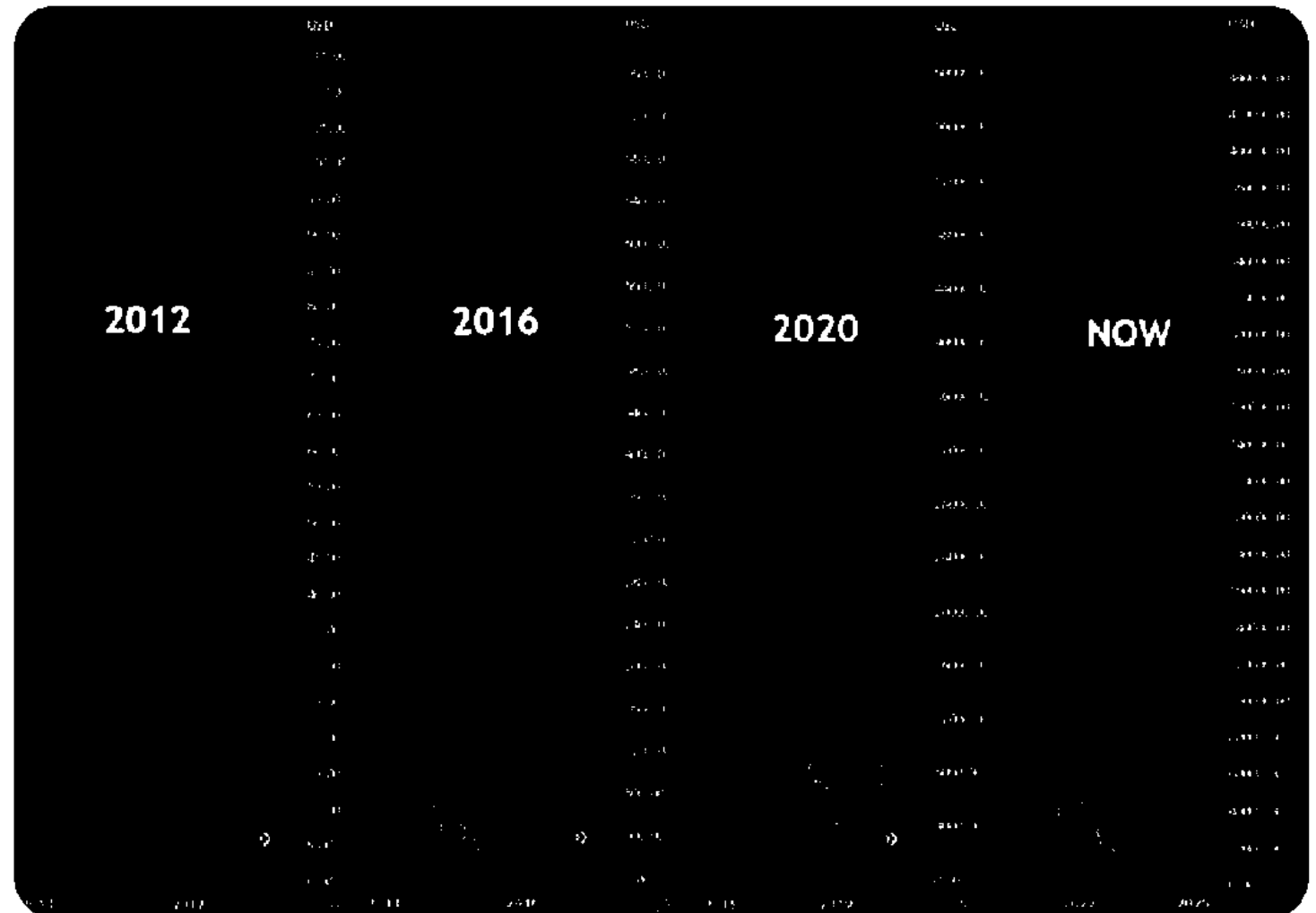
2018-2021

ACCUMULATION

2022-2023

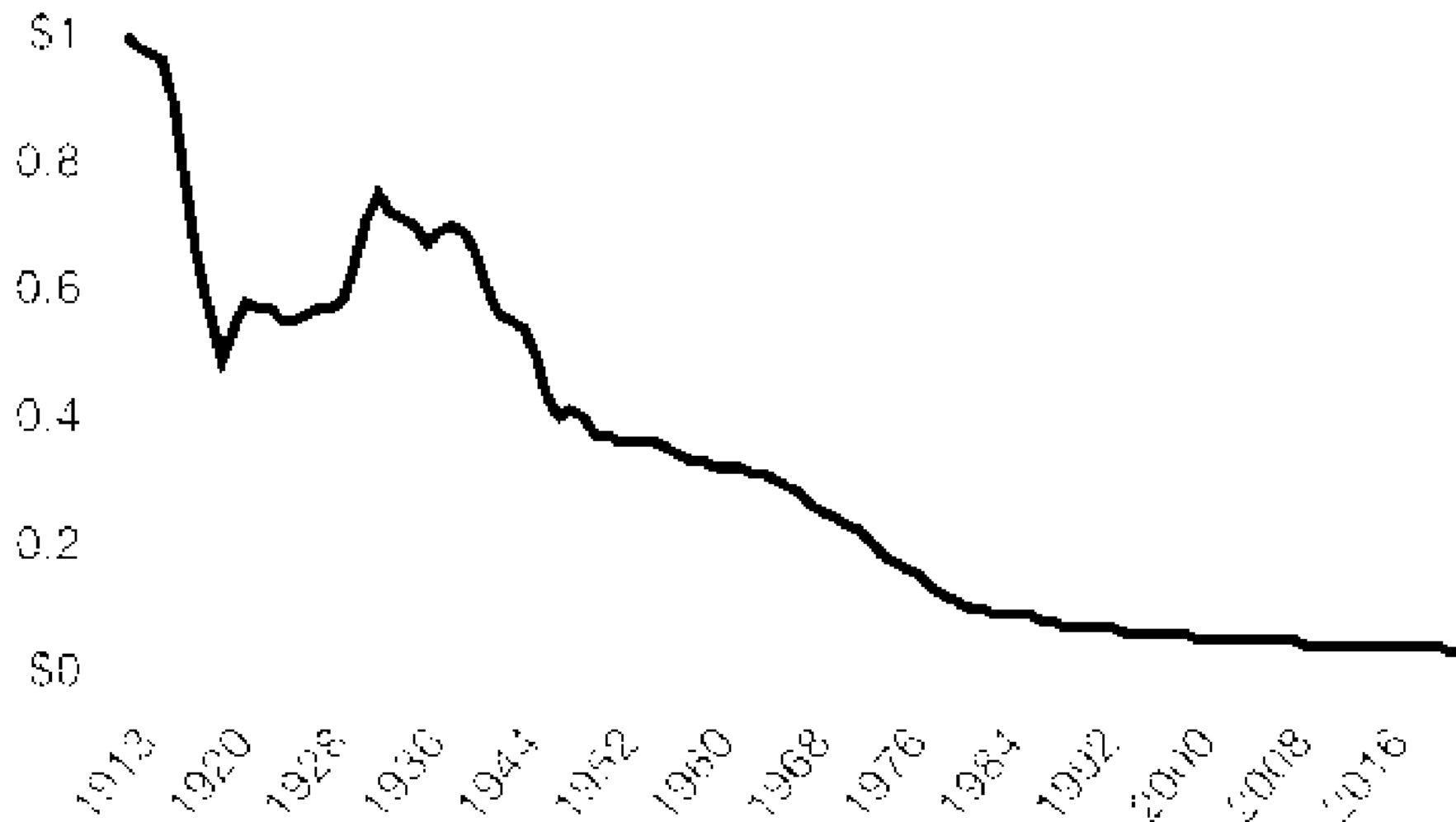
ACCUMULATION

# Why Now: Bitcoin in Halving Years



Source:  
[https://twitter.com/RD\\_btc/status/1728324716132511857](https://twitter.com/RD_btc/status/1728324716132511857)

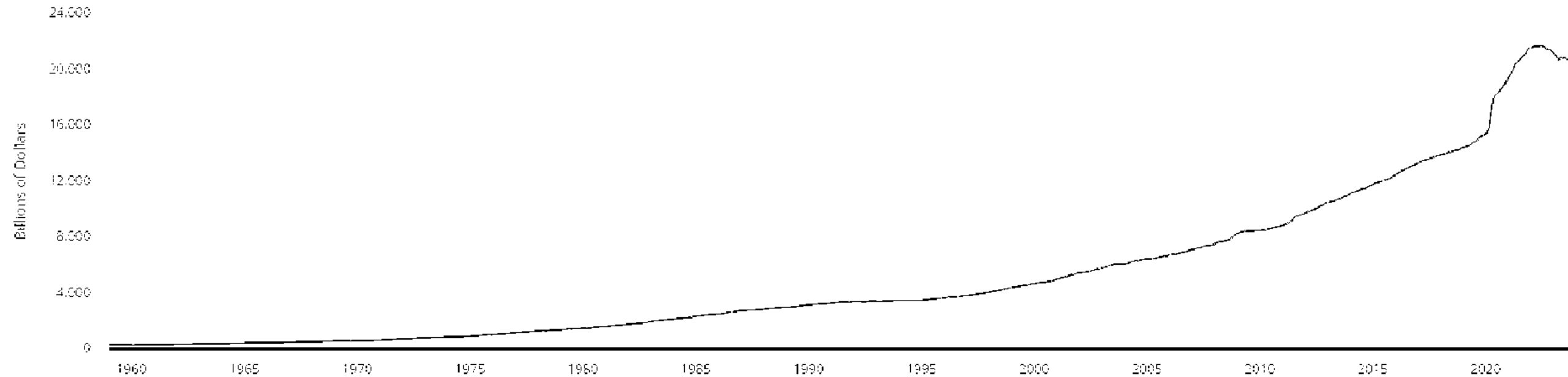
## Buying power of \$1 over time, 1913-2023



Source: <https://twitter.com/RealSpikeCohen/status/1738696879917957561>

# Money Supply Growth

FRED  — M2



Month	Year	M2 (money supply)
January	1959	286.6
January	2023	21,221.7

CAGR 6.96%

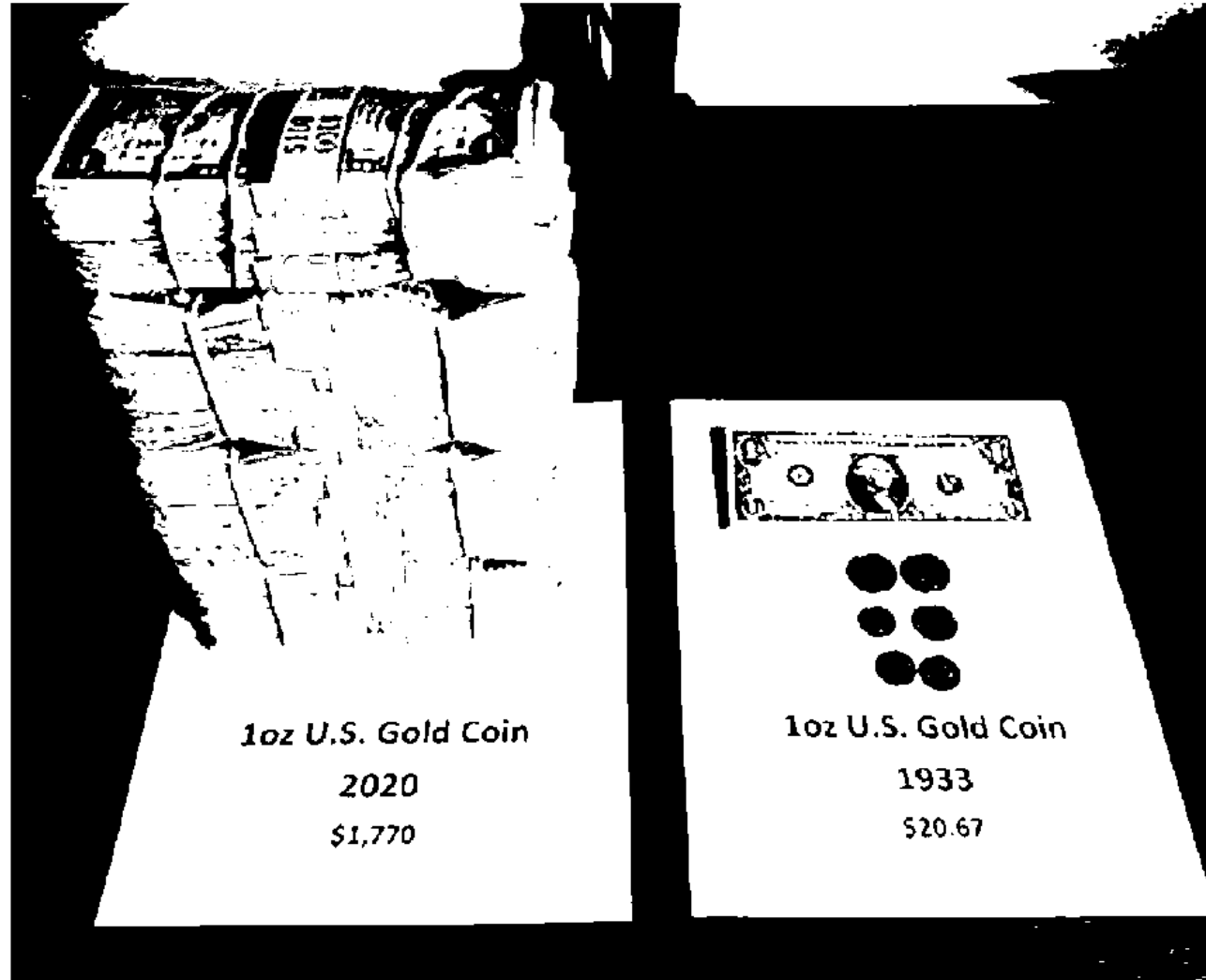
Month	Year	M2 (money supply)
January	1913	15.7
January	2023	21,221.7

CAGR 6.77%

Source: <https://fred.stlouisfed.org/series/M2SL>

Source: [https://www.econdat.us.com/cpi\\_m2.html](https://www.econdat.us.com/cpi_m2.html)

An ounce of gold is NOT worth more today—  
Your dollars are just worth less



Source:  
[https://twitter.com/thomas\\_fahrer/status/1680729048283230210](https://twitter.com/thomas_fahrer/status/1680729048283230210)

# iPhone: Priced in Bitcoin



**MDB**  
@MDBitcoin

...

Price of iPhone in

Over The Years:

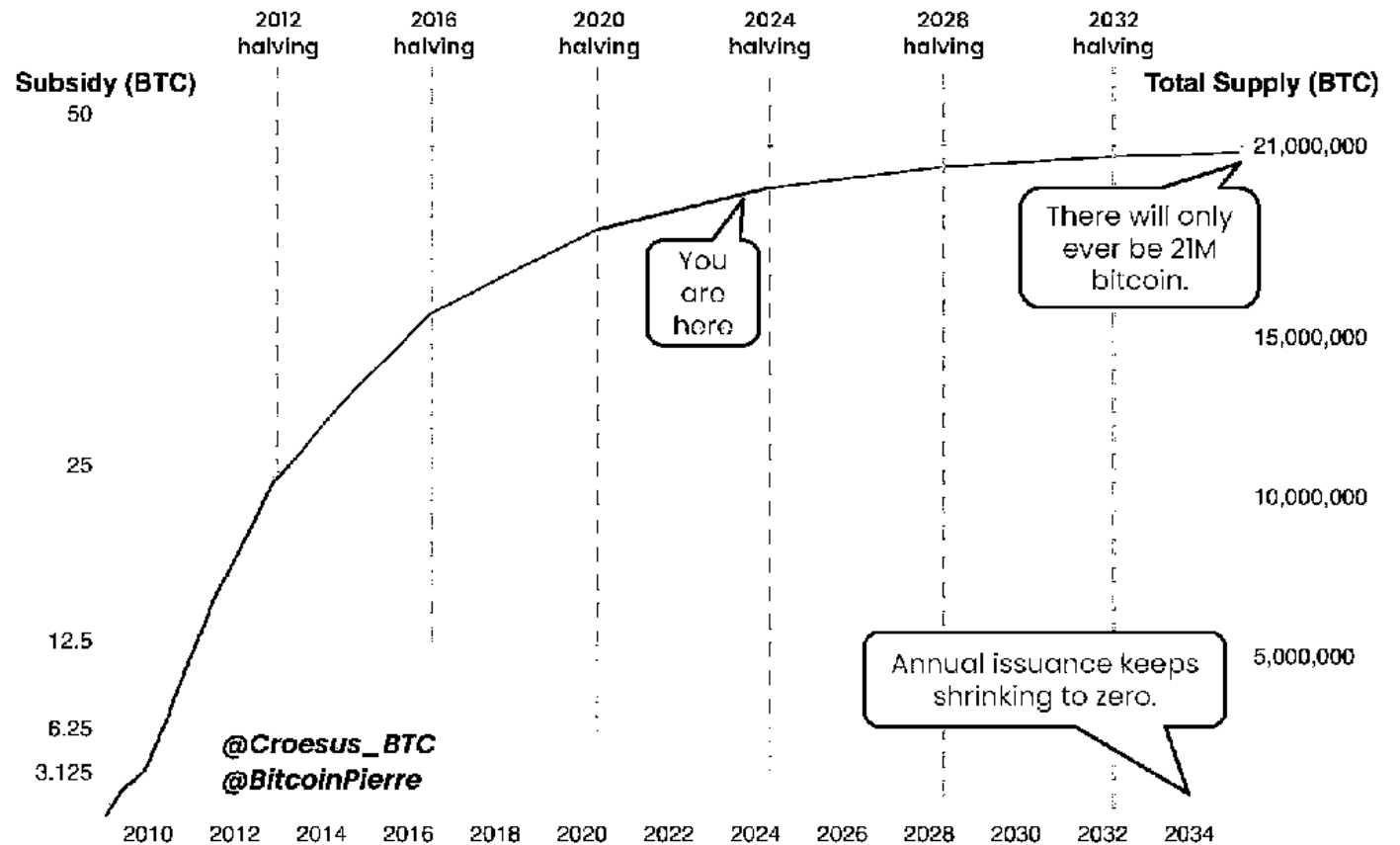
iPhone 4s: 162 BTC  
iPhone 5: 53 BTC  
iPhone 5s: 5 BTC  
iPhone 6: 1.7 BTC  
iPhone 6s: 2.8 BTC  
iPhone 7: 1.1 BTC  
iPhone 8: 0.19 BTC  
iPhone X: 0.14 BTC  
iPhone XS: 0.15 BTC  
iPhone 11: 0.068 BTC  
iPhone 12: 0.051 BTC  
iPhone 13: 0.018 BTC  
iPhone 14: 0.042 BTC  
iPhone 15: 0.031 BTC

Source:

<https://twitter.com/MDBitcoin/status/1748172879949132225>

# Bitcoin Supply is Inelastic

- New Bitcoin issued every 10 minutes
- The amount of Bitcoin issued every 10 minutes DECREASES over time
- More specifically, the new issuance of Bitcoin is cut in HALF every four years (approximately)



Source: <https://www.onceinaspecies.com/p/the-bitcoin-halving-6-months-until>

<https://www.investopedia.com/tech/what-happens-bitcoin-after-21-million-mined/>

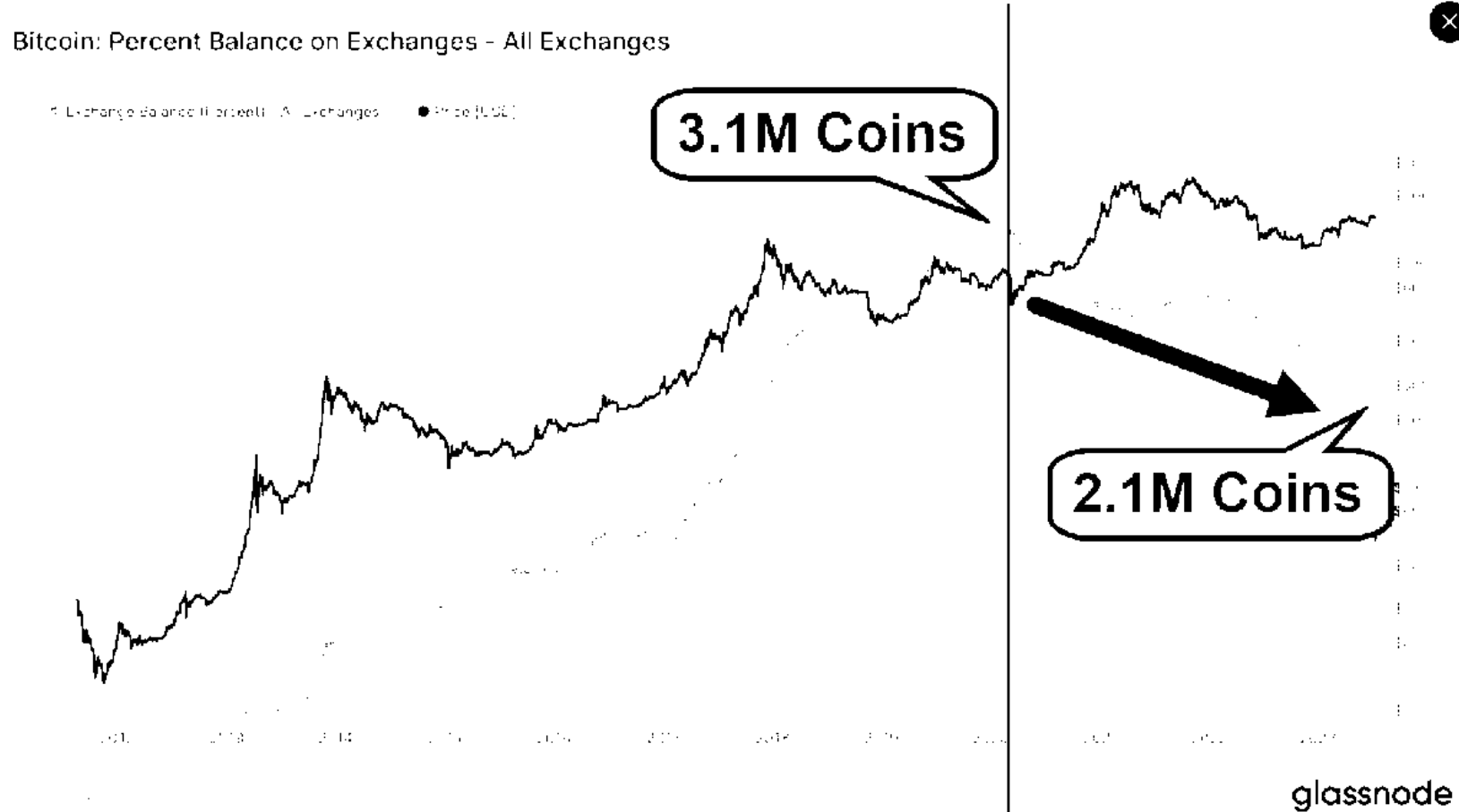
# Halving Cycles Create True Scarcity

Cycle	Halving Year	Cycle End	BTC per Block (every 10 min)	BTC per day	BTC per Cycle	Total Supply Mined	% Total Supply Mined
1	-	2012	50	7,200	10,500,000	10,500,000	50.0%
2	2012	2016	25	3,600	5,250,000	15,750,000	75.0%
3	2016	2020	12.5	1,800	2,625,000	18,375,000	87.5%
4	2020	2024	6.25	900	1,312,500	19,687,500	93.8%
5	2024	2028	3.125	450	656,250	20,343,750	96.9%
6	2028	2032	1.5625	225	328,125	20,671,875	98.4%
7	2032	2036	0.7813	112.5	164,063	20,835,938	99.2%
8	2036	2040	0.3906	56.25	82,031	20,917,969	99.61%
9	2040	2044	0.1953	28.125	41,016	20,958,984	99.80%
10	2044	2048	0.0977	14.0625	20,508	20,979,492	99.90%
11	2048	2052	0.0488	7.03125	10,254	20,989,746	99.95%
12	2052	2056	0.0244	3.515625	5,127	20,994,873	99.976%
13	2056	2060	0.0122	1.757813	2,563	20,997,437	99.988%
14	2060	2064	0.0061	0.878906	1,282	20,998,718	99.994%
15	2064	2068	0.0031	0.439453	640.9	20,999,359	99.997%
16	2068	2072	0.0015	0.219727	320.4	20,999,680	99.998%
17	2072	2076	0.0008	0.109863	160.2	20,999,840	99.9992%
18	2076	2080	0.0004	0.054932	80.1	20,999,920	99.9996%
19	2080	2084	0.0002	0.027466	40.1	20,999,960	99.9998%
20	2084	2088	0.000095	0.013733	20.0	20,999,980	99.9999%
21	2088	2092	0.000048	0.006866	10.0	20,999,990	99.99995%
22	2092	2096	0.000024	0.003433	5.0	20,999,995	99.999976%
23	2096	2100	0.000012	0.001717	2.5	20,999,997	99.999988%
24	2100	2104	0.000006	0.000858	1.25	20,999,999	99.999994%
25	2104	2108	0.000003	0.000429	0.63	20,999,999	99.999997%
26	2108	2112	0.000001	0.000215	0.31	21,000,000	99.9999985%
27	2112	2116	0.0000007	0.000107	0.16	21,000,000	99.99999925%
28	2116	2120	0.0000004	0.000054	0.08	21,000,000	99.99999963%
29	2120	2124	0.0000002	0.000027	0.04	21,000,000	99.99999981%
30	2124	2128	0.00000009	0.000013	0.02	21,000,000	99.99999991%
31	2128	2132	0.00000005	0.000007	0.01	21,000,000	99.99999995%
32	2132	2136	0.00000002	0.0000034	0.0049	21,000,000	99.99999998%
33	2136	2140	0.00000001	0.00000168	0.0024	21,000,000	99.99999999%



# Supply on Exchanges is Becoming More Scarce

Source:  
<https://twitter.com/satoshiimoneybtc/status/1679600801189097474>



# 70% of all Bitcoin hasn't moved in over a year

Bitcoin: Percent of Supply Last Active 1+ Years Ago



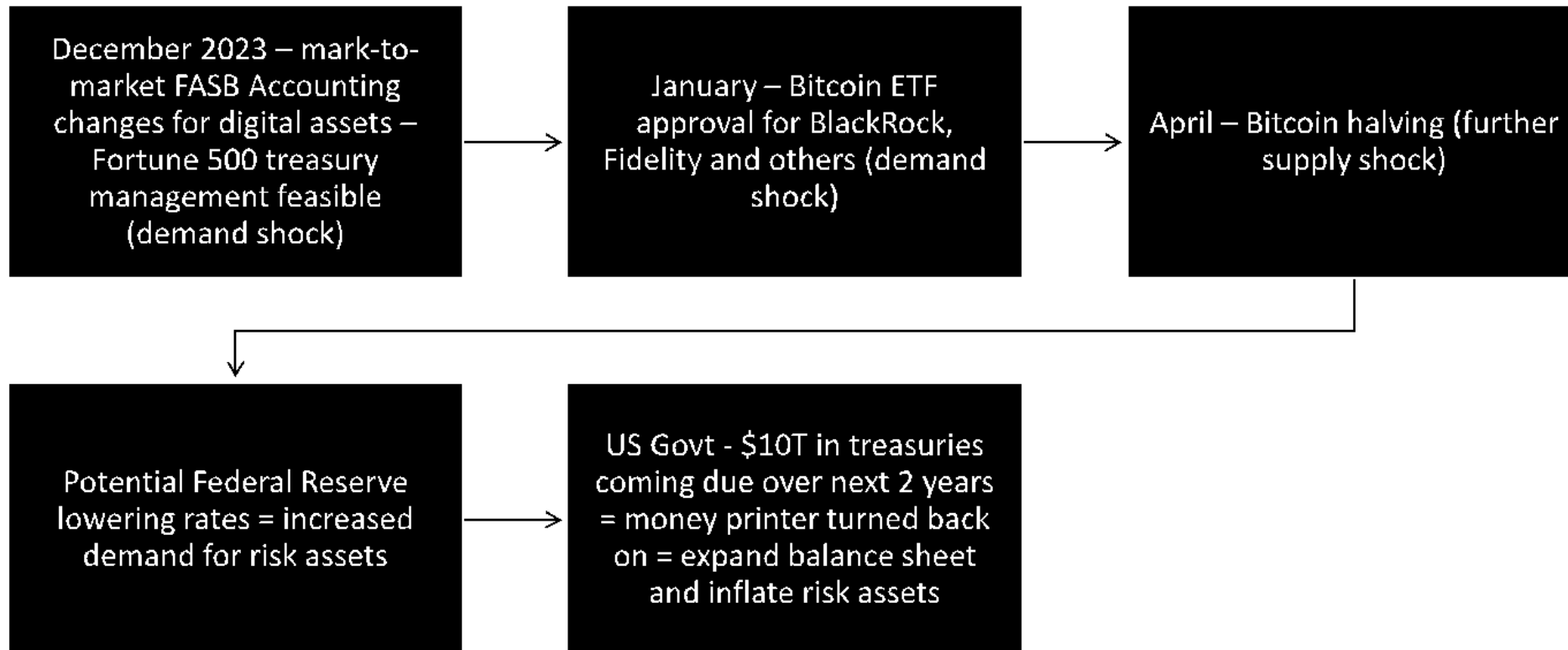
Source: <https://www.glassnode.com/>

glassnode

Data as of November  
2023

Source: <https://medium.com/coinmonks/70-of-all-bitcoin-hasnt-moved-in-over-1-year-89fa289dc048#:~:text=70%25%20of%20bitcoin%20hasn't,stronger%20conviction%20than%20ever%20before.>

# Potential Market Drivers in 2024





MARKETS

BUSINESS

INVESTING

TECH

POLITICS

CNBC TV

INVESTING CLUB



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CRYPTO WORLD

# Jamie Dimon lashes out against crypto: 'If I was the government, I'd close it down'

PUBLISHED WED, DEC 6 2023, 12:50 PM EST | UPDATED WED, DEC 6 2023, 3:25 PM EST



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# JPMorgan's Blockchain Unit Expands Despite CEO's Bitcoin Criticism

BY MIOLA ADRIAN

<https://www.cryptotimes.io/jpmorgans-blockchain-unit-expands-despite-ceos-bitcoin-criticism/>



Jason A. Williams

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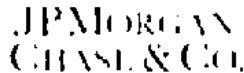

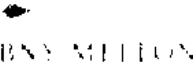


**BREAKING** ✨ **NEWS** : JP Morgan has tripled its internal crypto team, all while its CEO **bashes** Bitcoin, stating he would "ban crypto and bitcoin if he ran the government."

This is the exact move JP Morgan used with the Gold Spot ETF to short the market.

10:58 AM · Dec 13, 2023



# Major players quietly entering digital assets

Firm	AUM, B	Activity	Build or Partner
 <b>BlackRock</b>	9,090	Bitcoin spot ETF	Partner - Coinbase
 <b>Fidelity</b>	4,240	Bitcoin and Ether trading and custody, full stack crypto wealth management solutions	Build - Fidelity Digital Assets
 <b>JPMORGAN CHASE &amp; CO.</b>	3,300	Tokenized USD and EUR transfers via JPM Coin	Build - Onyx private blockchain platform
<b>Morgan Stanley</b>	3,131	Access to three bitcoin funds	Partner - Galaxy, NYDIG
 <b>Goldman Sachs</b>	2,672	OTC crypto trading	Partner - Galaxy
 <b>BNY MELLON</b>	1,910	Hold, transfer Bitcoin & Ether	Partner - Fireblocks
 <b>Invesco</b>	1,484	Bitcoin ETF in Europe, filed for Bitcoin ETF in US	Partner - CoinShares, Galaxy
 <b>BANK OF AMERICA</b>	1,467	Bitcoin futures trading	Partner - CME Group
<b>Total Assets</b>	<b>27,294</b>		

# Disclosures

## Digital Asset Definitions

“Crypto assets”, referred herein as “digital assets”, are assets that are issued or transferred using distributed ledger or blockchain technology. They include, but are not limited to, so-called “virtual currencies,” “coins,” and “tokens.” A particular crypto asset may or may not meet the definition of a “security” under the federal securities laws.

“Bitcoin”, is a type of digital currency in which a record of transactions is maintained, and new units of currency are generated by the computational solution of mathematical problems, and which operates independently of a central bank.

“Ethereum”, is a blockchain platform which hosts several digital assets, including ether. As a blockchain network, Ethereum is a distributed ledger for verifying and recording transactions.

## Digital Asset Risks

Crossover Capital Clients who purchase digital assets, unlike bank deposits or securities accounts respectively, are not subject to U.S. Federal Deposit Insurance Corporation (“FDIC”) or U.S. Securities Investor Protection Corporation (“SIPC”) protections. In the event of the permanent loss or theft of any digital assets, the insolvency of any of the digital asset exchanges where a Client’s digital assets are held or the insolvency of any depository or custodian for such digital assets, a Client may be unable to recover all of its funds or the value of its assets so deposited.

Digital assets are more volatile than traditional currencies and financial assets. The emergence of digital assets has exhibited liquidity risk; credit risk; market risk; operational risk (including fraud and cyber risks); money laundering and terrorist financing risk; and legal and reputation risks. The digital asset market at large is fast evolving and direct connections between crypto assets and systemically important financial institutions and core financial markets, while growing rapidly, are limited at the present time. When investing with Crossover Capital, Clients must be aware that they are making direct investments in approved digital assets using strategies and investment techniques with significant risk characteristics, including risks arising from the volatility, regulation, adoption, security, and underlying functionality of the digital asset marketplace. As such, a Client will be directly and indirectly exposed to risks relating to the further development and acceptance of digital assets, which are part of a new and rapidly changing industry. Digital assets are subject to a variety of factors that are difficult to evaluate both in their day-to-day operations and services offered, but also in their relation to the digital asset landscape as a whole. The slowing or stopping of the development or acceptance of such currencies may adversely affect all or certain digital assets as well as the value of a Client’s account. The potential use of digital assets to, among other things, buy and sell goods and services, to transfer value, and to represent ownership and control is part of a new and rapidly evolving industry that employs digital assets based upon a computer-generated mathematical and/or cryptographic protocol. The growth of the digital asset industry is subject to a high degree of uncertainty. The factors affecting the further development of this industry, include, but are not limited to:

- continued worldwide growth in the adoption and use of digital assets
- government and other regulatory agency regulation of digital assets and their use, services relating to, or restrictions on the operation of digital assets networks, systems, and protocols
- the use of the networks supporting digital assets for developing smart contracts and distributed application
- general economic conditions and the regulatory environment relating to digital assets
- improved anti-fraud, anti-money laundering, and suspicious activity controls, reporting and methodologies applicable to digital asset
- negative consumer or public perception of digital assets

## Risk of Total Loss of Capital

There can be no assurance that an investment strategy will achieve its investment objective or that substantial losses will not be incurred. Clients should be prepared to bear a substantial loss of capital, including the risk that the entire amount invested may be lost. No guarantee is made that a Client’s investment program or overall portfolio, or various investment strategies used or investments made, will have low correlation with one another or that a Client’s returns will exhibit low long term correlation with an investor’s traditional securities portfolio. The use of certain trading counterparties and exchanges, in the context of digital asset transactions, may substantially increase transactional risks and increase the adverse impact to which a Client may be subject.

## Risks Related to Custodial Processes of Digital Assets

The risks relating to the custody of digital assets include appropriate arrangements for which defined best practices and industry standards are not yet fully defined and the manner in which Crossover Capital interprets such rules and practices, may differ from interpretation from other regulatory agencies. Client accounts for and custody and trading of digital assets are provided through Fidelity Digital Assets Services, LLC, (“FDAS”) which is a New York State-chartered, limited liability trust company. While FDAS is an entity under the Fidelity branded companies, digital asset custodial services are not provided by the other related Fidelity companies such as Fidelity Brokerage Services, which is the custodian listed on the Firm’s ADV Part 1 with respect to the Firm’s traditional assets. Nor are custody services for digital assets provided by Fidelity Management and Research Company (“FMR”). For the purposes of digital asset custody, clients should be aware that FDAS is not in physical possession of bitcoin or ethereum, but they continue to use such phrasing of custody and storage, as they would with other traditional assets types such as equity and fixed income products, but such phrasing may be at odds with how the Securities and Exchange Commission (“SEC”) defines custody, which in turn poses an unknown regulatory risk to Clients (see Regulatory Change Oversight Risk below). Custodians often hold Client assets in physical or electronic form, typically charging fees for the secure, safe keeping of such assets represent a relatively new asset class which few state and federal legal frameworks directly address. As such, there is uncertainty as to how to attach and perfect a security interest over digital assets. A Client’s claim over such assets could be unsecured, increasing a risk of loss in the event of default.

# Disclosures cont.

Crossover Capital has limited knowledge of what capital requirements, reporting or system requirements that New York State-charter trust companies must abide by and cannot independently verify FDAS representations. Further, clients should be aware that despite the custodial efforts in place, wallets have been hacked and digital assets have been stolen. This is a significant risk for anyone investing in digital assets which cannot be completely protected against. There is a heightened risk of unauthorized withdrawals or theft of digital assets than there is with traditional asset classes as once a digital asset is removed from an account, it is more difficult to retrieve.

Any Crossover Capital client with digital asset exposure will have a high concentration of its digital assets with one custodian, which may be prone to losses arising out of hacking, loss of passwords, compromised access credentials, malware, or cyberattacks as described herein. Separate from risks relating to the custody of digital assets, there are also risks related to the custody of fiat currencies that are part of the Client account that are held by the digital asset exchange. Clients should also be aware that in 2023, a number of banks ceased operations, notably, Signature Bank, and Silvergate Bank. Such banks were partnered with digital asset exchanges and where client fiat assets were maintained in accounts associated with digital assets, there was an increase in risk of loss of the fiat currency assets held at the failed banks to the extent that the amount held was greater than available FDIC coverage limits. Clients should understand which banking partners are used by the custodians and/or exchanges for custody of fiat currencies.

## **Risk Related to Regulatory Change Oversight**

U.S. federal, state, and regulatory agencies, such as the SEC have been examining digital asset networks, digital asset companies and exchange markets. Currently, the regulatory framework does not present a uniform or unifying set of legal theories or applicable legal regimes to which digital assets are regulated or for which digital assets can be defined, as a result and as new legislation and regulations are enacted, regulatory changes and unforeseen regulatory implications have the potential to negatively impact the value of a Client's digital assets and the use and interest in such digital assets. Ongoing and future legislative and regulatory actions may impact and perhaps to a material adverse extent, the nature of a client's investment or the ability of the digital asset technology to continue to operate. Many state and federal agencies have issued consumer advisories regarding the risks posed by bitcoin and other digital assets to investors. In addition, U.S. federal and state agencies, and regulatory bodies in the U.S. and in other countries have issued guidance about the treatment of digital asset transactions or requirements for businesses engaged in digital asset activity. In particular, various digital assets may not be excluded from the definition of a commodity" or "security" by such future CFTC and SEC rulemaking, respectively. Currently, Crossover Capital is not aware of any rules that have been proposed to further regulate digital assets as a commodity or security, but this is subject to change. Crossover Capital cannot be certain as to how future regulatory developments will impact the treatment of digital assets under the law. The CFTC has declared that some digital assets are commodities, and digital assets transactions that are entered into, or offered, to retail customers, may be subject to CFTC jurisdiction under certain circumstances. However, the SEC has stated that certain transactions in digital assets may be securities transactions, depending on the specific facts and circumstances of the digital assets and transactions in question. Crossover Capital may be required to register and comply with additional regulatory agencies and other regulations. In such an event, Crossover Capital could cause a client not to hold any affected assets and cause the Client to incur losses and lost opportunities. Regulatory changes or interpretations relating to the custody of digital assets could require certain vendors to be required to apply for licenses that they do not already have and could subject these parties to investigations and penalties. Such additional registrations and compliance, or any enforcement action, may result in extraordinary, non-recurring expenses.

On February 15, 2023, the SEC proposed amendments to the Custody Rule (Safeguarding Advisory Client Assets, Investment Advisers Act Rel. No. 6240) ("Proposed Rule" or the "Rule"). Presently, the comment period the Proposed Rule has been re-opened by the SEC and the Rule reflects the SEC's growing concern about the safekeeping of digital assets through custodial relationships with registered investment advisers. The Proposed Rule would govern all client assets, which would include digital assets and would affect the ability of financial institutions to serve as qualified custodians for digital assets. The Proposed Rule, like the current Custody Rule, looks to the definition of "bank" under the Advisers Act, which includes state-chartered trust companies. Although the Proposed Rule does not modify the ability of state-chartered trust companies to serve as qualified custodians, the SEC raised various questions regarding the quality of regulatory protections and oversight imposed on such companies. The Proposed Rule also clarifies what it means for an adviser to "maintain" assets with a qualified custodian. While the Proposed Rule would entrust safekeeping of client assets to a qualified custodian, it would depart from the existing Custody Rule in that a qualified custodian would not be deemed to "maintain" a client asset for purposes of the rule if it does not have "possession or control" of that asset. If the Proposed Rule is adopted, partially or in full, and if the SEC determines that the custodians used by Crossover Capital and its Clients for custody and exchange services do not comply with the Rule with respect to their custody of digital assets, Clients may be required to move their assets to a custodian, should any exist, that would be deemed "qualified" or terminate the account and liquidate a Client's investments. Agreements prepared in connection with the Client cannot address or anticipate every possible current or future regulation that may affect a Client, Crossover Capital vendors or counterparties. Such regulations may have a significant impact to Clients, including, without limitation, by restricting the types of investments a client may make. Changes or actions may alter the nature of a client's investment or restrict the use of digital assets or the operation of digital asset networks in a manner that adversely affects a client's investment.

## **Risks Associated with Digital Asset Exchanges and Trading**

The digital asset trading platforms and venues ("exchanges") on which digital assets trade are relatively new and, in many cases, are either lightly regulated, unregulated or are facing significant regulatory scrutiny including enforcement actions, and therefore may be more exposed to fraud and failure than established, regulated exchanges for other assets. Any fraud, security failure or operational problems experienced by the digital asset exchanges could result in a reduction in the value of the digital assets and adversely affect an investment in the interests of the Clients. Furthermore, many such exchanges do not provide the public with significant information regarding their ownership structure, management teams, corporate practices, or regulatory compliance. As a result, the marketplace may lose confidence in, or may experience problems relating to, digital asset exchanges, including prominent exchanges handling a significant portion of the volume of trading. Digital asset exchanges may impose customer-specific transaction or distribution limits or suspend withdrawals entirely, rendering the exchange of digital assets for fiat currency difficult or impossible. To the extent that a digital asset is hosted or traded on a limited number of exchanges, these risks are amplified and may cause a significant diminution in value of such digital asset. Digital assets traded on a blockchain may not rely on a trusted intermediary or depository institution. Participation in exchanges often requires a user to take on risk by transferring digital assets from such user's account to a third party's account which may or may not be hosted directly at or by the exchange.



# Disclosures cont.

Clients should review the terms of their FDAS user agreements carefully and ensure that assets are maintained in a way that ensures protection of the assets. Digital asset exchanges that are regulated typically must comply with minimum net worth, cybersecurity, insurance, audit, and anti-money laundering requirements, but are not typically required to protect customers or their markets to the same extent that regulated securities exchanges or futures exchanges are required to do so. For example, U.S. state and federal regulatory regimes for digital asset exchanges have different requirements than traditional equity exchanges and their reporting requirements are less known and available than traditional exchanges. Crossover Capital has limited insight as to the processes used by digital asset exchanges to detect, report, or prevent manipulative trading activity. In addition, many digital asset exchanges may in fact lack certain safeguards put in place by more traditional exchanges to enhance the stability of trading. As a result, the prices of digital assets on digital asset exchanges may be subject to larger and/or more frequent sudden declines than assets traded on more traditional exchanges. A lack of stability in digital asset exchanges, manipulation of digital asset markets by digital asset exchange customers and the closure or temporary shutdown of such exchanges due to fraud, business failure, hackers or malware, or government mandated regulation may reduce confidence in the digital assets generally and result in greater volatility in the digital asset market. These potential consequences of an exchange's failure or failure to prevent market manipulation could adversely affect a client's investment.

## **Pricing and Volatility of Digital Asset Values**

Extreme volatility in the future, including further declines in the trading prices of digital assets, could have a material adverse effect on the value of a Client's investment, including a loss of all or substantially all of a Client's investment. Supply of any digital asset is generally determined by a computer code or network administration, not by a central bank, and prices can be extremely volatile relative to more traditional markets. Several factors may affect the price of digital assets or the value of digital assets, including, but not limited to: supply and demand, public and non-public information, investors' expectations, the rate of inflation, interest rates, currency exchange rates or future legislative or regulatory measures that restrict the trading of digital assets and the use of digital assets as a form of payment. Crossover Capital currently relies on pricing of digital assets as provided by FDAS. As a result, Clients may see different pricing for the same digital asset, depending on the exchange or data source that is providing such pricing data. Exchanges for digital asset investing are dependent upon the internet and any significant disruption in internet connectivity could disrupt network operations and have an adverse effect on the trading, pricing, and access of digital assets.

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# Introduction to Intel Surveillance

*The Definitive Guide to Intel Surveillance  
and the Legal, Practical and Technical Considerations  
for Unmanned Surveillance Investigations*



**Creative Solutions™**  
Investigative Services

FUELED BY  
**COVERT**  
CAPTURES 

# PREFACE

In 2012, I decided to end my law enforcement career to establish *Creative Solutions Investigative Services*, with the plan of building the largest professional investigations firm in New Jersey. Focusing on providing investigative surveillance services, I quickly realized a significant need in the industry for a better method of obtaining high-quality video and photographic evidence during field surveillance investigations.

With camera technology advancing, unmanned surveillance quickly emerged as the solution to provide our clients with a cost-effective method of obtaining high-quality visual evidence. It was clear that this approach represented the future of investigative surveillance. However, the challenge we faced was the absence of reasonably priced camera systems on the market that could meet the specific and diverse requirements of deploying cameras in varied environments.

To address this gap, I took off-the-shelf cameras and designed enclosures to conceal them. I also developed a process for effectively deploying these cameras and reviewing the footage they captured. My prior experience at the FBI and as a county detective provided the foundation for creating a program that ensured the legal admissibility of captured footage. Legal research and consultations with attorneys, judges, and investigative colleagues further supported this foundation.

As a result of our meticulous methods and the quality of our evidence presentation, our processes and reports have gained acceptance in the courts, with over 4,000 investigations employing unmanned surveillance benefiting from our approach.


Today, *Creative Solutions Investigative Services* is the largest full-service professional investigative firm in New Jersey, with the largest regional Intel Surveillance program in the United States. We have primarily driven our growth through successfully utilizing unmanned surveillance in our investigations. We have discovered that our true success with Intel Surveillance was born not only out of technology but also from our planning, processes, and utilization of investigative intelligence analysts to review and analyze footage in the context of the investigation.

One aspect of *Creative Solutions Investigative Services*' success we take pride in is the pivotal role played by two of our Intel Surveillance investigations in providing the evidence that formed the basis for significant New Jersey case law. The published Appellate decision of *Temple V. Temple* (2021), and the landmark New Jersey Supreme Court decision of *Cardali V. Cardali* (2023). Both cases involve the appeal and overturning of a Superior Court judge's finding of a lack of evidence to hear a motion for relief of alimony due to cohabitation.

Considering the demand for Intel Surveillance and its transformative impact on investigations, we felt compelled to write this Paper to share our knowledge and experiences. We also wanted to ensure that Intel Surveillance investigations and unmanned surveillance camera deployments are conducted legally and ethically, respecting people's rights.

In 2023, I founded *Covert Captures™*, the only company dedicated to providing the service of Intel Surveillance. *Covert Captures*' unmanned surveillance platform, including a custom-engineered camera system and integrated software, was engineered from the ground up by over a dozen engineers to conduct Intel Surveillance investigations exclusively.

I want to thank the hardworking team at *Creative Solutions Investigative Services* and *Covert Captures™* and the expert teams at Talktronics and Cardinal Peak Product Development, who have made our Intel Surveillance dreams a reality. I also want to thank my expert collaborators, who contributed and helped ensure the accuracy of the information in this White Paper and provided beneficial guidance, thus ensuring the legal, ethical, and professional conduct of Intel Surveillance investigations.



**Daniel Coleman**

President/CEO

*Creative Solutions Investigative Services LLC*

*Covert Captures LLC*

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# INTRODUCTION

The benefits of utilizing unmanned surveillance are clear. It allows for continuous undetected coverage on a target location and captures essential investigation footage, which provides consistent results and lowers costs by reducing or eliminating the need for live in-person surveillance. Whether replacing in-person surveillance or enhancing live surveillance with actionable intelligence, utilizing unmanned surveillance is a significant step forward in advancing investigative field surveillance.

*“Introduction to Intel Surveillance”* is a White Paper (“Paper”) written to benefit the following audiences:

1. Legal professionals seeking to understand the lawful, ethical, and proper use of unmanned surveillance as an investigative surveillance tool in litigation.
2. Insurance claims professionals interested in leveraging unmanned surveillance for more consistent results from their vendors who provide fraudulent claims investigation services.
3. Professional investigators already providing or considering offering unmanned or Intel Surveillance services.
4. Litigation support professionals who wish to explore the emerging business category of Intel Surveillance.

The purpose of this Paper is to provide information and education on the complexities involved in offering unmanned surveillance services and the associated technology costs, including camera systems, cellular/LTE data fees and the costs for the review, retention, and storage of captured footage. This Paper is a comprehensive reference tool for consumers and Intel Surveillance providers. It will stress the need to exercise due care in conducting pre-deployment research and surveys, respecting the property and privacy rights of investigation subjects, choosing technology that is not overly intrusive, and properly handling captured footage to respect individuals’ privacy rights.

After reading this Paper, the reader will have a greater understanding of Intel Surveillance and will gain an appreciation for the use of unmanned surveillance in investigations. Professional investigators, specifically, will be better informed about the current unmanned surveillance technology available, the proper implementation of covert unmanned surveillance cameras, and the handling and management of captured footage and visual evidence.

Based upon the current laws and acceptance of the proliferation of outdoor cameras, Intel Surveillance is an investigative service expected to grow in both adoption and acceptance. Ensuring the proper and legal deployment of cameras and the appropriate handling of evidence will ensure Intel Surveillance investigations and unmanned surveillance camera deployments are accepted methods of conducting investigative surveillance.

This Paper cannot cover every possible use case or deployment scenario in every state or jurisdiction. It is the responsibility of individuals providing unmanned surveillance services to be informed about the laws and local ordinances in their jurisdiction and to respect the privacy and rights of individuals under surveillance or inadvertently captured during an unmanned surveillance deployment. This Paper serves as a guide, provoking thoughtful consideration of potential issues when offering unmanned and Intel Surveillance services.

Regarding the legal considerations surrounding the implementation or utilization of unmanned surveillance, there is a misconception expressed in various online sources. They inaccurately assert that recording people without their consent is unlawful in certain states yet fail to reference specific statutes.



While this Paper clarifies much of the confusion surrounding the legal issues that impact unmanned surveillance, including a legal issues section and an appendix containing legal research, we advise consulting with a legal professional in your jurisdiction and conducting independent legal research.

Please contact *Creative Solutions Investigative Services* or *Covert Captures* for the complete and most current version of this Paper.

*Version date: 10/08/2023*



*Cohabitation Investigation (Image source: CSIS, 2020)*

# 1. UNMANNED SURVEILLANCE AND “INTEL SURVEILLANCE” AS A BUSINESS CATEGORY

## Intel Surveillance, the Emergence of a Business Category

Over the past twenty years, advancements in digital technology have enabled unmanned surveillance to emerge as a widely utilized and accepted investigative tool. However, a byproduct of increased technology in collecting information and data is the need to manage large amounts of footage and analyze it to identify activity pertinent to the investigation. The business category of Intel Surveillance is the utilization of unmanned surveillance as a tool, combined with human and computer analytics, to conduct an investigation, producing visual evidence, actionable intelligence visually impactful reports.

## Defining Unmanned Surveillance

For this Paper, we define unmanned surveillance as:

*The short-term deployment of a static, covert camera by an investigator to remotely monitor or capture footage of a location or area for an investigative purpose on a specific person or persons where the camera is not physically in the investigator's possession.*

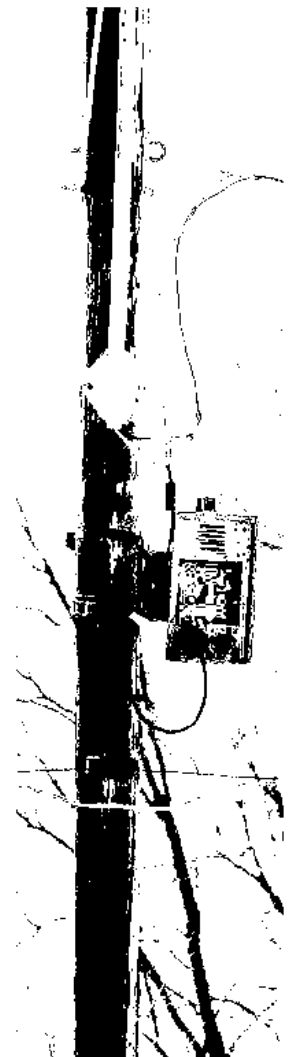
Unmanned or remote surveillance is an investigative technique of covertly deploying cameras in outdoor or public areas to capture the activity or movements of the subject of an investigation. Usually deployed for several days or brief periods, the term unmanned surveillance can also apply to a remotely monitored or controlled camera by a field investigator situated in the area of the camera deployment. Cameras utilized to conduct unmanned surveillance can have varying levels of features, including capturing video or photographic footage that is stored internally or to an SD card; remote monitoring through Wi-Fi or cellular/LTE connection; or sending footage to the cloud or a remote server. Whether obtaining quality video evidence, developing activity patterns, or live monitoring a subject to facilitate mobile surveillance, technology has made unmanned surveillance the future of investigative field surveillance.

## Origins of Unmanned Surveillance

The early history of unmanned surveillance began in the post-WWII Cold War era. Government agents and agencies conducting counterintelligence and counterespionage investigations utilized hidden cameras as part of their intelligence gathering. This included limited unmanned surveillance to document activities. However, at the time, cameras required manual triggering or tripwires for activation, producing only still photographs on film that required development. Only with the development of digital camera technology in the early 2000s was the environment for more widespread use of unmanned surveillance created.

## Advent of the “Pole-Camera”

Deploying “pole-cameras” became an investigative tool that government and U.S. law enforcement utilized to obtain intelligence and evidence or develop probable cause for criminal investigations. Pole-cameras are generally deployed high on a utility pole out of people's view and reach. Traditionally, these cameras connected



*Traditional law enforcement pole-camera (Image source: CovertLawEnforcement.com)*

to both power and cable services from the utilities on the pole, addressing two significant issues that unmanned surveillance must deal with:

1. Providing power to the camera, especially when running constantly.
2. Streaming large amounts of data and storing the footage on a remote server.

Because law enforcement has permission, often tacit, from the utility companies to deploy a camera and access the utilities (electricity and cable) high on a pole, "pole-cameras" were never a tool available to professional investigators who lacked that relationship with the utility companies.

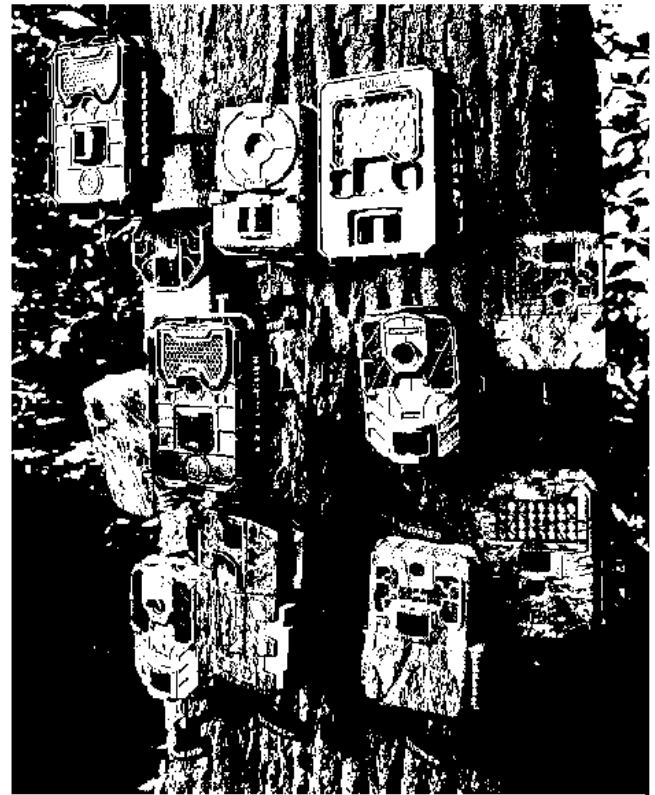
## Trail/Deer/Hunting Cameras

As digital camera technology rapidly advanced, conservationists harnessed and utilized the technology to document wildlife in their natural habitats. These "trail" cameras, also known as "game cameras," "deer cameras," or "trap cameras," were designed to be triggered by an animal and capture footage. The cameras did not require covert placement since they were in a heavily wooded environment. As digital technology developed in the mid-2000s, trail cameras became widely used by conservationists, wildlife enthusiasts, and hunters looking to identify activity patterns before hunting season. Trail cameras store footage on removable "flash" media/SD cards and are powered by batteries. Some models have cellular/LTE capabilities to provide real-time information on the movement of game in their hunting area. Trail cameras were early entrants into unmanned surveillance, albeit the surveillance targets were wildlife.

Due to significant consumer demand and large camera companies developing products, trail cameras continue to drive the technology in the remote camera market. However, these cameras are not adequately covert in their design and form factor for most unmanned surveillance applications. Also, their features and methods of capturing activity are not designed for investigative purposes and capturing visual evidence, so they have generally not been the ideal option for the investigator looking for an unmanned surveillance solution.

With advancements in digital signal processors, application-level software, battery technology, and higher megapixel CMOS sensors, consumer cameras are slowly entering the market that investigators are utilizing for unmanned surveillance deployments. These cameras offer a wide range of features and capabilities, including:

- Capturing high-resolution video, up to 4K.
- Capturing high-resolution still images.
- Capturing time-lapse videos (sequential photos assembled into a video).
- PTZ cameras capable of tracking a subject while live monitoring or automatically tracking objects moving within the camera's field of view.
- Live monitored video by a field agent conducting live manned surveillance, who is near the target location and the camera deployment.
- Remotely live monitoring through a website or phone application.
- Event-triggered live monitoring of activity by an office-based remote agent.



*Various trail cameras (Image source: macrophotography.org)*

- Storage of footage in the cloud or on a remote server rather than in the camera's internal "flash" storage or removeable media (SD Cards).

*(The "Camera Technology" section of this Paper provides a more detailed description of the technology mentioned above.)*

## **Terminology of Unmanned Surveillance**

Many professional investigators who previously worked in law enforcement regularly refer to unmanned surveillance as "installing a pole-camera." Also, much of the case law and legal citations utilize the term "pole-camera" to describe any unmanned surveillance. The author of this paper argues that the continued use of the term "pole-camera" is misleading because unmanned surveillance deployments do not follow the same installation approach as law enforcement's positioning of cameras high on a utility pole. Often, when an investigator suggests a "pole-camera" could be utilized for an investigation, the assumption is that the private investigator is installing a camera in a manner consistent with law enforcement's methods, which is not usually the case. The author suggests that a more appropriate term to describe the deployment of an unmanned or remote surveillance camera is "**Static Camera.**"

## **Drone Cameras and Security Cameras**

This Paper addresses only land-based cameras, so drone surveillance (also known as Unmanned Aerial Surveillance and Unmanned Aerial Vehicles) is not covered. However, some of the same laws and considerations apply.

In addition, hidden cameras, including those secreted in household items or placed inside dwellings or office buildings, are not this Paper's focus. This Paper only addresses cameras covertly deployed in outdoor environments to monitor activity outside the exterior of dwellings and businesses.

Furthermore, it is important to differentiate between unmanned surveillance camera deployment and security cameras. To achieve this, this Paper provides the following definition for security cameras:

***A security camera is a permanent or semi-permanent camera installed to document activity, act as a deterrent for potential bad acts, or utilize as an investigative tool AFTER an incident or illegal act occurs.***

## 2. BUSINESS ADVANTAGES OF INTEL SURVEILLANCE

### **Business benefits**

The advantages of Intel Surveillance are evident: it provides a highly effective tool that operates like skilled field investigators positioned covertly at multiple locations with cameras in hand, monitoring activity around the clock for several days. The significant business benefits from a properly implemented Intel Surveillance program are clear to both the consumer of investigative surveillance services as well as the professional investigator providing the service.

### **Consumers Using Intel Surveillance Will Experience:**

- Extended surveillance coverage over multiple days.
- Consistent results in surveillance investigations.
- Better-quality surveillance footage from field operations.
- Enhanced intelligence and detail regarding the subject's activities through deep investigative analysis of captured footage.
- Improved visual evidence for presenting at trials, depositions, or leverage in settlement negotiations.

### **Professional Investigators Who Add Intel Surveillance to Their Service Offerings Will Experience:**

- Increased customer satisfaction, especially with clients who may underestimate surveillance investigation complexity.
- Greater consistency and predictability in surveillance.
- Greater intelligence gathering by employing unmanned surveillance early in investigations.
- Expanded service capabilities to remote or challenging environments where manned surveillance traditionally proves difficult or impossible.
- More comprehensive investigative offering by integrating unmanned surveillance, live surveillance and desktop investigations.
- Increased profit margins through an established Intel Surveillance program.

### **Technology Impacting the Private Investigations Industry**

Over the past 25 years, technology has significantly impacted various industries, including professional services. Balancing their traditional expertise with technological integration has been a creative challenge for professional service providers. Like others in the professional service sector, investigation firms derive their profits from intangible assets such as experience, expertise, and specialized services. Technology has greatly advanced the investigations industry by facilitating research and investigations, enhancing the creation of compelling visual evidence, and improving communication between investigators and clients. However, in contrast to other aspects of investigative work, surveillance investigations have not kept pace with technological advancements, except for the adoption of digital cameras. The use of GPS trackers represented a notable advancement, but it has brought about legal and privacy concerns, leading to controversy and potential obsolescence. Surveillance services can constitute a substantial portion of an investigation company's revenue or bottom line due to the extensive time commitment involved. Currently, investigative service providers face challenges related to staffing and quality control in the provision of surveillance services, influenced by cultural shifts, economic conditions, and post-COVID issues.

Similar to law enforcement, which is solving more crimes with technology, the consumer expects professional investigators to utilize currently available technology for their investigations. This shift is

driven by the consumers' experience with digital cameras and what they see in the media, including scripted television shows and the proliferation of contrived online videos on social media designed to appear extemporaneous. Several years ago, law enforcement started experiencing the "CSI Effect" with trial juries who expected, often unrealistically, for law enforcement to utilize technology the jurors saw on television. Professional investigators experience a similar phenomenon called the "Reality T.V. Effect," where clients assume that perfect quality video can be obtained documenting a person's daily activity and movement. Unmanned surveillance can bring professional investigators into a more modern and forward, tech-centric era and help bridge the gap to meeting those expectations.

### **Better Quality Visual Evidence for Insurance Fraud Investigations and Litigations**

In investigating fraudulent insurance claims, capturing a greater volume of footage can create a more convincing summary video that contradicts an individual's claims of injury or restrictions.

Better visual evidence will benefit litigation by:

- Providing superior video material for trial presentations.
- Offering the most persuasive evidence, potentially expediting more favorable settlements.

### **Surveillance Coverage Over an Extended Period of Time**

When the investigative objective is to establish long-term behavioral patterns, deploying a static camera is the only cost-effective option. Capturing footage in a time-lapse format is often the ideal method of unmanned surveillance deployment. Some use-case examples of investigations benefiting from a time-lapse static camera deployment are:

- In the investigation of a fraudulent insurance claim, the defenses' response to damning video obtained by an investigator alleges that on the limited days of manned surveillance, the claimant was experiencing a "good day" and, therefore, not displaying any claimed limitations. Unmanned surveillance can document activity and mobility over more surveillance days.
- During a post-judgment relief of alimony investigation, a static camera at the residence is crucial in proving cohabitation (two people living as husband and wife) and documenting the frequency of contact and other factors necessary to prove the extent of the relationship over an extended period.
- In a child custody investigation, unmanned surveillance can reveal whether a custodial parent cares for the children or leaves them in the care and custody of others.

### **Ability to Provide Guaranteed Results to Clients**

When a static camera deployment has an optimal view of a target location, the professional investigator can provide clients with results unachievable using live manned surveillance alone. When combined with manned surveillance and desktop investigation, unmanned surveillance can fill in the gaps in an investigation and provide the professional investigator with a comprehensive investigative product tool. Unmanned surveillance can often answer many of a client's questions about the activities and movements of the subject under investigation, obtaining information to confirm a suspicion or providing proof. Unmanned surveillance can also be utilized to disprove a theory or belief. Sometimes, a client may be certain that something is taking place, and an investigation is initiated to provide proof. However, unmanned surveillance documented that what was suspected of occurring was NOT occurring. For instance, there may be a suspicion that a subject is going to a workplace every day, but a static camera deployed at the work location shows the subject is not going there as believed.

### **Increase in Subject and Case Intelligence**

Like the hunter utilizing a trail camera for pre-hunting intelligence to determine regular game patterns in a particular area, a significant benefit of unmanned surveillance is obtaining pre-operational intelligence

BEFORE an agent is sent into the field. The case intelligence obtained will arm the field investigator with valuable information when conducting live surveillance. Examples of intelligence obtained by using unmanned surveillance are:

- Daily habits of the investigative subject, including if they leave their residence and, if they do, their regular departure and return times.
- Individuals residing with the investigative subject.
- Time of day that the subject is most active.
- Operators of vehicles parked at the subject's residence.
- Travel direction the subject takes to and from their residence.
- Patterns of when the subject performs household chores, including garbage removal, cutting the lawn, or walking a dog.
  - If the subject or household members walk a dog, the intelligence of when and where the dog is walked can be crucial pre-operational intelligence to assist with field investigators assigned to perform live manned surveillance and their need to remain undetected.

### **Compensation Opportunities for Experienced and Highly Skilled Surveillance Investigators**

When an investigative firm offers Intel Surveillance as a service, it leads to an overall increase in gross margins. This, in turn, presents a significant opportunity to provide better compensation to highly skilled and experienced surveillance investigators. Those in the surveillance field understand the high levels of skill, experience, and innate abilities required to excel as an investigator. Unfortunately, these skilled professionals are often under-compensated due to clients' budgetary constraints. The introduction of Intel Surveillance creates an environment where skilled investigators can be retained and adequately compensated, thereby raising the industry's overall standard for quality surveillance.

### **Increase in Surveillance Requests Through Intel Surveillance**

Professional investigations firms specializing in surveillance services derive much of their revenue from live manned surveillance. Many professional investigation firms are cautious about offering unmanned surveillance as a service due to concerns about revenue loss from their live manned surveillance. However, firms that offer Intel Surveillance will find a significant INCREASE in live surveillance requests. This increase will result from several factors, including:

- Uncertainty of positive outcomes can prompt clients to start with Intel Surveillance, leading to further requests for in-person surveillance based on obtained intelligence.
- Limited surveillance budgets resulting in a low number of surveillance days can hinder success, but Intel Surveillance provides results within budget constraints.
- Becoming a preferred vendor known for forward-thinking and consistent high-level results attracts more business.
- Claims managers may request surveillance on low-value claims, driven by the cost-effectiveness of Intel Surveillance.
- Lower investigative costs for potentially fruitful results encourage claims managers to investigate more suspicious cases.

### **Employment Opportunities Created by Intel Surveillance**

The private investigations industry is evolving with the introduction of Intel Surveillance, resulting in the creation of new occupations detailed in the *New Occupations* section of this paper. These roles offer a more accessible entry point for individuals interested in pursuing careers in investigations and are crucial for the success of Intel Surveillance programs.

When recruiting candidates for Intel Surveillance desktop positions, prioritize those with technical, computer, and data analysis skills. Given the availability of high school and college programs in Criminal Justice, Forensics, and Data Science, there is a growing pool of potential candidates.

Small firms and sole proprietors with prior field investigative experience or retired law enforcement backgrounds dominate the private investigations industry. However, Intel Surveillance is expanding opportunities in the industry for investigators with technical and analytical capabilities. Investigative firms often create hybrid positions in the initial stages of offering Intel Surveillance services. Nonetheless, maximum productivity and profitability are achieved when individuals with specific skill sets focus on distinct roles. For instance, a field surveillance investigator tasked with reviewing static camera footage may lack the necessary data analysis and computer skills. Additionally, field investigators typically command higher pay rates than intelligence analysts. While having field investigators handle unmanned surveillance footage review benefits from their case knowledge, it can reduce the effectiveness and profitability of having a dedicated Intel Surveillance intelligence analyst.

Smaller Intel Surveillance programs have successfully integrated hybrid positions, combining essential analytical skills with desktop researchers or entry-level field investigators. This hybrid investigator/analyst role can be a valuable addition to a small investigative firm's staff. It allows field investigators to use downtime for desktop analysis work, effectively supporting the Intel Surveillance program.

## **Creative Solutions Investigative Services' Intel Surveillance Division**

Creative Solutions Investigative Services' (CSIS) Intel Surveillance Division initially had part-time or hybrid positions. However, with the growing number of unmanned surveillance camera deployments, we introduced full-time roles. This shift to full-time Intel Surveillance positions enhanced program efficiency and allowed us to hire individuals with specialized skills.

For example, CSIS' Field Tech Agent is responsible for managing camera deployments spanning a radius of several hundred miles. When handling numerous concurrent camera deployments in a specific geographic area in a single night, the service costs in remote areas drop exponentially.

In addition, CSIS has a team of in-house Intel Surveillance Intelligence Analysts. They review static camera footage, analyze it based on case requirements, prepare reports, and conduct intelligence briefings for managers and investigators. Our Analysts collaborate to draw accurate conclusions from captured footage.

CSIS' Intel Surveillance division includes the following positions:

- **Intel Surveillance Manager:** Responsible for overseeing all internal aspects of unmanned surveillance, including responding to client service requests, conducting feasibility assessments, managing intelligence analysts, and overseeing the flow and retention of captured footage. Additionally, this manager serves as the primary point of contact for responding to subpoena requests and providing testimony during depositions and trials to authenticate visual evidence and provide details on the survey and deployment process.
- **Intel Surveillance Field Tech Agent:** Conducts site surveys, handles static camera deployments, swaps cameras/batteries, and retrieves data.
- **Intel Surveillance Intelligence Analyst:** Analyzes footage for evidence and case intelligence. Works with case managers, investigators, and clients and provides reports and videos summarizing activity.



- **Static Camera Data Analyst:** An outsourced role tasked with examining raw footage for investigation-relevant activity and identifying specific footage with relevant activity for further review by analysts.
- **Design Fabricator:** Creates unique enclosures for camera concealments.



*CSIS Intel Surveillance Intelligence Analysts (Image Source, CSIS, 2023)*

### 3. PROBLEM: UNDERUTILIZATION OF UNMANNED SURVEILLANCE

#### Overall Issues Affecting Its Widespread Adoption

Although the benefits of unmanned Intel Surveillance investigations are evident, their broader adoption remains limited. Two main factors drive this. First, there are a limited number of professional investigators or investigative firms who can provide the service, primarily due to numerous hurdles. Second, the primary consumers of investigative surveillance, such as law firms and insurance carriers, exhibit reluctance due to concerns about its untested nature, legal implications, or other uncertainties. This Paper aims to address these issues, offering best practices and informed insights across all aspects of the service.

#### Hurdles for the Investigative Service Provider

- Reluctance to shift from traditional surveillance methods.
- Discomfort with new technology and technical skills.
- Limited cameras available for desired unmanned surveillance deployment results.
- High cost of specialized unmanned surveillance cameras (as high as \$8,000 per camera).
- Cost of equipment loss due to compromised deployments.
- Challenges concealing cameras due to design and fabrication limitations.
- Conflicting information about the legality of unattended camera deployments.
- Lack of in-house staff for captured footage review.
- Lack of infrastructure or technical skills to store and manage large amounts of captured footage.
- Inadequate expertise in presenting pertinent visual evidence to clients.
- Limited local subcontractors who provide unmanned surveillance services.

#### Attorney Questions Leading to Reluctance in Requesting Unmanned Surveillance

- Legality of camera deployments.
- Reputation damage from plaintiff's counsel for prolonged surveillance.
- Being the precedent for unmanned surveillance case law.
- Identifying the trial testimony investigator who will authenticate the evidence and unmanned surveillance processes.
- Handling, retention, and access to raw footage concerns.
- Lack of understanding of unmanned surveillance camera technology.
- Negative prior experience with unmanned surveillance services provided by investigators with limited experience providing unmanned surveillance services.
- **Additional concerns from Attorneys:**
  - Admissibility of evidence by the courts.
  - The investigator's actions trigger a professional ethics complaint for violations of the Rules of Professional Conduct.
  - Investigator exceeds their authority, leading to complications for the attorney or their client.
  - Collecting extensive footage of a claimant's activity that does not support the defense's position.

#### Submission and Authentication of Footage to the Courts

Traditionally, when an investigator conducts surveillance and obtains video or photographic evidence, the investigator is called to testify to what they observed and authenticate the footage presented in court. When presenting unmanned surveillance evidence in court, an investigator must be able to authenticate the captured footage. Therefore, a common question from the litigating attorney is, "Who will authenticate the evidence?" When unmanned surveillance footage is obtained and used to influence a

jury, concerns regarding the admissibility and authentication of that evidence become a valid concern. An investigator who is providing unmanned surveillance services and is unfamiliar with the “Silent Witness Theory” explained further in the **Appendix – Legal Research** section of this Paper, and how to testify to authenticate the evidence properly can make an attorney uneasy.

### **Perception that Providing Unmanned Surveillance Service is Easy**

Consumers requesting unmanned surveillance services think it is easy to deploy cameras because they are small and undetectable. They also assume cameras are capable of capturing only activity pertinent to the investigation. Providing unmanned surveillance services is more complicated than consumers realize due to the hurdles an investigator needs to overcome, the creativity and unique approach required, and the costs involved.

- ❑ Many investigators attempt to provide the service but find it is more complicated than they initially realized due to lack of adequate cameras and the nuanced skill of deploying them.
- ❑ Getting the results needed specific to the investigation requires planning and a creative approach of deployment by an investigator experienced in providing unmanned surveillance services.
- ❑ Underestimating the cost involved in providing the service, including the time necessary to both review and analyze captured footage.

### **Issues Complicating Unmanned Surveillance Service Perception**

- Lack of knowledge due to its current limited utilization.
- Investigators decline to recommend unmanned surveillance to clients who specifically request it due to their inability to provide the service.
- Misinformation on the Internet about the legality of unmanned surveillance, often incorrectly applying aspects of wiretapping laws, which only apply to intercepting audio.
- Lawsuits involving unmanned surveillance usually involve other issues, such as using GPS trackers or overreaching live surveillance tactics.

## 4. UNMANNED SURVEILLANCE CAMERA FEATURES AND TECHNOLOGY

### Camera Technology and Unmanned Surveillance

Early "pole-cameras" were mounted high on utility poles, where they drew power from the pole's electrical supply to run the camera and transmit video footage through a cable. Consequently, government and law enforcement agencies exclusively employed these unmanned surveillance systems. However, in the early 2000s, as digital camera technology advanced, along with improvements in digital storage and battery efficiency, cameras became accessible for private investigators to adapt for unmanned surveillance use. With the widespread use of trail and game cameras by wildlife enthusiasts and hunters, many of the technology needs met for those consumers apply to unmanned surveillance. These demands include extended battery life, ample digital storage capacity, high image resolution, and the ability to function effectively in challenging environmental conditions.

### Advancements of Technology and Balancing Camera Demands

As digital camera technology advances, image quality will continue to improve, and more feature rich cameras will be on the market. With these improvements in camera technology, the unmanned surveillance services provider must balance the tradeoffs of choosing the most important features to accomplish the investigation goals while meeting the battery demands, large file management and camera deployment location or environment restrictions. The unmanned surveillance provider must consider the following:

1. **Large file sizes accompany high video quality and image resolution.** High-resolution footage creates storage or cellular transmission challenges. The unmanned surveillance provider needs to strike a balance between image quality and data management. When transmitting the footage over a cellular/LTE network, a choice to either lower the resolution or transmit less footage is necessary.
2. **Better camera features require increased power:** The draw on the camera's power is affected by:
  - a. Power demands of advanced electronic components, including the processor and sensors.
  - b. Specialized applications (apps) running in the background to process data, such as image recognition and target activity tracking.
  - c. Weather and extreme temperature.
  - d. The camera's radio transmitters, including Wi-Fi, Bluetooth, and especially cellular/LTE.
  - e. The camera's flash.
3. **The size of the entire camera and battery system needs to blend into the environment.** For example, concealing a large system is easier in a wooded area than in a suburban or urban area.
4. **Equipment cost.** Investing in advanced equipment with enhanced features and cutting-edge technology necessitates a substantial financial commitment for the unmanned surveillance provider. This investment is crucial for establishing a robust inventory of systems that can effectively scale to accommodate multiple simultaneous deployments.
5. **Monthly fees for cellular data plans.** Each camera with cellular/LTE connectivity needs to be registered on a cellular carrier's network, which carries a monthly fee for each camera and possible excess data charges when live-monitoring cameras.
6. **Increased need to access the camera to retrieve footage or change batteries.** If the investigation demands the best quality footage as expeditiously as possible, it may require more frequent responses to the camera deployment to retrieve footage or change batteries.
7. **Which camera technology to utilize.** Technology utilized for unmanned surveillance should primarily focus on capturing what would likely be observed when conducting live surveillance.

The above factors create an environment where tradeoffs must be considered. High expectations by clients often create issues for the unmanned surveillance provider due to the client's lack of understanding of the complexities of providing the service. Knowing the client's investigative objective, the unmanned surveillance provider can determine the optimal method to obtain results with the unmanned surveillance technology they are utilizing. With these results in mind, the unmanned surveillance provider can accomplish the client's investigative goals, with unmanned surveillance being the complete solution or a key tool.

## Image Resolution and megapixels

Cameras with a CMOS image sensor with a higher megapixel (MP) count tend to be better for unmanned surveillance, especially when the camera deployment location is far from the target. When a camera advertises that it records HD quality video, at minimum, a 2MP sensor is required. A camera that records video in 4K requires at least an 8MP sensor. When choosing cameras and comparing sensor resolution, a 5MP sensor tends to provide good-quality video and images. However, most cameras are only equipped with a 1MP or 2MP sensor, with a reduced number of pixels, making it challenging to obtain clarity when digitally zooming captured footage. The unmanned surveillance deployment needs to be closer to the target area to obtain quality footage with a camera that uses a 1MP to 2MP sensor. If the camera deployment location is a distance away, a camera with a 1MP or 2MP sensor and a zoom lens can obtain quality footage. Since the environment dictates the deployment location, a smaller sensor often limits the camera placement options or reduces the clarity and quality of captured footage.

Utilizing a camera with a high-resolution CMOS sensor (such as 12MP or 16MP) creates a greater likelihood that quality footage will be obtained in a variety of deployment locations. Depending on the camera's features, the JPEG compression can be adjusted according to the deployment location and distance from the target when capturing JPEG images. A camera closer to the target can accommodate a higher JPEG compression. If the objective is to save storage space, obtaining a smaller file size requires high JPEG compression. However, JPEG is a "lossy" compression method, meaning that to accomplish the smaller file size, pixels of the image are eliminated. Once an image is compressed with a lossy compression method, those pixels cannot be restored, so the camera's settings and compression level must be considered at the time of deployment. Essentially, the higher the quality of the sensor, the more options the investigator has to obtain footage beneficial to the investigation, regardless of distance to the target.

When capturing video, another option is to adjust the frame rate of the video for smaller file sizes while still maximizing the image clarity a large megapixel sensor provides. Most videos are captured at a frame rate of 30 frames per second (FPS), meaning the camera is snapping thirty photos every second and stitching them together, making a video with seamless movements. A camera with adjustable frame rates will make the video appear "less smooth" but create high-resolution videos with much smaller files. For unmanned surveillance, frame rates from 10FPS to 4FPS will still capture the full movement of the subject while reducing the file size by as much as 67% to 85%.

When utilizing trail cameras for unmanned surveillance, the camera companies often boast a very high megapixel count, advertising cameras with sensors as high as 32MP. However, these sensor numbers are deceptive. The sensor in a trail camera boasting 32MP is equipped with only an 8MP sensor because trail camera market manufacturers can advertise these numbers through a method known as *interpolation*. Interpolation is a method where the camera is digitally "filling in" or adding pixels to add resolution, so the sensor is not truly 32MP. Increasing the image quality through interpolation does not substantially improve the image quality. Most trail cameras are designed to capture game close to the camera and have

only a 1MP or 2MP sensor. Cameras with these smaller sensors are often not ideal for unmanned surveillance unless the camera is deployed near the target location. The benefit of a camera with a higher megapixel sensor is that the camera can be deployed further away from the target and still capture clear footage of the target. However, these false claims of high megapixel cameras deceive the consumers of the cameras.

## Formats of Capturing Footage

Footage from unmanned surveillance can be captured in numerous formats, including video or time-lapse images. For many investigations, the ideal objective is for the camera to obtain the highest quality video of the subject target area capturing activity pertinent to the investigation. However, several factors affect the camera's ability to effectively capture quality and usable footage, which include:

- Locations with limited options for an optimal view of the target.
- Target line of sight obstructions, such as parked vehicles, trees, terrain elevation differences or hilly environments.
- Layout and environment of the target location, including privacy fences, flag lots and properties set back from the street.
- False recording triggers caused by vehicles, animals, blowing leaves or other objects moving in front of the camera's motion sensor.
- A motion-triggered camera which is deployed at a distance too far from the target to trip the motion sensor.

When deploying unmanned surveillance for video capture, managing the review and storage of the captured video should include careful consideration of the following factors:

- ❖ Cost required to review and edit the video, which can be time-consuming.
- ❖ False movement triggers that create large amounts of non-pertinent RAW video footage requiring review and retention.
- ❖ Specialized software to zoom in on the footage after the video is captured and training for analysts to become proficient and efficient with their time.
- ❖ Data management and storage issues driven by HD or 4K video production of large file sizes.

## Continuous Recording

Continuous recording of footage eliminates any issues with activity triggering to initiate recording. However, the camera needs to be constantly powered, so the power/battery consumption demands are significant and make this option more suitable for short-term deployments. Commercial security cameras have tremendous technology built into the camera with software to compress and store video in addition to motion and object identification capabilities. These systems generally require a computer or NVR (Network Video Recorder) connected to the camera to process and store the video. The software utilized to compress the video also enables quick review of the footage, and tools to zoom in on captured footage and export it into usable formats, including a playable video of only the zoomed-in portion. If there is a lot of activity beneficial to the investigation, the analyst's time to review it can be significant. Further, saving or backing up all the RAW footage for each investigation can be a large task and difficult when building a larger-scale unmanned surveillance program.

Because of the battery demands of these security camera-based systems, they are generally used more in unmanned surveillance vehicles or "drop car" deployments, which accommodates the space for a deep-cycle battery system. Vehicles that are specially equipped for unmanned surveillance may have a remote-start option to charge the batteries powering the camera(s). CSIS utilizes a surveillance van for manned

and unmanned surveillance. The covert nature of the van conceals multiple cameras continuously recording video. The large battery system enables the video recording system to run for several hours unmanned.

For short-term camera deployments, a camcorder with an extended battery can capture excellent quality video. However, the cameras lack high compression file management or processing to facilitate and speed the review of captured footage. Depending on the camera and technology being utilized, the zoom capabilities and quality of video are of the highest quality. However, the camera will need an extended battery system, which requires some slight engineering to power the camera for a prolonged period. Further, a customized weather-tight enclosure must be fabricated to conceal the camera in the environment where it is being deployed.

## Event Triggered Recording

Traditionally, when an investigator is in the field conducting surveillance, they turn on their camera and start recording footage when they observe activity that needs to be documented. However, unmanned surveillance deployments, most of which are not live monitored, require the footage to be captured, saved, and reviewed by an investigator or analyst to determine if any pertinent activity occurred. One of the biggest challenges with unmanned surveillance is the balance between capturing enough footage to ensure important activity is recorded and avoiding an excessive amount of footage requiring review and analysis.

For an unmanned camera deployment, having the camera begin recording only when key events are taking place helps save storage space and data transmission costs. It also makes it easier for the analyst conducting the review of the captured footage to identify and separate case-relevant footage. Camera technology advancements have improved and enhanced a camera's ability to filter triggers of non-relevant activity moving through the frame, such as moving leaves or small. Battery-powered cameras primarily utilize a combination of triggering sensors, including PIR infrared or audio sensors, which awaken the camera from a sleeping state. Once the camera is "awake," the camera processor analyzes what is in the frame and only records what it is programmed to record. Modern camera processors contain analytic capabilities to differentiate between humans, animals, and vehicles.

Situations where the camera is far from the target can cause missed events and excessive recording of non-pertinent activity. The ideal setting is to record only when there is movement or a change in activity in the frame of a targeted area. However, this requires the camera to be in a constant low-power state rather than a sleep state, which requires more processing power and a larger battery system.

Some limitations of triggered recording:

1. **Delay caused by "awakening" the camera:** Triggered recording can result in a delay between the time when an event occurs and when it is captured by the camera. This delay can be particularly problematic if the occurring event is brief, or if a person or vehicle moves quickly through the frame of the camera.
2. **False triggers:** Camera-recording triggers can result from different events, including wind-blown foliage, passing vehicles, small animal movement or loud noises. These false triggers can lead to a great deal of extraneous captured footage, requiring review to identify events pertinent to the investigation.
3. **Battery drain:** Sensors which are overly sensitive may "awaken" the camera unnecessarily and create false triggers increasing the drain on the battery system.

4. **Data storage:** False triggers can record unnecessary footage which quickly exceeds the storage capacity in the camera. If the camera does not have remote connectivity where the data can be managed, the storage on the camera can reach its capacity and either stop recording or record over older footage on the system.
5. **Bandwidth limitations:** If the camera is connected to a cellular/LTE network, motion-triggered recording can lead to a large amount of data transmission, which can be problematic if there are bandwidth limitations or if the data plan is limited or restricted.

## Triggered Recording Methods and Options

Cameras may employ several different methods to trigger recording when activity is detected. These methods include:

PIR (Passive Infrared) sensors. The PIR is the most common trigger method for consumer cameras. PIR sensors are used for virtually all motion-activated consumer products, including indoor and outdoor automatic motion lights, burglar alarm motion sensors, home automation, and energy-saving devices. PIR motion sensors work by detecting changes in the amount of infrared radiation (such as body heat) that is emitted by objects within their view. When an object emitting heat moves through the sensor's field of view (such as a human, animal, or vehicle), it will cause a change in the infrared radiation, which is detected by the sensor. The sensor then sends a signal to the camera which is in a low power "sleep" mode and begins recording photos or video. Modern PIR sensors are used in combination with other sensors, such as optical sensors, to improve their accuracy and reduce the likelihood of false recording triggers. Although very effective for many different applications, relying on a PIR motion sensor to capture evidence or activity for unmanned surveillance deployments has limitations, which include:

1. **Distance limitations:** PIR infrared motion sensors have a limited range to detect motion. If a camera is deployed too far from the target, it may have a clear view to capture footage. However, if it is beyond the sensor's range to trigger recording for the desired activity, it could cause the system to miss important events.
2. **Limited field of view:** PIR sensors will not detect motion outside of a specific coverage area. This can create "motion blind spots" in areas of the image frame where key activity may not be recorded.
3. **Limitations in their detection capabilities:** PIR sensors are only capable of detecting motion based on changes in heat-emitting objects moving across the capture area of the sensor. They cannot detect non-thermal movements of objects in the field of view or movement that does not emit heat, such as the opening of a garage door.
4. **Sensitivity to environmental factors:** PIR sensors can be affected by environmental factors such as temperature changes, humidity, and even sunlight. These factors can cause false recording triggers or reduce the effectiveness of triggered recording.
5. **Inability to distinguish between objects:** PIR sensors do not provide any information about the size or shape of detected objects. Distinguishing between people, animals, and other objects in the field of view is accomplished by the processor in the camera once recording has been initiated.
6. **Limited ability to track moving objects:** PIR sensors are not designed to track moving objects. Once motion is detected, the sensor may have a delay in initiating recordings. Further, if an object is moving directly toward the camera, the PIR will not trigger the camera to record, as an object needs to move across the plane of the sensor to trigger recording.
7. **Delays in recording:** PIR sensors "wake up" the camera from a low-power standby state to initiate recording, which can result in missed activity that moves through the frame quickly.



8. **Additional opening required in covert enclosures:** In covert deployments, especially in highly populated or high-traffic areas, PIR sensors require an extra opening in the covert enclosure, potentially exposing the camera to detection.
9. **Large amount of extraneous footage:** Deployment locations with high vehicle, human, or animal traffic activity can cause the camera to frequently trigger, recording excessive, extraneous, or irrelevant footage that necessitates review and may exceed the camera's storage capacity.
10. **Risk of camera not recording:** Relying on a PIR sensor to initiate recording can be a gamble, as there are different factors that can result in the camera not recording any footage at all.

Edge Processing: The computing power of modern DSP (Digital Signal Processor) chips that run cameras enables the camera to recognize certain object types or areas of the frame to trigger recording. This technology can be useful for unmanned surveillance deployments. However, when exclusively utilizing these features to initiate recording, the camera cannot be in a low power sleeping mode. With the camera in a full-power state, the battery consumption can be significant, requiring larger batteries, more regular swaps of batteries, or the use of a solar power charging system, which may make the deployment less covert. The modern processors inside cameras can handle a great deal of processing and management of applications, including artificial intelligence, recognition of license plates (LPR), and object and facial recognition, but more processing requires more power and larger capacity battery systems.

Sound Triggering: Cameras can be triggered to start recording when it detects a loud noise. When a camera is equipped with this feature, this sensor setting may be used as a stand-alone option or with PIR motion sensors. When using this feature, it is important to ensure that the camera technician is aware of whether the deployed camera is set to record audio with the video, as the camera could be recording conversations of people near the camera. Intercepting people's conversations can become extremely problematic as a potential violation of state and federal wiretapping statutes, so avoiding cameras that can record audio is advisable. If a camera has a microphone but does not have a setting to disable it, the microphone inside the camera should be disconnected or disabled.

Scheduled Intervals: Cameras can be programmed to record or monitor activity at specific pre-defined times and days, reducing unnecessary footage and conserving battery consumption when capturing activity only during desired periods.

LoRa Technology/Internet of Things: LoRa (Long Range) technology or Internet of Things (IoT) is a wireless communication protocol for long-range, low-power communication between devices. It uses radio frequencies to transmit data over long distances with low power consumption. LoRa technology is a way for devices to talk to each other wirelessly over long distances. This makes it ideal for IoT devices that send and receive data from remote locations. The amount of data that an unmanned camera produces makes LoRa feed transmission not an option. However, LoRa may be used in conjunction with an unmanned surveillance deployment. For instance, for a camera deployment that is a distance away from the target, a triggering device, such as a PIR motion sensor, can be deployed closer to the target area and communicate with LoRa to begin recording.

## **Time-Lapse Recording**

When considering the limitations of the different camera recording triggers noted in this chapter, it becomes clear that camera setup and choice of settings and recording format are essential parts of the pre-planning deployment process. When the only deployment location option is a distance away from the target, capturing photos in a continuous time-lapse format is often the optimal choice to ensure that

activity is not missed. A camera capturing footage with time-lapse can accommodate a much larger sensor (from 5MP to 16MP), which creates larger file sizes, but the overall amount of data needing to be stored is reduced due to the longer intervals between recordings.

Using time-lapse recording for unmanned surveillance can have two drawbacks:

1. When investigating fraudulent injury claims, it cannot capture the subject's complete physical movements and full range of motion.
2. It generates substantial irrelevant footage, necessitating custom software or manual review by an analyst or investigator to extract relevant activity footage.

One advantage of capturing time-lapse footage is the streamlined review process, especially when multiple cameras are deployed at different locations. For instance, in the context of unmanned surveillance monitoring a subject's arrival at a specific location, a strategically placed "choke point" camera near the subject's residence can offer a precise timestamp for when the subject's vehicle passes through the intersection. With this information, reviewing the time-lapse footage at the target location and estimating the subject's expected arrival time becomes a swift and efficient process.

## **Recording Intervals and File Formats of Time-Lapse Footage**

Depending on the available settings of the camera, a time-lapse recording option ensures that the camera will capture continuous footage over an extended period without relying on recording triggers. However, due to its continued operation, the choice of recording intervals significantly impacts storage volumes. For instance, a camera with a 5MP sensor that captures an image every ten seconds during daylight hours can store one week's worth of high-resolution images on one 32GB SD card. Increasing the image capture intervals to five seconds will double the storage required. A camera equipped with a larger megapixel sensor can accommodate a larger field of view. This larger view enables longer time-lapse intervals because the increased resolution permits zooming in on the footage after capturing it while maintaining clarity.

Another consideration when choosing time-lapse as a recording option is the type of file the footage is stored in. Time-lapse footage can be saved as individual images or as a continuous video for each day. However, the camera manufacturer usually determines this and how they choose to store the footage on the camera. After retrieving the footage, different software is available to create images from time-lapse videos or create a video from individual images. It is also important to remember that if your choice of format differs from what the camera produces, there is an extra step to convert the format for each camera deployment, adding man-hours of expense for the conversion.

## **Powering the Camera**

Powering cameras for unmanned surveillance is the most significant issue faced by the professional investigator providing unmanned surveillance. One prevailing misconception surrounding unmanned surveillance is the assumption that technological advancements enable cameras to be compact and inconspicuous. However, the practical reality is that cameras required for extended deployments, equipped with the essential features and settings to gather crucial evidence and intelligence, necessitate considerably large batteries and regular replacements.

The batteries or power source hold substantial importance in the strategic concealment of an unmanned surveillance camera system. As the sophistication of cameras increases with additional features, it inevitably demands greater processing power, leading to an augmented draw on the battery and, consequently, a need for a larger power source. Furthermore, a camera setup that requires frequent

battery swaps elevates the risk of potential detection owing to increased activity by agents at the deployment location. Moreover, each physical response by a camera technician to maintain the deployment incurs added operational costs.

Although chip manufacturers continue to enhance the power efficiency of processors, the evolution of camera capabilities demands ever-increasing processing power, placing substantial demands on batteries. Despite the strides made in power efficiency, battery technology lags behind the escalating power requirements of edge processing. Consequently, while cameras are destined to become more compact and batteries more efficient over time, long-term unmanned surveillance systems will invariably necessitate somewhat substantial camera and battery components. It is also important to note that battery longevity issues are significantly exacerbated in cold environments, requiring even larger battery systems in regions with demanding winter weather.

Different options for powering cameras include:

- **Rechargeable batteries (Lithium-Ion):** Battery systems using Lithium-Ion rechargeable batteries can be cost-effective and provide substantial power, especially with a custom-designed unmanned surveillance system. However, off-the-shelf cameras, such as trail cameras, which utilize AA-size batteries, generally do not operate optimally with Lithium-Ion batteries. (NOTE: Most electric vehicles manufactured today use a large number of small lithium-ion batteries with a complex computerized battery management system.)
- **Deep cycle lead acid batteries (marine batteries):** Many investigators utilize 12- or 6-volt deep cycle marine-type batteries to power cameras. These batteries are easily purchased and rechargeable. However, these batteries are large (often the size of a car battery) and heavy, making the deployment, concealment, and swapping of batteries significantly complicated.
- **Alkaline batteries:** For convenience, many trail and consumer cameras are powered by AA batteries. Alkaline batteries are often sufficient for a multi-day deployment for most temperature and environmental conditions. However, most of these cameras have a built-in IR flash that cannot be disabled. Even if blocked inside an enclosure, the flash continues to fire after darkness. Although the human eye cannot see the flash, the battery consumption from the flash is significant.
- **AA Lithium batteries:** Different from Lithium-Ion batteries, Lithium batteries are disposable. They run four times longer than Alkaline batteries. Utilizing Lithium batteries in a trail camera (requiring AA batteries) can provide extended power for long-term deployments and help to overcome the shortened battery life due to cold temperatures. However, the cost of Lithium batteries is significant, as much as ten times that of Alkaline batteries, and they are NOT reusable. For an investigations firm that has many cameras deployed in the field, disposable batteries can add a significant cost to each camera deployment.
- **Solar power:** Powering a camera and recharging batteries with a solar panel in an unmanned surveillance deployment is a significantly beneficial feature. However, several factors can affect the use of solar. This includes the difficulty or inability to conceal a solar panel or limited sunlight in a congested or heavily wooded area. The battery charging reduces significantly with little direct sunlight on the solar panel.

With the explosive growth of the electric vehicle market, the industry's investment in developing new products in battery technology is significant. Some of the new (or existing but improved) rechargeable battery technologies that will penetrate the market over the next few years are solid-state batteries and

lithium-polymer (Li-Po) batteries. At the time of this writing, it is unclear if these technologies will have an impact on unmanned surveillance.

## **Storage of Captured Footage**

To handle the volume of footage captured by unmanned surveillance cameras, it's common practice to save the footage locally on the camera and then retrieve it as needed. Some cameras have internal memory built into them (flash memory), which requires plugging the camera into a computer and downloading it onto a PC or server. However, the size of flash memory is small compared to the amount of memory SD cards can handle, so it is not regularly utilized for unmanned surveillance applications. Unmanned surveillance deployments providing more analytics, or a Pan-Tilt-Zoom lens system (PTZ) may utilize a connected Network Video Record system (NVR) to store the footage, which can accommodate a very large amount of storage. While having footage sent remotely to the cloud or other remote storage would seem ideal, many limitations that often make this challenging. Considerations with these storage methods include:

### SD Cards

Advanced cameras can handle SD Cards with extremely high storage capacities, as high as 512 GB, which is more storage than many laptops hard drives. Larger capacity SD cards are costly, which is an issue when determining and managing storage needs. Transferring the raw footage from the SD card to a server/NAS or portable hard drive is an accepted practice for evidence retention. It makes storing evidence more cost-effective than keeping SD cards as evidence. Further, SD cards are often only partially filled during a camera deployment, and saving a partially full high-capacity SD card as evidence can cause increased costs for each deployment. SD cards have become ubiquitous in our daily lives and are relatively inexpensive but contain complex circuitry. Using quality SD cards is very important, as low-quality cards can be prone to failure or corruption, potentially resulting in loss of critical footage or visual evidence. When re-using SD Cards and deleting footage from prior deployments, it is very important to fully format the SD cards and not perform a "Quick Format." When a "Quick Format" is performed on the SD card, footage from the previous deployment can still be retrieved, as it is not fully deleted. Also, not performing a full format of the card can sometimes cause issues with the SD card not performing optimally.

### External storage device (NVR)

Unmanned surveillance setups providing advanced features or utilizing commercial PTZ often use or need an NVR to store the footage.

### Cloud or Remote Storage on a Server

In an ideal scenario, captured footage from unmanned surveillance cameras is immediately and directly saved to the cloud or a remote server. However, saving footage to a remote server is typically achieved using a data (cellular/LTE) connection, as connecting through Wi-Fi is rarely an option. Several issues can affect the reliability and efficiency of transmitting footage or streaming over LTE. First, the ever-increasing image resolution of camera image sensors creates larger file sizes, which can significantly impact upload speeds, power demands, and data rates. Additionally, cellular service may not always be available at the camera deployment location, preventing footage transmission, live monitoring, real-time cloud storage, or remote access after it has been deployed.

One unmanned surveillance cloud storage option is to have a lower-resolution image or video transmitted to the cloud for storage, processing, and review, with the full-resolution file saved locally

on the camera. This approach can be beneficial in reducing file sizes, having all footage immediately retained, and minimizing data usage. It also means that the full-resolution footage must be physically retrieved from the camera if required for analysis or investigation purposes. Some cameras can have limited select, high-resolution footage downloaded remotely from the camera after key footage or events have been identified.

Finally, it's important to consider the security of captured footage. Saving footage to the cloud helps secure footage. Encryption of the video can also be beneficial in maintaining the data's security, confidentiality, and integrity, preventing unauthorized access and tampering.

## Compression of Photo and Video Files

### JPEG Compression of Images:

With unmanned surveillance, managing file sizes of captured images is critical to ensure efficient data storage or the transmission of images remotely. The most common method of reducing file size is using JPEG compression. Joint Photographic Experts Group (JPEG) compression removes some of the image's detail and color information, resulting in a smaller file size. However, balancing compression levels with optimal image quality is essential, as over-compressing images can lead to significant loss of detail and image degradation. Since JPEG is a "lossy" compression method, pixels of the image are permanently eliminated and cannot be restored. Therefore, how much to compress the image should depend on the camera's distance from the target. After a camera is deployed, based on the distance to the target, the compression level may need to be adjusted remotely to capture images of optimal quality.

### Codec Compression of Video:

Raw video data is managed through codec compression. Codecs, or compression/decompression algorithms, help to reduce the amount of data needed to store or transmit video footage by compressing it into a particular format. One commonly used codec for surveillance applications is H.264, which offers high compression ratios without sacrificing significant image quality. However, newer codecs, such as H.265, offer even greater compression capabilities while maintaining high-quality resolution of captured video. Higher-end security cameras have proprietary software with tremendous compression but need to play video back in their software. The camera manufacturers usually offer "players" as a free download. These types of software generally have tremendous editing capabilities for the captured footage and are an excellent option when applied.

## Video Resolution

Many cameras also provide an option to record video in different resolutions, with the maximum resolution being the limit of what the CMOS image sensor can provide. Each resolution defines the number of pixels used to create the image. Some of the most common video resolutions are:

1. **SD (Standard Definition):** SD is the most basic video resolution of 720x480 pixels. A camera with only a .5 MP image sensor can record SD quality.
2. **HD (High Definition):** HD video resolutions include 720p, 1080p, and 1440p, with 720p having a resolution of 1280x720 pixels, 1080p having a resolution of 1920x1080 pixels, and 1440p having a resolution of 2560x1440 pixels. An image sensor of 1 MP to 4 MP is necessary to record in this range.
3. **4K:** 4K has a resolution of 3840x2160 pixels and is often used for high-quality video content. To record 4K video, the camera must have at least an 8 MP image sensor or higher.
4. **8K:** 8K has a resolution of 7680x4320 pixels and is the highest resolution currently available. This requires a very expensive 33 MP image sensor, only used in specialized camera systems.

The video's resolution significantly impacts the quality of the visual evidence, with higher resolutions typically offering greater detail and clarity. However, higher resolutions also generate more heat, require more processing power, battery consumption, and storage, which are considerations when capturing and storing video footage. Considerations need to be made to balance the desire for the highest resolution footage with the cost and size of the camera system.

## Camera Lenses

### Optical vs. Digital Zoom

If the unmanned camera features can be remotely accessed after deployment, zooming in on a key distant target area is a beneficial feature. However, it is important to understand the difference between optical and digital zoom. Optical zoom involves using the camera's lens to physically adjust the lens' focal length and capture a smaller frame area, allowing the image frame to focus on the target area without sacrificing image quality. Optical zoom usually involves two glass lenses that mechanically move further apart to bring the subject area more into view. When the camera deployment is far from the target, an optical zoom lens will capture more detail and create the sharpest, most accurate image, even with an image sensor with fewer megapixels. Digital zoom, on the other hand, involves cropping and enlarging a portion of the image or frame, resulting in a loss of image quality. When you use digital zoom, the camera takes a smaller portion of the image and expands a smaller number of pixels to fill the screen. This can lead to a pixelated, blurry image, especially if the camera is deployed at a distance from the target.

Most unmanned surveillance cameras do not have optical zoom lenses. A camera that can optically zoom requires a physically larger body to accommodate two lenses moving to accomplish the task of zooming. Also, a zoom lens requires a larger camera form factor, costly lenses, and a greater battery supply to power the moving lens. As a result, the larger camera and battery systems are best suited to more rural deployments where larger camera and battery systems are easier to conceal.

The best way to understand the difference between optical and digital zoom is the camera on your cell phone. Due to the thinness of cell phones, an optical zoom lens is not feasible, so current cell phones accommodate this by having multiple lenses with different focal points. Current cell phones on the market have as many as four lenses (quad-cameras) to accomplish the different fields of view and zoom ranges.

### Lens Field of View:

One of the most important factors to consider when selecting a camera lens is its field of view, which directly impacts the amount of the target area that can be captured. A wider field of view can minimize blind spots but also means that the CMOS sensor's pixels are spread over a larger area. Consequently, zooming on footage captured with a wide field of view will result in a more pixelated image and less clarity. As a result, achieving optimal coverage and image quality requires finding the right balance between the field of view, distance from the target, and the size of the CMOS image sensor of the camera.

### PTZ Lenses:

A PTZ lens is a type of camera lens used in security surveillance systems commonly seen on the corners of commercial buildings. As its name suggests, a PTZ camera allows for pan, tilt, and zoom functions to be remotely controlled, enabling the investigator or agent watching a live feed to adjust the camera's field of view and zoom in on activity or areas of interest. The pan function allows the

camera to move horizontally, while the tilt function enables the camera to move vertically. The zoom function allows for close-up shots of a specific area, providing greater detail and clarity with optical zooming. The ability to remotely control the camera's movements and zoom capabilities makes PTZ cameras or lenses an effective tool for enhancing surveillance coverage and improving system flexibility.

Although a camera with a PTZ lens could be an ideal system for unmanned surveillance, several issues make PTZ a suboptimal choice for many deployments. These issues include:

1. Since the pan, tilt, and zoom functions are mechanical, they require a great deal of battery power to function. These lens systems draw power even when in a standby state.
2. The PTZ lens assembly is large and requires a camera body or enclosure that is large enough to house the lens unit.
3. The lens opening on the covert enclosure must be large enough to accommodate the pivoting lens assembly.

Digital PTZ or Electronic PTZ (ePTZ) is a method that emulates the functionality of a traditional PTZ camera. However, it employs digital zoom and analytics instead of mechanically moving the lens apparatus and optically zooming. ePTZ involves digitally cropping the video image and scaling it to the desired zoom level so the final image is of the desired target area. While ePTZ can effectively focus on specific areas of interest digitally, the resultant video may have lower resolution and quality than an optical zoom lens. However, with the emergence of lower cost, high megapixel CMOS image sensors, a camera designed with ePTZ, and a large CMOS sensor of 12MP or more can still have tremendous clarity, which can be enhanced by utilizing a lower level of JPEG compression. As the technology and analytics improve, ePTZ is poised to render mechanical PTZ for unmanned surveillance obsolete.

## **Infrared Flash and Thermal Imaging**

Trail cameras often incorporate a black IR (infrared) flash to capture footage at night, which is invisible to deer and humans, which is advantageous for wildlife photography. However, when utilized for unmanned surveillance in exceptionally dark environments, this flash could inadvertently capture footage in situations where humans have higher expectations of privacy. As such, it is essential to choose cameras that record footage the same as a person would observe conducting live surveillance under the same lighting conditions. While thermal imaging cameras, such as those offered by FLIR, provide advanced low-light imaging technology capturing activity in low or complete darkness, they may not be suitable for unmanned surveillance for the same privacy expectation reasons.

## **Cellular/LTE Connectivity**

Utilizing a camera that can be accessed remotely through a website or cell phone application has numerous benefits for unmanned surveillance, including:

- **Remote access:** The footage captured by the camera can be transmitted to a remote monitoring center or a user's mobile device in near real-time intervals, enabling discreet monitoring enabling a case manager or investigator make immediate, informed decisions.
- **Adjusting camera settings:** Monitoring the camera's status, including placement, storage capacity, internal temperature, strength of LTE coverage and battery level, is a crucial insight. Being able to remotely change camera settings, including recording intervals, image resolution, or pausing recording, is also a significant benefit of a camera remotely accessible, especially with regard to data and battery management.

- **Live monitoring by field agents:** Field investigators can live monitor a location when on surveillance and initiate mobile surveillance from a distance away, reducing the risk of being observed or the need for a second investigator.
- **Reducing the amount of non-pertinent footage recorded:** Live monitoring can reduce the recording, storage, or review of activity not pertinent to the investigation.
- **Reducing the risk of losing footage if a camera is compromised:** Footage can be sent to the cloud or a remote server/network area storage (NAS) for evidence retention or review, eliminating the risk of losing valuable visual evidence if a camera is found or damaged.
- **Remotely controlling the camera.** Cameras equipped with PTZ functionality can be accessed to control those functions to change the field of view, zoom onto a subject, and track activity in real time.

Cellular/LTE connectivity has several limitations affecting the investigator's ability to provide a live-monitored unmanned surveillance deployment option:

1. **Limited network coverage:** Cellular connectivity relies on LTE network coverage, which can be limited in some areas, particularly remote or rural locations where unmanned surveillance is often requested. In such cases, the camera may be unable to transmit data or alerts of activity. The investigation plan needs to be adjusted if the investigation depends on live monitoring and there is limited or no network coverage.
2. **File sizes too large to transmit:** As image resolution increases, the file sizes can become extremely large. Even with full cellular coverage, syncing full-resolution footage to the cloud requires the following:
  - a. An extensive amount of time to upload each file.
  - b. A large battery system to power the camera and cellular antennae.
  - c. A more expensive cellular data plan.
3. **Data plan costs:** LTE-connected cameras require data plans to transmit data over the cellular network. The investigator will often pay a per-month, per-camera base fee of \$50 or more, which usually only provides a limited amount of data. The cost of these plans can quickly add up, particularly when multiple cameras are on the account. And if the investigator has a large camera inventory that is not regularly deployed and generating revenue, it can create a wasted expense. These monthly fees should be factored into the overall cost of deployments. During a deployment, if the amount of data is not closely monitored and the plan's limits are exceeded, the costs can quickly spiral if not managed.

### Bonded Cellular

Bonded cellular technology is a method of transmitting video signals over multiple cellular connections or networks simultaneously. It combines the bandwidth of multiple cellular connections or even different carriers, typically using a hardware device or software solution, to create a faster and more reliable connection.

Video transmitted using bonded cellular technology divides the video into smaller packets and transmits them over multiple cellular connections simultaneously. The software on the receiving end then reassembles these packets to create a seamless video stream. Using multiple cellular connections simultaneously, bonded cellular technology can provide higher bandwidth and greater reliability than a single cellular connection.



It is important to note that bonded cellular technology can provide higher bandwidth and increased ability to transmit high-resolution footage. However, it is not a panacea for all video transmission issues as it is subject to the same limitations of cellular connectivity, such as limited network coverage. Further, the cost to transmit data through bonded cellular is multiplied by the number of SIM cards within the system. When getting high-resolution streaming video is of the highest importance, bonded cellular may be an option and potentially the future of high-end unmanned surveillance video streaming service offerings.

## Wi-Fi Connectivity

There are two separate and distinct categories to describe Wi-Fi for unmanned surveillance, which are often combined and need to be clarified. Many consumer cameras on the market, such as camcorders and point-and-shoot cameras, are equipped with an internal Wi-Fi antenna. These antennae can receive a Wi-Fi signal or act as a Wi-Fi access point creating a peer-to-peer (P2P) connection between the camera and a mobile device.

1. **Connecting to a camera through a Wi-Fi network:** Like consumer home cameras, such as Ring, Arlo, or Nest, unmanned surveillance cameras can be connected to a Wi-Fi network to remotely access the camera and send footage to a remote server or cloud application. Connecting to a home or business's Wi-Fi makes for an extremely fast connection to access the camera or send footage remotely. However, getting permission to access a secure Wi-Fi system in the deployment area is risky to highly unlikely. Public Wi-Fi systems such as Optimum or Xfinity have procedures to prevent video streaming, even if you have an account. A cellular/LTE hotspot can be utilized to connect to a camera equipped with Wi-Fi but will have the same speed, connectivity, and cost issues as a camera with a built-in cellular/LTE antenna.
2. **A camera's internal Wi-Fi as a modem for P2P Connection:** Cameras equipped with an internal Wi-Fi radio antenna system can also be programmed to function as a Wi-Fi router, allowing them to transmit a short-range signal to a mobile device such as a phone or tablet. However, the P2P transmission distance is limited to a maximum range of 50 to 75 feet, which may be useful for only certain applications. Additionally, initiating this communication requires physical access to the camera. As a result, this feature is ideal for a single-day deployment at the beginning of a surveillance assignment, when two field investigators are necessary for live surveillance due to the layout of the environment. This P2P method can eliminate the need and cost of a second surveillance investigator, with one investigator having both a live eye and a remote view.

## LoRa Technology and the Internet of Things (IoT)

LoRa, which stands for "Long Range," is a low-power, long-range wireless communication technology designed for IoT applications. LoRa operates on unlicensed frequency bands and can provide long-range wireless connectivity with low power consumption. It can transmit data over long distances, typically several kilometers, without requiring repeaters or other infrastructure. However, LoRa technology is not equipped to transmit data of large file sizes for video file transmissions. Hence, LoRa technology is not an option for transmitting unmanned surveillance footage. In addition, the lack of security of LoRa transmissions would make it susceptible to interception and, therefore, not a secure transmission method.

LoRa, however, may be utilized as a remote trigger for a remote camera. For instance, for a camera deployed a distance from the target, a small PIR motion sensor can be deployed closer to the target location and send a remote trigger to the camera to bring the camera out of a sleeping state and begin

recording, providing a more reliable triggering method to initiate recording. As of the writing of this Paper, this method is not widely utilized, and the technology is in development.

## **Bluetooth**

Bluetooth technology is not currently capable of transmitting high-resolution video. Bluetooth has limited bandwidth and is primarily designed for low-power, short-range communication between devices. The maximum data transfer rate of Bluetooth 5.2, the latest version of Bluetooth, transmits data at 2 Mbps (megabits per second), which is insufficient to support the high data rates required for transmitting video.

## **GPS Location of Camera**

Many current cameras produced for unmanned surveillance that can be accessed remotely through a cellular/LTE data plan are equipped with a GPS receiver. For an expensive camera deployed in environments where the camera could be found, retrieving the camera can save a tremendous amount of money and give the investigator peace of mind when investing in a camera and building an expensive inventory of camera systems. Consideration should be made, however, if the camera is found, and someone places the camera inside their vehicle. The investigator could be unwittingly tracking a subject's movement. Some investigators are now utilizing an Apple AirTag inside covert enclosures, which can be an effective method of locating a compromised unmanned surveillance deployment.

## **Environmental Factors Affecting Camera Deployments – Weather and Temperature**

- Cold weather can drastically affect batteries, reducing their capacity by as much as 50%.
- Excessive heat can cause cameras to malfunction, especially when the camera is concealed inside enclosures, which are often not vented, increasing the internal temperatures.
- Cameras deployed close to the ground can be covered by snow during a large snowfall or when snow is plowed into the camera deployment location. For instance, a camera deployed close to the ground, adjacent to a utility pole in the winter, may need to be placed on the opposite side where snow from a snowplow might be pushed.

## **Custom Camera Designs**

Since few adequate products are available specifically designed for unmanned surveillance applications, many investigators choose to fabricate their own systems, utilizing existing off-the-shelf camera components. By designing their own systems, they can retain more control over the features and applications. However, there are often limitations to the range of programming of these custom-made systems, as they are often not designed for their internal software to be reprogrammed by users. As a result, the custom-designed camera still suffers from several limitations, including:

- **Unused peripherals:** Circuit boards with peripherals (such as USB or HDMI ports) attached that are not being utilized but still draw power and add to the battery drain.
- **Not designed for low power consumption:** If the circuitry is not custom designed for a low power draw, battery consumption could require larger battery systems or frequent battery swaps.
- **Form factor:** The investigator is limited in their enclosure design due to the shape of the circuit boards and camera body, making them less customizable. Tall, narrow circuitry is an ideal form factor design for unmanned surveillance deployments.
- **Limited programmability options:** The unique nature of unmanned surveillance deployments requires specific programming to adapt to different deployment locations and environments. Most off-the-shelf cameras do not accommodate a range of programming.

- **Unreliable circuitry:** Non-commercial cameras, as compared to those produced by major manufacturers, may be susceptible to more malfunctions or issues due to quality control of the circuit boards when manufactured.
- **Deployment by technically skilled investigators:** Deployment of custom-designed cameras may be more complicated if not explicitly designed for easy programming at the time of deployment.
- **Limits to building an inventory:** Utilizing custom-made or one-off systems limits the investigator from building a large, unmanned surveillance program due to limitations in producing the electronics and enclosures in larger volumes.

Ultimately, a custom-designed camera system for unmanned surveillance will achieve superior results. However, the skill required to accomplish this is often beyond the ability of most investigators and finding people with these technical skills takes time and effort. However, cameras made specifically for unmanned surveillance deployments will likely reach the market by 2024 or 2025, as demand for them will significantly increase. Currently, high-end unmanned surveillance camera systems on the market cost more than \$8,000 per camera, which is out of reach of most investigators' budgets and makes building a large-scale unmanned surveillance program extremely challenging and expensive. Losing a camera at this cost can significantly impact the investigator.

### **Cameras Containing Real-Time Clock (RTC) Technology**

Advanced cameras may contain circuitry with a built-in real-time clock (RTC), enabling the time and date to be embedded into the hash and EXIF metadata of the captured footage. An RTC helps to eliminate any human programming errors or camera malfunctions affecting the accuracy of the time and date on captured footage. The RTC circuitry, soldered into the circuit board, usually includes its own battery to continue keeping accurate time. The accuracy of the time and date through an RTC is performed by the camera's LTE and GPS antennae. A camera system equipped with an RTC helps significantly with the authentication of evidence captured through unmanned surveillance camera deployments.

### **Technical Skills and the Investigator**

With unmanned surveillance allowing investigators to leverage technology to provide a better service to their clients, the technical ability of the investigator becomes a factor. These skills can be broken down into three categories:

1. **Technical camera skills:** An investigator or camera specialist can fabricate an unmanned surveillance camera system or adapt existing technology to provide the service. The skills required to design a covertly deployed camera and have it capture the desired footage can vary depending on the system's design.
2. **Deployment skills:** Deploying cameras requires the skills of an experienced field investigator. Either deploying covertly under the cover of darkness or disguised as a utility worker during the day, the deploying investigator needs to remain undetected and be prepared for potential confrontation. Experienced field investigators who do not have a high level of technical skills can be utilized for camera deployments if the system is designed for easy programming at the time of deployment or can remotely change the camera settings.
3. **Fabrication skills for camera concealment:** Many investigators providing unmanned surveillance solutions utilize commercial cameras and have in-house staff adept at looking at the deployment environment and fabricating or creating a method to conceal a camera. For instance, investigators will remove foliage from the deployment location and glue it onto the camera, making it seamlessly blend into the environment.

## **Technological Impacts on the Future Implementation of Unmanned Surveillance**

Unmanned surveillance has yet to become a commonly offered service due to the unique challenges posed by limited product choices, covert deployment, concealing cameras, and the self-sustained power supply required by the cameras. However, with continuous advancements in technology, unmanned surveillance is poised to become a widely utilized tool. Future advancements in technology which will affect unmanned surveillance include:

1. Reasonably priced camera systems entering the market, designed by investigators, specifically for unmanned surveillance investigations. These camera systems may utilize creative and unique integrated enclosure systems to conceal the camera.
2. Artificial intelligence and advanced analytics processed inside the camera (“on the edge”). Application-level software will continue to advance and provide analytics, which will enable the camera to capture only footage desired for the investigation.
3. Analytics of captured footage for facial and object recognition. Currently, programs like FindFace allow companies to analyze their captured footage and identify people through facial recognition, physical descriptions, and license plates. This data can be analyzed to develop specific subject or vehicle activity patterns. Facial recognition sites like PimEyes can quickly search the Internet to identify a person when faces are provided. These machine-learning analytics will occur at the server level after the captured footage is saved.
4. High-resolution image and video options. The cellphone camera market drives innovation and technological advances by improving camera and lens quality, with the camera components reducing in size. Camera size features and image resolution will follow close behind and impact the unmanned surveillance camera options.
5. Digital PTZ (ePTZ) and object tracking will be able to be programmed and function automatically inside the camera’s processor to track the movements of a target in the image’s field of view.

Camera technology and products are currently being designed and developed specifically for private investigative unmanned surveillance. With advancements in battery development and wireless technology, these cameras will specifically meet the needs of the professional investigator and be concealable in difficult environments. Further, the technology of these cameras will be LIMITED to help protect the rights and privacy of those under investigation, including the lack of ability to record audio or capture footage in extreme low-light conditions.

## **Considerations with Camera Technology**

Consideration should be made when choosing what technology to use. These decisions should be based on legality and ethics. As unmanned surveillance is a replacement or supplement to manned surveillance, the technology should be in keeping with what a person could observe if they were physically conducting surveillance at the time unmanned footage is being captured. For instance, when zooming into a target area, it is important to ensure that the camera captures “what any passerby would easily have been able to observe.” For instance, infrared technology can capture a large amount of detail in low-light conditions, but the environment around the deployment location should dictate if that technology should be employed.

As technology advances, it will become easier to have a camera system that employs technology to limit capturing certain people or actions to protect the privacy rights of the subject of the investigation and those not involved in the investigation.

## 5. PLACEMENT OF COVERT CAMERAS

There is a common misconception that small, inconspicuous cameras can be covertly placed in a wide range of locations without arousing suspicion. However, unmanned surveillance deployments require a complex combination of creativity, technical skills, artistry, and undercover investigative skills. Concealment and deployment of covert cameras remain a primary challenge in the wider adoption of unmanned surveillance. As technology advances, specialized camera systems tailored specifically for unmanned surveillance will become increasingly available in the market, which will help reduce the barrier of entry for new providers of Intel Surveillance services. For Intel Surveillance to be more widely accepted, investigators must follow a systematic and well-documented process when deploying unmanned surveillance cameras to ensure no issues with the location of deployment or the acceptance or authentication of captured footage.

### Pre-Deployment Considerations (Research and Surveys)

Several pre-deployment practices and considerations should be made before an unmanned surveillance deployment, which is an essential component of an Intel Surveillance investigation. Restrictions or limitations at the deployment location, which may result in less-than-ideal captured footage, should be communicated to the client. Clients often need help understanding the complexity of unmanned surveillance deployments, and deployment limitations or restrictions must be communicated to temper expectations. Considerations include:

1. **Purpose and Goals:** Determine the purpose of the surveillance and the goals the client expects to achieve through unmanned surveillance to help identify deployment locations, the type of equipment or technology needed, and the format of footage to collect.
2. **Research into Property Lines and Property Ownership:** In the locations where deployments are possible or considered, be informed of any property ownership or possible property rental by the subject of the investigation around the deployment. It is best to avoid deploying at locations where the investigation subject may have a property interest. It is also important to know if a road leading to the subject's property is a public roadway or part of the subject's property. For instance, if the house is a flag lot, more research may be required to determine the property rights regarding the road that accesses the subject's residence. Many counties have conducted GIS mapping (GPS with aerial views and property lines), which they make accessible online. Gone are the days of going to a municipality to look at paper tax map books to research and identify property lines.
3. **Online Research and Surveys:** Conduct Google Earth and Street View surveys of the deployment location and surrounding area. In cases where a choke-point camera is necessary, research likely routes the subject may travel to access major thoroughfares when driving out of a neighborhood.
4. **Physical Site Survey:** An investigator trained to conduct pre-deployment site surveys for unmanned surveillance might need to visit the deployment location to survey the current environment. They should take note of any security or privacy fences, posted No Trespassing signs, and the physical location and surrounding environment of utility poles and utility clusters.
5. **Legal Considerations:** Research and understand the legal framework surrounding unmanned surveillance in the deployment area, including state laws and local ordinances that may impact the deployment of cameras or restrictions such as placing items on utility poles or trees on federal land.
6. **Equipment and Technology:** Identify the necessary equipment and camera technology for the deployment, including environmental and weather considerations and the amount of foot or vehicle traffic around deployment locations.

7. **Data Collection and Management:** Develop a plan to collect and manage the data obtained during the surveillance, including determining who will monitor or review the footage, where the data will be stored, and who will have access to the data.
8. **Risk Management:** Identify potential risks associated with the deployment and develop a plan to mitigate them, including identifying potential hazards to people and property, privacy concerns, and risks related to data security and privacy.
9. **Training of Personnel:** Ensure that the personnel responsible for the deployment are adequately trained to operate the equipment and technology used to deploy and retrieve footage and equipment. They should also be trained to be aware of any potential issues regarding privacy and private property.
10. **Communication and Coordination:** Establish communication protocols and ensure that all parties involved in the deployment know their roles and responsibilities, including coordination with the case manager and any field investigators who conducted surveys or surveillance on the case.
11. **Testing and Evaluation:** Conduct testing and evaluation of the equipment, technology, and data collection and management systems to ensure they function correctly and meet the investigation and unmanned surveillance deployment goals.

Addressing these pre-deployment considerations will ensure an effective Intel Surveillance investigation or unmanned surveillance deployment.

## Vehicles or “Drop Cars”

While there are numerous advantages to deploying an unmanned surveillance system inside a vehicle, there are also many limitations and drawbacks. Generally, relying primarily on vehicle-based unmanned surveillance camera deployments can provide a superior product with greater video capability but require a fleet of dedicated vehicles, so the service cost will be higher than deployments not requiring a vehicle. Further, the service providers who utilize vehicles outfitted specifically for unmanned surveillance investigations are limited by their fleet size—vehicles requiring service result in lost revenue.

### Benefits of vehicle-based deployments:

- Parking a vehicle on a public street eliminates issues or concerns with placing cameras on property.
- Vehicle based unmanned surveillance cameras can be positioned to capture the same view of what a field investigator conducting live surveillance would observe.
- More complex camera systems can be utilized with the vehicle being a larger “enclosure” that can accommodate a larger camera system, remote communication, and battery. Some vehicle-based camera systems can remotely start the vehicle to recharge the system’s batteries.
- Opportunity to deploy a more expensive camera system when there are reduced concerns or risk of losing an expensive camera in the elements or public areas.
- Weather concerns can be eliminated, such as rain and snow, where weather can negatively impact a non-vehicle unmanned surveillance deployment.
- More concealment methods are available in the interior of a vehicle.
- Since the vehicle will not be occupied, it does not need the windows tinted which reduces suspicion and exposure as compared to a parked vehicle with tinted windows.
- Vehicles can be adapted to accommodating a lens or motion sensor on the exterior. For example, a camera may be concealed inside a PVC pipe on the roof of a work van.
- Deploying a drop car in an apartment complex with available visitor parking spots can be an excellent option for long-term deployments.

### Limitations and drawbacks of vehicle-based deployments:

- PIR motion sensors operate on changes in the temperature of objects in range of the sensor. PIR sensors cannot measure heat through glass, so motion detection using PIR sensors cannot be triggered to initiate footage recording.
- For a camera inside a vehicle filming through the windows, snow on the vehicle or frost on the windows will prevent the capturing of usable video. Further, melting snow or rain on a vehicle causes the windows to fog, inhibiting footage captured from inside the vehicle through the windows.
- Two people may be necessary to deploy, position, and retrieve the vehicle when in a location where a car service is unable to bring the investigator back to the office. Another option which only requires a single investigator is putting the drop car on a trailer and towing it to the surveillance location.
- Parking a vehicle in a rural area is usually only feasible for a limited number of days.
- The vehicle may need to be moved several times during the deployment to avoid arousing suspicion or to avoid the risk of the vehicle being deemed abandoned and towed.
- Parking restrictions in urban areas may require moving the vehicle on certain designated days. Moving the vehicle in a congested area can prevent finding another parking spot with an optimal view.
- Dedicated “drop cars” tend to be underused for other purposes, causing neglect issues with the vehicle requiring service and resulting in downtime, negatively impacting revenue.
- Utilizing “drop cars” exclusively requires a significant investment and expense of purchasing vehicles, outfitting them with camera systems, and maintaining and insuring them.
- A suspiciously parked vehicle may be noted by law enforcement or reported to the police. When police run the license plate and identify the vehicle as owned by a private investigator, they may remove it by contacting the investigator or towing the vehicle, even when legally parked.

### **Camera Deployment Locations**

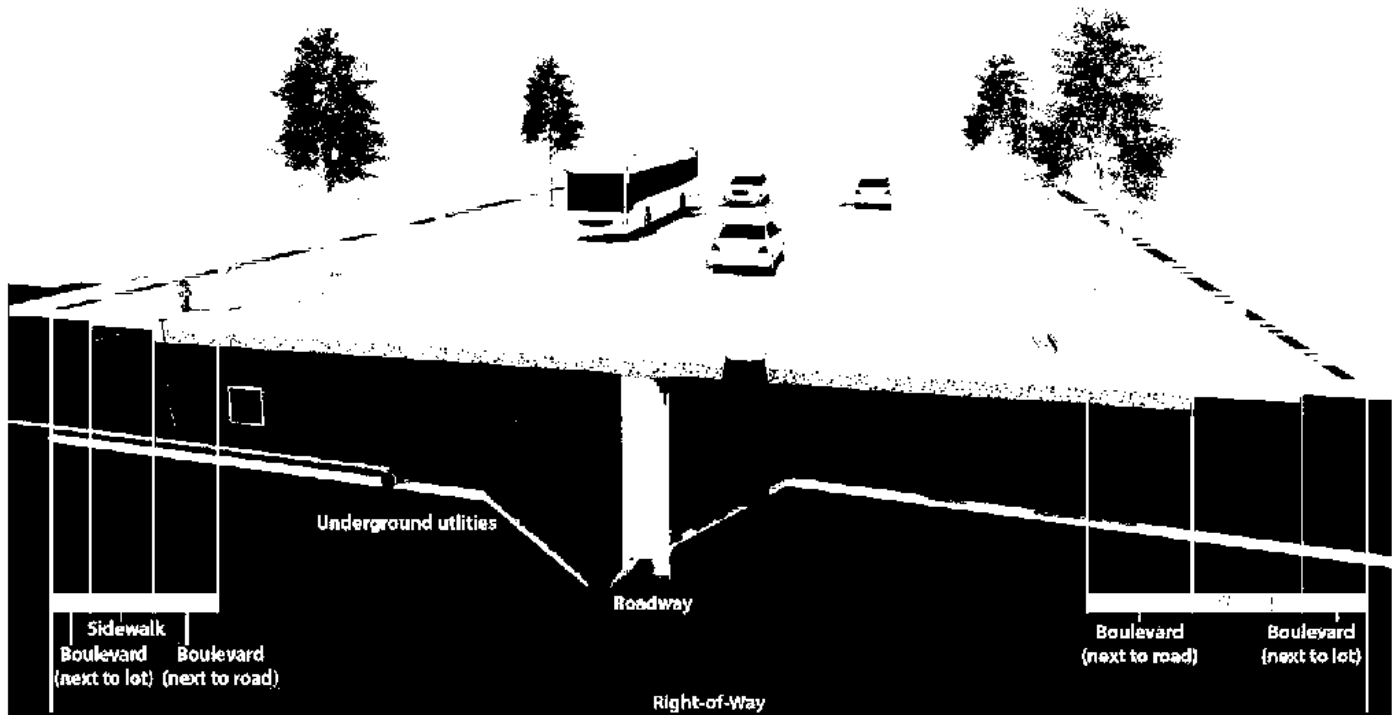
When considering deploying an unmanned camera for an investigation, a common question is, “Where do you place the camera?” Carefully considering the locations of where cameras are placed is important to ensure that any evidence obtained is admissible and that the investigator does not violate any laws. In selecting a deployment location, it is crucial to respect the “Golden Rules” of Intel Surveillance.

- **Golden Rule #2** “Respect Subject’s Privacy”:
  - When conducting pre-deployment surveys, questions that may affect the investigation subject’s reasonable expectation of privacy must be considered, including:
    - Have any measures been implemented by either the property owner or the investigation subject to limit the viewable area of the property, such as an installed privacy fence, hedgerow, or any other method to limit the visibility into the subject’s property?
    - Is the property in a rural location or on a road with limited access? If yes, does this increase the subject’s expectation of privacy due to the remote nature of the property?
  - Issues affecting privacy expectations may not become apparent until after the footage is reviewed, which may prompt a decision to review the deployment location and move the camera to an alternate location.
- **Golden Rule #3** “Respect Subject’s Private Property”:
  - Pre-deployment research should be conducted, including identifying property in which the investigation subject has an ownership interest. More in-depth research should be conducted when the exact property lines are unclear or whether a road accessing the subject’s property is a public thoroughfare or part of the subject’s property.
- **Golden Rule #4** “Capture what a standing person could observe”:
  - Physical site surveys can offer a line-of-sight view that may not have been easily identifiable from an online survey. The camera’s height at the actual deployment location should be

governed by what is observable from the residence's environment. A camera deployed high on a pole may still respect the subject's "reasonable expectation of privacy."

## Easements and Rights of Way

As part of the infrastructure development of roads, various elements are put in place to enable their safe and efficient use. These include the road surface, drainage systems, sidewalks or footpaths, streetlights, traffic signs and signals, and the installation of utility poles to provide essential services such as cable and electricity to adjacent homes and businesses. These elements are established in the roadway's rights-of-way (ROW) areas, which accommodate public access.



*What the right-of-way includes. (Image source: Minneapolis Parks & Recreation)*

A common consideration when determining camera placement location is to deploy in a right-of-way (ROW) or an area covered by a property easement. These important property rights issues can make the unmanned surveillance camera deployment locations accepted and lawful. They are defined as:

➤ Right-of-Way:

An ROW is a type of easement granted or reserved by a municipality for transportation or improvement purposes, and the town maintains property rights to the area. The property is generally in line with the roadway but wider than the road and extends into an adjacent property owner's property. The municipality maintains rights to this property for situations such as widening the roadway, installing utilities, or installing a walkway or sidewalk. There are usually restrictions where the property owner cannot plant trees or erect a fence in a ROW area if the municipality needs to access or make changes to that area.

Although the municipality technically owns the area covered by the ROW, the ROW area on the edge of the property is often maintained by the homeowner, usually planting grass or other landscaping to keep the area attractive. ROW areas usually extend approximately thirty to fifty feet out from the center line of the roadway. If there is a sidewalk along a property, it is usually placed about a foot from the ROW edge, with the entirety of the sidewalk located in the ROW area.



➤ **Easements:**

An easement is a legally recognized right that grants an individual or entity permission to use a portion of another's property. This right permits the holder to use or access the land while the property owner retains ownership and possession of the land subject to the easement. Easements can be created either by agreement between the parties or imposed by law.

Definition of easements in New Jersey roadways:

*“An easement is an interest that allows a person or entity the right to occupy or use the real property of another person or entity, but does not convey ownership.”*

State of New Jersey Department of Transportation Right of Way Acquisition Manual  
(August 2019)

Conducting research of the easement of a utility to determine the rights and specific language regarding the easement can be difficult. The easement may have been established many years prior, with no attention given to it as property ownership changed. Further, the subdivision of properties could make locating the specific easement documentation extremely challenging.

## **Utility Poles**

Law enforcement employing unmanned surveillance and resulting case law refer to all unmanned surveillance deployments as “pole-cameras.” Despite the evolution of technology resulting in smaller cameras and varied form factors supporting a variety of deployment locations, many private investigators (predominantly those with prior law enforcement experience) still use the term “pole-camera” for unmanned surveillance deployments. This implies that unmanned surveillance deployments are solely mounted on utility poles, misleading those considering unmanned surveillance. While cameras are now deployed in numerous locations, utility poles and surrounding areas remain prevalent as deployment locations. As a result, it is important to address deploying cameras on or around utility poles.

Utility poles, as a general term, may refer to different types of poles, materials, or other similar structures, including round wooden poles and metal, concrete, or square wooden light poles. Utility poles typically support a variety of overhead utility lines and equipment, including:

- ❑ Electrical power lines and transformers for the distribution of electricity
- ❑ Telephone lines and equipment for landline telephone service
- ❑ Cable television lines and equipment for cable TV service
- ❑ Fiber optic lines and equipment for high-speed internet and data transmission
- ❑ Street lighting fixtures for public lighting
- ❑ Wireless antennas and equipment for cellular and wireless communication services



*Various items on utility pole  
(Image source: unknown)*

In addition to the above, some utility poles may contain equipment such as traffic cameras, license plate reader cameras, weather sensors, or public address systems.

For this section, we are referring to round wooden utility poles, which contain overhead wires, running electricity, telephone, and cable to residences and businesses and are generally located on an easement in the ROW areas of roadways.

Deploying an unmanned surveillance camera on a utility pole will continue to be a common practice. However, questions often arise about the legality or acceptance of deploying on a utility pole.

Some issues to consider when using a utility pole as a deployment location may be local ordinances regarding the attachment of items on utility poles. The pole owner (i.e., utility company) may also have rules or guidelines on placing items on poles owned by the utility. When conducting pre-deployment research for any rules or guidelines, it is beneficial to know who the actual owner of the utility pole is. However, identifying the pole's owner may not be easy. Some examples of utility pole ownership are:

1. Electric utility companies such as Jersey Central Power and Light, Duke Energy, Southern Company, First Energy, or Pacific Gas and Electric Company.
2. Telecommunications companies such as AT&T, Verizon, or T-Mobile.
3. Cable TV providers such as Comcast, Charter Communications, or Cox Communications.
4. Municipal or local government entities responsible for public utilities.
5. Private companies that lease the poles for services such as outdoor advertising or wireless infrastructure.
6. Privately owned by the property owner where the pole is located.
7. Jointly owned poles by two or more different utility companies.

When utilizing a utility pole as a deployment location, it is important to understand the concerns of the pole owner when items are placed or secured on the pole. There are several issues that the owners of utility poles have with items on the poles. These include:

- **Safety:** The primary concern of utility companies is the safety of their personnel and the public. Any item that may obstruct the view of traffic by passing vehicles, including items on the pole such as signs, traffic lights, or other utility equipment, can be a potential hazard for motorists.
- **Damage to the pole:** Damaging the pole by drilling large holes creates concerns about premature replacement of the pole, leading it to fail and cause injury.
- **Liability:** Pole owners may be concerned about any damage or injury resulting from items installed on their poles.
- **Interference:** Utility companies need to ensure that any items installed on their poles do not interfere with the proper functioning of their equipment, such as power lines, fiber optic cables, or other utility infrastructure.
- **Accessibility:** Utility companies must ensure that their personnel have easy access to their equipment and infrastructure for maintenance and repair. They may be concerned that items placed on poles could hinder their ability to perform their work.

There may be general rules or local ordinances for utility poles, or utility poles owned by the municipality. There are various reasons why these rules are in place, including safety or liability. Common issues that local ordinances will address regarding placing or installing items on utility poles are:

1. Stapling of signs or notices
2. A convex mirror installed in a blind spot for line of site improvements
3. Security cameras or “ring doorbells”
4. Decorative flags
5. Planters
6. Signs or flyers
7. Religious area demarcation such as an Eruv (A symbolic boundary of wires or poles that allows Orthodox Jews to carry certain objects outside their homes on the Sabbath, which would otherwise be prohibited according to Jewish law.)

A well-thought-out camera deployment at a utility pole can avoid many of these issues and concerns. For instance:

- **Camera Height:** According to the National Electrical Safety Code (NESC), telephone lines must be at least 14 feet above the ground, and electrical lines must be at least 15-½ feet above the ground. A camera deployed well below these heights should not interfere with the utilities themselves.
- **Defacing or damaging the pole:** Methods such as strapping or utilizing small screws produce little to minimal damage which could lead to failure of the pole.
- **Interference with linemen working on the pole:** Linemen physically climbing a pole is a practice that has largely been replaced with using a “bucket truck,” which elevates the lineman to the location to access the utilities. A camera deployed low on the ground, adjacent to a utility pole, avoids these interference issues altogether.

There are also instances when a pole is in place but contains no utilities. For example, a new pole has been erected to replace a damaged or aging pole. The new pole is often buried in the ground adjacent to the old pole, with the utilities transferred to the new pole. Deploying a camera on the old pole to be replaced may avoid any issues about pole damage as the pole is due to be removed.

#### Admissibility of obtained footage:

The courts regularly accept footage or evidence obtained from cameras deployed in utility pole locations. In most investigations, it is important that the pole is situated away from any property where the subject of the investigation has an ownership interest. When unmanned surveillance captures footage and evidence from a camera placed in a location where the investigation subject has no property or privacy interest (such as a utility pole across the street), any claims by the subject that the camera was located on another person’s private property should hold no legal weight. This is because the investigation subject cannot assert any claims regarding the property rights of another individual as they lack standing in their attempt to exclude potentially damaging evidence.

There are advantages and considerations regarding deploying a camera by a utility pole.

- **Advantages of deploying in the area of a utility pole**
  1. Utility poles are often located in both a right-of-way and easement area, considered part of the public roadway or area accessible to the public (such as a sidewalk or footpath).
  2. Utility poles are often located in areas generally accepted as public spaces. This assists in determining if the investigation subject has a reasonable expectation of privacy.
  3. Cameras deployed on utility poles are quickly becoming ubiquitous.

➤ **Considerations of deploying in the area of a utility pole**

1. If a camera is deployed at a pole at a height of more than six feet off the ground, ensure that what the camera is capturing is the same footage as what a “passerby could observe.”
2. When a utility pole is located deeper into a residential property or in the rear of two abutting properties, these locations require additional consideration before deployment.
3. When deploying a camera by a utility pole and using a vehicle resembling a contractor’s work vehicle, there are OSHA (Occupational Safety and Health Administration) guidelines to consider. These guidelines are to protect utility workers and ensure that there are no traffic incidents due to the vehicles parked on the road. These guidelines may be as simple as putting a sign or cone on the ground, or there may be a requirement for a flagman or police officer on certain roadways. In these instances, knowing if a roadway is a state or Federal highway is beneficial, as it is not always apparent.

## **Underground Utilities**

In newer housing developments, condominiums, and apartment complexes, the utilities for the home or unit are often underground. For the utility companies to gain access to the utilities, the boxes are often away from the dwelling, usually with the different utilities clustered together. These utility “clusters” are typically located on the edge of property lines and regularly in the ROW area. Utility clusters are a common and accepted location for unmanned camera deployments.



*Typical underground utility “cluster” (Image source: unknown)*

## **Trees and Wooded Areas**

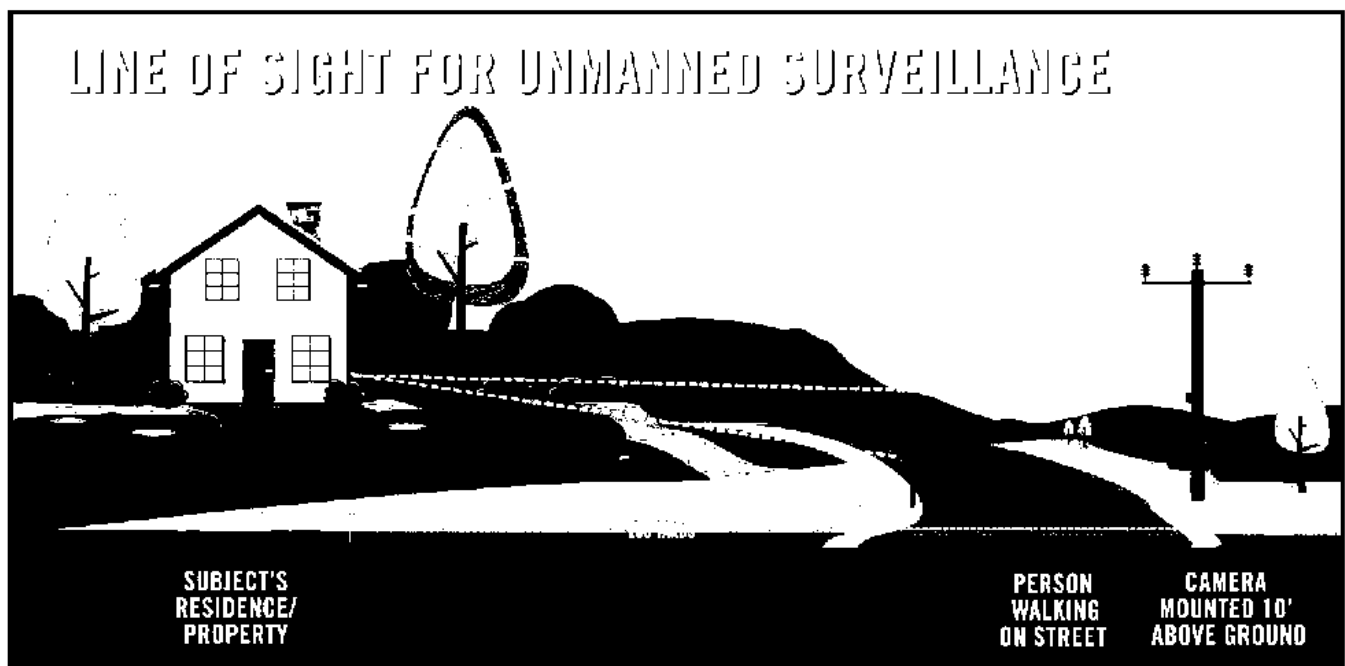
A common misconception is that deploying a camera on a tree is always an easy deployment location. This may be the case in heavily wooded environments where there are abundant concealment options, however in a suburban or urban environment deploying on a tree is usually not possible. However, even deploying in heavily wooded areas accessing an optimal location can be challenging, especially if the area is along a busy road. In urban or suburban areas, installing a camera on a tree, and utilizing screws, could cause damage to the tree, creating issues for the investigator. Further, concealing a camera in a tree in urban and suburban environments is extremely difficult, and the camera will be easily observed. Another consideration is that trees located on properties such as Federal land may be

protected or have restrictions in place. Therefore, deploying unmanned surveillance on a tree requires careful consideration in anything other than deeply wooded environments.

Another deployment option in wooded areas is concealing a camera inside a log or fake rock. These can be ideal deployments. However, with the height being lower to the ground, issues may arise with items blocking the camera view. In spring, weeds and fast-growing bamboo can quickly grow and block the camera lens, even during a short deployment. In winter, snowfall or drifts can obstruct the camera's view.

## Camera Height Considerations

When deploying cameras for unmanned surveillance, the subject's privacy rights, particularly regarding the camera's height off the ground, should be considered. However, more than just the camera's physical height off the ground, other environmental and geometric factors can be considered than just a human standing in the same location. These factors can affect whether a high camera deployment location is acceptable and does not encroach on any individual's expectation of privacy. For instance, if an investigation subject has an eight-foot fence surrounding their property, a camera positioned ten feet off the ground, directly across the street from the target residence, is likely to capture areas of a subject's property where they have a reasonable expectation of privacy. However, the same camera deployment situated 200 feet away from the target residence may only capture what is visible to a passerby who is standing directly across the street from the property and not capture any property areas concealed by the privacy fence. This can be the case for several reasons. For instance, the target location may be situated high on a hill, with the camera deployed at a location in a lower elevation, looking upward toward the target. In this instance, a camera placed in a high location may capture LESS than what a person could observe standing directly across the street. Another example involves geometry. With a camera deployed at a height above a standing human, the hypotenuse of the triangle, or the Field of View of the camera, changes. As the camera deployment gets further away from the target location, eventually, with a slight elevation change, the camera may only be able to capture what a person standing in front of the target would be able to observe, as the Field of View of the camera (the hypotenuse), becomes flatter as the distance increases (illustrated below).



Static camera line of sight rendering (M. Cooke, 2023)

Further, obstructions may also affect the camera's Field of View. A camera deployed in a high location whose Field of View is blocked by another structure may not be able to capture areas where the target has a reasonable expectation of privacy, rendering the higher camera deployment as non-problematic.

Case law on the subject reflects that when law enforcement deployed a camera high on a pole where the camera was able to capture more than what a standing person could see from the deployment location, the captured footage was admissible, as the specific captured footage utilized for Probable Cause was "the same as what a passerby could observe."

Another consideration regarding camera height is the utilization of the camera's technology to LIMIT what the camera is capturing by utilizing settings to block or prevent the camera from recording areas of the frame. For example, a camera is deployed at an elevated height near a target location, and the objective is to capture vehicles exiting or entering a driveway. However, the camera can also capture an area over a privacy fence. By programming the camera only to record footage of the driveway, the investigator is taking steps to respect the subject's privacy and will not be capturing any footage that could rise to the level of violating that expectation. It is important to document this minimization when minimizing footage or sections of the image frame. Ensuring that anyone accessing any live video feed abides by the minimization set in place is also important.

## **Concealment Methods**

Various consumer cameras exist in the marketplace created for outdoor environments and utilized by investigators for unmanned surveillance deployments. These cameras, such as the Arlo Go brand camera, are weatherproof and can be accessed remotely through LTE (with a monthly subscription). Cameras such as these have a good battery life. This camera also has additional accessories that can be purchased to conceal the camera, including three different "skins" to camouflage the camera in wooded environments. A PIR motion sensor triggers video, so issues with false triggers and distance limitations are still a factor. Further, since the PIR sensor cannot be blocked when in a covert enclosure, the face of the camera may not be adequately covert.

Other methods of concealing cameras include being creative to blend cameras into specific wooded environments. Investigators may cover the camera in "painter's" tape, then take leaves or needles from the deployment location and glue them to the camera body. This can be an effective short-term deployment solution in bushes or heavily wooded areas.

## **Enclosures (Where Cameras are Concealed)**

There is a common misconception that with current technology, cameras are tiny and can easily be deployed anywhere. The reality is that cameras used for unmanned surveillance are rarely tiny and require a battery source that can be substantial. Also, the physical size of the electronics may become smaller, but the more that camera software technology advances becoming beneficial for unmanned surveillance, the processing requires a great deal more power, so battery power sources need to be even larger. As a result, investigators need to be creative with their enclosure designs to conceal large battery systems. Most unmanned surveillance camera deployments are often off-the-shelf cameras adapted for the purpose, placed in enclosures, or concealed with camouflage methods. Some of these cameras are not weatherproof, so adapting an indoor camera that will be exposed to the elements requires sealing them in a weatherproof enclosure. How investigators conceal their unmanned surveillance deployments may be held as closely guarded secrets. However, there are several popular

methods of hiding cameras, some of which are sold online and specifically made for unmanned surveillance purposes. Some of these include:

- ❑ Boxes marked “electricity danger” to avoid tampering
- ❑ “Pole-cam” style cameras secured to a utility pole
- ❑ Traffic cones, barrels, or sawhorses
- ❑ Fake logs, stumps, or rocks to blend into wooded environments

Since many unmanned surveillance deployments are close to the ground, the choice of enclosure or deployment methods should consider environmental and weather issues, such as deep snowfall or quickly growing foliage, like tall grass, which will obscure the camera lens. A camera deployed adjacent to a stream or water runoff area can be a great choice. However, consideration should be made regarding the risk of heavy rains causing the water to rise and damage the camera, covering it with debris, or sweeping it away entirely.

## Performing the Covert Camera Deployments

There are different approaches and techniques concerning the method and time of day to deploy unmanned surveillance cameras. For instance, certain investigators opt for deploying a camera during daytime hours while donning a safety vest and hard hat. Employing a work van adorned with signs or markings to deflect any suspicions is advantageous for surreptitiously positioning a camera near a utility pole. Depending on the deployment location, this strategy may prove effective during the daytime, assuming that the investigator’s vehicle is in keeping with their undercover persona. While undertaking such a deployment, different considerations should be taken into account:

- **Vehicles:** Markings on a vehicle that are too similar to a utility company’s could create an issue, especially when someone knowledgeable about the utility company sees the vehicle. Reports could be made to law enforcement that a person is sabotaging the utilities.
- **Roadway where the pole is located:** When conducting the deployment and parking on the roadway by the pole, consideration should be made regarding who owns the roadway. Any state or local regulations or OSHA guidelines should be considered regarding necessary warning signs, flags, or cones notifying vehicular traffic of their presence.

Another school of thought is to deploy and attend to unmanned surveillance deployments only under the cover of darkness. The benefit of a nighttime deployment is that it reduces the risk of someone observing the deployment or an investigator accessing the camera.

With home and business owners’ increased use of wireless consumer cameras, investigators must be vigilant during the daytime and under darkness to avoid being detected. When conducting a pre-deployment site survey, attention should be paid to any motion-triggered lighting or cameras that may capture an investigator conducting a deployment, including Ring doorbells or other consumer security cameras.

## Private Property Considerations

Unless your client has property rights or ownership interest in the property, in most circumstances, deploying a camera on the investigation subject’s property should be avoided. Deploying a camera on private property where the investigation subject has no rights or ownership interest should not affect the admissibility of evidence obtained from the deployment as long as the footage does not violate the subject’s reasonable expectation of privacy.

Sometimes, during litigation, when compelling evidence is obtained, the adversary attempts to exclude the evidence and claim the camera was deployed on private property, even though the investigation's subject has no rights or ownership interest in the property where the camera was deployed. They may also threaten to file a civil tort claim against the parties involved. This is often a litigation strategy by the opposing party. Fortunately, these cases are generally dismissed, as the investigation subject does not have "standing" to sue, as they cannot enforce the property rights of another (where the camera was deployed). This is why it is important to articulate in reports the steps taken to ensure that the camera deployment was done with thoughtful consideration for the subject's reasonable expectation of privacy, their property interests, and the location of the camera deployment.

### **States with Laws Directly Impacting Unmanned Surveillance Deployment Placement**

An Internet search reveals a fair amount of confusion regarding unmanned surveillance, with online posts purporting, "You cannot record someone without their permission." This misbelief results from people erroneously applying the elements of wiretap laws to a camera only capturing footage, not audio. Federal and state wiretapping laws clearly state that intercepting or capturing AUDIO between two parties may be considered an illegal wiretap. However, capturing only footage of people from a publicly accessible location does not violate wiretapping laws.

Most states have laws regarding "hidden cameras," however, these laws are generally directed toward deploying cameras inside dwellings or businesses in locations where people have an elevated expectation of privacy, such as bathrooms, locker rooms, and changing rooms. For your state, it is important to look at the exact language of these laws to ensure that the deployment will not cause issues. Since the unmanned surveillance camera deployment is usually in open spaces and not deployed for an unlawful purpose, violation of these statutes should not be an issue. However, research and consulting with legal counsel may be advisable. At the time of the writing of this Paper, Indiana appears to be the only state with a law directly impacting unmanned surveillance deployments. Indiana statute: 35-46-8.5-1:

*(b) A person who knowingly or intentionally places a camera or electronic surveillance equipment that records images or data of any kind while unattended on the private property of another person without the consent of the owner or tenant of the private property commits a Class A misdemeanor.*

It appears this law is directed toward cameras but may also be more directed at GPS devices deployed on someone's "private property," with this definition extending to a motor vehicle.

### **Obtaining Permission from Property Owners**

In some instances, obtaining permission from a property owner at a desired deployment location is a consideration. However, this is rarely a viable option, as bringing in a third party into the investigation can involve them as a witness, creating a risk that the camera or investigation is disclosed to the subject. If the camera is not directed specifically at the target's residence or business, or if the location is a distance away, the risk of disclosure by the third party is reduced. Another option is to obtain general permission to utilize a person's property for a surveillance investigation but not expressly state that it is specifically for an unmanned camera surveillance deployment. Obviously, in Indiana, permission from the property owner needs to be considered.



## **Environments (Rural/Urban/Suburban/Industrial)**

The investigation subject can have different privacy expectations, depending on the environment where they have chosen to live. For example, someone living in an inner city has a lower expectation of privacy than someone living on a dead-end road surrounded by fields or farms. A residence in an industrial or retail area that is busy during certain days and times may have varying expectations of privacy based upon the day of the week or time of day due to industrial or retail traffic. These different environments can impact the choice of deployment location. Also, setting specific recording schedules may be an option, with the camera programmed not to record when the investigation subject has a higher expectation of privacy.

## **Gated Communities**

Unmanned surveillance deployments in gated communities present challenges, potential issues, and thoughtful consideration. How the community is designed in terms of access and security impacts the feasibility of an unmanned surveillance deployment inside the development. For instance, is the development just gated, or is there also a security guard? Some developments have a gate to prevent people from parking inside the development, while others have a gate and security fences around the development. The private property issues inside a gated community are the same as being deployed in an apartment or condominium complex. Unmanned surveillance cameras are usually deployed in common areas off the subject's private property, such as a utility cluster. However, different factors can impact a person's expectation of privacy if their residence is inside a gated community. These factors include:

- Are there fences surrounding the property, or can anybody walk onto the property from the road?
- Are vehicles allowed free access for ride shares, to deliver mail, packages, groceries, or newspapers inside the development?
- Is there a golf course, country club, or restaurant inside the community that allows visitors access?
- Do residents of the development rely on police and ambulance services from the municipality?
- Do they employ private security inside the development?
- When a residence is for sale, can anyone enter to attend an open house?

When conducting a pre-deployment feasibility assessment, entering the development under several pretexts may be beneficial, such as a food delivery person, Uber driver, or attending a real estate open house. Some developments have a restaurant or golf course open to the public. In some larger developments, the investigator may be acquainted with someone inside the development who can provide them access. All these efforts should be documented in case of future push-back.

Usually, if evidence is obtained through an unmanned surveillance deployment inside a gated community, any complaints or issues from the investigation subject are directed to the property management company, which may result in a cease-and-desist letter being sent. For the investigative company that conducted the investigation and receives notice from the property management, this may impact the decision for future camera deployments inside that development in other cases.

## **Weather and Seasonal Considerations**

Weather can significantly impact an unmanned surveillance camera's functionality. This is especially an issue in different parts of the country that experience extreme weather. Issues include:

- **Heat and high temperatures:** The camera electronics necessary for unmanned surveillance may malfunction or shut down when the temperature reaches a high level. A camera hidden in an enclosure or vehicle creates additional heat, so high temperatures, especially under direct sun, can cause the electronics to malfunction.
- **High humidity:** Humid conditions can cause issues with the electronics; the dampness can also create fog on the lens or lens cover.
- **Rain:** unmanned surveillance camera deployments can be affected by rain in numerous ways. Heavy rain can penetrate camera bodies, and if enclosures are not designed with drainage, water could settle inside them, damaging the electronics. Small amounts of rain can cause flash flooding in certain areas that are more arid. These floods can cause rivers to swell and sweep away or damage low-lying cameras. For vehicle-based deployments, rain can cause the camera to focus on the window rather than through it, capturing unusable footage.
- **Snow:** Not only can deep snowfalls bury a camera or obstruct its view, but even small amounts of snowfall can create significant issues for unmanned surveillance deployments due to snow drifts or snow plowing into the camera location. For deployments by utility poles, it is advantageous to deploy on the far side of the pole due to snowplows throwing snow to the side of the roads as they quickly travel down the road. Snow resting on top of an enclosure may also cause water damage to the camera. For vehicle-based deployments, a vehicle parked on a street may need to be moved off the roadway during snowfalls. If the vehicle can remain in its deployment location, the snow will need to be cleaned off it to continue capturing footage and to avoid the appearance that the snow-covered vehicle has been abandoned. Melting snow will also cause condensation inside of the vehicle's windows. For non-vehicle camera deployments, snow creates an environment where the camera technician's footprints when attending to a camera may reveal the camera deployment location.
- **Extreme low temperatures:** For regions that experience extreme temperatures in winter, the primary issue involves powering the camera. Batteries can lose over 50% of their capacity in low temperatures. Having to attend to the system and its batteries creates additional expense in man hours and the cost of batteries if utilizing Alkaline or disposable Lithium batteries.
- **Sun glare:** The angle of the rising or setting sun can cause sun glare issues, preventing usable footage from being obtained. This situation will often not be revealed until after the camera has been deployed and the day's footage reviewed.

### Seasonal Concerns

During extended deployments, different issues may occur in areas that experience changes in seasons. In these regions, homeowners and businesses tend to follow a similar pattern each year. Google Street View's historical images of the property may indicate these patterns. Some considerations include:

1. Spring cleanup of debris and leaves from the fall and winter in areas previously unattended, which could uncover a camera deployment in an area originally thought to be unattended.
2. Laying of mulch in the spring in flower beds, around trees, shrubs, or utility clusters.
3. Fall leaf cleanups, including leaf piles in roadways or bags of leaves, which may block an across-the-street view from a low deployment.
4. Foliage obstructions, including leaves, grass or weeds which may not have been a factor in the winter.

## **Responsibilities of the Unmanned Surveillance Manager and Camera Tech Agent**

Cameras should be deployed only by, or in concert with a private investigator licensed in the jurisdiction of the camera deployment. Investigators are generally more skilled in not arousing suspicion and deflecting probing questions from passersby. Further, if confronted by police for any reason, an unlicensed camera technician not with a licensed investigator is more exposed to potential harassment or stalking accusations, as private investigators are licensed and have the authority to perform surveillance and related operations. In addition, any evidence obtained through the unmanned surveillance deployment may be refuted if a licensed private detective was not involved in the deployment.

## 6. LEGAL CONSIDERATIONS

A regular question when considering Intel Surveillance or unmanned surveillance as an investigative option is the legal issues that can impact its utilization or admissibility of obtained evidence. In its simplest form, unmanned surveillance should be viewed just like any other investigative surveillance with the same laws and rules. It is important to respect an investigation subject's privacy and private property rights in any investigation. Since an investigator deploys unmanned surveillance that is not physically in their possession when footage is captured, legal considerations are an important aspect of both pre-deployment planning and post-deployment factors. This section and the accompanying appendix address the legal considerations that investigators providing the service should consider and specific laws and case laws for attorneys utilizing unmanned surveillance evidence in litigation. Unmanned surveillance investigations and deployments should always be managed and conducted by trained investigative professionals who are licensed private investigators. An investigator must remember the Four Golden Rules of Intel Surveillance before deployment and during the investigation and take appropriate steps to protect themselves and their clients from potential issues that may arise.

### Four Golden Rules of Intel Surveillance

1. *Capture Footage, Not Audio*
2. *Respect Subject's Privacy*
3. *Respect Subject's Private Property*
4. *Capture What a Standing Person Could Observe*

There is significant confusion regarding unmanned surveillance, including online articles asserting that it is illegal in certain states to record someone without their permission. This misbelief results from applying elements of wiretap laws to a camera that only captures footage and no audio. Federal and state wiretapping laws clearly state that intercepting or capturing AUDIO between two parties, where one or both of the parties did not give consent, may be considered an illegal wiretap. However, if no audio is recorded, capturing footage of people from a publicly accessible location cannot be a violation of state or federal wiretapping laws.

Most states have laws regarding "hidden cameras," however, these laws are generally directed toward deploying hidden cameras inside dwellings or businesses in locations where people have an elevated expectation of privacy, such as bathrooms, locker rooms, and department store dressing rooms. For your state, it is important to review the exact language of these laws to ensure that the deployment will not be impacted by these "peeping Tom" statutes. Since the unmanned surveillance camera deployments we address in this Paper are not in such indoor locations or for unlawful purposes, they are not a violation. Because jurisdictional laws may impact the deployment or placement of cameras, investigators providing unmanned surveillance should consult with legal counsel to address any concerns.

### Admissibility and Authentication of Visual Evidence

When collecting evidence through unmanned surveillance deployments, a common question from attorneys wishing to use the evidence in legal proceedings is identifying who will authenticate the evidence obtained. Usually, when visual evidence is presented at trial, an investigator testifies that the video or photos obtained represent what the investigator observed while conducting surveillance or that the presented footage was captured at the date and time water stamped on the footage.

With an Intel Surveillance or unmanned surveillance investigation, the provider of the service should have a designee who can testify at depositions, hearings, and trials. The person testifying is usually the

unmanned surveillance or Intel Surveillance manager, who conducted the pre-deployment planning and supervising the deployment and investigation. The person testifying should be prepared to detail:

1. Overall methodology of the provider's unmanned surveillance program.
2. Pre-deployment research, site survey, and planning conducted before the deployment.
3. Details of steps taken to ensure the investigation subject's privacy expectations or property rights were respected.
4. Methods and policies of retrieval and storage of captured footage, including the accuracy of the time and date and retention of raw footage.
5. Who had access to the raw or reviewed footage, including the name of the case manager who prepared the report or summary video.

During testimony, it is important to convey that unmanned surveillance often creates a large amount of footage which requires review and analysis to filter and present beneficial evidence. An adversarial litigation tactic often focuses on why certain specific footage was chosen rather than all footage shown. When responding to such criticism, the significant data management issues and the skills needed by the Intel Surveillance analyst should be described. Testifying that the purpose of the investigation was to determine certain facts, not document the entirety of the subject's movement and activities.

A further litigation tactic that may be attempted to exclude impactful evidence is a request by the adversary for the courts to discount unmanned surveillance footage, as an investigator cannot testify to what they personally observed. A response may highlight the scenario where security cameras capture a nighttime burglary, such as inside a bank or jewelry store. Courts regularly rule that footage identifying the suspect committing the burglary can be used as damning evidence, although no one witnessed the crime in real-time. The authentication of videos captured by "unmanned" surveillance is addressed by the "**silent witness theory**" of video authentication. In the silent witness theory, video footage is admissible by proving the reliability of the process and equipment that captured and produced the video.

Another example is of the investigator in a surveillance van or vehicle, zooming on a target location from a distance away. The investigator may not have been able to observe what was taking place due to the distance and was more focused on capturing quality zoomed video. When an analyst reviews the captured footage later, the footage may have revealed the activity that the investigator could not observe in real-time due to the distance, and the evidence will likely be admissible.

## **Reasonable Expectation of Privacy**

Regarding the surveillance of the investigation subject, one of the primary legal issues is the subject's reasonable expectation of privacy. A violation of this expectation is usually considered a "civil tort." As mentioned in this section, threats of lawsuits of "invasion of privacy" are usually a litigation tactic by those seeking to exclude evidence which refutes their claim.

The standard for professional investigators conducting surveillance has traditionally been the objective standard of whether footage captured during surveillance is what a passerby could observe.

Several factors may need to be considered regarding the investigation subject's expectation of privacy. For instance, is there a fence around the subject's property designed to block the view of passersby from seeing into the yard? If so, a camera deployed at a height should ensure it only captures footage that could be observed from another location. Another consideration is the environment of the target location. Is it in a rural area or an urban environment? Is the road a thoroughfare or a dead-end farm road in a rural location? If so, what is the volume and frequency of vehicular traffic traveling on the roadway?

After the camera is deployed and captured footage is reviewed, issues impacting the subject's expectation of privacy might arise and trigger a reevaluation of the deployment location, the camera settings, or certain days or times the footage should be captured. For instance, perhaps the captured footage revealed that on certain days, the traffic in front of the subject's residence was extremely light, allowing the subject to conduct themselves in a way that they believed they were not being observed. Therefore, it is essential when the footage is reviewed that due care is taken.

The time of day can also affect privacy expectations. For example, an individual standing in their open yard in a rural area has a different expectation of privacy at night than during the day. Therefore, a camera with infrared flash or extremely low light capabilities may capture more than the ambient light might provide, possibly exceeding what a person conducting live surveillance at that time would observe.

## **Private Property and Trespassing Considerations**

After conducting pre-deployment research and identifying the parameters of the investigation subject's property ownership interests, several considerations come into play when selecting the deployment location. As detailed in the "*Placement of Covert Cameras*" section, it is typically permissible for the investigator to deploy a camera in an easement or right-of-way area. However, it is important to consider what constitutes a criminal trespass in most states. In general, a person can be charged with trespassing if they possess criminal intent AND meet one of the following conditions:

1. They have received verbal or written notification that they are prohibited on the property.
2. There is clear signage, such as "no trespassing" notices.
3. There is a physical barrier, such as a chain link fence, which serves as a deterrent to prevent individuals from entering the property.

## **Fences (Privacy/Security/Decorative)**

The presence of fences at a target location can impact the decision of where to deploy a camera. However, the implications can vary depending on the type of fence in place. For instance, a chain-link fence is intended to restrict access but may offer visibility due to its design, while an 8-foot vinyl fence is usually erected for privacy reasons and prevent passersby from seeing into the property or an area of the property. A low decorative fence, on the other hand, generally raises the least amount of concern during a deployment, as they are usually put in place as decoration and not for privacy or security purposes. In many residential situations, a fence is put in place to contain the yard and prevent children, pets or livestock from getting out of the yard or an area or prevent deer from entering the yard.

## **Stalking and Harassment Laws**

In any surveillance investigation, investigators should clearly understand stalking and harassment laws, ensuring they remain on the right side of the legal boundary. Generally, harassment is classified as a misdemeanor, while stalking is a more serious criminal act constituting a felony. During the normal course of business, a professional investigator on the job conducting surveillance does not have any criminal intent (*mens rea*). It's important to consider the following factors, in addition to having criminal intent, to meet the elements of the offense:

Harassment: The investigator's actions must have purposely engaged in a course of "alarming conduct" meant to threaten or annoy an individual.

Stalking: The investigator would need to have engaged in a repeated course of "alarming conduct," seeking to cause harm or knowingly place a person in fear of harm or death.

In the absence of criminal intent, investigators should be on firm ground during the normal course of performing their job. Further, case law supports that an individual who has filed an insurance claim should expect an investigation of that claim. The deployment of unmanned surveillance, especially when its utilization was not revealed until a report was turned over, does not cross any of these lines. However, there are circumstances when the investigator should be aware that their actions could be considered a violation of these offenses. These situations include: 1.) If an investigation subject becomes aware of surveillance by finding an unmanned surveillance camera deployment and surveillance continues. 2.) A private client with bad intentions hires an investigator to monitor an individual's activities closely, but their motivation is to shield themselves by hiring the investigator. This may cross the line when the investigator reports to the client the subject's activities to the client in real time or provides the client with access to the camera feed. 3.) The investigator maintains mobile surveillance on a subject who is clearly taking evasive action after observing the investigator (whether unmanned surveillance is employed or not).

## **Managing Vendors Who Provide Unmanned Surveillance**

When engaging an unmanned surveillance provider, inquiring about how they perform the service and the investigative product they provide from the deployment will help manage expectations. Since there are widely varying methods of providing unmanned surveillance services, determining the investigator's methods, processes, footage retention, and product they produce is important to establish before initiating the investigation. Due to the time involved in reviewing footage, always establish the turnaround time on results and what investigative products or reports will be provided. Intel Surveillance service providers typically deliver a consistent and superior product because their primary focus lies in the investigative outcome rather than the technology and methods used during unmanned surveillance. The different consumers of unmanned surveillance services should consider:

Attorneys: Inquire who will testify to authenticate the footage and detail their investigative and analysis process and the pre-deployment research conducted. Also, ask who will conduct the pre-deployment research and deploy the unmanned surveillance cameras. If they are utilizing subcontractors, ensure that they are properly licensed as private investigators, retain all the raw footage and are prepared to turn the footage over in response to a subpoena request.

Insurance Carriers: Include specific language or a stand-alone agreement for providers of unmanned surveillance in your special investigations unit (SIU) vendor agreements. As a new service, with the rules of deployment still being established, a uniform agreement utilized by carriers will ensure that the investigation is conducted properly, the investigation results will be admissible, and there will not be any legal ramifications to the carrier. The authors of this Paper can assist with the template verbiage for an unmanned surveillance vendor agreement.

Professional Investigators: When hiring a subcontractor who provides unmanned surveillance, one of the most important issues, in addition to those above, is knowing how the footage will be provided or presented to you. With the review of footage being the most time-consuming component of unmanned surveillance, ensure you inquire how you will receive the footage and if the subcontractor will review the raw footage as a part of the service. If you are going to testify to the investigative findings obtained through unmanned surveillance, it is recommended that you personally review all the footage to ensure that your report of the findings is accurate.

## **Civil Torts**

Civil lawsuits resulting from unmanned surveillance deployments are rare, but as with any surveillance investigation, the possibility exists, especially when compelling evidence is obtained. For investigators with a civil claim against them, their insurance carrier assigns outside counsel to handle the claim. Most suits

involve a violation of privacy claim. If the investigator follows the guidance detailed in this Paper, they will have put themselves in the best position to defend such a suit. When subcontracting unmanned surveillance services, having the provider of the service sign an agreement and provide proof of insurance and licensing is a prudent idea.

## **States With Laws Restricting Unmanned Surveillance**

Research conducted for the writing of this Paper revealed that Indiana is the only state with a law that directly impacts the use of unmanned surveillance.

### Indiana 35-46-8.5-1

(b) A person who knowingly or intentionally places a camera or electronic surveillance equipment that records images or data of any kind while unattended on the private property of another person without the consent of the owner or tenant of the private property commits a Class A misdemeanor.

It appears this law is directed toward cameras but may also be just as focused on GPS devices being deployed on someone's "private property," with this definition extending to a motor vehicle.

## **When a Camera is Found or Discovered**

Another common question with unmanned surveillance is what happens when a static camera is found or discovered. An unmanned surveillance camera deployment which is discovered is often reported to the police. Usually, the police take custody of the camera and equipment and may conduct a routine investigation. A common action by the police is to contact the local Prosecutor's Office, who usually inquire if the camera was capturing audio in addition to video. If the camera is not recording audio and is not connected to another stalking or harassment investigation or complaint, there is usually no issue, and the investigation is closed. Contacting the police usually results in the camera's return to the investigator.

Many current high-end unmanned surveillance cameras with cellular connectivity also have a GPS antenna. If a camera with GPS is found, the investigator can determine where the camera is located. This can help to alleviate any issues if police initiate an investigation to determine who deployed the camera and the purpose. When the police know that the camera was deployed by a licensed investigator for a legitimate purpose, there is often no need for them to investigate further. Confirming the camera's location through GPS or an Apple AirTag can determine if the camera is in the possession of the police and facilitate its return to the investigator. However, the investigator should exercise due care when a camera with GPS or a tracking device is found. If the subject of the investigation has the camera and brings it into their house or puts the camera in their vehicle, the investigator could unwittingly be recording footage inside their residence or tracking the subject. Planning for instances when a camera is discovered under these circumstances is advisable.

After discovering a camera or providing the adversary with images from an unmanned camera, careful consideration is necessary before continuing to deploy another camera in the same location, as the hidden deployment location has been exposed.

## **Case Law Decisions and Unmanned Surveillance**

In reviewing the legal history of unmanned surveillance, most case law deals with governments' use of pole-cameras for criminal investigations and the public's right to protection from unlawful search and seizure through the Fourth Amendment to the Constitution of the United States. Although the Fourth Amendment ONLY applies to government and does not apply to private investigators, it is beneficial to understand the implications and how case law for specific cases could impact unmanned surveillance.



The Fourth Amendment (as it applies to government), states:

*“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

As of this date, no states have a standing law requiring law enforcement to obtain a search warrant when deploying a pole-camera for unmanned surveillance. However, the U.S. Supreme Court ruled in 2012 in *U.S. V. Jones* that law enforcement must obtain a Search Warrant deploying a GPS tracking device on a subject’s vehicle under investigation [*United States v. Jones*, 565 U.S. 400, 404 (2012)]. This decision supports the author of this Paper’s view that courts do not consider unmanned surveillance as intrusive as using a GPS-tracking device during an investigation.

### **Cases Where a Protective Order is in Place**

When the investigation is for a private client or family law attorney, the investigator should be made aware of any protective orders in place, such as restraining orders, as the unmanned surveillance deployment, especially if discovered, could trigger a contempt charge for the client. With protective orders in place, unmanned surveillance is commonly requested by attorneys for legitimate investigative purposes, such as cohabitation or child custody investigations. If a protective order is in place, the investigator should be extremely cautious about providing real-time information or footage to the private client. Communicating directly with the attorney rather than the client is advisable. If there is an agreement between parties, such as Civil Restraints, unmanned surveillance is less likely to be an issue of the same magnitude.

### **Technology: Unmanned Surveillance vs. GPS Tracking**

Conducting high-quality live manned surveillance combines preparation, skill, and art. Experienced investigators regularly utilize the most current technology to obtain results during their investigations. Several years ago, when GPS tracking technology advanced, it became an extremely useful tool for the professional investigator. However, its use was controversial from the onset, eventually leading to some states enacting laws restricting its use. Further, using GPS tracking devices by law enforcement generally requires a judge’s order. Placing a tracker on a subject’s personal vehicle and knowing their location at all times creates an environment that raises numerous issues.

Conversely, when conducted properly, unmanned surveillance is viewed by the courts differently than GPS tracking. Unlike GPS tracking, law enforcement is not automatically required to obtain a search warrant for unmanned surveillance. Further, with the proliferation of cameras in the public domain, including every person’s possession (cell phones) and on most motor vehicles, people now expect they are being filmed at all times.

In some highly publicized civil lawsuits which included unmanned surveillance, the cases involve numerous other methods of surveillance and the use of GPS tracking. GPS tracking itself, or where the vehicle was parked when the tracker was placed on the vehicle, is often the most significant issue in these cases. The unmanned surveillance component of the claim is not the primary issue in these cases.

### **Court Acceptance and Case Law (in New Jersey)**

CSIS has conducted more than 4,000 Intel Surveillance investigations for clients, including attorneys, government agencies, insurance carriers, corporations, and private clients. CSIS’ approach to investigating

post-judgment alimony relief cases and proving cohabitation through Intel Surveillance has become the established standard for the New Jersey State Bar Association. Several significant case law decisions, including Temple V. Temple (published N.J. Appellate decision) and Cardali V. Cardali (N.J. Supreme Court decision), were based upon evidence CSIS obtained through Intel Surveillance investigations.

**NOTE:** For our legal professionals, an additional appendix has been prepared containing legal theories, doctrines, laws, and annotated cases that both impact and support the use of unmanned surveillance in investigations. This appendix includes relevant case law on the acceptance of pole-cameras by law enforcement for conducting criminal investigations. Even with the higher level of scrutiny applied to the government by the courts, the overwhelming majority of cases support the conclusion that utilizing a pole-camera for surveillance during an investigation does not violate a subject's Fourth Amendment right to unlawful search and seizure.

## 7. ETHICAL CONSIDERATIONS

Ethical implications come into play alongside legal considerations in any surveillance investigation involving in-person surveillance or the use of unmanned surveillance technology. These ethical considerations are important to ensure that the surveillance investigation is conducted in a morally responsible manner. During unmanned surveillance investigations, ethical issues primarily occur after the cameras are deployed. These issues can occur when reviewing captured footage or while live monitoring a streaming feed. These distinct situations can give rise to varying considerations and responses. Ethical issues may also be encountered regarding the handling of captured footage and respecting the privacy of individuals captured or observed, including subjects under investigation and non-parties to the investigation. These issues extend to who has access to the stored footage and who is conducting the review.

Ethics in unmanned surveillance investigations encompass the following general categories:

1. **The legality of an unmanned surveillance deployment.** The investigator or firm is responsible for being aware of any laws, ordinances, or restrictions in the state/jurisdiction that may impact an unmanned surveillance investigation. The investigator is responsible for observing privacy and trespassing laws and being aware of what constitutes a violation of any stalking or harassment laws.
2. **Preserving evidence while respecting the privacy of non-involved parties.** Properly handling footage of any persons or situations not pertinent to the investigation and is of no probative value to the litigation.
3. **Protecting any persons observed to be in danger or at risk.** When reviewing captured footage, ancillary activity inadvertently might be observed indicating harm being done to a person. Identifying violations of the rights of others rising to the level of a criminal act might need to be reported to authorities.
4. **Aiding those in distress.** While live monitoring, a person may be observed who is clearly distressed. This may require an immediate decision to report to authorities, summon medical assistance, or request police response.
5. **Ethical responsibility by investigators.** Those involved in the investigation should be aware of their ethical responsibility of completing the job to the client's satisfaction with regards to billing honestly, providing the best possible product, and treating all persons with consideration to uphold the profession's standards.

### **Observing Incidents while Live-Monitoring Requiring Police Response**

While monitoring a live feed of a location, a situation may occur where a decision needs to be made to call 911. For example, a monitored live feed at a location may inadvertently capture an accident with injuries necessitating immediate police, fire, or EMT response. Or, emergency services have already arrived, but an investigation is taking place, and captured footage can assist in the investigation of the incident. However, a 911 call will prompt the operator to ask the identity of the caller and how they witnessed the incident. The agent will likely have to reveal that a covert camera is in place and turn the footage over to the authorities. The investigator's ability to respond and remove the camera can be hindered if the camera's location is too close to their home base and gets exposed. In such cases, the subject of the investigation may become aware of the unmanned surveillance operation. Also, if the captured footage becomes part of a criminal charge or civil complaint, the live monitoring agent may be called as a witness to authenticate the footage.

## **When Captured Footage may be of Interest to Authorities**

In the scenario described above, if the accident was not observed in real-time but was discovered during a subsequent review of recorded footage, it would not necessitate an immediate call to emergency services. Nevertheless, the footage could hold significance for a police investigation or an insurance claim resulting from the accident. Depending on the circumstances, a determination might be made to withhold the footage and maintain the secrecy of the covert camera deployment until the investigation concludes and the opposing party has received the report.

Another example is when illegal or suspicious activity is captured, which would be of police interest. A decision may need to be made to provide footage to police immediately or after the conclusion of the Intel Surveillance investigation.

Another possible scenario involves an incident captured that necessitates reporting to Child Protective Services for investigation. For instance, a static camera may capture evidence of a child being regularly left unattended at a residence or frequently wandering the road without adult supervision. In such cases, the decision to potentially compromise the confidentiality of the Intel Surveillance investigation should be weighed against the broader societal interest and the specific circumstances of the situation.

## **Responsibility When Reviewing Recorded Footage**

Data and intelligence analysts tasked with reviewing raw footage must receive clear guidance on how to handle visual evidence appropriately and understand the necessary actions to take when sensitive footage is encountered. For instance, capturing footage involving children, depending on the context, may require a more sensitive approach. Another example pertains to the recording of individuals, whether they are subjects of the investigation or not, who may be in various stages of undress. Establishing a policy for the proper handling of such footage is a critical consideration.

It's important to emphasize that if any footage contains individuals under 18 years of age in a state of undress, the storage or sharing of this footage can carry significant legal implications, both civil and potentially criminal. Consider whether sharing footage of this type could constitute child pornography.

## **Responsibility When Live Monitoring a Camera Feed**

Agents tasked with monitoring live camera feeds should be trained in the proper handling of footage. Depending upon the system being utilized, saving important footage is crucial, as lost footage deemed important to the investigation could make the monitoring agent a witness to the event(s). Further, there should be an open line of communication between the agent and the Intel Surveillance manager, as there are instances when immediate decisions should be made. If the agent must take immediate noteworthy action, that action should be documented or logged in the event it is brought up later. For example, if the raw footage is turned over in response to a subpoena, and the adversary notices something in the raw footage, unaware that the investigator had previously taken action, they could raise an issue that your attorney-client did not know had already been addressed.

Field investigators actively monitoring a live feed while on site carry a reduced level of responsibility, as they possess the capability to physically respond to any issues or emergencies that may arise. Conversely, when a remote analyst is observing a live feed while a surveillance investigator is physically present at the location, the remote analyst should be trained to recognize that they serve a dual role: to support the investigation and enhance situational awareness ensuring the investigator's safety.

## **Onboarding and Training**

Including ethical responsibilities training regarding handling unmanned surveillance footage in a new employee's onboarding is important, including education on legal and ethical implications, confidentiality obligations, and potential conflicts of interest that may arise when dealing with unmanned surveillance deployments.

## **Capturing Footage of Individuals Not a Part of the Investigation**

When establishing an unmanned surveillance program, handling footage of individuals who are not part of the investigation should be considered. This is particularly important when capturing footage involving children, as it raises sensitive concerns. Additionally, it becomes even more crucial to establish protocols for handling captured footage involving individuals in potentially embarrassing situations not connected to the investigation.

## **Footage Not Beneficial to the Investigation**

Frequently, during litigation, once the investigative evidence has been disclosed to the opposing party, they may request or subpoena all "raw" footage obtained during the investigation. In insurance defense cases, plaintiff attorneys often seek documentation demonstrating the extent of their client's injuries and may suspect that the investigator selectively presented footage that portrays the claimant unfavorably. Therefore, it is important to preserve raw footage whenever possible. While this may not be feasible in instances of live monitoring, when footage is captured and subsequently reviewed, the raw footage should be retained, including non-pertinent footage.

## **Sharing Footage with Clients**

While surveillance is ongoing, sharing footage with clients should be carefully considered, depending on who the client is. For instance, sharing footage in daily updates to a claims adjuster is a standard acceptable practice so the client can quickly assess surveillance results to manage the claim. Sharing footage with attorneys who engage the firm for litigation is also an accepted practice. However, advising the attorney that the camera is still in place is crucial. They should only share footage with the adversary after checking with the investigator first regarding the camera status.

There is a misconception that cameras are small and cannot be found, which is not the case with unmanned surveillance camera deployments due to the battery requirements. Therefore, sharing footage with an adversary will reveal the presence of a camera as well as telegraph its location.

Access to live feeds should be avoided, especially to private clients. When working with a private client with a protective order in place, it is best to deal directly with their attorney and not give regular updates or direct access to the camera's feed, as this could trigger a contempt charge for violation of the order. A good practice in many instances is to only share footage with clients after the investigation is concluded and the camera has been pulled.

## **Managing Sensitive Captured Footage**

When footage is captured that could be considered sensitive, it is very important to have a policy in place where the footage reviewer advises a supervisor on the nature of the footage and any issues it presents. For instance, footage of children or individuals in various stages of undress should be handled appropriately. A decision must then be made to delete the raw footage deemed sensitive or secure that footage in an encrypted or secure location. If the decision is to delete the footage, maintaining a log of what was deleted and why is beneficial. This policy will enhance the investigator's reputation by displaying

that they are conducting the unmanned surveillance investigation in a manner that respects individuals' right to privacy.

## **Higher Resolution and the Increase in Privacy Expectation Issues**

As with any digital technology, CMOS image sensors continually increase in megapixel size with the cost remaining the same. These larger sensors provide improved clarity and resolution, which becomes very effective for positively identifying subjects during an Intel Surveillance investigation or capturing fine motor skills performed by a personal injury or worker's compensation claimant. High-resolution captured footage creates an opportunity to zoom in with more clarity than ever before. However, this creates an entirely new ethical issue, which was not considered with film photography or the initial advent of digital imagery with small sensors. An image captured with a high-resolution sensor can zoom and retain a high level of detail while the footage is being reviewed. However, this creates a possibility that the image captured could be zoomed inside areas where a person may have a greater expectation of privacy, such as through a residence's windows. If this is a concern, the camera should be programmed not to record these areas of the image frame whenever possible. Technology may also be utilized to not record the neighbors of the investigation target, not party to the investigation, by blocking off that area of the image frame.

The advancement of technology should be used to obtain better visual evidence and increase controls to protect the privacy of individuals captured during the investigation, especially those not under investigation.

## **The Age of Artificial Intelligence**

With artificial intelligence, the future is now. For several years, the processors running cameras have been able to identify and differentiate people, vehicles, and animals. However, application-level software is advancing at a rapid rate. For example, until recently very few consumer cameras had LPR (license plate recognition) capabilities. However, that technology is now becoming readily available for many cameras. This software can recognize the characters and digits in license plates and identify the vehicles' make and model.

Facial recognition software saw a rapid rise and fall in its use, as privacy issues quickly arose with concerns that big companies were collecting personal data on individuals. With unmanned surveillance, facial recognition is not likely to become a part of its application, primarily due to the camera's inability to capture faces from a distance and at varying non-eye-level deployment heights. However, advancements in AI are occurring at an unimaginable pace at the time of the writing of this Paper. Also, any concerns or false allegations regarding the creation or manipulation of images with AI are easily addressed by the person responsible for authenticating unmanned surveillance evidence.

## **Concerns over Distribution or Sale of Collected Data**

With the defined restrictions of unmanned surveillance limited to a short-term camera deployment for a specific investigation, coupled with the proper retention and handling of captured footage, any concerns about captured data being aggregated and analyzed with other data should not be an issue.

## **Ethics and Unmanned Surveillance – Case Scenarios**

Below are several case scenarios where the unmanned surveillance provider might have to make an ethical decision based upon situations arising during live monitoring of a remote camera or review of captured footage. Several of the examples below are actual cases and situations encountered by CSIS during Intel Surveillance investigations.

- A hit-and-run motor vehicle accident is observed while remotely live monitoring a static camera. The agent identifies the vehicle leaving the scene. The agent calls the police to report the accident and the information on the suspect's vehicle. In responding to inquiries by the 911 operator, the agent must reveal a hidden static camera captured the event. The police become involved and request the footage and information on the camera deployment.
- During a cohabitation investigation (proving a couple is living together as husband and wife in violation of a Marital Settlement Agreement), the static camera captures beneficial case evidence when the female subject spends Christmas at her boyfriend's house with his family. However, her boyfriend's father has a medical incident during the party and is rushed to the hospital, where he passes. The static camera captured the holiday gathering and the emergency services response. Although the camera captured useful evidence of the couple spending the holiday together, the entire day's footage was excluded from the report out of respect for the family's privacy.
- While reviewing captured footage, the static camera captured an unidentified male walking up to the target residence while the residents were at work. The individual approached the home immediately after the mailman dropped off a package and departed. The unidentified male walked to the residence's rear, retrieved the package, and left on foot. Conversations with police revealed that drug dealers had packages with crystal meth delivered to houses in the area when people were at work then retrieved by the drug dealer. Since revealing the footage to police would prompt an investigation and reveal the existence of the unmanned surveillance camera deployment, a decision was made not to release the footage since there was no immediate emergency immediately. The choice to wait until the case was settled before providing the footage to the police was proper.

## 8. OCCUPATIONS CREATED WITH INTEL SURVEILLANCE

With the new business category Intel Surveillance, the private investigations industry is seeing the emergence of several new occupations and employment opportunities. The specialized skill sets necessary to maximize the benefits of a successful Intel Surveillance program involve intelligence analysis, data analytics, computer and technical, and project management. New positions, detailed below, will be driven by the increased use of unmanned surveillance and the management of the data it produces. The refinement of these positions will fuel the continued growth of Intel Surveillance as a new business category.

When beginning an Intel Surveillance program, field investigators, desktop analysts, or case managers can complete many tasks required to provide the service. However, the professional investigations firm providing the service will see a significantly increased profit margin when they build the program with dedicated staffing in new occupations, including:

### **Intel Surveillance Camera System Engineer/Designer**

Developing an Intel Surveillance program starts with identifying the cameras and technology to be utilized, how they are going to be concealed, and establishing the deployment process. In smaller investigation firms, this may be performed by the owner or a senior manager who invests the time and research into finding a suitable solution. However, identifying a field investigator with the desire and ability to research products and experiment with different camera systems is a common and often optimal solution. The ultimate objective is to design the system to be scalable by creating multiple easily deployed systems, with the deployments as “foolproof” as possible. Investing the time, money, and resources to establish the equipment, design the method of concealment, and have an inventory of systems on hand ensures that the firm can consistently provide the service to the customer. In the investigations industry, clients often look for a rapid response to their surveillance requests. Without an adequate inventory of unmanned surveillance camera systems, the investigations firm will not be able to fulfill the client’s requests and revert instead to offering traditional in-person live surveillance. When a surveillance request is received, rapidly deploying unmanned surveillance, and providing quality results will quickly create satisfied and repeat customers. After establishing an Intel Surveillance program, documenting the process with videos or training manuals will help ensure the continued success and growth of the program.

### **The Intel Surveillance Field Tech Agent**

Once the camera and enclosure systems are established, identifying the agent assigned to deploy and attend to the cameras in the field is an essential component of an Intel Surveillance program. If the system is designed to be easily deployed, multiple field investigators may be trained to deploy, swap, or remove cameras. This staffing method can be very efficient, as a field investigator can access a camera deployment early in the morning before sunrise before working on a case or file in the deployment area. However, when conducting numerous simultaneous Intel Surveillances, employing this method requires the camera deployment and swapping schedule to be closely monitored by the Intel Surveillance Manager.

When the professional investigative firm has enough camera systems to provide the service on a larger scale, having a dedicated field tech agent is ideal and most efficient and profitable for the provider. This agent should be a licensed investigator, comfortable with camera deployments, and adept at observing their surroundings when deploying cameras. They must be able to handle interactions or confrontations with neighbors or police that they encounter around deployments and be comfortable with spending a great deal of time driving. If the agent has a dog, it can be excellent cover when walking through



neighborhoods at night to attend to cameras. The field tech agent does not need the skills to research and design new systems. However, their value to the unmanned surveillance program is magnified if they do.

## **The Intel Surveillance Analyst**

The Intel Surveillance Analyst plays one of the most important roles when establishing an Intel Surveillance program. Just as having dedicated researchers, social media and desktop investigators have become a necessity in the modern age of investigations. The Intel Surveillance Analyst position will become increasingly important as unmanned surveillance becomes prevalent. Recruiting for this position can be relatively easy, as it is well-suited for recent college graduates with criminal justice degrees or candidates interested in breaking into the investigations field.

This position can also be filled with field investigators with good desktop investigation and analytical skills. A benefit of having a field investigator in a hybrid analyst/investigator role is that after analyzing a case, they will be familiar with the investigation subject's behavior patterns before they conduct in-person surveillance enabling them to provide more comprehensive surveillance products for clients.

A well-established Intel Surveillance program, with trained intelligence analysts, is extremely profitable and will provide consistent high-level results for clients. These analysts pay close attention to details of the activity at monitored locations. When there are multiple cameras deployed on the same case, the analyst can quickly identify vehicles and individuals traveling from one location to another, essentially making an unmanned surveillance investigation a complex mobile surveillance and can often eliminate the need for any live in-person surveillance.

When utilizing unmanned surveillance as an intelligence-gathering tool, the Intel Surveillance analyst can produce a "subject dossier" for case managers and field investigators. This dossier can include open-source photos of the subject, social media profiles, and images from the unmanned surveillance camera deployment, establishing a "pattern of life" for the investigation subject. Providing clients with a report combining a week of unmanned surveillance data with online activity can be an extremely powerful and valuable intelligence resource.

Intel Surveillance analysts should be trained in the proper handling of footage, chain of custody of evidence, confidentiality, and ethical responsibilities when reviewing captured footage and observing anything concerning.

## **Data Analyst/Remote Camera Monitor**

Unmanned surveillance deployments can produce a large amount of non-pertinent footage, which requires review. Software programs are available to facilitate the review, but having a human review of the footage for activity pertinent to the investigation is an essential component of Intel Surveillance. Having raw footage reviewed by managers, intelligence analysts, or investigators is not always cost-effective and can waste investigative or managerial resources. Hiring data analysts to review and identify footage pertinent to the investigation is a tremendously cost-effective solution. CSIS utilizes a team of outsourced data review agents. Using these agents provided a significant cost savings for the raw data review, freeing up the in-house intelligence analysts to focus their time and analytical skills on more files and having more time for deeper analysis on each file.

For information and case security, it is easy to limit subject and client information provided to the raw data reviewers as they do not need to know the details of the investigation to review raw footage.

As technology and cellular/LTE data connectivity improve, more unmanned surveillance deployments will be live monitored. For true live monitoring, the drain on the battery system can be significant, and data charges can add up quickly. However, the ability to observe activity in real-time, develop field intelligence without an investigator on site, or eliminate the need for a second field investigator on a surveillance outing is significant. It can forever alter how surveillance investigations are conducted. Partial live monitoring through unmanned surveillance can also be performed by conducting regular “virtual spot-checks,” which saves battery expenditure and cellular/LTE data costs. It is also important to note and understand that live monitoring requires a person to watch the video feed, essentially making the surveillance outing a two-person surveillance, with an investigator in the field and an agent offsite.

### **Benefits of live monitoring:**

1. Seeing if a subject is at their residence or another location before a field investigator responds to conduct live surveillance or returns to a residence after losing sight of the subject during mobile surveillance.
2. Eliminating the need for a second field investigator when conducting live surveillance in challenging surveillance locations.
3. Determining if a subject is on vacation or away for an extended period, eliminating wasted surveillance days.
4. Maximizing efficiency and investigative resources by having a remote camera analyst monitor or conduct virtual spot checks for several cases contemporaneously.
5. Saving storage space by only recording footage when case-specific activity is observed.

### Live monitoring options:

- In-house analysts, working in overlapping shifts during times of increased subject activity.
- Live monitoring performed by Central Station Monitors or Real Time Intelligence Centers.

### The Remote Camera Monitor must be trained to:

- Properly document activity.
- Be aware of their ethical and legal responsibility while live monitoring.
- Contact a supervisor if they observe activity requiring immediate action or police response.
- Be trustworthy when handling confidential or sensitive information.
- Immediately report any conflicts of interest.
- The proper handling and chain of custody of evidence.
- Document the time and date when a pertinent activity takes place to prompt further analysis or desktop investigation at a later date.

## **The Intel Surveillance Manager**

With the different components involved when simultaneously handling numerous unmanned surveillance deployments, it becomes essential to manage all the moving parts effectively. Having one manager oversee all the Intel Surveillance investigations is ideal. Although the position may begin as a hybrid position, when starting an unmanned surveillance program, identifying the role and job requirements for the Intel Surveillance manager position can help ensure the investigations run efficiently. The Intel Surveillance manager is an office-based position requiring project management, organizational, and computer skills. The job responsibilities for the Intel Surveillance manager include:

- Receive requests for unmanned surveillance from clients and managers and determine the feasibility and possible camera deployment locations to accomplish case objectives. Determine the likelihood that a camera deployment will achieve the desired results.

- Perform comprehensive pre-deployment research on locations, including identifying property boundaries and assessing the feasibility of deployment locations.
- Oversee pre-deployment site surveys, documenting the research conducted to support future testimony.
- Maintain and monitor the chain of custody of captured footage which may be utilized as evidence.
- Manage captured footage, including evaluating and storing of the RAW footage, responding to subpoena requests to turn over footage, and testify at depositions and hearings to authenticate evidentiary footage and validate processes.
- Monitor cameras from each deployment to determine if the deployment location captures footage beneficial to the investigation and there are no issues with the camera equipment.
- Coordinate the workflow from data reviewers to intelligence analysts.

As the Intel Surveillance business category matures, highly skilled Intel Surveillance managers who can efficiently manage multiple camera deployments and investigations will be sought after.

### **Providing Intel Surveillance Services as a Subcontractor**

For a company that can provide Intel Surveillance or unmanned surveillance services on a larger scale, offering the service to other investigators as a subcontractor can significantly increase efficiency and profitability. Since the resources and skills necessary to establish an unmanned surveillance program may be out of reach for many small investigative firms, a professional investigator who specializes in providing the service can easily develop a substantial client base of other investigators. Specializing in providing this service can benefit both the subcontractor and the investigative firms utilizing the service.

Conversely, a firm whose staff primarily conducts desktop investigators and subcontracts fieldwork and surveillance may choose to provide only the Intel Surveillance services of reviewing, summarizing, and preparing reports of captured and analyzed unmanned surveillance footage. When an experienced field tech agent forms an alliance with a firm with a deep office-based investigative and analyst infrastructure, they can offer the same services as a larger Intel Surveillance firm. Both agencies can benefit significantly from such a collaborative relationship.

## 9. MANAGEMENT OF DIGITAL EVIDENCE

### Reviewing of Raw Footage

When unmanned surveillance cameras are not being live monitored, the cameras generally capture a certain amount of footage not pertinent to the investigation. Having an excess of footage can help ensure that evidence or activity is captured and filtered rather than missed altogether. However, this excess footage requires reviewing to separate activity pertinent to the investigation from non-essential footage. When reviewing raw footage and identifying footage beneficial to the investigation, non-pertinent raw footage should still be retained. Subpoenas issued during litigation will often request all footage, so deleting footage after review could create the appearance that footage not beneficial to the investigation was deliberately deleted when it was actually deleted due to data storage issues.

Moreover, situations may arise where re-examining the raw footage becomes necessary. This need may stem from instances where certain details were overlooked by the data analysts or missed by the software during the initial data analysis.

Additional analysis of the raw footage may be prompted due to new information that comes to light later, necessitating a re-evaluation of the captured footage.

### Investigators Providing the Service as a Subcontractor

Professional investigators often provide the service of unmanned surveillance to other investigators. However, the service and product delivered by these providers can vary widely. Most investigators who provide the service generally have a limited number of unmanned surveillance service offerings based on the technology they use and what they are comfortable working with. It is essential to ask the provider how they conduct unmanned surveillance, how they provide or summarize the footage, and how much review of the raw footage they conduct. The price can vary depending on the amount of data review and analysis the provider performs. Some subcontractors will review and summarize the footage pertinent to the investigation. Other subcontractors may provide just the raw footage, which requires reviewing. How the raw footage is provided can also vary, as some provide a link, and others provide a flash or hard drive with the footage. As an investigator, receiving and securing the raw footage for further review or subpoena response is always the best practice.

### Providing Footage to Private Clients

When conducting unmanned surveillance investigations for private clients, having an established policy regarding providing footage or updates to the client is an important consideration. Providing regular or real-time updates to clients can expose the investigator to liability if the client takes any action based on the information received. Furthermore, there might be situations where the footage from the unmanned surveillance deployment is shared with a client who fails to secure it properly during the ongoing investigation, inadvertently allowing others to view it. This can ultimately lead to the investigation being revealed and the identification of the camera's location, creating unintended consequences.

### Evidence Presentation (Videos and Written Reports)

How footage identified as relevant and advantageous is presented varies significantly among investigative firms and serves as a critical distinguishing factor. The effective presentation of visual evidence can wield substantial influence, facilitating more favorable settlements in litigation or during a trial. It's worth noting that the creation of a concise video compilation featuring the most impactful clips demands both time and investment in infrastructure, which must be factored into the overall cost of the service.

In certain types of litigation, written reports are often the preferred choice. Well-prepared written reports incorporating images can prove highly impactful. Furthermore, with the increasing resolution capabilities of cameras, the practice of zooming and cropping footage before incorporating it into a report enhances the overall presentation of results obtained through unmanned surveillance.

### **Storage and Retention of Raw Footage**

When footage is stored on a camera and later reviewed for relevant evidence or activity, the raw footage should be retained. When managing multiple camera deployments, the volume of data needed to be stored can quickly mount and may be as much a terabyte (1,000 GB) or more per case. Retaining this amount of data in cloud storage can be expensive and take a long time to sync. A system of storing and backing up footage on external drives can be a cost-effective method of retaining raw footage. However, it is not always ideal for long-term storage of data due to the possibility of an error occurring on the drive or the drive failing, making data recovery very difficult or impossible. Although there are usually very few instances when the raw footage (as opposed to the select or case pertinent footage) is needed. Although there is no mandatory period that raw footage should be retained, there is a cost to retain raw footage in the cloud. Many firms will have in their statement of work that they will retain the raw footage for a predetermined period and then sell 'retention as a service' for the time after the initial agreement. Having a policy or practice of retaining all raw footage ensures the unmanned surveillance program maintains high credibility and integrity.

### **Securing Footage and Safe Storage**

With captured footage from unmanned surveillance investigations, maintaining the security and integrity of the data should be a priority. Implementing appropriate access controls to prevent unauthorized access to the data can be important. Saving footage can be divided into three categories: 1.) Saving footage provided as evidence for the investigation through written reports or in a summary video. 2.) Securing all "select" footage relevant or potentially relevant to the investigation. 3.) Retaining all raw footage, including non-pertinent.

Retaining and safely securing footage in the first two categories is most important, as they represent the evidence or footage utilized during the investigation or preparation of a report. Usually, the storage space required for the select and pertinent footage is relatively small as compared to the total raw footage. Backup storage of this footage can help ensure that the important visual evidence is not lost. Having backups of the footage and limiting who can access it can ensure that footage is not inadvertently accessed or deleted. Footage covered in the third category is not as critical to maintain, as only a small percentage of that footage may be beneficial to the investigation. Because of the low cost of external drives with large storage capacity, it is often easier to retain all raw footage than to decide what should be retained and what can be deleted.

The type of investigation conducted may also determine the importance of saving or not saving raw footage. For example, if cameras are deployed at several locations to determine which location a subject arrives at, a large amount of non-pertinent footage may be created from locations where there was no activity, making it unnecessary to retain. However, in the investigation of a subject of a possible fraudulent insurance claim, receiving a legal request or subpoena for all raw footage should be expected, as the plaintiff's attorney wants to see if footage exists of their client displaying limitations or utilizing devices to assist themselves. In insurance defense investigations, retaining all footage is a good practice. Treating all raw footage as "evidence" is the best practice when the investigation may result in criminal charges.

## Establishing a Digital Asset Management System (DAMS)

For firms handling a larger number of camera deployments, establishing an internal DAMS policy can be important. This policy might include:

1. **Physical security of data:** A simple lock on a door with restricted access can go a long way.
2. **Established DAMS system:** To keep track of case assets and permissions, establishing a DAMS system helps with the integrity of an unmanned surveillance program. It can be as simple as a spreadsheet for smaller firms or a commercial software package for firms specializing in unmanned surveillance services.
3. **File hashing:** For important visual evidence, a consideration should be made to have the data hashed. Hashing data helps demonstrate file integrity from when it was created to when it is presented in court. For crucial footage, it can substantially help authenticate footage at a later time. Most DAMS software will automatically hash on ingest when a file is moved or copied, and periodically check the file to ensure nothing has changed or been altered.
4. **Encrypting folders:** The encryption of folders that contain important or sensitive footage can also be a part of the DAMS protocols. For instance, it may be important to restrict footage or case data of a well-known investigative target. Or an investigation involving the protection of a client's intellectual property may necessitate the protection of the client's IP.

## Encryption of Footage

Encryption of captured footage should be viewed in two categories: 1.) Encrypting footage at the camera to restrict access in case the camera is compromised. 2.) Encrypting footage at the server level to avoid unauthorized access or inadvertent deletion. Encryption at the camera level can be accomplished with code embedded on the camera system hardware (on the edge) or code downloaded directly onto the SD card or removable media.

Encrypting the data on the camera will help ensure that should the camera be found, the footage saved on the camera cannot be accessed and reveal the investigative target. It also helps protect the privacy of both the investigation subject and non-subjects of the investigation who have been captured. Once the captured footage has been downloaded into the investigator's system, a consideration should be made whether encrypting the footage should be included as a step in the data retention process. Encrypting only the select or evidentiary footage, rather than the raw footage may be an acceptable practice, if the raw footage is properly secured. The benefits of encryption at the server level are preventing unauthorized access by staff in a larger investigative firm, maintaining the integrity of the visual evidence, or helping prevent the widespread release of case footage by hackers or people wishing to harm to the professional investigator or their client. Storing the footage under file names that do not identify a subject or client can help ensure that any access to the raw footage is not easily linked to the client or an investigation subject. For instance, at CSIS, our outsource team reviews raw footage and separates footage of relevant activity from non-pertinent. The data reviewers are provided with case information identified by a code name and only have access to raw footage for a case, not sensitive case information or personal information on case subjects. Most external drives have encryption built in for long-term storage on portable drives, making securing the footage easier.

## System and Organization Controls (SOC1 and SOC2 Compliance)

SOC2 is a voluntary compliance standard and security framework for service organizations, which specifies how organizations should protect customer data from unauthorized access, security incidents, and other vulnerabilities. The standard is based on the following Trust Services Criteria: security, availability, processing integrity, confidentiality, and privacy. Service companies handling sensitive customer data are

sometimes required to be SOC2 compliant. To become SOC2 compliant, an audit is conducted by a certified CPA. Obtaining SOC2 certification takes time and is an additional expense. However, many of the requirements of SOC2 compliance can be implemented by the investigations firm to ensure customer data is secure, which adds integrity to the unmanned surveillance program.

## Cloud Storage Vs. Local Storage

Storing footage in the cloud for review or backup should be viewed in two separate categories:

- 1.) Raw footage from an unmanned surveillance deployment, potentially voluminous.
- 2.) Select or evidentiary footage separated from the raw footage, which is generally a more manageable amount of data.

Storing raw footage on the cloud can be a very complicated and expensive option. The large amount of data and the number of files require a great deal of time to synchronize with the cloud, even with a fast internet connection. There is also a risk of losing data if there are issues or interruptions with the footage uploading. Further, the cost of storing large volumes of footage on the cloud can add up over time. Accessing and eliminating old raw case footage from the cloud can take time, especially if a process had not been established early on to label, organize, and prioritize the raw footage storage. Further, by storing raw footage on encrypted external drives, hacking, and data privacy issues are eliminated. Backing up the external drives and storing them at another site ensures that the raw footage is secure and cannot be lost or damaged due to fire, flood, or theft. Establishing an intranet storage system (such as Network Area Storage) that is not connected to the Internet can eliminate outside individuals accessing the data.

Storing or backing up the select or evidentiary footage in the cloud is a sound decision, as the amount of data is generally manageable and maintaining that footage is important for case integrity.

## Authentication of Evidence for Court

One of the more common questions that arise with the utilization of unmanned surveillance concerns the person who will authenticate the visual evidence at hearings and trials. Attorneys regularly call investigators as witnesses to authenticate video they obtained that is beneficial to their case, enabling the footage to be entered into evidence. Since the definition of unmanned surveillance is “unmanned”, the question arises of who will testify to its authenticity. The authentication of footage captured by “unmanned” surveillance is addressed by the “**silent witness theory**” of video authentication. In the silent witness theory, video footage is made admissible by proving the reliability of the process that produced the footage.

In terms of unmanned surveillance, the person who set up the camera system and viewed the footage should be prepared to testify that the system was functioning properly, the visual evidence captured an accurate representation of what the camera was capturing, and the timestamps are correct (or time offset noted). This testimony should also include many of the other topics covered in this guide, such as camera position, camera settings, and mode of recording.

Part of the reason CSIS’ visual evidence obtained through unmanned surveillance is regularly accepted by the courts is the choice to have the cameras capture footage utilizing time-lapse image recording. By capturing footage in this manner, it is much easier to prove that an incident occurred at a certain time and day, since the volume of footage helps verify the accuracy, including the sunrise and sunset on a particular day, and other weather events such as snow or rain.

Unmanned surveillance camera tech agents who are deploying a camera and acquiring stored footage from the camera should take and retain notes or author a log detailing their actions. Documentation may also include photographs of the unmanned camera being utilized and photographs of displayed timestamps on the camera that can be compared with the time of the photograph. The Federal Rules of Evidence [F.R.E. 902(F)] notes that video files may be self-authenticating when they are “authenticated by a process of digital identification” (hash value) and are accompanied by a certification of a qualified person. Meaning that effective notetaking, and report writing may not only help with testimony if needed but can be used to authenticate video evidence with the adversary stipulating to the footage being entered as evidence, not requiring the investigator’s testimony at all.

When providing the service of unmanned surveillance, be prepared for when attorneys who are presenting a case with unmanned surveillance evidence are going to ask the investigations firm who is going to testify to authenticate the evidence. When testifying to have footage entered into evidence, detailing the process conducted and the management and analysis of the data which produced the result is an important process. Basically, if there is a large volume of raw data retained, it is much easier to authenticate a single photo or video than it would be without the raw footage to support it.

### **The Benefit of Cameras with an Embedded Real-Time Clock (RTC)**

Ideally, the unmanned surveillance camera technology includes the utilization of a real-time clock (RTC). RTC is circuitry built into the camera, which automatically sets the time and date on the camera through the camera’s cellular/LTE and GPS coordinates. When the unmanned surveillance camera system utilizes an RTC to time and date stamp the captured footage and embed it into the hash and EXIF metadata, any human or camera malfunction error is removed from the process, and the evidence is more easily authenticated. As the implementation of an RTC in an unmanned surveillance deployment is a significant benefit to the video authentication process, its use should be noted in investigation reports and certifications to the court. (NOTE: The Exchangeable Image File format {EXIF} metadata standard is a method of encoding digital images with metadata tags. This standard was established in 2006 by the Metadata Working Group, formed by Adobe Systems, Apple, Canon, Microsoft, and Nokia.)

### **Preparing Footage in Response to Subpoena Requests**

In litigation, it is a common practice after the opposing party receives a report of the investigator’s findings to send a subpoena to the investigator, requesting the entire contents of their file, including raw footage. The large volume of footage produced during an unmanned surveillance investigation can often require downloading all footage to a portable hard drive to properly respond to the subpoena. Although the volume of data may seem daunting, having a well-established data management process, including logging where raw data is stored, will make the process much easier. Organizing the folders on the drive is also beneficial, as at the time of testimony, the investigator can detail the scope of the data management process. It is also a good practice that when preparing portable drives for a case to purchase or have on hand four drives when preparing the data in response to a subpoena. Prepare one copy for the adversary, one for your client’s attorney, one for the file/court presentation, and the fourth as a backup in case there are issues with one of the other drives.

### **Costs Associated with the Review and Storage of Footage**

There is a common misconception that unmanned surveillance costs less than live manned surveillance because the camera captures evidentiary footage and does not require an investigator to be on site. While this is essentially true, it is important to fully understand what is involved in the management and review



of captured footage to identify activity or visual evidence pertinent to the investigation. A well-thought-out and established unmanned surveillance program utilizes data reviewers and intelligence analysts to review footage, summarize activity and prepare reports. These positions are extremely trainable and scalable, and the costs to staff them are significantly less than having field investigators or case managers perform the data review. The cost savings of unmanned surveillance come not from the mere use of the technology but from the implementation of trained analysts who can quickly and efficiently review raw footage and identify footage pertinent and beneficial to the investigation.

It is also important to be aware that there are instances when there is a significant amount of time invested by analysts to review footage. The value in having an excess amount of captured footage is that analysts can respond to questions about activity and clarify specifics with more context. For instance, in an insurance defense case, when a claimant's activity is captured, further review of the footage may be requested about the specific activity or utilization of a brace or aids in walking.

For all the items detailed in this section, below are some of the incurred service provider costs to consider:

1. If a camera is being live monitored, an agent or analyst needs to be working to monitor the camera feed. If the company is managing multiple cases with unmanned surveillance deployments, the expense of the monitoring employee may be spread over several cases but still requires an agent to be working. Another option is to have the monitoring conducted overseas. However, issues of internet speed, connectivity and security need to be evaluated, tested, and addressed.
2. If live monitoring involves utilizing a PTZ (Pan Tilt Zoom) function, this requires focused attention by a live agent.
3. Reviewing volumes of raw footage requires time, attention, and focus by the assigned agent. If this raw data review is performed by an investigator or case manager, the cost for the professional investigator to provide the service will impact what the consumer will pay for the service.
4. Reviewing and storing large volumes of footage and data is an expense for the professional investigator. For CSIS' unmanned surveillance operation, over \$80,000 has been invested in computer firewalls, servers, network area storage and safeguards.
5. Software to facilitate the review of raw footage or compile summary videos can require costly up-front fees or annual subscriptions. No specific software exists to meet the industry's needs, so some firms have made an investment to develop their own software.
6. There are occasions where clients (usually private clients), have numerous follow-up requests regarding captured footage, which requires an analyst and manager to re-review captured footage. Sometimes this follows with a request to have additional items put into a final report. Clients need to be made aware of the additional time and cost involved in extensive re-review of footage. At CSIS, we call it the "Zapruder expense". The cost of quality review and presentation should be factored into the cost of providing the service.

### **Destruction of Footage Pursuant to a Court Order or Settlement Agreement**

There are occasions when the parties to a litigation reach a settlement agreement and part of the agreement is to destroy all investigative surveillance footage, including unmanned surveillance footage. Ensure that all case-related and raw footage is organized in a way that you can comply with these agreements or any judicial court orders.

## 10. SOLUTION FOR INCREASED UTILIZATION OF INTEL SURVEILLANCE AND ACCEPTANCE OF UNMANNED SURVEILLANCE

This Paper is intended to assist both the consumer and the provider of unmanned surveillance services and provide a greater understanding of unmanned surveillance as a service offering. When conducted properly, with thoughtful consideration of camera deployment locations and proper management of captured footage and visual evidence, unmanned surveillance can bring consistent effective results for the consumer and a profitable high-quality service for the professional investigator. By utilizing this Paper as a guide, both the consumers and providers of unmanned surveillance will have a greater understanding of how an unmanned surveillance investigation should be conducted and, when done properly, how it will provide intelligence and legally accepted evidence.

### **Widespread Acceptance of Unmanned Surveillance**

At CSIS, we have found that establishing a well-thought-out unmanned surveillance program was the foundation for creating a successful and sustainable Intel Surveillance division. By consulting with the legal community, including attorneys and judges, we were able to anticipate potential issues and overcome apprehensions about utilizing unmanned surveillance. As a burgeoning but new technology, consumers recognize the value of unmanned surveillance but sometimes take a “wait and see” approach before utilizing it. It is not dissimilar to when a new law is enacted, and attorneys cautiously approach filing motions impacted by the law, awaiting case law to be established and guide their actions in the courts.

At CSIS, we have also experienced more widespread acceptance due to the many cases and investigations we have conducted, which are regularly accepted by the courts. For example, our Intel Surveillance investigations have produced evidence which was used as the basis to establish case law in the New Jersey courts, including Appellate and State Supreme Court decisions. Establishing a widely accepted unmanned surveillance program relies on attorneys actively using the service, securing their support, and gaining acceptance by the court.

### **Unmanned Surveillance as a Specialized Service**

As either a consumer or provider of the service, recognizing unmanned surveillance as a specialization will help solidify the service as an effective investigative option or tool. For professional investigators looking to provide the service, adding unmanned surveillance to manned surveillance cases before offering the service exclusively is an ideal way to establish an Intel Surveillance program. Covertly deploying cameras can be a complex skill which sometimes becomes apparent only when attempted. Establishing an industry understanding that unmanned surveillance is a specialization, rather than just “putting a camera on a tree,” will further enhance its acceptance.

The utilization of unmanned surveillance for private investigations will see a rapid increase once these three factors align: 1.) The use of unmanned surveillance becomes more accepted. 2.) Camera systems enter the marketplace designed specifically to meet the needs of unmanned surveillance. 3.) Companies emerge who possess the skills, technology, infrastructure, and knowledge to effectively and properly provide the service on a large scale.

### **Investment of Thoughtful Consideration**

For the professional investigator interested in establishing an unmanned surveillance program, conducting research and thoughtful consideration of all the issues that could arise while conducting an unmanned surveillance operation is an ideal start. Applying these considerations and utilizing unmanned surveillance

as a complement to a complex investigation will quickly reveal the benefits of utilizing unmanned surveillance on almost every type of investigation, even if only for intelligence gathering purposes.

### **Establishing Internal Policies and Vendor Agreements**

After establishing an Intel Surveillance program, having documented internal policies and procedures, the service provider will: 1.) Ensure that staff anticipate and avoid potential issues. 2.) Be better informed to answer questions posed by attorneys, including internal processes, methodology, relevant laws and case law. 3.) Be able to efficiently provide a final product that is beneficial for the consumer. For the consumer of surveillance services, such as an insurance carrier or large investigations firm, having a vendor agreement specifically dealing with unmanned surveillance will help prevent known issues and establish consistency for those who are providing the service of unmanned surveillance.

### **Training and Oversight of Investigators and Analysts**

Having written policies and established training for investigators and intelligence analysts involved in an unmanned surveillance program will help ensure that the legal and ethical issues are brought to their attention and that they understand the impact that their actions can have. Remaining abreast of current developments in the industry regarding laws and events in the media that impact professional investigators is important with this new technology and service offering.

### **Establishing Protocols for Visual Evidence (Retention and Presentation)**

There are no set protocols for managing captured footage or how a final product should be presented. This occurs, in part, because the type of unmanned surveillance footage captured by the service provider can vary significantly. The choice of camera is impacted by the level of covertness needed for the deployment and what camera technology the investigator utilizes, which impacts what the investigator can provide. Further, creating a quality finished product takes time, personnel resources, and video editing skills or software. Investigators providing the service on a small scale generally lack the infrastructure and personnel to analyze and package the footage into a consistent and professional final product.

## 11. USE CASE EXAMPLES

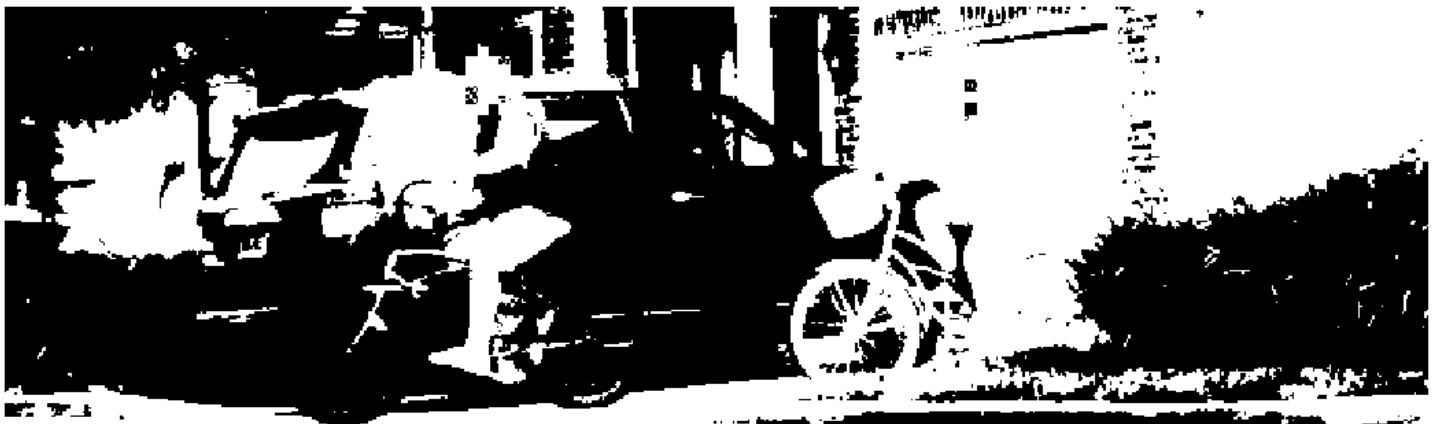
With Intel Surveillance investigations, being strategic and creative with camera deployment locations and carefully analyzing captured footage consistently obtains results that would have been unattainable and extremely cost-prohibitive utilizing traditional live surveillance. This section includes use case examples where CSIS utilized Intel Surveillance to successfully conduct an investigation to accomplish the investigative objective. This section will assist the reader with thinking about investigations they were involved in where Intel Surveillance would have been a beneficial or an ideal option. In most cases, Intel Surveillance would have provided results unachievable through other investigative methods.

### Family Law Investigations

Intel Surveillance investigations conducted in family law matters can be extremely beneficial, especially for cases involving cohabitation or child custody. In family law investigations, the client usually has more information about the subject and their activities than in many other types of investigations. Consequently, the coordination between the case manager and Intel Surveillance analyst becomes essential to accomplishing the case objectives. Often, when family law attorneys seek evidence to refute the credibility of the opposing party or a witness, Intel Surveillance is the ideal tool to obtain visual evidence to discredit a dishonest person's credibility.

### Cohabitation Investigations

Proving that a couple is living together in a relationship tantamount to husband and wife, especially when one party is receiving alimony, requires a protracted surveillance investigation. At CSIS, we have conducted over 500 cohabitation investigations and refined our Intel Surveillance service offering through these investigations. With unmanned surveillance, we are able to document continuous activity, including overnights spent together, using camera settings that capture footage in a time-lapse format. Multiple cameras are often deployed, including at the address that the co-subject may report as their primary residence, documenting that the alimony recipient's partner is not residing at that residence. Utilizing Intel Surveillance in cohabitation investigations, CSIS' evidence and reports have resulted in two significant New Jersey court cases, the Appellate Court published decision of *Temple V. Temple* (images below) and the New Jersey Supreme Court decision of *Cardali V. Cardali* where a Superior Court judge's decision not to hear a motion was overturned by the higher courts, with the judges basing their decision on evidence obtained through CSIS' Intel Surveillance investigations.



*Court filing in Temple V. Temple (Image source, CSIS)*





*Surveillance of claimant cutting tree branches (Image source: CSIS 2023)*

### **Refuting the “Good Day” Defense to Successful Manned Surveillance Outings**

Traditionally, live surveillance is conducted over a limited number of surveillance days. When a claimant is observed being active during those days, the claimant’s defense is that they were experiencing a “good day” physically but suffered from injuries on days they were not under surveillance. Unmanned surveillance can be deployed over an extended period documenting daily activity, which may contradict a claimant’s reporting of limitations and overcome the “good day” defense.

### **Claimant’s Movements and Direction of Travel**

When there is no surveillance vantage point or a camera deployment is not feasible with a direct view of the subject’s residence, “choke point” camera deployments can document a claimant’s driving frequency and direction of travel. When Intel Surveillance identifies a regular pattern of activity, manned surveillance efforts are targeted and more effective.

### **Documenting a Claimant’s Lack of Use of Physical Aids or Supporting Devices**

When a claimant provides testimony about their inability to walk without the assistance of a supporting device, like a cane or walker, Intel Surveillance can play a crucial role in documenting the claimant’s daily activities and the extent of their reliance on the supporting device. The Intel Surveillance investigation may reveal instances where the claimant does not use the supporting device or only uses it sparingly.

### **Intel Surveillance on IME days (Independent Medical Examinations)**

Requesting in-person live surveillance of a claimant on the day of a scheduled IME is a regular request by attorneys and claims adjusters. The surveillance request on these days is so common that claimants experienced in committing insurance fraud are aware of this tactic and will often alter their normal behavior on these days to exaggerate the outward signs of their injuries, including utilizing a supporting device. A dishonest claimant may also be more surveillance aware on these days and observe an agent conducting live surveillance. Unmanned surveillance on the day of the IME and encompassing the days surrounding the IME can often reveal the full extent of their need for such aids.

## **Employment Related Matters**

For investigations involving employment-related issues, Intel Surveillance can be utilized in a variety of situations, including uncovering misconduct, theft, or investigating policy or contract violations.

### **Worker's Compensation Abuse/Workplace Injury**

Employing Intel Surveillance immediately after a workplace incident involving employee injury can help employers combat sick time abuse or worker's compensation fraud. Unmanned surveillance can often be deployed very quickly after an incident occurs. This can significantly reduce the costs of lost productivity or protracted litigation for self-insured employers.

### **Theft of Goods and Diversion Theft**

Theft investigations at a warehouse or distribution center usually begin with the company reviewing footage captured through the facility's security cameras. Depending on the extent of the coverage area of these cameras, a dishonest employee may be aware of areas that the cameras are not covering. Intel Surveillance, utilizing covert cameras at the facility, can supplement the gaps in security cameras to capture incidents of theft. If the theft involves a diversion of goods, GPS analysis of company delivery vehicles or agent's observations during live surveillance can identify locations where the goods are dropped off. Unmanned surveillance deployed where the stolen goods were dropped off can capture who retrieves the stolen goods and identify others involved in the theft ring.

### **Theft of Time**

An employee submitting a timesheet or payroll records claiming they are working but are actually at home can cause a loss of revenue and productivity and negatively impact company culture. This theft of time can more readily occur when an employee has more than one worksite location that they can report to and falsely claim they were at one of the other locations. The Intel Surveillance investigation can involve cameras deployed at key locations to identify the employee's arrival and departure. The employee's timesheet can then be compared to the analyzed footage to determine if abuse is taking place. When this conduct is by a public employee, the theft of time could rise to a criminal level, and an Intel Surveillance can obtain proof beyond a reasonable doubt for prosecution.

### **Non-Compete Investigations/Restrictive Covenants**

Investigating an employee who violates a non-compete agreement after employment separation can be costly and often challenging to prove. An Intel Surveillance investigation can be very effective by deploying cameras with a view of the target's residence and the competitor's locations where the former employee is suspected to be working.

## **Litigation Support**

Similar to a criminal prosecution where law enforcement relies on investigators to gather evidence for a criminal charge, attorneys litigating non-criminal matters also rely on evidence obtained by investigators to prove their case. The investigator and attorney should work together to develop a creative strategy, including utilizing unmanned surveillance to obtain beneficial visual evidence to support the case.

## **Difficult Service of Process**

When the service of legal process becomes challenging due to a litigant avoiding service, the traditional option is to pay for a process server to sit and wait for the subject to appear. The short-term deployment of a static camera can help facilitate the surveillance to determine the subject's activity schedule so the server can respond at the best time to effectuate service.

## SUMMARY

The benefits of conducting an Intel Surveillance investigation or utilizing unmanned surveillance to enhance or replace field investigators are clear and compelling. In the wake of a softening economy, increasingly stringent client budgets, and a reduced pool of applicants for surveillance positions in a post-Covid workforce, utilizing unmanned surveillance as a part of a surveillance investigation makes practical sense.

However, as a new advancement, larger clients, such as insurance carriers, are sometimes reluctant to embrace its utilization, viewing it as untested by the courts. The primary reluctance in requesting Intel Surveillance surrounds three issues:

- 1.) Legal issues surrounding the deployment of covert cameras.
- 2.) Problems or issues if a camera is found or discovered.
- 3.) Authentication of evidence obtained through an unmanned surveillance investigation.

In traditional live in-person surveillance, when an investigator is ‘burned’ (observed by the investigative subject) while conducting surveillance, immediate action occurs, such as ceasing surveillance or police being called and approaching the investigator. However, when an unmanned surveillance camera is discovered, not knowing who placed it or for what purpose can create public concern and trigger a police investigation. Many unmanned surveillance systems have built-in GPS, which assists the investigator in determining the found camera’s location. If the camera is in police custody, the investigator can immediately contact the police, minimize any issues, and retrieve the camera equipment.

Many options exist for investigators interested in offering unmanned surveillance as a service. Providing the service independently or partnering with a company, such as Covert Captures, which provides Intel Surveillance services as a subcontractor. If you are an investigator looking to establish your own Intel Surveillance program, this Paper serves as a valuable guide. It will help you understand best practices and gain deeper insights into the factors affecting unmanned surveillance investigations, allowing you to provide this service with integrity.

### Defining Unmanned Surveillance

For this Paper, we define unmanned surveillance as:

***The short-term deployment of a static, covert camera by an investigator to remotely monitor or capture footage of a location or area for an investigative purpose on a specific person or persons, where the camera is not physically in the possession of the investigator.***

Unmanned surveillance is often confused with drone surveillance (also known as Unmanned Aerial Surveillance (UAS)). A drone’s primary design and purpose is to be remotely controlled by an operator to view and capture footage while airborne. While some aspects of this Paper apply to the utilization of drones for surveillance, the objective of this Paper is to address issues for land-based static cameras.

### Intel Surveillance Adoption Challenges

While the benefits of an Intel Surveillance investigation, such as improved outcomes from consumers’ investigative surveillance budgets and superior service provided by professional investigative firms, are clear, the industry is slow to transition from in-person surveillance to technology-driven alternatives. Many investigative service providers have attempted to conduct unmanned surveillance but often struggle to provide a consistent, scalable offering. This is primarily due to the lack of truly covert camera systems on



the market and insufficient personnel resources available to the provider to analyze the often-large volumes of footage produced from a deployment.

After recognizing the industry's slow transition to technology-driven alternatives and the challenges faced by investigative service providers, it is important to acknowledge that clients who seek immediate surveillance often need to be informed on the substantial benefits and cost savings associated with Intel Surveillance before requesting any manned surveillance. Since Intel Surveillance is a new business category, an education or re-education process is needed for the investigations firm to grow its program. While clients may request in-person surveillance, they should be advised of Intel Surveillance's significant benefits.

### **Perceived Limitations of Unmanned Surveillance**

A criticism of unmanned surveillance is that, unlike an investigator in the field, a static camera cannot make decisions or follow the investigation subject or claimant. However, when the benefits achieved through deep intel analysis of captured footage in an Intel Surveillance investigation are evaluated, the results prove worthwhile in nearly every investigation.

For example, consider a claimant who has either detailed physical restrictions from an injury they sustained in their claim or testified to the restrictions at a deposition. A field investigator is assigned to conduct surveillance on this claimant, and a vehicle has just left the premises. The field investigator follows the vehicle for an extended period without certainty regarding the claimant's presence but eventually determines they are following the claimant. However, maintaining a visual on the vehicle and claimant becomes challenging due to traffic congestion and the need to remain covert. Eventually, they follow the claimant to a shopping center, where they find the parked vehicle.

The investigator locates the claimant and observes them loading their vehicle after checking out. At this time, the investigator must decide whether to capture video of the claimant loading the vehicle or return to the residence to record the claimant unloading the purchased items, provided there is a surveillance vantage point at the residence to obtain this footage.

If a static camera was utilized instead of manned surveillance in this situation, more days of surveillance coverage would have been provided and more likely to capture the activity. Although the static camera cannot follow the claimant in their vehicle or while shopping, it can capture the claimant returning to their residence after shopping and unloading the items purchased while not displaying the physical restrictions they described.

Another potential limitation to the growth of unmanned surveillance is the current lack of specialized cameras on the market designed to meet the requirements of professional investigators looking to establish an Intel Surveillance program. Due to the diverse surveillance environments in which investigators operate, including suburban and urban areas, they often resort to traditional surveillance methods instead.

Investigators have also discovered that investing in various cameras to find solutions can be expensive, time-consuming, and demanding of technical and fabrication skills. As a result, the traditional approach of relying on in-person live surveillance continues to be the norm. However, to provide Intel Surveillance as a service, the technology is often secondary to the analysis of captured footage. There are several cameras on the market that can provide consistent results and are easy to conceal.

Consumers of surveillance services may not be aware of the true benefits Intel Surveillance provides, and their concerns regarding this service focus on three primary issues:

1. The inability of static cameras to follow subjects when they are mobile.
2. The legal issues and potential liability exposure, encompassing both criminal and civil, associated with deploying remote cameras for investigative surveillance.
3. The uncertainty regarding the acceptance of visual evidence by the courts, and the identification of the investigator who will authenticate the evidence.

As technology continues to advance and the public increasingly accepts cameras monitoring them in open spaces, unmanned surveillance will gain wider acceptance and will be seen as a viable surveillance method. This shift is driven by the availability of suitable cameras and a growing demand from clients for unmanned surveillance options. Traditional surveillance methods, where investigators physically follow individuals to document their activities, have been in use for centuries. With the significant demand by clients for unmanned surveillance and the increased availability of specialized camera systems on the market, the professional investigations market is on the verge of a significant **industry revolution** over the next several years.

*The Introduction to Intel Surveillance White Paper* delves into critical factors to consider when providing or engaging investigative services. By adhering to a well-defined process involving pre-deployment surveys and research, investigative service providers can protect themselves and their clients from potential issues, ensuring the admissibility of obtained evidence.

## **Challenges to Investigators Attempting to Provide the Service**

Many investigators have made initial efforts to establish unmanned surveillance programs but often abandon their attempts when confronted with the challenges detailed in this Paper. Despite client demands or pressures to provide the service, these hurdles lead investigators to recommend traditional manned surveillance methods. The barriers to entry in launching an Intel Surveillance service program will result in the emergence of specialized investigative firms dedicated to providing this service. Initially, these firms are expected to primarily serve specific regions. Ultimately, nationwide providers for the service will emerge, but establishing such a broad geographic presence requires a robust infrastructure that includes:

- Investment in industry-specific camera technology and equipment, including battery systems and various concealment methods.
- An established system for reviewing, processing, and storing footage, which involves hiring, training, and managing intelligence analysts.
- A training program for specialized personnel when expanding into new regional markets.

## **Future Increase in Demand for Intel Surveillance**

As the challenges and concerns outlined in this Paper regarding the utilization of unmanned surveillance are addressed and technology continues to advance, Intel Surveillance is poised to experience a significant increase in requests for and utilization of this service. This increase, potentially marking a paradigm shift in surveillance investigations, will be driven by several key factors:

- Increased demand from major consumers of investigative surveillance, such as insurance carriers, for their vendors to provide unmanned surveillance options.
- Elevated client expectations, particularly those unfamiliar with investigative surveillance, for high-quality visual evidence obtained from investigations.

- The introduction of specialized camera systems to the market, designed by investigators specifically for unmanned surveillance operations, making it more accessible for professional investigators to provide this service.
- The presence of professional investigative service companies offering Intel Surveillance with a deep understanding of privacy, legality, and evidence authentication issues essential to providing the service.
- Greater public acceptance of cameras in public spaces as a part of daily life.
- The courts' acceptance of unmanned surveillance usage and the admissibility of evidence obtained leading to a reduced reliance on eye-witness testimony.
- Increase in dedicated investigative intelligence analysts who can provide greater results at reduced costs.

## Four “Golden Rules” of Intel Surveillance

The effectiveness of an investigation firm’s Intel Surveillance program largely depends on adhering to these four fundamental principles:

1. *Capture footage, not audio*
2. *Respect subject’s privacy*
3. *Respect subject’s private property*
4. *Capture what a standing person could observe*

When the investigator can confidently attest to how their equipment, processes, and overall program uphold the rights of investigation subjects, and execute unmanned surveillance investigations with careful consideration, it significantly increases their credibility. Moreover, when camera deployments are conducted by an investigator trained in the legal and ethical issues surrounding unmanned surveillance, it enhances the firm’s professional integrity.

## Legal and Ethical Considerations with Intel Surveillance

Unmanned surveillance deployments that lack careful planning and execution can have consequences for the investigator and the client. Similarly, the same issues can arise during live manned surveillance operations. To mitigate these risks, it is crucial to establish a well-defined process and the ability to articulate the steps. This Paper addresses these issues in detail, equipping investigators to offer comprehensive Intel Surveillance services confidently.

## Public Perception of Unmanned Surveillance

The public has become accustomed to the idea of being constantly filmed when they are in public spaces. However, as technology in our public spaces continues to advance, there are growing concerns about the extensive collection of data and merging of camera footage with other data. This concern is more relevant to government mass surveillance rather than Intel Surveillance, which is conducted by the private sector.

In cases where unmanned surveillance investigations are successfully conducted as part of litigation, and the subjects of these investigations receive a report, they are often taken by surprise at how unaware they were of the surveillance. Well-presented evidence from unmanned surveillance can clearly document the actions of an investigation subject or claimant when they are in public settings.

## Cost Considerations

For the consumer, an Intel Surveillance investigation can offer cost savings and consistent surveillance coverage over an extended period. However, it is essential to manage expectations as the cost savings may

not be as substantial as some clients anticipate. This is because several human factors are involved in onboarding a case, conducting site surveys and investigative research. Further, there are costs incurred for the reviewing, analyzing, and creating a summary video or report from the investigation. Additionally, there are expenses associated with storing footage, purchasing, or financing equipment, covering LTE data fees, purchasing batteries, and obtaining removable media necessary for providing this service.

For the service provider, the cost of establishing an Intel Surveillance program is an investment. Equipment needs to be purchased and field tested, employees need to be hired and trained, and a computer infrastructure needs to be purchased or upgraded. However, the return on investment will be significant and rapid. Further, those who implement a successful Intel Surveillance program at the current time will be of a limited number of providers in a market that currently has high demand. The professional investigator will experience the most significant returns when key roles are staffed with dedicated specialists.

## Future of Intel Surveillance

As technology advances, cameras will become more power efficient, and battery systems will become smaller and last longer. Producing unique and creative camera and enclosure designs becomes easier with artificial intelligence and 3D printing. Investigators are designing products for specific use by professional investigators providing unmanned surveillance. With advancements in wireless technology, these cameras will meet the specific needs of the professional investigator and be able to be concealed in difficult environments, including suburban and urban areas. Further, the technology of these cameras may be **limited** to help protect the rights and privacy of those under investigation or not involved in the investigation.

Technological advancements will also fuel the demand from consumers for unmanned surveillance. In public spaces, cameras proliferate nearly every aspect of our lives, from cameras at self-serve checkouts to deter theft to 360-degree cameras on cars to government traffic pole-cameras capturing and storing the license plate of every vehicle. We have entered an age where people's smartphones are always within arm's reach, with the most basic phones having tremendous photographic capabilities. People taking photos to memorialize everything in their surroundings has become a way of life. This acceptance of cameras documenting our movements and activities aids the courts and juries in accepting unmanned surveillance. A further boon to unmanned surveillance is the trend for judges and juries to mistrust eyewitness testimony, especially an investigator's testimony not supported by photographic or video evidence. With eyewitness testimony being debated as unreliable, producing visual evidence in litigations will become even **more** essential and expected. For firms providing the service operating within the legal and ethical framework detailed in this Paper, unmanned surveillance will continue to become commonplace and accepted.

We live in a world with driverless vehicles, with cameras installed 360-degrees around the vehicles. Could we one day see an autonomous vehicle outfitted with remotely monitored cameras and artificial intelligence of likely routes a subject may take, anticipate a subject's movements, and conduct mobile surveillance of investigation subjects? A driverless car parked on the street reduces the risk of the subject burning the investigator, and vehicles that can change their exterior color have been introduced, further reducing suspicion of an investigation subject.

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## APPENDIX – LEGAL RESEARCH

While the benefits of Intel Surveillance investigations or utilizing unmanned surveillance during an investigation are numerous, attorneys often have questions regarding the acceptance of their use and the admissibility of the evidence the investigations obtain. As this type of surveillance practice is relatively new, there is limited legal precedent. There is, however, relevant case law that applies to all aspects of an unmanned surveillance investigation. Most of the cases deal with Fourth Amendment rights which apply only to investigations by the government and NOT the private sector, with the government being held to a higher standard. However, even when applying those more stringent standards, unmanned surveillance falls squarely into the parameters of allowable use. The following is a compilation of research that will hopefully answer some of the legal questions the reader of this Paper has about this technology.

### Reasonable Expectation of Privacy

For all types of surveillance conducted, a concern is whether the evidence violates someone's reasonable expectation of privacy. The Fourth Amendment of the United States Constitution protects our right to privacy by prohibiting unreasonable intrusions into our personal property. While these same Fourth Amendment implications don't apply to non-law enforcement, being compliant with the higher standard the Constitution upholds will help reduce any evidence admissibility issues.

Courts have routinely held that, "people generally do not have a legitimate expectation of privacy in open and accessible areas that the public is prepared to recognize as reasonable and no reasonable expectation of privacy in what is left 'visible to the naked eye.'" See *Gori*, 230 F.3d at 50 (citing *Riley*, 488 U.S. at 450).

Courts have made prior rulings concerning law enforcement's use of pole-cameras and expectation of privacy, which are all favorable to the utilization of unmanned surveillance in the private sector. In *United States v. Bucci*, the First Circuit concluded that pole-camera surveillance is not a search within the meaning of the Fourth Amendment because "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." 582 F.3d 108, 117 (1st Cir. 2009). The First Circuit found the defendant lacked both subjective and objective expectations of privacy in a driveway and garage exposed to the street and viewable by a camera fixed on a utility pole. *Id.* at 116. In *United States v. Jackson*, the Tenth Circuit similarly reasoned "the video cameras installed on the telephone poles were incapable of viewing inside the houses and were capable of observing only what any passerby would easily have been able to observe" such that the defendant "had no reasonable expectation of privacy that was intruded upon by the video cameras." 213 F.3d 1269, 1281 (10th Cir. 2000). Essentially, one cannot establish an objectively reasonable expectation of privacy when the images captured by a pole-camera are visible to any person who was located in the public.

Moreover, courts have held that construction of a fence did not affect the Fourth Amendment analysis. The Supreme Court has held, "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be, and which renders the activities clearly visible." *Ciraolo*, 476 U.S. at 213 (citing *Knotts*, 460 U.S. at 282). **There is no principled basis upon which this Court can conclude that the duration of otherwise lawful public video surveillance, standing alone, is of constitutional significance.**

Often people confuse the laws of unmanned surveillance with GPS tracking laws. Unmanned surveillance is categorically distinct from GPS tracking. Unlike a GPS tracker, which "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations", a stationary video camera only observes and records whatever happens to cross its fixed location and line of sight. Considering that the "Fourth Amendment

protects people, not places”, Katz, 389 U.S. at 351, many of the concerns expressed by the concurring justices in Jones—for instance, that extended GPS monitoring “enables the Government to ascertain, more or less at will, [a person’s] political and religious beliefs, sexual habits, and so on”—don’t apply with equal force with unmanned surveillance.

The U.S. Supreme Court case of *United States v. Tuggle* presents the question as to whether long-term, continuous, and surreptitious unmanned surveillance of a home and its curtilage constitutes a search under the Fourth Amendment. The Seventh Circuit Court of Appeals held that the isolated use of pole-cameras on public property, without a warrant, to observe Tuggle’s home, did not violate the Fourth Amendment. A person’s expectation of privacy generally does not extend to what a person “knowingly exposes to the public, even in his own home.” In this case, the court noted that Tuggle knowingly exposed the areas captured by the three cameras. Specifically, the outside of his house and his driveway, which were plainly visible to the public. In addition, the court reasoned that the officers only used the cameras, a technology that is in “**general public use**,” to identify who visited Tuggle’s house and what they carried, all things that a theoretical officer could have observed without a camera. Consequently, the court held that Tuggle did not have a reasonable expectation of privacy in what happened in front of his home. The court added that the Fourth and Tenth Circuit Courts of Appeals have considered the use of cameras by police officers to observe the exterior of private homes and have held such uses to be constitutional.

## **Admissibility of Evidence**

### Silent Witness Theory

Another concern that people have regards the question of admissibility in court. Generally, the person that conducts surveillance will need to testify to what they observed, how they observed it and that the video or photo footage they obtained was an accurate representation of what they observed. Obviously, this is not feasible with an unmanned camera.

The silent witness theory is a theory in the law of evidence whereby photographic evidence (including video) produced by a process whose reliability is established may be admitted as substantive evidence of what it depicts without the need for an eyewitness to verify the accuracy of its depiction. In *People of Illinois v. Taylor*, 956 N.E.2d 431, 353 ILL. Dec. 569 (2011), surveillance video of the defendant committing a crime was captured on a digital medium and transferred to a VHS tape for trial. The defense continually objected on foundational grounds, arguing that it had not been shown that the camera worked properly. The Illinois Court of Appeals, after discussing the silent witness theory, found that the tape was inadmissible based on issues demonstrating chain of custody, confirming the camera worked properly, ensuring the original digital recording was preserved, and concerns regarding the method used to transfer the video from digital to VHS format. While the Illinois Supreme Court agreed with the issues the Court of Appeals examined, it disagreed with its analysis and found adequate support for each foundational factor within the trial record and under Illinois law. The tape was ultimately admitted, and the defendant’s conviction affirmed. Therefore, a human witness is not necessary to admit this evidence.

For purposes of admissibility, a video is subject to the same authentication requirements as a photograph. See *Washington*, 406 Md. at 651, 961 A.2d at 1115. “Photographs and videotapes may be authenticated through firsthand knowledge, or, as an alternative, as “a ‘mute’ or ‘silent’ independent photographic witness because the photograph speaks with its probative effect.” *Id.* at 652, 961 A.2d at 1115 (quoting *Washington v. State*, 179 Md. App. 33, 44, 943 A.2d 704, 711 (2008)). As explained in *Washington* “so long as sufficient foundational evidence is presented to show the circumstances under which it was taken and the reliability of the reproduction process,” photographs (and videos) may be admissible as probative evidence. *Id.* at 652, 961 A.2d at 1116.

The Courts have yet to adopt “any rigid, fixed foundational requirements” for admission of evidence under the “silent witness” theory. See *Dep’t of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26, 672 A.2d 1115, 1122 (1996). The foundational basis may be established through testimony relative to “the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.” (“*Covel v. State* :: 2023 :: Maryland Appellate Court Decisions ...”) *Washington*, 406 Md. at 653, 961 A.2d at 1116 (quoting *United States v. Stephens*, 202 F.Supp.2d 1361, 1368 (N.D. Ga. 2002)).

The question of authenticity is whether the evidence “is what its proponent claims” it to be. Rule 5-901(a).

In sum, the silent-witness theory allows parties to forgo the witness-testimony requirement if they establish the integrity of the process that produced the evidence. While nearly all jurisdictions allow authentication using the silent witness theory, courts hold differing views about which evidentiary standards must be met. Some jurisdictions use a multi-factor approach to evaluate authenticity, taking into account evidence related to operator competency, the likelihood that alterations or tampering occurred, the manner in which the evidence was preserved, the speakers or persons pictured, the date or time of the evidentiary capture, and the reliability of the system.

All these factors illuminate whether the system was “capable of recording what a witness would have seen or heard had a witness been present at the scene.” Other jurisdictions use a flexible, fact-specific approach, allowing room for secondary evidence that may “bear[] on whether the . . . [main] evidence correctly depicts what it purports to represent.

Although witness testimony has often been used to establish the soundness of capture and storage mechanisms under the silent-witness theory, at least some courts have recognized that witness testimony is not required to establish reliability. Regardless of the analytical approach adopted, the silent-witness analysis focuses on whether evidence was captured and stored in a sound manner.

### Distinctive-Characteristics Doctrine

The distinctive-characteristics doctrine is “one of the most frequently used [methods] to authenticate e-mail and other electronic records.” The doctrine, embodied in Rule 901(b)(4), states that evidence can be authenticated when the “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances,” indicate that the proffered evidence is what the proponent claims it to be.

The commentary to Rule 901(b)(4) indicates that a wide variety of specific characteristics can be used for authentication, including language patterns and specific facts contained in a document. A witness is not necessarily required to authenticate evidence under the distinctive-characteristics doctrine. While many documents could theoretically fall under the distinctive-characteristics doctrine, several aspects of hashing and Distributed Ledger Technology (DLT) suggest that the distinctive-characteristics doctrine can apply to these technologies. First, hash values themselves can be considered distinctive characteristics that fall under Rule 901(b)(4).<sup>169</sup> The hash is a unique identifier, which provides a document with distinctive “contents” or “characteristics” as required by the rule. Second, the metadata preserved by DLT could be sufficiently distinctive to allow for authentication. By hashing and uploading evidence to distributed ledgers we can preserve the original metadata alongside the raw evidence rather than risking accidental file modification by uploading the content. The unchanged metadata would enable a court to trust the underlying data set, ascertain the distinctive characteristics therein and deem evidence admissible on those grounds.



## Video Enhancement

The court opined on the issue of whether video enhancement makes evidence inadmissible. In *Salazar v. Golden State Warriors*, a private investigator used a night-vision infrared high-powered scoping, among other high-tech surveillance equipments, to video tape the plaintiff snorting cocaine in a car in a parking lot. The plaintiff sued the defendant for invading his privacy by videotaping him while in his vehicle, arguing that the parking lot should be considered "a private place because it was not 'highly traveled but rather dark and isolated.'" To determine whether an impermissible privacy invasion took place, the district court considered two elements: "(1) intrusion into a private place, conversation, or matter, and (2) in a manner highly offensive to a reasonable person." The plaintiff failed the first part of the test because he did not cite any authority to distinguish "a public from a private place based on the amount of traffic or light," nor did the district court find traffic and light to be factors that were "determinative in characterizing a place as public or private." As for the second element, the district court found that the "intrusion was de minimis" and "not highly offensive to a reasonable person" because the "investigator merely videotaped the plaintiff from a distance in his car and in places where plaintiff was in public view." The intrusiveness of videotaping was further abated by "the absence of audio capabilities." Analyzing each of the determining factors, the court concluded that the "plaintiff's privacy rights were not violated."

This brings us to our second factor on sense-aided public surveillance. Based on *Salazar*, the isolation or darkness of a public place does not make it private or give rise to reasonable privacy expectations that warrant Fourth Amendment protection." Therefore, as long as infrared rays are not used to penetrate an opaque wall or ceiling to look inside a house, they could be used by government to keep dim streets safe at night. On the other hand, high-powered telescopic lenses should prompt a case specific evaluation. A camera with a powerful image magnifier may not be constitutionally permitted because it could reveal details that would not normally be seen by the human eye from ten or fifteen feet away, such as a close-up view of what a person may be reading or writing. A remote camera, equipped with a zoom lens will not offend the Fourth Amendment if it only magnifies to the scale of the naked eye, so that the video image resembles what would be normally seen by a person passing by or standing several feet away.

Dan Coleman - Bio:



Dan is the CEO of **Creative Solutions Investigative Services**, located in Morris Plains, NJ. Creative Solutions specializes in complex family law related matters and cohabitation investigations, including being the investigative firm on both the Temple and Cardali cases. Dan has been a detective since 1988, which includes twenty years as a County Detective with the Morris County Prosecutor's Office.

## The Importance of Paystubs

Hot Tip by Stephanie Hyland, ASA, CFE of Asterion, Inc.

An employee's paystubs (or employee payroll journal) provide more information than a Form W-2. Paystubs provide the make-up of gross compensation, which can provide information for both income available for support and equitable distribution. Paystubs also provide information as to the employee cost of benefits, reimbursements, and net check.

### COMPENSATION

- Regular wages
- Overtime wages
  - *Ferrer v. Colon 463 N.J. Super. 12* used average overtime hours. However, the magnitude and trend of overtime may lead to legal arguments to the contrary. For example, if using a three-year average for income and
    - overtime availability was cut in half company-wide two years ago, income from the year prior may need to be adjusted before calculating the average.
    - if you have a spouse that worked 12 hours a day, five days a week and will receive 50/50 custody time, could be argued that some of those overtime hours are not achievable based on future custody arrangements.
- Personal time off (PTO)
- 401(k) Match
  - Show on paystub, not a W-2.
- Hazard pay
  - If this is an anomaly, it may need to be adjusted before averaging income for support purposes.
- Restricted stock awards (RSAs)
  - Generally, RSAs do not show on a paystub when granted. Rather, they show as compensation when the restrictions are removed (when the RSAs vest).
  - Vesting based on time and/or performance.
  - Dividends on RSAs will show on a paystub during the vesting period.
  - RSAs may show in the year of grant if the employee makes an 83(b) Election, in which non-refundable taxes are paid on the restricted stock in the year of grant.
- Restricted stock units (RSUs)
  - RSUs do not show on a paystub until they have vested.
  - Vesting based on time and/or performance.
- Non-qualified stock options (NQSOs)
  - Most common type of stock option.
  - NQSOs will show on a paystub when exercised.
  - Normally subject to a vesting schedule.
- Incentive stock options (ISOs)
  - Less common type of stock option.
  - May not show on a paystub or W-2.
  - If exercised as a cashless purchase, it will show on a paystub when exercised.
  - If exercised after meeting all holding requirements, it may not show on paystub and will not show on a W-2.
- Deferred compensation
  - Generally, deferred compensation shows on a paystub when it is eligible to be received.
  - Will not be included in W-2 income until eligible to be received.

- Forgivable loans
  - May not be shown on paystub when funds are provided.
  - Shadow (cashless) income from forgivable loans show on paystubs as portions of the loan are forgiven. It is at this time that taxes are paid.
  - Special attention needs to be given to forgivable loan income when calculating income available for support.
    - If no longer in the forgiveness period, but there is forgiveness income in the analysis period, such income needs to be adjusted before calculating using averages to determine income for support purposes, unless there is a reason to believe it is recurring.
    - If still in the forgiveness period, if the loan proceeds are treated as an asset of the marriage, taxes owed on future shadow income are a marital liability, and future shadow income on that loan cannot be included in income available for support.
- Imputed income
  - Group term life insurance
  - Gym memberships
  - Moving expenses
  - Educational assistance and tuition in excess of \$5,250
  - Debt forgiveness
  - Company car
  - Dependent care in excess of \$5,000
  - Adoption assistance in excess of \$15,950 per child
  - Whether imputed income should be included in income for support purposes depends on the nature of the benefit.

#### **BENEFITS**

- Paystubs show the types and costs of benefits the employee is paying.

#### **REIMBURSEMENTS**

- Expenses reimbursements show on paystubs when paid and are not shown or included in the W-2.
- Paystubs usually do not show year-to-date amounts for expense reimbursements so all paystubs may be required to obtain full-year information.

#### **NET CHECK**

- The paystub helps with tracing and account identification in that it shows the net check amount and how that amount was paid.
  - Actual check
  - Direct deposit – bank and a portion of the account number are shown on the paystub.

#### **FOLLOW-UP REQUESTS**

The information on the paystub may lead to follow-up requests for documentation.

- Award and plan documents.
- Vesting schedules.
- Exercise statements.
- Form 3921 – for ISOs.
- Deferred compensation agreements.
- Forgivable loan agreement.
- Expense reports.
- Human resource file, which could include bonus calculations and other compensation documents provided to the employee.

## **Stephanie Hyland, ASA, CFE**

[shyland@asterion-consulting.com](mailto:shyland@asterion-consulting.com)

### **Biography**

Stephanie Hyland is an experienced financial and economic expert and is responsible for the provision of forensic, dispute, and valuation consulting services. Prior to joining Asterion in 2017, Stephanie was a Director in the Forensic, Litigation and Valuation Services Group of a national public accounting firm. Stephanie prepares business valuations, conducts forensic investigations, and performs various financial analyses. Her background includes engagements arising from matrimonial disputes, trust and estate litigation, shareholder disputes and damage assessments. Stephanie has experience valuing businesses in a variety of industries within the context of a litigation, for a transaction and for estate and gift tax purposes. In addition, Stephanie has experience in forensic accounting, tracing of assets, income analysis and lifestyle analysis.

Stephanie has presented on topics related to business valuation, forensic accounting, income and personal and business income tax. She has presented to organizations such as New Jersey Bar Association, the New York City Bar Association, the New Jersey Association of Professional Mediators and the New Jersey Courts for Judicial Education.

### **Designations**

- Accredited Senior Appraiser, American Society of Appraisers
- Certified Fraud Examiner, Association of Certified Fraud Examiners

### **Professional Memberships**

- American Society of Appraisers
- Association of Certified Fraud Examiners
- National Association of Certified Valuators and Analysts

### **Recognitions**

- 2017 Honoree of the National Association of Certified Valuators and Analysts' 40 Under Forty, awarded to a select group of professionals for their accomplishments and contributions to the profession.

### **Education**

- B.S. in Business Administration: Finance, cum laude, The College of New Jersey

255 N.J. 85

**Suzanne CARDALI, Plaintiff-Respondent,**

v.

**Michael CARDALI, Defendant-Appellant.**

**A-25 September Term 2022  
087340**

Supreme Court of New Jersey.

Argued April 25, 2023

Decided August 8, 2023

**Background:** Ex-husband filed a motion to terminate his alimony obligation, claiming that ex-wife was in a long-term romantic relationship with third-party and that the relationship constituted cohabitation. The Superior Court denied motion, and ex-husband appealed. The Superior Court, Appellate Division, 2022 WL 2297126, affirmed. Ex-husband filed petition for certification.

**Holdings:** The Supreme Court, Patterson, J., held that:

- (1) definition of “cohabitation” set forth in *Konzelman v. Konzelman*, 158 N.J. 185, 729 A.2d 7, applied, as opposed to factors set forth in amended statute governing motions to suspend or terminate alimony, since parties’ property settlement agreement was executed before enactment of amended statute;
- (2) if trial court finds that movant has presented prima facie showing of cohabitation, as ground for suspending or terminating alimony, court should order limited discovery as to discrete issues;
- (3) ex-husband seeking to terminate his alimony obligation established prima facie case of cohabitation pursuant to factors set forth in *Konzelman*; and
- (4) trial court did not properly exercise its discretion when it denied ex-husband’s

motion to terminate alimony obligation without discovery.

Reversed and remanded.

#### 1. Divorce $\Leftrightarrow$ 568

In actions for divorce, courts may award alimony as the circumstances of the parties and the nature of the case shall render fit, reasonable, and just.

#### 2. Divorce $\Leftrightarrow$ 627(3)

An award of alimony is always subject to review and modification on a showing of changed circumstances.

#### 3. Divorce $\Leftrightarrow$ 85

Evidence of a financial relationship between the spouse or civil union partner receiving alimony and the other person is not prerequisite to discovery in action to suspend or terminate alimony; as a practical matter, such a showing may be impossible without discovery. N.J. Stat. Ann. § 2A:34-23(n).

#### 4. Divorce $\Leftrightarrow$ 559

##### Marriage and Cohabitation $\Leftrightarrow$ 1272(1)

An award of alimony permits a spouse or civil union partner to share in the accumulated marital assets to which he or she contributed. N.J. Stat. Ann. § 2A:34-23.

#### 5. Divorce $\Leftrightarrow$ 559, 573

“Alimony” is an economic right that arises out of the marital relationship and provides the dependent spouse with a level of support and standard of living. N.J. Stat. Ann. § 2A:34-23.

See publication Words and Phrases for other judicial constructions and definitions.

#### 6. Divorce $\Leftrightarrow$ 904

Alimony may be subject of voluntary and consensual agreement undertaken as part of termination of marriage and divorce.

**7. Divorce**  $\Leftrightarrow$ 943(4)

Like other spousal agreements, those covering alimony may be modified in light of changed circumstances.

**8. Divorce**  $\Leftrightarrow$ 914

Agreements to terminate alimony upon cohabitation of recipient spouse are enforceable so long as relationship constitutes cohabitation and cohabitation provision of property settlement agreement is voluntary, knowing and consensual.

**9. Divorce**  $\Leftrightarrow$ 1281(5)

Appellate court reviews a trial court's decision denying a motion to modify alimony under a deferential standard, giving due recognition to the wide discretion the law rightly affords to the trial judges who deal with these matters. N.J. Stat. Ann. § 2A:34-23.

**10. Divorce**  $\Leftrightarrow$ 1261(2), 1288(5)

When reviewing a trial court's decision denying a motion to modify alimony, appellate court limits its review to the question whether the trial court made findings inconsistent with the evidence or unsupported by the record or erred as a matter of law. N.J. Stat. Ann. § 2A:34-23.

**11. Divorce**  $\Leftrightarrow$ 1266(4)

Appellate court reviews de novo a trial court's legal determination denying a motion to suspend or terminate alimony on basis on recipient spouse's cohabitation with third party, to the extent trial court premises its decision on amended statute prescribing standard for trial courts to apply when they determine whether the record supports a finding of cohabitation. N.J. Stat. Ann. § 2A:34-23(n).

**12. Divorce**  $\Leftrightarrow$ 510(2)

Definition of "cohabitation" set forth in *Konzelmann v. Konzelmann*, 158 N.J. 185, 729 A.2d 7, and the factors identified in that decision applied, as opposed to

factors set forth in amended statute governing motions to suspend or terminate alimony based on cohabitation, since parties' property settlement agreement, which was incorporated in their dual judgment of divorce and which provided that ex-husband's obligation to pay alimony would terminate upon ex-wife's cohabitation, was executed before the enactment of amended statute. N.J. Stat. Ann. § 2A:34-23(n).

**13. Divorce**  $\Leftrightarrow$ 510(2), 632(3)

Procedure for a prima facie showing of cohabitation in alimony modification cases that are governed by amended statute pertaining to motions to suspend or terminate alimony based on cohabitation is virtually identical to the procedure for a prima facie showing of cohabitation in cases governed by *Konzelmann v. Konzelmann*, 158 N.J. 185, 729 A.2d 7; amended statute applies only prospectively and not retroactively. N.J. Stat. Ann. § 2A:34-23(n).

**11. Divorce**  $\Leftrightarrow$ 632(3)

Prima facie showing of cohabitation in actions to suspend or terminate alimony is distinct from the final proofs that are the basis for an adjudication on the merits; it is simply a threshold showing required so that the privacy of the spouse or civil union partner receiving alimony is not invaded in pursuit of a baseless cohabitation claim. N.J. Stat. Ann. § 2A:34-23(n).

**15. Divorce**  $\Leftrightarrow$ 85

Although a litigant may devote considerable resources to gathering information to support a motion to terminate or suspend alimony, the mandate that a movant present a prima facie showing of cohabitation in alimony modification cases in order to obtain discovery is not intended to impose a high bar. N.J. Stat. Ann. § 2A:34-23(n).

**16. Evidence**  $\S$ 3012

"Prima facie evidence" is defined as evidence that, if un rebutted, would sustain a judgment in the proponent's favor.

See publication Words and Phrases for other judicial constructions and definitions.

**17. Divorce**  $\S$ 632(2)

In a prima facie showing of cohabitation in actions to suspend or terminate alimony, the movant is entitled to an assumption of the truth of his allegations and the benefit of all reasonable inferences to be drawn from the evidence he has marshaled; movant's burden at the preliminary stage is not an onerous one. N.J. Stat. Ann.  $\S$  2A:34-23(n).

**18. Divorce**  $\S$ 632(3)

To establish prima facie showing of cohabitation, movant's certifications, if supported by competent evidence, should not be read restrictively or literally to determine whether alone they spell out a claim for relief, nor should their probative worth be neutralized or discounted by the opposing certifications; in other words, the trial court should not find that movant, seeking to suspend or terminate alimony, has failed to present a prima facie showing of cohabitation simply because the parties' certifications dispute relevant facts. N.J. Stat. Ann.  $\S$  2A:34-23(n).

**19. Divorce**  $\S$ 632(3)

Trial court's inquiry as to whether movant has established prima facie showing of cohabitation, as ground for terminating or suspending alimony, is case-specific, and the evidence that is sufficient to establish a prima facie showing will vary depending on the circumstances of a given case. N.J. Stat. Ann.  $\S$  2A:34-23(n).

**20. Divorce**  $\S$ 627(13)

In alimony modification cases that are governed by *Konzelman v. Konzelman*,

158 N.J. 185, 729 A.2d 7, rather than by amended statute that applies prospectively and governs motions to suspend or terminate alimony based on cohabitation, the relevant factors include, but are not limited to, living together, intertwined finances, such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle; in cases in which statute applies, the court must consider the statute's seven enumerated factors, including all other relevant evidence. N.J. Stat. Ann.  $\S$  2A:34-23(n).

**21. Divorce**  $\S$ 632(3)

Nothing in either *Konzelman v. Konzelman*, 158 N.J. 185, 729 A.2d 7, or amended statute that applies prospectively and governs motions to suspend or terminate alimony suggests that the movant, seeking to suspend or terminate alimony, must present evidence relevant to all of the factors in *Konzelman* or in statute in order to set forth prima facie case of cohabitation: any such requirement would impose an unfair burden on a movant at the preliminary stage, and absent discovery, a movant is unlikely to have access to financial records and other documents relevant to financial factors. N.J. Stat. Ann.  $\S$  2A:34-23(n).

**22. Divorce**  $\S$ 632(3)

When court determines if movant has established prima facie showing of cohabitation as ground to suspend or terminate alimony, most information relevant to cohabitation is not readily available to movants, and motion at that stage is thus akin to summary judgment motions filed prior to completion of discovery. N.J. Stat. Ann.  $\S$  2A:34-23(n).

**23. Divorce**  $\S$ 510(2), 632(3)

Movant seeking to present a prima facie showing of cohabitation, as ground to suspend or terminate alimony, is not required to proffer evidence on all of the



cohabitation factors set forth in *Konzelman v. Konzelman*, 158 N.J. 185, 729 A.2d 7, or on all of the cohabitation factors set forth in statute governing alimony, in those cases governed by the statute, which applies prospectively. N.J. Stat. Ann. § 2A:34-23(n).

**24. Divorce** ⇨632(3)

If movant seeking to present a prima facie showing of cohabitation, as ground to suspend or terminate alimony, presents a certification supported by competent evidence as to at least some of the relevant cohabitation factors, and if that evidence, if unrebutted, would sustain the movant's burden of proof as to cohabitation, the trial court should find that the movant has made a prima facie showing of cohabitation even if the spouse or civil union partner receiving alimony presents a certification contesting facts asserted by the movant; movant need not address all of the factors identified in the governing standard. N.J. Stat. Ann. § 2A:34-23(n).

**25. Divorce** ⇨85

**Pretrial Procedure** ⇨41

If trial court finds that movant has presented prima facie showing of cohabitation, as ground for suspending or terminating alimony, court should order limited discovery as to discrete issues that it determines to be relevant to one or more of the cohabitation factors that govern the case; in fashioning its discovery order, trial court should take appropriate steps to safeguard privacy of spouse or civil union partner receiving alimony and individual with whom that person is alleged to be cohabiting; steps that court may take include, but are not limited to, constraints on the discovery to be provided to movant and protective orders limiting access to the information subject to discovery. N.J. Stat. Ann. § 2A:34-23(n).

**26. Divorce** ⇨630, 631

Following completion of limited discovery after movant has presented prima facie showing of cohabitation, parties should file supplemental certifications in support of and in opposition to motion to suspend or terminate alimony, and if material facts remain in dispute following discovery and submission of supplemental certifications, trial court must conduct plenary hearing to determine motion to terminate or suspend alimony. N.J. Stat. Ann. § 2A:34-23(n).

**27. Divorce** ⇨632(2)

**Marriage and Cohabitation** ⇨1276

Movant bears the burden of proving cohabitation at all stages of the proceeding to suspend or terminate alimony; prima facie showing of cohabitation by the movant does not shift the burden of proof to the spouse or civil union partner receiving alimony to disprove cohabitation. N.J. Stat. Ann. § 2A:34-23(n).

**28. Divorce** ⇨632(3)

Ex-husband seeking to terminate his alimony obligation established prima facie case of cohabitation pursuant to factors set forth in *Konzelman v. Konzelman*, 158 N.J. 185, 729 A.2d 7; report of ex-husband's private investigator demonstrated that ex-wife and third party were together on each of the 44 days over which investigator conducted surveillance, that they were together overnight on more than half of those days, that ex-wife had access to third party's home whether or not he was present, and that they shared household chores, and photographs from social media accounts maintained by ex-wife and third party depicted them at social events together and with the parties' children.

**29. Divorce** ⇨85

Trial court did not properly exercise its discretion when it denied ex-husband's motion to terminate his alimony obligation

without discovery, given that ex-husband had established prima facie case of cohabitation pursuant to factors set forth in *Konzelman v. Konzelman*, 158 N.J. 185, 729 A.2d 7.

On certification to the Superior Court, Appellate Division.

Mathew D. Nunn argued the cause for appellant (Einhorn, Barbarito, Frost & Botwinick, and DeTommaso Law Group, attorneys; Mathew D. Nunn, Denville, of counsel and on the briefs, and Jessie M. Mills, Bonnie C. Frost, Denville, and Taryn R. Zimmerman, Somerville, on the briefs).

Thomas D. Baldwin argued the cause for respondent (Chiesa, Shahinian & Giantomasi, attorneys; Thomas D. Baldwin, West Orange, on the brief).

Jeralyn L. Lawrence, President, argued the cause for amicus curiae New Jersey State Bar Association (New Jersey State Bar Association, attorneys; Jeralyn L. Lawrence, Watchung, of counsel and on the brief, and Derek M. Freed, Pennington, Timothy F. McGoughran, Oakhurst, Monmouth County, Catherine Murphy, and Brian G. Paul, Lawrenceville, on the brief).

Carolyn N. Daly argued the cause for amicus curiae New Jersey Chapter of American Academy of Matrimonial Lawyers (Cohen Seglias Pallas Greenhall & Furman, attorneys; Carolyn N. Daly, Morristown, Jeralyn Lawrence, Watchung, Dina M. Mikulka, Sparta, and Sheryl J. Seiden, Cranford, on the brief).

JUSTICE PATTERSON delivered the opinion of the Court.

¶<sup>99</sup>[1,2] In actions for divorce, “courts may award alimony ‘as the circumstances of the parties and the nature of the case shall render fit, reasonable and just.’” *Quinn v. Quinn*, 225 N.J. 34, 48, 137 A.3d

423 (2016) (quoting *Innes v. Innes*, 117 N.J. 496, 503, 569 A.2d 770 (1990)); see also N.J.S.A. 2A:34-23 (prescribing the factors for a court to apply in determining alimony). An award of alimony, however, is “always subject to review and modification on a showing of ‘changed circumstances.’” *Lepis v. Lepis*, 83 N.J. 139, 146, 416 A.2d 45 (1980); see also *Quinn*, 225 N.J. at 48-49, 137 A.3d 423.

We have long recognized, as one example of “changed circumstances,” the decision of a spouse or civil union partner receiving alimony to cohabit with another person, and we have authorized courts to suspend or terminate alimony in certain settings on cohabitation grounds. *Quinn*, 225 N.J. at 49-55, 137 A.3d 423; *Konzelman v. Konzelman*, 158 N.J. 185, 197-203, 729 A.2d 7 (1999); *Gayet v. Gayet*, 92 N.J. 149, 150-55, 456 A.2d 102 (1983). In *Konzelman*, we defined cohabitation as “an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage,” and we identified factors that a court should apply to determine whether to find cohabitation in a given case. 158 N.J. at 202, 729 A.2d 7.

In 2014, the Legislature amended the alimony statute to codify the standard governing motions to suspend or terminate alimony based on cohabitation, applying the amendments prospectively. *L.*, 2014, c. 42, § 1. It defined cohabitation to “involve[] a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household,” and prescribed seven factors, most of ¶<sup>99</sup>which are analogous to the factors identified in *Konzelman*, to guide the court’s determination. N.J.S.A. 2A:34-23(n).

In this appeal, we consider the prima facie showing of cohabitation that a party seeking to suspend or terminate alimony must present to obtain discovery. Plaintiff Suzanne Cardali and defendant Michael Cardali entered into a property settlement agreement (PSA), incorporated in their Dual Judgment of Divorce. The PSA provided that defendant's obligation to pay alimony to plaintiff would terminate upon her "cohabitation," as defined by New Jersey law. Because the parties' PSA was executed before the enactment of N.J.S.A. 2A:34-23(n), the definition of "cohabitation" in Konzelman and the factors identified in that decision apply.

Defendant filed a motion to terminate his alimony obligation, claiming that plaintiff was in a long-term romantic relationship with an individual named Bruce McDermott and that the relationship constituted "cohabitation" as that term was defined in our decisions in Konzelman and Quinn. Defendant presented evidence relevant to some of the cohabitation factors identified in Konzelman but submitted no evidence of any financial relationship between plaintiff and McDermott. He argued that he needed discovery in order to provide such proofs.

The trial court found that defendant had failed to present evidence that plaintiff and McDermott supported one another financially or in other respects, or that the relationship between plaintiff and McDermott was analogous to marriage. It held that defendant had not presented a prima facie showing of cohabitation and denied his motion without prejudice to a future application to terminate alimony. The Appellate Division affirmed the trial court's determination.

[3] We granted in part defendant's petition for certification, and now reverse the Appellate Division's judgment. We do not view the case law, or N.J.S.A. 2A:34-23(n)

in cases governed by the statute, to require evidence of a financial relationship between the spouse or civil union partner receiving alimony and the other 103 person as a prerequisite to discovery; as a practical matter, such a showing may be impossible without discovery. Accordingly, we hold that a movant need not present evidence on all of the cohabitation factors in order to make a prima facie showing. If the movant's certification addresses some of the relevant factors and is supported by competent evidence, and if that evidence would warrant a finding of cohabitation if unrebutted, the trial court should find that the movant has presented prima facie evidence of cohabitation.

If the movant presents such prima facie evidence, the court should grant limited discovery tailored to the issues contested in the motion, subject to any protective order necessary to safeguard confidential information. If material facts remain in dispute after discovery and the filing of supplemental certifications, the court must conduct a plenary hearing before deciding the motion to terminate or suspend alimony.

In this appeal, we find that defendant presented prima facie evidence as to several of the Konzelman cohabitation factors, and we view that evidence, if unrebutted, to warrant a finding of cohabitation. Defendant was therefore entitled to limited discovery, and the trial court erred when it denied his motion to terminate alimony without ordering discovery. Accordingly, we reverse the Appellate Division's judgment and remand this matter to the trial court for further proceedings.

I.

A.

Plaintiff and defendant were married on June 18, 1988. They had two children, a

son born in 1992 and a daughter born in 1995.

After initiating divorce proceedings, the parties, represented by counsel, negotiated the terms of a PSA. The parties executed the PSA on October 17, 2006, and it was incorporated in their Dual Judgment of Divorce entered on December 4, 2006. The PSA provided that defendant would pay permanent alimony to plaintiff 16 in the amount of \$5,417 per month. It stated that defendant's "obligation to pay alimony shall terminate upon [plaintiff's] remarriage or cohabitation (as defined by NJ law) or [plaintiff's] or [defendant's] death, whichever occurs first."

On December 1, 2020, defendant filed a motion to terminate alimony and for other relief that is not relevant to this appeal. In a certification filed in support of his motion, defendant stated that he believed that plaintiff and McDermott had been in "a relationship tantamount to marriage" for more than eight years, interrupted by a brief separation in 2014. He certified that he had learned in the summer of 2013 that McDermott "had proposed marriage to [plaintiff] and she declined." Relying on photographs and social media posts, defendant contended that plaintiff and McDermott had attended family functions and other social events as a couple, memorialized their relationship on social media, and vacationed together.

Defendant also submitted the report of a private investigator whom he retained to conduct surveillance of plaintiff and McDermott. The investigator reported that plaintiff and McDermott were together on all of the forty-four days that they were under surveillance in May through September 2019 and in October 2020, and that they were together overnight on more than half of those days. The investigator's report included photographs of plaintiff and McDermott carrying groceries, bags

of personal belongings, and laundry in and out of one another's residences. The investigator stated that plaintiff had access to McDermott's home when McDermott was not at home.

Plaintiff opposed defendant's motion to terminate alimony. She certified that "McDermott, with whom I have had an off and on dating relationship over the years, has never proposed marriage to me, nor I to him," and that she had "no interest in another relationship akin to or actually like marriage." She represented that she and McDermott maintained separate residences, primarily lived apart, and did not "share economics, either by way of contributing toward the other's expenses, sharing joint bank or 17 financial accounts, loaning the other money, or supporting the other in any way." Plaintiff stated that although she and McDermott "certainly enjoy spending time with and are fond of each other," they were not "in a mutually supportive, intimate personal relationship" in which they undertook "duties and privileges commonly associated with marriage."

Although the parties' PSA preceded the enactment of N.J.S.A. 2A:34-23(n), the trial court based its determination on the statute. The court opined that it is unclear precisely what evidence is necessary for a prima facie showing of cohabitation under N.J.S.A. 2A:34-23(n). It reasoned that "[s]erious committed dating relationships" are "vastly different than those of thirty or forty years ago," and that the relationship must be considered "under current social norms." The court cautioned that "the supported spouse is not to be financially punished for dating or even trying to find a future spouse" and held that "[t]he financial relief stemming from a finding of cohabitation is that the supported spouse no longer needs the financial support of the supporting spouse because that support is

being provided, in whole or in part, by another person.”

The trial court viewed the record to establish that plaintiff and McDermott saw one another frequently, that their relationship was recognized by their respective social circles, that they might occasionally have independent access to one another’s homes, that they vacationed together, and that McDermott had a close relationship with the parties’ children. The trial court found these factors to constitute “hallmarks” that McDermott was “plaintiff’s long-term romantic partner.” The court ruled, however, that “the evidence provided does not suggest that their relationship is marriage-like or that they mutually support each other financially or otherwise.” The trial court therefore denied defendant’s application, without prejudice to his opportunity to renew his application at a later stage “if the facts change.”

B.

Defendant appealed the trial court’s order. He agreed with the trial court that N.J.S.A. 2A:34-23(n) governed his application to § terminate alimony. Defendant contended, however, that at a preliminary stage in which his only obligation was to present a prima facie showing, the trial court had improperly imposed on him a burden to proffer evidence on all cohabitation factors set forth in N.J.S.A. 2A:34-23(n) without the benefit of discovery and had thereby deprived him of the opportunity to prove his claim.

Plaintiff disputed defendant’s contention that N.J.S.A. 2A:34-23(n) governs this case. She argued that our law provides no precise definition of a prima facie showing of cohabitation, and that the trial court had properly exercised its discretion when it denied defendant’s motion.

The Appellate Division acknowledged that N.J.S.A. 2A:34-23(n) applies only prospectively. The court stated, however, that neither party challenged the trial court’s application of the statute to their dispute, and that the statute essentially adopted Konzelman’s definition of cohabitation. The appellate court agreed with defendant that N.J.S.A. 2A:34-23(n) does not mandate proof as to all of the statutory cohabitation factors in a prima facie showing. The Appellate Division found, however, that defendant “provided no evidence to counter plaintiff’s assertion there was no financial entanglement between [plaintiff and McDermott] and that McDermott maintained his own residence.” Nor, in the court’s view, did defendant provide evidence that “McDermott made any enforceable promise of support to plaintiff.” The appellate court recognized no justification for any invasion of plaintiff’s privacy and held that defendant was not entitled to discovery. It affirmed the trial court’s judgment.

C.

We granted defendant’s petition for certification, limited to the first two questions raised: (1) whether “evidence of intertwined finances and joint responsibility for living expenses” is required for a movant seeking to terminate alimony to establish a prima facie cohabitation showing, even when the alleged relationship is long-term and exclusive; and (2) whether a payee spouse suspected § of cohabiting with another in a long-term relationship — who entered a post-marital agreement providing that alimony terminates upon cohabitation by the payee spouse — has “privacy rights sufficient to avoid discovery where that payee makes the relationship widely known to the public.” See 252 N.J. 465,

286 A.3d 1167 (2023).<sup>1</sup>

We also granted the applications of the New Jersey State Bar Association and the New Jersey Chapter of the American Academy of Matrimonial Lawyers to participate as amici curiae.

## II.

### A.

Defendant contends that the Appellate Division improperly mandated that he demonstrate a financial relationship between plaintiff and McDermott at the prima facie stage, without access to discovery that might have allowed him to make such a showing. He argues that nothing in N.J.S.A. 2A:34-23(n)'s plain language or legislative history supports the Appellate Division's view that a movant must make a prima facie showing on all of the statutory factors in order to obtain discovery.

### B.

Plaintiff counters that the trial court's denial of defendant's motion was proper and is entitled to deference on appeal. She argues that neither N.J.S.A. 2A:34-23(n) nor case law precisely defines the prima facie showing of cohabitation that a payor spouse must present. Plaintiff asserts that trial courts should retain the discretion to deny cohabitation applications without § 101 discovery to avoid harassment and oppression of former spouses and civil union partners who are entitled to alimony.

### C.

Amicus curiae the New Jersey State Bar Association argues that a movant in a cohabitation case makes a prima facie showing if the evidence presented would sup-

port a factfinder's conclusion that the spouse or civil union partner and another person are in a mutually supportive, intimate personal relationship in which they have undertaken duties and privileges commonly associated with marriage or civil union. Amicus asserts that if such a showing is made, the burden of proof should shift to the spouse or civil union partner receiving alimony to disprove cohabitation.

### D.

Amicus curiae the New Jersey Chapter of the American Academy of Matrimonial Lawyers asserts that a movant need not provide proof as to all factors identified in N.J.S.A. 2A:34-23(n) in order to present a prima facie showing of cohabitation.

## III.

### A.

[4, 5] New Jersey's alimony statute, N.J.S.A. 2A:34-23, provides in part that,

[p]ending any matrimonial action or action for dissolution of a civil union . . . , or after judgment of divorce or dissolution or maintenance, . . . the court may make such order as to the alimony or maintenance of the parties . . . as the circumstances of the parties and the nature of the case shall render fit, reasonable and just.

An award of alimony permits a spouse or civil union partner "to share in the accumulated marital assets to which he or she contributed." *Konzelman*, 158 N.J. at 195, 729 A.2d 7. "Alimony is an 'economic right that arises out of the marital relationship and provides the dependent spouse with "a level of support and § 101 standard of living . . . .'" *Quinn*, 225 N.J. at 48, 137 A.3d

1. We denied certification on the third issue raised by defendant: whether N.J.S.A. 2A:34-23(n) should retroactively apply to settlement

agreements executed prior to the statute's enactment in 2014 that do not specify a standard to determine cohabitation.

423 (quoting Mani v. Mani, 183 N.J. 70, 80, 869 A.2d 904 (2005)).

[6–8] Alimony “may clearly be the subject of a voluntary and consensual agreement undertaken as part of the termination of marriage and divorce.” Konzelman, 158 N.J. at 194-95, 729 A.2d 7. “Like other spousal agreements, those covering alimony may be modified in light of changed circumstances.” Id. at 195, 729 A.2d 7; see also Quinn, 225 N.J. at 49, 137 A.3d 423. “Agreements to terminate alimony upon the cohabitation of the recipient spouse are enforceable so long as the relationship constitutes cohabitation and ‘the cohabitation provision of the [PSA] was voluntary, knowing and consensual.’” Quinn, 225 N.J. at 50, 137 A.3d 423 (alteration in original) (quoting Konzelman, 158 N.J. at 203, 729 A.2d 7).

In Lepis, we established principles governing the modification of alimony by virtue of changed circumstances. 83 N.J. at 150-59, 416 A.2d 45. We observed that “[t]he equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted,” and that “‘changed circumstances’ are not limited in scope to events that were unforeseeable at the time of divorce.” Id. at 149, 152, 416 A.2d 45; see also J.B. v. W.B., 215 N.J. 305, 327, 73 A.3d 405 (2013) (noting that “[c]hanged circumstances are not confined to events unknown or unanticipated at the time of the agreement,” but that “care must be taken not to upset the reasonable expectations of the parties”).

As we held in Lepis, “[t]he party seeking modification has the burden of showing such ‘changed circumstances’ as would warrant relief from the support or maintenance provisions involved,” and “[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse’s financial sta-

tus.” 83 N.J. at 157, 416 A.2d 45. In Lepis, we identified “the dependent spouse’s cohabitation with another” as one example of “changed circumstances” recognized in prior case law, but we did not address the standard for a finding of cohabitation. Id. at 151, 416 A.2d 45.

Id. We first applied the principles of Lepis to an application to terminate alimony based on a finding of cohabitation in Gayet, 92 N.J. at 151, 154-55, 456 A.2d 102. In Gayet, we authorized “modification for changed circumstances resulting from cohabitation only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief.” Id. at 153-54, 456 A.2d 102. We recognized that “parties might attempt to conceal a new economic dependency by adopting different living arrangements from remarriage” but were “satisfied that our courts will have little difficulty in determining the true nature of the relationship.” Id. at 155, 456 A.2d 102.

In Konzelman, we refined the cohabitation standard, recognizing that cohabitation “can be a valid basis for discontinuing alimony, without regard to the economic consequences of that relationship.” 158 N.J. at 196, 729 A.2d 7; cf. Gayet, 92 N.J. at 154-55, 456 A.2d 102. We held that “a specific consensual agreement between the parties to terminate or reduce alimony based on a predetermined change of circumstances does not require an inquiry into the financial circumstances or economic status of the dependent spouse so long as the provision itself is fair.” Konzelman, 158 N.J. at 197, 729 A.2d 7. We reasoned that “where the parties have agreed that cohabitation will constitute a material changed circumstance, and that agreement has been judged fair and equitable, the court should defer to the arrangements undertaken by the parties.” Ibid.

We reaffirmed in Konzelman, however, that “[a] mere romantic, casual or social relationship is not sufficient to justify the enforcement of a settlement agreement provision terminating alimony,” which instead “must be predicated on a relationship of cohabitation that can be shown to have stability, permanency and mutual interdependence.” Id. at 202, 729 A.2d 7. As we observed,

[t]he ordinary understanding of cohabitation is based on those factors that make the relationship close and enduring and requires more than a common residence, although that is an important factor. Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, living together, § 103 intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple’s social and family circle.

[Ibid.]

We acknowledged in Konzelman that an application to enforce a cohabitation provision in a PSA requires careful oversight by the trial court, noting that “[p]rivacy concerns may be addressed and mitigated by judicial supervision over agreements” so that the provision is not “an instrument for vindictive, vengeful, or oppressive actions on the part of the supporting spouse.” Id. at 201, 729 A.2d 7. We cautioned that a court applying a cohabitation provision “does not abrogate its equitable jurisdiction over divorce arrangements and its responsibility to assure fairness in the implementation of such arrangements.” Ibid.

In Konzelman, we did not address the prima facie showing that warrants discovery and a plenary hearing; in that appeal, the trial court had conducted a plenary hearing and had determined the merits of

the application. Id. at 192-93, 729 A.2d 7. We did not impose the burden to disprove cohabitation on the spouse or civil union partner receiving alimony; to the contrary, we made clear that in a motion to terminate or suspend alimony because of alleged cohabitation, the movant has the burden to “show cohabitation to the satisfaction of the court.” Id. at 202, 729 A.2d 7. We found that the movant in that appeal had met that burden, and we terminated alimony. Id. at 202-03, 729 A.2d 7.

## B.

On September 10, 2014, the Legislature enacted a comprehensive amendment to the alimony statute. L. 2014, c. 42, § 1. As amended, the statute prescribes a standard for trial courts to apply when they determine whether the record supports a finding of cohabitation, including factors similar to those identified in Konzelman, 158 N.J. at 202, 729 A.2d 7. N.J.S.A. 2A:34-23(n) provides in relevant part that

[a]limony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship § 104 in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

- (1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
- (2) Sharing or joint responsibility for living expenses;
- (3) Recognition of the relationship in the couple’s social and family circle;
- (4) Living together, the frequency of contact, the duration of the relation-



ship, and other indicia of a mutually supportive intimate personal relationship;

(5) Sharing household chores;

(6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of [N.J.S.A.] 25:1-5; and

(7) All other relevant evidence.

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

Before enacting the 2014 amendment to N.J.S.A. 2A:34-23, the Legislature considered and rejected bills that would have authorized trial courts to “modify, suspend, or terminate” alimony “only if . . . the economic benefit inuring to the payee is sufficiently material to constitute a change of circumstances.” See S. 488 (2014); A. 845 (2014). In the statute as enacted, the financial relationship between the spouse or civil union partner receiving alimony and the alleged cohabitant is not itself dispositive, but is instead addressed in three of the factors to be considered by the trial court: “[i]ntertwined finances such as joint bank accounts and other joint holdings or liabilities,” N.J.S.A. 2A:34-23(n)(1); “[s]haring or joint responsibility for living expenses,” *id.* at (n)(2); and the existence of an “enforceable promise of support” to the spouse or civil union partner receiving alimony, *id.* at (n)(6).

The 2014 amendment to the alimony statute provided that it

shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for

contractual provisions that have been incorporated into

a. a final judgment of divorce or dissolution;

L. 2014, c. 42, § 2.  
b. a final order that has concluded post-judgment litigation; or

c. any enforceable written agreement between the parties.

[L. 2014, c. 42, § 2.]

In Quinn, we held that the statute did not govern the motion for termination in that case because it “was enacted after the PSA was entered.” 225 N.J. at 51 n.3, 137 A.3d 423; accord Spangenberg v. Kolakowski, 442 N.J. Super. 529, 538-39, 125 A.3d 739 (App. Div. 2015).

### C.

Our decisions in Gayet, Konzelman, and Quinn did not address the prima facie showing necessary for a court to order discovery in a dispute over cohabitation. See Quinn, 225 N.J. at 48-55, 137 A.3d 423; Konzelman, 158 N.J. at 193-203, 729 A.2d 7; Gayet, 92 N.J. at 150-55, 456 A.2d 102. The Appellate Division, however, has recently addressed that issue in two precedential decisions.

In Landau v. Landau, the Appellate Division rejected the contention of a plaintiff former spouse seeking to terminate, suspend, or modify alimony that, after the enactment of N.J.S.A. 2A:34-23(n), it was no longer necessary to make a prima facie showing of cohabitation before being permitted to conduct discovery. 461 N.J. Super. 107, 114-19, 218 A.3d 823 (App. Div. 2019). The appellate court found “no indication the Legislature evinced any intention to alter the Lepis changed circumstances paradigm when it defined cohabitation and enumerated the factors a court is to consider in determining ‘whether cohabitation is occurring’ in the 2014 amendments to N.J.S.A. 2A:34-23.” *Id.* at

116, 218 A.3d 823. It held that, in the wake of the 2014 amendments to the alimony statute, “the Lepis paradigm requiring the party seeking modification to establish [a] prima facie showing of changed circumstances . . . before a court will order discovery of an ex-spouse’s financial status’ continues to strike a fair and workable balance between the parties’ competing interests.” Id. at 118-19, 218 A.3d 823 (quoting Lepis, 83 N.J. at 157, 416 A.2d 45). The appellate court stated “that a prima facie showing of cohabitation can be difficult to establish,” but commented that the burden “is hardly a new 106 problem and it cannot justify the invasion of defendant’s privacy represented by the order entered here.” Id. at 118, 218 A.3d 823. It reversed the trial court’s order compelling discovery. Id. at 119, 218 A.3d 823.

In Temple v. Temple, the Appellate Division acknowledged that the issue presented in Landau was whether a prima facie showing is necessary before discovery is ordered, not the contours of that prima facie showing; it noted that “[w]hat constitutes that showing has not been precisely defined since the 2014 enactment of N.J.S.A. 2A:34-23(n).” 468 N.J. Super. 364, 368-69, 258 A.3d 1109 (App. Div. 2021). The appellate court rejected the argument that in a case governed by the 2014 amendments to the alimony statute, evidence of all six specific factors prescribed by N.J.S.A. 2A:34-23(n) “must be presented for a movant to establish a prima facie case of cohabitation.” Id. at 370, 258 A.3d 1109.<sup>2</sup> The Appellate Division questioned how any movant could present a prima facie showing of “[i]ntertwined finances such as joint bank accounts and other joint

holdings or liabilities” under N.J.S.A. 2A:34-23(n)(1), or “sharing or joint responsibility for living expenses” under N.J.S.A. 2A:34-23(n)(2), without discovery. Id. at 369-70, 258 A.3d 1109.

Acknowledging that “family judges should be careful not to permit a fishing expedition into a supported spouse’s private affairs on a weak claim,” the Appellate Division found it unfair that the plaintiff had “the burden of demonstrating the factual sufficiency of his claim when most of the relevant information” was in the defendant’s possession. Id. at 375-76, 258 A.3d 1109.

The Appellate Division held in Temple that, for a prima facie showing, “[i]t is enough that the movant present evidence from which a trier of fact could conclude the supported spouse and 107 another are in ‘a mutually supportive, intimate personal relationship’ in which they have ‘undertaken duties and privileges that are commonly associated with marriage or civil union.’” Id. at 371, 258 A.3d 1109 (quoting N.J.S.A. 2A:34-23(n)). Concluding that the plaintiff had met that standard, the appellate court remanded the matter for discovery and an evidentiary hearing. Id. at 377, 258 A.3d 1109.

#### IV.

##### A.

[9-11] We review the trial court’s decision denying defendant’s motion under a deferential standard, giving “‘due recognition to the wide discretion . . . our law rightly affords to the trial judges who deal with these matters.’” Spangenberg, 442

2. Noting that the PSA in Temple preceded the enactment of N.J.S.A. 2A:34-23(n) but the allegations focused on the alleged cohabitation “after the statute’s enactment,” and acknowledging the lack of clear evidence regarding

the parties’ intent, the appellate court declined to decide in Temple whether the statute governed the parties’ dispute. 468 N.J. Super. at 376 n.8, 258 A.3d 1109.

N.J. Super. at 536, 125 A.3d 739 (quoting Martindell v. Martindell, 21 N.J. 341, 355, 122 A.2d 352 (1956)); see also Innes, 117 N.J. at 504, 569 A.2d 770 (“The modification of alimony is best left to the sound discretion of the trial court.”). We limit our review to the question “whether the court made findings inconsistent with the evidence or unsupported by the record, or erred as a matter of law.” Reese v. Weis, 430 N.J. Super. 552, 572, 66 A.3d 157 (App. Div. 2013). However, to the extent that the trial court premised its decision on an interpretation of N.J.S.A. 2A:34-23(n), we review de novo that legal determination. W.S. v. Hildreth, 252 N.J. 506, 518, 287 A.3d 421 (2023).

B.

We first address the question whether the cohabitation standard of Konzelman or the test prescribed in N.J.S.A. 2A:34-23(n) governs this appeal.

[12] In this case, because the parties’ PSA was executed before N.J.S.A. 2A:34-23(n) was enacted, we view the appeal to be governed by the definition of “cohabitation” and the factors identified in Konzelman, 158 N.J. at 202, 729 A.2d 7, not by the 100s statutory definition and factors set forth in N.J.S.A. 2A:34-23(n). See Quinn, 225 N.J. at 51 n.3, 137 A.3d 423 (declining to apply N.J.S.A. 2A:34-23(n) to a case in which the parties’ PSA was executed before the statute was in effect); L., 2014, c. 42, § 2 (providing that the 2014 amendments to N.J.S.A. 2A:34-23 do not “modify . . . specifically bargained for contractual provisions that have been incorporated into . . . a final judgment of divorce”).

[13] We recognize, however, that the two standards are closely analogous. See Landau, 461 N.J. Super. at 117 n.8, 218 A.3d 823 (noting that the Legislature “essentially adopted the definition of cohabita-

tion the Court endorsed in Konzelman”). Compare Konzelman, 158 N.J. at 202, 729 A.2d 7, with N.J.S.A. 2A:34-23(n). We view the procedure for a prima facie showing of cohabitation in cases governed by N.J.S.A. 2A:34-23(n) to be virtually identical to the procedure for a prima facie showing of cohabitation in cases governed by Konzelman, and we thus address the requirements for such a showing in both categories of cases.

C.

[14, 15] As our case law recognizes, the prima facie showing is distinct from the final proofs that are the basis for an adjudication on the merits; it is simply a threshold showing required so that the privacy of the spouse or civil union partner receiving alimony is not invaded in pursuit of a baseless cohabitation claim. See Konzelman, 158 N.J. at 201, 729 A.2d 7 (noting the trial court’s obligation to protect the party receiving alimony from abusive tactics); Temple, 468 N.J. Super. at 375, 258 A.3d 1109 (cautioning trial courts not to permit intrusive discovery based on a weak claim); Landau, 461 N.J. Super. at 118-119, 218 A.3d 823 (discussing the requirement of a prima facie showing). We respectfully disagree with the Appellate Division’s observation in Landau that “[t]here is no question but that a prima facie showing of cohabitation can be difficult to establish.” 461 N.J. Super. at 117, 218 A.3d 823 (citing Konzelman, 158 N.J. at 191-92, 729 A.2d 7). Although a litigant may devote considerable resources to gathering information<sup>100</sup> to support a motion to terminate or suspend alimony, as did the movant in Konzelman, the mandate that a movant present a prima facie showing in order to obtain discovery is not intended to impose a high bar.

[16, 17] To the contrary, prima facie evidence is defined as “evidence that, if

unrebutted, would sustain a judgment in the proponent's favor." Baures v. Lewis, 167 N.J. 91, 118, 770 A.2d 214 (2001), overruled on other grounds by Bisbing v. Bisbing, 230 N.J. 309, 328-36, 166 A.3d 1155 (2017). In a prima facie showing, the movant is "entitled to an assumption of the truth of his allegations and the benefit of all reasonable inferences to be drawn from the evidence he had marshaled." Temple, 468 N.J. Super. at 368, 258 A.3d 1109. The movant's burden at the preliminary stage is not an onerous one.

[18, 19] Consistent with that standard, the movant's certifications, if supported by competent evidence, "should not be read restrictively or literally to determine whether alone they spell out a claim for relief, nor should their probative worth be neutralized or discounted by the opposing certifications." Conforti v. Guliadis, 128 N.J. 318, 328, 608 A.2d 225 (1992); see also Temple, 468 N.J. Super. at 375, 258 A.3d 1109 (noting that "[t]here may be non-cohabitation explanations" for evidence presented by the movant in his prima facie showing, "but the only question for the judge . . . was whether [the movant] presented enough to entitle him to discovery and an evidentiary hearing").<sup>3</sup> In other words, the trial court should not find that the movant has failed to present a prima facie showing simply because the parties' certifications dispute relevant facts.

Id. We next address the question whether the movant must proffer evidence on all of the applicable cohabitation factors, or just some of the factors, in order to present a prima facie showing.

[20] In cases that are governed by Konzelman rather than N.J.S.A. 2A:34-

23(n), the relevant factors "include, but are not limited to, living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle." 158 N.J. at 202, 729 A.2d 7. In cases to which N.J.S.A. 2A:34-23(n) applies, the court must "consider" the statute's seven enumerated factors, including "[a]ll other relevant evidence." N.J.S.A. 2A:34-23(n)(7).

[21] Nothing in Konzelman or N.J.S.A. 2A:34-23(n) suggests that the movant must present evidence relevant to all of the factors in order to set forth a prima facie case. Indeed, any such requirement would impose an unfair burden on a movant at the preliminary stage. Absent discovery, a movant is unlikely to have access to the financial records and other documents relevant to Konzelman's financial factors -- "intertwined finances such as joint bank accounts" and "sharing living expenses" -- or their statutory counterparts, N.J.S.A. 2A:34-23(n)(1) and (n)(2).

[22] As the Appellate Division noted in Temple, "[p]eople tend to treat financial information as confidential and do not normally volunteer it to others, let alone former spouses obligated to pay them alimony." 468 N.J. Super. at 370, 258 A.3d 1109. When the court determines whether there is a prima facie showing, "most information relevant to cohabitation is not readily available to movants," and the motion at that stage is thus "akin to summary judgment motions filed prior to the completion of discovery." Id. at 375, 258 A.3d 1109. We agree with defendant that at the prima facie stage, any requirement that a movant

3. Although the evidence presented to the trial court in Temple constitutes an example of a sufficient prima facie showing, 468 N.J. Super. at 371-75, 258 A.3d 1109, Temple does not establish the minimum quantum of evi-

dence required for such a showing. The trial court's inquiry is case-specific, and the evidence that is sufficient to establish a prima facie showing will vary depending on the circumstances of a given case.

present financial evidence showing cohabitation would impose too onerous a burden.

[23, 24] Accordingly, we decline to require a movant seeking to present a prima facie showing to proffer evidence on all of the 11 cohabitation factors in Konzelman, or on all of the cohabitation factors set forth in N.J.S.A. 2A:34-23(n) in cases governed by the statute. Instead, if the movant presents a certification supported by competent evidence as to at least some of the relevant factors, and if that evidence, if un rebutted, would sustain the movant's burden of proof as to cohabitation, the trial court should find that the movant has made a prima facie showing even if the spouse or civil union partner receiving alimony presents a certification contesting facts asserted by the movant. See Conforti, 128 N.J. at 328, 608 A.2d 225; Temple, 468 N.J. Super. at 375, 258 A.3d 1109. The movant need not address all of the factors identified in the governing standard.

Finally, we briefly address the procedure to be followed by the trial court if it finds that the movant has presented a prima facie showing of cohabitation.

[25] If the trial court makes such a finding, it should order limited discovery as to discrete issues that it determines to be relevant to one or more of the cohabitation factors that govern the case. In fashioning its discovery order, the trial court should take appropriate steps to safeguard the privacy of the spouse or civil union

partner receiving alimony and the individual with whom that person is alleged to be cohabiting. Those steps may include, but are not limited to, constraints on the discovery to be provided to the movant and protective orders limiting access to the information subject to discovery. See Konzelman, 158 N.J. at 201, 729 A.2d 7 (noting the importance of judicial supervision to address privacy concerns); see also Administrative Directive #02-22, "Family - - Revised Standard Protective Order" (Apr. 5, 2022). See generally R. 4:10-3 (addressing protective orders in civil practice).

Our current Family Part court rules do not address post-judgment discovery in connection with a motion to terminate or suspend alimony based on cohabitation. We therefore request that the Family Practice Committee propose amendments to the court rules governing such discovery and uniform interrogatories to streamline the discovery process in such cases.

11[26, 27] Following the completion of limited discovery, the parties should file supplemental certifications in support of and in opposition to the motion. If material facts remain in dispute following discovery and the submission of supplemental certifications, the trial court must conduct a plenary hearing to determine the motion to terminate or suspend alimony. We reiterate our holding in Konzelman, 158 N.J. at 202, 729 A.2d 7, that the movant bears the burden of proving cohabitation at all stages of the proceeding.<sup>1</sup>

4. We decline to adopt the argument of defendant and amicus curiae the New Jersey State Bar Association that a prima facie showing by the movant should shift the burden of proof to the spouse or civil union partner receiving alimony to disprove cohabitation. In the pre-Konzelman Appellate Division and trial court decisions cited by defendant and amicus in which the courts shifted the burden to the opposing party, the burden was shifted because the movant lacked access to evidence

relevant to cohabitation. See Ozolins v. Ozolins, 308 N.J. Super. 243, 248-49, 705 A.2d 1230 (App. Div. 1998) (holding that it would be unreasonable to impose the burden of proof on a party lacking access to the evidence necessary to support that burden of proof); Frantz v. Frantz, 256 N.J. Super. 90, 92-93, 606 A.2d 423 (Ch. Div. 1992) (same). A trial court's order granting limited discovery in cohabitation cases following a prima facie

## D.

[28] Here, defendant asserted that plaintiff and McDermott were in a mutually supportive relationship of at least eight years' duration in which they undertook duties commonly associated with marriage. See Konzelman, 158 N.J. at 202, 729 A.2d 7. Although defendant did not proffer evidence that plaintiff and McDermott had "intertwined finances such as joint bank accounts" or that they were "sharing living expenses," ibid., he did present evidence regarding other factors identified in Konzelman.

First, defendant presented evidence relevant to whether plaintiff and McDermott were "living together." See ibid. Defendant submitted to the trial court the report of his private investigator demonstrating that plaintiff and McDermott were together on each of the forty-four days over which the investigator conducted 11h surveillance; that they were together overnight on more than half of those days; and that plaintiff had access to McDermott's home whether or not he was present. Defendant also submitted photographs from social media depicting plaintiff and McDermott on vacation together.

Second, defendant presented evidence that plaintiff and McDermott shared household chores. See ibid. The private investigator's report included the investigator's observations and photographs of plaintiff and McDermott transporting groceries, bags of personal belongings, and laundry at one another's residences.

Third, defendant presented evidence relevant to "recognition of the relationship in the couple's social and family circle." See ibid. He submitted to the trial court photographs from social media accounts maintained by plaintiff and McDermott depict-

ing them at social events together and with the parties' children.

We do not address whether the evidence presented by defendant -- in its current form or as potentially buttressed by financial information following discovery -- establishes cohabitation under the Konzelman standard. That question will be addressed by the trial court on a full record. Assuming, for purposes of the prima facie inquiry, that defendant's contentions are correct, we view the evidence he presented to constitute a prima facie showing of cohabitation.

[29] Accordingly, we find that the trial court did not properly exercise its discretion when it denied defendant's motion without discovery, and we reverse the Appellate Division's judgment affirming the trial court's determination. On remand, the trial court must order plaintiff to provide limited discovery, and conduct a plenary hearing in the event that it finds disputes of material fact after discovery and the submission of supplemental certifications.

## V.

The judgment of the Appellate Division is reversed, and the matter is remanded to the trial court for further proceedings in accordance with this opinion.

CHIEF JUSTICE RABNER and JUSTICES SOLOMON, PIERRE-LOUIS, WALNER APTER, and FASCIALE join in JUSTICE PATTERSON's opinion. JUDGE SABATINO (temporarily assigned) did not participate.



showing resolves the concerns expressed in

those decisions.



# **What Every Lawyer Practicing Family Law in 2024 Needs to Know: Cross-Disciplinary Collaboration is Key**

New Jersey State Bar Association  
Family Law Retreat

March 21, 2024

**Sharon L. Klein**  
Executive Vice President  
Head of National Divorce Advisory Practice



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Sharon is President of Family Wealth, Eastern U.S. Region, for Wilmington Trust, N.A. She is responsible for overseeing the delivery of all Wealth Management services by teams of professionals, including planning, trust, investment management, family governance and education, family office, and private banking services. Sharon also heads Wilmington Trust's National Divorce Advisory Practice.

Sharon has over 25 years of experience in the wealth advisory arena and is a nationally recognized speaker and author. Global media company *Forbes* has featured Sharon as a Top Advisor in multiple categories since 2020. In 2022, 2023 and 2024 she was selected as one of the Top 50 Women Wealth Advisors in America, one of the Top 10 in New York and one of the Top 5 in New York City. Leading business publication *Crain's* named Sharon to its 2020 inaugural list of the Most Notable Women in Financial Advice. In 2023, Sharon was chosen as a Leading High Net Worth Wealth Manager by *Chambers*, an internationally renowned independent ranking company. In 2018, she was honored by the UJA-Federation of New York Lawyers Division for her contributions to the trusts & estates community and the community at large. Sharon is a Fellow of the American College of Trust and Estate Counsel, a highly selective professional organization of preeminent estate planning attorneys in the U.S. and internationally. Sharon was inducted into the Estate Planning Hall of Fame in 2021. This honor is considered the pinnacle of accomplishment in this field. Only 125 people across the U.S. have received the award since its inception in 2004.

Sharon is a member of The Rockefeller University Committee on Trust and Estate Gift Plans, the New York Bankers Association Trust & Investment Division Executive Committee, the Estates, Gifts and Trusts Advisory Board for The Bureau of National Affairs and the Thomson Reuters Trusts & Estates Advisory Board. She chairs the Domestic Relations Committee of *Trusts & Estates* magazine, where she sits on the Board, and is on the Advisory Board of *Family Lawyer Magazine*. Sharon served on the Board of the American Brain Foundation and was a member of its Finance Committee.

Prior to joining Wilmington Trust, Sharon was Managing Director at Lazard, the internationally renowned global investment banking and management company. As Head of Wealth Advisory of Lazard Wealth Management, she led the delivery of all wealth advisory services. Before that, she headed the Estate department at Fiduciary Trust Company International. Sharon began her career as a trusts & estates attorney at Rosenman & Colin (now Katten Muchin Rosenman LLP).

Sharon, who holds U.S., British and Australian citizenships, earned a master of laws from the Boalt Hall School of Law at the University of California, Berkeley, received a bachelor of arts and a bachelor of laws from the University of New South Wales, Australia and is a Certified Divorce Financial Analyst.

\* Please see link for more information about awards: <https://www.wilmingtontrust.com/about-us/awards>



# Considerations for Representing Clients in Divorce

- Increasing overlap among professional disciplines
- Need cross-disciplinary fluency



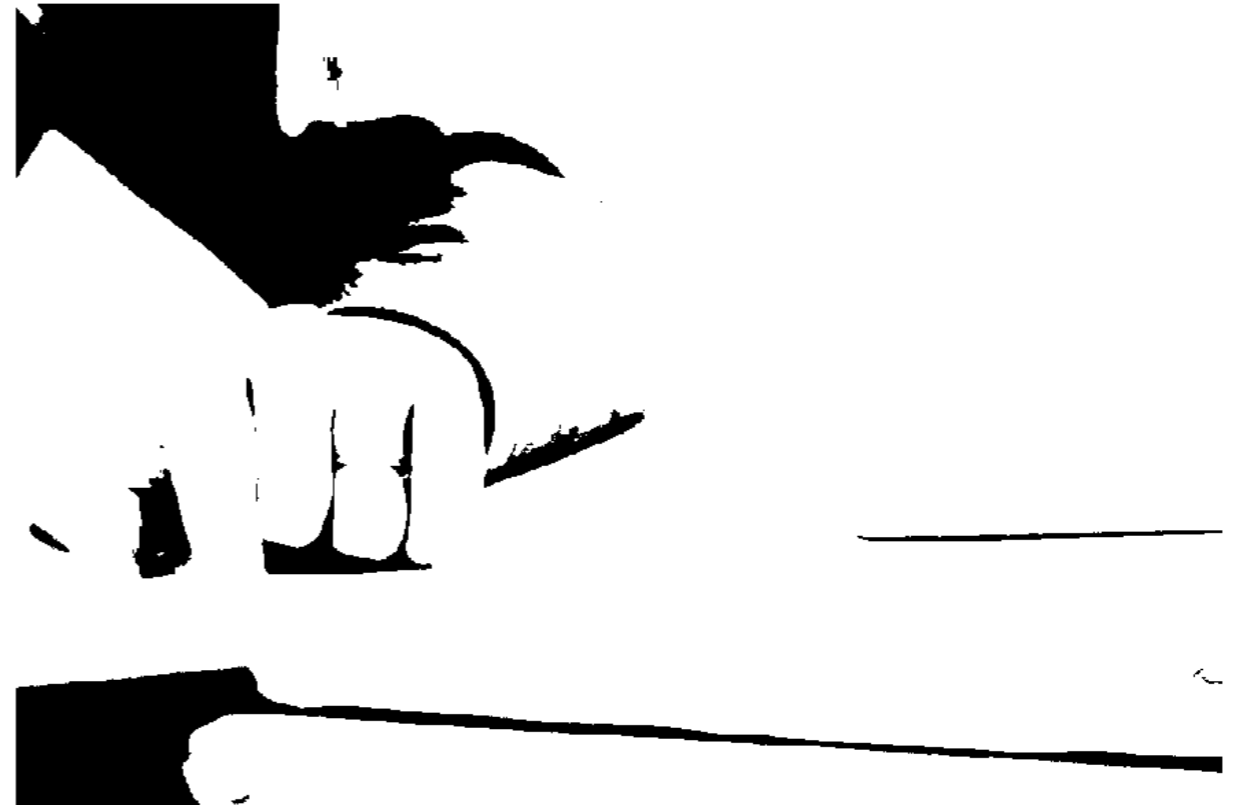
# In the Event of Separation and/or Divorce, Review Documents & Run Analytics

Wills and trusts

Powers of attorney and healthcare directives

Retirement accounts and plans, other beneficiary designations, such as life insurance

Jointly named real estate and financial accounts



# In the Event of Separation and/or Divorce, Review Documents & Run Analytics

**A global asset summary report, including cash flow projections and risk assessment, can provide important analytics**

Risk vs. Return

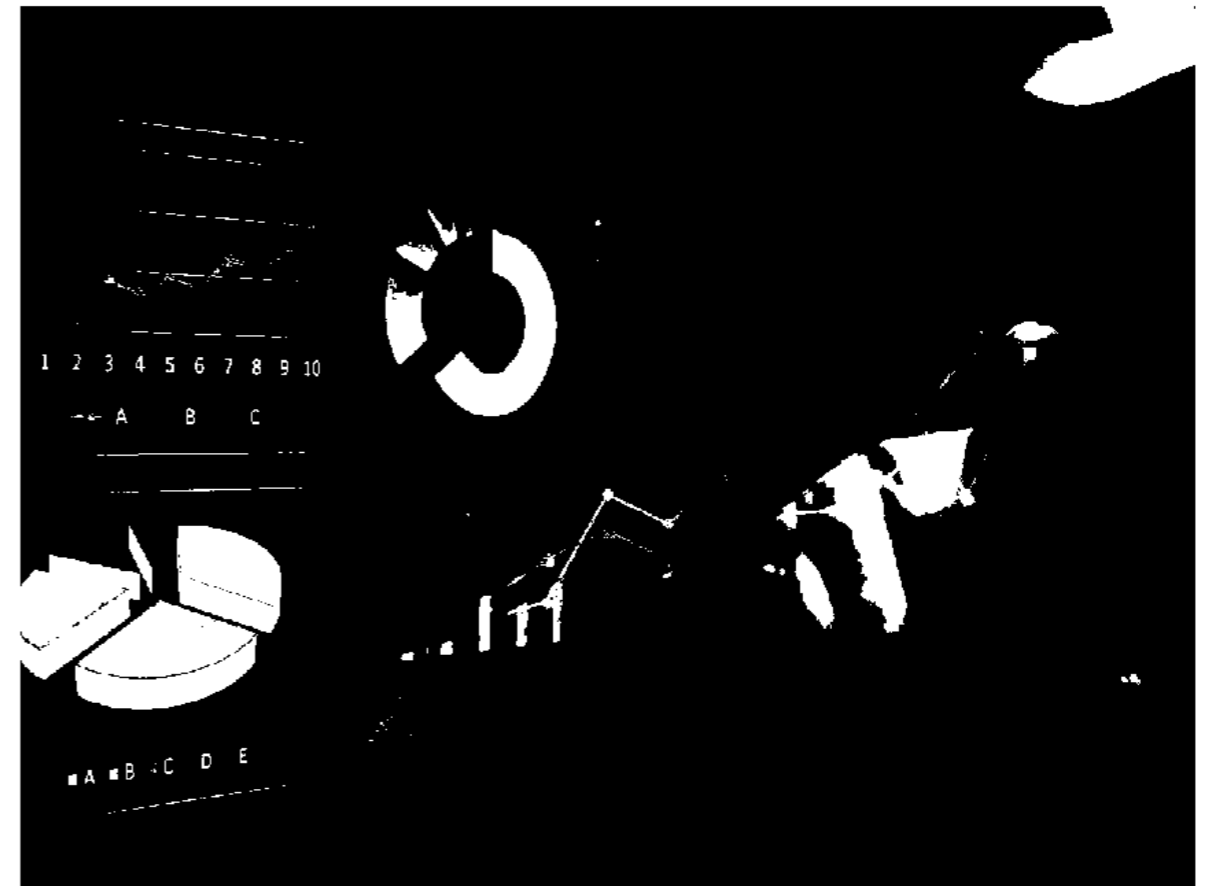
Asset Characteristics Matter

Portfolio Sustainability

Cash Flows

Tax Impact

Optimize Portfolio Allocation



# Use of Leverage

Closely held business interests

Partnership interests

Real estate (personal and investment)

Artwork and other collectibles

Private market interests with liquidity restraints

Aircrafts and watercrafts



# Accessing Trust Assets in Divorce

## Start with the trust terms:

Who created the trust?

Who are the beneficiaries?

On what basis can the trustee make distributions?

Is there a spendthrift provision?

Does a beneficiary have control powers?

Is the settlor's intent clear?

Who is the trustee?



# Accessing Trust Assets in Divorce

Have distributions been relied on to fund lifestyle, or were they irregular and uneven?

A leading case is *Tannen v. Tannen*, 416 N.J. Super. 248, 3 A.3d 1229 (App. Div. 2010), *aff'd*, 208 N.J. 409, 31 A.3d 621 (2011)

Does marital property transferred into an irrevocable trust lose its character as marital property?

Definition of “spouse”



# Delaware Asset Protection Trust (DAPT)

DAPT:

is an irrevocable trust created under Delaware law, with Delaware trustee

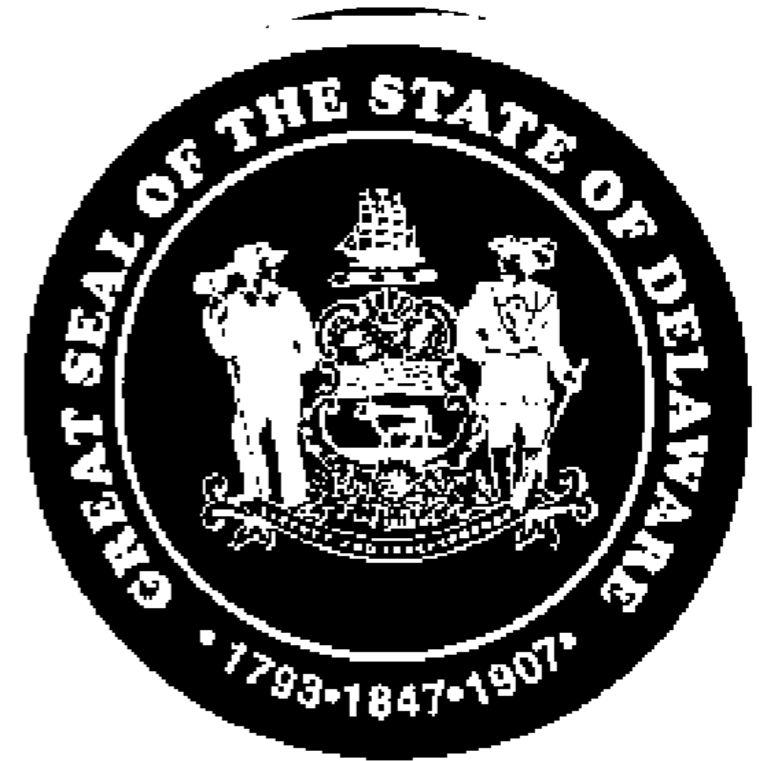
generally limits ability of an individual's creditors to reach trust assets

allows trust creator to remain trust beneficiary, including:

- Right to receive current income distributions

- Right to receive a 5 percent annual unitrust payout

- Ability to receive income or principal in discretion of independent trustee.



Note that a few states, including Delaware, have special trust advantages that may not be available under the laws of your state of residence, including asset protection trusts and direction trusts.

# Delaware Asset Protection Trust (DAPT)

Those who can potentially pursue claim are limited: spouse, former spouse, or minor child with claim resulting from agreement or court order for alimony, child support, or property division incident to judicial proceeding regarding separation or divorce

Does not include spouse if settlor marries *after* creating trust

Allowing independent corporate trustee broad discretion to make distributions to class of beneficiaries recommended



# Lessons Learned for Analyzing if Trusts Vulnerable to Attack in Divorce

Broad, unfettered distribution discretion

Open class of beneficiaries (instead of one beneficiary)

Detailed spendthrift provision

Clear recital of settlor's intent that trust assets should not be treated as marital property

Independent corporate trustee

Requiring beneficiary's spouse to waive marital rights as prerequisite to distribution

Requiring a prenuptial agreement

If trust created during marriage:

- Defining spouse as spouse to whom trust creator is married at time of distribution (self-adjusts)

- Requiring that current spouse be married to trust creator

# Trust Decanting Can Be a Powerful Tool:

With decanting, trustee can pour assets of otherwise irrevocable trust into new trust with different terms

Changing trustees

Changing investment limitations or directions

Limiting a beneficiary's rights

Eliminating a beneficiary

# Trust Decanting Can Be a Powerful Tool

- Decanting authorized, trust assets successfully moved out of reach of divorcing spouse
  - *Ferri v. Powell-Ferri*, 476 Mass. 651, 72 N.E.3d 541 (2017) and *Ferri v. Powell-Ferri*, 326 Conn. 438, 165 A.3d 1137 (2017)
- New trust not marital asset, but could be considered in determining alimony
  - *Powell-Ferri v. Ferri*, 326 Conn. 457, 165 A.3d 1124 (2017)



# Trust Decanting Can Be a Powerful Tool

- Important in *Ferri* case was that decanting occurred without husband's permission, knowledge or consent
- Including decanting provisions in trust instruments may maximize flexibility without resorting to state default law
  - Check trust provisions to see if decanting is permitted under document itself
- Trustees successfully relied on powers under trust document without reliance on New York statute
  - ***Davidovich v. Hoppenstein***, 162 A.D.3d 512, 79 N.Y.S.3d 133 (2018)

# Life Insurance

In many divorce proceedings, life insurance plays an integral role

Critical to review life insurance policies periodically to ensure they are performing as intended

*NOW, therefore, it is the intent of the Court that:*

- 1. All property which belongs to the personal estate, including real property, and said property*

# Life Insurance

Other important issues that may be uncovered by having a disciplined policy review procedure in place include:

Are premium notices being sent to correct address and are premiums being paid on time?

Is policy properly titled from an ownership perspective?

Does policy have correct beneficiary designation?

Are taxes apportioned as intended?

What is value of life insurance policies for divorce settlement purposes?

# Recent Developments Regarding Stored Genetic Material

## **Contractual Approach –**

honors an agreement entered into by the parties

## **Contemporaneous Mutual Consent Approach –**

disallows disposition unless there is mutual consent at the time the decision is being made

## **Balancing Approach –**

court evaluates interests of both parties

## **Hybrid Approach –**

honors an advance agreement, in absence of agreement, court evaluates interests of both parties

# Recent Developments Regarding Stored Genetic Material

Intestacy statutes ambiguous

States have begun to enact legislation to define inheritance rights of posthumously conceived children

27 states have enacted legislation addressing this issue





# The Bottom Line

- Clients benefit when matrimonial, trusts and estates, and investment professionals partner to balance considerations that cross disciplines
- Advisors who take a collaborative approach can most effectively represent clients



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## SYLLABUS

This syllabus is not part of the Court’s opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

### **S.T. v. 1515 Broad Street, LLC (A-87-18) (081916)**

**Argued November 6, 2019 -- Decided March 9, 2020**

**ALBIN, J., writing for the Court.**

Only when, through proper legal procedures, a court determines that a litigant lacks the mental capacity to govern her affairs may the litigant be deprived of the right to decide the destiny of her lawsuit. In this appeal, the Court considers whether the trial court adhered to those procedures when it empowered a guardian ad litem to make “any and all decisions regarding the ultimate disposition of this case, whether by trial or settlement,” on behalf of plaintiff S.T. without ever conducting a guardianship hearing.

On March 11, 2008, S.T. was a forty-four-year-old chemical engineer fluent in four languages. She came to this country as a teenage refugee from Vietnam and later served in the United States Army. She held a bachelor’s degree in chemical engineering and master’s degrees in both chemical engineering and environmental sciences. On the evening of March 11, S.T. was working as a chemical engineer at ABB Lummis Global, located at 1515 Broad Street in Bloomfield, N.J. While exiting the building, S.T. was struck in the head by a metal plate that fell from above the building’s doorway. The next day, she went to the hospital, was diagnosed with a concussion, and was given intravenous medications for the pain. That was the first of more than 500 visits S.T. made to healthcare providers to address a constellation of conditions related to her claim that she suffered a traumatic brain injury.

One year after the accident, the Social Security Administration declared S.T. permanently disabled and awarded her permanent disability benefits. A clinical psychologist diagnosed S.T. as suffering from cognitive, anxiety, and depressive disorders and opined that S.T.’s cognitive impairment is “expected to be a chronic and permanent condition.” A forensic psychiatrist diagnosed S.T. as suffering from such conditions as post-concussion syndrome, major depressive disorder, post-traumatic migraine disorder, intracranial hypertension, and left trigeminal neuralgia and found those conditions to be “causally related to the accident and . . . permanent in nature.” A 2013 psychological report indicated that S.T.’s “[m]easures of verbal comprehension . . . suggest[ed] a superior level of receptive language functions” and that her “measures of nonverbal domains including memory, spatial processing and nonverbal abstract reasoning” were above average. On the other hand, her speed in processing complex information remained impaired.

In February 2010, S.T. filed a civil complaint alleging that she suffered serious injuries resulting from the negligence of the building owner and other purported responsible parties. In July 2013, defendants filed an offer of judgment in the amount of \$475,000 to settle the case. S.T. rejected the offer against the advice of her attorney.

Because the attorney believed that S.T. suffered from a diminished mental capacity and that her rejection of defendants' offer was not in her best interests, he applied to the trial court for the appointment of a guardian ad litem and arranged for the forensic psychologist to examine S.T. again. The doctor opined that S.T. "shows a diminished capacity to fully consider the risks of her decisionmaking in regard to how to proceed with the case." S.T. later asserted that she was not advised of the purpose of the examination.

The court appointed attorney Frederick Miceli as a guardian ad litem and then ceded to him the authority to determine whether S.T. had the mental capacity to make an informed decision on whether to accept or reject a settlement offer. Miceli reviewed the "extensive case materials," including the discovery and medical records, and interviewed S.T. twice in person and once over the telephone. He finally expressed his opinion that a guardian ad litem should be entrusted with the authority to decide for S.T. whether the case should be resolved by trial or settlement. Without conducting a guardianship hearing, the court entered an order empowering Miceli to make "all decisions regarding the ultimate disposition of this case, whether by trial or settlement in accordance with the powers of a Guardian Ad Litem as set forth in the Rules of Court."

Without S.T.'s consent, an agreement was reached among the parties to settle the lawsuit for the sum of \$625,000. The court conducted a "friendly hearing" to assess the reasonableness and fairness of the settlement and to determine whether to approve it. Based on the recommendation of the guardian ad litem and S.T.'s personal-injury attorney, the court accepted a settlement of the lawsuit against S.T.'s forceful objections.

The Appellate Division affirmed the judgment of the trial court and the procedures that led to the approval of the settlement. 455 N.J. Super. 538, 548-49 (App. Div. 2018). The Court granted S.T.'s petition for certification. 238 N.J. 437 (2019).

**HELD:** Before depriving S.T. of the right to control the direction of her case and appointing a guardian to make legal decisions on her behalf, the court was required to conduct a hearing to determine whether she lacked "sufficient capacity to govern [herself] and manage [her] affairs" "by reason of mental illness or intellectual disability." See N.J.S.A. 3B:1-2; N.J.S.A. 3B:12-24; R. 4:86-4. At such a hearing, S.T. had the right to independent counsel. See R. 4:86-4(a)(7). In the absence of a guardianship hearing and a judicial finding by clear and convincing evidence that S.T. lacked the requisite mental capacity to decide how to proceed with her lawsuit, the court had no authority to accept a settlement against S.T.'s wishes.

1. Generally, a lawyer agrees to pursue the goals of a client to the extent the law permits, even when the lawyer believes that the client's desires are unwise. RPC 1.14(b) presents an exception to that rule; it permits a lawyer who "reasonably believes that the client has diminished capacity, is at risk of substantial . . . financial . . . harm unless action is taken and cannot adequately act in the client's own interest" to "take reasonably necessary protective action, including . . . in appropriate cases, seeking the appointment of a guardian ad litem." The Court does not question that S.T.'s attorney acted in good faith when he requested the appointment of a guardian ad litem. S.T.'s counsel, however, erred in not copying his client on the motion for the appointment of a guardian ad litem. The Court agrees with the Appellate Division that when "counsel for an alleged mentally incapacitated person makes a motion to appoint a [guardian ad litem]," the motion must be served on that person. See 455 N.J. Super. at 560 n.3. (pp. 23-25)

2. The Court also finds that the trial court, after reviewing S.T.'s counsel's certification along with the attached expert medical reports, properly exercised its discretion in appointing a guardian ad litem. The court's order, however, should have cited the basis of the court's authority and made clear the role to be played by the guardian ad litem. The Court explains that the interplay between Rule 4:26-2 and Rule 4:86 is critical to an understanding of how this case should have proceeded. (p. 25)

3. Paragraph (b) of Rule 4:26-2 sets forth the initial procedure that follows when a person is alleged to be mentally incapacitated. Under Rule 4:26-2(a), a guardian for a "mentally incapacitated person" is authorized to prosecute a legal action on her behalf. In contrast, the role of a guardian ad litem for an "alleged mentally incapacitated person" under Rule 4:26-2(b) is more limited: to act as an independent investigator and inform the court on the subject of the client's mental capacity. The Court acknowledges that this rule is not a model of clarity and notes that the interpretive mistakes made by both the trial court and Appellate Division might have been avoided if the language of the rule was more precise. The Court requests that the Supreme Court Civil Practice Committee review Rule 4:26-2 in light of this opinion. (pp. 25-28)

4. After completing its inquiry under Rule 4:26-2(b), the guardian ad litem submits a report to the court containing the results of the investigation and recommends whether a formal hearing should proceed under Rule 4:86. The guardian ad litem's recommendations are not binding on the court; ultimately the court must make its own independent factfindings. The court should not cede its responsibility and authority as the decisionmaker to the guardian ad litem. Nothing in New Jersey's court rules, statutes, or case law suggests that a guardian ad litem appointed to investigate a client's alleged mental incapacity has the power to make legal decisions for the client before a judicial determination on her mental capacity. In this case, Miceli recommended to the court that he be given the authority to decide whether S.T.'s case should be resolved by trial or settlement. Without affording S.T. notice or a hearing and without making a judicial determination that S.T. was a mentally incapacitated person, the court ceded to Miceli the

power to make “all decisions regarding the ultimate disposition of this case, whether by trial or settlement.” By abdicating the Judiciary’s nondelegable oversight and factfinding function, the trial court did not proceed in the constitutional manner prescribed by both Rule 4:86-1 to -8 and N.J.S.A. 3B:12-24 to -35 for the appointment of a guardian of an alleged mentally incapacitated person. (pp. 28-31)

5. An action for guardianship of an alleged incapacitated individual and the proceedings required for a judgment of incapacity are governed by court rule and statute. R. 4:86-1 to -8; N.J.S.A. 3B:12-24 to -35. Rigorous procedural safeguards protect the subject of a guardianship hearing because a finding of incapacity results in an individual’s loss of the right of self-determination. The procedural steps required by New Jersey court rules or statutes were not followed in this case: a guardianship complaint with notice to S.T., accompanied by the affidavits of qualified medical professionals, was never filed; a hearing with the taking of testimony, with S.T. represented by independent counsel, was never conducted; factfindings by the trial court based on clear and convincing evidence were never made; and S.T. was never adjudicated by the court as a mentally incapacitated person. The trial court ceded its judicial function, outsourcing to the guardian ad litem the role of final arbiter of S.T.’s capacity. The issue is not whether there was clear and convincing evidence of S.T.’s incapacity in the record, as the Appellate Division found. See 455 N.J. Super. at 560, 563-64. The issue is that the trial court failed to conduct the hearing -- either a jury or bench trial -- with the due process safeguards required by our court rules and statutes. (pp. 31-33)

6. Rule 4:44-3 provides that “[a]ll proceedings to enter a judgment to consummate a settlement in matters involving . . . mentally incapacitated persons shall be heard by the court without a jury” and that “[t]he court shall determine whether the settlement is fair and reasonable.” Such a proceeding is called a “friendly hearing.” But there was no judicial finding that S.T. was mentally incapacitated in accordance with our court rules and statutes. Without such a finding, the trial court had no authority to conduct a friendly hearing under Rule 4:44-3 or to deny S.T. the right to determine for herself whether to accept a settlement in her case. (pp. 34-35)

7. The Court notes that an additional issue was raised by one defendant: whether the complaint filed against that defendant is barred by the statute of limitations. The Court explains why it declines to pass judgment on or remand that issue. (p. 36)

**The judgment of the Appellate Division is REVERSED, the settlement approved by the trial court is VACATED, and the matter is REMANDED.**

**CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, FERNANDEZ-VINA, and SOLOMON join in JUSTICE ALBIN’s opinion. JUSTICES PATTERSON and TIMPONE did not participate.**

SUPREME COURT OF NEW JERSEY

A-87 September Term 2018

081916

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S.T.,

Plaintiff-Appellant,

v.

1515 Broad Street, LLC,  
The Walsh Company, LLC,  
and County Glass & Metal  
Installers, Inc.,

Defendants-Respondents,

and

County Glass & Metal Installers, Inc.,

Third-Party Plaintiff-Respondent,

v.

Virginia Glass Products,

Third-Party Defendant,

and

IDESCO Corp.,

Third-Party Defendant-Respondent.



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On certification to the Superior Court,  
Appellate Division, whose opinion is reported at  
455 N.J. Super. 538 (App. Div. 2018).

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Argued  
November 6, 2019

Decided  
March 9, 2020

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Charles Dawkins, Jr. argued the cause for appellant (Law Office of Charles Dawkins, Jr., attorneys; Charles Dawkins, Jr., of counsel and on the briefs).

Peter A. Gaudioso argued the cause for respondent County Glass & Metal Installers, Inc. (McElroy, Deutsch, Mulvaney & Carpenter, attorneys; Peter A. Gaudioso, of counsel and on the briefs, and Cassandra J. Neugold, on the briefs).

Gerard H. Hanson argued the cause for respondent Idesco Corp. (Hill Wallack, attorneys; Gerard H. Hanson, of counsel and on the briefs, and Victoria J. Airgood, on the briefs).

Matthew S. Mahoney argued the cause for respondent 1515 Broad Street, LLC (Law Offices of Linda S. Baumann, attorneys; Matthew S. Mahoney, on the briefs).

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JUSTICE ALBIN delivered the opinion of the Court.

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An individual's right to determine how best to pursue her personal and financial affairs -- and the fate of her lawsuit -- is so fundamental that it is embedded in our State Constitution and our laws. See In re M.R., 135 N.J. 155, 166-67 (1994). That right is recognized in our Rules of Professional

Conduct, which command lawyers to “abide by a client’s decisions concerning the scope and objectives of representation” and “abide by a client’s decision whether to settle” or proceed with a lawsuit. See RPC 1.2(a). Lawyers and judges may conclude that a client’s decision to turn down a settlement offer is mistaken or even foolish, but in a system of justice that respects the right of every individual to control her personal destiny, the client’s decision must be honored.

Only when, through proper legal procedures, a court determines that a litigant lacks the mental capacity to govern her affairs may the litigant be deprived of the right to decide the destiny of her lawsuit. Those essential principles are at the heart of the case before us.

Plaintiff S.T. allegedly suffered a serious injury when, as she exited the building where she worked, an object from above the building’s door fell and struck her on the head. The injuries, she asserts, have severely impaired all aspects of her life, including her career. She filed a personal-injury lawsuit against the building owner and other purported responsible parties. S.T. rejected defendants’ offer of judgment against the advice of her attorney. Because the attorney believed that S.T. suffered from a diminished mental capacity and that her rejection of defendants’ offer was not in her best

interests, he applied to the trial court for the appointment of a guardian ad litem.

The court appointed a guardian ad litem and then ceded to the guardian ad litem the authority to determine whether S.T. had the mental capacity to make an informed decision on whether to accept or reject a settlement offer. Based on the recommendation of the guardian ad litem and S.T.'s personal-injury attorney, the court accepted a settlement of the lawsuit against S.T.'s forceful objections.

The Appellate Division affirmed the judgment of the trial court and the procedures that led to the approval of the settlement. S.T. v. 1515 Broad St., LLC, 455 N.J. Super. 538, 548-49 (App. Div. 2018).

We now reverse. The trial court erroneously granted the guardian ad litem the power to make “any and all decisions regarding the ultimate disposition of this case, whether by trial or settlement” without ever conducting a guardianship hearing.

Before depriving S.T. of the right to control the direction of her case and appointing a guardian to make legal decisions on her behalf, the court was required to conduct a hearing to determine whether she lacked “sufficient capacity to govern [herself] and manage [her] affairs” “by reason of mental illness or intellectual disability.” See N.J.S.A. 3B:1-2; N.J.S.A. 3B:12-24; R.

4:86-4. At such a hearing, S.T. had the right to independent counsel. See R. 4:86-4(a)(7). In the absence of a guardianship hearing and a judicial finding by clear and convincing evidence that S.T. lacked the requisite mental capacity to decide how to proceed with her lawsuit, the court had no authority to accept a settlement against S.T.'s wishes.

We therefore vacate the settlement and remand the case to the trial court for further proceedings.

I.

A.

The record is derived from the discovery in S.T.'s personal-injury lawsuit, the pleadings and medical reports filed with the motion for the appointment of a guardian ad litem, and the proceedings related to the settlement of the personal-injury case.

On March 11, 2008, S.T. was a forty-four-year-old chemical engineer fluent in four languages. She came to this country as a teenage refugee from Vietnam and later served in the United States Army. She held a bachelor's degree in chemical engineering and master's degrees in both chemical engineering and environmental sciences.

On the evening of March 11, S.T. was working as a chemical engineer at ABB Lummis Global, located at 1515 Broad Street in Bloomfield, N.J. While

exiting the building, S.T. was struck in the head by a metal plate that fell from above the building's doorway. Immediately after the impact, a security guard and maintenance worker offered to call an ambulance, but S.T. declined help. As S.T. drove home, she experienced double vision and "a severe left-sided headache with swelling of the left jaw, as well as pain behind the left eye and within the left ear." The next day, she went to the hospital, was diagnosed with a concussion, and was given intravenous medications for the pain. That was the first of more than 500 visits S.T. made to healthcare providers to address a constellation of conditions related to her claim that she suffered a traumatic brain injury.

One year after the accident, the Social Security Administration declared S.T. permanently disabled and awarded her permanent disability benefits. Since the accident, S.T. has received ongoing speech and cognitive therapy at the Veterans Administration Hospital.

Beginning in November 2010, S.T. was treated by Dr. Paula Reid, a clinical psychologist. In November 2010, Dr. Reid performed a neuropsychological evaluation and found that S.T. had experienced a "significant reduction in the predicted intellectual performance on verbal comprehension and processing speed." Dr. Reid noted that S.T.'s "processing speed difficulties impaired her performance on many of the tasks which were

time dependent [and] specifically those related to complex” language material. S.T. also exhibited “a significant amount of depressive and anxious symptomology.” Dr. Reid diagnosed S.T. as suffering from cognitive, anxiety, and depressive disorders. Dr. Reid opined that S.T.’s cognitive impairment is “expected to be a chronic and permanent condition.”

Between June 2011 and August 2012, Dr. Peter Crain, a board-certified forensic psychiatrist, examined S.T. and reviewed her medical records.<sup>1</sup> He diagnosed S.T. as suffering from such conditions as post-concussion syndrome, major depressive disorder, post-traumatic migraine disorder, intracranial hypertension, and left trigeminal neuralgia.<sup>2</sup> Dr. Crain found those conditions to be “causally related to the accident and . . . permanent in nature.”

A 2013 psychological report from the Veterans Administration Hospital indicated that S.T. scored varied results on cognitive, intelligence, and psychological assessment tests. On the one hand, the report indicated that S.T.’s “[m]easures of verbal comprehension . . . suggest[ed] a superior level of

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<sup>1</sup> Dr. Crain was retained as an expert witness by S.T.’s counsel.

<sup>2</sup> Trigeminal neuralgia is a chronic pain disorder that affects the trigeminal nerve, which is located in the cranium. This disorder typically results in episodes of severe, sudden, shock-like pain in one side of the face that lasts for seconds to a few minutes. See Stedman’s Medical Dictionary 1307 (28th ed. 2006); Bonica’s Management of Pain 956, 1508 (Scott Fishman et al. eds., 4th ed. 2010).

receptive language functions” and that her “measures of nonverbal domains including memory, spatial processing and nonverbal abstract reasoning” were above average. On the other hand, her speed in processing complex information remained impaired. The report recommended -- as had Dr. Reid -- that S.T. receive extended time to complete projects, and that she be permitted “to record all verbally presented job related assignments” and be provided with “frequent breaks to reduce fatigue and headaches.”

S.T. also took numerous medications on a daily basis which were prescribed to treat anxiety, depression, chronic headaches and migraines, facial pain, and symptoms resulting from her cognitive impairment.

## B.

In February 2010, S.T. filed a civil complaint alleging that she suffered serious injuries resulting from the negligence of defendants 1515 Broad Street, LLC (1515 Broad Street); the Walsh Company, LLC (Walsh); County Glass & Metal Installers, Inc. (County Glass); and other fictitious defendants responsible for the building’s construction, repair, or maintenance. On May 26, 2010, County Glass filed a third-party complaint against Virginia Glass Products Corp. (Virginia Glass) and Idesco Corp. (Idesco). In an amended complaint filed two years and six months after her injury, S.T. brought a negligence claim against Idesco and product-liability claims against Virginia

Glass.<sup>3</sup> S.T. essentially contended that defendants played various roles in the negligent manufacture, installation, and maintenance of the doorway header that led to the accident and her injuries.

Idesco and Virginia Glass both moved for summary judgment arguing that S.T.'s claims were barred by the two-year statute of limitations. The trial court denied Idesco's motion, finding that S.T. satisfied the fictitious-practice rule, R. 4:26-4, and therefore her claim was not barred by the two-year statute of limitations. The court, however, dismissed all claims against Virginia Glass because S.T.'s amended complaint asserted new causes of action that did not relate back to the original complaint and therefore were beyond the statute of limitations.

The parties engaged in more than two years of discovery. The disputed issues focused on the identity of the object that struck S.T.'s head, the parties responsible for S.T.'s injuries, and the nature and extent of any causal relationship between S.T.'s medical conditions and the accident. The defense claimed that S.T.'s purported injuries were not caused by the accident at 1515

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<sup>3</sup> 1515 Broad Street owned the building where the injury occurred. 1515 Broad Street contracted with Walsh to perform building renovations. Walsh then contracted with County Glass to furnish and install the door through which S.T. passed when the object fell and struck her head. County Glass, in turn, purchased the door, along with its glazing and frames, from the door's manufacturer and distributor, Virginia Glass. S.T.'s employer, ABB Lummis, retained Idesco to install the magnetic locking system on that door.



Broad Street. The defense submitted a biomechanical analysis and engineering reports suggesting that the object that struck S.T.'s head was a light cladding surface layer -- not a metal plate, as claimed by S.T. The defense also asserted that there was no objective evidence, such as a magnetic resonance imaging (MRI) or computerized tomography (CT) scan, to show that S.T. suffered an organic brain injury.

In July 2013, defendants filed an offer of judgment in the amount of \$475,000 to settle the case. See R. 4:58-1, -3.<sup>4</sup> S.T. rejected the offer against the advice of her attorney.

In advance of the scheduled trial date, on September 10, 2013, S.T.'s attorney filed a motion with the Law Division pursuant to Rule 4:26-2(b) and RPC 1.14(b),<sup>5</sup> seeking the appointment of a guardian ad litem to represent S.T. for the limited purpose of determining whether to accept defendants' offer of

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<sup>4</sup> Under the offer of judgment rule, if S.T. received a money judgment of "80% of the offer or less," she would have to pay defendants the costs of suit, "all reasonable litigation expenses incurred following non-acceptance," and prejudgment interest. R. 4:58-2 to -3.

<sup>5</sup> Rule 4:26-2(b)(4) provides that "[t]he court may appoint a guardian ad litem for [an] . . . alleged mentally incapacitated person on its own motion."

RPC 1.14(b) authorizes a lawyer to seek the appointment of a guardian ad litem when he "reasonably believes that the client has diminished capacity, [and] is at risk of substantial" financial harm unless action is taken to protect the client's interest.

judgment. In his attached certification, counsel averred that he “reasonably believe[d]” that S.T. exhibited a “diminished capacity” that put her at “risk of substantial financial harm as well as psychological/physical harm.” Counsel disclaimed that he was suggesting that S.T. was “incompetent” or in need of a full-time guardian to manage her affairs. He asserted only that S.T. suffered from a “diminished capacity to understand the issues relating to her case.” He expressed his serious concern about S.T.’s “physical and emotional ability to participate in the prosecution of her case and . . . attend a lengthy trial” as well as her “capacity to make adequately considered decisions regarding her case.” Counsel appended to the motion reports from Dr. Crain, Dr. Reid, and the Veterans Administration Hospital. Notably, “there is no evidence [S.T.’s] counsel copied her on the motion” for the appointment of a guardian ad litem. See S.T., 455 N.J. Super. at 559-60 n.3.

After counsel applied for the appointment of a guardian ad litem, he arranged for Dr. Crain to examine S.T. for the purpose of determining whether S.T. exhibited a “diminished capacity” to understand the issues related to her case. Dr. Crain expressed his opinion -- in a two-sentence report submitted to the court -- that S.T. “shows a diminished capacity to fully consider the risks of her decisionmaking in regard to how to proceed with the case.” S.T. later asserted that she was not advised of the purpose of the examination.

Before deciding the motion, the court conducted an in-camera conference. On September 27, 2013, the court found “good cause” for the appointment of attorney Frederick Miceli to serve as a guardian ad litem for S.T. and adjourned the November trial date. Nothing in the record indicates that S.T. was aware of the conference or of the implications of the appointment of a guardian ad litem.

### C.

Miceli reviewed the “extensive case materials,” including the discovery and medical records, and interviewed S.T. twice in person and once over the telephone. In a March 17, 2014 report submitted to the court, Miceli concluded that S.T. either did not have “the requisite understanding and ability . . . to make a rational decision regarding her case” or had an “intransigent unwillingness to confront the realities” if the case proceeded to trial. Miceli noted that when he explained to S.T. the risk of rejecting the offer of judgment, she simply responded that “she had nothing to lose because her life had been taken away from her.” According to Miceli, S.T. could not accept that her New York treating physician, Dr. Reid, refused to testify at trial and that the court had barred the testimony of another expert.<sup>6</sup> Miceli finally

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<sup>6</sup> In a supplemental report from Miceli and letter from Dr. Reid’s attorney, it became clear that Dr. Reid would not “voluntarily” testify at trial, as an expert or fact witness. That did not foreclose, however, the ability of S.T.’s counsel

expressed his opinion that, pursuant to Rule 4:26-2(b)(4), a guardian ad litem should be entrusted with the authority to decide for S.T. whether the case should be resolved by trial or settlement.

On April 22, 2014, without conducting a guardianship hearing, the court entered an order, pursuant to Rule 4:26-2(b)(4), empowering Miceli to make “all decisions regarding the ultimate disposition of this case, whether by trial or settlement in accordance with the powers of a Guardian Ad Litem as set forth in the Rules of Court.”

On May 6, 2014, without S.T.’s consent, an agreement was reached among the parties to settle the lawsuit for the sum of \$625,000. After deducting attorney’s fees and costs, the guardian ad litem’s fees, and the medical liens from that amount, S.T. would receive \$254,322.65. In a June 17, 2014 supplemental letter to the court, Miceli expressed again his belief that S.T.’s judgment was impaired by diminished capacity. In his opinion, in light of “the issues regarding liability, causation, and the nature and extent of the damages,” “the settlement [was] fair and reasonable and in [S.T.’s] best interests.”

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to depose Dr. Reid as a fact witness in New York and present her deposition testimony at trial. See R. 4:11-5; R. 4:16-1(c).

On July 1, 2014, the court conducted a “friendly hearing” to assess the reasonableness and fairness of the settlement and to determine whether to approve it. See R. 4:44-3 (stating that a court shall hear “[a]ll proceedings to enter a judgment to consummate a settlement in matters involving . . . mentally incapacitated persons”).<sup>7</sup> At the hearing, S.T.’s attorney stated that “[w]e are not in any way saying that [S.T.] is incompetent to handle her affairs, but just [that she has] a limited diminished capacity with regard” to deciding whether to settle her case. Counsel estimated that if the case did not settle, a trial would run at least four weeks.

Miceli, the guardian ad litem, also addressed the court. Relying on Dr. Crain’s report and his own investigation, Miceli expressed his absolute confidence that S.T. suffered from “diminished capacity” and that the guardian ad litem, with the advice of S.T.’s counsel, should render the decision whether to settle the case. Miceli appraised the risks of proving liability and damages, including the challenge of proving causation, given that none of S.T.’s MRIs or CT brain scans “showed an organic injury.” Noting the potential that a jury could return an unfavorable verdict, Miceli viewed the settlement as “fair and

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<sup>7</sup> “Friendly hearing” is a term of art used in our jurisprudence to describe the hearing at which the court reviews a proposed settlement for minors or mentally incapacitated persons pursuant to Rule 4:44-3.

reasonable” and “in [S.T.’s] best interests,” and he “urge[d] the [c]ourt to approve the settlement.”

Also present at the hearing were counsel for defendants, who sought approval of the settlement.

S.T. testified that she wanted to go to trial, noting that she had already advanced \$30,000 to cover expenses. Although she expressed satisfaction with the representation provided by her attorney, she considered the settlement offer an inadequate recompense for her injuries. S.T. explained that she understood the risks of proceeding to trial -- but that she and her family had accepted risks in life when they made their perilous flight from Vietnam by boat. She stated that she did not want to accept “30 cents to a dollar” -- a settlement that did not cover the amount she owed to medical providers and to others who helped support her during her disability. She compared the “forced settlement” to a lifetime jail sentence, saying, “it’s just not fair.”

The court approved the settlement agreement. Under the agreement, S.T. was to be paid \$625,000 -- \$550,000 from defendants County Glass and Walsh and \$75,000 from defendant Idesco. The \$625,000 was allocated as follows: \$254,322.65 in damages to S.T.; \$190,998.75 in legal fees and unreimbursed expenses to S.T.’s counsel; \$22,720.50 in fees to Miceli; and \$156,958.10 in payment of medical and workers compensation liens.

The court explained its reasons for approving the settlement. The court observed that Miceli was a knowledgeable and experienced attorney and advised S.T. “to trust his judgment” because “it’s in your best interests.” The court discoursed on the unpredictability of juries -- a jury might return no monetary award or a lesser or greater award than the settlement. The court recognized that S.T. was “a very intelligent woman,” stating, “anybody who listens to you talk . . . can hear you have . . . a very good grasp of your situation. You obviously know the medicine involved, and the medical terms.” The court, however, added that “sometimes a little knowledge is dangerous. I’m not sure you know enough. Because the mere fact that you want to reject a \$625,000 offer is troubling.” Although the court acknowledged that S.T. would reject the settlement offer and “take [her] chances in front of a jury,” it nevertheless believed that S.T. did not understand the complexities and difficulties of the case and was guided by her emotions. After the court made its ruling, S.T. responded, “you’re making a wrong decision.”

S.T. appealed from the trial court’s appointment of the guardian ad litem and approval of the settlement. Idesco filed a protective cross-appeal, arguing that if the Appellate Division vacated the settlement, it should reverse the trial court’s denial of its motion for summary judgment on statute-of-limitations grounds.

## II.

The Appellate Division affirmed the trial court's appointment of the guardian ad litem, its authorization of the guardian ad litem to decide whether to settle the case, and its approval of the settlement over S.T.'s protest. S.T., 455 N.J. Super. at 548-49. The Appellate Division summarized two key legal principles that guided its decision. First, under Rule 4:26-2(b)(4), "a trial court may appoint a [guardian ad litem] if there is good cause to believe that a party lacks the mental capacity" to make decisions needed in the litigation. Id. at 548. The guardian ad litem's charge is to investigate the party's mental capacity and then "to provide the court with any information necessary to protect the person's best interests." Id. at 557-58. Second, if based on the information adduced from the guardian ad litem's investigation, the court finds by clear and convincing evidence that the party is mentally incapable of making important decisions, such as whether to try or settle the case, the court then may empower the guardian ad litem to make those decisions. Id. at 548, 558-59.

The Appellate Division determined that (1) there was "good cause" to appoint Miceli as a guardian ad litem based on the certification of S.T.'s counsel, id. at 561-62; (2) the guardian ad litem's "investigation provided clear and convincing evidence that [S.T.] was mentally incapable of deciding



whether to try or settle the case,” id. at 562-64; (3) “the trial court properly found that [S.T.] lacked the mental capacity to decide whether to try or settle the case,” id. at 548-49, 564; and (4) the court appropriately authorized the guardian ad litem to make that decision for S.T., id. at 564-66. Last, the Appellate Division found “ample evidence to support the trial court’s decision to approve the settlement” based on the appellate court’s review of the record, including S.T.’s testimony at the friendly hearing. Id. at 567.

Because Idesco asked the Appellate Division to render a decision on its protective cross-appeal only if the settlement was vacated, that issue became moot and was not addressed. Id. at 569.

We granted S.T.’s petition for certification. 238 N.J. 437 (2019).

### III.

#### A.

S.T. initially challenges the propriety of the trial court’s appointment of the guardian ad litem for “good cause” under Rule 4:26-2. S.T. primarily argues that she was deprived of her right to manage her affairs -- to decide for herself whether to settle or proceed to trial -- without the due process guarantees of a guardianship hearing under Rule 4:86 at which her mental capacity would have been determined. S.T. contends that the trial court should not have conducted a friendly hearing to decide the reasonableness of the

settlement agreement advanced by the guardian ad litem without first determining at a Rule 4:86 hearing whether she was mentally incapacitated. She asserts that, in the absence of a finding of mental incapacity, the court should not have approved the settlement over her objections, and therefore the settlement should be vacated.

B.

Defendants 1515 Broad Street, County Glass, Walsh, and Idesco present similar arguments.<sup>8</sup> Defendants argue that the trial court properly invoked Rule 4:26-2 and found “good cause” for the “appointment of a guardian ad litem to investigate whether S.T. lacked the capacity to prosecute her claim.” They also contend that under Rule 4:26-2, the court had the power to authorize the guardian ad litem “to make litigation-related decisions” without conducting a guardianship hearing to determine S.T.’s mental capacity pursuant to Rule 4:86. According to defendants, the role of a Rule 4:86 hearing is to assess whether a person is “generally incompetent to manage her person or property.”

“Even if a hearing should have occurred,” defendants posit that S.T. has not asserted that she can show that “vesting a guardian ad litem with litigation-related decision-making authority” was not justified by clear and convincing

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<sup>8</sup> 1515 Broad Street and County Glass submitted identical briefs. Walsh expressly relies on the opposition brief filed by 1515 Broad Street. Idesco filed a separate brief.

evidence. Next, defendants submit that the trial court did not abuse its discretion in approving the settlement. In their view, the court saved S.T. from “a significant risk of financial ruin.” They maintain that we should not presume that an independent counsel retained by or appointed for S.T. “would have advised her to reject the settlement.” And last, defendants suggest that a remand for a competency hearing would likely be a futile effort because of “the mountain of evidence of [S.T.’s] incompetency for the purpose of making litigation-related decisions.”

If this Court vacates the settlement, Idesco urges the Court to exercise its original jurisdiction and dismiss S.T.’s claim against it on statute-of-limitations grounds or, alternatively, to remand the issue to the Appellate Division.

#### IV.

This appeal raises four distinct issues: (1) whether S.T.’s attorney fulfilled his professional responsibility under RPC 1.14(b) by requesting the appointment of a guardian ad litem based on his reasonable belief that S.T. suffered from a “diminished capacity” in making litigation decisions; (2) whether the court properly appointed a guardian ad litem under Rule 4:26-2 to investigate whether S.T. had the mental capacity to decide whether to settle her case or proceed to trial in light of the \$475,000 offer of judgment;

(3) whether the court appropriately delegated to the guardian ad litem the authority to determine S.T.'s mental capacity to make key legal decisions and then appropriately gave the guardian ad litem the power to settle the case, without holding a guardianship hearing or rendering a judgment on S.T.'s mental capacity pursuant to Rule 4:86; and (4) whether the court erred in approving the settlement over S.T.'s vocal opposition.

The issues before us are generally legal in nature -- the construing of court rules, statutes, and constitutional precepts -- and therefore our standard of review is de novo. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253 (2013). We must judge for ourselves the meaning of the law that is in dispute, as well as the soundness of the legal reasoning and decisions of both the trial court and Appellate Division. See *ibid.*

We begin with some basic principles of law.

A.

N.J.S.A. 2A:15-1 guarantees that “[e]very person who has reached the age of majority . . . and has the mental capacity may prosecute or defend any action in any court.” The Rules of Professional Conduct, moreover, require lawyers to “abide by a client’s decisions concerning the scope and objectives of representation” and whether to accept or reject a settlement offer. RPC 1.2(a). Those provisions are just a few sources that reflect a “clear public

policy . . . to respect the right of self-determination of all people.” See M.R., 135 N.J. at 166.

“[C]ompetent people ordinarily can choose what they want,” even when their choices are unwise or contrary to their best interests. Id. at 167; see also Faretta v. California, 422 U.S. 806, 834 (1975) (finding that a person’s decision to represent himself in a criminal case, even though ill-advised, “must be honored out of ‘that respect for the individual which is the lifeblood of the law’” (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring))). The right of individuals to determine their unique destiny through the decisions they make -- to govern and manage their own affairs -- is an implicit guarantee of the New Jersey Constitution, which provides that “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. Const. art. I, ¶ 1; see M.R., 135 N.J. at 166.

A client’s interest in her lawsuit -- and the monetary damages that may come from a favorable jury award or settlement -- unquestionably is a property right. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (“[A] cause of action is a species of property protected by the Fourteenth Amendment’s

Due Process Clause.”). No person can be deprived of her right to govern and manage her own affairs -- or her right to control the fate of her lawsuit -- based on mental incapacity without rigorous adherence to the procedural protections set forth in our rules of court, statutes, and case law. See R. 4:86-1 to -8; N.J.S.A. 3B:12-24 to -35; *In re S.W.*, 158 N.J. Super. 22, 24-26 (App. Div. 1978).

The trial court stripped S.T. of her right to control her lawsuit on her own terms and empowered the guardian ad litem to settle the case -- with the court’s ultimate approval -- against her express wishes. We conclude that the court did not follow the requisite procedures in denying S.T. the right to accept or reject a settlement offer. Specifically, the court improperly vested the guardian ad litem with the singular authority to settle the case without holding a hearing to determine whether S.T. suffered from a mental incapacity that rendered her unable to make that legal decision for herself. See R. 4:86-1 to -8; N.J.S.A. 3B:12-24 to -35.

B.

1.

Generally, “[i]n accepting a case, the lawyer agrees to pursue the goals of the client to the extent the law permits, even when the lawyer believes that the client’s desires are unwise or ill-considered.” *Ziegelheim v. Apollo*, 128

N.J. 250, 261 (1992); see also RPC 1.2. RPC 1.14(b) represents an exception to that rule. That rule provides:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

[RPC 1.14(b).]

We do not question that S.T.'s attorney acted in good faith when, pursuant to RPC 1.14(b), he requested the appointment of a guardian ad litem based on his reasonable belief that S.T. suffered from a "diminished capacity" to make the critical legal decision whether to settle the case. The attorney reasonably believed, based on his understanding of S.T.'s medical records and his conversations with his client, that her cognitive and mental impairments affected her ability to view objectively the strengths and weaknesses of her case. He feared that her refusal to accede to his advice and settle the case might lead to financial ruin. Guided by RPC 1.14(b), he took "reasonably necessary protective action . . . [by] seeking the appointment of a guardian ad litem" under Rule 4:26-2(b).

S.T.'s counsel, however, erred in not copying his client on the motion for the appointment of a guardian ad litem. S.T. had the right to know about such a consequential motion filed by her lawyer. We agree with the Appellate Division that when "counsel for an alleged mentally incapacitated person makes a motion to appoint a [guardian ad litem]," the motion must be served on that person. See S.T., 455 N.J. Super. at 560 n.3.

2.

We also find that the trial court, after reviewing S.T.'s counsel's certification along with the attached expert medical reports, properly exercised its discretion in appointing a guardian ad litem. The court's order, however, should have cited the basis of the court's authority, Rule 4:26-2, and made clear the role to be played by the guardian ad litem. The court's instructions should have directed the guardian ad litem to conduct an investigation to determine S.T.'s mental capacity and then to make a recommendation to the court whether her best interests required the filing of an action for a limited or general guardianship of S.T. in accordance with Rule 4:86.

The interplay between Rule 4:26-2 and Rule 4:86 is critical to an understanding of how this case should have proceeded.

Rule 4:26-2(a) provides that a "mentally incapacitated person shall be represented in an action by the guardian of either the person or the property."



When a “mentally incapacitated person” is not represented by a guardian, paragraph (a) authorizes the court to appoint “a guardian ad litem . . . in accordance with paragraph (b) of this rule.” Ibid. A judicial determination of mental incapacity, however, must precede the appointment of a guardian. See R. 4:86-1 to -8; N.J.S.A. 3B:12-24 to -35. Paragraph (b) of Rule 4:26-2 sets forth the initial procedure that follows when a person is alleged to be mentally incapacitated.

Rule 4:26-2(b) provides that “[t]he court may appoint a guardian ad litem for . . . [an] alleged mentally incapacitated person on its own motion,” R. 4:26-2(b)(4) (emphasis added), or the motion of others, R. 4:26-2(b)(2) and (3). The word “alleged” before “mentally incapacitated” is not surplus language but is central to understanding the guardian ad litem’s function at this stage.<sup>9</sup>

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<sup>9</sup> Rule 4:26-2, in relevant part, states:

(a) Representation by Guardian. Except as otherwise provided by law or Rule 4:26-3 (virtual representation), a minor or mentally incapacitated person shall be represented in an action by the guardian of either the person or the property, appointed in this State, or if no such guardian has been appointed or a conflict of interest exists between guardian and ward or for other good cause, by a guardian ad litem appointed by the court in accordance with paragraph (b) of this rule.

(b) Appointment of Guardian Ad Litem.

Under Rule 4:26-2(a), a guardian for a “mentally incapacitated person” is authorized to prosecute a legal action on her behalf. In contrast, the role of a guardian ad litem for an “alleged mentally incapacitated person” under Rule 4:26-2(b) is more limited, as made clear by commentary to the court rule:

The use of the qualifier “alleged” to the use of the term “mentally incapacitated person” in subparagraphs (b)(2), (b)(3) and (b)(4) is to make clear that in contradistinction to the appointment of a guardian (see R. 4:86), which requires an adjudication of mental incapacitation, a guardian ad litem’s appointment is dependent only upon the allegation of mental incapacitation. The guardian ad litem’s responsibility is to advise the court as to whether a formal competency hearing may be necessary and if so, to represent the alleged mentally incapacitated person at that hearing.

[Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:26-2 (2020) (emphasis added).]

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....

(4) Appointment on Court’s Motion. The court may appoint a guardian ad litem for a minor or alleged mentally incapacitated person on its own motion.

We acknowledge that this rule is not a model of clarity. The interpretive mistakes made by both the trial court and Appellate Division might have been avoided if the language of the rule was more precise. We request that the Supreme Court Civil Practice Committee review Rule 4:26-2 in light of this opinion.

Thus, when a guardian ad litem is appointed pursuant to Rule 4:26-2(b) to represent an individual who is “alleged” to be mentally incapacitated, the guardian ad litem’s function is to inquire into the individual’s alleged mental incapacity. The role of a guardian ad litem is to act as an independent investigator and inform the court on the subject of the client’s mental capacity. See M.R., 135 N.J. at 173-74 (quoting Pressler & Verniero, official cmt. on R. 5:8A and R. 5:8B). In that sense, the guardian ad litem serves “as ‘the eyes of the court’ to further the [client’s] ‘best interests.’” In re Mason, 305 N.J. Super. 120, 127 (Ch. Div. 1997). After completing its inquiry, the guardian ad litem submits a report to the court containing the results of the investigation and recommends whether a formal hearing should proceed under Rule 4:86. See M.R., 135 N.J. at 173; Pressler & Verniero, cmt. 3 on R. 4:26-2. The guardian ad litem’s recommendations are not binding on the court; ultimately the court must make its own independent factfindings. See Milne v. Goldenberg, 428 N.J. Super. 184, 202 (App. Div. 2012). The court should not “cede [its] responsibility and authority” as the decisionmaker to the guardian ad litem. See ibid. (quoting P.T. v. M.S., 325 N.J. Super. 193, 216 (App. Div. 1999)).

Nothing in our court rules, statutes, or case law suggests that a guardian ad litem appointed to investigate a client’s alleged mental incapacity has the

power to make legal decisions for the client before a judicial determination on her mental capacity. For example, in In re S.W., a hospital wanted to move its patient, S.W., to a nursing home. 158 N.J. Super. at 24. S.W., however, resisted the move and refused to sign Medicaid forms necessary for the disbursement of money to the nursing home and for her placement there. Ibid. Without making any claim that S.W. was mentally incompetent, the hospital sought the appointment of a guardian ad litem who would have authority to sign the required documents on S.W.'s behalf. Ibid. Despite any adjudication or proof of S.W.'s incompetency, the court "determined, without elaboration, that [S.W.'s] 'interests' required her to have [a guardian ad litem], and an order was entered naming" a guardian ad litem to sign the Medicaid papers. Id. at 24-25.<sup>10</sup>

The Appellate Division reversed, holding that the "judicial designation of a person to sign documents on behalf of an adult deprives the latter . . . of the management and control of his personal affairs" and "cannot be done without the institution of an action in accordance with Rule 4:83 [(the predecessor to Rule 4:86)]." Id. at 26. The purpose of such an action is to

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<sup>10</sup> Our jurisprudence, at times, uses the terms guardian and guardian ad litem interchangeably. That dual usage of those terms does not alter the procedural requirements that must be observed before a person can be deprived of her right to manage her affairs on the ground of incapacity.

allow a court to adjudicate at a hearing whether, based on medical proof, “the alleged incompetent is unfit and unable to govern himself or herself and to manage his or her affairs” and therefore in need of the appointment of a guardian of the person or property. Ibid. The Appellate Division emphasized that any restraint that would deprive “an allegedly incompetent person of his liberty or . . . of the control of his property and the management of his personal affairs” must be imposed “in a constitutional manner in a proceeding instituted for that purpose.” Ibid. (quoting Borough of East Paterson v. Karkus, 136 N.J. Eq. 286, 288 (Ch. 1945)). The Appellate Division found in S.W. that the trial court did not proceed in the constitutional manner prescribed by Rule 4:83. Id. at 26.

In this case, the guardian ad litem appointed by the court -- Miceli -- conducted an investigation into S.T.’s mental capacity, reviewed the medical reports and counsel’s certification, interviewed S.T. on several occasions, evaluated the strengths and weaknesses of the causes of actions against defendants and the value of S.T.’s potential damages, and reported to the court. The guardian ad litem recommended to the court that he be given the authority to decide whether S.T.’s case should be resolved by trial or settlement. Without affording S.T. notice or a hearing and without making a judicial determination that S.T. was a mentally incapacitated person, the court ceded to

Miceli the power to make “all decisions regarding the ultimate disposition of this case, whether by trial or settlement.” By abdicating the Judiciary’s nondelegable oversight and factfinding function, the trial court did not proceed in the constitutional manner prescribed by both Rule 4:86-1 to -8 and N.J.S.A. 3B:12-24 to -35 for the appointment of a guardian of an alleged mentally incapacitated person.

3.

An action for guardianship of an alleged incapacitated individual and the proceedings required for a judgment of incapacity are governed by court rule and statute. R. 4:86-1 to -8; N.J.S.A. 3B:12-24 to -35. Rigorous procedural safeguards protect the subject of a guardianship hearing because a finding of incapacity results in an individual’s loss of the right of self-determination.

An “[i]ncapacitated individual” is a person “who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage his affairs.” N.J.S.A. 3B:1-2. An action for the appointment of a guardian must comply with Rule 4:86-2. A guardianship complaint, among other things, must include two affidavits from properly qualified medical professionals, stating their opinions about “the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs,” R. 4:86-2(b)(2)(F), and

“the extent to which the alleged incapacitated person retains sufficient capacity to retain the right to manage specific areas, such as . . . legal . . . decisions,” R. 4:86-2(b)(2)(G).

“If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings” are necessary, the court must (1) set a date for the hearing, R. 4:86-4(a)(1); (2) give the alleged incapacitated person “at least 20 days’ notice” of the hearing, R. 4:86-4(a)(2); and (3) advise the person that if she opposes the action, “she may appear either in person or by attorney, and may demand a trial by jury,” R. 4:86-4(a)(5).

“[T]he trial of the issue of incapacity may be had without a jury . . . unless a trial by jury is demanded by the alleged incapacitated person or someone on his behalf.” N.J.S.A. 3B:12-24. “[I]f the alleged incapacitated person is not represented by counsel,” the court must appoint counsel. R. 4:86-4(a)(7).

Unless the alleged incapacitated person requests a jury trial, the court must take “testimony in open court” and “determine the issue of incapacity.” R. 4:86-6(a). A finding of incapacity must be made by clear and convincing evidence. See M.R., 135 N.J. at 169, 171 (“[T]he burden of proving specific incapacity [is] by clear and convincing evidence.”).

Upon making a finding of incapacity, the court may appoint a general guardian or a limited guardian, depending on whether the individual “lacks the

capacity to do some, but not all, of the tasks necessary to care for himself.” N.J.S.A. 3B:12-24.1(a) to (b). “A judgment of limited guardianship may specify the limitations upon the authority of the guardian or alternatively the areas of decision making retained by the person.” N.J.S.A. 3B:12-24.1(b). After determining whether a general or limited guardian is appropriate, the court must then appoint an individual to serve as the guardian. R. 4:86-6(c).

None of the procedural steps required by our court rules or statutes were followed in this case: a guardianship complaint with notice to S.T., accompanied by the affidavits of qualified medical professionals, was never filed; a hearing with the taking of testimony, with S.T. represented by independent counsel, was never conducted; factfindings by the trial court based on clear and convincing evidence were never made; and S.T. was never adjudicated by the court as a mentally incapacitated person. The trial court ceded its judicial function, outsourcing to the guardian ad litem the role of final arbiter of S.T.’s capacity.

The issue is not whether there was clear and convincing evidence of S.T.’s incapacity in the record, as the Appellate Division found. See S.T., 455 N.J. Super. at 560, 563-64. The issue is that the trial court failed to conduct the hearing -- either a jury or bench trial -- with the due process safeguards required by our court rules and statutes.



4.

Rule 4:44-3 provides that “[a]ll proceedings to enter a judgment to consummate a settlement in matters involving . . . mentally incapacitated persons shall be heard by the court without a jury” and that “[t]he court shall determine whether the settlement is fair and reasonable.” But there was no judicial finding that S.T. was mentally incapacitated in accordance with our court rules and statutes. Without such a finding, the trial court had no authority to conduct a friendly hearing under Rule 4:44-3 or to deny S.T. the right to determine for herself whether to accept a settlement in her case. We therefore conclude that the trial court erred in conducting a friendly hearing and then approving the settlement against S.T.’s express will.

In the view of counsel, the guardian ad litem, and the trial court, a rejection of the settlement would have been an act of foolishness and against S.T.’s own best interests. But without a judicial finding of incapacity, in accordance with our court rules and statutes, S.T. had the right to make that choice and reject the settlement. Ultimately, she will live with the consequences of her freely made decision.

We offer this observation. S.T.’s attorney recommended that a guardian ad litem be appointed for her when she rejected a \$475,000 offer of judgment. According to S.T.’s attorney, S.T.’s rejection of the original offer was some

evidence of her purported incapacity. Several months later, however, after the appointment of a guardian ad litem, defendants agreed to a \$625,000 settlement. Had S.T. not rejected the original offer, an additional \$150,000 would not have been placed on the table.

A settlement is a compromise between the parties, a form of insurance in which the parties protect themselves against verdicts at polar ends of the spectrum. In many cases, there will be a wide range of reasonable outcomes, and “reasonable people may differ on what is fair compensation in any particular case.” See Cuevas v. Wentworth Grp., 226 N.J. 480, 500 (2016) (quoting Johnson v. Scaccetti, 192 N.J. 256, 280 (2007)). Presumably, defendants agreed to the settlement in furtherance of their own self-interests, not out of benevolence.

We do not pass on the merits of S.T.’s case -- its strengths, weaknesses, or potential value. Nor do we offer any opinion on the wisdom of the choices S.T. wishes to make. We conclude only that the judicial system did not function in the constitutional manner prescribed by our court rules and statutes in ceding to the guardian ad litem the authority to determine S.T.’s capacity and to settle her case.

Accordingly, we reverse the judgment of the Appellate Division and vacate the settlement.

## V.

Finally, Idesco has urged this Court, in the event we vacate the settlement, to exercise our original jurisdiction and consider its cross-appeal brought before the Appellate Division in which it challenged the trial court's denial of its motion for summary judgment. The issue raised is whether the complaint filed against Idesco is barred by the statute of limitations. Idesco did not cross-petition for review of that issue, and that issue has not been briefed or argued by both parties. We decline to pass judgment on it.

In light of our decision to vacate the settlement, Idesco's issue is interlocutory in nature. The Appellate Division denied Idesco's earlier motion for leave to appeal. We therefore will not remand this singular issue to the Appellate Division and delay a disposition of the entirety of the proceedings before the trial court.

## VI.

For the reasons explained, we reverse the judgment of the Appellate Division, vacate the settlement approved by the trial court, and remand for proceedings consistent with this opinion. The path forward is left to the parties, their counsel, and the court. We only caution that if a guardianship action is pursued, it must be in accordance with our court rules and statutes.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, FERNANDEZ-VINA, and SOLOMON join in JUSTICE ALBIN's opinion. JUSTICES PATTERSON and TIMPONE did not participate.

# RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2782-21

IN THE MATTER OF  
A.H.

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Submitted October 18, 2023 – Decided November 28, 2023

Before Judges Currier and Susswein.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Monmouth County, Docket No. P-  
000128-21.

Dilworth Paxson, LLP, attorneys for appellant (Kristen  
L. Behrens, of counsel and on the briefs; Sarah  
Grenminger, on the brief).

B.M., respondent, has not filed a brief.

PER CURIAM

A.H.<sup>1</sup> appeals from a Chancery Division judgment of limited incapacity  
and appointment of a guardian to act on her behalf in divorce litigation with her

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<sup>1</sup> We use initials to protect the privacy interests of the parties. R. 1:38-3(a)(2).

estranged husband, T.H.<sup>2</sup> After carefully reviewing the record in light of the governing legal principles and the deference we owe to the trial court's credibility findings, we affirm.

## I.

We discern the following pertinent facts from the evidence presented at the competency trial. A.H. and T.H. were married in New Jersey on June 6, 1987. They have three children together, all of whom are now adults. A.H. originally filed a complaint for divorce in June 2012. The divorce action was dismissed by a consent order entered in January 2017.

A.H. and T.H. have dual citizenship in the United States and Cyprus. T.H. also filed for divorce in Cyprus. A divorce decree was entered by the Nicosia Family Court on July 18, 2018. The Cyprus divorce decree did not address support issues or the distribution of assets. T.H. filed a request to register the foreign judgment in New Jersey. A.H. objected. Accordingly, T.H. and A.H. remained legally married in this State.

In September 2018, A.H. filed a new complaint for divorce. Those proceedings stalled. Concerns arose regarding A.H.'s capacity to manage her affairs. In October 2019, the Family Part judge issued an order appointing

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<sup>2</sup> T.H. filed a motion to intervene in this appeal, which was denied.

Bettina Munson, Esq. as guardian ad litem for A.H. "to serve as an independent investigator, fact finder and evaluator to report back to the [c]ourt as to whether [A.H.] lacks sufficient mental capacity needed to conduct the litigation." The judge also ordered A.H. to undergo a mental evaluation.

On January 6, 2021, Munson submitted a report to the court, recommending that an action for guardianship be initiated under Rule 4:86. On February 8, 2021, the Family Part judge issued an order directing the filing of an application for guardianship of A.H.

On April 8, 2021, Munson filed a complaint for guardianship in the Chancery Division. She submitted certifications of two doctors—Steven Dyckman, M.D. and Julie Davelman, Psy.D. A.H. opposed the petition, submitting a certification of a third doctor—Beverlee A. Tegeder, Psy.D.

On August 27, 2021, the Chancery Division judge held a preliminary hearing and appointed Suzana Hot as designated trial counsel for A.H. The guardianship hearing spanned three non-consecutive days between October 2021 and February 2022. The court heard testimony from Munson, Dr. Dyckman, Dr. Davelman, Dr. Tegeder, T.H., and A.H.<sup>3</sup>

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<sup>3</sup> A.H.'s counsel requested A.H. be permitted to participate virtually in the competency hearing. The judge denied that request, citing the presumption that

Munson testified that when they "had a general discussion of life in general [A.H.] did pretty well," but when their conversations involved the divorce and related issues, A.H. "would become anxious." Munson specifically mentioned a January 2020 court date where A.H. was "physically shaking. Her appearance was quite disheveled. You know, she just became so nervous and so anxious about being there."

Munson testified that A.H. expressed that going to court caused her to be so anxious and nervous that she would have a panic attack and needed to take medication. A.H. also reported to Munson that she could not handle making decisions about her case and she became very nervous and easily upset in discussing the divorce. A.H. further told Munson that she did not feel that she would be able to help her attorney with any of the court proceedings or participate in any type of litigation.

Dr. Dyckman, the only psychiatrist to testify, diagnosed A.H. with post-traumatic stress disorder and major depressive disorder. He also questioned whether she had bipolar disorder. During his evaluations of A.H., Dr. Dyckman observed that she was "extremely anxious." He testified that A.H. had "a

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competency hearings should be conducted in person and noting the need for the court to observe how A.H. would act during a court appearance.



number of bad experiences in court in the past and she was extremely fearful of her husband." Further, A.H. "was extremely depressed and anxious and stressed about having to come to court to testify." He continued, explaining A.H. "felt that she had been tricked in the past into saying things that she didn't realize she was saying and she was very concerned that that would happen again." Dr. Dyckman opined that these issues would "definitely have a great impact on her ability to participate [in divorce proceedings] in a rational way." He also opined that A.H. was unable to assist her attorney in connection with her divorce proceedings and participate meaningfully.

Dr. Davelman testified her evaluation of A.H. "reflected that she had a high level of anxiety and depression, she had difficulty with assessing situations, and conveying and asserting her wishes when she's stressed." She diagnosed A.H. with severe major depressive disorder and panic disorder. She did not find any indicators of bipolar disorder. She noted that A.H.'s anxiety was triggered by being in the same place as T.H. and having to discuss the divorce proceedings in general. Dr. Davelman further testified that A.H. said "there were times where she felt like she wasn't able to understand what was going on in the court and that she was losing focus and having a hard time processing what was happening." Although A.H. "didn't want to give up the chance to make

decisions, [she] also felt like she would have a hard time doing so." However, Dr. Davelman also opined that it was possible for A.H.'s condition to improve.

T.H. testified regarding his observations of A.H.'s mental health over the course of their marriage. He detailed issues that arose during the divorce litigation and noted A.H.'s "obstructive" behavior.

T.H. described an incident where A.H. sent a text to someone suggestive of suicidal intent, prompting a mobile crisis team to respond to their home. He also detailed incidents where A.H. would stop taking her medication, and become verbally abusive toward family members and friends.

Dr. Tegeder testified that based on her evaluation of A.H., she found her to be mentally competent. She stated A.H. "has a full understanding of the proceedings regarding her divorce proceeding, . . . [and that] she does have the capacity to comprehend and understand the proceedings." She determined A.H. suffers from moderate depression. Dr. Tegeder explained A.H. is "in treatment. She's on medication, but it's not to the extent that it's impairing her ability to make decisions."

Dr. Tegeder acknowledged she only reviewed medical records from A.H.'s treating psychiatrist, Dr. Bransfield. Cross-examination revealed that Dr.

Tegeder was not aware of many facts that might have impacted her opinion as to A.H.'s capacity to participate in the divorce proceeding.

A.H. testified she was "capable of understanding, comprehending what's going on in the court and [is] able to defend [her]self." She said she had an excellent relationship with her current matrimonial lawyer. She felt confident she could work with her in reference to the divorce action. On cross-examination, she acknowledged that in 2014 Dr. Bransfield opined she was not competent to sign legal agreements regarding the divorce proceeding, was unable to maintain adequate judgment and advocate for herself, and was not competent to represent herself pro se. A.H. refused to acknowledge the facts stated in a previous court opinion, insisting the judge's opinion was "misprinted."

On March 31, 2022, the Chancery Division judge issued a judgment of limited incapacity and appointment of guardian, appointing a lawyer to serve as limited guardian to act on A.H.'s behalf in the divorce action. The judge found "by clear and convincing evidence [A.H.] is in need of a limited [g]uardian for the purpose of the prosecution and defense of the pending [m]atrimonial action." The judge explained "that the stress of the proceedings result in [A.H.] not being

capable of making rational decisions to protect her interests and she is incapacitated when dealing with the [m]atrimonial proceedings."

The judge further explained that the need for a competency evaluation arose from the long pending divorce litigation, which was the subject of multiple proceedings and more than fifty orders. The judge found A.H.'s actions had stymied the proceedings. Moreover, A.H. had a longstanding history of mental health treatment and she had a "significant" amount of prescribed medications.

The judge highlighted the substantial disagreement between the parties' experts. Dr. Tegeder opined that A.H. was doing better mentally than she had been in the past, was capable of making her own decisions, and was not in need of guardianship. The judge discounted Dr. Tegeder's testimony, reasoning that she did not perform as thorough a review as did Dr. Dyckman.

The judge found Dr. Dyckman to be the most credible and reliable expert witness. The judge credited Dr. Dyckman's thorough review of A.H.'s psychiatric history and determined his analysis was most consistent with the facts as testified to by the parties.

The judge found T.H. to be a credible witness but acknowledged the "extremely strained relationship" between the spouses. He explained T.H. harbors resentment over how long the divorce litigation has lasted and attributes

that delay and his financial problems to A.H. Nonetheless, the judge found T.H. provided clear, credible testimony as to the problems A.H. experienced during the marriage and the divorce litigation.

The judge determined A.H. was the most important witness. The judge observed her throughout her testimony and reviewed evidence of A.H. being physically incapable of proceeding with hearings and the matrimonial litigation. The judge acknowledged A.H. appeared to be in control of herself in the courtroom. He did not observe A.H. shaking uncontrollably or in any inappropriate manner. The judge further noted that A.H. performed well while testifying on direct examination.

The judge described a change in A.H.'s behavior during her cross-examination. The judge found that when cross-examination touched on a sensitive topic, A.H. was not completely in control of her response or reactions to questions. The judge further found that her thought process was not rational, that she became increasingly disturbed over the course of cross-examination and lashed out with inappropriate and defensive responses.

Based on those observations, the judge was "absolutely convinced" that A.H. needed a limited guardian to help her make decisions involving the divorce action and to protect her interests and wellbeing. The written order appointing

a guardian was entered on March 31, 2022. On April 1, 2022, the judge issued an amended order substituting a different guardian from the one named in the March 31 order. That April 1 order further provided that "[a]ll other items in the [March 31, 2022] [j]udgment remain in effect."

This appeal follows. After it was discovered that A.H. had not ordered a transcript of the trial court's March 30, 2022 oral opinion, on our own motion, we ordered A.H. to provide a transcript of the oral opinion and to file a supplemental brief.

A.H. raises the following contentions for our consideration in her initial and supplemental briefs: (1) the trial court erred as a matter of law in failing to apply the clear and convincing standard to evidence presented as to her alleged incapacity; (2) the trial court erred in failing to order updated medical evaluations; (3) the trial court erred in allowing T.H. to file an answer and testify at the guardianship hearing; (4) the trial court erred in finding A.H. needs a guardian with respect to the divorce action; and (5) the trial court erred by failing to order reasonable accommodations or less restrictive alternatives to guardianship.

### III.

We begin our analysis by acknowledging the legal principles and procedural safeguards governing this appeal. We review the Chancery Division judge's determination for an abuse of discretion. See In re Est. of Hope, 390 N.J. Super. 533, 541 (App. Div. 2007) ("Remedies available to courts of equity 'are broad and adaptable.'") (quoting In re Mossavi, 334 N.J. Super. 112,121 (Ch. Div. 2000)); see also Wolosoff v. CSI Liquidating Tr., 205 N.J. Super. 349, 360 (App. Div. 1985). "The exercise of . . . discretion will be interfered with by an appellate tribunal only when the action of the trial court constitutes a clear abuse of that discretion." Salitan v. Magnus, 28 N.J. 20, 26 (1958). A trial court decision will only constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

We will not disturb a guardianship appointment pursuant to the guardian statute, N.J.S.A. 3B:12-24 to -29, in the absence of the mistaken exercise of the considerable discretion vested in the judge. See In re Queiro, 374 N.J. Super. 299, 311 (App. Div. 2005); see also In re Quinlan, 70 N.J. 10, 53-55 (1976). Nonetheless, challenges to legal conclusions as well as a trial judge's

interpretation of the law are subject to de novo review. Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382–83 (2010).

The legal authority to appoint a guardian for an incapacitated person is "derive[d] from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability." In re Grady, 85 N.J. 235, 259 (1981). "[T]he [S]tate's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests, even if the person's wishes cannot be clearly established." In re Conroy, 98 N.J. 321, 364-65 (1985). A person is incapacitated if she "is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern [her]self and manage [her] affairs." N.J.S.A. 3B:1-2.

Rule 4:26-2(a) provides that a mentally incapacitated person "shall be represented in an action by the guardian of either the person or the property." When a mentally incapacitated person is not represented by a guardian, paragraph (a) authorizes the court to appoint "a guardian ad litem . . . in accordance with paragraph (b) of this rule." R. 4:26-2(a).

A judicial determination of mental incapacity, however, must precede the appointment of a guardian. S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 277



(2020). Rule 4:26-2(b) "sets forth the initial procedure that follows when a person is alleged to be mentally incapacitated." Ibid. "The court may appoint a guardian ad litem for . . . [an] alleged or adjudicated incapacitated person on its own motion," or the motion of others. R. 4:26-2(b)(4). "The word 'alleged' before 'mentally incapacitated' is not surplus language but is central to understanding the guardian ad litem's function at this stage." S.T., 241 N.J. at 277.

"Under Rule 4:26-2(a), a guardian for a 'mentally incapacitated person' is authorized to prosecute a legal action on her behalf." Ibid. "In contrast, the role of a guardian ad litem for an "alleged mentally incapacitated person" under Rule 4:26-2(b) is more limited . . . [.]" Ibid. The commentary to the court rule explains:

The use of the qualifier "alleged" to the use of the term "mentally incapacitated person" . . . is to make clear that in contradistinction to the appointment of a guardian . . . , which requires an adjudication of mental incapacitation, a guardian ad litem's appointment is dependent only upon the allegation of mental incapacitation. The guardian ad litem's responsibility is to advise the court as to whether a formal competency hearing may be necessary and if so, to represent the alleged mentally incapacitated person at that hearing.

[Id. at 278 (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:26-2 (2020)) (emphasis added).]

"Thus, when a guardian ad litem is appointed pursuant to Rule 4:26-2(b) to represent an individual who is 'alleged' to be mentally incapacitated, the guardian ad litem's function is to inquire into the individual's alleged mental incapacity." Ibid. "The role of a guardian ad litem is to act as an independent investigator and inform the court on the subject of the client's mental capacity." Ibid. "In that sense, the guardian ad litem serves 'as "the eyes of the court" to further the [client's] "best interests."' " Ibid. (quoting In re Mason, 305 N.J. Super. 120, 127 (Ch. Div. 1997)). "After completing its inquiry, the guardian ad litem submits a report to the court containing the results of the investigation and recommends whether a formal hearing should proceed under Rule 4:86." Ibid. "The guardian ad litem's recommendations are not binding on the court; ultimately the court must make its own independent factfindings." Id. at 278-79. "The court should not 'cede [its] responsibility and authority' as the decisionmaker to the guardian ad litem." Id. at 279 (quoting P.T. v. M.S., 325 N.J. Super. 193, 216 (App. Div. 1999)).

"Nothing in our court rules, statutes, or case law suggests that a guardian ad litem appointed to investigate a client's alleged mental incapacity has the power to make legal decisions for the client before a judicial determination on her mental capacity." Ibid. "Rigorous procedural safeguards protect the subject

of a guardianship hearing because a finding of incapacity results in an individual's loss of the right of self-determination." Id. at 280-81. Accordingly, an action for guardianship of an alleged incapacitated individual and the proceedings required for a judgment of incapacity are governed by court rule and statute. R. 4:86-1 to -8; N.J.S.A. 3B:12-24 to -35.

An action for the appointment of a guardian must comply with Rule 4:86-2. A guardianship complaint must include two affidavits from properly qualified medical professionals, stating their opinions about "the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs," R. 4:86-2(b)(2)(F), and "the extent to which the alleged incapacitated person retains sufficient capacity to retain the right to manage specific areas, such as . . . legal . . . decisions," R. 4:86-2(b)(2)(G). Notice of the guardianship hearing must be given to the alleged incapacitated person, individuals named by that person in a power of attorney or health care directive, and the person's children. R. 4:86-4(a)(2).

Our Supreme Court recently explained:

"If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings" are necessary, the court must (1) set a date for the hearing, R. 4:86-4(a)(1); (2) give the alleged incapacitated person "at least 20 days' notice" of the hearing, R. 4:86-4(a)(2); and (3) advise the person that

if she opposes the action, "she may appear either in person or by attorney, and may demand a trial by jury," R. 4:86-4(a)(5). "[T]he trial of the issue of incapacity may be had without a jury . . . unless a trial by jury is demanded by the alleged incapacitated person or someone on his behalf." N.J.S.A. 3B:12-24. "[I]f the alleged incapacitated person is not represented by counsel," the court must appoint counsel. R. 4:86-4(a)(7).

[S.T., 241 N.J. at 281.]

Appointed counsel should "interview the alleged incapacitated person," as well as people who are knowledgeable about the person's circumstances, and "make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed." R. 4:86-4(b)(1). The appointed counsel is also required to file a report and make recommendations to the court. R. 4:86-4(b)(2).

"Unless the alleged incapacitated person requests a jury trial, the court must take 'testimony in open court' and 'determine the issue of incapacity.'" S.T., 241 N.J. at 281 (quoting R. 4:86-6(a)). "A finding of incapacity must be made by clear and convincing evidence." Ibid. "Upon making a finding of incapacity, the court may appoint a general guardian or a limited guardian, depending on whether the individual 'lacks the capacity to do some, but not all, of the tasks necessary to care for himself.'" Id. at 282 (quoting N.J.S.A. 3B:12-24.1(a) to

(b)). "A judgment of limited guardianship may specify the limitations upon the authority of the guardian or alternatively the areas of decision making retained by the person." Ibid. (quoting N.J.S.A. 3B:12-24.1(b)).

"After determining whether a general or limited guardian is appropriate, the court must then appoint an individual to serve as the guardian." Ibid. (citing R. 4:86-6(c)). The court possesses "broad powers and maintains far-reaching discretion in guardianship appointments . . . ." Mason, 305 N.J. Super. at 128.

### III.

Based on our review of the record, we are satisfied the procedural steps required by our court rules and statutes were followed in this case. A guardianship complaint was filed with notice to A.H.; the complaint was accompanied by the affidavits of qualified medical professionals; a hearing was convened, testimony was taken; A.H. was represented by independent counsel; the trial court made independent findings of fact applying the clear-and-convincing-evidence standard; and A.H. was adjudicated by the court as incapacitated with respect to the divorce litigation. The judgment of incapacity and appointment of A.H.'s guardian thus comported "with the due process safeguards required by our court rules and statutes." S.T., 241 N.J. at 282.

We emphasize the trial judge made clear and well-articulated credibility assessments regarding the expert witnesses who testified. "[W]e rely on the trial court's acceptance of the credibility of the expert's testimony and the court's fact-finding based thereon, noting that the trial court is better positioned to evaluate the [expert] witness' credibility, qualifications, and the weight to be accorded [the] testimony." In re Guardianship of DMH, 161 N.J. 365, 382 (1999). We find no abuse of discretion in the trial judge's determination to accredit the opinion rendered by Dr. Dyckman, the sole psychiatrist to evaluate A.H., based on his thorough review of A.H.'s psychiatric history. The trial judge reasoned his analysis was most consistent with the facts adduced at the trial.

The trial judge also acted within the ambit of his discretion in discounting the opinion rendered by A.H.'s expert, Dr. Tegeder, based on the fact that her evaluation was less thorough than the one performed by Dr. Dyckman. Dr. Tegeder was also unaware of pertinent facts that might have impacted her opinion.

Nor did the trial judge abuse its discretion in placing great weight on A.H.'s testimony. The judge observed A.H. appeared to become more disturbed over the course of cross-examination and lashed out with inappropriate and defensive responses. The judge's thoughtful analysis is consistent with the

transcript of A.H.'s testimony. She often refused to acknowledge past events in the litigation, even when presented with court documents. We thus have no basis upon which to disturb the trial judge's findings with respect to his direct observation of A.H.'s testimony.

#### IV.

A.H. contends the trial judge erred in failing to order updated medical evaluations. Rule 4:86-2(b)(2) generally requires that medical evaluations by experts in support of complaints for guardianship be completed "not more than [thirty] days prior to the filing of the complaint, but said time period may be relaxed by the court on an ex parte showing of good cause."

Dr. Dyckman examined A.H. on February 24, 2021. Dr. Davelman examined A.H. on February 26, 2021 and on March 3, 2021. The guardian ad litem filed the complaint for guardianship on April 8, 2021, and A.H. requested a relaxation of the thirty-day rule, which was granted by the court. A.H. does not challenge the court's initial relaxation of the thirty-day rule.

However, she argues on appeal that at the time the trial court rendered its decision on March 31, 2022, the evaluations were over a year old. This delay was due to adjournments and scheduling conflicts resulting from the COVID-19 pandemic. We are aware of no rule requiring medical evaluations by experts be

completed within a certain time period of the guardianship trial. The time requirement explicitly established in Rule 4:86-2(b)(2) is measured from the filing of the complaint.

We see no basis to intervene based on the trial judge's failure to sua sponte order reevaluations. Importantly, A.H. did not request reevaluations and did not object to the admission of the medical evaluations by any of the three experts who testified. Cf. State v. Robinson, 200 N.J. 1, 20 (2009) (declining "to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available") (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); see also J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021) ( "[W]e have recognized that 'if we allowed 'late-blooming issues . . . to be raised for the first time on appeal, this would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made, and, when they can no longer be corrected at the trial level, unveiling them as new weapons on appeal.'" ) (quoting Frank M. Coffin, On Appeal: Courts, Lawyering, and Judging 84-85 (1994)).

## V.

We turn next to A.H.'s contention the trial judge erred in allowing T.H. to file an answer and testify at the guardianship hearing. A.H. acknowledges



spouses are considered "interested parties" in guardianship actions. However, she argues that because T.H. attempted to register the divorce decree entered in Cyprus, he does not consider himself to be A.H.'s spouse and therefore should not be deemed to be an "interested party."

A.H. does not cite to any precedent to support that novel argument. Nor did she object to T.H.'s status as an interested party. As we have noted, the Cyprus divorce decree was not registered based on A.H.'s objection. Accordingly, T.H. and A.H. remained legally married in this State. It therefore was entirely appropriate for purposes of the competency hearing to treat T.H. as a legal spouse and an interested party.

## VI.


Lastly, we address A.H.'s contention that the court erred by failing to order reasonable accommodations or less restrictive alternatives to appointment of a guardian, such as allowing A.H. to appear virtually in the divorce action. Rule 4:86-4(b)(iii) provides that counsel for the alleged incapacitated person shall include in their report to the court "any recommendations concerning the suitability of less restrictive alternatives. . . ." A.H. acknowledges that no such recommendation was submitted to the court by A.H.'s competency trial counsel. In these circumstances, we see no abuse of discretion in the judge's failure to

consider whether A.H. would have been competent to participate at a virtual divorce trial.

To the extent we have not specifically addressed them, any remaining arguments raised by appellant in her initial or supplemental briefs lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office

  
CLERK OF THE APPELLATE DIVISION

# RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3383-21

R.B.,<sup>1</sup>

Plaintiff-Appellant,

v.

E.A.C.,

Defendant-Respondent.

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Submitted September 18, 2023 — Decided October 3, 2023

Before Judges Mawla and Chase.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Family Part, Monmouth County,  
Docket No. FM-13-1159-18.

August J. Landi, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

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<sup>1</sup> We use the parties' initials pursuant to Rule 1:38-3(a).

Plaintiff R.B. appeals from a May 23, 2022 dual judgment of divorce entered incorporating the terms of a May 10, 2022 settlement agreement. We affirm.

Plaintiff and defendant E.A.C. were married for twenty-two years at the time plaintiff filed her complaint for divorce in 2018. Pendente lite, the parties were under contract to sell the former marital residence, which had \$1 million in equity. However, the realtor reported plaintiff was not abiding by the court ordered sale and was attempting to thwart the sale. In February 2019, the trial court entered an order stating it was "concerned about . . . [p]laintiff's ability to make decisions and hereby appoints Howard [A.] Bachman, Esq. as [g]uardian [a]d [l]item [(GAL)] to explore if [p]laintiff has the mental ability to engage in the litigation of this matter." The court ordered the GAL to "expeditiously arrange for an evaluation of [p]laintiff."

The divorce trial was scheduled for April 1, 2019, but the parties failed to appear, prompting the court to schedule a hearing the following day. At the hearing, the court learned the marital residence fell into foreclosure and a final judgment was entered. Plaintiff claimed the bank was willing to accept a sum less than the full payoff amount in the foreclosure judgment. However, the bank was unwilling to accept a sum less than the final judgment amount. Defendant's

attorney reported the property was under contract for sale. To preserve the equity in the marital residence, the court entered an order granting the GAL power of attorney to sign the closing documents in the event plaintiff failed to cooperate. In addition to releasing funds to the parties' attorneys, the GAL, and advanced equitable distribution to each party, the court also allocated funds for "a medical expert to evaluate . . . plaintiff and prepare a report as a result thereof."

At the hearing, the court learned the parties did not appear for trial because they entered a consent order to arbitrate the divorce. The court's order memorialized "defendant and his counsel signed a consent order . . . [and] plaintiff through counsel indicated that she also wished to proceed to arbitration. [However, o]n the record . . . plaintiff indicated that she would not sign the order for arbitration." Therefore, the court scheduled a date for plaintiff to show cause "why her pleadings should not be stricken for failure to appear on the date of trial and/or failure to remove the matter to arbitration . . . ." Plaintiff later agreed to arbitration and signed an arbitration agreement and the consent order.

The GAL retained a psychiatrist who issued a report in May 2019. The psychiatrist found plaintiff had "no signs of formal mental illness(es) or

psychosis, but . . . appears to have personality issues at the basis for her lack of more direct self-protective legal action." The psychiatrist concluded

plaintiff's incidents of non-compliance to judicial requests and/or passivity in the face of possibly unnecessary financial loss from her divorce indicate personality problems. In view of her passivity in legally protecting herself, and with a reasonable degree of medical probability or certainty [plaintiff] needs the protection of a [GAL] to handle her divorce proceedings.

As a result, the court entered an order on May 26, 2020, directing the GAL proceed with his charge and submit a written report with the results of his investigation "and a recommendation as to whether a [g]uardianship hearing should proceed under Rule 4:86." Separately, the arbitrator stayed the arbitration "pending the reconsideration of the appointment of a [g]uardian for [p]laintiff . . . subsequent to . . . S.T. v. 1515 Broad Street, LLC, [241 N.J. 257 (2020).]"

In July 2020, the GAL issued a report detailing the history of the case and plaintiff's conduct; this included her interference with the sale of the former marital residence and misconduct during court proceedings. The GAL explained that following the issuance of the psychiatrist's report, he participated in the divorce proceeding on plaintiff's behalf along with her attorney and "[a]t all times she expressed great displeasure with [the GAL's] appointment." The GAL

noted that "[d]uring many of [his] conversations with [plaintiff] she had varying moods. Often, she will not let [him] speak. She reaches conclusions without support and is unwilling to listen to any comment inconsistent with her thoughts." Plaintiff was uncooperative and "at a moment's notice . . . loses her temper, becomes oppositional and tunes out to all around her." Although plaintiff told the GAL she was retaining a new attorney, she never did.

The GAL's report explained the parties agreed to mediate their matter with the arbitrator. However, plaintiff "was adversarial and oppositional with [her attorney] and [the GAL] during [the] mediation . . . . [She] refused to provide information and documentation to support her position and claims." The GAL noted the court ordered a second evaluation pursuant to S.T. The GAL "discussed and forwarded [S.T.] to [plaintiff] . . . [and she] originally was pleased with the necessity of a second evaluation" but later refused to cooperate.

The GAL concluded as follows:

I have found [plaintiff] to be an extremely bright person. I do believe that she understands what is being said to her regarding her legal matters. However, it is clear to me that [she] lacks the capacity to appropriately handle her legal matters. She has an inability to focus on the issues at hand and comply with reasonable requests for her participation. The request for her participation is for information that only she has available to her. . . .

. . . In my opinion, [plaintiff] needs a [GAL] in her divorce litigation. To be clear, I do not believe that [she] needs a guardian of her person. At all times that she has spoken and appeared before me, she is appropriately dressed, not under the influence of any substance, is able to communicate her thoughts to me and I believe able to understand what I am saying to her. She is not in any apparent physical distress. To the best of my knowledge, she has appropriate accommodations, is well fed, and manages her day[-]to[-]day affairs. However, in discussing matters related to her divorce litigation, she becomes easily irritated, critical, at times irrational, and without the ability to make business[-]like decisions.

On August 20, 2020, the court held a status conference and entered an order memorializing the "GAL advised [that] plaintiff . . . is willing to cooperate and meet with a second doctor." The court appointed a second doctor and ordered plaintiff to comply with the evaluation. On December 7, 2020, the court entered an order directing the GAL to issue an updated report following his receipt of the second doctor's report.

On January 8, 2021, the second doctor issued her report. She noted plaintiff refused to comply with a cognitive screen but completed all diagnostic testing and interviews. The doctor opined plaintiff's diagnosis was

[a]lcohol [a]buse [d]isorder, [m]ild to [m]oderate. She has a history of ADHD . . . . The additional identified personality characteristics involving emotional reactivity, aggression, interpersonal conflicts, risk taking behaviors . . . are suggestive of a [p]ersonality



[d]isorder. . . . This diagnosis brings characteristics such as anger responses, impulsive/self-destructive behaviors, feelings of loneliness/emptiness, [u]nstable relationship[s], high sensitivity/overwhelming emotions and reactions.

The doctor concluded plaintiff required mental health treatment because there was "no evidence that these mental health functioning risk factors have been sufficiently addressed to reduce her risk and enable her to act in her best interests in [the] divorce proceedings." Further, it was in plaintiff's "best interest to maintain a [GAL] through the completion of her divorce proceedings."

The GAL issued a second report, which enclosed the second mental health evaluation. The GAL further noted plaintiff advised him that she had entered a forty-five-day alcohol rehabilitation program and had jettisoned her divorce attorney. The GAL recommended the court schedule a guardianship hearing pursuant to Rule 4:86.

On March 9, 2021, the court entered an order noting it had reviewed the GAL's report and recommendation. The court stayed the divorce and scheduled a guardianship hearing. Subsequently, the court entered an order directing the GAL to initiate the guardianship proceeding. On April 8, 2021, the court held a status conference and entered an order memorializing that plaintiff instead requested the GAL continue to serve on her behalf. The order also appointed

new divorce counsel and directed defendant's attorney to release marital funds held in trust to pay counsel's retainer for plaintiff. The court directed the parties to resume arbitration within twenty days.

On May 23, 2022, the parties appeared with their respective counsel and the GAL for an uncontested divorce hearing. The trial judge took testimony from the GAL and defendant. Plaintiff was also placed under oath.

Both counsel and the GAL represented to the court the matter was resolved in mediation and provided a handwritten document signed by defendant, his counsel, plaintiff's counsel, the GAL, and the mediator. The settlement provided for: an alimony buyout payable over twelve and one-half years; plaintiff's waiver of an interest in defendant's pre-marital and inherited real estate, business, and trust interests; rollover of defendant's entire IRA to plaintiff; payment of ninety percent of the remaining marital home proceeds to plaintiff; and each party retaining their own vehicle, bank, and investment accounts. The settlement agreement provided: the parties would not pay direct child support to each other; absolved plaintiff of an obligation to contribute to the children's college, unreimbursed medical, and car expenses; and obligated defendant and the children to bear those expenses. There was no marital debt to distribute.

each party would pay their own debts and counsel fees, and plaintiff would bear the GAL's fees.

At the uncontested hearing, plaintiff told the court she did not agree to the settlement because it was "completely an unfair settlement," and the GAL and her attorney should have advocated for a "much better" settlement "than what . . . was agreed to." She claimed she wanted to proceed to arbitration but was denied the right to do so and now wanted a trial.

Plaintiff's counsel noted plaintiff did not attend the final mediation session and did not sign the settlement agreement because she previously stipulated the GAL "could make the ultimate decision on her behalf." Plaintiff denied that was the case and told the judge she wished to "rescind any request . . . for [the GAL] to sign on [her] behalf." Plaintiff's counsel noted after she communicated the settlement to plaintiff, she received emails from plaintiff, including on the morning of the uncontested hearing. Her emails advised she wanted to proceed with arbitration or a trial and she did not trust the GAL or her own counsel.

The trial judge noted the case was over four years old and the GAL had been appointed "many years ago." The judge recounted the lengthy procedural history of the case, including the court ordered evaluations and guardianship hearing. He noted the guardianship hearing did not occur because plaintiff "was

very satisfied with [the GAL's] services and, as embodied in my [April 8, 2021] order, she consented and requested that [the GAL] continue to assist her . . . .” The judge concluded the evidence presented showed the GAL “had authority to assist [plaintiff] in the conduct of this litigation, which is precisely what he did.” After counsel questioned the GAL and defendant regarding the settlement and the cause of action, the judge entered the judgment of divorce.

On appeal, plaintiff argues the trial judge erred when he concluded the GAL had authority to make decisions for her. She asserts this is precisely what happened in S.T., and the Supreme Court reversed there because the trial court failed to conduct a guardianship hearing. Plaintiff argues the trial judge here could neither accept the settlement nor enter the judgment of divorce because plaintiff’s “competency was never properly vetted,” she “‘rescinded’ her consent to the GAL proceeding in her behalf[,]” and thus there was no evidence the parties had freely entered into the agreement.

Plaintiff concedes she was disruptive at the uncontested proceeding, but asserts the judge deprived her of the ability to express her objections on the record by muting her microphone. She notes neither mental health evaluator found her incompetent. Nor did the judge conclude she was mentally

incapacitated; "merely that she is annoying and aggravating to others when she believes her concerns are not being listened to or respected."

"We accord deference to a trial court's factfindings, particularly in family court matters where the court brings to bear its special expertise." Moynihan v. Lynch, 250 N.J. 60, 90 (2022) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "Under that deferential standard of review, we are bound to uphold a finding that is supported by sufficient credible evidence in the record." Ibid. "However, we owe no deference to a trial court's interpretation of the law, and review issues of law de novo." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016).

Plaintiff argues the trial judge failed to follow S.T. We are unpersuaded. S.T. suffered a head injury and filed a personal injury suit against defendants for her injuries. 241 N.J. at 261. When she rejected defendants' offer of judgment against the advice of her attorney, he applied to the trial court for the appointment of a GAL unbeknownst to S.T. Id. at 261, 276. The court appointed the GAL, ceded authority to the GAL to determine whether S.T. had the mental capacity to settle her case, and based on the GAL's recommendation that she did not, accepted the settlement over S.T.'s objections. Id. at 262.

The Supreme Court reversed, holding the trial court deprived S.T. of the right to control her lawsuit and decide whether to accept the settlement by empowering the GAL to settle the case against her wishes. Id. at 275. The trial court "vested the [GAL] with the singular authority to settle the case without holding a hearing to determine whether S.T. suffered from a mental incapacity that rendered her unable to make that legal decision for herself." Ibid.

The Court explained a GAL's role is to

act as an independent investigator and inform the court on the subject of the client's mental capacity. . . . After completing its inquiry, the [GAL] submits a report to the court containing the results of the investigation and recommends whether a formal hearing should proceed under Rule 4:86. . . . The [GAL's] recommendations are not binding on the court; ultimately the court must make its own independent factfindings. . . . The court should not "cede [its] responsibility and authority" as the decisionmaker to the [GAL].

Nothing in our court rules, statutes, or case law suggests that a [GAL] appointed to investigate a client's alleged mental incapacity has the power to make legal decisions for the client before a judicial determination on her mental capacity.

[Id. at 278-79 (quoting Milne v. Goldenberg, 428 N.J. Super. 184, 202 (App. Div. 2012)).]

At the outset, we note the trial court here followed S.T. Based on its own observations of plaintiff's behavior, the court appointed the GAL who,

consistent with the Rules of Court and S.T., conducted a thorough investigation into plaintiff's mental capacity, obtained two evaluations, and reported those findings and his own back to the trial court. The court then ordered a guardianship hearing as required by S.T.

Here, unlike S.T., plaintiff had notice of the application to appoint a GAL and the trial court never ceded its authority to decide plaintiff's mental capacity to the GAL. Furthermore, unlike S.T. who contested the GAL's role, the record here reveals plaintiff declined to proceed with the guardianship hearing and designated the GAL as her agent to settle her case with the assistance of her attorney.

Contrary to the arguments raised on appeal, the dispute here was no longer about plaintiff's competency because plaintiff removed this issue from consideration by dispensing with the guardianship hearing. Rather, the issue was whether the GAL, as designated by plaintiff and her attorney, had authority to settle the case on her behalf. The credible evidence in the record shows plaintiff exhibited oppositional behavior throughout the proceedings; a fact plaintiff readily concedes on appeal. These circumstances convince us it was not unreasonable to have an intermediary—in this case two attorneys—negotiate and facilitate the divorce. Indeed, a settlement achieved by a party through their

representative is just as valid as one directly assented to by the party themselves. See Harrington v. Harrington, 281 N.J. Super. 39, 47 (App. Div. 1995) (citing Davidson v. Davidson, 194 N.J. Super. 547, 549-50 (Ch. Div. 1984)).

Finally, we note there is no evidence, let alone argument, that the settlement was unconscionable. Unconscionability occurs when there is "overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that no reasonable person not acting under compulsion or out of necessity would accept its terms." Howard v. Diolosa, 241 N.J. Super. 222, 230 (App. Div. 1990). Unconscionability occurs when there is: "(1) unfairness in the formation of the contract; and (2) excessively disproportionate terms." Est. of Cohen ex rel. Perelman v. Booth Comput., 421 N.J. Super. 134, 157 (App. Div. 2011).

The record shows the settlement process and the agreement contained none of the badges of unconscionability. The trial judge appropriately concluded the GAL and plaintiff's attorney had authority to settle her case and an enforceable settlement agreement was achieved. This decision was neither a mistaken understanding of the facts nor a misapplication of law.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION



**Polina M. Dostalík** is a Partner in Ziegler Law Group LLC, with offices in Livingston and Hackensack, New Jersey and New City, New York, where she concentrates her practice on the fields of family, relationship, and matrimonial law and related matters in New Jersey and New York. With nearly 15 years of experience, Polina represents clients in all stages of family and matrimonial law litigation, arbitration, and mediation, including but not limited to: divorce, equitable distribution, alimony, child custody, child support, parenting time, relocation, paternity, psychological parentage, marital agreements, and separation agreements, dissolution of civil unions and domestic partnerships, palimony, post-judgment matters, and domestic violence actions. Polina is also highly proficient in assisting clients negotiate and draft legally sound pre-nuptial, post-nuptial, and cohabitation agreements. From the filing of the Complaint for Divorce through post-judgment issues, she zealously represents her clients with a keen sensitivity to the emotional considerations unique to the family law client. While remaining focused on her client's goals, Polina is as comfortable in the courtroom as she is at the negotiation table. Polina also focuses on international and interstate family law, which includes an active practice in New York State. She has served clients in a wide range of cases in signatory countries to the Hague Convention on the Civil Aspects of International Child Abduction. Her expertise ranges from crafting enforceable, multi-jurisdictional agreements to managing complex international parental abduction matters, implicating international treaty law and global law enforcement. Polina has also been appointed by the court to serve as a Guardian *ad Litem* on behalf of minor children. Since 2010, Polina has volunteered with the Battered Women's Legal Advocacy Project, representing victims of domestic violence.

Prior to joining Ziegler Law Group LLC, Polina honed her litigation skills as an associate at Bressler, Amery, and Ross, P.C. While there, Polina practiced in areas of family law, securities, and commercial litigation. Polina's background in securities and commercial litigation has enriched her success in the family law arena, particularly as to effectively handling high net worth marital estates, complex equitable distribution, and business valuation issues.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Polina is a member of the Family Law Section of the New Jersey State Bar Association, the New York State Bar Association, and the Morris and Essex County Bar Associations. She is also a volunteer panelist for the Matrimonial Early Settlement Panel in Morris and Essex Counties and is a court-approved mediator.

A *magna cum laude* graduate of New York Law School, Polina was an Executive Editor of the New York Law School Law Review. The Law Review published her Note entitled "Embryo 'Adoption'?: The Rhetoric, the Law, and the Legal Consequences." Polina received her undergraduate degree with high honors in English and Political Science from Rutgers University.

Polina is fluent in Russian.