Committee Newsletter | Winter 2017

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A Winter Update from your YLD TIPS Co-Chair

By: Domenick G. Lazzara, Esq.

Happy New Year! I hope your 2017 is off to a great start! As one of your YLD TIPS Co-Chairs, I am excited to welcome you to another fantastic year, as well as discuss how you can start 2017 off on the right foot with YLD TIPS. Along with my Co-Chair, Charles Coffey, and an entire Team of dedicated Vice-Chairs and Content Editors, we at YLD TIPS are focused on bringing you new and exciting content. This includes offering you opportunities to develop your practice by expanding your knowledge base, strengthening your resume with speaking and publishing opportunities through YLD TIPS, and building your personal network with opportunities to meet other YLD and ABA TIPS Section members and practitioners.

1. Expand Your Knowledge Base

In this issue, we are excited to bring you the first article of this year’s 101 Practice Series, published by your Co-Chair, Charles Coffey. The 101 Practice Series is an online resource for new lawyers covering basic training in both substantive and practical aspects of law practice. With over 300 quick tips and tools, this series is an essential resource for lawyers in their first three years of practice and is exclusively available to ABA members. Mr. Coffey brings his expertise in legal malpractice to add to the 101 Practice Series in his article entitled: “Legal Malpractice 101.”

You can access the entire 101 Practice Series here. Please consider adding to the series by authoring your own 101 Practice Series article. For more information, please contact your YLD TIPS Content Editor, Alexandra Maiolini, Esq. at amaiolini@kirwanspellacy.com.

2. Strengthen Your Resume

As an YLD TIPS Member, you have the unique opportunity to strengthen your resume with speaking and publishing opportunities. Speaking opportunities include live teleconferences as well as local and national speaking opportunities. Publishing opportunities include publication in your YLD TIPS Quarterly Newsletter, as well as contribution to the 101 Practice Series. In fact, this month we are excited to bring you a new article from Michael Spanel, Esq., discussing what you should know about products liability litigation arising from drone accidents. Mr. Spanel was a cited source in my article featured in the Fall 2016 YLD TIPS Newsletter, “When Drones Attack – Is Drone Negligence on the Horizon?”

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3. Build Your Personal Network

YLD TIPS offers you myriad opportunities to build your personal network by meeting other YLD TIPS Members and Practitioners. In February, we will host our first **YLD TIPS In-Person Meet-Up**, to take place during the ABA’s Midyear Meeting in Miami, Florida. Please come out to Panther Coffee, 2390 NW 2nd Ave, Miami, FL 33127, on Friday, February 3, 2017 from 2:00 – 3:00 PM to meet other YLD TIPS Members and Practitioners, as well as Members of your YLD TIPS Leadership Team.

For more information, please contact me at DLazzara@LeeLazzara.com, or feel free to text or call me directly at: (305) 575-9463.

Overall, I speak for the entire ABA YLD TIPS Committee when I tell you I am excited for 2017 has in store for us all! I am excited to meet you in Miami, and hear from you more as this year unfolds.

Sincerely,

Domenick G. Lazzara*
Lee & Lazzara, P.A.
DLazzara@LeeLazzara.com

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*Domenick G. Lazzara is a trial attorney with Lee & Lazzara, PLLC, in Tampa, Florida and practices general civil litigation with a focus on personal injury. Domenick is the Co-Chair and Senior Content Editor for YLD TIPS, an adjunct professor at the University of Tampa, and holds numerous board positions with local and national bar organizations, most notably, the National Italian American Bar Association. Learn more by following his blog at: [https://domlawfl.wordpress.com/](https://domlawfl.wordpress.com/).
Product Liability Litigation in the Age of Drones

By: Michael Spanel, Esq.*

Despite their relatively recent introduction in the consumer goods market, the popularity of drones has skyrocketed with both hobbyists and professionals alike. In 2016, the Federal Aviation Administration (“FAA”) estimated that 2.5 million drones would be purchased nationwide.1 By 2020, the FAA expects that sales will reach 7.0 million.2 These drones have already seen a wide range of useful applications, including aerial photography, accident investigation, pipeline and powerline monitoring, and crop monitoring. Like most emerging technologies, however, drones do not always behave as expected and may cause injuries and property damage. Consequently, these accidents could expose the drone pilot, the drone manufacturer, and the drone designer to litigation. In addition to negligence, many plaintiffs may pursue product liability causes of action after a drone accident. Although there is currently a dearth of case law directly addressing drone cases, current product liability law provides a useful roadmap for what to expect when handling a drone accident.

The first part of this article discusses product liability causes of action for product defects, manufacturing defects, and inadequate instructions or warnings. The second part of this article discusses application of two common tests that courts use to determine whether a product was defective. Where appropriate, this article primarily uses Illinois case law along with the Second and Third Restatements of Torts as a comparison.

I. The Products Liability Cause of Action

Defectively designed or manufactured drones that cause injury or property damage could expose the drone’s designer to a products liability cause of action. Products liability cases are usually decided under a strict liability standard. Unlike simple negligence, strict liability imposes liability even without proof of fault, which means that so long as the drone’s condition was unreasonably dangerous, the drone’s designers and manufacturers could be exposed to litigation

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2 Id.
despite implementing safety measures.\textsuperscript{3} To prevail in a product liability cause of action, the plaintiff must demonstrate that: 1) the injury was caused by a condition of the product, 2) the condition was unreasonably dangerous, and 3) the condition existed at the time it left the manufacturer’s control.\textsuperscript{4}

Three main theories of recovery exist under products liability doctrine: (1) design defect; (2) manufacturing defect; and (3) failure to warn.\textsuperscript{5}

a. **Inadequate Instructions or Warnings**

Instructions for the proper use and operation of a product and warnings of specific potential hazards provide a user with notice, and can be used to insulate a drone manufacturer, seller, or member of the distribution chain from liability,\textsuperscript{6} especially when a safer design cannot reasonably be implemented.\textsuperscript{7} Conversely, inadequate instructions and warnings can expose manufacturers, sellers, and other members of the distribution chain to liability: a product is “defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.”\textsuperscript{8} As with any new technology, drones oftentimes come with dozens of pages of warnings and instructions. Some warnings are quite comprehensive, and can even be found online.\textsuperscript{9}

\textsuperscript{3} *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389 (N.Y. 1916). Previously, contractual privity between the injured and the manufacturer was required, with narrow exceptions. In *MacPherson*, however, Judge Cardozo paved the way for one of the narrow exceptions to become the norm, thus allowing for recovery even without privity of contract.


\textsuperscript{5} *Restatement (Third) of Torts: Products Liability* § 2 (1998)

\textsuperscript{6} *Sollami v. Eaton*, 201 Ill.2d 1, 19 (Ill. 2002).

\textsuperscript{7} See *Restatement (Third) of Torts: Products Liability* § 2, cmt. I; *Jennings v. BIC Corp.*, 181 F. 3d 1250 (11th Circ. 1999) (ruling that “keep out of reach of children” warning was sufficient because manufacturer was not required to take all possible measure to ensure that its product could not be misused by anyone who might come into possession of the product”).

\textsuperscript{8} *Restatement (Third) of Torts: Products Liability* § 2(c) (1998); see *Happel v. Wal-Mart Stores*, 199 Ill.2d 179, 186 (Ill. 2002) (finding that a duty to warn exists where there is “unequal knowledge, actual or constructive [of a dangerous condition], and the defendant[,] possessed of such knowledge, knows or should know that harm might or could occur if no warning is given.” (internal citations omitted)).


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In Illinois, warnings are inadequate if the warnings: “(1) do not specify the risk presented by the product; (2) are inconsistent with how a product would be used; (3) do not provide the reason for the warnings; or (4) do not reach foreseeable users.”10 In contrast to Illinois’s rule regarding warnings and instructions, some jurisdictions may find liability despite warnings where the product designer could have implemented a safer design alternative. In Texas, its Supreme Court found a defendant tire manufacturer liable for failing to design a safer 16” tire that would not catastrophically explode when mounted on a 16.5” rim: despite the defendant including a warning on the tire, the fact that the plaintiff read the warning and admitted that he was aware of the danger of an improper tire mount, and despite the plaintiff having changed tires well over 1,000 times in the past.11 Although onerous, the Texas ruling may become more popular due to a trend emphasizing safe product design and manufacture over instructions and warnings.12 Accordingly, drone designers should prioritize both design safety and creating proper design warnings.

b. Manufacturing Defect

A product contains a manufacturing defect when “the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.”13 A manufacturing defect typically arises when something goes awry during the production or fabrication process. Manufacturing defects are subject to rigid legal rules, and manufacturers may be found liable regardless of any precautions taken to insure the product’s safety.14 Furthermore, proof of the precise nature of the manufacturing defect is generally not required,15 if any defect theories are not speculative.16

Rules regarding manufacturing defects could have major implications in drone litigation. Since drones are usually destroyed when they crash, it can be difficult to obtain useful data to determine the exact reason why the crash occurred. However, a plaintiff does not necessarily

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10 Id.
11 Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W. 2d 328, 335-338 (Tex. 1998).
12 See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. I.
14 Id. at § 2, cmt. (a).
15 Id. at § 3.
16 Id. at § 3.

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need this missing evidence to be successful. If a plaintiff is able to show generally that the drone crashed because of a manufacturing defect, the plaintiff will likely prevail.17

c. **Design Defect**

As with all products, a drone is “defective in design when the foreseeable risks of harm posed by the [drone] could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the [drone] not reasonably safe.”18 Drone designers need not necessarily design a product incapable of causing injury if infeasible to do so;19 rather, drones should be designed to avoid injuries from reasonably foreseeable uses and misuses20 while still maintaining design feasibility.21

II. **Two Product Liability Tests**

Illinois has adopted two tests to help determine whether the condition is unreasonably dangerous22: the consumer-expectation test and the risk-utility test. Although Illinois has not determined under which circumstances each particular test should be applied, the Third Restatement of Torts: Products Liability found that the risk-utility test should be used for design defect cases.23 Third Restatement also appears to indicate that inadequate warnings lawsuits should adopt the risk-utility test.24

a. **Consumer-Expectation Test**

Under the consumer-expectation test, the plaintiff may “introduce evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an

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18 Id. at § 2(b) (1998); see *Restatement (Third) of Torts: Products Liability* § 4(a) (1998) (providing that “noncompliance with an applicable product safety statute or administrative regulation renders the product defective”). For a more detailed analysis of noncompliance with statutes and regulations, see Part II, supra.
21 Id.
22 The terms “unreasonably dangerous” and “inherently dangerous” as used in products liability causes of action have very different legal meanings from the term “abnormally dangerous.” The concept of abnormally dangerous activities is a separate species of liability, distinct from products liability, and is discussed in detail in Part I, supra.
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intended or reasonably foreseeable manner.”25 Litigants in products liability cases involving drones should consider analyzing the following two issues to determine whether the drone meets the consumer-expectation test:

Did the drone operate as reasonably expected? Some DJI-brand operators complain that their drones will occasionally drift around uncontrollably, a phenomenon many users call “flyaway.”26 Some flyaways appear to be attributed to inadequate pre-flight checks by the users,27 yet some appear to be attributable to other undetermined problems. Such a phenomenon could expose DJI to liability if one of these flyaways causes injuries or property damage because the drone arguably did not operate as reasonably expected by the user.28

Was the drone pilot operating the drone in a reasonably foreseeable manner? If a reasonably foreseeable misuse causes injuries, the drone manufacturer/designer could be found liable under a consumer-expectation test.29 Pilots operate in a wide variety of applications, exposing drone manufacturers and operators to potential litigation for injuries in a wide variety of activities, including for prohibited activities if the activities were reasonably foreseeable by the manufacturer/designer. Examples of prohibited activities include operating drones over crowded stadiums or in controlled airspace – both of which have already occurred.30

Litigants are not limited to the consumer-expectation test, however. The risk-benefit test is especially beneficial when evaluating the design features of emerging technologies, including drones.

25 Id. at 336 (internal citations omitted); see, e.g., Terry v. Gerry’s Ridgewood, 490 N.E.2d 987 (Ill. App. 3d Dist. 1986) (finding that a gun was not unreasonably dangerous when it fired a bullet when the trigger was pulled because firing a bullet was “precisely the operation of the product which, according to its function, is reasonably to be expected); Mele v. Howmedica, 808 N.E.2d 1026 (Ill. App. 1st Dist. 2004) (finding that artificial hip that caused artificial bone deterioration failed to perform as an ordinary consumer would expect under the consumer-expectation test); Sobczak v. GMC, 871 N.E.2d 82 (Ill. App. 1st Dist. 2007) (finding van unreasonably dangerous under consumer-expectation test when driver tried to restart van because the “ordinary consumer would expect his [van] either to start or not to start, but would not expect the interior of the van to ignite”).
26 See Sobczak, 871 N.E.2d at 93.
27 See Lancaster v. Jeffrey Galion, Inc., 396 N.E.2d 648, 652 (Ill. App. 2d Dist. 1979) (finding that “unless the manner of operation was not reasonably foreseeable by the defendants, the alleged misuse is not a bar to recovery”).
28 Far Part 107.
b.  **Risk-Benefit Test**

In Illinois, for example, the risk-benefit test inquires whether “on balance the benefits of the challenged design outweigh the risk of danger inherent” in the product and allows, but does not require, the plaintiff to introduce evidence of an alternative design that is “economical, practical, and effective.” Controversially, the Third Restatement of Torts requires the plaintiff to demonstrate a reasonable alternative design for the purportedly defective product. Reasonable alternative design factors include the alternative design’s production costs; its effect on product longevity, maintenance, repair, and aesthetics; and the range of consumer choice among products.

As an apparent inverse to the reasonable alternative design requirements of the Third Restatement, some jurisdictions allow the defendant to proffer a “state of the art” defense when under the risk-benefit test. “State of the art” is the “level of pertinent scientific and technical knowledge existing at the time of a product’s manufacture, and the best technology reasonably available at the time the product was sold.”

Many jurisdictions include proof of state of the art as an affirmative defense. Although state of the art is not considered a “true” affirmative defense in Illinois, it can be very persuasive evidence weighing in favor of a finding that there were no feasible alternatives to the product design.

Since drone technology is fairly new, engineers have implemented countless safety features into their drone designs. Integration of these safety features could be useful in determining that a drone is not unreasonably dangerous under the risk-utility test. Conversely,
the absence of safety features could suggest that the drone is unreasonably dangerous under the risk-utility test. Below are some examples of more recent drone safety features.

**Automated and Pre-Programmed Controls:** Instead of joystick controls, some companies are now moving towards the use of apps to maneuver and operate drones. These programs include functions that allow drones to take off, follow programmed flight paths, land autonomously, or even follow the pilot movements. Some of these applications even allow the user to program the flight path by using his finger on a touch screen map, which then transmits the instructions from the touchscreen to the drone. While some websites have suggested that it makes drone operations much easier and less dangerous, nevertheless there is ample room for improvement because the drones using this software remain unable to sense or avoid obstacles.

**Recall and Land Functions:** The recall, or “return-to-home” function, causes a drone to return to its takeoff position. The recall function is automatic and is useful in situations where the pilot loses connection with the drone. A more rudimentary, but similar, option is the emergency land function. This directs the drone to land immediately, regardless of where it is relative to the pilot.

**Geo-Fencing:** Geo-fencing prevents drones from taking off or entering a particular airspace through GPS tracking. Although already in use by DJI drones operating around “sensitive” locations, the concept of geo-fencing gained popularity after an off-duty employee of an intelligence agency crashed his friend’s drone into the White House lawn on January 26, 2015. Since then, DJI expanded its virtual fence to include a 15.5-mile radius around Washington, D.C. in order to prevent a similar or worse accident. DJI’s geo-fencing function also prevents its drones from crossing international borders and from entering the airspace around airports.

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40 Follow Your Lead, supra, n. 85.

41 Id.

42 Id.

43 Phantom 2 Features, supra, n. 85; Parrot AR Drone, supra, n. 85.

44 Id.


48 Grounded, supra, n. 92.

49 Id.

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Engine and Propeller Shutoff: Some drone models come equipped with a program that immediately shuts off the propellers if a collision does occur in an effort to mitigate any injuries that could occur because of the spinning blades.\(^{50}\)

Self-Destruction: The self-destruction feature turns a single large, relatively heavy falling object into many smaller, lighter, and less dangerous objects via a small explosive. A fascinating, albeit extreme, iteration of this concept is a drone made of mycelium spores that will disintegrate upon contact with water.\(^{51}\)

Drones can also come equipped with emergency parachutes in order to provide a safe landing, protect people on the ground, and prevent serious damage to the drone airframe.\(^{54}\) Some parachute designs for smaller drones add only a few ounces to the airframe, thereby balancing the need for safety while minimizing a reduction in payload capacity.\(^{55}\)

III. Conclusion

While lawsuits currently are rare, the rising popularity of drones crowding America’s skies means that litigation arising out of drone accidents could become more common. Much of this litigation will involve products liability causes of action arising out of design defects, manufacturing defects, and insufficient warnings and instructions. Plaintiffs and defendants should take care to

\(^{50}\) Bebop Drone, supra, n. 91.


\(^{53}\) Id.


understand both drone technology and product liability law in order to achieve a favorable result in the courtroom.

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The ABA Standing Committee on Lawyers’ Professional Liability Releases Latest Malpractice Data

By: Charles Coffey, Esq.*

Despite the prevalence of legal malpractice actions across the country, there are few sources of data to allow us to truly understand the nature of these actions and their frequency. Fortunately, the ABA Standing Committee on Lawyers’ Professional Liability has secured the cooperation of commercial liability insurance carriers and carriers who are members of the National Association of Bar Related Insurance Companies, or “NABRICO” legal malpractice insurance carriers to anonymously report data that, when viewed in the aggregate, provides a snapshot from which we can extrapolate trends. The Profile of Legal Malpractice Claims (hereinafter, “The Profile”) has been periodically prepared since 1985. The most recent edition of The Profile includes data from 2012-2015, and compares this to data from previous editions. The author of this article has endeavored to provide you some highlights of data from this study.

In order to view The Profile in the proper light, one must first possess a basic understanding of legal malpractice insurance and the law that governs legal malpractice actions. Most legal malpractice insurance policies, like other professional liability policies, are “claims made” policies. As Scott F. Bertschi and John C. Tanner explained in The National Law Review:

…claims based on errors occurring prior to the policy period are not covered if any insured had a reasonable basis to believe that a claim could

57 Standing Committee on Lawyers’ Professional Liability, Jessica R MacGregor, & Jason Timothy Vail, Profile of Legal Malpractice Claims: 2012-2015 (2016).
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be made. Courts in many states apply an objective standard to determine whether an insured had such “prior” knowledge. Thus, the question is not whether you specifically thought a claim would be made, but whether a “reasonable insured,” knowing what you know, would believe that a claim is possible.\textsuperscript{59}

Additionally, many policies require that insureds report knowledge of potential claims, as any claim that does arise from this knowledge will be tied to the provisions of the policy in force when said knowledge was gained\textsuperscript{60}. However, the time during which knowledge of a potential claim must/may be reported vary across the numerous policies in the marketplace.

It is also important to remember that, unlike auto insurance, no state but Oregon requires attorneys to purchase and carry legal malpractice insurance. Some states do, however, require attorneys to disclose to the state bar association, on their annual renewal, whether they have insurance. In states with mandatory disclosure, this information is sometimes available to clients via the state bar association.\textsuperscript{61}

As explained by Allen N. David, Esq., attorney with Peabody and Arnold, LLP in Boston, to establish a claim of legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) that the attorney failed to exercise reasonable care and skill in handling the matter for which he or she was retained; (3) that the client incurred a loss as a result of the attorney’s negligence, and (4) that the client's loss constitutes legally compensable damages.\textsuperscript{62} Moreover, a client’s “…damages will necessarily depend on what the client should have recovered on his claim or the damages he was required to pay in the unsuccessful defense. In the former situation, the plaintiff will have to prove up the “case within a case,” including damages. If a judgment in the underlying claim would have been uncollectible, there are no damages recoverable on the malpractice claim.\textsuperscript{63}

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{62} LEGAL MALPRACTICE, EXW MA-CLE 18-1.
Armed with this knowledge, one can take a look at the most recent version of "The Profile" and understand better the claims behind the numbers reported therein. Not surprisingly, real estate was the area of practice from which most claims arose during the last edition, which covered the recession period of 2008-2011. This most recent edition of "The Profile," however, reveals that personal injury-plaintiff has once again gained its pre-recession spot as the single largest claim generating practice area. Real estate thus slipped into the second spot, while family law, estate, trust and probate, and collection and bankruptcy took the next three spots. Perhaps most importantly, these three areas of the law saw the most growth in reporting claims in the history of "The Profile."

"The Profile"s data on claims per firm size provided interesting, yet not likely surprising, results. Solo practitioners continue to be the largest generators of claims. In fact, the number of claims reported by solo practitioners went up, along with the number of claims reported by firms with 100 or more lawyers, but the number of claims reported by all other firm sizes was lower than that which appeared in the 2011 version of "The Profile."

The type of activity that continued to dominate reported claims was “Preparation, Filing, and Transmittal of Documents.” This was followed distantly by “Advice” and “Commencement of Action/Proceeding.” In fact, “Substantive Errors” were responsible for more than half of all claims reported, with “Failure to know/apply the law” being the most common error made. As for the damages that flow from the claims reported, the categories of those under $1,000 and those over $100,000 experienced increases in their frequency. Given the additional higher-value claims, it is therefore not astounding that it took longer to close claims in the period of 2012-2015 than it did from 2008-2011. Notwithstanding this, approximately half of all reported claims were closed without any payment is made, yet the number of claims disposed of only after a lawsuit was filed rose to its highest level since 2003.

"The Profile”s author’s note that there were insurance companies that did not participate in this study and there, of course, an unknown about of attorney who have no malpractice insurance. This data, therefore, cannot possibly take all claims made against all lawyers into account, and therefore it potentially presents an incomplete picture. Nuances in state legal malpractice law also may skew the prevalence (or not) of a particular type of claim in that state. Finally, "The Profile" cannot take the amount of time an attorney devotes to a practice area into account; in
other words, it is unclear if the errors made in various practice areas are made by inexperienced or seasoned attorneys.  

While *The Profile* necessary paints what may be an incomplete picture, it still can serve as a guide to the young attorney when assessing potential practice areas, general risk to his or her practice, and whether they decide to purchase legal malpractice insurance. As such, the author recommends that you purchase a full copy of *The Profile* from the ABA, and cautions that this article should not be relied on for legal advice about malpractice insurance, risk management, or any other reason.  

*Charles Coffey is Senior Claims Counsel at The Bar Plan Mutual Insurance Company in St. Louis, Missouri, a legal malpractice insurer that writes policies in Missouri, Kansas, Indiana, New Mexico, and Tennessee. Prior to joining The Bar Plan, Coffey practiced civil litigation, with a defense-oriented emphasis on insurance issues, telecommunications, and commercial cases, for a boutique firm in South Florida. Coffey enjoys being involved in the legal community, and holds positions on the Missouri Bar Young Lawyers’ Section Council and the executive board of the Young Lawyers’ Division of the Bar Association of Metropolitan St. Louis.*  

**Legal Malpractice 101**  
*By: Charles Coffey, Esq.*  

Data shows that most attorneys will have from one-to-three legal malpractice claims made against them in their career. Thus, it is important for every lawyer to have at least a basic understanding of issues surrounding legal malpractice, and the insurance policies that may provide protection against it.  

I. The Basics of Legal Malpractice  

As explained by Allen N. David, attorney with Peabody and Arnold, LLP in Boston, to establish a claim of legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) that the attorney failed to exercise reasonable care and skill in handling the matter  

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64 Standing Committee on Lawyers' Professional Liability, Jessica R MacGregor, & Jason Timothy Vail, Profile of Legal Malpractice Claims:2012-2015 (2016).  
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for which he or she was retained; (3) that the client incurred a loss as a result of the attorney’s negligence [causation], and (4) that the client's loss constitutes legally compensable damages. Moreover, a client’s “…damages will necessarily depend on what the client should have recovered on his claim or the damages he was required to pay in the unsuccessful defense. In the former situation, the plaintiff will have to prove up the “case within a case,” including damages. If a judgment in the underlying claim would have been uncollectible, there are no damages recoverable on the malpractice claim.

As is evident from the above discussion, legal malpractice cases can be complicated and difficult. Thus, in almost every case, expert testimony is needed, both as to: a breach of standard of care in the legal representation; and as to liability issues in the underlying case (the so-called “case within a case”). The first element of the claim, the existence of an attorney-client relationship, is a question of fact. Thus, expert testimony is not needed as to this element. The second element of the claim, the attorney’s alleged failure to exercise reasonable care and skill, “…will almost always require expert testimony. This testimony must establish two things: the relevant standard of care, and whether the attorney complied with that standard of care...”

Likewise, the third and fourth elements, causation that the loss can be attributed to the attorneys' actions/inaction and damages, may both require expert testimony.

Allen David explains that,

[t]here are three situations in which expert testimony is not required. First, expert testimony is not required if the claim against the defendant lawyer does not implicate any standard of care. This usually involves intentional torts such as conversion or fraud. It may also involve, however, the breach of a promise to achieve a specific result... Second, expert testimony is not required if the defendant attorney has admitted that the alleged conduct constitutes a breach of the standard of care. This admission is usually coupled with a denial that the defendant committed the alleged conduct. Finally, there are dicta suggesting that expert testimony is not needed “where the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence ....

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67 LEGAL MALPRACTICE, EXW MA-CLE 18-1.

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The cases most frequently cited for this proposition, however, are from the early nineteenth century and are of questionable validity; the practice of law is becoming more complicated. No modern case has held that a plaintiff can dispense with expert testimony, and plaintiff's counsel should assess the risk before proceeding to trial without an expert witness.

II. Legal Malpractice Insurance

Most legal malpractice insurance policies, like other professional liability policies, are “claims made” policies. As Scott F. Bertschi and John C. Tanner explained in *The National Law Review*, this means that

…claims based on errors occurring prior to the policy period are not covered if any insured had a reasonable basis to believe that a claim could be made. Courts in many states apply an objective standard to determine whether an insured had such “prior” knowledge. Thus, the question is not whether you specifically thought a claim would be made, but whether a "reasonable insured," knowing what you know, would believe that a claim is possible.

Additionally, many policies require that insureds report knowledge of potential claims, as any claim that does arise from this knowledge will be tied to the provisions of the policy in force when said knowledge was gained. However, the time during which knowledge of a potential claim must/may be reported vary amongst the numerous policies in the marketplace.

It is also important to remember that, unlike auto insurance, no state but Oregon requires attorneys to purchase and carry legal malpractice insurance. Some states do, however, require attorneys to disclose to the state bar association, on their annual renewal, whether they have insurance. In states with mandatory disclosure, this information is sometimes available to clients via the state bar association.

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72 Id.
73 Id.
74 American Bar Association Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure (2016), available at © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
In order to know what to disclose, one must know how legal malpractice policies define a claim. Todd C. Scott, VP of Risk Management for Minnesota Lawyers Mutual Insurance Company, notes that:

Professional liability insurance policies may define a claim more broadly than a simple lawsuit naming the policyholder as a defendant. For example, a claim may be defined as “a demand or communication to the insured for damages or professional services,” or “an act, error, or omission by any insured which has not resulted in a demand for damages but which an insured knows, or reasonably should know, would support such a demand.”

Why, though, do insurers require notice of not just a claim, but circumstances that could give rise to a claim? Scott explains as follows:

By having a broader definition of what constitutes a claim, the carrier will have a better chance of knowing about the troubling matter when there still may be options to get the matter back on track—avoiding additional and perhaps unnecessary claim expense. Insurance carriers call this concept “claim repair,” which is hiring an expert attorney early in the process to assist the policyholder in correcting the situation before significant damages are incurred and a malpractice lawsuit can no longer be avoided.

The cost of legal malpractice insurance varies. Additionally, while one might expect that newer lawyers would be more “risky” and thus be charged more for legal malpractice insurance policies, this is not the case. The risk of a claim for a lawyer in practice increases dramatically for a lawyer who has been in practice for five to ten years. This is because these newer lawyers have not been in practice long enough to have mistakes discovered and reported, and because more experienced lawyers usually handle more complicated matters. Thus, an insurance policy for a new lawyer may be very affordable, but the price will increase drastically over time to account for the increased risk of malpractice claims.


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for the increased risk (called “step pricing”). Eventually, however, the price levels off. Scott notes, however, that:

…lawyers who devote a significant amount of their practice to areas that experience a frequent number of claims, such as plaintiffs’ personal injury or real estate, are more likely to pay higher annual premiums. Higher premiums can also be expected for lawyers in practice areas where the severity of their legal matters can cause them to be quite expensive to resolve—such as patent/trademark, entertainment, and securities law.77

Do not fret; not all is lost. Scott notes that “Just in time may be too late”:

New lawyers who are establishing a firm and do not yet have any clients may sometimes choose to wait for their doors to open before binding coverage on their first policy. However, any opportunity to provide legal advice is also an opportunity for individuals to rely on defective information to their detriment. Therefore, it is vital that new lawyers seek coverage for professional liability as soon as possible after they first receive their license to practice law.78

Ultimately, Scott recommends that new lawyers keep two very important things in mind: (1) choose clients wisely-get to know them, their expectations, and trust your gut if it tells you to walk away, and (2) communicate-touch base with your client at least every 30 days, and be sure to document all your client interactions.79

*Charles Coffey is Senior Claims Counsel at The Bar Plan Mutual Insurance Company in St. Louis, Missouri, a legal malpractice insurer that writes policies in Missouri, Kansas, Indiana, New Mexico, and Tennessee. Prior to joining The Bar Plan, Coffey practiced civil litigation, with a defense-oriented emphasis on insurance issues, telecommunications, and commercial cases, for a boutique firm in South Florida. Coffey enjoys being involved in the legal community, and holds positions on the Missouri Bar Young Lawyers’ Section Council and the executive board of the Young Lawyers’ Division of the Bar Association of Metropolitan St. Louis.

77 Id.
78 Id.
79 Id.

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NEWS AND ANNOUNCEMENTS

2017 ABA Midyear Meeting and YLD TIPS In-Person Meet-Up

The 2017 Midyear Meeting will be held February 1-7 in beautiful, sunny Miami, Florida. There are countless excellent programs and events to attend; some of which provide CLE credits for their participants. For example, the Young Lawyers Division has many interesting events scheduled for the Midyear Meeting. There are just a few of the wide selection of events:

- **YLD Plenary Session: Build Your Practice and Career by Sharpening Your Communication Skills Development** (February 2, 2017 at 3:30 P.M.). This session will discuss how you can sharpen your formal and informal communication skills. First, communication savvy experts will share their tips, insight, and experiences. Then, put what you learned to work with a mini Toastmasters session.

- **The Mindful Practice of Law and Attorney Well Being** (February 3, 2017 at 9:15 A.M.). This CLE program discusses mental health in the legal profession.

- **Cuba Libre: the Potential Legal Costs and Benefits** (February 3, 2017 at 9:15 A.M.). This discussion focuses on the regulations surrounding transactions with Cuban entities, litigation concerns for business and individuals bringing their businesses to Cuba, and more!

- **The Zika Virus: The Legal Implications of a Public Health Emergency** (February 3, 2017 at 10:30 A.M.). This CLE program will consider the possible litigation when enacting such measures as the spray of pesticides, the release of genetically modified mosquitoes, and those affected by the virus of harmful pesticides.

- **YLD Dinner Dance** (February 3, 2017 at 6:30 P.M. at the Treetop Ballroom at Jungle Island, 1111 Parrot Jungle Trail, Miami).

- **Anatomy of a Solo/Small Firm: Getting the Devil out of the Details – Ethical Technology Solutions for Practice Management Problems** (February 4, 2017 at 2:30 P.M.). This Ethics CLE program will tackle the challenging task of balancing the responsibilities of ethically practicing law and running a business.

The mobile app for the 2017 Midyear Meeting is live! It has all the most up-to-date information you will need for this event. Download the app [here](#) or go directly to the App Store or GooglePlay to download on your cellular device.
During Midyear, YLD TIPS will host our first YLD TIPS In-Person Meet-Up, to take place at Panther Coffee, 2390 NW 2nd Ave, Miami, FL 33127, on Friday, February 3, 2017 from 2:00 – 3:00 PM. Come out to meet other YLD TIPS Members and Practitioners, as well as Members of your YLD TIPS Leadership Team. For more information, please contact your Co-Chair, Domenick Lazzara, at DLazzara@LeeLazzara.com.

YLD Recorded Teleconferences Available Online!

Did you know the YLD website has recorded teleconferences on a number of topics to make you a better young lawyer? Find out more online at: http://www.americanbar.org/groups/young_lawyers/events_cle.html.

TIPS Business Litigation Committee’s Fall Leadership Meeting

At the TIPS Business Litigation Committee’s (“BLC”) Fall Leadership Meeting in San Diego, BLC discussed an upcoming CLE called “In House Counsel Bootcamp” that will be put on at the mid-year meeting in Miami.

February 2-5 BLC will be at the ABA Mid-Year Meeting in Miami, Florida. There, BLC will be putting on another free CLE event -- a boot camp for young in-house counsel and providing valuable insights into the kinds of things that are likely to come across their desks from day 1. Again, BLC will be following this event with a complimentary reception aimed at networking and introducing folks to our committee and our great section.

For those interested in attending the CLE, check the TIPS Corporate Counsel Committee’s webpage at http://apps.americanbar.org/dch/committee.cfm?com=IL205600 or contact David Becker at dbecker@freeborn.com for more details.
TIPS Section Conference

By: Brett Siegal, Esq.*

ABA TIPS – parent to ABA YLD TIPS, or “Big” Tips – will host the 2017 TIPS Section Conference at the JW Marriot Chicago from April 26-30, 2017. One of TIPS’ primary initiatives this bar year is to increase diversity and involvement among young lawyers in the Section. The Section Conference is the perfect time for YLD TIPS Committee members to learn more about “Big” TIPS and get involved.

While the schedule is not completely finalized, the Conference will include 24 hours of great programming with panels that will address litigation, insurance, trial techniques, cyber liability, ethics, and other topics of general interest to all TIPS members. At least 50 of the 120 speakers are expected to consist of general counsel, insurance company representatives, and judges.

In addition to prodigious programming, TIPS prides itself on offering its members several networking opportunities at its conferences. This conference is no different. The current schedule includes a cocktail party on Wednesday night, a reception at The Mid-America Club on Thursday night, which is on the 80th floor of the Aon Center featuring a panoramic view of Lake Michigan and the downtown skyline, and a TIPS Task Force on Outreach to Young Lawyers Committee networking reception on Friday evening is tentatively planned at Heyl, Royster, Voelker, and Allen.

The registration fee for TIPS member young professionals will only be $295 (compared to the $495 cost for those over 35 years old or with more than 7 years of practice). If you are not a member of “Big” TIPS, now is the perfect time to sign up. For those general counsel or insurance company representatives, the conference registration fee is free.

TIPS is expecting more than 600 attendees this year, so be sure to join us in Chicago for the fantastic programming and networking events. Please be sure to check TIPS website at http://www.americanbar.org/groups/tort_trial_insurance_practice.html to view the updated schedule for events and to register for the Section Conference.
“Brett Siegel is an associate at Heyl Royster in Springfield, Illinois. Brett began practicing civil defense at Heyl Royster after graduating from Chicago-Kent College of Law in 2012. He defends clients in tort litigation and employers in workers’ compensation and employment law cases. He can be reached at bsiegel@heylroyster.com.

43RD ANNUAL TIPS MIDWINTER SYMPOSIUM ON INSURANCE AND EMPLOYEE BENEFITS

EMERGING ISSUES AND INSURANCE LITIGATION RELATING TO LIFE, HEALTH & DISABILITY, AND ERISA

SCHEDULE
REGISTRATION FORM

PROGRAM HIGHLIGHTS:

- Appellate panel featuring Justice Charles Canady of Florida Supreme Court, Justice Edward Mansfield of Iowa Supreme Court, Justice David Stras of Minnesota Supreme Court, and Judge Linda Ann Wells of Florida Court of Appeals.

- Ethics presentation on “Competence Revisited—Legal Ethics In The Digital Age” by Jan Jacobowitz from the University of Miami Law School.

- A panel on the impact of the Affordable Health Care Act on the health insurance industry, including panelists from BlueCross Blue Shield of Illinois and United Healthcare.
• Diverse panels on emerging issues in life insurance, ERISA preemption and appeals, and claims trends.

HOTEL INFORMATION:

• A limited number of rooms have been blocked for program registrants at the Hyatt Regency Coral Gables, 50 Alhambra Plaza, Coral Gables, FL 33134, for a discounted rate of $259.00 per night plus 13.5% tax.

• Please call the hotel directly at 402-592-6464 to make your reservation. The room block will be held until exhausted or until Thursday, December 22, 2016 at 5:00 pm CT.

TIPS looks forward to seeing you in warm and sunny Coral Gables this January.

Publish YOUR Article with the YLD Tort Trial and Insurance Practice Committee!

If you have an idea for an article and are interested in authoring an article for future newsletters, please contact Alexandra Maiolini, Esq. at amaiolini@kirwanspellacy.com.

If not a newsletter article, consider publishing a 101 Practice Series Article with the YLD TIPs Committee. The 101 articles are specifically geared toward the new lawyer. This is not a law review, scholarly journal, or magazine. If you litigate or practice according to certain steps and/or procedures or just a certain way in which you practice that you would like to share with other young lawyers, this is a great opportunity to do so! This resource is designed to deliver specific, practical information in an easy-to-read format that maintains a professional presentation. The 101 articles include tips, lists, bullet points, examples, good quotes, lively writing, and other techniques to facilitate the readers’ grasp of information. If interested, please contact Alexandra Maiolini at amaiolini@kirwanspellacy.com.