Committee Newsletter | Fall 2016

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A Welcome Letter from Co-Chairs Domenick Lazzara and Charles Coffey

Welcome to another great ABA YLD TIPS Committee year! As you probably already know, the TIPS Committee addresses current and emerging issues that arise when a large number of plaintiffs are asserting claims involving issues rooted in insurance and – of course – tort law. This Committee focuses on the substantive and procedural developments in the case law, proposed reforms, and best practice techniques in insurance and torts cases that may involve environmental, toxic torts, pharmaceutical, products liability, aviation, antitrust, securities litigation, employment claims, and complex insurance issues.

The TIPS Committee also deals with all aspects of investigation, evaluation, litigation, settlement and trial of any personal injury and property damage caused by allegedly defective products. It provides a forum for interaction among plaintiffs’ counsel, outside defense counsel, corporate counsel, and the judiciary. This year, we aim to increase and promote that interaction among attorneys by engaging other TIPS members, by making the TIPS experience more personal, and by increasing TIPS committee membership.

We welcome you to contact either of us throughout the year with your feedback about the committee’s initiatives and your ideas for making the committee an even better resource for you. Please sign up for our listserv or register to be a member of the committee, if you have not done so already, and become actively involved in YLD TIPS this year.

You can find more information on the TIPS Committee at:

http://www.americanbar.org/groups/young_lawyers/committees/tort_tipc.html

Finally, TIPS needs help writing newsletters and 101 Practice Series articles. Please contact Alexandra Maiolini, Esq. at aimaiolini@gmail.com if you would like to contribute to a newsletter or 101 article! Contributing to one of our publications benefits the Committee and builds your knowledge and expertise while promoting your name and abilities. Not to mention, being published in a nationally circulated newsletter looks great on your website and your CV.
We look forward to working with each of you in the coming bar year; if you have any questions, please feel free to reach out to either of us. We would be happy to talk with other young lawyers and to answer any questions that you may have.

Sincerely,

Charles Coffey  *
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-and-

Domenick G. Lazzara**
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*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, which 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.

**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 extremely active in his community, devoting 25% of his practice to pro bono work and activities and is the author of a legal blog chronicling the life of The Young Lawyer, which you can read at https://domlawfl.wordpress.com/.
WHEN DRONES ATTACK – IS DRONE NEGLIGENCE ON THE HORIZON?

By: Domenick Lazzara, Esq.* and Stephanus Yang, Esq.**

Introduction

Every passing day, our world more closely resembles the science fiction dream we experienced growing up through television, movies, and the occasional Ray Bradbury novel. Autonomous, self-driving cars are around the corner and jetpacks are just beginning to gain popularity as a source of entertainment for those who can afford the hefty price of experiencing true human flight. Arguably, the most progressive technology from science fiction leading the charge is that of drones. Industries across the country are beginning to use drone technology for tasks ranging from aerial photography to shipping.

As drone technology becomes more prevalent, the Federal Aviation Administration(“FAA”) races to pass regulations in order to control the commercial use of drone technology. These regulations aim to ensure the safe operation of drones by their operators. This process mirrors that of the auto industry in the beginning of the twentieth century. As automobiles became more widespread, states raced to pass laws in order to regulate their use and ensure the safe operation of their use by the operator. It followed that the unsafe operation of an automobile by its user – in both the commercial and private context – could be viewed as, inter alia, negligent. Accordingly, is drone negligence the logical, next-step? Can the unsafe operation of a drone by its user be indicative of negligence? If so, can that same drone operator be found liable for resultant damages from its misuse or unsafe operation?

Drone Regulations

Drones – or Unmanned Aircraft Systems (UASs) – are used in various commercial industries. Real estate agents, for example, are now using drones for aerial views in their sales listings.¹ Amazon is exploring the idea of using drones to deliver packages directly to its customers in a service titled “Amazon Prime Air”, “a future delivery system from Amazon designed to safely

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get packages to customers in 30 minutes or less using small unmanned aerial vehicles, also called drones. And privately, drones are being marketed and sold as toys for children of all ages, including the child within; i.e., adults. The widespread use of drones in both the commercial and private context has spurred the FAA to implement regulations requiring FAA approval and drone registration.

In a June 21, 2016 press release, the Department of Transportation’s FAA announced that it had finalized the first operational rules for routine commercial use of drones in order to fully integrate their use into the nation’s airspace. Small UAS Rule (Part 107) went into effect on August 29, 2016, and contains operational limitations on the use of drones, including that the drone must:

- weigh less than 55 lbs.;
- remain within the visual line-of-sight (VLOS) of the remote pilot in command and the person manipulating the flight controls of the drone;
- remain close enough to the remote pilot in command and the person manipulating the flight controls of the drone for those people to be capable of seeing the aircraft with vision unaided by any device other than corrective lenses;
- be limited to daylight-only operations, or civil twilight with appropriate anti-collision lighting; and
- **not operate in a careless or reckless manner**.

Small UAS Rule (Part 107) also created the “Remote Pilot Airman Certificate” for establishing the remote pilot in command position. Accordingly, “a person operating a small UAS must either hold a remote pilot airman certificate with a small UAS rating or be under the direct supervision of a person who does hold a remote pilot certificate (remote pilot in command).” Any operation that results in at least serious injury, loss of consciousness, or property damage of at

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6 Id.
least $500 must be reported to the FAA by the remote pilot in command, within 10 days of that operation.\(^7\) That the FAA went out of its way to make this an inseparable part of Small UAS Rule (Part 107) takes drone negligence out of science fiction and into reality.

**Drone Negligence**

Case law discussing this idea of drone negligence is sparse if not non-existent. A 2015 article authored by Michael Spanel of the Chicago-Kent College of Law entitled *Liability and Allocation of Liability in Drone Accidents* discusses “negligence for improper operations of a drone.”\(^8\) We agree with Mr. Spanel, specifically in two respects: (1) liability for drone injuries may be founded on simple negligence; and (2) liability for drone injuries may also be founded on statutory negligence, or negligence *per se*.

The weathered tort practitioner will be familiar with simple negligence and how it could be applied to impart liability for the improper or unsafe use of a drone: breach of a duty; actual and proximate cause; and damages. First, did the drone operator owe a duty to the person that was injured by the improper use of the drone? If so, was that duty to pilot the drone safely in a reasonable manner and ensure that it was fully functional before its operation, i.e. properly maintained? Second, did a breach of that duty by the drone operator cause the injury at hand? In other words, did the drone operator’s failure to pilot the drone safely, or failure to ensure it was maintained properly and fully functional before its operation, cause the injury? If so, was it the actual and proximate cause of the injury? And third, damages must be established.; In most states, a permanent injury evidenced by medical treatment will suffice.

In certain states, violation of, or failure to comply with certain statutes or regulations is indicative of negligence. In others, such violations constitute negligence *per se*, where negligence is “established as a matter of law, and breach of the duty is not a jury question.”\(^9\) In these states,

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\(^7\) *Id.*
the failure of a drone operator to comply with Small UAS Rule (Part 107) could create serious exposure to liability because, should an injury occur as a consequence of the unlicensed drone operation, that operator could be found negligent as a matter of law.

**Affording Protection When Drones Attack**

Undoubtedly, injuries from the unsafe – or worse, unregulated – use of drone technology will result. On April 7, 2014, an Australian triathlete sustained minor head injuries after a drone operator lost control of device.\(^{10}\) Picture the unsuspecting jogger out for his morning run when, out of nowhere, a private toy drone manned by “Johnny” – your average high school student with too much time on his hands - falls out of the sky, striking the jogger in the head. The impact causes an emergency visit to the local emergency room and a concussion. Or imagine the diligent gardener who, in the process of manicuring the lawn of a million-dollar mansion, is struck in the hand by a commercial drone manned by none other than “Bob the Closer,” a real estate agent conducting a flyover for his listing of that same mansion. Can Johnny and – more likely – his parents – be held liable for the jogger’s injuries on a theory of simple negligence? What about Bob the Closer’s broker on a theory of respondeat superior? Or better yet, negligence *per se* should Bob the Closer not hold a remote pilot certificate, in accordance with Small UAS Rule (Part 107)?

Such hypotheticals, while seemingly far-fetched at first glance, are making their way into the news at an exponential rate. A simple search on YouTube of “drone injuries” returns 46,300 results of drone related injuries. Once the novelty wears off, the prudent lawyer well versed in tort and insurance practice will quickly see the potential for liability and corresponding risk of exposure. This becomes all the more evident when that jogger or gardener calls you after the drone “attack” wanting to know what his legal rights are. A familiar approach will serve as a guiding light in such circumstances.

1. **Seek medical attention and contact the authorities.**

   As with any claim involving personal injury, the first step must always be to seek medical treatment and contact the authorities immediately.

2. **Preserve the physical evidence.**

   Taking steps to preserve the physical evidence will serve two purposes: (1) determining the operator and owner of the drone; and (2) determining what went wrong. Answering both questions will help the prudent practitioner decide how best to classify the claim, be it simple negligence or product liability.

3. **Determine the identify of the operator.**

   Determining who the operator is plays an important part in determining your cause of action. Unquestionably, the umbrella of any drone negligence claim will be simple negligence. Other potential causes of action include those grounded in product liability, strict liability, and negligence *per se*.

4. **Determine what went wrong.**

   Was the injury the result of the negligence of the user, a product malfunction or defect, or both? In the case of the former, the above discussion is informative. For the latter, the tort practitioner should also consider claims grounded in product liability.

**Conclusion**

We began this article by introducing the science fiction idea of drone negligence. After thoughtful consideration, it becomes clear that drone negligence may quickly become a reality; a reality the prudent practitioner should keep at the forefront of his thought process. Soon, drone attacks may find their way among the coffers of automobile accidents, slip-and-falls, and dog attacks.
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DEMystifying the deposition & empowering your client

By: Margaret Sedy, Esq. *

Introduction:

Keep in mind the words of a California appellate judge when thinking about how to prepare your client for the rigors of litigation:

“The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are the cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites.”

Daley v. County of Butte, 227 Cal. App 2d 380, 392 (1964)

Preparing clients for their depositions is one of the first places where the perceptions and reality of civil litigation collide. Nevertheless it is crucial to case outcomes – it can make or break your case. Easy enough to understand, but sometimes difficult to do. Why? Because in many instances, whether you represent the plaintiff or defendant, this will likely be their first substantive experience with the civil legal system. It’s a system that can seem opaque and mystifying at the best of times, even to us as practitioners. So it’s no wonder that your client may be utterly baffled and have unrealistic expectations or misunderstandings about what to expect at a deposition.

The attorney wants just one thing: for the client to provide honest responses to questions asked. Nothing more, nothing less. While it seems simple enough, in practice, both your client and opposing counsel will throw numerous curve balls, and you must be able anticipate them ahead of time. Here are some tips for young lawyers tasked with preparing a client for a deposition. While much of this article is geared towards representing the plaintiff client, young defense counsel would be prudent in taking these tips into account, not only because they will face many of the same obstacles with their clients, but because information is power.

4P: Preparation Prevents Poor Performance:

First, be very clear about the general purpose and procedure of the deposition. It’s not about hitting a home run, it’s simply about just hitting the ball. Advise, again and again, before
the deposition, that your client needs to “keep their eye on the ball.” This requires you, the attorney, to explain, over and over (to the point of being pedantic, if need be), that your client must engage in active listening. Answer only the precise questions asked and only to the best of the client’s ability and recollection. Giving too much information, outside of the scope of the question asked, can be a detriment, so reiterate that simple, straightforward answers – often times with a simple “yes” or “no” – are appropriate.

Make sure they know that not having an answer is not a crime. One place deponents get into trouble is when they feel they must have a dispositive answer for every question. Get them comfortable with those subjects, facts or ideas where “I don’t know” or “I don’t recall” is a perfectly fine answer. Take the time in preparation to get your client to distinguish those facts that they know and of which they have good recollection, from those where memory or the record is hazy or uncertain.

Explain to your client that it is not her job to provide information that opposing counsel has not asked. Thus, after “hitting the ball” just stop talking. She should, and must wait, for the next pitch to be thrown her way. It is that simple.

**Client Knowledge is Client Power:**

The more formal or procedural aspects of depositions are often forgotten quickly by the time the deposition in underway – but they must be reinforced in the mind and actions of your client. During preparation (which could be days prior, or on the day of the depo), reinforce the following:

1. The answers your client gives create a record of the lawsuit – he or she must answer out loud, and must not talk at the same time as opposing counsel is talking.
2. He or she must wait until opposing counsel has fully finished the question and then, and only then, provide an answer. Doing so serves three objectives:
   a. it provides for a clearer deposition transcript for the case;
   b. it allows your client, or provides an opportunity for your client, to fully listen to and attempt to understand the questions asked, which will, in turn, hopefully result in a straightforward answer from your client, and;
c. it will allow your client to think about the question more, and then verbalize whether he or she does not understand the question. If there is a lack of clarity, the client may need the question asked in a different way in order to accurately respond, to the best of his or her ability and/or recollection.

3. Explain to your client the formal nature of the deposition and that they will be administered an oath, just like in court with the same expectations of honesty and completeness.
   a. A note about “penalty of perjury” – you can explain to your client up front that while “penalty of perjury” is a felony to lie under oath, it rarely, if ever, results in a deponent facing criminal action.

4. Explain the role of the players at the depo: the court reporter/videographer, opposing counsel, the client’s attorney. Tell your client what they what they are allowed to do and what they are not allowed to do.

5. Explain the role of objections and other bits of procedure they are likely to see, so that it does not catch them by surprise.

6. Most importantly, make sure your client understands that they are not alone, or left to the mercy of forces they barely comprehend and that it is your job to protect them from unfair or unjust questions or tactics.

_The Human Factor:_

This part of the process is where your legal education and experience necessarily overlaps and sometimes even takes second place to your role as a true counselor. In that regard, it is important to drill your client on the following:

(1) Listen to the question; (2) answer truthfully; and (3) wait until the next question.

If your client follows your advice and instructions, she has nothing to worry about. Reiterate the “Baseball analogy”: wait for the pitch from opposing counsel before you swing, and then hit it head on.

_Answer truthfully:_ Many clients honestly think they are being helpful by saying what they think we want to hear in a deposition, or think that they can get away with just a little untruth or misdirection. Explain to your client that their number one priority must be to tell only the truth!
Continually impress upon them the importance of this one simple concept. Do not be afraid to tell your client – in stark terms, if necessary – that if she does not answer truthfully, he or she will likely lose her case. Even if it is the “best” case – if he or she lies, he or she loses. Why? The other side will almost always discover a lie and undoubtedly hold it against your client.

Even if the client is not likely to be charged with perjury, explain what happens on the witness stand even to honest people who inadvertently misstated facts in their depositions in the hands of opposing counsel. Oftentimes, the little untruths or omissions can result in the biggest problems. Result? Your client loses; either by a defense verdict, a reduced plaintiff's judgment, or a settlement much lower than the case could have been worth. Stress this to your client, and stress this often: answer truthfully!

Naturally, you may be worried. You might be thinking that doing all this counseling and preaching will undoubtedly discourage your client and add to his or her anxiety, resulting in a “botched” deposition. So, what to do?

Empower your client: Remember, many clients (at least on the Plaintiff side) just want to be heard, to validate their experience. Explain, assure and reinforce (no matter how often prior to deposition, or perhaps even during deposition), that he or she is the one in control, not opposing counsel. He or she can decide, at any point during the deposition, that he or she needs a break, and for a legitimate reason. Most people generally feel “better” when they can internalize a reason for an otherwise awkward circumstance in which they find themselves. Help your client in this by reminding her that she can take a break if she is getting tired, to use the bathroom, get a glass of water or cup of coffee, wishes to speak with her attorney, or for any or no specific reason at all. Regardless, the goal is the same: empower your client on the basis of your client’s ability to control the deposition. All other parties must wait for your client’s answer. Help him or her understand he or she is the superhero of this story; that it is the time for people to hear him or her. This is the one great power your client has at deposition.

And after all, it is your clients’ case, not that of the attorneys in the room. Attorney are merely humble servants of the law. Convey this to your client because he or she must know that
he or she can maintain some level of control and feel comfortable with being in control of the deposition.

**A Final Word:**

There is some great advice from famed trial lawyer Rick Friedman to aspiring trial lawyers: “The jurors don’t need your perfection or your technique, they need your commitment and your integrity.” This maxim also applies to your client. The opposing counsel, the judge, and the jury don’t need your client’s perfection or technical legal skills. They only need the client’s commitment and their integrity. The more you help your client exhibit that, the better they will do, not only in deposition, but throughout the course of their case, and the client is therefore likely be more satisfied with their result.

*Margaret Sedy* is a trial attorney with the Law Offices of David Reinard, P.C., in Los Angeles, California. She is a member of the Consumer Attorneys Association of Los Angeles, the American Association for Justice, and is a Vice-Chair of the ABA YLD TIPS. Under the guidance of a seasoned trial attorney and ABOTA Associate, Margaret tries personal injury cases throughout California. You can contact her directly at msedy@reinardlaw.com.
NEWS AND ANNOUNCEMENTS

“The Associates Handbook” by Frank Ramos

The DRI is an organization of defense attorneys and in-house counsel. The DRI provides resources and tools for attorneys who “strive to provide high-quality, balanced and excellent service to their clients and corporations.” The DRI’s Young Lawyers Committee is unique within the DRI because its membership is made up of lawyers practicing across every substantive area within the defense bar. The DRI Young Lawyers Committee provides its members with opportunities to network and get involved. This year, the Committee published “The Associate’s Handbook: A resource for Aspiring Trial Lawyers.”

The Handbook is authored by Mr. Francisco (“Frank”) Ramos, Jr., who is the administrative partner of Clark Silverglate in Miami, Florida. Mr. Ramos has practiced for approximately nineteen years. In those nineteen years, he has amassed a great wealth of knowledge, including, but not limiting to how to a better lawyer, how to market yourself, and how to handle every case as if it is going to trial. The Handbook provides practical advice to help young lawyers avoid the pitfalls and obstacles of daily practice and excel at their firms. It is a “how-to” – how to write better, how to get more involved, how to be a rainmaker, and how to prepare every case as if it were going to trial.

“Having learned from my mentors, I want to pass that wisdom and experience to others and help them in their daily practice.”

– Frank Ramos

Mr. Ramos shares this knowledge in “The Associate’s Handbook,” which is absolutely free to download by clicking on the following link: http://bit.ly/2cBBj9d, scrolling down the page, and clicking “The Associate’s Handbook.”

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“Big” TIPS 2016 Fall Leadership Meeting

The TIPS 2016 Fall Meeting will be held October 19-22, 2016 in Coronado, California at the beautiful Hotel Del Coronado. There will be networking events, business meetings, a Complimentary Cyberliability CLE Program, and the opportunity to enjoy the beautiful Coronado surroundings.

The Cyberliability CLE Program is entitled “Cyber Liability Ills and Cures: Medicine, Law and Insurance Coverage.” Speakers include Kim Hogrefe, Esq., Retired Senior VP of Chubb & Son; Janice F. Mulligan, Esq., Mulligan, Banham & Findley; Mark VonderHaar, Esq., Haight Brown & Bonesteel, LLP; and Howard T. Wall, III, Esq., Regional Care Hospital Partners, Inc.. The presentation will be monitored by Brian K. Findley, Esq., Mulligan, Banham & Findley. The speakers will present the ills and cures of modern, medical data protection and breaches, through a cross-industry panel of hospital general counsel, insurance coverage, insurance claims, and litigation.

Beyond the Cyberliability CLE, there are many more events and meetings that we urge you to attend! The schedule has been provided on the ABA TIPS website and registration has been opened! We hope to see you there!

2016 Young Lawyers Division Fall Conference

The 2016 Fall Conference will be held October 20-22, 2016 in Detroit, Michigan. Don’t miss out on this chance to network with other young lawyers, gather CLE credits, and hear from well-known speakers. It’s important that we have a wide range of voices, experiences, and opinions at this meeting where young lawyers come to share ideas and network. The schedule of events can be found here. We hope that you can be part of this great event!

The ABA provides limited number of scholarships to attend this conference. For more information, please contact cbrown@ci.mansfield.oh.us.
ERISA Basics National Institute

Co-sponsored by the Tort Trial and Insurance Practice Section, this two and a half day ERISA Basics National Institute provides the opportunity to hear from Employee Retirement Income Security Act (ERISA) experts. The National Institute will be held October 26-28 in Chicago, Illinois. This program is designed for in-house and union counsel, benefits specialists, private practitioners, litigators, and consultants. The focus of the event is on comprehensive ERISA topics. Scholarships are available for this program; please contact Mary Karounos at 202.662.8676 or Mary.Karounos@americanbar.org.

Aviation and Space Law “From Cockpit To Courtroom”

The 2016 Aviation Program will be held November 3-4, 2016 in Washington, D.C. This event is sponsored by the Tort Trial and Insurance Practice Section. TIPS will bring together many knowledgeable speakers who are making the laws that will affect the practice of aviation litigation for years to come, and speakers who work as in-house counsel at airlines and manufacturers, insurers and government counsel, who will speak about challenges facing the aviation and insurance industries.

Women In Products Liability 2016 Regional CLE

This Regional Meeting will be held on November 3, 2016 in Philadelphia, Pennsylvania and it features five (5) CLE programs covering areas of substantive law, trial skills and ethics. It is not only for women, but men are also encouraged to attend! The meeting offers several networking opportunities as well as a reception for the attendees.


The 2016 FSLC Fall Meeting will be held November 9-11, 2016 in Chicago, Illinois. The focus of the meeting is on the FSLC’s latest publication, the fourth edition of the “Financial Institution Bonds” book, which has been updated for the first time in eight years. Attendees will receive a copy of the book. This program was designed to be of interest to anyone and everyone involved in the handling of claims against Financial Institution Bonds, from newcomers to
seasoned veterans, company claims reps to underwriters, and lawyers to accountants, investigators and other professionals.

2016 Section of Litigation Professional Success Summit

The 2016 Summit will be held November 14-16, 2016 in Atlanta, Georgia and it will include eighteen (18) programs and several networking events, offering attendees the tools and skills necessary to reach the pinnacle of success. Registration fees increase after October 24, 2016, so register now!

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 aimaiolini@gmail.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. The 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 aimaiolini@gmail.com.