President’s Message
Charlie Stevens
And the survey says “MIPRIMA’s Spring Conference was a hit!” Each speaker and topic received “EXCELLENT” reviews.

So if you weren’t there, what did you miss?

Troy Scott, Esq., Human Resources Director for Martin Transportation Systems, walked us through dealing with “rogue employees”. He began with defining rogue employees and the risk they pose. He then focused on the hiring process to screen applicants to avoid “bad” hires. However once they are on-board the important process of orientation, engagement and evaluations that must come from the top of any organization. In the end, Mr. Scott explained the termination process, which begins with a progressive discipline policy.

Brian Kellogg, with MIOSHA - Consultation Education & Training Division, emphasized that his goal was to create a collaborative environment between employers and MIOSHA to avoid injuries, which results in cost savings for employers by reduced work comp claims and avoiding MIOSHA penalties. Mr. Kellogg’s power point presentation used real life examples of unsafe work conditions that cause injuries and penalties. The examples included the obvious and the not so obvious. He made clear that MIOSHA should be a partner in reducing risk and encouraged all to contact MIOSHA with questions and / or review of your operations.

Alicia Birach and Mike Sanders, attorneys with Foster Swift, shared with us Workers’ Compensation Updates. They explained the trend toward use of Medical Based Evidence and the perceived benefits, such as, 14% earlier closure of work comp claims, with a 37% reduction in cost. They also discussed the latest involving Medical Marijuana, including the case law that continues to develop. They explained the latest procedural changes and changes involving “favored work” a/k/a light duty. Ms. Birach posed the question, “Is facilitation the new trial?” and we discussed the barriers to settlement.

Randall Roost, Principal Planner, Water Operations, at Lansing Board of Water and Light, concluded our day by scaring the “beggeebers” out of all of us. According to Mr. Roost, over 2000 communities throughout the United States have similar water issues currently facing Flint, MI. He explained the aging water infrastructure. In fact he explained that some of the oldest pipes installed in Lansing, MI were installed in 1885. But he says that pipes that were installed in the 1940’s and 1950’s, after WWII are in even worst condition as the metal used after the war was subpar and hence is failing much quicker.
He warned us of infrastructure risk, financial risk, environmental risk, and health and safety risk. Mr. Roost encouraged us to make Risk Management a central function of our operations and discussed mitigation options of risk transfer, tolerating risk, treating risk, sharing risk, and avoiding or eliminating risk. He engaged all residents to be engaged!

Throughout the day those that attended had opportunities to network with their peers and share experiences. A special treat was the attendance of one of MIPRIMA’s founding fathers and two time board president, Ken Swisher, who will be retiring from his current position with the City of Marshall. Thanks Ken for your past involvement, sharing your experiences and enjoy your retirement.

Please plan ahead . . . Don’t miss out on MIPRIMA’s Summer Conference on the beautiful Mackinaw Island. We promise more “EXCELLENT” topics and speakers.

The Michigan Court of Appeals opined in an unpublished decision that a question of fact exists as to whether or not a crosswalk caused an unreasonably dangerous hazard, effectively creating an artificial safety zone in which the pedestrian would have a reasonable presumption of safety. In the case of Fowler v. Menard, Inc., a customer was hit by a car as she used a pedestrian crosswalk in defendant’s parking lot. The plaintiff died as a result of her injuries. Plaintiff claimed that the negligently designed crosswalk created a “feigned zone of safety.”

Plaintiff’s expert was critical of the design of the parking lot/crosswalk, stating “there are no warning signs, no pedestrian crosswalk warning signs or any type of signage, resulting in an unreasonable risk to pedestrians.” The Court of Appeals agreed with the trial court, finding that there is a duty on the part of the landowner to install crosswalks in a reasonable and prudent manner. The court cited the rule in Fultz v. Union-Commerce Associates that found, “if one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a non-negligent manner.”
Michigan No Fault Update

Charlie Stevens,
Claim Operations Manager MMRMA

The Michigan Court of Appeals has opined that no-fault settlements with claimants do not bar recovery by medical providers, as long as the medical provider gives pre-settlement written notice of its claim. (See Covenant Medical Center v. State Farm Mutual Automobile Ins. Co.). The court ruled that the medical provider has an independent right of recovery based on the plain text of the statute (MCL 500.3112) as long as the medical provider had given written notice to the insurer. The subject claim involved a 2011 motor vehicle accident involving a State Farm insured, Jack Stockford. State Farm had settled Mr. Stockford’s claim for $59,000. The claim was settled with a written release agreement and included all past and present claims. Covenant Medical Center claimed outstanding medical expenses for services rendered of $43,484.80.
Drone Regulations What You Need to Know
Karen M. Daley, Attorney Cummings, McClory, Davis & Acho, P.L.C. (CMDA)

The views set forth below are those of the author Karen Daley and do not necessarily reflect the view of the MIPRIMA Organization.

Drones – also referred to as unmanned aerial vehicles (UAV), unmanned aircraft systems (UAS), and remotely piloted aircraft systems (RPAS) – are essentially aircraft without a human pilot aboard. Regardless of what they are called, one thing is clear: drones are here to stay and will increasingly be used for nonmilitary, domestic applications. The Federal Aviation Administration (FAA) estimates that there will be 30,000 drones in U.S. airspace within the next 20 years. Drones will get cheaper, faster and more reliable. There is already evidence of this: the retail giant Amazon.com has its own “Drone Store,” where the average person can purchase recreational and surveillance drones ranging from $30 to $3200. Drones are also available at countless mainstream retailers, including Best Buy, Wal-Mart and even Barnes & Noble.

**TYPES OF DRONE OPERATIONS**

There are three main types of drone operations:

1. **Public Entities:** Public entities are governmental in nature, and include law enforcement, firefighting, border patrol, disaster relief, search and rescue, military training, and other government operational missions. Public entity drones can be fitted with high-powered cameras, thermal imaging devices, license plate readers, facial recognition and laser radar (LADAR – capable of producing 3D images and can see trees and foliage). An extreme example of a governmental use is in North Dakota, where the police can now use drones equipped with less-than-lethal weapons such as Tasers, pepper spray and rubber bullets.

2. **Business:** Business users include all commercial, non-governmental users like real estate companies, photography companies, and the retailer Amazon, who is attempting to use drones to make deliveries.

3. **Recreational:** Recreational users include those flying hobby or model aircraft only.

**FAA REGULATIONS**

A drone is considered an aircraft, and therefore is subject to FAA regulations. There are specific requirements based upon whether the drone is being used for model aircraft operations or non-model aircraft operations:

1. **Model Aircraft Regulations:** Although flying a drone that is considered a model aircraft does not require FAA approval, all model aircraft operators must operate safely and in accordance with the law. On December 21, 2015, the FAA announced new rules requiring owners of recreational drones to register them in a national database. Owners must put the registration numbers on their drones so that it is readily visible, and must carry proof of registration and make it available to law enforcement upon request. It costs $5 to register, and the registration is good for 3 years.

2. The FAA has also laid out specific safety guidelines for recreational users. A recreational drone cannot fly any higher than 400 feet; must remain in sight at all times; must weigh less than 55 pounds, with all equipment attached; must stay at least 5 miles away from airports (unless the operator contacts airport and control tower before flying); must remain at least 25 feet away from individuals and vulnerable property; must not interfere with manned aircraft operations; cannot fly near stadiums or large crowds; cannot act carelessly or recklessly with the aircraft; and must comply with any community-based safety guidelines.

3. **Non-Model Aircraft Operations:** This includes all drone use that does not qualify as model aircraft operations, and requires specific authorization from the FAA. This is usually done by applying for a Certificate of Waiver or Authorization (COA). COA’s are typically given to governmental entities operating a public aircraft, and allows them to operate a particular aircraft, for a particular purpose, in a particular area. An example of a COA that has been granted is the Michigan State Police, who has FAA permission to fly a drone anywhere in the state for law enforcement purposes.

Any operation that does not meet the statutory criteria for a public aircraft operation is considered a civil aircraft operation – this includes commercial uses. The most common type of authorization to fly non-governmental, non-recreational drones is a Section 333...
Exemption, which automatically grants a “blanket” COA for flights at or below 200 feet, provided the aircraft weighs less than 55 pounds, operations are conducted during the daytime, the drone remains within the visual-line-of-sight of the pilot, and the drone remains certain distances away from airports or heliports.

**ENFORCING DRONE REGULATIONS**

Because drones are considered aircraft, it is ultimately the FAA that is responsible for enforcing drone regulations. The FAA recognizes, however, that state and local law enforcement agencies are in the best position to deter, detect, immediately investigate and even pursue enforcement actions to stop unauthorized or unsafe drone operations. Therefore, the FAA is relying on local law enforcement to try and enforce the regulations. Unfortunately, there’s no real plan in place for how they are going to do that.

The FAA has provided some guidance for law enforcement in dealing with unauthorized drone operations. Some activities that can be conducted by law enforcement include: witness identification and initial interviews of witnesses; identification of operators; help with education regarding registration requirements; viewing and recording locations of events; identifying sensitive locations, events or activities; and evidence collection. It is important for law enforcement to remember, however, that arrest, detention and non-consensual searches fall outside of the allowable methods to pursue administrative enforcement actions by the FAA, unless they are part of a state criminal investigation.

**CAN YOU SHOOT DOWN YOUR NEIGHBOR’S DRONE?**

No. Under federal law (18 USC § 32), anyone who “sets fire to, damages, destroys, disables or wrecks any aircraft” is subject to hefty fines and up to 20 years in prison. Since drones are considered aircraft, aiming a gun at a drone would be just like aiming a gun at an airplane.

**STATE AND LOCAL REGULATIONS**

In 2015, 45 states considered 168 different bills relating to drones. So far, 26 states have actually enacted laws addressing drones, and six other states have adopted resolutions related to drones. Most state and local laws regarding drone use are aimed at prohibiting the viewing, photographing or recording of individuals engaged in private activities on private property. In addition, several states, including Michigan, have enacted laws that prohibit the use of drones to interfere with or harass an individual who is hunting, and prohibit using drones for hunting, fishing or trapping.

Are new laws necessary? Probably not. Most complaints about drones involve their ability to spy on people, but there are already laws against unwanted photography or recording of private individuals; these laws apply whether the camera is mounted to a drone or to a creepy guy in a stained raincoat. Local governments can also prosecute drone operators if the use of drones violates a law of general applicability, such as laws protecting privacy or nuisance laws. In addition, there is strong evidence to suggest that local governments can use zoning ordinances to regulate the locations from which drones may be launched, landed or operated, just as they can regulate other activities that impact neighbors but are unlikely to affect those living outside of their community.

A problem with some of the new drone-specific laws is that they conflict with the FAA regulations. For example, Oregon has enacted a law enabling people to sue drone operators who fly over their houses at altitudes of less than 400 feet, after being notified that the residents don’t want them there. The problem is that FAA guidelines state drones should not be flown at altitudes over 400 feet. That means any drone operator in Oregon – as long as he’s on notice that his activities are unwelcome – will be in violation of something.

What is clear is that no state or local drone registration law may relieve a drone owner or operator from complying with the Federal registration requirements. Furthermore, the FAA recommends that it be consulted before a state of local municipality enacts laws that restrict flight altitude or flight paths, ban drone operations entirely, or require mandatory equipment or training. However, continued...
laws traditionally related to state and local police power – including land use, zoning, privacy, trespass, and law enforcement operations – generally are not subject to federal regulation and would likely be permitted.

**Use of Drones by Law Enforcement**

Drones can be a very valuable tool for law enforcement, aiding in search-and-rescue, arson and accident investigations, firefighting, border patrol and disaster relief. However, law enforcement agencies that chose to add drones to their arsenal could face several civil liability concerns. First, there are general liability concerns regarding the operation of drones such as ground damage, air-to-air collisions, potential communications interference, and nuisance and trespass claims by landowners.

Law enforcement also has to worry about Fourth Amendment violations. The Fourth Amendment regulates when, where and how the government may conduct searches and seizures. Overhead imagery and surveillance has always raised privacy concerns under the Fourth Amendment. In addition, many drones are equipped with advanced imaging capabilities such as thermal sensing and infrared imaging. These types of tools raise particular privacy concerns and should be used with caution.

The use and regulation of drones is obviously a new area of municipal concern, but one which will become increasingly important in order to protect the health, safety, welfare and privacy of all citizens. The thought that tiny unmanned aircraft could be invading private and public property is somewhat creepy and unnerving. On the other hand, drone technology has the potential to bring significant resources to communities. As the drone industry evolves, privacy concerns over the use of drones will persist. In the future, it will be up to the federal government, states and local municipalities to ensure that there are adequate privacy protections against the malicious use of drones, while at the same time not creating so much regulation as to stifle drone innovation.

For more information on this subject matter please feel free to contact Karen Daley direct. Karen M. Daley is an attorney at Cummings, McClorey, Davis & Acho, P.L.C. (CMDA), and is the head of the Firm’s appellate division. Karen can be reached at 734.261.2400 or kdaley@cmda-law.com.
MIPRIMA Spring Conference

Brian Kellogg, Safety Consultant, MIOSHA Consultation Education & Training Division Presented: MIOSHA – Compliance to Avoid Penalties

Leslie Locke & Priscilla Morris

Kathleen Dunning & Denise Pretzer

MIPRIMA Spring Conference

Matt Hersey, Leslie Locke & Grant Mason

Judy Thompson-Torosian & Margaret Kammerer
Margaret Kammerer & Kate Thorp-Hickner

Randall Roost, MBA - Principle Planner Water Operations, Lansing Board of Water and Light Presented: Risk Mitigation for Water Utilities

Attorneys Michael Sanders & Alicia Birach, Attorneys with Foster Swift Presented Workers’ Compensation Updates

Carol Scott

Troy Scott, Human Resources Director Martin Transportation Systems Presented: Identifying and Dealing with Rogue Employees

Shoni Galatian & Debra Russell

Margaret Kammerer & Kate Thorp-Hickner
Ferguson Missouri Is Back in the News

According to news reports Ferguson unilaterally decided to alter the terms of the agreement which resolved the Federal enforcement based on the recent police shooting which gained so much national notoriety. Ferguson had apparently agreed to stop writing traffic tickets in a racially discriminatory manner and to give training to local officers on avoiding discrimination. The Ferguson city fathers defended their failure to implement the agreed steps citing the cost of the training noting that city revenues were down (presumably because they were no longer writing so many tickets). There are a number of lessons that interested observers can learn from Ferguson about how not to be on the national news.

Last year during the reporting frenzy that followed the Ferguson shooting, the media noticed that there was no nationally available database on deaths involving law enforcement. After exploring the idea that this represented a massive conspiracy to cover up police misconduct, the media appeared to accept that this was just a case of local bureaucracy failing to coordinate. Some reporters then noted that a major finding of the post 911 report was that local first responders could not coordinate because their radios did not have a channel in common, a problem that has still not been resolved. Other reporters used massive FOIA requests to create their own data bases on deaths related to law enforcement. The Michigan legislature has apparently decided to add a new reporting requirement to get ahead of this issue.

New Death Report

A new bill is pending which would require a report to the legislature of Michigan, reporting deaths related to law enforcement actions. HB 4232 inserts a new requirement into the Elliott-Larsen Civil Rights Act. This bill would require the Michigan Department of Civil Rights to investigate “each incident in which a law enforcement officer is responsible for the death of an individual in the course of the law enforcement officer’s duties, if the deceased was a member of a group or had a characteristic that has been the subject of past discriminatory practices under this act.” A report would be prepared and issued to the legislature and the employing law enforcement agency as to each incident.

Old Report Forms

A package of bills has been pending for some time, HB 4660 through HB 4668. These bills would sunset the reporting requirements put in place in the mid-1980s to gather data about the “insurance crisis”. It appears the original legislation required the “insurance commissioner” prepare an annual report to the legislature on the “state of the insurance market in Michigan”. This report has not actually been produced each year as required by the statute and now the Bureau is trying to get the legislature to drop the requirement since it is not being met anyway. Part of the package is eliminating a liability report required on each new lawsuit against a municipality. Even though no one seems to be following the law (or caring about its breach), it would be nice to get this paper requirement off the books.

New FOIA - "Legislative Open Records Act"

For some time, we have watched several pending bills that would make the state legislators subject to FOIA. Our belief was that if they had to comply with FOIA it might alter the way they draft the law and the requirements that they place on everybody else. The politics around the Courser & Gamrat mess made the passage seem possible, but it did not happen. Then there was Flint and once again the head hunters are out for blood. This time it seems to be serious. Thirty-seven state lawmakers from both sides of the aisle introduced a package of bills that would effectively remove the FOIA exemptions for the Governor and Legislators and staff. This new package is HB 5469 through HB 5478 and needs to be watched by all public risk managers.

More Flint Fallout

The legislature has a pair of pending bills HB 5209-5210 which would exclude Emergency Managers from the protection under the Governmental Tort Liability Act (GTLA). Many worry about the implementation of “laser exclusions” which push specific jobs by title out from under the broad protection of GTLA.

Plowing Contracts

The legislature has pending HB 5230 which prohibits hold harmless or indemnification agreements in plowing and deicing contracts. Until recently everyone seemed afraid to meddle with the Governmental Tort Liability Act (GTLA), apparently based on the analogy of Pandora’s Box. The bill discussed about going after Emergency Managers, which may no longer hold true. But what has been happening is a series of end runs using an interesting new technique of simply declaring certain risk transfer techniques as no longer acceptable. We have seen recent lobbying by interest groups effectively block hold harmless and indemnification in several key areas. This is becoming an increasingly worrisome end to governmental immunity.
The People in the Powdered Wigs
US Supreme Court Justice Antonin Scalia died on Feb 13, 2016 while at a vacation ranch in Texas. Justice Scalia had for some time been the voice of a five to four conservative majority on the Court. This set the stage for President Obama to name a replacement who could only be more liberal. In the immediate aftermath of Scalia’s death, lawyers recalculated their chances of success and several large settlements were reported in the press. Among those deals was the payment by Dow Chemical of $835 million to settle a pending antitrust case. After some consideration, President Obama has nominated Merrick Garland to fill the vacancy. Judge Garland is currently the Chief Judge of the US Court of Appeals for the District of Columbia Circuit. At the point of this writing the confirmation process has stalled.

The Scalia-Ginsberg opera
During his life, Scalia was the fierce philosophical opponent of Justice Ruth Bader Ginsburg who led the minority position on the Court and often penned dissenting opinions.

Despite their philosophical differences both Justices Scalia and Ginsburg loved the opera and this passion allowed them to remain good friends even while disagreeing on many issues of law. In fact a musically inclined lawyer named Derrick Wang wrote an opera based on these clashing personalities: Scalia/Ginsburg, an American comic opera in one act. A sample may be found HERE.

Driverless Cars – Who Gets the Ticket?
What seems to be first accident involving a Google driverless car was recently reported in the media. On February 14, 2016 in Mountain View California, a driverless car side swiped a Santa Clara Valley Transportation Authority municipal bus. While a minor fender bender by most standards, this accident gained national media coverage. Autonomous vehicles are seen to be a solution to the newly developing problem of “stranded seniors” a group that is growing based on increasing life expectancy. According to Reuter’s news service – “Google said the crash took place ... when a self-driving Lexus RX450h sought to get around some sandbags in a wide lane.”

Many municipalities rely on traffic tickets for at least part of their revenue and this raises the question of who will receive the ticket; the owner of the vehicle or the programmer for the manufacturer? Experts opine that the advent of “driverless cars” will force a revolution in the handling of auto insurance. But in the meantime look forward to a lot of litigation over the impact of cars driven by software.

"State Police Motor Vehicle Pursuit Policy Act"
HB 4233 if passed, establish a state standard for local pursuit policies and is a bill that Risk Managers responsible for law enforcement agencies need to monitor.

Emojis
Oxford dictionaries made history by selecting an emoji as their “Word of the Year” for 2016. The emoji selected is a laughing face with two tear drops. It is called “Face with Tears of Joy” and translates as LOL. If you have not revised your policies regarding email and correspondence to include reference to emojis, then you may wish to consider this now. Several national litigation magazines have carried articles on how get the court to take notice of emojis and allow their introduction as evidence.

For more information or discussion with Michael Ellis, JD, CPCU, ARM-P, regarding this subject matter, please feel free to contact Michael direct by email: michael.m.ellis@aol.com.
An Employee’s Motivation Is No Longer Determinative
In A Whistleblower Protection Claim
Suzanne Bartos, Esq. Cummings, McClorey, Davis & Acho.

The views set forth are those of the author Suzanne Bartos and do not necessarily reflect the view of the MIPRIMA Organization.

The Michigan Supreme Court has recently held that the employee’s motivation is no longer a determining factor in whether the Whistleblower Protection Act (WPA) protects the employee from an adverse employment action.

Since the underlying purpose of the Act is to protect the public, municipalities are most vulnerable to a WPA claim. If government officials, who are bound to serve the public and violate laws, designed to protect the public, then employees who at their own risk blow the whistle on such illegality necessarily serve the public interest and are protected by the WPA. The WPA prohibits an employer from taking adverse action against an employee for reporting, or about to report, a violation of law. If an employee is demoted, disciplined or terminated and a link can be made between this and his reporting of a violation, he can then sue his employer for violating the WPA.

In one of the first decisions to interpret the WPA, Shallal v. Catholic Services of Wayne County, the court determined that the critical inquiry is whether the employee acted in good faith and with “a desire to inform the public on matters of public concern”. If the employee did not have a genuine motive behind the reporting they could not avail themselves of the protection of the Act.

This reasoning was reinforced in the decision in Whitman v. City of Burton. Police chief Whitman claimed his contract was not renewed due to his public objections to the City’s non-payment of overtime wages. The Chief argued that this was a violation of the City ordinance, and therefore, protected activity. The Court of Appeals, on two occasions, ruled that the Chief was not acting to advance the public interest and, therefore, he was not to be considered a whistleblower.

The Court of Appeals ruling was vacated, in part, by the Michigan Supreme Court in February 2016. The Supreme Court refused to accept the opinion of the Court of Appeals that an employee’s motivation in reporting a violation of law must be to advance the public interest for him to have the protection of the Act. Even though the Supreme Court has determined motivation is not a determining factor, they did uphold the dismissal of the Chief’s claim based on an unrelated issue. One has to wonder if the Court would have found the Chief’s motivation was not determinative if there was not another basis upon which he could be denied the protection of the Act.

Based upon this recent Whitman decision, it is evident that the employee need not have the advancement of the public interest at heart when they report a wrongdoing to avail themselves of the protection of the WPA.

For more information on this subject matter please feel free to contact Suzanne Bartos direct. Ms. Bartos has been practicing law since 1984. She specializes in employment and labor law and currently heads the Employment/Labor Practice Section at Cummings, McClorey, Davis and Acho. Suzanne can be reached at 734-261-2400 or sbartos@cmda-law.com.
Overview of Manual of Uniform Traffic Control Device (MUTCD) Part 6 MDOT/Federal Highway Administration:

- Underlying principles of work zone traffic control
- Features of work zone traffic control
- Hazards associated with work zone traffic control
- Injury prevention techniques

Workers in construction, utilities, or public works jobs on both highways and city streets are at risk of fatal or serious debilitating injuries. The work is in congested areas with exposure to high traffic volumes and speeds, as well as under conditions of low lighting, low visibility, and inclement weather. The work is routinely near both moving construction vehicles and passing motor vehicle traffic. Workers in temporary traffic control work zones are exposed to risk of injury from construction vehicles and motorized equipment, operating in and around the active work zone(s), operating in traffic control or secondary areas that support the work zone, and (ex. - temporary batch plants) entering and leaving the work zone.

Workers in the roadway are at risk of injury from a variety of general traffic vehicles entering the work zone: drunk drivers, sleepy or impaired drivers, impatient, reckless drivers, drivers using cell phones; other inattentive drivers, law enforcement and emergency vehicles, disabled vehicles pulling in and parking lost drivers looking for directions. What is a traffic control service? Definition from the MUTCD a sign, signal, marking, or other device used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, or shared-use path by authority of a public agency having jurisdiction. Purpose from the MUTCD – promote highway safety and efficiency by providing for the orderly movement of all road users on streets and highways throughout the nation.

Influences drivers’ perception of risk, provides information on potential hazards, minimizes aggressive behavior, assists in navigation, engineering concerns for work zones and the primary focus: safe and efficient movement of vehicles through work zone, relatively less emphasis on safety of construction workers. Worker safety considerations in work zone traffic control: modifying traffic control strategies to influence drivers’ perception of risk, leads to more careful and slower driving, improves safety for the workers.

Examples:
Positive Guidance Approach for workers you should provide active warning devices, Illuminated arrow boards, reliable advisory speed limit, active message with flashers, narrower lane widths, longer and/or wider buffer zones and rigid barriers to separate workers from travel lanes. May be used to improve safety in work zones and combines highway/traffic engineering features with what rational drivers expect. Considers, various age groups of drivers, Complexity of work zone information handling and Limited capability of humans for detecting, processing, and remembering information.

The first part of this article was about protecting our employees who perform work zone activities in our streets and roadways; these are the same roads and streets that we all travel daily to get to our places of work, our schools, vacations etc. We all hold a responsibility while driving.

Distracted driving is any activity that could divert a person’s attention away from the primary task of driving. All distractions endanger driver, passenger, road workers and bystander safety. These types of distractions include: texting, using a cell phone or Smartphone, eating and drinking, talking to passengers, grooming, reading, including maps, using a navigation system. To protect Michigan road workers (and any state you may travel in or through). Distracted driving is the leading cause of accidents on our roadways today, please drive safe and keep your mind and attention on what is in front of you at all times. Here are some statistics of Work Zone Fatalities by State in 2014:

Source: Fatality Analysis Reporting System (FARS) 2014 ARF, NHTSA

Work Zone Fatalities by Year and State:
- Michigan 2014 - 11
- Illinois 2014 - 31
- Indiana 2014 - 14
- Ohio 2014 - 17

Sources for this article: OSHA, MIOSHA, Michigan Department of Transportation, NHTSA

For more information on this subject matter please feel free to contact AJ Hale direct. AJ Hale Jr, Safety & Loss Prevention Manager CompOne Administrators 248-344-2267.
A Synopsis of Federal and State Law on Unmanned Aerial Vehicles
Hilary Ballentine and Rochelle Ralph, Attorney’s with Law firm of Plunkett & Cooney

The views set forth in this article are those of the authors Hilary Ballentine and Rochelle Ralph
and do not necessarily reflect the view of the MIPRIMA Organization.

In February 2012, President Barack Obama signed the FAA Modernization and Reform Act into law, encouraging the Federal Aviation Administration (FAA) to create a comprehensive plan for the acceleration and integration of unmanned aircrafts into United States airspace.

With the passage of this bill, the U.S. Congress paved the way for the proliferation of drones in American skies. In fact, the FAA predicts that as many as 7,500 small commercial unmanned aircrafts may occupy the nation’s skies by 2018.

A growing number of governmental agencies have applied for, and received, permission to operate drones to assist in search and rescue missions, crime scene reconstruction, and emergency situations. The ability of drones to carry cameras and various other electronic monitoring and sense-enhancing technology has raised questions about the constitutionality of drone surveillance under the Fourth Amendment.

The Fourth Amendment to the U.S. Constitution provides:
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 an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the U.S. Supreme Court has not specifically addressed the constitutionality of drone surveillance, it has issued a series of rulings regarding the use of manned aircrafts to conduct aerial surveillance and the use of electronic surveillance and sense enhancing technology that are particularly informative and likely applicable to the Fourth Amendment drone analysis.

In California v Ciraolo, 476 US 207, 209 (1986) police received an anonymous telephone tip that Ciraolo was growing marijuana in his backyard, which was enclosed by two fences and shielded from view at ground level. Officers, trained in marijuana identification, obtained a private airplane and flew over Ciraolo's home. At an altitude of 1,000 feet, officers were able to identify and confirm the plants growing in Ciraolo's back yard were, in fact, marijuana.

The Supreme Court held the warrantless aerial observation of Ciraolo's yard, did not violate the Fourth Amendment.

Applying the reasonable expectation of privacy test, the court acknowledged that Ciraolo manifested a subjective expectation of privacy in this area, evidenced by the 10-foot fence surrounding his yard. However, officers were lawfully positioned, within publicly navigable airspace, at a vantage point from which any member of the public flying in the airspace could have seen everything the officers observed. Accordingly, Ciraolo's "expectation that his garden was protected from such aerial observation was unreasonable and not an expectation society [was] prepared to honor." Ciraolo, 476 US at 214

The Supreme Court reached a similar conclusion in Florida v Riley, 488 US 445, 450 (1989) holding that an officer's naked eye observation of the interior of a partially covered greenhouse, located in the backyard of a residence, from a helicopter 400 feet above the residence was not a "search" under the Fourth Amendment.

Applying the Supreme Court's analysis in Ciraolo and Riley, drone surveillance will likely be permissible under the Fourth Amendment, provided the drone is lawfully positioned in publicly navigable airspace, and the item observed is in plain view.

However, advancements in technology allowing for more invasive and intrusive surveillance by drones present unique issues that will likely require an analysis and application of prior Supreme Court's decisions addressing the constitutionality of electronic surveillance and sense-enhancing technology.

In Katz v United States, 389 US 347, 353 (1967) the Court held that the government's use of an electronic listening device to listen to and record an individual's private conversation constituted a search under the Fourth Amendment. Similarly, in Kyllo v United States, 533 US 27, 33 (2001) the court held that the government's use of thermal imaging device, not generally used by the public, to determine whether marijuana was being grown in a home was a violation of the Fourth Amendment.

continued...
More recently, in *United States v Jones*, 132 S Ct 945, 949 (2012) the Supreme Court held that the government's use of a global positioning system to track the location of an individual violated the Fourth Amendment. Based on the court's decisions in *Katz*, *Kyllo* and *Jones*, the sophistication of the technology used and its availability and use by the public will be imperative to any Fourth Amendment drone surveillance analysis.

Despite the lack of regulations at the federal level, many states have enacted legislation addressing privacy concerns raised by law enforcement use of drones. In Michigan, House Bill 5026 is currently making its way through the Legislature. If passed, this bill would prohibit law enforcement agencies and other political subdivisions of the state from the following: equipping drones with weapons of any sort; operating drones over private property, absent a search warrant; and disclosing information acquired through the operation of a drone (except in limited circumstances). The bill does, however, provide an exception in emergency situations. If a believed imminent threat to life or safety of a person exists, law enforcement agencies may use drones to assist in their operations provided a warrant is obtained within 48 hours of the start of the operation.

This proposed legislation raises the important and related question of whether governmental agencies and their employees can be held liable for tort liability occasioned by improper operation of drones or drone-related injuries (whether to person or property).

Under Michigan's Governmental Tort Liability Act, a governmental agency, such as a city or township, "is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Employees of governmental agencies are afforded similar immunity from tort claims for injury to a person or property provided that they are (a) acting within the scope of their authority, (b) engaged in the exercise or discharge of a governmental function, and (c) not grossly negligent. MCL 691.1407(2)(a)-(c)

The definition of "governmental function" requires only that there be some constitutional, statutory, or other legal basis for the activity in which the governmental agency or employee is engaged. The focus is on the general activity (i.e., operation of a drone for police purposes) and not the specific conduct involved at the time of the alleged tort (i.e., operating the drone in an unauthorized air space). Currently, no Michigan cases have addressed this issue, and there are also no Michigan statutes on point. With all this uncertainty, however, what we do know is this - governmental liability for the use of a drone is not implicated in any of the five areas where the Michigan legislature has carved out exceptions to governmental immunity.

The Governmental Tort Liability Act provides for the following exceptions to the broad grant of immunity: (1) the highway exception; (2) the motor vehicle exception; (3) the public building exception; (4) the proprietary function exception and (5) the governmental hospital exception.

Drone use does not fit into any of these exceptions. Therefore, at least under current Michigan law, governmental entities should be able to enjoy governmental immunity for the use of a drone. The same should hold true for governmental employees, again provided they are acting with the scope of their authority and are not acting so reckless as to demonstrate a complete lack of concern for whether an injury results.

The next few years will be a critical time in the development of drone law, both in the legislative and judicial arenas. We may see legislation passed like House Bill 5026, which would set strict parameters for state and local government workers regarding drone use. At the federal level, the constitutionality of drone use may be examined by an appellate circuit court or even by the U.S. Supreme Court.

In the context of state governmental immunity, it will be particularly interesting to see how the courts will apply Michigan's current statutory immunity scheme to claims against governmental entities and/or their employees involving the use of drones.

*For more information or questions on this subject matter please feel free to contact Hilary Ballentine, Rochelle Ralph or Audrey Forbush with Plunkett & Cooney at their Bloomfield Hills office, 248-901-4000. hballentine@plunkettcooney.com, rralph@plunkettcooney.com, aforbush@plunkettcooney.com. The information contained herein should not be taken as legal advice. Advice for specific matters should be sought directly from legal counsel.*

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