

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, TUESDAY, JUNE 23, 2015

An **ALM** Publication

Drones Are Flying Under the Litigation Radar—for Now

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Of the Legal staff

In 1981, personal injury lawyer Jim Beasley Sr. was flying a World War II-era T-6 Texan over a site in North Philadelphia while attorney Thomas R. Kline was snapping photos out of the back of the plane to be used in a suit they had filed.

Fast-forward 34 years and Kline, now of Kline & Specter, isn't looking down from a trainer aircraft but rather at the possibility of unmanned aerial systems, or drones, capturing accident scene imagery for him.

Plaintiffs and defense counsel, as well as attorneys who represent companies looking to gain permission for commercial drone use, haven't seen drones invade the litigation sector just yet, but they all predict it is just a matter of time. And with that will come additional legal issues of privacy, admissibility and federal pre-emption of state regulations on drone use, they said.

"There will be more gray than black and white areas if and when drones become used in litigation," Kline said.

And he predicts drones will become part of the civil litigation process. But as with all new forms

of technology, Kline said, "the law has always played catch-up with the technology," as it did with e-discovery and social media.

"It's sort of early with respect to the use of civilian drones for civil litigation purposes," said Kramer Levin Naftalis & Frankel's Brendan M. Schulman. "But I can foresee that happening the same way that we now have social media being used in litigation proceedings on a regular basis."

Schulman heads up Kramer Levin's unmanned aircraft systems practice, representing companies and education institutions looking to use drones commercially.

The Federal Aviation Administration is currently in the process of issuing final rules on the use of commercial drones, which are expected within a year or so. Until then, the FAA has issued on a case-by-case basis more than 600 exemptions to its current ban on drone use. The exemptions are typically for the movie and photography industries, real estate and environmental purposes or, more recently, for the insurance industry.

On June 19, Liberty Mutual Insurance Co. was granted an exemption for aerial photography to assist in the claims adjustment process in cases of home and business roof

inspection and "large structure/fire site" inspections.

The use of drones by insurance companies was what prompted New Jersey-based Davis, Saperstein & Salomon to get a drone last year, according to Legal affiliate New Jersey Law Journal. The firm uses it for accident scene investigations.

"I always went out to the scene, but now when I go out to the scene I feel I have tools that are cutting-edge. I'm reading how the carriers are deploying these unmanned aerial vehicles in their investigations. My prediction is, it's not going to be long before, on both sides of the aisle, there are going to be drones launched to gather the best evidence you can gather," name partner Samuel Davis told the Law Journal.

The images captured by insurance companies are just as discoverable in litigation as other elements of an insurance company's claims determination, said Reed Smith partner Douglas J. Wood. Wood led his firm's effort this March in publishing a white paper titled "Crowded Skies: Opportunities and Challenges in an Era of Drones."

Aside from the entertainment, real estate and environmental industries, commercial drone use is very

limited, Wood said. Drones haven't been used much in litigation, though they have spawned personal injury, invasion of privacy and insurance coverage suits, he said.

"All this is still being sorted out," Wood said. "It's not around the corner. I think it's maybe around the block a few times." Part of the reluctance of many to embrace drone use is that there aren't clearly established laws surrounding it, Wood said, citing to when drone-captured images could be admissible in civil litigation.

And before the issues of admissibility are reached, there needs to be a license to operate the drone that created the evidence in question. As Marshall Dennehey Warner Coleman & Goggin aviation partner James G. Lare said, people are still trying to grapple with the power of the FAA. The agency has taken the position that it controls the airspace down to the ground. And until there are formal rules in place from the FAA, it is a process to get an exemption from the ban, Lare said.

Schulman said drones could become useful in real estate or construction disputes or to get efficient imagery of a disaster scene for claims adjustment purposes.

But a number of states have enacted anti-drone statutes dealing largely with law enforcement and the need to obtain warrants. Some of those statutes, however, have provisions precluding that information from being entered into evidence, Schulman said.

"I have a hard time believing that any of those legislatures that enacted that provision would want insurance photographs to be kept out of court," Schulman said, not-

ing that might, however, be an unintended consequence.

These statutes, which don't yet exist in Pennsylvania despite some proposals, have largely been adopted in just the last year or two, Schulman said. Some of them have a "misinformed concern about privacy" that has resulted in the outright ban of the technology even though it could be a safer, more efficient tool in situations such as disaster assessment, Schulman said.

"I would actually expect to see overhead drone photography be used in automobile tort cases if the state legislatures haven't inadvertently banned the use of them," Schulman said.

Kline said rules of evidence require information be turned over through formal discovery requests, so he said he isn't sure how much added access drones would give plaintiffs attorneys. He also doubted whether drones would supplant defense counsel's traditional surveillance of plaintiffs given drones are often noisy and noticeable.