



The National Transportation Safety Board Bar Association

www.ntsbbbar.org

July 2010

President's message...

by Tony B. Jobe

Congratulations to the newest Members of the National Transportation Safety Board who were sworn in on June 30, 2010, Member Mark R. Rosekind, PhD and Member Earl F. Weener, PhD. Member Rosekind is an internationally recognized fatigue and sleep disorder expert in all modes of transportation. He has received the NASA Exceptional Service Medal and two (2) Flight Safety Awards. Dr. Rosekind is a graduate of Stanford University, earned his doctoral degree from Yale University, and completed his post doctoral fellowship at Brown University Medical School. During our conference in November of this year, Dr. Rosekind will address current issues related to the NTSB and will join Dr. Jerry Kreuger in a Question and Answer session related to fatigue and sleep disorders. Member Weener has spent his entire career in the field of aviation safety, whether working for Flight Safety Foundation, at the Boeing Company, or as a general aviation Flight Instructor and Part 135 Pilot. He holds all of his academic degrees, including his doctorate in Aerospace Engineering, from the University of Michigan. We look forward to meeting both Member Rosekind and Member Weener at the November 3-4, 2010 National Air and Transportation Law Conference.

We send our special thanks to NTSB Chairman Debbie Hersman, whose request to the Smithsonian's National Air and Space Museum was vital in securing our reservation for Thursday evening, November 4th, from 7pm to 11pm. The museum's employees will be available during the evening, with the IMAX

theatre and flight simulators available to those in attendance. By the way, our dinner is limited to the first 300 persons who purchase tickets by the terms of our agreement with the Smithsonian Foundation, so don't wait to acquire your dinner tickets. Our next Newsletter, scheduled for August, will carry Charlie Morgenstein's recently conducted interviews with NTSB Chairman Debbie Hersman and Member Robert L. Sumwalt.

A special recognition goes out to NTSB Administrative Law Judge William A. Pope, II, who announced his retirement on June 3, 2010. The NTSB Bar Association recognizes Judge Pope's seventeen years of dedicated service. We hope that Judge Pope will continue to attend our NTSB Bar Conferences, even though he is finally free to enjoy time outside of the courtroom. The new Administrative Law Judge will be announced in September and will be invited to address the conference with the other Administrative Law Judges on Wednesday afternoon, November 3rd.

It is with special gratitude that we recognize our current three dinner sponsors for the Gala Dinner (Black Tie Optional) event at the Smithsonian National Air and Space Museum on November 4, 2010. The generosity of Magana, Cathcart and McCarthy of Los Angeles back in March of this year allowed us to secure the facility for that date. Their partner, Charlie Finkel, who is also the current President of the Lawyer Pilots Bar Association, spearheaded that firm's early decision. Charlie was also instrumental in obtaining the unanimous LPBA board approval

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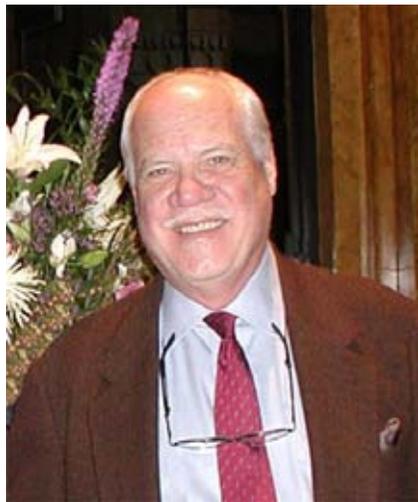
to co-sponsor this Conference with the NTSB Bar. This co-sponsorship will allow all LPBA members to register for the National Air and Transportation Law Conference and Gala Dinner at the same discounted rate as our own NTSB Bar Association members.

Robert "Bob" Parks of Coral Gables, Florida is also an anchor sponsor for the Gala Dinner. Bob, as you probably know, is a preeminent aviation trial lawyer, well known for his successes in complex transportation cases over the last forty years. Bob will address the conference on a to be announced subject. Thank you, Bob, for your generosity.

Our gratitude also goes out to Kreindler and Kreindler of New York City. We take this opportunity to especially thank Jim Kreindler and Anthony Tarricone for their assistance in securing their firm's contribution to this Gala Dinner event. Jim Kreindler will also be one of our CLE speakers on Wednesday afternoon, November 3rd. He will provide us with an update on recent air mass disaster litigation, including the Colgan crash, in which his firm is lead counsel for the passenger families. We look forward to seeing many of the members from the Kreindler firm at the conference and especially at the Gala Dinner.

Thus, through the support of Magana, Cathcart, and McCarthy; Bob Parks; and Kreindler and Kreindler; all conference attendees and their guests who attend the Gala Dinner will enjoy the Smithsonian National Air and Space Museum, which will be fully staffed, with the IMAX theatre and flight simulators in operation. Luxury bus transportation will be provided to and from the Key Bridge Marriott and the Museum. We have contracted with the highly acclaimed Washington, DC caterers, Occasions, to provide a lovely cocktail party and three-course meal. Please note on the registration form if you have any food allergies or if you prefer a vegetarian entrée for planning the menu for this dinner.

Through additional sponsorships, all conference participants can take advantage of the excellent social networking opportuni-



Tony B. Jobe (JD Tulane Law '74) has practiced aviation, maritime, products liability and commercial law as well as FAA enforcement defense for thirty-five years in the New Orleans area with offices in Madisonville, LA. Former Marine combat helicopter pilot and FAA licensed SEL, MEL, helicopter and instrument rated civilian pilot. Former CEO of a Continental Express Airline (1981 – 1988). Lead counsel in air mass disaster cases. AV Rated and selected as a "Top Lawyer for 2009" by New Orleans Magazine.

ties. On Wednesday morning, November 3rd, breakfast is sponsored by Mike Pangia and his firm, Anderson and Pangia, of Washington, D.C. Mike Dworkin and his firm, Michael L. Dworkin and Associates, of San Francisco, together with Mike Holland and his firm, Condon & Forsyth, of New York will sponsor your lunch on Wednesday, November 3rd, in the Solarium of the L'Enfant Plaza Hotel. In addition, Don Maciejewski of Jacksonville, Florida and Charlie Morgenstein and his firm, Mmo Legal Services of Boca Raton, Florida will be your hosts for a spectacular Cocktail Party on the top floor of the Key Bridge Marriott on Wednesday evening following the first day of CLE. If other law firms are interested in sponsorship of remaining events of this conference, please contact either:

Bill Elder, Program Chairman

Phone: (202) 637-8787

Email: william.elder@hoganlovells.com

or

Tony B. Jobe, President

Phone: (985) 845-8088 or

(985) 778-8263

Email: jobelaw@msn.com

All sponsorships will be featured in the NTSB Bar Associations next publications in August and September, in the national trade press, and in local Washington, D. C. papers, as well as at the conference in November.

Knowing that the national financial

downturn has had a broad reaching impact on all of us, including your firm and your clients, this November's law conference has been organized to achieve three major goals:

1. Top quality speakers, important topics, and the NTSB tours to enhance your continuing legal education program,
2. Exceptional social networking opportunities; and
3. Affordable pricing of the conference registration, the Gala Dinner, and your hotel room rate.

Recognizing the diversity in the practices of attendees in private practice from both the NTSB Bar and the Lawyer Pilots Bar, government attorneys, and the interests of students, we have designed the CLE presentations to cover many types of legal practice. Thus the Conference program will include regulatory changes at the NTSB and FAA, recent case law decisions in aviation and transportation, enforcement and investigations, as well as tort, contract, and one hour of ethics. They have been equally balanced with presenters from the NTSB and FAA as well as private sector practitioners.

We are offering affordable pricing for the Conference, which includes a Super Early Bird rate to the first twenty (20) people who opt to save some money by registering before August 15, 2010. Gov-

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ernment attorneys and students who are members of either the NTSB Bar Association or the Lawyer Pilots Bar Association can attend at rates below costs. In addition, if you plan to bring your spouse or a friend to the Gala Dinner, we offer below cost pricing for one guest with each conference participant at \$130.00. Additional dinner tickets are available for \$165. An exceptional room rate of \$159 per night has been negotiated with the newly renovated Key Bridge Marriott, just across the Potomac River from Georgetown. You must make your reservation before

September 15th for this rate. You can cancel up to the date of arrival by 3 pm. Our contract with the Smithsonian Foundation limits our total attendance at the Gala Dinner to three hundred (300) people, so you are encouraged to register soon. For any further questions, please contact Bill Elder or Tony Jobe through the contact information provided earlier in this message.

On page 20, we welcome our new members to the NTSB Bar Association, and encourage all of our new members to consider attending the Conference in November in order to meet other members. We also hope you will consider becoming

actively involved in the work of the NTSB Bar. Member rates will be extended to all conference registrants who join or renew their membership at the time of their registration. Depending on when you register (*see registration form included in this issue of the Newsletter*), the amount you save in your registration can more than pay for your annual membership dues. As you probably know, the NTSB Bar has one of the least expensive annual dues of any national bar association: a regular membership for an attorney costs only \$85.00 per year, \$45.00 per year for government attorneys, and \$35.00 per year for students. Whether you are joining the bar association, renewing your membership, or registering for the conference, it is easy. Just contact Charlie Morgenstein at the phone number, email, or address listed on the Conference Registration Form on page 9 of this Newsletter. You can also register online at NTSBBA.org, using the link set up for this November's Conference Registration.

Finally, we officially seek from all of our members nominations for this year's Joseph T. Nall Safety Award. Please submit your nominations by email to jobelaw@msn.com no later than August 30, 2010 with a position statement as to why that person is qualified to receive this Award. Nominations will be screened by the Board of Directors to assure qualification and then will be provided via electronic ballot to the membership for voting by September 20, 2010.

Have a great summer, and safe flying.

Cordially,
Tony B. Jobe
President

Website Update:

Very soon we will be changing the look and functionality of our website which will make it more "user friendly" and give members and non-members access to valuable information. We are planning to change the appearance, layout, add links and make it possible for non-members to email all NTSB Bar Association Members to request information or input. We welcome any suggestions or ideas to help improve the website by emailing your comments to: [Saskia Kelly at saskia@ntsbbbar.org](mailto:saskia@ntsbbbar.org).

In the mean time, if you would like additional information about the conference you can visit us at www.ntsbbbar.org, then click on the "Events Calendar", then click on "Upcoming Events". We will have a link set up which will give you the ability to register for the conference online. This Newsletter will also be available online by clicking "Public Information and Documents" and then click on "2010 Newsletter".

National Air and Transportation Law Conference in Washington, D.C. November 2-4, 2010

“An Evening Dedicated to National Air Safety”

A GALA DINNER AT THE NATIONAL AIR AND SPACE MUSEUM

Conference Presentations

Over fifteen hours of continuing legal education from government and private sector judges, attorneys, NTSB and FAA Investigators. Cosponsored by the Lawyer Pilots Bar Association.

Topics include:

- NTSB Enforcement – current issues, practice tips, and change to rules of practice
- Legal Malpractice in Aviation Cases
- NTSB Laboratory Resources – includes tour of CVR and FDR labs
- Air Mass Disaster – Litigation Update
- Commuter Rail, Marine, and Hazardous Materials Accident Investigations
- Sleep Deprivation – Crew Rest
- FAA Accident Investigations
- FAA Enforcement – current issues, including Hazmat enforcement
- Discretionary Function – FTCA – Hazardous Contamination Litigation
- Automatic Medical Disqualification – Recent FAA regulation changes and updates
- NTSB Administrative Law Judges address current practice changes
- NTSB TWA 800 Tour

Hotel Information

Key Bridge Marriott

1401 Lee Highway
Arlington, Virginia 22209
Reservations: (800) 228-9290

A preferential room rate of \$159.00 has been arranged for this conference. Reservations should be made directly with the Key Bridge Marriott, mentioning the NTSB Bar Association Conference. This rate is reserved until September 15, 2010 and will not be available after that date. Cancellation policy allows cancellation any time before 3pm the day of check-in.

Social Networking Opportunities

Catch up with old friends, make new friends, and enjoy Washington, DC with your family at a variety of activities over three days.

Gala Dinner at the Smithsonian National Air and Space Museum

(Limited to only 300 attendees)

Thursday, November 4th 7:00pm – 11:00pm

Sponsored through the generosity of:

- Magana, Cathcart and McCarthy
Los Angeles, California
- Law Offices of Robert “Bob” Parks,
Coral Gables, Florida
- Kreindler and Kreindler,
New York City, New York

Tuesday, November 2nd

Welcome Reception at the Key Bridge Marriott

Wednesday, November 3rd

Breakfast at the Key Bridge Marriott

Sponsored by:

*Michael Pangia, Washington, D.C.

Lunch at L’Enfant Plaza Hotel

Sponsored by:

*Condon & Forsyth, New York

*Michael L. Dworkin and Associates, San Francisco

Happy Hour Reception at the Key Bridge Marriott

Sponsored by:

*Charlie Morgenstein, Mmo Legal Services,
Boca Raton, Florida

*Dan Maciejewski, Jacksonville, Florida

Thursday, November 4th

Breakfast at the Key Bridge Marriott

Lunch at the NTSB Training Center

National Air and Transportation Law Conference in Washington, D.C. November 2-4, 2010

PROGRAM SCHEDULE OF EVENTS

Tuesday, November 2, 2010

- 4:00 pm – 8:00 pm** **Registration**
- 6:30 pm – 8:00 pm** **Welcome Reception**
Top Floor Overlooking Georgetown
Legendary Key Bridge Marriott Hotel

Wednesday, November 3, 2010

- 6:30 am – 7:15 am** **Registration**
Continental Breakfast
Key Bridge Marriott Hotel
Sponsored by: Michael J. Pangia Anderson & Pangia, Washington, D.C.
- 7:30 am** **Luxury buses leave Key Bridge Marriott for NTSB Auditorium**
L'Enfant Plaza
- 8:00 am** **Welcome Remarks**
Tony B. Jobe, President NTSB Bar Association
Charlie Finkel, President Lawyer Pilots Bar Association
Gary L. Halbert, General Counsel, NTSB
- 8:20 am – 8:50 am** **FAA's Changes to Automatic Medical Disqualification –
A Welcome Relief for Flight Crews**
Charlie Morgenstein, Mmo Legal Services, Boca Raton, Florida
- 8:50 am – 9:30 am** **FAA Participation in Accident Investigations (Panel Discussion)**
Richard Saltsman, FAA Assistant Chief Counsel for Litigation
Hooper Harris, FAA Director of Aircraft Investigations
Howard Martin, Regional Counsel, FAA Alaska Region
- 9:30 am – 10:30 am** **Sleep Deprivation and Fatigue in Transportation Accidents
and FAA Crew Rest Regulations**
Dr. Jerry Krueger - The Science and Reality of Sleep and Rest
NTSB Member Mark R. Rosekind, PhD – NTSB Perspective
Questions and Answers
- 10:30 am** **Coffee Break**
- 10:45 am – 11:15 am** **NTSB Reauthorization and Rules of Practice Before
Administrative Law Judges and Courts of Appeals**
Gary L. Halbert, General Counsel, NTSB
- 11:15 am – 11:45 am** **NTSB Enforcement Cases and Recent Changes
Presentation, Questions and Answers**
Chris Julius, Assistant General Counsel, NTSB

Program Schedule of Events *continued*

11:45 am – 12:45 pm	Buffet Lunch L'Enfant Plaza Hotel Solarium <i>Sponsored by:</i> Condon & Forsyth, New York City Michael L. Dworkin and Associates, San Francisco
12:45 pm – 1:15 pm	Federalism in the Twenty-First Century: Preemption in the Field of Air Safety Mike Holland, Condon & Forsyth, New York City
1:15 pm – 2:00 pm	Deference to Validly Adopted FAA Interpretations: How Far Must the Board Go? (Panel Discussion with Questions and Answers) <i>Moderator:</i> Chris Poreda, FAA Regional Counsel, New England Paul Lange, Private Practice, Stratford, Connecticut Representative, FAA Chief Counsel's Office, Washington, D.C.
2:00 pm – 3:30 pm	Tours of NTSB Laboratories – NTSB L'Enfant Plaza (10 person groups, every 10 minutes)
2:00 pm – 2:30 pm	Update on Air Mass Disaster Cases – Colgan Crash (Presentation with Questions & Answers) Jim Kreindler, Kreindler & Kreindler, New York City
2:30 pm – 3:00 pm	Presentation To Be Announced Robert "Bob" Parks, Coral Gables, Florida
3:00 pm – 3:30 pm	FAA - Hazardous Material, Enforcement and Courts of Appeals Cases (Panel Discussion and Questions & Answers)) Peter Lynch, Assistant Chief Counsel, FAA Enforcement Division, Office of Chief Counsel Allen Horowitz, FAA Special Programs Manager, Enforcement Division, Office of Chief Counsel David Grizzle (tentative), FAA Chief Counsel
3:30 pm	Coffee Break
3:45 pm – 4:00 pm	FTCA – Discretionary Function in Toxic Waste Pollution Cases Michael J. Pangia, Anderson & Pangia, Washington, D. C.
4:00 pm – 5:00 pm	NTSB Administrative Law Judges' Update on Practice before the ALJs – Tips and Procedures Chief Judge William E. Fowler, Jr. – Washington, D. C. Judge Roger Mullins – Fort Worth, Texas Judge Patrick Geraghty – Denver, Colorado New ALJ – To Be Announced in September
5:00 pm	First Day of CLE Concludes
5:30 pm	Luxury Bus Transportation to Key Bridge Marriott
6:30 pm – 8:00 pm	Cocktail Reception Top Floor, Key Bridge Marriott <i>Sponsored by:</i> Don Maciejewski, Jacksonville, Florida Charlie Morgenstein, Boca Raton, Florida

Program Schedule of Events *continued*

Thursday, November 4, 2010

8:00 am	Continental Breakfast Key Bridge Marriott Hotel
8:45 am	Luxury Buses Depart Key Bridge Marriott Hotel for NTSB Training Center; Dulles, Virginia
8:45 am – 9:30 am	Bus # 1 - Update on NTSB's Commuter Rail Cases – Catsworth, California and D.C. Metro Crash (On buses en route) Jim Southworth, Chief, Rail Division, NTSB
	Bus #2 - NTSB Marine Investigations – Staten Island, New York Crash Dr. Barry Strauch, Marine Investigations Division, NTSB
9:30 am	Buses Arrive at NTSB Training Center
10:00 am – 10:30 am	How the NTSB Trains Investigators and the TWA 800 Crash Paul Schuda, Chief, NTSB Training Center
10:30 am – 11:00 am	Tour of TWA 800 Paul Schuda, Chief, NTSB Training Center
11:15 am – 12:00 am	Presentation To Be Announced
12:00 noon – 1:15 pm	Lunch
1:15 pm – 2:00 pm	Legal Malpractice in an Aviation Case (Presentation and Questions & Answers) Broadus Spivey, Austin, Texas
2:00 pm – 3:00 pm	Presentation To Be Announced
3:00 pm	Luxury Buses Leave NTSB Training Center for Key Bridge Marriott Hotel
3:00 pm – 3:45 pm	Bus #1 - NTSB Marine Investigations – Staten Island, New York Crash (On buses en route) Dr. Barry Strauch, Marine Investigations Division, NTSB
	Bus # 2 - Update on NTSB's Commuter Rail Cases – Catsworth, California and D.C. Metro Crash Jim Southworth, Chief, Rail Division, NTSB
3:45 pm	Luxury Buses Arrive at Key Bridge Marriott Hotel

**NTSB Bar Association's
National Air and Transportation Law Conference
and Gala Dinner at the National Air and Space Museum
November 2-4, 2010 Washington, D.C.**

Program Registration

Name: (as you wish it to appear on badge) _____

Address: _____

City: _____ State: _____ Zip: _____

Phone 1: _____ Phone 2: _____

Fax: _____ Email: _____

Fees Include: Continuing Legal Education handouts, tours of NTSB labs, Luxury bus transportation to and from all meeting and hotel sites, 2 breakfasts, 2 lunches, 2 receptions, and 1 ticket to the Black Tie Optional Gala Dinner at the National Air and Space Museum, option to purchase 1 additional ticket to the dinner at a reduced price.

- NTSB Bar Association Member
- Lawyer Pilots Bar Association Member
- Government Employee Members of NTSB BA or LPBA
- Full-Time Student Members of NTSB BA or LPBA
- Nonmember

Additional Dinner Tickets

- First Guest Gala Dinner ticket
(must accompany conference attendee to the dinner. Limited to the first 100 additional tickets sold - First Come, First Serve)
- Additional Gala Dinner tickets
(While available. Dinner attendance is limited to 300 at the National Air and Space Museum for this event.)

Super Early Bird Registration <i>(first 20 registrants prior to 8/15/10)</i>	Early Registration <i>(postmarked prior to 10/5/10)</i>	Regular Registration <i>(postmarked after 10/5/10)</i>	
\$445.00	\$495.00	\$540.00	\$ _____
\$445.00	\$495.00	\$540.00	\$ _____
N/A	\$295.00	\$340.00	\$ _____
N/A	\$195.00	\$240.00	\$ _____
N/A	\$540.00	\$595.00	\$ _____
\$130.00	\$130.00	\$145.00	\$ _____
\$165.00 ea.	\$165.00 ea.	\$165.00 ea.	\$ _____

Total: \$ _____

Conference Activities

No additional charge for these activities. Please indicate your interest in and plans to participate for our planning purposes.

Tuesday, November 2

- Welcome Reception. Key Bridge Marriott
6:00pm – 8:00pm

Wednesday, November 3

- Luxury bus transportation from the Key Bridge Marriott to L'Enfant Plaza for the conference program.
- Lunch at L'Enfant Plaza Hotel
- NTSB Lab Tours at L'Enfant Plaza
- Cocktail Reception, Key Bridge Marriott
6:30pm – 7:30pm

Prefer vegetarian entree

Food allergy (please specify) _____

Thursday, November 4

- Luxury bus transportation from the Key Bridge Marriott to the NTSB Training Center for the conference program.
- NTSB Training Center tour, presentations, and lunch
- Luxury bus transportation from the Key Bridge Marriott to the National Air and Space Museum for the Gala Dinner
- Flight Simulator at National Air and Space Museum, evening event
- IMAX Theatre presentation at National Air and Space Museum, evening event

To pay by Check:

Please make check payable to the NTSB Bar Association and mail to:

Charlie Morgenstein
NTSB Bar Association Treasurer
Mmo Legal Services, LLC
8000 North Federal Highway
Suite 207
Boca Raton, FL 33487-1681
Phone: (561) 953-5025

To pay by Credit Card:

Email or fax this registration to:

Charlie Morgenstein
Email: Charlie@mlegal.com
Fax: (561) 953-5024

Visa Master Card AMEX

Card No. _____

Expiration Date _____

Name as it appears on card: _____

For further information regarding this conference, additional opportunities available for sponsorships, or for additional bar associations interested in cosponsoring this event, please contact:

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Law Offices of Tony B. Jobe
500 Water Street
Madisonville, LA 70447
Phone: (985) 845-8088
Cell: (985) 778-8263
Email: jobelaw@msn.com

NTSB Releases 2009 Aviation Accident Statistics; On-Demand Accidents at Lowest Level in Last 20 Years

On April 8, 2010 the NTSB released preliminary aviation accident statistics for 2009 showing an overall decrease in U.S. civil aviation accidents that includes general aviation and on-demand Part 135 operations. In fact, on-demand Part 135

operations had the lowest number of accidents and fatal accidents for that type of air operation in the last 2 decades.

The total number of U.S. civil aviation accidents decreased from 1,658 in 2008 to 1,551 in 2009. Total fatalities also showed a decrease from 566 to 534. The majority of these fatalities occurred in general aviation and scheduled Part 121 operations.

General aviation accidents decreased from 1,566 in 2008 to 1,474 in 2009. There were 272 fatal general aviation accidents, down from 275 the year before. However, the accident rate increased to 7.20 per 100,000 flight hours in 2009 from 6.86 in 2008, due to the decrease in

the number total of flight hours. Although fatalities decreased from 494 to 474, the fatal accident rate increased to from 1.21 to 1.33.

Last year, one fatal accident occurred involving a scheduled Part 121 operator. On February 12, 2009, a Colgan Air, Inc., Bombardier DHC-8-400, operating as Continental Connection flight 3407, crashed outside of Buffalo, New York, resulting in 50 fatalities.

On-demand Part 135 operations reported 47 accidents in 2009, a decrease from 58 in 2008. Fatalities also decreased from 69 in 2008 to 17 in 2009. The accident rate decreased to 1.63 per 100,000 flight hours in 2009 from 1.81 in 2008. ■

American Association for Justice:

Increase Pilot Training to Improve Aviation Safety

Washington, D.C.— In response to last year's tragic crash of Colgan Air flight, operating as Continental Connection Flight 3407 and the FAA's Advance Notice on Proposed Rulemaking regarding pilot certifications, the AAJ recently submitted comments stating that the FAA should require more rigorous training for second in command pilots to better provide for safety in air travel for passengers.

While second-in-command (SIC) pilots are currently required to complete 190 flight time training hours to obtain commercial certification, citing little experience, inadequate training, poverty wages, long commutes and fatigue, the AAJ believes SIC should first be required to complete 1500 hours of flight time training and obtain their Air Transport Pilot certificates. "[Current regulations] do not provide enough training to ensure that dangerous situations are recognized, evaluated and responded to in a safe and timely manner."

The AAJ believes that requiring SIC obtain an Air Transport Pilot certificate would result in increased pilot skills, experience and, ultimately, salaries. Higher wages would then in theory translate into less turn over, keeping experienced pilots where they should be, the cockpit.

Further, touching on ongoing concerns

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Remarks by Judge William A. Pope, II Upon Retirement as an Administrative Law Judge of the National Transportation Safety Board

On June 3, 2010, I retired after 17 years as an Administrative Law Judge of the NTSB, and over 49 years of Federal service. On the occasion of my retirement, I would like to take time to thank the attorneys of the FAA and the attorneys in private practice who appeared before me for their exemplary professional conduct and litigation skill that they uniformly demonstrated in representing their respective clients.

It makes the job of the presiding judge immeasurably easier when the attorneys in the case conduct themselves with courtesy and professional expertise. I have always found that to be true of the FAA attorneys and the attorneys engaged in aviation safety practice who appeared in cases before me.

The hearings before the NTSB judges are, of course, adversarial in nature, so it is not possible for parties to a proceeding to win their respective positions. But, that does not mean that professional courtesy and the other hallmarks of legal professionalism should not be scrupulously observed. On this score, I have found that the attorneys appearing before me, whether representing the FAA or airmen, have always excelled, and in doing so have contributed greatly to the orderly and fair administration of justice in proceeding before the NTSB. I extend my congratulations and appreciation to each and every one of you.

I will greatly miss my work as an ALJ of the NTSB, and the professional association I have had with the members of the legal profession who appeared before me. I extend my best wishes to all of you, and I hope I will have the privilege of meeting all of you again in the future. ■

William A. Pope, II

We are entering the fourth month of the FAA's disclosure grace period, providing a safeguard against enforcement actions for pilots who come forward with previously unreported use of certain antidepressant medications. In the past, under FARs 67.107(c), 67.207(c), and 67.307(c) and 67.113(c), 67.213(c) and 67.313(c), the FAA has held that a diagnosis of depression and use of psychotropic medication was medically disqualifying.

On April 5, 2010 the FAA began considering the special issuance of medical certificates for pilots taking medications for mild to moderate depression, a condition that previously barred them from all flying duties. With a predicted 10% of the population dealing with depression, "We need to change the culture and remove the stigma associated with depression. Pilots should be able to get the medical treatment they need so they can safely perform their duties," according to FAA Administrator Randy Babbitt.

The new FAA policy is limited to four antidepressant medications, specifically Fluoxetine (Prozac), Sertraline (Zoloft), Citalopram (Celexa), or Escitalopram (Lexapro). This is a huge change from the FAA's general policy which was "AMEs should use caution in certifying airmen with vague psychological signs, particularly when the use of this group of antidepressants is drastically increasing in the society". See the FAA's Office of Aerospace Medicine's July 2007 report, Selective Serotonin Reuptake Inhibitors: Medical History of Fatally Injured Aviation Accident Pilots.

Previously, the FAA held that bereavement, dysthmic and minor depression were to be treated as something needing a FAA determination unless the condition was stable, resolved, without recurrent episodes and with no associated disturbance of thought. The pilot had to have used psychotropic medication(s) for less than 6 months and been off them for 3 months. Guide for Aviation Medical Examiners Decision Considerations . Item 47. Psychiatric Conditions.

What happens when a pilot discloses

that he or she has been treated for depression without taking one of the four drugs? The pilot will be grounded until all symptoms of the psychiatric condition being treated are improved by the single medication and the pilot is stable for 12 months. Those already taking the drug and have not yet reported it should be able to fly within a few months of reporting.

The FAA will require a consultation status report from the treating psychiatrist, with follow ups, a written statement from the pilot describing his or her history of antidepressant use and mental health status, a neurocognitive psychological report; and an evaluation from a Human Intervention and Motivation study (HIMS)-trained AME who has reviewed the reports and recommends a special-issuance medical certificate.

This exclusion is not an "open pass" for pilots, their medical certificate will remain special issuance so long as they remain on the medication. The pilot will continue to need annual HIMS AME visits and must see a psychiatrist every six months.

There is a caveat, the FAA policy is confined to depression. It does not extend to those who are merely consulting a therapist (e.g., for anxiety) even though there is no clinical diagnosis of depression. A pilot will not be allowed to fly while undergoing treatment. Once the treatment is complete, the pilot may return to flying. This is unfortunate as some people simply prefer talking to a professional about aspects of their life they aren't otherwise comfortable disclosing to family and friends.

Penalties

While the FAA will not take action against a pilot who discloses his depression or treatment within the 6 month period, there is no immunity from criminal prosecution under 18 U.S.C 1001 for making materially false, fictitious, or fraudulent statements or entry on the medical application. Immunity can only be offered by the Department of Justice (DOJ). However, the FAA and the Department of Transportation's Office of



John T. Van Geffen received his law degree from the University of Santa Clara in 2006.

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Inspector General (DOT OIG), the office through which the FAA makes referrals for possible criminal prosecution, have agreed that the FAA will not refer cases of apparent intentional falsification to the DOT OIG for criminal investigation or prosecution.

Also, if an applicant falsifies any of the required information regarding their treatment or diagnosis on an application during or after the grace period, the FAA may take enforcement action based on that application and the previously falsified applications.

It will be interesting to see what other psychiatric and psychological conditions and medications will be considered in the future as the FAA gains experience and data under the new policy. DO NOT FORGET this grace period ends at midnight, September 30, 2010. ■

Synopsis:

U.S. Court of Appeals, District of Columbia Circuit. Decided June 8, 2010. The Federal Aviation Administration suspended the Airline Transport Pilot Certificates of Mark Turner and of Stephen Coonan for operating an “unairworthy” aircraft in violation of 14 C.F.R. § 91.7(a), the pilots appealed, and the FAA withdrew its complaints before an Administrative Law Judge could hear their appeal. The ALJ then awarded the pilots attorneys fees and expenses pursuant to the Equal Access to Justice Act (EAJA), codified as amended in relevant part at 5 U.S.C. § 504 (see also 28 U.S.C §2412), concluding each pilot was the “prevailing party” in his case.

The FAA appealed to the National Transportation Safety Board, which reversed the award. The pilots petitioned for review of the Board’s order and were denied.

Citing the three-part test for determining whether party has prevailed, as distilled from the Supreme Court’s decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department*

of Health and Human Resources, 532 U.S. 598 (2001), the NTSB held the pilots were not prevailing parties: They did not “prevail on any portion of the merits ... as the Administrator withdrew the charges before the [ALJ] could hold a hearing”; and the ALJ did not “issue an order akin to a court-supervised consent decree” because he “merely accepted the Administrator’s withdrawal of the charges.” The Board further concluded the ALJ “did not dismiss the case with prejudice or in any way alter the relationship of the parties.” The NTSB also held the pilots were not entitled to fees because § 504(a)(1) of the EAJA applies only where there was “an adversarial adjudication,” but the FAA did not defend

that argument in its brief to the court.

One member of the Board dissented. He maintained *Buckhannon* does not apply to this case because the Court’s holding there was limited to rejecting the “catalyst theory,” under which a party prevails if it “achieved the desired result because [its] lawsuit brought about a voluntary change in the defendant’s conduct,” 532 U.S. at 600, whereas the pilots here had not initiated proceedings but rather had successfully defended themselves against the FAA’s lawsuit.

Editorial note:

For a complete copy of the Court of Appeals’ holding, please email me at john@avialex.com. ■

“Disastrous” Trial Closes in France After Concorde Disaster

Hays Hettinger

NTSB Bar Association President, Tony Jobe, has authorized the revitalization of our Bar’s Select Committee on Aviation Public Policy and I have agreed to serve as its Chairman. Our immediate task is to report on the legal implications of the criminal trial that opened in February and closed May 28, 2010 in Pontoise, north of Paris, probing who is to blame for the 2000 Air France Concorde crash at La Patte d’Oie in Gonesse. It is intended that this will be a critical analysis and, hopefully, accepted later for publication in a law review.

The principal issue is the criminalization of what appears to have been no more than aviation negligence, and represents a reprise to an earlier article by this Committee published as *Aviation Professionals and the Threat of Criminal Liability—How Do We Maximize Safety?*, 67 *J. Air L. & Com.* 875 (Summer 2002).

Current Committee Members include: Tony Jobe; J.E. “Sandy” Murdock, former Chief Counsel FAA; Christa Hinckley; Bill Elder; Marty Raskin; Chris Kilgore; and our Newsletter Editor-in-Chief, John Van Geffen. Others may join us.

In the 4-month criminal probe, Continental Airlines, Inc., two of its employees and three French aviation officials were tried for manslaughter in the July 25, 2000 fiery crash of the jet, which plunged into a hotel shortly after takeoff from Roissy Charles de Gaulle airport, killing all 109 people aboard and four on the ground.

The French BEA (Bureau Enquetes-Accidents), equivalent to the U.S. NTSB, had found in its Accident Report of January 2002 that during takeoff from runway 26R, shortly before rotation, the No. 2 tire of the left landing gear ran over a metal strip, fallen five minutes earlier from a Continental MD-10 departing the same runway. Debris was thrown against the wing structure leading to a rupture of fuel tank 5. A major fire, fuelled by the leak, broke out immediately under the left wing. After takeoff, the aircraft was unable to gain speed or altitude, and after the No. 1 engine lost thrust, the angle of attack and bank increased sharply, thrust fell suddenly on Nos. 3 and 4, and the aircraft crashed

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Increase Pilot Training...

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with duty hours and pilot fatigue, the AAJ stated higher wages would result in pilots living closer to their home base and thus avoiding the often ridiculous commutes, sometimes over a hundred miles.

The AAJ also took the chance to call into question the FAA’s current practice of allowing academic credit in lieu of required flight hours, believing that experience in specific hazardous conditions should be mandatory, not an optional replacement for required flight hours.

AAJ President, Anthony Tarricone stated “The current level of training required for pilots is not substantial enough and has made the airways unsafe for passengers... The rigor of pilot certification should be first priority when it comes to improving flight safety.” ■

“Disastrous” Trial...

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into the hotel.

The accident was investigated under the provisions of Annex 13 to the convention on International Civil Aviation and European Community Directive 94/95, with our NTSB nominated as the U.S. Accredited Representative. In addition, in accordance with French law No. 99-243 of March 29, 1999, a Commission of Inquiry was established to assess responsibility.

Various tests and studies were carried out in France, in the United Kingdom and the United States. The BEA determined that the probable cause was the Concorde hitting the metal strip (a wear stripe that had attached to an engine and was replaced by Continental with titanium instead of a softer metal); resulting in destruction of the tire; deformation of the fuel tank; ignition of the leaking fuel; and ultimately, with loss of engine thrust on one, and then two engines; and the impossibility of retracting the landing gear, with no fault on the part of the flight crew.

The BEA and the AAIB (Air Accident Investigation Branch) recommended that the Certificates of Airworthiness for the Concorde be suspended until measures could be taken to guarantee a “satisfactory level of safety with regard to the risks associated with the destruction of” the tires. This recommendation was immediately accepted by the civil air authorities in both France and the United Kingdom. The Concorde’s Certificates were suspended, and the SST, capable of flying at twice the speed of sound, was retired from service in 2003 to a future as a museum relic.

The investigation brought to light incidental conflicts between the Concorde Flight Manual and Air France’s Operations Manual; operational and maintenance anomalies by Air France; and a failure by the DGAC (equivalent to the FAA) to systematically implement an airport debris prevention program. Continental was blamed for improper “maintenance/operations” and the FAA was requested to conduct an audit.

Significantly, however, during the accident investigation, the UK Accredited

Representative complained that the French judicial authorities obstructed its participation in the investigation by refusing to allow the UK to examine all items of the wreckage and to participate in component examinations. Recently, Continental filed suit accusing Air France of obstructing justice. Early in the trial, lawyers for Continental argued that investigators had failed to follow up leads from 23 witnesses who said a fire broke out on the Concorde eight seconds before it even reached the metal debris.

Typically, after an aircraft accident in France, a judicial inquiry, separate from the technical investigation, is conducted by one or more examining magistrates. This trial, just concluded, completes the inquiry contemplated by the French law. The prosecutor Bernard Farret has asked the court to fine Continental euro 175,000 and requested 18-month suspended prison sentences for two of its employees; a 2-year suspended sentence for 80-year old Henri Perrier, who headed the Concorde program; and argued for acquittal of a French engineer and the former Chief of the French DGAC.

A recommendation is expected in December, and in the meantime, your Committee will periodically report and analyze developments, particularly as they relate to a comparison of Civil



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Law v. Common Law, and the tension between the thesis of Annex 13 and the EC Directive, which is accident prevention—a remedial measure, and criminal prosecution—a punitive one. ■

Operation Safe Pilot: The Aftermath

Stanmore C. Cooper

March 2010 marked the fifth anniversary of the emergency revocations of my airman certificate and my third class medical certificate on March 22, 2005, following the Operation Safe Pilot investigation. For the past five years I have been reserved in my public comments on Operation Safe Pilot, but with publication of the Ninth Circuit’s opinion it is time for a thorough review of Operation Safe Pilot and its consequences from a defendant’s perspective, and I’d like to thank Mike Dworkin for this opportunity to share my views. My narrative is based on facts which are now in the public record, including documents from the ap-

peal of my emergency revocations (FAA 2005WP900005), my criminal case (3:05-cr-00549-VRW), the appeal of Captain Russell H. Johansen’s emergency revocations (FAA 2005WP780021), the criminal case against Captain Johansen (3:05-cr-00438-MMC), and my civil case (3:07-cv-01383-VRW and CA9_08-17074).

The Genesis of Operation Safe Pilot

In 2002, David F. Slavens, a Northern California pilot and airframe and powerplant mechanic with inspection authorization who had collected SSA disability

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benefits for chronic fatigue syndrome from 1988 to 2002 was successfully prosecuted for lying about his health in order to obtain a medical certificate, while simultaneously receiving SSA benefits for a chronic illness. Slavens was sentenced to pay \$197,384 in restitution and to serve a 21-month prison term.

Two Northern California special agents, one from the office of the DOT-IG and one from the office of the SSA-IG, had worked on the Slavens investigation and concluded that there might be other pilots who had similarly falsified their FAA medical certificate applications. They approached their management with the idea of comparing the FAA medical certificate database with the SSA disability databases. Ultimately, the project to perform the database matching program was approved, but only as a “pilot” program in Northern California, and then only under specific rules governing the conditions under which records resulting from the match could be shared. Not only did the rules set forth for sharing the records not conform to the requirements of the Privacy Act, they were completely ignored by the investigating agents during their investigation.

As a GS-12 mid-level manager for the Social Security Administration in the mid-nineteen seventies when 5 U.S.C. § 552a was codified, I was reasonably certain that a stack of SSA documents related to a one year disability claim in 1995 and 1996 presented to me by agents of the DOT Office of the Inspector General during a meeting on March 23, 2005, had been shared in violation of the Privacy Act. I was mortified that the confidential medical information I had provided to SSA ten years earlier for the purpose of obtaining disability benefits was now in the possession of DOT agents. As a former SSA employee, my faith in government was severely shaken. Soon after the meeting with the DOT-IG agents, I reviewed the Privacy Act and downloaded copies of the Federal Register looking for routine use notices of the SSA and FAA systems of records and notices of computer database matches proposed by SSA, DOT, and FAA, related

to the “pilot program” the DOT-IG agents had described during our meeting. In spite of a diligent search, I found nothing in the Federal Register that in my opinion as an informed lay person could have legally permitted a computer database matching program to be run comparing the FAA airman medical certificate system of records and the SSA Title 2 and Title 16 disability systems of records, and containing personally identifiable information in the program output.

In all, the FAA and SSA records of some 40,000 Northern California pilots were illegally shared, and of those some 3,000 were identified as either having collected SSA disability benefits in the past, or were currently collecting disability benefits at the time of the database match.

As further evidence that the Operation Safe Pilot data sharing was illegal, Nicholas A. Sabatini, FAA Associate Administrator for Aviation Safety, testified during his July 17, 2007, appearance before the Congressional Committee on Transportation and Infrastructure, Subcommittee on Aviation, that “In order to proceed with cross-checking applicants for airman medical certificates against the SSA disability database, or any other database, FAA must first revise the system of records notice for FAA’s ‘Aviation Records on Individuals’ to permit disclosure of the records through a routine use. This will require publishing a notice of the revised system of records in the Federal Register, and a period for public comments, before the records may be disclosed, and the FAA can begin any cross-checking. This process may take six to twelve months to complete.” Mr. Sabatini’s testimony was three years after the Operation Safe Pilot database matching program results were shared among the agencies. The tragedy is that Operation Safe Pilot could have been conducted legally had the steps outlined by Mr. Sabatini been followed.

My Case History

I obtained my private pilot airman certificate while on active duty in the U.S. Air Force on September 11, 1964. I flew fairly

regularly, accumulating 1712 hours as pilot-in-command by 1985. That year, I was diagnosed with HIV infection and didn’t renew my third class medical certificate. In 1994, I renewed my third class medical certificate, without revealing my HIV infection or the anti-retroviral drugs I was taking. Although I obtained the 1994 medical for the sole purpose of acting as “safety pilot” for pilot friends maintaining instrument currency and never acted as pilot-in-command using it, falsifying the application was a felony, and a serious error in judgment.

By mid-1995, I was suffering severely from the effects of HIV. My weight had plummeted from 195 to 135 pounds, my viral load was over a million RNA copies per milliliter, my CD4+ immune system cells were less than 50 per cubic millimeter, and I had barely enough energy to get out of bed and fix myself a meal. I was dying. In August, 1995, my employer and I agreed that it was time for me to apply for long term SSA disability.

Sometime in the late fall of 1995, the first of a new class of anti-HIV drugs, protease inhibitors, entered the market. Quantities were limited, so distribution was through a lottery. I was randomly chosen to receive the new drug, and I immediately began to gain weight and my energy level rebounded. Fearing my renewed health might be temporary, I wanted to make sure the new combination therapy, later known as the “cocktail” was a long term therapy and not just a temporary reprieve. In August, 1996, satisfied I was going to live, I terminated my SSA disability payments and returned to work.

In early 1998, I became aware that the FAA had begun granting “special issuance” medical certificates of all classes to HIV infected pilots who met certain medical criteria. I called the FAA’s Western Pacific regional office inquiring about the medical criteria, and was told the criteria were not public, and that to be considered I would have to send all of my medical records for the past ten years to Oklahoma City for review. The evaluation to determine if I qualified would take from nine

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months to a year to complete.

In late 1998, I again applied for and received a third class medical certificate without revealing my HIV status or the drugs I was taking. Part of my reluctance to be forthcoming was FAA guidance to AMEs that stated “Applicants who are Human Immunodeficiency Virus (HIV) positive who have not had symptoms and are not on medications, even for prophylactic use, are eligible for certification. Once they are on medication, or show symptoms of Acquired Immune Deficiency Syndrome (AIDS) related diseases, they will NOT be considered for certification.” I knew this statement was untrue because the FAA had begun granting special issuance medical certificates to HIV infected pilots on medications in November, 1997, yet it continued to be printed in the FAA’s Medical Certification Standards and Procedures Training (MCSPT) for AMEs and Staff until at least October, 1999. I was afraid that the FAA’s right hand didn’t know what the left hand was doing, and that I would be arbitrarily denied a special issuance medical certificate.

The FAA special issuance criteria was published publicly around 2000, and from the time I knew the viral load and CD4+ cell counts needed to qualify, I ensured I met those criteria every quarter when my blood was tested. In 2002 and 2004, I similarly obtained third class medical certificates without revealing my HIV infection or listing the antiviral medications I was taking.

In February, 2005, I took a cross-country trip in a friend’s Cessna Citation Encore, and among the reading material onboard was a PowerPoint presentation by Dr. Quay Snyder of Virtual Flight Surgeons. Part of the presentation was about HIV certification, and it prompted me to check the Virtual Flight Surgeons’ website where I discovered a statement by Warren S. Silberman, O.D., Manager of FAA’s Aeromedical Certification Division, urging pilots who had previously failed to report their infection on medical certificate applications to do so at the earliest op-

portunity. He further explained his policy of not reporting these violations to the FAA Security Division for enforcement if several conditions were met. These conditions were: 1) pilots initiate reporting the condition themselves, through their AME or other medical certification specialty service such as their union aeromedical advisors and independent services, 2) Complete past medical information is revealed and FAA AMCD protocols for evaluation of specific medical conditions are documented to evaluate current medical status, and 3) There is no history of an aviation accident or incident, positive test for illegal substances, or outside report of compromised aviation safety as a result of the previously unreported condition. In other words, there was an offer of amnesty for those who self-reported previously unreported potentially disqualifying conditions. I was in the process of gathering my records to self-report when I received the March 22, 2005, telephone call from the DOT-IG agents wanting to meet “because of irregularities in your medical certificate application.”

Although the agents who interviewed me the morning of March 23 were sympathetic, they were not persuaded by Dr. Silberman’s statement, the conflicting FAA information about special issuance medical certification of HIV infected pilots, or records of my blood work showing I met the medical criteria for special issuance. One of the agents, whom we later discovered was the DOT-IG special agent that had originally proposed the Operation Safe Pilot FAA-SSA computer matching program, said it was too late for any of the information I presented to be used in my defense against the emergency revocations. I got the impression from the interview that they thought HIV was, per se, disqualifying. I had collected SSA benefits for HIV related disability for one year (during which I wasn’t flying), didn’t reveal that on my medical certificate applications, and was guilty of falsifying multiple applications. They provided me with a courtesy copy of the emergency order of revocation, and I surrendered my airman

and medical certificates as well as my logbook to them. I had never been advised I was the subject of any investigation prior to the March 22 telephone call from the DOT-IG agent requesting a meeting.

The following morning I called AOPA and was referred to Michael Dworkin, who took my case. We began the lengthy process of appealing the emergency revocations. One of the first interrogatories from the FAA attorney asked if it were not true that I had been collecting SSA disability benefits since 1995! The investigation was apparently so incompetent that the FAA attorney thought I was still collecting benefits.

Criminal Charges

In July, 2005, as we sought discovery of evidence from the FAA in the certificate actions, the US Attorney for Northern California issued the criminal indictments for violations of US Code 18, Section 1001. Mr. Dworkin suggested that I retain a criminal defense attorney familiar with aviation law, and he recommended Jim Pokorny, whose practice is in San Diego.

Before retaining Mr. Pokorny, the US Attorney offered me a plea agreement in which I would plead guilty to a single misdemeanor, pay a \$250 fine, and serve probation. However, as a condition of the plea agreement I had to waive my right to confront and cross-examine government witnesses, to move to suppress evidence or raise any Fourth or Fifth Amendment claims, or to any further discovery from the government. Also, the agreement bound only the US Attorney’s Office in Northern District of California only; it did not bind any other federal state or local agency. Since I was almost certain the government had violated the Privacy Act and Mr. Dworkin was nervous about the agreement binding only the local US Attorney’s office, I refused the agreement.

On July 18, 2005, the US Attorneys for the Northern and Eastern Districts of California simultaneously made available to the press a news release announcing that forty airplane pilots in five major California cities had been charged in a criminal

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air safety investigation called Operation Safe Pilot. The news release identified the forty pilots by name, and said the investigation targeted the “most blatant” instances of fraud. Two of the names listed were Stanmore Cooper, San Francisco, CA, age 63, and Russell Johansen, Sacramento, CA, age 61.

At my initial hearing on the criminal charges, I pleaded not guilty, was booked (fingerprinted and photographed), and was released under a pre-trial agreement by which I surrendered my passport, had my travel restricted to the Northern California Federal Court District, had to report to a pre-trial services officer weekly, and had to provide a floor plan of my home to the federal marshal so they could enter my home at anytime without a warrant. I was charged with three felony counts, each punishable by a \$250,000 fine, five years in prison, or both.

Following Captain Russ Johansen’s criminal trial in March, 2006 (see his story below), I pleaded guilty to a single misdemeanor of making a false writing. With the criminal charges behind me, I requested and received permission from the FAA to apply for recertification. Four months later I was granted a special issuance third class medical certificate. The medical certificate was issued after a thorough review of my medical records for the previous ten years by the FAA’s Aeromedical Certification Branch, a physical examination by a senior aviation medical examiner, and administration of a Cogscreen-AE computerized cognitive deficit test. On September 11, 2006, after taking the private pilot written examination, oral test, and practical flight test, I was issued a new private pilot airman certificate. I am a licensed pilot again.

The Civil Complaint

On March 8, 2007, my attorneys at San Francisco’s Reed Smith filed a civil complaint in Northern California District Court alleging that the FAA, DOT-IG and SSA-IG had improperly shared records,

including mine, with each other in violation of 5 U.S.C. § 552a, the Privacy Act of 1974 as amended. Chief Judge Vaughn Walker was assigned the case, and on August 22, 2008, he issued a 25 page opinion in which he found for the government defendants. In his opinion, Judge Walker concluded that although the DOT-IG and SSA-IG had, in fact, shared the records of some 45,000 Northern California pilots in violation of the Privacy Act, that I had presented triable evidence the violations were willful and intentional, and that I had suffered an adverse effect from the violations, because I had suffered no “actual damage” (which he interpreted to mean pecuniary loss), my motion for summary judgment was denied and the government defendants’ motion for summary judgment was granted.

Following Judge Walker’s August 22, 2008 opinion, my attorneys immediately filed an appeal to the Ninth Circuit, and on January 13, 2010, oral arguments were heard by Circuit Judges Myron H. Bright, Michael Daly Hawkins, and Milan D. Smith, Jr. Judge Smith wrote the unanimous opinion which was published on February 22, 2010, reversing Judge Walker’s decision and remanding the case to him.

Captain Russell H. Johansen’s Case

Russ Johansen is a retired Delta Airlines Boeing 777 captain and check pilot. His ATP airman certificate with all of his ratings and his third class medical certificate were revoked under an emergency order of revocation as a result of Operation Safe Pilot. He was indicted on a felony count of falsifying his application for a medical certificate and was offered the same onerous plea agreement initially offered to me, and like me refused to sign it. I got to know Russ because we had both retained Michael Dworkin and Jim Pokorny to represent us. The problem with the certificate revocations and the criminal charges in Russ’ case is that he did nothing wrong. He was the victim of a sloppy investigation and the same “gotcha” mentality pervasive throughout the investigation and prosecution of Operation Safe Pilot.

In 1993, Captain Russ Johansen was pilot of a Delta B-727 on an IFR approach to the airport at Guadalajara, Mexico, when his Boeing was struck by another airplane. Russ landed his airplane safely without any injuries to his passengers or crew, but he suffered a severely strained neck and shoulder after catching a glimpse of the intruding airplane and abruptly maneuvering his 727 in attempting to avoid a collision, so the mid-air was a glancing blow rather than a direct hit. His action probably saved the lives of all on board the Delta flight. For his exemplary airmanship, Russ received a Presidential Citation from then ALPA President, and now FAA Administrator, Randy Babbitt.

Russ continued flying for Delta, and dutifully reported the injuries he had sustained as a result of the mid-air collision on the application forms he completed every six months for his first class medical certificate. Over the years following the mid-air collision, Russ’ condition, aggravated by his hectic transatlantic flight schedule, became so debilitating that he frequently felt unable to safely perform his duties as an airline captain. The absenteeism eventually used up his sick leave, and at age 59 (one year shy of the then mandatory retirement age), Russ and Delta agreed he should go on SSA disability. He did this, and free of the demands of flying a demanding schedule for the airline, continued flying his personal Cessna 340 twin-engine airplane for pleasure using the last first class medical certificate he had held while flying for Delta until, after two years, it was no longer valid as a third class medical.

Russ then applied to his AME for a third class medical certificate, and absentmindedly failed to check the “previously reported” box on the application to indicate his physical problems resulting from the 1993 mid-air collision.

The Operation Safe Pilot computer matching program spit out Russ Johansen’s name as having a current medical certificate and as having collected SSA disability benefits. Gotcha!

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Entitlement to Actual/Nonpecuniary Damages for Governmental Violations of the Privacy Act of 1974

Introduction

I last wrote about Operation Safe Pilot in the Winter 2005 Edition of the NTSB Bar Association Newsletter (see Operation Safe Pilot and the Privacy Act of 1974—Routine Use of Governmental Abuse?).

To recap very briefly, In July 2005, the United States Government, acting through its U.S. Attorneys in San Francisco and Sacramento, criminally indicted 40 pilots for falsification of applications for airman medical certificates, in violation of Title 18 U.S.C. Section 1001. More or less concurrently, the FAA issued Emergency Orders of Revocation to 16 of the 40 pilots, and at least in one instance, initiated revocation action by means of the issuance of a Notice of Proposed Certificate Action. These actions stemmed from the FAA's, Social Security Administration's (SSA) and Department of Transportation, Office of Inspector General's (OIG) interagency exchanges of FAA aeromedical certification records and Social Security disability records without the knowledge or consent of the airmen. This was more than a simple database comparison or computer match. In each instance, hard copies of the pilots' complete SSA disability files, including but not limited to highly sensitive, confidential medical and treatment records, were provided by the SSA to FAA and OIG.

I had represented 4 of the 40 pilots involved and in the prior article, I used these cases as illustrative examples to suggest that the Government's actions transcended routine use and constituted violations of the Privacy Act (5 U.S.C. §552a, et seq.). In the interests of client confidentiality and privacy, I used pseudonyms for each of the clients—Edward, William, Mary and Albert (despite the names, none of them, to my knowledge, are now or have ever been members of British royalty).

Case History: William

One of the illustrative cases in the prior article involved "William", who had been a certificated pilot for some 40 years. Wil-

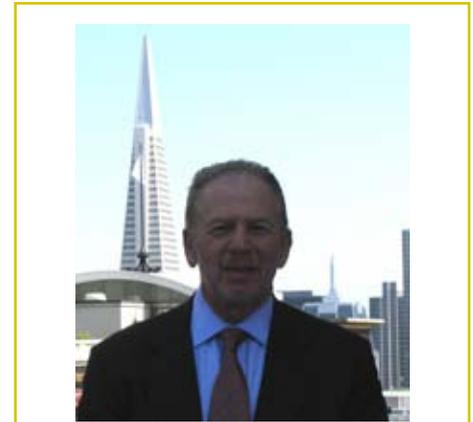
liam in real life is Stanmore C. Cooper.

In 1985, Mr. Cooper discovered that he was HIV positive. Knowing that the FAA was not issuing medical certificates to HIV-infected individuals at that time, he voluntarily grounded himself and allowed his airman medical certificate to lapse.

By 1995, Mr. Cooper's health had worsened and he left his job s Chief Network Architect with a financial services corporation and applied for and started receiving Social Security Disability Benefits. He was placed into a then-experimental program and treated with protease inhibitors. His health improved rapidly and markedly. In 1996, Mr. Cooper felt that he could return to work and requested that SAA terminate Disability Benefits, which it did. He went back to work and was ultimately promoted to Vice President-Global Strategy and Planning. He has since retired.

In 1998 Mr. Cooper wanted to return to flying. He did considerable research into what, if any, guidelines and standards the FAA had with respect to HIV-infected pilots. He found that there were not only no established eligibility guidelines but that there was substantial uncertainty and confusion within the FAA. Out of fear of being arbitrarily disqualified, Mr. Cooper applied for and was issued a Third Class Medical, withholding information as to his HIV infection. In 2000 Mr. Cooper saw the first published certification criteria for special issuance of medical certificates to HIV-infected persons. He verified that his cell counts and viral load were within the applicable criteria. He subsequently applied for and received Third Class Medicals in 2000, 2002 and 2004, again not disclosing his HIV status. Mr. Cooper admitted that withholding such information was wrong.

HIV today is no longer, in and of itself, medically disqualifying. In fact, the FAA Aeromedical Certification Division had issued a policy statement to the effect that



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HIV-infected individuals who voluntarily revealed their previously unreported infections would not be subject to FAA enforcement action. Mr. Cooper learned of the FAA policy statement in February 2005 and was in the process of gathering documents and records to submit to the FAA to avail himself of this amnesty program. However, before doing so, in March 2005, Mr. Cooper received a telephone message from a person he later learned to be an agent with the Department of Transportation ("DOT") Office of Inspector General ("OIG"), requesting a meeting for the purpose of discussing certain "certification irregularities". A meeting was arranged for the next day. At the meeting Mr. Cooper was shown numerous documents from his SSA file which, according to the OIG Agent, had been obtained as a result of a "pilot computer match" between SSA and FAA. At this meeting, Mr. Cooper fully cooperated and spoke freely to the OIG agents. He was not advised that he was the subject of a criminal investigation, that

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Operation Safe Pilot: Revisted

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a criminal proceeding would ensue or that anything that he said would be used against him. Before this meeting ended, the OIG Agent served Mr. Cooper with a copy of an Emergency Order of Revocation revoking his pilot and medical certificates for violations of FAR §67.403 (prohibition against intentionally false or fraudulent statements in an application for airman medical certificate) and Mr. Cooper surrendered his certificates on the spot.

Mr. Cooper appealed the certificate action. His extensive and repetitive efforts to obtain pre-hearing discovery of communications between SSA, FAA and OIG were essentially thwarted (in fact, it was not until long after this case was concluded that the Government acknowledged the existence, rationale or methodology of Operation Safe Pilot). The FAA filed a Motion for Summary Judgment, which Mr. Cooper opposed arguing that the documents and materials upon which the FAA's Motion were based were illegally

obtained in violation of the Privacy Act. The Administrative Law Judge granted the FAA's Motion. Mr. Cooper's appeal to the full Board was equally unsuccessful (NTSB Order EA-5212).

As if the FAA enforcement action was not enough, Mr. Cooper was indicted on 3 counts of making false statements under 18 U.S.C. §1001. He eventually pled guilty to one count of making a false official writing, a misdemeanor under 18 U.S.C. §1018 and was sentenced to two years on probation and fined \$1,000.

Mr. Cooper has since applied for and has been issued new airman and medical certificates and is once again an active pilot. He is also building an airplane.

Lawsuit for Violation of Privacy Act

In 2007, Mr. Cooper filed suit against the FAA, SSA and DOT in U.S. District Court for the Northern District of California, alleging that the defendants had willfully or intentionally violated the Privacy Act by their interagency exchange of his

medical and disability records, causing him "to suffer humiliation, embarrassment, mental anguish, fear of social ostracism and other severe emotional distress."

The Privacy Act forbids federal agencies from disclosing an individual's records without that person's written consent, unless the disclosure falls within one of the Act's narrow exceptions, 5 U.S.C. §552a(b). If an agency fails to comply with these requirements, the individual may file a civil action against the agency if the unauthorized disclosure has an "adverse effect" on the individual, §552a(g)(1)(D), and if the individual can demonstrate that the agency acted in a manner which was intentional or willful, the individual can recover "actual damages sustained", but not less than \$1,000, §552a(g)(4)(A).

In disposing of the parties' respective cross-motions for summary judgment, the District Court concluded that the Government failed to comply with its record-keep-

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JDA Aviation Technology Solutions Training in Regulatory Affairs

Hays Hettinger

NTSBBA President, Tony Jobe kindly arranged with Josh Plave for me to attend a training conference sponsored by JDA Aviation Technology Solutions, held on May 25 and 26 at the AA Training Center, DFW Airport, Tex.

The JDA was created by Joe Del Balzo, former FAA Acting Administrator, to assist the aviation industry in safety, certification, and compliance elements of aviation regulatory requirements, as well as airspace analysis/obstruction evaluation and business and commercial aviation solutions for corporate and charter operators. The company's team is composed of former FAA supervisors and inspectors and investigators of the NTSB, as well as personnel from airline/operator organizations.

In July, 2005, JDA became one of the first two consulting firms to be an FAA-

Qualified Certification Consultant for new FAR 121 operators.

I attended the session with representatives of major airlines, regional carriers, major repair stations, and other industry reps, as well as one of my former bosses, J.E. "Sandy" Murdock, former FAA Chief Counsel. The dialogue was excellent and conducted well.

One snippet from the conference for us in the NTSBBA: we often forget that Joe was one of the forerunners of the Flight Standards "Bible" which is FAA Order 8900.1 Flight Standards Information Management System ("FSIMS").

This Order is FAA policy for everything from certification, surveillance, investigation and oversight to Compliance & Enforcement. When checking FAA's compliance with its own policies, remember that FAR 13 and Handbook

2150.3 are NOT the only standards; they include 8900.1. For example, FAA inspectors become "sloppy" sometimes and when investigating accidents with the NTSB, merge NTSB reports with FAA EIR statements, which is forbidden by 8900.1. Another key point: every practitioner handling an enforcement case should review the Enforcement Decision Process ("EDP") in Vol 14, which was amended as recently as 01/14/10. This is a "decision tree" that tells you the procedures and criteria for FAA's evaluation of the proposed sanction for enforcement actions. Critical to this analysis is the 14-142 Definitions that guide the FAA throughout informal and formal actions.

For more information on this company in Bethesda, contact them at: www.jdasolutions.aero. ■

Operation Safe Pilot: The Aftermath

Continued from page 16

Russ had his ATP airman certificate with all of his type ratings revoked, his medical certificate revoked, and was then charged with a felony for falsifying his medical application.

The criminal trial of Russell H. Johansen took place over a two week period in March, 2006, and I attended most of the court sessions. In the end, a mistrial was declared because the jury was unable to reach a verdict. The jury was polled after the trial, and a majority of the twelve jurors said there was no way they would convict Russ of anything.

After the mistrial, the US Attorney offered both Russ and me a new plea agreement without the onerous restrictions of the initial one offered. Facing the cost of another trial (\$50,000 to \$100,000) and in debt for his legal expenses, Russ accepted the plea. I also

accepted the same plea agreement, in which we plead guilty to a single misdemeanor, paid a \$1,000 fine, a \$25.00 fee and served two years probation.

Between his certificate revocation appeal and his criminal defense, Russ spent over \$150,000 in legal expenses, virtually wiping out his retirement savings.

On March 8, 2007, after a thorough review of his medical records, Russ was issued an unrestricted third class medical certificate. This casts doubt about the materiality of the emergency revocations and criminal prosecution.

Because of the emergency revocations, Russ has been unable to secure post-retirement employment as a simulator instructor. Because of the egregious nature of government violations during Operation Safe Pilot, he went from a true hero to a pariah due to circumstances not of his doing.

Russell Johansen is innocent of any

charges that could possibly have justified the revocations of his medical and airman certificates. He was the victim of an illegal investigation, a rush to judgment, and overzealous prosecution. He has paid a very heavy price for the government's misconduct. Justice demands that the FAA reverse the emergency revocation of his ATP airman certificate with all of its ratings, and apologize for its actions.

Acknowledgement

Without the thousands of hours of legal work devoted to my civil lawsuit and subsequent appeal by my pro bono Reed Smith LLP attorneys, the violations of Operation Safe Pilot would never have come to light. Attorneys James Wood, Tiffany Thomas, Ray Cardozo, and David Bird doggedly pursued discovery from the government defendants, and have my eternal gratitude. ■

Operation Safe Pilot: Revisted

Continued from page 18

ing obligations under the Act, but finding the term "actual damages" to be ambiguous, construed the waiver of sovereign immunity strictly in favor of the Government and ruled against Mr. Cooper, holding that due to the strictly nonpecuniary nature of his damages, there was no actual issue of material fact as to his having suffered "actual damages" under the Act.

Mr. Cooper appealed to the Ninth Circuit.

Ninth Circuit: Clear Purpose—Agencies Subject to Civil Suit for Any Damages

In its Opinion filed February 22, 2010 (No. 08-17404), the Ninth Circuit Court of Appeals stated:

Congress articulated a clear purpose behind the Act, stating that "the right to privacy is a personal and fundamental

right protected by the Constitution..." To protect that right, Congress passed the Act "to "provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies... to...be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act."

One can readily envision circumstances in which these types of injuries might flow from the disclosure of one's confidential medical records, which often contain some of the most sensitive and intimate information about one's physical, mental, and emotional well-being, and sexual orientation. Given the nature of the injuries that most frequently flow from privacy violations, it is difficult to see how Congress's stated goal of subjecting federal agencies

to civil suit for any damages resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary damages.

The Court remanded the matter to the District Court for further proceedings.

As the Court's Opinion is only a few months old, there is no doubt that there will be subsequent developments.

To be continued....

Author's Note:

On June 18, 2010 the FAA issued Report Number FI-2010-060 which provides a summary of the FAA's efforts in setting up the legal framework allowing it to share information with other agencies. That report can be found at [http://www.oig.dot.gov/sites/dot/files/MSS%20Final%20Report%20\(signed\)%206-18-2010.pdf](http://www.oig.dot.gov/sites/dot/files/MSS%20Final%20Report%20(signed)%206-18-2010.pdf). ■

Announcements

Articles in our NTSB Bar Association Newsletter reflect the views of their authors, and we welcome your comments, reply articles, responses, or disagreements with any of the articles published. If received, we will include them in our next regularly published Newsletter.

Notice of NTSB Bar Association Officer Changes

- Linda Modestino of Oklahoma City, Oklahoma has replaced James Lane as Southwest Regional Vice-President.
- Erin Marston of Anchorage, Alaska has replaced Gregory Miller as Alaskan Regional Vice-President.

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