Air & Transportation Law Reporter

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President's Message

by Jim Waldon

Thank you for giving me the opportunity to serve as President of IATSBA. It is a great honor, and I look forward to working with all of you over the next two years.

First I would like to thank our outgoing President, Justin Green, who has done a great job in that role for the past two years. As Justin passed the baton to me after our recent, very well put together Washington, D.C. conference, he did so with a significant look of relief. And when I commented on it, he told me that two years earlier Justin's predecessor, Gary Halbert, had given him the exact same look. Thank you, Justin, for your service.

As I look forward to this year and what is in store for our organization, I am excited. As a group, we are well positioned. We are seeing new, and younger, members. We have a relatively new name and website, and we are coming off a well-attended and productive conference in Washington, DC. I believe, with your support and assistance, we can grow this organization into an even greater and financially sound organization.

To assist me in this process I am happy to announce that Jim Miller of UPS has agreed to fill my previous role as Executive Vice President. Jim has been with UPS for … well … a long time. Jim will be helpful in growing our airline-attorney presence and in growing our organization overall.

My primary goal is to increase our membership. At our peek, we had close to 400 members, but currently we have approximately 100 members. In order to move the trend back in the other direction, I have set a goal of increasing membership by 100 this year. As we work toward this milestone, I will provide updates on our progress and our strategies in the President messages in our Reporter.

One of the ways we can begin to increase membership is by increasing our visibility. Currently IATSBA is considered by many as an East Coast organization. I believe the last time we had a meeting East of D.C. or New York was ten years ago – and that meeting was in a different country! (Canada). So I am happy to announce that our next meeting will be in Seattle in the Spring of 2017. Although some may note that Seattle is also where I live and work, Seattle is, more importantly, an aviation hub and the Pacific Northwest is home to many aviation attorneys who I believe will join our organization (if we ask nicely). We are still in the early planning stages but I can promise a tour of Boeing and a conference meeting place at the Museum of Flight.

We can also increase our visibility by further developing our website. Justin did a great job bringing our website into this decade. My goal is to further utilize the website to allow all IATSBA members to use it as a marketing tool. Soon all members will be able to modify their member page to include full bios, photos, and other links, including the ability for Members to link their member page to their own sites.

Finally, as an initial step in our "Membership Drive," we will be reaching out to past members. So please join me as we move forward. Your assistance and your thoughts are welcome. Toward that end feel free to call me anytime at 206.612.7938. Cheers!

Jim Waldon, IATSBA President

JIM WALDON is a national aviation attorney. His practice focuses on aircraft transactions and regulatory matters. He is currently the managing partner at Paramount Law Group, an aviation law firm based in Seattle, Washington. Prior to founding Paramount, Jim worked as an aviation attorney at Lane Powell, Mokulele Airlines, Alaska Airlines and at TWA.

Editor's Column

by
Greg Reigel

GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters. Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

Welcome to the summer edition of the International Air & Transportation Safety Bar Association's Reporter. This issue arrives on the heels of our successful annual conference in Washington, D.C. I know those of you who attended will agree that this conference, as with our past conferences, presented a great opportunity to make new connections and to renew existing friendships. The venue was great and the company better still. And, as always, the presentations were interesting, informative and insightful. The materials will certainly benefit those of us practicing aviation law. We also managed to have some fun while we were at it.

So, what waypoints will we be visiting in this edition of the Reporter? First up, our newly elected President, Jim Waldon, delivers his first President's Message and explains his goal to increase our organization's reach and membership. Worthy goals that will benefit the association as well as the individual members. I am looking forward to working with Jim in that effort.

John Yodice, the recipient of IATSBA's Lifetime Achievement Award, discusses several recent NTSB decisions in FAA enforcement actions and the lessons aviation law practitioners may use in future cases. From the NTSB, Tracy White discusses a recent U.S. Coast Guard drug testing case. Although not an aviation case, it is instructive since the Coast Guard uses the same Department of Transportation regulations, found in 49 C.F.R. part 40, as the FAA.

Next, Elizabeth Vasseur-Browne, IATSBA's Vice President for the Central region, talks with John Yodice about receiving the IATSBA Lifetime Achievement award and some highlights from his more than fifty years as an aviation lawyer. Chris Jacobs discusses the impact of sales tax when selecting a location for closing on an aircraft transaction. We also have included a new "Announcements" section in the newsletter. If you have an announcement, news, a press release or an event you would like to share with other IATSBA members, please send me the details so we can include your information in the Reporter.

Finally, and as always, if you would like to submit an article but you have questions regarding topic, availability etc., please feel free to contact me. I will be happy to answer questions and help you through the process.

I hope you enjoy this edition of the IATSBA Reporter.

FAA Update

by John Yodice

This column is intended as an aid to practitioners to help keep abreast of recent developments in the law and procedures governing Federal Aviation Administration enforcement actions and medical certification. Your comments and suggestions are welcome.

THE NTSB AFFIRMS THE DEFENSE OF LACHES

In context, any unreasonable delay by the FAA in the prosecution of an enforcement case most usually involves the NTSB's stale complaint rule (Rule 33) about which we have written extensively. Less frequently, such delay implicates the general 5-year federal civil statute of limitations that has been held not to apply to FAA certificate revocation cases, *Administrator v. Brzoska*, NTSB Order EA-4288 (1994) (though the applicability of the statute to certificate suspension cases has not been authoritatively decided, see *Administrator v. Rex*, NTSB Order EA-5347 (2007)). What is now affirmed in this recent case is the availability of the added defense of the doctrine of laches if the FAA is not diligent in its prosecution and the respondent airman is prejudiced thereby.

In this case, the airman was charged with intentionally falsifying an FAA medical certificate application in violation of FAR §67.403(a)(1). The FAA delayed five years in bringing an emergency revocation proceeding against the airman. Here are the circumstances. Respondent was born in Iraq, coming to the United States at age 19, not fluent in English. He always employed a language assistant to help him read and review documents, and to fill out all of his paperwork, including legal and financial documents and, in this case, FAA medical certificate applications. Some years after he came to the United States, he started taking flying lessons. With the help of his assistant he filled out and signed the medical application, answering "no" to question 18w about non-traffic convictions. That answer was incorrect. He did have a record of a non-traffic conviction.

The FAA aviation medical examiner issued him an airman's medical certificate. Some five years later he reapplied for a medical certificate, this time with a different language assistant who knew of his five-year earlier conviction. With this knowledge, the answer provided on this application was "yes." The medical examiner again issued the medical certificate. After learning of the circumstances, the FAA issued an emergency order revoking the airman's medical and airman certificates on the basis of intentional falsification. He appealed the revocation to the NTSB, admitting before an NTSB administrative law judge ("ALJ") that his earlier answer was incorrect but denying that it was intentionally false. The airman prevailed before the ALJ based on his affirmative defense of the doctrine of laches; the FAA took too long to prosecute the matter, and the airman was prejudiced thereby. The FAA appealed the ALJ's decision to the full Board. The Board denied the FAA appeal.

On appeal, the Board

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determined that the airman had met his burden of proving that the FAA delayed too long and had prejudiced his ability to defend himself. The FAA's response to interrogatories admitted that the agency knew of the airman's conviction shortly after his first medical certification but then inexplicably took no action. The Board found that on the record the FAA showed a clear lack of diligence in pursuing the action against the airman, and this delay resulted in actual prejudice to the airman's defense. The Board noted that the airman had put on undisputed evidence that his assistant had returned to South America and the airman had tried to contact people who knew her in order to obtain her testimony that the airman had no intent to falsify.

"We find respondent met his burden of proof to show the [FAA] Administrator lacked diligence in pursuing this action against him and that this delay resulted in actual prejudice to the defense of this case. Under the doctrine of laches and in the interest of justice, we dismiss this case." *Administrator v. Zaia*, NTSB Order No. EA-5739 (2015). Practitioners should be aware that the little-used defense based on the doctrine of laches is alive and well in appeal proceedings before the NTSB.

EMERGENCY ORDER OF REVOCATION. THE PROCEDURAL TIME LIMITS OF EMERGENCY CASES MAY BE WAIVED UNLESS UNDULY BURDENSOME.

An "emergency" order suspending or revoking an airman certificate is to be distinguished from the more routine "non-emergency" order. An emergency order is one in which the FAA Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the order to be effective immediately. The more routine non-emergency suspension/revocation order is automatically stayed if the certificate holder appeals the order to the NTSB, and the stay is in effect during the prosecution of the appeal. Because the emergency order is effective immediately, to mitigate the grounding of an airman who might ultimately prevail in the appeal, the NTSB is required to make a final disposition of such an appeal within 60 days of the date on which the appeal is filed -- thus, shortening the time that a prevailing airman would be without his or her certificate. However, this 60-day time limit is sometimes too short to adequately prepare and prosecute an NTSB appeal. So, the 60-day limit may be waived, but with the consequence that a prevailing airman would have been without his/her certificate for much longer than 60 days. Whether to waive is a difficult decision for an airman and his or her counsel. This case not only reminds us of the waiver possibility, but it also highlights for practitioners, for the first time, the unusual circumstances where waiver is not permitted.

JOHN S. YODICE is senior partner in the law offices of Yodice Associates located in Frederick, Maryland, with an extensive practice in aviation law. He is general counsel of the Aircraft Owners and Pilots Association and the AOPA Air Safety Foundation. He holds Commercial Pilot and Flight Instructor Certificates with airplane single engine, multiengine, helicopter, seaplane, and instrument ratings. He owns and flies a Cessna Turbo 310 and a Piper J3 Cub.

FAA Update

continued

This case involved a flight instructor who is also the owner of the flight school. His pilot, flight instructor, and ground instructor certificates were all revoked on an emergency basis on the charge that he falsified and forged certain trainee-pilot records. He appealed the FAA order to the NTSB. A letter from the NTSB Office of Administrative Law Judges informed the airman that he could waive the emergency procedures but otherwise no continuances could be granted in an emergency proceeding. Four days before the scheduled hearing the ALJ assigned to hear the appeal granted the airman's counsel's motion to withdraw as counsel. The airman promptly requested a 15-day continuance of the hearing in order to retain new counsel. The ALJ denied the continuance but advised the airman that he could elect to waive the accelerated emergency procedures in order to secure more time to retain counsel. The airman did not waive, and proceeded to hearing. During the hearing the airman renewed his request for a continuance and, for the first time, requested a waiver. The ALJ denied these requests, and proceeded to decide the case on the merits in favor of the FAA. The airman appealed the ALJ's decision to the full Board, arguing that the ALJ's denial of a continuance of the hearing and denial of a waiver were improper. The full Board affirmed the ALJ's decisions on both counts.

As to the continuance, the Board noted that eight witnesses as well as the FAA attorney and the ALJ traveled to the site of the hearing. A continuance after the commencement of the hearing would have been wasteful, inconsistent with the rules of practice, and ineffectual in the absence of a waiver. As to the denial of a waiver sought after the hearing commenced, the Board cited (for the first time in our experience) to the exception in Rule 52(d) that permits a waiver, "except

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… where the law judge or the Board determines that it would unduly burden another party or the Board." It found that under the circumstances "the law judge did not abuse his discretion in determining respondent's waiver of the emergency procedures after the hearing commenced was untimely." *Administrator v. Kambod*, NTSB Order No. EA-5767 (2016).

AN AIRMAN'S ACCESS TO AIR TRAFFIC DATA. THE NTSB DECIDES THE HOTLY-CONTESTED QUESTION OF "WHEN?".

One of the problems which the Pilots Bill of Rights ("PBR") intended to cure was the timely availability of air traffic data to an airman in order for the airman to meaningfully participate in an FAA investigation of an incident in which the airman was involved. The PBR indicates "the Administrator shall provide timely, written notification to an individual who is the subject of an investigation relating to the approval, denial, suspension, modification, or revocation of an airman certificate under chapter 447 of title 49 United States Code." The statute further provides the "notification" must inform the individual that he or she is entitled to access or otherwise obtain air traffic data described in section 2(b)(4) of the statute. As a means of ensuring the Administrator's compliance with this requirement, the statute prohibits the Administrator from "proceeding against" the individual until 30 days from the date on which the air traffic data is made available to the individual has lapsed.

The Administrator interpreted the language "proceeding against" to mean as late as the issuance of a Notice of Proposed Certificate Action. The Administrator asked the Board to grant deference to the Administrator's interpretation. The Board ruled that such an interpretation is unreasonable for a number of reasons, and not entitled to deference. The Board further ruled that the appropriate remedy for the Administrator's failure to adhere to the statute is a dismissal without prejudice. In other words, the Administrator may nevertheless proceed with an enforcement action 30 days after the air traffic data is made available. *Administrator v. Wilcox*, NTSB Order EA-5770 (2016) (order denying reconsideration).

NTSB General Counsel

by:
Tracy M. White

In addition to serving as the "court of appeals" when certificate action is taken or when civil penalties are assessed by the Federal Aviation Administration (FAA), the Board also considers appeals from mariner license or certificate actions taken by the U.S. Coast Guard Commandant. In its recent decision, *Commandant v. Solomon*, NTSB Order No. EM-213 (March 24, 2016), the Board remanded the matter to the U.S. Coast Guard (USCG) to resolve a number of issues and problems the Board identified concerning a random drug test. While this case did not involve the Federal Aviation Regulations, it is of interest because the USCG utilizes, as does the FAA, the U.S. Department of Transportation (DOT) drug testing regulations, set forth at 49 C.F.R. part 40, for toxicology testing of urine.

Simone Solomon (Appellant) was the holder of a Merchant Mariner certificate and was employed by Argent Marine Operations, charterer of the vessel Alliance Charleston. On July 2, 2012, appellant submitted to a random drug test by providing a urine specimen while the Alliance Charleston was in port at Jebel Ali, United Arab Emirates. In accordance with 49 C.F.R. § 40.93(b), the USCG will consider a specimen to be substituted when the creatinine concentration is less than 2 mg/dL and the specific gravity is less than or equal to 1.0010 or greater than or equal to 1.0200 on initial and confirmatory tests.

A collecting officer employed by Anderson-Kelly Associates collected appellant's urine specimen but did not refrigerate it despite the temperature in Jebel Ali being approximately 111 degrees Fahrenheit that day. A courier picked up the specimen the following day. On July 10, 2012, the specimen arrived at Anderson-Kelly's office in Mount Olive, New Jersey, and an employee shipped the specimen immediately to MEDTOX Laboratories in St. Paul, Minnesota, for testing where it arrived the next day.

On July 12, 2012, Medical Review Officer (MRO) Dr. Hani Khella determined the drug test results indicated appellant provided a substituted urine specimen because it showed a creatinine concentration of 1.3 mg/dL and a specific gravity of 1.0223. Although pH level was not a criterion for establishing whether a specimen was diluted or substituted, the record established the pH level of appellant's urine specimen was 8.8, which was elevated but not considered out-of-range. Dr. Khella called appellant while she was on board the Alliance Charleston and informed her of his determination that she had substituted her urine specimen. Appellant did not request a re-test when Dr. Khella informed her of the problematic creatinine and specific gravity measurements, because she stated Dr. Khella did not inform her that she could undergo a re-test under the DOT drug testing regulations, nor did he inform her that she could

TRACY M. WHITE joined the Office of General Counsel in 2014. Ms. White handles cases on the Board's enforcement docket and serves as the attorney overseeing employment law matters. Prior to joining the Board, Ms. White was an attorney with the Federal Highway Administration (FHWA), a modal administration of the U.S. Department of Transportation, where she handled environmental and right-of-way litigation and provided guidance to FHWA field offices on Federal statutory and regulatory requirements involved in administering the Federal-aid Highways Program. Ms. White is a former U.S. Department of Transportation Honors Attorney.

request the urine be tested on different equipment or by a facility other than MEDTOX. Argent Marine Operations terminated appellant's employment on July 14, 2012.

In August 2012, the USCG filed a complaint, which charged appellant with one count of misconduct for providing a substituted urine specimen. Appellant requested a hearing, and it was convened in January 2013. At the hearing, Dr. Khella testified no explanation existed for appellant's diminished creatinine concentration with the heightened specific gravity. He also stated heat would not have an effect on creatinine concentration, specific gravity, or pH explaining that creatinine concentration in urine remains heat stable to 300 degrees Celsius. Dr. Khella emphasized he could not explain appellant's urinalysis results, because it was not physiologically possible to produce a urine specimen with the creatinine concentration and specific gravity of appellant's urine specimen.

Appellant denied she had substituted or diluted the specimen and contended the amount of heat to which the specimen was exposed altered the composition of her urine, which caused the abnormal creatinine concentration and specific gravity measurements. In addition to providing her own testimony, appellant presented two expert witnesses, both of whom stated heat affects creatinine concentration and the pH level of urine. Appellant also presented two studies from the Journal of Analytical Toxicology, which concluded time and heat affect the pH level of urine, and that excessive fluid intake can affect creatinine concentration and the specific gravity of urine.

In his Decision and Order, the USCG administrative law judge determined the USCG established appellant provided a substituted urine specimen based on the creatinine concentration and the specific gravity measurements and ordered suspension of appellant's Merchant Mariner Document for a period of 14 months.

Appellant appealed the law judge's Decision to the Vice Commandant and argued (1) the law judge committed discovery errors by rejecting appellant's requests in discovery for the recordings of certain telephone conversations among appellant and Dr. Khella, (2) the law judge abused his discretion in accepting Dr. Khella's testimony as more credible than the testimony of appellant's experts on the subject of the effects of heat on creatinine concentration, and (3) the law judge erred in determining the USCG's complaint was not facially deficient.

The Vice Commandant determined appellant waived her argument concerning the request for

the recording because she did not address the discovery issue at the hearing before the law judge. The Vice Commandant further affirmed the law judge's determination that the complaint was not facially deficient. Regarding the law judge's assessment that Dr. Khella's testimony was credible concerning degradation of creatinine concentration in hot temperatures, the Vice Commandant disagreed with the law judge's assessment, stating, "there is reason to doubt the testimony of Dr. Khella, to the extent that he suggested that creatinine in a urine specimen would not degrade at temperatures below 300 degrees Celsius." However, the Vice Commandant concluded, for purposes of its *prima facie* case, the USCG only needed to prove the collection and testing facilities conducted the collection and testing in accordance with the applicable regulations. The Vice Commandant stated the USCG was not required to prove appellant's specimen was not exposed to high heat, rather appellant bore the burden of establishing she produced or could have produced the urine through physiological means, which appellant did not accomplish.

On appeal to the Board, appellant contended the law judge improperly based his decision on an understanding that creatinine concentration in urine was heat stable to 300 degrees and improperly found Dr. Khella's testimony to be credible and probative. She also argued that the USCG did not comply with discovery obligations because the agency did not notify her of the existence of at least one recorded telephone conversation she had with Dr. Khella. Lastly, appellant argued that the Vice Commandant erred in not allowing testimony or opinions via amicus curiae. The Board identified a number of issues in the record that called into question the veracity of the test results and adherence to discovery and testing obligations, and remanded the case to the USCG for findings specific to the issues identified.

The Board observed the experts consistently agreed low creatinine concentration combined with low specific gravity was a certain indication of dilution; however, the converse relationship, in which a creatinine concentration is low, but a specific gravity measurement is high, was rare and perplexing to the experts. The Board found that certain aspects of appellant's urine test results indicated it was subjected to high heat. For example, the pH level of the urine was 8.8, and the creatinine initially measured 1.4 mg/dL on July 11, 2012, but measured 1.3 mg/dL the following day. In addition, the Board noted that appellant's normal laboratory results showed her creatinine levels tended to measure low, a likely result of genetics, the diuretic effect of a prescription drug she consumed to lower her blood pressure, and the fact she is female. The Board determined that appellant's traditionally low creatinine concentration, in light of the supposition

her urine specimen was exposed to heat, counseled in favor of a repeated test upon the MRO's receipt of the test results, which did not occur.

In determining appellant's urine should have undergone additional testing, the Board considered the plain language of the DOT drug testing regulations and the underlying regulatory history, which indicate USCG should have allowed appellant to provide a new specimen or notified her that she could request split sample testing. The Final Rule enacting the testing regulations stated, "to ensure fairness and to provide safeguards parallel to those available in cases of positive drug tests, the Department will add split specimen testing and MRO review to its procedures in these cases." DOT explained, "situations in which an adulterant is naturally found or a substitution naturally occurs are likely to be extremely rare… our policy to allow medical review and use of the split specimen will provide employees with an additional level of protection and an added degree of fairness." The Final Rule went on to state the proper procedure in such rare cases would consist of the MRO informing the employee that he or she may obtain additional evaluation from another physician, acceptable to the MRO, who has expertise concerning any potential medical explanation for the test results. The Board explained that the fact the DOT recognized a rare case might exist in which substitution *naturally* occurs, combined with the reliance on the MRO in such circumstances, emphasized the importance of the MRO's role in reviewing and explaining the test results and follow-up procedures to employees.

In this case, Dr. Khella testified he read from a script when informing appellant of her substituted test result. In reviewing the script, the Board noted that only at the conclusion of the interview did the script contain the sentence, "finally, you'll have the right, up to 72 hours, to request to have the original sample retested at another laboratory." The Board stated the script fell short of informing appellant she could obtain an "additional evaluation from another physician, acceptable to the MRO," as the DOT drug testing Final Rule contemplated. This shortcoming, in addition to the fact the specimen was subjected to hot temperatures prior to testing, caused the Board to question the reliability of Dr. Khella's determination that appellant had substituted her specimen. As Dr. Khella's testimony appeared to be the primary evidence contradicting appellant's case in rebuttal, the Board directed the USCG to address the inconsistency in the Vice Commandant's finding that Dr. Khella's testimony was not credible, but then finding no error with discovery in the case, and no problem with the resolution of the case overall.

The Board was also troubled by the fact that neither the DOT drug testing regulations, nor the regulatory history underlying them, addressed a possible non-corroborating relationship between creatinine concentration and specific gravity. The data and rationale upon which DOT relied did not discuss the possibility that creatinine concentration could be reduced, and specific gravity could increase, as the result of exposure to heat. The Board noted the USCG did not deny appellant's specimen was likely exposed to hot temperatures over a period of eight days before arriving in the United States for testing. Therefore, the Board directed the USCG to address whether the DOT drug testing regulations were intended to capture the non-corroborating relationship between creatinine concentration and specific gravity.

The Board found that the record was insufficient to establish the accuracy of the test results and needed clarification concerning the effects of heat, adulterants, or other environmental factors on creatinine and specific gravity levels. In remanding this case, the Board explained the accuracy of the test results would be paramount to the Board's analysis.

Board Member, Earl F. Weener, submitted a statement concurring, in part, and dissenting, in part.

The Board's decision in this mariner appeal is available at: http://www.ntsb.gov/legal/alj/OnODocuments/Marine/214.pdf

Lifetime Achievement Award

by:
Elizabeth Vasseur-Browne

AN INTERVIEW WITH JOHN YODICE

In our last newsletter we announced that the first ever IATSBA Lifetime Achievement Award was being awarded to John Yodice of Yodice and Associates. John received the award at our recent Gala dinner. Elizabeth Vasseur-Browne, IATSBA's Central Region Vice President met with and talked with John about the award and some highlights from his more than fifty years as an aviation lawyer.

Elizabeth: John, I want to first start out by congratulating you as being selected the first recipient of IATSBA's Lifetime Achievement Award. When the Board met to discuss the criteria for this award and potential nominees, you were purposefully not included in those discussions for obvious reasons. You should know it was a unanimous decision that you be selected as the first recipient of the award. I think this distinction, by many of your peers, is indicative of your contributions to our organization, to aviation law and aviation safety.

John: Thank you very much.

Elizabeth: As a leader in our industry John, I'm just curious as to what brought you to aviation law? Did you have an interest in aviation before you attended law school or did you develop this interest later?

John: In law school, my trial practice professor, who was also a practicing attorney, he picked me out of the class to join his law firm. At that firm there was another lawyer who was legal counsel for the Aircraft Owners' and Pilots' Association. That's when I started doing aviation law work, not only for AOPA, but for a bunch of other aviation associations, that's really how I got started; through the law firm that I first joined out of law school.

Elizabeth: Were you already a pilot at the time?

John: No. They encouraged me to learn how to fly and I did; everything seemed to meld together.

Elizabeth: That's very interesting. I had spoken a few weeks back to your daughter, Kathy, who is herself an accomplished aviation attorney, and she recalled some early memories where you would load the family in your airplane and go flying out to, for example, the LPBA conference and stuff like that. Did you use your aircraft and your experience as a pilot in your aviation practice?

John: Oh, yes, extensively. My law practice ranges throughout the country, in fact, throughout the world, but I didn't take the airplane out of the United States except Canada and Mexico. But, yeah, we traveled extensively in connection with representing pilots and aviation associations and aviation groups.

Elizabeth: That's very interesting.

John: I hope the IRS is listening. :)

ELIZABETH VASSUER-BROWNE is an attorney with Cooling & Herbers, P.C. in Kansas City, Missouri. Her practice focuses on defending aviation businesses, aircraft owners, pilots and mechanics in state and federal courts. She also defends certificate holders against FAA and DOT administrative sanctions and enforcement actions and represents clients before the NTSB. She is a licensed pilot.

Lifetime Achievement Award

CONTINUED

Elizabeth: Since you first started out as an aviation practitioner has there been anything that sticks out in your mind that you feel has had a significant impact on the industry?

John: Many cases, but one in particular that I feel was most important. It was a case I had against the Massachusetts Port Authority. They adopted a fee schedule which they foolishly admitted, was to drive general aviation out of Boston Logan Airport. We fought against this fee schedule and prevailed; it was a pretty tough litigation, but it set a pretty good precedent that airports cannot use money as a device to drive general aviation from the airport. Airports now must use fair and reasonable terms for aviation businesses.

Elizabeth: I've learned recently that you have also been involved in tort reform and specifically in aviation related cases. How so?

John: What had happened was that a couple of general aviation aircraft manufacturers had been hit with some very bad judgments. They were seriously considering exiting the general aviation market. So, we together with the General Aviation Manufacturers' Association (GAMA) and some other associations appeared before Congress to see if we could provide some balance into the legal system as it existed at that time. GAMA had been working very hard on tort reform and they had a list of possible procedural changes. I guess what I brought to consideration was that we ought not to try to get that whole list implemented, that we should pick one thing. That one thing was what is now known as the General Aviation Revitalization Act of 1994 (GARA) which limits the time a claim can be made against a manufacturer of a general aviation aircraft after its initial delivery.

I did testified several times before Congress and there was opposition from the plaintiffs' bar, as you would expect, but it was always a very friendly process. I think the main reason we prevailed is because although there was a great deal of tort reform, not only in aviation, but this particular reform had the support of consumers nationwide, which included pilots and aircraft owners. I think that's what carried it over to passage and signing by the President. Just tort reform by itself without the consumers on board probably would not have prevailed.

Elizabeth: Oh wow, again very interesting, that must have been very exciting.

John: Yeah, it was pretty hard core
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Elizabeth: So what was your position at the time, when you were doing this?

John: I was General Counsel of the Aircraft Owners' and Pilots' Associations.

Elizabeth: John, you are a founding member of IATSBA, which is formally the NTSB Bar Association. Where and when did this idea develop? Did you and some of your colleagues find a

reason to bring together attorneys that practice before the NTSB?

John: We already knew each other, we had quite a relationship. We just formalized what had been an informal relationship. I think in that regard, though, it's interesting to me because the NTSB has had a series of chairmen. I knew every chairman and met with every chairman of the Board from the very first, which is quite a string. Of course, now we have Chairman Chris Hart, and I tell Chris, he is the most qualified chairman. All of the chairmen were qualified, but he is the most qualified chairman we have ever had. He's a pilot, an aeronautical engineer, a lawyer, an aviation lawyer and among other things a Harvard Law School alum. He's uniquely qualified.

Elizabeth: I seriously agree. I know his background well.

Would you agree that creation of IATBA, or formerly the NTSB Bar Association has had a positive effect on aviation safety?

John: Yeah. Well, the whole point, maybe I'm emphasizing it too much, but the whole point of the Association was to advance aviation safety. Now, safety was achieved lots of ways; the NTSB had a function far beyond just enforcement, its main function was to investigate accidents, determine probable cause, and suggest or recommend ways to avoid similar accidents in the future. In its early years the NTSB investigations of major air accidents involved hearings which were more trial type hearings. I participated quite a bit where they would call witnesses and lawyers would represent the FAA, lawyers would represent the NTSB and lawyers would represent the other parties to the investigation.

Then came a time, though, when the NTSB decided that lawyers were counterproductive so they cut them out of the hearing process. FAA lawyers are not even allowed to participate in NTSB investigations. Now, that is another whole area of the law that requires a lot of discussion but right now the hearings are not as dramatic as they used to be.

Elizabeth: John, where do you see the aviation law industry going in, let's say, the next 10 years? You might even want to comment on some of the most recent FAA changes, and specifically, the FAA's changes to its compliance philosophy.

John: Well, I'm stroking my beard because I've been around so long. I've seen it wax and wane where the FAA would be very strict, then the kindler and friendlier and then strict again; we've been through a couple of iterations. I think this new compliance philosophy is now a kinder and gentler FAA phase and so far, my observations, it's kind of early to tell, but my observation is that it's working very well. We were getting a lot of cases where the violation was inadvertent and did not involve a serious safety compromise; these cases are not productive in improving or maintaining aviation safety. I think with this new compliance philosophy, the FAA will be cutting out a lot of

Lifetime Achievement Award

CONTINUED

these cases because they don't have a good payoff in terms of aviation safety. This will allow them to concentrate on the ones that do have a good payoff. So we're at that phase now. I would expect that if we all live long enough, the FAA will shift back to being a little bit stricter.

Elizabeth: I see that too. Well John, thank you for meeting with me today. I always enjoy speaking with you and today it even sweeter. On behalf of IATSBA members, thank you for your contributions to our organization from its inception, to aviation law and safety. We hope to be working with you for many years to come. Thank you again, John.

John: Thank you, Elizabeth.

Member Announcements

James T. Crouse, IATSBA Member, announces the publishing of his debut thriller, Broken Eagle, a fast-moving military-legal-aviation thriller about a flawed aircraft weapons program that seems destined to continue unless someone brings out the truth about its fatal flaws. That someone winds up being a reluctant southern attorney, Jake Baird.

Look for a review of this book in an upcoming edition of the IATSBA Reporter.

Tax Considerations in Closing Locations

By Chris Jacob

Selecting a tax-favorable closing location is an important consideration in planning an aircraft transaction that is too frequently overlooked. Given that combined state and local sales and use tax rates can be as high as 11%, and can potentially be assessed against buyers and/or sellers (depending on the state and other factors in the transaction), closing the purchase and sale in an unfavorable jurisdiction can unnecessarily escalate costs and headaches for both sides. Ultimately, the more expensive an aircraft is, the more motivated the parties to a transaction will be to plan a closing in a tax-friendly location.

While you may have heard stories about closings occurring while an aircraft is in-flight over international waters or other extreme measures taken to avoid triggering sales tax, less burdensome options are available. Two preferred methods are to close in a state that (i) does not impose a sales or use tax, or (ii) offers a "fly-away" exemption.

States without sales or use taxes

Oregon, Montana, Alaska, Delaware and New Hampshire impose no sales tax whatsoever and therefore make attractive candidates for a closing location. Other states offer tax breaks specific to aircraft purchases and sales ranging from a lower applicable sales tax rate (e.g., North and South Carolina), to complete exemption (e.g., Rhode Island and Massachusetts).

Fly-Away States

A number of states offer an exemption from sales or use tax on the purchase and sale of aircraft occurring within their jurisdiction provided the aircraft is removed from the state within a specified time after closing of the sale. The amount of time allowed before the aircraft must depart the state varies from state to state, as does the documentation or reporting required to perfect the exemption, and whether, how soon, or how frequently an airplane may return to the state following the closing. Additionally, some states limit their fly-away exemptions to newly manufactured, completed, or refurbished aircraft in order to promote aviation businesses within their borders, thereby excluding purchases and sales of most used aircraft.

Additional Considerations

State sales and use taxes are a significant factor to consider in an aircraft transaction, but are certainly not the only issue to contemplate. State property taxes and registration fees, federal income and excise taxes, and the Federal Aviation Regulations each can play into aircraft ownership and disposition decisions. Moreover, even where the buyer and seller can avoid triggering sales tax in a transaction by carefully planning a closing location, buyers at least need to keep in mind that their home states may still impose use tax on the newly-acquired aircraft upon its arrival unless other tax planning strategies are employed.

Sophisticated parties rarely undertake a purchase or sale without the assistance of experienced aviation counsel. If you are considering purchasing or selling an aircraft of any size, it is a good idea to consult with an aviation attorney early in the process to optimize the transaction and avoid costly mistakes.

CHRIS JACOB is an attorney with Paramount Law Group, PLLC in Seattle, Washington, where he focuses on counseling aircraft owners and operators on transactions and regulatory compliance.

Circuit Assignments

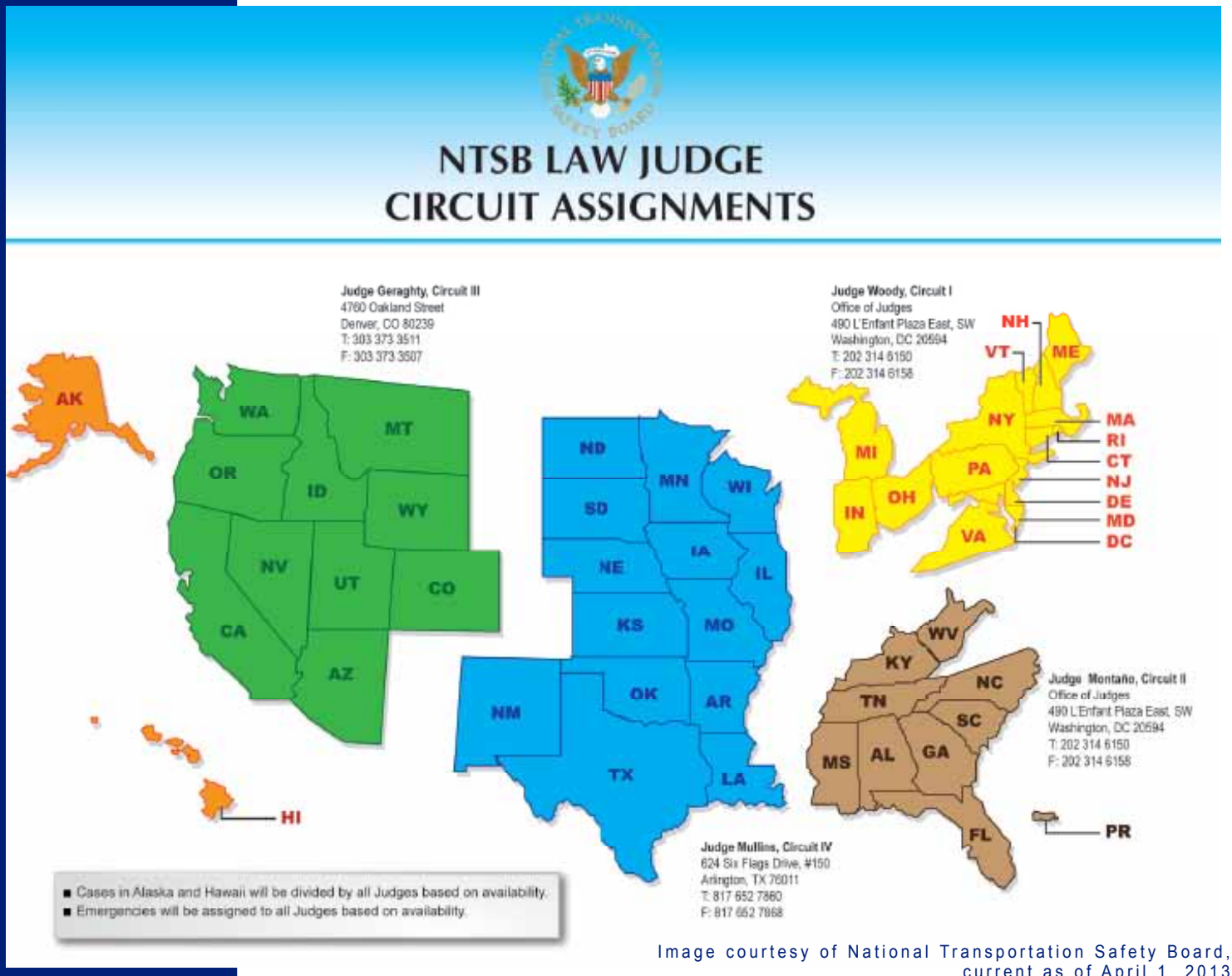

Image courtesy of National Transportation Safety Board, current as of April 1, 2013

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