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President's Message

by
Jim Waldon

Change is afoot! With the new year comes a new White House and changes in Congress. As an association focused on regulatory matters we know not what changes, if any, await. What is certain, however, is our upcoming conference. The conference will be in Seattle, Washington from April 26 - 30. And our agenda is just about set. We are excited about the quality of our speakers and the interesting topics we will offer.

The conference opens with a panel discussing motor carrier accident investigation and litigation. Note that our organization has previously focused on aviation. While we continue to do so we will now broaden that focus to other areas such as this.

We will also discuss the recent FAA overhaul of their enforcement policy. For those of us who have spent time defending certificate holders, these changes are welcome. For a bit of entertainment, one of our local Seattle attorneys will discuss the legalization of marijuana use in our state and how air transportation has dealt with the new law. These are just a few of the topics

and speakers we have lined up for you. We hope you can join us, and please register early.

I would also like to welcome two new board members. Sean Berry is our new Emerging Leaders officer and Scott Brooksby is our new Northwest Mountain Region Vice President.

I mentioned in my first article that we are focused on growing the group and that I would provide membership count updates. We are currently at 187 and are growing.

Finally, if you are a member of our organization or intend to join, please take a look at our website at www.iatsba.org. We have made many changes to the site and continue to make improvements. As a member you are listed in our members section. Once you log in you can modify your bio and contact information and can upload a picture (for those of you who think it might help your business).

See you in April!

Jim Waldon, President, IATSBA



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INSIDE THIS ISSUE

PAGE TWO

President's Message
Jim Waldon

PAGE THREE

Editor's Column
Greg Reigel

PAGE FOUR

FAA Update
John Yodice

PAGE FIVE

Responding to Air
Disasters
Michael L. Dworkin

PAGE TWELVE

Pilot Mental Fitness
Scott Brooksby

PAGE EIGHTEEN

IATSBA Conference

PAGE TWENTY-TWO

NTSB Law Judge Circuit
Assignments

PAGE TWENTY-THREE

IATSBA Membership
Application

PAGE

02

Editor's Column

by
Greg Reigel



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PAGE
03

In this first edition of the Reporter in 2017 I want to wish our IATSBA members a Happy New Year. I hope you are all doing well and finding success in 2017. And with this New Year, we also have a new President of the United States with an accompanying new administration. We expect, and have already seen, changes in government personnel. We also anticipate changes in policy, especially in light of the President's Executive Order freezing all agency rulemaking and delaying the effective dates of issued final rules, pending review. So, changes impacting the aviation industry may be on the horizon.

However, some things in the aviation industry will not change. Pilots will continue to fly and operate manned and unmanned aircraft. Those same aircraft will still need to be maintained. And pilots will continue to be trained to fly aircraft and UAS.

The FAA will continue to pursue legal enforcement actions against certificate holders, although its compliance philosophy has resulted, and will likely continue to result, in a significant decrease in the number of cases that actually go to legal enforcement. However, now when the FAA pursues legal enforcement action, it typically does so via emergency order, and I expect that approach to continue as well.

Aircraft and other aviation transactions will also likely continue, in spite of low oil prices and the uncertainty attributed to the new administration. And, unfortunately,

in spite of enhancements to aviation safety, aircraft accidents will still occur. As a result, in my opinion, it is not such a bad time to be an aviation attorney.

On that note, this edition of the Reporter includes articles and information that will certainly be of interest and use to our aviation attorney members. First, Jim Waldon, our IATSBA president, provides us with an overview of our upcoming conference in Seattle, Washington. We've also included the current conference agenda in this issue so you will know what the conference has in store for its attendees. Next, John Yodice gives us an update on several recent decisions in FAA enforcement proceedings.

We also have an article from Mike Dworkin discussing best practices for dealing with the NTSB, FAA and your client in the aftermath of an aircraft accident. Finally, Scott Brooksby analyzes the issue of pilot mental fitness in the context of aircraft accidents including, notably, the recent Germanwings accident.

Finally, we are always looking for content that would be interesting and useful to our members. If you would like to submit an article or 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.

I hope you enjoy this edition of the Reporter.

Greg Reigel

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.

NTSB PROCEDURE: FAILURE TO ANSWER FAA COMPLAINT RESULTS IN DENIAL OF APPEAL

As a follow up to my article in the last edition of the Reporter, two recent Board decisions further emphasize the Board's strictness in the application of its procedural deadlines.

One day late! This was an appeal to the full Board from an oral initial decision of an administrative law judge. The Board's Rules require a notice of appeal be filed within 10 days after the date on which an oral initial decision was rendered or the appealable order was served. This notice of appeal was filed one day late. On FAA's motion to dismiss the appeal as untimely, and respondent's failure to respond to the motion, the Board dismissed the appeal, *Wilson*, NTSB Order No. EA-5796 (2016)

In addition to certificate action appeals, the Board's strictness is also applied in medical cases. In this case, the petitioner filed for a review by the NTSB of FAA's denial of a second-class medical certificate. The Board's rules require that such a petition be filed with the Board within 60 days after the date on which notice of the FAA's denial was served on petitioner.

At the ALJ level, the judge noted that the petitioner filed 64 days after the FAA's notice. The petitioner argued

the he and his counsel believed that the 60-day filing deadline commenced on the day he received the letter of denial, not the day it was mailed (in former digests we have warned of the misunderstanding of this odd rule among infrequent practitioners before the Board). The petitioner also argued that more lenient Federal Rules of Civil Procedure that were made applicable by the Pilots Bill of Rights should be applied to his case. The law judge did not accept the appeal. He terminated the proceeding.

On further appeal to the full Board, the Board denied the appeal. "Neither petitioner and his counsel's purported ignorance of our [NTSB's] Rules nor their mistake regarding the calculation of the filing deadline establish good cause to excuse the late-filed notice of appeal." *Petition of Reza Amini*, NTSB Order No. EA-5797 (2016). Though the Board did indicate a basis for some future leniency by citing to the *Harless* case (NTSB Order No. EA-5699 (2014)), in which it stated "that it would be practicable to apply the provisions of FRCP 6(d) which allows three additional days to act when service is effected by mail, to non-emergency cases before the Board."



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Responding to Air Disasters

by:
Michael L. Dworkin

BEST PRACTICES FOR REPORTING AND WORKING WITH THE NTSB, FAA AND YOUR CLIENT IN THE AFTERMATH OF AN ACCIDENT

Author's Note:

In my 43 years of aviation law practice, there is probably no area that is as professionally (and sometimes emotionally) challenging as representing a client in responding to an aircraft mishap. This article is based on presentations that I gave last year to IATSBA's Annual Conference and at the Kings County (Washington) Bar Association.

One could easily write a multiple volume treatise on this subject. However, given practical limitations, this article is limited to NTSB, FAA and internal company investigations and further confined to the following areas of inquiry:

- designation of parties to the investigation;
- certification of the party representative required by the NTSB;
- preparation and submission of the Pilot/Operator Report;
- right of representation of those whom the NTSB seeks to interview; and
- NTSB's human performance investigation.

Obviously, there may be other equally important areas of inquiry and concurrent investigations.

Much of the guidance contained in this article can be found in NTSB

Regulations Parts 830 and 831 and Federal Aviation Regulation (FAR) Part 13. While these regulations are comprehensive, they do not address everything. In many instances, how one responds may be based not only on this regulatory guidance, but on other factors and even "gut instinct".

I would like to acknowledge and express my appreciation to the following individuals who provided valuable input in preparation of this paper and in the panel presentation at the 2016 IATSBA Conference:

- John DeLisi, Director, Office of Aviation Safety, National Transportation Safety Board;
- Jeffrey Guzzetti, Manager, FAA's Accident Investigation Division; and
- Ted Dunlap, Esq., General Counsel, RTI Forensics, Inc.

Scenario:

Accident Involving HYPRsonic One Test Flight No. 11

Background:

Daedalus Teknik, a leader in industrial and transportation technology, is a relative newcomer to aircraft manufacturing.

Notwithstanding improvements in aircraft propulsion, avionics, safety and efficiency, basic aircraft design has essentially not changed since



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Responding to Air Disasters

CONTINUED FROM
PAGE 5

the dawning of the jet age in the late 1950's. Daedalus, as its first foray into aerospace, is attempting to break this barrier--designing, building and selling a revolutionary airliner, the HYPRSONic One, that will not only fly higher and faster, but will create new economic and environmental efficiencies and greater passenger convenience and comfort.

The aircraft is an aeronautical engineer's dream: a "clean sheet" design, incorporating the latest advances in aerodynamics (blended wing and fuselage and variable geometry wing), composite construction and hybrid turbofan and ramjet propulsion. It is designed to carry up to 300 passengers at Mach 4+ at altitudes above FL 900 (90,000 feet MSL), without creating perceptible sonic boom on the ground.

Daedalus has completed one flying prototype. Two additional flying prototypes are being built and due to join the flight test program. Design and development costs have been significant, in part funded by outspoken and brash international billionaire/businessman, O. J. ("Weejay") D'Argent, who has committed to acquiring 30 HYPRSONic One's (with options for up to 30 more) for SOAR!, his proposed, but yet-to-be certificated airline, which he has predicted will provide a "faster and more efficient, luxurious and beautiful travel experience than the world has ever known". In fact, the test flight prototype bears the distinctive SOAR! livery. Production of this launch

customer's aircraft is expected to commence within the coming year.

There have been production and flight test delays due to the incorporation of new technologies. The prototype has made ten test flights.

Daedalus employs six highly skilled ATP-certificated test pilots whose qualifications are beyond reproach. Each has advanced academic degrees and other duties within the Company when they are not flying. The pilots are rotated so that everyone gets a chance to fly this exciting new aircraft.

Because of the aircraft's breakthrough design and anticipated capabilities, every flight attracts media and industry attention.

Test Flight No. 11:

Test Flight No. 11 is crewed by PIC Agnes "Amelia" Eyrehart and SIC Atticus "Finch" Rightwell. Ms. Eyrehart has previously served as flight test PIC on two occasions and as SIC on another two occasions. Mr. Rightwell has served as SIC on three prior flights. Ms. Eyrehart and Mr. Rightwell have previously been paired together twice. Aside from being co-workers, they have become close personal friends.

Test Flight No. 11 will feature new, and yet untested, engines providing greater thrust and speed. The test flight protocol will be somewhat abbreviated. The aircraft will takeoff and climb under turbofan power to FL555, transition to ramjets,

Responding to Air Disasters

CONTINUED FROM
PAGE 6

accelerate and continue climbing to FL800 attaining Mach 2.2, then immediately decelerate and descend, resuming turbofan power at FL555, and thereafter, continuing descent to landing.

The Accident:

Takeoff and initial climb were normal. ATC communications were routine. Aircraft information relayed to Daedalus via data link indicated that all systems were normal. However, as the aircraft was transitioning from turbofan to ramjet and going supersonic, it broke up. PIC Eyrehart was critically injured and SIC Rightwell was killed.

After the accident, telemetric and video data showed that the speed brake had deployed during acceleration. The accident has created a media frenzy.

Investigations:

There are numerous concurrent investigations:

- NTSB;
- FAA; and
- Daedalus, its vendors and suppliers and each of their insurance carriers are conducting their own investigations.

In addition, SOAR!, which has so much invested in this project, is considering conducting its own investigation. In fact, Mr. D'Argent has been openly critical (and somewhat disparaging) of the FAA, NTSB and Daedalus investigations.

Particular Issues of Concern:

1. Parties to NTSB Investigation

The NTSB may invite various qualified and interested organizations whose employees, functions, activities or products are involved in an accident and who can provide suitable qualified technical personnel to actively assist in the investigation and to participate as parties to the fact-finding investigation (49 C.F.R. Sec. 831.11(a)(1)).

The parties to the NTSB investigation are the FAA (as a matter of right), Daedalus and the manufacturers of the engines, speed brake system, avionics and on-board telemetry. Thus far, SOAR! has been excluded. This has aggravated Mr. D'Argent, who has not hesitated to voice protests not only to the NTSB Investigator in Charge ("IIC") but to the media and several politicians (many to whom he has previously contributed) and governmental officials.

QUESTION:

- Should SOAR! be included as a party to the investigation? In other words, can SOAR! provide suitable qualified technical personnel who can actively assist in the investigation and participate in the fact-finding investigation?

2. Certification by Party Representative

Party Representatives are expected to sign, for themselves, and their organization, a *Certification of Party Representative*. Under that *Certification*, "No information pertaining to the accident, or in any manner

Responding to Air Disasters

CONTINUED FROM
PAGE 7

relevant to the investigation, may be withheld from the NTSB by any party or party participant". At the same time, Party Representatives must agree not to share information developed by the NTSB investigatory effort with their employer, without the IIC's permission.

QUESTIONS:

- Does this preclude Daedalus from conducting its own internal investigation?
- To the extent that Daedalus obtains information in its internal investigation, must it convey it to the NTSB?
- What about the disclosure of proprietary or commercially sensitive information? (See NTSB Regulation 831.6)
- Under what conditions can a party representative share information obtained in the NTSB investigation with his/her employer?
- Can the parties each build "Chinese Walls" between their respective internal investigations and the NTSB investigation?
- What, if anything, can Daedalus say to its Board of Directors, investors, employees and the media that would not be violative of this *Certification* or otherwise interfere with or compromise the NTSB investigation?

2. NTSB Form 6120.1, Pilot/Operator Accident/Incident Report

NTSB Regulation 830.5(a) requires that this Report be submitted

within 10 days. Surviving PIC Eyrehart's injuries prevent her from submitting the report. The NTSB has requested that Daedalus (which arguably comes within the definition of "operator" (See FAR Sec 1.1 and NTSB Regulation 830.2)) submit the report.

Daedalus has several concerns, among them:

- there has been insufficient time to gather all information;
- the NTSB appears to be in a rush to "say something";
- this will likely be Daedalus' first recorded statement;
- any report could possibly constitute a party admission;
- the report will likely be used in any litigation or claim;
- Daedalus may need to coordinate any statement with its insurers;
- speaking of insurance, there may be some coverage issues; and
- although it believes that it has done nothing wrong, there is potential exposure to FAA enforcement or worse, criminal action.

In view of these concerns, and to protect its internal communications and deliberations by means of the attorney-client privilege, Daedalus has retained outside legal counsel not only to spearhead its internal investigation, but to submit the Form 6120.1 on its behalf.

The Pilot/Operator Report has

Responding to Air Disasters

CONTINUED FROM
PAGE 8

been signed and submitted by counsel. Counsel's cover letter transmitting the Report states, in pertinent part:

- While Daedalus is a party to the NTSB's investigation and is fully cooperating with all governmental authorities, Daedalus is conducting its own internal investigation;
- The information contained in the Report is tentative at best, containing information provided to Daedalus by its employees, contractors, and vendors, which have not been independently verified. Accordingly, Daedalus reserves the right to supplement or amend the Report;
- The Report is submitted in satisfaction of the requirements of NTSB Regulation Part 830 (49 C.F.R. Part 830) to assist the NTSB in fulfilling its statutory duties of aviation accident investigation and, if possible, determining a probable cause. It is submitted for no other purpose; and
- Any information conveyed by the NTSB to the FAA will be confined to accident investigation purposes and will not be given for enforcement purposes.

QUESTIONS:

- Can Daedalus shield its internal investigation and deliberations by invoking the attorney-client privilege?
- May the Pilot/Operator Report

be submitted by counsel?

- What, if any, legal effect will counsel's transmittal letter have?

1) on the NTSB's use of the Report or the information contained therein?

2) in any potential FAA enforcement action?

3) in any legal proceeding arising from this accident?

3. Right of Representation

Under NTSB Regulation 831.7, any person whom the NTSB wishes to interview in connection with an accident investigation is entitled to representation. Daedalus has retained legal counsel to provide representation to its employees who will likely be interviewed by the NTSB. Daedalus has also retained legal counsel to provide representation to the surviving PIC and the crewmembers' spouses, should the NTSB elect to interview them.

QUESTIONS:

- While parties to the investigation are required to cooperate with the NTSB, what, if any, rights to non-party third persons have to decline interviews?

- What, if any, recourse does the NTSB have should a prospective interviewee elect not to be interviewed?

4. Human Performance Investigation

A. 72-Hour Investigation:

The NTSB Accident

Responding to Air Disasters

CONTINUED FROM
PAGE 9

Investigation Manual states:

A critical part of the human performance investigation is tracing the activities prior to the accident of the pilots...or other individuals of importance to the investigation. The purpose of this history is to determine such information as sleeping and eating history, purpose and preparation for the accident trip, unusual activities or events, mood, crew interaction, and other information that could prove critical to understanding the accident.... (*Manual*, p. H-19)

...Those witnesses who are of prime interest would include: the last person to talk with the individual; anyone in professional contact during the 72-hour period; anyone with whom the individual lived; anyone with whom the individual was having a romantic relationship; immediate family; and anyone in the general public who came in contact with the individual, including taxi drivers, hotel staff, and neighbors... (*Id.*, and 19-20).

In this instance, the NTSB has requested interviews of the pilots' spouses. This interview can be potentially invasive seeking information of a highly sensitive

nature, including intimate details of a person's background lifestyle and otherwise personal and/or confidential medical, psychological, marital, social and financial information.

QUESTIONS:

- What questions are permissible?
- Is there anything that is out of bounds?
- Can any relevant and probative sensitive personal information obtained be included in the NTSB's Probable Cause Report?

B. Corporate Culture:

The *Manual* states:

In some accident and incidents, the stage is set for accidents by corporate events far removed in time from the accident. Companies vary in the degree that they emphasize safety in their operations, and individuals involved in accidents may be affected by the actions and decision of even well intentioned company officers and managers. (*Id.*, at H-21) The *Manual* suggests that investigators speak with individuals knowledgeable about the company (including FAA and NTSB employees having first hand knowledge); employees, supervisors and managers "up to the Chief Executive Officer"; focus on company history and policy

Responding to Air Disasters

CONTINUED FROM
PAGE 10

in areas such as pay, morale, flight and duty time schedules, workload, sick leave, size of workforce, turnover rate, training, equipment, maintenance, promotion, progress, financial condition and safety/office programs (*Id.*)

While Daedalus has pledged its full cooperation with the NTSB, it is concerned about the invasive potential of any such lines of inquiry.

QUESTIONS:

- What are the boundaries of permissible inquiry?
- Notwithstanding NTSB Regulation 831.6, can any relevant and probative sensitive business/proprietary/financial/trade secret information obtained be included

in the NTSB's Probable Cause Report?

- Can NTSB interview SOAR! and/or its senior management in connection with their examination of Daedalus' corporate culture?
- Notwithstanding any efforts by Daedalus to prevent the public disclosure of release of business/proprietary/financial/trade secret information under Regulation 831.6, what if the NTSB obtains such information from other sources?

Conclusion:

There are few, if any, clearly right or wrong answers. In fact, I must confess that between the time that I first prepared this paper, to its first and second presentations and its current submission to IATSB's *Reporter*, these questions have precipitated a certain amount of reflection and rethinking.

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Pilot Mental Fitness

by:
Scott Brooksby

PILOT MENTAL FITNESS IN THE CONTEXT OF THE INTERNATIONAL MENTAL HEALTH CRISIS

“But nobody ever thought about having to protect the passengers from the pilots.”

David Neeleman, founder and former CEO, Jet Blue

Introduction

Pilot mental health has been the subject of intense scrutiny in the wake of the Germanwings 9525 and MH370 crashes. Some knowledgeable observers, including the first TSA Administrator, John Magaw, have been quoted raising questions about whether or not reinforced cockpit doors are too secure, and should provide a way back in the cockpit.¹ This article will discuss the role pilot mental health has played in recent aviation tragedies, the applicable regulatory framework and the competing considerations for addressing pilot mental health issues.

Overview of Germanwings 9525

On March 24, 2015, 27 year-old co-pilot Andreas Lubitz was flying an A320 aircraft on a scheduled flight from Barcelona to Dusseldorf, with 144 passengers and a crew of six. The 27 year-old had been flying for Germanwings since June, 2014. Lubitz’s First Class Medical Certificate was issued in April 2008, and had been renewed yearly.

Lubitz waited until he was alone in cockpit at cruise altitude, and then he changed the selected altitude from 38,000 feet to 100 feet, leading to a steady descent into terrain. The crash in the French Alps was investigated by French Authorities, with assistance from their German counterpart, the

Federal Bureau of Aircraft Accident Investigation (“BFU”), with assistance from the F.B.I. The Bureau d’Enquêtes et d’Analyses (“BEA”) released its preliminary report on May 6, 2015 and its final report on March 13, 2016. The official BEA investigation concluded that the crash was intentional.²

We later learned that beginning in July, 2009, the medical certificate had contained a waiver due to a prior major depressive episode without psychotic symptoms that lasted from August, 2008 until July, 2009. The waiver in the medical certificate provided that the certificate would be revoked if a relapse into depression occurred. In December, 2014, Lubitz experienced symptoms consistent with the onset of a psychotic depressive episode. He then consulted with several doctors, including a psychiatrist, who prescribed an anti-depressant. But none of the doctors notified the authorities or Germanwings.

The Mental Health Landscape

It is not a secret that the United States and any number of other countries are experiencing mental health crises. According to the Centers for Disease Control and Prevention (“CDC”), a staggering 25% of the

² Bureau d’Enquêtes et d’Analyses pour la sécurité de l’aviation civile. [“Final Report: Accident on March 24, 2015 at Alpes-de-Haute-Provence, France to the Airbus A320-211 Registered D-AIPX Operated by Germanwings.”](#) March 2016.



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¹ Peterson, Barbara. [“Could Plane Cockpits Be Too Secure?”](#) *PopularMechanics.com*. Popular Mechanics. Web. 19 March 2014.

Pilot Mental Fitness

CONTINUED FROM
PAGE 12

U.S. adult population has some form of mental illness.³ The CDC's data indicates that suicide is the ninth leading cause of adult death, with more than 42,000 suicides in 2014.⁴ Alarming, suicide is the second leading cause of death for the age group 25-34 and the fourth leading cause of death for those 35-54.⁵

All of the commercial aviation disasters attributed to pilot mental health issues have involved male pilots. No commercial disasters involving U.S. Airlines have been attributed to mental health. A 2006 study by the FAA notes that 3,648 fatal aviation accidents occurred between 1993 and 2002. The NTSB concluded that 16 of those accidents involved aircraft-assisted suicides, and 1 of the 16 accidents also involved a flight student who intentionally exited a plane. All 16 accidents involved general aviation. The median age range for pilots in those accidents was 40 (15-67).⁶

Another study examined statistics on aircraft assisted suicide in the context of general aviation, and concluded that 37 incidents in which pilots either committed or attempted to commit suicide occurred between

1983 and 2012. 38% of those pilots had psychiatric problems, 40% of the pilots had legal problems, and 46% of the pilots had domestic or social problems.⁷

Pilot mental fitness did not just emerge as an issue with the advent of Germanwings 9525. Rather, back in 2007, the Airline Pilots Association ("ALPA") reported that 25% of the ALPA Aeromedical Office calls were mental health-related.⁸

Overview of Medical Certificate Requirements

FAA regulations require airline pilots to undergo a medical examination with an FAA-approved physician called an Aviation Medical Examiner ("AME") every six to twelve months depending on the pilot's age.⁹

According to the Guide for Aviation Medical Examiners, "The FAA does not expect the Examiner to perform a formal psychiatric examination. However, the Examiner should form a general impression of the emotional stability and mental state of the applicant."¹⁰

In the United States, the FAA issues three types of medical

3 ["CDC Report: Mental Illness Surveillance Among U.S. Adults."](#) [www.cdc.gov](#). Centers for Disease Control and Prevention. December 2, 2013.

4 ["National Center for Health Statistics: Leading Causes of Death."](#) [www.cdc.gov](#). Centers for Disease Control and Prevention. October 7, 2015.

5 ["Injury Prevention and Control: National Suicide Statistics."](#) [www.cdc.gov](#). Centers for Disease Control and Prevention. July 19, 2016.

6 Federal Aviation Administration. ["Aeromedical Aspects of Findings From Aircraft-Assisted Pilot Suicides in the United States, 1993-2002."](#) March 2006.

7 Bills, Corey B.; Grabowski, Jurek Geroge; Li, Guohua. ["Suicide by Aircraft: A Comparative Analysis."](#) *Aviation, Space, and Environmental Medicine*. Volume 76, Number 8, August 2005, pp. 715-719.

8 Burke, Susan. ["When your Mental State Cries 'Mayday' Your Union Stands With You."](#) *Air Line Pilot*. August 2007, pp. 24-27.

9 ["Fact Sheet – Pilot Mental Illness."](#) [www.faa.gov](#). Federal Aviation Administration. June 9, 2016.

10 *FAA Guide for Aviation Medical Examiners*, 137 (2015). See also the [FAA's webpage for AMEs](#).

certificates.¹¹ A first-class medical certificate, which is required for airline pilots, expires twelve months after the date of the medical examination for pilots under age 40, or six months after the date of the examination for pilots over age 40 at the time of the most recent medical examination.

Although a complete discussion of the mental standards for obtaining a first-class medical certificate contained in 14 C.F.R. § 67.107 is beyond the scope of this article, key provisions include the following:

Mental standards for a first-class airman medical certificate are:

(a) No established medical history or clinical diagnosis of any of the following:

- (1) A personality disorder that is severe enough to have repeatedly manifested itself by overt acts.
- (2) A psychosis. As used in this section, “psychosis” refers to a mental disorder in which:
- (3) A bipolar disorder.
- (4) Substance dependence, except where there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from the substance(s) for not less than the preceding 2 years.

The same standard applies to second-class and third-class airman medical certificates in 14 C.F.R. § 67.207 and 14 C.F.R. § 67.307, respectively.

¹¹ 14 C.F.R. Part 61.

Recent Regulatory Action

In response to Germanwings 9525 and MH 370, the FAA chartered the Pilot Fitness Aviation Rulemaking Committee (“ARC”) on May 11, 2015.¹² The ARC subsequently released its report on November 18, 2015.¹³

The report generally concluded that the best strategy for minimizing the risk associated with pilot mental health is to create an environment that encourages and is supportive to voluntary self-disclosure. The report recognized, however, that even when symptoms are recognized, a pilot’s self-reporting of a mental fitness issue may be perceived as a high risk situation, with financial, and even career-ending implications. The report also included eight recommendations:

1. Enhance AME Training. The FAA should ensure all Aviation Medical Examiners demonstrate knowledge in assessing basic mental health concerns, and enhance AME training on this topic.

2. Psychological Testing. The ARC does not recommend mandating formal psychological testing during the pilot hiring process nor as part of routine FAA aviation medical examination beyond those which already exist.

¹² [“Pilot Fitness Aviation Rulemaking Committee.” www.faa.gov](http://www.faa.gov). U.S. Department of Transportation; Federal Aviation Administration; Aviation Rulemaking Committee Charter. May 11, 2015.

¹³ [“Pilot Fitness Aviation Rulemaking Committee Report.” www.eurocockpit.be](http://www.eurocockpit.be). Federal Aviation Administration. November 18, 2015.

3. Pilot Assistance Programs. Air carriers should develop effective pilot assistance programs.

4. Air Carrier Education. Air carrier operators should be encouraged to implement mental health education programs... improve awareness and recognition of mental health issues, reduce stigmas, and promote available resources to assist with resolving mental health problems.

5. Informational Material on Pilot Support Programs. The FAA should assemble and disseminate information on benchmark pilot support programs...to serve as a resource for air carriers to develop new or improve existing programs.

6. Medical Professional Reporting. Encourage advocacy for a uniform national policy on mandatory reporting of medical issues that affect public safety.

7. Two Persons on Flightdeck and Flightdeck Access. The ARC recommends no changes to the guidance found in applicable FAA orders.

8. Aircraft Design Standards. The ARC believes existing aircraft and flightdeck door design standards are adequate and no changes are required by the FAA.¹⁴

Many of the recommendations contained in the report tracked issues that the Aerospace Medical Association (“AsMA”) had been addressing just prior to the Germanwings crash. In fact, the AsMA Coordinating Chair

had just discussed these same issues at the 2014 European Society of Aerospace Medicine conference in Bucharest, Romania in September, 2014, a few months before the crash of Germanwings 9505.¹⁵

The French BEA investigation into Germanwings 9525 and the ARC report both conclude that pilot perceptions about the potentially career-ending consequences of self-reporting a mental fitness problem and the financial repercussions are serious impediments to effective self-reporting.

Major Commercial Crashed Involving Mental Fitness

The BEA’s preliminary report on Germanwings 9505 noted that a search of ICAO and BEA databases revealed other instances of commercial flight crews intentionally crashing planes dating back to 1980.. It is worth noting that in two of the instances, JAL 350 and Egypt Air 990, the pilot or co-pilot were not alone in the cockpits, and while other flight crew members interceded, they were ultimately not able to regain control of the plane. Other notable mental health-related aviation incidents include:

- February 9, 1982, Japan Air Lines Flight 350. 35-year-old captain, who had just returned to work after a year-long medical leave for psychiatric reasons intentionally crashed into Tokyo Bay killing 24 of the 166 passengers and eight crew members.

¹⁵ Scarpa, Jr. MD, MS, Philip J. [“Mental Health Screening in Aviators – AsMA Recommendations.”](#) Aerospace Medical Association. ECAM 2014 Bucharest, Romania.

¹⁴ *Id.*

- August 21, 1994, Royal Air Maroc Flight 630. Investigation revealed the 32 year-old pilot intentionally turned off autopilot killing all 40 occupants.

- December 19, 1997, Silk Air Flight 185. The NTSB investigation revealed the 41 year-old captain intentionally dove from an altitude of 35,000 feet in one minute, diving almost vertically into the Musi River killing 97 passengers and a crew of seven.

- October 11, 1999, Air Botswana. A Botswanan pilot commandeered an ATR 42-320 and threatened to crash into the Air Botswana Terminal and kill himself. After the plane ran out of fuel, it crashed into the tarmac, killing the pilot.

- October 31, 1999, Egypt Air Flight 990. The scheduled passenger flight to Cairo, Egypt originated in Los Angeles and had a scheduled stopover at JFK. The Boeing 767-300 crashed into the Atlantic Ocean about 60 miles south of Nantucket, killing all 203 passengers and 17 crew members.

- November 29, 2013, LAM Mozambique Airlines Flight 470. The Republic of Namibia official investigation determined that the 49 year-old captain intentionally crashed the plane killing 27 passengers and six crew members.¹⁶

Employment Considerations

The FARs and federal preemption generally provide the airlines with significant discretion regarding the development, implementation and enforcement of operational safety programs, including those that may address the mental fitness of flight crew members. Federal law only establishes the minimum standards for airlines to use in the formation of safety policies. Under the applicable statutes, “[t]he Administrator may prescribe minimum safety standards for...an air carrier to whom a certificate is issued under section 44705 of this title...”¹⁷

Federal courts have generally given the airlines wide discretion to address safety. In *Johnson v American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), the court addressed American’s overhaul of the cockpit crew training, certification and promotional system following a large number of crashes in the early 1960s. Part of the overhaul involved an “up or out” certification system requiring flight crew to train for the next highest cockpit position. Plaintiffs sued, alleging violation of the Age Discrimination in Employment Act. The Fifth Circuit affirmed, holding that “the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely”. *Id.* at 993, quoting *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981).

However, employment law considerations in the context of flight crew employment and pilot mental health may also include the Americans with Disabilities Act (“ADA” 42 U.S.C. § 12112). Under the ADA, a person

¹⁶ [“List of Aircraft Accidents and Incidents.”](http://www.news.aviation-safety.net) www.news.aviation-safety.net. Aviation Safety Network. 1996-2017.

¹⁷ 49 U.S.C. §44701

is considered disabled if he or she: (1) suffers from a mental or physical impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment.¹⁸

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court ruled that for claims of discriminatory treatment in employment, a plaintiff must establish a prima facie case of discrimination by showing: (1) that he or she has a disability; (2) that he or she is a qualified individual; and (3) that he or she was subjected to unlawful discrimination because of the disability. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the employment action.

However, any claim for discrimination must be considered in the context of 14 C.F.R. 67.113(c)(1), which codifies the FAA requirement that in order to receive a first-class airman medical certificate, a person must not have any medical condition which renders that person “unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held”. Therefore, establishing the prima facie elements of discriminatory treatment sufficient to trigger the burden-shifting provisions outlined in *McDonnell Douglas* may be difficult for flight crewmembers. Even if a pilot is able to establish that a mental condition was a disability for purposes of the first element, the pilot would still have to establish that he or she is a qualified individual and that he or she was subjected to unlawful discrimination.

¹⁸ 42 U.S.C. § 12102(2).

Confidentiality Considerations

The BEA and ARC reports both recommend the development and implementation of a unified, coordinated system of national mental health reporting. However, the confidentiality of medical records arises through a complicated morass of federal and state statute and common law. While a complete discussion of the privacy considerations under federal and state law is beyond the scope of this article, those considerations likely include federal issues under the ADA, Family Medical Leave Act of 1993 (“FMLA”) and the associated Airline Flight Crew Technical corrections Act of 2009, the Aviation and Transportation Security Act (“ATSA”), and Health Insurance and Portability Accountability Act (“HIPAA”).

In addition to the privacy concerns raised by federal law, privacy considerations under myriad state law may include, state constitutions, state statutes, right to privacy statutes, as well as common law actions such as breach of duty of confidentiality.

Conclusion

The flying public, the regulators, the airlines and flight crewmembers may all have different perspectives on the approach to promoting pilot mental fitness as it relates to flight safety. The techniques and procedures put in place to prevent an in-flight mental health crisis from becoming a disaster are likely to be the subject of hot debate for the foreseeable future. And although the tragedy of Germanwings 9525 has renewed concern about the importance of ensuring pilot mental fitness, it is unlikely that any perfect solution is on the horizon.



International Air &
Transportation Safety Bar Association



2017 IATSBA Conference

The Edgewater Hotel

(Downtown Seattle)

April 26-29, 2017

CONFERENCE OVERVIEW

Dates: Wednesday, April 26 - Saturday, April 29, 2017

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Reservations can be made [online by clicking here](#) or by phone at: 206-728-7000

The Edgewater Hotel

2411 Alaskan Way
Seattle, WA 98121

Events

Seattle Museum of Flight Tour: Wednesday, April 26, 2016

For more information: <http://www.museumofflight.org/>

Tour of Boeing: Thursday, April 27, 2016

Future of Flight Aviation Center & Boeing Tour, Everett, Washington

For more information: <http://www.boeing.com/company/tours/>

GALA Dinner: Friday, April 28, 2016

Cruise and Dinner: Saturday, April 29, 2016

Argosy Cruise to Tillicum Village on Blake Island – \$76.00

For more information: <http://www.argosycruises.com/tillicum-village/#description>

AGENDA

Wednesday April 26, 2017

Time	Event/Activity	Location/Speakers
4:00 p.m.- 8:00 p.m.	Museum of Flight	9404 East Marginal Way S. Seattle, WA 98108

Thursday April 27, 2017

Time	Event/Activity	Location/Speakers
12 p.m. – 4:00 p.m.	Tour of Boeing	8415 Paine Field Blvd., Mukilteo, WA 98036
5:00 p.m. - 6:00. p.m.	Registration	The Edgewater Hotel
6:00 p.m. - 9:00 p.m.	Welcome Reception & Dinner	Dinner Speaker: <i>TBA</i>

Friday April 28, 2017

Time	Event/Activity	Location/Speakers
7:30 a.m. - 8:30 a.m.	Continental Breakfast/ Registration	The Edgewater Hotel
8:30 a.m.- 8:45 a.m.	Opening Remarks	Jim Waldon - Paramount Law Group
8:45 a.m. - 9:45 a.m.	Common Themes and Issues: Motor Carrier & General Aviation Accident Investigation and Litigation	Moderator: Jim Miller <u>Panel Members:</u> <ul style="list-style-type: none"> • Dennis Hogenson, Deputy Regional Chief, Office of Aviation Safety - NTSB • Paul Alp - Crowell Moring • Dan Ansa - Ansa Assuncao, LLP
9:45 a.m. - 10:45 a.m.	The Kinder, Gentler FAA	<ul style="list-style-type: none"> • Kathy Yodice - Yodice Associates • David Shayne, Western Enforcement Team - FAA
10:45 a.m. - 11:00 a.m.	Coffee Break	
11:00 a.m. - 12:00 p.m.	From Brazzaville to Victorville-- Commissimpex Revisited	Mike Dworkin - Michael L. Dworkin and Associates

12:00 p.m. - 1:30 p.m.	Lunch	Luncheon Speaker: Earl F. Weener - NTSB
1:30 p.m. - 2:30 p.m.	The Economics of Ethics	Brent Nourse - Paramount Law Group
2:30 p.m. - 3:30 p.m.	Washington Marijuana Law and Aviation	Jimmy Anderson - Aviation Law Group
3:30 p.m. - 3:45 p.m.	Break	
3:45 p.m. - 4:45 p.m.	Who owns the Moon? An Overview of Space Law.	Greg Reigel - Shackelford, Bowen, McKinley & Norton, LLP
7:00 p.m. - 10:00 p.m.	GALA Dinner	

Saturday – April 29, 2017

Time	Event/Activity	Location/Speakers
8:00 a.m. - 9:00 a.m.	Continental Breakfast	
9:00 a.m. - 11:00 a.m.	Transporting Hazardous Materials Panel	Moderator: Jim Miller <u>Panel Members:</u> <ul style="list-style-type: none"> • Greg Stofco -Fed Ex • Robert J. Hall, PE- NTSB • Angel Collaku - FAA
11:00 a.m. - 12:00 p.m.	What Does the NTSB Mean When It Prohibits Parallel Accident Investigations	Moderator: Jim Rodriguez , Senior Counsel, Holland & Knight LLP <u>Panel Members:</u> <ul style="list-style-type: none"> • Ed Kendall, Attorney Advisor, NTSB Office of General Counsel • Dana Schulze, Deputy Director, NTSB Office of Aviation Safety • Allison Kendrick, Principal Senior Counsel, The Boeing Company
12:00 a.m. - 1:30 p.m.	IATSBA Board Meeting	
4:00 p.m. - 8:00 p.m.	Argosy Cruise	

Circuit Assignments



NTSB LAW JUDGE CIRCUIT ASSIGNMENTS

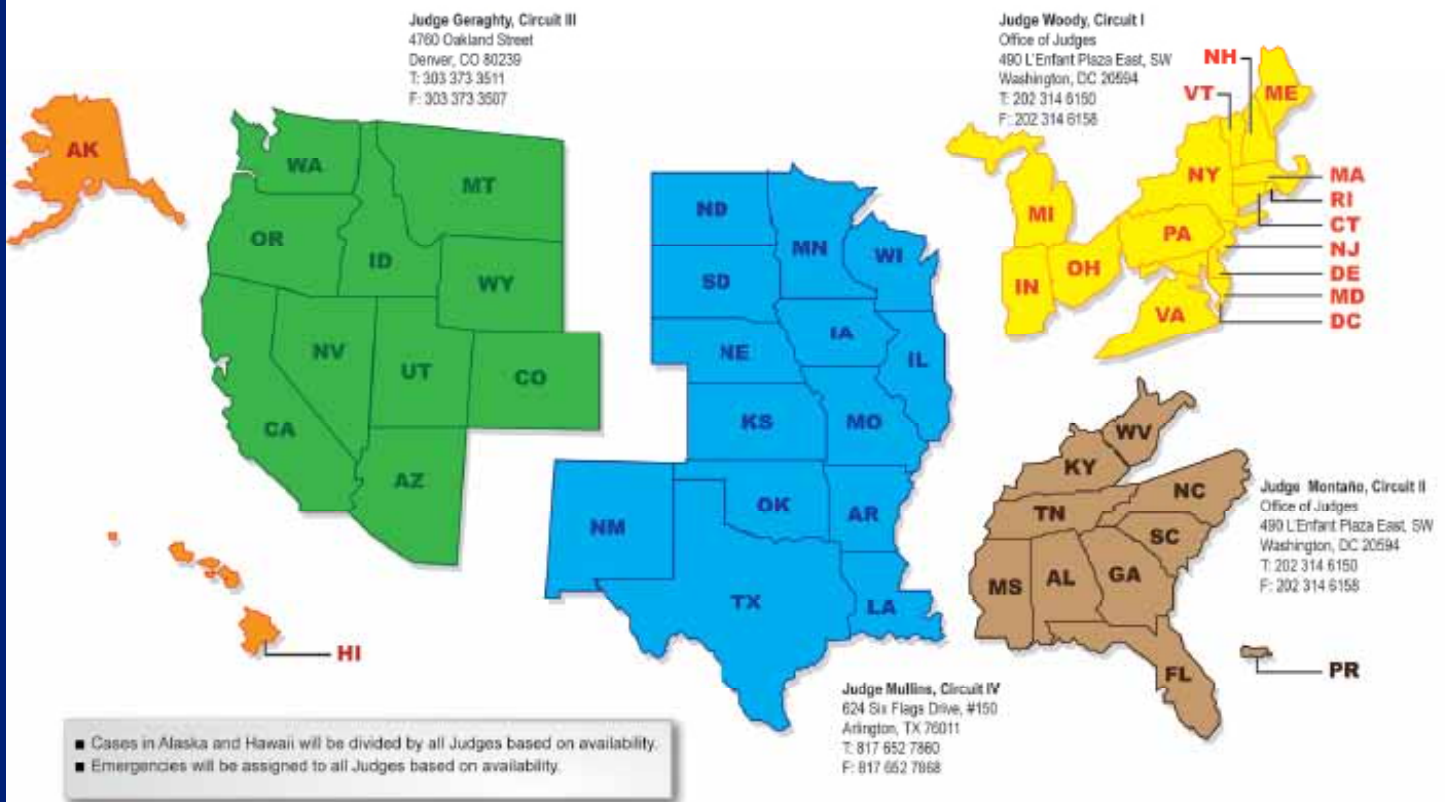


Image courtesy of National Transportation Safety Board, current as of April 1, 2013

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