



# Air & Transportation Law Reporter

International  
Air & Transportation  
Safety Bar  
Association



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2019



# President's Message

by  
Marc Warren

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I am excited to report that our November "Blue Angels CLE" is less than three months away! Greg Winton and Tony Jobe, and their team of conference elves, have been working hard to make this the "best ever" IATSBA conference, which will be held at the beautiful Pensacola Beach Hilton from the evening of Tuesday, November 5, through midday on Friday, November 8.

The conference will offer an exciting mix of speakers and panelists covering a range of aviation topics from flying cars through pilot training to drones, and feature a special Blue Angels airshow with a reception, dinner, and Nall Safety Award presentation at the Naval Aviation Museum on Wednesday, November 6. Our conference planners have built an entertaining and educational program, with maximum CLE credit, and included presentations on ethics, diversity, and technology, all meeting

Florida CLE requirements (recognized by other jurisdictions).

Ample time has been built into the schedule to socialize and network with other aviation lawyers and their families. The Hilton is offering an incredible rate, and agreed to make it available before and after the conference, so don't miss this unique opportunity to mix socializing and scholarship. Details on the program and registration information can be found at: [www.iatsba.org](http://www.iatsba.org). Register early – and don't forget to make travel arrangements.

Please encourage others to come with you, whether they are current members or non-member friends and colleagues who are looking for an enjoyable "one stop" CLE opportunity. I bet that non-members who come to our conference will like what they see and join IATSBA. I look forward to seeing you at Pensacola Beach!



**MARC WARREN** is a partner and co-chair of the Aviation and Aerospace practice group at Jenner & Block, LLP. Prior to joining Jenner & Block, Marc chaired the Aviation practice group at Crowell & Moring, LLP. He served as acting chief counsel, deputy chief counsel, and deputy chief counsel for operations of the Federal Aviation Administration (FAA). Before joining the FAA, he retired after 26 years of service in U.S. Army Judge Advocate General's Corps.

# 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 latest, and certainly long overdue, edition of the IATSBA Reporter.

As some of you approach, or are already enjoying, the fall season, here in Texas we are still enjoying summer. I love it! But in addition to the start of college and professional football (finally), the fall aviation conference season is also upon us.

The National Business Aviation Association, Corporate Jet Investor, our own International Air and Transportation Safety Bar Association, and the Aircraft and Owners Pilot Association, to name a few, will all be hosting conferences or seminars. Unmanned aircraft systems/drones, urban air mobility, illegal charter, FAA enforcement and medical certification, and civil liability exposure faced by aircraft operators will all be front and center for the aviation industry at these events.

I always enjoy the opportunity to meet with clients, colleagues and industry professionals to learn about the latest and greatest in the aviation industry, as well as the current legal issues faced by the industry. It is also an honor to present at these conferences and share my analysis and legal perspective regarding these important issues when I have the chance.

And, of course, the upcoming winter and spring will include

conferences held by the Lawyer-Pilot Bar Association, Embry Riddle, and various state associations. All of these aviation related conferences and seminars are important tools for staying informed and engaging with the industry in which we practice. Now, if I could only make a business out of just attending aviation conferences and events, I might be on to something!

Speaking of conferences, in this issue you will find information regarding IATSBA's upcoming annual conference in Pensacola, Florida including registration, hotel, events and continuing legal education presentations. As usual, it will be a conference not to be missed. Make sure you register and reserve your hotel room early!

Additionally, this edition of the Reporter includes several articles that will be of interest to our members. Our president, Marc Warren, has written an article on organization designation authority which is very timely given the ongoing saga with the Boeing 737MAX. John Van Geffen discusses the issue of civil liability in the context of the Pilot Records Improvement Act.

You will also find an article written by your editor analyzing application of the Convention on the International Sale of Goods in the context of aircraft transactions involving international parties. And Mike Dworkin provides us with a brief eulogy for Captain Al Haynes, who was the first recipient

# Editor's Column

...continued

of IATSBA's Joseph T. Nall Award in 2009.

Not to miss an opportunity to repeat my plea for submissions, if you would like to submit an article but you have questions regarding topic, availability etc., please feel free to contact me. I am more than happy to answer questions and help you through the process. Getting published in the Reporter is about as easy as it can get. And it is great resume fodder!

Also, 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'm sorry for the delay in getting this edition of the Reporter published and appreciate your patience. I hope you will find the articles in this issue interesting and informative.

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IATSBA: International Air  
& Transportation Safety Bar Association

# BLUE ANGELS LAW CONFERENCE

NOVEMBER 5-8 2019

PENSACOLA, FLORIDA





**REGISTRATION  
IS NOW OPEN**

The sooner you register the more you save.

## Blue Angels Air Law Conference in Pensacola, Florida

The International Air and Transportation Safety Bar Association is pleased to announce the dates of its next annual conference for 2019. This year, we will return to Pensacola in November to see the culmination of the United States Navy's Blue Angels air show schedule.

Check out the beautiful Hilton Hotel facilities.



See our Program Schedule of Events and Speakers.

The Blue Angels Law Conference brings together an exciting mix of speakers and panelists covering a broad range of aviation topics, from flying cars to pilot training to drones.

In addition to this terrific subject matter CLE, there will be ample opportunities for entertainment and networking, including the annual Gala Dinner, a Blue Angels Air Show, and of course the white sand beaches of Pensacola.

The full program is now posted, so please take a look for yourself!

## Get the Members' Discounted Registration Rate



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Join IATSBA or renew your membership to get our best offer on your conference registration.





# 2019 IATSBA BLUE ANGELS LAW CONFERENCE REGISTRATION

*November 5 – 8, 2019*



***It pays to be a member!***

Register for a membership and the conference before September 21, 2019 and you could save to save up to \$150. Be sure to renew your membership if it's been a while or turn on auto-renew for your convenience.

Registration Type	Through Sep. 20, 2019	Sep. 21, 2019 – Oct. 21, 2019.	After Oct. 21, 2019
IATSBA Member	\$450	\$490	\$525
Government Employee	\$420	\$420	\$420
Full-Time Student	\$400	\$420	\$420
Non-Member	\$550	\$575	\$595





## Additional Tickets

*Additional Included Events Tickets for Guests of Registrants (Guest tickets limited to spouses or family members of paying registrants. Must accompany conference registrant to the GALA dinner. Limited seating, first come first served.)*

All Inclusive (\$422.00)

Awards Ceremony and Dinner Only (\$75.00)

Cocktail Welcome Reception and Dinner Only (\$70.00)

Lunch(es) (\$40.00)

Breakfast(s) (\$30.00)

### IF YOU ARE A SPONSOR:

Sponsors at the \$5,000 level receive **2 FREE** conference registrations and sponsors at the \$3000 level receive **1 FREE** conference registration.

If you would like to register using one of these free slots, please contact the Membership Director at [vlesch@kreindler.com](mailto:vlesch@kreindler.com).

### IF YOU WOULD LIKE TO BECOME A SPONSOR:

There are many ways to get involved if your firm or company is interested in sponsoring this year's conference.

Please contact Program Chairman Greg Winton at (301) 529-5660 or [Greg@aviationlawexperts.com](mailto:Greg@aviationlawexperts.com) to learn more about sponsorship options.

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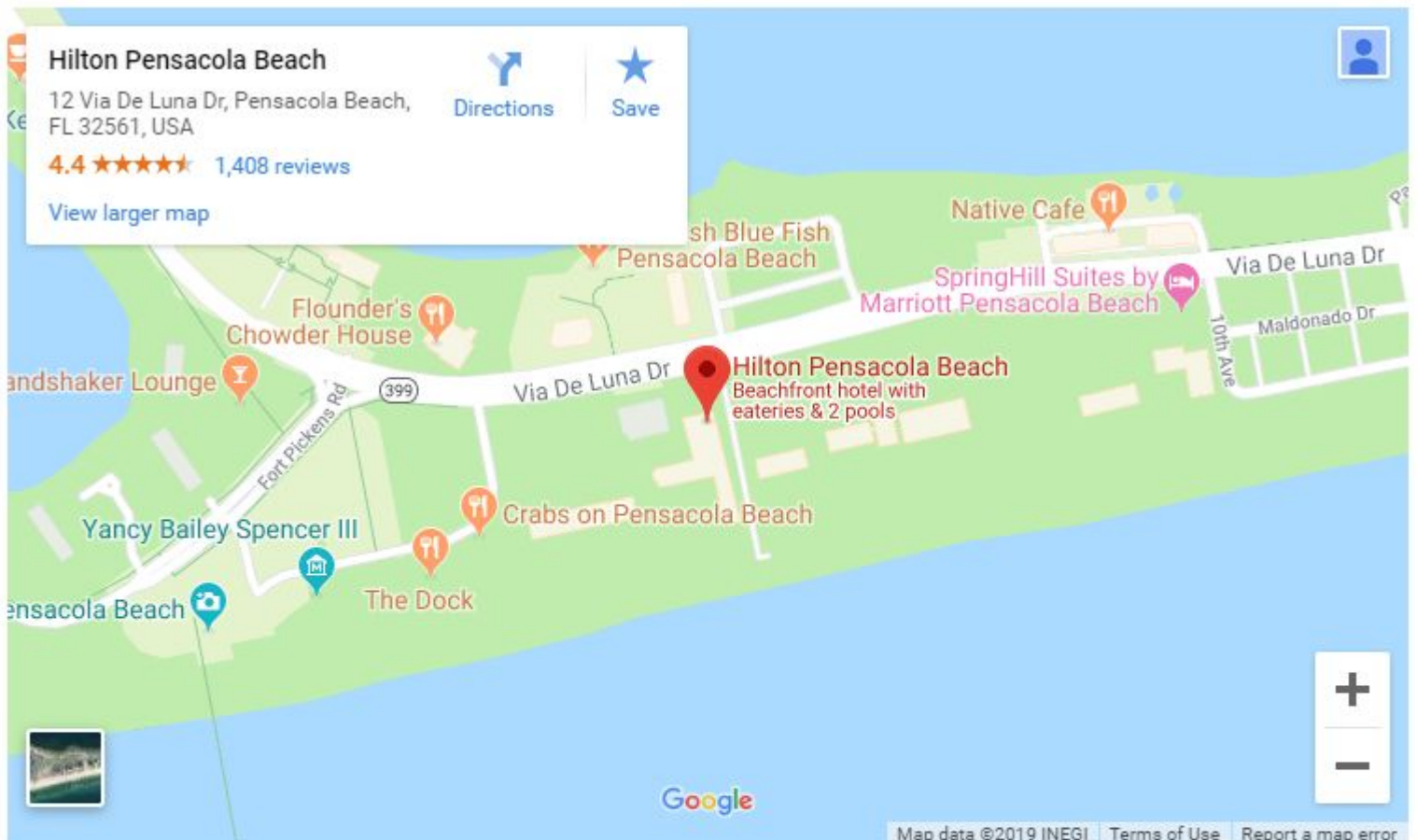


## Reserve Your Hotel Room Today!

Act now to reserve your room at the discounted IATSBA rates, starting at only **\$129** per night, or only **\$149** per night for a view of the beautiful Pensacola beach.



The hotel block will remain open until October 13, 2019, subject to availability of remaining rooms. Reservations can be changed or cancelled without penalty up until 4:00 P.M., three days prior to arrival.





## Conference Schedule

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Here's a quick overview of conference events taking place in Pensacola:

### *Tuesday, November 5, 2019*

Afternoon - Registration

Evening - Cocktail Reception

### *Wednesday, November 6, 2019*

Morning - CLE Program

Afternoon - Bus to the Naval Air Station, Pensacola

Blue Angels Air Show

Evening - Dinner at the Naval Museum

### *Thursday, November 7, 2019*

Morning and Afternoon - CLE Program

Evening - "Low Country" Dinner at Hilton

### *Friday, November 8, 2019*

Morning - CLE Program Conclusion





# BLUE ANGELS AIR AND TRANSPORTATION LAW CONFERENCE

Presented by the International Air and Transportation Safety Bar Association

November 5 – 8, 2019  
The Hilton at Pensacola Beach, Florida

FEATURING THE BLUE ANGELS AIRSHOW AND GALA DINNER AT  
THE NATIONAL NAVAL AVIATION MUSEUM

SPONSORED BY:

KREINDLER & KREINDLER  
TRIPP SCOTT

## PROGRAM SCHEDULE OF EVENTS

Tuesday, November 5, 2019

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3:00pm – 6:00pm      **Conference Registration**  
Pensacola Beach Hilton Lobby  
*Sign In, Pick up Conference Materials*

6:00pm – 9:00pm      **Welcome Reception / Dinner**  
Pensacola Beach Hilton Poolside

Wednesday, November 6, 2019

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- 7:30am – 8:30am      Registration and Continental Breakfast  
Pensacola Beach Hilton Ballroom A
- 8:30am – 8:45am      **Opening Remarks**  
**Marc Warren**, IATSBA President, Jenner & Block, LLP, Washington, DC
- 8:45am – 9:35am      **General Aviation Manufacturers' 2019 Challenges and Opportunities**  
**Lauren L. Haertlein**, Attorney, GAMA, Washington, DC  
**Gary Halbert**, Holland & Knight, Washington, DC
- 9:35am – 10:15am      **Recent Developments: Aviation Law Update**  
**Lisa Heller**, Condon & Forsyth, LLP, Miami, FL
- 10:15am – 10:30am      Coffee Break
- 10:30am – 11:00am      **AOPA Legal Services Plan: Common Calls From Pilots**  
**Jared Allen**, AOPA, Frederick, MD
- 11:00am – 12:00pm      **Ethics (Meets Florida CLE Ethics Requirement)**  
**Gregory Winton**, The Aviation Law Firm, Annapolis, MD
- 12:15pm – 1:00pm      Buffet Lunch
- 1:15pm                  Buses depart from Hilton to Pensacola NAS for Airshow



2:30pm – 3:30pm	<b>Blue Angels Airshow</b>
3:45pm	Buses depart from Airshow to Naval Aviation Museum
4:00pm – 5:00pm	<b>Tour Naval Aviation Museum</b>
5:00pm – 6:00pm	Cocktail Hour
6:00pm – 8:00pm	<b>Gala Dinner</b> Naval Aviation Museum Atrium
8:00pm – 8:45pm	<b>Joseph T. Nall Safety Award Presentation</b>
9:15pm	Buses depart from the Naval Aviation Museum to the Hilton

## Thursday, November 7, 2019

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8:00am – 8:30am	Breakfast Pensacola Beach Hilton Ballroom A
8:30am – 9:30am	<b>Current Developments in Pilot Training and Certification</b> <b>Paul Alp</b> , Jenner & Block, LLP, Washington, DC
9:30am – 10:20am	<b>Diversity (Meets Florida Bar CLE Requirement)</b> <b>Bobbi Wells</b> , Vice-President of Safety & Airworthiness, Federal Express, Memphis, TN

10:20am – 10:30am Coffee Break

10:30am – 11:30am **737 MAX and Autonomy**

**Justin Green**, Kreindler & Kreindler, LLP, New York, NY

**Vincent Lesch**, Kreindler & Kreindler, LLP, New York, NY

**Capt. Noah Flood**, Aviation & Autonomy Consultant, Washington, DC

**Lou Nemeth**, Flight Safety and CAE Simulators, Daytona, FL

11:30am – 12:30pm **App Based Air Transportation and Urban Air Mobility**

**David Tochen**, Fox Rothschild, LLP, Tyson's Corner, VA

**Ben Klein**, Skyrise, New York, NY

**Greg Bowles**, Joby Aviation, Santa Cruz, CA

*Insitu and Opener Panelists Invited*

12:45pm – 1:45pm Lunch

**Gulfstream Aerospace Presentation**

**Chip King**, Test Pilot, Savannah, GA

1:45pm – 2:45pm **FOIA and APA: FAA and NTSB Cases**

**Tony B. Jobe**, Law Offices of Tony B. Jobe, Covington, LA

**John Gagliano**, Law Offices of John Gagliano, Philadelphia, PA

**Jamie Rodriguez**, Holland & Knight, Washington, DC

*FAA Speaker Invited*

2:45pm – 3:15pm **The Drone Decade: The Good, The Bad, & The Ugly**

**Dr. Joe Vacek**, University of North Dakota, Grand Forks, ND

**John Carter**, IXI Technologies, Loma Linda, CA

*Speaker on European Perspective Invited*

3:15pm – 3:30pm Coffee Break



3:30pm – 4:30pm

## **Federal Preemption: Field and Conflict**

*PANEL:*

**Justin Green**, Kreindler & Kreindler, LLP, New York, NY

**Jonathan Hoffman**, MB Law Group, LLP, Portland, OR

**Katherine Slavin**, Gordon, Rees, Scully, Mansukhani, Philadelphia, PA

*MODERATOR:*

**Tony B. Jobe**, Law Offices of Tony B. Jobe, Covington, LA

4:30pm – 5:30pm

## **IATSBA Board of Directors Meeting**

6:00pm – 8:00pm

## **"Low Country" Dinner**

Pensacola Beach Hilton

*SPEAKER:*

**TBA**

**Friday, November 8, 2019**

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8:00am – 8:30am

## **Breakfast**

Pensacola Beach Hilton Ballroom A

8:30am – 9:30am

## **Human Intervention Motivation Study (“HIMS”): Effect on Treatment, FAA & Legal Outcomes**

**Dr. Penny Giovanetti**, Deputy Federal Air Surgeon, Federal Aviation Administration, Washington, DC

**Dr. Lawrence Blumberg**, HIMS-AME, Ft. Walton Beach, FL

**Dr. Bruce Bohnker**, HIMS-AME, Tampa, FL

**Dr. Joseph Tordella**, HIMS-AME, Ft. Lauderdale, FL

9:30am – 10:30am

## The Changing Aviation Insurance Market

*PANEL:*

**Garrett L. Pendleton**, Vice President, AIG Aerospace, Atlanta, GA

**Michael R. Barrett**, Senior Vice President, United States Aircraft Insurance Group (USAIG), Atlanta, GA

**J. Arthur Mozley**, Founding Member, Mozley Finlayson Loggins, LLP, Atlanta, GA

**Jeremy I. Hager**, Senior Vice President – Aviation Claims Practice, Leader, Marsh JLT Specialty, New York, NY

*MODERATOR:*

**Alison L. Squiccimarro**, Attorney, Law Offices of Paul A. Lange, LLC, Stratford, CT

10:30am – 11:15am

## ASAP Is Coming To Part 135 Operators

**Jim Waldon**, Paramount Law Group, Seattle, WA

11:15am – 12:15pm

## Technology (Meets Florida Bar CLE Requirements)

**Mohammed Faruqi**, Ft. Lauderdale, FL

12:15pm – 12:30pm

## Closing Remarks

**Marc Warren**, IATSBA President, Jenner & Block, LLP, Washington, DC

12:30pm

ADJOURN





# Organization Designation Authorization Demystified

by  
Marc Warren

*“THERE IS NOTHING EITHER GOOD OR BAD, BUT THINKING MAKES IT SO.”*  
—HAMLET, ACT 2, SCENE 2

The FAA has historically delegated limited certification authority to various private persons or entities. Delegation is authorized by statute and allows the FAA to focus its resources on safety critical or novel certification issues while allowing subject matter experts from private industry to perform specific tasks as agency representatives. Recently, Organization Designation Authorization (“ODA”) has become a hot topic, the subject of multiple investigations and public criticism, some of it uninformed. The future of ODA is not necessarily in doubt, but the nature and scope of it may change.

This season of discontent over delegation authority has taken place in the context of the FAA’s impending rollout of an initiative, long in the making, to expand the scope of ODA to airman certification. For a number of reasons, the FAA finds itself without sufficient resources to keep up with all the certification functions demanded of it, and, further, sound practical reasons exist for empowering private experts with authority that relieves some of the FAA’s administrative burdens.

Although delegation authority is currently the subject of investigation and debate, pilots are well familiar with individual FAA designees such as medical examiners and check airmen. The FAA’s use of designees is not novel, and ODA merely constitutes

a framework that logically extends the well-established use of individual designees to the enterprise context. This article provides an overview of the ODA system in order to encourage informed discussion about it.

## I. Background: FAA Delegation of Authority

The FAA delegates certification functions to qualified private persons such as engineers<sup>1</sup>, mechanics<sup>2</sup>, pilots<sup>3</sup>, and aircraft dispatchers<sup>4</sup>. The FAA also grants authority to organizations to perform specific certification functions. Both individuals and organizations with delegated authority act as representatives of the FAA and are subject to oversight by the FAA much like persons and organizations within the agency itself.

The agency’s ODA program establishes a process by which organizations obtain authority to allow specific employees to perform delegated functions, defines the nature and scope of such authority, and lays out how delegated work is performed and supervised. Employees of an ODA holder performing ODA functions do not have individual delegated

1 Designated Engineering Representatives (“DERs”).

2 Designated Airworthiness Representatives (“DARs”).

3 Designated Pilot Examiners (“DPEs”).

4 Designated Aircraft Dispatcher Examiners (“DADES”).

authority, although in practice their work is comparable to that of individual designees. An ODA holder, like an individual designee, acts as a representative of the FAA with respect to clearly defined functions within the scope of its authority.

An organization may obtain ODA to perform functions relating to engineering, manufacturing, operations, airworthiness, or maintenance.<sup>5</sup> The agency currently issues ODA in connection with the following types of certifications:

- Type certification;
- Production certification;
- Supplemental type certification;
- Technical Standard Order authorization;
- Major repair, alteration, and airworthiness;
- Parts manufacturer approval;
- Airman knowledge testing; and
- Air operator certifications for Rotorcraft External-Load certificates.

The nature and scope of ODA in the manufacturing context is often misunderstood. A holder of type certification (“TC”) ODA may not issue an original type certificate for a new type design, although it may issue airworthiness certificates for individual aircraft. Functions a TC ODA may perform include review and approval of technical data; compliance and conformity determinations; and acceptance of instructions for continued airworthiness.<sup>6</sup> In connection with the approval of new aircraft type, a TC ODA

holder may review design data and find compliance with the regulations, draft a type certificate data sheet, and submit a data package supporting certification to the agency. The FAA must then review the ODA’s data package, assess the ODA’s work, and then, only when the FAA ultimately concurs with the ODA’s conclusions, issue the type certificate.<sup>7</sup> A production certificate (“PC”) ODA holder may not issue an original production certificate. It may, however, determine that a product conforms to its type design and is in a condition for safe operation.<sup>8</sup>

In addition to the above functions, the FAA has been working on an initiative to extend ODA to allow companies to perform airman certification functions.<sup>9</sup> Originally slated for public roll-out this year, whether or to what extent the initiative has been delayed or sidetracked due to the ongoing debate over ODA is presently unclear.

## II. Organization Designation Authorization 101

On ODA holder must establish a discrete unit in its organization that reports to the FAA and, in effect, acts as the FAA’s agent with respect to delegated activities. Even though the ODA holder pays the unit members’

<sup>7</sup> Id. ¶ 8-6j.

<sup>8</sup> Id. ¶¶ 9-1 - 9-6. A designated manufacturing inspection representative (“DMIR”) is an individual employed by a production approval holder who conducts conformity inspections during the manufacturing process and issue airworthiness certificates and special flight permits. See 14 CFR § 183.31.

<sup>9</sup> The term “airman” in this context refers to any person who holds an “airman certificate,” which encompasses, inter alia, pilots, mechanics, and dispatchers.

<sup>5</sup> 14 CFR § 183.41(a).

<sup>6</sup> See generally Organization Designation Authorization Procedures, Order 8100.15B, ¶¶ 8-1 – 8-2 (May 16, 2013).



salaries, unit members ultimately answer to the FAA when they are wearing ODA hats. Communications between ODA unit members and the FAA typically run through a holder's employee known as an ODA administrator. The FAA conducts oversight through an organization management team ("OMT") within the agency comprising personnel and subject matter experts appropriate to the activities of the holder. An OMT manages the holder's activities, approves procedures, provides guidance and feedback, and reviews the organization's work to assess its performance.<sup>10</sup> The OMT may place limitations on the ODA holder's authority as appropriate to reflect the staffing, experience, qualifications, and capabilities of the organization.

## A. Issuance of ODA

The basis FAA's authority to delegate certification functions to private persons and organizations is statutory:

Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to—

- (A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and
- (B) issuing the certificate.<sup>11</sup>

The FAA may delegate "any function determined appropriate" under the statute to an ODA holder consistent with the holder's qualifications.<sup>12</sup> The regulations governing designees and ODA are found in 14 CFR Part 183. In order to qualify for ODA, an applicant must:

- (a) Have sufficient facilities, resources, and personnel, to perform the functions for which authorization is requested;
- (b) Have sufficient experience with FAA requirements, processes, and procedures to perform the functions for which authorization is requested; and
- (c) Have sufficient, relevant experience to perform the functions for which authorization is requested.<sup>13</sup>

The FAA grants ODA when it determines that the applicant can show that it meets the above criteria and:

- The organization's FAA workload is large enough to warrant approval;
- The FAA will benefit from granting ODA; and
- The FAA has the resources available to manage the authorization.<sup>14</sup>

If the applicant meets all requirements and the FAA finds that a need exists for delegating the

<sup>10</sup> See Order 8100.15B, ¶¶ 5-2, 5-3 and Appendix F, ¶ 23.

<sup>11</sup> 49 U.S.C. § 44702(d)(1).

<sup>12</sup> 14 CFR § 183.49(a).

<sup>13</sup> 14 CFR § 183.47.

<sup>14</sup> Order 8100.15B, ¶ 2-1.

requested function, the agency issues an “ODA Letter of Delegation” that states the type(s) of ODA authorized. The letter is not transferrable and is effective through a date shown on the document itself.<sup>15</sup> The FAA grants new ODA for a duration of two years, and may renew ODA for periods of two to five years at a time if the holder successfully completes a review.<sup>16</sup>

## B. Organizational Requirements

The FAA believes that a “key to success” of the ODA system is that the holder’s executive management “fully supports” the ODA unit.<sup>17</sup> In furtherance of this principle, the FAA requires senior management of the organization to sign a memorandum of understanding (“MOU”) in which the company expressly accepts the responsibilities attendant with ODA and acknowledges its obligations.<sup>18</sup> All persons in the organization that manage members of its ODA unit “in any capacity” must read and understand the MOU.

At least one person in the ODA unit must be identified as the ODA administrator.<sup>19</sup> An ODA administrator is responsible for ensuring that the organization performs all authorized functions in accordance with the

regulations and its procedures manual. The administrator “must be in a position that provides authority to act in the FAA’s interest.”<sup>20</sup> In particular, he or she must:

[R]eport to a level of management that is senior enough to enable the ODA unit to administer duties for the FAA without undue pressure or influence from other organizational segments or individuals.<sup>21</sup>

Minimum requirements for an ODA administrator include:

- Technical experience with the functions performed under ODA;
- At least five years of experience working with the FAA on projects similar to those authorized; and
- Sufficient knowledge, judgment, and integrity.<sup>22</sup>

The other persons in the unit must have the “experience and expertise”<sup>23</sup> to perform the delegated functions, and must:

- Be in a position that provides “enough authority and time to perform duties without pressure and influence from other parts of the organization”;
- Have no “conflicting restraints” while performing authorized functions; and
- Must not have

<sup>15</sup> 14 CFR § 183.67.

<sup>16</sup> Order 8100.15B, ¶¶ 4-4, 5-8.

<sup>17</sup> *Id.*, ¶ 3-4.

<sup>18</sup> *Id.*, ¶ 3-7 and Appendix A, Fig. 14. See also *id.* at ¶ 4-4 (“At least one member of the applicant’s senior level management, typically the organization’s chief executive officer, must sign the MOU.”)

<sup>19</sup> 14 CFR § 183.51(a). An organization may have more than one ODA administrator. The lead administrator must be a full-time employee, while alternate administrators need not be full time employees but must meet all qualification requirements. See Order 8100.15B, ¶ 3-5.

<sup>20</sup> Order 8100.15B, ¶ 3-4.

<sup>21</sup> *Id.*, ¶ 3-6.

<sup>22</sup> *Id.*, ¶ 3-5.

<sup>23</sup> 14 CFR § 183.51(b), (c).



“responsibilities that conflict with those of the ODA unit.”<sup>24</sup>

Proposed ODA unit members must be prescreened, evaluated, and approved by the FAA.<sup>25</sup> Each member must receive initial and recurrent training every two years from the ODA holder, and must also attend periodic FAA training seminars and standardization workshops.

The ODA holder must have an FAA-approved procedures manual that spells out all pertinent information about the holder’s program, including, inter alia, authorized functions and limitations, procedures, organizational structure, training requirements for personnel, record keeping processes, etc.<sup>26</sup>

### C. Obligations of ODA Holders

In performing delegated functions, ODA holders must generally follow procedures described in FAA orders that apply to agency personnel that perform analogous functions. For example, a holder that issues type certificates should, to the extent possible, follow procedures contained in Order 8110.4 pertaining to type certification. If the holder cannot literally comply with agency procedures, the FAA may to approve alternate procedures that are sufficiently close to FAA internal procedures with “minimal adaptations.”<sup>27</sup>

An ODA holder has a number of ongoing obligations, which include:

24 Order 8100.15B, ¶ 3-4.

25 Id., ¶ 3-13.

26 See generally 14 CFR § 183.53(c).

27 Order 8100.15B, ¶ 2-7.

- Providing ODA unit members “sufficient authority to perform the authorized functions;” and
- Ensuring that no “conflicting” non-ODA unit duties or “other interference” affects the performance of authorized functions by ODA unit members.<sup>28</sup>

The regulations require ODA holders to cooperate with the FAA in its oversight of the unit,<sup>29</sup> allow inspections “at any time and for any reason,”<sup>30</sup> and comply with detailed recordkeeping requirements.<sup>31</sup> The regulations also impose a variety of notification, error trapping, and continuous improvement obligations.<sup>32</sup> Any change involving ODA administrators or the structure of the holder or unit requires advance notice to the FAA.<sup>33</sup> An ODA holder may not perform any authorized function if a change in facilities, resources, or organizational structure affects how the holder performs that function,<sup>34</sup> and must notify the agency of any change that could affect the holder’s ability to comply with applicable regulatory requirements within 48 hours of the change occurring.<sup>35</sup>

### III. Current Developments

The FAA has been working on an initiative to expand the scope of ODA to allow holders to perform delegated functions relating to airman

28 14 CFR § 183.57(b), (c).

29 14 CFR § 183.57(d).

30 14 CFR § 183.59.

31 14 CFR § 183.61.

32 See generally 14 CFR § 183.65.

33 Order 8100.15B, ¶ 3-11.

34 Id.

35 14 CFR § 183.57(e).

# ODA Demystified

...continued

certification. This expansion will authorize holders of certificates under Parts 121, 141, 142, or 146 to obtain airman certification (“AC”) ODA, which will allow them to perform functions like individual designees such as DMEs, DPEs, Part 142 training center evaluators (“TCEs”), and aircrew program designees (“APDs”).<sup>36</sup> In addition to easing administrative burdens and delays, this expansion of ODA will afford air carriers opportunities to potentially increase the throughput of their training and checking programs. For instance, an air carrier could establish an ODA unit that certifies line check airmen, which would likely improve efficiency for both the airline and the FAA.

The qualification requirements for, and procedures used by, AC ODA holders will generally be the same as for analogous individual designees, with the holder having management, training, and oversight responsibility for its unit members.<sup>37</sup> The FAA had intended this year to issue a revision “C” to its primary ODA guidance document, Order 8100.15B, along with a new advisory circular, to describe its policy and processes with respect to the expanded ODA regime.

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<sup>36</sup> Like designated pilot examiners, APDs evaluate and issue certifications to flight crew members of Part 121 and 135 operators.

<sup>37</sup> The FAA recognizes that the structural model for an ODA holder will “vary significantly” depending on the functions, size, and corporate structure of the organization. Order 8100.15B, ¶ 3-4. Describing in detail the anticipated form that an ODA program for airman certification may take will have to await review of the FAA’s impending revised guidance. Nevertheless, it is reasonable to expect that the revised guidance will substantially similar to the existing guidance, and that basic principles of existing ODA will likely carry over to airman certification ODA.

Ongoing reviews of the aircraft certification process, including questions regarding the appropriateness of the FAA’s authority to delegate, could potentially change the fundamental nature of ODA or impact the expansion of ODA to airman certification. Last April, for instance, the DOT formed a Special Certification Committee on Design and Product Certification (the “SCC”). The SCC is tasked with examining the FAA’s certification processes, including the use of ODA and DERs, the agency’s oversight of designees, and to recommend improvements to such processes.

Whether or to what extent these ongoing reviews, or even action by Congress, may ultimately yield changes to ODA cannot be predicted at this time. What should not be forgotten in these investigations and related debates is that ODA is a mature process that reflects a logical extension of the time-tested, successful system of delegation to individual designees. In the current climate, some policymakers may be tempted to throw the baby out with the bathwater by tearing down the entire delegation framework rather than finding ways to improve it where necessary and appropriate. Despite what some commentators argue, however, no evidence exists that the concept of ODA is inherently flawed. Like any complex process, its success and failure depend on the actions of individual people working within a framework of procedures. It should be the subject of continuous scrutiny and improvement, but not unjustified or uninformed attack.



# Civil Liability Under PRIA

by  
John T. VanGeffen

## WHAT AIR CARRIERS, AIR OPERATORS AND PILOTS NEED TO KNOW ABOUT CIVIL LIABILITY UNDER THE PILOT RECORDS IMPROVEMENT ACT

The Pilot Records Improvement Act of 1996 (PRIA), 49 U.S.C.S. §44703(h), formerly known as the Airline Pilot Hiring Safety Act, is intended to promote aviation safety through the hiring of qualified pilots by requiring Federal Aviation Regulations (FAR) Part 121 and 135 air carriers, 125 and 135 air operators, and 91(K) fractional ownerships operators to request, receive and evaluate a potential pilot hire's employee file from the each of the pilot's employers during the previous five years. FAR Section 91.147 air tour operators are limited to PRIA's requirements covering drug and alcohol testing records.

As detailed in the FAA's Advisory Circular No. 120-68H (supplemented by FAA Order 8000.88) and AFS-620 PRIA 012 (Version 1.4/Approved 5-12-2017), a pilot's PRIA file is required to include records of training, experience, qualification and safety (disciplinary and drug and alcohol tests). Pilots seeking new employment must fill out request forms that release records from the FAA, previous employers and the National Driver Registry (NDR). The only items that are expressly prohibited from disclosure are records more than 5 years old, unless they concern revocation or suspension of an airman certificate or motor vehicle license (the FAA will report any formal closed certificate actions indefinitely).

What should a pilot expect? According to AC 120-68H a pilot should expect the protection specified in the PRIA statute (which is minimal) and "fair and timely treatment... concerning the process for the request, transfer, receipt, evaluation, and maintenance of the appropriate PRIA-related records." While privacy is supposed to be protected by requiring potential employers to first obtain the pilot's signature on the releases discussed above, there is no explicit recourse for a pilot who successfully contests the validity of his PRIA file under the statute.

Moreover, many hiring employers or former employers require pilots to sign a release from liability for records other than drug and alcohol testing records. But, as explicitly stated in AC 120-68H, any such releases do not apply if an employer furnishes information known to be false or maintained in violation of a criminal statute. While the FAA could initiate an enforcement action against an air carrier or operator who fails to comply with PRIA requirements, the only recourse for pilots under PRIA is to request a copy of their file and ask for corrections of inaccuracies and/or submission of a grievance to be included with their file.



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*So, what happens when a pilot believes his or her PRIA file contains something false or outside the scope of what was intended by PRIA?*

Typical lawyer answer; it depends. Let me explain, or at least highlight the potential pitfalls, with two civil cases involving PRIA that arose in opposite sides of the country with completely opposite verdicts.

When an Employer is in the wrong.

In the first scenario, in *Nelson v. Tradewind Aviation, LLC*, 155 Conn. App. 519 (February 24, 2015), a jury found that Tradewind Aviation hired Mr. Nelson as a second in command pilot on April 12, 2007; that Mr. Nelson attended the Tradewind’s mandatory training program; passed “ground school;” successfully completed a “flight check ride” and then went on to copilot 137 flights with 13 different PIC’s. Tradewind never issued Mr. Nelson a written negative performance review or disciplinary action.

The jury additionally determined that Tradewind routinely employed only a third of its pilots during the six-month off-season and that during the period when Tradewind usually determined which pilots it would keep on, the Assistant Chief Pilot sent Mr. Nelson for a drug test. While Tradewind claimed the reason for the test was bloodshot eyes, fidgeting and failure to make eye contact—i.e., for cause, Tradewind indicated on the subject drug test intake forms that the test was “random selection”, not due to pilot performance.

While the test returned negative, Tradewind still advised Mr. Nelson

that they were going to terminate his employment, suggesting Mr. Nelson should instead resign because it would “look better” to future employers. Mr. Nelson refused and Tradewind laid him off, issuing termination papers reflecting that he had been laid off due to “lack of work.”

Fast forward to Mr. Nelson’s application to a new air carrier and Tradewind’s response to the PRIA request stating that Mr. Nelson was “Terminated (Involuntary)” and that he had been removed from flying status for a “performance or professional competency reason”, providing a letter stating that Mr. Nelson was terminated for failing to follow company standards despite opportunities for improvement and additional training” and including a forwarding coversheet that stated “[The plaintiff’s] probable cause drug test result. The [defendant] was concerned that poor performance may have been caused by the use of drugs.”

On top of all this, Tradewind even failed to provide Mr. Nelson with the requisite twenty-day notice of receiving the PRIA request and then only sent Mr. Nelson copies of his successful training records but not copies of the file that Tradewind had provided to the prospective employer—i.e., Tradewind wanted to hide from Mr. Nelson that management had apparently not only changed the reason for termination, but had altered the drug test records and alleged disciplinary actions that did not exist in his file.

Obviously, Mr. Nelson’s job offer with the new employer was revoked and Mr. Nelson sued Tradewind for defamation with malice and for the



intentional interference with a business expectancy. Mr. Nelson was awarded economic, noneconomic and punitive damages.

When employee expectations are set too high.

In the second scenario, *Boring v. Alaska Airlines*, 123 Wn. App. 187, (September 13, 2004), the Plaintiff sued for wrongful discharge in violation of public policy, defamation and invasion of privacy based on the belief that his previous employer was prohibited from disclosing in a PRIA response a disciplinary action that had been previously overturned.

In short, Mr. Boring had applied to Alaska Airlines and received an offer that was later revoked after receipt of a PRIA response from Mesa Air Group citing a disciplinary action wherein Mr. Boring had been suspended for insubordination. The suspension had been overturned following a grievance hearing before the pilots' union and Mesa rescinded the termination and reinstated Boring's employment without loss of pay.

Mr. Boring claimed in his lawsuit that because PRIA does not require the disclosure of overturned disciplinary actions he was simply exercising his right to privacy by not mentioning the disciplinary action in his application.

The Court held that while PRIA recognizes the privacy rights of pilots in those records that air carriers and operators are required to provide to each other, PRIA neither prohibits air carriers from requiring pilot applicants to disclose disciplinary action that were subsequently rescinded, nor prohibits the firing of a pilot who falsely reports

that there has been no such disciplinary action. "Neither the promotion of air safety through the hiring of qualified pilots nor the protection of the privacy of pilots as provided in the act is placed into jeopardy when an air carrier asks a pilot who applies for employment whether he or she has ever been suspended, terminated, or otherwise disciplined by any previous employer, regardless of whether the action was subsequently overturned, and no policy promulgated by the act permits such a pilot to lie or otherwise fail to reveal the information once it is requested." (*Id.* at 18)

In other words, Alaska Airlines rescinded its job offer because Mr. Boring did not truthfully respond to questions during the hiring process, not because of the publication of a previously overturned disciplinary action.

What are the main differences between these two cases?

I would argue that in the first instance you have an employer that not only published unsubstantiated, if not malicious, information about a pilot that clearly contradicted the employer's previous statements, but the employer willfully denied the pilot an opportunity to review and correct the record, whereas in the second instance you have the simple matter of an employer providing true, albeit superseded, information that is not expressly required by PRIA.

While those who practice law or work in HR may think this is an easy delineation to understand, the issues surrounding a pilot employee's PRIA file can become murkier quickly when

faced with the following situation:

*What happens when an employer has information (unsubstantiated or not) in an employee's PRIA file that is not required to be held or disclosed under PRIA and the employee has explicitly requested that the employer remove the document(s) from his or her file?*

By way of example, our firm has represented two different pilots with similar complaints against the same airline. In the first case *John Doe* had requested that his previous employer provide him with a copy of his PRIA file only to find out that the airline had included two non-safety sensitive HR complaints involving "failure to restock drink cart" and "failure to appear at work". Obviously a pilot's job description does not generally include restocking drink carts and in this case the client advised that the "failure to appear at work" writeup stemmed from him refusing to go in on his day off to act as a baggage handler. Luckily for the client, the airline was quick to respond and agreed to remove the infringing HR complaints.

*But what would happen if the Employer refused? What would happen if the pilot had already lost a job opportunity before learning of the non-safety sensitive HR complaints?*

In the second case, *Jane Doe's* PRIA file contained a corrective action form covering a personnel non-safety sensitive writeup not required by PRIA. While at first glance this would appear to simply fall under the "not-required-by-PRIA-but-still-true" category", Ms. Doe had made multiple requests that the infringing record be removed from

her file. The airline employer promised to correct the file but failed to do so and Ms. Doe had multiple employment offers revoked due to background checks that included the infringing corrective action form.

In Mr. Doe's example there were no economic damages and the employer complied so there was no reason to go any further whereas in Mrs. Doe's example there was clearly loss of income as a result of the employer's publication and there is arguably no qualified privilege available under PRIA without showing "good faith compliance."

## Conclusion

As the cases and examples above illustrate, case law on this topic is not yet fully developed, but there are definitely a couple clear takeaways for both pilots and air carriers/operators.

If you are a pilot, it is extremely important that you avail yourself of your right to request, receive, review, contest and/or correct your employee file. Keep in mind that if you wait until after a PRIA request is made to inspect your file, you will have to explain the situation to both your prospective and past employer.

For air carriers, air operators, 91K fractional owners, and 91.147 tour operators, it is essential that you train your staff on how to (i) maintain PRIA files, (ii) respond to PRIA requests, (iii) know what documentation should be included, and (iv) communicate with employees to ensure that no unnecessary liability exposure is created.



# Contracts for the International Sale of Goods

by  
Greg Reigel

## APPLICATION OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS TO BUSINESS AIRCRAFT TRANSACTIONS

<sup>1</sup>In the current business aircraft sales' market, it is not uncommon for a transaction involving a business aircraft to have either a buyer or a seller from another country. In those situations, when the parties are drafting their aircraft purchase agreement, they should be aware that the United Nations Convention on Contracts for the International Sale of Goods ("CISG") could apply to their transaction.

### What Is The CISG?

The CISG is an international treaty that was ratified by the United States Senate in 1986. It was intended to be a uniform and fair set of rules for contracts for the international sale of goods to prevent parties to an international transaction from having to analyze the various national or international laws to determine the law applicable to the contract. One of the primary goals of the CISG is to facilitate certainty and predictability of international sales contracts. which, in theory, then decreases transaction costs.

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<sup>1</sup> I would like to thank my firm's summer law clerk, Anna Brooks, for the valuable research she provided on this topic.

By signing on to the CISG, a country adopts the terms of the CISG as its national law. In the case of the United States, the CISG is now part of U.S. federal law. When it applies to a transaction, the CISG generally replaces the uniform commercial code, adopted by most states within the U.S., with its own provisions regarding contract formation, obligations of the parties, breach, remedies, damages, etc.

### When Does the CISG Apply?

The CISG applies to contracts for the sale of goods, between parties whose places of business are in different countries where both countries are contracting states under the CISG (e.g. have agreed to be bound by the CISG). (Note: the CISG only applies to transactions between businesses, not consumer transactions or sales of services). Although the CISG does not apply to the sale of an aircraft,<sup>2</sup> it may apply to parts, components or other goods that are not installed on an aircraft but are

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<sup>2</sup> *UNCITRAL United Nations Commission on International Trade Law. Digest of Case Law on Contracts for the International Sale of Goods, Article 2. 2016 Edition* (<http://www.uncitral.org/pdf>)

otherwise being sold with the aircraft.<sup>3</sup> When a dispute arises out of a contract for sale of goods between parties from contracting states the CISG will apply to the dispute unless the parties elected to exclude its application to their transaction.

Thus, the American business owner of an aircraft who is selling uninstalled parts, components or other goods very well may be bound by the terms of the CISG if it contracts with a party whose “place of business” is in a country that is a signatory to the CISG at the time the aircraft purchase agreement was signed, unless the agreement specifically excludes application of the CISG. Since the United States is a signatory, in order to determine if the CISG applies to a business aircraft transaction an American owner must determine whether the other party’s “place of business” with the closest relationship to the aircraft purchase agreement is also within a contracting state.

Article 10 of the CISG provides, “[I]f a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time or at the conclusion

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<sup>3</sup> See, *Zodiac Seats US LLC v Synergy Aerospace Corporation*, 2019 WL 1552501 (E.D. Tex. 2019) (applying the CISG to purchase orders for the sale of airline seats). Since “exclusions from the Convention’s sphere of application must be interpreted restrictively” components such as engines, seats, and other materials may be governed by the CISG. See [www.uncitral.org](http://www.uncitral.org) *supra* note 2 at 18

of the contract.” The “place of business” determination requires analysis of where the communications about the contract or representations about the product originated, as well as when those communications occurred.

This means the communications relating to the entire transaction, including the offer and acceptance as well as performance of the contract. And for those who may be thinking along the lines of where the business is incorporated or where its home office is located (the analysis required for exercise of jurisdiction over a business), that isn’t the case under the CISG. Rather, a location is only relevant if it has the closest relationship to the contract and its performance.

### **Why Does It Matter?**

If application of the CISG applies and has not been specifically excluded in the purchase agreement, then the parties to a business aircraft transaction may be stuck with CISG provisions that may or may not be consistent with the state law otherwise selected or preferred. For example, in the event of a dispute the applicable CISG remedies or damages provisions may be more limited than what would otherwise be provided under state law. Or the CISG’s incorporation of INCOTERMS may be beyond applicable state law. And this is especially true where U.S. courts have either failed to recognize the CISG’s existence in applicable cases or misapplied the body of law to the transaction.<sup>4</sup>

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<sup>4</sup> See, *GPL Treatment, Ltd. v. Louisiana-Pacific*



### What Can You Do?

If the CISG would otherwise apply to a business aircraft transaction or if you are unsure whether the CISG will apply to all or part of the transaction, but you do not want it to apply, you must affirmatively opt-out of its application. To do that, you can specifically disclaim or exclude application of the CISG by including language in your aircraft purchase agreement. Merely including choice of law language in an agreement is not considered clear intent of opting-out. Rather, opt-out language should be similar to the following:

Notwithstanding that the Agreement is for the sale of an aircraft, and for the sake of clarity, to the extent that the Agreement includes the

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*Corp.*, 894 P.2d 470, 477 (Or. Ct. App. 1995) (The court failed to establish timing requirements that would comply with their view of the CISG's applicability); *See*, *Grbic*, *supra* note 3 at 180; *See also*, *Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari*, 638 Fed. Appx. 87, 90 (2d Cir. 2016).; *See*, *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003) (The court found a preemption issue affecting only choice of law may be waived if not timely raised although the CISG, when interpreted properly, applies automatically in nations that have opted in).

sale of parts, components or good that are not installed on the aircraft the parties agree that the 1980 United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

### Conclusion

So, if you are more comfortable with state law, or you are unfamiliar with the provisions of the CISG and don't want to take the chance on whether the CISG will be beneficial or unfavorable, and your transaction includes, parts, components or other goods that are not installed on the aircraft then you will want to include disclaimer language in your aircraft purchase agreement. Inclusion of disclaimer language relieves the parties of having to determine exactly what Article 2 does or does not cover, especially since the CISG's exclusions must be interpreted narrowly. Otherwise, if you enter into an aircraft transaction to which the CISG applies and do not include disclaimer language, you may be in for a surprise if a dispute arises from the transaction.

# In Memoriam: Captain Al Haynes

by  
Mike Dworkin

Retired United Airlines Captain, Al Haynes, who was credited with saving the lives of nearly 200 people by guiding a severely damaged DC-10 to a landing at Sioux City, Iowa in 1989, has died at the age of 87.

Captain Haynes was the first recipient of IATSBA's Joseph T. Nall Award in 2009.

He was hailed for his skill when the aircraft's center engine exploded during a flight from Denver to Chicago, causing the catastrophic loss of all hydraulic systems and power. Haynes and his crew used asymmetrical thrust of two remaining engines to steer a course to Sioux City. They remained aloft for 40 minutes. The aircraft landed on a runway, where a wing plowed into the ground and sent the aircraft into a cartwheel. The aircraft burst into flames and broke apart. Of the 296 people on board, miraculously, 184 survived.

During the emergency, Captain Haynes kept both his cool and his sense of humor. As recorded on the CVR:

Sioux City Approach: "United 232 Heavy, the wind's currently...360 at eleven. You're cleared to land on any runway."

Haynes: "Roger....You want me to be particular and make it a runway, huh?"

In the post-crash investigation and flight simulation runs, neither the NTSB, FAA nor the manufacturer's test pilots were able to accomplish what Captain Haynes and his crew did. They truly defied the odds.

After the crash, Captain Haynes continued as an airline pilot until his mandatory retirement in 1991. Several United 232 survivors flew as passengers on his final flight as an airline pilot.

Aside from being an accomplished aviator, Al was a gentleman. He served as a volunteer umpire for Little League Baseball for over 33 years and a high school football announcer for over 25 years.

He will be missed.



**MICHAEL L. DWORKIN** is the principal of Michael L. Dworkin and Associates, an AV-rated San Francisco, California aviation law firm. Prior to establishing the firm, Mike was an FAA attorney in Washington, DC and Los Angeles and in-house counsel to United Airlines. Mike is a past president of our Bar Association and currently serves as its Executive Vice President.



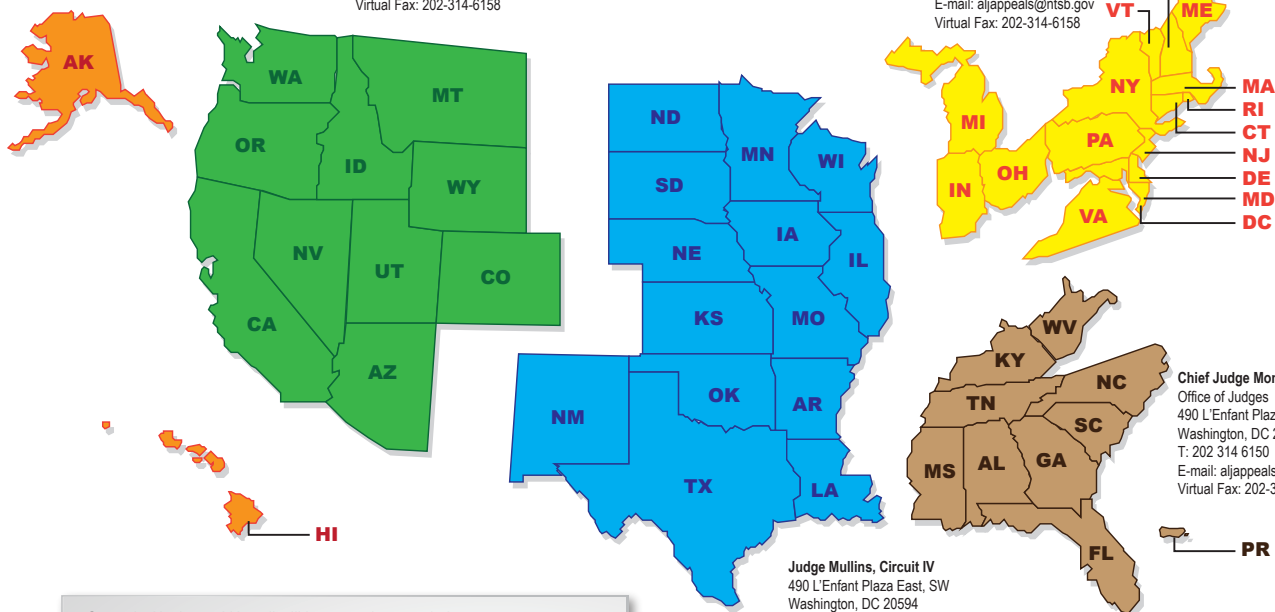
# Circuit Assignments



## NTSB LAW JUDGE CIRCUIT ASSIGNMENTS

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- Emergencies will be assigned across circuits based on availability.



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