



Air & Transportation Law Reporter

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Safety Bar
Association



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President's Message

by
Justin Green



JUSTIN GREEN joined Kreindler & Kreindler LLP in 1997 after clerking for the Honorable Alfred J. Lechner in the Federal District Court for the District of New Jersey. He became a partner in January of 2003. Justin focuses his practice on helping families of aviation disaster victims, but also litigates other complex matters. Justin learned to fly while in the United States Marine Corps and served as his squadron's aviation safety officer after graduating from the Naval Postgraduate School's aviation safety program. He was responsible for his squadron's aviation safety, and also for investigating accidents. He holds an airplane and helicopter commercial license from the Federal Aviation Administration. As an aviation lawyer, Justin has successfully represented families in dozens of major aviation cases, including most recently the families of Continental Connection Flight 3407 and Turkish Airlines Flight 1951 victims. He edits Kreindler, Aviation Accident Law published by Lexis/Nexis.

Dear Members:

I am looking forward to seeing many of you here in New York. We are all very excited about the conference and I want to remind anyone who has not yet registered there is still time and to make sure that you have a spot, you can just e-mail me at jgreen@kreindler.com and I will make sure you are not left out of the fun.

The theme of the conference is the "Past, Present and Future" of aviation law and regulation. We have a truly august panel of speakers. The first panel itself contains six men and women who can truly be described as deans of the aviation bar. We will also hear from the Chair-elect of the National Transportation Safety Board, the Board's Chief Administrative Judge and a leading federal district court judge who just happens to be a former Chief Counsel of the Federal Aviation Administration. We have a panel that includes key players in the most recent

major aviation cases. And we will also hear from lawyers involved in aviation's future, including drones and commercial Space operations. You really don't want to miss it.

I would like to thank our many sponsors, without whom we would not be able to put on the presentation. These include:

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I also want to thank the many members who helped put this together, in particular Greg Winton, our Program Director.

Justin

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Editor's Column

by
Greg Reigel

It is time, once again, for another edition of the IATSBA Reporter. And, as you may notice, we are running short on articles for the Reporter. I'm not sure whether it is the change toward colder weather and our members' fingers are less inclined to type out an article, or if the recovering economy is leaving little time for anything other than working on client matters. In either event, or perhaps for some other reasons, the Reporter is suffering, noticeably.

As I have in the past, I would like to take this opportunity to, once again, encourage our IATSBA members to share their knowledge and experience in writing with their fellow IATSBA members. I know for some of our members, this may seem like a daunting request and a lonely task. But it isn't, nor does it have to be. Submitting an article for publication in the Reporter is actually much easier than you might think. Really.

If you recently wrote a brief or memorandum in a case on which you are working and that brief or memorandum may be suitable for conversion into an article, I can help. If you have an article

written already but you think it needs some editing or work, I can help. If you have some ideas for an article but aren't sure which topic to write about, I can help. Or if you have a topic but would like some help writing the article, I can do that too. So you see, if you are at all interested in contributing, I am available and willing to help make that happen. Please give it some serious thought.

And now on to this latest issue of the Reporter. First, our President Justin Green highlights the upcoming IATSBA conference in New York City and the anticipated speakers and presentations, and recognizes the generous sponsors without whose support IATSBA would not be able to present such outstanding conferences. Next, John Yodice discusses the FAA's recent softening of its enforcement and compliance sanction guidance for security airspace violations. Finally, Katie Inman from the NTSB Office of the General Counsel provides a retrospective review of the agency's recent rulemaking activity.

I hope you enjoy this edition of the IATSBA Reporter.



GREG REIGEL is an aviation attorney and holds a commercial pilot certificate (single engine land and sea and multi-engine land) with instrument rating. His practice concentrates on aviation transactional and litigation matters. Greg is also an Adjunct Professor at William Mitchell College of Law teaching the Advocacy and Advanced Advocacy courses, and he is an Adjunct Professor at Minnesota State University - Mankato teaching the Aviation Law and Aviation Transactions courses.

This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

FAA SOFTENS SANCTION GUIDANCE FOR SECURITY AIRSPACE VIOLATIONS

Security airspace violations continue to be a significant source of FAA enforcement against general aviation pilots. As a reminder, practitioners in such FAA enforcement actions should know that the FAA policies for enforcing violations of the Federal Aviation Regulations are contained primarily in FAA Order 2150.3B, "Compliance and Enforcement Program," that is available to them through various sources including the FAA website. The order contains guidance concerning the FAA's discretion in selecting the type of enforcement action to be taken and determining the appropriate sanction for such violations. What is most significant to practitioners, the order has a Table of Sanctions in Appendix B that sets out ranges of certificate actions and civil penalties for specific regulatory violations.

However, following the terrorist attacks of September 11, 2001, the FAA adopted a special emphasis enforcement program with more stringent sanctions than in the Table, for certificate holders who commit security airspace violations. The FAA determined that a heightened state of security existed and issued Notices to Airmen (NOTAMs) under FAR 91.137 and 91.139. These NOTAMs placed significant restrictions or prohibitions on several types of aircraft operations in the interest of national security. So,

by memorandum dated September 24, 2001, the FAA issued sanction guidance pertaining to certificate holders who operated any aircraft contrary to any security airspace NOTAMs issued on, or after, September 11, 2001. The stringent restrictions on the airspace gradually eased and the FAA subsequently issued a new sanction guidance memorandum on April 26, 2002, for operations that occurred on or after December 20, 2001. Both these memoranda have been interpreted to require certificate action in the form of pilot license suspension and revocation. According to these memoranda, administrative action in the form of a warning notice or letter of correction would rarely be appropriate. Rather, a certificate suspension of 30 to 90 days would be required for a single, first-time violation, and a certificate revocation when such violation is deliberate or otherwise shows a disregard of or disdain for the FAR.

According to the FAA, many things have changed since that guidance, including changes to the procedures for operating in security airspace, changes to NOTAM issuance and dissemination, public perceptions about operating in security airspace, and efforts to educate certificate holders about the need to comply with special security requirements for operating in the airspace. So the FAA has now modified

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IATSB A Membership

Application

its sanction policy, while continuing to reflect the seriousness of violations that occur in security airspace, to provide the agency with more flexibility to use other enforcement tools, most significantly, remedial training.

The FAA has now issued Compliance and Enforcement Bulletin 2014-1, effective June 11, 2014, for violations of FAR 91.133 (restricted and prohibited airspace), 91.137 (disaster/hazard TFRs), 91.139 (emergency air traffic rules), 91.141 (presidential TFRs), 91.143 (space flight NOTAMs), 99.7 (ADIZ), and subpart V of part 93 (Washington Special Flight Rules Area), that applies the following sanction guidance:

1. Sanction a 30-day suspension for a single, first-time, inadvertent violation except in the following circumstances involving:
 - a. Inadvertent, first-time violations resulting from aircraft intruding one mile or less into the security airspace and then turning and exiting directly when there are no resulting complications for air traffic control or other aircraft.
 - b. Inadvertent, first time violations resulting from aircraft briefly (two minutes or less) squawking a 1200 code or failing to squawk an assigned discrete code, in security airspace that requires the aircraft to squawk a discrete

code when there are no resulting complications for air traffic control or other aircraft.

2. Sanction a 45 to 90-day suspension for having a new inadvertent violation and a history of 1 prior inadvertent violation occurring in security airspace. Sanction a 90 to 150-day suspension for having a new inadvertent violation and having a history of 2 prior inadvertent violations occurring in security airspace. Revocation is the sanction for having a new inadvertent violation and having a history of 3 or more inadvertent violations occurring in security airspace. One of the factors that may be considered, in selecting a sanction within the appropriate range, is the period of time that has elapsed between violations.
3. Use remedial training to address operations falling under one of the circumstances identified in 1.a. and 1.b. above when there are no prior related violations.
4. Reexamine the certificate holder's qualifications to hold a certificate under 49 U.S.C. §44709 when a violation is subject to this special emphasis enforcement program and calls into question the qualifications of the certificate holder.
5. Revoke the certificate holder's qualifications to hold a certificate for intentional violations occurring in security airspace and for aggravated violations.



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

NTSB General Counsel

by:
Katie Inman



KATIE PLEMONS INMAN

joined the Office of General Counsel in 2005. Ms. Inman handles cases on the Board's enforcement docket, and serves as the attorney overseeing rulemaking under the Administrative Procedure Act. Ms. Inman has also served as the attorney overseeing compliance with and litigation regarding various statutes involving the availability of information, such as the Freedom of Information and Privacy Acts. Prior to joining the Board, Ms. Inman served as a law clerk to a Federal judge in the Eastern District of Texas, where she assisted in research and drafted opinions on a variety of issues. Ms. Inman has also authored and published articles in scholarly journals concerning the legislative process and Federal programs.

The past summer has been a season for rulemaking activities at the NTSB. In particular, the NTSB published a Notice of Proposed Rulemaking (NPRM) to update its regulations that govern investigations (codified at 49 CFR part 831). The agency recently extended the deadline for comments on the NPRM to October 31, 2014.

In the NPRM, the NTSB proposes organizing its investigation procedures into mode-specific subparts to make the rules easier to access and consult. The NTSB also proposes to update some terms and procedures, including using the term "event" to describe transportation mishaps in regulatory text that applies to all transportation modes. In the mode-specific subparts, the NTSB included mode-specific terms, such as "accident" and "incident" for the rules specific to aviation investigations.

The NPRM also proposes substantive changes to several sections, such as those applicable to the NTSB's relationships with parties and other agencies, as well as the procedures to which party participants must adhere if they seek to share information within their organizations for safety improvements.

Following the NPRM, the next step in the rulemaking process is to publish a Final Rule, which explains the amendments from the NPRM that

the NTSB has chosen to adopt. The Final Rule will take effect 30 days from the date of its publication.

The NPRM is available for review in a rulemaking docket on www.regulations.gov (Docket Number NTSB-GC-2012-0002).

This NPRM follows the NTSB's June 25, 2012 notice in the Federal Register stating the agency would conduct a retrospective review of all agency regulations, to ensure they are up-to-date. The agency published this notice of retrospective review in response to Executive Order 13579, "Regulation and Independent Regulatory Agencies," issued July 11, 2011. The NTSB invited comments from the public concerning this plan for retrospective review of its regulations; in particular, the NTSB solicited comments concerning 49 CFR part 831.

In response to this Notice, the NTSB received six comments, which are available in the rulemaking docket at regulations.gov (search for NTSB-GC-2012-0002). Several commenters indicated the "party process" the NTSB utilizes for its event investigations was useful, and worked well. One commenter, Airlines for America (A4A) provided substantive feedback concerning a few distinct portions of the NTSB's rules. The NTSB responded to these comments in the preamble of its NPRM for part 831.

NTSB General Counsel

continued

In January 2013, the NTSB published a plan for this retrospective review, in which the agency described three phases of review the agency planned.

The NTSB stated Phase I of the plan would include updates to certain regulatory parts in the near future, in accordance with the standard informal rulemaking procedure of soliciting comments from the public.

The notice also includes a description of Phase II of the plan, which involves changing rules applicable only to internal agency matters. Such amendments do not require the notice-and-comment procedure under the Administrative Procedure Act, 5 U.S.C. § 553(a)(2) and (b)(A).

Finally, the NTSB stated it also plans to update other parts, which involve coordinating with other agencies, at a later date. The agency stated these parts are long-term actions that should proceed on a different timeline.

In the interest of providing more details to the public concerning the timeline for these rulemaking projects, the NTSB opted to submit a unified

regulatory agenda, which is available at www.reginfo.gov. The NTSB recently submitted its entries for the fall edition of the agenda.

The fall agenda indicates the NTSB's goal for issuing an NPRM to amend 49 CFR part 845 is this November. Part 845 contains rules of procedure for hearings, forums, symposiums, and conferences, as well as Board reports and petitions for reconsideration of investigation findings.

Following the amendments to part 845, the NTSB will proceed with producing and publishing additional NPRMs, to update rules concerning internal delegations of authority and accident and incident notification requirements for aviation events and railroad, pipeline, and hazardous materials events.

The Office of Information and Regulatory Affairs makes available agencies' entries in the Unified Regulatory Agenda twice per year. We encourage the public to view our agenda entries at www.reginfo.gov, and submit comments to each of the notices when we publish them.

Circuit Assignments



NTSB LAW JUDGE CIRCUIT ASSIGNMENTS

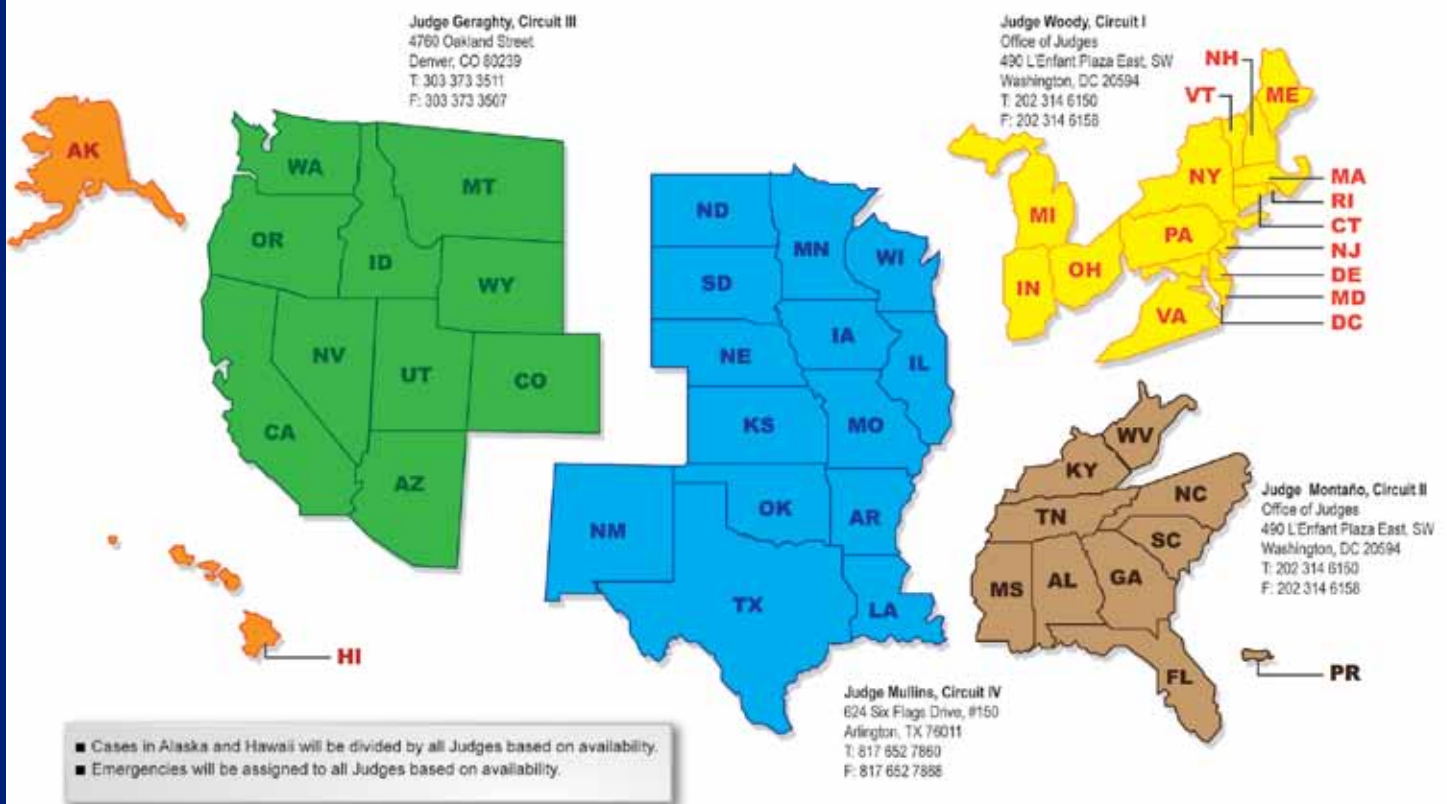


Image courtesy of National Transportation Safety Board, current as of April 1, 2013

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