

# **ETHICAL CONSIDERATIONS COMMONLY ASSOCIATED WITH AVIATION ACCIDENTS**

There are a number of ethical issues confronted by counsel, the insurers, the air carrier and the manufacturers when a commercial aviation accident occurs. This paper will highlight particularly delicate subjects that routinely arise.

## **I. THE REPRESENTATION OF MULTIPLE PLAINTIFFS OR CLAIMANTS IN THE US AND ABROAD**

In commercial aviation accidents, multiple passengers and crew are typically killed as and their heirs would seemingly have similar interests in pursuing liability claims against third parties. However, there are a number of potential conflicts of interest that can arise for the lawyer advocating for those families.

For example, the family of a crew member may have limited, if any, rights against the air carrier/employer and thus have an incentive to establish liability elsewhere, while a passenger's family may have just the opposite incentive. Similarly, the ability of an American family to withstand the defendants' forum non conveniens attack in a U.S. court is enhanced if no other foreign claimants have filed suit (in the U.S. or elsewhere), while the foreign claimants may be confronted by time bars to perfect their claims. The application of either the Montreal or Warsaw Conventions, and the choice of law rules on recoverable damages, in an overseas accident could also be significantly different depending on the passenger's residence or citizenship at the time of the crash. And of course there is the age old problem of family members not agreeing among themselves on the litigation strategy to employ or the allocation of settlement proceeds after the case settles. This is especially so in overseas accidents involving foreign passengers, as the damages law in their home country (e.g. Sharia or Islamic Law) may be in conflict with U.S. law upon which the case resolved.

In the fact pattern presented, a number of these potential conflicts arise. Assume, for example, that plaintiffs' counsel is contacted by the families of the Coastal Airlines flight attendant, one of the Brazilian passengers on board the Citation, Roger Sterling's heirs (pilot of the Eurocopter) and Megan Draper (partner of Peggy Olson, Sterling's passenger). The interests of the flight attendant's family are not promoted by establishing a liability case against the Citation pilots and Coastal Airlines, yet that is clearly one of the goals of the other clients. And what if the choice of law rules of State X are more favorable to the Brazilian family than State Y, but State X's rules on standing for Megan's and son Kevin's claims are less favorable. While the conflict between Sterling's and his passenger's (Olson's) heirs may seem irresolvable, what if Sterling has limited insurance coverage and no assets, thus making collection of any significant claim against Sterling's estate impossible.

The ABA's Model Rules of Professional Conduct provide guidance in dealing with these issues. Rule 1.7 states as follows:

“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.”

One of the key issues for plaintiffs' counsel to address is whether there is a risk that representation of one client *materially limits* the lawyer's responsibilities to another client. “When” in the process is the limitation potentially material is also an issue. For example, assume counsel has confirmed well before expiration of the limitations period that the AS350 owner/operator has limited insurance coverage and no assets upon which to collect a judgment, and that the litigation will be filed in a joint and several liability jurisdiction. Arguably, it is in the interests of both the owner's/operator's estate and the passenger families to quickly resolve all claims for policy limits and focus instead on the more collectible claims against the FAA (ATC liability), Coastal Airlines, or Acme Leasing. Is counsel nonetheless barred from accepting

a retainer from owner's/operator's estate because he/she has already been retained by passenger families?

It depends. If the insurer is willing to pay policy limits without further litigation and a mechanism for distribution of the settlement proceeds is agreed upon by all clients, then the lawyer's representation is probably not materially limited under Rule 1.7. But if no policy limits offer has been made and the likelihood is high that the passengers will need to file suit against the owner/operator, then clearly the lawyer's representation will be limited. Regardless, the lawyer should get all clients' informed consent and written waivers, preferably after the clients have been advised by a third party, independent attorney. The Restatement (Third) of the Law Governing Lawyers Section 122(d) notes that there are potentially substantial gains to both lawyer and client from a system of advance consent to defined future conflicts, and the ABA 1.7 comment 22 recognizes the appropriateness of such waivers.

Something else to be wary of: In an action between two parties to an aviation lawsuit where they were represented by one attorney, and the expert testimony presented for both parties was part of the reason for different verdicts for both clients, a concurring judge *Wilcox v. Vermeulen* (S.D. 2010) 781 N.W.2d 464, 473 noted that the lawyer would not have been subject to criticism if the Rule 1.7 conflicts rule was followed and informed consent and written waivers obtained. This makes sense since the purpose of the rule is to protect client confidences and assure loyalty.

## II. THE SOLICITATION OF US AND FOREIGN PLAINTIFFS OR CLAIMANTS FOLLOWING AN AVIATION ACCIDENT

Since the U.S. Supreme Court struck prohibitions against lawyer advertising as commercial free speech in the landmark 1977 decision of *Bates v. State Bar of Arizona*, 433 U.S. 350, attorney marketing has become commonplace. With respect to aviation accidents, however, federal law restricts unsolicited communications to victims' families before the 45<sup>th</sup> day following an accident. 49 U.S.C.A §1136(g)(2) states:

**(2) Unsolicited communications.**--In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.

According to the plain meaning of the statute, this rule applies to all plane crashes in the United States, to overseas plane crashes involving a domestic carrier, and to plane crashes of planes flying from the United States to foreign countries (although any crashes outside of the United States are likely outside of NTSB's exclusive jurisdiction.)

“Air carrier” and “foreign air carrier” have specific meanings here. “Air carrier” is “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” 49 U.S.C.A. § 40102(a)(2). “Foreign air carrier” is “a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.” 49 U.S.C.A. § 40102 (West). “Foreign air transportation” means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft. 49 U.S.C.A. § 40102(23).

The civil penalty for violation of the 45 Day Rule is \$1,000 per day for each day of violation. 49 U.S.C.A. § 1155(a)(1). So if the violation occurs the day of the crash, the penalty could be \$45,000. The NTSB has wide discretion to determine the appropriateness of penalties, so the amount of the penalty could be lowered. See *Cobb v. National Transp. Safety Bd.* (9th Cir. 1977) 572 F.2d 202.

A lawyer could also be exposed to additional penalties based on state ethics laws. For example, California State Bar Rule 1-400, which deals with advertising and solicitation, prohibits communications and solicitations that intrude or cause duress. An advisory opinion by the California Bar Standing Committee on Professional Responsibility and Conduct suggests that an attorney violates this rule by communicating with a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel.

Additionally, the ABA Model Rules of Professional Conduct Rule 7.3 restricts direct contact with, and solicitation of, potential clients with whom the lawyer does not have a pre-existing relationship or who are not themselves lawyers, with a proviso that any otherwise acceptable direct contact must be accompanied by an advertising disclosure and of course cannot involve coercion, duress, or harassment. Similarly, Rule 7.1 prohibits a lawyer from making false or misleading communications (i.e. materially misrepresenting the facts or law). Counsel clearly run afoul of this Rule by “promising” a particular settlement or verdict range to a prospective client or by misstating the applicable limitations period in order to pressure a client to sign a retainer.

Notwithstanding the above, there is no prohibition against a lawyer advertising his or her expertise in aviation litigation or reaching referral arrangements with a family's non-aviation attorney within 45 days after the accident. In *Florida Bar v. Went For It, Inc.*, 515 U.S.618 (1995), the Supreme Court upheld Florida's 30 day restriction in sending direct mail solicitation to victims of accidents, but did not prohibit such solicitations altogether so long as they are not directed to clients lacking capacity by reason of age, mental condition, or other disability.

Moreover, the 45 day rule does not apply to generic internet advertising, whether in the form of a website discussing the particulars of a crash or promoting the expertise of a particular attorney. Simply explaining a victim's rights and remedies on an attorney's website, standing alone, is commercial free speech, *see* Ariz. Bar Ethics Op. 97-04. If the website goes further and provides copies of form retainer agreements or invites the victim to contact the lawyer, then it likely constitutes "advertising" and is subject to some regulation, *see* State Bar of CA Standing Cte on Prof'l Responsibility & Conduct, Formal Op. No. 2001-155. But so long as the information provided on the internet is not directed specifically to a victim or his/her family (and is not otherwise a direct solicitation), the 45 Day Rule codified in 49 U.S.C.A. §1136(g)(2) is not implicated. Note, however, that a lawyer's participation in "chat rooms" on the internet sponsored by the attorney that occur in "real time" may constitute an "unsolicited communication" under §1136(g)(2) and a direct solicitation under ABA Model Rule 7.3.

### **III. THE INSURING AND DEFENSE OF MULTIPLE DEFENDANTS FROM THE ACCIDENT**

In many accidents, such as the accident that is presented in the mid-air crash over the Atlantic, an insurer will insure multiple defendants and parties to an accident (for example, the product manufacturer, an operator, an airport or a components part manufacturer). This is especially true when the lead insurer insures many defendants, as the aviation market is a fairly small market as compared to other industries. ABA Model Rules are considered, especially Model Rules 1.7 and 1.8 that deal with conflicts of interest, when an insurer insures multiple defendants in an accident. Most insurance companies have established policies as to how to handle multiple insured from one accident. This panel will discuss the ethical responsibilities that insurance companies have when representing multiple insureds/defendants from an accident. Considerations that will be discussed are the division of labor amongst the insurance management team, the access and limitation to litigation files within the insurance company, the hiring of separate counsel (or potentially common counsel) for the multiple insureds, having a computer system where certain files can be blocked or have limited access as to insureds' information, the hiring of common or separate experts for multiple insureds, and the all important conflict letters and agreement(s) amongst insureds, where applicable, for some conflicts to be waived regarding the defense of the case.

The panel will also discuss different conflict levels that insurance companies experience when insuring multiple defendants from the same accident. Many times you might have two

insureds which are represented by one lead insurer. Other conflict levels involve multiple insureds, but different leads and different co-insurers/concurrent insurers. The panel will discuss conflict issues that are encountered on a daily basis in these types of instances, and measures and procedures which have been implemented which allow for transparency in the representation of insureds, and the handling of these insureds' claims.

As to the defense of multiple defendants from an accident, this panel will address some of the more complex ethical issues that can be encountered. Representing multiple defendants in any litigation can present even the most skilled practitioner with a host of thorny ethical issues. And aviation litigation is no exception. Cases arising from aviation accidents often include a diverse array of defendants, from the pilots to the manufacturers of a plane's component parts. Each of these parties has their own set of interests and concerns in defending against claims.

As in other cases, the representation of some co-defendants in aircraft accident litigation presents obvious ethical issues. For example, in the fact pattern at hand, the FAA and the pilots have a clear conflict, with both potentially trying to apportion fault to the other. But the ethical issues that arise from representing multiple defendants are not always so clear. Many times the issues that arise could not have been predicted before joint representation began. It is these more subtle issues that the panel will focus on.

The touchstone for any analysis of the ethical issues that arise in the joint representation of co-defendants is Rule 1.7 of the ABA's Model Rules of Professional Conduct. The rule prohibits the representation of co-defendants if there is a "significant risk" that representation of either client will be limited by the lawyers responsibility to the other. Even if both co-defendants waive any conflicts they have, joint representation can only occur if the lawyer reasonably believes that he or she will be able to provide competent representation to both clients. But many times the application of this rule is anything but clear because the conflicts that arise between co-defendants are neither obvious nor direct.

Conflicts between co-defendants often arise when there is an imperfect alignment of interests, rather than a direct conflict. This may occur in any number of situations. For example, in the fact pattern at hand, if an attorney representing both Coastal Airlines and Acme Leasing Company discovered a witness at Coastal Airlines whose testimony would raise concerns that the crash resulted from the poor training of Coastal's pilot, how should that attorney handle the witness? Developing that witness' testimony, by deposing the witness for example, could lead to a significant increase in Coastal's liability and a corresponding decrease in Acme's. But both parties may be better off if this witness' testimony was never presented. Assuming there is no ethical duty to disclose the witness, this situation leaves an attorney representing two co-

defendants in a difficult situation. Even if both parties agree to not develop the witness' testimony, the risk that in the future this issue may again create a conflict is difficult to ignore. Of course this scenario could also raise potential confidentiality issues, which is why the ABA, in comment 31 to Rule 1.7, recommends advising both clients at the outset that all information will be shared between clients and that if either client seeks to withhold information from the other, the lawyer must withdraw.

Another example of a conflict arising from the imperfect alignment of interests between defendants is when there is an imbalance in insurance coverage. Where one defendant has significantly more insurance coverage than the other, the co-defendants may have differing incentives to settle the case and different approaches to how the settlement should be structured. Although this can lead to a direct conflict that would clearly require the attorney representing both co-defendants to withdraw from representing one or both of them, the potential conflict may not crystallize into such an open and obvious divergence of interests. Instead it may subtly affect the positions of the two parties.

This panel will explore these conflicts, focusing on the types of conflicts that are most likely to arise between co-defendants in aviation litigation. The panel will also discuss the confidentiality issues that can be encountered when representing of multiple defendants. Finally, the panel will look at joint defense agreements as a way of avoiding or mitigating conflicts between co-defendants.

#### **IV. THE RELATIONSHIP BETWEEN A LEAD AND CO-INSURER IN RELATION TO MULTIPLE INSURED DEFENDANTS**

The aviation insurance industry, being a relatively small industry as compared to other industries, generally has London insurers involved in almost every aviation insurance policy where there is a lead and concurrent or co-insurers. In claims handled in the US, the North American Claims Handling Agreement is used for the vertical placement of claims handling between a lead and multiple concurrent insurers. Generally, the rights and responsibilities between the lead and the concurrent insurers are outlined in the North American Claims Handling Agreements for each insurance policy, which generally guides claims handling between the lead and co-insurers on a vertical policy (one with a lead and concurrent insurers). One question that has been addressed in the industry and which is ripe for discussion in this ethics panel is whether there is a fiduciary relationship between the lead and concurrent insurers on a vertical policy?

Also, the panel will explore at the ABA Conference issues that are commonly addressed between a lead and concurrent insurers in representing one or more insureds from the same accident. One topic that is a very timely topic, especially in a case where there are multiple insureds with potentially different interests from one accident, would be what the lead insurer is

communicating to the concurrent insurers, especially if some of those insurers are in London, and insure various defendants in an accident (in London, the North American Claims Handling Agreement is not utilized, and so there may arise conflict issues in the handling of a vertical placement claim). When there is sharing of information between concurrent insurers, who might have a role in the representation of a co-defendant in the same accident, reporting and disclosure of information amongst concurrent insurers may lead to conflicts of interest or ethical questions that will be addressed by this panel.

Lastly, this panel will explore the obligation of a lead insurer to investigate, make decisions as to coverage of claims, settlement, and disclosure of information, and how this responsibility might be impacted when a lead knows that a concurrent or co-insurers represent or insure multiple defendants in the same accident where interests might not all be aligned.

#### **V. RECONCILING COVERAGE ISSUES AND THE DEFENSE OF AN INSURED OR MULTIPLE INSURED IN AN AVIATION ACCIDENT**

In litigation over aviation accidents many defendants are insured. And while this rarely raises any ethical issues, the potential for them to occur exists. This potential is magnified when there are multiple insured defendants under the same policy or multiple insurers for one defendant.

The relationship between the defense counsel, insured, and the insurer can be complicated. The rules governing whether or not the insurer is a client are not uniform across the United States. In some jurisdictions, such as California, both the insured and the insurer are considered clients, while in others only the insured is the attorney's client. *See* ABA Formal Op. 01-421, nn. 6, 7 (2001). But regardless of which parties are the attorney's clients, the rules of professional responsibility apply.

There are two primary rules that govern the relationship between defense counsel, the insurer, and the insured. The first is Rule 1.7 of the ABA Model Rules of Professional Conduct, which deals with conflicts between clients and co-clients or third parties. Comment 13 to that rule notes that a lawyer may be paid by another party, including a co-client, only if the payment by the other party does not present a "significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client." The comment goes on to explain that the lawyer must also satisfy the requirements of Rule 1.7(b) by ensuring that the lawyer believes he or she can provide competent representation to the client and obtaining informed consent in writing from the client.

The second rule that applies to the payment of a lawyer's services by an insurance company is Rule 1.8 (f) of the ABA Model Rules of Professional Conduct, which states that:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

This rule reinforces the requirements of Rule 1.7, further ensuring that the payment by another party does not interfere with the lawyer's representation of the client.

Applying these rules to the tripartite relationship between defense counsel, the insured, and the insurer is not always straightforward, and the relationship between the parties can lead to complex ethical dilemmas. Nowhere are these ethical issues more salient than in coverage issues. In these situations, where the insurer's coverage of the insured is at issue, attorneys for the insured face complicated ethical issues.

These types of coverage issues may arise in a number of ways in aviation cases. For example, in the fact pattern at hand the pilot's failure to meet instrument currency requirements could raise a coverage issue. If Coastal's insurance policy only provided coverage for flights in which the pilot complied with all FAA regulations, there would be a question of whether the policy would cover this flight. Another situation in which these coverage issues are commonly encountered are cases where a Plaintiff claims punitive damages. In those cases, a defendant's insurance policy may not cover punitive damages. Moreover, even if the policy does provide coverage for punitives, state law may prohibit such coverage. These situations often lead to an insurer issuing a reservation of rights letter. A reservation of rights alone does not create a conflict between the insurer and insured. But it does create the potential for conflicts, and counsel representing an insured must carefully navigate the potential ethical pitfalls.

This panel will discuss these ethical issues, exploring the potential conflicts that may arise in the relationship between defense counsel, the insurer, and the insured. The panel will focus on coverage issues and how to deal with the ethical dilemmas that are encountered when representing an insured whose insurer has reserved their rights to challenge coverage.

The panel will also discuss conflicts that may be encountered when representing multiple insured parties. Conflicts of interest are more likely to arise where there are more than one insured under a single policy. This could potentially result a four-way relationship between defense counsel, two co-defendants, and the insurance company. The potential conflicts in these situations are abundant. For example, two insured parties who have the same insurance may have separate defenses to liability that are inconsistent with one another. Moreover, the two parties may also have affirmative claims against each other. The panel will explore these and other potential conflicts that may arise in the representation of multiple insured parties.