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Legal Briefing: Overflying clouds

By: Kathy Yodice

Q: On a recent solo cross-country flight, the weather was VFR and my destination airport was reporting clear skies, but there was an isolated thin cloud deck along my route of flight at about 3,000 feet that I wanted to fly over at 4,500 feet. The visibility was more than 10 miles at both altitudes and I would have only been flying over the clouds for a few minutes until the cloud cover cleared. Could I do that?

A: FAR 61.89 sets forth general limitations for what a student pilot can and cannot do. Among these limitations, FAR 61.89(a)(7) specifically prohibits a student pilot from acting as pilot in command of an aircraft "when the flight cannot be made with visual reference to the surface." The FAA seems to interpret "flight" as being any portion of a student's solo flight and seems to say that any loss of visual reference to the ground could be a violation of this regulation. This general prohibition against operating in marginal weather conditions is intended to alleviate the problem of student pilots becoming lost or disoriented in those marginal conditions. Operating above a scattered or broken cloud layer could be the sort of marginal conditions that might cause a student pilot to become lost or disoriented. For this reason, section 61.89(a)(7) prohibits a student pilot from acting as PIC above a scattered or broken cloud layer.

Thus, flying over a "cloud deck," even if it is not a solid deck of clouds but scattered or broken, and even if it is only for a limited time during an otherwise beautiful VFR flight, is not allowed for student pilots since doing so inhibits the student's ability to see the ground. As a student pilot on your solo cross-country flights, you should not be tempted to climb higher than the clouds. ■

September 2009

AOPA Flight Training Magazine
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Legal Briefing: Reexamination

By: Kathy Yodice

An FAA inspector asked me to submit to a reexamination of my qualifications for my CFI certificate, following an accident with my student who flared too high and we landed hard. I successfully completed the reexamination, and there has been no further action against me by the FAA, but the inspector asked me to fill out and sign some paperwork. Did the inspector put anything in my FAA record? And, if so, how might that affect my ability to get a flying job?

An FAA inspector may exercise the FAA's authority to reexamine an airman when the inspector has sufficient reason to believe that an airman may not be qualified to exercise certain privileges of a particular certificate or rating. The purpose of a reexamination is to determine whether an airman remains qualified to hold his or her airman certificate. The guidance provided to FAA inspectors cautions, "the reexamination of an airman on the basis of lack of competency is never to be undertaken lightly...[and]...there must be ample or probable cause for requesting the reexamination...[gathered from]...reliable reports, personal knowledge, or on the basis of evidence obtained through an accident, incident, or enforcement investigation." A reexamination must be conducted by an FAA inspector, but it is not required that the FAA inspector requesting the reexamination also administer the reexamination; in other words, you can ask to have the reexamination conducted at another FSDO with another inspector.

Before the reexamination is conducted, the FAA inspector will ask you to fill out an FAA Form 8710-1, Airman Certificate and/or Rating Application, and ask you to check the box on the form for "Reexamination." When you successfully complete the reexamination, the FAA inspector completes the appropriate portion of the second page of the form indicating "Approved." The completed form is sent to the FAA's office in Oklahoma City to be included in your airman

certification file. When you submit to a reexamination, and you successfully complete that reexamination, the fact of that successful reexamination is made a part of your official FAA airman record by reason of the completed 8710-1 form. The Pilot Records Improvement Act (PRIA) requires that a potential employer request and receive certain information from the FAA before making a hiring decision about you. PRIA requires that the FAA information must include current airman certificates and associated type ratings, including any limitations to those certificates and ratings, and summaries of legal enforcement actions resulting in a finding by the FAA of an FAR violation that was not subsequently overturned.

The successful reexamination did not affect your current certificates and ratings, nor limit them in any way, and a reexamination is not a legal enforcement action. So, the fact of your reexamination should not be included in any response under PRIA to a potential future employer. Unless the employer learned of the information another way, it should not affect your application for a flying job. ■

August 2009

AOPA Flight Training Magazine Volume 21 Number 8

Legal Briefing: Fender Bender

By: Kathy Yodice

Q: If I have a "fender bender" with my aircraft, do I need to report that to anyone, other than having my mechanic look at the damage to see what repair, if any, may be necessary?

A: If you have an incident that results in some damage to your aircraft, you may have a reporting responsibility to the National Transportation Safety Board, but there is no duty to report the event to the FAA. It is important to understand this distinction so that any report is made to the correct agency and not unnecessarily made to the wrong agency.

The NTSB has a statutory role to investigate accidents and to identify the causes of the accident in the event that a safety recommendation can be

made to prevent future accidents. The NTSB does not make any finding of liability. The FAA, on the other hand, has a role to assure safety through enforcement of the FARs so if the FAA is investigating, they may be looking to find you in violation and seek to suspend or revoke your pilot certificate. In some circumstances, where the accident is minor, the NTSB may delegate some investigatory responsibilities to the FAA, and in those instances, the FAA inspector is understood to be acting on behalf of the NTSB and is not supposed to be gathering evidence for any FAR violation report.

The NTSB's rules define an aircraft accident as "an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage." Serious injury means "any injury which: (1) requires hospitalization for more than 48 hours, commencing within 7 days from the date of the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface." Substantial damage means "damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component...but...engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wing tips are not considered 'substantial damage' for the purpose of this part." ■

July 2009

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Legal Briefing: Q&A

By: Kathy Yodice

Q: I'm 40 years old. I would like to learn to fly. When I was 18, I had a DUI. Do I have to disclose this on my medical application form since it happened 22 years ago?

A: Your question relates to Item 18v on FAA's Form 8500-8, which asks, "Have you ever in your life had History of (1) any arrest(s) and/or conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any arrest(s), and/or conviction(s), and/or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or rehabilitation program."

Thus, if you have ever been convicted of driving under the influence of alcohol, the answer to this question is yes. Then, don't forget to explain your "yes" answer. The form and the accompanying instructions direct that in the event that you answer yes to any of the items in Question 18, you must describe the event in the Explanations section by listing the offense for which you were convicted, the name of the jurisdiction involved, and the date of the conviction. Provided there are no other alcohol- or drug-related events, disclosure of this 22-year-old event should not adversely affect your ability to obtain an airman medical certificate.

Figuring out whether you have to answer yes or no to this question can be quite challenging for some airmen. This is especially true if there is not an outright conviction of DUI or DWI involved, but maybe only an arrest, a refused or failed breathalyzer, or a conviction for a lesser offense with a commitment to attend traffic school. The FAA is quite unforgiving of an airman who tries to later explain that he or she didn't know to answer yes or didn't think he or she had to answer yes.

The FAA treats such unintentional or inadvertent errors seriously and severely in making a charge of falsification against the airman and revoking all of the airman's certificates. An innocent mistake could have grave consequences. For that reason we recommend getting competent counsel on how to answer the question before completing a medical application form at the AME's office. ■

June 2009

AOPA Flight Training Magazine Volume 21 Number 6

Legal Briefing: Whose Responsibility?

By: Kathy Yodice

When you have to tell the FAA Flight instructors carry a certain stature in the aviation community. After all, if you want to be a pilot, you have to go through a flight instructor. They are the people who first teach us about prudence, safety, and compliance. We often look to flight instructors to guide us through challenging times in our flight training, such as difficulty mastering a maneuver or visualizing a radial, or dealing with a mistake and learning a lesson.

Such was the case with a student pilot who took his girlfriend for a flight when he did not yet hold a private pilot certificate (see "Legal Briefing: Breaking the Rules," April 2009 AOPA Flight Training).

Among other things, Federal Aviation Regulation 61.89(a)(1) provides that "A student pilot may not act as pilot in command of an aircraft is carrying a passenger." In the case of our student pilot, he was planning to make a solo flight when his then-fiancée came to the airport and wanted to accompany him. The student agreed, apparently against his better judgment. After landing, the student was met by his former flight instructor--who, in consultation with his current instructor, decided not tell the FAA about the student's infraction in lieu of some remedial training.

The National Transportation Safety Board administrative law judge seemed quite concerned with the fact that the student pilot had met with his flight instructors and, in the judge's words, "contrived a scheme not to report" the student's activities to the FAA.

In the judge's view, the student pilot "proceeded to conspire with his two CFIs in devising a scheme which was intended to preclude the FAA from becoming aware of the violation." The judge's language seems to suggest that the three worked together to withhold the information from the FAA,

but there was no mention of anyone lying to the FAA or hiding information that the FAA was seeking to discover. And, although it was not an issue before him, the judge also stated, "The actions of the CFIs, in this judge's view, show a lack of the degree of judgment and responsibility expected of a CFI."

The judge did not provide any authority for this conclusion.

To be sure, the student pilot's actions in carrying a passenger were contrary to the explicit language of the regulation, thereby creating a potentially unsafe condition. As pilots, we would not want to condone such behavior. However, the case raises a question as to what regulatory responsibility the CFI, or any pilot, has to affirmatively report an apparent or suspected violation of the FARs to the FAA. Certainly, the FAA would welcome receipt of information that potentially or actually affects the agency's mission of aviation safety. For example, the FAA encourages reports from persons with knowledge of unsafe aviation situations, improper record keeping, or safety violations, and provides a means for reporting these kinds of things to its 24-hour Aviation Safety Hotline (800-255-1111). Such reports can be made anonymously, or the caller can give his or her identity and contact information and the FAA will provide the caller with the results of any investigation that was conducted.

In addition, through the Aviation Safety Reporting System, the FAA encourages pilots, controllers, flight attendants, maintenance personnel, and other users of the National Airspace System to submit reports to NASA about actual or potential discrepancies and deficiencies involving the safety of aviation operations. These reports generally are made anonymously.

And, there are other means of reporting concerning circumstances to the FAA. But, is there a requirement to make these kinds of reports so that your failure to make a report would demonstrate that you lack the care, judgment, and responsibility to hold your pilot certificate? I am not aware of any such requirement. ■

May 2009

AOPA Flight Training Magazine Volume 21 Number 5

Legal Briefing: Aviation Safety Reporting System - What it is, what it does

By: Kathy Yodice

For years, we have been telling pilots about a reporting program that has multiple benefits, both to the individual and to the aviation community. The Aviation Safety Reporting System (ASRS) enables pilots to identify safety hazards in operating practices, chart terminology, weather briefings, instruments, emergency procedures, at airports, regarding medical issues, or any other aspect of flying—no matter how small the concern or how large. There is value in hearing from those who are operating in the system.

The program was established in 1975 through a joint agreement between the FAA and NASA. The two government agencies agreed that NASA would administer the program by collecting and analyzing aviation safety reports and then would alert the FAA—or other aviation authorities—about circumstances that might compromise aviation safety so that they may be remedied. NASA would share the information, but not the source of the information. That way, the reporter remains anonymous, and any disincentive to make the report because of embarrassment or concern about FAA enforcement action is predominantly removed. NASA created an ASRS reporting form (sometimes called the "NASA form") that can be completed and mailed or submitted through the Internet (<http://asrs.arc.nasa.gov>). The form has two parts. One part of the form is a strip, on which the reporter records his or her name and address, and when NASA receives the report by mail, this strip is removed, date-stamped, and returned to the reporter. If the report is submitted electronically, a confirmation page is provided and must be printed out. The other part of the form is a survey that requests detailed information on the event or situation.

After NASA reviews this form and removes any information that may identify the reporter, this information is entered into NASA's database. The

actual report is not given to anyone and is ultimately destroyed. Thus, the information is received and used confidentially. There are only two exceptions to this aspect of this program-the report will not be de-identified if it involves criminal conduct or an accident.

To encourage pilots to file aviation safety reports, the FAA adopted a program that gives a pilot immunity from a punitive enforcement action. In Advisory Circular 46D, the FAA said that it will waive the penalty in an enforcement action if the pilot can show that he or she filed a timely NASA report and is otherwise eligible for the waiver. To qualify for the waiver, the pilot must be able to show that the report was filed within 10 days of the offending event. Also, the offending conduct must have been inadvertent and not deliberate, and it must not involve a lack of qualifications or competency. Finally, the pilot must not have been found in a prior FAA enforcement action to have committed a violation within the preceding five years.

When investigating or bringing an enforcement action against a pilot, the FAA may not inquire about whether a pilot has filed a report, although some inspectors and controllers have been known to recommend that pilots file a report. Sometimes, a pilot tells an inspector about a report and even provides the inspector with a copy of a report, believing it to be a good thing to do-but it's not, because the information is supposed to be confidential, and because it may contain admissions damaging to the pilot. There are better ways to provide information to the FAA. In the case of inadvertent disclosure of a report and its contents to the FAA, the regulations provide the pilot some protection-FAR 91.25 specifically precludes the FAA from using the report or any information in the report in any FAA enforcement action, no matter how it is received.

We continue to advise pilots that if you experience any sort of aviation safety incident or identify an aviation safety concern, promptly file an ASRS report. There is no limit to the number of reports a pilot can file, even if that means a report is made after every flight. Because the information is treated confidentially, except in the case of an accident or criminal behavior, a pilot is free to elaborate in the report as much as may be needed to fully describe

the safety concern. It's a system designed for the aviation community's benefit as well as that of the individual, so don't forget to use it. ■

April 2009

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Legal Briefing: Breaking the rules

By: Kathy Yodice

Student pilots aren't exempt from FAA sanction. Student pilots rarely face FAA enforcement actions, in my experience. An obvious reason is that during most flights, the student is accompanied by a flight instructor who is acting as the pilot in command of the flight. If there is a problem, it usually falls on the flight instructor, not the student. Another reason is that when a student pilot embarks on a solo flight, that student usually has spent hours preparing for the flight and has taken every precaution, under the guidance of an experienced flight instructor, to make sure the flight proceeds smoothly. There are other reasons, I'm sure. Occasionally, however, we see the FAA take swift and serious action when a student pilot breaks the rules. Here is such a case.

The student had been learning to fly for about a year and was within a few weeks of taking his private pilot checkride. On the date in question, he planned a solo flight. However, his fiancée came to the airport and wanted to fly with him, so he took her on the flight. Upon landing, the student encountered his former flight instructor, who admonished the student for his actions. A few weeks later, the student, his former flight instructor, and his current flight instructor met and worked out an arrangement in which they wouldn't report the student's action to the FAA if the student agreed to take 15 hours of additional dual instruction.

It's unclear exactly what transpired after that, but it seems that the former flight instructor changed his mind and threatened to report the event to the FAA. At some point, both the former flight instructor and the student brought the matter to the attention of two different FAA inspectors in two different Flight Standards District Offices. The student admitted his error and was counseled by one FAA inspector.

That inspector determined that the counseling and the remedial training plan adequately addressed the matter and that no further action was necessary, and he closed the matter in his office. A few dozen miles away, the former flight instructor gave the information to another FAA inspector who decided to investigate the matter. After the inspector completed his investigation, he sent the information he gathered to the FAA's legal office, and the FAA's lawyer sent an emergency order of revocation to the student pilot, immediately revoking his airman medical and student pilot certificates.

The FAA charged that the student violated FAR 61.89(a)(1), which prohibits a student pilot from acting as pilot in command of an aircraft that is carrying a passenger, and FAR 91.13(a), which states that no person may operate an aircraft in a careless manner so as to endanger the life or property of another. The FAA further charged that the student had shown a deliberate disregard for the federal aviation regulations, that he lacked qualifications to hold a student pilot certificate, and that revocation was therefore appropriate.

There was no hearing in this case. Instead, the FAA's case and the student's defense were put forth in briefs concentrating on whether there were any genuine factual disputes that required a hearing or whether the undisputed facts were enough to allow the judge to decide the case. In his brief, the student admitted the conduct, but he argued that his certificate should not be revoked because the FAA had not established that he lacked the care, judgment, and responsibility to hold the student pilot certificate. The judge was not persuaded: "As Respondent concedes that he carried his passenger 'against his better judgment,' the inference, which I made from that statement, is that he knew that his decision to carry a passenger was contrary to the provision of Section 61.89(a) and thus his action was a deliberate choice to act in violation of that FAR. Subsequently, Respondent participated in a scheme to prevent his deliberate violation coming to the attention of the FAA. In addition, the FAA's position is supported by the NTSB's historical determination that a violation of Section 61.89(a) is a serious offense warranting revocation and, therefore, one that establishes lack of qualification. That Respondent presumably completed his flight without incident has no bearing upon the issue of lack of qualification. The question

of lack of qualification is, rather, based upon his decision to undertake the flight in deliberate violation of the FARs and his subsequent actions related thereto."

The judge's decision was affirmed on appeal. A tough lesson for this student, but one for all of us to keep in mind. ■

March 2009

AOPA Flight Training Magazine Volume 21 Number 4

Legal Briefing: Liability lessons

By: Kathy Yodice

Instructors become the students
Being a lawyer, a simple and obvious question that is often asked of me is, "What is my liability as a flight instructor?" The answer, unfortunately, is not so simple.

Liability for something that may have gone wrong is generally decided on a case-by-case basis, and liability will require that certain facts and circumstances show that the person was responsible for what went wrong—either intentionally or because the proper care wasn't taken. In almost all of the cases that we are talking about, the lawsuit is based on the theory that someone was negligent. The law of each individual state governs negligence, so there could be variations that affect the success or outcome of a lawsuit, depending on which state the case was brought. Nevertheless, there are a few general requirements pertaining to the ability to hold someone liable in a lawsuit that is based on someone's negligence. First, there must be negligence, which is defined in the law as the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

Second, there must be a duty owed to the person who has been harmed, which must be evident from the relationship between the parties. Third, for the court to hear a lawsuit based on negligence, there must be harm done to someone—in other words, someone must have suffered some

damages that a court could then remedy by an award of money if the negligence is proved. Negligence is a tort, which is a civil-as opposed to criminal-wrong but does not include a breach of contract. Negligence is distinct from other torts, such as intentional torts (punching somebody in the nose) or torts for which strict liability is imposed. There are sometimes legal defenses, such as the contributory or comparative negligence of the person making the claim, which provides that if the person who is harmed has some fault in the harm, then the claim may be prohibited or reduced by the extent of that person's participation in causing the harm.

In the flight instruction context, an instructor owes a duty of care to his student and others. As long as the flight instructor exercises due care in giving flight instruction, there would be no negligence, even if a harm occurs because of the flight instructor's actions. However, if the instructor fails to exercise due care, the instructor is negligent and is liable if the negligence causes damage. If the person who was hurt participated, facilitated, or caused the flight instructor's negligent actions, that could serve to protect the flight instructor against full liability for the resulting damages.

The good news is that there are very few lawsuits initiated against individual flight instructors. There are practical reasons for that. The biggest is that plaintiff lawyers are usually looking for a "deep pocket" since the lawyer only gets paid if there is a recovery. If possible, then, the lawyer will file the lawsuit against the flight school or the fixed-base operator, and the insurance company ordinarily defends the lawsuit and pays any judgment or settlement, without any contribution by the flight instructor. Since insurance is more readily available to flight instructors than it used to be, individual flight instructors might prove to be a more attractive target in a lawsuit than they have been in the past. Are there ways to avoid a lawsuit? Well, we can't stop someone from filing the lawsuit, but we can take actions to avoid a reason to bring a lawsuit and to keep someone from being successful in the lawsuit. There are a few things I typically recommend to flight instructors to protect against bad things happening and a charge of negligence associated with their flight instruction activities. Incorporate quality control measures into your work; that is, stay informed, educated, and

proficient, and you cut down the chances of something going wrong. Double-check what you do to catch mistakes before they cause trouble. Employ conservative personal minimums, and you reduce the risk of being exposed to something going wrong.

And, if you can afford it, get insurance and protect yourself and your loved ones against having to pay an attorney or a judgment from personal assets. As with many things, begin by using good and prudent judgment. ■

January 2009

AOPA Flight Training Magazine Volume 21 Number 1

Legal Briefing: Disability benefit disclosure

By: Kathy Yodice

A change to the FAA's medical application A few years ago, there were several prosecutions of pilots who visited an FAA-designated aviation medical examiner (AME) for a medical certificate and provided incorrect answers on their FAA medical certificate application forms. The Justice Department criminally prosecuted the pilots under a federal statute that prohibits anyone from knowingly and willfully making a material false representation to the government. The FAA acted to revoke the pilots' airman and medical certificates because their intentionally false answers violated the federal aviation regulations.

The Justice Department prosecutions and the FAA enforcement actions came about because of a cross-matching of medical information that took place between the FAA and the Social Security Administration. The government discovered that some pilots were receiving social security benefits for medical conditions that were not properly disclosed on the medical certificate application form. These pilots denied that they intentionally falsified the form and contended that there was not a specific question on the application form that fairly asked for the information. One of the questions on the application form that was intended to elicit this kind of information was Item 18(x), which asks, "Have you ever in your life or do you

presently have illness, disability, or surgery?" These pilots answered no.

An 18-month probe called "Operation Safe Pilot" investigated 40,000 pilots residing in northern California. The operation discovered approximately 3,220 pilots with current medical certificates who were collecting Social Security benefits for an array of illnesses that were medically disqualifying. This investigation resulted in the U.S. Attorney General's Office prosecuting at least 40 pilots.

As a consequence of that experience, the FAA is changing the form to add a specific question in Item 18(y) that asks for disclosure of "medical disability benefits." The FAA intends to elicit information about *any* disability benefits, not just those benefits from the Social Security Administration. The privacy statement that accompanies the application form has also been changed to state that the FAA is authorized to disclose information to other federal agencies for verification of the accuracy or completeness of the information.

An important responsibility is placed on a pilot who applies for an airman medical certificate. The FAA expects the pilot to answer all of the questions on the form fully and accurately in order to make an appropriate determination of medical qualifications. In addition to identifying information such as name, address, and physical description, the form asks detailed questions about the applicant's medical history. It asks about any admissions to a hospital (any time) and about any visits to health professionals in the preceding three years. It also specifically asks about any history of frequent or severe headaches, episodes of unconsciousness, diabetes, and allergies.

One tricky question asks about the current use of *any* medication, even nonprescription. There is also a question that asks about your driving record (especially related to alcohol or drugs, and includes loss of driving privileges) and a question about any non-traffic convictions of a felony or a misdemeanor. Another question, which seems out of place on this medical form, is one that calls for your total flight time, to date and in the past six months. For any positive answers, details of the condition are to be provided in the Explanations section on the form. At the bottom of the form, the pilot must sign the form certifying that all

statements and answers provided on the form "are complete and true to the best of my knowledge." Completing the FAA's medical certificate application form can sometimes feel like a daunting task, especially when we see that the government is swift to take serious action against the pilot for an incorrect answer or the omission of elicited information.

When filling out the form, take your time and read the questions thoroughly, use the instruction sheet to help you, and seek help from the AME if something does not seem clear. If possible, practice filling out the form in advance of your visit to the examiner; consider using [AOPA's TurboMedical](#). Seek advice, if necessary, so that you are not rushed into answering--or answering incorrectly--the questions while in the AME's office. ■