



INNERMARKER

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Donald C. Frank, Editor

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I. President's Letter

By: Robert H. Hoschner
Chairperson

As I looked out at the members present at the annual meeting, I saw the faces of those I see on a regular basis at all the meetings and all the seminars, but it was refreshing to see a few new faces – those new to the profession and those who have been here from the beginning. It was exciting to see and speak to a couple of members who have been here since the section's beginning and have returned to offer their service to the section. My experience at the annual meeting has normally been that of installing the new officers, talking about the year that has just passed, and reciting a few hopes for the future. But this year, there appeared to be a new excitement as we spent a great deal of time discussing what the section should be doing in the future. It is my hope that this enthusiasm will continue, and that we can have the Aviation Law Section become an integral part of aviation in our state.



Robert Hoschner (left), the Section's new Chairperson, accepts the gavel of power from outgoing Chairperson, Gerald Padilla.

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Many thanks go to Jerry Padilla, our Chairperson emeritus, who led the Aviation Section this past year, bringing about a successful Great Lakes seminar and also our Spring seminars in Traverse City and Pontiac. As Chairman Elect last year, I had the opportunity to travel with Jerry on several of our outings and found him to be not only a great Chairman, but also a great pilot. It was fun to fly with him on those occasions. This year our Chairman Elect, Rick Durden, has shown his forethought for the Section by suggesting that in the coming years we emphasize in the Aviation Section the plight of general aviation and the small airport. I look forward to working with Rick as we explore the many possibilities that that subject brings to our organization.

On the fun side, we discussed putting together a family outing at the Kalamazoo Air Museum in June, where not only will we be able to attend the museum,

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but it is expected that we may be able to have a dinner with our families at the museum as an added treat. We will again be attending the Great Lakes International Aviation Conference in January where we hope to have another successful seminar. We will be posting the time and locations of our spring seminars on the website. The council encourages all of our members to come to the council meetings. You can find the information about the locations and times at www.michbar.org/sections/aviation and by sending me an e-mail at bobhoschner@yahoo.com. If anyone has any questions about the Section, or wishes to add any information to this coming year, I look forward to hearing from you and hope to see you at our Section activities this coming year. ■

II. A Note From the Ex-Chair

A year well spent.

By: Gerald V. Padilla

It is quite an honor to be able to write a letter like this. This is a great section with stellar participants. Our section boasts both legal and aviation aficionados. Our membership is proof that the two are not mutually exclusive.

I just finished a year of service as Chair of the Section. A number of exciting things occurred under my watch. We both promoted a social agenda and continued our traditions by giving public seminars, publishing the *InnerMarker*, developing an updated professional Web site and keeping the membership up to date on breaking aviation legal news through the e-mail *WayPoints*. The section has already contributed its expertise to the 2003 Great Lakes International Aviation Conference in January of 2003. Two seminars to the general public occurred in May 2003. The *InnerMarker* is a scholarly journal for the membership.

The Aviation Law Section was extremely active. Activity centered around the seminars and the *InnerMarker*. Another name for the *InnerMarker* could best be *Don Frank's InnerMarker*. Don has been absolutely relentless in putting together this journal. It is a task that often goes unrewarded. I am sure the members recognize his contribution.

The Aviation Law Section was the recipient of an **Award of Excellence** from the Michigan Aeronautics

Commission. The award was presented on September 11, 2002, in Sault St. Marie at the 50th Annual Fall Conference of the Michigan Association of Airport Executives. Eric Richards, former Chair for the Section and Donald C. Frank, Editor of the Section's *Inner-Marker* publication accepted. This was quite a feather in the Section's cap to receive this recognition from the State of Michigan. Thanks to Messrs. Richards and Frank for traveling to accept this honor.

Next and probably more exciting, the Section's Web site has finally taken off. Thanks to Ken Bobo, the Section Secretary, the Web site (located at www.michbar.org/sections/aviation/) contains past issues of the *InnerMarker*, current meeting minutes, and *WayPoints* bulletins that go out on e-mail. Ken, the photographer that he is, has inserted photos also. Thanks, Ken.

Another bit of recognition should go to Cliff Maine, former Chair of the Section. Cliff's practice has a significant portion related to business and tax issues centering on aviation, and he has published *WayPoints* memos giving updates on Aviation related issues to the members of the State Bar. These *WayPoints* bulletins are certainly good practice pointers. Thank you Cliff for taking that bull by the horns.

Another exciting event is the Section's participation in the **2003 Great Lakes International Aviation Conference** that has been taking place for the last several years at Michigan State University, Kellogg Center in East Lansing, Michigan. Eric Richards, again, deserves kudos for organizing a stellar panel for discussions of aviation/legal related topics. The panel consisted of Mike McKinley from the FAA on enforcement issues, Don Frank, Esq. from the Aviation Law Section, Steve Chait from the Aviation Law Section and Eric Richards. Eric has expertise on the buying and selling of aircraft. A highlight of the talk was the "point/counterpoint" discussion between Messrs. McKinley and Chait over the FAA's "temporary flight restrictions" over sporting events. The talk was well attended. I was lucky enough, as Section Chair, to be able to introduce this group of "heavyweights" to a reasonably-well attended crowd. Gentlemen, thank you.

On the horizon we have two spring seminars for the upcoming year. In recent years these have been held in various parts of the state. Attendance has historically exceeded over 250 attendees. Most are lay persons who want to keep up on legal issues regarding aircraft. In addition, the Section plans on contributing to the upcoming winter 2004 GLIAC seminar generally held mid state.

The seminars are an excellent opportunity for the Section to shine to the general public. The topics in the

past have ranged from insurance issues, to enforcement related topics, to security questions in light of September 11, 2001, through the organization and representation of business entities in owning and leasing aircraft as well as tax-related issues. Buying and selling of aircrafts and the checklist for doing the same have been especially interesting.

From a social standpoint, the Section did not sit on its hands either. Our first social outing was at Owosso Airport (5D3) on October 27, 2002. Owosso is a small airport that is the homebase for our Chairperson, Bob Hoschner. A good deal of the vitality of the airport is due to Bob and his cohorts there. On the fourth Sunday of each month, Owosso offers a pancake breakfast that is really an excuse for flying. The food is good but the flying is better.

Thank you for allowing me to be your Chair. It is, and always will be, an honor. ■

III. One Hundred Years – The Wright Brothers, The Wright Flyer & Four Years of Patent Litigation

*By: Leonard E. Nagi
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This year we celebrate the centennial of the maiden flight of the original Wright Flyer. Two and one half years after the flight, the Wrights received a patent; two years later they were involved in patent litigation over their design of the airplane. The opinions in the cases – some sixty-six pages – provide an interesting perspective for pondering what specifically the Wrights accomplished. We, of course, with our hundred years of experience with flight are "sophisticated" in our knowledge of aerodynamics. We also take for granted that the Wrights were the "first to fly," and that their design was a milestone. The opinions (particularly Judge Hand's opinion) provide details of the complexity of the Wright Flyer in the context of deciding whether the design was revolutionary as opposed to having been anticipated by the prior art.

The Wright Company filed two lawsuits involving patent infringement. Each suit sought an injunction to stop the alleged offender from building airplanes in

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violation of the Wright patent. The principal dispute involved stability and control devices patented by the Wrights to overcome the inherent instability of such flying machines.

Wright v Curtiss¹

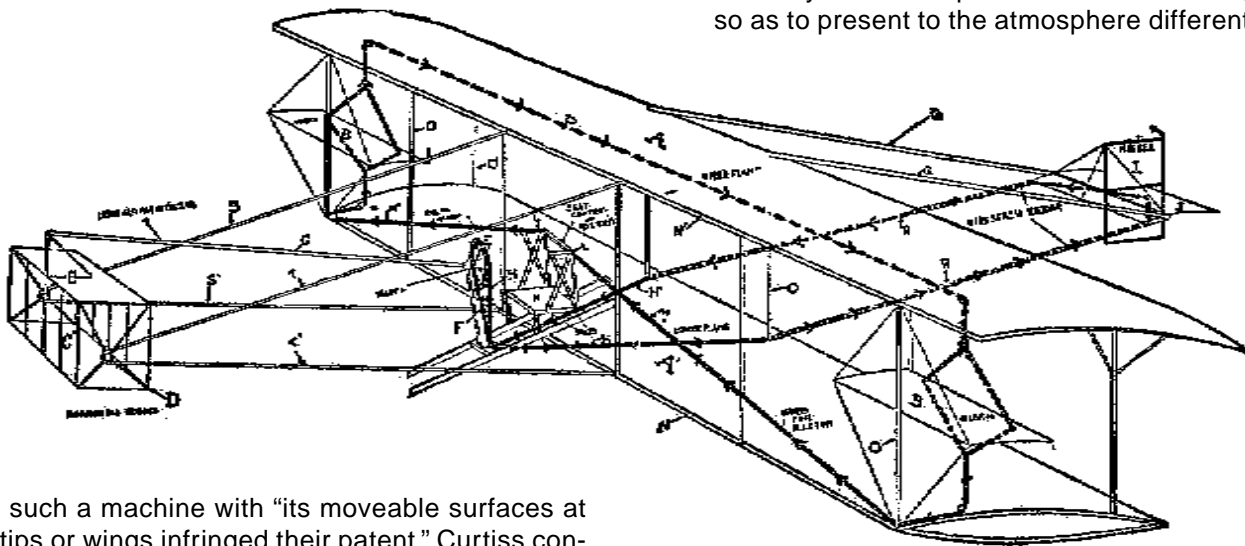
Wilbur and Orville received the patent for a flying machine on May 22, 1906. In July 1908, Glen Curtiss exhibited a flying machine, which he called "The Junebug." The Wrights immediately informed Curtiss

Curtiss in defense, claimed that his control surfaces were based upon an entirely different principle than the Wright design; that the patent was invalid in view of the prior art; and in addition that the patent was not entitled to a broad construction. Both sides presented affidavits of experts.

The Wrights relied upon several claims in the patent as outlined by the Court:

"(7) In a flying machine, the combination with an aeroplane, and means for simultaneously moving the lateral portions thereof into different angular relations to the normal plane of the body of the aeroplane and to each other, so as to present to the atmosphere different

From: 1928 U.S. Aviation Reports



that such a machine with "its moveable surfaces at the tips or wings infringed their patent." Curtiss continued to fly and demonstrate the machine, so the Wrights sued for infringement and sought an immediate injunction. Judge Hazel of the U.S. District Court for Western District of New York, after considering conflicting affidavits, found the validity of the patent and the infringement "so reasonably clear" that he issued the injunction pending a full trial on the merits.

The Bill of Complaint Against Curtiss

"...the patentees were the first inventors of what is commonly known as a heavier than air flying machine. Such machines are sustained in their aerial movements by either one or two planes or surfaces which travel through the air in a forward ascending or descending course at an angle of incidence, and may be driven or propelled by mechanical power or force of gravity. The objective of the inventors were to provide means for maintaining or restoring the equilibrium or lateral balance of the apparatus, to remove or repress aerial forces which tended to divert the course of the apparatus, and to provide means for guiding the machine both vertically and horizontally."

angles of incidence of a vertical rudder, and means whereby said rudder is caused to present to the wind the side thereof nearest the side of the aeroplane having the smaller angle of incidence and offering the least resistance to the atmosphere, substantially as described."

The essential elements of such claims are an aeroplane or supporting surface, the lateral portions of which are capable of adjustment to attain different angles of incidence and a vertical rudder in the rear of the machine. Claims 14 and 15 include as elements a horizontal rudder which is positioned forward of the machine and means for raising and lowering it so as to present its upper or under side to the pressure of the wind."

The Court discussed aeronautical principles, reviewed the history of flight, and relied upon the accomplishment and fame of the Wright brothers:

"The first aerial flights to which the attention of the public was attracted was had at Kitty

Hawk, N.C., in December, 1903, when the Wright machine using a 12 horse-power motor weighing 200 pounds demonstrated its ability to maintain its balance and readily turn to the right or left and ascend or descend. The newspapers of the country heralded as marvelous the success of the patentees, and published wide that human flight had been made possible and that the patentees were the first in the annals of the world to achieve success with a heavier than air flying machine. Public recognition of their success was subsequently made by scientific institutes and academies of high repute in this country and abroad. Medals were presented to the inventors by Congress, by the republic of France and by various aeronautical societies of Europe and America. Such testimonials are entitled to weight in support of the presumption of validity and the practical utility.”

Based on the affidavits from both parties, the court ruled that enough evidence existed to believe that the Wrights would prevail in a trial and granted the injunction.

An interesting Michigan connection appears in the opinion. The court notes that Curtiss had received detailed information on the construction of the Wright machine “through correspondence passing between the patentees and the late Lieut. Selfridge in January, 1908...” Lieutenant Thomas Selfridge was the first person to die in a powered airplane crash in September, 1908. He was assigned to an Army board conducting tests of the Wright Flyer “to see if it could fly 40 miles an hour, carry two persons aloft and be portable enough to be carried by a mule-drawn wagon.” He was a passenger aboard a demonstration flight with Orville Wright piloting, when the plane crashed resulting in his death and injuries to Orville. Our local Selfridge ANG airbase is named in his honor.²

Wright Co v Paulhan³

Six weeks after the decision in *Wright v Curtiss*, *supra*, the U.S. District Court for Southern Division of New York, Judge Learned Hand presiding, was faced with a virtually identical issue of an injunction against an alleged infringement of the Wright patent. Though Judge Hand believed that “(t)here is very little that I should wish to add to Judge Hazel’s opinion.... In view of the seriousness of the contest, I feel obliged to give my own reasons for this decision.” A fourteen-page discourse describing the intricacies of the aerodynamics and issues followed. I dare say you are courageous if you actually read through the following quote from the opinion; but you will find a rewarding description of “instability” if you stick with it:

“To an intelligent understanding of the invention and the question of how essential is the attachment of the tiller ropes to the warping rope, the method of maintaining equilibrium under the patented combination must first be set forth. Assume an aeroplane with or without dihedral sustaining surfaces, to be propelled through the air, having the combination specified, and also suppose the left wing has been accidentally depressed. That in itself will result, as all agree, in starting a revolution towards the left. This is the resultant of two motions: First, the forward motion of the plane; and, second, the motion at right angles caused by the sliding of the machine laterally in its own plane and over the successive columns of air. The resultant is precisely analogous to any planetary motion. This resultant is accentuated by the movement of the center of pressure towards the depressed lateral margin, giving a greater leverage to the propeller nearer the elevated wing. Also, the vertical rudder becomes transverse in its reaction to the lateral motion of the aeroplane and consequently the rudder is pushed up, and by its leverage further turns the direction of the plane to the left. Thus the machine will begin to revolve to the left. Moreover, this very motion will cause the right wing to be further elevated, because of the increased drift, or head-resistance by its increasing speed, and the decreased drift against the left wing, caused by its diminished speed. Thus in turn, the initial depression creates a revolution, and that, in turn, an increased depression with its corresponding acceleration of revolution, so on cooperating till the machine will swoop downwards to the left to its entire destruction.”

The opinion continued in great detail describing the design of the controls, and how the design by the Wrights prevented such spins. The issue of whether this was a “pioneer patent” was of great importance as such patents are entitled to a liberal construction of the claims made. The defendant claimed that the individual elements of the design (rudder and variable warped wing) were not patentable, so the patent based on the operation of the elements in conjunction with each other is not the proper subject of the patent. The Court considering this issue stated:

“Moreover, in this consideration is involved the question of whether this is a pioneer patent, because if the three-rudder system of control be an invention of the complainants,

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then they are clearly entitled to have their patent take place as a pioneer. Before, however, considering the prior art, it is necessary to determine first, whether the patent is of a true combination or of an aggregation; and, second, whether it be merely a principle or abstract function rather than a true invention....

The answer is, that if the combination of elements were not new, the patent would be merely upon the method of operation, but the combination is, as I have said, quite new and the method of operating it need not be relied upon as the invention. No one before did in fact combine all these, and therefore no one gave to aviators the possibility of so operating.”

The court reviewed the history of attempted flight and the prior state of art, and though Judge Hazel in *Curtiss, supra* did not hesitate to state that the Wrights were the first to fly, Judge Hand avoided the issue in his ruling in favor of the Wrights.

“From the showing made, I cannot doubt that the complainants first put into any practical form the system of three-rudder control. That there may be other systems is not the point; let the defendant use those, if he will. Nor is it necessary to conclude that the complainants were the “first to fly.” Upon that I decide nothing whatever, for it is not an issue in the case. All I do say is that I cannot find that any one prior to their patent had flown with the patented system, and that the changes from the specifications which the defendant has made are no more than equivalents which do not relieve him from infringement.”

The Appellate Decisions and Retrial

The Second Circuit Court of Appeals, *per curiam*, reversed both cases stating simply that whether or not there was an infringement, depends upon the question whether or not in defendant’s machine a tendency to spin or swerve is checked or counteracted by the operation of the vertical rudder. The court held that because of the sharp conflict of evidence, affidavits alone were insufficient to support an injunction and reversed.

On retrial of the *Wright v Curtis* case, Judge Hazel, in a twenty-three-page opinion dated February 21, 1913, summarized the witness testimony on aerodynamics, flying characteristics of both airplanes,

state of art and history of failed flight attempts prior to the successful flight by the Wright brothers. Placing the accomplishment in perspective, the Court noted:

“Much, indeed, prior to the Wright patent, had been written on the subject of aerial machinery by Prof. Langley, of Smithsonian Institution, Octave Chanute, and others, and there were a number of patents in this country and in foreign countries disclosing diligent and painstaking efforts by inventors to achieve success in aerial navigation with heavier than air machines; but all such efforts for one reason or another were abortive, and the intentions of the inventors and experimenters miscarried. The prior art taught that Langley, Lilienthal, Chanute, Maxim and others had faithfully endeavored to solve the difficulties and remedy the imperfections in apparatus. Flying machines of various kinds had previously been built, but no one had flown save a few, Chanute in this country, and Lilienthal and Pilcher abroad, who were engaged in experimentation.

In this situation the patentees conceived the idea of hinging dihedral planes to supports at their front and rear margins, with flexible joints to permit warping or tilting them at their extreme lateral ends by the use of suitable levers to impart to the aeroplane surface a helicoidal twist.”

Details of flying techniques and characteristics were considered as illustrated by a U.S. Signal Corps Aviation school pilot who frequently flew both the Wright and Curtiss machines, testifying concerning the method of flying the Curtiss machine as opposed to the Wright Flyer:

“I move the aileron on the low wing in order to increase the angle of lift, and move the vertical rudder toward the other side until the machine resumes a horizontal position,” and move “the aileron on the other side in the opposite direction. *** On two or three occasions, in very gusty weather, I have allowed the wing to remain in the position assumed when pressed down by the down trend of air, and have attempted to raise it by using only the ailerons. I held it in this position without touching the vertical rudder as long as I felt it to be safe, without any response. By moving the vertical rudder toward the high side, the machine resumed a horizontal position immediately.”

After consideration of all the evidence, Judge Hazel, once again ruled the patent was valid and infringed.

On appeal decided a year later, the Second Circuit, after summarizing the history of both cases, affirmed, stating:

“As we are in full accord with the reasoning by which he (and Judge Hand) reached the conclusions that the patent in suit is a valid one, the patentees may fairly be considered pioneers in the practical art of flying with heavier-than-air machines, and that the claims should have a liberal interpretation, it seems unnecessary to add anything to what has been already written”⁴

Summary

One hundred years after the first flight by the Wright brothers in the Wright Flyer, a reading of patent infringement opinions is as good a way as any to contemplate the event.

Endnotes

1. *Wright Company v Herring-Curtiss Company*, USDC WDNY, Jan. 3, 1910, Reversed by USCA, Second Circuit, June 14, 1910. 177 F. 257, 180 F. 110.
2. See www.nationalaviation.org/ enshrinee list for further biography.
3. *Wright Co. v Paulhan*, USDC SDNY, Feb 17, 1910, Reversed by USCA Second Circuit, June 14, 1910, 117 Fed. 261, 180 Fed. 112.
4. *Wright Company v Herring-Curtiss Company*, USDC WDNY, Feb. 21, 1913. Affirmed USCA Second Circuit, Jan. 13, 1914. 294 F. 597; 211 F. 654. ■

IV. Regulatory Myths

By: Rick Durden

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& Brengle, PC, Grand Rapids, MI
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All of us in the Aviation Section of the bar association get calls from pilots asking for advice regarding compliance with regulations. Most of the time it's pretty straightforward, we pontificate and our clients decide whether to follow our advice. However, things can get a trifle interesting when the client has heard some of aviation's more potent old wives tales and insists that because he is a pilot, he knows the regulations far better than some lawyer who has taken the time to look up the actual wording. After all, the pilot client did take a test that had some questions about FARs and, by gawd; he knows a thing or two about the regs. To make matters worse, there are times FAA inspectors aren't completely up to speed on the FARs either, complicating our task as we

diplomatically attempt to persuade one of those god-like figures from the FSDO that she might want to go take another look at the CFRs before jumping down our clients' throats. What follows is a recitation of several of the more common myths about regulations that we attorneys are told by our clients along with some support for deflating those myths in the hopes of helping keep your clients from getting themselves into trouble.

Errors on Clearance Readbacks

Most everyone is aware that the process of communicating with Air Traffic Coordinators via voice over two-way radios leaves something to be desired. Transmissions get stepped on, clarity varies and misunderstandings occur. Sensibly, the NTSB had for years ruled that pilots who read a clearance back incorrectly and then flew the aircraft where they said they would and busted an altitude or lost separation with traffic, were not generally guilty of a violation if the controller did not catch the mistake in the readback. It was a logical recognition that mistakes happen in the real world. As in football where opposing penalties nullify each other, the NTSB generally refused to convict where both the pilot and controller erred. Pilots felt they were protected so long as they read back clearances.

Unfortunately, that protection is now a myth. In the heat of an administrative law hearing against a pilot on that very issue, the NTSB law judge asked the FAA attorney whether the agency had an interpretive rule on clearance readbacks. Rather than take the time to evaluate the issue dispassionately, the FAA attorney said the FAA did and that the interpretation was that pilots were not protected if a controller didn't catch a mistake in the readback. Because the NTSB is obliged by law to follow any FAA interpretive rule, unless it is unreasonable, the judge was forced to find the pilot in violation. While there is a very good argument that the interpretive rule on readbacks is absolutely unreasonable, illogical and out of touch with reality, it is now the law and the clearance readback precaution as protection against a violation has become one of aviation's newest myths. For more on this nasty little topic see www.avweb.com/articles/lounge/tpl0009.htm.

Emergencies and Paperwork

A client calls you in a bit of a panic and says she just declared an emergency and returned for a safe landing at Detroit City Airport. She wants to know how many days she has to file the paperwork with the FAA or whether she has to do it immediately, before she heads to the bar. Fortunately, because you've done your homework, you know that there is no

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paperwork involved when a pilot declares an emergency. The FAA, in a fit of brilliance, figured out that pilots are already overly hesitant to admit they have an emergency and has imposed absolutely no reporting requirement if a pilot declares an emergency. You tell her that the airport itself may have some internal reporting requirements for its CFR crews, but that the most that will probably happen is that she'll get asked for her name and address by one of the crash crew members.

She doesn't believe you. She's seen the requisite John Wayne movies where it is: "Number three is on fire, the extinguisher isn't working, the prop won't feather, my copilot is having hysterics, one flight attendant is in an advanced stage of labor and the passengers are rioting, but I'm not declaring an emergency because I don't want to have to mess with the paperwork."

You calmly point out to her that the confusion arises from misreading FAR 91.3. It states that if, in the process of dealing with an emergency, she deviated from a regulation, then the FAA may ask her to provide a report about the deviation. That's it. The vast majority of emergencies do not involve deviation from any of the regulations. Only if she had to deviate from some regulation to handle the emergency is any potential for reporting even triggered and then, such a report is only required if the FAA decides it wants one. As someone who has been representing pilots for a fair number of years, I've never had a matter in which the FAA asked for a report after a pilot declared an emergency.

As an attorney who knows the regs, you have the chance to help stamp out the emergency declaration = paperwork myth, one of the most pervasive and dangerous in aviation. It has killed folks who, beyond a natural reticence regarding drawing attention to themselves (if I declare an emergency it tells the world I can't handle this), also worry about subsequent contact with the FAA. They shut up and die. If you are reading this, you have been around the block enough times to know that staying alive in an emergency may depend on using all the resources available in a very limited time. If something really goes amiss, it's wise for the pilot to declare the emergency word and have those crash/fire/rescue experts and their trucks right there by the runway rather than parked in the fire station.

Accident Reporting

Your client disarmed the automatic gear extension device on his Cherokee Arrow per Piper's Service

Bulletin. Then, on approach to the strip by his lakeside cabin a deer wandered onto the runway. Prudently, he went around. In the ensuing excitement of establishing a positive rate of climb while heavy on a hot day and listening to his passengers oohing and aahing over the deer, he retracted the gear. You know what's coming...he didn't extend it the next time around. Concentrating on the short strip, he didn't hear the gear horn because he had a really good headset and the passengers were still making a lot of noise. He went from those who will, to those who have, and made a gear up landing. He calls you and asks how long he has to report the event to the FAA because he knows he has to do so.

You calm him down and point out that accident reporting is to the NTSB, not the FAA, per Part 830. You then advise him that the event has to actually be an accident under Part 830 before he has to report it. Fortunately, for him, a gear up event almost never qualifies as a reportable accident, so, unless something very unusual happened, no report is going to be required. But, because you live in the real world, you know that some excited do-gooder who is clueless about the regs and figures he's got to do something after an airplane slides to a halt (often the airport manager), will start calling half the people on the planet. Therefore, advise your client that he can expect some attention from the FAA and he may find himself facing a 709 ride, or, if the inspector from the FSDO is in a bad mood, a violation. (Tell him also that the 709 ride is about the most painless thing there is in aviation, and not to get too worked up about it.)

There is a caveat to the accident reporting issue. Michigan law has an accident reporting provision that is more inclusive than the FARs, and a gear up landing is probably reportable to state authorities, although the reason for it has always escaped me. The Michigan state police seem to have an automatic procedure to report anything it hears to the FAA. So, when your client calls the state police on a non-accident under 830, have him advise the police that all required federal reporting has already been done. It's the truth and may prevent the state police from calling the FAA.

As a practice tip, if the FAA tries to lean on your gear up client by claiming he or she endangered the lives of the passengers with a gear up landing, gently ask the inspector to identify a civilian aircraft gear up landing (where the gear up is the only thing that was wrong, not an engine failure or other, additional problem) since World War II in which someone was injured or killed. Thus far, extensive searches by a number of folks, including some FAA attorneys, have failed to turn up a single such injury or death. I am told, however, but cannot verify, that there have been people killed and injured by TV camera crews driving

at high speed to airports to film an airplane that is going to make a gear up landing.

Be sure and get all the facts from your client before advising about reporting an accident to the NTSB. Say he was taxiing from his hangar to the fuel pumps to get fuel. An Alzheimer's patient and former pilot simultaneously drove his car onto the ramp. Your client hit the car and careened into the fuel pumps. A fire started. Then an explosion blew the airplane into the main hangar destroying a Citation X, three Falcon 50s and a G III. Your client has ten days to report this accident to the NTSB, right? Nope. It's not a reportable accident. Your client was not operating his aircraft for the purpose of flight.

Over Gross

One of the puzzling but pervasive old wives tales insisted upon by clients is that while it may be foolish for them to fly their airplanes over gross, it's not a violation of FARs. That is just plain wrong. 91.9 requires compliance with an airplane's operating limitations. Gross weight is an operating limitation. You might remind your client that operating over gross is a violation of the FARs. Should there be an accident, a violation of the regs may very well lead directly to an automatic finding of negligence against your client and effectively hamstring any defense she might otherwise have.

Lamination

Within two weeks of writing this article I had a client insist to me that it is illegal to laminate a pilot certificate. I don't know where this one got started, but it shows up from time to time. The FAA has never, ever said that encasing a certificate in clear plastic is prohibited. The only warning you might give to your client is to remind him to sign the certificate prior to laminating it.

Ramp Checks and Certificates

There are a couple of loose nuts running around on the Internet who claim that the FAA does not have the authority to conduct ramp checks under Part 91. If you have a client ask you about that (doubtful, members of that group seem to feel that they know more than lawyers) point out to him that Congress directed the FAA to scrutinize the entire aviation community for the purpose of safety in the very legislation that created the FAA, the Federal Aviation Act.

Pilots have a lot of questions about ramp checks generally, and are justifiably nervous about them. A lot has been written on this topic, yet one OWT still gets published from time to time: that a pilot getting ramp checked should only show her certificate to the

FAA inspector and never physically hand it over because the inspector can interpret that action as a voluntary surrender. It just isn't so. Nothing in any of the statutes, regs or internal procedures of the FAA gives an inspector such power during a ramp check. An FAA regional counsel once told me that any inspector who tried hanging on to a pilot's certificate during a ramp check would be lucky to have his next job assignment in Nome. A pilot may surrender her certificate, however, the FAA is pretty cautious about such actions and requires that any surrender be accompanied with a writing confirming the pilot's intent, per 61.27.

Landing On A Taxiway

You get another one of those cell phone calls from a panicked client on an airport ramp. He arrived at his destination to find an unforecast 45-knot direct crosswind for the one runway in existence. There was a 1,000-foot long taxiway directly into the wind and he landed on it. Was he legal in doing so? Yes. There is no FAR prohibition from landing on a taxiway. If your client faces such a situation at a controlled field, he should advise the controller of his intention and request a clearance. He will either get one or a "land at your own risk" clearance. The reality is that if your client has some question about his ability to handle a crosswind, he has a potential emergency. Therefore, why should he risk himself and his passengers trying to handle that crosswind when he can safely and legally land into the wind?

A Few More

A few more myths of which you may need to disabuse your clients in your practice: It is not only legal to fly your airplane under Part 91 once the engine is past TBO, you can take flight instruction in it and pay the CFI for that instruction. The only time TBO functions as a limitation is under Part 135.

It is legal to use a VFR GPS for enroute IFR navigation. It cannot be the primary navigation aid. It's perfectly legitimate for a pilot to indicate to ATC that a radar vector to a point a few hundred miles away is desired and then suggest a heading. While the pilot is using the VFR GPS as a "backup" navigation system, he or she is officially on a radar vector. Controllers like it, as they know the airplane will proceed in a straighter line than under VOR nav (VOR signals have significant scalloping) and the airplane will scoot out of their sector faster than if some other form of navigation is used. For more on this see www.avweb.com/articles/pelperch/pelp0011.htm.

FAR 91.109 insists that a pilot become familiar with all available information relevant to a planned

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REGULATORY MYTHS –

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flight, however, it does not require that current charts be aboard the aircraft. Only Parts 135 and 121 require that current charts be carried.

The accident involving a Cessna Beech Piper Cub was caused by the failure of the pilot to file a flight plan. That's got to be true, because I see it so often on the news. ■

V. “Security Program” Replaces Background Checks

By: Donald C. Frank
Meridian Law Center, PC
Okemos, MI

The background checks that were required in the wake of the September 11, 2001, attacks for individual's “enrolled” for flight training in Michigan have now been repealed in Michigan. The requirement for burdensome federal and state criminal background checks previously imposed by PA 2002, No. 258 and PA 2002 No. 318 has been replaced with a much less burdensome and less intrusive requirement that each flight school “implement a security program.” The security program must be “designed to limit aircraft accessibility and ensure the security of those aircraft on the ground that are used by the flight school. (MCL 259.85(24))

The new statute also contains specific provisions that must be included in required security program. These security program requirements include:

1. A requirement that a “student” present an FAA “student medical certificate” and a student pilot certificate before “enrollment” in a flight school. MCL 259.85(26)(a). (Although “student” is not defined in this statute, it now defines “enrollment” for purposes of that subdivision as “a flight instructor endorsement to operate an aircraft at a time during which the student is the sole occupant of the aircraft.” MCL 259.85(26)(a));
2. Instructional materials on “suspicious activity” and advising both “students and renter pilots” how to report such activity to local law enforcement officials and “federal authorities.” (MCL 259.85 (26)(b)); and
3. Prominent display of signs requesting “pilots” to report suspicious activity and providing telephone

numbers for local law enforcement officials and federal authorities. MCL 259.85 (26)(c).

These requirements were apparently designed around the AOPA's current airport watch program. In fact, at the present time, the state of Michigan is helping to implement these statutes by mailing licensed flight schools a set of the AOPA's airport watch materials including a sign, video, window stickers, and pamphlets together with a confirmation receipt which the flight schools are being asked to sign and return to acknowledge receipt of the materials and an intention to use the materials.

“Flight school” continues to be broadly defined by MCL 259.4(b) as follows: “Flight school means any person providing or offering to provide flight training leading to pilot or flight instructor certification, for hire or compensation, and engaged in any of the following: (i) advertising or calling oneself a flight school or anything equivalent to a flight school; (ii) hiring, contracting, or otherwise using 1 or more flight instructors in an endeavor described in this section.”

As was true with the background checks and other requirements of MCL 259.85, compliance with the security program requirements is a condition of licensure as a flight school and violation constitutes a misdemeanor. (MCL 259.85 (28)) ■

VI. Michigan Law Legislative Update

By: Clifford G. Maine, Esq.
Miller, Johnson, Snell & Cummiskey, PLC
Grand Rapids, MI

In the past year the Michigan Legislature has passed laws affecting Michigan aviation law. The following is a summary of the most recent bills passed by the Legislature:

2003 PA 133: Aeronautics; aircraft; flight schools; limit and provide certain security programs for an aircraft on the ground. Amends sec. 85 of 1945 PA 327 (MCL 259.85) & repeals sec. 85a of 1945 PA 327 (MCL 259.85a).

2002 PA 668: Transportation; motor fuel tax; diesel fuel rate; increase. Amends secs. 8, 92 & 152 of 2000 PA 403 (MCL 207.1008 et seq.) & repeals sec. 91 of 2000 PA 403 (MCL 207.1091). TIE BAR WITH: HB 5733'02 HB 5734'02 HB 5736'02.

Several aviation laws remain pending in the state legislature. The following is a list of bills pending as of August 12, 2003.

SB 0488: Aeronautics; other; fuel tax rebate; expand provision to include certain carriers. Amends sec. 203 of 1945 PA 327 (MCL 259.203).

SB 0542: Criminal procedure; sentencing guidelines; sentencing guidelines for conducting certain aeronautic violations; provide for. Amends secs. 1 & 12, ch. XVII of 1927 PA 175 (MCL 777.1 & 777.12). TIE BAR WITH: SB 0541'01.

SB 0783: Sales tax; collections; collection of sales tax imposed on sale of certain aircraft and aircraft parts; require a portion to be earmarked into the aeronautics fund. Amends sec. 25 of 1933 PA 167 (MCL 205.75).

SB 0784: Use tax; collections; collection of use tax imposed on sale of certain aircraft and aircraft parts; require a portion to be earmarked into the aeronautics fund. Amends sec. 21 of 1937 PA 94 (MCL 205.111).

HB 5489: Aeronautics; airports; restricted use of certain airports; clarify. Amends 1945 PA 327 (MCL 259.1 - 259.208) by adding sec. 1b.

SB 1393: Aeronautics; other; clarification of penalty provisions; provide for. Amends secs. 83 & 83b of 1945 PA 327 (MCL 259.83 & 259.83b).

HB 5011: Aeronautics; airports; December property tax levy; eliminate and revise date for collection. TIE BAR WITH: HB 5010'03 ■

VII. New Tax Laws Affect Depreciation On Aircraft

By: Donald L. Katz

*Miller Canfield Paddock and Stone, PLC
Detroit, MI
and*

Paul McCord

*Miller Canfield Paddock and Stone, PLC
Detroit, MI*

If you're planning to purchase or contract for new aircraft, please take note. The Job and Growth Tax Relief Reconciliation Act of 2003 turns some conventional wisdom regarding 1031 exchanges on its head and state tax issues may confuse the analysis even more.

Traditionally, companies have used a 1031 exchange to defer taxable gain on the sale or replacement of aircraft. But, under certain provisions of the Job and Growth Tax Relief Reconciliation Act of 2003 (the "Act"), other

options – namely the bonus depreciation – could be far more advantageous.

The Act increases the bonus depreciation allowance from 30% to 50%, extends the window of opportunity through 2004¹, and front loads depreciation benefits in the earliest years of ownership – thus offering a significant tax incentive to replace property before January 1, 2005.

To be eligible for the 50% bonus, qualified tangible property (such as aircraft, trucks, or equipment) must be contracted for, purchased, and placed in service during a specified period of time and meet these other criteria:

- The property must have a recovery period of 20 years or less,
- The property must be purchased between May 5, 2003, and January 1, 2005, (timing the execution of the purchasing contract is critical),
- The original use of the property must begin on or after May 5, 2003, (although certain improvements to used property also qualify), and
- With few exceptions, the equipment must be placed in service before January 1, 2005.

The bonus depreciation benefit works this way. In the year in which the aircraft is first placed into service, the taxpayer can take a deduction equal to half of the property's adjusted basis. The remaining 50% of the property's basis is subsequently depreciated over the remaining period, including the first year's depreciation allowance. That means the bonus is in addition to the first year's depreciation, not in lieu of it – making the effective cost recovery during that first year well above 60%.²

However, although it is anticipated that the bonus depreciation provision introduced in the 2002 tax act and increased by the 2003 tax act will have a stimulative effect for the national economy generally, and sales of new aircraft in particular, this change in federal tax law will produce a corresponding negative impact on state tax revenues.³ As a result, most states have taken steps within their own tax laws to reverse or "de-couple" from the federal bonus depreciation provisions. This state action undermines some of the benefit of the federal incentive.⁴

Many states, including the District of Columbia that previously followed the federal depreciation rules have now de-coupled. Those states include: Arkansas, Arizona, Connecticut, Georgia, Hawaii, Illinois, Idaho, Indiana, Iowa, Kentucky, Maine (for tax years 2001 though 2003), Maryland, Massachusetts, Minnesota, Mississippi, Missouri (for one year), Nebraska, New Hampshire, New Jersey, New York, North Carolina (for

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NEW TAX LAWS –

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tax years 2001 through 2003), Ohio, Oklahoma (personal income taxes only), Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont (personal income taxes only), Virginia and Wisconsin.

A handful of states still conformed to the federal depreciation rules including the bonus depreciation provisions. Those states include Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Michigan (no corporate income tax, but see the discussion of SBT below, federal rules apply, however, for personal income tax purposes), Montana, New Mexico, North Dakota, Oregon, Utah, and West Virginia.

Some states achieved this de-coupling by requiring taxpayers to simply add back the bonus depreciation claimed on their federal return to their adjusted gross income, while others require taxpayers to re-compute their depreciation on property placed in service on or after January 1, 2001, under the Internal Revenue Code as it stood prior to amendment by the 2002 tax act. In those states where their tax law was tied to the Internal Revenue Code as of a certain date, the state legislature simply took no action to incorporate the new bonus depreciation rules.

Under Michigan's Single Business Tax, the federal depreciation (including bonus depreciation) on your aircraft must be added to your Michigan tax base to the extent deducted in arriving at federal taxable income. Although federal depreciation must be added back to the tax base for Michigan SBT purposes, you may claim an investment tax credit (ITC) against your SBT liability for a percentage of the net costs paid or accrued in a taxable year for your aircraft if it is physically located in Michigan. Under the ITC, qualifying assets must be of a type that are or will become eligible for depreciation or amortization for federal income tax purposes, such as aircraft. Assets purchased or acquired for use outside the state but later moved into Michigan, also qualify for the ITC. Of course, the cost of mobile tangible assets, wherever located are subject to apportionment in the same manner as the tax base.

In many cases, the new tax law makes a 1031 exchange less attractive but not necessarily obsolete. The Act postpones the appropriate time for the 1031 exchange until January 1, 2005. At that time, the adjusted cost basis for property that's been subject to the bonus depreciation will likely be below the fair market value when replacement is being considered.

This year's tax law, intended to stimulate the economy, offers exceptional opportunities that can substantially reduce acquisition costs – but its provisions are only advantageous under particular circumstances

and each transaction should be carefully planned for and analyzed before a purchase contract is signed. That is, the key to using this strategy, just like any tax advantaged structure, is proper planning before the transaction occurs; implementing the proper structure can be cost effective and boost the company's bottom line.

Endnotes

1. Currently, there are bills in Congress that would extend the date even further.
2. Of course, if the acquisition is eligible for section 179 deduction, this percentage would increase depending on the acquisition cost.
3. Although state sales and property taxes are administered independently from the federal government, many state income tax rules are tied to the rules and definitions in the Internal Revenue Code. The practice of mirroring federal tax provisions at the state level is commonly referred to as "conforming." As a result, certain changes in federal tax policy, such as the bonus depreciation provisions, can have a substantial impact on state tax revenues.

With the exception of a handful of states (California, Michigan (with respect to its Single Business Tax) Nevada, Washington, and Wyoming which do not have corporate or personal income taxes), state depreciation rules have generally conformed to federal tax law.

4. The bonus depreciation rules are expected to reduce federal revenues by over \$100 billion in fiscal years 2002 – 2004. The Center on Budget and Policy Priorities, a nonpartisan research organization and policy institute that conducts research and analysis on a range of government policies and programs, estimates that state revenues would be reduced by several billion dollars in the next three years if all states were to maintain their conformity to federal law. ■



**Visit the
Aviation Section
Web site
at:
www.michbar.org**

VIII. Directory Changes

The Aviation Law Section will be publishing its updated membership directory in January 2004. Hundreds of copies of the directory are distributed free of charge each year to pilots, mechanics, and others at our seminars and by mail, as well as being provided to our members.

Many members have a “bullet point” practice description included with their listing, and all members are welcome to add such a practice description at no charge. Up to five lines of bullet points with up to about 30 characters per line can be included in member listings. Practice descriptions contained in the last directory will automatically be included with the same information as in the last directory for renewing members unless changes or other instructions are received by our section’s editor, Don Frank, by December 31, 2003. Address, telephone number, and other basic member information will be obtained for the directory from the State Bar of Michigan after the membership renewals are completed in 2003.

Members should send any corrections, changes, or additions of practice description by e-mail (preferred), facsimile, or US Mail to Donald C. Frank, 4151 Okemos Road, Suite 100, Okemos, MI 48864; fax (517) 349-2941; e-mail: PrattFrank@cs.com. Sending directory information by email is preferred because that facilitates electronic forwarding to the section’s printer and reduces handling and printing costs. ■

IX. Founder’s Honor Roll

*By: Donald C. Frank
Meridian Law Center, PC
Okemos, MI*

For many of us that were involved in the original organization of the Aviation Law Section, it is hard to believe that it has been almost twelve years since the founding of the Section. The Section’s roots actually date back to about 1990 when I suggested the idea of a state Aviation Law Section to Eric Richards during a break at an aviation law seminar. If I were left to myself, I probably never would have done anything more, but Eric gently prodded me over the next year or so to do something about forming a section.

Eventually, a Formation Committee was formed with attorneys from different parts of the state, and it met periodically at my offices during 1991 and early 1992. I no longer have a list readily available of everyone that participated in that Formation Committee, and I do not

mean to slight anyone. However, my admittedly hazy, twelve-year old memory recalls that the individuals that regularly attended the meetings included **Steve Chait, J.D. Ledbetter, Cliff Maine, Leonard Nagi, Ed Noonan, Thomas G. Power, Eric Richards** and **Gerald Stevens**. All of those individuals worked hard on the formation of the Section and Eric Richards took on the almost thankless (thank you Eric) task of drafting the bylaws for the proposed section.

Each of these founding committee members has also served as a chairperson of the Section at some point over the years, with the exception of Ed Noon and Thomas G. Power. Ed Noon was actually the first and only elected Chairperson Emeritus. As to Hon. Thomas G. Power, he had been serving in the Michigan Legislature during the formation of the section, and instead of going on to being a chairperson of the Section, he “settled” for being elected Circuit Judge in the 13th Circuit Court in Traverse City, Michigan.

State Bar of Michigan rules required a minimum of fifty members of the Michigan Bar to sign up to form a section before it could come into existence. The formation committee doubted that we could get that many members interested in joining an aviation section, but we decided to try. Commitment cards were mailed out in January 1992, and we were surprised to receive more than the required fifty minimum commitments in a few days and 88 commitments all together. As a result, the formation meeting was held at the State Bar Building on May 19, 1992, attended by an enthusiastic gathering of a large cross section of Michigan attorneys with an interest in aviation.

Without the commitment to join a new section by the first 88 members of the Bar who signed and returned their blue commitment cards, the Aviation Law Section would not have been possible. Because I was the chair of the formation committee and the first chairperson of the section after it was formed, I have been stuck storing those blue commitment cards for the last twelve years. I think now is a good time to put them to use to recognize the following attorneys who made our section possible by making that initial commitment.

James C. Adams
David P. Ahles
Michael D. Arthur
Richard Baron
David R. Baxter
Gregory Bill
Glenn V. Borre
Frank Aragona
David M. Brewster
John C. Buchanan
Robert J. Buchanan

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FOUNDER'S HONOR ROLL –

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John Buckley
Jeffrey Butler
Paul A. Callam
Robert E. Caron
George M. Carr
Steven M. Chait
Dennis A. Chamberlain
Robert L. Coburn
Byron R. Crary
Carrie N. Davis
Philip C. Dean
Robert R. Florka
Donald C. Frank
Myrel P. Fried
Gary S. Gondek
James F. Graves
Joseph Harper
David I. Katzman
Thomas E. Keenan
Anthony E. Kenny
William L. Kiriazis
Martin O. Kirk
Clifford A. Knaggs
James D. Ledbetter
Keith J. Lermينياux
James H. Loree
Clifford G. Maine
Anthony M. Malizia
Ralph R. Margulis
Linda Lee Massoud
Gary A. Maximiuk
Eric J. McCann
Kenneth B. McConnell
David W. Moore
Fred Morganroth
Leonard E. Nagi
Lonnie R. Nail
Edward T. Noonan
Michael E. Nye
Ronald J. Parker
Thomas M. Peters
Myron F. Poe
Henry A. Pominville
Thomas G. Power
Dennis N. Powers
Eric S. Richards
Elmer L. Roller
Alvin Rutledge
Larry A. Salstrom
William M. Schlecte
Lawrence M. Scott
John R. Secrest
Ronald B. Shamblin

Jon Shefferly
James T. Simmons
Barry R. Smith
Daniel P. Steele
Richard L. Steinberg
Gerald M. Stevens
Earle H. Stevenson
Paul R. Swanson
Daniel J. Seymour
Mark L. Teicher
James K. Thome
Peter R. Tolley
Scott R. Torpey
Paul G. Valentino
Mark H. Verwys
Richard G. Ward
William Webb
Mark A. Weigand
William P. Weiner
Robert Y. Weller, II
C. Barry Wetherington
Karl J. Weyand, Jr.
Stephen P. Whitaker
Robert H. Witkop

IX. Member Appointed to Aeronautics Commission

Dean Greenblatt, a long-time member of the Aviation Law Section, has been appointed to the Michigan Aeronautics Commission. Mr. Greenblatt is admitted to practice in Michigan and Florida with law offices in Bloomfield Hills, Michigan. In addition to belonging to the Aviation Law Section, Mr. Greenblatt is a member of the NTSB Bar Association and is an AOPA Legal Services Plan attorney with experience representing pilots, aircraft owners and operators in FAA enforcement actions and civil matters. Dean is a 3,000 hour airline transport pilot with single and multi-engine, instrument, glider, and sea plane ratings. ■



X. Aviation Law Calendar

*Any members aware of any upcoming aviation or aviation law-related events which may be of interest to our membership are encouraged to pass it on by e-mail, letter, or fax to our editor, Don Frank (517) 349-0000; Fax (517) 349-2941, e-mail prattfrank@cs.com so we can let our members know about it in the **Innermarker**.*

- 11/17-19/04 AIAA's 3rd Annual Aviation Technology, Integration and Operations, Denver, Colorado; <http://www.tsnn.co.uk/events/evitem.cfm?ID=219035>
- 01/1-3/04 EAA Southeast Regional Fly-In, Evergreen, Alabama. Contact: (251) 578-1707; <http://www.eaa.org>
- 01/7-10/04 Copperstate Regional Fly-In, Phoenix, Arizona. Contact: (520) 400-8887; <http://www.eaa.org>
- 01/14-18/04 Lawyer Pilot Bar Association Winter Meeting, Tucson, Arizona. Contact: (301) 972-7700; <http://www.lpba.org>
- 02/6-8/04 Great Lakes International Aviation Conference, Lansing, Michigan. Section member Steven Chait and FAA Attorney Michael McKinley will speak on FAA enforcement, and members Richard Durden and Robert Hoschner will speak on airport preservation. Saturday, February 7, 2004, 3:00 p.m. Contact: Tod Smith (248) 348-6942; <http://www.greatlakesaviationconference.com/>
- 02/26-27/04 38th Annual SMU Air Law Symposium, Dallas, Texas. Contact: Jennifer Cassady (214) 768-2570; <http://www.smu.edu/newsinfo/releases/02157.html>
- 03/ /04 ABA Forum on Air and Space Law, Annual Meeting and Conference. Contact: Kristin Crane (312) 988-5880
- 03/6-13/04 2004 IEEE Aerospace Conference, Big Sky, MT. <http://www.aeroconf.org/2002NewWebFrontMatter/map.gif>
- 04/1/04 General Aviation Technology Conference & Exhibition, Wichita, Kansas; <http://www.tsnn.co.uk/events/evitem.cfm?ID=204620>
- 04/13-19/04 Sun 'n Fun EAA Fly-In, Lakeland, Florida. Contact: (863) 644-2431
- 05/14-15/04 EAA Southwest Regional Fly-In, New Braunfels, Texas.
- 07/7-11/04 Lawyer Pilot Bar Association Summer Meeting, Sunriver Resort, Oregon. Contact: (301) 972-7700; www.lpba.org
- 10/21-22/04 AOPA Expo 2004, Long Beach, California; <http://www.aopa.org/exp>

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