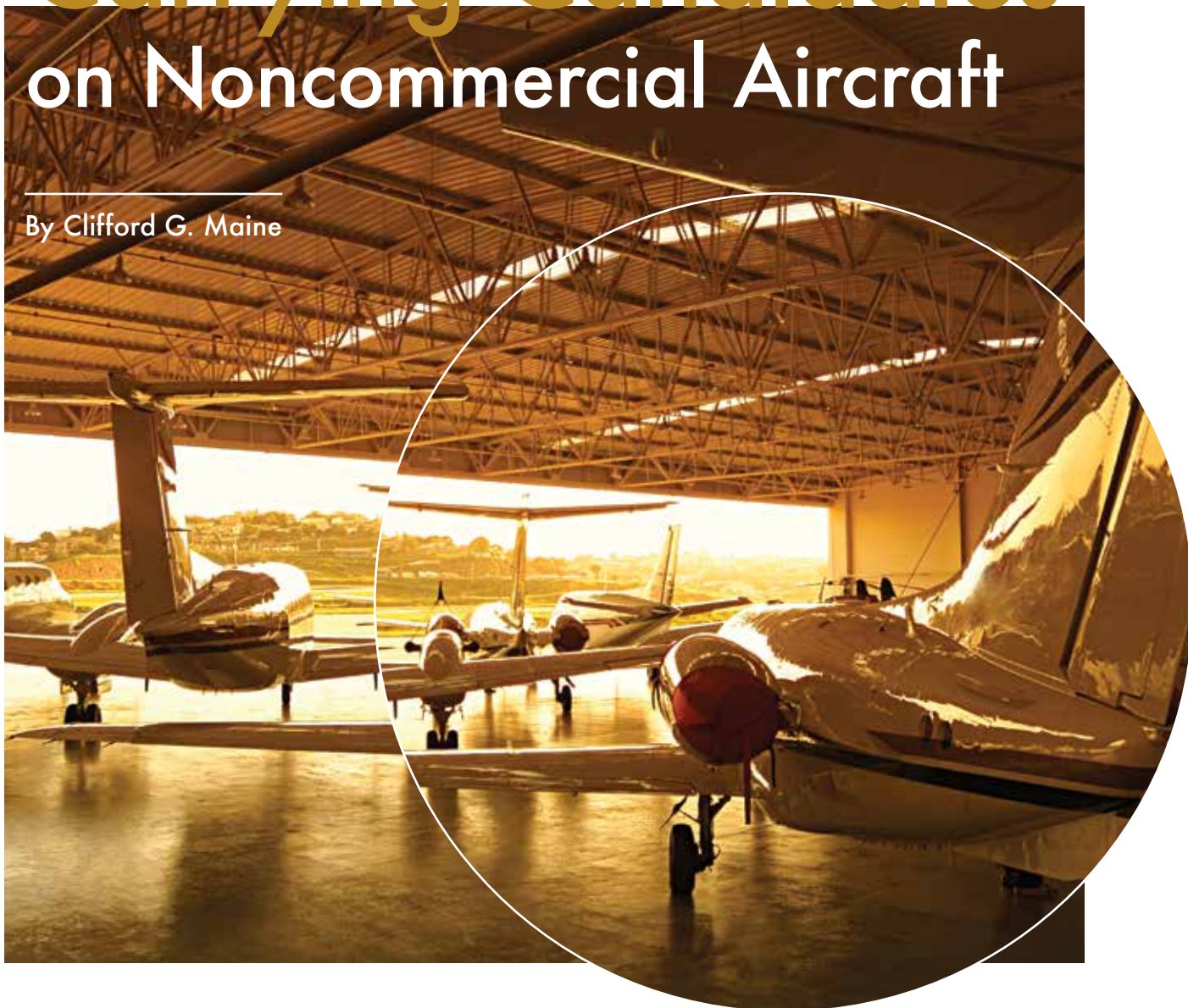


Carrying Candidates on Noncommercial Aircraft

By Clifford G. Maine



Most people are only vaguely aware of the number of flight hours donated to various charitable activities by general aviation pilots. These flights facilitate a range of services including organ transplants, disaster assistance, and environmental support. Various special laws and regulations govern the flight services. As the election season moves into high gear, of special interest are the rules that apply to providing flight services to candidates for public office.

Assume that your client is a pilot operating under the general rules of 14 CFR 91, which govern noncommercial operators—in other words, the client is not an air carrier

like Delta, a commuter flight operator, or the like. Assume that you receive a request from a political candidate to use your corporate aircraft. The following is a limited summary of the items of which you should be aware before providing transport.

The Federal Aviation Regulations, generally called “FARs,” allow noncommercial operators to carry federal candidates under 14 CFR 91.321 as long as the operator does not hold an Air Carrier Certificate, which is issued to airline and charter operators.¹ Additionally, the Federal Aviation Administration (FAA) requires that reimbursement for the flight not exceed the rates required

by Federal Election Commission (FEC) regulations. Unlike federal candidates, state and local candidates are governed by state and local laws and not necessarily FEC regulations.

As a matter of enforcement policy, the FAA expects aircraft operators who carry federal candidates to only receive payments from candidates covered by the new 2010 regulations (see below) and only to the extent permitted under the new regulations. FAR Part 91 operators are permitted to receive payment from candidates for federal, state, or local offices including candidate agents, political action committees, political party or noncandidate political committees, or persons traveling for the candidate subject to the following limitations:

- The operator's primary business must not be as an air carrier commercial operator;
- The applicable federal, state, and local election laws require the operator to receive payment for the transportation; and
- The payment may not exceed amounts calculated under applicable FEC laws and regulations or state and local laws and regulations.

It is important to be aware that for IRS purposes, the carriage of candidates by a noncommercial operator is considered commercial transportation for purposes of the applicable federal excise tax. Accordingly, amounts received by the aircraft operator for carrying candidates are subject to the federal excise tax (currently 7.5 percent plus \$4 per passenger per flight segment). The operator is required to file an IRS Form 720² for payment of the federal excise tax and should be able to claim a fuel-tax credit based on the fuel burned during the flight that is subject to the federal excise tax.

In a relatively recent change, the FEC revised its rules in 2010 to prohibit House of Representative candidates and individuals traveling on their behalf or in connection with House candidates from expending campaign funds on noncommercial aircraft travel.³ Senate, presidential, and vice presidential candidates are permitted to use noncommercial aircraft travel as long as the service providers are reimbursed in accordance with applicable guidelines.

The 2010 rules provide that the reimbursement rate for non-House candidates is the candidate's pro rata share of the normal and usual charter rate or rental charge for travel on comparable aircraft. A comparable aircraft would be an aircraft of similar size, make, and model as the aircraft that actually makes the trip. The aircraft should have similar amenities such as Internet access, satellite phone, etc. A normal and usual charter rate is typically determined by asking a charter company for the hourly rate it charges for a comparable aircraft and multiplying the hourly rate by the actual duration of the candidate's flight. The candidate's pro rata share is the charter rate divided by the total number of campaign travelers and multiplied by the number of campaign travelers associated with the specific candidate.

Often, presidential and vice presidential candidates travel on the same aircraft. For example, if a presidential candidate travels with a vice presidential candidate and the vice presidential candidate's campaign manager on a noncommercial aircraft, the presidential candidate is responsible for one-third of the applicable cost and the vice presidential candidate is responsible for two-thirds of the cost. The FEC rules provide that when determining the comparable size of the aircraft, the federal candidate is not required to include government-mandated security personnel and equipment. Additionally, the 2010 FEC rules allow media and governmental personnel who accompany a candidate to reimburse the aircraft operator directly, whereas the 2003 rules only allowed the media and governmental personnel to reimburse the federal candidate. Repositioning flights (flights to pick up the

Fast Facts

Carrying political candidates on noncommercial aircraft must be planned for in advance.

If you receive a request from a political candidate to use your corporate aircraft, be ready to respond with a compliance-oriented protocol.

It is important to comply with the rules regarding proper reimbursement by a political candidate and payment of applicable federal excise tax.

It is recommended that you obtain reimbursement before the beginning of the flight. Payment is generally required within seven days. Any unreimbursed amount would likely be treated as a contribution to the candidate or a political action committee, possibly resulting in FEC violations.



candidate) or deadhead flights (return flights without candidates) are typically not counted for purposes of determining the amount of reimbursement.

It is recommended that you obtain reimbursement before the beginning of the flight. Payment is generally required within seven days after the flight. Importantly, any unreimbursed amount would likely be treated as a contribution to the candidate or a political action committee, possibly resulting in FEC violations. It is also important to strictly comply with applicable FEC regulations.

Additionally, the FEC rules require candidates to maintain and report information pertaining to noncommercial air travel. The campaign should maintain records concerning flight itineraries, arrival dates, and lists of all passengers with designations. Candidates must also provide the source of the charter rate or rental charge for comparable aircraft and identify the airline charter or air taxi operator providing that rate or charge to the public. The charter rate must be available to the public within seven days of the federal candidate's actual travel.

At a minimum, the company operating the aircraft should consider a written policy addressing these issues. The most common problems we encounter on behalf of our clients are failures to remit federal excise tax and obtain proper reimbursement by the candidate.

We recommend that the company policy include a provision for written approval from the chief executive officer or a high-level executive for any transportation of candidates before scheduling the aircraft. A record of the

approval should be kept on file with other flight records in the transportation scheduler's office.

This is a summary of items to discuss with clients relating to carrying federal candidates. In our experience, the candidate's campaign staff is up to date on the FEC requirements for travel on noncommercial aircraft and should be able to readily work with the company to address these items. With all of this in mind, a practitioner will be in a much better position to understand an attorney's role in facilitating these transactions, especially in cases in which the campaign staff is not as well informed as we might hope. ■



Clifford G. Maine chairs Barnes & Thornburg's Aviation Law Group and co-chairs its Unmanned Aerial Vehicle Practice Group. He is a founding board member of the West Michigan Aviation Academy, a charter high school focusing on aviation education, and has been recognized by Best Lawyers in America. He frequently speaks at programs for the National Business Aviation Association, the Lawyer Pilots Bar Association, and other professional aviation organizations.

ENDNOTES

1. See 14 CFR 119 (2007); 14 CFR 121 (2007); 14 CFR 135 (2014).
2. Quarterly Federal Excise Tax Return <<http://www.irs.gov/pub/irs-pdf/f720.pdf>> (accessed November 6, 2015).
3. See 11 CFR 100 (2014); 11 CFR 113 (2014); 11 CFR 9034 (2014).