



LEGAL EASE

Aviation Law Made Simple

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Always Get the Advice in Writing

Have you ever followed the advice of an aviation safety inspector only to discover it was wrong?

It is common in our industry to treat the regulators as business partners in our shared safety mission. We seek out compliance advice from them, and we work with them to make sure that our systems continue to keep us both safe and compliant.

Most of the things I hear from aviation safety inspectors (from the FAA and other aviation authorities) make sense, but in a regulated system as large as ours, it is inevitable for someone representing the government to make a mistake.

I have seen many variations on the theme of “poor advice.” Much of my experience is in the United States system, where I have encountered FAA inspectors who advocated business practices that had nothing to do with the regulations (and represented poor business choices). I have encountered FAA inspectors who insisted upon mechanisms that violated FAA

regulations and policies. I have encountered FAA inspectors whose oral advice clearly was wrong. I have encountered FAA inspectors whose interpretations of the law were based on earlier wording of regulations that had changed decades before the advice. I have

The Cost of Communication

These sorts of experiences become especially costly when a repair station is faced with enforcement action because the business followed the advice of an FAA employee. I have handled several cases in which the repair station

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encountered FAA inspectors who refused to put their advice in writing, but nonetheless threatened “consequences” if the regulated entity did not follow their “exact words.”

These experiences are not limited solely to the U.S. FAA’s workforce. I had a foreign CAA inspector attempt to assert jurisdiction over a client in a three-nation transaction. The inspector relented when I sent her a copy of her own law, which made it clear my client had done nothing wrong.

claimed to have followed oral advice, while the FAA employee who gave the advice experienced a failure of memory when asked about this same advice.

I have seen companies that relied on the advice of an inspector to develop robust systems, but when the inspector retired or otherwise moved on, the next inspector found the company’s practices were wrong. In some cases, the first inspector gave poor advice but in other cases, it was the second inspector who was incorrect.

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No one intends to give bad advice. Generally, the reason for advice about regulatory compliance is a heartfelt desire to assist in compliance and promote safety. There is a wealth of experience and understanding within the FAA’s workforce, and any company that fails to tap into this body of experience is missing out on a terrific resource. Yet, there is bad advice and improper guidance perpetuated in the aviation community by government employees. There are many reasons for this, including lack of understanding of the law; misunderstanding of the facts; lack of experience; past experience in one factual setting that did not carry over into the new factual setting; generalizations that did not apply to a particular fact pattern; or even a plain error.

Comparing Them to Lawyers

Lawyers are in the business of giving advice about compliance, and in this factor they share some features with aviation safety inspectors. They research the law and write detailed analyses of a

situation to generate conclusions about the best path forward.

I have had clients come to me complaining about getting advice from “some high-priced law firm” that was unusable because the lawyer did not understand the practices of the aviation industry. Usually, in these situations, I can work with the client to point out what might be usable in the legal opinion they received or work with the original counsel to help develop a path forward that accurately reflects the standards and “unwritten rules” of the aviation industry. The lawyer’s written opinion letter often provides an important starting point for this sort of analysis, even if the advice in the letter was not 100 percent useful to the client. So, the writing becomes important, even when it is inaccurate or incomplete.

Writing and Aviation

There is no reasonable way to totally stamp out bad advice. However, there is a way to promote good advice and to help develop advice that makes sense. Start by getting it in writing.

Writing is important to the aviation community. When we perform work on an aircraft, we write down what we did in the logbook and approve it for return-to-service. When we perform work on a component, we create a written record of the work we performed and attach it to the component. This record used to be created on a yellow tag, but increasingly it tends to be written on an airworthiness authorization form, such as the 8130-3 tag of the United States or the Form One found in Canada and Europe.

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Writing and Compliance Systems

Written records are not unique to aviation. Much of the world operates on legal systems that rely on prior written decisions to guide future decisions.

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In common-law nations, there is a doctrine known as “stare decisis,” which means once an issue is decided, the written decision will persist to provide binding guidance for future decision-makers faced with the same issue. This sort of reliance on precedent encourages uniformity and fairness, and it provides the public with a reasonable understanding of the expectations of their government.

The FAA publishes regulations, as well as numerous guidance documents (such as advisory circulars), to help the public understand what the expectations are of the regulated industry. Even with the incredible volume of written material already published, there still are areas that bear further interpretation. And this is where advice from the aviation safety inspector is useful.

Getting Government Guidance

Recently, I represented a client who wanted to perform a maintenance activity. He sought the advice of a local inspector who explained how to accomplish the maintenance activity in conformance with the regulations and how to document it.

Sometime later, a different FAA inspector accused my client of fraud, claiming he had performed the work improperly (he interpreted the regulations differently); therefore, he said, the process was “intentionally false.” The process

accurately described the work performed, but the inspector alleged the claim that the aircraft was airworthy was “intentionally false.”

In such a situation, there are at least two major issues. The first is whether the work was done correctly. The second issue is whether the company committed fraud or intentional falsification.

If the company can show it was relying on the reasonable interpretation of an FAA employee (such as the company’s principal avionics inspector), then this undermines the allegation that the entry was a fraud because the FAA’s interaction shows the intent was not to commit falsification. Remember, this is a different analysis than the question of whether “the work was done correctly.”

How do you prove the FAA gave you advice? You can’t call your PAI to testify. There is a clause in the regulations forbidding you from calling your PAI as a witness, unless the FAA counsel explicitly permits it — my experience is they will reject such applications. Therefore, your PAI usually cannot be called to the stand unless the FAA lawyer calls him or her to the stand. There is, however, no prohibition on admitting the document that shows the written advice (the hearsay objection is inapplicable in Administrative Law Court).

Written advice is valuable for legal cases. In complex areas, such as aviation safety compliance, it is easy to misinterpret a statement. Complying with writ-

ten advice is easier because the plain language is there in front of you, and you do not have to rely on memory to recall the advice.

Finally, in the event that you disagree with the inspector’s advice, you have a sound basis for understanding the advice and can use this sound basis as the foundation for review. In other words, if you disagree, you can appeal the interpretation to the Flight Standards District Office manager (or even higher).

The FAA’s Consistency and Standardization Initiative is a mechanism for appealing inspector decisions, getting management involved in increasing standardization of the decisions across the FAA. However, it is nearly impossible to get a reasonable review of a decision unless there is a written exposition of the decision.

Getting written advice from your local inspector does not always mean you will get good or correct advice, but it does mean the inspector will be accountable for the advice. It also means your reliance on the advice is reasonable (assuming the advice is reasonable) and you have an opportunity to informally appeal the decision if it diverges from accepted interpretations of the FAA’s regulations and policies.

Get it in writing. Both you and your inspector will be glad you did. □

If you have comments or questions about this article, send e-mails to avionicsnews@aea.net.