

1991

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Recommended Citation

Alan Armstrong, *Defending False Statement Charges Relating to the FAA's Medical Applications Form*, 57 J. AIR L. & COM. 357 (1991)
<https://scholar.smu.edu/jalc/vol57/iss2/2>

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DEFENDING FALSE STATEMENT CHARGES RELATING TO THE FAA'S MEDICAL APPLICATION FORM

ALAN ARMSTRONG*

I. INTRODUCTION

ON AUGUST 1, 1990, the Federal Aviation Administration (FAA) published a Final Rule in the Federal Register revising Parts 61 and 67 of the Federal Aviation Regulations (FARs) as it relates to the FAA's Medical Application Form (Form).¹ In essence, the revisions have five significant aspects with reference to drug or alcohol-related driving adjudications: (1) they define a "motor vehicle action" as a conviction, cancellation, suspension, revocation or denial of an application for a license to operate a motor vehicle; (2) they provide for denial, suspension or revocation of an airman's certificate if he suffers a second "motor vehicle action" within a three-year period; (3) they impose a duty on the airman to report his motor vehicle action to FAA security within sixty days; (4) they provide for denial, suspension or revocation of any rating of an airman who fails to report his motor vehicle action;

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¹ Pilots Convicted of Alcohol or Drug Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedures, 55 Fed. Reg. 31,300 (1990) (to be codified at 14 C.F.R. § 61.15(c)(1), (3), 61.15(d)(1),(2); 61.15(e)(1)-(5); 61.15(f)(1), (2)).

and, (5) they require that the airman give his written consent to allow the FAA to access his driving record before he may obtain his medical certificate.²

This paper reviews the historical context in which the Form has been revised, examines the FAR revisions which relate to the driving and other convictions of an airman, and attempts to glean some insight into the elements of a *prima facie* case and the defenses presented where an airman is charged with making false entries on the Form with the intent to deceive the FAA.

II. HISTORICAL BACKGROUND

A. *The Department of Transportation Study of Pilots With DUI Records*

According to a 1986 report prepared by the Inspector General of the Department of Transportation (DOT), 16,000 of America's 700,049 active pilots had sustained a revocation or suspension of their driving privileges based upon driving under the influence (DUI) convictions.³ Although these pilots had suffered a loss of their driving privileges, there had been no suspension or revocation of their flying privileges.⁴ A DOT official called the findings in the report "surprising and alarming."⁵ On February 17, 1987, DOT/FAA gave notice that the Office of Inspector General (OIG) would conduct two computer matches comparing the FAA's medical files with criminal history records from the Federal Bureau of Investigation (FBI) and driver's license records from the Florida Department of Highway Safety (First Notice).⁶ On the same day as the First Notice was given, Anthony J. Broderick, Associate

² *Id.* at 31,309.

³ *Pilots Convicted of DUI Lose Driving, Not Flying Licenses*, ATLANTA J., Oct. 13, 1986, at 4A.

⁴ *Id.*

⁵ *Id.*

⁶ See Privacy Act of 1974: Matching Program — Federal Aviation Administration General Air Transportation Records on Individuals/Federal Bureau of Investigation Identification Records, 52 Fed. Reg. 5374 (1987) [hereinafter First Notice].

Administrator for Aviation Standards, wrote a memorandum to the Assistant Inspector General for Investigations.⁷ Among other things, the Broderick Memorandum discussed (1) the then-contemplated drafting of a "rule change proposal", (2) the OIG's "requesting from the FBI a computer match to find all those applicants for a medical certificate who appear to fall within FAR 61.15(a) [sic], which deals with drug convictions", and (3) "an appropriate 'cutoff' date . . . [of] January 1, 1986," beyond which the Agency would not "feel comfortable pursuing [certificates] for revocation or suspension . . ."⁸

Although the matching program was originally scheduled to begin in February of 1987,⁹ a DOT/FAA notice dated March 6, 1987, (Second Notice)¹⁰ delayed its implementation until March of 1987.¹¹ On October 29, 1987, the FAA published a "notice of enforcement policy" (Third Notice)¹² announcing that OIG had "identified some airmen who appear to have falsified their applications with regard to their record of traffic convictions."¹³ The Third Notice announced the adoption of a policy whereby airmen who had failed to disclose records of traffic or other convictions could avoid FAA certificate action for alleged false statements on their medical application forms if the airmen reported their convictions to the FAA (the Amnesty Program).¹⁴

Another notice of enforcement policy was published on

⁷ Memorandum from Anthony J. Broderick, Associate Administrator for Aviation Standards (AVS-1) to Assistant Inspector General Investigations (JI-1) (Feb. 17, 1987) (on file with the *Journal of Air Law and Commerce*) [hereinafter Broderick Memorandum].

⁸ *Id.*

⁹ First Notice, *supra* note 6, at 5374.

¹⁰ Privacy Act of 1974: Matching Program — Federal Aviation Administration General Air Transportation Records on Individuals/State of Florida Department of Highway Safety and Motor Vehicles Driver's License Records, 52 Fed. Reg. 8545 (1987) [hereinafter Second Notice].

¹¹ *Id.*

¹² Falsification of Airman Medical Certificate Applications; Record of Traffic Convictions, 52 Fed. Reg. 41,557 (1987) [hereinafter Third Notice].

¹³ *Id.* at 41,558.

¹⁴ *Id.*

November 1, 1988,¹⁵ announcing the expiration of the Amnesty Program effective December 1, 1988 (Fourth Notice).¹⁶ While the Amnesty Program was in effect, however, it offered no protection to airmen who disclosed their convictions to the FAA from criminal prosecutions by the Department of Justice (DOJ).¹⁷

B. *The Ruling of Judge Carr Finding the Form Constitutionally Infirm*

Before the Amnesty Program expired, a number of pilots were indicted in the United States District Court for the Middle District of Florida.¹⁸ These airmen were charged with making false or fraudulent statements to the United States, an offense carrying a term of up to five years imprisonment and/or a \$10,000 fine.¹⁹ Before trial, the Broderick Memorandum was discovered in which the Associate Administrator for Aviation Standards made the following observations to the Assistant Inspector General:

We also need to think about changing the form and substance of the questions asked on the Form 8500-8 [FAA's Medical Application Form], as we discussed. It has not generally been possible to successfully prosecute people in the past in part because of the vague, qualitative, and evaluative nature of these questions. As you know, dozens of such cases were returned to us as declined for prosecution a few years ago. We would be pleased to receive any suggestions you have for improvement in this area.²⁰

The record disclosed that the Broderick Memorandum was written over nineteen months before the Florida indictments.

The supposed basis for these criminal prosecutions

¹⁵ Falsification of Airman Medical Certificate Applications; Record of Traffic Convictions, 53 Fed. Reg. 44,166 (1980) [hereinafter Fourth Notice].

¹⁶ *Id.*

¹⁷ See, e.g., J.S. Yodice, *FAA "Amnesty" Practice*, AOPA PILOT, Nov. 1987.

¹⁸ See, e.g., *United States v. Manapat*, No. 88-00325-CR-T-13 (M.D. Fla. Dec. 8, 1988), *aff'd*, 928 F.2d 1097 (11th Cir. 1991).

¹⁹ See 18 U.S.C. § 1001 (1988).

²⁰ Broderick Memorandum, *supra* note 7.

concerned the “medical conditions” portion of the form, specifically questions 21V and 21W on the FAA Form 8500-8 and required applicants to describe each condition in the “Remarks” portion which followed that caption.²¹ Because the matters complained of by the Government (criminal or traffic convictions) were not properly describable as “medical conditions”, Judge George C. Carr granted a Motion to Dismiss in one of this series of cases saying:

I have given this a great deal of thought; and after reviewing the basis of the charge — that is the so-called “airman’s medical certificate” — I have determined that it is a matter of fundamental fairness. And the way their question has been put on this form, which is basically to determine medical conditions, is fundamentally unfair; that is the way it is put is vague. It is misleading and confusing.

It is ambiguous, and the way it is configured in the form amounts to a trick question; and I think it is fundamentally unfair to base a felony conviction on any answers that may be given by anybody on this form. And it is so fundamentally unfair that it amounts to a denial of due process.²²

Furthermore, Judge Carr noted that “[t]he Agency itself is cognizant of the fact that their form is confusing and misleading, and it is a danger to basic justice to bring prosecutions on the basis of this form in the Court’s opinion.”²³

After Judge Carr announced his decision from the bench to dismiss the charges against one of the airmen, the Government attorney indicated there were two pilots who wished to enter guilty pleas,²⁴ to which Judge Carr responded: “I am not going to accept a plea of guilty to a charge that I think is baseless”²⁵

²¹ See FAA Medical Application Form 8500-8 (10-75), O.M.B. No. 04-R0089 [hereinafter Form 8900-8] (on file with *Journal of Air Law and Commerce*).

²² *United States v. Manapat*, No. 88-00325-CR-T-13, slip op. at 2-3 (M.D. Fla. Dec. 8, 1988), *aff’d*, 928 F.2d 1097 (11th Cir. 1991).

²³ *Id.* at 4.

²⁴ *Id.* at 6.

²⁵ *Id.*

C. *The Eleventh Circuit's Affirmance in Manapat*²⁶

Judge Carr's decision was recently affirmed by the United States Circuit Court of Appeal for the Eleventh Circuit.²⁷

The Eleventh Circuit cited *United States v. Lattimore*,²⁸ reasoning that the false statement charge asserted against Manapat was similar to a perjury charge which, although subjective, "must have certain objective standards."²⁹ The Court reasoned that a phrase is fundamentally ambiguous if it is not one "with a meaning about which men of ordinary intelligence could agree."³⁰ Context is also important. After noting the two convictions questions appeared under the caption "Medical History," the Eleventh Circuit observed that the prosecution of a false statement claim could not be established "by isolating a statement from context."³¹ The court further affirmed Judge Carr's decision by observing that its holding would "not preclude the government from refusing to grant a certificate, or from revoking a certificate already granted, if the applicant falsely responds to the government's requests for information."³²

The court, however, cautioned that problems with fundamentally ambiguous questions appearing on the Form could be avoided "by providing a separate form for

²⁶ *United States v. Manapat*, 928 F.2d 1097 (11th Cir. 1991).

²⁷ *Id.* Given the Eleventh Circuit's agreement with Judge Carr, it has become increasingly apparent that the FAA and DOJ should stop prosecuting pilots and revise its admittedly ambiguous Form. See also Alan Armstrong, *Is the FAA's Medical Application Form Too ambiguous to Satisfy Due Process?*, 14 AIR LAW, 109 (1989), reprinted in 11 LAWYER-PILOTS BAR ASS'N J. 20 (1989); Alan Armstrong, *Ruling on Medical Certificates*, 58 AIR LINE PILOT 32 (1989).

²⁸ 127 F. Supp. 405 (D.D.C.), *aff'd by an equally divided court*, 232 F.2d 334 (D.C. Cir. 1955).

²⁹ *Manapat*, 928 F.2d at 1100.

³⁰ *Id.*

³¹ *Id.* at 1101. In fact, the Eleventh Circuit observed that in modern society, people are often asked to fill out similar forms asking for medical information. "If these forms do require such critical information, unwary citizens should be able to expect that important questions will not be hidden in laundry lists of unrelated topics." *Id.*

³² *Id.* at 1102.

convictions.”³³

D. *Disagreement Between the Administrative Law Judges About Whether or Not the Form is Fundamentally Ambiguous*

After the Eleventh Circuit rendered its decision in *Manapat*, there was disagreement among the NTSB Law Judges about whether or not the “conviction questions” appearing on the Form were fundamentally ambiguous so as to preclude an adjudication on the merits of alleged false statement charges against airmen by the Agency. On May 7, 1991, Judge Davis granted a motion to dismiss in a Medical Form case citing *Manapat*.³⁴ Two days later, Judge Coffman denied a motion to dismiss in a similar case, reasoning that the lower standard of proof in administrative proceedings rendered the decision of the Eleventh Circuit in *Manapat* inapplicable in aviation enforcement proceedings.³⁵ Thirteen days after Judge Coffman’s Order denying a motion to dismiss, Judge Davis, again granted a motion to dismiss relying on *Manapat*.³⁶ Nine days after Judge Davis’ second order granting a motion to dismiss, Judge Mullins postponed a hearing pending review of the Medical Form issue by the Board³⁷ and postponed a second hearing four days later

³³ *Id.* In addition to relying on *Lattimore*, the Eleventh Circuit cited *United States v. Ryan*, 828 F.2d 1010 (3d Cir. 1987) for the proposition that the defendant’s answer to a fundamentally ambiguous question should not be submitted to the jury in a false statement charge. In *Ryan*, the defendant was charged with making a false statement to a federally-insured bank in his response to a question asking for his “previous address” during the past 5 years without defining the term “address” as related to: (1) the applicant’s residence, (2) mailing address, (3) previous address, (4) most recent previous address, or (5) all previous addresses. *Ryan*, 828 F.2d at 1015-16; *Manapat*, 928 F.2d at 1100.

³⁴ See Order Granting Respondent’s Motion to Dismiss Complaint, Cancelling Hearing and Terminating Proceeding, *Administrator v. Howard*, N.T.S.B. No. SE-11512 (May 7, 1991) (Davis, J.).

³⁵ See Order Denying Motion to Dismiss, *Administrator v. Scarborough*, NTSB No. SE-11719 (May 9, 1991) (Coffman, J.).

³⁶ See Initial Decision and Order, *Administrator v. Holey*, NTSB No. SE-11727 (May 22, 1991) (Davis, J.).

³⁷ See Order Postponing Hearing, *Administrator v. Hamm*, NTSB No. SE-11362 (May 31, 1991) (Mullins, J.).

for the same reason.³⁸

Fourteen days after Judge Mullins' second order postponing a hearing, Judge Capps granted a continuance and cancelled a hearing,³⁹ but she subsequently denied two motions to dismiss in Medical Form cases.⁴⁰

Although the Agency abandoned its appeal in Judge Davis' first decision declaring the Form fundamentally ambiguous,⁴¹ on July 1, 1991, it filed motions for expedited review in two cases urging the Board to deal with the question of whether or not the "convictions" questions were fundamentally ambiguous to avoid further chaos.⁴²

E. Other Recent Developments

Although the Third Circuit Court of Appeals affirmed a conviction of an airman for allegedly giving a false statement in response to the questions on the Form in *United States v. Rodriguez*,⁴³ the affirmance was without opinion. It therefore has no precedential value.⁴⁴ An airman who suffered a criminal conviction on January 16, 1991, for making a false statement on the Form concerning a "traffic conviction" is appealing to the Third Circuit. It will be interesting to see how the Third Circuit rules on that appeal in light of the Eleventh Circuit's decision in

³⁸ See Order Postponing (sic), Administrator v. Garrison, NTSB No. SE-10855 (June 3, 1991) (Mullins, J.).

³⁹ See Order Granting Continuance and Cancelling Hearing, Administrator v. Odum, NTSB No. SE-11453 (June 17, 1991) (Capps, J.).

⁴⁰ See Order Denying Motion to Dismiss, Administrator v. Kuebrich, NTSB No. SE-11679 (June 19, 1991) (Capps, J.); Order Denying Motion to Dismiss, Administrator v. Bishop, NTSB No. SE-11657 (June 25, 1991) (Capps, J.).

⁴¹ See *supra* note 37 and accompanying text.

⁴² See Motion to Expedite Review, Administrator v. Barghelame, NTSB No. SE-11108 (July 1, 1991); Motion to Expedite Review, Administrator v. Sue, NTSB No. SE-11100 (July 1, 1991).

⁴³ 925 F.2d 420 (3d Cir. 1991).

⁴⁴ See Internal Operating Procedures, 3d Cir. § 5.1.2 (indicating memorandum opinions may be employed "to affirm the judgment, order or decision of the court under review . . . [when the court] determines that a written opinion will have no precedential or institutional value . . .").

Manapat.⁴⁵

In a letter from the Federal Air Surgeon to airmen dated June 14, 1991, the Agency announced employment of "a revised application form for airman medical certification" effective July 1, 1991.⁴⁶ One reason given in the Jordan letter for promulgation of the revised form was "to ensure it (the FAA) is gathering all information necessary to determine eligibility for airmen medical certification."⁴⁷ The Federal Air Surgeon stated: "[t]he new form also implements the so-called 'DWI Rule', part of which mandates that an applicant provide authorization for the FAA to access the National Driver Register to verify information provided by the applicant on the application."⁴⁸ On July 22, 1991, 4,000 pilots were under investigation and 84 cases had been sent to the Agency's Chief Counsel for possible enforcement action for possible misinformation appearing on the revised Form.⁴⁹

F. *The FAA's Proposals Following Judge Carr's Ruling*

Following dismissal of several of the criminal cases in Florida, the Federal Air Surgeon's Medical Bulletin⁵⁰ informed Aviation Medical Examiners (AMEs) of the following:

- (1) That twenty-seven indictments in Florida and six in Colorado related to airmen who did not "disclose alcohol and drug-related convictions on medical certificate applications";

⁴⁵ United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991).

⁴⁶ Letter to airmen from Jon L. Jordan, M.D., Acting Federal Air Surgeon (June 14, 1991) (captioned: "Federal Aviation Administration Office of Aviation Medicine — Revision to the Application for Airman Medical Certificate or Airman Medical and Student Pilot Certificate — Official Use Starts July 1, 1991.") (on file with *Journal of Air Law and Commerce*).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Safety Board Deletes FAA Recommendations From 'Most Wanted' List*, AIR SAFETY WK., July 22, 1991, at 3.

⁵⁰ See *Federal Air Surgeon Enlists AMEs' Help*, AIR LINE PILOT, Apr. 1988, at 33 (containing excerpts from the January 1988 Federal Air Surgeon's Medical Bulletin).

(2) That those convicted could be sentenced to five years in prison and fines of from \$5,000 to \$250,000;

(3) That "AMEs need to stress to applicants the importance of disclosing convictions for any reason, in any period of time";

(4) That "[p]hysicians who are aware of an applicant's convictions, but who fail to insist on full disclosure, also may be in violation of Federal requirements"; and

(5) That "AME interviews by investigators for the IG or local U.S. Attorney's Offices began in October [1988] and are expected to continue indefinitely."⁵¹

Moreover, on April 14, 1989, the Agency published another notice of enforcement policy (Fifth Notice)⁵² which indicated the OIG had "referred to the FAA more than 6,000 cases of airmen with drug- or alcohol-related convictions,"⁵³ most involving airmen who had not disclosed these matters on their application forms.⁵⁴

On May 18, 1989, however, the FAA published a Notice of Proposed Rulemaking (NPRM) calling for revisions to Parts 61 and 67 of the Federal Air Regulations (FARs).⁵⁵ The NPRM had five essential elements, all of which related to the airman's driving record.⁵⁶ The Agency had historically been authorized to seek a revocation or a suspension of a pilot's certificate in four circumstances: (1) operating an aircraft while under the influence of alcohol or drugs;⁵⁷ (2) operating an aircraft engaged in the carriage of narcotic drugs;⁵⁸ (3) being convicted of any federal or state statute relating to the possession,

⁵¹ *Id.*

⁵² Drug Convictions; Drug- and Alcohol-Related Traffic Convictions; Falsification of Airman Medical Applications, 54 Fed. Reg. 15,144 (1989) [hereinafter Fifth Notice].

⁵³ *Id.*

⁵⁴ *Id.* The Fifth Notice was published shortly after the Exxon Valdez oil spill.

⁵⁵ See Pilots Convicted of Alcohol or Drug Related Motor Vehicle Offenses are Subject to State Motor Vehicle Administrative Procedures, 54 Fed. Reg. 21,580 (1989) [hereinafter NPRM 89-12].

⁵⁶ *Id.* at 21,585-86.

⁵⁷ 14 C.F.R. § 91.17(a)(1)-(4) (1991).

⁵⁸ 14 C.F.R. § 91.19(a) (1991).

manufacture or transportation of narcotic drugs;⁵⁹ and (4) refusing a request by a law enforcement officer to submit to a drug test.⁶⁰ It was a radical departure from existing regulatory authority for the Agency to suspend or revoke a pilot's license based upon operation of a motor vehicle while intoxicated.

The NPRM proposed (1) to define a "motor vehicle action" as any conviction, cancellation, or denial of application for a motor vehicle license when any of those problems arose from "the operation of a motor vehicle while intoxicated by alcohol or a drug";⁶¹ (2) to amend FAR § 61.15 by inserting subparagraph (d) which would provide for the denial, suspension or revocation of any certificate or rating issued to an airman in the event he suffered a "motor vehicle action within 3 years of a previous motor vehicle action";⁶² (3) to amend FAR § 61.15 by inserting subparagraph (e) to require an airman to provide information about the "motor vehicle action" to the FAA Airman Codification Branch within sixty days after the effective date of a Final Rule implementing the NPRM or sixty days after the motor vehicle action, whichever was later;⁶³ (4) to insert subparagraph (d) to FAR § 61.23 to provide that an airman's medical certificate would expire on the sixty-first day following a motor vehicle action;⁶⁴

⁵⁹ 14 C.F.R. § 61.15(a)(1), (2) (1991). Historically, the National Transportation Safety Board distinguished between offenses involving aircraft and those unrelated to aircraft, the former warranting revocation and the latter warranting a suspension. See *Administrator v. Pekarcik*, 3 N.T.S.B. 2903 (1980).

⁶⁰ 14 C.F.R. § 61.14(b) (1)-(2) (proposed May 18, 1989).

⁶¹ 54 Fed. Reg. at 21,585 (to be codified at 14 C.F.R. § 61.15(c)(1)-(3) (1991)).

⁶² *Id.* (to be codified at 14 C.F.R. § 61.15(d) (1991)).

⁶³ *Id.* (to be codified at 14 C.F.R. § 61.15(e)(1)-(2) (1991)).

⁶⁴ *Id.* (to be codified at 14 C.F.R. § 61.23(d)(1)-(2) (1991)). This automatic suspension or expiration provision would have compelled the pilot to go to his AME and have the AME make a determination as to whether the pilot could substantiate his participation in an alcohol or substance abuse treatment program or whether the pilot could demonstrate his "compliance with a court-ordered program resulting from the motor vehicle action, if any." *Id.* The problem with the provision was that it would have required AMEs to determine about whether applicants were meeting supposed obligations under a substance abuse treatment program and/or whether they were meeting their legal obligations under a court-ordered program. *Id.*

and (5) to require that applicants give the FAA access to their driving records.⁶⁵

On July 13, 1989, the Air Line Pilots Association (ALPA) filed its comments on the public docket in opposition to NPRM 89-12. ALPA asserted (1) that pilots should be given more than sixty days to report their past driving offenses;⁶⁶ (2) that there was no rational basis to support the FAA's assertion that driving under the influence offenses are related to FAA safety regulations or FAA medical standards;⁶⁷ and (3) that the FAA should not require pilots to permit access to their driving records as a condition to obtaining a medical certificate.⁶⁸ Additionally, ALPA observed that, although a pilot "*may request*"⁶⁹ that his driving records be transmitted to the FAA under 1987 amendments to the National Driver Register Act,⁷⁰ the Agency had transmuted the permissive aspect of the statute into a mandatory obligation in violation of the Agency's statutory authority.⁷¹

⁶⁵ *Id.* at 21,586 (to be codified at 14 C.F.R. § 67.3) (1991)).

⁶⁶ Comments of Air Line Pilots Association, In the Matter of Notice of Proposed Rulemaking, 89-12 — Pilots Convicted of Alcohol or Drugs [sic] Related Motor Vehicle Offenses or Subject to Motor Vehicle Administrative Procedures, No. 25,905, Docketed July 13, 1989 [hereinafter ALPA Comments].

⁶⁷ *Id.* at 3-7. ALPA argued that there was no "rational connection between the facts found and the choice made" citing *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). *Id.* ALPA argued by analogy to *Whalen v. Volpe*, 348 F. Supp. 1235, 1239 (D. Minn. 1972) *vacated*, 379 F. Supp. 1143 (D. Minn. 1973), that there was no rational basis for concluding a correlation existed between a driving under the influence conviction of a private automobile and a pilot's future habits while piloting an aircraft. See ALPA Comments, *supra* note 69, at 3-7.

⁶⁸ ALPA Comments, *supra* note 66, at 3-7.

⁶⁹ *Id.* at 8 (emphasis in original).

⁷⁰ See Pub. L. No. 100-223, 101 Stat. 1525 (1987) ("Any individual who has applied for or received an airman's certificate may request the chief driver licensing official of a State to transmit information regarding the individual . . . to the Administrator of the Federal Aviation Administration."). *Id.* at 1526.

⁷¹ The ALPA comments conclude: "Accordingly, the FAA lacks the statutory authority for its 'required consent' provision." ALPA Comments, *supra* note 69, at 8.

G. *The Agency's Issuance of Its Final Rule Implementing a New Medical Application Form*

On August 1, 1990, the FAA issued its Final Rule.⁷² The Final Rule consisted of 10 pages, the first 9 of which discussed its regulatory history and disposed of public comments.⁷³

As part of its discussion concerning the regulatory history, the Agency said of the NPRM, which preceded the Final Rule, as follows: "This NPRM was issued in part to respond to the results of an audit of the FAA's Airman Medical Certification Program by the Office of the Inspector General (OIG) of the U.S. Department of Transportation (DOT) released on February 17, 1987."⁷⁴

After observing that the DOT audit of FAA records disclosed that 10,300 of the then 711,648 active airmen had suffered a suspension or revocation of their driver's licenses based upon "driving under the influence" offenses, and that 7,850 pilots had failed to report these convictions to the FAA, the Agency concluded that 76% of the DUI-convicted pilot population had "failed to report these motor vehicle convictions to the FAA on their medical applications."⁷⁵ The FAA characterized airmen's failure to report their convictions as intentional falsifications⁷⁶ and argued its Final Rule was needed to "enhance safety in air travel."⁷⁷

Although the Agency assumed that 76% of the DUI-

⁷² Pilots Convicted of Alcohol- or Drug-Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedures, 55 Fed. Reg. 31,300 (1990) (to be codified at 14 C.F.R. §§ 61.15, 67.3 (1991)) [hereinafter Final Rule].

⁷³ *Id.* at 31,300-08.

⁷⁴ *Id.* at 31,300.

⁷⁵ *Id.*

⁷⁶ *Id.* The OIG reported the results of the Florida state match and the Department of Justice (DOJ) match to the FAA for possible administrative action and to the DOJ for possible criminal action based on a violation of 18 U.S.C. 1001 (sic) for intentional falsification of an application for a medical certificate. *Id.*

⁷⁷ *Id.* The Rule is intended to enhance *safety* in air travel and air commerce, and is necessary to remove from navigable airspace pilots who demonstrate an unwillingness or inability to comply with certain *safety* regulations and to assist in identification of personnel who do not meet the medical standards of the regulations. *Id.*

convicted pilot population had intentionally falsified their medical application forms, no mention was made of the decision by Judge Carr.⁷⁸ The Agency's remarks in the Final Rule made reference to commenters who asserted that the FAA employed a harsh enforcement policy⁷⁹ and reminded airmen of the criminal penalties for making intentionally false statements.⁸⁰ Ironically, however, it announced the Form was being revised to enhance its clarity and to enable applicants to provide accurate information.⁸¹

After announcing it was revising the Form to improve its "clarity," the Agency abandoned its proposed implementation of § 61.23 because it would have placed the AME in the position of determining whether an applicant was complying with the drug abuse program or was meeting obligations imposed by a court.⁸² After deleting the proposed § 61.23(d) which would have made medical cer-

⁷⁸ See *supra* notes 20-30 and accompanying text.

⁷⁹ Final Rule, *supra* note 75 at 31,304. Nineteen commenters say that they believe the FAA has become irrationally harsh in its enforcement policy, that the FAA has not improved compliance, and that it has damaged its credibility. They further state that this rule is one more step in this onerous direction. *Id.*

⁸⁰ *Id.* Persons who make false statements on an application for an airman medical certificate also may be criminally prosecuted under 18 U.S.C. 1001 [sic], which carries a fine of not more than \$10,000 or a term of imprisonment for up to 5 years, or both. While the FAA refers cases for consideration, the Department of Justice determines whether to prosecute a person under this statute. *Id.*

⁸¹ *Id.* at 31,305 At this time, the FAA is revising the current form for consistency with the amendment to part 67 as adopted in this final rule. The express consent provision is added to the form and is placed above the space provided for the applicant's signature. This provision allows the FAA to receive information about the applicant that has been reported to the National Driver Register.

Along with the addition of the express consent provision, the agency is taking the opportunity to incorporate those suggestions it deems will enhance the appearance and clarity of the form. Changes, in part, include revising the instructions for filling out the form; increasing the type-size, where possible; moving the conviction items to a more prominent location within the medical history section; and updating the portion that deals with penalties for falsification. The agency believes that these revisions will enable more applicants for the airman medical certificate to provide the required information accurately and with less effort. *Id.*

⁸² *Id.* at 31,306. In fact, the Agency stated: "Other commenters, themselves physicians, also expressed grave reservations over this issue. They believe that the AME would be placed in the unfamiliar role of reviewer and verifier of legal documents, and would further have to attempt to determine if the sanctions imposed had been, or were being, discharged accordingly." *Id.*

tificates automatically expire "on the sixty-first day after a motor vehicle action,"⁸³ the Agency announced it was keeping intact the revisions to § 61.15⁸⁴ and the implementation of § 67.3 relating to the necessity of the pilot's executing an authorization giving the FAA access to his driving records before he could obtain a medical certificate.⁸⁵

In essence, thus, the Final Rule has five components. First, it defines a "motor vehicle action" as a "conviction" or a "cancellation, suspension, or revocation of a license to operate a motor vehicle" or "[t]he denial after November 29, 1990, of an application for a license to operate a motor vehicle by a state" to the extent those convictions, cancellations or denials relate to the operation of a motor vehicle "while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug."⁸⁶ The "motor vehicle action" (i.e., conviction, cancellation or denial) must occur after November 29, 1990.⁸⁷

Secondly, the Final Rule calls for the denial or suspension or revocation of the certificate of an airman who has a motor vehicle action occurring within three years of a previous motor vehicle action.⁸⁸ Third, rather than requiring the pilot to report his "motor vehicle action" to the Airman Certification Branch of the FAA, the Final Rule's provisions are more ominous, since the airman must report his transgression within sixty days to the FAA's Security Division. This report must include: (1) the person's name, address, date of birth and airman's certificate number; (2) the type of violation that resulted in the conviction or the administrative action; (3) the date of the conviction or administrative action; (4) the state that holds the record of conviction or administrative action;

⁸³ 54 Fed. Reg. 21,580, 21,585 (1989).

⁸⁴ Final Rule, *supra* note 72, at 31,307.

⁸⁵ *Id.*

⁸⁶ *Id.* (to be codified at 14 C.F.R. § 61.15(c)(1)-(3) (1991)).

⁸⁷ *Id.*

⁸⁸ *Id.* (to be codified at 14 C.F.R. § 61.15(d)(1)-(2) (1991)).

and (5) a statement of whether the motor vehicle action resulted from the same incident or arose out of the same factual circumstances relating to a previously-reported motor vehicle action."⁸⁹

Fourth, the Final Rule provides that any airman who reports his "motor vehicle actions" to the FAA within sixty days may suffer a suspension, revocation or denial of any rating held by him based upon his action of non-compliance.⁹⁰ The fifth and final aspect of the Final Rule requires that the airman, before obtaining a medical certificate, give the FAA access to any records on file with the National Driver Register.⁹¹

Although a petition for review challenging provisions in the Final Rule could have been filed with an appropriate United States Circuit Court of Appeals no later than October 1, 1990, no action was taken by any airman or aviation organization.⁹²

III. THE ELEMENTS OF A PRIMA FACIE CASE AND DEFENSES

A. Preliminary Observations

Counsel who undertakes the representation of an airman in a case involving alleged false entries on the Form should be alert to the prospect that the case may be proceeding on parallel tracks, i.e., (1) a criminal investigation

⁸⁹ *Id.* at 31,309 (to be codified at 14 C.F.R. § 61.15(e)(1)-(5) (1991)).

⁹⁰ *Id.* (to be codified at 14 C.F.R. § 61.15(f)(1)-(5) (1991)).

⁹¹ *Id.* (to be codified at 14 C.F.R. § 67.3 (1991)).

⁹² See 49 U.S.C. § 1486(a) (1988) (authorizing the filing of a petition for review with a United States Circuit Court of Appeals and/or with the United States Court of Appeals for the District of Columbia within sixty days of the entry of an order by the Secretary of Transportation). See also Letter from Alan Armstrong to J.L. Baker, President, AOPA, (Aug. 30, 1990) (suggesting that the Final Rule could be challenged (1) on the theory there is no rational basis to support the FAA's assertion that driving under the influence charges are related to FAA safety regulations or medical standards and (2) on the theory that the FAA exceeded its authority by requiring airmen to consent to the FAA's accessing their driving records as a condition to obtaining a medical certificate) (on file with the *Journal of Air Law and Commerce*).

by DOJ and (2) an administrative investigation by the FAA.

Further, the criminal considerations notwithstanding, there has been a common practice among investigators attached to the OIG to "interview" airmen without giving them any *Miranda*⁹³-type warnings.⁹⁴ Accordingly, the fact that the Inspector is from the OIG and does not give the airman any *Miranda*-type warnings should not be viewed as an indication that the case only relates to an administrative (FAA enforcement) action.

Assuming, in retrospect, that the information related by the pilot was false or incomplete, the ability of the prosecution to prevail may well hinge on its ability to show that airman knowingly gave false information or acted with the intent to deceive a Government officer. With reference to the issue of the airman's state of mind, he may testify (1) that he did not understand the import of the vague questions on the Form, (2) that even appreciating the import of the questions on the Form, his admittedly false answers were unintentional, or (3) that the Form, statute or regulation upon which the prosecution is premised is vague. Besides giving testimony about his lack of any "intent" to give false information or to deceive a government officer, an airman may attempt to prevail by arguing the information he withheld or misrepresented was immaterial, i.e., that it would not tend to affect the decision of the Agency to issue a medical certificate.

⁹³ See *Miranda v. Arizona*, 384 U.S. 436, 467-474 (1966). (*Miranda* holds that a suspect undergoing interrogation should be told: (1) that he has the right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has the right to consult with counsel before questioning and also to have counsel present during any questioning if he so desires; (4) that if he is indigent, a lawyer will be appointed to represent him; and (5) if he indicates a desire to speak with counsel before speaking with the police, they must respect his decision to remain silent). *Id.*

⁹⁴ See Letter from R.J. DeCarli, Acting Deputy Inspector General, Department of Transportation, to Alan Armstrong (Mar. 7, 1990) (on file with the *Journal of Air Law and Commerce*).

B. *Fraud Versus an Intentionally False Statement*

Pertinent provisions found in the United States Code⁹⁵ and the Federal Air Regulations (FARs)⁹⁶ require conduct of an intentional, fraudulent or knowing nature in relation to the alleged false statement.⁹⁷ Under the federal false statement statute,⁹⁸ criminal liability is imposed if the individual "(1) makes a statement that (2) was false, (3) was material, (4) was made knowingly and willfully, and (5) was made in a matter 'within the jurisdiction of any department or agency of the United States.'"⁹⁹ The five elements of fraud consist of (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) with action taken in reliance upon the representation.¹⁰⁰

There are three elements to a claim concerning an alleged false statement, namely (1) falsity, (2) materiality, and (3) knowledge.¹⁰¹ While the giving of an intentionally

⁹⁵ 18 U.S.C. § 1001 (1988).

⁹⁶ 14 C.F.R. § 67.20(a)(1), (2) (1991).

⁹⁷ See, e.g., 18 U.S.C. § 1001 (1988). This provision provides:

Whoever, in any matter within the jurisdiction of any agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

Id. See also 14 C.F.R. § 67.20 (1990). This resolution provides:

(a) No person shall make or cause to be made — (1) any fraudulent or intentionally false statement on any application for a medical certificate under this part; (2) any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made or used to show compliance with any requirement for any medical certificate under this part . . . (b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for suspending or revoking any airman, ground instructor, or medical certificate or rating held by that person.

Id.

⁹⁸ 18 U.S.C. § 1001 (1988).

⁹⁹ *Id.* See also *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983); see also *United States v. Seay*, 718 F.2d 1279, 1284 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Silva*, 715 F.2d 43, 49 (2nd Cir. 1983).

¹⁰⁰ *Pence v. United States*, 316 U.S. 332, 338 (1942).

¹⁰¹ *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

false statement is a lesser included offense within fraud, fraud requires at least one additional element, an intent to deceive.¹⁰² Moreover, even in administrative proceedings, the scienter requirements of administrative regulations are not to be ignored where the clear import of the regulation is to prohibit "intentional wrongdoing."¹⁰³

C. *Defenses Relating to an Absence of any Fraudulent or Intentionally False Statement*

1. *The Form's Ambiguities*

Recognizing that the airman's alleged intentional or fraudulent state of mind is at the heart of the prosecution's case, either in the context of criminal or administrative proceedings, it would appear incumbent upon the prosecution to demonstrate the import of the Form was clearly understood by the airman. Presently, the Form contains no meaningful instructions, and simply lists questions relating to "record of traffic convictions" or "record of other convictions" under the "Medical History" portion of the Form instructing the airman to "describe condition in REMARKS."¹⁰⁴

The Form has been criticized to the extent "no instructions are available," and "[t]he terms are not self-defining."¹⁰⁵ Additionally, the Federal Air Surgeon has admitted that "some persons consider the questions regarding convictions in the medical history portion of the form to be vague or ambiguous."¹⁰⁶ Moreover, since the

¹⁰² *Id.*

¹⁰³ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). "When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances — the commonly understood terminology of intentional wrong doing — and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct." *Id.* at 214.

¹⁰⁴ See *United States v. Manapat*, 928 F.2d 1097, 1101 (11th Cir. 1991).

¹⁰⁵ Letter from Bernard A. Geier, Executive Director of the National Association of Flight Instructors, to Robert R. McMeekin, M.D., Federal Air Surgeon (Feb. 6, 1990) [hereinafter Geier letter] (on file with the *Journal of Air Law and Commerce*).

¹⁰⁶ Letter from Robert R. McMeekin, M.D., Federal Air Surgeon, to Bernard A.

Form only calls for an affirmative response in the event the airman has multiple convictions, airmen could have reasonably understood the question as calling for an affirmative response only if more than one traffic conviction or other conviction was involved.¹⁰⁷

In light of these patent ambiguities in the Form, it is not surprising that Manapat argued in her motion to dismiss that "[t]he juxtaposition of a request for information regarding convictions with medical conditions is inherently ambiguous."¹⁰⁸ Further, she also argued that "[i]f a question is excessively vague or fundamentally ambiguous, the answer to such a question may not, as a matter of law, form the basis of a perjury or false statement prosecution."¹⁰⁹ Manapat concluded her argument by observing that an "applicant is left to wonder what is required to satisfy the FAA."¹¹⁰ Judge Carr ruled accordingly.

Furthermore, Judge Carr was mindful of the Broderick Memorandum in rendering his decision, having read a portion of same into the record before making his ruling.¹¹¹ Judge Carr further remarked that criminal prose-

Geier, Executive Director, National Association of Flight Instructors (March 1, 1990) [hereinafter Federal Air Surgeon's letter] (on file with the *Journal of Air Law and Commerce*).

¹⁰⁷ See Geier letter, *supra* note 105.

¹⁰⁸ Motion to Dismiss, at 5, *United States v. Manapat*, No. 88-00325-CR-T-13(A) (M.D. Fla. 1988) (filed Nov. 2, 1988).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

¹¹¹ *United States v. Manapat*, No. 88-00325-CR-T-13A, slip. op. at 3-4 (M.D. Fla. Dec. 8, 1988), *aff'd* 928 F.2d 1097 (11th Cir. 1991). Judge Carr said:

Also, last week a defendant routinely appeared before the court on a similar charge based on this same form to enter a plea of guilty pursuant to Rule 11. In the Rule 11 colloquy, as the court inquired into the matter, [it] learned that the defendant made the claim that he didn't willfully give false answers on this form; and the court could not accept the plea, even though he wanted to enter the plea for convenience sake. And this is the danger that this creates. And, in addition the Court learned in this trial, as I mentioned, about a memo [Broderick Memorandum] dated February the seventeenth, 1987, from the Federal Aviation Administration. It is from the Associate Administrator of Aviation Standards to the Assistant Inspector General for Investigation [sic] in which, among other things, there is a paragraph which I would like to quote for the record, which it states:

cutions based on the Form were "a danger to basic justice."¹¹² The Court concluded its remarks by saying that if the FAA wanted to know about airmen's driving records, it should revise the Form and ask specific questions in that regard.¹¹³

The most intriguing aspect of the *Manapat* decision is that it eliminates the prospect of putting the client "in jeopardy" on the theory that the prosecution cannot establish its case as a matter of law. "[I]t is *not* up to the jury as to whether the defendant understood the question or, more properly, how the defendant understood the question, but rather, it is up to the Court to decide whether the question is excessively vague or ambiguous and that it cannot be the proper basis for a false statement prosecution."¹¹⁴

Counsel who proceed to trial without attacking the pat-

We also need to think about changing the form in substance of the questions asked in form 8350-8 [sic] as we discussed; that is the form that I have been talking about. It has not generally been possible to successfully prosecute people in the past, in part because of the vague, qualitative and evaluative nature of these questions. As you will know, dozens of such cases were returned to us and [sic] declined for prosecution a few years ago. We would be pleased to receive any suggestions you have for improvement in this area.

Id.

¹¹² *Id.* at 4.

¹¹³ *Id.* at 4-5. Judge Carr stated:

Now, having said that, I would like to make it clear that the court does not quarrel with the FAA's need for the type of information that they are apparently wanting to get in this area. It is important that the FAA know of anyone who wants to fly airplanes in our skies and wants a pilot [sic] license to know whether these applicants have been convicted of drug offenses or alcohol-related offenses; and they are entitled to it, to have that information. And if they properly ask that question of an applicant, they are entitled to truthful answers; and if they don't get truthful answers, then that person is liable for prosecution. But the basic premise is that they need to ask these questions in a direct and concise and clear way so that there is not this chance of confusion; and, at least, that's what this court thinks.

Id.

¹¹⁴ Brief for Appellees at 18-19, *United States v. Manapat*, 928 F.2d 1097 (11th Cir. 1991) (citing *United States v. Ryan*, 828 F.2d 1010, 1015 (3rd Cir. 1987)) (on file at the *Journal of Air Law and Commerce*).

ent "ambiguities" in the Form may be placing his client at unnecessary risk. Accordingly, the prosecution should be confronted with the Agency's admissions in the Broderick Memorandum well before trial. A motion to dismiss the charges based on substantive due process deficiencies in the Form should be filed and pursued vigorously. FAA personnel acquainted with the Form's deficiencies should be placed under subpoena and should be required to acknowledge the FAA's awareness of the vague nature of the questions on the Form before the prosecution brought charges against the airman.

2. *The Inadvertence Defense*

The airman's "state of mind" at the time he completed the form is a pivotal issue if the prosecution is to prevail. Therefore, it is possible for the airman to successfully concede making a false statement without having done so "intentionally."¹¹⁵ Accordingly, even if the trial court declines to rule as a matter of law that statements made to questions on the Form cannot be the basis for a fraud or false statement prosecution, it is possible to persuade the finder of fact that the statements were not intentionally false. In *Hart v. McLucas*,¹¹⁶ an instructor was charged with making "fraudulent or intentionally false statement(s)" in his student's flight logbooks.¹¹⁷ The record demonstrated that the flight instructor was physically sick and admittedly overworked and certified the incorrect en-

¹¹⁵ See, e.g., 18 U.S.C. § 1001 (1988) (requiring proof from the prosecution that the airman acted "knowingly and willfully"); 14 C.F.R. § 67.20(a)(1)-(2) (1991) (requiring proof that the airman made a "fraudulent or intentionally false" statement).

¹¹⁶ 535 F.2d 516 (9th Cir. 1976).

¹¹⁷ *Id.* at 518. The instructor in *Hart* was charged with violating 14 C.F.R. § 61.59(a)(2) which prohibited "[a]ny fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or any certificate or rating. . . ." *Id.* The elements of intentional misconduct, i.e., that the airman acted either fraudulently or intentionally are the same in 14 C.F.R. § 61.59(a)(2) as those found in the regulation forbidding the provision of "fraudulent or intentionally false statement(s) on any application for a medical certificate . . ." 14 C.F.R. § 67.20(a)(1) (1991).

tries without first checking his own records.¹¹⁸ Moreover, he freely admitted the statements in question were false.¹¹⁹ The Administrative Law Judge before whom the case was tried found that the instructor's actions were "more consistent with inattention than with an outright attempt to defraud anyone."¹²⁰ Noting the instructor's actions were the result of "inattention," the Judge ruled that although the instructor had not acted "fraudulently," he had made "'intentionally false' statements within the meaning of C.F.R. § 61.59(a)(2)" and revoked his certificate.¹²¹ The National Transportation Safety Board (NTSB) affirmed the Judge's findings, but decided instead to suspend Hart's license for nine months.¹²²

Hart filed a Petition for Review with the United States Court of Appeals for the Ninth Circuit, arguing that the Agency had prevailed in his case based upon an application by the NTSB of a standard of "strict liability."¹²³ The Agency responded that "knowledge of falsity is not a required element for [an] intentional false statement."¹²⁴

The Ninth Circuit rejected the "strict liability" position advanced by the FAA and reversed the NTSB's decision, holding:

[T]he administrative interpretation of § 61.59(a)(2) advanced below, which essentially establishes a strict liability offense, is incorrect since it violates the common and normal meaning of the phrase 'intentionally false.' A fair reading of § 61.59(a)(2) indicates a desire to require scienter, i.e., knowledge of falsity, for liability. If the FAA thinks it would be better to establish strict liability, it is free to seek amendment of the regulation.¹²⁵

In light of the Ninth Circuit's holding, it remanded Hart's

¹¹⁸ *Hart*, 535 F.2d at 518.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 519.

¹²⁴ *Id.*

¹²⁵ *Id.* at 520.

case to the NTSB for a determination concerning his state of mind "at the time he entered the false statements into his students' logbooks."¹²⁶

In *Administrator v. Hart*,¹²⁷ the proceedings remanded to the NTSB by the Ninth Circuit were initially dismissed.¹²⁸ The Agency then petitioned for reconsideration,¹²⁹ and the NTSB allowed both parties to file briefs on the issue of Hart's state of mind at the time the admittedly false entries were made.¹³⁰ Hart's brief argued that the factual findings made by the Judge were "consistent with inattention"¹³¹ by reason of which he could not be found to have acted intentionally. The FAA argued that Hart's state of mind "in a fraud case . . . (includes) reckless disregard for truth or falsity."¹³² Confronted with the Judge's finding in the record that Hart's actions were "consistent with inattention," the NTSB again dismissed the FAA's complaint and terminated the proceedings, finding there was no evidence in the record that Hart knew the entries in the logbooks were false when he made them.¹³³

In dismissing the Agency's complaint, the NTSB made the following observation: "We agree with the Administrator that it is almost impossible to establish a past state of mind of another person, particularly when he disagrees. But, in accordance with the court's decision in this case, we think that circumstantial evidence on that issue must be so compelling that no other determination is reasonably possible."¹³⁴

In *Administrator v. Juliao*,¹³⁵ the airman had a conviction

¹²⁶ *Id.* at 521.

¹²⁷ 3 N.T.S.B. 24 (1977).

¹²⁸ *Id.* The NTSB dismissed the Agency's complaint and terminated the proceedings on August 16, 1976. *Id.*

¹²⁹ *Id.* The Agency's Petition for Reconsideration was granted on October 21, 1976. *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 25.

¹³² *Id.*

¹³³ *Id.* at 26.

¹³⁴ *Id.*

¹³⁵ N.T.S.B. No. EA-3087, 1990 N.T.S.B. LEXIS 36 (Mar. 1, 1990).

of currency-export violations in connection with his attempt to deposit \$100,000 in Columbia. Juliao failed to disclose the conviction in his medical application form. Juliao testified he merely checked all the "no" boxes on the Form because he had no medical problems. The Administrative Law Judge found Juliao had made a "fraudulent or intentionally false statement"¹³⁶ in violation of Federal Air Regulation § 67.20(a)(1).¹³⁷ In making his finding, the Judge observed: "I don't think its an acceptable defense that he later claims that, well, he didn't read what he clearly checked off and signed, so there is intentional falsity I find."¹³⁸

The NTSB reversed the Judge's ruling, observing that "[i]t is not enough, under the regulation, to show what a respondent should have known. Rather, the proof, either directly or circumstantially, must show what he knew."¹³⁹ Accordingly, Juliao's case was remanded for further consideration of his inadvertence defense.¹⁴⁰

Juliao is troublesome to the extent it indicates the Board approves of the Form being used to determine the pilot's "moral fitness" for flight. Although (1) multiple driving while intoxicated convictions may evidence alcoholism, (2) drug convictions may evidence drug dependency and (3) an extensive criminal record may evidence personality disorders,¹⁴¹ *Juliao* demonstrates that airmen are being prosecuted based on an ostensible medical form, for failing to disclose "convictions" which cannot be described as "medical conditions." Although Juliao, as the holder of an airline transport certificate, was required to "[b]e of good moral character,"¹⁴² one could argue the juxtaposition of terms on the Form was fundamentally unfair. *Ju-*

¹³⁶ *Id.*

¹³⁷ 14 C.F.R. § 67.20(a)(1) (1991).

¹³⁸ N.T.S.B. No. EA-3087, 1990 N.T.S.B. LEXIS 36, at * 5.

¹³⁹ *Id.* at *6.

¹⁴⁰ *Id.* at *7.

¹⁴¹ Alcoholism, drug dependency, and psychosis are medically disqualifying conditions. 14 C.F.R. § 67.13(d)(1)(i)(b)-(d) (1991).

¹⁴² 14 C.F.R. § 61.151(b) (1991).

liao indicates that an airline captain convicted of income tax evasion could suffer a revocation of all his airman certificates based upon failing to report his conviction as a medical condition on the Form.

Furthermore, the potential for confusion by the FAA's placing "convictions" under the "Medical History" caption on the Form was discussed over twenty years ago when the Board made the following observations in *Administrator v. LeBlanc*:¹⁴³

Placing entries concerning convictions under a general heading "Medical History" might cause a person who has no history of medical problems and who is filling out the Form hastily, to mark 'no' automatically to all entries without reading each one separately. We also agree for purposes of clarity, the entry concerning convictions could be more appropriately located on the form under a separate heading.¹⁴⁴

3. *Attacking the Regulation or Statute as Vague*

Although Judge Carr's decision in *Manapat* suggests there is some prospect for successfully attacking the Form as being ambiguous or vague, an attack on a regulation concerning "any fraudulent or intentionally false statement" has been rejected. In *Cassis v. Helms*,¹⁴⁵ an applicant for an Airline Transport Certificate had 1,500 legitimate flight hours and also had "false entries for an additional 150 hours of flight time."¹⁴⁶ Cassis testified he made the false statements in his logbook "in order to enhance his employment prospects."¹⁴⁷ Because the legitimate entries by Cassis satisfied the applicable flight hour requirement,¹⁴⁸ the Administrative Law Judge found (1)

¹⁴³ 1 N.T.S.B. 974 (1970).

¹⁴⁴ *Id.* at 976.

¹⁴⁵ 737 F.2d 545 (6th Cir. 1984).

¹⁴⁶ *Id.* at 546.

¹⁴⁷ *Id.*

¹⁴⁸ 14 C.F.R. § 61.155(b)(2) (1991) (requires an applicant for an Airline Transport Certificate to demonstrate that he has accumulated 1,500 hours of flight experience).

that the false entries were not material, (2) that the false entries had not been made with the intent to deceive, and (3) that the false entries had not been relied upon by the FAA.¹⁴⁹ Accordingly, the Judge concluded that Cassis had not violated § 61.59(a)(2).¹⁵⁰

The FAA appealed the Judge's ruling in favor of Cassis, and the NTSB reversed the decision of the Judge and affirmed the revocation of Cassis' license.¹⁵¹ Cassis petitioned for review before the United States Court of Appeals for the Sixth Circuit arguing (1) that his false statements were immaterial and (2) that § 61.59(a)(2) was unconstitutionally vague.¹⁵² Noting that Cassis admitted "that he knowingly made false statements in his logbook,"¹⁵³ the Sixth Circuit found the materiality issue was satisfied since "the false statements had the natural tendency to influence, or were capable of influencing, the decision of the FAA inspector to whom the logbook was submitted."¹⁵⁴ With reference to Cassis' attack on the regulation as being "unconstitutionally vague,"¹⁵⁵ the Sixth Circuit said:

"The plain language of the regulation clearly informs persons of the proscription against making fraudulent or intentionally false statements in pilot logbooks. The regulation certainly is not 'so vague that a person exercising common sense could not sufficiently understand and fulfill its prescription.' [Cits.] That courts have grafted onto § 61.59(a)(2) a requirement that misrepresentations be material does not render the provision vague. Indeed, the materiality requirement benefits persons like Cassis because the requirement limits the otherwise permissible reach of the regulation."¹⁵⁶

¹⁴⁹ *Cassis*, 737 F.2d at 546.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 547. The Sixth Circuit cited *Poulos v. United States*, 387 F.2d 4 (10th Cir. 1968). See *infra* notes 169-183 and accompanying text.

¹⁵⁵ *Cassis*, 737 F.2d at 547.

¹⁵⁶ *Id.*

Accordingly, while constitutional attacks on the Form may prevail, the court rejected an attack on the regulation or statute as "unconstitutionally vague."

D. *Defenses Relating to the Materiality of the Withheld or False Information*

As noted above, a *prima facie* case, either of fraud or false statements, requires proof concerning the materiality of the withheld or false information.¹⁵⁷ With the possible exception of the ruling in *Manapat*, attacks on the "materiality" of the withheld or falsified matter have not been successful. *Manapat* argued that if the applicant met the "vision, hearing, mental and neurological, cardiovascular and general medical requirements . . . she must be given a certificate; hence, the FAA's decision in the certification process is not discretionary."¹⁵⁸ Although Judge Carr sustained *Manapat*'s Motion to Dismiss,¹⁵⁹ he did so after his pronouncement from the bench on December 8, 1988, that the Agency had a legitimate interest in knowing "whether these applicants have been convicted of drug offenses or alcohol-related offenses."¹⁶⁰ Accordingly, *Manapat*'s argument that the withheld information was immaterial appears to have been unpersuasive to Judge Carr.

In *Poulos v. United States*,¹⁶¹ the appellant was convicted on two counts of falsifying medical forms, receiving concurrent sentences of four years.¹⁶² Poulos had 13 felony

¹⁵⁷ See *supra* notes 108-225 and accompanying text.

¹⁵⁸ Motion to Dismiss at 3-4, *United States v. Manapat*, No. 88-00325-CR-T-13(A) (M.D. Fla. 1988) (filed Nov. 2, 1988) (on file at the *Journal of Air Law and Commerce*). In this motion, *Manapat* argues that she met the medical requirements of 14 C.F.R. § 67.17 (1990) and cites 14 C.F.R. § 67.11 (1990) and *Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982) for the proposition that the Agency's discretion as to whether to issue an applicant a medical certificate was limited to her physiological and neurological qualifications.

¹⁵⁹ *United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991).

¹⁶⁰ Record at 4, *Manapat*, 928 F.2d 1097 (No. 88-4029).

¹⁶¹ 387 F.2d 4 (10th Cir. 1968).

¹⁶² *Id.*

convictions and several convictions for misdemeanors.¹⁶³ During the course of his flight training, he went to an AME to obtain a medical certificate. The physician refused to examine him "by reason of his extensive criminal record."¹⁶⁴

Poulos then went to his flight instructor, who called an FAA employee. His instructor was told "that this would make no difference."¹⁶⁵ Poulos then went to see other AMEs, and his criminal record was discussed prior to the examinations in issue.¹⁶⁶ On the two occasions when Poulos completed an application, he checked "yes" with reference to the boxes pertaining to "record of traffic convictions" and "record of other convictions."¹⁶⁷ In the "remarks" portion of the Form, he listed a grand larceny convictions, several motor vehicle citations and a jaywalking citation.¹⁶⁸

After Poulos' application was submitted to the FAA, the Agency learned of other criminal convictions "and returned the Form for further data, indicating by checkmarks the areas where the additional data should be furnished."¹⁶⁹ Poulos made some minor additions to the Form, such as "on appeal" and had his lawyer return the Form to the FAA.¹⁷⁰ Following submission of this additional data, the FAA requested that Poulos submit to a psychiatric examination.¹⁷¹

At trial, the Agency's flight surgeon testified that he had told Poulos "there was a serious question as to whether or not he could meet the FAA regulations and requested Poulos to surrender the medical certificate Poulos then had in his possession."¹⁷² On appeal, Poulos unsuccessful-

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 6.

fully argued that the withheld information was immaterial. The Tenth Circuit disagreed, holding that the withheld information has "the natural tendency to influence or was capable of influencing the decision of the officer or agent to whom it was submitted."¹⁷³

Besides attacking the materiality of the withheld information, Poulos challenged the Form itself on due process grounds, claiming that the Form was too vague, to the extent his record of convictions could not be described as a medical condition.¹⁷⁴ The Tenth Circuit rejected this argument but left the door open to a future challenge observing that Poulos' due process argument "could have some merit were it not for the fact that the appellant from the outset of his flight training had been made aware of the problem of his felony convictions in connection with his medical examinations."¹⁷⁵

The Agency apparently recognized that the prosecution's ability to prevail in the *Poulos* case was predicated upon the Tenth Circuit's finding that Poulos had been made aware of the importance of his felony convictions as related to his medical examinations.¹⁷⁶ It appears that the numerous notices published by the Agency in the Federal Register concerning its enforcement policy, as well as the creation of the "Amnesty Program," were attempts to bolster the otherwise constitutionally deficient Form and make pilots aware of the importance (materiality) of their driving convictions or relevant medical history.¹⁷⁷

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *Administrator v. Dolph*, No. EA-3031, 1989 N.T.S.B. LEXIS 176 (Nov. 16, 1989). In *Dolph*, the airman, after being involved in an aircraft accident in September of 1986, failed to disclose on his medical applications in January and March of 1987, his involvement in an aircraft accident resulting in 5 days' hospitalization where the facial bones (orbital floors) beneath both eyes were reconstructed. The FAA flight surgeon wrote the airman requesting additional information on his medical status but the airman did not respond. Based on this strong circumstantial evidence, the NTSB Administrator found that the airman

E. *The Potential Impact of a Revised Medical Form*

The FAA's revised Form currently marked "draft" contains two pages of instructions, including certain questions the Agency asks relative to the applicant's "conviction" and/or administrative action history.¹⁷⁸ To

knowingly gave false responses on the Form and revoked not only his medical certificate, but also his airman's certificate. *Id.* at *4-5.

Besides the results in *Manapat* and *Poulos*, other cases generally suggest that an attack on the "materiality" of the withheld data may be problematic. See *Twomey v. NTSB*, 821 F.2d 63, 66-67 (1st Cir. 1987) (falsification with respect to the date on which the medical certificate application was completed declared material to the extent the pilot could use the back-dated certificate to persuade his employer and the FAA that he possessed an appropriate medical certificate when he conducted certain flights for his employer when, in fact, his first class privileges had expired). It appears the materiality element in *Twomey* was improperly expanded in the context of allegedly violating 14 C.F.R. § 67.20(a)(1)(1991), since the date discrepancy on the pilot's medical application could not have affected nor had the tendency to affect the Agency's assessment of his medical qualifications. The fact that the pilot attempted to deceive his employer and the FAA concerning whether he was in possession of a first class medical certificate during specified flights, although possibly affording another basis for prosecution, was immaterial to his medical qualifications. See also *United States v. Norberg*, 612 F.2d 1, 4 (1st Cir. 1979) (conviction for providing materially false statements to a bank affirmed since the information had "the capacity to influence" the bank) (citing *Poulos*, 387 F.2d at 6); *United States v. Wolf*, 645 F.2d 23, 24-25 (10th Cir. 1981) (affirming conviction for making a false statement, i.e., "that the oil sold was 'stripper crude' when in fact it was fuel oil, a refined product," the Tenth Circuit held the information was material because it "(had) the natural tendency to influence or was capable of influencing the decision of the officer or agent to whom it was submitted") (citations omitted); *Niolet*, 3 N.T.S.B. 2846, 2849-2850 (1980) (false logbook entries with respect to the total number of flight hours the pilot had accumulated were held material by Judge John Faulk, and the NTSB affirmed a revocation of the airman's commercial pilot certificate).

¹⁷⁸ See Proposed FAA Medical Application Form (on file with *Journal of Air Law and Commerce* [hereinafter Draft]). The instructions direct the applicant to disclose whether or not he has been

(1) convicted, paid a fine or forfeited bond or collateral; (2) subject to an administrative action of a state or other jurisdiction where your license was denied, suspended or revoked, or (3) subject to an administrative action of a state or other jurisdiction where you were required to perform a service or attend a remedial rehabilitative as the result of a moving traffic violation. Each item must be checked either 'yes' or 'no'. For all items checked 'yes', a description of the conviction(s) and/or administrative action(s) must be given in the EXPLANATIONS box. This description must include: (1) the offense for which you were convicted and/or the administrative action taken, e.g., attendance at an alcohol treatment program in lieu of conviction, license denial, suspension or revocation for refusal to be tested, etc.; (2) the state or other jurisdiction involved; and (3) the

the extent the Form has been criticized for containing terms that were not "self-defining,"¹⁷⁹ or for seeking an affirmative response if only multiple convictions were involved,¹⁸⁰ the instructions on the Draft appear to conform to the observations made by Judge Carr from the bench.¹⁸¹ To the extent the Draft contains explicit instructions about the specific data sought by the Agency, an airman's testimony that he did not appreciate or understand the import of the questions may be less believable. Arguably, however, an ambiguity exists between the Draft and the revisions to Federal Air Regulation § 61.15.¹⁸²

Moreover, recognizing that regulations have been put in place requiring that airmen report their motor vehicle actions to FAA Security and allowing the Agency to access airmen's driving history diminishes the prospects of pilots withholding or failing to disclose their records of traffic convictions.

An applicant charged with falsifying or providing fraudulent data on the Draft or a substantially similar form may still assert the following factual arguments: (1) that he inadvertently omitted the data; (2) that he did not understand the import of the question (if it relates to a non-traffic offense situation); and (3) that he misapprehended

date of the conviction and/or administrative action. The FAA may check state motor vehicles drivers licensing records to verify your responses. Letter (w) of this subheading asks if you have ever had any non-traffic convictions, (e.g., assault, battery, public intoxication, robbery, etc.). If so, name the charge for which you were convicted and the date of conviction in the EXPLANATIONS box. See Note above.

Id.

¹⁷⁹ See Geier letter, *supra* note 105, at 1.

¹⁸⁰ *Id.*

¹⁸¹ See Transcript of Proceedings at 4, United States v. Manapat, No. 88-00325-CR-T-13 (A) (M.D. Fla. Nov. 2, 1988). "And if they properly ask that question of an applicant, (i.e., whether he has drug offenses or alcohol-related offenses), they are entitled to truthful answers" *Id.*

¹⁸² The Draft's instructions ask if the airman has "ever been . . . subject to an administrative action . . . as the result of a moving traffic violation," while 14 C.F.R. § 61.15(c)(1)-(3) all relate to motor vehicle actions "after November 29, 1990." Draft, *supra* note 178, at 1; 14 C.F.R. § 61.15(c) (3)(1991).

the importance (materiality) of a question, thereby leading to confusion on his part and negating the prosecution's assertion that he acted intentionally or knowingly. Moreover, a motion to dismiss and/or a motion for judgment of acquittal may still be advanced to the extent: (1) the FAA was on notice with respect to the data not disclosed on the application, (2) the withheld data is immaterial (i.e., is unrelated to the pilot's medical qualifications), and/or (3) the prosecution's basis for employing the application is fundamentally unfair.

F. *Other Problems in Medical Form Litigation*

In addition to the matters discussed above, counsel should be sensitive to other problems which may arise in litigation related to the Form. One problem relates to the possibility that the airman's AME has been indoctrinated in terms of the physician's duty to report the pilot's problems to the FAA. Although it may generally be desirable for an AME to call a serious problem to the attention of the Agency, potential for abuse exists in the current climate. For example in *Administrator v. Carroll*,¹⁸³ the airman, on the advice of a marriage counselor he and his wife were seeing, went to an AME who was a Board-certified physician in psychiatry and in addiction medicine.¹⁸⁴ After a 15-minute interview, it was the AME's assessment that the pilot was an alcoholic. Accordingly, the physician gave him one of two alternatives: (1) either enter (the AME's) 21-day, \$20,000, program of treatment or (2) he "would report (the pilot) as an alcoholic to the FAA."¹⁸⁵ When the pilot declined the physician's invitation to enter the program, the AME reported the pilot. The FAA issued an emergency order revoking his airman's certificate.¹⁸⁶ It is noteworthy that the airman had flown as a military helicopter pilot for 20 years, had served two tours

¹⁸³ NTSB No. EA-2952 (June 16, 1989).

¹⁸⁴ *Id.* at 7.

¹⁸⁵ *Id.* at 11.

¹⁸⁶ *Id.* at 1.

of duty in Vietnam, had 25 air medals, including Presidential citations, and had never been accused of having an excessive drinking habit.¹⁸⁷ At trial, Judge Mullins found that a 15-minute interview failed to demonstrate any basis for the charges and reversed the Agency's emergency order of revocation.¹⁸⁸ Judge Mullins' ruling was affirmed by the NTSB on appeal.¹⁸⁹

To the extent an airman has one or more convictions relating to illegal drugs, must the convictions be "final"? If the convictions are not final, to what extent is the airman obligated to give mitigating testimony in the NTSB proceedings if it is also incriminating in terms of criminal proceedings then on appeal? These issues were addressed in *Administrator v. Hernandez*.¹⁹⁰ Hernandez had three convictions relating to illegal drugs, two of which were on appeal.¹⁹¹ Based upon his record of drug convictions, the Agency sought a revocation of his commercial pilot certificate.¹⁹²

Judge Geraghty granted summary judgment to the Agency after it submitted exhibits proving the convictions suffered by Hernandez¹⁹³ and affirmed the Agency's order of revocation.¹⁹⁴ On appeal, Hernandez argued that the Agency had not demonstrated that his convictions were final¹⁹⁵ and that the absence of any finality in the criminal cases prohibited his giving testimony in mitigation of

¹⁸⁷ *Id.* at 6-7.

¹⁸⁸ *Id.* at 1.

¹⁸⁹ *Id.* at 18.

¹⁹⁰ NTSB No. EA-3164 (July 5, 1990).

¹⁹¹ *Id.* at 3-4. Hernandez had a Petition for Certiorari pending before the United States Supreme Court and another case on appeal to the Eleventh Circuit.

¹⁹² *Id.* at 1. The FAA's charges were premised on 14 C.F.R. § 61.15(a)(2) (1991). *Id.* This regulation authorizes the suspension or revocation of any certificate of an airman who had suffered a conviction "for the violation of any federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marijuana, or depressant or stimulant drugs or substances." 14 C.F.R. § 61.5(a)(2) (1991).

¹⁹³ Order Granting Summary Judgment, *Administrator v. Hernandez*, NTSB No. EA 4-3164 (July 5, 1990).

¹⁹⁴ Decisional Order of Termination, *Administrator v. Hernandez*, NTSB No. EA-3164 (July 5, 1990).

¹⁹⁵ *Hernandez*, NTSB No. EA-3164, at 2.

sanction in the administrative proceedings based upon the protection against self-incrimination.¹⁹⁶ Because both parties to the proceeding argued the case as though “finality” was essential to the FAA’s case, the NTSB made that assumption in its ruling which remanded the case to Judge Geraghty for further proceedings in order to provide Hernandez “the opportunity to offer evidence in mitigation of the decision to revoke.”¹⁹⁷

Does an airman who fails to provide information in response to a request from a regional flight surgeon with respect to questions on a medical application have a duty to disclose that information in response to questions appearing on a subsequent medical application after the Agency is aware of the information previously withheld by the airman? *Administrator v. Shrader* appears to stand for the proposition that there is no duty to voluntarily disclose the information after the Agency is on notice concerning the nature of the withheld information.¹⁹⁸ In *Shrader*, the airman was arrested on three occasions for driving while intoxicated and suffered two convictions as a consequence of those arrests.¹⁹⁹ In 1985, the airman flew an aircraft from Mexico to Texas with marijuana aboard, but did not suffer a conviction until 1987.

After the marijuana flight but before his conviction, the airman applied for a medical certificate in May of 1986. The regional flight surgeon requested further information from the airman in February of 1987 concerning his eligibility for a medical certificate. The airman did not respond to the flight surgeon’s request for information but applied for a medical certificate again in July of 1988, over two years after the date of the medical certificate in dispute.

Based on these assertions, the Agency sought a revocation of both Shrader’s airman and medical certificates.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 5.

¹⁹⁸ NTSB No. EA-3018 (Oct. 20, 1989).

¹⁹⁹ *Id.* at 3.

The Agency contended that he made one or more intentionally false statements on the Form by operating "a civil aircraft within the United States with knowledge that narcotic drugs . . . were carried in the aircraft."²⁰⁰ Although Judge Mullins affirmed an emergency order revoking Shrader's airman certificate, he determined that an appropriate sanction for the false statement on the form required the suspension of Shrader's medical certificate until the information requested by the Flight Surgeon had been provided.²⁰¹

On appeal, the Board affirmed the revocation of Shrader's airman certificate but reversed the indefinite suspension of his medical certificate citing FAR § 67.31.²⁰² Section 67.31 authorizes the suspension, modification or revocation of any medical certificate if the applicant "refuse[d] to provide the requested medical information or history."²⁰³ The Board wrote:

"[W]hile the respondent might have suspected that the information sought with regard to an expired certificate would be pertinent to the issuance of a medical certificate for which he subsequently applied, we do not think his failure to provide it voluntarily, that is, without being asked for it again, in connection with a later application constitutes a refusal that would authorize the administrator under FAR § 67.31 to suspend or revoke his medical certificate. We will, accordingly, reverse the indefinite suspension of that certificate ordered by the law judge."²⁰⁴

Apparently, the significant facts in *Shrader* were that the old medical certificate had expired and the Agency had become aware of Shrader's driving record before he applied for a new certificate. Shrader failed to reply to the Agency's inquiries. Accordingly, the charge was transformed from one concerning the making of an intention-

²⁰⁰ See 14 C.F.R. § 67.20(a)(1)(1990) (prohibiting the making of "[a]ny fraudulent or intentionally false statement on any application for a medical" certificate).

²⁰¹ *Shrader* at 4.

²⁰² *Id.* See 14 C.F.R. § 67.31 (1991).

²⁰³ 14 C.F.R. § 67.31 (1991).

²⁰⁴ *Id.* at 5.

ally false statement with reference to a medical application into a charge concerning a failure to provide data regarding his satisfying appropriate medical criteria. Judge Mullins and the Board could have found that the Flight Surgeon's letter of inquiry put Shrader on notice about the "materiality" of his driving record. Thus, *Shrader* appears to stand for the proposition that once the FAA is shown to be aware of convictions, the pilot's failure to disclose them on subsequent applications is immaterial.

IV. CONCLUSION

In the wake of the DOT investigation, the FAA did not move quickly to revise the Form. Rather, it continued to employ an admittedly ambiguous form and sought to clarify the Form's ambiguities by publishing a number of notices in the Federal Register. For its part, DOJ employed the Form in pursuing criminal prosecutions which Judge Carr characterized as a "danger to basic justice." Notwithstanding, a jury recently convicted a pilot on false statement charges relating to his medical application.²⁰⁵

In any event, if, as the FAA asserts, there are 6,000 airmen who are apt to be prosecuted (either criminally or administratively) for making false statements on the Form, then there are 6,000 airmen whose constitutional rights to substantive due process are being violated. Moreover, there are approximately 700,000 other licensed pilots whose civil liberties are at risk.

The FAA's "Draft," however, may "clarify" the relationship between pilots' driving records and their medical qualifications for flight. Yet, employing a "Medical Form" to elicit responses from which a pilot's "moral fitness" is evaluated may result in continued debate about "trick questions."

Arguably, to the extent the Federal Aviation Regula-

²⁰⁵ See Verdict, *United States v. McGeary*, No.90-200 (W.D. Pa. Jan. 16, 1991) (on file with the *Journal of Air Law and Commerce*).

tions preclude pilots having convictions for certain offenses, questions about specific offenses the FAA is interested in could be listed on a "moral qualifications questionnaire." Airmen would then know exactly what information the Agency wants and why it wants it. Finally, having partially clarified its interest in pilots' driving records by promulgating new regulations and indicating it plans to implement a new Form, the Agency should re-establish the amnesty program for a specified period of time. Airmen who wished to truthfully answer questions on future medical applications could do so without fear of being put in prison or having their licenses revoked based upon negative responses they may have given to the "convictions" questions on earlier Forms. Absent a renewed amnesty program, many airmen who want to provide full disclosure concerning their convictions will not do so for fear of self-incrimination.