

New York Law Journal Online

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Aviation Law

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03-10-2008

Airline accidents have always been among the most publicized mass disasters, and attorney misconduct in soliciting cases following an aviation disaster has been a black eye on the plaintiffs' bar and the legal profession.

Lee Kreindler, who wrote this column for many years, was a proponent of victim's rights and penned a number of articles on the topic of solicitation. Lee's efforts and the efforts of other plaintiffs' lawyers led to the adoption of a solicitation policy by the American Association for Justice (formerly the American Trial Lawyers Association) that prohibits association members from engaging in improper solicitation.

Lee argued early on that aviation disaster victims and families should not be harassed by plaintiffs lawyers or defense representatives (lawyers or insurance representatives) following an aviation disaster.

In a joint proposed code of conduct to the American Bar Association in 1998, Lee and George Tompkins, an aviation defense lawyer, argued that the families should have at least 60 days before receiving mailings from either plaintiffs' firms or potential aviation defendants or their insurers.¹ Congress later passed a law that prohibits "unsolicited communications" in the first 45 days following a disaster involving an air carrier.²

Federal law and state ethical rules protect aviation disaster victims and their families from aggressive lawyers, and most plaintiff aviation law firms scrupulously follow the rules. Indeed, those firms usually conduct themselves in a manner that far exceeds federal law and state ethical rules relating to solicitation.

There are a series of recent disturbing developments. A wave of "marketing attorneys" have appeared on the scene through the Internet and other media. These attorneys tout their "experience" but actually have no plan to handle cases themselves and merely seek referral fees from another lawyer or firm. We have also heard stories about attorney misconduct involving aviation disasters outside of the United States, including that certain U.S. "aviation lawyers" have directly contacted victim families within days of accidents; misrepresented their qualifications and experience in aviation cases; offered widely optimistic promises about the eventual recovery in a U.S. litigation; and, have advanced money to victims in exchange for a retainer. Recently, the state bar in Turkey filed complaints against two U.S. lawyers accusing them of breaching the Turkish code of lawyer's conduct in their solicitation of victims from the November 2007 crash of an Atlas Jet aircraft in Isparta, Turkey.

Given the rise of Internet marketing and the "off shore" misconduct, we believe it is appropriate to revisit the rules governing solicitation and to discuss the important protections that the law and ethical rules provide to victims in aviation disasters. We will also restate advice that Lee Kreindler provided to families of aviation disasters over 20 years ago. The advice is as relevant and important now as when Lee first offered it.

Attorney Solicitation

Commercial speech is entitled to First Amendment protection. The government is free, however, to "prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . or that proposes an illegal transaction . . ."³ Commercial speech that is not false or deceptive and does not concern unlawful activities, though, may be restricted only in the service of a substantial government interest and only through means that advance that interest. Courts have upheld restrictions on attorney solicitation, including no-contact provisions that prohibit solicitation following an accident for a set period of time.⁴

Federal Law

Federal law prohibits unsolicited communications with any accident victim or relative of any individual involved in the accident before the 45th day following the accident that involves an air carrier providing interstate or foreign air transportation and any foreign air carriers accident that occurs in the United States.⁵

New York Law

New York law prohibits in-person or telephone contact, or contact by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.

The law also prohibits any form of communication relating to an incident involving potential claims for personal injury or wrongful death that are disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.⁶

Rights of Victims

The New York Administrative Board of the Courts has published statements of client's rights and responsibilities, which provide important information to law firm clients. Among the rights of a client are the right to ethical, competent and diligent lawyers and the right to be charged a reasonable fee. These rights are really just a restatement of how good and ethical attorneys have always treated their clients. Clients deserve nothing less.

Families of aviation disasters face great challenges in the days following the disaster. The sudden loss of loved ones is always difficult to address, but in aviation cases tremendous media attention adds to the trauma. In a very real way, the families are denied privacy to grieve for their lost ones. The last thing that the family of a victim needs is to be harassed either by plaintiffs lawyers looking for clients or by representatives of the defendants looking for releases.

The nature of aviation cases and the law designed to protect aviation victims provides the following important rights:

- 1) You have the right to be left alone. No lawyer should ever approach you personally or through an agent unless you ask for the contact. The only exception to this rule in New York is where the lawyer is a close friend, relative, or you are a former or existing client.
- 2) Lawyers should not send you law firm advertising or brochures for at least 45 days in accidents involving air carriers, and, in New York, 30 days in all other cases.
- 3) In New York, you should not have to see attorney advertisements directed at the disaster for at least 30 days after the accident.
- 4) You have the right to competent counsel. Your attorney should be able to handle your aviation case or associate with counsel who can properly handle the aviation issues in your case.
- 5) You have the right to know which attorneys will work on your case. Too often lawyers will sign up a case and then have nothing to do with its prosecution. In certain instances, lawyers will act as "chasers" for other law firms and the lawyers may have no intention to actually work on your case.
- 6) You have the right to discuss the fees and expenses that you will ultimately pay in a litigation. Most plaintiffs' lawyers work on contingency fee arrangements and set fees based on the risks that they see in a case and the potential recovery. It is not true that the best firm will necessarily charge the higher fee.

Advice to Victims

Lee penned an article, published on Feb. 3, 1986, in the *New York Law Journal*, at p. 3, that addressed solicitation in aviation cases. In the article, Lee answered a number of questions that the survivors of victims killed in an aviation disaster frequently have in the days and weeks after their loss:

Your Husband, Wife, Child, or Parent Has Been Killed in an Airline Crash

Q. Do you need a lawyer?

A. Yes. The matter that you are now dealing with may be one of the most important of your entire life in terms of the financial well-being of you and your family, and the questions presented are very complex. You need a good lawyer.

Q. Should you speak to the airline's insurance company directly?

A. No. The airline's insurance company is a commercial institution whose job it is to make money, or, in this case, to save money. As a layperson dealing with professionals you may say or do things that will prejudice your position.

Q. How do you get the right lawyer for your case?

A. If you have a family lawyer or business lawyer or otherwise know a lawyer in whom you have confidence, talk to the lawyer.

Ask the lawyer to advise you regarding your legal rights. The lawyer will likely be able to help you find the right specialist and in many cases will be able to participate in the litigation.

If you know others victimized by the same accident, or similar accidents, speak to them. Find out who they have retained and why they selected the law firm that they selected. Don't feel you have to sign up with the first lawyer you talk to simply because the lawyer is nice. You have a lot at stake in this claim.

Q. Do you need a specialist or will any lawyer do?

A. This is a question your personal lawyer can answer best. Some claims are simple and straightforward and a specialist is not necessary. On the other hand, for some claims, such as airline crash situations, specialized skills will be helpful to you, and typically the total fee you pay won't be any more. Discuss it with the lawyer you visit.

Q. What should you do if an unknown lawyer solicits your case, or wants to talk to you? Should you talk to the lawyer?

A. Solicitation of accident cases, sometimes called "ambulance chasing" is frowned upon by most responsible lawyers and most good lawyers don't do it. You may, therefore, simply not want to talk to the soliciting lawyer. Furthermore, federal law in the United States forbids any unsolicited communications by lawyers to victims or victims' families during the first 45 days following an airline disaster.

On the other hand, if you feel that you are strong and careful, and that you can take care of yourself, you might learn something and derive some benefit from talking to the soliciting lawyer. Tell the lawyer at the outset that you are going to talk to other lawyers before making a decision. Ask about the lawyer's experience and what she knows about the accident, and what the legal strategy would be. Ask the lawyer if there are any special problems and if she thinks it's a good case or a difficult case. Ask the lawyer what her fee would be and whether it will be based on the gross recovery or the net recovery (after expenses are deducted.) Ask the lawyer whether she will advance necessary expenses, or if you have to pay them as they are incurred. Don't be pressured into hiring the lawyer; remember that a lawyer who solicits cases is most often the last person you want to hire.

Q. Is there a rush to do something? How much time do you have?

A. In most cases, you have at least a year from the date of the accident to take appropriate action in court, if it becomes necessary, so do not permit any lawyer to rush you into signing a retainer. Lawyers who do this are suspect. Their real interest may be in getting you to sign a retainer contract, and even starting your case, with publicity, in the hope it will attract other clients to them. You should be suspicious of any lawyer who pressures you into signing a retainer.

On the other hand, there are often times advantages to retaining a qualified lawyer sooner rather than later. Doing so will allow the lawyer to start the investigations, such as preserving evidence and speaking with eye witnesses before their recollection is affected.

Fees

Q. *If you sign a contract with a lawyer what should the fee be?*

A. *Most accident cases in the United States are handled on a contingent fee of 33 1/3 percent of the recovery. Sometimes the fee is based on the gross recovery and sometimes it is based on the net recovery (the gross recovery less expenses.) Obviously, the latter is better for you.*

There are economies in the handling of mass disasters, however, and they, plus competition, may bring the fees down. Fees in mass disasters airline crash cases are often 25 percent, and sometimes they are even lower. The fee you agree to should include the fee of your personal lawyer, the fee of the expert specialist and the fee of any local counsel who becomes necessary. Your retainer contract should provide for that.

Don't be bashful. Shop around for fees. When you decide on which lawyer you would like to handle your case ask whether the lawyer will match any better fee you've been quoted. Most of the time lawyers will. Remember though that the fee is often less important to you than the quality of the lawyer and his or her ability to get you a sizable award. The best lawyer will usually get the best recovery for you, and it may be worth a few extra percentage points.

Q. *Can you change your mind, after you have signed a retainer contract, and change lawyers: what, if anything, will it cost you? How do you do it?*

A. *You can always change your mind about who should represent you. Your new lawyer will address the discharged lawyer's fee and in virtually all cases you will not pay additional attorney's fees because you switched lawyers.*

Thus, if you have been rushed into signing with the wrong lawyer you can simply discharge the lawyer by a letter or e-mail. Your new lawyer will help you do this.

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Endnotes:

1. See George N. Tompkins, Jr. and Lee S. Kreindler, ABA Code of Conduct in the Aftermath of an Aircraft Accident, "After the Crash," originally presented at the ABA's forum on Air and Space Law meeting in Washington, D.C., on Jan. 30, 1998.
2. 49 U.S.C. §1136 (G)(2).
3. *Id.*
4. Florida Bar v. Went for It Inc., 515 U.S. 618 (1995).
5. See 49 U.S.C. §1136(g)(2).
6. See 22 N.Y. ADC 1200.8(g).