

# **USDOT Enforcement Practice Group Meeting**



## **FIXING THE DANGEROUS DISCONNECT BETWEEN FAA'S NATIONAL POLICY & ITS HAZMAT ENFORCEMENT PROGRAM**

**SEPTEMBER 20, 2018  
WASHINGTON, DC**

# National Policy



## **FAA Compliance Philosophy**

“[S]afety arises from the *culture* ... [of] those subject to FAA regulation ... [&] is largely dependent upon voluntary compliance .... When [regulatory] deviations ... occur, the FAA’s goal is to use the most effective means to ... [achieve] full compliance & to prevent recurrence....[S]imple mistakes ... can most effectively be corrected through ... improvements to procedures or training programs ... which are documented ....  
[but]  
[R]eluctance or failure in adopting ... methods to remediate deviations or instances of repeated deviations might result in ... strong enforcement.”

FAA Order 8000.373 (June 26, 2015) & Notice N8900.323 (Sept. 8, 2015)

# Actual Practice



## HQ Enforcement Attorneys Are Inclined to Follow Policy

- Safety Program is their client!
- It's about *safety*, not *fin*es for simple human errors.
- Fostering “traffic ticket” mentality undermines corporate responsibility.
- Collaborative, in-depth, on-site reviews of shipper's culture & procedures supports front-line safety.

## Regional Attorneys Tend To Do the Opposite

- “Gotcha” enforcement action on the most trivial, technical violations.
- Penny-ante penalties – more like *parking* tickets.
- Treating Respondents as ATM machines.
- Ignore or misrepresent statutory *scien*ter requirement.

# Litigation Encourages Unprofessional Conduct



## Ignoring safety by ...

- filing a Notice or Complaint w/o program office input;
- filing Notice two full years (or more!) after the alleged violation;
- making non-specific allegations; e.g., “not in proper condition for shipment;”
- withholding photos & other information Respondent needs to conduct internal investigation; &
- allowing carriers to destroy crucial physical evidence.

## Filing Notices in bad faith when ...

- rubber-stamping inspectors' reports;
- not consulting PHMSA rule-writers to unscramble gobbledegook;
- enforcement attorney has not read the Notice or verified that HMR provisions still exist!

# Unprofessional/Unethical Conduct cont'd



Deliberately addressing Notices/Complaints to ...

- a corporation instead of a person;
- a person who has no idea where to route it for prompt response or action;
- an address other than where the responsible corporate offices & officers are located; &
- Respondent w/no courtesy copy to counsel.

Failing to allege a “knowing violation” as required by the statute.

- The Southern Team formulation: “if you shipped it and it leaked, you owe a fine” *vs.*
- Statutory liability only for a person who “*knowingly violates*” the HMRs (negligence).

Violating Ethics Rules

- Communicating directly w/a represented party.
- Revenge filings.
- Prosecuting moot cases (more than 5 years after the alleged violation) for the *stated purpose* of damaging the respondent’s reputation.
- Failing to appear at conferences & hearings or appearing w/o preparation.

# ALJs' Naked Bias



“One-strike” rule for Respondents; *no limit* on FAA failure to prosecute.

- “Constructive Withdrawal.”
- Deliberate abuse of snail mail instead of required Certified Mail or email.

ALJ comments to a Regional Enforcement Team Leader:

“[The assigned FAA prosecutor] has been noticeably absent from the proceeding. She didn’t file anything in response to my initial order; ... she did not file ... a response to [my] notice to show cause [why FAA has not constructively withdrawn its Complaint]; and she has not appeared [at the hearing] today. ... *There needs to be someone from FAA who is on this case and ready to prosecute this case, because I’m proceeding with this case, I’m moving this case forward either way.*”

(Transcript of Pretrial Conference, October 4, 2016.)

# FAA Chief Counsel's Bias



Interlocutory appeals: circular FAA road to nowhere.

- Still available only to agency prosecutors, despite 1990 amendment to Rule of Practice 219(c).
- Appeal based on ALJ's *failure* to dismiss (per Rule 13.215).
- Obama delegation of authority in 2016 from Administrator to Office of Adjudication.
- Appeal dismissed as “not ripe for review” because the ALJ “has not yet issued a decision.”
- Endless litigation, endless costs to Respondents.

Presages how FAA's Chief Counsel will treat Respondents on appeal of ALJ's Initial Decision.

# Alternative Dispute Resolution



The “reset” button: *Lucia*’s invalidation of ALJ appointments (“inferior officers”).

- DOJ opinion letter: “[W]e advise agencies to ... ratify and approve the appointment of existing ALJs.”
- DOT: “Freeze!” (then likely years-long log-jam).

Opportunity to take hazmat enforcement cases away from ALJs & Chief Counsel.

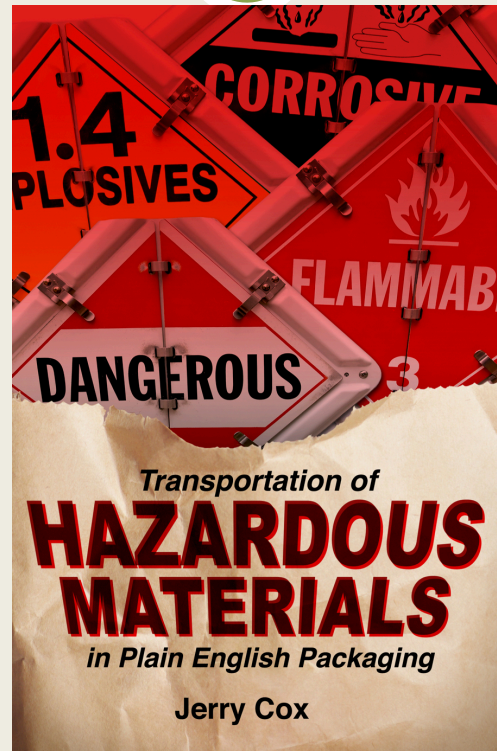
- Arbitration (preferably, binding) instead of hearing.
- *Talking* to one another!
- Either side could take truly serious issues (e.g., *scienter* requirement) to federal court.

Advantages of an unbiased arbitrator.

- Safety focus: arbitrator is more likely to demand plain-language explanations than pretend she’s an expert on the HMRs.
- Quicker, less expensive for all concerned.



# More Details



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# Jerry Cox Bio



## **Jerry W. Cox, Esq.**

- Jerry Cox practices law and provides public affairs services in Washington, DC. His practice focuses on consumer protection, energy & transportation safety & security. He defends companies in litigation involving the Department of Energy, the NTSB & all Department of Transportation modal administrations. Cox also handles accident investigations.
- As Legislative Counsel to U.S. Sen. John C. Danforth (R-MO), Jerry developed expertise in aerospace, transportation safety & consumer protection. He later co-authored the brief for the independent insurers in the case that led to the installation of airbags in automobiles. He is the author of *Transportation of Hazardous Materials in Plain English Packaging*, the first practical guide to the regulations governing the shipment of hazardous materials. His commentaries on transportation safety & defense policy have appeared in several global publications.
- Jerry graduated *cum laude* from the Woodrow Wilson School of Public & International Affairs at Princeton & earned his law degree at the University of Virginia. Has been admitted to practice before the U.S. Supreme Court & in several states.

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