

High Crimes and Misdemeanors: Unruly Passengers on Flights

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Join Carlton Fields attorney Ed Page, former federal prosecutor and active pilot and flight instructor, as he discusses federal criminal aviation cases from the past year, including the main tools used by the Department of Justice to prosecute violations and key takeaways and trends in the aviation industry.

Incidents involving unruly passengers are skyrocketing. As a result, the FAA has adopted a zero-tolerance policy for passengers who engage in unruly behavior. In this episode, Carlton Fields aviation attorney Ed Page discusses the penalties for such behavior – both civil and criminal – and the types of cases rising in the unfriendly skies.

Transcript:

Ted: Hi, I am Ted and today I am joined by our Aviation Attorney Edward Page in the Tampa office and our summer associate Nancy Eriksen. Today we will be talking about unruly passengers on flights.

Ed: This is a part of our series in Aviation Criminal and Civil matters that we have called high crimes and misdemeanors. Hi, my name is Ed Page. I have been working here at Carlton Fields as a shareholder for about 22 years. I am a former state, federal and special prosecutor and I focus about half of my practice in the Aviation area including federal, criminal aviation matters.

Nancy: I am Nancy Erickson. I just finished my second year at Stetson University College of Law and I am here as a summer associate at Carlton Fields.

Ted: Alright Ed, what have you noticed about the trends in unruly passenger behavior?

Ed: They are pardon the puns skyrocketing. We are seeing them in the news, we are seeing them on television, we are seeing them on the nightly news, we are seeing them all over and as a result the FAA is getting serious about these. You can take a look at some of the prevalence of unruly passenger cases at FAA.gov. As a result, the FAA has adopted a zero tolerance policy. There can be some warnings and some diversionary programs for unruly passengers but now most of these folks who engage in unruly passenger incidents are either fined through the civil monetary penalty process or referred criminally to the Department of Justice and the FBI for criminal prosecution.

Nancy: So we are talking about both civil and criminal cases then?

Ed: Exactly, and I think it is helpful to split up two of these into two separate components. Civil means that you are exposed to a civil monetary penalty and in these unruly passenger cases they are a lot. There are also criminal referrals to the Department of Justice and the FBI for criminal prosecution where the exposure not only as a fine but also jail, probation and also a civil monetary penalty. These numbers that we have been seeing for unruly passenger cases have been tracked since 1995. Most years there are a couple of hundred and they didn't make the news really until covid struck back in 2000 and we began seeing the spike. In 2021 for example the spike manifested itself in over 1,000 unruly passenger cases and in 2022 through the current date and today is June

13, 2022, we have almost 500. That will put us on pace for another 1,000 cases by the end of 2022. Although it should be noted that the cases seemed to be decreasing now that masks are no longer mandated.

Ted: So Ed, how many of these investigations actually result in a civil fine?

Ed: Well in 2021 we had 6,000 reports. We had 1,000 investigations and we had 350 fines. In 2022 to date which is in the middle of June, we have had 1419 incident reports, 417 investigations and 259 fines which will bring the year end totals past the numbers we saw in 2021 likely.

Ted: And what are these fines how much are we talking?

Ed: Well the maximum fine under federal law is \$37,000 per violation. And then you have the unruly passenger cases have multiple violations in one episode.

Ted: Is the entire fine paid as a lump sum?

Ed: It can be paid as a lump sum but a lot of people don't have the financial resources to do that. So the FAA has a payment plan where people pay on a monthly basis and the payment plan focuses on the overall amount agreed upon with the FAA and often times and most of the time in fact I think under these plans no interest is applied or paid under the plan provided no late payment is received. Under the FAA's payment policy though as I understand it a late payment can trigger interest for the remainder of the end including the entire civil monetary penalty that the unruly passenger agreed to to resolve the matter.

Ted: And is there any negotiating of the amount?

Ed: Everything is life is negotiable. And so there is negotiations with the FAA about the amount of the penalty and the FAA takes into account particularly the person's financial resources. In other words, if the person is unemployed or the person has low income having trouble getting a job or keeping a job or during its during covid, or the aftermath of covid these are all possible factors that the FAA make take into account in determining and agreeing to a civil monetary penalty.

Ted: Okay so that was civil cases how many cases have resulted in criminal charges?

Ed: Approximately 80 cases have resulted in criminal changes and it is important to note that these are federal criminal charges these are not cases that are brought in state court, county court or other courts around the nation. These are all in our federal courts across the nation. In these 80 cases, what we have seen is that a crew member makes an initial report. The FAA conducts an investigation and that leads to the FAA Council's office starting a civil monetary penalty enforcement matter

which results in a penalty. In addition for these 80 cases we have also seen referrals to the Federal Bureau Investigation within the Department of Justice as we said before for criminal prosecution. It is important to keep this in mind because it changes the landscape drastically from wherein a civil case people are concerned about fines and being on a possible no fly list which has been bandied about recently to the more severe sanction of possible federal criminal prosecution and going to jail being on probation and the court imposes a fine.

Nancy: Ed you had asked me to look into the statute that these criminal cases fall under and most of them are prosecuted under Title 49 of the United States Code section 46504 which makes it illegal to assault or intimidate a flight crew member or a flight attendant or to interfere with a crew member or flight attendant's ability to perform their duties. Often times when we are reading through the complaints or the indictments we saw the emphasis where they would explain how the unruly behavior caused the crew member or the flight attendant to be interrupted in conducting their duties on the airplane. Under Section 46504 there is a maximum of 20 years in federal prison under this statute.

Ed: And one thing we haven't talked about here but we can mention it is that when you are in federal criminal court the federal sentencing guidelines control. And so the federal sentencing guidelines dictate the sentence that a district court must imposed. It is not up to an agreement between the prosecutor and the unruly passenger and the unruly passenger's lawyer to say how the case should be resolved. We look to the federal sentencing guidelines which mandates a sentence in these cases. So, the takeaway here is that these are felony charges and some unruly passengers who are prosecuted criminally are eligible for pretrial diversion which is a diversionary program established by the United States Attorney manual to resolve some of these cases. The majority of unruly passenger cases are resolved once indicted or charged by pleas to felonies. These are the felonies that Nancy Erickson mentioned in Title 49 §46504. In many of these cases as you might imagine from reading in the newspaper and looking at FAA.gov also involve substance abuse and some mental health issues and the like.

Ted: So what type of behavior actually results in criminal charges?

Ed: The most common type of behavior that we have seen that Nancy Erickson located in the research and that I reviewed by following these cases is an assault or striking or pushing a flight attendant. In some of the big categories are as follows: In the three that we have identified we call them extreme cases there was danger to the aircraft or severe injury by a crew member or flight attendant. In the more typical cases we saw danger that arose as a result of the unruly passenger incident where it was isolated. The danger was isolated to nearby passengers and crew. Finally, in our third category we found that many of these unruly passenger cases were pandemic related and they were fueled by disputes about masks or vaccines between one passenger and a crew member or flight attendant or between one passenger and another passenger where the dispute arose

because someone had a mask and another person didn't or they weren't wearing it all the time and the like.

Ted: Well I am surprised there wasn't an abundance of pandemic related cases.

Ed: Well masking seems to have been the majority of all the civil cases early on and as we all know frustration with masks and people not wearing masks and not being treated similarly aboard an airplane can snowball. The snowball effect was evident in a lot of these unruly passenger cases. We saw that borne out in the civil monetary penalty cases that the FAA tracked and put on their website FAA.gov. In and the ones that we saw prosecuted as criminal cases because the cases started out with just disputes in the cabin or near the restrooms and the like but they escalated quickly and snowballed in the criminal cases that were referred to the Department of Justice and actually prosecuted.

Ted: So do you have an example of an extreme case?

Ed: We do and Nancy Erickson should explain this because she found this case *United States v. Dominguez* which is in the central district of California and is a 2021 case. Nancy

Nancy: In this case the defendant, Dominguez sought access to the cockpit while the plaintiff was actually taxiing and getting ready to take off. This person, as the plaintiff was taxiing, decided that he was on the wrong flight and he wanted to get off the plane so he ran forward to the cockpit and started banging on the door. The pilots didn't know what was happening there was a little bit of a scuffle with the flight attendant as they tried to get the defendant to sit back down. Eventually the defendant opened the exit door and the inflatable slide partially deployed and that led the pilots to declare a level 4 threat because they were concerned that if the slide deployed all the way that it could get sucked into one of the engines and cause a lot of damage to the aircraft and danger to all of the people on board. It took four days to repair the aircraft which had to taxi back to the gate and disrupt everyone's travel. Because this created such a danger to everyone on board this person eventually ended up getting sentenced to 18 months in the Bureau of Prisons as well as he received \$10,000 restitution payment that he has to pay. So that is one example. Recently one case that has been in the news a lot and you know in mid June and 2022 is this Southwest Airlines case where the defendant punched a flight attendant and that has been in the news lately because it was just sentenced. That happened in May of 2021. It was *United States v. Kononez* a Southwest Airlines case that was just sentenced and that occurred while the airplane was in flight as they were preparing to land. This is one of those cases that you were discussing Ed, where it kind of started with a mask dispute. The flight attendant asked the passenger to raise her mask up over her face and get ready to land. The altercation ended with the defendant punching the flight attendant in the head and it caused severe injury she had to be hospitalized. She broke several teeth and there was a lot of bruising on her face. She had to get stitches. It started over masking and I think the sentencing

for this just happened and the judge gave the defendant 15 months in the Bureau of Prisons as well as ordered her to pay \$26,000 in restitution and a \$7,000 fine. It is worth noting that amount of prison time is actually more than was requested by the prosecutor in this case.

Ted: So if these are examples of extreme cases what is more of a typical case?

Nancy: Well one case that we saw that happened recently is there is a dispute that started over the passenger being asked to wear his seat belt and put his tray table up for take off. This is like Ed was mentioning a lot of these cases involve some type of substance abuse and this case involved alcohol. The passenger asked to be served an alcoholic beverage and the flight attendant refused. He threw a glass at the flight attendant he used a slur to refer to the flight attendant and the flight attendant went to call the pilots using like a telephone that they have to communicate with the cockpit and the passenger grabbed the telephone and shoved it into the flight attendant's chest. That is an example of kind of a typical case where that I am sure was extremely distressing, particularly, for the flight attendant but also for everybody who was immediately situated in that area. It did impact the whole flight in that it prevented the flight attendant from doing their job. It didn't create that extreme level of danger that we saw in the Dominquez case with the slide that almost got sucked into the engine. The flight attendant I am sure was very distressed and probably had some minor injuries but there wasn't you know the severe level of injury that we saw with the Southwest case that was just sentenced. So you know the complaint focused on the disruption of the flight attendant's ability to do their job and the pilot's ability to do their job. There was not just quite that big impact that we saw with the more extreme cases.

Ted: So what kind of penalty might occur in a case like that?

Ed: Well, that case hasn't been sentenced yet. But typically, unless as Nancy has described it, it's one of these extreme cases. The person, the unruly passenger is going to likely score out under the sentencing guidelines to probation. They'll be ordered to pay restitution. They might have various restrictions or conditions of probation imposed. In Federal Court everyone who is prosecuted is formally convicted. So each unruly passenger will have a felony conviction. Finally, it is important to note that in many of these cases where complaints are filed and the person is taken into custody as a result of the unruly passenger incident, that the government request and obtains what's called pre-trial detention. That means your first trip to a gated community is permanent. While your case is resolved in Federal Court. So when you hear the words pre-trial detention, it means you are detained in jail pending the resolution of the case. You are not allowed on bond.

Nancy: Ed, what are some of the big differences that you see between defendants who are receiving terms of incarceration and those who are getting probationary sentences?

Ed: I see a natural divide between masking cases and inappropriate behavior, unruly behavior and the like, and when on the other hand, the passenger, the unruly passenger gets more aggressive and more dangerous to the flight operation as a result or through punching a flight attendant trying to get into the cockpit. Causing other serious risk to the operation of the aircraft by the crew or the flight attendant. That's how I think I would summarize that. And I think what you pointed out Nancy and describing the *Kononez* case, is that the judge who gave a more rigorous sentence than the prosecutor asked for is looking at these and trying to figure out what's the appropriate response to this situation. These level four risks that passengers create in the air and on the ground to other passengers. In that judges view it was a longer sentence than even the prosecutor had requested.

Nancy: You mentioned at the beginning of our talk, how this issue has really been in the public eye lately. And then you just mentioned the judge giving a longer sentence than was requested, do you think we're going to start to see a trend of more severe sentences for these cases in the future?

Ed: I think you will because naturally what happens is a judge who sees unruly passenger cases, either for the first time is alarmed and trying to figure out what the correct sentence is under the Federal Sentencing Guidelines. I have to suspect that many unruly passengers have no prior record, but yet the judge is trying to figure out how do I impose and do justice in this case by not only deterring others but by sanctioning the unruly passenger and the behavior that they demonstrated. It's a very difficult situation for the judge because he is in-a-fact or she is in-a-fact trying to protect the safety of air travel. It's a larger picture that the Federal judge has in mind but at the same time trying to fashion justice for the individual defendant. You are going to see more severe sentences for more severe cases. Even though the judges has discretion under the sentencing guidelines to impose probationary sentence or home confinement. You are going to see where an unruly passenger strikes somebody, kicks, spits, or does other interesting things, you're going to see prison sentences. More importantly, you are going to see more and more of these cases handled by the Department of Justice and the FBI because the FAA is referring all of these cases. These severe unruly passenger cases that involves striking and other behavior to the feds for prosecution.

Ted: So Ed we have covered a lot in talking about criminal and civil cases what are some of the key takeaways you can give us?

Ed: Well I thin there are several takeaways. First, we got to look at the timing of this. While lawyers love this phrase that correlation is not causation and that is true but gosh look at what's happened since covid. Covid struck when in February or March of 2020 we saw none of this for a while. Then we had masks imposed. Then we had debris as I might call it from Covid and people starting to get emotionally distraught about this. The newspapers and magazines and even professional journals psychology and psychiatric journals are now full of descriptions of people who are acting out as a result of and in the aftermath of covid. It is my opinion that you are seeing this as they are in unruly passenger cases. Some people are simply broken as a result of this. You are seeing more of it in

road rage incidents and you are seeing it in other situations that the country is confronting now days. That is that the straw that broke the camel's back is just right there in many of these cases and so the psychology and psychiatric issues involved in these are important to identify. The other take aways in many, many of these situations alcohol is involved and contributes to the unruly passenger situation getting quickly out of hand. Another takeaway is that there are many implications for the flight crew. The one case that Nancy described in United States v. Dominquez where the crew quickly had to deal with banging on the cockpit door and then the person opening the exit during taxi operation on the way to take off and the slide nearly getting ingested in the engine. These are all serious matters. This is not just a casual drink being tossed on the floor or in some other passenger's or flight attendant's lap. These are really serious things that could affect the safety of the aircraft operation. Also we have implications for passengers because as you read many of the unruly passenger matters you see the other passengers are getting involved in them in the disputes with the unruly passenger. They are trying to subdue the passenger, trying to hold them down until they land and law enforcement can board the plane and subdue the passenger and take them into custody. Finally, this is giving rise to the unruly passenger lawyer. So when unruly passengers are scrutinized for their conduct lawyers get involved including myself I have recently concluded an unruly passenger case and learned many of the things that we talked about today.

Ted: Ok, Ed so, what can you tell our listeners and your clients and any attorneys perhaps where can they go or what can they do if they have more questions or want more information on unruly passenger cases.

Ed: I think it is important that they reach out to someone who has done one or more of these unruly passenger cases so that they can have the benefit of learning from that person and some mentorship if they are going to accept that case. What I have noticed in practicing Aviation Law now for 22 years here at Carlton Fields is that the uninitiated to Aviation thinks that this is some magical land where all the rules and regulations are different and you know what for in large part they are. But if you have as I like to say, a flight instructor kind of mindset, and I am an FAA certificated flight instructor. I pride myself in trying to explain by using analogies and other tools to nonlawyers and clients what really is bothering the FAA here. And I think that is a good way to approach the unruly passenger cases for the uninitiated both lawyers and witnesses and clients.

Ted: Okay and how can our followers reach you.

Ed: They can call me Ed Page, at Carlton Fields, at 813-229-4308 or my email epage@carltonfields.com. I am also on linked-end and I would be happy to chat with them about their unruly passenger case or other FAA problem.

Ted: And with that being said you can also visit our website in our Aviation Industry page as well as our white collar and criminal investigations practice page at CarltonFields.com. Do you have any

other content or topics of conversations that you plan to feature on future podcasts episodes?

Ed: We do I want to give great credit to Nancy Erikson for help us put together this podcast and for the work she is already doing and going to do in the future on our next podcast on high crimes and misdemeanors where we will focus on the federal, criminal prosecution of drone pilots. Those people with and without a FAA certificate drone license.

Ted: Okay well thank you Ed and thank you Nancy for joining us.

Ed: Thank you.

Nancy: Thank you.

Presented By



Edward J. Page

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