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## Who is Really the Pilot-In-Command?

If you are flying alone, or with only non-pilots in the aircraft, you already know that the Pilot-In-Command (“PIC”) is you. However, what if there are two rated pilots in crew seats? Does it matter if one pilot has more experience, higher ratings, or is giving flight instruction? The answer might be clear as... low IFR.

### **Liability vs Logbook Time**

To clarify, the purpose of this article is to discuss who will likely be held responsible by the FAA, the NTSB, and the civil courts in the event of a mishap. The more esoteric discussion about who is eligible to actually log PIC time is for another day. 14 C.F.R. § 1.1 states that the PIC means the person who:

- (1) *Has final authority and responsibility for the operation and safety of the flight;*
- (2) *Has been designated as pilot in command before or during the flight; and*
- (3) *Holds the appropriate category, class, and type rating, if appropriate, for the conduct of the flight.*

Further, FAR §91.3(a) states: *The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.*

In Part 135 (air taxi) and Part 121 (airlines), the PIC is predetermined by those who schedule the pilots. If there are two pilots, one is the Captain (PIC) and the other is the First Officer (SIC). However, for us Part 91 pilots, several factors will determine who is PIC, and who can be held responsible for the flight.

The most common two-pilot situation in a Part 91 operation is flight instruction. In the case of a student pilot taking primary instruction, the instructor will always be deemed PIC by virtue of the student pilot’s lack of qualifications to carry passengers. Now, what about a private pilot who is taking instrument lessons? If the flight is operated IFR (even in severe clear), the

instructor must be PIC, since a non-instrument rated pilot cannot operate IFR, period. To make things more interesting, how about a private pilot under the “hood” in VFR conditions with an instructor? Again, since the pilot receiving instruction is not rated to operate solely by reference to the instruments, the instructor has to be the PIC. In all examples so far, a mishap would almost certainly fall 100% on the instructor, and none on the airman receiving instruction.

Similarly, if one pilot does not possess a current medical certificate (or BasicMed), and the only other pilot does, the only medically qualified pilot will be deemed the PIC. Interestingly enough, some pilots ask a buddy to be their “safety pilot” to build some hood time, but forget to verify that their buddy has a current medical. In this case, who would be PIC? Answer: nobody! No pilot was independently qualified to operate the aircraft, the entire flight would be illegal, and we would expect some certificates to be pulled.

Now, let’s spice it up a bit. A private pilot who is properly rated and current in all respects is getting a BFR from an instructor. Clearly, since the pilot receiving instruction could be PIC even without the instructor, does the instruction matter? Established NTSB precedent says: YES. *“[r]egardless of who is manipulating the controls of the aircraft during an instructional flight, or what degree of proficiency the student has attained, the flight instructor is always deemed to be the PIC.”* Admin. v. Hamre, 3 NTSB 28 (1977). This principle was reaffirmed in Admin. v. Walkup, 6 NTSB 36 (1988). Flight instructors, time to review your personal insurance coverage.

Who is PIC during a checkride? The examiner is required to hold a current flight instructor certificate, so common wisdom would suggest they would be presumed to be PIC as well. With the exception of a private checkride given to a student pilot, FAR §61.47(b) expressly states that examiners are not the PIC; end of discussion.

Another common situation is two pilots, both rated and current, but neither is a flight instructor. They share stick and radio time interchangeably, so which one is PIC? First, let’s be smart here and ask: “is one of them not covered by that aircraft’s insurance?” If not, it is strongly recommended that only the covered pilot perform takeoff and landing, and that there be a clear understanding before flight that PIC is the covered pilot. An email exchange to put this on the record before takeoff isn’t a bad idea. The last thing any pilot needs is a prop strike where the carrier won’t pay. Insurance coverage aside, what would the FAA or NTSB say?

Assuming no insurance issues, and the usual circumstances where neither pilot make any express indication of PIC before flight, the determination of which pilot is PIC will rest on the facts and circumstances of the situation. For example, if there is a TFR incursion, the FAA will likely find the PIC to be the one who had the controls (or the last one to engage the auto pilot). However, what if the PIC had delegate the pre-flight briefing or in-flight navigation functions to his buddy, who is not PIC? The answer is: regardless of who is determined to be PIC, both pilots face

liability. In *Admin v. Thomas, N.T.S.B. Order No. EA-4309 (1994)*, the FAA held responsible the non-PIC pilot for a near gear-up landing: “*an aircraft requires only one pilot does not support a conclusion that a second pilot (or even a non-pilot) participating in the inflight operations is not accountable for his own actions.*”

Reading the *Thomas* case carefully, it further narrows the affirmative defense doctrine that a pilot might rely on called “reasonable reliance”. An example of reasonable reliance would be a non-owner pilot renting a Cirrus from a flight school, but the aircraft has an Airworthiness Directive that has not been complied with. Even the heavy-handed FAA would not expect a renter pilot to research the maintenance logbooks for AD compliance before every flight. However, if two rated pilots are participating in any aspect of the flight, and if a mishap occurs, expect the FAA to hold both pilots responsible for the adverse consequences.

Further complicating this discussion, most civil courts allow for comparative negligence determinations. For liability purposes, one pilot could be held 90% liable, and the other 10% liable, regardless of the FAA’s determination as to who is (or is not) PIC. If you are the 10% pilot with deeper pockets (or insurance), expect to become the recovery target.

Final recommendations: whenever possible, establish who is PIC before the door closes. If both will share PIC duties, verbalize “*I am now PIC*” to the other pilot to reduce the likelihood of confusion, and to further promote good crew resource management.

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