Administrative Law Section Newsletter

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Writing and Challenging Emergency Orders

by Gar Chisenhall

Most attorneys would probably agree that a licensee should be afforded due process before his or her license is suspended, revoked, or restricted. *See Presmy v. Smith*, 69 So. 3d 383, 387, n. 1 (Fla. 1st DCA 2011)(noting "[a] professional has a property interest in his license to practice his profession protected by the due process clauses of the state and federal constitutions."). In addition to enabling one to earn a living, a license often confers a certain status on the holder thereof. *See generally Reid v. Fla. Real Estate Comm'n*, 188 So. 2d 846, 850-51 (Fla. 2d DCA 1966) (noting a hearing officer's finding that "a person's license to engage in a privileged business or profession" is "not only a paper writing that permits the holder to legally engage in the activities described therein, but it is also a proclamation to the world that the person to whom the license is issued is qualified to be chosen as a recognized member of a privileged business or profession. It is a most valuable property right; one to be proud of and to be zealously guarded and protected. It singles out a person as being an honorable citizen in the society of people.").

Nevertheless, the Florida Legislature has recognized there are circumstances in which action must be taken **before** a licensee is afforded due process. For instance, section 120.60(6), Florida Statutes (2012), provides that "[i]f the agency finds that immediate serious danger to the public health, safety, or welfare

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From the Chair: "Order, Order!"

by F. Scott Boyd

Let's say you are representing a client before an agency. You want to research prior orders of the agency to find out how it interprets the relevant statute and rules. Would you know how to research those orders if that agency was the Florida Board of Engineers? The Florida Housing Finance Corporation? The Department of Transportation?

There are well over 100 agencies subject to the APA, and many maintain their own orders.[1] Some keep these orders in electronic form on the Internet, others have only paper copies available. The search and indexing systems to locate these orders are unique to each agency: some systems are good; some are inefficient; a few are all but useless to the public. In light of the huge strides in access to public information generally in this electronic age, access to agency orders just hasn't kept pace.

While substantial progress has been made with respect to most of the goals of the 1974 APA,[2] less progress has been made in expanding "public access to precedent." Not that the problem has gone unnoticed. It was almost immediately recognized that the 1974 requirement that each agency "make available . . . all agency orders" and provide a "current subject-matter index"[3] to them was not being met, and in 1979, the Legislature

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enacted a provision permitting an agency to instead designate an official reporter for publication and indexing of its orders.[4]

Moving toward a compiled publication that might eventually include the orders of every agency seemed to be an important step forward, but at the same time the wording of the legislation had narrowed the universe of affected orders that needed to be retained and indexed. An even more substantial problem soon developed, too, because although the statute had specified that the agency had to designate a reporter to publish and index "all the agency's orders rendered after a proceeding which affects substantial interests," this requirement was never enforced. In practice only select orders chosen by the reporter were published.

Without detailing the many well-intentioned, but sadly often counterproductive, amendments that followed, suffice it to say that we are left today with statutory provisions in sections 120.53 and 120.533 that in some instances are contradictory and in others duplicative, and which are so poorly organized as to be nearly incomprehensible. This is no doubt because statutory "fixes" were crafted to respond to various issues without much regard for the existing statutory structure. Go ahead, take a quick look at these two sections, and any relevant rules of the Department of State (of course, the statutes call for rules, too) and see if you come away with a clear picture of the system that is in place. It would be one thing if all of this complication were the only way that we could provide broad public access to agency orders, but is anyone prepared to seriously argue that the current system meets that objective?

Some amendments were undoubtedly improvements, such as the 1992 provision allowing an agency to comply with "indexing" requirements by providing its orders in a database with electronic search capability.[5] Perhaps one of the best changes was made by the 2008 Legislature: agencies may now meet the requirement that they maintain and index their orders by simply sending them to DOAH for posting on the Division's website, at no charge to the agency.[6] While that site could certainly be improved, it does provide Internet access and basic full text search capabilities. The most effective public access to agency orders available today is the result of these two simple amendments.

A few court decisions have grappled with the problem,[7] but in general they have been unable to provide much help toward the larger goal. The APA vision as explained in *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977), that all agency policy had to be expressed as either rules or orders, accessible to the public through a subject-matter index "in an ever-expanding library of precedents to which the agency must adhere or explain its deviation," has not been realized.

Perhaps the most well-known case discussing the indexing of orders was *Gessler v. Department of Business and Professional Regulation,* 627 So. 2d 501 (Fla. 4th DCA 1993), *dismissed*, 624 So. 2d 624 (Fla. 1994). In that discipline case, in response to the licensee's contention that his defense was prejudiced by his inability to find previous orders, the Department had admitted that these had not been published or indexed. The First District, after recounting the statute's indexing requirements and a general history of noncompliance by agencies, certified the case to the Supreme Court as requiring immediate resolution because it was an issue of great public importance. Although later dismissed by the Supreme Court on joint motion of the parties, *Gessler* seemed to presage that no final orders could be issued in such cases in the absence of agency compliance with indexing requirements.

In *Caserta v. Department of Business and Professional Regulation,* 686 So. 2d 651 (Fla. 5th DCA 1996), the court mitigated the presumptive impact of *Gessler* somewhat by concluding that the 1992 amendments to the indexing provisions meant that agencies must maintain their subject matter index only after the date of the amendments.

Later cases may have receded somewhat from the extreme consequences that were hinted at in *Gessler*. In *Bethesda Healthcare System, Inc., v. Agency for Health Care Administration,* 945 So. 2d 574 (Fla. 4th DCA 2006), the court noted that two cases that had in part relied upon *Gessler* had essentially been concerned with an agency's failure to consider its own precedent in reaching a decision.

More consistent with this later approach, the First District has fairly recently held that an agency's failure to list or index a particular order in a similar case may be a procedural error which impairs the fairness of a Section 120.57 proceeding. *Villa*

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Capri Assocs., Ltd. v. Fla. Hous. Fin. Corp., 23 So. 3d 795, 797-798 (Fla. 1st DCA 2009)(remanding for a hearing to determine the applicability of the earlier, unavailable case). Such judicial action of course requires that the non-agency party, and ultimately the court, become aware of the precedential order notwithstanding the lack of indexing.

In any event, the current statutory scheme and judicial decisions have not led to efficient and effective public access to agency orders. While there is general agreement on this point, there is no consensus on solutions. Although the general term "indexing" has been used here to include not only a "hierarchical subject matter index" but also the newer alternative of searchable databases, perhaps the first issue to consider is whether it is time to dispense with the notion of a traditional index completely. Isn't full text search of orders kept in a database much simpler, less expensive, and less subjective? Indexing, properly done,[8] is much more time consuming and is a burden on scarce agency resources.

A second issue concerns the many existing orders already issued and maintained by agencies. It may be relatively easy to come up with a better system for the future, but converting thousands of old orders into a new searchable database, for example, is an entirely different matter and could be extremely expensive. While this is certainly a matter for concern, it seems to provide no legitimate reason not to create a better system as soon as possible—assuming that one can really be devised—and have it operate prospectively. Ten years after implementation, a new regime would be covering most of the orders that the public was actually interested in researching.

A third issue, and given history perhaps the most critical, is the enforceability of whatever scheme is adopted. Of course, it would be relatively easy to draft statutory provisions that would substantially enforce indexing requirements. For example, a single sentence requiring every order issued by an agency (after hearing or waiver thereof) to be sent to DOAH (or other central location) for inclusion in a searchable database before it could even become effective might suffice, but would such a "cure" have unintended consequences and cause more problems than it solved?

A fourth issue, related to the third, is the scope of the indexing requirement. There are hosts of minor agency orders that are issued daily which have no real precedential value. Why index them? On the other hand, might it be argued that excluding non-precedential orders from indexing is not worth the time and trouble it takes to identify them for that exclusion? Some agencies might also be concerned that central filing of all agency orders would cause them to lose control over their orders. Hasn't that happened before, in the realm of administrative rules?[9] But centralized indexing has certain inherent advantages, both in ease of public use and in conducting research on issues that extend across agencies, and may prove quite attractive if agencies are unable to separately comply with indexing requirements.

I am not in search of a "perfect" solution, but I am convinced we can do better. As a first step, we need to improve information as to how each agency is meeting the current order indexing requirements. Toward this end, an ad hoc Committee on Access to Agency Orders has been formed. Gar Chisenhall, John Lockwood, Patty Nelson, Daniel Nordby, Amy Schrader, and Richard Shoop have agreed to serve on this committee under the leadership of Jowanna Oates. The Committee plans to post information next year on the Administrative Law Section's website as to how each agency's orders are made available to the public and how they may be searched. I believe this alone will be an important step forward. Hopefully, the Committee will go on to examine other ways to improve public access to orders in future years. If you have information, questions, or ideas about this important issue, please give Jowanna a call.

Endnotes:

[1] Several agencies contract with outside "reporters." In addition, nine agencies have placed final orders on DOAH's website: the Department of Agriculture and Consumer Services, the Department of Children and Family Services, the Department of Community Affairs, the Department of Economic Opportunity, the Department of Environmental Protection, the Department of Health, the Department of Education, the Department of Business and Professional Regulation, and the Department of Highway Safety and Motor Vehicles. The APA requires that every order of these agencies that must be indexed must be published by the outside reporter or by DOAH if such publication is to suffice as an alternative to the provisions of subparagraphs 120.53(1)(a)1. and 2.

[2] The "Reporters' Comments on Proposed Administrative Procedure Act for the State of Florida" (March 9, 1974) identified seven major goals. One was to broaden "public access to the precedents and activities of agencies."

[3] The original provision relating to maintenance and indexing of orders was remarkably short: "(2) Each agency shall make available for public inspection and copying at no more than cost all rules formulated, adopted, or used by the agency in the discharge of its functions; all agency orders; *and a current subject-matter index*, identifying for the public any rule or order issued or adopted after the effective date of this act." The real issue then, as now, was making the retained orders useful to the public by providing some means by which the public could identify the orders it was interested in inspecting from among the multitude of orders issued each day.

[4] Chapter 79-299, Laws of Florida, created subsection (4) to provide, "Each agency may comply with subsection (2)(b) and (c) by designating by rule an official reporter which publishes and indexes by subject matter all the agency's orders rendered after a proceeding which affects substantial interests has been held."

[5] Section 1, Chapter 92-166, Laws of Florida.

[6] Section 3, Chapter 2008-104, Laws of Florida.

[7] The judicial remedy that was apparently originally envisioned might surprise you. I am not aware that an agency has ever been asked to provide a copy of its orders index under subsection 120.54(7)(a), but the Reporter's Comments to the APA note that citizens may invoke that section (actually its predecessor section 120.54(5)) to request this "minimum public information" required by the APA. Although a failure to provide the index might be appealed to the court, it is not clear what remedy a court might provide.

[8] I would be the first to agree that a quality, conceptually-based index would provide access to orders that would be almost impossible to retrieve simply by searching for particular words and terms, but there are few such indexes.

[9] Initial efforts to seek voluntary cooperation of state agencies in the publication of their rules were eventually abandoned in favor of actions to make publication mandatory. Report of the Committee on Administrative Law, 28 Fla. B. J. 146 (1954). Centralized publication of all agencies' rules by the Department of State followed.

Agency Snapshots:

Department of Business and Professional Regulation

by Colin M. Roopnarine

The Department of Business and Professional Regulation (DBPR) licenses and regulates one million professionals and businesses across the State of Florida. DBPR issues licenses ranging from talent agents to mold inspectors and real estate agents, and construction contractors to alcohol and tobacco manufacturers and professional boxers. DBPR's mission is to "License Efficiently, Regulate Fairly."

The Agency Head: Ken Lawson was appointed the Secretary of DBPR on May 2, 2011. A native Floridian and a graduate of Florida State University and the Florida State University College of Law, Secretary Lawson has spent more than 12 years serving and protecting the public in numerous regulatory positions. Secretary Lawson began his legal career in the United States Marine Corps, Judge Advocate General's Division and spent seven years serving as an Assistant U.S. Attorney for the Middle District of Florida. After serving as an Assistant U.S. Attorney, Secretary Lawson was appointed the Assistant Secretary of Enforcement for the U.S. Department of the Treasury. In this capacity, Secretary Lawson was responsible for the oversight of several federal law enforcement agencies, including the U.S. Secret Service, the Bureau of Alcohol, Tobacco and Firearms and the Federal Law Enforcement Training Center.

In 2003, Secretary Lawson returned to the U.S. Attorney's Office for the Middle District of Florida where he defended the United States against civil claims. He was then appointed the Assistant Chief Counsel for Field Operations with the Department of Homeland Security's Transportation Security Administration, a position he held for several months before moving to the private sector.

In the private sector, Secretary Lawson spent two years consulting for Booz Allen Hamilton, including one year as Chief of Party for the Financial Crimes Prevention Project in Jakarta, Indonesia. He most recently served as Vice-President for Compliance at nFinanSe Inc., a financial services company in Tampa, where he was responsible for the company's Bank Secrecy Act/Anti-Money Laundering program and its compliance with state money transmitter licensing regulations for 42 states.

Secretary Lawson can be contacted as follows: Office of the Secretary, 1940 North Monroe Street, Tallahassee, Florida 32399-1000; Ph.: (850) 413-0755; Fax: (850) 921-4094.

The Structure of DBPR: DBPR's

Joint Administrative Procedures Committee

by Jowanna N. Oates and Kenneth J. Plante

The Joint Administrative Procedures Committee (JAPC) is a joint standing committee of the Legislature. The Committee is comprised of six senators appointed by the President of the Senate and six representatives appointed by the Speaker of the House. JAPC's duties are prescribed by Joint Rule 4.6 of the Legislature and Chapter 120, Florida Statutes. Among JAPC's major functions are to review all proposed and existing agency rules to ensure that the rules are within the agency's delegated legislative authority, and to exercise oversight of agency actions taken pursuant to the Administrative Procedure Act.

Coordinator:
Kenneth J. Plante
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The Coordinator of JAPC is a joint appointee of the President of the Senate and the Speaker of the House of Representatives. Mr. Plante was appointed Coordinator in October, 2011. Prior to his appointment, Mr. Plante spent fifteen years in private practice, focusing on administrative and environmental law, and served as General Counsel of the Department of Environmental Protection and the Department of Natural Resources.

Hours of Operation:
8:00 a.m. – 5:00 p.m., Monday-Friday

Office Email: joint.admin.procedures@leg.state.fl.us

Practice Tips: JAPC's attorneys are available to answer questions concerning rulemaking. An individual interested in a proposed rule may track JAPC's review on its website located at www.japc.state.fl.us. The website provides links to correspondence to and from the Committee regarding administrative rules under review; provides links to DOAH challenges to a proposed rules; and provides the 90-day filing deadline dates for proposed rules. Additionally, the website contains links to publications such as the Committee's annual report and the pocket guide to the Administrative Procedure Act. The website is a great place to begin legal research, as it has an annotated Chapter 120 database that includes law review and journal articles, case law, DOAH decisions, and Attorney General Opinions.

regulatory functions are divided into two general divisions, namely the Divisions of Business Regulation and Professions' Regulation.

Deputy Secretary, Michael Walker, Business Regulation, is responsible for licensing and regulating Alcoholic Beverages & Tobacco; Condominiums, Timeshares & Mobile Homes; Hotels & Restaurants (including elevator safety); and Pari-Mutuel Wagering.

The Division of Alcoholic Beverages and Tobacco (Chapters 561-565 and 567-569, Florida Statutes) licenses the alcoholic beverage and tobacco industries, enforces the laws and regulations governing those industries, and collects taxes and fees paid by the licensees. The Division of Florida Condominiums, Timeshares and Mobile Homes provides protection for residents living in those communities. The Division of Hotels and Restaurants (Chapter 509, Florida Statutes) oversees compliance and licensure, sanitation and safety inspectors and elevator safety. The Division of Pari-Mutuel Wagering regulates activities such as jai alai, horse racing, dog racing, card rooms and the slot machine gaming industry.

Deputy Secretary, Tim Vaccaro, Professions, is responsible for licensing and regulating individual professions licensed primarily through regulatory boards administratively housed within the DBPR. "Professions" is responsible for licensing a very diverse group, including certified public accountants, boxers, community association managers, construction and electrical contractors, child and farm labor contractors, cosmetologists, geologists, real estate appraisers, brokers and sales associates and veterinarians. Recently, the Florida Building Commission was legislatively transferred to Professions.

Each of these two divisions has units that: (1) process applications for initial licensure and renewal; (2) investigate allegations of misconduct by licensees; and (3) monitor licensee compliance. The DBPR is very proactive in the regulation of its licensees. This is accomplished by proactively monitoring professionals and related businesses, aggressively pursuing and investigating complaints of wrongdoing and utilizing compliance mechanisms such as a mediation program, educational outreach, notices of noncompliance, citations and statutorily mandated inspections.

The General Counsel: Jeffrey Layne Smith became General Counsel at DBPR on May 2, 2011. Mr. Smith grew up in Tallahassee, where after high school he received an appointment to the United States Air Force Academy. Upon returning to Tallahassee, he graduated from TCC and the Florida State University College of Business, and in 1987, graduated from the Florida State University College of Law (J.D. with High Honors; Order of the Coif; Order of the Barristers).

Mr. Smith has been a member of the Florida Bar for twenty-five years, twenty-four of which he spent in private practice. He assumed several roles as a civil, criminal, and administrative trial lawyer. He practiced general civil litigation in state and federal courts, and administrative litigation at several state agencies. Mr. Smith is also a certified circuit court mediator, and he mediates cases. On several occasions he was designated to serve as a special public defender and he provided free legal services defending indigent clients. He has litigated complex civil fraud and commercial tort cases, and breach of contract and collection cases.

The General Counsel is assisted by three Deputy General Counsels. Michael Martinez is the current Deputy of Business Regulation having previously served as the Deputy of Professions' Regulation. Mr. Martinez has eleven years of experience in state government and was a public defender for two years. Colin M. Roopnarine is the current Deputy of Professions' Regulation. Mr. Roopnarine is Board Certified in State and Federal Government and Administrative Practice, and has worked in state government for sixteen years as a litigator, appellate counsel and hearing officer. J. Yvette Pressley, is the Deputy for Administration, which includes serving as DBPR's Ethics Officer. Ms. Pressley has served in state government for twenty-three years and has practiced in various areas such as criminal, labor, and employment law, having served as DBPR's personnel attorney prior to her promotion to Deputy.

Mr. Smith can be contacted as follows: Office of the General Counsel, 1940 North Monroe Street, Tallahassee, Florida 32399-2202; Ph.: (850) 488-0063: Fax: (850) 922-1278.

The Agency Clerk: Rhonda Bryan is the current Agency Clerk of DBPR. Her contact and filing information is as follows: 1940 North Monroe Street,

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requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances . . ." *See also* §120.569(2)(n), Fla. Stat. (2012)(providing for issuance of an "immediate final order" if an agency head finds "an immediate danger to the public health, safety, or welfare . . .").

During the course of my career as a chief appellate counsel for two government agencies, I have been involved with the drafting of many emergency orders. I have also encountered situations when the available facts did not amount to a genuine emergency, and the agency correctly declined to issue an emergency order. The material below describes the elements of a facially sufficient emergency order and is intended to assist my fellow agency attorneys with: (1) identifying situations appropriate for emergency orders; and (2) drafting emergency orders that can withstand judicial review.

This article is also intended to assist private attorneys defending licensees who are the subject of emergency orders. By being familiar with the elements of a facially sufficient emergency order and the procedure by which to call attention to their absence, a private attorney can expeditiously obtain relief for his or her client.

I. The Elements of a Facially Sufficient Emergency Order

When drafting an emergency order, agency attorneys must remember that emergency orders are subject to the exacting standards of section 120.60(6), Florida Statutes (2012). *See Kaplan, M.D. v. Dep't of Health*, 45 So. 3d 19, 20 (Fla. 1st DCA 2010). As a result, an emergency order must **convincingly** demonstrate: (1) the existence of an immediate, serious danger to the public health, safety, or welfare; (2) that the agency in question took only that action necessary to protect the public (i.e., the remedy was narrowly tailored to address the harm); and (3) that the licensee was treated fairly. *See Premier Travel Inter., Inc. v. Dep't of Agric. & Consumer Serv*., 849 So. 2d 1132, 1134-37 (Fla. 1st DCA 2003).[1]

Appellate courts also consider whether the pattern of conduct described in the emergency order is likely to continue. *See Premier Travel*, 849 So. 2d at 1135 (stating that "[i]n determining whether to affirm or reverse [an emergency order], courts consider whether the pattern of conduct is likely to continue."). *See also Bertany Ass'n for Travel & Leisure, Inc. v. Fla. Dep't of Fin. Serv.*, 877 So. 2d 854, 855 (Fla. 1st DCA 2004)(noting the emergency order "contains allegations of past and recent conduct which would support an inference that appellants' unauthorized activity may continue absent a cease and desist order.").

Because licensees are not given an opportunity to have an evidentiary hearing prior to issuance of an emergency order, all of the elements discussed above "must appear on the face of the order." *Bio-Med Plus, Inc. v. State, Dep't of Health*, 915 So. 2d 669, 672 (Fla. 1st DCA 2005). *See also Preferred RV, Inc. v. Dep't of Highway Safety & Motor Vehicles*, 869 So. 2d 713, 714 (Fla. 1st DCA 2004)(noting that "all of the factual allegations and elements necessary to determine the validity of the emergency order must appear on the face of the order.").

The following sections describe each element of a facially sufficient emergency order.

A. Is There an Immediate, Serious Danger to the Public Health, Safety, or Welfare?

The case law emphasizes the need to demonstrate that the public is in "immediate" danger. In other words, "[t]he factual allegations contained in the emergency order must sufficiently identify particularized facts which demonstrate an immediate danger to the public." *Witmer v. Dep't of Bus. & Prof'l Regulation*, 631 So. 2d 338, 341 (Fla. 4th DCA 1994).

When evaluating whether an emergency order is justified under a particular set of circumstances, this is often the most difficult element to assess. "General conclusory predictions of harm are not sufficient to support the issuance of an emergency suspension order." *Bio-Med Plus*, 915 So. 2d at 673. Instead, the agency's stated reasons for acting "must be factually explicit and persuasive concerning the existence of a genuine emergency." *Field v. Dep't of Health*, 902 So. 2d 893, 895 (Fla. 1st DCA 2005). *See also Unimed v. Office of Ins. Reg.*, 884 So. 2d 963, 964 (Fla. 1st DCA 2004)(reversing an emergency order because it was "predicated solely on conclusory allegations implying that appellants' failure to be licensed in Florida, by itself, constitutes an immediate danger to the public health, safety and welfare."). Unfortunately, there are few hard and fast rules as to what does (and does not) amount to a "genuine emergency." Therefore, agency officials often must make judgment calls (based in part on guidance from the cases discussed below) as to whether the facts presented to them justify issuance of an emergency order.

Obviously, an emergency order is justified when lives are in danger. *See Tauber v. Bd. of Osteopathic Medical Examiners*, 362 So. 2d 90, 93 (Fla. 4th DCA 1978)(noting "[w]e can conceive of no greater emergency of immediate necessity than that which endangers the preservation of human life.").

Also, "[o]ngoing criminal violations constitute a danger to the public health, safety, and welfare." *Allstate Floridian Ins. Co. v. Office of Ins. Reg.*, 981 So. 2d 617, 624 (Fla. 1st DCA 2008). *But see Witmer*, 631 So. 2d at 343 (holding "[t]he Department's characterization of the petitioner's 'willingness' to become involved in criminal activity is nothing more than an allegation of criminal propensity. The Department cites no authority which would permit it to suspend a license upon a mere showing of propensity to commit violations.").

However, allegations of statutory and/or rule violations (in and of themselves) may be insufficient to justify an emergency order. "The reviewing court [will] focus not simply on charges of statutory violations, but instead, upon 'particularized facts which demonstrate an immediate danger to the public.'" *Kaplan*, 45 So. 3d at 20. As stated by the First District Court of Appeal in *Unimed*, 884 So. 2d at 964, "it is not sufficient merely to allege a statutory violation; instead, the order

must contain a factual recitation sufficient to demonstrate the existence of an imminent threat of 'specific incidents of irreparable harm to the public interest' requiring use of the extraordinary device afforded by section 120.569(2)(n)."

At least one appellate court has held that an emergency order should not be used to punish past behavior. *See Daube v. Dep't of Health*, 897 So. 2d 493, 494 (Fla. 1st DCA 2005)(noting "[p]unishment for past behavior is properly the subject of an administrative complaint pursuant to section 120.60(5) wherein the licensee is afforded the opportunity to challenge the factual basis of the complaint through a section 120.57(1) hearing."). However, "[p]ast acts may be sufficient to allege a danger of future misconduct if the conduct alleged is sufficiently serious and is likely to be repeated." *Witmer*, 631 So. 2d at 343. *See also St. Michael's Academy, Inc. v. Dept. of Children & Families*,965 So. 2d 169, 172 (Fla. 3d DCA 2007) (noting "[i]mmediacy of harm to the public need not be alleged if there are allegations of sufficiently egregious past harm which are of a nature likely to be repeated.").

Potential monetary losses can be an immediate danger to the public health, safety, or welfare and justify an emergency order. *See Premier Travel*, 849 So. 2d at 1134 (noting [p]ersonal monetary losses can be the sort of danger addressed by section 120.60 Florida Statutes."). However, the Fourth District Court of Appeal noted in *Witmer*, 631 So. 2d at 342, that

> [w]hile loss of state revenue was found to be a sufficient reason for emergency action in *Little*, 557 So. 2d at 160 and *Calder Race Course v. Board of Business Regulation*, 319 So. 2d 67, 68 (Fla. 1st DCA 1975), those cases involved immediate, concrete, economic threats, rather than mere speculation. In *Calder* the complaint alleged a direct and immediate loss of state tax revenue. In *Little* the agency demonstrated that a budget revision was necessary to keep a state benefits program functioning through the end of the current fiscal year.

When an agency encounters a situation that amounts to a genuine emergency, it is absolutely essential that an emergency order be promptly issued. As more time passes between when the agency learned of the emergency situation and when an emergency order is issued, the harder it becomes to persuade an appellate court that the facts at hand amount to a genuine emergency. *See St. Michael's Academy*, 965 So. 2d at 173 (stating "[t]his Court is not persuaded by conclusory predictions of future harm based on factual allegations which do not demonstrate an immediate danger. The Court also notes that the time gap between a number of the incidents and the order undercuts the immediacy of the alleged danger."); *Bio-Med Plus*, 915 So. 2d at 673 (concluding "[t]he harm alleged in the Department's order is general and conclusory and relates to actions in excess of two years old" and that there are "no factual allegations to support a conclusion that the safety or welfare of the public is being threatened at present. Thus, neither immediate danger nor necessity for the [emergency suspension order] has been demonstrated.").

B. Is the Emergency Order Narrowly Tailored?

An emergency order must take "only that action necessary to protect the public interest . . ." §120.60(6)(b), Fla. Stat. (2012). In other words, the action taken via an emergency order must be narrowly tailored to address the alleged harm. *See Daube*, 897 So. 2d at 494 (holding that

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Practice Tips: There are distinct differences in practicing before the two divisions at DBPR. For example, Division Directors within Business Regulation are authorized to take final agency action, while regulatory boards are vested with authority over final agency action within Professions.

In addition, board meetings within Professions are subject to the public meetings requirement of Chapter 286, Florida Statutes, and may occur over the phone or in-person at locations throughout Florida. Licensee discipline is typically within the purview of DBPR counsel, while the boards are themselves represented and advised by select members of the Attorney General's Office. The exception to this is the Florida Building Commission whose advisory counsel is employed by DBPR's General Counsel's Office.

Recently too, DBPR assumed responsibility for non-board professions from the Attorney General's Office.

Number of Attorneys on Staff: DBPR employs approximately 50 attorneys (including the General Counsel and his deputies), most of whom are located in Tallahassee, and the remainder of whom are located in Orlando. The legal staff is supported by a number of administrative assistants and law clerks.

Recently, Professions coalesced its litigation endeavors into a unified Litigation Team, under the supervision of the Deputy Secretary of Professions, Colin M. Roopnarine. The team handles most of the litigation involving the Construction Industry Licensing Board, and all other Professions, with the exception of Real Estate. Professions also produced a Litigation Manual and conducts monthly Florida Bar approved CLE litigation training for all of its attorneys.

Typical Cases: The majority of DBPR's litigation involves the discipline of licensees, initiated through administrative complaints. The General Counsel's Office, however, is committed primarily to the discipline and prevention of consumer harm, and has devoted significant resources to that endeavor. There are also a few rule challenges and licensure denials in which DBPR is the respondent. Most cases are brought pursuant to Chapter 120, Florida Statutes, and Chapter 28, Florida Administrative Code.

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"[b]ecause the agency's emergency order was broader than that 'necessary to protect the public interest under the emergency procedure' as provided in section 120.60(6)(b), a more narrowly tailored emergency order is appropriate."). For example, "emergency orders revoking a license to conduct business must explain why less harsh remedies, such as probation, a fine, or a notice of noncompliance would have been insufficient to stop the harm alleged." *Preferred RV*, 869 So. 2d at 714 (quashing an emergency order suspending the petitioner's business license, because "[t]he emergency order in the instant case does not explain why other remedies available to the Department would not take care of the public concern."). In *Premier Travel Int'l, Inc.*, 849 So. 2d at 1137, the First District Court of Appeal's ultimate holding that three emergency orders were facially insufficient was based in part on the court's determination that "the Department issued orders suspending registration certifications and requiring Appellants to cease and desist, without demonstrating that such a drastic remedy was the only way to avoid future harm."

So, when is an emergency order sufficiently narrowly tailored to withstand judicial review? If a licensee is still able to conduct legitimate business, then an agency should be able to convincingly argue that its emergency order is narrowly tailored. *See Bertany Ass'n for Travel & Leisure, Inc.*, 877 So. 2d at 856 (rejecting an argument that the immediate final order at issue was not narrowly tailored by noting it "does not suspend or affect the status of appellants' licenses to sell legitimate and authorized insurance products, and appellants are still allowed to conduct legitimate business."). *Compare Henson, D.O., M.D. v. Dep't of Health*, 922 So. 2d 376, 377 (Fla. 1st DCA 2006)(holding the Department of Health's emergency order suspending the petitioner's license to practice as an osteopathic physician was not narrowly tailored, explaining as follows: "[t]he harms discussed in the emergency order deal with Dr. Henson's prescription of excessive amounts of narcotic drugs without proper examination, diagnostic testing, and follow-up drug screening. There are no findings in the order stating that he provides inadequate care to patients for whom he is not prescribing narcotic pain relievers. Narrowly tailoring an emergency order to prohibit Dr. Henson from prescribing narcotics and from treating the three patients named in the emergency order would protect the public from the harm described until the administrative proceeding has been completed.").

The narrowly-tailored requirement was also the focal point of *Cunningham v. AHCA*, 677 So. 2d 61 (Fla. 1st DCA 1996) in which the Agency for Health Care Administration issued an emergency order suspending Dr. Cunningham's license "based upon evidence that he had prescribed an excessive and unwarranted amount of narcotic medications to three patients." Because section 120.60(6)(b) requires the agency to take "only that action necessary to protect the public interest," the court held "Dr. Cunningham need be prevented only from prescribing narcotics and from treating the three patients named in the order, until his disciplinary proceeding has been completed." *Id.*

The court explained its reasoning by stating:

> [t]he agency's expert opined that Dr. Cunningham had unjustifiably overprescribed controlled substances to one patient. There was, however, no evidence that Dr. Cunningham was engaged in any kind of inappropriate or inadequate counseling of his patients. The agency's three concerns – that Dr. Cunningham is engaged in a criminal enterprise, possesses a dangerous lack of medical knowledge, or is unable to deny a patient who requests increasing amounts of drugs – can all be addressed by a more narrowly tailored emergency order. We therefore affirm the agency's emergency order insofar as it bars Dr. Cunningham from the practice of psychiatry in treating the three patients at issue and from prescribing narcotic medications. We reverse the order insofar as it exceeds these conditions.

Id. at 62.[2]

In my experience, agency officials sometimes neglect to consider whether some action short of a suspension will be sufficient to address the emergency, and that omission can be fatal if an emergency order is challenged. *See Machiela, O.D. v. Dep't of Health, Bd. of Optometry*, 995 So. 2d 1168, 1171 (Fla. 4th DCA 2008)(stating "we find merit to Dr. Machiela's secondary argument that there are less restrictive, but equally effective, means to protect the public during the pendency of the administrative proceeding."). When discussing with my colleagues and superiors whether to take emergency action against a licensee, I have often advocated doing something other than imposing an outright suspension. As evident from the cases cited above, the harm at issue can often be addressed by imposing some sort of restriction on a licensee that still enables the licensee to earn a living. *See Kubski v. Dep't of Health*, 840 So. 2d 376 (Fla. 1st DCA 2003)(approving "the Department's order insofar as it prevents Dr. Kubski from prescribing narcotics until his disciplinary proceeding has been completed. However, we quash the order to the extent it exceeds this condition and remand for the Department to enter a more narrowly tailored emergency order."). By taking action short of an outright licensure suspension, the agency is likely to appear reasonable to an appellate court and increases the odds of withstanding a challenge to its emergency order.

For the same reason, I have also advocated in the past that the emergency order give the licensee the ability to bring his or her own suspension to an end upon satisfaction of certain conditions.

In short, it is very important for an agency to assess whether an emergency order is sufficiently narrowly tailored to address the emergency. By appearing to act with an appropriate measure of restraint, an agency will look reasonable and substantially increase the odds of its emergency order withstanding judicial review.

C. Has the Licensee Been Afforded Due Process?

As discussed in more detail in the

section below on how private attorneys can challenge emergency orders before an appellate court, licensees are not allowed to contest the allegations set forth in an emergency order. Therefore, whenever an agency issues an emergency order, due process mandates that the agency promptly afford the licensee an opportunity for a formal administrative hearing in which the agency is put to its burden of proving the allegations and in which the licensee can present opposing evidence. *See* §120.60(6)(c), Fla. Stat. (2012)(providing that "[s]ummary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon."); *Field*, 902 So. 2d at 895 (stating "[s]ection 120.60(6)(c) requires, in cases of summary suspension, that the Department promptly institute a formal suspension or revocation proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (1999). In these formal proceedings, licensees may dispute the factual matters relied upon by the Department."); *Oakcrest Early Education Center, Inc. v. Dep't of Children & Families*, 936 So. 2d 1174, 1178 (Fla. 5th DCA 2006)(noting "[i]t is the Department's responsibility to promptly institute the formal suspension or revocation proceeding, which allows the licensee the opportunity to contest the allegations and factual matters relied upon by the Department to take away the license.").

Therefore, prompt issuance of an administrative complaint is the first step to assuring that a licensee receives due process. Ideally, an emergency order and an administrative complaint should be issued simultaneously. But, that level of efficiency is not required. *See* Fla. Admin. Code R. 28-106.501(3)(mandating that "[i]n the case of the emergency suspension, limitation, or restriction of a license, unless otherwise provided by

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New Feature Coming: DOAH Case Notes

By Garnett Chisenhall

I am happy to announce the imminent arrival of a new feature in the Administrative Law Section Newsletter called DOAH Case Notes ("DCN"). Beginning with the next edition of the Newsletter, DCN (much like Mary Smallwood's long-running "Appellate Case Notes") will appear in every edition and highlight final, recommended, and non-final orders containing discussions on legal concepts helpful to many (or all) administrative law practitioners. For example, perhaps an ALJ writes an order cogently explaining when an agency has the necessary authority to adopt a rule. Perhaps an ALJ sets forth a detailed analysis of the different attorney's fee statutes that administrative law practitioners are most likely to utilize. Or, perhaps an ALJ makes an interesting evidentiary ruling. Or, an agency's final order contains a good explanation for the agency's exercise of authority to reverse an ALJ's recommended findings of fact, conclusions of law, or penalty. In short, DCN's mission will be to highlight those orders that further the knowledge base of the administrative law bar. DCN will not be a vehicle for publicizing victories by any particular attorney, agency, or law firm.

By having a section devoted exclusively to recently-issued recommended and final orders, DOAH's recently updated website has made DCN feasible. In addition to myself, five other administrative law practitioners (Melinda Butler, Alyssa Cameron, Paul Rendleman, Kurt Schrader, and Jaakan Williams) will be reviewing the website on a rotating basis looking for informative orders. However, we invite all administrative law practitioners to alert us to any final, recommended, or non-final orders they believe fit the criteria described above. Such assistance will be especially critical for identifying recently issued non-final orders which do not yet have their own section on DOAH's website. Please send the ·DOAH case number and the name of the case to garnett.chisenhall@dbpr.state.fl.us. Also, please describe why you believe the order is significant.

My co-authors and I are very excited about this new feature, and we hope that it proves beneficial to all our colleagues.

Gar Chisenhall is the Chief Appellate Counsel for the Department of Business and Professional Regulation, Florida's largest regulatory agency. Prior to becoming the Department's appellate chief, Gar worked in the Administrative Law Section of the Attorney General's Office and served as the Chief Appellate Counsel at the Agency for Health Care Administration.

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law, within 20 days after emergency action taken pursuant to subsection (1) of this rule, the agency shall initiate administrative proceedings in compliance with Sections 120.569, 120.57 and 120.60, F.S., and Rule 28-106.2015, F.A.C.").

Promptly referring the case to the Division of Administrative Hearings ("DOAH") for a formal evidentiary hearing is the second step. "[A]lthough a hearing is not required prior to entry of an emergency order suspending a license to practice, a nonemergency suspension or revocation proceeding must be promptly instituted or pending in order for such emergency order to continue to be valid." *See Ampuero v. Dep't of Prof'l Regulation*, 410 So. 2d 213, 214 (Fla. 3d DCA 1982)(holding that "[w]hen the state undertook to temporarily restrict the petitioner's privilege to practice medicine it had an affirmative duty to grant a post-suspension hearing and one that would be concluded without appreciable delay.").[3]

While agency officials can debate over whether there is a genuine emergency and whether the contemplated emergency action is sufficiently narrowly tailored, a licensee is always entitled to a prompt evidentiary hearing at DOAH. *See Oakcrest*, 936 So. 2d at 1177 (stating that "[a]lthough the Legislature did not provide a test to determine promptness, the obvious purpose of the statute is to require that suspension or revocation proceedings be promptly instituted lest a constitutionally-protected right to procedural due process be unduly restricted or abrogated by a slow administrative process. Because a formal proceeding under section 120.60(6) was never instituted, it is not necessary that we resolve the issue of what 'prompt' means or formulate a test to make that determination – suffice it to say that what was never done is never prompt.").

D. Is the Conduct at Issue Likely to Continue?

In addition to the three elements discussed above, appellate courts also consider whether the harmful conduct at issue is likely to continue. *See Bertany Ass'n for Travel & Leisure*, 877 So. 2d at 855 (noting the immediate final order "contains allegations of past and recent conduct which would support an inference that appellants' unauthorized activity may continue absent a cease and desist order.").

However, and as mentioned above, it is important to remember that emergency orders are not a tool for punishing past behavior. Unless the harmful conduct in question is likely to continue, an agency must forego an emergency order and initiate a Chapter 120 proceeding. *See Daube*, 897 So. 2d at 495 (holding that "[p]unishment for past behavior is properly the subject of an administrative complaint pursuant to section 120.60(5) wherein the licensee is afforded the opportunity to challenge the factual basis of the complaint through a section 120.57(1) hearing.");[4] *Crudele v. Nelson*, 698 So. 2d 879, 880 (Fla. 1st DCA 1997) (noting the conduct at issue occurred well over two years ago and holding the emergency order "sets forth no factual findings of a continuing pattern of conduct that must be stopped in order to prevent further harm to the public. No allegations or findings in the order suggest anything in Crudele's history as a licensed agent that would support an inference of such continuing conduct."); *Bio-Med Plus*, 915 So. 2d at 673 (holding the emergency suspension order "does not contain a single, particularized allegation of a continuing public health or safety violation, or any allegations of harm or possible harm to any patient" and "[t]he harm alleged in the Department's order is general and conclusory and relates to actions in excess of two years old.").

Just as agency officials sometimes neglect to consider whether something short of a suspension will be sufficient to address the harmful conduct, they also sometimes neglect to consider whether the conduct at issue is likely to continue. If the conduct at issue was obviously a one-time event, then there is no reason for an agency to waste time and resources issuing a meaningless emergency order. Unfortunately, this is often not an easy call to make. If a licensee has been arrested and jailed, one might think an emergency order is unnecessary. But, an agency needs to assess the likelihood of the licensee posting bail and being able to subsequently continue his or her practice.

II. Challenging an Emergency Order

The discussion above is intended to assist agency attorneys with identifying emergency situations and drafting emergency orders that can withstand judicial review. However, that discussion is also important to private attorneys defending licensees who are the subjects of emergency orders. By knowing the elements of a facially sufficient emergency order, a private attorney can successfully challenge an order missing one or more of those elements. *See generally Robin Hood Group, Inc. v. Fla. Office of Ins. Regulation*, 885 So. 2d 393, 396 (Fla. 4th DCA 2004)(noting "[t]he standard of review of an [emergency order] is whether, on its face, the order 'sufficiently states particularized facts showing an immediate danger to the public welfare.'").

A. The Procedural Aspects of Challenging an Emergency Order

With that being said, how exactly does one challenge an emergency order? As alluded to throughout the discussion above, section 120.68(1), Florida Statutes (2012) and Rule 9.100(a) of the Florida Rules of Appellate Procedure confer jurisdiction on the district courts of appeal to review emergency orders. *See Bio-Med Plus*, 915 So. 2d at 670, n. 1. A party invokes that jurisdiction by filing with the appropriate appellate court a petition for review within 30 days of the emergency order's rendition. *See Krum v. Dep't of Health*, 764 So. 2d 929, 930 (Fla. 1st DCA 2000); Fla. R. App. P. 9.100(c)(3). If the petition is not filed with the appropriate appellate court within 30 days of the emergency order's rendition, then the appellate court's jurisdiction is not timely invoked, and the petition must be dismissed for lack of jurisdiction. *See Krum*, 764 So. 2d at 930. (holding "[t]he instant petition was filed 33 days after rendition of the order

of emergency suspension. Our jurisdiction was not timely invoked and accordingly this petition is dismissed for lack of jurisdiction.").[5]

At first blush, attorneys representing licensees may erroneously assume that the 30-day deadline to file a petition for review is not a substantial obstacle to overcome. However, a petition for review is not like a notice of appeal associated with a typical proceeding before an appellate court. Instead, petitions for review are similar to initial briefs and must set forth all of the reasons why the emergency order should be quashed. *See* Fla. R. App. P. 9.100(g) (mandating that "[t]he petition shall not exceed 50 pages in length and shall contain (1) the basis for invoking the jurisdiction of the court; (2) the facts on which the petitioner relies; (3) the nature of the relief sought; and (4) argument in support of the petition and appropriate citations of authority.").[6]

If an appellate court determines that a petition for review appears to be meritorious on its face, then the appellate court will issue an order requiring the agency in question to show cause "why relief should not be granted." *See* Fla. R. App. P. 9.190(h). The show cause order will establish a deadline for the agency to serve a response. *See* Fla. R. App. P. 9.190(j). "Within 20 days thereafter or such other time set by the court, the petitioner may serve a reply, which shall not exceed 15 pages in length . . ." *See* Fla. R. App. P. 9.190(k).

B. An Appellate Court's Scope of Review

In the course of assessing whether an emergency order states particularized facts showing an immediate danger to the public welfare, an appellate court's review is restricted to the facts alleged in the emergency order. *See Bio-Med Plus*, 915 So. 2d at 673, n. 3. *See also Pinacoteca Corp. v. Dep't of Bus. Regulation*, 580 So. 2d 881, 882 (Fla. 4th DCA 1991)(explaining that with "[n]o prior hearing having been held, the record for our review is limited to the four corners of the order itself."). In other words, the "record" associated with a petition for review is limited to the emergency order itself and any attachments thereto. *See Anderson v. Dep't of Health & Rehab. Serv.*, 482 So. 2d 491, 495 (Fla. 1st DCA 1986) (noting that because the emergency suspension order "was issued without a hearing and supporting evidentiary record, we are required by chapter 120 to review the facial sufficiency of the order without the benefit of a record establishing the facts underlying agency action and elucidating agency policies."); *Commercial Consultants Corp. v. Dep't of Bus. Regulation*, 363 So. 2d 1162, 1164 (Fla. 1st DCA 1978) (noting that because "the Division conducted no Section 120.57(1) or (2) proceedings before entering its order, we must review the order without benefit of a record establishing the facts underlying agency action and elucidating agency polices."); *Witmer*, 631 So. 2d at 343 (noting "the demonstration of immediate harm must be made within the four corners of the order," and holding "in this case neither the order nor the incorporated complaint contain this allegation.").

An appellate court must accept the allegations in an emergency order as true, and a licensee is not supposed to dispute the facts alleged therein. *See Anonymous Bank v. Dep't of Banking & Fin.*, 512 So. 2d 1112, 1113 (Fla. 3d DCA 1987)(noting "[t]he bank elected to seek review in this district court, which review, of necessity, must accept the factual basis underlying the cease and desist order for purposes of consideration of the emergency that warranted the issuance of the order.").

Because an appellate court must accept the facts alleged in an emergency order as being true, a licensee cannot use an appellate tribunal as a forum for disputing the facts. Instead, a licensee must raise factual disputes during the formal administrative hearing to which he or she is entitled. *See* Fla. Admin. Code R. 28-106.501(3) (mandating that "[i]n the case of the emergency suspension, limitation, or restriction of a license, unless otherwise provided by law, within 20 days

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after emergency action taken pursuant to subsection (1) of this rule, the agency shall initiate administrative proceedings in compliance with Sections 120.569, 120.57 and 120.60, F.S., and Rule 28-106.2015, F.A.C."); *Pinacoteca Corp.*, 580 So. 2d at 882 (denying a petition for review but noting the denial "does not, however, affect any subsequent administrative proceedings under section 120.57(1), Florida Statutes (1989), at which proceedings petitioner may introduce evidence to contradict the findings in the emergency order.").

For example, in *Broyles, M.D. v. Dep't of Health*, 776 So. 2d 340, 341 (Fla. 1st DCA 2001), the court noted that Dr. Broyles' arguments "primarily contest the factual matters set out in the Department's order" rather than advancing "any substantial argument that the order, on its face, fails to comply with section 120.60(6)." In affirming the emergency suspension order, the court noted the Department was required by law to "promptly institute a formal suspension or revocation proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (1999). It is in these formal proceedings that licensees, such as Dr. Broyles, may dispute the factual matters relied upon by the Department." *See Field*, 902 So. 2d at 895 (noting "[s]ection 120.60(6)(c) requires, in cases of summary suspension, that the Department promptly institute a formal suspension or revocation proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (1999). In these formal proceedings, licensees may dispute the factual matters relied upon by the Department.").

C. Suggestions on Effectively Challenging Emergency Orders

Despite the cases cited directly above, I have been involved in judicial review proceedings in which a licensee's attorney attempted to turn the review proceeding into an evidentiary hearing. In my opinion, an attorney should certainly identify for the appellate court which allegations are disputed by the licensee. But, an attorney should not allow factual disputes to distract him or her from the ultimate goal of demonstrating to the court that the emergency order is facially insufficient.

While I can certainly understand why one would want to do so, I cannot recommend that a licensee's attorney provide documentation to an appellate court that refutes the emergency order's allegations. As explained above, an appellate court's review is supposed to be confined to the emergency order itself and any attachments thereto. Accordingly, any documentation that is not part of the emergency order's four corners is supposed to be disregarded. *See Anderson v. Dep't of Health & Rehab. Serv.*, 482 So. 2d at 495 (holding it could not consider an affidavit included in an appendix to the Department's brief because its review was limited to the emergency order itself). I can recommend identifying for the appellate court which allegations are disputed and emphatically stating those allegations will be refuted during the impending evidentiary hearing at DOAH. However, if documentation refuting an emergency order's allegations is in hand, reference to that documentation (while inappropriate) could make a court more comfortable with quashing an emergency order based on facial insufficiency.

There appear to be no restrictions on licensees making their own allegations to demonstrate they are not a danger to the public. *See Bio-Med Plus*, 915 So. 2d at 673, n. 3 (noting "Bio-Med alleges, without contradiction from the Department, that no state or federal agency has alleged any unlawful acts by Bio-Med, its principals or employees, since the last act in January 2003 alleged in the indictment; that the United States Attorney's Office has not sought to prevent Bio-Med from presently engaging in its regular business, despite the existence of the indictment; and that Bio-Med continues to supply a large volume of plasma-derivative pharmaceuticals to numerous hospitals operated by the U.S. Department of Defense and the U.S. Bureau of Prisons. Our review, however, is limited solely to the facts alleged in the [emergency order]."); *Daube*, 897 So. 2d at 495 (noting "[n]or did DOH challenge petitioner's assertion that he had stopped using the product and destroyed his remaining supply before the emergency order issued. Under these circumstances, the complained of conduct is not likely to recur and issuance of the emergency order suspending petitioner's license was not necessary to prevent future harm.").

Finally, many readers may be wondering why all of this matters. A typical proceeding before an appellate court can take eight months or more, and a licensee may be irreparably harmed if he or she is unable to work for such an extended period of time. Fortunately for licensees, the rules of appellate procedure enable them to file motions for stay that will be considered on an expedited basis. *See* Fla. R. App. P. 9.190(e)(2)(B)(providing that "[w]hen an agency has ordered emergency suspension, restriction, or limitations of a license under section 120.60(6), Florida Statutes, or issued an immediate final order under section 120.569(2)(n), Florida Statutes, the affected party may file with the reviewing court a motion for stay on an expedited basis. The court may issue an order to show cause and, after considering the agency's response, if timely filed, grant a stay on appropriate terms.").[7]

A licensee's motion for stay and petition for review will probably be filed simultaneously or at about the same time. *See St. Michael's Academy*, 965 So. 2d at 170 (noting "St. Michael's petitioned this Court for review of the order, and filed an emergency motion for stay."). The appellate court will likely rule on the motion for stay first, with a final disposition on the petition to follow. *See Bio-Med Plus*, 915 So. 2d at 670, n. 1 (stating "[t]his court has previously granted Bio-Med's emergency motion for stay of the [emergency order] pending final disposition of this proceeding."); *Preferred RV*, 869 So. 2d at 714, n. 2 (stating "[t]he order of emergency suspension was stayed by an order of this court on August 15, 2002, pending final disposition of this proceeding."); *United Ins. Co. of America v. Dep't of Ins.*, 793 So. 2d 1182, 1183 (Fla. 1st DCA 2001)(noting that "[i]n response to Appellants' emergency motions for

immediate relief, this court issued a show-cause order to Department and subsequently granted the motions, thereby staying the emergency final orders during the pendency of this appeal.").

III. Conclusion

Writing a facially sufficient emergency order can be a significant challenge. However, that task is substantially easier if one is familiar with the elements of a facially sufficient emergency order and the standards by which emergency orders are reviewed. That knowledge can also assist agency attorneys with determining when a contemplated emergency order cannot withstand judicial scrutiny and should not be issued. If agencies use emergency orders in appropriate situations and agency attorneys draft them with the three elements of a facially sufficient emergency order in mind, then challenging emergency orders becomes a difficult task. But, attorneys attempting such challenges can use the information in this article to pinpoint an emergency order's deficiencies and obtain prompt relief for their clients via expedited motions for stay under Rule 9.190(e)(2)(B).

Endnotes:

[1] There can be situations in which an agency has no discretion about whether to issue an emergency order. *See* §456.074(1), Fla. Stat. (2012)(mandating that the Department of Health "shall issue an emergency order suspending the license" of various health care practitioners convicted of certain felonies or misdemeanors). In those cases, the First District Court of Appeal has held that findings pertaining to whether an immediate danger exists are unnecessary. *See Mendelsohn, M.D. v. Dep't of Health*, 68 So. 3d 965, 967 (Fla. 1st DCA 2011)(noting that "[s]ection 456.074(1), Florida Statutes, however, requires DOH [to] issue an emergency order suspending a medical license in certain circumstances without regard to specific proof that a petitioner is acting in a way that poses an immediate danger to public safety."); *Bethencourt-Miranda, M.D. v. Dep't of Health*, 910 So. 2d 927, 928 (Fla. 1st DCA 2005)(stating "Petitioner argues that the emergency suspension order fails to set forth the factual findings that are required by section 120.60(6)(c), Florida Statutes. We disagree. Because section 456.074(1) requires the department to issue an emergency suspension order in these particular circumstances, no other findings are necessary to support the agency action.").

[2] The *Cunningham* opinion referred to "evidence" and the opinion of an agency expert. Those references are a little puzzling because emergency orders are not preceded by evidentiary hearings, and an appellate court's review is limited to the four corners of the emergency order. *See Pinacoteca Corp. v. Dep't of Bus. Regulation*, 580 So. 2d 881, 882 (Fla. 4th DCA 1991)(explaining that with "[n]o prior hearing having been held, the record for our review is limited to the four corners of the order itself."). It is possible that the Agency for Health Care Administration attached affidavits from witnesses and its expert as exhibits to its emergency order. Unfortunately, the opinion does not go into that level of detail.

[3] *See also Aurora Enter., Inc. v. Dep't of Bus. Regulation*, 395 So. 2d 604, 606 (Fla. 3d DCA 1981)(stating "[t]he emergency order under review was entered on January 29, 1981. The present petition was heard on the merits before us on March 10, 1981. At that time we were informed by both sides that, although a formal revocation proceeding had been commenced within twenty days as specified by Fla.Admin. Code Rule 28-6.11(3), no hearing (let alone a disposition) has yet taken place or even been scheduled, although one had been immediately requested by the licensee. In no sense can it be said that a period of this length involving a fifty day minimum and an open-ended maximum between the emergency suspension and a hearing and determination of the merits involves either the prompt action the statute requires or the conclusion 'without appreciable delay' the constitution demands.")(quoting *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979)).

[4] In *Daube*, the First District Court of Appeal held the emergency order at issue was broader than necessary to protect the public interest. The emergency order alleged that instead of using BOTOX in wrinkle reduction procedures, the petitioner was using an unapproved product without his patients' consent. 897 So. 2d at 494. However, because the Department of Health did not challenge the petitioner's assertion that he had stopped using the unapproved product and destroyed his remaining supply before the emergency order issued, the court held that the complained of conduct was not likely to recur and that an emergency suspension of the petitioner's license was not necessary to prevent future harm. *Id.*

[5] Section 120.68(2)(a) may give a licensee some flexibility with regard to which court considers his or her petition for review. *See* §120.68(2)(a), Fla. Stat. (2012)(provides that "[j]udicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law."). Most state agencies are headquartered in Tallahassee, so the First District Court of Appeal is almost always an option. However, if a licensee resides within the jurisdiction of an appellate court other than the First DCA, then his or her attorney should consider whether the chances of prevailing are better in the other district.

[6] For other requirements pertaining to the format of a petition for review, please refer to Rules 9.100(g) and (*l*) of the Florida Rules of Appellate Procedure.

[7] Circuit courts have no jurisdiction to stay the effect of an emergency order. *See Dep't of Bus. Regulation v. Provende, Inc.*, 399 So. 2d 1038 (Fla. 3d DCA 1981); *Dep't of Bus. Regulation v. N.K., Inc.*, 399 So. 2d 416 (Fla. 3d DCA 1981).

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