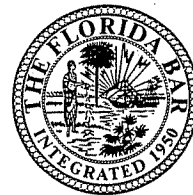


# ADMINISTRATIVE LAW SECTION NEWSLETTER



Vol. X, No. 4

THE FLORIDA BAR

June 1989

## Chairman's Message



I have enjoyed reminiscing about my year as Chairman so that I might include some highlights of these past months in the last Message to you. Clearly, one of the most exciting aspects of being Chairman was being placed on several hundred mailing lists for twelve months — or so it seemed! A new stack of Bar-related reports, minutes and the like loomed high on my desk each morning. The second most exciting event has just occurred: the name of our incoming Chairman, Drucilla Bell, has just been substituted for mine on those lists!

The rewards of this year lay in the bright and enthusiastic people with whom I have worked. Steve Pfeiffer single-handedly organized a superior administrative law conference. Bill Hyde has again coordinated some excellent CLE programs. Our *Newsletter* editor and part-time comic Gary Stephens, has provided articles to challenge us intellectually and to tickle our funny bone.

Previous newsletters have discussed projects and questions on which the Section has focused this year. One of the issues under study, that of a certification program in Administrative and Governmental Law, remains unresolved. Our March *Newsletter* contained my personal recommendation for administrative law certification and a request that you express your opinion on this issue by filling out and returning a form which was included in that publication. It is my hope that you will have voted by May 15. Your opinion, whether in support of or in opposition to a certification program, will help the Executive Council decide whether or not it will support such a plan.

Under our new bylaws, all Section members have an opportunity to vote at the Section's annual meeting on certain nominees for officers and Executive Council seats. The Executive Council will meet on Thursday, June 15 from 2:30 to 5:30 p.m at the Florida Bar Convention. The following nominees will be considered by the membership-at-large:

*Chair-elect:* William Hyde  
*Secretary:* Charles Gary Stephens  
*Treasurer:* Steven Pfeiffer

*Nominees for two Executive Council seats:*  
Margaret J. Bowles, Tampa  
Walter S. Crumbley, Tampa  
James W. Linn, Tallahassee  
Linda M. Rigot, Tallahassee

Thank you for the opportunity to serve you this year. I have received several letters regarding the proposed certification plan which will be passed on to the Executive Council and if appropriate to the Bar's Certification Committee. To those of you who have other problems or issues of concern, I can only say "write to Drucilla Bell"!

*Deborah J. Miller*

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# Creation of Legislative Committee and Election By-law Changes

In response to action taken by the Board of Governors at its January meeting, the Executive Council voted by conference call of March 7, 1989, to amend the Section bylaws to bring them into compliance. The Board of Governors, in order to promote more membership participation in the sections, voted to require that all executive council appointments be approved by a majority of the officers. The Administrative Law Executive Section bylaws had previously provided for appointment of the secretary and treasurer by the Chairman. They would now be nominated by the chairman and elected by the membership. Formerly, the chairman-elect was elected by vote of the Executive Council; now, the chairman-elect is elected by the membership at large at the convention. The only change in becoming a member of the ex-

ecutive council is that the appointments by the chairman must be approved by a majority of the officers.

A legislative committee has been created in the bylaws, which shall consist of three members, appointed by the chairman, the first three for staggered terms. The current Chairman is Betty Steffens. Terry Rigsby and Gary Stephens are currently committee members. Legislative positions recommended by the committee would require a 2/3 vote to become Section positions. During the session, emergency provision was made for the chairman to act on pending legislation, in consultation with the chairman of the Section and chairman-elect, if available. All executive council members would be notified of the action, as soon as practicable.

Drucilla Bell

*In Case You Didn't See . . .*

## Recent Cases in Administrative Law

### Playing by the Rules

*Board of Optometry, Florida Optometric Association, et al. v. Florida Society of Ophthalmology, Florida Medical Association and Department of Professional Regulation, et al.*, 11 FALR 14 (Fla. 1st DCA Dec. 19, 1988). Order on motions for rehearing and motion for clarification, 11 FALR 1228 (1st DCA Feb. 10, 1989). See also, *Florida Society of Ophthalmology v. State of Florida Board of Optometry*, 13 FLW 2284 (Fla. 1st DCA Oct. 1, 1988). In this chapter of the ongoing saga of conflict between ophthalmologists and optometrists, the court invalidated certain portions of Rule 21Q-10.001 as departing from recently-adopted statutory amendments. Despite a favorable ruling on the rule challenge, however, the court nonetheless denied standing to the principal petitioners. The opinion contains lengthy discussion on standing requirements, particularly as between Sec. 120.56 and 120.57 proceedings.

*Global Water Conditioning v. Dept. of Agriculture and Consumer Services, Div. of Forestry*, 14 FLW 865 (Fla. 1st DCA April 7, 1989). District court rejected the agency's argument that appellant's bid protest was not filed in accordance with Rule 13-4.012(2)(e) which re-

quired a copy of the challenged agency decision to accompany the petition.

*Joseph Thye Sexton v. Dept. of Highway Safety and Motor Vehicles, Div. of Driver Licenses*, No. 88-4022R (DOAH Jan. 20, 1988). Hearing officer found invalid a policy embodied in the Florida Examiner's manual to the effect that "a man's middle name can be changed to his wife's middle name on his driver's licenses only by court order, however, a female can add her husband's name on her driver's license merely by presenting a copy of her marriage certificate. See also, *Rice v. HRS*, 386 So.2d 844 (Fla. 1st DCA 1980).

*DeCarion and Roberts v. Martinez, et al., as Board of Trustees of the Internal Improvement Trust Fund*, 14 FLW 254 (Fla. 1st DCA Jan. 20, 1989). Trustees sought to require a lease for a proposed activity which "technically" qualified for mere "consent of use." Court concluded that an agency must honor its own rules until amended or repealed. See *Board of Trustees, infra*.

*Board of Trustees v. Mark Barnett, f/k/a Mark Bartecki, et al.*, 13 FLW 2590 (Fla. 3rd DCA Nov. 22, 1988). Although previous litiga-

tion had produced a DER permit for the dock (*Bartecki v. Beardsley*, 471 So.2d 1325 (Fla. 1st DCA 1985)) and Monroe County approval for the development (*Bartecki v. Dept. of Community Affairs*, 498 So.2d 972 (Fla. 1st DCA 1986)), the Department of Natural Resources still held the view that no consent of use for the sovereign bottoms underlying that dock had been properly granted and therefore brought suit in Monroe County for trespass, seeking damages and a mandatory and permanent injunction. Finding no legal authority for the DNR proposition that its consent of use, initially granted in the *Bartecki* proceeding, had been, or could be, properly revoked, the court's order granting summary judgment to the Defendants was affirmed by the 3rd DCA.

*St. Joe Paper Co., et al. v. Florida Department of Natural Resources*, No. 87-1929 (Fla. 5th DCA Dec. 21, 1988). *St. Joe Paper Co., et al.* sought an order in the Circuit Court of Gulf County challenging the authority of the Florida Department of Natural Resources to establish a coastal construction control line (CCCL) pursuant to Section 161.953, Florida Statutes. The 5th DCA affirmed the circuit court's order dismissing the complaint for failure to exhaust administrative remedies. See also, *Department of Professional Regulation, Florida State Board of Medicine v. Roger Marrero, M.D.*, 10 FALR 6923 (Fla. 1st DCA Nov. 18, 1988).

*DPR, Board of Medicine v. Marrero*, — So.2d —, 13 FLW 2536 (Fla. 1st DCA), pet. rev. granted, Fla. Sup. Ct. Case No 73,392, Oral argument, June 6, 1989. Here the 1st DCA reverses the circuit court order enjoining the State Board of Medicine from proceeding further on Dr. Marrero's licensure application, notwithstanding his withdrawal of that application. DCA found that Dr. Marrero failed to exhaust available administrative remedies.

*Fla. League of Cities and City of St. Petersburg v. Dept. of Insurance and Fraternal Order of Police*, 14 FLW 554 (Fla. 1st DCA Feb. 28, 1989) throwing out substantial portions of the rules proposed by the Department as invalid exercises of delegated legislative authority. In doing so, the court rejected the hearing officer's order upholding the disputed rules.

*Dept. of Highway Safety and Motor Vehicles, Div. of Drivers Licenses v. Samuel Allen*, 14 FLW 580 (Fla. 5th DCA Mar. 2, 1989). Samuel Allen found a circuit judge who would overrule a determination by the Div. of Drivers Licenses. The 5th DCA concluded, however, that it was not the prerogative of a circuit judge to reweigh evidence and make findings when he undertakes a review of a decision of an administrative forum. Because he exceeded the limits of the certiorari review, the circuit court decision was quashed.

## The Administrative Law Section — Prospects and Possibilities

Florida Bar activities of the past two years have brought about a quickening of the sense of purpose which each section represents within the community of lawyers. Public scrutiny of the legal profession has prompted self-scrutiny as well. The Administrative Law Section has not been free from this same process, although many questions perhaps remain unanswered.

I am assuming that this newsletter will reach at least some out there who were once active in the Section's deliberations, still take some pride in knowing your way around the Florida Administrative Code and ultimately make your living through your expertise in some substantive area of law. For you, the time for reviving your contribution to the Section is at hand. If there is a pattern of expansion and constriction

to fields of law, then administrative law is on the verge of expansion. With the novelty of Chapter 120 having worn off a bit, not unlike the numbness of the lower lip that survives the dentist's chair by a few hours, the practitioners of governmental decisionmaking must redefine their discipline even as the tools of success change shape in their hands.

The idea that one can know "state" administrative law and never deal with a federal agency is increasingly parochial (and incorrect). Similarly, rules and responsibilities delegated from state government to its local and regional counterparts require more varied arsenal of techniques for solving intergovernmental problems.

The burgeoning field of alternative dispute resolution, complete already with its ADR ac-

*continued . . .*

ronym and a BNA reporter all its own, is virtually a frontal assault on the pace and quality of dispute resolution in governmental settings. As problems get more complex, many participants cry for solutions which are quicker, cheaper and simpler. And unless the long route produces results which are qualitatively superior, a proposition now seriously doubted in most quarters, who's to say that sooner and cheaper isn't also easier and better. (See Commission Recommends Lottery, Administrative Law Section Newsletter, Dec. 1987.)

Whether these ruminations will provide the focus for activities within the Administrative Law Section remains to be seen. In large measure, it depends on you. Since its inception nearly ten years ago, the Administrative Law Conference has been widely regarded as a useful

forum and think-tank along these lines. That process, however, if it is to continue, begs for broader input and greater geographical dispersion. More Nicaraguans in Dade County are affected by the actions of state government than are all the farmers in all 67 counties. Nor is the hearing process and its role in the broader stream of dispute resolution confined to Tallahassee nor to the wooded precincts bordering Apalachee Parkway.

The Administrative Law Newsletter invites your letters and comments on matters of focus, direction and purpose for the Administrative Law Section. Please direct same to the Editor at the address contained herein. You may also wish to attend the annual meeting of the section detailed elsewhere in these pages.

## I'm Thinking of an Article . . .

Having been preliminarily designated as the newsletter editor air-apparent, I am already looking ahead to an exciting series of articles on timely administrative law topics. I am hoping right now, even as this paper lies warm in your palm, that you will seize upon the opportunity to develop an engaging theme for your colleagues in the Administrative Law Section. Some possible topics include:

"When Do Facts Blend into Policy?"

"Agency Staff as Expert Witnesses: What Would You Say if *Your* Job Were on the Line?"

"Making Administrative Litigation Work: Viable Alternatives to Alternative Dispute Resolution"

"What if Due Process Applied to Local Government?"

"Some Differences Between the Federal APA and the Florida APA"

"Hearing Officer Experimentation with Local Government Disputes"

"The Collegial Agency Head: Can a Multi-member Board Perform Judicial Functions?"

"Mangroves, Hospitals and Power Plants: A Cross-Disciplinary Look at Guardians of the Public Interest"

"The Eyes Have It: A Procedural Look at Disputes Between Optometrists and Ophthalmologists"

These topics merely scratch the surface of subjects about which you could begin to carve out a field of interest or expertise. Ideally, your contribution to the newsletter would have a specific procedural or multi-agency focus, reflect upon a specific judicial or agency ruling and stimulate commentary from other administrative law practitioners. It should also contain 500-800 words. In exchange, we will feature prominently an attractive passport-type photo of you (or a stand-in of your choice) in the newsletter along with an honorific, and probably optimistic, appraisal of your talents. All for statewide consumption. Think of it.

These contributions — I can hear those pencils starting to move even now — should be sent to:

Charles G. Stephens, Editor  
Administrative Law Newsletter  
6200 Courtney Campbell Cswy., Suite 460  
Tampa, Florida 33607

This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

Deborah J. Miller ..... Chairman  
*Miami*

Drucilla E. Bell ..... Chairman-elect  
*Tallahassee*

Patrick F. Maroney ..... Secretary  
*Tallahassee*

William L. Hyde ..... Treasurer  
*Tallahassee*

C. Gary Stephens ..... Editor  
*Tampa*

Fay Yenyo ..... Section Coordinator  
*Tallahassee*

Statements or expressions of opinion or comments appearing herein are those of the editors and contributors and not of The Florida Bar or the Section.

The Florida Bar and  
The Administrative Law Section present

# 1989 Florida Bar Annual Meeting Schedule

Marriott's Orlando World Center Resort and Convention Center  
8701 World Center Drive, Orlando, Florida  
June 14-17, 1989

## Recent Developments in Practice Before Selected Administrative Agencies:

- Significant Appellate Court Decisions and Administrative Orders
- Recently Adopted Rules
- Proposed Rules
- Enforcement Initiatives
- Emerging Agency Policies

(June 15, 1989)

Program Chairman: William L. Hyde

- 8:30 a.m.- 9:00 a.m. Department of Health & Rehabilitative Services  
*Stephen A. Ecenia, Tallahassee*
- 9:00 a.m.- 9:30 a.m. Department of Professional Regulation  
*Deborah J. Miller, Miami*
- 9:30 a.m.-10:00 a.m. Department of Environmental Regulation  
*Ralph DeMeo, Tallahassee*
- 10:00 a.m.-10:30 a.m. Department of Community Affairs  
*C. Laurence Keesey, Tallahassee*
- 10:30 a.m.-11:00 a.m. Bid Disputes  
*Martha Hall, Tallahassee*
- 11:00 a.m.-11:30 a.m. Case Law and Statutory Law Update  
*C. Gary Stephens, Tampa*

### Designation Credit

(Maximum 3.5 hours)

Administrative & Government Law	3.5 hours	General Practice	3.5 hours
Appellate Practice	3.5 hours	Trial Practice-General	3.5 hours
Corporation & Business Law	3.5 hours		

### CLER Credit

(Maximum 3.5 hours)

General	3.5 hours	Ethics	0 hours
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**Certification Credit**

(Maximum 2.5 hours)

Civil Trial . . . . . 2.5 hours

**Note:** The Annual Meeting of the Section will be held in conjunction with the Executive Council meeting of the Administrative Law Section. This Meeting will take place on Thursday, June 15, 1989 from 2:30 p.m. to 5:30 p.m. The Section will also have a luncheon on the same day from 12:30 p.m. to 2:00 p.m. Registration forms for those attending the Bar Convention (which includes this seminar and the luncheon) may be found in the Bar NEWS starting with the April 15, 1989 issue.

**All Member Reception**

At 5:30 p.m. on Thursday evening, you will have the opportunity to renew old acquaintances and make some new ones. Since the reception will take place in Salon "G" you will have the chance to visit our Exhibitors.

**Registration Information**

- A special fee is available this year for those of you registering by May 19. For \$95, you can attend any of the seminars offered on Thursday, Friday or Saturday at the Annual Meeting, plus two free drink tickets for the Thursday All-Member Reception and two tickets to the YLD Dance. Registrations received at the Bar between May 20 and June 1, 1989 will cost \$125. Registrations received after than date or at the site in Orlando will cost \$150. Register early to avoid the increased fee!
- Tickets for the Administrative Law and Local Government Law Sections Luncheon are \$18.00 if you register for the Convention. If you want to attend just the luncheon, the cost is \$25 per ticket.
- Please return your registration form along with the appropriate fees to The Florida Bar by June 17, 1989. (Forms can be found in the April 15, 1989 through June 1, 1989 issues of the Florida Bar News.)

**Hotel Reservations**

May 14, 1989 is the cut-off date for hotel reservations. Reservations made after this date will be on a space-available basis only. We suggest you make your reservation early, as it will be easy to cancel your reservation in the event you can't attend the Annual Meeting. It will be much harder to secure a room close to the dates of the meeting.

**Faculty/Steering Committee**

- Deborah J. Miller, Chairman-Administrative Law Section
- William L. Hyde, CLE and Program Chairman
- Stephen A. Ecenia, Tallahassee
- Ralph DeMeo, Tallahassee
- C. Laurence Keesey, Tallahassee
- Martha Hall, Tallahassee
- C. Gary Stephens, Tampa

Course No. C6717

## Approved 1989-90 Administrative Law Section Budget

<b>Line Items</b>	<b>Budget</b>	<b>Officer/ Council Office Expenses</b>	<b>100</b>
<b>Revenues</b>	<b>1989-90</b>	Newsletter	1,200
DUES	14,900	Membership Drive	200
Less 1/2 Dues	7,450	Supplies	50
Net Dues	7,450	Photocopying	150
CLE SEMINARS		Officer Travel Expenses	250
Administrative Overview	940	Meeting Travel Expenses	2,500
Admin. Practice DOAH	650	Other Travel Expenses	100
Local Gov't/ Admin, Law	375	CLE Speaker Expenses	100
Total Seminar Income	1,965	Committee Expense	100
OTHER REVENUE		Board or Council Meetings	250
Interest	1,800	Bar Annual Convention	3,000
Miscellaneous	425	Midyear Meeting	250
Total Other Revenue	2,225	Award	250
TOTAL REVENUE	\$11,640	Annual Administrative Law Conf.	7,500
<b>Expenses</b>		<b>TOTAL EXPENSES</b>	<b>\$16,650</b>
Postage	500	Operating Reserve	1,665
Printing	150	Net Operations	(6,675)
		Beginning Fund Balance	28,234
		Ending Fund Balance	21,559

**THE FLORIDA BAR**  
**650 APALACHEE PARKWAY**  
**TALLAHASSEE, FL 32399-2300**

