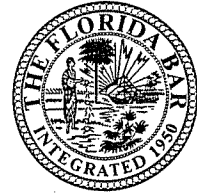


ADMINISTRATIVE LAW SECTION NEWSLETTER



Vol. XI, No. 1

M. Catherine Lannon, C. Gary Stephens, Co-Editors

August 1989

Chairman's Letter



In my first letter to you, I want to outline some of my goals and plans for this year.

Early in my term, I want to resolve the issue of certification in the area of Administrative Law. To that end, I have appointed a Certification Committee of Deborah Miller, Dean Bunch, and George Waas to study and respond to Section members' concerns in this area. As the standards have not been established, I hope that the perceived problems regarding subspecialty areas and minimum required number of formal hearings can be dealt with effectively. Any and all questions and concerns regarding certification and any requests for information on the subject should be directed to the committee chairman, Deborah Miller.

One of my goals as Chairman and as a long-standing government attorney, is to increase the participation of government attorneys in the Section and in the Executive Council. I will be working with the Government Bar to explore the kinds of benefits and services from the Section that would attract government lawyers.

We will continue to assist the legislature in analyzing Chapter 120 to improve its effectiveness, with some of our Executive Council serving on that study committee.

Our Administrative Law Conference will be held on St. Patrick's Day and will feature Rulemaking, both Federal and State. Professor Stephen Maher of the University of Miami College of Law is in charge of this venture and I encourage you not only to attend but to serve as a small group leader if requested.

You have probably already received an application for an administrative law directory entry

with your area(s) of specialization listed. This project, initiated by past Chairman Deborah Miller, should help us find the appropriate specialists to assist our clients.

Over the past year, we have moved to expand administrative law to include and recognize federal administrative law. As an extension of this broadening recognition, I hope to bring an international perspective to the area, as I pursue some joint venture possibilities with Russian cooperatives. This will include Soviet administrative law, as well as federal in the international sphere. I have also heard that "glasnost" has given new independence to the Russian Bar. I will report back as I learn more.

This should be an exciting year and I look forward to your participation.

—Drucilla Bell

Editor joins law firm, moves downtown

Gary Stephens, editor of the Administrative Law Section newsletter and recently elected Section secretary, has become a shareholder in the Tampa law firm of Smith & Williams which will practice under the name of Smith, Williams

continued . . .

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EDITOR JOINS FIRM

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& Stephens, P.A. David Smith and Greg Williams, actively engaged in real estate transactions and commercial litigation, respectively, are happy to acquire Stephens' strong background in environmental and administrative

law matters. "It seems like every time you turn around, you are bumping into something environmental," Smith said. "It is difficult to handle a major property transaction anymore without your own environmental expertise."

The firm, presently located in Ashley Tower, 100 S. Ashley Drive, Suite 1170, Tampa, 33602 (813/223-1068) anticipates a move toward Old Hyde Park Village by October.

You want to be certified? ... I'll certify you

There has flickered within the inner sanctum of the Administrative Law Section this past year a genteel debate about the value to individual members and to the Section as a whole which might be derived from the certification process made available by The Florida Bar. I am not quite sure what it means to be certified in administrative law. During pre-APA days, when rules had to be written down but not necessarily filed anywhere, they were routinely put away in shoeboxes until they could be brought out to legitimize some just result. Presumably knowing where that shoebox was, or knowing someone who knew, would have been essential for certification as an administrative lawyer.

Today that shoebox has to be big enough to hold all twenty (red) volumes of the Florida Administrative Code. But even that will not tell you how DOT will handle a bid dispute, who

can build a detox center in Duval County or what Tom's people will do when they get their hands on your comprehensive plan. *These* are the imponderables which mark the cutting edge of administrative law.

If you are an administrative law hotshot (read "certified"), it just seems like you should know the answer to these questions at a level of odds better than drawing to an inside straight. An "inside straight" is an old administrative law term derived from gaming practices and bespeaks the lower probability of drawing a card of exact number and suit rather than simply expanding a series on either end (see Appendix A).

Others hold the more patrician view that administrative law isn't *law* per se but merely a procedural framework in which substantive law may be articulated. (Again, cites omitted.) Following this view, one wouldn't get caught dead in an administrative hearing on a landfill without knowing a good deal about RCRA and liners and so forth nor would one jump into a C.O.N. proceeding just because your neighborhood clinic has a right to be heard. For that matter, as noted elsewhere in this newsletter, merely shifting into a federal administrative forum can render your Rolodex and your tattered copy of *McDonald* obsolete. I guess you could call this that happy combination between how to do something and what to do in the first place. Surely that question would come up somewhere in the certification process.

In conclusion, I don't know that we really need to get all tangled up with The Florida Bar and its people and committees. We can certify you right here by just asking a few questions and seeing if you really know how things work. I'm sure all of you could be certified in something, so we'll just get together one day soon and find out what that is. By the way, don't worry about my ability to do this. I've already been certified.

—CGS

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

Drucilla E. Bell Chairman
Tallahassee

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Tallahassee

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Tampa

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What is a hearing?

Since the mid-sixties, there has been a virtual explosion in citizens' rights to administrative and judicial review. (Citations omitted.) In fact, nothing has enhanced the security of the legal profession more than the mushrooming conviction that every citizen, howsoever humble, when faced with the slightest contrariness by any person, agency or office acting under color of governmental authority, has the right to a hearing. The centrality of that concept causes us to explore in more detail what it means and to anticipate its application to other arenas of life.

A hearing obviously means more than the opportunity to be heard. For the most part, those parties whose interests have already been adversely affected by governmental action have already been "heard" once; it's just that the government said "no" the first time. The primary purpose of a hearing, therefore, if indeed the government said no the first time, is to find some good soul out there who, after getting better acquainted with you and understanding truly where you're coming from, will say "yes." No one is content with a second no even if it is given in light of more facts and a careful scrutiny of the law. Unless somehow two no's could make a yes, which, so far, they do not.

Somehow what we want is a little time telling our story to someone who doesn't work for the first guy who said no. Here we have one of the most basic principles of a hearing: telling your story to somebody who doesn't work for the other guy. This is the backbone of our doctrine of separation of powers.

The second basic feature of a hearing is that you cannot decide who's telling the truth until

you hear them. People who are hearing officers suffer over this because they are usually endowed with greater powers of belief and disbelief than most of us. That sounds contradictory, but it really isn't. Hearing officers do something that only translators do: they listen to it all. Most of us just tune in to what we like to hear and leave the rest. The hard part is when you believe both sides to some degree but neither side exclusively. Sometimes the old coin trick is used, but still not until after the hearing.

Finally, the last rule about real hearings is that the winner can't be determined until the ninth inning, so to speak. Knowing that the decision is not pre-ordained as the Presbyterians would say, has the added benefit of making people work harder and be nicer to hearing officers because they always hold out the possibility that they will rule their way. You don't have to be too smart to catch on to this one.

So there you have it in a nutshell. Getting to talk to somebody who doesn't work for the first guy, knowing up front what the rules are and, finally, not knowing the outcome till it's over. These are the basic tenets of the administrative hearing which can serve now as a yardstick against which to measure who gets the detox center, whether a certain kid ought to have his bottom paddled, whether Roscoe was right to walk off the job and whether Laverne should be allowed to do your nails while you're reading the Wall Street Journal.

Keep these concepts in mind because we will be following up on them in later issues and will blend these concepts into a broader theory of administrative justice, perhaps even of truth. Stay tuned.

—CGS

On the Federal Side ...

by Walter S. Crumbley

Although many administrative law practitioners (especially those who practice in a narrow field) express the concern that there is "not enough work to go around," all indications at the federal level point toward no substantial decrease in the foreseeable caseload.

At present, more than 1,000 administrative law judges serve in approximately 30 different agencies at the federal level. These are hearing officers appointed pursuant to the federal Administrative Procedure Act. Interest in serving

in one of these positions has certainly not waned over the years. When the Office of Personnel Management opened the register for applicants in 1988, they received over 900 new applications for possible vacancies.

The caseload for ALJs has continued to grow over the years as Congress has amended existing laws or added new ones requiring APA-type hearings and hearing officers. In the past year alone, Congress added legislation which would require APA type hearings on individual claims

continued ...

FEDERAL SIDE

from preceding page

for benefits, including a housing discrimination statute which the Department of Housing and Urban Development expects to generate cases in the thousands.

Many agencies develop relatively few cases (less than one hundred per year); while others may develop cases by the thousands. Not many of us ever expect to see cases from such agencies as Alcohol, Tobacco and Firearms, the Maritime Commission, the Securities and Exchange Commission, Food and Drug Administration or Federal Trade Commission. We should not close our eyes and talents to the thousands of cases developed in Housing and Urban Development, Department of the Interior, the National Labor Relations Board, the Occupational Safety and Health Administration and Social Security Administration. Lawyers who

do similar work at the state level can easily expand their practice to include the same or similar cases at the federal level.

Despite the concern of some that alternative dispute resolution and/or mediation may reduce the practice, there will be plenty of administrative law work for a long time, if you keep your eyes open to new opportunities.

Walter S. Crumbley, recently elected to the Executive Council of the Administrative Law Section, has served as Administrative Law Judge for the Social Security Administration since 1975. A Tampa resident, Crumbley is also an Adjunct Professor for Golden State University and the Stetson College of Law. He is active in the American Bar Association, the Federal Administrative Law Judges Conferences and the American Society for Public Administration.

Minutes of the Administrative Law Section Executive Council Meeting

June 15, 1989

The Executive Council of the Administrative Law Section was called to order at 2:30 p.m. on June 15, 1989, at the Annual Florida Bar Convention in Orlando, Florida, at the Marriott World Center Complex.

As a preliminary matter, due to the resignation of Secretary Pat Maroney, William L. Hyde was elected as Interim Secretary and Charles Gary Stephens was elected as Interim Treasurer. Subsequent to these elections, the minutes from the last meeting were approved without reading.

I. Treasurer's Report: \$2,000 was approved as the Section's contribution toward the Section's Annual Convention Seminar entitled: "Recent Developments in Practice Before Selected Administrative Agencies." Furthermore, a sum of up to \$2,500 was also approved for the preparation and printing of an Administrative Law Directory.

II. Chairman's Report: Deborah Miller reported on the extent results of the proposed administrative law certification ballot. While the early results are decidedly in favor of certification, an ad hoc committee consisting of George Waas, Dean Bunch, and Deborah Miller was appointed to revisit and study the

issue of certification.

III. Executive Council Vacancies: The nominations of Mark Dresnick, Diane Tremor, Betty Steffens, M. Catherine Lannon, Linda Rigot, and Walter Crumbley were approved by the membership.

IV. Legislative Report: Gary Stephens advised that Senate Bill 1344, which would have established a temporary advisory committee to study the feasibility and desirability of agency order index/reporter, did not pass. However, Senate Bill 132, which essentially places a two-year restriction on an agency employee's lobbying his former agency, was adopted. Existing agency employees, however, have been grandfathered and are therefore not subject to the two-year restriction.

V. Publications: Gary Stephens reported on the Administrative Law Section's newsletter. Gary requested that all officers and committee chairmen submit to him or to Co-Chairman Cathy Lannon updates no later than July 10, 1989.

VI. Administrative Law Conference: The Administrative Law Conference will be held in Tallahassee at the Center for Professional Development on March 16-17, 1990. According

to Conference Chairman Steve Maher, Arthur Bonfield will be a repeat keynote speaker and discussions are currently underway to enlist a second keynote speaker. A \$50.00 fee is being proposed for attending this conference. Steve will update the Council as to further preparations at the next Council meeting.

VII. Public Access to Administrative Proceedings: This discussion was deferred to the next meeting of the Executive Council.

VIII. Television Show: Steve Maher reported on his efforts with the bureaucracy of The Florida Bar to obtain funding and bar staff assistance for preparing two television pilot programs on administrative law matters of general interest to the public. Steve will be continuing his efforts and the Council voted to approve an appropriation for up to \$5,000 per Steve's April 26, 1989 letter for funding such an effort. The budget of the Section was likewise amended to reflect this appropriation.

IX. Federal Court's Access Study: An ad hoc committee consisting of Cathy Lannon and Walter Crumbley was appointed to consider this issue and report back to the Council at its next regularly scheduled meeting.

X. Membership Drive: In an effort to boost membership in the Section each member of the Executive Council and all officers were re-

quested to enlist at least five persons in the Section.

XI. The nominations of Dru Bell as Chairman, Bill Hyde as Chairman-Elect, Gary Stephens as Secretary, and Steve Pfeiffer as Treasurer were approved without objection.

XII. Incoming Chairman's Report: Dru Bell reported that the Section would be holding a joint seminar with the Local Government Section on November 10, 1989. Furthermore, the next meeting with the Executive Council will be either on September 6, 1989 or September 7, 1989 from 2:00 p.m. to 5:00 p.m.

XIII. Public Access to Administrative Proceedings: Bill Hyde reported on the request of the Commission on Sections to develop forms for the use of lay persons in a legal proceedings. Also discussed was the Election of Rights form utilized by the Department of Professional Regulation in its disciplinary proceedings. An ad hoc committee consisting of Bill Hyde, Linda Rigot, and Mark Dresnick was appointed to further study these issues and make recommendations to the Council.

XIV. Attendees: Deborah Miller, Bill Hyde, Gary Stephens, Steve Pfeiffer, Vivian Garfein, Steve Maher, Bill Dorsey, Mark Dresnick, Harry Michaels and Dick Belz.

Section Funds Television Pilot: Next Step Bar Production?

The Executive Council of the Administrative Law Section, at its June meeting and through a subsequent conference call, approved funding for the production of pilot television programming designed to inform the public about the work of Florida agencies. The pilot effort was also approved by the Public Relations Committee in June, and production began in July. The first program in the proposed thirteen show series, titled "The Florida Bar Presents," is now complete. It features the Consumer Protection Division of the Attorney General's office, and includes interviews with Attorney General Butterworth and members of his staff. A second program, on the Department of Professional Regulation is in progress.

The Public Relations Committee will discuss the project at its September meeting. At that time, they will be asked to recommend that the Bar start regular inhouse production of broad-

cast quality television programming, beginning with the series on Florida government begun with the support of the Administrative Law Section. The proposal will suggest that 11 more shows be produced using the services of a professional producer and with the cooperation of members of the section, who are familiar with the various agencies of Florida government.

The project grew out of a proposal made by Executive Council member Steve Maher almost a year ago. The strong support of the section gave rise to this summer's efforts. Deborah Miller, Nikki Ann Clark, Wallace Saunders and Peg Griffin worked on the productions along with the Producers Resource Center, a professional production company based in Jacksonville. The video was shot in Tallahassee and edited in Jacksonville. Steve Maher directed and produced the shows and is making the presentation to the Public Relations Committee in September.

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904/878-7054

Did you know . . . The Florida Bar Fax number is (904) 222-3729

Committee Chairmen

Listed below are the names and addresses of the chairpersons of the Administrative Law Section's committees. If you are a member of the

section and wish to serve on any of these committees, please contact the appropriate chairperson.

Budget Committee

G. Steven Pfeiffer, Chairman
P.O. Box 5948
Tallahassee, FL 32314
904/222-6277

Certification Committee

Deborah J. Miller, Chairman
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Two South Biscayne Blvd.
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305/381-8050

Continuing Legal Education Committee

Vivian F. Garfein, Chairman
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904/488-9730

Federal Courts Study Committee

Walter S. Crumbley, Chairman
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Division of Administrative Hearings
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904/488-9675

Legislation Committee

Betty J. Steffens, Chairman
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Long Range Planning Committee

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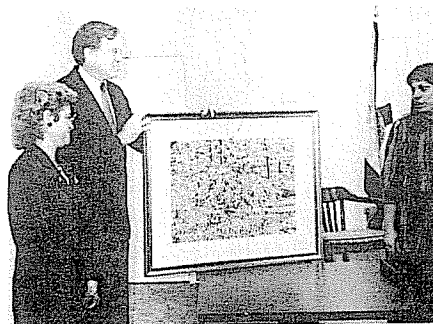
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Public Access to Administrative Proceedings Committee

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Sharyn Smith accepts plaque for Bob Benton, presented by Deborah J. Miller, immediate past chairman. The plaque was given to Benton in appreciation for his dedicated service and scholarly contribution to the section and to the *Bar Journal*. Benton served as the section's *Bar Journal* column 1987-1989.



Drucilla Bell, chairman, and R. Terry Rigsby, Executive Council Member, present a water color of Maclay State Gardens to the Division of Administrative Hearings, along with a plaque, in appreciation for the dedicated and skillful service of the Department in adjudicating disputes between agencies and citizens of the State of Florida.

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**Administrative Law Section
 Final Statement of Operations
 For Year Ended June 30, 1989**

<u>REVENUES:</u>	<u>Actual</u>	<u>Budgeted</u>			
Dues	\$16,420	\$14,200	Newsletter	959	1,000
Dues Retained by Bar	<u>8,210</u>	<u>7,100</u>	Membership	0	200
Net Dues	<u>\$ 8,210</u>	<u>\$ 7,100</u>	Supplies	2	50
Other Revenues:			Photocopying	108	150
Videotape Sales	\$ 266	\$ 150	Officers Travel	360	250
Audiotape Sales	347	150	Meeting Travel	2,086	2,500
CLE Courses	3,428	2,770	Out-of-State Travel	0	100
Interest	2,634	1,300	CLE Speakers	0	100
Administrative Conference	6,720	0	Committees	72	100
Miscellaneous	<u>0</u>	<u>2,650</u>	Council Meetings	133	250
TOTAL REVENUES	<u>\$21,605</u>	<u>\$14,120</u>	Bar Annual Meeting	2,584	3,000
			Midyear Meeting	56	250
			Administrative Conference	14,732	7,445
			Awards	207	250
			Operating Reserve	0	1,120
			Fax Processing	30	5
			Other	<u>1,334</u>	<u>2,000</u>
			TOTAL EXPENSES	<u>\$23,964</u>	<u>\$19,520</u>
<u>EXPENSES</u>			Beginning Fund Balance	\$29,523	\$26,041
Postage	\$ 735	\$ 500	Plus Revenues	+21,605	+14,120
Printing	254	150	Less Expenses	<u>-23,964</u>	<u>-19,520</u>
Officer Office	312	100	Ending Fund Balance	<u>\$27,164</u>	<u>\$20,641</u>