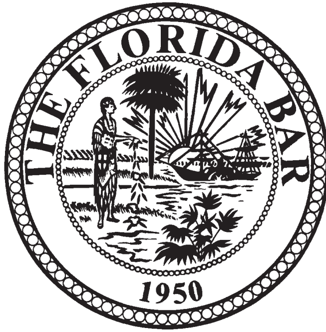

Administrative Law Section Newsletter

Vol. XXXII, No. 1 | Amy W. Schrader, Editor | September 2010

Attack on the Clones: The APA's New Provisions on Referential Rulemaking

by Scott Boyd

The Florida Administrative Code imposes requirements that are not set out in its text, but which must be found elsewhere. A reader might have to look up specifications of the American National Standards Institute, or study the Code of Federal Regulations, or obtain a form to find out exactly what a Florida rule requires or forbids. This isn't new. Florida's Administrative Procedure Act (APA) has long[1] permitted agency rules to incorporate material by reference.

July 1, 2010, however, began a new era. Now, material incorporated in administrative rules may be submitted to the Department of State in electronic format, allowing the online version of the Florida Administrative Code to contain a direct link to this material.[2] More significantly, after December 31, 2010,[3] agencies will be *required* to electronically file all[4] incorporated material. The APA's new provisions do not change the substantive law governing material incorporated by reference in the Code – only the method for filing and accessing it -- but the new electronic linking provisions do highlight some common points of confusion about incorporation.

Basic Incorporation Doctrine

An incorporative reference occurs whenever legislation references material outside of itself and indicates expressly or by implication that this material should be treated as if it were fully set forth at that point in the legislation.[5] The requirements of the referenced material are then said

See "Attack on the Clones," page 9

From the Chair

by Cathy M. Sellers

Thirteen years ago, when my friend and mentor Bob Rhodes took the helm of the Administrative Law Section, he proclaimed "your section needs you!!" Today, that proclamation rings truer than ever. If our Section is to remain a vibrant entity relevant to its members, we really do need "YOU" -- members who have the energy and desire to become involved in Section activities and assume Section leadership roles. As this year's Chair, one of my key goals is to stir the interest and enlist the ideas and energy of our current members who have not yet become involved in Section leadership. Happily, we have already made some substantial strides in that direction; I am delighted to welcome Melissa Mora, Patricia Nelson, Jowanna Oates, Lynne Quimby-Pennock, and Adam Schwartz to serve on our Section's committees this year. Many opportunities exist and I am asking you to become involved. Here is a rundown of some of the activities we have planned for the year.

The Section's Membership Committee will be busy this year. The Committee's goals are to retain, and,

See "Chair's Message," page 11

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Cortes v. Public Employees Relations Commission, 36 So. 3d 758 (Fla. 3d DCA 2010) (Opinion filed April 28, 2010)

Cortes and several other employees of Miami-Dade County Transportation Department contested the loss of seniority after they were moved from the Government Supervisors Association bargaining unit to the Transportation Workers Union of America ("TWU"). The employees had all initially been members of the TWU until they were promoted into supervisory positions. When their supervisory positions were abolished, they were notified that they were being returned to their former bus maintenance positions. However, they were placed at the bottom of the seniority list despite their initial hiring dates.

Immediately upon receiving notice of their return to the TWU and loss of seniority, the employees complained to the individual in charge of seniority for the local union and the union president. They further communicated via electronic mail with the vice president of TWU International requesting a meeting. While a meeting was held there was no resolution of the complaint. The national representative said he would confer with the president of the local union and respond to the employees. The employees then met with the local president who said he would get back to them after the Thanksgiving holiday. Ultimately, the employees were notified that their seniority stature would not be changed. They subsequently filed a complaint with the Public Employees Relations Commission ("PERC") alleging an unfair labor practice by the TWU.

PERC dismissed the complaint on the grounds that the employees failed to file grievances with the TWU and that PERC could not determine whether the TWU was arbitrary and acting in bad faith in failing to process the grievances.

The court reversed. It held that the bargaining agreement between the County and TWU did not require employees to file a formal grievance with the bargaining unit where the employees were alleging that the union had treated them unfairly. The court held that the allegations in the complaint that TWU had violated their rights to retention of seniority status stated a prima facie case that TWU beached its duty of fair representation.

Larner v. Department of Management Services, 34 So. 3d 179 (Fla. 1st DCA 2010) (Opinion filed May 6, 2010)

Larner, a retired correctional officer at the Hardee County jail, applied for in line of duty disability benefits allegedly resulting from a back injury suffered while employed at the jail. He had received extensive medical treatment including spinal fusion surgery. At a hearing before the Florida Retirement Commission, Larner testified that he had suffered a back injury before he became employed by the county but that it had healed completely. There was further evidence admitted that he had passed a pre-employment physical examination.

In its final order, the Commission concluded that "[m]ost of [Larner's] conditions are the result of aging, possible prior accidents, and a botched surgery. The Commission finds no in line of duty accident was the contributing cause to Mr. Larner's condition." It denied disability benefits.

On appeal, the court reversed. It found that there was no competent substantial evidence supporting the findings in the final order. It noted the undisputed testimony of the physician at the hearing that the need for surgery was directly related to the injury suffered during his employment at the jail. In addition, the court noted that while the surgery did not correct all of Larner's back problems, there was no competent substantial evidence that it was "botched."

Daytona Beach Kennel Club, Inc. v. Department of Business and Professional Regulation, 33 So. 3d 799 (Fla. 5th DCA 2010) (Opinion filed April 23, 2010)

Daytona Beach Kennel Club appealed a final order of the Department of Business and Professional Regulation dismissing its petition with prejudice on the grounds that it

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lacked standing to challenge a permit issued to Debary Real Estate Holdings to conduct quarter horse races. The kennel club argued that the Department erred in dismissing the petition with prejudice without holding a fact finding hearing on standing.

On appeal, the court affirmed the dismissal. It held that standing is primarily a question of law. Further, the court held that the dismissal was appropriate under *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).

Palmetto Ford Truck Sales, Inc. v. Sterling Truck Corp., 38 So. 3d 205 (Fla. 1st DCA 2010) (Opinion filed June 9, 2010)

Several franchise dealers for Sterling Truck Corporation ("Sterling") filed a petition with the Department of Highway Safety and Motor Vehicles ("DHSMV") pursuant to section 320.641(3), Fla. Stat., challenging the decision of Sterling to stop manufacturing operations as a bad-faith action. DHSMV dismissed the petition on the grounds that it did not have the authority to affect a manufacturer's decision to go out of business.

On appeal, the court reversed. It held that the decision to stop manufacturing a brand of trucks could be modification or a termination of a franchise agreement. The court determined that DHSMV was in error in concluding that cessation of manufacturing operations could never afford the right for a hearing; however, it did agree that DHSMV had no authority to order the manufacturer to continue its operations.

Rulemaking

Coventry First, LLC v. Office of Insurance Regulation, 38 So. 3d 200 (Fla. 1st DCA 2010) (Opinion filed June 9, 2010)

Coventry First, LLC ("Coventry"), a viatical settlement provider, challenged certain documents of the Office of Insurance Regulation ("OIR") as unadopted rules. In particular, it challenged letters sent out by OIR requesting that Coventry produce out-of-state business files and OIR's policies and procedure manual requiring production of such records. Coventry, which provides viatical settlements in Florida and in other states, argued that OIR had no authority to review any records related to out-of-state transactions. The administrative law judge held that the documents were not rules, and Coventry appealed.

The court affirmed the final order of the administrative law judge. It noted that section 626.9922(2), Fla. Stat., requires that viatical settlement licensees keep all records related to all viatical settlement transactions. Further, Coventry had challenged the authority of OIR to examine records related to out-of-state transactions in federal district court and lost prior to filing the rule challenge before the Division of Administrative Hearings.

The court held that the letter soliciting information was not a form that required information not required by statute or rule. Instead, the court concluded that, in seeking out-of-state documents, OIR was simply requesting records already required by statute. In addition, the court held that the policies and manual were: (1) internal memoranda not required to be adopted as rules, and (2) not statements of general applicability as the OIR examiners had discretion to use them or not.

Attorney's Fees

Boetzel v. Department of Business and Professional Regulation, 32 So. 3d 780 (Fla. 2d DCA 2010) (Opinion filed April 30, 2010)

The Department of Business and Professional Regulation filed an administrative complaint against Boetzel alleging that he had practiced unlicensed landscape architecture and electrical contracting. The administrative law judge held that Boetzel was not guilty of the charges and the Department adopted the recommended order.

Boetzel sought attorney's fees pursuant to section 57.111, Fla. Stat.. The administrative law judge entered an order requiring the Department to file a response to the request within 20 days and allowing Boetzel 10 days after the filing of the response to request an evidentiary hearing on the request. Pursuant to the order, Boetzel's request for an evidentiary hearing would have been due on December 18, 2008. However, on December 17th, the judge issued an order denying the request for attorney's fees.

On appeal, the court reversed. It held that Boetzel was entitled to an evidentiary hearing under the terms of section 57.111. The court rejected the Department's position that the provision should be construed consistently with the federal attorney's fees statute on which it was modeled, noting that the federal statute did not contain language providing for a hearing. The court also noted that the administrative law judge's order had been entered prior to the deadline for filing a request for hearing even though the initial order stated that a hearing would be held if one was requested.

Agency Authority

Agency for Persons with Disabilities v. Dallas, 38 So. 3d 831 (Fla. 1st DCA 2010) (Opinion filed June 21, 2010)

Dallas, age 35, was arrested and charged with domestic battery and possession of cocaine. Pursuant to Chapter 916, Fla. Stat., the court appointed two psychiatrists to evaluate his competency to stand trial. At least one, and possibly both, of the experts were chosen by the Agency for Persons with Disabilities. Both experts filed reports finding that Dallas had mild to moderate mental retardation and was incompetent to stand trial. At a competency hearing, the Agency objected to the findings on the grounds that Dallas' retardation had not manifested itself prior to the age of 18. At the hearing, one of the experts testified that, based on a review of Dallas' school records, she was concerned that there was no evidence of retardation before that age. However, the other expert concluded that his school records at the age of 17 were consistent with the diagnosis of retardation. The court then entered an order requiring that Dallas be committed to a forensic facility and that the Agency provide training to return him to competency to stand trial.

In a separate proceeding before

continued, next page

CASE NOTES
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the Agency under Chapter 393, Fla. Stat., the Agency had determined that Dallas was not entitled to certain community based services administered by the Agency to persons with developmental disabilities.

After entry of the court's order, the Agency filed a writ of certiorari with the District Court asking that the lower court's order be quashed on the grounds that the court had no authority to determine that Dallas was mentally retarded under Chapter 916 where the Agency had made a contrary decision under Chapter 393. The Agency noted that the definition of retardation in Chapter 916 was the same one used in Chapter 393.

The court denied the writ. It held that Chapter 916 did not grant the Agency any authority to determine the competency of an individual charged with a crime under that statute. Instead, it held that the plain language of the statute mandated the Agency provide services under the Mentally Retarded Defendant Program where the court has found an individual incompetent to stand trial.

Mary F. Smallwood *is a partner with the firm of GrayRobinson, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* mary.smallwood@gray-robinson.com.

Uniform Rules of Procedure Ad Hoc Committee Seeks Your Input

The Chair of the Section has appointed a Uniform Rules of Procedure ad hoc committee to consider possible revisions to the rules to recommend to the Administration Commission for its consideration and, hopefully, initiation of rulemaking.

Please forward any suggestions you may have for necessary and helpful revisions to the committee chair, Judge Linda Rigot, at *Linda_Rigot@doah.state.fl.us*.

Mark your Calendar

Plan to attend the

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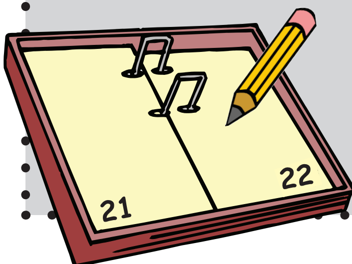
October 21-22
Tallahassee



Agency Snapshot

Department of Environmental Protection

by Francine M. Ffolkes

The Florida Department of Environmental Protection was created in 1993 when the Florida Legislature merged the Department of Environmental Regulation and the Department of Natural Resources. The Department is one of fifteen state government agencies under the executive branch of the Governor. The Department is the lead agency in state government for environmental management and stewardship. Among many other things, the Department administers regulatory programs and issues permits for air, water, and waste management. It oversees the State's land and water conservation program, Florida Forever, and manages the Florida Park Service.

Head of the Agency:
Mimi A. Drew, Secretary
Douglas Building
3900 Commonwealth Blvd., M.S. 10
Tallahassee, Florida 32399-3000
(850) 245-2011

Agency Clerk:
Lea Crandall
Douglas Building, Room 659
3900 Commonwealth Blvd., M.S. 35
Tallahassee, Florida 32399-3000
(850) 245-2242
Fax Filing (850) 245-2303

Hours of Operation:
Monday - Friday 8:00 AM to 5:00 PM

General Counsel:
Tom Beason
Douglas Building
3900 Commonwealth Blvd., M.S. 35
Tallahassee, Florida 32399-3000
(850) 245-2242

Mr. Beason received his Juris Doctor from Florida State University College of Law in 1974 (with honors) and a Bachelor of Arts in physics from University of South Florida in 1971. He began his practice as an assistant attorney general handling trials and appeals in civil rights, personal injury and construction cases and later was chief of the administrative law section in the Attorney General's Office and legal advisor to professional licensing boards. Mr. Beason then served as general counsel for the Florida Department of General Services, which was responsible for contracting for most state building construction. He represented the state in construction claims involving the Leon County Civic Center, the University of Florida's O'Connell Center, and the University of South Florida's Sun Dome. In private practice, Mr. Beason represented public and private entities in building construction disputes, professional and health care licensing, and public procurement matters. In 1992, he joined the OGC Enforcement Section, where he handled waste cleanup litigation. Later, he supervised the negotiation and the waste and air enforcement sections. He became Chief Deputy General Counsel in 1999 and General Counsel in 2007.

Number of lawyers on staff: 58

Kinds of Cases:
The Department is involved in and has expertise in a wide variety of areas. Many of its cases include different facets of administrative, environmental, land use, and real property law. A sample of the types of cases the Department handles includes permit challenges, rule challenges, enforcement actions, bid protests, takings litigation, land acquisitions, property disputes, and any related appeals that might result from these cases.

Effect of Chapter 120 on the mission of the agency:
Florida's Administrative Procedure Act (APA) has a substantial impact on the Department's rulemaking procedures, permit challenges, as well as challenges to any initial or final agency actions of the Department. As a government agency, the Department is committed to conduct itself in accordance with the APA while providing the greatest amount of environmental protection to the citizens of Florida.

Changes to the APA:
The Department did not propose any changes to the APA during the 2010 regular legislative session.

Changes to the Uniform Rules:
The Department is anticipating proposing changes to its Exceptions to the Uniform Rules contained in Chapter 62-110, F.A.C., sometime in early 2011. The scope and content of these changes has yet to be established, but all the changes will go through the formal rulemaking process.

Tips for practice before the agency:
The Department encourages anyone having questions regarding the Department's rules or procedures to contact an attorney within the Office of General Counsel.

Ethics Questions?
Call
The Florida Bar's
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Schedule of Events

Thursday, October 21

1:00 p.m. – 1:30 p.m.
Late Registration

1:30 p.m. – 1:40 p.m.
Welcome
Cathy M. Sellers, Broad and Cassel
Chair, Administrative Law Section

1:40 p.m. – 2:30 p.m.
Comments from the Castle: Administrative Law at the First District
Hon. T. Kent Wetherell, II, First District Court of Appeal

2:30 p.m. – 3:20 p.m.
Olde Minstrel's Tales: Administrative Law Case Update
Mary F. Smallwood, GrayRobinson, P.A.

3:20 p.m. – 3:35 p.m.
Break

3:35 p.m. – 5:00 p.m.
The Quest for the Grail: Tips for Successful Practice Before DOAH
Moderator: Hon. Robert S. Cohen, Chief Judge, DOAH
Hon. Bram D. E. Canter, ALJ, DOAH
Hon. Susan B. Harrell, ALJ, DOAH
Hon. June C. McKinney, ALJ, DOAH

5:00 p.m. – 6:00 p.m.
Reception
FSU College of Law Rotunda

Friday, October 22

8:30 a.m. – 9:20 p.m.
Who Sits at the Round Table? Standing in Administrative Proceedings
William E. Williams, GrayRobinson, P.A.

9:20 a.m. – 10:10 a.m.
Role of the Merchant's Guild: SBRAC and SERCs
Moderator: F. Scott Boyd, JAPC
Frederick R. Dudley, Holland & Knight, LLP
Patricia A. Nelson, Dept. of Business & Professional Regulation
Reginald L. Bouthillier, Greenberg Traurig, P.A.
Meredith C. Fields, Dept. of Environmental Protection

10:10 a.m. – 10:20 a.m.
Break

10:20 a.m. – 11:10 a.m.
Parliamentary Pronouncements: A Legislative Update
Lawrence E. Sellers, Jr., Holland & Knight LLP

11:10 a.m. – 12:00 noon
Merlin's Magical Mirrors: Web Sites for the Administrative Law Practitioner
Daniel E. Nordby, Ausley & McMullen, P.A.

12:00 noon – 1:30 p.m.
Lunch and Keynote Address
In Search of Camelot
Arthur J. England, Jr., Greenberg Traurig, P.A.

1:30 p.m. – 2:20 p.m.
Letters Patent from the King: Practice before Professional and Occupational Licensing Boards
Bruce D. Lamb, Ruden McClosky, P.A.

2:20 p.m. – 2:30 p.m.
Break

2:30 p.m. – 3:20 p.m.
A Pleasant Good Knight: Ethical Case Studies
Elizabeth C. Tarbert, The Florida Bar

3:20 p.m. – 4:10 p.m.
Jousting Rules: Administrative Law Issues at the PSC
Moderator: Michael G. Cooke, Ruden McClosky, P.A.
S. Curtis Kiser, General Counsel, PSC
J. R. Kelly, Public Counsel, Office of the Public Counsel

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ATTACK ON THE CLONES
from page 1

to be "incorporated into" the legislation that adopted them. Thus, the legal effect of an incorporative reference is to copy the requirements of the referenced material by creating a "clone" of the original material within the adopting legislation.[6]

At heart, it's a simple concept. Incorporation by reference is basically just a drafting technique to avoid the time and expense of setting forth all of the adopted language verbatim, and the reference should be treated as if this actually had been done. Drafters like incorporation because it can make their legislation seem much simpler and save publication costs. The resulting legislation is equally effective and the cost of publishing is reduced. Incorporation, however, can create problems.

Problems with Incorporation

One question that often arises is whether referenced requirements are within the jurisdiction of the legislative body adopting them. General governments have broad authority, but special purpose governments and administrative agencies have more limited charters. Thus, incorporations by an administrative agency must fall within the scope of that agency's statutory responsibilities, notwithstanding that some other statute, ordinance or rule independently may mandate compliance with additional or similar requirements. An agency has no authority to regulate matters beyond its mandate or to enforce requirements of other entities unless the agency's enabling statute expressly so provides.[7]

Vagueness has also plagued incorporation. If the referenced material is not described with particularity, it can be hard to later determine exactly what is being required. Thus, a county code provision that made it a violation for a contractor to disregard or violate "any municipal ordinance or state law pertaining to the contractor's business" was declared unconstitutionally vague.[8]

When a legislative body adopts not technical standards but precepts from other legislation, another question often arises. Which piece of legislation is actually being applied: is it the adopting legislation or the referenced legislation? Florida courts have made it clear that a violation of the referenced requirements is a violation of the incorporating legislation, enforced under the authority of the entity that adopted the requirements. For example, an elections complaint was dismissed because the conduct was erroneously charged as a violation of the Florida Elections Code rather than of the city ordinance that had adopted the state code.[9]

Confusion often occurs when changes are made to the referenced material between the time the incorporation takes place and the time the adopting legislation is actually being applied. Are the changes then given effect? The courts say no. "In the construction of such statutes the statute referred to is treated and considered as if it were incorporated into and formed part of that which makes the reference. The two statutes exist as separate, distinct, legislative enactments, each having its appointed sphere of action, and the alteration, change or repeal of the one does not operate upon or affect the other."[10]

This is the general rule in almost every state, but exceptions have developed to give effect to contrary legislative intent, or judicial presumptions of that intent.[11] These exceptions have created more problems. Most notably, if referenced material is legislation of a different[12] governmental or private body, any attempt to adopt future changes becomes an unconstitutional delegation of legislative power. The recent case of *Abbott Laboratories v. Mylan Pharmaceuticals, Inc.*, 15 So. 3d 642 (Fla. 1st DCA 2009), *petition for cert. denied*, 26 So. 3d 582 (Fla. 2009) discusses this constitutional limitation in some detail in interpreting a state statute.

Incorporation under the APA

Many of these incorporation problems have been eliminated or minimized in the Florida Administrative Code. For example, the APA provides that a copy of any incorporated material must be filed with the Department of State when a rule is filed for adoption.[13] This simple requirement precludes most argument about the scope or extent of the materials and virtually eliminates vagueness challenges.

As for issues related to subsequent changes or unconstitutional delegation, the APA states: "A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes."[14] This restriction maintains the integrity of the rulemaking process. Were Florida policy to automatically reflect each change in referenced documents, a rule would be effectively amended without the attendant public notice, legislative review, opportunity for DOAH challenge, and other requirements of rulemaking. The APA provision also reinforces the constitutional prohibition mentioned earlier, for incorporation of existing material never constitutes a delegation of legislative power.[15]

However, one pervasive problem with incorporation has remained: public access. Sooner or later, the mass of technical specifications not printed in the streamlined Code must be consulted. When that time comes, it is often hard to find a copy of the materials to read. The Department of State may have a copy, but this doesn't help a citizen in Cape Coral trying to find out exactly what it says.

While the Internet has generally expanded access, it also has increased confusion. The wealth of information on the web may include similar documents, incomplete copies, or different versions of material referenced in a rule. Worse, well-meaning agency personnel may themselves supply later versions in response to inquiries or even post them on the agency's website in a misguided effort to provide the "latest" information to the regulated public.

The Clone War

Chapter 2008-104, Laws of Florida, amended the APA to improve citizen access to incorporated materials and to reinforce the APA's existing provisions prohibiting the automatic incorporation of subsequent changes without rulemaking. The law attacks these problems with technology.

After December 31, 2010, a rule that incorporates material may not be filed for adoption unless an electronic copy of the referenced material is filed with the Department of State along with the rule.[16] Electronic

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ATTACK ON THE CLONES
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filing is remarkably easy. After logging into the Department's upgraded website at *https://www.flrules.org*, agencies will see a new section at the bottom of the screen entitled, "Manage Reference Materials," that offers several options. To upload reference materials, an agency simply gives the material a name (usually the title of the document or form), enters the file's location or browses to find it, enters a brief description of the document, and then clicks on the "Add" button. The site will accept files up to 10Mb in Word, WordPerfect, Adobe PDF, TIF, JPEG, HTML, and many other formats.[17] Once uploaded, the materials will appear on a later menu as "Pending Reference Materials" and can easily be linked to the text of a proposed rule as the rule is submitted for notice in the Florida Administrative Weekly. The agency simply identifies the words in the rule text to which the reference material is to be linked, and this text will then be highlighted in the electronic version of the Weekly.

After an agency has electronically filed materials in this way, a reader of the Weekly seeing the words "Application Form 1" highlighted in green in the rule text, for example, need only click on that link to have the form appear. Materials may be similarly linked when rules are submitted for adoption. Rather than having to abandon the Code to search the web for a copy of the referenced material (or worse, to locate a paper copy of material not available electronically), a reader will be able to simply "click" on the highlighted reference to the material, read it, and then "click" again to immediately return to the Code.

Although agencies must use this process beginning in 2011, they are able to use it now since the website is fully operational. As agencies begin to utilize the website, questions about the site and about incorporation more generally will surely arise. Counsel should note two points. First, the new regime is prospective only. While it applies to all rules filed for adoption after the effective date, it does not require an agency to initiate new rulemaking just for the purpose of electronically filing reference materials already adopted in the Code. As time passes, normal evolution of the Code should ensure that virtually all reference materials will become electronically accessible.

Second, the new statutory language actually repeals the authority of agencies to incorporate materials except through electronic filing.[18] This means that failure to electronically file becomes not only a violation of rulemaking procedures under section 120.52(8)(a), Florida Statutes, subject to the statutory "harmless error" rule, but also renders any other attempted "incorporation" beyond the substantive authority of the agency null, precluding application of the referenced material.

It is important to note an exception in this new electronic incorporation regime for copyrighted materials. As mentioned earlier, incorporation of building standards and other technical specifications is quite common. Drafters of such standards often persuade states to incorporate them into law and then sell copies of the standards to the regulated public. Cases trying to balance the copyright holder's right to protect original works with the public's right to have full access to the law have already arisen.[19] Florida's new electronic filing provisions avoid this issue by allowing an agency to continue filing paper versions of incorporated materials in lieu of electronic filing upon an agency determination that electronic posting of the material on the Internet would constitute a violation of federal copyright law.[20] In that event, a statement to that effect, along with identification of the locations at the Department of State and the agency at which the material is available for inspection, must be included in the rulemaking notice.

Conclusions

Incorporation by reference is a time-honored drafting technique, but it can create many problems. The new APA provisions should minimize some of these problems in the Florida Administrative Code. First, with the click of a button, readers of the Internet version of the Code will have greatly enhanced access to complete copies of incorporated materials.

Second, the APA's new provisions will ensure that the version of the material that is found is in fact the version that is legally effective. Unwary readers, and even counsel unfamiliar with the "clone" principle of incorporation doctrine or its constitutional significance, need no longer be led astray when numerous versions of a publication are in circulation on the web.

Finally, the APA's new attack on the "clone" problem will also provide needed help to some agencies that have struggled to comply with the long-standing prohibition on adoption of future changes to referenced material. The Internet version of the Code will allow agency program personnel to easily confirm exactly what their rules currently require and ultimately should reinforce the rulemaking requirements of the Act.

Agencies must comply with the new electronic filing provisions in rules filed for adoption after December 31, 2010. It would be smart, however, for agencies to begin using the new procedures as soon as possible, not only to become familiar with them, but also to avoid unexpected disruption if for any reason rules being noticed now cannot be filed for adoption as early as planned.

Minor tweaks to the APA's new incorporation regime may yet be required, but the new provisions seem likely to substantially eliminate some of the most persistent disadvantages of referential legislation. If these anticipated benefits are realized, the Florida Administrative Code's treatment of incorporated material may well become a national model for legislative publication in the coming years.

Endnotes:

1 Section 1, Chapter 81-309, Laws of Florida, amended section 120.54(8), Florida Statutes, to expressly authorize agencies to incorporate material by reference.

2 Section 9, Chapter 2008-104, Laws of Florida, created subparagraph 120.55(1)(a)5., Florida Statutes, requiring the Department of State's Internet version of the Florida Administrative Code to contain a hyperlink from an incorporating reference to the material that was incorporated when such material is filed with the Department in electronic form, beginning July 1, 2010.

3 §120.54(1)(i)3., Fla. Stat. (2010).

4 An exception is created for copyrighted materials, as discussed in the text preceding note 18.

5 *State ex rel. Attorney General v. Green*, 18 So. 334 (Fla. 1895).

6 The vast majority of references in the Florida Administrative Code require the reader to

ascertain the contents of the referenced material to interpret the requirements of the adopting rule. These are termed incorporative references. Very rarely, a reference is not incorporative, but is rather informational or amendatory. These latter two types of references are distinguished in Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 Louisiana L. Rev. 1201 (2008) beginning at page 1204.

[7] *Council of Lower Keys v. Charley Toppino & Sons, Inc*., 429 So. 2d 67 (Fla. 3d DCA 1983), held that the Florida Department of Environmental Regulation was not authorized to deny an air pollution permit for failure to comply with local zoning ordinances or land-use restrictions because issuance of a permit had to be based solely on compliance with applicable pollution laws.

[8] *Southeast Aluminum v. Metro Dade County*, 533 So. 2d 777 (Fla. 3d DCA 1988).

[9] *Weithorn v. Adelstein*, 201 So. 2d 643 (Fla. 3d DCA 1967). The court held that any violation of the municipal ordinance had to be prosecuted in the same manner as a violation of any other ordinance of the municipality, and the municipal charter lodged such jurisdiction in municipal court. Though the state might have brought an action under the statute itself, the city had created a distinct offense and could only charge a violation of the adopting ordinance.

[10] *Van Pelt v. Hilliard*, 78 So. 693, 698 (Fla. 1918).

[11] For a review of the development of the law on incorporation by reference, *see* Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 Louisiana L. Rev. 1201 (2008).

[12] When an internal incorporative reference is used, no delegation concerns arise. It is clear that any delegation from a legislative body to itself -- if that can be considered a delegation at all -- is not an unconstitutional one, for exercise of the power by the legislative body is by definition consistent with the constitutional or charter provision originally vesting that power.

[13] §120.54(3)(e)1., Fla. Stat. (2010).

[14] §120.54(1)(i)1., Fla. Stat. (2010).

[15] *Riggins v. State*, 369 So .2d 948 (Fla. 1979).

[16] §120.54(1)(i)3., Fla. Stat. (2010).

[17] Information provided by the Department of State. The Department notes that if more capacity is necessary, the materials can be uploaded in separate "volumes."

[18] Section 120.54(1)(i)3, provides in part: "In rules adopted after December 31, 2010, material may not be incorporated by reference unless . . . ."

[19] *Compare Veeck v. S. Bldg. Code Cong. Int'l, Inc.,* 293 F.3d 791 (5th Cir. 2002) (holding website publication of a city law adopting a building code did not infringe the copyright of the organization that authored model code), with *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n,* 121 F.3d 516 (9th Cir. 1997) (holding the AMA did not lose its copyright in a system of medical procedure classification codes when the federal government required Medicaid and Medicare filers to use the codes). For detailed discussions of the complex issues involved, *see* Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 Mich. L. Rev. 291 (2005) and Katie M. Colendich, *Who Owns "The Law"? The Effect on Copyrights when Privately-Authored Works Are Adopted or Enacted by Reference into Law*, 78 Wash. L. Rev. 589 (2003).

[20] §120.54(1)(i)3.b., Fla. Stat. (2010).

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CHAIR'S MESSAGE

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hopefully, to increase, our membership in the face of austere circumstances. To that end, the Committee will be reaching out to our sister Florida Bar sections, The Florida Bar's Young Lawyers Division, agency general counsels' offices, and other organizations such as the Florida Government Bar Association, to educate them about our Section, our activities, and the services we provide, and to shamelessly recruit new blood into the Section. We will particularly focus on increasing new or "young" lawyer involvement, but we greatly value the experience and wisdom that our more "seasoned" lawyers bring and we strongly encourage and warmly welcome their participation.

Our Continuing Legal Education Committee has a year of relevant and stimulating CLE programs in the works. On October 21-22, 2010, we will host our showcase CLE program, the Pat Dore Administrative Law Conference. The conference theme this year is "In Search of Camelot," and our program fittingly will address the current state of affairs under the Florida Administrative Procedure Act and examine whether, some thirty-five years later, we are any closer to "Camelot" than we were when the "modern APA" was enacted. Our keynote speaker is former Florida Supreme Court Chief Justice, Arthur England, Reporter of the Law Revision Council that drafted the modern APA and co-author of the *Florida Administrative Practice Manual* treatise. The distinguished program speakers include: First District Court of Appeal Judge Kent Wetherell; Chief Administrative Law Judge Robert Cohen; and ALJs Bram Canter, Susan Harrell, and June McKinney, as well as many other well-known and well-respected APA experts and practitioners. The program brochure is printed in this Newsletter; please take a look and sign up for the conference. It is a wonderful way to completely immerse yourself in everything Chapter 120 for two days and to get substantial CLE credits in the process. In addition to the Pat Dore Conference, the Section is offering a Public Service Commission practice oriented program entitled, "Telecommunications and Electric Utilities: Current Issues" on September 23, 2010. This half-day program will feature some of the best-known PSC practitioners, including PSC General Counsel, Curt Kiser and Public Counsel, J.R. Kelly and will cover such timely topics as energy delivery and reliability in the 21st Century, broadband initiatives under the Obama Administration, and ethical issues. We also are exploring the possibility of providing web-based CLE for the first time, and are planning additional programs for 2011. Please stay tuned for more developments on these fronts, and if you have suggestions or wish to become involved in the CLE Committee, please contact Committee Chair, Bruce Lamb.

Our Publications Committee remains committed to delivering the high quality Administrative Law Section Newsletter and Florida Bar Journal articles that are the hallmark of our Section. The Newsletter will continue to feature the Casenotes column by Mary Smallwood, the Agency Snapshots feature, and timely articles on a range of administrative law topics. We are always looking for articles to feature in the Newsletter, and encourage and welcome your contributions. Newsletter Editor, Amy Schrader is the contact for submitting articles and other items for publication in the

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Newsletter. Also, we are very pleased to have recently featured a Florida Bar Journal article by Administrative Law Judge Bram Canter on practice points for examining witnesses in administrative hearings. As with the Newsletter, we welcome your contributions to the Bar Journal on behalf of our Section. Publications Committee Co-chair, Paul Amundsen is your contact person when you are ready to publish that article you have been meaning to write.

The Section is also drafting amendments to the Uniform Rules of Procedure in Chapter 28, Florida Administrative Code, in response to recent legislation and to address "glitches" identified since the last URP revision. Administrative Law Judge Linda Rigot chairs the Uniform Rules of Procedure ad hoc committee, which is already well into the process of identifying rule provisions that must be amended and those that may be ripe for amendment. The URP Committee is seeking input, and welcomes your suggestions regarding updates, corrections, and clarification of the Uniform Rules; Judge Rigot is the contact.

Finally, one more plug for our Section's "new and improved" website. Website Committee Chair, Dan Nordby, Immediate Past Chair, Seann Frazier, and Section Administrator, Jackie Werndli cannot be praised enough for their tireless efforts in getting the website up and running. It is a great resource for the administrative law practitioner. If you have not yet visited the site, go to *http://www.flaadminlaw.org/* and check it out. If you are already a regular user, (like those of us who already find it an indispensible tool, particularly for accessing some of the harder to find materials and information) we welcome your suggestions regarding features and materials to add and ways to improve the website. Please direct your suggestions to Dan Nordby, Jackie Werndli, or me.

I am excited and honored to serve as your Chair this year, and I look forward to working with you.